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Conseil national des droits de l'Homme

المملكة المغربية
ⵜⴰⵎⴳⴷⴰⵢⵜ ⵏ ⵏⵓⵔⵓⵎⴰⵏ
Kingdom of Morocco

**MEMORANDUM ON
BILL NUMBER 79. 14 CONCERNING ON
THE AUTHORITY FOR PARITY AND
THE FIGHT AGAINST ALL FORMS OF
DISCRIMINATION**

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**I: FOUNDATIONS AND BACKGROUND REFERENCES FOR THE
OPINION OF THE NATIONAL COUNCIL FOR HUMAN RIGHTS**

The National Council for Human Rights,

Considering the request for an opinion expressed on 23 November 2015 by the President of the House of Representatives and received on 24 November 2015;

Considering the Rules of Procedure of the House of Representatives, in particular Article 234;

Considering Dahir Number 1-11-19 of 25 Rabi I 1432 (1 March 2011) establishing the National Council for Human Rights, in particular Article 16;

Considering the Belgrade Principles on the Relationship between National Institutions of Human Rights and Parliaments, including its principles 22, 24, 25 and 28;

Considering the Memorandum of Understanding concluded on 10 December 2014 between the House of Representatives and the National Council for Human Rights, and in particular Article 2;

Pursuant to the Constitution, including its Preamble and Articles 19, 32, 159, 160, 164 and 169;

Considering the International Covenant on Civil and Political Rights, in particular Articles 3 and 26 as commented on by the Human Rights Committee in its General Comment No. 28¹;

Considering the International Covenant on Economic, Social and Cultural Rights, in particular Article 2 (§2), 3 and 10, as discussed by the Committee on Economic, Social and Cultural Rights in its General Comments No. 20 on non- Discrimination in Economic, Social and Cultural Rights² and No. 16 on the Equal right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights¹³;

Considering the Convention on the Elimination of All Forms of Discrimination Against Women, in particular Articles 1, 2 and 4 as discussed by the Committee on the Elimination of Discrimination against Women in its General Recommendations No. 25 relevant to temporary special measures⁴ and No. 28 relevant to the States parties to the Convention and their core obligations devolving from Article 2 of the said Convention⁵.

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Given the Principles relating to the status and functioning of national institutions for the protection and promotion of human rights, commonly known as the Paris Principles⁶;

Given the general comments of the Accreditation Sub-Committee, under the national institutions of the International Coordinating Committee for the Promotion and Protection of Human Rights (ICC), including Observation No. 1. 2 of the mandate for Human rights, Observation No. 1. 5 on the relationships between the institutions of human rights, Observation No. 1. 8 on the selection and appointment of the decision-making body of the national human rights institutions, Observation No. 1. 9 on official representatives of government within national institutions for human rights, Observation No. 2. 2 of the full-time members of national institutions for human rights, and General Observation No. 2.10 on the quasi-judicial powers of national institutions of human rights (processing of complaints);

Considering Resolution 29/4 on the Elimination of Discrimination against Women adopted on 2 July 2015 by the United Nations Human Rights Council⁷ in particular paragraph 6 (a);

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Considering Resolution 23/7 on the Elimination of Discrimination against Women adopted by the United Nation Human Rights Council⁸ on 13 June 2013, in particular paragraph 8;

Considering the initial and the additional memoranda formulated by the National Council for Human Rights on the Authority for Parity and the Fight against All Forms of Discrimination published respectively in January 2013 and in May 2014;

Considering the opinion of the European Commission for Democracy through Law (Known as the Venice Commission) on «The Entity for Parity and the Fight Against All forms of Discrimination of the Kingdom of Morocco»⁹ formulated on 6 October 2013 at the request of the government of Morocco.

The National Council for Human Rights here-by presents its opinion on Bill No. 79. 14 concerning the Authority for Parity and the Fight Against All Forms of Discrimination.

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**II. REMINDER OF ELEMENTS TO BE CONSIDER IN THE DESIGN
OF THE LAW WHICH WILL DETERMINE THE COMPOSITION,
ORGANIZATION, POWERS AND RULES OF OPERATIONS FOR
THE AUTHORITY FOR PARITY AND THE FIGHT AGAINST ALL
FORMS OF DISCRIMINATION (THE CONSTITUTIONAL MANDATE
FOR THE AUTHORITY FOR PARITY)**

1. Considering that it is the duty of the legislature, in accordance with Article 171 of the Constitution, to decide by law on the composition, organization, powers and rules of the Authority for Parity and the Fight Against All Forms of Discrimination, the said entity subject of this opinion, the National Council for Human Rights wishes to recall a few elements that ought to be taken into consideration in the development process and discussion of Bill Number 79.14.

To this end, it should be recalled that the Constitution established a distinction between the concerned institutions in Articles 161 to 170 and thus created three categories: Institutions for the protection and promotion of human rights, institutions for good governance and regulation, and institutions for the promotion of sustainable human development and participatory democracy. This distinction, of a constitutional nature, obeys the principles of coherence and complementarity of the missions (protection and promotion of human rights, regulation and control, consultation, monitoring and evaluation of public policies). If the independence of these institutions and bodies is guaranteed under the first paragraph of Article 159 of the Constitution, it is, however, incumbent on the legislator to clarify its scope and terms.

2. The National Council for Human Rights justifies its position by referring to three considerations in decisions of the Constitutional Council.

Indeed, the Constitutional Council specified in the preamble to its decision No. 817 of 13 October 2011 that «the Constitution is self-complementary in its principles and its objectives.¹⁰» This legitimate consideration, in the opinion of the CNDH, is a systemic reading of the provisions of the Constitution mentioned in the citations of this opinion.

The Constitutional Council has also devoted through its Decision No. 932/14 of 30 January 2014¹¹ on the review of the constitutionality of the organic law on the Economic, Social and Environmental Council the principles of coherence, differentiation and complementarity of objectives of the constitutional bodies as prescribed in sections 161 to 170 of the Constitution.

