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The Quiet Revolution of Fundamental Rights Protection: How Independent Administrative Authorities are Reshaping Legal Guarantees in France

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Abstract
The right to an effective remedy is traditionally understood in France as access to a court. However, many individuals face social, economic, and procedural barriers that prevent them from exercising this right in practice. Procedural complexity, lack of knowledge about available remedies, and the burdens of litigation discourage vulnerable populations from claiming their rights. These obstacles are particularly acute in cases involving structural or systemic violations of fundamental rights, highlighting the limits of a purely judicial conception of rights protection. The study, therefore, focuses on French Independent Administrative Authorities, examining how their intervention may serve as a remedy to these limitations, with particular attention to the Defender of Rights and the General Controller of Places of Deprivation of Liberty. The research combines doctrinal analysis, examination of institutional reports, and study of empirical investigations conducted by these authorities. It evaluates both their individual casework and their structural interventions in public policy. The study demonstrates that these authorities redefine the right to an effective remedy as a socially situated process. By identifying patterns of non-recourse, overlapping vulnerabilities, and structural obstacles to justice, they intervene through mediation, legal information, field investigations, preventive oversight, and legislative proposals. Their recommendations influence administrative practices and statutory reforms. By combining facilitation, prevention, and normative initiative, they complement judicial protection without replacing courts, enhancing access to justice and strengthening institutional accountability. Future research may assess the impact of granting these authorities direct access to constitutional review. Comparative studies with other European ombuds institutions would also be relevant, as they could highlight differences and similarities in institutional design, procedural powers, and effectiveness, thereby informing best practices and potential reforms in rights protection.

Keywords: *independent administrative authorities; fundamental rights and freedoms; effective remedy; rule of law; access to justice; defender of rights; general controller of places of deprivation of liberty; systemic reform; soft law.*

Тиха революція у сфері захисту основоположних прав: як незалежні адміністративні органи переосмислюють правові гарантії у Франції

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Анотація
Право на ефективний засіб правового захисту традиційно розуміється у Франції як доступ до суду. Проте багато осіб стикаються із соціальними, економічними та процесуальними бар'єрами, які перешкоджають практичній реалізації цього права. Складність процедур, недостатня обізнаність про доступні засоби захисту та тягар судового розгляду стримують вразливі групи населення від відстоювання своїх прав. Ці перешкоди є особливо гострими у випадках, що стосуються структурних або системних порушень основоположних прав, що підкреслює обмеженість суто судового підходу до їх захисту. У зв'язку з цим дослідження зосереджується на французьких незалежних адміністративних органах, аналізуючи, як їх діяльність може слугувати засобом подолання зазначених обмежень, із особливою увагою до Захисника прав і Генерального контролера місць позбавлення волі. Дослідження поєднує доктринальний аналіз, вивчення інституційних звітів та аналіз емпіричних досліджень, проведених цими органами. Оцінюється як їхня діяльність щодо розгляду індивідуальних справ, так і структурні втручання у сфері публічної політики. Дослідження демонструє, що ці органи переосмислюють право на ефективний засіб правового захисту як соціально зумовлений процес. Виявляючи випадки невикористання засобів правового захисту, накладання вразливостей та структурні перешкоди доступу до правосуддя, вони втручаються шляхом медіації, надання правової інформації, проведення польових досліджень, превентивного нагляду та підготовки законодавчих пропозицій. Їхні рекомендації впливають на адміністративну практику та законодавчі реформи. Поєднуючи сприяння, превенцію та нормативну ініціативу, вони доповнюють судовий захист, не замінюючи суди, розширюючи доступ до правосуддя та посилюючи інституційну підзвітність. Подальші дослідження можуть оцінити вплив надання цим органам прямого доступу до конституційного контролю. Також доцільними є порівняльні дослідження з іншими європейськими омбудсманськими інституціями, що дозволить виявити відмінності та подібності в інституційному дизайні, процесуальних повноваженнях і ефективності, а також сприятиме формуванню кращих практик і можливих реформ у сфері захисту прав.

Ключові слова: *незалежні адміністративні органи; основоположні права і свободи; ефективний засіб правового захисту; верховенство права; доступ до правосуддя; захисник прав; генеральний контролер місць позбавлення волі; системні реформи; м'яке право.*

Introduction

The protection of fundamental rights and freedoms is a core requirement of the rule of law and modern democracy. In France, as in other established democratic systems, this task has traditionally been entrusted to the judiciary, with the right to an effective remedy before a court widely regarded as a foundational element of legal protection. In principle, access to an independent judge represents the ultimate safeguard against violations of individual rights, whether arising from public authorities, private actors, or the state itself. This model is grounded in the normative premise that access to justice ensures not only the recognition of rights but also their practical and effective enforcement. Through the adjudication of individual claims, courts are expected to uphold legal norms, provide redress for abuses, and deter future violations. In this regard, the judiciary is understood not merely as a guardian of legality, but as a central mechanism of democratic accountability.

This centrality of the judiciary in the protection of rights is also strongly reflected in French legal scholarship. As Professor Véronique Champeil-Desplats noted nearly two decades ago, "a review of contemporary textbooks on civil liberties, fundamental rights, or human rights leads to an unambiguous conclusion: today, judicial institutions are conceived as the ultimate guardians of rights and freedoms" [1, p. 12]. Despite the growing diversity of mechanisms designed to guarantee fundamental rights [2], their effectiveness continues to be understood primarily through the lens of judicial sanction. Indeed, the protection of rights has traditionally been associated with the notion of sanction [3, p. 93], most often one issued by an independent judicial authority in response to the violation of a legal norm. Legal action is now commonly described as the "primary vehicle for the realisation of rights" [4, p. 4]. The right to a judicial remedy, rooted in Art. 16 of the 1789 Declaration of the Rights of Man and of the Citizen, is understood as the right of all persons "to gain access to justice to assert their rights" [5, p. 90], and is now commonly described as the "right of rights" [6, p. 238], the "shield of other fundamental rights" [7, p. 3675], and the very guarantee of their effectiveness.

