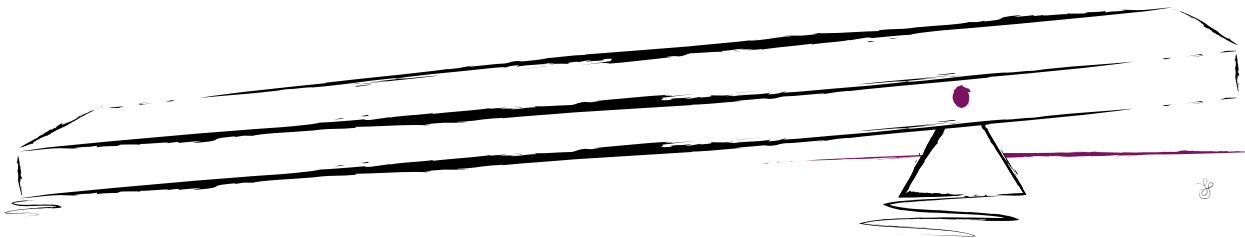




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Conseil national des droits de l'Homme

The Establishment of the Authority for Parity and the Fight against all Forms of Discrimination

Memorandum



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MEMORANDUM ON THE ESTABLISHMENT OF THE AUTHORITY FOR PARITY AND THE FIGHT AGAINST ALL FORMS OF DISCRIMINATION

BASIS OF THE OPINION

1. Through the constitutional reform of July 2011, Morocco reaffirmed its irreversible choice to build the rule of law and establish a democratic and modern State, and renewed its commitment to adhere to the principles, rights and obligations set out in international charters and conventions on the universally recognized human rights.

2. To this end, the Constitution provides for a number of mechanisms to ensure commitment of the public authorities to creating conditions to ensure that effective freedom and equality is extended to all citizens and enabling them to participate fully in political, economic, cultural and social life.

3. In accordance with its responsibilities in the field of promoting human rights, as provided by the Royal Decree setting it up, the National Human Rights Council (CNDH) has set the main directions of its action in line with the national priorities, particularly the project for implementing the provisions of the Constitution relating to human rights and fundamental freedoms, on the one hand, and strengthening the coherence of human rights-related public policies, on the other.

4. In this connection, the CNDH has initiated a consultation process to assist the Government and the Parliament in the process of setting up the new entities for the promotion of human rights provided for in the Constitution, including *the Authority for Parity and the Fight against all Forms of Discrimination (APALD)*. This specialized entity, created under Articles 19 and 164 of the Constitution, is mainly responsible for ensuring respect for the rights and freedoms provided for in Article 19, without prejudice to the powers of the CNDH. The Constitution vests in this Authority a wide range of powers but leaves it to the law to determine more precisely its mandate and mission as well as its relations with the other existing institutional mechanisms concerned with human rights.

5. After a study focusing in particular on international experiences in this field, and a long and rich process of exchange and consultation with various stakeholders, mainly civil society organizations and resource persons as well as a number of national institutions, *the objective of this memorandum is to present the CNDH's proposals regarding the status, mandate, missions, geographical coverage and composition of the APALD in order to guide policy and law makers in this area.* This memorandum is based on the provisions of the Constitution, the relevant international human rights instruments, and the particular context of Morocco.

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APALD STATUS

Independence

6. It is vital that institutions working in such sensitive areas as human rights in general and the fight against discrimination in particular should be autonomous. This independence allows these institutions to carry out the duties conferred upon them by law without disruption and to plan their action from a strategic and sustainable perspective.

7. The constitutionalization of the APALD can be interpreted as an assertion of its independence and its financial and management autonomy. The independence of this institution, which implies the absence of supervision or hierarchical powers on the part of the executive, should necessarily be reflected in its mandate, competence, composition and mode of governance as well as in the resources to be allocated to it.

Statutory/legal basis

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8. A legal basis is needed to establish this authority on clear foundations in accordance with the Constitution and the relevant international instruments. In this regard, it is necessary to:

8.1 Define, in a clear and explicit manner, discrimination (direct and indirect) against persons or groups perpetrated by a natural or legal person, a group or a public or private institution;

8.2 Mandate positive measures pursuant to (i) Article 6 of the Constitution, Article 19 and Article 30 (equal access for women and men to elective offices), and (ii) the provisions of international conventions (in particular Article 4 of the Convention on the Elimination of All Forms of Discrimination against Women);

8.3 Provide for legally binding, proportionate and dissuasive penalties for infringement of parity and anti-discrimination legislation.

