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Eastern Partnership seminar 9, 10, 11 May 2012

The role of the Ombudsman in reinforcing good governance and Human rights

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Wednesday 9 May 2012

Opening ceremony

Dominique BAUDIS
Defender of Rights, France

Irena LIPOWICZ
Human Rights Defendeur, Poland

Dominique BAUDIS explains that the Defender of Rights focuses on safeguarding rights; that is, establishing and driving independent institutions. These institutions are widely diverse between one country and the next, whether in terms of language, political traditions or organisation. Some of these institutions take care of children's rights, others security or issues of gender equality.

Four of these functions have been grouped together in the institution in France, the Ombudsman, children's rights, discrimination and security. Although this partnership is focused on how each country implements these missions, there are certain fundamental criteria that must be ensured, including independence and impartiality.

Irena LIPOWICZ asks why there is this cooperation between Poland and France ? Freedom and human rights were always very important in Poland, but this project enables the Defender of Rights to better understand how complex it is to change the system, and the main problems faced by the countries in the partnership. This unique connection between the experience of France and Poland in this regard makes this project very effective. The experiences of each country in this programme can bring something new and act as an inspiration.

The next seminar will be held in September 2012 in the office of the Human Rights Defender of Poland, and will deal with the ombudsman and the judiciary, protection of children's rights, elderly people and people with disabilities in labour law. The proposal for the Eastern Partnership summit in 2013 involves discussing the role of human rights institutions in the EU.

It is very important to view the goals and principles as common achievements but also as common questions for the future, because this work is never done. The past problems and future problems are not the same, so the human rights questions also differ; what can be taken from this conference is other perspectives which can be used in the daily work of these organisations.

Ethics of the Security

Françoise MOTHES
Deputy in charge of the ethics of security, Defendeur of Rights, France

Estelle FAURY
Rapporteur ethics of security, Defendeur of Rights, France

I) Presentation and thematic activities

Françoise MOTHES states that the Defender of Rights has taken up the activities of the former National Commission for the Security Ethics as well as all the different administrative staff. The former National Commission was created in 2000. The ethics of security has become more and more important since the Defender of Rights office was created, both because of legal provisions and submissions which have been referred to it. Any person who believes they are a victim of ethics misconduct can contact the office, and it now has a large number of submissions, not because there are more cases of misconduct but because the law now ensures that more people can make submissions.

Estelle FAURY states that the regulations govern proper modes of conduct by people who are in charge of security; from national and municipal police forces, prison guards and private security guards. The Defender of Rights office brings together the work of several rapporteurs, who are basically investigative judges who look into the cases which are submitted. Investigative authority is not unlimited, but once they have secured the necessary permissions from the General Prosecutor, the police authorities, etc, they can hold hearings involving everyone present at the time of the incident, and a report is drawn up.

Subjects of complaint can vary from conditions of custody, the conditions under which searches are conducted at airports, or deaths following law enforcement intervention. The rapporteur will then draw up a draft decision, there will be an analysis of the investigation, and in the case of an identified lapse, recommendations can be made. The Defender of Rights committee issues an opinion for adoption as a final decision, which is then given to the relevant authorities.

The authorities will then have a certain time in which to report on its actions to implement the recommendations. In the event that the follow-up has not been carried out, a special report is issued and made public along with the reply, and disciplinary measures are carried out where necessary.

The April 2011 law on custody took up the recommendations of the National Commission on Ethics of security (NCES) on body searches. There was also a major reform of correctional facilities in 2009, again largely taking up the recommendations of the NCES. There was one case where a complainant had a dispute with a pharmacist over his prescription, and in this case the Defender of Rights concluded that the police used disproportionate force. Another case related to an injury to a minor by a flash-ball, a supposedly less lethal weapon during a demonstration. The investigation determined that its use was disproportionate, and the Defender of Rights recommended the weapon not be used against demonstrators; further, disciplinary measures were taken against the person who used the weapon.

The Defender of Rights will strive to closely follow what the responsible authorities were asked to do by the former NCES as well as the Defender.

Françoise MOTHES adds that the Defender of Rights is the chair of the three colleges on security ethics, discrimination and child protection. Françoise MOTHES is the vice-chair, along with two other deputies. Theses committees are composed of eight people.

A PARTICIPANT asks how do the Defender of Rights exercises authority over private companies.

Françoise MOTHES replies that it works the same way for private companies. It is true that responses vary depending on the company, because some are less well developed in terms of training, but there have not been many cases so far. There is a hearing with the security officers and the alleged facts are investigated, including police reports.

Secondly, the Defender of Rights was created at the same time as the National Commission for private security firms, CNAPS, which started operation in January 2012, so they will have to see how competences will be shared.

A PARTICIPANT enquires whether the Defender of Rights has the power to force private security companies to comply with its recommendations.

Françoise MOTHES responds that the Defender will have to see how it coordinates with CNAPS, because it can ask the company director to take disciplinary measures, as this is feasible within the framework of the law.

A PARTICIPANT asks what Ms. Mothes sees as the main obstacle for the office's activity, and secondly, whether it has regular meetings with the heads of security companies or the police, not to discuss concrete cases but to influence policy.

Françoise MOTHES explains that the recommendations by the Defender of Rights are generally quickly implemented by the Interior Ministry, but it is more difficult where disciplinary measures are concerned. Disciplinary and criminal issues have to be decided on separately, and the Ministry always says that disciplinary measures will not be decided on until criminal proceedings are concluded. Sometimes the Ministry does not want to initiate proceedings against its own officers, and there is often a period of years before these commence. However, the Defender of Rights office believes that its arguments can prevail where families feel their rights have been infringed upon, and thinks it is better for the Ministry to apply sanctions immediately rather than waiting years, as otherwise people can lose trust in the institutions.

Secondly, the office has met with representatives of the police trade unions, both at lower and administrative level, and with the Ministry of the Interior, where it has insisted that disciplinary sanctions be applied irrespective of criminal proceedings.

Irena LIPOWICZ enquires whether the Defender of Rights has any publications on the violation of ethics in emergencies.

Françoise MOTHES confirms that the Defender of Rights will soon publish the annual report, where the cases that have been dealt with and the conclusions drawn from them are summarised.

A PARTICIPANT asks about the limits of the Defender of Rights' jurisdiction in these cases.

Françoise MOTHES states that they need authorisation either from the public prosecutor or the investigating judge in order to hold hearings. Charges were levied in the case of the pharmacy arrest, and in that case jurisdiction was not limited. The Defender of Rights has the power of making on-site verifications, but cannot make searches. It cannot investigate cases that the judicial authorities are looking into. Regarding statistics, the 185 cases were submitted to the NCES in 2010 and 51 in 2011. 72 cases were submitted to the Defendeur of Rights from May 2011.

A PARTICIPANT enquires as to who from the Defender of Rights office takes part in hearings, and what is the legal status of that representative.

Françoise MOTHES answers that the Defender of Rights usually tries to have a hearing with two rapporteurs so that all the questions are considered and to reassure the participants. Regarding legal status, the deputies of the Defender of Rights have criminal impunity in terms of executing their responsibilities.

A PARTICIPANT enquires whether human rights training is offered by the Polish Defender of Rights.

Irena LIPOWICZ states that the Polish Defender of Right does not have specific training on professional ethics for the police, because there are no specific laws linked to police functions. Last year it participated in a week-long training course conducted by the police commissariat, and this gave it better knowledge of the problems faced by police and in turn enabled it to work more effectively.

A PARTICIPANT clarifies that the question concerned whether the Defender of Rights conducted training for the police.

Estelle FAURY responds that the Defender regularly holds training courses for the police and penitentiary facilities, because it needs to work not only with the administrators and managers but also with the officers themselves.

A PARTICIPANT enquires whether the French Defender of Rights works with civil society, for example with NGOs.

Françoise MOTHES replies that they have worked on several issues with several NGOs and associations, and do this on a regular basis. Associations and NGOs in France have complained a great deal about ID checks, because they believe that stopping people on the street is unjustified. The Defender of Rights office will be meeting with these associations soon, and has been working on this issue for some time.

A PARTICIPANT comments that the Ukrainian Constitution states that suspects cannot be held for longer than 72 hours without a court decision, yet there is a long-standing practice of holding homeless or unregistered people in custody for up to 30 days. This regulation has been used to put pressure on people to give information, and it was deemed unconstitutional by the Constitutional Court. A student was found dead in custody in 2010, and the police inquiry stated that he had fallen; however, the Ombudsman conducted a separate enquiry.

The Ombudsman does not need court permission to conduct this kind of investigation. The Ministry of Internal Affairs claimed that this was an accident, and the court agreed, but the Ombudsman was able to hold an investigation over several months, at the end of which a number of people were found guilty of exceeding their powers.

II) Body Search

Carmen MARIN
Advisor of Security and Justice Area, People's Defender, Spain

Estelle FAURY
Rapporteur ethics of security, Defendeur of Rights, France

CARMEN MARIN states that the Spanish Constitution established that the High Commissioner of Parliament regulates the Office of the Ombudsman, who is appointed to defend basic rights and public freedom, and to ensure that the public administration acts in accordance with the Constitution. Its authority covers all bodies and authorities of central government and autonomous communities as well as local administrations, and may also intervene with agents appointed by these bodies. The justice and security area investigates complaints about military administration and citizen safety.

This is based on several cornerstones. The principle of caution covers both false accusations, exaggerations and ideologically-based attitudes, and also police abuse in all manifestations. One interesting practice is gathering witness information in any case of abuse by law enforcement officers, which has enabled nuance in matters where it is difficult for the police to recognise that boundaries have been overstepped.

Spanish law differentiates between degrees of violation of the right to physical integrity, and in this respect the interventions can be described as mild or serious. The first has to do with actions undertaken in the name of law or public safety. The law on public safety has to be applied strictly, in such a way that maintaining order does not involve violating citizens' rights. The law enables a police officer to search for hidden evidence of an offence. In addition, officers can carry out the necessary checks to prevent the use of weapons on roads or in public places.

When police officers have to perform searches on public roads, they are required to do so in a discreet place. The constitutional court has determined that frisking a suspect when a certain quantity of drugs is discovered is a legitimate action. Secondly, a vehicle inspection and search of a suspect do not require judicial authorisation. The second kind of search takes place in a police station. Detention is envisaged as a precautionary measure which can last no longer than 72 hours without charge. The first issue in this context is that of criminal arrest, where detainees must be informed of their rights immediately. A detainee may be registered and searched in a superficial way.

The practice of strip searching must be decided on by the arresting officer in accordance with the following rules: the decision to make a strip search and its severity can only be made to protect the detainee or the officers with the purpose of recovering objects or evidence determining culpability. It must also be based on the circumstances of detention, for example, detainee attitude, and a determination by the officer that the detainee has something which may threaten his body integrity, and there are no other ways to secure this object.

This resolution must be recorded in the police report and the detainee book, along with its causes. Strip searches are always performed by staff of the same sex in a room separate from other detainees.

The performance of this kind of search, according to Spanish law, may affect the right of movement, physical integrity, and privacy, and therefore judicial authorisation is

required. They must be performed by qualified physicians provided the detainee consents; if consent is not given, judicial authority must be requested. The Supreme Court has decided that the presence of a lawyer is not necessary when such inspections take place.

Inmates undergo a medical check-up in the first 24 hours, and are then interviewed by various qualified staff members in order to identify social and family circumstances and to decide on security measures. Some of the inmates accused or convicted of terrorist crime have complained of searches or frisking performed on visitors; from 2009 onwards, all those visiting such prisoners, including minors, have to undergo physical searches in addition to electronic screening. However, in 2010 instructions were issued regarding limitations of searches on certain visitors, namely minors, the elderly, and those with physical or psychological disabilities, requiring prior briefing sessions to be held.

Searches are conducted on inmates and their cells in accordance with the prisoner's rating. Strip searches are performed on the authorisation of the senior duty officer. A written record is kept of the measure and its results, with the prison director being notified; no provision is made for notification to the courts. The prison director may ask the competent courts for authorisation of an X-ray search if there is still suspicion.

The criminal code specifies 18 as the minimum legal age for imprisonment, and a law was enacted in 2000 to regulate the criminal liability of juveniles. This distinguishes between offences carried out between 14-18 and those under 14. Rooms are searched by security staff by the inmate's presence, either randomly or in response to suspicious circumstances, and a record is made. Personal searches involve frisking only, and any banned items are confiscated. Personal searches are carried out by two staff members and an educator whenever the inmates return from a trip outside. Strip searches must be authorised by the director, with an official document recording it and its results; these searches must be notified to the juvenile courts.

