

ALTERNATIVE PUNISHMENTS TO INCARCERATION IN THE SHARIA CRIMINAL  
LAW: THE APPLICABILITY OF THOSE ALTERNATIVES IN THE SAUDI ARABIAN  
CRIMINAL LAW FOR PERSONS WITH INTELLECTUAL DISABILITIES

By

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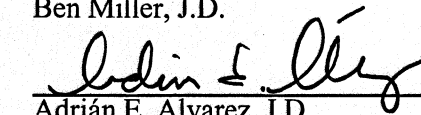
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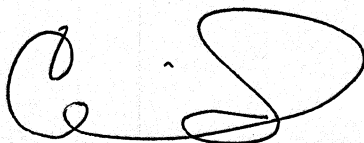
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“In The Name of Allah, The Most Gracious, Most Merciful”

### Dedication

“Read! In the Name of your Lord, Who has created (all that exists)” (Al-‘Alaq, 96:1).

This verse from the Quran is the first to be revealed to the Prophet Muhammed (Peace be upon him), and the first word is “read.” This sends a powerful message to not only Muslim societies, but to all humanity, that reading is an essential process to gain knowledge. Never has Allah command his Prophet to ask for more of anything other than knowledge: Allah says to the Prophet (commanding), “and say, My Lord, increase me in knowledge” (Taha, 20:114). Therefore, I dedicate this research to knowledge and anyone who seeks knowledge.

I also dedicate my work to all persons with disabilities in Saudi Arabia and around the world. I hope that my work and advocacy will be my legacy and bring light to people. There is nothing more precious in life than being a part of a process that enables someone to overcome his or her challenges. So, to all people with disabilities, I dedicate this work to you, as I will dedicate my future endeavors to ending all forms of discrimination on the basis of disability.

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ABSTRACT

In 2008, Saudi Arabia signed and ratified the Convention on the Rights of Persons with Disabilities (Convention, CRPD), an international treaty that addresses matters related to persons with disabilities (PWD). Article 12(2) of the CRPD requires State Parties to “recognize that persons with disabilities enjoy *legal capacity* on an equal basis with others in all aspects of life.” Saudi Arabian domestic laws, which are in accordance with the Sharia, differentiate between two different types of legal capacity: the legal capacity *to act* and the legal capacity *of rights*. This distinction does not *de facto* violate the Convention; however, a person with intellectual disabilities (PWID) faces a number of challenges due to the understating of the term *legal capacity*. This dissertation studies the effects of preventing PWIDs from enjoying their full legal capacity without supervision to determine whether Saudi Arabia should change its guardianship laws and the underlying domestic perspectives that ultimately isolate PWIDs. This dissertation does not resolve the challenges with how Saudi Arabia view disability, but rather calls to adopt the supported decision-making approach that allows PWIDs to enjoy their capacity to act and is in accordance with Saudi national laws.

## ACKNOWLEDGMENTS

I, first and foremost, thank Allah (the Entirely Merciful, the Especially Merciful) for giving me the strength to write this dissertation. I wish that Allah continues to praise me with his blessings so I can keep helping those who are in need. I would like to thank the government of Saudi Arabia for providing me with a full scholarship to study in the United States so I may gain the knowledge I need to support my people. I would like to thank the American University community in the Washington College of Law: students, faculty, and the administrative staff in the Program on Law and Government. They made this five-year journey unforgettable. I would like to express my sincere appreciation to my advisor, Prof. Robert Dinerstein, for continuously supporting me during my LL.M. and S.J.D. studies. His guidance helped me to better research and write this dissertation. I would like to thank my committee advisors — Prof. Adrián E. Alvarez and Prof. Ben Miller — for their insightful comments and encouragement, as well as their feedback and questions which encouraged me to go the extra mile in my research.

I thank my father, Nawaf Alsharif, who helped me throughout my whole education, offering encouragement and support, which allowed me to succeed. I also thank my mother, Abeer Alharethy, who supported me spiritually while writing this dissertation and who kept asking her favorite question: when will you finish and come back to Saudi Arabia? I also thank my father-in-law, Sharaf Alsharif, and my mother-in-law, Nourah Alfaris, for their support and prayers. I thank my wife, Sara, and my kids, Sultanh and Nawaf, for fueling me with their positive energy that prompted me to keep moving forward. To my close supporters, I thank all my sisters Sarah, Alhanouf, Raghad, Nourah, Hend, Rahaf, and Maha, as well as my brothers Harith, Ahmed, Hamza, Ibrahim, Abdullah, Zaid, and Ali.

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## LIST OF ABBREVIATIONS

PWID	Persons with Intellectual Disabilities
CRPD	Convention on the Rights of Persons with Disabilities
PWD	Persons with Disabilities
ADA	Americans with Disabilities Act
DDA	British Disability Discrimination Act
NAUSS	Naif Arab University for Security Sciences
Saudi Basic Law	The Basic Law of Governance
DWL	The Saudi Disability Welfare Law
GAS	General Authority of Statistics
PBUH	Peace Be Upon Him
CRPD-OP	Optional Protocol of the Convention on the Rights of Persons with Disabilities
UN	The United Nations
CDT	Critical Disability Theory
CESCR	The Committee on Economic, Social and Cultural Rights
SALCP	The Saudi Arabian Law of Criminal Procedures
PP	The Saudi Public Prosecution

## CHAPTER I: INTRODUCTION & LITERATURE REVIEW

In 2008, Saudi Arabia signed and ratified the Convention on the Rights of Persons with Disabilities (CRPD),<sup>1</sup> an international treaty that addresses matters related to persons with disabilities (PWD).<sup>2</sup> Article 12 of the CRPD declares that State Parties “reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.”<sup>3</sup> Article 12(2) requires State Parties to “recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.”<sup>4</sup>

Saudi Arabia entered the treaty with an understanding that the term legal capacity mentioned in Article 12(2), in accordance with Saudi domestic laws, has two parts.<sup>5</sup> In accordance with its national laws, Saudi Arabia recognizes two different types of any person’s legal capacity: the capacity *of rights* and the capacity *to act*.<sup>6</sup> The capacity of rights is guaranteed to all people from birth until death, ensuring the right of all types of ownership, education, life,

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<sup>1</sup> Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3.

<sup>2</sup> The Disability Welfare Law (DWL) states in Article 1, that a person is considered disabled if he suffers “from a permanent, whether total or partial, impairment affecting his senses, or his physical, mental, communicative, learning or psychological abilities, in a manner that reduces his ability to perform daily activities compared to a non-disabled person.” The DWL, furthermore, lists a number of disabilities that are protected by the law, such as “visual impairment, hearing impairment, mental disability, physical and motor disability, learning disabilities, speech disorders, behavioral and emotional disorders, autism, double and multiple disabilities, and other disabilities that require special care.” See Disability Welfare Law (2000), Royal Decree No. M/37 (Dec. 20, 2000) (Saudi Arabia).

<sup>3</sup> Convention on the Rights of Persons with Disabilities, *supra* note 1, art. 12.

<sup>4</sup> *Id.* art. 12(2).

<sup>5</sup> Brenton Kinker, *An Evaluation of the Prospects for Successful Implementation of the Convention on the Rights of Persons with Disabilities in the Islamic World*, 35 MICH. J. INT’L L. 443, 481 n.313 (2014).

<sup>6</sup> Sultan S. Al-Bogami, *Aloqobaat Albadilah le Thawi AlEhtiyajat Alkhasa [Alternative Sanctions for Handicap People]* 81 (2012) (unpublished Master’s dissertation, Naif Arab University) (on file with author); JIHAD MAHMOUD AL-ASHQAR, NIKAH ALMOAAQ THIHNIAN FE ALFIQH ALISLAMI [MARRIAGES OF PERSONS WITH INTELLECTUAL DISABILITIES] 49-50 (2011).

movement and many other rights.<sup>7</sup> Capacity to act is the mechanism via which people may claim their legal capacity of rights.<sup>8</sup> The legal capacity to act comes in three levels: (1) complete legal capacity, (2) totally lacking legal capacity, and (3) deficient legal capacity.<sup>9</sup> Unlike the provision of Article 12(2) of the CRPD, persons with intellectual disabilities (PWID)<sup>10</sup> in Saudi Arabia are not entitled *per se* to the legal capacity to act because of a distinction Saudi Arabia expressed when signing the CRPD.<sup>11</sup> This distinction may not explicitly violate Article 12 of the CRPD; however, because of this distinction, all laws and practices in Saudi Arabia are based on the notion that PWIDs are incapable of acting without the supervision of guardians, which renders PWIDs incapable until proven otherwise. Furthermore, this distinction shows how Saudi society looks at PWD's rights, which is reflected in how Saudi laws protect this segment of the population.

This dissertation studies the effects of preventing PWIDs from enjoying their full legal capacity without supervision to determine whether Saudi Arabia should change its laws or the underlying domestic views that resulted in isolating PWIDs. The dissertation does not argue to change how Saudi Arabia views disability, but it provides a new approach to be adopted that simultaneously allows PWIDs to enjoy their capacity to act and is in accordance with the Saudi national laws. This dissertation also studies the effects of Saudi interpretation of Article 12 of the CRPD and its impact on PWIDs interacting with the criminal justice system.

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<sup>7</sup> Al-Bogami, *supra* note 6, at 81.

<sup>8</sup> *Id.* at 82.

<sup>9</sup> SAOUD A.A. AL-OTEBY, ALMAWSOAA ALJINAIYAH ALESLAMIA [ISLAMIC CRIMINAL ENCYCLOPEDIA] 183 (2017); HUSAIN KHALAF AL-JOBORY, AWARED ALAHLYYA END ALOSOLAIEEN [BARRIERS OF LEGAL CAPACITY AMONG FUNDAMENTALISTS] 115-16 (1988); Kinker, *supra* note 5, at 482.

<sup>10</sup> This assertion is viewed on a case-by-case analysis depending on the severity of a person's intellectual disability.

<sup>11</sup> Kinker, *supra* note 5, at 481 n.313.

Allowing complete recognition of PWIDs as full persons before the law is greatly important. While this paper focuses on measuring the effects of limited legal capacity for PWID under the criminal justice system, PWIDs are impeded in a plethora of other areas under Saudi law due to guardianship programs. The dissertation does not argue to change how Saudi Arabia view disability, but it calls to adopt a new approach that simultaneously allows PWIDs to enjoy their full capacity to act and is in accordance with the Saudi national laws.

For example, in family law, a person who is intellectually disabled is not allowed to sign a marriage contract without the approval of his or her guardian.<sup>12</sup> The issue expands when two PWIDs are prevented from marrying each other because this type of marriage does not achieve one of the goals of marriage for a person with intellectual disability — obtaining another guardian.<sup>13</sup> Dr. Jihad Al-Ashqar argues that “marriages between PWID does not achieve any interest in marriage; it nevertheless causes harm.”<sup>14</sup> This practice, although appropriate for those who are severely mentally disabled, is not appropriate for all PWIDs.

International laws protect vulnerable groups and call for ending all types of discrimination. In accordance with Article 23(1) of the CRPD, “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.”<sup>15</sup> Saudi Arabia, by signing this international treaty, has an obligation to amend its laws as well as enacting new ones in order to ratify the treaty. Family laws in Saudi Arabia, like

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<sup>12</sup> AL-ASHQAR, *supra* note 6, at 73.

<sup>13</sup> *Id.* at 76.

<sup>14</sup> *Id.*

<sup>15</sup> Convention on the Rights of Persons with Disabilities, *supra* note 1.

criminal laws, are not fully codified; however, according to religious scholars, PWIDs are obligated to seek the approval of a male guardian.<sup>16</sup>

Eliminating discrimination and recognizing PWIDs as full persons before the law will result in greater compliance with the CRPD and more freedom of choice for PWIDs in all aspects of life. Brenton Kinker states that “legal capacity guaranteed by the CRPD would limit the ability of a guardian to override the choice of a disabled person in regard to voting rights, marriage rights, and all other rights possessed by society at large.”<sup>17</sup> Family law in Saudi Arabia is only one demonstration of the negative consequences of preventing PWIDs from enjoying full legal capacity.

### Literature Review

Previous research addressed similar issues PWD face in Saudi Arabia, including but not limited to the usefulness of imposing alternative sanctions on PWD and the importance of considering the moral abettor of PWIDs who commit crimes. However, the approach taken by this dissertation differs significantly from these previous endeavors. There are three prominent studies in this realm that overlap but yet failed to address the issues PWIDs face as a consequence of not enjoying their full legal capacity. Dr. Ahmad Alsaif wrote the first piece. His study was published in 2009, and it offers an extensive overview of Disability Rights in Saudi Arabia as well as covering international laws that protect PWDs. Sultan S. Al-Bogami is the author of the second research paper. His work focuses on PWDs and the need to implement alternative punishments to incarceration for PWDs. Aryouf Ahmed Al-Najar conducted the third

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<sup>16</sup> AL-ASHQAR, *supra* note 6, at 73.

<sup>17</sup> Kinker, *supra* note 5, at 480.

and most recent research paper. She focuses on the criminal responsibility of PWIDs in accordance with Sharia jurisprudence.

Dr. Ahmad Alsaif conducted one of the most important research papers in the field of disability law that addresses many issues PWDs in Saudi Arabia face,<sup>18</sup> providing a thorough overview of the rights PWDs have in the Kingdom of Saudi Arabia.<sup>19</sup> Moreover, Dr. Alsaif's paper compared Saudi law with both the Americans with Disabilities Act (ADA) and the British Disability Discrimination Act (DDA).<sup>20</sup> Dr. Alsaif's paper left no ambiguity about the background of the legal framework in Saudi Arabia, which can be seen in his discussion on the sources of legislation in Islam, the rights of PWD under Saudi law, and the models of disability as well as essential definitions.<sup>21</sup> Furthermore, Dr. Alsaif properly connected the underlying theories with current issues for PWIDs, in both international and domestic laws, which helped explain the roots of the issues to reach proper conclusions and solutions.<sup>22</sup> Ultimately, however, Dr. Alsaif's paper remains strictly informative with a minimal attempt to discuss controversial issues, such as Saudi Arabia's understanding of the term legal capacity mentioned in the CRPD

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<sup>18</sup> Currently, Dr. Alsaif is a member of Saudi Human Rights Commission Council, the Director of the Rights of Persons with Disability Unit in Saudi Arabia, and a candidate for the United Nations Committee on the Rights of Persons with Disabilities for the 2017-2020 term. Dr. Alsaif is also the vice chairperson of the Economic, Social and Health Rights Committee at the Saudi Human Rights Commission and a member of the Propagation of the Human Rights Culture Committee. He participated in the ninth session of the United Nations Committee on the Convention on the Rights of Persons with Disabilities in Geneva in April 2013, and is the head of the Saudi Arabia delegation who participated and spoke in the high-level meeting on disability and development in September 2013.

<sup>19</sup> Ahmad S. Alsaif, *The Rights of Disabled Persons and Discrimination: A Comparative Study in British, American and Saudi Arabian Disability Law* (2009) (unpublished Ph.D. dissertation, Newcastle University), <http://hdl.handle.net/10443/1047>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

Article 12(2).<sup>23</sup> Also, although Dr. Alsaif's paper was published in 2008, a year after the CRPD was open for signatures, the paper barely discussed the international agreement.<sup>24</sup> Indeed, Dr. Alsaif only devoted 12 of its 348 pages to the CRPD.<sup>25</sup> Finally, Dr. Alsaif did not fully address the differences between the legal capacity to act and the legal capacity of rights.<sup>26</sup> While Dr. Alsaif did not intend to focus on this difference, a useful discussion on PWID rights in Saudi Arabia should address how all rights and issues related to PWIDs are built upon the distinction between those two terms. This dissertation differs from Dr. Alsaif's study by fully addressing the role of international law, through the CRPD, as well as the importance of the distinction of the two capacities.

Additional research in this area was conducted by Sultan S. Al-Bogami,<sup>27</sup> whose paper focused on PWD and the need to implement alternative punishments, similar to the discussions that occur throughout this dissertation. Al-Bogami's paper affirmed, in accordance with *Sharia* criminal laws, the recognition and use of alternative punishments by judges in Saudi Arabia.<sup>28</sup> Furthermore, Al-Bogami emphasized that the core goal in punishing criminals under *Sharia* was never deterrence, but rehabilitation.<sup>29</sup> Using the analytic induction approach, Al-Bogami analyzed all four Islamic schools on the above-mentioned legal issues related to defying the term legal capacity,<sup>30</sup> enabling easy comparison of jurisprudential differences between the schools. This is extremely important because differences in the four schools' opinions allow researchers to draw other conclusions that could favor their arguments. Al-Bogami argued that a lack of legal

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Al-Bogami, *supra* note 6.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 55-56.

<sup>30</sup> *Id.*

framework to protect the rights of PWD in the Saudi criminal justice system resulted in the removal of many rights for this particular group.<sup>31</sup> According to Al-Bogami, imposing alternative punishments on PWD should help retain some rights of PWD.<sup>32</sup>

Granted, Al-Bogami's paper left some major questions unanswered. First, Al-Bogami did not mention the CRPD nor the implementation of the convention.<sup>33</sup> Even though his paper was published in 2012 — four years after signing and ratifying the CRPD — Al-Bogami barely mentioned international treaties that protect the rights of PWD. Second, Al-Bogami's paper failed to adequately discuss the issue of legal capacity, which requires a discussion when advocating for PWD.<sup>34</sup> Indeed, even though Al-Bogami spent ten pages on the legal capacity and its significance, those pages are only informative with no argument on what legal capacity people with disabilities are entitled to have recognized.<sup>35</sup> Finally, Al-Bogami's study did not address the applicability of imposing alternative punishments on PWIDs because his research focuses on PWD in general. For example, in building his argument, Al-Bogami kept referring to the targeted group as “handicapped people” or “people with special needs,” which created some ambiguity in his argument as this use of language might also cover those who are not disabled. What kind of disability was Al-Bogami referencing? Did Al-Bogami's recommendations target all types of disabilities or specific ones? It is critical to answer those questions as the analysis would have been different if Al-Bogami focused only on PWIDs.

Regardless, Al-Bogami's paper is an important piece that addresses issues related to the intersection of criminal law and disability law. Moreover, Al-Bogami's paper is a more recent

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<sup>31</sup> *Id.*

<sup>32</sup> This paper uses an analytic induction approach, but the overall purpose of the research and presentation leads to this conclusion.

<sup>33</sup> Al-Bogami, *supra* note 6.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 78-88.



exploration of the history of disability rights advocacy and the concepts of alternative punishments.

Although Al-Bogami’s study included similar points to those argued in this dissertation, this dissertation takes a different approach — analyzing the issue of PWIDs’ legal capacity from an international perspective. A focus on international law is a key point that also distinguishes this dissertation from Al-Bogami’s research and almost all papers written by NAUSS researchers. Moreover, this dissertation focuses exclusively on PWIDs because this category caused significant controversy while drafting the CRPD, particularly pertaining to legal capacity under Article 12. This study also recognizes the need to impose alternative punishments to imprisonment on PWD because of their social, psychological, and physical needs.<sup>36</sup>

The final research paper that overlaps with this dissertation was also published by NAUSS and is titled “The Criminal Responsibility of the Moral Abettor in the Saudi Regulations.”<sup>37</sup> Aryouf Ahmed Al-Najar discussed the issue of criminal responsibility when PWIDs are used as tools to commit crimes,<sup>38</sup> recognized as the moral abettor. Al-Najar argued that the concept of responsibility was not well known to Muslim scholars as it is quite new to their teachings and understanding, but it was generally conceived as an equivalent to the “legal capacity to act.”<sup>39</sup> Al-Najar addressed whether moral abettors are criminally responsible for their wrongdoings<sup>40</sup> and discussed the issue from two perspectives: linguistic and religious.<sup>41</sup> Al-

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<sup>36</sup> *Id.*

<sup>37</sup> Aryouf Ahmed Al-Najar, Almasoulaih Aljinaiyah Le Alfail Almanaway fe Al-Nidam Alsaoudi [The Criminal Responsibility of the Moral Abettor in the Saudi Regulations “Applied Fundamentalism Approach Study”] (2016) (unpublished Master’s dissertation, Naif Arab University) (on file with author).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 8.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

Najar’s paper highlighted, in great detail, differences between the two elements of any crime and whether or not PWIDs meet the two elements — *actus rea* and *mens rea*. Moreover, Al-Najar addressed what punishments PWIDs may receive should the court find them guilty, as well as what alternative punishments may be imposed.<sup>42</sup> Finally, Al-Najar’s paper explored seven court cases in which a moral abettor was involved in a crime, and analyzed those cases in terms of applicability to *Sharia*.<sup>43</sup>

Similar to the other research papers discussed herein, Al-Najar’s paper includes two areas for improvement. First, the paper is mostly informative. Al-Najar did not establish her own arguments; rather, she merely described the differences between concepts and applicability in certain situations. For example, she only briefly explained the legal capacity to act and the legal capacity of rights,<sup>44</sup> while this dissertation argues that PWIDs are entitled to both of those rights. Second, Al-Najar’s analysis was based on the issue of criminal responsibility when criminals use PWIDs as tools to commit crimes, but Al-Najar did not address the issues of legal responsibility when PWIDs freely and intentionally commit crimes.

Furthermore, because this research adopts the supported decision-making approach in lieu of guardianship programs, it is also important to include perspectives from the United States and international literature on supported decision-making. The supported decision-making approach is defined as “a process by which a third party (e.g., a support person or a peer support group) assists or helps a person with the intellectual disability to make legally enforceable

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 184-207.

<sup>44</sup> *Id.* at 144-49.

decisions by themselves, without substituting their decision for the person supported.”<sup>45</sup> Thus, it requires a host of family members or loved ones to assist the person with disability in reaching a proper decision.<sup>46</sup> No research has been conducted on the importance of adopting the supported decision-making approach in Saudi Arabia because no advocate has ever made such an argument. Hence, this last section of the literature review focuses on some important pieces that study the supported decision-making approach.

The first article discusses the implementation of legal capacity under Article 12 of the CRPD while acknowledging the difficulties of moving toward abolishing guardianship programs and adopting the supported decision making program.<sup>47</sup> Robert Dinerstein<sup>48</sup> raises an important question, which is “how to address the circumstances of individuals with disabilities who may not be able to exercise their legal capacity without some kind of assistance or intervention?”<sup>49</sup> Dinerstein argues that any differentiation between the two legal capacities (*capacity to act* and *capacity of rights*) violates Article 12 of the CRPD because the text of the CRPD is straightforward and does not make such distinctions. Dinerstein also argues that, in accordance

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<sup>45</sup> Nandini Devi, *Supported Decision-making and Personal Autonomy for Persons with Intellectual Disabilities: Article 12 of the UN Convention on the Rights of Persons with Disabilities*, 41 J.L. MED. & ETHICS 792, 792-93 (2013).

<sup>46</sup> Nicholas Caivano, *Conceptualizing Capacity: Interpreting Canada's Qualified Ratification of Article 12 of the UN Disability Rights Convention*, 4 W.J. LEGAL STUD. 1, 5 (2014).

<sup>47</sup> Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making*, 19 HUM. RTS. BRIEF, Winter 2012, at 8.

<sup>48</sup> Robert Dinerstein is a professor of law and the director of the Disability Rights Law Clinic (2005-present) at American University Washington College of Law (AUWCL), where he has taught since 1983. He previously served as the law school's associate dean for academic affairs from (1997-2004), associate dean for experiential education (2012-2018), and director of the clinical program (1988-96 and 2008-2018). He specializes in the fields of clinical education and disability law, especially mental disabilities law (including issues of consent/choice, capacity and alternatives to guardianship), the Americans with Disabilities Act, the UN Convention on the Rights of Persons with Disabilities, legal representation of clients with mental disabilities, and disability and international human rights.

<sup>49</sup> Dinerstein, *supra* note 47, at 8.

with Article 12(3) of the CRPD, State Parties shall “provide access to whatever supports people with disabilities need to exercise their capacity reflects the critical insight that even people with the most significant disabilities have legal capacity and are covered by the CRPD.”<sup>50</sup> Dinerstein defines supported decision-making “as a series of relationships, practices, arrangements, and agreements, of more or less formality and intensity, designed to assist an individual with a disability to make and communicate to others decisions about the individual’s life.”<sup>51</sup> He further argues that State Parties violate Article 12 of the CRPD when they do not support and assist PWIDs to make their own decisions.<sup>52</sup> Dinerstein concludes by claiming that the transition between guardianship programs to supported decision-making approaches cannot happen instantly.<sup>53</sup>

In addition, another scholarly study examines “the available evidence relevant to [supported decision-making] and so facilitate discussion of how this aspect of law, policy and practice may be further developed in mental health services.”<sup>54</sup> Even though this research focuses on people with mental health problems and not PWIDs, the study provides good background information on supported decision-making. The authors argue that autonomy is the key element in supported decision-making.<sup>55</sup> They elaborate by saying “no person should have another person appointed to make a decision on their behalf, if they could make the decision themselves with assistance and support.”<sup>56</sup> The authors also address the controversy regarding

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<sup>50</sup> *Id.* at 9.

<sup>51</sup> *Id.* at 10.

<sup>52</sup> *Id.* at 11.

<sup>53</sup> *Id.* at 12.

<sup>54</sup> Gavin Davidson et al., *Supported Decision Making: A Review of the International Literature*, 38 INT’L J.L. & PSYCH. 61 (2015).

<sup>55</sup> *Id.* at 61.

<sup>56</sup> *Id.*

use of the word “capacity.”<sup>57</sup> Reportedly, in the supported decision-making approach, some confusion and overlap occur in terms of using the word capacity regarding “both ‘legal capacity’ and ‘mental capacity.’”<sup>58</sup> It was suggested that the term “legal capacity” refers to both capacities — the capacity *to act* and the capacity *of rights*.<sup>59</sup> Therefore, if a person’s mental capacity is affected, he or she will not lose his “legal capacity.”<sup>60</sup> The authors further argue that the supported decision-making approach should be applied even when the person being supported totally lacks mental capacity.<sup>61</sup> Finally, the study points out three main reasons for why supported decision-making is important.<sup>62</sup> According to the authors, 1) autonomy is a fundamental human right, 2) supported decision-making is more effective, and 3) pragmatic reasoning recognizes the importance of this approach.<sup>63</sup> Under the pragmatic reasoning assertion, “it seems reasonable to assume that if a person has received the support necessary to make their own decision, such as the type of service to use, they may be more willing to fully engage and benefit from that service.”<sup>64</sup> After a number of real life applications of supported decision-making, the study concludes that limited positive evidence exists on the supported decision-making implementation, yet there are a host of reasons to conduct more research on the effectiveness of adopting the supported decision-making approach.<sup>65</sup>

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<sup>57</sup> *Id.* at 61-62 (2015).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 62.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 66.

Moreover, a study by Nina Kohn and Jeremy Blumenthal reviewed the evidence base on supported decision-making.<sup>66</sup> Their research “found little such empirical research, suggesting that significant further research is warranted to determine whether — and under what conditions — supported decision-making can benefit persons with intellectual disabilities.”<sup>67</sup> The study examined a number of supported decision-making models, including British Columbia’s Representative Agreement.<sup>68</sup> This model allows the person being assisted to cancel the agreement at any time, and requires the support(s) to discuss all decisions with the person being assisted.<sup>69</sup> Also, and more importantly, the person being assisted does not, at any time or for any reason, lose his or her legal capacity.<sup>70</sup> This research criticized guardianship for a number of reasons, including being “anti-therapeutic,” as well as because it “stigmatizes and undermines the human dignity of those subjected to it,” and “is used to inappropriately and illegally strip individuals of their legal personhood with insufficient evidence of decision-making incapacity.”<sup>71</sup> On the other hand, the study described supported decision-making “as an empowering process in which an individual with cognitive challenges is the decision-maker.”<sup>72</sup> Ultimately, the study recommends a number of key questions for future research to consider if supported decision-making is a good alternative.<sup>73</sup> First, they ask how “decision-making supporters and persons with [intellectual disability] engage with one another?” The study also wonders how “different techniques influence the decisions made and whether persons with

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<sup>66</sup> Nina A. Kohn & Jeremy A. Blumenthal, *A Critical Assessment of Supported Decision-Making for Persons Aging with Intellectual Disabilities*, 7 *DISABILITY & HEALTH J.*, Jan. 2014, at S40.