The doctrinal emphasis on judicial protection is further reinforced by judicial practice, particularly in the case-law of the European Court of Human Rights (ECtHR). According to the Court, "the rule of law cannot be conceived without the possibility of access to a judge" [8]. As a result, procedural guarantees are often prioritised over substantive ones. European

judges tend to sanction the absence of judicial oversight more readily than violations of rights themselves [9; 10, p. 251]. This approach is particularly evident in the field of prison conditions, where the requirements of Art. 3 of the European Convention on Human Rights (ECHR) are systematically combined with those of Art. 13, requiring both "preventive and compensatory remedies" [11]. Similarly, when the Council of Europe adopts a recommendation on the right of persons living in extreme poverty to access basic material needs, it emphasizes not only the recognition of such a right but also the necessity of its justiciability: "every person in such a situation should be able to invoke it directly before the authorities and, if necessary, before the courts" [12]. In this context, the effectiveness of rights remains largely dependent on the existence of a judicial remedy.

The effectiveness of this conception, built on an "enchanted vision" [13, p. 87] of access to justice, may legitimately be questioned today [14, p. 935]. While this framework remains essential, growing attention is being paid to its limitations, particularly when access to the courts proves difficult or ineffective for many individuals. Yet everyday experience and sociological research show that real access to justice is far from universal or fully effective. Multiple barriers limit the actual exercise of this right: procedural complexity, financial costs, lack of knowledge about available remedies, bureaucratic burdens and delays, and, at times, a lack of trust in the judicial system [15, p. 158]. These obstacles often intersect with social, economic, or cultural factors, leading to a "non-take-up" of rights that particularly affects the most vulnerable populations. In this context, the formal recognition of rights alone does not guarantee their effective realisation. In response to these shortcomings, the French model has, over the past few decades, developed an original institutional framework based on the creation and recognition of Independent Administrative Authorities (IAAs). These bodies, which enjoy established independence from the executive branch, are intended to complement the role of the courts in protecting fundamental rights, operating at various levels, from individual mediation to systemic oversight of public policy.

From a historical perspective, this type of institution was created in France by Law No. 78-17 of 6 January 1978, much later than in the United States [16][1]

[1] The first Regulatory Agencies or Independent Regulatory Commissions were created in the United States. For example: Interstate Commerce Commission (1887), Federal Trade Commission (1915), Federal Power Commission (1920), Federal Communication Commission (1934), Securities and Exchange Commission (1934). They had a regulatory function in order to reduce governmental centralization or to fight against monopolistic and unfair practices. In a report from 1937 (*Brownlow Report*), these agencies were presented as "a fourth branch of government". In the years 1960-1970, many agencies were invested with a regulatory power in social and interest fields: Environmental Protection Agency, Consumer Product Safety Commission.

or in the United Kingdom [17][2], for example. By Law No. 2017-55 of 20 January 2017, a significant reform was carried out. First, two categories of authorities were created: Independent Administrative Authorities (IAAs)[3] and Independent Public Authorities (IPAs)[4]. The difference between the two lies in the fact that Independent Public Authorities have legal personality, which enables them to have their own financial resources and to bring proceedings before a court. The second aspect of the 2017 reform was the reduction in the number of authorities, from 47 to 26 (17 IAAs and 9 IPAs).

The competences of Independent Administrative Authorities and Independent Public Authorities vary from one authority to another. In general, four types of powers can be distinguished: the power to issue opinions or recommendations; individual decision-making powers; regulatory powers, consisting of organising a sector of activity through the adoption of rules; and sanctioning powers where the rules laid down by these institutions are not respected. Through their activity, many of these authorities contribute, generally within their specialized fields, to the protection of fundamental rights. Some scholars describe this situation as "a pluralistic and increasingly competitive landscape" [18, p. 397], highlighting the "dynamic and evolving nature of this still-emerging continent of rights regulation through IAAs" [19, p. 6]. Among these authorities, the Defender of Rights *(Défenseur des droits)* [20; 21] and the General Controller of Places of Deprivation of Liberty *(Contrôleur général des lieux de privation de liberté) [22]* are the only ones specifically mandated to protect fundamental rights and freedoms.

Drawing inspiration from the Scandinavian ombudsman tradition [23, p. 499], the Defender of Rights is entrusted with a broad mandate to defend rights and freedoms – particularly in the context of relations between

[2] The American experience was brought to the United Kingdom, where have been created the QUANGOS (Quasi Autonomous Non-Governmental Organizations): public persons not under the authority of a minister, but which nevertheless contribute to the implementation of government policy. Three major categories of QUANGOS can be pointed up: those which perform administrative functions. These functions are quite varied: operational, regulatory by supervising and controlling activities of general interest, cultural and scientific, advising the central administration; the QUANGOS perform functions of an industrial and commercial nature: public enterprises, national companies (Bank of England, British Airways Corporation); the QUANGOS having judicial functions.

[3] Examples of French Independent Administrative Authorities: Commission for Access to Administrative Documents (*Commission d'accès aux documents administratifs*); Defender of rights (*Défenseur des droits*); National Commission for Computing and Freedoms (*Commission nationale de l'informatique et des libertés*); General Controller of Places of Deprivation of Liberty (*Contrôleur général des lieux de privation de liberté*).

[4] Examples of French Independent public authorities: Audiovisual and Digital Communication Regulatory Authority (*Autorité de régulation de la communication audiovisuelle et numérique*); High Authority for Health (*Haute autorité de santé*).

individuals and public administrations – because it consolidates within a single institution the powers previously entrusted to four Independent Administrative Authorities: the Mediator of the Republic, the Children's Ombudsman, the National Commission on Security Ethics and the High Authority for the Fight against Discrimination and for Equality [18, p. 397]. The very denomination of the new institution, referring explicitly to the "defence of rights", in itself marks a significant evolution. It signals a departure from the concept of the "judicial monopoly over the protection of rights" which had long been jealously guarded, as illustrated by parliamentary debates in 1972 concerning the creation of the Mediator of the Republic (*Médiateur de la République)*. At that time, it was notably proposed to call the office "Mediator, Defender of Rights and Freedoms", but this proposal was rejected by the Minister of Justice, who argued that the defence of rights and freedoms should remain the exclusive domain of the Council of State (*Conseil d'État*) and the Court of Cassation (*Cour de cassation*) [18, p. 211]. Another defining feature of this evolution lies in the constitutional recognition of this Independent Administrative Authority – the only one explicitly mentioned in the French Constitution[5] – thereby ensuring enhanced institutional protection and functional autonomy.

