

**TOWARDS A HIGHER STANDARD FOR INTERNATIONAL DISABILITY RIGHTS
AND SOCIAL JUSTICE:
An Islamic Perspective on the Universal Right to Social Welfare for People with Special
Challenges**

by

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Abstract

Although people with disabilities (PWDs) experience significant marginalization and vulnerability, they are not receiving social income assistance in the Middle East and North Africa (MENA) despite of their right under the United Nations Convention on the Rights of Persons with Disabilities.

Social welfare laws in the MENA should be reformed to include disability income assistance. These laws (that were inherited from the Western colonists) did not progress as much as their Western counterpart. This legal reform should consider the evolution of Western social welfare systems, which are based on liberal equality theories. This legal transplant of a liberal secular system into the MENA's Islamic background requires testing the compatibility between liberal and Islamic moral values.

In order to do this, first, I will analyze the strengths and weaknesses of these liberal theories in relation to the public policy to address the medical, economic and social needs of PWDs. Then, I will use my own amalgamation of these liberal ideas to form an Islamic version of this new liberal theory while showing their compatibility with my own Islamic perspective on liberty and equality (i.e. proposing a common ground between liberal and Islamic moral values). Next, I will use this common ground to explain *Qur'ānic* rules about *Zakāh* (Islamic social tax) with my own new interpretation that has a commitment to social justice and a consideration of both liberal and Islamic moral values. Finally, based on this new interpretation, I will offer a new model for social welfare systems in the MENA.

Therefore, based on the above, entitlements to disability supports can be justified and delivered through the governmental implementation of *Zakāh*. This implementation is feasible as it can be designed and delivered in Islamic countries with similar or better results than in Western liberal countries. Such a system with specific reference to *Qur'ānic* teachings is both socially and politically preferable to the imposition of traditional Western approaches to rights and services. This proposal would lead to establishing a higher standard for international disability rights (more specifically, the universal human right to social welfare) and establishing a higher standard for social justice.

Preface

This dissertation is an original, unpublished, independent work by the author, Husam Eddin Hawa.

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List of Abbreviations

ADA	Americans with Disabilities Act
BC	British Columbia
BHC	Basic Human Capability
BHCs	Basic Human Capabilities
BHR	Basic Human Right
BHRs	Basic Human Rights
CAP	Canada Assistance Plan
CCD	Council of Canadians with Disabilities
CDHRI	Cairo Declaration on Human Rights in Islam
CHST	Canada Health and Social Transfer
CPP	Canada Pension Plan
DTC	Disability Tax Credit
EI	Employment Insurance
EL	Employer Liability
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICF	International Classification of Functioning, Disability and Health
ID	Identification Card
MENA	Middle East and North Africa
NGO	Non-governmental Organization
NGOs	Non-governmental Organizations

OAS	Old Age Security
OIC	Organization of the Islamic Conference/Organization of Islamic Cooperation
PF	Provident Funds
PWD	Person with a Disability
PWDs	People with Disabilities
RCP	Responsibility-Catering Prioritarianism
RDTC	Refundable Disability Tax Credit
SI	Social Insurance
UBC	University of British Columbia
UDHR	Universal Declaration of Human Rights
UI	Unemployment Insurance
UK	United Kingdom
UN	United Nations
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities
UPIAS	Union of the Physically Impaired against Segregation
USA	United States of America
USA-SSA	United States of America Social Security Administration
WHO	World Health Organization

Transliteration Chart

Arabic	Romanization
اَ	a
اُ	u
اِ	i
اَ اَ	doubling the letter or digraph
اَ اَ; اَ اَ	an
اُ اُ	un
اِ اِ	in
ء	,
ا	omit
آ	ā; 'ā
اَ اَ	ā
اَ اِ	á
ال	al-
ب	b
ت	t
ث	th
ج	j

ح	h
خ	kh
د	d
ذ	dh
ر	r
ز	z
س	s
ش	sh
ص	ṣ
ض	ḍ
ط	ṭ
ظ	ẓ
ع	‘
غ	gh
ف	f
ق	q
ك	k
ل	l
م	m
ن	n

ه	h
ة	h; t
و	w
وُ	ū
وُ	aw
وُ	ūw
وُ	aww
ي	y
يَ	ī
يَ	ay
يَ	ī; īy
يَ	ayy

Glossary

<i>Aḥādīth:</i>	Plural of <i>Ḥadīth</i> .
<i>al-‘Āmilīna ‘alayhā:</i>	People who devoted their time to do charitable work.
<i>al-Anṣār:</i>	Supporters/Inhabitants of <i>al-madīnah al-munawarah</i> .
<i>Dhā matrabah:</i>	Those down in the dust.
<i>al-Dhullah:</i>	Humiliation.
<i>Fī:</i>	In.
<i>Fiqh:</i>	Islamic jurisprudence.
<i>Fī al-riqāb:</i>	People who are living in abusive relationships.
<i>Fiṭrah:</i>	Intrinsic nature that has the power of intuitive reason/the natural sense of right and wrong.
<i>al-Fuqarā’:</i>	The poor.
<i>Garam:</i>	Attachment to a harsh condition.
<i>Gharāmah:</i>	A Financial hardship.
<i>al-Ghārimīn:</i>	People who are forced to borrow and are not able to repay their debts for reasons outside their control.
<i>Ḥadīth:</i>	Traditional narratives of the sayings and practices of Prophet Muḥammad.
<i>Ḥadīth Ṣaḥīḥ:</i>	<i>Ḥadīth</i> considered authentic by traditionalists.
<i>Ḥajj:</i>	Pilgrimage to <i>Mecca</i> .
<i>al-Ḥanafī School:</i>	A school of Islamic jurisprudence founded by Abū Ḥanīfah Nu‘mān ibn Thābit ibn Zū‘ā ibn Marzubān.
<i>al-Ḥanbalī school:</i>	A school of Islamic jurisprudence founded by Abū ‘Abd Allāh Aḥmad ibn Muḥammad ibn Ḥanbal al-Shaybānī.

<i>Hudūd Allāh:</i>	God's borders
<i>Ijtihād:</i>	Reinterpreting the traditional texts that established Islamic Law.
<i>Jihad:</i>	Bigger <i>Jihad</i> : Internal spiritual struggle in resisting selfish temptations for God's cause/physical struggle in doing good deeds for God's cause such as taking care of people with disabilities. Smaller <i>Jihad</i> : Armed struggle/self-defence for God's cause.
<i>Karāmah:</i>	Inherent human dignity/capacity to treat each other with a mutual respect.
<i>Li:</i>	For.
<i>al-Madīnah al-Munawarah:</i>	A city in Saudi Arabia.
<i>al-Mālikī school:</i>	A school of Islamic jurisprudence founded by Mālik ibn Anas ibn Mālik ibn Abī 'Āmir al-Aṣḥabī.
<i>al-Masākīn:</i>	People who are in harsh circumstances due to having special needs (such as people with disabilities, elderly people and orphans).
<i>al-Maskanah:</i>	This word is related to the word <i>al-Masākīn</i> and it comes from the word <i>Sukūn</i> .
<i>Mecca:</i>	A city in Saudi Arabia.
<i>Meccan:</i>	Inhabitants of <i>Mecca</i> .
<i>al-Miskīn:</i>	Single of <i>al-Masākīn</i> .
<i>Niṣāb:</i>	The minimum <i>Zakāh</i> able income = 85 grams of gold at world prices.
<i>Qanāṭīr:</i>	Plural of <i>Qinṭār</i> .
<i>Qinṭār:</i>	1200 Ounces of gold.
<i>al-Qur'ān al-Karīm:</i>	The Holy <i>Qur'ān</i> /the divine book of Islam.
<i>Qur'ānic:</i>	<i>Qur'ān</i> + ic.
<i>Ramaḍān:</i>	A month in the lunar Islamic calendar.
<i>Ṣadaq:</i>	Believe.

<i>Ṣadaqah:</i>	Charity.
<i>Ṣadaqat:</i>	Plural of <i>Ṣadaqah</i> .
<i>Ṣalāh:</i>	Observing the five daily ritual prayers.
<i>Ṣawm:</i>	Fasting in the month of <i>Ramaḍān</i> from dawn till sunset.
<i>al-Shāfi'ī school:</i>	A school of Islamic jurisprudence founded by Abū 'Abd-Allāh Muḥammad ibn Idrīs al-Shāfi'ī.
<i>Shahādah:</i>	Declaring that 'there is no god but Allāh (the Creator) and Muḥammad is His Messenger'.
<i>Shari'ah:</i>	Islamic Law.
<i>Shi'ah Islam:</i>	The second-largest denomination of Islam.
<i>Shirk:</i>	Opposite of <i>Tawḥīd</i> /associating partners with God/attributing holiness to a created thing.
<i>al-Shūrā:</i>	Consultation
<i>Sukūn:</i>	Serenity or inability to move due to a disability or weakness.
<i>al-Sunnah:</i>	The <i>Sunnah</i> /prophetic practice and exemplary behavior/actions and judgments of Prophet Muḥammad.
<i>Sunnī Islam:</i>	The largest denomination of Islam.
<i>Tanzimāt:</i>	Large-scale reforms/reorganizing.
<i>Taqīd:</i>	Blind following/uncritical imitation.
<i>Tawḥīd:</i>	Monotheism.
<i>Waqf:</i>	Islamic Endowment.
<i>Zakāh:</i>	Islamic social tax/publicly disclosed charity/religiously obligatory charity (i.e. it is not voluntary and it is not arbitrary).
<i>Zakāhable:</i>	<i>Zakāh</i> + able/Taxable.
<i>Zakka:</i>	Purify.

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Dedication

This work is dedicated to my mother, my wife, and my son Adam Hawa, who have been a source of great motivation and inspiration to my new ideas.

Chapter 1: Introduction

1.1 The roadmap for Chapter 1

Entitlements to disability rights should be a guaranteed universal human right, even if there is no human law that supports these rights. On the other hand, disability rights should not be simply means-tested benefits or acts of sympathy and compassion towards people with disabilities (PWDs). Therefore, due to the fact that disability rights are guaranteed rights and not simply means-tested benefits, they should not be denied by the fact a person with a disability (PWD) has income and/or asset.

In this chapter, I will provide an overview of later parts of this dissertation. I will also provide an introduction and a justification for my research project. I will explain the universal consensus on basic human rights (BHRs) for PWDs, which is reflected in the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). I will introduce the research question and the literature review. I will discuss the politics of special rights and the moral source of rights. I will explain why a legal system based on universal natural BHRs is both socially and politically preferable to the imposition of traditional Western approaches to rights and services.

1.2 The universal consensus on BHRs for PWDs

Throughout history, PWDs have been viewed as individuals who need society's protection based on sympathy (instead of respect). While some countries have enacted comprehensive laws to protect the BHRs of PWDs, many other countries have not enacted such laws. Because of discriminatory practices, PWDs are living in the shadows of the society. Therefore, their rights

have been ignored. Therefore, the UNCRPD as a universal, legally binding standard was needed to ensure that the rights of PWDs are guaranteed everywhere. UNCRPD is an important step towards changing the negative attitudes about disability and ensuring that the society should provide all people (including PWDs) with opportunities to live their life to its fullest potential.

According to Article 1 of the UNCRPD, “The purpose of the [UNCRPD] is to promote, protect and ensure the full and equal enjoyment of all [BHRs] and fundamental freedoms by all [PWDs], and to promote respect for their inherent dignity.”¹ Therefore, this international human rights document of the United Nations (UN) ensures that PWDs enjoy full equality under the law. Additionally, according to Article 3 of the UNCRPD, the states parties should follow important principles (that should influence the promotion, formulation and evaluation of the policies at the national, regional and international levels in order to equalize opportunities for PWDs) including:

(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 [PWDs] as part of human diversity and humanity; (e) Equality of opportunity; (f) Accessibility; ...²

The preamble of the UNCRPD focuses on many points including that the states parties are:

(a) Recalling the principles proclaimed in the Charter of the [UN] 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 [UN], in the Universal Declaration of Human Rights [(UDHR)] 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

¹ *United Nations Convention and Optional Protocol on the Rights of Persons with Disabilities*, UN Doc A/61/611 (2006), 2515 UNTS 3, art 1, online: United Nations Treaty Collection <<http://treaties.un.org>> [UNCRPD].

² *Ibid*, art 3.

any kind, (c) Reaffirming the universality, indivisibility, interdependence and interrelatedness of all [BHRs] and fundamental freedoms and the need for [PWDs] to be guaranteed their full enjoyment without discrimination, ... (t) Highlighting the fact that the majority of [PWDs] live in conditions of poverty, and in this regard recognizing the critical need to address the negative impact of poverty on [PWDs], ... (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 [PWDs] 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 [PWDs], ...³

The UNCRPD is the first comprehensive human rights treaty of the 21st century. It was adopted by the UN General Assembly by resolution A/RES/61/106 on December 13, 2006. It was drafted more quickly than any other human rights treaty, completed in only eight sessions of an Ad Hoc Committee of the General Assembly from 2002 to 2006. The UNCRPD was opened for signature in accordance with its article 42 on March 30, 2007. It is the first human rights convention to be open for signature by a regional integration organization (i.e. the European Union). On its opening day, there were 82 signatories to the UNCRPD, 44 signatories to its Optional Protocol. This is the highest number of signatories in history to any UN Convention on its opening day. It came into force following ratification by the 20th party in accordance with its article 45(1) on May 3, 2008.

As of May 1, 2014, there are 158 signatories to the UNCRPD, 92 signatories to its Optional Protocol, 145 ratifications/accessions to the UNCRPD, and 80 ratifications/accessions to its Optional Protocol. Moreover, there are many Arab and Muslim states signatories, ratifications

³ *Ibid*, Preamble.

and accessions to the UNCRPD including: Afghanistan, Algeria, Azerbaijan, Bahrain, Bangladesh, Bosnia and Herzegovina, Egypt, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Mauritania, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, State of Palestine, Sudan, Syria, Tunisia, Turkey, Turkmenistan, United Arab Emirates, and Yemen.⁴ Therefore, this huge international interest in the UNCRPD reflected the universal consensus on the BHRs for PWDs including the universal basic human right (BHR) to equality and the universal BHR to social welfare (specifically, disability social income assistance).

The UNCRPD is a human rights instrument with an explicit social development dimension. It takes to a new height the shift from viewing PWDs as objects of charity and medical treatment to viewing PWDs as subjects with rights who should be active members of the society. Therefore, they should be able to claim these rights and make decisions for their own lives based on their own free and informed consent. It adopts a broad categorization of PWDs and reaffirms that people with all levels of disabilities must enjoy all BHRs and fundamental freedoms.

The UNCRPD covers areas such as equality (and non-discrimination) in health, personal mobility, accessibility, education, employment, habilitation and rehabilitation, and participation in political life. However, the UNCRPD does not create any new entitlement. The UNCRPD is only expressing the existing universal BHRs in a new way in order to address the situation of PWDs and their needs. The UNCRPD's Articles 4 - 32 define the rights of PWDs and the obligations of states parties towards PWDs. Many of these mirror rights affirmed in other UN

⁴ United Nations Web Services Section, the Department of Public Information, *Convention and Optional Protocol Signatures and Ratifications*, online: United Nations Enable <<http://www.un.org/disabilities>>.

conventions such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR), but with specific obligations ensuring that they can be fully realized by PWDs.

States parties to the UNCRPD are obligated to introduce measures that promote the universal BHRs of PWDs without discrimination. These measures should include eliminating laws and practices that discriminate against PWDs, enacting anti-discrimination laws, considering PWDs in adopting new policies, making goods, services, and facilities accessible to PWDs, ensuring an adequate standard of living for PWDs, and ensuring their right to social protection (including social assistance for disability-related needs). However, the UNCRPD's articles 5 and 28 are the most two important articles of the UNCRPD related to this dissertation, because they confirm the universal BHR to equality for PWDs and the universal BHR to social welfare for PWDs (specifically, disability social income assistance).

The UNCRPD's article 5 (titled "Equality and non-discrimination") confirms the universal BHR to equality for PWDs as follow:

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 [PWDs] 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 [PWDs] shall not be considered discrimination under the terms of the [UNCRPD].⁵

⁵ UNCRPD, *supra* note 1, art 5.

The UNCRPD's article 28 (titled "Adequate standard of living and social protection") confirms the universal BHR to social welfare for PWDs (specifically, disability social income assistance) as follow:

1. States Parties recognize the right of [PWDs] 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 [PWDs] 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 [PWDs] 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 [PWDs], in particular women and girls with disabilities and older [PWDs], to social protection programmes and poverty reduction programmes; (c) To ensure access by [PWDs] and their families living in situations of poverty⁶ to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care; (d) To ensure access by [PWDs] to public housing programmes; (e) To ensure equal access by [PWDs] to retirement benefits and programmes.⁷

In order for the states parties to the UNCRPD to implement their obligations, the UNCRPD's article 4 requires that

1. States Parties undertake to ensure and promote the full realization of all [BHRs] and fundamental freedoms for all [PWDs] 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 [UNCRPD]; (b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against [PWDs]; (c) To take into account the protection and promotion of the [BHRs] of [PWDs] in all policies and programmes; (d) To refrain from engaging in any act or practice that is inconsistent with the [UNCRPD] and to ensure that public authorities and institutions act in conformity with the [UNCRPD]; ... 2. With regard to economic, social

⁶ Whereas Article 28, 2 (d) of the UNCRPD provides a state obligation only to families living in poverty, I would argue that social welfare benefits for PWDs should not be means-tested benefits, because (as we will see in Chapter 3) people who are vulnerable due to disability should be in a separate category of beneficiaries of the social welfare system from the category that includes people who are vulnerable due to poverty (i.e. disability and poverty are two different problems and they should be confronted separately in two different solutions).

⁷ *Ibid*, art 28.

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 [UNCPRD] that are immediately applicable according to international law.... 4. Nothing in the [UNCPRD] shall affect any provisions which are more conducive to the realization of the rights of [PWDs] 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 [BHRs] and fundamental freedoms recognized or existing in any State Party to the [UNCPRD] pursuant to law, conventions, regulation or custom on the pretext that the [UNCPRD] does not recognize such rights or freedoms or that it recognizes them to a lesser extent.⁸

1.3 The research question and the literature review

Although it looks as if the UNCPRD has put a high price tag on the BHRs for PWDs as a large part of the population, it is actually good economics to ensure that PWDs are able to live their lives to its fullest potential.

While [PWDs] face higher unemployment rates than the rest of the population in virtually every country, studies show that the job performance of [PWDs] is as good, if not better, than the general population. High retention rates and less absenteeism have more than offset fears that it is too costly to accommodate the needs of [PWDs] in the workplace. Furthermore, fears that hiring [PWDs] add significant costs to employers are overblown. A 2003 survey in the United States found that almost three-quarters of employers reported that employees with disabilities did not require any special accommodation.⁹

If all obstacles were removed from their way, PWDs would be consumers, entrepreneurs, employees, and taxpayers. Therefore, it makes economic sense for states to adopt the UNCPRD, because PWDs can contribute to the society a wide range of talents, skills and expertise.¹⁰ Moreover, in regard to its implementation, the UNCPRD demands the “progressive realization” of its provisions considering each state party’s resources. Additionally, for states where resources

⁸ *Ibid*, art 4.

⁹ United Nations Web Services Section, the Department of Public Information, “Why a Convention?” in *Convention on the Rights of Persons with Disabilities*, online: United Nations Enable <<http://www.un.org/disabilities>>.

¹⁰ *Ibid*.

are scarce, international assistance would help. Therefore, the UNCRPD's Article 32 requires that states parties should provide development assistance to the efforts of the developing countries to implement the UNCRPD.¹¹

However, by reviewing materials that discuss social welfare systems in the Middle East and North Africa (MENA), it can be easily noticed that PWDs (who are among the most vulnerable people)¹² are not receiving social income assistance. Therefore, these social welfare laws in the MENA should be reformed to include disability social income assistance, because these laws (that were inherited from the Western colonists) did not progress as much as their Western counterpart social welfare laws. This legal reform should consider the evolution of Western social welfare systems, which are based on liberal equality theories. This legal transplant of a liberal secular system into the MENA's Islamic background requires testing the compatibility between liberal and Islamic moral values. Therefore, I should discuss liberal equality theories in order to choose which one of them can be used to confirm the universal BHR to equality for PWDs and the universal BHR to social welfare (more specifically, disability social income assistance).

¹¹ *UNCRPD*, *supra* note 1, art 32.

¹² It must be clear here that I am referring to PWDs collectively, because some critics would argue that there are some individuals with the least disabilities may not be particularly vulnerable. Some critics would ask that if there is a range of disabilities (some of which are not severe), is it always justifiable to place the needs of PWDs ahead of other disadvantaged groups? I would argue that the needs of PWDs (as well as orphaned children and seniors) should be placed ahead of other disadvantaged groups. See subsection 3.6.2.1, below, for more on this topic. In general, on balance, PWDs are a significantly disadvantaged group. According to the World Health Organization and the World Bank, "People with disabilities are particularly vulnerable to deficiencies in services such as health care, rehabilitation, and support and assistance. ... Coordination between the health, social and housing sectors can ensure adequate support and reduce vulnerability." World Health Organization & the World Bank, *World Report on Disability* (Geneva: WHO Press, 2011) at 9, 14, online: WHO <www.who.int>.

In order to do this, first, I will analyze the strengths and weaknesses of these liberal equality theories in relation to the public policy to address the medical, economic and social needs of PWDs while trying to find the most adequate candidate liberal equality theory to deal with issues of justice for PWDs. Second, I will use my own amalgamation of these liberal equality theories (which is the best candidate) to show their compatibility with my own Islamic perspective on liberty and equality and to show my proposed common ground between the liberal moral values and the Islamic moral values. Third, I will use this common ground (or my proposed Islamic version of my new liberal equality theory) to reinterpret the *Qur'ānic* rules about *Zakāh* (Islamic social tax) with my own interpretation that has a commitment to social justice and a consideration of both liberal and Islamic moral values. Lastly, based on this new interpretation, I will offer a new model for social welfare systems in the MENA.

Therefore, I will show how these moral rules can allow for the legal transplant of Western liberal secular social welfare rules into the MENA's religious Islamic background and even the creation of a better model for social welfare systems in the MENA (while establishing a higher standard for international disability rights and establishing a higher standard for social justice). Therefore, entitlements to disability supports based on the above can be justified and delivered through the governmental implementation of the Islamic system of *Zakāh*. This implementation is feasible as it can be designed and delivered in Islamic countries with similar or better results than in Western liberal countries. Such a system with specific reference to *Qur'ānic* teachings is both

socially and politically preferable to the imposition of traditional Western approaches to rights and services.¹³

1.3.1 Searching for the best candidate liberal theory to achieve justice for PWDs

In Chapter 2, I will try to find the best candidate liberal equality theory that is able to confirm the universal BHR to equality for PWDs and the universal BHR to social welfare (more specifically, disability social income assistance). Therefore, I will analyze the strengths and weaknesses of these liberal equality theories in relation to the public policy to address the medical, economic and social needs of PWDs. However, the success of any liberal equality theory to address disability as an issue of equality would depend on its perception of disability, because different scholars have conceived of disability in different ways. Therefore, I will provide a critique of liberal equality theories for their failure in addressing disability as an issue of equality.¹⁴

Due to the fact that the public perception of disability has changed over time (from describing disability as a form of punishment, to a health condition, to a source of sympathy, to a cause for inability to work, to a result of oppression, to a part of a continuum of human abilities, to a part of the satisfaction-demanding consumer's personal identity, and finally to describing disability as an absence of one or more of the rights-based access to citizenship dimensions), I will review the strengths and weaknesses of the different models of disability (including the [im]moral model of disability, the biomedical/expert/professional model of disability, the tragedy/charity model of disability, the economic model of disability, the social-political/adapted model of disability, the

¹³ The following three subsections below (i.e. subsection 1.3.1, subsection 1.3.2, and subsection 1.3.3) will provide an overview of later parts of this dissertation.

¹⁴ This subsection 1.3.1 provides an overview of Chapter 2 of this dissertation.

spectrum model of disability, the customer/business/market model of disability, and the rights-based access to citizenship/unified model of disability). In addition, I will discuss questions such as: What is the current definition of disability at the international level? Which one of these different models of disability has been adopted at the international level?¹⁵

¹⁵ For a detailed discussion about the different models of disability, there are some sources can be consulted including (but not limited to): Jerome E Bickenbach, "Minority Rights or Universal Participation: The Politics of Disablement" in Melinda Jones & Lee Ann Bassar Marks, eds, *Disability, Divers-Ability and Legal Change* (The Hague: Martinus Nijhoff, 1999) 101 [Bickenbach, "Minority Rights"]; Jerome E Bickenbach, *Physical Disability and Social Policy* (Toronto: University of Toronto Press, 1993) [Bickenbach, *Physical Disability*]; Jerome E Bickenbach et al, "Models of Disablement, Universalism and the International Classification of Impairments, Disabilities and Handicaps" (1999) 48: 9 Soc Sci Med 1173 [Bickenbach et al, "Models of Disablement"]; Jerome E Bickenbach et al, "Disability and Cultural Variation: The ICIDH-2 Cross-Cultural Applicability Research Study" in Jerome E Bickenbach et al, eds, *Disability and Culture: Universalism and Diversity* (Seattle: Hogrefe and Huber, 2001) [Bickenbach et al, "Disability and Cultural Variation"]; Dianne Pothier & Richard Devlin, *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* (Vancouver: UBC Press, 2006); Deborah Kaplan, "The Definition of Disability: Perspective of the Disability Community" (2000) 3:2 J Health Care L & Pol'y 352; Linda Waimari Nikora et al, *Disabled Maori and Disability Support Options* (Hamilton: University of Waikato, 2004), online: University of Waikato <<http://www.waikato.ac.nz>>; Anita Silvers, "Reprising Women's Disability: Feminist Identity Strategy and Disability Rights" (1998) 13 Berkeley Women's L.J. 81 [Silvers, "Reprising Women's Disability"]; Anita Silvers, "Formal Justice" in Anita Silvers, David Wasserman & Mary B Mahowald, eds, *Disability, Difference, Discrimination: Perspectives on Justice in Bioethics and Public Policy* (Lanham, Maryland: Rowman & Littlefield, 1998) [Silvers, "Formal Justice"]; David Wasserman, "Distributive Justice" in Anita Silvers, David Wasserman & Mary B Mahowald, eds, *Disability, Difference, Discrimination: Perspectives on Justice in Bioethics and Public Policy* (Lanham, Maryland: Rowman & Littlefield, 1998) [Wasserman, "Distributive Justice"]; Mary B. Mahowald, "Response" in Anita Silvers, David Wasserman & Mary B. Mahowald, *Disability, Difference, Discrimination: Perspectives on Justice in Bioethics and Public Policy* (Lanham, Maryland: Rowman & Littlefield Publishers, 1998); Michael Stein, "Disability Human Rights" (2007) 95 Cal L Rev 75; Ravi Malhotra, "Martha Nussbaum's Capabilities Approach and Equality Rights for People with Disabilities: Rethinking the Granovsky Decision" (2009) 45 Sup Ct L Rev 61; James I Charlton, *Nothing about us without us: disability oppression and empowerment* (Berkeley: University of California Press, 2000); Michigan Disability Rights Coalition, *Economic Model of Disability*, online: MDRC <<http://www.copower.org>> [MDRC]; Rich Donovan, *Emerging Giant—Big is Not Enough, The Global Economics of Disability* (New York: Fifth Quadrant Analytics, 2012), online: Fifth Quadrant Analytics <<http://returnondisability.com>>; Mark Priestley, *The Union of the Physically Impaired against Segregation [(UPIAS)] and the Disability Alliance discuss Fundamental principles of Disability-Being a summary of the discussion held on 22nd November, 1975 and containing commentaries from each organization* (London: UPIAS, 1997), online: University of Leeds <<http://www.leeds.ac.uk>>; Tom Shakespeare & Nicholas Watson, "The social model of disability: an outdated ideology?" (2002) 2 Research in Social Science & Disability Journal 9; Harlan Hahn, "Civil Rights for Disabled Americans: The Foundation of a Political Agenda" in Alan Gartner & Tom Joe, eds, *Images of the Disabled, Disabling Images* (New York: Praeger, 1987) 181 [Hahn, "Civil Rights"]; Harlan Hahn, "The political implications of disability definitions and data" (1993) 4: 3 Disability Policy Studies 41 [Hahn, "The political implications"]; Mike Oliver, *The Politics of Disablement* (London: The MacMillan Press, 1990); Susan Wendell, "Toward a Feminist Theory of Disability" in Debra Shogan, ed, *A Reader in Feminist Ethics* (Toronto: Canadian Scholars' Press, 1993); Martha Minow, *Making all the Difference: Inclusion, Exclusion and American Law* (Ithaca, New York: Cornell University Press, 1990); Jonathan Penney, "A Constitution for the Disabled or a Disabled Constitution?: Toward a New Approach to Disability for the Purposes of Section 15(1)" (2002) 1 JL & Equality 83; Doris Fleischer & Frieda Zames, *The Disability Rights Movement: From Charity to*

While most of these liberal equality theories focus more on liberty than on equality, the UNCRPD tries to guarantee both liberty and equality for PWDs by requiring states parties to use both anti-discrimination laws and social welfare laws to address issues of justice for PWDs. Therefore, I will discuss questions such as: What is so important about social welfare laws? Why anti-discrimination laws alone are limited in addressing issues of justice for PWDs? Is there a conflict between Liberty and Equality in the first place? Should states have a positive obligation to alleviate inequalities as well as an obligation not to engage in conduct that causes inequalities?¹⁶

Confrontation (Philadelphia, Pennsylvania: Temple University Press, 2011); M David Lepofsky, "The Duty to Accommodate: A Purposive Approach" (1992) 1 Can Lab LJ 1; Anne M Molloy, "Disability and the Duty to Accommodate," (1992) 1 Can Lab LJ 23; Evelyn Kallen, *Label Me Human: Minority Rights of Stigmatized Canadians* (Toronto: University of Toronto Press, 1989); Sally French, "Disability, Impairment or Something In Between?" in John Swain et al, eds, *Disabling Barriers – Enabling Environments* (London: Sage, 1993) 17; Gary L Albrecht & Lois M Verbrugge, "The global emergence of disability" in Gary L Albrecht, Ray Fitzpatrick & Susan C Scrimshaw, eds, *Handbook of social studies in health and medicine* (London: Sage, 2000) 293; Gareth Williams, "Theorizing disability" in Gary L Albrecht, Katherine D Seelman & Michael Bury, eds, *Handbook of disability studies* (Thousand Oaks: Sage, 2001) 123; Liz Crow, "Including all our lives" in Jenny Morris, ed, *Encounters with strangers: feminism and disability* (London: Women's Press, 1996) 213; Irving Kenneth Zola, "Disability statistics, what we count and what it tells us: A personal and political analysis" (1993) 4: 3 Disability Policy Studies 9; Scott Campbell Brown, "Methodological paradigms that shape disability research" in Gary L Albrecht, Katherine D Seelman & Michael Bury, eds, *Handbook of disability studies* (Thousand Oaks: Sage, 2001) 145; and Mark Deal, *Attitudes of disabled people toward other disabled people and impairment groups* (PhD dissertation, City University London, 2006), (London: British Library EThOS Service, 2006), online: Enham <<http://www.enham.org.uk>>.

¹⁶ For a detailed discussion about these issues, there are some sources can be consulted including (but not limited to): Jerome E Bickenbach, "Disability Human Rights, Law, and Policy" in Gary L Albrecht, Katherine D Seelman & Michael Bury, eds, *Handbook of disability studies* (Thousand Oaks: Sage, 2001) 565 [Bickenbach, "Disability Human Rights"]; Jerome E Bickenbach, "Disability and Equality" (2003) 2 JL & Equality 7 [Bickenbach, "Disability and Equality"]; Bickenbach, "Minority Rights", *supra* note 15; Bickenbach, *Physical Disability*, *supra* note 15; Douglas Rae, *Equalities* (Cambridge, Massachusetts: Harvard University Press, 1981); Christine M Koggel, "A Feminist View of Equality and its Implications for Affirmative Action" (1994) 7 Can JL & Juris 43; Patricia Illingworth & Wendy E Parmet, "Positively Disabled: The Relationship between the Definition of Disability and Rights under the ADA" in Leslie Pickering Francis & Anita Silvers, eds, *Americans with Disabilities: Exploring Implications of the Law for Individuals and Institutions* (New York: Routledge, 2000) 3; Michel Rosenfeld, *Affirmative Action and Justice: A Philosophical and Constitutional Inquiry* (New Haven: Yale University Press, 1991); Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997); Shelagh Day & Gwen Brodsky, "The Duty to Accommodate: Who Will Benefit?" (1996) 75 Can Bar Rev 433; Penney, *supra* note 15; Donna Greschner, "Does Law Advance the Cause of Equality?" (2001) 27 Queen's LJ 299; Isaiah Berlin, "Two Concepts of Liberty" in David Dyzenhaus, Sophia Reibetanz Moreau & Arthur Ripstein,

In order to explain my own Islamic perspective on liberty and equality, I need to explain my proposed Islamic version of my new liberal equality theory, which is my own amalgamation of the most adequate candidate liberal equality theories that can (with some modifications) address disability as an issue of equality. Therefore, I will discuss questions such as: Is there any liberal equality theory that might be compatible with my own Islamic perspective on liberty and equality? Which one of these different liberal equality theories can address issues of justice for PWDs? Which one of them can confirm the universal BHR to equality for PWDs and the universal BHR to social welfare (more specifically, disability social income assistance)?

For liberals, disability is a problem that tests the limits of theoretical positions on equality. Liberal equality theories disagree on the meaning of equality and on the role of the state in addressing inequality. In reviewing the different liberal equality theories, I will start with Michel Rosenfeld's theory of equality in order to use it as an introduction to the other liberal equality theories.¹⁷ From both philosophical and constitutional law perspectives, he tries to defend the justice of affirmative action programs. He tried to offer an "integrated philosophical and constitutional justification of affirmative action".¹⁸

eds, *Law and Morality: Readings in Legal Philosophy* (Toronto: University of Toronto Press, 2007) 342; Isaiah Berlin & Ramin Jahanbegloo, *Conversations with Isaiah Berlin* (Peter Halban, 1992); Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, Massachusetts: Harvard University Press, 2000) [Dworkin, *Sovereign Virtue*]; Ronald Dworkin, "Do Values Conflict? A Hedgehog's Approach" (2001) 43: 2 *Ariz L Rev* 251 [Dworkin, "Do Values Conflict?"]; and Tom W Patch, *Equal in Theory: An Assessment of Anti-Discrimination Statutes as Equality Tools for People with Disabilities* (LLM thesis, UBC - Faculty of Law, 2005), (Vancouver: UBC - cIRcle, 2009).

¹⁷ Rosenfeld, *supra* note 16.

¹⁸ *Ibid* at 283.

Rosenfeld based his theory (that he calls "justice as reversible reciprocity") on Lawrence Kohlberg's principle of justice as reversibility (i.e. placing oneself in the other people's circumstances) and on Jiirgen Habermas' theory of communicative ethics¹⁹ (i.e. "communicative action, through the ideal speech situation that is supposed to purge all distortions from the dialogical process, leads to the emergence of commonly shared generalizable interests").²⁰ This theory requires that all participants in the dialogical process should accept the equality of opportunity (as the mediating principle);²¹ and they should consider all perspectives of participants (in determining the validity of affirmative action programs). Therefore, this theory would allow for balancing between individual and society concerns,²² and balancing between identity and difference concerns.²³ Based on a reversal of perspectives, a dialogue aimed at reaching agreement should be constructed. This reversal is an imaginative reversal of roles; and all claims that might result from this reversal are legitimate. Conflicts between these legitimate claims are resolved through a dialogue by ideal representatives. When this dialogue ends in agreement, justice should be found. Therefore, affirmative action programs would be justified as a reasonable compromise between all participants' interests.

¹⁹ *Ibid* at 7.

²⁰ *Ibid* at 271.

²¹ Equality of opportunity is commonly used to justify accommodating differences and the removal of barriers to equality. According to Douglas Rae, there are two alternative ideas for equality of opportunity, which are "prospect-regarding equality of opportunity" and "means-regarding equality of opportunity". Equality of opportunity could mean that all prospects for obtaining the scarce resources are equal, which means that all persons have the same chances of achieving a specific result. On the other hand, Equality of opportunity could mean that all persons have the same tools/means for obtaining the scarce resources. Rae, *supra* note 16 at 65-66. However, equal means does not necessarily lead to equal prospects. For example, in the case of people with unequal power who are competing for a good that might be obtained only by the use of power, their prospects for obtaining the good would be unequal. Moreover, even if both people are given the same tool to increase their power in the same degree, their means would be equal, but their prospects will remain unequal. It looks as if "means-regarding equality of opportunity" (or "formal equality of opportunity") is similar to the equality of treatment. Therefore, when I speak of equality of opportunity, I mean by this term: "prospect-regarding equality of opportunity" (or "substantive equality of opportunity"), which means that all prospects for obtaining the scarce resources should be equal.

²² Rosenfeld, *supra* note 16 at 220.

²³ *Ibid* at 222.

Therefore, affirmative action programs would provide means of addressing claims of blacks and women (to bring their class' prospects of success to the level that they would have been at, if the systemic social deprivation did not occur) without causing undue burden on the interests of white males (i.e. without putting the innocent non-preferred citizens in a worse position than they would have been in, before the affirmative action program). Affirmative action programs should be inclusionary and not exclusionary; they should not cause any reverse discrimination. Therefore, affirmative action programs are justified as the best means of equalizing opportunities for disadvantaged citizens in order to compete and realize their life plans. This would require the state to move beyond the devotion to negative rights to the installation of positive rights.²⁴

Rosenfeld discussed the treatment of affirmative action programs under each of the four major contemporary liberal political equality theories including: the utilitarian, the libertarian, the egalitarian, and the contractarian theories of equality. He argued that they are unable to support race and gender preferential treatment. He also argued that although each of these theories can validate some affirmative action programs, they disagree on whether these affirmative action programs should be compensatory or distributive programs, how the equality for individuals is related to the equality for their group, and how much sacrifice (in the name of social equality) innocent white males should tolerate.²⁵

²⁴ *Ibid* at 283-336.

²⁵ *Ibid* at 219-38.

Moreover, based on my review of the different liberal equality theories, I noticed that every liberal equality theory by itself (including Rosenfeld's theory of equality) failed to deal adequately with disability as an issue of equality. I also noticed that the most adequate candidate liberal equality theories to deal with issues of justice for PWDs are the egalitarian theories of equality [i.e. Ronald Dworkin's luck-egalitarianism theory that he calls "equality of resources" theory²⁶ or Richard Arneson's "responsibility-catering prioritarianism" (RCP) theory²⁷ combined with Elizabeth Anderson's "democratic equality" theory²⁸] and the contractarian theories of equality [i.e. John Rawls' "social contract" theory²⁹ combined with Martha Nussbaum's "basic human capabilities" (BHCs) theory³⁰]. Both these two liberal equality theories (with some modifications) could take into consideration all of the three kinds of support for PWDs including medical support, economic support, and social support (i.e. it could promote a human right policy that is based on a fundamental social commitment to equality for PWDs in society).

Moreover, I noticed that Dworkin's equality of resources theory is similar to Arneson's RCP theory in its focus on the individual responsibility and bad luck; at the same time, I also noticed that Arneson's RCP theory (combined with Anderson's theory) is a better representative for the egalitarian equality theory to deal with disability as an equality issue. Therefore, I will limit my focus on Arneson's RCP theory (combined with Anderson's theory).

²⁶ Dworkin, *Sovereign Virtue*, *supra* note 16.

²⁷ Richard J Arneson, "Luck Egalitarianism and Prioritarianism" (2000) 110:2 Ethics 339.

²⁸ Elizabeth S Anderson, "What is the Point of Equality?" (1999) 109:2 Ethics 287.

²⁹ John Rawls, *A Theory of Justice*, revised ed (Cambridge, Massachusetts: Harvard University Press, 1999) [Rawls, *A Theory of Justice*].

³⁰ Martha C Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, Massachusetts: Harvard University Press, 2006).

I also noticed that Anderson's democratic equality theory is similar to Nussbaum's BHCs theory in its focus on the requirement that all individuals must be guaranteed the minimum level of BHCs (or the real freedom); at the same time, I also noticed that Nussbaum's BHCs theory has a comprehensive list of all BHCs that are necessary for minimum justice to deal with disability as an equality issue. Therefore, I will limit my focus on Nussbaum's BHCs theory.

Therefore, we could create the best candidate liberal equality theory to deal with issues of justice for PWDs by building minimal justice into full justice by combining Nussbaum's BHCs theory (for minimal justice) with both Rawls' social contract theory and Arneson's RCP theory (for full justice). Although both Rawls' theory and Arneson's theory focus on the priority for the badly off, both of these two theories need each other. Although Rawls' social contract theory provides an objective scale of well-being to define the least-advantaged (based on the primary goods of income, wealth and self-respect), it is missing the individual responsibility, which is required by Arneson's RCP theory to define who is deserving of help (in my opinion, in order to achieve justice, we should consider the individual's responsibility for his/her future choices).

Therefore, I will offer my own amalgamation of these three different liberal equality theories (i.e. Nussbaum's BHCs theory, Rawls' social contract theory, and Arneson's RCP theory) that would result in a new liberal equality theory that could take into consideration all of the three kinds of support for PWDs including medical support, economic support, and social support. However, by focusing on these three liberal equality theories, I am not claiming that I agree with all of the ideas presented in any one of these three liberal equality theories. I may agree with some of their ideas (with some reservations) but not with all of their ideas.

1.3.2 Reinterpreting Islamic rules about *Zakāh* according to the objective morality

Religious policy (based on the belief in the divine revelation) continues to have a very strong spiritual force in the MENA. There has been a focus on *al-Qur'ān al-Karīm* (i.e. the Holy *Qur'ān*) in the Islamic revival during the twentieth century. In my opinion, in addition to the fact that the *Qur'ān* is a Divine revelation, the *Qur'ān* is also a very valuable set of moral constructs. However, the current interpretative tones of Islamic rules have had direct practical impacts on millions of people.

Although God's plan for the universe is eternal, rules should be adjustable according to the current circumstances with a consideration of the divine wisdom. This does not mean that this wisdom has been changed, but it means that interpretations should be changed to correct the earlier misinterpretations of the divine wisdom. In my opinion, reinterpreting Islamic Law sources according to the objective morality (i.e. the common ground between the liberal moral values and the Islamic moral values) and with consideration of the current circumstances is necessary to achieve the divine wisdom (that exists in everyone's conscience) and to guarantee universal BHRs. By focusing on Islamic moral values, I am not denying the moral values that are included in the liberal equality theories. Actually, I will use some liberal equality ideas to explain my own perspective on Islamic rules. In my opinion, the liberal and the Islamic moral values (about social justice) are complementary (not contradictory).

In Chapter 3, I will discuss the compatibility between some liberal equality ideas and my own perspective on Islamic rules about social justice. I will discuss how ideas of liberal equality can be accommodated in my proposed human rights framework according to the progressive Islam

viewpoint. I will show how some elements of each of the above three liberal equality theories (i.e. Nussbaum's BHCs theory, Rawls' social contract theory, and Arneson's RCP theory) are compatible with some religious Islamic ideas. I will use specific Islamic rules that are needed to reform the social policy in the MENA. I will demonstrate how the liberal concepts of equality can be used to reinterpret religious Islamic rules about the BHR to social welfare (more specifically, disability social income assistance). In other words, I will use these liberal ideas (or my own amalgamation of them) to show the common ground between the liberal moral values and the Islamic moral values. Then, I will use this common ground (or my proposed Islamic version of my new liberal equality theory) to reinterpret Islamic rules about *Zakāh* with my own interpretation of the *Qur'ān* that has a commitment to social justice and a consideration of both liberal and Islamic moral values.³¹

Islam is one of the three great Abrahamic monotheistic religions of revelation in the MENA (i.e. in chronological order of their founding: Judaism, Christianity and Islam). According to the *Qur'ān*, "[O Muḥammad,] Say: O Mankind! I [Muḥammad] am indeed Allāh's Messenger [God's Messenger] to all of you [all of mankind]. It is to Him [God] that sovereignty over the heavens and earth belongs".³² The foundational sources of Islamic Law are the *Qur'ān* (i.e. the divine book of Islam),³³ *al-Sunnah* (i.e. the *Sunnah*/prophetic practice and exemplary behavior of

³¹ This subsection 1.3.2 provides an overview of Chapter 3 of this dissertation.

³² The *Qur'ān*: 7 (al-A'rāf):158; 4 (al-nisā'):126.

³³ For Muslims, the *Qur'ān* is the Holy book of Islam, the word of God, the primary source of Islamic Law, a divine spiritual guidance for all humans to successfully reach their destiny (the Hereafter), and a revelation from God that is begotten-not-created by Prophet Muḥammad. The *Qur'ān* was presented by Prophet Muḥammad to his followers piecemeal over time (in 23 years) as revelations (that he received from God via angel Gabriel) to meet the needs and requirements of the Islamic movement in its different stages. "And a *Qur'ān*, We [God] have divided, for you [Muḥammad] to recite it to mankind at intervals, and We have sent it down successively." See the *Qur'ān*: 17 (al-isrā'):106. The *Qur'ān* is an instruction book. The *Qur'ān* was gradually revealed so that Muslims could follow it in

Prophet Muḥammad),³⁴ the consensus amongst Muslim scholars (i.e. collective reasoning), and the analogical deduction (i.e. individual reasoning). However, the *Qur'ān* and the *Sunnah* are the two primary sources of Islamic Law. The process of interpreting these two primary sources is Islamic jurisprudence (i.e. *Fiqh*). Due to the fact that *fiqh* is the scholarly human understanding of these two primary sources, it is not flawless. While the *Qur'ān* and the *Sunnah* are regarded as infallible, the *fiqh* standards may change over different contexts. Classical jurists interpreted these two primary sources in their own contexts, but their interpretations do not close the door for new interpretations in the current context.

For example, in regard to women equality rights in Muslim states, human laws based on the classical *fiqh* discriminate against women; however, by re-examining the divine wisdom in the *Qur'ān* and the *Sunnah* and taking into consideration the current context, new interpretations could make a convincing case for human equality rights. Abdulaziz Sachedina notes that the Islamic faith is based on the human ability to know right from wrong. God provides every human with *fiṭrah* (an intrinsic nature that has the power of intuitive reason or the natural sense of right and wrong) and *karāmah* (an inherent human dignity or the inherent human capacity to treat each

intervals and implement it into their practical lives. Therefore, revelation was practical and intended for literal application. The *Qur'ān* (as a book) is unique in its composition and style. It is not like any other book ever written. Its chapters consist of verses that deal with miscellaneous topics. The information contained in any of its chapters is merged together in a mosaic form that may lack any interconnection or continuity. It is like a beautiful flower bouquet, each of its flowers has its unique smell and color. It is difficult to grasp all the wisdom of the *Qur'ān* after one reading. Amazingly, you discover new meanings (as its hidden treasures) every time you re-read the *Qur'ān* (with complete concentration and meditation); you might feel as if you have never read such verses before (regardless of your level of education). Therefore, to understand the *Qur'ān*, you should first free your mind from any notion of a “regular” book, and then understand the context of what was happening in the Muslim community at the time each verse was revealed.

³⁴ The *Sunnah* is the actions and judgments (i.e. *Aḥādīth*, plural of *Ḥadīth*) of Prophet Muḥammad, and from which precedents and guides for later Muslim practices were derived. However, sometimes, *Sunnī* scholars and *Shī'ah* scholars do not agree on the same *Aḥādīth*.

other with a mutual respect as members of the universal human community). *Fiṭrah* and *karāmah* together with the divine revelation lead humans to moral well-being.³⁵

In order to answer the question: Is Islam compatible with rational thought? Khaled Abou El Fadl tried to trace the conflict between reason and Islam back to the disputes between medieval Islamic philosophers. He examines every part of the debate between faith and reason (including such major themes as good, evil and the nature of divine will). He proposed using reasoning beyond the traditional boundaries of textual interpretation in order to fully realize the divine wisdom.³⁶ Therefore, modern Muslim jurists can provide new interpretations of the *Qur'ān* and the *Sunnah*; and they are not limited by traditional interpretations that are culturally-based (i.e. without universal applicability). Nevertheless, reformist Muslims consider their ideas as compatible with the teachings of Islam, because they believe in the basic doctrine of Islam including the six elements of belief³⁷ and the five pillars of Islam.³⁸

According to the Islamic principle of *Tawḥīd* (monotheism), there should be no mediator between God (i.e. the Creator) and human beings (i.e. His creatures); and all human beings are equal before God. Therefore, the reformist Muslims' central theory is the autonomy of the

³⁵ Abdulaziz Sachedina, *Islam and the Challenge of Human Rights* (Oxford: Oxford University Press, 2009) at 71.

³⁶ See Khaled Abou El Fadl, *Reasoning with God: Rationality and Thought in Islam* (London: Oneworld, 2010).

³⁷ The six elements of belief in Islam are as follows: Muslims should belief in 1. Allāh (the Creator), the only one worthy of all worship (*Tawḥīd*); 2. His angels; 3. His books (including the Torah, the Bible, and the *Qur'ān*); 4. His messengers (including Adam, Noah, Abraham, Moses, Jesus, and Muḥammad); 5. The Resurrection and the Day of Judgment; and 6. Fate as His limitless power and His boundless justice.

³⁸ The five pillars of Islam are as follows: 1. *Shahādah*, which means declaring that 'there is no god but Allāh (the Creator) and Muḥammad is His Messenger'. 2. *Ṣalāh*, which means observing the five daily ritual prayers. 3. *Zakāh*, which means paying a fixed percentage of one's income for specified good causes. 4. *Ṣawm*, which means fasting in the month of Ramaḍān. 5. *Hajj*, which means performing the pilgrimage to Mecca once in a lifetime by those who are able to do it.

individual in reinterpreting the *Qur'ān* and the *Sunnah* using *fiṭrah* with more critical examinations of traditional Islamic precedents. In order to move beyond problematic past and present interpretations of Islam, reformist Muslims have to pass critically through them and experience them first-hand.³⁹

I agree with modern Muslim jurists (whom Anver M. Emon called Islamic soft natural law jurists) that the human reason only cannot compel obedience, because the devoted Muslims obey Islamic Law as God-made-law. At most, the human reason can verify and substantiate what is established by the divine source. Without a scriptural basis, there can be no divine obligation or Islamic Law violation, because any obligation involves a reward or a punishment that is the result of God's express will. Due to the indeterminacy of nature, the need for a legislative will, and the imperfection of the jurists, the human reason alone cannot make evaluative judgments that reflect the divine will. Therefore, the modern Muslim jurists try to combine the authority of the human reason with the authority of the divine source-texts.⁴⁰

Not much has been written about disability within the general Islamic context, and much less in relation to Islamic Law. Vardit Rispler-Chaim addresses the question of disability in classical and contemporary Muslim jurists' works (i.e. *Fiqh*). She portrays the Muslim jurists' arguments and concerns for PWDs' participation (i.e. their rights) in religious, social, and communal life in regard to religious duties, *jihad*, marriage, hermaphroditism, intentional and unintentional injuries. However, she did not study the legal status of PWDs. Based on her study of the Muslim

³⁹ Reza Aslan, *No god but God: The Origins and Evolution of Islam* (New York: Random House, 2012) at 137-40.

⁴⁰ Anver M Emon, *Islamic Natural Law Theories* (Oxford: Oxford University Press, 2010) at 124.

jurists' arguments and concerns for PWDs, she portrays that Islamic Law concerning PWDs displays a very advanced social position.⁴¹

Although my particular point of attention is unique, I cannot claim that I am the first one who tried to provide reinterpretation of the *Qur'ān* and rethinking Muslim practices. As an example, we should consider Mohammad Fadel's discussion about an Islamic Law of adoption. Due to the fact that adoption implies a fictive relationship between the adopted child and the adoptive parent, the traditional Islamic rules prohibit adoption. According to Fadel, "popular perceptions simplify, mask and distort a complex and subtle body of legal doctrine that deals with children of unknown parentage."⁴² He argues that the traditional Islamic Law was concerned with the dilemma of abandoned children.

The law of foundlings was the principal area of Islamic jurisprudence that dealt with the social problems created by the two main causes of child abandonment: illegitimacy and poverty. Unfortunately, the law's ability to confront these problems directly was hampered by the unresolved tension between a paradigm of parental rights which relied on concepts of property law and a paradigm that put as a priority the best interests of the child. Once this tension is made clear, one can re-read the foundational texts of Islamic law with a view to resolving these tensions and creating new legal doctrine that would be more sympathetic to quasi-adoptive relationships.⁴³

By re-examining classical religious texts, Fadel places adoption in a historical context by providing a historical overview of the rights of parents and children in *Sunnī* Islamic Law. He concluded with "a reassessment of the pre-modern jurists' interpretation of the foundational revelatory texts upon which they built their doctrines, thus pointing the way for a reformulation

⁴¹ Vardit Rispler-Chaim, *Disability in Islamic Law* (New York: Springer, 2006).

⁴² Mohammad Fadel et al, "Classical Religious Perspectives of Adoption Law" (2004) 79:2 Notre Dame L Rev 101 at 138.

⁴³ *Ibid* at 155.

of Islamic Law's prohibition of adoption."⁴⁴ In my thesis, I will try to proceed methodologically in a similar style (while asserting that liberal equality theories support my new interpretations).

For another example, Abdullahi Ahmed An-Na'im and Asma Mohamed Abdel Halim argue that

[i]n view of the religious motivation of charitable giving by the vast majority of Muslims, the proposed rights-based approach needs to be founded on an appropriate Islamic justification. This can build as much as possible on existing interpretations of Islamic scriptural sources (commonly known as [*Shari'ah*]) and traditional institutions, but should not be limited to historical views on the subject. ... [T]here is need for fresh reflection on the issues and imaginative approaches to the realization of the underlying rationale and objectives of charitable giving in Islamic societies. The proposed rights-based approach ... is necessary for present Islamic societies precisely because it is not readily appreciated or accepted from the perspective of present understandings of [*Shari'ah*] and traditional charitable institutions. For this broader view of the sources of justification, we look directly to the Qur'an and *Sunnah* of the Prophet, as they might be understood in the present context.⁴⁵

Due to the fact that one of my intentions in this dissertation is trying to reconcile western discussions of human rights with Islamic ideas, I will try to discuss the question: Is there a conflict between Islamic values and universal human rights? I will offer an overview of the reformist Islam perspective that supports both the liberal and Islamic ideas about the universal human rights. Therefore, I will provide a historical background of Islamic modernism. I will try to distinguish between extremist Muslims and moderate Muslims. Within moderate Islam, I will try to distinguish between traditionalist Muslims and modernist Muslims. Within modernist Islam (as reactions to modernity), I will try to distinguish between revivalist Muslims and reformist Muslims. Within reformist Islam (which most scholars have inaccurately labelled it as liberal Islam), I will try to distinguish between liberal Muslims and progressive Muslims. I will

⁴⁴ *Ibid* at 139.

⁴⁵ Abdullahi Ahmed An-Na'im & Asma Mohamed Abdel Halim, *Rights-Based Approach to Philanthropy for Social Justice in Islamic Societies* (Cairo: American University, 2006) at 5.

discuss works by scholars who focus on the relationship between Islam and universal human rights (i.e. the relationship between the secular and religious moral values).⁴⁶ My own perspective is a part of the progressive Islam perspective, which is a part of the reformist Islam

⁴⁶ See section 2.9, section 3.2, section 3.3, and section 3.4, below, for more on this topic. For a detailed discussion about these issues, there are some sources can be consulted including (but not limited to): Joseph Runzo, "Secular Rights and Religious Responsibilities" in Joseph Runzo, Nancy M. Martin & Arvind Sharma, eds, *Human Rights and Responsibilities in the World Religions* (Oxford: Oneworld, 2003) 9; Abdullahi Ahmed An-Na'im, "The Synergy and Interdependence of Human Rights, Religion, and Secularism" in Joseph Runzo, Nancy M. Martin & Arvind Sharma, eds, *Human Rights and Responsibilities in the World Religions* (Oxford: Oneworld, 2003) 27 [An-Na'im, "The Synergy and Interdependence"]; Abdullahi Ahmed An-Na'im, *Islam and the Secular State: Negotiating the Future of Shari'a* (Cambridge, Massachusetts: Harvard University Press, 2009) [An-Na'im, *Islam and the Secular State*]; Arvind Sharma, "The Religious Perspective: Dignity as a Foundation for Human Rights Discourse" in Joseph Runzo, Nancy M. Martin & Arvind Sharma, eds, *Human Rights and Responsibilities in the World Religions* (Oxford: Oneworld, 2003) 67; Khaled Abou El Fadl, "The Human Rights Commitment in Modern Islam" in Joseph Runzo, Nancy M. Martin & Arvind Sharma, eds, *Human Rights and Responsibilities in the World Religions* (Oxford: Oneworld, 2003) 301 [Abou El Fadl, "The Human Rights Commitment"]; Khaled Abou El Fadl, *The Great Theft: Wrestling Islam from the Extremists* (New York: HarperCollins, 2005) [Abou El Fadl, *The Great Theft*]; Khaled Abou El Fadl, *Speaking in God's Name: Islamic Law, Authority and Women* (London: Oneworld, 2001) [Abou El Fadl, *Speaking in God's Name*]; Khaled Abou El Fadl, *Islam and the Challenge of Democracy: A Boston Review Book* (Princeton, New Jersey: Princeton University Press, 2004) [Abou El Fadl, *Islam and the Challenge of Democracy*]; Khaled Abou El Fadl, *The Place of Tolerance in Islam* (Boston, Massachusetts: Beacon Press, 2002) [Abou El Fadl, *The Place of Tolerance*]; John L Esposito, "Contemporary Islam: Reformation or Revolution" in John L Esposito, ed, *The Oxford History of Islam* (Oxford: Oxford University Press, 1999) 643; Albert Hourani, *Arabic Thought in the Liberal Age: 1798–1939* (Cambridge, England: Cambridge University Press, 1983) [Hourani, *Arabic Thought*]; Charles Kurzman, *Liberal Islam: a source book* (Oxford: Oxford University Press, 1998); Susan Waltz, "Universal Human Rights: The Contribution of Muslim States" (2004) 26 *Hum Rts Q* 799; David G Littman, "Islamism Grows Stronger at the United Nations" (1999) 6: 3 *Middle East Quarterly* 59; Sachedina, *supra* note 35; Aslan, *supra* note 39; Anver M Emon, Mark Ellis & Benjamin Glahn, *Islamic Law and International Human Rights Law* (Oxford: Oxford University Press, 2012); Eva Brems, *Human rights: universality and diversity* (The Hague: Martinus Nijhoff, 2001); Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics*, 3d ed (Boulder, Colorado: Westview Press, 1999) [Mayer, *Tradition and Politics*]; Ann Elizabeth Mayer, "Islam and human rights policy" in Sohrab Behdad, Farhad Nomani & Farhad Nomani, eds, *Islam and the Everyday World: Public Policy Dilemmas* (London: Routledge, 2006) [Mayer, "Islam and human rights policy"]; Ann Elizabeth Mayer, "Islamic Law and Human Rights: Conundrums and Equivocations" in Carrie Gustafson & Peter Juviler, eds, *Religion and human rights: Competing Claims?* (Armonk: M E Sharpe, 1999) [Mayer, "Conundrums and Equivocations"]; Ann Elizabeth Mayer, *Not Taking Rights Seriously: Hallmarks of the Frivolous Human Rights*, online: Ann Elizabeth Mayer <<http://lgstdept.wharton.upenn.edu/mayera/writings.htm>> [Mayer, *Not Taking Rights Seriously*]; Rhona K M Smith, *Textbook on International Human Rights*, 6th ed (Oxford: Oxford University Press, 2014); Mohammad Fadel, "Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights" (2008) 8:1 *Chicago Journal of International Law* 1; Ziba Mir-Hosseini, "Muslim Women's Quest for Equality: Between Islamic Law and Feminism" (2006) 32 *Critical Inquiry* 629 [Mir-Hosseini, "Muslim Women's Quest for Equality"]; Ziba Mir-Hosseini, "The Construction of Gender in Islamic Legal Thought: Strategies for Reform" (2003) 1:1 *Hawwa: Journal of Women in the Middle East and the Islamic World* 1 [Mir-Hosseini, "The Construction of Gender in Islamic Legal Thought"]; Clark B Lombardi & Nathan J Brown, "Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law" (2006) 21 *Am U Int'l L Rev* 379; Edip Yuksel, *Manifesto for Islamic Reform* (Tucson, Arizona: Brainbow Press, 2009); Jamāl al-Bannā, *Da'wa al-Ihya' al-Islami* (Cairo: Dar al-Fikr al-Islami, 2005); and Omid Safi, "What is Progressive Islam?" (2003) 13 *ISIM Newsletter* 48.

perspective, which is a part of the modernist Islam perspective, which is a part of the moderate Islam perspective, which is a part of the Islamic faith perspective, which is a part of the Abrahamic faith perspective, which is a part of the monotheistic perspective.

In order to discuss how my progressive Islam perspective can argue for the compatibility between some liberal equality ideas and Islamic ideas about social justice, I will try to show how some elements of each of three liberal equality theories (including Nussbaum's BHCs theory, Rawls' social contract theory, and Arneson's RCP theory) are compatible with some religious Islamic ideas. I will try to show how the *Qur'ān* can be reinterpreted to support many specific liberal principles for social justice. I will try to show how my proposed Islamic version of my new liberal equality theory (or my own amalgamation of these different liberal equality theories) can be used to explain my new interpretation of the *Qur'ān* (based on these liberal principles for social justice in addition to Islamic sources such as the *Qur'ān* and the *Sunnah*). In regard to these compatibilities, I will try to show the following ideas:

- In regard to the compatibility between some ideas of Nussbaum's BHCs theory⁴⁷ and my progressive Islam perspective about social justice in the *Qur'ān*, I will try to show (in

⁴⁷ Nussbaum tried to develop a theory of justice that is related to the human weakness in order to deal with issues of Justice (or the equal rights of citizenship) for PWDs (i.e. those who cannot be fully cooperating members of the society). She argues that disability in its various forms and degrees, and entailing dependency on others, is the norm rather than the exception in human life. Disability poses two problems to justice: 1. Should PWDs be treated as equal citizens? 2. What is the fair treatment of those who provide the necessary care during the permanent or temporary phases of deep dependency of others? She argues that her BHCs theory is inclusive towards both the cared-for and the caregivers. She discusses examples of good practices, including that of securing guardianship and education for PWDs. Taking examples from European welfare states, such as Sweden and Germany, she concludes by arguing for a revised liberalism that offers a view of social cooperation based on complexity and multiplicity, including love, respect for humanity, the passion for justice, as well as the search for advantage. Nussbaum, *supra* note 30 at 196-199, 220-223. She tried to avoid Immanuel Kant's idea of the person as a "rational being" by adopting Aristotle's idea of the person as "a political and social animal ... who shares complex ends with others at many levels". *Ibid* at 158. She identified ten central BHCs, which are entitlements for life, bodily health, bodily

Chapter 3) that her list of BHCs is similar to my list of Islamic BHRs that can be discovered by reinterpreting the *Qur'ān*. While she requires that all citizens get to a minimum level of all BHCs, the *Qur'ān* guarantees many necessary BHRs (which serve the same function as these BHCs) for all human beings including: The BHR to life, the BHR to social income assistance, the BHR to reasonable disability accommodation, the BHR to freedom of conscience, the BHR to legitimate pleasure, the BHR to practical social cooperation, the BHR to equality and non-discrimination, the BHR to environmental sustainability, the BHR to be consulted (i.e. right to a free democracy), and the BHR to private property.⁴⁸

- In regard to the compatibility between some ideas of Rawls' social contract theory and my progressive Islam perspective about social justice in the *Qur'ān*, I will try to offer my own interpretation of the terms and conditions of the *Qur'ānic* real social contract, which guarantees all of the above *Qur'ānic* BHRs (limited by the individual responsibility).

integrity, senses/imagination/thought, emotions, practical reason, affiliation, living with concern for and in relation to other species, play, and control over one's political and material environments. *Ibid* at 76-78.

⁴⁸ It looks as if Nussbaum's BHCs theory has some religious roots, because in addition to this similarity between Nussbaum's list of BHCs and my list of Islamic BHRs, Nussbaum's list of BHCs is ironically similar to John Finnis's list of "basic human goods". Phillip E Johnson noted that Germain Grisez and John Finnis describe some basic human goods, the irreducible categories of things for which it is rational to strive. These have been formulated in different ways, but a [classic] list would [include:] life (including health, safety, and procreation); knowledge (including appreciation of beauty); holiness or religion (in the sense of harmony with ultimate reality); self-integration, justice, friendship (including marriage); and the kind of exercise of skill in work or play that enriches human life. Deliberately missing from this list are such goods as money, which is merely instrumental to achieving more basic goods, and pleasure, which is to be sought not as an end in itself but as a benefit incidental to a rational end, in the way that sexual pleasure is achieved through marriage. Phillip E Johnson, "Metaphysics Matters", Book Review of *In Defense of Natural Law* by Robert P George, (1999) 97 *First Things* 70 at 70-71.

See also Germain Grisez, "The First Principle of Practical Reason" (1965) 10 *Natural Law Forum* 168; and John Finnis, *Natural Law and Natural Right* (Oxford: Clarendon, 1980). John Finnis, Joseph Boyle and Germain Grisez added that "In voluntarily acting for human goods and avoiding what is opposed to them, one ought to choose and otherwise will those and only those Possibilities whose willing is compatible with integral human fulfillment." John Finnis, Joseph Boyle & Germain Grisez, *Nuclear Deterrence, Morality and Realism* (Oxford: Oxford University Press, 1987) at 281-284.

