

# STATEMENT OF OPINION «FOR A HUMAN RIGHTS- BASED APPROACH»

3 JULY 2018



*The statement “For a human rights-based approach”  
was adopted unanimously  
by the plenary session of 3 July 2018.*

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The human rights-based approach is now a major framework within which United Nations activities fall. In fact, in 2003, all United Nations agencies adopted the “*United Nations Common Understanding on a Human Rights-Based Approach to Development Cooperation*”. The Sustainable Development Goals (SDGs 2015-2030) have extended this approach by allowing human rights to take their rightful place as part of the conceptual framework for development. For their part, competent human rights bodies, and in particular, treaty bodies and special rapporteurs, have continued to insist on the “human rights” component of public policies implemented by international bodies and Member States, highlighting the indivisibility and inter-dependence of all human rights. Thus, they have allowed for a better understanding of the fundamental obligation to respect, protect and implement human rights for all.

The CNCDH has previously advocated for the implementation of a human rights-based approach, for example in its opinions on extreme poverty<sup>1</sup>; it now calls for public authorities to use this approach in a more general and systematic manner, with a view to reaching the SDGs and effectively implementing human rights. With this opinion, the Commission intends to provide specific insight on the meaning, the scope and the requirements of this approach, in order to encourage its implementation by public authorities, at both national and local level. In doing so, and as a National human rights institution, the Commission also clarifies the general framework on which it bases its assessment of public policies. As such, the human rights-based approach offers a reference as much for public action as for its assessment<sup>2</sup>.

This approach was originally presented as a “*response to the failures of development in the 1980’s, which was more focused on the technical reduction of poverty than on improving the rights and freedoms of marginalised populations*”<sup>3</sup>. It led to a paradigm shift in development cooperation: the development approach initially based on the needs of populations in least developed countries gave way to an approach based on human rights. In this sense, individuals are no longer merely the subject of assistance that has been planned in advance by decision-making bodies but are also considered fully-fledged stakeholders in development. Public action is no longer seen in terms of compensation, or “assistance”, but instead as the implementation of fundamental rights.

Disseminating the human rights-based approach beyond its original scope has led to the partial redefining of its outlines. Originally formulated for the purposes of development

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1. *Statement of opinion on the indivisibility of rights in situations of precarity and exclusion, 2005; Statement of opinion on human rights and extreme poverty, 2007; Statement of opinion on French diplomacy and human rights, 2008; Statement of opinion on the follow-up to the United Nations Committee’s recommendations on economic, social and cultural rights addressed to France, 2017.*

2. For an explicit explanation of the human-rights based approach by a NHDI, as part of its public policy impact assessment, see the Scottish Human Rights Commission, “What is a HRBA to policy and decision making?”: <http://eqhria.scottishhumanrights.com/eqhriaadvalpolicy.html>

3. B. Décarý-Secours, « L’approche fondée sur les droits en développement : généalogie et état de la question » (A rights-based approach in the field of development: genealogy and state of things), *Canadian Journal of Development Studies*, 2017, p. 7.

cooperation, this approach was subsequently used by UN bodies in the 2000's, for example for the implementation of the right to education<sup>4</sup> or the right to food<sup>5</sup>. It therefore coincided with discussions on the characteristics of these human rights: their full effectiveness depends on the availability, acceptability, accessibility and adaptability of the right in question. In recent years, this approach has also been applied to issues relating to State sovereignty, such as the management of migratory flows<sup>6</sup>, security or criminal policies<sup>7</sup>. Beyond the diversity of its applications, a conceptual unity has appeared based on two main issues: first, restoring the primacy of the human being; and second, reasserting the rightful place of human rights in public action: the State should not only respect the human rights enshrined in the international conventions that it has ratified, but it must also be accountable for their implementation. Human rights are no longer placed on the outskirts of public action but must be placed at its core.

Without bringing into question the functioning of representative democracy, the human rights-based approach offers a framework for analysis and action that is fundamentally geared towards respecting human rights. It focuses on individuals or groups that are marginalised, excluded or victims of discrimination. In most cases, this requires an analysis of gender-related norms, of different forms of discrimination and of imbalances of power, to ensure that interventions benefit the most marginalised portions of the population. By adopting this approach, public authorities have set themselves on a path towards better ensuring the effectiveness of human rights.

The human rights-based approach does not exclude political arbitration, and it also acknowledges budgetary constraints, however it does require that human rights be truly taken into consideration, both in theory and in practice, in political decisions. Moreover, this approach highlights the need for public authorities to justify their decisions in regard to human rights. Whilst applying one of the axioms of contemporary law, i.e. “*the law only expresses general will when in compliance with the Constitution*”<sup>8</sup>, the human rights-based approach is a conceptual and operational framework enabling public authorities to better focus their action in respect of citizens’ rights and, in the long term, to establish more effective public policies.

Convinced of the suitability of this approach, both in terms of implementing France’s international undertakings – and of complying with the fundamental rights established in the Preamble of the *Constitution* of 1958 – and in terms of the more general objective

4. See in particular: Unesco, Unicef, “*A human-rights based approach to Education for all*”, 2007.

5. See in particular: FAO, *Report of the 30th Session of the Committee on World Food Security*, 20-23 September 2004.

6. See in particular: Inter-Parliamentary Union, ILO, OHCHR, “Migration, human rights and governance”, Handbook for parliamentarians No. 24, 2015

7. See in particular: Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

8. French Constitutional Council, Decision 85-197 DC of 23 August 1985, Loi sur l’évolution de la Nouvelle Calédonie (Act on the evolution of New Caledonia) (cons. 27).

of achieving a fairer and more peaceful society, the CNCDH recommends that it be systematically included in how public action is conducted. The purpose of this statement of opinion is, first and foremost, to shed light on the meaning of this approach (I) in order to subsequently suggest its systematic inclusion in public action while specifying the conditions for its application (II).

