

THE RIGHTS OF DISABLED PERSONS AND DISCRIMINATION

A comparative study in British, American and Saudi Arabian Disability Law



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ABSTRACT

In Saudi Arabia, as in other Arabic countries, disabled people are prevented by exclusion and marginalisation from obtaining their clear rights. In advanced countries, principles of equality and human dignity determine the position whereby disabled rights are a matter for procedures of justice, not merely for charity. Therefore in the West effective anti-discrimination legislation operates to protect the disabled. By reference to Western concepts and practice, this thesis attempts to propose appropriate means according to Islamic principles to establish the rights of disabled persons and to rectify problems of discrimination against them in Saudi Arabia.

The concept of disability is here understood broadly, in order to include a social model that takes account of the stigma of impairment attached to disabled persons, and the social restrictions this entails. The rights of disabled persons rest on principles of their fundamental interests and real needs, equal respect, self-esteem, autonomy and citizenship. To establish the case for these rights is to establish a case resting on dignity, equality and recognition which prohibits discrimination against the disabled. Discrimination refers to exclusion, all forms of denial of opportunities, harm, such as losing out on benefits, and distributive injustice. Distributive justice is required in order to address disability-based discrimination. Its principles of egalitarianism, resources, deserts and difference offer practical solutions to problems of discrimination. The 'difference principle', resources and other principles here are linked to 'reparative justice', for example, through the application of reasonable adjustment to enable disabled persons to enjoy their rights. The concept of the 'veil of ignorance' is applied to the position of disabled persons as a disadvantaged group, to discover what real concept of justice - according to their circumstances and needs - must be adhered to.

The UN's 2007 convention on the rights of disabled persons reflects these issues in terms of human rights, and offers a reform agenda for international consensus. It also stresses raising awareness of the clear rights of the disabled without discrimination.

Examination of the situation regarding disability in Saudi Arabia reveals a range of inadequacies both in services provided and in legal response. The British and American disability acts offer norms and models informed by justice as a blueprint for reform. When disabled Saudis become legal and autonomous rights-holders, the goal of this thesis will have been achieved.

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INTRODUCTION

A. General Background

Human rights are inherent in the condition of humanity, and belong innately to each human being without regard to race, religion, social status, or shape. International society has therefore deemed it essential to endow human rights overall with a status which ensures their respect. Accordingly, human rights have been transferred from concepts of general morality to the domain of legal principles. This transition has proceeded by means of both international conventions and legislation initiated by individual states.

Among humans, disability is a recurring condition resulting from both environmental and genetic causes. Its occurrence is universal. A study dating back to 2002 indicates that about 10 per cent of the world's population has a disability of one form or another.¹ It has been further observed that persons with disability are often marginalised and excluded from the mainstream of the society and denied their human rights. Hence, they frequently face diverse forms of discrimination despite their clear rights.

Discrimination against persons with disabilities takes various forms ranging from invidious discrimination, such as the denial of educational and employment opportunities, to more subtle forms of discrimination, such as segregation and isolation because of the imposition of physical and social barriers. The effect of such discrimination should particularly be considered in the context of education, employment, health, housing, transport, cultural life and access to public places and services.

Various efforts have been made to confront the discriminatory aspects and to promote the cause of disabled persons' rights. These efforts represent the movement of the rights of disabled persons and they have been made at both national and international levels. Efforts at national level include the struggles of non-governmental disability organisations, as well as the effective advocates for disabled person's rights who have challenged discriminatory practices against them and promoted their rights. On the international level, the movement has followed a path of medical rights specifically

¹ See UN Enable, www.un.org/esa/socdev/eable/disov.f.htm.

designed for people with disability to match concepts arising from the context of universal human rights. Consequently, the disability movement has benefited from various international conventions and instruments designed generally to protect human rights. In addition to this, the ‘International Convention for Protection of The Rights for Persons with Disabilities (2007)’ has recently been accomplished. The protection provided by these international instruments has been transferred to national level as internationally binding obligations on the respective states. In response, the Western states in particular have taken steps to introduce specific anti-discrimination legislations addressing disability. These legislations are founded on general principles of equality and justice. Study of the subject and a review of the related material show that a dramatic shift in perspective has taken place over the past two decades, from an approach motivated by charity towards the disabled to one based on rights.

The human rights context established by international law and the Western states has a clear relation to the international efforts and legislations related to disability rights. There is unanimous agreement that disability issues should be investigated under the concepts of rights and discrimination. Therefore, the field of this thesis is **disability law and discrimination**.

Since the main topic of the thesis is disability rights in Saudi Arabia, it is important to investigate these in terms of whether they comply with the international disability movement to protect the rights of disabled persons. Furthermore, Saudi Arabia is an Islamic state, which means that Islamic laws, of which the *Qur'an* and *Sunnah* are the primary sources, apply.² Thus the thesis depends on a **comparative study** of Islamic and Western perspectives in respect of both the philosophy of disability rights and of measures taken by Western states with regard to rights.

B. Statement of Problem (Issues)

Disabled persons in Saudi Arabia face various forms of discrimination and exclusion, despite the existence of specific legislation and disability laws. These legal responses appear to be inadequate, since they fail to perform their desired function of respecting and protecting disabled persons’ rights equally with others. Therefore, the fundamental rights

² For more details, see chapter 1, pp. 15-18.

of persons with disabilities in Saudi Arabia and other Arabic and Islamic countries are viewed as the object of charity rather than the obligation of justice. Moreover, discriminatory aspects and prejudice among disabled persons in terms of their rights run through all aspects of their life, and are increasing. This means that the legal responses intended to regulate disability issues have big deficiencies, which require review and reform in order that disabled persons receive consideration and in order to provide a sequence of international and national disability rights movements.

It is important to begin by searching for the real reasons behind this problem. The prevalence of discrimination often signals a deficiency in distribution of resources and absence of justice. Since the main issue of this thesis is **discrimination**, it is necessary to explore the concept of **distributive justice** and determine levels of its functional presence or absence.

C. Significance of Thesis

Subsequent to determining the reasons for the deficiencies in the rights of disabled persons, the problem then requires remedies. The search begins with a study of the precise basis for the rights of disabled persons, and of the concepts of discrimination and distributive justice. A strong philosophical background establishes the power of these principles as superordinate to any alternative traditions adhered to. The debate must also refer to the relevant international standards and principles established for the rectification of problems of disability, as international consensus lends cogency to the case. In order to further substantiate this study's claim to be convincing and reasonable, a comparison must be offered with the attempts of some countries from the advanced world. These are examined as an example to benefit from and imitate, since they have already achieved successful and memorable results in treating disability rights.

Most of the Middle Eastern countries including Saudi Arabia share a common factor in that they have no relevant disability discrimination enactments in place, or that the existing legislation is ineffective. This is because there is no explicit statement of clear rights which must be protected, and because they lack practical norms and enforcement mechanisms which fully address the real needs of disabled persons. A disabled person's rights are not viewed as rights, but rather merely as social grants, as mentioned above. In

most if not all cases, support is left to the charities provided by altruists moved by sympathy for this unprivileged sector of the population. It is hoped that the effect of this study will be to turn this perception around and contribute towards transforming it into a modernised approach catching up with what is being seen in the modern world.

Numerous studies have been conducted in the disability field in Saudi Arabia and some Middle Eastern countries. None of these studies, however, has touched on new rights or means of addressing these through prohibition of discrimination based on disability. No comparison has been attempted between Islamic or Arabic and Western legal perspectives. There has also been no attempt to create a comprehensive theory of the real rights of disabled persons, including practical standards for complying with international obligations in respect of equal opportunities and justice.

Previous research studies have mostly focused on medical, social and physical aspects of disability and special education related to disabled people only. Therefore, Saudi Arabia and most Middle Eastern countries suffer from a lack of legal studies on disability rights and discrimination. Because discrimination-based disability study is new around the world, so this thesis is likely to be one of the first studies in Saudi Arabia and Arabic countries to deal with disability rights in a legal framework which addresses the prohibition of discrimination.

Disability rights are largely overlooked not only by legislators but also by the scholars in that part of the world, as the task of raising awareness and providing for disabled persons has been left to sympathisers and good Samaritans. The present research offers scholarship in this field which can transform the official and public perception of these vital issues. It will make it a government obligation to provide for disabled persons in relevant areas including health, rehabilitation, education, employment, public and accommodation services and to protect them against the pervasive violation of their inherent rights.

This approach seeks intellectually and philosophically to found a real concept of **disability rights**, and present a correct way to deal with them, namely **non-discrimination** and the pursuit of **justice**. In addition, the research seeks to apply the philosophical foundation of disability rights and discrimination to legal practice on the basis of

comparative examination with the Western disability laws. Pursuant to this a proposed disability discrimination legislation blueprint is presented. Thus as a fruit of comparative study the research combines two cultures, which means enriching research, civilisational reciprocity and interchange of experiments.

The significance of the thesis consists also in assisting the government to draft a practical model explaining disability discrimination laws that recognise disabled persons' rights and urge the legislators finally to adopt such laws. The research will help transform the currently idle sector of disabled persons into a productive and creative sector contributing to the wealth of Saudi Arabia. Furthermore, the research should contribute to public awareness-raising of the real rights of disabled persons and establish respect for these rights. It should lead to the enlightenment of the officials in charge of the relevant government departments, and inspire the disabled persons' associations and trade unions in these jurisdictions to pursue their rights with justification. Therefore, it is expected that the research will generate a qualitative movement in legal disability studies for the region.

D. Objectives of Thesis

The general goal of the thesis is to affirm the foundations of clear disability rights and state the real motives for the appearance of discrimination concerning these, with recognition of its concepts and forms. An additional purpose is to review the current disability laws in Saudi Arabia and offer legal analysis and argument from a perspective of critical scrutiny. This process cites reasons for the problem and prescribes adequate solutions. The research includes criticism of the current laws, where they exist, by way of highlighting their deficiencies and proposing new legislation for procedures to effect these rights or modifications by way of adding new language to the current laws.

The main problem of disability rights in Saudi Arabia is their being viewed as a subject for charity rather than justice, with the result that the disability laws are inadequate. Therefore, the main theme of this thesis is **the need for a movement away from inadequate charitable responses to responses that are rooted in distributive justice.** The theme of the study focuses on the following. Firstly, an attempt to identify real and reasonable grounds on which to establish disabled persons' rights. As Saudi Arabia has an Islamic constitution, and as the major source of legislation is Islamic jurisprudence, so the

research explores the theory of disabled persons' rights on the basis of Islamic jurisprudence. Secondly, a diagnosis of the real malady of discrimination in disabled persons' rights, which is the lack of distributive justice. The research tries to devise appropriate treatment for discrimination. Thirdly, constructive analysis and critique of the provisions of the laws in terms of enforcement mechanisms, and of the absence of explicit language to the effect that the disability benefits are rights rather than privileges, or charity. Fourthly, a comparative study of the Disability Discrimination Act in the United Kingdom (hereafter referred to as DDA) and the American Disability Act in the United States of America (hereafter referred to as ADA). Fifthly, the study sheds light on the disability rights referred to in the human rights instruments in international law and the special new convention for the rights of disabled persons.

To summarise, the research questions to be addressed include, but are not limited to, the following. Should the disabled person's rights be viewed as rights or concessions, and why? What are reasonable grounds and principles on which to establish the rights of disabled persons? How does distributive injustice cause discrimination and what forms of discrimination can impact on disabled persons or be positive for them? What relevant principles of distributive justice might serve disability rights? How have DDA and ADA dealt with disability rights and discrimination, on what specific principles are they founded, and how is the connection made between theory and practice? May any critical views of them be argued? What is the reform agenda of the international law related to treatment of disability rights? What are the principles of the new International Convention for Disabled Persons (2007) that must be adhered to? In the case of Saudi law, what laws need to be amended in order to provide for more disability rights? How can the Saudi government promote and develop respect for disability rights within its society? What does the government need to do in order to ensure the proper enforcement of these rights? Finally and most importantly, what mechanisms are necessary to enforce the proposed laws and in what ways or through which bodies should these be formulated?

It might be asked why only the DDA and ADA have been selected for comparison. In fact, they are currently the most advanced legislations in the world for disability and discrimination rights when compared with other Western countries such as Canada and Australia, which also have advanced and civilised disability legislations. Briefly, the reasons for this are, firstly, that they are comprehensive and include all fundamental rights

necessary for disabled persons to count as normal persons. Secondly, they have identified the real reasons for the complications of disability rights and their legislators have dealt with them according to appropriate principles of non-discrimination and distributive justice. Thirdly, they include all the relevant required procedures presented as practical standards to enforce the laws. Thus they link theory to practice. Fourthly, they entail remedies and enforcement mechanisms to facilitate execution of the law. Finally, they satisfy all international human rights requirements, especially international equal opportunities standards for disabled persons. Consequently, disabled persons in these countries live as any normal persons, and enjoy general respect.

E. Methods of Thesis

The literature sources for the research largely comprise a library search of both Islamic jurisprudence and Western philosophical texts. An integral part of the methodology, however, reviews case law and the outcome of complaints made in Saudi Arabia which have been aired in the national press.³ The complaints of disabled persons are case studies, since the grant of their rights is still viewed as an act of charity and there are no formal legal mechanisms whereby those clear rights may be obtained.

The research has based its quantification of the problem of disability rights and discrimination in Saudi Arabia on the findings of a questionnaire and, hence, is to a modest extent empirical in orientation. The survey has been especially designed for this research to cover all relevant questions regarding the nature of the treatment which disabled persons have received, the kind of discrimination they have faced and their views and needs.⁴ The data from the survey have been analysed through the SPSS program.⁵

The research comprises three sections: theoretical and philosophical background, legal aspects, and practical aspects. Much of the research relies on comparative methods and analytical investigation, although critical, historical, descriptive, inductive and inferential methods are also occasionally employed.

³ See appendices.

⁴ See appendices.

⁵ SPSS (Statistical Package for the Social Sciences) was released in its first version in 1968, and is among the most widely used programs for statistical analysis in social science.

In the theoretical and legal parts of the research, the Western perspective will be investigated analytically through comparative law. Comparative law is an intellectual activity with law as its object and comparison as its process.⁶ It is, however, a study method rather than a legal body of rules.⁷ It is vital to engage in this activity in order to examine how different cultures deal with their moral responsibilities, to highlight areas that may merit reform and to shape an 'ethical community'. Comparative law implies the implementation of some degree of moral, human and innate general principles which are insisted upon by 'ethical communities', such as compliance with freedom and justice. The 'ethical community' in this context is an ideal which specifies that the law should adequately accommodate the interests of all those in the group it is supposed to serve.⁸ In addition to international harmonisation, for example, such interests may include human rights, consensus on global healthcare standards and protection of the environment, etc. Commitments which concentrate on fundamental human rights and the dignity of man, as found in the Universal Declaration of Human Rights (1948), must be free from strong commitment to a specific community, as Rawls observed.⁹ The concern here is the commitment to a community that privileges its own interests in particular ways: for example, Nazis who see Germans as *Übermenschen* and Poles and Jews as *Untermenschen*.¹⁰

Indeed, comparative law promotes the comprehension and clarification of the law and its better adaptation to fundamental interests and social needs, to secure the effective administration of justice and to encourage and carry on scholarly and scientific legal work.¹¹ It can also help us to comprehend alternative legal cultures rather better. Therefore, comparative law is more than simply looking at the way in which something is different or similar in bodies of law. Rather, it is thinking about different cultures in order to conceptualise the particular culture in which people do that which is morally right. In this regard, then, we consider, *inter alia*, suitable means both to hit the target (which may

⁶ See Zweigert K & Kotz H, *An Introduction to Comparative Law*, trans. T. Weir, 3rd Edition, (Oxford: Oxford University Press, 1998), p. 2.

⁷ *Ibid.*

⁸ See Mullender R, 'Nazi Law and the Concept of Community', 58 *University of Toronto Law Journal*, p. 377.

⁹ *Ibid.*

¹⁰ *Ibid.*, p. 381.

¹¹ De Cruz P, *Comparative Law in a Changing World*, 3rd Edition, (London: Routledge-Cavendish, 2007), p. 12.

be defined as a morally defensible body of law) and to transplant a new legal culture within the comparative method likely to be applied.

The need to be sensitive to particular legal cultures to facilitate the process of transplantation was recognised by Tocqueville. He identified custom as one of the important factors responsible for the adoption of a specific culture. He indicated that it applies not only in relation to what could be called 'the habits of the heart' (a way of life, feelings and beliefs that include concern for others), but also to the different concepts people adopt, and the diverse opinions that they hold. A mass of ideas also fashion 'mental habits' (reasoning, reflection, being critical of one's culture, readiness to embrace ideas from other cultures, readiness to debate controversial topics). Hence, Tocqueville stresses that custom should also be understood to embrace 'the entire and intellectual state of a nation'.¹²

To apply those factors to the subject matter of this comparative study, one must describe those features of Saudi Arabian culture which identify the Islamic religion as a foundation for its legal system. In order for those features to act as instruments for the transplantation of Anglo-American disability laws, they must reveal the extent of their commitment to the pursuit of justice, freedom and equality. A self-critical element is also important when problems of discrimination are addressed, as well as attentiveness to the needs of those with disabilities, in order to reform inadequate legal response. Moreover, does Saudi Arabia as an Islamic state show receptivity to foreign sources of law and political philosophy and declare a degree of openness to outside influences? Answers to these questions will be broadly elaborated within this thesis to justify transplantation on the lines that Tocqueville (on the above reading) would regard as feasible.

However, the thesis being advanced here (that USA and UK models of disability rights can be transplanted into Saudi Arabia) may attract a sceptical response. One might protest that the reform being argued for is doomed to failure, since the USA and the UK are secular, liberal, and egalitarian societies, while Saudi Arabia is theocratic, monocultural, and hierarchical. But sceptical critique of this sort is misplaced. As will be demonstrated, the Muslim faith that shapes Saudi Arabian society in fact gives expression to strongly

¹² Tocqueville A. *Democracy in America and Two Essays on America*, trans. E Gerald. (London: Penguin Group, 2003), pp. 335-336.

egalitarian assumptions. These assumptions provide good grounds for thinking that the modest reform agenda advanced in this dissertation is one that would win the approval of all those who make up Saudi Arabian society, as will be illustrated throughout the thesis, particularly in Chapter 10. Moreover, there are some Islamic moderates scholars¹³ who take the view that secularism has historically embraced procedural justice and egalitarian attributes such as respect for humanity, free thinking. Likewise, secularism has, on their account, exhibited a commitment to reason and a readiness to learn from experience. They have also observed that secularism has two sides. The one side (which is highly practical in orientation) includes separation of religion from the state, freedom as a realisable ideal, and an associated commitment to procedural justice; the other side is more theoretical and encompasses justice, equality, and rationality as regulative ideals, all of which are affirmed in the *Qur'an*. These scholars therefore stress that there is considerable potential for benefiting and borrowing from secularism in terms of equality, norms and procedures of justice, and reasoning, provided that *Qura'nic* principles are fully satisfied. This will be discussed further in Chapter 10.¹⁴

It should be mentioned that most of the legal systems of Arabic and Islamic countries pursue civil law alongside Islamic jurisprudence. In this respect they have borrowed a great deal of legislation from Western legal provisions, except those concerning personal status and religious laws. Nevertheless, as will be clarified, Saudi Arabia assumes the *Qur'an* as a constitution and therefore has a different legal system from that obtaining in the West.

Saudi Arabia has, however, revealed its receptivity to aspects of western culture. It has, for example, borrowed and benefited from Western laws in terms of health, finance, educational technologies, administration and so on.¹⁵ Methodical treatment of the subject thus entails consideration of the transplantation of ideas from one nation to another. Respecting the profound changes implicit in the idea of transplantation, this research will carefully consider what may or may not be transplantable on the basis of the comparative study.

¹³ For example of those Islamic scholars are Abdullwahab Al-Masiri and Rashed Al-Ghanoshi. See Al-Ghanoshi R, *Al-Islam wa Al-Elmaniah*, www. Al-Jazeera.net.

¹⁴ *Ibid.*

¹⁵ All other Arabic and Islamic countries assume Islam as a second source of their constitution and legislation, whereas Saudi Arabia considers the *Qur'an* and *Sunnah* as primary sources of its legislation, as will be elaborated later.

During discussion of the development of international law and disability rights, analytical investigation methods are used to identify international standards for treating disabled persons' rights as well as to consider the remit of the new 'International Convention for The Rights of Disabled Persons'. Having dealt with matters of theory (transplantation, etc.) and relevant principles (the latter providing a benchmark for the assessment of Saudi Arabian and Anglo-American law), we will move on to more practical considerations.

The legal section includes a presentation of attitudes towards disabled persons in Saudi Arabia and legal responses to disability that constitute the subject matter of the thesis. Initially, historical, descriptive, and analytical methods are used to illustrate the real situation of disabled persons and the historical stages of the legal responses. These responses are also examined and analysed by critical methods to identify deficiencies.

Presentation of examples from the DDA and ADA follows description of the Saudi disability laws to provide points of comparison. As well as comparative methods, historical, descriptive, and analytical methods are used. A historical presentation shows the stages of development of the disability legislation and the means whereby current rectification has been achieved. In addition, an analytical investigation method is applied to the presentation of the contents of the DDA and ADA and legal analysis of their principles.

Finally, general themes resulting from this comparative study are outlined. These concentrate on what should be agreed in order to establish the project of 'the rights of the Disability Discrimination Act'. Inductive and inferential methods are used, relying on conclusions drawn from the philosophical analysis to establish clear (and suitably strong) rights for disabled persons. New readings of the relevant Islamic texts reveal that, from an Islamic perspective, superior principles establish the rights of disabled persons and prohibition of discrimination against them. These are followed by the attempt to connect theory with practice by presentation of a blueprint for reform modelled on the Disability Discrimination Act.

The structure of the thesis, which relies on the comparative method and the various methods of research mentioned above, is described below.

F. Structure of Thesis

As explained above, the thesis comprises three main parts, dealing respectively with theoretical, legal, and practical issues. Within this framework the structure of the thesis divides the research into an introduction and ten chapters as follows.

It is important to precede the discussion with a general insight into both the nature of the legal system of Saudi Arabia with its sources and reference to Islamic jurisprudence, and the basis of the rights of disabled persons in Saudi Basic law and relevant Islamic principles. Chapter 1 is therefore titled: 'GENERAL LEGAL SYSTEM IN SAUDI ARABIA AND THE BASIS FOR RIGHTS OF DISABLED PERSONS'.

The following five chapters address the theoretical part of this research. The initial approach taken is to analyse and define the components of the thesis title. The first requirement is a clear statement of the concept of disability and of legal definitions of the disabled person who would benefit from the proposed act. This is the subject of Chapter 2: 'GENERAL CONCEPTS: DISABILITY AND THE DISABLED PERSON'.

Central to the thesis is the concept of a right and the grounds on which rights are based, as well as the relation of this to disabled persons. This is the content of Chapter 3: 'RIGHTS AND DISABILITY'.

Discrimination is the next essential term in the title. The concept of discrimination and its various forms, including discrimination based on disability, is the subject of Chapter 4: 'DISABILITY AND DISCRIMINATION'.

Since distributive justice is one of the main themes of the research, it must be fully discussed and its relevant principles identified. Chapter 5, 'DISTRIBUTIVE JUSTICE', deals with this area.

The international law and its reform agenda related to disability rights are important because they represent an international consensus on which disability rights must be dealt with. Hence this area also requires discussion and explanation. This is the subject of Chapter 6: 'INTERNATIONAL LAW AND DISABILITY RIGHTS'.

The legal part of the thesis occupies the next three chapters, which present examples of disability legislations. It opens with a discussion of attitudes towards disability in Saudi Arabia, describing the existing legal response in order to identify shortcomings and compare these with the DDA and ADA. This is found in Chapter 7: 'SAUDI ATTITUDES TOWARDS DISABLED PEOPLE AND DISCRIMINATION'. Chapters 8, 'BRITISH DISABILITY DISCRIMINATION ACT' and 9, 'AMERICANS WITH DISABILITIES ACT', outline current British and American legislation for the disabled.

After presenting the relevant theoretical and legal material, the research concludes by addressing the practical issue. This final part takes the form of offering clear legal solutions for disability and discrimination problems in Saudi Arabia. This is the subject of the concluding Chapter 10: 'DISABILITY AND THE PURSUIT OF JUSTICE'.

GENERAL LEGAL SYSTEM IN SAUDI ARABIA AND THE BASIS FOR RIGHTS OF DISABLED PERSONS

Introduction

In order to examine disability laws and discrimination in Saudi Arabia, it is first of all necessary to explore the foundations of its legal system. An insight into the background and characteristics of a nation's legal system is the key to understanding both the place and the people to whom the laws are applied. Further, it permits comparative study between nations and is therefore a necessary basis for a comparative study of disability politics. The principal aim of this chapter is therefore to describe the Saudi legal system and identify those areas in which a basis for the rights of disabled persons exists.

The population of Saudi Arabia is entirely Muslim, and the Islamic religion is the foundation of its government's constitution. The foundations of Islam are also the foundations of all Saudi principles, including the laws and the legal system. It is important to examine the content of these laws, as well as the legal system. Since one of the important characteristics of a legal system is its judicial system of state, the chapter also examines the nature and structures of the Saudi judicial system. This entails explanation of the judicial role. The chapter concludes by investigating the basis of disabled persons' rights found in Saudi Arabia's Basic Law, or constitution, and in relevant Islamic principles.¹ To allow useful comparison, examples are given of the constitutional basis of disabled persons' rights in some Western countries, with explanation of the constitutional guarantees of their human rights which are in place.

The chapter is thus divided into two sections. The first section addresses the concept of supremacy in the Saudi Arabian legal system, specifically discussing the three aspects of divine sovereignty, the 'Fundamental Laws', and the allocation of state powers. It examines the general judicial system in Saudi Arabia, including divisions of courts and

¹ This discussion is not a philosophical exposition, but a text-based analysis.

the judicial role. Section two considers disabled persons' rights in the Saudi Basic Law and in relevant Islamic principles. It discusses the Islamic constitutional basis for human rights and contrasts this with the constitutional guarantees for the rights of disabled persons in some Western states.

1. 1. 'Supremacy' in the Saudi Arabian Legal System

Saudi Arabia is the original Arab state on the Arabian Peninsula. It is the homeland of Islam, which was founded by Prophet Mohammad. The principle upon which the first Saudi State was established has been strongly reaffirmed by different statutes enacted since the current Saudi State emerged. Recently the redrawn 'Fundamental Laws' have reaffirmed the supreme statutory laws. The Basic Law adopted in 1992 is elaborated below. It declares that the constitution of Saudi Arabia is the book of Allah, the *Qur'an*, and the *Sunnah* of his Prophet.² It states that the government of Saudi Arabia derives power from the holy *Qur'an* and the Prophet's traditions. These have supremacy over all rules, including the Basic Law.³ It also proclaims, '*The state protects Islam, implements its Sharia, orders people to do right and shun evil and fulfil their duty regarding Allah's call*'.⁴

In some provisions, the Basic Law and Shura Law use the terms '*Qur'an*' and '*Sunnah*' of the Prophet to refer to this supremacy, and in others they use the terms 'Islamic Sharia', 'the Prophet's traditions' or the 'sources of Islamic jurisprudence'. Thus it is necessary to discuss the supremacy of the divine sovereignty and to provide an analysis of the sources of the Islamic Sharia.

1. 1. 1. The Supremacy of the Divine Sovereignty

Islam is not merely a system of legal rules that govern only an individual's relationships with other parties, but a complete way of life.⁵ It has guidelines for all aspects of life. The

² Although Article 1 of the Basic Law states that the *Qur'an* and the *Sunnah* are the Constitution of Saudi Arabia, the Fundamental Laws, in particular the Basic Law should be considered in a legal sense as the constitution of the country. This idea will be discussed later in this chapter.

³ The Basic Law, see note 6. Art. 7.

⁴ *Ibid.*, Art. 6.

⁵ The term Islam literally means surrender or submission. It is derived from the Arabic verb *Aslam* which means submitted or surrendered. In its religious or Islamic usage, it means surrendering or submitting to Allah's will. See also the Islamic Affairs Department: the Embassy of Saudi Arabia, *Understanding Islam and Muslims*, (The Islamic Affairs Department of the Embassy of Saudi Arabia, Washington D.C) p. 4.

Islamic Sharia has rules that govern one's relationships not only with others, whether Muslims, Christians, private individuals or public authorities, but also with Allah and one's own conscience.⁶ In other words, Islamic Sharia includes matters designated in the West as law, as well as matters which are spiritual, ethical, civic, political, humanitarian, and religious. As the basic reference for all Islamic laws, the Islamic Sharia draws on several sources.⁷ The two main sources of the Islamic Sharia are known as the primary and secondary sources.

(A) The Primary Sources of Islamic Sharia

The primary sources are the *Qur'an* and the *Sunnah*. They are the only divine revelations of Allah. The *Ijma* and the *Qiyas* are additional primary sources.

i) *The Qur'an*: this is the word of Allah, which was revealed to Prophet Mohammad during a period of 23 years by the Angel Gabriel. It was revealed as circumstances and situations at that time dictated.⁸ The *Qur'an* includes 114 Surah, or 'chapters'. Each one of them has Ayat, or 'verses'. In defining the *Qur'an* Allah says, '*And your Lord! He is indeed the Mighty, the Merciful. And it is a revelation of the Lord of the worlds, Which the True Spirit has brought down Upon your heart, that you may be (one) of the warners, In plain Arabic speech*'.⁹ The doctrine of the *Qur'an* is applicable for both this life and hereafter. Some tenets of Islam are intended to spread the religion. These are the doctrines of faith and worship.

The *Qur'an* contains other provisions for regulating the community such as those of trade and criminal punishment, in addition to matters of personal status and regulatory matters. All of these provisions and others rely on the principles of justice and equality. Prophet Mohammad, in describing the *Qur'an*, said '*In the Qur'an there are stories of the past, portents of the future, and orders prevailing in the period in between. It is settled fact*

⁶ The term 'Sharia' literally means 'the walking to a path place'. The common meaning is 'straight path'. Allah says in the *Qur'an* 'Then we put you on a straight path Sharia in your affairs, so follow it and do not follow the desire of those who have knowledge' (Surah 45: Al-Jathiyah, Verse no. 18). In its Islamic usage, some scholars use the term to refer to the Holy *Qur'an* and the *Sunnah*. See in this regard, Al-Qatan M. *Wojouh Tahkeem AL-Shariah AL-Islamiah*.: The Obligation of the Implementation of the Islamic Sharia, (Cairo, Egypt: Dar Al- Tawzea Walnasher Al-Islamiayah, 1989), p. 9.

⁷ Islamic Sharia in general and its divine sources in particular include a great many rules about what can be considered as ethical values or standards.

⁸ The Prophet Mohammad was born in 570 AD in Mecca and died in 632 AD in Medina.

⁹ The *Qur'an*, Surah 26: Ash-Shu'ara, Verse No. 192 – 195.

and not a joke'.¹⁰ Unlike the *Sunnah*, the *Qur'an* was written during the Prophet's lifetime. This is the foundation of Islamic jurisprudence. The sovereignty of Allah's power and its authority over all acts of the state is understood from the explicit language of the *Qur'an*. In it, Allah says '*Verily, the only sovereign is Allah, and He declares the law and He is the best judge*'.¹¹ Accordingly, the foundation of the state in Islam is the sovereignty of Allah. It is divinely different from the philosophical foundation of the Western democratic states, which is the sovereignty of the people. One of the main consequences of the idea of sovereignty in Islam is that no one can issue laws or regulations that contradict Allah's laws, even if the majority of the people desire them.

ii) *The Sunnah*: this is the sayings of the Prophet Mohammad. It reports his words of approbation as well as his deeds. In other words, the *Sunnah* refers not only to the statements and actions of Prophet Mohammad, but also to those statements and actions of his companions, made in his presence or with his knowledge, that met with his approval. The *Sunnah* is the interpreter of the *Qur'an*. Allah says: '*With clear proofs and writings...we have revealed to you the Remembrance that you may explain to mankind that which has been revealed for them, and that perhaps they may reflect*'.¹² The *Sunnah* is considered to be a sacred source and the second primary source of Islamic Sharia. The main difference between the two is that the words and meanings of the *Qur'an* are from Allah, whereas the words of the *Sunnah* are only from the Prophet.¹³

The *Qur'an* and *Sunnah* include rules dealing with faith, belief, morality, and rules of conduct, spirituality, worship, social life and legal matters. Although the *Qur'an* and the *Sunnah* are sovereign and cannot be amended, the Islamic Sharia is never out of date and can deal with new issues and meet evolving needs that have not been explicitly addressed in the *Qur'an* and *Sunnah*. The flexibility of the Islamic Sharia comes from two factors, the Qur'anic and Prophetic approaches, and the varieties of the sources of the Islamic Sharia. The Qur'anic and Prophetic approaches and attitude give ample room for dealing with new issues and circumstances because events and issues are different from one area to

¹⁰ Shabbir A. *Fatah Al- Bari Commentary on the Sahih Al-Bukhari*, Vol. 1, (Karachi, Pakistan: Published by Qadi Abdur Brahman), p. 18.

¹¹ The *Qur'an*, Surah 6: Al- An'am, Verse No.57.

¹² The *Qur'an*, Surah 16: An-Nahl, Verse No. 44.

¹³ In this regard see Juraihsah A, *Masader Al- Sharia Al-Islamiyah*, 2nd Edition, (Cairo, Egypt: Almaktab Al-Islami, 1988), p. 32.

another. The *Qur'an* and the *Sunnah* follow a flexible approach that leads to the development of the Islamic law according to changing circumstances and times.

The *Qur'an* and the *Sunnah* operate at two legislative levels. In some areas of human conduct, where changes in time and circumstances require existing rules to be altered in line with new subject matter, the *Qur'an* and the *Sunnah* may provide some general principles, but be silent on specifics. In other areas, where the subject matter is not affected by changes in time and circumstances, the *Qur'an* and the *Sunnah* are explicit. These two legislative levels are seen in Islamic jurists' classification of the dictates of the *Qur'an* and the *Sunnah*. The jurists identify three basic categories of the commandments of Allah in both the *Qur'an* and the *Sunnah*:

- Ibadat: worship and rituals. Since these types of obligations are not subject to change even when circumstances vary, the *Qur'an* and the *Sunnah* are relatively explicit.
- Mu'amalat: civil and other legal obligations which cover commercial, constitutional, administrative, labour, employment, family, and civil laws. Unlike the Ibadat, with issues related to the Mu'amalat the *Qur'an* and the *Sunnah* provide for general principles and rules.
- Uqubat: punishments. This covers criminal laws and criminal procedure.

The second factor that makes the Islamic Sharia flexible in terms of dealing with new issues and circumstances is the fact that legal rules are established through reliance on different non-divine sources. In addition to the *Qur'an* and the *Sunnah*, Islamic jurists and the state may use other sources to develop legal rules and deal with contemporary issues that may not have existed in their current form during the early days of Islam. These non-divine sources, whether primary or secondary, are connected to the intellectual process of determining the law when it is not covered explicitly in the two divine sources.¹⁴

iii) *The Ijma* (Consensus): this is the unified opinion, derived from the *Qur'an* and the *Sunnah*, of *Mujtahedeen* (jurists) concerning a legal stipulation. Its reliability comes from the fact that the jurists would not agree upon a provision which is in contradiction to the *Qur'an* or the *Sunnah*. Since consensus is based on both the *Qur'an* and the *Sunnah*, the

¹⁴ Juraihsah A, *Masader Al- Sharia Al-Islamiyah*, 2nd Edition, (Cairo, Egypt: Almaktab Al-Islami, 1988), pp. 23- 24.

Ijma is accepted as a source of Islamic Sharia. Allah says: ‘O ye who believe! Obey Allah and obey the Messenger and those charged with authority among you’.¹⁵ As for the *Sunnah*, the Prophet Mohammad said: ‘My nation should not gather (agree) upon what is wrong’.¹⁶ He also said: ‘Whatever is seen as good by the Muslims is considered good by Allah’.¹⁷ These texts make clear that the basis for considering consensus as a source of law is both direct instruction from the verses and the assurance of the *Sunnah* that the opinion of the community is right and acceptable. It is important to understand that the concept of *Ijma* means the agreement of individual opinions of Islamic scholars, not opinions of the majority of the people. In western democratic society the equivalent would be accepting the majority of authority.¹⁸

iv) *Al-Qiyas* (analogy): this means analogy or analogical deduction or reasoning by analogy from the *Qur’an* and the *Sunnah*. Where the *Qur’an* and the *Sunnah* do not address a particular problem or issue, Islamic jurists employ *Qiyas* to reach a logical decision. To apply *Qiyas* the jurist, when providing a *Fatwa* (legal opinion based on Sharia), or the judge, when deciding a case, must find a verse in the *Qur’an* or a rule in the *Sunnah* as the starting-point. Then he must determine both the direct cause or purpose behind the *Qur’an* or the prophetic ruling and the relationship between the original issue and the current one. If the direct cause or purpose is similar in both respects, then the original ruling can be extended to the current case.¹⁹

(B) Secondary Sources of the Islamic Sharia

When none of the primary sources of the Islamic Sharia provide solutions, there are secondary sources to work with. They are considered secondary because they are not consulted unless the primary sources fail to provide a legal solution for the issue at hand. The different secondary laws are *Al-Masaleh Al-Morsalah* and *Al-Urf*.

i) *Al-Masaleh Al-Morsalah*: the significance of this stems from the fact that it is one of the main bases on which Islamic governments, including Saudi Arabia, can comprehensively

¹⁵ The *Qur’an*, Surah 4: An-Nisa, Verse No. 59.

¹⁶ Ibn Majah M, *Saheeh Ibn Majah*, vol. 2, (Cairo Egypt: Al-Maktab AL-Islami, 1975) Vol. 2, p. 1303.

¹⁷ Ibn Hanbal A, *Almusnad*, revised by Ahmad Shakir, Vol. 3, (Cairo Egypt: Dar Al- Ma;arf, 1972) p. 43.

¹⁸ In this regard see Al-amdi A, *Al-Ehkam Fi Osoul Al-Ehkam*, Vol.1, (Beirut, Lebanon: Almaktab Al-Islami) pp. 226-227.

¹⁹ See Mosa Y, *Madkhal Al-Figah AL-Islami*, 1st Edition, (Cairo, Egypt: Al-Maktab Al-Islami, 1977) pp. 27-28.

address the ongoing development of their country. This includes the modernisation of its legal system through the enactment of laws and regulations that do not contradict the primary sources of the Islamic Sharia.

The term '*Al-Masaleh Al-Morsalah*' is composed of two words: *Masaleh*, which means interest, whether gaining benefit or preventing harm, and *Al-Morsalah*, meaning unrestricted. Hence, the combined words mean 'unrestricted-public interest'. As a source of the law *Al-Masaleh Al-Morsalah* means public interest that is not restricted or prohibited by either the *Qur'an* or the *Sunnah*. To establish new rules based on *Al-Masaleh Al-Morsalah*, however, certain conditions must be satisfied. Firstly, a rule based on *Al-Masaleh Al-Morsalah* must not conflict with higher sources of the Islamic Sharia. Secondly, the rule must be related to the public good and not directed toward certain private interests or groups. Thirdly, the interest must be factual and concrete and fall within the general principles of Islam. Fourthly, the public interest cited must not conflict with higher public interests.²⁰ Finally, in addition to these substantive conditions, some scholars argue that only experts in Islamic Sharia are capable of examining whether these conditions are satisfied.

ii) *Al-Urf*: this means the local practices and customs. They are considered secondary and supplementary sources of the Islamic Sharia. In order for *Al-Urf* (the local practices) to be accepted as a source of law, two conditions must be met. Firstly, they may not conflict with primary sources, and secondly, they must not be incidental practices. In the past, *Al-Urf* was an important fundamental source in law. Over time, its importance has given way to increasing reliance on written rules. Nowadays the role of *Al-Urf* has become merely explanatory, or completes the legal texts.²¹

The initial source in Islam according to all Islamic sects is revelation (the *Qur'an* and *Sunnah*).²² The other sources have been created by Islamic scholars as ways of rationalising jurisprudential rules, which must be referenced to the *Qur'an*, or ascribed to general principles in it. As Al-Imam Al-Shafie said, all Islamic verdicts must rest on *Quranic* and *Sunnah* texts or they must have been referred to them from other sources such

²⁰ Kalifah B, *Al-Ehasan*, 1st Edition, (Cairo, Egypt: Dar Al-Turath, 1985), p. 39.

²¹ Zedan A, *Al-Wajeez Fi Osoul Al-Fegh*, (Beirut, Lebanon: Mo'assasat Al-Resalah, 1997), pp. 252-259.

²² Zedan A, *Almadkhal Li derast Al-Shariah Al-Islamiah*, (Baghdad, Iraq: Matba'at Al-A'ali, 1969), p. 145.

as *Ijma* (consensus) and *Quias* (analogy).²³ It is evident that the sources of Islamic legislation except the *Qur'an* and *Sunnah* have not been stipulated as imposed means. This means that they have been created to understand the commands of Allah and achieve and stress the general principles in the *Qur'an* such as commitment to liberty and justice. Therefore, the relationship between all Islamic sources is an organic-structural relationship. They must be united by denotation and the leadership of the *Qur'an*, since the sources are not counted unless they have reference to the *Qur'an* or any general principle in it.

In conclusion, it can be said that the Islamic Sharia or Islamic law differs from other legal systems regarding the number of sources from which the law can be derived. Most legal systems rely on human experience and secular sources to establish their laws, whereas in the Islamic Sharia even non-divine sources are related in some way to the divine sources of the *Qur'an* and the *Sunnah*. They must coincide perfectly with the *Qur'an* and the *Sunnah*, and must not produce new rules that conflict with the general principles of Islam.

1. 1. 2. The Fundamental Laws as Supreme Statutory Laws

As mentioned above, the Saudi State derives its constitutional legitimacy from the principles of the *Qur'an* and the *Sunnah*. It also depends on the permanency of the Saudi royal family's authority. King Abdulaziz noted that any new state would need to adjust to change.²⁴ He said: '*We should gradually construct the rudiments of the Saudi constitutional system*'.²⁵ Subsequently several constitutional documents were gradually issued before Saudi Arabia was unified and officially known by this name. As a result, in 1992 Saudi Arabia introduced constitutional documents or 'Fundamental Laws'.

²³ See Al Shafie M, *Al Resallah*, (Beirut, Lebanon: Dar Al-Kotob, 1977), p. 128.

²⁴ King Abdulaziz Ibn Abdurrahman, 1297 A.H (1880 - 1953) was the founder of the current Saudi State. In 1891 he fled with his family to Kuwait after the Al-Rasheed family deprived the second Saudi State of its power and controlled its capital, Riyadh. He managed, however, to regain control over Riyadh in 1319 A.H (1902). He then launched wars to unify the state's different regions; he regained AL-HIJAZ and brought it under his control in 1344 A.H (1925). Consequently, he was named 'the King of AL-HIJAZ and SULTAN NAJD, and its Provinces' pursuant to the enactment of the Organic Law of the Kingdom of AL-HIJAZ. After the unification of all regions of the country in 1351 A.H (1931), King Abdulaziz enacted the Organic Law of the Kingdom of Saudi Arabia. Since then the country has been officially known as the Kingdom of Saudi Arabia, and he was proclaimed King. After the death of King Abdulaziz, his sons ruled the country.

²⁵ See Al-Shlhoob A, *Constitutional System in Saudi Arabia*, 1st Edition, (Riyadh, Saudi Arabia: 1999), p. 324.

These are the main factors that led to such constitutional reform.²⁶ The Fundamental Laws broadly comprise the Basic Law, the Shura Council law, the Council of Ministries Law, and the Regional Law.

(A) The Basic Law of Governance (the Basic Law)

The Basic Law is the most important constitutional document in the Saudi State. It defines the nature, aims, and responsibilities of the Saudi State. It explains that the system of authority in Saudi is monarchical and hereditary. The Basic Law deals with the components of Saudi society, which has its foundations in Islam. In fact, it is similar to the constitutions of other countries. It includes the form of government and the rule of secession, social and economic principles, rights of individuals and the duties of the state, the state authorities and the inter-branches relationship. It does not provide an extensive treatment of individual rights, but rather declares that the state protects the rights in the accordance with the Islamic Sharia.²⁷ Nevertheless, the Basic Law reflects the patterns of modern constitutionalism because it includes the protection of some affirmative rights such as traditional human rights of protection of home and property. It also includes some rights which must be provided by government, for instance, the right to a healthy environment, the right to free education, to health care, and aid for disabilities, which will be explained below as constitutional rights. In addition, the Basic Law identifies three powers of state: judicial, executive, and legislative.

(B) The Shura Council Law

The principle of Shura was prescribed by the *Qur'an* and the *Sunnah* for an Islamic state.²⁸ It has only consultative powers. Accordingly, every state has the right to constitute this principle according to its need. In fact, Saudi Arabia has implemented this principle throughout its history. King Abdulaziz established the first Shura council in 1926. The

²⁶ See Al-Shlhoob A, *Constitutional System in Saudi Arabia*, 1st Edition, (Riyadh, Saudi Arabia: 1999), p. 83.

²⁷ This issue will be further analysed later in this chapter. Also see Al-Jarbou A, *Judicial Review of Administrative Actions. A comparative study between USA and Saudi Arabia*. (Virginia, USA: Unpublished SJD dissertation in University of Virginia, 2000), p. 88.

²⁸ The term Shura means consultation. It is derived from the verb Shura which means to seek consultation. Both the *Qur'an* and the *Sunnah* do not provide for very detailed provisions or rules regarding the Shura and its conditions. They rather include general principles. Allah says:

It was by some mercy of Allah that thou wast gentle to them; hadst you been harsh and hard of heart, they would have scattered from about thee. So pardon them, and pray forgiveness for them, and take counsel with them in the affair, and when thou art resolved, put thy trust in Allah: surely Allah loves those who give their trust in Him. (The *Qur'an*, Surah 3: Al-Imeran, verse No. 159.)

Shura Council remained the primary legislative body in the Saudi State until the Council of Ministers was established in 1973.

Furthermore, it remained without amendment or rescission until 1992 when King Fahad restructured the Shura Council to be the official channel for legislation.²⁹ The new law for the Shura Council, however, is similar to the old. According to the new law, the council renders advisory opinions. In addition it provides opinions about public policy if asked by the king as Head of the Council of Ministries.³⁰ It also has a role in the legislative process.³¹ The Shura Council is authorised to provide opinions and suggestions in regard to the following:³² (a) the general plan of economic and social development; (b) international law, charters, treaties and agreements, and concessions; (c) interpretation of laws; (d) annual reports submitted by ministries and other governmental bodies. It should be noted that the Shura Council has no authority over the national budget.

(C) The Council of Ministers Law

The new law of the Council of Ministers was enacted in 1993 to provide further constitutional development in Saudi Arabia, and to accord with the Basic Law and the Shura Council Law of 1992. This law declares that the council is an organised body headed by the King.³³ The council also has a legislative capacity; it formulates internal, foreign, financial, economic, educational and defensive policies, and all public affairs. It oversees the implementation of these policies. Moreover, it reviews the decisions and suggestions of the Shura Council. It has the executive power, and it is the point of reference for financial and administrative affairs in all the ministries and other governmental departments and agencies.³⁴ It monitors the implementation of statutes, rules, decrees and the national development plan within the administration. It also creates public bodies and public services.³⁵ Any increase in the national budget has to be approved

²⁹ See Al-Shlhoob A, *Constitutional System in Saudi Arabia*, 1st Edition, (Riyadh, Saudi Arabia: 1999), p.327.

³⁰ The Shura Council Law, Art. 15.

³¹ *Ibid.*, Art. 18, and The Basic Law, Art. 67.

³² The Shura Council Law, Art. 15, and The Council of Ministries Law, Art. 20.

³³ The Basic Law, Art 56, and the Council of Ministers Law, Art..67.

³⁴ The Council of Ministers Law, Art. 19.

³⁵ *Ibid.*, Art. 24.

by the Council of Ministers.³⁶ The decisions of the Council are not, however, final until they are approved and signed by the head, i.e. the Prime Minister (the King).³⁷

(D) The Regional Law

The new Fundamental Laws which were enacted in 1992 include the Regional Law. According to Article One of the Regional Law, the aim in dividing the country into several regions is to improve the level of administrative work and development, maintain security and order and guarantee the rights and liberties of citizens in the framework of the Islamic Sharia. This indicates that the regions enjoy considerable financial and administrative independence. Although it suggests a degree of decentralisation of authority between the central and the local governments, in fact the law establishes a very strong centralised government. It ties the local government of the different regions into a very strong relationship with the Ministry of the Interior. According to the law, the regional council is responsible for studying any aspect that could improve the standard of services in the region. In particular, it defines the needs of the region and proposes their inclusion in the national annual development plan.

1. 1. 3. The Allocation of State Power in the Saudi Legal System

Since the foundation of the Saudi legal and political system was based on Islamic Sharia in all aspects of life, it is important to examine briefly the allocation of state powers.³⁸

The Islamic state like any other state can enact regulations, implement them and adjudicate disputes that might arise from them. To separate or allocate these functions or powers into distinct departments or authorities is not part of Islamic political theory.³⁹ The political theory of Islam is based on centralised authority in the hands of the head of the state. Hence, the head of the state is responsible for all state functions, including the judiciary.

³⁶ *Ibid.*, Articles 26-27.

³⁷ *Ibid.*, Art. 7.

³⁸ Important issues relating to the allocation of powers, such as principle of separation of powers, and independence and impartiality of the judiciary either in Islamic Sharia or in Basic Law in Saudi Arabia, cannot be examined in detail here. The goal of this chapter is to give a general introduction to the legal system in Saudi Arabia.

³⁹ Mutwali A, *Nizam Alhukum Fi Al_islam*, (Cairo, Egypt: Munshat Al-Marif, 1990), pp. 138-143. and see Norman A and Noel C. 'The Muslim Ruler and Contractual Obligations', (1958), 33(917), *New York University Law Review*, p. 931.

Here an apparent contradiction should be explained. On the one hand, the operation of Islamic law is conducted outside state control by independent jurists with the necessary qualifications of *Ijtihad*. On the other hand, the enactment of any regulations has always been under the control of the head of the Islamic state. In fact, state enactment of regulations is called for only in those circumstances where the divine sources of the Islamic Sharia are silent, or provide only general principles.

With regard to the allocation of state powers in the Saudi legal system, the general principle stresses the supreme authority of the King, the Islamic roots, and the limitations on the King's authority. The Basic Law of Saudi Arabia declares that the authorities of the state are judicial, executive, and legislative. This may lead to the misconception that a separation of powers is acknowledged and recognised.⁴⁰ In fact, there is no separation between authorities. The Council of Ministers explicitly undertakes both legislative and executive functions.⁴¹ It also shares the legislative function with the King.⁴² More importantly, the King is granted numerous and extensive powers. According to the Basic Law, the King is both head of state, and head of the Council of Ministers.⁴³

(A) Legislative Authority

The Basic Law mentions that the regulatory authority means that the authority is entitled to promulgate ordinary laws and regulations, and accept treaties, international agreements and concessions. It is an authority shared by the Council of Ministers, the Shura Council, and the King. According to the Basic Law, the Council of Ministers Law, and the Shura Council Law, no laws or regulations, treaties, international agreements or concessions may be enacted or amended unless approved by royal decree after study by the Council of Ministers and the Shura Council.⁴⁴

Regarding the external and the internal legislative process, the King of the Council of Ministers or the Shura Council can initiate legislative acts or amendments. All the members of the Shura Council and all ministers have the right to propose a legislative act

⁴⁰ The Basic Law, Art. 47.

⁴¹ The Council of Ministries Law, in Art. 19 states that "*the Council of Ministries will have the executive power and it will be the point of the reference for financial and administrative affairs in all the ministries and other governmental bodies*".

⁴² The Basic Law Art. 70.

⁴³ The Basic Law Art. 56 and the Council of Ministries Law Art. 1.

⁴⁴ *Ibid.*, Articles 67-70.

or amend an effective one.⁴⁵ The right of the Shura Council's members, however, needs the approval of the King.⁴⁶ As indicated, to become a law every legislative proposal or amendment has to be approved by the two councils and the King. To gain approval for a proposal, two-thirds of the Council of Ministers who attend the session must adopt it. But if the Council is meeting in extraordinary cases where only half of its members are present, then the proposal must be approved by two-thirds of the attending members.⁴⁷

The decisions of the Council of Ministers, including those related to the approval of legislative proposals and amendments, are not considered final unless the King approves them.⁴⁸ Unlike the decisions of the Council of Ministers, for a legislative proposal or amendment to be approved by the Shura Council, two-thirds of all its members must adopt it regardless of the number of members attending.⁴⁹ If the decisions of both Councils concur, the legislative proposal or amendment will be adopted after the King's consent. The King has the final word, however, if the decisions of the Councils are different. He has the right to decide what he deems fit.⁵⁰

(B) The Executive Authority

Since the King is the head of state, consequently he has the ultimate power over the executive. According to the Basic Law, the King is the reference point for all authority.⁵¹ In addition, the King is the head of the Council of Ministers. He carries out the policy of the nation, a legitimate policy, in accordance with the provisions of Islam. He oversees the implementation of the Islamic Sharia, the system of government, the state's general policies, statutes, rules and decrees and the protection and defence of the country.⁵² Further, he has the authority to supervise the Council of Ministers, ministers, and other governmental bodies, in order to ensure their cooperation and harmony.⁵³

Members of the Council of Ministers, who have executive power, and who are the point of reference for the financial and the administrative affairs in all the ministries and

⁴⁵ The Council of Ministers Law, Art. 22.

⁴⁶ The Shura Council Law, Art. 23.

⁴⁷ The Council of Ministers Law, Art. 14.

⁴⁸ The Council of Ministers Law Art, 7.

⁴⁹ The Shura Council Law Art. 16.

⁵⁰ *Ibid.*, Art. 17.

⁵¹ The Basic Law, Art. 44.

⁵² *Ibid.*, Art. 55.

⁵³ The Council of Ministers Law, Art. 29.

other governmental bodies, assist the King. Under the direct control of the King, the Council of Ministers in its capacity as the supreme executive authority has the power to lay down the policy of the state with respect to internal, foreign, financial, economic, and educational, defence policies, and all public affairs of the state.⁵⁴

(C) Judicial Authority

The judicial authority is a Saudi constitutional element. The judicial system in the Saudi State reflects the influence of the judicial system of Islamic Sharia, the basic principle of which is to adjudicate with justice. Allah says: *'Allah commands you that you restore deposits to their owners, and if you judge between mankind, that you judge justly'*.⁵⁵

The Basic Law declares that the judiciary must be an independent authority. The independence of the Sharia judges is assured.⁵⁶ There may be no power over judges in their judicial function other than the power of the Islamic Sharia. Consequently, the Basic Law assures that the Islamic Sharia is the main reference for the courts: *'The courts shall apply to cases before them the provisions of Islamic Sharia as indicated by the Qur'an and the Sunnah, and whatever laws which are not in conflict with the Qur'an and the Sunnah which the authorities may promulgate'*.⁵⁷ In addition, the right of litigation is guaranteed equally for both citizens and residents in the Kingdom.⁵⁸

According to the Basic Law, the judicial authority is divided into two court systems, the Sharia Courts and the Board of Grievances. The dual judicial system was launched in 1982 pursuant to the Board of Grievances' 1982 Statute, which declares that the Board of Grievances is to be an independent administrative judiciary.⁵⁹ The Basic Law confirms the existence of the Sharia Courts and the Board of Grievances, and grants the Sharia Courts general jurisdiction over all disputes and crimes unless these disputes or crimes come by law under the jurisdiction of the Board of Grievances. It is important to note that, although the Basic Law vests the judicial authority in the Sharia Courts and the Board of Grievances, there are still vast numbers of administrative committees which function within the

⁵⁴ *Ibid.*, Art. 19.

⁵⁵ The *Qur'an*, Surah 4: An-Nisa, Verse No. 58.

⁵⁶ In this regard, see Al-Gasimi D, *Nizam Al-Hukom Fi Al-Sharia Al-Islamiah (Independence of Judiciary In Islam*, 1st Edition, (Beirut, Lebanon: Dar Alnafais, 1993), p.p. 51- 45.

⁵⁷ *Ibid.*, Art. 48.

⁵⁸ The Basic Law, Art. 46- 47.

⁵⁹ The Board of Grievances Statute, (1982), Art. 1.

executive branch, and whose judicial jurisdiction is established by their respective constituting decrees.

Also according to the Law of Judiciary, courts have jurisdiction with respect to all disputes and crimes, except those exempted by law. Rules for the jurisdiction of courts must be set forth in the Sharia Procedure, Law Courts and Law of Criminal Procedure. Specialised Courts may be formed by Royal Order on the recommendation of the Supreme Judicial Council.⁶⁰

The Sharia Courts were established pursuant to the Law of Judiciary of 1975. According to the Law of Judiciary, the Sharia Courts consist of the Supreme Judicial Council, the Appellate Court, General Courts and Summary Courts, all of them with their own special jurisdictions.⁶¹

The current Saudi Board of Grievances as an administrative court was established pursuant to the Board of Grievances Statute for 1982. The Board comprises the Chairman, the Deputy Chairman, Assistant Deputies, and Judicial Members.⁶²

⁶⁰ The Law of the Judiciary, Art. 26. Working is in process in Saudi Arabia to launch new Specialised Courts including commercial courts, labour courts, and traffic courts.

⁶¹ Without prejudice to the provision of the Law of Judiciary and the principles of justice, the Ministry of Justice shall assume the administrative and financial supervision over the courts and other judicial panels, take actions, and submit to the appropriate authorities such proposals project as may secure the proper standard for the justice in Saudi States. See The Law of Judiciary, Art. 87.

⁶² The structure of the Board is as follows:

- The Reviewing Committee;
- The Committee of Administrative Affairs of the Board Members;
- The Disciplinary Committee;
- The General Body;
- The General Panels: Penal Panel, Commercial Panel, Administrative Panel, Disciplinary Panel and Subsidiary.

The Board has jurisdiction to decide various issues, the most important of which are as follows:

- An application for enforcing judgements issued in an Arabic country and possibly elsewhere;
- Cases concerning government officials and employees;
- Disputes between Ministers and a business establishment operating in Saudi Arabia against a decision withdrawing its licence or liquidating it;
- Penal cases of crimes relating to forgery and bribery, and crimes provided for by law directly related to public money. See the Board of Grievances Statute (1982) Art. 8.

Following this general formulation of the judicial system in Saudi Arabia, it is essential here to explore the real role of the judicial channel. This permits the identification of areas of application of the judicial principle, and the potential scope for the protection of the rights of the disabled.

1. 1. 4. Understanding the Judicial Role

It has been explained that the supreme law of Saudi Arabia is the divine sovereignty (Allah's Laws). This raises the question of whether, and to what extent, Saudi Arabia is a theocratic state. The answer to these questions will help understanding of the role of the judiciary in the Islamic state of Saudi Arabia.

A theocratic state is defined in Western terms as '*government of a state by those who are presumably acting under the immediate direction of God or some other divinity*'.⁶³ The power in a theocratic state is '*exercised by ecclesiastics*'⁶⁴ or by '*priests or clergy as representatives of God*'.⁶⁵ It can be argued that none of these terms apply to the legal system in the Saudi State. Islamic terminology does not recognise words such as 'ecclesiastics', 'priests' or 'clergy'. Nor does Islam aim to be a political system in which a hierarchy of priests has paramount authority in politics and state affairs. In Islamic Sharia only those who have the required qualifications can undertake the task of interpreting Islamic Law. These conditions and qualifications are not based on any direct relation with Allah, but rather they are related to knowledge of the Islamic Sharia. Thus, any Muslim individual who holds the qualifications of either the judges or *Ulama* can say what the Islamic law is.

The legitimacy of rule in Saudi Arabia is based in part on the consent of the people and implementation of the Islamic Sharia. The King does not claim that his authority comes directly from Allah, nor does he claim that his authority is absolute. Consequently, he is subject to political and judicial control.

⁶³ Paul M, *The Black Law Dictionary*, 17th Edition. (New York, NY: West Group, 1999), p. 1487.

⁶⁴ *Ibid.*, p. 1487.

⁶⁵ Handler J, *Ballentine's Law Dictionary: Legal Assistant Edition*, (New York, NY: Delmar Publisher, 1994), p. 3270.

It may be asked how the judges therefore see themselves. As explained above, the Islamic Sharia assures the independence of the judiciary from the influence of any authority. The judges and anyone else are required by Allah to follow justice and to explore people's rights according to the principles of justice in Islamic Law (see also Chapter 5). Allah, however, asks the judge to judge with justice: '*Allah commands you that you restore deposits to their owners, and if you judge between mankind, that you judge justly*'.⁶⁶ This means that a judge must be just and carry out his duties with regard to equality because Allah said: '*Indeed Allah commands you*'.⁶⁷

Consequently, the Sharia according to the *Qur'an* and the *Sunnah* obliges the president or the King of the Islamic State to set requirements and conditions to appoint the judges.⁶⁸ Regarding these conditions, in the *Sunnah* there is a *Hadeeth* of Prophet Mohammad.⁶⁹ When the Prophet appointed Muadh Ibin Jabal as judge over Yemen, he asked him how he would decide an issue. Muadh said that he would decide the issue according to the *Qur'an*. The Prophet asked him what he would do if the *Qur'an* did not address the issue. Muadh said that he would then rely on the *Sunnah* of the Messenger of Allah. The Prophet asked him again what he would do if the *Sunnah* did not address the issue. Muadh said, *Ajtahed* (I shall strive to determine my viewpoint with utmost effort, and I shall strain every nerve to that end). It was reported that the Prophet was very satisfied with Muadh's answer. In this text, it seems that the Prophet Mohammad already

⁶⁶ The *Qur'an*, Surah 4: An-Nisa, Verse No. 58 .

⁶⁷ See Al-Gasimi D, *Nizam Al-Hukom Fi AL-Sharia Al-Isamiah (Independence of Judiciary In Islam*, 1st Edition, Vol. 2, (Beirut, Lebanon: Dar Alnafais, 1993), p. 39.

⁶⁸ In Saudi Arabia, according to the Law of Judiciary in terms of appointment of judges: 'To be appointed as a judge, a candidate shall fulfil the following requirements:

- a) He shall be of Saudi nationality.
- b) He shall be of good character and conduct.
- c) He shall be fully qualified to hold the position of judge in accordance with the SHARIA provision.
- d) He shall hold the degree of one of the SHARIA colleges in the Kingdom of Saudi Arabia or any equivalent certificate, provided that, in the latter case, he shall pass a special examination to be prepared by the Ministry of Justice. In case of necessity, persons well-known for their learning and knowledge who do not hold the required degree may be appointed as judges.
- e) He shall not be less than forty years of age if he is to be appointed to the rank of an appellate judge, and not less than twenty-two if he is to be appointed to any other rank in the judiciary.
- f) He shall not have been sentenced to a HADD (QUR'ANIC prescribed punishment) or a TAZIR (discretionary punishment) or for a crime affecting honour, or punished by disciplinary action dismissing him from a public office, even though he may have been rehabilitated'. See The Law of Judiciary, Art. 37.

⁶⁹ *Hadeeth* means talk, *Hadeeth*, prophetic tradition. See Qoutoub Sano M. *Concordance of Jurisprudence Fundamental Terminology*, (Pittsburgh, USA: Dar A-Lfikr, 2000), p. 171.

legitimised two major principles. Firstly, the law must be written and the judge does not judge according to custom and behaviour or upon the King's desire, but upon the *Qur'an* and the *Sunnah*, and if he does not find the law in them, he must strive to determine his viewpoint according to the principle of justice, which is founded in Islamic Law. Secondly, the judiciary in Islam is extremely independent, and in reaching a decision the judge examines the Islamic texts from his viewpoint and his vision to see where justice is located.⁷⁰

As a result, judges in Islam see themselves as agents of justice and at the same time agents of Islam. Islam assures justice and equality in its judgements whether these judgements are given by a judge, a president, a king or anyone qualified to give judgement. Furthermore, in Islamic Sharia, one of the major jobs of the Prophet Mohammad was the application and judgement of justice between the people. Hence, the judges and the *Ulama* (scholars) are considered successors to the Prophet Mohammad in terms of implementing Islamic principles.

1. 2. Disabled Persons' Rights in Relevant Legal Principles and the Basic Law

Although disabled persons have special personal characteristics, they are still human beings. Essential human rights are the same for disabled and non-disabled persons. The main purpose of this section is to identify generally the grounds and principles for protecting human rights in Islam. It further seeks to discover whether there is any direct reference to the protection of the rights of disabled persons, either in Islamic jurisprudence or in constitutional guarantees in the Basic Law. For purposes of comparison the constitutional foundations for the rights of disabled persons in some Western countries are described.

The concept of a right, the capacity of disabled people to have special rights, and the question of discrimination in Islamic thought compared with Western approaches are all discussed in Chapters 3 and 4. The following section considers three areas: the Islamic foundation of general human rights, the basis for disabled persons' rights in the Saudi Basic

⁷⁰ Al-Gasimi D, *Nizam Al-Hukom Fi AL-Sharia Al-Islamiah (Independence of Judiciary in Islam)*, 1st Edition, Vol. 1, (Beirut, Lebanon: Dar Alnafais, 1993), p. 403.

Law, and the constitutional guarantees for the rights of disabled persons in some Western countries.

1. 2. 1. *The General Foundation of Human Rights: Islamic Perspective*

In order to explore the foundation of human rights in Islam, it is necessary to identify the viewpoints of Islamic scholars concerning the notion of human rights.

In the late forties, there were two Islamic viewpoints. First, some scholars absolutely refused to accept the International Declaration of Human Rights (1945), because they claimed that in Islam no such concept is known, and that the Declaration was based on the philosophy of the Western world. Second, other scholars absolutely accepted the Declaration and argued that the Islamic and Arab world was backward in developing its human rights. Accordingly, they needed to follow Western countries especially in issues concerning the philosophy of human rights. In the late sixties and early seventies, there was a movement among moderate Islamic thinkers who argued that it was time to seek a foundation for and consolidation of human rights issues according to Islamic thought and texts. They quoted Quranic terminologies such as ‘divine succession on earth’ which they claimed was in opposition to the western philosophy of ‘natural law’.⁷¹ They responded with several declarations on Human Rights drawn up in specifically Islamic terms.⁷²

These declarations focused on four areas: (a) international development in terms of Human Rights issues; (b) affirmation of ‘Islamic singularity’ referring to the special Islamic philosophy of the concept of human rights; (c) international multiplicity and Islam as a worldwide religion; and (d) right as a religious duty.⁷³

Concerning the foundation of human rights according to Islamic thought, the concept of human rights originates from two norms. Firstly, the ‘task’, or accomplishing

⁷¹ In this regard and for further information, see Al-Said R, ‘Massalat Hqouq Al-Insan Fi Al-Fiker Al-Islami Al-Moaser’ (ed) in *Hqouq Al-Insan Fi Al-Feker Al-Arabi*, by: Mnn’a H, (Beirut Lebanon: Markaz Derasat Al-Wehddah Al- Arabiah, 2000), p. 557.

⁷² For example:

- 1) Project of ‘Declaration of Human Rights and their duties in Islam’ International Islamic Organization 1979.
- 2) The International Islamic Declaration. Issued by Islamic European Council, 1980.
- 3) International Declaration about Human Rights in Islam. Issued in London, 1981.
- 4) The declaration of Cairo for Human Rights in Islam, 1990.

⁷³ See Shaban H, *Al-Islam wa Hqouq Al-Insan*, (London, UK: Moassat Hqouq Al-Insan, 2001), p. 37.

something according to the Sharia rules, where Allah says: '*Allah commands you that you restore deposits to their owners, and if you judge between mankind, that you judge justly*'.⁷⁴ Secondly, 'succession', or the belief that each person should be the successor of Allah on earth, in order to build the world through *Ebadat* (worshipping Allah according to his rules), and to create a social structure for it. Allah says: '*And when your Lord said to the angels: I am about to place a victory in the earth*'.⁷⁵

These beliefs produce the theory of '*Al-Maqased Al-Sharia*' which means in general that the purpose of the existence of Sharia rules is to build the world and protect systems of living. The rules also promote the continuing piety of the people (successors) and the exercise of justice, equality, and respect for human dignity in all human works. Piety should underpin all works, including practical reforms and administration of public interests.⁷⁶

The theory of *Al-Maqased Al-Sharia* consists of two major parts, the primary *Maqased* and the secondary *Maqased*. The primary *Maqased* means the necessary things (five necessities) which are found in all religious communities, because they are considered necessary for achieving well-being. In other words, they are essential for all human interests, not for the Islamic religion only. The secondary *Maqased* refers to the method and the mode intended by Allah to protect the public interests and behaviour of the people.⁷⁷

The 'Al-Maqased' (objectives of Islamic Sharia) has been divided into three norms: necessities, needs, and embellishments. 'Necessities', as above, means the five basics which are indispensable for living. 'Needs', sometimes called 'equivalent of necessary' indicates anything that people need to promote their life and eliminate any harm which undermines their interests. 'Embellishments' means adopting good behaviour and customs in which noble character and morality combine.⁷⁸

⁷⁴ The *Qur'an*, Surah 4: An-Nisa, Verse No. 58.

⁷⁵ The *Qur'an*, Surah 2: Al-Baqarah, Verse No. 30.

⁷⁶ See Al-Farisi A, *Magased Al-Sharia Al-Islamiah Wa Mkaremaha*, 5th Edition, (Morocco: Dar Al-gharb Al-Islami, 1993), p. 7.

⁷⁷ See in this regard, Al-Shatibi E. M. *Al-Mowfaqat*, Vol. 2, (Beirut, Lebanon: Dar Alkotub Al-Elmiah, 1989), p. 134.

⁷⁸ For these divisions, *ibid.* p. 135.

The five necessities are protection of religion, protection of soul, protection of mind, protection of dignity, and protection of property. These protections are not only enshrined in the Sharia but also contained in the various laws of other religions. They have come to be the Islamic theoretical basis for the protection and respect of human rights, since the observance of these necessities entails the protection and respect of human rights.

(A) Protection of Religion

Protection of religion is the fundamental basis for everything else. The religion of Islam is regarded as fixed by Allah, the Most High, for the benefit of humanity. Adherence to its orders and instructions are thus seen as a form of protection of humanity and a channel for blessings upon persons (male or female). Allah says: *'Who believe in the Unseen, establish worship, and spend of that We have bestowed upon them; And who believe in that which is revealed to you (Mohammad) and that which was revealed before you, and are certain of the Hereafter'*.⁷⁹ Furthermore, any behaviour that goes against the instructions of the religion represents a refusal of Allah's choice of religion for the people. Therefore, the intended protection is weakened by bad conduct. Consequently, protection of the religion, i.e. of Islam, secures for the person the rights to choose any religion he wants and to exercise his worship as he likes. Allah says *'there is no compulsion in the religion'*.⁸⁰ Moreover, Islam forbids anyone who denies or disbelieves in Allah and his religion.

(B) Protection of the Person (Soul)

The essence of the person is the soul. This soul is intended to create and protect humanity. So Islam encourages marriage and reproduction in order to guarantee the continuity of existence. Furthermore, Islam encourages everything which is beneficial to the human body. Hence, it prohibits any kind of assault or violation on the person either on his body or his dignity. Islam has, however, legitimised capital punishment in cases of murder, as it is perceived as a deterrent whose aim is the protection of men's souls as well as their bodies.⁸¹

⁷⁹ The *Qur'an*, Surah 2: Al-Baqarah, Verse No. 3-5.

⁸⁰ The *Qur'an*, Surah 2: Al-Baqarah, Verse No. 256.

⁸¹ Al-Zuhaily M, *Hqouq Al-Insan Fi Al-Islam*, 2nd Edition, (Damascus, Syria: Dar Al-kalem Al-Taib, 1997), p. 86.

(C) Protection of Mind

Islam lays great importance upon the human mind. Islam favours human beings above other species because of the human mind. Allah says: *'Verily we have honoured the children of Adam. We carry them on the land and the sea, and have made provision of good things for them, and have preferred them above many of those whom We created with a marked preferment'*.⁸² The mind and the ability to think, bestowed by Allah on human beings, appear to be the most significant form of honour and preference mentioned in this verse.⁸³

With his mind, man distinguishes between good and evil and between beauty and ugliness; he is able to turn many things in this life to his advantage, and is regarded as qualified to build the world and be Allah's deputy on Earth. People who think are highly praised by the *Qur'an*. Allah says: *'He gives wisdom to whom He will, and he to whom wisdom is given, he truly has received abundant good. But none remember except men of understanding'*.⁸⁴ Thus, the mind is the basis of responsibility, and without it a person cannot be responsible for his actions. Prophet Mohammad said: *'The pen (responsibility) is lifted in regard to three things: the sleeper until he wakes, the boy until he becomes an adult and the insane until he recovers'*.⁸⁵ It is in order to keep the mind in good condition and the person in a position to receive divine orders that Islam has prohibited any substance that may be a hindrance to the mind. In terms of protection of the mind, Islam strongly demands the promotion of the intellect and the right to education, since Allah says: *'Are those who know equal with those who know not? But only men of understanding will pay heed'*.⁸⁶ In addition, Islam secures the rights of freedom of thought and promotes research.

(D) Protection of Dignity (Honour)

Honour is a part of the human soul, and in Islam it is one of the basic characteristics of the human being which distinguishes him from all other creatures. In Islam, special attention is given to dignity, and any type of aggression against it, however slight, is prohibited. In

⁸² The *Qur'an*, Surah 17: Bani Israel, Verse No. 70.

⁸³ See Ibn Kathir M, *Tafser Al-Qur'an Al-Azim*, Vol. 3, (Cairo, Egypt: Maktabat Wa Madhbat Al-Mashhad Al-Husaini, 1997), p. 51.

⁸⁴ *Ibid.*

⁸⁵ The *Qur'an*, Surah 2: Al-Baqarah, Verse No. 269.

⁸⁶ Ibn Majah M, *Sunan Ibn Majah*, Vol. 1, (Beirut, Lebanon: Al-Maktab Al-Islami, 1987), p. 658.

⁸⁷ The *Qur'an*, Surah 39: Az-Zumar, Verse No. 9.

the *Qur'an*, Allah tells men and women not to practise any kind of undesirable behaviour towards others. In some verses, He calls those who do not give up doing such things evil-doers: *'O you who believe! Let not a person deride a person who may be better than they (are), nor let women (deride) women who may be better than they are; neither defame one another, nor insult one another by nicknames. Bad is the name of lewdness after faith. And whoso turn not in repentance, such are evil-doers'*.⁸⁷

On this basis Islam promotes marriage as the only way to create a cohesive family because in this way dignity and honour are preserved and protected and the soul remains pure. In Islam, the man or the woman has the right to choose their own partner; this means that dignity and honour are protected, as a woman is not forced to live with someone with whom she does not wish to have a relationship.

(E) Protection of Property

Islam pays great attention to property, placing it amongst the most important things to mankind, the others being life and honour. The Prophet Mohammad has said: *'Most surely your life, your property, and your honour are as sacred as this day of pilgrimage, this month of yours and this town of yours. Surely you will soon meet your Lord and you will be held answerable for your actions'*.⁸⁸ This is taken to mean that any action whatsoever and by whomsoever that may cause a threat to property is prohibited. In Islamic Sharia, this protection relates to two aspects of property: acquisition and disposal.

Concerning the former, *'Islam allows an individual to acquire property, movable or immovable, through lawful means. He can earn as much wealth as he can within his knowledge, skill, experience, and effort'*.⁸⁹ In fact, Allah says: *'And desire not the thing in which Allah has made some of you surpass others. To men a fortune from that which they have earned, and to women a fortune from that which they have earned. (Envy not one another) but ask Allah of His bounty. Allah is ever Knower of all things'*.⁹⁰ Some of the lawful means of earning are sale and rent. Islam prohibits, however, any conduct relating to property whereby it is acquired through unlawful means and for bad purposes. Allah

⁸⁷ The *Qur'an*, Surah 49: Al-Hujurat, Verse No. 11.

⁸⁸ Al-Nisabari M, *Saheeh Muslem*, Vol. 5, (Beirut, Lebanon: Al-Maktab Al-Islami, 1995), p.128.

⁸⁹ Chandhy M, *Human Rights in Islam*, (Washington, DC: 1993), p. 26.

⁹⁰ The *Qur'an*, Surah 4: An-Nisa, Verse No. 32.

says: 'And eat not up your property among yourselves in vanity, nor seek by it to gain the hearing of the judges that you may knowingly devour a portion of the property of others wrongfully'.⁹¹ Since the general benefits of property accrue to all society, Islam assures protection of the rights of earning and rights of workers.

In Islam and in many world religions, if a man does not respect these necessities, then he does not respect his religion. Accordingly, Islam considers the rights conferred by these necessities to be religious duties rather than mere options. In Islam a man must carry out his religious duties unquestioningly.⁹²

Thus protection of the principles of human rights in Islam is seen to be founded on the four elements of liberty, rights, justice, and morality. These will be discussed further in the chapters discussing the concept of right, discrimination, and distributive justice. Examination of these elements in Islam clearly indicates that international declarations and conventions on human rights are compatible with Islamic thought. The exceptions are issues regarding women, division of inheritance, and the punishment system. From a Western perspective these rest on principles of natural law that will not be covered in this thesis.

As mentioned above, however, some Islamic thinkers reject any thought on human rights, because they believe that the declarations have been made by major western powers as a means of uniting countries against Islamic politics. As proof of this, they cite the 'double standards' which major powers in the western world use in international policies.

Moderate thinkers in the Islamic world believe, however, that the existing declarations of human rights have emerged as the response of civilisation, and through overlaps and intermarriages between civilisations and cultures including the Islamic and Arabic states.⁹³ Some of these scholars cite the '*Helf Al-Fadhul*', which means the confederacy between Arab leaders in pre-Islamic times which was the first human rights organisation in the world. It originated in the late sixth century (590-595), when some

⁹¹ The *Qur'an*, Surah 2: Al-Baqarah, Verse No. 188.

⁹² In this regard, Al-Shatibi E. M. *Al-Moafaqat*, Vol. 2 (Beirut, Lebanon: Dar Alkotub Al-Elmiah, 1974), p. 130. See also Amarah M, *Al-Islam Wa Hqouq Al-Insan: Dharorat ...L'a Hqouq*, (Kuwait: Dar Al-Ma'Refah, 1992), pp. 15, 16, 139.

⁹³ Shaban H, *Al-Islam wa Hqouq Al-Insan*, (Beirut, Lebanon: Moassasat Hqouq Al-Insan, 2001), pp. 41- 42.

virtuous men from Mecca promised to succour any persons who were maltreated. When Prophet Mohammad was appointed by Allah, he encountered this confederacy and agreed on all points and articles. He said that if he was invited to this confederacy in Islam he would agree and promote it. The points of the confederacy were:

- Refusing all kinds of wrongful acts and working for their abolition;
- Equality between the people living in or visiting Mecca;
- Executing rights, helping the wronged, and giving them their rights;
- Stopping injustice;
- Protecting life and dignity;
- Engaging judges to stop or punish wrongdoers.

These points typify the position of modern human rights issues vis-à-vis prejudices and discrimination.⁹⁴

In brief, general human rights hold a clear place in Islam, permitting a theoretical foundation resting on a human being's interest, protection of his dignity and his rights to equal respect and justice. Islam also imposes a binding religious duty that these rights be protected and promoted. There is, however, no specific theory dealing with the rights of disabled persons. Instead unconnected references are found in some Islamic jurisprudence books. Consequently, the proposed theoretical foundation of human rights in Islam would offer the chance to establish an Islamic theory of disability rights.

An examination of the current Saudi constitution demonstrates to what extent a basis already exists for disabled persons' rights in Saudi Arabia.

1. 2. 2. Basis for Disability Rights in Saudi Arabia's Basic Law

The Basic Law in Saudi Arabia is considered to be its constitution. The constitution of a State must be a document containing clear processes to protect human rights and liberties as rights of civilisation. To understand the role of the constitution of Saudi Arabia in terms of the protection of human rights, it is necessary to examine the means and procedures of enforcement of constitutional guarantees.

⁹⁴ Shaban H. *Al-Islam wa Hqouq Al-Insan*, (Beirut, Lebanon: Moassasat Hqouq Al-Insan, 2001), p. 42.

Regarding a basis for disabled persons' rights in the Basic Law, it might be argued that these specific rights are affirmed in the principles of equality and justice which are mentioned in the Basic Law. In terms of equality and protection of human rights, the Basic Law of the Saudi State declares: '*Governance in the Kingdom of Saudi Arabia shall be based on justice, Sharia (consultation), and equality in accordance with Islamic Sharia*'.⁹⁵ Further: '*The State shall protect human rights in accordance with Islamic Sharia*'.⁹⁶ Nevertheless, examination of these texts and the entire Basic Law yields no clear mention of equality between all people. These texts relate to the protection of human rights and justice within the framework of Sharia, because they discuss constitutional rights in general. In order to enforce these rights, the constitution needs to contain more detail and more processes and procedures for protecting the rights of the people. Similarly, there is no mention of prohibition of discrimination based on race, colour or even disability.

One may argue, however, that the Basic Law has already declared the protection of human rights and equality in accordance with Sharia. Furthermore, the Basic Law says: '*The State shall guarantee the rights of the citizen and his family in emergencies, sickness, disability, and old age, and shall support the social security system and encourage institutions and individuals*'.⁹⁷ It declares that rights such as those of education, employment, housing, and freedom of transport must be guaranteed.⁹⁸ Most importantly, the Basic Law does not except disabled people as civilians.

Indeed, the Islamic Sharia has treated these issues clearly where it has an extremely good background to deal with international human rights issues in terms of having and protecting human rights and liberties. The problem here, however, does not lie with the codification and legislations of Islamic Sharia, but in the need to enact a Human Rights Bill and create enforcement mechanisms, that is to say, the need to establish obligatory general standards.

There is also a need for a complete modern constitution to protect human rights, which should guarantee the rights of minorities and also contain clear procedures for obtaining these rights. There should also be proper guarantees for the prevention of

⁹⁵ The Basic Law, Art. 8.

⁹⁶ *Ibid.*, Art.26.

⁹⁷ *Ibid.*, Art. 27.

⁹⁸ See, for example, The Basic Law, Articles 28, 29, 30, 36.

discrimination. Therefore, the rights of disabled people need to be given constitutional recognition and there must be guarantees for their equality and for judicial action. This would make the disability laws more effective in terms of enforcement and identifying breaches of the law, which occur in some modern countries. In respect of the ways in which modern countries treat their minority groups, it is useful to find comparisons in examples of advanced constitutions.

1. 2. 3. Constitutional Guarantee for Disability Rights: some Western Examples

This section discusses the content of some modern constitutions in terms of the recognition of disability, and presents a historical outline of how they came about. The purpose of this will be to compare, contrast, and identify the degree of urgency needed to reform Saudi's Basic Law in terms of protection of disability rights.

The Western states vary in their constitutions with regard to disability rights, as they show different approaches to disability law within quite different traditions of constitutional and civil rights. The majority of constitutions around the world are general in their legal diction of principles. Regarding discrimination on the basis of disability, some countries put human rights and the prohibition of discrimination into constitutional documents, which endows them with the strongest legal and political commitment possible. The majority of these Western countries recognise the principle of common law and the Anglo-Saxon legal system.

The constitutions of some countries directly mention prohibition of discrimination based on disability. For example, in 1985 Canada was the first country in the world to include disability explicitly in a full equality text in its constitution. The Canadian Charter of Rights and Freedoms provides in Section 15 (1) for a general, and on the face of it very broad, guarantee of equality: *'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability'*.⁹⁹

⁹⁹ See Leslie P. F. & Anita S, *Americans with Disabilities*, (London, UK: Routledge Publishing 2000), p. 339.

The United Kingdom introduced its Disability Discrimination Act (DDA) in 1995. This came to be linked with anti-discrimination legislation. It was enacted by parliament as a compromise after successive failures to pass a stronger alternative, the Civil Rights (Disabled Persons) Bill.¹⁰⁰

The discourse on disability rights has traditionally '*advocated policies based upon according disabled people full citizenship rights through anti-discrimination legislation*'.¹⁰¹ In fact, the 1980s saw several parliamentary attempts to secure the adoption of some form of disability anti-discrimination legislation in Britain. In 1994, in a very controversial move, the Minister for Disabled People, with the support of his backbench colleagues, brought out a widely supported bill. As a result of these efforts, the government agreed to introduce and support a disability discrimination bill.¹⁰²

The Americans with Disabilities Act (ADA) of 1990 is deemed the model for disability anti-discrimination legislation around the world. This act was influenced by the Civil Rights Act of 1964, which is a strong constitutional approach regarding civil rights and prohibition of discrimination on the basis of race, ethnic origin, sex, etc. Although the act did not directly address the situation of individuals with disabilities, powerful efforts were made to include them, and several titles of the Civil Rights Act of 1964 are relevant.¹⁰³ Then the National Council on Disability resolved that 'disability discrimination is distinctive', that is, substantially different from other kinds of prejudice, and thus 'a separated civil law' was necessary to address disability bias.¹⁰⁴ The disability lobby was not strong enough to assert itself enough to include people with disability in the

¹⁰⁰ See Leslie P. F. & Anita S, *Americans with Disabilities*, (London, UK: Routledge Publishing 2000), p. 340.

¹⁰¹ Oliver M, *Understanding Disability from Theory to Practice*, (New York, USA: Palgrave, 1996), p. 123.

¹⁰² Waddington L, *Changing Attitudes to the Rights of People with Disabilities in Europe. Law, Rights & Disabilities*, Ed. By Jeremy Cooper, (London, UK: Jessica Kingsley Publishers, 2000), p. 47.

¹⁰³ See Quinn G, *Disability Discrimination Law in the United States, Australia and Canada*, 1st Edition, (Dublin: Oak Tree Press, 1993), p.19.

¹⁰⁴ There is also a list of findings by Congress, which states that, unlike individuals who have experienced discrimination on the basis of race, colour, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had legal recourse to redress such discrimination. See Fersh D and Thomas P W, *Complying With the Americans With Disabilities Act*, 1st Edition, (London, UK: Quorum Books, 1993), pp. 29-30.

Civil Rights Act of 1964.¹⁰⁵ Finally, in 1988, Congress began to consider that the Civil Rights Bill might prohibit discrimination on the basis of disability.¹⁰⁶

It is evident that Canada, unlike the United States, gives explicit constitutional recognition to the right to equality of people with disabilities, whereas the United States gives constitutional recognition through the Civil Rights Act as a constitutional Bill. The DDA is similar to the ADA, since the ADA gives constitutional support within a constitutional Bill of Rights, and the UK has recently introduced the European Convention on Human Rights into British Law.¹⁰⁷

There are other countries which have achieved the same result, without explicitly mentioning mental or physical disability as protected ground.¹⁰⁸ The Anti-Discrimination Act of the Polish Constitution and Article 1 of the Dutch Constitution prohibit discrimination on grounds of '*religion, personal convictions, political opinion, race, sex or any other ground*'; the latter phrase is understood to include disability. The German Constitution more broadly stipulates that no one must suffer disadvantages because of disability.¹⁰⁹ In addition, there are other legal mechanisms for responding to discrimination. For example, Poland has constitutional guarantees of equality for persons with disabilities.¹¹⁰

There is no doubt that whenever the human rights of severely disabled persons are guaranteed constitutionally, a strong impact is made in terms of constitutional enforcement of human disability rights. This can, however, be problematic. The discourse on human

¹⁰⁵ Zames D and Zames F, *The Disability Rights Movement*, 1st Edition, (Philadelphia, USA: Temple University Press, 2001), p. 89.

¹⁰⁶ Gostin L and Beyer H, *Implementing the Americans with Disabilities Act*, 1st Edition, (Baltimore, Maryland, USA: Paul H. Brookes Publishing Co, 1993), p. 25.

¹⁰⁷ Leslie P. F. & Anita S, *Americans with Disabilities*, (London, UK: Routledge Publishing 2000), p. 359.

¹⁰⁸ In addition to that, there is very good legislation for disability discrimination act in Australia. Australia, unlike the US, does not have a significant civil rights tradition. Unlike both Canada and the US, in Australia there is no tradition of protection of constitutional rights. There are, however, several statutes protecting the civil and political rights of people with disabilities, including the recently enacted Disability Discrimination Act, modelled in part on the American ADA. Also, both the conceptualisation and the implementation of disability rights vary from nation to nation. For example, the 1987 Philippines constitution explicitly lists rights of people with disabilities, including the right to vote without assistance, while Nepal adopts the approach of the United Nations' International Covenant of Economic, Social, and Culture Rights by including special provisions to protect disabled persons.

¹⁰⁹ Bickenbach J E, Disability Human Rights, Law, and Policy, in *Handbook of Disability Studies*, Albrecht G, Seelman K D & Bury M (eds) (London, UK: Sage Publications, 2000), pp. 570-571.

¹¹⁰ See Leslie P. F. & Anita S, *Americans with Disabilities*, (London, UK: Routledge Publishing 2000), p. 342.

rights becomes specialised and removed from common understanding. Moreover, cases involving the equality provision of the constitution will form part of the body of law of government.¹¹¹ An individual or a group who wants to bring a case against a law or policy has the government as defendant, which can call on strong resources in its defence.¹¹²

The individual characteristics of any country play a major role in shaping its constitution. Rights and duties properly differ from one country to another. Whereas the majority of these issues have a common background, however, in the case of disability discrimination rights the process and systems are different.

Accordingly, changes and reforms in disability discrimination issues in all countries start with reform of their constitutions, to include the principles for legal guarantees. The state is obliged not only to remove any barriers it creates, but also to provide legal enforcement mechanisms and listen to complaints about other barriers in social life from disabled people and their organisations.

In order to make the domestic laws within legal systems more effective, there are four basic kinds of legal expression of human rights for disabled persons:

- Enforceable anti-discrimination legislation;
- Constitutional guarantees of equality;
- Specific entitlement programmes;
- Voluntary human rights manifestos.¹¹³

In conclusion, the movement to legislate against disability discrimination is increasing around the world. In the case of Saudi Arabia, guarantees of the rights of disabled persons in the constitution (Basic Law) of the Saudi State must be under the

¹¹¹ In the case of Canada, several Supreme Court decisions have carefully interpreted the constitutional provision to create a strong protection for persons with disabilities. Since successful adjudication using the charter has constitutional force, all levels of government are bound to act in accordance with court decisions. See Leslie P. F. & Anita S, *Americans with Disabilities*, (London, UK: Routledge Publishing 2000), p. 571.

¹¹² Bickenbach J E, Disability Human Rights, Law, and Policy, in *Handbook of Disability Studies*, Albrecht G, Seelman K D & Bury M (eds) (London, UK: Sage Publications, 2000), p. 571.

¹¹³ *Ibid.*, p.568. Also, see Cooper J, *Changing Attitudes to the Rights of People with Disabilities in Europe. Law, Rights & Disabilities*, ed.by Jeremy Cooper, Law, Rights and Disability, (London, UK: Jessica Kingsley Publishers, 2000), p. 81.

Islamic Laws. The Basic Law declares that the state guarantees human rights in accordance with Islamic Sharia.¹¹⁴

The Saudi constitution, however, has some deficiencies in terms of its conditions for guarantees of equality and justice for human rights and especially disability rights. These are at present treated as charitable grants rather than as rights (see Chapter 7), unlike the Western countries which have constitutional guarantees safeguarding rights.

It might be argued that the Saudi State has special Islamic Laws, and that its Basic Law does not need to be reformed. In accordance with Islamic Sharia, the Basic Law declares that the State guarantees equal rights via the principle of justice. But in fact, since the Islamic principles are extremely reasonable and flexible, they can readily accommodate the procedures and approaches necessary for rights to be secured.

The Islamic Sharia does not stop at presenting merely general religious principles. It undertakes the welfare and protection of the human being and in acting justly gives a person his rights. In two major ways it achieves practical guarantees of a person's rights being obtained.

The first is faith in Allah and the raising of the soul. The primary basis of the protection of human rights lies in believing in Allah and in the liberation of the human being from enslavement to any except Allah. The Islamic Sharia makes a link between piety and the promise of recompense in the afterworld. Thus, identifying these rules as a religious duty is equivalent to formulating a guarantee to enforce the laws of human rights.

The second is through the Islamic states' guarantees for human rights. These must be included in their constitutions.¹¹⁵ The Islamic Sharia already considers human rights as a part of Sharia rules. The guarantee of human rights in Islam proceeds from faith in Allah and the power of state. The king or the president of the Islamic state is obliged to safeguard and follow all rules of religion and living. It appears, however, that the existence of Islamic principles and traditions alone, without power, are not sufficient to guarantee the

¹¹⁴ The Basic Law, Art. 26.

¹¹⁵ See Al-Zuhaily M, *Hqouq Al-Insan Fi Al-Islam*. (Damascus, Syria: Dar Al-kalem Al-Taib, 1997), pp. 361-365.

protection of human rights. This is especially true in the modern world, because of different regimes and the move towards globalisation. Islamic Sharia requires the existence of a strong power and authority to enforce its rules, rather than merely religious principles. Uthman Bin Affan (companion of Prophet Mohammad) said: *'Allah the Almighty Keeps His servants away from sins and corruption by the power of the ruler more than by the admonition of the Holy Qur'an'*.¹¹⁶ These ideas will be expanded below in the chapters on concepts of right, on discrimination and on distributive justice.

In order to investigate the grounds of disability rights, the concept of disability must first be defined. The following chapter addresses the real concept of disability and the disabled person.

¹¹⁶ Ibn Gaim Al-Joziah M, *I'Elam Al-Mo'geen An Rab Al-Alameen*, Vol. 2. (Beirut, Lebanon: Dar Al-Jeel, 1973), p. 33.

GENERAL CONCEPTS: DISABILITY AND THE DISABLED PERSON

Introduction

Definitions are considered to be the key to understanding the subject matter. Definitions in the field of humanities, however, are not subject to objective criteria because they involve theoretical aspects which are determined by the values of individuals. Thus each scholar presents his definition according to his own perspective. For instance, a sociologist's definition of disability differs from a psychologist's and a doctor's, and so on.

The main object of this chapter is to achieve definitions of 'disability' and 'disabled person' adequate for the discussion of the 'rights of disabled persons', which is central to the aims of this thesis. Its emphasis should be on the practical reality of disability. More specifically, it should focus on the ways in which disability affects the major activities of ordinary daily life, and on the relationship of these with discrimination and the rights of the disabled.

The chapter is divided into three main sections. The first section presents background information on a number of relevant aspects. It opens with a general discussion of Islam's concept of man, and continues with several perspectives on disability taken from lingual and legal contexts. The second section discusses different models of disability, and Section Three identifies definitions from international law. The importance of Section two is its identification of the most appropriate model for discussing issues of disabled rights and discrimination. Section three is necessary in order to present international standards for the definition of disability, and to establish what should be considered as the international criteria for the definition of disability.

2. 1. General Concept of Man and Definitions of Disabled and Disability

Before dealing with the concept of disability and the definition of disabled, it is appropriate to discuss the concept of man in Islam. The basis for any general picture must be found in Islam's main sources, that is, the *Qur'an* and the *Sunnah*.

2. 1. 1. The Concept of Man in Islam

Man is the living creature at the starting-point of creation. Human beings themselves originated from clay, as Allah said: *'Who made all things good which he created, he began the creation of man from clay'*.¹ Man has been given all material power and mental ability including verbal communication or power to speak. Allah says all these abilities resulted in the creation of the first person, which is Adam. Allah ordered the angels to prostrate themselves when he said: *'When your Lord said to the angels I am about to create a mortal out of mud and when I have fashioned him and breathed into him of my spirit, then fall down before him prostrate'*.² Allah created Adam in a good image: *'Surely we create man of the best stature'*.³ That is, Allah gave man a strong physical and psychological construction. This is a very fine stage of creation where Allah created man with the attributes of moderation, coherence and perfection.⁴ Allah conferred upon man very fine values and placed him on a high level where all the elements of creation both material and spiritual were gathered in him. This has been confirmed by Al-Imam Al- Razi, who said: *'I know man is a core of soul and body. The man's soul is the most honoured soul created in the lower earth and his body is an honoured body in the earthly life. Allah conferred these unique values upon the human soul. Accordingly, the human soul has three essential powers: nourishment, growing and delivering. The animal soul has two powers, sensitivity whether apparent or implied, and voluntary movement. All these five powers which include nourishment, growing, delivering, sensing and movement have been gathered in human beings in general'*.⁵

It can be concluded that Man has a host of attributes, known as attributes of humanity, which distinguish him from all other creatures. Man is different from other

¹ The *Qur'an*, Surah 32: As-Sajdah, verse No.7.

² The *Qur'an*, Surah 38: Sad, verse No. 71-72.

³ The *Qur'an*, Surah 95: At-Tin, verse No. 4.

⁴ An-Najjar A, *Qimat Al-Insan*, 1st Edition, (Morocco: Dar Al-zaitonah, 1996), p. 18.

⁵ Al-Razi F, *Al-Tafseer Al-Kabeer*, Vol. 2, 2nd Edition, (Dhahran, Saudi Arabia: Dar Alkutob Al-Ilmiah, no year), p. 13.

creatures in that he has unique abilities of distinguishing between time and place, and he has spiritual and physical dimensions.

The position of man on the Earth is not dependent upon his colour, race, or disability, and these should never be bases for him to lose his position on Earth.⁶ Man has a material presence and he shares with other creatures the attribute of body. As such, man is bound by the rules of nature and the necessities of life. These rules and mechanisms and this destiny apply to all creatures alike. There is, however, another side to human nature which goes beyond nature and matter and this is not subject to nature's rules, and is exclusive to man and his humanity. It expresses itself through the activities of human beings, human society, morality, the sense of religion, and beauty.⁷

Man has in himself all the material and spiritual dimensions which other creatures lack. Allah created man in a perfect form which enables him to carry out religious duties and bear the great duty of being Allah's successor on Earth, achieving constructive development through worship and social construction.