While Rawls uses his hypothetical fair choice situation, i.e. what he called the “original position”, in which the parties to his hypothetical social contract select mutually acceptable principles of justice (that will govern in the actual world) behind what he called the hypothetical “veil of ignorance”, the *Qur’ān* (according to my progressive Islam perspective) affirms that all human beings sign a real social contract with their Lord (God) in their previous life in the Spiritual World before they enter into this material world.⁴⁹ Therefore, the main difference between Rawls’s hypothetical social contract and the *Qur’ānic* real social contract is that the *Qur’ānic* social contract is between only two parties: God and the whole of humanity. In the same way as Rawls’s hypothetical veil of ignorance hides all facts (e.g. social class, generation, race, physical handicaps, etc.) that could confuse what the idea of distributive justice should be (i.e. principles that are fair to all), all human beings in their spiritual form (the second party to this *Qur’ānic* social contract) could not know all of these facts (i.e. no human being could have known how s/he will end up in the society). I will note that under this *Qur’ānic* social contract, the BHR to responsible ownership, the BHR to secured respected life, the BHR to protected sustainable environment, the BHR to responsible freedom of

⁴⁹ In addition, although Rawls tried his best to keep God out of the moral equation, it looks as if his theory has some religious roots, because his idea of justice (based on the equal dignity and freedom of all individuals) originates from the principles that all individuals are equal before God, and all individuals are worthy of equal respect and equal concern even when they disagree in matters of religion. Rawls asks us to accept moral principles arrived at as a result of a decision process where it is stipulated beforehand that the moral beliefs held by actual particular individuals are in some sense “arbitrary”. He states “If men’s inclination to self-interest makes their vigilance against one another necessary, their public sense of justice makes their secure association together possible.” Rawls, *A Theory of Justice*, *supra* note 29 at 5. He also states “Citizens may have, and normally do have at any given time, affections, devotions, and loyalties that they believe they would not, and indeed could and should not, stand apart from and objectively evaluate from the point of view of their purely rational good.” John Rawls, *Justice as Fairness: A Restatement*, 2d ed by Erin Kelly (Cambridge, Massachusetts: Belknap Press, 2001) at 22 [Rawls, *Justice as Fairness*]. He also states “Justice as fairness honours, as far as it can, the claims of those who wish to withdraw from the modern world in accordance with the injunctions of their religion, provided only that they acknowledge the principles of the political conception of justice and appreciate its political ideals of person and society.” *Ibid* at 157.

conscience, the BHR to be consulted (i.e. right to a free democracy), and the BHR to legitimate pleasure serve the same function as Rawls's equal basic rights and liberties principle.⁵⁰ Additionally, the BHR to absolute equality and non-discrimination serves the same function as Rawls's equal opportunity principle.⁵¹ Furthermore, the BHR to social income assistance, the BHR to practical social cooperation, and the BHR to reasonable disability accommodation serve the same function as Rawls's difference principle.⁵²

- In regard to the compatibility between some ideas of Arneson's RCP theory and my progressive Islam perspective about social justice in the *Qur'ān*, I will try to show that while Arneson requires that individuals have to accept their responsibility for their free choices and individuals should be reasonably responsible for their faulty behavior, all of the *Qur'ānic* BHRs are conditioned by the individual responsibility. The *Qur'ān* repeatedly focuses on the idea that every soul is responsible for its own actions. Due to the fact that God gives every human being the right to free choice, every human being is responsible and accountable to God on the day-of-judgment for his/her own freely chosen actions.⁵³ Although the *Qur'ān* focuses on the individual responsibility, God always leaves the door open for all of His creatures to repent and to return to the God's borders. Therefore, we should focus on the individual responsibility for the future choices and not for the past choices.

⁵⁰ That is "[e]ach person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value". John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) at 5 [Rawls, *Political Liberalism*].

⁵¹ That is "[s]ocial and economic inequalities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity". *Ibid* at 6.

⁵² That is "second, they are to be to the greatest benefit of the least advantaged members of society." *Ibid*.

⁵³ This idea of the individual responsibility exists in each of the three great monotheistic religions of revelation.

Therefore, my own interpretation of this *Qur'ānic* social contract (that guarantees all of the above *Qur'ānic* BHRs, which are limited by individual responsibility) is my proposed Islamic version of my new liberal equality theory (or my own amalgamation of the different liberal equality theories in Chapter 2). In my opinion, the moral principles that we can draw out of this *Qur'ānic* contract (including all of the above *Qur'ānic* BHRs limited by the individual responsibility) can be described as the common ground between the liberal and the Islamic moral values. Based on this common ground, I will try to reinterpret the Islamic rules about *Zakāh* in the *Qur'ān* with my own interpretation that has a commitment to social justice and a consideration of both liberal and Islamic moral values.

Giving to help the poor and the disadvantaged in order to achieve a just society has long been a fundamental part of the religious and the cultural background of the MENA. For more than a millennium, Muslims have been required to pay *Zakāh* as an Islamic obligation in their search for a just society. While the least-advantaged (according to my new liberal equality theory) should be defined as related to the minimum level of all BHCs and all basic needs, the *Qur'ān* (according to my progressive Islam perspective) took any speculation out of the equation of social justice by specifying the least advantaged in the society in specific categories with specific priority ranking among them.

However, in the modern Muslim societies, there is diversity between the complete inclusion of *Zakāh* by the government (with widespread lack of trust in centralized *Zakāh* systems) and the marginalization of *Zakāh* to the individual's private conscience. The privatization of *Zakāh*

increased with the secularization of the MENA's states (as Muslim states became under Western control and influence). Although there are no penalties or measures of discipline on defaulters in the *Qur'ān* or the *Sunnah*, *Zakāh* should be mandatory. However, *Zakāh* in the most modern Muslim practices (with some exceptions) is considered an optional or voluntary payment, and sometimes a fund-raising tool. Therefore, the focus became on those verses in the *Qur'ān* that give importance on the distribution of alms in secret to purify *Zakāh* from any intention other than God's cause (e.g. *Qur'ān* 2. 271). Some donors prefer the anonymous giving (in addition to the spiritual rewards), because they do not want to attract requests for donations. At the same time, some beneficiaries prefer not to disclose that they receive donations, because they do not want to compromise their eligibility for public welfare benefits. Regardless of donors' self-interested motivation (whether in expectation of an earthly or a heavenly reward or both) or their hypocrisy (claiming one thing and doing another thing), it is important to know what the *Qur'ān* teaches, and how it has been interpreted.⁵⁴

⁵⁴ For a detailed discussion about the moral *Qur'ānic* origins of *Zakāh* as the Islamic social tax (including its importance, its history, its purposes, its benefits, its rate, its meaning, and its uses), there are some sources can be consulted including (but not limited to): 'Abd al-'Azīz al-Khayyāt, *al-Zakāh wa Taṭbyqātuhā wa Istithmārātuhā* (Amman: Ministry of al-awqāf and Islamic Affairs, 1993); Medani Ahmed & Sebastiana Gianci, "Zakat (Islamic almsgiving)" in Joseph J Cordes, Robert D Ebel & Jane G Gravelle, eds, *Encyclopedia of Taxation and Tax Policy* (Washington, DC: The Urban Institute Press, 2005) 479; Suliman Bashear, "On the Origin and Development of Zakat in early Islam" (1993) 40 *Arabica* 84; Jonathan Benthall & Jérôme Bellion-Jourdan, *The Charitable Crescent: Politics of Aid in the Muslim World* (London: I B Tauris, 2003); Timur Kuran, "The Economic System in Contemporary Islamic Thought: Interpretation and Assessment" (1986) 18:2 *International Journal of Middle East studies* 135 [Kuran, "Interpretation and Assessment"]; Timur Kuran, "Islamic Redistribution through Zakat: Historical Record and Modern Realities" in Michael Bonner, Mine Ener & Amy Singer, eds, *Poverty and Charity in Middle Eastern Contexts*, (Albany: State University of New York Press, 2003) 275 [Kuran, "Islamic Redistribution"]; Timur Kuran, "The Economic Impact of Islamic Fundamentalism" in Martin E Marty & R Scott Appleby, eds, *Fundamentalisms and the State: Remaking Politics, Economies, and Militance* (Chicago: University of Chicago Press, 1996) [Kuran, "Islamic Fundamentalism"]; Charles Tripp, *Islam and the Moral Economy: The Challenge of Capitalism* (Cambridge: Cambridge University Press, 2006); Hans Visser, *Islamic Finance: Principles and Practice* (Cheltenham: Edward Elgar, 2009); Franz Kogelmann, "Sidi Fredj: A Case Study of a Religious Endowment in Morocco under the French Protectorate" in Holger Weiss, ed, *Social Welfare in Muslim Societies in Africa* (np: Nordic Africa Institute, 2002); Dimitri Novossyolov, "The Islamization of Welfare in Pakistan" in Dale F Eickelman, ed, *Russia's Muslim Frontiers: New Directions in Cross-cultural Analysis* (Bloomington: Indiana University Press, 1993); Dehvin Roy, "Islamic banking" (1991) 27:3 *Middle Eastern Studies* 427; Annemarie

The diverse interpretations of the *Qur'ān* about the categories of beneficiaries of alms resulted in the distribution of *Zakāh* funds for some expenses outside of the original purpose for achieving social justice. Muslim scholars disagree on the interpretation of verse 9 (al-Tawbah):60 of the *Qur'ān*, which identifies the eight permitted categories of beneficiaries of *Zakāh*. The distribution of *Zakāh* funds has been commonly misinterpreted as a matter of free choice only within specified limits. However, I will argue that it is not possible to have these words in this verse with this specific order (as we will see) and with specific prepositions (as we will see) without any reason. Therefore, there is (as we will see) a specific priority ranking among all of these categories; and it is not a matter of choice.

I will try to review all of the available diverse (classical and contemporary) interpretations on *Zakāh* in relationship to verse 9 (al-Tawbah):60 of the *Qur'ān*. These diverse interpretations are connected with present-day practices of *Zakāh*. Among the classical scholars, I will try to review interpretations by al-Andalusī,⁵⁵ al-Bayḍāwī,⁵⁶ al-Maḥallī and al-Ṣuyūṭī,⁵⁷ al-Qurṭubī,⁵⁸ al-Rāzī,⁵⁹

Schimmel, *Islam: An Introduction* (Albany: State University of New York Press, 1992); M Th Houtsma, *First Encyclopaedia of Islam: 1913-1936* (Leiden: E J Brill, 1993); Muhammad Hamidullah, *Le Prophète de l'Islam*, vol 2 (Paris: J Vrin, 1959); and Sayyid Quṭb, *Fī Zilāl al-Qur'ān* (Beirut: Dār al-Shurūq, 1978), online: al-Tafsīr <<http://www.altafsir.com>>.

⁵⁵ Abū Ḥayyān Muḥammad ibn Yūsuf al-Andalusī, *al-Nahr al-Mādd min al-Baḥr al-Muḥīṭ*, online: al-Tafsīr <<http://www.altafsir.com>>.

⁵⁶ 'Abd Allāh ibn 'Umar al-Bayḍāwī, *Anwār al-Tanzīl wa-Asrār al-Ta'wīl*, online: al-Tafsīr <<http://www.altafsir.com>>.

⁵⁷ Jalāl al-Dīn Muḥammad ibn Aḥmad al-Maḥallī & Jalāl al-Dīn 'Abd al-Raḥmān ibn Abī Bakr al-Ṣuyūṭī, *Tafsīr al-Jalālayn*, online: al-Tafsīr <<http://www.altafsir.com>>.

⁵⁸ Abū 'Abd Allāh Muḥammad ibn Aḥmad ibn Abū Bakr al-Anṣarī al-Qurṭubī, *al-Jāmi' li-Aḥkām al-Qur'ān*, online: al-Tafsīr <<http://www.altafsir.com>>.

⁵⁹ Abū 'Abd Allāh Muḥammad ibn 'Umar ibn al-Ḥasan ibn al-Ḥusayn ibn 'Alī al-Taymī al-Bakrī Fakhr al-Dīn al-Rāzī, *al-Tafsīr al-Kabīr* (also known as *Mafātīḥ al-Ghayb*), online: al-Tafsīr <<http://www.altafsir.com>>.

al-Shawkānī,⁶⁰ al-Ṭabarī,⁶¹ al-Zamakhsharī,⁶² Ibn ‘Abbās,⁶³ and Ibn Kathīr.⁶⁴ Among the modern scholars, I will try to review interpretations by al-Ālūsī,⁶⁵ ‘Abd al-‘Azīz al-Khayyāt,⁶⁶ Aṭṭafayyish,⁶⁷ Ibn ‘Āshūr,⁶⁸ Sayyid Quṭb,⁶⁹ al-Sha‘rāwī,⁷⁰ Ṭanṭāwī,⁷¹ ‘Uthmān Ḥusayn ‘Abd-Allāh,⁷² Abdullah Yusuf Ali,⁷³ and Muhammad Asad.⁷⁴ Among *Shī‘ah* scholars, I will try to review interpretations by al-kāshānī,⁷⁵ al-Qummī,⁷⁶ al-Janābdhī,⁷⁷ al-Ṭabarsī,⁷⁸ and al-Ṭabāṭabā’ī.⁷⁹

⁶⁰ Muḥammad ibn ‘Alī ibn Muḥammad ibn ‘Abd Allāh al-Shawkānī, *Faṭḥ al-Qadīr*, online: al-Tafsīr <<http://www.altafsir.com>>.

⁶¹ Abū Ja‘far Muḥammad ibn Jarīr al-Ṭabarī, *Jāmi‘ al-Bayān fī Ta’wīl al-Qur’ān*, online: al-Tafsīr <<http://www.altafsir.com>>.

⁶² Jār Allāh Abī al-Qāsim Maḥmūd ibn ‘Umar al-Zamakhsharī, *al-Kashāf ‘an Haqā’iq al-Tanzīl*, online: al-Tafsīr <<http://www.altafsir.com>>.

⁶³ ‘Abd Allāh ibn ‘Abbās ibn ‘Abd al-Muṭṭalib, *Tanwīr al-Miqbās min Tafsīr ibn ‘Abbās*, translated by Mokrane Guezzou, online: al-Tafsīr <<http://www.altafsir.com>>.

⁶⁴ ‘Imād al-Dīn Abī al-Fidā’ Ismā‘īl ibn ‘Umar ibn Kathīr al-Dimashqī, *Tafsīr al-Qur’ān al-‘Azīm*, online: al-Tafsīr <<http://www.altafsir.com>>.

⁶⁵ Abū al-Thanā’ Shihāb al-Dīn Sayyid Maḥmūd ibn ‘Abd-Allāh ibn Maḥmūd al-Ḥusaynī al-Ālūsī al-Baghdādī, *Rūḥ al-Ma‘ānī fī Tafsīr al-Qur’ān al-‘Azīm wa al-Sab‘ al-Mathānī*, online: al-Tafsīr <<http://www.altafsir.com>>.

⁶⁶ al-Khayyāt, *supra* note 54.

⁶⁷ Muḥammad ibn Yūsuf Aṭṭafayyish, *Hamyān al-Zād ilā Dār al-ma‘ād*, online: al-Tafsīr <<http://www.altafsir.com>>.

⁶⁸ Muḥammad al-Ṭāhir ibn ‘Āshūr, *al-Taḥrīr wa-al-Tanwīr*, online: al-Tafsīr <<http://www.altafsir.com>>.

⁶⁹ Quṭb, *supra* note 54.

⁷⁰ Muḥammad Mutawallī al-Sha‘rāwī, *Tafsīr al-Sha‘rāwī: khawāṭir Faḍīlat al-Shaykh Muḥammad Mutawallī al-Sha‘rāwī ḥawla al-Qur’ān al-karīm*, online: al-Tafsīr <<http://www.altafsir.com>>.

⁷¹ Muḥammad al-Sayyid Ṭanṭāwī, *al-Tafsīr al-Wasīl lil-Qur’ān al-Karīm*, online: al-Tafsīr <<http://www.altafsir.com>>.

⁷² Sami Awad Aldeeb Abu-Sahlieh, *Les Musulmans face aux droits de l’homme: religion & droit & politique: étude et documents* (Bochum: Dr Dieter Winkler, 1994).

⁷³ Abdullah Yusuf Ali, *The Holy Qur’an: Text, Translation and Commentary*, online: al-Tafsīr <<http://www.altafsir.com>>.

⁷⁴ Muhammad Asad, *The Message of the Qur’an*, online: al-Tafsīr <<http://www.altafsir.com>>.

⁷⁵ Muḥammad Moḥsen al-Fayḍ al-kāshānī, *al-Ṣāfi fī Tafsīr Kalām Allāh al-Wāfi*, online: al-Tafsīr <<http://www.altafsir.com>>.

⁷⁶ Abū al-Ḥasan ‘Alī ibn Ibrāhīm al-Qummī, *Tafsīr al-Qummī*, online: al-Tafsīr <<http://www.altafsir.com>>.

⁷⁷ Muḥammad al-Janābdhī, *Tafsīr Bayān al-Sa‘ādah fī Maqāmāt al-‘Ibādah*, online: al-Tafsīr <<http://www.altafsir.com>>.

⁷⁸ Abū ‘Alī Fadhl ibn Ḥasan al-Ṭabarsī, *Majma‘ al-Bayān li-‘Ulūm al-Qur’ān*, online: al-Tafsīr <<http://www.altafsir.com>>.

⁷⁹ Sayyid Muḥammad Ḥusayn al-Ṭabāṭabā’ī, *al-Mizān fī Tafsīr al-Qur’ān*, online: al-Tafsīr <<http://www.altafsir.com>>.

1.3.3 Creating a new model for social welfare systems in the MENA

Although anti-discrimination laws are necessary protections for PWDs, my focus in this dissertation is primarily on social welfare laws since my goal is to describe a possible model for social welfare systems in the MENA. In Chapter 4, I will move to the practical part of this thesis, which is providing justification for the necessity of reforming social welfare laws in the MENA to include disability social income assistance (i.e. creating a new model for social welfare systems in the MENA). These social welfare laws (that were inherited from the Western colonists) did not progress as much as their Western counterpart. This legal reform should consider the evolution of Western social welfare systems, which are based on liberal equality theories. Therefore, this legal transplant would require a comparison between Western social welfare systems and MENA's social welfare systems. Therefore, I will discuss the current social welfare systems in the MENA and I will compare their development possibilities with models of Western social welfare systems. I will use the Canadian social welfare system as an example of Western social welfare systems.⁸⁰

However, Western states have capitalist free market economies, which do not exist in the MENA's states. While Western states also have liberal democratic free societies, the MENA's states have conservative societies that are deeply attached to their religious values. Therefore, it would be almost impossible to compare between Western states and MENA's states. In order to do this comparison, I have to use a method of typology and Gøsta Esping-Andersen's three

⁸⁰ This subsection 1.3.3 provides an overview of Chapter 4 of this dissertation.

worlds of welfare capitalism typology would be the most useful system of organization for this comparison (especially his idea of “de-commodification” of social rights).⁸¹

In regard to the application of Esping-Andersen’s typology to the evolution of the Canadian social welfare system (as an example of Western social welfare systems), I will discuss the historical evolution of the Canadian social welfare system, which is divided into three stages by Dennis Guest:⁸²

- Before the Second World War, where the Canadian social welfare system can be described as a “residual” model of welfare (or Esping-Andersen’s “liberal” model of welfare).
- After the Second World War, where there was a shift from a residual model of welfare to an “institutional” model of welfare (or Esping-Andersen’s “social democratic” model of welfare).

⁸¹ De-commodification is the process of viewing utilities as an entitlement, rather than as a commodity that must be paid or traded for. De-commodification comes from the idea that in a free market economy, citizens (and their labor) are commodified. Given that labor is a citizen's primary commodity in the free market, de-commodification refers to activities (generally by the government) that would reduce citizen's reliance on the market (and their labor) for their well-being. Generally, unemployment, sickness insurance and pensions are used to measure de-commodification for comparisons of the welfare states. Esping-Andersen refers to de-commodification “when a service is rendered as a matter of right, and when a person can maintain a livelihood without reliance on the market.” Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton: Princeton University Press, 1990) at 21-22.

⁸² For a description of the Canadian social welfare system and its history, there are some sources can be consulted including (but not limited to): Dennis Guest, *The Emergence of Social Security in Canada* (Vancouver: University of British Columbia Press, 1997); Leonard C Marsh, “The Welfare State: Is It a Threat to Canada?” in *Proceedings of the Canadian Conference on Social Work* (Ottawa: Canadian Conference on Social Work, 1950); Angelo Wei Djao, *Inequality and Social Policy: The Sociology of Welfare* (London: John Wiley & Sons, 1983); A W Johnson, “Social Policy in Canada: The Past as it Conditions the Present” in Shirley B Seward, ed, *The Future of Social Welfare Systems in Canada and the United Kingdom: Proceedings of a Canada/UK Colloquium, October 17-18, 1986, Ottawa/Meech Lake* (Halifax: Institute for Research on Public Policy, 1987); Ernie Lightman, *Social Policy in Canada* (Toronto: Oxford University Press, 2003); Jeff Keshen & Raymond Benjamin Blake, eds, *Social fabric or patchwork quilt: the development of social policy in Canada* (Toronto: University of Toronto Press, 2006); Marcy Cohen et al, *Removing Barriers to Work, Flexible Employment Options for People with Disabilities in BC* (Vancouver: Canadian Centre for Policy Alternatives, 2008), online: CCPA <<http://www.policyalternatives.ca>>; and Tim Stainton, *An Overview of Canadian Social Policy*, PowerPoint (School of Social Work - UBC, 2009).

- However, since early 1970s, we can notice a swing back to the residual model of welfare. As an example, I will try to discuss Rick August's argument that supports the Canadian government's effort to swing back to the residual model of welfare.⁸³

In regard to the applicability of Esping-Andersen's typology for the development of social welfare in the MENA (in comparison with the Canadian social welfare system), I will note the difficulty of applying Esping-Andersen's typology (which is focused on the welfare state in capitalist free market economies and liberal democratic free Western societies) on the MENA's states (because they are still in the process of transition; and they cannot be described as fully developed capitalist countries). However, I will try to use my imagination to see which type of Esping-Andersen's welfare models can be applicable to the MENA's states (by focusing only on their social welfare systems and their social and political institutionalization). I will try to show that there are three possibilities for the development of social welfare in the MENA:

- The governmental social welfare systems in the MENA have clear definitions of the social welfare entitlements based on the current human-made-law rules. However, these definitions have a limited scope and they are not as comprehensive as the definitions of the social welfare entitlements in the West (due to the restrictions on political activities of the diverse interest groups and social movements). Therefore, if we limit our consideration only to the governmental social welfare systems in the MENA, it would look like that the MENA's states could be grouped under Esping-Andersen's conservative model of welfare, where the effect on redistribution is minimal. The

⁸³ Rick August, *Paved with Good Intentions: The Failure of Passive Disability Policy in Canada* (Ottawa: Caledon Institute of Social Policy, 2009).

governmental social welfare systems in the MENA focus on social insurance (SI) programs,⁸⁴ which are set out in their civil laws that were inherited from the European colonial powers' civil laws (for example, the Syrian civil law was inherited from the French civil law). Therefore, there is no surprise that for example, Syria (like France) could be considered under Esping-Andersen's conservative model of welfare.

- Due to the fact that Islamic charitable non-governmental organizations (NGOs) in the MENA represent an alternative to the secular state's institutions and even to the government and state type, their social activities have been resisted and restricted. Therefore, the struggle between the secular forces and the religious forces in the MENA has led to limited non-governmental social welfare systems in the MENA (e.g. a duplication of social welfare services in some areas and an absence of social welfare services in other areas or for some people). Therefore, in practice, if we look at the big picture and take into our consideration the non-governmental social welfare systems beside the governmental social welfare systems in the MENA, it would look like MENA's states could be grouped under Esping-Andersen's liberal model of welfare, where social assistance is provided mostly through a means-tested low level of benefits.⁸⁵

⁸⁴ For a description of the current governmental social welfare systems in the MENA's states (in countries where they have a governmental social welfare system) and their history, there are some sources can be consulted including (but not limited to): United States of America Social Security Administration, *Social Security Programs Throughout the World*, online: USA-SSA <<http://www.ssa.gov>> [USA-SSA]; John E Dixon, *Social welfare in the Middle East* (London: Croom Helm, 1987); and James Midgley, *Social Security, Inequality and the Third World* (London: John Wiley & sons, 1984).

⁸⁵ For a description of the non-governmental social welfare systems in the MENA, there are some sources can be consulted including (but not limited to): Janine A Clark, *Islam, Charity and Activism: Middle-Class Networks and Social Welfare in Egypt, Jordan, and Yemen* (Bloomington: Indiana University Press, 2004); and Lars Gunnar Lundblad, "Islamic Welfare, Discourse and Practice: The Institutionalization of Zakat in Palestine" in Nefissa Naguib & Inger Marie Okkenhaug, eds, *Interpreting welfare and relief in the Middle East* (Boston: Brill, 2008) 195.

- Due to the fact that the moral rules in the *Qur'ān* must stay in vague and general terms in order to be applicable to anyone in any circumstances at any period of time, these terms led to diverse interpretations (some of which might be criticized as tools for political implementations) of these moral rules. Therefore, the non-governmental social welfare systems in the MENA do not agree on clear and detailed definitions of the social welfare entitlements based on these moral rules. On the other hand, social welfare entitlements based on my new interpretation of the *Qur'ānic* rules about *Zakāh* (that has a commitment to social justice and a consideration of both liberal and Islamic values) can be justified and delivered through the governmental implementation of the Islamic system of *Zakāh*. Therefore, for the future development of social welfare in the MENA, if the governmental social welfare systems take into their consideration my new interpretation, it might take the direction towards Esping-Andersen's social democratic model of welfare in order to promote equality of the highest standards through universal provision and de-commodification of social rights.

Therefore, neither the current governmental social welfare systems nor the current non-governmental social welfare systems can cover the needs of their citizens. After discussing (in Chapter 3) how specifically the *Qur'ān* addresses the issue of social welfare and disability support (and how it has been misinterpreted), I will try to offer (in Chapter 4) a new model for social welfare systems in the MENA. However, before discussing a model of how a system could work/would look like based on my new interpretation of the *Qur'ānic* rules about *Zakāh*, I will try to discuss questions such as: What lessons can be learned from the Canadian experience

for the social welfare development in the MENA? What are the fundamental principles that social programs in the MENA should be founded on?

In order to describe how my proposed model for social welfare systems in the MENA would look like based on my new interpretation of the *Qur'ānic* rules about *Zakāh*, I have to address the allocation of social benefits and the financing of social services, which are the two sides of the redistributive cycle. Therefore, I will try to discuss questions such as: What are the parts of the total welfare spending for social policy? How should the social benefits be delivered (i.e. comparing between governmental delivery of services and non-governmental delivery of services)? In what form should the social benefits be provided (i.e. comparing between in-kind benefits, cash benefits, and vouchers)? To whom should the social benefits be given (i.e. comparing between universal benefits, means-tested benefits, and needs-tested benefits)? How should resources be generated within the society in order to pay for the activities of the welfare state? Should *Zakāh* be a separate governmental tax system (where all money collected from *Zakāh* has to be spent on social welfare only)? How should the non-governmental voluntary sector provide the social services?

1.4 The need for finding the common ground for the objective morality

Due to the fact that the practical goal of my dissertation is to provide justification for the necessity of reforming social welfare laws in the MENA to include disability social income assistance, this legal reform should consider the evolution of Western social welfare systems, which are based on liberal equality theories. However, this legal transplant would not be possible without finding the common ground for the objective morality that exists in everyone's

conscience in these two worlds. Therefore, this legal transplant would require critical analysis, interpretations, comparisons between the liberal theories of equality and my progressive Islam perspective, as well using international comparative law to compare between social welfare systems in the MENA and the Canadian social welfare system (as an example of Western social welfare systems).

Due to the fact that most people in the MENA are attached to their religious moral values, and due to the struggle between the secular forces and the religious forces in the MENA, any legal reform has to be acceptable by both sides (i.e. the secular group and the religious group) in order to be an effective legal reform. Therefore, I recognize that there are two kinds of audience for my research project (i.e. the secular audience and the religious audience). If I based my research project only on Islamic ideas, my religious audience would agree with my conclusions, but my secular audience would be skeptical about my conclusions. On the other hand, if I based my research project only on the liberal concepts of equality, my secular audience would agree with my conclusions, but my religious audience would be skeptical about my conclusions. Therefore, I have to attempt the almost-impossible challenge, which is trying to use both Islamic ideas and the liberal concepts of equality at the same time.

I agree with Robert M. Cover that law grows by interpretation;⁸⁶ and any legal interpretation cannot be valid if no one is prepared to live by it,⁸⁷ because the world is a system of tension between reality and vision. Human beings live in a reality but they are always working on

⁸⁶ Robert Cover, "The Supreme Court, 1982 Term - Foreword: Nomos and Narrative" (1983) 97 Harv L Rev 4 at 40.

⁸⁷ *Ibid* at 44.

aspirations and expectations of what may be and what ought to be.⁸⁸ Therefore, the content of law has to fulfill the desired values of the community, in order to be able to be followed willingly and to be respected among all members of this community.

I agree with Thomas Aquinas that law should always be directed to the common good,⁸⁹ and law should always pertain to a practical reason.⁹⁰ However, I also agree with Margaret Davies that the standard of practical reasonableness cannot be separated from the value-system of the community (what is logical or common sense within a particular community). She states that “we cannot dissociate our understanding of law from our conventional environments – our language, our social existence, and the institutions which structure our lives.”⁹¹ She also notes that “it is important to see ideas as a part of social and political environments, for the very simple reason that the people who have and generate ideas are part of their environments, and are immersed in their political, cultural and intellectual institutions.”⁹²

Therefore, it is important to find the common ground for the objective morality and to use this common ground as a foundation for any legal reform. This need for finding the common ground for the objective morality is due to many reasons including:

1. The difficulty of exporting liberal ideas to the Islamic world;
2. The need for distinguishing between special rights and rights guaranteed by the objective morality;

⁸⁸ *Ibid* at 9.

⁸⁹ Thomas Aquinas, *Treatise on Law: Summa Theologica, Questions 90-97* (Washington, DC: Regnery, 1996) at 5-7

⁹⁰ *Ibid* at 2-4.

⁹¹ Margaret Davies, *Asking the Law Question*, 3d ed (Law Book Company, 2008) at 93.

⁹² *Ibid* at 9.

3. The need for distinguishing between permanent rights and temporary advantages/benefits; and
4. The dependency between human law and the objective morality.

1.4.1 The difficulty of exporting the liberal ideas to the Islamic world

Western social and political philosophies played a role in the labeling of the “non-West” as the “Other,” who needs to be developed or civilized (i.e. who needs to be brought into conformity with the “West”). As a result, the tools employed by the “West” in the labeling of the “Other” have existed to maintain the distinction between the “West” and the “Other”. Dianne Otto’s view on liberalism towards embracing differences is that “liberal pluralism embrace difference only to the point that the supremacy of European modernity is not threatened.”⁹³ However, the “West” and the “Other” have fundamentally different views on the philosophy of coexistence and community. “Liberal individualism denies difference by positing the self as solid, self-sufficient unity, not defined by or in need of anything or anyone other than itself... community on the other hand denies difference by positing fusion rather than separation as a social ideal.”⁹⁴

According to Otto, both John Locke and John Rawls portray human beings in liberal societies as being fundamentally self-interested. Therefore, the act of the G77 countries to “replace the self-interested individualism of liberal positivism with legal principles that were consistent with the third world ideals of solidarity or collective legitimacy” is a reflexive strategy towards the

⁹³ Dianne Otto, “Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference” in Eve Darian-Smith & Peter Fitzpatrick, eds, *Laws of the Postcolonial* (Ann Arbor: University of Michigan Press, 1999) 145 at 170.

⁹⁴ *Ibid.*

hegemony of these ideas.⁹⁵ According to Dipesh Charkabarty, the “Western identity” (which he limits to “political modernity”), or in other words “Enlightenment humanism”, was preached by the European colonizers in the nineteenth century and now “entail an unavoidable — and in a sense indispensable — universal and secular... concepts such as citizenship, ... human rights, equality before the law, ... social justice [and] scientific rationality”.⁹⁶ He tried to “explore the capacities and limitations of these social and political categories in conceptualizing political modernity in the context of non-European life-worlds.”⁹⁷

There is no one complete liberal equality theory that addresses all of the problems related to disability. Regardless of their failures to deal adequately with disability as an issue of equality, the liberal equality theories are useful to reform laws in Western societies. However, I cannot export these liberal ideas about equality for PWDs to the other parts of the world outside the Western societies. Due to their sensitivity about globalization and colonialism (particularly for formerly colonized countries), they reject any liberal argument that may represent the secular Western systems and does not take into account their moral values. Colonialism (and the misuse of some Western concepts by colonialists) has created a degree of distrust. Therefore, the BHRs of PWDs would be (more likely) accepted, if they are tied to Islamic sources rather than directly tied to Western liberal theories.

⁹⁵ *Ibid* at 156.

⁹⁶ Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton: Princeton University Press, 2002) at 4.

⁹⁷ *Ibid* at 20.

The very roots of the Western legal and political system still seem to be very different from other nations' roots. The phenomenon of exporting constitutions, constitutional systems and democracy also presents an important point when discussing the discourse and the legal symbols in other countries. Therefore, finding the common ground between the liberal moral values and the Islamic moral values (i.e. the common ground for the objective morality) about equality for PWDs would help me to export these liberal ideas about equality for PWDs to the other parts of the world outside the Western societies (more specifically, Islamic countries).

1.4.2 The need for distinguishing between special rights and rights guaranteed by the objective morality

Currently, all human laws appear to be limited in their ability to establish and maintain the BHRs of PWDs. All cultures must have an understanding of rights and necessary circumstances for human beings to be able to develop these rights. There are true rights, not only the temporal politically enhanced entitlements (i.e. rights that are myths), but also a group of rights that are entrenched in everyone's conscience and understandings of life. To put it in simple terms, there are two kinds of entitlements. The first kind of entitlements is a human construct that can be deconstructed at any time; therefore, they are myths and they should be described as temporary advantages/benefits (and not as rights). On the other hand, the other kind of entitlements is an infinite warranty; therefore, they are true rights and they are guaranteed by universal moral values (i.e. the common ground for the objective morality).

Not all legislatively created rights are special rights or myths. Special rights go against the concept that all are equal. They seem to be some kind of zero sum game in which granting a civil

right to one person somehow takes it away from someone else. This is counter-mobilization where there are rights consciousness and anti-rights consciousness. Some rights are myths that might result from one political movement claiming a right and another political movement claiming a counter-right. However, in my opinion, if the right is guaranteed by the objective morality, it is a true right and should not be described as a myth. Political alliances and logical categories organized around race, gender, disability, sexuality, and class have been arguably narrow and troublesome. Therefore, there is a need for finding commonalities to reformulate populations independent of traditional identity-based categories. Using the concept of vulnerability should unite people (such as orphans, seniors and PWDs) across their differences.⁹⁸

PWDs constitute one of the most vulnerable population groups due to the lifelong and severe nature of disability-based discrimination and the systemic nature of the obstacles PWDs face in integrating into their communities on an equal basis with others. What are disability rights? Are they special rights/rights as excess? Or a necessary part of the universal equality right? Are they temporary advantages/conditional means-tested benefits? Or permanent rights/guaranteed rights regardless of income? Are they myths? Or true rights?

According to Rawls, those who cooperate must benefit;⁹⁹ however, he avoided the possibility that some people are sufficiently disabled, and they will remain unable to be fully cooperating members of society no matter how many productive means they have. This may lead to the

⁹⁸ This idea should have significant consequences on the legal and scholarly debates on rights and freedom, on the legacies of liberal humanism, and on the critical gender, race, disability, and sexuality scholarship under the shadows of globalization, multiculturalism, and the rise of religious fundamentalism.

⁹⁹ Rawls, *Political Liberalism*, *supra* note 50 at 300.

argument that disability rights are special rights or rights as excess claimed for special interests. On the other hand, Nussbaum argues that governments are responsible to ensure that all citizens get to a minimum level of all BHCs.¹⁰⁰ Therefore, ensuring a minimum level of all BHCs for PWDs should be a necessary prerequisite for them to be able to achieve equality. If one adopts Nussbaum's reasoning, disability rights should be a necessary part of the universal equality right. They are true rights and they should not be described as special rights or myths.

1.4.3 The need for distinguishing between permanent rights and temporary advantages/benefits

The politics of civil rights may explain how high or how low the reasonableness standard of the reasonable disability accommodation for PWDs. We should remember that people who are in the center of power are the ones who are able to claim and acquire any entitlement and describe this entitlement as a right or an advantage. Although the politics of civil rights are part of reality, the political power can create only temporary advantages but not permanent rights, because as soon as other political movements are able to tip the balance of power, they will be able to overturn laws and invalidate these temporary advantages. For example, the existing human laws replace the permanent guaranteed disability rights with the temporary conditional income-tested disability benefits. On the other hand, some human laws confer entitlements that should not exist in the first place, because if rules do not conform to morals, they cannot confer rights. For example, in regard to the master and his/her slave, although some statutes conferred masters with

¹⁰⁰ Nussbaum, *supra* note 30 at 70.

the right to enslave other human beings, they do not really have the right, because this is not a right, and it is only benefit or advantage conferred by a human law.

At the same time, the universal BHRs are guaranteed by the objective morality, even if there was no man-made-law that supports these universal BHRs. These universal BHRs should include equality among all humans. However, sometimes, rights have been designed, interpreted, and applied without consideration of the needs of the disadvantaged groups.¹⁰¹ We should remember that according to all of the major religions, all human beings (as creations) are equal in the eyes of God (as the Creator). We should also remember that some constitutions (e.g. the Canadian constitution) confirm the supremacy of God, which means the supremacy of the God-made-law to any man-made-law.

In my opinion, the positive law (human law) is useful to provide detailed description of disability benefits; however, the positive law is not sufficient to distinguish between disability benefits and disability rights. Therefore, finding universal moral values (i.e. the common ground for the objective morality) would help me to explain my position on disability rights, to challenge the traditional assumption, and to argue that disability benefits and disability rights are not the same thing.

¹⁰¹ In my opinion, violating some principles of the objective morality is like going against the nature of things, which would cause problems and suffering.

1.4.4 The dependency between human law and the objective morality

In my opinion, morals should inspire law and law should follow what morals dictate. My argument will start from the idea that if the secular legal system means the separation of church and state, it does not necessarily mean the separation of law and morals.¹⁰² It means that law should not and cannot exclude all moral values (including the liberal moral values and the religious moral values). If law excluded all religious moral values, this means that the secular legal system adopted atheism as its own only religion and ignored all other religions.¹⁰³ However, man-made-law and the objective morality need each other. Morality cannot survive for a long time without human law, because morality needs a human law in order to be enforced, implemented, and supplemented by details for all social variations. At the same time, if it is inconsistent with the objective morality, human law cannot survive for a long time, because any human law needs the objective morality to be voluntarily effective and to be able to achieve the ultimate justice.

Most of the criticisms that are directed towards the legal positivism theory started from the suspicion that the legal positivism theory fails to give morality its due. The legal positivism theory is not able to explain why law should make human life go well, and why the legal rules are highly valued, and why the legal language and the legal practice are highly moralized. Therefore, I agree with critics of the legal positivism theory who argue that the most essential

¹⁰² According to Cover, legal positivism theory may be seen as a massive effort that has gone on in a self-conscious way for over two centuries to strip the word law of these meanings. Robert M. Cover, "The Folktales of Justice: Tales of Jurisdiction" (1985) 14 Cap U L Rev 179 at 180.

¹⁰³ Davies notes that the positivist insistence on what the law is rather than on what the law ought to be and "the supposed separation of law from morality is simply that it is in itself a political gesture. The exclusion, and effective suppression, of matters other than those which are determined to be 'legal' cannot be seen to be politically neutral." Davies, *supra* note 91 at 88.

feature of law is its moral nature, which is its capacity to rule with integrity, to protect BHRs, and to require the common good. These features of law cannot be found in its source-based character.

Although H. L. A. Hart admitted some validity in the "minimum content of natural law" (because it explains the legal rationale in reacting to some human needs such as vulnerability), he failed to connect the "minimum content of natural law" with his idea of the "ultimate rule of recognition", which considers the compatibility of a rule with moral values to be legally valid. He stated that "nothing the legislators do make laws unless they comply with fundamental accepted rules specifying the essential law making procedures".¹⁰⁴ These fundamental rules are the same as Lon L. Fuller's internal morality of law. Therefore, Fuller notes that Hart had to conclude that these fundamental rules are "not rules of law, but of morality."¹⁰⁵ Fuller also notes that Hans Kelsen takes this plunge by accepting that law must be backed by a "basic norm", which he likens to a "norm of natural law."¹⁰⁶ Therefore, by acknowledging the existence of these "fundamental accepted rules", positivists are accepting Fuller's position that there is an internal morality of law, the non-existence of which will render a legal system invalid.¹⁰⁷

According to positivists, morality is the final test of conduct, and only "what ought to be" should regulate the affairs of humans. Hart notes that John Austin and Jeremy Bentham seek to steer us away from two dangers that are integral to the idea that "law as it is" is inseparable from "law as

¹⁰⁴ H L A Hart, "Positivism and the Separation of Law and Morals" (1958) 71:4 Harv L Rev 593 at 603.

¹⁰⁵ Lon L Fuller, "Positivism and Fidelity to Law-A Reply to Professor Hart" (1958) 71:4 Harv L Rev 630 at 639.

¹⁰⁶ *Ibid* at 641.

¹⁰⁷ *Ibid* at 639.

it ought to be,” which are: “the danger that law and its authority may be dissolved in man’s conceptions of what ought to be and the danger that the existing law may supplant morality as a final test of conduct and so escape criticism.”¹⁰⁸ Therefore, my argument regarding the need for finding the common ground between the liberal moral values and the Islamic moral values (i.e. the common ground for the objective morality) is consistent with the argument of other scholars such as Fuller who have argued that the positive law and morality cannot be completely separated.

¹⁰⁸ Hart, *supra* note 104 at 598. While both Hart and Fuller admit through their different interpretive modes that the application of the law could actually extend into a consideration of what ought to be or what possibilities could arise from the language of a law, they both disagree on the exact content of “ought”. For Hart, “ought” should not of necessity be interpreted as moral rules. For Fuller, “ought” must be defined in the light of the internal order or goodness that the law was originally promulgated to advance. Therefore, he centers the effectiveness of a law on its acceptance as good law. Moreover, both scholars seem to steer their arguments to a point of near unity in their agreement that the interpretation of law as it is should take into account changes in social policies.

Chapter 2: Disability Rights within Liberal Theories of Equality

2.1 The roadmap for Chapter 2

In order to discuss the legal reform that is needed to reform social welfare laws in the MENA, I should consider the evolution of their Western counterpart social welfare laws, which are based on liberal equality theories. Therefore, this legal transplant of a liberal secular system into the MENA's Islamic background requires testing the compatibility between liberal and Islamic moral values. Therefore, I will discuss disability rights within the liberal theories of equality; and how these approaches would be justified in my proposed human rights framework. Therefore, I will analyze the strengths and weaknesses of these liberal theories in relation to the public policy to address the medical, economic and social needs of PWDs.

In considering the compatibility between the liberal theories of equality and my progressive Islam perspective on liberty and equality, I will discuss these liberal equality theories in order to choose which one of them can be used to confirm the universal BHR to equality for PWDs and the universal BHR to social welfare (more specifically, disability social income assistance). Then, I will use my own amalgamation of these liberal ideas to form my proposed Islamic version of my new liberal equality theory and to propose a common ground between the liberal and Islamic moral values. In Chapter 3, I will use this common ground to reinterpret *Qur'ānic* rules about *Zakāh* with my own interpretation that has a commitment to social justice and a consideration of both liberal and Islamic moral values. Then, in Chapter 4, based on this new interpretation, I will offer a new model for social welfare systems in the MENA.

Many different liberal theories influenced the analyses of equality rights. Achieving equality is a legitimate goal for social policy. However, different scholars often use different terminology in describing equality.¹⁰⁹ Despite their different terminology, they are often fundamentally in agreement with one another. However, some of these different terminologies represent differences in approach that cannot be reconciled. On the other hand, different scholars have conceived of disability in different ways. The perception of disability by others has been changing over time from viewing disability as a form of punishment to viewing disability as an absence of one or more of the rights-based access to citizenship dimensions.

Therefore, first, I will provide a historical overview of the changing perceptions of disability by reviewing the strengths and weaknesses of the different models of disability (including the [im]moral model of disability, the biomedical/expert/professional model of disability, the tragedy/charity model of disability, the economic model of disability, the social-political/adapted model of disability, the spectrum model of disability, the customer/business/market model of disability, and the rights-based access to citizenship/unified model of disability). Second, I will discuss the current definition of disability at the international level, examining which one of these different models of disability has been adopted at the international level. Third, I will discuss the questions: What is so important about social welfare laws? Why anti-discrimination laws alone are limited in addressing issues of justice for PWDs? Is there a conflict between

¹⁰⁹ Equality theorists do not agree on what equality means. However, they have developed some common terms used to describe different ideas about what equality should be. The most common terms of equality are:

- Equality of the individual versus equality of the group.
- Formal equality versus substantive equality.
- Equality of treatment versus equality of opportunity or equality of result.
- Positive freedoms versus negative liberties (and the rights that protect them as related concepts to equality).

Liberty and Equality? Should states have a positive obligation to alleviate inequalities as well as an obligation not to engage in conduct that causes inequalities? Fourth, I will try to choose one theory among the different liberal equality theories that can address issues of justice for PWDs by reviewing their strengths and weaknesses (including Rosenfeld's theory of equality, the utilitarian theories of equality, the classical liberal and the libertarian theories of equality, the contractarian theories of equality, and the egalitarian theories of equality)? Fifth, I will provide a new liberal equality theory as the best candidate liberal equality theory to deal adequately with disability as an issue of justice (i.e. it can confirm the universal BHR to equality for PWDs and the universal BHR to social welfare, more specifically, disability social income assistance). Sixth, I will discuss the compatibility between the liberal moral values and the religious (in general)/Islamic (in particular) moral values.

2.2 A historical overview of the changing perceptions of disability

Different scholars have conceived of disability in different ways. In 1980, the World Health Organization (WHO) introduced a framework for working with disability using the terms Impairment, Handicap and Disability as follows:¹¹⁰

- Impairment = a loss or abnormality of physical bodily structure or function, of logic-psychic origin, or physiological or anatomical origin;
- Disability = any limitation or function loss deriving from impairment that prevents the performance of an activity in the time-lapse considered normal for a human being; and

¹¹⁰ World Health Organization, *International Classification of Impairments, Disabilities and Handicaps* (Geneva: WHO Press, 1980) at 27-29, online: WHO <<http://www.who.int>>.

- Handicap = the disadvantaged condition deriving from impairment or disability limiting a person performing a role considered normal in respect of their age, sex and social and cultural factors.

On the other hand, Bickenbach discusses three different models of disability, which are the biomedical model of disablement, the economic model of disablement, and the social-political model of disablement. According to Bickenbach, the social policy in Canada that is related to PWDs is “fragmented, incoherent and uncoordinated.”¹¹¹ Instead of criticizing the social policy-makers for these inconsistencies, he tried to offer a theoretical rationale for the social forces, the medical forces and the political forces that have shaped the social policy, based on the evolving understanding of the idea of disablement and of the place of PWDs in Canadian society.

All of the different models of disability view disability as a value-based determination about which explanations for the abnormal are legitimate for membership in the disability category; and they provide justification for the disability policy. Therefore, they answer two questions that are at the root of policy development regarding disability: What does it mean to have a disability (i.e. the lens through which disability is viewed)? And what is society obliged to do for PWDs (i.e. the lens through which social policy for PWDs is viewed)? The perception of disability by others has been changing over time from describing disability as a form of punishment, to a health condition, to a source of sympathy, to a cause for inability to work, to a result of oppression, to a part of a continuum of human abilities, to a part of the satisfaction-demanding

¹¹¹ Bickenbach, *Physical Disability*, *supra* note 15 at 5.

consumer's personal identity, and finally to describing disability as an absence of one of the rights-based access to citizenship dimensions.

2.2.1 The [im]moral model of disability

This model considers that PWDs are morally responsible for their disability. Therefore, under this model, based on religious doctrines, disability is considered as a result of bad actions (e.g. the principle of karma in Indian religions). According to Deborah Kaplan,

The [im]moral model is historically the oldest and is less prevalent today. However, there are many cultures that associate disability with sin and shame, and disability is often associated with feelings of guilt, even if such feelings are not overtly based in religious doctrine. For the [PWD], this model is particularly burdensome. This model has been associated with shame on the entire family with a [PWD]. Families have hidden away the disabled family member, keeping them out of school and excluded from any chance at having a meaningful role in society. Even in less extreme circumstances, this model has resulted in general social ostracism and self-hatred.¹¹²

In my opinion, this is the worst model of disability; and it is the root of negative attitudes towards PWDs and discriminatory and prejudiced actions against PWDs.

2.2.2 The biomedical/expert/professional model of disability

According to Bickenbach, this model is limited to only one dimension of disablement (i.e. "impairment", which means the structural and functional deficiencies located in the individual). He argues that those who adopt this view of disablement are inclined towards a biomedical model of social obligation or one where the medical opinion determines the right to benefits. The

¹¹² Kaplan, *supra* note 15 at 353.

aim of this model is to modify the individual so as to eliminate or ameliorate those structural and functional deficiencies.¹¹³

This model views disability as a problem of the person, directly caused by disease, trauma, or other health condition which requires sustained medical care provided in the form of personal treatment by professionals, because it is a part of his/her own body, and it may reduce his/her quality of life, and it may cause clear disadvantages to him/her. This model views the body as a machine to be fixed in order to fit within the normative values. Therefore, under this model, management of disability is aimed at a "cure," or an adjustment and a behavioural change of the individual that would lead to an "almost-cure" or effective cure. Consequently, medical care is viewed as the main issue, and at the political level, the principal response is that of modifying or reforming healthcare policy.¹¹⁴

Professionals follow a process of identifying the impairment and its limitations, and taking the necessary action to improve the position of PWDs.¹¹⁵ This has tended to produce a system in which an authoritarian, over-active service provider prescribes and acts for a passive client. In my opinion, this model is not enough by itself to achieve equality for PWDs, because relying uncritically on this model would produce unwanted consequences (e.g. damaging the human

¹¹³ Bickenbach, *Physical Disability*, *supra* note 15 at 61.

¹¹⁴ Nikora et al, *supra* note 15 at 5-6.

¹¹⁵ This model implies that curing or at least managing disability mostly or completely revolves around identifying the illness or disability from an in-depth clinical perspective (in the sense of the scientific understanding undertaken by trained healthcare providers), understanding it, and learning to control and/or alter its course. By extension, this model also believes that a "compassionate" or just society invests resources in health care and related services in an attempt to cure disabilities *medically*, to expand functionality and/or improve functioning, and to allow the PWD a more "normal" life. The medical profession's responsibility and potential in this area is seen as central.

dignity of PWDs by using the “impaired” label).¹¹⁶ Although this medical model lens can be used to address things other than medical support, it is limited in changing the oppressive environment, because it provides incomplete picture of disability; and it focuses on changing the individual.

2.2.3 The charity/tragedy model of disability

This model portrays PWDs as victims of their circumstances who are deserving of help. Along with the biomedical model of disability, this charity/tragedy model of disability is usually used by charitable NGOs to explain disability. Most charitable initiatives use the biomedical model of disability in their portrayal of PWDs;¹¹⁷ therefore, these charitable initiatives promote a pitiable, essentially negative, largely disempowered image of PWDs.¹¹⁸ Therefore, this charity/tragedy model of disability should be considered as a hazard to BHRs for PWDs, because it harms the human dignity of PWDs; and it is the basis for an unintended social degradation of PWDs.

2.2.4 The economic model of disability

According to Bickenbach, this model is limited to only one dimension of disablement (i.e. “disability”, which means the inability of individuals to perform certain activities in the way that is considered normal). The most important for this model are those activities related to one's

¹¹⁶ Attempts to change, “fix” or “cure” individuals, especially when against the wishes of the patient, can be discriminatory and prejudiced. These negative attitudes can harm the self-esteem and the social inclusion of those patients (e.g. being told that they are not as good or valuable, in an overall and core sense, as others). Moreover, according to Wasserman, the medical model of disablement (where the individual must be restored to fit the able-bodied norms of society) “may demand too much for too few” and may obscure other issues of social justice. Wasserman, “Distributive Justice”, *supra* note 15 at 158.

¹¹⁷ However, some advocacy groups rely on charitable donations using the social model of disability to fundraise.

¹¹⁸ Nikora et al, *supra* note 15 at 6.

ability to be gainfully employed and economically self-sufficient. He argues that those who adopt this view of disablement are inclined towards an economic model for the social policy formulation, whereby the social policy attempts to promote economic integration of PWDs. He argues that examples of this model are workers' compensation and social income assistance programs in Canada.¹¹⁹

This model defines disability by the inability of the person to participate in work. It also assesses the degree to which impairment affects the productivity of the PWD and the economic consequences for that person, his/her employer, and the society in general. Such consequences may include: loss of earnings for that person, lower profit margins for his/her employer, and state welfare payments of social income assistance for him/her.¹²⁰

However, the label of "unemployable" has been very problematic for PWDs, because it has excluded them from the workforce; it has meant they must rely on disability social income assistance benefits and/or some other services that may or may not be able to meet their needs. However, PWDs are forced to accept this label in order to qualify for disability-related welfare benefits that are usually higher than regular welfare benefits. The label of "unemployable" is mixed with negative attitudes and assumptions about the individual, it reinforces the stigma of receiving social income assistance, and it is responsible for hostile attitudes towards social income assistance's recipients. In my opinion, this model is not enough by itself to achieve equality for PWDs, because relying uncritically on this model would produce unwanted

¹¹⁹ Bickenbach, *Physical Disability*, *supra* note 15 at 93.

¹²⁰ MDRC, *supra* note 15.

consequences (e.g. damaging the human dignity of PWDs by using the "unemployable" label). Although this economic model lens can be used to address things other than economic support, it is limited in changing the oppressive environment, because it provides incomplete picture of disability. The label of "unemployable" implies that the problem rests with the individual; it shifts the focus away from the society's responsibility to remove social and economic barriers to equality.

2.2.5 The social-political/adapted model of disability

According to Bickenbach, this model is limited to only one dimension of disablement (i.e. "handicap", which means the disadvantage in terms of role fulfillment). Under this model, disability results when the PWD interacts with a hostile environment. The aim of this model is to transform the environment so as to reduce its disabling effects. This view of disablement as an interaction of the individual with the environment leads to a social-political model of disablement policy that is strongly tied to the individual rights and the collective rights of PWDs in a variety of social contexts. He argues that examples of this model can be found in more recent policies regarding educational, vocational and accessibility entitlements.¹²¹

This model views disability as a socially created problem and a matter of the full integration of PWDs into the society. Under this model, disability is not an attribute of the person, but rather a complex collection of conditions, many of which are created by the social environment. This model states that although disabilities pose some limitations on PWDs in an able-bodied society,

¹²¹ Bickenbach, *Physical Disability*, *supra* note 15 at 135.

oftentimes the surrounding society and environment are more limiting than the disability itself. Therefore, under this model, the management of this problem requires a social action and it is the collective responsibility of the society at large to make the environmental modifications necessary for the full participation of PWDs in all areas of social life.¹²²

This model identifies systemic barriers, negative attitudes and exclusion by the society (purposely or inadvertently) as the main contributory factors in disabling people.¹²³ Under this model, PWDs have the potential to contribute to the society (and, therefore, adding economic value to the society), if they are given equal rights and equally suitable facilities and opportunities as others. Therefore, disability is used to refer to the restrictions caused by society when it does not give equivalent attention and accommodation to the needs of PWDs. Under this model, the struggle for equality is often compared to the struggles of other socially marginalized groups.¹²⁴ Equal rights would empower PWDs to make their own decisions and would give them the opportunity to live life to the fullest.¹²⁵

¹²² Nikora et al, *supra* note 15 at 6-7.

¹²³ While physical, sensory, intellectual, or psychological variations, may cause functional limitations or impairments, these do not have to lead to a disability unless the society fails to take account of and include all people regardless of their individual differences. The UPIAS states "In our view it is society which disables physically impaired people. Disability is something imposed on top of our impairments by the way we are unnecessarily isolated and excluded from full participation in society." Priestley, *supra* note 15 at 3, 14.

¹²⁴ Anita Silvers argues that the inequality in regard to PWDs is rooted in social practices that stop them from demonstrating their competence. Neglecting to offer PWDs access to the opportunities that other citizens enjoy usually has been defended by conceptualizing them as limited and deficient. She argues that we should conceive of disability in terms of social discrimination (i.e. practices that exclude PWDs as a minority from full participation in social and economic life) and not in terms of natural impairments. PWDs as a minority are not naturally needy, but their lowered functionality has resulted mostly from the exclusionary social environment that has been preferred by the able people. Disability means the lack of a capacity that is a valuable tool for others. However, it does not necessarily mean a net loss for PWDs, considering the fact that some alternative tools and alternative activities can have the same useful values, and may make up for their limitations. Therefore, any limitation does not necessarily mean loss. She argues that the Americans with Disabilities Act (ADA) promotes a significant evolution of the status of PWDs by advancing them beyond confinement to a class subject to special treatment and by joining them with

According to Bickenbach, this model is both revolutionary and liberating. It is revolutionary in demanding a shift in perspective on disability to the viewpoint of PWDs. He states “To be, or to be perceived to be, a handicapped person is to experience a social status, a role reinforced by the attitudes and beliefs of people as well as the practices and institutions of society.”¹²⁶ This model challenges the assumption that PWDs, who are excluded, must accept their situation as it is. Due to the fact that this model considers the perspective of PWDs as their disabilities are created or exacerbated by social factors, it broadens the possible social responses to disability. This model liberated social policy and “jarred social policy analysts out of well-worn paths and demanded imaginative solutions to handicap situations.”¹²⁷ In challenging the assumptions of the medical model, the disability rights movement liberated PWDs by empowering them. They used their voice to take greater control of their lives. Part of their strategy was to work through the established system to obtain greater rights to self-determination. Activists seek legislative reform to give them enhanced rights within the system. The movement was also counter-hegemonic. Therefore, the movement was more revolutionary than mere agitation for legislative reform. Activists tried to change the dominant framework of society, and not only to improve their position within it. Their effort to take control of their lives away from the medical professionals was like rebellion or secession.¹²⁸

other minorities as classes explicitly designated to command equal social access. Silvers, “Formal Justice”, *supra* note 15 at 141-45.

¹²⁵ Charlton, *supra* note 15 at 3.

¹²⁶ Bickenbach, *Physical Disability*, *supra* note 15 at 158.

¹²⁷ *Ibid* at 159.

¹²⁸ *Ibid* at 171.

According to Tom Shakespeare and Nicholas Watson, this model implies that PWDs “are an oppressed social group. It distinguishes between the impairments that people have and the oppression which they experience and most importantly, it defines ‘disability’ as the social oppression, not the form of impairment”¹²⁹ Under this model, disability is caused by the oppressive social environment; therefore, the main source of the problem is the systemic discrimination against PWDs. As a result, disability is not a matter of bad luck, but disability is a social evil for which the society bears responsibility.¹³⁰

This social-political model of disability is a central feature of the minority rights analysis. The dominant disability rights movement is based on what is described as a minority rights analysis. Under this analysis, PWDs are viewed as a minority that has been disadvantaged by discriminatory practices, which means that as a group, PWDs are the victims of practices that deny them (either consciously or unconsciously) opportunities available to other members of the society. As a result of those practices, PWDs become isolated and excluded from full participation in the society. Therefore, the political strategy for this movement is based on the belief that removing the discriminatory practices will enable participation by PWDs (i.e. removing social biases and empirical obstacles to achieve equality). Therefore, activists of this movement have focused their efforts on the enactment of effective anti-discrimination laws.¹³¹

¹²⁹ Shakespeare & Watson, *supra* note 15 at 10.

¹³⁰ Bickenbach, *Physical Disability*, *supra* note 15 at 153.

¹³¹ *Ibid* at 152-58.

Harlan Hahn identified the architectural, the institutional and the cultural environments in order to determine the meaning of disability, arguing that biases and prejudices of the dominant group (the able-bodied) underlie those environmental barriers. He states that

governments bear an inescapable responsibility for those facets of the environment that have a discriminatory effect on [PWDs]. Furthermore, evidence of widespread aversion to the presence of [PWDs] cannot be separated from the values and feelings that have contributed to the formation of social policy. Hence, if institutions allow the nondisabled majority to avoid and exclude [PWDs], that result cannot be attributed to mere happenstance. This realization also imposes a corresponding duty on policymakers to protect the civil rights of disabled citizens by eliminating this form of segregation and inequality.¹³²

Therefore, inequality for PWDs results (directly or indirectly) from biases and prejudices towards them from the non-disabled majority, and from the social policy as a result of the negative attitudes of society towards PWDs. Moreover, Mike Oliver tried to apply the analysis of oppression; he states that the “disabled identity” is formed through a combination of internal psychological processes and external factors.¹³³ According to Oliver, “disability is not merely socially constructed, but socially created as a form of institutionalised social oppression like institutionalised racism or sexism.”¹³⁴ He argues that the disability movement has a central role to play in eliminating the social restrictions and oppressions associated with disability.¹³⁵

According to Susan Wendell, many of the issues facing feminists are the same as those issues facing the disability movement: whether to focus on sameness or difference; whether to focus on independence or vulnerability; and whether to seek full integration and equal power or to

¹³² Hahn, “Civil Rights”, *supra* note 15 at 184-85.

¹³³ Oliver, *supra* note 15 at 77.

¹³⁴ *Ibid* at 121.

¹³⁵ *Ibid* at 130.

maintain a separate community.¹³⁶ Therefore, she concludes (like Oliver) that disability must be addressed as a phenomenon of oppression. However, she focuses (unlike Oliver) on the relationship of PWDs to their own bodies; she states that “We need a theory of disability for the liberation of both disabled and able-bodied people, since the theory of disability is also the theory of oppression of the body by a society and its culture.”¹³⁷

According to M. David Lepofsky, PWDs must function in a world in which virtually all institutions were designed on the premise that they are intended to serve the able-bodied; in such a world, “absent a duty to accommodate, equality guarantees would be entirely meaningless [for PWDs].”¹³⁸ Moreover, Anne M. Molloy stated that “If [PWDs] are ever to achieve true equality in employment, ... it will only be upon an understanding and acceptance ... of the duty to

¹³⁶ Wendell, *supra* note 15 at 224.

¹³⁷ *Ibid* at 242. Wendell argues for a feminist theory of disability (after noting the absence of perspectives on disability in feminist theory). She states that

Disabled women struggle with both the oppressions of being women in male-dominated societies and the oppressions of being disabled in societies dominated by the able-bodied. They are bringing the knowledge and concerns of women with disabilities into feminism and feminist perspectives into the disability rights movement. To build a feminist theory of disability that takes adequate account of our differences, we will need to know how experiences of disability and the social oppression of the disabled interact with sexism, racism and class oppression. ... Unfortunately, feminist perspectives on disability are not yet widely discussed in feminist theory, nor have the insights offered by women writing about disability been integrated into feminist theorizing about the body. My purpose... is to persuade feminist theorists... to turn more attention to constructing a theory of disability and to integrating the experiences and knowledge of disabled people into feminist theory as a whole. *Ibid* at 223-25.

Silvers considered the intersection of disability and feminism. She also wants to persuade feminist theorists to adjust their theory to incorporate a disability rights perspective. See Silvers, “Reprising Women’s Disability”, *supra* note 15 at 81-82. She noted an increasing insistence by women with disabilities that they were being marginalized in the women’s movement in a manner that was similar to their marginalization by patriarchal society (i.e. women’s rights groups were unwilling to include women with disabilities or recognize their issues as women’s issues). *Ibid* at 95.

From an egalitarian feminist perspective, Mahowald states that

Like most feminists, I resist a conception of individual autonomy that ignores the context, which often compromises that autonomy. Until and unless the compromising influences are removed, equal liberty for individuals is not possible. These influences include all of the social biases and empirical obstacles placed in the path of people who belong to nondominant groups; they also include covert obstacles such as internalized biases, psychological pressures, and reduced expectations on the part of the nondominant persons themselves. Material equality, defined as the removal of both internal and external obstacles to autonomy, is thus a prerequisite to equal liberty. See Mahowald, *supra* note 15 at 290-91.

¹³⁸ Lepofsky, *supra* note 15 at 6-7.

accommodate as an essential element of equality.”¹³⁹ She adds that for PWDs, “the right to accommodation goes to the very heart of equality.”¹⁴⁰ Therefore, the claim for disability accommodation has formed an important part of disability rights advocacy. According to Evelyn Kallen, the disadvantages faced by minority groups result from systemic human rights violations that create oppression. PWDs may experience discrimination; however, it is only because of their membership in an oppressed minority group. Kallen concludes that although PWDs have a valid legal complaint, social policy should be aimed at the oppressive environment.¹⁴¹

This model has had a major influence on governments’ policies. Disability activists have concentrated their efforts on the removal of barriers to participation in society such as the introduction of the right to physical accessibility. According to Bickenbach, the minority rights argument (as the political strategy that forms the basic platform of disability rights movements around the world) is a proven success. He stated that “These [disability rights] movements can be credited with nearly every change in attitude and treatment of [PWDs] in the last two decades—from kerb cuts to accessible bathrooms, to programs to integrate developmentally disabled children into the public schools to protections of the rights of people in mental institutions.”¹⁴²

¹³⁹ Molloy, *supra* note 15 at 24.

¹⁴⁰ *Ibid* at 26.

¹⁴¹ Kallen, *supra* note 15 at 192-220.

¹⁴² Bickenbach, “Minority Rights”, *supra* note 15 at 105. Some critics would argue that Bickenbach’s views (with respect to disability rights theory) are fairly idiosyncratic and not necessarily representative of the disability rights movement. I acknowledge that there is much more to disability rights theory. For example, 24 scholars from a variety of disciplines in *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* (see Pothier & Devlin, *supra* note 15) contend that achieving equality for PWDs is not fundamentally a question of medicine or health, nor is it an issue of sensitivity or compassion. Rather, it is a question of politics, and of power and powerlessness. Therefore, we need a new understanding of participatory citizenship that encompasses PWDs, new policies to respond to their needs, and a new vision of their entitlements. I also acknowledge the reality of impairment-based social movements, which they often worked in tandem with litigation. There have been impairment based commonalities leading to successful social struggles in many areas. The disability rights as a

According to Bickenbach, this model does not describe a single unified explanation of disability or justification for disability policy. He notes that this model “is still in the process of evolving, and there remains considerable controversy, even among its staunchest supporters, over the social-scientific basis for the model and the political agenda it mandates.”¹⁴³ He questions the long-term effectiveness of the minority rights argument.¹⁴⁴ The social-political model could be criticised as being too narrow, because it ignores the different experiences of people with different impairments and the different social responses to them (such as between physical and mental disabilities). According to Bickenbach et al, supporters of this model tend to be “highly educated, white middle-class males with late onset physical disabilities and minimal needs”;¹⁴⁵ therefore, they fail to represent the wider issues of disability. Although Sally French supports the social-political model and the need to present a unified front in order to bring about social change, she argues that some problems faced by PWDs cannot be solved by social manipulation alone.¹⁴⁶

In addition, according to Gary L Albrecht and Lois M Verbrugge, “[t]he social causation model is a reaction to the medical one. In its purest form, activists and scholars claim that disability has nothing to do with a person's disease or impairment, but instead is entirely created by societal

social movement has been documented in many books such as *The Disability Rights Movement: From Charity to Confrontation* (see Fleischer & Zames, *supra* note 15), which provides encyclopedic history of the struggle for disability rights. Based on interviews with over one hundred activists, it tells a complex and compelling story of an ongoing movement that seeks to create an equitable and diverse society, inclusive of PWDs. However, I am not focused on anti-discrimination measures.

¹⁴³ Bickenbach, *Physical Disability*, *supra* note 15 at 158.

¹⁴⁴ Bickenbach, “Minority Rights”, *supra* note 15 at 105.

¹⁴⁵ Bickenbach et al, “Models of Disablement”, *supra* note 15 at 1181.

¹⁴⁶ French, *supra* note 15 at 17-18.

barriers and attitudes."¹⁴⁷ According to Gareth Williams, although the disability studies are very diverse, "...all of this work has as its common root a rejection of the medical model as the foundation for any effective understanding of impairment or disability."¹⁴⁸ According to Liz Crow, disconnecting disability from impairment does not recognize the everyday experiences of pain and suffering for many PWDs.¹⁴⁹ Due to the fact that this model tries to avoid any form of medicalization or link with impairment, it requires that the individual must positively identify himself/herself as a PWD. On the other hand, many people with impairments do not regard themselves as disabled; however, supporters of this model have accused them of having a "false consciousness".¹⁵⁰

Bickenbach challenges the assumption that PWDs can be characterized as a minority group. He argues that the social response to impairment varies with the type of impairment, and there is no common experience or feeling of solidarity amongst PWDs. He stated that "there is no unifying culture, language or set of experiences; [PWDs] are not homogeneous, nor is there much prospect for trans-disability solidarity."¹⁵¹ He raises the concern that, by focusing on their status as a distinct and disadvantaged minority, PWDs highlight their difference from the mainstream.¹⁵² According to Martha Minow, "when does treating people differently emphasize their differences and stigmatize or hinder them on that basis? and when does treating people the same become insensitive to their difference and likely to stigmatize or hinder them on that

¹⁴⁷ Albrecht & Verbrugge, *supra* note 15 at 300.

