

TRANSLATION OF THE OFFICIAL PUBLICATION OF SINT MAARTEN (AB 2010, GT no. 3)

EXPLANATORY MEMORANDUM

1. General Section

This draft national ordinance contains provisions on the exercise of freedom of religion and faith and of the right to gather and demonstrate as referred to in Articles 9 and 13 of the draft Constitution of Sint Maarten. According to Article 9(1) of the draft Constitution, everyone has the right to practice their religion or belief freely, individually or in groups, subject to everyone's responsibilities in accordance with the national ordinance. The second paragraph provides that the exercise of this right outside buildings or enclosed spaces may be restricted by national ordinance for the protection of health, in the interests of traffic and to control or prevent disorder.

Article 13(1) of the draft Constitution recognises the right to meet and demonstrate, subject to everyone's responsibilities pursuant to the national ordinance. According to the second paragraph, the right may be restricted by national ordinance in order to protect health, in the interests of traffic and to control or prevent disorder.

Article 31(1) of the draft Constitution provides that the regulations to restrict the traditional fundamental rights are necessary and proportionate and that furthermore, such national ordinances must be sufficiently specifically described. 'Necessity' means that there is a justified objective for a restriction. The objectives are described in Article 2 and are drawn from the grounds for restriction in Articles 9 and 13 of the draft Constitution. These are also generally accepted internationally (see the ECHR). The requirement of proportionality of the restriction means that the restriction must be in reasonable proportion to the objective and furthermore, implies that no less severe alternative is available (subsidiarity). Thus a general ban on a demonstration at which unrest can be expected is only justified if less extreme measures such as policing or banning the demonstration in a particular street or confining it to a particular site will not suffice. This is ...among other things first paragraph of the draft Constitution that the restriction must be described as specifically as possible so that citizens can know under which circumstances restrictions of their fundamental rights are permitted. This regulation complies with these criteria. Further attention is devoted to this in the Special section.

The draft is a completely new regulation that is consistent with the Constitution for Sint Maarten. Adoption of the Netherlands Antillean regulation containing provisions concerning the exercise of the right to meet¹ was not possible, because that regulation does not relate to religious or ideological meetings. Furthermore, the Netherlands-Antillean regulation is not based on the same restriction clauses as those of the draft Constitution. This regulation is of an older date than the Constitution of the Netherlands Antilles and the international conventions on the protection of human rights. The instruments included in it should therefore be placed in the context of the drafting of that regulation in 1933. The creation of the country of Sint Maarten requires consistency with current insights regarding relationships between the government and citizens, as laid down in the international conventions.

The right to meet is laid down in Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and in Article 21 of the International Covenant on Civil and Political Rights (ICCPR). Although neither provision lays down the right to demonstrate in so many words, as a result of established jurisprudence it is recognised that these provisions also include the right of demonstration. The principle is explicitly recorded in Article 13 of the Constitution. This is also consistent with the Constitution of Aruba and the Dutch Constitution,

The preparation of this draft drew on Dutch regulations concerning public demonstrations, in particular the restrictions on the exercise of these fundamental rights as laid down in the Public

Manifestations Act (hereinafter referred to as 'WOM').² It also drew on the Model Regulation for a General Local Regulation of the Association of Netherlands Municipal Authorities.

An important feature of the draft is the difference between manifestations in public locations and in non-public locations. An order to discontinue manifestations in non-public places may only be issued in highly specific circumstances. The rationale for the distinction made in regimes is that with manifestations in public places, the interests of the protection of health, traffic and the control or prevention of disorder usually carry considerably more weight than manifestations at other locations.

The regulation assumes that the exercise of the fundamental freedoms to gather and demonstrate may only be restricted under certain circumstances. The key issue here is that these fundamental rights are instrumental for the exercise of another fundamental freedom, namely freedom of expression. It is not up to the government to impose restrictions on its citizens regarding the opinions that are expressed. The international conventions underlying these rights do recognise that there are times when the government must be able to take action, in the general interest, against expressions of opinion (content) or the way in which these opinions are expressed (demonstration). One should not lose sight of the fact here that the Criminal Code criminalises conduct with the aim of preventing the expression of discriminatory and inflammatory opinions.

On the basis of the freedom of manifestation, it is appropriate to limit the involvement of the government to an assessment in advance based on notification of the intention to organise a demonstration, meeting or gathering. The government, in the form of the Minister of Justice, shall assess the notice on the basis of the interests that justify the restriction of the practice of the fundamental rights concerned.

On the basis of the information that the minister receives in the notice, appropriate measures can be taken to prevent disorder and the like. This could include organising the required ...

Costs may be associated with the practice of public manifestations in the form of policing. However, no increase in the number or scale of public manifestations is to be expected on the basis of the new regulation. The costs will be absorbed within the budget of the Ministry of Justice.

2. Special section

The draft is divided into four paragraphs. The first paragraph contains general provisions. The second contains provisions concerning public spaces and the third provisions concerning locations other than public spaces. The final paragraph contains the penal provision.