In this respect, the considerations behind the decision should be recalled : «the Constitution recognizes that, pursuant to Article 159, the independence of these three councils and institutions [in this case the High Authority for Audiovisual Communication, the Competition Council, and the National Council for Integrity and Anti-Corruption]

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as they are part of good governance and regulatory bodies, assigns to said institutions of constitutional tasks relating to the control, the regulation and the implementation of monitoring in accordance with Articles 165,166 and 167,a fact that distinguishes them from other bodies and advisory councils in the Constitution.The Constitutional Council further considered that» the independence vested in these institutions and the nature of their skills do not prevent them, under the laws governing them, to consider cooperative relations in all shapes, with the Economic, Social and Environmental council the way that allows it to effectively exercise these missions. However, this cooperation should be conducted in the manner that the law of each instance provides for decision-making and issuing opinions without any interference between the organic institutions. «The Constitutional Council has concluded, therefore, that» the Organic Law of the Economic, Social and Environmental Council, by opening membership in the Council to the presidents of these three constitutional bodies did not take into account the nature, functions and the purpose of creating these bodies.»

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3. The Constitutional Council stated in its Decision Number 924 of 22 August 2013, that the scope and purpose of the independence of institutions and bodies provided for in Articles 161 to 170 of the Constitution, including the Authority for Parity and the Fight Against All Forms of Discrimination, the said entity subject of this opinion.The Constitutional Council considered that «the consolidation and strengthening of the institutions of a modern state is a constitutional purpose as stated in the preamble to the Constitution.This aim implies that the institutions and bodies established by the Constitution must enjoy independence even allow them to fulfill the tasks and powers that the Constitution has conferred on them. It is up to the legislature to define the scope and conditions of this independence in compliance with the constitutional provisions.¹²»

Starting from the aforementioned constitutional jurisprudence, the National Council for Human Rights believes that Bill Number 79.14 must reflect the legal nature of the Authority for Parity and the Fight Against Forms of Discrimination as a body promoting human sustainable development and participatory democracy.The particularity of each instance must be taken into account particularly in the design of the missions, responsibilities and respective composition of these bodies.

4. The National Council for Human Rights considers that the contours of the jurisdiction of the Authority for Parity and the Fight Against All Forms of Discrimination can be defined through the precisions brought upon by the general observations of the United Nations treaty bodies, resolutions of the General Assembly and the United Nations Human Rights Council , as well as the general comments of the accreditation sub-committee under the International Coordinating Committee of the National Institutions for the Promotion and Protection of Human rights.

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5. To this end, the National Council for Human Rights considers that the design of the functions of the Authority for Parity and the Fight Against All Form of Discrimination as an institution for the protection and promotion of human rights, specializing in the fight against discrimination based on gender, should be preoccupied with the implementation of three types of state obligations in the fight against gender-based discrimination. These obligations were defined by the Committee on the Elimination of Discrimination against Women in its General Recommendation No. 25¹³, on the basis of a «parallel reading of articles 1 to 5 and 24» of the Convention on the Elimination of all Forms of Discrimination Against Women.: «The first obligation is to ensure the absence of any direct or indirect discrimination in the law and to protect women from discrimination, the second obligation is to improve the status of women-in reality-by concrete policies and programs and the third obligation is to better manage the prevailing relationships between the two sexes and to fight against persistent stereotypes about gender that are harmful to women and whose effects are manifested not only in individual behavior but also in legislation, legal and societal structures and in institutions.»

6. The protective mission of the Authority for Parity and the Fight against all Forms of Discrimination must focus on the fight against discrimination through commission and / or omission. This vision is part of the interpretation given by the Committee on the Elimination of Discrimination against Women, which stated in its General Recommendation No. 28¹⁴ that:» Member States are required not to give rise to discrimination against women by their actions or their passivity. They are also obligated to react actively against discrimination against women, whether by an act or an omission of the State or a private actor.»

7. Regarding the different dimensions of the concept of discrimination, the Human Rights Committee noted in its General Comment Number o. 28 that: «Discrimination against women is often linked to other types of discrimination, such as discrimination based on race, color, language, religion, political or views, national or social origin, property, birth or other status¹⁵. « Similarly, the Committee on Economic, Social and Cultural Rights stated in its General Comment No. 20¹⁶ that: «certain people or groups of people are subject to discrimination on several prohibited grounds, such as women belonging to an ethnic or religious minority. This cumulative discrimination has very specific consequences for those affected by it and deserves special attention and solutions.» This should be taken into account in defining the management modalities of cases of multiple discrimination by the Authority for Parity and the Fight Against all Forms of Discrimination, as a body specialized in the fight against discrimination against women, in coordination with other general mandate to institutions such as the National Council for Human Rights Commission and the Institution of the Ombudsman.

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8. The powers of the Authority for Parity and the Fight Against All Forms of Discrimination, as an entity specialized in the fight against discrimination based on gender, must deal in the opinion of this council, with the fight against direct and indirect discrimination. It should be recalled that the Committee on Economic, Social and Cultural Rights has stated in its General Comment No. 20¹⁷ that «some direct or indirect forms of differentiated treatment can amount to discrimination under paragraph 2 of Article 2» of the International Covenant on Economic, Social and Cultural Rights, and that there is «direct discrimination when a person is treated less favorably than another person in a similar situation for a reason related to a prohibited motive.» The Committee considers that there is indirect discrimination «in the case of laws, policies or practices that appear generally neutral but that have a disproportionate discriminatory impact on the enjoyment of rights enshrined in the Covenant regarding the prohibited motives for discrimination.»

9. Following the same logic, the Committee on the Elimination of Discrimination against Women stated in its General Recommendation No. 28¹⁸ that: «Direct discrimination means a different treatment explicitly based on sex and gender-related to social peculiarities. Indirect discrimination occurs when a law, policy, program or practice seems neutral from the perspective of gender relations but in practice has a discriminatory effect on women because the measure, though apparently neutral, does not take into account any existing inequalities. This discrimination may additionally exacerbate existing inequalities in question if neither the structural and historical patterns of discrimination nor the unequal relations of power between women and men are not taken into account.»