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APALD MANDATE

9. Having regard to the Constitution and the lessons learned from international and national experiences, it is recommended that ***the mandate of the APALD relate exclusively to the fight against gender-based discrimination (unique/specific mandate)***:

9.1 The Constitution provides for the creation of the APALD in Article 19, which is exclusively dedicated to equality and parity between men and women in all fields. In addition, Article 164 explicitly stipulates that the mandate of this entity is to ensure respect for the rights and freedoms enshrined in Article 19;

9.2 From a sociological perspective, it is crucial to take into account the historical and structural realities of discrimination against women, as it implies how the Government will direct and implement the establishment of the APALD. However, discrimination against women is largely acceptable by society and is often ethically and morally justified. Therefore, it cannot be equated with discrimination against other groups in society;

9.3 Not being a social category by themselves (gender is the only element inseparable from the notion of person), women, half of humanity, face multiple discrimination because of their sex, exacerbated by the complex interplay of other grounds of discrimination now prohibited by the Constitution, ***particularly disability and/or personal circumstances***. In other words, the effective enjoyment of rights is often influenced by the fact that women are members of groups facing multiple forms of discrimination;

9.4 The core challenges of the gender equality issue in a Morocco transiting to democracy more than justify the choice of the model of an institution dedicated solely to the fight against discrimination on grounds of sex. The establishment of an independent institution dedicated to the promotion of gender equality and the fight against discrimination against women can contribute significantly to strengthening and expanding the democratic and modernist achievements of recent years;

9.5 As Morocco starts its first experience of institutionalizing the fight against discrimination, it would be appropriate that the APALD be specifically vested with a unique mandate to enable it to meet the conditions necessary for the success of its mission.

10. However, the choice to provide the APALD with the specific unique mandate of fighting against gender-based discrimination in no way prevents:

10.1 The establishment by this institution of different procedures and remedies in the field of fighting against all forms of discrimination prohibited by the Constitution. These statutory and operational arrangements would be useful for all anti-discrimination organizations that could be set up simultaneously with or subsequent to the establishment of the APALD;

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10.2 The creation of other institutions geared to multiple or sectoral grounds of discrimination, including grounds prohibited under the Preamble of the Constitution, provided that the prerogatives of each of these entities and the relationships between them are clearly defined;

10.3 Future development, if necessary, into a “comprehensive” model focused on several or all of the discrimination grounds set out in the Constitution.

APALD MISSIONS

11. The Constitution implicitly defines the mission of the APALD, as reflected in its name:

11.1 Parity between men and women, namely the promotion of equality; and

11.2 The fight against all forms of discrimination, i.e. the prevention of and protection against all forms of discrimination.

12. The promotion of equality and the processing of complaints are both important for the anti-discrimination strategies. Promotion is in itself a means to prevent discrimination and violation of the right to equality. By integrating this dual mission and through the interplay the latter creates, the APALD could ensure that the actions it takes are complementary and strengthen the overall impact of its action. Without replacing other structures, the APALD can draw on the “Paris Principles”, including as part of its quasi-judicial mandate.

APALD FUNCTIONS

13. The Constitution does not mention the functions of this institution, except for the publication of annual reports and their submission to and discussion by the Parliament (Article 160). The standards and guidelines laid down by the relevant international instruments and the lessons learned from international experiences provide valuable insights on the nature of the duties to be assigned to an institution such as the APALD.

13.1 *Regarding the “protection” function, the CNDH recommends the adoption of a quasi-judicial mandate in order to adhere to the spirit and letter of the Constitution.* Indeed, the term «AUTHORITY» refers to a *quasi-judicial institution whose duty is not merely to process and forward complaints.* The establishment of a quasi-judicial entity draws its significance and justification from the difficulties faced by litigants, especially women and girls -more vulnerable to discrimination-, in accessing justice and enjoying their rights. Therefore, it is recommended that the APALD be vested with the following functions:

■ Receiving complaints from individuals, their representatives, nongovernmental and socio-professional organizations, and all other representative organizations;

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- Informing the complainants of their rights and the remedies available;
- Handling complaints according to established rules and procedures, and forwarding them to the competent authorities and other relevant actors;
- Intervening with the authorities, other entities and all those involved in the complaint to seek a settlement by conciliation/mediation or by a binding decision (set by law);
- Conducting investigations in public and private organizations and other entities through the appointment, within the APALD, of competent officials accredited for this purpose;
- Initiating investigations on its own initiative in cases of discrimination, and bringing actions before the courts;
- Making recommendations to the public authorities and other stakeholders, by proposing reforms to laws, administrative and other practices based on the analysis of complaints and the assessment of the settlement process;
- Monitoring and following up the cases of discrimination/violence and the recommendations it issues.