Estelle FAURY indicates that a significant number of complaints have been brought to the National Commission on Ethics of Security (NCES) about body searches, and it was realised that strip searches were carried out almost every time someone was placed in custody, without any legal reason. The NCES had put forward recommendations for a legal procedure to be followed, and the April 2011 law ultimately went beyond these recommendations.

Before this law, searches were covered by a circular from the Interior Minister issued in March 2003, referring to the dignity of the person in custody, which was clarified by an intervention by the NCES. The criteria required that strip searches not be randomly conducted, but only in situations where someone was trying to hide something that could present a danger. The behaviour of the person during the arrest also had to be considered, as well as other indications as to whether a more in-depth search was required.

Police often defend strip searches on the basis that they were acting on orders from the head of service. One example of this was where a young woman, suspected of being an accomplice, was arrested and frisked, but then fully strip searched. The Commission considered that this measure was unjustified. There was some improvement before 2011; a note from the Director General of the national police was issued giving strict criteria for strip search and handcuffing. Currently, the measures are as defined by the Minister, and do not include strip searches. Another point concerning the prohibition of strip searches is that they should still not be systematic even if circumstances warrant their being carried out in one instance. There have not been enough cases so far to judge how the current measures have been operating.

There has been some progress with regard to correctional facilities. The Penitentiary Law of 2009 banned systematic strip searches; prior to 2009, these were covered by various decrees and texts. Searches were permissible where the security of an establishment called for it, but this led to a situation where they were regarded as systematic. There was one case where a strip search was carried out on the decision of

the guard, whereas permission from the relevant prison authority would have been required.

However, two years after the Law came into effect, there are still cases where strip searches have been carried out systematically, such as in the case of cell searches, and the NCES have recommended that this not be done. The Defender of Rights has worked on an agreement with the General Controller to devise common recommendations to prevent abuse of full-body searches.

A PARTICIPANT enquires as to who decides whether a search is necessary and if further authorisation is required.

Estelle FAURY replies that the officer of the judiciary police is formally responsible, but it is often the case that the detention officer is instructed to do so by the supervisor.

Carmen MARIN adds that everything has to be registered in the police record and may be inspected afterwards. Strip searches are ordered by the chief police officer in the station.

A PARTICIPANT asks whether there have there been any submissions about searches by private security forces at airports.

Carmen MARIN states that searches by private security are supervised by the Civil Guard, as they are regulated by European law.

Estelle FAURY further explains that the Defender of Rights has been contacted by people about pat-down searches and body scanners, but that there have not been any complaints about more invasive practices.

Irena LIPOWICZ states that it is a good practice to meet the Interior Minister every six months, because sometimes the Defender of Rights discovers cases where officers have not sought authorisation. Secondly, it was not able to reach common ground with the Minister concerning the gathering of personal data and regulations for detention centres, but once they initiated a public discussion about these issues, the Minister and Government saw that public opinion was on the Defender of Rights' side, and that it would be better to accept certain measures. Nevertheless, there were certain measures where agreement could not be reached, and they had to resort to the Constitutional Court. However, the experience shows that this process of discussion is a constructive one. It would be dangerous to have a close relationship with the Ministry, but it is possible to speak openly about these problems.

Françoise MOTHES adds that there must be this dialogue, but the work of the Interior Ministry is very difficult, because they have to manage all the police forces. The majority of police do a good job, and the Defender of Rights needs to protect them because they have to cope with difficult responsibilities. However, the Ministry also needs to ensure that they do not exclude the citizens whose support is needed.

Children's rights protection

Marie DERAIN
Children's Defender, Deputy, Defender of Rights, France

Elmira SULEYMANOVA
Commissioner for Human Rights, Azerbaijan

José Manual Sánchez SAUDINÓS
Head of the Cabinet of the Deputy Ombudsman, People's Defendeur, Spain

David POTIER
In charge of educative and social actions, Centre for children's protection institutions, France

I) Children in institutional care

Marie DERAIN explains that the 2007 law reorganised the competencies of those responsible for protecting children's rights. Previously, the main authority responsible was the juvenile and children's judge; under the law, they were delegated to the departmental level, and the financial aspect to the departments' councils. The judge will only intervene in cases where there are specific difficulties, such as opposition from parents. There are two systems of placement, the first being administrative, which is conducted by the department's council and requires parental authorisation the second being judicial placement where parents do not cooperate.

The Children's Ombudsman decided to compile a report on this topic because the ENOC network began to collect examples of good practices; this gave a framework and points of reference for this report. There are about 250,000 children who benefit from protective measures, and about 150,000 are placed, out of 15 million minors in France, and this may not seem like a large number, but it is an exceptional situation, and it is necessary to make sure their rights are safeguarded. Most of the children are in foster families rather than in detention.

The fact that there are two parallel systems complicates matters, and it is essential to make sure that there are effective points of contact between the child, their parents and all the other actors. The Ombudsman recommended more cooperation between the different agencies and for the public authorities to organise at national level, as there is a great deal of inconsistency in the application of these laws. Secondly, institutionalisation can undermine children, and it is important to make sure there is more stability. Foster children should be able to take part in the decisions that concern them, and we need to ensure that they are able to have education and a social life. The links between child and family have to be maintained, and it is not an easy task to ensure this happens.

Finally, the child protection system needs to plan for the end of placement, meaning that provisions are needed to help the child go back to their family, in terms of a progressive system which prepares both children and parents. It was also important to make sure that the Ombudsman's recommendations, while giving priority to children, did not neglect parents.

A PARTICIPANT points out that, according to legislation, a child may express his or her opinion in court from the age of 10, and asked from what age a child's opinion is taken into account in France.

Marie DERAIN replies that it depends on the topic and the maturity of the child. The law mandated the age of 13 for a long time, but now in youth court children are listened to systematically unless there are specific issues. Regarding placement or separation, they are considered from the age of six.

A PARTICPANT enquires how socialisation is dealt with in the context of these establishments.

Marie DERAIN states that there are difficulties about children coming into establishments who are not placed there.

Irena LIPOWICZ asks about the arrangements for interviewing children.

Marie DERAIN explains that judges mostly hear children in their offices. Police stations have special rooms set up for the purpose, and psychologists can discreetly observe the conversation, especially in abuse cases.

1) Azerbaijan

Elmira SULEYMANOVA indicates that a third of the population of Azerbaijan is under-18, and there are 1,657 children in institutions, 256 of whom are disabled. Children's rights are protected by a number of institutions, as well as the Committee on Family, Women and Children's Affairs. However, there is only one Ombudsman, and the Committee on the Rights of the Child recommended that a division be created to deal with children's rights. The Committee's activities involve conducting regular monitoring of children in institutions, preparing proposals for improving legislation, conducting awareness raising campaigns, and cooperating with State bodies and international organisations.

Azerbaijan signed the optional protocols of the CRC on child trafficking, pornography, prostitution, and involvement in armed conflict in 1992. The Constitution and laws also protects children's rights, with the legislation was amended in line with international treaties. The Law on the Rights of the Child was adopted in 1998, defining the rights and freedoms of children, the main principles of State policy, and the tasks and responsibilities of State bodies.

Many State programmes have been adopted, including the one on poverty reduction and sustainable development for 2008-2015. The poverty level has been reduced from 46% to 7%. Another programme was to declare 2009 the Year of the Child, with all State bodies focusing on this subject. Other programmes were organising education for children with physical and mental disabilities and the provision of information technology. The institutionalisation programme has been implemented from 2006, aimed at transferring children from State institutions to family environments.

These children have been closely monitored, and it was discovered that not all were living in good conditions. It was determined that the majority of these children came from broken families or families which provided inappropriate conditions. The Commissioner has recommended that financial support for these children should be strengthened, and that they should be given an allowance after the age of 18.

The Commissioner's office are organising a survey on disabled children with healthy parents and vice versa, because in those cases many cannot continue in education. It also initiated a survey on violence against children, which involved bringing international experts to observe State institutions. A UNICEF study was initiated out last year on disabled children in institutions, and this is ongoing. Furthermore, the Commissioner is also monitoring the quality of inclusive education. Some principals have been removed from

their positions because of cases of violence against children, and a hotline has been set up so that children can contact the Commissioner's office.

The CRC encourages the State parties, disseminates the Convention among vulnerable groups and provides training on child rights, but to address the issue of human resources, the Commissioner's office have implemented a system of hierarchical education in the schools and institutions. Some psychotherapists and other therapeutic staff have also been included in the staff of these institutions.

2) Spain

José Manual Sánchez SAUDINÓS explains that the 1978 Spanish Constitution gave a new legal framework for child protection; Article 14 recognises the fundamental rights of families and minors, especially children, in accordance with international treaties. The text sets up a mixed system, based on cooperation between the public and private spheres and sharing responsibilities between the family and public administrations. The family is responsible for the education and upbringing of children, though public administrations are obliged to ensure that this happens. Therefore, the public administrations have to be able to act alongside other bodies responsible for the rights of children in order to ensure children enjoy the protection and rights due to them.

The authorities use different measures, including administrative guardianship, and the Defender of the People has a parliamentary mandate to deal with problems involving children's rights. Many reports have been drafted with regard to minors, particularly the 1991 report on children in detention and the 2002 report on penal responsibility. There have also been reports on school violence and abuse from 2000-2007.

Recommendations are given in the Defender's end of year report and submitted to Parliament, and some of these have been implemented, particularly in 1986 and 1996 on legal protection. Certain issues have encouraged the Defender to open a new investigation office to look at the children with behavioural issues in detention.

These children need specific attention due to their problems, because the circumstances are not well adapted to their needs and because they may infringe on the rights of others. The measures that are taken cannot be framed in the context of punishment, but instead be placed in a situation that emphasises protection of their rights and differentiates adolescents who may need rehabilitation as a consequence of criminal actions. Families which are faced with these problems are most often a danger to themselves and those around them, and the administration needs to intervene to protect the children.

The Defender's office needs to focus on families and the minors themselves, which is why the institutions need to ensure they focus on rebuilding these ruined homes. Once it was discovered how complex the situation was, the Defender's office decided that all autonomous regions of Spain needed to do this type of investigation; hence, the office have ensured that all the regional institutions are involved. 27 of the 58 centres have been visited personally by the Defender on the basis of complaints received about them and information provided from the regions themselves.

The conclusion was to ensure that the centres function well. They need to be managed by professionals, to be devoted to the children, and to ensure that they prosper. Some of the visits have highlighted breaches of children's rights, such as inappropriate medical treatment and disproportionate sanctions. Some of the children suffer from physical or psychiatric problems, and rehabilitation rather than sanctions are required.

Some institutions have not yielded the expected results, such as financing, application of disciplinary measures, healthcare, the role given to children in decision making, and training. Pedagogy cannot be confused with criminal law, but some of these centres often just apply sanctions to the children. The most difficult aspect is resort to containment,

certain drugs and educative measures. Isolation could have very serious consequences for the children. Personnel often lack appropriate training.

A number of complaints have been received about the use of psychiatric medication in institutions. Such medication must be appropriate to the diagnosis, carefully monitored, applied for as short a term as possible, and applied only by qualified medical staff. Medicating problems is a way of preventing valid solutions from being developed.

Children have a minimal role in decisions concerning themselves, and when they reach majority they do not have the tools they need for a successful life. The law requires that children should have a right to freely express their opinion, and we have to guarantee these rights because they are citizens.

What happens after the placement? Children often find themselves in the street with no resources, because after the placement they find themselves with other problems. Considering the problems observed in these centres, this is not surprising. These children need to know that their lives will have meaning, that their rebellion is part of their story, and they must feel that their stay in the centre will help them. It is the Defender's duty to give them this opportunity. Therapeutic intervention is essential in the majority of cases, but it is our responsibility to educate children using psychological and pedagogical means, as opposed to penal ones.

The conclusions in the report led the Defender to put forward various recommendations, among which are the creation of indicators to evaluate programmes of intervention. The current model of specialisation in psychiatry and psychology has to be revised in order to include child psychiatry and psychology. A system has to be established that makes it possible for minors to file complaints and make claims. The regime for offences and sanctions has to be specified in accordance with the applicable law, and the use of force to restrain a minor must be prohibited unless all others have failed.

Furthermore, protocols of intervention have to be adopted, including measures of physical or medical restraint mentioning the roles of each person responsible, and the reports being submitted to the public authority. The duration of isolation has to be as brief as possible, and prohibited as a regular punishment.