It is an honour given by Allah to Man, where Allah said: *'Verily we have honoured the children of Adam. We carry them on the land and the sea, and have made provision of good things for them, and have preferred them above many of those whom we created with a marked preferment'*.⁸ In this regard, Al-Imam Al- Zamakhshari said: *'It has been said in the honour of the son of Adam that Allah actually honoured him by power of speech, power to distinguish, power of writing and power of drawing, and by his straight body in order for man to prepare for himself what he needs in this life and on the day of resurrection. It is still said that man has dominance over all other creatures and conquers them to serve his needs. And also said that every creature uses their mouth to eat except the son of Adam'*.⁹

From the above verse it can be concluded that there are two dimensions to man, one is the rational dimension (power of reason and distinction and power of speech), and the

⁶ See An-Najjar A, *Mabda'a Al-Insan*, 1st Edition, (Morocco: Dar Al-zaitonah, 1996), pp. 29-39.

⁷ Al-Masiri A, *Al-Falsafah al-Maddiyah wa-Tafkik al-Insan*, 1st Edition, (Damascus, Syria: Dar Al-Fikr, 2002), p. 12.

⁸ The *Qur'an*, Surah 17: Bani Israel, Verse, No. 70.

⁹ Al-Zamakhshari A, *Al-kashaf*, Vol. 3, (Beirut, Lebanon: Dar Al-Kotoub, 1976), p. 123.

social dimension (power of writing and preparing for living, eating by hand, riding on roads and sailing through seas, and enjoyment of the fruits of life).¹⁰ Further, from this verse it can be noted that the honours regarding sons of Adam are absolute and general for the whole human race without any distinction between Muslim and non-Muslim, men and women, Arab and non-Arab, disabled or non-disabled. This will be further considered in the chapter on discrimination.

Thus, man can be considered in terms of his power of reason by which Allah honoured him above other creatures, or in terms of his role as Allah's viceroy, and he can be considered in his entire humanity including his soul and body. But in fact his human qualities will be emphasised more through his spiritual dimension than his body. Ibn Taimieh said: *'Man is soul and body together, but soul is more important than the body, the body is the place where the soul lies'*.¹¹ This means that the human body is only the means to fulfil the permitted purposes and whatever defect or imperfection or impairment, for example, a disability, the body may have, man can never be outside humanity and remains as a subject of religion regardless of his appearance. As Prophet Mohammad said: *'Allah does not look at your physiques and wealth, but He looks at your hearts and deeds'*.¹² An example may be given of how Islam concentrates on addressing the human being on the basis of his soul and mind rather than of his body and appearance. One of Prophet Mohammad's followers, Omran Ibn Al-Hossein, was disabled and unable to stand to do the prayers. When he asked Mohammad how to pray, he was answered by the Prophet, *'you can pray standing, if you cannot, sitting, if you cannot, on your side'*.¹³ This instance allows the disabled person to feel his value and his high essence and to appreciate his role in life, and this will lead him to mix in his society to prove himself, because Islam does not consider the loss of part of the body as total loss of the social function. Allah said: *'For indeed it is not the eyes that grow blind, but it is the hearts, which are within the bosoms, that grow blind'*.¹⁴

¹⁰ Al-Jabiri M, *Al-Dimuqratiyah wa Hqouq Al-Insan*. 1st Edition, (Beirut, Lebanon: Markaz Derasat Al-Wehdah Al-Arabiah, 1994), p. 202.

¹¹ Ibn Timieh A, *Fatawa Ibn Timieh*, Jam'a Abdulrahman Ibn qasim, Vol. 4, (Riyadh, Saudi Arabia: Edarat Al-Bohooth Al-Ilmiah, 1982), p. 222.

¹² Al-Hafiz Al-Mundhiri, *Sahih Muslem, Arabic-English*, Vol. 2, 1st Edition, (Riyadh, Saudi Arabia: Dar us Salam Publishers and Distributors, 2000), p. 951.

¹³ Khan M, *Sahih Al-Bukhari, Arabic-English*, Vol.2, (Riyadh, Saudi Arabia: Dar us Salam Publishers and Distributors, 1997), p.137.

¹⁴ The *Qur'an*, Surah, 22: Al-Hajj, Verse No. 46.

It must now be asked what the term ‘disability’ means, and what the specific definition of a disabled person is.

2. 1. 2. General Definition of Disabled and Disability

There is no universal definition of disability or disabled in classic Islamic jurisprudence. There have been some efforts, however, to define disabled and disability by people concerned, including the legislators and commentators. The words disabled and handicap, in fact, have not been known in the Arabic language, as they are identified in modern times with people who have a physical disability or problems with senses such as hearing, vision, etc., or a mental disorder. Nor has there been a particular definition in Arabic dictionaries and culture. In Arabic, the only word used is *zomon* meaning chronic, referring to people with an incurable disease, which means that it will last for a long time, or impairment owing to age.¹⁵

In the physical disability context, Islamic jurisprudence mentions different terms including impairment, paralysis and amputation. Paralysis has been defined as inaction or inability of part of the body and the function of that part. This means the part has lost its capacity and become motionless, weak and paralysed. Impairment and disability in Arabic is called *al-ajz*, which is a kind of weakness or inability of a person which reduces the person’s capacity to function and conduct his/her normal life. In the context of physical disability there is also the concept of deafness, *somm*, which also means blocked. The person who loses his sense of hearing has become *somm*, i.e. deaf or blocked. On the other hand, there is *amma*, which refers to people who have lost their vision.¹⁶

All definitions of disability, however, have been covered and used in the *Qur’an* and have been dealt with by the religious leaders in their books. As Allah said: ‘*No blame is there upon the blind nor any blame upon the lame nor any blame upon the sick...*’.¹⁷ The word blind in this verse indicates a disability in senses and it includes the loss of vision and hearing, and the word lame refers to physical movement which includes paralysis, amputation and disfigurement and physical injuries. With regard to sick persons in the verse, this indicates that there are various kinds of sickness, including mental disability.

¹⁵ See *Al-Muajam Al-waseet*, (Cairo, Egypt: Mujam’a Al-Lughah Al-Arabiah, 1977), p. 401.

¹⁶ *Ibid.*, pp. 585, 37, and 863.

¹⁷ The *Qur’an*, Surah 24: An-Nur, Verse No. 61.

To be compared, according to the legal context in the western view, there are two ways of defining disability. First, being unable to use one's body properly because one is blind, cannot walk, etc. Second, lack of legal capacity to act in one's own right (perhaps because of one's age or mental state). A person under a disability is a person who is not capable of taking legal action for him/herself.¹⁸ This definition qualifies the meaning of disability as the inability of a person to perform some specific function. This implies that the disability is caused by handicap.

A more detailed definition here would differentiate more aspects of 'disability'. For example, disability: (1) The lack of ability to perform some function, e.g. *'his disability entitled him to worker's-compensation benefit'*. Partial disability: a worker's inability to perform duties that he or she accomplished before an accident, even though the worker can engage in some gainful activity on the job. Permanent disability: a disability that will indefinitely prevent a worker from performing duties accomplished before an accident. Physical disability: an incapacity caused by a physical defect or infirmity, or by bodily imperfection or mental weakness. Temporary disability: a disability that exists until an injured employee is as restored as the nature of the injury will permit. Total disability: a worker's inability to substantially perform employment-related duties because of physical condition. (2) Incapacity in the eyes of the law, e.g. most of a minor's 'disabilities' are removed when the minor turns eighteen.¹⁹

As has been observed, these definitions seem more elaborated in terms of performance of job requirements, in addition to the capacity and incapacity of a person. They imply that disability refers to social restrictions and the legal capacity of a person. These meanings of disability in western terms are similar to the meaning of disability and impairment in Arabic and Islamic thought. The meanings of disability and disabled in a western context, however, are more comprehensive, and they may be examined and used under social and legal models, as will be shown later.

Significantly, none of these definitions refers to the impact that a disability may leave behind even after the person has recovered from that disability. The individual may continue to suffer, for example, from the effects of his records or from the stigma that

¹⁸ See *Dictionary of Law*, 3rd Edition, (London: Peter Collin Publishing, 2000), p. 114.

¹⁹ See Garner B A, *Black's Law Dictionary*, (New York, NY: West Group, 1996), p. 191.

attaches to impairment. This may lead to discrimination, with exclusion from the very act which is put in place to regulate disability rights issues. Thus there are practical and personal disability issues to address, which should be included in the concept of disability. A satisfactory model of disability must therefore be found in order to achieve satisfactory solutions.

2. 2. Models of Disability

Models of service delivery over time have reflected changes in attitudes to disability. The charitable and popular model sees people with disabilities as objects of pity or charity. The medical model, as will be seen below, focuses on the disability, rather than the person, and concentrates on diagnosis and treatment. The welfare model focuses on the well-being of the person and introduces the concept of government responsibility for that well-being. The rights model focuses on the human and legal rights of the person, while the consumer model emphasises the status of the people with disabilities as consumers of services. Below, three major models, i.e. a medical, a social and an individual model, will be examined.

2. 2. 1. Medical Model

According to the medical model, disability is the result of a physical condition, is intrinsic to the individual (it is part of that individual's own body), may reduce the individual's quality of life and causes clear disadvantages. Furthermore, a compassionate or just society will put resources into trying to cure disabilities medically or to improve functioning, and the medical profession has a major responsibility and potential for helping disabled people.²⁰

This model is frequently referred to by disabled people's civil rights groups when evaluating the costs and benefits of invasive or traumatic medical procedures, prosthetics, 'cures', and medical tests such as genetic screening or pre-implantation genetic diagnosis. Often, a medical model of disability is used to justify large investment in these procedures, technologies and research, when adaptation of the disabled person's environment would be cheaper and more attainable. Some disabled rights groups see the medical model of

²⁰ See Silvers A, Wasserman D & Mahowald M B, *Disability, Differences, Discrimination*, (London, UK: Rowman & Littlefield, 1998), p. 73.

disability as a civil rights issue, and criticise charitable or medical initiatives that use it in their portrayal of disabled people because it promotes a negative, disempowered image of people with disabilities, rather than depicting disability as a political, social and environmental problem.²¹ The medical model of disability risks isolating disabled people from their societies and making them subject to more discriminatory treatments linked to misplaced ideas of charity.

As noted, in the medical model, the dominant idea is that disabled people's lives are restricted by their 'impairment' and that medical professionals are important people in their lives, since they consider disabled people as patients. This role of the medical profession in relation to disabled people and disability has, however, been strongly criticised. It is not satisfactory to divide disabled people's lives in a way which suits a professional activity. It is not just decisions that doctors make about disabled people that are questionable but it is also about what they do to them. The whole medical and rehabilitation enterprise is founded upon an ideology of normality and this has far-reaching implications for rehabilitation and treatment. It aims to restore the disabled person to normality, whatever that may mean. Where that is not possible, the basic aim is not abandoned. The goal is to restore the disabled person to a state that is as near normality as possible. Hence, medical treatment and physical rehabilitation, whatever their cost in terms of relieving disabled individuals, are always justified by the ideology of normality rules.²²

Generally, the medical model does not cater for inclusion of disabled persons in their societies. For this reason it has to some extent given way to other models of disability.

2. 2. 2. Social Model

The social model of disability is about nothing more complicated than a clear focus on the economic, environmental and cultural barriers encountered by people who are viewed by

²¹ Silvers A, Wasserman D & Mahowald M B, *Disability, Differences, Discrimination*, (London, UK: Rowman & Littlefield, 1998), p.73.

²² Oliver M, *Understanding Disability: from Theory to Practice*, (New York, NY: Palgrave Publishers, 1996), pp. 36-37.

others as having some form of impairment- whether physical, sensory or intellectual.²³ Disability according to the social model has been considered as *'all the things that impose restrictions on disabled people; ranging from individual prejudice to institutional discrimination, from inaccessible public buildings to unusable transport systems, from segregated education to excluding work arrangements, and so on'*.²⁴ This concept can be seen in the Union of the Physically Impaired Against Segregation definition which states: *'In our view it is society which disables physically impaired people. Disability is something imposed on top of our impairments by the way we are unnecessarily isolated and excluded from full participation in society. Disabled people are therefore an oppressed group in society'*.²⁵

For example, it has been established that often the social response to certain mental conditions has caused more harm than these conditions themselves, and therefore the definition of handicap has been shifting from physical and psychological conditions of personal functioning toward the social consequences of these conditions.²⁶

The social model of disability has been also subject to criticism. For one thing, too much emphasis is placed on society and the conditions of the individual are sometimes ignored. For instance, it has been argued by French that her visual impairment imposes some social restrictions which cannot be resolved by the application of the principles of the social model.²⁷ Furthermore, some disabled have argued that the social model does not take sufficient account of the pain they suffer as a result of their impairment. It has been stated that: *'... there is a tendency within the social model of disability to deny the experience of our own bodies, insisting that our physical differences and restrictions are entirely socially created. While environmental barriers and social attitudes are a crucial part of our experience of disability, to suggest that this is all there is to it is to deny the*

²³ Silvers A, Wasserman D & Mahowald M B, *Disability, Differences, Discrimination*. (London, UK: Rowman & Littlefield, 1998), pp. 73-75, and The Social Model of Disability and Emancipatory Disability Research, British Council of Disabled People, www.bcodp.org.uk.

²⁴ Oliver M, *Understanding Disability: from Theory to Practice*, (New York, NY: Palgrave Publishers, 1996), p. 33.

²⁵ Union of the Physically Impaired Against Segregation. *Fundamental Principles of Disability*. (London, UK: 1976), P. 132.

²⁶ Reinders S, *The Future of the Disabled in Liberal Society*. (Notre Dame, IN: University of Notre Dame Press, 2000), p. 42.

²⁷ French S, Disability, Impairment or something in between? in: Swain J (ed). *Disabling Barriers- Enabling Environment, Disabling Barriers- Enabling Environment*, (London, UK: Sage Publishing, 1993). p. 231.

personal experience of physical or intellectual restrictions, of illness, of the fear of dying'.²⁸

The social model of disability has also been criticised by other oppressed groups within society which are not covered by the model. The related oppressions include racism, sexism and homophobia. The concept of the social model should involve consideration of the stigma which may follow a person with any impairment who suffers persecution and is put at risk of exclusion.

2. 2. 3. Individual Model

The individual model of disability is mainly based on the concept of some kind of random personal accident. This model places the problem of disability within the individual and secondly it sees the causes of this problem as deriving from the functional limitations or psychological losses which are assumed to stem from disability. These two points are underpinned by what might be called 'the personal tragedy theory of disability' which suggests that disability is some appalling chance event which occurs at random to unfortunate individuals.²⁹

It is clear from the above that the individual model does not take account of the reality of disability within society and limits itself to the individual. It ignores the fact that impairment in itself does not define the scope of the problem for the person with that impairment. It is the social construction attached to that impairment, and the discrimination that may ensue, that form to a large measure the situation of the person with the impairment. Therefore, the disability has a considerable social element. For these reasons, it may be said that the individual model of disability is not capable of providing a realistic definition of disability which includes its various aspects. This is one of the main reasons why this model of disability does not have many adherents.

From the above study of three models of disability it would appear that there are advantages and disadvantages in all of them. A closer examination of the models reveals, however, that the social model of disability is more compatible with the situation of the

²⁸ Morris J, *Pride against Prejudice*, (London, UK: Women's Press, 1991), p. 10.

²⁹ Oliver M, *Understanding Disability: from Theory to Practice*, (New York, NY: Palgrave Publishers, 1996), p. 32.

disabled and could accommodate various types of disability according to the definitions concerned. The medical concept of disability, as noted above, is centred on the medical conditions of the disabled person and does not sufficiently take into account the social burden of disability. It arbitrarily provides the medical profession with the power to rule on matters on which they are somewhat inexpert. In other words, it is not for the medical profession to decide on various matters of social concern in relation to disability and disabled people. The individual model, on the other hand, strongly ignores the role of social elements in the situation of disabled persons and the fact that disability is not entirely definable on the basis of impairment. It reduces the definition of disability to the impairment of the person with the impairment and does not cover the social aspect of disability.

It is the social model of disability which is relatively capable of expressing the reality of disability and disabled people. This model sufficiently explains the effect that the individual's impairment can have on his/her situation together with the role that society can play in defining the said situation. It is the social model that tries to address the disability as a social concept and not the sickness of the person in isolation from the society.

There are certain criticisms directed against the social model, including the fact that it overemphasises the social element of the disability. In response, it should be borne in mind that the preference for the social model is on a comparative basis. This model, compared with other models, is more comprehensive and effectively more capable of reflecting the reality of disability. Unlike the medical model, the social model is likely to make the disabled persons more integrated in their societies. Although it cannot be claimed that this model is totally free from deficiencies in answering all the questions in this context, it does have distinct advantages. For instance, definitions under this model could embrace a wider community of people with some kind of impairment than other definitions. It seems that the model is flexible enough to be the basis of a definition which could include, for instance, people with the HIV virus and people with obesity.³⁰ Therefore, it can be concluded that the social model of disability is the preferred model to

³⁰ Fat people feel that it is not their bodies that cause problems, but society's treatment of them as unable, different, undeserving, and inferior. In this regard see Solovay S, *Tipping the Scales of Justice*. (New York, NY: Prometheus Books, 2000), p.129.

be adopted because it is another face of a human rights model of disability. It promotes protection of the rights of disabled persons and prohibition of discrimination against them.

The social model theoretically rectifies the social barriers and puts disabled persons and the people who are included within the broad meaning of disability within the mainstream of society. This social rectification, however, requires a rationale for its manner of implementation. This rationale rests on principles of fair treatment, and is imposed by morality and duties of mutual respect for persons, based on equality, justice and mutual assistance, as will be elaborated in the following chapters. These moral duties entail such processes and material assistance as can place disabled persons on the same level as non-disabled, in order to confront discriminatory practices against them. Hence, the social model should be integrated with a moral model of disability, in order to make the investigation of the disability more effective and protect the rights of disabled persons better. Such integration will result in a model of ‘human rights for disabled persons’ that would serve the goals of this research.

2. 3. Definitions of Disabled and Disability in International Law

International society, including the United Nations and its organisations, in addition to the non-governmental organisations, has produced some definitions of disability terminology, e.g. impairment, disability, and handicap. These definitions are intended primarily to be considered by the state members, when they pursue disability discrimination legislation. It is important to examine these definitions so as to explore what they include and the background to which they refer.

2. 3. 1. United Nations’ Definitions of Disability and Disabled

The United Nations uses a general definition of disability: impairment is any loss or abnormality of psychological, or anatomical, structure or function; disability is any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being.³¹ Handicap: a disadvantage for a given individual, resulting from an impairment or disability, that limits or prevents the fulfilment of a role that is normal, depending on age, sex, social and cultural

³¹ Identity, definition and demographics of disability; The Center for an Accessibility Society; Disability Issues for Journalists. www.accessiblesociety.org/topics/demographics-identity.

factors, for that individual. Therefore handicap can be seen as a function of the relationship between disabled persons and their environment. It occurs when they encounter cultural, physical or social barriers which prevent their access to the various systems of society that are available to other citizens. So, handicap can be concluded to be a loss or limitation of opportunities to take part in the life of the community on an equal level with others.³²

There are, however, United Nations Standard Rules on equalisation of opportunity. According to these standards, the term 'disability' includes a variety of functional limitations in society. A person may be disabled by physical or intellectual impairment, and the impairment may be permanent or temporary. The term 'handicap' means the loss, or limitation, of opportunity to participate in activities on an equal footing with others. This definition establishes a relation between the disabled person and his/her environment. Its aim is to place the emphasis on the limitations of a disabled person's participation in social activities, for example, in the fields of education, communication, and employment, where disabled persons are prevented from equal participation.³³

Furthermore, there is the 1975 Declaration of the Rights of the Disabled Persons (UN 1975). The declaration calls for national and international action to protect the rights of disabled persons, which will be discussed in the chapter on disability rights and international public law. It defines a disabled person as any person unable to ensure by himself/herself the necessities of a normal individual and/or social life, as a result of disability in his/her physical or mental capacities.

2. 3. 2. World Health Organization's Definition of Disabled and Disability

Why do people always use the term disability rather than impairment and handicap? All three terms are used in different ways by different authors. There is broad agreement that impairment describes the malfunction or malformation of part of a body or brain. There is also a broad agreement that many of the disadvantages faced by people with impairment come from the environment, rather than the impairment itself. These disadvantages are described as disabilities or as handicaps.

³² Identity, definition and demographics of disability; The Center for an Accessibility Society; Disability Issues for Journalists. www.accessiblesociety.org/topics/demographics-identity.

³³ See United Nations Standard Rules on Equalization of Opportunities, www.un.org/esa/socdev/enable.

The most commonly-cited definition of disability is that of the World Health Organization from 1976.³⁴ The definition draws a three-fold distinction between impairment, disability and handicap as follows: an impairment is any loss or abnormality of psychological, physiological or anatomical structure or function; a disability is any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being; a handicap is a disadvantage for a given individual, resulting from an impairment or a disability, that prevents the fulfilment of a role that is considered normal (depending on age, sex and social and cultural factors) for that individual.³⁵

It can be noted that the World Health Organization (WHO) does not clearly distinguish between the terms disability and impairment. They maintain that impairment refers to physical or cognitive limitation that an individual may have, such as an ability to walk or speak. In contrast, according to WHO, disability refers to social restrictions, that is, the system of social constraints that are imposed upon those with impairments by the discriminatory practices of society. UPIAS defined impairment and disability in the following manner. Impairment is lacking part or all of a limb, or having a defective limb, organism or mechanism of the body. Disability is the disadvantage or restriction of activity caused by contemporary organisations which take no or little account of people who have physical impairments and thus excludes them from the mainstream of social activities.³⁶

In 1980, the World Health Organization adopted an international classification of impairments, disabilities and handicaps, which suggested a more precise and at the same time relativistic approach. The International Classification of Impairment, Disabilities and Handicap makes a clear distinction between impairment, disability and handicap.³⁷ It has been extensively used in areas such as rehabilitation, education, statistics, policy, legislation, demography, sociology, economics and anthropology.

³⁴ World Health Organization. Document A29/INFDOC/I, (Geneva, Switzerland, 1976).

³⁵ Alberecht G. D, *Handbook of Disability Studies*, (London, UK: Sage Publications, 2000), p.109.

³⁶ Union of the Physically Impaired Against Segregation. *Fundamental Principles of Disability*, (London, UK: UPAIS, 1976), p. 136.

³⁷ World Health Organization, *International Classification of Impairments, Disabilities, and Handicaps: A manual of classification relating to the consequences of diseases* (Geneva, Switzerland: World Health Organization, 1980), p. 453.

Some users have expressed concern that the classification and its definition of the term handicap may still be considered too medical and too centred on the individual and may not adequately clarify the interaction between societal conditions or expectations and the abilities of the individual.

2.3.3. International Labour Organization's Definition of Disabled and Disability

The ILO Code of Practice on Managing Disability in the Workplace agreed by a committee of experts comprising 27 government, employer and trade union representatives from developing and industrialised countries defines a disabled person as: *'...an individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognized physical, sensory, intellectual, or mental impairment'*.

In fact, this definition has proven to be universally acceptable, in the context of vocational rehabilitation and employment, while allowing for variation in national interpretations of disability.³⁸

The International Labour Organization agrees that, if disability is to be defined in the UN Convention, the definition should reflect the social dimensions of disability.

Regarding the achievement of the World Health Organization in promoting a standardised classification for the purposes of diagnosis, the (ILO) is concerned that the ambit of the convention may be limited if disability is defined specifically. It is suggested, however, that, rather than including a definition of disability, the convention should include a definition of a disabled person, as is the practice in (ILO) international labour standards concerning persons with disabilities.

In summary, the definitions of disabled and disability in the context of international declarations and standard rules reflect a social model of disability, which focuses on social restrictions with consideration for the special needs of disabled persons. The integration of a 'moral' model as proposed above adds a further dimension to the definition, resulting in a

³⁸ UN Enable- Towards a convention Comments on the draft text –Draft Article 3: Definition. www.un.org/esa/socdev/enablerights/wgdca3.htm.

‘disability human rights model’ which provides a basis for addressing disabled persons’ rights.

In the light of the perspective of this concept, it is appropriate to discuss the rights of disabled persons in terms of a fundamental concept of right, and of the relationship between this concept and the disabled person. In particular, the discussion should address the consequences of the capacity of disabled persons to have rights.

RIGHTS AND DISABILITY

Introduction

There is no single definition for the concept of 'right'. Owing both to the universality of human nature and to intermarriages between nations, all definitions share certain common components. But the specific cultural values of each society dictate its basic understanding of what right is, and of what constitutes a personal right. Moreover, definitions of right can change and adapt, since they evolve in line with change in their society.

Concepts of human rights and the awareness that these require specific protection have developed significantly in the wake of the scale of abuse practised in World War II. In modern legal, political and moral discourse, definitions of the term 'right' entail features of rights which exceed the purely social connotations of the term, and are applicable in cases of specific minority groups who may require particular protection, such as women, children, the elderly and disabled people.

As discussed in Chapter 2, the disabled person is a human being and should consequently be treated as an equal person. Nevertheless, one may ask if any special rights are due to disabled persons, and if it is appropriate to make a special case for disability rights.

Since rights are the major focus of this thesis, so the main aim of this chapter is to identify and emphasise those features of rights which carry crucial relevance for this project and for the argument for rights for disability. The chapter aims to give a moral and legal perspective on the rights of the disabled. This must, however, be preceded by brief accounts of general concepts of rights, both from a Western perspective and in Islamic thought.

The chapter is divided into two main sections. The first section addresses the issue of general concepts of rights. It falls into two parts, discussing definitions of rights from Western and Islamic perspectives respectively. This section will conclude with an assessment of common ground between the two perspectives concerning the essential basis of rights, and of interaction between them. The second section examines the specific rights of disabled persons according to five categories represented as grounds for establishing their rights. These comprise respectively needs, fundamental interests, autonomy, equal respect and self-esteem, and citizenship, however before that the capacity for rights will be discussed.

3. 1. General Concepts

As mentioned above, no single version of the concept of right has met with universal agreement. Definitions tend to be connected with the nature of a nation's legal system. Here the discussion will focus on the various influences that shape modern perspectives on rights in both Western and Islamic thinking.

3. 1. 1. Definition of Rights: Western Perspective

In the West, the evolution of theories concerning concepts of rights reflects the changing emphases of the times. Some theories seem to view rights as normative attributes that belong to persons i.e. self-conscious human beings.¹ A second approach regards rights as entitlement to choose.² A third approach explains rights positively as entitlement to do, have, enjoy or claim.³ A fourth contends that rights always and necessarily concern human goods, that is, concern what it is right, at least in normal circumstances, for a person to have.⁴

In Western thought the term 'right' is defined according to the context in which it is used. Sometimes the definition refers to simple linguistic denotation, but most often a 'right' is understood with legal, political, social or moral dimensions.⁵ This is seen in the

¹ Nickel, J W, *Making sense of human rights: philosophical reflections on the Universal Declaration of Human Rights*, (Berkeley, CA: University of California Press, 1987), p. 82.

² Gewirth A, *A Reply to Danato*, (Chicago, IL: University of Chicago Press, 1982), p. 34.

³ Golding M P, 'Towards a Theory of Human Rights', (1986), 52(4) *The Monist*, pp. 532-533.

⁴ C. Taylor (ed), 'Human Rights: The Legal Culture', in *Philosophical Foundations of Human Rights*, (Paris: UNESCO, 1986) p. 50, and see also Freedman M, *Rights*, (London, UK: Open University Press, 1991), p. 6.

⁵ Raz J, *The Morality of Freedom*, (Oxford, UK: Clarendon Press, 1986), p. 165.

liberal theories of John Locke and Thomas Paine, and understood in the moral and political philosophy of Kant and in the work of Rousseau and Stuart Mill.⁶

It is important to distinguish between a right to perform or do something, and a right to something. The right to a house is therefore different from the right to build a house, as the former could mean ownership while the latter could mean the freedom to build or own. A right could mean discretion, i.e. John has a right to hire and fire any employee in the company. A right could mean authority, i.e. the policeman has the right to detain suspects for 24 hours.

Sometimes rights are established by recognition of an individual person's interests. For instance, a positive claim/right to health care can be understood in terms of the recognition that the individual's interest in life is a sufficient ground to establish a right. In contrast, another view indicates that a right may be established on grounds of a person's freedom to choose. This view presents rights as the basis of protection not of all human interests but of those related to choice, such as self-determination and autonomy.⁷

There is a necessary distinction between an original or 'core' right, and a right which is grounded in a core right, which is a 'derivative' right.⁸ To acknowledge the validity of the derivative right, it is necessary to argue the existence and justification of the core right from which it is derived.⁹ Confirmation of the existence of a derivative right requires tangible evidence indicating its connection with the 'core' right, in order to justify protecting it.

For example, the right of 'life' is considered the most important 'core' right because the right-holder here has a direct justificatory interest, namely to enjoy his/her life. The interest of a disabled person entails further rights which are an essential prerequisite for the

⁶ See Waldron J, *Theories of Rights*. (Oxford, UK: Oxford University Press, 1984), p. 1. In this regard, it is appropriate to mention that most historians have concluded that there was no concept comparable to the modern idea of rights in ancient Roman law, and that this concept was not developed until the Middle Ages. When writers in ancient Rome discussed 'right', it meant something like 'the right thing to do'. In modern continental Europe, this meaning is sometimes characterised as 'objective right', while the usual Anglo-American understanding of legal or moral 'right' is labelled 'subjective right'. See Bix B.H. *A Dictionary of Legal Theory*, 1st Edition, (New York, USA: Oxford University Press, 2004), p. 188.

⁷ *Ibid.*, pp. 10-11.

⁸ Raz J, *The Morality of Freedom*, (Oxford, UK: Clarendon Press, 1986), p. 168.

⁹ *Ibid.*, p. 168.

core right 'life', the rights of health care and of rehabilitation, among others. The indirect justificatory interest in respect of the core right creates derivative rights.

In contrast, a right for one person implies a corresponding duty on the part of another person, whether this person represents the government or the law, or is a private person. Some personal rights implicate all other persons, or all with certain specified exceptions. The individual right to personal security is the ground of a duty on everyone else not to assault a person.¹⁰

An analysis of rights in Western philosophy should be presented in two parts: a description of the internal structure of rights (their form), and a description of what rights do for those who hold them (their function).¹¹ Concerning the form of rights there are four basic components known as 'the Hohfeldian incidents'. These four elements are privilege (liberties) and power, sometimes named 'active rights', and claim and immunity, sometimes named 'positive rights'. Each of these elements has a distinctive logical form and can be a right by itself.¹²

Raz has attempted to apply these principles and meanings in his proposed definition of rights. He states that: '*X has a right if and only if X can have rights, and other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under duty*'.¹³ The interest of a person is a sufficient and important ground for a right and to hold another to be obligated or under duty. This definition disregards mention of the moral dimensions of right, although one might argue that ethical principles may be inherent in the concept of interest. In fact the meanings of 'interest' are various and broad, including for example respect and personal autonomy. Raz himself has indicated that the proposed account of rights allows for the existence of fundamental moral rights.¹⁴ Otherwise, he has always responded that rights-based moralities are narrow because they exclude moral elements such as supererogation or virtue.¹⁵ In contrast Dworkin asserts that rights constitute the most fundamental moral

¹⁰ Raz J, *The Morality of Freedom*, (Oxford, UK: Clarendon Press, 1986), p. 183.

¹¹ See Bix B.H, *A Dictionary of Legal Theory*, 1st Edition, (New York, NY: Oxford University Press, 2004), p. 188, and Rights, [www http://plato.stanford.edu/entries/rights/](http://plato.stanford.edu/entries/rights/).

¹² *Ibid.*

¹³ Raz J, *The Morality of Freedom*, (Oxford, UK: Clarendon Press, 1986), p. 166.

¹⁴ *Ibid.*, p. 190.

¹⁵ *Ibid.*, pp. 193-216.

category.¹⁶ Indeed the moral case plays an important role in the claim that rights are rooted in human nature. Accordingly, a proposed definition of rights generally should include mention of morality and the importance of the protection of rights. This was not treated in Raz's definition.

The majority of thinkers agree, however, that rights have a special force. Dworkin created a famous image describing rights as 'trumps'.¹⁷ This means that the existence of a right is a reason to confer certain treatment on its holder or permit him or her to act in a certain way, even if a particular social purpose would be served by doing otherwise.¹⁸

Nevertheless, Dworkin's formulation of rights as trumps disregards the trumping force of rights against non-welfarist social goals. It merely considers rights within a utilitarian framework, which only work on the assumption of a fundamental right to equality underlying utilitarian considerations and claims of right that trump them. Consequently, the main force of right deriving from the primary premises of Dworkin's theory is the right to equality.¹⁹

Likewise Dworkin's formulation requires that rights trump non-right objectives, for instance, increasing national wealth and development or using public facilities. This raises the question of the priority of one right with respect to another. One can keep to the trumps metaphor while recognising that some rights have a higher priority than others. For example, the right of precedence of a person on the plane or bus lane has priority over the right of precedence of the person in the lane who stops behind that person, and the right of the lane of a disabled person trumps both able-bodied persons. This consideration derives from the right of a disabled person in respect of his/her position. Their interest is a justifiable ground of their right which must be protected. This will be discussed in more detail in Section 3.2.2 below on fundamental interests.

Dworkin's formulation of the trumps principle also raises the logical question of whether there is any absolute right. Attempting to answer this question, Gewirth indicates

¹⁶ Dworkin R, *Taking Rights Seriously*, (London, UK: Gerald Duckworth, 1997), p. 171.

¹⁷ Dworkin R, Rights as Trumps, in: *Theories of Rights*, Waldron J (ed) (Oxford, UK: Oxford University Press, 1984), pp. 153-67.

¹⁸ Rights, [www http://plato.stanford.edu/entries/rights/](http://plato.stanford.edu/entries/rights/) First published 19 December 2005.

¹⁹ *Ibid.*, p. 17.

that various rights may conflict with one another as to one or another of the elements which were the justificatory basis or ground of the right. He concludes that there is at least one such absolute right, namely the right of all persons not to be made the victim of a murder.²⁰ A further right is not to be made the victim of a right-holder by any deliberate harm. To be absolute, a right would have to trump every other consideration such as other rights, economic efficiency, saving lives.²¹

Although all rights have moral significance in Dworkin's view, another aspect of the conflict may raise a question of absolute rights which is related to moral rights. Although the objects of moral rights are successively ordered, this is not true of the subjects of the rights. If one class or group of persons such as disabled persons inherently had moral rights such as their interest to be respected over non-disabled persons, any conflict between their respective rights would be dissolved as the rights of the disabled person would then rightly take precedence, and therefore their rights would be absolute.²² This is because moral rights are collective and distributed equally among people. The question is whether moral rights may be given as the justification for claiming rights, or whether alternative justification is required.

One form of rights, the 'claim', has a significant role in protecting and demanding certain rights, such as the rights of specific groups of people. The 'claim' contributes to an understanding that rights can not only be described but also prescribed. Some philosophers assert that 'all rights are claims' and another declares rather that all rights are 'valid claims'.²³ This means that interest is a valid ground for rights and provides a justifiable reason to claim the right. Consequently, the welfare rights of a person, for example 'his interests', are claims for action that extend beyond forbearance and are intended to provide the right-holder with resources. Such rights are interventionist and hence depicted as 'positive' rights-claims.²⁴

²⁰ Gewirth A, *Reason and Morality*, (Chicago, USA: Chicago University Press, 1978), pp. 135, 343-344, also see Waldron J, *Theories of Rights*, (Oxford, UK: Oxford University Press, 1984), pp. 91-95.

²¹ Rights, <http://plato.stanford.edu/entries/rights/> First published 19 December 2005.

²² Waldron J, *Theories of Rights*, (Oxford, UK: Oxford University Press, 1984), p. 93.

²³ Hohfeld W, *Fundamental Legal Conceptions*, W. Cook (ed.) by (New Haven, CT: Yale University Press, 1919), p. 36.

²⁴ See Freedman M, *Rights*, (London, UK: Open University Press, 1991), p. 54.

The positive rights-claims of a person require an authority which will protect him. Generally if something is called a person's right, it means, as Mill indicated, that the person has a 'valid claim' on society to protect him in the possession of it, either by the force of law or by that of education and opinion or even by the force of morality.²⁵ The latter would follow from the fact that human rights are considered as a moral claim for self-development, which requires the practice of liberal theories of justice distributed equally in favour of persons. Dworkin has defined a right as a claim that it would be wrong for a government to deny an individual, even if it would be in the general interest to do so.²⁶

In contemporary Western jurisprudence the connotations of right derive from various principles including meanings of fairness, equality, justice and liberty. Its definition includes entitlement to something, and an interest or expectation protected by law. By implication, for every right that a person has, somebody else has a corresponding duty.²⁷

The powerful point of the definition of right in Western thought is that it refers both to entitlement to the rights to be enjoyed or exercised, and the forms of right which are assertion, claim and demand of rights. Thus Western definitions are strongly worded devices with power to secure and protect the rights-holder's interests.

As shown above, in Western thought the study of the notion of right has involved wide philosophical enquiry. This includes establishing reasonable grounds as the basis for rights, namely interests and freedom of choice. It has also generated an intellectual and practical structure for rights, where positive claim-rights carry procedures for enforcement.

The concept of right in Islamic thought is criticised for lacking the grounds enabling it to establish the meaning of claim-rights and enforcement mechanisms. The following section presents a comparative analysis of Islamic approaches to the concept of right.

²⁵ Mill J S Utilitarianism. Page reference in the text is to the reprint in Mill, J, *Utilitarianism*, Sher, G. ed., (London, UK: Indianapolis, IN: Hackett, 2002), p. 54.

²⁶ Dworkin R, *Taking Rights Seriously*, (London, UK: Gerald Duckworth, 1997), p. 269.

²⁷ See, for example, Garner B A, *Black's Law Dictionary*, (New York, NY: West Group, 1996), p. 551.

3. 1. 2. Definition of Rights in Islamic Thought

In Islam, the concept of rights has generally received less attention than in the West. Nevertheless, Islamic principles laid down by the Prophet Mohammad and his followers contain material which provides a rich source for interpretation, and classical Islamic jurists indeed made certain efforts to define and categorise rights. Modern jurisprudential scholars too have attempted to develop the concept of a right in Islam. These attempts have largely been influenced by the Western legal philosophy of rights, especially with reference to 'positive law'.

Since Islamic jurisprudence has evolved in the Arabic language, it is inseparable from the meanings of this language. In Arabic, the term 'right' has a number of meanings depending on the context in which it is used. According to most Arabic dictionaries, the term 'right' turns around several meanings including 'incontrovertible', 'essential', 'duty', 'share', and 'the opposite of falseness'. For example, Allah said: *'Mix not truth with falsehood, nor knowingly conceal the truth'*.²⁸

Thus Islamic thought, similar to Western jurisprudence on the subject of right, relies on linguistic meanings to determine the concept of a 'right'. Moreover, in its reference to such meanings as truth, duty, essential, and share, the Islamic definition of right conforms to some of the linguistic definitions in the Western view.

In terms of the definition of 'rights' in Islamic jurisprudential consuetude, certain classical Islamic scholars have viewed rights as being divided into the rights of Allah and the rights of the people. The rights of the people are acts which the people may choose to do or not do.²⁹ The rights of Allah are the things ordained by Allah. Mainly these are acts required of human beings in order to please Allah. For example, the annual *Zakat*, 'the levy of the taxes in the Islamic state' is one of the cornerstones of Islam. It is referred to as the right of Allah, as it is money taken from those who have and given to those who have not. There are seven categories of these people, including the needy and poor.

²⁸ The *Qur'an*, Surah 2: Al-Baqarah, Verse No. 42.

²⁹ Al- Ghamdi A, *Huquq Al-Insan Fi Al-Islam*, (Riyadh, Saudi Arabia: Maktabat Al-Rushed, 2000), p. 39.

The Islamic classical scholar, Al-Taftazani, described the rights of Allah as everything concerning public utility without precedence for any person, while the rights of people are special interests.³⁰ It is reasonable to place public interests among the rights of Allah, who loved all things equally. The Prophet Mohammad said that: '*The right of Allah upon his servants is to worship him . . .*' and the meaning of worship, as Ibn Timiah said, includes both good words and deeds.³¹ The rightful distribution of national resources and the equal access of all people to public interests and opportunities without any kind of discrimination are seen as a form of worship of Allah that must be followed without question.

Similarly, Al-Shatibi believed that the concept of a right is closely connected with the concept of an interest and that there is a close connection between the rights of people and the rights of Allah. Al-Garafi has indicated that the rights of Allah are his permissions and prohibitions while the rights of people are their interests.³² Against this Al-Nashat responds that the rights of Allah do not consist in his permissions and prohibitions but are merely related to them: the right of Allah is to be worshipped. Al-Nashat agrees with Al-Garafi, however, that the rights of people consist in that which will attain their interests. In spite of these divisions, one might observe that all these rights, those of Allah and those of people, might be considered to be rights of Allah, because Allah commands that man must be a rights-holder. Thus compliance with and enforcement of Allah's permissions and prohibitions are Allah's right, even where they entail interests on behalf of man.

Ibin Arabi has classified rights into three categories: the rights of Allah, the rights of people towards others, and the rights of the people towards themselves. The rights of Allah are to be worshipped and never to be associated with anyone else. The rights of the people towards others are to be virtuous, do good and never hurt each other, and the rights of the people towards themselves are to pursue their happiness and welfare.³³ Ibin Arabi divides the rights between Allah and mankind on the basis of recognition of the essence of man. His classification asserts that to pursue people's interests and cooperation between them are requirements to achieve their welfare through protection of rights. This classical

³⁰ Al-Taftazani S, *Sharh A-Italoeeh Ala Al-Al-todheeh Limatin Al-tangeeh Fi Asol Al-igh*, Vol. 2. (Beirut, Lebanon: Dar Al-kutob Al-ilmiah, 1996), pp. 323-351.

³¹ Ibin Timiah A, *Fatawa Shaikh Al-Slam Ibin Timiah*, Combined by Al-Gasim, A. Vol. 12. (Riyadh, Saudi Arabia: Edarat Al-Bohooth Al-Ilmiah, 1982), p. 23.

³² Al-Garafi A. *Tahzeep Al-Fouroq*, Vol. 1, (Beirut, Lebanon: Alam A-lkutob, 1981), pp. 140-142.

³³ Mnn'a H, *Al-Im'n Fi Huquq Al-Insan*. (Damascus, Syria: Al-Aha'li Press, 2000), p. 176.

category appears comprehensive. The foundation for rights is welfare and every kind of interest of humans, at the same time in association with the rights of Allah. This view asserts that interest and seeking human welfare are grounds for the claim-rights, the right itself being merely a device to attain interests.

Clearly the classical Islamic scholars have dealt with the meaning of a right in wider terms than those which define it by linguistic denotations, such as incontrovertibility, duty and interest. Some modern Islamic thinkers have criticised the definition of right in classical Islamic jurisprudence on the grounds of its unrestricted criteria.³⁴ Al-Garafi, however, defined one of man's rights as his interests. In addition, one can note several classical Islamic usages involving rights. For example, there is one instance citing general rights, and another citing individual rights and possession, where Ibin Al-Nashat cites a 'special right' concerning possession.³⁵ It seems that human rights derive from possession and hence he here refers to general rights or human rights as fundamental rights rather than permissions.

To summarise, the definition of a right in classical Islamic jurisprudence has referred to rights of Allah and rights of the people. The former have been defined as worship of Allah in compliance with his directive which would include the entitlement of people to share fundamental rights and public interests equally. In classical Islamic jurisprudence, however, the concept of rights appears ambiguously drawn, since in one instance it comes defined as interest in itself, and in another is associated with interests without any clear mention of the specific grounds of right or the enforcement of the rights. Islamic classical jurists appear to have dealt with the definition of rights within the concept of moral right, and moreover simply define right as equalling interest, as Al-Garafi and Al-Shatibi indicated. Nevertheless, in Al-Taftazani and Ibin Arabi's definitions of rights, one can note some hints that interest and welfare would give strong cause to establish rights requiring protection. It is unlike the definitions made by Al-Garafi and Al-Shatibi because the definition made by Ibin Arabi implies that the concept of right is just a device to protect the interests, not interest in itself.

³⁴ Mnn'a H. *Al-Im'n Fi Huquq Al-Insan*, (Damascus, Syria: Al-Aha'li Press, 2000), p. 177.

³⁵ *Ibid.*

In modern Islamic jurisprudence, some scholars have attempted definitions of the concept of right. A right according to Ali Al-Khafif is any interest or benefit, whether material or moral, to the individual and not to others.³⁶ To include 'any' benefits and interest seems a very broad definition, but whether an absolute interest or a conditional one is meant will be explored later. Moreover, Al-Zarga has defined right as any entitlement sanctioned by the legislature on or for a person. This sounds much more like the Western view mentioned above. Otherwise Esawei has indicated that a right is the incontrovertible interest for a person upheld as entitlement and possession and sanctioned by the legislature.³⁷ These definitions embrace all rights including civil, political, economic, moral and religious rights as determined by Islamic Sharia. One might conclude from these definitions that right is entitlement sanctioned by the legislature of 'Allah' or interest protected by law. It seems that the foundation of rights in Islamic jurisprudence is the desire of Allah, because rights in Islam rely on the *Qur'an* and *Sunnah*. Accordingly, rights in Islam do not derive from nature or personal reason, but simply comply with human nature and instincts.

Here the question may arise whether in Islam there is any absolute right. According to Al-Shatibi, there is no such thing as absolute right. All rights in his view are conditional and their exercise is surrounded by a bundle of limitations and restrictions. He argues that the person entitled to a right shall not use excess in practising that right.³⁸ The person entitled to a right shall not arbitrarily use that right.

These definitions of rights according to modern Islamic scholars have been clearly influenced by Western 'positive law'. For example, Alzarga and Al-Esaowie define rights according to the doctrine of 'objectives' (*Al-Maqased Al-Shariah*: objectives of Islamic Sharia which are protection of men's interests and reduction of harm, see Chapter 1). They claim interests as grounds to establish a right and have it protected by law. Although these definitions stress that rights must be protected by law, however, they lack consistency because they do not differentiate between civil, political, and moral rights. These Islamic approaches to rights appear different from Western approaches because the Islamic scholars depict all rights as essentially moral rights. This is associated with a failure to

³⁶ Al-Khafif A, *Al-Huq wa Al-Dhimah*, (Cairo, Egypt: Dar Al-Turath, 1987), p. 12.

³⁷ Mnn'a H, *Al-Im'n Fi Huquq Al-Insan*, (Damascus, Syria: Al-Aha'li Press, 2000), p. 178.

³⁸ Al-Shatibi M, *Almuwafagat*, Vol. 3, (Cairo, Egypt: Commercial Printing Press, 1979), p. 17.

establish the enforcement mechanisms that make Western positive rights practically meaningful in everyday situations.

Some Islamic approaches have taken other routes. For example, Al-Sanhouri limits rights concerning 'financial interest' since he states that these are an interest that has financial value protected by law. From his definition of right he excepts civil rights and all human rights. He argues that civil rights and human rights and all general rights are merely an actual capability to use liberty, such as freedom to work, travel, make contracts, have possessions and so on. Therefore these rights are only permissions. Also, he states that there is a 'middle rank' between right and permission, which designates preparedness for right before its completion.³⁹ Obviously, Al-Sanhouri is influenced by Western 'positive law' when he defines a right as permission or refers to a 'middle rank' which has not been previously mentioned by other Islamic scholars. To describe human and general rights merely as permissions would seem, however, to devalue concepts which are inherent in human nature. In fact, human rights take precedence in his content over merely special rights which rely on exclusive possession, so they are natural rights which must be protected by law.

Thus one might outline the major features of Islamic notions of the concept of rights as the following:

Firstly, the fundamental source of right is Islamic Sharia through the *Qur'an* and *Sunnah*, since only Allah determines what men must have and what their duties are concerning the interests of people.⁴⁰ As Allah says: '*And We reveal the Scripture to you as an exposition of all things...*'.⁴¹

The second feature is the principle of succession of Allah on Earth and deposit. As mentioned in Chapter 1, this principle rests on considerations of the rights of soul and rights of others who have succeeded Allah on Earth, to worship him and build the world in order to protect, through rights, a system for living. Relying on this principle for example, Islam insists on the right of life as an abstract right which must be preserved for all people.

³⁹ Al-Sanhouri A, *Masader Al-Houq Fi Al-Figah Al-Islami*, Vol. 1, 1st Edition, (Beirut, Lebanon: Dar Ehia Al-Turath Al-Arabi, 1985), p. 7.

⁴⁰ Mnn'a H, *Al-Ema'n Fi Huquq Al-Insan*, (Damascus, Syria: Al-Aha'li Press, 2000), p. 178.

⁴¹ The *Qur'an*, Surah 16: An-Nahl, Verse No. 89.

In this regard, Allah assures us that: '*Whosoever kills a human being for other than killing or corruption in the earth, it shall be as if he had killed all mankind, and whoso saves the life of one, it shall be as if he had saved the life of all mankind*'.⁴² Concerning deposit, it has been defined by Islamic scholars as the conception of task or covenant. Through these obligations which are commands and interdictions of Allah, the rights have been established and must be protected so as to preserve the social life of people, and then Allah commanded people to return deposits for people who merit them.⁴³ This means that Allah commands all parties to keep their covenants with Him.

Thirdly, rights and duties are undifferentiated, since the Islamic scholars do not address the differences between them. Thus they have used the word 'right' with both meanings, saying that something is 'right for' a person, or that it is a 'right upon' him which means a duty upon him. Since all rights stem from Allah, so also people have the religious duty to protect them.⁴⁴

Fourthly, the *Al-Maqased Al-Sharia* theory, as explained in Chapter 1, means the objectives of Islamic Sharia, namely to protect the interests of men and to reduce harm.⁴⁵ It asserts the fundamental rights of men through the protection of five necessities (protection of religion, mind, dignity, property and soul). As Allah says: '*Verily we have honoured the children of Adam...*'.⁴⁶ These are the basis for protecting human rights in Islam.

Fifthly, the Islamic view regarding the system of values. Islam's highest value is justice, which means according all people equal dignity and rights. As Allah said: '*Allah enjoins justice and kindness*'.⁴⁷ As mentioned above, Allah stresses the protection of fundamental rights as 'deposits' which must be distributed justly, as he says: '*Allah commands you that you restore deposits to their owners, and, if you judge between mankind, that you judge justly*'.⁴⁸ Thus, the *Qur'an* is palpably informed by a commitment

⁴² The *Qur'an*, Surah 5: Al-Ma'idah, Verse No. 32.

⁴³ Ibin Taiymiah A, *Al-Siasah Al-Shareiah Fi Eslah Al-Raei Wa Al-Raeiah*. (Damascus, Syria: Al-Kitab Al-Islami, 1988), p. 34, and see Chapter 5, pp. 151-153.

⁴⁴ Raafat Othman M, *Al-Houquq wa Al-Wjabat Fi Al-Islam*, 1st Edition, (Cairo, Egypt: Dar Al-Kitab Al-Islami, 1983), p. 86, and see Al-Khafif A, *Al-Huq wa Al-Dhimah*. (Cairo, Egypt: Dar Al-Turath, 1987), p. 56.

⁴⁵ Al-Shatibi E. M, *Al-Mowfaqat*, Vol. 2. (Beirut, Lebanon: Dar Alkotub Al-Elmiah, 1989), p. 67.

⁴⁶ The *Qur'an*, Surah 17: Bani Israel, Verse, No. 70.

⁴⁷ The *Qur'an*, Surah 16: An-Nahl, Verse No. 90.

⁴⁸ The *Qur'an*, Surah 4: An-Nisa, Verse No. 58.

to distributive justice concerning distribution of rights, and this ideal must be considered as a basis upon which to build legal and social institutions, as will be discussed in Chapter 5.

On the above basis an Islamic theory of rights can be established. Where the main goal of Islam is protection of interests, then the interests are reasonable grounds to establish a right. The right is an instrument to protect interests, but is not itself interest. Moreover, evolution of rights in Islam entails a duty to protect the right. That is to say, the concept of a right includes a valid claim to be protected. Therefore, rights that serve the interest of men must be enforced and protected by the law: this is a religious duty associated with the supreme right of Allah. Finally, the concept of a right in Islam must be built on liberty and equality as well as justice.

In conclusion, the Islamic perspective on rights differs from the definition of a right in Western jurisprudence in the sense that it includes reference to rights of 'Allah'. The main sources of a right in Islam are the *Qur'an* and *Sunnah*, whereas in Western thinking they derive from philosophical principles of natural right, social contract and citizenship. Additionally the Libertarian school posits utility of person and liberty as the superior value, and the Marxist school embraces equality as the highest value, whereas for Islam the superior value is justice in terms of equal dignity and rights. The Islamic perspective on rights, however, bears similarities with the Western perspective in terms of making the interest and welfare of human beings the driving force for rights. But it seems that in Islamic, and especially classical Islamic, thought a right has been treated as an interest in itself, whereas in the West it has been treated as an instrument to serve the interests of a person. Furthermore, both Western and Islamic views of right take account of values of fairness and liberty. Modern Western thought, however, is more specific than Islamic thought in terms of affirmation that the constitution must be founded on the basis of fundamental rights and their distribution on the basis of equal human dignity. This approach is known as the 'Capabilities Approach' (CA). It indicates that an essential task of a nation's constitution and its legal interpretation is to guarantee for all people all necessary requirements for a life worthy of human dignity.⁴⁹ This notion is a clear foundation for the constitutional entitlements for all citizens without discrimination, including disadvantaged groups.

⁴⁹ Nussbaum M, 'The Supreme Court 2006 Team, Forward: Constitutions and Capabilities: "Perception" Against Lofty Formalism', (2007) 121(4), *Harvard Law Review*, p. 7.

The discussion now turns to the specific rights of disabled persons. The chief topics of investigation are whether special needs or interests make a case for special rights, and what other principles may underpin the same case.

3. 2. The Rights of Disabled Persons

The primary basis for the rights of disabled persons is the same for non-disabled persons. In Western thought this is the doctrine of natural law, social contract and citizenship. By contrast, in the Islamic view it is the principle of succession to Allah on Earth, to protect the life system, and the principle of protection of people's interests. Both perspectives foreground interests as grounds to establish rights. In order, however, to put persons with disabilities on an equal level with the non-disabled, affirmative action is needed. Sometimes this takes the form of priority and preference, where it is necessary to make reasonable adjustment. These measures are necessary to fulfil the real interests and satisfy the needs of disabled persons, which are the main grounds for just claim to a right.

It is necessary to establish justifiable reasons for claiming specific rights and concerns for disabled persons. The relevant principles which provide grounds for claiming such rights are needs, fundamental interests, autonomy, equal respect and self-esteem and citizenship. Before discussion of those general grounds, something must be said about capacity for rights.

3. 2. 1. Capacity for rights

The capacity for rights varies depending on what is meant by such capacity. If the capacity means capacity for natural rights, then all men have the capacity for these rights by their human nature, without any kind of discrimination. As regards capacity for rights which is relative to action or behaviours, generally the existence of such persons who can act as well as be subject to duties accounts for their capacity to have rights.⁵⁰ Therefore, relying on belief and acceptance of natural differentiation of persons, it is important to indicate what kinds of persons or groups they are, for instance normal person, adult, child, or disabled person, woman or black. This has a significant role in determining the need and conditions under which they may have rights, as will be discussed later. Furthermore, there is a view, which Raz calls the 'reciprocity' thesis, which says that only members of the same moral

⁵⁰ Raz J, *The Morality of Freedom*, (Oxford, UK: Clarendon Press, 1986), p. 176.

community can have rights. This view, however, seems narrowly interpreted when the same moral groups are reciprocating with each other whereby they impose such obligations deriving from a social contract or to represent the outcome of valid bargaining process. A broad concept of moral community would involve all moral agents and respect anyone who is subject to duties as being capable of rights.⁵¹

In the context of a moral community, the question can be raised whether children are capable of rights. Since children are not capable of rationality or of acting as autonomous beings, they cannot be held to account for their conduct, and as they are not moral entities they do not deserve the rights based on the abilities of a person.⁵² Some philosophers have tried to regard young children as potentially moral entities. This view is inadequate, however, because it makes the potential for rational conduct the ground for a right. This would exclude some categories of human being such as people who suffer from severe retardation. These issues can be resolved by distinguishing between the rights which require rational conduct as a ground, and the rights which rest merely on 'humanity'. It seems that in the case of rights which require rational conduct, the condition of autonomy would restrict these, while in the case of rights which rest only upon 'humanity' all men have equal capacity for natural rights, because their differences were brought about by special circumstances.

In Islamic jurisprudence the division of eligibility is similar to that in Western jurisprudence. Generally, capacity in Islam is peculiar to man, it qualifies him to abstain from rights that are restricted by Allah's traditions. It has been divided into 'performing capacity' and 'deserving capacity'. The performing capacity is the power of a person to be responsible for his actions. The grounds for this capacity are intellect and reaching the age of majority. Children and retarded people are therefore not included in this capacity, and the system of custody operates in its place. The deserving capacity is the power of a person to merit natural rights as unequivocal rights, the ground for which is their 'humanity'.⁵³ Therefore children and people who suffer from severely retarded disability are considered in this kind of capacity.

⁵¹ Raz J, *The Morality of Freedom*, (Oxford, UK: Clarendon Press, 1986), p. 179.

⁵² Freedman M, *Rights*, (London, UK: Open University Press, 1991), p. 60.

⁵³ *Al-Mousou'ah Al-Feghiah*, Vol. 8, 2nd Edition, (Kuwait: Wazart Al-Aougaf wa Al-Shaoun Al-Islamiah, 1988), pp. 56-58.

The deserving capacity for the rights of people to public facilities, freedom of expression, autonomy or any aspect of essential rights is defended on the grounds of public interest. The rights-holder's interest is conceived of independently of its contribution to the public interest. This reason is insufficient to justify holding others to be subject to expanded duties and disabilities commonly derived from the essential rights of using public facilities or of free speech.⁵⁴ Because people, on the grounds of human nature, share equally in the rights of public interest, so the countervailing concerns may provide reasons for not establishing a right. In other words, in the case of countervailing in public interests and other rights which are shared between people by their humanity, there is never any differentiation between people, disabled or non-disabled, therefore, there is no specific right based in public interest for specific persons, but rather the public interests are common.

In his proposed definition Raz indicated that a person is capable of having rights if and only if either his interest is of ultimate value or he is an artificial person such as a 'corporation'.⁵⁵ He restricts those rights held to serve interests of ultimate value, as some interests are not considered at all of ultimate value, but protect interests which are considered as of just instrumental value.

Likewise, anything would be beneficial and in a person's interest if it is valuable and he has capacity to participate in that value.⁵⁶ In this regard, it appears that some things are not in a person's interests because he has not the capacity to participate in them, and therefore they are not valuable.⁵⁷ Accordingly, interests to a person would be determined by things in which he has capacity to participate. Sometimes, however, persons find difficulty in participating in things such as games. This does not mean, however, that they have no value. In fact, the value is in taking part, but facilities must be made accessible, as will be discussed in Chapter 5.

⁵⁴ Raz J, *The Morality of Freedom*, (Oxford, UK: Clarendon Press, 1986), p. 179.

⁵⁵ *Ibid.*, p. 166.

⁵⁶ Gardner J & Macklem T, 'Value, Interests, and Well-Being', (2006), 18(4), *Utilitas Journal*, p. 352.

⁵⁷ *Ibid.*, p. 356.

3. 2. 2. Needs

Welfare is always associated with the satisfaction of needs, desire and interests. The right to what a person needs, however, is not a right to what he desires. Desire is a variable feature of people's lives.⁵⁸ Need comes before all else. A person with unmet needs will live in hardship and may suffer harm. In terms of interest, Wiggins states that a person's unmet need results in the denial of a vital interest.⁵⁹ 'Need' is always present in the concept of the welfare state, which assures for its citizens their citizenship rights. The view of welfare-rights proceeds from the notion of a claim to the goods of life, and extends welfare to cover all needs and capacities that are essential for human functioning.⁶⁰ To identify needs covered by the concept of welfare, the welfare state attempts to select those wants whose satisfaction prevents harm or serves vital interests, and to give these priority.⁶¹ The basis for dealing with 'needs' in this respect is the 'Capabilities Approach' mentioned above. This focuses not on whether people's desires are satisfied, but on what people are actually able to do and be, as well as on their essential requirements.⁶²

Some socialists have indicated that a reasonable and morally sound theory of human need must draw upon both liberal and socialist thought. They argue that all needs can ultimately be reduced into two basic ones: '*Since physical survival and personal autonomy are the preconditions for any individual actions in any culture, they constitute the most basic human needs: those which must be satisfied to some degree before actors can effectively participate in their form of life to achieve any other valued goals*'.⁶³ The idea of 'need' is central to human welfare, and the concept of need entails social control by governments. The view of 'need' no longer overlaps, however, with the concept of poverty as it used to do. Reflecting social change, during the twentieth century the concept of poverty became relative, while the concept of need became more flexible and diverse. 'Need' has many social and cultural dimensions which reflect broad human experiences.⁶⁴

⁵⁸ Freedman M, *Rights*, (London, UK: Open University Press, 1991), p. 49.

⁵⁹ Wiggins D, 'Needs, Values, Truth': Essays in the *Philosophy of Value*, 3rd Edition, (Oxford, UK: Oxford University Press, 1998), p. 46.

⁶⁰ Freedman M, *Rights*, (London, UK: Open University Press, 1991), p. 52.

⁶¹ Barry B, *Political Argument*, (Berkeley, CA: University of California Press, 1990), p. 1xviii.

⁶² See Nussbaum M, 'The Supreme Court 2006 Team, Forward: Constitutions and Capabilities: "Perception" Against Lofty Formalism', (2007) 121(4), *Harvard Law Review*, p. 25.

⁶³ Doyal L & Gough I, *A Theory of Human Needs*, (London, UK: Basingstoke Macmillan, 1991), p. 54.

⁶⁴ Squires P, *Anti-Social Policy: Welfare, Ideology and the Disciplinary State*, (London, UK: Harvester Wheatsheaf, 1990), p. 111.

The concept of needs is essential to welfare provision of reasonable standards of living for the state's population. Need also plays a significant role in the provision of welfare services for disabled persons. The needs of disabled persons, however, are often not met unless in the form of material assistance and reasonable adjustment. A common version of welfare relates it to material assistance for individual need, but is concerned with a fair redistribution of the resources available in a society regarding public assistance schemes.⁶⁵ Therefore, welfare rights should be claimed for material assistance that provides disabled persons with resources equally with non-disabled persons, as their 'positive rights'. Disabled persons are called 'people with special needs' and those needs require special treatment. The basis of these required measures is the equal dignity of disabled persons which insists on special measures to ensure that disabled persons have full and equal access to fundamental rights. This is why the 'Capabilities Approach' is preferred to deal with special disability needs.⁶⁶

There is a wide range of right-based claims that should be designated as special needs in order to enable disabled persons to exercise their rights and to live autonomously (where possible). For example, needs of access to all general facilities in either public or private sectors including access to housing, transport and shops by provision of ramps, etc. Also, claim-needs for equipment necessary in order to live a fulfilling life, such as wheelchairs, medical equipment and reparative devices.

Communication plays an important role in the operation of social structure, in which mutual dependence is the norm and in which human personality, needs and conduct are shaped through social instruction. Generally, support from others in one's society is itself a fundamental human need, the more so for a disabled person in order to give him confidence in himself.⁶⁷ Disabled persons cannot function without the cooperation of others. To ensure a disabled person's right to social participation, it is important to consider it as a special need which should be respected: his interest grounds his right to social participation and integration.

⁶⁵ Freedman M, *Rights*, (London, UK: Open University Press, 1991), pp. 51-54.

⁶⁶ See Nussbaum M, 'The Supreme Court 2006 Team, Forward: Constitutions and Capabilities: "Perception" Against Lofty Formalism', (2007) 121(4), *Harvard Law Review*, p. 74.

⁶⁷ In this regard see Freedman M, *Rights*, (London, UK: Open University Press, 1991), p. 58.

Affirmative actions are the practices which result from an evenhanded response to disabled persons' needs, such as making ramps, providing medical assistance and any other measures that ought to be provided because the disabled need them. It might be argued that although the case is very convincing, meeting these needs would cost too much. There is also the problem of who would undertake the responsibility, especially in poor countries. The special needs of disabled persons, however, are sufficient reason to require respect for their rights. Therefore, governments have the duty to provide all forms of assistance needed by the disabled. These special needs involve fair redistribution of the resources available in society. In this regard, Nussbaum stated that *'for these reasons, the CA ascribes an important role to government in human life: government is charged with securing for citizens a comprehensive set of necessary conditions for a life worthy of human dignity'*.⁶⁸

It could be argued that one can take certain measures without holding that they are rights which must be protected. Examples are facilitating employment procedures for disabled persons, or giving them precedence in using public facilities which serve their interest. But some utilitarian theories deny that there is a useful distinction between moral reasons for action and duties, and some moral views confine duties to matters affecting human needs, or human dignity.⁶⁹ In fact, fully sufficient reasons exist to claim these measures as rights for disabled persons, since the fundamental rights of disability are not fulfilled without them. Further, they should be claimed as grounds for holding others to be under duty or obligation. In cases of transplanting disability laws from nation to nation, however, the economic position of the state must be taken into consideration.

Another objection could be that the obligation to provide for the needs of disabled persons may limit and influence the liberty of others. The need principle states, however, that we are justified in interfering with individual liberty to provide for people's needs. The special needs of disabled persons provide a reason to limit individual liberty or to constrain people to respond. Although libertarians reject the need principle, one is accustomed to believe that it justifies taxation of people's resources so as to provide for

⁶⁸ Nussbaum M. 'The Supreme Court 2006 Team, Forward: Constitutions and Capabilities: "Perception" Against Lofty Formalism', (2007) 121(4), *Harvard Law Review*, p. 11.

⁶⁹ Raz J, *The Morality of Freedom*, (Oxford, UK: Clarendon Press, 1986), p.182.

others' needs for medical care, food education and so on, as in welfare.⁷⁰ Furthermore the disabled person's need justifies the imposition upon private sectors also to provide goods and services.

In short, the need principle is one of the grounds justifying a specific right for disabled persons to be protected. Disabled persons cannot enjoy the welfare owed to human beings until those needs be met which serve their fundamental interests.

3. 2. 3. Fundamental Interests

Welfare is also associated with a person's fundamental interests. The outcome of satisfying needs is to realise a person's interests. Therefore interests are another main ground for establishing the rights of disabled persons, and should be seen as a basic source of these rights. The interest on which a right is based is the reason for holding that some people have certain duties. Hence rights are the ground of these duties. Interests are part of the justification of the rights, which are part justification of the duties.⁷¹ But it must also be asked when the interest is justified. Generally an interest is a justifiable ground of a right if it was sufficient, whenever '*there is a sound argument of which the conclusion is that some right exists and among its non-redundant premises is a statement of some interest of the right-holder, the other premises supplying grounds for attributing to it the required importance, or for holding it to be relevant to a particular person or class of person so that they rather than others are obligated to the right-holder*'.⁷²

Thus the Western perspective insists on needs and fundamental interests as generally reasonable grounds to establish rights. Specifically, Western thought demonstrates how needs and interests represent reasonable grounds to establish specific rights for disabled persons. Turning to Islam, one might ask how interests and needs may be presented as grounds to establish these rights, since Islamic thought does not specify the existence of grounds to establish specific rights for disadvantaged groups.

⁷⁰ In this regard, see Wertheimer A, 'Liberty, Coercion, and the Limits of the State', in *The Blackwell Guide to Social and Political Philosophy*, (ed) by Robert L. Simon, (Massachusetts, USA: Blackwell Publishers Ltd, 2002), p. 57.

⁷¹ Raz J, *The Morality of Freedom*, (Oxford, UK: Clarendon Press, 1986), p. 181.

⁷² *Ibid.*, p. 182.

Chapter 1 outlines how the notion of the interest of mankind upon which the Islamic Sharia has been built develops from five necessities.⁷³ As Ibin Al-Ghaim said: ‘*Wherever is interest, there is the charter of Allah*’.⁷⁴ Hence the interest of people in Islam is the driving force for all rights which implement the welfare of people.

Al-Maqased (objectives of Islamic Sharia, that is, protection of people’s interests) has been divided into three norms: necessities, needs, and embellishments, as mentioned in Chapter 1. ‘Necessities’ means the five basics (protection of religion, soul, honour, mind and property) which are indispensable for living. Needs, sometimes called ‘parity of necessary’ indicate anything the people need to promote their life and eliminate the harm to them which undermines their interests. ‘Embellishments’ means adopting good behaviour and customs in which noble character and morality combine.⁷⁵

It is seen that promotion and protection of the person’s interest are the main goal of Islamic Sharia. As Ibin Taimiah said, Sharia was formed to achieve interest and exclude and reduce corruption.⁷⁶ The interest of a person consists in giving him benefit or removing harm. The interest of a disabled person is zero, however, unless his needs according to his special circumstances be satisfied and respected, in accordance with Islam’s aim to eliminate harm.

The concept of special needs for disabled persons being derivative rights must be respected in Islam, in order to put the disabled on an equal footing with the non-disabled. Islamic thought is likely to treat issues like these upon the Islamic principle that ‘*whatever leads to a duty is itself a duty*’.⁷⁷ That is to say that the tools are both means and ends. Although the means are vehicles to the ends, the means themselves become ends in the case that no ends can be reached without these particular means. Therefore, considering the fact that the disabled person has interests that are grounds to establish the same rights to education, employment and social participation as non-disabled people, any actions

⁷³ See Chapter 1, pp. 33-6.

⁷⁴ Ibin Al-Ghaim Al-Joziah M, *I’Elam Al-Mo’geen An Rab Al-Alameen*, Vol. 4, (Beirut, Lebanon: Dar Al-Jeel, 1979), p. 373.

⁷⁵ For these divisions, see Al-Shatibi E, *Al-Moafagat*, Vol. 2, (Beirut, Lebanon: Dar Alkotub Al-Elmiah, 1978), p. 135.

⁷⁶ Ibin Taimieh A, *Majmoua Fatawa Ibin Taimiah*. Combined by Al- Ghasem. A, Vol. 20, (Riyadh, Saudi Arabia: Edarat Al-Bohouth Al-Elmiah, 1982). p.48.

⁷⁷ Qoutob Sano M, *Concordance of Jurisprudence Fundamental Terminology*, (Pittsburgh, USA: Dar A-Lfikir, 2000). p. 474.

necessary to achieve these rights become an end. Hence they are already rights which must be protected according to Islamic traditions. Thus both needs and interests can be demonstrated in Islam as one of the main grounds to establish rights of disabled persons.

Finally, one might object that certain interests of people are not protected by rights. But, specifically, respect for a person consists in respecting his or her interest in being free to act and to live independently. Here one can note why Raz relates interests to well-being, autonomy, etc. The rights of a disabled person protect his interest in freedom, that is to say the capacity of a disabled person to be free, in order to live by himself without depending on others. Thus respect for disabled persons in this regard consists in respecting his interests to enjoy personal autonomy.⁷⁸

3. 2. 4. Autonomy

Autonomy is simply the right to self-government or independence. Individual autonomy is a basic moral and political value.⁷⁹ Moral weight is attached to an individual's ability to manage himself, independent of his role in social structures and political institutions. In other words, every person has an authority over himself that is grounded, not in his political or social role, nor in any law or custom, but in the simple fact that he alone can initiate his actions and manage his life.

Freedom regards the promotion and protection of personal autonomy as its basis. Autonomy rests on the capacity for the right of freedom to make one's own choices. A person is autonomous if he is master of his own life. Therefore, autonomy is often cited as the ground for treating all individuals equally from a moral point of view.⁸⁰

According to Hegel, he is treating autonomy as the self-originating capacity of the will that makes it independent from everything else. In this regard he follows the line which Kant had stressed. Moreover, he identifies autonomy both negatively and positively. Autonomy in the negative sense has to do with freedom from external influences, for

⁷⁸ Qoutob Sano M, *Concordance of Jurisprudence Fundamental Terminology*, (Pittsburgh, USA: Dar A-Lfikir, 2000), p. 190.

⁷⁹ Sec Raz J, *The Morality of Freedom*, (Oxford, UK: Clarendon Press, 1986), p. 96.

⁸⁰ Benn S, *A Theory of Freedom*, (New York, NY: Cambridge University Press, 1988), p. 156.

example, those that exist in actual communities. Independence, self-determination, and spontaneity each give expression to autonomy in the positive sense.⁸¹

The disabled person's interest is promoted by his having an autonomous life. It is in his interest not to be subjected to the prejudice of others who might prevent him from enjoying his rights and let him remain an inferior, second-class person. Often disadvantaged groups such as the disabled are less substantially free people, who can choose to act in ways expressing human dignity, than like prisoners, unable to select the entitlements or activities which are essential to a life worthy of human dignity.⁸² This can occur when governments make some people free to select or enjoy advantages and opportunities, whereas disadvantaged people including disabled persons are disempowered because they are denied autonomy.

The value of autonomy is also tied to the value of self-integration. When people's intentions are not under their own control, they suffer from self-alienation.⁸³ Therefore, enabling disabled persons to live autonomously plays a significant role in the process of integrating them into their societies. Thus personal autonomy is an important element in a disabled person's interests. Proper respect for him would entail giving rightful consideration to his special needs. J.L. Mackie declares that the fundamental right is a right to liberty: *'If we assume that, from the point of view of the morality we are constructing, what matters in human life is activity, but diverse activities determined by successive choices, we shall take as central the rights of persons progressively to choose how they live'*.⁸⁴ His view of morality appears to be rights-based because he states that only a rights-based morality should compose the fundamental value of autonomy.

A capacity for autonomy means that autonomy is an absolute value in a disabled person's life, because the rights of autonomy derive from the rights of collective goods. So the disabled person needs to be given the chance to live independently, on the basis of having obtained his fundamental rights. For example, his right of employment which guarantees for him a self-contained income, and access to the use of public facilities by

⁸¹ Williams R, *Hegel's Ethics of Recognition*. (Berkeley, CA: University of California Press, 1997), p.82.

⁸² Nussbaum M. 'The Supreme Court 2006 Team, Forward: Constitutions and Capabilities: "Perception" Against Lofty Formalism', (2007) 121(4), *Harvard Law Review*, p. 6.

⁸³ See Personal Autonomy, <http://plato.stanford.edu/entries>. and Bix B.H. *A Dictionary of Legal Theory*, 1st Edition, (New York, NY: Oxford University Press, 2004), p. 15.

⁸⁴ Mackie J L. 'Can There be a Right-Based Moral Theory', (1978), 3 *Midwest Studies in Philosophy*, p.355.

eliminating the many obstacles. Thus, autonomy guarantees wide-ranging aspects of social practices and independent living for disabled persons, which should be viewed as rights not as social grants. Accordingly, autonomy is a valid and fundamental principle providing further grounds for establishing the rights of disabled persons.

The Western view of autonomy having been affirmed as one ground for establishing the rights of disabled persons, it is interesting to consider how the principle of autonomy in Islam may be employed to establish the same rights.

With regard to natural rights in Islam, the relevant source is the words of Omar Bin Al-Khatab (the second follower of Prophet Mohammad): ‘*When have you enslaved the people while they are born free?*’⁸⁵ It is understood from this statement that every man is free by nature.

Pursuant to the dignity inherent in humanity, Islam ensures that liberty is a primary principle and a necessary requirement in human life. The human being is not a person of respect unless he fully engages his capability to lead an independent life. Therefore, Islam affirms autonomy for a person to choose the way that he likes to live, as long as it fulfils his interests and does not violate the general principles of Islam.⁸⁶ Thus, the principle of autonomy in Islam is capable of being a valid ground for establishing the right of disabled persons, to promote a life of greater independence.

Nevertheless, respecting the disabled person’s interests including giving him autonomy entails recognition of the special needs of the disabled as the main import of his interest. This recognition of his interests and special needs is confirmed by the principle of equal consideration and respect.

3. 2. 5. Equal Respect and Self-Esteem

The foundation of rights proceeds from recognition based on morality. These rights must be distributed equally through the principle of justice which is a moral ideal that the law

⁸⁵ Al-Hendi T, *Kanz Al-Oummal*, vol. 12, (Beirut, Lebanon: Dar Al-Elm Li Al-malaeen, 1986), p. 294.

⁸⁶ Mnn’a H, *Hqouq Al-Insan Fi Al-Feker Al-Arabi*, (Beirut, Lebanon: Markaz Derasat Al-Wehddah Al-Arabiah, 2002), p. 320.

seeks to uphold.⁸⁷ Historically, justice has been understood in its distributive dimension as ‘equal’, as expressed by Aristotle when he created the notion of distributive justice: ‘Justice is equality, as all men believe it to be, quite apart from any argument’.⁸⁸

Therefore, the rights of all citizens must be treated by their governments with equal concern and respect without any distinction, and it is the governments’ corresponding duty to offer such treatment.⁸⁹ In this regard, equal treatment does not necessarily mean equality of outcome because if the people treated equally are not equal in certain merits or qualities, outcomes must vary. In that case, treating them differently is what can be counted as equality, as will be discussed in the chapter on discrimination.

According to Western Utilitarian principles, all are morally entitled to have their interests respected. Bentham said that ‘On the first account of utilitarianism, then the reason that we should give equal weight to each person’s preference is that it treats people as equals, with equal concern and respect’.⁹⁰ Namely, under many theories each person’s interests should be given equal respect. From the moral view, each person’s life matters equally and thus everyone’s interests should be given equal respect.⁹¹

One might object that the idea of treating people with equal respect lacks precision. Details need to be provided if it is to offer a definite standard of rightness. In fact, the Utilitarian idea is to give equal weight to each person’s preferences, regardless of the content of interests or the material position of the person.⁹² Bentham indicated that we count everyone for one, no one for more than one.⁹³ Indeed the reason that we should give equal weight to each person’s interests is that this is the way to treat people as equals, with equal concern and respect.

⁸⁷ *Oxford Dictionary of Law*, edited by: Elizabeth A. Marten, 6th Edition (Oxford, UK: Oxford University Press, 2006), p. 301.

⁸⁸ Aristotle, *Nicomachean Ethics*, trans. D. Ross (Oxford, UK: Oxford University Press, revised edition, 1980). Book V. 1131 a 13.

⁸⁹ In this regard, see Dworkin, R, *Taking Rights Seriously*, (London, UK: Gerald Duckworth, 1997), p. 67.

⁹⁰ Bentham J, *An Introduction to the Principles of Morals and Legislation*, ed. J. H. Burns and H. L. A. Hart. 1st Edition, (London, UK: Athlone Press, 1970), p. 66.

⁹¹ Kymlicka W, *Contemporary Political Philosophy, An introduction*, 2nd Edition. (New York, NY: Oxford University Press, 2002). p. 53.

⁹² *Ibid.*

⁹³ Bentham J, *An Introduction to the Principles of Morals and Legislation*, ed. J. H. Burns and H. L. A. Hart. 1st Edition, (London, UK: Athlone Press, 1970), p. 157.

The interests of a person depend on his real needs and circumstances, so the most important object in the disabled person's life is to be granted respect. In other words, the special physical and mental situation of disabled persons must be considered and treated with equal respect and weight in terms of their interests. One may ask how the special position of disabled persons can be considered under the principle of equal respect in distribution of rights.

It is important firstly to mention the basis for this regard insisted on by the 'Capabilities Approach'. It declares that the primary requirement is to ask what the adequate requirement of basic minimum justice is. It has been argued that since people are initially equal in dignity, then the entitlements should be secured to people on a basis of full equality, because this equality is congruous with their equal dignity as citizens. Therefore, the rights to healthcare, education, employment and other entitlements have not been adequately distributed unless they have been equally distributed.⁹⁴

In this regard, Raz has mentioned that principles which confer rights are principles of entitlement.⁹⁵ One of the strict egalitarian principles in Western thought is that 'all are entitled to equal welfare'. This proposition is best interpreted as the outcome of two principles combined, namely, all are entitled to the maximum welfare there can be. If some people are better off than others then those who are less well off are entitled to the extra benefits necessary to bring them to the level of welfare enjoyed by the better-off.⁹⁶ The combination of these two principles aims to ensure that all members of society enjoy their rights equally, giving people equal respect through acknowledgement of differences between them. This form of equality has an important bearing on the rights of disabled persons whose special needs must be satisfied in order to be on an equal footing with other citizens. This principle of equal respect strongly promotes the 'positive' rights-claim to make all aspects of welfare accessible. Hence, respect for differences and acceptance of persons with disabilities as a part of human diversity and humanity is a moral and religious duty.

⁹⁴ Nussbaum M, 'The Supreme Court 2006 Team, Forward: Constitutions and Capabilities: "Perception" Against Lofty Formalism', (2007) 121(4), *Harvard Law Review*, p. 23.

⁹⁵ Raz J, *The Morality of Freedom*, (Oxford, UK: Clarendon Press, 1986), p. 218.

⁹⁶ *Ibid.*, p. 230.

To compare, one can seek meanings of 'equal treatment' in Islamic sources in order to form an Islamic basis for the building of disabled persons' rights in a Saudi context. Islam constitutes its view of people on the principle of 'brotherhood'. Allah said: '*The believers are nothing else than brothers*'.⁹⁷ This means all people are equal and must be given the same consideration without distinction. Prophet Mohammad said: '*People are equal like the teeth of a comb*'.⁹⁸ In this address he stresses respect for the interests of all people on an equal level. In other speeches he associates belief in Allah with treating people with equal weight: '*You cannot be a believer in Allah unless you love your brother in faith as you love yourself*'.⁹⁹ These texts are clear evidence that Islam insists on equal respect and weight for people's interests.

Islamic thought, however, has not clarified how the actual needs of disabled persons must be treated. Neither has Islam affirmed the principle of equal respect as the basis for the specific fundamental rights of the disabled, as in Western thought. Instead, according to Islamic traditions and morality, the disabled are treated through charity. It would be reasonable, however, to adopt the same Western principles in Islam as basis and norms on which to establish the principle of rights for disabled persons, with the same implications of justice. Since the Western discourse of rights and justice has relevance in terms of distribution of rights and justice in Islam, as has been mentioned above, it will be discussed more in Chapters 4 and 5. In this regard, however, one should note, as Rawls argues, that the just state: (i) prioritises the rights over the good; and that (ii) only a political conception of justice can adequately accommodate the interests of groups where the fact of diversity is a feature of practical life.¹⁰⁰

To be a person is to have a value that is unlike that of any other person. Since all persons should attribute this value to themselves, they must therefore acknowledge that every other person has the same value. Human nature is common to all persons. To

⁹⁷ The *Qur'an*, Surah, 49: Al-Hujurat, Verse, No. 10.

⁹⁸ Al-Haithami N, *Majma Al-Zawaid Wa Mannba Al-Fawaed*, Vol. 1, (Beirut, Lebanon: Dar Al-Kitab Al-Arabi, 1982), p. 156.

⁹⁹ Al-Tirmithi A. *Saheeh Al-Tirmithi*, Hadith No. 1847, (Riyadh, Saudi Arabia: Edarat Al-Bohouth Al-Elmiah, 1982), p. 87.

¹⁰⁰ See Rawls J, *A Theory of Justice*, (Oxford, UK: Oxford University Press, 1999), pp. 68-131.

respect a person's value promotes his sense of self-esteem and self-respect.¹⁰¹ This has an effective impact on his life plans, as well as on his function and stature in society.

The concept of self-esteem has been variously represented. It can be represented as a ratio found by dividing one's successes in important areas of life by the failures in them.¹⁰² This definition appears inappropriate because it makes self-esteem rely merely on success, which is always indemonstrable since failure can occur at any moment. Some social theorists have defined self-esteem in terms of a stable sense of personal worth. But this definition involves problems of boundary-definition, making self-esteem indistinguishable from such things as narcissism.¹⁰³ Self-esteem is also defined as the experience of being competent to cope with the basic challenges of life and being worthy of happiness. This definition deals with self-esteem primarily in terms of competence or worth alone.¹⁰⁴

Rawls insists on the importance of self-esteem in a person's life when attempting to gather characteristics of self-esteem in his proposed definition of self-respect. He describes self-respect or 'self-esteem' as: *'having two aspects: (a) it includes a person's sense of his own value, his secure conviction that his conception of his good, his plan of life, is worth carrying out. (b) self-esteem implies a confidence in one's ability, so far as it is within one's power, to fulfill one's intentions'*.¹⁰⁵ Hence, self-esteem sounds like a human need. It makes an essential contribution to the life process, and is indispensable to normal self-development. Thus it has an intrinsic value for survival. Also, self-esteem is counted as an inevitable result of an individual's choice. If someone feels that his life plans have been treated with little value, then he cannot pursue them with happiness and pleasure or see the fruits of his achievement. Equally, he cannot continue seeking to develop his plans of life when plagued by failure. For these reasons Rawls counts self-esteem as a fundamental primary good as well as an essential human need.¹⁰⁶

¹⁰¹ Self-respect or self-esteem. The two concepts are very similar, but the differences between them are crucial. To esteem anything is to evaluate it positively, but evaluation might result in trouble because while one sometimes wins, another also sometimes loses. In contrast, to respect something is to accept it. See Ellen J, *Self-Esteem vs. Self-respect*, (Sussex, UK: Sussex Publisher LLC, 2006). p. 66.

¹⁰² James W, *The Principles of Psychology*. (Cambridge, MA: Harvard University Press, 1983) p. 56.

¹⁰³ Murk C, *Self-Esteem research, theory, and practice*, 3rd Edition, (New York, NY: Springer Press, 2006), p. 137.

¹⁰⁴ *Ibid.*, p. 138.

¹⁰⁵ Rawls J, *A Theory of Justice*. (Oxford, UK: Oxford University Press, 1999), p. 386.

¹⁰⁶ *Ibid.*, p. 387.

There are two kinds of 'esteem needs', the need for respect from others and the need for self-respect. Self-esteem as mentioned above entails competence, confidence, achievement, independence and freedom. Respect from others entails recognition, acceptance and appreciation. Without the fulfilment of these needs, an individual feels discouraged, weak and inferior, with profound implications for his psyche. Clearly this is especially relevant for disabled persons.

Self-esteem in a disabled person's life is not contingent on success, because there are always failures to contend with. Neither is it a result of comparing one disabled person with another in terms of body or shape, because there is certainly someone better. Self-esteem, however, is a given. With self-esteem a disabled person confirms himself because of who he is as a human and not because of what he can do or cannot do.

Thus, self-esteem is a fundamental interest of the disabled person which must be secured. As such it becomes another justifiable ground for establishing disability rights. Here self-esteem would be affirmed and supported through the principle of justice. Rawls declared that the fact that justice as fairness gives more support to self-esteem than other principles is a strong reason for them to adopt it.¹⁰⁷

All four principles described above, presenting grounds for establishing specific rights for disabled persons, are strongly supported by principles of justice and liberty. In this regard the Western philosophical concept of rights has passed through several stages to identify relevant principles. According to Kymlicka, in the 1970s the central concepts were justice and rights and in the 1980s the keywords were community and membership. After that, there was tropism towards the idea of citizenship which is '*intimately linked to ideas of individual rights and entitlements on the one hand, and to communitarian ideas of membership in and attachment to a particular community on the other*'.¹⁰⁸ A theory of citizenship is now widely seen as a necessary supplement to theories of institutional justice. Citizenship is discussed below in terms of those features of the theory which relate to disability and its potential to establish rights of disabled persons.

¹⁰⁷ Rawls J, *A Theory of Justice*, (Oxford, UK: Oxford University Press, 1999), p. 386.

¹⁰⁸ Kymlicka W, *Contemporary Political Philosophy, An introduction*, 2nd Edition, (New York, NY: Oxford University Press, 2002), p. 284.

3. 2. 6. Citizenship

The idea of citizenship is generally a device for talking about the relationship between an individual and the state, in which the individual owes allegiance to the state and in turn is entitled to its protection. The concept of citizenship has been described by philosophers over the last centuries simply as the integration of citizens into their societies. Historically, the term citizenship has been viewed as having various connotations. For instance, Marshall indicated that the history of citizenship can be seen as the achievement of political, social and civil rights.¹⁰⁹ In recent years, however, the idea of citizenship has been used as a criterion to measure the extent of some classes of people who are not socially integrated.¹¹⁰ Another recent view defines citizenship by reference to needs. It is informed by an appreciation of social 'difference' between people and how certain groups have been marginalised.¹¹¹

Thus a new concept of citizenship, referring to needs and the integration of all people equally under the umbrella of state, has emerged. At the same time concepts of disability and disabled have broadened, from designating merely personal tragedy requiring therapy to depicting collective oppression requiring political action. It is therefore important to consider the relevance to a disabled person of citizenship as a major source of rights. Citizenship not only entails some duties and responsibilities, but also confers a bundle of political, social and civil rights. These characterise the shape of the legal rights.

In general, full political rights include the right to vote and to hold public office, though some disabled persons are denied the opportunity to exercise their political choice either because they do not appear on the electoral register or because of problems of access.¹¹² Disabled persons are also denied opportunities to hold leading public posts, because of non-confidence in their own ability or disrespect for their rights, as well as the various practical difficulties that disabled persons face in participating in political life.

¹⁰⁹ Marshall T. H. *Citizenship and Social Class*. (Cambridge, UK: Cambridge University Press, 1952), p. 6.

¹¹⁰ Oliver M, *Understanding Disability: from Theory to Practice*, (New York, NY: Palgrave Publishers, 1996), p. 45.

¹¹¹ Taylor G & Bishop J, *Being Deaf: The Experience of Deafness*, (London, UK: Pinter Publishers, 1991), p. 5.

¹¹² Oliver M, *Understanding Disability: from Theory to Practice*, (New York, NY: Palgrave Publishers, 1996), p. 46.

The social rights of citizenship enable a citizen to lead a social life and to enjoy social facilities. Marshall declared that '*By the social element I mean the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilized being, according to the standard prevailing in the society*'.¹¹³ That is, all citizens of a state have the right not to be poor or live in poverty, to use social facilities as everyone uses them, and to have minimum standards of living. It cannot be argued, however, that disabled people currently share these rights of social citizenship.¹¹⁴ Indeed the majority of disabled persons especially in developing countries - according to international polls - live in conditions of need. They are underprivileged and do not exercise minimal social rights in respect of either basic needs or use of social facilities.¹¹⁵

With regard to civil rights, generally these are the protections and privileges of personal liberty given to all citizens by law. Civil rights are the rights which were derived from the convention of the social contract. They are therefore different from 'human rights' or 'natural rights'. Civil rights are rights that are granted by nations to those within their territorial boundaries, while natural or human rights are rights that many scholars claim ought to belong to all people. John Locke argued that the natural rights of life, liberty and property should be converted into civil rights and protected by the sovereign state as an aspect of the social contract. Marshall declares that civil rights go beyond a narrow conception of legal rights and include not only property rights and the right of contract, but rights to free speech and assembly.¹¹⁶

Regarding basic civil rights of disabled persons, by nature this group of persons is also entitled to these, but is frequently deprived of them. For example, disabled persons may encounter difficulties in exercising their rights to buy or rent a house. Concerning the narrow area of legal rights, disabled persons have been disadvantaged by, for example, not being given equal access to job opportunities.

¹¹³ Marshall T. H, *Citizenship and Social Class*, (Cambridge, UK: Cambridge University Press, 1952) p. 11.

¹¹⁴ Oliver M, *Understanding Disability, from Theory to Practice*, (New York, NY: Palgrave Publishers, 1996), p. 47.

¹¹⁵ See appendices.

¹¹⁶ Marshall T H, *Citizenship and Social Class*, (Cambridge, UK: Cambridge University Press, 1952), p.13.

Notwithstanding that disabled persons are not accorded the full range of citizenship rights, however, they are not always exempt from the duties and obligations of citizenship. These usually include allegiance, payment of taxes, and obedience to the criminal law and such civil laws as the laws of negligence and contract.¹¹⁷ The formulation of citizenship including its rights and obligations appears to subject all individuals to the general legal systems of states. Certain human values and considerations, however, are common to all nations. For example, in all countries, owing to their special situation disabled persons cannot be forced to perform military service for their states.

All in all, all the benefits and various civilization rights must be shared by disabled people as citizens under the ideal of 'equality of opportunity'. It insists that all are entitled to equal opportunities, and if some have more opportunities, then disabled persons who are ignored are entitled to alternative opportunities to bring them up to the level of those who have more.¹¹⁸ The principle of equal distribution can also be applied to the case, as it indicates that if all people are, for example, entitled to opportunities for employment, disabled persons are entitled to their share of employment opportunities. Inequalities of primary goods, however, are assumed to be justified if there was fair competition for these goods. These issues and exploration of distribution of rights will be discussed in Chapter 5 on distributive justice.

In conclusion, both Western and Islamic perspectives on rights turn around interests and needs of people as grounds to be established as rights under the principles of liberty, equality and justice. Similarly the nature of disabled persons' special needs, their real and fundamental interests, their autonomy and self-esteem, and their status regarding citizenship are humanly relevant issues both in the West and in Islam. Since the two cultures agree on the common human principles according to which disability issues should be treated, one may conclude that transplantation between them does not pose insuperable problems.

The above rational premises would appear to be reasonable and justifiable grounds to establish the rights of disabled persons. On this basis one might propose a special

¹¹⁷ See Oliver M, *Understanding Disability, from Theory to Practice*, (New York, NY: Palgrave Publishers, 1996), p. 49.

¹¹⁸ *Ibid.*, p. 231.

definition for rights of disabled persons: *‘Disabled rights are conceptual devices that assign priority to certain special needs, interests and precedence in respect of human and social attributes regarded as essential to the adequate functioning of human beings, in order to bring disabled persons to the level of normal persons. They are intended to serve as a protective capsule for those attributes and appeal for deliberate action to ensure such protection’*.

The rights of disabled persons must be thought of as ‘capabilities’. They should be adequate and free of obstacles to their access. Equality of access to these rights, by means of material assistance, must be counted as part of the rights themselves. This proposed definition contains several features which are conceived as criteria for the rights of disabled persons. Firstly, they are a means to enable disabled persons to recapture their fundamental rights, which depict their interest that must be respected. Secondly, they rest on principles of equality and distributive justice in human and social life, implying morality and duty. Thirdly, they appeal for deliberate action to protect disabled rights. This action entails legislation such as anti-discrimination laws and enforcement mechanisms. It also entails bringing these rights under the regulation of the court system, because they must be viewed as rights rather than as charity. In addition, the deliberate actions might include deliberate non-action such as self-restraint, or forbearance as an invisible form of action, as well as making efforts to disseminate legal and cultural awareness of disabled rights in society.¹¹⁹

As the rights of disabled persons according to this proposal entail equality and non-discrimination, so the investigation of the concept of discrimination, and the argument for its prohibition in the field of disabled rights, are essential aspects of this thesis. This forms the topic of the next chapter.

¹¹⁹ Freedman M, *Rights*, (London, UK: Open University Press, 1991), p. 7.

DISCRIMINATION AND DISABILITY

Introduction

Principles of egalitarianism direct that social equality should prevail between individuals. Citizens are equal legally and politically and should be treated equally before the law. These principles therefore imply non-discrimination.

Discrimination may occur where human beings differ because of their physical, cultural, social or other status. Discrimination in its pejorative sense is more than differentiation. It is action based on prejudice, including exclusion and subordination of groups and individuals for irrelevant reasons, resulting in unequal treatment. Not every treatment involving differentiation, however, falls into this category of discrimination. Acts of discrimination must be assessed in relation to their effects, which can be either negative or positive.

In the United Kingdom and the United States, legal responses to discrimination have resulted in broad and effective anti-discrimination legislation. This depends on two doctrines of legitimacy associated with discrimination, the harm principle and distributive justice.¹ On the other hand, the only detailed work of Islamic scholarship concerning discrimination is research regarding racial discrimination, largely influenced by studies of Western legal and social systems. There are no discrimination laws or bills. Some Arab constitutions contain reference to prohibition of discrimination, but without implementation.² In the Islamic context the only direct references for discussion of discrimination are therefore the main sources of Islam, the *Qur'an* and the *Sunnah*.

The main aim of this chapter is to define various categories of discrimination, and to identify its philosophical foundations, from both Western and Islamic perspectives. In order to identify the areas in which discrimination towards the disabled is practised, it is

¹ See Gardner J, 'Liberals and Unlawful Discrimination', (1989), 1, *Oxford Journal of Legal Studies*, pp. 3-4.

² See Mnn'a H, *Hqouq Al-Insan Fi Al-Feker Al-Arabi*, (Beirut, Lebanon: Markaz Derasat Al-Wehddah Al-Arabiah, 2002), p. 473.

important to examine discrimination in terms of its impacts on disabled persons and what might clearly constitute their rights.

To achieve these objectives, the chapter will be divided into two main sections. The first, theoretical, section deals with fundamental concepts of discrimination: specific meanings of grounds, types and forms of discrimination, including definitions of direct and indirect, negative and positive discrimination. This section will also investigate philosophical concepts of equality and non-discrimination and of recognition. The second section addresses practical aspects of disability and discrimination under three headings: discrimination based on disability, effects of disability discrimination, and justification for discrimination.

4. 1. Fundamental Concepts

The strength of any argument depends on the strength of the premises on which it is based. This section sets out the definitions and philosophical concepts which form the foundation of the discussion of discrimination. This will confirm the strength of the case and therefore the requirement to put its conclusions to practical application.

4. 1. 1. Discrimination: Definitions, Grounds, Types and Forms

Discrimination manifests its meanings and illustrations according to the exigencies of its use. It is important to identify on its used dimensions, but its initial definition would be presented firstly in both Western and Islamic perspectives.