The awareness of the need to develop "new pathways to uphold rights" [24, p. 85], through the exploration of "non-judicial protection mechanisms" [25, p. 15], is also illustrated by the creation, in 2007, of another major Independent Administrative Authority: the General Controller of Places of Deprivation of Liberty *(Contrôleur général des lieux de privation de liberté),* which is "responsible for overseeing the treatment of persons deprived of liberty to ensure that their fundamental rights are respected"[6]. Its action falls within the framework of the Optional Protocol to the United Nations Convention against Torture, signed by France in 2005.

These IAAs exemplify a pluralistic and innovative approach to rights protection – one that goes beyond the strict confines of litigation. They combine legal expertise, sociological analysis, public outreach, institutional advising, and political engagement. This model reflects a form of *institutional pluralism* in the guarantee of rights, in which diverse actors and methods of action work together to enhance the effectiveness of rights, particularly for individuals facing vulnerability or exclusion. The health crisis has brought about significant upheaval in their activities and operational methods, while also fostering a more assertive conception of their role [26, p. 58-67]. During this period, they focused essentially on the defence of fundamental rights and freedoms undermined by the state of health emergency. This surge in

[5] Art.71-1 of the Constitution.

[6] Art. 1, Law No. 2007-1545 of 30 October 2007.

activity increased their visibility [27][7] and allowed them to consolidate their role as effective defenders of rights and freedoms.

During the colloquium jointly organised in February 2025 by the Court of Cassation, the Council of State, and the Defender of Rights, the First President of the Court of Cassation acknowledged that the Defender of Rights is "undeniably a pillar of the rule of law, just like the judiciary itself" [27, p. 29]. The Vice-President of the Council of State similarly stated that "the collaboration between the Defender of Rights and the administrative courts to safeguard freedoms is self-evident" [28]. These statements illustrate that IAAs are now fully integrated into the architecture of rights protection "as collaborators of the judiciary" [29, p. 54], reinforcing judicial guarantees through what Michel Foucault once described as the "multiplication of the judge's role" [29, p. 55].

The present study aims to analyse this distinctive French model through the lens of the role played by IAAs in the protection of fundamental rights. We argue that these institutions contribute to a renewed dynamic in which the effectiveness of rights is understood not solely as access to a judge, but also as a social, informational, and political capacity to claim and exercise those rights. First, we show how these authorities adopt a situated and pragmatic understanding of the right to an effective remedy, revealing the social and structural factors that hinder access to justice. In doing so, they uncover patterns of non-take-up that remain largely invisible to traditional judicial actors, thereby enriching conventional conceptions of fundamental rights. Second, we examine the practical and strategic responses deployed by the two IAAs, which combine roles in public information, access facilitation, mediation, and preventive action in public policy. Beyond the French case, this study seeks to contribute to broader reflections on systems of fundamental rights protection in which traditional judicial mechanisms are increasingly supported by a diversified institutional ecosystem.

Results and Discussion

1. A supportive role in judicial remedies: making the right to an effective remedy tangible

The effectiveness of the right to a judicial remedy depends on several cumulative parameters: easy access to a judge, compliance with standards of independence and impartiality, procedural speed, equality of arms, and the enforcement of judicial decisions. While these requirements are formally guaranteed in democratic legal systems, their effectiveness remains uneven in practice, particularly in situations involving structural or systemic

[7] The number of requests addressed to the Defender of rights have increased of around 10%.

violations of fundamental rights. Independent Administrative Authorities therefore, occupy a strategic position within the architecture of rights protection, enabling them to act as a "catalyst of judicial guarantee" [25, p. 38], by facilitating access to the courts (1.1) and reinforcing the impact of judicial decisions once rendered (1.2).

1.1. Facilitating access to judicial authorities

By using various avenues of action, which allow them to lower the practical and procedural barriers to access to courts, IAAs contribute to the effectiveness of judicial remedies. In the case of the Defender of Rights, its contribution lies first and foremost in the day-to-day handling of the individual complaints referred to it, the number of which continues to grow. In 2023, for example, the Defender of Rights received 137,894 complaints[8], requests for information, and guidance, marking a 10% increase compared to 2022. This upward trend reflects both the growing challenges faced by individuals in asserting their rights and the institution's expanding role in addressing emerging issues. Public service users accounted for 92,400 complaints, up 12%, largely due to difficulties in accessing services caused by excessive digitisation, office closures, and administrative burdens. Issues affecting foreigners remain a major concern, representing 28% of all complaints. Discrimination remains pervasive, with contacts to the anti-discrimination platform increasing by 25%, while whistleblower cases surged by 128% following the 2022 legal reforms strengthening their protection. Overall, these figures illustrate a continuous rise in the number of individuals seeking assistance from the Defender of Rights, underscoring both the institution's central role in safeguarding fundamental rights and the persistent obstacles faced by vulnerable populations.

The primary power the Defender of Rights mobilises for solving the cases it receives is undoubtedly that of mediation[9]. In the field of immigration law, mediation is particularly relied upon to address violations resulting from deficiencies in public services (difficulties in accessing administrative counters, excessive processing times, failure of the administration to respond, etc.). In practice, this avenue enables the resolution of 10 to 20% of the cases [30]. In the event of failure of an amicable settlement, assistance may be provided by helping victims to assemble their case file, identify the competent jurisdiction, and select the procedural avenue best suited to their situation. This form of assistance responds directly to asymmetries of information, expertise, and resources that frequently undermine effective access to justice.

[8] For more information, see: https://www.defenseurdesdroits.fr/rapport-annuel-dactivite-2023-la-banalisation-des-atteintes-aux-droits-et-libertes-inquiete-la-597.

[9] Art. 26, Organic Law No. 2011-333 of 29 March 2011.

In some cases, the initiation of judicial proceedings on behalf of individuals is also possible. Such action reflects the traditional definition of the Ombudsman as "one who pleads on behalf of another" [31, p. 387]. In addition, the Defender of Rights and the General Controller of Places of Deprivation of Liberty are both empowered to refer matters to the authority competent to initiate disciplinary proceedings for facts of which they become aware[10], and they must inform the Public Prosecutor when those facts appear to constitute a criminal offence[11]. This prerogative allows IAAs to act as institutional relays between individual grievances and judicial accountability mechanisms.

