

# TRANSLATION OF THE OFFICIAL PUBLICATION OF SINT MAARTEN (AB 2010, GT no. 1)

[As approved in draft form by the Island Council dated 21 July 2010]

## EXPLANATORY MEMORANDUM

### 1. GENERAL SECTION

#### 1.1. Introduction

On 23 June 2000, a referendum was held among the population of Sint Maarten regarding the political future of the island territory. By an ample majority, the option chosen was that of Sint Maarten as a Country within the Kingdom of the Netherlands and withdrawal from the alliance of the Netherlands Antilles. During the initial Round Table Conference (RTC) of the Kingdom of the Netherlands on the political developments of November 2005, it was agreed that the ultimate prospect for the island territory of Sint Maarten was the status of a country within the Kingdom.

#### 1.2. Objectives, points of departure and principles

This draft Constitution formulates and guarantees the fundamental rights of the citizens and covers the position of the main institutions of the country of Sint Maarten. This makes it the main reference for the constitutional law of the forthcoming country of Sint Maarten. The Constitution of the country of Sint Maarten is based on the principles of a democratic state under the rule of law.<sup>1</sup> A distinguishing feature of the concept of a state under the rule of law is the legality principle, meaning that all government action should be based on statutory grounds and furthermore, that the national ordinances should comply with certain quality requirements. This promotes legal certainty and legal equality. The democracy principle relates to the method of political decision-making, namely through the participation of all citizens. In a democratic state under the rule of law, the majority decides, but protection and respect for the minorities is also essential. The draft assumes a representative parliamentary system, with opportunities for more direct participation by means including a consultative referendum, (see further paragraph 1.3).

Another feature of the concept of a democratic state under the rule of law is the *trias politica*. A spread of powers over different offices is an important means of countering abuse of government power. A key issue in that regard is that the three government functions of legislation, administration and administration of justice are assigned to different offices. The aim is to further prevent abuse through checks and balances between the different offices. In that regard, it is important that the forthcoming country of Sint Maarten has opted to regulate key elements of the administration of justice, the department of public prosecutions and the police together with the (future) Kingdom partners in a consensus Kingdom Act, within the meaning of Article 38 of the Charter for the Kingdom. The principles concerning the administration of justice (as well as the department of public prosecutions and the police) are also included in this draft. In connection with the checks and balances, reference can also be made to the introduction of the institute of the Ombudsman, an independent body that will be assigned the task of handling complaints regarding improper government conduct (Article 78 of the draft).

Finally, it is important to note in connection with the checks and balances that the court will be assigned the power to assess legislation in terms of, in principle, the entire Constitution. This constitutional assessment sharply increases the control of the judiciary over the legislature (see paragraph 1.3 below). A final feature of the democratic state under the rule

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<sup>1</sup> Article 43(1) of the Charter for the Kingdom is also based on that concept of a state under the rule of law. Each country provides for the realisation of the fundamental human rights and freedoms, legal certainty and sound administration.

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of law concerns the recognition of the fundamental rights of citizens (see paragraph 1.3. below).

Three objectives in particular took priority in the design of this draft Constitution. Firstly, a strengthening of the fundamental rights, secondly, a strengthening of representation and the democratic principle and thirdly, the promotion of the binding of political processes by constitutional principles. These objectives led to the following changes.

### 1.3. Principal changes

While the Constitution of the Netherlands Antilles is based on the old Dutch Constitution before the last reforms of 1983, this draft Constitution is based on the Aruban Constitution of 1986, as the most recent constitution in the Kingdom. Unlike the Netherlands Antilles, Aruba has only one administrative tier and the scale of the population of the new country of Sint Maarten is similar to that of the country of Aruba. The Aruban Constitution is reflected in both the division into chapters and in the formulation of the Articles. For example, the Constitution of the Netherlands Antilles assigns an important role to the Governor as the executive power, as it were. This role of the Governor dates from the time when the administration of the Netherlands Antilles was more colonial, based on Government Regulations. The Constitution of Aruba reflects the modern constitutional relationships far more clearly: executive power rests with the government. The ministers are answerable to Parliament and the Governor holds immunity as head of government. Naturally, constitutional developments since 1986 have been taken into account. While the Aruban Constitution still assigns a role to the constitutional Governor in dealings between the government and Parliament, the draft Constitution of Sint Maarten assumes an autonomous position for Parliament that is entirely independent of the government. The Governor, as the immune head of the national government, no longer plays any role in the operation of this. This design is consistent with a number of new national ordinances changing the Constitution of the Netherlands Antilles precisely in relation to a clear formulation of the constitutional role of the Governor and the entirely independent position of Parliament.

In that regard, the relations between the government and the public representation of the country of Sint Maarten, Parliament, also merit attention. Although the Islands Regulation of the Netherlands Antilles (ERNA) offered different possibilities for this, in practice all administrators of the island territories were almost always recruited from the Island Councils. In general, it can be said that in a situation where members of the executive power are also Members of Parliament, strong ties of loyalty exist between the executive power and Parliament. That is distinctive of a monistic system. The Netherlands Antillean parliamentary system, on the other hand, showed more features of a dualistic system, in which the government and Parliament held more sharply segregated powers. The members of the government, the ministers, cannot at the same time serve as Members of Parliament. With the aid of the instruments offered by the Constitution and the Rules of order for Parliament, Members of Parliament can control the government, set the frameworks within which the government can govern (legislation) and exercise the budget rights. Acting as a Member of Parliament in a dualistic system has a different nature and calls for a different deployment of the membership of the monistic Island Councils. In connection with this, membership of Parliament in Sint Maarten has been made a full-time function, as a position independent of the government is required, in which Members of Parliament make optimal use of the control instruments and in which, together with the government, they set the frameworks, in outline, for the policy and administration of the country of Sint Maarten.

#### 1. *New catalogue of fundamental rights*

With regard to the somewhat dated Constitution of the Netherlands Antilles, the fundamental rights have been broadened and modernised, including the right to inviolability of the home (Article 7), the privacy of correspondence (Article 8) and the petition rights (Article 24). The draft also contains a number of new fundamental rights, i.e. the right to life (Article 2), the prohibition of torture (Article 3), the protection of children, senior citizens and the handicapped (Article 18), animal welfare (Article 22), the right to a fair trial (Article 26) and the right to humane treatment of prisoners (Article 30). The layout is also new. While the

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fundamental rights are not sub-divided further in the other constitutions of the Kingdom, in this draft, the fundamental rights are transparently grouped by subject, i.e. freedoms, equality, solidarity, citizenship and the administration of justice.

In order to strengthen the assurance character of the traditional fundamental rights, such as the right to protection of physical integrity, a provision has also been included with substantive quality requirements that (proposed) statutory regulations that breach the traditional fundamental rights must meet. According to Article 31(1), every statutory restriction of traditional fundamental rights must be necessary and proportionate. Furthermore, such a draft must be described sufficiently specifically. These criteria form an assessment framework for legislature and the courts (see paragraph 3 below) for the assessment of legislation that breaches traditional fundamental rights. Furthermore, an intensified procedure is prescribed in Article 31(2) for the approval of draft national ordinances that lead to restrictions of traditional fundamental rights.

## 2. *Consultative referendum*

A new matter within the constitutions of the Kingdom is the regulation of the consultative referendum (see Articles 92-96). From the point of view of facilitating representation, it is desirable that citizens of Sint Maarten can exert a direct influence on important draft national ordinances and orders, to supplement and correct the parliamentary democracy. This may involve either a binding or a non-binding referendum. It is generally assumed that a binding referendum requires a basis in the Constitution as a departure from the constitutional legislative process. To that end, a basis for this is included in this draft.

## 3. *Concrete and abstract assessment*

A fundamental modernisation concerns the powers of the courts to assess enacted statutory regulations of the country in terms of, in principle, all provisions of the Constitution that lend themselves for this (see Article 119). This constitutional assessment truly makes the Constitution the 'supreme law'. Since 1848, the Dutch Constitution has provided that the courts do not assess laws for compliance with the Dutch Constitution. Dutch political relations are based on the adage that the laws are inviolable. Since the 1950s, the courts have been authorised to declare statutory provisions applying within the Kingdom that are inconsistent with generally binding provisions of treaties to be inapplicable (Article 94 of the Dutch Constitution). Although the Constitution of the Netherlands Antilles does not contain any explicit prohibition of assessment, the courts have continually rejected assessment of national ordinances in terms of the Constitution, because there is a tradition of non-assessment. Within the Kingdom at present, only the Aruban Constitution has any form of constitutional assessment, which is limited to assessment in terms of traditional fundamental rights.

This draft proposes that the courts be permitted to assess all provisions eligible for provision. This gives the Constitution the necessary teeth. The key underlying concept of the proposal is that no-one stands above the law. Two examples can illustrate its significance. If Parliament had approved a national ordinance on the grounds of which holding a demonstration is dependent on the prior consent of the Minister van Justice, which consent may be refused because the content or object of the demonstration are deemed to be undesirable. Refusal of consent on those grounds flagrantly conflicts with Article 13(2) of the Constitution, which provides that the right to demonstrate may only be restricted by national ordinance 'in order to protect health, in the interests of traffic or to combat disorders'. Consequently, the courts will in this way not only condemn the minister's refusal, but also declare the underlying national ordinance to be unconstitutional. This example concerns an assessment in terms of the traditional fundamental rights, as also laid down in the Aruban Constitution, but the draft also makes assessment in terms of other provisions of the Constitution possible. For example, if Parliament has approved a national ordinance concerning the General Audit Chamber pursuant to which members of the Audit Chamber are appointed by national decree. This provision breaches Article 75(2) of the Constitution, which provides that members of the Audit Chamber are appointed on the nomination of Parliament. As a result, the independence of the Audit Chamber, which is necessary for the proper performance of its tasks, is assured more effectively. In the Netherlands, such an alteration of the law, once approved by Parliament following consultation of the Council of State, would

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be inviolable. According to this draft, the courts would be able to declare the provision on appointments in the national ordinance concerning the General Audit Chamber to be incompatible with the Constitution.

In order to petition the courts, the applicant must have a sufficient interest. Because such an interest is unlikely to be present in purely constitutional cases such as in the second example, the Ombudsman has been granted the power to be able to submit a national ordinance that has been ratified but has not yet taken effect to the Constitutional Court. The Ombudsman is an authority that stands above the parties and acts, as it were, as the 'conscience' of the Constitution (Articles 127 and 128).

In comparison with the Netherlands, the proposed concrete and abstract constitutional assessment is far-reaching. The reason for its introduction in this form is that Sint Maarten and the Netherlands are not really comparable. The Netherlands is a country with established traditions that are usually followed without the threat of force in the form of sanctions by a court. Sint Maarten, on the other hand, is a very young democracy, a new country on a very small scale, which lacks those traditions and experience. In that regard, it is comparable to the islands of the 'Commonwealth Caribbean'. These countries already have some thirty years of experience with constitutional assessment.

#### 4. *Suspension and dismissal of convicted holders of authority*

Holders of political authority perform an exemplary function. It creates considerable dissatisfaction among the populace if a minister or a Member of Parliament refuses to resign after being convicted by a court. This also harms the reputation in other countries. Even though a court may impose exclusion from election rights as an additional penalty with certain sentences, the application of this, or otherwise, is quickly regarded as a political action by the courts. For these reasons, the draft proposes that a minister or Member of Parliament who is handed down a final custodial sentence for committing certain criminal offences is deprived of his position by law.

The proposal also means that if a minister or Member of Parliament is provisionally detained or convicted of a crime, they will be suspended by law (Articles 36(2) and 50(2)). In order to avoid the possibility of prosecuting too lightly, prosecution of a minister or Member of Parliament is only possible following an order of the Common Court of Justice, on a petition from the Attorney-General. (Article 123).

#### 1.4. Preparation

On 1 July 2005, the working group on Constitutional Affairs for the Island Council of the Sint Maarten island territory published the report entitled 'Sint Maarten as a Country within the Kingdom of the Netherlands'. This report outlines the administrative structure of the country of Sint Maarten. It also presents the fundamental principles on which the administration will be based. The report contains a section in which the traditional and social fundamental rights as they are to be included in the Constitution of Sint Maarten are developed on an Article-by-Article basis. A group of Sint Maarten lawyers from different parts of the community were asked to develop an initial draft of a Constitution for Sint Maarten. The members of this 'design group' based the design of a draft on the aforementioned report of the Constitutional Affairs working group and naturally, also considered other constitutions and developments applying within and outside the Kingdom, including the plans to install a State Commission in the Netherlands to issue an advisory report on a reform of the Constitution.<sup>2</sup> The texts developed by the design group, with technical support, were provided with commentary by a number of experts, which led to various adjustments. The draft was also discussed on various occasions by the 'Broad-based Committee', consisting of a broadly-based representation of the society of Sint Maarten, and forums with members of the public were organised.

The letter from the Preparatory Committee for the RTC of March 2006 to the Chairman of the RTC contains the criteria that the constitutions, the legislation and the government machinery of the new entities must meet. Representatives of the participants in the RTC reached consensus on these criteria. They concern matters including democratic

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<sup>2</sup> Parliamentary Documents 31 570.

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decision-making, the administrative and decision-making structure and respect for the rule of law and human rights. The RTC of 15 December 2008 established that the draft Constitutions and the organic draft national ordinances of the forthcoming countries largely complied with the legislative criteria.

On 2 June 2010, the government of the Kingdom presented its views of the draft, as laid down in the proposed Article 60(a) of the Charter for the Kingdom, to be inserted with the draft Kingdom Act altering the Charter for the Kingdom in connection with the dissolution of the Netherlands Antilles. In response to these views, the draft was revised on a number of points.

## **2. SPECIAL SECTION**

### **CHAPTER 1: TERRITORY AND UNITY**

#### **Article 1**

Paragraph 1 is derived from Article 1 of the Constitution of the Netherlands Antilles but is obviously tailored for Sint Maarten. The northern section of the island is assigned to the Republic of France pursuant to the Treaty of Concordia of 23 March 1648. A modern definition of land boundaries has still to be realised.

The second paragraph provides that the official languages are Dutch and English, in accordance with the current regulations.

According to the third paragraph, the national anthem, the national flag and the coat of arms will be established by national ordinance. These are important symbols of the country.

### **CHAPTER 2: FUNDAMENTAL RIGHTS**

#### **2.1. Introduction**

Unlike the Constitution of the Netherlands Antilles, the fundamental rights are grouped in a separate chapter in this draft. This includes both traditional and social fundamental rights, including the fundamental rights from the Aruban Constitution of 1986 and the Dutch Constitution of 1983, which in principle serve as paradigms.

The Constitution of the Netherlands Antilles lacks a number of fundamental rights that were added to the Constitution in 1983. These fundamental rights are therefore included in the Constitution for Sint Maarten, as a further modernisation. This concerns the right to privacy (Article 5), the right to the integrity of the body (Article 6), the confidentiality of telephone calls (Article 8), the right to freedom of expression and the freedom of broadcasting (Article 10), the right of every person to leave the country (Article 14), the *nulla poena* rule (Article 28) and the right to legal aid (Article 29). A number of fundamental rights drawn from the European Convention on Human rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) are also included, such as the right to life (Article 2), the prohibition of torture (Article 3), the prohibition of slavery and forced labour (Article 4), the protection of children (Article 18), the right to a fair trial (Article 26), the right to freedom and security (Article 27) and the right to fair treatment of detainees (Article 30). Finally, an entirely new element is the protection of animal welfare (Article 22), which is drawn from a Dutch Parliamentary motion.

For the sake of clarity, the first chapter is grouped in five paragraphs: freedoms, equality, solidarity, citizenship and administration of justice. Both traditional and social fundamental rights are included in the first chapter. Traditional fundamental rights are, in short, freedom rights and protect citizens against government breaches (such as the right to physical integrity, freedom of religion, freedom of expression and respect for personal privacy), while social fundamental rights comprise instruction standards for the government, for example to provide for the protection of children or the environment, or for sufficient employment opportunities.

#### **2.2. Restriction system**

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The government may subject the exercise of fundamental rights by citizens to restrictions only if these are based on a restriction clause in the Constitution. This applies both for measures directed at the exercise of the fundamental right ('special restrictions') and for measures that have the unintended side effect of restricting the fundamental right. To that end, two systems have been included: a formal and a material system. The formal system means that a restriction of a fundamental right is permitted only by or pursuant to a national ordinance. This complies with the legality principle and the democracy principle, entailing that restrictions of fundamental rights are only possible with the consent of Parliament or following the explicit specific authorisation of lower legislature. In addition, for a number of fundamental rights, the objectives on the basis of which the fundamental right may be restricted are named (see under the heading 'Objective criteria').

Finally, in connection with the assurance character of the traditional fundamental rights, a general provision has been included, to the effect that a restriction of traditional fundamental rights is permissible only if the restriction is necessary and proportionate: i.e. that there is a need for the restriction and furthermore, the restriction is in reasonable proportion to the objective. No less far-reaching alternatives must be available, such as a temporary regulation or the possibility of voluntary cooperation. This calls for proper justification of the draft. Furthermore, the restrictive national ordinance must be described sufficiently specifically.<sup>3</sup> This is provided for in Article 31(1).

#### *Objective criteria*

This method means that infringements may be made in the interests of a number of policy objectives that are listed exhaustively in each Article. This method is frequently applied in international treaties, such as the ECHR. The advantage of this method is that the grounds on which a fundamental right may be restricted are clear. A disadvantage is that broad objective criteria are sometimes necessary, for example the interests of public order. Objective criteria are applied in cases including the following:

- the restriction of freedom of religion outside buildings or enclosed spaces;
- the restriction of radio and television;
- the restriction by national ordinance of the right of assembly and the right to demonstrate

#### *Procedural and competency regulations*

Competency regulations designate the government bodies that are authorised to establish restrictions, while procedural regulations subject the exercise of those powers to certain formal requirements. Only the formal legislature is authorised to restrict the exercise of a fundamental right by national ordinance. There is no possibility of delegation. If a restriction of a fundamental right arises, the legislature must ensure that a legal course to an independent body administering justice is open.

Where the Dutch Constitution allows the delegation of regulatory powers, this is often done in order to enable further rules to be imposed by municipal bye-law. Due to the fact that Sint Martin is a country with only one tier of government, there is less reason for delegation: delegation is only important for the imposition of further rules within the national level by the legislature on the government or on individual ministers.

#### *Terminology*

The power of the formal legislature to delegate tasks imposed on it by the Constitution to another government body is expressed by the term 'by or pursuant to'. The fact that in certain cases the formal legislature has no delegation power also means that the impression may not be created through vague formulation that delegation is possible.

### 2.3 Horizontal effect of fundamental rights

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<sup>3</sup> Parliamentary Documents II 2007/08, 31 570, No. 3, Pg. 27

The horizontal effect of fundamental rights concerns the questions of whether fundamental rights only have legal effect in the relationship between the government and citizens, or whether they also apply between citizens themselves. It is correct to regard fundamental rights as rules of law applying in the relationship between the government and the citizens. However, depending on their purport and formulation, fundamental rights may also have an effect in the application of private law by the courts on the grounds of unlawful action. It is up to the courts to decide the form in which this is the case, and which legal force applies in which cases.

### 3. Article by Article

#### *§ 1. Freedoms*

##### **Article 2: Right to life and prohibition of the death penalty**

The right to life is the first human right mentioned in the European Convention on Human Rights (Article 2 of the ECHR) and in the International Covenant on Civil and Political Rights (Article 6 of the ICCPR). It is sometimes described as the most fundamental of all human rights. Pursuant to Article 4(2) of the ICCPR, a breach of this provision is not even permissible in an emergency. Remarkably enough, this fundamental right does not appear in any of the current constitutions of the Kingdom.

Paragraph 1 is based on Article 2(1) of the ECHR and the third sentence of Article 6(1) of the ICCPR, which already apply for the Netherlands Antilles. The first paragraph contains a prohibition on arbitrary deprivation of life. It will be clear that this prohibition does not prevent the invocation of grounds for excluding criminal responsibility, such as legitimate self-defence. The term 'arbitrary' is derived from the second sentence of Article 6 of the ICCPR, which provides that no-one may be arbitrarily deprived of life. According to Article 2(2) of the ECHR, the deprivation of life is not deemed to contravene the Article if it is necessary: a. in defence of any person from unlawful violence; b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; and c. in action lawfully taken for the purpose of quelling a riot or insurrection. A choice to adopt the exceptions to the prohibition on the deprivation of life in Article 2(2) of the ECHR was not made, since the formulation of 'arbitrary' now chosen provides the courts with an opportunity to impose more stringent requirements than through the adoption of the exceptions of Article 2(2) of the ECHR, which apply as minimum rights.

The first sentence of the first paragraph describes the right. The second sentence provides that everyone's right to life is protected by national ordinance. It is assumed that the right should not be interpreted narrowly as protection against murder and manslaughter, where the obligation is met by making murder and manslaughter criminal offences.<sup>4</sup> The provision has a broader purport and also covers other threats to life such as malnutrition, life-threatening diseases and nuclear waste. According to the committee, the protection of the right to life requires the government to take positive measures, for example measures to prevent epidemic diseases, contamination by nuclear waste and the like. It is desirable that this fundamental minimum right is included in the Constitution, so that in cases arising, no treaties need be invoked. Inclusion in the Constitution can also contribute to awareness.

The second paragraph provides that the death penalty may not be imposed. It is similar to Article 1.4 of the Aruban Constitution and Article 114 of the Dutch Constitution, where it is included in the section on administration of justice. Such a provision is not found in the Constitution of the Netherlands Antilles. Due to its inhumane and irrevocable character the prohibition of the death penalty is embedded in the Constitution in this draft. Inclusion in the chapters on fundamental rights is a more obvious choice than placing this in the chapters on administration of justice, as otherwise the idea might be created that the provision is directed solely at the courts and not also at the legislature.

##### **Article 3: Prohibition of torture**

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<sup>4</sup> Manfred Nowak, Convention on civil and political rights, 2005, p. 124.

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According to this provision, no-one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment. This fundamental prohibition is currently not regulated in any of the constitutions of the Kingdom. It is adopted from Article 3 of the ECHR and Article 7 of the ICCPR. Among other things, the provision may have significance for the treatment of detainees. Various European countries have been convicted by the European Court of Human Rights in Strasbourg in that regard. In its report of December 2008 on its visit to the Netherlands Antilles (and Aruba), the Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment noted a number of serious shortcomings with regard to the deprivation of freedom.<sup>5</sup> Inclusion of the right in this Constitution can help to increase awareness and compliance.

#### **Article 4: Prohibition of slavery and forced labour**

This fundamental provision does not appear in the constitutions of the Kingdom either, but is included in Article 4 of the ECHR and Article 8 of the ICCPR. In view of the importance of the provision, it is desirable to also record this right in this Constitution. The formulation is drawn from Article 4 of the ECHR. It explicitly provides that the prohibition on forced labour does not prevent courts from imposing a community service order.

The third paragraph provides for the prohibition of human trafficking. Human trafficking is described as follows in the United Nations Convention on Transnational Organised Crime: 'the recruitment, transportation, transfer, harbouring or inclusion of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.' The exploitation of the victims may take various forms; sexual exploitations, for example in prostitution (brothels, bars); forced labour in e.g. construction or the exploitation of domestic staff. Due to the seriousness of the violation of the person's freedom, it is desirable to also embed this prohibition in the Constitution. Police and the judiciary should actively detect and prosecute human trafficking.<sup>6</sup>

#### **Article 5: Protection of personal privacy**

The right to respect for personal privacy is not guaranteed as such in the Antillean Constitution. Only the right to right to inviolability of the home and the privacy of correspondence are recognised separately. The provision is largely drawn from Article I.16 of the Aruban Constitution and Article 10 of the Dutch Constitution. The term 'personal privacy', like the term 'privacy', is intended to indicate an area within which an individual is free and need not tolerate any intervention from other persons. The nature of the right to protection of personal privacy means that no exhaustive description of its effect can be given. Personal privacy includes confidential communication, the home as a special private place, physical and mental integrity, personal data and also to some extent the right to enter into and maintain relationships with other persons. The definition of the term is still in development. The nature and degree of what is observed or published with regard to another person carries great weight in the question of whether an unwarranted breach of privacy has occurred. For example, brief observation of a suspect by the police in public does not constitute a breach of personal privacy, but systematically monitoring a person's activity in public for a particular, non-brief period can generate so much information that personal privacy is breached. Generally speaking, a link is also laid between recording of personal data and privacy. By recording all sorts of data on persons, relating or processing these and making use of them in taking decisions, personal privacy can be seriously breached.

In connection with this, the second paragraph provides that rules may be imposed to protect personal privacy by or pursuant to national ordinance, in connection with the recording and provision of data. With regard to Article 10 of the Dutch Constitution, the following is added to the first sentence of paragraph 2: 'The data must be processed fairly,

<sup>5</sup> See [www.cpt.coe.int](http://www.cpt.coe.int) and Parliamentary Documents II, 2008/09.24 587, No. 321.

<sup>6</sup> See the WODC report, Organised crime and law enforcement on St. Maarten, 2007, in particular Section 4.

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for specific purposes and with the consent of the person concerned or on the basis of other justified grounds for which the law provides.' In this way, the basic international standards for the use of personal data are embedded in the Constitution in this draft. These standards are adopted from Article 8(2), of the draft Charter of Fundamental Rights of the European Union.

The third paragraph states that rules may be imposed by or pursuant to national ordinance on the entitlement of citizens to view data recorded on them and to information on the use made of them. There is also the possibility to correct data. This will be regulated in more detail in a national ordinance on data protection. In the Netherlands, the Data Protection Act is currently being evaluated, in two phases. Experience with this can be used in drawing up a draft national ordinance, appropriate for the country of Sint Maarten.

The commission on 'Fundamental Rights in the Digital Age' has proposed, among other things, that the right to protection of personal privacy (Article 5(2) and 5(3)), the right to protection of the privacy of correspondence and telephone conversations (Article 8) and freedom of expression (Article 10) should be formulated independently of technology, in connection with the emergence of new technologies such as fax, text messaging and the internet.<sup>7</sup> In response to the report, the Council of Ministers does not wish to adopt the Bills at present. There are various reasons for this. Firstly, the Council of State issued a critical advisory report on the proposals. According to the Council of State, there was a lack of clarity regarding the relationship between the proposals and international developments.<sup>8</sup> Secondly, the introduction of the fundamental rights proposed by the Commission would also lead to changes in the Code of Criminal Procedure of the Netherlands Antilles, to be adopted by the country of Sint Maarten, including with regard to the protection of confidential communications in the form of a confidential meeting. A complication here is that according to the agreement in the concluding statement of the administrative meetings on the future political position of Curacao and Sint Maarten on 2 November 2006, process law should be regulated uniformly.

#### **Article 6: Inviolability of his person**

The right to inviolability of his person is an important aspect of privacy and is therefore included separately. The Article is an adoption of Article I.3 of the Constitution van Aruba and Article 11 of the Dutch Constitution. According to the history of the Dutch Constitution, the right refers to the right to be protected against physical harm to and violation of the body by other persons, as well as the right to have control over one's own body. For example, the right affords protection against violations such as enforced medical treatment, withdrawal of cells and taking cheek mucous samples for DNA testing in relation to criminal investigations. Pursuant to this provision, such restrictions are only permissible by or pursuant to national ordinance. The Netherlands Antillean Constitution does not include this right.