3) Examples

David POTIER states that most children who are placed at the Centre are associated with private, non-profit associations. The Centre was created in 1947, and today manages six establishments in different categories. These include the social children's homes for adolescents and the kindergarten for children under three. There are meetings with psychologists to create communication between the parents and children, some of whom are institutionalised. There are foster families, and there is a specialised prevention club with so-called street educators, working in the most sensitive neighbourhoods. There is also the social centre for children from 3 to 18 with behavioural difficulties.

The aim is to protect children and families, promote professionalism, and reform how situations are handled, because it is important to be able to react to people's needs quickly. Social action law was reformed in January 2002, in order to put the user at the heart of all actions taken by the Centre. The January 2010 law says that users will have free choice of the services provided. This poses some problems, because a judge has to make the decision to withdraw a child from a family, and the child might not agree with that. Before the Centre hosts a child, the team meets with the family and the child so that they can visit the facilities and meet the various professionals involved, and the family and the child then have a period in which to consider whether these provisions would be suitable.

The rights to dignity, physical integrity, privacy and social life are not so easy to respect on a daily basis. For example, the Centre accommodates all religious concessions within its structures. It is very complex to organise facilities to do this; however, we endeavour to

do it. The Centre also makes an effort to allow children to participate in activities outside the establishment, because many of these children feel isolated from others because of their placement. Almost all of the children participate in extra-curricular activities and other types of recreation, even if this creates organisational challenges; we adapt to them and not the reverse.

A child's physical privacy has to be respected, because the structures are mixed, and girls and boys sleep in separate rooms irrespective of age. Staff has to knock before entering a child's room, and wherever there is an issue relating to privacy, there have to be at least two adults present. Very few children are happy at being placed, and staff has to make it clear to children that they are not going to trick them to get information from them.

This was the third right identified in the law of 2002. The Centre has to work out the proportion of educators to children that will work the best, and the person who keeps track of the child's placement is the one who will draft reports, talk to the parents and take the child to school. There is a turnover in terms of staff scheduling during the year, so a child might not see that staff member during the year but knows who they are. The law has formalised accompaniment, requiring a contract to be drawn up where the objectives are specified as well as the activities and accompaniment provided.

The Maison d'Enfants has 20 children, and one has to be very careful when talking to a child about their private life, because one does not want other children to overhear. It is easier for a child to verbalise when playing, so within the structures the Centre is developing collective and individual activities to facilitate exchange. Confidentiality also applies to anything that is written, and only those with authorisation can access the files, so more training is provided as to how to draft reports.

The children need a family, and the position of the association is that a placing has to be the exception. It is becoming much more infrequent for judges to strip parents of their authority, so all decisions concerning the child must be taken with their consent. This is very difficult to manage on a day to day basis, but it is these details that tend to strengthen the child's ability to exercise their rights.

Children have to go to school until age 16, and so the Centre has to make sure this happens, and that children go to schools that are adapted to their needs. This is difficult to achieve in practice, because the parents might not agree with the choice of school; in this case the Centre will not sign the child up, because it is up to the parents. However, if this is against the child's interests, the magistrate can compel this to happen.

It is essential to safeguard children's rights, but at the same time it is essential not to agree to everything they ask; there need to be limits in place where it is in their interests. Therefore, exercising one's rights also has disadvantages, because not very much is done to advertise their responsibilities and duties, especially where teenagers are concerned, and sometimes it is in their interests to say no to them.

A PARTICIPANT asks what the minimum age is for placing children in one of the institutions.

David POTIER replies that the Centre takes in children from three years of age in one of the institutions, but that there is another for mothers with children.

A PARTICIPANT enquires whether there are mechanisms to protect children in dysfunctional families where there is no question of taking away parents' rights but staying in the family would be dangerous.

David POTIER answers that there is a provision in France for information of concern, so that the Centre is aware if a child is in danger. Once a teacher realises a child might be in danger, they draft a document and send it to the departmental unit handling that information, and the general counsel assesses the information. Sometimes parents come to a hearing with a lawyer to defend their rights, and the Centre always asks for a lawyer for the child as well, because the interests of the child need to be represented.

José Manual Sánchez SAUDINÓS indicates that almost all of the children come from vulnerable families. Some come of their own accord, and sometimes the administrative authorities intervene. These agencies can take children away, and parents have to initiate a legal procedure if they disagree.

Elmira SULEYMANOVA states that there are different kinds of violations. The Commissioner's office can contact the head of an institution if it is notified of a possible incident, and there are also cases where parents can discuss the problem with the office. Sometimes the assistance of a psychologist is necessary to help understand the behaviour of the child and to win the trust of the child. The committee is obliged to give a recommendation in this instance, but the ultimate decision lies with the court.

The psychological status of the mother also has to be taken into account.

A PARTICIPANT adds that it is important not only to protect children and families but also to maintain family ties. We need to make sure we safeguard minimal family ties where possible.

II) Children and new technologies

Odile NAUDIN
Editorial advisor, Defender of Rights, France

Quentin AOUSTIN
Jurist-Analyst, Internet service provider's association, France

Odile NAUDIN explains that digital convergence makes it possible to access a multitude of audiovisual content in an increasingly interactive way. It is clear that the use of these devices is spreading among the young and old, and it is necessary to note that there is a considerable economic impact with respect to the manufacture and production of this content. There is also a need to develop the laws because of the lack of uniformity in terms of legal systems internationally.

This is important because the Defender of Rights' role is to defend the rights of children in policy orientation and decisions. There are four main rights: each child has the right to education and recreation, to be involved in sporting and cultural activities, develop their talents and values related to life in society; each child has the right to express themselves or be heard on issues of concern to them; children have the right to be protected from all forms of violence and exploitation; finally, children have the right to the protection of their private life, correspondence and emotional ties without being controlled in an abusive way. However, it is quite a difficult task to do this.

Youth are the major consumers of new media; 97% of those from 12 to 18 have Internet at home; 82% have a mobile phone; 33% of those from 16 to 19 use Internet on the mobile phone; 88% of those from 17 to 19 have a gaming console. Their activities online vary greatly, from information to games, video clips, messaging, social networks, fora etc.

Parents and educators have a certain lack of trust with regard to these new media, because they are focused on risks which are real but often overestimated. It is often forgotten that these new media are a social and personal advantage which opens the door to many resources. One of the most important points is the need to educate both young people and adults in the use of these media, because their habits may not be exemplary. Young people are not passive receivers of content, and it is important to adapt the content to the age of the child. The age indications for media in France are not very efficient, because they can be seen on the Internet at any time.

Disclaimers can also be used to indicate that a site is only suitable for adults. The sale of alcohol to people under-18, for example, is illegal, so sites selling these products need to carry a warning and age verification. The problem is how one then verifies that the person is over the age and has permission. Maintaining parental control would require erasing many apparently ordinary words.

The Internet is a world where copyright rules are immaterial. It is also a place where anonymity rules, so content can be posted on sites which would not be acceptable elsewhere. Identity theft is a major issue; a lot of persons use other people's identities to write nasty comments, and this can lead to indictment, given that this is an offence. Therefore, while anonymity is conducive to exchanges between people, it is also conducive to trust in people we do not know.

The Internet is a place where we are exposed for a long time and which is not well controlled, which raises issues of privacy. Personal data protection is a relevant issue, because we do not know what commercial use is being made of it. There are also ethical problems with potential recruiters accessing personal information from social media sites, and there seems to be a low level of awareness of this.

Is it wise to try to control the Internet, generally speaking? There are various possible modalities, and what we need are certain provisions for making certain types of content inaccessible. There is no unified monitoring agency in France, and existing rules are quite difficult to change. There are some existing regulations, but they may not be the same in different countries. Principles for governance based on age and time of broadcast are difficult to apply to new modes of consumption such as the Internet and connected TV.

It is necessary to take international legal steps through frameworks such as the Council of Europe, and international actions on self-regulation practices such as PEGI (Pan European Game Information). There could also be some action taken with regard to cultures and mentalities. It is important to focus on education for young people and adults; there are numerous measures, but they tend to be very scattered. Organisations and companies are also undertaking education, and many associations have been set up to deal with these issues. The most important thing is to undertake international action and education campaigns.

Quentin AOUSTIN indicates that the 'Point of Contact' was created in 1998, and is an online form which a user can fill in if they find illicit or shocking content. There is now also a smart phone application, and as of September 2011 users can download the forms. The Digital Information law of 2004 mandates the AFA to notify such content, and make available the means to fight it. A charter against hateful content was signed by members of the association, establishing the hotline as the legal point of content. Service providers are no longer obliged to establish internal services for collecting complaints, but this platform provides the link for members on their own sites so that subscribers can be informed.

The scope has been extended with time from child pornography to shocking content accessible to minors, offences against individuals, apologies for war crimes and terrorism, etc. The result is the same; the AFA obtains the URL of the site, analyses it legally, and if it has potentially illicit contents, traces the IP and transfers the information to the appropriate authorities. Regarding child pornography, the INHOPE network, which includes the AFA organisation, works to remove it from the Internet. 86 sites were localised in France, with 86 instances of removed content, in 2011.

There is some leeway in terms of interpreting criteria for child pornography, because sometimes the notion can shift. 10 of the 20 notifications in the Netherlands have not been removed, because it is down to interpretation, whereas in France these would unequivocally be illicit. 90% of notified content has been removed in Europe. It is important to make sure that this content can be filtered or masked somehow, or to ensure that countries that do not have the technology can block it somehow.

There were 48 notifications of child pornography as of March 2011, and 48 of those were removed. There were 101 cases in the INHOPE network, of which 76 were removed. The overall figure of notifications through the hotline was 149, of which 124 were removed.

This association was set up between seven hotlines. The first of these was set up in 1996 in the Netherlands; in 1998, France established a complaints platform. The task of the INHOPE network, which has 36 members but 48 countries, is to coordinate the task internationally. It is only through international cooperation that the AFA will be able to progress in removing illicit content, as otherwise they will only be able to block content from countries which are not members. The European Commission started to support the operation in 2000 as part of the Safer Internet programme; the first contract was from 1999-2004, with Safer Internet Plus following in 2005-2008, which focused on bringing all the hotlines together and raising awareness.

The AFA started the third programme in 2009, which terminates in 2013, and have started focusing on roaming, which involves attempts to corrupt minors on chat lines. A website has also been set up, saferinternet.fr, to promote the AFA's activities through the points of contact.

This was established by the law on trust in digital content, and members of the association committed to doing this free of charge. This software works according to three settings, children, adolescent and adult. Children have access only to sites which are specifically allowed by the parents; teenagers have access to everything except for restricted sites chosen by the parents; the adult mode deactivates the parental control setting. There is additional software which helps parents check content and limit how much time children spend online. The software is far from being perfect, and there are always ways to overcoming solutions. Parental control software should not take the place of real control by the parents.

The AFA decided issue recommendations on children's games in 2010. The icons are linked to the content of the games themselves, whether this relates to drug use, violence, online play, etc. Then there is an age recommendation. The idea is that companies will promote this scheme using these labels. There are also labels for online games; when parents see these labels they can decide whether a child should play that game or not.

The 'Behaviour' pass is a kind of online quiz which discusses viruses, piracy, hacking, protecting children, etc. There are other sections which are about helping children to learn more about Internet use, and schools often use this information as a learning tool to help students find out more about these problems.

Thursday 10 May 2012

Relationship with the claimant

Richard SENGHOR
Secretary General, Defender of Rights, France

Christine JEANNIN
Director of the admissibility department, Defender of Rights, France

Tornike TSAGAREISHVILI
Chief Specialist of the Department of Justice, Office of the Public Defender, Georgia

Jean-Francois GRATIEUX
Director of the territorial network department, Defender of Rights, France

Marta PRATNICKA
Advisor at the Department for International Cooperation, Office of the Human Rights Defender, Poland

I) Admissibility of the claims

Richard SENGHOR introduces the next section, concerning the way in which the administrative mechanism of the Ombudsman is organised; it is barely a year old and brought together four authorities. The first subject will be the relationship with claimants, of which there are 90,000-100,000 per year. The discussion will also concern the territorial network, and will present the activities of the directorship, which has 450 delegates who deal with a lot of the claims we receive. The second part will deal with communication with the public, which involves informing the authorities, the press, the public and legal professionals. This will be done through two examples, institutional communication and the challenge of the Internet, because the website was the first manifestation of the organisation's unity.

Christine JEANNIN explains that there is a team of 20 people, half of whom come from the Ombudsman's office, and this team was put together when the Defender of Rights office was created. The other institutional jurisdictions are crucial for putting together all the information received.