13.2 *Concerning the function of “promoting equality/parity”*, it is advisable to provide the APALD with the following functions:

- Giving opinions ahead of the drafting of laws and public policies in areas related to its mandate to ensure their compliance with the Constitution, international instruments and relevant laws;
- Conducting surveys, opinion polls and research to better understand and fight against discrimination;
- Consulting with stakeholders and the public concerned, and fostering societal debate on discrimination-related issues;
- Building the capacities of other actors to better inform, educate and raise awareness about the rights enshrined in the law and how to enforce them;
- Developing codes of conduct, tools and relevant materials, and disseminating them among the concerned public and private institutions and bodies;
- Supporting and disseminating good practices in the fight against discrimination and the promotion of gender equality in all areas and sectors;
- Publishing annual reports to be debated by Parliament and widely distributed.

GEOGRAPHICAL COVERAGE

14. The advanced regionalization project is undoubtedly an opportunity to break with the centralist approaches and policy guidelines that have shown their limitations in terms of proximity and targeting the populations most vulnerable to discrimination and violations of their rights, in particular the poorest women and girls.

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15. In this regard, it is recommended that the geographical coverage of the APALD be carefully considered and gradually implemented in accordance with the advanced regionalization objectives, institutions and mechanisms set out in the Constitution and the Local Government Charter, namely:

15.1 Better allocation and management of resources in order to solve community problems based on the rule of law, equity, efficiency, citizen participation, transparency and accountability;

15.2 The effectiveness of rights as set out in Articles 6 and 31 of the Constitution, which require the State, public institutions and local authorities to mobilize all the resources available to them to facilitate equal access for citizens of both genders to conditions allowing them to enjoy their rights;

15.3 Strengthening arrangements and mechanisms set forth in the Local Government Charter relating to “the consideration of gender in the development of the local development plan” (Article 36) and the creation of the “Commission for Equality and Equal Opportunities” in local government councils (Article 14).

COMPOSITION AND ORGANIZATION

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16. Ensuring respect for the criteria of independence and credibility as well as the nature of the APALD mandate, which combines the functions of protection and promotion, justify, in terms of composition, the preference of *a deliberative body of a “select panel” character* rather than a large extended structure. The panel members should be appointed *intuitu personae* based on criteria relating to their acknowledged commitment toward gender equality, their proven professional experience in the fight against discrimination and established expertise in the management of protection and/or promotion functions.

17. Whatever approach is taken, it will be important to insulate the future operation of the APALD from the paralyzing effects that the interference of political and ideological factors may cause. Given the Authority’s specific mandate, the legitimacy created by an appointment mode favouring the representation of different political views or inclusion of the diverse ideological trends will eventually constitute a reliable guarantee of the efficiency of an institution of this nature.

18. Finally, the lessons learned from the experience of countries with similar institutions argue strongly in favour of a select collective leadership or an individual one such as the “ombudsman” or the “human rights defender”.

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19. *The leadership/technical management* of this entity should fulfill a number of criteria, particularly expertise and independence. The technical and administrative staff should be recruited following transparent hiring procedures which will provide the APALD with the required capacity while complying with good governance values.

HUMAN AND FINANCIAL RESOURCES AND GOOD GOVERNANCE

20. The determination of the *required human, financial and information resources* needs to be done on the basis of a precise and objective external assessment conducted by an independent body in order to:

20.1 Provide the APALD with regular, sustainable and sufficient financial resources allowing it to perform all its functions and activities;

20.2 Require State bodies to lend support to the APALD, particularly in providing it diligently with the information and statistics necessary for the performance of its duties and functions (Article 159 of the Constitution);

20.3 Require the APALD to discharge its responsibility toward citizens of both genders through the publication of activity reports at least once a year, to be presented to Parliament for discussion (Article 160 of the Constitution) and widely disseminated to the public and other public and private institutions;

20.4 Provide for regular external assessments of the APALD's activities and operation;

20.5 Submit, on a regular basis, the APALD's expenditure and fund management to the control of the competent financial authorities.