<sup>67</sup> *Id.* at S40.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at S41.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at S42.

[intellectual disability] feel satisfied with and empowered by the process?” as well as questioning to what extent and under what conditions supported decision-making could be considered coercive? Finally, the researchers ask if the supported decision-making “processes result in decisions that are substantively different than the decisions reached under surrogate decision-making models and if so, what is the nature and impact of these differences?”<sup>74</sup>

### Research Overview

This dissertation addresses issues PWIDs face from the criminal justice system in Saudi Arabia. Chapter II addresses the legal background needed to understand the legal structure of the topic. Saudi Arabia is a uniquely structured country and understanding the legal system in Saudi Arabia is essential to understand the underlying theories and concepts of this discussion. One of the main objectives of this dissertation is to explain how international laws and Saudi laws can collaborate to ensure that persons with disabilities are enjoying their rights as full persons before the law. Therefore, this chapter’s main goal is to educate readers about the Saudi legal system and introduce *Sharia* law.

Chapter II explains how *Sharia* is the main source from which all Saudi laws are driven. This step is crucial because analysis of this dissertation’s argument is essentially built on the flexibility of *Sharia* sources. The purpose of this section is not only to describe the laws of Saudi Arabia, but to also raise awareness of the divergence in Islamic opinions. Chapter II navigates a number of Saudi laws relevant to the argument of this dissertation and provides a summary of the most important laws in Saudi Arabia required to understand the argument. Starting with the Saudi Constitution, this section provides a brief summary of every law relevant to the argument with specific focus on certain provisions that are useful to build the claim.

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<sup>74</sup> *Id.*

Chapter III outlines the theoretical framework applied and explains various disability law theories that other countries relied upon when recognizing the rights of PWIDs. The main theoretical framework for this dissertation uses the models of disability from critical disability theory, which centers on “disability as it compares liberalism’s norms and values with their actualization in the daily life of disabled people.”<sup>75</sup> According to norms of liberalism, when judges only look at the facts of each case and ignore reality when applying the law, many vulnerable groups face some sort of discrimination. As David L. Hosking noted “since law is part of a complex social organization and cannot be understood as a thing unto itself, other disciplines such as economics, psychology and political science can make important contributions to understanding the nature of law, its role in society, and the outcome of particular disputes.”<sup>76</sup> The models of disability allow scholars to look at issues related to persons with disabilities differently.

Chapter IV addresses the CRPD, the convention upon which this whole argument is built. The first part of this chapter introduces the history of the CRPD, which shows what the drafting committee faced during the writing process of Article 12 of the CRPD, specifically in regard to defining the term “legal capacity.” This part also provides updated statistics on the CRPD, including but not limited to information and numbers of state parties to the Convention. One subsection addresses the involvement of Saudi Arabia in the CRPD, starting with the history and reasons for signing the treaty, while the next part addresses Saudi Arabia’s implementation of the CRPD, discussing and analyzing Saudi government reports on the Convention. The following

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<sup>75</sup> David L. Hosking, Critical Disability Theory, Presented at the 4th Biennial Disability Studies Conference at Lancaster University 5 (Sept. 2-4, 2008), [http://www.lancaster.ac.uk/fass/events/disabilityconference\\_archive/2008/papers/hosking2008.pdf](http://www.lancaster.ac.uk/fass/events/disabilityconference_archive/2008/papers/hosking2008.pdf).

<sup>76</sup> *Id.* at 4.



part addresses the Optional Protocol of the CRPD (CRPD-OP) — which Saudi Arabia also signed — that allows the citizens of any state party to raise CRPD-related issues related to the CRPD Committee at the United Nations.

Chapter V offers novel contributions to the legal literature of both criminal and disability areas of the law. The chapter compares the meaning of legal capacity under international law to the meaning of legal capacity under *Sharia*. Muslim scholars differ in their interpretation of Islamic text, thus allowing a variety of options that can accommodate more than just one opinion and interpretation. The four well-known schools of Islam in the Saudi region are the focus of this section in terms of making the argument of judging the capacity of PWIDs. Defining the legal capacity to act and legal capacity of rights will be discussed as well to prepare readers for the conclusion of this dissertation. Finally, Chapter V concludes with the best practice for persons with intellectual disabilities in accordance with international and Sharia laws under the criminal justice system in Saudi Arabia.

To conclude, the goal of the dissertation is not to change how the Saudi Arabian legal system understands the term legal capacity mentioned in Article 12 of the CRPD because such an argument will be easily rejected. The goal, however, is to establish a new approach that can work with Saudi domestic laws, yet fulfills the objectives and purposes of the Convention.

## CHAPTER II: LEGAL BACKGROUND AND STATUTORY FRAMEWORK OF THE LEGAL SYSTEM IN SAUDI ARABIA

One of the main objectives of this research is to explain how international law and Saudi law can exist in tandem to ensure that persons with intellectual disabilities enjoy their full rights before the law. In order to define this objective, the Saudi Arabian legal system must be reviewed. Saudi Arabia is a uniquely structured country and understanding the legal system of Saudi Arabia is essential to comprehend these underlying legal principles for a discussion on disability rights under Saudi and international law. This chapter addresses the sources of *Sharia*, the primary source of law in Saudi Arabia, as well as the Basic Law of Governance (hereinafter Saudi Basic Law).<sup>77</sup> Starting with the Constitution, this chapter briefly summarizes relevant Saudi laws with specific focus on certain provisions that are useful to achieve the objective of this dissertation: that persons with intellectual disabilities should enjoy full rights before the law. Specifically, persons with intellectual disabilities possess legal capacity; therefore, awareness of the different levels of mental capacity is key when dealing with criminal offenders.

Although this thesis focuses mainly on disability rights to build its discussion, Saudi criminal law is a crucial component of this dissertation that demonstrates the negative consequences of preventing PWIDs from enjoying full legal capacity. This chapter explores the elements of Islamic criminal laws, all the way from criminalization to punishment. Furthermore, this chapter discusses the purpose of punishment under Islam and, referencing the title of this dissertation, alternative punishments to incarceration under Islamic. By linking alternative punishments with the goals of punishment, this section advocates increased alternatives to incarceration, which serve one of the purposes of punishment: rehabilitation.

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<sup>77</sup> Basic Law of Governance (1992), Royal Order No. A/90, art. 7 (Mar. 1, 1992) (Saudi Arabia).

This chapter also provides an overview of the rights of persons with disabilities in Saudi Arabia. Because definitions are critical for clarity on the issues discussed in this dissertation, this chapter summarizes legal terminology related to persons with disabilities, including the definition of “disability” in Islamic and Saudi law. Leading causes of disability and efforts to prevent and reduce the numbers of those with disabilities are discussed as well as government statistics on the disabled community in Saudi Arabia. Moreover, this chapter analyzes and critiques the Disability Welfare Law, the main law that protects and promotes the rights of persons with disabilities. This law was passed in 2000 — approximately eight years before the government of Saudi Arabia signed and ratified the CRPD — and analysis suggests that this law must adapt to incorporate a new perspective: a twenty-first century vision of disability rights.

### Statutory Framework

Saudi Arabia does not have one law or document referenced as its “Constitution.” In 1992, however, Saudi Arabia enacted three major laws that form the base of its “constitutional law”: The Saudi Basic Law (1992), The Shura Council Law (1992), and The Law of Provinces (1992).<sup>78</sup> Later, two additional laws were added to the constitutional framework<sup>79</sup>: The Council of Ministers Law (1993) and The Law of the Pledge of Allegiance Commission (2006).

The Saudi Basic Law is the highest source of law among these five constitutional laws.<sup>80</sup> Saudi Basic Law defines a number of major principles, such as state authorities (Executive, Legislative, and Judiciary Branches), and it “reaffirms the following principles of governance:

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<sup>78</sup> *Search*, BUREAU OF EXPERTS AT THE COUNCIL OF MINISTERS, <https://www.boe.gov.sa/search.aspx?lang=en> (last visited May 5, 2016).

<sup>79</sup> Abdullah F. Ansary, *Update: A Brief Overview of the Saudi Arabian Legal System*, GLOBALEX (Aug. 2015), [http://www.nyulawglobal.org/globalex/Saudi\\_Arabia1.html#\\_Toc424144443](http://www.nyulawglobal.org/globalex/Saudi_Arabia1.html#_Toc424144443) (last visited Nov. 20, 2017).

<sup>80</sup> *Id.*

justice, consultation and the equality of citizens under the Islamic Shari'ah."<sup>81</sup> The Basic Law states that "laws, international treaties and agreements, and concessions shall be issued and amended by Royal Decrees."<sup>82</sup> Furthermore, under Islamic principles, international treaties are contracts when properly signed and shall be enforced.<sup>83</sup> Therefore, signed international treaties — like the CRPD — become domestic law and shall be used in courtrooms. Saudi Arabia signed and ratified both the CRPD and the CRPD-OP in 2008; those two treaties are now law in Saudi jurisprudence.

In Islam, the main sources of *Sharia* are the Holy Quran, the *Sunnah* (the Prophet's acts and sayings), *Ijmaa* (concepts most Muslim scholars agreed upon), and *Qiyas* (a reasonable interpretation).<sup>84</sup> The Quran, essentially, "is the word of God as revealed by the Angel Gabriel to the Prophet Muhammad [PBUH] and recorded by scribes and edited by scholars,"<sup>85</sup> while the *Sunnah* is the Prophet's actions and sayings that explain the Quran.<sup>86</sup> The *Ijmaa* is what most Muslim scholars agree upon when deciding an issue that concerns the Muslim population.<sup>87</sup> Trustworthiness of *Ijmaa* is based on the notion that consensus opinions based on the Quran and *Sunnah* are akin to the two divine sources<sup>88</sup>: "A rule by consensus requires (a) participation of a reasonable number of jurists, (b) who reach a unanimous decision, (c) based upon an

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<sup>81</sup> *Id.*

<sup>82</sup> Basic Law of Governance (1992), art. 70 (Saudi Arabia).

<sup>83</sup> ISMAIL KAZEM AL-ESAWI, AHKAM ALMOAHDAAT FE ALFIQH ALESLAMI [TREATY JURISDICTIONS IN ISLAMIC FIQH] 151 (2016).

<sup>84</sup> Matthew Lippman, *Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law*, 12 BC INT'L & COMP. L. REV. 29, 37 (1989); Alsaif, *supra* note 19, at 16.

<sup>85</sup> Lippman, *supra* note 84, at 37.

<sup>86</sup> *Id.*; Alsaif, *supra* note 19, at 17; Sunnah, Book 46, Hadith 3 ("I have left two matters with you. As long as you hold to them, you will not go the wrong way. They are the Book of Allah and the Sunna of His Prophet.").

<sup>87</sup> Lippman, *supra* note 84, at 37-38; Alsaif, *supra* note 19, at 18-19.

<sup>88</sup> Alsaif, *supra* note 19, at 18-19.

unequivocal statement of agreement by each jurist.”<sup>89</sup> Lastly, *Qiyas* is a method under *Sharia* that allows Muslim scholars to compare an existing issue in Islam to a previous issue and reach a reasonable conclusion if the Quran, *Sunnah*, and *Ijmaa* do not address the issue.<sup>90</sup> An issue clearly addressed by the Quran and *Sunnah* is law, which should be applied and cannot be manipulated. However, if the two main sources are silent on a certain issue, the solution is left to human interpretation of the context of the two sources.

Secondary sources of Islam include *Al-Masaleh Al-Morsalah* and *Al-Urf*.<sup>91</sup> Because Islam is applicable at all times and places, Muslim scholars are allowed to adjust their reasoning and understanding of Islamic principles in accordance with what humanity knows at the time. “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.’”<sup>92</sup> Passing new laws that fulfill a public interest need not be expressly in the Quran or *Sunnah*; however, using *Al-Masaleh Al-Morsalah* is conditional.<sup>93</sup> New rules based on *Al-Masaleh Al-Morsalah* shall: (1) not contradict the main sources of Islamic law, (2) fulfill a public interest that is “within the general principles of Islam,” and (3) be issued from Islamic scholars.<sup>94</sup> *Al-Urf*, on the other hand, is “the prevailing practice in a community,”<sup>95</sup> which may result in diverse interpretations on the same topic. Similar to *Al-Masaleh Al-Morsalah*, using *Al-Urf* to enact new laws is limited by two conditions: “Firstly, they

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<sup>89</sup> Lippman, *supra* note 84, at 37.

<sup>90</sup> *Id.*; Alsaif, *supra* note 19, at 19.

<sup>91</sup> Lippman, *supra* note 84, at 38; Alsaif, *supra* note 19, at 19-21.

<sup>92</sup> Alsaif, *supra* note 19, at 20.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Lippman, *supra* note 84, at 38.

may not conflict with primary sources, and secondly, they must not be incidental practices.”<sup>96</sup>

The Quran and *Sunnah* are the only two divine sources; all other sources of Islamic law are the conclusion of highly respected Muslim scholars.<sup>97</sup> Therefore, if research or other means demonstrate a public interest in enacting a new law or changing an existing law, Islamic principles advocate and accept this process.

### Criminal Law in Saudi Arabia

*Sharia* criminal law categorizes crimes into three main themes: *Huddod*,<sup>98</sup> *Qisas*, and *Ta'zir*.<sup>99</sup> First, *Huddod* crimes are specific crimes with fixed punishments to protect Allah's rights to life, offspring, property, religion and intellect.<sup>100</sup> Seven types crimes are considered *Huddod*<sup>101</sup>: theft, highway robbery, fornication, false accusations of fornication, consuming alcohol, revolutionizing the system, and apostasy.<sup>102</sup> *Huddod* are the only crimes defined by Allah to Muslims; governments determine all other crimes.<sup>103</sup> Allah specifically criminalized those actions “to preserve five universal necessities: life, offspring, property, religion and

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<sup>96</sup> Alsaif, *supra* note 19, at 20.

<sup>97</sup> *Id.* at 18-20.

<sup>98</sup> Plural of *Had*.

<sup>99</sup> Jamla A. Al-Harthiy, *Tatbeeq AlEjraat Albadilah Ala Alsajinat be Sojon Almmlakah Alarabia Alsaoudiah* [Application of Alternative Actions on Women Prisoners in Prisons in Saudi Arabia] 19 (2014) (unpublished Master's dissertation, Naif Arab University) (on file with author); A.H. Tawfik, *The Concept of Crime in the Afghan Criminal Justice System: The Paradox between Secular, Tradition and Islamic Law: A Viewpoint of an International Practitioner*, 9 INT'L CRIM L. REV. 667, 668 (2009).

<sup>100</sup> MOHAMMED SALEM AL-AWA, *FE OSOOL ALNETHAM ALJINAYEE ALESLAMI* [COMPARATIVE STUDY IN THE ISLAMIC CRIMINAL LAW PRINCIPLES] 173 (2013).

<sup>101</sup> The number of *Huddod* crimes is arguable among Muslim scholars. For example, not all scholars say that apostasy — leaving the religion of Islam — is a punishable sin. Also, some say that revolutionizing the system is a crime only if it was intended to harm society and not committed for the greater good. Not all scholars agree that all of the seven crimes are *Huddod* crimes. *See id.* at 174.

<sup>102</sup> GAZI H. ALSABAN, *ALJARAAIM WA ALOQOBAAT ALBADILAH AAN ALHABS* [CRIMES AND ALTERNATIVE PUNISHMENTS TO IMPRISONMENT] 41-42 (2012).

<sup>103</sup> *Id.*

intellect.”<sup>104</sup> For example, to protect offspring, Allah prohibited sexual intercourse outside marriages; to protect someone’s intellect, drinking alcohol is prohibited.<sup>105</sup>

Second, *Qisas* crimes apply the legal concept of retaliation — the “an eye for an eye” concept.<sup>106</sup> *Qisas* crimes occur when someone (1) physically injures a victim, or (2) steals or destroys someone’s property.<sup>107</sup> Sanctions for *Qisas* crimes are also fixed and require subjecting the aggressor to similar physical punishment, or, if inapplicable, obligating the aggressor to pay the victim or the victim’s family an amount of money determined by experts in the field.<sup>108</sup>

Third, *Ta’zir* crimes are any crime not considered *Huddod* or *Qisas*.<sup>109</sup> Defining *Ta’zir* crimes are left to individual governments for criminalizing, enforcing, and punishing.<sup>110</sup> Punishments for *Ta’zir* range from a rebuke to capital punishment.<sup>111</sup> Depending on the crime, judges may have discretion to sentence defendants with any punishment considered appropriate. For example, smuggling five kilos or more of any type of drugs is punishable by death in Saudi Arabia.<sup>112</sup>

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<sup>104</sup> Tawfik, *supra* note 99, at 669; KHALID AL-SAYYED, ALAAFOU AAN ALOQOBAB BAIN ALSHARIAH WA ALNETHAM [AMNESTIES FOR SANCTIONS BETWEEN SHARIA AND THE LAW] 107-109 (2016).

<sup>105</sup> Tawfik, *supra* note 99, at 669.

<sup>106</sup> ALSABAN, *supra* note 102, at 43-46; AL-SAYYED, *supra* note 104, at 46.

<sup>107</sup> ALSABAN, *supra* note 102, at 43-46; AL-SAYYED, *supra* note 104, at 46.

<sup>108</sup> AL-AWA, *supra* note 100, at 337.

<sup>109</sup> ALSABAN, *supra* note 102, at 48-50; AL-SAYYED, *supra* note 104, at 221-23.

<sup>110</sup> Abdurrahman Raden Aji Haqqi, *Criminal Punishment and Pursuit Justice in Islamic Law*, 15 INT’L J. TECH. RES. & APPLICATIONS 1, 9 (2015); ALSABAN, *supra* note 102, at 48-50; AL-SAYYED, *supra* note 104, at 221-23.

<sup>111</sup> Haqqi, *supra* note 110, at 9; ALSABAN, *supra* note 102, at 48-50; AL-SAYYED, *supra* note 104, at 221-23.

<sup>112</sup> ALSABAN, *supra* note 102, at 48-50.

Crimes, according to Muslim scholars, are unlawful actions and wrongdoings that are punishable by fixed or unfixed sanctions.<sup>113</sup> According to decision makers, however, crimes are any action that violates existing penal laws.<sup>114</sup> A complete crime, in accordance with *Sharia*, consists of three main elements: *nulla poena sine lege*, *actus reus*, and *mens rea*.<sup>115</sup> *Nulla poena sine lege*, means no punishment can occur without written laws.<sup>116</sup> This element has to meet a two-prong-test: (1) the written law must criminalize the action, and (2) the action does not fall under any exceptions, such as self-defense.<sup>117</sup> However, Saudi Arabia still does not possess a written penal code that defines all crimes and punishments. According to Saudi Basic Law, “punishment shall be carried out on a personal basis. There shall be no crime or punishment except on the basis of a Shari‘ah or a statutory provision, and there shall be no punishment except for deeds subsequent to the effectiveness of a statutory provision.”<sup>118</sup> The legality of prosecuting most *Ta’zir* crimes comes from Article 7 of Saudi Basic Law, which says that every law “derives its authority from the Book of God Most High and the Sunnah of his Messenger, both of which govern this Law and all the laws of the State.”<sup>119</sup> Hence, most judicial reasoning in Saudi Arabia is based on Muslim scholarly analogies and not penal codes, creating a tremendous gap for defense arguments — especially for PWIDs.

The second element is the *actus reus*, which is the action that resulted in harm or damages.<sup>120</sup> This element has three components: (1) a wrongful action, (2) damages, and (3) a

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<sup>113</sup> AL-OTEBY, *supra* note 9, at 340-341; IBRAHIM ABDULRAHMAN ALTAKHES, DIRASAT FE ELM ALEJRAAM [STUDIES IN CRIMINOLOGY] 22 (1997).

<sup>114</sup> AL-OTEBY, *supra* note 9, at 341; ALTAKHES, *supra* note 113, at 24.

<sup>115</sup> AL-OTEBY, *supra* note 9, at 341-42.

<sup>116</sup> *Id.* at 341; AL-AWA, *supra* note 100, at 85.

<sup>117</sup> AL-OTEBY, *supra* note 9, at 341.

<sup>118</sup> Basic Law of Governance (1992), art. 38 (Saudi Arabia).

<sup>119</sup> *Id.* art. 7.

<sup>120</sup> AL-OTEBY, *supra* note 9, at 341.



causal connection that links the action to the results.<sup>121</sup> Whether or not the act is considered intentional is measured by the third element.

Lastly, *mens rea* is the guilty mind.<sup>122</sup> This is the most important element as it determines whether the accused person is guilty of a crime or not. This element has to meet two components: (1) knowing that the act committed is a crime and acknowledging its consequences, and (2) committing the act on freewill and without any outside influential.<sup>123</sup> The first component cannot be grounds for defense because ignorance of the law is not an excuse.<sup>124</sup> The second component, however, determines liability for crimes.<sup>125</sup> *Mens rea* is affected by the person's legal capacity. Legal capacity is defined as the person's legal status to perform duties.<sup>126</sup> There are two types of legal capacity: (1) legal capacity of rights, and (2) legal capacity to act.<sup>127</sup> Legal capacity of rights is granted to all people regardless of their mental status,<sup>128</sup> and is defined as the legality for all human beings to acquire their inherited rights.<sup>129</sup> The second type is the legal capacity to act, which is the right of any person to act freely and without intervention (such as a guardianship).<sup>130</sup> The legal capacity to act comes in three levels: (1) complete legal capacity, (2) complete lack of legal capacity, and (3) deficient legal capacity.<sup>131</sup> As later chapters explain, criminal accountability is determined based on the level of the legal capacity to act. Persons with

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<sup>121</sup> *Id.* at 341-42.

<sup>122</sup> *Id.* at 342.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 182.

<sup>127</sup> *Id.* at 182; AL-JOBORY, *supra* note 9, at 91.

<sup>128</sup> AL-OTEBY, *supra* note 9, at 182; AL-JOBORY, *supra* note 9, at 93.

<sup>129</sup> AL-OTEBY, *supra* note 9, at 182; AL-JOBORY, *supra* note 9, at 92.

<sup>130</sup> AL-OTEBY, *supra* note 9, at 183; AL-JOBORY, *supra* note 9, at 113-14.

<sup>131</sup> AL-OTEBY, *supra* note 9, at 183; AL-JOBORY, *supra* note 9, at 115-16; Kinker, *supra* note 5, at 482.

intellectual disabilities do not possess complete legal capacity;<sup>132</sup> therefore, awareness of the differences in levels of mental capacity is key when dealing with criminal offenders. By doing so, proper punishment occurs, thus serving the goals of punishment.

Punishment is “the pain that criminals have to suffer because of committing their crimes.”<sup>133</sup> The goals of punishment include retribution, deterrence, incapacitation, and rehabilitation.<sup>134</sup>

Retribution, making the victim whole again, faces substantial criticism as it does not focus on the criminal individual.<sup>135</sup> Those who support retribution believe that punishments serve no benefit to society or the criminal, and their main goal is only to have criminals suffer *pain* without any other considerations.<sup>136</sup> Deterrence, on the other hand, intends to deter criminals from committing other crimes while also creating social stability and security.<sup>137</sup> According to scholars, deterrence is only beneficial if punishments are seen by the public, requiring proof of what *pain* criminals receive after committing crimes.<sup>138</sup> Incapacitation, meanwhile, occurs in situations where criminals cannot be deterred and simultaneously remain dangerous to the society.<sup>139</sup> Incapacitation comes in many different forms — it could be incarceration or, in the case of PWIDs, institutionalization. Lastly, rehabilitation as a goal of punishment aims to reform criminals so they can reintegrate into their society.<sup>140</sup>

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<sup>132</sup> The distinction between the terms legal capacity and mental capacity has been pointed out in General Comment 1, issued by the CRPD Committee. This discussion will be highlighted later in the research.

<sup>133</sup> AL-OTEBY, *supra* note 9, at 629.

<sup>134</sup> *Id.* at 631; AL-AWA, *supra* note 100, at 103-13.

<sup>135</sup> AL-AWA, *supra* note 100, at 103-04.

<sup>136</sup> *Id.* at 103.

<sup>137</sup> AL-OTEBY, *supra* note 9, at 631; AL-AWA, *supra* note 100, at 106-07.

<sup>138</sup> AL-AWA, *supra* note 100, at 108.

<sup>139</sup> AL-OTEBY, *supra* note 9, at 631; AL-AWA, *supra* note 100, at 113.

<sup>140</sup> AL-AWA, *supra* note 100, at 109.

Punishing criminals is not the goal of Islamic law; rather, Islam views punishments as a tool to rehabilitate. *Sharia* aims first to rehabilitate criminals who commit nonviolent crimes rather than imprison all criminals regardless of the type of crime committed.<sup>141</sup>

A man kissed a woman [who was not his spouse, which is considered a sin in accordance with the *Sharia* law.] So he came to the Messenger of Allah [Mohammad, Peace Be Upon Him (hereinafter PBUH)] and informed him about it. [The Prophet told him to wait until Allah informs the Prophet of what to do, during which the man prayed with the Prophet more than once.] Then Allah revealed this Ayah<sup>142</sup>: “And perform the Salat<sup>143</sup>, between the two ends of the day and in some hours of the night. Verily, the good deeds efface the evil deeds (i.e., minor sins).” (11:114) [It means that when the man prayed, he learned how not to commit other sins.] The man asked the Messenger of Allah (PBUH) whether this applies to him only. The Messenger of Allah (PBUH) said, “It applies to all of my Ummah.”<sup>144</sup>

The above *Hadith*<sup>145</sup> demonstrates that, according to *Sharia* law, imprisonment is not the only type of punishment to deter criminals; alternative punishments to imprisonment are recognized in Islam as methods to rehabilitate criminals. The concept of alternative punishments in *Sharia* has no merit if the crime committed is either *Huddod* or *Qisas* because, as mentioned, those punishments are fixed<sup>146</sup> and no viable replacement is recognized under *Sharia* to protect the five necessities of life, offspring, property, religion and intellect.<sup>147</sup> Hence, alternative punishments to imprisonment occur only if the crime committed is classified as *Ta'zir*. Indeed, *Ta'zir* — in the eye of many Muslim scholars — is used interchangeably with alternative punishments to imprisonments.<sup>148</sup> Notably, however, the mainstream practice among Saudi

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<sup>141</sup> Al-Harthiy, *supra* note 99, at 18.

<sup>142</sup> Ayah is a single verse from Quran.

<sup>143</sup> Muslim prayers are called Salat.

<sup>144</sup> Sunnah, Book 9, Hadith 54.

<sup>145</sup> *Hadith* is a saying by the Prophet, which is one of the main sources of *Sharia* law.

<sup>146</sup> Al-Harthiy, *supra* note 99, at 20.

<sup>147</sup> Tawfik, *supra* note 99, at 669.

<sup>148</sup> Al-Harthiy, *supra* note 99, at 20.

judges is to incarcerate as many criminals as possible.<sup>149</sup> Judges, through time, found it much easier to send criminals to prison, even if the crime committed is not classified as *Huddod* or *Qisas*.<sup>150</sup> In fact, as research suggests, the vast majority of Saudi judges see alternative punishment as a weak tool for justice, not believing in its efficiency or applicability.<sup>151</sup> The goals of punishments may vary depending on the circumstances of each case; should judges want to apply the best sentence, the evolution should be based on a case-by-cases analysis to design a sentence that would best help criminals.

### Disability Rights in Saudi Arabia

The Saudi Disability Welfare Law (DWL) considers a person disabled if he or she suffers “from a permanent, whether total or partial, impairment affecting his senses, or his physical, mental, communicative, learning or psychological abilities, in a manner that reduces his ability to perform daily activities compared to a non-disabled person.”<sup>152</sup> According to Article 1 of the CRPD, “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.”<sup>153</sup> The CRPD definition is similar to Muslim scholars in the field of disability; Al-Bogami defines disability as an impairment that would leave a person with a disability in a different situation compared to someone who does not have the same disability.<sup>154</sup> A person with a disability is also considered

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<sup>149</sup> *Id.* at 31.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Disability Welfare Law (2000), art. 1 (Saudi Arabia).