## **I. UNDERSTANDING THE HUMAN RIGHTS-BASED APPROACH**

The human rights-based approach provides both an objective and a process to achieve said objective. The objective consists of ensuring the effective realisation of human rights for all, including the most disadvantaged, in other words of fully achieving the ambition embedded at the core of the Universal Declaration of Human Rights (A). The process that this approach adopts implies that a certain number of principles, arising from consideration of human rights, are observed during the action taken by public authorities and, more broadly, by “duty-bearers”<sup>9</sup> (B).

### **A. The objective: ensure the full effectiveness of human rights**

The human rights-based approach is undoubtedly supported by compliance with international treaties relating to human rights, but it is also supported, at national level, by the Constitution. The latter places the duty to respect the fundamental rights arising from the various texts referred to in its preamble squarely on the State’s shoulders. The effectiveness of human rights should be promoted by highlighting both their indivisibility and their inter-dependence, and by underlining their universality so that they may benefit all individuals. In other words, this approach requires that all human rights be respected for all individuals, which entails a holistic approach to the implementation of public policies.

#### **1. The human rights-based approach serving the full effectiveness of human rights**

This approach implies that public authorities promote a “positive” reading of human rights, which must constitute the core of political action. For the State, and more broadly for duty-bearers, it is not merely a matter of protecting or respecting human rights, but also, more ambitiously, a matter of implementing these rights. This is an approach that involves surpassing the idea, expressed in some public statements, according to which human rights are reduced to legal obstacles placed in front of political authorities.

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<sup>9</sup>The conceptual framework of the human-rights based approach distinguishes between individuals and groups with rights that are recognised by international conventions (“rights-holders”) on the one hand, and States and non-state stakeholders with corresponding obligations (“duty-bearers”) on the other hand.

It forces public decision-makers to systematically take human rights into consideration when formulating and implementing their policies. A “human rights reflex” is both encouraged and expected. To this end, public decision-makers should compulsorily undergo initial and continuing training in human rights. In this respect, it would be appropriate to train local representatives and to organise an integration seminar for members of parliament<sup>10</sup>, senators, etc., at each new parliamentary term, including training on the human rights-based approach, and to reinforce senior officials’ training on the issue.

## **2. Promoting the indivisibility and interdependence of human rights: the effectiveness of all human rights.**

As reminded by René Cassin, “*there are no 1st class fundamental freedoms and 2nd class fundamental rights. No hierarchy has been established by the Universal declaration or can be inferred from it. Human personality is a whole and, similarly, the rights that should enable the fulfilment of said personality constitute an indivisible whole*”<sup>11</sup>. Their inherent bond is rooted in the notion of human dignity, enshrined in the *Universal Declaration of Human Rights* in 1948.

The human rights-based approach is based on the interdependency of these rights: the realisation of economic and social rights requires the effective exercise of civil and political rights as much as the latter requires implementation of the former.

Indeed, the effectiveness of human rights implies that the socio-economic background in which they are exercised is taken into account. Thus, for example, access to justice is conditioned by access to legal aid, which itself is dependent on the State’s budget.

Furthermore, this economic and social background cannot evolve without the most socially disadvantaged categories of population being able to exercise their civil and political rights. The effectiveness of economic, social and cultural rights is indeed linked to citizens’ participation in political life, who must be able to express the need for the realisation of their rights.

## **3. Reasserting the universal nature of human rights: the effectiveness of human rights for all**

The human rights-based approach is associated with the promotion of human rights for all as its aim is to remedy the exclusion of some individuals, who are sometimes kept from benefitting from fundamental rights due to ‘general interest’ considerations. This is the case,

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10. Similar to the workshop based on the knowledge and practice sharing approach which will take place in July 2018 and involve members of parliament from the National Assembly and individuals in great poverty.

11. Speech given by René Cassin during the United Nations General Assembly session on 9 December 1948.

for example, for migrants or detainees, against whom security considerations, in particular, sometimes prevail without human rights being systematically considered.

This approach ultimately leads to individuals being protected beyond the legal categories or protection schemes to which they may be associated. For example, migrants are subject to specific protection if they fall under the legal categories of “refugees”, “asylum seekers” or “stateless persons”. Yet, all migrants, whomever they are, including those in an irregular situation, have similar human rights needs (for example in terms of the right to health or to protection against arbitrary or prolonged detention)<sup>12</sup>. Consequently, the human rights-based approach implies that all individuals be treated with dignity, regardless of who they are. In this respect, it is incompatible with the migrant situation in the Calais shantytown<sup>13</sup> or in some administrative detention centres<sup>14</sup>.

In this regard, the CNCDH notes the insufficiency of the policy on human trafficking victims with regard to an authentic human rights-based approach, although recommended by the European Directive<sup>15</sup>. By subjecting the recognition of rights and the protection of these victims to the filing of a complaint, or a witness statement in criminal proceedings, the national action plan for combatting trafficking, in effect from 2014 to 2016, neglects the primacy of human rights. Before being eligible for the legal status of victim, supported by involvement in criminal proceedings, trafficking victims need time to rebuild themselves and eventually decide whether or not to file a complaint.