PARTNERSHIPS

21. The independence and efficiency of the APALD are closely linked to the partnerships and synergies it builds with:

21.1 The public authorities and other independent institutions working in the field of human rights and good governance (the CNDH, the Mediator (ombudsman), the High Authority for Audio-Visual Communication, etc.) without prejudice to the responsibilities of each of these institutions, in order to avoid duplication and improve the focus and services provided;

21.2 Socio-professional organizations (employers associations and trade unions) and nongovernmental organizations in order to define and develop an extended action framework for parity and non-discrimination;

21.3 Similar organizations and institutions in other countries and regions.

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CONCLUSION

22. The main lesson to be learned from international experiences in the institutionalization of the fight against discrimination is that there is no ideal model. These international experiences, combined with the Moroccan statutory and social context, are an incentive to opt for an entity:

22.1 With independent status and autonomous management, enshrined by a statute/law;

22.2 Focused, in terms of mandate, on direct and indirect discrimination based on sex/gender;

22.3 Covering the promotion of equality/parity as well as protection against discrimination, for example through its quasi-judicial function;

22.4 Based on the principles of select and committed leadership, good governance and proximity with citizens of both genders;

22.5 Endowed with human resources, high level of expertise and appropriate budget;

22.6 Open to strategic and successful partnerships.

SHEET I: DISCRIMINATION AND PARITY

Discrimination

1. Discrimination means treating a person or a group of persons differently and adversely on the basis of unlawful/prohibited criteria relating to characteristics inherent to the individual (sex, race, ethnicity, colour, age, etc.) or acquired characteristics (language, religion, marital status, union membership, etc.). It may be committed by natural persons, legal entities, state officials, or public or private institutions.

2. Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979)¹ defines “discrimination against women” as “any distinction, exclusion or restriction made on the basis of sex which *has the effect or purpose* of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

3. In referring to “effect” and “purpose”, CEDAW addresses two forms of discrimination, namely *direct and indirect discrimination*.

- The **purpose** of direct discrimination is to use the law to place one group at a disadvantage compared with another.

- The **effect** of indirect discrimination is to place one group at a disadvantage compared with another. Indirect discrimination includes all practices that are formally neutral but have a disproportionately disadvantageous impact on the members of certain salient social groups (mostly women and ethno-racial minorities), regardless of the motivations of their proponents².

4. Several international human rights treaties³ explicitly define discrimination as an effect-based concept. Under these instruments, the prohibition of discrimination includes measures that are not discriminatory in appearance (neutral) but are so in fact and in effect, thus constituting indirect discrimination.

5. According to the CEDAW Committee, “indirect discrimination against women may occur when laws, policies and programmes are based on seemingly gender-neutral criteria which in their actual effect have a detrimental impact on women”⁴. This indirect discrimination is attributed to often structural causes that “may exist because of stereotypical expectations, attitudes and behaviour directed towards women which are based on the biological differences between women and men. They may also exist because of the generally existing subordination of women by men”⁵. “Gender-neutral laws, policies and programmes unintentionally may perpetuate the consequences of past discrimination. They may be inadvertently modelled on male lifestyles and thus fail to take into account aspects of women’s life experiences which may differ from those of men.”⁶

1- Adopted by the UN General Assembly (resolution 34/180 of December 18, 1979) and entered into force on September 3, 1981, in accordance with Article 27 thereof.

2- Definition given by the United States Supreme Court in *Griggs vs. Duke Power Company* in 1971, and introduced into the European context by the British Race Relations Act 1976.

3- Particularly CEDAW, CERD and the Convention on the Rights of Persons with Disabilities

4- General Recommendation No. 25 on article 4, paragraph 1, of the CEDAW, on temporary special measures, 2004, p. 9, note 1. (<http://www.un.org/womenwatch/daw/cedaw/recommendations/>)

5- Idem.

6- Idem.

Parity

6. Parity is the “recognition of a socially constructed otherness”, and forms the basis for policies against inequalities between men and women. It can be defined as the equal quantitative representation of women and men in all areas and in access to decision-making bodies in the public, professional and political spheres. Its *raison d'être* is the need to use **binding legal, regulatory and institutional measures** to counteract discrimination. The aim of this voluntary affirmative action is to remedy past and/or present discrimination of which women are allegedly victims. In other words, parity is a means to enforce formal egalitarianism, without which equality would remain an abstraction.

7. In enshrining the principle of rights effectiveness and parity, the Constitution is in conformity with CEDAW, which stipulates in Article 4 that measures to accelerate **de facto equality** between men and women (**temporary special measures**) shall not be **considered discrimination as defined in Article 1 of this Convention**.