#### **Article 7: Right to inviolability of the home**

The proposed Article is derived from Article 12 of the Dutch Constitution. The Article concerns a special aspect of privacy, the right to protection of the home. This right, too, is not absolute. Obviously, in certain cases it must be possible for certain people to enter a home without the occupant's consent, such as in the context of a criminal investigation or in an emergency situation. According to the first paragraph, entry of a residence without the consent of the occupant is only warranted in cases determined by national ordinance, by persons designated for that purpose by national ordinance. The formulation excludes delegation. Article 12(1) of the Dutch Constitution, by contrast, refers to 'by or pursuant to the law'. According to the memorandum to the Article of the Dutch Constitution, a 'home' is defined as a space equipped and intended solely for the accommodation of a single person or a limited number of persons living in a shared household. This includes the living accommodation on a boat. Under certain circumstances, a hotel room may also be deemed to be a home. Temporary absence does not lead to the loss of the character of a space as a

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<sup>7</sup> Report of the Franken Commission, Fundamental Rights in the Digital Age, The Hague, 2000.

<sup>8</sup> Parliamentary Documents II 2005/06, 30 300, VII, No. 35.

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home. An 'occupant' is a person who uses the home in the manner described above. An important difference with the regulation of the right to inviolability of the home in Article 107 of the Constitution of the Netherlands Antilles is that the phrase 'against the occupant's will' is replaced by 'without the consent of the occupant'. This avoids every entry to a home from being assessed as lawful as long as the occupant has not explicitly forbidden this.

The second and third paragraphs contain formal regulations that go beyond Article 107 of the Antillean Constitution, such as the requirement of prior proof of identity and notification of the purpose of the entry, and provision of a report on the entry within 48 hours. This term is clearer than the counterpart of this provision in the Dutch Constitution, which refers to 'at the earliest opportunity'. The report must state the person from whom consent was obtained, who entered the home, when, for what purpose and which actions took place.

#### **Article 8:** The privacy of correspondence

The privacy of correspondence is also a further specification of the right to privacy. There are two differences from Article 108 of the Constitution of the Netherlands Antilles. Firstly, in addition to the privacy of correspondence in the first paragraph, the confidentiality of telephone calls is also afforded constitutional protection. Furthermore, the privacy of correspondence in the first paragraph is formulated more generally. This no longer only concerns letters entrusted to the post office or another mail delivery service. This editing is an attempt to ensure that the privacy of correspondence applies for all government bodies and services, for example including the director of a prison and parliamentary inquiry committee. According to the history of the law, the privacy of correspondence concerns communications that take place in sealed envelopes, or in packaging that expresses the intention of the sender that third parties should not view the contents of the letter.<sup>9</sup> For that reason, postcards, for example, are not covered by the privacy of correspondence. The term 'letter' includes more personal written message, in principle regardless of the medium of dispatch chosen.

In view of the strong similarities concerning the privacy and the nature of the form of communication using 'traditional' letters in envelopes, in this draft, a choice has been made to also include letters or messages sent by e-mail in the protection of the privacy of correspondence. In this way, authorisation of the courts is required in order to open a secured e-mail. Secured e-mail refers to mail sent from a mail program for which a password is required. With this, the writer of the mail has a justified expectation that third parties will not view it. Messages sent via communication networks such as Hyves and Facebook may also be included in the protection of the privacy of correspondence, depending on the sender's justified expectation that only friends will be able to view it, and not third parties. As already mentioned in the memorandum to Article 5, a choice for a technology-independent formulation of this fundamental right, as proposed by the Franken Commission, among others, is not made in this draft. This choice does not alter the fact that the rapid developments in the possibilities and possible applications in communication technology and the related necessary protection of personal privacy may, in due course, necessitate alteration of this provision. Developments in international law in this regard, particularly in relation to the ECHR and the ICCPR, are therefore closely monitored.

According to the second paragraph, the privacy of the telephone calls can be breached in the cases laid down by national ordinance, by any person designated for that purpose by national ordinance. The privacy of the telephone calls is also directed at all government bodies. The right is not as strongly protected as the privacy of correspondence; no court authorisation is required in this case. According to the memorandum to Article 13 of the Dutch Constitution, the confidentiality of telephone calls can then only be inviolable if the user ensures that confidential communications may be involved (Parliamentary Documents II, 1975/76, 13 872, No. 3, p. 46). In view of the enormous growth of mobile telephony and the expectation of mobile callers that confidential communication is still involved, a distinction between protection of telephony via landlines and via the ether is no longer sustainable. This therefore means that mobile telephone calls, too, are protected against bugging. Naturally,

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<sup>9</sup> Parliamentary Documents II 1975/76, No. 3, pg. 44.

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*October 2013*

the protection does not relate to third parties who hear someone having a conversation by mobile in the street or on a bus. In comparison with the Dutch counterpart, the privacy of the telegraph communications has been deleted from the second paragraphs, because telegraph communications are out of date.

#### **Article 9: Freedom of religion and belief**

The proposed Article 9 protects the right of all persons to freely choose and profess their religion or belief. The guarantee of the freedom of belief is new in comparison with the Constitution of the Netherlands Antilles. The right of freedom of religion is regulated in Articles 123-127 of the Constitution of the Netherlands Antilles, but the content is less extensive. It is customary internationally that the guarantee tends to extent to both forms of spiritual life. In the relationship with the government, no distinction may be made between religion and belief. The term 'profess' not only covers holding a religious or ideological conviction, but also conducting oneself accordingly. The regulation is adopted from Article I.15 of the Constitution of Aruba and Article 6 of the Dutch Constitution. The jurisprudence concerning Article 6 of the Dutch Constitution contains various examples of cases in which the courts ruled that certain forms of conduct could be regarded as an expression of religion, or otherwise.

The limitation clause 'subject to each person's responsibility according to national ordinance' makes it possible that the formal legislature is authorised to make certain forms of conduct that arise in the form of the practice of a religion or conviction criminal offences. The persons concerned must thus comply with the Criminal Code and a certain manner of practising a religion or conviction may give rise to an unlawful act.

The second paragraph contains a number of objective criteria to restrict the exercise of the right outside buildings or enclosed spaces. This could include a Roman Catholic procession, but practising outside buildings or enclosed spaces may arise with every religion or belief. It is likely that some form of government intervention will be necessary. This will be regulated in the draft national ordinance on public demonstrations, which will probably be incorporated at a later stage in a new national ordinance to be drawn up on public order, decency and security.

#### **Article 10: Freedom of expression**

This Article involves an expansion of the right to publish thoughts or opinions in the press without prior permission, as this right is currently regulated in Article 8 of the Constitution of the Netherlands Antilles (P.B. 1955, No. 32). The regulation is based on Article I.12 of the Constitution of Aruba.

At present, a guarantee of the existing freedom of the press no longer suffices; for that reason, the scope of the said Article 10 must be broadened. Expansion of the provision to include radio and television media also fails to satisfy current views in society in this regard, nor does it do justice in an adequate manner to the substantial and multi-faceted significance of the right to publish thoughts or opinions without prior permission. For that reason, in addition to the separate provisions on the press (the first paragraph) and radio and television (the second paragraph) a provision with a general purport is also included in the third paragraph. As mentioned earlier, a choice was not made for a technology-independent formulation of fundamental rights. An important issue in that regard is under which paragraph the internet falls. The internet can be said to bear some analogies to the press (the first paragraph) and to radio and television (the second paragraph). However, none of these media take clear precedence. The obvious step is therefore that the internet should be covered by the general provision of paragraph 3.

The first paragraph contains the right to publish thoughts or opinions through the press without prior permission, without prejudice to all persons' responsibilities as laid down by national ordinance. Such a formulation has gained great significance in the Netherlands over the years, through the jurisprudence. Benefits can be drawn from this by leaving the necessary conditions for preserving the 'circulation jurisprudence' unaltered. The freedom to pass on information, which is now part of the first and third paragraphs, is of such importance that a separate mention of this should not be omitted. This concerns a right that is of essential importance for every citizen. This is in fact a right, like that to gather information,

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*October 2013*

which appears in paragraph 5, that cannot be considered separately from the freedom of the press; however, restrictions of the rights referred to in the first paragraph must always remain possible.

The second paragraph contains an independent regulation for radio and television; in the proposed Article, these media too, are not, therefore, covered by the third paragraph. The first sentence of the second paragraph makes it possible to create a licensing system for radio and television. Licences can be required in the interests of responsible use. Thus, for example, the use of frequencies can be regulated. This regulation of the responsible use of the ether will be necessary for both the amateurs who make use of the ether and for persons or organisations who broadcast via the ether professionally. The term 'broadcasts' should be interpreted broadly enough to include the transmission of signals through the ether that have previously been received from the ether. It is important that the aim is to deliver the signals to the end-user. The phrase 'in the interests of a pluriform broadcasting system' makes it possible to impose licensing conditions with a view to a degree of variety in the programmes provided. For example, it may be considered desirable that certain programmes are broadcast even if they are not directly attractive in a commercial sense; for example, programmes with a cultural or educational character. It is also conceivable that there will be a desire to regulate the broadcasting of advertising messages for certain consumables by broadcasting companies, from the point of view of the protection of public health. Licensing conditions must therefore be possible in that regard. The fourth paragraph of this Article provides adequate grounds for such a regulation. In general, it should be noted that equal licensing conditions should be imposed for all broadcasting organisations licensed for radio or television; it is not, therefore, the intention that separate legal regimes should be created regarding broadcasting organisations formed by the government. The second sentence of the second paragraph explicitly prohibits preventive censorship with regard to broadcasts. It is not allowed to impose the obligation to submit texts of programmes to an administrative authority for approval (in advance) on operators of radio and television broadcasting companies. (Advance) control of the texts of radio broadcasts, as was legally possible in the Netherlands Antilles until 1980, would therefore contravene this Constitution (see Article 7 of the National decree, containing general measures, of 15 October 1955, P.B. 1955, No. 115; this Article was repealed by Article 1 of the National decree, containing general measures, of 27 March 1980, P.B. 1980, No. 87).

Paragraph 3 formulates the freedom of expression regarding forms of expression other than those referred to in the first two paragraphs. With regard to these other forms, the key issue in the description has become securing the content of the expression. However, the proposed editing, through its limitation to the content of the thoughts or sentiments, does not prejudice many essential government powers, some of which have already been mentioned above. The legal concept of the licence also remains one of the possibilities, although the content of the expressions may not provide grounds to refuse a licence or to attach certain conditions to it. To avoid any misunderstanding, it should also explicitly be noted that the third paragraph does not constitute any constraint to forbidding a presentation in order to combat disorder. It is possible that a population group will become disorderly in response to a presentation and that this can reasonably only be brought to an end by dismantling the presentation. If, for example, a presentation that leads to disorder also forms part of a series of presentations, it is not impossible that the tense situation will persist to such an extent that continued disorder, or a repetition of the disorder must also be feared with subsequent presentations. In cases of this kind, presentations that have not yet commenced could also be forbidden. In the said cases, some connection may exist with the presentation – the content of the presentation and the circumstances in which it takes place may also have had an influence on the development of the disorder – but there is then no question of a ban due to the content, as referred to in paragraph 3. A ban in such a situation is a ban due to the existence or the development of disorder. A ban on the grounds of the content does not arise unless a presentation is banned on the grounds of a (negative) assessment of its contents. The third paragraph now rules this out. The authorities responsible may not allow their consideration of the question of whether a particular presentation should be banned be guided by a value judgment of any kind regarding the content of the presentation. The second sentence of the third paragraph contains a further restrictive possibility concerning

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what is laid down as a right in the first sentence of that paragraph. That restrictive possibility means that the legislature can impose rules that provide for preventive supervision of presentations that are accessible to young persons aged less than 16, to the extent that protection of good morals is involved. This supervision can therefore also concern the content of the presentation. This could especially include the inspection of films intended for children. The criterion of the protection of good morals should be broadly interpreted, so that the protection of good morals also includes protection of the moral development of children. Furthermore, the Constitution of Sint Maarten should not rule out an inspection to protect children against, for example, sadistic presentations or against presentations of war violence. However, the provisions of the third paragraph do not permit a mandatory inspection for adults. Normally, one would also think of film censorship here. The same considerations concerning the protection of young people, which call for maintenance of the censorship of films for children and young people, in principle also apply for other presentations. In a more general sense, the Constitution should not automatically prohibit the censorship of presentations for young people. This should not be regarded as a call for introducing all sorts of other inspections, in addition to the censorship of films for young people. The issue is only that this provision keeps open the possibility that it could be laid down by national ordinance that a certain presentation or category of presentations will not be accessible to young people below a certain age. For the censorship of films for young people, a separate statutory regulation in that regard is an obvious step. For other presentations, if there was a need for regulation of these in this regard, a regulation in a separate national ordinance could be considered. It should be noted here that the second sentence of this paragraph serves to enable measures concerning the admission of young persons. Only if it is not possible to ensure that young people cannot watch a presentation through the regulation of admission, as may be the case with an open air presentation, can a general ban on the presentation be considered admissible. The foregoing shows that the term 'accessible' contains a component that relates to the possibility of observation. Thus a presentation that is given within a part of an open space that is fenced in is deemed to be accessible within the meaning of the fourth paragraph, for everyone who can watch the presentation from outside the fences by normal means.

Paragraph 4 aims to offer the government the possibility, in a more adequate manner than is the case at present, to impose restrictions on certain forms of advertising. The use of the term 'commercial advertising' makes it clear that this refers to advertising for commercial purposes in the broadest sense, and that it covers every offer of goods and services; propaganda for idealistic purposes is therefore excluded. If it did include the latter, this would harm freedom of expression to the core. The boundary between commercial advertising and propaganda for idealistic purposes will not always be equally clear and cases may arise in which advertising has both a commercial and an idealistic motive. On the basis of the case histories arising, sharper lines must be drawn in legislation and jurisprudence regarding matters where the boundaries of the term 'commercial advertising' still leaves questions open.

Paragraph 5 contains the right to gather or receive information without preventive supervision. The formulation matches that of the Netherlands State Commission (Second Report, pg. 69). However, in the formulation used here, the freedom to gather and receive information is equated with the freedom of disclosure. The reason for this is that for the freedom to publish and pass on information, certain means of expression must be used, while the freedom to gather and receive information does not have this feature. One can imagine that the freedom of receipt also entails other freedoms, such as the right to put up an antenna on the roof. It is entirely conceivable that a similar jurisprudence will develop regarding connected rights of this kind as with regard to the right to disseminate written documents as a right connected to the right of publication. For example, it is conceivable that the freedom to install an antenna will be restricted with a view to protection of the cityscape and landscape or to secure the safety of flight traffic. This restriction must never go so far as to prohibit a person from installing an antenna on their property under all circumstances. The freedom to gather information is of great importance to the mass communication media. After all, if they cannot do their work, the right of citizens to receive information is largely illusory. However, more newsgathering takes place in society than solely with a view to

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*October 2013*

immediately making the information obtained public. This could include, for example, the gathering of information by researchers with a view to scientific research or by companies as part of a market analysis. The possibility for restriction of the freedom to gather information is formulated primarily with the press in mind. For instance, it may be necessary to keep overly-curious journalists away during the control of disorder or in other serious situations such as kidnappings etc. However, in all sorts of tense situations it is especially important that a critical press watches to ensure that the government exercises its authority lawfully. It is desirable that legislature concerns itself with this consideration of interests in general; in a democratic society, an independent press has a function that is so important that it is not acceptable for administrative bodies to be granted all sorts of policy freedoms to make the work of the press impossible, or otherwise. The possibility has therefore been created to restrict the freedom to gather information by national ordinance. The question of the extent to which the right to free gathering of information entails an information obligation on the part of the government merits attention. Phrases such as 'without prior permission' or 'without interference by public authority', as used in Article 10 of the ECHR, indicate government restraint. It is therefore not the intention to indicate with the fifth paragraph that there is a legal obligation for the government to provide information if it is requested to do so. Nevertheless, it is of great importance for a democratic society that the administration performs its work in public as far as possible. It should become political and official practice to provide information on request as far as possible.

#### **Article 11: Freedom of education**

The freedom to provide education is assured in the first paragraph. Three elements can be distinguished: 1. The freedom to provide education: this is the freedom to form and design schools and to provide courses and lessons, where the term 'education' relates to all forms of the transfer of knowledge or skills. 2. The right to certain forms of education: this right includes the government's responsibility for the general availability and accessibility of education (respecting everyone's religious or ideological conviction). 3. The right of parents to provide education for their children in accordance with their religion or ideological conviction: this right includes the freedom to select the form of special schools and the freedom to set up schools on any religious or ideological basis. Apart from an editorial change, this paragraph is consistent with the second paragraph of Article 1.20(2) of the Aruban Constitution and Article 23(2) of the Dutch Constitution.

According to the second paragraph, every child has the right to receive general primary education. Although this right is laid down in treaties, because of its importance, it is also desirable to embed this in the Constitution.

In the third paragraph, the assurances concerning public education are regulated. One difference with the Dutch Constitution is that the assurance is not confined to primary education, but also extends to other forms of education designated by national ordinance.<sup>10</sup>

The fourth paragraph concerns the financial equivalence of public and private education. An important difference with the Dutch Constitution is that decisions regarding the forms of education that will be deemed to be equivalent, other than primary education, are delegated to the legislature.

The fifth paragraph contains the provision that the freedom of the form of education must be respected in the regulations of the conditions for government-funded private education. This principle is expressed more clearly than in the Dutch Constitution.

#### **Article 12: Freedom of association**

In this draft Constitution, the right of assembly and the freedom to demonstrate are regulated in a separate article, as the external form of meeting and working together in an association is a very different phenomenon from a gathering for a meeting or a demonstration. Unlike a meeting in an association, in the latter two cases a number of people actually gather, in private or in public; furthermore with a demonstration, this preferably takes place on a public road. Actually gathering in a group raises a problem of a different nature to that arising from the phenomenon of an association. This Article recognises the

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<sup>10</sup> See Parliamentary Documents II 1975/76, 13874, No. 2.

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freedom of association in the first sentence. In the second sentence, the power for restriction is formulated. This includes the criterion of 'the interests of public order'. In contrast to Article 10 of the Constitution of the Netherlands Antilles, this criterion lacks the terms 'good morals' or 'health'. The first term has been withdrawn because the term 'public order' includes 'good morals'. The second term, 'health', is not included in the criterion because, other than in the case of a meeting or a demonstration, when people take actual physical action, there is no need for the possibility of imposing restrictive provisions relating to health. As in Article 10 of the Constitution of the Netherlands Antilles, the second sentence is formulated as a possibility for the legislature, not as an obligation. According to this Article too, restriction of the freedom of association right can only take place 'by national ordinance'. If the legislature wishes to subject this right to restrictions, therefore, it must record those restrictions in a formal law. The imposition of these restrictions cannot be delegated to legislators in the lower tiers of government. This would have been different if the text of Article 10 of the Constitution of the Netherlands Antilles had been adopted, as this provides that the freedom of association (and assembly) can be regulated and restricted by national ordinance, which formulation does permit delegation to lower tiers of government. This Article avoids the term 'regulate', which establishes that delegation of the powers assigned to the formal legislature is not possible. This is an important reinforcement of the assurance of the freedom of association. The regulation is an adoption of Article I.10 of the Aruban Constitution and Article 8 of the Dutch Constitution.

### **Article 13: Assembly and demonstration**

The reason for placing the right of assembly and the right to demonstrate in a separate Article – i.e. separately from the right of association, has already been explained in the memorandum to Article 12. As stated there, a considerable difference exists between the terms 'assembly' and 'demonstration' and the term 'association'. The right to demonstrate does not appear in the Constitution of the Netherlands Antilles (Statute Book 1955, No. 136; P.B. No. 32). The decision to include this right in the chapter on fundamental rights in this draft was made on the basis of the consideration that demonstration has great significance as a means of expressing opinions or desires in the social and political fields in public, preferably with as many people as possible. It goes without saying that for the formal legislature, there must be a possibility of declaring certain forms of assembly or demonstration penal offences or unlawful. The right of assembly and the right to demonstrate must, in particular, not create a licence to commit criminal offences. The use of the phrase 'subject to all persons' responsibilities as laid down by national ordinance' determines the competence: the right may only be restricted by national ordinance; delegation is not permitted. This Article does not, however, prohibit the formal legislature from making assemblies and demonstrations subject to prior consent. Nevertheless, in that case the refusal of consent must be related to one of the grounds referred to in the second paragraph. For example, the freedom of assembly and demonstration should obviously not prevent the prohibition of gatherings if this is necessary to control an epidemic. However, the Article does not allow a meeting or demonstration to be prohibited because its content or objective is regarded as undesirable. This is regulated in the draft national ordinance on public demonstrations. The provision is adopted from Article I.13 of the Aruban Constitution.

In contrast to Article 9(2) of the Dutch Constitution, which provides that 'rules may be imposed by law', no provision is made for the possibility of delegating the powers to impose restrictions on the freedom of assembly and demonstration. From a democratic point of view, it is better that the imposition of restrictions should be reserved for the formal legislature.

### **Article 14: Freedom of movement and the right to leave the country**

The term 'freedom of movement' can be regarded as the freedom to travel through the country without controls. By or pursuant to national ordinance restrictions may be imposed. This is necessary, because a large number of legislative, administrative and judicial measures entail restrictions on the freedom of movement. The first paragraph is taken over from Article I.8 of the Constitution van Aruba.

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The second paragraph covers the right to leave the country, except in cases laid down by national ordinance, and is taken over from Article 2(3) of the Dutch Constitution. In that regard, the restrictions on claims to passports and other travel documents are laid down in the Passport Act (Kingdom Act of 26 September 1991).

### **Article 15: Expropriation**

The first paragraph describes the right to possession. This right appears in Article 99 of the Antillean Constitution, but is not formulated in a positive manner. In the ECHR, it is included in Article 1 of the First Protocol. The term 'peaceful enjoyment' should be interpreted broadly. Even if the government does not harm a person's possessions, but prevents them from using their possessions as they see fit, this involves an infringement of this right. This right may be restricted by or pursuant to national ordinance, but in the general interest only.

The second paragraph determines when and under which circumstances a person may be deprived of their possessions. The text is largely similar to that of Article 99 of the Constitution of the Netherlands Antilles. The addition of 'in accordance with regulations to be laid down by or pursuant to national ordinance' is consistent with the Dutch expropriation Article. It means that the law must contain procedural regulations for both expropriation and for compensation. Before a person can be deprived of their possessions, it must be laid down by national ordinance that the expropriation promotes the general interest. In contrast to the Dutch Constitution, which has repealed the general interest law, such a legal regulation as a requirement for expropriation is retained, in the interests of legal certainty. At the same time, in contrast to Article 99(2), of the Antillean Constitution, no exceptions to the principle of the general interest law are possible, except for the provisions of the next paragraph. It is necessary to avoid a situation arising such as that in the Netherlands, where the exception became the rule.

The third paragraph regulates the procedure in emergency situations. The fourth paragraph describes the situations for which no general interest law is required. The legislature is left the necessary freedom to assess the cases in which full or partial compensation for damages will be provided.

## *§ 2. Equality*

### **Article 16: Equality principle**

According to Article 3 of the Constitution of the Netherlands Antilles, all persons on the territory of the Netherlands Antilles have equal rights to protection of their person and possessions. It is assumed that this should be deemed to include the legal principle of equal treatment in similar circumstances. This is expressed better in the formulation used. The regulation is partly adopted from Article I.1 of the Aruban Constitution and is a close match with Article 1 of the Dutch Constitution and Article 14 of the ECHR.

The principle applies for the courts, the administration and the legislature and requires equal administration of justice in many fields. It should be noted here that the requirement of equal treatment in equal circumstances carries extra weight for the legislature, as the courts are granted the power to assess whether the actions of the legislature are constitutional. In contrast to the Constitution of the Netherlands Antilles, an explicit prohibition of discrimination is included. Unequal treatment on the grounds listed is not permitted, unless justified convictions can be presented for this. The grounds are broader than those currently named in the Dutch Constitution. Grounds drawn from Article 14 of the ECHR have been added: skin colour, language, national or social origin, association with a national minority, assets and birth. Obviously, the list is not exhaustive. Grounds that are not mentioned carry equal weight to those that are; this follows from the final phrase in Article 16: 'or on any grounds whatsoever'. According to the jurisprudence, discrimination arises if there is no reasonable and objective justification for different treatment. It is important here whether the distinction made serves a legitimate purpose and whether the distinction can be regarded as an appropriate method for achieving the goal.<sup>11</sup> The significance of the terms 'legitimate purpose' and 'appropriate method' are determined partly by generally accepted views.

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<sup>11</sup>Supreme Court, 7 May 1993, AB 1993, 440.

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*October 2013*



It should be noted that with regard to whether marriage, within the meaning of civil law, should be permissible for same-sex partners, it follows from the jurisdiction of the European Court of Human Rights that Article 12 (the right of marriage) and Article 14 of the ECHR (the equality principle), in combination with Article 8 (family life) do not mean that the member states are obligated to permit same-sex marriages.<sup>12</sup> It should however also be noted here that the Supreme Court, in relation to mutual recognition of deeds by the countries of the Kingdom, ruled that Article 40 of the Charter for the Kingdom means that a same-sex marriage entered into in the Netherlands should be recognised in the Netherlands Antilles and Aruba and, therefore, also in the country of Sint Maarten (Supreme Court, 13 April 2007). This recognition means that persons who are married under Dutch law must also be able to claim the same rights and obligations within the legal territory of Sint Maarten as persons married according to the law of Sint Maarten.

#### **Article 17: Equal eligibility for appointments to public service**

According to Article 7 of the Constitution of the Netherlands Antilles, every Dutch person, without distinction of citizenship, is eligible for appointment to every civil service position. The phrase 'on an equal basis' expresses the fact that this Article concerns the provision of an assurance that discrimination is not permissible in appointments in government service. The requirements must be the same for all Dutch citizens living in Sint Maarten. Naturally, requirements can be imposed with regard to ability and suitability. The proposed Article 17 has been taken over from Article I.2 of the Constitution of Aruba and Article 3 of the Dutch Constitution.

The Article does not prejudice the government's authority to reserve civil service appointments partially or entirely for persons who hold Dutch nationality. At the same time, the restriction of the guarantee to persons of Dutch nationality does not rule out the eligibility of foreigners for civil service appointments. However, aliens cannot invoke this Article.

#### *§ 3. Solidarity*

#### **Article 18: Protection of children, senior citizens and persons with a disability**

The first paragraph aims to provide explicit constitutional protection for children and young persons, who are usually 'the weakest party'. 'Children' refers to children below the age of eighteen; 'young persons' are young adults aged over eighteen, such as students. The provision is formulated as a combination of a traditional fundamental right and a social fundamental right. Precisely because children are usually the weaker members of a society, constant government vigilance regarding the welfare of children is required. Recording this right in the Constitution means that there is no need to invoke international treaties and creates greater awareness of the children's rights. After all, this provision means that the government, in addition to current legislation, must create the necessary regulations to ensure that child protection takes place properly. The provision is not a departure from earlier fundamental rights, but in fact strengthens these fundamental rights if they relate to children. In particular, children's rights include the right of children to registration and a name immediately after their birth and the right to contact with both parents. The government has a duty to assure the joint responsibility of both parents for the care and upbringing of their children; the creation of facilities for the care of children of working parents; the imposition of rules and measures to protect children against all forms of physical and mental abuse, economic exploitation and sexual abuse; the provision of adequate healthcare for children; the provision of social security for poor and needy children; and an effectively enforceable regulation to ensure payment of alimony by parents living apart from their children.