¹⁴⁸ Williams, *supra* note 15 at 124.

¹⁴⁹ Crow, *supra* note 15 at 221.

¹⁵⁰ Deal, *supra* note 15 at 16.

¹⁵¹ Bickenbach, "Minority Rights", *supra* note 15 at 105.

¹⁵² *Ibid*; Penney, *supra* note 15 at 91-92.

basis.”¹⁵³ This “dilemma of difference” has particular force for PWDs, because their disabilities are socially constructed as a result of narrow mainstream idea about what is normal. However, PWDs need some accommodation of their differences to function within the mainstream.¹⁵⁴

In my opinion, this model is not enough by itself to achieve equality for PWDs, because relying uncritically on this model would produce unwanted consequences. Although this social model lens can be used to address things other than social support, it is limited in achieving equality for PWDs. I agree with Bickenbach that this social model provides incomplete picture of disability; and the label of "oppressed minority" would harm the human dignity of PWDs. He argues that it is demeaning to have to “earn one’s right to equality and eligibility to ‘special treatment’ by proving that one is a member of a socially discredited group.”¹⁵⁵

2.2.6 The spectrum model of disability

This model argues that disability should be considered as a part of the normal human functioning spectrum. While minority rights advocates consider PWDs as a discrete and insular minority in order to remedy the inequality by advocating anti-discrimination laws (i.e. it is through their status as a minority group, PWDs can claim equality rights parallel to those granted to other minority groups), universalists do not view PWDs as a minority. Instead, they consider disabilities as part of the universal human condition and they seek to remedy the inequality by expanding the range of the normal.¹⁵⁶ According to Bickenbach, “a disability should not be

¹⁵³ Minow, *supra* note 15 at 20.

¹⁵⁴ *Ibid.*

¹⁵⁵ Bickenbach, “Minority Rights”, *supra* note 15 at 106.

¹⁵⁶ *Ibid* at 111-14.

viewed as a human attribute that demarcates one portion of humanity from another (as gender does, and race sometimes does), but rather as an infinitely various but universal feature of the human condition.”¹⁵⁷ There are no inherent boundaries to the variation of human abilities; rather they are part of a continuum in which “the complete absence of disability, like the complete absence of ability, is a limiting case of theoretic interest only.”¹⁵⁸

Due to the fact that many disabilities emerge slowly over time, Williams stated that "imperative it may be politically to define [PWDs] as a minority group, it is a curious minority that will include us all - if not today, then tomorrow, or the day after that."¹⁵⁹ While Irving Kenneth Zola argues that disability could virtually include everyone at some particular situation in their lives,¹⁶⁰ Harlan Hahn argues that people are either socially labelled as disabled or they are not.¹⁶¹ Therefore, according to Bickenbach, boundaries are drawn which have the effect of creating disability. Some people become disabled, because they fall on the wrong side of the line. However, those boundaries do not reflect inherent boundaries in human abilities but are drawn for political or social reasons. They are therefore negotiable as a matter of social or political policy.¹⁶² Therefore, this spectrum model of disability reflects the reality of PWDs; and it takes into consideration all kinds of disabilities (from the least disabilities to the most extreme disabilities); and it guarantees the human dignity of PWDs.

¹⁵⁷ *Ibid* at 112.

¹⁵⁸ *Ibid*.

¹⁵⁹ Williams, *supra* note 15 at 141.

¹⁶⁰ Zola, *supra* note 15 at 27.

¹⁶¹ Hahn, “The political implications”, *supra* note 15 at 48.

¹⁶² Bickenbach, “Minority Rights”, *supra* note 15 at 112.

Shakespeare and Watson argue that “societies have evolved to minimise the problems of the majority of people with impairment, but have failed to deal effectively with the problems of a minority of people with impairment, in fact, societies have actively excluded, disempowered and oppressed this minority.”¹⁶³ Therefore, the universalists’ strategy is to expand the range of the normal; this is not by forcing PWDs to become more like an able-bodied norm, but by widening the range of the normal “to more realistically include empirically-grounded human variation.”¹⁶⁴ Bickenbach provides little guidance on how this strategy is to be achieved; however, he is clear that anti-discrimination laws should not be the central tool. Bickenbach criticizes the minority rights argument as setting “its sights entirely on civil rights and anti-discrimination protection.”¹⁶⁵

According to Bickenbach et al, disability claims should not be limited to anti-discrimination only, because they should also include “failures to provide the resources and opportunities needed to make participation feasible”.¹⁶⁶ Bickenbach argues that although PWDs face issues involving how to fit their impairment to the social and structural environment, this fitting is determined by how society distributes resources and opportunities; and this distribution may unfairly benefit some people at the expense of others. He argues that “when discrimination is not involved, the injustice may well remain, if the distribution of society’s resources and

¹⁶³ Shakespeare & Watson, *supra* note 15 at 26.

¹⁶⁴ Bickenbach, “Minority Rights”, *supra* note 15 at 113.

¹⁶⁵ *Ibid* at 108.

¹⁶⁶ Bickenbach et al, “Models of Disablement”, *supra* note 15 at 1181.

opportunities ignores the full range of human variation in need, and caters instead to some frozen and arbitrary conception of the normal.”¹⁶⁷

Although universalists tried to offer an alternative theoretical context for a social policy on disability (based on the idea of equality, and aimed at achieving the social goals of respect, accommodation, and participation), this spectrum model is limited to only explain and define disabilities. It is used to include as many people as possible; therefore, it tries to transform PWDs from a minority group to a majority group. However, this model does not include (besides guaranteeing the human dignity of PWDs) any other principle of justice in order to achieve equality for PWDs.

Although PWDs should not have to accept some form of inferior status to claim legal rights against discrimination, this spectrum model makes it harder to say how the claims of PWDs differ from those who lack skills or talents. Under this spectrum model, would a person with an IQ slightly below average be considered as someone lacking skills and talents or as a person with a mild disability? Due to the fact that we cannot distinguish the claims of PWDs from those who lack skills or talents, there is a danger that claims by PWDs will have to compete in the political sphere with other societal claims. Therefore, this spectrum model cannot support the recognition of equality rights for PWDs (i.e. what is the source of those rights?). If PWDs are considered to come within the definition of an expanded normal rather than as a distinct identifiable group, how do equality rights apply?

¹⁶⁷ Bickenbach, “Minority Rights”, *supra* note 15 at 113.

2.2.7 The consumer/business/market model of disability

This model considers the personal identity to define disability, because PWDs and their stakeholders (family/friends/employers) represent a big percentage of voters, employees and consumers. Under this model, based on equal rights, PWDs as customers should have access to services and goods offered by businesses. Therefore, businesses should accommodate and fully engage PWDs in all aspects of business service activities. All business operations and its established customer service should integrate inclusion practices for PWDs that support the active engagement of people with different abilities. This model allows PWDs and their families to decide what services they actually need; the service provider's role would be limited to only offering advice and implementing their decisions under the pressure of their demands. According to Rich Donovan, "due to the size of [PWDs'] demographic, companies and governments will serve their desires, pushed by demand, as the message becomes prevalent in the cultural mainstream."¹⁶⁸ Therefore, it empowers PWDs to pursue their desires.

This consumer model of disability was central to the independent living movement, which was instrumental in advancing rights for PWDs. Although this model considers that PWDs and their stakeholders are the only ones who know what their needs are and how to fulfill them, this model is limited, because it places more emphasis on business services. Also, it does not include governmental services. This model is just a business model and it is not a model built into law. This model does not provide rights; it provides only policy advice.

¹⁶⁸ Donovan, *supra* note 15.

2.2.8 The rights-based access to citizenship/unified model of disability

If we tried to expand the above customer/business/market model of disability to include governmental services in addition to business services, we can create a rights-based model that is not limited to the relationships between customers and businesses, but related to the idea of citizenship. This new model can be built into law to provide rights to PWDs based on the fact that they should be treated as any other citizens who have their equal right to demand a good quality of life and satisfaction. The source of their rights is their membership in the society (i.e. their status of citizenship) where businesses and governments should compete to satisfy their demands. This can be achieved by empowering PWDs economically (i.e. improving their financial circumstances) and socially (i.e. eliminating all social barriers) and allowing them to choose between services (including medical treatments).¹⁶⁹

The promotion or denial of equality rights for PWDs can be properly assessed by evaluating the systematic provision of access. However, this assessment of accessibility in the society should be done by using the same classifications that are used for all members of the society. The processes causing disadvantage, marginalisation and exclusion can be revealed only by systematically appraising accessibility at both the personal and the environmental levels. It is not enough to focus only on the environmental factors, because the denial of access to BHRs has very real

¹⁶⁹ This is my proposed model of disability, which is tied to the status of citizenship. In order to explain how the status of citizenship could be the source of the right of access (to resources and opportunities for PWDs to allow for their participation), we should consider the example of the right to vote. For example, a new immigrant (with a legal permanent resident status in Canada) is not allowed to vote; however, as soon as s/he acquires his/her Canadian citizenship, any restriction to the right of access to vote would be eliminated. Therefore, his/her status of citizenship would be the source of his/her right of access to all resources and opportunities that are available for other citizens. Similarly, apart from the constitutional right to equality, the right of access to resources and opportunities for PWDs (to allow for their participation as citizens) would be based on their status of citizenship.

impacts on human beings, therefore access needs to be evaluated both at the level of PWDs experiencing these conditions and at the level of the environments causing them. Therefore, a systematic explanation of the dimensions of access in the society would clarify the extent of interactions between human beings and their environments. This access must be assessed to boost equality for PWDs, and to monitor (along these dimensions) whether PWDs have been assured their BHRs (i.e. how poorly or how well an individual becomes an active member of the society). The best explanation of these dimensions is offered by Scott Campbell Brown, who argues that equality should be a dimension that cuts across all dimensions of access.¹⁷⁰

According to Brown, access (by its nature) is not a situation or an act, but it is a liberty to communicate with, to pass to and from, to approach, to enter, or to make use of a situation.¹⁷¹ He proposed using universal dimensions of interaction between human beings and their environment to determine dimensions of access. He proposed that these universal dimensions should take into consideration four conditions: 1. The situation of the whole person; and 2. The importance of the social context; and 3. Factors such as age and culture; and 4. These dimensions should be analyzed from the viewpoint of both human beings and their environment.¹⁷² He offered the following dimensions of access: 1. Orientation/what – i.e. do you have the information you need to have? 2. Independence/who – i.e. do you choose what you wish to do? 3. Mobility/where – i.e. do you go where you want to go? 4. Occupation of time/when – i.e. do you engage when you wish to engage? 5. Social integration/with whom – i.e. are you accepted by others? 6. Economic

¹⁷⁰ Brown, *supra* note 15 at 166.

¹⁷¹ *Ibid* at 164.

¹⁷² *Ibid* at 167.

self-sufficiency/with what – i.e. do you have the resources you need? 7. Transition/change – i.e. are you prepared for change?¹⁷³

Due to the fact that these dimensions of access are viewed as the interactions between PWDs and their environment, one of these dimensions of access is related to the social-political model of disability that focuses on the environment, while other dimensions of access are related to the biomedical and the economic models of disability that focus on individuals. The social integration/with whom dimension of access is related to the social-political model of disability, because it reflects the social and/or the political disadvantages of PWDs. The economic self-sufficiency/with what dimension of access is related to the economic model of disability, because it reflects the economic disadvantages of PWDs. On the other hand, all of the other dimensions of access are related to the biomedical model of disability, because they reflect the physical and/or the mental disadvantages of PWDs.

However, as we will see below, these dimensions of access combine all of these three models of disability in a way that can escape all of criticisms that are directed towards each of these three models of disability (i.e. the biomedical, the economic and the social-political models). Therefore, we can use these dimensions of access in order to create the rights-based access to citizenship/unified model of disability, which can provide a complete picture of disability, including all of three dimensions of disablement. Therefore, under this new model, disability can be viewed as having the need for one or more of these dimensions of access.

¹⁷³ *Ibid.*

However, we should notice here that the social integration/with whom dimension of access (i.e. are you accepted by others?) cannot by itself define disability. If it is the only missing dimension of access, it is not enough to include someone in the PWDs category, because it implies that other people could be included in the same category such as the ugly. Although this social integration/with whom dimension of access is related to the social-political model of disability (because it reflects the social and/or the political disadvantages of PWDs), it can escape criticisms that are directed towards the social-political model of disability by considering PWDs as an identifiable group based on their special needs rather than considering PWDs as an identifiable group based on inferior status as an oppressed minority. By eliminating the use of the “oppressed minority” label, this new model of disability does not harm the human dignity of PWDs nor reduce their equality status.

Similarly, we should also notice here that the economic self-sufficiency/with what dimension of access (i.e. do you have the resources you need?) cannot by itself define disability. If it is the only missing dimension of access, it is not enough to include someone in the PWDs category, because it implies that other people could be included in the same category such as the poor. Although this economic self-sufficiency/with what dimension of access is related to the economic model of disability (because it reflects the economic disadvantages of PWDs), it can escape criticisms that are directed towards the economic model of disability by focusing on the economic needs/support rather than focusing on the inability to work. By eliminating the use of the “unemployable” label, this new model of disability does not harm the human dignity of PWDs nor reduce their equality status.

However, all of the other dimensions of access are decisive dimensions of access to define disability as long as they are related to health issues (i.e. at least, one of them has to be missing and has to be related to a health issue to include someone in the PWDs category), because they reflect the physical and/or the mental disadvantages of PWDs. Although these central dimensions of access are related to the biomedical model of disability, they can escape criticisms that are directed towards the biomedical model of disability by focusing on the health care/personal care needs rather than focusing on the health problem/the impairment. By eliminating the use of the “impaired” label, this new model of disability does not harm the human dignity of PWDs nor reduce their equality status.¹⁷⁴ At the same time, this new model of disability takes into consideration that other dimensions of access (such as the social integration/with whom and the economic self-sufficiency/with what dimensions of access) might be missing in addition to one of these central dimensions of access. On the other hand, if any of these central dimensions of access is not related to a health issue, it cannot by itself define disability (similar to the social integration/with whom dimension of access and the economic self-sufficiency/with what dimension of access as we have seen above).

Therefore, if the orientation/what dimension of access (i.e. do you have the information you need to have?) is the only missing dimension of access (and it is not related to a health issue), it is not

¹⁷⁴ Some critics would argue that focusing on the health/personal care needs may imply the idea that PWDs are needy people; this “needy” label may harm the human dignity of PWDs and reduce their equality status. However, I would argue that as a legally blind person, I would feel better describing myself as a person with special needs rather than a PWD, a person with low vision, unable to work individual, or a member of an oppressed minority. In my opinion, the label of “special needs” does not harm the human dignity of PWDs nor reduce their equality status, because no human being can claim that s/he does not have any needs all the times in all circumstances.

enough by itself to include someone in the PWDs category, because it implies that other people (such as the uneducated) could be included in the same category.

Similarly, if the independence/who dimension of access (i.e. do you choose what you wish to do?) is the only missing dimension of access (and it is not related to a health issue), it is not enough by itself to include someone in the PWDs category, because it implies that other people (such as the dependent child) could be included in the same category.

Likewise, if the mobility/where dimension of access (i.e. do you go where you want to go?) is the only missing dimension of access (and it is not related to a health issue), it is not enough by itself to include someone in the PWDs category, because it implies that other people (such as the imprisoned) could be included in the same category.

Alike, if the occupation of time/when dimension of access (i.e. do you engage when you wish to engage?) is the only missing dimension of access (and it is not related to a health issue), it is not enough by itself to include someone in the PWDs category, because it implies that other people (such as the student) could be included in the same category.

Equally, if the transition/change dimension of access (i.e. are you prepared for change?) is the only missing dimension of access (and it is not related to a health issue), it is not enough by itself to include someone in the PWDs category, because it implies that other people (such as the refugee) could be included in the same category.

Therefore, in my opinion, the PWDs category should include only those people who have health care needs/personal care needs (due to their medical conditions - based on their BHRs to reach these missing decisive dimensions of access to citizenship - without using the “impaired” label) and who (due to their interactions with their environments) may or may not have economic needs (based on their BHR to reach the missing economic self-sufficiency/with what dimension of access to citizenship - without using the “unemployable” label) and/or social-political needs (based on their BHR to reach the missing social integration/with whom dimension of access to citizenship - without using the “oppressed minority” label).

Therefore, in order to include someone in the PWDs category, s/he should demonstrate that s/he has health care needs/personal care needs (due to his/her medical condition) while considering his/her economic needs and/or social-political needs (due to his/her interactions with his/her environment) based on his/her BHRs to reach the minimum level of all BHCs and the primary goods of income, wealth and fundamental self-respect.

In order to know which one of these different models of disability is the most acceptable in the MENA (and not limited to the liberal western civilization), we should know the international definition of disability under the UNCRPD, which reflected the universal consensus on the BHRs for PWDs (including the consensus from many Arab and Muslim states signatories). Therefore, after reviewing all of the above different models of disability, it is important to know: What is the current definition of disability at the international level? And which one of these different models of disability has been adopted at the international level?

2.3 The definition of disability at the international level

According to the International Classification of Functioning, Disability and Health (ICF), disability is defined

as an umbrella term for impairments, activity limitations and participation restrictions. Disability is the interaction between individuals with a health condition (e.g. cerebral palsy, Down syndrome and depression) and personal and environmental factors (e.g. negative attitudes, inaccessible transportation and public buildings, and limited social supports).¹⁷⁵

Therefore, the ICF takes into account the social aspects of disability and it does not see disability only as a “medical” or “biological” dysfunction.¹⁷⁶ The ICF tries to integrate all of the three models of disability (i.e. the biomedical, the economic and the social-political models). The ICF’s definition of disability is related to the rights-based access to citizenship model of disability, which can provide a complete picture of disability including all of three dimensions of disablement. According to Bickenbach et al,

all levels of disability occur with a health condition and within the context defined by environmental factors and personal characteristics (age, sex, level of education, life history and so on). The three dimensions of disability are not conceived as links in a causal chain, but as alternative, but conceptually distinct, perspectives on the disablement process. One perspective is at the level of body or body part, and abnormalities of function or structure are called impairments. If in association with a health condition, a person does not perform a range of activities that others perform, this person level difficulty is called an activity limitation. Finally, from the perspective of complete context of a person’s life, characterized for the most part by the physical and social environment in which the person lives, disability may be manifested as restrictions in major areas of human life – for example, parenting, employment, education, social interaction and citizenship. In the [ICF], these are termed participation restrictions.¹⁷⁷

¹⁷⁵ World Health Organization, “Disability and Health Fact sheet N°352” in *Media centre* (Geneva: WHO Press, 2013), online: WHO <<http://www.who.int>>.

¹⁷⁶ World Health Organization, “International Classification of Functioning, Disability and Health” in *Classifications* (Geneva: WHO Press, 2013), online: WHO <<http://www.who.int>>.

¹⁷⁷ Bickenbach et al, “Disability and Cultural Variation”, *supra* note 15 at 7-8.

The UNCRPD did not provide a definition of the term “Disability” or the term “People with Disabilities”. However, the UNCRPD provides some guidance to clarify the application of the UNCRPD in its Preamble and in its Article 1 as follows:

- In regard to the term “Disability”, the Preamble (e) of the UNCRPD stated “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”.¹⁷⁸ Therefore, by dismantling attitudinal and environmental barriers (as opposed to treating PWDs’ medical conditions as problems to be fixed), PWDs can participate as active members of society and enjoy the full range of their rights. Moreover, depending on the dominant environment from society to society, the reality of “disability” can be different. Therefore, the UNCRPD takes into consideration the social-political model of disability without using the “oppressed minority” label.
- In regard to the term “People with Disabilities”, Article 1 of the UNCRPD stated that “[PWDs] include [¹⁷⁹] 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”.¹⁸⁰ Therefore, Article 1 has the same meaning mentioned in the Preamble (e) above. Although Article 1 uses the “impairment” label, it does not view disability as impairment only and the UNCRPD (in

¹⁷⁸ UNCRPD, *supra* note 1, Preamble (e).

¹⁷⁹ The UNCRPD does not restrict coverage to particular persons; rather, the UNCRPD identifies persons with long-term physical, mental, intellectual and sensory impairments as beneficiaries under the UNCRPD. The reference to “include” assures that it does not restrict the application of the UNCRPD; States Parties can provide protection to others, for example, persons with short-term disabilities.

¹⁸⁰ *Ibid.* art 1.

general) focuses more on specific needs of PWDs rather than on their specific types of impairments. However, by citing different kinds of medical conditions, Article 1 implies a consideration of the biomedical model of disability in addition to the social-political model of disability, because it implies that at least one of these medical conditions must exist in order to include someone in the PWDs category.

Due to the fact that the UNCRPD's article 28 (titled "Adequate standard of living and social protection") confirms the universal BHR to social welfare for PWDs (specifically, disability social income assistance),¹⁸¹ the UNCRPD takes into consideration the economic needs of PWDs. However, the UNCRPD did not use the "unemployable" label. Actually, the UNCRPD's article 27 (titled "Work and employment") recognizes "the right of [PWDs] 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 [PWDs]."¹⁸²

Moreover, in order to increase PWDs' chances for employment, the UNCRPD's article 26 (titled "Habilitation and rehabilitation") requires that

States Parties shall take effective and appropriate measures, including through peer support, to enable [PWDs] 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.¹⁸³

¹⁸¹ *Ibid.* art 28.

¹⁸² *Ibid.* art 27.

¹⁸³ *Ibid.* art 26.

Furthermore, in order to increase PWDs' chances for employment, the UNCRPD's article 24 (titled "Education") recognizes

the right of [PWDs] to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and life long learning directed to: (a) The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for [BHRs], fundamental freedoms and human diversity; (b) The development by [PWDs] of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential; (c) Enabling [PWDs] to participate effectively in a free society.¹⁸⁴

Therefore, the UNCRPD takes into consideration the economic model of disability (in addition to the biomedical and the social-political models of disability) without using the "unemployable" label.

Accordingly, the UNCRPD combines the biomedical, the economic and the social-political models of disability in a way that can escape criticism directed towards each of these three models of disability. Therefore, the UNCRPD is related to the rights-based access to citizenship model of disability, which can provide a complete picture of disability including all three dimensions of disablement.

However, the UNCRPD's article 5 (titled "Equality and non-discrimination")¹⁸⁵ and the UNCRPD's article 28 (titled "Adequate standard of living and social protection")¹⁸⁶ are the two most important articles of the UNCRPD that are related to this thesis, because they confirm the universal BHR to equality for PWDs and the universal BHR to social welfare for PWDs

¹⁸⁴ *Ibid.* art 24.

¹⁸⁵ *Ibid.* art 5.

¹⁸⁶ *Ibid.* art 28.

(specifically, disability social income assistance). Due to the fact that the UNCRPD requires states parties to use both anti-discrimination laws and social welfare laws to address issues of justice for PWDs, it is important to know: What is so important about social welfare laws? And why anti-discrimination laws alone are limited in addressing issues of justice for PWDs?

2.4 Using social welfare laws and anti-discrimination laws to address issues of justice for PWDs

Although some authors place emphasis on anti-discrimination laws, no one can claim that they provide a complete answer or that the use of other tools such as social welfare laws is completely unnecessary. According to Bickenbach, "it is important to be clear what the human rights approach is, what it entails and how it manifests itself in legal and policy concerns."¹⁸⁷ Bickenbach proposes four essential elements that should be included in this human rights approach: 1. Specific entitlement programs, 2. Constitutional guarantees of equity, 3. Enforceable anti-discrimination laws, and 4. Voluntary human rights guidelines.¹⁸⁸

In my opinion, anti-discrimination laws mostly guarantee the equality of opportunity (not the equality of result).¹⁸⁹ The equality of opportunity guarantees that people have equal chances, but

¹⁸⁷ Bickenbach, "Disability Human Rights", *supra* note 16 at 565.

¹⁸⁸ *Ibid* at 568.

¹⁸⁹ Equality of result means equality in power, right and acquisition (and not only equal opportunities). According to Rae, where "opportunities of power, right and acquisition are to be equal: power, right, and acquisition themselves are not". Rae, *supra* note 16 at 64. According to Christine M Koggel, liberal theories may include both "formal equality of opportunity" and "substantive equality of opportunity", but they do not include "substantive equality of result" that is generally linked to "radical egalitarianism". Koggel, *supra* note 16 at 43. Both "substantive equality of opportunity" and "substantive equality of result" require some state intervention to achieve the needed result. However, the purpose of the intervention in the "substantive equality of opportunity" is to equalize opportunities, but the purpose of the intervention in the "substantive equality of result" is to equalize results. Therefore, when I

it does not guarantee equal results.¹⁹⁰ In order for PWDs to achieve the equality of result, PWDs would need all of the three kinds of support including medical support, economic support, and social support, which means PWDs need both anti-discrimination laws and social welfare laws in order to achieve equality.¹⁹¹

Jonathan Penney questions the ability of the minority rights analysis to achieve substantive equality.¹⁹² He states “special equality guarantees and accommodation for a minority group of

speak of equality of result, I mean by this term: “substantive equality of result”, which means that the purpose of the state’s intervention should be to equalize results.

¹⁹⁰If 100 people were trapped in a life-threatening situation, but there were only enough resources to rescue 50 of them, how would those resources be justly distributed? If we applied the formal equality of treatment or the formal equality of result, the only solution would be to refuse to rescue any of them; all 100 people would die. However, if we applied the equality of opportunity, all 100 people would have the same opportunity to be rescued, but not all will have the same result; a fair lottery would give each of them the same chance to be rescued, but only 50 would survive. So if it is impossible to achieve equality of result by saving everyone, then justice requires that everyone have an equal opportunity to be saved. Rosenfeld, *supra* note 16 at 23-24.

¹⁹¹ Some critics would disagree with my argument that anti-discrimination laws mostly guarantee the equality of opportunity (not the equality of result). They would argue that for an example, Canadian courts recognize the concept of adverse effect discrimination, in which apparently neutral rules or practices have unequal results. However, in section 2.6, I will use the example of refundable disability tax credit in order to show that when poverty is the source of disadvantage, we must use social welfare and social justice argument; we cannot use anti-discrimination argument for poor PWDs, because poverty is not a ground for discrimination. While the current social welfare laws failed to treat disability as a detached problem from poverty, the current anti-discrimination laws failed to recognize poverty as a ground for discrimination; the current anti-discrimination laws ignored the fact that most PWDs are living in poverty. Some critics would argue that in some statutes, the social condition is a ground of discrimination; failure to take account of poverty could be considered to have a disproportionate impact on PWDs and thus to be discriminatory. However, in my opinion, we cannot use this argument when there is a different treatment between poor PWDs and rich PWDs. Therefore, while social welfare laws cannot eliminate all discriminations against PWDs, anti-discrimination laws can guarantee the equality of opportunity between disabled and non-disabled people, but anti-discrimination laws cannot guarantee the equality of result for poor PWDs (even the equality of result between poor PWDs and rich PWDs). See section 2.6, below, for more on this topic.

¹⁹² Substantive equality considers the effects of laws, practices and procedures (in light of their context) on people’s economic, social and political circumstances by considering whether the disparities or inequalities are made worse or better. According to Joel Bakan, substantive equality is the social equality, which requires “an absence of major disparities in people’s resources, political and social power, well-being, and [an absence] of exploitation and oppression”. Bakan, *supra* note 16 at 47. While formal equality mostly considers the equal treatment of individuals, substantive equality may address an individual case; however, it does so by considering that individual’s circumstances as a member of a group. Therefore, some liberal theorists (such as Rosenfeld) support affirmative action programs that aim at transforming institutions by increasing the representation of historically disadvantaged groups, such as Blacks or women. Moreover, Shelagh Day and Gwen Brodsky describe substantive equality as being “concerned with conditions of inequality experienced by groups, and with the imbalance in power among groups and society that is at the root of inequality.” Day & Brodsky, *supra* note 16 at 461.

[PWDs]...does not challenge mainstream norms and structures.”¹⁹³ Penney and others argued that acceptance of the idea of reasonable disability accommodation may imply that it is acceptable to base institutional and architectural obstacles on mainstream norms.¹⁹⁴ Therefore, substantive equality (that seeks transformation rather than accommodation) should be incorporated into a minority rights analysis.¹⁹⁵

On the other hand, Bickenbach argues that the negative valuation of disability can be demeaning in the anti-discrimination process. For example, under the Americans with Disabilities Act (ADA), the adjudication process requires “that one embrace an adverse label to apply for protection. What could be more demeaning than having to earn one's human rights by showing that one is eligible to 'special treatment' by virtue of being a socially discredited group?”¹⁹⁶ He argues that relying entirely on civil rights and anti-discrimination laws would have limited value for PWDs due to the obstacles they face. He states that there are socially-constructed disadvantages created by disability such as

[PWDs] face unaccommodating physical and organizational environments, lack of educational or training programming, impoverished or non-existent employment prospects, confused and inadequate income support programs, under-financed research

¹⁹³ Penney, *supra* note 15 at 93.

¹⁹⁴ *Ibid*; Day & Brodsky, *supra* note 16 at 462.

¹⁹⁵ Theorists who adopt a substantive equality such as Donna Greschner does not “deny the importance of...any version of formal equality; every version contributes, in different circumstances and in different ways, to a just society.” Greschner, *supra* note 16 at note 11. According to Patch,

Although the goal of substantive equality is to transform society's institutions to eliminate the imbalances of power and conditions for disadvantaged groups, there remains a need to eliminate formal inequalities that do not impede substantive equality. For example, if [PWDs] are to achieve substantive equality, the structures of society must be transformed to remove barriers that result from the application of mainstream norms. Sometimes, that will require recognition that a [PWD] must be treated differently to be able to participate equally. In such cases, application of principles of formal equality might impair substantive equality. On the other hand, if the disability is irrelevant to the decision being made, then there is no reason to deny that person formal equality. Patch, *supra* note 16 at 45.

¹⁹⁶ Bickenbach, “Disability Human Rights”, *supra* note 16 at 577.

for assistive device technologies, lack of resources to meet impairment-related needs, policy neglect and minimal political influence.¹⁹⁷

Bickenbach argues that not all of these are problems of discrimination. However, he relies on an obsolete definition of discrimination based on formal and intentional discrimination (which rolls back Canadian judicial interpretation more than two decades). He states

a person is discriminated against when through no fault of their own the person is disadvantaged in some way by the decisions or actions of others explicitly carried out on the basis of some morally irrelevant feature of that person. In light of this injustice, [there should be] a corrective or remedial response by way of compensation¹⁹⁸.

Instead of Bickenbach's definition, I agree with Tom W. Patch that courts in Canada (more than two decades ago) have decided that the right to be free from any discrimination should not be limited only to a conduct that is explicitly and intentionally related to a prohibited ground.¹⁹⁹

Bickenbach agrees that discrimination is a social evil that offends the dignity of an individual or group; that compensation is a meaningful remedy for the victim of an insult. However, he states "it is common in equality jurisprudence to speak of derivative forms of discrimination - 'indirect', 'adverse effect', or 'constructive'".²⁰⁰ These are legal fictions created to provide a remedy where there is no evidence of a discriminatory intent or even a discriminator. He argues that these legal fictions should not form the basis of a political strategy; where neutral factors (such as economics) are the cause of disadvantage, "there is no insult, because there is no insulter."²⁰¹

¹⁹⁷ Bickenbach, "Minority Rights", *supra* note 15 at 108.

¹⁹⁸ *Ibid* at 108-109.

¹⁹⁹ Patch, *supra* note 16 at 116.

²⁰⁰ Bickenbach, "Minority Rights", *supra* note 15 at 109.

²⁰¹ *Ibid*.

Bickenbach argues that even where substantive interpretations are available, judges will return to the “core” notion of discrimination (formal and intentional discrimination) to determine if conduct contravenes the law.²⁰² Based on his conception of the limited scope of anti-discrimination laws, he states

[in order] to be effective as an instrument of corrective justice, anti-discrimination law must be substantively focused and procedurally relevant to its remedial purposes. Nothing is gained –and much is lost– by extending the scope of anti-discrimination law to include inequalities arising from distributive injustice or characterizing disability in a manner irrelevant to the phenomenon of discrimination.²⁰³

In my opinion, anti-discrimination laws can guarantee the access (for all individuals during their entire lives) to the minimum level of all BHCs.²⁰⁴ However, anti-discrimination laws are limited

²⁰² *Ibid.*

²⁰³ Bickenbach, “Disability and Equality”, *supra* note 16 at 14.

²⁰⁴ Some critics would disagree with my argument that anti-discrimination laws can be used to guarantee access to the minimum level of BHCs. They would argue that for example, if the state does not provide any public transportation to anyone (including no accessible transportation for PWDs) in remote areas, could a PWD argue that the result of this policy is discriminatory? I would argue that yes, for example, a poor blind person could argue that the result is discriminatory, because this policy would have an adverse effect on poor people with blindness. Although the state does not provide any public transportation to anyone, people (other than poor people with blindness) can drive their own cars as an alternative private transportation. However, a blind person cannot drive, if there is no public transportation to anyone (including no accessible transportation for PWDs) and if s/he does not have enough money to pay for a taxi or to pay someone to drive him/her, s/he will have to choose between two harsh choices: 1. Begging others to provide free transportation for him/her, which may harm his/her human dignity and reduce his/her equality status; and 2. Be restricted in his/her travel, which means being imprisoned in his/her own home. Therefore, this example supports my argument that anti-discrimination laws can be used to guarantee access to the minimum level of BHCs by (as an example) requiring that the state must provide public accessible transportation (as an affirmative action) to poor people with blindness in all areas (including remote areas). However, anti-discrimination laws are limited to guaranteeing only the access to this threshold level, because if the state provides this accessible transportation for a fee (i.e. without a state subsidy), poor people with blindness would have the access to this threshold level (i.e. the accessible transportation is available), but they would not be able to achieve this threshold level of basic functioning (i.e. not only the access to this threshold level). Therefore, PWDs need also social welfare laws (in addition to anti-discrimination laws) to achieve this threshold level of basic functioning (and not only the access to this threshold level) and to eliminate any inequality above this threshold level in terms of income, wealth and fundamental self-respect. Moreover, this example shows that there could be small minority groups within the PWDs group. Therefore, PWDs cannot depend always on the minority rights analysis. However, this argument (i.e. a failure to provide an accessible transit system in a particular area would discriminate based on disability against people who cannot drive a car, because the absence of transit would have a disproportionate impact on people with such a disability) implies the idea that states have a positive obligation to alleviate inequalities as well as an obligation not to engage in conduct that causes inequalities. Although it would be logical to argue that states should have such positive obligations, Canadian courts have been reluctant to impose such obligations (e.g. *Auton v. British Columbia*, 2004 SCC 78, [2004] 3 SCR 657, where an equality claim was

to guaranteeing only the access to this threshold level when the benefit is not provided to anyone.²⁰⁵ Therefore, PWDs also need social welfare laws (in addition to anti-discrimination laws) to achieve this threshold level of basic functioning (and not only the access to this threshold level), and to eliminate any inequality above this threshold level in terms of income, wealth and fundamental self-respect (as we will see later).

I agree with Bickenbach that inequality for PWDs lies primarily in the denial of their positive freedoms to achieve what it is they wish to achieve. The denial of resources and opportunities that lie at the root of this inequality are issues not of discrimination but of distributive justice.

According to Bickenbach,

Anti-discrimination laws, long the darling of the disability movement, must in the end be seen as playing an essential, but limited, role in the equality agenda. Attempts to extend and expand anti-discrimination law in order to remedy inequality in all of its manifestations will ultimately be futile and may completely undermine the effectiveness of this law in its proper domain. To better serve the disability equality agenda, the spotlight must be turned from anti-discrimination to social welfare law – that complex

denied on the ground that no-one was provided with certain types of medical treatment). In section 2.6, I will provide a better example (which is about a refundable disability tax credit) in order to discuss imposing such positive obligations on governments, to explore why anti-discrimination claims would be limited only to provide access to a threshold level (and not necessarily achieving this threshold level), and to explain the different effects of both the equality of opportunity and the equality of result on PWDs.

²⁰⁵ Some critics would disagree with my argument that anti-discrimination laws only provide access at a threshold level. They would argue that if others get the same benefit above that level but it is denied to PWDs, PWDs should be able to claim that denial of that higher level of benefits discriminates against them. I would remind them that any anti-discrimination claim based on the disability ground would be limited by the requirement of reasonable disability accommodation that do not cause undue harm to the entity concerned. Therefore, PWDs can claim discrimination (based on the disability ground) above that threshold level of BHCs only if the requested accommodations are reasonable (i.e. they would not cause undue harm to the entity concerned). On the other hand, all individuals (including PWDs) can claim that denial of that higher level of benefits discriminates against them for reasons other than requesting reasonable disability accommodation. If, for example, the government chooses to provide a high level of education or health care, anti-discrimination laws (although ineffective for a variety of reasons such as burden of proof, cost, power imbalances, etc.) would ensure that those services are provided equally to all. Therefore, I have to acknowledge that my argument (that anti-discrimination laws only provide access at a threshold level) applies only when the government chooses not to provide the benefit/the service to anyone (including PWDs). See *supra* note 204 and accompanying text.

and highly political domain of law and policy designed to facilitate the transfer of resources, accommodations, and opportunities for [PWDs].²⁰⁶

Bickenbach agrees with the minority rights advocates that the normative basis for disability policy should be equality. However, he argues that equality for PWDs is an issue of distributive justice. I agree with Bickenbach that “an adequate normative basis for disablement would address the fundamental entitlement controversies that set the agenda for policy development. It is essential that the basis resolve the question whether the entitlement of [PWDs] are enforceable rights or merely benefits that society provides or withholds at pleasure.”²⁰⁷

On the other hand, minority rights advocates argue that if PWDs are simply part of a human continuum of abilities, what distinguishes their claim from those who lack skills or talents? What is the basis for their claim to distributive justice? According to Bickenbach, these are questions of policy that ought to be addressed in the political sphere. However, he stated that once policy becomes a matter of politics, it must compete with other claims;

Disablement policy decisions, plainly enough, cannot be made in a vacuum. There are other calls on society, its resources, institutions and citizens. An adequate framework for policy decision-making must come to grips with macroallocative dilemmas, and it must shed light on what is to be done about our obligations to [PWDs], given our other social obligations.²⁰⁸

I disagree with Bickenbach on this point, because entitlements for PWDs should not be considered as a matter of politics. In order to insure that the entitlements for PWDs are enforceable permanent rights and not merely temporary benefits, these entitlements for PWDs should be based on natural rights. This is the goal of this dissertation (as we will see in Chapter

²⁰⁶ Bickenbach, “Disability and Equality”, *supra* note 16 at 13.

²⁰⁷ Bickenbach, *Physical Disability*, *supra* note 15 at 224.

²⁰⁸ *Ibid* at 229.

3). Although Bickenbach does not provide a comprehensive theory, he is clear that the focus should be on distributive justice; he claims that the minority rights theory (with its emphasis on anti-discrimination laws) is inadequate. According to Bickenbach, even if PWDs are a minority group, there is no reason to think that anti-discrimination laws are effective means to address the social ill of discrimination.²⁰⁹ Bickenbach argues that anti-discrimination law is a form of remedial or corrective justice; whereas the disadvantages of disablement are primarily problems of distributive injustice.

Therefore, anti-discrimination laws alone are limited in addressing issues of justice for PWDs. In my opinion, PWDs need both anti-discrimination laws and social welfare laws in order to achieve equality. Although anti-discrimination laws are necessary protections for PWDs, they are not enough by themselves to achieve equality for PWDs, because they cannot achieve substantive equality (i.e. they are mostly concerned with accommodation rather than a transformation of the whole society). On the other hand, social welfare laws are not enough by themselves to achieve equality for PWDs, because they cannot eliminate all discrimination against PWDs. I acknowledge that anti-discrimination laws are necessary protections for PWDs. However, my focus in this thesis is primarily on social welfare laws.²¹⁰ Therefore, social welfare laws (in addition to anti-discrimination laws) are very important to address issues of justice for

²⁰⁹ *Ibid* at 106.

²¹⁰ If we are willing to accept the argument that disability rights should not be absolute and they should be limited by the proportionality principle and the reasonable disability accommodation requirement, we need to have a better system for welfare and social cooperation in order to implement our moral obligations towards PWDs. However, this system cannot be effective alone without disability rights protections by anti-discrimination laws. In my progressive Islam perspective, as we will see in Chapter 3, by reinterpreting the *Qur'ān*, it could be argued that in the *Qur'ān*, we can find the roots of the anti-discrimination protection for PWDs and the BHR to social welfare for PWDs (within the principle of *Zakāh*, which is the basis for an Islamic social welfare system).

PWDs. However, some critics would argue that social welfare laws may give priority to the idea of equality over the idea of liberty. Moreover, some critics would argue that the distinction between negative rights and positive obligations is even more relevant. Therefore, it is important to know: is there a conflict between liberty and equality?

2.5 Is there a conflict between Liberty and Equality?

Liberal equality theorists struggle to determine whether liberty and equality conflict; they struggle to determine whether liberty has priority over equality or equality has priority over liberty. According to Patch, political philosophers differ in the extent of the state's role for achieving equality.

For some, the state's role should be limited to actions that protect individuals from being interfered with in their pursuit of resources that could help them achieve equality. For others, the state has an obligation to take positive steps to achieve equality either by providing the means to those with few resources to gain a greater share, or to redistribute the resources to ensure those with less get more. The divide between those who support state action to achieve equality and those who see it as inappropriate interference with individual liberty is evident even between philosophers who share a broad theoretical orientation.²¹¹

According to Isaiah Berlin, while negative liberty is the area in which an individual must not be interfered with by others, including the state (i.e. the liberty from), positive freedom is the freedom to be one's own master, to have one's life and decisions depend on oneself rather than external forces (i.e. the freedom to be).²¹² Therefore, negative rights (i.e. rights that protect those negative liberties) place restraints on state action; for example, the right to free speech is a negative right, because it restrains government from interfering in an individual's speech. On the

²¹¹ Patch, *supra* note 16 at 53.

²¹² Berlin, *supra* note 16 at 342-56.

other hand, positive rights (i.e. rights that protect those positive freedoms) create a duty for positive state action; for example, education and health care are positive rights, because they improve positive freedom of self-mastery by encouraging self-development. Therefore, the state has a positive duty to provide the means to self-mastery such as schools, teachers, books, etc.²¹³

However, due to the fact that positive rights are used to protect positive freedoms of self-mastery by encouraging self-development (such as education and health care), states have a positive legal obligation to provide these positive benefits free of charge only for citizens who are not able to obtain them on their own. Therefore, if the individual (who is not restricted by any vulnerability) is able to obtain these positive benefits (such as education and health care) using his/her own resources, the government has no obligation to provide these benefits free of charge. However, this requirement (i.e. these benefits should be means-tested) should not be applicable to vulnerable people, because vulnerable people (including PWDs) should receive their social benefits (based on their needs) regardless of their income and their assets.²¹⁴

However, the difference between negative rights and positive rights is not always clear; for example, sometimes the negative right to free speech needs positive intervention by the state through the judicial system. According to Berlin, "liberty is liberty, not equality or fairness or

²¹³ Illingworth & Parmet, *supra* note 16 at 5.

²¹⁴ We should distinguish here between vulnerable people and non-vulnerable people. In my opinion, as we will see in Chapter 3, vulnerable people (including PWDs) should receive their social benefits (based on their needs) regardless of their income and their assets, which means that those vulnerable people include poor vulnerable people and rich vulnerable people (i.e. with or without poverty, they have vulnerability other than poverty). However, if their vulnerability is limited to poverty only, their social benefits should be means-tested benefits by definition of poverty. On the other hand, non-vulnerable people (i.e. those who are not restricted by any vulnerability) should receive their social benefits as means-tested benefits, because the government should not provide these benefits free of charge for those people who can obtain them on their own using their own resources.

justice or human happiness or a quiet conscience."²¹⁵ He adds "total liberty can be dreadful, total equality can be equally frightful."²¹⁶ There are no final answers to the persistent human problems. All political values must conflict in the end; all of these conflicts need to be negotiated and this is what liberal governments have to recognize.²¹⁷

On the other hand, according to Dworkin, equality is the sovereign virtue, because it is a special and indispensable value that the political power must uphold. He defends equality as a political principle that is more important (for a healthy political environment) than the majority principle.²¹⁸ Therefore, judges and legislators should translate the concern for equality into jurisprudence and law. In *Sovereign Virtue*, Dworkin advocates his equality of resources theory. He tried to develop a liberal egalitarian legal and political theory grounding law in morality. He made contributions to the "equality of what" debate (i.e. the debate that focuses on what kind of equality, which the government must protect and uphold)²¹⁹

Dworkin's theory combines two key ideas: 1. Humans are responsible for their life choices. 2. Talent and intelligence are morally arbitrary natural features that should not influence the distribution of available resources in the society. He argues that in designing the structure of society, every individual have the right to equal concern and equal respect. His theory focuses on two fundamental principles: 1. All human lives should flourish. 2. Each individual is responsible for realizing his/her own life's flourishing. He argues that equality between individuals is the

²¹⁵ Berlin, *supra* note 16 at 345.

²¹⁶ Berlin & Jahanbegloo, *supra* note 16 at 146.

²¹⁷ *Ibid.*

²¹⁸ Dworkin, *Sovereign Virtue*, *supra* note 16 at 120-23.

²¹⁹ *Ibid* at 11-14.

equality of the resources that each individual has, not the equality of the success that s/he accomplishes.²²⁰ Therefore, individual responsibility, liberty, and equality are not in conflict, but are parts of one humanist theory of politics and life. Dworkin's theory is his reply to the difficulty of reconciling between equality and liberty. He disagrees with supporters of equality, and he agrees with conservatives that individuals are responsible for their own fates. At the same time, he disagrees with supporters of liberty, and he supports that the government is responsible to intervene to secure more equality. Moreover, he argues for a third way, and he argues that liberty and equality are not in conflict.²²¹

Dworkin criticizes Berlin's idea of liberty as a "flat" idea of liberty. At the same time, Dworkin offers a new "dynamic" idea of liberty, because an individual cannot say that his/her liberty is violated when s/he is not allowed to commit a crime. Therefore, liberty cannot be violated when no wrong has been done. In other words, liberty is the freedom to do anything the individual wishes to do as long as s/he does not violate the rights or the freedom of others. According to Dworkin, "negative liberty" is not enough, because it deals only with political processes. Liberty must involve some considerations of equality, because it is impossible to have freedom without some resources (for example, it is not possible for an individual to participate in a democratic voting, if s/he does not have health, food, knowledge, or time). Therefore, liberty must have some substance, because it is not only a process.²²² Dworkin's "dynamic" idea of liberty may lead us to the question: should states have a positive obligation to alleviate inequalities as well as an obligation not to engage in conduct that causes inequalities?

²²⁰ *Ibid* at 446-52.

²²¹ *Ibid* at 123-83.

²²² Dworkin, "Do Values Conflict?", *supra* note 16.

2.6 Should states have a positive obligation to alleviate inequalities as well as an obligation not to engage in conduct that causes inequalities?

The state has to move beyond the devotion to negative rights to the installation of positive rights, because all individuals are morally equal; they deserve equal human dignity and self-respect, and the equal opportunity to choose and pursue a reasonable life plan. PWDs have unavoidable additional expenses (that are not faced by other citizens); covering these disability costs is a positive right that should protect the positive freedom of self-mastery by encouraging self-development (similar to education and health care). Therefore, states should have a positive legal obligation to alleviate inequalities as well as an obligation not to engage in conduct that causes inequalities.

Anti-discrimination laws should be supplemented by social welfare laws to provide adequate assistance to PWDs, because anti-discrimination laws require a complaint; this process can be long and costly. On the other hand, social welfare laws avoid any doubt about whether governments have a positive obligation to support PWDs, because PWDs (especially people with extreme disabilities) should not be held responsible for not working (because they do not have a free choice to participate and/or are not able to work). I have argued that using social welfare laws (in addition to anti-discrimination laws) should guarantee achieving the threshold level of basic functioning (and not only the access to this threshold level) and eliminating any inequality above this threshold level in terms of income, wealth, and fundamental self-respect.

Therefore, we should distinguish between the freeloader (who is able to work and refuse to work) and PWDs (especially those with severe disabilities who are not able to work). Due to

their greed and selfishness, human beings may not have any compassion for the less fortunate. They are resisting the idea of redistributing their wealth (or sharing the fruit of their labour) and/or the idea of exercising their talents for the benefit of society without keeping all the returns. They fear that they could be transformed from advantaged individuals into mules forced to carry the responsibilities of distributive justice. They fear that distributive justice may become law. Moreover, some extremists feel that taxes are like forced theft of their personal property. They want morality or distributive justice to be limited to their personal choice without any force of law in order to make it effortless for them to choose not to help others. Rawls tried to build a moral and political theory that can balance individual rights and collective rights. Rawls based his theory on the principle of reciprocity (i.e. do unto others as you would have them do unto you); he developed his social contract theory behind the hypothetical veil of ignorance, in which parties to the social contract do not yet know the advantages and the circumstances of their life.²²³

In Rawls' original position behind the veil of ignorance, all of the parties to the social contract have their complete individual rights. However, in the next stage, their compassion and charity become obligatory based on prior agreements that are made behind the veil of ignorance. On the other hand, Nozick's theory would result in a system of complete individual rights, where

²²³ Rawls calls his theory "justice as fairness", because people choose the correct principles of justice in a position that is supposed to be fair. These principles determine the nature of a just society and they should be acceptable by all people, because the parties to the social contract behind the veil of ignorance are not able to design these principles for their own benefit rather than others' benefit (i.e. they should not be allowed to force other people into choosing principles that might not benefit them; and they should not be allowed to limit these principles to their desires).

compassion and charity are dependent on the free choice of individuals.²²⁴ Under Nozick's system, the merciless features of the social Darwinism theory are morally allowed. At the same time, the freeloader problem (as an economic hazard of morality) is solved. On the other hand, under Rawls' system, the merciless features of the social Darwinism theory will not be allowed by the agreement made behind the veil of ignorance. However, Rawls' system is more vulnerable to the freeloader problem than Nozick's system. Rawls responds to the objection about whether able-bodied individuals can refuse to work and then appeal to the difference principle for financial support (or as Rawls puts it: "Are the least advantaged, then, those who live on welfare and surf all day off Malibu?") as follows:

This question can be handled in two ways: one is to assume that everyone works a standard working day; the other is to include in the index of primary goods a certain amount of leisure time, say sixteen hours per day if the standard working day is eight hours. Those who do not work have eight extra hours of leisure and we count those eight extra hours as equivalent to the index of the least advantaged who do work a standard day. Surfers must somehow support themselves.²²⁵

This is not logical to me, because it is not fair to equalize between someone is able to work but refuses to work, and someone who is unable to work due to a disability. Rawls states "The inability to take advantage of one's rights and opportunities as a result of poverty and ignorance, and a lack of means generally, is sometimes counted among the constraints definitive of liberty. I shall not, however, say this, but rather I shall think of these things as affecting the worth of liberty"²²⁶

²²⁴ Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974) at 348.

²²⁵ Rawls, *Justice as Fairness*, *supra* note 49 at 179.

²²⁶ Rawls, *A Theory of Justice*, *supra* note 29 at 179.

As a practical example of the usefulness of such positive legal obligation to alleviate inequalities, I will discuss the following proposal for a Canadian progressive tax reform, which is a conversion of the existing non-refundable Disability Tax Credit (DTC) to a Refundable Disability Tax Credit (RDTC). This proposal has been a long standing issue and it most likely would have enormous impact on the lives of PWDs who largely live in poverty.

In Canada, the existing non-refundable DTC is intended to act as a fairness measure for PWDs and their families; it is designed to help offset the unavoidable additional expenses that are not faced by other citizens. It might reduce the tax liability of the individual to zero. If its application results in a negative tax owing, no refund is issued. However, any unused amount of it can be transferred to a “supporting person” (i.e. a spouse or common-law partner, or a parent, grandparent, child, grandchild, brother, sister, aunt, uncle, nephew or niece of that PWD) who paid for some or all of his/her basic necessities of life including food, shelter, and/or clothing. Moreover, taxpayers can back-file for up to 10 years and can receive the full benefit of it for each of the years that they failed to claim it. This would result in substantial amounts of money being received by PWDs or by their “supporting persons”.

According to the Council of Canadians with Disabilities (CCD), “[m]ost provinces’ disability support program benefits are inadequate and leave recipients living in deep poverty.... The [DTC] is not refundable so it is not of value to those who do not pay income tax.”²²⁷ The CCD offered a proposal to make the DTC a RDTC equal to the maximum value of the DTC. The CCD

²²⁷ Council of Canadians with Disabilities (CCD), *Proposal for A Refundable Disability Tax Credit*, online: CCD <<http://www.ccdonline.ca>>.

recommended in its proposal that the RDTC should not be means-tested. Therefore, “[e]veryone eligible for the DTC should get the full value of [the RDTC] regardless of their income or their employment status.”²²⁸ The CCD recommended in its proposal that provinces should agree “that the money received by [PWDs] would not be clawed back under provincial programs, ensuring the money directly impacts the quality of life for our most disadvantaged citizens.”²²⁹ The CCD concluded its proposal that “a RDTC with no provincial clawback would vastly improve the lives of hundreds of thousands of [PWDs]. Given the economic situation of the recipients virtually all of the funds would go directly into the purchase of goods and services.”²³⁰

Therefore, the CCD’s proposal is the conversion of the existing non-refundable DTC to a RDTC paid by the federal government from the general revenues. To clarify, under the existing non-refundable DTC program, if the individual’s tax liability is less than the non-refundable DTC, his/her tax liability would be reduced to zero, but s/he would not get any refund. On the other hand, under the proposed RDTC program, if the individual’s tax liability is less than the RDTC, his/her tax liability would be reduced to zero; s/he would get a refund equal to the difference between the RDTC and his/her tax liability (i.e. his/her RDTC would be reduced by his/her tax liability).²³¹

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ The RDTC program would work similar to the Refundable Medical Expense Supplement program and the provincial Sales Tax Credit program with only one difference. While these other tax benefits are means-tested benefits, the RDTC should not be means-tested. Moreover, in my opinion, similar to the RDTC, the refundable medical expense supplement also should not be means-tested, because this supplement currently does not benefit those taxpayers who do not have employment income or self-employment income.

Therefore, this RDTC would reach the poorest PWDs who do not currently benefit from the existing non-refundable DTC, because they are below the taxpaying threshold. Similar proposals have been offered within the last two decades, but there have been no actual results until now (i.e. the DTC is still non-refundable). Why have these proposals not been successful until now? What are the theoretical objections to the implementation of the RDTC? What are the theoretical justifications for the implementation of the RDTC?

The supporters of the existing DTC would claim that the DTC is a preferential affirmative action intended to act as a fairness measure for PWDs and their families to compensate them (based on the glaring group inequalities and the frequency of historical discrimination against them) and to restore the integrity of a distributive justice system based on equality of opportunity (because it is designed to help offset the unavoidable additional expenses that are not faced by other citizens). They would claim that the DTC is based on equality of opportunity, because it is offered to all PWDs equally in the same amount regardless of their income and assets, and offered in the form of a non-refundable tax credit as a work incentive measure to encourage PWDs to work, while giving them the freedom of choice based on their negative rights.

In my opinion, although these claims might be true in theory, in practice, offering the DTC in the form of a non-refundable tax credit does not hold to the claim of promoting the equality of opportunity. It is a “means-regarding equality of opportunity” (or a “formal equality of opportunity” which is similar to the equality of treatment), because providing the same tax credit amount to all PWDs (i.e. the same tools/means) does not necessarily lead to equal prospects. The poor PWDs (who have low income) who are below the taxpaying threshold level do not

currently benefit from the existing non-refundable DTC. Although their tools/means (i.e. the same tax credit amount) would be equal with the rich PWDs, their prospects will remain unequal (i.e. they will not actually get any cash refund).

Moreover, in my opinion, offering the DTC in the form of a non-refundable tax credit does not hold to the claim of protecting negative rights. It does not provide PWDs the freedom of choice, because it is a work incentive only for PWDs who are able to work, but it is not a work incentive for people with extreme disabilities who cannot work. The supporters of the existing DTC would argue that those PWDs (with extreme disabilities who cannot work) still have the freedom of choice, because if PWDs cannot use the DTC, they can still choose to transfer it to their “supporting persons”. Therefore, all prospects for obtaining the scarce resources are equal, which means that all PWDs have the same chances of achieving a specific result (i.e. “prospect-regarding equality of opportunity” or “substantive equality of opportunity”). However, I would argue that there is no guarantee that those “supporting persons” would not abuse and bully those PWDs (with extreme disabilities who cannot work) to transfer it to them (and even with a refusal of paying any support), which means that there is no guarantee for this freedom of choice. Basically, people with extreme disabilities (who cannot work) recognize that they will not actually get any cash benefits from the government, if they choose not to transfer it to their “supporting persons” (who most likely might be their caregivers and controlling their lives).²³²

²³² Some critics would argue that although there is a danger that giving the DTC to caregivers makes it possible for them to mistreat the PWD, this is also true when it goes directly to a person with a severe disability who cannot manage his/her own money. However, I would argue that in this case, his/her own money should be managed and protected by a public legal guardian/trustee; therefore, his/her caregiver would not be able misuse the DTC for his/her own personal benefits.

It looks as if the existing non-refundable DTC is designed to benefit only those PWDs who have taxable income (either through employment or investment). Furthermore, taxpayers can back-file for up to 10 years and receive the full benefit of it for each of the years that they failed to claim, which means substantial amounts of money being received by those PWDs or by their “supporting persons”. At the same time, the non-refundable DTC discriminates against only poor PWDs with extreme disabilities who cannot work and who do not have enough assets for investment to generate taxable income. Therefore, in order to justify the implementation of the RDTC, we can use this anti-discrimination argument for those PWDs with extreme disabilities who cannot work due to the adverse effect discrimination based on disability ground. However, we cannot use anti-discrimination argument for those poor PWDs who do not have enough assets for investment to generate taxable income, because poverty is not a ground for discrimination (i.e. regardless of their level of disabilities, poor PWDs and rich PWDs are treated differently). Therefore, due to the fact that poverty is the source of disadvantage, we must use social welfare and social justice argument. This example shows that anti-discrimination claims would be limited only to provide the access to the minimum level of BHCs (but not actually achieving this threshold).²³³

²³³ Some critics would argue that this example implies the idea of imposing a legal obligation on the government to provide equality by means of this particular mechanism (i.e. the RDTC). In my opinion, due to the fact that the existing non-refundable DTC is designed to help offset the unavoidable additional expenses (that are not faced by other citizens), the DTC is a positive right that is used to protect the positive freedom of self-mastery by encouraging self-development (similar to education and health care). As I explained in section 2.5, states have a positive legal obligation to provide these positive benefits only for those citizens who are not able to obtain them on their own. Therefore, it would be more logical to provide cash refund for those poor people with extreme disabilities, who cannot work, who do not have enough assets for investment to generate taxable income, and who do not have any eligible “supporting person” to transfer the DTC. Therefore, in order for the DTC to confirm the claim of fairness for all PWDs and their families, it should be changed from a non-refundable DTC to a RDTC.

Although implementing the RDTC would guarantee “prospect-regarding equality of opportunity” or “substantive equality of opportunity” (i.e. all prospects for obtaining the scarce resources are equal, which means that all PWDs have the same chances of achieving a specific result) with a respect for the true freedom of choice, implementing the RDTC would not guarantee the equality of result, because the poor PWDs would need additional resources (i.e. social welfare benefits) to be on equal footing with the rich PWDs and non-disabled people. Therefore, it is important that the social welfare benefits received by PWDs should not be clawed back under provincial programs to ensure that the money from the RDTC directly impacts the quality of their lives.

We should note here that any additional governmental spending (as a result of this conversion of the DTC to a RDTC) would be limited to cover only those (which are not too many) poor people with extreme disabilities who cannot work, do not have enough assets for investment to generate taxable income, and do not have any eligible “supporting person” to transfer it. This example shows the different effects of the equality of opportunity and the equality of result has on PWDs as well the different effects of anti-discrimination laws and social welfare laws.

Therefore, the above discussion (about the RDTC) shows that such a credit would provide better assistance (especially to people with severe disabilities). It provides an example to demonstrate that governments should insure an equal initial sum of resources for each individual by considering that PWDs have unavoidable additional expenses (that are not faced by other citizens). Governments should insure that these resources would reach all PWDs including poor people with extreme disabilities (who do not have a free choice to participate and/or are not able

to work; therefore, they should not be held responsible for not working).²³⁴ Therefore, states should have a positive legal obligation to alleviate inequalities as well as an obligation not to engage in conduct that causes inequalities. Therefore, I agree with Dworkin that liberty and equality do not have to be in conflict; moreover, as we will see in Chapter 3, according to my progressive Islam perspective and my own interpretation of the *Qur'ān*, liberty and equality do not conflict; instead they complete each other with the idea that equality has priority over liberty.

However, before I move to my progressive Islam perspective on liberty and equality (and my proposed Islamic version of my new liberal equality theory), it is important to know: is there any liberal equality theory that might be compatible with my progressive Islam perspective on liberty and equality? Which one of these different liberal equality theories can address issues of justice for PWDs? Which one of them can confirm the universal BHR to equality for PWDs and the universal BHR to social welfare (more specifically, disability social income assistance)?

2.7 Which liberal equality theory can address issues of justice for PWDs?

According to F. A. Hayek, the British or the classical liberal tradition focused on the individual. Unlike the communitarian equality theorists who focus on the equality or welfare of groups, what unites the liberal equality theorists is their focus on the individual.²³⁵ On the other hand, the *Qur'ān* [1 (al-Fātiḥah):2] begins with the recognition of Allāh (God) as “the Lord of all worlds” (i.e. the Lord of everything including all human beings). Therefore, the *Qur'ān* recognizes

²³⁴ This idea (that governments should insure an equal initial sum of resources for each individual; at the same time, individuals accept their responsibility for their free choices) is based on Dworkin’s equality of resources theory. See subsection 2.7.5.2, below, for more on this topic.

²³⁵ F A Hayek, *New Studies in Philosophy, Politics, Economics and the History of Ideas* (Chicago: University of Chicago Press, 1978) at 119-20.

human beings simply as human beings without any distinction between Muslims and non-Muslims nor between believers and non-believers, because the *Qur'ān* is a message to all humanity (i.e. not only to those who self-identify as Muslims). Therefore, the *Qur'ān* focuses on the individual (and the equality or welfare of individuals) rather than on the Muslim community (and the equality or welfare of groups). Therefore, I chose to focus on the liberal equality theories rather than on the communitarian equality theories.

According to Rosenfeld, it is widely accepted that the proper subject of equality is the individual rather than the group. “In other words, regardless of what equality may require in concrete situations, it is the individual rather than the group who is entitled to such equality.”²³⁶ For liberals, disability is a problem that tests the limits of theoretical positions on equality. Within the liberal theories of equality discussion, there are different views on the meaning of equality and the role of the state in addressing inequality. Some contemporary liberal theorists view formal equality as an ineffective goal for liberalism, others argue for a considerable state role for achieving equality. Therefore, I will discuss the following liberal theories of equality.²³⁷

- Rosenfeld’s theory of equality;
- The utilitarian theories of equality;
- The classical liberal and the libertarian theories of equality;
- The contractarian theories of equality; and
- The egalitarian theories of equality.

²³⁶ Rosenfeld, *supra* note 16 at 4.

²³⁷ I will discuss the different liberal equality theories starting with (what I think is) the least useful theory for PWDs (i.e. the utilitarian theory of equality) and ending with (what I think are) the most two useful theories for PWDs (i.e. the contractarian and the egalitarian theories of equality). However, I will start with Rosenfeld’s theory of equality (as an exception) in order to use it as an introduction to the other liberal theories of equality.

2.7.1 Michel Rosenfeld's theory of equality

Although most of the liberal equality theorists focus on the individual, Rosenfeld's theory of equality tries to incorporate the idea of systemic discrimination against a group into this individual focus. According to Rosenfeld, using preferential affirmative action to compensate individuals on the basis of group affiliation will restore the integrity of a distributive justice system based on equal opportunity rights. When there are glaring group inequalities such as poverty that indicates the frequency of historical discrimination, distributive justice becomes actually compensatory justice. Therefore, compensation that requires distribution should be given preferential treatment.²³⁸

Rosenfeld provides a critical examination of the major constitutional theories and the four major liberal equality theories on affirmative action. His theory provides the justification for affirmative action based on constitutional law and philosophy. He claims that liberal theories centered in utilitarian, libertarian, contractarian, and egalitarian forms of equality are unable to support race and gender preferential treatment. He also claims that they failed to provide a balance in the tension between individual independence and societal welfare as they relate to justice, and the tension between identity and difference as they relate to equality.²³⁹

Therefore, Rosenfeld's aim is to clarify a theory of justice that does not contain these defects and that holds to the claim of equality.²⁴⁰ His theory is that all individuals are morally equal as individuals; they deserve equal human dignity, self-respect, and the equal opportunity to choose

²³⁸ *Ibid* at 29-51.

²³⁹ *Ibid* at 219-38.

²⁴⁰ For a description of Rosenfeld's theory, see subsection 1.3.1, above.

and pursue a reasonable life plan. Therefore, his theory of equality would require the state to move beyond the devotion to negative rights to the installation of positive rights using the equal protection clause. Rosenfeld supports affirmative action programs that aim at transforming institutions by increasing the representation of historically disadvantaged groups, such as blacks or women.²⁴¹

However, Rosenfeld's theory discussed affirmative action programs only for blacks and women; he ignored the issue of how to determine which groups should be given preferential treatment. Therefore, Rosenfeld's theory avoided the question whether PWDs should be preferred using affirmative action programs. Moreover, Rosenfeld's theory discussed only whether affirmative action programs should be acceptable, not whether they should be authorized by legislatures or courts.

Due to the fact that Rosenfeld's goal is transforming the society to eliminate inequalities in opportunities, his theory implies the idea that the oppressive social environment is the source of inequalities. However, I have argued that PWDs need social welfare laws in addition to anti-discrimination laws to address issues of justice for PWDs. Although anti-discrimination laws can guarantee the access (for all individuals during their entire lives) to the minimum level for all BHCs, anti-discrimination laws are limited to guaranteeing only the access to this threshold level when the benefit is not provided to anyone. Therefore, PWDs also need social welfare laws (in addition to anti-discrimination laws) to achieve this threshold level of basic functioning (and not

²⁴¹ *Ibid* at 283-336.

only the access to this threshold level), and to eliminate any inequality above this threshold level in terms of income, wealth and fundamental self-respect.²⁴² Therefore, Rosenfeld's theory is limited in addressing issues of justice for PWDs.