The work of this service involves receiving two forms of claim: letters written informally, sometimes by hand, and these account for 80% of claims, and claims which come through our website. Around 100 new letters are received per day, some of which deal with what is already being processed and some of which are new claims.

There are three main decisions. The claim is within the jurisdiction of the Defender of Rights, and can be forwarded to the appropriate unit. The office does not take a decision as to how it will be dealt with at this stage. Less than half of the 100 letters that are received will be sent immediately to a unit. Secondly, the office receives a submission with attached documents which cannot be dealt with by the Defender of Rights. This will remain in Admissibility and Orientation so that the office can explain why the Defender cannot pursue it and suggest other steps the claimant can take. The most frequent cases are those lacking precision or are insufficiently documented, in which case the Defender will contact that person using all available means and ask for more information. Once the office has all the information, the other two possibilities apply.

Should the information received highlight an urgent situation requiring urgent intervention, the office can decide to process the case from beginning to end and reach an amicable solution. For example, people can have difficulties securing documentation for the purpose of a business trip, as in the case of French citizens born overseas. The office would look at the admissibility of the case, and then contact people from the prefecture to determine what is obstructing a solution.

Another example concerns people with disabilities who encounter difficulties securing appropriate facilities at work. Sometimes the problem is that the employer has not found the right way to accommodate this person, and dialogue has broken down. The office has to try and renew this dialogue, and especially help the employer to accommodate the employee. This is a complex situation, but thanks to the expertise in the various units, the office can try to remedy the situation and ensure the person can remain employed before the situation deteriorates further.

Therefore, the office intervenes in the substance of some cases, but has to do this in moderation, as otherwise there would not be enough time to provide orientation and reply to claims. The challenge is to find the right balance between these various activities. Over half of the claims remain within the department, and beyond the qualitative challenge of dealing with both admissible and inadmissible cases appropriately, there is a quantitative one. Each of the members of the team has to deal quickly with a file of complaints, and the office needs to make a decision on each case as quickly as possible.

The Defender's office does not meet personally with complainants, though some write requesting such a meeting. That kind of interaction is sometimes appropriate in sensitive cases, where an administrative response would not necessarily be appropriate. Such complainants would be asked to get in touch with a delegate in this case.

Tornike TSAGAREISHVILI indicates that Article 43 of the Georgian Constitution states that the protection of fundamental rights and freedoms shall be supervised by the Public Defender. The general form of the Defender's activities is provided by the organic law, and four main roles are outlined. The first is a monitoring mission, where the Defender monitors State and local enterprises and officials to ensure they recognise fundamental rights. The preventative mechanism involves preventing torture and other acts of cruel and inhuman treatment. Thirdly, the Defender undertakes various forms of education involving human rights. The Defender is authorised to submit proposals or comments on legislation to the Parliament to ensure human rights conditions are met. Finally, the Defender examines complaints of human rights violations, whether on the basis of complaints received or through his action.

The Office can be contacted by filling in a form in person, sending a letter of application, filling in an online application form or calling the service centre. The consultant is the first level of the admissibility system in some cases, but there are often instances where the scope of the case is beyond the Defender's mandate, and the consultant can refer the claimant to another body. Where the consultant thinks the claim is within the mandate, or the claimant completes the form without the consultant's help, the application proceeds to the chancellery and to the admissibility officer, who decides whether the Ombudsman proceeds with the claim or declines it.

The decision of a public entity is the most common cause of complaints, and this is usually sufficient grounds to proceed to investigate a claim further. Such claims often involve violation of rights to free speech, assembly, food, shelter, etc. The claimant may not be aware that the violator is a public entity; it is sufficient for the claim to point out a general violation, and it is our job to investigate further.

Another cause of complaint is violation of rights in court proceedings, such as fair trial or representation. Prisoners or detainees often contact us without representation, and their complaints can lack clarity; members of the preventive mechanism or the Department of Justice investigate further. The final ground of complaint is compliance with the second article of the Constitution.

Because these criteria are disjunctive, it is sufficient that only one of them is met to proceed with an investigation.

There are other procedural criteria. The Public Defender will not investigate a claim if he has already been investigating it. Secondly, under the complementarity criterion, the investigation of a claim may not proceed if it inhibits the investigation of the same case. Finally, a claim is incomplete when it lacks essential documentation or when the request of the applicant is not clear. A claim is regarded as inadmissible if the claimant does not reply to requests for clarification.

There are cases where the Defender lacks jurisdiction to investigate but does so anyway. For example, there were several cases of public school teachers who alleged they were fired on the grounds of their political beliefs. The Defender lacked jurisdiction in this case, but requested information so that these cases could be better understood. However, cases of rights violations by private entities are admissible.

The main obstacle is lack of understanding of the work of the Public Defender by civil society, which is why the office undertakes educational activities, and the main goal is to facilitate claims and be as accessible as possible.

II) Local Delegates

Jean-Francois GRATIEUX states that the network is made up of volunteers, not salaried employees. It was created in the 1980s because the Ombudsman required a liaison network but did not have the funds available. The network has 450 volunteers throughout France. The status of these delegates is clearly regulated by law; the 2011 law clearly defines their role and activities, enabling them to organise their networks as they see fit. The majority of these volunteers are retirees with the requisite experience, so 80% are from the public sector and 20% from the private sector.

The majority of access points are community facilities that are shared with other institutions, on sites mostly financed by local communities or the State. The objective is to provide information to those who need it. The recent activities of the network on behalf of detainees have enabled delegates to listen to their complaints and provide these services. 350 of these requests were dealt with in 2011.

The network has three main objectives. These are interfacing with the public, fighting discrimination and protect the rights of the children; in terms of detention, mediation only takes place at headquarters, but in other circumstances, the delegates have jurisdiction to find amicable solutions.

Delegates must be available to meet the public at points of contact two days a week, and another day and a half is used for considering and processing the complaints. Training is available for delegates as well as telephone support for consulting on specific cases. There are regular meetings between delegates in the field and regular exchanges with headquarters.

The delegates process 70% of requests, representing 70,000 cases in 2011. Qualitatively speaking, the delegates are the point of entry, with the role of providing explanations and orientation, as well as providing information on inadmissibility. This helps the Defender of Rights when dealing with these cases.

Marta PRATNICKA explains that the regional offices were introduced to bring the institutions closer to citizens and extend the ability of the Ombudsman to respond to cases. There are three field delegates in Poland; the regional offices act under the authority of the Ombudsman. The Deputy Ombudsman has regular meetings with the local delegates, and the regional offices provide substantive and administrative support.

Because the regional offices are external units of the Ombudsman's office, their tasks reflect the scope of the central office activities. Due to the small number of employees, each has two or three broad specialisations, but this does not prevent them from looking at other issues. The staff has to receive claimants and correspondence, participate in initiatives aiming to increase positive public perception, organise regional conferences, promote awareness about rights and freedoms, offer internships, etc.

The total number of cases received by the offices in 2011 was 642, representing about 10% of the cases received by the Ombudsman. The major areas of complaint are civil law, penal law, labour law and social security, economic law, and constitutional and international law. The local contact points are designed to improve direct contact with the Ombudsman's representatives and to provide legal information.

The first contact point was established in Krakow in 2010, and the Ombudsman then saw the need to continue this activity, establishing three more in 2010 and two more in 2011, though one has since closed due to low attendance and budgetary problems. However, another point has been opened this year. These contact points received 1,229 people in 2011. All cases accepted are taken into account when preparing motions for the public administration.

Since the free citizen hotline was opened in April this year, the number of calls to the office doubled; the average daily number of calls is 100. Many of these concern cases already submitted, while others relate to requests for legal advice or complaints. Therefore, we also plan to give the employees further training in telephone counselling to cope with difficult calls.

A PARTICPANT asks how the network deals with domestic violence complaints, and whether they are frequently withdrawn the next day, as is the case in Georgia, for example.

Jean-Francois GRATIEUX replies that the legislation on violence in the family and against women was strengthened in 2007. The delegate acts on the request of the claimant, and can only act without consent where the interests of the child are concerned.

A PARTICIPANT enquires about the civil liability of the volunteers in cases where people who receive advice are not happy with it.

Jean-Francois GRATIEUX responds that this has never happened, probably because delegates never take decisions on their own. They promote amiable resolutions, but if this fails it cannot be the source of a grievance. A submission to the Defender of Rights is independent from a submission to a judge; the delegates warn applicants that they are parallel. Another important point is that the law allows the Defender of Rights to refuse a submission, as long as they present the reasons; these will not necessarily be legal reasons.

A PARTICIPANT asks whether complainants can go to the courts where they are not satisfied with the decision of the Defender of Rights.

Jean-Francois GRATIEUX states that the delegate's decisions can be contested before the administrative judge. Refusal to handle cases could be due to jurisdiction or a lapsed deadline. The judges have sometimes pointed out that recourse to the Defender of Rights cannot be a substitute for appeal to a judge. It is impossible to avoid situations where the

decisions are contested. For example, a company might complain their image has been damaged, and that can sometimes be resolved behind closed doors. Another example is where a police officer against whom a delegate had recommended sanctions, but had been found not guilty by the criminal court, could file a complaint.

Irena LIPOWICZ wishes to know whether there have been issues where delegates have passed information to the press.

Jean-Francois GRATIEUX replies that they must maintain professional confidentiality; that guarantee must be respected. There are no recent examples where such an incident has occurred, but delegates cannot share the information they have received, except with the Defender of Rights or possibly with other professionals, who must also maintain confidentiality. What the delegates do is based on trust, and it is vital to ensure that information people share with them will remain confidential. All information that comes from the office is anonymous.

A PARTICIPANT asks whether the Ombudsman has the right to contact the courts to protect citizens' rights, and in what situations that can take place.

Jean-Francois GRATIEUX confirms that that is provided for in the law. The Ombudsman's office has protocols for cooperation with other institutions with which it has regular contact, such as the prison oversight committee. It has daily contact with public authorities dealing with immigration or foreigners and residing in France, as well as the local authorities responsible for protecting children.

A PARTICIPANT enquires whether the Ombudsman can contact the courts in order to provide for the rights of specific citizens or remedy a specific situation.

Jean-Francois GRATIEUX indicates that the Defender of Rights can present his observations to a court of law, but he cannot himself make a submission. The case must already be underway, and the Defender may be contacted by the court or one of the parties.

A PARTICIPANT asks how children are facilitated to contact the Defender of Rights.

Christine JEANNIN replies that there is an online form which is easy to work with. There are no other specific modes of submission for children, but when the office realises that a complaint has been made by a child, it is handled immediately. Children can also contact youth ambassadors.

Communication of the institutions

Ben HAGARD
Head of Communication Unit, European Ombudsman

Mariia SYNENKA
Deputy Head of Department for international and legal activities, Office of the Parliament Commissioner for Human Rights, Ukraine

Sophie BENARD
Press Advisor, Defender of Rights, France

Siranush HARUTYUNYAN
Head of the International Cooperation and Strategic Development Department, Human Rights Defender's Office, Armenia

I) Written report

Ben HAGARD explains that the first Ombudsman took office in 1995, and the role of the office is to investigate complaints against EU offices, bodies and agencies. The communication unit is responsible for all the outreach activity, from website to publications, stakeholder and public events, and events with other ombudsman offices. It is also working on projects to raise awareness, such as through viral videos on YouTube.

There are different varieties of written reports. Most of the reports are case related, including decisions by the Ombudsman, draft recommendations to institutions, and special reports where all other efforts at solving the problem have failed. There are activity related reports, the main one being the annual report, and an overview of the annual report is also produced.

Each office can decide what kind of annual report it will produce, and that will determine its success. The office produces annual reports because it is obliged to do so, but if it is an obligation, it is considered to be a missed opportunity to communicate with the public.

A key principle is that length is not necessarily good. One department produces a report that is 755 pages long, and the question is who would read it. Members of parliament will not read it, and the media will not report on it. The European Ombudsman's report for 2003 was 284 pages long, but it is difficult to believe that most people will read it. It included the full decision in every case, so it goes into far too much detail. There was very little analysis, and lessons were not being drawn from those cases. It also had a very unattractive design.

The 2011 report is 74 pages in length, with short case examples; any document mentioned in the report can be accessed on the Internet or will be sent on request. Most of the text is horizontal analysis, and it has an eye-catching design. It has to stand out, because a member of parliament who receives 20-30 reports a month will chose the one that looks interesting.