(A) Definitions of discrimination

The English word ‘discrimination’ comes from the Latin *discriminate*, which means to distinguish between, to recognise a difference between things.³ The Law Dictionary defines ‘to discriminate’ as: ‘*To note differences between things and act accordingly. To discriminate against someone: to treat someone unequally*’.⁴ Black’s Dictionary defines discrimination as: ‘*1. The effect of a statute or established practice that confers privileges*

³ *Longman’s Dictionary of American English*, 2nd Edition, (New York, NY: Pearson Education, 1997), p. 215.

⁴ *Dictionary of Law*, 3rd Edition, (London, UK: Published by Peter Collin Publishing Ltd, 2001), p. 116.

on a certain class or that denies privileges to another class because of race, age, sex, nationality, religion, or handicap. 2. Differential treatment; esp. a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured'.⁵ These definitions interpret discrimination as unequal, less favourable treatment based on a relative concept of equality. They refer only to negative impacts of discrimination, where discrimination is prejudice resulting in unfair treatment of people. They do not address the potential of positive discrimination as a remedy for equalising undesirable differences. While negative discrimination results from responses to observed differences such as colour, sex, etc., the legal definition of discrimination, 'to note differences between things and act accordingly', equally permits the interpretation that positive action may result as a response to observed differences in persons' natural circumstances.

Legal definitions of discrimination refer to specified prohibited categories of disadvantageous treatment of an individual. As has been seen, discrimination is not merely a matter of distinction, as not all distinctions are prohibited. Individuals can be treated differently in a situation that is approved. A difference in treatment does not amount to discrimination unless it is unlawful, that is to say, when it is based on a criterion which the law prohibits in the making of legal distinctions.⁶ Discrimination is unlawful when it generates harm and loss of a person's interests as discussed below.

To summarise, differential treatment may be understood in two ways. One is disadvantageous treatment, but the other is positive action which notes the special position and needs of a person in order to bring him on to an equal footing with others. Therefore, differential treatment may in one instance be prohibited, and in another be a required target of equality.

To discuss the Islamic definition of discrimination, it is appropriate to explain the denotation of the Arabic word equivalent to 'discrimination', and to illustrate its use in Islamic jurisprudence. This is because in Islamic thought it is held that meanings and concepts reflect social and intellectual beliefs.

⁵ Garner, B A, *Black's Law Dictionary*, (New York, NY: West Group, 1997), p. 195.

⁶ MacColgan A, *Discrimination Law: text, cases and material*, 1st Edition, (Oxford-Portland, OR: Hart Publishing, 2000), p. 4. and see Fredman S, *Discrimination Law*, (Oxford, UK: Oxford University Press, 2002), p. 34.

The word *miza*, meaning to distinguish and isolate, is the root of the Arabic word *Al-ttamiez*, as explained by Ibin Mandhour.⁷ In addition, *Al-Muj'am Al-Waseet* defines the verb *miza* as meaning to distinguish. To discriminate any person means to give preference to a person or group over another person or group in equal matters.⁸ These Arabic linguistic interpretations of 'discrimination' are thus seen to turn on several meanings including distinguish, isolation, priority, and distinction.

In Islamic jurisprudence, there is only one reference to 'discrimination'. This occurs where the Islamic scholars use the word *Al-ttamiez* as the child becomes adult and mature.⁹

These meanings are similar to Western views in terms of discrimination as giving preference or unequal treatment. Islamic scholars, however, neglect to mention discrimination on the basis of nationality or, a fortiori, disability. In the *Qur'an* and *Sunnah*, however, there is specific mention of these. Concern is expressed about the principle of equality and non-discrimination in terms of both nationality and disability, as will be shown below.

Western legal definitions of discrimination appear to be exhaustive for all types of discrimination. Further, the definitions connote a duty to rectify the consequences of discrimination on the basis of class or category, regardless of individual merit.

(B) Grounds of Discrimination

Common grounds of discrimination against individuals or groups are personal criteria such as gender, nationality, race, colour, disability and age, as well as behavioural criteria such as religion, belief, or sexual orientation.¹⁰ These conditions may be argued to merit protection from discrimination. In fact, as long as the individual is subject to differential treatment which causes harm, or requires positive action to put him on an equal footing

⁷ Ibin Mandhour M, *Lesan Al-Arab*, Maddah 'miza', Vol. 12, (Beirut, Lebanon: Dar Al-Koutob Al-Elmiah, 1984), p. 122.

⁸ *Al-Mujam Al-Waseet*, Vol. 2. (Cairo, Egypt: Moujama Al-Lughah Al-Arabiah, 1988), p. 893.

⁹ *Al-Mousou'ah Al-Feghiah*, Vol. 14, 2nd Edition, (Kuwait: Wazart Al-Aougaf wa Al-Shaoun Al-Islamiah, 1988), p. 32.

¹⁰ See Fredman S, *Discrimination Law*. (Oxford, UK: Oxford University Press, 2002), p. 92.

with others, then his circumstances form a nominated ground of discrimination. Individuals facing such discrimination have been called 'disadvantaged groups'.

Beyond the separate causes of discrimination named above, a further concept is relevant, namely that of a 'characteristic'. The basis of discrimination may be not merely the ground of race, sex, etc., but also that of a 'characteristic' which generally appertains to persons of that sex, race or religion and is imputed not to an individual but to an entire group or class.¹¹ The idea that the 'characteristic' appertains generally to a particular group, however, gives rise to questions. For example, one can ask if it is correct to say that the ability to bear children is a characteristic appertaining generally to people of the female sex. The characteristic is unique to that sex, yet there are many women who for reasons of age or health are not able to bear children. Thus, the characteristic may be unique to the group and may apply to many women, but although prevalent in the group is not universal.¹² The theory of the 'characteristic' rules that a characteristic may appertain generally to a particular class if it appertains to a subset of that class. In another example, overweight people have the prevalent characteristic of slow movement, but not all must necessarily use the lift. Their prevalent characteristic should, however, be taken into consideration. The term 'disability', as has been observed in Chapter 2, should cover a broad concept encompassing many varieties of 'impairment' as well as the stigma consequent on these. Thus disability is imputed to a class rather than an individual, with a prevalent character which must be respected and computed as a ground of discrimination. This concept of 'characteristics' offers the potential to extend the operational scope of the concept of discrimination.

(C) Types of Discrimination

Discrimination laws in the United Kingdom and United States refer to different types of discrimination, direct and indirect. Direct discrimination is the result of differential treatment related to specifically prohibited grounds such as race, sex, etc. But disadvantage can also result, for example, from the inappropriate application of tests which have an

¹¹ See Fredman S, *Discrimination Law*, (Oxford, UK: Oxford University Press, 2002), p .98.

¹² *Ibid.*

unreasonable impact on a particular group of people. The resulting discrimination is called ‘indirect’ discrimination.¹³

(i) *Direct Discrimination*: Direct and illegal discrimination in the Western legal context occurs where similar cases are treated differently or where different cases are treated in the same way.¹⁴ It means treating someone ‘less favourably’ than another in the same circumstances, or in circumstances which are not materially different, for example, if somebody treats a disabled person ‘less favourably’ on grounds of his disability than he would treat a non-disabled person from the mainstream group. The fundamental criterion for direct discrimination or negative differential treatment is that whenever a person is treated ‘less favourably’ on prohibited grounds, then discrimination is in operation. To establish direct discrimination, however, certain elements must be proven. A comparison must show that the personal and other circumstances of the victim of discrimination and of the other person without the relevant characteristic are the same, or not materially different.

These descriptive factors of direct discrimination are close in a number of ways to the descriptive elements of a conventional harm-based tort.¹⁵ For example, in direct discrimination as in the traditional model of crimes and tort, an element of blame is required for there to be liability. Discrimination must be intentional and the victim of discrimination must be influenced by some decision process. The result of intention depends upon the wrongdoer’s decision and not upon his incentive.¹⁶ This is because motive is subject to a fault of will and may be justified. Furthermore, ‘direct discrimination’ approximates to the model of a harm-based tort by requiring a nexus of wrongdoing between the complainant and defendant. Accordingly, given the similarity of direct discrimination with crimes and torts, there has been an assumption of harm as the basis of this type of discrimination. Further details about these issues will be discussed in the section on the effects of discrimination below.

(ii) *Indirect Discrimination*: Indirect discrimination is discrimination by applying an abstract principle, so that the result is that, for example, people of different sexes are

¹³ See MacColgan A, *Discrimination Law: text, cases and material*. 1st Edition, (Oxford-Portland: Hart Publishing, 2000), p. 35, and Fredman, S, *Discrimination Law*, (Oxford, UK: Oxford University Press, 2002), p. 97.

¹⁴ *Dictionary of Law*, 3rd Edition, (London, UK: published by Peter Collin Publishing Ltd, 2001), p. 116.

¹⁵ Gardner J, ‘Liberals and Unlawful Discrimination’, (1989), 1, *Oxford Journal of Legal Studies*, p. 4.

¹⁶ *Ibid.*, p.4

treated differently.¹⁷ The concept of indirect discrimination in United Kingdom legislation has been imported from the American judicial theory of 'disparate impact'.¹⁸ It is noted that someone discriminates indirectly, if he applies some unjustifiable 'requirement or conditions', to a woman for example, with which she cannot comply, and with which additionally, statistically fewer women than men can comply.¹⁹ Indirect discrimination also occurs where somebody imposes irrelevant conditions of employment. For example, a capacity to walk well may be demanded despite the fact that the job requires not a strong walk but rather intellectual ability and minimum performance of job functions. In this case the condition is unreasonable and impossible in the case of a disabled person, therefore the employer discriminates indirectly against disabled persons.

In short, in order for the concept of indirect discrimination to be affirmed, four elements must be established. Firstly, the discriminator requires the victim of discrimination to comply with a requirement or condition. Secondly, a substantially higher proportion of persons of a different status comply or are able to comply. Thirdly, the requirement is not reasonable having regard to circumstances, and it is not capable of justification. Fourthly, the victim of discrimination does not, or is not able to, comply.

A further category qualifying for the status of indirect discrimination is failure to make a reasonable adjustment, such as making ramps, supplying reparative devices and so on. This description of indirect discrimination is applied in the United States as one of the core concepts of the Disability Discrimination Act, as will be discussed in Chapters 8 and 9.

Where aspects of 'indirect discrimination' exist, entailing isolation and dispossession of clear rights and certain opportunities for some groups of society, there also must exist absence of 'equal respect'. This means that there is deficiency in distribution of resources, and the matter needs the redress of redistributive justice. Thus Anglo-American jurisprudence has attempted to associate between indirect discrimination and the theory of distributive justice. This association was the felicitous achievement of Anglo-American

¹⁷ *Dictionary of Law*, 3rd Edition, (London, UK: published by Peter Collin Publishing Ltd, 2001), p. 116.

¹⁸ Gardner J, 'Liberals and Unlawful Discrimination', (1989), 1, *Oxford Journal of Legal Studies*, p. 4.

¹⁹ Sex Discrimination Act 1975, s 1 (1) (b).

jurisprudence, since it considered the law of indirect discrimination to be a cure for distributive injustice.²⁰

It might be argued that there is always a justification for indirectly discriminatory exercises. This means that there is not such effective harm, but a redistributive aim which must be balanced between rights of citizens according to their interests and needs in order to respond to concept of 'equal respect'. Notwithstanding that indirect discrimination is actionable as a tort, no damages are available where the discriminator can show that he had no intention to discriminate.²¹ This implies that without intention, the practice of indirect discrimination does not involve the nexus of wrongdoing that is involved in direct discrimination.²² Thus, the principle of redistributive justice is both the relative reference to indirect discrimination and its remedy, whereas the harm which relates to direct discrimination must be eliminated. '*Unlike the direct discriminator, it appears that the indirect discriminator is not marked off as a wrongdoer, but is implicated in society's collective responsibility for social injustices*'.²³ In other words, the responsibility for an occurrence of direct discrimination as 'harm' falls upon the individual, because each person is responsible for his actions, whereas the responsibility of an occurrence of indirect discrimination, which represents 'distributive injustice', falls upon the whole of society. Therefore it is the responsibility of society to redistribute resources. Distributive justice will be discussed in more detail in Chapter 5.

(D) Forms of Discrimination

From another point of view, as seen above, there are two forms of differential treatments, the negative and the positive faces of discrimination.

(i) Negative discrimination: As has been seen, differential treatment generates both negative and positive discrimination. Negative discrimination results from unequal treatment and neglect of a person, which causes them harm. Negative discrimination becomes unlawful whenever it generates harm, as in direct discrimination.²⁴ Negative

²⁰ In this regard see, Gardner J, 'Liberals and Unlawful Discrimination', (1989), 1, *Oxford Journal of Legal Studies*, p. 4

²¹ Sex Discrimination Act, 1975 s 66 (3).

²² Gardner J, 'Liberals and Unlawful Discrimination', (1989), 1, *Oxford Journal of Legal Studies*, p 5.

²³ *Ibid.*

²⁴ Gardner J, 'Liberals and Unlawful Discrimination', (1989), 1, *Oxford Journal of Legal Studies*, p. 4.

discrimination, however, may also result from indirect discrimination, as in cases of lack of 'equal respect' arising from distributive injustice. Furthermore, negative discrimination results from failure to make reasonable adjustment, because this leads to exclusion. Thus negative discrimination may be generated by both direct and indirect discriminatory practices either through affecting harm or imbalance in distributive justice. It takes such forms as exclusion, isolation and denial of opportunities.

United Kingdom anti-discrimination legislations impose a broad prohibition on negative discrimination. They detail a number of areas including employment, facilities, goods, services and housing.²⁵ Wording relevant to negative discrimination, such as 'unlawful' and failing to provide 'reasonable adjustment', is used, as will be elaborated in Chapters 8 and 9 on DDA and ADA.

(ii) *Positive Discrimination*: Positive discrimination may have a remedial aspect. It includes a number of methods designed to counteract the effects of past discrimination. Steps taken positively to improve the position of the disadvantaged and to redress disadvantage in the mainstream of society are generally termed 'positive discrimination'.²⁶ Other terms used in this context include 'affirmative action', 'reverse discrimination' or 'employment equality'.²⁷ Affirmative action connotes '*the steps designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination*'.²⁸ Objections may be raised, however, to the application of affirmative action as opposed to reasonable accommodation (see Chapter 9 on ADA).

'Positive discrimination' generally applies to discrimination in favour of groups or categories of individuals, such as women or disabled persons, to enable them to be more equal. Effectively, it means addressing past, current and future discriminatory practice. It implies social and moral dimensions since it seeks to eliminate all kinds of social differences between people. Definitions of 'positive discrimination' or 'affirmative action' do not, however, mention the level of obligation required of these positive measures, that

²⁵ Monaghan K, *The Disability Discrimination Legislation*, (New York, NY: Oxford University Press, 2005), p. 95.

²⁶ MacColgan A, *Discrimination Law: text, cases and materials*, (Oxford-Portland, OR: Hart Publishing, 2000), p. 137.

²⁷ *Ibid.*, pp. 137-138.

²⁸ Garner B A, *Black's Law Dictionary*, (New York, NY: West Group, 1997), p. 195.

is, whether they must be legally respected as intrinsic rights, or whether they are merely statements of voluntary commitment to oppose discrimination.

Clarification of this question is to be found in the case argued in Chapter 3 for special rights. Chapter 3 links the rights of a disabled person with his interests, and establishes the principle of special rights in order to ensure his access to abstract rights, such as healthcare, education, employment, goods, services, etc. Special needs become rights and must be respected in their capacity of rights as capabilities, not from charity. Some legal dictionaries identify affirmative action with 'special rights'. Affirmative action is '*the process of a business of governmental agency in which it gives 'special rights' of hiring or advancement to ethnic minorities...*'.²⁹ These special rights are applied as a 'reasonable accommodation' for circumstances such as disability, family responsibility and so on, where special needs are recognised in order for an individual to claim his rights. They are defined in terms of 'characteristics' as discussed above, for example, just as nursing mothers need locations for breastfeeding, and religion needs a location to perform religious rites, so disability requires 'reasonable adjustment' to give accessibility to shops, employment, and public facilities.

Affirmative action plans are not legally required in the UK and USA discrimination laws. They are voluntary extensions of direct discrimination legislation, but not in cases of indirect discrimination. For example, an employer may adopt a plan only as method of admitting and atoning for past discriminatory practice for which he is personally responsible. Here he discriminates positively because he has delivered past harm, not because he bears the collective responsibility of redistribution.³⁰ This raises the question of responsibility for 'positive discrimination'. If the 'positive discrimination' or 'affirmative action' is required to treat past harm resulting from direct discrimination, then the responsibility of affirmative action in this case falls upon the person who has exercised direct discrimination. If, however, it is required to treat indirect discrimination either past, current or future, then the responsibility should fall collectively upon all society through the redistributive justice principle. Therefore, the lawmakers of anti-discrimination legislation should hold affirmative action and reasonable adjustment to be rights which must be respected as a requirement to satisfy the principles of egalitarianism.

²⁹ See, for example, <http://legal-dictionary.thefreedictionary.com/affirmative+action>.

³⁰ Gardner J, 'Liberals and Unlawful Discrimination', (1989), 1, *Oxford Journal of Legal Studies*, p.14.

It has been debated whether positive discrimination is a compensatory or a redistributive technique. In fact, the practice is not simply one or other of these, and it must be understood in terms of both of them inseparably.³¹ For example, there is overlap between these techniques when treatment of past discriminatory practice entails compensation through the device of redistribution. Again, if the practice is relevant to rectification of past discrimination, then it should be perceived as a compensatory technique. If it is relevant in dealing with present and future discrimination, then it should be seen as the redistributive technique.

4. 1. 2. Philosophical Foundation of Discrimination

On the basis of the above discussion, negative discrimination is seen as a violation of the principle of 'equality', while positive discrimination is the result of differential treatment whose object is to restore an egalitarian balance. Hence, the concept of discrimination is closely dependent on the concept of 'equality'.³² A Western exploration of discrimination refers to philosophical principles of equality and to contemporary political philosophy. The Islamic approach explores discrimination by reference to Islamic principles of equality. This section includes investigations of equality and non-discrimination from first a Western and then an Islamic perspective, and concludes with a discussion of recognition.

(A) Equality and Non-Discrimination: a Western Perspective

Various dimensions may be attached to the broad term 'equality', depending on the perspective of the term's various users. Here the relevant perspective is that of non-discrimination. As this is linked to principles of equal respect and differential treatment relevant to the distribution of rights, the appropriate dimensions attaching to the term 'equality' here are those of social and political morality. A philosophical basis underpins these concepts.

It is necessary to distinguish between equality of 'correspondence', and equality of 'identity'. 'Correspondence' refers to a qualitative relationship where between a group of different objects, persons, processes or circumstances the same qualities are found in at least one, but not all, respects concerning one specific feature, with differences in other

³¹ Gardner J, 'Liberals and Unlawful Discrimination', (1989), 1, *Oxford Journal of Legal Studies*, pp. 15-16.

³² Fredman S, *Discrimination Law*, (Oxford, UK: Oxford University Press, 2002), p. 44.

features.³³ 'Identity' refers to an equality where total correspondence is found between the features of objects.³⁴ In terms of equal treatment of people, the required relationship is that of correspondence in one specific feature. For instance, 'equal respect' is imposed between men, since all men share the specific feature of 'humanity'.

A further important distinction must be made between descriptive and prescriptive equality. The common standard is descriptive, for example, two persons have the same age or height. Prescriptive use of equality entails that rules or norms be applied, for instance, people must be equal before the law.³⁵ In this case standards are applied which contain descriptive components, in order to identify those people to which the rule or norm applies.³⁶ Use of descriptive criteria in the prescriptive assertion of equality, either legal or moral, is directly relevant in determining special rights for minorities or groups such as disabled persons and women.

Concerning 'equal treatment', a further consideration requires examination, namely the principle that justice inheres in consistency. This principle is based on an abstract view of justice, which does not take into consideration existing distributions of resources. Consistency in treatment of two individuals who appear alike but in fact differ in terms of access to public interests, opportunities or material benefits, results in unequal outcomes. Therefore, identical treatment may be a source of discrimination in the case of disabled persons for example, whereas differential treatment may eliminate discrimination against them. In other words, equal treatment can in practice require inequalities.³⁷ Here an alternative conception of equality is based not on an abstract but a substantive view of justice, which emphasises redistribution of resources to achieve social targets of fairness.³⁸

Equality viewed in terms of morality and social justice thus entails a group of principles forming the basic core of egalitarianism.³⁹ Complex practical problems arise,

³³ Equality, <http://plato.stanford.edu/entries>. p. 2, and see Westen P. *Speaking Equality*. (Princeton University Press, 1990), p. 39.

³⁴ *Ibid.*, p. 2.

³⁵ In this regard see, Oppenheim F. 'Egalitarianism as a Descriptive Concept', (1970), 7, *American Philosophical Quarterly*, pp. 143-152. reprinted in Pojman L & Westmoreland R. *Equality. Selected Readings*, (Oxford, UK: Oxford University Press 1997), pp. 55-65.

³⁶ Equality, <http://plato.stanford.edu/entries/equality>, p. 2.

³⁷ Fredman S. *Discrimination Law*, (Oxford, UK: Oxford University Press, 2002), p. 2.

³⁸ *Ibid.*, p. 2.

³⁹ Equality, <http://plato.stanford.edu/entries/equality>, p. 3.

however, from concepts of ‘equal respect’ or ‘equal treatment’ and distribution. In a Western approach these are dealt with by reference to several philosophical principles including formal equality, proportional equality and moral equality.

The discourse on formal equality, or absolute equality, is based on Aristotle’s words: ‘*Those things that are alike should be treated alike, whereas things that are unlike should be treated unlike in proportion to their unlikeness*’.⁴⁰ Debate arises, however, around the criterion for recognising relevant respects of ‘unlikeness’. Some scholars refer this criterion to a rule of rationality. It is irrational because it is inconsistent to treat equal cases unequally without sufficient reason.⁴¹ The majority assert that the criterion for recognising relevant respects should refer to an intrinsic moral principle of justice. This view of a moral principle of justice rests on an acknowledgment of the impartial and universalisable nature of moral judgements. In other words, the postulate of formal equality demands something beyond consistency with one’s subjective preferences.⁴²

Proportional equality is sometimes named ‘material’ equality. It is a form of treatment referring to distribution of goods to persons. Aristotle describes two kinds of equality, numerical and proportional.⁴³ Numerical equality consists in treating all people identically or granting the same quantity of a good to everyone.⁴⁴ This, however, has the disadvantages of potential unfairness outlined above. Proportional equality exists where all relevant persons are treated in relation to their deserts. There may be some overlap between numerical and proportional equality, since numerical equality is considered as a special case of proportional equality. It occurs in special circumstances where persons are equal in a relevant respect, so that the relevant proportion is equal.⁴⁵

Equality of the relevant respect plays an important role in determining equality of treatment and distribution. The notion of proportional equality does not require all people to be treated identically. It acknowledges the significance of individual and group

⁴⁰ Aristotle, *Nicomachean Ethics*, translated by D. Ross (Oxford, UK: Oxford University Press, revised edition, 1980), Book, V.3. 113 1a 10-b 15.

⁴¹ Berlin I, ‘Equality’ (1955), 56(3), *Proceedings of the Aristotelian Society*, London, pp. 301-326.

⁴² Equality, <http://plato.stanford.edu/entries/equality>, p. 4.

⁴³ Aristotle, *Nicomachean Ethics*, translated by D. Ross (Oxford, UK: Oxford University Press, revised edition, 1980), Book, V.3. 113 1a 10-b 15

⁴⁴ Equality, <http://plato.stanford.edu/entries/equality>, p. 5.

⁴⁵ *Ibid.*

differences and takes account of both personal and environmental barriers which may inhibit societal participation.

The concept of proportional equality, however, is too abstract to provide useful answers to questions of what is due to whom. Principles of distributive justice detailed in Chapter Five extend the discussion concerning egalitarianism and desert. The concept of equality underpins theoretical ideas of equal treatment, equal respect, and so on. But to find a substantive principle of equality, providing a normative standard for practical equality among mankind, it is necessary to put the case for moral equality.

It is conventionally agreed that an action is just when it confers on each person his due. Since the natural due of a person is the dignity with which he or she is born, then everyone deserves the same dignity and respect. From this premise derives the concept of substantive, universal, moral equality which represents the principle of egalitarianism. Raz asserts that political morality is egalitarian.⁴⁶ All theistic religions declare natural equality. Further, the idea of natural equality became dominant in the seventeenth century in theories of natural law, natural rights, and social contract theory. For example, Locke declared that all human beings have the same natural rights to both self-ownership and freedom.⁴⁷ In the eighteenth century Kant's moral philosophy declared that all persons have inherent dignity and merit respectful treatment. Kant's categorical imperative recognises the autonomy of all human beings as the fundamental principle of human rights.⁴⁸ It declares that each individual should perform only those acts which he finds acceptable in others.⁴⁹ Thus, practical arrangements such as legal institutions should satisfy the requirements of the categorical imperative.

In brief, fundamental ideas of equal respect for and equal dignity for all human beings are accepted as a minimal standard by all schools of modern Western political and moral culture.⁵⁰ Further, the principles of formal, proportional and moral equality

⁴⁶ Raz J, *The Morality of Freedom*, (Oxford, UK: Clarendon Press, 1986), p. 217.

⁴⁷ Locke J, '*The Second Treatise of Government*', an essay concerning the true original, extent and end of civil government, ed by Gough J.W, 3rd Edition, (Oxford: Basil Blackwell, 1976), p. 75.

⁴⁸ Kant I, *Grounding for the Metaphysics of Morals* (J.W. Ellington, trans.), (Indianapolis, IN: Hackett, 1993) (Original work published 1785), p. 230.

⁴⁹ *Ibid.*

⁵⁰ In this regard, see Kant I, *Grounding for the Metaphysics of Morals* (J.W. Ellington, trans.) (Indianapolis, IN:Hackett, 1993) (Original work published 1785), pp. 5-6 and

explained above are the basis for the Western case against discrimination. So these relevant principles have strengthened the allegation to prohibit all discriminatory aspects on the base of any grounds.

In comparison, it is necessary to consider Islamic principles in terms of their relevance to the rectification of discriminatory practices in Islam. The subject of discrimination in Islam, and especially disability-based discrimination, has not been sufficiently studied. This is one of the main reasons for widespread discrimination in Islamic society. Thus the following section examines the relevant Islamic principles with a view to identifying possible Islamic positions regarding non-discrimination and the rectification of discrimination.

(B) Equality and Non-Discrimination: the Islamic Perspective

The Islamic view holds that human beings, having both physical and mental capacity, are entitled to be Allah's successors on Earth. According to this concept, the human being is the centre of life. The Islamic scholar Ibin Arabi said: '*Human being is the aim of life*'.⁵¹ Allah created human beings as one kind to live on this Earth as their home and unity of kind requires unity of place. Allah said that the earth is a place for all people without any distinction: '*And the earth, He appointed for (His) creature*'.⁵² As mankind is one kind, all the individuals in this life are equal in their origin, having no difference between them. Prophet Mohammad said: '*People are equal like the teeth of a comb*'. This unity is not affected by the differences in religions. Allah emphasises this in his words: '*And if your Lord had willed, He verily would have made mankind one nation, yet they cease not differing, save him on whom your Lord has mercy; and for that He did create them*'.⁵³ Differences in jurisprudence, legislations, ways, and methods do not affect that unity. Neither do differences in languages and colours, as seen in Allah's words: '*And of His signs are the creation of the heavens and the earth, and the difference of your languages and colours. In this indeed are signs for men of knowledge*'.⁵⁴

Equality, <http://plato.stanford.edu/entries/equality>, p. 7.

⁵¹ Ibin Arabi, *Rasael Ibin Alarabi*, presented by Mohammad Shihab Al-Deen Al-Arabi, (Beirut, Lebanon: Dar Sader, 1997), p. 104.

⁵² The *Qur'an*, Surah, 55: Ar-Rahman, verse, No. 10.

⁵³ The *Qur'an*, Surah, 11: Hud, verse No. 118-119.

⁵⁴ The *Qur'an*, Surah, 30: Al-Rum, verse No. 22.

In Islam all humanity is thus equal in origin and affiliation. This premise can be considered as the basis for dealing with the concept of equality and non-discrimination in Islam.

Allah said: *'The believers are nothing else than brothers'*.⁵⁵ The equality which arises from this brotherhood does not mean equality in products of mind and action, because people are different in talents and abilities.⁵⁶ The significance of universal brotherhood lies in its relevance to universal human equality and susceptibility to natural rights, without any social and racial discrimination. Like the West, in some circumstances Islam also recognises a substantive rather than an abstract approach to equality.

Another verse from the *Qur'an* has been declared a cornerstone for the prohibition of discrimination in Islam⁵⁷: *'O mankind! We created you from a male and a female, and have made you nations and tribes that you may know one another. The noblest of you, in the sight of Allah, is the best in conduct...'*⁵⁸ These words are addressed to all mankind regardless of whether or not an individual is a Muslim. They stress unity of origin and urge co-existence, with rejection of distinctions. The reason for the verse is to deter individuals from evaluating human beings on grounds of fame or family reputation. An extrapolation from this verse might be the prohibition of all grounds of discrimination, which are likely to take changing forms according to changes in time. In this case the verse can be seen as the basis of prohibition of discrimination for reasons of disability.

Allah said: *'Verily we have honoured the children of Adam. We carry them on the land and the sea, and have made provision of good things for them, and have preferred them above many of those whom we created with a marked preferment'*.⁵⁹ The dignity which these words confer on all human beings without distinction is the basis of the principle of equality in Islam. All people are equal in their dignity, which ensures their respectful treatment. Therefore, they are equally qualified for rights and duties, irrespective of generation, tribe, age, race, grade, shape or description. The *Qur'an* bids us

⁵⁵ The *Qur'an*, Surah, 49: Al-Hujurat, verse, No. 10.

⁵⁶ Al-Taher Bin Ashour M, *Asoul Al-Nedham Al-Ejtimai Fi Al-Islam*, 1st Edition, (Jordan: Dar Al-Nfais, 2001), pp. 214-215.

⁵⁷ Darozah M, *Al-Destour Al-Qura'ni*, (Beirut, Lebanon: Al-Maktab Al-Islami, 1983), p. 84.

⁵⁸ The *Qur'an*, Surah, 49: Al-Hujurat, verse No. 13.

⁵⁹ The *Qur'an*, Surah, 17: Bani Israel, verse No. 70.

not to isolate, degrade, humiliate or deride others because of their shape, deny their rights or discriminate among them.

Further, Allah said: *'O you who believe! Let not a folk deride a folk who may be better than they (are) nor let women (deride) women who may be better than they are'*.⁶⁰ It is prohibited to deride another by looking down at him, whether because of his old clothing, poor speech, intellectual capacity, or his disability. One who perjures himself by degrading a person respected and preferred by Allah might be less useful to society than one who has a pure and good heart.⁶¹ These words add the dimension of moral tort to Allah's prohibition of discrimination by violation of dignity.

Islamic sources offer practical instances of the principle of equality and non-discrimination. For example, racial non-discrimination is upheld in the story of the black Ethiopian Bilal, a follower of Mohammad. Abazar Al-Ghefari, a famous active member at that time, tried to insult Bilal by calling him the son of a black woman. Mohammad described Abazar as an ignorant person, saying that we are all sons of Adam.

Equality in Islam has two bases. The first is the body of Islamic sources related to Islamic belief. Muslims are required to abide by these. In addition, in the making of legal decrees, equality must be applied as a legislative source.⁶² Thus the principle of equality which derives from the assertion of natural rights is a tradition of Islam.

A comparison of the principle of equality in Islam and the West shows that while in Islam the same practical dimensions are recognised as in the West, Islam has not developed the same range of theoretical foundations. Islam and the West concur in proportional equality, in terms of products of the mind and actions. Investigation of absolute or formal equality in Islam, however, does not address the question of those unable through their special circumstances to obtain their natural rights. Western thought deals with this by citing the criterion of relevant respect to illuminate concepts of equal respect and differential treatment. Yet both perspectives investigate equality through its social and

⁶⁰ The *Qur'an*, Surah, 49: Al-Hujurat, verse No. 11.

⁶¹ Al-Qurtobi I, *Al-Jami Le Ahkam Al-Qur'an*. Vol. 3, (Beirut, Lebanon: Dar Al-Kutob Al-Ilmiah, 1982), p. 210.

⁶² Al-Maseri A, *Al-Falsafah Al-Madiyah wa Tafkik Al-Insan*, 1st Edition, (Damascus, Syria: Dar Al-Feker, 2002), p.232.

moral dimensions, both assert non-discrimination on any basis, and hence both deem equality to be a constitutive feature of justice.

The final discussion in this section concerns a further theoretical basis for non-discrimination. This is the concept of 'recognition'.

(C) Recognition

In 1807 the German philosopher Hegel published his *Phenomenology of Spirit*, in which he expounded his influential theory of recognition. Recognition in Hegel's terms is systematically related to a social conception of rights and duties.⁶³ Hegel argues that adequate recognition from others is the foundation of just social relations.⁶⁴ To promote his idea, he developed a theme that Fichte had earlier pursued.⁶⁵ Hegel, however, unlike Fichte, made the practical significance of recognition apparent to observers by unfolding a dramatic narrative concerning the roots of 'ethical community' (*Sittlichkeit*).⁶⁶ Thus, in contrast with the selfish theories of Hobbes and Locke, it rests on a moral basis of reciprocity. Hegel imagines a primitive 'first man' who lives at the beginning of history. Like other animals, this man desires food, shelter and sleep. Unlike other animals, however, he seeks the recognition of other men. This desire is, on Hegel's analysis, entirely understandable. The individual cannot be self-conscious or aware of his separateness from others and their capacity for freedom without recognising those around him.⁶⁷

As has been seen, recognition has a personal and a social dimension. The former refers to the individual's innate need for primary mutual recognition in contexts such as love and marriage. The latter refers to recognition between individuals and institutions in such contexts as family, property, and legal institutions.⁶⁸

⁶³ Williams R, *Hegel's Ethics of Recognition*, (Berkeley, CA: University of California Press, 1997), p. 5.

⁶⁴ *Ibid.*, p. 2.

⁶⁵ *Ibid.*, p.1.

⁶⁶ *Sittlichkeit* translates as morality or ethical life, denoted by family life, society and state. It fills the gap between individual subjective feelings and the general right. See also Fukuyama F. *The End of History and the Last Man*, (London, UK: Penguin Books, 1992), p.148.

⁶⁷ Williams R, *Hegel's Ethics of Recognition*, (Berkeley, CA: University of California Press, 1997), p.7 and see also Fukuyama F. *The End of History and the Last Man*, (London, UK: Penguin Books, 1992), p.146.

⁶⁸ Williams R, *Hegel's Ethics of Recognition*, (Berkeley, CA: University of California Press, 1997), p.3.

Hegel's concept of primary human personality describes both material and non-material desires. The non-material desires include the innate need to receive recognition and treatment as an individual. Thus the human personality is capable of both self-respect and its corollary, respect for others. This expression of the dignity of a person as an autonomous, independent human being implies a moral dimension which necessarily attaches to all inter-personal structures created by human beings.

History is seen in Hegel's theory as the 'struggle for recognition'. This struggle is coterminous with political life, and is observed in society's efforts to obtain liberal rights.⁶⁹ According to Hegel, the process of historical development takes the form of a journey towards an 'ideal end-state' i.e. freedom for all reasonable persons. This ideal represents an abstract right that specifies that institutions and practices should accommodate all relevant persons adequately.⁷⁰ Those people who are touched by their operations include 'mankind' as a whole. Accordingly, universalism as a form of 'egalitarianism' that extends beyond the nation-state to humankind as a whole, without discrimination on any grounds, is a feature of Hegel's thinking.⁷¹

The modern thinker Fukuyama is strongly influenced by Hegel's political philosophy. Like Hegel, Fukuyama argues that humans desire the recognition of others. Also, he argues that this need for recognition can only be adequately met in egalitarian societies where all are assumed to be equal without discrimination.⁷² He claims that humankind is now in a position to establish a 'universal and homogeneous state', a state in which the interests of all are adequately accommodated.

It may be argued that an ideal 'end-state' cannot be represented in a specific time or nation. History does not end, and each nation has its own changing values which must determine the forms it will apply according to normative force. Every state, however, must be founded according to the universal and abiding principles of justice, equality, dignity and freedom.

⁶⁹ Fukuyama F, *The End of History and The Last Man*, (London, UK: Penguin Books, 1992), p. 145.

⁷⁰ Williams R, *Hegel's Ethics of Recognition*, (Berkeley, CA: University of California Press, 1997), p. 133.

⁷¹ *Ibid.*, p. 143.

⁷² See Fukuyama F, *The End of History and The Last Man*, (London, UK: Penguin Books, 1992), pp. 144-146. Also, see Hegel G. W. F, *Phenomenology of Spirit*, translated by A. V. Miller, (Oxford, UK: Oxford University Press, 2004), p. 121.

In the light of the above, it is clear that recognition is one of the valid grounds for prohibiting discrimination between mankind. Actualising reciprocal recognition here means that all relevant groups' fundamental interests and special needs must be satisfied. A society that fails adequately to accommodate the disabled is open to criticism from the perspective of abstract right.

With regard to Islamic thought concerning recognition, Islam considers that life is based on the principle of recognition. Allah said: *'O mankind! We created you from a male and a female, and have made you nations and tribes that you may know one another'*.⁷³ It is understood from this verse that life rests on social and correlative recognition which accepts individuals without discrimination concerning their differences.

Prophet Mohammad said: *'Treat people as you like people to treat you'*. Recognition in Islam entails equal treatment. The philosopher Ibin Khaldon has built his social theory on civil recognition, that is, all individuals' interests should be met equally. Man is civilised and social in his own make and therefore he needs mutual recognition which preserves his abstract rights.⁷⁴ Ibin Khaldon echoes Hegel in stating that it is impossible for a person to realise his humanity if he is not recognised by other human beings. Man is a social and a civil being.⁷⁵

In terms of specific anti-discrimination legislation, the West and Islam are at different stages. In the West, various anti-discrimination laws have been enacted, with enforcement mechanisms, to rectify discrimination based on sex, race and disability, etc. as will be illustrated in the Chapters on DDA and ADA. These laws are based on constitutional and human rights bills, and every Western constitution takes a different form. The Canadian constitution, for example, contains a clear and comprehensive expression for non-discrimination. The Canadian Charter of Rights and Freedoms provides in Section 15 (1) *'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental*

⁷³ The *Qur'an*, Surah, 49: Al-Hujurat, verse, No. 13.

⁷⁴ In this regard see, Ibin Khaldon A. *Moqademat Ibn Khaldon*, Vol. 3. (Beirut, Lebanon: Dar Al-Kitab, 1986), p. 239.

⁷⁵ See Fukuyama F, *The End of History and The Last Man*, (London, UK: Penguin Books, 1992), p. 146.

or physical disability'.⁷⁶ Generally speaking, discrimination laws in the West can be compared to a tree. The roots represent the values embodied by human dignity, justice, equality and recognition. The trunk represents applicable rules and issues common to all types of discrimination such as the concept of discrimination, and each branch represents a particular area of discrimination such as sex, race, disability, etc.

Islamic legislation is criticised on the grounds that there are no written and binding conventions for human rights, discrimination, and social justice. The absence of equality results in discrimination. This appears to be a big loophole in Islamic legislation. Islamic Sharia principles, however, are valid for and compatible with all periods and places. On the basis of these principles it is possible to introduce relevant legislations in the areas of human rights, anti-discrimination and social justice. Naturally, wherever modern Western legislations are not in conflict with principles of Islam, these may be referred to as a model and source of guidance. Also, appropriate enforcement mechanisms may be established on similar lines to the West, in order to guarantee implementation of the legislation.

The above section serves to situate issues relevant to discrimination in a strong theoretical and philosophical basis. Aspects of specific disability discrimination are discussed in Section 4.2 below.

4.2. Disability and Discrimination

Disability is recurrently seen as a ground for discrimination. This section will focus on discrimination on the basis of disability, the effects of disability discrimination and justifications of disability discrimination.

4.2.1. Discrimination Based on Disability

Disabled persons like any disadvantaged group facing discrimination may be affected by direct or indirect discrimination. Direct discrimination means treating the disabled 'less favourably' than the non-disabled, thereby generating harm to them. Indirect discrimination operates by application of an abstract principle, with the result that disabled persons are treated differently because of their disability and hence are subject to being

⁷⁶ See Leslie P & Anita S, *Americans with Disabilities*, (London, UK: Routledge, 2000), p. 339.

denied opportunities.⁷⁷ In addition, they are denied fundamental protections. Similarly, the risk is present that, because of the extra cost, the disabled person is denied the reasonable accommodation or the provision of auxiliary aids necessary for equal treatment. Disability-based discrimination might take the form of scoffing, fun-making, harassment, stigma and misjudging of the disableds' abilities, affecting their dignity and fundamental self-esteem. Where disability is seen as a stigma, these discriminatory responses may predominate and even justify themselves, thus reinforcing social barriers.

Islamic thought lacks detailed discussion of these issues. But its main sources reveal intimations as to its position regarding discrimination based on disability.

Importantly, Islamic traditions insist on prohibition of discrimination, especially on the basis of disability where victims maintain their dignity and feeling. This was clearly cited when Allah blamed Prophet Mohammad for rejecting Abdullah Ibin Mactoom who was poor and blind, when he came to Mohammad wanting instruction in the *Qur'an*. Mohammad preferred other people because of their reputation and wealth. Allah reproached Mohammad for discriminating against Abdullah Ibin Mactoom because of his circumstances.⁷⁸ Plainly, this verse prohibits educational discrimination based on disability.

Throughout history, disabled persons have been treated both positively and negatively. The main aims of this historical presentation are first to identify how Western countries responded to principles of humanity and converted to a modern age which treats all people equally. The second aim is to show how Islamic principles have dealt with disability problems in terms of positive discrimination. Further to this, to present this evidence to Saudi and other Arab governments in order to demonstrate the practice of previous Islamic kingdoms in treating disabled persons through applications of Islamic traditions.

⁷⁷ A case of physical disability provides a dramatic example of the circumstances in which differential treatment may be required, but it demonstrates an important principle underlying the concept of discrimination, as has been discussed above.

⁷⁸ See The *Qur'an*, Surah 80: Abasa, verse, No.1-2, and Tafser Ibin katheer, [www. Islamonline.com](http://www.Islamonline.com).

(A) Historical Perspective on Negative Discrimination against Disabled Persons

Inequality and discrimination were known by the ancient nations. The Greeks believed they were the selected nation of God and had been created from different ingredients from other nations. Similarly, the Romans had their own laws and social customs which deprived the non-Romans, such as Israelis, Persians and Arabs before Islam, of rights which Romans maintained, believing that they were a perfect nation and others were not.⁷⁹

The ancient Greek civilisation used to throw disabled children to beasts or from the top of a mountain. In Athens, Plato decided that consideration should only be given to able people with healthy bodies and perfect minds.⁸⁰ Owing to a common belief that a disabled person was contagious, disabled people were refused the right of going out. Plato when calling for the Republic and Aristotle for Utopia asserted that disabled people should die or be expelled from the country. In Rome, people continued to throw the disabled into the Tiber until Romulus came to power. Romulus prohibited this act and established a non-governmental committee to decide whether or not a disabled person was entitled to citizenship.⁸¹

The disability of deafness was associated with particular prejudices. Aristotle said that persons who were born deaf were also dumb, that is, without speech. From this idea the word dumb in Greek acquired connotations of mental impairment. Other interpreters concluded that people born deaf should be considered as idiots or weak-minded. Thus the negative interpretations of the Greek and Roman civilisations deprived disabled people of their social and financial rights.⁸²

China and Japan granted disabled people some recognition. But in Jewish literature the expression 'disabled is dead' is found. Ancient Jewish societies considered the

⁷⁹ Raafat Othman M, *Al-Houquq wa Al-Wjabat Fi Al-Islam*, 1st Edition, (Cairo, Egypt: Dar Al-Kitab Al-Islami, 1983), p. 42.

⁸⁰ Ibin Kathcer E, *Tafser Al-Qur'an Al-Azim*, Vol. 3, (Riyadh, Saudi Arabia, Edarat Al-Bohouth Al-Islamiah, 1988), p. 196.

⁸¹ See Al Roasan F, *Ghadaya wa Moshkelat Fi Al-Tarbiah Al-Islamiah*, (Bahrain: Maktab Al-Tarbiah Al-Arabi, 1989), p. 85.

⁸² *Ibid.*

disabled as damned by God and a burden to society. They suffered different kinds of persecution and degradation amounting to death.⁸³

Moving to modern times, during the Nazi era there was mass persecution and extermination of the disabled. An ideology was constructed invoking precepts of health to eliminate disabled people as infected elements and to maintain the purity of the population free from any disability. The concept of euthanasia was introduced as 'mercy killing' to get rid of the disabled, the chronically sick, the old, and people with mental disorders.⁸⁴ On 14 July 1933, the Nazis introduced the so-called 'immunisation Act' prohibiting disabled people, psychiatric patients, people with epilepsy or inherited blindness, etc., from having babies. Thousands were sterilised. Subsequently they introduced the 'T4 Scheme' which entailed the 'scientific' murder of all disabled people. It was documented that 70,000 disabled persons were killed as 'useless eaters'. They were considered a burden on the national economy and an obstacle to the development of society.⁸⁵

Thus negative discrimination has taken different forms in different times, from neglect and deprivation of rights to killing. Schemes to support, protect or rehabilitate the disabled used not to exist. Although all theistic religions are concerned with equality and prohibit discrimination, the only efforts were individual. The Christian religion taught love and kindness, but disabled people were ignored until the emergence of Islam, which imposed equality and confirmed the dignity of people in respect to their rights and duties. But unfortunately in today's Muslim society disabled people suffer from isolation, persecution, negative discrimination and lack of rights, unlike modern countries where a serious approach to disabled affairs has been taken.

(B) Historical Perspective on Positive Discrimination of Disabled Persons

Modern Western countries deal with discrimination-related disability issues by enacting anti-discrimination disability legislations to equalise differences between disabled and non-disabled. One important principle applied is that of 'reasonable accommodation'. Modern Islamic countries have failed to introduce similar measures for disabled persons. Yet

⁸³ Al Roasan F, *Ghadaya wa Moshkelat Fi Al-Tarbiah Al-Islamiah*, (Bahrain: Maktab Al-Tarbiah Al-Arabi, 1989), pp. 210-211.

⁸⁴ Al-Masiri A, *Al-Falsafah Al-Madiyah wa Tafkik Al-Insan*, 1st Edition, (Damascus, Syria: Dar Al-Feker, 2002), p. 230.

⁸⁵ *Ibid.*

Islamic principles urge non-discrimination, and the history of Islamic civilisation cites positive discrimination for disabled persons. Allah said: '*No blame upon persons who were blind, sick limbed...*', '*Nor on yourselves if you have food from your home, or your parents' home... shall it be for you whether you eat together or apart...*'.⁸⁶ Al Zahhak said: '*people before Mohammad's message were ashamed of having food with someone who had a disability*'.⁸⁷ These verses confirm the historical prohibition of negative discrimination against the disabled, and admit their rights in equality and non-discrimination. Thus according to Islamic principles, disabled people have rights to equal services and non-segregation.

Islamic principles require Muslim countries to provide the fundamental needs of people with disability, and protect their health and social needs in the form of positive discrimination. Governments are required to support and protect disabled people and they are bound to secure their financial needs through social security. They should provide disabled people with suitable accommodation and provide regular benefit to cover their needs when they are unable to work because of disability. Islamic governments can meet these requirements from the resources of *Al-Zakkat*. Known as one of the five pillars of Islam, *Al-Zakkat* is a tax imposed on the income of rich people to be distributed among poor people.⁸⁸

If the government refuses to support and protect the needs of the disabled as rights, the courts should intervene and impose sanctions, and force the government to perform its duty towards disabled people.⁸⁹

There are early records of health care in Islam. A leper hospital was built by Al Khalifah Al-Weed Ibin Abdullmalik in the year 88 AH. (year 707 Gregorian calendar). Ibin Asaker records that Al Khalifah Al-Waleed provided a carer for each handicapped person at that time, including a guide for every blind person. Many institutions were established at that time, such as Al Bimarstanat and sheltered houses in different Muslim

⁸⁶ The *Qur'an*, Surah, 24: Al Noor, verse No. 61.

⁸⁷ Ibin Katheer E, *Tafser Al-Qur'an Al-Adheem*, Vol. 3, (Riyadh, Saudi Arabia, Edarat Al-Bohouth Al-Islamiah, 1988), p.404.

⁸⁸ See *Al-Zakat*, www. Islam today. net.

⁸⁹ See Abu Zahra M, *Al Takafol Al Ejtimaie Fi Al-Islam*, (Cairo, Egypt: Dar-al-Feker Al-Arabi, 1991), p. 65.

regions.⁹⁰ At the beginning of the eighth century, Al-Khalifah Omar Ibin Abdullaziz called for a census of all the handicapped in order to provide carers for the disabled and guides for the blind. That time may be seen as a golden era of justice and equality for the Muslims in general and for the disabled in particular, as it was a time of fairness, equality and justice. Historians record that in 163 AH (780 AD) Al-Khalifah Al Mahdi provided disabled people with a permanent allowance. In fact, this is a positive procedure concerning disabled affairs.⁹¹ This procedure in the early days of Islam resembles modern Western treatment of disabled people.

Modern positive discrimination is chiefly practised in the USA, where it has been incorporated into legislation. In the UK positive discrimination has been viewed with some scepticism on the grounds that it may lead to inequality. Principles of Islamic Sharia favour positive discrimination towards the disadvantaged, and in particular the disabled. Islam, however, has no set of advanced rules incorporating positive discrimination. But Islamic countries may, in principle, take their model and guidance from positive discrimination from Western modern legislation, so far as this supports rather than conflicts with Islamic principles.

4. 2. 2. Effects of Disability Discrimination

Both physical and psychological effects may result from direct discrimination, or from indirect discrimination by breach of the principle of distributive justice. In Western thought the treatment of such problems would be linked to the theory of 'harm'. The theory of 'harm' is also likely to be applied in Islamic thought when dealing with the effects of disability in Islam.

The concept of 'harm' is understood *'in a way that is context-relative. In one context the description 'harm' only extends to physical injuries, in another it might include the emotional effects of stress, demoralization and so on'*.⁹² A context-relative, more flexible approach to 'harm' admits considerations of either physical or psychological injuries which may arise from disability discrimination. For example, psychological effects

⁹⁰ Al Bimarstanat: is a Persian word for hospital which can also be for the people with mental diseases who need to stay for long time, see Al-Sebaei, M, *Hadharatuna Al-Islamiah*, (Damascus, Syria: Al-Maktab Al-Islami, 1988), p. 94.

⁹¹ *Ibid.*, p. 22.

⁹² Gardner J, 'Liberals and Unlawful Discrimination', (1989), 1, *Oxford Journal of Legal Studies*, p. 1.

may ensue from the dispossession of rights suffered by a disabled person. The loss of the right to equal respect also impacts on self-respect, resulting in demoralisation and loss of self-esteem. Therefore, the 'harm' principle is the appropriate approach to treating these effects of discrimination.

The definitional elements of harm-based tort require that the discrimination against a disabled person must be intentional. For example, a discriminatory decision process must be influenced by the fact of a person's disability. '*Also, the finding of intention depends upon the wrongdoer's decision and upon his motives*'.⁹³ In other words, in order for 'harm' to materialise, there must be a causal relation between act and motive. It might, however, be argued that to establish direct or indirect discrimination, intention is not always a necessary condition. Non-intention is not a sufficient justification in a case of discrimination. For example, it is not an acceptable defence for the discriminator that he did not intend discrimination against a disabled person in employment, but wants all his employees to be non-disabled.

Some effects of disability discrimination are clear instances of harm. First is the denial of the opportunity to secure desired benefits. For a disabled person the important desired benefit is to ensure an independent lifestyle, by being given, for example, the opportunity of employment or participation in social life. Denial of these opportunities will no doubt harm him. In fact, this 'denial discrimination' is considered to be an essential element of direct discrimination.⁹⁴ This applies in the case of all opportunities which ensure the rights of the disabled, including rights to education, public services, etc. It is not always clear, however, that this sort of detriment satisfies the requirements of the harm principle that discrimination must be intentional and unjustified. For example, a disabled person cannot claim to be harmed if he is rejected for a job because he was underqualified. This will be discussed in 4.2.3 below.

Secondly, decisions based on assumptions of core value and selective indifference inflict psychological injury by stigmatising disabled persons as inferior. Isolation and non-confidence in one's ability to perform an effective role in life are the outcome. Here it must be determined whether the psychological injury or the stigmatisation counts as the

⁹³ Gardner J, 'Liberals and Unlawful Discrimination', (1989). 1. *Oxford Journal of Legal Studies*, p. 4.

⁹⁴ *Ibid.*, p. 6.

relevant harm. If the harm is supposed to be the ‘psychological injury’ as a result of treating a disabled person ‘less favourably’, then this would come under the definition of direct discrimination. Direct discrimination obviously continues to be unlawful whether or not the disabled person suffers an emotional response, and whether or not he realises that discrimination has occurred. Here Gardner in his excellent essay indicates that stigma is different and a person can be said to have been stigmatised without his knowledge. This could be the ‘harm’ resulting from discrimination.⁹⁵

In the context of Islamic thought and disability discrimination, the principle of ‘harm’ in Islam is a fundamental jurisprudential rule to which all civil and criminal relations must refer. Harm has been defined generally in Islam as breach of interest or deprivation of others.⁹⁶ Prophet Mohammad said ‘*No harm to be done*’.⁹⁷ Ahmad Mowafa defined harm as a breach of a legitimate interest against someone, and an arbitrary trespass against an individual.⁹⁸ Generally, interest is defined as conservation of the Islamic principles. As mentioned in Chapter 1, Islamic legislation has five goals, to protect religion, the person (soul), the mind, decency and property. Interest in the form of giving benefit or removing harm could be linked to directly affecting the person physically or emotionally. Rights are established by interest, thus these effects amount to one person depriving another of his rights. Contravention of the interests of disabled persons connotes harm either physically or psychologically, caused by the effects of negative disability discrimination. According to Islamic principles, it is a religious duty to eliminate such harm, since the Islamic principle states that ‘*harm must be removed*’ unless it can be justified.⁹⁹ This can be compared with the Western principle of removing aspects of discrimination which cause harm. As Raz declares, the harm principle does not set the boundaries of the use of state power, but its scope is wide. It allows governments to use coercion both in order to stop people from actions which would diminish people’s autonomy and in order to force them to take the actions required to improve people’s options and opportunities.¹⁰⁰

⁹⁵ Gardner J, ‘Liberals and Unlawful Discrimination’, (1989), 1, *Oxford Journal of Legal Studies*, p. 1.

⁹⁶ Zaid M, *Al-Maslahah Fi Al-Tashri Al-Islamiah wa Najm Al-Deen Al-Toufi*, 1st Edition, (Beirut, Lebanon: Dar Al-Fiker Al-Arabi, 1954), p. 15.

⁹⁷ Al-Imam Malik Ibin Anas, *Al-Mowata*, 3rd Edition (Cairo, Egypt: Dar Al-Saada, 1984), p. 384.

⁹⁸ Mowafa A, *Al-Dharar Fi Al-Figah Al-Islami*, Vo. 1, (Dammam, Saudi Arabia: Dar Ibn Affan, 1997), p. 97.

⁹⁹ *Ibid.*, p. 93.

¹⁰⁰ Raz J, *The Morality of Freedom*, (Oxford, UK: Clarendon Press, 1986), p. 416.

4. 2. 3. Justification of Disability Discrimination

The effects of disability discrimination are the result of differential treatment through direct and indirect discrimination. The principle of equality, however, does not require absolute equality of treatment, but recognises relative equality which confers treatment commensurate to individual circumstances. Thus differential treatment can produce negative discrimination where a disabled person is treated less favourably than a non-disabled person in similar circumstances, but also produces positive discrimination where it takes 'affirmative action' to comply with principles of equality. Although discrimination against a disabled person based only on his disability can never be justified, nevertheless, discrimination against him may be justified as long as there are convincing and sufficient reasons. In other words, justification can be required for making the 'reasonable accommodation' of positive discrimination. This section analyses what justification is, and how and when disability-related discrimination is justified.

Justification is a moral excuse used to explain an acceptable reason for an act.¹⁰¹ In Western jurisprudence, justification comes as a form of 'immunity'. To excuse means to obtain an exemption from a potential liability for a group of persons sharing a common characteristic.¹⁰² For example, a disabled person is exempted from a duty on grounds of his physical condition. Thus, justification describes the quality of the act whereas excuse is related to capacity. In general, however, equality does not need to be justified as much as discrimination does. It is inequality which must be justified.¹⁰³

Justification of discrimination is only permissible if the reason for the treatment is both material to the circumstances of the particular case and substantial. Material means that there must be a strong connection between the reason given for the treatment and the circumstances of the particular case. Substantial means that the reason must carry real weight and be of substance.¹⁰⁴ For example, when the requirement of a particular job specifies a level of education and experience which a disabled person does not fulfil, then the justification of discrimination is accepted. Although the material and substantial reason for treating a disabled person less favourably is the circumstances of his existence.

¹⁰¹ *Dictionary of Law*, 3rd Edition, (London, UK: published by Peter Collin Publishing Ltd, 2001), p. 202.

¹⁰² See Bix B.H, *A Dictionary of Legal Theory*, 1st Edition, (New York, NY: Oxford University Press, 2004), p. 109.

¹⁰³ Raz J, *The Morality of Freedom*, (Oxford, UK: Clarendon Press, 1986), p. 230.

¹⁰⁴ <http://www.personneltoday.com/Articles/2005/09/27/31775/disability-discrimination>.

nevertheless, this reason is not sufficient to justify that treatment. Where there is a material and substantial reason regarding disability which places the disabled person at a substantial disadvantage, then it is the duty of the discriminator to make 'reasonable accommodation' to eliminate all barriers.¹⁰⁵ The justification for requiring reasonable accommodation is based upon the social benefits of the full life available to disabled persons whereby they receive recognition.

There are cases where justification for not making reasonable accommodation is accepted. An employer must show that it is not reasonable to make those accommodations. For instance, if the company is small and its employees do not exceed ten persons, the cost of accommodation will be disproportionately expensive. This problem was treated under the 'undue hardship' principle in ADA (see Chapter 9). Moreover, the justification of disability-related discrimination is accepted if reasonable accommodation for disabled persons would disturb the nature of the goods and services in question. For example, in a night club the nature of the service requires that lights should be dim. Hence, it is unreasonable to raise the lighting level for a customer who suffers from eye disease. In short, justification must meet two conditions: one, it must be objective; two, the objective fact must be accepted as legitimate. If an employer is unable fully to justify his policies and conduct, the charge of indirect discrimination is established.¹⁰⁶

It may be noted that United Kingdom legislation involves a test for 'justification' of the discriminatory effect, rather than, as in the USA, asking whether the discriminatory effect is not 'reasonable'.¹⁰⁷ This is considered as a mark of excellence in the Disability Discrimination Act (see Chapter 8).

If the Western perspective for justification is compared with Islam, it can be seen that the Western principle has undergone a more elaborate process of theorisation. Therefore, one should pursue the intimations of the justification principle in Islamic jurisprudence in order to conclude a theory of justification to deal with disability issues.

¹⁰⁵ <http://www.personneltoday.com/Articles/2005/09/27/31775/disability-discrimination>.

¹⁰⁶ See MacColgan A, *Discrimination Law: text, cases and material*, 1st Edition, (Oxford-Portland, OR: Hart Publishing, 2000), 65.

¹⁰⁷ See Doyle B, *Disability Discrimination: Law and Practice*, 5th Edition, (Bristol, UK: Jordan Publishing Limited, 2005), pp. 86-87.

In the Islamic view, human beings are generally subject to weakness and imperfection. The *Qur'an* shows that impairment is common in human beings. Allah said: '*Allah would make the burden light for you, as man was created weak*'¹⁰⁸, and hence '*Allah desires for you ease; he desires not hardship*'.¹⁰⁹ Therefore, Islamic traditions are based on 'ease' and not 'hardship'. This verse applies the fundamental rule that individuals are not required to do anything which can cause hardship or affect the person in a negative way. Applying these rules, for example, Prophet Mohammad said that for the old and sick, prayers should be simple and light. The goal is to make things simple for people with impairment.¹¹⁰ For instance, a person who has difficulty praying because he is old or has an impairment can pray sitting, standing or on his side.¹¹¹ This indicates that Islam aims to relieve people with disabilities of their difficulties. Allah said: '*Allah tasks not a soul beyond its scope*', that is, Allah would not impose any obligations on people beyond their capacity.¹¹² These concepts are considered to be the basis of an understanding of the principles of justification and exception for Islamic conduct, if it is deemed that equality and non-discrimination are tasks to be complied with in Islam.

Equality in Islam is a fundamental rule and does not need to be justified. In special conditions or times, however, when there are cogent reasons against its implementation, equality need not be applied. The test for exemption is the existence of superior interest, as for instance where changes make the work environment expensive or unaffordable for the employer, or where altering conditions to be suitable for a disabled person alters the nature of the occupation or affects other employees. Such cases justify the existence of inequality.

The Islamic tenet '*harm should be removed*', or the principle of removal of harm, embraces the rules and principles which justify the removal of harm in Islamic Sharia. Further, this basis and that of '*survival of the best*' embrace the rules or the principles which justify the removal or acceptance of discrimination.¹¹³ The latter Islamic principle means that the removal of harm should not itself result in harm. Ibin Nojaim says that

¹⁰⁸ The *Qur'an*, Surah, 4: Al Nisae, Verse No. 28.

¹⁰⁹ The *Qur'an*, Surah, 2: Al Bagharah, Verse No. 185.

¹¹⁰ Al-Bukhari M. *Sahiha-al-Bukhari*, Kitab Al Azan, Vol. 1, part 1, (Riyadh, Saudi Arabia: Edarat Al-Bohooth Al-Elmiah, 1982), p.172.

¹¹¹ *Ibid.*, p. 40.

¹¹² The *Qur'an*, Surah 2: Al Bagharah, Verse No. 286.

¹¹³ Ibin Nojaim A.Z. *Al-Ashbah wa Al-Nadhair*, (Beirut, Lebanon: Dar Al-Kutob -Al-Elmiah, 1985), p. 85.

harm is not removed by harm.¹¹⁴ This rule has been approved by Muslim scholars and adopted by ancient and modern Muslim societies.¹¹⁵ Muslim jurists hold that if there is a conflict between two harms, one being minor and the other serious, the minor harm should be removed even if it causes harm to a disabled person. This is because the harm affects the public in general, so it should be removed in order to protect the public interest.¹¹⁶

One can see that there are no big differences between the two cultures generally in terms of seeking easy and necessary removal of harms and the aim of principle of justification especially in disability cases. Therefore, the problem of transplantation in this comparative study is smoothed out and the potential of benefiting from effective laws from nation to nation is evident.

This chapter has presented the concept of discrimination and its forms and analysed the effects caused by direct or indirect discrimination. In the following chapter the concept of distributive justice must also be analysed. Practices of discrimination arise from breaches of distributive justice. The concept of the latter is therefore proposed as a means to rectify the former.

¹¹⁴ Ibin Nojaim A.Z, *Al-Ashbah wa Al- Nadhair*, (Beirut, Lebanon: Dar Al-Kutob –Al-Elmiah, 1985), p. 85..

¹¹⁵ *Ibid.*, p. 87.

¹¹⁶ See Mowafa A, *Al-Dharar Fi Al-Figah Al-Islami*, Vol. 1, (Dammam, Saudi Arabia: Dar Ibn Affan, 1997), pp. 939-940.

DISTRIBUTIVE JUSTICE

Introduction

The criteria determining a society's definition of justice may be secular or religious, according to that society's beliefs. The outcome of secular criteria is positive justice, whereby people define their interests and express their needs individually or collectively. The result is a general system with varied rules for justice. This type of justice is not considered to be perfect, and is constantly subject to changes designed to improve it in line with the changing needs of society.

Systems of justice based on religious criteria are implemented by people through their belief in and respect for religion. They uphold their forms of justice because of their belief that its origin is the morality of their religion.¹

Whether justice derives from secular or religious criteria, all societies are liable to certain imbalances in the distribution of advantages, that is, to forms of discrimination. Distributive justice is a legitimate doctrine proposed in order to restore the balance and rectify aspects of discrimination, offering societies a means to accommodate the interests of all their members adequately. Distributive justice can be the appropriate principle by which all relevant persons and especially disabled persons will justly obtain their fundamental rights.

It is therefore important to identify the concept and relevant principles of distributive justice in addition the methods by which it can be practised. It is also necessary to investigate the notion of distributive justice in Islam.

¹ Khaddouri M, *Maqhoum Al-Adel Fi Al-Islam*, 1st Edition, (Damascus, Syria: Dar Al-Kalimah. 1998). p. 127. In fact, this classification was influenced by Ibin Khaldon when he tried to classify criteria of justice; he indicated that the condition may be divided into three models according to the scale of justice. The first model is when countries base their political system on the principle of the religion. In these countries the principles of justice are rooted in these teachings. The second model is to be found in countries where the law is made by people and not from a religious resource. The laws were, however, enacted with due regard to the rules and traditions of the religion. In the third model, the political structure is based on a mixture of positive and religious rules together. All Islamic countries follow the third model.

To achieve these goals, this chapter is divided into two main sections investigating distributive justice in the West and Islam respectively. Both sections open with an outline of general aspects of justice. The section on Western distributive justice continues with a discussion of Rawls's arguments of equal liberty, the difference principle and the veil of ignorance, and concludes with an examination of relevant principles. The section on Islam includes an attempt to identify instances of intimation of distributive justice within Islam, and concludes with a discussion of the connections between justice, charity and disability.

5. 1. Distributive Justice in Western Thought and Practice

The concept of distributive justice in Western thought derives its foundation from Western philosophy of justice which rests on principles and concepts. It is appropriate to identify these general concepts in order to reach the intended meaning and practice of distributive justice.

5. 1. 1. General Concepts

Justice is a moral ideal referring to a correct state of things and persons. It has been defined as fairness. Some theorists have viewed the principles of justice as connected with what people would agree to under certain ideal conditions.² It is also defined as moral rightness and a system of law in which all persons receive their due, including all rights, both natural and legal.³ The terms just and unjust may apply not only to laws, institutions and social systems, but also to particular actions including decisions, judgements, and imputations.⁴ The primary subject of justice is the basic structure of society, or more exactly the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages by social cooperation.⁵ According to Rawls, '*justice is the first virtue of social institutions, as truth is of systems of thought*'.⁶

Therefore, the main definition of justice has a social dimension. A concept of social justice provides the standard whereby the distributive aspects of the basic structure of a society are to be assessed.

² Bix B.H, *A Dictionary of Legal Theory*, 1st Edition. (New York, NY: Oxford University Press, 2004). p. 108, and see Rawls J, *A Theory of Justice*, (Oxford, UK: Oxford University Press, 1999), p. 3.

³ *Oxford Dictionary of Law*. Edited by: Elizabeth A. Marten, 6th Edition (Oxford, UK: Oxford University Press, 2006). p. 301.

⁴ Rawls J, *A Theory of Justice*. (Oxford, UK: Oxford University Press, 1999), p. 3.

⁵ *Ibid.*

⁶ *Ibid.*, p. 3.

The sources of justice in Western philosophy have been seen alternatively as harmony, divine command, human creation, or natural law. Justice as harmony is presented in Plato's *The Republic*. Plato uses the character of Socrates to describe a single account of justice that covers both the just person and the just city. Justice is a proper, harmonious relationship between the warring parts of the person or city.⁷

Advocates of divine command theory argue that justice is the authoritative command of God. Since murder is wrong, then the murderer must be punished, because God commands that it be so.⁸

Some thinkers such as Thomas Hobbes hold that justice is created by public, enforceable, authoritative rules, and that injustice is whatever those rules forbid. Justice is created, not described by the command of an absolute sovereign power.⁹ In this view of justice as authoritative there are some similarities with divine command theory, with the difference that the state or any authority replaces God.

Natural law theorists consider justice to be a part of natural law. It involves the system of consequences which naturally derives from any action or choice. Justice requires what individuals or groups actually deserve, merit, or are entitled to. Justice in this account is a universal and absolute concept, and hence laws and principles are merely attempts to codify that concept.¹⁰

Theorists of the social contract tradition consider justice as mutual agreement, since it is derived from the mutual agreement of everyone concerned, or, in many versions, from what they would agree to under hypothetical conditions, including equality and absence of prejudice. Using a social contract argument, justice would thus be interpreted as fairness. According to Rawls, those who engage in social cooperation choose together the principles which are to assign basic rights and duties and they agree on how the social benefits should be divided.

Justice rests on fundamental moral principles which are seen as paramount. Justice is distinct from other ethical standards such as benevolence, charity, mercy and

⁷ Plato, *Republic* (Trans. Robin Waterfield, UK: Oxford University Press, 1994), p. 28.

⁸ Barry B, *Theories of Justice*, (Berkeley, CA: University of California Press, 1989), p. xiii.

⁹ *Ibid.*, p. 54.

¹⁰ Tackema S, *The Concept of Ideals in Legal Theory*, (London, UK: Springer, 2003), p. 97.

compassion, and is superordinate to these principles.¹¹ Even though these principles are valuable, they are supererogatory rather than compulsory and hence they depend on the will of the benefactor.

In contrast, some utilitarian thinkers such as John Mill hold that justice is not as fundamental as we often think. Mill said that justice is derived from the more basic standard of what right is and what the optimal consequences of right are, which is measured by the average amount of welfare caused. Hence, the appropriate principles of justice are those which tend to have the best consequences.¹²

Justice in operation must address the two areas of 'distribution' and 'retribution', giving rise to distributive justice and retributive justice. However, it is first necessary to examine two other concepts, 'procedural' and 'corrective' justice'.

(A) Procedural Justice

Procedural justice is a device for the administration of justice and legal proceedings. It concerns the fairness of the processes by which decisions are made, on the basis that fair procedure - namely, hearing all parties before a decision is made - leads to equitable results.¹³

According to Rawls, there are three ideas of procedural justice. First, perfect procedural justice, which has two characteristics: (a) an independent criterion for what constitutes a fair result of the procedure, and (b) a procedure that guarantees that the fair outcome will be achieved. Second, imperfect procedural justice shares the characteristic of perfect procedural justice that there is an independent criterion for a fair result, but has no method that guarantees that the fair result will be achieved. Third, pure procedural justice depicts positions in which there is no criterion for what constitutes a fair result other than the procedure itself.¹⁴

The question arises as to the means by which a procedure can be fair. A model classification of procedural fairness offers an answer. This classification is divided into

¹¹ Tasioulas J, 'Mercy', (2003), 2, *Proceedings of the Aristotelian Society*, London, p.103.

¹² Mill J. S, *Utilitarianism in On Liberty and Other Essays*, ed.. John Gray, (Oxford, UK: Oxford University Press, 1991), Chapter 5.

¹³ Dworkin R, *Principle, Policy, Procedure in a Matter of Principle*, (New York, NY: Oxford University Press, 1985) p. 145.

¹⁴ Rawls J, *A Theory of Justice*, (Oxford, UK: Oxford University Press, 1999), p. 84.

three main models: the outcomes model, the balancing model, and the participation model.¹⁵ The ‘outcomes model’ of procedural justice is that the fairness of a process relies on the procedure bearing the correct result. For example, where the procedure is a criminal trial, the correct outcome would be conviction of the guilty and acquittal of the innocent.¹⁶ Concerning the ‘balance model’, a fair procedure is one which reflects a fair balance between the costs of the procedure and the benefits. The ‘participation model’ describes a fair procedure as one that gains those affected an opportunity to participate in the making of decisions. For example, it entails that at the trial the defendant be given a chance to present witnesses for cross-examination.¹⁷ Also, that every party has the same opportunity to represent himself in order to get a fair trial.

(B) Corrective Justice

Corrective justice deals with the liability arising when one person is treated unjustly by another. The reference for this idea is taken from Aristotle’s treatment of justice.¹⁸ Corrective justice deals with voluntary and involuntary transactions which represent for example contract and torts theories. It focuses on whether one party has committed and the other has suffered a transactional injustice. According to Aristotle, corrective justice relates one person to another according to a conception of equality or fairness. Therefore, injustice arises in the absence of equality, when one person has too much or too little relative to another.¹⁹ Corrective justice insists on the maintenance and restoration of the equality with which the parties enter the transaction. This equality, however, stands on persons’ having what lawfully belongs to them, since injustice occurs when one party realises an acquisition at the cost of the other’s loss. Thus the law corrects this injustice when it establishes the initial equality by depriving one party of the acquisition and restoring it to the other party.²⁰

¹⁵ See Solum L.B, ‘Procedural Justice’, (2004), 78, *Southern California Law Review*, p. 181.

¹⁶ Sometimes the procedure is a legislative process, then the procedure would be fair to the compass that it fruited righteous legislation and unfair to the compass that it fruited bad legislation. See Solum (*ibid.*) and Hay B L, ‘Procedural Justice - Ex Ante vs. Ex Post’, (1997) 44 *University of California Law Review*, p. 1803.

¹⁷ *Ibid.*

¹⁸ See Aristotle, *Nicomachean Ethics*, translated by D. Ross (Oxford, UK: Oxford University Press, revised edition, 1980), Book, V, 2-5, 1130a14-1133b28.

¹⁹ *Ibid.* and Weinrib E J, ‘Corrective Justice in a Nutshell’, (2002), 52(4) *University of Toronto Law Journal*, p.2.

²⁰ *Ibid.*, p. 2.

Since the major function of corrective justice is to rectify injustice that one party has inflicted on the other, corrective justice asserts a connection between the remedy and the wrong.

(C) Retributive Justice

Retributive justice is concerned with the appropriate response to wrongdoing. The theory of retributive justice is expressed in the 'law of retaliation' which indicates that the proper punishment is equal to the wrong suffered, as in the quotation: '*life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe*'.²¹ This maintains that proportionate punishment is a morally acceptable response to crime, regardless of whether the punishment produces any palpable benefit.²²

Appropriate punishment requires that the level of punishment should correspond to the severity of the wrongdoing. But this does not mean that the punishment must be equivalent to the crime. A retributive system must punish severe crime more harshly than minor crime, but theorists of retributive justice differ in terms of how to measure harshness or leniency.²³ The classical definition of retributive justice holds that the amount of punishment must be proportional to the amount of harm caused by the wrongdoing, but according to Michael Davis the amount of punishment must be proportional to the amount of unfair advantage gained by the wrongdoer.²⁴

(D) Distributive Justice

According to Aristotle, distributive justice deals with the distribution of whatever is divisible, such as honours and goods, among the participants and a group of recipients in a political community.²⁵ Three essential areas must be clarified before this can be implemented: the kinds of goods to be distributed, i.e. wealth, income, power, opportunities, jobs, welfare, respect and combinations of these; the entities between which they are to be distributed, e.g. natural persons, classes of people, or nations; and finally,

²¹ Exodus, Chapter 21, *The Bible, Authorized Version, Standard Text*, (Cambridge, UK: Cambridge University Press, 1995), xxiii-xxv.

²² Murphy, J G, *Retribution Reconsidered* (Norwell, MA: Kluwer Academic Publishers, 1992), p. 23.

²³ *Ibid.*

²⁴ Davis M, *Justice in the Shadow of Death: rethinking capital and lesser punishments*, (Lanham, MD, London, UK: Roman & Littlefield, 1996), p. 123.

²⁵ See Aristotle, *Nicomachean Ethics*, translated by D. Ross (Oxford, UK: Oxford University Press, revised edition, 1980), Book V. 177-178, and Bix B.H. *A Dictionary of Legal Theory*, 1st Edition, (New York, NY: Oxford University Press, 2004), p. 55.

whether distribution is to be made e.g. on an equal or a meritocratic basis, according to social status, or to need.²⁶

According to Aristotle, a just act involves four elements: two persons and two shares of something that is good. Distribution is just if the shares are divided according to ratio of social honour between persons. If people are not equal in terms of honour and money then the shares should not be the same, because shares must be proportional to personal worth.²⁷ It appears that the value of people echoes the distribution of shares of valued assets in the case of a just act. But the query arises about those who are not naturally equal at the outset: those whose assets and honour are less valued and are out of their control. Rawls argues in finding the appropriate principle of justice that the equal person should be capable of making a contribution to the social product, as will be elaborated below.²⁸

The notion of distributive justice assumes that everyone in the relevant group should take what he deserves and needs from general resources as a human being, as well as what he merits from his work. As a question has been raised about those who have no suitable work or those who are marginalised because of sex for example, or about those who society believes deserve nothing because they have been born disabled. This matter must be solved within the conception of justice through the creation of 'remedial justice' working within the principles of distributive justice.²⁹ This has been affirmed as a response to the requirement of the 'capabilities approach' which means all citizens' interests, necessary requisites and needs must be accommodated and accessible equally without discrimination.³⁰

(E) Remedial Justice

Remedial Justice is sometimes used as a synonym of 'corrective justice' in a philosophical context. Corrective justice as discussed above refers to what is required to rectify the situation between two persons when one has harmed the other under contract, tort law and criminal. But remedial justice here should take another meaning, since the situation

²⁶ See Barry B. *Theories of Justice*, (Berkeley, CA: University of California Press, 1989), p. 88.

²⁷ Aristotle, *Nicomachean Ethics*, translated by D. Ross (Oxford, UK: Oxford University Press, revised edition, 1980), Book V. 177-178.

²⁸ See Rawls J, *A Theory of Justice*, (Oxford, UK: Oxford University Press, 1999), p. 86.

²⁹ Freeman S, *Rawls*, 1st Edition, (New York, NY: Routledge, 2007), p. 107.

³⁰ See Nussbaum M, 'The Supreme Court 2006 Team, Forward: Constitutions and Capabilities: "Perception" Against Lofty Formalism', (2007) 121(4), *Harvard Law Review*, p. 25.

needing rectification is not between just two persons, but instead is a group of people who suffer isolation from the appropriate principle of distributive justice: namely, people who face social and architectonic barriers to reach their fundamental rights. It might share with corrective justice the occurrence of harm upon the person and the need for rectification. Remedial justice falls within distributive justice to rectify the differences caused by natural incident and harm caused by isolation and marginalisation of those who are born disabled, and give them their clear rights. Then remedial justice in this context insists on returning those people to the original equality that existed for all people prior to some accident or injury which means people must be dealt with through their initial human dignity. Therefore, through this kind of remedial justice, as will be examined below, the clear rights of those people must be treated according to distributive justice, because equal here means not absolute equality, but division according to their real circumstances and special needs. Accordingly, justice remedies these differences, harms and prejudice, through collective actions of society and government, since distributive justice must be applied primarily to a government's distribution or redistribution of general assets among its citizens.³¹

This duty of 'remedial justice' is imposed by moral principles and duties such as the duty of mutual of aids, duties of assistance and rescue, as well as the duty of respecting the dignity of persons.³² This conception of justice rests on Rawls's approach of justice as fairness, since he argues that the phrase 'justice as fairness' does not reflect an equation of the two terms, but rather the fact or claim that under his approach the principles of justice are accepted in an initial situation that is fair.³³

The principles of distributive justice should be applied to disabled persons' rights, and how they should be treated in operation of distribution of rights in this respect. The theory of 'distributive justice' thus requires closer investigation.

5. 1. 2. Distributive Justice

Aspects of discrimination in societies arise in the absence of distributive justice. Therefore it is essential to analyse in detail what distributive justice is and how it should be practised through identifying relevant principles of distributive justice. Reference must be made to

³¹ Bix B.H, *A Dictionary of Legal Theory*, 1st Edition. (New York, NY: Oxford University Press, 2004), p. 55.

³² Freeman S, *Rawls*, 1st Edition. (New York, NY: Routledge, 2007), p. 107.

³³ See Rawls J, *A Theory of Justice*, (Oxford, UK: Oxford University Press, 1999), p. 67.

some principles of John Rawls, the most prominent contemporary theorist of distributive justice. His arguments concerning equal maximum liberty, difference principle, and veil of ignorance are of central relevance.

One might query why Rawls's analysis in particular is central to this thesis. Emphasis is placed on his work for the following three reasons. First, his account of distributive justice is comprehensive. Second, it gives clear expression to egalitarian assumptions that are taken for granted in Anglo-American everyday life (*e.g.* the moral equality of individuals). Third, Rawls's account of distributive justice has great moral appeal. This is, *inter alia*, because he recognises that self-esteem is underwritten by practical arrangements that identify all persons as having equal moral worth.³⁴ But while significant emphasis has been placed on Rawls, the chapter also discusses a wide range of other contributions to the current heated debate on distributive justice. Each of these contributions to this debate has relevance to the question as to how the interests of those with disabilities should be accommodated in Saudi Arabian society. Surveying the relevant field in this way is important for two reasons. First, it points up the highly contested character of distributive justice as an ideal - about which reasonable people can reasonably disagree. Second, if we make the assumption that the reforms proposed in this work are a spur to reform in other areas, the various accounts of distributive justice examined here may be of particular relevance (*e.g.* feminist thinking on distributive justice in circumstances where gender relations in Saudi Arabia are the subject of legal reform), as will be elaborated below.

(A) Meaning and Role of Distributive Justice

Distributive justice is one of the main aspects of justice. It is a form of fairness and deals with appropriate distribution of 'good' things such as wealth, power, reward, and respect.³⁵ The theory of distributive justice is an egalitarian ideal, that is, the proper distribution of relevant goods is an equal distribution whereby no one in the relevant group should have more or less than anyone else in the same group.³⁶

³⁴ For self-esteem as a primary good, see Rawls J, *A Theory of Justice*, (Oxford, UK: Oxford University Press, 1999), p. 386.

³⁵ Rawls J, *A Theory of Justice*, (Oxford, UK: Oxford University Press, 1999), p. 266.

³⁶ See *ibid.* and <http://plato.stanford.edu/search/searcher.py?query=distributive+justice>

Distributive justice deals with the sharing of a benefit or burden. It involves comparing the potential parties to the distribution in terms of a distributive criterion. Unlike corrective justice, which is fairness in the rectification of wrong, and whose parties are merely the victim and the perpetrator, distributive justice is a corrective mechanism whose parties are all people. Thus the liability in the case of corrective justice falls upon particular persons, whereas the liability in distributive justice falls upon society, since its parties are all the people linked by distributive justice through the benefit or burden they all share. Moreover, distributive justice admits any number of parties because, in principle, no limit exists for the number of persons who can be compared and among whom something can be divided.³⁷

The difference between distributive justice and procedural justice is one of outcome versus procedure. Distributive justice is fairness in the distribution of rights and resources, thus it emphasises just outcomes and consequences. In contrast, procedural justice concerns the fairness processes such as the administration of law.

(B) Rawls's Arguments: Equal Liberty, Difference Principle, Veil of Ignorance

Investigation of distributive justice usually begins with the work of John Rawls. This section will outline Rawls's concepts of equal liberty, difference principle and veil of ignorance. The historical roots of his theory and his hypothesis of 'original position' form the starting point for the discussion.

In his '*A Theory of Justice*' Rawls uses a social contract argument to show that justice, and especially distributive justice, is a form of fairness. Traditional social contract theory assumes an original state of nature in which there is no government, and then asks what would be the content of a social contract, that is an agreement to enter civil society.³⁸ Assuming the state of nature and the social contract to be hypothetical, then one might ask whether the contract concluded in this state of nature is fair. The answer might be no: a social contract reached in the state of nature would not be fair, because it would favour those who are advantaged by the conditions of the state of nature, for instance, the strong.

³⁷ See Weinrib E J, 'Corrective Justice in a Nutshell', (2002), 52(4) *University of Toronto Law Journal*, p. 4.

³⁸ For social contract, see Rousseau J, *The Social Contract*, trans. M Cranston, (London: Penguin Classics, 1968).

the clever, and the powerful. Rawls attempts to correct this problem by assuming what he calls 'original position'.³⁹

In the original position, the parties are to agree on principles of justice to govern the basic structure of society. Unlike the state of nature, however, the original position includes a 'veil of ignorance' that prevents the parties from knowing the specific characteristics of those whom they represent. The original position is the position under which people are free, equal and rational and are concerned to make a choice of principles that they will live under.⁴⁰ People in the original position are rational in that they take the most efficient means to satisfy their desires. Desires aim at a set of primary goods, wealth, opportunities, liberties and self-respect, which enables an individual to promote his conception of the good, whatever it is. People in the original position are mutually disinterested, and they know general laws and principles that govern society. Moreover, they know that they will have a conception of the good for themselves. They know that they will have a sense of justice, and that their society is subject to the circumstances of justice and, further, that people live in proximity and are equal. There is moderate scarcity, they have some, but not all, interests in common, and they have finite psychological, emotional and intellectual capacities.⁴¹

Rawls argues that the parties to the original position would choose two principles of justice: (1) Each person has an equal claim to a fully adequate and mutually compatible scheme of equal basic rights and liberties; and in this scheme equal political liberties, and only those liberties, are to be guaranteed their fair value. This is the 'Equal Liberty Principle'. (2) Social and economic inequalities are to satisfy two conditions: (a) they are to be attached to positions and offices open to all under conditions of fair equality of opportunities; and (b) they are to be to the greatest benefit of the least advantaged members of society. This is the 'Difference Principle'.⁴²

To elaborate on the Difference Principle, Rawls's theory distinguishes two kinds of goods: (i) liberties and (ii) social and economic goods, i.e. wealth, income and power. To achieve equality, however, the procedure of distribution of each kind may differ: (i) should

³⁹ Rawls J, *A Theory of Justice*, (Oxford, UK: Oxford University Press, 1999), p. 131.

⁴⁰ Rawls J, *A Theory of Justice*, (Oxford, UK: Oxford University Press, 1999), pp. 131-134.

⁴¹ *Ibid.*, p. 87.

⁴² *Ibid.*, p. 60.

be equally divided between citizens unless an application of inequality would improve the position of the worst off for (ii).

The two principles of justice are the solution to the problem of choice presented by the original position. Under Rawls's proposed system, in case of conflict the first principle takes priority over the second. Also, these principles of justice for society are justified on the grounds that they are agreed by a fair decision-making procedure.

Not only Principle 2b above but also Principles 1 and 2a are seen as principles of distributive justice, as Principle 1 governs the distribution of liberties, and Principle 2a the distribution of opportunities. Looking at the principles of justice in this way makes all principles of justice, principles of distributive justice.⁴³ The underlying premise is that to take account of the circumstances, knowledge, beliefs, and interests of all parties is the best way for every individual to secure his ends in view of the alternatives available. This has special impact for those with special needs and circumstances.

Rawls means the 'least advantaged' of the group sharing primary goods, as described above. He declares that since one's share of wealth and income matches one's share of primary goods of power, status, authority and self-respect, the least advantaged are economically least advantaged in a society, which are the poorest people. In this approach using the difference principle, Rawls omits the unluckiest people and the people who live under what is known as 'natural lottery' in which some are born disabled, clever and some are not and so on. He means the 'least advantaged' of working persons, in terms of the income they earn from employment.⁴⁴ Rawls has been criticised for leaving disabled persons, and the people who live with special circumstances beyond their control, out of his approach to distributive justice and the principles which structure basic economic and legal institutions.⁴⁵ He deals with the complication of the special needs of the disabled separately from the difference principle, as will be seen below.

One may ask how Rawls reached this concept of the least advantaged and why he has excepted 'disability' from falling within the scope of distributive justice. Generally,

⁴³ Miller D, *Social Justice*, (Oxford, UK: Oxford University Press, 1979), p. 20.

⁴⁴ Rawls J, *A Theory of Justice*, (Oxford, UK: Oxford University Press, 1999), p. 86.

⁴⁵ Freeman, S, *Rawls*, 1st Edition, (New York, NY: Routledge, 2007), p. 107.

Rawls depicts society according to its social form which depends on social cooperation and beneficial reciprocity. He argues that since social cooperation produces benefits and interests, for a person to participate in that cooperation, this person requires the necessary capacities for cooperation, consisting of either moral or material powers. These capacities permit the person to function and to do his fair share in contributing to that cooperation and the resulting social product.⁴⁶ Rawls's account of distributive justice thus bypasses disability.

This argument, however, holds no convincing reason for omitting 'disability issues' from distributive justice. Since most disabled persons can participate in social cooperation and take significant roles in society especially as qualified individuals, most of them can enjoy social participation. Further, since Rawls considers the least advantaged to be just the poorest working people, one can note that persons with disabilities are worse off than the working poor, who at least may improve their position, whereas disabled persons are not in control of theirs.⁴⁷

The main question Rawls raises in terms of distributive justice as a requirement of a democratic society is how to design and structure the basic economic and legal institutions which are important for society and social cooperation. But when planning to build a democratic society, one must answer another question on the special needs of disabled persons as human beings.⁴⁸ In this respect, Freeman indicates that '*it misreads Rawls's project to just assume that he must begin answering this question of the appropriate shape of the basic structure by focusing its design and his account of distributive justice on the needs of the handicapped*'.⁴⁹

The special needs and circumstances of disabled persons have been shown to be rights upheld by equal dignity, respect, needs, fundamental interests and autonomy, as elaborated in Chapter 3. Accordingly the needs of disability are certainly questions of justice. The appropriate response to these requirements should take a form of 'remedial justice' which is also affirmed by duties of mutual aid, assistance and mutual respect for

⁴⁶ Freeman, S. *Rawls*, 1st Edition, (New York, NY: Routledge, 2007), p. 106.

⁴⁷ *Ibid.*, p. 106.

⁴⁸ *Ibid.*, p. 104.

⁴⁹ *Ibid.*, p. 108.

persons.⁵⁰ The example of this kind of justice is a sort of ‘positive discrimination’ or ‘reasonable adjustment’, as seen in Chapter 4. Since the fundamental rights of the disabled are not reached unless these needs are met, enforcement of these necessary measures represents a kind of obligatory justice. Thus for the purpose of this argument, disability does fall within the scope of distributive justice, as will be further demonstrated below. For Rawls, however, these kinds of special needs fall within the role of democratic legislation which shall decide how much in the way of social benefits is deserved by persons with physical or mental disabilities.⁵¹

Some persons who have mental or severe disabilities can invoke their society’s moral duty to respect and protect fundamental rights worthy of their human dignity, through the principle of ‘reparative justice’. The case of ‘qualified disabled individuals’ able to enter into an agreement and exercise their abilities in work and social cooperation also comes, however, under distributive and reparative justice, because they are qualified people and must therefore be treated according to difference and equal opportunity principles.

Furthermore, Rawls’s theory has been challenged according to which primary goods are the variable to be equalised and hence are the end of a distributive policy and provide the means for assessing it. Amartya Sen argued Rawls’s claim that according to his two principles of justice, primary goods are the objects to be distributed and to be equalised. Rawls shows a lack of attention to variations in the use of the same amount of these resources by different people. Sen focuses on the fact that different people have different ways of transforming the same bundle of goods into opportunities for achieving their plans.⁵² Thus Rawls’s theory needs to be expanded. For example, although a disabled person has the same amount of primary goods as non-disabled person, he is, nonetheless, less able to fulfil his goals in life, whatever they may be.

Rawls’s second approach of fairness assesses a person’s advantage regarding his income and wealth and it demands that attention be paid to liberty and its priority. The criticism made of that is that wealth or income is not something that would be valued for its

⁵⁰ *Ibid.*, p. 107.

⁵¹ Rawls J, *A Theory of Justice*, (Oxford, UK: Oxford University Press, 1999), p. 62.

⁵² See Wiebke K, ‘*Amartya Sen's Capability Approach: Theoretical Insights and Empirical Applications*’, (Ph.D. dissertation, Cambridge University, 2004), p. 125.

own interest. A disabled person need not really be judged to be more advantaged than an able-bodied person even if he or she has a higher level of income or wealth than the completely fit person. What has to be explored is the overall capability that any person has to lead the kind of life he has reason to want to lead. This requires that attention be paid to his personal circumstances including his disability as well as his income and other resources, since both can influence actual capabilities.⁵³

The 'veil of ignorance' conceived by Rawls refers to the fact that the parties in the 'original position' do not know how the various alternatives will affect their own particular case and need, and are therefore obliged to evaluate principles solely on the basis of general considerations.⁵⁴ They are situated behind a 'veil of ignorance' concerning: (a) what stage of social, economic and cultural development their society is in, and what sort of society or economy it is, (b) what generation of the society they belong to, (c) their own social, political and economic position as well as their special and necessary needs, (d) their natural talents and abilities, intelligence, strength, etc. (e) their conception of good, (f) their psychological proclivities.⁵⁵

The parties behind the veil of ignorance would have to take into account the possibility that they represent the least advantaged members of society. To protect the interest of those who are worst off, they would first make sure that everyone's basic rights of liberty, freedom of speech, due process, and respect were protected: that is the function of the 'equal liberty principle'. Therefore, the parties in the original position would attempt to make sure that the wealth, income, self-esteem and other goods were adequately distributed so as to make the least advantaged members of society including disabled people as well off as they could be made: that is the role of the difference principle.

The parties in the original position will not choose a principle that they do not believe reasonable people could adhere to. If a principle is agreed from the original position, but it turns out that some cannot adhere to it once the veil is lifted, then the scheme of cooperation so constructed would fall apart. Whenever the veil is lifted, even the person in the worst position must be able to see the reasonableness of the arrangements.

⁵³ Wiebke K, '*Amartya Sen's Capability Approach: Theoretical Insights and Empirical Applications*', (Ph.D. dissertation, Cambridge University, 2004), p. 125.

⁵⁴ Rawls J, *A Theory of Justice*, (Oxford, UK: Oxford University Press, 1999), pp. 118-120.

⁵⁵ *Ibid.*

The difference principle ensures that inequalities are to the benefit of the persons in the worst positions, including disabled persons, whose clear rights have been marginalised. Making the principles of distribution public is a further important factor in the stability of society.⁵⁶

5. 1. 3. Relevant Principles of Distributive Justice

Principles of distributive justice are normative principles which aim to guide the allocation of benefits which are in limited supply relative to demand. This section will focus on principles of distributive justice designed to cover the distribution of goods and services to individuals, and identify how these principles would serve those with special needs and circumstances. The relevant principles are: ‘strict egalitarianism’, ‘the difference principle’, ‘resources principle’, ‘desert principle’, ‘welfare principle’, ‘libertarian principle’, ‘feminist principle’, and ‘disability principle’.

(A) Strict Egalitarianism

Strict equality is considered to be one of the main principles of distributive justice. It declares that every person should have the same level of material goods and services. This principle is justified on the grounds that people are owed equal respect, and hence equality in goods and services is the appropriate way to grant effect to this ideal.⁵⁷

There are, however, problems with this principle, namely those of index and time frame. The index problem arises because the goods to be distributed require to be measured if they are going to be distributed according to some standard such as ‘equality’. If strict equality declares that there should be ‘the same level of material goods and services’, the problem here is how to measure levels. To solve this problem, it may be suggested that everyone should have the same ‘bundle’ of material goods and services rather than the same level: for example, everyone would have four oranges, six apples, etc. The main problem here is that there will be many other allocations of material goods and services, which make some people better off without making anybody else worse off.⁵⁸ For example, a person preferring apples to oranges will be better off if he exchanges some of the oranges from his bundles for some of the apples belonging to a person preferring

⁵⁶ See Rawls J, *A Theory of Justice*, (Oxford, UK: Oxford University Press, 1999), p. 265.

⁵⁷ <http://plato.stanford.edu/search/searcher.py?query=distributive+justice>.

⁵⁸ <http://plato.stanford.edu/search/searcher.py?query=distributive+justice>.

oranges to apples.⁵⁹ Therefore, meting out the same bundle of goods to everybody is seen not to be a suitable solution of the index problem.

The second problem relates to the time frame. Some principles of distributive justice require a particular pattern of distribution to be implemented but specification is required of when the pattern is required. One definition of the principle of strict equality requires that all people should have the same wealth at some basic point, after which people are free to use their wealth in whatever way they choose. Principles specifying initial distribution, after which the pattern need not be preserved, are commonly called 'starting gate' principles.⁶⁰ Since these may lead in time to very inegalitarian wealth distributions, they are not common.⁶¹

A number of additional criticisms are directed against the strict equality principle, including that they unduly restrict freedom, that they do not achieve the best effect in terms of equal respect for persons, and that they conflict with what people deserve. The most common criticism, however, is that everyone can be materially better off if incomes are not strictly equal.⁶² This view is explained by analysis of the difference principle.

(B) The Difference Principle

The difference principle arises in contradistinction to the view that the simple way of producing more wealth is to have a system where those who are more productive earn greater incomes. Rawls however declares that social and economic inequalities should satisfy two conditions, one of them being that they are to be to the greatest benefit to the least advantaged members of society, which as argued above should include persons with special needs.⁶³ The difference principle means that this condition of inequalities is reasonably expected to be to everyone's advantage.

The command of equal respect for persons is the moral motive of the difference principle. It has been argued, however, that in the anticipated future the possibility of earning greater income will bring forth greater productive effort. This will increase the

⁵⁹ *Ibid.*

⁶⁰ See Ackerman B, *Social Justice and the Liberal State*, (New Haven, CT: Yale University Press, 1980), pp. 53-59, 168-170, 188-186.

⁶¹ <http://plato.stanford.edu/search/searcher.py?query=distributive+justice>.

⁶² See Carens J, *Equality, Moral Incentives and the Market*, (New York, NY: Chicago University Press, 1981), p. 89.