2.7.2 The utilitarian theories of equality

According to Rosenfeld, the utilitarian equality theorists seek to maximize welfare. There are different theories: "those who treat considerations of social utility as being paramount; ... those others that treat such considerations as being legitimate, provided individual rights are properly considered."²⁴³ According to Rosenfeld, under the pure utilitarian theory of equality, positive actions of the state that interfere with individual rights are justified, if such actions result in an increase in overall welfare. However, this pure utilitarian theory could also be used to justify discrimination.²⁴⁴ On the other hand, under the limited utilitarian theory of equality, considerations of social utility are subject to individual rights. Therefore, a positive action of the state could be justified either if it did not violate any individual rights or if the gain in social utility (even if it did violate individual rights) would be so great that it would make up for the effects on individual rights. Therefore, discrimination could be justified by this limited utilitarian argument, if the benefit was great.²⁴⁵

It seems like that both of these two theories focus on the interests of the majority (i.e. they aim to maximize the welfare of the whole society, and they are not interested in the welfare of the

²⁴² See section 2.4 & section 2.6, above, for more on this topic.

²⁴³ *Ibid* at 94-95.

²⁴⁴ *Ibid* at 100.

²⁴⁵ *Ibid*.

individual); therefore, they do not consider the medical, the economic, or the social-political problems that PWDs face.²⁴⁶

Moreover, Rosenfeld discussed the utilitarian arguments against affirmative action based on the following claims:

the distinction between maximizing welfare and preventing harm cannot be maintained in connection with the allocation of certain positions; the short-term utilities of preferential treatment are outweighed by the long-term utilities of hiring exclusively on the basis of competence; aiming directly at the general welfare is not always the best way to promote it; and, even if preferential treatment can produce the benefits that some utilitarian claim it can, it is sufficient to favour some blacks and women rather than either or both groups as a whole.²⁴⁷

Due to the fact that the utilitarian theories of equality reject the implementation of preferential treatment and affirmative action, they are not able to protect PWDs from discrimination; they do not consider the medical, the economic, or the social-political problems that PWDs face. Therefore, the utilitarian theories of equality are limited in addressing issues of justice for PWDs.

2.7.3 The classical liberal and the contemporary libertarian theories of equality

Classical liberal theorists focus on individual freedom and equality. However, for people living in society, individual freedom does not mean freedom from all limitations. Individual freedom can only be guaranteed using laws that prevent others from limiting an individual's freedom. According to Hayek, liberalism "recognizes that if all are to be as free as possible, coercion

²⁴⁶ It is possible to argue that these utilitarian theories of equality (in considering the benefit to society in general) would consider taking steps that allow PWDs to become productive; these utilitarian theories of equality may consider the medical, economic and social needs of PWDs to some extent. However, due to the fact that some people with extreme disabilities may never be productive, these utilitarian theories of equality would not care about their medical, economic and social needs.

²⁴⁷ *Ibid* at 109.

cannot be entirely eliminated, but only reduced to that minimum which is necessary to prevent individuals or groups from arbitrarily coercing others.”²⁴⁸ Therefore, individual freedom “meant primarily that the free person was not subject to arbitrary coercion”;²⁴⁹ and in order for coercive laws to be acceptable at all, they have to be applied equally; governments have to apply the same formal rules to all. Hayek argues that equality of opportunity according to the classical liberal means

only that those obstacles to the rise to higher positions should be removed which were the effect of legal discriminations between persons. It did not mean that thereby the chances of the different individuals could be made the same. Not only their different individual capacities, but above all the inevitable differences of their individual environments, and in particular the family in which they grew up, would still make their prospects very different.²⁵⁰

Therefore, this formal equality of opportunity means that individuals should have equal opportunity to obtain a specific result if no one of them faces a legal or quasi-legal barrier to the

²⁴⁸ Hayek, *supra* note 235 at 133.

²⁴⁹ *Ibid* at 131.

²⁵⁰ *Ibid* at 141. There is little to differentiate between this narrow form for equality of opportunity and the equality of treatment. Equality of treatment is the goal of the basic form of formal equality; it simply means that all people must be treated identically. However, equality of treatment cannot address the practical reality that sometimes an equal access for PWDs requires modification of architectural or organizational barriers. Theresia Degener & Gerard Quinn, “A Survey of International, Comparative and Regional Disability Law Reform” in Mary Lou Breslin & Silvia Yee, eds, *Disability Rights Law and Policy: International and National Perspectives* (Ardsley, NY: Transnational Publishers, 2002) 3 at 8. For example, the written test that is administered in an identical manner to all job applicants would satisfy the test of equal treatment. However, it is not an equality to require that PWDs compete in the identical manner as other applicants (especially for a blind applicant who is unable to read the test or write a response). Although this view of formal equality requires identical treatment for everyone (i.e. equality is achieved if laws, policies and practices apply identically to all people affected by them), there is another view of formal equality, which is the similarly situated test. In the *Andrews* case, McIntyre J. stated: “The similarly situated test is a restatement of the Aristotelian principle of formal equality – that ‘things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unalikehood.’” *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143 at 165-66. This Aristotle’s view of formal equality has been used to justify discriminatory laws (i.e. violations of equality rights), but it can also be used to justify accommodating differences. However, formal equality, in both views, does not consider the effects of any law, practice or procedure (in light of its context) on PWDs’ economic, social and political circumstances that have been made worse or better.

result that others do not face. Therefore, the state's role is limited to the removal of legal or quasi-legal barriers that prevent individuals from competing for scarce goods and resources.

On the other hand, according to Rosenfeld, fair equality of opportunity means that differences in the chances for individuals competing for the scarce resources should be a function of differences in their natural abilities and skills, and not of differences in socially-generated abilities and skills. This means that competitors should not be disadvantaged by socially-generated differences that could result from income or social class. Therefore, simply eliminating barriers will not be adequate to achieve equality especially where there has been a history of discrimination creating a disadvantaged class. Fair equality of opportunity may require the elimination of social disadvantages, which may justify an unequal allocation of some goods and resources.²⁵¹

Therefore, according to classical liberalism, individual freedom should be protected by minimal state action and formal equality. The contemporary libertarian theory of equality is the closest theory to the classical liberal theory of equality. According to Rosenfeld, the libertarian equality theorists focus on individual independence, property rights, and the limited role of the state to only protecting the lives and the properties of its citizens and enforcing contracts. They strongly reject any action by the state to achieve equality through any positive action (such as affirmative action). Sometimes, libertarians may support some positive actions to avoid discrimination based

²⁵¹ Rosenfeld, *supra* note 16 at 28-29.

on grounds such as race or color;²⁵² but even some extreme libertarians (such as Richard A. Epstein) oppose that degree of interference in private affairs.²⁵³

Due to the fact that the classical liberal and the contemporary libertarian theories of equality focus on the individual independence and formal equality, they assume that all individuals are independent and equal; they do not take into consideration the needs of PWDs who are dependent due to their structural and functional deficiencies. Moreover, they reject the implementation of preferential treatment and affirmative action; they are not able to protect PWDs from discrimination, and they do not consider the medical, the economic, or the social-political problems that PWDs face. Therefore, the classical liberal and the contemporary libertarian theories of equality are limited in addressing issues of justice for PWDs.

2.7.4 The contractarian theories of equality

According to Rosenfeld, the contractarian equality theorists in their social contract theories argue that the legitimacy of any law and its principles of justice are based on the approval of those who are expected to be compelled by them. Therefore, the social contract provides a balance between the guaranteed right of the individual to pursue his/her own conception of the good and the necessary practical social cooperation in the society.²⁵⁴ Rawls (who is the most influential contemporary contractarian equality theorist) asked what principles of justice parties to the social

²⁵² *Ibid* at 52, 61.

²⁵³ See Richard A Epstein, *Equal Opportunity or More Opportunity: The Good Thing about Discrimination* (Trowbridge, Wiltshire: Institute for the Study of Civil Society, 2002).

²⁵⁴ Rosenfeld, *supra* note 16 at 65.

contract would agree to from behind the veil of ignorance that prevents them from knowing their place in society or their natural talents and abilities.²⁵⁵

2.7.4.1 John Rawls' social contract theory

Considering that humans are both self-interested (i.e. humans are motivated to choose whatever looks beneficial for them), rational (i.e. humans use their rationality to achieve their goals), and reasonable (i.e. humans use their reasonableness to cooperate according to mutually acceptable principles in order to achieve their goals together), and considering how different their goals are, what principles of justice would they agree on in order to cooperate with each other? Therefore, the parties to the social contract have goals that they want to achieve; they also want to achieve them via cooperation with others on mutually acceptable principles of justice. Considering that they are faced with the circumstances of justice (i.e. moderate scarcity), and considering that every one of them would prefer more benefits and less responsibilities that are related to this cooperation, how can they find these principles that are acceptable to all of them?

In his answer to problems of distributive justice, Rawls utilized and revived the social contract theory with its application to basic social and political institutions. His approach to justice is a non-utilitarian egalitarianism. In his social contract theory, Rawls tried to reconcile between liberty and equality. According to Rawls, “justice as fairness” does not mean that people will define either justice or fairness in the same way, because the use of the term simply means that the procedure for defining justice will be fair since all parties will have an equal footing.

²⁵⁵ Rawls, *A Theory of Justice*, *supra* note 29 at 11.

However, it does not guarantee that the final outcome will not produce any injustices, because justice means different things to different people.²⁵⁶ Rawls is interested in justice as a process not in justice as a result. However, Rawls' goal is to create a theory of justice, not purely a theory of equality.

Rawls uses the veil of ignorance in order to hide all facts (e.g. social class, generation, race, physical handicaps, etc.) that could confuse what the idea of distributive justice should be (i.e. principles that are fair to all). Due to the fairness of this procedure, Rawls claimed that the principles that would be chosen as a result of this procedure would be fair principles. Due to the fact that anyone of the parties to the social contract does not know how s/he will end up in the society, s/he would not favour any certain group, but rather would choose a system of justice that treats everyone fairly. For example, a self-interested rational individual behind the veil of ignorance would not want to discriminate against any race or gender or disability, because s/he does not have any guarantee that s/he may end up in one of the groups that s/he choose to discriminate against. Therefore, the principles of justice that would be chosen should be anti-discriminatory. All of the parties to the social contract would use a Maxi-Min approach that maximizes the situation of the least well-off individuals.

Therefore, Rawls claims that parties to the social contract in his hypothetical fair choice situation would be attracted to his principles of justice (winning out over many different alternatives

²⁵⁶ *Ibid.*

including utilitarian and libertarian alternatives). According to Rawls, his theory leads to two general principles of distributive justice:

The first requires equality in the assignment of basic rights and duties, while the second holds that social and economic inequalities, for example inequalities of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society.²⁵⁷

Therefore, Rawls argues that in order to structure society in the real world, the two general principles of distributive justice that would be chosen by the parties to the social contract are as follow:

1. Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.^[258]
2. Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle,^[259] and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.²⁶⁰

However, Rawls argues that these principles and conditions are to be ranked in the following priority order: the highest priority to the equal basic rights and liberties principle, then the equal opportunity principle, and finally the difference principle.²⁶¹

Rawls confirms that his theory of justice is practical and is not utopian theory, because his principles of justice should ultimately attract an “overlapping consensus” of a sufficient majority

²⁵⁷ *Ibid* at 14.

²⁵⁸ *Ibid* at 266. This is the equal basic rights and liberties principle. This principle echoes libertarianism in its commitment to extensive liberties. This principle is egalitarian, since it distributes extensive liberties equally to all persons. Rawls changed this principle from “equal right” to “equal claim,” and from “system of basic liberties” to “a fully adequate scheme of equal basic rights and liberties.” Rawls, *Political Liberalism*, *supra* note 50 at 5-6.

²⁵⁹ This is the difference principle. This principle has elements of the “socialist” idea that responsibilities should be distributed according to abilities, and benefits should be distributed according to needs. The “least advantaged” have the greatest needs and those who receive special powers (under “social inequalities”) have special responsibilities.

²⁶⁰ Rawls, *A Theory of Justice*, *supra* note 29 at 266. This is the equal opportunity principle. This principle is egalitarian, since it distributes opportunities to be considered for offices and positions in an equal manner.

²⁶¹ *Ibid*.

to be effective and to make stable society. Rawls explains the public institutions that should exist in a fair and just society. He discusses five different types of political and economic systems: “(a) laissez-faire capitalism;^[262] (b) welfare-state capitalism;^[263] (c) state socialism with a command economy;^[264] (d) property-owning democracy;^[265] and finally, (e) liberal (democratic) socialism.”²⁶⁶ I agree with Rawls that the first three types of these political and economic systems (a), (b), and (c) “[violate] the two principles of justice in at least one way”;²⁶⁷ therefore, only the other two types of these political and economic systems (d) and (e) are the

²⁶² In economics, Laissez-faire means allowing industry to be free of government restriction, especially restrictions in the form of tariffs and government monopolies. It is used to describe a form of philosophic anarchism, which is a political philosophy encompassing theories and attitudes which consider the state, as compulsory government, to be unnecessary, harmful, and/or undesirable. According to Rawls,

Laissez-faire capitalism (the system of natural liberty...) secures only formal equality and rejects both the fair value of the equal political liberties and fair equality of opportunity. It aims for economic efficiency and growth constrained only by a rather low social minimum. Rawls, *Justice as Fairness, supra* note 49 at 137.

²⁶³ Welfare-state capitalism refers to the combination of a capitalist economic system with a welfare state (e.g. United States of America). According to Rawls,

Welfare-state capitalism also rejects the fair value of the political liberties, and while it has some concern for equality of opportunity, the policies necessary to achieve that are not followed. It permits very large inequalities in the ownership of real property (productive assets and natural resources) so that the control of the economy and much of political life rests in few hands. And although, as the name ‘welfare-state capitalism’ suggests, welfare provisions may be quite generous and guarantee a decent social minimum covering the basic needs..., a principle of reciprocity to regulate economic and social inequalities is not recognized. *Ibid* at 137-38.

²⁶⁴ State socialism is any variety of socialism which relies on control of the means of production by the state, either through state ownership or state management (e.g. the former Soviet Union). According to Rawls,

State socialism with a command economy supervised by a one-party regime violates the equal basic rights and liberties, not to mention the fair value of these liberties. A command economy is one that is guided by a general economic plan adopted from the center and makes relatively little use of democratic procedures or of markets. *Ibid* at 138.

²⁶⁵ The moderate social democrats advocate regulated capitalism, in the form of modern social democracy (i.e. property-owning democracy), in which regulation is used in place of ownership. They do not advocate the overthrow of capitalism in a socialist revolution; however, they support the continuing existence of the capitalist state and the capitalist economic system, only turned to more social purposes.

²⁶⁶ *Ibid* at 136. The liberal (democratic) socialists’ form of socialism involves collective ownership of the means of production without state control. They argue for a gradual, peaceful transition from capitalism to (full) socialism. They wish to abolish capitalism, but through political *reform* rather than *revolution* (In contrast, Marxism holds that a socialist revolution is the only practical way to implement fundamental changes in the capitalist system). However, some libertarian socialists are similar to modern social democrats in advocating regulation rather than ownership.

²⁶⁷ *Ibid* at 137. See *supra* notes 262, 263, and 264 that explain why each of laissez-faire capitalism, welfare-state capitalism, or state socialism with a command economy violates at least one of the two principles of justice.

"ideal descriptions" that have "arrangements designed to satisfy the two principles of justice."²⁶⁸ However, Rawls' theory of justice as fairness does not choose between them; it only provides guidelines for making this kind of choice based on the "society's historical circumstances, to its traditions of political thought and practice, and much else".²⁶⁹ Similarly, my progressive Islam perspective promotes either the last two types of these political and economic systems (i.e. property-owning democracy or liberal [democratic] socialism), because my progressive Islam perspective disagrees with both the pure capitalism system and the pure communism system. At the same time, my progressive Islam perspective (as we will see in Chapter 3) combines the best elements from both capitalist and communist systems.

Rawls' theory is an egalitarian theory under a stipulation that any equality should not worsen the situation of the least advantaged, because each individual in a well-ordered society has the right to an equal share on the society's goods. This share should not be affected by natural attributes. Therefore, inequalities would be permitted only for the advantage of the worst-off individuals by making those individuals as better off as possible in terms of rights, freedoms, opportunities, income and wealth.

Rawls' theory focuses on the claim that morally arbitrary factors (e.g. race, gender, physical handicaps, etc.) must not determine life opportunities and humans are not entitled to all of the possible benefits from inborn talents. Rawls eliminated inborn talents as alternative criteria to equality in assessing the distributive justice. Therefore, positive actions of the state would be

²⁶⁸ *Ibid* at 138.

²⁶⁹ *Ibid* at 139.

justified to rearrange social and economic inequalities. It seems that Rawls' social contract theory with some modifications (as we will see below) could promote a human rights policy that is based on a fundamental social commitment to equality for PWDs in society.

2.7.4.2 The debate between Rawls' social contract theory and Martha Nussbaum's BHCs theory in addressing equality for PWDs

Rawls' original position embodies a morally convincing attitude for consideration to confront the issue of justice regarding disability, because it secures principles of compassion, equality, fairness, and rationality. Its veil of ignorance embodies a clear way of combining the common sense idea about being in someone else's shoes with the idea of fairness that reduces the effect of disadvantages. The balance between the veil of ignorance and the mutually-disinterested rationality of the parties can articulate the universal concern, because each party rationally promotes and pursues (without selfishness, envy, or spite) the goods attained, achieved, or enjoyed by the person it represents.²⁷⁰ Rawls states

the aim is to realize in the basic institutions the idea of society as a fair system of cooperation between citizens regarded as free and equal. To do this, those institutions must, from the outset, put in the hand of citizens generally, and not only of a few, sufficient productive means for them to be fully cooperating members of society on a footing of equality.²⁷¹

²⁷⁰ Rawls, *A Theory of Justice*, *supra* note 29 at 128, 166.

²⁷¹ Rawls, *Justice as Fairness*, *supra* note 49 at 140.

This means that Rawls avoided considering the possibility that some people are sufficiently disabled, and they will remain unable to be fully cooperating members of the society no matter how many productive means that they have.²⁷²

Rawls states "Fair terms of cooperation articulate an idea of reciprocity and mutuality: all [²⁷³] who cooperate must benefit, or share in common burdens, in some appropriate fashion judged by a suitable benchmark of comparison."²⁷⁴ On the other hand, Nussbaum argued that Rawls' original position cannot produce suitable principles of justice related to the needs of PWDs (i.e. principles apply to all persons, no matter how disabled).²⁷⁵ Why would self-interested parties (guided by the idea of fair social cooperation) agree to extend principles of justice to PWDs? Why would they enter into a social contract at all, if it does not offer the prospect of reciprocal benefit?²⁷⁶

Rawls tries to produce principles for a closed and isolated perfect society in which "all citizens are fully cooperating members of a society over a complete life."²⁷⁷ He states "once we have a sound theory...the remaining problems of justice will prove more tractable in the light of it. With suitable modifications such a theory should provide the key for some of these other

²⁷² The fundamental organizing idea that Rawls makes into a full blown conception of social justice is the idea of fair social cooperation among free and equal citizens; however, those with severe mental disabilities are not capable of cooperating as free and equal citizens.

²⁷³ Henry S Richardson argued that this idea of reciprocity and mutuality does not say ONLY those who cooperate must benefit. Henry S Richardson, "Rawlsian Social Contract Theory and the Severely Disabled" (2006) 10: 4 *Journal of Ethics* 419 at 427.

²⁷⁴ Rawls, *Political Liberalism*, *supra* note 50 at 300.

²⁷⁵ Nussbaum, *supra* note 30 at 176.

²⁷⁶ For a description of Nussbaum's theory, see *supra* note 47, *supra* note 48, and accompanying text.

²⁷⁷ John Rawls, *Collected Papers*, ed by Samuel Freeman (Cambridge, Massachusetts: Harvard University Press, 1999) at 332 [Rawls, *Collected Papers*].

questions.”²⁷⁸ Rawls assumes that the parties to his social contract in their original position are independent, free, and equal. However, all of Rawls’ assumptions exclude PWDs, because independence excludes individuals who are dependent on the care of others, freedom assumes some natural capacities, and equality assumes equal natural abilities.

Nussbaum criticizes Rawls in what she called the "postponement" of problems of PWDs, because Rawls ignored the special needs of PWDs in his original position, and he dealt with these issues only at the later legislative stage. Nussbaum argues that Rawls is not able to include PWDs in his original position for the following reasons:

1. Rawls used income and wealth as a measurement of social status. The index of primary goods of wealth and income is adequate to measure the well-being of people without any kind of disability. On the other hand, the index of primary goods of wealth and income cannot measure the well-being of PWDs, because PWDs may require more resources for the same level of well-being. At the same time, Rawls has to use income and wealth in order to be able to identify the worse-off individuals, and to be able to apply the difference principle.²⁷⁹
2. The goal pursued by the parties to Rawls’ social contract in their original position is mutual advantage. Therefore, the parties to the social contract would not agree to include PWDs, because they would have doubts about the costs of including PWDs as compared with the benefits from the social productivity of PWDs. The parties to the social contract

²⁷⁸ Rawls, *A Theory of Justice*, *supra* note 29 at 7; Rawls, *Political Liberalism*, *supra* note 50 at 183.

²⁷⁹ Nussbaum, *supra* note 30 at 140-44.

are not able to be motivated by humanity, generosity, or compassion. They are indifferent to the well-being of others.²⁸⁰

3. Rawls presupposed that the parties to the social contract are equal in their abilities. Therefore, including PWDs would require some moral compassion from the parties to the social contract as a motivation, which would cause complexity.²⁸¹
4. Rawls supported the Kantian idea of the individual that necessitates a level of rationality and excludes people with mental disabilities.²⁸²

Nussbaum makes important modifications to the Rawls's ideas of reciprocity, inviolability, and human dignity in order to address the issues of justice related to PWDs. As a result, she believes, the whole idea of original position is irrelevant;²⁸³ and she believes that Rawls's postponement of the difficult questions about justice for PWDs is wrong.²⁸⁴

The fact that the permanently severely disabled cannot be equally cooperating citizens would limit the discussion to those whom Rawls describes as "above the line" (those whose disabilities leave them "above the line" or with the possibility of getting back above it such as those with temporary disabilities).²⁸⁵ However, Nussbaum describes as "below the line" only those

²⁸⁰ *Ibid* at 64-66.

²⁸¹ *Ibid* at 156-58.

²⁸² *Ibid* at 159-61.

²⁸³ Nussbaum rejects only Rawls' original position, and not his two principles of justice.

²⁸⁴ *Ibid* at 176.

²⁸⁵ Rawls, *Political Liberalism*, *supra* note 50 at 183.

genetically human (such as those in a persistent vegetative state) whose life is “just not a human life at all.”²⁸⁶

Unlike Rawls’s more Kantian idea that is built around rationality and capacity (that is what keeps the severely disabled “below the line”), Nussbaum insisted that as a prerequisite, governments should guarantee the minimum level of all BHCs in order to provide alternative answer (based on more Aristotelian idea of human dignity) to the following question: as a matter of justice, if a PWD is incapable of social cooperation, why do we owe him/her any of the fruits of social cooperation? Or should we instead think of our duties towards him/her as duties of charity?²⁸⁷

Henry S. Richardson argued that these questions are ill formed and that Rawls’s Theory can be suitably modified to address the issues related to justice for PWDs. He argued that the parties are not asked to choose whether they wish to enter society, nor to choose the qualities of society to that of a “state of nature” in Rawls’s original position. However, they are asked to choose principles of justice for the society, and whether these principles should address PWDs is also not a choice for the parties to make.²⁸⁸

²⁸⁶ Nussbaum, *supra* note 30 at 181. Nussbaum admitted that some PWDs will not be able to get above the minimum level of BHCs, but we have to keep trying to help those PWDs to get some of these BHCs as many as possible, because even those who fail to get above this minimum level of BHCs remain humans. However, Nussbaum’s BHCs theory has been criticized for insensitivity to PWDs and having a minimum cut off point for functioning below which no rights would accrue. Some critics argue that it excludes a larger group of people than those in a vegetative state. Stein argues that while Nussbaum’s BHCs theory provides an especially fertile space within which to understand the content of human rights, it falls short of a comprehensive framework, because it excludes some intellectually disabled individuals and conditions the inclusion of others. See Stein, *supra* note 15. Malhotra argues that while Nussbaum’s BHCs theory is not perfect and not always consistent with the values of the social model, it is superior to Rawls’ theory of justice. See Malhotra, *supra* note 15.

²⁸⁷ Nussbaum, *supra* note 30 at 70.

²⁸⁸ Richardson, *supra* note 273 at 429; Rawls, *A Theory of Justice*, *supra* note 29 at 11.

It is possible to argue that the veil of ignorance would mean that since the parties to the social contract would not know whether or not they would be among people with severe disabilities, they would include PWDs in the scheme as a form of insurance. Rawls states that differences in physical capacities (that put some citizens “below the line” for cooperating in the society) can be dealt with at the legislative stage when the specific information about disabilities in society can be known and the costs of treating them can be determined and balanced with the total governmental spending.²⁸⁹

Richardson argued that due to the fact that the parties are uncertain about the level of development of their society in which the principles will be applied, they will be concerned that maximizing the lifetime minimum income expectation (or maximizing the transferred payments to PWDs) and wealth expectation will do too little for PWDs. They cannot be sure what the minimum income level would allow a severely disabled person to function.²⁹⁰ Just as minimum income is insufficient to help the severely disabled, a guarantee that all of his/her income needs will be met is also inefficient.²⁹¹ Therefore, in order to avoid these possibilities, the parties should address specially the minimum level of all BHCs in addition to the basic needs.²⁹²

On the other hand, Richardson argued that the BHCs alone is not a sufficient basis for assessing comparative lifetime expectations, because it will express perfectionist commitments not equally

²⁸⁹ Rawls, *Political Liberalism*, *supra* note 50 at 184.

²⁹⁰ Even with a strictly equal distribution of income and wealth in undeveloped or developing relatively poor societies, the minimum income expectation protected by the difference principle may not guarantee everyone a decent level of BHCs, and may put the severely disabled in bad circumstances.

²⁹¹ A severely disabled person is likely to have far more urgent needs for care, loving attention, and being included in some kind of social life.

²⁹² Richardson, *supra* note 273 at 449.

respectful of everyone's dignity, and will threaten the equality of respect. Moreover, the commitment to basic distributive justice and fairness as independent of well-being is also another reason to use Rawls's primary goods of income, wealth and equal opportunities. Therefore, in order to avoid these difficulties, we should use Rawls's primary goods of income, wealth and equal opportunities in addition to using the BHCs as a measure for people's expectations.²⁹³

Rawls articulates his idea of self-respect as the social basis of self-respect or the mutual self-respect, understood as the self-respect of the equal citizen. In his justification of the goodness of the well-ordered society of justice as fairness, he states

A second reason political society is a good for citizens is that it secures for them the good of justice and the social bases of self respect. Thus, in securing the equal rights and liberties, fair equality of opportunity, and the like, political society guarantees the essentials of persons' public recognition as free and equal citizens.²⁹⁴

On the other hand, Nussbaum articulates her idea of self-respect as a fundamental appeal to the notion of human dignity, because her case studies of PWDs make it obvious that a valuable dignity and self-respect can reside even in people whose mental capacities are so limited that they will never be able to join in the mutual recognition of equal citizens.²⁹⁵ Richardson states

for the severely disabled, the self-respect of the fully-cooperative citizen is out of reach; but that does not mean that they must be viewed as 'objects of our charity and compassion.'²⁹⁶ Rather, fundamental self-respect may be protected by building provision for everyone's basic needs into the constitutional essentials of society.²⁹⁷

²⁹³ *Ibid* at 460.

²⁹⁴ Rawls, *Political Liberalism*, *supra* note 50 at 202, 318.

²⁹⁵ Nussbaum, *supra* note 30 at 167.

²⁹⁶ Rawls distinguished between reciprocal cooperation among fully cooperative agents and charity for the unfortunate. Rawls, *Justice as Fairness*, *supra* note 49 at 129.

²⁹⁷ Richardson, *supra* note 273 at 448.

According to Nussbaum, the fundamental self-respect is necessary for all people to have a sense that their life is worth living (no matter what their level of ability or disability excluding those in a persistent vegetative state, who are so severely disabled as to wholly lack the capacity to live a dignified human life).²⁹⁸

Whereas Rawls's goal is to produce principles of justice that govern the basic structure of society (creating just limitations for its constitutional essentials),²⁹⁹ Nussbaum does not limit her theory to "constitutional essentials". Instead, she supports a principle of minimum justice (that must be fulfilled by a society in order to be decent),³⁰⁰ which is as follows: governments are responsible to ensure that all citizens get to a minimum level of all BHCs;³⁰¹ she stipulates this responsibility of governments ought to be assured in the constitution of every nation.³⁰² However, the basic structure (or constitutional essentials) of a society is not under the everyday control of a government.

It is important to distinguish between an actual functioning and a capability. While an actual functioning means the actual engagement in an activity, a capability means the opportunity and ability to do this activity. For example, the basic human capability (BHC) to control over one's political environment means ensuring the opportunity and ability to participate in politics, but does not mean that everyone has to get actually involved in politics. Moreover, Nussbaum's

²⁹⁸ Nussbaum, *supra* note 30 at 187.

²⁹⁹ Rawls, *Collected Papers*, *supra* note 277 at 425, 575.

³⁰⁰ Nussbaum, *supra* note 30 at 84.

³⁰¹ *Ibid* at 70. Nussbaum argues that the same minimum level of BHCs should be used for all people with or without any kind of disability, because by designing appropriate social policies most PWDs can get above this minimum level of BHCs; this would require a huge change in designing the public arena and in the educational system.

³⁰² *Ibid* at 155.

theory is not adequate by itself to deal with the inequalities that could persist after achieving the minimal level of BHCs for everyone. Therefore, it is a theory of minimal justice, because it requires that all people possess the BHCs up to a threshold level that allows them to lead a fully flourishing human life. It is silent on the redistribution of resources after the threshold level has been reached.

2.7.4.3 The combination of Rawls' social contract and Nussbaum's BHCs theories

In my opinion, combining both Rawls' social contract theory and Nussbaum's BHCs theory, would result in a new theory that could take into consideration all of the three kinds of support for PWDs including medical support, economic support, and social support. Therefore, Rawls' social contract theory needs some modifications in order to promote a human rights policy that is based on a fundamental social commitment to equality for PWDs in society. These modifications are best explained by Richardson's argument about the possibility of combining both Rawls' social contract theory and Nussbaum's BHCs theory.³⁰³ Richardson offered alternative principles of justice (which are combination of Nussbaum's and Rawls's ideas) to build minimal justice into full justice and may be applicable to PWDs. He argues that we need to reframe Nussbaum's principle slightly (to accommodate the parties' ignorance about their own society) as follows:³⁰⁴

1. The basic structure (or "constitutional essentials") of a society should be arranged as to assure (as reasonably possible) that all citizens get to a minimum level of all BHCs. He assumes "that this principle will control a four-stage sequence in a well-ordered society

³⁰³ I agree with Richardson on the possibility of combining both Rawls' social contract and Nussbaum's BHCs theories.

³⁰⁴ Richardson, *supra* note 273 at 437.

and accordingly will be duly implemented via constitutional and legislative provisions that work it out for each particular society.”³⁰⁵

2. So long as BHCs have been taken care of, “[e]ach person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value.”³⁰⁶
3. So long as BHCs have been taken care of, “[s]ocial and economic inequalities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity;³⁰⁷] and second, they are to be to the greatest benefit of the least advantaged members of society.”³⁰⁸

In contrast to the primary goods (which are put forward by Rawls) as generally useful means, the BHCs (which are put forward by Nussbaum) are essentially related to the Aristotelian account of the natural goods of a good human life; they are necessary means for living a good human life.³⁰⁹ Therefore, the parties should be motivated by equal basic rights and liberties, equal opportunities, and the primary goods of income and wealth; they should also be motivated by fundamental self-respect (to protect the dignity and self-respect of PWDs); and they should also be motivated by BHCs.³¹⁰ The commitment to freedom and the commitment to fairness would justify adding the basic needs (including equal basic rights and liberties, equal opportunities, and

³⁰⁵ *Ibid* at 433.

³⁰⁶ This is the equal basic rights and liberties principle of justice as listed in Rawls, *Political Liberalism*, *supra* note 50 at 5.

³⁰⁷ This is the equal opportunity principle of justice as listed in *ibid* at 6.

³⁰⁸ This is the difference principle of justice as listed in *ibid*.

³⁰⁹ Nussbaum, *supra* note 30 at 166–168.

³¹⁰ Richardson, *supra* note 273 at 448.

the primary goods of income, wealth and fundamental self-respect) to the list of what the parties care about in addition to caring about the commitment to meeting the BHCs.³¹¹

According to Richardson, “[s]ince we may safely assume that the least advantaged in any society will be people who are severely disabled, this means that the difference principle, so applied, permits inequalities only if they raise the expectations of the severely disabled.”³¹² Therefore, in my opinion, the least-advantaged should be defined as related to the minimum level of all BHCs and all basic needs (which should include equal opportunities including health-care needs for equal opportunities for species-typical functioning, equal basic rights and liberties including the right to life, and the primary goods of income, wealth and fundamental self-respect). As we will see in Chapter 3, I will take into consideration all of these issues in defining the least-advantaged (while reinterpreting the *Qur’ān*).

2.7.5 The egalitarian theories of equality

According to Rosenfeld, the egalitarian equality theorists argue that persons are morally equal and each has an equal entitlement to actual or potential benefits. Therefore, needs should be well ordered and the most urgent needs should be given priority. Recovering the welfare of the worst off is a more urgent need than recovering the welfare of the better off. According to Rosenfeld, this theory “would seem to require the pursuit of equality of result rather than of equality of opportunity”,³¹³ because pursuing equality of opportunity only would not guarantee the welfare of the worst off in the society. Therefore, state’s action to redistribute welfare to help the worst

³¹¹ *Ibid* at 461.

³¹² *Ibid* at 444.

³¹³ Rosenfeld, *supra* note 16 at 116-17.

off would be justified.³¹⁴ This theory with some modifications (as we will see below) could promote a human rights policy that is based on a fundamental social commitment to equality for PWDs in society. I will focus on two egalitarianism theories (which are two branches of the luck-egalitarianism theory), which are:

1. Arneson's RCP theory (including the debate between Arneson's RCP theory and Anderson's democratic equality theory); and
2. Dworkin's equality of resources theory.³¹⁵

2.7.5.1 The debate between Richard Arneson's RCP theory and Elizabeth Anderson's democratic equality theory

I have argued that using social welfare laws (in addition to anti-discrimination laws) should guarantee the equality of result for PWDs by achieving the threshold level of basic functioning, not only the access to this threshold level (i.e. not only the equality of opportunity), and by eliminating any inequality above this threshold level in terms of income, wealth and fundamental self-respect. I have also argued that social welfare laws avoid any doubt about whether governments have a positive legal obligation to support PWDs (to cover their unavoidable additional expenses that are not faced by other citizens), because PWDs (especially people with extreme disabilities) should not be held responsible for not working (because they do not have a free choice to participate and/or are not able to work).

³¹⁴ *Ibid.*

³¹⁵ Both Arneson's RCP theory and Dworkin's equality of resources theory are two branches of the egalitarianism theory; and both of them can be categorized under the luck-egalitarianism theory.

In order to promote her theory, Anderson argues against a theory of justice that what she called "luck-egalitarianism". According to the luck-egalitarianism theory, in order to achieve equality, justice requires the elimination of the impact of bad luck on people's lives as much as possible, if this bad luck falls on them through no choice or fault of their own. According to the luck-egalitarianism theory, there should be no inequalities in people's future unless those inequalities resulted from their voluntary choice or their faulty behaviour, because they should be held reasonably responsible for only their voluntary choice or their faulty behaviour.³¹⁶ On the other hand, Anderson does not determine the individual's eligibility (for receiving social assistance to achieve justice) based on the degree of his/her responsibility in making his/her choices. Therefore, she does not limit this social assistance to only responsible individuals whose lives have been impacted by bad luck that produced inequalities with others.

According to Anderson, in order to achieve equality, justice requires the elimination of oppressive social relationships. The social conditions of people should secure their real freedom to participate in democratic self-government, and their relationships should be based on the principle of fundamental equality (including equal respect).³¹⁷ Anderson argues that the luck-egalitarianism theory wrongly focuses on the distribution of private properties and goods between individuals. According to Anderson, to avoid this kind of shopping mall egalitarianism, the point of equality should be the creation of a society of equal individuals, because what is important is the equality in their relationships.³¹⁸

³¹⁶ Arneson, *supra* note 27 at 339.

³¹⁷ Anderson, *supra* note 28 at 316.

³¹⁸ *Ibid* at 313. Anderson implies here that while her democratic equality theory focuses on "prospect-regarding equality of opportunity" or "substantive equality of opportunity" (which means that all prospects for obtaining the

Anderson argues that the luck-egalitarianism theory does not provide the equal respect for all individuals, because its principles are adopted based on considerations of the feelings of pity for those worse-off or the feelings of envy of those better-off, and those feelings of pity or envy cannot fit with the equal respect for all individuals. Therefore, the luck-egalitarianism theory represents the principle that what essentially matters how well off the individual is as compared to other individuals; this is a morally incorrect idea that could lead to vague principles of what humans owe to each other.³¹⁹ On the other hand, Arneson argues that luck-egalitarianism theory requires that practices and institutions should maximize the well-being of individuals under the condition that it is more morally valuable to obtain a benefit (or to avoid a loss) for an individual, if the well-being that this individual would gain from it is greater (or the loss in well-being that this individual would avoid is smaller) or if this individual's lifetime expectation of well-being before obtaining this benefit (or avoiding this loss) is lower. Therefore, prioritarianism luck-egalitarianism theory is egalitarianism theory in favour of individuals who are badly off. However, priority is given to the individual in the consideration of how badly is his/her life's circumstances using an objective scale of well-being, and not essentially by comparing between his/her life's circumstances and the life's circumstances of others. Therefore, prioritarianism has nothing to do with a psychology of pity or envy.³²⁰

scarce resources should be equal), the luck-egalitarianism theory wrongly focuses on “means-regarding equality of opportunity” or “formal equality of opportunity” (which is similar to the equality of treatment, because equal means does not necessarily lead to equal prospects).

³¹⁹ *Ibid* at 289.

³²⁰ Arneson, *supra* note 27 at 343.

According to Anderson, it is wrong to build consideration for individual responsibility into any theory of justice as in the luck-egalitarianism theory, because this would lead to disastrous results. Under the luck-egalitarianism theory, in order to achieve justice, it is vital to minimize and equalize the effects of the bad luck that falls on people beyond their control. However, this means that the luck-egalitarianism theory tolerates the bad luck that falls on people through their bad choice or fault, meaning that some individuals are allowed to fall into poverty that has resulted from their bad choices or fault. The luck-egalitarianism theory's insistence on basing the social decision to help (or not to help) on the degree to which those needy individuals have practiced their responsibilities (or have failed to practice their responsibilities) is unfair to those who are labeled faulty and are allowed to suffer.³²¹ However, Arneson argues that it is fundamentally more valuable to help in gaining "well-being to someone who is just as badly off as an unlucky gambler but arrives at this condition through bad luck that is beyond his power to control than to the unlucky gambler."³²² Therefore, we should adjust prioritarianism to RCP.

According to Arneson's RCP theory,

the moral value of altering a [condition] in a way that makes someone better off or worse off depends, other things being equal, on the degree of responsibility the person bears for [his/her] present condition. [Therefore], It is morally more valuable to provide a gain in well-being of a given size for a person with a given well-being prospect if [s/he] is less rather than more responsible for [his/her] present [bad] condition. [Similarly, it is morally less problematic to cause] a loss in well-being of a given size to a person with a given well-being prospect if [s/he] is less rather than more responsible for [his/her] present [good] condition.³²³

Therefore, Arneson's RCP theory focuses on the three factors, which are responsibility, priority for the badly off, and well-being. Arneson implies that his RCP theory focuses on the equality of

³²¹ Anderson, *supra* note 28 at 289.

³²² Arneson, *supra* note 27 at 344.

³²³ *Ibid.*

result, because persons are morally equal, needs should be prioritized, and the most urgent needs should be given priority. Pursuing only the equality of opportunity would not guarantee the welfare of the worst-off in the society, which should have priority over the welfare of the better-off. Therefore, redistribution of welfare to help the badly off would be justified.

Anderson argues against the luck-egalitarianism theory that the social process of deciding which individual is responsible (or irresponsible) and deserving (or non-deserving) individuals is unfair and naturally disrespectful. The recipients of aid are stigmatized as useless failures, and the unworthy of aid is stigmatized as undeserving and morally irresponsible. Under the luck-egalitarianism theory, the privacy of individuals would be violated by offensive investigation in order to categorize them in accord with the level of immorality and the degree of irresponsibility in their life choices. These violations of privacy erase the borders between the society's legitimate concern and the individual's free judgment.³²⁴

Therefore, Anderson's arguments against the luck-egalitarianism theory open the door for her theory to replace it. Anderson's democratic equality theory requires that all individuals must have an equal status of real freedom during their entire lives "to be free from oppression, to participate in and enjoy the goods of society, and to participate in democratic self-government."³²⁵ Therefore, all individuals must be equally guaranteed the real freedom (or the BHCs)³²⁶ in these three areas. Anderson emphasized this guarantee to show the superiority of her

³²⁴ Anderson, *supra* note 28 at 288-89.

³²⁵ *Ibid* at 315.

³²⁶ Although Anderson did not use the term BHCs in the same way as Nussbaum does, I understand Anderson's term "real freedom" has a similar meaning as Nussbaum's term BHCs.

theory over the luck-egalitarianism theory that allows some people to suffer if they lost their fair opportunities through their own choice or fault.

However, Anderson's democratic equality theory guarantees equality only at an acceptable level (i.e. only the equality of opportunity, and not the equality of result, because it guarantees only the equal freedom in these three areas). Therefore, any inequality above this threshold level is not considered morally objectionable. This limited guarantee requires that individuals be responsible in ordering their lives when they choose above this threshold level. Moreover, Anderson's theory guarantees only the BHCs or the real freedom or the access to this threshold level of basic functioning, but it does not guarantee achieving this threshold level of functioning. On the other hand, according to Arneson,

when misfortune strikes, it is a regrettable fact that some people cannot be sustained at the threshold level no matter what resources [they have]. In other cases, sustaining an individual at the threshold level is too [costly]. Morally sensitive cost and benefit calculation must be carried out to determine whether maintaining an individual at the guaranteed level (or at some specified distance from the level) is morally worthwhile.³²⁷

Therefore, it looks as if this debate between Arneson's RCP theory and Anderson's democratic equality theory is similar to a debate to determine whether equality for PWDs requires only the equality of opportunity or also the equality of result. Due to the fact that Anderson's theory focuses on the elimination of oppressive social relationships, it implies the idea that the oppressive social relationships are the source of inequalities; it also implies the idea that disability is caused by oppressive social relationships. Whereas Anderson's theory focuses on the

³²⁷ Arneson, *supra* note 27 at 347-48.

equality of opportunity and anti-discrimination laws, Arneson's RCP theory focuses on the equality of result and social welfare laws.

Due to the fact that all of the three factors of Arneson's RCP theory (i.e. responsibility, priority for the badly off, and well-being) could be applied to disability, PWDs should be among those who would benefit from Arneson's RCP theory to achieve equality. However, in order for PWDs to achieve the equality of result, PWDs would need all of the three kinds of support including medical support, economic support, and social support, which means PWDs need both anti-discrimination laws and social welfare laws in order to achieve equality. Therefore, Arneson's RCP theory needs some modifications in order to take into consideration all of these three kinds of support (i.e. in order to include anti-discrimination laws). These modifications may include:

1. Combining Anderson's democratic equality theory with Arneson's RCP theory would result in a new theory that takes into consideration both the equality of opportunity and the equality of result, and both anti-discrimination laws and social welfare laws. This new theory could be explained as follows: we should first apply Anderson's theory using anti-discrimination laws to guarantee the access -for all individuals during their entire lives- to the minimum level of all BHCs or the real freedom "to be free from oppression, to participate in and enjoy the goods of society, and to participate in democratic self-government."³²⁸
2. However, this limited guarantee requires that individuals be responsible in ordering their lives when they choose above this threshold level. Therefore, we need to add Arneson's

³²⁸ Anderson, *supra* note 28 at 315.

RCP theory to take into consideration the individual's bad luck and the individual's responsibility above this threshold level. After applying Anderson's theory under this threshold level, we should apply Arneson's RCP theory above this threshold level using social welfare laws to achieve this threshold level of basic functioning, not only the access to this threshold level, and to eliminate any inequality above this threshold level (i.e. when poverty is involved).³²⁹

3. Unlike Arneson's RCP theory, as we will see in Chapter 3, I will argue (according to my progressive Islam perspective) that we should focus on the individual responsibility for his/her future choices and not for his/her past choices. This means that if the individual chooses to repent and change his/her attitude about his/her bad faulty behaviour and take steps to show his/her willingness to become a good citizen and stop his/her bad faulty behaviour, then s/he will be eligible to be relieved from inequalities that s/he suffers.³³⁰ For example, any alcoholic or illegal drug abuser should not be eligible to receive any social income assistance until s/he successfully completed his/her rehabilitation (from alcohol or illegal drug abuse) program.

³²⁹ See section 2.4 & section 2.6, above, for more on this topic.

³³⁰ I should explain here the difference between future choices (for which individuals would bear responsibility) and past choices (for which they would not). What I mean by future choices are those choices that the individual would make after s/he applied for social benefits; therefore, s/he would bear responsibility for those future choices. What I mean by past choices are those choices that the individual have already made before s/he applied for social benefits; therefore, s/he would not bear responsibility for those past choices, unless it is obvious that s/he made those past choices with the sole intention that s/he is planning to apply for these social benefits (such as a poor gambler who does not have any money and s/he gets a loan to use for his/her gambling with the sole intention that if s/he loses all of his/her money, s/he would declare bankruptcy and apply for social benefits). For another example, if a person drove a car recklessly in a way that caused a disability that would prevent him/her from ever driving again, s/he would be eligible to apply for social benefits. S/he would not bear responsibility for this past bad choice, because it is most likely that s/he did not plan to become disabled.

2.7.5.2 Ronald Dworkin's equality of resources theory

Dworkin insists that governments must guarantee that the "fates" of individuals are "insensitive" to their characteristics but "sensitive" to their choices. Governments can accomplish this by insuring an equal initial sum of resources for each individual and requiring that individuals must accept their responsibility for their free choices. According to Dworkin, requiring government to maintain the "equality of welfare" between individuals is not "so coherent or attractive an ideal as it is often taken to be."³³¹ He argues that governments cannot and should not guarantee that each individual achieves his/her own life's preferences. According to Dworkin, the effects of personal choices should dictate the effects of personal luck. He states

When and how far is it right that individuals bear disadvantages or misfortunes of their own situations themselves, and when is it right, on the contrary, that others—the other members of the community in which they live, for example—relieve them from or mitigate the consequences of these disadvantages? ... [I]ndividuals should be relieved of consequential responsibility for those unfortunate features of their situation that are brute bad luck, but not from those that should be seen as flowing from their own choices.³³²

Therefore, Dworkin declares that his theory balances between individual responsibilities and collective responsibilities, and his theory distinguishes between unfair and fair differences in wealth. He argues that "the wealth of everyone in a fair society would be much closer to the average than is true in America now: the great extremes between rich and poor that mark our economic life now would have largely disappeared."³³³ Although individuals' fates should be sensitive to their free choices, their fates should not be determined by things beyond their control.

³³¹ Dworkin, *Sovereign Virtue*, *supra* note 16 at 62.

³³² *Ibid* at 287.

³³³ *Ibid* at 312.

Moreover, according to Dworkin, his theory is against the idea that “people should be allowed to retain the benefits of superior talent”,³³⁴ because it is based on luck, and it would cause envy when one individual has superior talent than others. He argues that the luck of being in the right place at the right time is usually more important than anything else.³³⁵ He argues that those who have “wealth-talents” cannot justify their additional wealth for their contributions to their society, due to the fact that their ability to contribute to their society is accidentally dependent on their luck whether they are living in a free economy or living in a command economy. According to Dworkin, “[s]o the claim that wealth-talent produces wealth presupposes rather than argues for a particular economic structure—a market structure in which that claim is true.”³³⁶ He rejects “the idea that accumulation of wealth is a mark of a successful life and that someone who has arranged his life to acquire it is a proper object for envy rather than sympathy or concern.”³³⁷

Dworkin claims the “neutrality” of his egalitarian liberalism political theory, because it does not require “any collective judgment about the comparative importance of people or the comparative worth of projects or personal moralities.”³³⁸ However, he is inconsistent in his theory. For example, he argues that in spite of equality, the envy-generating unequal distribution of good-quality educational resources is justified, because this distribution effectively uses these resources to “help improve the collective life of the community.”³³⁹ On the other hand, it could be argued that the unequal distribution of wealth resources can be justified for the same

³³⁴ *Ibid* at 90.

³³⁵ *Ibid* at 327.

³³⁶ *Ibid* at 326.

³³⁷ *Ibid* at 107.

³³⁸ *Ibid* at 154.

³³⁹ *Ibid* at 403.

reason.³⁴⁰ According to Rosenfeld, under Dworkin's equality of resources theory, the right to be treated as an equal individual is essential. It does not mean that each person has "the right to receive an equal lot, but 'the right to be treated with the same respect and concern as anyone else.'"³⁴¹ Therefore, Dworkin's theory is able to justify positive actions of the state without legitimizing discrimination.³⁴²

On the other hand, according to Dworkin, physical or mental powers are not material resources for the theory of equality, because they cannot be manipulated or transferred (i.e. physical or mental powers cannot be taken from one person and given to another to equalize their distribution).³⁴³ Therefore, he rejects normalization as an appropriate goal, because of the difficulty in establishing a "normal" standard, and because there is "no amount of compensation could make [PWDs] equal in physical or mental resources" with others who are considered to be "normal." According to Dworkin, disabilities are "features of body or mind or personality that provide ... impediments to a [successful life]."³⁴⁴ He states that "Though skills are different from handicaps, the difference can be understood as one of degree: we may say that someone who cannot play basketball like Wilt Chamberlain, paint like Piero, or make money like Geneen, suffers from an (especially common) handicap."³⁴⁵

³⁴⁰ Dworkin's argument can be easily misunderstood; Rosenfeld classifies Dworkin among limited utilitarians.

³⁴¹ Rosenfeld, *supra* note 16 at 104.

³⁴² *Ibid.*

³⁴³ Dworkin, *Sovereign Virtue*, *supra* note 16 at 80.

³⁴⁴ *Ibid* at 82.

³⁴⁵ *Ibid* at 92.

Although Dworkin sees disabilities as part of a continuum of abilities that are affected by their context, he locates the problem to be remedied in the individual. Since the disabilities relate to physical, non-transferable resources within the individual, his only solution is to provide compensation through a hypothetical compensation scheme. He argues that it is possible to create a single insurance scheme to address handicaps and skills as part of a continuum. Whereas handicaps are future possibilities, a person would normally know their skills when purchasing insurance. Therefore, he develops two hypothetical insurance schemes: one for handicaps, the other for skills.³⁴⁶

It seems that Dworkin's equality of resources theory limits disability to the structural and functional deficiencies in the individual; he does not suggest any redistribution of resources to make society less disabling. Therefore, Dworkin's theory failed to deal adequately with disability as an equality issue. Due to the fact that Dworkin's theory is similar to Arneson's RCP theory in its focus on the individual responsibility and bad luck, I would limit my discussion and my focus on Arneson's RCP theory as a better representative of the egalitarian equality theory to deal with disability as an equality issue.

2.8 A candidate liberal equality theory to deal with issues of justice for PWDs

Although all of these liberal equality theories accept some role for the state in protecting equality, they differ noticeably on what this role should be especially within the practical application of each equality theory. According to Rosenfeld, "In the most general terms, in any

³⁴⁶ *Ibid* at 92-97.

complex socio-political universe, the implementation of any theoretical conception of equality promotes not equality in general but certain particular equalities that are necessarily accompanied by correlative inequalities.”³⁴⁷ Even the most radical egalitarians do not argue that all persons must be equal in all respects.

According to Patch, justice requires that those who are disadvantaged due to a disability should receive some form of redress, compensation or redistribution. However, liberal equality theorists failed to distinguish between those who are disadvantaged by a disability and those who are disadvantaged by lack of talent, to find an appropriate form of redistribution, and to agree on the purpose of this redistribution: is it to eliminate the disadvantage, or to equalize the well-being?³⁴⁸

According to David Wasserman, “[t]he liberal philosophers who have addressed disability have come up with proposals that bear a depressing similarity to the status quo.”³⁴⁹ According to Patch, due to the fact that liberal equality theorists focus on the individual, normalization, and they see disability as a natural disadvantage located within an individual, those few of them who have directly addressed disability have often considered it as an issue of health policy.³⁵⁰

Based on his review of the theories of social justice (such as the theories of Rawls, Dworkin, etc.) as related to disability issues, Wasserman argues that a just social response to disabilities must encompass distributive concerns and that it can do so without treating PWDs as defective or incompetent. At the same time, he acknowledges that recent theories of distributive justice

³⁴⁷ Rosenfeld, *supra* note 16 at 13.

³⁴⁸ Patch, *supra* note 16 at 99-100.

³⁴⁹ Wasserman, “Distributive Justice”, *supra* note 15 at 172.

³⁵⁰ Patch, *supra* note 16 at 100.

have tended to misrepresent the significance of impairments by treating them as natural inequalities that a just society has some obligation to correct or compensate for. Therefore, PWDs have a claim to special assistance because they fall below the line for full participation in a society's cooperative system. This special assistance usually takes the form of resources set aside from the general distribution to fix impairments or compensate the impaired. He argues that this response is clearly inadequate, reflecting an oversimplified view of disabilities as internal deficits. Due to the fact that the disadvantages associated with disabilities largely arise from the interaction between the impaired individual and his/her physical and social environment, justice requires modifications of the environment as well as corrective or compensatory measures.³⁵¹

The issue is not one of compensating for natural inequalities but of accommodating a wide variety of needs, interests, capacities, and goals with limited resources; it is a general problem of distributive justice, it is not a special problem of disability. Wasserman objects to the idea of compensating people for their natural impairments. He argues that if we were to compensate for natural impairments, we would need to compensate all with less than average talent, physical beauty, or intelligence, because a smart person with an impairment may already have greater opportunity than an able-bodied person with less than average intelligence. It is obvious that the cost of these kinds of equalizing would be prohibitive. At the same time, he objects to the idea of an absolute social obligation to correct for lack of opportunity caused by the social environment. He argues that doing this kind of absolute correction is similar to compensating people with

³⁵¹ Wasserman, "Distributive Justice", *supra* note 15 at 172-76.

obsolete skills; the only difference between these two approaches is the concern that the construction of the hostile physical environment is an expression of disrespect.³⁵²

However, there is another difference between these two approaches (which is emphasized by Lawrence Becker) that opening opportunities for PWDs can increase productivity, while catering to obsolete skills will be inefficient. Wasserman also asks why the ADA allows limitations due to costs even when the ADA expresses the demand to restore civil rights denied. On the other hand, Becker argues that the social programs for PWDs are most easily justified when they enable their beneficiaries to reciprocate their costs through increased productivity.³⁵³

I agree with Wasserman that although the removal of physical and social barriers to full participation of PWDs is necessary, we should view this requirement as a part of a much broader problem of the distributive justice. By recognizing a continuum of functioning on the mental and physical levels, and recognizing that society excludes the less intelligent and physically attractive from its full benefits, it seems acceptable to view the problems of PWDs in this larger context of distributive justice. However, we should recognize that this idea places the program of distributive justice in the context of conflicts among interests of different groups and competition for scarce social resources. According to Wasserman, it is important to recognize our

³⁵² *Ibid.*

³⁵³ Lawrence C Becker, "Afterword: Disability-Strategic Action and Reciprocity" in Anita Silvers, David Wasserman & Mary B Mahowald, eds, *Disability, Difference, Discrimination: Perspectives on Justice in Bioethics and Public Policy* (Lanham, Maryland: Rowman & Littlefield, 1998) 293 at 298-301.

interdependence. Moreover, in regard to the subsidies for PWDs, he states that what is demeaning is not the subsidy itself but the disrespect with which it is distributed.³⁵⁴

Wasserman examines the approaches that view justice for PWDs exclusively in terms of the redress of discrimination and the reconstruction of the social environment. He argues that although the recognition that disabilities are socially constructed has served as an important corrective to theories of justice that treat disabilities as natural inequalities, this recognition does not eliminate the need for an adequate theory of distributive justice. In shaping the environment, no less than in distributing goods and services, we have to face difficult trade-offs among different interests of different people. Some of these trade-offs cannot be adjudicated by an injunction against discrimination or a demand for equal access.³⁵⁵ Therefore, he argues that we need a more comprehensive theory of distributive justice that faces two difficult challenges:

[1.] it must assess the fairness of a cooperative scheme with a metric of well-being that takes account of what people can do with the resources they have, while respecting the multiplicity of ways in which people can do well. [2. It] must decide how much inequality on its chosen metric is acceptable. It must address...the morality of 'leveling down' to achieve equality,...the priority of the worst-off, and...the moral significance of numbers in conflicts over scarce resources or incompatible designs.³⁵⁶

Based on my earlier review of the different liberal equality theories, we must notice the following points:

³⁵⁴ David Wasserman, "Response" in Anita Silvers, David Wasserman & Mary B Mahowald, eds, *Disability, Difference, Discrimination: Perspectives on Justice in Bioethics and Public Policy* (Lanham, Maryland: Rowman & Littlefield, 1998) at 276.

³⁵⁵ Wasserman, "Distributive Justice", *supra* note 15 at 172-76.

³⁵⁶ Anita Silvers, David Wasserman & Mary B Mahowald, eds, *Disability, Difference, Discrimination: Perspectives on Justice in Bioethics and Public Policy* (Lanham, Maryland: Rowman & Littlefield, 1998) at 6-7.

1. Although anti-discrimination laws can guarantee the access (for all individuals during their entire lives) to the minimum level for all BHCs, anti-discrimination laws are limited to guaranteeing only the access to this threshold level when the benefit is not provided to anyone. Therefore, PWDs also need social welfare laws (in addition to anti-discrimination laws) to achieve this threshold level of basic functioning (and not only the access to this threshold level), and to eliminate any inequality above this threshold level in terms of income, wealth and fundamental self-respect (i.e. when poverty is involved).³⁵⁷
2. Rosenfeld's theory of equality is limited in addressing issues of justice for PWDs, because Rosenfeld's goal is transforming the society to eliminate inequalities in opportunities. His theory implies the idea that the oppressive social environment is the source of inequalities. However, I have argued that PWDs need social welfare laws in addition to anti-discrimination laws to address issues of justice for PWDs.³⁵⁸
3. The utilitarian theories of equality are limited in addressing issues of justice for PWDs, because they reject the implementation of preferential treatment and affirmative action; they are not able to protect PWDs from discrimination. They do not consider the medical, the economic, or the social-political problems that PWDs face, because they focus on the interests of the majority (i.e. they aim to maximize the welfare of the whole society, and they are not interested in the welfare of the individual).³⁵⁹
4. The classical liberal and the contemporary libertarian theories of equality are limited in addressing issues of justice for PWDs, because they focus on the individual independence

³⁵⁷ See section 2.4 & section 2.6, above, for more on this topic.

³⁵⁸ See subsection 2.7.1, above, for more on this topic.

³⁵⁹ See subsection 2.7.2, above, for more on this topic.

and formal equality (i.e. they assume that all individuals are independent and equal); therefore, they do not take into consideration the needs of PWDs who are dependent due to their structural and functional deficiencies. Moreover, they reject the implementation of preferential treatment and affirmative action. Therefore, they are not able to protect PWDs from discrimination, and they do not consider the medical, the economic, or the social-political problems that PWDs face.³⁶⁰

5. Dworkin's equality of resources theory is limited in addressing issues of justice for PWDs, because Dworkin limited disability to the structural and functional deficiencies in the individual. He does not suggest any redistribution of resources to make society less disabling.³⁶¹
6. Due to the fact that Dworkin's equality of resources theory failed to deal adequately with disability as an equality issue and that Dworkin's theory is similar to Arneson's RCP theory in its focus on the individual responsibility and bad luck, I will limit my focus on Arneson's RCP theory (combined with Anderson's theory) as a better representative of the egalitarian equality theories to deal with issues of justice for PWDs.
7. We discovered that although every liberal equality theory by itself failed to address issues of justice for PWDs, the most adequate candidate liberal equality theory to deal with issues of justice for PWDs are the contractarian theory of equality (especially, Rawls' social contract theory in combination with Nussbaum's BHCs theory) OR the egalitarian theory of equality (especially, Arneson's RCP theory in combination with Anderson's theory). This is because either one of these two theories with some modifications could

³⁶⁰ See subsection 2.7.3, above, for more on this topic.

³⁶¹ See subsection 2.7.5.2, above, for more on this topic.

promote a human rights policy that is based on a fundamental social commitment to equality for PWDs in society.

8. Anderson's democratic equality theory is limited in addressing issues of justice for PWDs, because Anderson's theory guarantees only the BHCs/the real freedom/the access to the threshold level of basic functioning, and it does not guarantee achieving this threshold level of functioning.³⁶²
9. Due to the fact that Anderson's theory failed to deal adequately with disability as an equality issue and that Anderson's theory is similar to Nussbaum's BHCs theory in its focus on the requirement that all individuals must be equally guaranteed the minimum level of BHCs (or the real freedom), I would limit my focus on Nussbaum's BHCs theory, which has a comprehensive list of all BHCs that are necessary for minimum justice to deal with disability as an equality issue.
10. Therefore, we should reformulate the above statement as follows: we could create the best candidate liberal theory to deal with issues of justice for PWDs by building minimal justice into full justice by combining Nussbaum's BHCs theory (for minimal justice) with either Rawls' social contract theory OR Arneson's RCP theory (for full justice). Therefore, the issue now is to choose between two choices:
 - a. A combination between Nussbaum's BHCs theory and Rawls' social contract theory; OR
 - b. A combination between Nussbaum's BHCs theory and Arneson's RCP theory.

³⁶² See subsection 2.7.5.1, above, for more on this topic.

11. Although both Rawls' social contract theory and Arneson's RCP theory focus on the priority for the badly off, both of these two theories need each other. Although Rawls' social contract theory provides an objective scale of well-being to define the least-advantaged (based on the primary goods of income, wealth and self-respect), it is missing the individual responsibility, which is required by Arneson's RCP theory to define who is deserving of help. In order for the legal theory to address justice, it must include the idea of responsible citizens that is based on the consideration of the individual responsibility.

12. However, the idea of responsible citizens implies three different ideas:

- a. The idea of responsible citizens could imply the idea of being fully cooperative citizens. However, this idea has (as we have seen) been criticized by Nussbaum's BHCs theory. Therefore, in my opinion, this idea of being fully cooperative citizens should be avoided, because it reflects a commitment to the equality of opportunity only and not to the equality of result (i.e. a commitment to a fair process even if it produces unfair results). Moreover, some of PWDs will never become fully cooperative citizens no matter how many productive means they have.
- b. The idea of responsible citizens could also imply the idea of holding individuals responsible for their past bad choices and past faulty behaviours. However, this idea has (as we have seen) been criticized by Anderson's democratic equality theory. Therefore, in my opinion, this idea of holding individuals responsible for their past bad choices and past faulty behaviours should be avoided, because it reflects a commitment to the equality of opportunity only and not to the equality of result (i.e. a commitment to a fair process even if it produces unfair results).

Moreover, some disabilities could result from those individuals' past bad choices and past faulty behaviours. It would be unfair to deny assistance for those individuals (i.e. giving an advantage to other people who are in similar circumstances; therefore, not realizing the equality of result between them) especially if they choose to repent and change their attitudes about their bad faulty behaviours and take steps to show their willingness to become good citizens and stop their bad faulty behaviours.

- c. The idea of responsible citizens could also imply the idea of requiring the lack of irresponsibility for individuals' future choices. In my opinion, this idea is necessary for a theory of justice, because it reflects a commitment not only to the equality of opportunity but also to the equality of result; and it would be fair to deny assistance for those individuals who are unwilling to become good citizens and stop their bad faulty behaviours.
13. Therefore, a combination of these three theories (i.e. Nussbaum's BHCs theory, Rawls' social contract theory, and Arneson's RCP theory) would be possible to best serve the interests of PWDs. This combination would result in a new liberal theory that could take into consideration all of the three kinds of support for PWDs including medical support, economic support, and social support by promoting a human rights policy that is based on a fundamental social commitment to equality for PWDs in society. This new liberal theory could be explained as follows:
- a. The basic structure (or the constitutional essentials) of a society should be arranged as to assure (as reasonably possible) that all citizens get to a minimum level of all BHCs.

- b. So long as BHCs have been taken care of, “[e]ach person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value.”³⁶³
- c. So long as BHCs have been taken care of, “[s]ocial and economic inequalities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society.”³⁶⁴
- d. The least-advantaged should be defined with a commitment to freedom (as related to the minimum level of all BHCs), a commitment to fairness (as related to all basic needs, which should include the primary goods of income, wealth and fundamental self-respect), and a commitment to justice (as related to the individual responsibility).
- e. The individual responsibility is limited to the future choices and not in regard to the past choices, which means that if the individual chooses to repent and change his/her attitude about his/her bad faulty behaviour and take steps to show his/her willingness to become a good citizen and stop his/her bad faulty behaviour, then, s/he will be eligible to be relieved from inequalities that s/he suffers. For example, any alcoholic or illegal drug abuser should not be eligible to receive any social income assistance until s/he successfully completed his/her rehabilitation program.

³⁶³ Rawls, *Political Liberalism*, *supra* note 50 at 5.

³⁶⁴ *Ibid* at 6.

14. This new liberal theory can be translated into practical terms by using anti-discrimination laws (to guarantee the access -for all individuals during their entire lives- the minimum level of all BHCs) and using social welfare laws (to achieve this threshold level of basic functioning and not only the access to this threshold level; and to eliminate any inequality above this threshold level in terms of income, wealth and fundamental self-respect) while considering the individual responsibility of the recipient of social assistance (in regard to his/her future choices).

I am not claiming that I agree with all of the ideas presented in any one of the above three liberal equality theories (i.e. Nussbaum's BHCs theory, Rawls' social contract theory, and Arneson's RCP theory). I may agree with some of their ideas (with some reservations) but not with all of their ideas. I will show (in Chapter 3) how some elements of each of the above three liberal equality theories are compatible with some religious Islamic ideas. I will use specific Islamic rules that are needed to reform the social policy in the MENA. I will demonstrate how the liberal concepts of equality can be used to reinterpret religious Islamic rules about the BHR to social welfare (more specifically, disability social income assistance). In other words, I will use these liberal ideas or my own amalgamation of them to show the common ground between the liberal moral values and the Islamic moral values. Then, I will use this common ground to reinterpret Islamic rules about *Zakāh* with my own interpretation of the *Qur'ān* that has (as we will see in Chapter 3) a commitment to social justice and a consideration of both liberal and Islamic moral values.

Therefore, the purpose of this chapter was to use Western (mainly liberal) experience (in addressing justice for PWDs) to identify issues that arguably need consideration in the Islamic context as well (e.g. different models of disability, how to develop a system that does not exclude those with severe cognitive disabilities). On the other hand, the purpose of Chapter 3 will be to show that my progressive Islam perspective provides a tool of dealing with these issues (in particular that *Zakāh*, properly interpreted, does so). However, by focusing on Islamic moral values, I am not denying the moral values that are included in the liberal equality theories. Actually, I will use some liberal equality ideas to explain my own perspective on Islamic moral values. In my opinion, the liberal moral values and the religious/Islamic moral values (about social justice) are complementary and not contradictory. Therefore, as a transition from Chapter 2 to Chapter 3, I will discuss the compatibility between the liberal moral values and the religious (in general)/Islamic (in particular) moral values.