The content does matter. There are highlights of the year, key statistics, information about the outreach activities with other ombudsman's offices, etc. The office has increased its audience as a result: 14,000 copies were distributed in 2011 to all the key audiences, including NGOs, businesses, regional organisations, and the media. Multilingualism is a

key part of the EU project, and it is only possible to serve the citizens of 27 countries if communication takes place in their languages.

The overview is only eight pages long, containing the highlights of the year, the star cases, statistics, etc., and it has an eye-catching design. 55,000 copies were distributed in 2011 in 23 languages to all the key audiences, and thousands more were downloaded or ordered online. The annual report is also available in large print and audio versions, both in 23 languages.

Annual reports are produced because the intention is to communicate about the services, and because an obligation can be a great opportunity.

Mariia SYNENKA states that the Ukrainian Ombudsman's report is accorded a 20-minute hearing in Parliament, followed by questions. During this discussion there are positive comments as well as criticisms regarding the Ombudsman's activities. It is a comprehensive report about rights and freedoms so that Parliament can take the appropriate action, not a report to them.

There is a summary of the results of the comprehensive assessment of the fundamental rights and freedoms guaranteed by the Constitution and international agreements. There is also a section on complaints received and their assessment. The report looks at specific groups such as children, Chernobyl victims, those living abroad, minorities, stateless persons, etc. There is a provision for the yearly report to focus on the military and law enforcement with regard to specific activities. There are thematic topics such as land and labour rights, health, education and housing. There are also specific sections that focus on personal freedom, physical integrity and access to information. One focuses on the cooperation of the Ombudsman with other State agencies.

These sections usually focus on how the recommendations of previous years have been implemented. This section is important because it is a performance indicator in terms of the Government's work in improving the human rights situation. The report periodically focuses on specific aspects of the implementation of European Court decisions.

Submissions are a good barometer of the most acute problems in society and the ability of the State to deal with them. The report gives specific examples of violation of rights and freedoms, as well as assessments and verifications.

The content is similar to that of the European Ombudsman; every section is broken down into topics and themes, and there are recommendations on how to solve specific problems. An important aspect of the process is that it is broadly covered in the media and society. This is why the report is presented during a plenary session of Parliament. There is usually a briefing for the media afterwards, where journalists are presented with an outline, and the Ombudsman gives interviews.

The feedback from government bodies regarding the recommendations is usually positive, and some tell the office about the measures they have undertaken. However, in 2000 when the first report was sent out to the regions, they indicated that the law enforcement agencies handled human rights. A lot of energy over the last 14 years has been directed toward awareness raising. Eight annual reports and six special reports have been presented.

These are done on the initiative of the Ombudsman, and the topics come from experience of cases that have been dealt with. The reports contain a number of specific examples, some of which are quite positive, and others where there have been massive rights violations.

The same issues sometimes emerge repeatedly, and from the outset a lot of submissions came from Ukrainian citizens abroad. A lot of very serious issues were raised which the Government not only did not solve but ignored, such as human trafficking, lack of rights protection abroad, repatriation of deceased persons, etc. There has been a revolution in terms of the mentality, because people understand the country is losing

invaluable human capital, and that it is essential to protect the rights of these people. The first report was the first serious analytical document on the subject.

Two special reports assessed how Ukraine respected its European treaty obligations and the recommendations of UN and European agencies. The last report focused on the rights of Ukrainian sailors, many of whom after the collapse of the navy had to work under foreign flags.

When the Parliament hears the annual report, a resolution is taken and it is published in the parliamentary journal, and the committees, ministries, prosecutor's office and regional authorities are tasked with considering the recommendations. The reports raise overall knowledge as to the importance of human rights and the state of the law.

II) Internet

Sophie BENARD explains that there are four types of communication. The first is communicating with the Ombudsman himself; the challenge here is to sort through all the requests and determining what should be handled within the institution. The second is communication with the three deputies, who each handle different areas. The third is territorial communication; the Defender of Rights is divided into territories managed by delegates, who handle 80% of with the cases, and there should be as much media coverage of this work as possible. The last is communication around the institution more generally; for example, information is being prepared for companies on how to avoid discrimination and promote diversity. This also applies to proposals for reform, and it would be very useful if it were made known that the Defender of Rights was responsible for initiating them.

The daily management of requests works as in any other institution, but what is interesting is the use of the website, which the Ombudsman personally requested. It is a resource base for everyone, open to all French citizens, but it is also designed for heads of associations, researchers, etc. The site fully explains the work of the Defender of Rights, the missions it undertakes, its decisions and recommendations. There is a provision for online submissions.

There is constant communication with the press, but it is important not to be complacent and believe this is sufficient. Sometimes there are a number of sporadic requests when a news event comes within the office's jurisdiction, and these have to be dealt with. The Defender of Rights has to be properly represented in the media; the office should be made a reference point for journalists if need be, but must not be used in all cases. Therefore, a delicate balance must be struck on a daily basis.

Siranush HARUTYUNYAN indicates that communication is one of the key activities of the office, and it uses all available forms of communication to inform and educate. It has introduced new methods in recent years to allow the public to communicate with it directly, such as social media, webcasts, electronic newsletters, and the redesigned website.

Hundreds of articles have been published in Armenian newspapers about the Ombudsman's office, reaching an audience of about a million, with a very high estimated advertising value. Radio and television programmes on the subject were also broadcast at local and national level.

The office established a social media presence in early 2012, allowing people to follow the office's work and contribute to investigations. The Facebook page has around 600 followers and has received around 5,374 visits, a large number considering the population. The YouTube channel is assembling all the press releases and live events.

The website was redesigned in late 2011 to make it more usable and accessible. It offers a broad variety of information, and allows people to make complaints, comment on the latest news and watch press conferences. It has had over 38,000 visits since the

launch. It clearly explains how to apply, how long a case might take and where the Ombudsman may not intervene. The site makes the office much more productive, as it satisfies public expectations. The site also provides information about the public hotline.

There is a department specifically devoted to protecting the rights of children, women, the disabled, people in detention, etc., and the site has pages for each group, providing legal information and an overview of the problems. The office has a large mailing list with the media, human rights NGOs, international organisations and ombudsman's offices.

Given the relatively low level of awareness of the Ombudsman's role among the rural population, a key challenge was to raise the office's pubic profile, and so the offices developed online and printed awareness raising content, aired advertisements on radio and television, and worked with human rights organisations.

A series of conferences was organised during 2011 on freedom of expression, fair trial, protection of vulnerable groups and cooperation with human rights organisations, accompanied by media releases.

Elmira SULEYMANOVA enquires as to the subject of the complaints received from within the country, and secondly, how the office communicates with Armenians who were driven out of the country into Azerbaijan.

Siranush HARUTYUNYAN responds that 500,000 Azerbaijan refugees arrived in Armenia from 1988 to 1990, and that the country has experienced very serious problems with these people. It is difficult to comment on communication with Armenians outside the country without specialised knowledge of the subject.

Richard SENGHOR adds that there are people who are more difficult to reach because of conflict situations, because they are of different origins or are vulnerable, but that the current subject is the tools used to reach these people to inform them of the existence of an ombudsman or its equivalent. The image of an ombudsman in a country has changed considerably over time, and what is relevant here is the extent to which this has happened thanks to communication.

Elmira SULEYMANOVA says that these meetings have to be oriented according to collective rights, the right to live in peace, be protected, etc., and that is why it is absolutely wrong to say that 500,000 Azerbaijanis left for Armenia.

Richard SENGHOR interjects that the purpose of the meeting is to discuss something of general interest, and though he is not questioning the legitimacy of your statements, it is not the place or time for them.

A PARTICIPANT explains that Moldova is trying to tackle tasks such as reaching citizens to inform them how they can demand respect for their rights, and ensuring that the essential information is contained in as small a volume as possible. The ombudsman's term is three years, so every three years it would draft a report, and everyone in the working group would make proposals on how to improve it. The report is given in three languages in the one book, including Russian and English, so that it can reach a wider audience.

Part of this report is geared to the Members of Parliament; if 101 copies were made for them the budget would be exhausted, so the office produces an electronic version. The office is also working on an outline report, which is in greater demand than the main report. Information from the report is presented at roundtables in the regions, and public authorities and other groups involved in protecting rights are invited to participate.

The office sends the reports to institutes of higher learning and to libraries, and sometimes notices on the Internet that people have quoted from the report in countries like Germany, Romania and the Netherlands, which is gratifying. Finally, there are legal consultations to explain how certain cases are settled using existing legislation.

Ben HAGARD states that the point raised about resources is very important, and that reducing the report from 300 pages to 75 created a lot more. The office includes a lot of

what they call teasers in our report, parts of the text put in a different font size to draw attention to it. There are a lot of simple design mechanisms that can be used to make reports more attractive. Most citizens get what they want from the eight-page document, and this is not expensive to produce.

There are countries which do not fall under the European law to provide reports in different languages, but do so anyway, and this is one way of reaching out. Several ombudsmen's offices produce very simple leaflets for people who need things explained in this way, and those can be very useful. Finally, the Ombudsman of Cyprus has a Turkish language website and accepts complaints in Turkish; this shows that the office is about finding peace and solutions.

Health mediation

Loïc RICOUR
Head of the health unit, Defender of Rights, France

Katarzyna LAKOMA
Director of the Department for Administrative and Economic Law, Office of the Human Rights Defender, Poland

I) The Nature of the Problems Faced in Health in France

Loïc RICOUR explains that the rise in the number of health-related incidents and issues in France led the French Ministry of Health to set up a regulatory system that has resulted in a much better awareness of the relevant issues. Nevertheless, one in 10 patients who are admitted to hospital are involved in some kind of medical incident and one-third of these incidents are avoidable. 4,200 deaths occur each year from infections that people acquire in hospitals, which is the same number as a result of traffic accidents. The public is therefore very concerned and people are suspicious as to why this number of deaths is so high. The public therefore wants to understand what is going on, while the medical profession feels under pressure.

Health is an area where there are issues of misconduct or even violence against health professionals and it is important to be able to react to problems. In addition, society is asking politicians to become accountable, while there is the notion in people's minds of responsibility without liability. People also have a strong feeling that things are being hidden from them when things go wrong medically.

The biggest reason people contact the justice service is because of a lack of information or transparency or where someone has been lied to. People want to understand why things have happened and what steps are being taken in order for incidents not to recur. The role of the Ombudsman is to reinforce transparency, dialogue and trust between professionals and the public and it is important that the approach taken is a rational rather than emotional one.

The Defender of Rights is therefore trying to create a culture of dialogue and mediation and to draw out the lessons from the mistakes that are made. The scope of its activity reflects the complexity and diversity of complaints. In France patient rights are overseen by the "Kouchner Law", which focuses on patients' involvement in hospitals, access to medical records and compensation for medical accidents through national solidarity schemes. Rights in terms of safety in healthcare relate to medication and blood transfusion and the avoidance of misconduct and abuse. There is also an emphasis on persuading people to move from traditional healthcare to alternative healthcare provisions and ethical conduct. Additionally, the Defender of Rights has a programme that analyses and follows up cases and deals with mediation and support to professionals. The role is mainly to provide information and assist healthcare professionals through medical and non-medical Ombudsmen and to conduct enquiries for more complicated situations. The Defender of Rights informs healthcare oversight bodies if a patient or healthcare professional's life is in danger and makes proposals for reforms.

3,000 health-related complaints were made in 2011 and 1,317 cases underwent in-depth analysis. 50% of all complaints were made by people who asked for more information, 20% related to mediation assistance and 10% were linked to abuse of the elderly.

II) The Role of the Ombudsman in Poland

Katarzyna LAKOMA explains that the work of the Polish Ombudsman is limited. The department is comprised of legal experts only and does not have the medical expertise to be able to carry out mediation. The area covered by the Ombudsman can be vast and at times there is cooperation with other public authorities.

Health protection is a difficult and complex area and the Polish Ombudsman receives a very large number of complaints relating to health. In 2011, 900 new complaints were received on health issues and while these complaints related to individual cases, they frequently revealed the inability of the health system to function properly. One important area has been people's inability to access the medical records of deceased family members when no authorisation has been given for this access and many complaints also concern restricted access to various health services. While investigating these complaints, the Ombudsman acts within the competence set out in the constitution and the law on the Defender of human rights. The Ombudsman guards human and civil rights and freedoms and covers Polish citizens, foreigners and stateless persons as well as moral persons. The Ombudsman also acts as an anti-discrimination body and safeguards the principle of equal treatment.