The human rights-based approach also pursues the objective of restoring the dignity of the most deprived and vulnerable individuals, whatever the reason, who are also prevented, in law or in fact, from accessing their rights<sup>16</sup>. By once again placing these individuals at the core of preoccupations relating to the organisation and functioning of a public service, and by involving them in the redirection of the service itself, this approach places them once more in the position of free and responsible agents.

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12. On this subject, see: Parliamentary Union for democracy for all, ILO, OHCHR, “Migration, human rights and governance”, 2015.

13. CNCDH, *Follow-up opinion on the situation of migrants in Calais and in the Pale of Calais*, 7 July 2016. Though the shantytown mentioned in this opinion has since been dismantled, the current living conditions of migrants settled along the coast remain contrary to respect for human dignity.

14. CNCDH, *Statement of opinion on the situation of migrant individuals on the Franco-Italian border: missions in the Hautes-Alpes and the Alpes-Maritimes* - March/April 2018, June 2018.

15. Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, cons. 7

16. From the start, the human-rights based approach, which coincided with the works of Amartya Sen, aimed to provide nationals from the poorest States with the ability to act and exercise their freedom in order to contribute towards the country's economic and social development



#### 4. A holistic approach

The universality, indivisibility and interdependence of human rights, on which this approach is based, imply that integrated and holistic inter-sectorial policies are implemented in order to ensure protection for all. Thus, the fight against poverty must not be limited to material aspects and to individuals' economic struggles but must also include not only the repercussions of this scourge on the education, health, housing, employment, and culture of these individuals but also their participation in political life.

The human rights-based approach directly involves populations in the improvement of their living conditions. It is a sign of the effectiveness of public action as it allows the identification of all aspects of issues with the help of concerned individuals, and therefore allows to ensure the effectiveness of human rights<sup>17</sup>. For example, the effectiveness of the right to health is subject to individuals' ability to access the care offered (livelihoods, housing, geographical location, respect for culture). Thus, in the French département of Guyana, both the effectiveness of this right and that of children's right to education, or even that of access to justice, are conditioned by the development of a satisfactory network of road infrastructures<sup>18</sup>.

By pursuing the effective guarantee of human rights for all, this approach is underpinned by a restorative and, above all, transformative ambition. More fundamentally, it aims to bring into question the unequal social relations that have, over time, become set in social structures. By insisting on the implementation of human rights for all, its aim is to combat structural discrimination.

### **B. The guiding principles of the human rights-based approach: guaranteeing the primacy of the human person**

To achieve the effective realisation of all human rights for all, this approach implies, for its own effectiveness, that a process be respected. United Nations bodies have developed a certain number of principles intended to characterise this approach's methods, which, incidentally, coincide with practices that are also promoted by civil society. These principles, drawn from international conventions on human rights, are summarised by the acronym 'PANEL', and are intended to serve as a guide for public authorities, particularly to encourage the concrete application of this approach: Participation, Accountability, Non-discrimination, Empowerment, Law.

17. See in particular: "Quatre piliers pour un développement holistique" (Four Pillars for Holistic Development), Zahnd, Alex and McKay, Kimber, *Tracés : bulletin technique de la Suisse romande*, available at:

18. See the CNCDH's opinion on the subject: *Statement of opinion on the effectiveness of the right to education in French overseas départements, special focus on Guyana and Mayotte*, July 2017; *Statement of opinion on access to law and justice in French overseas départements, in particular in Guyana and Mayotte*, June 2017.

**Participation.** The principle of participation was initially conceived to remedy the flaws contained in cooperation or development programmes established on the basis of strategies led by development agencies and donors which have a tendency of setting out action priorities based on the presumed needs of the populations receiving international aid. The human rights-based approach is based on the premise that it is not possible to improve the living conditions of individuals and communities without involving them when defining their needs. Not only can this participation requirement rely on a normative reference, such as the exercise of civil and political rights (freedom of expression, of association, of assembly, etc.), and even the “right to participation”<sup>19</sup>, but, from a more pragmatic point of view, it also increases the chances of success of an action programme: in particular, it prevents the failure or adverse effects of a public initiative which, all too often, are attributed to the “beneficiaries”, and may even turn against them.

**Accountability.** Recalling States’ accountability in implementing human rights is the heart of the human rights-based approach. According to this principle, States, and more generally duty-bearers (public service delegates for example) must be accountable for the way in which they apply human rights. Being accountable implies justifying the outcome when balancing between human rights that may clash (for example, the right of ownership v. the right to housing), or when a fundamental freedom is the subject of restriction for the purposes of general interest.

**Non-discrimination.** The principle of non-discrimination is rooted in the methodology attached to the human rights-based approach. A corollary of the universality of human rights, highlighted in most international texts on human rights, the principle of non-discrimination requires that all individuals be included in this methodology. This principle aims to draw the attention of bodies in charge of implementing rights to the necessary consideration of individuals placed in a structural position of exclusion, at all stages of a project, from analysing the state of mechanisms for access to rights, to providing protection. In doing this, the human rights-based approach pursues the objective of specifically identifying situations of discrimination, which may be multiple or intersectional<sup>20</sup>.

**Empowerment.** A corollary of the principles of participation and non-discrimination, empowerment entails improving the ability to act of social groups in vulnerable situations, for whatever reason (financial, intellectual, physical, psychological, etc.). From this perspective, the human rights-based approach aims to involve these groups in the analysis of their needs, in the establishment of means to meet such needs, and put them in a position to demand that the State and other duty-bearers respect them. It should be noted that the French term for empowerment, “autonomisation”, is not satisfactory: it is not only a matter of giving these individuals autonomy, but of literally returning power to them regarding the

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19. UN, *Report of the Special Rapporteur on extreme poverty and human rights*, March 2013

20. Intersectional discrimination refers to a situation in which several reasons are present and interact with each other at the same time in such a way that they are inseparable. Women belonging to minorities, for example, can be subject to particular kinds of prejudice and stereotypes. They can be confronted with specific types of discrimination with which men belonging to the same minority are not confronted.

implementation of human rights.