10. The legal protection against discrimination is based on the concept of equality in its dimensions de facto and de jure. The Committee on Economic, Social and Cultural Rights noted in its General Comment No. 16¹⁹ that the: «enjoyment by men and women of their rights in conditions of equality must be understood in all its dimensions. The protections of non-discrimination and equality set out in international instruments on human rights stipulate equality both de facto and de jure. These two concepts, though different, are closely related. Formal equality is the fact that a law or policy addresses neutrally men and women. Substantive equality or de facto equality relates in turn to the impact of legislation, policies and practices and the need to ensure that they do not maintain, but rather alleviate the disadvantages inherent in the situation of certain categories of people.»

It should also be noted that the significance of gender-based discrimination must be general in the sense pointed out by the Committee on Economic, Social and Cultural Rights in its General Comment No. 20²⁰. Indeed, the Committee noted that: «the adoption of the Covenant, [the International Covenant on Economic, Social and Cultural Rights,] the notion of sex «as a prohibited ground of discrimination has evolved considerably to cover not only the physiological characteristics but also the social construction of stereotypes,

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prejudice and pre-established roles for men and women, which hinders the realization of economic, social and cultural rights on an equal footing.»

11. Analysis of the general comments of treaty bodies allows us to identify a range of key parameters on the characteristics of remedies to set up in the fight against gender-based discrimination. To this end, the Committee on Economic, Social and Cultural Rights has emphasized in its General Comment No. 20²¹ the diversity, as well as the complementary, mechanisms of redress against discrimination. The Committee stated that: «the institutions addressing allegations of discrimination usually involve the courts and tribunals, administrative authorities, national institutions of human rights and / or mediators; they should be accessible to everyone without discrimination. These institutions should adjudicate complaints or conduct due diligence investigation, impartial and independent in case of complaint, [...] including the acts or omissions which are the work of private actors. When facts and events at issue fall, in whole or in part, within the exclusive knowledge of the authorities or other defendant, it should be considered that the burden of proof falls to the authorities or to the other defendant, respectively. These institutions should also be empowered to order effective remedies [...] and the States parties [to the Convention] should ensure that these measures are implemented. The above institutions should interpret domestic legal guarantees of equality and non-discrimination in a manner that facilitates and encourages the full protection of economic, social and cultural rights.»

12. Similarly, the Committee on Economic, Social and Cultural Rights recommended in its General Comment No. 16²² that: «national policies and strategies should include the establishment-by automatic default-, of mechanisms and efficient institutions, including administrative authorities, ombudsmen and other national institutions of human rights and jurisdictions. These institutions should investigate allegations of violations of Article 3 [of the International Covenant on Economic, Social and Cultural Rights], and consider these violations and provide remedies accordingly. States parties [to the Convention] should in turn ensure that those remedies are effective.»

13. The characteristics of remedies as defined by the Committee on Economic, Social and Cultural Rights must be read in light of those, further defined by the Committee on the Elimination of Discrimination against Women. In Recommendation No. 25²³, the Committee stressed that: «States parties [to the Convention] are also required to ensure that women are protected from discrimination by public authorities, the judiciary, organizations, businesses and individuals in the public sphere as in the private sphere. This protection is provided by the courts and other competent public bodies and implemented by sanctions and remedies when necessary. « The same recommendation also sets up additional requirements to be considered in the design of review procedures against

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discrimination based on gender. As such, «States parties [to the Convention] should ensure that women can invoke the principle of equality in support of a complaint for an act of discrimination committed by a public official or a private actor in violation of the Convention. They must ensure also that women have access to timely, affordable and effective remedies.»²⁴

14. It is concluded based on the analysis the above guidelines that certain requirements must be taken into consideration, regardless of the type of remedy against discrimination based on gender. These can be summarized as follows.

- Easy access to remedies;
- The appeal body must be empowered to carry its own investigate and / or bring upon independent investigations;
- Adequate procedural arrangements should be established to deal with cases of discrimination (e. g discrimination tests, possibility of reversing the burden of proof, ...);
- The consecration of a broad interpretation that is oriented towards the protection of rights, of constitutional and legislative provisions relating to the fight against various forms of discrimination.

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15. Besides the usual functions of a national institution for human rights in matters of promotion, the Authority for the Parity and the Fight Against All forms of Discrimination, by its special purpose, should be empowered to review the legislation and policies in order to offer all measures to eliminate discrimination against women in all fields. The National Council for Human Rights wishes to recall in this connection a similar recommendation, formulated as an obligation of the State, by the Human Rights Committee in its General Comment No. 28²⁵. In the same framework, the analysis of paragraphs 21 and 41 of General Comment number 16 of the Committee on Economic, Social and Cultural Rights²⁶ justifies assigning to Authority for Parity and the Fight against all forms of Discrimination the ability to assess the impact of laws, programs and policies in terms of gender equality and the fight against gender-based discrimination.

16. The National Council for Human Rights also considers that all attempts to define the functioning and composition of the Authority for Parity and the Fight against All Forms of Discrimination must take into consideration the general observations of the Accreditation Sub-committee of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights. The National Council for Human Rights recalls in this connection that it considers the Authority for Parity and the Fight Against all forms of discrimination as an institution for the protection and promotion of human rights, with a special mandate to fight against gender-based discrimination. Therefore, the structure of the said authority should not be that of a «an entity for the promotion sustainable human development and participatory democracy.»

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17. As such, the mandate of the Authority for Parity and the Fight Against All Forms of Discrimination as a specialized agency of the protection and promotion of human rights responsible for the fight against discrimination based on gender, must extend: «to acts and omissions of the public and private sectors» in the matter. This recommendation seeks to implement t General Observation No. 1. 2 of the Accreditation Sub-Committee entitled: «Mandates Relating to Human Rights.»²⁷

18. As an integral part of the national system of protection of human rights, the Authority for Parity and the Fight against all Forms of Discrimination is called to work in synergy with general institutions for protection and promotion of human rights such as the National Council for Human Rights, especially when processing cases of multiple discriminations. To this end, the National Council for Human Right recalls General Comment No. 1. 5 of the Accreditation Sub-Committee entitled «Cooperation with other institutions of human rights.» The Accreditation Sub-Committee recommends that national institutions of human rights «should develop, formalize and maintain working relations as appropriate with other national institutions established to ensure the promotion and protection of rights... including thematic institutions.»²⁸. The Accreditation Sub-Committee pointed out, moreover, the importance of «the expertise of other defense organizations of human rights because of their specialized mandates.»