⁶³ Rawls J, *A Theory of Justice*, (Oxford, UK: Oxford University Press, 1999), pp. 5-6.

total wealth of the economy and, on the difference principle, the wealth of the least advantaged. Opinion is divided on the bulk of the inequalities which would be allowed by the difference principle, and on how much better off the least advantaged would be under the difference principle than under the strict equality principle.⁶⁴ Rawls, however, provides clear guidance on what type of argument he will consider as justification for inequalities. To be fair, he is not against the principle of strict equality as a principle, but is concerned about the ‘absolute position’ of the least advantaged group rather than their ‘relative position’. Where a system of strict equality promotes the ‘absolute position’ of the least advantaged, then the difference principle advocates strict equality. Whereas if there is potential to develop the ‘absolute position’ of the least advantaged further by gaining some inequalities of income, then the difference principle prescribes inequality up to that point where the absolute position of the least advantaged can no longer be developed.⁶⁵

Further criticisms are made of Rawls’s difference principle, in addition to those discussed above. Libertarians protest that the difference principle involves violation of liberty. This is because sometimes the difference principle requires redistributive taxation to the poor people, whereas libertarians object that such taxation contains the immoral taking of just holding.⁶⁶

Furthermore, the difference principle is criticised on the grounds that it ignores claims that people deserve some economic benefits according to their actions. ‘Desert principle’ theorists argue that some might deserve a higher level of material goods because of their hard work, even if their unequal rewards do not function to improve the position of the least advantaged.⁶⁷

One important objection to the difference principle is made by advocates of the ‘resource principle’, on the grounds that the difference principle is not sufficiently ‘ambition-sensitive’: it is not sensitive to the consequences of people’s choice. They argue that it does not adequately consider natural endowment and inability of person: it does not compensate people for natural inequality, for example, disabled persons or people who suffer health problems that is, those who have no control.⁶⁸

⁶⁴ Rawls J, *A Theory of Justice*, (Oxford, UK: Oxford University Press, 1999), pp. 5-6.

⁶⁵ <http://plato.stanford.edu/search/searcher.py?query=distributive+justice>

⁶⁶ *Ibid.*

⁶⁷ <http://plato.stanford.edu/search/searcher.py?query=distributive+justice>.

⁶⁸ Dworkin R, *Sovereign Virtue*, (Cambridge, MA: Harvard University Press, 2000), p. 113.

Moreover, Will Kymlicka argues that the difference principle allows inequalities to be too much influenced by undeserved natural talent. That is, he defines the ‘least advantaged’ position only socially and economically, but not in terms of the lack of natural talents. Lack of natural talent, however, is undeserved, and makes people less well-off. Accordingly, if inequalities are to be to the benefit of the least well-off, they must compensate not only for fewer social and economic goods, but also for the lack of natural goods, talent, abilities, and health. Thus the *‘difference principle does not entirely mitigate the effect of natural accident and social circumstance. For the well endowed still get the natural good of their endowment’*.⁶⁹

(C) Resource-Based Principles

Resource-based principles entail equality of resources between people. They do not prescribe a model outcome: the outcomes are determined by people’s free use of their resources. Provided that people have equal resources they should live with the consequences of their choices.⁷⁰

Furthermore, resource theorists argue that the difference principle is not sufficiently ‘endowment-sensitive’. Since one of Rawls’s reasons for the difference principle is that people have unequal endowments, resources theorists assert on this feature of their theory to question of distributive justice.⁷¹ They agree that social circumstances over which people have no control should not affect life earning capacity. Also, they argue that for similar reasons, unequal natural endowment should entail compensation for people such as those born with disability: they have not brought these circumstances upon themselves and therefore should not be disadvantaged.⁷²

In addition to the system of equal resources and ‘ambition-sensitivity’, Dworkin suggests sensitivity to inequality in natural endowments. He notes that natural inequalities are not distributed according to people’s choices, nor are they justified by reference to other morally relevant facts about people. So he proposes a compensation scheme.⁷³

⁶⁹ Kymlicka W, *Contemporary Political Philosophy, An introduction*, 2nd Edition, (New York, NY: Oxford University Press, 2002), p. 72.

⁷⁰ <http://plato.stanford.edu/search/searcher.py?query=distributive+justice>.

⁷¹ Rawls J, *A Theory of Justice*, (Oxford, UK: Oxford University Press, 1999), pp. 75-76.

⁷² <http://plato.stanford.edu/search/searcher.py?query=distributive+justice>.

⁷³ Dworkin R, ‘What is Equality, Part 1: Equality of Resources’, (1981), 10, *Philosophy and Public Affairs Journal*, pp. 185-246.

(D) Desert-Based Principles

The theories of distributive justice all claim that people should get what they deserve in the light of their actions. Where they differ is on the basis of desert. Some theories argue that the basis of just desert is something held equally by everyone, hence deriving egalitarian accounts of distributive justice. Other theories argue that the basis of just desert is unequally distributed, according to personal effort, hence deriving accounts of distributive justice according to which some should have more than others.⁷⁴ Some contemporary proposals for desert-bases fit into one of three broad categories: (1) contribution: people should be rewarded for their work activity depending on the value of their contribution⁷⁵; (2) effort: people should be rewarded according to the effort they put into their work; and (3) compensation: people should be rewarded depending upon the costs they bear in their work.⁷⁶

According to John Locke, people deserve to have those items which are produced by their effort. It seems that his idea was to guarantee to individuals the fruits of their own labour. Contemporary desert theory declares that people freely apply their abilities and talents to socially productive work in varying degrees, and thus come to deserve varying levels of incomes.⁷⁷ Distributive justice systems are just inasmuch as they distribute incomes according to the different levels earned or deserved by the individuals in the society for their productive labour, effort, or contribution.⁷⁸

Desert may alternatively be interpreted as need. According to needs-based theories, goods, especially such basic goods as food, shelter and medical care or medical equipment for disabled persons, should be distributed to meet individuals' basic needs.⁷⁹ Some readings of Marx's words 'from each according to his ability, to each according to his needs' might permit Marxism to be regarded as a needs-based theory.⁸⁰ In this regard,

⁷⁴ Lamont J, 'The Concept of Desert in Distributive Justice', (1994), 44(174) *The Philosophical Quarterly*, p. 45.

⁷⁵ Miller D, *Social Justice*, (Oxford, UK: Clarendon Press, 1979), p. 55, and see Riley J, Justice Under Capitalism, in: Chapman J (ed) *Market and Justice*, (New York, NY: New York University Press, 1989), pp. 122-162.

⁷⁶ See Lamont J, 'Incentive Income, Deserved Income, and Economic Rents' (1997), 5(4), *Journal of Political Philosophy*, pp. 26-46.

⁷⁷ Feinberg J, *Justice and Personal Desert, Doing and Deserving*, (Princeton, NJ: Princeton University Press, 1970), pp. 55-94.

⁷⁸ <http://plato.stanford.edu/search/searcher.py?query=distributive+justice>

⁷⁹ *Ibid.*

⁸⁰ Karl Marx, Critique of the Gotha Program in *Karl Marx: Selected writings*, (ed) by David McLellan, (Oxford, UK: Oxford University Press, 1977), p. 569.

fulfilment of special needs for disabled persons on grounds of equal dignity becomes an obligatory entitlement and a principle for distributive justice.

(E) Welfare-Based Principles

According to advocates of welfare-based principles, primary distributive concerns should not be material goods and services. These have no crucial value and are valuable only in so far as they increase welfare. Thus they consider that distributive principles should be formulated according to how they affect welfare⁸¹. In other words, all questions of distributive justice should address the maximisation of welfare. The term 'welfare' is imprecise, and therefore welfare theorists specify the functions of welfare to be maximised. The welfare functions suggested vary both in what will count as welfare and the weighting system for that welfare.⁸²

Most philosophical approaches have emphasised a variant known as Utilitarianism. This can be used to indicate most of the main characteristics of welfare-based principles. Utility has been defined as pleasure, happiness, and preference-satisfaction. Thus, for example, the principle for distributing economic benefits for 'preference utilitarians' is to distribute them in order to maximise preference-satisfaction.⁸³

According to the utilitarian theorists, justice requires the maximisation of the total or average welfare across all relevant individuals. This might require the sacrifice of some for the good of others, so long as the good of everyone is taken justly into account. Utilitarianism argues that the standard of justification for actions and institutions is impartial welfare, and has only indirectly, if at all, to do with rights, needs, or any other non-utilitarian criteria.⁸⁴

The theory of Utilitarianism has been criticised by moral theory, particularly from the perspective of 'commonsense' morality. One criticism indicates that Utilitarianism fails to take the distinctness of persons seriously. It is often argued against Utilitarianism that it is immoral to make some people suffer so that there is a net gain for other people.⁸⁵

⁸¹ <http://plato.stanford.edu/search/searcher.py?query=distributive+justice>.

⁸² *Ibid.*

⁸³ <http://plato.stanford.edu/search/searcher.py?query=distributive+justice>.

⁸⁴ Barry B, *Theories of Justice*, (Berkeley, CA: University of California Press, 1989), p.88.

⁸⁵ <http://plato.stanford.edu/search/searcher.py?query=distributive+justice>.

Utilitarianism is criticised on the grounds that it highlights only mental characteristics and treats those characteristics as indicative of the overall advantages that different individuals have. It also assumes that people's pleasures and desires adjust to circumstances and adapt to adversities. Thus according to the utilitarian view a person who is physically disabled, but who manages to lead a life of some happiness by keeping their aspirations low, is not considered disadvantaged.⁸⁶

Another criticism of Utilitarianism involves its treatment of individual preferences or interests by reference to the holding of others. For example, some people may have a preference that some minority racial groups or other groups such as the disabled be viewed as a second class of people and have fewer material benefits. According to Utilitarians, this preference or interest counts like any other towards determining the suitable distribution. Therefore, if racial or disability preferences are widespread and are not outweighed by the minorities' contrary preferences, Utilitarianism is capable of suggesting an inegalitarian distribution based on race or other minority grounds.⁸⁷

Utilitarians answer these criticisms by arguing that utility is suitably promoted in the long run when people's preferences are formulated in ways that are compatible with one another. They recommend that racist or other group preferences should be discouraged. The utilitarian must, however, supply an account of why racist or sexist preferences should be discouraged when the same level of total long-term utility could be achieved by encouraging the less powerful to be contented with a lower position. Utilitarians also argue that the empirical conditions are such that maximising utility will rarely require disabled persons, women or racial minorities to sacrifice or suffer for the benefit of others or satisfy the prejudice of others.⁸⁸

(F) Libertarian Principles

Libertarians believe that each individual should have an equal right to basic liberties (or autonomy). On the other hand, most libertarians reject the idea that there should be any principles that govern the distribution of resources. For libertarians, the distribution of wealth and income flows from the free choices made by individuals.⁸⁹ Therefore,

⁸⁶ Wiebke K, '*Amartya Sen's Capability Approach: Theoretical Insights and Empirical Applications*', (Ph.D. dissertation, Cambridge University, 2004), p. 128.

⁸⁷ <http://plato.stanford.edu/search/searcher.py?query=distributive+justice>.

⁸⁸ <http://plato.stanford.edu/search/searcher.py?query=distributive+justice>.

⁸⁹ See http://solum.typepad.com/legal_theory_lexicon/2005/07/legal_theory_le.html

advocates of Libertarian distributive principles rarely see the market as the means to some desired pattern, since the principles they advocate do not apparently propose a 'pattern' at all, but instead describe the category of acquisitions or exchanges that are themselves just. The market will be just whenever the exchanges permitted in the market satisfy the conditions of just exchange which comes accordant to the principles. For Libertarians, just results are those which result from separate just actions of individuals, and thus they believe a particular distributive pattern is not required for justice.⁹⁰

The 'capabilities approach' (CA), however, is different from the Libertarians' in respect of its approach to appropriate distribution. Unlike the Libertarian view, CA insists that a state aim be to ensure and promote a bundle of requisites for a reasonably decent life worthy of human dignity. Failure to fulfil these requirements would be the government's fault: minimal justice has not been achieved.⁹¹

In addition, some Libertarian thinkers ask only whether some basic freedoms are legally protected. The thinking behind the CA appears deeper, since it asks whether people, especially disadvantaged people, live in appropriate positions to avail themselves of these freedoms, and if the latter refer to areas of choice and opportunity such as healthcare, education and so on.⁹²

(G) Feminist Principle

At the outset, it should be noted that there is no one feminist conception of distributive justice. John Stuart Mill gives one of the early feminist critiques of the political and distributive structures of the emerging liberal democracies. He argues that the principle associated with the developing liberalism of his time required equal political status for women. The principles which Mill mentions include a rejection of the aristocracy of birth, equal opportunity in education and in the market-place, equal rights to hold property, a rejection of the man as the legal head of the household and equal rights to political participation.⁹³

⁹⁰ <http://plato.stanford.edu/search/searcher.py?query=distributive+justice>.

⁹¹ Nussbaum M, 'The Supreme Court 2006 Team, Forward: Constitutions and Capabilities: "Perception" Against Lofty Formalism', (2007) 121(4), *Harvard Law Review*, p. 34.

⁹² Nussbaum M, 'The Supreme Court 2006 Team, Forward: Constitutions and Capabilities: "Perception" Against Lofty Formalism', (2007) 121(4), *Harvard Law Review*, p. 38.

⁹³ <http://plato.stanford.edu/search/searcher.py?query=distributive+justice>.

Many contemporary feminists have argued that the resulting liberal theories of justice have fundamentally been unable to accommodate the injustices that have their origins in this protected private sphere. The liberal commitments to government neutrality and to a protected personal sphere of liberty where the government must not interfere have been primary critical targets.⁹⁴

The feminist advocate Susan Okin demonstrates that women have substantial disadvantages in competing in the market because of childbearing responsibilities which are not equally shared with men.⁹⁵ As a result, any theory relying on market mechanisms, including most liberal theories, will yield a system which results in women having less income and wealth than men. Accordingly, feminists have challenged contemporary political authority in the name of securing a just outcome for women and other historically oppressed groups.

One might argue that the feminist issues are considerably similar to disability issues in terms of their isolation and deprivation of fundamental rights and equal opportunities. Therefore, one can see that the scheme of distributive justice is the best way to treat disability discrimination. Since the various theories of justice have not paid sufficient attention to the particular problem of disability, a 'disability' as normative principle may be added to the principles for distributive justice.

(H) Disability Principle

Questions implicit in the theory of distributive justice relate to who and where the special parties are, and what should be the basis of proper distribution. It has been shown above that, on grounds of equal dignity entailing equal respect and the right to positive discrimination, the specific rights of disabled persons are merited by their circumstances. Medical assistance and access to education, employment and full social participation and status are thus required by the concept of remedial justice. Therefore, disability offers answers to some of the questions above: disabled people are a special group and their special needs are norms to determine proper distribution.⁹⁶

⁹⁴ <http://plato.stanford.edu/search/searcher.py?query=distributive+justice>.

⁹⁵ See Okin S. M. *Justice, Gender and the Family*. (New York, NY: Basic Books Publishers, 1991), p. 65.

⁹⁶ So, for example, Canada noted when it stipulated the prohibition of discrimination based on disability directly in its constitution. (See Chapter 1).

Since the disabled person is still a human being, each of the above principles should in fact take account of disability, especially 'strict egalitarianism'. In the difference principle, however, the less advantaged must include disabled persons. Further, the principle of 'reparative justice' should apply to distribution, taking account of the special circumstances of the disabled which they cannot control. In addition, the resources principle is particularly relevant in view of the issues of compensation and the implications of the terms 'ambition-sensitive' and 'endowment-sensitive'. These entail devices relevant to distributive justice which meet the needs of disabled persons. The concept of 'veil of ignorance' is also particularly useful in identifying a real concept of justice which is appropriate for the situation and needs of the disabled, and is an explorative device to protect their rights. For these reasons, disability must feature in theorising the principles of distributive justice.

In short, the Western theory of distributive justice is an egalitarian ideal: i.e. it assumes that disabled persons have interests that merit adequate accommodation prohibiting discrimination. Islamic thought lacks explicit theories of distributive justice, and discriminatory practices can frequently be found in Islamic societies, especially towards the disabled. It should not be assumed, however, that Islamic thought lacks an intellectual and philosophical basis for addressing problems of discriminatory practices in a way comparable with Western approaches. The second section of this chapter turns to Islamic thought, and seeks to discover signs of distributive justice and its principles in operation in Islamic justice.

5. 2. Distributive Justice in Islamic Thought and Practice

Distributive justice in Islamic thought has not been known by this specific name, which is found in the West, but there are some attempts to investigate this kind of justice, as will be discussed below. Initially the matter needs to study general concepts of justice that represent the touchstone of principle of justice in Islam in order to pursue intimations of distributive justice.

5. 2. 1. General Concepts

From the Islamic point of view, it is known that justice is a fundamental principle in the world. The world cannot survive without justice.⁹⁷ Justice in Islam is known as fairness. Justice as fairness begins with one of the most general of all choices which people might make together, namely with the choice of the first principles of a conception of justice. Accordingly, Allah always demands the practice of justice as a guide to regulate all subsequent criticism and reform of institutions that choose the legislature to enact the law. Ibin Al-ghaim says: '*Allah sent messengers to promote justice*'.⁹⁸ Also, Ibin Taiymiah states that justice is obligatory, and prejudice is not permitted in any interaction, whether between Muslim or non-Muslim. People are required to act fairly towards each other.

This section will outline the meaning and sources of justice, as well as aspects of justice, from an Islamic perspective. Further, it will identify sources or signs of distributive justice in Islam. This section will also discuss the problem of justice and charity.

(A) Meaning and Sources of Justice

The word justice in Arabic derives from balancing between two positions to reach a third, middle position. Thus the word medium is used in Arabic for the meaning of justice.⁹⁹ Arabic has many words referring to justice, such as *qest*, *esteqamah*, *wasat*, *mizan*, etc. Justice is straightforward and unequivocal.¹⁰⁰

In English the opposite of justice is 'injustice'. In Arabic the opposite of justice is a totally different word which is 'prejudice'. There are several words in Arabic with similar meanings, including *zolm* (prejudice), *toghian* (rebellious), *enheraf* (deviation).¹⁰¹ The concept of justice may be associated with what is right, as when the people say it is a right judgement when a judge judges with justice. Justice to Ibin Taiymiah is based on elements such as right, honesty and balancing.¹⁰² On the other hand, Ibin Khaldoun based his understanding of justice on the rejection of animosity towards people, their property,

⁹⁷ Al-Mawarrdi M, *Adab Al-Deen Wa Al-Donia*, 5th Edition, (Beirut, Lebanon, Dar Alkotob Al-Ilmiyah, 1992), p. 111.

⁹⁸ Ibin Al-Ghaim Al-Joziah M, *I'Elam Al-Moa'geen An Rab Al-Alameen*, Vol. 4, (Beirut, Lebanon: Dar Al-Jeel, 1979), p. 373.

⁹⁹ Ibin Ashur A, *Osoul Al-Nedham Al-Ejtemai Fi Al-Islam*, 1st Edition, (Jordan: Dar Al-Nafis, 2001), p. 293.

¹⁰⁰ *Ibid.*

¹⁰¹ Khaddouri M, *Mafhoum Al-Adel Fi Al-Islam*, 1st Edition, (Damascus, Syria: Dar Al-Kalimah, 1998), pp. 20-21.

¹⁰² Ibin Taiymiah A, *Al-Radd Ala Al-Manteghien*, (Damascus, Syria: Al-Kitab Al-Islami, 1988), pp. 435-437.

bodies, privacy, secrecy, intellectual property, beliefs, and safety. This also applies to the governor of state, who is to apply fairness and justice in society.¹⁰³

Al-Ragheb Al-Asfahani said that justice means equality. The concept of justice is used with reference to the equality of something to another. This has two aspects, equality and quantity. The first refers to mere equality which means equality in rights. The second aspect embodies the principle of distributive justice which can be expressed in the following terms: proportion, part, scale and rectification, which means make things 'straight'. Hence, the literal meaning of the word *Adel* (justice) in Arabic is a combination of moral and social values which means fairness, scale, and balance. Allah's justice is a combination of all these principles and values and is a matter of debate among Muslim jurists.¹⁰⁴ It can be seen that the concept of justice in Islam is based on the original concept of equality. For justice to be a moral concept, respect for both human values and rules, and mutual acceptance are required. Justice has the power to provide and maintain rights to every individual, and the legal system or the judiciary will be entitled to apply the relevant justice.

Concerning the sources of justice in Islam, the general system including the principles of justice is derived from the *Qur'an* and *Sunnah*. Muslim scholars generally consider Islamic justice to be the expression of Allah's justice, and it can be summarised as follows. Firstly, justice comes from Allah, therefore cannot be defined without evidence, which cannot be provided by human beings. Only evidence direct from Allah, usually informing his prophets, is sufficient. Some commentators insist, however, that the mind plays an important part in understanding the concept of justice. Secondly, justice is a virtue of Allah and hence not easily defined by human beings' words. Therefore, Muslim scholars consider justice to be an embodiment of noble values for human beings and an ideal principle, whether it originates from Allah or human beings. Thirdly, the concept of 'Allah justice' is to believe in Allah. The goal of justice should be pursued by all humans, and is a central aim that even non-believers can rely on. Finally, whether from Allah or mankind, the purpose of justice is to maintain people's rights, define what is wrong, and

¹⁰³ Ibin Khaldon A, *Al-Moqademah*, Part 43, (Beirut, Lebanon: Dar Al-Kotob, 1982), p. 286.

¹⁰⁴ Khaddouri M, *Mafhoum Al-Adel Fi Al-Islam*, 1st Edition, (Damascus, Syria: Dar Al-Kalimah, 1998), pp. 22-23.

show people how to interact with tolerance.¹⁰⁵ Mohammad founded the Islamic Sharia by means of his words and acts. Muslim scholars identified precedents on which they built their theories, as also on the words and acts of 'Kholafa' who came after Mohammad.¹⁰⁶ Accordingly, the *Qur'an* and *Sunnah* comprise specific rules referring to the elements of justice and how to define it. Thus Muslim scholars have tried to extract these elements from the different sources of Islam.¹⁰⁷

(B) Aspects of Justice

According to Abu Zaharah, justice is described in Islam as two prongs. The first prong is self-justice, which means that the individual must be his own judge of whether he has acted fairly towards others. This kind of justice is a direct and natural way of dealing between people, it strengthens the relationship between the members of the community and it does not need any rule to enforce it. It also contains moral, philosophical and religious elements. The second prong is organised by the state. It cannot be applied unless the basis of self-justice is recognised by everyone, from the governor down.¹⁰⁸ State justice includes political, social, legal, international and finally distributive justice.

(i) Justice in Theory (Divine Justice): this aspect of justice was defined by Muslim scholars as the wishes of Allah, and they agreed that divine justice is rooted in Allah and Allah is the final arbiter. But scholars have different thoughts in respect of the nature of justice. There are two schools of thought, i.e. 'revelation' and 'mind'. The quote school believes only in the *Qur'an* and *Sunnah*. The mind school focuses on the premise that Allah's virtue will prevail. Clarification is needed here between these schools because there is some debate on the nature of justice and how human beings can determine it in life and after death.¹⁰⁹

The mind school is represented by 'Motazelah' scholars. They hold that the *Qur'an* should be construed in a way that is consistent with the mind. They believe in *Wahi* (revelation) power and recognise no conflict between revelation and mind, saying that mind directs people to general principles of justice, and revelation to different acts. The

¹⁰⁵ Khaddouri M, *Mafhoum Al-Adel Fi Al-Islam*, 1st Edition, (Damascus, Syria: Dar Al-Kalimah, 1998), pp. 223-224.

¹⁰⁶ The term 'Kholafa' refers to the followers of Islamic calling of Prophet Mohammad, and they followed Mohammad Islamic method.

¹⁰⁷ See Chapter 1. p. 15.

¹⁰⁸ Abu Zaharah M, *Al-Mujtama Al-Insani Fi Al-Islam*, (Cairo, Egypt: Dar Al-Feker Al-Arabi, 1984), p. 18.

¹⁰⁹ Khaddouri M, *Mafhoum Al-Adel Fi Al-Islam*, 1st Edition, (Damascus, Syria: Dar Al-Kalimah, 1998), p.59.

Motazelah further say that Sharia only clarifies people's duty, defining the permitted and prohibited acts. It does not, however, define any rule to distinguish these acts. so we are required to resort to our mind to find out the differences. They say that people before Mohammad believed in justice and were able to distinguish between justice and injustice.¹¹⁰ Hence, they conclude that the ideal justice is divine justice but that human beings can realise the justice of Sharia and the concept of justice through mind at the same time.¹¹¹

The school of revelation is represented by *Sunnah* Imams. Ahmad Ibin Hanbal holds that all matters concerning justice should be considered in the light of Sharia, which is revelation. *Sunnah* scholars such as Abu Hanifah view analogy as a secondary source of Sharia.¹¹² Analogy is known in Islam by the name *Giyas* which means analogy, or analogical deduction, or reasoning by analogy from the *Qur'an* and *Sunnah*. Where the *Qur'an* and the *Sunnah* do not address a particular problem or issue, Islamic Jurists employ *Giyas* to reach a logical decision. Nevertheless, analogy is based on reason, they do not agree on mind solely to determine the concept of justice. Generally the jurists are agreed on the definition of justice according to Sharia. Al Shafie defines justice as 'obeying Allah'.¹¹³ Therefore, applying justice means obedience to Allah, within the revelation of the *Qur'an* and *Sunnah*. These two concepts of justice i.e. schools of revelation and mind can be connected to each other. The justice of revelation leads the person to good deeds.

Justice is an expression of Allah's will and human beings are required to do what is considered just. So human mind and reason can by analogy decide what is just, even if it is not decided in the *Qur'an* or *Sunnah*.

(ii) *Philosophical Justice*: philosophical justice is based on reason only and not on revelation. Thus, philosophical justice is determined by mind and affected by time or place. Philosophers have, however, tried to link reason with revelation. Some Islamic philosophers such as Al-Farabi, Ibin Seena and Ibin Roshed tried to understand justice from the Greek sources and put it in a way which does not touch the spirit of the religion,

¹¹⁰ *Ibid.*, p. 54.

¹¹¹ Al Shahrestani M, *Al Mellal Wa Al-Nehal*. (Beirut, Lebanon: Dar Al-Marefa), p. 58.

¹¹² For secondary resources of Islamic sharia, see Chapter 1. p. 16.

¹¹³ Al Shafie M, *Al Resallah*. (Beirut, Lebanon: Dar Al-Kotob, 1977), p. 25.

so they tried to combine revelation with reason.¹¹⁴ Al Kindi said that justice is based on instinct. In other words, justice is a sense inside the person which is decided by reason. Justice is always to be found in support of right and is not only against evil but is also a value which can be developed by humans in the light of their understanding of that right. Hence, people are under obligation to perceive justice and to adhere to it.

There is a mechanism for distinguishing between what is just and what is unjust. Al-Ashari says '*The mechanism of distinguishing between just and unjust was decided by Sharia which imposes rules of permission and prohibition*'.¹¹⁵ These rules pronounce that all prohibited acts are unjust and all others are just. Comparing Allah's justice with philosophical justice, Ibin Roshed concluded that the concept of justice in the above-mentioned schools of thought is the same, despite the variation of the sources, i.e. Greek philosophy and Islam. Ibin Roshed was inspired by the philosophy of Plato and Aristotle. He finally concluded that justice is no more than every citizen's rightful activity.¹¹⁶

(iii) *Moral Justice*: moral justice encourages people to adhere to high values, and the first source of morality for Muslims is the *Qur'an*. Allah said: '*and you are tremendous nature; your nature is great?*'.¹¹⁷ Mohammad said: '*I came to introduce the great values*'. Regarding moral justice Allah said: '*Allah enjoins justice and kindness*'.¹¹⁸ This verse is the principle of moral justice in Islam. Allah orders us to do good deeds, as this is higher in rank than justice.¹¹⁹ Many Muslim philosophers such as Al Razi were concerned with moral justice, and tried to introduce criteria of justice according to Islamic values. They stated that moral justice is not a package of religious and legal duties only, but also a moral duty.

(iv) *Legal Justice*: legal justice in the Islamic Sharia supposes that justice originating from Allah is holy. Legal justice is judging according to the law, in this case the rules of Islam. Sharia does not offer any limited measure to distinguish between just and unjust acts.

¹¹⁴ Khaddouri M, *Mafhoum Al-Adel Fi Al-Islam*, 1st Edition, (Damascuse, Syria: Dar Al-Kalimah, 1998), pp. 101-102.

¹¹⁵ *Ibid.*

¹¹⁶ Ibin Roshd M, *Sharh Jomhouriat Aflatoon*, (Morocco: Dar Atlas, 1978), pp.114-115.

¹¹⁷ The *Qur'an*, Surah 68: Al-Qalam, verse No.4.

¹¹⁸ The *Qur'an*, Surah 16: An-Nahl, verse No. 90.

¹¹⁹ Al-Tabari M, *Tafsir Al-Qur'an Al-Karim*, Vol. 2. (Riyadh, Saudi Arabia: Edarat Al-Bohooth Al-Islamiah, 1982), p 34.

Therefore, the principle of legal justice is divided into two parts, each covering a particular aspect of justice: substantive justice, which is justice concerning material issues, and procedural justice, which is formal ways of applying justice.

Substantive justice, the first aspect, consists of those elements of justice that constitute the material of Sharia, which represents the Islamic law. But law is a collection of regulatory principles. According to Ibin Ashur the main aim of law and justice is to protect the national system and to maintain continuity and validity and to protect people and maintain goodness among them.¹²⁰ So, the main principle of Sharia is to provide justice and equality.

One might query what the main reference of structure of Islamic law is? The main aim of Sharia is to protect the general interest. General interest has been defined by Al Ghazali as an increase in interest and avoidance of corruption. Sharia aims to confer benefit and remove harm as has been noted before.¹²¹ The question also needs to be answered whether Sharia's intention is to protect the public interest or the individual's interest? If one looks at general rights and duties, Sharia's aim is to maintain Muslims' rights generally without any kind of distinction. The individual's rights also should be maintained as long as they do not conflict with the public interest.¹²²

The second aspect, procedural justice, concerns the formal process the courts follow to achieve justice that means administration of justice. The procedural rules vary from one particular legal system to another.¹²³ The Islamic Sharia ensures that justice will not be achieved unless there is a power to enforce and apply it. In this context, Al-Khaliffa Omar Ibin Kahttab said in his popular message to Abu Mussa Al-Ashari: '*It is not worth pronouncing right that which cannot be enforced*'.¹²⁴ He believes that the judiciary should be independent, and justice and fairness will not be achieved unless the judge is impartial and independent.

¹²⁰ Ibin Ashur A, *Maghased Al-Sharia Al-Islamiah*, (Tunis: Dar Al-Zaitonah, 1946), p. 64.

¹²¹ See Al-Ghazali, *Al Mostassfa*, (Cairo, Egypt: Dar Al-Kutob Al-Ilmiah, 1973), p. 138-40.

¹²² Khaddouri M, *Mafhoum Al-Adel Fi Al-Islam*, 1st Edition, (Damascus, Syria: Dar Al-Kalimah, 1998), p. 164.

¹²³ Khaddouri M, *Mafhoum Al-Adel Fi Al-Islam*, 1st Edition, (Damascus, Syria: Dar Al-Kalimah, 1998), p. 162.

¹²⁴ Al-Mawardi A, *Al-Ahkam Al-Sultaniah*, (Beirut, Lebanon: Al-Maktab Al-Islami, 1978), p. 119.

Legal justice requires the unity of law, one law applied to all, and people to be counted equal before the law. Omar Ibin Al-Khattab said in his above-mentioned message: *'Rule between people in your court where the noble do not expect partiality nor poor people lose trust in your justice'*.¹²⁵ In order to make the law available to all, without distinction and without interference of any party to obstruct it, and to uphold the rights of all, strong justice is necessary.

(v) Political Justice: the state enables an individual to belong to an international community of human beings. This requires the state to be fair in ruling the country. Justice derives from the general system of the state, called political justice, and any given state has its appropriate form of justice. Political, social and moral justice always is bound to the political interest. For the government to exist and continue, its legal system should be compatible with the principles of justice. A society has the right to choose whether its legal system should originate from Allah or humans. Muslims are required to obey the Islamic Sharia and Muslim rulers are bound to rule according to justice.¹²⁶ Allah said: *'Allah commands you that you restore deposits to their owners, and, if you judge between mankind, that you judge justly'*.¹²⁷ Mohammad was ordered to judge according to justice because this is the foundation of life and civilisation. Allah made the rule of justice as a method for the continuity of government and the state, even irrespective of its religion and belief: as Ibin Taimiah said: *'Allah establishes a just state even if it is not a believer, and does not establish the unjust state even if it is a Muslim state'*.¹²⁸

(vi) International Justice: the relationship between Muslim and non-Muslim nations is based on their relationship and knowledge of each other. Allah said: *'O mankind! We have created you from a male and a female, and have made you nations and tribes that you may know one another. The noblest of you in the sight of Allah, is the best in conduct'*.¹²⁹ Islam requires human relations to be based on kindness, as Allah said: *'and speak kindly to mankind.....'*¹³⁰ In a further instance Allah said: *'Allah forbids you not those who warred*

¹²⁵ See Al-Mawardi A, *Al-Ahkam Al-Sultaniah*, (Beirut, Lebanon: Al-Maktab Al-Islami, 1978), p.119.

¹²⁶ See Khaddouri M, *Mafhoum Al-Adel Fi Al-Islam*, 1st Edition, (Damascus, Syria: Dar Al-Kalimah, 1998), p. 30.

¹²⁷ The *Qur'an*, Surah 4: An-Nisa, Verse No. 58.

¹²⁸ Ibin Taimiah A, *Majmoua Fatawa Ibin Taimiah*, Combined by Al-Ghasem, A, Vol. 28, (Riyadh, Saudi Arabia: Edarat Al-Bohouth Al-Ekmiah, 1982), p.146.

¹²⁹ The *Qur'an*, Surah 49: Al-Hujurat, Verse No. 13.

¹³⁰ The *Qur'an*, Surah 2: Al-Baqarah, Verse No. 83.

not against you on account of religion and drove you not out from your homes, that you should show them kindness and deal justly with them. Allah loves the just dealers. Allah forbids you only those who warred against you on account of religion and have driven you out from your homes and helped to drive you out, that you made friends of them (All) such are wrong-doers'.¹³¹ Therefore, these principles of justice which are based on kindness do not require that justice to be according to a convention between nations, because justice is a principle in itself.

Regarding conventions between Muslims and non-Muslims, Muslims are required to fulfil these without any religious or other discrimination. As Allah says: '*O you who believe fulfil your undertakings*'.¹³² A respect for others' opinions and different views is emphasised in Allah's words: '*O you who believe! Be steadfast witnesses for Allah in equity, and let not hatred of any people seduce you that you deal not justly. Deal justly, that is nearer to your duty*'.¹³³

Non-Muslims living in Muslim states have their rights and duties which should be maintained by the state and people. Justice is the main principle in Islam between Muslim and non-Muslim. It is a natural right held by people irrespective of their religion, sex, colour, or sympathies.

(vii) Social Justice: social justice is determined by the principles of moral justice upheld by Islamic Sharia. These affirm that social, political and economic wealth should be shared among all people. Thus social justice covers all aspects of living. Social justice is made by people and is distinct from the ideal concept of justice which comes from Allah, nature and reason, because social justice results from human experience. It is not a response to orders given by reason.

Earlier Muslim jurists do not discuss the concept of social justice. But some of them emphasise the elements of social justice such as habit and tradition.¹³⁴ Recent Muslim jurists have many definitions for social justice. For example, Saiyed Qotoub says

¹³¹ The *Qur'an*, Surah 60: Al-Mumtahinah, Verse No. 8-9.

¹³² The *Qur'an*, Surah 5: Al-Ma'idah, Verse No. 1.

¹³³ The *Qur'an*, Surah 5: Al-Ma'idah, Verse No. 8.

¹³⁴ Khaddouri M, *Mafhoum Al-Adel Fi Al-Islam*, 1st Edition, (Damascus, Syria: Dar Al-Kalimah, 1998), p. 204.

that social justice in Islam is perfect human justice covering not only economic justice but all aspects of life. These include senses, conduct and conscience, combining physical and spiritual values. The two prongs of human justice identified by Islam are human conscience and legal duty. Qotoub defined social justice as absolute freedom of conscience and absolute human equality and social security.¹³⁵ Qotoub's wide definition covers all social, economic, political aspects and is based on freedom and equality which are rooted in moral and spiritual values.

Some jurists have tried to gather these social, political and economic aspects together. Dr. Abdol Latif Al-Mahmoud defines social justice as '*equality made by the government for all members of the society and also to implement, political, economic, and legal justice. The government will achieve this by applying the principles and the rule of law pertaining to rights and duties, and regulating the relationship between the government and individuals and between individuals themselves*'.¹³⁶ This definition contains the basic principles of distributive justice.

The concept of social justice in Islam can thus be found to include distributive dimensions. The philosophical framework, however, lacks explicit statement of the specific concept and its principles. In order to consider the possibility of constructing a distributive justice theory for Islam, it is important to identify historical instances of the intimations of such a principle.

5. 2. 2. Intimations of Distributive Justice

Although ideas of distributive justice are contained within general concepts of social justice in Islam, Muslim scholars and jurists have not addressed the concept explicitly. People can enjoy social wealth and political power among themselves following particular procedures compatible with the general system. But Muslim society is becoming aware of a need for another dimension of justice which moves closer to the notion of distributive justice in Western terms. In this context, two schools of thought can be distinguished. First is the progressive school which in turn is divided into two branches, i.e. the restrictive and liberal

¹³⁵ See Qotoub S, *Al-Adalah Al-Ejtimaieh Fi Al-Islam*, 7th Edition, (Cairo, Egypt: Dar Al-Shorouq, 1987), pp.35-77-28.

¹³⁶ Al Mahmoud A, *Al Tamein Al-Ejtimaie Fi Doh Al-Sharia Al-Islamiah*, 1st Edition, (Beirut, Lebanon: Dar al Nafaies, 1994), p. 82.

branches. The former rejects Western ideas, whereas the latter accepts those which do not contradict Sharia principles. The second school is the modern school, which adopts the secular Western principles of distributive justice irrespective of their compatibility with Islamic concepts.¹³⁷

(A) The Concept of Distributive Justice

The basis of the concept of distributive justice was known by the Muslim scholars who used it in its quantitative meaning as Aristotle uses it, not in its modern social meaning. Some Muslims support the modern development to adopt distributive justice, but differ on the mechanism of applying it. The modern supporters take distributive justice as an expression of people's choice. They maintain that distributive justice is required by public interest, and that it is not required to justify it on an Islamic basis. Progressive supporters and conservative scholars reject this view.¹³⁸ Therefore it is appropriate to find a reasonable definition for distributive justice according to Islam, taking social and quantitative meanings of justice into account.

It is recognised that justice should distribute social and moral property among people. According to Al-Farabi, justice is a guaranteed way of sharing all property that citizens have to share.¹³⁹ This general definition of justice concentrates on the distributive aspect including its social, economic, political context. In other words, it defines justice both quantitatively and qualitatively. This complies with the meaning of Allah's words in the *Qur'an*: '*So give full measure and full weight and wrong not mankind in their goods, and work not confusion in the earth after the fair ordering of it*'.¹⁴⁰ This constitutes a general definition for distributive justice. Here there is no mention of distribution of respect and other moral values, yet this is found in the words of Prophet Mohammad when he said: treat and respect people as you desire them to treat you. So, the definition would be: ***Distributive justice is comprehensive equality between people in distributing wealth in the fundamental, social, cultural, economic, political context and respect without any***

¹³⁷ Khaddouri M, *Mafhoum Al-Adel Fi Al-Islam*, 1st Edition, (Damascus, Syria: Dar Al-Kalimah, 1998), p. 227

¹³⁸ See Khaddouri M, *Mafhoum Al-Adel Fi Al-Islam*, 1st Edition, (Damascus, Syria: Dar Al-Kalimah, 1998), p.236.

¹³⁹ Al-Farabi A, *Al Fosoul Al-Madani*, (Beirut, Lebanon: Dar Al-Torath, 1975), pp. 141-42.

¹⁴⁰ The *Qur'an*, Surah 7: Al-A'raf, Verse No. 85.

prejudice, and the right of the less advantaged people should be respected. To gain legitimacy, the definition requires a solid foundation.

Distributive justice falls within the context of social justice, which is considered to be secular because it is based on custom and tradition. In order to bring this additional element into the Islamic concept of justice, new efforts are required within the Islamic Sharia in regulating the relationship between the individual and the society and the state. Public interest is the main aim of Islamic legislation: Ibin Taimiah said Sharia was formed to achieve interest and exclude and reduce corruption.¹⁴¹ Hence it can be seen that, according to Sharia, distributive justice is based on public interest within precedent and custom. These specify practically the interest which according to the primary legislation should be maintained as a principle upon which distributive justice is based.

(B) Principles of Distributive Justice

Since Islamic Sharia was designed in order to maintain public interest, and public interest is a valid basis for distributive justice, it is possible to discover principles which serve as a reference and norms for distributive justice according to Islam. These principles include equality in fundamental rights and public services, freedom and the balance of ownership, and the principle of differentiation.

(i) Equality in Fundamental Rights and Public Services: the principle of equality in Islam is a consequence of brotherhood, which makes all men equal in fundamental rights. Prophet Mohammad said: '*Allah protects all mankind equally*'.¹⁴²

Individuals can be entitled to rights by virtue of either their actions, or their human dignity. The latter applies to fundamental rights such as the rights of food and security. Allah said: '*Who has fed them against hunger and has made them safe from fear*'.¹⁴³ These rights are upheld in Islam for all mankind and not for a particular nation or race. Prophet Mohammad said: '*People share in three things; water, grass and fire*'.¹⁴⁴ The address here is directed to all mankind, whether Muslims or non-Muslims. Water, fuel and plants are all

¹⁴¹ Ibin Taimieh A, *Majmoua Fatawa Ibin Taimiah*, Combined by Al-Ghasem, A, Vol. 20, (Riyadh, Saudi Arabia: Edarat Al-Bohouth Al-Ekmiah, 1982), p. 48.

¹⁴² Ibin Hisham M, *Serat Ibin Hisham*, Vol. 1, (Beirut, Lebanon: Al-Maktab Al-Islami, 1984), p. 341.

¹⁴³ The *Qur'an*, Surah 106: Quraysh. Verse No. 4.

¹⁴⁴ Al-Haithami N, *Majjma Al-Zawaid Wa Mannba Al-Fawaed*, Vol. 1, (Beirut, Lebanon: Dar Al-Kitab Al-Arabi, 1982), pp. 508-509.

a natural part of our shared earth, owned by no one party. People are equal in respect of these commodities, which are essential to the public interest.¹⁴⁵ At the time of Prophet Mohammad, these were the three essentials of life, and are accordingly the named commodities. In modern times, public needs have expanded, thus some modern Islamic thinkers argue that the same equality should apply to national wealth, income and facilities such as hospitals, roads, etc.¹⁴⁶

The Islamic Sharia exists to promote the interests of the people. Therefore it is appropriate that it should provide the public facilities of free health care, education and employment for all citizens without discrimination on any basis, to persons who are unable to lead a normal life without these fundamental rights.

(ii) *Freedom and Balance of Ownership*: freedom in modern thinking refers to what humans can do according to their capacity.¹⁴⁷ But in Islamic Sharia, two different meanings have been attached to the concept. The logical meaning refers to individual choice. The religious meaning, upheld by the revelation school of thought, sees Sharia as the arbiter of rights and duties. There is, however, no modern written source in this respect. Since the principle of freedom is the natural outcome of equality, the principle of justice is arguably the arbiter of people's rights and duties.¹⁴⁸

Prophet Mohammad's message was given to determine the rights of freedom. It is a message for the freedom of human beings from persecution and against injustice. Therefore, the Muslim communities from that time up to now were commanded by justice, equality, brotherhood, mercy and accountability. Al-Kawakebi emphasises that the principle of liberty is the most valuable thing for men: if liberty is taken from them the laws will break down.¹⁴⁹

Regarding ownership, there is difference of opinion among different schools of thought. The idea of public ownership was recognised in all regimes and legislation. Regarding private ownership, however, Islam has divided opinions. Dispute centres

¹⁴⁵ Ibin Hammdon M, *Al-Tazkerah Al-Hammdoniyah*, Vol. 9, (Beirut, Lebanon: Dar Sader, 1977), p. 66.

¹⁴⁶ See Al-Kasani M, *Bada'i Al-Sana'i*, Vol. 3, (Beirut, Lebanon: Dar Al-Kutob, 1978), p. 99.

¹⁴⁷ Ibin Ashur A, *Osoul Al-Nedham Al-Ejtemai Fi Al-Islam*, 1st Edition, (Jordan: Dar Al-Nafis, 2001), p. 256.

¹⁴⁸ *Ibid.*

¹⁴⁹ Al-Kawakabi A, *Aum Al-Qoura*, (Beirut, Lebanon: Dar Al-Tourath, 1967), p. 9.

around the relationship between ownership and the individual and its connection with the criteria of social distributive justice.

In terms of distributive justice in Islam, the primary issue is whether freedom of ownership is based on the principle of equality or on the principle of economic freedom. First, all ownership derives from Allah, the first master on earth: '*Verily all that is in the heavens and the earth is Allah's*'.¹⁵⁰ The right of ownership is provided by Allah to mankind: '*See you not how Allah has made serviceable to you whatsoever is in the skies and whatsoever is in the earth and has loaded you with his favours both without and within*'.¹⁵¹ What is not clear from this verse is whether Allah gave the right of public ownership without distributing this ownership between individuals. Allah left it to people to decide the way they can distribute.¹⁵²

Generally speaking, Sharia agrees to the principle and rights of individual ownership but there are some exceptions in respect of things that if owned individually would affect the public interest.¹⁵³ Thus individual ownership is the main principle with some restriction for the public which is based on the principle of equality.¹⁵⁴ This restriction comes with a legal provision emphasising public ownership despite the priority given by the *Qur'an* and *Sunnah* to private ownership. The restriction can be considered as an instrument to guarantee the balance of ownership and can be seen as a mechanism for distributive justice. It ensures the protection of persons in need, based on the principle that people are brothers in Islam.¹⁵⁵

Some of the restrictions such as *Zakat* (tax on the rich for the poor, see Chapter 3 above) are considered as pillars of Islam and some, such as *Reeba* (usury), *Al-Waghf* (trust), *Shefa* (Severance) and the restriction on the right of inheritance and wills and expropriation in the public interest, are derived from the *Qur'an* and *Sunnah*. These restrictions conform to principles of distributive justice. For instance, *Zakat* can be

¹⁵⁰ The *Qur'an*, Soura 10: Yunis, Verse No. 55.

¹⁵¹ The *Qur'an*, Surah 31: Lugman Verse No. 20.

¹⁵² Khaddouri M. *Mafhoum Al-Adel Fi Al-Islam*, 1st Edition, (Damascus, Syria: Dar Al-Kalimah, 1998), p. 251.

¹⁵³ See Wafi A, *Al-Mousawat Fi Al-Islam*, (Cairo, Egypt: Nhadat Masour L-Lnasher. 1980), p. 58.

¹⁵⁴ Khaddouri M. *Mafhoum Al-Adel Fi Al-Islam*, 1st Edition, (Damascus, Syria: Dar Al-Kalimah, 1998), pp. 251-52.

¹⁵⁵ The *Qur'an*, Surah 49: Al-Hujurat, Verse No.10.

considered as a mechanism of distributive justice to cover the needs of poor people, to prevent money from being in the hands of a few people, and to remove difference between classes of people. *Zakat* has particular obligatory regulations.¹⁵⁶ But regarding *Al-Waghf* (trust), scholars define it as the benefit of the income of the property without affecting the property itself. *Al-Waqf* is made public in the interest of the poor.¹⁵⁷ Nevertheless, *Al-Waqf* is coveted as a religious duty, but it is not obligatory duty. Therefore, this approach of *Al-Waqf* might contribute to with the idea of disability rights as charity.

Regarding wills, these are a mechanism of distributive justice where someone leaves his property to someone else after death. Islam encourages wills. Allah said: *'It is prescribed for you, when death approaches one of you, if he leave wealth, that he leave an inheritance to parents and near relatives in kindness'*.¹⁵⁸ Islam defines the balance between the rights of heirs and the people who are beneficiaries of the will when the will is for more than a third of the estate.¹⁵⁹

(iii) *Differentiation Principle*: in principle, in the Islamic Sharia equality is considered to be the natural basis for the treatment of people. Preference, however, is given to a person according to what he can do for people, religion and society. Allah said: *'He it is Who has placed you as viceroys of the earth and has exalted some of you in rank above others'*.¹⁶⁰ Preference is given to some messengers of Allah, who said: *'Of those messengers, some of whom We have caused to excel over others, and of whom there are some to whom Allah spoke, while some of them He exalted (above others) in degree'*.¹⁶¹

Islam declares itself a natural religion, and assesses equality according to the natural circumstances of individuals. If there is any differentiation between talents, Islam notes it and assigns rights to persons on this basis. In other words, according to Sharia the difference between preference and non-preference reflects the differences in mental and physical capacity between individuals. In the following verse Allah denied equality between individuals: *'Allah coins a similitude: Two men, one of them dumb, having control*

¹⁵⁶ Wafi A, *Al-Mousawat Fi Al-Islam*, (Cairo, Egypt: Nhadat Masour L-Lnasher, 1980), p.82.

¹⁵⁷ Al-Dawood A, *Al-Waghf: Shorutoh wa Khasaisoh*, (Riyadh, Saudi Arabia, Majalat Adhwa Al-Sharia, Al-Imam Mohummad Bin Saud Al-Islamiah University, 1980), p.107.

¹⁵⁸ The *Qur'an*, Surah 2: Al-Baqarah, Verse No.3.

¹⁵⁹ www.Islamtoday.net/ will.

¹⁶⁰ The *Qur'an*, Surah 6: Al-An'm, Verse No. 165.

¹⁶¹ The *Qur'an*, Surah 2: Al-Baqarah, Verse No. 253.

of nothing, and he is a burden on his owner, whichever way he directs him to go, he brings no good, Is he equal with one who enjoins justice and follows a straight path (of conduct)'.¹⁶² If individuals apply the principles of Islamic Sharia, society can benefit from differences in mental and physical capacity and from preference. Otherwise these differences will demonstrate absence of distributive justice. Rather than cancel preference between individuals, it is better to construct a fair mechanism which takes account of everyone's talents and skills. For this reason Allah did not cancel social preference, but ordered a fixed obligatory taxation to benefit individuals born with lack of talent, or the poor or disabled.¹⁶³ It appears that Allah insists on these processes as religious duties, as means to determining justice towards Islamic individuals and legal institutions. The deficiency resides in governments and people who present these benefits as social grants rather than rights entailed by justice.

Here there is a difference between a Western and an Islamic understanding of the differentiation principle. According to some Western theorists, basic equal opportunity should be guaranteed to all, and in that respect all should be treated the same. Furthermore, any social and economic inequalities should be to the greatest benefit of the least advantaged members of society. According to the Islamic view, however, inequality between people is accepted, according to their capacity to contribute to society and its religious aims. Some preferential treatment, however, is given to the disabled and poor, to compensate for their situation. This measure has similarities with the views of Western theorists Dworkin and Kymlicka, whose proposal of a compensation system is a criticism of the Difference Principle. In addition, Freeman criticised Rawls's difference principle and suggested the concept of 'remedial justice'.

5. 2. 3. Problems: Charity, Justice and Disability

A logical problem obscures the concept of the clear rights of disabled persons. This arises from the confusion between charity and duty. If the protection of disabled people is viewed, and treated, in terms of a charitable option, then by definition the concept of duty or obligation is not applicable. If duty is not applicable, the implication must be that the disabled have no inherent rights to protection.

¹⁶² The *Qur'an*, Surah 16: An-Nahl, Verse No.67.

¹⁶³ See *Ibid*.

Conversely, if a duty of protection does exist, then the disabled have inherent rights to such. In this case, leaving the solution to charity is inappropriate. It denies the disabled their rights, robs them of self-esteem, and exposes them to greater levels of subjection and dependence.

In order to diagnose the origin of this problem, there are several reasons why in Muslim societies the rights of the disabled have been presented as a claim on charity rather than on justice. First, charity is directed at the consequences of injustice. Although Islamic principles exist that could serve as a foundation for a legal theory of distributive justice, Islamic jurisprudence has not formulated clear principles of distributive justice. This absence has contributed to injustices in the circumstances of the disabled, and thus to a situation which seems to call for charity. Since works of distributive justice address the root causes of injustice, these could bypass the need for charity.

Second, the concept of valid claim-rights is not treated in Islamic legislation. Islamic jurisprudence therefore lacks the legal mechanisms to redress deficiency in the treatment of rights (see Chapter 3 above).

Third, the dominant view of disabled persons in Islamic societies is that they are sick and poor, and that pity and social mercy is what they need to help them improve their life. This attitude further obscures the fact that the issue is one of rights, and reinforces the expectation that the disabled must entreat support rather than receive it through justice.

In fact, the view that the rights of disabled persons are a matter for charity rather than justice has arisen from one of Islam's fundamental principles, namely that of mercy. Clemency in Islam is perceived as the divine secret surrounding the whole universe and the source of its harmony, order, and beauty. It is the eternal abstract from which all realities emerged and the universe is one of its phenomena, hence, mercy is the standard of all values in this world. In the case of the disabled, the principle has been applied to the exclusion of other considerations.

Allah said to Prophet Mohammad: *'We sent thee not, but as a mercy for all creatures'*.¹⁶⁴ In the same sense Prophet Mohammad said: *'Indeed, I am the mercy that is gifted (to all creatures)'*.¹⁶⁵ He summarized this rule of mercy as: *'Who shows no mercy will not receive any mercy'*.¹⁶⁶ Muslims are influenced by these traditions of the morality of mercy. But they need not be allowed to obscure the real concept of mercy, and the relationship between charity and justice.

It is possible to distinguish between mercy applied as charity and mercy as a realistic mechanism operating to support the structure of society. Prophet Mohammad dealt with disability issues reasonably and justly. For example, when outside Al-Madinah, he appointed Ibin Um Maktoom as administrator at Al-Madinah although he had the disability of blindness. Allah says: *'No blame is there upon the blind nor any blame upon the lame nor blame upon the sick...'*.¹⁶⁷ Prophet Mohammad empowered the disabled person because he was qualified for this job and in justice his right deserved respect. Mohammad's treatment of a disabled person demonstrates that self-esteem is justly merited by the disabled. Here the Prophet indicates the importance of self-esteem as a fundamental interest which must be treated with justice not charity. By appointing Ibin Um Maktoom, the Prophet gave him a chance to feel his own value and confidence in his ability. In this instance Prophet Mohammad presents an effective example of self-respect and justice. He did not say that Islamic tradition requires us to pity the disabled and leave them in homes. This should teach all Muslims that Islamic traditions are not mainly intended to be followed through literal interpretation of the texts of Islam. Rather they promote the real goals of Islam, which are justice and giving everyone his deserved rights.

Chapters 3 and 4 show that the rights of disabled persons are affirmed by both their humanity and the special circumstances which are beyond their control. These circumstances impose special needs which must be satisfied in order to meet their fundamental interests and the prerequisites of a life worthy of human dignity.¹⁶⁸ These

¹⁶⁴ The *Qur'an*, Surah 21: Al-Anbia, Verse No.107.

¹⁶⁵ Al-Tirmithi A, *Saheeh Al-Tirmithi*, Hadith No. 1847, (Riyadh, Saudi Arabia: Edarat Al-Bohooth Al-Elmiah, 1982), p. 176.

¹⁶⁶ Al-Bukhari M. *Saheeh Al-Lbukhari*, Hadith No.5538, (Riyadh, Saudi Arabia: Edarat Al-Bohooth Al-Elmiah, 1982), p. 65, and Al-Tirmithi A, *Saheeh Al-Tirmithi*, Hadith No. 1834. (Riyadh, Saudi Arabia: Edarat Al-Bohooth Al-Elmiah, 1982), p. 89.

¹⁶⁷ The *Qur'an*, Surah 24: An-Nur, Verse No. 61.

¹⁶⁸ See Nussbaum M, 'The Supreme Court 2006 Team, Forward: Constitutions and Capabilities: "Perception" Against Lofty Formalism', (2007) 121(4), *Harvard Law Review*, p. 7.

processes are affirmed by the morality of autonomy and equal respect, ensuring their self-esteem. Consequently these capabilities become constitutional entitlements which in justice not charity must be recognised for all citizens. As Hobbes says, men, including the disabled, who are unable to maintain themselves by their labour must be provided for by laws, not left to the charity of private persons. Protection of disability rights is a duty not of charity but of justice, the benefits of which the disabled can claim as rights.¹⁶⁹ In addition, these rights entail non-discrimination, merited by their right to equality, recognition and respect. As Hegel indicated, the desires of the non-material human personality include the innate need to be recognised and treated as an individual. Hence the human personality is capable of both self-esteem and respect of others. Inherent dignity argues for the autonomy of a disabled person. This ideal represents an abstract right that specifies that institutions and practices should accommodate disabled persons adequately, in justice not as charity.

Like any humans, disabled persons crave the recognition of others to affirm their value and self-esteem. This need for recognition can be adequately met in egalitarian societies, where all are assumed to be equal without discrimination and their interests are adequately accommodated. The relevant Islamic principles insist on equal respect, and the superior principle in Islam is justice. Also, Allah stresses returning clear rights to where they belong: *'Allah commands you that you restore deposits to their owners, and, if you judge between mankind, that you judge justly'*.¹⁷⁰ The convergence of Islamic and Western principles on these issues points to the necessity for the rightful placing of disability rights. Therefore, since they are already upheld as entitlements, the rights of disabled persons in Saudi Arabia must be transferred from charity to justice.

The relevant connection between justice and charity is that the terms of justice are enforceable by law, but charity is not. Fundamental human rights deserve to be upheld by the terms of justice, which includes distributive justice. If rights are left to the voluntary basis of charity, their claims are empty of force and people are subject to discrimination. This can be seen in Saudi Arabia, where the rights of disabled persons are denied and protection is presented as charity, leading to increasing discriminatory practices, as will be elaborated in Chapter 7. This frequently applies to both the rights of disabled persons and

¹⁶⁹ Freeman S, *Rawls*, 1st Edition, (New York, NY: Routledge, 2007), p. 86.

¹⁷⁰ The *Qur'an*, Surah 4: An-Nisa, Verse No. 58.

other minority rights, and also explains the incidence of inadequate legal response to disability and minority rights.

Justice gives better support than any other principle (and a fortiori than charity) in securing interests which establish the rights of disabled persons and their self-esteem. When disabled persons cannot gain clear rights except through charity and the misconstructions of others, then it must be imagined how a disabled person's life may come under attack. First of all, there is the issue of self-esteem as a primary good. Where the fundamental interests of disabled persons are subject to the specification of others, all the advantages conferred on disabled persons by self-esteem, for example, confidence in one's personal value and ability, are undermined. This will contribute to shame at losing autonomous interests in exchange for receiving something given under charity.¹⁷¹ In practical terms, placing the primary interests of disabled persons at the mercy of charity reduces opportunities such as employment and social participation and therefore attacks their self-respect, as one of the main grounds of equal opportunity resides in promoting the independence and equal-respect of equal citizens.¹⁷² In turn this leads to harm and regret. Regret is the general feeling aroused by loss or absence of what we think good for us.¹⁷³

Thus justice is preferable to charity, which depends on the willingness of donors to act in the ways described in the traditions of Islam. Justice can secure the special rights of the disabled with reference to the principles of distributive justice, and remedial justice, which make enforcement binding. Charity represents 'imperfect duties' in contrast with justice, which requires 'enforceable obligation' to confer benefit on others. Distributive justice offers the potential to meet the special needs of disabled persons and place them on a footing with the non-disabled, by means of both positive preference and remedial justice.

Finally, charity is by tradition associated with the work of social services, whereas justice stimulates social change of the structures of injustice. The changes required in order to enforce the fundamental rights of disadvantaged groups such as disabled persons are changes in institutions and political structures, or political actions. To make the change

¹⁷¹ Rawls J, *A Theory of Justice*, (Oxford, UK: Oxford University Press, 1999), 56.

¹⁷² Freeman S, *Rawls*, 1st Edition, (New York, NY: Routledge, 2007), 97.

¹⁷³ Rawls J, *A Theory of Justice*, (Oxford, UK: Oxford University Press, 1999), 87.

effective, legal codification with anti-discrimination legislations and strong enforcement mechanisms is essential.

It is important to recall at this point that some of the views of the Muslim scholars on which emphasis is placed in philosophical and intellectual analysis were articulated in a much earlier age. For example, some of those scholars were followers of Prophet Mohammad, such as Umar Ibin Al-Khatab (542 AD), who said: '*When have you enslaved the people while they are born free?*'.¹⁷⁴ Al-Farabi (874) assumed that justice is a guaranteed method of sharing all property fairly.¹⁷⁵ Ibin Al-Ghaim (1292) also said: '*Allah sent his messengers and sent down his books so that people may establish justice*'.¹⁷⁶ Further, Al-Tftazani (1389) described the right of Allah as everything concerning public utility without the precedence of any one person, while the rights of people were of special interest.¹⁷⁷ Of course, these views are open to the criticism that they do not provide support for the sort of reform agenda being proposed here. But such criticism is wide of the mark. Those scholars on whose authority some reliance is placed (Chapters 3 and 4 and this chapter) have been selected for the reason that they address, and counter, just this sort of objection. They express views that are strongly egalitarian in orientation and therefore have contemporaneous relevance, serving to advance the egalitarian agenda defended in this thesis. They assume the moral equality of all persons. Their work also exhibits a strong commitment to justice rather than charity. Moreover, the fact that their views have been a feature of the rich tapestry of culture in the Arabian peninsula and Islamic world for many centuries lends support to the claim that the reforms proposed here will not be at odds with but, rather, will give expression to the 'habits of the heart' of Saudi Arabians.

This chapter concludes the philosophical part of this thesis which throws light on the concept of disability and rights and the origins of discrimination, and identifies appropriate means of treatment, namely the distributive justice principle. The following chapters examine the efforts of international law concerning the rights of disability, and analyse the scope and methods of its practices as well as the principles on which it rests.

¹⁷⁴ See Chapter 3, p. 86.

¹⁷⁵ See Chapter 5, p. 162.

¹⁷⁶ See Chapter 10, p. 319.

¹⁷⁷ See Chapter 3, p. 70.

INTERNATIONAL LAW AND DISABILITY RIGHTS

Introduction

International law refers to the body which regulates relationships between states, and is concerned with the rights and duties of states that are agreed by treaties. The international law of human rights is part of international law in general, and it incorporates international law in its values and general principles.¹ International human rights law is the law of international community of states made by treaty and by customary law commanded by human general principles. Hence, treaties and conventions of international human rights law should be signed and adhered to by the members of the international family.² This importantly includes treaties of the protection of human rights in respect of disability. As seen in Chapter 1, the Islamic view is very clear in terms of ensuring that those international obligations which are relevant to the general protection of human rights are embraced and enforced. Islam obliges all persons and states to follow and enforce all treaties made to protect human values.³

It may be argued that the international law is not binding because it has no power to impose sanctions on the party who is in breach of any provisions of the law. The idea of ‘obligation and duty’ is a response to this argument: all member states are obliged to adhere to the convention when it is signed by them and the law itself is a matter of orders backed by threats. A non-compliant member is *‘likely to suffer the sanction or punishment threatened for disobedience’*.⁴ In addition to this, Islam also considers implementation of international agreements related to the protection of human rights as a religious duty rather than merely a legal requirement (see Chapter 1).

¹ See Henkin L. Neuman G, Orentlicher D & Leebron D, *Human Rights*. (New York, NY: Foundation Press, 1999), p. 295.

² *Ibid.*

³ In this regard, see Chapter 1, p. 37.

⁴ Hart H L A, *The Concept of Law*, 2nd Edition, (New York, NY: Oxford University Press, 1997), pp. 27-231.

The main goal of this chapter is to throw light on the international law agenda, i.e. international human rights treaties and standard rules, in addition to the international convention on the protection of the rights and dignity of persons with disabilities. The chapter aims to identify how human rights treaties relate to disability causes, and what is called for by the principles of the declaration and convention on the protection of the rights of persons with disabilities. Where the member states of the international society including Saudi Arabia declare commitment to the principles of the international disability rights reform agenda, a basis for judgement is agreed upon.

The chapter will be divided into two main sections. Section one concerns the legal framework of international human rights regarding disabled persons. It includes civil and political rights and disability, and economic, social and cultural rights and disability. Section two deals with the United Nations measures for disability rights. It examines the 1975 International Declaration for Disabled People's Rights, and the 2007 International Convention on the Rights of Persons with Disabilities. Discussion of the latter covers the preamble and aims of the convention, its general principles, its scope and its implementation.

6. 1. Disabled Persons and International Human Rights: Legal Framework

Over the past decades disability issues have undergone a dramatic shift in perspective, from an approach motivated by charity towards disabled persons to one based on rights. In the context of promotion of rights of disabled people within the ambit of human rights, mention should be made of the efforts made by Non-Governmental Organisations (NGOs).⁵ NGOs working with disability issues such as the collaborative project 'Disability Awareness in Action' are beginning to consider themselves as human rights NGOs. It is also noteworthy that there has been a high level of contribution to this cause by people with disabilities, who are now talking in the language of rights.

The trend towards viewing the disability issue in the context of human rights has also had an influence at the domestic level. National institutions all over the world have taken up the matter. This is seen as an important development, as these institutions act as

⁵ Regarding the rights of the child, for example, see Young K, 'Convention on the Rights of the Child and NGO Participation', (2003) 2(7) *Disability Negotiations Bulletin*.

a bridge between international human rights of people with disability and rights on a national level. These efforts have contributed jointly to building a legal framework of disability issues. This section shows where and how disability issues have been attended to in international human rights treaties.

Human rights values form the basis of a legal system which has been embodied in a number of human rights treaties introduced by the United Nations and ratified by a large number of states. The two main human rights treaties are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICCPR provides protection for a wide range of civil and political rights. It aims to underpin '*the freedom of the individual and to make sure that he/she is enabled to exert influence over the political life of polity*'.⁶ On the other hand, ICESCR aims at ensuring that freedom is reinforced by the relevant social rights. Four other core United Nations human rights treaties have been adopted. One of them deals with the very specific human right to freedom from torture: the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This Convention is of obvious importance to, among others, the millions of people with disabilities who are institutionalised.⁷ The three other treaties focus particularly on groups of people who are at risk of discrimination: the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the 1989 Convention on the Rights of the Child (CRC) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

In addition, the contribution of the United Nations specialised agencies to advance the situation of disabled people is noteworthy: the United Nations Educational, Scientific and Cultural Organization (UNESCO) by providing special education; the World Health Organization (WHO) by providing technical assistance in health and prevention of disease; the United Nations International Children's Fund (UNICEF) by supporting childhood disability programmes and providing technical assistance in collaboration with Rehabilitation International; the International Labour Organization (ILO) by improving

⁶ Quinn G & Degener T (eds) Building bridges from "soft law" to "hard law": the relevance of the United Nations human rights instrument to disability, in: *Human Rights and Disability: The current use and potential of United Nations human rights instruments in the context of disability*, (New York, NY: United Nations Publishing, 2002), p. 31.

⁷ *Ibid.*, p.32.

access to the labour market and increasing economic integration through international labour standards and technical cooperation activities.

6. 1. 1. Civil and Political Rights and Disability

In order to elaborate on civil and political rights and disability, it is useful to view these in the context of the work already undertaken by the United Nations in this area. The latter's efforts in the context of civil and political rights and disability are largely embodied in the ICCPR. This is one of the most important international instruments on human rights. It was adopted in 1966 by the United Nations General Assembly and entered into force in 1976. It has two additional Protocols: one optional, which allows for individual complaints by citizens of State parties, and another, which deals with the abolition of the death penalty.

It was not the intention of the drafters of the Covenant to deal specifically with the matter of disability. Provisions of the Covenant, however, clearly cover disability. It has been noted that the Covenant, unlike other treaties on the subject, is universal in the sense that it covers all human beings including disabled persons since they already have rights as human beings. Likewise, while it is true that disabled persons are not explicitly mentioned by the ICCPR, it is by now clear that disability is covered by the term 'other status' in articles 2 and 26, which together constitute the non-discrimination provisions of that treaty.⁸ Therefore, what has emerged in the recent history of disability rights is a view of disability in the context of civil and political rights rather than of a medical condition. Moreover, compared with economic and social rights which for some time were dominant in the context of human rights concerning disability, attention is now also on civil and political rights. Indeed, it has been observed by one of the leading experts on the subject that now is the time '*that disability community paid as much attention to civil and political rights as it does ...to economic and social rights*'.⁹

⁸ See Degener T, 'Disability and freedom: the International Covenant on Civil and Political Rights (ICCPR)', in: *Human Rights and Disability: the current use and potential of United Nations human rights instruments in the context of disability*, Quinn G and Degener T (eds) (New York, NY: Geneva, Switzerland, 2002), p. 37.

⁹ Quinn G, 'The International Covenant on Civil and Political Rights', in: *Human Rights and Disabled Persons*, Degener T & Koster-Dreese Y (eds) (Boston, MA: Dordrecht, Netherlands, Martinus Nijhoff, 1995), p. 81.

In the more specific context of rights protected and promoted in relation to civil and political rights, reference can be made to various provisions of the ICCPR. These can be conveniently grouped into: rights relating to human existence, liberty rights, associational rights and political rights.

Firstly, the most important right in relation to rights relating to human existence has been emphasised in the ICCPR's article 6 which in part provides: *'1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'*.

As is clear, the article specifies the right to life as part of human rights in general and does not have rights of disabled people as its focus. It evidently, however, covers the latter group. The mortality rate of children with disability and of other disabled people in all countries, especially in developing countries, is much higher than others. In these cases, disabled people will be covered by the scope of article 6. This article is also likely to be the basis to protect the right of a disabled person to health care and medical equipment which is necessary to uphold his right to life. Another important article of the ICCPR in relation to the right to existence and life is article 7, which declares: *'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation'*.

This article aims at preventing medical or scientific experimentation without consent. It is argued that there are some circumstances in which these rights may be considered as relevant to the subject of disability. It is first noted that disability is often the result of human rights violations such as war crimes, torture, and cruel treatment. It is further noted that services for disabled persons provided by or under the auspices of the state may violate article 7 because they are inhumane. Gerard Quinn takes the argument in this context as far as arguing that *'a deliberate policy to treat persons with disabilities under separate arrangements simply for the sake of administrative convenience might amount to second class citizenship and is thus at least arguably "degrading" as per*

article 7'.¹⁰ Another circumstance relevant here where provisions of article 7 may be violated is when disabled people are placed in an inappropriate environment, for instance subjected to an ordinary prison regime like convicted persons. Finally, and importantly, article 7 rights are of relevance in relation to medical treatment and research. Disabled people have often been used as objects of medical and scientific experimentation without their actual consent. In particular, people with mental difficulties are vulnerable in this context. The 'principles for the protection of persons with mental illness and the improvement of mental health care' adopted by the United Nations General Assembly in 1991 give important guidance for the interpretation of article 7 in the context of institutionalised disabled persons.¹¹ The principles specifically aim at prohibiting certain kinds of treatment such as sterilisation and psychosurgery and other forms of irreversible medical 'therapy' in the case of involuntary patients. They provide detailed guidelines on situations where free and informed consent for medical treatment is necessary.¹²

The second category of rights covered by the ICCPR relates to the right to liberty which is stated in article 9 of the convention. This declares:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

¹⁰ Quinn G, 'The International Covenant on Civil and Political Rights', in: *Human Rights and Disabled Persons*, Degener T & Koster-Dreese Y (eds) (Boston, MA: Dordrecht, Netherlands, Martinus Nijhoff, 1995), p. 81.

¹¹ See General Assembly Resolution 46/119 of 17 December 1991, United Nations.

¹² See Degener T & Koster-Dreese Y (eds), *Human Rights and Disabled Persons*, (Boston, MA: Dordrecht, Netherlands, Martinus Nijhoff, 1995), p. 84.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.¹³

The right to liberty and security is important in relation to civil commitment of the mentally ill and the circumstances under which these people may be committed to a mental health facility. There are other matters of relevance to such situations which give rise to further questions in relation to the procedure relating to involuntary commitment, whether a doctor or a judge should decide on the matter, or whether there are legitimate grounds for the infringement of liberty rights.¹⁴ For example, whether a therapeutic argument is sufficient or whether it should first be established that the person to be committed presents a danger to him/herself or to others.¹⁵ Here again, the ‘principles for the protection of persons with mental illness’ provide relevant guidance as they require decisions concerning involuntary admission to be taken by qualified mental health practitioners who are monitored and controlled by judicial or other independent and impartial review bodies.¹⁶

There are other important provisions in relation to liberty which have been embodied in Articles 8, 10, 12, 14 and 16. Article 8 concerns freedom from slavery which is important in the context of the workplace relationship where disabled persons work. It provides: ‘*1. No one shall be held in slavery; and the slave-trade in all forms shall be prohibited*’.

Articles 10 and 14 may be relevant to cases of commitment of disabled people to civil or criminal proceedings. Article 10 among others provides that ‘*all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person*’.¹⁷ Article 14 is worthy of citation as it provides certain safeguards of

¹³ See Degener T & Koster-Dreese Y (eds), *Human Rights and Disabled Persons*, (Boston, MA: Dordrecht, Netherlands: Martinus Nijhoff, 1995), p. 84.

¹⁴ Degener T, ‘Disability and freedom: the International Covenant on Civil and Political Rights (ICCPR)’, in: *Human Rights and Disability: the current use and potential of United Nations human rights instruments in the context of disability*, G Quinn and Degener T (eds) (New York, NY: Geneva, Switzerland, United Nations, 2002), p.39.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Article 10 Provides:

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

due process including the right to a fair hearing and representation of disabled people when subject to proceedings. The article has not been introduced in the particular context of human rights of disabled people but as is seen throughout its provisions, these are equally, if not more, protective of the rights of disabled people committed to legal proceedings than of able people.¹⁸

Article 16, among others, provides that every person ‘*shall have the right to recognition everywhere as a person before the law*’. This has been considered as a key due process right in the context of both civil and criminal proceedings.¹⁹ People with disability, whether legally competent or not, must not be treated as mere objects in any official proceedings.²⁰

Article 12 relates to right to liberty of movement, which includes the right to move around freely within a State and the freedom to choose one’s residence. In order to implement this right for their disabled citizens, State parties may need to reconsider their public facilities, public transportation and housing policies.²¹

The third group of rights covered by the ICCPR relates to associational rights. In this context reference can be primarily made to article 22 which partly declares: ‘*1. everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests*’.

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons; (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

¹⁸ Article 14 declares: ‘1. all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children’.

¹⁹ Degener T, ‘Disability and freedom: the International Covenant on Civil and Political Rights (ICCPR)’, in: *Human Rights and Disability: the current use and potential of United Nations human rights instruments in the context of disability*, G Quinn and Degener T (eds) (New York, NY: Geneva, Switzerland, United Nations, 2002), p.38.

²⁰ *Ibid.*

²¹ *Ibid.*

On the same lines, article 23 refers to family rights such as the right to marry and to have family, and equality rights between spouses. In the context of rights of people with disability, the rights provided by article 23 are violated if on eugenic grounds a disabled person is denied marriage and the right to found a family. Compulsory sterilization also violates rights provided by article 23.

Finally, political rights under the ICCPR to be considered in the context of disability are also found mainly in articles 2, 3, 21 and 25. Articles 2 and 3 deal with equality rights.

Article 2. (1) provides that *'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or 'other status'*. This can be considered a cornerstone of human rights of the disabled, as it provides an equal footing for all humankind. In the context of implementation of these rights, article 3 provides that each state party undertakes *'to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant'*. As noted, the two above articles provide for substantive equal rights for all, including disabled people, and the machinery for their implementation which is an international obligation of states provided by the treaty. It is clear that while disability is not expressly mentioned, the term *'other status'* covers this group.

Articles 21 and 25 provide for the right of assembly and the right to take part in public affairs. This raises the issues of access to places where political life is played out. The right to vote covered by article 25 is a paramount example of a democratic right which is of central importance to the realization of freedom of thought and expression. Representation of disabled persons in political parties, parliaments and other bodies are other forms of political participation. It has been noted that the most important

implication of article 25 for disabled persons may be that every citizen has the right of access, on general terms of equality, to public service in his country.²²

In short, the dominant theme of the disability rights movement seems to be freedom and participation, and not welfare. This is however over and above the fact that the general awareness of the specific rights of disabled people should be developed. This development should be pursued by all states and primarily Saudi Arabia, where there is not a long tradition of covering the matter in legislation and the issue has not been the subject of attention. Therefore, this again points to the need for further awareness among various members of the international community in relation to the subject of disabled rights.

6. 1. 2. Economic, Social and Cultural Rights and Disability

The study of economic, social and cultural rights and disability is conducted in the context of the efforts which resulted in the International Covenant on Economic, Social and Cultural Rights or ICESCR. The Covenant was concluded in 1966 and entered into force in 1976. Although the Covenant does not have the rights of disabled persons as its focus, there are certain provisions of the Covenant which are of direct or indirect relevance to the human rights of the disabled. A review of certain of these provisions follows.

One of the most important rights which underpins most other provisions of the Covenant is the right to non-discrimination. Article 2. (2) of the Covenant declares: *'The State Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'*. The term 'other status' brings disabled persons into the ambit of the provisions. In response the General Comment has already defined disability-based discrimination resting on 'other status' as *'Including any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of*

²² Degener T, 'Disability and freedom: the International Covenant on Civil and Political Rights (ICCPR)', in: *Human Rights and Disability: the current use and potential of United Nations human rights instruments in the context of disability*, Quinn G and Degener T (eds) (New York, NY: Geneva, Switzerland, United Nations, 2002), p.38.

economic, social and cultural rights'.²³ Article 3 of the ICESCR extends the non-discrimination provisions to women who, in the context of disability, are often subject to double discrimination. It indicates: *'The State Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and culture rights set forth in the present Covenant'*.

Although the provisions concerning non-discrimination do not provide disabled persons with minimum standards, it may be noted that the ICESCR is also relevant in respect of basic standards for enjoyment of economic, social and cultural rights.²⁴

There is another important provision in this convention related directly to the life of disabled persons and that is article 12, which provides that the State parties should recognise the right of everyone to the enjoyment of the highest standard of physical and mental health.²⁵ The use of 'everyone' here implies provision of this right without discrimination. Therefore, disabled persons according to this article have a clear right to the highest standards of healthcare and rehabilitation and provision of all medical services relevant to their needs by their government.²⁶ Saudi Arabia as a member of international society has ratified the convention and recently it has been chosen to be a member of the International Human Rights Council in the UN. This means that Saudi Arabia should undertake to meet these obligations to provide the highest standard of health care, since the Basic Law (constitution) of Saudi Arabia also stresses people's rights to health care and the proper care of disabled persons, as discussed in Chapter 1. These obligations to observe the rights of disabled persons are incorporated in the Saudi Provision Code for Persons with Disability, which will be examined in detail in Chapter 7. As has been observed in Chapter 1 and will be seen in Chapter 7, there is no direct legal obligation upon the government to provide these health standards, nor any measures requiring the

²³ Bruce A. and others, Disability and social justice: the International Covenant on Economic, Social and Cultural Rights, in: Quinn, G and Degener T (eds), *Human Rights and Disability: The current use and potential of United Nations human rights instruments in the context of disability*, (New York, NY: Geneva, Switzerland, United Nations, 2002), p. 58.

²⁴ *Ibid.*

²⁵ See Article 12 of the ICESCR Convention.

²⁶ This provision also includes as in article 12 (2): The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would ensure for all medical services and medical attention in the event of sickness.

allocation of resources to overcome discrimination within the Saudi Arabian legal system. This is one of the motives for calling for the reform of the Saudi constitution and legal institutions. Likewise, it provides a significant part of the explanation as to why this dissertation calls for a Human Rights Bill. Such a Bill would (as discussed in chapter 1) be aimed at protecting the disabled against discrimination and securing their rights. At present, the situation of the disabled in Saudi Arabia is unsatisfactory. This is because individuals can only bring a suit to the Board of Grievances against the Ministry of Health for failure to provide health care and medicines.

It is important to mention here that the culture of human rights in Saudi Arabia is as yet nascent. This means that ordinary citizens are typically ignorant of their clear rights to the highest standards of health care. Moreover, even if Saudi Arabians have awareness of these rights, they lack appropriate enforcement mechanisms. This thesis is intended to raise awareness and open the eyes of people to their rights and justice.²⁷

Other groups of provisions of the ICESCR are largely concerned with the participation of people without exception in all aspects of social activities. One of the most important aspects particularly relevant in the context of disability is the right to education which is covered by article 13 of the Covenant. This article provides: *'1. The State Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace'*.

On aspects of the right to education and scope of article 13 in the context of rights of disabled people, General Comment No. 13 mentions availability, accessibility, acceptability and adaptability.²⁸

²⁷ In recent years in Saudi Arabia two new human rights organisations have emerged. One is a government enterprise and the other a private one. It is hoped that both these organisations can help people to obtain their rights.

²⁸ General Comment No.13, The Right to Education, para. 36.

The right to participate in the workplace is another fundamental social right which is also covered by the Covenant. Work is the main basis and requirement of an independent right. Unless rights of participation in the workplace are protected and guaranteed, there cannot be equal opportunity for the enjoyment of social rights. In the context of disability, right of access to the workplace in mainstream employment is of paramount importance. Often, the workplace should be adjusted so as to make it possible for the disabled workforce to have access to it. Article 6 of the Covenant declares with regard to the mainstream workforce in principle:

1. The State Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Under the 1991 revised reporting guidelines of article 6, states are under treaty obligation to report on disability.

The right to just and favourable conditions of work in the context of disability can be considered in the light of the provisions of article 7 of the covenant: *'The State Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favorable conditions of work which ensure, in particular: (a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant; (b) Safe and healthy working conditions; (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays'.*

There is a wide range of other rights which play an important role in the life of people with disability. These include the right to social security, article 9, the right of protection of the family, mothers and children in the context of disability, article 10 and the right to an adequate standard of living in the context of disability, article 11. General Comment No. 5 holds that the right to an adequate standard of living in the context of disability entails the fulfilment of basic material needs such as adequate food, housing and clothing, having in mind the particular needs of persons with disability so as to enable them to function fully and effectively in society.²⁹

In short, it appears that the principal rights recognised by the ICESCR for the general protection of human rights are equally, and sometimes with more emphasis, applicable to the rights of people with disabilities in view of their special needs. In addition to this, the United Nations has important measures in place which are directly dedicated to disability rights issues through specific various declarations and conventions.

6. 2. United Nations Measures for Disability Rights

This section explores the important efforts being made by the United Nations in disability rights causes, and identifies the results in terms of international standard rules and conventions which are obligatory for member states of the United Nations. The identification here will focus on the declarations and conventions which are directed at disability rights: the ‘International Declaration for Disabled People’s Rights (1975)’ and the new ‘International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (2007)’. First a brief outline of the history of the United Nations international declarations and conventions on disability rights is presented.

6. 2. 1. History of International Declarations and Conventions on Disability Rights

The history of the disability rights movement dates back to the middle of the twentieth century. Certain instruments were adopted as early as the 1940s, including the Universal Declaration of Human Rights 1948, article 25.(1), and later the International Covenant on

²⁹ General Comment No. 5, para. 33, reproduced in Degener T, ‘Disability and freedom: the International Covenant on Civil and Political Rights (ICCPR)’, in: *Human Rights and Disability: the current use and potential of United Nations human rights instruments in the context of disability*, Quinn, G and Degener T (eds) ((New York, NY: Geneva, Switzerland, United Nations, 2002), pp.37-51.

Civil and Political Rights 1966, article (26) and the International Bill of Rights 1971, the Declaration on the Rights of Disabled Persons 1975, Declaration on the Rights of Deaf-Blind Persons.³⁰ The Convention on the Elimination of Discrimination Against Women was also adopted. Subsequently, the United Nations has continued with the adoption of several instruments and declarations regarding disability rights issues.³¹ The movement came under the spotlight in 1981, however, in the international year of disabled persons. The main achievement of that year was the adoption in 1982 by the UN General Assembly decision 37/52 of a World Programme of Action 1982-1992 concerning disabled persons. Both the International Year and the Programme stressed the right of persons with disabilities to equal opportunities with other citizens and to a fair share of improved living conditions resulting from economic and social development.³²

The first worldwide meeting of experts was held in Stockholm in 1987 in order to review the implementation of the World Programme of Action. The meeting suggested the formulation of a philosophy to clarify the priorities for the coming years. The philosophy was to be based on the recognition of the rights of persons with disabilities. The meeting also recommended the drafting of a convention on the elimination of all forms of discrimination against persons with disabilities. The UN General Assembly did not reach consensus on the need for such a convention because a number of state representatives maintained that the existing instruments guaranteed equal rights to persons with disabilities.³³ At the 47th Session of the UN General Assembly special sessions were devoted to issues relating to disability.

³⁰ Article (1) of the Declaration states that ‘...every deaf-blind person is entitled to enjoy the universal right that are guaranteed to all people by the Universal Declaration of Human Rights and the rights provided for all disabled person by the Declaration of the Rights of Disabled Persons’

³¹ For example, for these instruments and declarations under the United Nations Human Rights Division:

- World Programme of Action concerning Disabled Persons (1982).
- Convention on the Rights of the Child (1989).
- Tallinn Guidelines for Action on Human Resources Development in the Field of Disability (1990).
- Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (1991).
- Standard Rules on the Equalization of Opportunities for the Persons with Disabilities (1993).

³² Rehabilitation ... the outline of human right regards disability, see, www.rehab-international.org/social-commissions/human-rights.html.

³³ The outline of Human Rights with regards to Disability (Rehabilitation International), www.rehab-international.org/social-commissions/human-rights.html.

The UN decided that a different international instrument should be drawn up as an alternative to a convention. The UN Economic and Social Council authorised the Commission for Social Equalization of Opportunities for persons with disabilities. In 1993 these Standard Rules were adopted and proclaimed by the UN General Assembly Resolution 48/96. The Standard Rules were elaborated on the basis of the experience gained during the UN Decade of Disabled Persons 1982-1992. The moral and political foundation of the Standard Rules lies not only in the World Programme but also in international human rights instruments, specially in the Universal Declaration of Human Rights.³⁴

It may be argued that the Standard Rules are preferable to a convention, in the sense that they apply to all 185 of the UN member states, whereas a convention would only apply to its parties. Furthermore, it has been noted that another advantage could be that, in addressing the entire spectrum of policy-making by states, they provide a more dynamic instrument to influence thinking relating to persons with disabilities. The Standard Rules require states to ensure that disability aspects are included in all relevant policymaking and national planning.

The following two sections elaborate respectively on the 1975 Special International Declaration for Disabled People's Rights, and the new 2007 International Convention on the Rights of Persons with Disabilities.

6. 2. 2. International Declaration for Disabled People Rights (UN 1975)

The UN International Declaration on the Rights of Disabled Persons is considered the first comprehensive 'declaration' for disability rights. The main goal of this section is to review the contents of this declaration and identify the relevant principles on which it is based.

Essentially the declaration rests on the principles of the Universal Declaration of Human Rights and the International Convention on Human Rights. Further, it reflects other relevant declarations which insist on human dignity and principles of equality and

³⁴ The outline of Human Rights with regards to Disability (Rehabilitation International), www.rehab-international.org/social-commissions/human-rights.html.

justice. It recalls the principles of the Declaration of the Rights of the Child and the Declaration on the Rights of Mentally Retarded Persons, which emphasise special needs for disabled persons.³⁵

The UN International Declaration on the Rights of Disabled Persons calls for national and international action to ensure that it will be used as a common basis and frame of reference for the protection of these rights. According to article 1, the term 'disabled person' means any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of deficiency, either congenital or not, in his or her physical or mental capabilities.³⁶ This definition appears to refer to human rights and social models of disability. The following embody the cardinal principles which are covered by the declaration:

The primary principle in this declaration is that *'disabled persons shall enjoy all the rights set forth in the declaration. These rights shall be granted to all disabled persons without any exception whatsoever and without distinction on the basis of race, colour, sex, language, religion, or other opinions, national or social origin, state of wealth, birth or any other situation applying either to the disabled person himself or herself or to his or her family'*. This is a clear prohibition of all forms of discrimination on any basis against disabled people and their families, and is rooted in the principle of equal respect.

Most important in this declaration is the assertion that disabled persons have inherited the right to respect for their human dignity. Article 3 provides that *'Disabled persons, whatever the origin, nature and seriousness of their handicaps and disabilities, have the same fundamental rights as their fellow-citizens of the same age'*.

³⁵ In addition to the declaration recalling the standards already set for social progress in the constitutions, conventions, recommendations, and resolutions of the International Labour Organization, the United Nations Educational, Scientific and Cultural Organization, the World Health Organization, the United Nations Children's Fund.

³⁶ Human Rights Index: Declaration on the Rights of Disabled Persons. Proclamation by General Assembly Resolution 344 (XXX) of 9 December 1975, United Nations.

Therefore, the declaration insists on equal treatment for disabled persons, especially mentally disabled persons, with other human beings in terms of civil and political rights.³⁷

The declaration requires that these rights be enacted, in order for the disabled people and their organisations to be able to protect their rights. Article 5 declares that disabled persons are entitled to the measures designed to enable them to become as self-reliant as possible in the light of the principle of autonomy.

The declaration states that disabled persons have some specific and special rights enabling them to gain their fundamental rights. It insists on the most important rights which generally protect the disabled persons' life. It provides that *'disabled persons have the right to medical psychological and functional treatment, to medical and social rehabilitation, education, vocational training and rehabilitation, aid, counselling, placement services and other services which will enable them to develop their capabilities and skills to the maximum and will hasten the processes of their social integration or reintegration'*.³⁸

The declaration further states that, like any person, disabled persons have the right to economic and social security and to an appropriate level of living. They have the right, according to their capabilities, to secure and retain employment or to engage in a useful, productive and remunerative occupation and to join a trade union.³⁹

By asserting that disabled persons have the right to live with their families or with foster parents and to participate in all social, creative or recreational activities, the declaration upholds the disabled person's rights to integration and non-isolation which are imposed by principles of equality, freedom and autonomy. The declaration forbids any differential treatment that may generate any kind of discrimination or isolation. Accordingly, no person with disability may be subjected, as far as his or her residence is concerned, to differential treatment other than that required by his or her condition or by the improvement which he or she may derive from it. Where the stay of a disabled person

³⁷ See article No. 4 of Declaration on the Rights of Disabled Persons.

³⁸ See article No. 6.

³⁹ See article No. 7.

in a specialised establishment is indispensable, the environment and living conditions therein shall be as close as possible to the normal person's life.⁴⁰

The declaration includes provisions to enable disabled persons independently to avail themselves in terms of judicial proceedings when demanding or protecting their rights, and also if judicial proceedings are instituted against them. The declaration indicates that the legal procedure applied shall take their physical and mental condition fully into account.⁴¹

In general the declaration insists that the rights of disabled persons are based in their human dignity, and entail rights of autonomy and equal respect with others. This valuable declaration, however, remains non-obligatory and subject to violation.

Since 1975, the United Nations has perceived that the needs of disabled people have increased and multiplied with the growth of social barriers. The rights of disabled persons around the world have been violated, and disabled persons are now in a more discriminatory situation. It has been noted that increasing discrimination against disabled persons needs to be treated by ensuring equal opportunities for disabled persons in terms of employment and mainstream activities in their societies. The state members, however, largely ignored the human duties and principles of the (1975) international declaration for disabled people and other relevant conventions and declarations. This resulted in the pressing need for a comprehensive international convention on the rights of disabled persons.

6. 2. 3. *International Convention on the Rights of Persons with Disabilities (2007)*

The International Convention on the Rights of Persons with Disabilities is the latest, most advanced and most comprehensive international convention dealing with disability rights and discrimination issues (hereafter referred to as 'the convention').⁴² All relevant principles and mentions of disability issues in previous declarations and conventions are gathered up and upheld in this convention, which also contains further affirmation of the protection of the dignity of the disabled and directives for implementation. The purpose of

⁴⁰ See article No. 9.

⁴¹ In this regard, see article No. 11 of the declaration.

⁴² For the full text of the convention, see the appendices.

this section is to identify the principles on which the convention is based, to identify the application of these principles through exploration of the scope of the convention, and to discuss what kind of enforcement mechanisms are offered for the implementation of the convention.

The convention was accomplished after several attempts. Proposals for an international convention to eliminate discrimination against disabled people and promote their rights had been put forward since 1987. In August of that year, the mid-point of the United Nations Decade of Disabled Persons, a global meeting of experts to review the implementation of the World Programme of Action concerning Disabled Persons was held. It was the first expert group meeting held by the United Nations in which the majority of experts were disabled persons. The disabled community sought a convention.⁴³

The argument for having a disability-specific convention had been strongly advanced by many disability NGOs for many years. A World NGO Summit on Disability was held in March 2000 in Beijing. It was attended by leading NGOs from all over the world. It produced the Beijing Declaration on the Rights of People with Disabilities in the New Century whereby the said NGOs gave their support to the call for a disability-specific convention.⁴⁴

In autumn 2001 the Mexican government put forward another proposal at the UN which persuaded different states to start a process establishing a convention on the rights of disabled people.⁴⁵ Efforts and conferences continued until in its eighth session the United Nations issued a report by the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities including Optional Protocol to the Convention on the Rights of Persons with Disabilities (A/AC.256/2006/4 and Add. 1). On 25 August 2006,

⁴³ See Osaamu N, *Universal Design and International Convention on Rights of Disabled Persons*, International Conference for Universal Design, Yokohama, Japan, (2002), Conference Paper, no. 1032. University of Tokyo.

⁴⁴ Quinn G & Degener T (eds), *Expanding the system: the debate about a disability-specific convention*, in: *Human Rights and Disability: The current use and potential of United Nations human rights instruments in the context of disability*, (New York, NY: Geneva, Switzerland, United Nations, 2002), p. 181.

⁴⁵ *Ibid.*

the Committee adopted the draft Convention.⁴⁶ From 30 March 2007 it was opened for signature.

Saudi Arabia has accepted new obligations in international law, and recently signed the Convention. As a result, as has been indicated in the Convention, Article 4 connotes general obligations of the States Parties above and beyond the more specific obligations contained in the individual Articles. It is to the effect that legislation should be adopted where needed, inadequate legislation should be reformed, that disability should be mainstreamed into policy formulation and that active consultation should take place with persons with disabilities and their representative organisations on all relevant matters.⁴⁷

(A) The Preamble and Aims of the Convention

The convention opened by recalling the principles proclaimed in the Charter of United Nations which recognise the inherent dignity and value and the equal rights of all members of the human family as the foundation of freedom and justice. Therefore, it recognises that discrimination against any person on the basis of disability is a violation of inherent dignity.⁴⁸

The convention's main references are the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.⁴⁹ It does not refer to the 1975 International Declaration on Disability Rights, despite the affirmations of the latter concerning the rights of disabled persons and discrimination.

⁴⁶ Before issuing the convention, United Nations in its report 56/168 of 19 December 2001 established an Ad Hoc Committee, open to the participation of all Member States and observers to the United Nations, to consider proposals for an international convention on disability rights.

⁴⁷ See Article No. 4 of the Convention.

⁴⁸ See Annex 1. (h) of the Convention.

⁴⁹ Annex 1. (d) of the Convention.

The United Nations holds the conviction that a comprehensive international convention to protect the rights of people with disabilities will contribute effectively to redressing the social disadvantages of disabled persons, as well as promote their participation in civil, political and all life activities. It is the convention's aim to protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities.⁵⁰

Persons with disabilities include *'those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'*.⁵¹ This definition appears more comprehensive for all kinds of disabilities, and it specifies long-term impairment, physical, mental or intellectual, as a common characteristic for the disabled. It also defines the term 'disabled person' according to a social and moral model, since it focuses on enabling participation of the disabled in all social activities and eliminating all barriers which exclude them from full participation. The moral model entails protection of human rights. It is included here in the reference to enabling disabled persons' participation in society on an equal basis with others.

One might argue that when article 2 of the convention declared the definitions of its relevant and main terms, it was not sufficiently specific as to the meaning of 'disabled persons' rights'. Chapter 3 shows that the rights of disabled persons can be specifically defined on justified and reasonable grounds.⁵²

Further, one might ask why in its preamble the convention omitted to mention incentives to the state parties to avoid and prohibit all causes which result in disabilities, such as wars, mass destruction and nuclear weapons, pollution of the environment and so on. One of the grounds to establish the right to personal security is the duty on everyone else not to assault a person through, for example, practices of this kind. (See Chapter 3).

⁵⁰ See article No. 1 of the Convention.

⁵¹ Article No. 1.

⁵² See Chapter 3, pp. 76-93.

(B) General Principles of the Convention

The principle of respect for inherent dignity generates the right of a person to individual autonomy, including the freedom to make one's own choices.⁵³ Furthermore, the main principle on which the convention rests is 'equality and non-discrimination'. It declares that all persons are equal before and under the law and are entitled without any discrimination on the basis of disability to the equal protection and equal benefit of the law.⁵⁴ Discrimination on the basis of disability is defined by the convention thus: '*any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation*'.⁵⁵ Use of the expression 'discrimination on the basis of disability' may be seen as recognition by international society that problems of discriminatory practices against disabled persons do occur and require to be treated.

Moreover, this definition includes all acts of discrimination which generate all forms of social, economic, and political isolation. These acts of discrimination represent negative discrimination, and indeed this definition omits to mention positive discrimination. Nevertheless, if denial of reasonable accommodation is considered to be negative discrimination, then one may infer the converse, that provision of reasonable accommodation is required as a positive discrimination process. Elsewhere the convention requires state parties to take all appropriate steps to ensure that reasonable accommodation is provided as a requirement of equality.⁵⁶

According to the convention, reasonable accommodation means '*necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms*'.⁵⁷

⁵³ See article No. 3.

⁵⁴ See article No. 5.

⁵⁵ Article No. 2.

⁵⁶ See article No. 5.

⁵⁷ Article No. 2.