**Law.** The human rights-based approach is based on a normative framework. This fifth PANEL requirement refers to the rules and principles contained in international texts. This body of rules is a frame of reference for rights-holders and duty-bearers. For this reason, in any given situation, all rights in question should first be identified in order to set out a strategy aiming to ensure their effectiveness and to clarify which elements are called on to inform duty-bearers' responsibilities.

These principles constitute a demanding framework for action. They imply respect for human dignity and consideration of human rights at all stages of public action. Ultimately, the human rights-based approach is fundamentally characterised by an increased involvement of rights-holders and by a much broader understanding of duty-bearers' accountability.

## II. INTEGRATING THE HUMAN RIGHTS-BASED APPROACH

The human rights-based approach serves the effectiveness of human rights, but it must also be effective in itself and not artificially certify public policies. Its effectiveness first requires that the actual involvement of rights-holders be guaranteed (A). Secondly, it requires that duty-bearers, and in particular public authorities, can account for their actions before citizens as regards respecting these fundamental rights (B).

### A. Effective involvement in respect for dignity

#### 1. The insufficiency of current means of participation

Citizens' participation in political decision-making is not ignored by legal texts<sup>21</sup>. An

21. Besides those referred to in the statement of opinion, other noteworthy examples are:

- Liaison committees, first at the ANPE (French national unemployment agency) and then at Pôle Emploi (French Employment Centre), created by the 1998 Act to combat exclusion. These are mechanisms for active listening and for joint development of innovative responses to jobs seekers' expectations and needs. They implement a continual dialogue and cooperation approach between Pôle emploi and representative organisations for the unemployed and for job seekers.
- The creation of citizens' boards by *Town Planning and Urban Cohesion Act* no. 2014-173 of 21 February 2014, composed equally of inhabitants and local stakeholders, is based on the suggestions contained in the "Citoyenneté et pouvoir d'agir dans les quartiers populaires" (Citizenship and the ability to act in working-class neighbourhoods) report submitted by Marie-Hélène Bacqué and Mohammed Mechmache to the Minister delegate for Urban affairs on 8 July 2013. Citizens' boards are intended to promote the self-expression of inhabitants of these neighbourhoods, in particular those that are distanced from traditional participation processes, and to take their user experience into consideration for urban policies. Their purpose is to fully participate in the governance of urban contracts by being involved in the contractual process, at every stage (development, implementation, monitoring, and later assessment) and in every aspect, including urban

Act dated 2008 generalising the active solidarity income (Revenu de Solidarité Active, RSA) and reforming inclusion policies, for example, outlined the RSA's general framework and provides, in particular, that the definition, management and assessment of this scheme are carried out under conditions that ensure the effective participation of interested persons<sup>22</sup>. However, the procedures for organising the assessment committees established on these grounds have not enabled the representatives of RSA beneficiaries to peacefully contribute: as they are not authorised to sit in a committee elsewhere than in their département, they are indeed called on to “judge” their peers.

The Code of Relations between the Public and the Administration (CRPA) also provides for several methods for involving citizens in decisions made by the administration<sup>23</sup>: open internet consultations, consultative administrative commissions, public surveys and public participation in local decisions. Besides these regulated cases expressly provided for, the code also provides for the administration's ability to involve the public in the design of a reform or the development of a project or an act, on the condition that the modalities of this process are made public, that persons concerned are provided with any necessary information, that such persons are given a reasonable period of time to participate and that the results and follow-ups envisaged are made public at the appropriate time<sup>24</sup>.

However, the means of association provided for by the CRPA encompass a very diverse range of realities and amalgamate two types of participation: on the one hand, the consulting of individuals or administrative bodies; on the other hand, citizens' ability to make decisions through referendums. In other words, there is either mere consultation, which can be likened to a pure formality, or there is a vote considered in binary terms which risks locking in the terms of the discussions. None of these hypotheses are consistent with a real involvement of rights-holders in the making of a decision.

By way of illustration, the Ministry of Health and Solidarity has recently set up public online consultation in order to feed its project strategy on preventing and combatting child and youth poverty<sup>25</sup>. Online consultations pose a certain number of risks. First, although not unique to this process, public consultation risks widening the gap between citizens: those who participate spontaneously are often better informed and “participatory democracy”, which this form of consultation is often associated with, therefore tends to increase pre-existing inequalities<sup>26</sup>. In the past, the CNCDH has already drawn attention to

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renewal. The CNCDH has already expressed itself on the insufficient implementation of these participatory bodies: see *Statement of opinion on the draft Law on Equality and citizenship*, 7 July 2016. It should be noted that the *Act on Equality and Citizenship* of 27 January 2017 established a right of interpellation of citizens' boards as well as a right to leave for associative commitments from which employed citizen councillors can benefit.

22. Social Action and Family Code, Art. 115-2.

23. Code of Relations between the Public and the Administration (CRPA), Art. L. 131-1 et seq.

24. CRPA, Art. L. 131-1.

25. The results of this survey are available since March: [[http://solidarites-sante.gouv.fr/IMG/pdf/opinionway\\_consultation\\_nationale\\_pauvrete\\_final.pdf](http://solidarites-sante.gouv.fr/IMG/pdf/opinionway_consultation_nationale_pauvrete_final.pdf)].