However, the range of competences is very broad, covering absolutely all public bodies. The Ombudsman has the right to appeal to an independent body both against acts of a general nature and in individual cases. The Ombudsman operates in judicial trials or administrative proceedings only and uses the right of intervention to change a situation that is inconsistent with the law or undertake a necessary action.

The legal basis for the involvement of the Ombudsman in health issues is found in Article 68 of the Constitution that stipulates that everyone has the right to have their health protected and that equal access to the healthcare services financed by public funds should be ensured by public authorities to citizens irrespective of their material situation. The intervention of the Ombudsman can consist in investigating the legality of actions undertaken, receiving complaints and taking up cases *ex oficio*.

The Ombudsman also has the ability to intervene in a way that is not legally binding but may allow issues to be resolved through dialogue and cooperation. This type of intervention often helps to solve a problem without the need to initiate formal proceedings and may replace traditional mediation involving professionals. Those approached by the Ombudsman are obliged to respond within 30 days.

One example of the work of the Ombudsman was the unlawful charging of patients in public hospitals, where the Ombudsman took up the case *ex oficio*. Here, the Ombudsman approached the director of a hospital, who then admitted that what was going on should not have taken place. Another case related to the ban on smoking in psychiatric facilities where, because of the very special difficulties that the ban created, the Ombudsman asked the Minister of Health to consider an amendment to the legislation for psychiatric institutions. While initially hesitant about this, the Minister has now decided to request an opinion of experts. Nevertheless, it is important to recognise that it is not always possible to persuade the relevant authority to change its position, particularly where finance is involved.

A further scope of the Polish Ombudsman has been the appointment of the Social Council and Experts Committees on elderly people and people with disabilities. The role of these bodies is a consultative one where they assist the Ombudsman through their experience and expertise.

The issues of health safety and healthcare are the most acute of all social problems and when examining individual complaints the Ombudsman is guided by patients' wellbeing and the protection of constitutional rights.

Bernard DREYFUS explains that before the Healthcare Safety Unit in France was set up there was no intervention of any kind in the medical area. He asks if there is any funding in Poland for approaching medical experts.

Katarzyna LAKOMA replies that the Ombudsman has the right to ask for expertise but problems arise in terms of understanding complex medical reasons.

A PARTICIPANT states that it is essential to have a committee of different doctors who can then produce a joint assessment.

Katarzyna LAKOMA explains that there will soon be a national prevention mechanism in Poland. Doctors will form part of this and there will be a multidisciplinary approach.

Anatolie MUNTEANU states that rights defenders do not have the required medical expertise that would allow them to be involved in proceedings. However, other mechanisms can be used, such as making the public aware. Generally, the public is just interested in getting the information that they are missing and does not necessarily want to see people punished.

A PARTICIPANT points out that the Ombudsman's office in the Ukraine has included two professional doctors for a number of years.

Reforms proposals

Anatolie MUNTEANU
Parliamentary Advocate, Director of the Centre for Human Rights, Moldova

Martine TIMSIT
Director of the reforms and studies department, Defender of Rights, France

I) The Approach to Reforms in Moldova

Anatolie MUNTEANU states that national institutions that promote and protect human rights have broad-based powers and authority that are often set out in the constitution or other legislative acts in accordance with how priorities are set in a particular country.

A key area for the Ombudsman in Moldova is to try to promote reform and according to the Paris Principle national institutions are called upon to promote and align legislation, rules and practice with international norms on human rights. In Moldova, the Ombudsman can make proposals to Parliament on improvements to existing legislation and Parliamentary Advocates have the right to address the Constitutional Court to request the monitoring of Presidential decrees and Parliamentary resolutions.

However, as well as these two levers, Anatolie MUNTEANU states that he has been contacted by various Government Ministries and other State structures interested in proposing improvements to legislation. This is also a very opportune time for the Ombudsman's office to do a lot of work. There is no legislation that requires a public body to go to the Ombudsman and whether that is a good thing or not is up for discussion, although in some cases there is a need for the Ombudsman's office to address the Constitutional Court. Parliamentary advocates are unable to take legislative initiatives, as this is a prerogative that belongs exclusively to Members of Parliament (MPs), the Government, the President and the people's legislative assembly. This has both positive and negative aspects. For instance, on the negative side, the Ombudsman cannot make suggestions on drafting bills and it can take a very long time for results to come from any proposals that are made. On the positive side, the parliamentary advocates are independent and avoid the risk of being drawn into any forms of lobbying.

Existing legislation allows parliamentary advocates to address the Constitutional Court with requests to verify the constitutionality of a piece of legislation and verify how it is aligned with general human rights principles. However, the powers of parliamentary advocates in respect of addressing the court are limited to human rights areas.

At present, a new bill is being drafted in Moldova on role of the parliamentary advocate and the Ombudsman. This is looking at whether the Ombudsman should have the right to initiate legislation and to what extent his scope should be expanded in respect of the Constitutional Court. The hope is for this to become as broad as possible.

II) The Approach to Reforms in France

Martine TIMSIT states that whether it relates to an Ombudsman or a Defender of Rights the area of jurisdiction is a shared one, even if people have not been using these institutions in the same ways or with the same tools. These institutions are often created to identify lapses in legislative provisions and they are well placed to do so and can be

partners in the reform of the State. Another advantage is their objectivity and independence, which goes beyond political party interests and gives them legitimacy in their attempts to be heard on proposals for reform.

In France, previous institutions had the capacity to propose reforms and the power to initiate debates on particular topics. Sources of proposals for reform are varied and come from submissions from the public. In respect of the Defender of Rights, the right to propose reforms is found in Article 32 of the Organic Law of 2012, where changes to legislation can be requested where these seem helpful. This is very general and the aim here is to ensure the legitimacy and credibility of the institutions. Consequently, reforms can only be proposed according to the relevant jurisdiction. The aim is also to define the basis on which the involvement of the Defender of Rights can be justified. However, there is also a difficulty here in that the Defender of Rights is not an elected authority and as such cannot propose laws, although it can try to influence matters. For this influence to be perceived as legitimate, involvement can only be in areas that fall clearly within its jurisdiction.

It is therefore important to know on what basis the Defender of Rights can act and it has been seen that there are several bases for action. The Ombudsman had stated that administrative procedures should be set up to try to address the dis-functioning of the system and a recent example that the Defender of Rights inherited from the Ombudsman was where people had sold their cars yet continued to receive requests for the payment of fines. However, the law states that if the buyer of a vehicle has not registered as the new owner, the car remains registered legally with the previous owner. The Defender of Rights considered this to be absurd and a proposal for reform was accepted by the legislature.

The basis here is one of equity and in the French legal system reference is always made to the law. A law may have provisions that have unfair results and in the name of equity that provision will be asked to be changed. Additionally, action will be taken where a legal gap is identified. The Defender of Rights has therefore added two extra bases and it is now possible to propose reforms to abolish discrimination.

Ombudsmen and Defenders of rights spend a lot of energy in proposing reforms but have no decision-making powers. In France, it is the Ministries that communicate with them more than anyone else and each Ministry has a dedicated point of contact. As this work on reform begins to take shape, good cooperation is taking place through Parliamentary commissions and the Defender of Rights has even drafted laws at Parliamentarians' request.

A PARTICIPANT explains that the Defender of Rights does not have the right to make direct submissions to the Constitutional Council.

Katarzyna LAKOMA asks if the Defender of Rights status is as a party to a case when providing assistance during the judicial procedure or whether they are just there to present the views of those involved in the case.

Martine TIMSIT replies that the role is to assist only in cases where discrimination is involved. The links with the judicial authority have not been clearly established as the Defender of Rights is not party to the court case, although it is possible to submit comments and opinions.

A PARTICIPANT adds that the role does not include acting as a witness either. The main element is simply to ensure that their position is known. There is in fact no actual requirement for the Ombudsman to submit observations or comments. However, at an informal level, anyone at all is free to ask the office to draft a memo.

A PARTICIPANT explains that in Moldova the Ombudsman does not take the side of a party in a case or act as a kind of lawyer and intervenes only when it is a question of an infringement of fundamental human rights.

Katarzyna LAKOMA explains that the Ombudsman in Poland is sometimes party to proceedings and works for one of the sides involved where the points in question are linked

to constitutional law. However, the Ombudsman must follow the relevant administrative or civil procedures and where there is recourse to the Supreme Court the clear requirement is to work within all appropriate deadlines. The Ombudsman has his own scope to submit a complaint to the Constitutional Court and then escalate the matter if necessary.

A PARTICIPANT explains that in the Ukraine the role is to influence the adoption of legislation and the Ombudsman is required by law to attend meetings and make direct submissions.

A PARTICIPANT explains that the French Defender of Rights has fewer rights than the Ombudsman in the Ukraine. The relevant law states that the Defender of Rights may or may not be consulted by the Prime Minister on draft legislation.

A PARTICIPANT states that the Ombudsman's office in the Ukraine has a total of 140 staff.

A PARTICIPANT adds that many countries have relevant committees in their Parliaments and virtually all draft legislation pertaining directly or indirectly to human rights is directed to the Ombudsman's office. In their country, discussions are organised with the relevant Governmental bodies and this provides the opportunity to formulate proposals on the amendment of legislation, particularly on healthcare. Previously, the Ombudsman could only take part in the discussions in the committees and then in the Parliamentary sessions but it is now possible to also work with non-Governmental Organisations (NGOs), and this has led to positive results.

Friday 11 May 2012

Discrimination and promotion of equality

Nepheli YATROPOULOS
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Slimane LAOUFI
Head of the private employment unit, Defender of Rights, France

Anna ARGANACHVILI
Head of the Centre of Child and Woman's Rights, Office of the Public Defender, Georgia

Claudine BOURGEOIS
Head of the access to the rights and promotion of equality unit, Defender of Rights, France

Fabienne JEGU
Disability Expert, Defender of Rights, France

Arnaud de BROCA
Secretary General of the National Federation of the injured, France

Nepheli YATROPOULOS explains that a 2004 law in France provided for the High Authority for the struggle against Discrimination and for Equality. The French legislation finds its roots in European directives which required Member States to establish an organisation to support victims of discrimination. The Organic Law names 18 specific areas of discrimination and the jurisdiction has been widened further since then. From the outset, the aim has been to provide support to victims of discrimination and the institution can hold hearings and carry out investigations. Today, this is the main focus of the work of the legal experts within the office of the Defender of Rights. In parallel with the legal action, there has been a second strand of work on the prevention of discrimination, focusing on awareness raising, education and the creation of tools for fighting discriminatory practices.

50% of complaints received by the Defender of Rights are linked to work-related discrimination, with the two main areas of focus being the discrimination of older people and the disabled. In terms of age discrimination, the office is working in line with European institutions to ensure that senior citizens remain active. As regards the disabled the office has developed follow-up mechanisms within the framework of United Nations (UN) Convention on the rights of the disabled.

Slimane LAOUFI states that in order to get to grips with the issue of discrimination in age and employment all forms of age discrimination in the workplace need to be addressed. The legal framework that relates to age discrimination that the office of the

Defender of Rights works within is based on Council Directive 2000/78/EC on jobs and employment which prohibits discrimination in the workplace due to age. However, this allows for three exceptions: where there are security or safety issues involved; where there is some sort of professional requirement; and where there is an overriding national objective relating to employment policies. Another piece of European legislation that is relevant is the 2005 decision of the European Court of Justice which established that the prohibition of job-related discrimination linked to age is a general principle of community law. Additionally, part of the Labour Code in France is also relevant and discrimination is expressly prohibited in other areas of the French legislative system.

50% of complaints received by the Defender of Rights are work related, with one-third relating to the public sector and two-thirds to the private sector, corresponding to the structure of the labour market in France. Of these work-related complaints, most in fact relate to people's background or origin.

I) Age and employment

In terms of age-related discrimination, there are two main categories of discrimination. Firstly, there is the discrimination that takes place when people are trying to find employment and, secondly, there is all the discrimination that takes place throughout a person's career. Within those categories, two subcategories have been identified: discrimination that comes from age limits imposed on jobs and where a candidate therefore decides not to process with a job application; and discrimination where a candidate is rejected while the recruitment process is underway because of their age.

In June 2011, when the Defender of Rights was created, all jobs that were being advertised over a period of a month and a half were examined. Of the 274,000 vacancies identified, 15,500 had an age requirement, some had a gender requirement and some of them even asked about the person's origin. 400 of 15,500 were then examined in greater depth by the office and it was found that in a number of these employers were clearly acting in a discriminatory way and those responsible were approached in an effort to increase awareness. The office also approached other parties, such as Internet employment sites, to explain how vacancies should be advertised. Follow-up work was then carried out a year later and it was seen that the number of job advertisements specifying an age requirement had dropped and people had begun to change their approaches.