The provision also states that children and young persons have the right to education, cultural education, sport and leisure activities and that the government must promote these rights. Children's right to education is recorded, together with many other rights, in Article 28 of the Convention on the Rights of the Child, adopted at the General Meeting of the United

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<sup>12</sup> See European Court of Human Rights, 24 June 2010, app 30141/04 (Schalk and Kopf).

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*October 2013*

Nations on 20 November 1998. These rights can be effected through schools and educational institutes and through district social work, among other things.

The second paragraph lays down the protection of the elderly and persons with a disability. Establishing this as a social fundamental right creates a duty for the government to take measures for the elderly and persons with a disability. This could include building ramps for government buildings, with a view to wheelchair access, or providing for sufficient parking spaces for the disabled. Regulations on access can also be formalised in the reform of building legislation. It should be noted that the duty of care applies for the government. Implementation of this duty of care will depend on the prioritisation in the budget.

#### **Article 19: Social security**

This Article describes the right to social government assistance for Dutch nationals who comply with requirements to be laid down by national ordinance. Article 142 of the Constitution of the Netherlands Antilles (P.B. 1955, No. 32) provides that supervision and the necessary provisions for the poor will be regulated by national ordinance and that special and religious charities shall be left free in that regard and will be promoted as far as possible. Article 142 is still based on the now outdated view that care for the poor should be regarded as supplementary assistance, in addition to private charity. Social assistance relates to Dutch nationals who comply with requirements to be laid down by national ordinance. This means that requirements in addition to the requirement of domicile can be imposed, such as the requirement that Dutch nationals residing in Sint Maarten should also have lived there for a number of years.

#### **Article 20: Promotion of employment**

The first paragraph imposes a duty of care on the government. However, the government itself need not create jobs in order to meet the obligation to promote sufficient employment. The government also fulfils its duty of care through its budgetary and/or monetary policies, through economic levies, taxes and other facilities and through stimulation measures in general. Naturally, this is formulated in a manner that leaves the government an ample policy margin. It is the government that determines the programme through which employment is promoted. The second paragraph provides that rules must be laid down by national ordinance concerning the legal status of employees and concerning their protection in that respect. In fact, this paragraph is a confirmation of what is already regulated for the Netherlands Antilles in the field of labour, in the Employment regulation (P.B. 2000, No. 67), the National Ordinance on Collective Labour Agreements (P.B. 1958, No. 60), the National Ordinance on Termination of Employment Contracts (P.B. 1972, No. 111) and other statutory regulations concerning employment. In contrast to the equivalent Dutch Article concerning the fundamental right, which refers to 'those who perform work', the term 'employees' has been chosen. The term 'those who perform work' also includes the self-employed: persons who do not perform work under an employment contract. Generally, they wish to determine their legal status independently. There is also no evidence that there is demand for such a regulation among the self-employed. In the relevant Explanatory Memorandum (Overall Reform of the Dutch Constitution, Section 1a, pg. 261), the Dutch government comments that statutory regulations for the self-employed, even if they should be created, in no way need to be the same as those for employees. The need for such a regulation for the self-employed is in no way established, however, which is why this Article relates only to employees. The phrase 'and regarding their protection in this respect' refers to labour protection; this includes regulations on working hours and dismissals, regulations on safety at work, etc. This paragraph does not cover civil servants; but it does cover 'workers'.

The third paragraph recognises the right to a free choice of work. This standard, which is enforceable in law, is taken over from Article 19(3) of the Dutch Constitution. The provision does not provide for the practice of a profession, but only for the freedom of choice of profession, which is available both personally and socially (Parliamentary Documents II, 1976/77, pg. 2319). The right may be restricted by national ordinance and by orders based on delegation. The term 'work' covers both work under an employment contract and self-employed work in a profession or business, paid and unpaid work, work as a primary and a secondary occupation, etc. Certain restrictions of the free choice of work cannot be regarded

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as restrictions within the meaning of the Constitution, such as the given social and economic situation and price and wage measures.

**Article 21: Public health etc.**

This Article emphasises the great importance that the government attaches to public health, housing, proper social and cultural development and leisure activities for the citizens and the protection of cultural heritage. After all, the government includes many other interests in its responsibilities, but because of their broad scale, not all of these can be included in the Constitution. This social fundamental right does not give citizens a guarantee, but only represents an instruction to the government.

**Article 22: Improvement of living environment and animal welfare**

According to this provision, the government's constant concern is directed at the habitability of the country and the protection and improvement of the living environment. This social fundamental right is taken over from Article 21 of the Dutch Constitution.

Animal welfare was added in response to the Dutch Private Member's Bill proposed by Members of Parliament Halsema and Van Gent.<sup>13</sup> This concerns a duty of care that is in the first instance directed at the legislature. Precisely what that care involves is not developed in more detail: that is up to the legislature. The legislature must ensure that the interests of animals are included in the legislation in an equal manner in the consideration of the use of animals and the intrinsic value and welfare of animals. It is certainly not the intention, for example, to make the use of animals for food or as pets impossible, or to make the control of 'harmful species' impossible. The duty of care for animals as living creatures does, however, prevent their use function for humans from being raised to the sole standard and that the intrinsic value of the animal can automatically be subordinated to this. This means that the interests of the animal must be included on an equal basis in the assessment of interests made in the preparation of legislation.

*§ 4. Citizenship*

**Article 23: Election rights**

In this Article, the active and passive election rights that are currently regulated in Article 44 of the Constitution of the Netherlands Antilles (P.B. 1955 No. 32), together with the provisions concerning the relevant representative bodies, are given a place in the draft Constitution of Sint Maarten as an independent fundamental right. According to the first sentence of Article 46(1) of the Charter for the Kingdom, the representative bodies are elected by the residents of the country concerned who are also Dutch nationals and who have reached an age to be determined by the countries, not exceeding the age of 25. Inclusion of election rights in the fundamental rights is consistent with the design of various international documents in the field of fundamental rights. Examples of this include Article 21 of the Universal Declaration of Human Rights and Article 25 of the International Covenant on Civil and Political Rights. The general representative bodies are deemed to include the bodies with tasks that are not confined to a single special section of the overall administrative field; bodies that have a task only with regard to a specific policy sector, such as environmental protection, are not, therefore, covered by the term 'general representative bodies', regardless of whether those bodies have been assigned tasks of providing advice, conducting studies, imposing rules or issuing administrative decisions. The country of Sint Maarten's sole general representative body will be its Parliament. The term 'equal' reflects the principle of 'one man, one vote'. Consequently, it is not permissible to assign multiple voting rights to certain qualified persons. It is clear that the possibility of restrictions of the fundamental right to active and passive election rights is essential. An age limit must inevitably be imposed, for example. The election rights for the general representative bodies are currently bound to residence and Dutch nationality. Reference should also be made to the withdrawal of election rights by the courts as an additional penalty, and the temporary exclusion from the right to

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<sup>13</sup> Parliamentary Documents 30 900.

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*October 2013*

stand for election of holders of political authority who have been finally convicted according to the provisions of Articles 36 and 50 of this draft. In order to remove any doubt that such cases do not contravene the Article, reference is made here to 'exceptions'. The power of restriction included in the Article means that exceptions relating to election rights may be made only by national ordinance.

#### **Article 24: Petition right**

The petition right laid down in the first paragraph entails a guarantee that every natural person and all legal persons and organisations can address written petitions to the competent authorities without restriction. The right encompasses the obligation of the competent authorities to view and process these petitions; setting petitions aside, unread, is in contravention of the Constitution. No-one addressing a written petition to a government body may be prosecuted under criminal law for that reason.

The term 'written' does not exclude electronic communication with characters.<sup>14</sup> The determining factor for the question of whether the requirement of submission in writing has been met is whether the data carrier can perform the function of this requirement included in the Article on the fundamental right: recording characters, more or less permanently. On the basis of this definition of the term 'written', the data carrier may be paper or a magnetic tape, the hard disk of a computer or a USB stick. As illiterates can generally only draw up written documents through the intermediary of a civil-law notary, the legislature is instructed in the second paragraph of the Article to designate officials by national ordinance who must assist the illiterate (national ordinance of 8 May 1961, P.B. 1961, 77). Unlike the mediation of a civil-law notary, this assistance is free of charge. The first two paragraphs are taken over from Article I.14 of the Aruban Constitution.

The third paragraph is entirely new and provides that the competent authority is required to respond to petitions within a term laid down by national ordinance. This provision serves to ensure that incoming petitions are answered promptly. This is regulated in the draft Parliamentary Rules of Order for Sint Maarten. Article 9(2) of the Constitution of the Netherlands Antilles contained a regulation on the signature of written petitions. This has not been adopted, because a regulation on the signature of written petitions in the Constitution is no longer deemed to be opportune.

#### **Article 25: Admission and expulsion of aliens**

Pursuant to Article 3(1)(f) of the Charter, supervision of the general rules concerning the admission and expulsion of Dutch nationals is a matter for the Kingdom, as is the imposition of general conditions for the admission and expulsion of aliens (Article 3(1)(g) of the Charter); in other respects, this is a matter for the countries themselves. The admission and expulsion of Dutch nationals is not explicitly included in this draft Constitution. However, the format chosen does not rule out every possibility for the establishment of an admission regulation for Dutch nationals. The text is consistent with Protocol 4 of the ECHR with regard to the admission and expulsion of nationals. The 4<sup>th</sup> Protocol permits a distinction to be made between the territories comprising the Kingdom and permitting the rights recognised in Articles 2 and 3 of the Protocol to apply only for each territory. The Convention does not rule out the possibility of an admission regulation for Dutch nationals.

According to the proposed Article 25, the admission and expulsion of aliens is regulated by national ordinance. The provision has been taken over from Article I.9 of the Constitution of Aruba. Admission and expulsion is regulated in the National Ordinance concerning admission and expulsion.

The draft Constitution contains no provisions on Dutch nationality and expulsion, as these are matters for the Kingdom.<sup>15</sup>

### *§ 5. Administration of Justice*

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<sup>14</sup> Parliamentary Documents II 2004/05, 27 460, No. 4, pg. 3.

<sup>15</sup> See Article 3(1)(c) and 3(1)(f) of the Charter. Dutch nationality is regulated in the Kingdom Act on Dutch Nationality.

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*October 2013*

### **Article 26: Right to a fair trial**

According to this provision, in establishing his civil rights and obligations or in the determination of the grounds for any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial court. The right to a fair trial has been adopted from Article 6 of the ECHR, which already applies for the Netherlands Antilles. The reason for including this right in the Constitution of Sint Maarten is that the right to a fair trial is such an elementary minimum right that it should not be omitted from the Constitution. The jurisprudence of the European Court on Article 6(1) of the ECHR is relevant for the significance of this fundamental right. Two aspects are of particular importance here. Firstly, the provision relates not only to civil and criminal proceedings but also to certain administrative proceedings, to the extent that these are of a penal nature (European Court of Human Rights, 21 February 1984, NJ 1988, 937 (Öztürk)). Secondly, the European Court also sees in the right to a fair trial rights that are not explicitly included in Article 6(2), such as the right to remain silent and the prohibition on self-incrimination (e.g. European Court of Human Rights, 8 February 1996, NJ 725 with notes by Kn (Murray) and European Court of Human Rights, 17 December 1996, NJ 1997, 699, with notes by Kn (Saunders)). However, the right to remain silent is included separately in Article 28(4)(a) of this draft.

There must also be a public hearing by an independent and impartial court. The term 'independent' refers to the independence of the implementing authority and to assurances against external pressure, such as the term of appointment and the possibilities for dismissal. The required impartiality of the court must prevent prejudice. Furthermore, this right must ensure that both defendants and the public retain confidence in the administration of justice. The purport of the right to a hearing of a case within a reasonable time is that the defendant may not be left in uncertainty about the outcome for an excessively long period. There is extensive jurisprudence of the European Court of Human Rights in that regard.

Article 26(4) refers to a number of special rights as part of the right to a fair trial.

### **Article 27: Liberty**

This right gives shape to the right to liberty. Consistency has been sought with Article 5 of the ECHR and Article 1.5 of the Constitution of Aruba, which is based on this. This Article is far more extensive than Article 106 of the Constitution of the Netherlands Antilles, which relates only to cases of detainment.

Deprivation of liberty can be defined as conduct of a government body that places or retains a person in the physical power of other persons (e.g. arrest, imprisonment). In the interpretation of the term 'detention', the concrete intensity and duration of the intervention is significant. This involves radical restrictions of the freedom of movement. The phrase 'according to statutory regulations' as referred to in Article 79(f) and 79(g), shows that the procedural rules laid down by the formal legislature must be followed with regard to detention. The term 'lawful', referred to in various exceptional cases, means that the power to deprive a person of liberty must be laid down in law. With regard to the exception in paragraph 1(a), this must involve a decision by a judicial authority. The military criminal court is also regarded as such. The members of a court must be independent of both the implementing authority and of the parties involved in a case. Among other things, the exception in paragraph b(1) legitimises the deprivation of liberty in order to ensure compliance with a statutory obligation, such as bringing of a witness who refuses to appear after having been summoned to do so. The exceptions in paragraphs c and d have also been adopted from Article 5(1)(c) and 5(1)(d) of the ECHR. With regard to the exception in paragraph 1(c), this legitimises the use of means of enforcement under criminal law. The case referred to in paragraph 1(d) could involve a court order to place a minor under supervision combined with a deprivation of liberty, such as a mandatory stay in a clinic. The provision in paragraph 1(e) concerns various categories of persons from whom society must be protected, or who must be protected against themselves. The detention must be lawful. The court must assess the lawfulness of the detention in terms of the rules applying in Sint Maarten. This is particularly important when an administrative institution orders detention. The provisions of paragraph 1(f) and 1(g) provide an important assurance to aliens in the event of arrest or detention pending a decision concerning deportation or extradition.

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The detention must comply with the current rules of law and on the basis of the fourth paragraph, the court can see whether this is indeed the case. In many cases, the legitimacy of the deportation or extradition itself will also be raised in this assessment procedure. It is then of great importance in such a case of detention whether the deportation or extradition is postponed pending the decision of the court. In addition, this provision provides an assurance that the detention must not serve any purpose other than preventing admission of the alien to the country or enabling a decision to be taken on his deportation or extradition.

With regard to the second paragraph, it is clear that a detainee cannot always be brought before a public prosecutor immediately following his arrest. In contrast to the position regarding the information obligation, in this case, the deployment of a third party is always required. The term 'reasonable' in the phrase 'a reasonable term' does not relate to the organisation of the criminal proceedings, but to the duration of the detention. In the Brogan case (European Court of Human Rights, 29 November 1988, NJ 1989, 815), it took more than four days before the arrested terrorism suspects were brought before a court. In the view of the European Court, there was no question of 'prompt' bringing before a court. The formulation of Article 28(2) appears to suggest the possibility of a choice: release or a hearing within a reasonable term. After all, one could argue that with release in the interim, the right to a hearing within a reasonable term lapses. However, that is not the intention. A person on provisional detention may not be held on pre-trial detention for longer than is reasonable and his case must be heard within a reasonable term.

The third paragraph grants the right to a person who has been deprived of his liberty to submit the question of the legitimacy of the deprivation of liberty to a court. If the court finds that the deprivation of liberty is unlawful, the person concerned must be released. A person deprived of his liberty must also be informed immediately, in a language that he understands, of his right to remain silent and his right to the support of a lawyer. This lawyer must be present from the first questioning. If a person who has been deprived of his liberty requests the support of a lawyer, the authority prosecuting him must refrain from all questioning activities. Through the general formulation of this paragraph, problems could arise. For example, it is not the intention that a person who is detained on the grounds of sub-paragraph a should be able to reopen his case following a court conviction by invoking paragraph 3. However, the legitimacy of the detention may be at issue on the grounds of being brought before the public prosecutor pursuant to paragraph 2 and in that case, paragraph 3 may be invoked.

The fourth paragraph provides for the right to compensation for damages in the event of an arrest or detention that contravenes the preceding paragraphs. The equivalent formulation in the ECHR refers to an 'enforceable right to compensation'.

The fifth paragraph is derived from Article 15(4) of the Dutch Constitution and provides that restrictions on the exercise of fundamental rights may be imposed on a person who is deprived of his liberty, to the extent that this is not consistent with the deprivation of liberty. The clearest example is his freedom to elect domicile. How far the restrictions apply in all sorts of situations is a matter that calls for careful consideration by the relevant authorities on each occasion.

#### **Article 28: *Nulla poena; ne bis in idem*; rights of defence in criminal proceedings**

Article 28 contains a number of criminal law principles and rights. The first paragraph contains the criminal law legality principle – the *nulla poena* rule. The formulation is consistent with Article 1 of the Criminal Code of Sint Maarten and Article 16 of the Dutch Constitution. The principle is also laid down in Article 7 of the ECHR.

The second paragraph contains the presumption of innocence, as also laid down in Article 6(2) of the ECHR: everyone charged with a criminal offence shall be presumed innocent until proven guilty according to the law. This principle does not prevent a defensible lawful assumption of guilt, as in the case of infringements

The third paragraph contains the principle that a person cannot be prosecuted or convicted of the same offence twice, as laid down in Article 14(6) of the ICCPR, among others.

The fourth paragraph formulates a number of special rights of defence in criminal proceedings, as part of the right to a fair trial. The formulation is largely drawn from Article

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6(3) of the ECHR. The right in sub-paragraph a) requires all prosecuting authorities to notify the accused immediately of the charges made against him, of his right to remain silent and his right to the support of a lawyer. The right to remain silent implies that the government should refrain from all actions with the purport of obtaining a statement from the accused that cannot be said to have been made in full freedom. The addition of 'in a language that he understands' is intended to ensure that the accused does not face an entirely incomprehensible summons. The requirements of this provision are not met with a summons in the national language only, which only the counsel understands; after all, in such a case it becomes very difficult for the defendant to assess the defence submitted (see Supreme Court 23-4-1974, NJ 1974, 272). The formulation is broader than the equivalent formulation of Article 6(3)(a), of the ECHR. On the basis of the draft, the defendant must also be informed, in a language that he can understand, of his right to remain silent and his right to legal counsel. The right in sub-paragraph b) should not be regarded as so restricted that only the accused receives the time and facilities for the preparation of the defence; after all, the counsel must also be able to prepare the defence properly. In the event that the accused has been deprived of his liberty, the provision carries extra weight, in the sense that sufficient communication must be possible between the person held in preventive detention and his counsel. With regard to aliens who do not understand the national language, a fair trial also means that their defence counsel must be given an opportunity to inform them adequately about the proceedings in court. The right to a defence in sub-paragraph d) concerns one of the most essential principles of our law of criminal procedure. However, the right to the support of counsel is not included here, since this matter is regulated in Article 30. The right in sub-paragraph e) could be regarded as making the right in sub-paragraph d) more concrete. The court must grant the accused or his counsel ample opportunity for questioning and must only impose limits on the right to put questions in the event of apparent abuse or improper use of this right.

#### **Article 29: Legal assistance**

The right to legal assistance is also expressed in Article 6 of the ECHR and Article 14 of the ICCPR. The text does not rule out the possibility that a right to legal assistance will also be recognised in out-of-court cases. In society, the administrative proceedings directed at reconsideration by an administrative body of an order taken, and the appeal against that order, are becoming increasingly important. The complexity of such a case may require citizens to seek legal assistance. Procedural rules can then be imposed, such as rules applying for the action of counsel in certain proceedings, requiring a particular capacity. Legal assistance may therefore be sought in cases other than court proceedings alone. The second paragraph contains an element of a social fundamental right. This concerns the question of how legal assistance can still be provided for persons who cannot pay for that legal assistance, in or out of court, or cannot do so in full. For the impecunious, few costs, if any, should be associated with the acquisition of legal assistance; the lawyers that provide the assistance should receive compensation from the government. The Article is adopted from Article 18 of the Dutch Constitution and Article I.7 of the Aruban Constitution.

#### **Article 30: Treatment of detainees**

This provision contains a number of principles for the treatment of detainees. The provision is based on Article 10 of the ICCPR. The first paragraph provides that all persons deprived of their liberty should be treated humanely, with respect for the dignity inherent to the human person. This concerns humane and respectful treatment of detainees that goes beyond the prohibition of humiliating treatment laid down in Article 3 of this draft. The second paragraph assumes that in principle, persons who have yet to be tried should be kept separately from convicts. According to the third paragraph, young suspects should be kept separately from adults. This requirement also follows from other international treaties. Furthermore, young suspects should be brought to court at the earliest opportunity. This is important in view of their development. Finally, the Article provides that the prison system must provide for treatment of prisoners that is aimed in the first instance at re-education and rehabilitation. This is regulated in the existing Netherlands Antillean penitentiary regulations, which will be adopted by the Country of Sint Maarten. Inclusion of this Article in the Constitution is

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desirable because it can contribute towards awareness and compliance. In its report of December 2008 on its visit to the Netherlands Antilles (and Aruba), the Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment noted a number of serious shortcomings with regard to the deprivation of liberty.

With regard to the definition of 'child', the UN Convention on the Rights of the Child is based on persons under the age of eighteen. This Convention also requires the Member States to set a minimum age by law, according to which 'children do not have the capacity to infringe the penal law (Article 40)'. According to the present Criminal Code and Code of Criminal Procedure of the Netherlands Antilles, the lower age limit is twelve. Children below that age cannot be prosecuted or penalised for offences committed (Article 477 Code of Criminal Procedure of the Netherlands Antilles). Article 479 of the Code of Criminal Procedure of the Netherlands Antilles provides for special procedures for the prosecution of defendants aged below eighteen; the current Criminal Code also contains special penalties for defendants aged below eighteen. Penal law for young people is being completely reformed in the draft Criminal Code. The regulation is based on Dutch criminal law for young persons, in which priority is given to the educational character. Among other things, the regulation means that under certain circumstances, sixteen and seventeen-year-olds may be tried under adult criminal law. According to the draft Explanatory Memorandum, the UN Convention on the Rights of the Child will be respected.

### **Article 31: Restriction of fundamental rights**

The first paragraph is entirely new in the constitutions of the Kingdom and contains a number of substantive criteria that a statutory regulation restricting traditional fundamental rights must meet. This in fact concerns general legislative quality requirements, i.e. the requirement that a regulation should be necessary and in proportion to its objective. This also means that there is no less radical alternative available to achieve the goal (subsidiarity principle). Furthermore, with a view to predictability for the citizens, the restriction must be described sufficiently specifically, particularly where far-reaching restrictions are involved. The European Court of Human Rights imposes requirements of this kind with regard to restrictions of, for example, the right to privacy (Article 8 of the ECHR). The reason for the inclusion of this provision is that strictly speaking, no further requirements than the requirement of statutory regulation are imposed for the restriction of a number of fundamental rights in the draft Constitution. Article 6, for example, grants everyone the right to the integrity of the body, without prejudice to restrictions to be imposed by or pursuant to national ordinance. These quality requirements, in terms of which the legislature and the courts can assess (draft) legislation that restricts traditional fundamental rights, strengthen the guarantee character of the traditional fundamental rights. Naturally, the courts should not step into the legislature's shoes. But the concept of a state under the rule of law does mean that the legislature must convincingly demonstrate the need for a restriction of a freedom. In assessing the need, the courts should allow the legislature some scope for assessment, similar to the European Court of Human Rights in Strasbourg in assessing whether the 'pressing social need' and objective criteria on the basis of which human rights violations are permitted. The proposed Article calls for a precisely formulated statutory regulation with adequate Explanatory Memoranda, providing proper support for the benefit and the need for the restriction.

Due to the special significance of traditional fundamental rights, a weightier decision-making procedure is prescribed in the second paragraph for every national ordinance that restricts the said fundamental rights, i.e. an absolute majority of the number of members that are present. The procedure in the first paragraph is based on Article I.21 of the Aruban Constitution. A more stringent requirement is prescribed for the approval of various administrative national ordinances, i.e. a majority of two thirds of the votes cast by the number of members that are present. That requirement is equal to the requirement imposed in this draft for the adoption of a national ordinance altering the Constitution itself (Article 129 of this draft). That is not at issue here. Reference could be made, for example, to a national ordinance that defines other public offices that cannot be held simultaneously with the office of minister (Article 34(3)), in addition to the incompatibilities of Article 34(2) of the

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draft Constitution. This concerns matters that, in view of their importance, can also be regulated in the Constitution itself.

### CHAPTER 3: GOVERNMENT AND MINISTER PLENIPOTENTIARY

#### § 1. Government

##### **Article 32: Form of government**

Article 32 is an implementation of Article 2 of the Charter for the Kingdom. According to Article 2(1) of the Charter, the King governs each of the countries of the Kingdom. He is immune, while the ministers are responsible. The unity of the King and the ministers is expressed in the first paragraph. According to the second paragraph, the King is represented by the Governor.

The content of Article 32 is similar to Articles 11 and 37(1) of the Constitution of the Netherlands Antilles. Two differences should be noted. Where the Constitution of the Netherlands Antilles assumes in Article 37(1) that the government consists of the Governor and the Ministerial Council, the proposed Article 32 is a closer match with the Charter and makes the King part of the government, as Article 2 of the Charter does. Secondly, according to Article 32(1), the government consists of the King and the ministers. This Article does not mention the Ministerial Council or the Council of Ministers, as Article 37(1) of the Constitution of the Netherlands Antilles does. The proposed Article 32(1) is based on individual ministerial responsibility and is consequently consistent with the third paragraph of this Article and with Article 41(1).

Article 32(2) regulates the representation of the King by the Governor and is similar to Article 11 of the Constitution of the Netherlands Antilles. It is clear that the Governor represents the immune King as part of, as head of the national government of Sint Maarten. In that capacity, the Governor has no responsibilities to the government of the Kingdom. Article 32(1) and 32(3) of the draft Constitution describe the grounds for the individual ministerial responsibility to Parliament. Each minister is individually responsible for his actions or omissions, as shown by the countersignature of orders (see Article 39(1): national ordinances and orders must be signed by the Governor and by one or more ministers). This does not alter the fact that the Council of Ministers can make the individual responsibility of a minister the collective responsibility of the Council of Ministers if this serves general government policy. The countersignature of national ordinances and orders shows that the ministers are responsible for the actions and omissions of the Governor as the representative of the immune King.

##### **Article 33: Appointment and dismissal of ministers**

The statement that the prime minister and the ministers are appointed and dismissed by national decree shows that appointment and dismissal always takes place under an order of the constitutional Governor, countersigned by a minister. This text differs from that of Article 37(3) of the Constitution of the Netherlands Antilles: 'appointment by the Governor'. This formulation suggests that the Governor holds sole authority. There can no longer be any question of this in the organisation of a modern state. The countersignature of appointment and dismissal decisions is therefore explicitly regulated in Article 39 of this draft.