2.9 The compatibility between the liberal moral values and the religious (in general)/Islamic (in particular) moral values

According to Fuller, when Austin distinguishes law from morality, the word morality stands for almost every possible standard by which human conduct maybe judged that is not itself law: the inner voice of conscience, notions of right and wrong based on religious belief, common conceptions of fair play, and culturally conditioned prejudices.³⁶⁵

³⁶⁵ Fuller, *supra* note 105 at 635.

Jonathan Haidt and Craig Joseph tried to explore the relationship between virtues and innateness. They explore how people know what is wrong or right and how this knowledge is affected by emotions and intuitions. They used their “social intuitionist” model to explain how moral emotions and moral reasoning work together to produce moral judgments by arguing that moral judgments are made intuitively and quickly. According to Haidt,

the emotional responses of moral intuition occur instantaneously—they are primitive gut reactions that evolved to generate split-second decisions and enhance survival in a dangerous world. Moral judgment, on the other hand, comes later, as the conscious mind develops a plausible rationalization for the decision already arrived at through moral intuition.³⁶⁶

Moreover, this model extended into their “moral foundations” theory. According to Haidt and Joseph, this theory tries to explain why morality differs from one culture to the next and why (at the same time) morality has much similar subject matter across cultures. They argue that there are five universal psychological systems, which are the moral foundations of “intuitive ethics.” However, every culture builds on top of these moral foundations its own different narratives, virtues, and institutions making different (and sometimes conflicting) moralities in different cultures. However, according to Haidt and Joseph, there are five best candidates for being foundations of morality:³⁶⁷

1. Fairness/reciprocity, which is related to unselfishness. This psychological moral foundation motivates theories of independence, rights, and justice.
2. Harm/care, which is related to rejecting the pain of others. This psychological moral foundation motivates nurturance, gentleness, and kindness.

³⁶⁶ Nicholas Wade, “Is ‘Do Unto Others’ Written Into Our Genes?”, *The New York Times* (18 September 2007) online: The New York Times <<http://www.nytimes.com>>.

³⁶⁷ Jonathan Haidt & Craig Joseph, “Intuitive Ethics: How Innately Prepared Intuitions Generate Culturally Variable Virtues” (2004) 133:4 *Daedalus* 55 at 55-66.

3. Purity/sanctity, which is related to the feeling of disgust and contamination. This psychological moral foundation motivates struggle for more decency. It is the root for the religious idea that the body is a temple, and should be protected from contaminants and immoral activities.
4. Authority/respect, which is related to the social hierarchy. This psychological moral foundation motivates respect for traditions and respect for legitimate authority.
5. In-group/loyalty, which is related to the ability of forming coalitions (as tribal creatures). This psychological moral foundation motivates self-sacrifice for the group and feeling of patriotism.

Jonathan Haidt and Jesse Graham focused on the difficulty that liberals and conservatives (i.e. between secular and religious) may have in understanding each other's morality. The liberal social justice theories have focused that morality is related to issues of rights, harm, and justice. Therefore, due to this psychological understanding of morality, the conservatives' resistance to programs of social justice has been characterized as an immoral resistance and as a result of non-moral processes (i.e. social dominance or system justification). They argue that the moral psychological realm is not limited to individuals, but it includes other parts of the social life including institutions and their values. Therefore, they provided empirical and theoretical reasons to prove that there are five psychological moral foundations for the world's different moralities. These five psychological moral foundations are used to psychologically detect and emotionally

react to issues related to fairness/reciprocity, harm/care, purity/sanctity, authority/respect, and in-group/loyalty.³⁶⁸

Haidt and Graham tried to apply the psychological moral foundations theory to political "cultures" such as the political culture of conservatives and the political culture of liberals. Political liberalism theories have focused on the moral intuitions that are based on the first two psychological moral foundations (fairness/reciprocity and harm/care). Therefore, the liberal social justice theorists do not recognize the moral motivations of political conservatives, because political conservatives rely on all of these five psychological moral foundations (fairness/reciprocity, harm/care, purity/sanctity, authority/respect, and in-group/loyalty). They argue that the ongoing American culture war between political conservatives and political liberals should be explained by the fact that the morality of liberals is based only on the first two psychological moral foundations. On the other hand, the morality of conservatives (particularly religious conservatives) is based on all of the five psychological moral foundations.³⁶⁹

In addressing the relationship between the secular and religious moral values, Joseph Runzo identified a common religious perspective (according to the world religions) that promotes the interpersonal and moral responsibility, which can provide a balance to the self-centred inclinations of the secular rights and the role of law.³⁷⁰ In advocating the interdependence between the world religions and secular human rights, Abdullahi Ahmed An-Na'im argues that

³⁶⁸ Jonathan Haidt & Jesse Graham, "When morality opposes justice: Conservatives have moral intuitions that liberals may not recognize" (2007) 20:1 Social Justice Research 98 at 98-116.

³⁶⁹ *Ibid.*

³⁷⁰ Runzo, *supra* note 46 at 9-26.

those religions can provide moral foundations to mobilize their adherents for the protection of BHRs, while the secular system can mediate between different religious and non-religious groups to unify the political community for upholding BHRs.³⁷¹ In addressing the question of what those religions can contribute to the human rights discourse, Arvind Sharma argues that the human dignity should be the source for human rights, which would allow for the religious grounding of the human dignity in relationship to a supreme dimension.³⁷²

In rejecting the argument that Islamic Law and the secular ideas of human rights cannot coexist, Sachedina tried to search for a human rights system in Islam that would guarantee the human dignity and it does not conflict with the UDHR. He argued for the compatibility between Islamic Law and the secular ideas of human rights. He argued that while both traditions are thorough with meaning, they cannot claim alone to have a comprehensive idea of human rights. He criticized Western scholars who have ignored the value of religion for human rights. He argued that any theory of universal rights requires considerations of cultural contexts.³⁷³

Sachedina studied the juridical basis for the conservative Muslims' objections to the secular ideas of human rights, arguing that Islamic Law can be changed. He also tried to argue for a set of moral principles (whether secular or sacred) that are able to protect human beings from abuse. He argued that in order for human rights principles to be effectively enforced, they must be locally justified. According to Sachedina, "without the traditional leadership's endorsement of constitutional democracy and a bill of rights in Muslim states, it will be hard to see critically

³⁷¹ An-Na'im, "The Synergy and Interdependence", *supra* note 46 at 27-50.

³⁷² Sharma, *supra* note 46 at 67-78.

³⁷³ Sachedina, *supra* note 35 at 3-40.

needed changes of attitude regarding the international document to afford it cultural legitimacy in the Muslim world.”³⁷⁴

Sachedina notes that “Islamic doctrines share the universalism of human rights”.³⁷⁵ He opens “a real conversation between the secularist and the Islamic notions of human agency and human dignity for the protection of abused individuals.”³⁷⁶ In order for BHRs to be universal, they have to be practical and what makes these rights universal is the fact that they provide a cure for many political and socioeconomic problems. Therefore, Sachedina argues that the real test of BHRs is their “practical implementation in the community of nations.”³⁷⁷

Sachedina tries to show an overlapping consensus between religious and secular principles for human rights. However, he prefers religious morality and he argues for its role to form a consensus on universal BHRs.³⁷⁸ According to Sachedina,

Islamic political theology based on the central doctrine of a just and merciful God bound by His own moral essence to guide humanity to create a just public order can serve as the major theological-ethical foundation for human rights and its prerequisite, namely, democratic governance in Muslim societies.³⁷⁹

Sachedina agrees with Rawls that liberalism advanced religious tolerance by privatizing religion and clearing the public domain of religious interference. However, Sachedina argues for rethinking about what is the role that the religion is capable of playing for the promotion and

³⁷⁴ *Ibid* at 22.

³⁷⁵ *Ibid* at 15.

³⁷⁶ *Ibid*.

³⁷⁷ *Ibid* at 36.

³⁷⁸ *Ibid* at 13.

³⁷⁹ *Ibid* at 25.

protection of BHRs.³⁸⁰ According to Sachedina, “religion cannot and will not confine itself to a private domain where it is threatened by the loss of its influence on cultivating human conscience. It needs a public space in which it could create a sense of a world community with a vision of constructing an ideal society that cares and shares.”³⁸¹

According to Sachedina, “if traditionalist Muslim scholars can be convinced of the authenticity of natural law in Islamic theological ethics, then human rights discourse in the Muslim world can be based on this foundational doctrine, which treats human equality as its first and essential tenet.”³⁸² He tries “to identify and articulate Islamic foundational sources that could establish a legitimate correspondence with secularly derived human rights.”³⁸³ In order to do this, he cites verses of the *Qur’ān* about the human dignity emphasizing that all humans are born free, they are capable of understanding good and evil, and they have this human dignity because of their humanity that is worthy of protection by a new Islamic human rights system.³⁸⁴

Sachedina is not the only one who wrote on this topic of the relationship between Islam and human rights. Although Sachedina's approach is theological and ethical rather than legal, the above arguments by Sachedina are presented here as an overview of this relationship in very general terms as a hint to what follows. As we will see in Chapter 3, due to the fact that one of my objectives is trying to reconcile western discussions of human rights with Islamic ideas, I will discuss the question: is there a conflict between Islamic values and universal human rights? I will

³⁸⁰ *Ibid* at 51.

³⁸¹ *Ibid* at 39.

³⁸² *Ibid* at 113-14.

³⁸³ *Ibid* at 35.

³⁸⁴ *Ibid*.

offer an overview of the reformist Islam perspective that supports both the liberal and Islamic ideas about the universal human rights. In order to provide a solid grounding to this overview, works of other scholars will be discussed in Chapter 3, because they focus on the relationship between Islam and human rights.³⁸⁵

For example, in analysing the human rights commitments in Islam, Abou El Fadl explains the challenges to the human rights discourse within contemporary Muslim society following the cultural imperialism from the west due to

the particular historical dynamics that Muslims have had to confront in the modern age. Political realities—such as colonialism, the persistence of highly invasive and domineering despotic governments, the widespread perception, and reality, of Western hypocrisy in the human rights field, and the emergence and spread of supremacist movements of moral exceptionalism in modern Islam—have contributed to modes of interpretation and practice that are not consistent with a commitment to human rights.³⁸⁶

He argues that the support of human rights is a fulfilment of Islamic teachings in addition to being consistent with Islamic Law. “In fact, the Islamic tradition has generated concepts and institutions that could be utilised in a systematic effort to develop social and moral commitments to human rights.”³⁸⁷

According to Dworkin, “Law’s attitude is constructive: it aims in the interpretive spirit, to lay principle over practice to show the best route to a better future, keeping the right faith with the past.”³⁸⁸ Dworkin argues that in order for a legal theory to be complete, it must address two questions: 1. Whether the rules of conduct are justified and 2. Whether there are moral grounds

³⁸⁵ See section 3.2, section 3.3 & section 3.4, below, for more on this topic.

³⁸⁶ Abou El Fadl, “The Human Rights Commitment”, *supra* note 46 at 301.

³⁸⁷ *Ibid.*

³⁸⁸ Ronald Dworkin, *Law's Empire* (Cambridge, Massachusetts: Belknap Press, 1988) at 413.

for forcing compliance with these rules of conduct. Therefore, the complete legal theory must consider the "force of law" (i.e. the relationship between law and coercion) and the "grounds of law" (i.e. the relationship between law and justifiability or rightfulness). Dworkin stated that integrity demands that "fidelity not just to rules but to the theories of fairness and justice that these rules presuppose by way of justification."³⁸⁹ In my opinion, the correct interpretation of Islamic Law sources with a commitment to both the Islamic and the liberal moral values should guarantee our BHRs. Therefore, as we will see in Chapter 3, I will try to reinterpret the *Qur'ān* (which is the main source of Islamic Law) using the objective morality (i.e. the common ground between liberal moral values and religious/Islamic moral values).

³⁸⁹ *Ibid* at 185.

Chapter 3: The Compatibility between Islamic Ideas and the Liberal Ideas about Social Justice

3.1 The roadmap for Chapter 3

By reviewing materials that discuss social welfare systems in the MENA, it can be easily noticed that PWDs (who are among the most vulnerable people) are not receiving social income assistance. Therefore, these social welfare laws should be reformed to include disability social income assistance, because these laws (that were inherited from the Western colonists) did not progress as much as their Western counterpart. This legal reform should consider the evolution of Western social welfare systems, which are based on liberal equality theories. This legal transplant of a liberal secular system into the MENA's Islamic background requires testing the compatibility between liberal ideas and Islamic ideas about social justice.

In order to do this, first, I will provide a historical background of Islamic modernism. Second, I will discuss the question: is there a conflict between Islamic values and universal human rights? Third, I will discuss reformist Muslims who support both the liberal and Islamic ideas about the universal human rights in order to provide an introduction to reformist Islam (progressive Islam versus liberal Islam). Fourth, I will discuss the compatibility between some liberal equality ideas and my own personal Islamic approach to reading the *Qur'ān* (that might support an agreeable relationship between western philosophy and Islamic thought when considering the problem of the PWDs), including the compatibility between my own understanding of the *Qur'ānic* social justice and some ideas of Nussbaum's BHCs theory, some ideas of Rawls' social contract theory, and some ideas of Arneson's RCP theory about social justice. Fifth, I will discuss how to choose

the least advantaged members in the society within the *Qur'ānic* framework? This should include the moral *Qur'ānic* origins of *Zakāh* and the diverse interpretations and textual analysis of the *Qur'ān* about the distribution of *Zakāh* funds. Sixth, I will provide my own new interpretation of *Zakāh* rules in the *Qur'ān* based on my progressive Islam perspective of the common ground between the liberal moral values and the Islamic moral values.

3.2 A historical background of Islamic modernism

According to moderate Islamic political thought, promoting the Muslim identity and guaranteeing BHRs and democracy should be promoted together. If we fast-forward to the present day, we will see that most Euro-Americans have been subjected by the media to a twisted stereotype, which portrays Muslims as anti-Western extremists. Therefore, far too many Westerners are convinced that Muslims and terrorists are synonymous. Abou El Fadl states “Islam is at the current time passing through a transformative moment no less dramatic than the Reformation movements that swept through Europe”.³⁹⁰ At this critical stage, there are two completely opposed worldviews within Islam competing to define the true Islam and the stakes have never been higher, with the future of the Muslim world hangs in the balance. While extremists have an impact that is larger than their actual numbers, moderates are the less visible silent majority of Muslims worldwide. This gap between the quiet voice of moderates and the loud statements of extremists threatens the whole future of the Islamic faith.³⁹¹

³⁹⁰ Abou El Fadl, *The Great Theft*, *supra* note 46 at 5-6.

³⁹¹ *Ibid* at 6-7, 11-25.

Drawing on the Islamic history and law, Abou El Fadl tried to defend Islam against the encroaching power of the extremists by describing key differences between moderates and extremists. He roots his arguments in ancient historical legal debates and he outlines the beliefs and practices of moderates to distinguish them from the corrupting influences of the extremists (from the nature and role of women in Islam³⁹² to the nature of *jihad*, warfare and terrorism³⁹³). He argues that the silent majority of Muslims (who oppose extremism) want to reclaim Islam's great moral tradition.³⁹⁴

Although it is important to distinguish between extremist Muslims and moderate Muslims, it is also important to distinguish within moderate Islam between traditionalist Muslims and modernist Muslims. Islamic modernism was a reaction to modernity by reviving and/or reforming Islam to deal with the challenges from both the European colonial expansion and the observed decline of Muslim societies. According to John L. Esposito, “The reformist spirit of the times was especially evident in the emergence from Egypt to Southeast Asia of an Islamic modernist movement that called for a ‘reformation’ or reinterpretation of Islam.”³⁹⁵

If we traveled back in time, we will see that up until the end of the 17th century, the Ottoman Empire had considered itself to be stronger than Europe. However, by the mid-18th century, the Ottoman Empire had to acknowledge that Europe has become equal in strength to it, and by the end of the 18th century, the balance of power started to change in favor of Europe due to the

³⁹² *Ibid* at 250.

³⁹³ *Ibid* at 220.

³⁹⁴ *Ibid* at 275.

³⁹⁵ Esposito, *supra* note 46 at 646-47.

technical progress of western and northern Europe. In the 18th century, the enlightenment ideas (that focus on rationality and science) and the industrial revolution (with its new technologies) provided Europe with great power and influence. At the same time, this rise of modern Europe concurred with the breakdown of the Ottoman Empire.³⁹⁶

Therefore, in order to modernize and strengthen the Ottoman Empire, Ottomans instituted large-scale reforms (known as *Tanzimāt* inspired by French civil law), which included effective European practices in the sphere of administrative, military, economy, law, and education. Some traditionalist Muslims denounced these reforms by describing them as “un-Islamic innovations into state and society”,³⁹⁷ because these reforms confined Islamic Law to family law only (i.e. marriage, inheritance, divorce, and etc.). Moreover, the Ottoman Empire opened embassies in Europe and sent official researchers to Europe. According to Albert Hourani, this gradually created “a group of reformers with certain knowledge of the modern world and a conviction that the [Ottoman] empire must belong to it or perish.”³⁹⁸

Although the occupation of the Ottoman province of Egypt by Napoleon Bonaparte’s army (in 1798) did not last a long time, it opened Egypt to enlightenment ideas and new technologies of Europe.³⁹⁹ This exposure to European power and ideas inspired Muḥammad ‘Alī Bāshā (ruler of Egypt between 1805 and 1848) to draw on these new technologies to modernize Egypt. Rifā‘ah Rāf‘i al-Ṭaḥṭāwī (who was sent to Paris by Muḥammad ‘Alī Bāshā, where he studied for five

³⁹⁶ Albert Hourani, *A History of the Arab Peoples* (Cambridge, Massachusetts: Harvard University Press, 1991) at 258-59.

³⁹⁷ Eugene L Rogan, *The Arabs: A History* (New York: Basic Books, 2009) at 90.

³⁹⁸ Hourani, *Arabic Thought*, *supra* note 46 at 43.

³⁹⁹ Rogan, *supra* note 397 at 62.

years) is considered one of the early Islamic Modernists who tried to integrate Islamic values with European social ideas.⁴⁰⁰ Having studied Islamic Law, he stressed that Islamic Law principles are compatible with those of European Modernity. He argued that Islamic Law should be reformed according to the new circumstances, because there should be more harmony “between the principles of Islamic law and those principles of ‘natural law’ on which the codes of modern Europe were based.”⁴⁰¹ He influenced many later Islamic Modernists such as Sayyid Jamāl al-Dīn al-Afghānī,⁴⁰² Muḥammad 'Abduh,⁴⁰³ and Muḥammad Rashīd Riḍā'.⁴⁰⁴ According to Esposito, although Islamic modernists have been criticized that their reforms could be considered as westernizing Islam,⁴⁰⁵ their ideas influenced many later Islamic reformers.⁴⁰⁶

Although it is important to distinguish between traditionalist Muslims and modernist Muslims, it is also important to distinguish within modernist Islam (as reactions to modernity) between revivalist Muslims and reformist Muslims. However, most scholars have labelled reformist Muslims as liberal Muslims.⁴⁰⁷ Charles Kurzman provides modern interpretations of Islam based on the writings of 32 Muslim authors coming from a wide variety of geographical regions. Although not all of these Muslim authors are literally liberal, they are progressive. He describes liberal Islam as a neglected tradition (whose influence peaked before 1920 and whose advocates have been disproportionately the victims of violence), with concerns similar to the Western

⁴⁰⁰ James L Gelvin, *The Modern Middle East: a History* (Oxford: Oxford University Press, 2005) at 133-34.

⁴⁰¹ Hourani, *Arabic Thought*, *supra* note 46 at 75.

⁴⁰² *Ibid* at 103-29.

⁴⁰³ *Ibid* at 130-60.

⁴⁰⁴ *Ibid* at 222-44.

⁴⁰⁵ Esposito, *supra* note 46 at 650.

⁴⁰⁶ *Ibid* at 680.

⁴⁰⁷ See section 3.4, below, for more on this topic.

liberalism's concerns. He defines liberal Islam as it is distinguished from traditionalist/customary/popular Islam and distinguished from revivalist Islam (that seeks to "rid Islam of un-Islamic practices not sanctioned by orthodox sources").⁴⁰⁸ He tried to show a range of modernist and pluralist Islamic reflections on the rights of non-Muslims, the rights of women, democracy and freedom of thought in order to neutralize the Orientalist, one-sided misunderstandings about Islam (which frequently have been promoted in academia and in the media).⁴⁰⁹

Reformist Islam has been a key intellectual movement in the Islamic world during the 19th and 20th centuries. Reformist Muslims are challenging the status quo upheld by traditionalist and revivalist Muslims, who upheld the doctrine of *taqlīd* (blind following/uncritical imitation). Therefore, reformist Muslims rejected this doctrine of uncritical imitation; they stressed the need for Islam to be reinterpreted according to contemporary circumstances. They consider that this resistance to change by traditionalist and revivalist Muslims does not allow the Muslim community to challenge the western hegemony. They argue that it is possible and crucial to show how authentically Islamic ideas could be compatible to modern values (such as universal BHRs) and modern institutions.⁴¹⁰ Therefore, it is important to discuss the question: is there a conflict between Islamic values and universal human rights?

⁴⁰⁸ Kurzman, *supra* note 46 at 6.

⁴⁰⁹ *Ibid* at 3-13.

⁴¹⁰ Esposito, *supra* note 46 at 647.

3.3 The debate about whether there is a conflict between Islamic values and universal human rights?

A study (by Susan Waltz) of Muslims' input into the universal human rights principles expanded awareness of the debt that the UN's human rights system owes to delegates from Muslim countries. Middle Eastern Muslims figured among the most important contributors to formulating the ICCPR, the ICESCR, and the UDHR⁴¹¹ (adopted by most members of the UN, including all Muslim countries except Saudi Arabia). The UDHR has been criticized by several Muslim countries, because it failed to consider the Islamic cultural background of many countries. For example, Iran criticized it as "a secular understanding of the [Western] Judeo-Christian tradition" that might violate Islamic Law.⁴¹²

Therefore, as an Islamic response to the UDHR, in 1990, the Organization of Islamic Conference (OIC)'s members⁴¹³ adopted the Cairo Declaration on Human Rights in Islam (CDHRI)⁴¹⁴ as an Islamic perspective on human rights while confirming that *Shari'ah* (Islamic Law) is the only source for these rights.⁴¹⁵ However, in 2008, the OIC revised its charter in order to promote fundamental freedoms and BHRs. These revisions also deleted any reference to the CDHRI. Therefore, the OIC has chosen to support the UDHR in its revised charter.⁴¹⁶

⁴¹¹ Waltz, *supra* note 46 at 799-844.

⁴¹² Littman, *supra* note 46 at 59-64.

⁴¹³ In 2011, the OIC changed its name from the Organization of the Islamic Conference (OIC) to the Organization of Islamic Cooperation (OIC). See OIC, "About OIC", online: OIC <<http://www.oic-oci.org>>.

⁴¹⁴ *Cairo Declaration on Human Rights in Islam*, 5 August 1990, UNGAOR, World Conf on Hum Rts, 4th Sess, Agenda Item 5, UN Doc A/CONF 157/PC/62/Add 18 (1993), English translation [CDHRI].

⁴¹⁵ Emon, Ellis & Glahn, *supra* note 46 at 113.

⁴¹⁶ See OIC, "OIC Charter", online: OIC <<http://www.oic-oci.org>>.

While supporters of the CDHRI claimed that the CDHRI is a supplement and not a replacement of the UDHR, Article 24 of the CDHRI declares that "[a]ll the rights and freedoms stipulated in this Declaration are subject to the Islamic *Shari'ah*";⁴¹⁷ moreover, Article 25 of the CDHRI declares that "[t]he Islamic *Shari'ah* is the only source of reference for the explanation or clarification of any of the articles of this Declaration."⁴¹⁸ Although the CDHRI uses universalistic language similar to the UDHR, it includes many references to the *Qur'ān*, *Shari'ah* and Islamic beliefs that are not included in any other similar international document.⁴¹⁹ According to the CDHRI's preamble, "no one as a matter of principle has the right to suspend them in whole or in part or violate or ignore them in as much as they are binding divine commandments".⁴²⁰

The CDHRI has been criticized for being used by Muslim countries (with very different religious practices), which have "a shared interest in disarming international criticism of their domestic human rights record."⁴²¹ According to Ann Elizabeth Mayer, the CDHRI is "designed to dilute, if not altogether eliminate, civil and political rights protected by international law".⁴²² According to Adama Dieng, the CDHRI deliberately limits some freedoms to the point that some of its requirements are below the legal standards in some Muslim countries.⁴²³ Mayer argues that the CDHRI did not include provisions for democratic principles such as freedom of religion,

⁴¹⁷ CDHRI, *supra* note 414, art 24.

⁴¹⁸ *Ibid*, art 25.

⁴¹⁹ Brems, *supra* note 46 at 241-84.

⁴²⁰ CDHRI, *supra* note 414, Preamble.

⁴²¹ Brems, *supra* note 46 at 259.

⁴²² Mayer, *Tradition and Politics*, *supra* note 46 at 175.

⁴²³ Mayer, "Islam and human rights policy", *supra* note 46 at 72.

freedom of association, freedom of expression, and equal protection.⁴²⁴ Rhona K. M. Smith argues that the CDHRI suggests a natural superiority of men over women.⁴²⁵

Fadel tried to discover a strategy for finding a principled reconciliation between international human rights and Islamic values. According to Fadel, Rawls' analysis (of how incompatible ideas can co-exist with an overlapping consensus) suggests that justifications for BHRs should be articulated in a way suitable for Muslims.⁴²⁶ In order to do this, Fadel proposed: 1. Reforming the non-conforming substantive Islamic rules (without engaging in controversial interpretations) in order to show conformity with international BHRs,⁴²⁷ 2. Allowing Muslims to enjoy their right to religious freedom by voluntarily observing Islamic rules (without imposing any discrimination in Muslim states' laws),⁴²⁸ and 3. Eliminating all restrictions on freedom of conscience in Muslim states' laws.⁴²⁹

Due to the fact that authoritarian interpretations of Islamic scriptures have usually resulted in severe problems for some groups, Abou El Fadl (drawing upon both religious and secular sources) argues that the divine law has often been misinterpreted by authorities at the expense of some groups (such as the ban on women driving cars). Therefore, he proposes a return to the

⁴²⁴ Mayer, "Conundrums and Equivocations", *supra* note 46 at 177-98.

⁴²⁵ Smith, *supra* note 46 at 206.

⁴²⁶ Fadel, *supra* note 46 at 2-6.

⁴²⁷ *Ibid* at 12-13.

⁴²⁸ *Ibid* at 14-18.

⁴²⁹ *Ibid* at 18-19.

original moral values (i.e. those Islamic moral values that are not biased toward any political standpoint), which should be at the heart of Islamic Law.⁴³⁰

Mayer argues for examining the political uses of Islam to justify oppression. She notes how Muslims who are supportive of BHRs found harmony between Islamic values and international law principles while believing as Muslims that they do not have to choose between Islam and BHRs. She tried to show how Muslims' different positions on whether or not Islam constituted an obstacle to human rights reflected a variety of competing tensions in Islamic thought and how they often indirectly tied with local politics. She tried to show how the official Islamic laws (i.e. in cases where Islam was controlled by governments) must be understood as expressions of state policy, not as expressions of absolute Islamic doctrine. She stressed that it is not Islamic culture, but the national politics of the state (as a Western model of government adopted by all Muslim countries) lay behind state-sponsored deviations from international human rights law.⁴³¹ Ziba Mir-Hosseini states "without the democratization and modernization of Islam's legal vision, Muslim women's quest for equal rights will be held hostage to the fortunes of various political tendencies".⁴³²

Mir-Hosseini examined manufacturing of gender rights in Islamic legal theories; and she explored the needed strategies for the desired reform to retrieve the Islamic spirit. Within Islamic legal thought, she distinguishes between three different discourses on gender rights: the traditionalist discourse (which is based on the classical *Shari'ah* texts), the modernist/neo-

⁴³⁰ Abou El Fadl, *Speaking in God's Name*, *supra* note 46 at 264-71.

⁴³¹ Mayer, *Not Taking Rights Seriously*, *supra* note 46 at 4.

⁴³² Mir-Hosseini, "Muslim Women's Quest for Equality", *supra* note 46 at 631.

traditionalist discourse (which is developed in the contemporary legal systems), and the reformist discourse (which is still developing). While the traditionalist discourse and the modernist/neo-traditionalist discourse are based on different forms of gender inequality, the reformist discourse is based on gender equality in law.⁴³³

Due to the fact that a number of Muslim countries (with a secular legal system) have adopted constitutions requiring state laws to respect fundamental Islamic legal norms, Clark B. Lombardi and Nathan J. Brown ask how do courts interpret these "constitutional Islamization" provisions?

They noted that

in interpreting Egypt's constitutional Islamization provision, the Supreme Constitutional Court of Egypt has interpreted [*Shari'ah*] norms to be consistent with international human rights norms and with liberal economic policies. The experience of Egypt does not tell us how constitutional Islamization will necessarily unfold in every country. It does demonstrate that, in a world where Islamic norms are contested, a progressive court can effectively develop and apply a theory that interprets Islamic legal norms to be consistent with democracy, international [BHRs] and economic liberalism.⁴³⁴

Therefore, it is important to discuss the ideas of those reformist Muslims who support both the liberal and Islamic ideas about universal human rights.

3.4 An introduction to reformist Islam (progressive Islam versus liberal Islam)

The methods of reform under reformist Islam (that make them different from the more conservative Islamic outlook) can be categorized into two groups: the first method is using *Ijtihād*, which is re-interpreting the traditional texts that established Islamic Law. This *ijtihad*

⁴³³ Mir-Hosseini, "The Construction of Gender in Islamic Legal Thought", *supra* note 46 at 1-28.

⁴³⁴ Lombardi & Brown, *supra* note 46 at 379-80.

varies widely from little departure from the traditional interpretations, to the more liberal interpretations.⁴³⁵ The second method is doubting the obligation to follow traditional texts. More liberal trends include rejecting *Ḥadīth* (i.e. traditional narratives of the sayings and practices of Prophet Muḥammad) completely in the case of the *Qur'ān* Alone Muslims (such as Edip Yuksel)⁴³⁶ or partially (such as Jamāl al-Bannā).⁴³⁷

Although there is no full consensus among all reformist Muslims on their ideas, most reformist Muslims consider that one of Islam's central concepts is the Islamic notion of absolute equality of all humanity. Reformist Muslims argue that all humanity is covered by the umbrella of human rights. For reformist Islam, absolute equality of all humans and social justice are the core principles by which to reinterpret the *Qur'ān* (as this dissertation wishes to do). Many reformist Muslims favour the separation of church and state idea. Therefore, they oppose the idea of political Islam; they support the idea of secular governments. According to Abou El Fadl, a constitutional democracy is the best-suited governmental system to promote Islamic social and political values central to Islam.⁴³⁸ He argues that there is no place in Islam for obeying authoritarian regimes, because the Islamic faith is about submitting to God and acting responsibly as God's representative on Earth.⁴³⁹

⁴³⁵ Some reformist Muslims may not use the literal word interpretation, because they believe that the wording is intended to suit Prophet Muḥammad's time and situation; they consider only the meaning of the *Qur'ān* as a divine inspiration. They reinterpret the problematic verses in modern times symbolically or they may not consider them at all. Aslan, *supra* note 39 at 137-40.

⁴³⁶ The *Qur'ān* Alone Muslims are denying any obligation to follow *Ḥadīth*; at the same time, they are allowing greater freedoms in interpreting the *Qur'ān* regardless of the *Ḥadīth*. See Yuksel, *supra* note 46.

⁴³⁷ Some reformist Muslims are rejecting *Ḥadīth* partially by accepting only *Ḥadīth Ṣaḥīḥ* (i.e. *Ḥadīth* considered authentic by traditionalists). See al-Bannā, *supra* note 46. According to my progressive Islam perspective, I accept only *Aḥādīth* that do not contradict the *Qur'ān* and its message of equality, justice, freedom, and tolerance.

⁴³⁸ Abou El Fadl, *Islam and the Challenge of Democracy*, *supra* note 46 at 3-48.

⁴³⁹ *Ibid* at 109-128.

Many reformist Muslims also focus on the idea of religious tolerance and non-violence; they focus on conflict resolution between Muslims on the one hand, and Christians and Jews on the other hand. Abou El Fadl tries to focus on important questions such as: why is the Muslim community witnessing an emergence of extremism today? What must be done to pull the 'tolerant' Islam back into the forefront of the faith? How can we preserve a deep religious conviction while participating in what he called "a collective enterprise of goodness" that cuts across confessional differences?⁴⁴⁰ He argues that Islam is a deeply tolerant religion; and injunctions to violence against non-Muslims originate from misunderstanding the *Qur'ān*. Moreover, he argues that *jihad* (or so-called holy wars, which grew out of social and political conflicts) has no basis in the *Qur'ān* or in Islamic theology.⁴⁴¹ Reformist Muslims interpret the idea of *jihad* in terms of "internal spiritual struggle" instead of "armed struggle", because Prophet Muḥammad called the armed struggle as the "Smaller *Jihad*"; he preferred the "Bigger *Jihad*" / the internal spiritual struggle to overcome one's own desires. They focus on the *Qur'ānic* text: "Permission to fight is given only to those who have been oppressed... who have been driven from their homes for saying, 'Allāh is our Lord'..."⁴⁴² Moreover, the *Qur'ān* also clearly declares that "There shall be no compulsion in religion";⁴⁴³ confirming the *Qur'ānic* principle for freedom of choice.

⁴⁴⁰ Abou El Fadl, *The Place of Tolerance*, *supra* note 46 at 93-112.

⁴⁴¹ *Ibid* at 3-26.

⁴⁴² The *Qur'ān*: 22 (al-Ḥajj):39-40.

⁴⁴³ The *Qur'ān*: 2 (al-Baqarah):256.

Although it is important to distinguish between revivalist Muslims and reformist Muslims, it is also important to distinguish within reformist Islam (which most scholars have inaccurately labelled it as liberal Islam) between liberal Muslims and progressive Muslims. I agree with Omid Safi that liberal Islam and progressive Islam are two different movements. According to Safi,

The various understandings of Islam which fall under the rubric of 'progressive' are both continuations of, and radical departures from, the hundred and fifty year old tradition of liberal Islam. Liberal advocates of Islam generally display an uncritical, almost devotional identification with modernity, and often (but do not always) by-pass discussions of colonialism and imperialism. Progressive advocates of Islam, on the other hand, are almost uniformly critical of colonialism, both of its nineteenth century manifestation and its current variety. Progressive Muslims espouse a critical and non-apologetic 'multiple critique' with respect to both Islam and modernity. They are undoubtedly postmodern in the sense of their critical approach to modernity. That double engagement with the varieties of Islam and modernity, plus an emphasis on concrete social action and transformation, is the defining characteristic of progressive Islam today.⁴⁴⁴

There are many controversial issues surrounding liberal Muslims' ideas. I may agree with some of their ideas (with some reservations) but not with all of their ideas. However, I will not discuss these controversial issues, because I focus primarily on social welfare arguments to achieve equality. On the other hand, in my opinion, liberal Muslims focus (generally) on anti-discrimination arguments (which are outside of my primary focus in this dissertation) to achieve equality. My focus is primarily on social justice, specifically the universal BHR to equality for PWDs and the universal BHR to social welfare. Therefore, I wish that my thesis would be considered as a part of the progressive Islam perspective. In fact, Prophet Muḥammad was progressive for his time and place (7th century Arabia). Progressive Muslims argue that following his footsteps today would require extending his revolutionary program even further.

⁴⁴⁴ Safi, *supra* note 46 at 48.

Prophet Muḥammad was a political revolutionary. He advocated economic reforms of a broadly "socialist" character (such as condemning exploitation of the poor). However, Prophet Muḥammad was not anti-patriarchal or an abolitionist. The state (he founded) was not a secular state. According to William Montgomery Watt, Prophet Muḥammad was a social reformer, because

He created a new system of social security and a new family structure, both of which were a vast improvement on what went before. By taking what was best in the morality of the nomad and adapting it for settled communities, he established a religious and social framework for the life of many races of men.⁴⁴⁵

Progressive Muslims are persistently seeking the universal notion of social justice for Muslims and non-Muslims as well. Under this universal notion of social justice, Muslims should affirm all universal BHRs for all humans in the global village; they should uphold a fair system for redistribution of God-given natural resources.⁴⁴⁶ According to Safi,

Progressive Muslims perceive themselves as the advocates of human beings all over the world who, through no fault of their own, live in situations of perpetual poverty, pollution, oppression, and marginalization. Their task is to give voice to the voiceless, power to the powerless, and confront the 'powers that be' who disregard the God-given human dignity of the *muṣṭaḍ'afūn* [disadvantaged people] all over this Earth.⁴⁴⁷

Progressive Muslims depend on a solid body of customs in the social justice using Islamic sources (such as the *Qur'ān* and the *Sunnah*) as well as non-Islamic sources that are useful tools in the global pursuit of social justice. In fact, social justice lies at the heart of Islamic teachings. For example, the *Qur'ān* repeatedly (many times) encourages believers to help the

⁴⁴⁵ W Montgomery Watt, *Muhammad: Prophet and Statesman* (Oxford: Oxford University Press, 1964) at 234.

⁴⁴⁶ This is the Islamic perspective that this dissertation wishes to be identified with. Therefore, my own perspective is a part of the progressive Islam perspective, which is a part of the reformist Islam perspective, which is a part of the modernist Islam perspective, which is a part of the moderate Islam perspective, which is a part of the Islamic faith perspective, which is a part of the Abrahamic faith perspective, which is a part of the monotheistic perspective.

⁴⁴⁷ Safi, *supra* note 46 at 48.

disadvantaged, the hungry, the poor, the oppressed, the orphaned, the refugee, etc. Therefore, progressive Muslims argue that Muslims (who wish to be true believers) should consider all of humanity as their neighbours in today's global village; they should care about the dignity and well-being of all humans. Therefore, progressive Muslims try to reinterpret the idea of social justice in the *Qur'ān* into a legal system that can be used by decision makers to help all humans.

According to Safi,

At the heart of a progressive Muslim interpretation is a simple yet radical idea: every human individual, female or male, Muslim or non-Muslim, rich or poor, northerner or southerner, has exactly the same intrinsic worth. The essential value of human life is God-given, and is in no way connected to culture, geography, or privilege. A progressive Muslim is one who is committed to the strangely controversial idea that the true measure of a human being's worth is a person's character, and not the oil under their soil or their particular flag. A progressive Muslim agenda is concerned with the ramifications of the premise that all members of the human race have this same intrinsic worth because each of us has the breath of God breathed into our being.⁴⁴⁸

To prove this, appeal can be made to many verses of the *Qur'ān* for evidence of the dignity of all human beings. For example: “When I [God] have shaped him [Adam], and breathed My Spirit in him, you [Angels] must fall down, bowing before him! Then, the Angels bowed themselves all together.”⁴⁴⁹ In other words, Adam was appointed to establish God’s law on earth, because God told the angels, "I am appointing a vicegerent on earth".⁴⁵⁰ Therefore, everything in the earth was created for the benefits of all humans; the human being should have control over his/her material world (i.e. the human being should be its master and should not be a slave to anyone but God). The human being was ranked higher than the angels. This is confirmed in the *Qur'ān* repeatedly:

⁴⁴⁸ *Ibid.*

⁴⁴⁹ The *Qur'ān*: 15 (al-Ḥijr):29-30; 38 (Ṣād):72-73.

⁴⁵⁰ The *Qur'ān*: 2 (al-Baqarah):30.

“We [God] said to the angels: ‘Bow yourselves to Adam’, so they bowed themselves”.⁴⁵¹ The *Qur’ān* also confirms: “We [God] have honoured the Children of Adam and carried them on land and sea, and provided them with good things, and preferred them greatly over many of those We created.”⁴⁵² God distinguishes the human being from both animals and angels by giving him/her rationality and cognition.⁴⁵³ For an extra honour upon humans, the *Qur’ān* explains:

And He [God] taught Adam the names [of all things], all of them; then He presented them unto the angels and said: ‘Now tell Me the names of these, if you [angels] speak truly [if you are so knowledgeable].’ They said: ‘Glory to You [God], of knowledge that we have none, except what You have taught us; in fact, it is You Who are perfect in knowledge and wisdom.’ He [God] said: ‘Adam, tell them their names [everything].’ And when he [Adam] had told them their names, He [God] said: ‘Did I not tell you [angels] I know the unseen things of the heavens and earth? And I know what things you reveal, and what you were hiding.’⁴⁵⁴

After I located my own perspective within the progressive Islam perspective, it is important to show how my progressive Islam perspective (about social justice in the *Qur’ān*) is compatible with some liberal equality ideas.

3.5 The compatibility between some liberal equality ideas and my progressive Islam perspective about social justice in the *Qur’ān*

As we have seen above, progressive Muslims depend on the strong tradition of social justice from within Islam using Islamic sources (such as the *Qur’ān* and the *Sunnah*) as well from outside Islam using non-Islamic sources (such as liberal theories of social justice). Therefore, the purpose of the previous Chapter 2 was to use Western (mainly liberal) experience (in addressing

⁴⁵¹ The *Qur’ān*: 2 (al-Baqarah): 34; 7 (al-A’rāf):11; 17 (al-Isrā’):61; 18 (al-Kahf):50; Tāhā 20 (Tāhā):116.

⁴⁵² The *Qur’ān*: 17 (al-Isrā’):70.

⁴⁵³ The *Qur’ān*: 55 (al-Raḥmān):1-4, 31; 96 (al-‘Alaq):1-5. This idea is supported by another idea in Subsection 3.5.1, which is about the BHR to freedom of conscience. See subsection 3.5.1 (#4), below, for more on this topic.

⁴⁵⁴ The *Qur’ān*: 2 (al-Baqarah):31, 32, 33.

justice for PWDs) to identify issues that arguably need consideration in the Islamic context as well. The purpose of this chapter should be to show that my progressive Islam perspective provides a means of dealing with these issues (in particular that *Zakāh*, properly interpreted, does so). However, by focusing on Islamic moral values, I am not denying the moral values that are included in the liberal equality theories. Actually, I will use some liberal equality ideas to explain my own perspective on the *Qur'ānic* moral values. I will demonstrate how the liberal concepts of equality can be used to reinterpret religious Islamic rules about the BHR to social welfare (more specifically, disability social income assistance). Therefore, my own interpretation of the *Qur'ān* will have a commitment to social justice and a consideration of both liberal and Islamic moral values.

As a result of my search (in Chapter 2) for one liberal equality theory that can be used to confirm the universal BHR to equality for PWDs and the universal BHR to social welfare (more specifically, disability social income assistance), every liberal equality theory by itself failed to address the issues of justice for PWDs. However, we discovered in Chapter 2 that the best candidate liberal theory to deal with issues of justice for PWDs is a combination of the following three liberal equality theories: Nussbaum's BHCs theory, Rawls' social contract theory, and Arneson's RCP theory.

In order to discuss how my progressive Islam perspective can argue for the compatibility between some liberal equality ideas and Islamic ideas, I will display how some elements of each of the following three liberal equality theories (i.e. Nussbaum's BHCs theory, Rawls' social contract theory, and Arneson's RCP theory) are compatible with some religious Islamic ideas. I

will demonstrate how the *Qur'ān* can be reinterpreted to support many specific liberal principles for social justice. I will show how my new liberal equality theory (or my own amalgamation of the different liberal equality theories) can be used (as we will see later) to explain my new interpretation of the *Qur'ān* using these liberal principles for social justice in addition to the Islamic sources (such as the *Qur'ān* and the *Sunnah*).⁴⁵⁵

3.5.1 The compatibility between some ideas of Nussbaum's BHCs theory and my progressive Islam perspective about social justice in the *Qur'ān*

While Nussbaum's BHCs theory requires that all citizens get to a minimum level of all BHCs,⁴⁵⁶ the *Qur'ān* (according to my progressive Islam perspective) guarantees many necessary BHRs (which serve the same function as these BHCs) for all human beings including:

⁴⁵⁵ Therefore, this section 3.5 is an introduction to my new interpretation of the *Qur'ān* regarding the Islamic rules about *Zakāh* in the following section 3.6.

⁴⁵⁶ The ten central BHCs identified by Nussbaum include:

1. *Life*. Being able to live to the end of a human life of normal length; not dying prematurely...
2. *Bodily health*. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.
3. *Bodily integrity*. Being able to move freely from place to place; to be secure against violent assault, including sexual assault... ; having opportunities for sexual satisfaction and for choice in matters of reproduction.
4. *Senses, imagination, and thought*. Being able to use the senses, to imagine, think, and reason-and to do these things in... a way informed and cultivated by an adequate education, ... Being able to use imagination and thought in connection with experiencing and producing works and events of one's own choice, ... Being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to have pleasurable experiences and to avoid nonbeneficial pain.
5. *Emotions*. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; ... to experience longing, gratitude, and justified anger. Not having one's emotional developing blighted by fear and anxiety...
6. *Practical reason*. Being able to form a conception of the good and to engage in critical reflection about the planning of one's own life. (This entails protection for liberty of conscience ...)
7. *Affiliation*. A. Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another... B. having the social bases of self-respect and nonhumiliation; being able to be treated as a dignified being whose worth is equal to that of others... 8. *Other species*. Being able to live with concern for and in relation to animals, plants, and the world of nature.
9. *Play*. Being able to laugh, to play, to enjoy recreational activities.
10. *Control over one's environment*. A. *Political*. Being able to participate effectively in political choices that govern one's life; having the rights of political participation, protections

1. The BHR to life (which serves the same function as Nussbaum's BHC of "Life"): The *Qur'ān* prohibits killing of any human being: "Therefore We [God] decreed for the Children of Israel that whosoever killed a soul not [to retaliate] for [another] soul [killed], nor [to remove] corruption in the earth, shall be as if he had killed mankind altogether; and whosoever saves the life of a soul, shall be as if he had saved the life of mankind altogether..."⁴⁵⁷ In other words, "O believers! ... do not kill yourselves [and each another]..."⁴⁵⁸ "And do not kill your children fearing a fall into poverty, We [God] shall provide for you and for them..."⁴⁵⁹ The *Qur'ān* describes the believers as "And those who... do not kill the soul [or take life which God has made sacred] that Allāh has forbidden, except for just cause..."⁴⁶⁰ Some critics would argue against this point using some of the "fighting" verses of the *Qur'ān*; however, almost all of these verses give Muslims the right to self-defence (for themselves and for the vulnerable members of the society) and to protect their souls and their properties from any attack from non-Muslims.⁴⁶¹ For example, according to the *Qur'ān*, "permission to fight is given only to those who have been oppressed... who have been driven from their homes for saying, 'Allāh is our Lord'..."⁴⁶² Moreover, the *Qur'ān* explicitly states "There shall be no

of free speech and association. B. *Material*. Being able to hold property (both land and movable goods), ... having the right to seek employment on an equal basis with others. Nussbaum, *supra* note 30 at 76-78.

According to Samuel Freeman, the BHCs approach is a kind of human rights view. It sets forth the necessary conditions to which any person has a moral right by virtue of being a member of the human species. Samuel Freeman, "Frontiers of Justice: The Capabilities Approach vs. Contractarianism" (2006) 85 Tex L Rev 385 at 430.

⁴⁵⁷ The *Qur'ān*: 5 (al-Mā'idah):32.

⁴⁵⁸ The *Qur'ān*: 4 (al-Nisā'):29.

⁴⁵⁹ The *Qur'ān*: 6 (al-An'ām):151; 17 (al-Isrā'):31.

⁴⁶⁰ The *Qur'ān*: 17 (al-Isrā'): 33; 25 (al-Furqān):68.

⁴⁶¹ The *Qur'ān*: 2 (al-Baqarah):190-191, 193, 216-218, 244-246; 3 (Āl-'Imrān):195; 4 (al-Nisā'):75-76, 84, 89-91; 8 (al-Anfāl):30, 39; 9 (al-Tawbah):12-14, 36; 16 (al-Nahl):110; 22 (al-Ḥajj):39-40; 29 (al-'Ankabūt):6; 60 (al-Mumtaḥanah):8-9.

⁴⁶² The *Qur'ān*: 22 (al-Ḥajj):39-40.

compulsion in religion".⁴⁶³ Therefore, people should not be forced into conversion. Therefore, these verses confirm the BHR to life, because the right to self-defence is the other side of the right to guaranteed life.⁴⁶⁴

2. The BHR to social income assistance (which serves the same function as Nussbaum's BHC of "Bodily health"): The *Qur'ān* gives all human beings (even the unbelievers⁴⁶⁵) the right to nutrition: "...Eat of the good things wherewith We [God] have provided you..."⁴⁶⁶ The *Qur'ān* describes the believers as "They give food, despite their love of it [food], to the needy, the orphan, and the captive; [and the believers said to the needy, the orphan, or the captive:] 'We feed you only for the cause of Allāh; we desire no recompense from you, nor thankfulness'."⁴⁶⁷ On the other hand, the *Qur'ān* describes the unbeliever as who "does not urge the feeding of [nor feed] the needy"⁴⁶⁸ man in misery, nor even an orphan⁴⁶⁹ near of kin especially upon a day of hunger.⁴⁷⁰ In fact, the *Qur'ān* commands the believers to feed the miserable poor.⁴⁷¹ "And those of you who possess bounty and plenty must not swear off giving to [their] kinsmen and the needy and the refugee for the cause of Allāh ..." ⁴⁷² "Did He [God] not find you [Prophet Muḥammad] an orphan, and shelter you? Did He not find you erring, and guide you? Did He not find

⁴⁶³ The *Qur'ān*: 2 (al-Baqarah):256.

⁴⁶⁴ I should acknowledge here that some of my parallels between the *Qur'ān* and Nussbaum's BHCs are more convincing than others. For example, Nussbaum's BHC of life goes significantly beyond protection from being killed. However, I am not trying to find an exact parallel between each of Nussbaum's BHCs and the *Qur'ān*. Instead, I am trying to explain a list of natural BHRs that are guaranteed by the *Qur'ān* (according to my progressive Islam perspective), while showing some kind of compatibility with Nussbaum's list of BHCs.

⁴⁶⁵ The *Qur'ān*: 17 (al-Isrā'):18-20.

⁴⁶⁶ The *Qur'ān*: 2 (al-Baqarah):57, 168, 172; 5 (al-Mā'idah):88; 6 (al-An'ām):142; 7 (al-A'rāf):160; 8 (al-Anfāl):69; 16 (al-Nahl):114; 20 (Tāhā):54, 81; 23 (al-Mu'minūn):51; 67 (al-Mulk):15; 77 (al-Mursalāt):46.

⁴⁶⁷ The *Qur'ān*: 76 (al-Insān):8-9.

⁴⁶⁸ The *Qur'ān*: 69 (al-Ḥaqqah):34.

⁴⁶⁹ The *Qur'ān*: 89 (al-Fajr):17-18; 107 (al-Mā'ūn):2-3.

⁴⁷⁰ The *Qur'ān*: 90 (al-Balad):14-16.

⁴⁷¹ The *Qur'ān*: 22 (al-Ḥajj):28, 36.

⁴⁷² The *Qur'ān*: 24 (al-Nūr):22.

you needy, and suffice you? As for the orphan, do not oppress [him/her], and as for the beggar, do not scold [him/her], and as for your Lord's blessing, declare [it]."⁴⁷³ The *Qur'ān* commands that "The alms are [only] for the poor and the needy... and [for] the wayfarer; a duty imposed by Allāh."⁴⁷⁴ According to the *Qur'ān*, poor people have the right to the money of rich people.⁴⁷⁵ In fact, the *Qur'ān* confirms this right to the public money (i.e. the government's responsibility) for "...the orphans, the needy and the wayfarer [especially for the poor refugee]; so that it may not be [limited to or] taken in turns among the rich of you..."⁴⁷⁶ Moreover, the *Qur'ān* gives the blind, the lame, and the sick a full authorization to eat from any house that is available to them. Therefore, the following verse of the *Qur'ān* could be interpreted and might be argued to suggest that they have a BHR to social income assistance (in addition to avoidance of social isolation of these groups):

There is no fault in the blind, and there is no fault in the lame, and there is no fault in the sick, neither in yourselves, that you eat of your houses, or your fathers' houses, or your mothers' houses, or your brothers' houses, or your sisters' houses, or the houses of your uncles or your aunts paternal, or the houses of your uncles or your aunts maternal, or that whereof you own the keys, or of your friend; there is no fault in you that you eat all together, or separately...⁴⁷⁷

3. The BHR to reasonable disability accommodation (which serves the same function as Nussbaum's BHC of "Bodily integrity"): In addition to the above verse of the *Qur'ān*, the *Qur'ān* provides the weakest members of the society (including the blind, the lame,

⁴⁷³ The *Qur'ān*: 93 (al-Duḥá):6-11.

⁴⁷⁴ The *Qur'ān*: 9 (al-Tawbah):60.

⁴⁷⁵ The *Qur'ān*: 2 (al-Baqarah):177, 271, 273; 51 (al-Dhāriyāt):19; 70 (al-M'ārij):24-25.

⁴⁷⁶ The *Qur'ān*: 59 (al-Ḥashr):7-8.

⁴⁷⁷ The *Qur'ān*: 24 (al-Nūr):61.

and the sick) with many exemptions from some of their religious obligations,⁴⁷⁸ which might be argued to suggest that they have a BHR to reasonable disability accommodation. At the same time, the *Qur'ān* considers some other exceptions (for the rich people who have health problems) as reasons for redemption or expiation in the form of feeding the needy⁴⁷⁹ or clothing them⁴⁸⁰ (these rules are also related to the BHR to social income assistance).

4. The BHR to freedom of conscience (which serves the same function as Nussbaum's BHCs of "Senses, imagination, and thought" and "Practical reason"): The *Qur'ān* states "There shall be no compulsion in religion".⁴⁸¹ Therefore, people should not be forced into conversion.⁴⁸² The *Qur'ān* repeatedly (in many of its verses) encourages all human beings (especially the believers) to think about God's creation⁴⁸³ and to think about God's miracles.⁴⁸⁴ In addition to encouraging the believers to think, the *Qur'ān*

⁴⁷⁸ The *Qur'ān*: 4 (al-Nisā'):43; 5 (al-Mā'idah):6; 9 (al-Tawbah):91; 48 (al-Fath):17; 73 (al-Muzzammil):20.

⁴⁷⁹ The *Qur'ān*: 2 (al-Baqarah):184-185, 196; 5 (al-Mā'idah): 95; 58 (al-Mujādalah):4.

⁴⁸⁰ The *Qur'ān*: 5 (al-Mā'idah): 89.

⁴⁸¹ The *Qur'ān*: 2 (al-Baqarah):256.

⁴⁸² The *Qur'ān*: 10 (Yūnus):99.

⁴⁸³ The *Qur'ān*: 2 (al-Baqarah):21-22, 26, 164; 3 (Āl-'Imrān):6, 26-27, 145, 190-191; 6 (al-An'ām):1-2, 38, 73-81, 95-99, 102, 141-144; 7 (al-A'rāf):34, 54-58, 185; 10 (Yūnus):5-6, 22-24, 31-34, 55-56, 67, 101; 11 (Hūd):6; 13 (al-Ra'd):1-4, 8-15; 14 (Ibrāhīm):32-34; 15 (al-Ḥijr):16-26; 16 (al-Naḥl):3-22, 48-50, 65-70, 72, 78-81; 17 (al-Isrā'):12; 18 (al-Kahf):45; 20 (Ṭāhā):53-55; 21 (al-Anbiyā'):30-35; 22 (al-Ḥajj):5, 61-66; 23 (al-Mu'minūn):12-22; 24 (al-Nūr):42-46; 25 (al-Furqān):45-54, 59-62; 26 (al-Shu'arā'):7-9; 27 (al-Naml):59-64, 86; 28 (al-Qaṣaṣ):71-73; 29 (al-'Ankabūt):60-63; 30 (al-Rūm):19-27, 46-51, 54; 31 (Luqmān):10-11, 20, 25-26, 29-32, 34; 32 (al-Sajdah):7-9; 34 (Saba'):1-2; 35 (Fatir):9-13, 27-28; 36 (Yāsīn):33-46, 68, 71-73, 77-83; 39 (al-Zumar):5-6, 21, 41-42; 40 (Ghāfir):61-70, 79-81; 41 (Fuṣṣilat):9-12, 37-39, 47, 53; 42 (al-Shūrā):11, 28-29, 32-35; 43 (al-Zukhruf):9-14; 45 (al-Jāthiyah):3-6, 12-13; 46 (al-Aḥqāf):33; 49 (al-Ḥujurāt):13; 50 (Qāf):6-11; 51 (al-Dhāriyāt):20-23, 47-49; 53 (al-Najm):45-46; 55 (al-Raḥmān):1-28; 56 (al-Wāqī'ah):57-87; 57 (al-Ḥadīd):2-6, 17; 64 (al-Taghābun):3; 65 (al-Ṭalāq):12; 67 (al-Mulk):1-5; 75 (al-Qiyāmah):36-40; 76 (al-Insān):1-2; 78 (al-Naba'):6-16; 79 (al-Nāzi' Āt):27-33;

82 (al-Infītār):6-8; 86 (al-Ṭāriq):1-14; 87 (al-A'alaá):1-5; 88 (al-Ghāshiyah):17-20; 95 (al-Teen):4-5; 96 (al-'Alaq):2

⁴⁸⁴ The *Qur'ān*: 2 (al-Baqarah):47-60, 72-73, 242-243, 258-260; 3 (Āl-'Imrān):13, 38-41, 44-49, 59, 137-138; 5 (al-Mā'idah):110-120; 6 (al-An'ām):6, 10-11; 7 (al-A'rāf):59-137, 141, 160; 8 (al-Anfāl):54; 9 (al-Tawbah):40, 70; 10 (Yūnus):13-14, 71-92, 102-103; 11 (Hūd):25-103; 12 (Yūsuf):4-103, 109-111; 13 (al-Ra'D): 32; 14 (Ibrāhīm):5-15, 45; 16 (al-Naḥl):36; 17 (al-Isrā'):59, 101-104; 18 (al-Kahf):9-26, 32-44, 60-98; 19 (Maryam):2-36, 98; 20 (Ṭāhā):9-80; 21 (al-Anbiyā'):6-9, 41, 68-91; 22 (al-Ḥajj):48; 23 (al-Mu'minūn):27-50; 24 (al-Nūr):34-35, 39-41; 26 (al-Shu'arā'):10-191; 27 (al-Naml):7-58; 28 (al-Qaṣaṣ):2-14, 29-46, 57-60; 29 (al-'Ankabūt):14-18, 24-44; 34

repeatedly criticizes the unbelievers of not thinking and not using their intelligence and their senses to understand God's signs and His wisdom.⁴⁸⁵ According to the *Qur'ān*, "A book which We [God] have revealed to you [O Muḥammad] so that you may lead the people from out of the darkness into the light by the will of their Lord to the path of the All-Mighty, the Praiseworthy."⁴⁸⁶ Moreover, the *Qur'ān* repeatedly challenges the unbelievers (especially those among the Arab people, who are speaking the same *Qur'ānic* Arabic language) to create at least one chapter that is similar to the *Qur'ān*'s contents (in wisdom and stories) and its style.⁴⁸⁷ However, no human being (regardless of his/her Arabic language skills and regardless of his/her level of education) has been able to do it so far. The *Qur'ān* repeatedly encourages all human beings to think freely and to take charge of their own life and be responsible for their own actions. The *Qur'ān* encourages all human beings to have their own free choice (with fair warning that God is

(Saba'):10-19, 45; 35 (Fatir):25-26, 44; 36 (Yāsīn):13-32; 37 (al-Şāffāt):71-148; 38 (Şād):36-42; 39 (al-Zumar):25-26; 40 (Ghāfir):5-6, 21-45, 82-84; 41 (Fuşşilat):13-18; 43 (al-Zukhruf):6-8, 45-56; 44 (al-Dukhān):17-39; 46 (al-Aḥqāf):21-28; 47 (Muḥammad):10, 13; 50 (Qāf):12-14, 36; 51 (al-Dhāriyāt):24-46; 53 (al-Najm):50-54; 54 (al-Qamar):1-4, 9-42; 64 (al-Taghābun):5-6; 65 (al-Ṭalāq):8-10; 66 (al-Taḥrīm):12; 68 (al-Qalam):17-33, 48-50; 69 (al-Ḥaqqah):4-12; 71 (Nūh):1-28; 73 (al-Muzzammil):15-16; 79 (al-Nāzi'āt):15-26; 89 (al-Fajr):6-14.

⁴⁸⁵ The *Qur'ān*: 2 (al-Baqarah):6-20, 44, 74-79, 170-171, 257; 3 (Āl-'Imrān):80; 5 (al-Mā'idah):71, 75-76, 103-104; 6 (al-An'ām):25, 39, 46, 50, 55-67, 71, 103-105, 109-110, 122-126, 136-140; 7 (al-A'rāf):28, 33, 146-149, 175-179, 191-198; 8 (al-Anfāl):21-23; 10 (Yūnus):12, 18-23, 35-36, 42, 59-60, 68-69, 104-106; 11 (Hūd):5, 18-24; 12 (Yūsuf):39-40, 105-111; 13 (al-Ra'd):16-17, 19; 16 (al-Naḥl):51-60, 73-74, 106-108; 17 (al-Isrā'):40, 46, 56; 18 (al-Kahf):56-59, 101; 19 (Maryam):41-42; 20 (Ṭāhā):88-89, 128; 21 (al-Anbiyā'):2-3, 10, 22-24, 42-45, 50-67; 22 (al-Ḥajj):11-13, 42-46, 73; 23 (al-Mu'minūn):66-92; 25 (al-Furqān):3, 35-40, 43-44, 55, 73; 27 (al-Naml):4, 65-69, 79-81; 29 (al-'Ankabūt):19-20; 30 (al-Rūm):8-9, 28, 40-42, 52-53; 31 (Luqmān):7; 32 (al-Sajdah):26-27; 34 (Saba'):9; 35 (Fatir):14, 19-24; 36 (Yāsīn):8-10, 62, 74-75; 37 (al-Şāffāt):149-159; 38 (Şād):29; 39 (al-Zumar):38, 43-45; 40 (Ghāfir):12-13, 53-58; 43 (al-Zukhruf):15-25, 87; 45 (al-Jāthiyah):7-9, 23-26; 50 (Qāf):37; 57 (al-Ḥadīd):9; 62 (al-Jumu'ah):5; 67 (al-Mulk):9-10, 15-24, 30; 68 (al-Qalam):35-47; 74 (al-Muddaththir):49-52.

⁴⁸⁶ The *Qur'ān*: 14 (Ibrāhīm):1.

⁴⁸⁷ The *Qur'ān*: 2 (al-Baqarah):23-24, 151; 3 (Āl-'Imrān):164; 4 (al-Nisā'):82; 5 (al-Mā'idah):15-16; 7 (al-A'rāf):52-53, 157, 203; 8 (al-Anfāl):31-33; 9 (al-Tawbah):64-65, 124-129; 10 (Yūnus):15-17, 37-44, 57-58; 11 (Hūd):1, 13-14; 12 (Yūsuf):1-3; 13 (al-Ra'd):37; 14 (Ibrāhīm):1, 4; 16 (al-Naḥl):102-103; 17 (al-Isrā'):41, 88-89, 106; 18 (al-Kahf):27, 54, 109-110; 20 (Ṭāhā):99, 113-114, 133-135; 22 (al-Ḥajj):16; 25 (al-Furqān):32-33; 26 (al-Shu'arā'):192-199; 27 (al-Naml):76-78; 28 (al-Qaṣaṣ):47-50; 29 (al-'Ankabūt):48-52; 30 (al-Rūm):58-60; 31 (Luqmān):27; 36 (Yāsīn):69; 39 (al-Zumar):23, 27-29; 40 (Ghāfir):78; 41 (Fuşşilat):2-6, 40-44; 43 (al-Zukhruf):2-4; 44 (al-Dukhān):58-59; 45 (al-Jāthiyah):20; 46 (al-Aḥqāf):2-4, 10-12; 52 (al-Ṭūr):29-34; 59 (al-Ḥashr):21; 62 (al-Jumu'ah):2-3; 69 (al-Ḥaqqah):38-48; 73 (al-Muzzammil):5.

watching what they are doing). At the same time, the *Qur'ān* confirms that every one of God's messengers (including Prophet Muḥammad) is no more than a Warner and a carrier of good tidings and is only delivering God's message. Therefore, human beings should make informed free choice.⁴⁸⁸ This confirms the *Qur'ānic* principle of exercising the responsible freedom of choice.

5. The BHR to legitimate pleasure (which serves the same function as Nussbaum's BHCs of "Emotions" and "Play"): According to the *Qur'ān*,

Made to appear pleasing to mankind is the love [and cherishing] of lusts [and desires]: Of women and children and that which is stored-up heaps [of treasures] of gold and silver and horses, ones that are distinguished with high mark [and fine branded for blood and excellence], and [wealth of] cattle and cultivation [of well-tilled land]. These are the enjoyments of this [present] worldly life, while Allāh has with Him the beauty [and the goodness and the fairest] of the Destination [the final resort and return to Him].⁴⁸⁹

However, this pleasure is limited in time (i.e. temporary pleasure during this worldly life) for the unbelievers⁴⁹⁰ and it has to be legitimate pleasure for the believers.⁴⁹¹ Therefore,

⁴⁸⁸ The *Qur'ān*: 2 (al-Baqarah):119, 134, 139, 141, 165-167; 3 (Āl-'Imrān):20, 178-179; 4 (al-Nisā'):63, 94, 165; 5 (al-Mā'idah):48, 92, 99, 105; 6 (al-An'ām):48, 69-70, 90-91, 112, 135, 164; 7 (al-A'rāf):2, 155, 183-186, 188; 9 (al-Tawbah):6, 105; 10 (Yūnus):11, 61, 99, 108; 11 (Hūd):2, 12, 15, 121-122; 13 (al-Ra'd):7, 40; 14 (Ibrāhīm):42-44, 52; 15 (al-Ḥijr):3, 89; 16 (al-Nahl):2, 35, 43-44, 82, 125; 17 (al-Isrā'):36, 84, 105, 107-109; 18 (al-Kahf):1-2, 29; 19 (Maryam):97; 20 (Tāhā):2-4; 21 (al-Anbiyā'):106-09; 22 (al-Ḥajj):49- 51; 23 (al-Mu'minūn):51-56; 24 (al-Nūr):54, 64; 25 (al-Furqān):1, 56; 26 (al-Shu'arā'):208-09; 27 (al-Naml):84-85, 92-93; 28 (al-Qaṣaṣ):51-56; 29 (al-'Ankabūt):64-66; 30 (al-Rūm):44; 31 (Luqmān):23-24; 32 (al-Sajdah):2-3; 33 (al-Aḥzāb):45-47; 34 (Saba'):24-37, 46; 36 (Yāsīn):6, 11, 54, 70; 37 (al-Ṣāffāt):27-33, 39; 38 (Ṣād):65-70; 39 (al-Zumar):7, 39; 42 (al-Shūrā):7, 15, 48; 43 (al-Zukhruf):83, 88-89; 44 (al-Dukhān):2-3; 46 (al-Aḥqāf):9, 19; 48 (al-Fath):8; 50 (Qāf):1-2, 45; 51 (al-Dhāriyāt):50-55; 52 (al-Ṭūr):45; 53 (al-Najm):29, 38-41, 56; 59 (al-Ḥashr):18-19; 64 (al-Taghābun):12; 67 (al-Mulk):13-14, 26; 68 (al-Qalam):52; 70 (al-M'ārij):42; 74 (al-Muddaththir):54-55; 75 (al-Qiyāmah):13-15; 76 (al-Insān):3, 29; 77 (al-Mursalāt):29; 78 (al-Naba'):39-40; 79 (al-Nāzi'āt):34-46; 80 ('Abasa):11-12; 81 (al-Takwīr):27-28; 86 (al-Ṭāriq):15-17; 87 (al-A'alaá):9; 88 (al-Ghāshiyah):21-22; 96 (al-'Alaq):13-14.