<sup>153</sup> Convention on the Rights of Persons with Disabilities, *supra* note 1, art. 1.

<sup>154</sup> Al-Bogami, *supra* note 6, at 8.

any person who cannot perform daily tasks without assistance.<sup>155</sup> The DWL, furthermore, lists a number of disabilities protected by the law, such as “visual impairment, hearing impairment, mental disability, physical and motor disability, learning disabilities, speech disorders, behavioral and emotional disorders, autism, double and multiple disabilities, and other disabilities that require special care.”<sup>156</sup>

Analyzing the issues PWD face in Saudi Arabia requires knowing the disability population and highlighting the causes of prominent disabilities. The 2016 General Authority of Statistics (GAS) demography survey showed disability populations in Saudi Arabia,<sup>157</sup> estimating that 3.3% of the Saudi population has some type of disability that is covered in the definition<sup>158</sup> of the GAS.<sup>159</sup> The survey noted that the current Saudi population increased 16.54% from 2010 to 31,742,308 “with [an] average annual increase of 2.54%.”<sup>160</sup> while “the ratio of the disabled Saudi nationals changes from one age group to another as it reaches the lowest level among children (0.6%)”<sup>161</sup> and “hits the highest level among the Saudi population who are >80-year-old (27.6%).”<sup>162</sup> A higher percentage of males than females are considered to have a

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<sup>155</sup> NAWAL OMAR BA-SAAD, ALMANHAJ ALNABAWI FE DAAM THAWI ALEHTIYAJAT ALKHASSA [THE PROPHETIC METHOD IN SUPPORTING PERSONS WITH SPECIAL NEEDS] 7 (2016).

<sup>156</sup> Disability Welfare Law (2000), art. 1 (Saudi Arabia).

<sup>157</sup> GEN. AUTHORITY STATISTICS, DEMOGRAPHY SURVEY 2016 (2016), [https://www.stats.gov.sa/sites/default/files/en-demographic-research-2016\\_4.pdf](https://www.stats.gov.sa/sites/default/files/en-demographic-research-2016_4.pdf) (last visited Nov. 28, 2017).

<sup>158</sup> GAS defines disability as “an inability or permanent disability that limits the activity and mobility of a person who loses, suffers a deviation of a physiological or neurological organ or a function of an element or limb. The disability means the person suffers shortage or inefficiency in doing activities than normal man can do, for example: impairment of hearing, speech, mobility, etc. The disability can be divided into levels according to undeniable medical check results. The man may suffer disability since birth or it may become clear as he gets older.” *Id.* at 18.

<sup>159</sup> *Id.* at 28.

<sup>160</sup> *Id.* at 20.

<sup>161</sup> *Id.* at 28.

<sup>162</sup> *Id.*

disability — 58.5% to 41.5%, respectively.<sup>163</sup> A total of 667,280 Saudis are considered disabled, meaning that among every 100,000 people, 3,300 meet the definition of “disabled.”<sup>164</sup>

In terms of the severity of the disability, 284,917 PWD have mild difficulties, while 215,018 PWD have severe difficulties, and 167,345 PWD have extreme difficulties.<sup>165</sup> Many factors may cause a disability, including consanguineous marriages,<sup>166</sup> pregnancy problems,<sup>167</sup> traffic accidents,<sup>168</sup> and diseases.

Because of the high number of consanguineous marriages in Saudi Arabia, “the risk of disabilities associated with genetic causes is significant.”<sup>169</sup> According to the GAS report, 192,741 PWD in Saudi Arabia have parents who are first degree relatives, while only 106,628 PWD have parents who are not related.<sup>170</sup> To reduce such risks, the government of Saudi Arabia now requires couples to take a blood test before they marry to note potential kinship and the likelihood of having children with disabilities.<sup>171</sup> A blood test before marriage, as a precautionary measure, has a plethora of positive outcomes, such as informing parents of the possibility of having children with disabilities, allowing early medical interventions to prevent diseases, and mentally preparing the couple for the responsibility of a child with a disability.<sup>172</sup>

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 94.

<sup>165</sup> *Id.* at 96.

<sup>166</sup> S.I. Al-Gain & S.S. Al-Abdulwahab, *Issues and Obstacles in Disability Research in Saudi Arabia*, 13 ASIA PAC. DISABILITY REHABILITATION J. 45, para. 5 (2002).

<sup>167</sup> ABDULBAQI MUHAMMED SALEM, TAWIAT ALMOJTAMAA BE QADAIYAH ALEAQA [EDUCATING SOCIETY ON DISABILITY MATTERS] 23-29 (2012).

<sup>168</sup> M.S. Al-Jadid, *Disability in Saudi Arabia*, 34 SAUDI MED. J. 453, 455 (2013).

<sup>169</sup> Al-Gain & Al-Abdulwahab, *supra* note 166, at para. 5.

<sup>170</sup> GEN. AUTHORITY STATISTICS, *supra* note 157, at 105.

<sup>171</sup> SALEM, *supra* note 167, at 66.

<sup>172</sup> *Id.* at 68-69.

Car accidents, on the other hand, are a leading cause of disability in Saudi Arabia,<sup>173</sup> behind cerebral palsy and developmental delay.<sup>174</sup> According to the GAS report, 38,667 PWD in Saudi Arabia are classified with a disability because of traffic accidents.<sup>175</sup> Interestingly, more men are diagnosed with car accident-related disabilities than women — 33,451<sup>176</sup> compared to 5,216,<sup>177</sup> respectively.

The number of Saudis with disabilities is quite significant and, despite government efforts to reduce the number, the Saudi disabled population continues to increase. However, the problem is not the increasing number of Saudis with disabilities, it is what rights are recognized under national law.

According to Saudi Basic Law, “the State shall guarantee the right 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 to participate in charitable work.”<sup>178</sup> This general principle requires the Saudi government to create national laws and sign international treaties that help the government fulfill this duty. Saudi Basic Law also reaffirms that “laws, international treaties and agreements, and concessions shall be issued and amended by Royal Decrees.”<sup>179</sup> Saudi Arabia has both passed laws and signed international treaties<sup>180</sup> that protect and promote a plethora of rights for PWD.

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<sup>173</sup> Al-Gain & Al-Abdulwahab, *supra* note 166, at para. 9.

<sup>174</sup> Al-Jadid, *supra* note 168, at 455.

<sup>175</sup> GEN. AUTHORITY STATISTICS, *supra* note 157, at 108.

<sup>176</sup> *Id.* at 109.

<sup>177</sup> *Id.* at 110. Notably, Saudi Arabia only started to allow women to drive in June 2018, thus this number might change in future studies.

<sup>178</sup> Basic Law of Governance (1992), art. 27 (Saudi Arabia).

<sup>179</sup> Basic Law of Governance (1992), art. 70 (Saudi Arabia).

<sup>180</sup> See discussion *infra* Chapter IV for further analysis of the CRPD.

On December 11, 2000, Saudi Arabia passed a law that protects the rights of PWD in many areas — the sixteen articles of the Disability Welfare Law.<sup>181</sup> This law “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.”<sup>182</sup> Ten of its articles deal with administrative matters, such as the mechanism to establish its own supreme council.<sup>183</sup> The other six articles promote rights for PWD, including but not limited to health, education, training and rehabilitation, employment, and social services.<sup>184</sup> While the Disability Welfare Law was considered progressive when passed, it is now considered outdated.

For comparison, the Saudi Basic Law promotes human rights in light of *Sharia* and criminalizes all forms of discrimination. Saudi Basic Law states that “the State shall protect human rights in accordance with the Islamic Shari‘ah”<sup>185</sup> and recognizes that “Governance in the Kingdom of Saudi Arabia derives its authority from the Book of God Most High and the Sunnah of his Messenger, both of which govern this Law and all the laws of the State.”<sup>186</sup> In contrast, the current Disability Welfare Law does not expressly mention basic human rights for PWD, nor does it provide remedies if those rights are violated. Generally speaking, the Disability Welfare Law is not highly sophisticated, and barely touches upon small, yet crucial, points and details. The current Disability Welfare Law “is very general [and it] contains deficiencies in terms of definitions of disabled, education, employment, public services, and techniques for their legal treatment.”<sup>187</sup>

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<sup>181</sup> Disability Welfare Law (2000) (Saudi Arabia).

<sup>182</sup> *Alsaif*, *supra* note 19, at 221.

<sup>183</sup> Disability Welfare Law (2000) (Saudi Arabia).

<sup>184</sup> *Id.* art. 2.

<sup>185</sup> Basic Law of Governance (1992), art. 26 (Saudi Arabia).

<sup>186</sup> Basic Law of Governance (1992), art. 7 (Saudi Arabia).

<sup>187</sup> *Alsaif*, *supra* note 19, at 223.



Meanwhile, the CRPD was signed and ratified in 2008; comparison of its extensive provisions highlights many deficiencies in the current Disability Welfare Law and one can easily recommend rewriting the current Saudi law on disability rights.<sup>188</sup> The Disability Welfare Law needs major reforms to take it to the level required by the CRPD.

There is no indication that the DWL law does not promote rights for the disabled community, but as an understanding of rights evolves and people require new accommodations, examination of current law results in recommendations to produce better results for the disabled community. An effective law protecting those with disabilities in Saudi Arabia should not only mention all services PWD should be able to access, it must also include their rights. In the current Disability Welfare Law, “there is no mention of the word ‘right,’ except in Article 2, which indirectly suggests rights,”<sup>189</sup> an “omission [that] is probably one of the main reasons why disability rights are dealt with as charitable social grants.”<sup>190</sup> The Disability Welfare Law should not only act as an enforcement mechanism, but should also promote rights for PWD in accordance with international laws. In February 13, 2018, the Council of Ministers approved the establishment of a new government branch called the Persons with Disability Rights Commission (PDRC).<sup>191</sup> The PDRC will raise the level of services provided to PWD and help PWDs contribute to building the national economy, Dr. Ali bin Nasser Al-Ghafees<sup>192</sup> argued.<sup>193</sup>

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<sup>188</sup> *Id.* at 222 (“[A]lthough the [Disability Welfare Law] 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.”).

<sup>189</sup> *Id.* at 223.

<sup>190</sup> *Id.*

<sup>191</sup> *Algafis: Tandeem “Haiat Reayat thawi aleaaqa” Yarfaa Mustawa Alkhadamat [“Gafis”: Organization of the “Persons with Disability Rights Commission” Raises the Level of Services]*, SABQ (Feb. 13, 2018), <https://sabq.org/ZNCMF8> (last visited Oct. 30, 2018).

<sup>192</sup> Al-Ghafees is the Minister of Labor and Social Development, and the Chairman of the Board of Directors of the Persons with Disability Rights Commission.

<sup>193</sup> *Algafis, supra* note 191.

Dr. Al-Ghafees stated that the PDRC will be financially and administratively independent, and will work collectively with other government branches, thus ensuring PWD's productive involvement in the government's National Transformation Program, one of the objectives of the vision of the Kingdom 2030.<sup>194</sup>

The PDRC was authorized to take appropriate and immediate steps toward the enactment of new legislation to replace the outdated DWL. Moreover, the PDRC was established to oversee Saudi Arabia's compliance with the CRPD. The PDRC affirms PWD's participation to be part of the its Board of Directors. Since the establishment of the PDRC, no apparent effort by the PDRC to address these issues has been made. However, on February 14, 2019, the PDRC began officially operating and appointed Dr. Hisham Muhammed Alhaidary as its Chairman.

According to a Council of Ministers statement, the Board of Directors for the PDRC will include "two persons with disabilities (two members) and two parents of two persons with disabilities (two members)."<sup>195</sup> This participation is in accord with Article 29 of the CRPD, which states that "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: (a) to 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."<sup>196</sup> PWD in Saudi Arabia deserve more attention and support from the PDRC to establish a solid legal and judicial framework that will enhance how disability is viewed in Saudi society.

Currently, disability is viewed from a perspective that impacts how PWD live in Saudi society. According to disability rights advocates, there are a number of models for viewing

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<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> Convention on the Rights of Persons with Disabilities, *supra* note 1, art. 29(a).

disability within a society. Depending on the model adopted and used, the rights of PWD are affected. The next chapter introduces the models of disability and analyze the current situation in Saudi Arabia.

### CHAPTER III: THEORETICAL FRAMWORK AND THE MODELS OF DISABILITES

This chapter addresses the theoretical framework used in this dissertation to connect the scope of the issue with a theory that offers a solution to the challenges PWIDs face in Saudi Arabia because of the understanding of Article 12 of the CRPD. A theoretical framework is essential to understand the intersection of law and disability. A theoretical framework is also important to support the adoption of a new approach that would create safeguards for PWIDs, which is covered by Article 12 of the CRPD.

The main theoretical framework this dissertation uses is the *models of disability* framework, part of critical disability theory (CDT). Disability is the central focus of CDT, comparing “liberalism’s norms and values with their actualization in the daily life of disabled people.”<sup>197</sup> CDT, in order to understand the complexity of disability and the law, does not isolate other “disciplines such as economics, psychology and political science,” resulting in broader understanding of disability and its relation to society.<sup>198</sup> The models of disability framework, which is a part of the CDT, allows scholars to look at issues related to people with disabilities differently. Out of the models of disability, two main models will be the focus of this dissertation, that are the medical model and the social model; however, other models are highlighted as well.

The medical model of disability focuses on the disability itself and tries to link the all issues related to PWD to the existence of the disability. In other words, PWD often face significant legal and social obstacles and the medical model of disability emphasizes curing the disability to resolve the issue, rather than working with the existence of a disability to still

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<sup>197</sup> Hosking, *supra* note 75, at 5.

<sup>198</sup> *Id.*

provide legal and social stability. For example, according to the medical model, all legal and other issues related to people with disabilities are caused by the disability.<sup>199</sup> This model suggests that “curing” the disability is the only way to resolve the problem related to disability. As a consequence, any treatment is justified, even if consent was not granted.<sup>200</sup>

The social model, on the other hand, characterizes the issue differently. According to the social model of disability, the problems people with disabilities face are not because of their inability to perform daily life activities, but rather society’s inability to accommodate people with disability.<sup>201</sup>

There are a number of reasons behind choosing this theoretical framework for this dissertation. First, CDT moved from using the medical model to resolve issues for people with disabilities and CDT started to adopt the social model of disability.<sup>202</sup> A fair number of people in Saudi Arabia believe in the medical model, even though they are doing it unintentionally.<sup>203</sup> The majority in Saudi Arabia see people with disabilities as sick people who need to be cured out of sympathy. This is the main issue in recognizing people with intellectual disabilities as full persons before the law. Second, the solution proposed herein needs the social model analysis adopted by the CDT because the social model advocates for every single disability and it includes all of society in the problem-solving process. Using these two models as the primary theoretical framework will simultaneously show how Saudi Arabia adopts the medical model, as well as the results of adopting the social model of disability.

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<sup>199</sup> Alsaif, *supra* note 19, at 52.

<sup>200</sup> *Id.* at 53.

<sup>201</sup> Hosking, *supra* note 75, at 7.

<sup>202</sup> *Id.*

<sup>203</sup> Alsaif, *supra* note 19, at 168.

## The Medical Model of Disability

According to the medical model of disability, issues related to PWD are directly associated with the physical or mental condition of the disabled, which reduces their “quality of life and causes clear disadvantage.”<sup>204</sup> The medical model “sees disability as an inherent characteristic of a person arising from an objectively identified impairment of the mind or body.”<sup>205</sup> Under this model, when PWD are discriminated against, the cause of such practices is linked to the existence of their disabilities; society has no obligation to eliminate or minimize the gap between PWD and their rights.

The medical model is how most people and lawmakers understood disability<sup>206</sup> before the social model was introduced in the 1970s<sup>207</sup> and is believed to be the leading framework for how Saudi society still understands disability.<sup>208</sup> Dr. Alsaif stated that “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.”<sup>209</sup> Dr. Alsaif’s argument can be proven by looking at how disability rights are preserved in Saudi law and how PWD live in the Kingdom. The Disability Welfare Law unintentionally adopts the medical model of disability.<sup>210</sup> Moreover, since the DWL refers to *rights* of PWD protected by the CRPD as services, it creates a social barrier that suggests the rights PWD have are given but not earned.<sup>211</sup> Using the term services

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<sup>204</sup> Alsaif, *supra* note 19, at 52.

<sup>205</sup> Hosking, *supra* note 75, at 6-7.

<sup>206</sup> *Id.* at 6.

<sup>207</sup> CULTURE–THEORY–DISABILITY: ENCOUNTERS BETWEEN DISABILITY STUDIES AND CULTURAL STUDIES 20 (Anne Waldschmidt, Hnajo Berressem & Moritz Ingwersen eds., 2017).

<sup>208</sup> Alsaif, *supra* note 19, at 168.

<sup>209</sup> *Id.*

<sup>210</sup> Hashem N. Alsharif, *Eaadat Alnathar fe Nidaam Reiyat Almoawakeen [Revising the Disability Welfare Law]*, OKAZ NEWS (Dec. 215, 2017), <https://www.okaz.com.sa/article/1598129>.

<sup>211</sup> *Id.*

instead of rights “has created . . . a gap between the framework of [the Disability Welfare Law] and the provision of services, resulting in a lack of special education services for persons with disabilities.”<sup>212</sup> Dr. Alsaif argued that “the rights of disabled persons in Saudi Arabia must be transferred from charity to justice.”<sup>213</sup> The medical model, by identifying physical and mental disabilities as the cause of disempowering PWD not only stops any contribution to accommodate PWD, but also justifies other maltreatments the CRPD prohibits.

Because the medical model of disability dominates other models, PWD in Saudi Arabia face a number of challenges when interacting with the criminal legal system. First, PWIDs often face forced treatment<sup>214</sup> and are institutionalized.<sup>215</sup> The medical model’s goal is to a society without disability, so that any “medical treatment and physical rehabilitation, whatever their cost in terms of relieving disabled individuals, are always justified by the ideology of normality rules.”<sup>216</sup>

Article 25 of the CRPD requires States Parties to “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.”<sup>217</sup> The Committee on Economic, Social and Cultural Rights (CESCR) interpreted this article as indicating that “the right to health is not to be understood as a right to be healthy.”<sup>218</sup> The right to health is merely governed by the ability to “control one's health and body . . . and the right to be free from interference, such as the right to

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<sup>212</sup> Al-Jadid, *supra* note 168, at 458.

<sup>213</sup> Alsaif, *supra* note 19, at 170.

<sup>214</sup> This in itself is a violation of Article 15 of the CRPD, which states “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” This point is discussed further in Chapter IV.

<sup>215</sup> Alsaif, *supra* note 19, at 53.

<sup>216</sup> *Id.* at 53.

<sup>217</sup> Convention on the Rights of Persons with Disabilities, *supra* note 1, art. 25.

<sup>218</sup> Kinker, *supra* note 5, at 468.

be free from torture, non-consensual medical treatment and experimentation.”<sup>219</sup> Forced treatment is the leading cause of institutionalization.<sup>220</sup> Historically, PWD’s impairments were often medicalized due to the long-term maltreatment by societies and the negative side effects of the medical model, which often resulted in institutionalization as the “best” effort to address disabilities.<sup>221</sup> Therefore, practices that would reduce the gap between PWD and society to integrate PWD socially and economically were removed.<sup>222</sup>

In fact, the second challenge PWD face from the medical model of disability is the social stigma created and attached to PWD from this model. Disability affects not only the life of the disabled, but also the family of PWD.<sup>223</sup> How the family understands the disability is a core element in dealing with the disability,<sup>224</sup> potentially yielding a better life for the disabled. Families that ignore the disability, however, create more barriers for the disabled and the society *in toto*. For example, it used to be believed that disability populations in the Kingdom were low because “some families tend[ed] to leave [PWD] behind closed doors,” and PWD rarely attended “social gatherings and even relatives can hardly see the disabled people.”<sup>225</sup> This practice impacted the accuracy of estimating the disability population in Saudi Arabia. Furthermore, this stigma affects the health of the disabled person’s close family members, leading to depression,

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<sup>219</sup> *Id.* at 468.

<sup>220</sup> However, institutionalizing PWID is justified only when (1) the disability is so severe, and (2) the person with the intellectual disability constitutes a danger to the society because of his or her disability. *See* discussion *infra* Chapter V on institutionalization.

<sup>221</sup> ANDREW POWER, JANET LORD & ALLISON DEFRANCO, *ACTIVE CITIZENSHIP AND DISABILITY: IMPLEMENTING THE PERSONALISATION OF SUPPORT* 7 (2013).

<sup>222</sup> *Id.*

<sup>223</sup> SULIMAN T. AL-REHANI, IBRAHIM A. AL-ZREGAT & AADEL J. TANOS, IRSHAD THAWI ALHAJAT ALKHAHAH WA OSARAHOM [GUIDANCE TO PERSONS WITH SPECIAL NEEDS AND THEIR FAMILIES] 162 (2016).

<sup>224</sup> *Id.*

<sup>225</sup> Al-Jadid, *supra* note 168, at 455.



sadness, and hopelessness,<sup>226</sup> as “the anxiety and depression rates were higher in mothers with female disable children.”<sup>227</sup> In a qualitative study to survey “the unmet needs and experiences of mothers of [Autism Spectrum Disorder] children in [ ] Saudi Arabia, some ‘mothers expressed that they felt *stigmatised* as a result of their children’s disability.’”<sup>228</sup> According to the study, some mothers found it “hard going outside the home with their children because people in public places [were] annoyed by their children’s behaviour.”<sup>229</sup> Also, in a survey of families including children with disabilities, conducted by Dr. Waleed Alsloom, 60% of participants felt ashamed and did not acknowledge the existence of the disability in their family member.<sup>230</sup> Dr. Alsloom further noted that one of the challenges institutions and disability centers faced was that the disabled person’s family often refused to visit the patient at the center, and often did not want to host their disabled relative after the program was finished.<sup>231</sup> Dr. Alsloom reasoned that this occurrence arose from a lack of knowledge and understanding those families have of disability; the problem is greater when the family lives in urban cities.<sup>232</sup>

To sum up, the medical model of disability is nothing more than creating more social and legal barriers that do not allow PWD to be recognized as full persons before the law. Allowing physical and mental disabilities to disempower PWD under the medical model of disability not

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<sup>226</sup> AL-REHANI, AL-ZREGAT & TANOS, *supra* note 223, at 162.

<sup>227</sup> Al-Jadid, *supra* note 168, at 456.

<sup>228</sup> A. Hemdi & D. Daley, *The Needs of Mothers of Children with Autism Spectrum Disorder (ASD) in the Kingdom of Saudi Arabia (KSA): A Qualitative Study*, 5 INT’L J. ACAD. SCI. RES. 19 (2017).

<sup>229</sup> *Id.*

<sup>230</sup> Manal Aljoeed, *Osaar Takhdal mn Mouaqiha [Families Ashamed of their Disabled Relative]*, AL-WATAN NEWS. (Feb. 10, 2018),

[http://www.alwatan.com.sa/Nation/News\\_Detail.aspx?ArticleID=329336](http://www.alwatan.com.sa/Nation/News_Detail.aspx?ArticleID=329336).

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

only creates a host of negative consequences, but the medical model leaves social barriers out of the scope of disability issues, unlike the social model of disability.

### The Social Model of Disability

*“It’s one thing to live in a community, but it’s another thing to be part of it.”*<sup>233</sup>

In contrast to the medical model, the social model notes that disability itself does not constitute a discriminatory barrier but societies, by not properly accommodating PWD, create those obstacles. “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 others as having some form of impairment- whether physical, sensory or intellectual.”<sup>234</sup> Since its introduction in the late 1970s, the social model of disability went through a number of stages until it became accepted by mainstream scholars.<sup>235</sup> Advocates of this model claimed that physical or mental impairments did not constitute a disability — that “only the failure of society to accommodate difference limited an individual’s life options.”<sup>236</sup> Some claim that because of this extreme advocacy, the social model of disability is now accepted and “without this extreme proposition the medical model may never have been budged.”<sup>237</sup> In other words, the medical model was extreme for only blaming disability as the cause of issues related to PWD to the existence of the disability, so the social model, by blaming only the society for issues related to PWD, has created an equivalent but yet an opposite proposition.

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<sup>233</sup> POWER, LORD & DEFRANCO, *supra* note 221, at 12 (citing the Ministry of Community and Social Services in Ontario).

<sup>234</sup> Alsaif, *supra* note 19, at 53-54.

<sup>235</sup> Hosking, *supra* note 75, at 7.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

The social model implies three main assumptions. First, it recognizes that PWD are an underprivileged group of people requiring reasonable accommodations that allow them to live normally in society.<sup>238</sup> Second, the physical and mental impairments should not be linked to the lack of rights given to PWD because “it is not impairments *per se* which disable, but societal practices of ‘disablement’ which result in disability.”<sup>239</sup> Finally, unlike the medical model that wants to cure PWD, the social model of disability emphasizes society’s duty to accommodate PWD into society regardless of their disability.<sup>240</sup> Therefore, the social model of disability “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,” and it “tries to address the disability as a social concept and not the sickness of the person in isolation from the society.”<sup>241</sup>

Granted, the social model of disability has faced a number of criticisms. Firstly, emphasizing the role of the society, while ignoring disabilities as factors, made it difficult to some societies to fully apply the social model.<sup>242</sup> By focusing more on the role of societies, some barriers “cannot be resolved by the application of the principles of the social model.”<sup>243</sup> One of the barriers is the disability itself.<sup>244</sup> By emphasizing that societies are the only cause of PWD’s isolation, less emphasis is given to the impairment,<sup>245</sup> which is somehow factually incorrect. In

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<sup>238</sup> CULTURE–THEORY–DISABILITY, *supra* note 207, at 20-21.

<sup>239</sup> *Id.* at 21.

<sup>240</sup> *Id.*

<sup>241</sup> Alsaif, *supra* note 19, at 56.

<sup>242</sup> *Id.* at 54.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

other words, it is argued that but for the disability, the barriers would not exist. Hence, some PWD are calling for more attention to the *pain* PWD “suffer as a result of their impairment.”<sup>246</sup>

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 personal experience of physical or intellectual restrictions, of illness, of the fear of dying.’<sup>247</sup>

The social model of disability should not have gone so far in blaming societies because by doing so, this model almost ignores the impairment, which is obviously an integral part of every disabled person’s life. Also, the social model of disability does not cover other underprivileged groups of people,<sup>248</sup> such as women, children, foreign workers, or religious minorities. In other words, the social model of disability does not factor in extra concerns PWD face when they are also part of another disenfranchised group. The social model should not focus only on issues related to PWD, it “should involve consideration of the stigma which may follow a person with any impairment who suffers persecution and is put at risk of exclusion.”<sup>249</sup> In addition, the social model of disability suggests that all issues PWD face “can be ‘solved’ through accessibility and participation, mainstreaming and human rights policies.”<sup>250</sup> This has caused some issues in trying to apply this model nowadays as “especially in recent years, many interpretations have tended to ignore the revolutionary impetus of the social model and have watered it down to reformist aspirations of social inclusion and participation.”<sup>251</sup> The social model, therefore, has become outdated due to its limited scope in resolving issues related to PWD; there is a need to find better models and concepts that improve inclusion of PWD as

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<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 54-55.

<sup>248</sup> *Id.* at 55.

<sup>249</sup> *Id.*

<sup>250</sup> CULTURE–THEORY–DISABILITY, *supra* note 207, at 21.

<sup>251</sup> *Id.*

active members of their societies.<sup>252</sup> In trying to overcome such barriers, a number of other models and theories consider other perspectives of issues related to PWD. Two other models are briefly highlighted: (1) the cultural model of disability, and (2) disability justice.