19. Being different from the institutional structure of the «advisory councils», the Authority for Parity and the Fight Against All Forms of Discrimination must consist essentially of expert (s). As such, the General Observation No. 1. 8 of the Accreditation sub-committee entitled: "Selection and appointment of the decision-making body of the national institutions of Human Rights» states that «a process which promotes the selection based on merit and guarantees pluralism is necessary to ensure the independence of the senior executive of a national institution and public confidence in them. « The inclusion of this recommendation of the Accreditation Sub-Committee also involves the exemption of the Authority for Parity and the Fight against All Forms of Discrimination of the «representative logic» principle. This exemption is not incompatible with other requirements of the Paris Principles relating to composition, including pluralism. Indeed, the Accreditation Sub-Committee recommends in the same General Comment Number. 1. 8:»select members so that they act in their own personal capacity rather than on behalf of the organization they represent.»²⁹. The adoption of this choice is, according to the accreditation Sub-Committee: «will likely result in an independent professional body» that will favor «the nomination of candidates based on merit.»

20. The National Council for Human Rights recalls that paragraph B. 1 of the Paris Principles explicitly provides that ministerial officials can only participate in an «advisory

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capacity» only within a national institution for the protection and promotion of human rights regardless of its whether it be general or specialized.

Commenting on this paragraph, the Accreditation Sub-Committee stated in its General Comment Number. 1. 9 that «the Paris Principles require that a national institution for human rights be independent of government in its structure, composition and methods of operation «and that» relating to the composition of a national institution representatives of government agencies should not be represented, in general, within the governing body of the national institution. «If government officials are included in the institution's membership, the Accreditation Sub-Committee recommends that» the law of a national institution should make it clear that these people are involved in an advisory capacity. «It also stresses that «To further encourage independence with regard to decision-making and to avoid conflicts of interest, the procedural rules of a national institution should establish practices to ensure that these people are not able to unduly influence its decision making.»³⁰

The Accreditation Sub-Committee has, in view of the above paragraphs, a clear preference for a composition in which government officials are not involved. The National Council for Human Rights concurs seeing that the Authority for Parity and the Fight against All Forms of Discrimination will be asked to rule on cases of discrimination which may be committed by government agents under the authority of the Head of Government, or by agents of public institutions and corporations under the supervision of the government under Article 89 of the Constitution.

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21. Exempting the Authority for Parity and the Fight Against all Forms of Discrimination from institutional framework of the «Advisory Councils» implies that the number of its members will be limited. These members who are chosen for their expertise, will be able to carry out professional missions to protect against gender-based discrimination. This justifies, in the opinion of the National Council for Human Rights, that these members be available-by flaw- to the said Authority for the duration of their mandate. The Council recalls in this regard, General Comment Number 2. 2 of the Accreditation Sub-Committee on «full-time members of a national institution for human rights.» The Accreditation Sub-Committee believes that the exercise of the full-time members' help to ensure: a) the independence of the national institution for human rights, free from any conflict of interest real or perceived; b) stable functions for members; c) regular and adequate guidance for staff.»³¹

22. The National Council for Human Rights, while believing that it is up to the legislature whether or not to grant quasi-judicial powers to the Authority for Parity and the Fight Against All Forms of Discrimination, recommends that it strengthens the functions of the said Authority for protection by integrating into Bill Number 79-14 some powers

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provided by the Accreditation Sub-Committee in its General Comment Number 2. 10 entitled «Quasi-judicial powers of national institutions of human rights (processing of complaints).»³²

The Council recalls that certain powers under the General Comment of the Accreditation Sub-Committee and indicated below can be easily integrated as part of the general protection mission in the fight against gender-based discrimination, even if in the future the said Authority will not exercise quasi-judicial powers.

23. According to the Accreditation Sub-Committee, when a national institution for human rights, of a general or specialized nature, «has the mandate to receive, investigate and resolve complaints alleging violations of human rights, it should be entrusted with the functions and the powers to adequately fulfill this mandate «and that « according to its mandate, those powers and functions could include the following:

- To be empowered to receive complaints against public and private organizations under its jurisdiction;
- To be empowered to receive complaints from persons on behalf of the alleged victims, when they give their consent;
- To be entitled to make a complaint on its own initiative;
- To be empowered to investigate complaints, including having the power to require the production of evidence and the testimony of witnesses;
- To be able to protect complainants against retaliation they may suffer because they have made a complaint;
- To be able to protect complainants against retaliation they could suffer because they provided evidence in a complaint;
- To be able to negotiate a settlement and ensure the confidentiality of the complaint in the context of an alternative dispute resolution process;
- To be able to resolve complaints through a binding decision;
- To be able to submit its findings to a regular court of law or to specialized tribunal so as a decision may be issued.
- To be able to refer complaints exceeding its jurisdiction or under concurrent jurisdiction to the appropriate decision-making body;
- To be able to request, through the judicial system, the implementation of its decisions on the complaints;
- To be able to track and monitor the implementation of its decisions on the complaints;
- To be able to communicate its findings to the government in cases where a complaint reveals that there are widespread or systemic violations of human rights.»

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**III. RECOMMENDATIONS REGARDING CERTAIN PROVISIONS
OF BILL NUMBER 79. 14 ON THE AUTHORITY FOR PARITY AND
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24. The following recommendations are designed to address the following challenges:

- The Consecration of the constitutional vocation of the Authority for Parity and the Fight Against All Forms of Discrimination as a specialized entity dedicated to the protection and promotion of human rights, while exempting the said Authority from the configuration of entities for the promotion of sustainable human development and participatory democracy;
- Ensure a better compliance of the powers and composition of the Authority for Parity and the Fight against All Forms of Discrimination with the principles relating to the status and functioning of national institutions for the protection and promotion of human rights, commonly known as the Paris Principles;
- Ensure better coherence within the national system for the protection of human rights, in particular as regarding the fight against discrimination;
- Strengthening the independence of Authority for Parity and the Fight Against all Forms of Discrimination through the review of the composition and appointment methods of its members.

