



Parliament of Sint Maarten

Staten van Sint Maarten

Parliamentary Year 2018-2019-129

National Ordinance establishing a new Code of Criminal Procedure (Code of Criminal Procedure)

**Report
No. 5**

Parliament in its meeting of the Central Committee has exchanged views with the Government on the Draft National Ordinance establishing a new Code of Criminal Procedure (Code of Criminal Procedure).

Parliament considers the present draft to be adequately prepared when the questions below are answered in time for the public meeting so that the draft can be discussed in a public meeting.

The United Democrats-faction has taken note of the draft. Can Government indicate examples of what way in any form these laws will strengthen the belief that in our justice system one is innocent until proven guilty, instead of guilty until proven innocent? The “afgeschermd getuige”, the secret or protected witness. Does Government find that the law submitted to Parliament gives sufficient clarifications as to when and how one is considered a secret or protected witness? Who in our legal system checks if the legislative branch is doing their job properly based on the law? The legislative branch can order Government, when Government doing something against the law, to rectify it. But who does that for the legislative branch?

“Redelijke termijn”, a decent time frame. Who, how and based on what specific criteria does the judicial branch decide how long someone will be considered a suspect and not be prosecuted or a court case is initiated with no-end in

sight? The faction would like to know if Government doesn't think, looking at the many examples in our community for the past years of key persons within our community that after many years of being held hostage were either fully exonerated or charged with one or two months conditional sentence, that there should be a specific timeframe in the law to handle such cases?

How is the matter of crown witness being addressed? Or is this something that is now being incorporated in these changes? Is this something already happening but because we don't have the law in Sint Maarten it cannot be executed here so it is holding up particular cases? Can this be made clearer? What does this part of the draft have to do with anti-money laundering and anti-terrorism? Should we handle them as two separate cases? The faction proposes to handle them separately.

Can Government the Minister share with Parliament the definition of a crown witness? What requirement does one have to meet to fall in this category? How reliable can one consider such a witness? Does this include making deals with suspect witness? Can this or will this include paying, in any form? Where are the boundaries for this? Where will this be set? Where will it stop? Based on what can a witness be considered a suspect at the same time as a witness? Which laws are there to protect a suspect against a witness and to avoid the suspect just saying whatever the public prosecutor wants to hear just to get his or her way? How do we stop such from happening? The actions of some of our prosecutors comes in to question and there is nothing to protect suspects from that. What protection does a witness have against a public prosecutor that would label him or her a suspect just for the mere fact that the public prosecutor did not get the answers he or she was looking for? What is the punishment for the public prosecutor who withholds the case files against a suspect even after the lawyers ask for them several times?

The faction mentions that it honestly thinks that these two cases should be separated, because while we are in the process of amending the Penal Code there are also some real urgent changes that we need to make. The faction thus proposes that these two cases be separated.

What part is to be added relative to this amendment to satisfy or comply with the CFATF? What part of the amendments are needed to be added based on for instance the recommendation of the OM and or coming from the Ministry of Justice relative to the amendments? The faction mentions that the urgency seems to be the need to satisfy Sint Maarten as a regional and international community member, so we just want to understand what are the needs to satisfy from that CFATF standpoint as well as then what is the urgent need for the OM and or the Ministry of Justice?

It was mentioned that the Dutch act was added to our criminal code and criminal procedures. Can Government provide some examples as to why this is beneficial for and needed to be added to the Penal Code and the Criminal Procedure?

Can clarity be given on the responsibilities shifted from the Ministry of Justice to the public prosecutor? What is and what are these responsibilities that have shifted?

The faction references that they thought they heard that a foreign law enforcement officer may apprehend a suspect on the Dutch side. Can Government give examples as to how this can be seen or based on whatever agreement how they can come and apprehend a person on the Dutch side?

The faction states that it was mentioned that house searches are no longer termed as house searches and that the word house has been removed but it is just based on the term search and also without the examining magistrate needing to be present. Can we get an example as to why these changes have been made?