### The Cultural Model of Disability

The cultural model of disability is one of the models included in CDT and that scholars are encouraged to study more. Since it is a newer model than the medical and social models, there have been many attempts to redefine and shape the cultural model as it was feared that a narrow definition would weaken its purpose without including all aspects that define a cultural approach in the definition. The cultural model was defined in the context of religious studies as “an approach which analyzes ‘how a culture’s representations and discussions of disability (and nondisability or able-bodiedness) help to articulate a range of values, ideals, or expectations that are important to that culture’s organization and identity.’”<sup>253</sup> It was also defined as “the analysis of the representations of disabled people in the cultural spaces of art, media, and literature,” even speaking of a “cultural turn” in disability studies.<sup>254</sup> Despite the number of definitions of the cultural model of disability, all definitions reflect “the totality of ‘things’ created and employed by a particular people or a society, be they material or immaterial: objects and instruments, institutions and [organizations], ideas and knowledge, symbols and values, meanings and interpretations, narratives and histories, traditions, rituals and customs, social [behavior,] attitudes and identities.”<sup>255</sup>

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<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 23.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 24.

The cultural model of disability distinguishes itself by seeing disability as a discourse that evolves and is better understood through time and knowledge.<sup>256</sup> Since, over time, cultures change due to expanded knowledge and understanding, the cultural model of disability is more suited to adapt and accommodate PWD. Moreover, the cultural model argues that the concept of disability should not merely reflect the physical or mental status of the person with disability.<sup>257</sup> Rather, the concept of disability should be viewed as a manifestation of a different class “because it is not a natural fact but a naturalized difference.”<sup>258</sup> Furthermore, since this model centers cultural structures as its dominant character, normality and deviance are of equal importance<sup>259</sup> as the “cultural model of disability shows that the individual and collective subjectivities of ‘disabled’ and ‘nondisabled’ persons are interdependent.”<sup>260</sup> Finally, the cultural model expands the lens through which scholars may examine disability to include more than just what society should offer to accommodate PWD.<sup>261</sup> This model’s objective is “to a look at society and culture in general, aiming to understand the dominant ways of problematizing issues of health, normality, and functioning.”<sup>262</sup> In changing the culture and how societies perceive disability, disability would never be an issue because the model offers tools by which disability can easily adjust over time and with the changes.

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<sup>256</sup> *Id.* at 24-25.

<sup>257</sup> *Id.* at 25.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

## Disability Justice

“Just because disabled people are in the room doesn’t mean there is no ableism.”<sup>263</sup>

Disability justice (DJ) on the other hand does not look at disability-related issues from a one-sided perspective;<sup>264</sup> rather, the DJ “movement distinguishes itself as a departure from the disability rights movement, which focuses on civil rights within the liberal tradition.”<sup>265</sup> DJ enhances the intersection between environmental and racial justice<sup>266</sup> as the theoretical framework of disability social activism that aims to end all types of discrimination against PWD who also fall into other discriminatory category, such as sexism, racism, and most importantly *ableism*.<sup>267</sup> Unlike disability rights movements that only focus on what the law says, DJ “has the power to not only challenge [people’s] thinking about access but to fundamentally change the way [people] understand organizing and how [PWD] fight for social change.”<sup>268</sup>

Before exploring DJ, ableism needs to be highlighted. Ableism is defined as a “set of beliefs, processes and practices that produce — based on abilities one exhibits or values — a particular understanding of oneself, one’s body and one’s relationship with others of humanity, other species and the environment, and includes how one is judged by others.”<sup>269</sup> Ableism is, therefore, any belief that labels others to justify practices that are discriminatory. Historically, different social groups used ableism to rationalize their superiority and advantage over a contrary

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<sup>263</sup> Mia Mingus, *Changing the Framework: Disability Justice*, LEAVING EVIDENCE (Feb. 12, 2011), <https://leavingevidence.wordpress.com/2011/02/12/changing-the-framework-disability-justice/>.

<sup>264</sup> *Id.*

<sup>265</sup> Catherine Jampel, *Intersections of Disability Justice, Racial Justice and Environmental Justice*, 1 ENVTL. SOC. 1, 3-4 (2018).

<sup>266</sup> *Id.* at 1.

<sup>267</sup> *Id.* at 3.

<sup>268</sup> Mingus, *supra* note 263.

<sup>269</sup> Gregor Wolbring, *The Politics of Ableism*, 51 DEVELOPMENT 252, 252-53 (2008).

group.<sup>270</sup> Ableism comes in many different forms that target various underprivileged and vulnerable groups of people, including PWD and women.<sup>271</sup> The medical model of disability supports ableism against PWD because it focuses on a person's *inabilities* when compared to other people's *abilities*.<sup>272</sup> However, the social model declines ableism as "[i]t rejects the 'variation of being,' biodiversity notion and categorization of disabled people."<sup>273</sup>

DJ aims to not only eliminate all forms of discrimination, but it mainly focuses to end ableism as the core causation for many oppressions.<sup>274</sup> DJ and the intersection of environmental justice are related in a number of factors.<sup>275</sup> DJ requires "collective access" that not only guarantees full access to public services and other social areas, but also requires creating "environmental conditions in which each person can access their version of wellness."<sup>276</sup>

Moreover, DJ is opposed to capitalism because,<sup>277</sup> unlike other disability rights movements that work adjacent to current political-economic regimes, the DJ movement is associated with "collective liberation."<sup>278</sup> This derived from the notion that DJ is about economic opportunities and employment, as well as having autonomy and support to live healthy and independently. DJ and other civil rights movements, without economic opportunity, cannot obtain justice.

Furthermore, DJ commits to not only fight oppression based on disability, but also "includes a commitment to addressing multiple forms of oppression rather than being 'single

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<sup>270</sup> *Id.* at 253.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> Jampel, *supra* note 265, at 3.

<sup>275</sup> *Id.* at 4.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*



issue identity based.”<sup>279</sup> Ableism is the core of a system that underestimates PWD; DJ activists do not blame PWD for not being *able* to live normally.<sup>280</sup>

### Islam and Disability

As shown in Chapter II, since all laws and practices in Saudi Arabia are based on Islamic teachings, it is important to also understand the relationship between Sharia and disability. Religion alone does not affect how disability is viewed, yet requires a host of other factors, such as politics, social, and economic factors.<sup>281</sup> When Islam was revealed to Muhammed (PBUH) who started to invite people to accept the faith, the social structure in Mecca was based “on tribal hierarchies and slave [labor].”<sup>282</sup> The views of disability among the Arabs in Mecca before Islam were not civilized. However, “Islam’s revolutionary teachings focused on a central belief that human beings are to be valued on the basis of inner ethical and moral worth that connects them to a divine and singular source of all humanity, rather than on the bases of tribe, ethnicity, economic class, and other dominant social indices of power.”<sup>283</sup> Those Islamic teachings inspired a number of vulnerable groups, such as PWD, to accept Islam.<sup>284</sup> PWD barely had rights in pre-Islamic Arab culture. For example, sitting at a table with a person with a disability was considered a shameful act.<sup>285</sup> Islamic teachings, particularly from the Quran and Sunnah, transformed the people’s views significantly.

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<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 6.

<sup>281</sup> H. Al-Aoufi, N. Al-Zyoud & N. Shahminan, *Islam and the Cultural Conceptualisation of Disability*, 17 INT’L J. ADOLESCENCE & YOUTH 205, 213 (2012).

<sup>282</sup> L.J. Claassens & L. Swartz, *Engaging Disability and Religion in the Global South*, in THE PALGRAVE HANDBOOK OF DISABILITY AND CITIZENSHIP IN THE GLOBAL SOUTH 147, 155 (Brian Watermeyer et al. eds., forthcoming 2019) (on file with author).

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> BA-SAAD, *supra* note 155, at 9.

In the Quran the word “disability” does not exist. Indeed, Quran refers to persons with disabilities as ‘disadvantaged people.’<sup>286</sup> Islam does not only recognize “the existence of disabilities as a natural part of human nature, but also [provides] principles and practical suggestions for caring for disabled people, as well as discussing the significance of such caring.”<sup>287</sup> One story from the Quran,<sup>288</sup> of a blind person interacting with the Prophet PBUH, is the best example to show how Islam cares about PWD. Abdullah Ibn Umm Maktum, a blind person, approached the Prophet seeking some answers while the Prophet was trying to convince some powerful non-Islamic leaders to accept the faith of Islam in Mecca.<sup>289</sup> Allah revealed a whole chapter in the Quran entitled “He Frowned” (*Abasa*)<sup>290</sup>:

The Prophet frowned and turned away; because there came to him the blind man, [interrupting]. But what would make you perceive, [O Muhammad], that perhaps he might be purified; or be reminded and the remembrance would benefit him? As for he who thinks himself without need, to him you give attention. And not upon you [is any blame] if he will not be purified. But as for he who came to you striving [for knowledge]; While he fears [Allah], from him you are distracted.<sup>291</sup>

It is interpreted that “this powerful story opens up a number of profound ethical, political, and religious questions for Muslims.”<sup>292</sup> Abdullah Ibn Umm Maktum had already converted to Islam when he approached the Prophet PBUH seeking guidance and answers, so the Prophet’s focus toward Mecca non-Islamic leaders in order to convince them of Islam is logical because

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<sup>286</sup> Al-Aoufi, Al-Zyoud & Shahminan, *supra* note 281, at 205.

<sup>287</sup> *Id.* at 206.

<sup>288</sup> See Claassens & Swartz, *supra* note 282, at 154 (“The Prophet Muhammad was in a meeting with some of the most influential leaders of Mecca, trying to persuade them of the value of his religious message. He was approached by Abdullah Ibn Umm Maktum, a blind man who comes to him devotedly seeking an explanation of a Quranic teaching. Annoyed, Muhammad frowned and turned his back on Abdullah, reverting his attention to the elite Meccan men.”).

<sup>289</sup> *Id.*; BA-SAAD, *supra* note 155, at 28.

<sup>290</sup> Claassens & Swartz, *supra* note 282, at 154; BA-SAAD, *supra* note 155, at 28.

<sup>291</sup> QURAN.

<sup>292</sup> Claassens & Swartz, *supra* note 282, at 155.

Islam will be empowered by them.<sup>293</sup> However, this story offers a good lesson to the Prophet PBUH and the whole Muslim community that all people, notwithstanding their social or mental status, should be treated equally. This example also shows that the right to education is granted to all PWD, and that discrimination in the context of education on the basis of disability is strictly prohibited. After this, the Prophet PBUH joked every time he saw Abdullah Ibn Umm Maktum by saying, “Allah has blame me because of this man.”<sup>294</sup> Also, the Prophet has appointed Abdullah Ibn Umm Maktum several time to lead Muslim in prayers, which is a great task.<sup>295</sup> Moreover, the Prophet “appointed [Abdullah Ibn Umm Maktum] as a governor of Medina (in his absence) twice.”<sup>296</sup> This shows that, in accordance with Islam, disability is not viewed as cause to disallow anyone from equal treatment before the law.

While there are many examples in the Sunnah regarding PWD, a few stand out. The first example teaches that harming PWD is a sin. The Prophet PBUH said, "Allah curses anyone who misguides a blind person and leads him away from the path."<sup>297</sup> When a blind person asks for a direction, it is considered a sin to lie about the correct path.<sup>298</sup> Without this type of disability, the person would not have asked for directions; thus, it is society’s role to accommodate the person and provide assistance. Another saying from the Prophet PBUH, “not greeting a blind person is betrayal of faith,”<sup>299</sup> shows society the importance of integrating PWD; because greetings

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<sup>293</sup> *Id.* at 156.

<sup>294</sup> BA-SAAD, *supra* note 155, at 14.

<sup>295</sup> Sunnah, Book 2, Hadith 205; BA-SAAD, *supra* note 155, at 41.

<sup>296</sup> Sunnah, Book 20, Hadith 4; BA-SAAD, *supra* note 155, at 41.

<sup>297</sup> BA-SAAD, *supra* note 155, at 17.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

between people send a message peace and love, not sharing such practice with blind people is marginalizing.<sup>300</sup> Islam wants to integrate PWD into society.

One Hadith affirms this goal: “There came to the Messenger of Allah . . . a blind man and said: Messenger of Allah, I have no one to guide me to the mosque. He, therefore, asked. Allah's Messenger permission to say prayer in his house. [the Prophet] granted him permission. Then when the [blind] man turned away [the Prophet] called him and said: Do you hear the call to prayer? He said: Yes. [The Prophet] said: Respond to it.”<sup>301</sup> Although this Hadith has been used by Muslim scholars to show the importance of prayer in mosques, it also shows that Islam does not intend to isolate PWD.

Had the blind person stayed home, it would be interpreted that PWD would lead a better life away from society, which is what the medical model proposes. However, this is not the goal of Islam because requiring PWD to pray in the mosque not only benefits PWD through inclusion in society, but such practice benefits the society by being accustomed to seeing PWD in daily life. This is what Saudi Arabia truly needs today. The medical model isolates PWD, but passing new laws that serve this Hadith's purpose will allow PWD their chance to be active citizens.

Another example from the Sunnah teaches all Muslims the importance of taking care of PWD and assisting them in their needs. The Hadith recounts that: “a woman had a partial derangement in her mind, so she said ‘Allah's Messenger, I want something from you.’ [The Prophet] said: . . . ‘see on which side of the road you would like (to stand and talk [about her matter]) so that I may . . . [help] you.’ He stood aside with her on the roadside until she got what she needed.”<sup>302</sup> Two lessons can be taught from this Hadith. The first lesson is that all PWD have

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<sup>300</sup> *Id.*

<sup>301</sup> Sunnah, Book 5, Hadith 322.

<sup>302</sup> Sunnah, Book 43, Hadith 102.

the right to enlightenment to matters they have questions about. Although that no one knows what the women with the intellectual disability wanted from the Prophet PBUH, it can be concluded that she earned her right to be heard and answered. Despite being busy, the Prophet PBUH granted her that right. The other lesson is that matters regarding PWD should be kept confidential. The Prophet PBUH not only allowed her to ask her questions, but he did it privately. Although he could have asked her to speak about her matter in front of all Muslims so they might learn from listening to the Prophet PBUH, he granted her right to privacy. Why would some Muslim societies still discriminate on the basis of disability with all these positive teachings on inclusion of PWD?

Although Islam calls for abolishing any type of discrimination on PWD, some Muslim societies' cultural values, including those in Saudi Arabia, dominate the society's Islamic values. "People's [behaviors] and attitudes might reflect their own understanding of their religion, but not necessarily the exact meaning of its values, where culture contributes in forming views of disability."<sup>303</sup> While Islam shape the views of people toward disabilities and PWD, the situation in the Saudi Arabia is the other way around. The socio-economic status overruled Islamic values, which can be seen in how disability is viewed. One of the many factors that contributes to such views is the social stigma from having a disability or having a family member with a disability.

Although some scholars argue that the Prophet PBUH said that disability can be cured, parents tend to "use religious values as a safety net against anxiety and shock, and as an excuse for not taking any concrete action to deal with the situation."<sup>304</sup> In doing so, parents in Saudi Arabia often react to their child's disability by denying the disability, ignoring any opportunities for early intervention to limit the effects of the disability, or reacting to the disability as a test

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<sup>303</sup> Al-Aoufi, Al-Zyoud & Shahminan, *supra* note 281, at 213.

<sup>304</sup> *Id.* at 214.

from God that can be cured through traditional charms, amulets, and spiritual treatments rather than medical treatment.<sup>305</sup> When knowing that their child has a disability, parents often deny such news. Accordingly, “curability” and abortion as means to reduce the disability population are not accepted by parents because they think that disability is a test from God and should only be faced by amulets and spiritual treatments.<sup>306</sup> However, some Muslim scholars argue that Islam favors any type of medical procedure that would help the person with disability minimize the effects of the disability.

Although prevalent in the legal system, Islamic views do not affect how Saudi Arabian society deals with disability; instead, it is the social and economic factors that contribute to such barriers. These socio-economic factors are typical medical model views of disability; the only way to rectify such beliefs is to raise awareness about disability among society. A person with a disability needs assistance and accommodations, but it is equally important to assist and help his or her family as well.

### Concluding Remarks

Chapter III introduced the models of disability under the CDT in order to explain the theoretical framework used in this dissertation and help understand the scope of the issue as well as theories that suggest potential solutions. In this chapter, five theoretical frameworks were highlighted: the medical model, the social model, the cultural model, disability justice, and Islamic perspectives on disability. Based on the analysis provided and the discussion of all the movements, advocating to apply and adopt the social model of disability would best adhere to the purposes of this dissertation.

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<sup>305</sup> AL-REHANI, AL-ZREGAT & TANOS, *supra* note 223, at 162.

<sup>306</sup> Al-Aoufi, Al-Zyoud & Shahminan, *supra* note 281, at 215.

As previously mentioned, the mainstream belief in Saudi Arabia unintentionally adopts the medical model of disability. It would be difficult to adopt a more complex approach (like the cultural model or disability justice) while the most rejected model (the medical model of disability) is still dominant within the country. Therefore, based on the current situation in Saudi Arabia, the social model of disability remains an acceptable and adequate model for Saudi Arabian disability advocacy.

The social model of disability rejects the idea that PWIDs are not capable of living independently. PWIDs should enjoy their full legal capacity and have the right to exercise it freely without any intervention from a guardianship, as mentioned in the CRPD. Article 12(2) of the CRPD asserts that “States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.”<sup>307</sup> The CRPD advocates the social model of disability, “describing it as a condition arising from ‘interaction with various barriers [that] may hinder their full and effective participation in society on an equal basis with others’ instead of inherent limitations.”<sup>308</sup> It is, therefore, crucial to analyze and further study the CRPD to better understand how to adopt the social model of disability, which the next chapter explores.

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<sup>307</sup> Convention on the Rights of Persons with Disabilities, *supra* note 1, art. 12(2).

<sup>308</sup> Michael Ashley Stein & Janet E. Lord, *Jacobus tenBroek, Participatory Justice, and the UN Convention on the Rights of Persons with Disabilities*, 13 TEX. J. C.L. & C.R. 167, 175 (2007).

## CHAPTER IV: THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD) AND ITS IMPLEMENTATION IN SAUDI ARABIA

This chapter focuses on the Convention on the Rights of Persons with Disabilities (CRPD), which is the international treaty supporting the argument that all PWIDs should be recognized as full persons before the law. The legal manifestation of a state signing the CRPD and how international treaties stand in the Saudi Arabian legal system are an essential component of this dissertation. Therefore, this chapter first addresses how international law can be used in Saudi courts and, most importantly, the practice when international law conflicts with domestic law in the Saudi legal system. The second part of this chapter introduces the drafting process for the CRPD. The historical roots of this Convention are crucial because the drafting committee included a specific article that caused significant global controversy and gave rise to the issue discussed in this dissertation. This part also provides the most updated statistics on the CRPD, including information of state parties to the Convention, showing how other states reacted to the CRPD and its goals.

In addition, one sub-section addresses the involvement of Saudi Arabia as a state party in the CRPD, starting with the historical interactions and Saudi Arabia's reasons for signing the treaty. This is a critical step because Saudi Arabia and other Arab countries have some reservations and understandings about this treaty, which raise questions. The subsequent part addresses the implementation of the CRPD in Saudi Arabia, discussing and analyzing reports to and from the Saudi government. This part also introduces the Optional Protocol of the CRPD (CRPD-OP), which Saudi Arabia has signed and ratified, that represents an important step for the state party's citizens. Specifically, the CRPD-OP allows citizens of any state party to raise



CRPD-related issues to the CRPD Committee at the United Nations (UN); this section addresses the usefulness of this protocol.

The final part of this chapter addresses a central issue in this dissertation: government understanding of the term “legal capacity” in Article 12 of the Convention. As previously mentioned, definitions are an important component in resolving issues related to PWD. Thus, this part touches upon the definition of disabilities from the international standpoint, as well as the definition of legal capacity. In doing so, this part deals with the issue of definitions in terms of defining the term *legal capacity* in the Arabic language, and what caused Saudi Arabia to sign the CRPD with an understanding of the term legal capacity in Article 12. Understanding the meaning of Article 12 in terms of the UN point of view is also a goal of this section. Lastly, this section sets the stage for Chapter V, addressing differences between the legal capacity to act and the legal capacity of rights.

#### Legitimacy of International Laws

The Basic Law states that “laws, international treaties and agreements, and concessions shall be issued and amended by Royal Decrees.”<sup>309</sup> Therefore, international treaties, like the CRPD, when signed, become domestic law and can be used in court. Saudi Arabia signed and ratified the CRPD and the CRPD-OP in 2008; since then those two treaties have been applicable laws in the Saudi jurisdiction. This interpretation is based on *Sharia*, which is the main source of legislation in Saudi Arabia, in accordance with Article 7 of the Basic Law.<sup>310</sup> Under Islamic principles, international treaties are contracts, when properly signed, that shall be enforced.<sup>311</sup> International treaties can be defined as a number of articles that are written in contractually

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<sup>309</sup> Basic Law of Governance (1992), art. 70 (Saudi Arabia).

<sup>310</sup> Basic Law of Governance (1992), art. 7 (Saudi Arabia).

<sup>311</sup> AL-ESAWI, *supra* note 83, at 151.

binding language between governments that focus on a variety of legal topics and issues.<sup>312</sup> Since some Muslim scholars view international treaties as contracts that need to be fulfilled, contract theory is used to advocate adopting the CRPD in its entirety and ratifying more of its requirements. Allah says, in the Holy Quran: “And fulfill the covenant of Allah when you have taken it, [O believers], and do not break oaths after their confirmation while you have made Allah, over you, a witness. Indeed, Allah knows what you do.”<sup>313</sup> As this verse and others show, when a contract or a treaty is signed, it shall be fulfilled. This language is used to refer to orders that are not merely advisory but mandatory for anyone. This is obviously to avoid all consequences from breaking and violating international treaties. This raises questions though on whether Islam considers international law a source of legislation. Chapter II discussed the main sources of legislation in Islam and, since Islam is the main source of legislation in Saudi Arabia, it is crucial to understand if treaties are a source in Islam, according to Muslim scholars.

Muslim scholars first had to distinguish if international treaties and conventions were themselves a source in Islam or if they gained their legitimacy under contract theory.<sup>314</sup> The scholars concluded that the *Sunnah*, the second main source in Islam, allows signing agreements, contracts, and treaties with other states.<sup>315</sup> The Prophet PBUH signed a number of treaties, one of which was the famous *Sulh Al-Hudaybiyah*,<sup>316</sup> calling for a truce between Muslims and non-Muslims for a ten-year period. This treaty’s articles were written by non-Muslims and eventually broken by the non-Muslim as well. According to these scholars, international treaties gain their legitimacy under Islamic jurisprudence from the *Sunnah* as they are considered contracts that

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<sup>312</sup> *Id.* at 67-68.

<sup>313</sup> QURAN §16:91.

<sup>314</sup> AL-ESAWI, *supra* note 83, at 80.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* at 80-81.

shall not be broken.<sup>317</sup> However, Article 46 of the Basic Law states that “the Judiciary shall be an independent authority . . . [and] [t]here shall be no power over judges in their judicial function other than the power of the Islamic Shari‘ah.”<sup>318</sup> Based on this article, some Saudi judges do not share the opinion that international treaties are binding and do not accept citation to treaties in court, considering those laws inapplicable. This practice not only affects some individuals who try to win their cases by citing international laws in domestic jurisdiction, but the practice obviously raises concern from the international community with regard to the Kingdom’s compliance with international laws the state signed and ratified.

### The Convention on the Rights of Persons with Disabilities

As U.N. Secretary General Kofi Annan remarked, the CRPD was “the first human rights treaty to be adopted in the twenty-first century; the most rapidly negotiated human rights treaty in the history of international law; and the first to emerge from lobbying conducted extensively through the Internet.”<sup>319</sup> To date, there are 177 ratifications yet only 161 signatories to the CRPD.<sup>320</sup> Eighty-two countries signed the CRPD on the opening day, giving this Convention the highest number of signatories when compared with all human rights treaties.<sup>321</sup> The Convention was adopted in 2006, opened for signature in 2007, and went into force in 2008.<sup>322</sup> Saudi Arabia both signed and ratified the CRPD and CRPD-OP in 2008.<sup>323</sup> The CRPD-OP has now been

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<sup>317</sup> *Id.* at 82.

<sup>318</sup> Basic Law of Governance (1992), art. 46 (Saudi Arabia).

<sup>319</sup> Stein & Lord, *supra* note 308, at 174; Kinker, *supra* note 5, at 444.

<sup>320</sup> *Convention on the Rights of Persons with Disability*, U.N.-DISABILITY, DEP’T ECON. & SOC. AFF., <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html> (last visited Apr. 1, 2018).

<sup>321</sup> Kinker, *supra* note 5, at 448.

<sup>322</sup> *Convention on the Rights of Persons with Disability*, *supra* note 320.

<sup>323</sup> *Id.*

signed and ratified by 92 countries.<sup>324</sup> The international community was prompted to draft this treaty after realizing that PWD had no treaty that both protected and enforced their rights in all aspects of life.<sup>325</sup> Hence, as Article 1 of the CRPD states “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.”<sup>326</sup> This Chapter does not address every article of the Convention, but rather highlights some key aspects of the CRPD and its controversial articles.

The controversy began with the definition of “disability,”<sup>327</sup> which the Convention actually does not define.<sup>328</sup> Lacking the definition is a double edged sword. In one way, not having a clear definition allows some countries to “rely on inadequate domestic laws to exclude people from legal protection and thereby undermine the Convention.”<sup>329</sup> On the other hand, the Chairman of the drafting Committee stated that giving a solid definition might lead to excluding some types of disability as every state and culture proffers its own view on disability parameters.<sup>330</sup> Forcing all states to agree to one definition is not only an impossible task, but might be an excuse for excluding some types of disability as understanding disability changes and requires flexibility to adapt. Article 1 of the CRPD, however, gives a guideline for who might be a disabled by stating that “persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers

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<sup>324</sup> *Id.*

<sup>325</sup> Kinker, *supra* note 5, at 446.

<sup>326</sup> Convention on the Rights of Persons with Disabilities, *supra* note 1, art. 1.

<sup>327</sup> Minimal English-language research exists on Islamic countries’ implementation of the CRPD that share the focus of this research.

<sup>328</sup> Kinker, *supra* note 5, at 452.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

may hinder their full and effective participation in society on an equal basis with others.”<sup>331</sup> This, in itself, is not an explicit definition of the term “disability,” but shows who might be considered a person with disability. Focusing more on the rights than the definition provided a broader scope of potential coverage.

The controversy continued in the drafting process of the Convention by the Working Group where “the Working Group of State Parties, inter-governmental institutions, human rights institutions, and non-governmental organizations formulated the first text on legal capacity for the consideration of the Ad Hoc Committee.”<sup>332</sup> Article 12 of the CRPD, entitled “Equal Recognition Before the Law,” generated vigorous debates during the drafting process between government representatives and NGOs:

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

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<sup>331</sup> Convention on the Rights of Persons with Disabilities, *supra* note 1, art. 1.

<sup>332</sup> Amita Dhanda, *Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future*, 34 SYRACUSE J. INT’L L. & COM. 429, 438 (2006).

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.<sup>333</sup>

During the drafting process, the term "legal capacity" in Article 12(2) resulted in significant controversy surrounding its meaning.<sup>334</sup> A number of states differentiated between two different types of legal capacity: the legal capacity to act and the legal capacity of rights.<sup>335</sup> Article 12(2) originally included a footnote, stating that "[i]n Chinese, Russian, and Arabic, legal capacity means 'legal capacity for rights' and not 'legal capacity to act.'"<sup>336</sup> However, this footnote was heavily criticized by NGOs and was ultimately removed,<sup>337</sup> as it "would have restricted the meaning of 'legal capacity' in several UN languages to 'capacity for rights,'

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<sup>333</sup> Convention on the Rights of Persons with Disabilities, *supra* note 1, art. 12.

<sup>334</sup> Dhanda, *supra* note 332, at 442.

<sup>335</sup> *Id.*

<sup>336</sup> *Id.* at 443.

