

Challenges of National Preventive Mechanisms (NPMs) in psychiatric care

Working together in the prevention of inhuman or degrading treatment – The functioning of NPMs and their relation with NHRIs: Ideals and reality in the Netherlands

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1. Introduction

The Netherlands ratified OPCAT in 2010 and in December 2011 the Deputy-Minister of Security and Justice formally designated, by letter, several established institutions as its NPM. This means the Netherlands has a NPM with a multi-body structure, existing of the Inspectorate of Security and Justice (IVenJ), the Health Care Inspectorate (IGZ), and the Inspectorate for Youth Care (IJZ), as well as the Council for the Administration of Criminal Justice and Protection of Juveniles (RSJ). Apart from these four member organisations, there are several observer associates: the Commission of Oversight for Penitentiaries, the Commission of Oversight for Police Cells and the Commission of Oversight for Military Detention. Each of these commissions is an umbrella organization representing committees of citizens who monitor conditions and the treatment of persons deprived of liberty in specific places of detention around the country. The idea behind the involvement of these associates in the work of the NPM is that this would ensure a good information position of the NPM with a wide coverage of places of detention. The observer associates do participate in NPM meetings and communicate concerns to the NPM.

In my view, the basic idea on which the Dutch NPM is built is a good one: secure involvement of those institutions that do already exist and have a mandate and task in inspecting places of detention and monitoring the well-being of persons deprived of their liberty, in the penal law sphere as well as in the sphere of medical care, elderly care and youth care. The inspectorates in the Netherlands do have the staff, the resources and the experience to do quite frequent periodic visit to all relevant institutions where persons are – *de jure* or *de facto* – deprived of their liberty. Although the role of NPMs is a broader one, bringing inspection visits to places of detention to see how people are doing there is the hard core of the work of NPMs. It is better to have a body with an adequate capacity to do such things than to create a new and separate NPM with hardly any staff to set up an

adequate visiting scheme, like it has been the case in many other countries. Another positive element of the Dutch NPM structure is the involvement of the Commissions of Oversight. Representing the local committees of oversight that we have in all prisons and other detention centres, these commissions can give adequate information on what is going on “on the workfloor” of life in detention: what kind of complaints do the local committees receive, how does the director of the facility react to these complaints, etc. This offers the NPM good information channels.

However, despite these positive features of the Dutch NPM the functioning of the NPM has been the subject of much discussion, both among legal scholars and prisoners’ rights ngo’s and among the participating bodies themselves. I will explain a bit more about the aspects of the NPM functioning that many considers to be fallacies. And after that I will try to present some thoughts on how these fallacies might be remedied and to what extent the NHRI might play a role in the future functioning of the NPM.

2. Fallacies in the Dutch NPM structure and functioning

One thing that really influenced the formation and functioning of the NPM in the Netherlands is the fact that the deputy minister, when designating the separate inspectorates and other bodies as NPM, indicated that there was nothing new under the sun. Being part of the NPM would basically mean nothing for the activities of the Inspectorates and other bodies: “continue to do what you always have done, business as usual, and most of all: don’t expect any extra budget”. Simply by continuing the tasks that you have performed so far we are complying with our obligations under OPCAT. You meet a few times a year to exchange information, you write a joint annual report to the SPT on the activities that your organisations have performed with respect to situations of deprivation of liberty (which is only a limited part of the work of for instance the Health Care Inspectorate and the Youth Care Inspectorate) , that’s it. The idea that an NPM is a link in an international chain of supervision and partner in a developing structure of international ‘soft law’ standards with regard to the treatment of persons deprived of their liberty did not sink in in the Netherlands. At least not in the practice and orientation or mindset of the NPM bodies. And the main cause for that was the message of the deputy minister.

- lack of independence

The Inspectorate of Security and Justice acts as co-ordinator of the Dutch NPM. In the first years of the functioning of the NPM a lot of time was spent to discuss the independence of the NPM, at least the independence as perceived by stakeholders. Although in practice all Inspectorates can operate in a high degree of independence when they are conducting their inspections and drafting their reports, ultimately their visiting programmes and priority strategies have to be agreed upon by the minister. If an ngo or person deprived of liberty wants to contact the NPM, there is an address and telephone number at the ministry of Security and Justice, where the co-ordinating Inspectorate is based.

- no single legislative instrument which designates the NPM

The perceived lack of independence is strengthened by the fact that we have no single legislative instrument which designates the NPM. The inspectorates base their operations on the Netherlands General Administrative Law Act, which provides the legal mandate for all supervisory bodies. This Act grants supervisory bodies the general power to enter all public properties, request information related to their mandate, and to conduct relevant investigations or research. In addition, each member of the NPM has its own foundational text, spread over a number of bye-laws and regulations (most of them executive ordinations by the minister), as a legal basis for further NPM activities. All in all this makes that the legal basis for the functioning of the bodies that form the NPM is not fully in compliance with the Paris Principles.

- Not completely fulfilling the NPM mandate

As I already mentioned, the Dutch NPM might be considered strong as far as the conduct of inspection visits is concerned. Indeed, the Inspectorates do this on a regular basis, although it needs to be acknowledged that they do not have a tradition in bringing unscheduled or unannounced visits, whereas especially these kind of visits may play an important role in preventing inhuman or degrading treatment.