Although they are not parties to proceedings, IAAs also contribute to safeguarding the principle of equality of arms before the court by reducing the evidentiary burden borne by claimants. They play an expert role before courts by submitting observations either at the judge's request, acting as *amicus curiae*, or at their own initiative. In the case of the Defender of Rights, Art. 33-2 of the Organic Law authorises civil, administrative and criminal courts to invite it to submit written or oral observations and allows the authority to request leave to intervene as of right. This prerogative has been extended in practice to constitutional and supreme jurisdictions, including the Constitutional Council in the context of *ex-ante* review [32], as well as the Court of Cassation and the Council of State in support of referrals of priority constitutional questions (QPCs) [33, p. 863]. The intervention power is extensively exercised by the Defender of Rights in the field of visas. Such practice is explained by the frequent identification of violations of the limits and obligations that respect for fundamental rights imposes on the administration in this area. The same reason explains the Council of State's request for IAAs interventions in litigation concerning discriminatory identity checks [34].

In addition, and more innovatively, the Defender of Rights has developed since 2014 a sustained practice of third-party intervention before supranational jurisdictions, most notably the European Court of Human Rights, based on Art. 36 §2 of the European Convention on Human Rights, which allows any interested party, other than the applicant, to submit written observations [35, p. 341; 36, p. 67]. It is a way to provide information likely to assist the Court on questions of fact or law, and helps the judge to be in an optimal position to decide on a novel issue or a proposed reversal of precedent. The Defender of Rights has submitted twenty-six observations in cases falling within its field of competence defined in Art. 4 of the Organic

[10] Art. 29, Organic law No. 2011-333 of 29 March 2011; Art. 9, Law No. 2007-1545 of 30 October 2007.

[11] Art. 33-3, Organic law No. 2011-333 of 29 March 2011; Art. 9, Law No. 2007-1545 of 30 October.

law, especially in cases concerning the issue of administrative detention of children [37]; the reception and care of unaccompanied minors [38]; the conditions of the evacuation of a Roma family encampment [39]; the readmission of an asylum-seeking family to Hungary [40]; the reception conditions for asylum seekers [41]; the denial of family benefits to children entering France outside the family reunification procedure [42]; the effectiveness of remedies for challenging detention conditions [43]; interventions concerning bioethics issues [44]; and the use of intelligence techniques and their implications for lawyers and journalists [45].

Given the relatively small number of cases judged annually by the Strasbourg Court against France (around 20-25), it can be observed that the Defender of Rights' interventions are proportionally significant. An analysis of this list of observations shows that it intervenes before the European Court of Human Rights as a third-party participant when issues raised at the European level intersect with concerns that it regularly addresses through the examination of individual complaints and the review of legislative and regulatory texts. Thus, going beyond the immediate scope of the case, its interventions aim to extend the action conducted at the domestic level to remedy structural or systemic deficiencies affecting the protection of rights and freedoms.

The legal status of such observations raises questions regarding their compatibility with the adversarial principle, insofar as they transform IAAs into "propositional forces directed toward judges" [46, p. 466]. Nonetheless, rather than undermining judicial neutrality[12], these interventions may be understood as contributing to the quality of judicial decision-making, by providing empirically grounded analyses of administrative practices and their concrete effects on rights. In this sense, these authorities participate in a dialogical conception of adjudication, fulfilling their role in promoting rights and objectively defending the public-interest cause of respect for fundamental rights, without substituting themselves for the judge.

Even when they do not intervene directly in proceedings, IAAs increasingly function as "resource institutions" whose analyses and findings are mobilised by judges. The European Court of Human Rights frequently refers to the opinions of the Defender of Rights or the General Controller of Places of Deprivation of Liberty, in sections of its judgments devoted to the "relevant domestic legal framework" [47]. This reliance reflects the IAAs' capacity to document systemic practices and recurring dysfunctions that may escape judicial scrutiny limited to the facts of a single case.

[12] The 2020 parliamentary information report on the Defender of Rights recommends clarifying the use of this prerogative, stating that it "must be adapted to the conditions of the proceedings and respectful of the balance between the parties", https://www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/l15b3203_rapport-information#.

This capacity for expertise before the courts is furthermore supported by enhanced investigative powers. The Defender of Rights and the General Controller of Places of Deprivation of Liberty can conduct thorough investigations on a timetable independent of the courts, including by hearing individuals or performing on-site inspections, and they enjoy broad access to administrative documents, while also having the power to issue formal notices to those concerned. If some documents or information may be refused – those covered by national defence, security, or foreign policy – the secrecy of investigation or criminal proceedings cannot be invoked against the Defender of Rights, nor can medical confidentiality or attorney-client privilege in lawyer-client relations if the concerned person expressly requests disclosure, while medical secrecy is no longer opposable to the General Controller of Places of Deprivation of Liberty if information is shared with inspectors possessing medical qualifications.

The significance of these investigative powers is illustrated by the case concerning the death of environmental activist Rémi Fraisse during a demonstration. While the European Court of Human Rights ultimately found no violation of Art. 2, it nonetheless emphasised: "the quality of the investigations carried out by the Defender of Rights, which he conducted *ex officio* and which gave rise to a particularly detailed decision" [48]. This acknowledgement confirms the authority's capacity to contribute substantively to the assessment of the effectiveness of domestic investigations.

Beyond their litigation-related interventions, the IAAs also carry out significant information and awareness-raising activities targeting specific groups. As an example, we can take the dissemination of the "General Controller of Places of Deprivation of Liberty norm" [49, p. 88] within detention-condition litigation by publishing its findings promptly so they can be used by lawyers and judges. The institution also produces "prison fact sheets" focusing on the material detention conditions of penitentiary establishments, which are made available to judges and lawyers as a reliable and impartial database of prisons [50, p. 8]. The General Controller also intervenes at a structural level by contributing to the elaboration of litigation strategies. In its 2024 thematic report on the *Effectiveness of Remedies Against Inhuman Detention Conditions*[13]*, it provides a critical assessment of the new specific remedy introduced by Art. 803-8 of the Code of Criminal Procedure [51]*[14] *following the judgment of the European Court*

[13] The report is available in French: https://www.cglpl.fr/publications/leffectivite-des-voies-de-recours-contre-les-conditions-indignes-de-detention.