The convention believes in the principle of respect for differences and acceptance of persons with disabilities as a part of human diversity and humanity.⁵⁸ Equality and non-discrimination will ensure for disabled persons integration in their societies and the enjoyment of all social and political advantages. Thus the convention insists on the principle which ensures full and effective participation and inclusion in society.⁵⁹

The general principle of equality and non-discrimination also entails equality of opportunity. This includes making all general facilities adequate and accessible for disabled persons.⁶⁰

Since women have historically been subjected to discriminatory practices, women with disabilities could face double discrimination. The convention insists on the rights of women with disabilities, and makes it attendant throughout the convention. Generally, it provides that the state parties shall take measures to ensure the full and equal enjoyment by women of all human rights, and to ensure their full development and empowerment⁶¹. This rests on the principle of equality between men and women.⁶²

Moreover, children with disabilities receive the same concern of the convention. State parties should take necessary measures to ensure the full enjoyment by children with disabilities of all human rights on an equal basis with other children.⁶³

In short, these valuable principles inform the full scope of the convention. As will be elaborated below, however, the purpose of the objects and scopes of the convention is to treat aspects of discrimination faced by disabled persons. It is logical that the spread of discriminatory practices was the result of deficiencies in the distribution of resources and advantages in some societies. Hence, the convention can be criticised for not having included the principle of distributive justice as a remedy for discrimination based on disability. Mention of distributive justice must be included, so that the specific rights of disabled persons are viewed as clear rights entailing justice and not social charity.

⁵⁸ See article No. 3 (d).

⁵⁹ See article No. 3 (c).

⁶⁰ In this regard, see article No. 3 (e) and (f) of the convention.

⁶¹ See article No. 6.

⁶² See article No. 3 (g).

⁶³ See article No. 7.

(C) Scope of the Convention

State parties undertake to ensure and promote the realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination. In order for these aims to be verified through affirmation of the principles set out above, the convention contains various scopes to be implemented by state parties.

Since disability rights must be viewed as rights that entail justice rather than charity, the convention emphasises awareness-raising in society, to promote acceptance of disability rights and discrimination issues. It provides that states parties undertake to adopt effective and appropriate measures. Firstly, raising awareness in society in terms of the respect of the rights of disabled persons and their dignity. Secondly, preventing all kinds of prejudices and harmful practices relating to disabled persons. Thirdly, promoting awareness of the capabilities and contributions of disabled persons.⁶⁴ This will give disabled persons more confidence in themselves, which represents one of the incentives for self-respect.

A fundamental human right is the right to life. The convention reaffirms that every human being has the inherent right to life and the member states should take all necessary measures to ensure that the disabled persons enjoy this on an equal basis with others.⁶⁵ These measures are expanded by the affirmation of the right to health in article 25 which indicates that state parties shall take all appropriate measures to ensure access for disabled persons to health services, including prevention and health-related rehabilitation. This article insists on the right of disabled persons to the provision of health services specifically related to their disability needs. It does not, however, mention the rights of disabled persons to medical equipment essential to their daily life. But it might be argued that the rights to this necessary equipment are implied in the words 'the state parties shall take appropriate measures to ensure access for disabled persons to health services' in article 25.

In article 25 mentioned above, the convention requires that state parties recognise that disabled persons have the right to enjoy the highest standards of health without discrimination on the basis of disabilities. This right includes providing persons with

⁶⁴ See article No. 8 (a), (c).

⁶⁵ Article No. 10.

disabilities with the same range, quality and standard of free health care as provided to other persons. Since in some countries disabled persons are likely to be subject to unsympathetic treatment from health providers, so the convention insists on requiring health professionals to provide care of the same quality to persons with disabilities as to others. This entails awareness-raising through promulgation of moral standards for public and private health care on grounds of human rights.

Recognition of disabled persons as persons is seen as the basis for prohibition of discrimination against them. So the convention indicates that disabled persons have the right to recognition everywhere as persons before the law. Also, the states parties must recognise that disabled persons are entitled to legal capacity on equal terms with any other person. Therefore, state parties should take suitable measures to provide access to enable the disabled to exercise their capacity equally.⁶⁶

The convention recognises the rights of disabled persons to live independently and be integrated into society without discrimination.⁶⁷ Thus it insists on positive discrimination as the means to achieve these rights, for example in the form of reasonable adjustment. Article 9 declares that *'to enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas'*.

The rights of disabled persons in civil and political affairs require the state parties to recognise that the disabled person must participate effectively in political and public life on an equal basis with others. These provisions would be implemented through representatives chosen by them, or would enable disabled persons to participate directly by themselves.⁶⁸ Furthermore, the convention attempts to encourage disabled persons participating in the conduct of public affairs, without discrimination. Hence the

⁶⁶ In this regard, see article No. 12 (1) (3) (4) of the convention.

⁶⁷ See article No. 19 of the convention.

⁶⁸ In this regard, see articles No. 29 and 30.

convention declares the importance of establishing disability organisations to represent them at international, national, regional and local levels.⁶⁹

An important right insisted on by the convention is the right of disabled persons to education without discrimination. The convention provides that the '*States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, State Parties shall ensure an inclusive education system at all levels and life long...*'.⁷⁰ In order to include disabled persons in general education without discrimination, the convention insists that persons with disabilities are not excluded from the general education system on the basis of disability. Also, children with disabilities are not excluded from free primary or secondary education. Importantly, the convention does not omit to mention the necessity of providing reasonable accommodation for the individual's requirements, and accessibility of the facilities of education to disabled persons.⁷¹ Clearly this provision rests on principles of recognition and autonomy which entail remedial justice. Similarly, the convention ensures the provision of special education for those disabled whose circumstances do not allow their inclusion in the general education system, for example, people who suffer from mental disabilities.⁷²

The convention insists that state parties recognise the fundamental right of disabled persons to work, and on an equal basis with others. This recognition includes allowing disabled persons every opportunity to build their life independently. So they should be free to choose any kind of employment they consider appropriate for themselves. To implement this process, the convention insists on prohibition of discrimination in the workplace on the basis of disability. This includes procedures of job application, and applies to both public and private sectors.⁷³ This right, however, also acknowledges the requirement to consider the special needs and circumstances of disabled persons, and to give precedence and exemption from some job requirements in view of their situation.

The assertion of the right to work also includes the requirement to make every work environment accessible. Treating persons with disabilities equally with others in

⁶⁹ See article No. 29 (a) and (ii).

⁷⁰ Article No. 24.

⁷¹ See article No. 24 (c).

⁷² In this regard, see article 24, ii. (a) (b) (c).

⁷³ See article No. 27 (a).

terms of applying for the job should be taken after making the employment accessible, as the disabled person should be treated according to his qualification rather than to his disability. This is imposed by their right to recognition before the law.

Concerning participation in cultural life, entertainment and sport, the convention requires state parties to recognise the right of disabled persons to participate on an equal basis with the non-disabled in cultural and social life without prejudice. To this end all centres of sport and recreation should be made accessible to disabled persons.⁷⁴

To help resolve the problems of disabled persons and their needs, accurate, current and complete information should be available. Thus the convention is concerned with the requirement for society to collect statistics and data.⁷⁵ In effect this would contribute to lifting the 'veil of ignorance' concerning the realities of disability issues.

The contents of this convention with its valuable principles should be adhered to and valid in Saudi Arabia, as a member of the international family. Further, as they can be effective only where strong enforcement mechanisms are in place, member states should see them as guidelines to reform disability legislation.

(D) Implementation of the Convention

For the purposes of enforcement, the convention enjoins states parties to appoint one or more government bodies to be responsible for implementation of its clauses. This includes the establishment of governmental coordination mechanisms to facilitate all enforcement-related measures. The convention leaves the state parties free to determine these processes according to their own legal systems.⁷⁶ Further it emphasises the role of all civil establishments, especially disability organisations, to participate fully in the monitoring processes as compressing organisations.⁷⁷

⁷⁴ In this regard, see article No. 30.

⁷⁵ See article No. 31.

⁷⁶ See article No. 33 (1).

⁷⁷ See article No. 33 (3).

To reinforce its intention, the convention proposes the establishment of a committee on the rights of persons with disabilities. This will initially comprise twelve experts, increasing to eighteen, who will work in their personal capacity.⁷⁸

The state parties are requested to submit to the committee a comprehensive report on measures taken to give effect to their obligations under the present convention. Within two years after the convention enters into force, they are also requested to present evidence indicating progress made. Subsequently the states parties should submit their reports at least every four years.⁷⁹

The role of the committee is to consider and study the reports, make suggestions and recommendations as appropriate, and regulate the scale of application of the convention. In order to promote a constructive transparency, the public in each country should have ready access to both the reports and the suggestions and recommendations made.⁸⁰

For cases of failure to comply with the clauses of the convention, the convention has created the ‘Optional Protocol to the Convention on the Rights of Persons with Disabilities’. This measure is seen as a resort for disabled persons where they face discrimination and marginalisation.

According to article 1. (1) of the Optional Protocol to the Convention on the Rights of Persons with Disabilities, a state party to the present protocol recognises the competence of the Committee on the Rights of Persons with Disabilities to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction, who claim to be victims of a violation of the provisions of the Convention by that state party.⁸¹ In order, however, for the complaint of a disabled person to be accepted, the main condition is the adherence of the state party to the present protocol.⁸²

⁷⁸ See article No. 34.

⁷⁹ See article No. 34.

⁸⁰ See article No. 35.

⁸¹ Article No. (1.1) Annex II of the Optional Protocol to the Convention on the Rights of Persons with Disabilities.

⁸² See article No. (1.2) of the Optional Protocol to the Convention on the Rights of Persons with Disabilities. Also, article (2) indicates that The Committee shall consider a communication inadmissible when:

(a) The communication is anonymous;

In summary, the debate is related to ensuring the equal enjoyment of all human rights by people with disabilities. The concepts of respect for human dignity, equality and non-discrimination, autonomy and distributive justice are the cornerstones linking human rights with disability issues. Local efforts related to enacting disability anti-discrimination legislation have supported the movement concerning disability rights and discrimination, thus bringing the issues from an international to a national level. In particular, progress has been made in the case of some Western countries such as the UK and USA, Canada and Australia. These countries are guided by the general principles mentioned above in terms of allocation of fundamental rights, as well as by the principles laid down by the United Nations International Convention and Declaration on Disability Rights. These countries also have disability anti-discrimination legislation which is more exhaustive and detailed concerning disability rights than international law urges.

In conclusion, the reasons for including in this chapter the principles, reform agenda and efforts made by international law for the protection of dignity and rights of disabled persons should be reiterated. Firstly, all members of the international society must adhere to the principles, and challenge discriminatory practices against the disabled. They must also establish a suitable formulation of the legal response, including enforcement mechanisms and awareness-raising of disability rights. Secondly, Saudi Arabia belongs to the international community and has signed the new convention, but its legal responses to disability issues are inadequate or not in place, as will be seen in the next chapter. The Saudi state must take steps to reform its disability laws and practical outlooks presented in previous chapters, following the international disability reform agenda, as both a religious and moral duty and as a civilisational requirement. It should moreover attempt to benefit from what has been established in Western countries regarding disability legislation.

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- (b) The communication constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of the Convention;
 - (c) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;
 - (d) All available domestic remedies have not been exhausted. This shall not be the rule where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief;
 - (e) is manifestly ill-founded or not sufficiently substantiated; or when
 - (f) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date.

What must be examined is the extent to which the content and form of this legislation refer to the same touchstone of relevant principles as the West and the United Nations. Since it is one of the purposes of this thesis to compare the disability laws of Saudi Arabia with DDA and ADA, the following chapter will investigate and evaluate attitudes towards disabled persons and discrimination in Saudi Arabia. In the subsequent chapters the content and frameworks of DDA and ADA will be discussed, and their degree of compliance with relevant principles and international law reform agenda will be assessed.

SAUDI ATTITUDES TOWARDS DISABLED PEOPLE AND DISCRIMINATION

Introduction

Since discrimination against disabled people in Saudi Arabia is the main issue of the thesis, a central focus must be the reality of life as a disabled person in today's Saudi Arabia. This entails evaluation of the degree to which disabled and non-disabled share equal rights. Of equal significance is the attitude of the government and society towards disabled persons. In this regard, this chapter aims to discover what aspects of discrimination are faced by disabled persons and to explore the level of complexity of these in respect of their compatibility with principles of justice. It examines the current Saudi legislation dealing with disability and considers whether this provides an adequate response to the problem of discrimination against disabled persons. It also asks whether or not the current disability legislations and regulations are achieving change in social attitudes towards disabled persons.¹

The first requirement is to identify the actual current situation concerning the welfare and rehabilitation of disabled people. The following sources of information are used here as a basis for analysis of aspects of deficiency in Saudi disability laws and discrimination:

- the available official statistics, which have been surveyed merely for numbers and demographic information of disabled persons;
- the current disability regulations in addition to
- the last Provision Code for Persons with Disabilities in the Saudi State 2001;
- the findings of a questionnaire specifically designed for this research;²

¹ The increasing consciousness of disability issues internationally suggests that we need to develop a thorough understanding of the status of disabled people in the political structures of their countries. We need to understand how these various nations govern themselves, and how disabled people can gain and wield influence. In this regard, see, Kay S, 'Challenges in the Comparative Study of Disability Politics', www.Disabilityword.com.

² See the outcomes and analysis of the questionnaire in the appendix. This questionnaire, which explores the rights of disability and discrimination, is the first specific survey of the field in the Saudi State.

- complaints expressed by disabled persons describing their positions and demanding elimination of discrimination, taken from newspapers since 2002 for the purpose of this study.³

The chapter is divided into three sections. Section one discusses the current status of welfare and rehabilitation of disabled persons in Saudi Arabia. Section two describes and analyses legal responses to disability issues, and Section three presents the data from the questionnaires and cases from the press.

7. 1. Welfare and Rehabilitation of Disabled Persons in Saudi Arabia

As has been mentioned, the constitutional foundation of the rights of disabled persons regarding social welfare, health care, and rehabilitation is the Basic Law. This declares that *'The government guarantees the rights of the citizen and his family in case of emergency, illness, disability and mental retardation, and supports the Social Security System and encourages institutions and individuals to voluntarily participate in the welfare programmes'*.⁴

The Saudi State alleges in its foundation for its social policy its embrace of the Islamic social solidarity system.⁵ According to these policies, and at the instigation of the Saudi State, Royal Order No. 41418 dated 18 / 7 / 1956 was introduced in order to organise social care for workers. In 1970, social security began to perform a role in caring for the poor and disabled in the Saudi State.⁶

³ These complaints are represented in this study in lieu of cases in Saudi Arabian law: since the solution of disability issues still takes the form of social grants rather than rights, no cases in law exist.

⁴ The Basic Law, Art .27.

⁵ Social Solidarity in Islam is one of the bases of society through which it can achieve its permanent happiness, goodwill, security, unity, and peace. Simply, each member of society should help those in need so that they can lead at least a decent life and meet their basic needs. This includes all members of society whatever their religion or nationality. Scholars have stressed that solidarity is categorised into financial and moral solidarity. Solidarity does not only mean negative sympathy, but also positive reaction. Financial solidarity includes financial assistance, aiming at making the poor cross the threshold of 'financial independence' or 'prosperity'. In this sense, Umar bin Al-Khattab said: *'When you make a donation, grant financial independence'*, and Ali bin Abi Talib said: *'Allah imposes a duty on the rich to donate as much money as adequate for the poor in their society'*. On the other hand, moral solidarity is represented by many factors because human needs are not only financial ones as they also include such needs as consultation, advice, friendship, goodwill, education, consolation, and many other forms of donation. In this regard, see Abu Zaharah M, *Al Takafol Al Ejtimaie Fi Al-Islam*, (Cairo, Egypt: Dar-al-Feker Al-Arabi, 1991), p.78.

⁶ See Al-Turaiki M, 'National Survey and Advanced Rehabilitation Techniques', *Saudi Journal of Disability and Rehabilitation*, 5(2), (Riyadh, Saudi Arabia: 1999), p. 137.

Study of both the demographics of disabled persons and the government bodies promoting them is necessary in order to provide a comprehensive account of their real situation in Saudi Arabia. This will also help in identifying the extent to which the latter comply with international standards.

7.1.1. Demographics and Statistics of Disability

The latest demographic poll in the Saudi State estimates the population to be 22,673,538, with a growth rate of 2.4%. Over 86% of the population is under 40 years old and 45% is male and 55% female.⁷

According to the World Health Organization (1993, 2001), disabled persons now account for 10% of the world population. This percentage is increasing in developing countries owing to the rise in poverty and decline in health levels.⁸

All of these disabilities have been caused by sickness, accidents, dystrophy and hereditary disease. The percentage in the United States is estimated at around 13%, although it is deemed the wealthiest country in the world. Numerous surveys have been carried out, whose results across 55 countries vary from 2% to 21%.⁹ These differences in terms of incidence of disability and actual numbers of disabled persons arise from several causes:

- definitions of disability. Some reports define disability as disability of mobility whereas other reports include all kinds of disability;
- the method of survey, which can vary;
- severity of disability. Some surveys include only severe disability, discounting chronic diseases such as rheumatic gout, and diseases of old age.¹⁰ Owing to the

⁷ See Al-Turaiki M, 'National Survey and Advanced Rehabilitation Techniques', *Saudi Journal of Disability and Rehabilitation*, 5(2), (Riyadh, Saudi Arabia: 1999), p. 137.

⁸ The original estimate was publicised in document A29/INF DOC/3, WHO, Geneva, Switzerland, 1976, Annex I.

⁹ *Ibid.*

¹⁰ A large number of these surveys and studies have been reviewed by Chamie at the UN Statistical Office, New York.

- United Nations. Disability Statistics Compendium (ST/ESA/STAT/SER.Y/4): (esp.pp.1/75), New York, NY, 1990;
- M. Chamie: "Survey design statistics for the study of disability," *World Health Statistics Quarterly*, 42(3), pp. 122-140, 1989. *Manual for the Development of Statistical information for Disability Programme and Policies*, United Nations, New York, 1996.

differences in calculation, the real numbers of disabled persons remain indemonstrable.

(A) Measurement of Disability in Saudi Arabia

There are several national statistics projects related to disability in Saudi Arabia. Firstly, the National Survey and Advanced Rehabilitation Techniques for 1997 indicate that the percentage of disabled persons in Saudi society is 3.73%. In addition, this statistic gives the percentage of disabled males as 57.3% and of females as 42.7%.¹¹ Secondly, the National Statistics Project for 2001 identifies 6.3% of the Saudi population as disabled.¹² There is also a statistic from the Ministry of Social Affairs for 2003, which declares that the number of disabled persons registered with the Ministry has risen to 105,929 (55.2 % males - 44.8 % females).¹³

Evaluation of definite percentages of disabled persons is complicated and inexact around the world. The United Nations' estimate is an average 10% of the population of the world. There are big variations in the estimates for Saudi Arabia, and some kinds of disability are not included. In this study disabled persons were estimated to be 10% of the Saudi population, that is, over 2,200,000, since the elderly, obese, and those suffering from rheumatic and other diseases were included. The majority of these certainly face discrimination, and they look forward to having their clear rights and being protected. Until such time, however, as a comprehensive definition of disability on the lines of the social model discussed above (Chapter 2) is reached, this estimate will be exceeded.

(B) Categorisation of Disability in Saudi Arabia

According to the statistics of the National Project for the Research into Disability and Rehabilitation, the categorisation of disabled persons has been calculated as the following:

- Mobility **33.6 %**;
- Visual **29.9%**;
- Phonetic **13.4%**;

¹¹ See Al-Turaiki M, 'National Survey and Advanced Rehabilitation Techniques', *Saudi Journal of Disability and Rehabilitation*, 5(2). (Riyadh, Saudi Arabia: 1999), p. 120.

¹² Al-Harhi M, *National Research for Disabled Children Study in Saudi Arabia*, (Riyadh, Saudi Arabia: Prince Salman Centre for Disability Research, 2003), pp. 18-19.

¹³ Al-Wznah T, *Statistical Study about Position of Disabled who were Registered in the Ministry of Social Affairs*, (Riyadh, Saudi Arabia: King Saud University, Medicine School, 2004), p. 10.

- Audio **10.7%**;
- Social and Psychological **12.4%**.¹⁴

On the basis of the questionnaire administered by this research to a sample of 500 registered disabled persons who have faced discrimination, the following categories were found (see Figure 1).

- Mobility **60.8%**;
- Audio **26.8%**;
- Visual **6.2%**;
- Mental **6.2%**

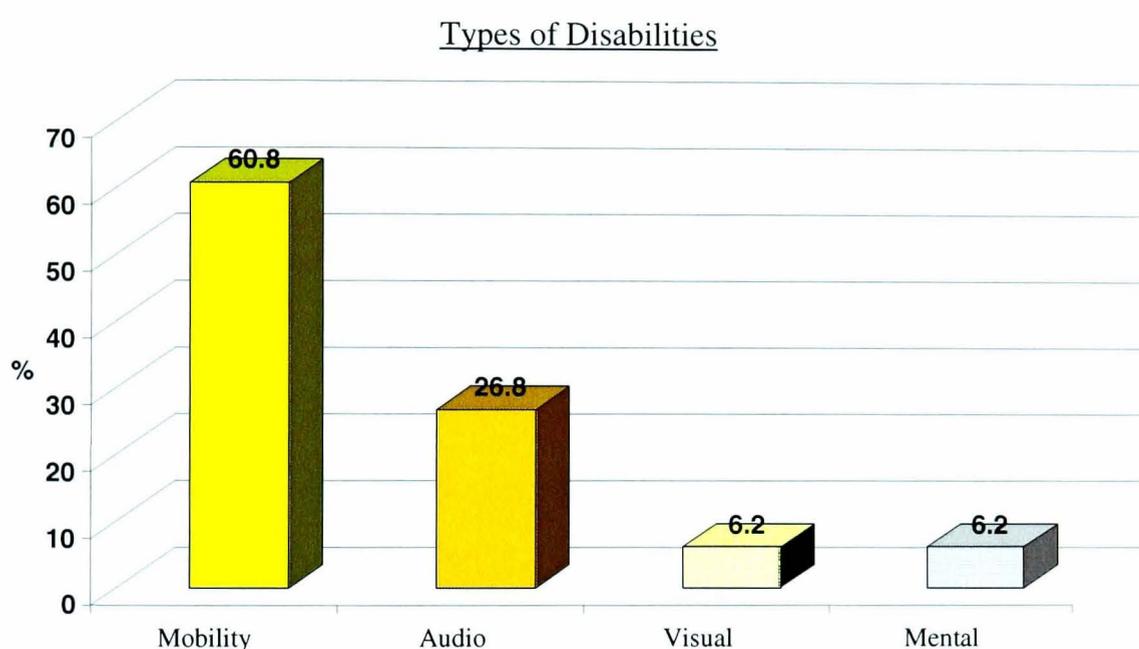


Figure 1

(C) Educational Level of Disabled Persons

Education is very important for disabled persons in order for them to ascertain their rights, and seek an independent living. The statistics of the National Project for the Research into Disability and Rehabilitation show, however, that 69% of disabled persons in Saudi Arabia are illiterate.¹⁵ This percentage differs from one disability type to another, but is nevertheless very high, and adds a further disability. The reasons for the low educational

¹⁴ Al-Turaiki M, *The National Project for Disability and Rehabilitation in Kingdom of Saudi Arabia*, (Riyadh, Saudi Arabia, 1997), p. 98.

¹⁵ *Ibid.*, p. 225.

level must be investigated to see whether it has been caused by any form of discrimination in the right to education.

Moreover, Figure 2 shows that the primary educational level was the maximum achieved by the largest group (28%) of the questionnaire respondents.

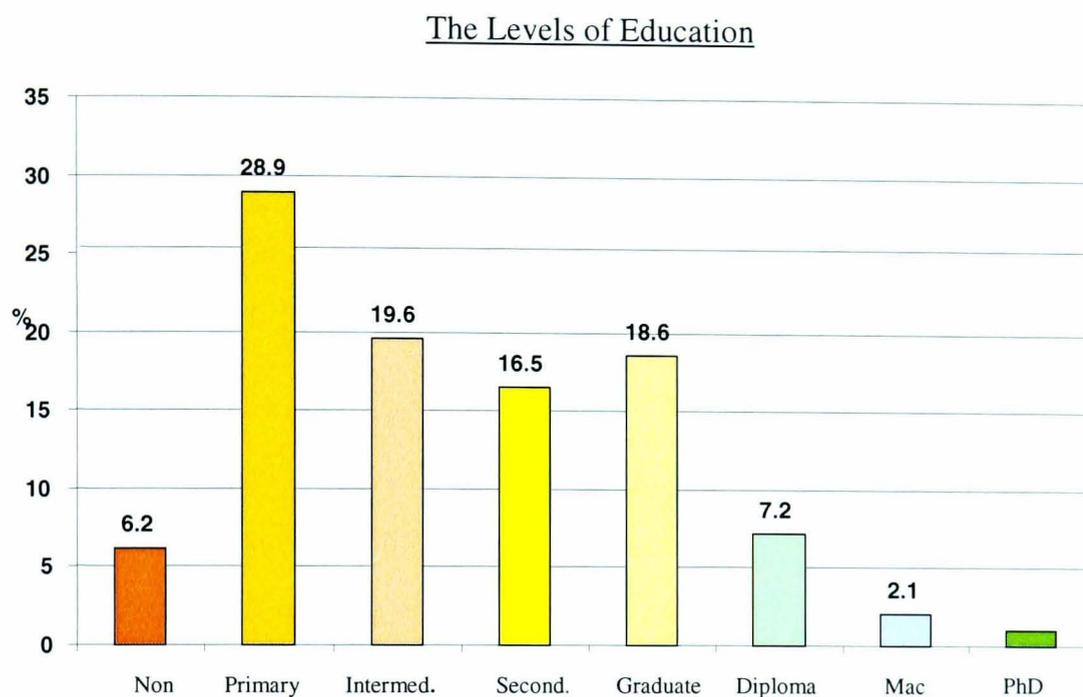


Figure 2

The question remains, why the majority of disabled persons have a lower level of education than non-disabled. The matter will be discussed further at the end of this chapter.

7. 1. 2. Government Bodies Promoting Disabled Persons

The concern of the Saudi government for disability welfare and rehabilitation began in line with the social and economic development programmes for the Saudi State. It has achieved a lot in the field of the care of disabled persons. This achievement is seen in the comprehensive services and distinguished facilities provided for disabled persons throughout the country. Many ministries, such as the Ministry of Social Affairs, the Ministry of Health, and the Ministry of Education, in addition to many governmental institutions, have participated in serving disabled persons in Saudi Arabia. They provide care and rehabilitation programmes.

(A) The Ministry of Social Affairs

The Ministry of Social Affairs has provided rehabilitation programmes and social and vocational training programmes. It is considered to be the mother institution of disability because most of its services are geared towards serving people with special needs.¹⁶ There are several disability centres supervised by the Ministry of Social Affairs: (i) Vocational Rehabilitation Centres: three of these serve both males and females. (ii) Severely Handicapped Social Rehabilitation Centres: there are three residential centres. (iii) Paralysed Children's Care Institutions: there are two of these. (iv) Comprehensive Rehabilitation Centres: these are residential institutions amalgamating all the services for disabled persons in one unit. There are sixteen of these throughout the country for both males and females. (v) Daycare Centres: this kind of centre has been designed to provide specialised rehabilitation services in day programmes to give care and training to disabled persons. There are fifteen centres and sections for daycare. Moreover, there are five new care centres supervised by the social and development sector.¹⁷ As will be discussed, however, these numbers appear to fall short of the requirements for disabled persons, bearing in mind the increasing numbers of disabled persons and their complaints.

(B) The Ministry of Education

The Ministry of Education merges the education of girls and boys, providing educational programmes for both male and female disabled. These play a pioneering role in helping disabled students, and provide them with welfare and rehabilitation. They serve disabled students through the following institutions: (i) Al-Noor Institute: there are thirty-three specialised institutes 'affiliated to the Ministry of Education'. They have been designed to carry out rehabilitation and education of blind, partially blind and multiply disabled males and females. (ii) Al-Amal Institutes: these have been specially designed for the education and rehabilitation of deaf mute and multiply disabled males and females with severe hearing impairment. (iii) Institutes for the Mentally Retarded: some specialised institutions have been built for multiple disabilities and for those mentally retarded individuals who are able to be educated.

¹⁶ For further information see Al-Maghlooth F, *Welfare and Rehabilitation of Disabled Persons in Saudi Arabia*, 1st Edition, (Riyadh, Saudi Arabia, 1999), p. 41.

¹⁷ See *The Services of Disabled Persons in the Eyes of the Future*, (Ministry of Social Affairs in Saudi Arabia, 2004), pp. 15-17.

Besides this, the Ministry of Education makes provision for those with other learning problems such as autistic children, students with hearing disabilities and the physically disabled. Moreover, there are other disabled people being served by the Ministry of Education, which makes special educational provision for disabled girls.

(i) Autistic children: these are served by the Ministry of Education through programmes run by some Institutes for the Mentally Retarded in the Kingdom of Saudi Arabia. (ii) For those facing learning difficulties at school: the Ministry of Education has implemented a programme to help them continue their education smoothly and to reduce the negative effects of dropout from schools because of their difficulties. (iii) Physically disabled: these also include talented students who may have special needs.¹⁸

In addition to these exemplary services, the Ministry of Education has encouraging programmes to integrate disabled children into regular schools. This started with blind people and then extended to other kinds of disabled students.¹⁹ Despite these instances of equality of educational opportunity for disabled students, however, the level of education for disabled persons continues to deteriorate. In addition to deficiencies in means of obtaining their rights, there is also a clear deficit in the provision of welfare for disabled persons. That is to say, discrimination and distributive injustice result from arrangements whereby welfare is provided as charity.

(C) The Ministry of Health

The Ministry of Health is concerned with medical care, preventative measures to avoid disability and medical rehabilitation. It provides medical care by supplying doctors, nurses, medical equipment and medicines, and by carrying out surgical, immunisation and preventative programmes in its governmental hospitals and primary care centres.

Since the Ministry of Health concerns itself mainly with medical rehabilitation, it has eight medical centres throughout the country, whose goal is to provide physical

¹⁸ See *The Services of Disabled Persons in the Eyes of the Future*, (Ministry of Social Affairs in Saudi Arabia, 2004), pp. 17, 18.

¹⁹ For more information, see, Al-Mousa N, *Journey of Special Education in the Ministry of Education*, (Riyadh, Saudi Arabia: Ministry of Education, General Secretariat of Special Education, 1999). p. 118.

rehabilitation for disabled persons.²⁰ Again, however, the scale of care provided falls far short of the numbers in need of it.

(D) Other Governmental Institutions

There are several governmental bodies which provide services for disabled persons, for example: (i) Universities: some universities such as King Saud University serve disabled persons through: (1) A Special Education Department in the College of Education, (2) A Special Education Services Unit for disabled women students and (3) The University Centre for the Handicapped. (ii) General Presidency of Youth Welfare: This organisation serves disabled persons through: (1) The Saudi Federation for Handicapped Sports, (2) The Deaf and Mute Club, (3) Supporting the activities of disabled persons.²¹

In brief, these services provided by governmental bodies seem satisfactory as long as disabled persons have equal access to their rights. Ambiguity and disagreement between governmental bodies arise, however, in supporting the disability services. In addition, these provisions are treated as social grants rather than rights. This may be one of the reasons for the occurrence of discrimination. Therefore it should be asked whether the regulations and the Act for disabled persons provide a solution, or whether they also have deficiencies which need to be reformed. Before addressing this question, the historical development of disability regulations in the Saudi State will be outlined in order to show the improvements which have taken place.

7.2. Legal Responses to Disability Issues in Saudi Arabia

The historical development of services and regulations for disability in Saudi Arabia has passed through several stages. For example, at the beginning of the seventeenth century some enthusiastic blind citizens of the Saudi state learned Braille and began to teach it to others. But the real beginning of care and rehabilitation of disabled persons came when the plans for the social and economic development were laid down.

In 1962, the administrative body for special education in the Ministry of Education was established for the purpose of providing educational, vocational and social services for

²⁰ See Al-Maghlooth F. *Welfare and Rehabilitation of Disabled Persons in Saudi Arabia*. 1st Edition. (Riyadh, Saudi Arabia: 1999), p. 56.

²¹ *Ibid.*, p. 60.

blind, mute and mentally retarded people. Many institutes have since been established all over the country for males and females with such disabilities.

In addition, the Ministry of Social Affairs is the main department serving disabled persons. In 1970 it established a small unit for vocational rehabilitation in the social services centre in Riyadh. It opened in 1974 as the first specialised centre for the rehabilitation of disabled persons.²²

To regulate these procedures, many decrees of the Ministerial Council have followed regarding services for the disabled, and the provision of facilities for them. There has been an increased development of programmes to meet their growing need for a decent life. Examples of these decrees are: (i) Decree No. 715 (1974): This decree contains several points: (a) Establishing specialised centres for the care of all disabled persons, male and female, under the auspices of the Ministry of Social Affairs (b) Pending the establishment of the above-mentioned specialised centres, taking immediate measures to address the problems of the following disabled persons:

- 1) Those who have medical and mobility disabilities, and need medical treatment or health care whether their disability is mental or not. Their treatment is the remit of the Ministry of Health;
- 2) Those who have mental disability and are capable of training. The Ministry of Education also has charge of their treatment;
- 3) Those who have severe mental disability, are multi-disabled and incapable of being trained. The Ministry of Social Affairs is responsible for their social care and rehabilitation.

(ii) Decree No. 1355 dated (1974), Vocational Rehabilitation for Disabled Persons: this decree included the first regulation for vocational rehabilitation programmes. It stipulates that the following has to be constructed within the Ministry of Social Affairs: (a) Department for vocational rehabilitation specialising in the following:

- 1) Placing and enforcing general policy for vocational rehabilitation programmes;
- 2) Suggesting methods for disabled persons' services;

²² See Al-Maghlooth F, *Welfare and Rehabilitation of Disabled Persons in Saudi Arabia*, 1st Edition. (Riyadh, Saudi Arabia: 1999), pp. 66-68.

- 3) Preparing disabled persons for work;
- 4) Registration of any services presented for disabled persons.

(b) Committee for coordinating disabled persons' services. The decree limited the specialisations of the committee to the following:

- 1) Coordinating the services between the departments offering care and rehabilitation of disabled persons;
- 2) Presenting suggestions and recommendations for the officers;
- 3) Facilitating the gathering of statistical information about disability;
- 4) Exchanging information from the studies and research achieved in the disability field.

(iii) Decree No.1219 (1976): This decree includes the second amended regulation for vocational rehabilitation programmes. The first article of the regulation stipulates that the general department for rehabilitation specialises in setting the general policy for rehabilitation programmes. It includes rehabilitation programmes for those who are qualified vocationally. It also includes granting subsidies to disabled persons' families who are not eligible for social rehabilitation centres.

(iv) Decree No. 34 (1980): This ministerial decree includes ratification of the fundamental regulations for rehabilitation programmes for the disabled. It declares that the general department for rehabilitation in the Ministry of Social Affairs functions to draw up the general policy for the programmes of disabled rehabilitation. Subsequently, the Decree No. 219 (1980) and the Decree No. 85 (1988) were issued. They include examining applications for subsidies essential for supporting a disabled person's family.²³

Unfortunately a lack of cohesion between these decrees and regulations undermines their effectiveness as directives and recommendations. Their weakness as tools to obtain services for disabled persons results from their lack of legal process. Consequently they need to be assembled in a comprehensive legal code, as special legislation for disabled persons' rights.

²³ See *The Services of Disabled Persons in the Eyes of the Future* (Ministry of Social Affairs in Saudi Arabia, 2004), pp. 11-13.

These primary disability regulations in the Saudi state were a natural initiative as a legal response to disability issues in Saudi Arabia. Similarly to other countries, there were several regulations for rehabilitation and welfare before the enactment of comprehensive disability discrimination acts. For instance, in the United Kingdom, the Committee of Enquiry into the Education of Handicapped Children and Young People issued the Warnock Report (1978) on special educational needs. This was the fundamental reference for disability issues before the enactment of the DDA (1995).

The United States issued the Architectural Barriers Act of 1968, the Law No. 94/142 for Special Education, and the Law No. 503 for Vocational Rehabilitation. These laws dealt with disability issues prior to the enactment of the ADA (1990).

Saudi Arabia has recently enacted the Provision Code for Persons with Disabilities. This came about as a reaction to the increasing needs of disabled persons, and in compliance with the demand for reform and the demand to join the modern world. Furthermore, it came about as a response to international pressures to change the situation of disabled persons to secure their rights equally with non-disabled persons.²⁴ It remains to be seen whether actual Saudi practice will demonstrate intention to reform in the spirit of the Code.

The main goal of the following section is to identify the regulations and examine the Provision Code for Persons with Disabilities in order to determine whether it is adequate. The section also examines the level of the Code's compatibility with the relevant themes of this thesis and the principles of the international convention.

7.2.1. Fundamental Regulations for the Disability Rehabilitation Programmes

The foundation of these regulations was issued in Decree No. 1355 (1974). They were subject to various amendments until the issuing of Decree No. 1219 (1979). This package

²⁴ The Member States of the Gulf Cooperation Council have issued to the Arabic Gulf States 'The Proposal; Public Law for Disability, Prevention, and Rehabilitation' in the Gulf member states as a recommendation and reference for member states when they want to enact a disability code. In fact, this project is a response to international and specially the United Nations' calls to ensure the rights of disabled persons. Furthermore, it includes interesting Islamic and legal principles; it looks at the framework of international declarations on disabled rights. It indicates prohibition of discrimination on the basis of disability, and it covers welfare and rehabilitation, education, employment, and the right of disabled persons to participation in society. In this regard, see, Al-Hammdan A, 'The Proposal; Public Law for Disability, Prevention and Rehabilitation', (1994) 6 *Journal of King Saud University, Educational Sciences and Islamic Studies*, p. 335.

of regulations includes the fundamental regulations for disabled rehabilitation programmes and for persons with severe disability, and the special regulation for the care of paralysed children.

(A) The Fundamental Regulation for Disabled Rehabilitation Programmes

This regulation consists of eighteen articles. It includes authorising the general department for rehabilitation in the Ministry of Social Affairs to set general policies for rehabilitation programmes. According to article 2, this department supervises the enforcement of rehabilitation programmes.²⁵ Moreover, it ordains the institution of a committee from the Ministry of Social Affairs, the Ministry of Education, and the Ministry of Health. The remit of this committee is to coordinate the services for disabled persons between the ministries providing these services.²⁶

One might argue that the authority granted to the Department to set general policies for rehabilitation programmes needs to be laid down in a legal framework. Further, that its actions should be under purview through the fundamental act for disability. This would better guarantee the rights of disabled persons against the potential tyranny of the committee.

In addition, the regulation sets down the disabled categories accepted in the rehabilitation centres. They include mobility disabled, hearing and mentally impaired people, TB patients (Tuberculosis), and the clinically depressed.²⁷ These categories seem comprehensive. According to Article 8 of the regulation, however, the vocational rehabilitation centres have a right to perform services only for one or some of these disabled categories, 'according to the possibilities'. This seems a clear contradiction and a form of discrimination, since the term 'possibility' permits the refusal of services to some disabled, who are therefore unprotected by the regulation. One might note that this arises from disabled persons' rights being provided as social grants, depending on the willingness of the agent rather than on imposed justice.

²⁵ See The Fundamental Regulation for Disabled Rehabilitation Programmes, Art. 2.

²⁶ *Ibid.*, Art. 3.

²⁷ *Ibid.*, Art. 7.

Article 9 of the regulation declares the conditions for acceptance of disabled persons in the rehabilitation centres. These include that the disabled must have Saudi nationality. Only 10% of disabled persons who do not have Saudi nationality can be accepted. This seems a kind of injustice, because any person who resides legally should be treated equally, for example, as practised in the UK.

In terms of employing the disabled, the regulation declares that the rehabilitation centres should put their effort only into employing the qualified disabled.²⁸ Yet there are no arrangements or programmes or legal procedures in place for this. Indeed this is one of the defects of the regulation since it does not address the employment of disabled persons. Even though the Saudi Arabia Labour Law stipulates employing 2% of qualified disabled persons in public and private sectors it has nevertheless so far made no legal procedures, of employing disabled persons, to implement this.²⁹ The regulation depends on the willingness of the employer, because it lacks binding legal processes which must rest on equality and justice.

(B) Fundamental Regulation for Severe Disabilities

This regulation is considered to complete the previous regulation. It consists of ten articles (19-28) and it deals with those persons who have severe disability. According to the regulation, the general department for disabled rehabilitation supervises institutional rehabilitation centres for disabled persons who are not suitable for vocational rehabilitation. The regulation distinguishes between three cases of disability: severe disability, multi disability, and mental retardation.³⁰ It also declares the conditions for admission to the centres. One of these conditions includes giving the Minister of Social Affairs the right to exempt some disabled persons from some conditions.³¹ Although this appears to improve flexibility regarding terms of acceptance, the only means to ensure recognition of the rights of the disabled is to determine a legal definition of 'severe disability'.

With regard to housing the disabled in the rehabilitation centres, Article 24 directs that a disabled person's accommodation be withdrawn whenever his or her condition is

²⁸ The Fundamental Regulation for Disabled Rehabilitation Programmes Art. 18.

²⁹ See the Saudi Arabia Labour Regulation for 1389 (1969), Art. 54.

³⁰ See the Fundamental Regulation for Disabled Rehabilitation Programs, Art. 19.

³¹ *Ibid.*, Art. 21.

'better'. Here one might note that the regulation should indicate in legal terms who should state when the disabled are better.

(C) Special Regulation for Care of Paralysed Children

The main aim of this regulation is to establish the process of operation of the establishment for paralysed children. This is a social establishment run by the Ministry of Social Affairs. This regulation consists of fourteen articles which cover the goals of the establishment, conditions of acceptance, processes of acceptance, and types of care which the establishment offers the paralysed children. In addition it declares the allocation of jurisdiction for the establishment's employees. One of the weaknesses in this legislation, however, is that its drafters failed to synthesise the different regulations dealing with disability. This leaves problems of duplication and a conflict of regulations.³²

(D) Special Education

As has been mentioned, the Ministry of Education superintends the Special Education Department. This specialises in care and education of disabled persons in three units: (1) Department for the education of blind students; (2) Department for the education of deaf students; (3) Teaching and education of retarded students.

The tasks of the Special Education Department are to produce plans and suitable programmes in order to enforce the educational policy of Saudi Arabia.³³ Special regulations or codes for special education have unfortunately not been issued yet. The

³² Further to these regulations, several decrees were issued on behalf of disabled persons. For example:

- The decree No. 219 dated 27 / 11 / 1400 (1980) regarding the presentation of subsidies for promoting individual projects for qualified disabled persons.
- The decree No. 187 dated 19 / 9 / 1401 (1981) concerning cutting travel charges on planes, trains, and ships by up to 50% for disabled persons and their attendants.
- The decree No. 66 dated 16 / 4 / 1405 (1985) regarding the acceptance of 10% of non-Saudis resident in Saudi Arabia into Governmental Rehabilitation centres.
- The decree No. 39 dated 11 / 2 / 1421 A.H (2001) including:
 - The Saudi state undertakes full living costs for the foreign wives of Saudi disabled.
 - The Saudi state undertakes the transport costs of sponsoring the sons of disabled Saudi women.
 - The Saudi state undertakes all traffic fines for disabled person after his death.

These decrees reflect the progress and development of understanding of disabled needs. Regarding these decrees, see *Regulations of Welfare and Rehabilitation of Disabled Persons in the Kingdom of Saudi Arabia*, (Dammam, Saudi Arabia: Disabled People Association in Eastern Region of Saudi Arabia, 2002), pp. 50-73.

³³ See Al-Mousa N, *Journey of Special Education in the Ministry of Education*, (Riyadh, Saudi Arabia: Ministry of Education, General Secretariat of Special Education, 1999), p. 82.

exception is those decrees and standing orders which organise work in the departments and institutions, such as the decree of conditions of acceptance into Special Education institutions.³⁴ Some of these decrees have achieved encouraging action, while others have forms of discrimination.³⁵

Furthermore, all the decrees and circulated notes from the Department of Special Education follow the Educational Policy of Saudi Arabia in the ministerial Decree No. 7798 of 1969. This policy includes several principles and standards pertaining to special education for disabled persons. According to Clause No. 56 of the educational policy, '*The right of special education and care of disabled students in Islam is common between the sons of the nation*'. In addition, Clause No. 188 of the educational policy declares: '*The Saudi state supports, according to its possibilities, the education of disabled persons through designing special methodologies that suit their special circumstances*'.³⁶

These principles, however, lack legal framework and legal obligation. They have the status of mere traditions which are probably useful when necessary to enact the special education code.

(E) Other Regulations for Disabled Persons

Saudi Arabia has issued other regulations in response to disabled needs, specifically to social pressures to treat the situation of disabled persons, and to give them the chance to participate within their society. These regulations deal with the elimination of architectural barriers and with the safety of disabled persons. It is very important to explore these regulations to find out whether they perform their roles in respect of disabled people's needs.

³⁴ *Regulations of Welfare and Rehabilitation of Disabled Persons in the Kingdom of Saudi Arabia*, (Dammam, Saudi Arabia: Disabled People Association in Eastern Region of Saudi Arabia, 2002), p. 79.

³⁵ Examples of these decrees:

- Circulated note of the Ministry of Education, No. 639/27 dated 18 / 10 / 1413 A.H (1993). Regarding the admission of paralysed persons to general schools.
- Circulated note of the Ministry of Education, No. 361/27 dated 13 / 5 / 1415 A.H (1995). Concerning the integration of blind students in general schools.

³⁶ See Al-Maghlooth, F. *Welfare and Rehabilitation of Disabled Persons in Saudi Arabia*, 1st Edition, (Riyadh, Saudi Arabia: 1999), p. 99. Also, see Al-Mousa N. *Journey of Special Education in the Ministry of Education*, (Riyadh, Saudi Arabia: Ministry of Education, General Secretariat of Special Education, 1999), p. 74.

i) Conditions of Environmental Adjustment for the Disabled: these technical conditions were issued by ministerial promulgation No. 7 (1982). A general definition of disability identifies the majority of disability types (mental retardation, visual and audio disability and mobility disability). In addition, specifications for technical standards and conditions are given which should be adhered to by all municipalities and rural councils granting building permits. These include general recommendations for public and private sectors to structure ramps, provide special parking for disabled cars, special bathrooms and walkways. Furthermore, it lays down all disabled persons' requirements in government buildings, for example, automatic doors and lifts.³⁷ The aim of these services and recommendations appears to be to facilitate and serve disabled persons according to modern models.

Despite this promulgation, which includes interesting modern conditions for the adjustment of disabled persons' environments, an obligatory legal national architecture code is not given. Moreover, the regulation does not make any reference to existing buildings. Therefore, the provisions of this regulation appear to cover only general recommendations and traditions for governmental buildings. It does not appear to be a regulation because it lacks any legal framework and enforcement mechanism. There are no words which refer to any legal obligation. Also, although it includes a definition of disability, this definition is very general.

ii) Conditions of Safety in Disabled Persons' Centres: these conditions were issued according to the Civil Defence Code, which was issued by royal decree, No. M/10 (1986). This regulation indicates who provides services and rehabilitation in disabled persons' centres. It consists of 28 articles, of which Article One includes a definition of disability. It defines the disabled person in terms of his/her ability to escape in case of fire, or to act like a non-disabled person. This definition expresses a medical conception of disability, with special definitions according to the specific subject matter of the regulation. The latter directs that all disabled persons' centres must implement local and international

³⁷ See *Regulations of Welfare and Rehabilitation of Disabled Persons in the Kingdom of Saudi Arabia*, (Dammam, Saudi Arabia: Disabled People Association in Eastern Region of Saudi Arabia, 2002), pp. 137-146.

specifications for safety and protection. Also, it includes the technical conditions which must be fulfilled for the building structure of disabled persons' centres.³⁸

This regulation seems to represent only governmental instructions and traditions, because it again lacks legal framework and binding procedures. Additionally, it does not indicate how to pursue anyone breaching the regulation. Thus it cannot be applied.

In conclusion, although these last regulations provide satisfactory responses to and services for disabled persons' needs, nevertheless, they contribute to some aspects of deficiency. First of all, they deal with disability issues as social and charitable matters. Secondly, they lack any statutory frame to guarantee the disabled persons' rights which have been provided. In addition, they do not state how the regulations will be applicable, and who will enforce them. Thirdly, they permit disagreement and dispute in the implementation of their roles. Thus, they should be drawn up in specialised codes within a legal framework. For example, in terms of special education, there should be a special separate education code similar to the Special Education Needs in England. Also, a single comprehensive anti-discrimination Disability Act would carry greater significance.

7.2.2. Provision Code for Persons with Disabilities (2001)

This Code was written in response to many calls to develop disability issues in the Saudi state, so that all regulations concerning disability could be assembled in a comprehensive national code. Historically, the proposal for the national disability code was presented by the Prince Salman Disability Research Centre in 1993. The Code should be according to Islamic legislation, and should consider all the regulations related to disability issues in Saudi Arabia. The centre appointed a specialised committee in order to study the terms of the Code.

The Code was to cover education, rehabilitation, and employment. In addition, it was to be the essential reference for all state departments when enacting the disability regulations. The committee's task was to prepare the draft of the Code, which resulted in

³⁸ *Regulations of Welfare and Rehabilitation of Disabled Persons in the Kingdom of Saudi Arabia*, (Dammam, Saudi Arabia: Disabled People Association in Eastern Region of Saudi Arabia, 2002), pp. 149-157.

2001 in the issuing of the Provision Code for Persons with Disabilities (referred to hereafter as the Provision Code).³⁹

The Provision Code contains sixteen articles, including definitions of words and expressions it contains, such as 'persons with disabilities', 'prevention', 'welfare', 'rehabilitation', and 'the supreme council'. These concepts are needed to express the aim of the Code's lawmakers, which is the social care and rehabilitation of disabled persons. The Code also covers health, education, training, work, social aspects, culture and sport in addition to the information and complementary services.⁴⁰

It is important to examine the contents of the Provision Code in order to assess their adequacy. That is, to determine whether they meet the real needs of disabled persons and address issues concerning the development of disability rights, as well as dealing with them according to the relevant principles.

(A) Aspects of Legal Deficiency in the Provision Code

As has been shown, the legal responses to disability issues in Saudi Arabia have been achieved in two stages. The first stage was that of the early regulations, which were a bone of contention between several departments. The second stage is that of the comprehensive Provision Code for Persons with Disabilities, which has not yet received interpretational regulations. Although the Provision Code is a recent and comprehensive code covering all aspects of living, nevertheless, it has some deficiencies both in its legal form and in the texts and subject.

(i) Deficiencies in the Legal Form: the legal form means the framework and legal language. Both legal framework and legal formulation play an important role in the identification of deficiencies and weaknesses in the laws. The general legal form of the Provision Code has some deficiencies.

Firstly, the external shape of the Provision Code lacks legal lineaments. It is very important that the Code be linked to the constitution. That is to say, the rights of disabled

³⁹ See Al-Maghlooth F, *Welfare and Rehabilitation of Disabled Persons in Saudi Arabia*, 1st Edition, (Riyadh, Saudi Arabia: 1999), p. 97.

⁴⁰ For full text of the Provision Code, see the appendices.

persons without discrimination on base of disability should be affirmed as constitutional guarantees.

Secondly, the Code's allocation of service providers appears very general, and omits essential definitions of disabled persons in some sections. For example, the 'qualified disabled' who deserve the right to education and employment are not further identified. In contrast there is no mention of a criterion to decide who merits employment. Thus the Provision Code should be divided into several parts, each part containing its own relative statements and definitions.

Thirdly, the Provision Code and disability regulations do not directly refer to the services provided (health, rehabilitation, education, and employment) as rights. Furthermore, throughout the Code there is no mention of the word 'right', except in Article 2, which indirectly suggests rights. It declares that '*The government shall guarantee the provision of welfare and rehabilitation services to persons with disabilities...The government shall guarantee to provide services to persons with disabilities in health, education.....*'.⁴¹ This omission is probably one of the main reasons why disability rights are dealt with as charitable social grants. Moreover, the articles begin with verbs of 'providing' and 'awarding'. Consequently and a fortiori there is never any indication or stipulation concerning protection of the rights of disabled persons without discrimination.

(ii) Deficiencies in the Text and Subject: the text of the Provision Code is very general. It contains deficiencies in terms of definitions of disabled, education, employment, public services, and techniques for their legal treatment. Also, there are some deficiencies in respect of transport, housing and telecommunication as well as of enforcement mechanisms of the code. For example:

(1) Definition of Disability: the Provision Code does not expressly define disability. It rather defines persons with disability. Art. 1 of the Code provides that: '*A person with disability is one who is totally or partially disabled with respect to his/her bodily, material, mental, communicative, and academic or psychological capabilities, to the extent that it compromises the ability of that person to meet his or her normal needs as*

⁴¹ The Provision Code for Persons with Disabilities, Art. 2.

compared with his or her non-disabled counterpart'. For the purpose of this code, 'persons with disabilities shall refer to individuals who have one or more of the following disabilities: visual disability, hearing disability, cognitive disability, motor disability, learning disability, speech and language impairment, behavioural problems and pervasive developmental delay, multi-disabilities, and other disabilities which require special care'.⁴²

It is noted that, under these provisions, the main criterion is that the person is in need of 'special care'. This special care has not been defined by the Code. Unlike the definition under DDA and ADA, where particular criteria including substantial measure of disability and the period of effect of impairment are set out, the Code defines the person with disability in more general terms. Instead of setting out the attributes relating to disabled persons, the Code considers non-disabled people and their normal needs as the basis of the definition for disabled persons in that anyone who cannot meet these normal needs will be considered as disabled. This would give an unbalanced account of the real concept of disability, but it could be a useful approach for the purposes of expanding the concept.

There remain certain questions about disability to which the Code seems not to provide sufficient answers. For example, there is no clear reference to the degree of impairment and the period of impairment needed to qualify as disability. It should be considered that the impairment should be 'substantial', i.e. have an effect that is more than minor. Even minor impairments can prevent a person from meeting his/her normal needs, but the question is whether these minor impairments would be considered as basis for qualification of the person as disabled under the Code. There seems to be no straightforward answer to this question under the Provision Code as it does not give an indication as to the measure of disability. Similarly, the Code does not specify a time frame for impairment. For instance, under the DDA, the effect of impairment should be long-term, that is, it has lasted for at least twelve months, or the period for which it lasts is likely to be at least twelve months, or it is likely to last for the rest of the life of the person affected. Under the Provision Code, it is not clear whether an impairment which lasts only for a short period of time and can prevent the person from meeting his/her normal needs can be considered as serious enough to render the person disabled.

⁴² The Provision Code for Persons with Disabilities, Art. 1.

Under the Provision Code, reference is made to the 'normal life' of the person who is affected. This is a more general term than that of the DDA under which the 'normal day-to-day activities' of the person are affected. It can be argued that the Provision Code is more advanced and comprehensive in this respect as it provides for a more general framework which includes everyday activities as well as activities which may not be considered as day-to-day activities.

The definition needs to determine the specific characteristics of disability. It must also distinguish the lawmakers' attitudes towards disability from those towards, for example, alcohol and drug addiction. In addition, it makes no statement on the position of persons with a history of HIV or any persons whose impairments expose them to discrimination. Moreover, the Code does not address the position of disabled persons who are not presently disabled but whose history includes disability. The definition appears to deal with a medical model of disability, and hence the disabled person has been seen as an ill person. This is why issues of disabled persons' rights are handled as social grants rather than as human rights issues. In reality, using medical and sociological models means that people with disability are labelled and characterised by others, as has been discussed.⁴³

Accordingly, further improvement can result from clarification of what exactly impairment is, what types of impairment can qualify as disability and what the other attributes of disability might be. In addition, clarification of 'qualified individual' is required, as well as of the position of those persons who have a history of disability.

The Provision Code's definition can be further improved through adoption of specific definitions of impairment, disability and handicap. In this respect, the improvement can benefit from the already-existing definitions offered by the WHO, the ILO and the UN's standard rules on these matters, as well as by modern disability discrimination acts such as the DDA and ADA, as will be examined in the following chapters.

The definition of disability should be linked to an extent with an individual's ability to do the job concerned and is highly fact-specific. Also, it should be recognised that

⁴³ See Chapter 2, and Leslie P. F. & Anita S, *Americans with Disabilities*. (London, UK: Routledge 2000), pp. 73-76.

discrimination is based on stigma and social restrictions consequent on impairment. Having considered the approach of Islam towards disability together with various definitions of disability, let us propose the following definition: *'Disability is a physical or mental impairment or being regarded as a having an impairment that, notwithstanding the support of mitigating measures, substantially limits one or more of the major life activities of the disabled person'*. The main reasons for choosing this definition are: firstly, it appears to be more comprehensive and to include all kinds of disability; secondly, it involves a social and moral model of disability, which emphasises the rights of disabled people.

(2) Health and Rehabilitation: these include providing medical, preventative and rehabilitation services, and registering children who are at risk of or born with disability. They also include enriching the health care of the disabled in addition to training health providers and families of the disabled in handling and care. The Provision Code lays on the government the provision of medical services for disabled persons through specialised departments.⁴⁴ These measures have the appearance of social grants; they also lack indications concerning the continuation of these services, and the possibility of treatment outside the Saudi State. Further, they place no requirement on the government to provide medical equipment and reparative devices needed by the disabled.

In addition, this article includes no supplementary medical services such as transport, institutions, and accommodation. It also does not undertake to provide such medical systems for disabled persons as are found in the modern world.

Consequently this article seems very general and inflexible. It needs to deal more precisely with the specific needs of disabled persons.

The Provision Code mentions the training of disabled persons' families regarding the mode and means of disabled care and welfare. It does not, however, indicate which body would implement this service. Moreover, the Health and Rehabilitation article omits to indicate the obligation to eliminate all forms of obstacles to health services, such as architectural, administrative and social barriers. Unfortunately, this legislative omission of

⁴⁴ See Provision Code, Art. 2.

enforcement processes in the Provision Code contributes to greater discrimination against disabled persons in the rights of health and rehabilitation.

(3) Education: the Provision Code includes all phases of education suitable to the abilities of the disabled: pre-school, general, vocational, and higher education.⁴⁵ The provision of education is referred to in general terms which lack legal expression. The Code does not directly assert the right of the disabled to education, and only mentions the services.

Likewise, the Provision Code does not indicate whether a disabled person has a right to special education or to integration into public education. The Provision Code should differentiate between the respective rights of disabled persons to these two pathways without discrimination. The integration of disabled students requires a procedural law statement. Accordingly, the Provision Code should stipulate legal procedures for obtaining this right without discrimination: for example, reasonable accommodation and elimination of all kinds of obstacles which the disabled students are likely to encounter in the schools.

One might claim that the Code already indicates that it provides an education suitable to the abilities and needs of the disabled. This seems, however, to be a very general and vague expression. More precision is required concerning the classification of 'qualified disabled' for either special education or integration into public education.

(4) Employment: the Provision Code includes recruiting and employing persons with disabilities, to give them the opportunity to discover their personal capabilities and potential and to enable them to earn and generate an income. The foundation of the right to work generally in Saudi Arabia is the Basic Law, which declares that the Saudi State shall guarantee the right of work for all qualified civilians.⁴⁶ In addition to that there is the Saudi Regulation of Civil Service. It deals with employment issues for all Saudi civilians. Concerning the right of disabled persons to employment, there is an article in the Saudi Labour Regulation which obliges the companies of the private sector who have more than

⁴⁵ See Provision Code, Art. 2.

⁴⁶ See the Basic Law, Art. 29.

50 employees to employ 2% of disabled persons.⁴⁷ This kind of quota system, however, is likely to make disabled persons more isolated, because it deals with the disability of a person rather than his qualifications. In this regard he should be given a chance to compete with other non-disabled employees according to his qualifications.

The Provision Code for people with disabilities has come to be the foundation of disabled persons' rights to education, employment, etc. Yet the provision of employment for disabled persons in Saudi Arabia seems extremely inadequate, because there are several areas of deficiency. These may constitute one of the major reasons of discrimination of disabled persons in employment:

Firstly, the provision of employment in the Code is again expressed in general and non-legal terms. There is no explicit reference to the right of disabled persons to employment or to prohibition of discrimination against them, either during the application process or in the workplace. This again makes access to employment appear more like a charity than a right.

Secondly, the Regulation of Civil Service does not except disabled persons from its conditions for the right to work. Its conditions are a deterrent to employing disabled persons as they include the requirement of medical fitness.⁴⁸ Moreover, the Regulation of Civil Service trusts the medical committee in the Ministry of Civil Service to decide the scale of the disabled person's capability for the employment. Putting this decision in the hands of the committee is unfair, as the disabled person is thereby subject to the committee's arbitration and discrimination.

Although the Provision Code was intended to facilitate the employment of disabled persons, it merely stipulates the employment of disabled persons according to their abilities, without any further details.⁴⁹ These universal expressions and the condition of medical fitness require more precision, with clearer definition of the 'qualified individual'. This could resolve the problems of disabled persons' rejection for employment.

⁴⁷ See the Saudi Arabia Labour Regulation for 1389 (1969), Art. 54.

⁴⁸ The Regulation of Civil Service, Art. 4/C.

⁴⁹ The Provision Code for Persons with Disabilities, Art. 2/4.

Thirdly, one might possibly argue that in response to the requirement to employ disabled persons, the Ministry of Civil Service has designated particular jobs for the disabled.⁵⁰ Designation of specific jobs for disabled persons does not, however, realise the objective of employing disabled persons equally with non-disabled without discrimination. Furthermore, designation of specific jobs for disabled persons contributes to non-recognition and more segregation for the disabled. It means treating the disabled as a different person rather than a normal person with the same human rights, causing unfair treatment of disabled persons. The employment of disabled persons must be more just, since determination of their qualification is the reasonable measure for employing them. They must be dealt with in the light, not of their disability, but of their ability to perform the functions of the job.

Fourthly, the Provision Code does not explicitly declare the obligation of the private sector or even the public sector to employ disabled persons. Although the Saudi Regulation of Labour has stipulated the obligation of private sector companies with more than 50 employees to employ 2% of disabled persons, nevertheless it lacks applicable legislation to enforce the Code, even though it intrinsically could generate isolation of the disabled, as discussed above.

Finally, the Provision Code and the entire disability regulations in Saudi Arabia lack any stipulation on enforcement procedures. These would enable the person with disability to ensure his right to employment equally with non-disabled people, for example, by making reasonable adjustment of the workplace environment, by eliminating all kinds of barriers, by provision of reparative equipment and so on. Therefore, the Code should include the criterion of reasonable adjustment and a definition of discrimination in employment.

(5) Culture and Sport and Complementary Services: the Provision Code entails utilisation of cultural and sporting facilities, and the adaptation of such facilities to enable persons with disabilities to participate therein. It also indicates complementary services, which include facilitating a method of secure and safe public transport for the disabled and

⁵⁰ Examples of these jobs for disabled persons, which have been designed by the Ministry of Civil Service, are: telephone operator, computer programmer, official equipment operator, and so on. See *A Brief Study on Welfare of Disabled Persons and their Participation in Jobs in the Public and Private Sectors In the Kingdom of Saudi Arabia*, (Riyadh, Saudi Arabia: Manpower Council of Saudi Arabia, 1994), p. 23.

their caretakers, at reduced cost.⁵¹ This provision is also expressed in non-legal and general terms, and without any mention of disabled persons' rights to eliminate forms of discrimination in transport and public and private facilities. Accordingly, one might note that there are some considerable deficiencies in these provisions, as below.

Firstly, with regard to the sporting services, the Code indicates merely that the disabled person can utilise sporting facilities. No obligation is placed on either the public sporting facilities or the private sector which provides such sports services. This indicates social and charitable grants rather than a right. Here there should be clear stipulation that disabled persons have the right to enjoy sporting facilities without discrimination. Also, it should be indicated that all public and private sporting facilities must be accessible and usable by disabled persons. The Provision Code should define the meaning of 'reasonable adjustment' as a positive discrimination.

Secondly, concerning methods of public transport to securely and safely transport the disabled, this lacks direct mention of the right of disabled persons to public transport without discrimination. In addition, it lacks any obligation on private companies who provide transport services (taxis, buses, trains, etc.) to make adaptations to their vehicles in order to carry disabled persons as readily as non-disabled. Consequently, in a separate section the right of disabled persons to transport and to all related issues should be given the status of a fundamental right, rather than of a complementary service as found in the Provision Code. The right of disabled persons to transport without discrimination should also be declared. Similarly, reference should be made to the international transport code facilitating accessibility for the disabled.

Thirdly, article 3 of the Provision Code indicates that '*The Supreme Council shall coordinate with authorities to abide by the regulations for architectural specifications required to provide access and accommodate persons with disabilities in all centres for rehabilitation, training, education, medical.....*'.⁵² Indeed, it mentions access to facilities for disabled persons, but only as a general statement and recommendation, and not as a law for coordination and co-operation between the organisation and the government authorities. The intention here is to make the facilities accessible without legal obligation.

⁵¹ See the Provision Code for Persons with Disabilities, Art. 2/ 6, 8.

⁵² *Ibid.*, Art. 3.

The article also lacks a separate section declaring the right of disabled persons to eliminate architectural barriers in order to utilise facilities. Consequently, these can appear as only a secondary service for the disabled. This omission should be explicitly rectified legally, with reference to international architectural norms in terms of accessibility for the disabled. Furthermore, since the Provision Code is expressed in general terms, it fails to specify whether the private sectors which offer goods and services, such as restaurants, shops, hotels, etc. have any obligation to comply with the Provision Code.

One might argue that the Provision Code gives the Supreme Council the right to issue the policies and procedures required to implement the Code, including enacting the procedures needed to enforce it, and that the Supreme Council will coordinate with the authorities to abide by the said regulations. In this case the Provision Code would not need, for example, to define a ‘qualified individual’ in terms of education and employment rights or ‘reasonable accommodation’.

The deficiency of this argument is that it lacks convincing reasons. A stipulation in the Code concerning the definition of qualified individuals and the criterion of reasonable accommodation would more strongly and effectively guarantee the rights of disabled persons. It would also override dispute as to interpretation of the text of the Code. In the points of transport and the elimination of architectural barriers, a direct indication in the main Provision Code would be significantly stronger and more effective in terms of enforcement than entitlement of the authority to ‘abide by the said regulations’. Thus it would more effectively prevent some forms of discrimination against disabled persons.

Briefly, the legal definition of ‘regulation’ is the act or process of controlling by rule. A rule or order which carries legal force is issued by an administrative agency or a local government, and explains and interprets the Code. In other words, the regulation is the act of making sure that something will work well.⁵³ A regulation seems merely a mechanism for explanation of the law. This renders it less than a law, in terms of the level of efficiency and power in application and enforcement.⁵⁴ Accordingly, entitlement of the authorities to abide by the ‘said regulations’ for transport and eliminating architectural

⁵³ In this regard, see Garner B A, *Black’s Law Dictionary*, (New York, NY: West Group, 1996), p. 532. Also, see *Dictionary of Law*, 3rd Edition, (London, UK: Peter Collin Publishing, 2000), p.313.

⁵⁴ For the definition and features of law, see Hart H L A, *The Concept of Law*, 2nd Edition, (New York, NY: Oxford University Press, 1994), pp. 27-28.

barriers may be one of the reasons for the deficiencies of the Provision Code. The main Provision Code should explicitly change the status of 'regulations' to that of fundamental rights.

(B) The Supreme Council for the Affairs of Persons with Disabilities

The Code declares that a Supreme Council for the Affairs of Persons with Disabilities shall be established. The Council shall be associated with the Prime Minister and shall have a chairman, to be appointed by Royal Order. The members of the Council will be a Secretary-General for the Supreme Council, Ministers of Labour and Social Affairs, Health, Higher Education, Education, Finance, and Municipal and Rural Affairs, and a General President of Girls' Education. Furthermore, the Code states that two members of the Council must be persons with disabilities, two must be specialists in the field of disability, and two must be businessmen interested in disability affairs.⁵⁵

Article 9 of the Provision Code gives the Supreme Council several jurisdictions. For example, to issue policies and procedures required to implement the Code, to propose modifications of regulations pertaining to the affairs of persons with disabilities, and also to ensure implementation of the Code and its regulations. This means that the Supreme Council authority controls all the regulations related to communication and transport, and the architectural code to eliminate all architectural barriers. This clearly gives two major roles to the Supreme Council, both legislative and enforcement agent. One may ask whether this arrangement can satisfactorily enforce the law.

As noted above, the Supreme Council has been deemed a suitable channel to enforce disability policies. It has extensive authority to issue executive regulations and pursue enforcement of the code. Its jurisdictions related to disability issues are in fact satisfactory.⁵⁶ Nevertheless, the organisation within the Supreme Council has some defects, as listed below:

Firstly, as described above, the constitution of membership of the Supreme Council is: a Chairman, a Secretary-General for the Supreme Council, Ministers of Labour and

⁵⁵ Art. 8 of The Provision Code.

⁵⁶ For example, see Articles 3, 4, 7, 9 of The Provision Code.

Social Affairs, Health, etc.⁵⁷ The Minister of Civil Service is not a member of the Supreme Council. Yet this minister should be one of its main members, because the Ministry of Civil Service is responsible for employing Saudi civilians, and the employment of disabled persons without discrimination is one of the main rights of a disabled person.

Secondly, the Provision Code declares that the membership of the Supreme Council shall contain two persons with disabilities.⁵⁸ This is an extremely low number of disabled members of the Supreme Council, given that its field of activity is disability issues, and that disabled persons are the pivot of disability. The number seems unjust, since the qualified disabled person is the most expert in understanding disabled needs.

To compare, the UK for example has a Disability Rights Commission (DRC).⁵⁹ The DRC must consist of no fewer than ten and not more than fifteen commissioners, more than half of whom will be disabled persons. Thus, the intention of the DDA (1995) is that the majority of commissioners shall be disabled persons, as will be seen in Chapter 8. The Secretary of State appoints one commissioner as chairman of the DRC. What most demonstrates justice is that provision is also made for either one or two other commissioners as deputy chairmen, and at least one of the persons holding office as chairman must be disabled.⁶⁰

In addition, the United States has a National Council on Disability, whose members are people with disabilities and parents or guardians of people with disabilities. The majority of NCD members are people with disabilities.⁶¹

Therefore it would be more just if the Supreme Council for the affairs of persons with disabilities in Saudi Arabia were constituted with at least 50% of its members represented by qualified disabled persons. This percentage should include all forms of disabilities or guardians of people with disabilities. Furthermore, the Chairman of the

⁵⁷ See The Provision Code. Art. 8.

⁵⁸ *Ibid.*

⁵⁹ It is important to mention that section 50 of the Disability Discrimination Act 1995 set up the National Disability Council whose purpose was to advise the government on disability issues. It was dissolved when the Disability Rights Commission came into being in spring 2000, as will be explained below.

⁶⁰ In this regard, see for example, Doyle B, *Disability Discrimination: Law and Practice*, 5th Edition, (Bristol, UK: Jordan Publishing Limited, 2005), pp. 269-271. See also: www.drc.gov.uk.

⁶¹ See The National Council on Disability in USA. www.ncd.gov.

Supreme Council should also be disabled, or at least the deputy chairman should be. This would give disabled persons the chance to participate in the decisions which concern them and also give them the opportunity to manage themselves.

In conclusion, the defects of the Provision Code and the previous disability regulations can be summarised as follows:

- Absence of explicit affirmation of the rights of disabled persons to education, employment, and public services without discrimination. This prevents the Provision Code from being an anti-discrimination act such as to ensure the rights of disabled persons and prohibit discrimination against them;
- Absence of legal definitions concerning rights of disabled persons and discrimination;
- Absence of practical norms;
- Absence of enforcement and legislative mechanisms;
- Absence of implementation guarantees, and of stipulations concerning a punishments system and pursuit of offenders. Also, absence of mention of judicial channels to restore the rights of the disabled through a disability rights commission;
- Absence of direct obligation on the private sector, which provides goods and services, to comply with the Provision Code;
- General deficiency in the legal framework of the Provision Code and regulations;
- Inadequate treatment of disabled persons' housing issues, absence of recommendation of positive discrimination to uphold this right, e.g. prioritising the disabled in allocating governmental accommodation;⁶²
- Absence of mention of the right of disabled persons to telecommunications without discrimination;
- Absence of mention of insurance systems.

All these legal deficiencies make the Provision Code and regulations inadequate, and therefore jointly contribute to all forms of discrimination concerning the rights of

⁶² In Saudi Arabia, there is a fund (Predial Development Fund) managed by a government bank which grants the Saudi people long-term interest-free loans to build houses. The disabled persons should be given preference as positive discrimination, and the Provision Code should indicate this. Also, it should deal with provision of accessible housing and prohibition of discrimination against disabled persons.

disabled persons to participation in public interests and in Saudi society. To investigate the scale of this discrimination, this study carried out its own survey.

7.3. Survey: Instances of Discrimination against Disabled Persons in Saudi Arabia

The social services provided by the Saudi government for disabled persons look satisfactory. In addition, the Saudi government spends generously in terms of disability services. The question remains, however, whether these services are granted as rights or charity, and whether there are any complications in terms of distribution of rights, existence of discrimination or absence of distributive justice. The answer to these questions has been sought here by investigation of aspects of actual discrimination faced by disabled persons.

The goal of this section is to identify the actual discriminatory status of disability in Saudi Arabia. A questionnaire was used to identify aspects of discrimination which disabled persons face in a normal day in education and employment, in terms of existing barriers and participation in society. It also assessed their desire to eliminate such forms of discrimination. Also, data from the press in the form of complaints from disabled persons themselves were used to illustrate ongoing discrimination. Examples are given of each aspect of discrimination, and of the complaints of disabled persons (see appendix).

The pie chart in Figure 3 below demonstrates the proportion of disabled persons in Saudi Arabia who responded 'yes' or 'no' to the question whether they experienced discrimination in their lives. The percentage of disabled persons who said they faced discrimination in Saudi society in terms of education, employment, architectural barriers, etc., is 83.9%. This very high percentage is disturbing.

The Percentage of Discrimination of Disabled Persons in Saudi Society

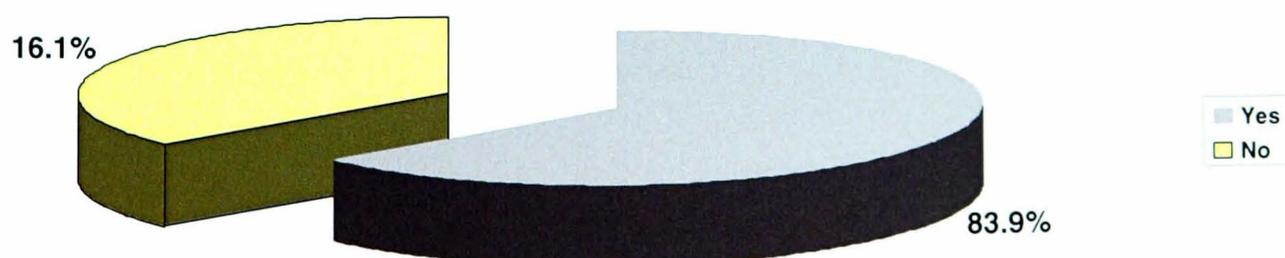


Figure 3

7.3.1. Discrimination in Education

The percentage of illiteracy in disabled persons in Saudi Arabia is 69%. No code for special education exists to deal with special education issues and prohibit discrimination against disabled persons. Clearly this omission contributes to the discriminatory treatment of the rights of disabled persons in education. The point is illustrated by the following case.

‘Because of his disability, Al-Ghanimy was not accepted at the university’

Ali Al-Ghanimy is a Saudi youth destined to live as a person with special needs. His left leg has been paralysed since childhood. In spite of his disability, he continued his education until he left secondary school seven years ago. Since then, he has been trying to apply for a BA course in order to prove that there is no place for despair as long as hope exists. He was not accepted at King Faisal University because, he was told, he was not medically fit. He tried repeatedly to meet the Dean of the Registrar Office to express his point of view but in vain. He then started to search for a job. He took his application file to more than one company. But he was always disappointed because he lacked work experience. Accordingly, he wondered why he was not allowed to continue his education or get a job because he had the necessary mental abilities that could help him perform his duties and be self-reliant and have his own family in the future. Ali is just a single case among many similar cases.⁶³ Many people are destined to be disabled and keep struggling to have a job or an opportunity to be accepted on a BA course. The decision, however, remains in the hands of others.⁶⁴

This case exemplifies one kind of discriminatory treatment of disabled persons. It arises from the rejection in public education of anyone not medically fit. But more fundamentally it results from lack of anti-discrimination legislation, weakness of the Provision Code, and lack of enforcement mechanisms, including judicial channels, for the disabled to demand their rights.

⁶³ For more examples, see appendices.

⁶⁴ See *Al-Yaom Newspaper*, issue no 11031 dated 28 / 8 / 2003. Dammam, Saudi Arabia.

7.3.2. Discrimination in Employment

Discrimination in employment in Saudi Arabia is seen by qualified disabled people as the worst of the privations which they face. The majority of qualified disabled are educated and experienced. According to the Ministry of Social Affairs' annual report, at the end of 2002 there were 6,500 disabled persons who had been trained and habilitated within rehabilitation centres. Approximately 500, however, of them have been employed so far.⁶⁵ Figure 4 represents the proportions of employed and unemployed disabled according to the questionnaire. The percentage of disabled employees is merely 24.7%, and the great majority, 75.3%, are unemployed.

The Percentage of Disabled Employees

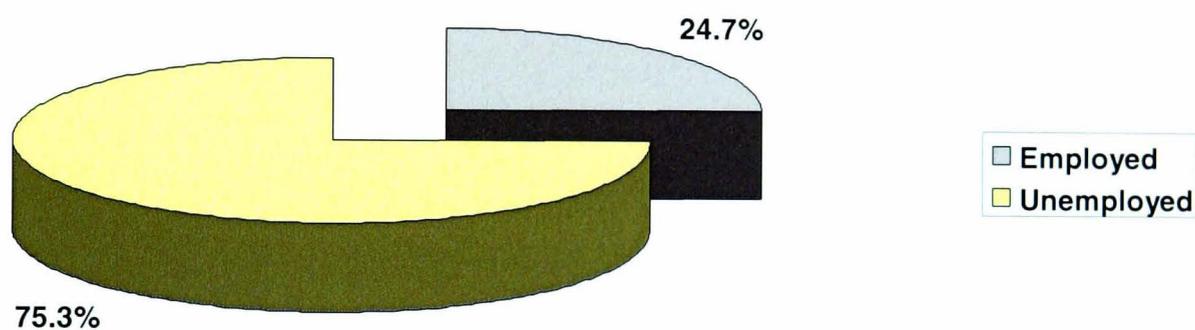


Figure 4

This rate is very worrying, and should be examined. The questionnaire and complaints of disabled persons reveal several reasons for discrimination in employment. The questionnaire showed that 89.7% of disabled persons do not know about their right to employment. Lack of awareness of disabled persons' rights to employment, in addition to provision of employment being presented as a social grant rather than a right, is responsible for this. Furthermore, according to disabled persons, the conditions of employment cause more rejection. Figure 5 represents the proportions of problems experienced in the conditions of employment, as reported in the questionnaire.

⁶⁵ See *The Services of Disabled Persons in the Eyes of the Future*, (Riyadh, Saudi Arabia: Ministry of Social Affairs in Saudi Arabia, 2004), p. 20.

Conditions of employment and Disability

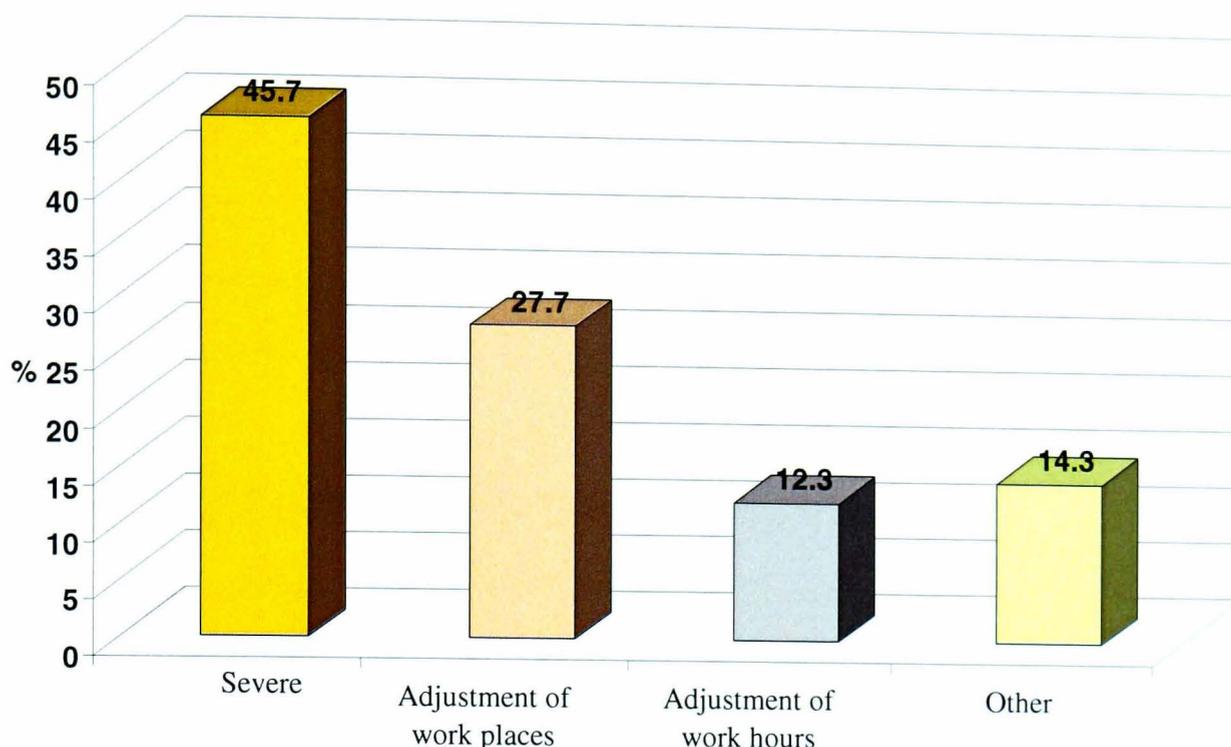


Figure 5

Further, complaints were registered that abuse and tyranny had been experienced from some officials heading the Ministry of Civil Service. For example:

‘Jobs of Disabled People Occupied by Normal People under the Eyes of the Ministry of Civil Service’

This is the tragedy of a wide range of people, i.e. disabled people. Among them are those, including deaf mute and blind people, who could overcome the circumstances of their disability to continue their education. Among them are also those who were able to complete their university education far away from their homes. They patiently endured their difficulties, travelling daily for nearly thirteen years studying at Al-Aaml primary, intermediate and secondary schools until they graduated with computer skills.

In spite of being very well qualified, disabled people do not have a chance to apply for special jobs that are made available for normal people. In fact, disabled people cannot find a job either in the public or private sector.

Furthermore, disabled persons always face exclusion from some kinds of jobs, such as teaching, regardless of their qualification and ability to teach, merely because they are disabled. They call upon the Provision Code to ensure that they gain their rights without being regarded with pity, and they call for equal opportunities.

Clearly this kind of discrimination and lack of distributive justice are the result of disregarding an applicant's qualifications, whether or not he is disabled. In addition, the Provision Code fails to define 'qualified individual', as noted above. It also lacks any process for affirmative action, for example, whereby equality may be attained. Thus, the majority of qualified disabled persons who have applied for jobs have always been rejected. The questionnaire's results regarding job applications show that 68.3% of disabled persons were rejected on the basis of disability.⁶⁶

7.3.3. Discrimination in terms of Barriers to Participating in Society

Disabled persons in Saudi Arabia also confront discrimination in society in terms of existing architectural and social barriers. Furthermore, they have been discriminated against by not being given the chance to participate in the operation of social structure. As a result, they have not been given the opportunity to live independently and thus remain second-class citizens always dependent on others. In surveying forms of discrimination faced by disabled persons the questionnaire found that 75.3% of disabled persons have faced architectural barriers, especially to public facilities. This percentage also includes private facilities offering goods and services, such as restaurants, hotels, entertainment centres, and places of worship⁶⁷.

It is important here to allow some disabled persons to identify these barriers, and to explain their needs so that they can be considered and reformed.

Al-Riyadh Newspaper has interviewed a number of disabled people about their problems. They offered a number of recommendations to help solve their problems, and to encourage society to recognise them and integrate with them.

'Special parking areas'

A number of disabled people expressed anger that they are rarely provided with special car parks. Abdullah Al-Jafn said that disabled people do not receive adequate commitment from governmental departments, private dispensaries and many public facilities and

⁶⁶ See appendices, *The Complaints of Disabled Persons in Saudi Arabia*.

⁶⁷ *Ibid.*

markets in this respect. Available parking areas in some public hospitals and some public facilities lack security measures.

Abdullah Al-Ruzaiq and Muhammad Al-Sagheer strongly agreed with Al-Jafn, adding that even if some government buildings provide disabled parking areas, normal people often ignore the disabled designation.⁶⁸ Thus the disabled are deprived of easy access to the building. This can be attributed to lack of awareness about the sufferings of disabled people.

All disabled people stressed their need for special parking areas everywhere, to facilitate movement from one place to another.

‘Punishments and violations’

Salih Al-Mosa, a disabled person, said that generous donors had provided the mosque with a special toilet and passage for disabled people. But although, thanks to them, he can pray in the mosque, cars sometimes block the passage.

Another disabled person said that many public facilities and government buildings do not have special passages for disabled people. They are built as if only non-disabled people need to visit them.⁶⁹

These kinds of complaint appear to arise from deficiencies in the Saudi disability code and lack of enforcement mechanisms. The latter are essential in order to ensure that the Provision Code is observed, and to pursue offenders.

7. 3. 4. *Desire to Eliminate all Forms of Discrimination and Move towards Rights*

In the face of these forms of discrimination, disabled persons in Saudi Arabia have the strongest desire for personal respect and for protection and recognition of their rights. They also desire to move this agenda from a basis of goodwill to one of rights and challenge. Disabled persons long to participate and integrate in society. Figure 6 shows that more than 77% share this desire.

⁶⁸ See *Al-Riyadh Newspaper*, issue no (13134), dated 9 / 6 / 2004.

⁶⁹ *Ibid.*

Desire of Disabled Persons for Integration into Society

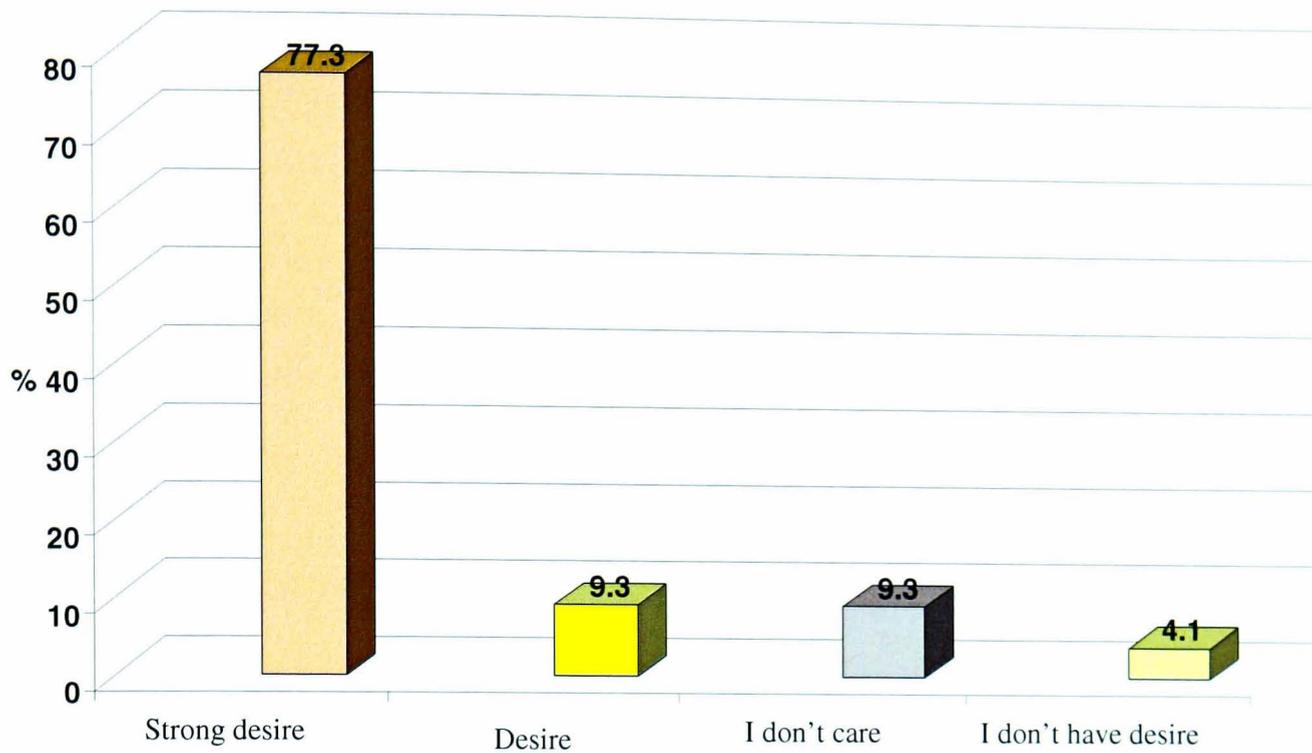


Figure 6

As a result, many disabled persons now call for an end of discrimination and non-recognition, and demand their fundamental rights. Figure 7 shows pictorial evidence of



Some cartoons show the attitude of public opinion towards disabled rights causes



AL-Sharq AL-Awsat Newspaper, Jeddah, Saudi Arabia, issue no.(9708), dated by 27-6-2005



Protest by disabled people, demanding their equal rights from the Ministry of Social Affairs

Figure 7

how the problems of discrimination are worsening, and how public opinion reflects the suffering of disabled persons from discrimination and marginalisation, and demanding their clear rights. In addition, these pictures show a mass meeting of disabled persons and the strength of their demand for change and reformation.

‘Our legal rights’

Some disabled persons declare their strong desire to reform their situations. Mr. Al-Hammad says: *‘We, disabled people, ask for equality and our legal rights. We should also have alternative jobs in case we are deprived of certain jobs (e.g. teaching). When a disabled person applies for a job, the interview form is usually returned with the words ‘unfit/unsuitable for the job’. An alternative should be offered. Disabled people should be offered suitable jobs in governmental departments, according to their qualifications and in the cities where they live’.*

Al-Hammad says that it is important for disabled people, especially those who work hard and have good degrees, to be integrated into their communities by being allowed to have jobs.

Officials at the Ministry of Civil Service argue that special treatment of disabled people by offering them jobs and exempting them from vacancy waiting lists is a discriminative act which will hurt their feelings. This discrimination against disabled people is a common practice in both public and private sectors.⁷⁰

Al-Hammad concludes with a comment about conferences that discuss the needs of disabled people, especially their need for employment. Despite the fact that such conferences conclude with a number of recommendations, none of the recommendations has been activated.⁷¹ Such conferences frequently spend time debating the appropriate term that should be used to describe disabled people, whether disabled people or people with special needs. Disabled people, however, answer this question by saying:

‘Give us our rights and call us whatever you like’

Fahd Al-Hamly says: *‘There is no doubt that, as is the case with normal people, disabled people should meet the needs of life. But the problem lies in the fact that disabled people should enjoy certain rights which are endorsed by the government but at the same time are not activated. So we pray to Allah that the officials will help us to find suitable jobs in suitable places as well as suitable accommodation and transport facilities’.*

⁷⁰ See *Al-Riyadh Newspaper*, issue no (13134), dated 9 / 6 / 2004.

⁷¹ *Ibid.*

Al-Hamly wonders why disabled people are deprived of jobs in education, despite the fact that some of them have the ability to move around classroom and school. He urges officials to find alternative jobs for disabled people in any other field that suits their qualifications. He says, '*Try us, then judge*'.⁷²

The majority of disabled persons set store by independent living and personal dignity. Accordingly, they strongly prefer to get their incomes independently rather than through subsidies and charity. The questionnaire shows that more than 80% of disabled persons prefer to derive their incomes from the wages of employment.

The uncertain status of disabled persons has created a strong desire in them to have disability issues dealt with as clear rights, and eliminate all forms of discrimination. For this reason the majority of disabled persons are demanding to place the disability issue on a legal basis. They realise that their rights will not be respected except through justice. The questionnaire shows that 87.3% of disabled persons surveyed would like disability issues to be enshrined in legal forms. Hence, the matter here should be taken into judicial channels.

Briefly, although services and concerns for disability issues in Saudi Arabia do exist, as well as legal responses to regulate causes of disability, aspects of discrimination have been increasing. Investigation into the reasons for the decline in disabled persons' rights has shown that the latter are viewed as the object of charity, and that legal responses are inadequate.

In addition, the evidence of discrimination reveals that there is a lack of distributive justice. These legal responses are inadequate and far from the relevant principles that must be adhered to in addressing disability issues, according to either Islam or international law. Accordingly, it is essential to rectify the deficiencies by returning to the real foundation of the disabled person's rights: concepts of discrimination and distributive justice, which are discussed in Chapters 3, 4, and 5, as well as to the principles affirmed by international law, as in Chapter 6.

⁷² See *Al-Riyadh Newspaper*, issue no. 13134, dated 9 / 6 / 2004.

Useful models exist in the legislation of some other countries, specifically the British DDA and American ADA. In the next two chapters these will be described and compared, with reference to the scope of their application of the relevant principles in dealing with the rights of disabled persons. The chapters also consider the scale of their compliance with international law, the method by which they built their effective disability discrimination legislations and the standards which they follow.

BRITISH DISABILITY DISCRIMINATION ACT

Introduction

In the United Kingdom there is effective anti-discrimination legislation outlawing discrimination on the basis of sex, race and, recently, disability. Examples are the Sex Discrimination Act 1975 (SDA), Race Relations Act 1976 (RRA) and Disability Discrimination Act 1995 (DDA). The DDA sets out from the same fundamental principles as the others, namely the general concept of discrimination in both its forms, direct and indirect discrimination. DDA, however, excludes a prohibition on indirect discrimination, as will be explained below.

Non-discrimination in this legislation rests on egalitarianism before the law. Although there is no direct constitutional equality guarantee, there is however a set of specific statutes, reinforced by EU law and the European Convention on Human Rights, of which Article 14 insists on the equality guarantee. This article in particular became part of domestic law from October 2000.¹

As mentioned in previous chapters, anti-discrimination laws including disability laws primarily aim to introduce a level of equality between one section of society which has been subject to discrimination and the rest of society. One of the values underlying equality is that it is redistributive, aiming not just to redress previous disadvantage, but to achieve an equal distribution of social goods.² This is referred to as distributive justice.

Before enactment of the DDA, disabled persons were exposed to prejudice and discriminatory practices, inasmuch as they were not granted enforceable rights against disabled discrimination. The Disabled Persons Employment Act 1994, regarding the

¹ Fredman S, *Discrimination Law*, 1st Edition, (New York, NY: Oxford University Press, 2002), p. 93.

² *Ibid.*, p. 20.

imposition of a quota system for disabled persons, was enforceable by individuals but only by criminal sanction.³

Thus there was a need in the UK for change in the position of the disabled, through the provision of legal processes to challenge discrimination. Appeals from non-government organisations and disabled people's communities lent weight to the desire to comply with the principle of equality and the international disability discrimination movement. In 1995 the DDA was enacted.⁴

As with any new legislation, initial deficiencies in the DDA led to development and amendment. In 1999 the Government agreed to establish a Disability Rights Task Force to examine comprehensive civil rights legislation for disabled people. Resulting amendments were the Disability Rights Commission Act 1999, the Special Education Needs and Disability Act 2001 and the Disability Discrimination Act 1995 (Amendment) Regulation 2003. In addition, in 2003 the Government published a draft Disability Discrimination Bill for general consultation which resulted in further proposed amendments.⁵ The fundamental inclusion of public transport and education made the DDA more comprehensive, as will be observed later.

The fundamental meaning of 'discrimination' that focuses on exclusion and denial opportunities is common to all parts of the DDA. Depending, however, on the circumstances to be rectified, there are specific variations. Therefore each part of the Act requires appropriate explanation of the term.

Part 1 of the amended DDA defines disability. Parts 2 and 3 address respectively discrimination and harassment in the employment field, and discrimination related to goods, facilities, services, and premises. Parts 4 and 5 address education and public transport. Part 9 deals with the Disability Rights Commission and liability. In Part 10 remedies are examined.

³ See Monaghan K, *The Disability Discrimination Legislation*, 1st Edition, (New York, NY: Oxford University Press, 2005), p. 2.

⁴ *Ibid.*

⁵ Doyle B, *Disability Discrimination: Law and Practice*, 5th Edition, (Bristol, UK: Jordan Publishing Limited, 2005), p. 11.

The main aim of this chapter is to present a brief account of DDA as an example of advanced anti-discrimination legislation, for the purpose of comparison with ADA and the Saudi Disability Code. Those parts of its content which are connected with the theme of the thesis must be identified. Therefore the main features of the Act are critically analysed, to show its approach to the meaning and forms of discrimination, and how its provisions address acts of unlawful discrimination. The chapter also discusses the DDA's relation to the relevant principles of egalitarianism and distributive justice. Finally, it identifies the enforcement mechanisms outlined by the DDA to uphold the demands of justice.

The chapter's five sections track the structure of the DDA. The first section addresses the meaning of disability. Sections 2, 3 and 4 discuss respectively employment, goods, facilities, services & premises and education. The issue of transport is included in Section 3. Finally Section 5 discusses the Disability Rights Commission.

8. 1. Meaning of Disability and Disabled Person

Since the definition sets the tone for the law, this is an important section of the DDA. The section covers people who are disabled or who have been disabled in the past. Section 1 of the Act states that disability means '*a physical or mental impairment, which has a substantial and long-term adverse effect on a person's ability to carry out normal day to day activities*'. It further provides '*in this Act 'disabled person' means a person who has a disability*'. It appears in this section that the definition of disability in DDA draws quite heavily on the 'medical model' of disability (see Chapter 2).