The Aruban Constitution has a regulation that the appointment of ministers will take place following the consultation of Parliament. This consultation of Parliament takes place prior to the appointment. The proposed Article 33(1) no longer contains this requirement. After all, the question arises of who Parliament should consult on a minister's appointment prior to his appointment. Furthermore, 'following consultation' does not mean that agreement must actually be reached on the proposed appointment. In the legal terminology, the phrase 'by agreement with' is reserved for this. The addition providing that a minister can only be appointed following consultation of Parliament is not meaningful. Naturally, this does not mean that debates cannot take place in Parliament on the formation of the government and the plans underlying this.

In 1985, the office of prime minister was included in the Constitution of the Netherlands Antilles. The increasing integration of government policy on the one hand and

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the growing importance of provision for unity in government policy on the other have increased the importance of the role of prime minister, both internally and externally. Internally, his coordinating and arbitrating role has gained importance, while externally he is increasingly often charged with defending and explaining government policy. His position has also become increasingly important at the international level. For this reason, the office of prime minister is mentioned separately in Article 33.

While Article 39(2), of the Constitution of the Netherlands Antilles states that the Governor may dismiss a minister if he finds that the minister no longer has the confidence of Parliament, Article 33(2) imposes a legal duty on the individual minister to resign if a majority in Parliament no longer has any confidence in him or her. This formulation expresses the individual ministerial responsibility more effectively. The phrase that the Governor 'may dismiss a minister if he finds that' has not been adopted, because this suggests that the question of whether a minister should actually resign could be based on a subjective observation and assessment of political realities. This is not intended. If Parliament clearly expresses its view in that regard, the minister should resign. If he does not do so, he will be acting beyond the rule of constitutional law. If developments concerning the interpretation and implementation of the 'confidence rule' provide grounds for this, the legislature may impose further rules to that end on the basis of Article 33(3). As the confidence rule is constitutionally a fundamental matter, the fourth paragraph prescribes a more stringent decision-making procedure for further regulations.

#### **Article 34: Requirements for appointment**

In the Constitution of the Netherlands Antilles, the requirements for the office of minister are laid down in Article 37(4), with the exception of the age requirement of 25, which is problematic in accordance with modern insights, in view of the requirement of equal treatment. Today, in the year 2010, it is not possible to see why a person aged less than 25 should, by definition be unsuited to hold the office of minister.

The positions listed in Article 34(2) as being incompatible with the office of minister are intended to secure the independent performance of the ministerial office and the said positions. The number of incompatible positions mentioned in Article 34(2) is higher than that shown in Article 37 of the Constitution of the Netherlands Antilles. Particularly in a small community such as that of Sint Maarten, it is necessary to separate ministerial office from the positions listed in Article 34. This is self-evident for the members of the judiciary. The appearance of the impartiality of the courts can quickly be called into question if a judge holds political office. Naturally, membership of the advisory bodies mentioned in the Constitution (the Council of Advice and the General Audit Chamber) is also not compatible with the office of minister. Otherwise, the minister could also act as his own advisor. The position of the independent Ombudsman is added as a new High Council of State. A minister cannot simultaneously hold active office as a civil servant; a non-active civil servant may serve as a minister.

#### **Article 35: Incompatibilities**

Articles 12 and 13, 38, 49 and 54 of the Islands Regulation of the Netherlands Antilles (ERNA) contain an extended regulation on incompatibilities for members of the Administrative Board and holders of authority. These are laid down in this draft for ministers in Article 34 and in this Article. Paragraphs 1 and 2 are adopted from Article 54(1) and Article 49(2) of the ERNA. Paragraphs 3 and 4 are based on Article 64(2), 64(3) and 64(4) of the ERNA, which provides for a prohibition of an accumulation of positions for holders of authority. Although the Lieutenant governor of the island has a different constitutional position from a minister, in view of the risk of a conflict of interest, a decision was made that the existing incompatible positions for the Lieutenant governor should apply for ministers too.

#### **Article 36: Suspension and dismissal**

Holders of political authority have an exemplary function. They should keep their distance from matters that could sully their office or position. In particular, this applies for the commission of criminal offences by ministers or Members of Parliament. In such a case, it is initially the person concerned who considers whether lines are being crossed that place good

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*October 2013*

performance of their duties in jeopardy. It creates great dissatisfaction among the public if a minister or Member of Parliament refuses to resign following a conviction by a court. This also harms the international reputation. Although the courts may impose removal from office or disenfranchisement as an additional penalty, whether or not this is imposed on a holder of political authority can quickly be seen as a political action by the courts. The confidence rule (Article 33(2)) offers too little relief, as this rule relates only to ministers and not to Members of Parliament, and furthermore, the purport of the confidence rule is quite different from that of an examination by the criminal courts.

For these reasons, it is proposed that a minister (Article 36) or Member of Parliament (see Article 50) who is finally sentenced to a certain term of imprisonment for committing certain crimes should be removed from office or lose his membership of Parliament by law. They should also not qualify for nomination or election for the term of the current Parliament. It could be argued that the statutory dismissal of a minister or Member of Parliament could place pressure on the criminal proceedings. In the view of the Administrative Board, the proposed regulation in fact reduces the pressure, as the criminal courts will have to decide in fewer cases in which a holder of political authority is prosecuted on the additional penalty such as removal from office or disenfranchisement.

In the second paragraph, provision is made for a situation in which certain prosecution actions are taken against a holder of political office who then refuses to resign. It is proposed that if the person concerned is held in provisional custody or has not yet been finally handed down a custodial sentence for certain crimes, he shall be suspended by law. Article 49 of this draft contains a similar regulation for Members of Parliament.

This Article is based partly of the draft national ordinance altering the Constitution of the Netherlands Antilles in order to broaden the rules concerning the election and mandatory resignation of Members of Parliament, including resignation in the case of a conviction for committing a criminal offence while in office. Adoption of that draft in full is not desirable, as it does not provide for ministers and does not contain a regulation on suspension.

#### *The cases for statutory dismissal (Article 36(1)(a) – 36(1)(c))*

The purpose of this regulation is to ensure that serving ministers and Members of Parliament (see Article 50) who have committed certain crimes will step down. The regulation therefore does not provide for former ministers (or former Members of Parliament). As in the Criminal Code of the Netherlands Antilles, 'committed' refers to both the participants in a crime, including accessories to the crime, and the perpetrators (Articles 49 and 50 Criminal Code of the Netherlands Antilles). Obviously, a minister who is removed from office cannot be reappointed to a different ministerial position in the same government (see Article 36(1)).

In three cases, dismissal by law takes place. Firstly, a final custodial sentence of at least one year for committing a crime regarding which the law provides that the courts can impose the penalty of disenfranchisement. A custodial sentence of a year reflects the fact that the rule of law has been seriously breached. The term is consistent with Article 54(2) of the Dutch Constitution and Article 48(2) of this draft, which reads: 'Persons who have been given custodial sentences of at least one year in a final decision of a court for committing an offence designated as such by national ordinance and have in these sentences also been disenfranchised, shall be excluded from the franchise', and with Article 48(2)(c) of the draft national ordinance altering the Constitution of the Netherlands Antilles in order to impose rules concerning the election and mandatory resignation of Members of Parliament. With this category of offences, both the severity of the offence and the possibility of imposing disenfranchisement, in combination with the quality of the offender as a holder of political authority, justify the dismissal or expulsion from Parliament. As the mandatory resignation of a Member of Parliament represents a restriction of his fundamental right to stand for election (see 'restriction of election rights') below, statutory expulsion is limited to crimes for which disenfranchisement is permitted by law as an additional penalty. This is not possible for every offence, for instance for manslaughter. The possibility of disenfranchisement is laid down in the Criminal Code at the end of each paragraph for a particular category of offences.

According to the Dutch legal history, disenfranchisement should be justified as an additional penalty by the severity and nature of the crime. With regard to the severity, in the Dutch Constitution and Criminal Code, disenfranchisement is only possible in combination

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with a custodial sentence of at least one year. With regard to the nature of offences, the general criterion is that disenfranchisement should only be possible regarding penal offences that, according to their statutory description, entail a serious infringement of the principles of the structure of the Kingdom.<sup>16</sup> As already shown, however, the purpose of statutory removal from office and deprivation of the right to stand for election on the grounds of this draft is a very different one.

According to paragraph 1(b), final custodial sentences for the criminal offences committed by officials mentioned there also lead to dismissal. Articles 183 and 184 pertain to bribery of an official or judge. This also concerns the criminal offences by officials of Title XXVIII Criminal Code of the Netherlands Antilles. The criminal offences by officials of Title XXVIII have been adopted from the aforementioned Netherlands Antillean draft national ordinance altering the Constitution. All criminal offences in this title are summed up in paragraph 1, with the exception of the Articles relating to Lieutenant governors and members of the Administrative Board, as these are not relevant for the country of Sint Maarten. Among other things, this concerns the signature of national decrees by a minister in contravention of higher statutory regulations (Article 372bis of the Criminal Code of the Netherlands Antilles), forging books and registers (Article 376 of the Criminal Code of the Netherlands Antilles), fabricating evidence (Article 377 of the Criminal Code of the Netherlands Antilles) and accepting bribes (Article 378 of the Criminal Code of the Netherlands Antilles). Article 46 of the Criminal Code of the Netherlands Antilles provides that if an official violates a special official duty or makes use of powers, opportunities or means assigned to him by his office in committing a crime, the penalty can be increased by one third. This general ground for increasing the penalty for violation of a special official duty applies for all criminal offences, with the exception of the criminal offences in which the official capacity is already included as a fact determining the penalty, the criminal offences by officials from Title XXVIII of the Criminal Code of the Netherlands Antilles.

According to Article 86 of the Criminal Code of the Netherlands Antilles, 'officials' refers to all persons elected by or pursuant to elections prescribed by law. This in any event means that under criminal law, all Members of Parliament can be qualified as officials. The question is whether ministers can also be qualified as officials within the meaning of this provision and can therefore commit other criminal offences than those especially defined for ministers, such as signing national decrees in contravention of a higher regulation (Article 372bis of the Criminal Code of the Netherlands Antilles). The term 'official' is broadly interpreted in the Criminal Code. In the Supreme Court ruling of 30 May 1995, 620, the term 'official', within the meaning of Article 249(2), of the Dutch Criminal Code, is interpreted as: 'a person who is appointed under the supervision of the government and the responsibility of the government to a position to which a public character cannot be denied in order to perform part of the duties of the State or its bodies.' In view of this, it is assumed that for the purposes of criminal law, ministers can also be deemed to be officials.

Paragraph 1(c) refers to a custodial penalty for committing a criminal offence in connection with Article 46 of the Criminal Code. This concerns a custodial sentence for a common criminal offence, with the official capacity as a fact that increases the penalty (Article 46 of the Criminal Code of the Netherlands Antilles). In the cases referred to in paragraphs 1(b) and 1(c), the official capacity of minister or Member of Parliament is a decisive factor for the dismissal. These cases have been adopted from the Netherlands Antillean draft.

The condition of a final custodial sentence prevents dismissal from having disproportionately serious effects in cases arising. As a result, no hardship clause for harrowing cases is necessary. Furthermore, it is not ruled out that, in addition to the statutory dismissal, a court may impose an additional penalty of disenfranchisement or deprivation of the right to stand for election. However, in determining the degree of deprivation of the right to stand for election, the court cannot avoid the minimum of dismissal.

A draft national ordinance for a new Criminal Code of the Netherlands Antilles (and a partially new Code of Criminal Procedure) is now before the Parliament of the Netherlands

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<sup>16</sup> Parliamentary Documents 1984/85, 18 973, Nos. 2-5, pg. 23.

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Antilles. The intention is that the new countries will adopt the Criminal Code. At present, the new numbering of the draft Criminal Code, among other things, is not yet known. This means that coordination of the two drafts cannot take place until a later stage (see the additional Article VI).

#### *Restriction of election rights*

The proposed regulation does not mean that those concerned are disenfranchised, but does mean that it become impossible for a democratically elected Member of Parliament to perform his position as a representative of the people and the right to stand for election is thereby temporarily restricted. Furthermore, he cannot be re-elected during the current parliamentary term. According to Article 3 of the First Protocol of the ECHR, restrictions of the election rights are permissible only if they do not undermine this right to the extent that its essence is harmed and the effectiveness of the election rights is nullified, that these serve a justified purpose and are not disproportionate. Pursuant to Article 23 of this draft, exceptions to the election rights are possible only by national ordinance. According to Article 31(1) of this draft, a national ordinance involving a restriction of a traditional fundamental right must be necessary and proportional and the restriction must also be defined as specifically as possible.

In the view of the Administrative Board, the proposed restriction must serve a justified goal, i.e. the promotion of the integrity of holders of political authority. In the view of the Administrative Board, the relationship between the means and the end is also reasonable. A final custodial sentence by the courts is required, for a criminal offence that severely abuses the legal order and that jeopardises the exemplary function of holders of political authority. Furthermore, the withdrawal of the right to stand for election is limited to the current parliamentary term. Furthermore, the dismissal of a minister and the loss of the membership of Parliament do not prevent the person concerned from standing for re-election to Parliament or being appointed as a minister in a new government, on the basis of new elections. This therefore involves a limited period. Finally, it is important that according to the Guidelines on Elections of the Venice Commission, 'the withdrawal of political rights or finding of mental incapacity may only be imposed by *express decision* of a court of law' (European Commission for Democracy Through Law, Code of Good Practice in Electoral Matters, 2002). As already mentioned, there are good reasons for derogation from this guideline. The Explanatory Memorandum states that 'the conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them, as the holding of a public office is at stake and it may be legitimate to debar persons whose activities in such an office would violate a greater public interest.' If matters ever reach the point of a case before the Court in Strasbourg, it can be assumed that the Court will have sympathy for this context in assessing the 'margin of appreciation'.

#### *Suspension following certain acts of prosecution (Article 36(2))*

The second paragraph proposes that a minister who (a) is detained on suspicion of a criminal offence or (b) has not been finally issued a custodial sentence for a criminal offence will be suspended by law. This proposal, too, is new in the constitutions of the Kingdom. The grounds are drawn from the grounds for suspension of the members of the Common Court of Justice by the Supreme Court, pursuant to Article 28(1)(a) and 28(1)(b) of the draft Kingdom Act on the Common Court of Justice. Because the suspension of a minister is a provisional measure only, there is no question of violation of the presumption of innocence, as laid down in Article 28(2) of this draft and elsewhere.

It is clear that the prosecution of a holder of political authority on the grounds of this draft has far-reaching consequences. In order to avoid the possibility that the public prosecutor may prosecute too lightly, two procedural assurances are included. Firstly, a minister or Member of Parliament can be prosecuted for a criminal offence only by the Attorney-General or a member of the Department of Public Prosecutions that he designates and furthermore, the Attorney-General requires an order of the Common Court of Justice to prosecute a minister or Member of Parliament for a criminal offence (Article 123). For a further explanation, see the memorandum to Article 123.

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#### *Article 36(3)*

According to Articles 36(3) and 50(3), a minister or a Member of Parliament who is dismissed or expelled will be replaced. This will be arranged by the party of which the person concerned is a member. Provision will be made for remuneration during the replacement. The remuneration will be discontinued as soon as the person concerned is finally convicted. A minister who replaces a minister who has been dismissed shall step down at the same time as the other ministers. The circumstance that the person concerned is not convicted in a final decision may provide grounds for compensation for damages.

#### **Article 37: Blood relations**

The contents of this provision speak for themselves. The provision has been taken over from Article II.4 of the Aruban Constitution.

#### **Article 38: Institution of ministries**

The Antillean Constitution does not include a provision that ministries shall be instituted by national ordinance. Article 44 of the Dutch Constitution does contain such a provision. Reference is made here to ministries, whereas the Dutch Constitution previously referred to the institution of ministerial departments. The term 'department' is also commonly used in the Netherlands Antilles. Moreover, a National Ordinance concerning the establishment of the outline organisation of the national government and the accompanying positions was adopted there in 2001. In this national ordinance, which is not, therefore, based directly on the Antillean Constitution, ministries are instituted. The term 'ministry' is used in Article 38 of this draft Constitution, by analogy with the Dutch Constitution and the Aruban Constitution, because this term shows most clearly that an organisational unit under the responsibility of the minister is involved.

The second sentence of Article 38 states that ministries are managed by a minister. If a ministry is managed poorly, or performs poorly (in part), the minister can be called to account for this to Parliament. In order to give Parliament control over the number and the main points of the design of the ministries, they are instituted by national ordinance. Certain parts of the official service may be assigned their own powers by statutory regulations, in order to enable independent service provision where necessary (e.g. the tax authority).

#### **Article 39: Council of Ministers**

Article 39 regulates the position of the Council of Ministers in the structure of the country of Sint Maarten. The provisions of this Article give the office of Prime Minister a basis in the Constitution. According to the second paragraph, the Council of Ministers will consist of seven ministers. The number of seven matches the Administrative Board of Sint Maarten, which, in addition to the Governor, consists of five members, with two 'new' ministers, the Minister of Justice and the Minister of General Affairs. Furthermore, this number is regarded as appropriate to the current size of the country of Sint Maarten. In that regard, no provision has been made for the regulation of state secretaries. The addition 'unless otherwise provided by national ordinance' makes a reorganisation possible at a later stage without first needing to alter the Constitution for that purpose.

The third paragraph of this Article provides a constitutional basis for the office of prime minister, including as chairman of the Council of Ministers and thus lends weight to the important position of the prime minister in modern administrative and political relations.

The fourth paragraph provides that the Council of Ministers discusses and decides on the general government policy in order to promote the unity of that policy. This provision emphasises the fact that it is neither the prime minister nor the individual ministers who determine the 'general' government policy, but the Council of Ministers. It is established that as the chairman of the Council of Ministers, the prime minister holds primary responsibility for the general government policy as an integrated whole and for the coordination of that policy. The Council of Ministers debates and takes decisions in general, on matters that require general consultation between the ministers in order to assure unity in government policy. This 'general consultation' should be broadly interpreted. The draft rules of order for the Council of Ministers also list a very extensive number of matters which the Council of Ministers debates 'in particular'.

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The rules of order for the Council of Ministers also assign a number of powers to the prime minister, aimed at promoting the unity of government policy and its coordination. The rules of order for the Council of Ministers of the Netherlands Antilles do not contain these powers.

The Constitution of Aruba assigns the position of chairman to the Governor if he attends a meeting of the Council of Ministers. He has an advisory vote. In the relations of a modern state under the rule of law, the position of chairman does not appear appropriate. It can be said that the presence of the Governor at a meeting of the Council of Ministers does not alter the nature of that meeting. It remains a meeting of the Council of Ministers, of which the prime minister is the chairman.

Paragraph 6 provides that the Council of Ministers shall enact internal rules of order for its operations, which will be published. The enactment takes place by national decree. Both the Netherlands Antillean Constitution and the Aruban Constitution provide that the rules of order for the Council of Ministers laid down by national decree require approval by national ordinance. This approval procedure is no longer included in this Article as it is not possible to see why Parliament should play a role in the adoption of rules that have only an internal effect for the Council of Ministers. Paragraph 6 does provide that the rules of order should be published through recording in the Official Publication.

#### **Article 40: Signature of national ordinances**

Article 40(1) regulates the signature of national ordinances and national decrees. The signature by one or more ministers shows who can be deemed to be politically responsible for the creation of that legislation. This Article is consistent with the Aruban Constitution and not the Constitution of the Netherlands Antilles which, as already mentioned, still places executive power in the hands of the Governor and is not based on the constitutional Governor. The above responsibility may also be important in terms of civil and criminal law. If no special regulations are imposed for this, it must be assumed that general private and criminal law apply to their actions as a minister.

Political responsibility may also extend to the ministers who did not sign, if Parliament takes this view. For example, if Parliament takes the view that a particular order is a responsibility of the entire Council of Ministers, it can hold all ministers to account for their responsibility, jointly and/or individually. Article 40(1) is also consistent with Article 47 of the Dutch Constitution. In the terminology of Article 40(1), the government enacts national ordinances after obtaining the approval of Parliament. National ordinances are therefore (formally) enacted with their signature by the Governor and by one or more ministers. The Governor also acts in this case as the representative of the King.

Article 40(2) regulates the countersignature on the appointment and dismissal of ministers. The first sentence contains the provision that the new prime minister who takes up office must be deemed to hold primary responsibility for the formation of a new Council of Ministers. In the Netherlands, it was the custom for some time that on a change of government, the Royal Decree concerning the dismissal of the former prime minister and the appointment of his successor bore the countersignature of the minister who transferred from the old Council of Ministers to the new one. If no ministers transferred from the old Council of Ministers to the new one, this means that no countersignature can take place. Even if a minister does transfer, this need not mean that he will have acted as the formateur in the formation of the new government. The most desirable situation is therefore that the new prime minister who takes up office should co-sign the appointment decisions of his new colleagues. The appointment decision of the new prime minister also covers the dismissal of the former prime minister. After his own appointment, the new prime minister can co-sign the appointment and dismissal decisions for the other ministers. It is also conceivable that the outgoing prime minister, before stepping down, should first countersign the decisions on the dismissal of the other outgoing ministers. The serving prime minister can perform these actions in the event of an interim dismissal or appointment. However, before such a countersignature is placed, an order must have been taken on the relevant dismissal or appointment in the Council of Ministers, as such matters must be deemed to form part of the general government policy.

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#### **Article 41: Oath or solemn affirmation of office**

The text of the oath or solemn affirmation of office to be taken by ministers before the Governor is the same as that of Article 38 of the Constitution of the Netherlands Antilles. The same text is included in the Aruban Constitution.

#### **Article 42: Remuneration and retirement**

While the Constitution of the Netherlands Antilles contains separate Articles providing that the remuneration, travel and accommodation allowances and the pension for the ministers (Article 40) and for the minister plenipotentiary (Article 43) will be laid down by national ordinance, the proposed Article 42 provides for a similar regulation for both officials. However, the proposed Article 42 states that in addition to the remuneration and the pension, other financial provisions will also be regulated by national ordinance. Other financial provisions have been deliberately interpreted more broadly in this Article than in the allowances for travel and accommodation referred to in the Antillean Articles. The Article should be interpreted to mean that no difference in remuneration can exist for ministers. The Article allows scope for a different remuneration for the prime minister than for the other ministers.

#### *§ 2. The minister plenipotentiary*

#### **Article 43: Incompatibilities with the office of minister plenipotentiary**

The minister plenipotentiary is a representative of the government of Sint Maarten who plays a role in the handling of Kingdom affairs on behalf of the government, and who is assigned a number of special powers for that purpose in the Charter. According to Article 8(1), of the Charter, the minister plenipotentiary is appointed and dismissed by the government. Although it does not follow from the provisions of the Charter that the minister plenipotentiary is a political official, in the practice of the formation of a coalition government, the position has acquired more of that character. Despite this political development, the minister plenipotentiary is not accountable to Parliament. The minister responsible for policy and the Minister of General Affairs remain responsible for the instructions issued to the minister plenipotentiary. It is noted here that on the basis of his position as a representative of Sint Maarten and of its interests in The Hague, the position of minister plenipotentiary calls for flexibility in the performance of the duties and a significant degree of personal insight.

This Article contains the positions that are incompatible with that of minister plenipotentiary and is based on Article 43 of the Constitution of the Netherlands Antilles and Article II.10 of the Aruban Constitution. For a further explanation of the first paragraph of this Article, reference is made to the memorandum to Article 33(1).

Article 43(2)(g), contains the position of minister in the list of positions that are incompatible with that of minister plenipotentiary, naturally other than Article 34. This emphasises the different nature of the two positions. The minister plenipotentiary acts on behalf of the government of Sint Maarten. He does this on the basis of 'instructions' for the minister plenipotentiary adopted by the government. He is consequently subordinate to the government.

For an explanation of the other positions listed as incompatible with that of minister plenipotentiary, reference can be made to the memorandum to Article 34.

Paragraph 3 of this Article is based on the similar regulations in the Antillean and Aruban Constitutions. Paragraph 5 is not found in the Constitution of the Netherlands Antilles, while it was customary to offer the minister plenipotentiary an opportunity to attend the meetings of the Council of Ministers if he was in the country, and to cast an advisory vote. The Aruban Constitution explicitly regulates this custom, as Article 42(5) now also does.

Paragraph 7 declares a number of provisions concerning ministers to be applicable to the minister plenipotentiary.

### **CHAPTER 4: PARLIAMENT**

#### *§ 1. Structure and composition*

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#### **Article 44: People's representation**

Sint Maarten is a parliamentary democracy. The will of the people is the foundation of the government's authority. This will is expressed by a people's representation, Parliament, which is elected directly, regularly, freely and confidentially.

Naturally, the provision that Parliament represents the entire populace of Sint Maarten should not be interpreted in a private law sense. Parliament does not act on behalf of the people of Sint Maarten in the way that a representative acts on behalf of the party that it represents. In constitutional terms, the provision not only expresses the fact that Parliament plays a key role in the united state of Sint Maarten, but also that the Members of Parliament may not conduct themselves as representatives of local or regional interests, or particular interests based on other criteria, but represent the general interest of the entire populace of Sint Maarten. This provision means that, strictly speaking, the representation of the people of Sint Maarten bears no relationship to the number of voters for Parliament or to the electoral system on the basis of which the members are elected. This relationship is regulated in principle in Article 46 of the Constitution.

#### **Article 45: Composition of Parliament**

When the island territory of Aruba gained the status of a constituent Country of the Kingdom on 1 January 1986, it was regulated in the Constitution of Aruba that its Parliament would consist of 21 members, the same number of members as that of the Aruban Island Council at the time. The Parliament of the new constituent country of Curacao will also have the same number of members as the former Island Council, 21. Following this line of reasoning, the Parliament of the country of Sint Maarten could be made up of the same number of members as the former Island Council, i.e. 11.

The primary principle for politics and administration applies: the government determines government policy and is politically answerable to Parliament for the quality of the administration. The administration has a dual structure. The members of the government are not Members of Parliament. This ensures that Parliament can perform its primary tasks properly. Parliament monitors the government. The main generally binding regulations can only be adopted with the cooperation of Parliament. A good, broadly-based and well-equipped parliamentary system in which the checks and balances can be realised to the full is necessary to perform these key tasks for parliamentary democracy. For this reason, a Parliament of 15 members was chosen, instead of the 11 members that made up the Island Council. A total membership of 15 is also more likely to do justice to the diversity in the population of Sint Maarten. Because the quota with 15 members will be smaller than with 11 members, smaller parties will have a greater chance of representation in Parliament. This will be investigated in more detail in relation to the draft electoral ordinance for Sint Maarten.

Because the operation of Parliament entails an increase in the tasks for the members in comparison with the operation of the Island Council, membership of Parliament will constitute a full-time job for the members. The provisions for the members will be appropriate for full-time work.

There is also a relationship between the size of the population and the size of the Parliament. Article 8 of the Dutch Municipalities Act, for example, provides that the size of the municipal council is determined by the population of the municipality. The Administrative Board considers it desirable to ensure that the size of Parliament laid down in the Constitution need not be altered in connection with an increase in the size of the population. In view of the recent history of the island territory, the possibility of an increase in population is not inconceivable. According to the population register, the population of the island territory of Sint Maarten consisted of 53,653 registered inhabitants in June 2010. In connection with this, it is proposed that Parliament will consist of 15 members if the population of Sint Maarten is 60,000 or less, 17 members if the population is more than 60,000 and no more than 70,000, 19 members if the population is more than 70,000 and no more than 80,000, and 21 members if the population exceeds 80,000.