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I. Recommendations Relating to Certain General Provisions

25. The National Council for Human Rights proposes to introduce a paragraph into the first article of the Bill that will contain—literally—the central constitutional mission of the Authority for Parity and the fight Against All Forms of Discrimination, so as to ensure compliance with the rights and freedoms provided for in Article 19 of the Constitution, without infringing on the powers vested in the National Council for Human Rights. This recommendation will ensure, if adopted, a more logical relationship between the missions and functions of the said Authority.

26. The National Council for Human Rights also recommends the introduction between Article 1 and Article 2 of the Bill, a new article which will provide for the definition of discrimination against women as the foundation of the mission of the Authority for Parity and the Fight Against all Forms of Discrimination. As such, the Council proposes to transpose the definition of discrimination against women, as provided for in Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women. The Convention defines discrimination against women as «any distinction, exclusion or restriction based on sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, regardless of their marital status, on

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the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural and civil fields or any other field «The Council considers that this definition is broad in scope and will allow the said Authority to be aware of any case of direct and indirect discrimination against women. It will also enable the said Authority to deal with cases of multiple discriminations, one of whose grounds was covered by the above definition.

The National Council for Human Rights also recommends to introduce in the proposed new article, two additional definitions:

- Discrimination tests as any method used by the thematic mandate holders concerning discrimination in order to demonstrate a behavior or a possible discriminatory situation;
- Temporary special measures such as legislative, regulatory or public policy to accelerate the achievement of equality between men and women in accordance with articles 19 and 30 of the Constitution.

2. Recommendations Concerning the Powers of the Authority for Parity and the Fight against All Forms of Discrimination

27. The National Council for Human Rights conducted an analysis of the provisions of Article 2 of the Bill, and it became clear from this analysis that Article 2:

- Confuses the powers for protection and promotion of the Authority for Parity and the Fight Against all Forms of Discrimination with those of other advisory councils;
- Reduces significantly the powers of protection of the said Authority. The Bill limits, indeed, the powers of the said Authority on the subject of receipt of complaints of discrimination and submission of related recommendations to the authorities concerned (paragraph 3 of Article 2 of the Bill). This choice may reduce the protection powers of the Authority into simple monitoring and tracking dimensions, while the term «authority», used by the Constituent refers to a specialized institution for protecting human rights and the fight against gender discrimination. Indeed, the mission of this authority goes beyond the processing, filing and monitoring of complaints;
- Does not include any provisions allowing the Authority for Parity to intervene before the proper authorities and before other entities as well as all stakeholders in the complaints, to seek a settlement through conciliation / mediation or binding decisions;
- Does not grant the said Authority the power to investigate these entities in cases of discrimination;
- Does not allow the said Authority to initiate its own cases of discrimination investigation;
- Presents, in general, a serious imbalance between the Authority's powers to promote and its powers to protect. Article 2 of the Bill grants the Authority 11 functions which fall under the powers of promotion³³ and two more functions that fall under power of

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protection. In doing so, the Bill may misrepresent the nature of the constitutional mandate of the said Authority as an entity for the protection and promotion of human rights, and is, therefore, grant the said Authority a mandate that is purely consultative and primarily oriented towards the promotion. The National Council for Human Rights considers that this choice may be incompatible with the provisions of Articles 164 and 19 of the Constitution.

28. Based on the above findings, the National Council for Human Rights proposes to introduce a new article before article 2 which will be devoted entirely to the definition of the powers of the Authority for Parity and the Fight against All Forms of Discrimination in matters related to the protection and the fight against discrimination. It is the opinion of the Council that this new article can be rewritten by the transfer of paragraph 3 of the current Article 2 to the proposed new article, while specifying that the said Authority is empowered to receive complaints from all individual persons or corporations.

In addition, the new Article shall, in the opinion of the National Council for Human Rights, empower the Authority for Parity and the Fight against all Forms of Discrimination to:

- Inform the complainants of their rights and remedies;
- Handle the complaints according to established standards and procedures and forward them to the competent authorities and other stakeholders;
- Intervene with the authorities and other institutional entities as well as all stakeholders in the complaints, to seek a settlement through conciliation / mediation, while excluding any possibility of mediation in cases of violence against women and girls;
- Conduct investigations with public, private and other institutional entities and carry out discrimination tests;
- Initiate its own investigations of discrimination case;
- Submit, to the competent authorities, complaints that do not fall within its jurisdiction while informing the complainants;
- Treat cases of multiple discriminations in conjunction with the National Council for Human Rights
- Contact the relevant judicial or professional authority to sanction confirmed discrimination cases
- Petition, within the limits of its powers as a civil party in any civil action, to ask for damages for harm directly caused by a crime, an offense or contravention;
- Develop recommendations to public authorities and other stakeholders, by proposing reforms of laws, administrative practices and others, based on the analysis of complaints and process evaluation of their settlement.;
- Ensure the monitoring and follow up of cases of discrimination /violence and follow up of the given recommendations.

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The National Council for Human Rights also recalls that the opinion of the Commissioner for Human Rights of the Council of Europe on national structures for promoting equality of 21 March 2011 specifically recommends the allocation to national institutions against discrimination skills in «independent assistance to victims of discrimination who wish to go to court» and achieving «independent investigations into acts of discrimination.»³⁴

29. The National Council for Human Rights also proposes to dedicate a specific article to the powers of the Authority for Parity and the Fight Against all Forms of Discrimination in the matter of promotion. As such, the Council recommends that the legislature:

- Transfer the first paragraph of Article 2 to the proposed new article after adding a provision that will allow the said Authority to issue, within the area of its jurisdiction, its opinion on any matter submitted to it the King;
- Transfer paragraphs 2, 4, 5, 7, 8, 9, 11, 12 and 13 of Article 2 of the bill to the proposed new article;
- Transfer the sixth paragraph of Article 2 of the bill to the proposed new article, after the reformulation of this paragraph to define the powers of the said Authority on the harmonization of the laws and regulations in force, with the international conventions on human rights that the Kingdom has ratified or to which it has acceded, within the limits of its mandate as a specialized entity for the protection of human rights and the fight against gender-based discrimination
- Transfer the tenth paragraph of Article 2 of the bill to the proposed new article, after the reformulation of this paragraph in a less detailed manner by providing only the general competence of the said Authority in strengthening the capacity of the stakeholders.