The crown witnesses. Can we get some clarity on the urgency and the need to introduce this as part of the FATF recommendation or is this urgency coming from the OM or the Ministry of Justice? Once we have that clear we can understand the compliance and the need for that. The faction also mentions that it would be good to have a discussion with the Bar Association and that we should not be, for the sake of urgency, not willing to have more discussion i.e. with the Bar Association or any relevant stakeholder for that matter.

The faction would like to know when a case is going on for 6, 7, 8 years with no results or in the end just a symbolic

punishment, what is in place to protect people from this? What happens when the law is broken by the very prosecutors and judges?

What is the punishment for a public prosecutor who withholds a case file of a suspect even after the lawyer has asked for it several times? What happens when the prosecutor refuses to give the files? If the crown witness is being addressed, is it something already being implemented? Is the reason for it being included in this law as a reason for maybe something that is happening now that they need it to be passed because it cannot be used otherwise? What does the CFATF have to do with this whole witness program? Why is it suddenly involved in here?

What protection is there for a suspect whose witness is now being deemed a crown witness to testify against them? What protection is there for the suspect that protects them from the witness creating stories and saying what they have to say just to please the prosecutor so that they can get a lesser sentence? What is there in place in the law to protect a suspect from such?

Based on what can a witness be considered a witness and a suspect?

Why is the Dutch act added to the Sint Maarten law? The faction mentions that it is concerning and alarming that we copy paste or translate the Dutch act into our national legislation, of course keeping in mind the Caribbean national context. The faction mentions that something prosecutable in the Netherlands could be so much different on the islands.

The faction would like to know what responsibilities were shifted from the Ministry of Justice to the public prosecutor. The possibility of seizure has been broadened. The faction would like to know why we needed to broaden the seizure possibilities from what it is now currently.

Who were the members of the workgroup? The faction is of the opinion that this law can only be passed with amendments because we need to leave in what is urgent and what is not urgent remove. If not, this entire law will fail. It is too much to be consumed under the understanding of urgent. What is urgent is to comply with the FATF, but when it comes to the Penal Code, Civil Code and Procedures we want to

ascertain that enough time is given so that when we pass the laws that the people of this island and a person who finds himself in breach of the law, the person might have had the opportunity of due course where that is concerned.

The issue of the law being an eenvormige landsverordening that basically prescribes consultation with the other countries. This matter is one that is derived from the so called Samenwerkingsregeling eenvormig procesrecht, not yet approved by Aruba. The fact that Government classifies this as eenvormig, that means that the vetting by the Constitutional Court cannot take place.

How can we engage the population and interest groups within the population as far as these far reaching changes to the Criminal Procedure Code are concerned?

With regards to the MOT. Related to the privacy a committee was supposed to be setup and installed. Has this committee been established? If not, by when?

Can Government give on which indicators we come to the conclusion that for the MOT department that seeing these indicators that form the indication that makes a transaction suspicious?

On Sint Maarten the closest thing we have had similar to that is the prosecution of the Windward Roads where they got the penalty of having to carry out work and not the prison sentence. Is there a possibility for the crown witness to be cross examined? If the crown witness resides in another country and the prosecutor is going to withhold some of his loot, if the loot took place on Sint Maarten, what happens to that portion?

In the absence of what is being proposed to regulate the crown witness, how does it take place now? The process, the procedure. Are there no limitations to the proposal for a crown witness at this time? In what context does it take place right now? Is it only based on jurisprudence that that takes place?

If we are dealing with recommendations that are under pressure about the consequences of for example blacklisting and the consequences of that. Is there in the recommendation of the FATF a demand to give the crown witness as such a

place for us to go forward with the recommendations? Is this crown witness entity a must or is it a recommendation of the FATF for us to move forward with the transparency of transactions?

Has the process been followed for an eenvormige landsverordening? Was that necessary given the fact that the Samenwerkingsregeling has been signed but not ratified by Aruba? How is Government dealing with that matter?