26. H. Belrhali-Bernard, « La pratique des consultations sur Internet par l'administration » (The Administration's

the risk of digital fracture and to the difficulties in accessing the internet experienced by part of the population. Furthermore, beyond the risk that this form of consultation could be instrumentalised, the CNCDH regrets the exclusion of collegiality and deliberation in this type of process given that this form of consultation does not allow, strictly speaking, for a collective demand to blossom from exchanges within a deliberative body: *“electronic consultations appear to sustain segmented interests, as though the search for a consensus is a futile pursuit”*<sup>27</sup>.

Another good example is the rights-based approach in terms of culture, enshrined in law. The National Assembly has updated this requirement on two occasions, in 2015 and in 2016, in the NOTRe Act (Art. 103) and in the LCAP Act (Art. 3)<sup>28</sup> to comply with General comment No. 21 of the UN Committee of Economic, Social and Cultural Rights<sup>29</sup>. Very often, cultural aspects are limited to issues in accessing to cultural resources (building of libraries, culture passes, etc.). Yet the rights-based approach goes further than schemes for access to cultural goods and involves all aspects of participation: it stems from the individual’s concerns, provides them with a means to express and build the cultural identity that they wish to develop, and highlights their resources. It is fundamental to enable all individuals, and in particular those who are excluded the most, to speak out, make a contribution, and exist amongst others. Cultural rights are an essential component in order to take an approach that is truly based on human rights.

A majority of current consultative bodies only attach importance to intermediate bodies. For example, this is the case for the French Economic, Social and Environmental Council (CESE). In this respect, the implementation, in 2012, of an eighth college, initially as an experiment, within the National Committee for Policies Combatting Poverty and Social Exclusion (CNLE), comprised of eight representatives for individuals in situations of poverty or precariousness should be commended. However, it does not entirely meet the

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Online consultation practices), *Revue française d'administration publique*, 2011/1 (no. 137-138), pp. 181-192.

27. *Ibid.*

28. The two laws that refer to cultural rights are a) the NOTRe law, Article 103: *“Cultural responsibility shall be exercised jointly by local authorities and the State in compliance with the cultural rights listed by the Convention on protecting and promoting the diversity of cultural expression of 20 October 2005.”*, b) the LCAP law, Article 3: *“The State, through its central and decentralised departments, local authorities and their associations as well as their public establishments shall set out and implement a public service policy developed in collaboration with artistic creation stakeholders, in compliance with the cultural rights set out in the Convention of the United Nations Educational, Scientific and Cultural Organisation on the Protection and the Promotion of the Diversity of Cultural Expressions of 20 October 2005.”*

29. General comment 21. *“The concept of culture must be seen not as a series of isolated manifestations or hermetic compartments, but as an interactive process whereby individuals and communities, while preserving their specificities and purposes, give expression to the culture of humanity.”*

*“The Committee considers that culture, for the purpose of implementing article 15 (1) (a) of the IPESCR, encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives.”*

requirements for an authentic human rights-based approach. These individuals, taken from collectives, do indeed benefit from work related to support and to the appropriation of subjects. However, the CNLE's way of working has not been adapted to their integration. The significant number of topics linked to current events, covered in a short period of time, does not allow these individuals who are often little qualified or not qualified at all, and who are also unused to this type of consultation, to peacefully contribute towards the CNLE's works. Furthermore, the Committee's organisational arrangements do not afford them enough time to consult with the members of their collective in order to have a truly collective voice: the representatives for individuals in situations of poverty are therefore only able to speak of their own personal experience, however rich it may be. Despite these flaws, the creation of this eighth college is a step in the right direction and its organisation would fully benefit from a human rights-based approach such as presented in this opinion.

## 2. The conditions for effective participation

The interviews carried out by the CNCDH for this opinion suggest that there is not a single unique *modus operandi* which could be used for all occasions. In fact, there are many methods and tools available and each participation method should be considered in itself in light of the context in question. However, a certain number of prerequisites can still be insisted on<sup>30</sup>:

**Inclusiveness.** The individuals possessing the human rights in question must be involved in the development of public policies at both national and local level. Obvious difficulties, especially in terms of logistics, must be overcome with the support of intermediate bodies. Representative organisations, such as NGOs or unions, that are capable of relaying the real life experiences of individuals, specifically their difficulties in accessing their rights, and their proposals to remedy such difficulties, should be involved in order to develop suitable public policies. The local level enables concerned individuals to become more involved. *A fortiori*, this must be the case when public action is deployed as part of the organisation and functioning of a public establishment (school, hospital, etc.). For example, the city of Nantes has decided to involve inhabitants in a project to create a care home, by including them in the development of the future establishment's charter<sup>31</sup>. To this end, the individuals in charge of the project had to first identify which inhabitants were in situations of precariousness. To do this, they went to the streets, the market, to associative and professional activity sites to meet the public. They also worked with posters and through the intermediary of mediator inhabitants that had been contacted during previous detection work carried out by the local health network.

Inclusiveness must remain a major concern when defining the framework for consultation: the consultation body set up must enable the effective participation of all

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30. These conditions are inspired by the interviews of Marion Carrel and ATD Quart Monde. They partly overlap the principles set out by the Institut de la Concertation (Institute for Concertation).

31. Example provided during the interview of ATD Quart Monde members.

and enable them to have a voice and to be heard. This implies thought on how to identify and mobilise the most excluded individuals, how to facilitate discussions and how they can express themselves. Indeed, forms of dominance could jeopardize the smooth flow of discussions and silence some participants. The conditions under which the most disadvantaged citizens can use their voice must therefore be set out prior to consultation. This can be done, in part, by alternating between meetings between peers and meetings including all concerned stakeholders (professionals, categories of individuals targeted by the action plan or draft law, experts).