[14] This Article provides a specific remedy, distinguishing according to the legal status of the detainee: applications by remand prisoners fall within the jurisdiction of the Judge of Freedoms and Detention (*juge des libertés et de la détention*), whereas applications by sentenced prisoners are examined by the Sentence Enforcement Judge (*juge de l'application des peines*).

of Human Rights in the J.M.B. v. France case (30 January 2020), in which the Court found that French law lacked an effective remedy capable of putting an end to detention conditions contrary to Art. 3 of the European Convention on Human Rights.

The General Controller's analysis is based in particular on a sample of 699 judicial decisions issued under this provision. It reveals a heterogeneous interpretation of admissibility criteria. Approximately 11% of applications were upheld, this rate revealing significant territorial disparities. Even where applications are upheld, their consequences remain limited. Based on these findings, the report encourages the development of complementary litigation strategies, such as systematically lodging an emergency application for the protection of fundamental freedoms (*référé-liberté*)[15] before the administrative courts in parallel with judicial proceedings under Art. 803-8, or making greater use of actions for administrative decisions annulment (*recours pour excès de pouvoir*) capable of leading to structural injunctions. Such proposals reflect a shift from case-by-case litigation toward procedural tools capable of addressing structural violations.

1.2. Highlighting failures in the enforcement of judicial decisions

For the European Court of Human Rights, the right to enforcement of judicial decisions constitutes an integral component of the right to a fair trial and to an effective remedy [52]. Yet the persistence of non-execution or partial execution of judicial rulings, particularly in sensitive areas such as migration, detention, or policing, remains a recurrent concern. IAAs have therefore assumed a visible role in denouncing these failures and reaffirming the binding nature of judicial decisions. Through their pedagogical role of reminding and explaining the law, they can "confer on a judicial decision the authority of the accepted thing" [53, p. 727], which it sometimes lacks.

The Defender of Rights warns in its 2023 annual report that disregarding the enforcement of judicial decisions allows public authorities to "free themselves from the rule of law and undermine the authority of judicial institutions". It concludes that such practices contribute, in the long-term, to an erosion of "the stability of the judicial system and the public's confidence in justice"[16].

[15] The *référé-liberté*, provided for in Article L. 521-2 of the Code of Administrative Justice, is an emergency procedure. It allows an applicant to request that the interim relief judge urgently order measures to safeguard the exercise of a fundamental freedom in cases where a public authority has committed a serious and manifestly unlawful infringement. In the context of this procedure, the administrative judge must rule within 48 hours.

[16] The report is available in English: https://www.defenseurdesdroits.fr/sites/default/files/2024-06/ddd_rapport-annuel-activite-2023_EN_20240603.pdf.

Beyond *public denunciation*, IAAs also intervene more concretely in the supervision of enforcement, urging authorities to adopt the necessary reforms to comply with judicial rulings. Through their "legal power to know" and "power to publicise" [54, p. 52], they deploy what may be called dissuasive and persuasive forces. This power of denunciation takes diversified and increasing forms: opinions and reports, joint op-eds, alerts and warnings, but more effectively, via *urgent recommendations* that the General Controller of Places of Deprivation of Liberty may adopt – making serious violations immediately visible via publication in the *Official Journal* [55; 56] – and by the capacity of the Defender of Rights to issue a *special public report* if its formal notices go unheeded.

More precisely, IAAs may intervene again after the judge to amplify decisions that have become definitive, via mechanisms to *monitor jurisprudence*. The Defender of Rights participates in the *supervisory process* conducted by the Committee of Ministers of the Council of Europe. Although it did not explicitly inherit from the Mediator of the Republic the power to issue injunctions to a challenged entity to comply with a judicial decision, the Defender of Rights has nonetheless endowed itself with such competence *ex officio*, including through on-site inspections. During the monitoring of the enforcement of the *Moustahi v. France* judgment concerning unaccompanied minors, it intervened several times with the ECtHR's execution service [57]. In this judgement pronounced on June 25, 2020, the European Court of Human Rights found several violations of the ECHR, which arose from the administrative detention of two children, their expulsion from Mayotte to the Comoros and the conditions of their removal, following their arbitrary attachment to an adult who had no authority over them, as well as from the lack of effective remedies. Notwithstanding this judgment, in decision No. 2022-023 of 27 January 2022, the Defender of Rights observed that the situation of minors in Mayotte, and the practices affecting them, remain a matter of concern. In particular, this concerns the arbitrary attachment of minors to third parties and the alteration of their dates of birth for administrative detention and removal from the territory.

The Defender of Rights submitted its findings and analysis to the Committee of Ministers of the Council of Europe, relying on individual complaints and situations reported both by its delegate in Mayotte and by an association operating at the Pamandzi detention centre. It further noted that remedies remain ineffective, as several children have continued to be removed from Mayotte in disregard of their fundamental rights. The Defender of Rights also addressed recommendations to the Committee, inviting it in particular, to postpone its examination of the case and to request additional information and further measures from France in order to ensure compliance with the judgment.

Taking into consideration the observations submitted by the Defender of Rights, on 9 March 2022 the Committee of Ministers invited the French Government to provide updated information by November 2022 and decided to resume its examination of the case in June 2023. The Committee emphasized in particular the need to appoint legal representatives for unaccompanied minors, to provide information on the contested practices (administrative detention of children, expulsion from Mayotte to the Comoros following their arbitrary attachment to an adult), and to adopt concrete measures to ensure that all authorities in Mayotte (in particular the Prefecture) comply with the requirements of the Court's judgment: before any removal, verifying the identity of the minors, the exact nature of their ties with the adults to whom they are attached, and the effective conditions of their care upon return.

The Defender of Rights reiterated its observations in 2023 and 2024 and called on the Committee of Ministers not to close the examination of the case. In its decision No. 2025-068 from 14 April 2025, it underlined that since its previous observations in 2024, the persistence of a troubling administrative practice can be noted, consisting in the arbitrary attachment of minors to adults with whom they have no legal ties, for the purpose of placing them in administrative detention and removing them from the territory. This practice is identified in numerous decisions pronounced by administrative judges in urgent judicial review (*référés-libertés*) in 2023 and 2024 and highlights the inadequacy of the verification mechanism put in place by the Government. The Defender of Rights also regrets that the prohibition on the detention of minors, enshrined in the Law of 26 January 2024, will only enter into force in Mayotte on January 1, 2027. Furthermore, the Defender of Rights underscores the continuing failure of the authorities to comply with the right to an effective remedy. It notes in particular the enforcement of removal measures despite the administration's awareness that an application for urgent judicial review (*référé-liberté*) had been lodged, prompting the judge to order the return of individuals who had been prematurely removed. In light of the continuing systemic deficiencies, the Defender of Rights called the Committee of Ministers, as in its previous decisions, not to close the examination of the case.