⁴⁸⁹ The *Qur'ān*: 3 (Āl-'Imrān):14. In this verse, the pleasures of this world are first enumerated: women for love; children for strength and pride; hoarded riches, which procure all luxuries; the best and finest pedigree horses; cattle, the measure of wealth in the ancient world, as well as the means and symbols of good farming in the modern world; and broad acres of well-tilled land. By analogy, we may include, for our mechanized age, machines of all kinds, motor/cars, airplanes, etc. In "stored-up heaps of gold and silver," the Arabic word that is translated into heaps is *Qanāṭīr* (plural of *Qintār*). One *Qintār* = 1200 Ounces of gold.

⁴⁹⁰ The *Qur'ān*: 2 (al-Baqarah):35-36, 96, 126; 3 (Āl-'Imrān):185, 196-197; 6 (al-An'ām):32; 7 (al-A'rāf):24-25; 10 (Yūnus):24, 70; 11 (Hūd):15; 13 (al-Ra'd):26; 16 (al-Nahl):80-81; 18 (al-Kahf):46; 21 (al-Anbiyā'):111; 23 (al-

this pleasure is permitted within certain limitations and restrictions or what the *Qur'ān* called *Hudūd* Allāh (God's borders).⁴⁹² For example, in its chapter 4 (al-Nisā'/Women), the *Qur'ān* specifies the categories of women that Muslim men are prohibited to marry.⁴⁹³ For another example, in its chapter 5 (al-Mā'idah/Table Spread), the *Qur'ān* specifies the categories of food that Muslims are prohibited from eating.⁴⁹⁴

6. The BHR to practical social cooperation (which serves the same function as Nussbaum's BHC of "Affiliation part A"): The *Qur'ān* encourages the believers to find pleasure in doing their good deeds. Therefore, the *Qur'ān* described the believers as

And those who had settled in the hometown [al-Madīnah al-Munawarah⁴⁹⁵], and [had adopted] the faith prior to emigrants' arrival, they love those who have emigrated to them as refugees, and they do not find in their hearts any need [or ambition] of that which those [emigrants] have been given, but give [emigrants] preference over themselves, even though they had been in destitution. And

Mu'minūn):52-56; 28 (al-Qaṣaṣ):60-61; 29 (al-'Ankabūt):64; 30 (al-Rūm):33-34; 36 (Yāsīn):44; 39 (al-Zumar):8; 40 (Ghāfir):39; 42 (al-Shūrā):36; 43 (al-Zukhruf):35, 83; 50 (Qāf):6-11; 57 (al-Ḥadīd):20; 70 (al-M'ārij):42; 73 (al-Muzzammil):11; 79 (al-Nāzi'āt):27-33; 80 ('Abasa):24-32; 86 (al-Ṭāriq):13-17.

⁴⁹¹ The *Qur'ān*: 7 (al-A'rāf):26; 10 (Yūnus):22-23; 11 (Hūd):3; 16 (al-Naḥl):5-18; 23 (al-Mu'minūn):71; 24 (al-Nūr):55.

⁴⁹² The *Qur'ān*: 2 (al-Baqarah):22, 168, 172, 187, 219-223, 229-230; 4 (al-Nisā'):13-14, 19, 134-135; 5 (al-Mā'idah):1-5, 87-88, 100; 6 (al-An'ām):70, 119-121, 135-145; 7 (al-A'rāf):10, 31-33, 51, 189-190; 8 (al-Anfāl):53; 9 (al-Tawbah):65-66, 112; 10 (Yūnus):59; 14 (Ibrāhīm):31-34; 15 (al-Ḥijr):88; 16 (al-Naḥl):72, 78, 114-117; 17 (al-Isrā'):26-32, 70; 18 (al-Kahf):7; 20 (Ṭāhā):131; 23 (al-Mu'minūn):78; 24 (al-Nūr):3, 26-33, 61; 25 (al-Furqān):67-68; 28 (al-Qaṣaṣ):50, 76-84; 29 (al-'Ankabūt):17; 30 (al-Rūm):21, 29, 31 (Luqmān):6, 20, 33; 32 (al-Sajdah):9; 35 (Fatir):5, 12; 36 (Yāsīn):33-44, 71-73; 39 (al-Zumar):53-54; 40 (Ghāfir):64-66, 79-81; 42 (al-Shūrā):37; 43 (al-Zukhruf):10-14; 45 (al-Jāthiyah):12; 47 (Muḥammad):14, 36; 53 (al-Najm):32; 58 (al-Mujādalah):3-4; 62 (al-Jumu'ah):9-11; 65 (al-Ṭalāq):1-7; 67 (al-Mulk):15, 23; 79 (al-Nāzi'āt):37-41.

⁴⁹³ The *Qur'ān*: 4 (al-Nisā'):22-28.

⁴⁹⁴ The *Qur'ān*: 5 (al-Mā'idah):1-5, 95-96; See Also 2 (al-Baqarah):173; 6 (al-An'ām):119-121, 138-145; 16 (al-Naḥl):115.

⁴⁹⁵ This relates, in the first instance, to the historical *al-Anṣār* (supporters)/Inhabitants of al-Madīnah al-Munawarah (A city in Today's Saudi Arabia), who had embraced Islam before the Prophet Muḥammad and his Meccan followers (refugees from Mecca) immigrated to them, and who received the refugees with utmost generosity, sharing with them like brethren their own dwellings and all their possessions. In a wider sense, the above refers also to all true believers, at all times, who live in freedom and security, and are prepared to receive with open arms anyone who is compelled to leave his homeland in order to be able to live in accordance with the dictates of his faith.

whoever is protected from the stinginess [and greed⁴⁹⁶] of his soul - those who will be the successful.⁴⁹⁷

In addition, the *Qur'ān* encourages the believers to help others for the sake of God. Therefore, the *Qur'ān* described the believers as “Those who spend their wealth in the way of Allāh and, then, they do not follow up what they have spent with reproachful reminders [of their generosity] nor with [other] injury, they will have their reward with their Lord. And there will be no fear for them nor will they grieve.”⁴⁹⁸ Muslims should follow the principle of mutual responsibility, because the individual and the society have responsibilities towards each other. The individual is obligated to seek the welfare and prosperity of the society. At the same time, the society is responsible for the welfare of all individuals including its weakest members. Therefore, all members of the society should pay *Zakāh*. *Zakāh* is a social tax that is paid to provide for those who cannot provide for themselves. *Zakāh* creates a sense of unity, love, cooperation and higher purpose.⁴⁹⁹ Prophet Muḥammad described the Muslim community as a single human body, where the welfare of each part affects the welfare of the whole body; the sufferings, hunger, or

⁴⁹⁶ Therefore, greed, niggardliness, and covetousness are pointed out here as the main obstacles to man's attaining to a happy state in this world and in the hereafter.

⁴⁹⁷ The *Qur'ān*: 59 (al-Ḥaṣhr):9. This verse refers to *al-Anṣār* who accepted Islam when it was persecuted in Mecca, and who invited Prophet Muḥammad to join them and become their Leader in al-Madīnah al-Munawarah. Prophet Muḥammad's and his Meccan followers' immigration was possible because of their goodwill and their generous hospitality. They entertained the Prophet and all the refugees who came with him. The most remarkable ties of full brotherhood were established between individual members of the one group and the other. Until the Muslim community got its own resources, the supporters regularly gave and the Refugees regularly received. The supporters consider it a privilege to entertain the Refugees, and even the poor vied with the rich in their spirit of self-sacrifice. When the major portion of the land was assigned to the refugees, there was not the least jealousy on the part of the supporters. They rejoiced in the good fortune of their brethren.

⁴⁹⁸ The *Qur'ān*: 2 (al-Baqarah):262.

⁴⁹⁹ The *Qur'ān*: 2 (al-Baqarah):110, 177, 195, 207, 254, 261-274, 277; 3 (Āl-'Imrān):92; 4 (al-Nisā'):36-40, 162; 5 (al-Mā'idah):2, 55-56; 7 (al-A'rāf):156; 8 (al-Anfāl):72-75; 9 (al-Tawbah):18, 34, 60, 71, 103; 13 (al-Ra'd):22; 17 (al-Isrā'):26-30; 22 (al-Ḥajj):78; 23 (al-Mu'minūn):1-4; 24 (al-Nūr):22, 37, 55-56;27 (al-Naml):1-3; 30 (al-Rūm):38-39; 31 (Luqmān):1-5; 35 (Fatir):18, 29-30; 47 (Muḥammad):38; 51 (al-Dhāriyāt):19; 57 (al-Ḥadīd):7-11, 18; 58 (al-Mujādalah):12-13; 60 (al-Mumtaḥanah):8; 63 (al-Munāfiqūn):7, 9-11; 64 (al-Taghābun):15-18; 73 (al-Muzzammil):20; 92 (al-Layl):1-21; 98 (al-Bayyinah):5.

wrongdoing of one member of the community is felt by the whole community.⁵⁰⁰ Therefore, there is a need for the government to act on behalf of society when individuals cannot resolve their own issues.⁵⁰¹ In order to accomplish both the welfare of the individual and the welfare of the society as a whole, there is a need for practical laws that guarantee an economically just, fair, and prosperous society, where any of its member ought not to exploit others for his/her own benefit (to implement God's commandments against luxury and exploitation). *Zakāh* provides the tools for curing the inequities and the temporary instabilities of the free market while protecting the private property and providing the just distribution of common goods. *Zakāh* (as we will see) includes principles and practices that guarantee the social welfare without creating dependency or losing human dignity. In rejecting the evil of exploitation, usury is condemned in the *Qur'ān*, because usury causes suffering and misery for the weak members of the society while benefiting only the rich moneylenders. It causes humans to treat each other as economic objects.⁵⁰²

7. The BHR to equality and non-discrimination (which serves the same function as Nussbaum's BHC of "Affiliation part B"): As we have seen above, one of Islam's central concepts is the Islamic notion of absolute equality of all humanity. To prove this right, appeal can be made to the *Qur'ān* for evidence of the Islamic notion of absolute equality

⁵⁰⁰ Prophet Muḥammad said: "The similitude of believers in their mutual love, affection, fellow-feeling is that of one body; when any limb of it aches, the whole body aches, because of sleeplessness and fever." This is a prophetic *Ḥadīth* from Abū al-Ḥusayn 'Asākir al-Dīn Muslim ibn al-Ḥajjāj ibn Muslim ibn Ward ibn Kawshādh al-Qushayrī al-Naysābūrī [Muslim al-Naysābūrī] from al-nu'mān ibn Bashīr ibn Sa'ad ibn Tha'labah al-Anṣārī al-Khazrajī from Prophet Muḥammad. This *Ḥadīth* is found in "Virtue, Good Manners and Joining of the Ties of Relationship" in *al-Musnadu al-Ṣaḥīhu bi Nakli al-'Adli [Ṣaḥīh Muslim]*.

⁵⁰¹ This issue about whether governments should act rather than individuals will be discussed further in subsection 3.6.2.2.1, subsection 4.8.2 & subsection 4.8.5.1, below.

⁵⁰² The *Qur'ān*: 2 (al-Baqarah):275-281; 3 (Āl-'Imrān):130; 4 (al-Nisā'):161; 30 (al-Rūm):39.

of all humanity such as: “O believers! Do not let any people put down any other people who may be better than they are; neither let women put down women who may be better than they are. And find not fault with one another, neither insult one another by nicknames...”⁵⁰³ In other words, “O mankind! We [God] have created you from a male and a female, and made you into nations and tribes, that you may know each other. Surely the most honored of you, in the sight of Allāh, is the most God-fearing of you, Allāh is All-knowing All-aware.”⁵⁰⁴ The *Qur’ān* teaches that no human is superior in origin or nature, for all were created from the same soul. “O Mankind, fear your Lord, who created you of a single soul, and from it created its mate, and from the pair of them spread abroad a multitude of men and women; and fear Allāh by whom you claim [your rights] of one another, and towards the wombs [that bare you]; surely Allāh ever watches over you.”⁵⁰⁵ Moreover, in his farewell speech, Prophet Muḥammad announced the constitution of Islam:

All mankind is from Adam and Eve, an Arab has no superiority over a non-Arab nor a non-Arab has any superiority over an Arab; also a white has no superiority over black nor a black has any superiority over white except by piety and good action. Learn that every Muslim is a brother to every Muslim and that the Muslims constitute one brotherhood. Nothing shall be legitimate to a Muslim which belongs to a fellow Muslim unless it was given freely and willingly. Do not, therefore, do injustice to yourselves.⁵⁰⁶

8. The BHR to environmental sustainability (which serves the same function as Nussbaum’s BHC of “Other species”): Due to the fact that God gives the right to life to all of His

⁵⁰³ The *Qur’ān*: 49 (al-Ḥujurāt):11.

⁵⁰⁴ The *Qur’ān*: 49 (al-Ḥujurāt):13.

⁵⁰⁵ The *Qur’ān*: 4 (al-Nisā’):1.

⁵⁰⁶ This is a part of the Last Sermon of Prophet Muḥammad delivered on the Ninth Day of Dhū al-ḥijjah in the year 10 After Hijrah (i.e. on 9 March 632 CE) in the Uranah valley of Mount ‘Arafāt (in Mecca), online: IslamiCity <<http://www.islamicity.com>>.

creatures, He gives the right to sustainable environment that is suitable to live in for all of His creatures. According to the *Qur'ān*, “Every moving creature on earth depend on God for its sustenance: God knows the time and place of its habitation [its definite abode where a thing stops or stays for some time, where it is established: denoting its life on this earth] and its repository [its temporary deposit where a thing is laid up or deposited for a little while: denoting its temporary pre-natal existence in the egg or the womb and its after-death existence in the tomb or whatever state it is in until its resurrection]: All is in a clear Record.”⁵⁰⁷ Therefore, the creature will be responsible and accountable to God about not saving the environment for his/her future generations⁵⁰⁸ (including squandering his/her substance wastefully, i.e. without a righteous purpose or in a frivolous cause⁵⁰⁹); and the creature has no right to cause any damage⁵¹⁰ to the environment (unless within God’s borders),⁵¹¹ which means the creature has the BHR to protected sustainable environment. This right is a perfect complement for the BHR to practical social cooperation. While Muslims should cooperate with each other and live in harmony with all human beings, they should also live in harmony with other species in the natural world. For example, the *Qur'ān* reminds human beings of this responsibility using a metaphor of an ant who told the other ants to hide in their dwelling-places until Prophet Solomon and his hosts pass through their valley, because he and his hosts might crush them while being unaware.⁵¹² For another example, Prophet Muḥammad told a story of a

⁵⁰⁷ The *Qur'ān*: 11 (Hūd):6.

⁵⁰⁸ The *Qur'ān*, in 2 (al-Baqarah):266, uses a metaphor to remind human beings of this responsibility.

⁵⁰⁹ The *Qur'ān*: 17 (al-Isrā’):26-30; 25 (al-Furqān):67.

⁵¹⁰ The *Qur'ān*: 2 (al-Baqarah):204-206.

⁵¹¹ The *Qur'ān*: 59 (al-Ḥashr):5.

⁵¹² The *Qur'ān*: 27 (al-Naml):18.

woman who will be punished in the Hereafter because of a cat. She had neither provided her with food nor drink, nor set her free so that it might eat the insects of the earth.⁵¹³

9. The BHR to be consulted, i.e. right to a free democracy (which serves the same function as Nussbaum's BHC of "Control over one's political environment"): Prophet Muḥammad introduced a kind of democracy within the Muslim community after overthrowing the pagan aristocrats. To prove this right, appeal can be made to the *Qur'ān* for evidence of the Islamic institution of *al-Shūrā* (consultation), which supports the principle of democracy and public consultation (elections). According to the *Qur'ān*,

So by mercy from Allāh, [O Muḥammad], you were lenient with them [the public]. And if you had been rude [in speech] and harsh in heart, they would have scattered from about you. So pardon them and ask forgiveness for them and consult them in the affair. And when you have decided, then rely upon Allāh. Indeed, Allāh loves those who rely [upon Him].⁵¹⁴

In another verse, the *Qur'ān* portrays the believers as "And those who have responded to their Lord and established prayer and whose affair is [determined by] consultation among themselves, and from what We [God] have provided them, they spend."⁵¹⁵

10. The BHR to private property (which serves the same function as Nussbaum's BHC of "Control over one's material environment"): The human being's authority on earth cannot be separated from God. Without God's divine guidance, the human being loses his/her authority and legitimacy as a ruler over earth. God said: "Guidance shall reach you from Me [God]. Those who follow My guidance shall have nothing to fear nor shall they grieve, but those who deny and oppose Our revelations shall have the fire, wherein they

⁵¹³ This is a prophetic *Hadīth* from Muslim al-Naysābūrī from Abū Hurāīrah `Abd al-Raḥman ibn Ṣakhr al-Azdī [Abū Hurāīrah] from Prophet Muḥammad. This *Hadīth* is found in "Salutations and Greetings" in *Ṣaḥīḥ Muslim*.

⁵¹⁴ The *Qur'ān*: 3 (Āl-'Imrān):159.

⁵¹⁵ The *Qur'ān*: 42 (al-Shūrā): 38.

shall abide."⁵¹⁶ Due to the fact that God is the only true owner of everything, the human being receives his/her private property as a trust from God. Therefore, humans are obliged to use their private property in the cause of God, which is the good of the whole society. Therefore, the individual (as a representative of God) should act as a manager of his/her private property on behalf of the whole society; his/her possession of his/her private property is a responsibility rather than a right. On the other hand, the *Qur'ān* protects the right of individuals to ownership of private property from theft and robbery. However, his/her right to ownership is conditional on his/her fulfillment of his/her economic duties to the whole society, because all properties are owned by God in the big picture.⁵¹⁷ It is a responsible private ownership system that is restricted for the welfare of the whole society (not a Marxist common ownership system).

3.5.2 The compatibility between some ideas of Rawls' social contract theory and my progressive Islam perspective about social justice in the *Qur'ān*

While Rawls uses his hypothetical original position in which the parties to his hypothetical social contract chooses mutually acceptable principles of justice behind his hypothetical veil of

⁵¹⁶ The *Qur'ān*: 2 (al-Baqarah):38-39.

⁵¹⁷ The *Qur'ān*: 1 (al-Fātiḥah):4; 2 (al-Baqarah):1-3, 22, 57, 60, 107, 126, 172, 212, 254-255, 267-274; 3 (Āl-'Imrān):26-27, 37, 189-190; 4 (al-Nisā'):36-40, 53-54; 5 (al-Mā'idah):18, 40, 87-88,114, 120; 6 (al-An'ām):73, 75, 140-142, 151; 7 (al-A'rāf):32, 158, 160, 185; 8 (al-Anfāl):2-4, 26; 9 (al-Tawbah):116; 10 (Yūnus):31, 49, 59; 11 (Hūd):6; 12 (Yūsuf):101; 13 (al-Ra'd):22, 26; 14 (Ibrāhīm):31-34; 16 (al-Naḥl):3-18, 52-56, 65-73, 77-81, 112-114; 17 (al-Isrā'):30, 31, 70, 99-100, 111; 20 (Ṭāhā):81, 114, 131-132; 22 (al-Ḥajj):27-28, 34-35, 56; 23 (al-Mu'minūn):84-89, 116; 24 (al-Nūr):38, 42; 25 (al-Furqān):2-3, 26; 27 (al-Naml):60-64; 28 (al-Qaṣaṣ):54, 57, 82; 29 (al-'Ankabūt):17, 59-67; 30 (al-Rūm):19-28, 37, 40; 31 (Luqmān):20, 24-32; 32 (al-Sajdah):15-16; 34 (Saba'):24, 36, 39; 35 (Fatir):2-3, 12-13, 29-30; 36 (Yāsīn):47, 80-83; 39 (al-Zumar):5-8, 44, 49-52; 40 (Ghāfir):13, 16, 61-64; 41 (Fuṣṣilat):50-51; 42 (al-Shūrā):11-12, 19-20, 27-29, 38, 49; 43 (al-Zukhruf):9-13, 85; 44 (al-Dukhān):23-28; 45 (al-Jāthiyah):3-5, 16, 27; 47 (Muḥammad):38; 48 (al-Fath):14; 50 (Qāf):6-11; 51 (al-Dhāriyāt):19-22, 56-58; 57 (al-Ḥadīd):1-11; 59 (al-Ḥashr):23; 62 (al-Jumu'ah):1; 63 (al-Munāfiqūn):7, 9-11; 64 (al-Taghābun):1-4, 15-18; 65 (al-Ṭalāq):3; 67 (al-Mulk):1-5, 15, 21; 85 (al-Burūj):9; 89 (al-Fajr):15-20; 93 (al-Ḍuḥā):6-11; 114 (al-Nas):2.

ignorance, the *Qur'ān* (according to my progressive Islam perspective) claims that all human beings sign a real social contract with their Lord (God) in their previous life in the Spiritual World before they enter into this material world. According to verse 7 (al-A'arāf):172 of the *Qur'ān*, “And [O Muḥammad, remember, on the Day of the contract,] when your Lord took [drew forth] from the children of Adam, from their loins [generative organs], their seed [offspring/descendants] and made them testify against themselves, [asking them:] ‘Am I not your Lord?’ They said: ‘Of course, [yes, You are.] We have testified.’ [Of this We remind you, therefore,] you cannot say on the day of Resurrection: ‘We were unaware of this [contract/we did not make this promise].’”⁵¹⁸ This verse is read in Arabic language as follows:

{ وَإِذْ أَخَذَ رَبُّكَ مِن بَنِي آدَمَ مِن ظُهُورِهِمْ ذُرِّيَّتَهُمْ وَأَشْهَدَهُمْ عَلَىٰ أَنفُسِهِمْ أَلَسْتُ بِرَبِّكُمْ قَالُوا بَلَىٰ شَهِدْنَا أَن تَقُولُوا يَوْمَ الْقِيَامَةِ إِنَّا كُنَّا عَنْ هَذَا غَافِلِينَ }⁵¹⁹

This verse has led to two different major opinions in interpretation. I agree with the majority's opinion (such as among the classical scholars, al-Maḥallī and al-Ṣuyūṭī,⁵²⁰ al-Qurṭubī,⁵²¹ al-Rāzī,⁵²² al-Shawkānī,⁵²³ al-Ṭabarī,⁵²⁴ al-Wāḥidī,⁵²⁵ Ibn 'Abbās;⁵²⁶ among the modern scholars, Ḥūmid,⁵²⁷ Ibn 'Āshūr,⁵²⁸ Quṭb,⁵²⁹ al-Ṣābūnī,⁵³⁰ al-Sha'rāwī,⁵³¹ and among *Shī'ah* scholars, Ibn

⁵¹⁸ The *Qur'ān*: 7 (al-A'rāf):172.

⁵¹⁹ *Ibid.*

⁵²⁰ al-Maḥallī & al-Ṣuyūṭī, *supra* note 57, in the comments regarding verse 7 (al-A'rāf):172 of the *Qur'ān*.

⁵²¹ al-Qurṭubī, *supra* note 58, in the comments regarding verse 7 (al-A'rāf):172 of the *Qur'ān*.

⁵²² al-Rāzī, *supra* note 59, in the comments regarding verse 7 (al-A'rāf):172 of the *Qur'ān*.

⁵²³ al-Shawkānī, *supra* note 60, in the comments regarding verse 7 (al-A'rāf):172 of the *Qur'ān*.

⁵²⁴ al-Ṭabarī, *supra* note 61, in the comments regarding verse 7 (al-A'rāf):172 of the *Qur'ān*.

⁵²⁵ Abī al-Ḥasan 'Alī ibn Aḥmad al-Wāḥidī, *al-Wajīz fī Tafsīr al-Kitāb al-'Azīz*, in the comments regarding verse 7 (al-A'rāf):172 of the *Qur'ān*, online: al-Tafsīr <<http://www.altafsir.com>>.

⁵²⁶ Ibn 'Abbās, *supra* note 63, in the comments regarding verse 7 (al-A'rāf):172 of the *Qur'ān*.

⁵²⁷ As'ad Maḥmūd Ḥūmid, *Aysar al-Tafsīr: Tafsīr, Asbāb al-Nuzūl, Aḥādīth*, in the comments regarding verse 7 (al-A'rāf):172 of the *Qur'ān*, online: al-Tafsīr <<http://www.altafsir.com>>.

⁵²⁸ Ibn 'Āshūr, *supra* note 68, in the comments regarding verse 7 (al-A'rāf):172 of the *Qur'ān*.

⁵²⁹ Quṭb, *supra* note 54, in the comments regarding verse 7 (al-A'rāf):172 of the *Qur'ān*.

Furāt⁵³² and al-Qummī⁵³³) that each individual in all future generations of Adam had a separate existence from the time of Adam, and a promise/contract was taken from all of them, which is binding accordingly on each individual. The words in the text refer to the descendants of the children of Adam, i.e. to all humanity, born or unborn, without any limit of time. Adam's seed carries on the existence of Adam and succeeds to his spiritual heritage. Humanity has been given (by God) certain powers and faculties, whose possession creates on our side special spiritual obligations which we must faithfully discharge. These obligations may from a legal point of view be considered as arising from this implied contract. While in the previous verse⁵³⁴ a reference was made to the implied contract for the Jewish nation, the reference in this verse is to the implied contract for the whole of humanity, because Prophet Muḥammad's mission is for the whole of humanity.

On the other hand, other opinions in interpretation (such as among the classical scholars, al-Andalusī,⁵³⁵ al-Bayḍāwī,⁵³⁶ al-Zamakhsharī,⁵³⁷ Ibn Kathīr,⁵³⁸ among the modern scholars, al-Ālūsī,⁵³⁹ Aṭṭafayyish,⁵⁴⁰ Ṭanṭāwī,⁵⁴¹ and among *Shī'ah* scholars, al-kāshānī,⁵⁴² al-Janābdhī,⁵⁴³ al-

⁵³⁰ Muḥammad 'Alī al-Ṣābūnī, *Ṣafwat al-Tafsīr*, in the comments regarding verse 7 (al-A'rāf):172 of the *Qur'ān*, online: al-Tafsīr <<http://www.altafsir.com>>.

⁵³¹ al-Sha'rāwī, *supra* note 70, in the comments regarding verse 7 (al-A'rāf):172 of the *Qur'ān*.

⁵³² Furāt ibn Furāt ibn Ibrāhīm al-Kūfī, *Tafsīr Furāt al-Kūfī*, in the comments regarding verse 7 (al-A'rāf):172 of the *Qur'ān*, online: al-Tafsīr <<http://www.altafsir.com>>.

⁵³³ al-Qummī, *supra* note 76, in the comments regarding verse 7 (al-A'rāf):172 of the *Qur'ān*.

⁵³⁴ The *Qur'ān*: 7 (al-A'rāf):171.

⁵³⁵ al-Andalusī, *supra* note 55, in the comments regarding verse 7 (al-A'rāf):172 of the *Qur'ān*.

⁵³⁶ al-Bayḍāwī, *supra* note 56, in the comments regarding verse 7 (al-A'rāf):172 of the *Qur'ān*.

⁵³⁷ al-Zamakhsharī, *supra* note 62, in the comments regarding verse 7 (al-A'rāf):172 of the *Qur'ān*.

⁵³⁸ Ibn Kathīr, *supra* note 64, in the comments regarding verse 7 (al-A'rāf):172 of the *Qur'ān*.

⁵³⁹ al-Ālūsī, *supra* note 65, in the comments regarding verse 7 (al-A'rāf):172 of the *Qur'ān*.

⁵⁴⁰ Aṭṭafayyish, *supra* note 67, in the comments regarding verse 7 (al-A'rāf):172 of the *Qur'ān*.

⁵⁴¹ Ṭanṭāwī, *supra* note 71, in the comments regarding verse 7 (al-A'rāf):172 of the *Qur'ān*.

⁵⁴² al-kāshānī, *supra* note 75, in the comments regarding verse 7 (al-A'rāf):172 of the *Qur'ān*.

⁵⁴³ al-Janābdhī, *supra* note 77, in the comments regarding verse 7 (al-A'rāf):172 of the *Qur'ān*.

Ṭabarsī,⁵⁴⁴ and al-Ṭabāṭabā’ī.⁵⁴⁵) argue that this verse is in the past tense, stressing the continuous recurrence of the above metaphorical “question” and “answer”. The ability to perceive the existence of the Supreme Power is inborn in human nature (i.e. *Fiṭrah*). This instinctive cognition (which may or may not be subsequently blurred by self-indulgence or adverse cultural influences) makes every sane human being “bear witness against himself” before God. God’s “speaking” and man’s “answering” in the *Qur’ān* is usually a metonym for the creative act of God and of man’s existential response to it.

Regardless of the differences between these two different major opinions in interpretation, both of them suggested the idea that there is a real social contract between God and the whole of humanity.⁵⁴⁶ However, I prefer the first opinion in interpretation, which includes all human beings in this *Qur’ānic* social contract, because the second opinion in interpretation excludes people with mental disabilities from this *Qur’ānic* social contract. This contract is completed as follows: We acknowledge that God is our Lord, Creator and Sustainer; therefore, we testify against ourselves and acknowledge our duty to Him. This obligation flows from our very nature when it is pure and uncorrupted.

The main difference between Rawls’s hypothetical social contract and the *Qur’ānic* real social contract is that the *Qur’ānic* contract is between only two parties: the first party is God and the second party is the whole of humanity. In the same way as Rawls’s hypothetical veil of

⁵⁴⁴ al-Ṭabarsī, *supra* note 78, in the comments regarding verse 7 (al-A’rāf):172 of the *Qur’ān*.

⁵⁴⁵ al-Ṭabāṭabā’ī, *supra* note 79, in the comments regarding verse 7 (al-A’rāf):172 of the *Qur’ān*.

⁵⁴⁶ Although the Arabic words for “covenant” (in the Biblical sense) may not necessarily convey the meaning of social contract (because there is a contemporary intellectual context to the concept of social contract), progressive Islam perspective may reinterpret these words as a social contract.

ignorance hides all facts (e.g. social class, generation, race, physical handicaps, etc.) that could confuse what the idea of distributive justice should be (principles that are fair to all), all human beings in their spiritual form (the second party to this *Qur'ānic* real social contract) could not know all of these facts (i.e. no human being could have known how s/he will end up in the society).⁵⁴⁷

Therefore, God drew forth the seed of Adam and all of his descendants in a molecular form possessing intellects; He made them testify against themselves. At the same time, God took from His messengers their promise to perform their sacred duty to act as warners and carriers of good tidings; i.e. to convey His message that includes His commandments and His prohibitions from Him to all human beings. According to the *Qur'ān*, “We [God] took from [all of] the Prophets their pledge: as [We did] from you [Muḥammad], and from Noah, and Abraham, and Moses, and Jesus son of Mary; We took from [all of] them a firm pledge.”⁵⁴⁸ Then, God returned all of Adam’s descendants to the loins of Adam and subsequently He sent Adam and all of his descendants (the human family) to the earth to test all of them. God sent His Prophets to remind the human family of this contract and to discover those who would deny it and those who would verify it. This contract will be valid until the judgment day. Therefore, the judgment day will not

⁵⁴⁷ Similar to the previous subsection 3.5.1, I should also acknowledge here that I am not trying to find an exact parallel between each of Rawls’ ideas and the *Qur'ān*. Instead, I am trying to explain the terms and conditions of the *Qur'ānic* real social contract (which describe my list of priorities among all of the natural BHRs that are described in subsection 3.5.1), while showing some kind of compatibility with Rawls’ ideas. Therefore, I am inviting the reader to see my vision about the terms and conditions of the *Qur'ānic* social contract according to my progressive Islam perspective.

⁵⁴⁸ The *Qur'ān*: 33 (al-Aḥzāb):7.

come until every person who made this contract has appeared in this worldly life and participated in this examination.⁵⁴⁹

Therefore, the most fundamental Islamic idea of uncompromising monotheism is the central stipulation of this *Qur'ānic* social contract (i.e. the Islamic principle of *Tawḥīd*), which confirms that God is one and unique. The Islamic principle of *Tawḥīd* implies that God's law is comprehensive; it includes all aspects of life and all creatures. According to the *Qur'ān*, "Say [O Muḥammad]: 'He is Allāh, the One [and only], Allāh, al-Ṣamad [the Everlasting Refuge⁵⁵⁰], who has not begotten, and has not been begotten; and there is no one [or nothing] that could be co-equal [or comparable] unto Him.'"⁵⁵¹ This verse by itself is equal to the third of the whole book of the *Qur'ān*, because the total number of verses that talk about the Islamic principle of *Tawḥīd* (in many different ways) is almost the third of the total number of verses in the *Qur'ān*.

The *Qur'ān* argues that the prevailing order and stability throughout the created universe proves that it has been administered by only one God,⁵⁵² because if there were at least two gods, they would surely (at one time or another) disagree; and this disagreement would result in a conflict of wills. According to the *Qur'ān*, "If there were numerous gods instead of one, then, [the heavens and the earth] would have fallen in disorder."⁵⁵³ Moreover, humans unconsciously dislike polytheism, because, according to the *Qur'ān*, even the idol-worshippers forget their false

⁵⁴⁹ The *Qur'ān*: 29 (al-‘Ankabūt):1-3.

⁵⁵⁰ The meaning of al-Ṣamad (which is mentioned only once in the *Qur'ān*) is applied only to God. al-Ṣamad means that God is the primary cause of everything (i.e. He is eternal and absolute; and everything else is conditional or temporal; and all things are dependent on Him).

⁵⁵¹ The *Qur'ān*: 112 (al-Ikhlāṣ):1-4.

⁵⁵² The *Qur'ān*: 27 (al-Naml):60-64; 28 (al-Qaṣaṣ):70-72.

⁵⁵³ The *Qur'ān*: 21 (al-Anbiyā’):22.

gods and ask Allāh for help at their time of crisis. However, as soon as their crisis ended, they go back to their false gods.⁵⁵⁴ Therefore, attributing holiness to a created thing is the only unforgiveable sin (known in Islam as *Shirk*) mentioned in the *Qur'ān*, because it is denying the truth.⁵⁵⁵ According to the *Qur'ān*, “God does not forgive associating partners with Him, but He forgives any lesser sin to whomever He wills. Anyone who associates partners with God has indeed gone far astray.”⁵⁵⁶

Moreover, this *Qur'ānic* social contract has been mentioned repeatedly many times in the *Qur'ān* in all of the stories of the prophets and God’s messengers.⁵⁵⁷ God sent many prophets and messengers including Adam, Noah, Hūd, Šāliḥ, Shu’ayb, Lūṭ, Abraham, Moses, Jesus, and Muḥammad as humanity’s rescuers throughout the human history to rescue human beings every time they have strayed far away from the right path and they have ignored the divine commands. Each of these prophets and messengers invited his people to accept God’s guidance with this unifying message: ”My people, worship God alone; and you have no deity other than Him.”⁵⁵⁸ Although God sent this message throughout the human history, people had the freedom to choose their own path (and suffer the consequences that would result from their disobedience to God).

⁵⁵⁴ The *Qur'ān*: 16 (al-Naḥl):54; 29 (al-‘Ankabūt):65; 30 (al-Rūm):33.

⁵⁵⁵ The *Qur'ān*: 34 (Saba’):20-27; 35 (Fatir):40; 46 (al-Aḥqāf):4.

⁵⁵⁶ The *Qur'ān*: 4 (al-Nisā’):116.

⁵⁵⁷ The *Qur'ān*: 2 (al-Baqarah):27, 40, 63, 83-84, 93; 3 (Āl-‘Imrān):76-77, 81, 187; 4 (al-Nisā’):154-155; 5 (al-Mā’idah):1, 7, 12-14, 70; 6 (al-An‘ām):152; 7 (al-A‘rāf):102, 169; 9 (al-Tawbah):77; 10 (Yūnus):4, 55; 13 (al-Ra‘d):20, 25; 14 (Ibrāhīm):22; 16 (al-Naḥl):38, 95; 17 (al-Isrā’):34, 108; 18 (al-Kahf):21; 19 (Maryam):54; 20 (Tāhā):86; 21 (al-Anbiyā’):104; 23 (al-Mu‘minūn):8; 24 (al-Nūr):55; 25 (al-Furqān):16; 28 (al-Qaṣaṣ):61; 30 (al-Rūm):60; 31 (Luqmān):33; 33 (al-Aḥzāb):7; 35 (Fatir):5; 36 (Yāsīn):52, 60; 40 (Ghāfir):77; 45 (al-Jāthiyah):32; 46 (al-Aḥqāf):16-17; 57 (al-Ḥadīd):8; 70 (al-M‘ārij):32; 73 (al-Muzzammil):18; 77 (al-Mursalāt):7; 85 (al-Burūj):2.

⁵⁵⁸ The *Qur'ān*: 7 (al-A‘rāf):59, 65, 73, 85.

According to the *Qur'ān*, "Mankind was one single nation, and God sent messengers with glad tidings and warnings; and with them, He sent the Book in truth, to judge between people in matters wherein they differed."⁵⁵⁹ Therefore, at the beginning of time, humanity was living under one legal system and upholding one belief system. Then, humanity disagreed and developed different practices. Therefore, God sent messengers with His message (i.e. the Holy Books including the *Qur'ān*) to return humanity to its original unity under one unified system of life. Therefore, the practical result of the Islamic principle of *Tawḥīd* is the unconditional submission to God by truly accepting His divine guidance and fully submitting to His divine system for our life. According to the *Qur'ān*, "In truth, God's guidance is the only guidance."⁵⁶⁰ Therefore, as we will see, flowing out of the Islamic principle of *Tawḥīd* would be all the terms and conditions of this *Qur'ānic* social contract, which are parts of God's guidance that guarantee all of the above *Qur'ānic* BHRs limited by the individual responsibility.

Therefore, the terms and conditions of this *Qur'ānic* social contract can be simplified as follows:⁵⁶¹ Allāh is the only one and unique God for the whole universe; therefore,

1. Due to the fact that God is the true owner of everything, He gives the right to possession (or temporary ownership) of private property (including soul, body, mind, and materials) to anyone of His creatures (as He wishes) and take it away from anyone of His creatures (as He wishes). Therefore, the creature will be responsible and accountable to God about his/her illegitimate usage of his/her private property. The creature has to use his/her right

⁵⁵⁹ The *Qur'ān*: 2 (al-Baqarah):213.

⁵⁶⁰ The *Qur'ān*: 6 (al-An'ām):71.

⁵⁶¹ The following description is my own understanding of this *Qur'ānic* social contract, which involves an interpretive move by mixing modern concepts with the *Qur'ān*; it can be justified through the progressive Islam perspective.

to private property within God's borders, which means the creature has the BHR to responsible ownership.

2. Due to the fact that God is the only creator, He is the true owner of all souls. He gives the right to life to all of His creatures. Therefore, the creature will be responsible and accountable to God about not cherishing his/her life or the life of others. The creature has no right to commit suicide or murder nor to decide when s/he or anyone else will die (unless within God's borders, for example, if it accidentally happened in the case of self-defence), which means the creature has the BHR to secured respected life.
3. Due to the fact that God gives the right to life to all of His creatures, He gives the right to healthy life (including food, health care, clothing, shelter). Therefore, the creature will be responsible and accountable to God about not helping others in obtaining these necessities of a healthy life. The creature has no right to keep more than what s/he needs of these necessities (unless within God's borders, for example, if they are needed for saving a human's soul from death). This means that the creature has the BHR to social income assistance; however, this right has less priority than the BHR to secured respected life.⁵⁶²
4. Due to the fact that God gives the right to life to all of His creatures, He gives the right to sustainable environment that is suitable to live in for all of His creatures. Therefore, the creature will be responsible and accountable to God about not saving the environment for his/her future generations. The creature has no right to cause any damage to the environment (unless within God's borders, for example, if it is required for providing

⁵⁶² My list of priorities for all *Qur'ānic* BHRs is a matter of logic and the reasoning for these priorities will be described further in this same subsection 3.5.2.

necessities for a healthy life for someone in need). This means that the creature has the BHR to protected sustainable environment; however, this right has less priority than the BHR to social income assistance.

5. Due to the fact that God is the true owner of everything and the creature has the right to responsible ownership, God gives the right to suitable community for all of His creatures. Therefore, the creature will be responsible and accountable to God about not helping disadvantaged members of the community. The creature has no right to refuse cooperation with other members of the community (unless within God's borders, for example, if it is required for protecting the environment). This means that the creature has the BHR to practical social cooperation; however, this right has less priority than the BHR to protected sustainable environment.
6. Due to the fact that God gives the right to suitable community for all of His creatures, He gives the right to eliminate all disadvantages facing all of His creatures. Therefore, the creature will be responsible and accountable to God about not eliminating any disadvantage that is caused by him/her. The creature has no right to create barriers to social participation for other members of the community (unless within God's borders, for example, if it is permitted for avoiding any undue harm to the community as a whole). This means that the creature has the BHR to reasonable disability accommodation; however, this right has less priority than the BHR to practical social cooperation.
7. Due to the fact that there is only one and unique God for the humanity and for the whole universe, God is superior to everything; everything else is a creature and inferior to God; and there is no mediator between God and His creatures. Therefore, there are two levels in the whole universe: God is in the first class level and His creatures are in the second

class level. However, within this second class level, God authorized only the human species to have a superior position over all other species. According to the *Qur'ān*, in the story of creation of Adam, Satan diverged from the oneness of God by letting his own hierarchical value idea to replace God's will: God ordered the angels to bow to Adam, who He had created from clay. Satan refused and said: "I am better than him [Adam]; You [God] created me [Satan] from fire and created him [Adam] from clay."⁵⁶³ Due to the fact that there are no lesser gods or mediators between God and His creatures (including human beings), all human beings are equal in the sight of God. Therefore, the human being will be responsible and accountable to God about not eliminating any discrimination that is caused by him/her. The human being has no right to cause any inequality (unless within God's borders, for example, if it is required for providing reasonable disability accommodation). This means that the human being has the BHR to absolute equality and non-discrimination;⁵⁶⁴ however, this right has less priority than the BHR to reasonable disability accommodation.

8. Due to the fact that the purpose of this contract is to set out the rules that will manage the examination period during the life time of each human being on earth, God gives all human beings the right to freedom of choice to act freely in order to see how each human being will live according to this contract and to see who will confirm it and who will deny it. Therefore, each human being will be responsible and accountable to God about all of his/her freely chosen actions during his/her life time. The human being has no right

⁵⁶³ The *Qur'ān*: 7 (al-A'rāf):11-12.

⁵⁶⁴ According to Muḥammad al-Ghazālī, every time a rich man believes that he is better than a poor one, or a white man believes that he is better than a black one, then, he is being arrogant, adopting the same hierarchical principles adopted by Satan in his ignorance, and falling into *Shirk* (the opposite of *Tawḥīd*). Azizah Y al-Hibri, "An Islamic Perspective on Domestic Violence" (2003) 27:1 Fordham Int'l LJ 195 at 198.

to infringe on the right to freedom of choice of other human beings (unless within God's borders, for example, if it is required for avoiding discrimination). This means that the human being has the BHR to responsible freedom of conscience; however, this right has less priority than the BHR to absolute equality and non-discrimination.

9. Due to the fact that each human being has the right to absolute equality and the right to freedom of conscience, God gives each human being the right to participate in a democratic system where s/he can be consulted about matters that concern him/her and that involve his/her life. Therefore, the human being will be responsible and accountable to God about creating barriers to participation in the political system. The human being has no right to infringe on the right of other human beings to participate in the political system (unless within God's borders, for example, if this human being chooses freely not to participate in the political election). This means that the human being has the BHR to be consulted (i.e. right to a free democracy); however, this right has less priority than the BHR to responsible freedom of conscience.
10. Due to the fact that the rules of this contract will manage the examination period during the life time of each human being who has the right to freedom of conscience, God gives each human being the right to pleasure in order to see how each human being will be able to follow his/her pleasure according to this contract and to see who will be able to resist illegitimate temptations and who would not. Therefore, each human being will be responsible and accountable to God about his/her illegitimate usage of his/her right to pleasure; and each human being has to follow his/her pleasure within God's borders, which means the human being has the BHR to legitimate pleasure.

We should note here that the BHR to responsible ownership, the BHR to secured respected life, the BHR to protected sustainable environment, the BHR to responsible freedom of conscience, the BHR to be consulted (i.e. right to a free democracy), and the BHR to legitimate pleasure serve the same function as Rawls's equal basic rights and liberties principle of justice in his theory of justice.⁵⁶⁵ In addition, the BHR to absolute equality and non-discrimination serves the same function as Rawls's equal opportunity principle of justice in his theory of justice.⁵⁶⁶ Furthermore, the BHR to social income assistance, the BHR to practical social cooperation, and the BHR to reasonable disability accommodation serve the same function as Rawls's difference principle of justice in his theory of justice.⁵⁶⁷ However, unlike Rawls, this *Qur'ānic* social contract (while guaranteeing the equal dignity and the equal freedom of individuals) does not require the rational and moral competence of individuals to be part of this contract.

I have a different priority rule from Rawls' priority rule.⁵⁶⁸ My priority rule is that in the case of conflict between these BHRs, these rights are to be ranked in the following order:⁵⁶⁹

1. The highest priority is for the BHR to secured respected life.

⁵⁶⁵ That is "[e]ach person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value". Rawls, *Political Liberalism*, *supra* note 50 at 5.

⁵⁶⁶ That is "[s]ocial and economic inequalities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity". *Ibid* at 6.

⁵⁶⁷ That is "second, they are to be to the greatest benefit of the least advantaged members of society." *Ibid*.

⁵⁶⁸ Rawls's priority rule is: these principles and conditions are to be ranked in the following order:

1. The highest priority to the equal basic rights and liberties principle;
2. Then, the equal opportunity principle; and
3. Finally, the difference principle.

⁵⁶⁹ My list of priorities is a matter of logic and the reasoning for these priorities is described in this same subsection 3.5.2 under the terms and conditions of the *Qur'ānic* social contract at points 3-9 above. In my progressive Islam perspective, our moral virtues are written into our genes, and these moral virtues come originally from God (who is the Creator of everything), and from reason (i.e. the moral judgment which is the eternal wisdom of God), and from our genes (i.e. the moral intuition which is a creature of God). We can notice morality in our genes, when our moral judgment cannot explain what our moral intuition has decided. See section 2.9, above, for more on this topic.

2. The BHR to secured respected life has priority over the BHR to social income assistance, because every human being has a responsibility (according to the *Qur'ānic* social contract) to help others in obtaining the necessities of a healthy life. S/he should not be relieved from this responsibility unless these resources are needed for saving a human's soul from death.
3. The BHR to social income assistance has priority over the BHR to protected sustainable environment, because every human being has a responsibility (according to the *Qur'ānic* social contract) to protect the environment for his/her future generations. S/he should not be relieved from this responsibility unless these damages to the environment are required for providing necessities for a healthy life for someone in need (because not providing these necessities may lead to his/her death).
4. The BHR to protected sustainable environment has priority over the BHR to practical social cooperation, because every human being has a responsibility (according to the *Qur'ānic* social contract) to cooperate with other members of the community. S/he should not be relieved from this responsibility unless refusing this cooperation is required for protecting the environment (because not protecting the environment may endanger the lives of all humans). Moreover, protecting the environment (for all defenceless creatures including humans and non-human creatures) is more important than imposing social cooperation with other humans (i.e. to protect the lives of all defenceless creatures).
5. The BHR to practical social cooperation has priority over the BHR to reasonable disability accommodation, because every human being has a responsibility (according to the *Qur'ānic* social contract) to eliminate barriers to social participation for other

members of the community. S/he should not be relieved from this responsibility unless this elimination would cause undue harm to the community as a whole.

6. The BHR to reasonable disability accommodation has priority over the BHR to absolute equality and non-discrimination, because every human being has a responsibility (according to the *Qur'ānic* social contract) not to cause any discrimination (i.e. dissimilar treatments). S/he should not be relieved from this responsibility unless reasonable disability accommodation is necessary for achieving equality.
7. The BHR to absolute equality and non-discrimination has priority over the BHR to responsible freedom of conscience, because every human being has a responsibility (according to the *Qur'ānic* social contract) not to infringe on the right to freedom of choice of other human beings. S/he should not be relieved from this responsibility unless this infringement is required for avoiding discrimination.
8. The BHR to responsible freedom of conscience has priority over the BHR to be consulted (i.e. right to a free democracy), because every human being has a responsibility (according to the *Qur'ānic* social contract) not to infringe on the right of other human beings to participate in the political system. S/he should not be relieved from this responsibility unless this human being chooses freely not to participate in the political election.

3.5.3 The compatibility between some ideas of Dworkin's and Arneson's theories and my progressive Islam perspective about social justice in the *Qur'ān*

The BHR to responsible ownership and the BHR to legitimate pleasure are not parts of the above priority ranking, because they should not affect the principles of social justice. These BHRs (in

addition to being BHCs) are gifts from God and are guaranteed by the *Qur'ānic* social contract. They should be used according to this *Qur'ānic* social contract as tools for testing the human being's obedience and his/her commitment to this contract.⁵⁷⁰ They serve the same function as Dworkin's requirement that governments have to insure an equal initial sum of resources for each individual in his equality of resources theory. God already guarantees that each human being has an equal portion of this worldly life's resources; however, this portion could be in the possession of someone else. According to the *Qur'ān*, the poor people have the right over the money of [or their portion is in the possession of] the rich people.⁵⁷¹ Therefore, *Zakāh* (or the BHR to social income assistance, the BHR to practical social cooperation, and the BHR to reasonable disability accommodation) is the tool to be used by the government to correct these inequalities and to insure an equal initial sum of resources for each individual.⁵⁷²

According to my progressive Islam perspective, governments must insure that the fates of individuals sensitive to their choices but not to their characteristics. Similarly, Arneson's RCP theory argues that the individuals' fates should not be determined by things beyond their control

⁵⁷⁰ The *Qur'ān*: 2 (al-Baqarah):155-156; 3 (Āl-'Imrān):178; 5 (al-Mā'idah):71; 6 (al-An'ām):23, 53; 7 (al-A'rāf):27, 155; 8 (al-Anfāl):25, 28; 9 (al-Tawbah):126; 20 (Ṭāhā):85, 90, 131; 21 (al-Anbiyā'):35, 111; 22 (al-Ḥajj):11, 53; 25 (al-Furqān):20; 27 (al-Naml):47; 29 (al-'Ankabūt):2-3; 39 (al-Zumar):49; 44 (al-Dukhān):17; 54 (al-Qamar):27; 64 (al-Taghābun):15; 72 (al-Jinn):17.

⁵⁷¹ The *Qur'ān*: 2 (al-Baqarah):83, 177, 184, 215, 271-273; 4 (al-Nisā'):8, 36; 5 (al-Mā'idah):89, 95; 8 (al-Anfāl):41; 9 (al-Tawbah):60; 17 (al-Isrā'):26; 22 (al-Ḥajj):28, 36; 24 (al-Nūr):22, 61; 30 (al-Rūm):38; 51 (al-Dhāriyāt):19; 58 (al-Mujādalah):4; 59 (al-Ḥashr):7-8; 68 (al-Qalam):17-33; 69 (al-Ḥaqqah):34; 70 (al-M'ārij):24-25; 74 (al-Muddaththir):44; 76 (al-Insān):8-9; 89 (al-Fajr):17-18; 90 (al-Balad):14-16; 93 (al-Ḍuḥā):6-11; 107 (al-Mā'ūn):2-3.

⁵⁷² This issue about whether *Zakāh* should be centrally administered by the government will be discussed further in subsection 3.6.2.2.1, subsection 4.8.2 & subsection 4.8.5.1, below.

(including those unfortunate features of their situation that are the result from brute bad luck);⁵⁷³ individuals have to accept their responsibility for their free choices, because they should not be relieved of those inequalities resulted from their voluntary choice or their faulty behaviour.⁵⁷⁴ On the other hand, Anderson argues that basing the social decisions to help or not to help on the degree to which those needy individuals have practiced their responsibilities or have failed to practice their responsibilities is unfair to those who are labeled faulty and are allowed to suffer.⁵⁷⁵

However, similar to my progressive Islam perspective, Arneson argues that it is fundamentally more valuable to help in gaining “well-being to someone who is just as badly off as an unlucky gambler but arrives at this condition through bad luck that is beyond his power to control than to the unlucky gambler.”⁵⁷⁶ He argues that “the moral value of altering a [condition] in a way that makes someone better off or worse off depends, other things being equal, on the degree of responsibility the person bears for [his/her] present condition.”⁵⁷⁷

Similarly, we should note here that all of the above *Qur’ānic* BHRs are conditioned by the individual responsibility.⁵⁷⁸ The *Qur’ān* repeatedly focuses on the idea that every soul is

⁵⁷³ Arneson argues that in order to achieve equality, justice requires the elimination of the impact of bad luck on people's lives as much as possible, if this bad luck falls on them through no choice or fault of their own. Arneson, *supra* note 27 at 339.

⁵⁷⁴ Arneson argues that there should be no inequalities in people's future unless those inequalities resulted from their voluntary choice or their faulty behaviour, because they should be reasonably responsible only for their voluntary choice or their faulty behaviour. *Ibid.*

⁵⁷⁵ Anderson, *supra* note 28 at 289.

⁵⁷⁶ Arneson, *supra* note 27 at 344-45.

⁵⁷⁷ *Ibid.*

⁵⁷⁸ Muslims have discussed this issue of “individual responsibility” extensively for centuries and this reading of the *Qur’ān* is by no means the only one. Due to the fact that God is the sole source of all actions (because humans have

responsible for its own actions. Due to the fact that God gives every human being the right to free choice, every human being is responsible and accountable to God on the day of judgment for his/her own freely chosen actions.⁵⁷⁹

At the same time, according to Arneson's RCP theory, it is morally less problematic to cause "a loss in well-being of a given size to a person with a given well-being prospect if [s/he] is less rather than more responsible for [his/her] present [good] condition."⁵⁸⁰ On the other hand, according to the *Qur'ān*, God is the creator of everything; He is the cause of all causes and He is the true owner of everything. Therefore, it is morally acceptable to take from the money of the rich people (because they did not make/they are not responsible for/they are not in control of their wealth) using *Zakāh* to help the poor and disadvantaged people.⁵⁸¹

However, Anderson argues that deciding which individual is responsible (or irresponsible) and deserving (or non-deserving) individuals is unfair and naturally disrespectful process. The

no power to create; power resides only with God), this idea has been a powerful trend in Islam and the consequent wrestling with how it is we are "responsible" for our actions (such that we could be punished in the hereafter for them) has dominated Muslim theological thinking.

⁵⁷⁹ The *Qur'ān*: 2 (al-Baqarah):48, 95, 110, 119, 123, 134, 139, 141, 254, 270, 272, 281, 286; 3 (Āl-'Imrān):25, 30, 57, 108, 115, 145, 161, 185, 195; 4 (al-Nisā'):40, 49, 79, 111, 123-124; 5 (al-Mā'idah):29, 105; 6 (al-An'ām):52, 93, 104, 123, 129, 132, 135, 152, 158, 160, 164; 7 (al-A'rāf):8-9, 42, 44; 10 (Yūnus):30, 41, 44, 47, 52, 54, 106, 108; 11 (Hūd):101-102; 13 (al-Ra'd):33, 42; 14 (Ibrāhīm):13, 42, 51; 16 (al-Nahl):28, 56, 90, 93, 111; 17 (al-Isrā'):7, 13, 15, 71; 18 (al-Kahf):29, 49; 19 (Maryam):60; 20 (Ṭāhā):15, 112; 21 (al-Anbiyā'):23, 47, 94; 23 (al-Mu'minūn):62; 24 (al-Nūr):54; 25 (al-Furqān):27; 27 (al-Naml):92; 29 (al-'Ankabūt):4-7; 30 (al-Rūm):44; 31 (Luqmān):12; 32 (al-Sajdah):17; 34 (Saba'):25, 50; 35 (Fatir):18, 37; 36 (Yāsīn):54; 37 (al-Şaffāt):39; 39 (al-Zumar):24, 41, 47, 51, 69-70; 40 (Ghāfir):17-18, 40, 52; 41 (Fuşşilat):46; 42 (al-Shūrā):15, 22, 42; 43 (al-Zukhruf):19; 45 (al-Jāthiyah):15, 21-22, 28; 46 (al-Ahqāf):19; 48 (al-Fath):10; 51 (al-Dhāriyāt):59; 52 (al-Ṭūr):16, 21; 53 (al-Najm):31, 39; 55 (al-Rahmān):39; 59 (al-Hashr):18; 62 (al-Jumu'ah):7; 66 (al-Taḥrīm):7; 73 (al-Muzzammil):20; 74 (al-Muddathtir):38; 76 (al-Insān):31; 82 (al-Infītār):5, 19; 99 (al-Zalzala):7-8; 101 (al-Qāri'ah):6-11.

⁵⁸⁰ Arneson, *supra* note 27 at 344-45.

⁵⁸¹ The *Qur'ān*: 2 (al-Baqarah):177, 271, 273; 9 (al-Tawbah):60; 22 (al-Ḥajj):28, 36; 24 (al-Nūr):22, 61; 51 (al-Dhāriyāt):19; 59 (al-Ḥashr):7-8; 69 (al-Ḥaqqah):34; 70 (al-M'ārij):24-25; 76 (al-Insān):8-9; 89 (al-Fajr):17-18; 90 (al-Balad):14-16; 93 (al-Ḍuḥā):6-11; 107 (al-Mā'ūn):2-3.

recipient of aid is stigmatized as useless failure and the unworthy of aid is stigmatized as undeserving and morally irresponsible; therefore, the privacy of individuals would be violated by offensive investigation in order to categorize them in accord with the level of the badness of their lives and the degree of their irresponsibility in their life choices. These violations of privacy erase the borders between the society's legitimate concern and the individual's free judgment.⁵⁸²

On the other hand, although the *Qur'ān* focuses on the individual responsibility, God always leaves the door open for all of His creatures to repent and to return to the God's borders (after they have gone stray away outside of His borders). Therefore, if any human being (while using any of his/her BHRs) has gone stray away outside of God's borders, s/he will be responsible and accountable to God on the day of judgment for his/her own freely chosen actions unless s/he repented and returned to the God's borders (well in advance) before s/he died.⁵⁸³ Therefore, we should focus on the individual responsibility for the future choices and not for the past choices, which means that if the individual chooses to repent and change his/her attitude about his/her bad faulty behaviour and takes (whatever s/he can do) steps to show his/her willingness to become a good citizen and stop his/her bad faulty behaviour, then, s/he will be eligible to be relieved from inequalities that s/he suffers. For example, any alcoholic or illegal drug abuser should not be eligible to receive any social income assistance until s/he successfully completed his/her rehabilitation program.

⁵⁸² Anderson, *supra* note 28 at 288-89.

⁵⁸³ The *Qur'ān*: 2 (al-Baqarah):37, 54, 160, 285; 3 (Āl-'Imrān):89-90, 128; 4 (al-Nisā'):16-18, 26-27, 64, 92, 110, 146; 5 (al-Mā'idah):34, 39, 74; 6 (al-An'ām):54; 7 (al-A'rāf):153; 8 (al-Anfāl):33; 9 (al-Tawbah):5, 11, 15, 27, 74, 102, 104, 106, 117-118, 126; 16 (al-Naḥl):119; 19 (Maryam):60; 20 (Ṭāhā):82, 122; 24 (al-Nūr):5; 25 (al-Furqān):70-71; 28 (al-Qaṣaṣ):67; 31 (Luqmān):15; 33 (al-Aḥzāb):24, 73; 39 (al-Zumar):17; 40 (Ghāfir):7; 42 (al-Shūrā):5, 25; 49 (al-Ḥujurāt):11; 51 (al-Dhāriyāt):18; 58 (al-Mujādalah):13; 66 (al-Taḥrīm):8; 85 (al-Burūj):10; 110 (al-Naṣr):3.

Therefore, it looks as if my own interpretation of this *Qur'ānic* social contract (that guarantees all of the above *Qur'ānic* BHRs, which are limited by individual responsibility) is the Islamic version of my new liberal equality theory (or my own amalgamation of the different liberal equality theories in Chapter 2). Therefore, in my opinion, the moral principles that we can draw out of all the terms and conditions of this *Qur'ānic* social contract (including all of the above *Qur'ānic* BHRs limited by the individual responsibility) can be described as the common ground between the liberal moral values and the Islamic moral values. Based on this common ground, we can reinterpret the Islamic rules about *Zakāh* in the *Qur'ān* with my own interpretation that has a commitment to social justice and a consideration of both liberal and Islamic moral values. However, in order to do this, we need to discuss how to choose the least advantaged members in the society (i.e. what is the definition of the least advantaged members according to this *Qur'ānic* social contract)?

3.6 How to choose the least advantaged members in the society?

In a society with limited resources, priority for the badly off must be taking into consideration to insure social justice. According to Arneson, governments should maximize the well-being of individuals under the condition that it is more morally valuable to obtain a benefit (or to avoid a loss) for an individual, if the well-being that this individual would gain from it is greater, or the loss in well-being that this individual would avoid is smaller, or if this individual's lifetime expectation of well-being before obtaining this benefit (or avoiding this loss) is lower. Therefore, priority should be given to the individual who is badly off. However, this priority is given using

an objective scale of well-being (i.e. not by comparing between his/her life's circumstances and the life's circumstances of others). Therefore, it has nothing to do with pity or envy.⁵⁸⁴

According to Richardson, “[s]ince we may safely assume that the least advantaged in any society will be people who are severely disabled, this means that the difference principle, so applied, permits inequalities only if they raise the expectations of the severely disabled.”⁵⁸⁵ He adds “for the severely disabled, the self-respect of the fully-cooperative citizen is out of reach; but that does not mean that they must be viewed as ‘objects of our charity and compassion.’ Rather, fundamental self-respect may be protected by building provision for everyone’s basic needs into the constitutional essentials of society.”⁵⁸⁶ According to Nussbaum, the fundamental self-respect is necessary for all people to have a sense that their life is worth living (no matter what their level of ability or disability excluding those in a persistent vegetative state, who are so severely disabled as to wholly lack the capacity to live a dignified human life).⁵⁸⁷ This fundamental self-respect is similar to the dignity of all human beings that is confirmed in the *Qur’ān* as I mentioned above in this chapter.⁵⁸⁸

As we discussed in Chapter 2, the commitment to freedom and the commitment to fairness would justify adding the basic needs (including equal basic rights and liberties, equal opportunities, and the primary goods of income, wealth and fundamental self-respect) to the list of what the parties to Rawls’ social contract care about (in addition to caring about the

⁵⁸⁴ Arneson, *supra* note 27 at 343.

⁵⁸⁵ Richardson, *supra* note 273 at 444.

⁵⁸⁶ *Ibid* at 448.

⁵⁸⁷ Nussbaum, *supra* note 30 at 187.

⁵⁸⁸ See section 3.4, above, for more on this topic.

commitment to meeting the BHCs).⁵⁸⁹ We should note here that the above *Qur'ānic* BHRs serve the same function as both all of the basic needs and all of the BHCs. Therefore, the least-advantaged should be defined as related to the minimum level of all of the above *Qur'ānic* BHRs. At the same time, the *Qur'ān* took any speculation out of the equation of social justice by specifying the least advantaged in the society in specific categories with specific priority ranking among them in verse 9 (al-Tawbah):60 of the *Qur'ān*.⁵⁹⁰

Although there are serious degrees of inequalities and persistent poverty in the MENA as in other parts of the world, *Zakāh* has been marginalized. Unfortunately, most Muslim countries do not practice *Zakāh* as a system of automatic redistribution. The diverse interpretations (some of which might be criticized as tools for political implementations)⁵⁹¹ of the *Qur'ān* about the categories of beneficiaries of alms resulted in the distribution of *Zakāh* funds for some expenses (which should be covered by using other resources) outside of the original intended divine wisdom of God for achieving social justice. They also triggered the lack of trust and the struggle between the secular states' governments and the Islamic NGOs for providing social welfare services. While these misinterpretations lead to a shift from charitable aid to funding businesses, they caused the exclusion of PWDs (who are among the most vulnerable people) from receiving social income assistance as a part of social welfare systems in the MENA (simply because scholars consider that taking care of the needs of PWDs is the responsibility of their families).

⁵⁸⁹ Richardson, *supra* note 273 at 461.

⁵⁹⁰ The *Qur'ān*: 9 (al-Tawbah):60.

⁵⁹¹ It is important here to explain that what I mean by political interpretations of some Muslim scholars are those interpretations that might be criticized as tools for political implementations of the *Qur'ān* about the categories of beneficiaries of *Zakāh* (i.e. biased towards one political standpoint; e.g. only Muslim recipients and excluding non-Muslim recipients).

Regardless of donors' self-interested motivation (whether in expectation of an earthly or a heavenly reward or both) or their hypocrisy (claiming one thing and doing another thing), it is important to know what the *Qur'ān* teaches,⁵⁹² and how it has been interpreted. Some interpretations have led to heated political implications of complex details in the *Qur'ān*. Muslim scholars disagree on the interpretation of verse 9 (al-Tawbah):60 of the *Qur'ān*, which identifies the permitted beneficiaries of *Zakāh*. However, first, we need to outline the moral *Qur'ānic* origins of *Zakāh* and then, review the diverse (classical and modern) interpretations on *Zakāh*, which is connected with present-day practice of *Zakāh*.

3.6.1 The moral *Qur'ānic* origins of *Zakāh*

Zakāh (alms) means the religious obligation to give up a fixed proportion of one's income for specified good causes. It is the outstanding social pillar of Islam that should steer individuals' efforts towards a common goal. It is the third pillar of the five pillars of Islam. It is an Islamic religious duty. It is mentioned many times in the *Qur'ān*. It is often mentioned together with *Ṣalāh* (the prayer) to emphasise the importance that the *Qur'ān* places on *Zakāh*.⁵⁹³ It is a central Islamic theological/ethical/socio-political principle that aims at a comprehensive redistribution.

⁵⁹² In addition to the moral goals of the *Qur'ān*, I may use in my analysis other sources of authority such as the *Sunnah*. However, I prefer to focus my study on the *Qur'ān* itself, because it is less controversial. The *Sunnah* does not contradict the *Qur'ān* on these matters. Studying the *Sunnah* requires almost a lifetime's devotion, because it is distinguishing the more from the less authentic. When *Aḥādīth* are cited, they are among the well-known ones that are affectionately and selectively repeated by devout Muslims, whereas the references to the *Qur'ān* are grounded in the standard text itself. Although the *Sunnah* illuminates the *Qur'ān*, the *Qur'ān* has ultimate precedence, because the *Qur'ān* is considered as the eternal and unchallengeable speech of God, and a primary revelation. Therefore, I accept only *Aḥādīth* that do not contradict the *Qur'ān* and its message of equality, justice, freedom, and tolerance.