#### **Article 46: Parliamentary term**

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The parliamentary term is four years: i.e. Parliament 'sits' continuously and permanently for a term of four years. This Article does not prevent the dissolution of Parliament in the meantime and consequently, a shorter term. See also Article 59.

The second paragraph is consistent with the Antillean Constitution, which regulates that at a special meeting of Parliament on the second Tuesday of September, the government policy for the preceding year will be debated and the Governor will also explain the government policy and budget for the new parliamentary year. The provision is the counterpart of Article 65 of the Dutch Constitution, which regulates the opening of the parliamentary year.

The parliamentary year is related to the budget cycle that the government should maintain in the implementation of the budget adopted by Parliament. Further to the alteration of the Antillean Constitution in 2008, the role of the Governor has been adjusted. In contrast to what was originally the case, the parliamentary year is no longer opened by the Governor but by the President of Parliament. During this special meeting of Parliament, the Governor explains the government's policy for the upcoming period. After this special meeting, discussions of the draft budget with the individual ministers will commence. These discussions lead to the enactment of the budget for the following year of office.

#### **Article 47: Election of Members of Parliament**

All constitutions of the constituent Countries of the Kingdom are based on an electoral system of proportional representation 'within limits to be laid down by law' (electoral ordinance) and on free and confidential elections. This is regulated in Article 44 of the Constitution of the Netherlands Antilles.

The proportional representation system is distinguished by the fact that the number of seats won is determined on the basis of the division of the total number of votes cast in the entire country by the number of available seats in Parliament. In other words, a party that wins 10% of the votes in the election will also hold 10% of the seats. The proportional representation system does the greatest justice to the election outcome. In all other systems, such as the majority system applying on the French side of the island, the outcome of the election is 'manipulated' to a greater or lesser extent. The winning party gains a bonus. The underlying purpose of this is to promote greater stability. If necessary, this can also be achieved by means other than a complete reform of the system, for example through the introduction of an election threshold in the electoral ordinance.

In the proportional representation system, the seats are divided by the quota. This is the number of votes that is sufficient to win a single seat, or the total number of valid votes cast (the vote total) divided by the number of seats. If 30,000 votes are cast and there are 15 seats in Parliament, the quota amounts to 2,000. The Constitution of the Netherlands Antilles still refers to 'constituencies' in Article 4(3). Article 47 no longer does so. A potential division of the country into constituencies would have a purely administrative significance and does not, therefore, need to be mentioned in the Constitution. On the contrary, the term 'constituency' is easily confused with the term 'electoral district'. A division into electoral districts indicates a district system, which consequently conflicts with the system of (national) proportional representation.

#### **Article 48: Exclusion of election rights**

Direct election to Parliament is regulated in Articles 44(2), 45(1) and 46 of the Constitution of the Netherlands Antilles. The proposed Article 48 is also based on direct election to Parliament. This explicitly rules out the possibility of indirect elections.

Although, according to the courts, the requirement of registered residency is not an unreasonable restriction within the meaning of Article 25 of the ICCPR, the principle of registered residency was abandoned in the reform of the Constitution and of the Dutch Constitution, in order to allow election rights for non-resident Dutch citizens. However, the country of the Netherlands Antilles made no use of the possibility of extending election rights to non-residents pursuant to Article 46(2), of the Constitution. This system from the Constitution of the Netherlands Antilles is now being adopted.

According to the proposed Article 48, persons who are given a final custodial sentence of at least one year for an offence designated as such by national ordinance and are also

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disenfranchised are excluded from the election rights. This ground is derived from Article 54(2)(a) of the Dutch Constitution and Article III.5(2)(a) of the Aruban Constitution. The exclusion in the proposed Article 48 is far more restricted than the categorical grounds for exclusion in Article 46 of the Constitution of the Netherlands Antilles, because according to modern views, the election rights are a fundamental right that in principle applies to everyone, subject to the requirements of nationality and age. Persons deprived of their liberty by law do not, therefore, according to current insights, automatically lose their election rights. Disenfranchisement on the grounds of a conviction for vagrancy and, connecting to the Dutch Bill on the adaptation of the Dutch Constitution, serving for the repeal of the provision on the exclusion of legally incapable persons from the election rights<sup>17</sup> of persons who, according to a final court ruling, are incompetent to perform legal actions due to a mental disorder, has also been repealed.

It is also important to note that Articles 36 and 50(1) of this draft provide that a minister or a Member of Parliament who has been finally convicted of serious criminal offences will lose their positions by law. This regulation leads to a restriction of the right to stand for election for holders of political office who have committed criminal offences. For a further explanation, reference is made to the memorandum to those Articles.

#### **Article 49: Requirements for membership of Parliament**

The requirements that must be met for election to Parliament, as formulated in the first paragraph, are derived from Article 47 of the Constitution of the Netherlands Antilles. The age has been reduced from 21 to 18, as it is not possible to see today why someone of 18 should by definition be excluded from membership of Parliament. Membership commences at the time when the oath is taken.

In order to emphasise the independence of Parliament from the government and the constitutional Governor, Article 48(2) provides that resignation takes place through written notice to the President of Parliament and no longer to the Governor, as still provided by Article 54 of the Constitution of the Netherlands Antilles, or to the government, as regulated in Article III.6(2) of the Aruban Constitution.

The content of the third paragraph is regulated in more detail in Article 54(3)(1) of the Constitution of the Netherlands Antilles. The loss of membership of Parliament through the surrender of domicile in the Country is no longer included. Article 49(3) provides that membership of Parliament is lost through a continuous stay outside the Country of more than eight months. Article 54 of the Netherlands Antillean Constitution adds to this: 'unless a different term is laid down by national ordinance.' Because this could be regarded as a restriction of the mandate assigned to the elected representative, this addition has been withdrawn. Article 49(3) should therefore be interpreted as meaning that a Member of Parliament who loses his membership as a result of the eight-month term cannot be re-elected to Parliament after a time, within the parliamentary term of four years. After all, in that case the vacant seat could be taken by the next person on the electoral list immediately on the expiration of the continuous term of eight months.

#### **Article 50: Suspension, dismissal and exclusion from the right to stand for election of Members of Parliament**

Article 49 regulates the same for Members of Parliament as Article 35 does for convicted ministers. Reference is made to the memorandum to Article 35 for an explanation of the motives for including these Articles in the Constitution.

#### **Article 51: Prohibition to vote**

The first and second paragraphs contain a prohibition on voting by Members of Parliament on matters that concern them personally and have been adopted from Article 38(1) and 38(3) of the ERNA, which relates to members of the Island Council. Paragraphs 3 and 4 are adopted from Article 13(1) and 13(2) of the ERNA, which also relates to members of the Island Council. There is no reason why existing prohibitions for people's representatives in the island

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<sup>17</sup> Parliamentary Documents 31 012.

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territory should not apply for the new people's representatives of the Country of Sint Maarten.

#### **Article 52: Incompatibilities**

Article 48 of the Constitution of the Netherlands Antilles briefly mentions positions that are incompatible with membership of Parliament. The text of Article 52 is more closely related to Article III.7 of the Constitution of Aruba and Article 57 of the Dutch Constitution.

As in Article 34, this provision also includes the position of the Ombudsman as being incompatible with membership of Parliament. See Article 57(2) of the Dutch Constitution. A distinguishing feature of the dualistic system is that a minister cannot be a Member of Parliament (see also the General section of the memorandum). Like the Constitution of Aruba and the Dutch Constitution, Article 52 provides that it can be regulated by national ordinance that public positions not mentioned in the first paragraph may not be simultaneously performed with membership of Parliament. Because of the significance of the intervention in the occupation of public positions, such a national ordinance must be approved by a majority of at least two thirds of the votes cast.

#### **Article 53: Blood relations**

The contents of this Article are related to Article 49 of the Constitution of the Netherlands Antilles. The Aruban Constitution also contains such a provision. The motive for the provision is the small scale of the countries. This makes the risk that blood relations up to the second degree will be elected to Parliament simultaneously a realistic one.

#### **Article 54: Investigation of credentials**

This Article is developed in Section 2 of the Sint Maarten Rules of order for Parliament. Article 54 contains an assurance for the independence and autonomy of Parliament. See also Article 58 of the Constitution of the Netherlands Antilles. A new element in the Constitution of Sint Maarten (see also Article III.9 of the Constitution of Aruba) is that 'decisions on disputes will be made in observance of rules to be established by national ordinance'. This is because the question arose under the Constitution of the Netherlands Antilles as to whether a provision of a national ordinance stating that examination of credentials will not extend to the validity of the lists published by the central electoral committee does not contravene the Constitution. This text makes such a discussion unnecessary. In the case of the approval of the credentials of Members of Parliament presenting themselves after the elections, the prevailing view is that the Members of Parliament who have been declared elected will themselves decide on each other's credentials. This is also expressed in Section 2 of the Rules of Order for Parliament. The advantage of the assessment of the credentials by the new members instead of by the 'old' Parliament is that these new members have been recently elected and must be deemed to enjoy the latest expressed confidence of the electorate. In the Netherlands Antilles a different interpretation was followed, namely that the credentials will be handled by the 'old' Parliament. The question of whether the old or the new Parliament should decide is a result of the view that Parliament is a group of persons. Parliament can also be regarded as a constitutional institution that leads its own constitutional life, separately from the persons who are required by law or constitutional practice to debate and realise the orders of this institution within the parliamentary setting. In Article 54 (see also Article III.9 of the Constitution of Aruba), 'Parliament' refers to the constitutional institution, not to the congregation of sworn in members. It is up to the institution itself to regulate the processing of credentials in its own Rules of Order. This takes place in Section II of the draft Rules of Order.

#### **Article 55: Elections**

Article 51 of the Constitution of the Netherlands Antilles regulates what is provided for in the first paragraph of this Article 55. The relevant national ordinance is the Electoral Ordinance. The content of paragraph 2 of this Article is not found in the Constitution of the Netherlands Antilles but is contained in that of Aruba. The provision that rules will be laid down by national ordinance to promote the balanced and sound progress of elections can be regarded as a complement to the provision that elections are free and confidential, as prescribed by

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Article 47(2). The said national ordinance must impose rules so that every political party has equal opportunities in competing for the favour of the electorate. The draft national ordinance concerning the registration and finances of political parties of the country of Sint Maarten states that only political parties that have a form of association recorded by notarised deed can be registered with the central electoral committee in connection with participation in the elections and furthermore, imposes rules for the financial administration of the political party and restrictions on donations to be received by the party and candidates. The purpose of this standardisation of finances is to avoid an appearance of a conflict of interests and to promote the integrity of political parties. Incidentally, the Criminal Code also contains various provisions that serve to promote the sound progress of elections. Reference can be made to Article 132 of the Criminal Code of the Netherlands Antilles, for example, which reads: 'He who, on the occasion of an election held according to statutory requirements, bribes someone with gifts or promises to refrain from exercising their right to vote, or to exercise it in a particular way, shall be penalised with a custodial sentence of no more than six months, or a financial penalty of no more than 300 guilders. The same penalty shall be imposed on the voter or a voter's authorised representative who allow themselves to be bribed to do so with a gift or promise.' Also relevant in that regard is Article 136: 'He who, on the occasion of an election held according to statutory requirements, deliberately prevents a vote that would have taken place or performs any fraudulent action that results in a different result for the vote than that which would have been obtained through the voting slips lawfully delivered shall be penalised with a custodial sentence of no more than eighteen months.'

#### **Article 56: Taking of the oath or solemn affirmation by Members of Parliament**

The text of the oath form included in Article 56 for Members of Parliament is the same as that in Article 52 of the Constitution of the Netherlands Antilles and in Article III.11 of the Constitution of Aruba.

#### **Article 57: President, vice president and clerk to the Parliament**

According to Article 56 of the Constitution of the Netherlands Antilles, the president and vice president of Parliament are still appointed by the Governor. In recent years, developments have been initiated in the parliamentary democracy aimed at the functioning of Parliament that is actually independent of the government. These developments have been partially implemented in the Constitution of Aruba. According to Article III.12(1), the president and vice president of Parliament are appointed by national decree, on his nomination. In order to complete the independent position of Parliament, the first paragraph of Article 55 provides that Parliament decides entirely for itself who is appointed as its president and vice president. This is implemented in Section 3 of the draft Rules of order for Parliament.

The second paragraph of this Article regulates who will hold the office of president in the period between elections and the vote by the new Members of Parliament following their swearing into office. The president is an important position for the proper functioning of Parliament. The first task of the person who serves as president pursuant to this provision is to convene the meeting at which the appointment of the president and vice presidents will be raised. This regulation is drawn from Antillean constitutional law: Article 56 of the Constitution of the Netherlands Antilles. The third paragraph provides that 'Parliament shall appoint, suspend and dismiss its clerk', which is adopted from Article 57(1) of the Antillean Constitution and Article III.12(3) of the Constitution of Aruba. The third paragraph defines an extra function that is incompatible with that of a Member of Parliament. The same also applies for the staff of the Department of the clerk to the Parliament.

In order to emphasise the independence of Parliament, a second paragraph was added later to Article 57 of the Antillean Constitution. The legal status of the clerk to the Parliament must be regulated by national ordinance. In that regard, a fifth and sixth paragraph have been added to Article 57 of this draft. They provide that all aspects of the legal status of the clerk to the Parliament of Sint Maarten and of the staff of the Department of the clerk to the Parliament shall be regulated by national ordinance.

#### **Article 58: Remuneration and pension of Members of Parliament**

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Article 53 of the Constitution of the Netherlands Antilles provides that the indemnification, the travel and accommodation allowance and the pension of Members of Parliament shall be regulated by national ordinance. In contrast to the situation in the Netherlands Antilles, the Members of Parliament of Sint Maarten are employed on a full-time basis. Like the country of Aruba, the country of Sint Maarten has only one administrative tier. The financial provisions for Members of Parliament need not be the same for all members. For example, an extra supplement may be granted to leaders of parliamentary parties and to the president. The term 'regulation' by national ordinance allows for delegation. The main points of the remuneration and other financial provisions, however, must be established by national ordinance, approved by a qualified majority.

#### **Article 59: Dissolution of Parliament**

The matter of the dissolution of Parliament is regulated in Article 66 of the Constitution of the Netherlands Antilles. The guarantee that Parliament can be dissolved before the end of its term, with the assurance that a newly-elected Parliament must convene within a specific term, is upheld in the proposed Article 59. In Article 59(1), the formulation 'by national decree' has been chosen, as this better expresses the fact that dissolution falls under ministerial responsibility. According to the Antillean Constitution, the Governor still dissolves Parliament. In Article 59(2), the order to elect a new Parliament within a predetermined term, as laid down in the Constitution of the Netherlands Antilles, has been withdrawn. After all, it is not necessary to fix a term within which elections must be held if it is established that the newly-elected Parliament must convene within three months of the dissolution decree. This is consistent with the practice of providing for dissolution in due course and not from the date on which the dissolution decree is issued. This is consistent with the Constitution of Aruba and Article 64 of the Dutch Constitution. This allows Parliament to still complete all sorts of matters, which in this way moreover remains in office in case exceptional circumstances arise. The continuity of the administration is thereby assured.

Article 66(4) of the Constitution of the Netherlands Antilles has not been adopted. It was also not adopted in the Aruban Constitution. Article 66(4) is the counterpart of Article 64(4) of the Dutch Constitution. This paragraph provides for the possibility that a sitting Parliament can adjust the term of the next Parliament. In the case of Article 66(4) of the Antillean Constitution, the term may be made shorter than the prescribed term of four years. Pursuant to Article 64(4) of the Dutch Constitution, the term may be made longer than the prescribed four years.

The government of the Kingdom has proposed that Article 64(4) of the Dutch Constitution be included in the Constitution after all, or that further additional notes be made to the memorandum if this provision is not adopted (letter from the State Secretary of Internal Affairs and Kingdom Relations of 2 June 2010 to the Minister Plenipotentiary of the Netherlands Antilles). A decision has been made not to adopt the proposal. The advantage of maintaining a fixed time in the year for the swearing into office of a new Parliament seen by the Dutch constitutional legislature is outweighed by the extra demands on the democratic system to determine which term is reasonable for the new Parliament. In view of the very short period set for the swearing into office of newly elected Members of Parliament, it is advisable to avoid this possibility for the time being.

#### **Article 60: Meetings of Parliament**

Parliament always meets in public. This principle is laid down in all constitutions of the Kingdom (see Article 60 of the Constitution of the Netherlands Antilles, Article III.15 of the Constitution of Aruba and Article 66(1) of the Dutch Constitution). The second paragraph of this Article, concerning private meetings, is developed in more detail in Section 13 of the Rules of order for Parliament. Once a private meeting has been convened on request, Parliament may decide by a qualified majority whether the meeting can be held in public or not.

#### **Article 61: Quorum**

In accordance with Article 62 of the Constitution of the Netherlands Antilles and Article III.16 of the Constitution of Aruba, the first paragraph of this Article requires a quorum for debates

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and decision-making. Unlike the Constitution of the Netherlands Antilles, no reference is made to half of the membership, but to half of the serving members; vacancies are taken into account.

According to the third paragraph, members vote without mandate or conferral of those who elected them. Naturally, the members may consult their support base. However, it is not possible for a member to be issued a binding mandate under constitutional law.

Further rules for the conduct of public meetings of Parliament and concerning the procedures for voting (by a show of hands, roll call) are laid down in Chapter 9 of the draft Rules of order for Parliament.

#### **Article 62: Right to put questions**

The individual right of Members of Parliament to put questions is found in many parliamentary systems. To what extent is a minister required to answer questions from individual members? Article 65(2) of the Constitution of the Netherlands Antilles provides that ministers provide Parliament with the required information, if such provision cannot be regarded as contrary to the interests of the Kingdom or of the Netherlands Antilles. This provision could be interpreted to mean that only Parliament as a whole has a right to put questions, and that individual Members of Parliament do not. According to the unwritten constitutional law of the Netherlands Antilles, which is now recorded in Article 60 (and in Article III.17 of the Aruban Constitution), it is defensible that the government should be required to provide individual Members of Parliament with the requested information. This is developed in Article 63 of the draft Rules of order for Parliament. This assumes that an individual Member of Parliament may put questions to one of more ministers, even without the consent of Parliament, always via the president. The draft Rules of order assign the President of Parliament the right to refrain from passing on questions, for the reasons laid down in Article 63(2) of the Rules of order. The minister(s) respond(s) to questions and requests for information, always however via the president. At the parliamentary level, therefore, Antillean law has a passive information obligation and not the active information obligation as laid down in e.g. the Dutch Municipalities Act.

The reasonable term within which an answer must be provided depends on the (political) circumstances. A minister is not required to answer questions if the answer could be regarded as contrary to the interests of the country of Sint Maarten or of the Kingdom. A consideration of interests is therefore necessary. The relevant minister must make his reasons for invoking these grounds for exemption clear to Parliament. In practice, Parliament will have to decide in each concrete case whether a minister's invocation of these grounds for exemption can exempt him/her of consequences.

#### **Article 63: Provision of information by ministers to Parliament**

The first paragraph of this Article regulates the right of ministers to attend meetings of Parliament, including without invitation. 'Access to Parliament' expresses the practice better than the phrase 'have seats in Parliament', as used in Article 65 of the Constitution of the Netherlands Antilles. The text of the proposed Article 60 does greater justice to the interplay between ministers and Members of Parliament than the phrase 'have seats in Parliament and then can cast only an advisory vote'. The second paragraph of this Article matches the second and third paragraphs of the Antillean Constitution, in which the right to put questions and the right to intercede are expressed in a somewhat old-fashioned manner. In the Constitution of Sint Maarten, the right to put questions is formulated in Article 61, see above. The right to intercede is included in Article 63(2) and is developed in Article 62 of the draft Rules of order for Parliament. Parliament authorises a member who so requests to raise a matter that is not included in the items on its agenda at its meetings. The minister concerned is invited to attend the meeting of Parliament. According to Article 63(3), he may provide for the support of persons that he designates for that purpose.

#### **Article 64: Right of inquiry**

The right of investigation, inquiry, is laid down in Article 82 of the Constitution of the Netherlands Antilles. The right of inquiry must be regulated by the national ordinance, the Inquiries Regulation. The right of inquiry is a far-reaching instrument and is only used if it is

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clear that the other parliamentary rights to put questions to the government or to request and obtain information from the government are not functioning properly. The right of inquiry is one of Parliament's most severe means of control. The Inquiry Regulation of the country of the Netherlands Antilles dates from 1948 and is based on the Dutch Act dating from 1850. In 2008, a completely new Inquiry Act took effect in the Netherlands, because the existing Act, despite a number of alterations, was unclear on many points. The draft national ordinance on the Inquiry Regulation of the country of Sint Maarten is based on the recent Dutch Act.

#### **Article 65: Immunity of members**

This provision concerning the immunity of Members of Parliament, ministers and other persons who take part in the debates, contains substantively the same provisions as Article 64 of the Constitution of the Netherlands Antilles. The committees, which are not yet included in the Antillean Article, are included in the draft Article 65, because many debates are currently conducted in committees. The immunity does not apply for participants in the meetings of parliamentary parties or for members of committees, which, although they are instituted by Parliament, are not heard as official Parliamentary committees. It applies only for parties who are designated to participate in debates by a minister, Member of Parliament or by Parliament.

#### **Article 66: Rules of Order**

The people's representation, Parliament, functions entirely independently of the government and determines its own methods of operation, in observance of the relevant provisions of the Constitution. To that end, Parliament will adopt its own Rules of Orders. These Rules order and regulate the operations of the people's representation and its members, the meetings, the committees, the presidency, the application and use of the instruments and the powers assigned to it in order to monitor the government and to be able to play the role of co-legislature adequately. The Rules impose rules regarding the operations of Parliament. They will be made public in the same manner as national ordinances are published.

#### **Article 67: Representation of the interests of Sint Maarten**

See also Article 80 of the Constitution of the Netherlands Antilles. Parliament is authorised to represent the interests of the Netherlands Antilles to the King, the States General and to the Governor. Article 26 of the Islands Regulation assigns similar powers to the Island Council. According to Article 67, Parliament may represent the interests of Sint Maarten to important bodies of the Kingdom, the government of the Kingdom and to the States General. The Governor is no longer mentioned in this Article. This seems logical, as it may be assumed that the reference in the Constitution of the Netherlands Antilles is to the Governor as a body of the Kingdom, whose position is covered in that sense by 'the government of the Kingdom'. After all, as a body of the Kingdom, the Governor cannot replace the government of the Kingdom. The provision is adopted from Article III.22 of the Aruban Constitution.

#### **Article 68: Investigation of petitions**

Article 24 of the draft Constitution regulates the fundamental right to submit written petitions to the competent authority. This right means that everyone, without restriction, may address the competent authority in writing (see the memorandum to the right of petition). The third paragraph of that Article is new and contains an obligation to reply.

Article 66 develops the statement that government bodies, thus certainly including Parliament, must always not only view incoming written requests at all times, but must also process these. Article 12 of the draft Rules of order for Parliament provides that the petitions committee must respond to incoming petitions in writing, within 12 weeks.

### **CHAPTER 5: COUNCIL OF ADVICE, GENERAL AUDIT CHAMBER, OMBUDSMAN AND PERMANENT ADVISORY BODIES**

This chapter contains provisions concerning the various permanent boards that, in addition to Parliament and the government, play a key role in the structure of the government of the Country of Sint Maarten. These are the Council of Advice, the General Audit Chamber and the

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Ombudsman, as well as High Councils of State and the permanent advisory bodies, in any event including the Social-Economic Council. Section III of the Constitution of the Netherlands Antilles contains regulations concerning the Council of Advice. The Constitution of the Netherlands Antilles does not refer specifically to a General Audit Chamber and an Ombudsman. Article 134 of that Constitution does provide for an independent body responsible for supervision of the expenditure of financial resources. The Constitution of the Netherlands Antilles also contains no provisions concerning the permanent advisory bodies. The formation of the advisory bodies in this chapter is related to the layout from Section IV of the Constitution of Aruba.

### *§ 1. The Council of Advice*

#### **Article 69: Consulting the Council of Advice**

The Council of Advice advises the government and Parliament on legislation and administration. The purpose of the advice of the Council is, in short, to improve the quality of legislation and administration. The Council is the advisor of the government; it does not take initiatives itself to prepare national ordinances; it is not the decision-making institution. The Council is the final general advisor of the government and in relation to members' Bills also the final advisor of Parliament. The Council is independent. The expertise of the Council lies primarily in the legal, general administrative and legislative technique fields.

The work of the Council of Advice of the Netherlands Antilles is laid down in Article 32 of the Constitution of the Netherlands Antilles. The Council is consulted by the (constitutional) Governor in relation to draft national ordinances, Kingdom Acts, orders in council for the Kingdom, treaties, national decrees containing general measures, etc.

According to Article 69(2) of the Constitution of Sint Maarten, the Council of Advice is consulted by the government on all draft national ordinances and national decrees containing general measures, on proposals to ratify Kingdom treaties and on Kingdom Acts and orders in council for the Kingdom.

The third paragraph makes explicit that Parliament must consult the Council on members' Bills before these are debated. This provision is derived from the Dutch Act on the Council of State and provides greater clarity than Article 32(1)(1) of the Netherlands Antillean Constitution, which provides that the Council of Advice must be consulted by the Governor 'regarding all draft national ordinances that Parliament has presented to the Governor for enactment.'

The fourth paragraph provides that the Council may also submit advice to the government on its own initiative and is consistent with Article 32(2) of the Netherlands Antillean Constitution. The fifth paragraph provides that the Council must be consulted in cases prescribed by national ordinance and in all other cases in which the government considers this necessary; the provision is derived from Article 32(1)(4), 32(1)(5) and 32(1)(6) of the Netherlands Antillean Constitution.

#### **Article 70: Composition of the Council of Advice and incompatibilities**

The Council of Advice of Sint Maarten has five members, including the Vice Chairman. The Governor may chair the Council as often as he considers this necessary. The structure that has always applied for the Netherlands Antilles is chosen here, as laid down in Article 28 of the Constitution of the Netherlands Antilles. The Constitution of Aruba differs from this construction. The Governor of Aruba does not chair the Council of Advice. Also in accordance with the Antillean regulation, a choice has been made for the possibility of appointing associate members of the Council of Advice, including in order to replace members. The draft national ordinance concerning the Council of Advice also provides that the member of the Council of State of the Kingdom for Sint Maarten is also an associate member of the Council of Advice. In this way, expertise can be mutually deployed.

The third paragraph regulates that the Vice Chairman and the four other members shall be appointed by national decree. They are appointed for a term of seven years and may be reappointed. The latter is included in order to promote continuity. The suspension and dismissal of the Vice Chairman, members and associate members is regulated by national ordinance.

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In order to ensure the independence of the national administration, the fourth paragraph provides that the legal status of the Vice Chairman and the members of the Council is regulated by national ordinance. In contrast to the Constitution of the Netherlands Antilles, the fifth, sixth and seventh paragraphs cover positions that are incompatible with membership of the Council in detail. The seventh paragraph affords the legislature the possibility of expanding the incompatible positions. Pursuant to the eighth paragraph, a more stringent procedure applies for this.