30. The CNDH also recommends deleting the last paragraph of Article 3 of the bill that forces the Authority for Parity and the Fight against All Forms of Discrimination to express its opinion on the adoption of the draft of a bill before it has been voted by a meeting of the Council of the government. The National Council for Human Rights Council considers this paragraph as being incompatible with Article 3 of the Paris Principles, in particular point (a. I). This point provides that a national institution of human rights is empowered to «To submit to the Government, Parliament and any other body or jurisdiction or at the request of the authorities concerned or through the exercise of its right to self-referral, opinions, recommendations, proposals and reports on any matters relating to the protection and promotion of human rights. «The exercise of this function can be limited at any stage of the legislative process since the national institution for human rights can recommend «if necessary, the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures. «The appreciation of the need, mentioned in point A.i of Article 3 of the Paris Principles, is the sole decision of the national institution.

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3. Recommendations for the Composition of the Authority for Parity and the Fight Against All Forms of Discrimination

31. The recommendations of the National Council for Human Rights on Article 4 of the Bill is based on a vision that conceives of the Authority for Parity and the Fight against all Forms of Discrimination as a national institution dedicated to the protection and promotion of human rights, consisting of a small number of members chosen for their expertise in the fight against discrimination, particularly those based on gender. This vision also implies balanced interventions by different constitutional powers in the process of designation and -appointment of members. The Council also considers that the appointment of the President, the Secretary-General and a number of members by the King is a fundamental guarantee of independence not only of the said Authority but of all cited entities in Articles 161 to -170 of the Constitution.

32. The National Council for Human Rights, however, believes that Article 4 of the Bill clearly deviates from this vision. The observations that follow demonstrate the validity of this conclusion.

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In fact, the term «representatives» is used for three of the four categories of members of the Authority for Parity and the Fight against all forms of Discrimination³⁵. This term means not only the predominance of «the representative logic» which characterizes the composition of the advisory councils, but it is contrary to the General Observation No. 1. 8 of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC)³⁶. This observation, entitled «Selection and appointment of the decision-making body of the national human rights institutions» advocates in point (e) of «select members so that they act in their own personal capacity rather than in the name of the organization they represent. «Now the term» representative «is incompatible with the principle that members should join the said Authority on their own « personal basis ». The Council recalls in this connection Paragraph 17 of its main Memorandum on the said Authority which states that «... care should be taken to protect the future operation of the Authority crippling interference that could generate political and ideological parameters. Indeed, given the specificity of the mandate of the said Authority, the designation procedures that are in favor of political representation and in favor of respect for the diversity of ideological sensibilities will, in time constitute a serious blow to the efficiency of an institution of this nature.»

33. Section 4 of the Bill does not establish the transverse principle of parity in the composition of the Authority for Parity and the Fight against all Forms of Discrimination. This choice goes against the second paragraph of Observation No. 1. 8 cited above, which states that: «we must ensure pluralism in terms of sex.»³⁷ The Committee also states

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that «ensuring the meaningful participation of women at all levels is important to ensure that the national institution has a good understanding of a significant proportion of the population and that it has access to the national institution.»³⁸

34. The powers to appoint members is distributed according to Articles 4 and 14 of the Bill as follows.

- The King appoints 3 members: The President, the Secretary-General (and a representative of the Higher Council of Ulema (Religious Scholars) proposed by the Secretary General of the said Council
- The President of the House of Representatives shall, after consultation with political parties and parliamentary groups, two members: one member of parliament and one member representing civil society organizations;
- The President of the House of Councilors shall, after consultation with political parties and parliamentary groups, two members: one member of parliament and one member representing civil society organizations;
- The Head of Government appoints 10 members: one member representing the organizations of civil society, two members representing the most representative professional organizations on the recommendation of such organizations, 2 members nominated by the most representative trade unions, three expert members and 2 members representing government agencies participating in the work of the Authority in an advisory capacity;
- A judge appointed by the Higher Council of the Judiciary.

35. The National Council for Human Rights makes the following remarks on the composition under the above-cited articles of the bill:

- The Head of Government has an overriding power of appointment over other constitutional powers (The King and the Parliament). This scheme differs from the opinion of the Council, the balance of power (the principle enshrined in Article 1 of the Constitution). The Council also stresses that General Comment 7 I. of the Accreditation Subcommittee entitled «Ensuring pluralism of the National Institution of Human Rights» states that «the criteria that can reduce and limit unduly diversity and the plurality of the membership of the national institution should be avoided. « The same observation advocates «Pluralism through the appointment procedures of the governing body of the National Institution, for example when various groups of society suggest or recommend candidates;»³⁹
- The number of members from civil society does not meet the requirements of paragraph B. I of the Paris Principles, which states: «The composition of the national institution and the appointment of its members by election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the

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pluralist representation of the social forces (of civil society) involved in the protection and promotion of human rights;»

■ The preponderance of the Head of Government in the appointment scheme (55% of appointments) may impact the independence of the Authority for Parity and the Fight Against All Forms of Discrimination as a constitutional entity, seeing that the government is responsible, under section 89 of the Constitution «for the administration and supervises public companies and ensures their guardianship.» It should be remembered also that the said Authority will have to rule on discrimination cases that may involve directly or indirectly public administrations, which could pose recurring conflicts of interest if the appointment structure is maintained as is under the current Bill;

■ The Council considers that trade unions should not be classified under the category «the private sector» because the unions also represent employees of the government and those of public companies;

■ Article 4 of the draft law does not specify that the government will be represented at the said authority in an advisory capacity;

■ Article 4 of the Bill provides for two parliamentarians in the composition of the said Authority, while the most recent jurisprudence issued by the Accreditation Sub-Committee favors the exclusion of legislators from the composition of national institutions of human rights⁴⁰.

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36. Based on the above -presented remarks, the National Council for Human Rights provides an indicative proposal for an alternative composition of the Authority for Parity and the Fight Against All Forms of Discrimination that will better reflect the status of this specialized entity that will protect human rights and fight against discrimination.