Definitions are given in Article 1. The designation of the Minister of Justice as the responsible minister is included in section a. Assigning responsibility to the Minister of Justice speaks for itself, since the protection of public order and peace form part of this minister's portfolio.

Section b gives a definition of a public space. This is one of the key provisions of the regulation. Without a description of what constitutes a public space, it is not clear to either the government or the citizens when the powers afforded in the regulation can be exercised. Furthermore, Article 31(1) of the draft Constitution provides that a regulation to restrict a traditional fundamental right must be necessary and proportionate and that the national ordinance must also be sufficiently specific. The definition of the public space is sufficiently specific to be used as a basis for the restriction of the right to gather, meet or demonstrate. The definition also contains further detail. Locations as referred to in Article 9(2) of the draft Constitution are not included in the definition of public spaces, although they are accessible to the public. As for other non-public spaces, a separate regulation applies for these buildings and locations, laid down in paragraph 3.

After all, situations may arise in which a limitation of the exercise of these rights at places other than public spaces is necessary. The grounds for a limitation are laid down in Article 9(1) and ...

Article 2 clearly describes the interest for which a restriction of the fundamental rights is permitted. The interests for a restriction of these traditional fundamental rights are drawn from both Article 9 and Article 13 of the draft Constitution. The description of the interests is once again consistent with the requirement laid down in Article 31(1) of the draft Constitution that the restriction of a traditional fundamental right must be described as specifically as possible.

Article 3, read in conjunction with Article 8(a) and Article 12(1)(a) of the draft contains the system for the limitation of fundamental rights. After all, the threat of a penalty is made for holding or participating in gathering or demonstration for which no notice has been submitted. However, the limitation is kept as minimal as possible. In contrast to the regulation that applied for the Netherlands Antilles, there is no question of a licensing requirement for holding a gathering or demonstration. In order to give shape to the restrictions included in the Constitution, it is necessary for the government to be given an instrument with which to take measures to protect public order. This instrument is the notification, referred to in the first paragraph. The third paragraph contains the possibility that notice can also be given orally. A breach of the national ordinance will then be corrected.

Article 4 contains provisions that facilitate the supervision of a gathering or meeting by the minister. The second paragraph once again underlines the fact that the content of the opinions expressed may not be assessed in advance. If expressions are made during the gathering or meeting that could be penalised under criminal law, a separate process can be followed on the basis of criminal law.

Article 5 provides that the minister assesses a notice or that measures should be taken regarding the prevention of a gathering or meeting. The minister will base this assessment on the frameworks provided in Article 3. The second paragraph provides the basis for any ban. Here, too,.

the proportionality of the restriction of traditional fundamental rights as referred to in Article 31(1) of the draft Constitution. It is justifiable to restrict or ban a demonstration if this could prevent a breach of the peace and no less extreme solution is available to prevent this.

Article 6(1) once again underscores the fact that a ban, restriction or regulation does not relate to the content of the opinions expressed. Such an assessment would contravene the Constitution.

Article 7 contains powers for the minister to issue instructions to the participants during a gathering or meeting. These may include a diversion of the route for considerations of public order or traffic.

Article 8 assigns more extensive powers to the minister. On the basis of this Article, the minister is authorised to order that a gathering or meeting be discontinued. Generally, this power will be exercised only in exceptional cases. The reference to the interests mentioned in the second paragraph emphasises this restraint.

Similar powers are assigned to the minister in Article 9(3) with regard to a meeting or demonstration open to the public at locations other than public spaces. Which locations can be designated as 'other than public spaces' shall be assessed on a case-by-case basis. If the responsibilities of citizens themselves are not complied with and danger arises, or threatens to arise, to health at a location other than a public space, or for the prevention or control of disorder, the minister is then authorised to act and to order the meeting or demonstration to end. Gatherings at locations other than public spaces cannot be restricted on these grounds (Article 9(2)) of the draft Constitution.

Article 10 is drawn from Article ...of the WOM and contains a special provision.

Article 11 is drawn from Article 10 of the WOM. The first phrase requires no further explanation than that this enacts that these activities are not an infringement of public order and peace and are not, therefore, subject to the powers assigned in paragraph 2. The second phrase does impose a restriction of the exercise of this fundamental right by restricting its exercise to places where the residential enjoyment of local residents is unacceptably obstructed. This restriction is consistent with Article 18(3) of the ICCPR and also Article 8 of the ECHR as the restriction is established by formal law and serves to protect the fundamental rights of other persons.

The final paragraph contains a single Article. The penal provision is necessarily brief. It is the minimum necessary to be able to enforce the instruments at the minister's disposal. The facts are infringements, for which no provisional detention may be ordered. Participants who qualify for this through their behaviour may be detained on the spot and taken for questioning. On the basis of Article 80 of the Criminal Code, detention for questioning may last six hours.