The National Alliance-faction has taken note of the draft. The faction is of the opinion that we will be turning our country into a gestapo state, based on the presentation given. Confiscation, when things are seized. A plane was seized with a large amount of gold. The faction would like to know what law was used then, and what is being asked of us now? What is the difference between the two? What law was used then to seize the plane, to seize the gold, to investigate and what is the difference in what is being asked to approve now? The faction would like to know what is meant by crown witness. Exactly what is it that we as Members of Parliament ought to approve to give extra to the OM in terms of a crown witness? You are asking Members of Parliament to continue slaughtering Sint Maarten people by giving the OM office carte blanche, by giving even more power. Concerning the crown witness, does this include paying individuals for their testimony? Does it include bribing individuals for their testimony from the OM office? The faction is of the opinion that this is a dangerous law that Government is asking us to approve. The faction would like to know if Government is comfortable asking Members of Parliament to approve such a law or is it simply because you are being forced, by which ever means, specifically the Dutch Government, specifically State Secretary Knops, that this must be approved? Can Government give a detailed outline of any terrorist activity in terms of terrorism that started or came out of Sint Maarten? Can Government indicate that we have any semblance of terrorism grass root growing here in Sint Maarten? Are the Cubans that asked for asylum here, are they considered terrorists? Based on what were they incarcerated for the number of days that they were? What is the difference

between what the afpak team is doing and what is being regulated here? The faction would like to know why the Minister of Justice isn't the one making the presentation.

The faction would like to know if the crown witness is being paid for their testimony. Does this include bribing and paying of suspects for their testimony? The faction would like to know what is meant by "was a suspicion of terrorism financing". What does that mean? "And high-risk countries carried out". Which countries and what did they carry out? Isn't it the MOT that is responsible to look and see what transactions are being done here in Sint Maarten? "Blacklisted and high-risk countries carried out", what does that mean? Terrorism financing to whom, where, what? Which countries? The Minister mentioned that the Cubans were detained, tried and convicted of being illegal on Sint Maarten and awaiting deportation. The faction would like to know where are the Cubans today awaiting deportation? The United Nations High Commission for Refugee issued a document to each of those three individuals. Is the Minister aware of that document? Did these individuals seek asylum and does the Minister consider them to be refugees?

The faction mentions that the Minister mentioned that Sint Maarten was the last country evaluated in the CFATF third round of mutual evaluations whereby interpretations and expectations on the implementation of FATF recommendations has been shifting. Can the Minister further clarify what that means by "has been shifting"? Have the requirements been changed in the meantime? Does it then only affect us and not our own Kingdom partners? Are we then going to have a discord between what is not allowed in Sint Maarten but is well allowed in other parts of the Kingdom?

The faction would like some clarification on the crown witness, especially based on the advice received. Was the Minister aware of an advice from legal persons within Sint Maarten and the Netherlands? What is the Ministers opinion on the validity of the advice?

The draft articles read that either a punishment or a financial fine. Are we saying then that once you have money

you can pay your way out of a crime? It was mentioned that the difference between Sint Maarten and the other island countries within the Kingdom in terms of Sint Maarten having casinos and hotels, standalone casinos, lottery booths etc. which poses a high risk as well as a lack of a Gaming Board. The process to implement a Gaming Board, would it be able to mitigate that risk? How long will that take?

The final sentences. Which goods will be sold or whose goods will be sold as part of the crown witness program?

The job of the prosecutor is to prosecute. Now if it is up to the prosecutor and the prosecutor's discretion how they compensate a witness then basically they can guide the investigation to how they want. This empowering the prosecution to do what they want. Can the Minister make certain adjustments to curb that, because the faction is of the opinion that it is encouraging crime because the risk is low if you decide to confess first on your comrade. It is basically like confession buying. The faction would like some clarity on that, if this is not the case.

The faction is of the opinion, based on legal advice, that we are giving ultimate power to the OM. It undermines the authority of the judge.

It was mentioned that the crown witness program is only used in high-profile cases. Who determines if a case is a high-profile case?