Now we are all aware that the mandate of NPMs as foreseen by the OPCAT also contains elements in the area of advice and comments on new legislation or policies and in the area of advocacy. This is an area in which the current NPM members do not completely fulfil the NPM mandate. The Inspectorates do not see a role for themselves in advising on policy of draft legislation. They function in a tradition in which advisory roles are not part of their mandate. The Council for the Administration of Criminal Justice does have an advisory mandate, but only with respect to deprivation of liberty in a penal law setting. Therefore, the Dutch NPM has some gaps in fulfilling the complete NPM mandate.

I must admit that I can understand the reluctance on the side of the inspectorates to engage in advisory or advocacy activities. That type of activities are really alien to their traditional position within the ministry. On the other hand these advisory and advocacy activities are an important part of the NPM tasks. So somehow, these gaps in the mandate should be mended.

- Lack of visibility of the NPM as an integral entity

In its report on the Netherlands the SPT has expressed worries about the lack of visibility of the NPM as an integral entity. Actually, the only way in which we see any collective action from the NPM is when the NPM publishes its annual report. Throughout the year there are only very little joint activities, investigations or reports. The sense of togetherness simply is not there.

- No clear orientation on developments in international human rights standards and relevant soft law documents

Now I think several of the structural fallacies that we have so far identified could very well be compensated by a strong orientation on international human rights standards, also those that can be found in soft law documents. However, as far as the Inspectorates are concerned these standards are not a structural part of the reference frameworks they tend to adhere by. Although the Inspectorate of Security and Justice most certainly is aware of the European Prison Rules and the CPT standards, it does not really engage with them. International discussions on such standards are not closely followed. And although in some reports the Health Care Inspectorate does really take on board human rights standards on deprivation of liberty, for instance in its reports on the use of restraining measures in elderly care and psychiatric care, this seems more or less the result of the personal engagement of certain individual inspectors and of discussion within the sector itself. It is not the result of a structural orientation on relevant human rights standards and international developments within the organisation of the Inspectorates. They seem to consider these standards too vague and unspecified to apply them in the practice of their inspection work..

3. Could and should the NHRI come to the rescue?

Given these gaps in fulfilling the NPM mandate and this lack of international orientation with the majority of the current NPM members, one might argue that the NHRI could play an important role. After all, being a link between the international and national legal order and promoting the implementation of international human rights standards is what NHRIs are there for. The NHRI has both a broad advisory task and a human rights advocacy role with respect to all areas of law and policy. Wouldn't the easy solution be that the NHRI becomes part of the NPM?

Indeed, this is a feasible option and I most certainly would not be against this. Perhaps this would be the ideal scenario. But I also think we need to be cautious. Just becoming part of a structure that basically only consists of 4 joint meetings of the NPM members every year will not do the trick. More is needed.

For instance, preparing well founded advices on draft legislation or on policy initiatives would definitely require making use of the experience and workfloor knowledge of the Inspectorates. The very broad mandate of the NHRI makes that we have very little staff members with a specific expertise in the area of penitentiary law or other forms of deprivation of liberty. Also, when it comes to deprivation of liberty or the use of restraining measures in the setting of psychiatric care our expertise is limited. Any legislative or policy advice that leans on a mere superficial knowledge of international standards or case law and is not really able to translate these standards to the national legal practice will have very little impact. In order to identify issues of non-compliance with human rights standards you

need to be able to look beyond the letter of the law and know about factors that hinder compliance in practice. I think that kind of practical knowledge is there within the Inspectorates, so any advice should be a joint effort. This would require that the Inspectorates, at least to a certain extent, should get rid of their reluctance to participate in advisory activities. Inspectorates should realize that the difference between their inspection reports that result in conclusions and recommendations and other types of advice is not always so clear cut. In this respect the model used by several NPMs where an NPM advice is undersigned only by these bodies that have an explicit advisory mandate might be an inspiration, as long as this does not result in complete non-involvement of the Inspectorates.

Furthermore, in order to give a more create a more human rights oriented mindset within the Inspectorates a stronger engagement of the NPM bodies with NGOs and academia seems necessary. So far, there seems quite a distance between at least the Inspectorates and civil society. Again, here the NHRI might play an intermediary role. It is part of the genes of NHRIs to engage with civil society and function as a bridge between civil society and the government agencies. But again, the NHRI will only succeed in playing such a role of bringing together NPM bodies and stakeholders if there is at least a willingness on the side of the NPM bodies to acknowledge the relevance of closer contacts with civil society. I am afraid that so far I haven't seen this willingness with the Inspectorates.

But I do see a chance for change. It is my understanding that for instance the development of a multi-body NPM in the UK was brought several steps forward by the fact that at a certain moment a new head of HM Prisons Inspectorate was appointed. In the UK this Inspectorate is the coordinating body of the NPM. This man that turned out to be really in favor of developing a well-functioning NPM. He made the difference in the UK. And at the end of his mandate he even drafted a proposal to increase the independence of the UK NPM by introducing the appointment of an independent chair of the UK NPM. Mr. John Wadham, a solicitor with a broad experience in the public sector and with a heart for prisoners' rights was appointed, so it is no longer the head of the prisons inspectorate that chairs the NPM. For the perception of independence I think this is a very important step, one we should follow in the Netherlands: place the coordinating role of the NPM not with an Inspection but with a more independent body or person. I think in any country that has a structure of Inspectorates in the area of the NPM mandate a strong relation, a really meaningful interplay, between Inspectorates and the NPM is necessary. However, the coordinating role should be placed outside the government structure.

And guess what: only yesterday I heard that a new head of the Inspection of Security and Justice has been appointed. The Dutch NHRI most definitely will try to convince him that he can make the difference like his colleague in the UK did.