<sup>337</sup> *Id.*

excluding ‘capacity to act.’”<sup>338</sup> After deleting the footnote, Iraq delivered a statement on behalf of Saudi Arabia and other Arab states insisting that:

the aforementioned States are joining the consensus on the Convention based on the understanding that legal capacity mentioned in paragraph 2 of Article 12 of the Convention entitled ‘Equal recognition before the law’ means the capacity of rights and not the capacity to act, [for those who are unable to practice the capacity to act] in accordance with the national laws and legislation of these States.<sup>339</sup>

However, concerns remain. Rights for PWIDs are difficult to promise with such a distinction in the term “legal capacity.”<sup>340</sup> Without the right to make autonomous decisions, PWIDs will not be able to enjoy any other right provided in the Convention since, “for example, the right to health requires ‘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.’”<sup>341</sup> Consent cannot be given without practicing both the legal capacity to act and the legal capacity of rights. Unlike Egypt, Saudi Arabia did not enter the agreement and sign the CRPD with a reservation, but rather joined other Arab countries in expressing a specific understanding of the term “legal capacity.” Saudi Arabia stated, in its report to the Committee on the Rights of Persons with Disabilities, that “[t]here are two forms of legal capacity: capacity of obligation and capacity of performance,” which are the capacity of rights and the capacity to act, respectively.<sup>342</sup> This, in itself, might not be a violation of the CRPD; however, this is a basis to justify any form of discrimination against PWIDs. The report further stated that the domestic law in Saudi Arabia guarantees, similar to persons without intellectual disabilities, the legal capacity of rights to

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<sup>338</sup> Caivano, *supra* note 46, at 1-2.

<sup>339</sup> Dhanda, *supra* note 332, at 443.

<sup>340</sup> *Id.* at 457.

<sup>341</sup> *Id.*

<sup>342</sup> Comm. on the Rights of Persons with Disabilities, *Consideration of Reports Submitted by States Parties Under Article 35 of the Convention: Saudi Arabia*, 21, U.N. Doc. CRPD/C/SAU/1 (Nov. 16, 2015).

PWIDs since it is entitled *per se* to all people regardless of their mental capacity.<sup>343</sup> However, PWIDs would be entitled to enjoy full legal capacity only when “deemed sufficiently intelligent and discerning to carry out actions and make statements in a manner recognized by the law.”<sup>344</sup>

This what the medical model is all about. When a person has an intellectual disability, he or she is presumed incapable of making his or her own decisions. Therefore, it is crucial to establish a new set of practices in order to eliminate the gap between what the CRPD advocates and what is in accordance with Saudi law. However, would the Saudi Arabian understating of the term “legal capacity” in Article 12 of the CRPD impede its ratification? Is there a middle ground between how domestic laws in Saudi Arabia understand the concept of legal capacity and the purposes of the CRPD?<sup>345</sup> Article 46 of the CRPD allows States Parties to enter the Convention with reservations; however, this choice is not permitted at all situations.<sup>346</sup> In accordance with Article 46(1) of the CRPD, “reservations incompatible with the object and purpose of the present Convention shall not be permitted.” By examining the text of the CRPD, though vaguely stated in Article 1 of the Convention, it can be argued that any reservation to Article 12 should be considered “inconsistent with the CRPD’s general tenor . . . [because] legal capacity for persons with disabilities is a critical part of the structure of the CRPD and underpins its efficacy due to its close link to several other provisions.”<sup>347</sup> For example, not recognizing PWIDs as full persons before the law would affect PWIDs’ “protection of liberty and security of the person” guaranteed by Article 14.<sup>348</sup> Although Saudi Arabia did not enter with a reservation, its distinction of legal capacity raises concerns about its commitment to ratifying domestic laws that prevent PWIDs

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<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

<sup>345</sup> See discussion *infra* Chapter V.

<sup>346</sup> Caivano, *supra* note 46, at 13.

<sup>347</sup> *Id.* at 14.

<sup>348</sup> *Id.*



from being recognized as full persons before the law. The Saudi Arabian report to the Committee states that Saudi Arabia “has adopted a number of measures to protect minors and other persons lacking legal capacity,” and “measures are in place to protect the right of persons with disabilities to equal treatment.”<sup>349</sup> Without examining the applicability of those measures and laws, however, it would be difficult to determine whether the distinction of term legal capacity violates Article 12 of the CRPD. States Parties’ reservations that do not fulfill the “obligations imposed by Article 12 would appear to undermine the effective implementation of other critical provisions in the convention, and could fail the ‘object and purpose’ test set out under Article 46 of the CRPD and in the Vienna Convention.”<sup>350</sup> The main objective of Article 12 is to strike down substituted decision-making approaches and replace them with supported decision-making programs.<sup>351</sup> Supported decision-making helps people with intellectual disabilities choose their own supported decision-makers to assist them in making autonomous decisions rather than reluctantly following their appointed guardians.<sup>352</sup> On the other hand, substituted decision-making disallows people with intellectual disabilities from making their own decisions, and leaves them with no choice except to follow the decisions of their guardian.<sup>353</sup> The distinction is fully discussed at the end of Chapter V.

As of October 18, 2018, there are eight declarations and four reservations to Article 12 of the CRPD.<sup>354</sup> Countries that entered and signed the Convention with reservations, such as

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<sup>349</sup> *Consideration of Reports Submitted by States Parties Under Article 35 of the Convention: Saudi Arabia*, *supra* note 342.

<sup>350</sup> Caivano, *supra* note 46, at 15.

<sup>351</sup> Devi, *supra* note 45, at 293.

<sup>352</sup> *Id.* at 792-93.

<sup>353</sup> *Id.* at 793.

<sup>354</sup> *Status of Treaties*, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-15&chapter=4](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4) (last visited Oct. 18, 2018).

Canada, can still provide PWIDs with safeguards. Canada entered with a declaration and a reservation, stating that:

Canada [recognizes] that persons with disabilities are presumed to have legal capacity on an equal basis with others in all aspects of their lives. Canada declares its understanding that Article 12 permits supported and substitute decision-making arrangements in appropriate circumstances and in accordance with the law.

To the extent Article 12 may be interpreted as requiring the elimination of all substitute decision-making arrangements, Canada reserves the right to continue their use in appropriate circumstances and subject to appropriate and effective safeguards. With respect to Article 12 (4), Canada reserves the right not to subject all such measures to regular review by an independent authority, where such measures are already subject to review or appeal.

Canada interprets Article 33(2) as accommodating the situation of federal states where the implementation of the Convention will occur at more than one level of government and through a variety of mechanisms, including existing ones.<sup>355</sup>

Canada is considered a positive example for recognizing PWIDs as full persons before the law as its policies still adopt the substituted decision-making approach. Therefore, Canada entered a reservation to Article 12 in order to avoid rewriting its laws to adopt the supported decision-making approach required by the CRPD.<sup>356</sup> Most Canadian laws still apply the substituted decision-making approach to those who are considered mentally disabled.<sup>357</sup> Ontario's Seventh-day Adventist Church (SDA), for example, does not allow PWIDs to make autonomous decisions after "capacity assessors," to whom the SDA "grants broad discretion," determine that they lack capacity.<sup>358</sup> The SDA also "does not account for situations where a person's decision-making capacity fluctuates on a day-to-day and decision-by-decision basis due to the nature of the specific disability or medical condition."<sup>359</sup> Such practices persuaded

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<sup>355</sup> *Id.*

<sup>356</sup> Caivano, *supra* note 46, at 23.

<sup>357</sup> *Id.* at 20.

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

disability rights advocates in Canada to adopt the supported decision-making approach.<sup>360</sup> Therefore, Canada's reservation to Article 12 avoids any form of legal reform, allowing the continuation of its guardianship programs.<sup>361</sup> Granted, Canada's reservation did not stop it from taking some steps to incorporate Article 12 of the CRPD. Canada, despite current criticism from international community, acknowledges that supported decision-making approach should be the controlling basis of assistance.<sup>362</sup> For example, the Canadian Supreme Court decided that Section 7 of the Canadian Charter of Rights and Freedoms protects PWIDs' right to undertake autonomous decisions "intimately affecting [one's] private [life.]"<sup>363</sup> This decision, and many others, demonstrate Canada's interest in adopting laws for "the general principles of respect for individual autonomy, non-discrimination, and equal opportunity in Article 3 of the CRPD."<sup>364</sup> This demonstrates the potential correlation between entering a treaty with reservations yet complying with its purposes. Therefore, the case of Saudi Arabia should not be complex as there is no reservation to the CRPD. Indeed, all reservations, declarations, and understandings shall be seen "as temporary in character to be withdrawn as soon as possible in order to maintain the normative integrity of the CRPD."<sup>365</sup>

Saudi Arabia submitted its report on July 1, 2015,<sup>366</sup> and the Committee issued a list of issues (LOIs) on October 1, 2018.<sup>367</sup> The LOIs point out key issues, questions, and concerns a State party must address. In regard to Article 12 of the CRPD, the LOIs requested Saudi Arabia:

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<sup>360</sup> *Id.*

<sup>361</sup> *Id.* at 21.

<sup>362</sup> *Id.*

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

<sup>365</sup> *Id.* at 23.

<sup>366</sup> *Consideration of Reports Submitted by States Parties Under Article 35 of the Convention: Saudi Arabia, supra note 342.*

Please inform the Committee about the number of persons with disabilities currently under guardianship, and about steps taken to repeal provisions that deny or restrict the legal capacity of persons with disabilities. Please also provide information on measures taken to repeal substituted decision-making regimes and replace them with supported decision-making for persons with disabilities, particularly in the areas of ownership, inheritance, financial affairs and family relations.<sup>368</sup>

The Committee clearly encouraged replacing the substituted decision-making approach with supported decision-making. The LOIs also request the Saudi government “provide the Committee with information on “(b) [t]he current number of persons with disabilities deprived of liberty for penal reasons.”<sup>369</sup> Saudi Arabia replied to the LOIs on January 14, 2019.<sup>370</sup> In regard to Article 12 of the CRPD, Saudi Arabia responded<sup>371</sup> by stating that PWD can make autonomous decisions as long as they have the legal capacity *to act*.<sup>372</sup> Saudi Arabia’s reply to the LOIs continues by stating that decisions made by PWIDs whose mental state is affected are judged based on whether those decisions are beneficial or not.<sup>373</sup> The reply to the LOIs did not address who has the power to make those decisions, but the position is obvious. The reply also states that, currently, 156 persons with disabilities are deprived of liberty for penal reasons.<sup>374</sup> Saudi Arabia came before the Committee on March 20<sup>th</sup> and 21<sup>st</sup> of 2019.

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<sup>367</sup> Comm. on the Rights of Persons with Disabilities, *List of Issues in Relation to the Initial Report of Saudi Arabia*, U.N. Doc. CRPD/C/SAU/Q/1 (Oct. 30, 2018).

<sup>368</sup> *Id.* para. 9.

<sup>369</sup> *Id.*

<sup>370</sup> Comm. on the Rights of Persons with Disabilities, *Replies of Saudi Arabia to the List of Issues in Relation to its Initial Report Submitted Under the Convention on the Rights of Persons with Disabilities*, U.N. Doc. CRPD/C/SAU/Q/1/Add.1 (Jan. 22, 2019).

<sup>371</sup> At the time of writing this section, there was only an Arabic version of the document, so the text has been translated by the author and might differ from the one that will eventually be issued by the UN.

<sup>372</sup> *Replies of Saudi Arabia to the List of Issues in Relation to its Initial Report Submitted Under the Convention on the Rights of Persons with Disabilities*, *supra* note 370, para. 46.

<sup>373</sup> *Id.* para. 46.

<sup>374</sup> *Id.* para. 53.

Saudi Arabia discussed its report before the CRPD Committee in two separate meetings of the 21st Session, the 449<sup>th</sup><sup>375</sup> meeting and 450<sup>th</sup><sup>376</sup> meeting. During the first meeting, the Committee addressed issues and concerns related to Articles 1–10 of the CRPD, with Saudi Arabia represented by His Excellency Dr. Bandar Aliaban, Head of the Delegation and President of the Human Rights Commission of Saudi Arabia.<sup>377</sup> At the end of the first meeting, the Committee experts asked questions regarding Articles 11–20 but, due to time limitations, Saudi Arabia responded on the following day during the second meeting. Although many questions were asked, this part focuses on concerns from the Committee Experts regarding Article 12 of the CRPD. The Committee Expert Mr. Robert George Martin asked the Saudi delegation to provide steps taken by the State to implement Article 12 of the CRPD by abolishing the substituted decision-making approach and replace it with the supported decision-making approach.<sup>378</sup> Mr. Abulaziz Al-Zaid responded by stating that all persons with disability enjoy their full legal capacity without discrimination on the basis of disability, and it is unlawful for anyone to ask PWIDs to provide his or her guardian’s approval.<sup>379</sup> Al-Zaid further stated that if a person’s legal capacity was limited, the best interest approach is applied, thus approving his or her actions based on the outcome of the decision.<sup>380</sup> He concluded by saying that legal capacity

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<sup>375</sup> *Consideration of Saudi Arabia — 449th Meeting 21st Session Committee on Rights of Persons with Disabilities*, UN WEB TV (Mar. 20, 2019), <http://webtv.un.org/search/consideration-of-saudi-arabia-449th-meeting-21st-session-committee-on-rights-of-persons-with-disabilities/6016254859001/?term=saudi&lan=english&sort=date>.

<sup>376</sup> *Consideration of Saudi Arabia (Cont'd) — 450th Meeting 21st Session Committee on Rights of Persons with Disabilities*, UN WEB TV (Mar. 21, 2019), <http://webtv.un.org/search/consideration-of-saudi-arabia-contd-450th-meeting-21st-session-committee-on-rights-of-persons-with-disabilities/6016470240001/?term=saudi&lan=english&sort=date>.

<sup>377</sup> *Consideration of Saudi Arabia — 449th Meeting*, *supra* note 375.

<sup>378</sup> *Id.*

<sup>379</sup> *Consideration of Saudi Arabia (Cont'd) — 450th Meeting*, *supra* note 376.

<sup>380</sup> *Id.*

issues are dealt with on a case-by-case basis; hence, not all intellectual disabilities deprive PWIDs of their decision-making power.<sup>381</sup> While the discussion covered a number of other issues, the most relevant conversation concerned the issue of legal capacity. After the end of the 21<sup>st</sup> Session, the CRPD Committee issued its Concluding Observations (COs) on all State Parties that discussed their reports before the Committee.<sup>382</sup> The COs of Saudi Arabia, issued in April 9, 2019, addressed issues and concerns from the Committee as well as a number of recommendations.<sup>383</sup> In regard to Article 12 of the CRPD, the Committee expressed its concerns “that persons with psychosocial or intellectual disabilities are deprived of equal recognition before the law, resulting from the practice of evaluating the decision- making capacity of persons with disabilities.”<sup>384</sup> Furthermore, the Committee is also “concerned at the absence of measures taken [by Saudi Arabia] to grant the necessary support to persons with disabilities for the exercise of their legal capacity.”<sup>385</sup> Therefore, and in accordance with the Committee’s COs, it is clear that Saudi Arabia is not in compliance with Article 12 of the CRPD. The Committee then recommended a number of measures to be taken by Saudi Arabia that are in accord with its COs and General Comment No. 1.<sup>386</sup> The Committee recommended that Saudi Arabia should take “legislative measures to recognize the full legal capacity of persons with disabilities on an equal basis with others, and abolish substitute decision making regime,”<sup>387</sup> and “[i]ntroduce supported decision making mechanisms that respect the autonomy.”<sup>388</sup> Saudi Arabia as a signatory to the

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<sup>381</sup> *Id.*

<sup>382</sup> Comm. on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Saudi Arabia*, U.N. Doc. CRPD/C/SAU/CO/1 (Apr. 9, 2019).

<sup>383</sup> *Id.*

<sup>384</sup> *Id.* para. 21.

<sup>385</sup> *Id.*

<sup>386</sup> *Id.* para. 22.

<sup>387</sup> *Id.* para. 22 (a).

<sup>388</sup> *Id.* para. 22 (b).

CRPD is expected to act upon based on these observations and amend its laws accordingly. The COs of Saudi Arabia concluded by requesting that Saudi Arabia is expected “to submit its combined second, third and fourth periodic reports by no later than 24 July 2026, and to include therein information on the implementation of the present concluding observations.”<sup>389</sup>

As mentioned in the introduction, this distinction between the two capacities has negatively affected PWIDs in many areas of the law; however, the purpose of this dissertation is to examine the consequences of such practice in the criminal justice system. When a person with an intellectual disability is accused of committing a crime, he or she might be institutionalized against his or her will as a form of punishment. The next chapter addresses this issue by looking at criminal procedure laws in Saudi Arabia and how PWIDs interact with the system, including sentencing and how rehabilitation plays a role in meeting the objective of criminal punishment.

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<sup>389</sup> *Id.* para. 63.

## CHAPTER V: ALTERNATIVE PUNISHMENTS TO INCARCERATION IN THE SHARIA CRIMINAL LAW AND THE APPLICABILITY OF THOSE ALTERNATIVES IN SAUDI ARABIAN CRIMINAL LAW FOR PERSONS WITH INTELLECTUAL DISABILITIES

The distinction between the two legal capacities Saudi Arabia expressed before signing and ratifying the CRPD negatively impacts the life of every person with an intellectual disability in the Kingdom. Specifically, this dissertation argues that this distinction does not make it easy for PWIDs to make their own decisions on everyday life choices. According to the CRPD, as Chapter IV shows, every person with a disability has the right to be recognized as a full person before the law, which includes enjoying full legal capacity to make decisions regarding what their life should look like.<sup>390</sup> Since PWIDs are not recognized as full persons before the law, however, Saudi Arabia is violating Article 12 of the CRPD. The goal of this chapter, and the whole dissertation, is to examine the consequences of such *understanding* to the term legal capacity in Article 12 of the CRPD to PWIDs when they face the criminal legal system — specifically, practices that require PWIDs to be institutionalized as a form of punishment and subjected to involuntary treatment.

In doing so, this Chapter first addresses the legal capacity of rights and legal capacity to act, including analysis of different interpretations from Muslim scholars to determine if any of their opinions is akin to the CRPD's understanding of legal capacity. Then, the Saudi Arabian Law of Criminal Procedures is examined to observe the current practice in Saudi Arabia when a person with an intellectual disability is accused of committing a crime and faces the criminal legal system. This step is supported by a case study of previous cases where a person with an intellectual disability was a defendant in order to see how Saudi judges address these types of

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<sup>390</sup> Convention on the Rights of Persons with Disabilities, *supra* note 1, art. 12.



cases. Finally, this Chapter addresses the supported-decision making theory as an alternative for the current guardianship programs.

### Legal Capacity in in Accordance with Islamic Jurisprudence

Defining legal capacity<sup>391</sup> is essential to understand the criminal responsibility of PWIDs. As previously mentioned, Saudi Arabia signed and ratified the CRPD on the understanding that, in accordance with Islamic jurisprudence, there is a distinction between the legal capacity to act and the legal capacity of rights.<sup>392</sup> Describing this distinction not only helps PWIDs know how to best confront the criminal legal system in their defenses, but also allows scholars to accept Saudi Arabia's understanding and simultaneously create a new approach in accordance with the purposes and objectives of the CRPD. This section, thus, focuses on explaining the two legal capacities based on definitions from Muslim scholars. As previously stated, a complete crime consists of three main elements: *nulla poena sine lege* (legality), *actus reus*, and *mens rea*.<sup>393</sup> The *mens rea* is the element associated with a person's legal capacity to act. Hence, defining the legal capacity is extremely critical as it could determine the outcome of criminal cases involving PWIDs.

### Is it the Heart or the Brain?

Before expatiating on the differences of the two capacities, it is important to understand the concept of legal capacity as a whole in accordance with Islamic jurisprudence. Legal

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<sup>391</sup> The difference between the term legal capacity and mental capacity is that legal capacity is a right to which all people are entitled. The mental capacity, on the other hand, is the status of a person's state of mind that determine the person's ability to undertake and make decisions.

<sup>392</sup> See discussion *supra* Chapter IV.

<sup>393</sup> See discussion *supra* Chapter II. See also AL-OTEBY, *supra* note 9, at 341-42.

capacity, according to some Islamic fundamentalists, is the validity of owning rights.<sup>394</sup>

However, this definition does not include the two capacities and is closer in meaning to the capacity of rights.<sup>395</sup> A more accurate definition of legal capacity is the validity of persons owning and providing rights while being capable of controlling their actions and sayings.<sup>396</sup> “Validity” refers to both the willingness and the capability of a person to exercise his or her rights.<sup>397</sup>

Muslim scholars have debated which part of the human body is responsible for making decisions and how its status determines whether an individual possesses or lacks mental capacity.<sup>398</sup> All Muslim scholars agreed that legal capacity is governed by the state of mind;<sup>399</sup> however, they disagreed on which of the organs governs the state of mind — some said it was the heart and others said it was the brain.<sup>400</sup> “State of mind” is defined by Muslim scholars as the mechanism people rely on for thinking, inference, and creating perceptions and conclusions.<sup>401</sup> It is also defined as the tools that can determine right from wrong and good from evil.<sup>402</sup> The first group of scholars argues that the state of mind is located in the human brain.<sup>403</sup> Their reasoning is based on the notion that if a person gets a hit to the head, his or her state of mind is

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<sup>394</sup> SALEH SAUOD AL-ALI, AWARED ALAHLYYA ALMOAATHIRA FE ALMASOULIYAH ALJINAYOAH [BARRIERS OF LEGAL CAPACITY AND CRIMINAL RESPONSIBILITY] 20 (2011).

<sup>395</sup> *Id.*

<sup>396</sup> *Id.*

<sup>397</sup> *Id.* at 21.

<sup>398</sup> AL-JOBORY, *supra* note 9, at 191-92; ABDULLAH SAIED AL-SHEHRI, THALTA RASAIL FE ALELHAAD WA ALELM WA ALEMAAN [THREE STUDIES IN ATHEISM, KNOWLEDGE AND FAITH] 117-20 (2014).

<sup>399</sup> AL-JOBORY, *supra* note 9, at 73.

<sup>400</sup> *Id.* at 191-92; AL-SHEHRI, *supra* note 398, at 117-20.

<sup>401</sup> AL-JOBORY, *supra* note 9, at 189.

<sup>402</sup> *Id.*

<sup>403</sup> *Id.* at 191-92; AL-SHEHRI, *supra* note 398, at 117-20.

diminished.<sup>404</sup> Under this interpretation, unlike other parts of the human body, only a hit to the head causes decreased mental capacity.<sup>405</sup> In fact, this notion is the reason why some Muslim scholars ruled that if someone hits another person and causes the victim to lose his or her state of mind, it is as if that person committed homicide.<sup>406</sup>

The second group, on other hand, argues that the state of mind is located in the human heart.<sup>407</sup> Their argument is based on a Quranic verse, which states: “So have they not traveled through the earth and have hearts by which to reason and ears by which to hear? For indeed, it is not eyes that are blinded, but blinded are the hearts which are within the breasts.”<sup>408</sup> Using the text of the Quran, this group of scholars concluded that this ears hear and hearts reason, leading those scholars to argue that hearts control the state of mind.<sup>409</sup> The argument is supported by the *Sunnah*, in which the Prophet (PBUH) said “Beware! There is a piece of flesh in the body if it becomes good (reformed) the whole body becomes good but if it gets spoilt the whole body gets spoilt and that is the heart.”<sup>410</sup> Accordingly, in accordance with this *Hadith*, hearts make final decisions after receiving facts from the brain.<sup>411</sup> Those scholars, however, still recognize that the brain, as a place of visualization, plays an essential part in encouraging the heart to make decision.<sup>412</sup> Accordingly, the heart and the brain are considered interconnected: the brain sends all the facts using the five senses but only the heart orders.<sup>413</sup> Thus, when brains are not functioning well, the image is not fully linked to the heart, making all actions questionable due to

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<sup>404</sup> AL-JOBORY, *supra* note 9, at 191.

<sup>405</sup> *Id.*

<sup>406</sup> *Id.*

<sup>407</sup> *Id.* at 191-92; AL-SHEHRI, *supra* note 398, at 117-20.

<sup>408</sup> QURAN §22:46; AL-JOBORY, *supra* note 9, at 191-92; AL-SHEHRI, *supra* note 398, at 118.

<sup>409</sup> AL-SHEHRI, *supra* note 398, at 117-20.

<sup>410</sup> *Sunnah*, Book 2, Hadith 45; AL-SHEHRI, *supra* note 398, at 117.

<sup>411</sup> AL-SHEHRI, *supra* note 398, at 117-20.

<sup>412</sup> *Id.*

<sup>413</sup> *Id.*

the lack of visualization.<sup>414</sup> This deficiency causes someone to have limited legal capacity as the next section explains.

### The Legal Capacity of Rights

The first type of the legal capacity is the capacity of rights — *Ahlyat Alwojob* in Arabic.<sup>415</sup> The word *wojob* is rooted from the word *wajaba*, which means “a must”; hence, granting this capacity to every person is a must.<sup>416</sup> The legal capacity of rights is defined as the validity of any human being to own his or her legitimate rights that Allah grants.<sup>417</sup> Kinker defines it as “the ‘legal capacity for the [acquisition] of rights and obligations.’”<sup>418</sup> Two components can be highlighted from this definition: the acquisition of rights and required obligations to others. The legal capacity of rights is linked to the soul of every human being from embryo to death; therefore, every living person is entitled to the legal capacity of rights, regardless of gender, mental status, health condition, or age.<sup>419</sup> *Ahlyat Alwojob* is divided into two categories: limited and complete. The limited legal capacity of rights is the validity of any human being to own his or her legitimate rights without being obligated to give rights to others.<sup>420</sup> For example, according to Muslim scholars, the limited legal capacity of rights is only applied to embryos and, in some cases, dead persons.<sup>421</sup> Embryos have a limited legal capacity of rights because embryos are entitled to rights but are not obligated to give rights to others.<sup>422</sup>

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<sup>414</sup> *Id.*

<sup>415</sup> These two terms are used interchangeably; when the term “legal capacity of rights” is mentioned, it means *ahlyat alwojob*, and vice versa.

<sup>416</sup> AL-JOBORY, *supra* note 9, at 108.

<sup>417</sup> AL-ALI, *supra* note 394, at 25; AL-JOBORY, *supra* note 9, at 92.

<sup>418</sup> Kinker, *supra* note 5, at 481.

<sup>419</sup> AL-ALI, *supra* note 394, at 25; AL-JOBORY, *supra* note 9, at 93.

<sup>420</sup> AL-ALI, *supra* note 394, at 26; AL-JOBORY, *supra* note 9, at 109.

<sup>421</sup> AL-ALI, *supra* note 394, at 26; AL-JOBORY, *supra* note 9, at 109.

<sup>422</sup> AL-ALI, *supra* note 394, at 26; AL-JOBORY, *supra* note 9, at 109.

Furthermore, embryos may not enjoy complete legal capacity of rights because it is not guaranteed that they will be born alive,<sup>423</sup> which renders the embryo unable to enjoy the complete legal capacity of rights.<sup>424</sup> The deceased<sup>425</sup> also have no obligation to give rights to other people.<sup>426</sup> Therefore, they only enjoy a limited legal capacity of rights as well.<sup>427</sup>

Secondly, the complete legal capacity of rights is granted to every human being from birth until death,<sup>428</sup> which includes the acquisition of rights and obligations.<sup>429</sup> The type of obligations and duties under this complete legal capacity of rights include paying from the person's own wealth for *zakat*,<sup>430</sup> damages caused by the person, and life expenses.<sup>431</sup> Therefore, regardless of their mental status, health condition, or age, people are required to perform such duties and obligations to the society.<sup>432</sup> However, some people might be exempted from these duties depending on their mental status, health condition, or age based on the legal capacity to act, *Ahlyat Aladaa*.

### The Legal Capacity to Act

The second type of the legal capacity is the capacity to act, which is *Ahlyat Aladaa* in Arabic.<sup>433</sup> The capacity to act was challenged in Iraq's statement delivered on behalf of the Arab

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<sup>423</sup> AL-ALI, *supra* note 394, at 26.