⁵⁹³ The *Qur'ān*: 2 (al-Baqarah):43, 83, 110, 177, 277; 4 (al-Nisā'):77, 162; 5 (al-Mā'idah):12, 55; 7 (al-A'rāf):156; 9 (al-Tawbah):5, 11, 18, 60, 71; 19 (Maryam):31, 55; 20 (Tāhā):76; 21 (al-Anbiyā'):73; 22 (al-Ḥajj):41, 78; 23 (al-Mu'minūn):4; 24 (al-Nūr):37, 56; 27 (al-Naml):3; 30 (al-Rūm):39; 31 (Luqmān):4; 33 (al-Aḥzāb):33; 35 (Fatir):18; 41 (Fuṣṣilat):7; 58 (al-Mujādalah):13; 73 (al-Muzzammil):20; 80 ('Abasa):3, 7; 87 (al-A'alaá):14; 92 (al-Layl):18-21; 98 (al-Bayyinah):5.

The focus is on the giver's conscience and the recipient's right to claim alms from the rich. *Zakāh* is a form of religious obligatory charity (i.e. it is not voluntary and it is not arbitrary). The amount of *Zakāh* that must be paid differs depending on the type of assets (like silver and gold, agriculture and mining). The rate varies from 2.5% of the asset's value (for most objects) and up to 20% of the asset's value (for certain agriculture and mining).⁵⁹⁴

The religious and political characteristics of *Zakāh* go back to the beginnings of Islam, and even to the Arabic tribal society and also to the Jewish-Christian tradition.⁵⁹⁵ *Zakāh* has an equalizing effect on the social classes, because the poor will be able to improve his/her situation step by step towards some kind of balance between the rich and the poor. *Zakāh* can be used to feed, offer free health services, and/or offer free schooling for the poor. Therefore, both giving money to the poor directly and offering free services (like health services and education services) for the poor should improve society. Therefore, *Zakāh* should bridge the gaps between the rich and the poor members of the society. *Zakāh* promotes not only economic equality, but also solidarity within the community. According to Timur Kuran, "On the one hand, it counsels the rich not to feel obligated to eradicate poverty and never to feel guilty for being well-off. On the other hand, it dampens the resentments of the poor and moderates their demands."⁵⁹⁶

⁵⁹⁴ Kuran, "Interpretation and Assessment", *supra* note 54 at 135-164.

⁵⁹⁵ Bashear, *supra* note 54 at 84-113.

⁵⁹⁶ Kuran, "Islamic Redistribution", *supra* note 54 at 284.

Zakāh is a reminder that all wealth belongs to God. Therefore, alms are a “loan to God”⁵⁹⁷ (i.e. *Zakāh* is not a gift to the poor but it is a repayment to God and it is an exchanging process with rewards in the Hereafter). Therefore, *Zakāh* had nothing to do with voluntary charity, because the poor can accept their due as a matter of right without any loss of dignity. According to Quṭb, “the payment of the Islamic social tax [or *Zakāh*] is established by God as a right of the poor over the wealth of the rich, by virtue of his being Master of all goods which he has entrusted as property by means of a contract one of whose conditions is the carrying out of *Zakāh*.”⁵⁹⁸ The private property is not called into question, but is held to be subject to automatic redistribution. We are simply trustees over the resources available to us. Whatever we have must be used to bring us closer to God. Wealth is to be cherished in moderation not in obsession. The *Qur’ān* condemns the emulous multiplication of wealth.⁵⁹⁹

Zakāh derived from the Arabic language verb *Zakká*, which means to purify (also with the implication of growth or increase). The meaning of *Zakāh* is that, by giving up a portion of one’s income, s/he purifies the other portion that remains, and also purifies his/her soul (through a restraint on his/her selfishness, greed and disregard to other people’s sufferings). On the other hand, in addition to fulfilling his/her needs, the recipient of *Zakāh* is purified from hatred, isolation, depression, and jealousy of the well-off people. *Zakāh* is closely linked with the prayer in many verses of the *Qur’ān*. It is a financial worship, and without its observance, the value of the prayers is invalid, because prayers are to maintain a desirable mood of fear of God and a

⁵⁹⁷ The *Qur’ān*: 2 (al-Baqarah):245; 5 (al-Mā’idah):12; 57 (al-Ḥadīd):11, 18; 64 (al-Taghābun):17; 73 (al-Muzzammil):20.

⁵⁹⁸ Quṭb, *supra* note 54 at 161.

⁵⁹⁹ The *Qur’ān*: 102 (al-Takāthur):1-2; 104 (al-Humazah):1-9.

desirable mood of devotion. During the month of Ramaḍān, the exercise of fasting should remind believers of what it would be like to be poor and hungry, and the believers are called on to be more generous than usual. Pilgrimage to Mecca also stimulates repentance from sins, and the harshness of the journey should remind believers of the comforts of home and the goodwill which they ought to extend to refugees.

Although the *Qur'ān* does not downgrade money, over one hundred verses of the *Qur'ān* deal with restrictions regarding the right way for spending money.⁶⁰⁰ The *Qur'ān* explicitly urges believers not only to be generous in alms-giving but also to persuade others to be charitable.⁶⁰¹ The *Qur'ān* also encourages *ṣadaqah* as well as *Zakāh*.⁶⁰² *Zakāh* as a religious duty has been usually interpreted and distinguished from *ṣadaqah*. *Ṣadaqah* has been usually interpreted as a voluntary personal form of charity in which meat or clothing (for example) is donated directly to poor families. The rich should give *ṣadaqah* to be purified of their possessions which otherwise enslave them. They should know how much to give, when to give and to whom. They should not wait for an open request; i.e. a hint should be enough. They should give willingly and wholeheartedly and they should keep promises of help. They should not give for the sake of a reciprocal benefit and they should not brag or remind people of their generosity.⁶⁰³

⁶⁰⁰ For example, see the *Qur'ān*: 2 (al-Baqarah):195; 70 (al-M'ārij):23-25.

⁶⁰¹ The *Qur'ān*: 107 (al-Mā'ūn):1-7.

⁶⁰² The *Qur'ān*: 2 (al-Baqarah):195-196, 254, 261-274; 3 (Āl-'Imrān):92; 4 (al-Nisā'):36-40, 114; 9 (al-Tawbah):34, 60, 103; 13 (al-Ra'd):22; 17 (al-Isrā'):28; 24 (al-Nūr):22; 35 (Fatir):29-30; 36 (Yāsīn):47; 47 (Muḥammad):38; 57 (al-Ḥadīd):7, 10; 58 (al-Mujādalah):12-13; 63 (al-Munāfiqūn):7, 10; 64 (al-Taghābun):15-18.

⁶⁰³ The *Qur'ān*: 2 (al-Baqarah):262-274.

However, in my opinion, due to the fact that the word *ṣadaqat* (plural of *ṣadaqah*) derives from the Arabic language verb *ṣadaq* (believe), *ṣadaqah* should be interpreted as a tool for human beings to prove their belief in God by helping others. Therefore, *ṣadaqah* is a general term that means charity. According to verse 2 (al-Baqarah):271 of the *Qur'ān*: Although “it is well to disclose *ṣadaqat*, it is the best for you to conceal *ṣadaqat* and give them to the poor, [because] this will atone for you some of your sins; and Allāh is Aware of what you do.”⁶⁰⁴ Therefore, in my opinion, *ṣadaqah* (charity) in the *Qur'ān* has two forms of charity: 1. The first form is a publicly disclosed charity (to persuade others and to achieve social justice); and 2. The second form is a concealed (delivered in secret) charity (to remove sins and to obtain God’s mercy). On the other hand, due to the fact that *Zakāh* derives from the verb *zakka* (purify), *Zakāh* should be interpreted as a tool for human beings to purify their income (i.e. to legitimize their possession of this income, because ownership actually resides with God). Therefore, in my opinion, *Zakāh* should be a form of religiously obligatory charity (i.e. it is not voluntary and it is not arbitrary). Therefore, *Zakāh* should be a publicly disclosed charity to make sure that everyone has paid his/her religious duty. In my opinion, the general term *ṣadaqah* (charity) includes *Zakāh* as the obligatory and publicly disclosed charity in addition to the voluntary, arbitrary, and concealed (delivered in secret) charity. Moreover, this meaning is also confirmed in verse 9 (al-Tawbah):103 of the *Qur'ān*, which states that “Take [O Prophet Muḥammad] from their money *ṣadaqah* to cleanse them [removing their sins] and to purify them [*Zakāh*] with it”.⁶⁰⁵

⁶⁰⁴ The *Qur'ān*: 2 (al-Baqarah):271.

⁶⁰⁵ The *Qur'ān*: 9 (al-Tawbah):103.

Therefore, the two terms (*Zakāh* and *Ṣadaqah*) are closely linked throughout the *Qur'ān*. They are so closely linked that in the key verse 9 (al-Tawbah): 60 of the *Qur'ān*, which specifies the permitted beneficiaries of *Zakāh*, the word *ṣadaqat* is actually used in the text, but it has been generally interpreted as referring to *Zakāh*. Moreover, in my opinion, as I mentioned above, the general term *ṣadaqah* (charity) includes *Zakāh* as the obligatory and publicly disclosed charity in addition to the voluntary, arbitrary, and concealed (delivered in secret) charity. Therefore, the term *ṣadaqat* (charity) in this verse could be interpreted to include both forms of charity. However, due to the fact that my intention in this dissertation is to use this verse to build a social welfare system (to achieve social justice) based on *Zakāh*, I would limit my discussion of the meaning of *ṣadaqat* (charity) in this verse to the obligatory and publicly disclosed charity (i.e. *Zakāh*).⁶⁰⁶ In Islam, Judaism, and Christianity, there is the idea that all wealth belongs to God. However, “among all of the sacred books, the *Qur'ān* seems to be the only one in the world which sets out precisely [in verse 9 (al-Tawbah):60] the basic principles of the budget and expenses of the state”.⁶⁰⁷

3.6.2 The diverse interpretations and textual analysis of the *Qur'ān* about the distribution of *Zakāh* funds

The verse 9 (al-Tawbah):60 of the *Qur'ān* is read in Arabic language as follows:

⁶⁰⁶ Therefore, the term *ṣadaqat* (charity), in verse 9 (al-Tawbah):60 of the *Qur'ān*, could be interpreted as a voluntary arbitrary concealed (delivered in secret) charity when the charity is related to a personal action, but it should be interpreted as an obligatory publicly disclosed charity (i.e. *Zakāh*) when the charity is related to the governmental action and its social welfare system (particularly because this verse confirms that it is an obligation imposed by God).

⁶⁰⁷ Hamidullah, *supra* note 54 at 617.

{ إِنَّمَا الصَّدَقَاتُ لِلْفُقَرَاءِ وَالْمَسْكِينِ وَالْعَامِلِينَ عَلَيْهَا وَالْمُؤَلَّفَةِ قُلُوبُهُمْ وَفِي الرِّقَابِ وَالْغَارِمِينَ وَفِي سَبِيلِ اللَّهِ وَأَبْنِ السَّبِيلِ فَرِيضَةً مِّنَ اللَّهِ وَاللَّهُ عَلِيمٌ حَكِيمٌ }⁶⁰⁸

This verse has been translated in English language most commonly in the following terms: The *ṣadaqat* [i.e. *Zakāh* expenditures] are [meant to be given only] for the poor and for the needy, and those employed to administer the funds [who collect them], and those whose hearts have been [recently] reconciled [to Truth]; and those in bondage and in debt [for those who are overburdened with debts]; and [for every struggle] in the cause of Allāh; and [for] the wayfarer [stranded traveler]: [This is] an obligation [imposed] by Allāh; and Allāh is full of knowledge and wisdom.⁶⁰⁹

Therefore, it is impermissible to dispense *Zakāh* to other than these categories. Muslim scholars disagree on the interpretation of verse 9 (al-Tawbah):60 of the *Qur'ān*, which identifies the permitted beneficiaries of *Zakāh*. Some Muslim scholars, in their interpretations with heated political implications of complex details in the *Qur'ān*, sometimes ignore the existence of other Muslim scholars. The distribution of *Zakāh* funds has been commonly misinterpreted as a matter of free choice only within specified limits.⁶¹⁰ In my opinion, the *Qur'ān* (which is the words of God) is full of wisdom; it is not possible to have these words in this verse with this specific order (as we will see) and with specific prepositions (as we will see) without any reason. Moreover,

⁶⁰⁸ The *Qur'ān*: 9 (al-Tawbah):60.

⁶⁰⁹ *Ibid.*

⁶¹⁰ If the term *ṣadaqat* (charity), in verse 9 (al-Tawbah):60 of the *Qur'ān*, was interpreted as a form of personal voluntary arbitrary concealed (delivered in secret) charity, we could consider (in this case only) that choosing among the eight permitted categories of beneficiaries of charity is a matter of free choice only within these specific eight permitted categories. However, due to the fact that this verse confirms that this charity is an obligation imposed by God, the term *ṣadaqat* (charity) should be interpreted as an obligatory publicly disclosed charity (i.e. *Zakāh*), which means it is not arbitrary, and it is not a matter of free choice.

verse 9 (al-Tawbah):60 ends with the phrase: “Allāh is full of knowledge and wisdom”,⁶¹¹ which confirms that every word and every preposition with this specific order has a specific reason.⁶¹² Therefore, there is (as we will see) a specific priority ranking among all of the following categories of beneficiaries of *Zakāh* (i.e. it is not a matter of choice). There are eight permitted categories of beneficiaries of *Zakāh*, which are listed in verse 9 (al-Tawbah):60 of the *Qur’ān* in the following order:

1. Category 1: (*al-Fuqarā’*);
2. Category 2: (*al-Masākīn*);
3. Category 3: (*al-‘Āmilīna ‘alayhā*);
4. Category 4: “those whose hearts are made to incline [to truth]”;
5. Category 5: (*Fī al-riqāb*);
6. Category 6: (*al-Ghārimīn*);
7. Category 7: “[those] in the way of God”; and
8. Category 8: “Son of the road”.

⁶¹¹ The *Qur’ān*: 9 (al-Tawbah):60.

⁶¹² Although no human being can know the exact wisdom of God, every scholar tries his/her best to understand the divine wisdom. I will try my best to understand the most logical reason (to me) for this specific order by using my progressive Islam perspective in order to produce my desired social welfare system. Although I should not use my beliefs (about the divine wisdom and the status of the *Qur’ān* as a revelation) as proof for linguistic matters, it could be argued that this is integral to the progressive Islam perspective, because progressive Muslims try to reinterpret the *Qur’ān* depending on the strong tradition of social justice using Islamic sources (such as the *Qur’ān* and the *Sunnah*) as well as non-Islamic sources (such as liberal theories of social justice). Therefore, I will try to understand the divine wisdom based on the common ground between the Islamic moral values in these Islamic sources and the liberal moral values in these non-Islamic sources.

3.6.2.1 Category 1 and category 2

Category 1 (*al-Fuqarā'*) and category 2 (*al-Masākīn*) are mentioned in the *Qur'ān* many times together, separately or interchangeably.⁶¹³

3.6.2.1.1 Category 1: (*al-Fuqarā'*)

*al-Fuqarā'*⁶¹⁴ is usually interpreted as the poor (who cannot find anything to suffice them in the least⁶¹⁵ or the folk of the platform⁶¹⁶). Some Muslim scholars (such as, the classical scholar al-Shāfi'ī,⁶¹⁷ and the modern scholar 'Uthmān Ḥussayn 'Abd-Allāh⁶¹⁸) stated that the recipients of *Zakāh* must be Muslims. On the other hand, other scholars (such as, the modern scholar al-Khayyāṭ⁶¹⁹) argues that the word *al-fuqarā'* means in Arabic language “all of the poor”, which means the word *al-fuqarā'* includes the non-Muslim poor as well as the Muslim poor. Some Muslim scholars argue that *Zakāh* may be paid to non-Muslims, but only after the needs of Muslims have been met.⁶²⁰ This disagreement in opinions may explain the difference views in the policies of two United Kingdom (UK) - based Muslim charities as follows: while the Muslim

⁶¹³ The *Qur'ān*: 2 (al-Baqarah):83, 177, 184, 215, 271-273; 4 (al-Nisā'):8, 36; 5 (al-Mā'idah):89, 95; 8 (al-Anfāl):41; 9 (al-Tawbah):60; 17 (al-Isrā'):26; 22 (al-Ḥajj):28, 36; 24 (al-Nūr):22, 61; 30 (al-Rūm):38; 51 (al-Dhāriyāt):19; 58 (al-Mujādalah):4; 59 (al-Ḥashr):7-8; 68 (al-Qalam):17-33; 69 (al-Ḥaqqah):34; 70 (al-M'ārij):24-25; 74 (al-Muddaththir):44; 76 (al-Insān):8-9; 89 (al-Fajr):17-18; 90 (al-Balad):14-16; 93 (al-Ḍuḥā):6-11; 107 (al-Mā'ūn):2-3.

⁶¹⁴ The *Qur'ān*: 9 (al-Tawbah):60.

⁶¹⁵ al-Maḥallī & al-Ṣuyūfī, *supra* note 57, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur'ān*.

⁶¹⁶ Ibn 'Abbās, *supra* note 63, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur'ān*.

⁶¹⁷ Abū 'Abd-Allāh Muḥammad ibn Idrīs al-Shāfi'ī is the founder of al-Shāfi'ī school of Islamic jurisprudence. See al-Maḥallī & al-Ṣuyūfī, *supra* note 57, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur'ān*.

⁶¹⁸ Abu-Sahlieh, *supra* note 72 at 261.

⁶¹⁹ al-Khayyāṭ, *supra* note 54 at 184.

⁶²⁰ Visser, *supra* note 54 at 29.

Aid non-governmental organization (NGO) restricts its aid (with some exceptions) to Muslim beneficiaries only, the Islamic Relief NGO extends *Zakāh* funds to non-Muslims in Africa.⁶²¹

Muslim scholars have reviewed the question: should charity be designed to help all of the poor, or only the “deserving poor”? According to al-Khayyāt, Islam calls on all people to work, and the characters and reputations of poor people may be taken into account in deciding whether they deserve help. Programs for relieving unemployment are eligible for subsidy.⁶²² In my opinion, all of the poor should be helped (taking into account the commitment to social justice and a consideration of both liberal and Islamic moral values). Moreover, the poor is the most obvious category of all of categories of beneficiaries of *Zakāh* who deserves the help,⁶²³ because this category is related to the BHR to secured respected life, the BHR to social income assistance, the BHR to protected sustainable environment, the BHR to practical social cooperation and the BHR to absolute equality and non-discrimination. Therefore, this category has the highest priority over all of the other categories, because the BHR to secured respected life has the highest priority over all of the other BHRs. Moreover, the *Qur’ān* confirms that the highest priority is the poor category when it states “[although] it is well to disclose *ṣadaqat*, it is the best for you to conceal *ṣadaqat* and give them to the poor”.⁶²⁴ In my opinion, there should be a priority ranking within the poor category. This priority ranking among all of the subcategories within the poor category is similar to the following priority ranking among all of the other major categories.

⁶²¹ Benthall & Bellion-Jourdan, *supra* note 54 at 10.

⁶²² al-Khayyāt, *supra* note 54 at 181.

⁶²³ Ibn Kathīr, *supra* note 64, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*; and al-Shawkānī, *supra* note 60, in the comments regarding the same verse.

⁶²⁴ The *Qur’ān*: 2 (al-Baqarah):271.

3.6.2.1.2 Category 2: (*al-Masākīn*)

*al-Masākīn*⁶²⁵ is usually interpreted as the very poor (or the needy who cannot find anything to suffice them,⁶²⁶ or the needy among the pilgrims⁶²⁷). However, Muslim scholars disagree on the difference between *al-fuqarā'* and *al-masākīn*:

- Among the classical scholars, according to al-Ṭabarī⁶²⁸ and al-Qurṭubī,⁶²⁹ some of them (such as Mālik⁶³⁰) said while *al-fuqarā'* are the needy who do not ask for help, *al-masākīn* are the needy who beg for help. Other (such as al-Shāfi'ī) said while *al-fuqarā'* are the needy with disabilities, *al-masākīn* are the needy without any disability. Other (such as Ibn 'Abbās) said while *al-fuqarā'* are the needy Muslims who emigrated from Mecca to al-Madīnah al-Munawarah, *al-masākīn* are the needy who did not emigrate. Other said: *al-Masākīn* are the needy with low income. Other said while *al-fuqarā'* are the needy who are Muslims, *al-masākīn* are the needy who are from the people of the book (Jews and Christian).⁶³¹ According to al-Rāzī, some scholars (such as al-Shāfi'ī and his followers) said: *al-Fuqarā'* are needier than *al-masākīn*, because they are mentioned first in this verse (therefore, they have the highest priority). Other (such as Abū Ḥanīfah⁶³² and Ibn Ḥanbal⁶³³ and their followers) said: *al-Masākīn* are needier than *al-*

⁶²⁵ The *Qur'ān*: 9 (al-Tawbah):60.

⁶²⁶ al-Maḥallī & al-Ṣuyūfī, *supra* note 57, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur'ān*.

⁶²⁷ Ibn 'Abbās, *supra* note 63, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur'ān*.

⁶²⁸ al-Ṭabarī, *supra* note 61, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur'ān*.

⁶²⁹ al-Qurṭubī, *supra* note 58, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur'ān*.

⁶³⁰ Mālik ibn Anas ibn Mālik ibn Abī 'Āmir al-Aṣḥabī is the founder of al-Mālikī school of Islamic jurisprudence.

⁶³¹ al-Ṭabarī, *supra* note 61, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur'ān*.

⁶³² Abū Ḥanīfah Nu'mān ibn Thābit ibn Zū'ayb ibn Marzubān is the founder of al-Ḥanafī school of Islamic jurisprudence.

⁶³³ Abū 'Abd Allāh Aḥmad ibn Muḥammad ibn Ḥanbal al-Shaybānī is the founder of al-Ḥanbalī school of Islamic jurisprudence.

fuqarā'.⁶³⁴ Other (such as Mālik and his followers) said there is no difference between *al-fuqarā'* and *al-masākīn*.⁶³⁵ According to al-Bayḍāwī, while *al-fuqarā'* are those who do not have any asset or any income, *al-masākīn* are those who do have assets and income, but they are in *sukūn* (serenity or not able to move) due to their disability.⁶³⁶

- Among the modern scholars, Quṭb states that *al-fuqarā'* and *al-masākīn* are the same, but *al-masākīn* are those poor people who do not show their needs and they do not ask for help.⁶³⁷ According to al-Khayyāt, *al-masākīn* or the very poor are people deprived of any kind of ownership who are not even able to evaluate their own needs. *al-Fuqarā'* or the poor may just not be able to meet their expenses out of their income. In assessing their needs, account must be taken of their obligations to their families and of their social status.⁶³⁸ On the other hand, 'Uthmān Ḥussayn 'Abd-Allāh offers the following sub-groups of poor: orphans and foundlings, widows and divorcees, prisoners and their families, the unemployed, students, the homeless, those who cannot afford to marry, disaster victims, and those in need of free medicines or dignified funerals.⁶³⁹
- Among *Shī'ah* scholars, al-Qummī states that *al-masākīn* are PWDs such as the blind, people with physical or mental disabilities, and all men, women, and children with any kind of disability.⁶⁴⁰ According to al-Ṭabāṭabā'ī, in addition of being poor, *al-masākīn* are PWDs such as the blind, because the word *al-masākīn* comes from the word *al-*

⁶³⁴ al-Rāzī, *supra* note 59, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur'ān*.

⁶³⁵ al-Qurṭubī, *supra* note 58, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur'ān*.

⁶³⁶ al-Bayḍāwī, *supra* note 56, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur'ān*.

⁶³⁷ Quṭb, *supra* note 54, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur'ān*.

⁶³⁸ al-Khayyāt, *supra* note 54 at 184.

⁶³⁹ Abu-Sahlieh, *supra* note 72 at 261.

⁶⁴⁰ al-Qummī, *supra* note 76, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur'ān*; and al-kāshānī, *supra* note 75, in the comments regarding the same verse.

maskanah, similar to the meaning of the word *al-dhullah* (which means humiliation). Therefore, *al-Fuqarā'* category is the general category of the poor, but *al-masākīn* are the poor people who are disabled.⁶⁴¹

In my opinion, *al-Fuqarā'* category includes all of the poor individuals and families (Muslims and non-Muslims) with low income. On the other hand, although some of *al-masākīn* can be poor, *al-Masākīn* category cannot be and should not be the same as *al-Fuqarā'* category, because *al-miskīn* (single of *al-masākīn*) does not necessarily need to be poor for the following reasons:

1. In my opinion, it is not possible to have two words that have the same meaning in the same verse without any reason.⁶⁴² Therefore, *al-masākīn* and *al-fuqarā'* do not have the same meaning. Moreover, verse 9 (al-Tawbah):60 ends with the phrase: “God is full of knowledge and wisdom”,⁶⁴³ which confirms that every word and every preposition with this specific order should have a specific reason.⁶⁴⁴
2. al-Shāfi‘ī and his followers argue that *al-fuqarā'* are needier than *al-masākīn*, because they are mentioned first in this verse (therefore, they have the highest priority).⁶⁴⁵

⁶⁴¹ al-Ṭabāṭabā‘ī, *supra* note 79, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*.

⁶⁴² Some critics would reject this point based on the idea that *Ṣadaqah* and *Zakāh* have the same meaning. On the other hand, I would remind them that *ṣadaqat* (or *ṣadaqah*) and *Zakāh* do not usually occur together in the same verse. In all verses of the *Qur’ān*, they occurred only one time together in the same verse, which is verse 58 (al-Mujādalah):13 and even in this verse, they have deferent meanings. In fact, this verse can be used to prove that they have deferent meanings. While *ṣadaqat* (in this verse) could include any form of charity (i.e. voluntary or obligatory), *Zakāh* (in this verse) means only a form of religiously obligatory charity.

⁶⁴³ The *Qur’ān*: 9 (al-Tawbah):60.

⁶⁴⁴ The idea that there are no synonyms in the *Qur’ān* is a popular hermeneutical device used to reinterpret the *Qur’ān*. However, this idea is quite widespread in the modern Muslim thinking, because this idea provides a tool by which the meaning of passages of the *Qur’ān* can be re-examined. This is a progressive Islam position, which suggests that Arabic rhetoric and poetics has no role to play in the interpretation of the *Qur’ān*; this position is contrary to the classical exegetes who extolled the literary qualities of the text. Therefore, I would argue for this progressive Islam position based on the desirability of the results and not on the basis of Arabic rhetoric and poetics.

⁶⁴⁵ al-Rāzī, *supra* note 59, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*.

3. *al-Miskīn* is a PWD, whose needs will not be fulfilled by using only financial resources. Prophet Muḥammad said that *al-miskīn* is not who asks other people for help, because some food will not realize his/her needs; no one remembers to help him/her; and no matter how much financial resources s/he has, his/her needs will not be fulfilled.⁶⁴⁶
4. *al-Miskīn* is a person with special needs. Although Prophet Muḥammad asked God to protect him from poverty, Prophet Muḥammad also asked God to consider him one of *al-masākīn* who has special need (which is seeking the satisfaction of God).⁶⁴⁷
5. According to al-Shāfi‘ī, *al-miskīn* is not necessary to be poor considering verse 18 (al-Kahf):79 of the *Qur’ān*, which mentions the story of a group of *al-masākīn* who have a ship⁶⁴⁸ (which means that *al-miskīn* could have assets).⁶⁴⁹
6. The verse 35 (Fatir):15 and the verse 47 (Muḥammad):38 of the *Qur’ān* state “Allāh is the rich and you [human beings] are *al-fuqarā’* [the poor]”,⁶⁵⁰ which means that God is the owner of everything and all human beings do not own anything. Therefore, the term *al-fuqarā’* means people who should not have assets.⁶⁵¹

⁶⁴⁶ This is a prophetic *Hadīth* from Muslim al-Naysābūrī from Abū Hurāirah from Prophet Muḥammad. This *Hadīth* is found in “*Zakāh*” in *Ṣaḥīḥ Muslim*.

⁶⁴⁷ This is a prophetic *Hadīth* from Abū ‘Īsā Muḥammad ibn ‘Īsā al-Sulamī al-Ḍarīr al-Būghī al-Tirmidhī [al-Tirmidhī] from Anas ibn Mālik ibn Nādar al-Anṣārī al-Khazrajī from Prophet Muḥammad. This *Hadīth* is found in “Poor-due” in *al-Jāmi` al-Mukhtaṣar min al-Sunan ‘an Rasūl Allāh wa Ma’rifat al-Ṣaḥīḥ wa al-Ma’loom wa mā ‘alāhi al-‘Amal [Jāmi` al-Tirmidhī]*. This *Hadīth* is also from Abū ‘Abd-Allāh Muḥammad ibn Yazīd ibn Mājah al-Rab‘ī al-Qazwīnī from Sa’id ibn Mālik ibn Sinān al-Anṣārī al-Khazrajī al-Khudrī from Prophet Muḥammad. This *Hadīth* is found in *Sunan ibn Mājah*.

⁶⁴⁸ The *Qur’ān*: 18 (al-Kahf):79.

⁶⁴⁹ al-Rāzī, *supra* note 59, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*.

⁶⁵⁰ The *Qur’ān*: 35 (Fatir):15; 47 (Muḥammad):38.

⁶⁵¹ These two verses (i.e. 35:15 and 47:38) of the *Qur’ān* simply mean that God does not need anything from any human being; on the other hand, every human being needs everything from God, because the true ownership actually resides with God. However, these two verses have been used to argue that the word *al-fuqarā’* in the *Qur’ān* is used to describe people who do not have or possess any asset. This meaning in this point 6 (that all human beings are asset-less in term of true ownership) does not contradict the meaning in the previous point 5 that *al-miskīn* could have assets in term of worldly possession or temporary ownership (not in term of true ownership). See point 10 in subsection 3.5.1, above, for more on this topic.

7. According to al-Shāfi‘ī, *al-miskīn* is not necessary to be poor considering verse 90 (al-Balad):14-16 of the *Qur’ān*, which requires to feed *al-miskīn* who is poor,⁶⁵² because this verse adds the adjective *dhā matrabah* (those down in the dust) to the word *al-miskīn*. Therefore, there could be a person who is *al-miskīn* without the adjective *dhā matrabah*, which means that there could be a person who is *al-miskīn* without being poor.⁶⁵³
8. The *Qur’ān* states “there is a known right in their [the believers’] money for the requester and for the deprived.”⁶⁵⁴ This means that the deprived is the poor, but the requester (who has special requests/needs) does not have to be poor.
9. Al-Bayḍāwī argues that while *al-fuqarā’* are those who do not have any asset or any income, *al-masākīn* are those people who do have assets and income, but they are people in *sukūn* (serenity) or not able to move [or to see (or blink) or to talk] due to their disabilities.⁶⁵⁵
10. Al-Qummī argues that *al-masākīn* are individuals with any kind of disability (such as the blind).⁶⁵⁶
11. As we have seen,⁶⁵⁷ verse 24 (al-Nūr):61 of the *Qur’ān* gives the blind, the lame, and the sick a full authorization to eat from any house that is available to them (i.e. this verse might imply the idea that they have the BHR to social income assistance).⁶⁵⁸ In addition, the *Qur’ān* provides the weakest members of the society (including the blind, the lame,

⁶⁵² The *Qur’ān*: 90 (al-Balad):14-16.

⁶⁵³ al-Rāzī, *supra* note 59, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*.

⁶⁵⁴ The *Qur’ān*: 51 (al-Dhāriyāt):19; 70 (al-M‘ārij):24-25.

⁶⁵⁵ al-Bayḍāwī, *supra* note 56, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*.

⁶⁵⁶ al-Qummī, *supra* note 76, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*; and al-kāshānī, *supra* note 75, in the comments regarding the same verse.

⁶⁵⁷ See subsection 3.5.1, above, for more on this topic.

⁶⁵⁸ The *Qur’ān*: 24 (al-Nūr):61.

and the sick) with many exemptions from some of their religious obligations,⁶⁵⁹ which might imply the idea that they have the BHR to reasonable disability accommodation.⁶⁶⁰

12. According to the *Qur'ān*, in the stories of the miracles of Jesus, the blind and the leper are those among whom Prophet Jesus can cure, which is the same theme within the New Testament stories.⁶⁶¹ These stories indirectly give the feeling that PWDs have the BHR to reasonable disability accommodation and the right to health care.

13. Although the word *al-masākīn* comes from the word *al-maskanah*, unfortunately, most of the scholars confuse the word *al-maskanah* with the word *al-dhullah*,⁶⁶² because these two words are mentioned in the *Qur'ān* together in the same verse twice.⁶⁶³ However, in my opinion, these two words do not have the same meaning, because the word *al-maskanah* comes from the word *sukūn*, which means serenity or inability to move due to a disability or weakness. On the other hand, the word *al-dhullah* means humiliation, which is mentioned in the *Qur'ān* many times by itself without the word *al-maskanah*.⁶⁶⁴ Therefore, *al-masākīn* are people with all kinds of disabilities. According to Sarah Scalenghe, "preliminary evidence suggests that the physically and mentally disabled were

⁶⁵⁹ The *Qur'ān*: 4 (al-Nisā'):43; 5 (al-Mā'idah):6; 9 (al-Tawbah):91; 48 (al-Fath):17; 73 (al-Muzzammil):20.

⁶⁶⁰ Some critics would argue that other exemptions are frequent such as: menstruation, childbirth etc. Surely such things should not be included under reasonable disability accommodation in this sense. However, those other exemptions can be used to prove that the *Qur'ān* provided women with accommodations related to their special circumstances. This idea can support the argument for the BHR of PWDs (similar to women) to reasonable necessary accommodations.

⁶⁶¹ The *Qur'ān*: 3 (Āl-'Imrān):49; 5 (al-Mā'idah):110.

⁶⁶² See for example, al-Ṭabarī, *supra* note 61, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur'ān*; Ibn 'Āshūr, *supra* note 68, in the comments regarding the same verse; and al-Ṭabāṭabā'ī, *supra* note 79, in the comments regarding the same verse.

⁶⁶³ The *Qur'ān*: 2 (al-Baqarah):61; 3 (Āl-'Imrān):112.

⁶⁶⁴ The *Qur'ān*: 3 (Āl-'Imrān):123; 5 (al-Mā'idah):54; 7 (al-A'rāf):152; 10 (Yūnus):26-27; 27 (al-Naml):34, 37; 68 (al-Qalam):43; 70 (al-M'ārij):44.

not necessarily stigmatized or marginalized."⁶⁶⁵ According to Rispler-Chaim, "Against the abusive attitudes to the disabled in the Roman and Byzantine empires as well as in the dark Middle Ages in Europe, the attitudes in Islamic law were in every way enlightened and far-seeing."⁶⁶⁶ However, according to Mohammed Ghaly, this positive attitude towards PWDs in Islamic sources does not deny the social reality, which was not always in line with what these sources plead for.⁶⁶⁷

14. In regard to the negative attitude towards PWDs, Andrew Rippin states

Blindness is recognized as a physical attribute that imposes restrictions upon the experience of those afflicted but does not change their status nor are they at a necessary disadvantage in front of God nor should it affect their relationship with other people.^[668] The physical trait itself is not declared impure or a legal deficiency [in the *Qur'ān*] as it is in the Bible, for example, where the blind are prohibited entrance to the temple because of their bodily difference. However, underlying this attitude are other thoughts which might even be considered to be in conflict with this explicit level. "Blind" becomes associated with [spiritual death,⁶⁶⁹] doubt [⁶⁷⁰], [manifest] error [⁶⁷¹], dark [⁶⁷²], lacking understanding [⁶⁷³], sickness [⁶⁷⁴]. These metaphorical connotations, then, convey an attitude towards the blind that associates those who are physically afflicted with these metaphorical connotations. So, despite the positive view of those who are physically blind, the passages which may or must be read as metaphorical will always convey their connotations back upon the physiological nature of blindness. It is in that observation that we see the power of metaphor and of language as a whole to convey social attitudes and perspectives. Such metaphors stand at the basis of language and illustrate the ways that historical manifestations of language

⁶⁶⁵ Sarah Scalenghe, *Towards a History of Disability in the Middle East: Attitudes to the Deaf in Ottoman Syria: Rethinking Culture in the Ottoman 18th Century* (New Jersey: Princeton University Press, 2005) at 209.

⁶⁶⁶ Rispler-Chaim, *supra* note 41 at 95.

⁶⁶⁷ Mohammed Ghaly, *Islam and Disability: Perspectives in Islamic Theology and Jurisprudence* (London: Routledge, 2010) at 164.

⁶⁶⁸ The *Qur'ān*: 24 (al-Nūr):61; 48 (al-Fath):17.

⁶⁶⁹ The *Qur'ān*: 7 (al-A'rāf):64; 35 (Fatir):19-22.

⁶⁷⁰ The *Qur'ān*: 27 (al-Naml):66; 40 (Ghāfir):58.

⁶⁷¹ The *Qur'ān*: 5 (al-Mā'idah):71; 10 (Yūnus):42-45; 11 (Hūd):20-24; 17 (al-Isrā'):72; 20 (Tāhā):124; 27 (al-Naml):80-81; 30 (al-Rūm):53; 41 (Fuṣṣilat):17; 43 (al-Zukhruf):36-40.

⁶⁷² The *Qur'ān*: 2 (al-Baqarah):17-20; 13 (al-Ra'd):16; 28 (al-Qaṣaṣ):66.

⁶⁷³ The *Qur'ān*: 2 (al-Baqarah):171; 6 (al-An'ām):50, 103-104; 13 (al-Ra'd):19; 22 (al-Ḥajj):46; 25 (al-Furqān):73; 47 (Muḥammad):23-24.

⁶⁷⁴ The *Qur'ān*: 17 (al-Isrā'):97; 41 (Fuṣṣilat):44.

are a product of their own time and space. Of course, the Arabic-speaking world is not the “source” of this conception of the blind: the metaphor is widely used ... and the same metaphorical usage of “blind” in Biblical stories conveys the same sense in its *Qur’ānic* setting. This does not suggest the necessity of “borrowing”: if anything, it argues against it, since for the metaphor to remain meaningful between cultures, there must be a shared understanding. The attitudes conveyed in the “blindness” metaphor may well be so universal as to be a part of common human experience ... It is worthy of note the extent to which the metaphor of “blindness” is linked to an entire “conceptual metaphor” in language: the overwhelming use of aspects of “sight” in the sense of “knowledge” (as in the English usage of “insight,” “farsighted,” “I see”), something as true in Arabic as it is in English (see the words related to the root b-ṣ-r for an illustration “They have eyes, but perceive not with them,” Q. 7:179)...The metaphorical use of “blindness” as equivalent to “ignorance” involves the reader in the acceptance of the equation.⁶⁷⁵

Rippin argues that this *Qur’ānic* metaphor about blindness and other kinds of disabilities can be easily misunderstood and misinterpreted and PWDs can be easily offended by it. However, any believer who is a PWD should not be offended by it. Although this *Qur’ānic* metaphor highlights their weakness and inabilities,⁶⁷⁶ it also highlights their

⁶⁷⁵ Andrew Rippin, “Metaphor and the authority of the Qur’an” in Khaleel Mohammed & Andrew Rippin, eds, *Coming to Terms with the Qur’an: A Volume in Honor of Issa Boullata*, McGill University (North Haledon, NJ: Islamic Publications International, 2008) at 58-59.

⁶⁷⁶The *Qur’ān* focuses especially on blindness to highlight the fact that blindness is the worst disability among all kinds of disabilities. Our eyes are the windows of our souls to the world. Therefore, blindness is a prison for the soul. Moreover, the sighted people rely so heavily upon their vision for their construction of reality that they cannot conceive of a fully meaningful human existence; they are ignorant without their sight. According to Rippin, It is commonly held around the world that sight is the “queen of the senses.” This is based on the equation that seeing equals understanding (as embedded in so many metaphorical uses), but it is important to remark that not all (if even many) blind people are mentally deficient, so the presumption of sighted people that sight equals understanding is simply wrong empirically. Regardless, sight has been deemed essential to life and essential to the definition of a full person, and it is those attitudes which pervade the metaphorical usages of blindness. Sight is so valued by sighted people (because its function is so obvious) that we forget that all the other senses play as important a role: they are all necessary, strong, vivid and pleasurable. Yet the absence of any or all of the senses does not deny the possibility of the “examined life,” of living a reflective, human existence. What factors lead to thinking this way about sight and the blind? Surely the clumsiness in the dark of those of us who are sighted leads us to think about the blind this way. The blind remind us of our own vulnerability even in our sightedness. Further, we discover that the blind function and are productive in society, even though we think of sight as essential to life. We end up questioning our own sense of personal productivity. Loss of vision seems the most serious deviation from the norm of “body-wholeness,” thus the encounter with the functioning-blind becomes threatening, especially to our way of defining identity through physique. Some have suggested that encountering blindness makes us confront our own mortality, because of the conceptualization of vision as essential to life (and darkness as associated

needs for help and their right to receive this help. The *Qur'ān* uses this metaphor repeatedly to criticize the unbelievers of not thinking and not using their intelligence and their senses to understand God's signs and His wisdom.⁶⁷⁷ At the same time, the *Qur'ān* uses this metaphor repeatedly to criticize the unbelievers about their negative attitudes towards PWDs by reminding them that God is the owner of everything (including their senses). If they are not willing to use their senses to understand God's signs and His wisdom, He is going to take their senses away from them; scaring them through their own

with death). The images which thus become associated with the blind are defense mechanisms to protect our own sense of identity and meaning. Our image of blindness builds upon and interacts with a variety of symbols: a) the image of light and dark: illumination, enlightenment, God is light, He is the All-Seeing; b) the image of the eye: association with light, idea of the "divine/third eye"; the eye as magic/mystery/power/evil/harm; the eye as the window to the soul; the appearance of the eye as a key to the person ("dark eyes," "somber eyes"); c) the image of loss of an eye: punishment for having seen what is forbidden, transgression of the natural order—the loss of an eye is thus transformative, being associated with death and rebirth (Paul blinded on the road to Damascus); the person who is blind is guilty of "looking" (often in a sexual sense, suggesting a link between blindness and castration). ... When blindness is used as a motif in literature, [according to Michael E Monbeck], it conveys one or more of the following...: deserving of pity and sympathy; miserable; in a world of darkness; helpless; fools; useless; beggars; still able to function despite their blindness...; compensated for their lack of sight; being punished for some past sin; to be feared, avoided, and rejected; maladjusted; immoral and evil; better than sighted people (an idealization because such people are "protected" from the horrors of the world); mysterious and connected to magic and the supernatural. Examples of metaphorical uses within these motifs are easy to cite within the patterns of everyday speech; we speak of "blind rage" and "blind chance," reflecting the attitude of irrationality that sighted people imagine to be the life of one who is blind. The blind man creates the popular beggar image of cartoons and the like, and the blind salesperson on the side of the street is a cross-cultural figure in movies for the person to be taken advantage of. Examples can be multiplied endlessly. *Ibid* at 50-51.

Monbeck states "Blindness is, therefore, a thing in itself, not an absence of sight, but the grip of darkness, the maw of the chasm, the obliteration of consciousness by the overpowering seduction of the unconscious." Michael E Monbeck, *The Meaning of Blindness: Attitudes towards Blindness and Blind People*, 2d ed (Bloomington: Indiana University Press, 1973) at 143.

⁶⁷⁷ The *Qur'ān*: 2 (al-Baqarah):6-20,44, 74-79, 170-171, 257; 3 (Āl-'Imrān):80; 5 (al-Mā'idah):71, 75-76, 103-104; 6 (al-An'ām):25, 39, 46, 50, 55-67, 71, 103-105, 109-110, 122-126, 136-140; 7 (al-A'rāf):28, 33, 146-149, 175-179, 191-198; 8 (al-Anfāl):21-23; 10 (Yūnus):12, 18-23, 35-36, 59-60, 68-69, 104-106; 11 (Hūd):5, 18-24; 12 (Yūsuf):39-40, 105-111; 13 (al-Ra'd):16-17, 19; 16 (al-Naḥl):51-60, 73-74, 106-108; 17 (al-Isrā'):40, 46, 56; 18 (al-Kahf):56-59, 101; 19 (Maryam):41-42; 20 (Ṭāhā):88-89, 128; 21 (al-Anbiyā'):2-3, 10, 22-24, 42-45, 50-67; 22 (al-Ḥajj):11-13, 42-46, 73; 23 (al-Mu'minūn):66-92; 25 (al-Furqān):3, 35-40, 43-44, 55, 73; 27 (al-Naml):4, 65-69, 79-81; 29 (al-'Ankabūt):19-20; 30 (al-Rūm):8-9, 40-42, 52-53; 31 (Luqmān):7; 32 (al-Sajdah):26-27; 34 (Saba'):9; 35 (Fatir):14, 19-24; 36 (Yāsīn):8-10, 62, 74-75; 37 (al-Şāffāt):149-159; 38 (Şād):29; 39 (al-Zumar):38, 43-45; 40 (Ghāfir):12-13, 53-58; 43 (al-Zukhruf):15-25, 36, 87; 45 (al-Jāthiyah):7-9, 23-26; 50 (Qāf):37; 57 (al-Ḥadīd):9; 62 (al-Jumu'ah):5; 67 (al-Mulk):9-10, 15-24, 30; 68 (al-Qalam):35-47; 74 (al-Muddaththir):49-52.

deepest fear,⁶⁷⁸ while using terms that are similar to their own negative attitudes towards PWDs. Therefore, the *Qur'ān* is teaching them that they are not better than PWDs and they do not have any guarantee of not becoming disabled.⁶⁷⁹

15. The *Qur'ān* uses harsh language in this *Qur'ānic* metaphor to make those unbelievers change their own negative attitudes towards PWDs and understand that they will be accountable to God (on the day of judgment) about not using their senses to understand God's signs and His wisdom, because this worldly life is only an examination period according to the *Qur'ānic* social contract. In fact, according to the *Qur'ān*, disability is not a punishment, but it is part of the individual's examination in this life to examine the faith and patience of the PWD and to examine other people willingness to help him/her. If the disability is a punishment, why have some disabilities or illnesses been inflicted upon some of God's messengers (such as Prophet Jacob⁶⁸⁰ and Prophet Ayyūb⁶⁸¹)? It cannot be a punishment for those prophets (because prophets are infallible, so they do nothing wrong to be punished for), but it is an examination for those prophets. According to Ghaly, the most familiar Islamic explanation for the existence of disability and suffering is that disability is a tool for testing one's faith. Muslim scholars frequently quote the sagacious statement, "Gold and silver are to be examined by fire and the believer is to be examined by affliction."⁶⁸²

⁶⁷⁸ The *Qur'ān*: 17 (al-Isrā'):97, 20 (Tāhā):124-127.

⁶⁷⁹ The *Qur'ān*: 2 (al-Baqarah):20; 6 (al-An'ām):46.

⁶⁸⁰ The *Qur'ān*: 12 (Yūsuf):84.

⁶⁸¹ The *Qur'ān*: 21 (al-Anbiyā'):83; 38 (Şād):41.

⁶⁸² Ghaly, *supra* note 667 at 47.

16. The above argument gives the feeling that PWDs are in much better position than those unbelievers who are not using their senses to understand God's signs and His wisdom.

Even more, according to the *Qur'ān*,

He [Prophet Muḥammad] frowned and turned away, when the blind man came to him [Prophet Muḥammad, because of interrupting his meeting with the rich people]. You [Prophet Muḥammad] would not know that he [the blind] might pay *Zakāh* [that would purify him], or [he might] get awareness that would benefit him. But as to the one who regards Himself as self-sufficient, you [Prophet Muḥammad] gave him all of your attention although it is not your responsibility, if he chooses not to pay *Zakāh* [to purify himself]. But as to him [the blind] who came to you striving [earnestly], and with fear [in his heart], you [Prophet Muḥammad] ignored him.⁶⁸³

Therefore, God had criticized prophet Muḥammad for his negative attitude towards a blind person, which means God preferred this blind person over His own prophet. Therefore, this verse confirms the human dignity or the fundamental respect for PWDs and their right to be helped and not to be ignored (i.e. their BHR to absolute equality and non-discrimination).

17. In fact, disability should be considered as a source of rewards in the Hereafter. According to Ibn Ḥajar al-‘Asqalānī, God visits people He loves with affliction so that He will reward them in return.⁶⁸⁴ According to ‘Abd al-Karīm Zaydān, disability is an instrument of attaining lofty degrees and ranks in Paradise that would have been unattainable through one's good deeds alone.⁶⁸⁵ In fact, there are many well-known prophetic traditions supporting this fact, to the extent that Abū al-Ḥasan al-Haythamī (for example) dedicated for these prophetic traditions one of his chapters entitled "Section of Attaining

⁶⁸³ The *Qur'ān*: 80 (‘Abasa):1-10.

⁶⁸⁴ Shihāb al-Dīn Aḥmad ibn ‘Alī ibn Muḥammad ibn Ḥajar al-‘Asqalānī, *Fath al-Bārī bi Sharḥ Ṣaḥīḥ al-Bukhārī* (Beirut: Dār al-Ma‘rifah, 1959) vol 10 at 108.

⁶⁸⁵ ‘Abd al-Karīm Zaydān, *al-Sunan al-Ilāhiyyah fī al-Umam wa al-Jamā‘āt wa al-Afrād fī al-Sharī‘ah al-Islamiyyah*, 3d ed (Beirut: Mu‘ssasat al-Risālah, 1994) at 213.

the [honourable] Ranks by Affliction".⁶⁸⁶ The most famous *Ḥadīth* about this fact: whomever God has took his/her jewels [his/her eyes in this worldly life], God will compensate him/her with the highest level of paradise [which is the highest level of rewards in the Hereafter], where s/he will enjoy looking at the face of God in the morning and in the evening.⁶⁸⁷ Therefore, the believer who is blind will have priority in rewards over all other creatures in the Hereafter; this implies that the blind should have priority to be helped in this worldly life.⁶⁸⁸

18. Programs for relieving unemployment are eligible for subsidy. Therefore, *al-Masākīn* category should include PWDs, because people who are unable to work deserve to be helped. Unfortunately, most Muslim scholars have not interpreted *al-Masākīn* category clearly in this way to include PWDs, simply because they consider that taking care of the needs of PWDs is the responsibility of their families. Therefore, this idea may explain the exclusion of PWDs from receiving social income assistance as a part of social welfare systems in the MENA.

⁶⁸⁶ Abū al-Ḥasan Nūr al-Dīn `Alī ibn Abū Bakr al-Haythamī, *Majma' al-Zawā'id wa Manba' al-Fawā'id* (Beirut: Mu'assasat al-Ma'ārif, 1986) vol 2 at 292.

⁶⁸⁷ This is a prophetic *Ḥadīth* from Abū Hurayrah from Prophet Muḥammad. This *Ḥadīth* is found in al-Tirmidhī, *Jāmi' al-Tirmidhī*; Aḥmad ibn Shu'ayb ibn Alī ibn Sīnān Abū `Abd al-Raḥmān al-Nasā'ī, *al-Sunan al-Kubrā lil-Nasā'ī*; Aḥmad ibn Ḥanbal, *Masnad Aḥmad ibn Ḥanbal*; and Abū al-Qāsim Sulaymān ibn Aḥmad ibn al-Ṭabarānī, *al-Mu'jam al-Awṣaṭ lil-Ṭabarānī*.

⁶⁸⁸ This point here is to confirm that PWDs are chosen by God to have priority over other people and to confirm that their disabilities are not punishments from God. The point here is not meant to treat disabilities as something to be compensated for in the hereafter or in this worldly life, because if their reward in the hereafter is meant to be as a compensation for their disabilities, we would not see the *Qur'ān* urging the believers to help PWDs. As it is explained in this dissertation, PWDs get their share of *Zakāh* as a matter of right to the money of rich people. Therefore, *Zakāh* is not a compensation for their disabilities, because if it is meant to be as a compensation for their disabilities, their rewards in the hereafter would be meaningless. Simply, PWDs get *Zakāh* as an allowance from God (the true owner of everything) pursuant to the terms and conditions of the *Qur'ānic* social contract (between God and all human beings), which set forth the borders of God (His commandment) to be considered in the examination challenge of this worldly life. In addition, only the believers among those PWDs (who got the passing mark for their examination result in the hereafter) will get their reward in the hereafter for their patience not for being disabled.

19. In my opinion, *al-masākīn* are those people who are in harsh circumstances; they have special needs due to their disabilities; and they are not able to free themselves from these circumstances due to their demanding special needs. Due to the fact that in our old age, all of us will definitely have some demanding special needs (as result of a sickness or limitations), elderly people should be included in this category. Due to the fact that in our young age, some of us might have some demanding special needs (not as result of a disability, but as result of losing parental support), orphans should be included in this category. In fact, the *Qur'ān* repeatedly in many of its verses commanded taking care of orphans.⁶⁸⁹

Therefore, with a commitment to social justice and a consideration of both liberal and Islamic moral values, I would interpret this category as people with special needs (such as PWDs, elderly people and orphans). Those people are included in this category based on their BHRs to reach the minimum level of all BHCs. While PWDs are included in this category (as we have seen in Chapter 2) based on their true demonstrated health care needs/personal care needs (due to their medical conditions), elderly people are included in this category based on the assumption that seniors (above specified age) most likely will have health care needs/personal care needs (even if they do not have any of these needs in reality). Orphans are also included in this category based on the assumption that without any parental support, children (below specified age) most likely will have health care needs/personal care needs (even if they do not have any of these needs in reality).

⁶⁸⁹ The *Qur'ān*: 2 (al-Baqarah):83, 177, 215, 220; 4 (al-Nisā'):2, 6, 8, 10, 36, 127; 6 (al-An'ām):152; 8 (al-Anfāl):41; 17 (al-Isrā'):34; 18 (al-Kahf):82; 59 (al-Ḥashr):7; 76 (al-Insān):8; 89 (al-Fajr):17; 90 (al-Balad):15; 93 (al-Ḍuḥá):6, 9; 107 (al-Mā'ūn):2.

This category is related to the BHR to social income assistance, the BHR to practical social cooperation, the BHR to reasonable disability accommodation and the BHR to absolute equality and non-discrimination. Therefore, this category has the second priority after the poor category. These people with special needs do not have to be poor to be eligible for social assistance. However, if anyone of these people is poor, s/he has the highest priority over all of the subcategories within the poor category.⁶⁹⁰

3.6.2.2 The other categories from category 3 to category 8

Due to the fact that all of the other categories (i.e. categories 3 - 8) are (in one way or another) related to exercising the BHR to responsible freedom of conscience (as we will see), they have less priority than the first two categories. However, the difference between all of the following categories is the degree of the required individual responsibility (as opposed to the first two categories, which they do not require it):

- Category 3 and category 4 have the third priority and the fourth priority among all of the categories, because (as we will see) they only require the lack of irresponsibility after receiving *Zakāh* to keep their eligibility for the following year.

⁶⁹⁰ In my opinion, the top priority for any human being would be to satisfy his/her basic necessities of life (to survive death). His/her second priority would be to satisfy his/her health/personal care needs (to live a healthy life). His/her third priority would be to satisfy his/her economic independence needs and his/her social-political participation needs (to reach his/her full life potential). Therefore, the top priority should be given to the poor due to their need to satisfy their basic necessities of life to survive death; however, if all of these basic necessities of life are satisfied, then the second priority should be given to PWDs (as well as orphaned children and seniors) due to their health/personal care needs to live a healthy life (even if their limitations are not severe). Therefore, outside of the poor category, PWDs (as well as orphaned children and seniors) should have priority over all other disadvantaged groups who do not have health/personal care needs. Moreover, the poor PWDs (as well as poor orphaned children and poor seniors) within the poor category should have priority over all other poor disadvantaged groups (within the poor category) who do not have health/personal care needs.

- Category 5 and category 6 have the fifth priority and the sixth priority among all of the categories, because (as we will see) they require the lack of irresponsibility before receiving *Zakāh* to confirm their eligibility for this year.
- Category 7 and category 8 have the seventh priority and the eighth priority among all of the categories, because (as we will see) they require the responsibility in spending *Zakāh* for the previous year to be eligible for the following year.

3.6.2.2.1 Category 3: (*al-‘Āmilīna ‘alayhā*)

*al-‘Āmilīna ‘alayhā*⁶⁹¹ is usually interpreted as the administrators of *Zakāh* (i.e. *Zakāh* funds should be focused only on the genuine expenses of administering charity and not diverted to other uses). According to al-Ṭabarī, al-Rāzī and al-Qurṭubī (based on the opinion of al-Ḥanafī school and al-Mālikī school of Islamic jurisprudence), those people take their portion not based on their needs but based on their work. Therefore, their portion should be equivalent to the size of their work, because they dedicated their time for this kind of work.⁶⁹² al-Qurṭubī added that this category also includes the religious leader who leads the prayer.⁶⁹³ al-Sha‘rāwī added that they should be paid the average pay for their time of work even if they were rich, because they dedicated their time for this kind of work even if they have other incomes from other jobs.⁶⁹⁴ However, al-Ālūsī argued that they get from *Zakāh* only the amount that is enough to cover their expenses to do their job (not a monthly income).⁶⁹⁵ Ibn ‘Āshūr argued that they are eligible,

⁶⁹¹ The *Qur’ān*: 9 (al-Tawbah):60.

⁶⁹² al-Ṭabarī, *supra* note 61, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*; al-Rāzī, *supra* note 59, in the comments regarding the same verse; al-Qurṭubī, *supra* note 58, in the comments regarding the same verse.

⁶⁹³ *Ibid.*

⁶⁹⁴ al-Sha‘rāwī, *supra* note 70, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*.

⁶⁹⁵ al-Ālūsī, *supra* note 65, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*.

because they do charitable work [for social justice] and collecting money from people is the most difficult job.⁶⁹⁶ Aṭṭafayyish argued that those workers should not accept any gift from whom they collect *Zakāh* from to avoid any possibility of corruption in the system of redistribution.⁶⁹⁷

I agree with al-Sha‘rāwī that the existence of this category is significant, because when *Zakāh* has its own administration governed by the central government, there will be a social welfare system where the poor will not be humiliated by getting the money directly from the rich.⁶⁹⁸ Moreover, this meaning is confirmed in the *Qur’ān*, which states that “Take [O Prophet Muḥammad (the administrator)] from their money *ṣadaqah* to cleanse them and to purify them with it”.⁶⁹⁹ This verse of the *Qur’ān* confirms that there is a support in the *Qur’ān* for a centrally administered obligatory taxation of this nature (i.e. the process of *Zakāh* should be centrally administered as a governmental income tax system). This understanding of the government's role (i.e. there is a need for governments to act rather than individuals) is a part of the progressive social justice reading of the *Qur’ān*.⁷⁰⁰

Due to the fact that this kind of job most likely will be a hard voluntary job (with accountability), this category is related to exercising the BHR to responsible freedom of conscience. Therefore,

⁶⁹⁶ Ibn ‘Āshūr, *supra* note 68, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*.

⁶⁹⁷ Aṭṭafayyish, *supra* note 67, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*.

⁶⁹⁸ al-Sha‘rāwī, *supra* note 70, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*.

⁶⁹⁹ The *Qur’ān*: 9 (al-Tawbah):103.

⁷⁰⁰ I should be clear here that in my opinion, the *Zakāh* system is a “special case”, which should be implemented by the secular government (i.e. not an “Islamic state”); the state is not responsible for observance of *Ṣalāh* (for example), or morality (in general). Although *Zakāh* is often mentioned together with *Ṣalāh*, there is a main difference between *Ṣalāh* and *Zakāh*. *Ṣalāh* is related to the relationship between the human being and God; therefore, the government should not intervene in the observance of *Ṣalāh*. On the other hand, *Zakāh* is related to the relationship between the human being and other human beings to achieve social justice for the benefit of the whole society; therefore, the government should intervene in the fulfillment of *Zakāh*.

people in this category will be able to keep their eligibility for the following year as long as they did not commit any corruption during their voluntary job (i.e. the lack of irresponsibility after receiving *Zakāh*). This category is related to the BHR to protected sustainable environment, the BHR to practical social cooperation, the BHR to absolute equality and non-discrimination, and the BHR to responsible freedom of conscience.

With a commitment to social justice and a consideration of both liberal and Islamic moral values, I would interpret this category as people who devoted their time to do charitable work (such as any voluntary job that involves social justice or environmental protection).⁷⁰¹ This category has the third priority among all of the other major categories. These people do not have to be poor to be eligible for social assistance. However, if anyone of these people is poor, s/he has the second priority among all of the other subcategories within the poor category.

We should note here that the misinterpretations of the following five categories of beneficiaries of alms might be criticized as tools for political implementations that may result in the distribution of *Zakāh* funds for some expenses outside of the original intended divine wisdom of God for social justice (i.e. for the distribution of *Zakāh* funds to people who are truly in need).

⁷⁰¹ Although the existence of this category would prove that *Zakāh* should have its own administration (as I have argued) governed by the central government, I would not include government agencies, because government agencies should get their funding from the general tax revenue (and not from *Zakāh*). I would not include government employees, because government employees should get their salaries from the government as their employer (and not from *Zakāh*). Therefore, I would limit this category as people who devoted their time to do charitable work (such as any voluntary job that involves social justice or environmental protection).

Regardless of the importance of these other expenses, they should be covered by using other resources and not by using *Zakāh* funds.⁷⁰²

3.6.2.2.2 Category 4: “those whose hearts are made to incline [to truth]”

The phrase: “Those whose hearts are made to incline [to truth]”⁷⁰³ is usually interpreted as those recently or about to be converted to Islam or anyone “who have been weaned from hostility to Truth, who would probably be persecuted by their former associates, and require assistance until they establish new connections in their new environment”.⁷⁰⁴ According to Asad, this category includes anyone “whose conversion every effort should be made, either directly or indirectly (i.e. by means of the widest possible propagation of the teachings of Islam).”⁷⁰⁵ al-Khayyāt interpreted this category as applying to anyone sympathetic with Islam.⁷⁰⁶ On the other hand, ‘Uthmān Ḥussayn ‘Abd-Allāh argues that this category applies to missionary education, journalism to resist secularism or communism or Zionism or Christian missions, assisting new converts to Islam, and assuring the support or neutrality of people in power.⁷⁰⁷

According to al-Maḥallī and al-Ṣuyūṭī, this category includes

those whose hearts are to be reconciled, so that they might become Muslims, or that Islam might be firmly established, or that their peers might become Muslims, or that they might defend Muslims, all of whom are [classed according to different] categories. al-Shāfi‘ī stated that the first and the last [of these categories] are no longer given [of the

⁷⁰² Some critics would argue that my own interpretation of the *Qur’ān* about the categories of beneficiaries of *Zakāh* might also be criticized as tools for political implementations (i.e. biased towards one political standpoint). However, I would argue that my own interpretation of the *Qur’ān* about the categories of beneficiaries of *Zakāh* is based on an objective device, which is the motivation for social justice and equality rights.

⁷⁰³ The *Qur’ān*: 9 (al-Tawbah):60.

⁷⁰⁴ Yusuf Ali, *supra* note 73, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*.

⁷⁰⁵ Asad, *supra* note 74, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*.

⁷⁰⁶ al-Khayyāt, *supra* note 54 at 185.

⁷⁰⁷ Abu-Sahlieh, *supra* note 72 at 573.

alms-tax] today, because of the [established] power of Islam; in contrast, the other two [categories] are given [of the alms-tax].⁷⁰⁸

Some scholars said this category includes anyone from the people of the book who converted to Islam even if s/he is rich (not for his/her needs but for his/her support to Islam and for supporting him/her and for encouraging others). Other scholars said (such as those from al-Mālikī and al-Ḥanafī schools) those people existed only at the time of Prophet Muḥammad and this category is no longer applicable.⁷⁰⁹

On the other hand, al-Qummī and al-kāshānī includes people who like to search for the truth in the *Qur'ān*⁷¹⁰ and people whom Prophet Muḥammad used *Zakāh* to support and to encourage to learn about Islam to enlighten their hearts.⁷¹¹ In fact, the *Qur'ān* in many of its verses connects the human heart with idea of thinking freely and looking for the truth and searching for God.⁷¹² al-Ālūsī states that *Zakāh* could be giving to any scholar [or scientist] even if s/he has many

⁷⁰⁸ al-Maḥallī & al-Ṣuyūṭī, *supra* note 57, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur'ān*.

⁷⁰⁹ al-Ṭabarī, *supra* note 61, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur'ān*; al-Rāzī, *supra* note 59, in the comments regarding the same verse; al-Qurṭubī, *supra* note 58, in the comments regarding the same verse; Ibn Kathīr, *supra* note 64, in the comments regarding the same verse; and al-Shawkānī, *supra* note 60, in the comments regarding the same verse.

⁷¹⁰ al-Janābdhī, *supra* note 77, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur'ān*.

⁷¹¹ al-Qummī, *supra* note 76, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur'ān*; and al-kāshānī, *supra* note 75, in the comments regarding the same verse.

⁷¹² The *Qur'ān*: 2 (al-Baqarah):7, 10, 74, 88, 93, 97, 118, 225, 260; 3 (Āl-'Imrān):7, 8, 167; 4 (al-Nisā'):63, 155; 5 (al-Mā'idah):13, 41, 52, 113; 6 (al-An'ām):25, 43, 46, 110; 7 (al-A'rāf):100-101, 179; 8 (al-Anfāl):49, 70; 9 (al-Tawbah):64, 77, 87, 93, 117, 125, 127; 10 (Yūnus):74, 88; 15 (al-Hijr):12; 16 (al-Nahl):22, 78, 106, 108; 17 (al-Isrā'):36, 46; 18 (al-Kahf):28, 57; 21 (al-Anbiyā'):3; 22 (al-Ḥajj):46, 53-54; 23 (al-Mu'minūn):63, 78; 24 (al-Nūr):50; 26 (al-Shu'arā'):89, 194, 200; 30 (al-Rūm):59; 32 (al-Sajdah):9; 33 (al-Aḥzāb):12, 60; 37 (al-Ṣāffāt):84; 39 (al-Zumar):22-23; 40 (Ghāfir):35; 41 (Fuṣṣilat):5; 45 (al-Jāthiyah):23; 46 (al-Aḥqāf):26; 47 (Muḥammad):16, 20, 24, 29; 48 (al-Fath):11-12; 49 (al-Ḥujurāt):3, 14; 50 (Qāf):33, 37; 57 (al-Ḥadīd):16; 58 (al-Mujādalah):22; 61 (al-Ṣaff):5; 63 (al-Munāfiqūn):3; 64 (al-Taghābun):11; 67 (al-Mulk):23; 74 (al-Muddaththir):31; 83 (al-Mutaffifeen):14.

books worth much money.⁷¹³ Atṭafayyish added that the scholar has priority in receiving *Zakāh* to cover his/her expenses and his/her children's expenses.⁷¹⁴

Due to the fact that this category is related to freely converting to Islam and thinking freely and looking for the truth and searching for God (which will lead to the benefit of the whole society), this category is related to exercising the BHR to responsible freedom of conscience. Therefore, people in this category will be able to keep their eligibility for the following year as long as they did not waste their time in the previous year for something other than study or research (i.e. the lack of irresponsibility after receiving *Zakāh*). This category is related to the BHR to protected sustainable environment,⁷¹⁵ the BHR to practical social cooperation, the BHR to absolute equality and non-discrimination, and the BHR to responsible freedom of conscience.