#### **Article 71: Structure and powers of the Council of Advice**

In observance of paragraph 1 of this Article, the draft national ordinance concerning the Council of Advice has been drawn up. This contains rules concerning the structure and the tasks and powers of the Council. The draft also includes tasks and powers other than those referred to in Article 69. Reference is made here to the second paragraph of the draft national ordinance concerning the Council of Advice.

#### **Article 72: Taking the oath or solemn affirmation by members of the Council of Advice**

The text of the oath taken by the Vice Chairman and members before the Governor is adopted from Article IV.4 of the Constitution of Aruba. The text is abbreviated in comparison with Article 30 of the Constitution of the Netherlands Antilles.

#### **Article 73**

This provision is based on Article 31(1), of the Netherlands Antillean Constitution and speaks for itself.

### *§ 2. The General Audit Chamber*

#### **Article 74: General Audit Chamber**

The Constitution of the Netherlands Antilles does not contain a separate section on the advisory bodies. The organisation, tasks and powers of the General Audit Chamber of the Netherlands Antilles are based on Article 134 of the Constitution of the Netherlands Antilles and are developed in the 1965 National Ordinance concerning the General Audit Chamber. Due to the considerable importance of the body, the General Audit Chamber is specifically mentioned in this draft. The proposed Article 74 is consistent with Article IV.5 of the Constitution of Aruba and the relevant Antillean regulation. The General Audit Chamber is responsible for investigating the effectiveness and legitimacy of the country's revenue and expenditure.

#### **Article 75: Composition of the General Audit Chamber**

While the appointment procedure for members of the General Audit Chamber in the Netherlands Antilles is regulated in the 2002 national ordinance, Article 75, like Article IV.6 of the Aruban Constitution, assigns a constitutional character to the appointment procedure. The aim of this is to further secure the independence of the General Audit Chamber, which is essential for the proper functioning of that body. According to an earlier draft, members of the General Audit Chamber were appointed for life. Partly in view of the keeping abreast of new developments, on further consideration, a term of seven years was decided, in line with the regulation for the Council of Advice. Nominations for membership by Parliament may be adopted by a qualified majority only. This is regulated because the holders of such office must stand above the parties.

The fourth paragraph refers to Articles 9 and 10 of the draft national ordinance concerning the General Audit Chamber. This contains all the cases in which members may be suspended or dismissed, on request or otherwise, by the Common Court of Justice. Placing suspension and dismissal in the hands of the independent court further promotes the independence. In other respects, the legal status of the members of the General Audit Chamber is regulated by national ordinance.

The regulation of the positions that are incompatible with that of the Chairman and members of the General Audit Chamber has taken place through the provision in paragraph 6

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of this Article 75 that Article 70(5), 70(6) 70(7) and 70(8) are likewise applicable. These provisions regulate the functions that are incompatible with membership of the Council of Advice. See the memorandum to Article 70.

#### **Article 76: Structure and powers of the General Audit Chamber**

The first paragraph provides that the structure and powers shall be regulated by national ordinance. According to the second paragraph, the legislature may also provide that tasks be assigned to the General Audit Chamber other than those referred to in Article 74. The draft national ordinance concerning the General Audit Chamber for the country of Sint Maarten is based largely on the current National Ordinance concerning the General Audit Chamber of the Netherlands Antilles 2002.

#### **Article 77: Taking the oath or solemn affirmation by members of the General Audit Chamber**

The members take their oath or solemn affirmation of office before the Governor.

### *§ 3. Ombudsman*

#### **Article 78: Ombudsman**

This Article forms the basis for the new institution of the Ombudsman. It describes the main task of the Ombudsman, to investigate the conduct of administrative bodies, on request or at its own initiative. The Ombudsman has become an internationally recognised institution and is therefore also included in this draft constitution. Unlike the Dutch Constitution, the term of the appointment is also embedded in the Constitution. A term of seven years has been chosen, in line with that for membership of the Council of Advice, with the possibility of reappointment for one term. The performance of the tasks means that the independence of the Ombudsman must be assured. Article 78 also regulates the core of the Ombudsman's legal status. The draft national ordinance on the Ombudsman develops the independence of the Ombudsman, lays down the grounds for dismissal and suspension, as well as provisions on the powers and working methods of the Ombudsman.

It is of great importance that Article 127 of this draft assigns a special task to the Ombudsman, as the 'conscience' of the Constitution in relation to abstract constitutional assessment (see the General section and the memorandum to Article 127).

### *§ 4. Other provisions*

#### **Article 79: Permanent advisory bodies and support**

This Article does not cover committees or bodies of a temporary nature or official commissions that advise members of the government. In contrast to Article 79 of the Dutch Constitution, this Article does not provide for delegation.

Article 79 of this draft in any event enables the institution and structure by law of a body to advise that is essential for the social and economic development of the country of Sint Maarten: the Social-Economic Council (SER). As is customary in the Netherlands Antilles and Aruba, the SER will have a tripartite composition. In addition to representatives of employers and employees, three representatives of the government will be appointed. The structure, composition and powers of this advisory board are regulated in the draft national ordinance concerning the Social Economic Council. This draft is based on the Netherlands Antillean and Aruban national ordinances regulating the institution of the SER. SER members do not take an oath of office.

#### **Article 80: Publication of advisory reports**

The Constitution of the Netherlands Antilles does not contain a regulation concerning the publication of the advisory reports of the boards referred to in this chapter. Article 80 of the Dutch Constitution does contain a regulation on which the proposed Article 78 is based. Unlike Article 80 of the Dutch Constitution, this Article 80 does not provide for the possibility of delegation.

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Partly with a view to public debate, the publication of the advisory reports is the starting point of the provision. Article 25a(4) and Article 25b(3) of the Council of State Act and Article 10 of the Government Information (Public Access) Act make provision for cases in which publication does not take place. These restrictions are included in the draft national ordinance on the Council of Advice and the draft national ordinance concerning government information (public access), in accordance with the Dutch regulation.

## **CHAPTER 6: LEGISLATION AND ADMINISTRATION**

### *§ 1. General provision*

#### **Article 81: Statutory regulations**

The first Article of this chapter provides a review of all statutory regulations in the country of Sint Maarten. The structure of the provision is derived from Article 1 of the Antillean Constitution, tailored to the situation in Sint Maarten. A general reference to potential mutual arrangements, as laid down by Kingdom Act or otherwise has been added, as well as the uniform national ordinances and orders of public bodies, as referred to in Article 97 and independent administrative bodies, as referred to in Article 98.

### *§ 2. National ordinances, uniform national ordinances, national decrees containing general measures and ministerial regulations*

#### **Article 82: Enactment of national ordinances**

Article 67 *et seq.* of the Constitution of the Netherlands Antilles lay down the main points of the procedure for the realisation of national ordinances, as this takes place by agreement between the Governor, i.e. the government of the Netherlands Antilles, and Parliament. These Articles are distinguished by the inclusion of the texts of the forms of presentation, notification, etc. The legislative procedure is recorded in this Constitution in Articles 82 up to and including 90. The presentation and notification forms are no longer included.

The term 'enactment' in Article 82 refers to the legislative process as a whole. However, in the Netherlands Antillean Constitution, the term 'enact' is used for the action of the government following the approval of the draft by Parliament. In the Kingdom, it is customary to use the term 'ratified' for this: the government introduces a draft national ordinance, Parliament approves this (or in the Netherlands, 'passes' it) and the government ratifies it. In this draft, a decision has been made to use the terminology customary in the Kingdom (see also Article 83).

Article 82 constitutes the basic rule of the democratic government structure of the country of Sint Maarten, based on the will of the people: the legislative power is exercised jointly by the government and the people's representation, Parliament. National ordinances are realised through cooperation between Parliament and the government. The national ordinances referred to here in the Constitution are called Acts of Parliament in the legal doctrine, to distinguish them from other orders of a regulatory nature such as national decrees, containing general measures, or ministerial regulations.

#### **Article 83: Ratifying national ordinances**

According to Article 18 of the Constitution of the Netherlands Antilles, the Governor, after the approval of Parliament has been obtained, enacts the national ordinances. In the Dutch Constitution and the Aruban Constitution, the term 'ratification' by the Governor is chosen. Article 83 of this draft Constitution states that the ratification of draft national ordinances by the government takes place following approval of, or on the proposal of Parliament. The term 'ratification' has been chosen because the term 'enactment' used in the Constitution of the Netherlands Antilles could give rise to some confusion in common parlance. 'Ratification' refers less to the (final) enactment of the text of the national ordinance as to the legal consequence arising on ratification: the draft attains the force of national ordinance, as also laid down in Article 83.

#### **Article 84: Introduction of draft national ordinances**

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In Article 68, the Constitution of the Netherlands Antilles assumes that the Governor submits draft national ordinances to Parliament for approval. This Article also lays down the text of the introduction form.

Article 84 assumes that the government introduces draft national ordinances to Parliament for approval. Introduction takes place with a specific introduction form that is dated and signed by the Governor. See the Royal message in the Netherlands. According to the second paragraph, before the government introduces a draft national ordinance to Parliament, it consults the Council of Advice. The government responds to the advisory report in a further report. On introduction to Parliament by the government, the draft national ordinance is accompanied by the advisory report of the Council of Advice, the further report and any other advisory reports.

#### **Article 85: Right of proposal**

This Article lays down the right of proposal of Members of Parliament, i.e. the right of one or more Members of Parliament to introduce a draft national ordinance to Parliament for debate and approval. The people's representatives in the Kingdom have traditionally held the right of proposal. For the Parliament of the Netherlands Antilles, this is laid down in Article 77 of the Antillean Constitution. The Council of Advice also issues advisory reports on draft national ordinances proposed by Parliament. Following approval, Parliament presents the proposed draft national ordinance to the government for ratification. The right of proposal for the Parliament of Sint Maarten is developed in Article 60 of the Rules of order for Parliament. Article 85(3) is included in order to avoid parliamentary adoption of a national ordinance before the government introduces it to the Council of Advice, as took place on the basis of the Constitution of the Netherlands Antilles.

#### **Article 86: Right of amendment**

Article 86 regulates the amendment of draft national ordinances introduced both by the government (paragraph 1) and presented by one or more Members of Parliament (paragraph 2). This matter is only partially regulated in Article 74 of the Constitution of the Netherlands Antilles. That Article regulates only the parliamentary right to amend draft national ordinances introduced by the government. The power of the government to alter its own drafts if they have yet to be approved by Parliament is not explicitly regulated, although it is always deemed to exist. Pursuant to the revised Dutch Constitution (Article 84), this government right is laid down in the Constitution of Aruba and now, therefore, also in this draft Constitution of the country of Sint Maarten. The second paragraph provides for the right of amendment for a Member or Members of Parliament who has/have proposed a draft national ordinance. The right of amendment is developed in Article 52 *et seq.*, Chapter 10 of the Rules of order for Parliament.

#### **Article 87: Withdrawal of draft national ordinances**

Until a draft national ordinance introduced for approval has actually been approved by Parliament, the party introducing it, the government (paragraph 1) or one or more Members of Parliament (paragraph 2) may withdraw it. This is not regulated in the Constitution of the Netherlands Antilles but is regulated in the Constitution of Aruba. This rule is also based on Article 86 of the Dutch Constitution.

#### **Article 88: Procedures**

Paragraph 1 of this Article provides for the mutual notification of the government and Parliament of their decisions concerning draft national ordinances. The Constitution of the Netherlands Antilles also assumes this, but formulates this differently in the various form Articles. Paragraph 2 lays down the form of the notification, i.e. through the intermediary of the Governor, in his capacity as the (immune) head of the government.

The notification by the government contains the following text: 'The government has ratified the national ordinance (title)'. The notification is signed by the Governor and is co-signed by one or more ministers.

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The notification by Parliament reads: 'Parliament approves the national ordinance (title) introduced to it by the government (title)'. The form is dated by the president and the clerk to the Parliament.

If the government objects to the ratification of a national ordinance approved by Parliament, it notifies Parliament of this as follows: 'The government has objections to the ratification of the draft national ordinance (title) approved by Parliament'. The form is signed by the Governor and one or more ministers.

If Parliament does not approve a draft, it gives notice of this with the following form, containing the text: 'Parliament has objections to the approval of the draft national ordinance (title) introduced to it by the government for approval'. The form is signed by the president and the clerk to the Parliament.

An addition in relation to the Antillean Constitution is that Parliament notifies the government of a decision to subject a draft national ordinance to a referendum, within the meaning of Article 92 *et seq.*, Chapter 6(3) provides for the regulation of a consultative referendum, i.e. a referendum initiated by Parliament.

#### **Article 89: Entry into force of national ordinances**

The publication and entry into force of national ordinances and other statutory regulations is regulated by national ordinance. This is the national ordinance concerning publication and entry into force. This also contains the forms for the notification of national ordinances (and decrees). In the Constitution of the Netherlands Antilles, the announcement of national ordinances is regulated in Article 22. The form for announcement (publication) is included in the Article itself. For the Constitution of Sint Maarten, a decision was made not to include the texts of the different forms in the Constitution itself. The publication of Kingdom Acts and orders in council for the Kingdom is regulated in Article 22 of the Charter.

#### **Article 90: Uniform national ordinances**

In relation to the secession of Aruba from the country of the Netherlands Antilles in 1986, the Cooperative Regulation for the Netherlands Antilles and Aruba (SWR) was realised. The SWR is a mutual arrangement, within the meaning of Article 38(1), of the Charter for the Kingdom. A key element of the SWR is the introduction of the uniform national ordinance. The uniform national ordinance served as a legal basis for certain specific fields of law relating to the functioning of the Common Court of Justice. In practice, no consensus was reached on the status of the uniform national ordinance. After all, in the absence of a joint Parliament, no single regulation is enacted. Each country enacts its own regulation in its own Parliament. There is a special procedure that is intended to ensure that both Parliaments adopt an identical text. As part of the negotiations on the continuation of the Common Court of Justice as a court of justice for Aruba, the new countries of Curacao and Sint Maarten and the Netherlands, political agreements were also reached with regard to the public bodies of Bonaire, Sint Eustatius and Saba regarding the use of the uniform national ordinance as a legal basis for regulations that are essential for the functioning of the Court. An issue here is the fact that the basis regulation for the Court was laid down in a Kingdom Act, within the meaning of Article 38(2) of the Charter, and not in a form-free mutual arrangement, as had been the case since 1986.

As mentioned above, the distinguishing feature of the uniform national ordinance is the procedure to be followed for its enactment. This procedure differs from the normal procedure and division of tasks between the government and Parliament. After all, these bodies are not free to make decisions regarding the regulation, since every change in the text must be coordinated with the other countries. Derogation from the customary parliamentary procedure for the realisation of national ordinances requires anchoring in the Constitution. Consequently, the role of the government and Parliament in the legislative process is also assured in the case of a procedure for the enactment of a uniform national ordinance.

Article 90 therefore provides that derogation from the procedure described in paragraph 2 is possible pursuant to a mutual arrangement, within the meaning of Article 38(1) of the Charter. The provision is formulated as an option, with a view to the durability of the Constitution. Political considerations and changing circumstances may eliminate the need

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for uniform national ordinances in the future. It will then not be necessary to alter the Constitution itself.

### **Article 91: National decrees, containing general measures, and ministerial regulations**

The first paragraph of this Article grants the government the power to enact national decrees, containing general measures. Article 35 applies for the signature of national decrees, containing general measures. National decrees, containing general measures, have the character of generally binding regulations. There may also be national decrees that have a general character in terms of their content, but do not fall within the category of generally binding regulations, such as those instituting a service institution; these decisions must also be issued in the form of a national decree, containing general measures.

If the government therefore independently issues a generally binding regulation or independently takes a decision with a general purport, it should choose the legal form of a national decree, containing general measures.

Moreover, according to modern insights, independent (national) decrees containing general measures can only be enacted in exceptional situations and by way of a temporary provision, for the determination of generally binding regulations.

The first sentence of paragraph 2 is derived from Article 24(2) of the Constitution of the Netherlands Antilles. However, the phrase 'pursuant to a general ordinance' has not been adopted in Article 91(2) as, according to Article 2 of that Constitution, this designation relates to many types of regulation. The designation 'pursuant to national ordinance' is intended to show that only the formal legislature has the power to authorise the government to issue regulations by national decree, containing general measures, that can be enforced by penalties. The second sentence of paragraph 2 is consistent with Article 24(3) of the Constitution of the Netherlands Antilles. In contrast to this third paragraph, the formulation 'regulates the penalties to be imposed' has not been chosen in Article 89, but the formulation 'lays down' the penalties to be imposed. The later formulation clearly shows that the legislature may not delegate the regulation of penalties. A system in which the formal legislature defines a minimum and a maximum penalty standard from which the government then makes a choice is not possible. It is not the intention that the formal legislator should at the same time enable delegation for an indefinite number of cases, as permitted in the second paragraph, or should at the same time determine the penalties for an indefinite number of decisions containing general measures. A 'Blanket law' is not permitted.

The formal legislature must consider for each national ordinance the extent to which delegation should be possible and for each national ordinance, must determine the penalties concerning regulations issued by national decree, containing general measures.

The fifth paragraph refers to ministerial regulations. This does not create independent authority for the minister to impose generally binding rules. In a ministerial regulation, a minister can only issue generally binding regulations for the implementation of other regulations. Paragraph 4 provides that Article 89 is likewise applicable to the publication and entry into force of national decrees, containing general measures. The national ordinance on the publication and entry into force also regulates the publication and entry into force of national decrees, containing general measures, and of ministerial regulations.

### *§ 3. Consultative referendum*

### **Article 92: Consultative referendum**

This section, starting with Article 92, imposes a number of rules concerning the consultative referendum: this refers to the consultation of the public at the initiative of the government. While the country of Sint Maarten has a representative system (see Article 44), it is considered desirable that, at the initiative of Parliament, the view of the electorate can be requested on important decisions, to be defined by national ordinance, in a 'consultative referendum'. This instrument for Parliament is regarded as a welcome addition to representative democracy and a means of increasing the influence of the electorate on policy. With a consultative referendum, Parliament can actively involve the electorate in a public matter and thus stimulate debate on matters of public interest. A referendum to be initiated

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by Parliament can be beneficial with regard to matters concerning which views and opinions conflict with those of the political parties represented in Parliament. These benefits are outweighed by the potential disadvantages of the consultative referendum, such as the risk of its strategic political use by Parliament. If the electorate nevertheless reaches such a view in cases arising, this could be reflected in voting behaviour during elections. For the time being, a decision has been made not to regulate an advisory referendum initiated by the public in this draft as well. This type of referendum may be initiated by members of the public, for example by a number of signatures to be laid down by national ordinance. It is wise to first await experience with the consultative referendum and perhaps regulate the referendum initiated by the public in the Constitution at a later stage.

Depending on the provisions of the national ordinance, a referendum may be binding or non-binding. It is generally assumed that binding legislative referenda require a basis in the Constitution, as these referenda are inconsistent with the closed system of the constitutional legislative procedures (Parliamentary Documents II, 2002/03, 23 987, No. 28). Article 92(2) provides this basis.

A constitutional basis is not necessary for a non-binding referendum. The Council of State did attach a number of conditions to this in its advisory report of 12 September 2007 (Parliamentary Documents II, 2007/08, 31 091, No. 4) concerning the holding of a referendum in the context of the approval procedure for a treaty.

### **Article 93: Subjects of a referendum**

Firstly, a corrective legislative referendum is proposed. This means that the referendum can relate only to a draft national ordinance that has been approved by Parliament. This avoids a referendum from being held before Parliament has expressed its view on a draft. In addition to legislation, according to the first paragraph a referendum can also concern a matter of great public interest on which a decision has been taken. Certainly for matters of great public interest, it is wise for the government to give Parliament an opportunity to express its view on the desirability of a referendum.

### **Article 94: Matters that may not be subject to a referendum**

This provision lists a number of matters that in no case may be the subject of a referendum, such as draft Kingdom legislation and draft national ordinances concerning taxation.

### **Article 95: Consequences of a referendum**

According to Article 95(1), the legal consequences of a referendum are 'always' laid down by national ordinance. A consultative referendum is in all cases conducted pursuant to a national ordinance. This in any event lays down the legal consequences. The referendum may be binding or non-binding (Article 95(2)), depending on what the relevant national ordinance provides. A non-binding consultative referendum serves as a recommendation to Parliament, although the troubles surrounding the non-binding referendum on the European Constitution in the Netherlands have illustrated that a clear outcome of a referendum cannot simply be ignored. A binding referendum should therefore be the principle, unless exceptional circumstances warrant a non-binding referendum.

Depending on the subject, referenda could be organised at the initiative of Parliament on each occasion, preferably at the same time as the parliamentary elections, in view of the cost-saving. Naturally, it is also possible to conduct referenda on occasions other than at the time of a general election.

### **Article 96: Regulation of referendum by national ordinance**

All other matters concerning the referendum are regulated by national ordinances. This concerns matters such as those entitled to call a referendum and the required response rate. Clearly, derogation from the regulation in the Constitution by national ordinance is not possible.

## *§ 4. Other provisions*

### **Article 97: Establishing of public bodies**

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The Aruban Constitution includes a regulation (Article V.10) related to Article 134 of the Dutch Constitution, concerning the establishing of public bodies to represent certain interests, by national ordinance. The Article is included in order to enable the implementation of any required functional decentralisation. The proposed provision is adopted from the Aruban regulation.

#### **Article 98: Establishing of independent administrative bodies**

Article 104a of the ERNA contains a regulation for independent administrative bodies. This Article is based on this. Pursuant to the first paragraph, an independent administrative body may be established and dissolved by national ordinance. This could include an institution such as the Social Insurance Bank. It is not the intention that an independent administrative body should be assigned an extensive package of tasks. There are tasks that must be reserved for the general administration legitimised by the general elections. The second paragraph provides, among other things, that the structure, composition and powers of an independent administrative body will be regulated by national ordinance. Paragraph 2 also relates to public access to its meetings. The third paragraph provides for the possibility of granting regulatory powers to an independent administrative body. Paragraph 4 provides that supervision of such bodies shall be regulated by national ordinance. Supervision may be more or less extensive, depending on the duties of the independent administrative body. If powers of approval or overturning are granted in a particular case, the provisions of paragraph 5 apply.

#### **Article 99: Enactment of taxes and charges**

Article 129 of the Constitution of the Netherlands Antilles provides that taxes may be levied only pursuant to and in accordance with the provisions of a national ordinance; other levies do not require a statutory basis.

The Constitution of Sint Maarten assumes that obligations to transfer assets to the government in the form of taxes or charges other than on the basis of legal rules based on private law will always require a statutory basis. Furthermore, draft national ordinances concerning taxes must always be approved by an absolute majority of the votes cast by the serving members. Owing to the great interest of fiscal regulations, an extra parliamentary support base is desirable. With fifteen serving members, this amounts to eight votes. In this case, it is inappropriate to prescribe the more stringent procedure described elsewhere in this draft of a majority of two thirds of the votes cast by serving members, which also applies for an alteration of the Constitution itself (see Article 129(1)). The requirement of an absolute majority of the serving members has been taken over from Article V.II(1) of the Constitution of Aruba. According to paragraph 3, charges are regulated by national ordinance. Unlike taxes, charges are payments to the government for the provision of individual services by the government. It is assumed that no qualified majority is required for such a draft.

The term 'pursuant to a national ordinance' in paragraph 1 shows that everything concerning the material structure of the tax will be regulated in the national ordinance itself. These are the elements of the taxable fact, the basis for the rate and the parties liable for the tax. The regulation of exceptional technical details can be left to other bodies by means of delegation.

#### **Article 100: Budget**

The matters regulated in Article 100(1) are regulated in Articles 83 and 85 of the Constitution of the Netherlands Antilles. While the Antillean Constitution still refers only to the means that serve to cover the expenditure, Article 100, as well as Article V.12(1) of the Aruban Constitution, refer to the budget for (all) revenues and expenditure.

Paragraph 2 is new and is also not included in the other constitutions of the Kingdom. The requirement of a balanced budget as a principle is aimed at ensuring a sound budgeting process. However, circumstances can arise in which a balanced budget is not feasible or may even be detrimental to the society. In view of the relationship with the Financial Supervision Kingdom Act, a derogation mechanism has been built in, with the same purport as Article 25 of the Kingdom Act. After the Kingdom Act has been repealed, this provision can continue to be part of the Constitution. The further development of this Article is laid down in the National accountability ordinance.

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Paragraph 3 is substantively consistent with Article 84 of the Constitution of the Netherlands Antilles. It indicates that the government should initiate the introduction of a budget national ordinance. It is desirable to submit a draft budget ordinance for each departmental policy field. In the debate about the budget of his ministry, each minister can explain and account for his policy. Individual ministerial responsibility is properly reflected in this manner.

Paragraph 4 places the emphasis on the obligation of ministers to account to Parliament, which will assess the minister's financial management in terms of the realisation of political ambitions. The Constitution of the Netherlands Antilles does not contain such a formulation. In Article 134, this regulation assigns the supervision of expenditure of national finances to the General Audit Chamber. In the design of the Constitution of Sint Maarten, the General Audit Chamber will primarily supervise the legitimacy of the financial management. Today, the Audit Chamber also has the authority to make comments concerning the effectiveness of expenditure. Rules concerning the financial management of the country's finances are laid down by national ordinance. This concerns the National accountability ordinance. The Constitution of the Netherlands Antilles contains no assignment to the legislature to regulate this.

#### **Article 101: Assurances of the integrity of administration and financial management**

The purpose of this provision is to promote administration with integrity in every sense. The formal legislature must lay down the rules to attain this goal. The provision is derived from Article V.13 of the Aruban Constitution; the Constitution of the Netherlands Antilles has no equivalent regulation. On the basis of the recommendations in the 1999 report of the Netherlands Antilles Constitutional Affairs Agency, entitled 'Konfiansa, administrative improvement and integrity', the government of the Netherlands Antilles has developed a number of (draft) national ordinances aimed at improving the legitimacy and integrity of actions by the administrative and official organisation. Some important matters in that regard have now entered into force, such as reform of the national ordinance on the General Audit Chamber. In the development of the system of standards with which the new entities within the Kingdom must comply, the RTC Preparatory Commission formed in the context of the constitutional developments also focused on the development of integrity legislation, as arising from the 'Konfiansa' report.

In the preparation of integrity drafts for the country of Sint Maarten, attention was devoted to the way in which the government of the Netherlands Antilles developed the 'Konfiansa' report. The draft national ordinance concerning the promotion of the integrity of holders of authority contains an obligation for ministers to report secondary positions and various personal commercial interests or commercial interests of their partners or children to the Prime Minister. The draft national ordinance concerning the registration and financing of political parties is also important in that regard. The obligation of political parties, to be included in this ordinance, to register as associations with legal personality promotes transparency in the functioning of the political parties. The rules to be included in the ordinance with regard to the financing of political parties provide primarily for restrictions on the receipt of gifts to political parties. The purpose of this is to prevent any conflicts of interest.

Paragraph 6 of the National accountability ordinance referred to in the preceding Article primarily provides for the assurance of the integrity of financial management. Paragraph 2 of this Article provides that accounting for the financial management performed shall take place annually. This takes place by submission of the financial statements and reports of the General Audit Chamber to Parliament in good time.