<sup>424</sup> *Id.*

<sup>425</sup> People with severe health issues that make their death imminent or those who are in a coma do not enjoy their complete legal capacity of rights, according to some Muslim scholars.

<sup>426</sup> AL-ALI, *supra* note 394, at 27; AL-JOBORY, *supra* note 9, at 111-13.

<sup>427</sup> AL-ALI, *supra* note 394, at 27; AL-JOBORY, *supra* note 9, at 111-13.

<sup>428</sup> AL-ALI, *supra* note 394, at 29; AL-JOBORY, *supra* note 9, at 110-11.

<sup>429</sup> AL-ALI, *supra* note 394, at 29; AL-JOBORY, *supra* note 9, at 110-11.

<sup>430</sup> An amount — roughly 2.5% of someone's wealth — paid to the poor, which all Muslims are required to pay annually.

<sup>431</sup> Kinker, *supra* note 5, at 481.

<sup>432</sup> *Id.*

<sup>433</sup> These two terms are used interchangeably; when the term "legal capacity to act" is mentioned, it means *Ahlyat Aladaa*, and vice versa.

countries.<sup>434</sup> Capacity to act is not covered under the meaning of legal capacity in Article 12(2) for the Arab countries that supported this reservation, including Saudi Arabia. In affirming this statement, Saudi Arabia's report to the Committee noted that "[t]here are two forms of legal capacity: capacity of obligation and capacity of performance," which are the capacity of rights and the capacity to act, respectively.<sup>435</sup> The report also stated that PWIDs would be entitled to enjoy their full legal capacity only when they "are deemed sufficiently intelligent and discerning to carry out actions and make statements in a manner recognized by the law."<sup>436</sup> Therefore, in order for any person with intellectual disability to enjoy his or her complete legal capacity, he or she has to be *deemed* capable of carrying out actions as recognized by Saudi laws. While some suggest this is to the benefit of PWIDs in protecting their rights and guaranteeing a better way of living, this claim is discriminatory especially when PWIDs interact with the criminal legal system. It is imperative, first, to assess Muslim scholarly opinion on the legal capacity of rights because that constituted the national law of the Kingdom, thus creating this understanding.

*Ahlyat Aladaa* is defined by Muslim fundamentalists as the validity of any person to make statements and actions on his or her behalf in a legitimate fashion.<sup>437</sup> Another definition is provided by Kinker, who stated that the legal capacity to act is "the legal capacity for execution and the legal requisite for the exercise of rights and obligations."<sup>438</sup> Unlike the capacity of rights, the capacity to act is not granted to all persons upon birth but it is based on a number of factors including mental status, health conditions, and age. Some scholars limit the legal capacity to act

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<sup>434</sup> See discussion *supra* Chapter IV. See also Dhanda, *supra* note 332, at 455.

<sup>435</sup> *Consideration of Reports Submitted by States Parties Under Article 35 of the Convention: Saudi Arabia*, *supra* note 342.

<sup>436</sup> *Id.*

<sup>437</sup> AL-ALI, *supra* note 394, at 39; AL-JOBORY, *supra* note 9, at 113-14.

<sup>438</sup> Kinker, *supra* note 5, at 481-82.

to statements and not actions, but many others include both statements and actions.<sup>439</sup> The legal capacity to act is categorized into three levels: (1) complete legal capacity, (2) totally lacking legal capacity, and (3) deficient legal capacity.<sup>440</sup> The vast majority of scholars only provide two levels, that are limited and complete legal capacity to act; however, the three-level approach is more accurate and realistic for real life application. What determines the level of the capacity to act is the status of the state of mind.<sup>441</sup> People’s mental status controls if they are “*deemed* sufficiently intelligent and discerning to carry out actions and make statements in a manner recognized by the law.”<sup>442</sup> For instance, youths have deficient legal capacity due to their age, and a person in a coma lacks legal capacity to act, due to their health conditions. This is also based on the Prophet’s *Hadith*, that stated “The pen<sup>443</sup> has been lifted from three: From the sleeper until he wakes up, from the minor until he grows up, and from the insane until he comes back to his senses or recovers.”<sup>444</sup>

Complete legal capacity to act is defined as having “intellectual maturity without factors that could seriously impact judgment.”<sup>445</sup> This complete legal capacity entails the obligations of responsibilities to perform all duties to Allah — by completing rituals — and to other human beings.<sup>446</sup> It is granted to all people after puberty should their health condition remain good.<sup>447</sup>

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<sup>439</sup> AL-JOBORY, *supra* note 9, at 114.

<sup>440</sup> AL-ALI, *supra* note 394, at 40; AL-OTEBY, *supra* note 9, at 183; AL-JOBORY, *supra* note 9, at 115-16; Kinker, *supra* note 5, at 482.

<sup>441</sup> AL-ALI, *supra* note 394, at 42; AL-JOBORY, *supra* note 9, at 114.

<sup>442</sup> AL-ALI, *supra* note 394, at 42; AL-JOBORY, *supra* note 9, at 114-15; *Consideration of Reports Submitted by States Parties Under Article 35 of the Convention: Saudi Arabia*, *supra* note 342.

<sup>443</sup> The “pen” herein means the state of mind.

<sup>444</sup> Sunnah, Book 27, Hadith 44.

<sup>445</sup> AL-ALI, *supra* note 394, at 53; AL-JOBORY, *supra* note 9, at 116; Kinker, *supra* note 5, at 482.

<sup>446</sup> AL-ALI, *supra* note 394, at 53; AL-JOBORY, *supra* note 9, at 116.

<sup>447</sup> AL-ALI, *supra* note 394, at 54; AL-JOBORY, *supra* note 9, at 116; Kinker, *supra* note 5, at 482.

With complete capacity comes full legal liability and criminal responsibility.<sup>448</sup> If a person totally lacks legal capacity to act, he or she has no liability because of his or her mental status, health conditions, or age.<sup>449</sup> Infants, children under the age of seven, and certified insane persons<sup>450</sup> fall under this category.<sup>451</sup> The rationale is self-evident. Since the onus is not yet placed on anyone who lacks legal capacity to act, his or her actions should be tolerated.<sup>452</sup> It is widely agreed among Muslim scholars that “there is no retaliation against children . . . [t]heir intention is accidental . . . [because] they have not yet reached puberty . . . [so] [i]f a child kills someone it is only accidentally.”<sup>453</sup> However, not everyone is exempt from any civil actions. For example, “[w]hen a child or madman kills someone or destroys the property of another person, they can only be held liable with reference to their property, but not to their persons.”<sup>454</sup> Finally, deficient legal capacity to act is a thin line between the aforementioned two levels. Deficient is the level that the state of mind is not in its complete form.<sup>455</sup> According to Muslim scholars, children between the age of seven and puberty<sup>456</sup> as well as persons with minor intellectual disabilities possess deficient legal capacity to act.<sup>457</sup> Actions by those who fall under this type of capacity are viewed on a case-by-case basis.<sup>458</sup> Any action that would benefit the person, such as

<sup>448</sup> AL-ALI, *supra* note 394, at 54; AL-JOBORY, *supra* note 9, at 116; Kinker, *supra* note 5, at 482.

<sup>449</sup> Kinker, *supra* note 5, at 482.

<sup>450</sup> This is an outdated terminology that is not used by disability rights advocates. It refers to persons with mental illness.

<sup>451</sup> AL-JOBORY, *supra* note 9, at 119-20; Kinker, *supra* note 5, at 482.

<sup>452</sup> AL-JOBORY, *supra* note 9, at 120.

<sup>453</sup> Sunnah, Book 43, Hadith 4.

<sup>454</sup> Kinker, *supra* note 5, at 482.

<sup>455</sup> AL-JOBORY, *supra* note 9, at 120; Kinker, *supra* note 5, at 482.

<sup>456</sup> There is no specific age to define puberty, according to Muslim scholars; however, eighteen years old is the most common age to be considered an adult in Saudi Arabia.

<sup>457</sup> AL-JOBORY, *supra* note 9, at 120; Kinker, *supra* note 5, at 482.

<sup>458</sup> AL-JOBORY, *supra* note 9, at 120; Kinker, *supra* note 5, at 482.



receiving a gift or making a good financial transaction, is acceptable<sup>459</sup> but all other actions must be approved by the person's guardian.<sup>460</sup> Those who have deficient legal capacity to act are criminally liable.<sup>461</sup> However, they receive different treatment compared to those who enjoy complete legal capacity to act because deficient legal capacity affects their state of mind, creating an incomplete crime under the *means rea* element.<sup>462</sup>

One of the two components of *mens rea* is committing the crime based on free will.<sup>463</sup> Criminal responsibility is determined by the level of the legal capacity. First, people who enjoy full legal capacity to act are criminally liable for their actions.<sup>464</sup> They are unable to establish an affirmative defense based on their limited legal capacity or the lack thereof. Their free will, however, might be affected should the crime be committed under the debatable concept of duress. Some Muslim scholars claim that duress does not affect the level of the legal capacity, thus the individual is culpable.<sup>465</sup> Other Muslim scholars, on the contrary, argue that duress affects the level of the legal capacity as it affects the state of mind.<sup>466</sup> However, not all duress defenses stand. In the case of homicide, duress cannot be grounds of defense because taking a life is inexcusable.<sup>467</sup>

Second, people who totally lack the legal capacity to act are not criminally responsible.<sup>468</sup> Their "actions therefore have no legal [consequences] attached to them."<sup>469</sup> The Prophet (PBUH)

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<sup>459</sup> AL-JOBORY, *supra* note 9, at 120; Kinker, *supra* note 5, at 482.

<sup>460</sup> AL-JOBORY, *supra* note 9, at 120-21; Kinker, *supra* note 5, at 482.

<sup>461</sup> Al-Najar, *supra* note 37, at 34.

<sup>462</sup> *Id.*

<sup>463</sup> AL-OTEBY, *supra* note 9, at 342.

<sup>464</sup> Al-Najar, *supra* note 37, at 148.

<sup>465</sup> AL-JOBORY, *supra* note 9, at 473.

<sup>466</sup> *Id.* at 473-74.

<sup>467</sup> *Id.* at 474.

<sup>468</sup> Kinker, *supra* note 5, at 482.

<sup>469</sup> *Id.*

said that “the pen has been lifted from three: From the sleeper until he wakes up, from the minor until he grows up, and from the insane until he comes back to his senses or recovers.”<sup>470</sup> The “pen” refers to the accountability of someone’s actions; even if they cannot be found culpable ethically and morally, they are liable civilly for the damages they cause.<sup>471</sup>

Muslim scholars disagree about where compensation for damages should come from — the PWID or the PWID’s guardian. The majority asserts that compensation should come from the guardian’s wealth if he or she knew of the intended criminal action.<sup>472</sup> On the other hand, damages should be taken from the PWID’s own wealth if they commit a crime without their guardian’s knowledge. This type of liability is granted to those who are under the age of seven and those who are totally mentally disabled.<sup>473</sup>

Third, people with deficient legal capacity are criminally responsible based on the level of their competency.<sup>474</sup> For some, the intellectual disability is not so severe, and thus does not affect their state of mind to a degree that would render them inculpable.<sup>475</sup> Certain disabilities — such as obsessive-compulsive disorder, simple depression, panic, and sleep disorders — do not affect the legal capacity of PWIDs.<sup>476</sup> Therefore, such disabilities cannot be considered mitigating factors for criminal liability.<sup>477</sup> Other disabilities, on the contrary, are so severe and affect the state of mind that they might be considered mitigating factors.<sup>478</sup> Medical experts

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<sup>470</sup> Sunnah, Book 27, Hadith 44.

<sup>471</sup> Al-Najar, *supra* note 37, at 146; Kinker, *supra* note 5, at 482; KHLUD ABDULRAHMAN AL-MHEZEA, AHKAM ALMAREED ALNAFSI FE ALFIQH AL’ESLAMI [PSYCHIATRIC PATIENT PROVISIONS IN ACCORD WITH ISLAMIC FIQH] 347 (2012).

<sup>472</sup> AL-MHEZEA, *supra* note 471, at 437-38.

<sup>473</sup> Al-Najar, *supra* note 37, at 145.

<sup>474</sup> *Id.* at 147.

<sup>475</sup> AL-MHEZEA, *supra* note 471, at 360.

<sup>476</sup> *Id.*

<sup>477</sup> *Id.*

<sup>478</sup> *Id.*

decide the level of legal capacity, which determines individual liability.<sup>479</sup> Because disabilities affect the state of mind, persons with severe intellectual disabilities are not criminally responsible, while persons with deficient legal capacity to act are partially responsible. The Saudi Law of Criminal Procedures must be examined to oversee what rights PWIDs have when accused of committing a crime and how the system uses experts to determine the level of competency.

### PWIDs and the Criminal Legal System

Criminal procedures are the set of rules governing criminal proceedings from the commission of a crime until sentencing.<sup>480</sup> Those rules guarantee that all rights for defendants are protected.<sup>481</sup> This section highlights important rights the Saudi Arabian Law of Criminal Procedures (SALCP) provides before and during criminal trials. There are three ways to initiate criminal investigations in criminal proceedings: the indictment method, the inspection method, and the combined method.<sup>482</sup> SALCP adopts the combined method to trigger the proceedings.<sup>483</sup> The indictment method, which is the oldest of all three, considers that criminal disputes should only be dealt with by the two parties involved and the right to prosecute is solely in the hands of the victim, creating no difference between civil and criminal lawsuits.<sup>484</sup> According to the indictment method, the two parties select the judge, who has no authority over what evidence

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<sup>479</sup> *Id.* at 344.

<sup>480</sup> FAHAD NAIF AL-TRESY, ALEJRAAT ALJAZAIYAH FE ALMMLAKAH ALARABIA ALSAODIAH [CRIMINAL PROCEDURES IN SAUDI ARABIA] 15 (2016); MOHAMMED ALI AL-KAMLY, ALAWSEET FE SHAREH NETHAM ALEJRAAT ALJAZAIYA ALJADID [REVIEWING THE NEW SAUDI CRIMINAL PROCEDURES] 14 (2015).

<sup>481</sup> AL-TRESY, *supra* note 480, at 15; AL-KAMLY, *supra* note 480, at 14.

<sup>482</sup> AL-TRESY, *supra* note 480, at 17; OSAMA S. AL-LABAN, ALEJRAAT ALJAZAIYAH FE ALMMLAKAH ALARABIA ALSAODIAH [CRIMINAL PROCEDURES IN SAUDI ARABIA] 27 (2014).

<sup>483</sup> AL-TRESY, *supra* note 480, at 19; AL-LABAN, *supra* note 482, at 32.

<sup>484</sup> AL-TRESY, *supra* note 480, at 17; AL-LABAN, *supra* note 482, at 27.

parties bring to the hearing.<sup>485</sup> Under this method, judicial duties are akin to a juror in U.S. criminal trials — only to hear what the accused and the victim provide and rule accordingly. The indictment method is criticized in two ways: (1) powerful people can easily win their cases due to the limited role judges have, and (2) not allowing the state to start criminal proceedings might create chaos and disorder in communities.<sup>486</sup> The inspection method, on the other hand, only allows the state to start criminal proceedings, so victims are not involved in the prosecution.<sup>487</sup> The state starts the proceedings and investigates even without the presence of the two parties or even their knowledge.<sup>488</sup> Judges are appointed who have some discretion in finding evidence, unlike the indictment method;<sup>489</sup> however, judges are limited to what type of evidence can be used in trials.<sup>490</sup> This method is also criticized for: (1) not allowing the two parties to practice their rights in defending themselves from the early stages of the proceedings, and (2) combining the judiciary and executive branches by allowing judges to undertake both tasks.<sup>491</sup> The combined method, which SALCP adopts, incorporates the state, the victim, and the victim's family.<sup>492</sup> The government of Saudi Arabia has the right to initiate criminal proceeding should the crime committed be classified as *Huddod* because those types of crimes, violate Allah's rights that affect the public more than the victim, making such crimes more vicious and devious.<sup>493</sup> *Qisas* and *Ta'zir* crimes can be triggered by victims and their family.<sup>494</sup> Although the government of Saudi Arabia retains the right to prosecute such crimes, the main right is in the

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<sup>485</sup> AL-TRESY, *supra* note 480, at 17; AL-LABAN, *supra* note 482, at 27.

<sup>486</sup> AL-TRESY, *supra* note 480, at 18; AL-LABAN, *supra* note 482, at 28.

<sup>487</sup> AL-TRESY, *supra* note 480, at 18-19; AL-LABAN, *supra* note 482, at 28-29.

<sup>488</sup> AL-TRESY, *supra* note 480, at 18-19; AL-LABAN, *supra* note 482, at 28-29.

<sup>489</sup> AL-TRESY, *supra* note 480, at 18-19; AL-LABAN, *supra* note 482, at 28-29.

<sup>490</sup> AL-TRESY, *supra* note 480, at 18-19; AL-LABAN, *supra* note 482, at 28-29.

<sup>491</sup> AL-TRESY, *supra* note 480, at 18-19; AL-LABAN, *supra* note 482, at 29-30.

<sup>492</sup> AL-TRESY, *supra* note 480, at 19; AL-LABAN, *supra* note 482, at 30.

<sup>493</sup> AL-TRESY, *supra* note 480, at 19; AL-LABAN, *supra* note 482, at 30.

<sup>494</sup> AL-TRESY, *supra* note 480, at 19; AL-LABAN, *supra* note 482, at 30.

hands of the victims and their family.<sup>495</sup> The combined method divides the proceedings into two main stages: pre-trial proceedings and the trial stage.<sup>496</sup> In pre-trial proceedings, the combined method is akin to the inspection method.<sup>497</sup> At this stage, the Saudi Public Prosecution (PP) investigates and prosecutes all crimes.<sup>498</sup> During this stage, the combined method allows the PP to charge people and lead investigations.<sup>499</sup> The PP may continue its work privately and all activities that the PP pursues should be written.<sup>500</sup> The combined method, similar to the indictment method, allows victims and their families to file lawsuits and to attend some investigation procedures.<sup>501</sup> The combined method is also akin to the indictment method in allowing judges to exercise judicial discretion in weighing evidence and limiting what types of evidence are admissible.<sup>502</sup> Therefore, the SALCP offers space for both parties to defend their cases by adopting the combined method in criminal proceedings. Next, it is crucial to examine the SALCP practices to understand the rights PWIDs have in both the pre-trial and trial stages.

The Saudi Arabian report to the CRPD Committee states that the SALCP guarantees that PWIDs enjoy all rights similar to persons without intellectual disabilities.<sup>503</sup> In affirming this claim, the Basic Law states that “all citizens and residents of the Kingdom have a guaranteed equal right to seek legal remedy and the requisite procedures therefor shall be prescribed by law.”<sup>504</sup> Also, the Saudi Arabian report to the Committee concluded that access to justice is

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<sup>495</sup> AL-TRESY, *supra* note 480, at 19; AL-LABAN, *supra* note 482, at 30.

<sup>496</sup> AL-LABAN, *supra* note 482, at 30.

<sup>497</sup> *Id.*

<sup>498</sup> *Id.*

<sup>499</sup> *Id.*

<sup>500</sup> *Id.*

<sup>501</sup> *Id.* at 30-31.

<sup>502</sup> *Id.*

<sup>503</sup> *Consideration of Reports Submitted by States Parties Under Article 35 of the Convention: Saudi Arabia*, *supra* note 342.

<sup>504</sup> Basic Law of Governance (1992), art. 47 (Saudi Arabia).

guaranteed to all persons without discrimination.<sup>505</sup> However, do PWIDs enjoy all these specific rights before and during trials?

First, rights for defendants during the pre-trial stage are crucial as they might seriously affect the outcome of every case in court. General rights include the ability of PWIDs to communicate with and assess their attorneys. However, the right to seek experts' opinions is highlighted. In accordance with Article 177 of the Implementing Regulations of the SALCP, "if a mute person from whom a spoken statement is required can write, the statement shall be taken in writing. If a person being questioned is deaf and can read, he or she shall be questioned in writing. If a deaf or mute person from whom a statement is required is illiterate, the statement shall be delivered through an expert."<sup>506</sup> The SALCP relies heavily on experts in determining a PWID's mental capacity before and during trial. During the investigation stage, the SALCP allows prosecutors to seek assistance from experts in situations in which a person with intellectual disability is accused of committing a crime. Article 76 of the SALCP states that "the investigator may seek the assistance of an expert with respect to any matter relating to the investigation."<sup>507</sup> Experts have wide-ranging and authoritative experience or skill in a particular area.<sup>508</sup> Their work is defined, in the context of criminal procedures, as a process that helps judges by offering specific opinions established by the expert's specific abilities and

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<sup>505</sup> *Consideration of Reports Submitted by States Parties Under Article 35 of the Convention: Saudi Arabia, supra note 342.*

<sup>506</sup> *Id.*

<sup>507</sup> Law of Criminal Procedures (2013), Royal Order No. M/2, art. 76 (Nov. 26, 2013) (Saudi Arabia).

<sup>508</sup> ABDULHAMMED ABDULLAH AL-HARGAN, ALEJRAAT ALJINAIYAH FE MARHLAAT MA KABL ALMOHAKMAH FE ALMMLAKAH ALARABIA ALSAODIAH [PRE-TRIAL CRIMINAL PROCEDURES IN SAUDI ARABIA] 162 (2014); SAAD M.A. AL-DOFER, ALEJRAAT ALJINAIYAH FE ALMMLAKAH ALARABIA ALSAODIAH [CRIMINAL PROCEDURES IN SAUDI ARABIA] 164 (2015).

knowledge.<sup>509</sup> Experts have to write their professional opinions to investigators; these written opinions would be equivalent to testimonies.<sup>510</sup>

Although the SALCP does not mention specific requirements governing the procedures to seek assistance from experts, the practice in Saudi Arabia does.<sup>511</sup> The SALCP does not require investigators to seek assistance, so this procedure is voluntary.<sup>512</sup> It is also the right of each defendant to request an expert's opinion in order to strengthen his or her case.<sup>513</sup> The SALCP does not specify what expertise investigators may request, but areas include forensic medicine, inspecting weapons and ammunitions, analyzing evidence, and mathematical matters.<sup>514</sup> For example, experts might be used to examine the mental state of the accused to determine their legal capacity, concluding whether they understand the process and the procedure.<sup>515</sup> Since seeking assistance from experts is voluntary, their expert opinions are advisory, not compulsory.<sup>516</sup> However, investigators shall give reasons for why they would not rely on the expert's testimony<sup>517</sup> and investigators can also request another expert's opinion on the same matter.<sup>518</sup> Each party to the criminal case can request its own independent expert opinion, but all experts should be registered in the court database, ensuring that all experts are authenticated.<sup>519</sup>

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<sup>509</sup> AL-DOFER, *supra* note 508, at 164.

<sup>510</sup> AL-HARGAN, *supra* note 508, at 164; AL-DOFER, *supra* note 508, at 167.

<sup>511</sup> AL-HARGAN, *supra* note 508, at 162.

<sup>512</sup> *Id.* at 163-64; AL-DOFER, *supra* note 508, at 167.

<sup>513</sup> AL-HARGAN, *supra* note 508, at 164; AL-DOFER, *supra* note 508, at 167.

<sup>514</sup> AL-HARGAN, *supra* note 508, at 164.

<sup>515</sup> AL-KAMLY, *supra* note 480, at 105.

<sup>516</sup> AL-HARGAN, *supra* note 508, at 163; AL-DOFER, *supra* note 508, at 168; AL-KAMLY, *supra* note 480, at 109.

<sup>517</sup> AL-DOFER, *supra* note 508, at 168; AL-KAMLY, *supra* note 480, at 109.

<sup>518</sup> AL-HARGAN, *supra* note 508, at 167; AL-KAMLY, *supra* note 480, at 109.

<sup>519</sup> AL-HARGAN, *supra* note 508, at 164-67; AL-DOFER, *supra* note 508, at 109; AL-KAMLY, *supra* note 480, at 109.

Second, rights for PWIDs during the trial include rights related to expert opinions and the right to stand trial. Similarities exist between proceedings for PWIDs and juveniles based on their mental capacity. The juvenile court system in Saudi Arabia was established in 1974, and it has jurisdiction over criminal cases in which the accused is a child between the age of seven and eighteen.<sup>520</sup> The rationale behind this is the need for special treatment commensurate with the defendant's level of competency.<sup>521</sup> Since juvenile cases are compared to cases involving PWIDs who have deficient legal capacity, the procedures should also be the same. In juvenile cases, the age that determines whether the accused is an adult or not is the defendant's age at the time of the crime;<sup>522</sup> therefore, the state of mind of an accused person with an intellectual disability should also be determined at the time of the crime. Another example is the right of juvenile offenders to rely on experts to determine their mental state, social status, education level, psychological condition, and future implications of punishment.<sup>523</sup> The right to seek experts' opinions at the trial stage is equally important to PWIDs for three reasons: to determine if a PWID can stand trial, to determine the PWID's level of competency, and to determine whether the PWID would understand the punishment received.

As previously mentioned, there are three levels of legal capacity. For those who totally lack legal capacity to act, the proceedings shall stop and the person with the severe intellectual disability is detained if he or she poses a danger to the community.<sup>524</sup> PWIDs who have deficient legal capacity, on the other hand, can be tried, but their limited legal capacity plays a critical role

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<sup>520</sup> AL-LABAN, *supra* note 482, at 260-61.

<sup>521</sup> *Id.*

<sup>522</sup> *Id.*

<sup>523</sup> ABDULLAH ABDUL-AZIZ AL-DARAAN, *ALMABSOT FE QWAYED ALEJRAAT ALJAZAIYAH [REVIEWING CRIMINAL PROCEDURE CODES AND AN INTRODUCTION TO THE JUDICIARY]* 910 (2013).

<sup>524</sup> *Id.* at 913.



in determining their criminal responsibility should they raise such defense in court.<sup>525</sup> Experts, thus, determine whether PWIDs are capable of standing trial as well as determine their level of competency.<sup>526</sup> Judges are allowed to seek assistance from additional experts and then compare the testimony of experts and investigators.<sup>527</sup>

The same rules apply to judges when accepting or rejecting experts' professional opinions.<sup>528</sup> Both judges and the accused are allowed to impeach and cross-examine experts.<sup>529</sup> Judges might reject part or all of the experts' opinions, but they have to provide their reason in their ruling.<sup>530</sup> The majority of Muslim scholars agree that the rules of evidence are limited to the admission of guilt, eyewitness accounts, and sworn testimony.<sup>531</sup> Other Muslim scholars say otherwise, allowing any type of evidence that would help the accused persons.<sup>532</sup> Almohaimeed, who wrote a well written research about insanity and liability, agreed with the second opinion because, he argued, justice would be served better by allowing parties to use all types of evidence approved under Sharia.<sup>533</sup>

Finally, experts also play a role after sentencing since it is important that convicted individuals understand the nature of the punishment.<sup>534</sup> If someone is found criminally liable and sentenced, he or she should have a proper state of mind to understand that he or she is being

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<sup>525</sup> *Id.*

<sup>526</sup> *Id.*

<sup>527</sup> AL-KAMLY, *supra* note 480, at 261-63.

<sup>528</sup> *Id.*

<sup>529</sup> *Id.*

<sup>530</sup> *Id.*

<sup>531</sup> Saad I. Almohaimeed, Aljonoon AlAared baad Ertikab Aljarimah wa Atharoh fe Almasouliah Aljinaiah [Temporary Insanity after Committing a Crime and its Impact on Criminal Responsibility] 68 (2012) (unpublished Master's dissertation, Naif Arab University) (on file with author).

<sup>532</sup> *Id.* at 70.

<sup>533</sup> *Id.* at 73.

<sup>534</sup> *Id.* at 95; AL-DARAAN, *supra* note 523, at 913.

punished for committing crime.<sup>535</sup> Punishing persons who lack legal capacity to act does not achieve the goal of punishments.<sup>536</sup> Punishing people with deficient legal capacity, however, would be appropriate should they understand the nature of the punishments they receive.<sup>537</sup>

Seeking expert opinions is an essential right in criminal proceedings that PWIDs need. It not only helps PWIDs, but also helps judges impose appropriate sentences. Later in this chapter, a number of criminal cases involving PWIDs will be reviewed. It will be seen how the right to expert's testimony has benefited PWIDs.