Joint training programmes are a good example of consultation based on the sharing of knowledge and practices between rights-holders and duty-bearers. As early as 1998, the act on combatting poverty and exclusion committed social action professionals and volunteers to training on “*an overall and transversal approach to and concrete knowledge on situations of exclusion and their causes*”<sup>32</sup>. Joint training methods, which meet this objective and which are one application of the approach based on shared knowledge and practices implemented by the ATD Quart Monde association over the last twenty years<sup>33</sup>, provide the ability to better identify the obstacles to the exercise of rights and provide practical means of removing them. These joint training programmes fall perfectly within the realisation of a human rights-based approach: rights-holders are involved and provide practical knowledge through their experience, and the conciliation of professionals and individuals in situations of poverty enables prejudices to be corrected, and allows for the different stakeholders’ action rationales and stances to be brought into question. At the end of this type of training, professionals are better able to meet the demands and needs of individuals in situations of precariousness, which in turn favours their access to rights.

**Information.** The entire consultation process must include clear and appropriate information at each stage in the project. First, prior to consultation, in order to reach those individuals concerned by the project. Information must also allow an understanding of the operational objectives targeted and the issues raised by the project, in particular with regard to the requirement for effectiveness of human rights. The procedures for involvement must also be explained to participants. A training programme targeting non-professionals called to participate could encourage appropriation of the topic. In order to prevent the risk of information drifting towards the formatting, or misinformation, of rights-holders, the terms for communicating the information provided must be set out with the greatest possible care. Such terms must enable a free and informed choice, that is not conditional on the maintenance of rights or services by the organisers. Ultimately, public authorities must ensure that information is disseminated and made available to all individuals involved.

<sup>32</sup> Framework Act No. 98-657 of 29 July 1998 on combatting exclusion, Art. 151.

<sup>33</sup> For more details on this approach: T. Arnoux, N. Hajji, H. Lefeuvre, « Les perspectives nouvelles du croisement des savoirs et des pratiques entre professionnels et personnes en grande pauvreté » (New perspectives for knowledge and practice sharing between professionals and individuals in great poverty), in Y. Molina and G. Monceau (dir.), *Les Formations du secteur social aujourd’hui, Transformations et diversifications* (Training programmes in today’s social sector, Transformation and diversification), Presses de l’EHESP, 2017.

**Temporality.** Concerned individuals must be involved in the long term for such involvement to be real. It must occur prior to project development, to enable individuals to be involved in the decision-making process and have a real possibility of influencing the outcome. It is not merely a matter of collecting testimonies, but also allowing such testimonies to translate into collective claims. This is the difference between mere consultation and real participation. In this respect, the consultation carried out between January and March 2018 as part of the Strategy for combatting poverty was a wasted opportunity. Neither the time allocated for consultation with social action association representatives and professionals within working groups, nor the working conditions of the latter, allowed for real participation and an examination of issues based on the analysis of individuals directly faced with a denial of rights.

The mismatch between the time for dialogue, which is uncertain and sensitive, and the temporality of the policy, which is tied to elections, is one of the challenges that must be overcome in order to fully implement a human rights-based approach. The time afforded for concerned individuals to be truly involved is a sign of the effectiveness of a public policy, both in terms of respecting fundamental rights and in terms of public action. Furthermore, this approach implies that rights-holders are involved in all stages of the project's development: from carrying out diagnostics to the remedies that should be found by examining which levers are most able to ensure the effectiveness of the human rights in question.

Lastly, the human rights-based approach requires a monitoring of public policies that have been implemented in order to ensure that human rights are effectively taken into account. The individuals involved should be included in the monitoring and potential adjustment of the plan. Such monitoring may be carried out by a body specifically dedicated to this purpose, at national or local level, and whose effectiveness is conditioned, in addition to the terms for effective participation already mentioned above, by: the presence of all stakeholders concerned by the project, corresponding rights-holders and duty-bearers; the regularity of meetings; a precise agenda; reports recapitulating the diversity of opinions, etc.

It is essential that the consultation process at work within monitoring bodies results in the formulation of recommendations. These recommendations must be examined by the steering body. Regardless of the action taken following these recommendations, the latter must provide the reasons for its decision.

The effects of involvement. The directions and conclusions resulting from involvement in a draft law or action plan must be taken into consideration by public authorities. This is an essential requirement for the realisation of a human rights-based approach: a participatory approach must be taken seriously by public decision-makers. It is an integral part of a project's development process and must have a prominent place in the analysis of a situation and in the thought given to the appropriateness of public action methods. This is all the more important as the credit given by citizens to the consultation process depends, to a large extent, on the place reserved for the works resulting from these discussions.



However, adopting a human rights-based approach does not call into question the power of political decision-making. It forces public authorities to take into consideration the results of a consultation, at both national and local level, and requires that they justify any potential different directions taken.

## **B. The responsibilities of duty-bearers: recognition of human rights and accountability**

A human rights-based approach forces public authorities to truly implement human rights. This constraint compels them to assess their projects in light of the obligation to respect human rights and to justify any choices that they make.