Another example of the work of the office relates to discrimination in respect of age limits in the public sector. Here, the aim was to eliminate the use of age limits, and further work related to age limits was also undertaken with major French corporations. While employers can be concerned by the age profile of their companies, for example, that is no justification for discriminating on age and there is no legal basis for it. An example of another justification that the office has encountered is where an employer refused to take on someone as an intern because they believed that they were too old.

In terms of in-career discrimination, there are often discriminatory measures where people claim that they have been prevented from being transferred, given training or promoted because of their age, and the justifications put forward by employers are often quite ridiculous in these cases.

Age-related discrimination can also be very evident when employees come to the latter stages of their careers and are forced to retire. One case that the office of the Defender of Rights in France has been involved in has been that of ski instructors who were fighting against a decision made by their own trade union that set out that instructors over the age of 60 had to substantially reduce the number of hours of classes that they gave. The union justified the decision on the grounds that it would improve the situation for younger instructors. However, when this was examined closely it was in fact found that there was

no advantage for younger instructors. The office agreed to assist the older instructors in their litigation against the union and it was found that the decision was indeed discriminatory. The union has now appealed and the office is continuing to support the instructors.

Another example of in-career discrimination, and which is something that has been occurring with greater frequency in recent years, is age discrimination relating to the setting up of social plans for employees who are being laid off. In a particular case that the office was involved in, the plan stated that there would be reduced compensation for employees over the age of 57. The company justified its decision to impose different arrangements on its older employees on the basis that people over the age of 57 would be entitled to unemployment insurance up to the age or retirement, effectively transferring compensation obligations onto the State. Unfortunately, the legislation on this point is not completely clear, but the opinion of the office is that this approach of the company is unconnected to any legitimate employment policy goal of the State. The matter currently remains to be settled.

A PARTICIPANT states that the issue of discrimination is quite serious in countries such as Moldova and a law on the prevention and elimination of discrimination is currently going through Parliament. The PARTICIPANT asks how the issue of age-related discrimination can be presented to Government effectively. The Government in Moldova believes that it has to take approaches based on age because there are not enough jobs for younger people. In that way, the Moldovan Government prevents people in the Civil Service who are close to retirement age from taking part in competitions or accessing on-the-job education.

Slimane LAOUFI replies that the problem of automatic retirement has had to be confronted in France and this could be considered to be discriminatory. It has been established that there is discrimination if someone who is automatically retired has not accumulated all their retirement credits. Effectively, these people are seen as being made to retire too early. However, where there is an employment policy adopted by the Government where the purpose is to recruit young people into the Civil Service it may not be deemed to be discriminatory.

Countries that are not members of the European Union are unable to refer to the European Court of Justice although countries with association agreements would have recourse to the Directorate General of Employment in the European Commission.

A PARTICIPANT explains that they are working on the second phase of the implementation of the association agreement to bring domestic legislation in line with European laws.

A PARTICIPANT states that employers often set out conditions when hiring in terms of asking for qualifications. This means that people applying for jobs need to have a certain amount of experience and that in turn is linked to age. In the view of the PARTICIPANT, this is a type of conditionality in disguise, as it were, and as such it is a real problem for young graduates. The PARTICIPANT asks if the French Government has any policy that deals with this issue. Conditions need to be created so that young people working in the area of technology in particular can find jobs and gain experience.

Slimane LAOUFI replies that the situation described can often be an indirect form of age discrimination. Job advertisements should contain information that relates to the job and not the person and people could have professional experience no matter what age they are.

In terms of the promotion of employment for young people, measures could be introduced that stimulate employment and the most recent initiative in France was the ‘Young Jobs’ policy. The new French President has now developed a policy known as ‘the generation contract’, which seeks to treat young people in a favourable way. As a result of this, when a company recruits a young person and at the same time retains an older person, they will not be required to pay social contributions for both of them. This is an

exceptional kind of affirmative action policy based on a legitimate political aim and as such is permissible.

A PARTICIPANT refers to the 2004 law on combating discrimination and the 2011 Organic Law on the activities of the Defender of Rights and asks for greater detail on what the Defender of Rights can do when dealing with complaints of discrimination.

A PARTICIPANT asks whether the remit of the Defender of Rights includes discrimination in the private sector.

Slimane LAOUFI explains that the 2008 European Directive which required Member States to establish an institution to assist people who may be victims of discrimination is the basic starting point for France. In France, the aim was to create an independent unit and an institutional authority that would have all the tools needed to take action. When the High Authority for Fighting Discrimination and Promoting Equality was created its main task was to provide assistance and support to people who were victims of discrimination and some of these functions have now been merged.

If people believe that they have been the victim of discrimination, they can write to the Defender of Rights and it will then be decided whether the Defender of Rights has competence in the area and whether discrimination may have taken place in an area provided for by the law. The Defender of Rights then uses the powers that are at his disposal under the law. The first of these powers is to conduct an investigation where, first of all, a letter of enquiry is sent to the person against whom the allegation of discrimination is made. The employer is provided with all the information that the Defender of Rights has received and is requested to justify his reasons for the action that is the subject of complaint. The company is required to provide all relevant documentation to the Defender of Rights. In addition, the Defender of Rights can invite the employer to come and explain the situation, accompanied by a legal representative if desired, and the office can carry out an onsite investigation and have access to all documents that are of interest. The Defender of Rights therefore has a very far-reaching power of enquiry.

Once all the relevant information has been gathered together, a legal assessment is performed and it will then be decided whether the company can justify its decision or not. The Defender of Rights then makes a written recommendation which is sent to the company. Where a complainant does not want to have the matter go through the court system it may be possible to find an amicable solution. In the case that the complainant has a strong desire to see the company taken to court because they want the company to be seen to be found guilty and have sanctions imposed, the Defender of Rights can provide observations to the court.

This has been the situation since the High Authority for Fighting Discrimination and Promoting Equality was created in 2004 and on its termination in 2011, when the structure was merged into the office of the Defender of Rights.

A PARTICIPANT asks for detail on the criminal powers of investigation that the Defender of Rights has in France that do not exist in other countries.

Slimane LAOUFI replies that the Defender of Rights has powers that other countries are very jealous of in terms of what is called ‘the criminal transaction’, which goes back to a situation that existed in the past. In 2005, there were riots in the suburbs of major French cities and in reaction to those disturbances the Government adopted the Law on Equal Opportunity in 2006. This law granted the power of criminal transaction to the High Authority and then to the Defender of Rights so that when the Defender of Rights identifies a case of discrimination within the context of a criminal allegation, the fines can be imposed and the perpetrator ordered to pay damages to the victim. The Prosecutor’s office is then approached to see if it is in agreement with that transaction and if the complainant and the perpetrator are also in agreement, the case then reaches its conclusion. Where a fine is imposed and the guilty party refuses to pay the fine a submission can be made to the correctional facilities via a direct submission through the

courts. The Defender of Rights therefore has very strong powers in this area. Fines of up to EUR3,000 for individuals and EUR15,000 for companies can be imposed.

A PARTICIPANT states that this year sees the 10th anniversary of the Madrid Convention and that 2012 is the Year of Senior Citizens. However, there is no sign of countries planning any major events to celebrate this. While there may be some international documents that can be pointed to, agreements of this kind do not always lead to any concrete action. The PARTICIPANT would like to have a better understanding of the statutory acts that France uses when resolving these kinds of issues through the courts.

Slimane LAOUFI replies that it would possible to prepare some information on the legal framework that France uses, including the European Directives on age and senior citizens.

II) Disability and employment

Anna ARGANACHVILI states that although there is a separate Centre for disability rights within the office of the Ombudsman in Georgia; all other departments are also very sensitive to the issue of disability. The general framework within which the Ombudsman operates in Georgia is the UN Convention on the Rights of Persons with Disabilities (CRPD) and while the convention has not yet been ratified in Georgia, the office of the Ombudsman attempts to use all the major principles identified within it.

However, disability rights are often discussed separately from general services issues in Georgia and the Ombudsman is very insistent that services should always be discussed within the framework of disability rights. In addition, the International Labour Organisation addresses the issue of employment services for persons with disabilities. This is a very sensitive area in Georgia because, as a former Soviet Republic, it is not easy to make the move to having higher standards and transitional steps are required. Persons with disabilities have not had access to education or vocational training for a long time in Georgia and it is this that often constitutes a disability for them rather than their diagnosed disability. As a result, efforts are being made to connect the Human Rights framework to existing services.

In terms of the legal framework, the major elements are found in the Constitution's provisions on equality of opportunity and there are also laws on social protection and social assistance. Unfortunately, the Labour Code offers no tangible opportunities to persons with disabilities in terms of employment.

Georgia has real problems with statistics. The World Health Organisation has identified that at least 10% of the population suffers from a disability while Georgia's own statistics put this at just 4%, meaning that up to 6% are effectively unregistered. The main reason for this is that the understanding of disability is still very much based on a medical model and it is not easy to shift to a social model or even a human rights model. There is also still a lot of inappropriate terminology in use and many pieces of legislation continue to refer to invalids and so on. Additionally, persons with disabilities also have great difficulties in accessing much of the physical environment and services to persons with disabilities are focused completely on rehabilitation, with no role for the vocational component so that very few persons with disabilities find themselves able to compete in the job market.

In the annual Parliamentary report, there is a chapter dedicated to persons with disabilities and in 2010 this raised the issue of certain persons with disabilities having to forego employment in favour of the state disability allowance, thus creating unequal categories of disability. Rather than facilitating the employment of persons with disabilities, the State therefore infringes people's rights. The Ombudsman considers this to be a violation of the rights of persons with disabilities and has addressed the Parliament, recommending changes to the law.

Georgia's tax code provides for the tax exemption of persons with disabilities where annual income is less than the equivalent of EUR1,500. However, as the average monthly income in the public administration is EUR800, the Ombudsman has recommended that the tax exemption limit should be raised so that it is in line with an annual salary of that level. Additionally, a weakness of the Georgian tax code is that it provides no tax incentive to employers to employ persons with disabilities.

In the Parliamentary report of 2011, the Ombudsman pressed for the introduction of the principle of reasonable accommodation in all fields, not just in employment. This was the first instance that the term 'reasonable accommodation' was used in Georgia and it is hoped that there will be further discussions in this area in due course.

In October 2010, under the mandate of the UN Convention against Torture, the Ombudsman carried out a monitoring exercise of all public social institutions where persons with disabilities resided and this revealed the exploitation of persons with disabilities in the context of vocational therapy. In one institution, persons with disabilities were required to do long hours of hard work in return for just a very nominal benefit. Accordingly, the Ombudsman addressed the relevant authorities, recommending that persons with disabilities should be protected from all forms of labour exploitation and called for the proper definition of vocational therapy and vocational rehabilitation.

However, there have also been examples of good practice in Georgia. The Ombudsman was one of the first people to show society that persons with disabilities can be a powerful force. For instance, persons with disabilities were involved as Human Rights monitors in the work of Ombudsman where they brought a more in-depth understanding to the work. Another positive example was where with the support of the World Institute for Disability the first wheelchair factory was set up in Georgia in 2010 where in the factory about 80% of the workforces are wheelchair users themselves. This is a Government-funded project, although few other initiatives of this kind exist. Nevertheless, the Ombudsman seeks to include all such initiatives in the report and the hope is that in the future the employment outlook for persons with disabilities will change.

Claudine BOURGEOIS states that promoting the rights of disabled people and preventing discrimination are the two areas of principal focus for the Defender of Rights and this is based on France's international commitments with respect to disabled people and, at the national level, the 2005 Law for the Equality of Rights and Opportunities and Participation in Citizenship of Disabled People. The Defender of Rights attaches particular importance to taking up the issues of discrimination that disabled people face and the obligation to protect disabled people, particularly in the area of employment and professional integration. France has a total of 817,000 disabled people in the workforce, with about 630,000 in private companies and about 187,000 in the public sector. The requirement to employ disabled people in certain conditions was reinforced by the 2005 law, although specific legislation should not preclude disabled people from accessing common law.

The office of the Defender of Rights carried out an assessment along with the International Labour Organisation (ILO) in 2011 to identify disability issues and this showed that there was virtually unanimous support for initiatives to encourage the recruitment of disabled people. It is often the case that when people know about someone's disability it is considered a positive contributing factor to improving their integration into the workplace. Nevertheless, there are also shortfalls and problems because people do not know what is available to them and quite often also because of prejudice.