### Alternative Punishments to Incarceration for PWIDs

Preventing PWIDs from exercising their legal capacity to act affects their life in many aspects. Despite Saudi Arabia's understanding of the terms legal capacity, Article 12(1) of the CRPD still reads that "States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law."<sup>538</sup> PWIDs have the right to make autonomous decisions, similar to people without disabilities. For those who totally lack their legal capacity to act, it is reasonable to appoint someone as a guardian or supported-decision maker. However, those whose legal capacity to act is deficient should have the right to execute their own legal decisions as their state of mind is not totally diminished. Under no circumstances should the deficient legal capacity determination affect PWIDs when confronting the criminal justice system. To insure judicial protections for PWIDs, the criminal justice system should protect s PWID's independence and free will.<sup>539</sup> This includes the right to choose his or her own

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<sup>535</sup> Almohaimeed, *supra* note 531, at 95; AL-DARAAN, *supra* note 523, at 913.

<sup>536</sup> Almohaimeed, *supra* note 531, at 95; AL-DARAAN, *supra* note 523, at 913.

<sup>537</sup> Almohaimeed, *supra* note 531, at 95; AL-DARAAN, *supra* note 523, at 913.

<sup>538</sup> Convention on the Rights of Persons with Disabilities, *supra* note 1, art. 12(1).

<sup>539</sup> AHMED S.A. MAHMOUD, TADABIR ALHIMAYA ALQADAIYAH LE ALMOAWAQEEN [JUDICIAL PROTECTION MEASURES FOR PERSONS WITH DISABILITIES] 92-94 (2016).

supported-decision maker.<sup>540</sup> Judges are required to consider a PWID's level of competency in sentencing,<sup>541</sup> which serves the purposes of punishments as imposing harsh or improper sentences would not only harm PWIDs, but those sentences also would not help PWIDs return to their communities rehabilitated. When a lesser sentence serves the goals of punishment, it is inappropriate to impose a harsher sentence.<sup>542</sup> Hence, it is better to impose alternative punishments to incarceration when PWIDs commit crimes, provided this application does not violate the purpose of Articles 12 and 15 of the CRPD.

Alternative punishments to incarceration are defined as non-prison measures and penalties before, during, and after trials.<sup>543</sup> Imprisonments, generally, have a plethora of negative results and have increased violence in communities as imprisonment does not effectively rehabilitate prisoners.<sup>544</sup> It is estimated that pretrial detainees in third world countries represent three-quarters of the prison population.<sup>545</sup> This demonstrates that there is a need to apply more alternatives to incarceration during the investigation and the trial stages. However, the focus of this section is to examine whether or not PWIDs should receive alternative punishments to incarceration and how judges should impose such sentences.

As previously discussed, crimes committed by PWIDs are not considered complete crimes due to their deficient legal capacity to act, which affects their state of mind.<sup>546</sup> Consequently, judges should consider in their sentencing that PWIDs who possess deficient legal

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<sup>540</sup> *Id.*

<sup>541</sup> ABDULLAH M.S. AL-KNEEN, SOLTAT ALQADY FE TAGDEER ALOKOBAN ALTAZERIAH [JUDICIAL DISCRETION IN SENTENCING TA'ZIR CRIMES] 183-84 (2013).

<sup>542</sup> *Id.* at 67-68.

<sup>543</sup> Al-Bogami, *supra* note 6, at 41.

<sup>544</sup> MUHAMMED SALEH AL-ONEZY, ALETJAHAAAT ALHADITHAH FE ALOKOUBAAT ALBADILAH [MODERN TENDENCIES IN ALTERNATIVE PUNISHMENTS] 39 (2016).

<sup>545</sup> *Id.* at 80.

<sup>546</sup> *Id.* at 117.

capacity to act are not totally culpable. “The Messenger of Allah (PBUH) [said] ‘[a]vert the legal penalties from the Muslims as much as possible, if he has a way out then leave him to his way, for if the Imam makes a mistake in forgiving it would be better than making mistake in punishment.’”<sup>547</sup> This *Hadith* illustrates the importance of imposing proper sentences that better suit defendants. Alternative punishments to imprisonment in Saudi Arabia are unlawful if the crime committed is either classified as *Huddod* or *Qisas* because, as mentioned in Chapter II, punishments for *Huddod* and *Qisas* are fixed.<sup>548</sup> Moreover, punishments for *Huddod* and *Qisas* crimes are applied with no possible alternative in order to protect Allah’s five “necessities: life, offspring, property, religion and intellect.”<sup>549</sup> Consequently, alternative punishments to imprisonment occur only if the crime committed is classified as *Ta'zir*, which is almost all crimes except *Huddod*. However, the mainstream practice among Saudi judges is to incarcerate as many criminals as possible.<sup>550</sup> Judges, over time, found it much easier to send criminals to prison if the crime committed is not classified as *Huddod* or *Qisas*.<sup>551</sup> Criminal culpability is determined based on the level of the legal capacity to act. For those with limited legal capacity to act, it is appropriate for judges to impose sentences that would either rehabilitate or deter them,<sup>552</sup> because exempting PWIDs from punishment is no justice at all and such claim is totally rejected. Nevertheless, judicial rulings are subject to scrutiny when imposing alternative punishments to incarceration in order to avoid violating the rights of PWIDs. Those rights include the freedom of choice and freedom from degrading treatment or punishment guaranteed

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<sup>547</sup> Sunnah, Book 17, Hadith 2.

<sup>548</sup> Al-Harthiy, *supra* note 99, at 20.

<sup>549</sup> Tawfik, *supra* note 99, at 669.

<sup>550</sup> Al-Harthiy, *supra* note 99, at 31.

<sup>551</sup> *Id.*

<sup>552</sup> AL-KNEEN, *supra* note 541, at 183-84.

by Article 12 and 15<sup>553</sup> of the CRPD. However, before criticizing the current practice of alternative punishments to incarceration, a number of case law briefs deserve attention.

### Case Law Briefs and Applications

This sub-section shows how adopting the medical model of disability has affected not only how Saudi Arabia understands the term legal capacity, but how such adoption affected PWIDs in their everyday life experiences, including but not limited to their interaction with the criminal legal system.<sup>554</sup> Out of the plethora of criminal cases, four are highlighted that show how a PWID's rights are affected by the medical model of disability. Also, at the end of this chapter, these cases are used to argue that, but for the adoption of the medical model of disability, the outcomes of those cases would have been different. It is impossible to determine the exact outcomes from adopting the social model of disability, but each individual case's application causes some concern, which is the focus of the analysis following each case brief.

Case #1:<sup>555</sup> The defendant was arrested while intoxicated. The prosecution requested an imprisonment sentence and a ban from traveling in accordance with the Narcotics and Mental Effects Control Law, as well as eighty lashes for consuming alcohol, which is classified as *Huddod* crime. After the positive urine sample, the defendant pleaded guilty to the drug charges,

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<sup>553</sup> The full text of Article 15 reads:

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.”

<sup>554</sup> Due to some vagueness in defining the term “disability” in Saudi Arabia, and the limited number of cases that involved PWIDs, the cases in this section include persons with mental illness. Because this study is concerned with the right to make autonomous decisions when interacting with the criminal legal system, the outcome for PWIDs or persons with mental illness will be the same.

<sup>555</sup> Case No. 341083510/Drug Violation (dated: 1434 Hijri).

but not to alcohol. The defendant’s father established an affirmative defense that the defendant suffered from chronic mental schizophrenia, which was proven by a medical report requested by the court. The report stated that the defendant, while committing the crime, was unaware of his actions because of his deficient legal capacity to act. The court only rebuked the defendant for his actions and banned him from traveling outside Saudi Arabia.

This case raises an issue to the access of justice. In accordance with Article 13 of the CRPD, “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.”<sup>556</sup> This court, by allowing the defendant’s father — the guardian herein — to defend his son in court, violated the defendant’s right to legal counsel. The defendant's right to an attorney is guaranteed by both domestic and international laws; however, in this case, the court allowed the guardian to play the attorney’s role in representing the defendant in a criminal trial and present evidence for his defense. It is a violation of Article 12 of the CRPD to allow the guardian to speak on behalf of the defendant instead of allowing the defendant to speak for himself. If the defendant had been afforded the right to make an autonomous decision, the result would have been different by seeking experienced legal representation to provide a better outcome. Though it would be difficult to know the outcomes should Saudi Arabia adopt the supported decision making approach, one can speculate about such conclusions. Those speculations are pointed out at the end of this dissertation, linking the new suggested approach to the cases presented here.

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<sup>556</sup> Convention on the Rights of Persons with Disabilities, *supra* note 1, art. 13(1).

Case #2:<sup>557</sup> The accused beat a government employee and the prosecution requested proper punishment for this assault. The court requested a medical report showing whether the defendant suffered from schizophrenia. The report stated that the suspect was not criminally responsible for his actions and that he needed to be hospitalized, suggesting that the court end the proceedings as soon as possible. The defendant had no prior convictions. His brother promised to take care of him and not to leave him in governmental departments without supervision so the court dropped all charges, finding the accused not liable and lacking the legal capacity to act.

This case raises the same concerns as the previous case, access to legal representation that would properly protect the rights of PWIDs guaranteed under the criminal legal system. However, the other issue with this case concerns forced medication and institutionalization. The court requested a medical report, which stated that the defendant was not criminally responsible for his actions, but he needed to be hospitalized immediately for medication to cure his schizophrenia. Although the court did not require the defendant be institutionalized, the expert testimony calling for forced medication reflects practices derived from the medical model of disability and violate the CRPD. “The right to health is not to be understood as a right to be healthy.”<sup>558</sup>

Case #3:<sup>559</sup> The defendant killed a man and then raised an insanity defense. The victim’s family claimed that the defendant lied about his mental condition. The court relied on the opinion of the psychiatrist that the defendant needed treatment. The father of the defendant became his guardian after the court confirmed the defendant’s incapacity to appear before the court and stand trial. The crime was reduced from first degree murder to manslaughter because of the

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<sup>557</sup> Case No. 3458963/Assault Violation (dated: 1434 Hijri).

<sup>558</sup> CESCR, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, E/C.12/2000/4 (Aug. 11, 2000).

<sup>559</sup> Case No. 139-8/Homicide Violation (dated: 1403 Hijri).

mental condition of the defendant. The defendant was sentenced to spend his entire life in the hospital for observation and treatment because of his danger to society.

Similar to the previous two cases, this case raises the issue of ineffective assistance of counsel because the father of the defendant served as guardian and defended his son after the court confirmed the defendant's incapacity to appear before the court. The other issue is that the verdict required the defendant to remain institutionalized for his life as he was considered dangerous to the community. Is forcing the defendant to remain hospitalized due to his risk to society a punishment or an administrative measure? Even though it was reported by medical experts that his mental disability was severe and he might pose a danger to society, forced medication should never be a form of punishment, nor should institutionalization.

Case #4:<sup>560</sup> Three defendants physically abused their mother, tried to burn her house down, and prevented her from leaving the house. The primary defendant, who had a psychiatric disorder caused by using prohibited substances, had two prior convictions of disobeying his parents, which is a crime in Saudi Arabia. The other two defendants were sentenced to imprisonment. The primary defendant was sentenced to placement in a psychiatric institution for treatment and rehabilitation. During investigation, the primary defendant claimed he suffered from a psychiatric illness and was being treated at the mental health hospital in Al Jawf. The court requested a letter from the Al Jawf hospital requesting information on the primary defendant's psychological status and whether he was aware of his actions or not. The Al Jawf hospital submitted its criminal psychiatric report at the 11th session, stating that although the primary defendant had a psychiatric disorder, he was criminally liable. The report further

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<sup>560</sup> Case No. 33441188/Parental Disobedience (dated: 1433 Hijri).



recommended that the primary defendant be admitted to a psychiatric hospital. The Court of Appeal affirmed the sentence.

This case shares the same concerns in regard to effective legal representation at criminal trials. In this case, the primary defendant, who had a psychiatric disorder, defended himself in the proceedings. This raises speculation on the fairness of the trial. It is unclear why the court would impose such a sentence and simultaneously not inform the primary defendant of his right to an attorney. Also, the court ruled that the primary defendant was required to accept medications as his mental status would render him dangerous to the community. The court further ruled that the primary defendant had to face the consequences of his actions in the civil court. The effect of the medical model of disability can be seen in this case because of considering the time spent at the mental health hospital as a punishment.

### Analysis and Observations

As the case briefs demonstrate, alternative punishments to incarceration in Saudi Arabia need further analysis. There are a number of issues when Saudi judges impose alternative punishments to imprisonment for PWIDs, many that violate Articles 12 and 15 of the CRPD. First, Article 12 states that “States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.”<sup>561</sup> Since understanding the nature of crimes and punishments is an essential element to serve the goals of punishments, imposing alternative punishments to incarceration should only be applied consensually; instead, Saudi judges enforce such punishments.<sup>562</sup> Article 46 of the Basic Law notes that, “[t]here shall

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<sup>561</sup> Convention on the Rights of Persons with Disabilities, *supra* note 1, art. 12.

<sup>562</sup> In accordance with Article 4 of drafting of the new law, *Alternative Punishments Regulation*, judges may send convicted people to medical, psychological or social treatment as a form of punishment.

be no power over judges in their judicial function other than the power of the Islamic Shari‘ah.”<sup>563</sup> Therefore, judicial discretion is not limited to any type of law other than the Sharia. This practice is problematic because it does not keep up with scholarly views on the subject. Research has revealed that application of alternative punishments is conditioned by a number of factors, one of which is consent.<sup>564</sup> The effectiveness of imposing alternative punishments to incarceration is interconnected with a PWID’s consent to receive such sentences. Because rehabilitation is only successful when the incarcerated express willingness to change, consent for such punishment shall be mandatory.<sup>565</sup> Since consent is an integral part of people’s freedom of choice, denying such right violates PWIDs’ rights guaranteed by Article 12 to enjoy legal capacity on an equal basis with others in all aspects of life.

Second, PWIDs are institutionalized in psychiatric hospitals as a form of punishment, which violates Article 15 of the CRPD. Article 15 states that “[n]o 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.”<sup>566</sup> Essentially, the CRPD prohibits involuntary treatment on the basis of disability.<sup>567</sup> Although Saudi Arabia and other countries “employ compulsory interventions or court rulings to ensure adherence to therapy in patients with serious mental disease,”<sup>568</sup> Articles 12, 14, 15, 17,<sup>569</sup> and 25<sup>570</sup> prohibit

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<sup>563</sup> Basic Law of Governance (1992), art. 46 (Saudi Arabia).

<sup>564</sup> AL-ONEZY, *supra* note 544, at 114.

<sup>565</sup> *Id.*

<sup>566</sup> Convention on the Rights of Persons with Disabilities, *supra* note 1, art. 15.

<sup>567</sup> G. Szmukler, R. Daw & F. Callard, *Mental Health Law and the UN Convention on the Rights of Persons with Disabilities*, 37 INT’L J. L. & PSYCHIATRY 245, 246 (2014).

<sup>568</sup> G. Lera-Calatayud et al., *Involuntary Outpatient Treatment in Patients with Severe Mental Illness: A One-year Follow-up Study*, 27 INT’L J. L. & PSYCHIATRY 267, 267 (2014).

<sup>569</sup> “Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.”

nonconsensual treatment for PWIDs.<sup>571</sup> Moreover, “the CRPD Reporting Guidelines for Article 17 require State Parties to report on measures taken to protect persons with disabilities from medical (or other) treatment given without free and informed consent.”<sup>572</sup> Even if the consent is given by a third party, such as the guardian, “Article 25 in conjunction with Article 12 indicates that the ‘consent of third parties is not substituted for that of persons with disabilities, who at all times enjoy the right to exercise legal capacity according to their own will and preferences.’”<sup>573</sup>

The Committee, in its concluding observations to Tunisia’s 2011 report, stated that:

The Committee recommends that the State party repeal legislative provisions which allow for the deprivation of liberty on the basis of disability, including a psychosocial or intellectual disability. The Committee is concerned about the lack of clarity concerning the scope of legislation to protect persons

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<sup>570</sup> “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.”

<sup>571</sup> Szmukler, Daw & Callard, *supra* note 567, at 247.

<sup>572</sup> *Id.*

<sup>573</sup> *Id.*

with disabilities from being subjected to treatment without their free and informed consent, including forced treatment in mental health services.<sup>574</sup>

Countries that continue such practice are subject to scrutiny by the Committee; however, it is difficult to argue that involuntary treatment is ruled out as a whole by the CRPD as, in very limited circumstances, some scholars argue that it is acceptable.<sup>575</sup> “[I]nvoluntary outpatient treatment may be effective for patients with serious mental disease who are unaware of their illness and for whom treatment discontinuation carries a high risk of relapse.”<sup>576</sup> However, this approach should be subjected to scrutiny to “a form of ‘capability-based’ law, narrowly drawn, [that] is consistent with the CRPD in providing for involuntary treatment that is non-discriminatory.”<sup>577</sup> Research has found “that community-based alternative treatments such as the application of assertive treatment programs in the community, which are intensive interventions, can produce good results in patients with serious mental diseases.”<sup>578</sup> Such studies should be the focus when judges impose alternative punishments to incarceration for PWIDs in criminal cases. Doing so will not only help rehabilitation, but relying on those studies will help enact new laws and practices that do not violate the purposes of the CRPD. For example, Saudi Arabia can reach a middle ground between current guardianship programs on PWIDs and the purpose of Article 12 by implementing the supported decision-making approach.

### Supported Decision-Making v. Substituted Decision-Making

Supported decision-making is the concept that people with intellectual disabilities should be able to choose their own supported decision-makers rather than reluctantly following their

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<sup>574</sup> *Id.* at 246-47.

<sup>575</sup> Lera-Calatayud et al., *supra* note 568, at 267; Szmukler, Daw & Callard, *supra* note 567, at 247.

<sup>576</sup> Lera-Calatayud et al., *supra* note 568, at 270.

<sup>577</sup> Szmukler, Daw & Callard, *supra* note 567, at 247.

<sup>578</sup> Lera-Calatayud et al., *supra* note 568, at 270.

guardians. On the other hand, substituted decision-making prevents people with intellectual disabilities from making their own decisions and expects them to follow what their guardian thinks is best. At first, supported decision-making sounds similar to guardianship programs as there is someone else making final decisions; however, supported decision-making is completely to the contrary as the person being supported retains decision-making power, with the assistance of his or her supporter(s). Guardianship programs, on the contrary, deprive PWIDs of the right to make autonomous decisions and bestow that right upon others.<sup>579</sup>

### Substituted Decision-Making Approach

In addressing the process that the Ad Hoc Committee used to implement Article 12 of the CRPD, Dhanda stated, “substituted decision-making is premised on the incapacity of the person with a disability.”<sup>580</sup> Therefore, substituted decision-making is defined as “the process by which decisions are made for a person with disabilities who has been deemed to lack capacity.”<sup>581</sup> This approach requires substituted decision-makers, or any third party, to take into consideration the best interest of the person with the intellectual disability when making decisions for him or her.<sup>582</sup> The best interest factor raises two main concerns that might contradict the purpose of Article 12 of the CRPD.<sup>583</sup> A substituted decision-maker has the authority to make all decisions

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<sup>579</sup> K.B. Glen, *Changing Paradigms: Mental Capacity, Legal Capacity Guardianship, and Beyond*, 44 COLUM. HUM. RTS. L. REV. 93, 93 (2012).

<sup>580</sup> Dhanda, *supra* note 332, at 446.

<sup>581</sup> Caivano, *supra* note 46, at 4-5. *See also* Nina A. Kohn, Jeremy A. Blumenthal & Amy T. Campbell, *Supported Decision-Making: A Viable Alternative to Guardianship*, 117 PENN. ST. L. REV. 1111, 1116 (2013) (describing the process in the U.S. legal system where “the appointment is made through a guardianship proceeding, a court proceeding in which a judge appoints a third party (called a “guardian”) to make some or all decisions on behalf of an incapacitated individual (called a “ward”).”).

<sup>582</sup> Caivano, *supra* note 46, at 5.

<sup>583</sup> *Id.*; Devi, *supra* note 45, at 803.

on behalf of PWIDs without their consent,<sup>584</sup> and a substituted decision-maker might not be known to the person with the intellectual disability, thus making it difficult for the decision-making to actually know the needs and desires of the PWIDs.<sup>585</sup> The issue of substituted decision-making is correlated to the model of disabilities adopted in Saudi Arabia.<sup>586</sup> According to Dr. Alsaif, rights for the disabled in Saudi Arabia are given as charity.<sup>587</sup> Substituted-decision making “allow[s] guardians to make all decisions on behalf of, and without consultation with, their ward.”<sup>588</sup> However, did Article 12 of the CRPD call for elimination of substituted decision-making at all times, or it was acceptable in very limited situations? The Ad Hoc Committee suggested that Article 12 did not totally eliminate guardianship, but rather encouraged it to “be used as a last resort and only in the event that supported decision-making failed to discern the will of the person with disabilities.”<sup>589</sup> Therefore, contrary to what the CRPD concludes, substituted decision-making might be a replacement for a supported decision-making approach should the last approach “fail[] to allow the person with disabilities to exercise their legal capacity.”<sup>590</sup> It is important to note that many leading commentators agree with the conclusions of the CRPD, that supported-decision making should always prevail, and therefore does not support the last argument.

Nandini Devi<sup>591</sup> addressed Sarah Conly’s argument of limited paternalism.<sup>592</sup> Conly’s argument allowed the use of substituted decision-making approaches in limited situations<sup>593</sup> and

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<sup>584</sup> Caivano, *supra* note 46, at 5.

<sup>585</sup> Devi, *supra* note 45, at 803.

<sup>586</sup> Caivano, *supra* note 46, at 5; Glen, *supra* note 579, at 104.

<sup>587</sup> Alsaif, *supra* note 19, at 5.

<sup>588</sup> Dhanda, *supra* note 332, at 446.

<sup>589</sup> Caivano, *supra* note 46, at 12.

<sup>590</sup> *Id.* at 13.

<sup>591</sup> Nandini Devi is a Ph.D. candidate at the Department of Health Sciences and Health Policy, at the University of Lucerne in Lucerne, Switzerland as well as a member of the Disability Policy

claimed that PWIDs would lose more than just their right to make autonomous decision if they were allowed to make decisions on their own.<sup>594</sup> Conly also suggested that coercive intervention was acceptable in two types of cases:<sup>595</sup> for “individuals who are ignorant or unaware of the facts in carrying out an act,”<sup>596</sup> and “where a person is incompetent to make a rational choice.”<sup>597</sup> Granted, the CRPD recognizes “the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices.”<sup>598</sup> Moreover, Article 3(a) also states that the principles of the present Convention shall be: “Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons.”<sup>599</sup> Autonomy cannot be granted if the medical model is the dominant model in Saudi Arabia, reflecting its approach to enacting laws and viewing rights of PWD in the community. Hence, adopting the supported decision-making model would yield better outcomes because “the CRPD’s supported-decision making model recognizes first, that all people have the right to make decisions and choices about their own lives.”<sup>600</sup> Because “supported decision-making [is] premised on the competence of persons with disabilities, [and] substituted decision-making [is] based on their incompetence . . . the two concepts could not subsist together.”<sup>601</sup> Ultimately, “the paradigm of *supported* decision-making, rather than *substituted* decision-

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Group at the Swiss Paraplegic Research in Nottwil, Switzerland. Her research focus is on the interpretation and implementation of Article 12 of the CRPD, focusing on substituted decision-making and supported decision-making at a service provision level in the United Kingdom.

<sup>592</sup> Devi, *supra* note 45, at 799.

<sup>593</sup> *Id.*

<sup>594</sup> *Id.*

<sup>595</sup> *Id.*

<sup>596</sup> *Id.*

<sup>597</sup> *Id.*

<sup>598</sup> Convention on the Rights of Persons with Disabilities, *supra* note 1, para. n.

<sup>599</sup> *Id.* art. 3(a).

<sup>600</sup> Kinker, *supra* note 5, at 480.

<sup>601</sup> Dhanda, *supra* note 332, at 448.

making, is preferable since it more fully recognizes the right of people with disabilities to equal treatment and the protection of their human rights.”<sup>602</sup>

### Supported Decision-Making Approach

On the other hand, the supported decision-making approach “is a process by which a third party (e.g., a support person or a peer support group) assists or helps a person with the intellectual disability to make legally enforceable decisions by themselves, without substituting their decision for the person supported,”<sup>603</sup> thus requiring a host of family members or loved ones to assist the person with disability in reaching a proper decision.<sup>604</sup> Supported decision-making can also “be defined as a series of relationships, practices, arrangements and agreements, of more or less formality and intensity, designed to assist an individual with a disability to make and communicate to others decisions about the individual’s life.”<sup>605</sup>

Despite the CRPD’s call to adopt supported decision-making approach, no State Party has completely abolished guardianship programs.<sup>606</sup> Unlike the substituted decision-making approach, the legal capacity of PWIDs is assumed in accord with the supported decision-making approach.<sup>607</sup> This approach is also preferable because even if a person with severe intellectual disability was incapable of communicating with the supported decision-maker, this approach “requires following the person’s previously expressed wishes, abiding values, and experience in

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<sup>602</sup> *Id.* at 446.

<sup>603</sup> Devi, *supra* note 45, at 792-93. *See also* Kohn, Blumenthal & Campbell, *supra* note 581, at 1111 (“[S]upported decision-making empowers individuals with cognitive challenges by ensuring that they are the ultimate decision-maker but are provided support from one or more others, giving them the assistance they need to make decisions for themselves.”).

<sup>604</sup> Caivano, *supra* note 46, at 5.

<sup>605</sup> Robert Dinerstein, Esmé Grant Grewal & Jonathan Martinis, *Emerging International Trends and Practices in Guardianship Law for People with Disabilities*, 22 ILSA J. INT’L & COMP. L. 435, 441 (2016).

<sup>606</sup> Glen, *supra* note 579, at 139-40.

<sup>607</sup> Caivano, *supra* note 46, at 5.



similar situations.”<sup>608</sup> Furthermore, according to Michael Bach and Lana Kerzner, who lead a legal reform that helps Canada’s guardianship laws to comply with the CRPD, supported decision-making may be reduced to three main styles.<sup>609</sup> The supported decision-maker can help the person with the intellectual disability by “formulating one’s purposes, to explore the range of choices and to make a decision,” engaging the person “in the decision-making process with other parties to make agreements that give effect to one’s decision,” and acting “on the decisions that one has made.”<sup>610</sup> To put that into perspective, supported decision-makers, in the context of health care, for example, are required to “acquire a clear understanding of the medical facts,” “acquire a clear understanding of the health care options and the risks and benefits of each,” and “encourage and support the individual in understanding the facts and *directing a decision*.”<sup>611</sup> Glen argues that the final step is still, nonetheless, to be made by the guardian.<sup>612</sup>

Article 12 of the CRPD recognizes that personal autonomy is assumed when dealing with PWIDs.<sup>613</sup> The Yokohama Declaration, in affirming this notion, provides: “(1) a person must be assumed to have the mental capacity to make a particular decision unless it is established that he or she lacks capacity,” and “(2) a person is not to be treated as unable to make a decision unless all practicable steps to help him or her do so have been taken without success.”<sup>614</sup> Therefore, supported decision-making is the dominant approach,<sup>615</sup> “making substituted decision-making a last resort.”<sup>616</sup>

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<sup>608</sup> *Id.*; Devi, *supra* note 45, at 793.

<sup>609</sup> Glen, *supra* note 579, at 136-47 n.197.

<sup>610</sup> *Id.*

<sup>611</sup> *Id.* at 118.

<sup>612</sup> *Id.* at 118 n.121.

<sup>613</sup> Devi, *supra* note 45, at 793.

<sup>614</sup> Glen, *supra* note 579, at 119.