To this end, the Council proposes that the said Authority be composed, in addition to its Chairman and Secretary General appointed by Dahir, of seven experts selected from among persons recognized for their expertise and their meritorious contribution, nationally and internationally, in the areas of equality, parity and the fight against discrimination, particularly discrimination based on gender. The Council also proposes to introduce in Article 4 a provision which will require a number of years of experience (15 years for example).

The Council recommends under the same structure that Article 4 be reworded so as to provide for the appointment of two experts by the King, two experts by the Head of Government, one expert by the President of the House of Representatives, by an expert President of the House of Councilors and an expert by the Higher Council of the Judiciary.

37. The implementation of the recommendations expressed in the paragraph involves the replacement of certain terms under Article 4 of the bill. As such, the CNDH recommends

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replacing the term «representative or representatives» with «chosen among». The proposed replacement is part of distancing APALD from the logic of advisory boards. The CNDH also recommends replacing the requirement of «good character» by «integrity.» This recommendation is justified by the fact that the SCA considered in its General Comment I. 7 entitled «Ensuring pluralism of the National Human Rights Institution» that «the integrity and quality of members is a key factor in the effectiveness of the institution.⁴¹»

38. Given the role, missions and responsibilities of APALD, the Council considers it necessary that the status of members needs to be strengthened. The following recommendations are part of this framework.

It is recommended to strengthen the system of incompatibilities under the second paragraph of Article 5 of the bill by making the function of a member of the APALD incompatible with that of:

- Government members, the House of Representatives, the House of Councilors, the Higher Council of the Judiciary, the Economic, Social and Environmental Council, the National Council of Languages and Moroccan culture, bodies of protection and promotion of human rights, of good governance, of regulation, of promotion of human and sustainable development and participatory democracy;
- The exercise of non-representative remunerated functions for a foreign state, such as an international organization or a non-governmental organization;
- The exercise of the legal profession.

The second paragraph of Article 5, thus reframed, can also allow APALD members to exercise, as volunteers, educational and research functions which, in the opinion of the Authority, would not be inconsistent with the obligation of reserve.

39. The CNDH further recommends to introduce, in Article 5 of the bill, a new paragraph under which members of APALD are made of right available to this authority during their term of office. For employees of the administration, the law should stipulate that they are reinstated automatically, at the end of their mandate, to the bodies they belonged to in their original administration. This recommendation seeks to implement a requirement of the SCA which provides that «The enabling law of the National Human Rights Institution should provide that members of its decision-making body include full-time remunerated members.» and «This would assist in insuring a) the independence of the NHRI free from actual or perceived conflict of interests.⁴²»

40. Using the same logic that aims to strengthen the status of members, the National Council for Human Rights recommends introducing the following paragraphs into Article 5 of the Bill:

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- A paragraph under which the members of the said Authority are required to make a declaration of interests to the President on the situation in which they may be faced with a conflict of interest, about decisions and the duties assigned to them under the law. In this situation the President of the Authority is required to prevent the person concerned from participating in the decision-making process and from the exercise of their duties in the matters constituting a conflict of interest;
- A paragraph under which the members of the Authority must refrain from taking any position, display any conduct or perform any action likely to undermine their independence. The same paragraph shall provide that the members are also bound to the obligation of discretion on the substance of deliberations of the Authority and its organs and internal documents;
- A paragraph which provides that the President and members of the Authority shall enjoy all the guarantees necessary to ensure the same protection and independence in the performance of their duties or any activity related to these missions.

41. When taking into account the abovementioned recommendations, the CNDH proposes to eliminate, in Article 6 of the bill, the clause which provides for the loss of the quality of member of the APALD following loss of the quality that founded the right to serve on the Authority. This paragraph is no longer justified in effect, as it stems from a representative design of the APALD that the CNDH does not consider relevant.

4. Recommendations Relating to the Bodies of the Authority for Parity and the Fight against All Forms of Discrimination

42. With regard to the three standing committees whose creation is provided for by Article 13 of the bill, the CNDH believes that the inclusion of its recommendations concerning the expansion of powers of the APALD logically requires a change of designation of these commissions. In an effort to ensure flexibility, it would be more appropriate, in the opinion of the CNDH, to simply provide, in the first paragraph of Article 13, the principle of creation of standing committees in the APALD, while referring to the bylaws regarding their name and their scope of action based on the new configuration of powers of the APALD.

5. Recommendations Relating to the Organization of the APALD

43. The CNDH proposed that Article 5 of the bill be amended so that APALD members are rightfully made available to this authority for the duration of their mandate. The inclusion of this recommendation implies that APALD members perform their duties on a full time basis. Accordingly, the CNDH recommended that section 16 of the bill be amended

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to provide that the members receive an indemnity equal to the indemnity granted to members of parliament and that this allowance is subject to the same tax regime.

44. The CNDH considers that the prevention, protection and the fight against discrimination require advanced skills in technical support for APALD (recognition and qualification of cases of discrimination, administration of discrimination testing). For this purpose, the CNDH proposes to introduce in Article 19 of the bill a provision bearing creation of an administrative body of agents of fight against discrimination.

These agents, who will be part of an administrative body, to be created within the APALD, will officiate under the supervision and responsibility of the president. They will take the oath prescribed by the Dahir of 1 May 1914 pertaining to the oath of enforcement officers, and can perform the following functions:

- Conduct investigations and surveys of public, private and other corporate bodies and proceed if necessary to discrimination testing;
- Provide information and technical advice in the fight against discrimination;
- Carry out conciliation attempts under the responsibility of one APALD member or more;
- Report, through account that shall be deemed authentic until proved otherwise, violations of the laws and regulations relating to the fight against discrimination. The president of the APALD shall address these reports to the competent courts.