#### **Article 102: Financial loans**

The content of paragraph 1 is predominantly the same as that of Article 132(1) of the Constitution of the Netherlands Antilles. Contracting or guaranteeing financial loans in the name of, or at the expense of the country must take place pursuant to national ordinance (paragraph 1), for which a more stringent approval procedure applies (paragraph 2). Article 132(2) of the Constitution of the Netherlands Antilles contains the same text with regard to contracting or guaranteeing financial loans outside the Kingdom as Article 29 of the Charter

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for the Kingdom, but of course directed at the country of the Netherlands Antilles. The Constitution of Sint Maarten, like that of Aruba, contains no separate regulation for contracting or guaranteeing financial loans outside the Kingdom. After all, for the procedure concerning these loans, reference can be made to Article 29 of the Charter for the Kingdom.

Paragraph 1 contains a financial standard, namely that financial loans may only be contracted or guaranteed in order to cover expenditure of the capital service of the Country.

The text of this Article must be consistent with the system of financial supervision agreed for the new countries in the closing declaration of 2 November 2006. The National accountability ordinance will be used for the implementation of the specific financial standards. This is in line with the system in which the principles are laid down in the Constitution and the implementation is regulated by national ordinance. The interest charge standard will be included in this, for example. In addition, further rules concerning a loan or guarantee can be included in every national ordinance in which the contracting or guaranteeing of financial loans is approved.

### **Article 103: Central bank**

The first paragraph of this Article provides for a central bank that supervises the monetary system. Paragraph 2 provides that the monetary system will be regulated by or pursuant to national ordinance. Article 128 (currency system) and Article 144 (circulation bank, central bank and Bank of the Netherlands Antilles) of the Constitution of the Netherlands Antilles regulate these matters. The formulation of Article 103 is related to the text of Article V.15 of the Constitution of Aruba. Article 103 is more broadly formulated than the aforementioned Article 128, referring to a monetary system rather than a currency system. In the regulation of a monetary system by national ordinance, rules will also be imposed regarding the issue and circulation of money and the powers of the Central Bank, which is responsible for this.

In accordance with the agreement in the closing declaration, from 2 November 2006 there will be a single Central Bank for the countries of Curacao and Sint Maarten, with one set of laws and one supervisory authority for the regular monetary and financial supervision (conduct and prudential) and the supervision of integrity.

### **Article 104: Codification of civil (procedural) law and criminal (procedural) law**

In the interests of legal certainty, it is desirable that key fields of law such as criminal (procedural) law and civil (procedural) law are regulated in general Codes. This provision contains the relevant instruction of the legislature to do so.

It should be noted however, that Article 39 of the Charter of the Kingdom provides that these fields of law and a number of others listed should be regulated in the same manner in the countries of the Kingdom as far as possible. Paragraph 2 contains a procedure for that purpose. The Constitution of the Netherlands Antilles complied with this with Article 98. That Article provides that the legislature ensures that a number of key fields of law (civil and commercial law, civil procedure, criminal law and criminal procedure) must be laid down in accordance with the regulations applying in the Netherlands as far as possible.

It is important to note that it was agreed in the closing declaration of the administrative meeting of 2 November 2006 on the future political position of Curacao and Sint Maarten that there should be uniformity of procedural law for the judicial task of the Common Court of Justice and the Supreme Court, and also with regard to criminal and civil law, including the law on bankruptcy. Uniformity is not described in the final declaration, but indicates identical. Concordance is aimed for with regard to the other components of substantive law. The SWR of the Netherlands Antilles and Aruba includes procedural rules to promote uniformity and concordance of these pieces of legislation. This regulation will lapse with the dissolution of the country of the Netherlands Antilles. In order to promote uniformity and concordance in the said legislation of the (future) countries, new procedural rules will be laid down (see also Article 90 of this draft Constitution).

### **Article 105: Codification of general rules of administrative law**

The Constitution of the Netherlands Antilles does not contain any order to the legislature to lay down general rules of administrative law. The Aruban Constitution (Article V.17) and the Dutch Constitution (Article 107(2)) do contain that obligation. According to the memorandum

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to that provision, the Article creates scope to create statutory rules concerning the administrative decisions, the obligation to provide justification for these and appeals against administrative decisions.

In the Netherlands, the complex of general administrative rules is laid down in the General Administrative Law Act. Article 105 of the Constitution of Sint Maarten also invites the legislature to draw up a general regulation on administrative law. The existing National ordinance concerning administrative jurisdiction can serve as a basis for this.

#### **Article 106: Legal status of civil servants**

The legal status of civil servants and government employees shall be laid down by national ordinance. This concerns a complex system of national ordinances taken over from the Netherlands Antilles (in particular those concerning substantive law on civil servants) which will be transformed into national ordinances of the country of Sint Maarten, of new legislation and of many implementing regulations.

#### **Article 107: Open government**

The Constitution of the Netherlands Antilles does not include an order to the legislature to impose rules concerning open government. The Netherlands Antilles has had a National ordinance concerning open government since 1995. This is based on the Charter for the Kingdom: 'that it is desirable, in view of Article 43 of the Charter for the Kingdom of the Netherlands and in the interests of sound and democratic administration, to establish rules concerning openness and open government.' Article 107 is based on Article V.19 of the Constitution of Aruba. The Netherlands Antillean National ordinance concerning open government (P.B. 1995, No. 211) will serve as the basis for this.

#### **Article 108: Concessions for public utility businesses**

The origins of this Article lie in Article 147 of the Constitution of the Netherlands Antilles. The rules according to which licences can be obtained for a mining business and/or a public utility business must be laid down by national ordinance. General rules are conceivable in this regard, on the basis of which the government grants concessions for e.g. production of mineral ores, it is also conceivable that the specific concession rights will be established by the national ordinance itself.

#### **Article 109: Management of state land**

The term 'state land and other state rights' refers to land and buildings regarding which the government holds rights *in rem* and to the minerals in the soil and the sea-bed. Article 109 is based on Article V.21 of the Constitution of Aruba. The national ordinance referred to in this Article is the draft national ordinance regulating the issue in ownership or lease and the management of state land, as well as the exercise of other state rights. Article 108 concerns a different aspect of mining from Article 109. While Article 108 enables the regulation of mineral production by means of a licensing system, to ensure that production takes place in a responsible manner from an administrative point of view, Article 109 concerns the transfer of rights *in rem* by the country of Sint Maarten as the owner of the minerals, and the conditions under which that transfer takes place.

#### **Article 110: Military service**

This Article is based on Article 31 of the Charter for the Kingdom and is derived from Article 135 of the Constitution of the Netherlands Antilles and Article V.27 of the Constitution of Aruba. The substance of Article 110(1) is consistent with Article 31(1) of the Charter. The Kingdom has armed forces. Military service in the armed forces must be regulated by national ordinance for each country. Paragraph 2 is included in order to implement Article 31(2) of the Charter for the Kingdom, which determines that a decision that conscripts serving in the armed forces can only be posted elsewhere without their consent by law, is reserved for the Constitution.

#### **Article 111: Exceptional military service**

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This Article corresponds more or less to Article 136(1) of the Constitution of the Netherlands Antilles and corresponds fully with Article V.28 of the Constitution of Aruba. In Article 111, the phrase 'without prejudice to the power of the King, in accordance with Article 4 of the Defence Act for the Netherlands Antilles' from Article 136 of the Antillean Constitution has not been adopted. This speaks for itself. The Defence Act is a Kingdom Act and therefore also applies for the country of Sint Maarten. The phrase 'war and risk of war' has also been omitted, in order to avoid creating the impression that the government of Sint Maarten should concern itself with matters concerning defence which, pursuant to Article 3 of the Charter for the Kingdom, is a matter for the Kingdom.

If the government of Sint Maarten avails itself of the powers referred to in this Article, this must take place for purposes falling within the autonomy of the country. This would concern exceptional circumstances, such as internal security, protection of the population, etc.

#### **Article 112: State of emergency**

The text of Article 112, related to the text of Article V.29 of the Constitution of Aruba, differs from Article 138 of the Constitution of the Netherlands Antilles on a number of key points. Article 138 refers implicitly to general rules to be imposed by Kingdom Act with regard to the state of war or the state of occupation. That reference no longer appears in Article 112. Since the reference to a Kingdom Act is omitted, the formal legislature has more general powers to regulate states of emergency. In that regard, this Article is consistent with the formulation of Article 103(1) of the Dutch Constitution. Following the example of this Article of the Dutch Constitution, Article 109(1) does not provide that the national ordinance should also determine the way in which a state of emergency is announced.

Article 112(2) creates possibilities for derogation from a number of fundamental rights in states of emergency. Article 103 contains the same derogation possibilities as those in the Constitution of Aruba (Article V.29(2)). Article 112 provides some broader derogation possibilities than Article 103 of the Dutch Constitution, in the fields of freedom of movement and freedom of ownership (dispossession). The location of Sint Maarten in a hurricane zone could be considered in that respect.

Paragraph 3 is included in order to enable Parliament to express its views as quickly as possible on the question of whether the government correctly interpreted the circumstances as being such that states of emergency had to be announced.

### **CHAPTER 7: ADMINISTRATION OF JUSTICE, THE DEPARTMENT OF PUBLIC PROSECUTIONS AND THE POLICE**

According to the Charter for the Kingdom, the administrative system of the country, including the administration of justice, is a matter for the autonomous determination of the countries themselves. However, Sint Maarten has opted to regulate the judicial system, the structure, organisation and management of the Department of Public Prosecutions and the police force and cooperation on the basis of a mutual arrangement within the meaning of Article 38(2) of the Charter for the Kingdom by or pursuant to Kingdom Acts. This is laid down in the draft Kingdom Act concerning the Common Court of Justice of Curacao, Sint Maarten, Bonaire, Sint Eustatius and Saba (hereinafter referred to as 'the Court Kingdom Bill'), the Kingdom Bill on the departments of public prosecutions of Curacao, Sint Maarten, Bonaire, Sint Eustatius and Saba (hereinafter referred to as 'the Department of Public Prosecutions Kingdom Bill') and the Kingdom Bill concerning the police force.<sup>18</sup> The principle for the Court Kingdom Bill is the present judicial organisation for the Netherlands Antilles and Aruba, which functions well and is based on the Cooperative Regulation of the Netherlands Antilles and Aruba (SWR) and is developed in more detail in the Uniform national ordinance concerning the organisation of the judiciary system (ELRO).<sup>19</sup>

<sup>18</sup> Parliamentary Documents 32 017 (R 1884), 32018 (R 1885), 32019 (R 1886).

<sup>19</sup> Bulletin of Acts, Orders and Decrees 1985, 542, P.B. 1985, 88, Official Publication of Aruba 1985, 28 and Official Journal of the Netherlands Antilles 1985, 170.

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The principles for the administration of justice, the Department of Public Prosecutions and the police force, which must be observed in the consensus Kingdom legislation, are laid down in this draft Constitution. Regulation of the administration of justice and the Department of Public Prosecutions in the Constitution is important, because this concerns parts of the *trias politica* model. Constitutional embedding of regulations on the police force is also important, because the police force is an essential institution in the Country which furthermore, holds the monopoly on the use of force and, as already mentioned, a number of aspects relating to the police will be regulated by Kingdom Act. Many constitutions in the region also contain a separate section on the police.

With regard to the administration of justice (§ 1), this concerns the basis and the tasks of the judiciary, the courts comprising the judiciary and a number of assurances of independent administration of justice, namely the appointment of judges for life and the assurance that administration of justice takes place in public. With regard to the Department of Public Prosecutions (§ 2) and the police (§ 3), this concerns the basis, the structure and the primary tasks.

Some provisions have been adopted from the said consensus Kingdom Acts. That construction is not unique. Section 6 of the Constitution of Aruba ('The judicial system and the judiciary') also contains many provisions that are identical to the provisions of Section 6 of the SWR ('The judicial system and the judiciary'), which entered into force at the same time as the Aruban Constitution in and is of a higher order than the Constitution.

### *§ 1. Administration of justice*

#### **Article 113: The judiciary and independence**

The first paragraph refers to the possibility of cooperation with other entities within the Kingdom, as created in the Court Kingdom Bill.

The second paragraph explicitly prohibits the government from issuing instructions to the courts. This provision is taken over from the SWR and the Court Kingdom Bill. This prohibition would still exist without this provision. It arises from the separation of powers between the administration and the judiciary which underlies this Constitution.

#### **Article 114: The judiciary**

This Article provides for the courts comprising the judiciary. This description does not prejudice the possibility that courts that do not form part of the judiciary may also have the task of administering justice. Pursuant to the Cassation Regulation for the Netherlands Antilles and Aruba, the Supreme Court of the Netherlands is the court of cassation in these countries and following the proposed alteration of the Charter for the Kingdom dissolving the Netherlands Antilles, this will also apply for the new countries of Curacao and Sint Maarten. Nevertheless, this is clarified in the second paragraph.

#### **Article 115: Tasks**

The substance of this Article is largely consistent with Article 42 of the SWR. It follows from the first and second paragraphs that the ordinary courts hear all civil and criminal cases (currently Article 42(1) and 42(2) of the SWR). The adjudication of administrative disputes is in the hands of the ordinary courts unless a special court section is designated by national ordinance.

The designation of a court outside the judiciary for the settlement of criminal or civil cases is not possible, because Article 115 provides that the judiciary is responsible for the settlement of civil cases and criminal offences. However, this does not rule out the possibility of disputes committees, also known as 'small claims courts', in e.g. consumer cases. Such easily accessible and cheap alternatives, usually organised by a particular sector itself, can provide for a need. However, they do not prejudice the competence of the courts. These paragraphs have been adopted from Article 4 of the Court Kingdom Bill. Paragraph 3 is based on Article 116(2) of the Dutch Constitution. The possibility of cooperation with other countries of the Kingdom has been added.

#### **Article 116: Appointment, dismissal, suspension and legal status**

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Paragraph 1 is based on Article 21(1) of the Court Kingdom Bill. The appointment for life provides an important assurance. The members and deputy members of the Court act as judges in the first instance. Paragraph 2 is based on Article 25(1) of the Court Kingdom Bill. The third paragraph provides that in cases laid down by national ordinance, the members or deputy members of the judiciary responsible for the administration of justice are suspended or dismissed by a court designated by national ordinance that forms part of the judiciary, unless a mutual arrangement, within the meaning of Article 113(1) has been established, which provides for this. This refers to the Court Kingdom Bill. The first part of this provision is derived from Article 117(3) of the Dutch Constitution. According to paragraph 4, their legal status is arranged by national ordinance, unless a mutual arrangement, within the meaning of Article 113 has been established, which provides for this.

#### **Article 117: Public hearings**

The principle that court hearings should be conducted in public is a fundamental one: it is therefore also included as a fundamental right in Article 26 of this draft, as part of the right to a fair trial. The importance of the principle lies primarily in the possibility of public control of the judiciary as an 'undemocratic' institution. Nevertheless, in certain circumstances, in incidental cases, it may be necessary to conduct part or all of a hearing in chambers, providing that a national ordinance makes provision for this. Whether there are grounds for a restriction in a concrete case must be determined on the basis of what is raised in that regard during the hearing. The court must provide reasons for conducting a hearing in chambers and must ensure that the reasons are included in the procès-verbal of the hearing. The possibility of a restriction by national ordinance or law, as laid down in the first paragraph (see Article 43 of SWR) is limited by Article 6 of the ECHR.

Decisions must always be pronounced in public. It is accepted that in civil and administrative law cases, not all decisions will always actually be pronounced in open court. It is sufficient that the decisions are available on the date on which they are deemed to have been pronounced. Finally, reasons for decisions must be provided. This, too, is a key assurance that calls for sharpening of the decision and public accounting.

#### **Article 118: Pardon**

This provision is based on Article 45 of the SWR and Article 122 of the Dutch Constitution.

#### **Article 119: Constitutional reviews**

This provision concerns constitutional review, i.e. the power of the courts to assess national ordinances and lower regulations in terms of the Constitution. The purpose of constitutional reviews is to ensure that everyone complies with the Constitution. The idea is that no-one stands above the law. In order to ensure that the Constitution is not just a paper tiger, the Constitution must be enforceable by the courts virtually in full. Through the constitutional review, the Constitution truly becomes the 'supreme law' of the country.

The Dutch Constitution has provided since 1848 that the courts do not assess laws in terms of the Dutch Constitution. Dutch constitutional relationships are based on the principle that the laws are immune. The courts have been authorised since the 1950s to declare legal provisions in force within the Kingdom that are incompatible with any binding provisions of treaties to be inapplicable (Article 94 of the Dutch Constitution). This significantly moderates the primacy of the legislature. The courts are also accustomed to assessing the constitutionality of regulations of a lower level than formal laws.

The government paper on the constitutional review of formal legislation, in which the government expressed a preference for the introduction of court powers to assess laws in terms of traditional fundamental rights, was published in 2002. Dutch Member of Parliament Femke Halsema submitted a member's Bill for the amendment of the Dutch Constitution, to the same effect. The proposal was approved on its first reading.<sup>20</sup> In the Netherlands Antilles, the tradition is that the courts do not assess ordinances in terms of the Constitution, although the Constitution does not explicitly prohibit this. The Aruban courts may assess national

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<sup>20</sup> Parliamentary Documents II 2008/09, 32 334, No. 2.

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*October 2013*

ordinances in terms of traditional fundamental rights, but not in terms of the further provisions.<sup>21</sup>

It should be borne in mind that the prohibition on assessment in the Dutch Constitution is exceptional within and beyond Europe. Most European countries do have some form of constitutional review. The 'judicial review' is also customary in the Caribbean region, such as Trinidad and Tobago and the Dominican Republic, and in the United States.

The proposal for the constitutional review has been submitted to the Common Court of Justice for advice.<sup>22</sup> With regard to the concrete review pursuant to Article 119, the Court has presented a proposal to clarify the text of parts of the regulation, in line with the purport of the regulation according to the Explanatory Memorandum. That proposal has been taken over and is discussed below.

The following are discussed, in sequence: (a) inclusion in the Charter, (b) the purpose and scope of the review, (c) the subject of the review, (d) the competent court, (e) the admissibility, (f) the consequences and (g) the practicability.

#### *Item a. Inclusion in the Charter*

The first question is whether it is constitutionally possible to include a constitutional review in the Constitution of Sint Maarten. This is the case, for two reasons. Firstly, pursuant to the Section 4 of the Charter for the Kingdom, the constitutional review is in principle a matter for the countries, although changes to the Constitution regarding certain matters (referred to in Article 44(1) of the Charter for the Kingdom) require the consent of the government of the Kingdom. A national ordinance altering the Constitution is not presented to the representative bodies until the 'views' of the government of the Kingdom have been obtained (Article 44(1) of the Charter for the Kingdom). It can be said that the constitutional review is consistent with the mandate of the countries to provide for 'the realisation of the fundamental human rights and freedoms', as referred to in Article 43(1) of the Charter for the Kingdom. Article 39(1) of the Charter also provides that the fields of law mentioned therein, such as civil and criminal law, are regulated 'in the same manner, as far as possible', but fundamental rights are not mentioned here. In other words, the Charter for the Kingdom does not make regulation of concordant, let alone uniform constitutions within the Kingdom a mandatory requirement. Secondly, the Aruban Constitution has included a form of constitutional review from as long ago as 1986, restricted to the traditional fundamental rights.

Another question concerns the relationship of the constitutional review to preventive and repressive supervision by the Kingdom. Supervision of the alteration of the Constitution (Article 44 of the Charter for the Kingdom) and supervision of the enactment of national ordinances and decrees (Article 21 of the Governor Regulations) is preventive. The proposed constitutional review by the courts takes place after the event, i.e. after the legislation has been realised. For that reason alone, there is no overlap with the preventive supervision by the Kingdom. There is also repressive supervision. According to Article 50(1) of the Charter for the Kingdom, legislative measures by the countries that contravene the Charter, an international regulation, a Kingdom Act or an order in council for the Kingdom, or that are counter to the interests that are Kingdom affairs, may be suspended and overturned by the King. The fact that the courts have found a national ordinance to be compliant with the Constitution need not prevent the government of the Kingdom from nevertheless overturning that national ordinance on the grounds that it contravenes a Kingdom Act. A constitutional review is a judicial review of the constitutionality of legislation, in addition to the administrative supervision by the Kingdom. The conclusion is that the Charter for the Kingdom does not prevent the inclusion of the constitutional review in the Constitution of Sint Maarten.

#### *Item b. Purpose and scope of the review*

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<sup>21</sup> The courts can rule that the absence of a national ordinance is unlawful (Supreme Court, 19 February 1993).

<sup>22</sup> Letter of 24 May 2010 of the Common Court of Justice of the Netherlands Antilles and Aruba.

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The purpose of the constitutional review is to ensure that everyone complies with the supreme law of the country. To that end, it is desirable that the Constitution should be enforceable in the courts. In comparison with the Netherlands, the proposed regulation is far-reaching. The reason for its introduction is that Sint Maarten and the Netherlands are not easily comparable. The Netherlands is a country with established traditions that are usually complied with without the need for enforcement measures in the form of judicial sanctions.<sup>23</sup> Sint Maarten, however, is a very young democracy, a new country on a very small scale, which lacks that experience. The neighbouring countries in the Commonwealth, for example, also have a constitutional review. A substantive difference between a court decision declaring a national ordinance inapplicable and a recommendation of the Council of Advice that a draft national ordinance contravenes the Constitution is that the recommendation is not binding.

In view of the purpose of the review, it is an obvious step to enable a review in terms of all provisions of the Constitution, in principle. However, it is ultimately up to the courts to decide whether a provision is sufficiently concrete and sufficiently clearly formulated to enable an assessment by the court. Partly in response to the advice of the Common Court of Justice, Article 119(1) clarifies that an assessment by the courts of a statutory regulation in terms of the Constitution shall not be conducted if the content of the constitutional provision does not lend itself for assessment. What this amounts to is that the provision must be concrete and workable enough for the courts to apply it. The formulation, the context, the objective and the purport of the provision, and its relationship to other provisions all play a role here.<sup>24</sup> The Constitution contains different types of provisions. A distinction can be made between:

- (1) Traditional fundamental rights;
- (2) Social fundamental rights (both laid down in Chapter 2);
- (3) Institutional provisions concerning the structure of the country (specifically, Chapters 3, 4, 5, paragraphs 6(1) and 6(2), Chapter 7 and Chapter 8);
- (4) Other provisions (Chapter 1, paragraph 6(3) and Chapter 9).

#### Items 1 and 2

The assessment of legislation in terms of traditional fundamental rights is material, because these provisions contain rights for citizens that they can invoke in a court of law. The court, unlike the legislature, assesses laws after their entry into force and in concrete cases. Assessment in terms of social fundamental rights is far more difficult. Social fundamental rights impose a duty of care on the government and usually afford broad policy freedom for compliance with the duty of care. Nevertheless, assessment in terms of social fundamental rights is not ruled out. For example, the courts may find that, in due course, no legislation at all has been adopted in a particular field of policy.

#### Item 3

A result of assessment in terms of institutional provisions (Chapters 3, 4, 5, paragraphs 6(1) and 6(2) and Chapter 7) is that the court comes to play a fundamentally different role in the state system, because it acts as a constitutional arbiter in the internal organisation of the other state institutions and their mutual relationships. This could involve a situation, for example, where a Member of Parliament takes legal action because the government has introduced a draft national ordinance without consulting the Council of State, as prescribed by Article 85(3). Or a Member of Parliament could petition the courts to order a minister to reply to his questions regarding a draft national ordinance within a reasonable term (Article 62 of the draft Constitution). There is a risk of endless political action via the courts. This risk was limited by explicitly excluding the legislative method from assessment through the reference in the text to 'legal rules that have entered into force'. According to the Common Court of Justice, it is not possible to see that the term 'have entered into force' entails a restriction. Partly in response to the advisory report, Article 119(1) now explicitly provides that the court cannot assess the legislative method of a legal regulation that has taken effect in terms of the

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<sup>23</sup> In contrast to H.R. van Gunsteren, 'Het staatsrecht in de politiek' (*Constitutional Law in Politics*), NJB 2010, pgs. 1111-1113, among others.

<sup>24</sup> Administrative Law Section of the Council of State (ABRS), 15 September 2004, LJN AR2181.

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Constitution. Moreover, it is up to the courts to determine whether an institutional provision is sufficiently concrete and clear to enable a review of a legal regulation that has entered into force. An example of this is Article 75(2), which provides that the members of the General Audit Chamber shall be appointed by national decree on the nomination of Parliament. A national ordinance providing that appointment takes place by national decree without the nomination of Parliament contravenes this.

#### Item 4

The other provisions are laid down in paragraph 3 of Chapter 6 and Chapter 9. These are very diverse provisions, concerning, for example, taxes (Article 99), the budget (Article 100), the promotion of integrity (Article 101) and open government (Article 107). A review of these provisions may also be significant. One possibility is the assessment of a national ordinance concerning the budget that does not comply with the financial standards laid down in the Constitution.

The proposed Article 31(1), in which certain quality requirements are imposed for draft national ordinances that restrict traditional fundamental rights, merits special attention. The draft must be necessary and proportional. Furthermore, the description in the draft must be sufficiently specific. Obviously, it is not the intention that the courts should take the place of the legislature; the issue is only to give the courts a number of substantive assessment points for the assessment of legislation that breaches fundamental rights, as the European Court of Human Rights assesses restrictions of human rights. The Member States are permitted a certain assessment margin here. Article 119 concerns the competence of the courts to assess legal regulations in terms of the relevant provisions of the Constitution, including the criteria of Article 31(1); it does not grant the authority to assess legal regulations in terms of unwritten fundamental legal principles.<sup>25</sup>

#### *Item c. The subject of the review*

In the Netherlands, the question regarding the judicial review concerns the competence of the courts to assess formal laws in terms of the Dutch Constitution, because that assessment is explicitly ruled out in the Dutch Constitution. It must be borne in mind that in the Netherlands Antilles and in the Netherlands, the courts can already assess *government actions* in terms of the Constitution. The administrative courts can assess legal acts ('administrative decisions') and the civil courts can assess actual actions in terms of the constitution, via unlawful government action. The judicial review therefore relates to the assessment of national legislation in terms of the Constitution: i.e. national ordinances, national decrees, containing general measures, and ministerial regulations. The 'uniform national ordinances' are excluded from the judicial review, because obviously, the view of the court cannot relate to a uniform national ordinance of another country of the Kingdom. Furthermore, a judicial review cannot relate to the compatibility of Kingdom legislation with the Constitution.

#### *Item d. The competent court*

The courts are accustomed to assessing national ordinances in terms of treaties and also to assessing lower forms of regulation in terms of the Constitution. In view of this, it is an obvious step to leave this assessment to the ordinary courts and not to create a separate Constitutional Court. Furthermore, an important advantage of assessment by the ordinary courts is that it reduces the risk of politicisation of the courts. The judges of both the Common Court of Justice and the Supreme Court can assess national ordinances and lower forms of regulation in terms of the Constitution.

#### *Item e. The admissibility*

It is current law that a person may take action in the courts only if they have a sufficient interest, if there is a concrete dispute (see Article 3:303 of the Dutch Civil Code). This is no different for the judicial review pursuant to Article 119. Consequently, it is not strictly necessary to include a separate regulation on admissibility, nor is this the case in the

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<sup>25</sup> Supreme Court, 14 April 1989, NJ 1989,469.