### **1. Identifying the characteristics of human rights meeting essential needs**

The action plans implemented in order to ensure the full effectiveness of some human rights (against poverty, for education, for quality information, etc.) must, first, precisely identify which rights-holders are recognised by the project and, second, provide the essential characteristics of the fundamental rights in question. These two steps are vital, not only because they force project holders to question the precise scope of their text, but also because they are decisive factors in the development of the indicators implemented to assess the effects of the policy carried out. The essential characteristics of human rights, such as those of the right to food or the right to education, generally coincide with the availability, accessibility, adequacy and durability requirements of these rights<sup>34</sup>. It is the role of decision-making authorities to further detail these characteristics, in collaboration with stakeholders, with a view to providing precise normative content for the human right(s) in question.

In this respect, the “Zero long-term unemployment territories” project, launched by French solidarity associations, supported by Territorial Experimentation Act no. 2016-231 of 29 February 2016 aiming to reduce long-term unemployment, is a good example of a human rights-based approach. Designed to give Paragraph 5 of the Preamble of the *Constitution of 1946* on the right to employment its full scope, this experimental scheme is based on the involvement of long-term unemployed people, entrepreneurs, unionists, local representatives, local authorities, or even public establishments. The aim is to be able to offer all long-term unemployed people with employment that is suited to their know-how and that meets the area’s needs. These newly created jobs are financed by redirecting the costs of employment deprivation towards financing a complementary local economy<sup>35</sup>.

34. See in particular: Human Rights Council, Report submitted by the Special Rapporteur on the right to food, Olivier De Schutter, 24 January 2014, Para. 2.

35. Another noteworthy example is the supplementary health insurance ACS-P.

## 2. An impact study incorporating human rights to explain the choices made

Since the constitutional revision of 2008, an organic law relating, in particular, to the impact studies that must accompany draft laws, specifies which types of information must be provided in such a context: particularly “*the assessment of economic, financial, social and environmental consequences*”<sup>36</sup>. In order to nurture a human rights-based approach at the heart of public action, an assessment of the consequences of new provisions envisaged on human rights should be added to the indications that comprise the impact study. This new requirement would not only aim to strengthen the effectiveness of human rights, but would also enable the government to assess, in more detail, its project’s compliance with constitutional and international human-rights norms. Furthermore, in light of the multiplication of action plans, which rightly attempt to adopt a new, if not holistic, at least multi-sectoral approach, extending the impact study requirement to these new public action methods would be useful.

In this respect, the impact study should reveal in detail which methodology was used to select target groups, the terms of their participation in the realisation of a diagnostic, and an assessment of the situation. For this purpose, the Office of the High Commissioner for Human Rights has established several principles intended to develop data collection in compliance with a human rights-based approach<sup>37</sup>: the participation of concerned individuals or groups whilst ensuring that those categories that are likely to be discriminated against are represented; the disaggregation of data in order to identify the needs of high-risk groups and to combat discrimination; transparency regarding the method by which data is collected; respect for the privacy of individuals whilst preserving the confidentiality of personal information collected; accountability for collecting and using data.

The impact study should include, where appropriate: the necessities to which public authorities wanted to provide a response; the essential characteristics of the human rights implemented. In doing so, public authorities would be led to explain their decisions. Furthermore, by detailing the components of human rights whose realisation is targeted by

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Non-use of complementary health cover and the giving-up of care affect a large number of people in precarious situations, including those who actually benefit from ACS (Aid for supplementary health cover). In fact, despite the implementation of ACS by the government, which should enable any individual who does not benefit from complementary universal health coverage to take out health insurance, many insured do not apply for it. In light of these observations, action research was carried out on individuals in great precariousness in order to understand why and to provide suggestions meeting their expectations. These individuals then worked with major supplementary health insurance groups (through the intermediary of an ACS-P association created in June 2013), in order to propose a contract meeting the needs of low-income households. Upon assessing three years of this association’s operation and its contracts, 31.4% of insureds interviewed declared that they did not have any complementary health cover prior to taking out supplementary health insurance with the ASC-P. Using this information, the laboratory for ideas in Nancy created an insurance database containing over 1.5 million people. The ACS-P association, co-founded by major supplementary health insurance groups and individuals in great precariousness, now provides cover to 37% of individuals benefitting from ACS.

36. Organic law no. 2009-403 of 15 April 2009 *on the application of Articles 34-1, 39 and 44 of the Constitution*, Art. 8

37. OHCHR, “A human rights based approach to data, Leaving no one behind in the 2030 agenda for sustainable development”, 2018.

a legal text or action plan, public authorities would be able to provide detailed accounts of the effectiveness of their human rights-based approach using quantitative and qualitative indicators.

### 3. Indicators of compliance with the human rights-based approach

The use of indicators of compliance with this approach has a certain number of advantages. First, it helps States to evaluate their progress in enabling their citizens to exercise their fundamental rights<sup>38</sup>. At the same time, it provides treaty bodies with detailed and useful information<sup>39</sup>. The development of indicators invites public authorities to specify the meaning and scope that they intend to give to a human right, which once again contributes towards strengthening the transparency of choices made in order to realise human rights. The CNCDH therefore recommends that public authorities assess the impact of public policies on human rights. To this end, it invites them to envisage the development of indicators designed on the basis of a human rights-based approach.

For the moment, the CNCDH recommends that public authorities draw inspiration from the items set out by the Scottish Human Rights Commission to assess the impact of public policies on human rights<sup>40</sup>.

**As regards participation:** which groups or individuals are the most likely to be affected by the proposal? Which methods would you use to ensure that the individuals affected by the policy are actively and meaningfully involved in the decisions that affect their human rights?

**In terms of accountability:** who within the organisation is responsible for ensuring that human rights are respected, protected and implemented? Which sources of reliable (qualitative and quantitative) data could help to inform decision-makers? Are there procedures enabling employees or service users who deem that their fundamental rights have been, or could be, violated to hold the organisation accountable? (e.g.: judicial mechanisms, mediation, etc.)