45. Finally, the CNDH proposes to introduce in Article 19 of the bill a provision that imposes a fine, which will be doubled in case of recidivism, on whoever put the agents of APALD in the impossibility to perform their duties. One of the measures accompanying this proposal is to amend the Code of Criminal Procedure to recognize the results of the discriminatory tests as part of the trial for discrimination. This proposal is part of the logic of the European Network of Equality Bodies' (Equinet) recommendations published in its opinion entitled «Equality Bodies: Current Challenges and Opportunities» (October 2012). The network has emphasized «the need for enhancing the protection to those who experience discrimination» by establishing “legal provisions with the effect of preventing discrimination.”⁴³

Notes

1. General Comment No. 28, Article 3 (Equality of Rights between Men and Women), adopted by the Committee at its 1834th meeting, March 29, 2000; CCPR / C / 21 / Rev.1 / Add.10.
 2. General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (article 2, paragraph 2 of the International Covenant on Economic, Social and Cultural Rights.) (E / C.12 / GC / 20), 2 July 2009.
 3. General Comment No. 16 (2005): Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights (article 3 of the International Covenant on Economic, Social and Cultural Rights.) E / C.12 / 2005/4; August 11, 2005.
 4. General Recommendation No. 25: First paragraph of Article 4 of the Convention (temporary special measures); U.N. Doc. HRI / GEN / I / Rev.7. (2004).
 5. General Recommendation No. 28 on core obligations of States Parties under article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women; CEDAW / C / GC / 28; December 16, 2010.
 6. These principles were approved by the Human Rights Commission in March 1992 (resolution 1992/54) and by the United Nations General Assembly (resolution A / RES / 48/134 of 20 December 1993).
 7. A / HRC / 29 / L.7 / Rev.1.
 8. A / HRC / RES / 23/7.
 9. European Commission for Democracy through Law (Venice Commission) Opinion on the draft law on the instance of parity and fight against all forms of discrimination in the Kingdom of Morocco, on the basis of comments of Ms Laurien Koster (President, Dutch College of human rights), Maria ELOSEGUI ITXASO (member of ECRI in respect of Spain, Professor of philosophy of law, University of Zaragoza), Madame de GUILLENCHMIDT (Member of the Venice Commission in respect of France) Patrick Charlier, Deputy Director of the Centre for equal opportunities and the fight against racism (Belgium), Substitute member of the European Commission against racism and intolerance (ECRI) under Belgium. Notice No. 740/2013, CDL (2013) 052 * 6 October 2013.
 10. Unofficial translation.
 11. Unofficial translation.
 12. Unofficial translation.
 13. U.N. Doc. HRI / GEN / I / Rev.7. (2004) (§ 6).
 14. CEDAW / C / GC / 28 (§10).
 15. CCPR / C / 21 / Rev.1 / Add.10 (§ 30).
 16. E / C.12 / GC / 20 (§17).
 17. E / C.12 / GC / 20 (§10).
 18. CEDAW / C / GC / 28 (§16).
 19. E / C.12 / 2005/4 (§ 7).
 20. E / C.12 / GC / 20 (§20).
 21. E / C.12 / GC / 20 (§40).
 22. E / C.12 / 2005/4 (§ 38).
 23. U.N.Doc. HRI / GEN / I / Rev.7 (§17).
 24. U.N.Doc. HRI / GEN / I / Rev.7 (§34).
 25. CCPR / C / 21 / Rev.1 / Add.10 (§31).
 26. E / C.12 / 2005/4.
- § 21: «Establish monitoring mechanisms to ensure the implementation of laws and policies to promote equal access of men and women to the enjoyment of economic, social and cultural rights n has no negative impact on people, disadvantaged and marginalized groups, especially women and girls.»
- §41: «The exercise, on an equal footing, economic, social and cultural rights require the elimination of discrimination de jure and de facto. The failure to adopt, implement and monitor the effects of laws, policies and programs to eliminate discrimination in law and practice for the rights set out in Articles 6 to 15 of the Covenant constitutes a violation of human rights.»
27. International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights: Report and Recommendations of the meeting of the Accreditation Sub-Committee (SCA); May 2013, p. 55.
 28. International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights: Report and Recommendations of the meeting of the Accreditation Sub-Committee (SCA); May 2013, p. 63.

- 29.** International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights: Report and Recommendations of the meeting of the Accreditation Sub-Committee (SCA); May 2013, pp.73-74.
- 30.** International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights: Report and Recommendations of the meeting of the Accreditation Sub-Committee (SCA); May 2013, p. 76.
- 31.** International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights: Report and Recommendations of the meeting of the Accreditation Sub-Committee (SCA); May 2013, p. 89.
- 32.** International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights: Report and Recommendations of the meeting of the Accreditation Sub-Committee (SCA); May 2013, pp. 106-107
- 33.** Issuing opinions, promote the culture of equality, parity and non-discrimination, recommending the harmonization of national legislation with the international law of human rights, technical support, capacity building, implementation studies and research, public policy evaluation, partnership and cooperation.
- 34.** Opinion of the Commissioner for Human Rights of the Council of Europe on national structures for promoting equality Strasbourg, 21 March 2011, Comm. DH (2011) 2 (p. 7).
- 35.** «State officials», «representatives of the associations of civil society» and «private representatives», see Section 4 of the bill.
- 36.** Accreditation Report Subcommittee of the ICC - May 2013 (p. 73).
- 37.** Accreditation Report Subcommittee of the ICC - May 2013 (p. 141).
- 38.** Accreditation Report Subcommittee of the ICC - May 2013 (p. 142).
- 39.** Accreditation Report Subcommittee of the ICC - May 2013 (p. 70).
- 40.** Accreditation Report Subcommittee of the ICC - (pp. 77) May 2013 «The SCA emphasizes that paragraph B.1 of the Paris Principles explicitly states that representatives of government agencies will play an advisory role, so that 'there is no such restriction explicitly stated with regard to the representatives of Parliament. However, he stressed that by providing an indicative list of stakeholders, paragraph B.1 of the Paris Principles is considering the «presence» or the ability to establish a «genuine cooperation» with these representatives. Given the explicit requirements of independence set forth throughout the Paris principles, some examples have been cited above, the Subcommittee believes that such a restriction should apply to all members, especially those who are members of the political party or coalition of parties in power.'»
- 41.** ICC Sub-Committee on Accreditation Report – May 2013, p. 67
- 42.** ICC Sub-Committee on Accreditation Report – May 2013, G.O. 2.2 (Full-time members of a National Human Rights Institution) p. 82.
- 43.** European Network of Equality Bodies (Equinet): Organizations Struggle against Discrimination: Current challenges and Opportunities, October 2012, p. 24.

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