

The operational modalities of the NPMs: challenges posed by the provisions of OPCAT

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by Dr Elina Steinerte (University of Bristol)

The nature of obligations contained in the OPCAT

- OPCAT moves away from such traditional modes of supervision of implementation of international human rights treaties as reporting obligations and individual complaints mechanisms;
- Main obligation by states parties: designation of a National Preventive Mechanism (NPM);
- What is an appropriate NPM?
 - Article 18 of the OPCAT:
 - Functional independence;
 - Independence of personnel;
 - The necessary expertise within the NPM;
 - The necessary resources;
 - ‘due regard’ given to the Principles Relating to the Status of National Institutions, the so-called ‘Paris Principles’.

Choices made by the states parties in respect of the NPMs

Three trends around the world:

- Designation of existing National Human Rights Institutions: Human Rights Commissions (Mexico and Mauritius) or Ombudsman Offices (Denmark, Armenia, Sweden and Costa Rica);
- Designation of a number of institutions that together carry out NPM functions: New Zealand (5 institutions: the Human Rights Commission (as a central body), Office of the Ombudsman, the Independent Police Conduct Authority, the Office of the Children's Commissioner and the Inspector of Service Penal Establishments of the Office of the Judge Advocate General of the Armed Forces) or Slovenia and Moldova, where in both countries the mandate of the NPM is carried out by the respective Ombudsman Offices together with local NGOs;
- Creation of an entirely new institution for the purposes of an NPM: France- the general Inspector of Places of Deprivation of Liberty; Senegal- the office of the National Observer of Places of Deprivation of Liberty; the forthcoming National Committee for the Prevention of Torture in Paraguay.

Institutional characteristics of an NPM

- Obligation of a state party to ‘establish’, ‘maintain’ or ‘designate’- the state party free to choose between these three options;
- Reference to Paris Principles in Article 18 (4):
 - The quality of the designation process: inclusiveness, openness and transparency;
 - Legal basis: anchored in the constitution (lends more legitimacy and provides extra guarantees of independence but more complicated to amend) or regular legislative instrument (easier to amend but no constitutional status).

Institutional characteristics of an NPM (continued)

- Independence:
 - Functional independence:
 - » Adequate funding *for the NPM work*;
 - » ‘ring-fencing’ NPM budget;
 - » Freedom to operate;
 - » Privileges and immunities- Article 35 of the OPCAT
 - Independence of personnel:
 - » Appointment and dismissal procedures: fairness, openness, inclusiveness and transparency;
 - » Composition: variety of expertise; gender and minority representation.

Functioning of an NPM

- Functions of the NPM described in Articles 19-23 of the OPCAT;
- Wide definition of 'deprivation of liberty' contained in Article 4 of the OPCAT- covers not only 'traditional' places like prisons and police cells, but also 'less traditional' ones, like psychiatric hospitals, transit zones in international airports etc;
- Mandate to prevent:
 - Visits to places of deprivation of liberty:
 - » Focus of the visit- prevention;
 - » Regularity and system of visits- how often? Jurisdiction? Which places? Geographical and thematic scope.
 - » Unannounced visits;
 - » Recommendations and Follow-Up- the corresponding obligation upon states parties in Article 22.

Functioning of an NPM (continued)

- Mandate to prevent (continued):
 - Preamble to OPCAT (para 5): *‘effective prevention (...) requires educational and a combination of various legislative, administrative, judicial and other measures’*;
 - Article 19 (c) of OPCAT- NPMs to have rights to submit proposals and observations concerning existing or draft legislation;
 - The potential challenge: the traditional quasi-judicial mandate of the Ombudsmen offices and the proactive nature of the NPM mandate.

Functioning of an NPM (continued)

- **NPM Reports:** Article 23 requires NPM to make annual reports which states are obliged to publish and disseminate;
 - » NPM report required;
 - » Preventive mandate to be reflected;
 - » Publicity of report (especially important in the light of confidentiality of the SPT reports).
- **Work with the SPT:** Article 20 (f) gives the NPMs right to have contacts with the SPT, to send it information and to meet it with the SPT and it send information.

Particular challenges for Ombudsman Offices in fulfilling the NPM mandate

- The preventive mandate that NPMs are to carry out may require modifications of approach, changes in existing methodologies and shift in the thinking, ethos of the institution;
- Careful balance between NPM work and complaints handling functions;
- Access to all places of deprivation of liberty as defined in OPCAT: thematic and geographic;
- Variety of expertise and gender and minority representation;
- System of regular visits;
- Other preventive activities.