



# The Daily Herald

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## Parliament should withdraw or severely amend law on prosecution of politicians

Dear Editor,

In *The Daily Herald* of December 29, 2010, Mr. Dennis Richardson reacted to the legal opinion of the Corporate Governance Committee of the Bar Association of St. Maarten (hereinafter: "The Committee").

The Committee is pleased to learn that Mr. Richardson showed interest to publicly debate this sensitive subject matter.

As you know, Article 123 of Constitution and the Lv. Vervolging politieke Ambtsdrager (Land Ordinance Prosecution Politicians, hereinafter "Lv. VPA") creates a limited form of immunity for politicians against prosecution. According to this law politicians can only be prosecuted after (A) a request of the Attorney General and (B) after approval has been obtained from the Court of Appeal.

In its recent legal opinion the Committee presented its arguments and concluded that this legislation is (very) undesirable and the Committee appealed to Parliament to either withdraw this legislation or severely amend same.

In his reaction Mr. Richardson stated, amongst other things, that the piece of legislation was (1) not thought up by local politicians but - in essence - by Dutch technocrats and (2) was not put in place by local politicians.

Ad. 1:

The Committee has assessed the legislation on its merits and not based on its origin. For the Committee it is irrelevant who thought up the legislation. The fact that the legislation was thought up by the Dutch, does not make it good or proper legislation, as also the Dutch can think out bad, improper or undesirable legislation.

The allegation of Mr. Richardson that a similar legislation is applied in the Netherlands is only partly correct. First of all, the procedure in the Netherlands is limited to "ambtsmisdrijven" (crimes committed in office), while the procedure applicable in Country St. Maarten also applies to "ordinary crimes." As stated before, in the Netherlands it was already acknowledged in 1848 that there can be no justification for such a far-reaching protection.

Furthermore, the procedure in the Netherlands differs on several points from the procedure applicable over here.

Besides that, the procedure as applicable in the Netherlands is severely criticized in literature. Several authors in the Netherlands have concluded that at this day of age procedures like this can no longer be justified as the procedure provides too much/ disproportionate protection for politicians against prosecution.

St. Maarten politicians should at least have taken these arguments into account before im-

plementing this questionable piece of legislation.

Ad. 2:

The allegation by Mr. Richardson that the legislation "was not put in place" is factually incorrect and incomprehensible. The Island Council of St. Maarten (and not the Dutch or anybody else) took the final decision about the acceptance and implementation of this legislation. If the Island Council members would be against the legislation then they should have voted against this legislation. It can therefore be said that by accepting this (questionable) legislation local politicians have therefore taken care of themselves as it becomes very difficult to prosecute a politician.

Richardson is right when he says that the question about whether or not the legislation is in conflict with the Constitution and/or international treaties should have been raised with the Office of the Ombudsman. As stated in the legal opinion, the Committee had addressed the Ombudsman ("the conscience of St. Maarten") with the request to unlock the door to the Constitutional Court. The Ombudsman, however, for incomprehensible reasons, refused to deal with this matter.

The Committee of the Bar Association wholeheartedly embraces the principle that everybody should be considered innocent until proven

guilty. Evidently this also needs to apply to politicians.

Richardson places the questionable legislation in the context of the alleged fact that politicians will automatically be suspended in case a criminal investigation is started against a politician.

This statement is not completely accurate. According to Article 36 and Article 50 of the Constitution politicians will only be automatically suspended if they are held in custody. Pending suspension, politicians maintain their rights to claim their full salaries though. Parliament could consider deleting or amending the clause of the "automatic" suspension. If the principle "innocent until proven guilty" (Article 28 section 2 Staatsregeling) is taken as a starting point, then it can be argued that this clause is undesirable.

Notwithstanding the above, the Committee is of the opinion that once a criminal investigation against a politician is started, stepping down is the (only) just and honourable way to do. Nevertheless it can be

argued that this should only be a moral obligation, as opposed to a legal obligation.

In the view of the Committee the creation of limited immunity for politicians is in any way not the proper answer to the (automatic) suspension issue problem. Politicians should be protected against light hearted prosecution, but the protec-

tion put in place now is disproportionate.

The Committee again appeals to Parliament to withdraw or severely amend the legislation.

Roeland Zwanikken,  
Chairman of the Corporate  
Governance  
Committee of St. Maarten Bar  
Association