Four conditions must be present to fulfil the definition of disability: the condition of impairment; the condition of adverse effect on the ability to carry out normal day-to-day activities; a 'substantial' adverse effect; and a 'long-term' adverse effect. The definition of disability and what constitutes it has, however, been subject to further elaboration by statutory instruments, regulations and guidelines.⁶ DDA does not define 'physical or mental impairments' but provides in the latter case that it must be 'clinically well

⁶ The Secretary of State has issued guidance about the matter to be taken into account in determining whether an impairment has a substantial adverse affect on a person's ability to carry out normal day-to-day activities; and whether such an impairment has a long-term effect. See Statutory Instrument No. 1996/1996,p. 63.

recognized'. The Guidance provides that 'impairment' includes sensory impairments, such as sight and hearing, and also learning disabilities.⁷

Mental impairment must be a clinically recognised mental illness. If there is any complication in determining the mental impairment, the Employment Appeal Tribunal (EAT) in *Goodwin v. The Patent Office* has advised whether a mental illness counts as disability or not. Additionally the WHO International Classification of diseases should be followed.⁸

Physical impairment is not sufficiently defined by the Guidance to indicate broadly who would benefit from the Act. A number of specific groups are excluded and classified as 'impuissant', such as addicts of alcohol, nicotine or any other substance not medically prescribed. Yet the results of addiction such as lung disease, cancer or any damage to health may be covered. In contrast, there are some special rules about what is or is not classed as a disability for the purposes of the Act. For example, severe disfigurement is classed as a disability.

Interestingly, some progressive conditions such as multiple sclerosis and HIV are included once symptoms start to appear.⁹ A stigma such as HIV, however, causes stereotypical prejudice from the moment of diagnosis, not from the development of symptoms. Sufferers may live for many years without experiencing any physical or mental symptoms. This may be considered a weakness in the DDA's definition of disability. Further, in this case the definition will not cover people who have been shown to have a genetic predisposition to an illness.

Schedule 1, paragraph 4, explains that an impairment is held to affect the ability of the person concerned to carry out normal day-to day activities only if it affects one of the following: (a) mobility; (b) ability to use hands, for example, for writing; (c) physical coordination; (d) continence (the ability to control the bladder); (e) the ability to lift, carry

⁷ Guidance, paragraph 12.

⁸ [1999] IRLR 4, EAT. For the WHO International Classification of Disability, see Chapter 2, p. 58.

⁹ Schedule 1, paras. 2-8, Schedule 2.

or move ordinary objects; (f) speech, hearing, or eyesight; (g) memory, or the ability to concentrate, learn or understand; (h) being able to recognise physical danger.¹⁰

Where medical aids or treatment are used to help control or remove the effects of an impairment, for example, an artificial limb or medication to control epilepsy, the impairment is taken to have the effect that it would have without treatment, and still viewed as a disability.¹¹ Visual impairment corrected with glasses, however, is not considered to be a disability, as it does not normally fulfil the ‘substantial’ condition.¹²

Although a minor impairment may not on its own count as ‘substantial’, a number of minor impairments together may be held to have a substantial effect. Criteria for determining ‘long term’ are: (a) the effect has lasted at least twelve months; (b) the period for which it lasts is likely to be at least twelve months; or (c) it is likely to last for the rest of the life of the person affected.¹³

Concerning past disability, Section 2 (1) provides that this Part and Parts 2-4 apply equally in relation to a person who has had a disability and to a person who currently has that disability.¹⁴ For example, the education provisions for a disabled student apply equally whether the disability is past or current. Section 2 (2) and Schedule 2, para. 2 require some modification of the meaning of ‘long-term’ in order to accommodate the inclusion of past disabilities. To determine whether the effect of an impairment is long-term where the disability is a past disability and where an impairment ceases to have a substantial adverse affect on a person’s ability to carry out normal day-to-day activities, it is counted as continuing to have that effect.¹⁵

Since each component of the DDA’s definition of disability must be present, the presence of impairment alone is insufficient to establish disability.¹⁶ Thus many persons who suffer from impairment are excluded from the benefits of the Act. Further, the

¹⁰ Guidance, Part II, paras C14-C21.

¹¹ DDA 1995, Sch 1, para. 6(2).

¹² Doyle B, *Disability Discrimination: Law and Practice*, 5th Edition, (Bristol, UK: Jordan Publishing Limited, 2005), p. 21.

¹³ Schedule 1, paragraph 2 (1).

¹⁴ DDA 1995, s. 2.

¹⁵ Schedule 2, paragraph 5(2) DDA..

¹⁶ Monaghan K, *The Disability Discrimination Legislation*, 1st Edition, (New York, NY: Oxford University Press, 2005), p. 65.

definition of disability in the Act focuses on a person's medical impairment. The definition should, however, recognise that discrimination is based on stigma and social restrictions, and that the issue is the experience of discrimination, not the degree of impairment. The limited definition of disability in the DDA is not sufficiently comprehensive to cover people who suffer discrimination.

One might argue that this definition is 'common sense', as people who are not 'really' disabled should not be included. It is contended, however, that a discrimination law should concentrate, not on how impaired or functionally limited a person is, but on how much they are discriminated against. This law asks: are you disabled enough by an impairment to deserve fair treatment? The proper question is: are you disabled by discrimination?

One may reply that a definition based on the social model would cover too wide a group of people. But this is precisely the issue with other equality laws such as SDA and RRA. The rights to fair treatment and equal respect should not be given to some but not others. The problems faced by disabled persons arise not because of their impairment but rather because of social attitudes and barriers.

The following sections describe how the Act deals with discrimination against the clear rights of disabled persons. Employment is the first area of investigation.

8. 2. Employment

The Act insists on the employment of disabled persons as an abstract right entitled and imposed by the principle of equal treatment. Part 2 of the Act deals with the employment field. Section 4 prohibits discrimination in employment against prospective employees, existing employees and ex-employees.¹⁷ Referring to that principle, the DDA 1995 (Amendment) Regulation 2003 lays down a general framework for outlawing discrimination on grounds of disability as regards employment and occupation.¹⁸

¹⁷ See Section 4 and 16A of the DDA.

¹⁸ See SI 2003/ 1673.

For the purposes of the Act, employment means employment under a contract of service or of apprenticeship or a personal to do any work.¹⁹ Since the (Amendment) Regulation 2003, the Act covers small employers, police officers, fire-fighters, prison officers and statutory office holders, previously exempted. Currently, only the armed forces remain exempt.²⁰ Interestingly, the DDA in terms of covered entities sounds exhaustive and broad. Indeed this means that the relationship between employer and employee need not be simply to exchange labour with wages, but an obligation to perform work must be its dominant aim.²¹

8. 2. 1. Meaning of Discrimination in Employment

As expressed in Part 2 of the DDA, a person may discriminate against a disabled person in one of the following ways: (a) direct discrimination; (b) disability-related discrimination; (c) victimisation; and (d) a failure to make reasonable adjustment.²²

A person directly discriminates against a disabled person if, on the ground of the latter's disability, the person treats him/her less favourably than the person treats or would treat a person not having that particular disability, whose relevant circumstances, including his abilities, are the same as or not materially different from those of the disabled person.²³

For the purpose of the EC Framework Employment Directive, the principle of equal treatment means that there shall be no direct discrimination whatsoever on the ground of 'disability'.²⁴ Direct discrimination is concerned with discrimination that is the ground of a disabled person's disability as opposed to a reason related to that disability. These meanings reflect the academic definition of direct discrimination in discrimination law, as examined in Chapter 4.

Several problems may be identified here. First, the only ground mentioned for the less favourable treatment is that of the disabled person's disability. Hence the Act limits

¹⁹ DDA 1995, s. 68 (1).

²⁰ See Section 64 (5) and (7).

²¹ Monaghan K, *The Disability Discrimination Legislation*, 1st Edition, (New York, NY: Oxford University Press, 2005), p. 240.

²² DDA 1995, s. 3A and 55.

²³ DDA 1995, s. 3A (5) and Sch 2, para 2C (as amended)

²⁴ EC Framework Employment Directive, 2000/78, Art. 2 (1).

itself to protecting only the disabled and overlooks discrimination against people associated with disabled persons, such as parents or guardians of disabled children.

Second, to establish 'less favourable treatment', comparison is required with a person who does not have a disability at all or a person who has another kind of disability.²⁵ This places scrutiny not on the treatment but the disability. The case of *Clark v. TDG Ltd*, however, resulted in a verdict showing that the test of less favourable treatment is based not on the fact of the disabled person's disability but on the reason for the treatment. Further, the comparator's relevant circumstances must be the same as, or not materially different from, those of the disabled person, including the respective abilities of the comparator and the disabled.²⁶

Regarding disability-related discrimination, a person discriminates against a disabled person if for a reason which relates to the disabled person's disability, the person treats the disabled person less favourably than the person treats or would treat others to whom that person does not or would not apply and the person cannot show that the treatment in question is justified.²⁷ It appears that the same treatment may produce direct discrimination or disability-related discrimination. Direct discrimination cannot, however, be justified.²⁸ Accordingly, disability-related discrimination will be relevant where the complaint is incapable of amounting to direct discrimination.

Less favourable treatment here is the same in direct discrimination. It can be noted that this form of discrimination is wider than presented by direct discrimination. It does not depend on the treatment which is given on grounds of disability but nevertheless has a much wider reach. It is a concept wide enough to embrace some acts of indirect discrimination.²⁹

²⁵ Code of Practice: Employment and Occupation (2004), para 4.13.

²⁶ [1999] IRLR 318.

²⁷ DDA 1995, s. 3A (1).

²⁸ Code of Practice: Employment and Occupation (2004), para 4. 23. and DDA 1995, s 3A (4) and Code of Practice: Employment and Occupation (2004) , para 6.3.

²⁹ In this regard see *Clark v. TDG Ltd*, [1999] IRLR 318.

Victimisation as a form of discrimination is different from other forms. It can apply to persons with or without disability.³⁰ It has been explained that person (A), for example, discriminates against another person (B) if A treats B less favourably than A treats or would treat other persons whose circumstances are the same as B's, and A does so for one of a number of specific reasons. These reasons are: (i) that B has brought proceedings against A or any other person under this Act; or (ii) that B has given evidence in connection with such proceedings brought by any person; or (iii) that B has otherwise done anything under this Act in relation to A or any other person; or (iv) that B has alleged that A or any other person has (whether or not the allegation so states) contravened this Act, or A believes or suspects that B has done or intends to do any of those things.³¹ It can be noted that the victimisation provisions do not themselves make any act unlawful. They just define one form of discrimination for the goals of the other parts of DDA.³² The victimisation provisions, however, are unlike all other provisions of the DDA which define discrimination, and protect persons who committed a protected act whether or not they are disabled.³³

In the DDA the scope of discrimination is widened to include physical and emotional aspects such as harassment. According to an EC Framework Employment Directive, harassment is considered a form of discrimination. It exists when undesirable behaviour related to disability takes place, with the aim or effect of violating the dignity of a person, for example, by making jokes about his disability.³⁴ It has the effect of creating an intimidating, hostile, degrading, humiliating, or offensive environment for him.³⁵ Significantly, in acknowledgment of principles of respect of dignity and recognition (see Chapter 4), the Act focuses on the need to protect the human spirit.

The process of making 'reasonable adjustment' is a requirement of equal treatment. It is a kind of 'positive discrimination' which brings all people with disability to the same level of respect as others. On the basis of the principles set out below it is seen as a duty: failure to make reasonable adjustment is a form of discrimination.

³⁰ Monaghan K, *The Disability Discrimination Legislation*, 1st Edition, (New York, NY: Oxford University Press, 2005), p. 134.

³¹ DDA 1995, s 55 (4).

³² DDA 1995, s.55 (1).

³³ DDA 1995, s.55 (5) also s. 19 (4).

³⁴ Council Directive 2000/ 78 / EC, Art. 2 (3).

³⁵ DDA 1995, s 3B (1).

8. 2. 2. Duty to Make Reasonable Adjustment

The duty to make reasonable adjustment is a rightful and effective process affirmed in the Act. The foundation of this duty is the requirement to treat people with equal respect, and the requirement of distributive justice. Doyle states: *‘in order to guarantee compliance with principles of equal treatment in relation to disabled persons with disabilities, reasonable accommodation shall be provided’*.³⁶

This kind of positive discrimination imposes a duty upon the respondent.³⁷ It includes methods and steps taken positively to improve the position of the disadvantaged and to redress disadvantage in the mainstream of society in order to enable disabled persons to enjoy their fundamental rights without difficulties. Effectively, it means addressing past, current and future discriminatory practice, as has been discussed in Chapter 4.

Unlike other anti-discrimination Acts, DDA does not address indirect discrimination. Duties of reasonable adjustment should eliminate indirect discrimination: according to the Framework Employment Directive, the principle of equal treatment shall mean that there shall be no indirect discrimination on the ground of disability.³⁸ Indirect discrimination exists where any provision or practice would put persons with disability at particular disadvantages compared with other persons. Accordingly, the employer must take suitable measures when disabled persons require them in order to gain their rights in employment.

One might argue, however, that in cases where the employer was not required to make such changes, disabled persons would be subject to indirect discrimination. They might face unreasonable conditions for the job such as to constitute barriers to equal opportunity. So, if this part of the Disability Discrimination Act included prohibition of indirect discrimination beside the possibility of acceptance of employer justification, then disabled persons would be better protected against potential discriminatory practices.

³⁶ Doyle B, *Disability Discrimination: Law and Practice*, 5th Edition, (Bristol, UK: Jordan Publishing Limited, 2005), p. 58.

³⁷ In this regard see *Archibald v. Fife Council*, [2004] UKHL. 32.

³⁸ Council Directive 2000/ 78 / EC, Art.2 (1).

Making reasonable adjustment is not only a duty imposed by the principle of equal treatment, it also relates to principles of distributive justice in its rectification of discrimination. As has been seen in Chapter 5, distributive justice is the proper distribution of relevant goods and resources whereby no one in the relevant group should have more or less than anyone else in the same group. This ideal rests on valuable principles to rectify problems in the distribution of rights, each according to his real needs and circumstances, work, etc. through principles of egalitarianism, resources and desert, and through a compensatory system and remedial justice within the difference principle.³⁹ The DDA places the issue of duty to make reasonable adjustment in the context of distributive justice, and counts its violation as a kind of disability-related discrimination. Here the Act's application of this concept in its provision of employment is described.

The duty to make reasonable adjustments in the field of employment is presented in Section 6A (1) (a) and (b) of the DDA. It provides that it is the duty of the employer to take such steps as is reasonable to prevent the arrangements or features of the workplace from placing the disabled person at a substantial disadvantage in comparison with persons who are not disabled. The Act indicates that these duties apply to arrangements for determining to whom employment should be offered and to any conditions or arrangements by which employment, promotion, a transfer, training or any benefit are offered.

Section 6 (3) of the Act details the kind of steps that the respondent might have to take in relation to disabled persons in order to comply with the duty to make reasonable adjustments: (1) making adjustment to premises; (2) allocating some of the disabled person's duties to another person; (3) transferring the disabled person to fill an existing vacancy; (4) altering the disabled person's hours of working or training; (5) assigning the disabled person to a different place of work or training; (6) allowing the disabled person to be absent during working or training hours for rehabilitation, assessment or treatment; (7) giving or arranging for training or mentoring (whether for the disabled person or any other person); (8) acquiring or modifying equipment; (9) modifying instructions or reference manuals; modifying procedures for testing or assessment; (10) providing a reader or interpreter; (11) providing supervision.

³⁹ See Chapter 5, pp. 133-141.

The needs and requirements of disabled persons vary according to space-time changes and the development of employment. Therefore the above list is not intended to be comprehensive or definitive, or to be treated as a checklist, as has been mentioned in the case of *Humphreys v. Environment Agency*.⁴⁰ It needs to remain flexible in order to serve the main aim of duty, which is equal treatment.

The duty to make reasonable adjustments arises only where relevant. It applies to employers' provisions, practices, or criteria, or to any physical features of employers' premises. With this treatment the disabled person concerned is at a substantial disadvantage compared with the non-disabled. Here the duty is not anticipatory and therefore substantial disadvantage must be shown in a particular case for specific disabled.⁴¹

If the employer cannot bring substantial reasons to justify his failure to make reasonable adjustment, then he will be counted as guilty of an act of discrimination.⁴² In fact, the amendments to the Act provide that a failure to comply with that duty can have no justification.⁴³ The question is that of the principle of harm. Whenever the employer can prove any material or physical harm his failure can be justified. The lawmaker here applies to this case what the relevant concept of justification mentions. As mentioned in Chapter 4, that material means that there must be a strong connection between the reason given for the treatment and the circumstances of the particular case. Substantial means that the reason must carry real weight and be of substance. To compare, instead of justification of failure to comply with duty, the ADA has stipulated that the disabled who applies for a job must be a qualified individual, as will be elaborated in the next chapter.

With regard to unlawful discrimination acts in the employment field, the DDA presents broad outlines to protect current employees and prospective employees from discriminatory practices. To claim this protection, a claimant requires evidence that the alleged practice of disability discrimination falls within one of the following unlawful acts.

⁴⁰ (1999) EAT / 24 / 95.

⁴¹ See Employment Code of Practice, para. 5.8.

⁴² DDA 1995, s. 5 (2) (b), (4).

⁴³ In this regard, see *British Gas Services v. McCaull*, [2001] IRLR 60, EAT.

Firstly, it is unlawful for an employer to discriminate against a disabled person: (a) in the arrangements which he makes for the purpose of determining to whom he should offer employment. The concept of arrangement covers the recruitment and selection process including job application forms.⁴⁴ It also includes job specifications, qualifications, interviews and the use of assessment techniques;⁴⁵ (b) in the terms on which he offers that person employment; or (c) by refusing to offer, or deliberately not offering, him employment. Discrimination by these means includes a deliberate failure to offer employment to a disabled person.⁴⁶

Secondly, it is unlawful for an employer to discriminate against a disabled person whom he employs: (a) in the terms of employment which he affords him. Conditions of service should not discriminate against a disabled person, which does not mean that an employer can never offer a disabled person a less favourable contract. Nevertheless, subject to any duty to make reasonable adjustments, the employer must be prepared to justify the differential. Equally employers must not discriminate in their inclusion procedures;⁴⁷ (b) in the opportunities which he affords him for promotion, transfer, training or any other benefit; (c) by refusing to afford him, or deliberately not affording him, any such opportunity; or (d) by dismissing him, or subjecting him to any other detriment.⁴⁸ Furthermore, it is unlawful for an employer to subject to harassment: (a) a disabled person whom he employs; or (b) a disabled person who has applied to him for employment.⁴⁹

These clauses are included in the Act in order to secure disabled persons' interests and place them as deserved rights on the level of non-disabled. The relevant principles protecting disabled persons from unlawful discriminatory acts can be seen to rest on recognition, equal respect, equal opportunity, justice and so on, as explored in Chapters 3, 4, and 5. The aim of these duties of employers is that disabled people shall enjoy employment opportunities equally with others.

⁴⁴ Code of Practice: Employment and Occupation (2004), paras s 7. 11-7.14.

⁴⁵ *Ibid.*, paras 7.19-7.31.

⁴⁶ Doyle B, *Disability Discrimination: Law and Practice*, 5th Edition, (Bristol, UK: Jordan Publishing Limited, 2005), p. 77.

⁴⁷ Code of Practice: Employment and Occupation (2004), paras 8.7.

⁴⁸ DDA 1995, s. 4 (1) (2).

⁴⁹ *Ibid.*, s 4 (3).

The Act goes beyond providing these terms: it also outlines the procedures whereby they may be implemented either through enforcement, or by remedies for cases of complication. The first step is to prove the occurrence of discrimination, which can be difficult to confirm. In this case the Tribunals will have to rely on inferences drawn from the circumstances of the case.

The Act is concerned to implement its principles through judicial channels of enforcement mechanisms. This is a recognition of the need to realise the rights of the disabled through justice rather than as a social grant. A complaint of disability discrimination under the employment provision of the Act must be brought to the Employment Tribunal within three months of the act of discrimination.⁵⁰ The Tribunal has jurisdiction to hear the complaint out of time if it is just and equitable to do so. Where the discrimination disability claim is successful, the Tribunal can give the verdict with compensation by applying the principles applicable to the calculation of damages in tort or in reparation for breach of statutory duty.⁵¹ This covers injury of feelings, whether or not it includes compensation under any other head, as well as giving recommendations as to the employer's conduct.⁵²

8. 3. Goods, Facilities, Services, and Premises

The rights of disabled persons to enjoy all economic, social life and public interests equally with the non-disabled are upheld as entitlements imposed by the constitution for all citizens without discrimination. Part 3 of the DDA deals with outlawing discrimination by providers of goods, facilities and services. It is first necessary to identify who the providers of services are, and what 'goods, facilities and services' mean. According to the Act, a provider of services is a person if he/she is concerned with the provision of services to the public in the United Kingdom, regardless of whether payment is made.⁵³ The Act does not directly define goods, facilities, and services. Instead it provides a non-exhaustive list of examples of services to which the legislation applies. It includes access to and use of any place which members of the public are permitted to enter.⁵⁴ In this regard, the Code of

⁵⁰ DDA 1995, s. 8, Schedule 3 Part 1, para 3.

⁵¹ DDA 1995, Schedule 3, para 3.

⁵² DDA 1995, s. 8.

⁵³ DDA 1995, s. 19 (2).

⁵⁴ For example, it includes access to and use of any place which members of the public are permitted to enter. Also hotels and boarding houses; facilities by way of banking or insurance or for grants, loans, credit or

Practice Rights of Access Facilities, Services and Premises provides guidance to the interpretation of the Act. A wide range of establishments and businesses are covered by the rights of access.

The list of services provided does not explicitly include accessing to civic rights and duties, health services, judicial and legal proceedings and so on. Clearly an exhaustive list is impossible, since the aim of the legislation is to provide universal and all-embracing rights of non-discrimination against disabled persons, covering all aspects of life. Generally, goods, facilities and services should be given their ordinary meaning: (a) goods are any movable property, including merchandise or wares; (b) facilities include any opportunity for obtaining some benefit or for doing something; (c) services refer to any conduct tending to the welfare or advantage of other people.⁵⁵ These meanings cover the majority of human activities. Health services, although covered by this definition, merit separate mention. This is because although they represent a central need in a disabled person's life, they are sometimes not completely available and can be the cause of further discrimination.

Now it is important to identify the intended meaning of discrimination in provisions of goods, facilities and services; and to consider the potential of justification for these discriminatory practices.

8. 3. 1. Meaning of Discrimination in Goods, Facilities and Services

It is unlawful for providers of services to discriminate against disabled persons in several aspects related to goods, facilities and services. But more elaboration is required if unlawful discrimination is to be declared as the result of actual discrimination committed by the provider of services.

Essentially, the meaning of discrimination in goods, facilities and services provision is similar to the definition of discrimination in part 2, dealing with employment. A service provider discriminates against a disabled person if for a reason regarding the disabled person's disability he treats the disabled person less favourably than he treats others to

finance: facilities for entertainment, recreation; facilities provided by employment agencies: the service of any profession or trade, or any local or other public authority. See DDA 1995, s. 19 (3).

⁵⁵ Lester A & Bindman G, *Race and Law*, (London, UK: Penguin Group, 1972), p. 260.

whom that reason does not or would not apply, and if he cannot show that the treatment is justified.⁵⁶ The provider of services also discriminates against the disabled person if he fails to comply with a duty to make reasonable adjustments imposed in relation to the disabled person, and again if he cannot demonstrate that the failure to comply with that duty is justified.⁵⁷

It appears that 'less favourable' here is unlike other discrimination legislation because of the added phrase 'for a reason which relates to the disabled person's disability'. This suggests a more flexible test of discrimination.⁵⁸ If the case of discrimination is related to the disability, which is a floating word, and every discrimination case in this regard obeys its own facts, then the case becomes subject to the defence of justification.

Moreover, someone complaining of discrimination must show that he has been less favourably treated than other persons to whom the disability-related reason does not apply. Here again the issue of the 'comparator' is critical, as in the case of *Clark v. Novacold* (see 8.2.1 above). This case was judged upon the non disability-related 'reason' why the disabled person was treated less favourably than others.

Every service provider is likely to make conditions that some disabled persons can meet less easily than non-disabled. If the service provider fails to show justification for this, these conditions might result in indirect discrimination against the disabled person. As already mentioned, unlike the SAD and RRA, the DDA does not include prohibition of indirect discrimination in relation to services. In particular a Green Paper of 1994⁵⁹ replied that indirect discrimination would be more difficult to rectify effectively where disabled persons are involved, because disability occurs in many forms and should not be the subject of legislation.⁶⁰ To avoid this complication, all service providers regardless of their size should endeavour to make reasonable adjustments or modifications for their goods and services before being required to do so. Namely, they should anticipate possible dealings with disabled persons. This would be the time to clarify what the duty to make reasonable

⁵⁶ DDA 1995, s. 20 (1).

⁵⁷ DDA 1995, s. 20 (2).

⁵⁸ In this regard, see DDA 1995, s. 20 (1) (a).

⁵⁹ A Green Paper is a report by the British government on proposals for a new law to be discussed in Parliament. See *Dictionary of Law*, 3rd Edition, (London, UK: Peter Collin Publishing Ltd, 2001), p. 164.

⁶⁰ Green Paper 1994, para 4. 11, and see MacColgan A, *Discrimination Law: text, cases and material*, 1st Edition, (Oxford-Portland, OR: Hart Publishing, 2000), pp. 37- 452.

adjustments means, for whom this should be undertaken, and the extent to which it relates to the relevant equality and justice principles.

8. 3. 2. Duty to Make Reasonable Adjustments

As has been indicated, there is a big potential for indirect discrimination in relation to goods, facilities and services. Therefore, the duty to make reasonable adjustments represents a means to prevent unjustified discriminatory practices, rules, and policies.⁶¹ Further, it represents a positive action or discrimination to enable disabled persons to enjoy and use goods, facilities and services equally with others.⁶² Clearly these processes are a response to the requirements of the principle of equal treatment of persons, and to the requirements of distributive justice through the principles of difference, resources and a compensatory system as reparative justice. These entail equal accommodation of all public interests and welfare of persons, an ideal which cannot be realised except through this kind of process (see Chapters 4 and 5). For this reason this kind of adjustment is a main part of the Act, and its implementation is a necessary duty in order to comply with justice.

Three main aspects describe the duty to make reasonable adjustments in the context of goods, facilities and services. Firstly, if the service providers fail to make adjustments where they have a practice, policy, or procedure making it impossible or unreasonably difficult for disabled persons to make use of goods, facilities or services, unless such failure was justified.⁶³ The service providers must take reasonable steps to change practices, policies or procedures in order to enable disabled persons to use their services like other members of the public.

The second aspect refers to physical features that make it impossible or unreasonably difficult for the disabled to use and enjoy goods, facilities and services provided to the public.⁶⁴ Here the provider of services must take reasonable steps such as: (a) to remove the feature;⁶⁵ (b) to alter it so that it no longer has that effect; (c) to provide

⁶¹ See MacColgan A, *Discrimination Law: text, cases and material*, 1st Edition, (Oxford-Portland, OR: Hart Publishing, 2000), p. 452.

⁶² The 1995 White Paper proposed that it would not be enough simply to prohibit discriminatory practices. Legislation would also require positive action that is reasonable and readily achievable to overcome the physical and communication barriers which impede disabled people's access. 1994 White Paper, para 4.4.

⁶³ DDA 1995, s. 21 (1).

⁶⁴ DDA 1995, s. 21 (2).

⁶⁵ DDA 1995, s. 21 (2) (a).

reasonable means to avoid the feature; (d) to provide a reasonable alternative method of making the services available to disabled persons.⁶⁶

The third aspect is the duty to take reasonable steps to provide auxiliary aids or services which enable disabled persons to use the service equally with other members of the public. The Act instances information on tape or the provision of a sign language interpreter.⁶⁷ Providers of services must take such steps as far as is reasonable.

In employment provision, the duty to make reasonable adjustment is narrower than in goods, facilities and services. This is because in employment the duty refers to a particular disabled individual. In goods, facilities and services the duty is owed to disabled persons in general. It does not rely on a specific individual disabled person establishing disadvantage. Further, it is anticipatory.⁶⁸ Providers of services are obliged in advance to make reasonable adjustments to ensure that all categories of disabled persons can use their services accessibly. Hence, there is no specific time for attending to the duty. It is an obligation which accompanies the general provision of a service.

With regard to unlawful discrimination acts, DDA as mentioned declares that it is an unlawful act for a service provider to discriminate against a disabled person by: (a) refusing to provide, (or deliberately not providing) any services which it provides (or is prepared to provide) to members of the public;⁶⁹ or (b) failing to comply with any duty to make reasonable adjustments in circumstances in which the effect of that failure is to make it impossible or unreasonably difficult for the disabled person to make use of the service.⁷⁰ It is also unlawful for a service provider to discriminate against a disabled person in the standard of service provided, or the manner in which it is provided, or in the terms on which the service is provided.⁷¹ A theatre, for example, which refuses to admit a disabled person because of that person's disability may be committing an unlawful act of discrimination.⁷² Unlawful discrimination in the standard or manner of services would be committed by a restaurant that asked disabled customers to dine in a separate room unseen

⁶⁶ DDA 1995, s. 21 (2) (b), (c) and (d).

⁶⁷ DDA 1995, s. 21 (4).

⁶⁸ Cooper J, *Law, Rights & Disability*. 1st Edition, (London, UK: Jessica Kingsley Publishers, 2000), p. 156.

⁶⁹ DDA 1995, s. 19 (1) (a).

⁷⁰ DDA 1995, s. 19 (1) (b).

⁷¹ DDA 1995, s. 19 (1) (c) (d).

⁷² In this regard, see Rights of Access Code of Practice 2002, Chapter 2.

by ordinary customers. Unlawful discrimination in the terms on which services are provided would be illustrated by a services provider making further conditions for a disabled person, such as an extra charge. Finally unlawful discrimination occurs when a service provider fails to make reasonable adjustment by suitably adapting the provided location or object.

Concerning justification of unlawful discriminatory acts, as mentioned above, in a case of disability-related discrimination or failure to make reasonable adjustments in the field of goods, facilities and services, justification is possible. Both instances of discriminatory treatment will be justified only if, in the service provider's opinion, one or more of the conditions which will be discussed below are satisfied, and if this opinion is held to be reasonable in all the circumstances of the case.⁷³ The justification defence in this part of the Act involves a subjective and objective test since the opinion of the service provider must be seen as appropriate, and the circumstances must be reasonable.

In its approach to the principle of justification the DDA reflects ideas found in Western philosophy to avoid harm and to satisfy the requirements of justice. Chapter 4 explains how justification of discrimination is only permissible if the reason for the treatment is both material to the circumstances of the particular case and substantial. This is the origin of the Act's provisions for justification.

The exhaustive list of conditions for justification contained in s. 20 (4) of the DDA is as follows. First, the treatment is necessary in order not to endanger the health or safety of any person, which may include the disabled person. This condition is important to protect the disabled person's life and at the same time the provider. It should not be used as a pretext to discriminate against a disabled person, if the claim of protecting the disabled is without reasonable evidence. The Code of Practice indicates that dubious health and safety grounds cannot provide a justification for discrimination and declares that fire regulations should not be used as an excuse to place unnecessary restrictions on disabled persons.⁷⁴ Second, the treatment is held to be reasonable when the disabled person is incapable of entering into an enforceable agreement or of giving informed consent. Third, in cases where refusal of services is alleged, this treatment is deemed necessary if the

⁷³ DDA 1995, s. 20 (3) (a), (b).

⁷⁴ Code of Practice, Rights of Access para. 6. 11.

provider of services would otherwise be unable to provide the services to members of the public. Fourth, where services of different standard or terms are alleged, the treatment may be necessary for the service provider to be able to provide the services to the disabled person or the other members of the public. Fifth, in a case of discrimination in the terms on which a service is provided, this is justified if the difference reflects the greater cost to the provider of services in providing the services to the disabled person.

Clearly certain conditions apply only to certain discriminatory acts, and justification cannot apply where a treatment occurs with an inappropriate condition. A service provider is not justified in refusing to supply a disabled person on the ground that it will involve a greater cost for him. The test here seems harder than the test of justification in employment provision. It requires that the provider of services thinks that one or more of the relevant conditions are satisfied, and that his opinion is reasonable in all the circumstances of the case.⁷⁵ In this respect, the Goods, Facilities, Services, and Premises Code of Practice declares that a service provider does not have to be expert in disability. A service provider should, however, take into account all the circumstances including information that is available or advice that would be reasonable to seek and the opinion of the disabled person.⁷⁶

8.3.3. Premises

Provision of premises is a supplement to goods, facilities and services provisions; nevertheless, a separate section of the Act prohibits discrimination in premises. Section 22 of the DDA prohibits discrimination by those who have power to dispose, and those whose licence is required to dispose, of premises, as well as those who manage premises. For the purposes of the Act 'premises' includes land of any description, and therefore both commercial and domestic premises are covered.⁷⁷ In view of the stipulation of power, private premises seem to be excluded.

Discrimination against disabled persons is unlawful firstly in the terms on which premises are put at the disabled person's disposal and, secondly, in refusal to dispose of

⁷⁵ Monaghan K, *The Disability Discrimination Legislation*, 1st Edition, (New York, NY: Oxford University Press, 2005), p. 189.

⁷⁶ The Goods, Facilities, Services and Premises Code of Practice, para. 7.8.

⁷⁷ DDA 1995, s. 68 (1).

those premises to the person.⁷⁸ This measure is intended to protect a disabled person from being denied the right to own a legal interest in the property on grounds of disability alone. Thirdly, discrimination is unlawful in the treatment of the disabled person in relation to any list of persons in need of premises of that description.⁷⁹ Moreover, it is unlawful for a person managing premises to discriminate against a disabled person occupying those premises: (a) in the way they permit the disabled person to make use of any benefit of facilities. (b) by refusing or deliberately omitting to permit the disabled person to make use of any benefits or facilities, or (c) by evicting the disabled person or subjecting him to any other detriment.⁸⁰

The meaning of discrimination in this part of the provision is the same as that applicable to goods, facilities, and services. There is, however, no explicit duty to make reasonable adjustment for a disabled person in the context of the disposal or management of premises. It would fall to judicial interpretation of the meaning of discrimination to read implicit duty in the terms.⁸¹ Persons managing or disposing of premises, such as estate agencies or accommodation bureaux, might have to provide certain forms of reasonable adjustments to the way in which they provide their services related to premises. The main goal of these duties is always to pursue justice and enable disabled persons to live independently as equal human beings.

Despite basic similarities, there are some differences from the provisions relating to goods, facilities and services.⁸² Justifications relating to premises refer to health and safety, and also incapacity to enter into a contract. Further, discrimination may be justified in relation to why the disabled person is permitted or not to use a benefit or facility.⁸³

The Act's position concerning enforcement and remedies in the provisions of goods, facilities, services and premises is again the issue of rights by justice rather than solely by charity. Judicial processes enforce the Act and pursue infringers to protect disabled persons' rights. Cases and claims of unlawful discrimination under this Part of the

⁷⁸ DDA 1995, s. 22 (1) (a) (b) and Rights of Access Code of Practice 2002, paras 9. 14.

⁷⁹ DDA 1995, s. 22 (1) (c) .

⁸⁰ DDA 1995, s. 22 (3) (a) (c).

⁸¹ Doyle B, *Disability Discrimination: Law and Practice*, 5th Edition, (Bristol, UK: Jordan Publishing Limited, 2005), p. 182.

⁸² DDA 1995, s. 24 (1).

⁸³ DDA 1995, s. 24 (3).

Act can be filed in the county court in England and Wales or Northern Ireland, and the sheriff's court in Scotland. The remedy will be damages in tort including injury to feelings. Further, a claimant might seek an injunction or declaration.⁸⁴

Interestingly, some cases of goods, facilities and services that are contested involve not a dispute of fact but arguments as to whether or not a declaration of discrimination should be granted as a presumptive remedy.⁸⁵ This indicates the strength of the Act's intentions to eliminate and reduce discriminatory practices faced by all disabled persons. This is illustrated by the case of *Ginley v. Virgin Cinemas Ltd* [1999].⁸⁶ A visually impaired guide dog owner had been refused access to a cinema because of his dog. Judge Madge granted this declaration: '*Discrimination against disabled people is prevalent, otherwise the Act would not have been passed. The purpose of the Act is not only to give individual claimants remedies, but also to eliminate discrimination . . . Discrimination occurs not only as the result of a conscious intention to discriminate, very often it is the result of the actions of well motivated people, as it was in this case*'.

8.3.4. Public Transport

Transport is essential to the life of disabled persons of all ages. If it is inaccessible, disabled people are prevented from full enjoyment of their society's life, including employment, services and education. According to Section 19 (5) of the DDA, however, the use of transport is excluded from provisions for goods, facilities and services. This part addresses transport-related activities, excluding use of transport though not related customer services. Although the DDA does not make provision for a full transport system, Part 5 imposes accessibility requirements on public transport providers. It empowers the Secretary of State to enact new accessibility standards for public transport. It also creates criminal liability in certain circumstances where there is failure to comply with those standards. These standards should be worded as legislation, and apply to taxis, public service vehicles and rail vehicles.

The purpose of the public transport regulations is to attend to the needs of disabled persons and offer suitable solutions for their circumstances. They entail duties to prepare

⁸⁴ DDA 1995, s. 25 (2) and (5).

⁸⁵ Cooper J, *Law, Rights & Disability*, 1st Edition, (London, UK: Jessica Kingsley Publishers, 2000), p. 159.

⁸⁶ *Ginley v. Virgin Cinemas Ltd*, [1999], Case No. WL 901352.

means of transport to be as accessible, comfortable, and safe for disabled persons as for others. In addition transport providers have duties towards disabled passengers, including taking no additional charge for providing further assistance or equipment.⁸⁷ Drivers of taxis and private hire vehicles are required to take guide dogs in their vehicles.⁸⁸

Again, the principle of distributive justice underlies these obligatory measures. Without these requirements concerning transport, an important interest of disabled persons is not met. If, however, the DDA had provided a separate section for public transport which covered discrimination and its justification as well as acts of unlawful discrimination, this would be more effective in terms of transport accessibility, and would make the Act more comprehensive.

8.4. Education

The right to education is an abstract right guaranteed by the constitution in terms of equal treatment and opportunity without exclusion for any citizen. It is therefore a clear right and entitlement for the disabled. Originally, the DDA did not include access to education in its anti-discrimination provisions. Education was excluded from the scope of goods, facilities and services provisions of the Act.⁸⁹ Education is, however, recognised as essential to the ambition of disabled persons to enjoy full and equal opportunities.⁹⁰ If the right of disabled persons to education were not provided equally without discrimination, the right to employment, for example, would be undermined, since education enables disabled persons to compete in the workplace. To remove the exclusion, the Disability Rights Task Force recommended that all schools and educational institutions should come under a statutory duty not to discriminate against the disabled in relation to their disability. They also insisted on a duty on school education providers to review policies, practices, procedures and make reasonable adjustments to enable the disabled to participate in education, by either eliminating physical barriers or providing auxiliary aids.⁹¹ As a result, the Special Education Needs and Disability Act (SENDA, 2001) was enacted.

⁸⁷ DDA 1995, s. 36 (1) (3) (a) (b).

⁸⁸ DDA 1995, s. 37 (1) and 37 A (9).

⁸⁹ DDA 1995, s. 19 (5).

⁹⁰ See Doyle B, *Disability Discrimination: Law and Practice*, 5th Edition, (Bristol, UK: Jordan Publishing Limited, 2005), p. 207.

⁹¹ Disability Rights Task Force Report, recommendations 4.5 and 4.6.

Historically, before SENDA several legislations had attempted to promote and educate disabled persons with consideration for their special needs. Generally they rested on the principle of equal treatment regarding access and admissions, examination and assessments, as well as disability support services and staff development and training programmes. Other efforts anent special education for disabled children were also made according to their categories.⁹² The changes to the Act were, however, a response to changes in the times, and were subject to natural development of the law.

Accordingly, the DDA was amended by SENDA to include the outlawing of discrimination against disabled persons in their rights to education in Part 4 of the DDA. This applies in England, Wales and Scotland. Part 4, Chapter 1 of the Act now deals with schools and education authorities, while Part 4, Chapter 2 deals with discrimination in relation to further and higher education.

It is notable that the original Part 4 of the Act amended existing education legislation in order to encourage policymaking and action by educational institutions to promote the integration of disabled students.⁹³ It is important here to note the role of political and collective action in this process of protecting and integrating disabled rights.

8.4.1. Meaning of Discrimination in Education

In addition to the definition common to all areas covered by the DDA, specific discrimination in schools and higher and further education is defined according to the context in which it occurs. Section 28B provides for schools discrimination and covers disability-related discrimination, failure to comply with a duty to make reasonable adjustments, and victimisation. Section 28C covers higher and further education similarly. The sections also address specific aspects of discrimination in education provision, namely knowledge of disability and justification of discrimination in education.

A responsible body discriminates against a disabled person if, for a reason which relates to his disability, it treats him less favourably than it treats or would treat others to

⁹² In this regard, see Doyle B, *Disability Discrimination: Law and Practice*, 5th Edition. (Bristol, UK: Jordan Publishing Limited, 2005), pp. 210-221.

⁹³ In this regard, see DDA 1995, s. 29-30.

whom that reason does not or would not apply, and it cannot show that the treatment in question is justified. This will be elaborated below.⁹⁴

The other aspect of discrimination is failure to make reasonable adjustments. The duty to make reasonable adjustments in the contexts of schools and higher and further education is presented in sections 28B and 28T. The responsible body for a school or any educational institution has two basic obligations. It must take reasonable steps to ensure that disabled persons are not placed at a substantial disadvantage in comparison with persons who are not disabled, first, in relation to admission procedures and, second, in relation to education and associated services it provides for, or offers to, pupils at the school or educational institution.⁹⁵ The lawmaker is clearly guided by the principle of egalitarianism and the requirement of justice, here prioritising processes which ensure that disabled students are on the same footing as the non-disabled. Further, as in other provisions of the Act, the rectification of unlawful acts of discrimination is based on the principle of distributive justice, as mentioned above and in Chapter 5.

Accordingly, a responsible body discriminates against a disabled student if it fails to his detriment to comply with these duties, and cannot show that its failure to comply is justified. As with the duties in other provisions, however, these duties determine the circumstances in which discrimination may happen, and are not actionable in themselves.⁹⁶

The nature of the duties in this provision is anticipatory and ongoing. They therefore apply to disabled students in general, and do not require disadvantage to be suffered by a specific disabled. Hence, as with goods, facilities and services a responsible body should not wait for an instance to arise: reasonable adjustments should be made in advance to ensure that disabled students are not situated at a substantial disadvantage.

These duties do not directly require a responsible body to remove physical features of building or provide specific auxiliary aids.⁹⁷ ‘The Schools Code of Practice’ declares that a special educational needs framework is formed to identify, assess and make provision for students with special educational needs. This provision would include

⁹⁴ DDA 1995, s. 28B (1).

⁹⁵ DDA 1995, s 28C (1) (a) and (b).

⁹⁶ DDA 1995, s. 28C (8).

⁹⁷ Sec DDA 1995, exemption in section 28C (2).

necessary educational aids.⁹⁸ Rather, the duty relates to planning and support for disabled students.⁹⁹ It has been noted that '*whilst the meaning given to auxiliary aids in particular is very wide in the field of goods, facilities and services because the duty there extends to the provision of the same, it should be given a narrower reading in the context of schools provisions. This must be so if any real sense is to be made of the duty to make reasonable adjustments*'.¹⁰⁰ In these sections the purpose of the duty to make reasonable adjustments is to serve the real goals of the Act. That is, to make mainstream educational institutions and schools adequate and accessible for disabled persons, in terms of balancing the distribution of resources and rights through remedial justice.

Regarding unlawful discrimination acts in schools and education authorities, section 28 of DDA is the starting provision of Part 4, dealing with discrimination against current and prospective disabled pupils. It provides that it is unlawful for 'the body responsible for a school' to discriminate against a disabled person in the following: (a) in the arrangements it takes for determining admission to the school as pupil; (b) in the terms on which it offers to admit him or her to the school as a pupil; or (c) by refusing or deliberately omitting to accept an application for his or her admission to the school as a pupil. Furthermore, it is unlawful for the body responsible for a school to discriminate against a disabled pupil in the education or associated services provided for or offered to pupils at school by that body.¹⁰¹ Similarly, discrimination by exclusion, permanent or temporary, is unlawful, that is, a question of justice, since the relevant principles demonstrate that inclusion of students is not a charity.¹⁰² In fact these unlawful discrimination acts are similar to those in the provisions for employment, goods, facilities and services, except that the nature of what is provided entails some changes. Here the issue is to forestall all aspects of discrimination with which the responsible body might injure disabled pupils.

In respect of independent schools and special schools not maintained by a local authority, the proprietor is the responsible body. The local education authority or governing body will be the responsible body. Where the school is a pupil referral unit or a

⁹⁸ School Code of Practice, para. 6.20.

⁹⁹ Monaghan K, *The Disability Discrimination Legislation*, 1st Edition, (New York, NY: Oxford University Press, 2005), p. 206.

¹⁰⁰ *Ibid.*

¹⁰¹ DDA 1995, s. 28 A (2).

¹⁰² DDA 1995, s. 28 A (4).

maintained nursery school it will always be the local education authority.¹⁰³ A 'disabled pupil' is a pupil who is a disabled person within the meaning of the DDA.¹⁰⁴

Concerning further and higher education, it is unlawful for 'the body responsible' for an educational institution to discriminate against a disabled person. Here the unlawful committing of discriminatory acts is the same as in the schools elaborated above.¹⁰⁵ Here also a disabled student means a student who is a disabled person according to the meaning of disabled in the Act.¹⁰⁶ Regarding educational institution, for the purposes of the DDA in relation to England and Wales, this refers to any institution within the higher and further education sectors, in addition to those designated in an order made by Secretary of State.¹⁰⁷ In relation to Scotland educational institution refers to education within the higher education sector; a college of further education with a broad management; a college institution; a college of further education maintained by an education authority; or an institution designated in an order made by the Secretary of State.¹⁰⁸

In higher and further education also discrimination is outlawed against both current and prospective students. For example, in the process of applying to the school or in arrangements made for determining admission to the institution. This prohibition of discrimination against prospective disabled students is a remarkable innovation by the DDA. It is an additional guarantee for the disabled of safety from anticipated discrimination.

With regard to justification of discrimination in the field of education, less favourable treatment of disabled persons might be justified on two bases. Firstly, where it is the result of a permitted form of selection.¹⁰⁹ Secondly, where the reason for it is both material to the circumstances of the particular case and substantial.¹¹⁰ Both these provisions are comparable to the employment provisions of the DDA as discussed above. Furthermore, failure to comply with the duty to make reasonable adjustments is justified

¹⁰³ DDA 1995, sch. 4A.

¹⁰⁴ DDA 1995, s. 28 Q (2).

¹⁰⁵ DDA 1995, s. 28 R.

¹⁰⁶ DDA 1995, s. 31 A.

¹⁰⁷ DDA 1995, s. 28 R (6).

¹⁰⁸ DDA 1995, s. 28 R (7).

¹⁰⁹ DDA 1995, s. 28B (6).

¹¹⁰ DDA 1995, s. 28B (7).

only if the reason for it is both material to the circumstances of the particular case and substantial.¹¹¹ To stipulate that the reason should be material to the circumstances and substantial seems reasonable, and gives the judge discretionary power to deal with individual complaints case by case.

Further, a responsible body's failure to take a particular step does not constitute discrimination if that body shows that at the time in question it did not know and could not reasonably have been expected to know that the individual was disabled and that its failure to take the step was attributable to that lack of knowledge.¹¹² Thus in the context of education, lack of knowledge of disability is a ground for justification. In the contexts of employment and goods, facilities and services, however, lack of knowledge as justification for discrimination is not acceptable.

Ultimately the provisions of the DDA are upheld as fundamental rights which must be enforced through the channels of justice, namely the judicial system. Anti-discrimination legislation applying to schools is enforced in England and Wales by the Special Educational Needs and Disability Tribunal.¹¹³ In Scotland remedies are implemented through civil proceedings in a sheriff's court. Anti-discrimination legislation applying to further and higher education is enforced by civil proceedings like any claim in tort. In Scotland reparation for breach of legal duty is claimed. The case will be heard in the county court in England and Wales, and in Scotland in the sheriff's court.¹¹⁴

Seeking to guarantee the implementation of its provisions, the DDA established the National Disability Council (NDC), whose main goal was to advise the Secretary of State, especially in the elimination or reduction of discrimination against disabled.¹¹⁵ The powers of the NDC, however, were limited. To support the complaints of disabled persons, expansion was required.¹¹⁶ This need resulted in the Disability Rights Commission (DRC) as an enforcement mechanism for the DDA.

¹¹¹ DDA 1995, s. 28B (7).

¹¹² DDA 1995, s. 28B (3).

¹¹³ DDA 1995, s. 28H, and also see Schools Code of Practice, Chapter 9.

¹¹⁴ DDA 1995, s. 28V.

¹¹⁵ DDA 1995, s. 50 (1).

¹¹⁶ DDA 1995, s. 50 (3) and (4).

8.5. The Disability Rights Commission

According to the White Paper,¹¹⁷ in view of the spread of discriminatory behaviour against disabled persons, an effective enforcement mechanism to fulfil the spirit of the legislation was essential if the rights of disabled people were to be recognised by all sectors of society.¹¹⁸ As a result, the DRC was enacted in 1998 and was followed by the Disability Rights Commission Act (DRCA) in 1999. In fact, this consolidation of disabled persons' rights did no more than follow the dictates of justice in the case of clear rights. Hence the DRC invoked several duties and powers reflecting these relevant principles.

The DRC is considered a statutory corporation.¹¹⁹ The DRCA stipulates its duties to be: (i) to work towards the elimination of discrimination against disabled persons; (ii) to promote the equalisation of opportunities for disabled persons; (iii) to take such steps as it considers appropriate with a view to encouraging good practice in the treatment of disabled persons; and (iv) to keep under review the working of the Disability Discrimination Act 1995 and the DRCA.¹²⁰

These important duties give powers to the DRC which advance its functions. These powers are not considered, however, as limiting the Commission's powers and in fact they are to be deduced from general duties of the DRC. The limits on the powers of DRC will be determined by reference to the scope of its functions.¹²¹ Namely, the powers are flexible and admit development or amendment as long as they serve to fulfil the duties.

The DRCA gives particular powers to respond to the duties. First, the power to conduct formal investigation. This power is intended in any connection with the duties. It confers power on the DRC to address actual discrimination and prevalent discriminatory practices, without the requirement for a disabled complaint or the burden of disabled litigation.¹²² Second, the power to enter into binding agreements: when a person has committed an unlawful discrimination act it may enter into an argument with another

¹¹⁷ A White Paper is a report issued by the British government as a statement of government policy on a particular problem, often setting out proposals for changes to legislation for discussion before a Bill is drafted. See *Dictionary of Law*, 3rd Edition, (London, UK: Peter Collin Publishing Ltd, 2001), p. 393.

¹¹⁸ White Paper 1998, para. 1.5- 1.6.

¹¹⁹ Disability Rights Commission Act 1999, Sch. 1, para. (1).

¹²⁰ Disability Rights Commission Act 1999, s. 2 (1).

¹²¹ *Ibid.*, s. 2 (2).

¹²² *Ibid.*, s. 3 (1).

person in writing. Here the DRC is required to undertake not to take any enforcement action, and should require that person not to commit further discrimination. The intention here is to change procedures or policies which have caused unlawful acts.¹²³ Third, the power to bring injunction proceedings in cases of persistent discrimination. According to Section 6 of the DRCA, the DRC might apply to a County Court for an injunction, when the DRC see that unless restrained a person is likely to commit one or more unlawful acts.¹²⁴ Fourth, the power to provide assistance to individuals who have brought or propose to bring proceedings under the DDA. Fifth, the power to issue a Code of Practice, giving practical guidance on how to avoid discrimination in all the provisions covered by the DDA and to any persons to promoting equal opportunities for disabled persons.¹²⁵ Sixth, the power to make arrangements with another person for the provision of conciliation services.¹²⁶

As an enforcement mechanism, the fact that the powers and functions of the Disability Rights Commission are combined in one body makes its performance more focused and effective. This is one of the distinguishing characteristics of the DDA, in contrast with the ADA, whose enforcement and remedies are apportioned between several different bodies, as will be seen in Chapter 9.

In conclusion, it has been shown that the DDA has passed through several stages, from limited scope and provisions until reaching its current comprehensive formulation. The supplement of important provisions, such as for transport and education, shows its response to wider discrimination issues. It has also achieved precision in addressing acts of unlawful discrimination and imposing duties to rectify these problems. Thus it appears to cover all aspects of the life and rights of the disabled.

The DDA has the strengths that (a) its case for the rights of the disabled is grounded in the relevant principles of inherent dignity, equal treatment, needs, autonomy and non-discrimination; and (b) its case for the rectification of discriminatory aspects and the duty to make reasonable adjustments is grounded in principles of distributive justice. In these

¹²³ In this regard, see Monaghan K, *The Disability Discrimination Legislation*, 1st Edition. (New York, NY: Oxford University Press, 2005), p 398.

¹²⁴ Disability Rights Commission Act 1999, s. 6 (2).

¹²⁵ DDA 1995, s. 53 A (1).

¹²⁶ DDA 1995, s. 28.

respects it is compatible with the value principles upheld in Chapters 3, 4 and 5 as the basis of disabled persons' rights. It has the further strength that it complies closely with international disability reform agenda as discussed in Chapter 6, sometimes even providing more detail and egalitarian rectification than found in the international reform agenda.

Some flaws may also be indicated. Firstly, not to address indirect discrimination is a point of weakness. It is true that the requirement of specific justification in cases of direct discrimination goes some way towards eliminating indirect discrimination. But more guarantees against discriminatory practice would be available if indirect discrimination were explicitly addressed. Secondly, the application of a medical model, rather than a social model, of disability is inappropriate, since it excludes large numbers of people with impairments from utilising the DDA. Thirdly, health services feature only under goods, facilities and services, yet they are essential to the disabled and they are subject to discrimination. Hence they should be expressly dealt with in a separate section, to investigate the potential of unlawful discrimination acts in health care.

By enacting the DDA, however, the United Kingdom became one of the world leaders in the struggle towards comprehensive anti-discrimination legislation for disabled people. Continual modifications generate more accommodating measures serving the protection of disabled persons' rights. As the DDA currently stands, there are no comparable aspects between it and the Saudi disability code, since the latter has no legal formulation in place and lacks any mention of rectifying discrimination. It simply gives a definition of disability, and is presented as a code indicating how social grants should be distributed, as has been assessed in Chapter 7.

The following chapter turns to another example of an anti-discrimination act, the Americans with Disabilities Act (ADA). Again, an analysis of its treatment of disability rights issues, and the principles underlying this, will serve as basis for comparison with the Saudi disability code and the DDA.

AMERICANS WITH DISABILITIES ACT

Introduction

Official recognition of disability rights in the United States of America first became apparent in the 1960s. In 1968 the Architectural Barriers Act provided for the removal of architectural barriers from new federally funded buildings. The 1970s witnessed considerable progress in public policy. For example: (a) the passage of Intermediate Care Facilities and Mental Retardation 1971; (b) the Alabama case of *Wyatt v. Stickney* 1972, which upheld the right of individual treatment;¹ (c) the 1973 passage of Section 504 of the Rehabilitation Act which prohibited discrimination against disabled persons in any programme receiving federal financial assistance, as will be discussed below; (d) the Education of All Handicapped Children Act 1974.²

The basis for prohibition of discrimination in the USA is the obligation to treat people equally. The Constitution of the USA declares: '*no state shall deny to any person within its jurisdiction the equal protection of the laws*'.³ All people are equal in their constitutional rights on the basis of a normative approach that is CA, which insists that all fundamental and essential needs must be secured for all citizens for a life worthy of human dignity.⁴ However, the question has been as to the appropriate way to deal with the case of people with disabilities in terms of entitlement to those guaranteed needs. In the case of *City of Cleburne v. Cleburne Living Center, Inc.* the Supreme Court held that persons with mental disability do not constitute a 'suspect class'. The court denied people with severe disabilities the opportunity for judicial review of state legislation under either a strict or

¹ The key issue of this case: patients have a 'constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition'. Summary of case: in defining a right to treatment by specific staffing ratios and other objective criteria (which the state could not meet because of expense and inability to attract sufficient professionals), the court paved the way for massive deinstitutionalisation. See *Wyatt v. Stickney*, 325 F. Supp 781(M.D. Ala.1971).

² Scotch R, *From Good Will to Civil Rights*, 2nd Edition, (Philadelphia, USA: Temple University Press, 2001), p. 8.

³ Constitution of the United States of America, 14th Amendment.

⁴ Nussbaum M, 'The Supreme Court 2006 Team, Forward: Constitutions and Capabilities: "Perception" Against Lofty Formalism', (2007) 121(4), *Harvard Law Review*, p. 7.

heightened scrutiny standard. In this regard the opinion of the court was that disabled people are different from other classes such as race or sex: they need special treatment and they have more reduced abilities to function in everyday life. Hence people with disabilities are abidingly different from normal persons, and states have a legitimate interest in issuing regulations dealing with the treatment of such persons.⁵

In the USA, equal constitutional entitlement according to the notion of CA became the dominant view in judicial interpretation when affirming the fundamental rights of disabled persons to free education, employment and so on without discrimination. Further, all special needs and processes which enable disabled persons to reach their rights and full social participation, are merited, not as a matter of charity, but as one of entitlement and basic justice. For example, in the case of *Brown v. Board of Education*, the court held that the denial of appropriate free and public education for disabled persons is a violation of equal protection. In addition the court was assured of the need for special affirmative support for inclusion in public school.⁶ What must be understood from this case is the difference between exclusion and inclusion, not an interdiction on special affirmative remedies. Certainly, the court insists that the inclusion of disabled persons must be viewed as a right entailing justice.⁷

Disability rights and the movement against discrimination, in both a formal sense and a normal sense, also have their roots in the civil rights movement of the 1960s. The Civil Rights Act 1964, by focusing on its intent to eliminate racial discrimination, set the stage for a number of minority groups to widen its coverage and use its mandate to demand equality. The disability movement began to be a force and have its agenda recognised in legislation during the 1970s, starting with the Rehabilitation Act as mentioned above. The power of this Act came from its language: Section 504 specifically echoes Title 7 of the 1964 Civil Rights Act. Section 504 was the first statutory definition of discrimination towards disabled persons. It was a crucial factor in shifting disability issues and rights from the realm of social services and therapeutic practice to the context of political and

⁵ 473 U.S. 432, 105 S.Ct. 3249, 87 L. Ed 2nd 313 (1985), 9, 10, 13.

⁶ 347 U.S. 483, 74 S.Ct. 686, 98 L. Ed. 873, (1945). See also, for example, *Mills v. Board of Education*, 348 F. Supp. 866 (D. D. C. 1972) 12, 13.

⁷ Nussbaum M, 'The Supreme Court 2006 Team, Forward: Constitutions and Capabilities: "Perception" Against Lofty Formalism', (2007) 121(4), *Harvard Law Review*, pp. 71-72.

civil rights.⁸ It was also the start of a new view that response to disability law entails the pursuit of justice, and that the scope of charity is limited.

The core of the Civil Rights Act of 1964 is that it prohibits discrimination against people on the grounds of race, colour, religion, national origin, and sex. It can be seen that the Act of 1964 did not directly address the right of individuals with disabilities. The main relevant title is Title 7 which deals with employment discrimination.⁹ This title applies generally to states or their instrumentalities and to private enterprises.¹⁰ It also established the Equal Employment Opportunities Commission (EEOC), which is charged with certain supervisory, educational and enforcement tasks.

The Civil Rights Act was subjected to many attempts at amendment to include individuals with disabilities among the categories of persons protected by the Act. Discrimination on the grounds of race or gender, however, was considered too specific and the Civil Rights model was held by one federal judge not to be '*automatically adaptable to the problem of discrimination against the handicapped*'.¹¹ During this period, a social and political movement was starting to emerge among people with disabilities in local communities through local action. The disability movement was born in Berkeley, California. In the early 1970s the first centres for independent living were established.¹²

As has been mentioned above, the Rehabilitation Act of 1973 was enacted prior to the ADA. The Rehabilitation Act continued in force even after the enactment of the ADA. It incorporated many of the enforcement and administrative principles of the Civil Rights Act 1964, i.e. Sections 501, 503 and 504 concerning discrimination against employees on the basis of disability. The main part of the Rehabilitation Act is contained in Part 5, which deals with vocational education. The Act also deals with discrimination.

⁸ James D & James F, *The Disability Rights Movement*, 1st Edition, (Philadelphia, PA: Temple University Press, 2001), p. 77.

⁹ Codified at 42 USC 2000 E et seq. in Civil Rights Act 1990.

¹⁰ Discrimination within the federal branch is catered for separately in 42 USC 2000 -16. The Civil Service Commission is charged with responsibility for enforcement.

¹¹ *Garrity v. Gallen*, 522 F. Supp. 171, 206 (D.N.H. 1981).

¹² James D & James F, *The Disability Rights Movement*, 1st Edition, (Philadelphia, PA: Temple University Press, 2001), p. 79.

The 1964 Act and 1973 Act paved the way for the ADA 1990. There is a common thread between the Civil Rights Act and the Americans with Disabilities Act of 1990, in that they both refer to the commerce clause of the Constitution. According to this the courts hold '*that the commerce clause authorizes Congress to enact legislation to regulate employment which affects interstate and foreign commerce*'.¹³

The reason for enacting the ADA was that the existing legislation was incomplete and not comprehensive in its scope. People with disabilities shared a common experience of discrimination. It was also necessary to confront increased discriminatory practices by pursuing them through justice, since at that time rights of disabled persons were viewed in terms of a social pension.¹⁴

The ADA is founded upon the principles of equality and non-discrimination, derived from principles of distributive justice which rectify the impacts of discrimination against the disabled. In this regard, both the DDA and ADA embrace the same Western philosophical basis and thus represent a shared Anglo-American law in treating disability discrimination problems. These principles emanate from Aristotle and the ancient Greeks, in addition to Hegel's philosophy, as seen in Chapter 4. The aim of this chapter is to examine the main features of the ADA in order to identify how the relevant principles apply to its contents, and to compare these with the DDA, as a useful benchmark for assessing the Saudi Disability Code. As in Chapter 8, an analysis will be made of its provisions, in terms of: (1) the relevant principles by which it deals with disability discrimination; (2) the means whereby it rectifies discriminatory practices; and (3) its relation to the themes of the thesis, namely the duty of transferring the rights of disabled persons out of the scope of charity into the arena of justice.

The Chapter will be divided into four main sections. Section one examines the ADA's definition of disability. Section two deals with employment discrimination and Section three examines public services. Section four explores the question of public accommodation, including telecommunications. Finally a conclusion briefly compares and contrasts the ADA and the DDA.

¹³ *The Civil Rights Act 1964*, (Washington, DC.: Bureau of National Affairs, 1964), p. 97.

¹⁴ See Shapiro J, *No Pity*, 1st Edition, (New York, NY: Three Rivers Press, 1993), p. 42.

9. 1. Definition of Disability

The definition of ‘disability’ under ADA was derived from the definition of ‘handicap’ under the Rehabilitation Act 1973. According to Section 3 of the ADA, the definition comprises three major components, one of which must be present to qualify a person as an individual with a disability: (a) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (b) a record of such impairment; or (c) being regarded as having such an impairment.

The first component entails identifying: a physical or mental impairment, an effect which causes substantial limitation of one or more of the person’s major life activities. Physical or mental impairment means ‘*any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems; musculoskeletal; special sense organs; respiratory including speech organs; cardiovascular; reproductive; digestive; genito-urinary; haemic and lymphatic; skin; and endocrine or any mental or psychological disorder...*’.¹⁵ The main concern of the ADA is protection of the disabled from possible discrimination arising because of the stigma of impairment. Thus impairment is defined irrespective of mitigating measures such as medicines or assistive devices.¹⁶

In the ADA, the term impairment is used broadly, to cover a wide spectrum of individuals with physical and mental impairments. Although for this purpose the ADA did not provide a complete list, orthopaedic, visual, speech and hearing impairments also qualify for inclusion. Moreover, in *School Board of Nassau County v. Arline*, the Supreme Court recognised that a contagious disease also constitutes a physical impairment.¹⁷ Some courts also recognise that an individual who has AIDS, or tests positive for the HIV virus, has a physical impairment.¹⁸ From this expansion of the concept of impairment it appears that the lawmakers of the ADA are guided by a social model of the concept of ‘disability’. Their focus is on the stigma attaching to the disabled individual and restricting his social participation, as well as on the absence of rights exposing him to discrimination. This contrasts with the DDA which approaches its legislation via a medical model.

¹⁵ EEOC 29 CFR 1630. 2 (h) 1-2.

¹⁶ See EEOC Interpretive Guidance 29 CFR 1630.2 (h).

¹⁷ 480 U.S. 273, 107 S.Ct. 1123, 94, (1987).

¹⁸ In this regard, see, for example, the cases of *Doe v. Centinela Hospital*, (C. D. Cal 1988) 17, and *Chalk v. United States District Court Central District*, 840 F. 2d 701 (9th Cir. 1988), 17.

The ADA definition of disability excludes certain conditions that are not considered as disability. For example, the ADA specifically excludes current users of illegal drugs, since these are forbidden. The ADA's scope, however, logically includes people who have successfully completed or are participating in supervised drug rehabilitation programmes.¹⁹

Regarding major life activities, both the EEOC and Department of Justice (DOJ) regulations offer a non-exhaustive list of these. It includes caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.²⁰ In other words, 'major life activities' are important basic activities which the majority of people generally can perform with little or no difficulty. The list is not fixed and is open to change. The generality of the term also allows the definition of disability in ADA to be more flexible and to include more social aspects and activities.

Over and above the presence of a disability, the ADA requires that its impact be such as to 'substantially limit' one or more life activities. As defined by the EEOC this means that the individual is: (a) unable to perform a major life activity that the average person can perform; and (b) significantly restricted as to the condition, manner, or duration under which he can perform a major life activity . . .²¹ For instance, persons who have back conditions that prevent them from lifting heavy objects are substantially limited in the major life activity of working because they cannot perform a class of jobs owing to their impairment.²²

The second component of the definition of disability is 'having a record of impairment'. This is defined as meaning either someone who had a physiological or mental disorder that substantially limited them in a major life activity, but no longer has that impairment, or someone who was simply misclassified as having such an impairment.²³

¹⁹ Tucker B & Goldstein B, *Legal Rights of Persons with Disabilities: An Analysis of Federal Law*, 1st Edition, (Horsham, Pennsylvania: LRP Publications, 1991-1992), Vol. II, p. 22: 32.

²⁰ EEOC 29 CFR 1630. 2 (i).

²¹ EEOC 29 CFR 1630. 2 (i) 1-2.

²² See Fersh D & Thomas P W, *Complying With The Americans With Disabilities Act*, 1st Edition, (London, UK: Quorum Books, 1993), p. 56.

²³ See ADA 1990, s. 3 (2) (b).

The point of this component is that people who have recovered from physiological or mental disorder often face discrimination simply because of the stigma or the fear associated with such impairments. When an employer or a business discovers through educational, medical or employment records that an individual has a history of such disorder, if the employer discriminates against the person the second component of the definition will apply.

The third component of the definition of disability is 'being regarded as having an impairment'. The EEOC and DOJ regulations explain that a person is considered as having an impairment if: (a) he has a physical or mental impairment that does not substantially limit a major life activity, but is treated by an entity covered by the law as causing such limitation; or (b) he has a physical or mental impairment that substantially limits major life activity only as the result of the attitudes of others towards the impairment; or (c) he does not have a physical or mental impairment, but is treated by the entity covered by the law as having a physical or mental impairment that substantially limits a major life activity.²⁴ This component appears to indicate that the lawmakers of the ADA sought to widen the concept of disability to include even someone who has a history of disability. A social definition of disability, intended to address the discrimination which springs from fears and stereotypes associated with disabled persons, shows the disabled individual subject to social restrictions and discrimination. This component of the definition addresses misconceptions and attitudinal barriers which frequently result in the exclusion of disabled persons.²⁵

This interesting point of the definition of disability in the ADA is absent in the DDA's definition of disability. Accordingly, the definition of disability in ADA is more effective than in the DDA, and, moreover, than in the Saudi Disability Code. Because the ADA defines disability through a social model, so a broad sector of people may be included who, either currently or in the past, suffer from any impairment or stigma of impairment causing isolation or marginalisation. The ADA allows them to have protection from discrimination.

²⁴ EEOC 29 CFR 1630. 2 (1) 1-3.

²⁵ Fersh D & Thomas P W. *Complying With The Americans With Disabilities Act*, 1st Edition. (London, UK: Quorum Books, 1993), p. 58.

Having clarified its definition of disability, the ADA continues with an exposition of measures to deal with discrimination encountered in the lives of disabled people.

9.2. Employment and Discrimination

The ADA recognises and insists on the rights of the disabled to employment, and is concerned to enable all members of the USA to be equal partners of the American workforce. In other words, like everyone else, people with disabilities should be able to get a job that meets their needs and is suited to their talent. Moreover, the right of disabled persons to employment, and the regulation of this right through prohibition of discrimination, is the necessary result of provision for education, vocational rehabilitation and training programmes. If people with disabilities have obtained equal education and vocational rehabilitation, then they need jobs to live independently.

Title I of the ADA deals with employment discrimination. It states and directly rectifies the barriers and problems faced by people with disabilities in respect of entry to, and participation in, economic life. The concept of equality requires the breaking down of these barriers and the widening of opportunities for disabled persons to practise their rights of employment, as mentioned in Chapter 4. The main goal then for Title I is the development of a capacity for independent living as well as social integration through employment.²⁶ The foundation of the right of disabled persons to employment is equal treatment and opportunity, as well as the principle of justice conferring constitutional rights.

The employment rights under ADA differ, however, from constitutional rights and liberties, such as the right to free speech or the freedom of religion. Under the ADA the rights of people with disabilities are grounded in the principles of human dignity and respect for people's abilities, irrespective of inconsequential personal characteristics that have no bearing on the successful and productive performance of a specific job.²⁷

²⁶ See Kemp E J & Bell C G. 'A labour lawyer's guide to the Americans with disabilities act of 1990' (1991). 15 *Nova Law Review*, p. 31, and Arlene M, 'Title 1 Employment Provisions of the American with Disabilities Act of 1990', *Temple University Law Review*, p. 499.

²⁷ Fersh D & Thomas P W, *Complying With The Americans With Disabilities Act*, 1st Edition, (London, UK: Quorum Books, 1993), p. 168.

Section 102(a) of the Act rules that *'no covered entity shall discriminate against a 'qualified individual' with disability because of the disability of such individual in regard to job application procedure, the hiring, advancement or discharge of employees, employee compensation, job training, and other terms, conditions, and privilege of employment'*. It may be noted that the DDA's presentation of the term 'discrimination' was more detailed than the ADA's, since the DDA expanded it to include emotional and psychological discriminatory aspects such as victimisation and harassment which relate to human dignity.

Concerning the entities covered, this means: an employer, an employment agency, a labour organisation, or a joint labour-management committee. 'Employer' normally means an economic entity which engages in an industry affecting commerce with fifteen or more employees, but in the private sector twenty-five or more employees are required.²⁸ In contrast, one may note that after amendment to include small businesses the DDA was more comprehensive.

On the other hand, religious entities are not excluded from coverage under Title I. Such entities are permitted to require a religious commitment from prospective and existing employees and are allowed to give preference to applicants who profess such commitment. A religious entity may not, however, discriminate against a person who meets the religious commitment test but who also has a disability and is otherwise qualified for the particular job in question. For instance, in ADA, Section 103 (c) 1-2, a teacher runs a school in a church and meets the religious criteria.

Regarding persons covered, it is clear that the ADA prohibits discrimination in employment only against a disabled person who is a 'qualified individual'.²⁹ The person should prove that he not only suffers a disability as defined under Section 3 of the ADA, but is also an otherwise 'qualified individual'. Qualified means a person who: *'With or without reasonable accommodation can perform the essential functions of the employment that such individual holds or desires'*.³⁰

²⁸ ADA 1990, s. 101 (2).

²⁹ ADA 1990, Title I. s. 101 (8).

³⁰ *Ibid.*

The EEOC regulations expand this definition somewhat to encompass a person who: *'Satisfies the requisite skill, experience, education and other job-related requirements of the employment position such as a person holds or desires and who, with or without reasonable accommodation, can perform the essential functions of the job'*.³¹ From this definition, one can identify two main aspects of proof that the disabled person is 'qualified'. One is that the disabled person can satisfy the job qualifications and requirements. The second is that the disabled person can perform the 'essential functions' of the job, either through reasonable accommodation or not. If the disabled person satisfies these requirements, then the outlawing of discrimination will be applied.

'Essential functions' generally means job tasks that are fundamental and not marginal.³² According to EEOC regulation a job function might be counted fundamental if: (a) the reason the position exists is to perform that function; (b) the number of other employees available to perform that task, or among whom the task can be distributed, is limited; and (c) the function is highly specialised so that the incumbent of a position is hired for his ability to perform the particular function.³³

ADA indicates, however, that due deference is to be given to the employer's own judgement, provided that judgement has been fixed in writing before a job is advertised.³⁴

The term 'essential function' refers only to the task to be performed, and not to the manner of the performance. Accordingly, the House Judiciary Committee explains that: *'in a job requiring the use of a computer, the essential function is the ability to access, input, and retrieve information from the computer. It is not 'essential' that person be able to use the keyboard or visually read the information from the computer screen. Adaptive equipment or software may enable a person with no arms or a person with impaired vision to control the computer and access information'*.³⁵

³¹ EEOC 29 fCFR1630.2 (m).

³² EEOC 29 CFR1630.2 (n).

³³ EEOC 29 CFR1630.2 (n) i-iii.

³⁴ ADA 1990, s. 10 (8).

³⁵ Tucker B & Goldstein B, *Legal Rights of Persons with Disabilities: An Analysis of Federal Law*, 1st Edition, (Horsham, Pennsylvania: LRP Publications, 1991-1992), Vol. II, p. 22:44.

As seen above, the definition of ‘qualified individual’ refers to the term ‘reasonable accommodation’. The following section examines the concept of reasonable accommodation in order to identify its meaning, motive and basis.

9.2.1. Reasonable Accommodation

Reasonable accommodation in the employment provision is action that must be taken by an employer to enable a qualified individual with a disability to perform the essential functions of a job. The EEOC regulations declare that reasonable accommodation is any change or modification to the job application processes, to the way things are customarily done that enables a disabled person to enjoy equal employment opportunities.³⁶ Reasonable accommodation sounds like a sort of ‘positive discrimination’ whereby steps are taken positively to improve the position of the disadvantaged and to redress disadvantage to them from mainstream society. Effectively, it means addressing past, current and future discriminatory practice as has been discussed in Chapter 4, since its main aim is to create the same opportunity for disabled as for non-disabled persons to perform essential job functions.

This process is different, however, from ‘affirmative action’, since the latter is not required under ADA. Employers need not affirmatively seek employees with disabilities. But they are required not to refuse applicants or employees either on grounds of disability or because a disabled employee requires reasonable accommodation.³⁷ Unlike the racial discrimination provision in the 1964 Civil Rights Act, the purpose of Title I is not only to rectify past discrimination. It concentrates on eliminating current barriers to employment.

Processes of reasonable accommodation are therefore essential to this purpose. Equal employment opportunities for the disabled are not mere social endowments. Without adjustments which eliminate discrimination the purpose of equal opportunity cannot be achieved, and these acknowledged requirements of justice cannot be met. Clearly the ADA here observes principles of distributive justice. That is, public interests including employment must be adequate and must accommodate everyone without discrimination, each according to his work, needs, special circumstances and so on. Reasonable

³⁶ See EEOC 29 CFR 41-53 and DOJ regulation.

³⁷ Tucker B & Goldstein B, *Legal Rights of Persons with Disabilities: An Analysis of Federal Law*, 1st Edition, (Horsham, Pennsylvania: LRP Publications, 1991-1992), Vol. II, p. 22:18.

accommodation here is a sort of positive discrimination, of a kind required for 'reparative justice', resting on principles of distributive justice such as those of egalitarianism, resources and desert. In addition, it corresponds to the difference principle inasmuch as less advantaged would represent disabled persons. This process reflects the commitment of ADA to distributive justice which entails the balancing of competing interests, as discussed in Chapter 5.

Consequently, the ADA states that discrimination in employment is defined by failure to make reasonable accommodation.³⁸ ADA does not present limited and exact definitions for reasonable accommodation, since this varies according to specific situations, but offers examples. Hence 'reasonable accommodation' according to the ADA includes: making existing facilities used by employees readily accessible to and usable by disabled persons; job restructuring (by re-allocating or distributing the non-essential job functions); part-time or modified work schedules; reassignment to a vacant position (when accommodation within an employee's current job cannot satisfactorily be made); acquisition or modification of equipment or devices; appropriate adjustment or modification of examinations, training materials or policies; the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.³⁹ Reasonable accommodation could also include removal of physical barriers by building ramps or lifts, and provision of special car parking or transport systems.

Furthermore, reasonable accommodation also entails provision of auxiliary aids and services where required. This includes items such as special or adapted equipment and special human assistance.⁴⁰

In short, the relevant EEOC regulations make it plain that the duty to provide reasonable accommodation is bound up with the duty to enable people with disabilities to perform the essential function of their jobs. It should be also noted that reasonable accommodation does not necessarily mean best accommodation. According to the EEOC regulations, it is sufficient to meet the job-related needs of the individual being

³⁸ ADA 1990, s. 102 (b) (5).

³⁹ ADA 1990, s. 101 (9).

⁴⁰ ADA 1990, s. 101 (9). Also, the EEOC regulations widen the explanation of reasonable accommodation to include: (1) modifications or adjustments to the job application process ... (2) modifications or adjustments to the work environment... (3) modification or adjustments that allow for enjoyment of equal benefits and conditions. EEOC 29 CFR 1602 (o).

accommodated.⁴¹ This treatment seems to make reasonable use of the broad concept of distributive justice, dealing with the special circumstances and real needs of the disabled to rectify problems of disability rights issues.

Finally if the employer fails to reasonably accommodate a qualified disabled person, then the employer will be considered as violating the ADA unless undue hardship can be shown. On top of that, it is illegal for an employer to base an employment decision on an individual's need for an accommodation. It is not an excuse for an employer to claim that he did not receive technical assistance to comply with the law.⁴²

9. 2. 2. Failure in Presenting and Providing Reasonable Accommodation

Title I of the ADA does not leave the employers without a shield to protect them. In fact there are a number of defences, some of which were inherent in the foundation of the rules themselves and others provided for separately under the aforementioned Title.⁴³

The ADA relieves the employers of compliance with Title I if 'undue hardship' can be shown as a result. Employers are permitted to plead undue hardship in cases where reasonable accommodation has reached the point of threatening the very existence of the employer's business (bankruptcy provision).⁴⁴

'Undue hardship' is defined in Section 101 (a) and (b) of the ADA as: ' . . . significant difficulty or expense, when considered in light of . . . factors . . . which include . . . (a) the nature and cost of the accommodation needed under the Act; and (b) the overall financial resources of the facilities . . . (c) the overall size and financial resources of the covered entity; and (d) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; (e) the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.' Each case should be taken according to its merits and not only the financial consideration.

⁴¹ EEOC Inter-operative Guidance 29 CFR1630.9, App. at 419.

⁴² See Tucker B & Goldstein B, *Legal Rights of Persons with Disabilities: An Analysis of Federal Law*, 1st Edition, (Horsham, Pennsylvania: LRP Publications, 1991-1992), Vol. II, pp. 22: 33.

⁴³ See Wilson M, 'Defense to Discrimination Actions filed under the ADA', (1991), 732, *Labour Law Journal*, p. 65.

⁴⁴ Tucker B, 'The Americans with Disabilities Act: An Overview', (1992) 22(13) *University of New Mexico Law Review*, p. 34.

The Interpretive Guidance of the EEOC clarifies the issue of an employer pleading undue hardship in cases where providing reasonable accommodation might fundamentally alter the nature or operation of a business.⁴⁵ An example cited in the relevant EEOC Interpretive Guidance is the case of a nightclub owner being required to provide reasonable accommodation to a visually impaired waiter. Increasing the light in the nightclub might fundamentally alter the nature of the business to the detriment of the employer and ultimately his or her employees.⁴⁶

Thus if the employer can supply a satisfactory excuse he has the right to refuse reasonable accommodation. His excuse is accepted as justification because it represents a device to carry out justice and avoid harm.

It has been considered that failure on the employer's part to afford reasonable accommodation to a qualified disabled person in itself deemed to be discrimination. The main purpose of this rule is to place a duty on the employers in respect of applicants who may be able to perform the essential function of a job if afforded reasonable accommodation. The EEOC Interpretive Guidance prohibits employers from selecting an able-bodied person over a qualified disabled person if the reason is merely that the individual with disability needs reasonable accommodation.⁴⁷ Owing to their country's increased wealth, advances in medical science, and changes in popular morality, Americans can more readily recognise that failure to accommodate the interests of the individual with disabilities reasonably is a form of injustice.

The ADA may be compared in this regard with the DDA. Chapter 8 describes how, under the DDA, discrimination can be legally justified if the reason for it is both material to the circumstances of the particular case and substantial. The ADA's approach is similar, but restricts its rights to 'qualified disabled persons' who are able to perform 'the essential function of the job'. In other words, if the disabled person is not qualified, then

⁴⁵ This issue also arose under section (504) of the Rehabilitation Act, 1973. The Supreme Court stated in *Alexander v. Choate*, 469 U.S.287 (1985) that its previous rulings under section 504: *.....struck a balance between the statutory rights of the handicapped to be..... preserving it may be required to make reasonable ones.* ID, p. 300.

⁴⁶ See Quinn G, *Disability Discrimination Law in the United States, Australia and Canada*, 1st Edition, (Dublin, Eire: Oak Tree Press, 1993), p.22.

⁴⁷ EEOC Interpretive Guidance 29 CFR 1630.9(b), App. At 421.

discrimination against him would be justified, since the underlying aim is to find a just and reasonable way to achieve the interest of disabled and employer and to eliminate harm.

The employment provision is effective only where mechanisms ensure its implementation. The remedies available to wronged disabled persons are based on Title 7 of the Civil Rights Act 1964. For the purposes of the reform, victims of disability-based discrimination were to be dealt with like other victims of discrimination. The terms of Title 7 converge with Section 107 (a) of the ADA. The relevant primary enforcement agency is the EEOC and the remedies include reinstatement, back-pay, attorney's fees and other equitable injunctive relief, such as the federal district court might deed if the case goes to court.⁴⁸ To achieve equality among all victims, it was decided that the new punitive damages provisions should also apply to victims of disability discrimination.⁴⁹

Part II of the ADA addresses another central aspect of life and public interest, namely public services. These must be as available for the use of disabled persons as for any member of society.

9.3. Public Services

Since the economic aspect of everyone's life is crucial, no barriers should obstruct any individual's access to it. It is the key to living independently. On the basis of the principle of autonomy, living as independently as any normal person is a necessary requirement in a disabled person's life. Thus, in the light of the egalitarian principle and the principle of non-discrimination against disabled persons, public services should be accessible to disabled persons. Applying the concept of equality in the public sector should lead to equal distribution of public programmes, giving the disabled the opportunity to participate more fully in public life.⁵⁰

Title II: Public Services concerns non-discrimination against qualified individuals with a disability who, by reason of their disability, are excluded from participation in or denied the benefit with regard to employment, facilities, services, programmes, and

⁴⁸ See Quinn G, *Disability Discrimination Law in the United States, Australia and Canada*, 1st Edition. (Dublin, Eire: Oak Tree Press, 1993), p. 77.

⁴⁹ See *The Civil Rights Act 1990*, (Washington, DC: Bureau of National Affairs, 1990).

⁵⁰ Quinn G, *Disability Discrimination Law in the United States, Australia and Canada*, 1st Edition, (Dublin, Eire: Oak Tree Press, 1993), p. 85.

activities provided by 'public entities', including communication and specifically public transport. 'Public entities' includes any state or local governments, any departments, agency and establishment.⁵¹ Regarding employment, however, Title II basically obliges state and local government entities to comply with the mandates indicated in Title I dealing with the private sector as described above. Title II also covers schools' programmes and activities, including those which are not covered by the Individuals with Disabilities Education Act, e.g. programmes open to parents or the public, ceremonies, parent-teacher organizations, meetings, plays and adult education classes.⁵²

As in Title I, negative differential treatment is prohibited under Title II in the light of the principle of equal treatment. Similarly, Title II prohibits discrimination against the associates of persons with disabilities on the basis of that association.⁵³ It is an attractive point that the protection of the disabled extends to his associates to assure his interest. ADA here is unlike the DDA which is satisfied to cover only the disabled.

As stated above, Title II stipulates that to benefit from this provision the disabled person must be qualified. A qualified person can be defined as an individual who, with or without reasonable modifications to rules, policies and practices, the removal of architectural, communication, or transport barriers, or the provision of auxiliary aids services, meets the essential eligibility requirement for the receipt of services or participation in programmes or activities provided by a state or local government.⁵⁴ Provision is made, however, for this disabled person to receive only an 'equally effective' opportunity to participate in public life services. Thus it is not seen as reasonable to require a public entity to provide services for qualified disabled persons that it does not provide for others.

The significance of the condition of 'qualification' of a disabled person should be noted. The disabled person must meet an eligibility requirement. If he fails to do so, the provision does not protect him: discrimination would be justified. Thus the condition can be seen as a device for justification.

⁵¹ ADA 1990, s. 202.

⁵² PL 101- 476, amended and renamed PL94- 142, Education for all Handicapped Children of 1975. 20 U.S.C.1400 et seq.

⁵³ Tucker B, *Federal Disability Law*, 2nd Edition, (New York, NY: West Group. 1998), p. 159.

⁵⁴ See ADA 1990, s. 202 (2).

The obligation lies on the state or local government, however, to show that an eligibility requirement is essential. It is their duty to consider whether any of the following criteria apply to meet the requirements of a disabled individual: (a) modification of the rules, policies or practices; (b) removal of architectural or transportation barriers; (c) provision of auxiliary aids and services.

Discrimination occurs where a qualified individual is excluded from participation in, or denied the benefits of, services, programmes or activities of a state or local government, simply on grounds of his or her disability. For example, it is a violation of the ADA to restrict a wheelchair user's presence in a public park because the sight of his/her mobility impairment would upset other picnickers. It is also a violation of the ADA if a blind person is refused admission to a city art museum because he cannot enjoy the exhibits. Further, in the case of *Galloway v. Superior Court*, Joyce Hens Green, District Judge ruled that: '*After careful consideration of the statutes invoked and the pleadings submitted, it is clear that defendants have violated the Rehabilitation Act, the ADA, and the Civil Rights Act of 1971 by implementing a policy that categorically excludes individuals from jury service*'.⁵⁵

A paradox must be resolved. On the one hand, the rights of disabled persons to access equal opportunities for the use and enjoyment of public interests and services are upheld. On the other, the practical handicap of their special circumstances and needs subjects them to natural discrimination. To resolve this paradox, positive measures, that is to say, the adjustments or auxiliary aids that represent disabled persons' material needs, must make public facilities and services accessible to disabled people. By these means disabled persons may gain a rightful proportion of the distribution of public interests, as discussed in Chapter 5. In stipulating that public facilities and services must be accessible to the individual with disabilities, the ADA appears to be informed by a commitment to distributive justice. This includes requirements to make reasonable accommodation and/or provide auxiliary aids where necessary, as a requirement to equal treatment and 'remedial justice', except in cases where undue burden would result as described under Title I.⁵⁶

⁵⁵ 816 F. Supp.12 (D.D.C..1993).

⁵⁶ DOJ (28) CFR 35. 130 (a) (3).

To segregate people with disabilities inevitably relegates them to second-class status. Therefore it is a violation of the ADA if the state or local government fails to meet disabled people's needs in respect of any service or activities.⁵⁷ For instance, it is a violation of the ADA to segregate seating for persons using wheelchairs to the backs of theatres, or to require such persons to sit near exits. In addition, it is discrimination for a state or local government to apply an eligibility requirement or standard that screens out or tends to screen out a disabled individual, or a class of disabled individuals, from fully and equally enjoying any goods or service. Justification for doing so may be that such criteria can be proven necessary for the provision of the goods and services.⁵⁸ The wishes, tastes, or preference of other clients or participants may not, however, be used to justify criteria that would exclude or segregate individuals with disabilities.

The purpose of the ADA is to pursue justice, since it sees it as a given right and not as an act of charity that disabled persons should enjoy public interests by means of reasonable accommodation. Thus it is concerned to carry out these obligations through the judicial system. Regarding the enforcement and remedies of Title II, the ADA establishes a system of eight federal agencies that are responsible for enforcing the ADA criteria for state and local governments. Each agency processes complaints about the components of state or local government that exercise responsibilities most like their own. The DOJ will determine any dispute arising between the agencies.⁵⁹

When a state or local government refuses to enter into voluntary compliance or negotiations have failed, the designated agency refers the matter to the DOJ with recommendations for appropriate action. Thus, a lawsuit can be filed at any time against a state or local government. Either an individual with disabilities or an organisation representing an individual with disabilities may file lawsuits. Under Title II of the ADA the remedies available are similar to those provided by Section 504 of the Rehabilitation Act 1973. These remedies include court orders to force the state or local government to comply with ADA, and also cover the Attorney's fees.

⁵⁷ DOJ (28) C.F.R.35. 130[b] [1] [IV], 35. 130[c], 35. 130 [d].

⁵⁸ DOJ (28) C.F.R. 35. 130 [b] [8], DOJ, 1992, P.12).

⁵⁹ See Gostin L & Beyer H, *Implementing the Americans with Disabilities Act*, 1st Edition, (Baltimore, MD: Paul H. Brookes, 1993), p. 68.

Courts may also award damages under Section 504. The Supreme Court held that ‘under a similar law – Title IX of the Education Amendments of 1972, which prohibits sex discrimination - courts may award damages’.⁶⁰ Therefore, cash awards for damage seem likely to be available under Title II of the ADA.

The second part of Title II deals with forms of public transport. The latter plays an essential role in the life of disabled people, relating to all aspects of life such as social life, education, employment and so on.

9.3.1. Public Transport

Prior to the Americans with Disabilities Act, the right to access and use public transport had little precedent in federal law. The law represents a new social contract between America and citizens with disabilities. In the United States much transportation is in the hands of private operators. As will be seen below, Title III also deals with the provision of private transport services. Part of it applies to private entities primarily engaged in the business of transporting passengers and another part applies to private entities providing incidental travel services.

The Act provides people with disability with the absolute right of access to, and full use of, all public carriers that provide public rail or ground transportation. Following principles of equal consideration and autonomy, the ADA states that all people who have a mobility impairment or use wheelchairs have the right of access without discrimination to public transport by bus and rail, including fixed route systems, paratransit and demand response system, and to transport facilities.⁶¹

Generally speaking, the ADA prohibits discrimination in public transport provided by both publicly funded and privately funded entities. Public transport means transport by bus, rail, or any other conveyance that provides the general public with general or special services on a regular and continuing basis.

⁶⁰ *Franklin v. Gwinnet County Public Schools*, 503 U.S.60 9(1992).

⁶¹ See Ferish D & Thomas P W, *Complying With The Americans With Disabilities Act*, 1st Edition, (London, UK: Quorum Books, 1993), p.182.

By extension, after 25 August 1990, it was discrimination under the ADA for a transit agency to lease a non-accessible new vehicle, unless the transit agency could demonstrate that the system, when 'viewed in its entirety', provided a level of service to individuals with disabilities equivalent to the level of service provided to the general public.⁶²

Concerning public transport by intercity and commuter rail, the Act required Amtrak, which operates intercity rail transit in the United States, to have at least one passenger car per train appropriate for the use of people with disabilities. Amtrak was required to meet all the demands of the Act by 26 July 1990.⁶³ With regard to Commuter, Rapid and Light Rail the law required that from the same date, on light and rapid rail trains of minimum two cars in length at least one car per train should be accessible to individuals with disabilities (Intercity Rail).

The Act also refers to new vans with a seating capacity of fewer than eight passengers. These are required to be readily accessible to and usable by individuals with disabilities (including wheelchair users) unless the entity can demonstrate that the system for which the van is being purchased or leased, when viewed in its entirety, provides a level of service to such individuals equivalent to the level of service provided to the general public.⁶⁴

By analogy with the requirement of 'reasonable accommodation' under services facilities, public entities are therefore placed under obligation to make public means of transport accessible. The obligation covers booking systems and making disabled passengers comfortable and safe.⁶⁵ As in the provisions of services and facilities, it is a response to the principles of equality and distributive justice. This means that failure to comply is counted as discrimination and injustice.

⁶² DOJ, 42 U.S.C.12144; 49 C.F.R 37. 77).

⁶³ (42 U.S.C.12162 49 C.F.R. 37.91).

⁶⁴ See ADA 1990, s. 304 (5), and Tucker B, *Federal Disability Law*, 2nd Edition, (New York, NY: West Group, 1998), p. 193.

⁶⁵ See Tucker B, *Federal Disability Law*, 2nd Edition, (New York, NY: West Group, 1998), p. 188.

Title III of the ADA covers Public Accommodation. This is an extension to the aspects of society to which the disabled require access in order to lead full and independent lives.

9. 4. Public Accommodation

The majority of human and social economic needs, such as restaurants, hotels, shopping centres, pharmacies, etc. are provided in the private markets. It is essential that these markets too make such accommodation as to ensure that they are adequate and accessible for the disabled, offering the possibility of social integration. Again the imposition of equal treatment and recognition of disability needs stems from the principle of justice, which maintains that all people should enjoy the same advantages. The ADA responds by affirming the rights of disabled persons to enjoy public goods, facilities, and services free from disability-based discrimination. This includes provision of any reasonable process to enable a disabled person to achieve these ends. Title III of the ADA rectifies discriminatory practices in ‘public accommodation’ that have been experienced by individuals with disabilities.

Referring to the relevant concept of ‘discrimination’ that includes meanings of isolation, exclusion, and denial of opportunities, Title III of the ADA clearly outlaws disability-based discrimination in terms of public accommodation. It declares that: *‘no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodation of any place of public accommodation by any person who owns, leases...’*⁶⁶

The provisions covered under Title III refer to the provisions of goods and services provided by the private sector. The ADA does not define the term ‘public accommodation’. Instead it provides a broad list of examples of what the term covers. It includes (a) places of housing such as inn, motel, hotel and so on; (b) shops serving food or drink, e.g. restaurant; (c) places of exhibitions or entertainment such as theatre, cinema, concert hall and sports stadium; (d) places of public gathering, for example auditorium, convention centre; (e) sales or rental establishments such as bakery, grocery, shopping centre; (f) service stores such as laundromat, dry cleaner, petrol station, insurance office,

⁶⁶ ADA 1990, s. 302.

offices of physician, pharmacy, hospital and so on; (g) transport stations like public transport depot or station; (h) places of public display or collection such as museum, gallery; (i) places of recreation like park and zoo; (j) places of education, e.g. schools and colleges; (k) social service establishments for example, daycare centre, senior citizens' centre; (l) places of exercise or recreation, e.g. gym, other place of exercise.⁶⁷

This list includes the majority of goods and services that are needed daily by the disabled. As in the DDA, however, the scope of goods and services is broad and can develop and increase with time. Thus a finite list is less appropriate than examples, which can be adjusted in accordance with the ongoing developments in a society.

To come within the coverage of Title III, an entity must fall within one of the above twelve categories of public accommodation. The examples given are merely illustrative, however, and the Title applies to all places and establishments almost without exception. This is unlike Title I, whereby small businesses are exempt from the employment provisions. Although some entities such as religious entities are exempted, they generally include a public place of worship. This should be provided and made accessible for disabled persons, since their right to worship is equal to others'. A further exemption is private clubs.⁶⁸

Services covered in the list include hospitals, schools and colleges. In the DDA these provisions are treated separately and explicitly owing to their importance. In this respect the DDA is more satisfactory.

In terms of the condition of a disabled person's being 'qualified' in order to receive protection, Title III is different from Titles I and II. Under these titles, where the law requires that the individual must be qualified to do the job or receive the services, the disability discrimination law would be seen as just removing artificial barriers and prejudice. In Titles I and II these problems were resolved by requirements of 'reasonable accommodation' as discussed above. Under Title III qualification is not required. It would be a difficult and always stigmatising burden to prove one's qualification to participate in public accommodation. On the contrary, in Title III the lack of qualification effectively

⁶⁷ See ADA 1990, s. 301 (a) (1).

⁶⁸ ADA 1990, s. 307.

becomes an affirmative defence. That is to say that the defendant will bear the burden of proof.⁶⁹ This lack of qualification requirement in Title III produces the presumption that all persons with or without disability are qualified for public accommodation. In the light of the principle of equal respect, public life and mainstream society should be open and accessible to all, without the need for disabled persons to prove their qualification for public services. Therefore all categories of disabled persons are covered.

9.4.1. Reasonable Modification

Title III thus requires reasonable modification to be made to enable a disabled person to enjoy public accommodation. That is to say, reasonable modifications must be made in policies, practices or procedures when such actions are necessary to provide goods, services, accommodation, etc. to persons with disability. Failure to do so is seen as an aspect of discrimination, except when the reasonable modification would fundamentally alter the public accommodation.⁷⁰ In other words, although the ADA does not require the fundamental alteration of the public world, it does require public accommodations to take significant steps toward making their facilities and services more meaningfully available to people with disabilities.⁷¹

The ‘reasonable modification’ here is similar to the ‘reasonable accommodation’ under Titles I and II. It is a sort of positive discrimination of carrying out justice, since all of these processes aim to bring disabled persons to the level of others by making public accommodation adequate and accessible. Again it reflects the commitment of the ADA to distributive justice, rectifying discriminatory practices by implementing a compensatory system or remedial justice of resources and advantages to meet the needs of disabled persons (see Chapter 5).