Through these repeated requests not to close the supervision procedure for the execution of the Court's judgment, the Defender of Rights aims to increase pressure on the French authorities to ensure the incorporation into domestic law and practice of the necessary measures for guaranteeing the effective rights and freedoms of individuals in the same situation as the applicant, thereby ensuring that access to the judge leads to concrete and enforceable outcomes. The same strategy has been adopted by the

Defender of Rights in the framework of the supervision of the execution of the judgment *Khan v. France* of 28 May 2019. In this case, the European Court of Human Rights found a violation of Art. 3 ECHR due to the failure of the French authorities to care for an unaccompanied migrant minor living for several months in the Calais "Jungle". In its decision No. 2020-144 of 10 July 2020, concerning a third-party intervention on the execution of the judgment *Khan*, it is underlined that the case illustrates the difficulties faced by many minors in transit and the shortcomings of the national reception and care system for unaccompanied minors, which persist throughout the territory, both in the Hauts-de-France region and elsewhere. This situation has been shared by numerous stakeholders and is reflected in the work of the Defender of Rights, in particular in its December 2018 report, *Exiles and Fundamental Rights, Three Years after the Calais Report*. That report contains numerous recommendations which remain relevant.

The Defender of Rights highlights not only serious difficulties regarding the initial reception and the absence of access to accommodation or assessment, although emergency care is legally guaranteed, but also problems in access to judges and the enforcement of court decisions, leaving minors homeless for weeks or months. As the quality-of-care arrangements remain insufficient, and access to healthcare, socio-educational support, and schooling is not consistently guaranteed, the Defender of Rights invited the Department for the Execution of Judgments to identify the appropriate general measures required to remedy systemic shortcomings and prevent further violations of Art. 3 of the Convention. On 2 December 2021, the Committee of Ministers of the Council of Europe requested the French Government to indicate the concrete and specific measures envisaged to ensure the effective protection of unaccompanied minors in transit.

In the absence of concrete action by the French Government, the Defender of Rights reiterated its previous findings in decision No. 2022-178 of 8 December 2022 and called on the Committee not to close the examination of the case. In response to this request, the Committee asked the Government to adopt additional protective measures. On 6 March 2025, the Committee of Ministers decided to close its examination of the case, having considered that the measures required under Art. 46 of the ECHR had been adopted despite the new decision No. 2024-139 of 3 October 2024 of the Defender of Rights, highlighting the insufficient character of the measures adopted by the Government. The conclusion of the Committee of Ministers does not reflect the observations submitted by the Defender of Rights. This can be one of the reasons why its activity in the supervision procedure for the execution of the judgment *Moustakali v. France* is still so strong.

In the case of the General Controller of Places of Deprivation of Liberty, this supervision function has been reaffirmed in the area of detention-conditions litigation, where remedies multiply without real effect. In its 2024 thematic report on the *Effectiveness of Remedies against Inhuman Detention Conditions*, the authority conducted a detailed analysis of administrative and judicial case-law relating to the procedure introduced by the April 8, 2021 Law to ensure more effectively the right to invoke before a judge the breach of the right to dignity in detention, and arrives at a rather negative assessment. It recommends procedural reforms to strengthen follow-up mechanisms, such as the automatic imposition of penalties for non-compliance or the organisation of follow-up hearings after injunctions are issued.

Through these monitoring and amplifying functions, IAAs act as *auxiliaries to the judge*, extending the practical reach of judicial decisions and reinforcing their authority. However, as the following section will demonstrate, their contribution to the effectiveness of the right to a remedy extends beyond litigation support and enforcement mechanisms alone, encompassing a broader reflection on the social conditions under which the right to an effective remedy may be meaningfully exercised.

2. A systemic role: strengthening the foundations of effective remedy

The right to a remedy is only effective – despite being enshrined in law and despite the existence of judicial avenues – if individuals can exercise it. Possessing a legal entitlement alone does not guarantee that rights will be mobilised or enforced. Through their work, human-rights ombudsmen assess not only the formal existence of rights but also the real obstacles to their exercise, moving beyond legal formalism to address the social and systemic dimensions of justice (2.1). While identifying barriers that prevent recourse, these authorities simultaneously deploy compensatory and preventive actions to reinforce the effectiveness of the right to a remedy (2.2).

2.1. Assessing the state of the right to an effective remedy

Former French Defender of Rights Jacques Toubon described the institution as a *"seismograph of fundamental rights"* [58], capturing emerging problems and litigation often invisible to judges or public authorities. IAAs use this diagnostic role to challenge the classical, proceduralist reading of rights, which equates protection with the mere possibility of judicial recourse. In the traditional view, a right is considered protected if it can be invoked before a judge to sanction its violation or enforce its respect. This conception is a proactive one and assumes that individuals have both the will and the means to assert their rights [59, p. 368]. It is based on a defensive and

voluntarist interpretation of rights, in which the right to bring a case to court is inherent to the very notion of a subjective right [60, p. 85; 61, p. 233]. Professor Walline said that such a situation is explained by the fact that "the judging machine is inert by nature" [62, p. 160]. Consequently, the individual must possess both the desire and the means to activate the right to a remedy.

This conception is challenged in practice. Legal capacity does not guarantee that a person can claim his or her rights. The sociology of legal processes [63, p. 691] shows that perceiving an injustice, translating it into legal terms, identifying the competent institution, and pursuing a judicial claim are sequential steps that many individuals, particularly those in vulnerable situations, cannot accomplish without support. To the lack of knowledge about available remedies must be added the cost and complexity of legal proceedings, the procedural delays, or the emotional and psychological burden of litigation [64, p. 189], which discourage vulnerable people from bringing a claim. All these elements illustrate that the guarantee of the right to remedy is not sufficient. People must also be *socially empowered* to exercise and claim this right.