8. This article is a provision of international law with a quite original legal value and meaning insofar as its interpretative scope cross-cuts all the rules and requirements established by CEDAW. Under this article, this clause aims to ensure **accountability for results or substantive equality** “that neither creates the recognition of a specific right nor imposes a new obligation on States parties, but aims to confer general and indisputable legality on the affirmative action referred to in Article 4 in order to avoid any future doubt or dispute on the compatibility of measures favouring women only, while CEDAW prohibits gender discrimination, and could therefore, in the absence of Article 4, raise doubt about the legality of such measures”⁷.

9. In conclusion, it is possible to assert that the Constitution's provision on gender equality is a prerequisite for any legislation designed to make effective, on the one hand, the prohibition of discrimination on grounds of gender in particular, and on the other the provisions of Article 19 on equality between women and men in all areas. This will allow for the switch from constitutional recognition of rights to the promotion of their effectiveness.

SHEET 2: APALD GEOGRAPHICAL COVERAGE

1. The advanced regionalization project is undoubtedly an opportunity to break with the policy guidelines and centralizing approaches that have shown their limits in terms of proximity and targeting the population most vulnerable to discrimination and rights violations, in particular the poorest women and girls.

2. In this respect, the geographical coverage of the APALD can contribute to:

a. Achieving the advanced regionalization objectives stated in the Constitution, namely better allocation and management of resources in order to solve community problems on the basis of the rule of law, equity, efficiency, citizen participation, transparency and accountability;

b. Ensuring the effectiveness of rights as set out in Articles 6 and 31 of the Constitution, which require the State, public institutions and local authorities to work toward the mobilization of all the resources available to them so as to facilitate equal access for citizens of both genders to conditions allowing them to enjoy their rights;

c. Strengthening arrangements and mechanisms set forth in the Local Government Charter relating to “the consideration of gender in the development of the local development plan” (Article 36) and the creation of the “Commission for Equality and Equal Opportunities” in local government councils (Article 14).

3. The APALD should play a crucial role in the adoption of comprehensive, coherent and integrated regional and local policies based on the human rights-based approach, legal commitment and accountability. To this end, the decentralized action of the APALD should take into account the following tasks.

3.1 *The promotion of regional/local gender equality and participatory democracy*

a. The participation of women on an equal footing with men is both a policy lever to promote citizen and democratic participation and an operational lever providing greater relevance and sustainability of development policies at regional and local level.

b. The APALD can make a major contribution to strengthening local governance and accountability through the consolidation of local dynamics to combat discrimination and gender gaps in accordance with the Constitution, which attaches great importance to citizen participation in the formulation and monitoring of development programmes by devoting several articles to this matter (12, 13, 14, 15, 136 and 139).

c. At the regional level, the APALD should perform the following tasks and functions:

- Promoting equal representation of women and men in the various elected bodies of local governments, the offices of these bodies and all regional and local governance and coordination bodies;
- Monitoring key stakeholders in the field of the fight against discrimination and the promotion of equality and parity;
- Building the capacity of local actors and enhancing their openness to innovation and citizen participation, creating new and emerging complaint processing methods, and organizing forms of cooperation among local actors (elected representatives, local authorities, economic stakeholders and civil society organizations).

3.2 *Protection/prevention of discrimination and violence against women and girls*

- a.** Monitoring cases of discrimination and violence against women and girls;
- b.** Receiving and processing complaints, providing assistance to the complainants -victims of discrimination, and informing them of their rights and the available remedies;
- c.** Intervening directly with the entities involved in the complaint to seek a settlement by conciliation/mediation.

3.3 *Promotion of effective equality between women and men in all areas*

- a.** Stimulating and supporting the adoption of **a human rights and gender-sensitive approach** in the development, implementation, monitoring and evaluation of regional development policies;
- b.** Stimulating and supporting the establishment of regional and local information systems based on gender-sensitive statistics and factual data, in order to make a detailed diagnosis of the region/community, actively guide regional/local choices and political and fiscal priorities, take into account the needs of vulnerable populations, including women and girls, and measure the impact of regional and local policies on the latter;
- c.** Supporting the development of results-based gender-responsive **budgeting**, which the Ministry of Economy and Finance has progressively pilot-tested at national level since 2002;
- d.** Boosting the systematic implementation of steering, management, analysis and monitoring instruments in the regional and local governance structures, including the various commissions set up within the local and regional councils;
- e.** Advocating and fostering the establishment of a "Commission for Equality and Equal Opportunities" in local government councils, while giving due consideration to (i) clarifying their mandate and responsibilities to provide them with the required power; (ii) specifying the criteria used to select their members (parity, competence, commitment, etc.), and (iii) strengthening the human and financial resources of these commissions;
- f.** Supporting the training of local officials specialized in equality and parity issues



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Memorandum - january 2013

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