The case *Marie C. D. Amico v. New York State Board of Law Examination* is an instance of court treatment under Title III ‘reasonable modification’.⁷² The plaintiff suffered from a severe visual disability. Prolonged reading or writing could result in a burning sensation in her eyes and it was imperative to take breaks. She was accommodated

⁶⁹ Gostin L & Beyer H, *Implementing the Americans with Disabilities Act*, 1st Edition, (Baltimore, MD: Paul H. Brookes, 1993), p. 128.

⁷⁰ DOJ (42 U.S.C. 12182 [b] [2] [A][ii]).

⁷¹ DOJ 1992; 28 C.F.R. 36. 402 ET SEQ.

⁷² 813 F. Supp. 217 (1993).

at her law school and now demanded similar accommodation while sitting the bar exam. She had previously sat the bar exam and failed. She particularly demanded to be allowed to take the bar exam over four days instead of the normal two. She won her case and the board was required to provide the 'reasonable accommodation'.

Moreover the entities covered are required to take action when necessary to ensure that no disabled persons are excluded by the absence of auxiliary aids. Thus these entities must provide necessary auxiliary aids and services for the disabled.⁷³ The term 'auxiliary aids' includes, for instance, qualified interpreters or readers for the hearing-impaired, or modification of equipment or devices, etc. This requirement appears to operate like the notion of reasonable accommodation under Title I. As a measure ensuring effective equality, on the part of the public entity it represents positive discrimination to reach out to the disabled persons.⁷⁴

Further, and regarding discriminatory eligibility criteria, this matter is also covered by Title III of the Act. Discrimination is considered to occur through the enforcement of eligibility that screens out or intends to screen out an individual with a disability from full enjoyment of a service, unless it can be demonstrated that such criteria are necessary for the provision of goods or services.⁷⁵

As a kind of justification, Title III does not apply where the individual concerned poses a direct threat to others which constitutes a significant risk to health or safety. The exemption of safety was illustrated in a recent case where the court pointed out: *'There is indication in the pleadings..... That the defendants conducted an individualized assessment and discrimination that the plaintiff poses a direct threat to the health and safety of others. In fact there is no indication that the defendants undertook any type of enquiry to ascertain the nature, duration and severity of the risk ..., [or] the probability that the potential injury will actually occur, or whether reasonable modifications of policies, practices, or procedures will mitigate the risk allegedly posed by the plaintiff.'*⁷⁶

⁷³ ADA 1990, s. 302 (2) (A) (iii).

⁷⁴ See Quinn G, *Disability Discrimination Law in the United States, Australia and Canada*, 1st Edition, (Dublin, Eire: Oak Tree Press, 1993), p. 102.

⁷⁵ ADA 1990, s. 302 (2) (A) (i).

⁷⁶ *Lawrence O. Anderson v. Little League Baseball Inc.* 749 F. Supp 342 (1992).

9. 4. 2. Barrier Removal in Existing Facilities and Alternative Methods of Removal

Title III of the ADA declares that it is discrimination to fail to remove specified barriers where this is ‘readily achievable’. This applies in existing facilities to architectural barriers and communication barriers that are structural in nature, and in existing vehicles to transportation barriers.⁷⁷

The stress on reasonability of quick enforcement of the removal requirement is an attractive point in the ADA. The term ‘readily achievable’ is defined by the Act as easily accomplishable and able to be carried out without much difficulty or expense.⁷⁸ For example, readily achievable barrier removal includes the lowering of telephones, the re-arranging of seating, e.g. in restaurants, the addition of grab bars, the boxing of pipes in toilets to prevent burning, and the removal of high pile carpeting to allow wheelchair mobility.⁷⁹

As many entities will find it hard to remove all barriers at once the relevant DOJ regulations require priority to be given as follows: (a) removal of barriers to access into the facility from public thoroughfares; (b) removal of barriers to access to areas where the services/goods are provided; (c) removal of barriers to access/use of restroom facilities; and (d) any other measures necessary.⁸⁰

Concerning alternative methods of removal, all places which include commercial facilities must make reasonable modifications, such as widening aisles or enlarging doors and signs, in order to provide access to their establishments to people with disabilities. All new buildings constructed after 26 January 1993 as places for public accommodation should be accessible to people with disabilities. All barriers must be removed if ‘readily achievable’.

Where the removal of the barriers causes hardship or considerable expense the entity covered must seek a possible alternative arrangement to make their goods, devices and accommodations available to everyone. For example, they might use kerbside or home

⁷⁷ ADA 1990, s. 302 (2) (A) (iv).

⁷⁸ ADA 1990, s. 302 (9).

⁷⁹ DOJ (28) CFR 36. 304 (b) 1-21.

⁸⁰ DOJ (28) CFR 36. 304 (c).

delivery service; they should provide assistance to retrieve items in an accessible location; cinemas should rotate films to be shown in an accessible first floor theatre.

On the basis that the rights of disabled persons to equal enjoyment of public accommodation are affirmed, then the necessary means to implement this provision is through judicial channels.

9. 4. 3. Remedies

Victims of discrimination are entitled to actual remedies under Title I, based on Title VII of the Civil Rights Act of 1964. The notion was to put the victims of disability-based discrimination on much the same footing as the victims of other discrimination, at least for the purpose of redress. The ADA may grant all types of 'equitable' relief.

Punitive damages are also available for international disability-based discrimination if the employer acted with malice or reckless indifference. The total award of punitive and compensatory damages for emotional distress and future monetary loss for each individual with disability is limited according to the size of the employer. Federal legislation has, however, been introduced in Congress. The Equal Remedy Act would eliminate these caps on compensatory and punitive damages on the basis of fairness and equity.⁸¹

The final area addressed by the ADA is that of telecommunication. Again this is crucial to enable disabled people to lead an autonomous social life. The same principles of recognition, equal respect, needs and autonomy uphold disabled people's right to use telecommunication. To make it adequate and accessible for their needs, reasonable modification is again applicable.

9. 4. 4. Telecommunication

It is estimated that some twenty-four million Americans have a hearing impairment. To implement the ethic of equality requires that an individual such as a disabled person be able to communicate with the world at large.⁸²

⁸¹ *The Civil Rights Act 1990*, (Washington, DC: Bureau of National Affairs, 1990).

⁸² Quinn G, *Disability Discrimination Law in the United States, Australia and Canada*, 1st Edition, (Dublin, Eire: Oak Tree Press, 1993), p. 110.

Regarding telephone transmission, in 1934 Congress passed the Communications Act, establishing Federal Communication (FCC). In the light of the rights of disabled persons to telecommunication, Title IV of the Americans with Disabilities Act promises to eliminate many of the barriers to this access.⁸³ The Title obliged local and long-distance telephone companies to afford nationwide telephone relay services by 26 July 1993. This provision enables individuals with speech impairments or hearing losses or who are hard of hearing to use the telephone to communicate with anyone, anywhere, and at any time.

Under Title IV the telephone companies are responsible for affording relay services in the geographical area in which they provide a conventional telephone service. The Title amends Section 225 of the Federal Communication Act of 1934.⁸⁴

The main object of Title IV is to ensure that individuals with hearing impairments are not isolated from public, economic and social life such as family and friends simply because they cannot use the telephone. People with hearing losses now have the advantage of transmission devices for the deaf (TDDs) to connect with the outside world. The device was defined by the ADA as a machine that employs graphic communication in the transmission of coded signals through a wire or radio communications system.

Another advantage for deaf people introduced by telephone companies is the use of text telephone TTYs. This is relatively new, and is a device with a keyboard that uses graphic communication to send or receive coded signals over radio or wire communication system. Hence, individuals with hearing losses or speech impairments can conduct telephone conversations by using text telephones.

Despite the fact that the invention of the text telephone opened the pathways of communication between its users, it did not eliminate the telephone barriers that existed between text telephone users and conventional voice telephone users. Although the

⁸³ Title IV of the Americans with Disabilities Act of 1990 (PL – 101-336) is published as Statute at large (104stat. 366-369), and codified in the United States code (47U.S.C. 255, 611[Supp.11. 1990]).

⁸⁴ Generally, see Peltz Strauss K & Richardson R E 'Breaking Down the Telephone Barrier- Relay Services on the Line', (1991), 64, *Temple University Law Review*, p. 583.

telephone users could call each other, they still could not use the telephone to access businesses, employers, and others who used conventional voice telephone.⁸⁵

Title IV gives permission to states to continue operating and enforcing their own programmes so long as they receive Federal Communication Commission certification to do so. The FCC's rules state that in order to obtain relay certification, a state must submit the relevant documentation to FCC that proves that its programme will: (a) meet or exceed all of the operational, technical, and functional minimum standards contained in the FCC's regulation; (b) provide adequate procedures and remedies to enforce the state programme; (c) not conflict with federal law where the state's programme exceeds the minimum standards contained in the FCC regulations.⁸⁶

Accordingly, the FCC is responsible for introducing detailed regulations for implementing Title IV. The FCC is also obliged to introduce regulations to require carriers to operate relay services on a 24-hour basis, to require that users of relay services pay rates no greater than those levied for ordinary services, to prohibit carriers from refusing calls of a certain duration and to prohibit disclosure of the content of calls etc. Complaints are directed to the FCC. State programmes of compliance must be certified by the FCC.

To conclude, relay services have spread nationwide since the passage of the ADA. Thus, all the states of the United States have comprehensive service relay programmes in operation. The majority of these states have taken genuine steps to confirm that their service will comply with the FCC guidelines. Care must be taken to ensure that relay programmes effectively meet the needs of the text telephone user community, so that the community can finally enjoy equal opportunities in employment, education and recreation throughout all facets of society.⁸⁷

Concerning Closed-Captioning of Public Service Announcement, Section 402 under the Title amends Section 711 of the Communications Act of 1934. It requires that any television public service announcement, if funded in whole or in part by any agency or

⁸⁵ Tucker B & Goldstein B, *Legal Rights of Persons with Disabilities: An Analysis of Federal Law*, 1st Edition, (Horsham, PA: LRP Publications, 1991-1992), Vol. II, p. 22: 65.

⁸⁶ DOJ 47 C.F.R. 54. 605. [b].

⁸⁷ See Gostin L & Beyer H, *Implementing the Americans with Disabilities Act*, 1st Edition, (Baltimore, MD: Paul H. Brookes, 1993), pp. 160-171.

instrumentality of the federal government, shall include closed-captioning of its verbal content.⁸⁸

Ultimately, the findings of Chapters 8 and 9 are that the contents and main features of the ADA and the DDA are generally similar. The Acts share common ground in terms of the meanings of discrimination, its rectification, the provisions covered, and reasonable accommodation. In its investigation of the concept of discrimination, however, the DDA is more organised, elaborated and specific than the ADA. The DDA's wider definitions of discriminatory forms and their justifications have been discussed in Chapter 8.

Furthermore, there is some variation. Firstly, the DDA does not deal with indirect discrimination except through connotation of 'reasonable adjustment', whereas the ADA in its treatment of discriminatory aspects recognises indirect discrimination. Secondly, the meaning of disability varies, since the DDA approaches it through a 'medical' model', whereas the ADA deals with it through a more effective 'social model'. Thirdly, the ADA, but not the DDA, includes persons who have a historical disability and persons who suffer from stigmatisation for some impairment. Fourthly, the ADA considers those who have association with the disabled, such as families or friends, as persons covered by the Act who must be protected from discrimination. The DDA's scope extends only to the disabled themselves. Fifthly, the DDA now includes education and public transport as main topics under one anti-discrimination act, resulting in more comprehensive protection of disabled persons' rights. In contrast, ADA includes neither education nor health under one effective anti-discrimination act, although these are addressed in separate acts. Finally, the DDA's 'Disability Rights Commission' constitutes an enforcement mechanism for the Act which is united under one roof and is endowed with power to implement the Act. This is superior to the enforcement mechanisms for the ADA which are split between several bodies.

Despite the differences, both Acts represent the application of relevant principles of equal respect, recognition, non-discrimination, needs, self-respect, and autonomy to uphold the rights of disabled persons. In addition they guarantee these as constitutional entitlements and rights worthy of human dignity and therefore, they reflect a commitment

⁸⁸See DuBow S, 'The Television Decoder Circuitry Act – TV for All', (1991), 64 *Temple University Law Review*, p. 609.

to distributive justice as a response to disability laws. This is the basis for their advanced and successful approach to the rectification of disability problems.

Further, they clearly comply with the international disability rights reform agenda. Indeed, one may note that the new International Disability Rights Convention (2007) was influenced by ADA and DDA in its investigation of disability rights issues, for example, in respect of the duty to make reasonable accommodation.

Evidence of the achievements of DDA and ADA confirms distributive justice as the appropriate path towards reformation of disability rights and discrimination problems. This comparative study offers results which can be balanced against a new assessment of Saudi disability laws.

The final stage of this thesis is to identify ways in which the pursuit of justice can reform the disability laws of any state, and specifically of Saudi Arabia. Questions remaining to be addressed in the final chapter concern the fundamental principles for such reform, the legal framework and the shape of the resulting Act, and mechanisms to enforce its implementation.

CONCLUSION: DISABILITY AND THE PURSUIT OF JUSTICE

Introduction

The major aim of this thesis is to consider the rights of persons with disabilities in Saudi Arabia. An investigation into problems of disability rights began by identifying motives of discrimination in respect of disability rights, and diagnosing points of malady. A need was discovered for reform of Saudi Arabian disability laws, in order to achieve respect for and promotion of the rights and situations of disabled persons. Thus it is seen that the prescribed remedy for the situation lies in the pursuit of justice.

Examples of legislation in the UK and USA indicate directions in which the law in Saudi Arabia might be reformed. Further, the international declaration and the new convention of the rights of disabled persons illustrate the necessary lines of reform.

Political philosophy drawn on in this thesis suggests that reform of the sort contemplated has to do with broad ideals and principles such as need, fundamental interests, equal respect and self-esteem, autonomy, and distributive justice, etc. The goal of this concluding chapter is to draw these principles together to establish concrete and valid grounds confirming the rights of disabled persons.

Islamic contexts offer convincing possibilities for the treatment of disability rights. Further interpretation is required in order to prescribe features of a modern anti-discrimination disability act such as emerges from comparison with the DDA and ADA. These have been examined in respect of the possibilities and risks of transplantation. To confirm the validity of this procedure, a blueprint is required with concrete proposals for a disability rights law and an enforcement mechanism proposal. Effective recommendations should support the blueprint.

To achieve these aims the chapter is divided into two main sections. Section one reviews in three parts the themes relevant to disability which have been fully discussed in previous chapters. Part 1 summarises the themes which underpin the Western position: fundamental interests, needs, equal respect and self-esteem, autonomy, non-discrimination and distributive justice. Part 2 reviews ways in which interpretation of the relevant Islamic principles and contexts may be taken further to serve the goal of the protection and reform of disabled persons' rights. Part 3 examines transplantation of legal materials from one culture to another. Section two presents a detailed blueprint for reform, followed by an account of the 'disability rights commission' proposed as the enforcement mechanism for the new Act, and a series of recommendations.

10. 1. Review of relevant themes

The humanity of a human being emanates from his soul, not from his shape. A disabled person, who suffers from physical and mental impairments, and also from social and political exclusion, must be considered human. As a result, he must be treated with regard to his special circumstances which are beyond his control.¹ Social and moral models of disability as discussed in Chapter 2 are the appropriate parameters for dealing with the complications of disability rights. They entail treating disability rights in the context of human rights. Accordingly, general human rights such as the right to life, health, work, freedom, justice, etc. are affirmed for the disabled as for the non-disabled.

It is inherent in the situation of disabled persons that they may face aspects of discrimination and exclusion. This results from both inadequate legal responses and the view that their welfare is a matter for charity, not justice. The situation gives rise to a need for reform of the legal and social situations of disabled persons. Reform should be implemented through consolidation of their rights, which must be ascribed to valid principles in order to make enforcement obligatory.

10. 1. 1. Western perspectives on disability rights issues

Western legislation for disability refers to specific themes and principles connected with the concept of human rights. The concept of a right turns on its being established on the basis of **interests** that safeguard a person's life. The corollary of a right is a corresponding

¹ See full definition of disability and disabled person in Chapter 2.

duty on the part of another, whether person, government, or law, or the whole of society. Personal interest is a valid ground for the assertion of a right, and provides a justifiable reason to claim the right. Thus, provided that the right was justified on the ground that it serves the right-holder's interest, it is a fundamental and moral right inherent in the humanity and dignity of a person, regardless of his shape or sex and race and so on, and is considered to be an absolute value.

Therefore, the interests of a disabled person are the foundation of his claim to realise his fundamental rights equally with others. They entail the conditions he requires in order to enjoy fundamental rights which enable him to live an independent and good life. For a disabled person, the interests claimed are for action that extends beyond mere forbearance: they are intended to provide the rights-holder with resources. Such rights are interventionist and hence depicted as a positive rights-claim. Hence, the formulation of the trump card concept of rights, and the concept of valid rights-claim, are sufficiently important to endorse the establishment of societal sanctions to protect the rights of disabled persons.

The term 'interest' represents a broad concept depending on circumstantial features of the individual. Sometimes a disabled person's fundamental interests can be served only where there is provision of measures appropriate to his circumstances and **needs**. Such measures might be called 'positive discrimination' or 'affirmative actions' resting on valuable principles such as need, respect, autonomy, justice, equality and non-discrimination as a form and requirement for 'remedial justice'.

Fulfilment of need is essential for life, and it is central to human welfare that the person with unmet fundamental human needs will live in hardship and may suffer harm. Although the disabled person's needs are included within the general concept of human needs, he nevertheless has special needs according to his position and circumstances. Some examples of special needs would be considered 'core' rights, since they are the condition for fulfilling core human rights, for instance, the right to healthcare or provision of medical and reparative equipment. Specifically, the special needs of a disabled person should include all areas not routinely covered by fundamental rights unless in the form of material assistance, such as access to general facilities and employment, and to all social and political aspects of life. In certain cases of special needs of a disabled person, some

exemptions and precedence would be required. Accordingly, the principle of need is a necessary and moral ground for establishing the rights of disabled persons.

The concepts of interest and need are closely connected to the concept of **equal respect**. Respecting a person consists in giving adequate weight to his interests. It rests on a moral obligation to respect a person for his inherent dignity as a human being who has the same human requirements as another. To be a person is to have a value that is unlike that of any other person. All persons should attribute this value to themselves and must therefore acknowledge that every other person has the same value on the same grounds, because human nature is common to all persons. Respect for differences and acceptance of persons with disabilities as a part of human diversity and humanity is a moral and religious duty. Consequently, opportunities must be equal and open to all, including to disabled persons.

To be a person is to have a value that is unlike that of any other person. Since all persons should attribute this value to themselves, they must therefore acknowledge that every other person has the same value. Human nature is common to all persons. To respect a person's value promotes his sense of self-esteem and self-respect. This has an effective impact on his life plans, as well as on his function and stature in society. Thus, **self-esteem** is a fundamental interest of the disabled person which must be secured. As such it becomes another justifiable ground to establish disability rights.

In Chapter 4 these concepts were referred to the philosophy of Kant and Hegel: '*Be a person and respect others as a person*'. This means **reciprocal recognition** of all persons on an equal basis before the law depending on 'egalitarianism' with their individuality, needs and all interests being adequately accommodated.

Therefore, equal respect is one of the most relevant principles forming the grounds for establishing the rights of disabled persons. Respect for a disabled person in this regard consists in respecting his interests by making them adequate and accessible without discrimination. One of the disabled person's most important interests to respect is the enjoyment of personal **autonomy**.

Autonomy is simply the right to self-government or independence. Individual autonomy is a basic moral and political value. Moral weight is attached to an individual's ability to manage himself, independent of his role in social structures and political institutions. The right of autonomy rests on the capacity for rights of freedom to make one's own choices, since liberty regards the promotion and protection of personal autonomy as its basis. Therefore, autonomy is often cited as the ground for treating all individuals equally from a moral point of view (see Chapter 3).

Since the fundamental value of autonomy means deserving respect for one's own ability to decide for oneself, then autonomy is an absolute value in a disabled person's life. The disabled person's interest is promoted by his having an autonomous life: it is in his interest not to be subjected to the prejudice of others who would prevent him from enjoying his rights and let him remain an inferior second class person. In addition, the right of autonomy derives from the rights of collective goods as discussed in Chapter 3. Therefore, a disabled person needs to be given the chance to live independently, by defining himself through work and founding his own family for example, and eliminating those barriers which prevent him from full social and political participation. Accordingly, autonomy is a valid and fundamental principle providing further grounds to establish the rights of disabled persons.

Since the rights of disabled persons are affirmed by resting on the valuable ideals of dignity, interest, need, equal respect and autonomy, therefore, these rights must not be subject to **discrimination**. Discrimination on the basis of disability means any kind of distinction, exclusion or opportunities denial which through its purposes or effects causes harm to disabled persons, by impairing or undermining the recognition and exercise of any human right. Discrimination may be direct or indirect. Direct discrimination treats a disabled person 'less favourably' than another in the same circumstances. Indirect discrimination is discrimination by applying an abstract principle, such as an unjustifiable condition which precludes someone disabled. Discrimination against a disabled person also includes denial of reasonable accommodation enabling him to enjoy his fundamental rights, or denial of positive discrimination as described in Chapter 4.

To practise non-discrimination is to follow a principle of strict equality and recognition of persons on the basis of common humanity. Here equality means the

impartial application of absolute justice. In the case of disabled persons, however, equality and non-discrimination are not absolute, but subject to human standards and principles of harm. Hence discrimination might in some cases be justified.

Instances of discrimination on the basis of disability are seen to be to the result of lack of **distributive justice**. Thus distributive *injustice* is one of the major impacts of discrimination. To address this problem, the matter of discrimination must be resolved by reviewing principles of distribution of resources. Distributive justice assumes that disabled persons have interests that merit adequate accommodation.

Chapter 5 explores the relevant principles supporting the concept of distributive justice. For instance, the principle of 'strict egalitarianism' insists that every person should have the same level of material goods and services. To this is linked the difference principle and the necessity of a system which compensates for differences. This was presented by advocates of the 'resource-based principle'. The resource principle takes account of the natural talents of the person with disability. It entails making adjustments so that compensatory resources are adequate and accessible to the disabled person, sufficient to place him on a level playing-field with others, and it represents 'remedial justice'. Accordingly, it has been suggested that 'disability' is likely to be regarded as one of the relevant principles of distributive justice because the latter offers convincing solutions for the complications of disability. Since the concept of distributive justice embraces consideration of the disabled person, the potential is given to treat disability in terms of for example, egalitarianism, resources, desert, welfare principles, etc.

To conclude, the important values of fundamental interests, equal respect and self-esteem, need and autonomy present a basis to establish clear rights for disabled persons and an obligatory reason to prohibit discrimination against them. Distributive justice must therefore be pursued as a means of securing these rights. The pursuit of justice entails the adoption of enforcement mechanisms through the statutory judicial court system as described below.

As the above principles of interest, need, respect, autonomy and justice have clear relevance, the UK and USA take them as their basis for dealing with the complications of disability issues. The themes are dealt with in DDA and ADA, both of which have

generated advanced and effective anti-discrimination disability legislations (see Chapters 8 and 9). To seek rectification of the position in Saudi Arabia whereby disability rights are subject to charity, it is invaluable to re-read relevant Islamic contexts in relation to these specific themes, which claim justice as a means of protecting the rights of disabled persons.

10. 1. 2. New readings of relevant Islamic contexts

The unseen source of discrimination of disabled persons in Saudi Arabia, which allows their rights to be met with charity rather than justice, is lack of real distributive justice. This has caused imbalances in social and political life for other social classes such as women and poor people, as much as for disabled persons.² Since the Islamic Shariah is the primary source for the fundamental law in Saudi Arabia, it is important to give new readings of the relevant Islamic contexts which establish the origins of the rights of disabled persons, of prohibition of discrimination against them, and of concepts of distributive justice.³

According to the *Qur'an*, Allah created man to worship him: *'I created the jinn and humankind only that they might worship Me'*⁴. The core message of Islam is to liberate man from all slavery except that of Allah. Hence Allah honoured humans and sent them preferential messages. One of these honours was man's appointment as a 'successor' of Allah, to make the earth prosperous by worshipping him and by building a worthy social and civil life. These commands have been affirmed by moral recognition and principles of dignity, equality and justice among people. Prophet Mohammad said: *'O people, your God is one, your father is one, all of you to Adam and Adam from clay. There is no difference between Arab and non-Arab, red and white except piety'*. This was also confirmed by Allah when he said to Prophet Mohammad: *'Say (to them Mohammad): I am only a mortal like you'*.⁵

To ensure the satisfactory progress of human life, the theory of 'Al-Maqased Al-Shariah' (objectives of Islamic Shariah) was created to safeguard it. The main part of this

² See Chapter, 7, p. 235, and Chapter 5, pp. 15-156.

³ Regarding sources of Islamic Shariah and fundamental laws in Saudi Arabia. see Chapter 1, p.

⁴ The *Qur'an*, Surah 51: Adh-Dhariyat, Verse No. 56.

⁵ The *Qur'an*, Surah 41: Fussilat, Verse No. 6.

theory, as stated in the *Qur'an*, is the protection of 'five necessities': religion, soul, mind, honour, and property (see Chapter 1).

The main aim of the protection of these 'five necessities' is to secure the general interests of people in their worldly existence and hereafter. Since religion is validated by the consequent rightness of people's lives when these necessities are fulfilled, therefore the adequacy of the life of people affirms the rightness of religion. Al-Ghazali indicates that the system of religion has no substance unless the system of life is satisfactorily in place. For instance, worship of Allah and enforcement of his tasks have no substance unless all essential needs for life, health, food and clothing etc. are satisfied.⁶

In order to implement 'Al-Maqased Al-Shariah', a secondary objective of 'Al-Maqased' is adhered to, that is, the method intended by Allah to protect the public interests and conduct of the people.⁷ Hence, objectives of Islamic Sharia have been divided into three norms: necessities, needs, and embellishments. Necessities, as above, mean the five basics which are indispensable for living. Needs, sometimes called 'parity of necessity' indicate anything the people need to promote their life and eliminate the harm to them which undermines their interests. Embellishment means adopting good behaviour and customs in which noble character and morality combine.⁸ Thus, morality is likely to be one of the sources of Islamic legislation.

It is seen that promotion and protection of the person's interest are the main goal of Islamic Shariah. As Ibin Taimiah said, Shariah was formed to achieve interest and exclude and reduce corruption.⁹ The interest of a person consists in giving him benefit or removing harm. The interest of a disabled person is null, however, unless his needs according to his special circumstances be satisfied and respected, in accordance with Islam's aim to eliminate harm. This respect rests on his right to dignity which is given by Allah to all mankind. In this regard Prophet Mohammad insisted on equal respect and treatment of persons when he said: '*Treat people as you like them to treat you*'.

⁶ In this regard, see Al-Ghazali M. *Al-Eqtasad Fi Al-Eiteqad*, (Cairo, Egypt: Matbat Sabeeh, 1974), p. 135.

⁷ See in this regard, Al-Shatibi E, *Al-Moafagat*, Vol. 2, (Beirut, Lebanon: Dar Alkotub Al-Elmiah 1988), p. 134.

⁸ For these divisions, see *ibid.*, p.135.

⁹ Ibin Timieh A, *Fatawa Ibn Timieh*, Jam'a Abdulrahman Ibn qasim, Vol. 2. (Riyadh, Saudi Arabia: Edarat Al-Bohooth Al-Ilmiah, 1982), p.48.

Pursuant to the dignity inherent in humanity, Islam assures us that liberty is a primary principle and a necessary requirement in human life. The human being is not a person of respect unless he feels with his essence and senses with his dignity and his capability to lead an independent life. Therefore, Islam affirms autonomy for a person to choose the way that he likes to live, as long as it fulfils his interests and does not violate the general principles of Islam.

It may be concluded that Islam establishes the rights of a person on the basis of the person's interest. In order for the interest to be realised, the essential needs and embellishments of a person must be satisfied, with enjoyment of dignity, equal respect, liberty and autonomy. Thus, the fundamental rights of a disabled person are affirmed by these valuable principles.

Islam strictly prohibits discrimination in fundamental rights. Allah said: '*O mankind! We created you from a male and a female, and have made you nations and tribes that you may know one another. The noblest of you, in the sight of Allah, is the best in conduct...*'.¹⁰ These words stress unity of origin and urge co-existence, with rejection of distinctions on any basis including disability (see Chapter 4).

Islam deals with discrimination in negative and positive forms under the Islamic principle 'achieving interests and reducing the harm'. Regarding positive discrimination, Islamic doctrine declares that harm must be removed and difficulty must be eliminated. Allah said: '*Allah tasks not a soul beyond its scope...*'.¹¹ Therefore, Islam affirms the rights of disabled persons to receive preferential consideration of their special circumstances as discussed in Chapters 2, 4, and 5. Also, as long as this principle stresses achieving interest, then any positive conduct responding to a disabled person's interest and dignity is a priority requirement.

Islam insists on non-exclusion of disabled persons and on recognising and respecting their special circumstances, by giving them preference in respect. Allah said: '*No blame upon persons who were blind, crippled...*': '*nor on yourselves if you have food from your home, or your parents' home... shall it be for you whether you eat together or*

¹⁰ The *Qur'an*, Surah, 49: Al-Hujurat, Verse No. 13.

¹¹ The *Qur'an*, Surah, 2: Al-Baqarah, Verse No. 286.

apart ...'.¹² Here Allah stresses the integration of disabled persons and their acceptance in society, saying they must not be blamed for their disability since it is beyond their control. Thus they must be treated as normal persons. Allah declares the rights of disabled persons to integration and non-discrimination to be a duty which must be enforced. The importance Allah attaches to this is seen in another verse warning people against violating their charge of respecting disabled persons and facilitating their rights. He promises to reward those who implement his task and to punish those who break his commands, saying: *'There is no blame for the blind and other disabled people.....And whoso obeys Allah and His messenger, He will make him enter Gardens...And whoso turns back, him will He punish with a painful doom'*.¹³

Islam affirms the fundamental rights of disabled persons and consideration of their special position and circumstances on the grounds of humanity, needs, equal respect and interest. It insists on giving and returning all rights to their beneficiaries and assuming the principle of justice as an obligatory requirement to distribute the rights. Allah said: *'Allah commands you that you restore deposits to their owners, and, if you judge between mankind, that you judge justly'*.¹⁴ In this verse, deposits refer to the fundamental rights of people, merited by virtue of their humanity. An Islamic scholar has argued that the address here is to the head of the Islamic state (government), to distribute fundamental rights justly, including natural resources, wealth, incomes and so on.¹⁵ These rights can never be distributed justly following relevant principles unless there is effective political action. Thus political justice in Islam is seen as a religious duty. Accordingly, it is the government's religious duty to ensure that disabled people enjoy their rights.¹⁶

There remains the question as to the method whereby rights can be distributed justly. In treating human issues, Islam generally presents general principles but leaves the specifics to the particular circumstances of time and place. Some of these principles are relevant to the issue of disabled persons' rights and the need to treat them equally with non-disabled people in respect of their special needs and circumstances.

¹² The *Qur'an*, Surah, 24: Al Noor, Verse No. 61.

¹³ The *Qur'an*, Surah, 48: Al-Fath, Verse No. 17.

¹⁴ The *Qur'an*, Surah, 4: An-Nisa, Verse No. 58.

¹⁵ In this regard, see Al-Tabari M, *Tafsir Al-Qur'an Al-Karim*, Vol. 2. (Riyadh, Saudi Arabia: Edarat Al-Bohooth Al-Islamiah, 1982), p. 85.

¹⁶ In this regard, see Chapter 5, p. 158.

Firstly, a general principle in Islam declares that '*whatever leads to a duty is itself a duty*'.¹⁷ Namely, the means are as important as the ends, for example, if the government's duty is to ensure the disabled person's right to enjoy general facilities, so these must be made adequate and accessible for him. Secondly, the Islamic '*Al-Zakat*' system means taxing the rich for the poor and it is the government's duty to maintain the balance between wealth and income. This system is one of the basic elements of Islam and it is a religious duty to implement it.

Furthermore, Islam takes concepts of differentiation into account in considering its basis for distribution of benefits and burdens in accordance with the principle of equality in fundamental rights and principles of justice. The principle of differentiation in Islam takes account of natural talents and holds any difference to be beyond the individual's control. Islam treats these differences through principles of '*Al-Zakat*' or obligation of the government to redress the balance. In addition, Islam requires the government to maintain a balance between ownership and personal desert. In this regard, it deals with disabled persons' interests and needs through a compensation system as a reparative justice (see Chapters 4 and 5).

Otherwise, as social justice is a religious requirement whose purpose is to rectify unequal distribution of rights, Islam affirms that social, political and economic wealth should be shared among all people. Thus social justice covers all aspects of living. People can enjoy social wealth and political power among themselves following particular procedures compatible with Islamic principles. But Muslim society is becoming aware of a need for another dimension of justice which moves closer to the notion of distributive justice in Western terms. Western distributive justice theory complies with principles of justice which treat all relevant persons equally, each according to his position, work, desert, needs and so on. The application of this theory offers Western countries a fresh approach to restoring social and political balance in their societies. It is an attractive and advanced idea appropriate to modern societies. Islamic scholars should similarly review and develop Islamic justice theory, and attempt to benefit from the formulation of Western principles of distributive justice.

¹⁷ Qoutob Sano M, *Concordance of Jurisprudence Fundamental Terminology*, (Pittsburgh, PA.: Dar Al-Fikr, 2000), p. 474.

Through awareness-raising throughout society of the concept, the pursuit of distributive justice might help to provide a basis on which to identify other sources of injustice in Saudi Arabia especially that suffered by some minorities such as women, poor people and so on. In this respect, Rawls's concept of the 'veil of ignorance', elaborated in Chapter 5, would be of benefit. The parties in the 'original position' do not know how the various alternatives will affect their own interests, particular case and special needs, and are therefore obliged to evaluate principles solely on the basis of general considerations.

The disabled persons, women, or other parties denied their clear rights and marginalised behind the veil of ignorance represent the least advantaged members of society. Hence, to be protected they would first ensure that everyone's basic rights of liberty (autonomy), freedom of speech, due process, and respect were protected. In addition, the disabled in the original position would attempt to make sure that the wealth, income, and other goods were justly distributed, adequate and accessible so as to make them as well off as they could be made.

In brief, the Islamic principles of liberty (autonomy), equal respect, and fundamental interests, which are insisted on by the *Qur'an* and *Sunnah* as valid grounds to establish rights and make fair distribution of resources, lend themselves to developed and attractive interpretations. The interpretation of Islamic texts related to the treatment of disability issues which has been presented in this thesis is superior to traditional charity-based readings. Therefore, the rights of disabled persons in Saudi Arabia should be transferred into the arena of justice with **enforcement**. This implies the active pursuit of distributive justice, and elimination of every kind of discrimination against disabled people. Saudis with disabilities would therefore become: (i) rights-bearers; (ii) their rights would be enforceable in the court; (iii) enforceable rights would bestow on Saudis an enhanced level of recognition; and (iv) disabled Saudis would be better able to live autonomous lives.

This desirable situation cannot, however, be achieved without substantial changes and additions to existing law and the transplantation to the Saudi state of those norms and laws which are in force in Western countries. Such transplantation from one culture to another is a complex and delicate matter, and careful consideration of the issues is therefore essential, as will be seen below.

10. 1. 3. Transplantation of Legal Materials from Particular Legal Cultures

It could be suggested that transplantation of Anglo-American disability laws to the Islamic legal system and the attempt to formulate disability laws for Saudi Arabia on the model of DDA and ADA are incongruous and potentially dangerous. As Kahn-Freund argues, rejection of foreign law is a live possibility where the foundations of the existing political-legal regime are challenged by newly-transplanted law.¹⁸ One may ask to what extent liberal ideals of justice (strongly associated with secularism) can be said to have practical relevance in religious contexts. This prompts further questions: how is the process of transplantation between different cultures to be achieved? And what are the real justifications for such an enterprise?

Generally speaking, national differences of people and their legal systems significantly affect the content of local laws regarding social rights. Hence transplantation of laws from nation to nation can be problematic, especially with regard to family laws, personal status or religious laws; as such laws conform to the nature of their country's general legal system. In a human transplant operation, the transplant is rejected if there is no compatibility between all internal tissues of the body. Similarly, if laws are not compatible with a particular society and its culture, then their transplantation into it will fail.

It is important first, however, to shed some light on the nature of the state which holds Islam as a foundation for its legal system. This does not mean specific regimes professing Islam but is intended to establish the theory of Islamic political institutions relying on the *Qur'an*. As has been indicated, principles of dignity, equality, liberty, and justice are the principles of *Qur'anic* morality which affirm the possibility of pluralism and acceptance of others. Thus there is no reason to suppose that *Qur'anic* principles are a barrier in the way of shaping modern human rights respecting culture.

As the *Qur'an* counts as a constitution, all the valuable principles which have been affirmed in it are generally without elaborations or conditions. Islam does not impose specific norms to attain justice and equality between mankind and any moral invitation. It

¹⁸ Kahn-Freund O, 'On Uses and Misuses of Comparative Law' (1974), 37(1), *The Modern Law Review*, p. 21.

has reasonable principles for making such procedures and approaches for obtaining the rights and achievement of justice without imposing the means. As Ibin Al-Gaim said: *'Allah sent his Messengers and sent down his books so that people may establish justice. It is justice upon which the heavens and the earth were established. Therefore, if the signs of the truth appeared, and the evidence for justice emerged and became clear and evident through whichever way, then it is the law of Allah and his command and pleasure. Allah did not restrict the ways and signs of justice to one type and stop other ways which may be stronger and clearer than it. But he made clear through the ways he legislated that his will is to establish the truth and justice and that people should maintain justice'*.¹⁹ Therefore, any way through which the truth and the knowledge of justice were found would become obligatory. The ways are just a means to achieve the end.

Unlike a purely theocratic state, Islam does not demand absolute obedience from jurists or clergy. Absolute obedience in Islam is required only for Allah's commands and tasks which affirm the human (rights-oriented) principles of Islam, giving people freedom to choose suitable ways to manage their life according to their circumstances in space and time (see Chapters 1, 3 and 4). In this respect, Islam is not a religion which proscribes knowledge. It invites others to add to and hone its moral code through learning and research and it accepts any invitation for cooperation which implies investigation of the human condition and human rights. Accordingly, Islamic culture exhibits a greater degree of openness than Medieval Europe (sunk as it was in Roman Catholic prejudice).²⁰ Since Islam stresses that useful knowledge should be sought without search for its sources, Prophet Mohammad said that the believer's objective is wisdom, which should be taken wherever it is found.²¹ It is worth mentioning that Islam is not to be understood adequately by focusing on the actions of groups who practise extremism in the name of Islam (radical Islamists), or by the practices of some Islamic states which deny people their (human) clear rights. Rather, Islam should be studied through its primary sources: the *Qur'an* and *Sunnah*, for these sources indicate the extent to which the Islamic faith and human rights norms can be reconciled with one another.

¹⁹ Ibin Al-Ghaim Al-Joziah M, *I'Elam Al-Moa'geen An Rab Al-Alameen*, Vol. 4. (Beirut, Lebanon: Dar Al-Jecl, 1979), p. 373.

²⁰ See Mullender R, 'Nazi Law and the Concept of Community', 58, *University of Toronto Law Journal*, pp.377-387.

²¹ See Al-Tirmithi A. *Saheeh Al-Tirmithi*, Hadith No. 1847, (Riyadh, Saudi Arabia: Edarat Al-Bohooth Al-Elmiah, 1982), p. 123.

In the Islamic context there are explicit invitations from the ‘ethical community’ (a group who reflect on the interests of all and seek to ensure that those interests are adequately accommodated) to pursue justice for mankind. One can, however, query the composition of such communities. The basic element is a moral dimension, supported by an empirical aspect such as a collection of practices, institutions, and associated dispositions. In actual communities (even radically imperfect ones) there are those who reflect on how to ensure that all relevant persons receive their due or justice. Moreover, they consider how legal reforms might work to ensure that this happens. Reflection of this sort, on occasion, also prompts those who engage in it to call for reforms which will ameliorate and accommodate the interests of relevant, marginalised, individuals or groups.²²

One can find powerful support for the notion of ‘ethical community’ in Hegel’s philosophy. Hegel’s political philosophy might be summarised as the account of a journey (his universal history). He has built his notion on recognition and justice. The individual cannot be self-conscious or aware of their separateness from others and their capacity for freedom without recognising those around them.²³ Hegel, however, has stressed the practical significance of recognition by unfolding a dramatic narrative concerning the roots of the ‘ethical community’ (*Sittlichkeit*).²⁴

As seen above, one of the important elements in the ‘ethical community’ is the institution, so Hegel has emphasised it, since he finds in the modern state a particularly strong commitment to the ideal of abstract right. The abstract right particularises that institutions such as frameworks of law should adequately accommodate the interests of all those who reside within them. Their operations extend to mankind as a whole. Hence ‘universalism’ as a form of ‘egalitarianism’ that extends beyond the nation-state to humankind as a whole moves to a just-end state.²⁵

²² See Mullender R, ‘Nazi Law and the Concept of Community’, 58, *University of Toronto Law Journal*, pp.377-387.

²³ Williams R, *Hegel’s Ethics of Recognition*, (Berkeley, USA: University of California Press, 1997), p. 5.

²⁴ *Ibid.*, p. 2. See also Fukuyama F, *The End of History and The Last Man* (London, UK: Penguin Books, 1992), p.148.

²⁵ Critchley S, *A Very Short Introduction to Continental Philosophy* (Oxford: Oxford University Press, 2001), p. 58.

One might, however, argue that the ideas which invite all mankind to be equal under one particular culture (nomos) might require Islam's adoption of foreign ideas. In fact, as has been seen in earlier chapters, these ideas are moral principles which have been affirmed by the *Qur'an*. Moreover, since the aspects of a particular nomos could change over time and circumstances, it retains one abiding feature relating to its internal construction and history. The nomos depends for its existence on an egalitarian 'normative force' which draws its strength from the religious and social character of the nation.²⁶ Such a force is found in narrative. When narrative is enshrined in law it operates to underpin and maintain the character and aspirations of a particular normative sphere.²⁷

As mentioned here and elsewhere, through the *Qur'an* and *Sunnah*, Islam gives solely general concepts about justice, but they present essential rules which indicate what the norms of justice should be. Therefore, one cannot find in the *Qur'an* and *Sunnah* any mention of the elements of justice or explanation of how justice must be achieved. Islamic scholars then have a duty to explore norms of justice according to contemporary time through examination of the primary and secondary sources of Islam, since Islam considers that no nation should ignore the experiences of other nations or cultures in the application of justice.²⁸ Islamic thought has benefited from the intellectual creations of other nations like Greece and Rome, as amply evidenced in its philosophical works.²⁹

The need for procedures and norms which can achieve the aims of these valuable principles and resolve the problems of disability rights in Saudi Arabia is the motive for transplanting Western disability laws. The aim of this thesis is to analyse the latter's legal framework and enforcement mechanisms with reference to their applicability to Saudi disability laws.

One could maintain that, operating within the specific framework of human rights, the problem of transplantation is surmountable. Human rights rest on universal moral principles. Disability rights are defended by innate human standards transcending the differences between civilisations. These principles express common human values,

²⁶ Cover R.M, 'Foreword: Nomos and Narrative', (1983), 97, *Harvard Law Review*, 4, 13-14.

²⁷ Mullender R. 'Two Nomoi and a Clash of Narratives: The Story of the United Kingdom and the European Union', in Cover R M (ed), *Nomos and Narrative* (Berkeley Electronic Press, 2006), Article 3.

²⁸ See Khaddouri, M, *Mafhoum Al-Adel Fi Al-Islam*, 1st Edition, (Damascus, Syria: Dar Al-Kalimah, 1998), pp. 15-17.

²⁹ See, for example, Ibin Roshd, M, *Sharh Jomhouriat Aflatoon*, (Morocco: Dar Atlas, 1978).

whether religious or positive values, which are fixed in the innermost core of humanity and are the result of the development of civilisation. This affirmation of the duality of the foundation of human rights is supported by Perry, who identifies the morality of human rights as the dominant force of our time. He describes it as universal and thus unique in human history. Perry also notes that both religious and non-religious accounts of the morality of human rights make a double claim.³⁰ These approaches promote the common foundation of human rights, especially for disabled persons, in both liberal states and states that rest on religion, because all of them ensure the ‘inherent dignity’ of each person as having ‘normative force’.³¹ These values comply with human intuition and find spontaneous approval, because they draw on the human principle of respecting and treating disabled persons on equal terms with other humans.

Since the practices within institutions and the whole of civil society give expression to the practical life of communities, some of those concerned for reform in ethical communities criticise those practices and institutions that provide justification for injustice. The result is a search for reform that leads to the abstract ideals of rights and justice.

As the previous chapters indicate, the problems of discrimination faced by disabled persons and other minorities are caused by lack of distributive justice and absence of real equality. Further, the legal responses to those issues are inadequate and the attitude toward ethical community declares a lack of commitment to law in the ‘narrow sense’, according to Simmonds. The Saudi disability laws deal with disability issues through the law in the ‘wide sense’ (it just regulates disability rights as a social issue). Simmonds defined law in the wide sense as coordinating human conduct.³² Law in the wide sense may not be oriented toward the pursuit of justice, whereas law in the narrow sense regulates behaviour in ways that satisfy moral sensibility, such as the pursuit of distributive justice.³³ This critical vision finds support in the Islamic context, where vocalisation and insistence on reform are encouraged. As Islam encourages unselfish desire for the protection of rights, it gives authority to those claiming rights to voice their demands publicly and legitimately. In a case where an individual was condemned for doing exactly this, Prophet Mohammad

³⁰ Perry M. J, *Towards a Theory of Human Rights: Religion, Law, Courts*, (Cambridge, UK: Cambridge University Press, 2007), pp. 4-5.

³¹ *Ibid.*

³² Simmonds N, *Law as a Moral Idea*, (Oxford: Oxford University Press, 2007), p. 42.

³³ Mullender R, ‘Nazi Law and the Concept of Community’, 58, *University of Toronto Law Journal* 377-387.

reproved his accusers, saying: *'Let him! Indeed the proprietor of right has the legitimate right to voice and demand his right loudly'*.³⁴

According to the Islamic view, whenever the right is deserved and permanent, then it must be respected and protected by enforcement through justice. In Islam, abstract rights are not to be bestowed as a gift on people. Rather they should be enforced. Islam does not endorse the publicity of fault except to demand rights and justice. As Allah said: *"Allah loves not utterances of harsh speech save by one who has been wronged..."*.³⁵ Wrong here indicates the withholding of rights and non-application of justice. Thus the existence of invalid practices representing violation of justice and abuse of rights is an important element in the structure of the concept of a right.

It was observed in Chapter 7 how the disability communities and the ethical community in Saudi Arabia exhibit strong desire and insistent demand for the reform of disability laws and disabled persons' status. They have determination to benefit from and imitate advanced Anglo-American disability laws through the pursuit of justice. Their invitation to exert moral rights by reforming disability rights is finding significant support from all Saudis, whether officials or the general public, and it is their empathy/compassion that will facilitate reform.

In the light of the above and what has been explored in the thesis, one can summarise the features of Saudi Arabian culture as: (i) a religious and moral commitment to the pursuit of justice; (ii) receptivity and openness to foreign sources of law and political philosophy; as long as they attain superior value in Islam, that is justice; (iii) willingness to cooperate and work within the specific international framework of human rights for disability issues; (iv) attentiveness to the needs of those with disabilities; and finally (v) a significant fund of empathy and compassion which finds support in the 'habits of heart', since Prophet Mohammad said to the Muslims: *'If you want success and prosperity you will find them in taking care of the disabled and empathising with their issues, being*

³⁴ Al-Bukhari M, *Sahiha-al-Bukhari*, Kitab Al Kosouf, Vol.12, part 3, (Riyadh, Saudi Arabia: Edarat Al-Bohooth Al-Elmiah, 1982), p. 234.

³⁵ The *Qur'an*, Surah 4: An-Nisa, Verse No. 148.

blessed by their prayers'.³⁶ Thus, 'the habits of the heart' and the 'mental habits' of Saudi Arabians strongly give expression to and transplant Anglo-American disability laws.³⁷

Ultimately, the goal of this comparative study is not crudely to transplant Western laws into relevant Islamic laws, but rather to offer a reading of the Islamic texts and culture in the *Qur'an* and *Sunnah*, to detect in these a commitment to distributive justice. As Tocqueville claims, the point of using 'habits of heart' and 'mental habits' is not to paint a portrait of Anglo-American customs, but for the moment merely to seek those which help to support political institutions.³⁸ Hence, one can take norms that are established in the Western disability context which have to do with equal respect and justice for disabled persons and apply them in Saudi Arabia. It is acknowledged that in the UK and USA, disability laws indicate how equal respect, non-discrimination and distributive justice might be more adequately achieved.³⁹ It may equally be observed that when the Islamic traditions were examined, they displayed in this regard much in common with Western disability laws. Therefore, Western law would help to implement the values in the *Qur'an* and *Sunnah*.

In order to show the advantages of this interpretation of the Islamic context, and demonstrate the reasonable case it offers for reforming Saudi disability laws, a blueprint for reform is presented below. The expected advantages of the proposed model and its enforcement mechanism are also described.

10. 2. Towards a Plan of Enforcement

Following the diagnosis of elements of deficiency in the Saudi disability laws, and prescription of remedial procedures comparable with UK and USA disability laws, this section offers a detailed model for disability laws. This model involves all important and fundamental elements to be included in anti-discrimination disability legislation. These would usefully apply not only to Saudi Arabia but also to other Arabic or Islamic states.

³⁶ Al-Tirmithi A. *Saheeh Al-Tirmithi*, Vol. 12, (Riyadh, Saudi Arabia: Edarat Al-Bohooth Al-Elmiah, 1982), p. 32.

³⁷ See Introduction (Methods of Thesis).

³⁸ Tocqueville A, *Democracy in America and Two Essays on America*, trans. E Gerald, (London: Penguin Group, 2003), pp. 335-336.

³⁹ See Chapters 8 and 9.

The specifications of the law should be left to interpretative memorandums and codes of practice.

Generally speaking, in order that the disability anti-discrimination act should be successful and effective, certain significant characteristics should be available in the general body of disability law:

- A strong and direct link with the constitution that opposes discrimination on the basis of disability and mentions the fundamental principles on which this position rests.
- Comprehensive fundamental definitions.
- Comprehensive covering of all fundamental rights and areas of life, such as the rights of healthcare, education, employment, public services, social and political participation.
- Practical standards to implement the law.
- Principles to justify discrimination.
- Enforcement mechanisms for the law.

10. 2. 1. Blueprint

The title of the legislation is the first consideration. Its subject matter is discrimination, and the legislation prohibits and rectifies discrimination on the basis of disability. Thus the name of the law should be the **Saudi Disability Discrimination Act (SDDA)**.

In order that the new law is effective and strong, it must link with the Saudi fundamental laws (Constitution) as a visage to the law. It must openly declare that its goal is to protect and ensure the equal enjoyment of all human rights and fundamental freedoms by all disabled persons, and to promote respect for their inherent dignity and autonomy. Also, it should indicate that the government ensures the rights of disabled persons without any kind of discrimination based on their disability, and requires special measures corresponding to the disabled persons' circumstances, to give them equality with the non-disabled. This is inherent in disabled people's right to equality, non-discrimination and justice, and their right to be accounted an object of distributive justice. Thus the rights of disabled persons would be established and enforced, and those violating the rights prosecuted.

(A) Definitions

The content of the Disability Act should include some basic definitions. These represent a point of reference for the purpose of interpreting the Act in cases of legal dispute. Terms to be defined should include: disability and disabled person, rights of disabled persons, discrimination on the basis of disability, reasonable accommodation, justification, communication and language.

i) Disability and Disabled Person: disability is lack of ability to perform certain functions, which might be physical or mental. Disability results from the interface between persons with impairments, and attitudinal and environmental barriers which hinder their full and effective participation in society on an equal basis with non-disabled. Hence the social model of disability is the appropriate parameter within which to deal with disability, as it focuses attention on discrimination and loss of rights resulting from the social barriers, exclusion and stigma that follow impairment. This model deals with all socially-based restrictions on disabled people, ranging from individual prejudice to institutional discrimination, from inaccessible public buildings to unusable transport systems, and from segregated education to exclusion from work arrangements. The social model then refers these cases to their correct remedial place, namely the human rights model.

Therefore the legal definition of ‘disability’ and ‘disabled person’ should be influenced by moral, social and human rights models, since the Act rectifies the various aspects of discrimination which prevent the disabled person from having his clear rights. Also, it should include impairment as a necessary characteristic in definitions of disability and the disabled, in order to include all who face discrimination based on an impairment such as HIV, obesity, age and so on. The resulting definition would read: ‘A *disabled person is someone who has a long-term physical, mental, or sensory impairment that, notwithstanding the support of mitigating measures, substantially limits one or more of his major life activities, and may prevent his full and effective participation in society on an equal basis with others*’.

ii) The Rights of Disabled Persons: since ‘rights of disabled persons’ are the major subject of the Act, it is necessary to define the term, in order to specify the changes in meaning brought about by this particular qualification of rights.

Towards establishing the rights of disabled persons on grounds of equal respect, interests, autonomy, need, and justice, the proposed definition of 'disabled person's rights' would read: *'Disabled rights are conceptual devices which: assign priority to certain special needs in respect of human and social attributes regarded as essential to the adequate functioning of human beings, in order to bring disabled persons to the level of normal persons; which are intended to serve as a protective capsule for those attributes; and which appeal for deliberate action in order to ensure such protection'*.

iii) Discrimination on the Basis of Disability: discrimination is one of the main elements of the Act, so it is important to define it. The definition should include both positive and negative discrimination. Positive discrimination means steps taken positively to improve the position of the disabled person and to redress disadvantage in the mainstream of society. Sometimes this is called 'affirmative action', referring to steps designed to eliminate ongoing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination. In contrast, negative discrimination results from unequal treatment or neglect of a disabled person, causing him harm. Discrimination on the basis of disability is mostly defined through the negative discriminatory context. It means *'any distinction, exclusion or opportunities denial on the basis of disability the aim or effect of which is to impair or frustrate the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'*. This discrimination may take direct or indirect forms as below.

Direct negative discrimination is the result of differential treatment related to disability which occurs where similar cases are treated differently or where different cases are treated in the same way. It means treating a disabled person 'less favourably' than another in the same circumstances, or in circumstances which are not materially different. In addition, direct discrimination may be conceived as a failure to comply with a duty to make such reasonable accommodation as is required for positive discrimination.

Indirect negative discrimination is discrimination by applying an abstract principle, resulting in differential treatment of the disabled person. Someone discriminates indirectly if he applies some unjustifiable 'requirement or conditions' to a disabled person, with which he cannot possibly comply.

iv) Reasonable Accommodation: reasonable accommodation is a practical measure. It is a fundamental part of the Act and necessary to ensure its application. It means '*necessary and appropriate modification and adjustment and assistance to avoid causing harm or imposing disproportionate or undue hardship, where needed in a particular case in health and rehabilitation, education, employment, goods, general facilities, housing, communications, transportation and any services deemed necessary, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all their rights and fundamental freedoms*'.

The term 'undue hardship' means an action requiring significant difficulty or expense. The concept of undue hardship applies to all sections covered by the Act. The amount of harm should be measured according to the level of the relevant body or institution, which means determining it case by case.

v) Justification: justification is the term used to describe an acceptable reason for an action. Justification of discrimination is only permissible if the reason for the treatment is both material to the circumstances of the particular case, and substantial. Material means that there must be a strong connection between the reason given for the treatment and the circumstances of the particular case. Substantial means that the reason must carry real weight and be of substance.

vi) Communication: the term 'communication' in the Act covers languages, display of text, Braille, tactile communication, large print, accessible multimedia, and written, audio, plain language, human readers and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology.

With regard to language, it covers spoken and signed languages and other non-spoken forms of language.

(B) Health and Rehabilitation

The Act lays on the government the duty to ensure the right of disabled persons to the highest standard of healthcare without discrimination. So, the government is required to make reasonable accommodation by taking all suitable measures to ensure access for

disabled persons to general health services including health-related rehabilitation. Provision of free healthcare and programmes of the same range and standard as provided to other persons must be included.

In addition, the health services for disabled persons must involve free provision of all medical requirements, and extra auxiliary aids needed by disabled persons as a result of their disability, as well as reparative devices. Health measures and services must include early identification programmes for disability and programmes to minimise and prevent further disability.

Towards ensuring access to health services for disabled persons, programmes of healthcare household visits should be provided. Consideration of the special circumstances of disabled persons should further include, for example, facilitation of their appointments at medical clinics.

Moreover, the right of healthcare for disabled persons imposes the duty upon the government to accommodate persons with severe disabilities who need further and/or permanent healthcare, or disabled persons who have no family or are rejected by their family. Hence the government is required to provide appropriate lodgings meeting health and safety requirements and provided with all necessary conveniences and care.

Health insurance for disabled persons must be provided without discrimination on the basis of disability. Also, where such insurance is permitted by national law, life insurance must be provided fairly and reasonably according to the disability.

With regard to rehabilitation, this plays a very important part in disabled persons' lives because it enables them to attain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. Therefore the government should strengthen and extend comprehensive habilitation and rehabilitation services and programmes, especially in areas of healthcare, education, training and employment, and social and political services.

The right of rehabilitation for persons with mental disabilities or mental illness must be affirmed, so they should be habilitated in the least restrictive environment possible

according to their situations. Decisions regarding appropriate placement will entail individual assessment of their health needs. Respect for their fundamental human rights must be preserved without discrimination, as with all disabled people.

The health and rehabilitation section of the Act imposes on all relevant health and social ministries and departments the obligation to change practices or procedures in cases where it is impossible for disabled persons to use or benefit from health services. Additionally provision should be made for health and rehabilitation programmes designed particularly for the disabled.

The following would then constitute the ways in which a health service provider might discriminate against a disabled person:

- failure or refusal to provide a disabled member of the public with healthcare services required by health and rehabilitation sections of the Act for all categories of disabilities, unless with justification;
- failure to comply with the duty (a) to make reasonable accommodation for disabled persons' access to and benefit from health services; and (b) to provide medical requirements and extra auxiliary aids necessary to disabled persons;
- discrimination in the qualitative standard and manner of health and rehabilitation services provided to disabled persons;
- treating disabled persons less favourably than other members of the public in the scope of general health services, for example, if the provider of a health service refuses to admit a disabled person to a clinic for treatment on the grounds that he might cause disturbance or need more services, unless this can be justified.

(C) Education

The government has a duty to create an inclusive education system at all levels including lifelong learning. This system should aspire to full human development grounded in a sense of human dignity and self-respect and promotion of respect of human rights and human diversity. Hence, the Act obliges the government to ensure the right of disabled persons to education without discrimination, on the basis of equal opportunity. To enable disabled people to participate effectively in society, focus should be on development of their personality, talents and creativity, as well as their mental and physical abilities.

The general formulation of the right of disabled persons to education should encompass three main parts: general education, special education, and further and higher education.

1) The government must ensure the right of disabled persons to the general education system without discrimination on the basis of disability. Children with disabilities may not be excluded from free and compulsory primary, and secondary education. So the education section of the Act requires the government to create general educational integration programmes to include disabled persons without discrimination. This requires making reasonable accommodation in order that the schools are accessible. 'Reasonable' here might take account of (a) the needs to maintain academic and other standards (b) financial budgets (c) the practicalities of making the particular accommodation (d) the health and safety of the disabled students (e) the interests of other students.

A school may discriminate against a disabled student in three ways:

- less favourable treatment: a school treats a disabled student less favourably than another because of their disability. For instance, a school might refuse to admit a disabled student because of poor mobility or fits. This will be unlawful discrimination unless the school can justify it with a substantial reason;
- failure to make reasonable accommodation. Unlawful discrimination occurs if without reasonable justification a school fails to make the school or classroom accessible to disabled needs, or if it places a disabled student at a substantial disadvantage compared with non-disabled students;
- failure to comply with a statement of special educational needs, for example, providing a learning support assistant or any extra auxiliary aids.

2) With regard to special education, the government must recognise the right to education of disabled persons with learning difficulties or hearing impairments, as well as those needing special educational care. This includes facilitating the learning of Braille and alternative scripts and formats of communication including sign language. Furthermore, the government should ensure that the education of persons who are blind, deaf or deaf-blind is delivered in the appropriate languages and modes. In order to help

safeguard this right, the government should enact special codes to regulate provision of special educational needs. This entails the same legal measures as applied in the general education section: less favourable treatment, consideration of reasonable accommodation and justification and so on.

3) The right of disabled persons to education must involve their right to further and higher education without discrimination, provided by educational institutions in either public or private sectors. Educational institutions include any bodies such as universities, general and specialised institutions responsible for providing higher or further education. These must not discriminate against disabled persons on the basis of equal respect and opportunity. It is unlawful for the educational institution to discriminate against disabled persons in the following ways:

- by refusing admission to a person on the basis of his disability while failing to create special admission programmes or quota systems to include disabled persons which requires making reasonable accommodation;
- failure to make reasonable accommodation, or to provide auxiliary educational needs without bringing reasonable justification;
- excluding disabled persons from student services and activities;
- not making exemption systems for disabled persons in terms of attendance and educational examinations and research, such as time extensions for exams or research in view of their health circumstances;

It should be stressed that all the principles of equal opportunity, discrimination, reasonable accommodation and justification should apply in all formulations of the right of disabled persons to education.

(D) Employment

On the basis of equal opportunity and distributive justice the Act requires the government to ensure and protect disabled persons' right to work without discrimination. This includes the right to the opportunity to make a living by work freely chosen or accepted in workplaces or environments that are open, inclusive and accessible to disabled persons, since the disabled person should be treated according to his ability, not his disability, in his right to employment. It is important to determine which disabled persons are intended in

the right to employment and non-discrimination; what sectors and entities should be covered by the Act; and what kinds of discrimination the disabled person could face in employment.

Only qualified disabled individuals are intended to be protected by the employment section of the Act. The qualified individual with disability means a disabled individual who can perform the essential functions of the job with or without reasonable accommodation. Essential functions of the job mean job tasks that are intrinsic and not marginal. Further, after reasonable accommodation is made the qualified individual with disability must be treated equally with non-disabled applicants in applying for the employment. He should be treated as a normal competitor for the post. He should satisfy all job conditions including skill, education, experience and any fundamental conditions required by the relevant position.

The sectors and entities which should be covered by the employment section of the Act are the public and private sectors. A small business, however, should be exempted from the Act, therefore only employers having fifteen or 20 or more employees are covered. In fact, the number of employees is subject to regulation, which should be dealt with by a quota system. The point is, however, that it is a small business. Moreover, religious and charitable organisations or any foundations exempted from taxation should not be covered by the employment section of the Act.

Discrimination against disabled persons is prohibited with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions. Consequently the following would constitute discrimination:

- direct discrimination against the disabled person by rejecting his application on the basis of disability;
- less favourable treatment of disabled persons because of their disability, unless with justification;
- failure to make reasonable accommodation to the workplace to enable a disabled person to work or to continue in work;

- harassment of a disabled person, for instance by making jokes about their disability.
- exclusion of a disabled person from training courses, incentives and promotion, and leading jobs on the basis of disability;
- imposing unnecessary and impossible conditions of employment, aiming to exclude persons with disability.

With regard to reasonable accommodation, in addition to making physical adjustments to the departments and workplaces, some special measures should be provided. Firstly, altering and adjusting a disabled person's hours of work or giving him extra time off according to his individual situation. Secondly, giving him time off to attend clinical appointments. Thirdly, supplying special equipment to help him do his job. Fourthly, transferring a disabled person to the area or workplace nearest his home. These procedures should be under the direction of medical and social reports.

(E) Public Services

In accordance with principles of equal treatment and distributive justice, public benefits and interests must be adequate and accessible for full and equal enjoyment of all citizens without discrimination. By 'public services' the Act means any services, programmes, or activities provided by government or public entities to all members of the public. A public entity means any governmental establishment, department and agencies, or any instrumentality of government such as schools, housing authorities, electricity, water, transportation and so on.

The Public Services section of the Act should cover the following kinds of services, activities, programmes and practices by public entities:

- employment including all governmental workplaces, services and training programmes, with reference where necessary to the employment section of the act;
- areas of contact with the general public such as all public facilities including governmental buildings, streets, mosques, transport termini, airports, public parks, entertaining centres, stadiums and sports centres, general libraries, car parks, and any other facility provided to the public. In addition, telephone communications;

- activities administered by government such as local electoral and judicial systems, social affairs, civil status and nationality, municipal, zoning and housing authorities as well as city councils, police, fire and emergency services, and any activity currently or subsequently provided by government;
- benefits provided by government such as Medicaid, governmental Saudi social assistances and financial loans provided to members of the public such as Governmental Bank Credit and Real State Development Bank, or any governmental benefit currently or subsequently provided to members of the public.

Not all disabled persons, however, are qualified to use or benefit from some government services, activities or programmes. It is therefore important in this section to include an indication as to which ‘qualified individual with disability’ is intended. A public entity cannot apply eligibility criteria that prevent or tend to prevent any class of individual with disabilities from full and equal enjoyment of the services, programmes and activities unless the criteria are necessary for the provision of the services, activities or programmes. ‘Qualified individual with disability’ means a disabled individual who, with or without reasonable accommodation in terms of rules, policies or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services, or for participation in programmes or activities provided by a public entity.

No qualified individual with disability shall, on grounds of his disability, be excluded from participation in or denied the benefits of the services, programmes, or activities of a public entity, or be subjected to discrimination by any such entity.

Accordingly, this section of the Act requires the government to make reasonable adjustment for disabled persons where the existence of a practice, policy, or procedure makes it impossibly difficult for them to make use of services, activities and programmes provided by government. In addition this section requires the government to provide auxiliary aids or services such as provision of information on audio tape or of a sign language interpreter to enable disabled persons or facilitate the use by disabled persons of services, activities and programmes provided. The government is required to make reasonable adjustment to overcoming physical barriers to access or use for public facilities.

where such barriers make it impossible or unreasonably difficult for disabled persons to use a service.

Thus, it is unlawful for a public entity to discriminate against disabled persons in the following ways:

- failure or refusal to provide a disabled member of the public with services which are provided for non-disabled members of the public;
- failure to comply with the requirement to make reasonable adjustment, unless with justification;
- treating disabled persons less favourably than a person who is not disabled, for example, denying a disabled person participation in a governmental activity or benefit on grounds of needing special care or unsuitability to mingle with the non-disabled, unless with justification.

(F) Public Accommodation

The principles of strict equality and distributive justice insist on equality for all citizens of the enjoyment and use of all benefits and services provided for the public. It is unlawful for a provider of public accommodation including goods, facilities and services to discriminate against a disabled person.

Public accommodation provisions in this section of the Act mean any public businesses or services operated by private entities. Moreover, goods, services, and accommodation must be offered in the most integrated setting appropriate to the needs of the individuals. A private entity indicates any private company, establishment, agency, organisation, or any foreign company working in local markets. It is irrelevant whether services, goods or facilities are provided on payment, for example, restaurant services, or without payment, like services provided by charitable organisations. In addition, it is irrelevant whether the service is quantified as greater or smaller.

This section of the Act provides a list of goods, facilities and services as follows:

- access to and use of any place which members of the public are permitted to enter;
- access to and use of means of communication;
- access to and use of information services;

- accommodation in hotel or boarding house;
- facilities for purposes of banking or insurance or for grants, loans, credit, or finance;
- facilities for entertainment, recreation.

The services that should be covered in this section of the Act are those provided to members of the public by, amongst others: hotels, motels, malls and shops, restaurants, post offices, banks, building societies and complexes, law and accounting offices, advice agencies, telecommunication and broadcasting organisations, museums, theatres, cinemas, sport and fitness centres, petrol stations, telesales businesses, doctors' clinics, pharmacies, or any shop, establishment, agency or company providing goods or services for the public.

Therefore, providers of public accommodation must make reasonable adjustment for their provision to be accessible and as easily used by disabled as by non-disabled members of the public.

The reasonable adjustment must include the following:

- changing practices or procedures which make it impossibly difficult for disabled persons to make use of a service, resulting in exclusion of disabled persons from services, goods and facilities provided;
- providing extra aids or services, where these (for example, the provision of information on audio tape or of a sign language interpreter) would enable disabled persons to use, or benefit from the services, goods, facilities provided, or to facilitate the use by disabled persons of such services;
- eliminating physical and architectural barriers, where a physical feature (for example, one arising from the design or construction of a building or the approach or access to premises) makes it impossibly difficult for disabled persons to use such services and facilities.

Therefore, a private entity contravenes the Act if it discriminates against the disabled person in the following ways:

- failure or refusal to provide a disabled member of the public with services that are provided for non-disabled members of the public, unless with justification.

- treating disabled persons less favourably than other members of public, (for example, if the owner of a motel refuses to hire a disabled person, stating that the motel will be unsuitable if he hires a person with disability).
- failure to comply with a duty to make reasonable adjustments where the effect of that failure is to make it impossible or unreasonably difficult for disabled persons to make use of any such service, unless with justification;
- discrimination in standards, manner or terms of services provided to disabled persons.

Concerning the Public Services and Public Accommodation sections of the Act which stipulate reasonable adjustment by overcoming physical or architectural barriers, making relevant buildings accessible and provision of auxiliary aids, to satisfy the requirements of the Act these sections should include any specifications involving plans, programmes and time schedules.

First of all, it is important to arrange coordination between all relevant public entities to regulate their efforts to comply with the disability discrimination act. For example, the Municipal Affairs Department should regulate a suitable code that entails eliminating all architectural barriers and adjusting all public facilities and places that provide services to the public to provide accessibility for any disabled person according to his special needs. The Traffic Department should regulate disabled persons' parking and car licensing and so on.

Secondly, regarding locations and old buildings, relevant locations and old buildings must be made accessible for the disabled as quickly as possible by making any readily achievable alterations. 'Readily achievable' means easily accomplishable and able to be carried out without much difficulty or expense. Factors to be considered include the nature and the cost of the structural modification, as well as the size, financial resources and types of business.

Thirdly, new structures must have built-in accessibility and satisfy all the requirements and conditions of the Act. The plans of new structures and zones must be included and considered by the conditions and requirements of the public services and

accommodation. Therefore, permission or constructional licensing for the new structure will be given only subject to its satisfying the requirements and conditions of the Act. This also applies to provision of auxiliary aids.

(G) Public Transport

According to principles of equal treatment and distributive justice, all citizens have a right to enjoy and use without discrimination all benefits and services offered to members of the public. Hence it is unlawful for a provider of public transport to discriminate against disabled persons in provision of transport services.

In this Act public transport indicates any transport system operated either by government or private sector that works within cities, between cities and towns or internationally. It includes ships, airline companies, trains, taxicabs companies or any transport provided. Single taxis driven by one person working by himself should be exempted from the Public Transport section of the Act. Taxi companies using fifteen or more cars fall under the terms of the Act. The Act also requires 10% of a company's cars to have disability access.

The provider of transport services must without discrimination take account of disabled persons. Thus they must make reasonable accommodation to make their transport accessible, easy and safe for disabled people to use, unless with justification.

The duty of making reasonable accommodation in this section begins with changing practices or procedures which make it impossibly difficult for disabled persons to make use of a service, resulting in exclusion of disabled persons from the transport services provided.

Reasonable accommodation in terms of airports, railway stations and shipping involves making all transit and arrival stations accessible, and eliminating all physical barriers. Further, suitable measures should be taken to facilitate meeting or seeing off disabled passengers. Auxiliary aids and special assistance should be available (for example, a supply of wheelchairs or workers to assist those who are not able to help themselves, or audio, sign interpreter, etc.). Hence the airline, rail and shipping companies must provide such extra auxiliary aids as are needed by disabled persons to enable them to

use transport easily and safely. They must also take account of the special needs and circumstances of disabled persons in their booking systems.

Reasonable accommodation must be also made inside aeroplanes, trains and ships. They must be accessible and safe to use for a disabled person. All physical barriers should be overcome: it is important that aisles, seats and cabins are accessible, roomy, comfortable and safe. In addition, all facilities including entertainment inside the transport must be accessible to disabled persons.

The Act requires taxi companies and establishments to make reasonable accommodation to enable disabled persons' access or use of their transport services easily and safely. Reasonable adjustment in terms of taxis requires the provision of special vehicles with wheelchair access systems among the regular cars of each company. These must include necessary equipment, ramps, elevators and roomy, comfortable seats with concern for means of safety. The taxi companies' booking systems must also take account of disabled persons' special circumstances in order to give them appropriate care.

The public transport provider would be held to discriminate against the disabled person in the following instances:

- refusal to provide a disabled member of the public with transport services that are provided for the non-disabled public;
- failure to comply with a duty to make reasonable adjustments where the effect of that failure is to make it impossibly difficult for disabled persons to use any such service;
- treating disabled persons less favourably than other members of the public (for example, if a taxi company operator refuses a booking for a wheelchair user, stating it is not good for the company's commercial reputation to carry this disability).

It should be noted that coordination will be required from the relevant ministry or department of transport to consider the clauses and requirements of the Public Transport section of the Act in the regulations of their vehicles. Alternatively binding decrees should be issued, the aim being to oblige governmental and private transport companies and establishments to comply with the clauses and requirements in this section of the Act.

10. 2. 2. The Disability Rights Commission

It should be reiterated that disabled persons have an inherent right to justice and to demand their rights: they are a clear object of the principles of distributive justice, and they may voice their positive claim-rights on an equal basis with others. Consequently, as the requirement of an advanced civilisation the rights of disabled persons must be enforceable. Enforcement of the Act needs effective mechanisms with binding statutory rules.

In Saudi Arabia there is no special ministry to promote all disability causes under one roof, but rather all relevant matters and jurisdictions concerning disability are distributed between several departments. The 'Provision Code for Persons with Disabilities', however, stipulates the establishment of the 'Supreme Council for Affairs for Persons with Disabilities'. This Supreme Council has various practical functions: to issue policies and a practical code, propose modifications of regulations regarding disability laws, ensure implementation of the code and its regulations, and liaise with the government and private sectors concerning services provided. Nevertheless, these and other functions are not sufficient in order to realise the aims required to enforce the disability rights detailed in this thesis. Thus the proposed 'Saudi Disability Discrimination Act' must include the necessity of establishing a 'Disability Rights Commission' that has extensive functions and powers. This commission should be under the auspices of the Supreme Council. It represents an effective enforcement mechanism for the Act. It must be empowered by being granted duties and practical functions to guarantee implementation of the Act, and to confront discriminatory practices against disabled persons, with litigation in cases of contravention.

(A) Constitution and Formulation of the Commission

Since the commission would be established under the Supreme Council which would be associated with the Council of Ministers, the commission must be a statutory corporation. It should consist of no fewer than fifteen commissioners. Since the commission directly addresses disability and discrimination issues, a reasonable and statutory requirement states that the majority of the commissioners must be either disabled or ex-disabled or the guardian of a disabled person. Further, the chairman or deputy chairman of the commission should be disabled. The commissioners should include legal experts, and also social, psychological, disability and habilitation experts. This ensures that the

representation of disabled people in the governance of the commission is mandatory and institutionalised.

The head office of the commission should be in the capital of Saudi Arabia, with branches in every large city and region. These will monitor enforcement of the Act, and deal directly and speedily with the complaints of disabled persons.

(B) General Duties and Powers of the Commission

Duties and powers to be conferred on the commission in order to perform its aims effectively are as follows:

- working towards the elimination of discrimination against disabled persons;
- promoting the equalisation of opportunities for disabled persons;
- taking steps as it considers appropriate towards encouraging suitable and good practices in the treatment of disabled persons;
- monitoring and reviewing the work of the Saudi Disability Discrimination Act;
- right to oppose resolutions of the Supreme Council, and state the commission's views with regard to them.

For any purpose connected with performance of its functions, the commission is enabled:

- to make proposals or give advice to the Council of Ministers of Saudi Arabia, or to the Shura Council concerning any proposal to change any article of the Act, or to answer any question regarding it;
- to make proposals or give advice to any governmental entity and agency, or any private entity, as to the practical application of any law;
- to support either financially or otherwise applications for research or the provision of information or advice.

These functions should not be limited and restricted, but rather dynamic and flexible, and will be incidental to its duties.

Moreover, the commission should be given particular powers to exercise effective roles as follows:

- the power to conduct formal investigations for any purposes connected with performance of its duties and functions, or to do so if directed by the Council of Ministers for any purpose. This power is very important because it permits the commission to address institutional discrimination and look for discriminatory practices without the requirement of an individual complaint. It involves giving the commission coercive powers to obtain documentary and other evidence which might be relevant in exposing unlawful practices. Therefore, where the commission is satisfied that the person has committed an unlawful act, the commission has the power to make recommendations and/or serve a non-discrimination notice.
- the power to enter binding agreements: if the commission has reason to believe that an unlawful act has been committed, it might enter an agreement in writing under any section of the law. This agreement requires the commission to undertake not to take any enforcement action, and requires the person or entity concerned not to commit any further unlawful act.
- the power to deliver notice of injunction regarding persistent discrimination: the commission may apply to the Board of Grievances for an injunction, where it appears to the commission that unless restrained a person is likely to commit one or more unlawful acts.
- the power to make arrangement for the purpose of interventions or conciliation between disabled persons and any entity or person in claims concerning application of the Saudi Disability Discrimination Act. The aim of this power is to resolve disputes and encourage implementation of the Act.
- the power to provide assistance for the persons suffering discrimination who desire to sue a contravener of the Act. This step should come if all avenues of intervention and conciliation and other ways of settlement are exhausted. The commission would assist individuals who have brought or propose to bring proceedings under the Saudi Disability Discrimination Act. Where an application for assistance is made, the commission might confer such assistance where: (1) the case raises a question of principle, (2) it is unreasonable to expect the applicant to deal with the case unaided, (3) there is some other special consideration which makes it suitable for the commission to provide assistance. Further instances might be applying to a court to prevent continuing discrimination, and by arranging (in some cases) for the disabled person to be legally represented.

It is important here to mention the judicial body in Saudi Arabia under which a case falling within the Saudi Arabia Disability Discrimination Act would be filed. There are in Saudi Arabia two kinds of courts: the Sharia Courts and the Board of Grievances. It is under the jurisdiction of the Board of Grievances to hear cases concerning government officials and employees, and disputes between any governmental bodies and business establishments operating in Saudi Arabia. Accordingly, cases falling under the Saudi Disability Discrimination Act must be filed with the Board of Grievances.

In short, all these functions and powers given to the Disability Rights Commission should be seen not as restrictive and limiting, but as flexible discretionary measures limited only by the requirement to respond to the aims of the Act. If they require extension, this can be determined by reference to the duties of the commission. Further, the jurisdictions, functions, and powers of the commission should be enacted and interpreted by them as a code of practice.

10. 2. 3. Recommendations

(A) Awareness-raising

In order for the fundamental aims of the disability discrimination Act to be effectively realised, the Act must call for propaganda which presents the themes and values of disability rights in terms of equal respect and justice rather than charity. Awareness-raising of disabled persons' rights should take place both at the level of family and throughout society. It should call for promotion and respect of disabled persons' rights on the basis of human dignity, and represent them as clearly enforceable. Disabled persons should be presented as a potential social resource rather than mere victims and beggars.

Awareness-raising should include a call to abolish exclusions, prejudices and harmful practices that disabled persons have been facing in their society. Promoting awareness of their capabilities and contributions to society should increase society's respect for them.

In order to comply with the duty of awareness-raising, the government is required to implement the following processes:

- implement effective publicity and educational campaigns which rely on nurture receptiveness for the rights of disabled persons through informational plans and policies.
- promote positive perceptions and social awareness towards disabled persons.
- encourage mass media to present disabled persons as productive persons of equal status with others under the terms of the proposed Saudi Disability Discrimination Act.
- foster an attitude of respect for the rights of disabled persons at all levels of the education system, including young children.

(B) Necessary Supplementary Measures

In order to accomplish the purposes of this thesis and of the proposed 'Saudi Disability Discrimination Act', as well as to promote general disability issues in Saudi Arabia, several general suggestions for further action should be followed:

- Review and research the concept of a right in Islam, where the meanings of 'rights-claim' and binding enforcement should be examined as a given.
- Review and research an Islamic theory of distributive justice principles, as a basis for addressing complications of discrimination such as those related to disability, women's rights and poverty.
- Reform fundamental Saudi laws (Constitution) to include prohibition of discrimination on the basis of social status and disability.
- Expedite reform of disability laws relevant to the legal framework proposed in this thesis (Saudi Disability Discrimination Act) through reformative programmes and time schedules.
- Establish comprehensive and consolidated data-processing including entire categories of disability and its real needs, especially qualified individuals with disability facing discrimination in social life.
- Encourage establishment of disability rights organisations to observe progress and exercise pressure to enforce the Act.
- Affirm and regulate volunteer work regarding the disability rights movement.
- Work towards publishing the Saudi Disability Discrimination Act, publicising it among disabled persons and all relevant entities.

- Study implications of teaching disability rights under a human rights model, and develop scientific legal methods for this. Establish philosophical, legal and practical parts as an independent course or credit in schools of law.
- Extend the area of scientific legal research into the field of disability rights and discrimination in Saudi Arabia, taking this thesis as a foundation. The proposed topics that should be complementary to this thesis are, for example: (a) study of the concepts of Disability and Disabled. (b) Discrimination Based on Disability. (c) The Right of Disabled Persons to Education. (d) The Right of Disabled Persons to Employment. (e) The Right of Disabled Persons to Social Participation. (f) The Concept and Scope of Reasonable Accommodation. (g) Implementation of the Saudi Disability Discrimination Act.
- Accede to and sign all relevant International Treaties and Conventions regarding disability rights, especially the recent ‘International Disability Rights Convention 2007’.
- Initiate regional protocols and cooperative treaties regarding protection of the rights of persons with disabilities.
- Publish the current International Convention for Disability Rights (2007) and make it available to disabled persons and society in general.
- Encourage study and analysis of contents of International Disability Rights Convention, e.g. The Principles of the Convention, The Rights of Disabled in Work, Social Participation, Awareness-raising and so on.
- Pursue prosecution of relevant governmental and private entities. This prosecution should be made by disabled persons or disability rights organisations as a ‘class action’ to bring them consideration and respect for their clear rights in society, particularly concerning employment and accessibility of all social facilities.

These proposed points are not intended as the final outcome of this reform project for disability rights issues. Rather, they offer a starting-point for applying distributive justice as an appropriate way to present effective and adequate solutions for discriminatory practices. Pursuing the principles of justice protects the interests of both current and future generations: the circumstances of the latter must also be provided for. As Freeman indicated, *‘each generation has a duty to preserve just institutions intact that it and its forebears have established, and pass on the gains of culture and civilization, in order to*

benefit future generations, including their least advantaged'.⁴⁰ Accordingly, one of the main aims of this thesis is to open a new door through distributive justice. Another is to contribute to starting the movement from charity to justice for the rights of disabled persons and other similar minorities, in order to benefit current and future generations.

No law can be expected to emerge in a fully developed form. Problems of practical application will be faced during its development, and the complicated social context may prevent its immediate success. The essential aim here, however, is the adoption of distributive justice as a basis for the new law and its ensuing practical development. It has been seen how the DDA and ADA were developed and amended according to practical circumstances, until they became successfully founded in justice rather than charity, in the light of principles of equality, non-discrimination and distributive justice. The ongoing development of the law can itself shape the determination of the Saudi government to pursue the ideal of distributive justice in order to address this specific disability rights issue, as well as similar issues relating to the same philosophical background.

A similar example of those who suffer from discrimination and marginalisation in their clear rights are women. They share the same philosophical grounds as disabled people which establish their fundamental rights such as dignity, equal respect, autonomy and so on. All of them are behind the hypothesis of the 'veil of ignorance', so that they have been imagined to be unaware of their strengths, weaknesses, and position in society. Such individuals, Rawls contends, would be tempted to argue for principles that would favour their own essential needs and interests, and any principles such negotiators could agree upon would be presumptively fair.⁴¹

In order that current and future generations of those groups are protected and receive their rights through distributive justice the relevant laws and all social and legal institutions should be maintained. This should be practised through incremental development so as to improve the positions of disabled persons, and as a consequence benefit those who are today the victims of discrimination. Therefore, we have to question our practices and laws, so as to refine them and point them the right way.

⁴⁰ Freeman S, *Rawls*, 1st Edition, (New York, NY: Routledge, 2007), p. 137.

⁴¹ See Rawls J, *A Theory of Justice*, (Oxford, UK: Oxford University Press, 1999), p. 136.

These chapters show that we can seek to discover the principles of distributive justice which may be linked to the Islamic traditions. Ultimately, being imperfect, we cannot hope to do more than approximate the ideal of justice in the *Qur'an* and the practices of Prophet Mohammad.

Before closing, we should consider once again the sceptical critique of the reform agenda for which this thesis has argued. We examined this critique above and in the introduction. Its central tenet was that Saudi Arabia is a backward state in which theocracy, social hierarchy, and a discriminatory monoculture are roadblocks to reform. In the light of the arguments advanced in this thesis, these criticisms are far too sweeping. For the reasons given earlier, a legal regime that responds justly to disability would win the support of those who make up Saudi Arabian society. This is because it would provide a means of expression for the egalitarian impulses that have long been a feature of Saudi Arabia's Muslim culture. That this is so became clear when we examined the work of those scholars who have dwelt on the moral significance of the *Qur'an*. For this reason, and those given earlier, we therefore have grounds for supposing that we could transplant a body of law much like the ADA or the DDA into Saudi Arabia. Moreover, such a highly focused transplant could spur further egalitarian reform (*e.g.* in the sphere of gender relations). Examining the likelihood of such reform is not a matter that can be addressed within the compass of this work. But we can, at least, say this: that the habits of the heart of those in Saudi Arabia are such that the pursuit of justice may spread from one sphere to another and in ways that would reflect a pattern of development much like that which has unfolded (over an extended period of time) in the West.⁴²

⁴² Development of the sort contemplated here might be thought of as involving an egalitarian 'meme' in the sense specified by Richard Dawkins. See Dawkins R, *The Selfish Gene*, (Oxford, UK: Oxford University Press, 1980).

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APPENDICES

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1. CONVENTION ON THE PROTECTION AND PROMOTION OF THE RIGHTS AND DIGNITY OF PERSONS WITH DISABILITIES (2007)

United Nations

General Assembly

Sixty-first session

Item 67 (b)

Human rights questions: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Note by the Secretary-General

The Secretary-General has the honour to submit to the General Assembly, pursuant to General Assembly resolution 60/232, the final report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities on its eighth session.

Final report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on its eighth session

1. The present report complements the report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on its eighth session (A/AC.256/2006/4 and Add.1). During that session, at its 20th meeting, on 25 August 2006, the Committee had adopted the draft Convention on the Rights of Persons with Disabilities, including a draft Optional Protocol, as a whole, without a vote.¹

2. At the same meeting, the Committee had decided to establish an open-ended drafting group tasked with ensuring the uniformity of terminology throughout the draft Convention and draft Optional Protocol; harmonizing the versions in the six official languages of the United Nations; and reporting on the results of its work to the Committee at a resumed eighth session to be held in time to enable the Committee to forward the finalized draft Convention and draft Optional Protocol to the General Assembly before the end of its sixty-first session. The Committee had requested the Secretary-General to provide adequate secretariat services to the drafting group, within existing resources.

3. At its 21st meeting, on 5 December 2006, the Committee heard an oral report by the Chairman of the open-ended drafting group, Stefan Barriga (Liechtenstein), on the results of its work. The drafting group had held nine meetings, from 6 September to 17 November 2006. At its ninth meeting, on 17 November, the drafting group had decided to forward to the Committee the results of its work as reflected in the annex to the present report.

4. At its 22nd meeting, on 5 December 2006, the Committee decided to delete the footnote to article 12 of the draft Convention.

5. At the same meeting, the representative of Iraq, in his capacity as Chair of the Arab Group for the month of December 2006 (on behalf of Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Kuwait, Lebanon, Libyan Arab Jamahiriya, Mauritania, Morocco, Oman, Palestine, Qatar, **Saudi Arabia**, Somalia, Sudan, Syrian Arab Republic, Tunisia, United Arab Emirates and Yemen), read out a letter dated 5 December 2006 addressed to the Chairman of the Committee (A/AC.265/2006/5). The representative of Finland, in his capacity as Chair of the European Union (on behalf of the States Members of the United Nations that are members of the European Union as well as Andorra, Armenia, Australia, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Iceland, Israel, Moldova, Monaco, Norway, Romania, San Marino, Serbia, Switzerland, the former Yugoslav Republic of Macedonia and United States), read out a letter dated 5 December 2006 addressed to the Chairman of the Committee (A/AC.265/2006/6).

6. Also at the same meeting, the Secretary of the Committee read out a statement by the Secretary-General concerning the financial implications of draft resolution A/AC.265/2006/L.8/Rev.1.

7. At the same meeting, the Committee decided to recommend to the General Assembly for adoption a draft resolution entitled "Convention on the Rights of Persons with Disabilities", containing the draft Convention and draft Optional Protocol (see annex).

Footnotes:

1. The Committee had adopted preambular paragraph (s) bis of the draft Convention by a recorded vote of 102 to 5 with 8 abstentions (see A/AC.256/2006/4); the paragraph was subsequently renumbered by the drafting group to become preambular paragraph (u) of the draft Convention.

Annex

**Draft resolution
Convention on the Rights of Persons with Disabilities**

The General Assembly,

Recalling its resolution 56/168 of 19 December 2001, by which it decided to establish an Ad Hoc Committee, open to the participation of all Member States and observers to the United Nations, to consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities, based on a holistic approach in the work done in the fields of social development, human rights and non-discrimination and taking into account the recommendations of the Commission on Human Rights and the Commission for Social Development,

Recalling also its previous relevant resolutions, the most recent of which was resolution 60/232 of 23 December 2005, as well as relevant resolutions of the Commission for Social Development and the Commission on Human Rights,

Welcoming the valuable contributions made by intergovernmental and non governmental organizations and national human rights institutions to the work of the Ad Hoc Committee,

1. *Expresses its appreciation* to the Ad Hoc Committee for having concluded the elaboration of the draft Convention on the Rights of Persons with Disabilities and the draft Optional Protocol to the Convention;
2. *Adopts* the Convention on the Rights of Persons with Disabilities and the Optional Protocol to the Convention annexed to the present resolution, which shall be open for signature at United Nations Headquarters in New York as from 30 March 2007;
3. *Calls upon* States to consider signing and ratifying the Convention and the Optional Protocol as a matter of priority, and expresses the hope that they will enter into force at an early date;
4. *Requests* the Secretary-General to provide the staff and facilities necessary for the effective performance of the functions of the Conference of States Parties and the Committee under the Convention and the Optional Protocol after the entry into force of the Convention, as well as for the dissemination of information on the Convention and the Optional Protocol;
5. *Also requests* the Secretary-General to implement progressively standards and guidelines for the accessibility of facilities and services of the United Nations system, taking into account relevant provisions of the Convention, in particular when undertaking renovations;
6. *Requests* United Nations agencies and organizations, and invites intergovernmental and non-governmental organizations, to undertake efforts to disseminate information on the Convention and the Optional Protocol and to promote their understanding;

7. *Requests* the Secretary-General to submit to the General Assembly at its sixty-second session a report on the status of the Convention and the Optional Protocol and the implementation of the present resolution, under a sub-item entitled “Convention on the Rights of Persons with Disabilities”.

Annex I

Convention on the Rights of Persons with Disabilities

Preamble

The States Parties to the present Convention,

(a) *Recalling* the principles proclaimed in the Charter of the United Nations which recognize the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world,

(b) *Recognizing* that the United Nations, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, has proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind,

(c) *Reaffirming* the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination,

(d) *Recalling* the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,

(e) *Recognizing* that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others,

(f) *Recognizing* the importance of the principles and policy guidelines contained in the World Programme of Action concerning Disabled Persons and in the Standard Rules on the Equalization of Opportunities for Persons with Disabilities in influencing the promotion, formulation and evaluation of the policies, plans, programmes and actions at the national, regional and international levels to further equalize opportunities for persons with disabilities,

(g) *Emphasizing* the importance of mainstreaming disability issues as an integral part of relevant strategies of sustainable development,

(h) *Recognizing also* that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person,

(i) *Recognizing further* the diversity of persons with disabilities,

(j) *Recognizing* the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support,

(k) *Concerned* that, despite these various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world,

(l) *Recognizing* the importance of international cooperation for improving the living conditions of persons with disabilities in every country, particularly in developing countries,

(m) *Recognizing* the valued existing and potential contributions made by persons with disabilities to the overall well-being and diversity of their communities, and that the promotion of the full enjoyment by persons with disabilities of their human rights and fundamental freedoms and of full participation by persons with disabilities will result in their enhanced sense of belonging and in significant advances in the human, social and economic development of society and the eradication of poverty,

(n) *Recognizing* the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices,

(o) *Considering* that persons with disabilities should have the opportunity to be actively involved in decision-making processes about policies and programmes, including those directly concerning them,

(p) *Concerned* about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status,

(q) *Recognizing* that women and girls with disabilities are often at greater risk, both within and outside the home of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation,

(r) *Recognizing* that children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children, and recalling obligations to that end undertaken by States Parties to the Convention on the Rights of the Child,

(s) *Emphasizing* the need to incorporate a gender perspective in all efforts to promote the full enjoyment of human rights and fundamental freedoms by persons with disabilities,

(t) *Highlighting* the fact that the majority of persons with disabilities live in conditions of poverty, and in this regard recognizing the critical need to address the negative impact of poverty on persons with disabilities,

(u) *Bearing in mind* that conditions of peace and security based on full respect for the purposes and principles contained in the Charter of the United Nations and observance of applicable human rights instruments are indispensable for the full protection of persons with disabilities, in particular during armed conflicts and foreign occupation,

(v) *Recognizing* the importance of accessibility to the physical, social, economic and cultural environment, to health and education and to information and communication, in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms,

(w) *Realizing* that the individual, having duties to other individuals and to the community to which he or she belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the International Bill of Human Rights,

(x) *Convinced* that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, and that persons with disabilities and their family members should receive the necessary protection and assistance to enable families to contribute towards the full and equal enjoyment of the rights of persons with disabilities,

(y) *Convinced* that a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities will make a significant contribution to redressing the profound social disadvantage of persons with disabilities and promote their participation in the civil, political, economic, social and cultural spheres with equal opportunities, in both developing and developed countries,

Have agreed as follows:

Article 1

Purpose

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Article 2

Definitions

For the purposes of the present Convention:

“Communication” includes languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology;

“Language” includes spoken and signed languages and other forms of non spoken languages;

“Discrimination on the basis of disability” means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;

“Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;

“Universal design” means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. “Universal design” shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.

Article 3 **General principles**

The principles of the present Convention shall be:

- (a) Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons;
- (b) Non-discrimination;
- (c) Full and effective participation and inclusion in society;
- (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- (e) Equality of opportunity;
- (f) Accessibility;
- (g) Equality between men and women;
- (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Article 4 **General obligations**

1. States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:

- (a) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;
- (b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;
- (c) To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes;
- (d) To refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention;
- (e) To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise;
- (f) To undertake or promote research and development of universally designed goods, services, equipment and facilities, as defined in article 2 of the present Convention, which should require the minimum possible adaptation and

the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines:

(g) To undertake or promote research and development of, and to promote the availability and use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost;

(h) To provide accessible information to persons with disabilities about mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities;

(i) To promote the training of professionals and staff working with persons with disabilities in the rights recognized in this Convention so as to better provide the assistance and services guaranteed by those rights.

2. With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.

3. In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.

4. Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of persons with disabilities and which may be contained in the law of a State Party or international law in force for that State. There shall be no restriction upon or derogation from any of the human rights and fundamental freedoms recognized or existing in any State Party to the present Convention pursuant to law, conventions, regulation or custom on the pretext that the present Convention does not recognize such rights or freedoms or that it recognizes them to a lesser extent.

5. The provisions of the present Convention shall extend to all parts of federal states without any limitations or exceptions.

Article 5

Equality and non-discrimination

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

Article 6

Women with disabilities

1. States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.

2. States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.

Article 7

Children with disabilities

1. States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.

2. In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.

3. States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.

Article 8

Awareness-raising

1. States Parties undertake to adopt immediate, effective and appropriate measures:

(a) To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities;

(b) To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life;

(c) To promote awareness of the capabilities and contributions of persons with disabilities.

2. Measures to this end include:

(a) Initiating and maintaining effective public awareness campaigns designed:

(i) To nurture receptiveness to the rights of persons with disabilities;

(ii) To promote positive perceptions and greater social awareness towards persons with disabilities;

(iii) To promote recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market;

(b) Fostering at all levels of the education system, including in all children from an early age, an attitude of respect for the rights of persons with disabilities;

(c) Encouraging all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the present Convention;

(d) Promoting awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities.

Article 9

Accessibility

1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:

(a) Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces;

(b) Information, communications and other services, including electronic services and emergency services.

2. States Parties shall also take appropriate measures to:

(a) Develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public;

- (b) Ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities;
- (c) Provide training for stakeholders on accessibility issues facing persons with disabilities;
- (d) Provide in buildings and other facilities open to the public signage in Braille and in easy to read and understand forms;
- (e) Provide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public;
- (f) Promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;
- (g) Promote access for persons with disabilities to new information and communications technologies and systems, including the Internet;
- (h) Promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.