The real-world obstacles to the use of remedies cannot be seen by the judge. Their role is to find legal solutions in the claims brought before them by individuals able to assert their legal standing. On the contrary, given their status and mandate, the IAAs can move beyond the voluntarist and universalist vision of access to justice, seeking instead to identify *real-world obstacles* to the use of remedies. Their situational analyses are conducted through the detection of *non-recourse* scenarios, by working in context, through field visits, investigations, complaints received, and multidisciplinary studies. This plural approach allows the human rights ombudsmen to develop the capacity to analyse the *social use and non-use* of the right to a remedy and identify their reasons, their conclusions and recommendations being a key source of information, not only for identifying the problems at stake and their underlying causes, but also for informing reflection on the social, economic and political solutions required to address them.

For example, in the Defender of Rights' 2017 *Survey on Access to Rights*, it is highlighted that 12% of public service users abandon their administrative procedures, a proportion rising among socioeconomically disadvantaged groups [65]. In addition, two studies supported by the Defender of Rights and published in 2023 investigated why vulnerable populations fail to assert their rights, revealing underutilization of the economic vulnerability criterion in anti-discrimination law and barriers to social housing access for low-income households [66].

In turn, in the thematic report on the *Effectiveness of remedies against degrading prison conditions*, the General Controller of Places of Deprivation of Liberty conducted interviews with detainees, lawyers, judges, and NGOs to assess how remedies are perceived and function in practice, rather than in abstract law. In the conclusions, it can be seen that the vulnerable situations that prevent people from exercising their right to a remedy, which are the most often overlapping, are: deprivation of liberty, economic or administrative precarity, social, territorial, or digital exclusion.

These empirical insights allow IAAs to uncover systemic barriers to justice, demonstrating that legal entitlement alone is insufficient. The right to a remedy thus requires not only formal recognition but also social empowerment. By highlighting patterns of non-recourse and overlapping vulnerabilities, IAAs intervene at both individual and structural levels. Through this approach, they reconceptualise the right to an effective remedy as a socially situated and institutionally mediated process, rather than a mere procedural entitlement. Their systemic role lies precisely in this shift: from adjudicating isolated violations to addressing the structural production of rights deficits. This evolution amounts not to a displacement of the judiciary, but to a quiet redistribution of normative authority within the architecture of rights protection. Building on this diagnostic capacity, IAAs are then able to take concrete steps to enhance access to remedies, both by providing guidance and information to rights-holders and by promoting systemic reforms, thus bridging the gap between the identification of problems and practical action.

2.2. Acting preventively and providing compensation

If the right to an effective remedy is a prerequisite for the effectiveness of other rights, its own operationalisation depends on several mechanisms, such as legal aid and, even more fundamentally, on access to information about existing rights and remedies. IAAs thus perform an educational and informational role. The Defender of Rights offers, in that regard, assistance by "informing any person who contacts it about the nature and scope of their rights (access to knowledge of rights) and about the means to assert them (access to the exercise of their rights)" [64, p. 193]. The same pedagogical work is done by the General Controller of Places of Deprivation of Liberty, notably through the publication of a Guide for detained persons, available in prison libraries. Written in clear and accessible language, it enables detainees to understand and become aware of their rights and possible legal remedies. These efforts reflect a shift from a reactive, case-based approach to a proactive, pedagogical strategy. In its report on the *Effectiveness of remedies against inhuman conditions of detention*, the General Controller further recommended strengthening detainees' access

to legal information by introducing an "annual hour-credit allowing them to receive advice and legal support from a court-appointed lawyer outside any pending procedure", as well as the creation of a "turnkey complaint kit" to facilitate judicial remedies.

However, access to these non-judicial authorities may itself be difficult for the rights-holders. Accordingly, through a "going toward" approach, the IAAs seek to make themselves more accessible. Counterbalancing the judge's institutional distance, they emphasise proximity, for instance, through the network of territorial delegates of the Defender of Rights, the development of digital anti-discrimination platforms, and the establishment of free telephone lines accessible to detainees. Their referral procedures are direct, free of charge, and do not require legal representation, making them more accessible than courts, to the point that they are sometimes described as being "preferred to the courtrooms" [64, p. 194]. The Defender of Rights may be seized directly, without the need to initiate parallel judicial proceedings [67, p. 447], by electronic means, without intermediary, by any person who considers himself wronged in the operation of a public service or organisation, even for acts committed in the past. Likewise, although the 2007 Law did not formally require the General Controller to respond to complaints, the institution voluntarily created a dedicated complaints division to ensure systemic processing of correspondence.

Another crucial distinction lies in temporality. Whereas judges intervene after a violation has occurred, IAAs operate in a broader and more anticipatory framework, seeking "to act at the source of obstacles to access to the courts no longer for a single claimant but for the greatest number» [64, p. 202]. As the Defender of Rights has explained, this implies shifting from a "case-centred" approach to one oriented toward "public policy", acting not only from "below" through individual complaints but also "from above" [68, p. 14] through structural engagement. The preventive oversight exercised by the General Controller of Places of Deprivation of Liberty exemplifies this logic*:* rather than responding solely to isolated malfunction, it identifies structural deficiencies and promotes systemic improvements. Similarly, in the field of anti-discrimination, the Defender of Rights has advocated the development of class actions capable of exposing systemic patterns of inequality and prompting courts to address discrimination in its structural manifestations [69]. Yet it also emphasises the need to go beyond litigation to engage institutions and social actors in a broader transformation of practices and behaviours [70].

Beyond oversight, prevention, and strategic litigation, IAAs also exercise a form of normative entrepreneurship by formulating concrete legislative and regulatory proposals aimed at remedying the systemic deficiencies

they identify in the course of their activities. Their recommendations do not merely call for better compliance with existing law; they frequently suggest amendments to statutory provisions or regulatory frameworks in order to address structural obstacles to the effective enjoyment of rights. In this sense, they operate as intermediaries between lived experiences of rights violations and the legislative process.

In the field of immigration law, the Defender of Rights has repeatedly intervened where unlawful or excessive administrative practices – particularly within certain prefectures – significantly hindered access to residence permits, including for individuals legally entitled to them. Through targeted recommendations, it has contributed to the clarification of legal requirements relating to proof of civil status, the production of valid passports, or acceptable evidence of domicile. In some instances, prefectural practices were amended following its interventions. In others, the Ministry of the Interior endorsed the Defender's analysis and disseminated clarifications to ensure more uniform and rights-compliant implementation nationwide [71]. These interventions demonstrate how soft-law instruments may effectively reshape administrative practice.