<sup>615</sup> *Id.*

<sup>616</sup> *Id.* at 152.

## Supported Decision-Making in Application

In order to apply the supported decision-making approach for PWIDs, a suggested application<sup>617</sup> from Bach and Kerzner should be adopted.<sup>618</sup> Bach and Kerzner’s model (The Model) is built on the notion that legal capacity is governed by two factors: (1) “whether or not a person’s particular decision-making abilities means that they need another person to help communicate and represent their will or intention to others,” and (2) “whether or not a person meets the minimum threshold — where at least one other person can reasonably understand the person’s will and/or intention, and communicate that to others for the purposes of a decision-making process.”<sup>619</sup> The Model uses three different statuses<sup>620</sup> in its analysis: (1) legally independent decision-making status, (2) a supported decision-making status, and (3) a facilitated decision-making status.<sup>621</sup>

The first category, legally independent decision-making status, recognizes the right to make autonomous decision for PWIDs, meaning that the full legal capacity is assumed.<sup>622</sup> Accordingly, PWIDs are presumed to be able to comprehend information that would allow them to make decisions and face consequences.<sup>623</sup> Also, this category recognizes a PWID’s ability “to communicate the decision made to a third party.”<sup>624</sup> A PWID, though, still needs reasonable

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<sup>617</sup> Bach and Kerzner’s model was used to show the application of supported decision-making in the context of seeking assistance to make medical-related decisions; however, their model might be used to show a proper application of their model in accepting or rejecting a plea agreement in criminal trials.

<sup>618</sup> Devi, *supra* note 45, at 796.

<sup>619</sup> *Id.*

<sup>620</sup> This categorization matches the one used earlier in this dissertation on how the three levels of capacity are viewed by Muslim scholars: (1) complete legal capacity, (2) totally lacking legal capacity, and (3) deficient legal capacity.

<sup>621</sup> Devi, *supra* note 45, at 796.

<sup>622</sup> *Id.*

<sup>623</sup> *Id.*

<sup>624</sup> *Id.*

accommodation that helps in the supported decision-making process.<sup>625</sup> This includes “information provided in an easy read (easy to understand by using simple words and pictures) language for a person with a mild intellectual disability.”<sup>626</sup> According to the second category, a supported decision-making status requires that, “the individual does not act in isolation and is provided with support in the decision-making process.”<sup>627</sup> A PWID can choose one or more persons, who should not be a family member, including any person the PWID trusts.<sup>628</sup> The supporters’ duty “is to interpret and carry out the will or intention of the person with the intellectual disability that is ‘consistent with the person’s identity’ and respects ‘the individual’s dignity of risk.’”<sup>629</sup>

Finally, the third category — facilitated decision-making status — “is often used for persons with significant disabilities, where they do not have a family member or close friends to understand their will and preferences regarding decision-making.”<sup>630</sup> The state appoints a guardian to make proper decisions for PWIDs covered by this status.<sup>631</sup> The standard followed by the guardian is to adopt the “best interest” principle.<sup>632</sup>

Saudi Arabia needs to adopt such models as a replacement to its guardianship programs in order to fully comply with Article 12 of the CRPD. Article 5(2) of the CRPD requires States Parties to “prohibit discrimination on the basis of disability.”<sup>633</sup> Saudi Arabia “should see [its understanding of Article 12] . . . as temporary in character to be withdrawn as soon as possible in

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<sup>625</sup> *Id.* at 800.

<sup>626</sup> *Id.*

<sup>627</sup> *Id.*

<sup>628</sup> *Id.*

<sup>629</sup> *Id.*

<sup>630</sup> *Id.* at 801.

<sup>631</sup> *Id.* at 802.

<sup>632</sup> *Id.* at 796.

<sup>633</sup> Convention on the Rights of Persons with Disabilities, *supra* note 1, art. 5(2).

order to maintain the normative integrity of the CRPD.”<sup>634</sup> Adopting the supported-decision making is the best solution for PWIDs in Saudi Arabia because it simultaneously guarantees the right to legal capacity in accord with Article 12 of the CRPD and does not contradict how Muslim scholars view the differentiation of the two legal capacities. It is important to understand that the term *support* in General Comment #1 means that the State party is required provide the support to all PWIDs in order to ensure they are living their life independently.<sup>635</sup> This means that “[s]upported decision-making must be ‘available to all.’”<sup>636</sup>

This last section will connect the supported decision-making approach with the criminal cases identified previously in this chapter. This includes addressing what the courts should do if a defendant already has a guardian. Should the court require the guardian to adopt the supported decision-making approach principles when the defendant faces the criminal justice system? Should the court seek to deal directly with the defendant, irrespective of the guardian’s presence? Is there any situation in which Saudi Arabia might, consistent with Article 12, eliminate or at least reduce the use of guardianship? Answering these questions requires considering how the results in the case studies might have differed if the supported decision-making approach principles had been in use. Among the four case laws identified previously, only two will be highlighted and analyzed.<sup>637</sup>

In some cases, there was a strict violation of Article 12 of the CRPD, and in some other cases there were areas where the outcome would have been different if the court had used the

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<sup>634</sup> Caivano, *supra* note 46, at 23.

<sup>635</sup> Dinerstein, Grewal & Martinis, *supra* note 605, at 446-47.

<sup>636</sup> *Id.* at 447 (2016).

<sup>637</sup> Since this analysis is only speculations on how the outcomes of the cases involving PWIDs would be but for adopting the substituted decision-making approach, Cases #3 and #4 would not be highlighted since Cases #1 and #2 have more information that would serve the purpose better.

supported decision-making approach. For example, in Case #1<sup>638</sup> the father — acting as a guardian — spoke out and defended his son. This in itself constitutes a violation of Article 12 of the CRPD because he overtook his son’s power to make autonomous decisions and acted accordingly. For this issue, no speculation is needed because the father’s action constituted a violation, as courts should allow all PWIDs to make their own decisions. In real life, the father might have discussed all options with his son, but as the case documentation shows, the father acted solely at his discretion. The results would have been different if the defendant was able to make his own decision at the trial. But for the father’s intervention, the defendant might not have wanted to raise his mental illness as a mitigating factor. The defendant’s father established an affirmative defense that the defendant suffered from chronic mental schizophrenia, which was proven by a medical report requested by the court. If the defendant had the right to hire an attorney and had discussed his options, he might not have wanted to reveal his mental illness. For sure, the attorney would have know better the consequences of raising such claims — including, but not limited to, the stigma associated with the mental illness — and he might have advised the defendant not to raise the issue. Finally, one can speculate that, but for the father’s intervention, the ruling would have been different. Being represented by a lawyer will obviously be better than being represented by a guardian, even if that guardian is the father who certainly does not want to harm his son.

In Case #2,<sup>639</sup> the accused beat a government employee and then the court requested a medical report that stated that the suspect was not criminally responsible for his actions and that he needed to be hospitalized. After establishing his mental illness, the court appointed the accused’s brother to act as his guardian. This case shows a number of negative consequences of

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<sup>638</sup> Case No. 341083510/Drug Violation (dated: 1434 Hijri).

<sup>639</sup> Case No. 3458963/Assault Violation (dated: 1434 Hijri).

not adopting the supported decision-making approach. The first problem is that the court put the accused under guardianship immediately after the report stated that the accused was mentally ill. Had the court system adopted the supported decision-making approach, the accused would have chosen his own supporter(s) who would have discussed more options with him. This very practice by courts shows how the medical model of disability is reflected in the criminal legal system. Judges, prosecutors, and all who work with the criminal legal system might unknowingly create barriers to PWIDs by adopting the medical model of disability, which justifies the substituted decision-making approach. The right to make autonomous decisions is a fundamental right that should be guaranteed to all without discrimination on the basis of disability. But for adopting the medical model of disability that justifies all guardianship programs, the result *will* be different. Even if some might argue that the results of those identified cases are a great result, the problem is far greater. All PWIDs shall have the right to make their *own* decisions. Therefore, adopting the supported-decision making is the best solution for PWIDs in Saudi Arabia in order to “respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons.”<sup>640</sup>

“WE ARE TALKING TO MOST OF THE COUNCIL OF SENIOR SCHOLARS ABOUT GUARDIANSHIP SYSTEM TO SEE WHAT IS ISLAM AND WHAT IS NOT.”

- Mohammed bin Salman, Bloomberg interview

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<sup>640</sup> Convention on the Rights of Persons with Disabilities, *supra* note 1, art. 3(a).

## CHAPTER VI: CONCLUSION

PWIDs face a host of challenges in Saudi Arabia, and every single challenge is correlated significantly with the implementation of Article 12 of the CRPD. Article 12 of the CRPD declares that State Parties “reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.”<sup>641</sup> Article 12(2) requires State Parties to “recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.”<sup>642</sup> Saudi Arabia’s distinction of the terms “legal capacity to act” and “legal capacity of rights,” this dissertation argues, is not the immediate cause of a PWID’s non-recognition as a full person before the law. Not recognizing PWIDs as full persons before the law is, however, caused by a number of combined factors that created a discriminatory system. One of the key factors, is the socio-economic factor. As Chapter III indicated, adopting the medical model of disability (1) requires all PWDs to face significant legal and social obstacles, and (2) emphasizes curing the disability to resolve the issue, rather than working with the existence of a disability to still provide legal and social stability. Therefore, as shown in Chapters III and IV, the CRPD advocates adoption of the social model of disability, which characterizes the issue differently. According to the social model of disability, the problems people with disabilities face are not because of their inability to perform daily life activities, but rather society’s inability to accommodate people with disability.<sup>643</sup>

The Saudi Arabian understanding of the term “legal capacity” in Article 12 of the CRPD should not stop Saudi Arabia’s ratification because there is a middle ground between how domestic law in Saudi Arabia understands the concept of legal capacity and the purposes of the

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<sup>641</sup> Convention on the Rights of Persons with Disabilities, *supra* note 1, art. 12.

<sup>642</sup> *Id.* art. 12(2).

<sup>643</sup> Hosking, *supra* note 75, at 7.

CRPD. Article 46 of the CRPD allows State Parties to enter the Convention with reservations; however, this choice is not permitted at all situations.<sup>644</sup> In accordance with Article 46(1) of the CRPD, “reservations incompatible with the object and purpose of the present Convention shall not be permitted.”

The main objective of Article 12 is to strike down substituted decision-making approaches and replace these methods with supported decision-making programs.<sup>645</sup> The CRPD Committee “has stated unequivocally that all laws imposing substituted decision-making, including guardianship laws, violate Article 12 of the CRPD.”<sup>646</sup> Supported decision-making helps PWIDs choose their own supported decision-makers rather than reluctantly following their appointed guardians.<sup>647</sup> Saudi Arabia can still keep its understanding of Article 12 and simultaneously ratify the Convention. As of October 18, 2018, there are eight declarations and four reservations to Article 12 of the CRPD.<sup>648</sup> Canada is a good example of a state that submitted reservations, but also provided adequate safeguards to PWIDs by replacing its guardianship programs with supported decision-making programs. An argument that demands Saudi Arabia withdraw its understanding of the term “legal capacity” would not stand because this distinction is rooted in how Muslim scholars understand the term. Therefore, adopting supported-decision making is the best solution for PWIDs in Saudi Arabia because it simultaneously guarantees the right to legal capacity in accordance with Article 12 of the CRPD and does not contradict Muslim scholarly views on the differentiation of the two legal capacities.

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<sup>644</sup> Caivano, *supra* note 46, at 13.

<sup>645</sup> Devi, *supra* note 45, at 793.

<sup>646</sup> K.B. Glen, *Supported Decision-making and the Human Right of Legal Capacity*, 3 INCLUSION, no. 1, 2015, at 2, 6.

<sup>647</sup> Devi, *supra* note 45, at 792-93.

<sup>648</sup> *Status of Treaties*, *supra* note 354.



Adopting the supported decision-making approach does not *de facto* create a system that protects PWIDs from abuses. Glen, whose research spotlighted the supported decision-making approach, argued that “supported decision-making is not the end, but rather the means to the end of the human right of legal capacity.”<sup>649</sup> Her concern included how PWIDs deal with third parties, such as financial institutions, landlords, or healthcare professionals.<sup>650</sup> Glen argued that even when PWIDs have supporters, third parties often fear dealing with a PWID because they “become liable for any transaction they enter into with her/him.”<sup>651</sup> Hence, adopting the supported decision-making approach should only be a means by which a State can provide a system that protect PWIDs in all aspects.

#### Acknowledged Limitations

This dissertation, like all other research, was bound by limitations that could impact its conclusion. One limitation of this study is its reliance on Arabic-language sources. Though the focused group of this study is PWIDs who live in Saudi Arabia, making it reasonable to understand the legal system therein, a more rounded conclusion could be obtained through the study of other systems for comparison. The Canadian example, used in Chapter 4, was only a model to show how another State has expressed some issues with guardianship programs and still advanced its systems to ratify the CRPD. If another State’s ratification of the CRPD is examined, more specifically, a State with a similar legal system to Saudi Arabia, the analysis would be more complex and show other Islamic countries define legal capacity in their system.

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<sup>649</sup> Glen, *supra* note 646, at 6.

<sup>650</sup> *Id.* at 9.

<sup>651</sup> *Id.*

## Moving Forward

This dissertation, nonetheless, has established a forceful foundation for future studies in the field of disability rights in the Kingdom of Saudi Arabia. No other research has discussed the issue of legal capacity from the domestic and the international perspectives together. A number of studies exist on the issue of legal capacity from the Islamic perspective, but not enough critique issues related to PWIDs in terms of recognizing PWIDs as full persons before the law. Moreover, this dissertation studied the models of disability and how the rights of PWD as a whole are viewed in Saudi Arabia.

These are just the first steps toward moving forward to eliminate the medical model of disability. Although a host of social movements call for an end to discrimination on the basis of disability, the lack of forceful legislations does not help PWDs, and PWIDs in particular, move forward. Without enactment of new and solid legislation to protect the rights of PWDs in Saudi Arabia, activists will be unable to help this vulnerable group. In accordance with Article 4 of the CRPD, “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[, and to] this end, States Parties undertake: . . . (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.”<sup>652</sup> The enactment of new legislations shall not be limited to the DWL, but shall extend to other areas of the law as well.

Chapter V covered the rights of PWIDs when they interact with the criminal legal system in Saudi Arabia, highlighting the usefulness of relying on expert testimony in criminal trials,

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<sup>652</sup> Convention on the Rights of Persons with Disabilities, *supra* note 1, art. 4(1)(b).

while recognizing that judges have discretion to reject part or all of an expert opinion, which might cause PWIDs to lose their case.<sup>653</sup> Therefore, a reformulation of the SALCP is an essential step to create a better system for justice. Furthermore, this dissertation introduced readers to Saudi Arabia's involvement in international bodies and how Saudi Arabia can strengthen its position as a CRPD signatory. No other conducted research, in either English or Arabic, has discussed the Saudi Arabian report to the CRPD Committee, nor did any research paper strongly criticize the report. The ultimate goal is recognizing all PWD as full persons before the law, which can be achieved through enacting effective legislation that helps eradicate all forms of discrimination on the basis of disability.

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<sup>653</sup> AL-KAMLY, *supra* note 480, at 261-63.

## APPENDIX A: CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

(CRPD)

*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 the present 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:

(a) To 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) To 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) To provide training for stakeholders on accessibility issues facing persons with disabilities;

(d) To provide in buildings and other facilities open to the public signage in Braille and in easy to read and understand forms;

(e) To 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) To promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;

(g) To promote access for persons with disabilities to new information and communications technologies and systems, including the Internet;

(h) To 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 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 the present 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 the present 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 lifelong 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:

(a) To 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) To 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, paragraph 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 of the United Nations, 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, paragraph 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 States Parties shall be convened by the Secretary-General of the United Nations. The subsequent meetings shall be convened by the Secretary-General 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 the present Convention. Such organizations shall declare, in their instruments of formal confirmation or accession, the extent of their competence with respect to matters governed by the present 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, of the present Convention, 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 the present 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 present 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 of the United Nations 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.

## Article 12

### “Equal recognition before the law”

86. In keeping with the provisions of the sharia, the Basic Law of Governance emphasizes the principle of equal recognition before the law; article 8 thereof states that “governance in the Kingdom of Saudi Arabia shall be based on justice, shura (consultation) and equality, in accordance with Islamic sharia”. Nothing in the Basic Law of Governance or in any other regulations in force in Saudi Arabia can be considered as being contrary to the principle of equal recognition before the law, in all circumstances, for all persons.

87. The legal capacity of persons with disabilities is assessed in the light of their entitlement and level of competence. It is a quality that the sharia bestows on a person that makes it possible for that person to be subject to a rule of law. There are two forms of legal capacity: capacity of obligation and capacity of performance. The first of these, which all persons possess by virtue of being human, refers to the capacity of a person to possess legal rights and obligations; in other words, all persons have rights vis-à-vis other persons. Capacity of performance is ascribed to individuals when they are deemed sufficiently intelligent and discerning to carry out actions and make statements in a manner recognized by the law; in other words, they are capable of exercising their rights and fulfilling their obligations vis-à-vis other persons. Persons with disabilities who are capable of managing their own affairs are therefore deemed to have capacity of obligation and performance.

88. The Saudi Government has adopted a number of measures to protect minors and other persons lacking legal capacity; this includes persons with disabilities who do not have a legal guardian to protect their rights. On 11 April 2006, for example, the Council of Ministers agreed to establish the Commission for Guardianship of the Property of Minors and Persons of Equivalent Status, which reports to the Minister of Justice. The Commission safeguards property that is not protected in practice or by a legal ruling. It has the authority to act as, inter alia, a legal or testamentary guardian, a custodian, an agent or a trustee, with all the obligations that each of those roles entails. It safeguards the property of persons who are deficient or lacking in legal capacity for whom a legal custodian has not been assigned and monitors the actions of custodians and legal and testamentary guardians.

89. Measures are in place to protect the right of persons with disabilities to equal treatment in regard to owning property, opening bank

accounts and accessing banking services. For example, on 30 November 2008, the Saudi Arabian Monetary Agency, the country's central bank, issued rules on opening and managing accounts at commercial banks in Saudi Arabia which included the following regulations and requirements to ensure that banks protect the transaction rights of persons with disabilities:

- Banks must grant priority to customers who have disabilities and must treat them with special care. They must ensure that they are received as promptly as possible and the procedures for the relevant banking services are expedited by, inter alia, providing assistance and sign-language interpreters.
- Banks must, upon request, open bank accounts for blind persons and provide them with ATM cards and chequebooks. Blind customers have the right to access all banking services, including telephone and Internet banking and credit cards, provided that they have been informed of the relevant conditions and regulations and have signed the requisite paperwork to confirm that such services have been rendered to them of their own free will and that they are aware of the associated risks and their legal liability in respect of all transactions carried out through such services.

## APPENDIX C: DISABILITY WELFARE LAW

### Article 1

The following terms and expressions, wherever mentioned in this Law, shall have the meanings assigned thereto, unless the context requires otherwise: <sup>[1]</sup>Disable Person: Any person suffering from a permanent, whether total or partial, impairment affecting his senses, or his physical, mental, communicative, learning or psychological abilities, in a manner that reduces his ability to perform daily activities compared to a non-disabled person.

Disability: Suffering from one or more of the following disabilities: <sup>[1]</sup>Visual impairment, hearing impairment, mental disability, physical and motor disability, learning

disabilities, speech disorders, behavioral and emotional disorders, autism, double and multiple disabilities, and other disabilities that require special care. <sup>[1]</sup>Prevention: The set of medical, psychological, social, educational, informational, and legal measures for prevention, limiting or early detection of disabilities as well as limiting their effects.

Care: Comprehensive care services offered to a disabled person in need of care due to his health condition, degree of disability or social status. <sup>[1]</sup>Rehabilitation: A coordinated process to utilize medical, social, psychological, educational and professional services for the purpose of empowering disabled persons to achieve their maximum potential of functional efficiency so as to perform natural and social activities with comply with the requirements of their natural and social environment and develop their capabilities of self-reliance and be effective members in the community up to the level of their endurance.

The Supreme Council: The Higher Council for the Affairs of Disabled persons.

### Article 2

The State shall guarantee the rights of disabled persons to access prevention, care and habilitation services, and shall encourage institutions and individuals to participate in charitable activities for the disabled. Such services shall be provided by the competent authorities as follows:

#### 1. Health Services:

Including: <sup>[1]</sup>a) Provision of prevention, treatment and rehabilitation services, including preventive genetic counselling, examinations and various laboratory tests for early detection of diseases, and necessary immunizations <sup>[1]</sup>b) Registering and monitoring cases of high-risk newborns and reporting the same to the competent authorities <sup>[1]</sup>c) Taking necessary measures to improve health care provided to disabled persons. <sup>[1]</sup>d) Training health workers and those responding to accidents on dealing with the injured and providing them with emergency care

during their transportation from the scene of the accident. (e) Training the families of disabled persons on providing care to them.

2. Educational Services: Providing educational services at all levels (pre-school, general, technical, and higher education) in a manner that suits the capabilities and needs of disabled persons and facilitates their enrolment, alongside with continuous assessment of curricula and services provided.

3. Training and Rehabilitation Services: Providing training and rehabilitation services in accordance with the type and degree of disability and labor market requirements, including the provision of vocational and social rehabilitation centers and appropriate training means.

4. Employment Services: Employment services include employment in jobs appropriate to the abilities and qualifications of disabled persons enabling them to discover their potentials and earn a living as other members of the society, as well as improvement of their work performance through training.

5. Social Services: Social services include programs contributing to the development of the capabilities of disabled persons to achieve integration in various aspects of public life and reduce the negative effects of disability.

6. Cultural and Sports Services: Cultural and sports services include making cultural and sports programs and facilities accessible to disabled persons to facilitate their participation in local and international events.

7. Media Services: Media services include raising awareness through audio, visual and print media in the following areas: (a) Raising awareness on disability, its types, causes, as well as detection and prevention methods. (b) Improving the image of disabled persons in the society, and raising awareness of their rights, needs, abilities, and contributions, as well as of services available to them, their duties towards themselves, and their role in the community. (c) Allocating programs targeting disabled persons to ensure their integration in the society. (d) Encouraging individuals and organizations to provide material and moral support to disabled persons, and promoting voluntary work for their benefit.

8. Complementary Services: Including: (a) Provision of safe and suitable public transportation means at discounted rates for the disabled person and the person accompanying him, depending on the nature of disability. (b) Provision of day and home care services. (c) Provision of supporting equipment.

### Article 3

The Supreme Council shall, in coordination with competent authorities, set the building

specifications to meet the needs of disabled persons in rehabilitation, training, educational, care and treatment facilities, and in public places and other locations intended to achieve the purposes contained in this Regulation, provided that the relevant agency issue the necessary implementing decisions.

#### **Article 4**

The Supreme Council shall, in coordination with the educational and training institutions, qualify and train national manpower in the field of disability, within the Kingdom and abroad, and exchange expertise in this field with other countries as well as relevant Arab and international organizations and bodies.

#### **Article 5**

The State shall grant disabled persons, whether individually or collectively, soft loans to initiate professional or commercial businesses that suit their abilities.

#### **Article 6**

Devices and equipment designed for disabled persons shall be exempted from customs duty, provided that they are identified in a list agreed upon with the Ministry of Finance and National Economy.

#### **Article 7**

A fund under the Council shall be established for the care of disabled persons to which donations, gifts, legacies, endowments and fines for violations to the regulations governing the services provided to disabled persons.

#### **Article 8**

A supreme council for the disabled persons shall be established, reporting to the Prime Minister. It shall be composed as follows: [SEP] President, appointed pursuant to a royal decree, and the following members: [SEP] Minister of Labor and Social Affairs. [SEP] Minister of Health. [SEP] Minister of Education. [SEP] Minister of Finance and National Economy. [SEP] General President of girls' Education. [SEP] Minister of Higher Education. [SEP] Minister of Municipal and Rural Affairs. [SEP] Secretary-General of the Council. [SEP] Two disabled persons, two businessmen concerned with the affairs of disabled persons, and two specialists in the field of disability, appointed by the Prime Minister based on a recommendation by the President of the Supreme Council for a term of four renewable years. [SEP] The President of the Supreme Council may designate one of the members to act on his behalf in his absence.

#### **Article 9**

The Supreme Council shall set the general policy in the field of disability and regulate the affairs of disabled persons, and shall, in particular, assume the following:<sup>[L][SEP]</sup>a) Issue regulations and decisions necessary for the implementation of this Law.<sup>[L][SEP]</sup>b) Propose amendments to the statutory provisions relating to the affairs of disabled persons in various fields; propose rules relating to the benefits and financial support to be provided to disabled persons or caretakers; and propose imposition of fines or modification thereof.<sup>[L][SEP]</sup>c) Monitor the implementation of this Law and its regulations, as well as other relevant laws and regulations.<sup>[L][SEP]</sup>d) Coordinate between the government agencies and the private sector with respect to services provided to disabled persons.<sup>[L][SEP]</sup>e) Encourage research on the scope, types and causes of disability, as well as prevention, treatment and management methods to overcome or limit its negative effects, and identify professions most appropriate for the training and rehabilitation of disabled persons in accordance with the degree and type of disability as well as labor market requirements.<sup>[L][SEP]</sup>f) Encourage organizations and individuals to establish programs and charitable organizations for the care and rehabilitation of disabled persons.<sup>[L][SEP]</sup>g) Review annual progress reports issued by relevant government agencies on prevention, rehabilitation and care services provided to disabled persons, and take necessary measures.<sup>[L][SEP]</sup>h) Issue regulations for the acceptance of donations, gifts, bequests and endowments.<sup>[L][SEP]</sup>i) Issue work rules for the Disability Welfare Fund.<sup>[L][SEP]</sup>j) Issue bylaws to regulate the work procedures of the Council.<sup>[L][SEP]</sup>k) Provide an opinion on international conventions relating to disabled persons, and on the Kingdom's accessions to regional and international organizations concerned with disability.

#### **Article 10**

The Supreme Council shall submit an annual report to the Prime Minister on its activities, services provided to disabled persons, and difficulties encountered, as well as on support for services provided to the disabled.

#### **Article 11**

a) The Supreme Council shall convene at least twice a year upon a call by its President or his designee.

b) Council meetings shall be valid if attended by majority of its members including the President or his designee. Its decisions shall be passed by a majority vote of attending members; in case of a tie, the chairman of the meeting shall have the casting vote.

#### **Article 12**

The Council shall have a general secretariat. The Secretary-General and staff shall be appointed according to the civil service laws. The Secretary-General shall:<sup>[L][SEP]</sup>a) Manage the tasks of the general secretariat.<sup>[L][SEP]</sup>b) Carry out the functions of the Council's secretary, prepare for meetings, record meeting minutes, and communicate its decisions to concerned agencies.<sup>[L][SEP]</sup>c)



Draft the implementing regulations of this Law.<sup>[1]</sup><sup>[SEP]</sup>d) Prepare technical studies required by the Council.<sup>[1]</sup><sup>[SEP]</sup>e) Prepare draft laws and regulations relating to the affairs of disabled persons, in coordination with relevant agencies.<sup>[1]</sup><sup>[SEP]</sup>f) Prepare the Council's draft budget.<sup>[1]</sup><sup>[SEP]</sup>g) Represent the Council before government agencies and other relevant entities.<sup>[1]</sup><sup>[SEP]</sup>h) Form committees of experts and specialists to review issues related to the affairs of disabled persons. i) Prepare the Council's annual report.<sup>[1]</sup><sup>[SEP]</sup>j) Any other tasks assigned to him by the Council.

### **Article 13**

The Supreme Council may form a preparatory committee from among its members or others and determine its powers and work procedures.

### **Article 14**

The Council shall have a budget subject to the provisions governing the state budget.

### **Article 15**

All applicable laws, regulations, decisions, and instructions relating to disabled persons shall be amended in line of this Law and its regulations within a period not exceeding three years from the date of its publication.

### **Article 16**

This Law shall be published in the Official Gazette and shall enter into force after one hundred and eighty days from the date of its publication.

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