Article 10
Right to life

States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.

Article 11
Situations of risk and humanitarian emergencies

States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.

Article 12
Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Article 13
Access to justice

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Article 14

Liberty and security of the person

1. States Parties shall ensure that persons with disabilities, on an equal basis with others:

(a) Enjoy the right to liberty and security of person;

(b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.

Article 15

Freedom from torture or cruel, inhuman or degrading treatment or punishment

1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.

2. States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.

Article 16

Freedom from exploitation, violence and abuse

1. States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.

2. States Parties shall also take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse. States Parties shall ensure that protection services are age-, gender- and disability-sensitive.

3. In order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.

4. States Parties shall take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs.

5. States Parties shall put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.

Article 17

Protecting the integrity of the person

Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

Article 18

Liberty of movement and nationality

1. States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities:

(a) Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability;

(b) Are not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement;

(c) Are free to leave any country, including their own;

(d) Are not deprived, arbitrarily or on the basis of disability, of the right to enter their own country.

2. Children with disabilities shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents.

Article 19

Living independently and being included in the community

States Parties to this Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

(a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;

(b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;

(c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

Article 20

Personal mobility

States Parties shall take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities, including by:

(a) Facilitating the personal mobility of persons with disabilities in the manner and at the time of their choice, and at affordable cost;

(b) Facilitating access by persons with disabilities to quality mobility aids, devices, assistive technologies and forms of live assistance and intermediaries, including by making them available at affordable cost;

(c) Providing training in mobility skills to persons with disabilities and to specialist staff working with persons with disabilities;

(d) Encouraging entities that produce mobility aids, devices and assistive technologies to take into account all aspects of mobility for persons with disabilities.

Article 21

Freedom of expression and opinion, and access to information

States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in article 2 of the present Convention, including by:

- (a) Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost;
- (b) Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions;
- (c) Urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities;
- (d) Encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities;
- (e) Recognizing and promoting the use of sign languages.

Article 22

Respect for privacy

1. No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks.

2. States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others.

Article 23

Respect for home and the family

1. States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:

(a) The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized;

(b) The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided;

(c) Persons with disabilities, including children, retain their fertility on an equal basis with others.

2. States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, wardship, trusteeship, adoption of children or similar institutions, where these concepts exist in national legislation: in all cases the best interests of the child shall be paramount. States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.

3. States Parties shall ensure that children with disabilities have equal rights with respect to family life. With a view to realizing these rights, and to prevent concealment, abandonment, neglect and segregation of children with disabilities, States Parties shall undertake to provide early and comprehensive information, services and support to children with disabilities and their families.

4. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such

separation is necessary for the best interests of the child. In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.

5. States Parties shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting.

Article 24 **Education**

1. States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and life long learning directed to:

(a) The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;

(b) The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;

(c) Enabling persons with disabilities to participate effectively in a free society.

2. In realizing this right, States Parties shall ensure that:

(a) Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;

(b) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;

(c) Reasonable accommodation of the individual's requirements is provided;

(d) Persons with disabilities receive the support required, within the general education system, to facilitate their effective education;

(e) Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.

3. States Parties shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community. To this end, States Parties shall take appropriate measures, including:

(a) Facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring;

(b) Facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community;

(c) Ensuring that the education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development.

4. In order to help ensure the realization of this right, States Parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.

5. States Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities.

Article 25

Health

States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties shall:

- (a) Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes;
- (b) Provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons;
- (c) Provide these health services as close as possible to people's own communities, including in rural areas;
- (d) Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care;
- (e) Prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance where such insurance is permitted by national law, which shall be provided in a fair and reasonable manner;
- (f) Prevent discriminatory denial of health care or health services or food and fluids on the basis of disability.

Article 26

Habilitation and rehabilitation

1. States Parties shall take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. To that end, States Parties shall organize, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services, in such a way that these services and programmes:

- (a) Begin at the earliest possible stage, and are based on the multidisciplinary assessment of individual needs and strengths;
- (b) Support participation and inclusion in the community and all aspects of society, are voluntary, and are available to persons with disabilities as close as possible to their own communities, including in rural areas.

2. States Parties shall promote the development of initial and continuing training for professionals and staff working in habilitation and rehabilitation services.

3. States Parties shall promote the availability, knowledge and use of assistive devices and technologies, designed for persons with disabilities, as they relate to habilitation and rehabilitation.

Article 27

Work and employment

1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:

- (a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;
- (b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;
- (c) Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;
- (d) Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;
- (e) Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;
- (f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;
- (g) Employ persons with disabilities in the public sector;
- (h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;
- (i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;
- (j) Promote the acquisition by persons with disabilities of work experience in the open labour market;
- (k) Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.

2. States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour.

Article 28

Adequate standard of living and social protection

1. States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.

2. States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures:

- (a) To ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs;
- (b) To ensure access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes;
- (c) To ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care;
- (d) To ensure access by persons with disabilities to public housing programmes;
- (e) To ensure equal access by persons with disabilities to retirement benefits and programmes.

Article 29

Participation in political and public life

States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake to:

(a) Ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by:

(i) Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;

(ii) Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;

(iii) Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice;

(b) Promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including:

(i) Participation in non-governmental organizations and associations concerned with the public and political life of the country, and in the activities and administration of political parties;

(ii) Forming and joining organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels.

Article 30

Participation in cultural life, recreation, leisure and sport

1. States Parties recognize the right of persons with disabilities to take part on an equal basis with others in cultural life, and shall take all appropriate measures to ensure that persons with disabilities:

(a) Enjoy access to cultural materials in accessible formats;

(b) Enjoy access to television programmes, films, theatre and other cultural activities, in accessible formats;

(c) Enjoy access to places for cultural performances or services, such as theatres, museums, cinemas, libraries and tourism services, and, as far as possible, enjoy access to monuments and sites of national cultural importance.

2. States Parties shall take appropriate measures to enable persons with disabilities to have the opportunity to develop and utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society.

3. States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.

4. Persons with disabilities shall be entitled, on an equal basis with others, to recognition and support of their specific cultural and linguistic identity, including sign languages and deaf culture.

5. With a view to enabling persons with disabilities to participate on an equal basis with others in recreational, leisure and sporting activities, States Parties shall take appropriate measures:

(a) To encourage and promote the participation, to the fullest extent possible, of persons with disabilities in mainstream sporting activities at all levels;

(b) To ensure that persons with disabilities have an opportunity to organize, develop and participate in disability-specific sporting and recreational activities and, to this end, encourage the provision, on an equal basis with others, of appropriate instruction, training and resources;

(c) To ensure that persons with disabilities have access to sporting, recreational and tourism venues;

(d) To ensure that children with disabilities have equal access with other children to participation in play, recreation and leisure and sporting activities, including those activities in the school system;

(e) To ensure that persons with disabilities have access to services from those involved in the organization of recreational, tourism, leisure and sporting activities.

Article 31

Statistics and data collection

1. States Parties undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention. The process of collecting and maintaining this information shall:

(a) Comply with legally established safeguards, including legislation on data protection, to ensure confidentiality and respect for the privacy of persons with disabilities;

(b) Comply with internationally accepted norms to protect human rights and fundamental freedoms and ethical principles in the collection and use of statistics.

2. The information collected in accordance with this article shall be disaggregated, as appropriate, and used to help assess the implementation of States Parties' obligations under the present Convention and to identify and address the barriers faced by persons with disabilities in exercising their rights.

3. States Parties shall assume responsibility for the dissemination of these statistics and ensure their accessibility to persons with disabilities and others.

Article 32

International cooperation

1. States Parties recognize the importance of international cooperation and its promotion, in support of national efforts for the realization of the purpose and objectives of the present Convention, and will undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society, in particular organizations of persons with disabilities. Such measures could include, inter alia:

(a) Ensuring that international cooperation, including international development programmes, is inclusive of and accessible to persons with disabilities;

(b) Facilitating and supporting capacity-building, including through the exchange and sharing of information, experiences, training programmes and best practices;

(c) Facilitating cooperation in research and access to scientific and technical knowledge;

(d) Providing, as appropriate, technical and economic assistance, including by facilitating access to and sharing of accessible and assistive technologies, and through the transfer of technologies.

2. The provisions of this article are without prejudice to the obligations of each State Party to fulfil its obligations under the present Convention.

Article 33

National implementation and monitoring

1. States Parties, in accordance with their system of organization, shall designate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.

2. States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.

3. Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.

Article 34

Committee on the Rights of Persons with Disabilities

1. There shall be established a Committee on the Rights of Persons with Disabilities (hereafter referred to as "the Committee"), which shall carry out the functions hereinafter provided.
2. The Committee shall consist, at the time of entry into force of the present Convention, of twelve experts. After an additional sixty ratifications or accessions to the Convention, the membership of the Committee shall increase by six members, attaining a maximum number of eighteen members.
3. The members of the Committee shall serve in their personal capacity and shall be of high moral standing and recognized competence and experience in the field covered by the present Convention. When nominating their candidates, States Parties are invited to give due consideration to the provision set out in article 4.3 of the present Convention.
4. The members of the Committee shall be elected by States Parties, consideration being given to equitable geographical distribution, representation of the different forms of civilization and of the principal legal systems, balanced gender representation and participation of experts with disabilities.
5. The members of the Committee shall be elected by secret ballot from a list of persons nominated by the States Parties from among their nationals at meetings of the Conference of States Parties. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.
6. The initial election shall be held no later than six months after the date of entry into force of the present Convention. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit the nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating the State Parties which have nominated them, and shall submit it to the States Parties to the present Convention.
7. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election once. However, the term of six of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these six members shall be chosen by lot by the chairperson of the meeting referred to in paragraph 5 of this article.
8. The election of the six additional members of the Committee shall be held on the occasion of regular elections, in accordance with the relevant provisions of this article.
9. If a member of the Committee dies or resigns or declares that for any other cause she or he can no longer perform her or his duties, the State Party which nominated the member shall appoint another expert possessing the qualifications and meeting the requirements set out in the relevant provisions of this article, to serve for the remainder of the term.
10. The Committee shall establish its own rules of procedure.
11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention, and shall convene its initial meeting.
12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide, having regard to the importance of the Committee's responsibilities.
13. The members of the Committee shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 35

Reports by States Parties

1. Each State Party shall submit to the Committee, through the Secretary-General of the United Nations, a comprehensive report on measures taken to give effect to its obligations under the present Convention and on the progress made in that regard, within two years after the entry into force of the present Convention for the State Party concerned.
2. Thereafter, States Parties shall submit subsequent reports at least every four years and further whenever the Committee so requests.

3. The Committee shall decide any guidelines applicable to the content of the reports.

4. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports, repeat information previously provided. When preparing reports to the Committee, States Parties are invited to consider doing so in an open and transparent process and to give due consideration to the provision set out in article 4.3 of the present Convention.

5. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Convention.

Article 36

Consideration of reports

1. Each report shall be considered by the Committee, which shall make such suggestions and general recommendations on the report as it may consider appropriate and shall forward these to the State Party concerned. The State Party may respond with any information it chooses to the Committee. The Committee may request further information from States Parties relevant to the implementation of the present Convention.

2. If a State Party is significantly overdue in the submission of a report, the Committee may notify the State Party concerned of the need to examine the implementation of the present Convention in that State Party, on the basis of reliable information available to the Committee, if the relevant report is not submitted within three months following the notification. The Committee shall invite the State Party concerned to participate in such examination. Should the State Party respond by submitting the relevant report, the provisions of paragraph 1 of this article will apply.

3. The Secretary-General of the United Nations shall make available the reports to all States Parties.

4. States Parties shall make their reports widely available to the public in their own countries and facilitate access to the suggestions and general recommendations relating to these reports.

5. The Committee shall transmit, as it may consider appropriate, to the specialized agencies, funds and programmes of the United Nations, and other competent bodies, reports from States Parties in order to address a request or indication of a need for technical advice or assistance contained therein, along with the Committee's observations and recommendations, if any, on these requests or indications.

Article 37

Cooperation between States Parties and the Committee

1. Each State Party shall cooperate with the Committee and assist its members in the fulfilment of their mandate.

2. In its relationship with States Parties, the Committee shall give due consideration to ways and means of enhancing national capacities for the implementation of the present Convention, including through international cooperation.

Article 38

Relationship of the Committee with other bodies

In order to foster the effective implementation of the present Convention and to encourage international cooperation in the field covered by the present Convention:

(a) The specialized agencies and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite specialized agencies and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;

(b) The Committee, as it discharges its mandate, shall consult, as appropriate, other relevant bodies instituted by international human rights treaties, with a view to ensuring the consistency of their respective reporting guidelines, suggestions and general recommendations, and avoiding duplication and overlap in the performance of their functions.

Article 39

Report of the Committee

The Committee shall report every two years to the General Assembly and to the Economic and Social Council on its activities, and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties. Such suggestions and general recommendations shall be included in the report of the Committee together with comments, if any, from States Parties.

Article 40 **Conference of States Parties**

1. The States Parties shall meet regularly in a Conference of States Parties in order to consider any matter with regard to the implementation of the present Convention.
2. No later than six months after the entry into force of the present Convention, the Conference of the States Parties shall be convened by the Secretary-General of the United Nations. The subsequent meetings shall be convened by the Secretary-General of the United Nations biennially or upon the decision of the Conference of States Parties.

Article 41 **Depositary**

The Secretary-General of the United Nations shall be the depositary of the present Convention.

Article 42 **Signature**

The present Convention shall be open for signature by all States and by regional integration organizations at United Nations Headquarters in New York as of 30 March 2007.

Article 43 **Consent to be bound**

The present Convention shall be subject to ratification by signatory States and to formal confirmation by signatory regional integration organizations. It shall be open for accession by any State or regional integration organization which has not signed the Convention.

Article 44 **Regional integration organizations**

1. "Regional integration organization" shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention. Such organizations shall declare, in their instruments of formal confirmation or accession, the extent of their competence with respect to matters governed by this Convention. Subsequently, they shall inform the depositary of any substantial modification in the extent of their competence.
2. References to "States Parties" in the present Convention shall apply to such organizations within the limits of their competence.
3. For the purposes of article 45, paragraph 1, and article 47, paragraphs 2 and 3, any instrument deposited by a regional integration organization shall not be counted.
4. Regional integration organizations, in matters within their competence, may exercise their right to vote in the Conference of States Parties, with a number of votes equal to the number of their member States that are Parties to this Convention. Such an organization shall not exercise its right to vote if any of its member States exercises its right, and vice versa.

Article 45 **Entry into force**

1. The present Convention shall enter into force on the thirtieth day after the deposit of the twentieth instrument of ratification or accession.

2. For each State or regional integration organization ratifying, formally confirming or acceding to the Convention after the deposit of the twentieth such instrument, the Convention shall enter into force on the thirtieth day after the deposit of its own such instrument.

Article 46 **Reservations**

1. Reservations incompatible with the object and purpose of the present Convention shall not be permitted.
2. Reservations may be withdrawn at any time.

Article 47 **Amendments**

1. Any State Party may propose an amendment to the present Convention and submit it to the Secretary-General of the United Nations. The Secretary-General shall communicate any proposed amendments to States Parties, with a request to be notified whether they favour a conference of States Parties for the purpose of considering and deciding upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting shall be submitted by the Secretary-General to the General Assembly for approval and thereafter to all States Parties for acceptance.
2. An amendment adopted and approved in accordance with paragraph 1 of this article shall enter into force on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any State Party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only on those States Parties which have accepted it.
3. If so decided by the Conference of States Parties by consensus, an amendment adopted and approved in accordance with paragraph 1 of this article which relates exclusively to articles 34, 38, 39 and 40 shall enter into force for all States Parties on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment.

Article 48 **Denunciation**

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. The denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

Article 49 **Accessible format**

The text of the present Convention shall be made available in accessible formats.

Article 50 **Authentic texts**

The Arabic, Chinese, English, French, Russian and Spanish texts of the present Convention shall be equally authentic. In witness thereof the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

Annex II

Optional Protocol to the Convention on the Rights of Persons with Disabilities

The States Parties to the present Protocol have agreed as follows:

Article 1

1. A State Party to the present Protocol ("State Party") recognizes the competence of the Committee on the Rights of Persons with Disabilities ("the Committee") to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention.

2. No communication shall be received by the Committee if it concerns a State Party to the Convention that is not a party to the present Protocol.

Article 2

The Committee shall consider a communication inadmissible when:

(a) The communication is anonymous;

(b) The communication constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of the Convention;

(c) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;

(d) All available domestic remedies have not been exhausted. This shall not be the rule where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief;

(e) It is manifestly ill-founded or not sufficiently substantiated; or when

(f) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date.

Article 3

Subject to the provisions of article 2 of the present Protocol, the Committee shall bring any communications submitted to it confidentially to the attention of the State Party. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

Article 4

1. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation.

2. Where the Committee exercises its discretion under paragraph 1 of this article, this does not imply a determination on admissibility or on the merits of the communication.

Article 5

The Committee shall hold closed meetings when examining communications under the present Protocol. After examining a communication, the Committee shall forward its suggestions and recommendations, if any, to the State Party concerned and to the petitioner.

Article 6

1. If the Committee receives reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention, the Committee shall invite that State Party to cooperate in the examination of the information and to this end submit observations with regard to the information concerned.

2. Taking into account any observations that may have been submitted by the State Party concerned as well as any other reliable information available to it, the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted and with the consent of the State Party, the inquiry may include a visit to its territory.

3. After examining the findings of such an inquiry, the Committee shall transmit these findings to the State Party concerned together with any comments and recommendations.
4. The State Party concerned shall, within six months of receiving the findings, comments and recommendations transmitted by the Committee, submit its observations to the Committee.
5. Such an inquiry shall be conducted confidentially and the cooperation of the State Party shall be sought at all stages of the proceedings.

Article 7

1. The Committee may invite the State Party concerned to include in its report under article 35 of the Convention details of any measures taken in response to an inquiry conducted under article 6 of the present Protocol.
2. The Committee may, if necessary, after the end of the period of six months referred to in article 6.4, invite the State Party concerned to inform it of the measures taken in response to such an inquiry.

Article 8

Each State Party may, at the time of signature or ratification of the present Protocol or accession thereto, declare that it does not recognize the competence of the Committee provided for in articles 6 and 7.

Article 9

The Secretary-General of the United Nations shall be the depositary of the present Protocol.

Article 10

The present Protocol shall be open for signature by signatory States and regional integration organizations of the Convention at United Nations Headquarters in New York as of 30 March 2007.

Article 11

The present Protocol shall be subject to ratification by signatory States of this Protocol which have ratified or acceded to the Convention. It shall be subject to formal confirmation by signatory regional integration organizations of this Protocol which have formally confirmed or acceded to the Convention. It shall be open for accession by any State or regional integration organization which has ratified, formally confirmed or acceded to the Convention and which has not signed the Protocol.

Article 12

1. "Regional integration organization" shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by the Convention and this Protocol. Such organizations shall declare, in their instruments of formal confirmation or accession, the extent of their competence with respect to matters governed by the Convention and this Protocol. Subsequently, they shall inform the depositary of any substantial modification in the extent of their competence.
2. References to "States Parties" in the present Protocol shall apply to such organizations within the limits of their competence.
3. For the purposes of article 13, paragraph 1, and article 15, paragraph 2, any instrument deposited by a regional integration organization shall not be counted.
4. Regional integration organizations, in matters within their competence, may exercise their right to vote in the meeting of States Parties, with a number of votes equal to the number of their member States that are Parties to this Protocol. Such an organization shall not exercise its right to vote if any of its member States exercises its right, and vice versa.

Article 13

1. Subject to the entry into force of the Convention, the present Protocol shall enter into force on the thirtieth day after the deposit of the tenth instrument of ratification or accession.

2. For each State or regional integration organization ratifying, formally confirming or acceding to the Protocol after the deposit of the tenth such instrument, the Protocol shall enter into force on the thirtieth day after the deposit of its own such instrument.

Article 14

1. Reservations incompatible with the object and purpose of the present Protocol shall not be permitted.

2. Reservations may be withdrawn at any time.

Article 15

1. Any State Party may propose an amendment to the present Protocol and submit it to the Secretary-General of the United Nations. The Secretary-General shall communicate any proposed amendments to States Parties, with a request to be notified whether they favour a meeting of States Parties for the purpose of considering and deciding upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a meeting, the Secretary-General shall convene the meeting under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting shall be submitted by the Secretary-General to the General Assembly for approval and thereafter to all States Parties for acceptance.

2. An amendment adopted and approved in accordance with paragraph 1 of this article shall enter into force on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any State Party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only on those States Parties which have accepted it.

Article 16

A State Party may denounce the present Protocol by written notification to the Secretary-General of the United Nations. The denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

Article 17

The text of the present Protocol shall be made available in accessible formats.

Article 18

The Arabic, Chinese, English, French, Russian and Spanish texts of the present Protocol shall be equally authentic. In witness thereof the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Protocol

2. SAUDI PROVISION CODE FOR PERSONS WITH ISABILITIES (2001)

Article 1

The following words and expressions, wherever used in this code, shall have the following meanings:

Persons with disabilities

A person with a disability is one who is totally or partially disabled with respect to his/her bodily, material, mental, communicative, academic or psychological capabilities, to the extent that it compromises the ability of that person to meet his/her normal needs as compared to his/her non-disabled counterparts.

For the purpose of this code, "persons with disabilities" shall refer to individuals who have one or more of the following disabilities:

visual disability, hearing disability, cognitive disability, motor disability, learning disabilities, speech and language impairments, behavioral problems, pervasive developmental delay, multi-disabilities, and other disabilities which require special care.

Prevention

The set of medical, psychological, social, educational, informational and regulatory procedures, which aim at preventing or limiting the effect of disabilities and at pre-empting and easing the consequences thereof.

Welfare

To provide care services to persons with disabilities dependent upon the degree of their disability, as well as their medical and social situation.

Habilitation

A coordinated process to utilize medical, social, psychological, educational and professional services to enable the disabled to achieve the maximum feasible degree of functional efficiency; to enable persons with disabilities to adapt to the needs and requirements of their natural and social environment, as well as developing their capabilities to attain independence and be productive members of society to the extent possible.

The Supreme Council

The Supreme Council for the Affairs of Persons with Disabilities.

Article 2

The Government shall guarantee the prevention, welfare and habilitation services to persons with disabilities and their families, and will encourage institutions and individuals to contribute to charitable activities within the field of disability. The Government shall guarantee to provide services to persons with disabilities in the following areas:

1. Health

This includes:

- a) providing medical, preventive and habilitation services, including genetic counseling, laboratory testing and analyses for the early detection of disease and necessary intervention,
- b) registering children who are at risk or born with a disability, and conducting follow-up monitoring of their condition(s), and communicating relevant information to the appropriate authorities,
- c) enriching the health care of the disabled and taking the necessary steps to achieve this.

- d) training health care providers and paramedics in appropriate procedures for the safe handling of injured persons on site to prevent further complications during transit, and
- e) training families of the disabled on handling and care.

2. Education

This includes all phases of education (pre-school, general, vocational, and higher education) that are suitable to the abilities of the disabled and that are commensurate with their various categories and needs, including the continuous updating of curricula and services provided in this field.

3. Training and habilitation

This includes the provision of training and habilitation services as required by the labor market, in order to be competitively employable. This also includes the provision of vocational and social habilitation centers and adequate training aids.

4. Work

This includes recruiting and employing persons with disabilities to give them the opportunity to discover their personal capabilities and potential and enabling them to earn and generate an income like other members of the community. This also includes enhancing the performance of employed persons with disabilities by providing further ongoing training.

5. Social

This includes programs which contribute to developing the capabilities of persons with disabilities to enable them to integrate naturally into various facets of public life without hindrance from the nature of their disability.

6. Culture and sports

This includes utilization of cultural and sporting facilities, and the adaptation of such facilities to enable persons with disabilities to participate therein, indoors and outdoors, in a manner suitable to their abilities.

7. Information

This includes the role the mass media plays in enlightening and educating the community by:

- a) defining the types and causes of disabilities, and the importance of the processes of early diagnosis and prevention,
- b) educating the public in the role of persons with disabilities in society, by identifying their rights, needs, abilities and their contribution to the services available; as well as educating persons with disabilities regarding their duties towards themselves and their role in society,
- c) producing special programs for persons with disabilities that will assist them in their integration into society, and
- d) encouraging individuals and institutions to provide financial and moral support to the disabled and encouraging volunteer work in the community to serve persons with disabilities.

8. Complementary services

This includes:

- a) facilitating a method of public transport to securely and safely transport the disabled and their caretakers, at reduced cost (depending on the condition of the disability),
- b) providing day-care centers and/or home help to assist persons with disabilities, and
- c) providing technical aids.

Article 3

The Supreme Council shall coordinate with authorities to abide by the regulations for architectural specifications required to provide access and accommodate persons with disabilities in all centers for habilitation, training, education, medical, welfare and public places, as well as all other areas, to enable persons with disabilities easy access of movement and transportation. All authorities shall abide by the said regulation.

Article 4

The Supreme Council will coordinate with authorities to provide manpower to be educated and trained nationally and internationally in the field of disability, and to promote the exchange of experience with other countries.

Article 5

The Government shall award loans for persons with disabilities to establish occupational or commercial employment that is suited to their abilities in their capacity as individuals or as a group.

Article 6

Technical aids and devices used by persons with disabilities shall be exempt from customs duties. These will be specified in a list approved by the Ministry of Finance and National Economy.

Article 7

A trust fund shall be established, under the control of the Supreme Council, for depositing all endowments, donations and revenues from fines, and which will be used for providing care for persons with disabilities.

Article 8

A Supreme Council for the Affairs of Persons with Disabilities will be established. The Council shall be associated with the Prime Minister and shall be constituted as follows:

a Chairman, to be appointed by Royal Order, and members -

- " A Secretary General for the Supreme Council
- " The Minister of Labor and Social Affairs
- " The Minister of Health
- " The Minister of Higher Education
- " The Minister of Education
- " The Minister of Finance and National Economy
- " The Minister of Municipal and Rural Affairs
- " The General President of Girls Education
- " Two persons with disabilities
- " Two businessmen interested in the affairs of persons with disabilities
- " Two specialists in the field of disability.

The latter six members are appointed by the Prime Minister based on recommendations of the Chairman of the Supreme Council and their appointments are for renewable terms of four years.

The Chairman of the Supreme Council may appoint any member of the Council to act on his behalf in the event of his absence.

Article 9

The Supreme Council will be authorized in the organization of the affairs of persons with disabilities in the following:

- a) issue policies and procedures and decisions required to implement this code,
- b) propose modifications of regulations pertaining to the affairs of persons with disabilities in different areas, propose basic standards to what is offered to them or to whoever takes care of them, i.e. financial benefits,
- c) ensure implementation of this code and its regulations, including other policies and procedures relating to the affairs of persons with disabilities,
- d) coordination between the Government and private sectors in relation to services provided to persons with disabilities,
- e) encourage scientific research to examine the extent of disability, the types and causes; examine the means of prevention, and methods of treatment in order to alleviate its negative effects; specify occupations that would be suitable to train and habilitate persons with disabilities, taking into consideration the degree and type of their disability as well as the needs of the labor market,
- f) encourage individuals, charitable institutions and associations to create special programs to habilitate, support and enable persons with disabilities,

- g) review annual reports issued by the concerned governmental authorities relating to what has been achieved in the prevention, habilitation and welfare of persons with disabilities,
- h) furnish a list of donations and endowments received,
- i) prepare a method of operation of the trust fund for persons with disabilities,
- j) issue an internal procedure for the administration within the Supreme Council, and
- k) comment on the point of view of the International Memorandum of Agreement concerning persons with disabilities.

Article 10

An annual report will be submitted to the Prime Minister regarding the achievements of the Supreme Council and the status of the services provided, difficulties and obstacles experienced and means of support services provided to persons with disabilities.

Article 11

- a) The Chairman or his Acting will call upon the Supreme Council for a meeting twice annually.
- b) The Supreme Council shall convene upon the presence of a majority of its members, including the Chairman or his Acting, and shall take its decisions by the majority of the votes of the attendees. In the case of a tie, the Chairman shall have the deciding vote.

Article 12

The Supreme Council shall have a General Secretariat and shall appoint a Secretary General and the necessary staff, in accordance with the regulations of the civil service. The Secretary General will be responsible for the following:

- a) administer the Secretariat,
- b) assume responsibility for convening meetings, taking minutes, informing the concerned parties of the decisions taken in the meetings,
- c) prepare executive policies for this code,
- d) prepare technical reviews on the work of the Supreme Council,
- e) format policies and procedures relating to the affairs of persons with disabilities, in coordination with the concerned parties,
- f) represent the Supreme Council to governmental departments, institutions and other related organizations,
- g) form committees consisting of members specialized and experienced in reviewing the issues related to the disabled,
- h) prepare an annual report on the work of the Supreme Council, and
- i) perform other duties allocated to him by the Supreme Council.

Article 13

The Supreme Council shall form a working group from amongst its members or otherwise. The Council shall determine and specify the Group's expertise and work methodology.

Article 14

The Supreme Council shall have a budget which shall be subject to the general rules and provisions of the Kingdom's budget.

Article 15

All pre-existing codes, policies, procedures, decisions and instructions relating to persons with disabilities shall be modified according to this code within three years of the date of its publication.

Article 16

This code will be published in the official book of law and shall be valid and in effect after 180 days from the date of publication.

3. QUESTIONNAIRE FINDINGS

Introduction

This questionnaire aims to reveal the real facts regarding discrimination towards disabled persons in Saudi Arabia. It especially focuses on those who are qualified, competent, and eager to participate in social life, and on those who strive to improve and reform their conditions to reach a level of equality with the non-disabled. The questions attempt to discover the extent of actual discrimination facing disabled persons in education and employment. Hence, all the questions foreground the rights of disabled persons and the discrimination they face. Some questions also ask how the latter see their rights: as charity and social grants or as pure rights (see the questionnaire form).

The survey uses a sample of 500 qualified disabled persons. The questionnaires upon which this thesis is based were analysed by the SPSS program. The questionnaire tackles the issue of disability through an authentic sample and is considered the first of its kind in Saudi Arabia. It was designed for the requirements of this thesis. I personally questioned each participant and, as a disabled person myself, I have experienced similar problems. Being one of those who call for change, I offer this research as one means which may bring about that change.

The survey firstly presents official statistics and classifications of the handicapped. It attempts to establish the extent of discrimination by finding out the percentage of discrimination in general and its practice in the context of disability. It then investigates levels of education, discrimination in education, employment, opportunity and equality with non-disabled and their integration into social life and the elimination of discrimination amongst the handicapped. Finally, the survey attempts to identify a preferred method among these disabled people for gaining equality of fundamental rights.

- **Disabled Persons and Discrimination**

This research, the statistics and the estimates of the United Nations show that the total number of disabled persons in Saudi Arabia is around 2,000,000. Amongst those who were questioned, more than 60% suffer from mobility disability, 26% from audio disability, 6.25% from visual disability and 6.2% from mental disability (see Figure 1).

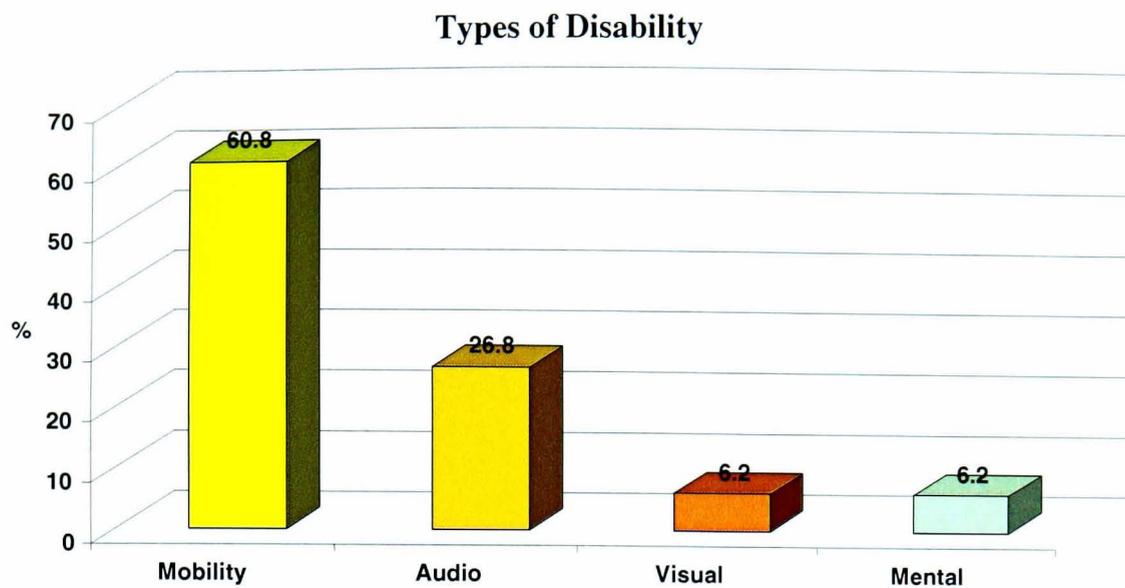


Figure 1

The statistics reveal that most qualified disabled people suffer from architectural constraints. This high percentage, 60%, shows an urgent need to eliminate architectural constraints and all other obstacles facing the disabled, so as to allow them to participate in social activities and benefit from public facilities. The latter always need to be prepared and air-conditioned.

The survey also reveals a high number of audio-disabled individuals whose needs must be taken into account so as to enable them to obtain their rights. This may entail the provision of compensational apparatus, sign language translators for education and mass media, sign boards in all public facilities, training and education. Visually disabled individuals need support appropriate to their situation. They need to receive private education, compensational apparatus, transport and elimination of all types of obstacles.

The percentage of the mentally disabled is high, especially those whose mental condition allows them to participate in social life, education and in the use of public facilities. Their problems need attention so as to enable them to receive private education and social care.

It may be argued that all needs and requirements for all categories of disabled are provided by the government, which strenuously exerts itself to deliver these services to them. The reply to this argument is found in the actual situations of disabled persons, the percentage of those who suffer from discrimination and the means by which the services are introduced. They may be offered in a spirit of charity and sympathy, or they may follow a specific model. The questionnaire attempts to investigate this.

In general, the survey reveals that a high percentage of the samples of disabled persons questioned urgently want to integrate into society and contribute to social life. The percentage of those who strongly wish to integrate into social life and to change their situations by eliminating discrimination is 77.3%. Those who express an interest only in changing their situations as such constitute 9.3% (see Figure 2).

The Desire of Disabled Persons for Integration into Society

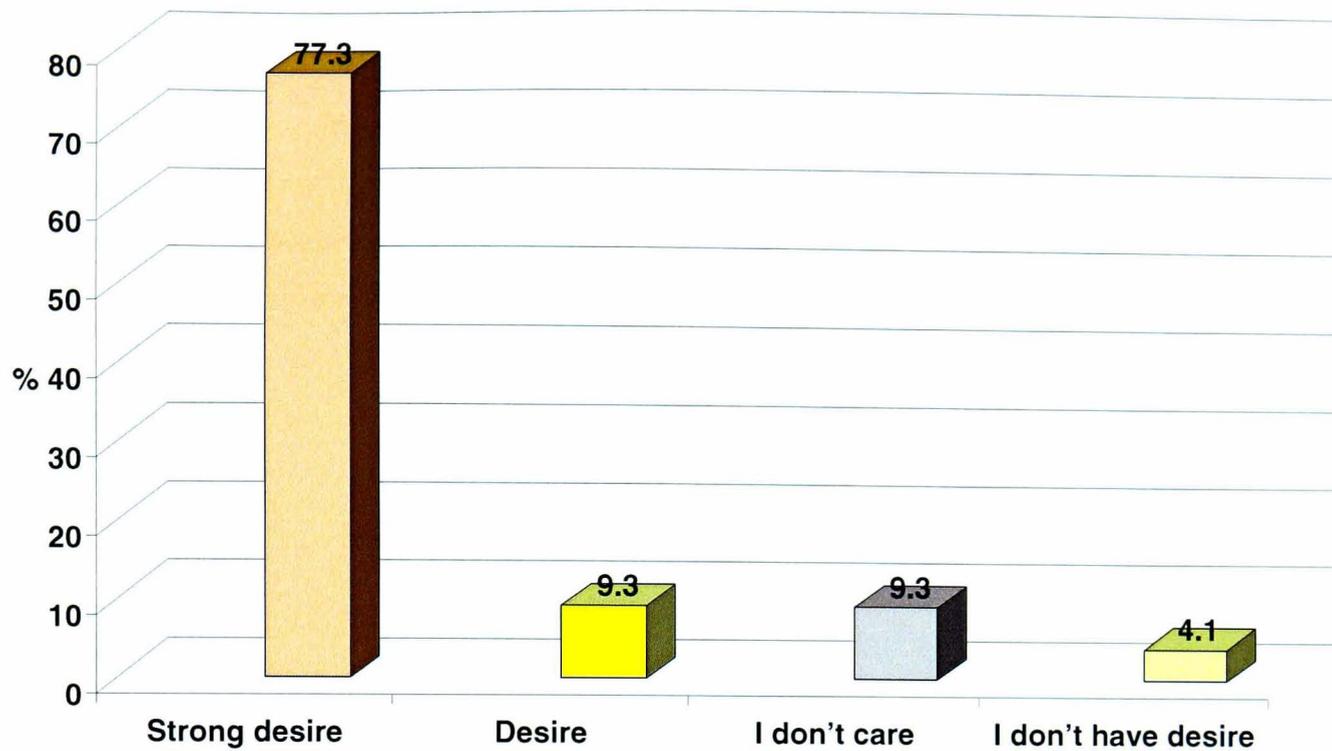


Figure 2

There is a serious obstacle to the fulfilment of these wishes. It constitutes one of the major reasons for this research. The obstacle is a lack of understanding on the part of most of the disabled, including those who are eligible to get a job and participate in social life, of the fundamental difference between charity and rights as a basis for obtaining their goals. Of those questioned, 93.8% do not appreciate this difference (see Figure 3). This high percentage is probably because of absence of awareness in general and legal awareness in particular amongst individuals on these issues. Government institutions and the media are widely responsible for this ignorance, in addition to the absence of an anti-discrimination disability law. The issues and rights of disabled persons have hitherto always been given as gifts and charity, not as rights.

Knowledge of differences between rights given in charity or by law

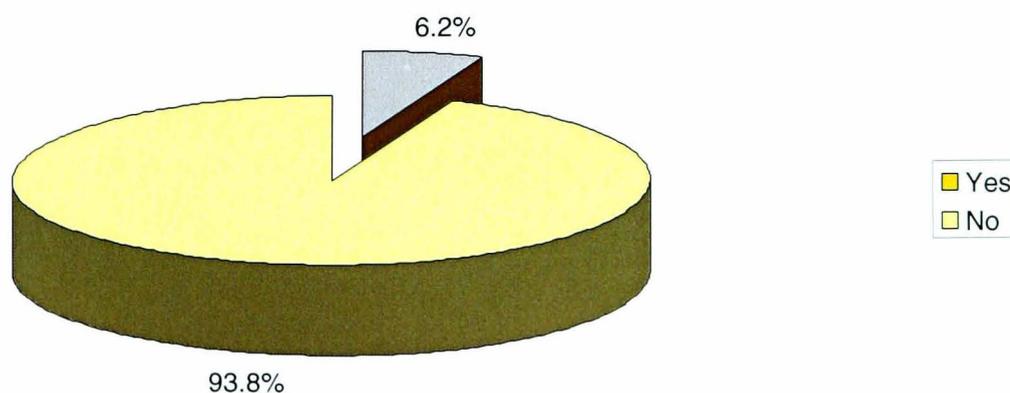


Figure 3

The survey reveals a worryingly high percentage of those who have experienced discrimination (63.9%). Among the categories of discrimination identified, the highest percentage (75.3%) is discrimination in opportunities for social participation. This figure is considered to be the result of mobility disability, because no thought is given to the mobility needs of the disabled. The next highest percentages are for the categories showing discrimination in getting training and education. This is because of the failure of the state institutions to do what ought to be done, in addition to the absence of a law and enforcement mechanisms for such a disability law (see Figures 4 and 5).

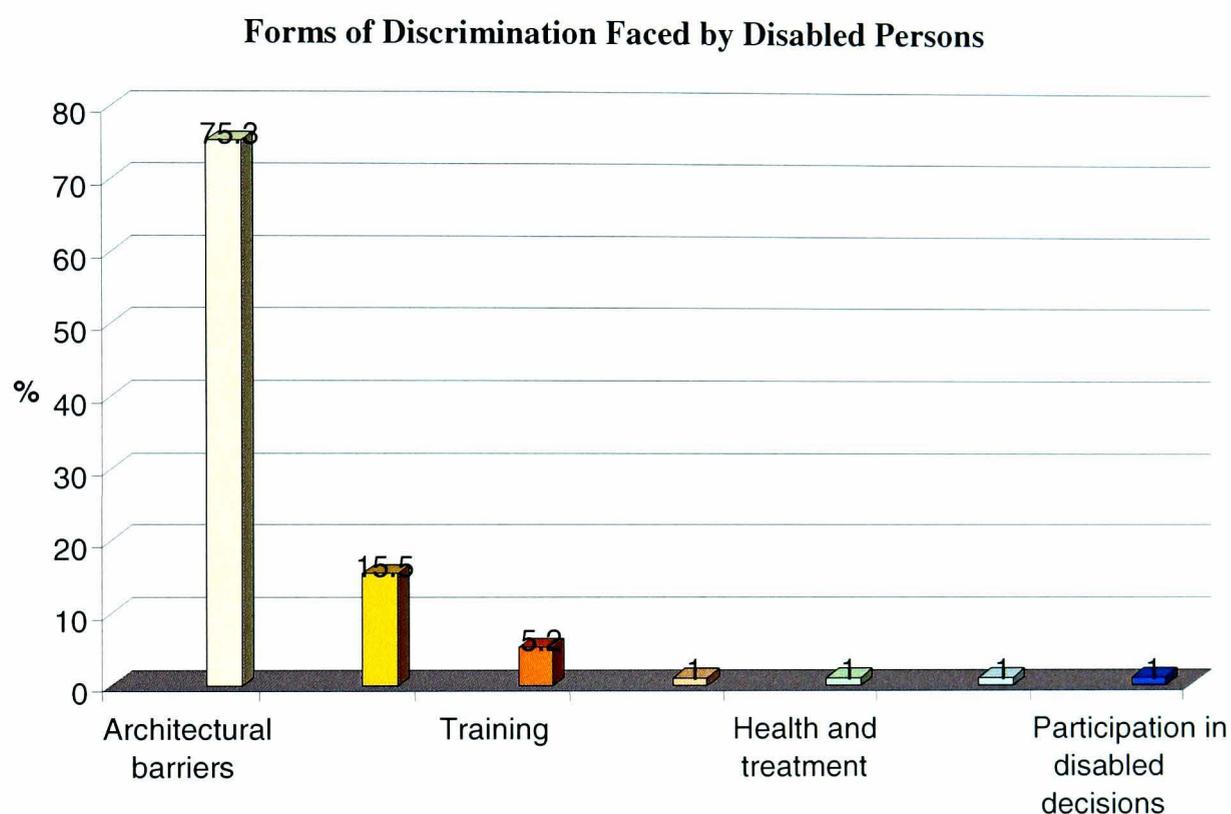


Figure 4

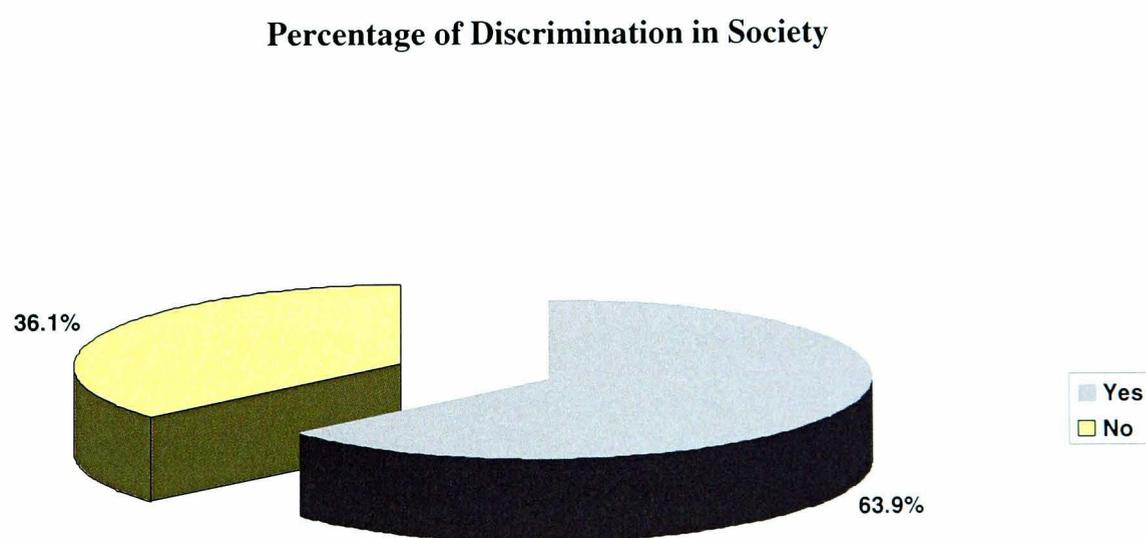


Figure 5

- **Education and discrimination**

The state has made great efforts to raise its standards, through private education for the disabled or programmes recently initiated by the Ministry of Education for integrating disabled people into state education. This survey attempts, however, to uncover areas of discrimination still facing disabled persons in education. It has found that the total percentage of illiteracy amongst the disabled is over 60%. Moreover, the percentages for education amongst disabled persons are generally very low: only 28.9% have completed the elementary stage, 19.6% the intermediate stage, 16.55% high school and 18.6% university (see Figure 6).

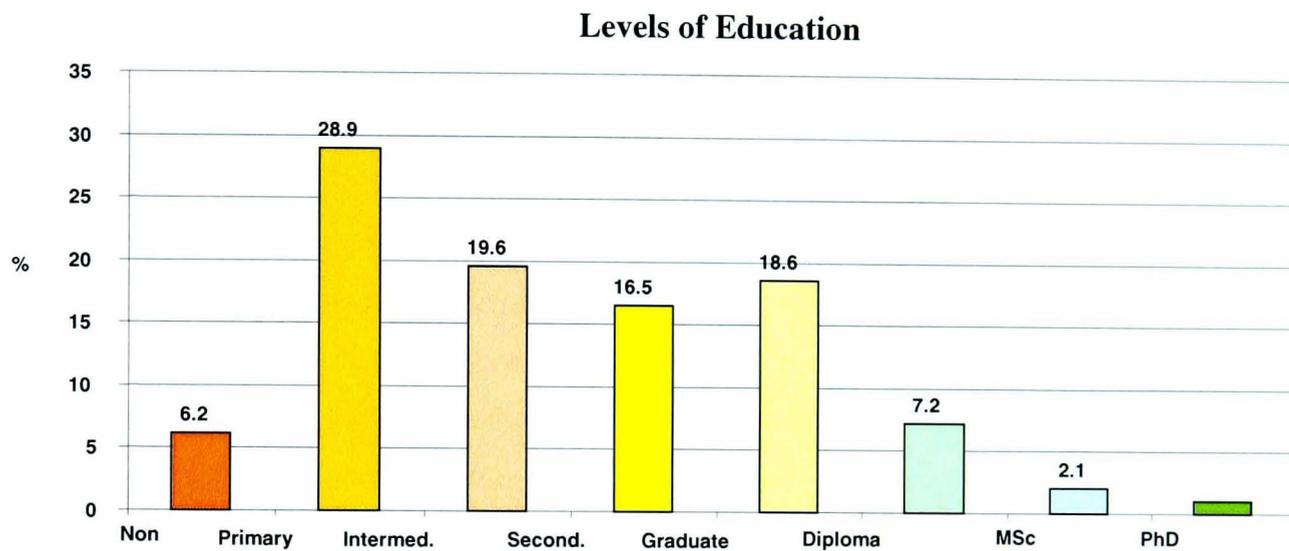


Figure 6

A reason must be sought for the high percentage of illiteracy and the low standards of education amongst disabled people. It is suggested that the reason is the practice of discrimination against disabled people in education. This discrimination might be intentional or non-intentional. The disabled persons themselves outline a variety of forms of discrimination experienced. These include rigorous entry requirements for university study, on the grounds that there are no prepared seats or places for them, or that they are incapable of education, or sometimes on the ground that there is no private transportation. The fact is that 54.9% of university applicants were rejected, and those who were accepted have complaints about architectural constraints and the non-organisation of their allocated car parking. This confirms the existence of an urgent need to find enforcement mechanisms for laws for disabled persons.

- **Employment and Discrimination**

Discrimination in employment is considered the most recurrent form of disability discrimination in societies in general and in Saudi society in particular. Figure 7 shows that 89.7% of disabled individuals do not know that to have a job, including a leading public position, is their right, as opposed to the good fortune of a gift. In other words, they do not know that they have the right to compete with non-disabled for the same jobs and for training qualifications for public jobs; they do not need to take only the jobs classified as '*handicapped jobs*' which are likely to entail low-levels of pay and status.

Knowledge of Rights of Employment

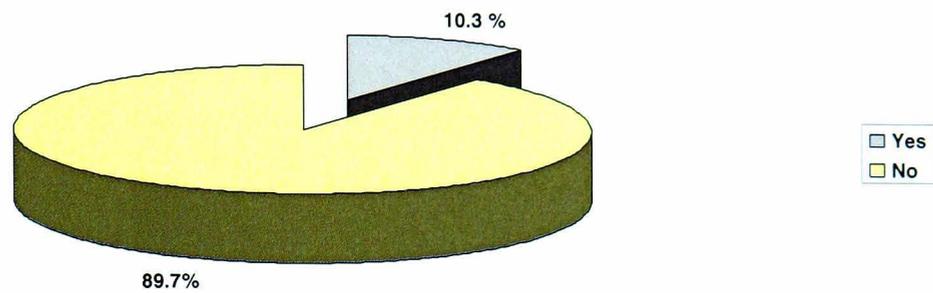


Figure 7

As a result, most qualified disabled persons are unemployed. Figure 8 shows that 75.3% of competent and qualified persons are unemployed and get their income from charity or relatives. Only 24.7% are employed in less demanding jobs such as textile work and typing, which are allocated to them. Some of them hold advanced degrees, yet they are given only secondary jobs. This worrying situation shows the prevalence of discrimination in employment, and requires speedy correction and reform by provision and full implementation of anti-discrimination laws.

Percentage of Disabled Employees

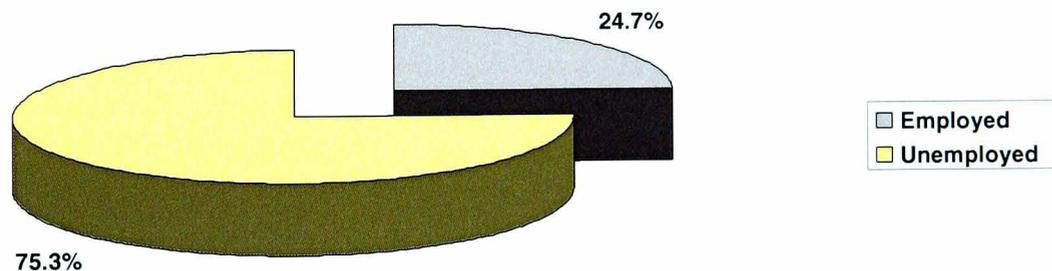


Figure 8

Disabled persons have the strongest desire to have a job and be given the chance to live independently. When asked about the preferred source of their personal income, 83.5% name an independent salary (see Figure 9). This high percentage reflects a very strong interest amongst disabled persons.

Preferred Sources of Income for Disabled Persons

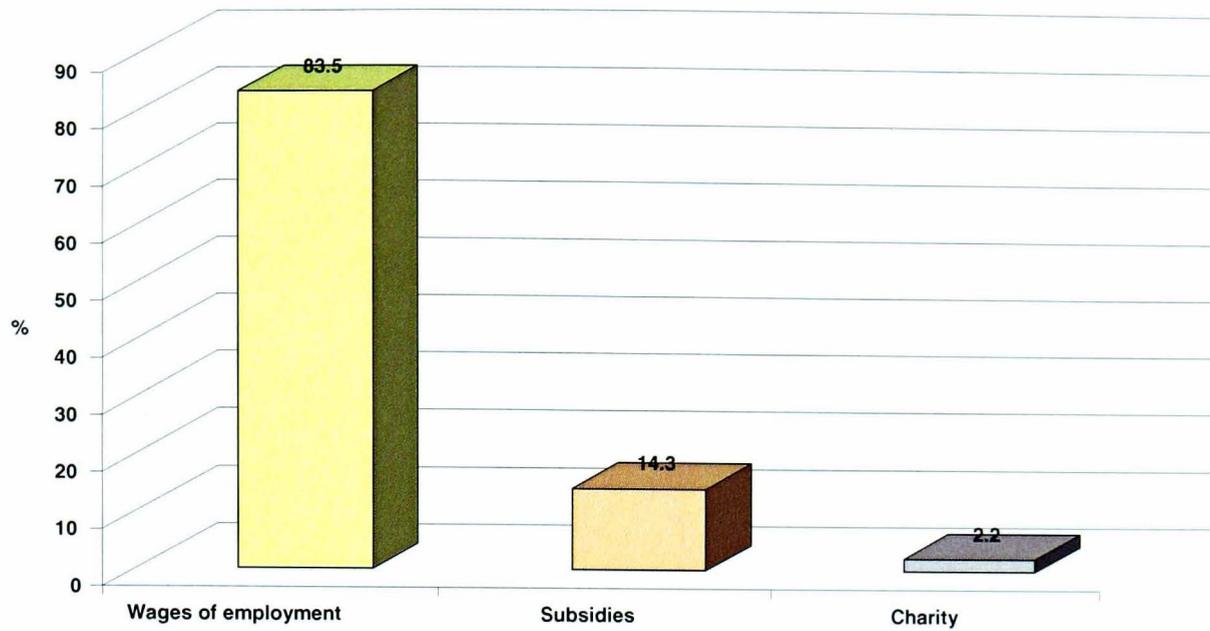


Figure 9

It might be argued that the state does not prohibit the employment of a qualified disabled person in an appropriate job: jobs are open for public competition amongst citizens without any discrimination, and efforts are made to allocate jobs to disabled persons. The survey reveals, however, that 45.7% of disabled persons think that the required job conditions are so severe as to disqualify them and 27.7% think that these conditions should be facilitated and there should be an adjustment of the working environment appropriate to their situation (see Figure 10). Unsuitable working environments are considered to be the major obstacle facing disabled persons. They result from lack of reform of the conditions of health and fitness for the job. Another cause is that buildings and public facilities have not been adjusted to suit their use by disabled persons.

Conditions of Employment and Disability

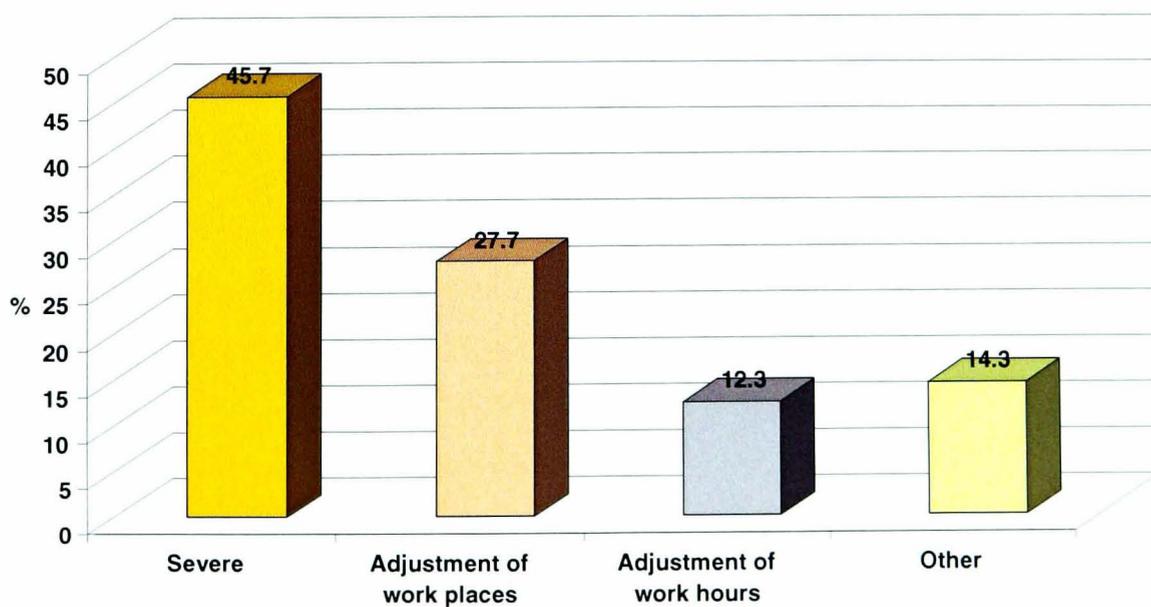


Figure 10

Moreover, this questionnaire shows that disabled applicants for public sector or private sector jobs are always rejected, either because of their disability or without reasonable justification. Figure 11 shows that among disabled applicants in the survey, 68.3% were rejected because of their disability and 22.6% without explanation, while only 9.9% were employed. This strongly indicates discrimination in terms of failure to employ disabled persons without convincing reasons.

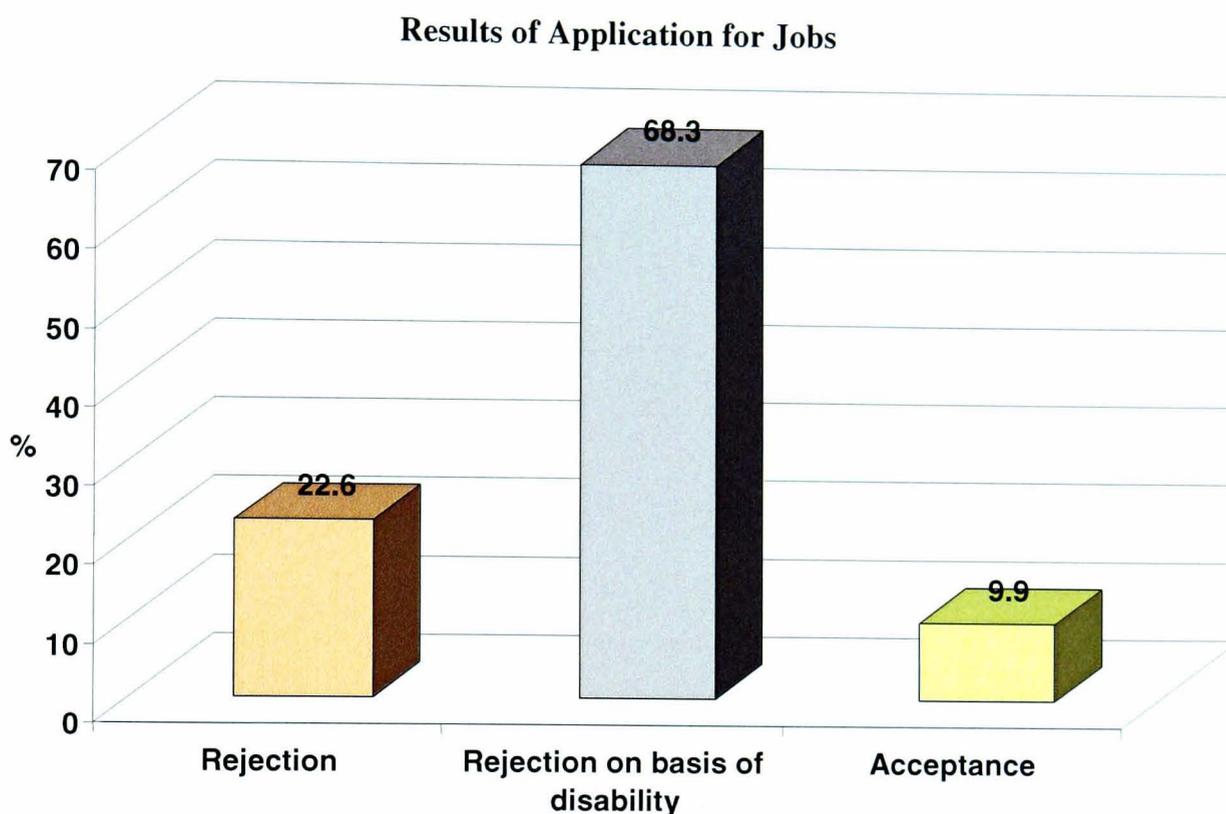


Figure 11

Participants in the survey were asked how they would themselves go about remedying this situation and 45.3% of them think that the best way is to go through the judicial authorities. By this means their rights can be established as a matter of justice upheld by the courts, instead of being a matter for charity. The Ministry of Civil Services was also nominated to resolve the employment issue.

Conclusion

The findings of this questionnaire reveal high percentages of discrimination practised against disabled persons in employment, education, use of public facilities and social life. These results are worrying, and require rapid rectification. The causes to be targeted are absence of justice and a weak disability law and discrimination that is entrenched. Judicial channels with strong implementing mechanisms are seen as the solution. The disabled themselves confirm that at present the rights of the disabled are seen only as a matter for charity, rather than as legally acquired rights.

The survey concluded that 87.3% of disabled persons would prefer to see their interests treated through official channels, rather than leave them to charity. Among these disabled people there is an urgent interest in change whereby they are treated like disabled people in the developed countries. Their need is the main reason for carrying out the comparative study described in this thesis.

The comparative study comprises research into what has been achieved in the field by the developed nations, in addition to an authentication of these issues in Islam. By discussing the latter through the principles of equality, distributive justice and rights it is hoped that a reform in terms of both the law and fundamental human rights can result in benefit to the disabled people of Saudi Arabia.

4. SAMPLE QUESTIONNAIRE

The Rights of Disabled Persons and Discrimination in Saudi Arabian Law

Principal Information

Name (optional).....

Address.....

Age.....

Gender: male female

Type of disability: mobility audio visual mental

Educational level: none primary intermediate

Secondary graduate higher diploma

Master PhD vocational

1. Rights of disabled and discrimination

To what extent do you feel that you are interested in integration in society?

Highly interested interested not interested I don't care

Are you aware of differences between acquiring your rights through humanitarian mercy or as genuine civil rights?

Yes No

If yes, what do you know about that and how does it affect you?

.....
.....
.....

Have you ever faced any discrimination in getting your rights in society?

Yes No

How would you like to raise disability issues and rights?

on humanitarian grounds

on equality and lawful grounds

Have you ever faced discrimination in getting your rights in society?

Yes no

If yes, what type of rights have you faced discrimination in?

Right of welfare and health protection

Right of education

Right of training and qualification

Right of work and employment

Right of conditioning architectural barriers to participate in society

Right of employment in senior jobs

Right of participating in disabled decision-making

How do you think you can obtain your rights?

By law

By appealing to others

By another way

If you are going to obtain your rights by law, what legal type and frame do you prefer?

Courts

Administrative committees and responsible bodies

Complaints to higher authorities

2. Training and qualifying

Are you aware of your rights in employment training and qualifying?

Yes No

Have you ever had training and/or qualifications?

Yes No

If yes, what type of preparations?

Occupational social medical vocational

Type of training

Occupational vocational

Did you get a trouble-free and equal chance of training?

Yes No

If no, what are the reasons?

Discrimination

Poor finances and preparation for intake of disabled

If yes, was the training level enough for preparing you for work?

Yes No

What was the level of the service?

Fair good excellent

3. Employment and work

How would you like to gain your income?

From charity

From state benefits

From employment and salaries

Are you interested in a job?

Highly interested interested not interested

Do you know your employment rights like others in society?

Yes No

If yes, how would you like to get these rights?

By law and emphasis these rights

By pleading to responsible people in the government

By applying to Ministry of Social Services or private sector

Through job centres

By applying to charitable organisations

Do you think that present addressing of disabled issues and rights in employment is strong enough for you to integrate in society?

Very strong strong has no effect

I don't know

Do you see yourself qualified enough to carry out main duties as an employee?

Yes No

If yes,
Quality of training for employment.....

Type of training.....

Academic qualifications

Enough training

No need for training

4. Applying for jobs

Have you ever applied for a job?

Yes No

Place of application

Public sector private sector

Type of job

Clerk professional educational

Technical services

How did you apply for the job?

Through direct application to the Ministry of Work

Through special committees in the Ministry of Work

Through job centres
Through private sector
Commercial and industrial chambers
Asking responsible people
Other

Did you competed with able individuals or there were special jobs for the disabled?

Yes No

Were terms and conditions applied to your case, except for disability?

Yes No

If no, what was the condition that you did not meet?

Health fitness
Qualifications and training
Academic training

What was the outcome of your job application?

Absolutely refused refused for disability
Requested to complete some job requirements
Accepted for job
Promised to be accepted for the job

How many times did you apply for jobs and your application was not successful ?

No.....

How do you see employment conditions in accordance with your disability?

Extremely hard
Need revising to be in accordance with disabled's needs
Difficult work and long working hours
Transport facilities
There is need for more training

Do you think that you need special working areas separate from able-bodied ones?

Yes No

Do you think that reconditioning is needed to fit your job description?

Yes No

If yes, what type of reconditioning?

- Buildings and corridors
- Compensating and assisting facilities
- Amending work timetable
- Reducing working hours
- Moving from high duties to lower duties
- Special transport facilities
- Training
- All above

Did you face any discrimination in applying for jobs?

Yes No

If yes, what type of discrimination?

- Preferring able individuals treatment of disabled
-

other types of discrimination.....
.....
.....

5. Disabled Employees

Are you doing any work currently?

Yes No

Public sector private sector

Type of job

Educational writing vocational services

How did you get the job?

Through applying and competition

Through applying to private sector

Through special committees in Ministry of Work

Through development of human resources funds

Through asking others

Through special committees in trade chambers

Have you got a job through competition with able individuals?

Yes

No

Do you face discrimination in work?

Yes

No

If yes, what type of discrimination and what are the reasons?

Humiliation by other employees

Bosses are biased toward able individuals

In promotion in jobs

In getting chances for training

In getting chances for promotion for senior jobs although you are qualified for these jobs

Discrimination in not conditioning the work environment

Positive discrimination for disabled

other

reasons.....

.....

.....

What are the solutions to getting your rights in the job

Pleading and humanitarian approaches

Legal complaints and courts

Complaints to higher authorities

Leaving the job

If the answer is legal complaints and courts, how do you see the frame for that?

Individual appeal to courts

Group appeal by disabled against responsible bodies

6. Health insurance for a disabled employee

Do you have health insurance?

Yes No

If yes, with whom?

State insurance private insurance company

Type of insurance

Social-cooperative insurance

Health insurance

Commercial insurance

If the answer is no, what are the reasons?

No insurance system in my work

Not necessary

No idea about disabled insurance

Is it essential for you to have health insurance?

Highly essential essential not essential

What type of health insurance do you see as useful for disabled employees?

General health insurance

Special insurance for needs of disabled

Other type of insurance

.....
.....

Working hours

Do you see the working hours suitable for you as a disabled person?

Yes No

If no, do you think working hours should be reduced for you?

Yes No

If yes,

Because of disability

Because the job is not suitable for you

How do you want reduced working hours to suit you?

Start after normal working hours

End two hours earlier

Other opinion

Do you think that you need to be shifted to another, easier, job?

Yes

No

Warnings

Have you ever received a warning at work?

Yes

No

If yes, what are the reasons?

You come late to work

Poor performance in work

Because of disability

Other reasons.....

What was the punishment?

Money taken from your salary

Threats of dismissal from the job

Moving to lower job

Other punishment.....

Rewards

Have you had any rewards?

Yes

No

If yes, what were the reasons?

High work performance

High productivity

Both

Other reasons.....

.....
.....

What type of rewards have you had?

Promotion

Certificates and letters

Payment

All above

other rewards

.....
.....
.....

5. COMPLAINTS BY DISABLED PERSONS: demanding equal rights and elimination of discrimination!!!

Introduction

The Saudi disabled, in particular qualified individuals, suffer from various types of isolation in, for example, social participation, education, employment and other matters. Moreover, their problems do not generally receive attention.

As disability is still treated as a matter for pity and charity, it is certain that there are no legal channels through which the disabled can claim their rights. Their only resort is to raise their complaints and express their discontent through official newspapers in the Kingdom of Saudi Arabia. Some of these complaints from different newspapers are reproduced here, in order to illustrate the reality and scale of the suffering of the disabled in Saudi Arabia.

JOBS OF DISABLED PEOPLE OCCUPIED BY NORMAL PEOPLE UNDER THE SIGHT OF MINISTRY OF CIVIL SERVICES !!!

This is a tragedy of a wide range of people, i.e. disabled people. Among them are those who could overcome their disability circumstances to continue their education. These include deaf, dumb and blind people. Among them are also those who could complete their high education far away from their homes. They remained patient and endured all of the troubles of travelling everyday for nearly 13 years studying at Al-Aaml primary, intermediate and secondary schools until they graduated and became qualified in using the computer.

In spite of being very well qualified, disabled people do not have a chance to apply for special jobs that are not made available for normal people. In fact, disabled people cannot find a job either in the public or private sector, especially that governmental jobs in Saudi Arabia are of two types.

The first type of jobs is available through the Ministry of Civil services. Both disabled and normal people apply for such jobs but are rarely occupied the disabled people, especially deaf or dumb applicants.

The second type is made available through the governmental departments themselves. Examples of such jobs are the jobs under categories A, B, C and D. Only preferred applicants are usually employed by the directors of these departments. Such jobs do not undergo comparison between applicants' qualification and are not announced. However, even if a disabled person is a BA holder they are always told that no jobs are available for the time being and are asked to leave their files and contact details. What is surprising is that after two or three days, someone else is appointed to a job on category D

although he just has a first year secondary school certificate. All that he has is a strong connection with the director. Of course, the disabled BA holder's file will be lost. This happens under the sight and hearing of the officials of the Ministry of Civil Services. One relative of mine went through this tragedy in spite of having a BA since 1418 AH (1998). He provided all governmental departments in his province with a copy of his file. But after all these years, he was never given a chance. Instead, younger and lower degree holders are employed.

So, I suggest that the Ministry of Civil Services leave the matter of employment to the concerned ministries and set up new regulations to guarantee the rights of disabled people. Particularly, they should be offered special jobs that are not made unavailable for normal people.

* Al-Watan Newspaper, issue no. 1415 dated 14-8-2004. Abha, Saudi Arabia.

AFTER OVERCOMING DISABILITY AND GETTING A BA DISABLED PEOPLE URGE THE CONCERNED AUTHORITIES TO ACTIVATE THE NATIONAL PROGRAM FOR DISABLED PEOPLE

Ahmed: "It is our right to be exempted from the waiting list of vacancies."

Al-Hammad: "Give us our rights and call us whatever you wish, whether disabled people or people with special needs."

After a long struggle for 16 years spent on education, disabled BA holders are waiting for jobs day after day specially after issuing a Royal Decree which recognises the rights of disabled people in education, jobs, and other life affairs.

Al-Riyadh Newspaper met a number of BA holders. It aims to express their strong desire to activate the National Program for Disabled People before it is forgotten by the concerned authorities.

Mr. Ahmad Ben Salih Al-Sodairy (married BA holder in Origins of Islam) says: "We, disabled people, ask for our wasted rights with regard to jobs. Those people with special needs are only a small

percentage within the community. So, it is quite fair for us, after being deprived from our right to work as teachers, to have office work jobs and be exempted from the waiting list of vacancies offered by the Ministry of Civil Services. This is the least that should be done for us.

I urge governmental officials and that responsible for the affairs of disabled people to activate the National Program for the Disabled People issued in 1/9/1421 and was endorsed by the Cabinet of Ministers. The programme consists of 16 articles. Item four of the second article concerns their right to have suitable jobs. It states that they should be employed in the type of jobs that best suit their abilities and qualifications in order to give them a good opportunity to manipulate their talents and earn suitable incomes. Al-Sodairy says that it is evident to everyone that disabled people are more productive at work as they go out of work during work hours less frequently. The problem is that some officials look at us with inferiority, not with pity. I say some

officials not all, as there some officials who care about us and encourage us. Islam is a religion of brotherhood where we should serve each other, not contempt or disgrace one another. Finally, I pray to Allah that the officials consider our problems and give us our rights, as we represent only a small percentage of the community."

Mr. Mohammad Ibn Hammad Al-Hammad (BA holder from Qassim Imam University) says: "No one can say that the government under the leadership of King Fahd, HRH the Crown Prince and HRH the Second Deputy is not doing its best for people with special needs. They do their best to meet the needs of disabled people in order to allow them to be productive citizens in their communities. This includes providing traffic and transportation facilities. This also includes the monthly allowances given to disabled people during their university study, exactly like their blind peers."

(OUR LEGAL RIGHTS)

Al-Hammad continues his remarks about the needs of people with special needs and says: "We, disabled people, ask for equality and our legal rights. We also should have alternative jobs in case we are deprived from certain jobs (e.g. teaching). When a disabled person applies for a job "He/She is unfit or unsuitable for the job" is usually written on the interview form. There should be an alternative. Disabled people should be offered suitable jobs at governmental departments

according to their qualifications and in the cities where they live.

Studies, and the disabled people themselves, have proven that many disabled people excel at work, especially in office work jobs."

Al-Hammad says that it is important for disabled people to be merged into their communities by allowing them to have jobs, especially those who worked hard and got good degrees. A considerable number of them are BA holders.

Officials at the Ministry of Civil Services argue that special treatment of disabled people by offering them jobs and exempting them from being listed within waiting lists of vacancies is a discriminative act which will hurt their feeling. The irony is that discrimination against disabled people is a common practice in both public and private sectors, except in the Ministry of Civil Services!

Al-Hammad concludes his remarks saying that there are some

conferences that discuss the needs of disabled people, especially their need for employment. Despite the fact that such conferences conclude with a number of recommendations, none of the recommendation is activated. A question is usually raised up during such conferences. It concerns the appropriate term that should be used to describe disabled people either as 'disabled people' or 'people with special needs'. Disabled people, however, answer this question by saying "Give us our rights and call us whatever you like."

Fahd Ibn Mohammad Al-Hamly (a married BA holder) says: "No doubt

that, as is the case with normal people, disabled people should meet the needs of life affairs. But the problem lies in the fact that disabled people enjoy certain rights which are endorsed by the government but at the same time are not activated. So we pray to God that the officials help us find suitable jobs in suitable places as well as suitable accommodation and transportation facilities."

Al-Hamly wonders why disabled people are deprived of education jobs despite the fact that some of them have the ability to move around classroom and school. AL-Hamly urges officials to find

disabled people alternative jobs at any other field that suits their qualification. He says, "Try us, then judge".

Thamer Ibn Abdullah Al-Minee'ee (married) also spoke to Al-Riyadh Newspaper. He says: "I graduated from Imam University, Department of Islamic Law. I tried to meet the minister of Civil Services, but he refused to meet me. I tried another time, but he refused again. When I decided to run my own business, a decision prohibiting recruiting non-Saudis was issued. So what should I do now?"

* Al-Riyadh Newspaper, issue no. 13134 dated 9-6-2004. Riyadh, Saudi Arabia.

HAMIDA CHALLENGED DISABILITY BUT IMMOBILISED BY JOB TRANSFERRING!

A human story,

Reported by: Thamer Soodi Qomqoom

Hameedah: "Without hope, the heart would break"

This an old proverb that Hameedah, a disabled female teacher, keeps saying. She has a long story with hope. After every stage she passes, other stages appear on the horizons. She has been disabled since she was a young girl. She can't walk, but she struggled until she completed her education. She outperformed normal girls and became a teacher. She tells a story through which she assures the fact that the impossible can sometimes happen to those who have determination and insistence. She says "God willed to make me a disabled person since childhood. It became a dark life for me, but who lives in this country does not lose hope, especially that I don't see a difference between disabled and normal people. I always say to myself that it is hard to live without a light of hope.

I still remember when I started school. The first school day was a source of determination for me in this life. I thank Allah. I did very well in my primary, intermediate and secondary schools.

When I applied to college, Hameedah adds, I was accepted. I realised by then that my dreams are about to come true. I always wanted to pay back my country some of what it has given me. I graduated with the first honour degree. I completed my dreams and became a teacher. Unfortunately, I was appointed in a school 250 kilometres away from my home city. My disability circumstances were not considered in spite of presenting medical reports that explain my disability.

I had nothing but to wait. I said to myself that it would only be one school year and I would be transferred to my home city. Instead, my normal colleagues were transferred and I was ignored. This happened despite that fact that we

were appointed in the same time and we are from the same city. I'm waiting for God's mercy. My father then died. He was ill while I am far away from him. He was the only one who takes care of me. He died and I was not able to see him. Later on, my mother accompanied me. All these circumstances were not enough for the officials to transfer me to my home city. Another year passed and the transferring that I am waiting for never came. It was a shock for my mother and my brothers as I am the only supporter for my family after the death of my father. I am not asking for too much! All I need is considering my circumstances. My hope is to be reunited with my family in one place. Only Allah knows my need for a job as I support my entire family. It is the only source of income for all of us. I want to be transferred to an office job in the Education Administration. Working as a teacher is a very hard job for me. I am quite sure I will excel at an office job."

It is worth mentioning here that Hameedah who challenged her disability takes her way to her home city every day through a very bad road. It is called the Death International Road. It links Saudi Arabia with other Arab Gulf countries as well as a number of Middle Eastern and European countries. This road is very well known for its horrible accidents and sharp curves. Every time Hameedah goes to work, her family becomes too worried about her.

The persisting question here is "Will this disabled teacher wait in the queue for another year, or will the officials consider her

circumstances and reunite her with her family?"

The "Red-knife man" dreams of a wheeled chair

His house one day was full guests and his neighbours used to call him the red-knife man, because his knife used to be covered with the blood of slaughtered animals. But he is now abandoned and unable to walk, dreaming of a wheeled chair.

Rajaa ibn Sa-eed Al-Mar-adhy, 80 years old, says: "I live now by myself after it used to be full of guests day and night. I had diabetes and because of having a gangrene doctors decided to cut my legs up to my knees. I became unable to move.

Even my only daughter refused to stay with me and went to live with her divorced mother.

My neighbors help me and provide me with daily meals, because I cannot leave the house.

He adds that before Eid I had a sum of money (6500.S.R.) to buy some of my needs, but unfortunately it was stolen. Al- Mar-adhy accepts God's will, but he wishes from merciful donors to provide him with a wheeled chair.

Before leaving, his neighbours told us that he was the most generous man in the whole area and that they used to call him the red-knife man.

* Okaz Newspaper, issue no. 13679 dated 8-2-2004. Jeddah, Saudi Arabia.

BECAUSE OF HIS DISABILITY, AL-GHANIMY NOT ACCEPTED AT THE UNIVERSITY !!!

Ali Salim Al-Ghanimy is a Saudi youth who is destined to live as a person with special needs. He had left leg paralysis since childhood. In spite of his disability, he continued his education until he got a secondary school certificate with an 81.50 % GPA seven years ago. Since then, he has been trying to apply for a BA course in order to prove that there is no place for despair as long as hope is there. He was not accepted at King Faisal University because, as he was told, he is not medically fit. He tried repeatedly to meet the Dean of the Registrar Office to express his point of view but in vein. He then started to search for a job. He took his application file to more than one company. But he is always disappointed by the condition of

having work experience, something which he of course lacks. This condition is rarely found among young applicants who have just finished their education. This is not the only condition. There is also the condition of having a good experience is using the computer. He then decided to train in using the computer. But this was not useful either. When he heard about the Charitable Association for Taking Care of and Qualifying Disabled People in the Eastern Province he said to himself "I have found the organisation that will take care of me and help me find a job". He then applied for a job at the Association itself. The Association however gave him a recommendation letter to take to King Fahd Educational Hospital.

But it was useless. Because of not finding a job, Ali is now sitting by himself waiting for a job or a monthly social benefit from the Ministry of Social Affairs and Labor until he gets a job. He wonders why he is not allowed to continue his education or get a job as far as he has the necessary mental abilities that can help him perform his duties and depend on himself and have his own family in the future. Ali is just a single case among many similar cases. There are many people who are destined to be disabled and keep struggling to have a job or an opportunity to be accepted at a BA course. However, the decision remains in the hands of its makers

* Al-Youm Newspaper, issue no. 11031 dated 28-8-2003. Dammam, Saudi Arabia

THE COMMUNITY TREATS THEM WITH UNINTENDED SUPERIORITY, BUT IT EXISTS. DISABLED PEOPLE: POSITIVE DECISIONS, BUT NEGATIVE IMPLEMENTATION!

The Ministry of Civil Services, according to the government regulations, is fully responsible for providing suitable jobs for disabled people. So will it?

At every meeting of the Cabinet of Ministers, the government stresses the need for putting the interests of citizens as a top priority as well as making easy the measurements that serve their interests.

This springs from the continuous care of the government towards achieving the highest standards of social welfare and justice. This is the practice of the Saudi government since its establishment as is based on the noble rulings of Islam which take into consideration the humanity of human beings and guarantee for them all of their rights .

This unlimited and continuous care towards disabled people is clearly embodied by a royal decree which was issued by King Fahd ibn Abdul-Aziz, the Custodian of the Two Holy Mosques. It approves of the Code of Taking Care of Disabled People which was endorsed by the Cabinet of Ministers in 15/9/1421 AH (11/12/2000). The code consists of 16 articles. Disabled people are part of our society who badly need the support of both the government and the society in order to guarantee their rights.

The articles of this code as a whole serve disabled people, regardless of their disability. Below is summary of the main items of the code:

1. The government guarantees the right of disabled people to prevention, care and qualifying services.
2. Disabled people should be employed in suitable jobs.
3. They should be provided with suitable training and qualifying services according to the type of disability.

4. They should be provided with educational services throughout all stages of education.
5. They should be exempted from paying customs duties for the special equipments that they use.
6. They should be provided with interest-free loans for carrying out vocational businesses.
7. They should have access to transportation means with low prices.
- 8.

These are the most important articles. In fact, these and all other articles are equally important, as they aim to serve disabled people who should merge into their societies. Their disability should not deprive them from participating in building up their society according to their ability.

Thus, the government confirms the need for taking care of disabled people by enacting a set of comprehensive regulations which are by no means inferior to their counterparts in developed countries. This is because they are in line with the Islamic teachings which verify the right of humans to practice their life and fulfill their duties. Of course, Prophet Muhammad is our example in this regard.

In spite of this, there are some officials and some government agencies that live in strictly closed circuits as if they are located in a world different from the world where we live. They seem to be outdated and dislocated and still think in the same old fashioned mentality which does not suit the advanced stage of today.

The motive behind writing on this issue is the story of the blind girl who has a high degree in children mental retardation. an important and sophisticated field which is rarely majored by normal girls. But she works a provisional

job. This makes her constantly worried about losing this job which provides her with a hope to merge into social work. This job provides her with the psychological security that she and other female disabled members of the society need if they are capable of serving their societies.

But, with regret, we cannot deny the fact that in spite of all the efforts made for qualifying and taking care of disabled people, the community still treat them with superiority. It might be unintended superiority, but it exists.

Back to the blind girl! I wrote about her story two times before. I explained that she needs a permanent job. Her disability and family circumstances make it obligatory on us to help her to the best that we can. She is demanding a lawful right which is guaranteed by the government regulations.

However, officials at the concerned ministry (i.e. Ministry of Civil Services) ignored all that which was published. I can't say that this disregard is deliberate. But no one would imagine that no feedback was given or action was taken to solve the problem by the ministry despite that the issue was published twice. In fact, it is a habit among government officials not to comment on published complaints. In this case with the Ministry of Civil Services, we didn't receive a reply even after writing a similar article; as we didn't have for the past two articles. So would they care about this third article?

I should reconfirm here the fact that the Saudi government asserts that the welfare of citizens is a top priority. But when will the officials perceive this fact, especially after the public speech made by the Custodian of the Two Mosques in the Shura Council meeting which HRH the Crown Prince instructed senior officials to implement into a

government work programme which allows no place for languor. It is a clear message. It addresses those who take the responsibility of

important positions and do not perform their duties honestly. It affirms that there would be no place for those who do not implement the

policies of the government which aim to achieve the highest standards of righteousness, justice and welfare of the citizens.

* Al-Riyadh Newspaper, issue no. 12784 dated 25-6-2003. Riyadh, Saudi Arabia.

FOR BETTER CARE FOR DISABLED PEOPLE (AL- RIYADH) REPORTS THE CONCERNS AND SPECIAL DEMAND OF DISABLED PEOPLE!

Al-Ruzaiq: A governmental department once allocated us special car parks but were later on seized by senior officials.

Al-Mosa: We need special passages and toilets in mosques and cooperation from citizens.

A number of disabled people expressed their satisfaction with the services provided by the Saudia Airlines as they provide wheeled chairs and make easy the traveling

procedures inside and outside the airport. However, they expressed **their** dissatisfaction with some governmental departments as they do not provide special car parks for disabled people. Others urged the Office of Labour to provide them with suitable jobs according to their needs and abilities. Others asked for dedicating a special awareness week to educate people about the living conditions of disabled people and how to deal with them in a way that

which makes them live a normal life.

Arriyadh Newspaper interviewed a number of disabled people to ask them about their problems. A number of recommendations were made that will help solve their problems and encourage the society to merge with them in a complementary way and to give them the appreciation that they need.

SPECIAL PARKING AREAS

A number of disabled people expressed their anger towards the fact that they are rarely provided with special car parks. Abdullah Al-Jafn said that disabled people do not receive adequate commitment from governmental departments, private dispensaries and many public facilities and markets with regard to providing special car parks. Available parking areas in some public hospitals and some public facilities, however, lack security measures.

Abdullah Al-Ruzaiq and Muhammad Al-Sagheer strongly agreed with Al-Jafn and added that even if parking areas are provided for disabled people in some government buildings (e.g. Directorate of Passports in Buraidah), disabled people are deprived from having easy access to the main building. This happens, they say, because normal people ignore the signs in the parking area of disabled people. This can be attributed to lack of awareness

about the sufferings of disabled people.

Ali Al-Mosa said that the special parking areas provided for disabled people should not be used by normal people. Some employees from the General Directorate of Libraries who are mainly disabled people complained about not having appropriate parking areas.

All Disabled people stressed their need for special parking areas everywhere to make it easy for them to move from one place to another.

PUNISHMENTS AND VIOLATIONS

Salih Al-Mosa, a disabled person, said that, with the help of generous donors, he could pray in the mosque, because a special toilet and a special passage were newly built for disabled people. However, he maintains, this passage is sometimes blocked by some cars.

Fahd Al-Mosa, another disabled person, urged the Ministry of Islamic Affairs, Propagation of Islam and Guidance as well as the General Trust (municipal) of Riyadh City to provide disabled people with special passages in every mosque.

Another disabled person said that many public facilities and government buildings do not have special passages for disabled people, as if such places are sought only by normal people.

DISTINGUISHED SERVICES, BUT!

On the other hand, another disabled person praised the services presented by Saudia Airlines for disabled people. The airlines provide wheeled chairs and make easy the travelling procedures of disabled people inside and outside

the airport. Unfortunately, he says, disabled people in other Arab countries receive more care.

Abdullah Al-Jafn, Khalid Al-Hamid and Saud Al-Sheebani hope that the Saudia Airlines would offer lower

prices for the first and horizon classes for disabled people, as is the case with the tourist class, because the latter has smaller seats and narrower passages.

SPECIAL SERVICES

Salih Al-Mosa praised the bank services provided by local banks for disabled people. However, a disabled person criticised some

banks saying that they do not pay much attention to their needs.

The disabled people met by *Arriyadh* also asked for special

reception services inside the Saudi Telecommunications Centres.

QUALITY CONTROL

Al-Jafn complained about the high prices of wheeled chairs and urged the Ministry of Commerce to keep the prices of wheeled chairs under observation. He also said that the wheeled chairs provided by the Ministry of Labour and Social Affairs are not suitable and are of poor quality; they are also relatively

heavy. Nasir Humood Al-Turaiqee holds the Ministry of Labour and Social Affairs responsible for the poor quality of the wheeled chairs that they provide. Al-Turaiqee maintains that the wheeled chairs provided by the ministry do not meet the following conditions: (1) being good quality, (2) having a

copy of the certificate of origin, (3) having a guarantee, (3) having maintenance services and (4) having spare parts. Meeting this conditions, Al-Jafn asserts, will guarantee the provision of top quality wheeled chairs.

DISABLED PEOPLE ARE PRODUCTIVE

A-yed Al-Shalawy, the supervisor of the Binding Unit at the General Directorate of Libraries, told *Arriyadh* that the majority of workers at the Binding Unit are disabled people. He added that disabled people are active and productive; so why do some governmental departments and

some private establishments refuse to employ them, making their disability an obstacle towards fulfilling their dreams?

Salih Al-Mosa added that he has been looking for a job for a long time, but in vein.

Another disabled person stressed the need for a commitment by the Office of Labour to provide disabled people with jobs that suit their abilities and needs.

* Al-Jazirah Newspaper, issue no. 12671 dated 4-3-2003. Riyadh Saudi Arabia.

He defeated Disability ... and Completed his University education !

Bureaucracy kills Al Ainzi's Dreams and turns the job into illusions !

Al Ainzi was not aware that the natural disability which came to him at his birth is going to be a barrier that does not allow him to get a job which supports him as well as his family. Al Ainzi is a youth in the age of twenties. He is one of the special needs people with a disability rate of 50%. However, this disability did not represent abomier that forbid him from obtaining the required science and Knowledge and continuing his education. "I obtained a bachelor degree in Sociology and Social service. I also obtained computer science diploma (Data Insertion) from I mam. Mohamed Bin Saud Islamic University. Also I have a number of certificates and experiences that qualify anybody to gat a job. But my disability is still the major problem that does not allow me to get a job. Wherever I applied for a job, my application was rejected due my disability,

bearing in mind that this disability is from our God and I have nothing to do with it.

In spite of the instructions issued from the Custodian of the two holy Masques, his queen price and the second Deputy to pay special attention to the special needs people in order to catch up with the society and be equal citizens to the other people, there are some people who look only to their personal interests and did net employ the people of special needs and I am one of those people.

Al Ainzi added that I am not fit for the military posts and the jobs that need the use of both bands. For that reason I chose to study Sociology so the I could be teacher, a job which suits me and my condition. But I was shacked by the community when I graduated and did not Find a job I here to mention the fact that I

have received training as a teacher in three Schools and passed all through that training obtaining an excellent grade. The matter which gets me more angry is that most of my collogues got military and civil jobs. I am the only one who has not got a job yet despite my pressing need to this job as I am the eldest in my brother and my father has only ten months to retire from work and his burdened by a lot of debts. If I do not get a job, how can I and my family live.

Al Ainzi calls for those in charge to look carefully and with pity to his problem, this problem which might destroy his future and his life. He mode resin , but he was born with that natural disability.

Al youm Newspaper 23-06-1425H
Corresponding to 31-07-2005 AD
Issue No (11734)

He defied all the people and completed his university education

* Al-Jazirah Newspaper, issue no. 11980 dated 17-7-2005. Riyadh, Saudi Arabia.

ALHOUIKH DISABILITY SEPARATED HIM FROM THE BENEFICIARY FRIENDS !

He who live in this world is not totally secured from disasters and hard times which might happen to him There are a lot of healthy people who were driven away by the current of which took them to where he wished. He was not expecting a disease that makes him disable and can not perform his daily duties in a natural way. He might not be able even to perform the simplest forms of duties. Examples of those ore the people who suffer from children disability or damage in their backbones as a result of traffic accidents. Strongly

enough, some of them do not know the real cause of their disability, but it is the will of our god the disability which happen to some of them was the cause to terminate their live whereas some others try their best to lead a normal life overcoming the difficult conditions bearing no attention to this disability to the extent the disabled person farce the healthy people to respect their greater abilities and high morale in encountering the difficulties of life. Most of the disabled practices their normal life paying no attention to the hardships of movement and

mobility. We studied some cases to know something of their daily live and some of the difficulties that they face and their hopes in this live.

In the beginning we interviewed a person who really surprised me when I saw him and before I talked to him he was working for Sihat Charity Society and I saw how he mores from here to there more actively paying no attention to his advisability as of he were in war with it. He wanted at any cast to win that war. I sat watching what he was

doing and after that I asked to interview him. He welcomed my suggestion and talked to me frankly. He is the struggling youth "Gaffar Ali Al-Shouikh – born in 1394H) . He first spoke about the cause of his disability (Children's Cripple).He said I am leading a very normal life after the problem of disability and I tried to study but I was faced with some difficulties at the beginning so I did not finish my education until the age of 15. the difficulty was in the same schools which did not admit the people of special needs saying that those people should be registered in the schools of the disabled. This was the cause which made me not able to read or write till the age of after 15. when I joined the Qualification of the Disabled Institute I studied sewing. Though not admitting me at the normal basic school affected on me, I did not give up . My desire arose when I acquainted that illiteracy is an unacceptable matter in this time. For that reason I joined (after one year) the evening classes for adult education till I completed my secondary education I faced some problems there as there was no Secondary evening classes in Sihat I tried to receive my education in the morning schools, but the schools administration asked for a letter of admission from the Ministry of Education because I was too old, I could not get that letter, so I went to study in Al Geteep and I was told that the secondary classes were in the Second term the matter which made it difficult for me to join. A teacher who is called Ali Al Mussiri helped me a lot by letting down a class which was in the upper classes for the sake of me. After that I tried to join the university but the difficulties of disability did not allow me to continue and some universities apologized attribution that to my old age.

Gaffer went on saying that " I wanted to complete my university education by joining the far learning and that was at king Abdul Aziz

University when it was advertised for registration was not made in a clear way and was done in a short time, so I could not register. As for the Management Institute I was not able to pass the admission test. Then I worked for Sihat Society at the post of typist from the year 1421 because I have a good command to the computer specially the programs of the word, the Excel and the Photo shop. Frankly , the society from me started employing the disabled and it is thanked for that trend. As for his practice to sports he said" I practice sports and I participate in the charity race which is arranged by the committee of the outstanding problems he faces, Gaffer said" Praise be to Allah, disability does not make any difficulty. But the difficulty arises when I go to a public place, there I find no special entrances for the disabled. That was the only difficulty which we the disabled face.

He went on pointing out that in the past people looked at the disabled person in a sympathetic way, but now they look at him as a normal person, though there still some people who look at the disabled person as a person who is unable to work or move in a normal way the matter which affects on the morale of the disabled.

Al shouikh said: The most difficult situation which I faced was that I was once in need to enter a public place, so I asked for help from a person who did not pay attention to me because he thought I was a beggar, that matter hurt me and affected on me for two days, but I forgot about it and came back to my normal life. Frankly, in my family I never feel disabled and in need for help. All of them care for me and knew my situation. Even after the death of my parents, no one of my family showed a change in his dealing with me when I asked Gaffer about marriage he said he had not got married yet because he did not get ready materially As for

the concept of my acceptance. I put it in my mind that some people might refuse me because they have the idea that disabled children. But, I asked a doctor who assured to me that this speech is incorrect and that disability is not inherited. Other say that" Shall I marry him my daughter to merely serve him. I need no one help, I live my life more naturally and I know disabled persons who are married and lead a happy life and have healthy children.

About whether refusal might affect on him he did not pay attention to the matter of marriage to the extent that it might destroy his life. Of course refusal will affect, but only to a limited extent and that all of those who know me are aware of that fact, particularly those who look at me on the basis of disability, I did many things that proved I live a normal life. Of those works: I connected the electric wires in the house and I worked in the maintenance of electronic equipments, but unfortunately I did not improve that career because I stopped doing so when I learnt the maintenance of . "7" He went on adding that unfortunately some people still say that the disabled person is not a productive one. Some of the families which have disabled children look at them as a sign of shame, so they hide them in their houses the matter which makes them dependant and might develop psychological complex but if the relative accept this matter, the child is more likely to live a normal life. At the end of his speech Al shouikh hopes to complete his university education and get married as well as improve his occupational position and establish clubs that invest the power of the disabled. It is worth mentioning that some of the disabled were able to air condition car and made it ready for use in away that suits them.

* Al-Yaoum Newspaper, issue no. 11734 dated 31-7-2005. Dammam. Saudi Arabia.

STREET VIEW: SUMMER ACTIVITIES AND PEOPLE OF SPECIAL NEEDS ARE NOT TARGETED !!!

The summer activities and carnivals have started in all of the cities and provinces of the Kingdom of Saudi Arabia. There activities included interesting and attractive programs which cover all of the strata's citizens and residents and all of the age categories. The matter which drew the attention is that the people of special needs were totally neglected and in particular the category of the dumb and deaf people who amount to about (80.000) dumbs and deafs who live in the lords of this holy country. Now special places were made for them so that they could follow the activities and participate in them, and to communicate with the rest of people through a translator who has a good know ledge of the signal language that connect the deaf with his community and participate in the joy and entertainment games bearing in mind the deaf whether males or females suffer a social separation that they have nothing to do towards it. That was a God made disaster, that the majority of them deal with it in a wiser way but the boast of other people who try to marginalize them from the reality that the live and that they ore omang the developers of this country and ore of its shields that defend it against its enemies if we get to understand them and make them understand their correct reality.

When looking again at the summer activities we find that they did not care for this important category to the extent that some families do not let them because they are no activities for them. It is worth mentioning that the charity campaign in the Eastern province is used to set special places for the dumb and the deaf in its daily priorities and secure a signal translator. To communicate them.

With the events and activities in a direct way and that matter happens annually, at Damman beach. This is one of the successful aspects of charity campaign in the Eastern region that if covers all of the

strata's of the community. We have to point out that only one week have passed for the summer activities in all of the regions of the kingdom and we could present programs for the dumb and deaf. Shall the tourism committees in all the regions and provinces look more carefully and closely to that matter in the coming activities?

*Al -Jazirah Newspaper, issue no. 11993 dated 30-7-2005. Riyadh, Saudi Arabia.

