

Decision

The Constitutional Court of St Maarten

Declares the complaint of the Ombudsman concerning not consulting the Council of Advice on the introduction of the Amendment to the Bill leading to the *Integrity Chamber Ordinance* well founded.

Strikes down the *Integrity Chamber Ordinance* in its entirety.

Reasons:

The most far-reaching complaint the Ombudsman brought against the legislation was that the Council of Advice had not been consulted about a substantial amendment of the law which had been introduced by the government during the course of the parliamentary debates. The Court finds this complaint to be justified as the Amendment has introduced substantial changes - both compared to the initial draft legislation commented on by the Council of Advice and to the Bill that was eventually introduced in Parliament. The Court considers that in the course of the legislative process the balance between effectiveness, legal protection and supervision in the legal framework of this law has fundamentally changed to such an extent that it would have been incumbent upon the government to formally re-consult the Council of Advice. This is particularly the case as the Bill seeks to create an entirely novel institution – the Integrity Chamber – that cannot be compared to anything remotely similar within the Kingdom of the Netherlands.

The Constitution empowers the Constitutional Court to strike down a law on the basis of its being incompatible with the Constitution, either in substance or in form (i.e. because of constitutional flaws in the manner in which the law has been established). Although the Court can strike down a law, it is not necessarily bound to do so. Indeed, the Court is fully aware of the fact that the nullification of this particular Ordinance for procedural reasons may be considered a harsh result, given the importance of the goal and purpose of this legislation which, with good reason, seeks to achieve an appropriate approach of law enforcement against integrity breaches within and around the institutions of St Maarten's governmental structure. These aspects notwithstanding, the Court holds that nullification of the Ordinance is in this case necessary. It would appear, the Court notes, that the Constitution highly values the role of the Council of Advice as well as its participation in the legislative process with a view to the necessary constitutional expertise and administrative thoughtfulness. The Council of Advice is important as it is aimed at increasing the quality of both legislation and the legislative process. The Council, therefore, needs to be fully involved in the legislative process.

In deciding to strike down the law the Court also took into account the many substantive and, from a Constitutional perspective, essential flaws and serious ambiguities in the Ordinance at bar.

It is for this latter reason that a mere nullification of the Ordinance on procedural grounds would not suffice. The Court therefore has sought to formulate preconditions, pointing at parts of the Ordinance that are unclear, and making such suggestions which may provide guidance with respect to the constitutional safeguards that need to be observed when drafting a new Ordinance.

The Court holds that both in light of section 5 (the right to privacy) and section 26 of the Constitution (the right to a fair trial) and for reasons of effectiveness essential flaws and substantial ambiguities

would need to be avoided in a new Ordinance. In drafting such legislation, it should be considered and clarified to what extent the Integrity Chamber's authority to hear persons under oath or on pain of a fine should be maintained, particularly (but not exclusively) with respect to the primary subject of the integrity investigation. Further consideration is also necessary concerning the issue of evidentiary privilege: how broad should such privileges be during, exclusively, the integrity investigation by the Chamber and to which persons should such privileges be extended?

The Court holds that the possibility of hearing a person under oath or on pain of a fine by the Integrity Chamber should be excluded as soon as that person is under a criminal charge. Moreover, that statements thus acquired by the Integrity Chamber should be prohibited from being used as evidence in a criminal trial as this would be in violation of the *nemo tenetur* principle (i.e the right against self-incrimination).

The Court notes that a new Ordinance should be clear on what kind of information gathered by the integrity Chamber during its investigation should be handed over to the Prosecution Service and to what extent the Integrity Chamber, after the subject of its investigation had been charged with a crime, could still continue its own investigation. Further clarification is needed, more generally, with respect to the question as to what extent evidence obtained by the Integrity Chamber in an administrative investigation with less legal safeguards than provided by the Code of Criminal Procedure could be used in a criminal trial, such in order to prevent that – contrary to the demands of a fair trial – safeguards of criminal procedure could be evaded. A coordination regulation between the Integrity Chamber and the Prosecution Service appears indispensable.

Another issue the Court explored are the powers of the Integrity Chamber with respect to search of and investigation in premises. The Court holds that these powers would need oversight and supervision by an institution, not necessarily the judiciary, with sufficient safeguards for independence and expertise. This together with a complaint procedure comparable to the procedure of section 150 of the Code of Criminal Procedure would seem to secure compatibility with section 5 of the Constitution (protecting the right to privacy). The Court notes, however, that the Commission of Supervision as created by the current Ordinance cannot serve as such an institution as its independence and expertise are not guaranteed by this law and it does not have the necessary powers properly to fulfil that role. More generally, the supervising body of the Integrity Chamber would need sufficient powers with respect to that Chamber.