Can a suspect or a defense lawyer request that those things, pertaining to crown witness, be inadmissible based on the fact that it is not regulated by law? They are asking to regulate it, is it to enforce or facilitate the prosecution so that there is no middleman and make it easier? Has this ever happened before and what was the result? If it is happening already, why not leave it as is? What is the sudden rush to have it implemented?

Have any recommendations from the Raad van Advies been reevaluated based on the Members of Parliament questions and concerns? Any attempt to incorporate some of those?

The United St. Maarten Party-faction has taken note of the draft and would like to know if the Minister can provide the Dutch Act that was mentioned? The faction encourages that the notes presented be provided to Parliament and to the public as soon as possible. The faction finds it interesting that the FATF says that we don't comply sufficiently with certain things, such as mutual legal assistance, freezing and confiscation, confiscation and provisional measures, other forms of international cooperation. They are saying that we don't comply with this, but how many times have we asked the question in Parliament: What is the legal basis for TBO and for the afpak team, which is doing exactly what these recommendations are saying? The faction would like to know if the FATF is looking at fore mentioned and saying that is not legally sufficient? Are they even maybe indicating to us that Sint Maarten does not have currently sufficient legal basis for this TBO and anti-corruption task force? If we have this, why didn't FATF say that they read our laws and what TBO is doing and that you all are in compliance with recommendations 4, 38 and 40 of these things about seizures and so on? The faction is of the opinion that Parliament, from the legislative angle of these things, need to sit face to face with this FATF and find out for ourselves. All of these things are already in place, so why is it not sufficient? The faction would like some more information about the pre-trial detention? Why is it 8 days? What is the FATF stance on this? According to the constitution pre-trial detention should be like a last resort, but it seems that the actual application of pre-trial detention is that that is the first resort. The faction is of the opinion that article 100 and 100a is not addressing this enough. Is it addressed somewhere else? The faction would like some more information on this.

The use of the term terrorist. Can the Minister please provide and explain why the definition of terrorism or what is a terrorist is what it is? What is it based on? Can Sint Maarten dictate who is a terrorist? Can the judicial branch of Sint Maarten determine what is a terrorist? Are we now creating yet another situation by allowing the judicial branch to determine what is a terrorist? Based on what? How is that determination made that we believe this person is a terrorist? Are we going to start labeling a certain group of people that have a particular view that does not coincide with the judicial

branch and say, well they are now terrorist? That is a serious concern. The faction is of the opinion that this is where the Parliament and Members of Parliament have to be careful about what we are approving.

Bail and a bail system. Is this addressed in the criminal procedure code? The faction does not find that it is sufficiently addressed. What changes particularly are made to solidify this issue of bail? The faction is of the opinion that the way the criminal procedure code is now it is simply at the discretion of a judge to say yes or no, and believes that there should be more of a set criteria for when someone could be afforded the opportunity to post bail based on article 28 of the Constitution. Can the Minister explain specifically what the objective terms are of a bail system being implemented in Sint Maarten or improved upon?

How is article 28 of the Constitution not being infringed upon with the introduction of a secret witness? There should be a difference between witness protection and witness secrecy. Has the secret witness issue been put through this constitutional test?

In the law it states that these laws and changes to the penal code are actually being done in coordination with Aruba and Curaçao. The faction didn't hear much about how this is being executed. What are the standpoints of the legislative branches of those countries in terms of coordinating this law and making it so that we have similar legal systems? What level of indication have you gotten or can you present to Parliament that those legislative branches over there are going to or have already changed their penal procedure and criminal codes to what we have here so that they are going to be identical? The faction proposes that the CKAIR committee have some type of video conference of such and sit down with theirs, and get some type of idea where they are with this and if they have established a standpoint as a Parliament on this.

The faction mentions the issue of the hoofdverdachte. Is every citizen, in accordance with these procedures going to be afforded the possibility to do work for i.e. government instead of sitting time in jail, if someone is suspected of money laundering? The faction is of the opinion that the penal procedure code is too subjective. The faction would like to hear from criminal lawyers and hear how they feel about these

procedures. What are we doing with the police force, the people that have to enforce and apprehend?