**Non-discrimination:** have the individuals or groups who are most vulnerable to the violation of their rights been identified? What could the consequences of the policy on these individuals or groups be? Have you identified which actions could be recommended to

38. Office of the High Commissioner for Human Rights, *“Human Rights Indicators: A Guide to Measurement and Implementation”*, 2012, p.3.

39. The UN Committee on Economic, Social and Cultural Rights regularly calls on States to put into place indicators inspired by the guide developed by the OHCHR. For example, for France, see: Committee on Economic, Social and Cultural Rights, *Concluding observations on the fourth period report of France*, E/C.12/FRA/CO/4, 24 June 2016.

40. This Commission draws inspiration from the UN PANEL principles. On its website, see: Scottish Human Rights Commission, “What is a HRBA to policy and decision making?”: <http://eqhria.scottishhumanrights.com/eqhriaaddvalpolicy.html>

reduce the negative impact of the policy envisaged?

**Empowerment:** what information will the individuals affected by the policy need in order to effectively influence the decision?

**Law:** what are the possible impacts of a project on human rights? (Which rights could be endangered?) What is the nature of these rights (Are they non-derogable rights or are they likely to be restricted)? Is an interference in the exercise of a right necessary in order to achieve a legitimate and proportionate aim? Knowing that the least amount of interference possible should be ensured.

Convinced that a human rights-based approach is an asset that favours the emergence of public policies that are more coherent, more effective in the long-term, and that better comply with France's international undertakings, the CNCDH recommends that this approach be systematically applied at all stages of public action.

## Recommendations

**Recommendation 1:** The CNCDH invites public authorities, both at national and local level, to implement a human rights-based approach. This approach is based both on the effective involvement of concerned individuals in the development of public policies and on the need for public authorities to justify their decisions in regard to human rights.

**Recommendation 2:** Draft laws, and action plans, should be accompanied by an impact study containing an assessment of the consequences of the envisaged provisions on human rights. To this end, the CNCDH recommends amending Article 8 of Organic law no. 2009-403 of 15 April 2009 on the application of Articles 34-1, 39 and 44 of the Constitution.

**Recommendation 3:** Both elected representatives and administrative officers should benefit from training on the human rights-based approach, as part of both initial and continuing training. Local representatives in particular, and parliamentarians alike, should, at the beginning of their term, attend a training seminar on human rights and this approach.

**Recommendation 4:** Public authorities should allocate time and means to consulting rights-holders or, failing such, and as a last resort, if not possible at national level, to consulting their representatives.

**Recommendation 5:** The CNCDH recommends ensuring the full effectiveness of current participation mechanisms involving citizens in the organisation of some public services. It commends the progress embodied by the 8<sup>th</sup> college of the CNLE and recommends that its effectiveness be strengthened by guaranteeing the conditions for informed and collective speech.

**Recommendation 6:** The human rights-based approach must be based on popular education practices enabling as many citizens as possible to become involved in public debates, by gaining personal and collective knowledge and power to take action.

**Recommendation 7:** To ensure the true participation of rights-holders in the human rights-based approach, joint training programmes, which are based on the sharing of knowledge and practices should be recommended at all levels of decision-making and be subject to assessment.

**Recommendation 8:** To ensure that the public policies implemented are monitored and that human rights are effectively taken into account, an assessment body should be created.

## List of people interviewed

**Marion Carrel**, Lecturer in sociology at the University of Lille 3

**Olivier de Schutter**, Professor of International Law at the Catholic University of Louvain, former United Nations Special Rapporteur on the right to food

**Emmanuel Decaux**, Professor of International Law at the University of Panthéon-Assas Paris II

**Mary Doris**, ATD Quart Monde activist

**Hervé Lefeuvre**, ATD Quart Monde, Head of knowledge and practice-sharing workshops

**Jean-Michel Lucas**, Lecturer at the University of Rennes 2 (Economic sciences), Cultural policy consultant

**Patrice Meyer-Bisch**, Coordinator for the Interdisciplinary Institute of Ethics and Human Rights (IIEDH), and for the UNESCO Chair on Human Rights and Democracy, University of Fribourg

**Frédéric Penaud**, Head of the Social Department of the French départemental council of the Côtes d'Or

**Suzanne Rosenberg**, Sociologist, Head of ATD Quart Monde's National network for knowledge-sharing

**Colette Théron**, Delegate for knowledge-sharing in the Champagne-Ardenne region



Created in 1947 at the instigation of René Cassin, the **National Consultative Commission on Human Rights (CNCDH)** is the French national institution responsible for promoting and protecting human rights with level 'A' accreditation from the United Nations.

The CNCDH performs a three-pronged role that involves the following:

- enlightening the public decision-making process with regards to human rights;
- monitoring the effectiveness in France of rights protected by international human rights conventions;
- overseeing France's implementation of recommendations made by international committees.

The CNCDH is independent and operates based on the principle of the pluralism of ideas. This being the case, as the only institution that maintains continuous dialogue between civil society and French experts in the field of human rights, the Committee comprises 64 qualified individuals and representatives of non-governmental organisations with their roots in civil society.

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20 Avenue Ségur - TSA 70334 - 75334 PARIS Cedex 07

Tel : 01.42.75.77.09

Mail : [cncdh@cncdh.fr](mailto:cncdh@cncdh.fr)

[www.cncdh.fr](http://www.cncdh.fr)



@CNCDH



@cncdh.france