Three recent case studies where the Defender of Rights has taken action are of interest in terms of the type of issues addressed. The first example is where a territorial authority dismissed a member of staff who was physically disabled. Here, the authority made no attempt to reclassify the job, as provided for by law. In the case, the Defender of Rights submitted a recommendation to the employer requesting that the person be reinstated or given compensation for damages.

The second case also involved a territorial authority. In this case, the person's job had not been adapted to their disability, thus constituting a form of discrimination. The recommendation here was for all measures to be taken to allow anyone to be able to work in an appropriate environment.

The third case was that of a civil servant who had been dismissed because it was claimed that no position was available that was compatible with his disability. In this case, the administration he was employed by took no action to assist him. The matter is currently undergoing mediation between the office of the Defender of Rights and the relevant Ministry.

Individual submissions received by the Defender of Rights give a good idea of what issues need to be dealt with and based on assessments of these situations a number of tools have been developed that aim to help in raising awareness of the risk of discrimination and making sure that positive outcomes are achieved. However, it is also often the case that employers seek assistance from the office of the Defender of Rights and the office is frequently contacted regarding issues of legislation and the promotion of employment of disabled people.

It was therefore considered to be important that the office of the Defender of Rights was clear about the legal framework relating to access to employment for disabled people and the practices that can be followed. In this respect, the first relevant decision was adopted on 14 June 2010 on access to work of disabled people in the private sector, where the aim was to clarify the legal framework and help employers and intermediaries focus attention on the principle of non-discrimination and the requirement to ensure that disabled people made up 6% of a company's workforce. This was followed on 13 December 2010 by another piece of legislation on public sector jobs which required disabled people to be recruited on the basis of skills and competences, while bearing in mind the need to make reasonable adaptations for them.

A useful tool that has been developed has been a brochure entitled *Hiring Disabled People Without Discrimination*, which fits in with the aim to raise awareness and help people learn about how they can change their practices and behaviours. The brochure was produced with the assistance of associations and NGOs, representatives of disabled people, trade unions and companies, and it addresses practical issues. The brochure was published in 2011 and will be updated as the legal framework develops.

The office of the Defender of Rights is currently finalising a set of frequently asked questions (FAQs) with the help of a working group made up a wide range of stakeholders. The dialogue with the working group led to difficulties in interpretation of the statutes in some instances and as a result it was decided to develop this set of FAQs so that the types of issues that arose could be addressed. Through the work of the office of the Defender of Rights, the aim is to promote a change in mentality and process.

The full involvement of disabled people in the workplace is a collective common effort that is incumbent upon the entire community that deals with the world of work and the most important thing is not to look for blame but for people to work together to improve working conditions for disabled people.

Fabienne JEGU explains that the legal area in respect of disabled people and employment in France is based on two types of provisions. Firstly, there is a kind of positive discrimination effort to promote work for disabled people through the law of July 1987 which obliges employers who have 20 employees or more to establish measures for the professional integration of disabled people. This 1987 law was a very positive step but it has to be recognised that it has not been enough to guarantee equal access to work for disabled people and today the rate of employment of disabled people is stagnant at about 3% or 4%. Secondly, there are the European directives that have been incorporated into French law, particularly in 2005 through the law on equal opportunities and rights for disabled people.

Rather than access to jobs, the area of employment where most discrimination against disabled people has been seen in the office of the Defender of Rights is the problem of unequal treatment in the workplace in terms of promotion possibilities or in the jobs that people are actually doing. Therefore, the obligation that exists in respect of recruiting disabled people is not sufficient to ensure that there is equal treatment of disabled people when they are part of the workforce. People have approached the Defender of Rights to say that they had been recruited to satisfy an employer's obligations in respect of disabled people but that once they are in place they are not given equal treatment.

One of the most common issues to arise in the submissions that people make is that of career advancement and they often believe that their salaries do match their competences. Access to training is another issue and many submissions relate to employers refusing to adapt the physical working area. If a person cannot do their job properly in the workplace, it can have an effect on their health and people are prevented from doing their jobs effectively. Additionally, although the law requires employers to reclassify jobs and adapt working conditions, this is often not done and the employer can then eventually decide to dismiss the person.

A large number of submissions also relate to instances where disabled people have health issues that prevent them from going to work and the employer then sees absence on sick leave as disturbing the flow of work. Again, this can often lead to dismissal. People with degenerative illnesses also face particular problems.

The 2005 law was an important development regarding the employment of disabled people and it was then that the principle of reasonable accommodation was imposed on all employees. With the principle of reasonable accommodation the law says that in order to guarantee equality of treatment all employers must take the requisite measures to allow disabled people to have access to their work and progress in their job. The only exemption for employers here is by showing that this would constitute disproportionate cost and difficulty. Reasonable accommodation is an area that the office of the Defender of Rights is attempting to raise awareness on as it is defined quite vaguely.

The Defender of Rights has been involved in two cases relating to reasonable accommodation which are of particular interest. In the first case, a person with very slight hearing problems was applying for a post of teacher of physical education. The medical opinion given at the time was that his disability was perfectly compatible with the position. However, his disability prevented him from going underwater and he was therefore unable to provide a required certificate of live saving. This resulted in him failing to get the post and the High Authority at the time believed that this was a form of indirect discrimination. Recommendations were made to the Government on improvements to the regulations but the Government chose not to follow the recommendations as it considered that there was a safety problem. The case finally went to court where the candidate won as it was considered that his disability could be accommodated in other ways given that lifeguards at public pools could ensure the safety of the children and there was also the possibility of the teacher exchanging classes with another teacher.

Another example is where a disabled lawyer felt that she was discriminated against in her profession because being in a wheelchair meant that she could not have access to the courts. Here, the view of the Defender of Rights was that the State should take the appropriate measures to ensure that disabled people were able to exercise their profession. While the State was given until 2015 to make the necessary changes, the lawyer nevertheless received compensation because it was considered that she was suffering from a prejudice in exercising her profession.

Access to public sector jobs for people with degenerative diseases is another important area and there the problem is the issue of aptitude tests that are often part of entry requirements. The relevant legislation debars people with a degenerative illness that could lead to long-term sick leave from applying for jobs. Effectively, therefore, the aptitude of a person was not taken into consideration but people were simply excluded for having a degenerative disease. The Defender of Rights received a large number of submissions on

this from people suffering from diabetes and the recommendation made was that the legislation should be improved. This approach had a successful outcome as the legislation now requires the aptitude of the person at the time they apply for a post to be taken into account and where a person has a degenerative illness the employer needs to take into account any treatment they would need.

Arnaud de BROCA explains that he is speaking as a representative of an association that represents the disabled, particularly those who have become disabled after an accident or illness. His particular role is to seek to improve the relevant legislation, although it is recognised that the legal framework is currently more or less satisfactory in terms of defending the rights of the disabled. However, there is a wide gap between the regulation and its application and as well as issues of employment other key areas include access to school and healthcare.

The situation with regard to employment is very complex and the current level of unemployment for disabled people is two to three times higher than that for the rest of the population. Disabled people are dismissed too easily and could be retained if they were re-graded to a different position, for example. 120,000 people are dismissed each year for ineptitude and it will be inevitable that that number will include people who are victims of discrimination.

The situation differs significantly depending on what the disability is and behind the term 'disabled' there are many different realities. In addition, there is discrimination not just from employers themselves but also from colleagues at work, and people with mental disabilities have even greater difficulty remaining integrated in the workplace.

There is a large number of associations in France working on disability and many levels of cooperation. FNATH and other associations met twice a year with the High Authority when it existed and this made it possible for important issues to be raised and for the High Authority to explain what it was doing. Many disabled people need an association to help them stand up for their rights and this kind of regular exchange has helped associations develop awareness and understanding. Associations can therefore make submissions on behalf of the disabled where the aim is to get the Defender of Rights to take the case on.

One of the most prominent issues that FNATH deals with is career development. In one case, someone involved in the trade unions suffered from an asbestos-related illness. In fact, there were two criteria of discrimination in this case as in addition to the illness the person had not been given the same career development opportunities as his colleagues In another case, a nurse developed back problems through her work in the hospital. FNATH helps people make their submissions and its legal unit will advise on the best kind of action to take. For FNATH, the office of the Defender of Rights is clearly the destination where most submissions will be sent.

As well as individual submissions FNATH can deal with group interests. For example, one case dealt with the opportunity set out in law for disabled people to take early retirement. The issue at stake here was settled within a few months and the support of the Defender of Rights helped ensure that progress was made more rapidly. The members of FNATH have great expectations of the Defender of Rights although it is important that people recognise that things can take a long time to go through the relevant processes. Additionally, the legal complexities can be hard for people to follow and one of the important roles of associations such as FNATH is to explain to people why decisions have been made, particularly when it has been decided that discrimination has not taken place.

Anna ARGANACHVILI asks what types of issues need to be considered when a complaint has been made relating to the issue of reasonable accommodation and what kind of proportionate and affirmative action needs to be taken.

Fabienne JEGU replies that it is important to keep in mind the specific situation that is at issue as the law requires complaints to be dealt with on a case-by-case basis. It is therefore not possible to assume that just because someone has a disability they must

automatically have their workplace adapted. In cases of reasonable accommodation, the office of the Defender of Rights carries out an investigation and looks at any information provided by the disabled person or the employer as well as how the company itself operates. After that, any appropriate measures that need to be taken will be considered and occupational doctors can also put forward suggestions regarding adaptation of the workplace. There also needs to be consideration as to whether the cost of introducing the measures would be disproportionate as the law considers excessive cost to remove any obligation to adapt the workplace. However, the employer may have the opportunity to access certain funds and finance may therefore be available from that source. It is therefore only at the end of this entire process that it is possible to decide if there is discrimination or not.

Nevertheless, in reality things are much simpler because what mostly happens is that the occupational doctor would recommend changes. However, it is often the case that employers simply do not follow the doctor's recommendations and that in itself can point to the fact that discrimination has taken place.

Slimane LAOUFI affirms that the need to adapt the workplace is based on the recommendation made by the occupational doctor. However, where the employer has not made the recommended changes there can be some discussions of a very technical nature. The employer will sometimes point to a feasibility study that shows that it was not possible to make the adaptations or that they would lead to disproportionate cost. In this type of situation, various experts discuss the issues and reach a conclusion. However, where an employer simply says that the changes could not be made, it is clear that there is a case of discrimination.

Concluding Remarks

Maryvonne LYAZID
Deputy in charge of the struggle against discrimination and the promotion of equality, Defender of Rights, France

Maryvonne LYAZID states that the life expectancy of people in Europe is increasing and there is already discrimination against older people in recruitment and training as well as in the provision of goods and services. Aged-based discrimination was one of the main issues that were addressed by pervious speakers and younger people as well as older people can suffer from discrimination. Discrimination suffered by disabled people was the second issue covered earlier and age and disability can often go hand in hand. The issue of discrimination linked to health in terms of career prospects was also a key issue that was covered by previous speakers.

There are three areas of discrimination where progress needs to continue to be made. Firstly, in terms of gender discrimination, the High Authority and the Defender of Rights have made a great deal of headway on gender-based discrimination and the legislation in this area is now much stronger. However, many women do not recognise that they are in fact being discriminated against and this will be a very important area of work for the Defender of Rights in the years ahead. There is clearly an underestimation of the value of work done by women.

Secondly, as regards origin-based discrimination, the Defender of Rights has just issued a guide to help employers assess their anti-discrimination policies and track how practices are changing. The third issue relates to sexual orientation and while a great deal was achieved in this area by the High Authority it continues to be an area of focus for the office of the Defender of Rights. Work is also being carried out on sexual discrimination at European Union level and the Council of Europe has issued a report that could act as a working guide for the office of the Defender of Rights.

As was pointed out earlier, the basic tool available to the office of the Defender of Rights in working on issues of discrimination is the individual submissions of complaint that it receives. This helps the office to concentrate the work of its different units and committee, and working groups are another important means by which the office functions, with groups currently looking at the issues of air travel and school cafeterias. The resolution of the Defender of Rights is very clearly going forward and the office has ensured that appropriate experts are available via the relevant committees. The office also works very closely with associations, such as FNATH, who were pioneers in this area. Key objectives for 2012 will be to create committees on gender equality, the rights of the child, health and age.

In terms of international activity, the Defender of Rights has prioritised the need to participate in existing European networks, particularly Equinet, and the office also works closely with the Council of Europe, the European Union and the United Nations. It is also important for the office of the Defender of Rights to work bilaterally and multilaterally where there are real opportunities for people to learn from each other.