The faction would like to know if there are possibilities to produce some sort of financial gain that by being a crown witness you go in with x amount of net worth but at the end of it you come out on top? The faction is of the opinion that that is very dangerous in our society. A situation of witness buying being prevalent within the judicial branch is something left unchecked that could be very dangerous. The faction doesn't see that the law is sufficiently boxed out to prevent those issues. Further limitations to this needs to be protected as well.

The faction mentions the issue of the witness and constitutional test. The biggest constitutional protection we have is the test that happens after, let us say Parliament was to approve this law, and then it has that period where the Ombudsman and their team can really go through this. The Minister is saying on the one hand there is measures in place and our legislative situation where there is opportunity for constitutional review but the Minister has removed that in the case of spoedeisend belang. The faction is of the opinion that to apply spoedeisend belang to any of these laws is very detrimental, because the factions sees constitutional violations here. The Ombudsman should thus be allowed their time.

What part of this law is supposed to be to live up to international standards or FATF recommendations? The Minister is saying all of this law is to live up to FATF recommendations. The faction is of the opinion that this is simply disingenuous if not untrue.

We have legislation that clearly says the rights of privacy of citizens, and all of these things and issues, are not in accordance with our own local legislation that says a committee should be in place and they should be able to review such legislation. Fact of the matter is we are in contravention of our own laws. Are we going to respect the legislation of our own country or are we going to respect the wishes of this foreign entity, the CFATF?

The faction finds that it would be very irresponsible to support this law without having gone through the sufficient privacy concerns, especially the ones that are brought up

within this agenda point and this law that we are handling right now.

Has there been positions of the Parliaments of Aruba and Curaçao on this law? The Minister mentioned that the Governments of Aruba and Curaçao do agree with the law and that the Parliament of Aruba will start handling this legislation in September and that it is not clear when the Parliament of Curaçao will start debating this legislation. The faction thought that this legislation is necessary to comply with FATF. But isn't Aruba and Curaçao in compliance with FATF? So how come despite the fact that Aruba and Curaçao have not implemented these laws, they comply with FATF? They didn't have to pass this to comply with FATF, so let us take this law and deal with it properly since Aruba and Curaçao didn't have to do it. Rule for one, rule for all.

The faction believes that the committee for Kingdom relations should meet in a teleconference or somehow and have a discussion with that committee over there to see from a parliamentary perspective as to the parliaments progress or if there is some sort of position on this.

Is there any intention to create an objective formula pertaining to the bail system? Is the Minister going to bring new legislation for us to decide on the internal matter on how we conduct fair investigations in Sint Maarten that are not targeted, unfair and bias?

Was the 100 million dollars transfer from Ennia reported as an unusual, suspicious or illegal transaction? What is being done to investigate possible terrorist ties to that? Where is this actually happening? The faction is of the opinion that the FATF are saying you have not sufficiently strengthened within your law the legal basis for afpak team and TBO.

International agreements. The faction mentions that we have human rights issues at the prison that still need to be satisfied and it doesn't see this sufficiently addressed in this law. The faction doesn't see the exact specifications, not just the timeframe of pretrial detention. What is a person entitled to in terms of meals, what should they have in their cell, what are their visitation rights? These things are not sufficiently

addressed, that is an international standard. We are not running to fix that.

We have another international standard which is the right of individuals to have bank accounts. This is nowhere addressed. This is an international standard.

The right to a full measure of self-governance. This is something that is an international standard. The faction hasn't seen any of that coming to Parliament to seek the support. The faction mentions that it seems that this Government picks and chooses which international laws they want to abide by but the faction shudders to think that it is possibly not reasons in the best interest of our people.

This report is to be considered the Final Report.

Stipulated in the meeting of the Central Committee of September 12th, 2019.

The Reporter,

W.V. Marlin