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Constitution of Aruba, which authorises the courts to assess national ordinances in terms of traditional fundamental rights. Obviously, there will be no question of a sufficient interest if a citizen of Sint Maarten claims to have suffered harm as a result of a particular unconstitutional regulation. In relation to a concrete dispute, the court may consider whether the disputed action complies with the national ordinance. If necessary, it may investigate whether the underlying legal regulation is consistent with higher rules, including the provisions of the Constitution. In the interests of clarity, Article 119(1) also provides that there will be no assessment in the absence of a sufficient interest.

The requirement of a sufficient interest may be problematic with regard to purely constitutional cases, i.e. cases that in principle are not administrative, criminal or civil law cases. For this reason, it is proposed that the Ombudsman can institute proceedings for the assessment of the constitutionality by the Constitutional Court of a national ordinance that has yet to enter into force (see Chapter 8).

*Item f. The legal consequences*

In an assessment in a concrete case, it is appropriate that the court should have the final say only in that concrete case. The court will not be able to go beyond declaring a legal provision to be inapplicable, with a hint to the legislature (Article 119(2)). It can also rule that the absence of a national ordinance is unlawful (Supreme Court, 19 February 1993, AB 305). From the point of view of the segregation of powers, however, it would be going too far if the courts could also rule in their decisions how the legislature should comply with the Constitution. After a provision is declared (partially) inapplicable, it is up to the legislature to create a new regulation that is consistent with the Constitution.

*Item g. The practicability*

The introduction of the judicial review may increase the tasks of the judiciary in particular, and also of the legislative department. In Aruba, the withdrawal on the prohibition of assessment led to little or no increase in the burden on the courts. This appears to be related to the fact that the courts are more likely to conduct assessments in terms of rights in international treaties than in terms of the comparable fundamental rights in the Constitution. Partly in view of this, no additional judicial capacity appears to be necessary. The review could also mean that national ordinances need to be altered. About two national ordinances per year seem likely. No extra legislative capacity is required for this.

## *§ 2. The Department of Public Prosecutions*

As stated in the introduction to this chapter, in this draft the principles concerning the Department of Public Prosecutions are embedded in the Constitution. Rules concerning the powers of the Department of Public Prosecutions can be found in the Code of Criminal Procedure of the Netherlands Antilles, which will be adopted by Sint Maarten. It is important that Sint Maarten has opted, together with Curacao and the Netherlands, with regard to Bonaire, Sint Eustatius and Saba, to regulate the structure, organisation and management of the departments of public prosecutions and the cooperation in the various fields by or pursuant to consensus Kingdom Acts. The principles are that the detection and prosecution of criminal acts are as a rule embedded in the society. This is the level at which the democratic control of policy and implementation takes place. The judicial tasks of each country, including the policy on prosecution, are the responsibility of the relevant Minister of Justice. In order to be able to account to their own parliaments, the ministers of justice responsible must be enabled to steer the Department of Public Prosecutions.

For practical reasons, a decision was made to lay down the organisation of the Department of Public Prosecutions and that of the judiciary in separate Kingdom Acts. These practical reasons lie partly in the fact that the Common Court of Justice Kingdom Act regulates the administration of justice in all Caribbean parts of the Kingdom, while the Kingdom Bill does not relate to the Department of Public Prosecutions of Aruba. This decision does not imply that the Department of Public Prosecutions is not part of the judiciary. The members of the Department of Public Prosecutions are regarded as members of the judiciary.

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### **Article 120: Structure Department of Public Prosecutions**

Paragraphs 1 and 2 of this provision regulate the basis for the Department of Public Prosecutions of Sint Maarten, headed by the Attorney-General. Paragraph 3 provides for the possibility of imposing rules for the Department of Public Prosecutions by mutual agreement, in observance of the principles of the Constitution.

### **Article 121: Attorney-General's office and public prosecutor's office in the first instance**

These provisions define who heads the office of the Attorney-General and who heads the public prosecutor's office at the court of first instance. They are consistent with the Kingdom Act concerning Departments of Public Prosecutions.

### **Article 122: Core tasks of the Department of Public Prosecutions**

Article 122(1) contains a description of the core tasks of the Department of Public Prosecutions. The description is broad and general. These core tasks are developed in more detail in paragraph 2, which is taken over from Article 3 of the ELRO. The assignment of specific tasks and powers that give shape to the core tasks takes place in national ordinances. The description of the tasks is not exhaustive. Other tasks, such as the demand to dissolve legal persons, may be assigned to the Department of Public Prosecutions by national ordinance.

### **Article 123: Prosecution of a minister for a criminal offence**

The draft Constitution contains a developed system to support the integrity of the country's holders of political authority (ministers and Members of Parliament). The consequences for a minister who is suspected of committing a criminal offence and who is possibly convicted of that offence at a later stage are considerable (see Articles 36 and 50). Not only is the minister suspended from office in the event of provisional detention or following a conviction, but in the event of a final conviction, the person concerned is also dismissed from office by law. Before these measures are applied, it is naturally essential that the decision to prosecute is taken with due care. To that end, this provision follows that already included in the Code of Criminal Procedure for official offences, i.e. that prosecution can only be instituted by the Attorney-General or by a person especially designated for that purpose by the Attorney-General. As a further assurance, grounds are included for the regulation by national ordinance that the decision of the Attorney-General cannot be taken without the consent of the Court. Prosecution must be regarded as the involvement of a criminal court in a criminal case by the Department of Public Prosecutions. Article 119 of the Dutch Constitution contains a special procedure for the prosecution of holders of political office for criminal offences while in office: they are prosecuted before the Supreme Court by the Attorney-General and are sentenced by the Supreme Court, as the court of first and sole instance, on the orders of the government or the Second Chamber of Parliament. Questions have been raised in the literature concerning the justification for this procedure, which leads to a limited possibility of prosecution.<sup>26</sup> Furthermore, the prosecution of a holder of political office on the orders of the government or the Second Chamber of Parliament is open to question from the point of view of the prevention of political criminal proceedings. For these reasons, a decision was made not to adopt the Dutch procedure.

Article 16(3) of the Kingdom Bill concerning the Common Court of Justice includes the possibility of assigning additional tasks to the Court by national ordinance. This national ordinance is such an assignment. According to Article 123(2), the procedure will be developed in more detail in a national ordinance. If the Minister of Justice intends to issue a special instruction to the Attorney-General concerning the investigation and prosecution of criminal offences, such as the prosecution of a Member of Parliament, the minister is required

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<sup>26</sup> See R.M. Vennix, Korthals and Peper suspected of official offences, NJB 2000, pgs. 14-15 and J.L.W. Broeksteeg et al. 'Strafrechtelijke aansprakelijkheid van ministers: ruime aansprakelijkheid, beperkte vervolgbaarheid' (*Criminal liability of ministers: broad liability, limited possibilities for prosecution*), NJB 2000, pgs. 965-971.

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pursuant to the Kingdom Act concerning Departments of Public Prosecutions to submit a proposal to that effect to the Common Court of Justice for an assessment in terms of the law.<sup>27</sup>

### § 3. Police

#### **Article 124: Structure and cooperation**

Paragraph 1 lays down the basis for the police force of Sint Maarten. According to paragraph 2, rules on the police may be laid down in a mutual arrangement with one of more countries of the Kingdom. A mutual arrangement within the meaning of the first sentence is laid down by Kingdom Act and observes the provisions of the Constitution. The Kingdom Bill concerning the police of Curacao, Sint Maarten, Bonaire, Sint Eustatius and Saba (hereinafter referred to as 'the Kingdom Act concerning the police') was drawn up pursuant to the agreement in the closing declaration of the administrative meeting of 2 November 2006 on the future political position of Curacao and Sint Maarten.

#### **Article 125: Tasks of the police**

This Article provides for the tasks of the police force. The task of the police is to provide for the actual enforcement of the legal order and to assist those in need of it, in subordination to the competent authority and in observance of the applicable rules of law. This description of the tasks matches the current police regulation of the Netherlands Antilles and the Kingdom Act concerning the police.

#### **Article 126: Use of force**

Police officers appointed to implement the tasks of the police are authorised to use force against persons and property in the lawful performance of their duties if this is justified by the envisaged objective, partly in view of the risks associated with the use of force, and that objective cannot be achieved by other means. Where possible, the use of force will be preceded by a warning. In connection with the police force's monopoly on the use of force, it is desirable to embed this provision of the current police regulation in the Constitution. Further rules are included in the official instructions and the instructions on the use of force.

## CHAPTER 8: CONSTITUTIONAL COURT

#### **Article 127: Task of the Constitutional Court: abstract assessment of legislation**

Article 119 of the draft Constitution provides for the authority of the courts to assess national ordinances and lower regulations that have entered into force in terms of the Constitution. An inherent limitation of concrete assessment is that the courts can only make an assessment if a dispute is submitted to them. To that end, a sufficient interest must be demonstrated. But it may also be desirable for a court to review legislation in terms of the Constitution, as the supreme law of the country, when there is no concrete dispute. This could involve a budget ordinance that contravenes the financial provisions of the Constitution, for example. Such a regulation could probably not be submitted to the courts for assessment by a citizen, due to the absence of a sufficiently concrete interest. Article 127 therefore affords the Constitutional Court the possibility of assessing – in terms of the Constitution – a legal regulation that has been ratified but has not yet entered into force. The Court can assess a regulation in terms of all the relevant provisions of the Constitution, with regard to both the content and the manner of realisation of the regulation. As the guardian of the Constitution, the Ombudsman is authorised to submit a case within six weeks of the ratification of the national ordinance, unless there is an urgent interest. This will primarily concern controversial draft national ordinances that have already caused considerable commotion in the Council of Advice and in Parliament. When a legal regulation enters into force, the Ombudsman's authority to act lapses. From that time on, pursuant to Article 119, the ordinary courts can assess an underlying regulation in terms of the Constitution in the handling of a dispute.

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<sup>27</sup> Article 13 of the Kingdom Bill concerning Departments of Public Prosecutions.

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In its advisory report on the proposed constitutional review, the Common Court of Justice of the Netherlands Antilles and Aruba advised against the introduction of abstract assessment. The Court regards concrete assessment as a major step and recommends that experience first be gained with the concrete assessment with which legal protection can be offered in a concrete case. As mentioned above, the Administrative Board takes the view that the proposed abstract assessment affords important additional legal protection in relation to the assessment by the ordinary courts in cases in which a sufficient interest to allow action in the ordinary courts is lacking. Furthermore, the Constitutional Court can also review the realisation of statutory regulations.

The first paragraph installs the Court. The assignment of the authority to make abstract assessments to the ordinary courts, such as the Court of First Instance of Sint Maarten, is not an appropriate step because abstract assessment of legislation, in which no concrete case is involved, is an entirely different profession from the adjudication of disputes.

Paragraph 2 describes the tasks of the Court; the assessment of legal regulations – in terms of the Constitution – that have been ratified but have not yet entered into force. The optional assessment by the Constitutional Court is positioned at the end of the legislative process, following any referendum and precisely before the regulation enters into force. A consultative referendum may relate to a draft that has been approved by Parliament or that has been proposed for ratification (see Article 92). An appeal term of six weeks was selected (Article 127(3)). Only after the expiration of the appeal term can the legal regulation enter into force (Article 127(4)), except in the case of an urgent interest. This term has been kept limited in order to avoid unnecessary postponement of the entry into force. If the Court finds a legal regulation to contravene the Constitution, it shall overturn the regulation. In that case, the regulation will not enter into force (Article 127(5)). It is to be expected that the legislature will draw up a new draft, in observance of the decision of the Constitutional Court. As the assessment by the Court relates to a legal regulation that has not yet entered into force, the actual and legal consequences of overturning it will be limited. It is conceivable that other tasks may be assigned to the Court in the future, for example with a view to ensuring integrity. Article 127(6) provides for the possibility of expanding the tasks of the Court by national ordinance.

The following matters are discussed in more detail below: a. the purpose and scope of the review, b. the admissibility, c. the relationship to administrative supervision, d. the legal consequences and e. the implementation.

#### *Item a. The purpose and scope of the review*

The purpose of the constitutional assessment is to ensure that everyone complies with the supreme law of the country. To that end, it is desirable that the Constitution should be enforceable in the courts. In view of the purpose of the review, it is an obvious step to enable a review of all provisions of the Constitution, in principle. However, it is ultimately up to the courts to decide whether a provision is sufficiently concrete and sufficiently clearly formulated to enable an assessment by the court. Partly in response to the advice of the Common Court of Justice, Article 119(1) clarifies that an assessment by the courts of a statutory regulation in terms of the Constitution shall not be conducted if the content of the constitutional provision does not lend itself for assessment. What this amounts to is that the provision must be concrete and workable enough for the courts to apply it. The formulation, the context, the objective and the purport of the provision, and its relationship to other provisions all play a role here.<sup>28</sup>

A significant expansion in relation to the concrete assessment by the ordinary courts is that the Constitutional Court can also assess the manner of the realisation of legal regulations in terms of the relevant provisions of the Constitution. Consequently, for example, the Ombudsman may take the view that the advice of the Council of Advice should have been requested for a radical alteration memorandum. In such a case, the Ombudsman can submit the realisation of the legal regulation for assessment by the Constitutional Court.

#### *Item b. The admissibility*

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<sup>28</sup> Administrative Law Section of the Council of State (ABRS), 15 September 2004, LJN AR2181.

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As seen in the memorandum to Article 119, the requirement of a sufficient interest will be problematic in relation to purely constitutional cases, i.e. cases that in principle are not administrative, criminal or civil cases. For that reason, it is proposed that the Ombudsman be able to institute proceedings to have a national ordinance that has not yet entered into force assessed by the Constitutional Court. A choice was made for the Ombudsman because this is an independent authority that stands above the parties. For that reason, the assignment of the authority to instigate action to e.g. the opposition is not opportune. Furthermore, in view of the small scale of Sint Maarten, it is not desirable to create yet another new body.

A choice was made for a limited period of six weeks following the ratification of the legal regulation and before it enters into force, except in the case of an urgent interest. In that case, it is not necessary to wait for the end of the six-week term before the entry into force. According to paragraph 3, further rules on the urgent interest will be imposed by or pursuant to national ordinance. This took place in the draft national ordinance concerning the Constitutional Court. An urgent interest exists in the following four cases only: firstly, if delays would lead to serious private or public adverse effects. This means that target groups will benefit from urgent entry into force or that a delay will lead to exceptionally large disadvantages for target groups. Secondly, urgent or emergency regulation, in the event of incidents and crises. Thirdly, adjustment regulation, if for example, court decisions call for adjustment of the regulation. The fourth ground for exception concerns international regulations.<sup>29</sup> The Explanatory Memorandum to a legal regulation must clearly state which ground for exception is used, and why. If, in the opinion of the Ombudsman, the urgent interest is not properly justified in a concrete case, it is possible that the Ombudsman's action will still be admissible.

Naturally, it is not appropriate that the Ombudsman will use his authority to institute action without good reason. The Ombudsman must submit a petition to the Court, explaining the reasons and grounds on which, in his view, a legal regulation is incompatible with the Constitution. The Court will otherwise declare the petition inadmissible or unfounded. This is regulated in the draft national ordinance concerning the Constitutional Court.

#### *Item c. The relationship with administrative supervision*

Article 50 of the Charter for the Kingdom grants the government of the Kingdom general powers to overturn orders taken at the national level in the countries. Legislative and administrative measures of the countries that contravene the Charter for the Kingdom, an international regulation, a Kingdom Act or an order in council for the Kingdom, or that are counter to 'interests for which the protection or assurance is a matter for the Kingdom' may be overturned. This repressive supervision is laid down in Article 50 of the Charter for the Kingdom and is developed in Article 22 of the Regulations for the Governor. Article 22(1) of the Regulations requires the Governor to send every national ordinance and every national decree, containing general measures, to the government of the Kingdom without delay following its enactment. The purport of this is that the regulation can be checked for contravention with Kingdom law or Kingdom interests on behalf of the Kingdom.

Pursuant to Article 21, the Governor, as a body of the Kingdom, has the obligation to refrain from enacting a national ordinance approved by Parliament or a national decree submitted to him if he takes the view that it contravenes the regulations or interests referred to in Article 50 of the Charter for the Kingdom. This involves preventive administrative supervision. Kingdom law is explicitly excluded from the proposed abstract assessment by the Constitutional Court. According to Article 127(2), the assessment relates only to national legislation; i.e. to lower legal regulations than the Constitution.

#### *Item d. The legal consequences*

With an abstract assessment of legislation by a Constitutional Court, an appropriate legal consequence is that the Court can overturn the relevant regulation. As a result, the regulation does not enter into force (Article 127(5)). However, the consequences of overturning the

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<sup>29</sup> Parliamentary Documents II 2009/10, 29 515, 309.

regulation are limited, as it has not yet entered into force. The legislature can be expected to draw up a new legal regulation, in observance of the Court's decision.

*Item e. The practicability*

The Constitutional Court is a novelty in the Kingdom. The Constitutional Court of the Netherlands Antilles and Aruba existed only on paper and was never implemented. Many countries do have a Constitutional Court, but these are countries and institutions that have often already existed for a long time, as a result of which their experience is not automatically relevant for Sint Maarten. In view of this, it is difficult to predict how many cases the Ombudsman will submit to the Court each year. Naturally, the capacity of the office of the Ombudsman also plays a role here. The draft national ordinance concerning the Constitutional Court provides that a clerk will be added to the Court. At the start of the new country, one case per year is assumed.

**Article 128: Structure and composition of the Constitutional Court**

This Article contains the main provisions for the structure of the Constitutional Court. The principles here are that the members will have a high level of expertise in assessing legislation and that the Court will operate independently of the political system, as a result of which it can build up authority. The regulation is based partly on the uniform national ordinance concerning the Constitutional Court of the Netherlands Antilles and Aruba (ELCH).

According to paragraph 1, the Court consists of three members and three deputy members. In connection with the task and the powers of the Court to prevent legislation, multiple membership is desirable. On paper, the Constitutional Court of the Netherlands Antilles and Aruba consisted of five members and two deputies. In its advisory report, the Common Court of Justice notes that it is not customary to man a Constitutional Court with three members only. In the view of the Court, it is unappealing that if five members of the Council of Advice and then 15 Members of Parliament have considered a draft, an 'appeal' should then be possible by the Ombudsman to three members of the Constitutional Court. The Court also notes that the Constitutional Court of the Netherlands Antilles and Aruba 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 the Parliament 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 are appointed by national decree. The first member and a deputy member of the Constitutional Court will be appointed on the nomination of the Council of State of the Kingdom, from among its members. This is relevant for the constitutional developments in the broader context of the Kingdom. Although the regulation in the Constitution cannot bind the Council of State of the Kingdom, as a Kingdom body, it follows from the fact that the government of the Kingdom is required to grant consent to the draft Constitution that the Council of State for the Kingdom will cooperate. However, because, pursuant to the draft national ordinance concerning the Council of Advice, the member for Sint Maarten in the Council of State for the Kingdom is also an associate member of the Council of Advice of Sint Maarten, this cannot be the member for Sint Maarten in the Council of State for the Kingdom.

The second member and a deputy member of the Constitutional Court will also be members of the Common Court of Justice and will be appointed on the nomination of the Common Court of Justice. The aim of this is to take account of the Caribbean context. The legal basis is provided in Article 17(3) of the Kingdom Bill concerning the 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 participate in the concrete assessment pursuant to the Article 119. The judge must claim privilege.

The third member and a deputy member of the Constitutional Court will be appointed by the government of Sint Maarten, after consulting the Constitutional Court. In contrast to the nominations by the Council of State for the Kingdom and of the Common Court of Justice, the requirement to consult the Constitutional Court is not binding on the government.

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From the point of view of independence, an appointment for life is called for. However, in order to promote a match with developments in society, appointment for a term of ten years has been chosen. The ELCH also assumes a term of ten years. Provision has been made for the possibility of reappointment.

Article 128(3) provides that the appointment requirements will be laid down by national ordinance. The draft national ordinance concerning the Constitutional Court follows the appointment requirements of Article 24(1), 24(2) and 24(3) of the Kingdom Bill concerning the Common Court of Justice. It requires that candidates have passed an examination in the field of law at a university designated by national ordinance or grades or certificates equated with this by national ordinance. Obviously, candidates must also provide evidence of skills in matters of legislation, administration and the administration of justice, or of special expertise in matters concerning legislation, administration or the administration of justice. In particular, broad knowledge of and experience in constitutional law are relevant. Pursuant to Article 24(3) of the Kingdom Bill concerning the Common Court, the members or deputy members of the Common Court of Justice must hold Dutch nationality. This provision is also included in the draft national ordinance concerning the Constitutional Court.

According to the fourth paragraph, the nomination will contain the names of two people if possible. This has been adopted from Article 23(2) of the Court Kingdom Act, although the Kingdom Act assumes three persons if possible. In connection with the small scale, this number was not chosen.

Paragraph 5 was adopted from the ELCH and speaks for itself. Paragraphs 6 and 7 determine the legal status of the members of the Constitutional Court. Paragraph 6 provides that suspension or dismissal as a member of the Common Court of Justice also entails suspension or dismissal as a member of the Constitutional Court. This provision has also been taken over from the ELCH.

Article 128(7) provides for the suspension and dismissal of members of the Constitutional Court. They are dismissed in the cases laid down by national ordinance. This concerns dismissal at their own request or on reaching the age of 70. Dismissal will also follow if a member is permanently unable to perform the position due to illness. Proceedings before the Common Court of Justice, instituted by the Attorney-General are required for this, as developed in the draft national ordinance concerning the Constitutional Court. Suspension may also follow in the cases laid down by national ordinance. The procedure and the cases are regulated in more detail in the draft national ordinance concerning the Constitutional Court. According to that draft, dismissal may follow a final conviction for a criminal offence or a final court order concerning placement in receivership, bankruptcy, a moratorium on payments or imprisonment for failure to comply with a judicial order, or for action that causes serious harm to the smooth progress of the administration of justice. The procedure and the grounds for dismissal and suspension are derived from the Court Kingdom Bill.

The regulation referred to in Article 128(8) is the draft national ordinance concerning the Constitutional Court.

## **CHAPTER 9: FINAL PROVISIONS**

### **Article 129: Altering the Constitution**

The procedure for the alteration of this Constitution is substantively consistent with Article 42(2) of the Charter for the Kingdom and Article 149 of the Constitution of the Netherlands Antilles. A not insignificant difference, however, is the more stringent procedure prescribed for alteration of the Constitution. While the Charter for the Kingdom requires a majority of two thirds of the votes cast, this draft, in accordance with the Constitution of Aruba and the draft Constitution of Curacao, requires a two thirds majority of the serving members. This more stringent procedure reinforces the assurance character of the Constitution. On the basis of Article 42 of the Charter for the Kingdom the Constitution, assuming 15 members, could already be altered with six votes; according to this draft, at least 10 votes are required for that purpose. The government of the Kingdom accepted this more stringent procedure for the Constitution of Aruba in 1986 and more recently did so again in its views of the draft Constitution of Curacao.

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**Article 130: Reference title**

This Article speaks for itself.

**ADDITIONAL ARTICLES****Article I: Transitional provision for island and national legislation**

When the Constitution of Sint Maarten enters into force, a large number of implementing regulations required for this will not be complete. With regard to a number of provisions, implementing legislation did exist for the Netherlands Antilles. This legislation is based on the Constitution of the Netherlands Antilles and the ERNA, to the extent that the legislation concerns the island territory of Sint Maarten. On commencement of the status of a Country within the Kingdom, therefore, Sint Maarten will necessarily have to continue to make use of the existing Antillean or island laws and regulations for the time being. For this reason, the structure of this Article was chosen. Two transitional national ordinances have been enacted for its implementation. The draft national ordinance concerning general transitional provisions contains a 'positive list' including all Netherlands Antillean and island laws and regulations that will attain the force of law or regulation of the country of Sint Maarten when this transitional national ordinance enters into effect. The draft national ordinance concerning special transitional provisions includes a number of key alterations and adjustments of existing Antillean or island laws and regulations in the form of a 'negative list'. On the entry into force of the latter transitional national ordinance, the existing Antillean and island regulations, as altered by that national ordinance, shall have the force of a law or regulation of Sint Maarten.

**Article III: Transfer of Parliament**

This Article has a dual objective. Paragraph 1 regulates that the serving members of the Island Council will attain the status of Members of Parliament. As the Island Council for the island territory of Sint Maarten consists of 11 members and Parliament will consist of 15 members, paragraphs 2 and 3 make provision for the necessary expansion of the number of members. The regulation provides for the meeting of the new Parliament of 15 within three months of the Constitution entering into force. This is consistent with the regulations for the early elections as laid down in Article 59.

Paragraph 3 contains a limitation of the power of the Parliament consisting of 11 members. The limitation provides for the approval of regulations that restrict the fundamental rights. Regulations of this kind are of such importance for society that their approval should be reserved for the Parliament consisting of 15 members, as provided for in the Constitution.

**Article IV: Transfer of pending draft national ordinances**

This Article facilitates the continuation of the legislative process commenced by the Country of the Netherlands Antilles in the new country. The Netherlands Antilles commenced various interesting legislative processes that were not yet completed when this Constitution was submitted for decision-making, such as the reform of the Criminal Code. If these processes have not yet been completed, the additional Article IV affords the possibility of taking over and continuing these processes. In this way, the new country will benefit from the work already invested. Naturally, the Article is formulated as an option, since the political decision concerning the desirability of a certain regulation rests with the new country of Sint Maarten.

**Article V: Appointment of first members of the Constitutional Court**

This Article regulates the initial appointments of the members and the clerk of the Constitutional Court as referred to in Chapter 8 of this draft. The first appointments of the members shall be made by the Island Council on the nomination of the Administrative Board. The same procedure is used for the initial appointment of the members of the General Audit Chamber. One of the members shall be recruited from the Common Court of Justice and one from the Council of State of the Kingdom. The latter is relevant in view of the constitutional developments in the broader context of the Kingdom. Moreover, the candidate members must meet the qualifications laid down by national ordinance (Article 128(3)). The said

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national ordinance is the draft national ordinance concerning the Constitutional Court. The appointment requirements for judges in this national ordinance have been adopted from the Court Kingdom Bill.

The draft national ordinance concerning the Constitutional Court provides that the clerk will be appointed by national decree on the nomination of the Constitutional Court. According to Article V(2), the initial appointment of the clerk to the Court will take place on the nomination of the Administrative Board.

**Article VI: Introduction of a new Criminal Code**

As mentioned in the memorandum to Article IV, a draft national ordinance is before the Parliament of the Netherlands Antilles, serving for the introduction of a new Criminal Code, which will be adopted by the new countries as agreed. The expectation is that the new Code will enter into force before the constitutional reforms enter into force. Reference is made to the Criminal Code in Articles 36 and 50 of the draft Constitution. The additional Article VI has been included in connection with the possibility that this draft Constitution is enacted before the altered Criminal Code. This provision affords the government the possibility of adjusting the numbering in connection with the introduction of the draft national ordinance on the enactment of a new Criminal Code, which is currently before the Parliament of the Netherlands Antilles.

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