More significantly, the Defender of Rights has, on several occasions, advocated legislative reform. A notable example concerns the conditions for granting residence cards to beneficiaries of the disability allowance (Allocation aux adultes handicapés – AAH). The discriminatory effects of applying standard resource requirements to disabled foreign nationals were repeatedly denounced by the Defender of Rights. This mobilisation ultimately contributed to the 2016 legislative amendment exempting this category of beneficiaries from the resource condition for access to a residence card [72]. Although certain limitations persist, this reform illustrates the institution's capacity to translate structural findings into statutory change.

This role of promoting fundamental rights constitutes the most original part of the ombudsmen's oversight, the one least reducible to traditional juridical review. IAAs are thus able to free themselves from constraints weighing upon the judge – whether temporal, procedural, institutional, or political. If the judge cannot do everything [73, p. 2105], IAAs can perhaps do more. Unlike the judge's retreat behind the argument of the separation of powers, refusing to act as judge-administrator, IAAs do not hesitate to assume the role of "political entrepreneur" [74]. The absence of *res judicata* authority in their positions thus becomes "the strength of these weak institutions" [75].

This proactive posture, however, is not without criticism [76]. Public authorities and certain scholars have questioned whether such interventions

risk blurring institutional boundaries. The 2020 parliamentary information report on the Defender of Rights illustrates. Professor Bertrand Mathieu argued that its "interventions before judges are sometimes too partisan and used as an instrument to transform the law" [76]. A role he considers to belong to the legislator rather than to judicial proceedings. Similarly, the former President of the Administrative Court of Strasbourg described the Defender of Rights' observations in litigation as "para-judicial positions" insufficiently connected to the constraints of adjudication [76].

Although such criticisms are not entirely unfounded and may fuel legitimate debate aimed at improving institutional balance in the interest of litigants, they do not undermine the essential contribution of these authorities. On the contrary, their interventions play a crucial role in ensuring that fundamental rights are effectively protected, that public authorities remain accountable, and that the rule of law is substantively upheld. By combining facilitation, prevention, structural analysis, and normative initiative, IAAs contribute to a more comprehensive and socially grounded understanding of effective remedies. Their value, therefore, extends beyond individual cases and contributes to the broader functioning of a democratic society governed by law.

Conclusion

In France, Independent Administrative Authorities (IAAs) have gradually emerged as central actors in the protection of fundamental rights, reshaping traditional models of legal oversight. While the right to an effective remedy has long been conceptualised primarily through the judicial enforcement, the French experience reveals a more pluralist architecture of the rule of law. In this system, IAA complements, supports, and sometimes strengthens the role of the courts. Far from constituting a circumvention or dilution of judicial authority, their interventions reflect a redistribution of functions within the legal ecosystem.

Through their para-contentious role, IAAs such as the Defender of Rights, the General Controller of Places of Deprivation of Liberty act both as facilitators and guarantors of judicial effectiveness. They assist individuals in navigating complex legal pathways, provide technical expertise to judges, and alert public opinion to shortcomings in the enforcement of judicial decisions. These contributions enhance the procedural dimensions of justice – accessibility, transparency, and fairness – thereby reinforcing the legitimacy and authority of judicial outcomes.

Beyond litigation support, these institutions also perform a meta-contentious function. They diagnose systemic flaws, propose legal and procedural reforms, disseminate a culture of rights, and promote strategic

litigation to address normative gaps. Their intervention goes beyond identifying dysfunctions or encouraging compliance: IAAs formulate concrete legislative and regulatory proposals aimed at correcting structural shortcomings revealed through complaints and field investigations. In this capacity, they serve as institutional relays between social realities and the law-making process, contributing to the evolution of positive law. Their actions thus support both individual remedies and structural transformation of the justice system, making it more responsive to the social realities it is intended to regulate.

Crucially, IAAs embody a non-adversarial logic of rights enforcement. Operating through persuasion, expertise, and visibility rather than sanction, they expand the spectrum of protection without undermining judicial sovereignty. Their soft-law instruments – recommendations, opinions, reports – do not carry binding force but often acquire significant normative weight, especially when they are echoed in case-law or incorporated into legislative reforms. In this way, IAAs contribute to a "reflexive rule of law" [78, p. 215][17], which is open to institutional innovation, sensitive to context, and capable of adapting to the evolving demands of rights protection.

However, this model has inherent limits. First, despite their constitutional or statutory mandate to protect fundamental rights, neither the Defender of Rights nor the General Controller of Places of Deprivation of Liberty has the power to refer legislation directly to the Constitutional Council. In practice, these authorities frequently identify issues in the interpretation or application of the law, normative gaps, and potential constitutional concerns. The absence of a direct referral right contrasts with several European systems where ombuds institutions possess standing before constitutional courts. Granting such competence could enhance the consistency of their mission and strengthen their institutional role.

Second, the effectiveness of IAAs depends structurally on the persuasive force of soft law. Outside judicial proceedings – where their analyses may gain binding effect through court decisions – their recommendations do not impose legal obligations on political authorities. The implementation of the reforms relies on the executive or the legislature to act. While this limitation preserves democratic balance, it can also constrain timely and comprehensive reform.

[17] The "reflexive rule of law" refers to a legal system capable of self-assessment and adaptation, taking into account the practical effects of norms and social obstacles that may hinder the exercise of rights, in order to strengthen the real-world effectiveness of legal protection. This concept is not yet fully standardized in mainstream legal doctrine. It has been used, for example, by B. Archibald, who argued that hybrid and restorative justice models reflect a reflexive approach to the rule of law in deliberative constitutional democracies.

Nevertheless, the French model offers a significant contribution to international debates on access to justice and the diversified accountability mechanisms. In contexts where democratic institutions face growing scrutiny and rights violations persist despite formal guarantees, the role of IAAs is particularly relevant. Their capacity to operate at the intersection of law, society, and governance positions them as indispensable collaborators of the judiciary, as well as independent watchdogs, advocates, and reformers.

Ultimately, the recognition of IAA challenges the traditional hierarchy of legal actors. It encourages a more networked and pluralist vision of the rule of law, in which multiple institutions, each endowed with specific tools and legitimacy, work collectively to ensure that rights are not only proclaimed but also effectively realised.

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