Although this category is related to the same rights in the previous category, the previous category has priority over this category, because working and doing has priority over searching and studying. Therefore, this category has the fourth priority among all of the other major categories.

With a commitment to social justice and a consideration of both liberal and Islamic moral values, I would interpret this category as people who are looking for the truth and searching for God such as students (and their teachers) and researchers (and their assistants), because people should

⁷¹³ al-Ālūsī, *supra* note 65, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur'ān*.

⁷¹⁴ Atṭafayyish, *supra* note 67, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur'ān*.

⁷¹⁵ This category is related to the BHR to protected sustainable environment, because thinking freely and looking for the truth and searching for God ultimately would lead to respect the greatness of the Creator and the greatness of His creation, and to acknowledge the importance of protecting and sustaining the environment that He created.

be encouraged to obtain all kinds of knowledge based on the idea that any kind of sciences can help people to know God. These people do not have to be poor to be eligible for social assistance. However, if anyone of these people is poor, s/he has the third priority among all of the other subcategories within the poor category.

We should note here that the previous four categories in this verse started with the preposition “*Li*”, which means “For”. Therefore, *Zakāh* belongs to all of the previous four categories as a matter of ownership for them; they receive it directly. This proves that the term *ṣadaqat* mentioned in verse 9 (al-Tawbah):60 of the *Qur’ān* are meant to be the obligatory *Zakāh* (i.e. not voluntary and not arbitrary). This also means that everyone in the previous four categories has the right to automatic wealth redistribution for social justice (i.e. universal benefits). People in the first four categories will be eligible for this year or keep their eligibility for the following year with a simplified straightforward method by providing specified documents (i.e. a tax return for low income poor, a doctor letter for disability, Identification Card (ID) for old age, death certificate for both parents of the orphan, work experience letter for volunteer, or enrolment letter for students and researchers).

On the other hand, the next four categories in this verse started with the preposition “*Fi*”, which means “In”. Therefore, *Zakāh* could be spent within any of the next four categories on a case-by-case basis (i.e. selective benefits), but they receive it indirectly (e.g. through another person or a NGO) for their own benefit. This also means that people in the next four categories cannot be eligible for this year or keep their eligibility for the following year (as we will see) unless they go through a complex process and only after they get an official decision every year on their own

particular case for their eligibility or for keeping their eligibility. We should also note here that in addition of being related to exercising the BHR to responsible freedom of conscience, all of the next four categories are (as we will see) related (to some degree) to guaranteeing the BHR to be consulted (i.e. right to a free democracy). On the other hand, all of the previous four categories are (as we have seen) related (to some degree) to guaranteeing the BHR to absolute equality and non-discrimination; they have higher priorities over the next four categories. Therefore, in my progressive Islam perspective, according to the *Qur'ān*, equality has priority over liberty.

3.6.2.2.3 Category 5: (*Fī al-riqāb*)

*Fī al-riqāb*⁷¹⁶ is usually interpreted as “in the freeing of human beings from bondage”, which relates both to the ransoming of prisoners of war and to the freeing of slaves.⁷¹⁷ On the other hand, ‘Uthmān Ḥussayn ‘Abd-Allāh argues that this category includes helping Muslims in their struggle against colonialism and supporting Muslim minorities living in non-Muslim tyrannies.⁷¹⁸ According to Yusuf Ali, this category includes “those in bondage, literally and figuratively:” captives of war (i.e. Muslims captured by enemies) who must be redeemed; and slaves who must be freed; and “those in the bondage of ignorance or superstition or unfavourable environment should be helped to freedom to develop their own gifts”.⁷¹⁹

⁷¹⁶ The *Qur'ān*: 9 (al-Tawbah):60.

⁷¹⁷ Asad, *supra* note 74, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur'ān*.

⁷¹⁸ Abu-Sahlieh, *supra* note 72 at 573.

⁷¹⁹ Yusuf Ali, *supra* note 73, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur'ān*.

In my opinion, freeing of physical slaves is no longer applicable, because in our time, there are no more known physical slaves.⁷²⁰ Due to the fact that the *Qur'ān* should be applicable anytime and anywhere, the obligation to free all captives of war should include Muslims captured by enemies and non-Muslims captured by Muslims. Therefore, ransoming of captives of war should not be covered by *Zakāh*, because exchanging of captives of war is an international problem that is subject to the international law and international relations; it is not limited to one state or to one society. Moreover, freeing those in the bondage of ignorance or superstition should not be part of this category, because they are related to education, which is related to the previous category (i.e. category 4: “Those whose hearts are made to incline [to truth]”⁷²¹). Therefore, this category (i.e. category 5: *Fī al-riqāb*) should include only those in the bondage of unfavourable environment who need to be helped to freedom to develop their own skills and abilities.

People in this category will be able to prove their eligibility for this year as long as they did not deliberately play any part of subjecting themselves to a bondage or to an abusive relationships (i.e. the lack of irresponsibility before receiving *Zakāh*), which means this category is related to exercising the BHR to responsible freedom of conscience. *Zakāh* could be spent within this category on a case-by-case basis (i.e. selective benefits), but they receive it indirectly through NGOs that provide them with all kinds of required supports for their own benefit depending on their needs. This also means that people in this category cannot be eligible for this year or keep

⁷²⁰ The discussion of physical slavery here is about those in bondage literally and not figuratively. However, progressive Islam considers slavery as a very real phenomenon such as child labour or the abusive relationship between husbands and wives. Their discussion of this kind of slavery is about those in the bondage figuratively of unfavourable environment who need to be helped to freedom to develop their own skills and abilities. Therefore, I included those people in this category as people who are living in abusive relationships.

⁷²¹ The *Qur'ān*: 9 (al-Tawbah):60.

their eligibility for the following year unless they go through a complex process and only after they get an official decision every year on their own particular case that they are under abusive relationships.

With a commitment to social justice and a consideration of both liberal and Islamic moral values, I would interpret this category as people who are living in abusive relationships (such as women under abuse, children under abuse, elderly people under abuse and PWDs under abuse). Therefore, this category is related to the BHR to practical social cooperation, the BHR to reasonable disability accommodation, the BHR to absolute equality and non-discrimination, the BHR to responsible freedom of conscience, and the BHR to be consulted (i.e. right to a free democracy). Hence, this category has the fifth priority among all of the other major categories. These people do not have to be poor to be eligible for social assistance. However, if anyone of these people is poor, s/he has the fourth priority among all of the other subcategories within the poor category.

3.6.2.2.4 Category 6: (*al-Ghārimīn*)

*al-Ghārimīn*⁷²² is usually interpreted as debtors or those who cannot repay their debts; as a result, they lose their rank (such as businessmen) and they become clients of their creditors. Due to the fact that it is forbidden to disburse *Zakāh* funds into investments instead of being directly given to those who are in need,⁷²³ this category has been restrictively interpreted by some scholars as

⁷²² *Ibid.*

⁷²³ Visser, *supra* note 54 at 29.

meaning only those “debtors who by financing good works have become impoverished”.⁷²⁴ According to Ibn ‘Abbās, this category includes only “those who incurred debts to fulfill works, which are for the obedience of Allāh”.⁷²⁵ al-Maḥallī and al-Ṣuyūfī state that this category includes “those in debt, if they have taken out a debt without intending thereby an act of disobedience,⁷²⁶ or those who have repented but have nothing with which to fulfill [the penalty of expiation], or to set things right between people,⁷²⁷ even if they are wealthy”.⁷²⁸ According to Asad, this category “describes people who are overburdened with debts contracted in good faith, which –through no fault of their own– they are subsequently unable to redeem.”⁷²⁹ This means that “those who are held in the grip of debt should be helped to economic freedom” from their financial bondage.⁷³⁰ al-Qurṭubī and al-Bayḍāwī added that those people do not have to be poor to receive *Zakāh*.⁷³¹ According to al-Sha‘rāwī, *Zakāh* is an Islamic system similar to insurance system for loans.⁷³²

With a commitment to social justice and a consideration of both liberal and Islamic moral values, I would limit this category to people who are forced to borrow due to their harsh circumstances and are not able to repay their debts for reasons outside their control, because the word *al-*

⁷²⁴ Schimmel, *supra* note 54 at 35.

⁷²⁵ Ibn ‘Abbās, *supra* note 63, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*.

⁷²⁶ al-Ṭabarī, *supra* note 61, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*.

⁷²⁷ al-Zamakhsharī, *supra* note 62, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*.

⁷²⁸ al-Maḥallī & al-Ṣuyūfī, *supra* note 57, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*; and al-Rāzī, *supra* note 59, in the comments regarding the same verse.

⁷²⁹ Asad, *supra* note 74, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*.

⁷³⁰ Yusuf Ali, *supra* note 73, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*.

⁷³¹ al-Qurṭubī, *supra* note 58, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*; and al-Bayḍāwī, *supra* note 56, in the comments regarding the same verse.

⁷³² al-Sha‘rāwī, *supra* note 70, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*.

ghārimīn comes from the word *garam* (which means attachment to harsh condition), and it is related to the word *gharāmah* (which means a financial hardship).

People in this category will be able to prove their eligibility for this year as long as they did not deliberately borrow outside of their personal emergencies and they did explore all of their resources that are available to them for repaying their debts (i.e. the lack of irresponsibility before receiving *Zakāh*). This means that this category is related to exercising the BHR to responsible freedom of conscience. *Zakāh* could be spent within this category on a case-by-case basis (i.e. selective benefits), but they receive it indirectly through NGOs that provide them with all kinds of required supports for their own benefit depending on their needs. This also means that people in this category cannot be eligible for this year or keep their eligibility for the following year unless they go through a complex process and only after they get an official decision every year on their own particular case that they declared their bankruptcy.

This category is related to the BHR to practical social cooperation, the BHR to reasonable disability accommodation, the BHR to absolute equality and non-discrimination, the BHR to responsible freedom of conscience, and the BHR to be consulted (i.e. to a free democracy). Although this category is related to the same rights that are related to the previous category, the previous category has priority over this category, because freeing people from physical bondage (abuse) has priority over freeing people from financial bondage (debts). Therefore, this category has the sixth priority among all of the other major categories. These people do not have to be poor to be eligible for social assistance. However, if anyone of these people is poor, s/he has the fifth priority among all of the other subcategories within the poor category.

3.6.2.2.5 Category 7: “[those] in the way of God”

The phrase: “[those] in the way of God”⁷³³ is usually interpreted as “those who are engaged in the struggle, or those for whom there is no [share of the] booty, even if they are wealthy”.⁷³⁴ According to Ibn ‘Abbās, this category includes fighters for the cause of God.⁷³⁵ On the other hand, Asad argues “The expression ‘in God’s cause’ embraces every kind of struggle for righteous causes, both in war and in peace, including expenditure for the propagation of Islam and for all charitable purposes.”⁷³⁶ According to Yusuf Ali, this category includes “those who are struggling and striving in Allāh’s Cause by teaching or fighting or in duties assigned to them by the Islamic state, who are thus unable to earn their ordinary living”.⁷³⁷ According to al-Rāzī, the term “in Allāh’s Cause” is a general term and it is not limited to fighters, but should include all good deeds such as building of Mosques.⁷³⁸ al-Bayḍāwī added building of bridges and factories.⁷³⁹ al-Qurṭubī added that *Zakāh* can be used to support people to go to *Hajj* (i.e. pilgrimage to Mecca, which is a difficult journey to perform a religious obligation),⁷⁴⁰ even if they are rich.⁷⁴¹ Quṭb and al-Ṭabāṭabā’ī added that the term “in Allāh’s Cause” includes any good deed for the benefit of the whole society.⁷⁴²

⁷³³ The *Qur’ān*: 9 (al-Tawbah):60.

⁷³⁴ al-Maḥallī & al-Ṣuyūṭī, *supra* note 57, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*.

⁷³⁵ Ibn ‘Abbās, *supra* note 63, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*; and al-Ṭabarī, *supra* note 61, in the comments regarding the same verse.

⁷³⁶ Asad, *supra* note 74, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*.

⁷³⁷ Yusuf Ali, *supra* note 73, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*.

⁷³⁸ al-Rāzī, *supra* note 59, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*.

⁷³⁹ al-Bayḍāwī, *supra* note 56, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*.

⁷⁴⁰ al-Qurṭubī, *supra* note 58, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*; and al-Shawkānī, *supra* note 60, in the comments regarding the same verse.

⁷⁴¹ al-Andalusī, *supra* note 55, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*.

⁷⁴² Quṭb, *supra* note 54, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*; and al-Ṭabāṭabā’ī, *supra* note 79, in the comments regarding the same verse.

Therefore, this category has been interpreted as people in *jihad*. Since the term *Jihad* is vague,⁷⁴³ the interpretations of this category 7 as well as the interpretations of category 4 and category 5 as people in *jihad* have allowed considerable flexibility for the application of *Zakāh* funds in ways that might be criticized by non-Muslims as political implementations. In my opinion, fighting enemies is no longer applicable, because in our time, covering the costs of fighting enemies has become the responsibility of the government.⁷⁴⁴ Therefore, this category is limited only to those who are struggling for righteous causes in peacetime.

However, the term “in the way of God” implies the meaning of continuity, which means that those who are devoting their whole life for this kind of struggle; it is not applicable to building of Mosques, bridges, factories, etc., and it is not applicable to *Hajj* (i.e. pilgrimage to Mecca). Therefore, this category is limited only to those who are devoting their whole life for any kind of struggle for righteous causes in peacetime. Moreover, teachers should not be part of this category, because they are related to education, which is related to category 4.

With a commitment to social justice and a consideration of both liberal and Islamic moral values), I would limit this category to those who spiritually and/or physically struggle for God’s

⁷⁴³ The term *Jihad* is not limited only to self-defence for God’s cause. The term *Jihad* also includes spiritual struggle in resisting selfish temptations for God’s cause. The term *Jihad* also includes physical struggle in doing good deeds for God’s cause such as taking care of PWDs, elderly people and orphans.

⁷⁴⁴ I acknowledge that some Muslims would disagree that the modern nation state is the appropriate vehicle to deal with these issues. We should note here that this move of fighting enemies (from a religious responsibility to a responsibility solely of the secular government) is a progressive Islam perspective. For example, An-Na’im argues that state policies or legislation must be based on civic reasons accessible to citizens of all religions. He shows that throughout the history of Islam, Islam and the state have normally been separate. He claims that ideas of human rights and citizenship in a “secular state” are more consistent with Islamic principles than in a supposedly “Islamic state”. He claims that the very idea of an “Islamic state” is based on European ideas of state and not on the Islamic tradition. An-Na’im, *Islam and the Secular State*, *supra* note 46 at 267-94.

cause in peacetime and they devoted their whole life for this struggle for righteous causes. Although this category justifies receiving of *Zakāh* by NGOs that are specialized in helping one of the other major categories, they receive *Zakāh* not for their own benefit, but for the benefit of whom they are helping; and these NGOs have to pass on *Zakāh* to their beneficiaries. Therefore, this category should include caregivers who are single parents or who take care of disabled or elderly family member or friend, or who are foster parents for an orphan. It should also include individuals who open their home for other human beings to help them to freedom from abuse and individuals who help/sponsor refugees.

It is obvious that these people freely choose to help someone in one of the other major categories. Therefore, this category is related to the BHR to responsible freedom of conscience. Therefore, *Zakāh* could be spent within this category on a case-by-case basis (i.e. selective benefits), but they receive it indirectly through NGOs that provide them with all kinds of the required support for their own benefit depending on their needs, and/or through the individual whom they are helping. This also means that people in this category cannot be eligible for this year (or keep their eligibility for the following year) unless they go through a complex process and get an official decision on their own particular case that they are designated to help someone in one of the other major categories and made responsible choices in spending *Zakāh* for the previous year.

Due to the fact that this category includes individuals who are helping other individuals in one of the other major categories, this category is related to all of the *Qur'ānic* BHRs. However, this category has less priority than the other major categories, because this category (the same as the

next category) requires the responsibility in spending *Zakāh* for the previous year to be eligible for the following year. Therefore, this category has the seventh priority among all of the other major categories. These people do not have to be poor to be eligible for social assistance. However, if anyone of these people is poor, s/he has the sixth priority among all of the other subcategories within the poor category.

3.6.2.2.6 Category 8: “Son of the road”

The phrase: “son of the road”⁷⁴⁵ is usually interpreted as travelers.⁷⁴⁶ al-Maḥallī and al-Ṣuyūfī added the condition that s/he has been cut off [from all of his/her resources] during his/her journey;⁷⁴⁷ i.e. strangers stranded on the way.⁷⁴⁸ According to Ibn ‘Abbās, this category includes the wayfarers, the guests, and the passer-by.⁷⁴⁹ Many scholars (such as al-Ṭabarī, al-Zamakhsharī, al-Qurṭubī, Ibn Kathīr, al-Shawkānī, Quṭb, Ṭanṭāwī, al-Ṭabarsī, and al-Ṭabāṭabā’ī) added that even if s/he was rich in his/her country.⁷⁵⁰ al-Khayyāṭ stated that even if a traveler is rich in his/her country, as long as s/he has a need, s/he is eligible for a share of *Zakāh*.⁷⁵¹ On the

⁷⁴⁵ The *Qur’ān*: 9 (al-Tawbah):60.

⁷⁴⁶ Pilgrimage to Mecca stimulates repentance for sins. The harshness of the journey should remind believers of the comforts of home and the goodwill which they ought to extend to travelers.

⁷⁴⁷ al-Maḥallī & al-Ṣuyūfī, *supra* note 57, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*.

⁷⁴⁸ Yusuf Ali, *supra* note 73, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*.

⁷⁴⁹ Ibn ‘Abbās, *supra* note 63, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*.

⁷⁵⁰ al-Ṭabarī, *supra* note 61, in the comments regarding verse 9 (al-Tawbah):60 of the *Qur’ān*; al-Zamakhsharī, *supra* note 62, in the comments regarding the same verse; al-Qurṭubī, *supra* note 58, in the comments regarding the same verse; Ibn Kathīr, *supra* note 64, in the comments regarding the same verse; al-Shawkānī, *supra* note 60, in the comments regarding the same verse; Quṭb, *supra* note 54, in the comments regarding the same verse; Ṭanṭāwī, *supra* note 71, in the comments regarding the same verse; al-Ṭabarsī, *supra* note 78, in the comments regarding the same verse; and al-Ṭabāṭabā’ī, *supra* note 79, in the comments regarding the same verse.

⁷⁵¹ al-Khayyāṭ, *supra* note 54 at 181, 186.

other hand, ‘Uthmān Ḥussayn ‘Abd-Allāh included in this category the subcategory of refugees.⁷⁵²

Due to the fact that the term ”son of the road” implies the meaning of continuity, this category should not include travel for a short period of time; this category should be limited to permanently immigrant. Moreover, the term ”son of the road” also implies the meaning that they did not freely choose to immigrate. Therefore, with a commitment to social justice and a consideration of both liberal and Islamic moral values, I would limit this category to refugees, because it is obvious that refugees did not freely choose to immigrate. According to the *Qur’ān*, “A part of the dues is for the poor fugitives who have been driven out from their homes and their belongings, who seek bounty from Allāh and help Allāh and His messenger. They are the loyal ones.”⁷⁵³

This category is related to the BHR to responsible freedom of conscience. Therefore, *Zakāh* could be spent within this category on a case-by-case basis (i.e. selective benefits), but they receive it indirectly through NGOs that provide them with all kinds of the required support for their own benefit depending on their needs. This also means that people in this category cannot be eligible for this year (or keep their eligibility for the following year) unless they go through a complex process and get an official decision on their own particular case that they are designated as refugees and made responsible choices in spending *Zakāh* for the previous year.

⁷⁵² Abu-Sahlieh, *supra* note 72 at 573.

⁷⁵³ The *Qur’ān*: 59 (al-Ḥashr):8.

Due to the fact that this category includes refugees who have been forced to leave their own old lives and to start new lives in new locations, this category is related to all of the *Qur'ānic* BHRs. However, this category has less priority than the other major categories, because this category (the same as the previous category) requires the responsibility in spending *Zakāh* for the previous year to be eligible for the following year. Due to the fact that helping indigenous residents has priority over helping strangers, this category has less priority than the previous category. Therefore, this category has the eighth priority among all of the other major categories. These people do not have to be poor to be eligible for social assistance. However, if anyone of these people is poor, s/he has the seventh priority among all of the other subcategories within the poor category.

3.7 Moving from interpretation to implementation

Based on the above arguments, *Zakāh* looks like a social tax for the benefit of the whole society in a system of social security between those who are able to pay *Zakāh* and those who should receive *Zakāh* to achieve social justice. We should note here that all of the above eight categories are in general terms; they are not limited to believers only nor to Muslims only. It is unreasonable that someone who is not a Muslim could be denied social assistance, if s/he is a poor; or if s/he is a PWD (or an elderly or an orphan) who has special needs; or if s/he is volunteering for the benefit of the whole society; or if s/he is studying/researching for the benefit of the whole society; or if s/he needs to be freed from an abusive relationship; or if s/he needs to

be freed from heavy debts; or if s/he devoted his/her whole life in good deeds for the benefit of the whole society; or if s/he is a refugee.⁷⁵⁴

We should also note here that according to my own interpretation of verse 9 (al-Tawbah):60 of the *Qur'ān* (with a commitment to social justice and a consideration of both liberal and Islamic moral values), all of these categories of beneficiaries of alms have common characteristics; they are all people with special challenges and are not able to free themselves from their harsh circumstances (i.e. they are compelled not by their own free choice and outside their control), and these alms should relieve them from these harsh circumstances. Moreover, it is also very important to notice that categories 2 - 8 are not part of category 1 (the poor), which means they do not have to be poor to be eligible for social welfare benefits. Therefore, my own interpretation of verse 9 (al-Tawbah):60 of the *Qur'ān* (with a commitment to social justice and a consideration of both liberal and Islamic moral values) confirms that the *Qur'ān* (according to my progressive Islam perspective) provides these categories of beneficiaries (most importantly, PWDs) with guaranteed minimum standard of living as a BHR to social welfare regardless of their assets and incomes. Therefore, they can freely choose whether to participate or not in employment without the risk of losing eligibility for social welfare benefits.

Entitlements to disability supports based on the above can be justified and delivered through the governmental implementation of *Zakāh*. Such a system with specific reference to *Qur'ānic*

⁷⁵⁴ Some critics would argue that my analysis seems like “cherry picking” ideas that just happened to fit together. Although it is not a complete consensus, I am just trying to show that in every period of time (i.e. contemporary, 8 centuries ago, and 13 centuries ago) and in every school of Islamic *Fiqh* (i.e. all *Sunnī* schools and all *Shī'ah* schools), we may find some seeds for my own interpretation of verse 9 (al-Tawbah):60 of the *Qur'ān* and some support for my new ideas.

teachings is both socially and politically preferable to the imposition of traditional Western approaches to rights and services. Therefore, these moral rules can allow for the legal transplant of Western liberal secular social welfare rules into the MENA's religious Islamic background (and even the creation of a better model for social welfare systems in the MENA); establishing a higher standard for international disability rights (more specifically, the BHR to social welfare), and a higher standard for social justice. In Chapter 4, I will discuss the current social welfare systems in the MENA; I will compare their development possibilities with models of Western social welfare systems. I will offer a new model for social welfare systems in the MENA. I will discuss a model of how a system could work/would look like based on my new interpretation of the *Qur'ānic* rules about *Zakāh* that has a commitment to social justice and a consideration of both liberal and Islamic moral values.

Chapter 4: The Current Social Welfare Systems in the MENA and their Development Possibilities

4.1 The roadmap for Chapter 4

Due to the fact that my practical goal of this dissertation is to provide justification for the necessity of reforming social welfare laws in the MENA to include disability social income assistance, this legal reform requires some kind of legal transplant of certain aspects of social welfare systems found in other parts of the world such as Western social welfare systems. Therefore, this legal transplant would require a comparison between Western social welfare systems and MENA's social welfare systems. In order to move to the practical part of my thesis, I will discuss the current social welfare systems in the MENA and compare their development possibilities with models of Western social welfare systems. I will use the Canadian social welfare system as an example of Western social welfare systems.

However, it would be difficult (and almost impossible) to compare between Western states and MENA's states, simply because Western states have capitalist free market economies, which do not exist in the MENA's states. Moreover, Western states have liberal democratic free societies, while the MENA's states have conservative societies that are deeply attached to their religious values. In order to compare between Western states and MENA's states, I have to use a system of organization; Esping-Andersen's three worlds of welfare capitalism typology would be the most useful system of organization for this comparison.

Therefore, in order to do this, first, I will provide a summary of my understanding of Esping-Andersen's three worlds of welfare capitalism typology. Second, I will discuss the application of Esping-Andersen's typology to the evolution of the Canadian social welfare system (as an example of Western social welfare systems). Third, I will discuss what lessons can be learned from the Canadian experience for the social welfare development in the MENA (including the fundamental principles that social programs should be founded on)? Fourth, I will discuss the applicability of Esping-Andersen's typology for the development of social welfare in the MENA. Fifth, I will provide some comparison between social welfare systems in the MENA and the Canadian social welfare system. Lastly, I will explain a new model for social welfare systems in the MENA based on my new interpretation of the *Qur'ān* (with a commitment to social justice and a consideration of both liberal and Islamic moral values).

4.2 A summary of Esping-Andersen's three worlds of welfare capitalism typology

Esping-Andersen's primary focus is on the welfare state and its place in capitalist economies. He tried to show how the welfare state in eighteen developed capitalist Western societies group into three main types of welfare models. He also tried to show how the welfare state (through its institutionalization) has become a powerful tool for shaping the social and political behavior. The three types of social welfare systems are characterized as liberal, conservative, and social democratic models of welfare.⁷⁵⁵

⁷⁵⁵ It is important to note here that these categories have little to do with the contemporary labels of Canadian politics, and rather have much more to do with general political theory.

4.2.1 The liberal model of welfare

This model mixes non-universal means-tested programs for the poor with other programs for all who contribute to them based on a SI basis. This model, with its capitalist economic system, leans to “commodify” people and their labor to the point they would not be able to survive outside of the market.⁷⁵⁶ This would lead to difficulty for working-class’ mobilization, because workers (as commodities ready to be traded between industries) are not able to achieve the necessary political power to translate "mobilized power into desired policies and reforms."⁷⁵⁷ Due to the fact that this model is dependent on the free market, the government intervenes only after the failure of all personal supports. This model is distinguished by means-tested social income assistance program, which stigmatizes recipients. This model would result in a system of class stratification, where the middle class depends on the SI program and the poor class depends on the state-sponsored social income assistance program.⁷⁵⁸

Under this liberal model [such as Australia, Canada,⁷⁵⁹ United States of America (USA), and UK], social assistance is provided mostly through a low level and means-tested benefits.

⁷⁵⁶ Esping-Andersen, *supra* note 81 at 21.

⁷⁵⁷ *Ibid* at 16.

⁷⁵⁸ *Ibid* at 23.

⁷⁵⁹ Canada was presented as an example of the liberal model by the process of elimination, because Canada is not a conservative corporatist or a social democratic. Some writers questioned the suitability of placing Canada in the same pigeonhole as USA; however, Esping-Andersen's analysis was published in 1988, and Canada has moved much closer to USA (especially since the Free Trade Agreement). Although Esping-Andersen's classification of Canada as an example of the liberal model was premature in 1988, it appears to be still valid now. Some academics focused on Canadian-American comparisons in the context of social policy, and reach very different conclusions, such as Keith Banting who argues that the Canadian social welfare system took a different path from the direction of the American social welfare system. These two different paths were dictated by "domestic politics, and different countries respond to a changing world differently." He wants to "avoid determinist interpretations" in the light of globalization. He claims that the status of the needy remained significantly better north of the border, despite emphasis on the deficit cutting and the free trade. Keith Banting, "The Social Policy Divide: The Welfare State in Canada and the United States" in Jeff Keshen & Raymond Benjamin Blake. eds, *Social fabric or patchwork quilt: the development of social policy in Canada* (University of Toronto Press, 2006) 345 at 377. On the other hand, using

Moreover, this social assistance is seen as causing unemployment and poverty, and leading to "moral corruption" and laziness.⁷⁶⁰

4.2.2 The conservative (or the corporatist-statist) model of welfare

Whereas the liberal model of welfare mixes non-universal means-tested benefits (i.e. social income assistance programs) and contribution-based benefits (i.e. SI programs), this conservative model of welfare depends less on social income assistance programs and more on SI programs that benefit only those who pay into these programs either on a mandatory or voluntary basis (excluding some sections of the population such as homemakers). The conservative philosophy does not agree with the philosophy of laissez-faire economic policies. According to Esping-Andersen, the conservative philosophy considers "the perpetuation of patriarchy and absolutism as the best legal, political, and social shell for capitalism without class struggle."⁷⁶¹ This model rejects the chaotic system based on free markets as it prefers a more strict system.

Under this corporatist-statist model, in order to minimize the need for social income assistance programs, contributions to SI programs do not have to be related to employment; instead, it allows for contributions from outside the labor market (such as coverage for students based on

Saskatchewan for analysis, Garson Hunter and Dionne Miazdyck noted that the trend with social welfare has been towards "downward convergence" and increasing similarity to USA. Garson Hunter & Dionne Miazdyck, "Current Issues Surrounding Poverty and Welfare Programming in Canada: Two Reviews." in Jeff Keshen & Raymond Benjamin Blake, eds, *Social fabric or patchwork quilt: the development of social policy in Canada* (University of Toronto Press, 2006) 383 at 386-88. Lightman notes that "[b]y the turn of the twenty-first century there wasn't much left of what we had built so assiduously; just the prospect of further economic and social integration with the American empire where, of course, they don't believe in social programs at all. From the welfare state optimism inherited from Britain to the rugged Darwinianism of [USA] imperialism, all in one fast half-century." Lightman, *supra* note 82 at 2.

⁷⁶⁰ Esping-Andersen, *supra* note 81 at 42.

⁷⁶¹ *Ibid* at 10.

voluntary contributions). Therefore, this corporatist-statist model considers that liberal-capitalism to be destructive of the old hierarchical structure. However, this model rejects making people starve, because the conservative philosophy considers that commodifying people is morally disgusting. Rather, the conservative philosophy considers that people should "subordinate self-interest to recognized authority and prevailing institutions."⁷⁶² Instead of making people slaves to the market, this model makes people dependent on the state by contributing to SI programs (either mandatory or voluntary).

Under this conservative model (such as Germany, Austria, France and Italy), the effect on redistribution is minimal, because the state has a central role both in legitimating social rights and in maintaining differences related to status and class. Similar to the residual model (i.e. where social assistance is provided only after all personal resources have been exhausted),⁷⁶³ the focus in this conservative model is on the role of family support. Therefore, there is little provision for support services (such as day care for children).

4.2.3 The social democratic (similar to the Marxist) model of welfare

This model emphasizes programs that are universalistic (i.e. independent of whether people do or do not pay in these programs). Therefore, this would enable an able-bodied person of working age (who so wishes) to live independently of the labor market for long stretches of time (e.g. when unemployed, sick, or disabled or to pursue education or raise children). This model considers that the accumulation of capital would lead to deeper social stratifications. Therefore,

⁷⁶² *Ibid* at 38.

⁷⁶³ For a description of the residual model of welfare, see subsection 4.3.1, below, for more on this topic.

this model considers that instead of actually addressing need, and in the name of ensuring stability, the liberal model of welfare or the conservative model of welfare would lead to deeper social stratifications.⁷⁶⁴ Therefore, by implementing universal social policies under this social democratic model of welfare, employees would be less dependent on employers and the labor market. Moreover, allowing workers to create a strong coalition with other groups and to exercise their political power would lead to a system of socialism and equality.⁷⁶⁵

Under the social democratic model (such as Scandinavian countries and particularly Norway and Sweden), the goal is to promote equality of the highest standards through universal provision and de-commodification of social rights. Esping-Andersen argued that the purpose of social rights is to "permit people to make their living standards independent of pure market forces."⁷⁶⁶ His definition of de-commodification is that "citizens can freely, and without potential loss of job, income, or general welfare opt out of work when they themselves consider it necessary."⁷⁶⁷ He argued that the level of de-commodification represents "the degree to which individuals, or families, can uphold a socially acceptable standard of living independently of market participation,"⁷⁶⁸ or (in other words) it represents "the ease with which an average person can opt out of the market."⁷⁶⁹

⁷⁶⁴ *Ibid* at 55.

⁷⁶⁵ *Ibid* at 164-65.

⁷⁶⁶ *Ibid* at 3.

⁷⁶⁷ *Ibid* at 23.

⁷⁶⁸ *Ibid* at 37.

⁷⁶⁹ *Ibid* at 49.

Esping-Andersen used USA, Germany and Sweden as prototypes or case studies for each of these three types of welfare models. USA represents the prototype of the liberal model of welfare, characterized by a low degree of de-commodification, heavy reliance on social income assistance programs with minimal means-tested benefits. Germany represents the prototype of the conservative model of welfare (with a strong corporatist-statist legacy), dominated by status-preserving, barely redistributive, and occupationally distinct SI programs. Sweden represents the prototype of the social democratic model of welfare; characterized by universal benefits based on citizenship, equal access to benefits and services of the highest standards, a high degree of de-commodification, and a minor role for private welfare markets.⁷⁷⁰

Although Esping-Andersen mainly tried to prove his idea about the grouping of systems, he acknowledged that “there is no single pure case” in any of these models. He draws attention to the differences between countries, because some characteristics assigned to different welfare models may co-exist in one country.⁷⁷¹

Esping-Andersen focuses on how these three types of welfare models (a) allow people to exist independently from the labor market,⁷⁷² (b) influence the system of social stratification,⁷⁷³ (c) develop different systems for the provision of pensions,⁷⁷⁴ and (d) are influenced by politics and

⁷⁷⁰ *Ibid* at 9.

⁷⁷¹ *Ibid* at 28.

⁷⁷² *Ibid* at 35. However, Esping-Andersen’s definition of the “de-commodification” limits the welfare state policies to those which are related to the labor contract; it does not capture areas such as family policy (e.g. child tax allowances), social services (e.g. care for the infirm and sick), and housing policy (e.g. housing allowances), all of which have great importance for the standard of living of individuals and families regardless of whether or not they participate in the labor market.

⁷⁷³ *Ibid* at 55.

⁷⁷⁴ *Ibid* at 79.

other factors in their development.⁷⁷⁵ He focuses on how these different types of welfare state influence the social and economic behavior. The main concern is with the sphere of employment, especially the issues of organizing the labor markets and maintaining full employment and changes in employment and social stratification.⁷⁷⁶

Esping-Andersen argued that the welfare state variations should not be conceptualized by the degree of industrialization, urbanization, economic growth, the strength of the working-class, or the influence of state bureaucracies. Therefore, he did not try to search for further independent variables. However, he tried to explain "the causal forces behind welfare-state development." He argues that working-class mobilization is decisive not as a "single powerful causal force," but rather in combination with the nature of this class mobilization (especially union structure), the ability to form class-political alliances (especially those which incorporate the middle class), and the "historical legacy of institutionalization".⁷⁷⁷

In Esping-Andersen's view, "politics not only matters, but is decisive";⁷⁷⁸ the power collections at the time of forming the welfare state were essential in shaping the type of social policy that emerged out of the different philosophies and values of political actors as they entered certain coalitions and compromised on certain outcomes. Therefore, he finds "three highly diverse regime-types, each organized around its own discrete logic of organization, stratification, and societal integration. They owe their origins to different historical forces, and they follow

⁷⁷⁵ *Ibid* at 105.

⁷⁷⁶ *Ibid* at 191.

⁷⁷⁷ *Ibid* at 29.

⁷⁷⁸ *Ibid* at 4.

qualitatively different developmental trajectories.”⁷⁷⁹ However, Esping-Andersen did not consider that welfare states may enter different tracks due to subsequent political and/or economic changes.

4.3 The application of Esping-Andersen’s typology to the evolution of the Canadian social welfare system

Guest discusses the evolution of the Canadian responses to poverty, the main influences that are shaping the Canadian social welfare system, and the tensions within that process between the “residual” model of welfare (or Esping-Andersen’s liberal model of welfare) and the “institutional” model of welfare (or Esping-Andersen’s social democratic model of welfare). The residual model of welfare (whereby the governmental aid is additional, unreliable, means-tested or needs-tested and satisfies minimal requirements) considers that the causes of unemployment and poverty are within the individual and can be solved by personal/familial system and the free market. However, the severe problems that resulted from the Great Depression and the Second World War led to the rise of the institutional model of welfare (in which benefits are conferred by right). Unemployment and poverty came to be considered products of the Canadian systemic failure; therefore, Canadians demanded that the Canadian government create institutions that could guarantee a minimum level of social protection.⁷⁸⁰

According to Guest, social welfare programs that confer social human rights to benefits or services are personally empowering, and are helpful in the redistribution of power, because the

⁷⁷⁹ *Ibid* at 3.

⁷⁸⁰ Guest, *supra* note 82 at 3-10.

population would be interested in demanding accountability from public and private sector officials. However, the growth of participatory citizenship has suffered due to a lack of government support. The serious recessions of the early 1980s and early 1990s compounded by jobless economic growth, downsizing, and increasing restrictions on programs -such as unemployment insurance (UI)- have created widespread social insecurity. Therefore, the environment that allows citizen participation to flourish has been impaired.⁷⁸¹

Therefore, the evolution of the Canadian social welfare system can be divided into the following three stages:

- The residual model of welfare (or Esping-Andersen's liberal model of welfare) before the Second World War.
- The shift from a residual model of welfare to an institutional model of welfare (or Esping-Andersen's social democratic model of welfare) after the Second World War.
- The swing back to the residual model of welfare after the early 1970s. I will discuss Rick August's argument (as an example) that supports the Canadian government's effort to swing back to the residual model of welfare.

4.3.1 The residual model of welfare (or Esping-Andersen's liberal model of welfare) before the Second World War

Guest discussed Canadian social welfare in late-nineteenth-century and early-twentieth-century. He described Canadian society at the time of Confederation as a mainly agricultural, rural-based

⁷⁸¹ *Ibid* at 6-7.

society. According to Guest, in the year of Confederation (1867), the majority of Canadians earned their livelihood either in farming, fishing, logging, or some mining, which supported a small group of manufacturing and service industries. Most of the necessities of life were produced on the family farm or obtained by exchange. The main causes of income interruption (illness, injury, premature death of the breadwinner, and old age) were handled within the family group or with the support of neighbors and other members of the local community. Therefore, “saving for a rainy day” was very important. However, the processes of industrialization and urbanization (which had already started at the time of Confederation and accelerated sharply at the turn of the 20th century) severely weakened this independence and these informal systems of social welfare. Therefore, Canadians were forced to create alternative means⁷⁸² to deal with the emerging universal risks to income⁷⁸³ that arose out of industrialization and urbanization.⁷⁸⁴

Prior to the Second World War, social welfare programs⁷⁸⁵ were provided as temporary or emergency relief measures. To be eligible for these programs, the claimant must establish that s/he had exhausted all other resources such as personal savings, the possibility of alternative job,

⁷⁸² In 1876, there were early forms of workmen’s compensation legislation. Charitable NGOs formed shortly after (such as Toronto Children’s Aid Society in 1891, Red Cross in 1896, and Victorian Order of Nurses in 1897).

⁷⁸³ The universal risks to income are universal in the sense that all citizens in an industrialized nation could be exposed to them. These universal risks are either natural risks or man-made risks. The natural risks include extreme old age, illness, disability, and childbearing. The man-made risks include risks that their source wholly or mainly are within social and cultural factors such as discrimination, compulsory retirement, unemployment, underemployment, the delayed entry of young people into the labor market, and any subtle cultural factor that may reduce the earning power of individuals and the standard of living for them and their dependents. Moreover, these universal risks may threaten either the continuity of income or the adequacy of income. The risks that threaten the continuity of income include death, old age, retirement, absence of the breadwinner, unemployment, sickness, disability (which may be temporary or long term), pregnancy and childbearing (for women who are wage earners supporting families). The risks that threaten the adequacy of income include changes in family size, shelter costs, medical care costs, low earnings (including low wage rates, irregular, seasonal, or casual employment), and inflation. *Ibid* at xiii.

⁷⁸⁴ *Ibid* at 20-39.

⁷⁸⁵ The beginning of the Canadian federal social policy included the old age pensions act of 1927 (means-tested), which was the first federal-provincial cost sharing program (i.e. provincially administered with 40% federal contribution).

and assistance from relatives and/or friends. The theory was that by leaving them to their own devices, individuals would develop methods of survival. While the government played a limited role in the delivery of these services, persons in need were forced to rely on charitable NGOs such as the church and community. Social welfare agencies were designed to provide short-term temporary assistance and were expected to withdraw once other social structures (such as the market and the family) are able to resume their normal functions. This model of social welfare is referred to as the residual model of welfare. This residual model of welfare is compatible with the theory that less government is better government.⁷⁸⁶

Under this residual model of welfare, characteristics such as independence, self-reliance, and thrift are highly valued and necessary for survival. Individuals who need assistance are considered personally responsible for failing to develop these essential human qualities. The central feature of this residual model of welfare is the passionate commitment to the independence of the individual. According to Angelo Wei Djao, this commitment to the "rugged individual" (Whose strong spirit was the driving force behind settlement in the land and building the country) is based on the belief that reduced state interference will enable individuals to prosper. Individuals who need assistance are considered personally accountable for their situation due to laziness and worthlessness. These beliefs inherent in this residual model of welfare are responsible for the negative attitudes and stigma related to receiving public assistance.⁷⁸⁷

⁷⁸⁶ *Ibid* at 2.

⁷⁸⁷ Djao, *supra* note 82 at 11.

Under this residual model of welfare, the main objection to welfare programs is their distortion of the incentive to work and their interference of the individual freedom to compete in the free marketplace, because freedom is the absence of state intervention or coercion according to the classical liberal notion of citizenship. Supporters of the free market consider that many of the social welfare programs are threats to freedom. According to Djaio, "though they are presented as mere service activities, they really constitute an exercise of coercive powers of government and rest on its claiming exclusive rights in certain fields."⁷⁸⁸

Under this residual model of welfare, equality is the equal right to freedom or the equal freedom to compete in the free market. Therefore, in cases of extreme poverty where it is necessary for the state to intervene, it was advocated that programs should put cash into the hands of the individuals in the belief that this will enhance their competitiveness in the free market. However, social welfare programs for eliminating systemic disadvantages experienced by groups (such as public housing and SI programs) were considered unacceptable, because they might distort the free market. Therefore, social welfare programs designed to ensure a more equitable distribution of income were opposed, because they are considered to be the government's use of coercive power.⁷⁸⁹

⁷⁸⁸ *Ibid* at 13.

⁷⁸⁹ Bickenbach, *Physical Disability*, *supra* note 15 at 127.

4.3.2 The shift from a residual model of welfare to an institutional model of welfare (or Esping-Andersen's social democratic model of welfare) after the Second World War

During the Great Depression (1930-1940), the Canadian federal government instituted some temporary unemployment and relief measures. Despite its widespread unemployment, the Great Depression constituted an insufficiently strong social force to “crack the residual mould”. Guest sees the Second World War as a vehicle for the social welfare advances. The closing years of the Second World War (1939 to 1945) mark the divisional period in the history of Canadian social welfare in terms of breaking barriers. The socioeconomic costs of the Second World War (together with the Great Depression that preceded it) broke many barriers that had delayed social welfare developments up to that time. Canadian officials were mobilized under the stress of the Second World War and the vision of peace that follow. From this point, the bases for planning were sharply altered, because social welfare programs had to reflect new realities; Canadian officials introduced policies radically different from those existing before the Second World War. Although the deeply held prejudices concerning the nature of poverty continue to control some events after the Second World War, they become opposing views (not a general consensus).⁷⁹⁰

The commitment to individual self-sufficiency and freedom from government interference gradually surrendered to the idea that not all social and economic problems could be laid at the feet of the individual. There was uncertainty as to whether people could fulfill all of their needs independently. This need for security arose from the devastating effects of the Great Depression

⁷⁹⁰ Guest, *supra* note 82 at 83-133.

coupled with the disruption of the Second World War. The Great Depression of the thirties and the Second World War were influential forces in the shift from a residual model of welfare to an institutional model of welfare in Canada. High levels of unemployment and extreme poverty together with the return of the Second World War veterans created a strong opportunity for political change.⁷⁹¹

The development of social programs of the post Second World War era in Canada is founded on the fundamental principles of adequacy (guaranteeing a minimum standard of living), universality (ensuring that all individuals had access to social benefits) and public administration (placing the responsibility for the distribution of social welfare on the state). These crucial principles of social welfare marked an obvious shift from a residual model of welfare to an institutional model of welfare. Djaio notes that Leonard Marsh (who was the head of the House of Commons Special Committee on Social Security) submitted in 1943 his landmark report⁷⁹² to the Advisory Committee on Post-War Reconstruction that acknowledged (for the first time in Canada) the importance of providing a minimum level of national social security as an essential element of the concept of citizenship.⁷⁹³ Marsh believed that a comprehensive system of social welfare should be established which would protect citizens against prolonged unemployment, serious sickness, accident and premature death. The concept of a social minimum was defined by

⁷⁹¹ Johnson, *supra* note 82 at 30.

⁷⁹² This report together with the 1945 Dominion-Provincial Conference on Reconstruction report (which put forward proposals to the government of Canada for ‘establishing the general conditions for high employment and income policies, and for the support of national minimum standards of social services’) established the ‘blueprint’ for Canadian social welfare policy.

⁷⁹³ Djaio, *supra* note 82 at 24.

Marsh as realizing that “in civilized society there is a certain minimum of conditions without which health, decency, happiness and a chance in life are impossible.”⁷⁹⁴

This institutional model of welfare evolved out of the societal recognition that there are certain social risks inherent in an advanced capitalist society that should not be the sole responsibility of the individual. Social welfare programs became the first line of defence against hardship. This means that individuals who experience more than their fair share of the social costs of economic progress should be compensated for these costs. For example, the unemployed individuals are entitled to collect unemployment payments without the stigma or suspicion that is attached to the residual model of welfare.⁷⁹⁵ Therefore, the passage of various statutes guaranteeing certain social minimums of income security institutionalized the social and economic well-being of Canadians as a government responsibility.⁷⁹⁶

Beginning in 1940, Canada embarked on a social policy plan which included programs such as UI, family allowances, old age security (OAS), equalization payments, the Canada/Quebec pension plans, the Canada assistance plan (CAP), medicare, and federal funding of training and

⁷⁹⁴ Marsh, *supra* note 82 at 35.

⁷⁹⁵ Guest, *supra* note 82 at 2.

⁷⁹⁶ In 1940s, the Canadian welfare state begins with the UI act of 1940, the universal family allowances (introduced in 1945 and ended 1992), and the establishment of the central Mortgage and Housing Corporation in 1945. Some provinces introduced hospital insurance acts (such as British Columbia in 1949). In 1950s, the gradual expansion of social welfare legislation and institutions begins (confirming principles of universality and equality) including: the universal old age pensions in 1951, the blind persons act in 1951, the disabled persons act in 1955, the unemployment assistance act (which enabled cost sharing of social income assistance with the provinces) in 1956, the federal hospital insurance and diagnostic services act (which enabled cost sharing of hospital services with the provinces) in 1956, the federal medical services act (which was enacted in 1968 to extend cost sharing agreement and eventually it led to the universal health care coverage in all provinces including doctors services), the CPP in 1965, the guaranteed income supplement to the OAS (for low income seniors) in 1967, and the CAP (which enabled 50/50 cost-sharing of health, education, and social services with the provinces; it was introduced in 1966 and ended 1996).

post-secondary education. The existence of statutory-based social programs dealing with unemployment (including the first law in 1940 and the current law in 1996), pensions (including universal pension in 1951, disability assistance in 1955, earnings-related pension in 1965, and income-tested supplement in 1967), health care (including hospital services in 1956, physician services in 1968, and the current law in 1985), and family allowances (including the first law in 1944 and the current law in 1998 and 2006) confirms that the promise of a social safety net of the post Second World War era was realized by Canadian society in many ways.

This institutional model of welfare recognizes that despite independence and self-sufficiency, individuals are still vulnerable to the changes in fortune of a competitive market. Social programs became institutionalized to minimize the harsh impact on individuals caused sometimes by defects in the system. However, the emphasis remains focused on the individual. Although the independence of the individual is still recognized and respected, the new liberal democratic principles included a shift away from the commitment to the “rugged individual” towards a more collaborative union between the individual and the state. According to Djao, this compromise between the individual and the state has guided the development of the welfare state in Canada. Therefore, the purpose of social welfare programs would be to enhance and maximize the potential of the individual and to ensure the best participation of individuals in society.⁷⁹⁷

⁷⁹⁷ Djao, *supra* note 82 at 19. However, Canada did not develop a full institutional model, because it was not a complete break with the past; Canada remained a SI/service state rather than a fully institutionalized welfare state.

4.3.3 The swing back to the residual model of welfare after the early 1970s

Guest sees the 1960s as a hesitant decade when Canadian officials tried to fill the gaps. Therefore, movements away from the residual model of welfare such as the Canadian pension plan (CPP) coexist with obvious residual (means-tested) policies.⁷⁹⁸ However, he sees the 1970s as the decade of stemming the residual tide and rediscovering poverty.⁷⁹⁹ Therefore, in the 1960s and 1970s, there was a tension between a residual model and an institutional model with small swings each way; however, by the 1980s, the movement away from an institutional model back to a residual model was in full swing and has only been in one direction since.

Therefore, Canadians have engaged in intense policy debate on major social issues such as medical care, family allowances, unemployment, and the adequacy of Canada's old age pension system. The debate over the relative merits of a residual (market oriented) model of welfare versus an institutional (solidarity oriented) model of welfare was sharper in the 1980s and 1990s than in the past. Due to cuts (by the Canadian federal government) in transfer payments to the provinces, residual policies in provincial social income assistance programs and serious cuts in health care and social services appeared in most parts of Canada.⁸⁰⁰ The residual model of welfare was actively advanced by those who support a much smaller role for government, and cuts in public spending and in the civil service. Moreover, the residual model of welfare was advanced by the policies of deregulation, privatization, and decentralization (promoted as the

⁷⁹⁸ Guest, *supra* note 82 at 142-52.

⁷⁹⁹ *Ibid* at 153-71.

⁸⁰⁰ In the late 1980s, the principal of universality disappeared. In 1989, the government introduced Clawback of OAS and family allowances effectively make them selective programs. In 1992, family allowances abolished, and replaced by the selective child tax credit. In 1996, UI was replaced by EI, whereby it became more difficult to qualify for benefits with less support over a shorter period of time.

only way to deal with both global competition and growing unemployment) as well as by the influence of USA.⁸⁰¹

Canada's success in establishing a justifiable social minimum of income for the majority of elderly and retired Canadians and a highly creditable social minimum of health care for all Canadians is used to remind Canadians of the need to ensure a reasonable standard of living for all Canadians. Guest argued that while attempts to develop answers to concrete problems (e.g. child poverty) were left in the hands of voluntary or interest groups, there were also attempts in the 1990s to employ many well-financed academics to search for the exact mix of incentives and disincentives to protect the Canadian social safety net from dependency as a result of poverty. The residual model of welfare has been used as a rationale to end entitlement programs due to escalating government debt.⁸⁰²

Ernie Lightman compared Canada with the other major industrialized countries. He concluded that welfare activities (however measured) shows Canada to be significantly ahead of USA and Japan, but a distinct laggard compared to some Western European countries.⁸⁰³ He argues that the anti-welfare state rhetoric in Canada (much of it grounded in narrow comparisons between the Canadian tax levels and those of USA) would lose much impact by comparing Canada with the major Western European countries in what they have achieved.⁸⁰⁴ Although the pendulum swings back and forth from the residual model of welfare, Canada never experienced the full

⁸⁰¹ Guest, *supra* note 82 at 248-303.

⁸⁰² *Ibid.*

⁸⁰³ Lightman, *supra* note 82 at 255.

⁸⁰⁴ *Ibid* at 26-30.

meaning of Esping-Andersen's idea of de-commodification, because Canadians have not been able to "freely, and without potential loss of job, income, or general welfare, opt out of work when they themselves consider it necessary."⁸⁰⁵ Therefore, Canada did not arrive completely at the level of the institutional model of welfare (or Esping-Andersen's social democratic model of welfare).

Although Canada has introduced a variety of social programs since the Second World War, the principles of the residual model of welfare (which are still prevailing in Canada) have resulted in a fragmented and complex range of social programs and services. Social income assistance payments are considered short-term temporary measures. Benefits are intentionally maintained at low levels to act as a motivation to get people off welfare assistance. Negative attitudes and stereotypes about individuals who need social income assistance are still flourishing. Instead of the social and economic barriers to full participation in the society, individual deficiencies are considered to be the problem. Many of the social programs are designed to cure the individual rather than addressing the systemic problems arising from the social and economic system. The idea of a social minimum for all citizens has fallen short of its original goal.

One of the major influences of residualism on the institutional model of welfare is the use of labels or categories to determine who is and who is not eligible for a particular service or assistance. The purpose of these labels or categories is to ensure that program costs are kept under control. This is intensely problematic for PWDs who are subject to a confusing variety of

⁸⁰⁵ Esping-Andersen, *supra* note 81 at 23.

services that are inadequate, restrictive, and based on demeaning assumptions. In the distinction between the "deserving" and the "undeserving" poor, labels such as "employable" and "unemployable" are often used to determine eligibility for benefits. If a person is labeled "employable" but s/he is not working, the assumption is that the fault lays with the individual and not with society for his/her unemployment. As a result, s/he is not quite as deserving of benefits as someone who is labeled "unemployable"; therefore, s/he is paid less in social income assistance. On the other hand, the label of "unemployable" has been very problematic for PWDs, because it has excluded them from the workforce. It has meant they must rely on disability social income assistance benefits and/or some other services that may or may not be able to meet their needs. However, PWDs are forced to accept this label in order to qualify for disability-related welfare benefits that are usually higher than regular welfare benefits.⁸⁰⁶ The label of "unemployable" is mixed with negative attitudes and assumptions about the individual; it reinforces the stigma of receiving social income assistance and it is responsible for hostile attitudes towards social income assistance's recipients. The label of "unemployable" implies that the problem rests with the individual; it shifts the focus away from the society's responsibility to remove social and economic barriers to equality.

Michael Prince's paper on PWDs notes that despite obligations under the Charter of Rights and Freedoms to end discrimination on the basis of physical and mental disability, progress has

⁸⁰⁶ The idea that PWDs are forced to accept a label such as "unemployable" in order to qualify for disability-related welfare benefits is very important; I will provide further details and discussion (in subsection 4.3.4, below) to argue that PWDs should receive disability social income assistance regardless of their income and their assets.

remained mixed and assistance has been too little.⁸⁰⁷ While the Canadian government provides some assistance to PWDs, it still relies on charitable NGOs to meet many of their needs. For example, although the Canadian National Institute for the Blind receives some government funding, delivery of most of its services are dependent on charitable donations. Therefore, many of the social programs for PWDs (such as employment training, counseling, rehabilitation services and the acquisition of technical aids) have been delivered through non-profit, voluntary NGOs that depend on charitable dollars to operate. The idea of charity is a critical part in the residual model of welfare. Under this residual model of welfare, the state abandons its responsibility for the social well-being of its citizens and leaves this responsibility to the generosity of individuals and the community. PWDs have been considered as deserving of charity as far back as the English Poor Law.⁸⁰⁸

Bickenbach traced the role of the idea of charity back to the English Poor Law where it was used to distinguish the worthy from the non-worthy. He described how the category of disability was used as an administrative and ideological device to distinguish those worthy of consideration by charitable NGOs from those considered lawbreakers, drifters and beggars who could work and who were not worthy of charity.⁸⁰⁹ However, this attitude of pity towards PWDs has severely hampered and undermined their claims and aspirations to equality, because the benefits derived from these social services for PWDs have not been provided as of right or entitlement, and these

⁸⁰⁷ See Michael J Prince, "Canadian Disability Policy: Still a Hit-and-Miss Affair" in Jeff Keshen & Raymond Benjamin Blake, eds, *Social fabric or patchwork quilt: the development of social policy in Canada* (Toronto: University of Toronto Press, 2006).

⁸⁰⁸ According to Tim Stainton, although English Poor laws of 1601 and 1834 were not officially transferred to Upper Canada, their influence was there. Stainton, *supra* note 82 at 2.

⁸⁰⁹ Bickenbach, *Physical Disability*, *supra* note 15 at 193.

social services have been reliant on the generosity and desire of someone to provide these benefits.⁸¹⁰ Charity is usually driven by compassion and a desire to help those not as well off as the giver. This idea advances a relationship of inequality between the giver and the recipient and attaches the stigma of helplessness and dependency to the recipient. Therefore, the idea of charity becomes the opposite of the equality aspirations of PWDs.⁸¹¹ Moreover, the act of charitable giving does not carry with it a sense of social responsibility in that the donation is given voluntarily and not because of duty or obligation. According to Bickenbach, It is "a gift, not a contractual exchange or something that is acquired as of right."⁸¹²

4.3.4 Rick August's argument (as an example) that supports the Canadian government's effort to swing back to the residual model of welfare

While opponents of the welfare state in Canada have succeeded with their anti-statist message, the traditional supporters of the welfare state in Canada did not develop any practical alternative to the status quo. Therefore, it became too difficult for them to defend the welfare state in Canada, because they also have serious doubts about it. For the lack of a practical alternative, those supporters continued to support the "big government", because it is viewed as the only practical agency with the capacity to implement social policy on a non-stigmatizing and universal basis. According to Lightman,

With more modest goals, our welfare state at its height arguably might have succeeded. But these were not the benchmarks against which it was being assessed. When its supporters (through their enthusiasm) and its opponents (through their wish to eliminate) both attributed more grandiose expectations to the welfare state, more grand than could ever be achieved through the programs envisaged or delivered, then failure was

⁸¹⁰ *Ibid* at 197.

⁸¹¹ *Ibid* at 194.

⁸¹² *Ibid* at 196.

essentially assured. With powerful opponents on a moral crusade, and with supporters who were often ambivalent, the post-war welfare state had little chance.⁸¹³

Lightman argues that “the sense of collective responsibility that marked the earlier days of Canada's welfare state increasingly has been replaced by an individualism in which the powerful use state mechanisms to meet their own needs, while blaming the vulnerable for having fallen into states of dependency.”⁸¹⁴ He notes that

Within the broad post-war social consensus that helped to develop our social programs, there were always points of dissent—individuals, groups, and provinces that did not endorse our collective social interventions. And coming north across the border was the incessant cry for individualism and the private market. ... What had begun two decades earlier as a technical response to the structural economic problem of deficit reduction had evolved into an ideological assault on the welfare state and all that it stood for. Government spending became undesirable, not on economic grounds, but rather on purely normative grounds: people should look after their own needs; collective responses to social problems were morally and ethically wrong.⁸¹⁵

I will discuss one argument (as an example) that supports the Canadian government's effort to swing back to the residual model of welfare (and to swing away from Esping-Andersen's idea of de-commodification), which is August's argument in his paper *Paved with Good Intentions: The Failure of Passive Disability Policy in Canada*,⁸¹⁶ where he argues that the current Canadian income support policy for PWDs has an adverse effect on the Canadian economy and the Canadian society. He asks: “Under what circumstances could public investment in a vulnerable segment of the population be considered a bad thing?” He argues that although Canada has made significant steps towards social protection for the Canadian citizens, the current system of income support for working-age adults has failed, because it is both costly and ineffective. He

⁸¹³ Lightman, *supra* note 82 at 257.

⁸¹⁴ *Ibid* at 4.

⁸¹⁵ *Ibid* at 258.

⁸¹⁶ August, *supra* note 83.

used the term “passive benefit” to describe the disability cash benefits, because they are intended to contribute to the general living expenses rather than specific needs, and because they are paid without behavioral conditions or expectations, or they are paid as guaranteed entitlements through delivery welfare models that do not effectively enforce conditionality.⁸¹⁷

August criticizes the disability cash benefits. He focuses on the effects of these transfers on prospects for PWDs to reach their full income potential through employment. He tries to establish that income support strategies for PWDs “force their intended beneficiaries to sacrifice employment prospects for help with short-term income needs, a trade-off that reinforces poverty and dependency over the longer term.”⁸¹⁸ Therefore, there is a struggle between economic security and incentive or (in economists’ terms) a struggle between equity and efficiency. He argues that the higher the benefit level for an individual or household at zero earnings, the greater the benefit’s attraction relative to work. He argues that these negative incentive effects can be solved by keeping the benefit at lower levels at zero income at the expense of the goal of benefit adequacy. Therefore, the inadequacy of the benefit will force PWDs to choose work over the dependency on the economic security of these disability cash benefits.⁸¹⁹

Although I agree with August on the importance of this problem, I disagree with him on the source or the main reason for this problem. It is a fact that PWDs struggle in making the harsh choice between these two hard choices:

⁸¹⁷ *Ibid* at 25.

⁸¹⁸ *Ibid* at 1.

⁸¹⁹ *Ibid*.

1. Sacrificing the income equity of employment prospects (and better standard of living) to keep a secure income support for their urgent needs, which most likely will result in persistent poverty due to the inadequate disability cash benefits; or
2. Sacrificing the economic security of disability cash benefits to pursue employment, which most likely will result in additional costs for additional disability needs outside their home.

However, in my opinion, this struggle did not result from the high level of these disability cash benefits (compared to the income support for people without any disability) or from the additional earnings exemptions as August claimed, because he did not provide any solid statistical evidence that might prove the increased dependency on welfare directly resulted from the additional income support for PWDs. He states “Although quality empirical evidence is scant, apparent disability rates seem to be rising faster than actual incidence, suggesting that barriers and perverse incentives continue to discourage labour market attachment.”⁸²⁰ In my opinion, this struggle resulted from the inadequacy of these disability cash benefits, the earnings restrictions and the poverty conditionality (that is attached to the means-tested income support), and the high costs to cover the additional urgent disability needs (which most likely will increase to perform any job outside of home).

Although August admits that not all PWDs and not all low-income people will have jobs and significant earnings at any given point in time, he argues that for PWDs, employment and

⁸²⁰ *Ibid* at 15.

earnings are an underutilized resource that many better lives can be built upon. Although he admits that to a great extent, the target outcome for the existing Canadian social welfare system has been to eliminate the charity model, he argues that the result was simply to transfer the charity model to the state administration. He argues that the income support policy should focus on helping PWDs live and work in the mainstream. He argues for systematic efforts to recover “the wasted human potential” for PWDs, which is “currently warehoused in passive income support programs.”⁸²¹

August argues that disability support subsidies should be income-tested, because he rejects the view that disability benefits should be treated as guaranteed rights. Ironically, while he is arguing against the high level of these disability cash benefits (compared to the income support for people without any disability) and the additional earnings exemptions (and ignoring the high costs to cover the daily living disability needs), he argues that the income test under his approach would take into account the greater actual disability costs in the personal budget.⁸²²

August argues that these higher “passive” benefits lead to more dependency on welfare. Although his argument could be applicable to the other welfare beneficiaries, his solution is not suitable for PWDs welfare beneficiaries, because they have high costs to cover their daily living disability needs. It seems as if he is arguing for a lower level of cash benefits for PWDs so they are forced to accept “lower-wage employment of the type most accessible to adults with limited

⁸²¹ *Ibid* at 25.

⁸²² *Ibid* at 17.

work experience.”⁸²³ However, this argument is based on an assumption that most people on welfare choose to be lazy after comparing the (in)adequate level of their welfare cash benefits with a full-time minimum wage from employment.⁸²⁴

Moreover, August’s analysis proves the opposite of his argument. Looking at the employment prospects for individuals receiving “passive” benefits, he argues that

From the point of view of reasonable economic incentive, it would be fair to say that this individual [without a disability] has to reach a gross earnings level of about \$14,000 per year to make additional earnings attractive. This amount is roughly equivalent to 31 hours of work per week at minimum wage, which is achievable in principle for many welfare recipients, particularly in the higher-demand labour markets of the Western provinces. Subject to other constraints, an employment-based antipoverty strategy for single persons on welfare who do not have a disability would seem to have a reasonable chance of succeeding.⁸²⁵

On the other hand, he concluded that

The disability designation triggers additional benefits as well as higher levels of earnings exemptions, which have the effect of widening the income range at the threshold of welfare eligibility... The income level at which the single [PWD] on welfare has an incentive to earn more is about \$16,000 on an annual basis, which is the rough equivalent of 36 hours of work per week at minimum wage.⁸²⁶

This conclusion proves that this incentive threshold for PWDs is almost identical to the incentive threshold for the generic welfare recipient (with a small difference of less than \$167 a month).

⁸²³ *Ibid* at 8.

⁸²⁴ *Ibid* at 14. On the other hand, according to Lightman,

The dichotomy supposed between 'passive' welfare recipients sitting home and watching TV as compared with 'active' job-seekers taking control of their lives did not correspond to the realities faced by most people on income assistance. Skills development initiatives have always been dramatically oversubscribed and there has never been a need to formally tie participation to benefit receipt. Even the line between voluntary and compulsory participation is artificial: under CAP, income assistance payments for some were so low that any 'optional' add-ons that increased overall benefit levels were, in practice, compulsory; when the basic benefit is inadequate to live on, supplements may be voluntary in principle but mandatory in practice. Lightman, *supra* note 82 at 115-16.

⁸²⁵ August, *supra* note 83 at 12.

⁸²⁶ *Ibid* at 13.

Therefore, the higher level of cash benefits for PWDs and their earnings exemptions did not create a higher level of disincentive to earn more from employment (and they did not create a higher level of dependency on welfare). At the same time, removing these additional cash benefits for PWDs and their earnings exemptions would not create greater incentive to earn more from employment.

On the other hand, many Canadian jurisdictions have addressed (to some degree) the issue of removing some disincentives in order to enable PWDs to move to employment by phased withdrawal, earnings exemptions, and permanent PWDs designation which allows PWDs to seek work without losing their eligibility (i.e. if they lose their job, they can immediately return to benefits). This permanent PWDs designation may also allow PWDs to retain in kind benefits while working (such as medical expenses and bus pass).

A research study (done by Marcy Cohen, Michael Goldberg, Nick Istvanffy, Tim Stainton, Adrienne Wasik and Karen-Marie Woods) about disability policies in Canada [including British Columbia (BC), Alberta, Saskatchewan, Manitoba and Ontario] and abroad [including Sweden, UK, USA and Australia] explained that although there is not a perfect policy related to disability benefits and employment (currently, in Canada and abroad), “there are several promising practices in some jurisdictions which, if combined, could have a significantly positive effect on the employment opportunities and quality of life for [PWDs].”⁸²⁷ This study argues that

While all jurisdictions have designed policies to encourage individuals to enter employment, the majority of [PWDs] in BC currently receiving disability benefits do not

⁸²⁷ Cohen et al, *supra* note 82 at 17.

receive additional income from the labour market... [There are] several policies that might enable more [PWDs] who are receiving benefits to increase their engagement with the labour market. These include: • Ensuring that individuals have continued medical and dental benefits at the same level as when on assistance... [as in BC]; • Ensuring unlimited reinstatement as in Ontario and rapid re-qualification for income benefits, including earnings exemptions as in Alberta; • Providing a monthly transportation allowance for people who access *any* employment as in Ontario; • Increasing earnings exemptions by including the current flat rate earnings exemption... in BC and adding a 50 per cent graduated reduction in benefits for additional earnings as in Alberta...; • Developing ‘working credits’ to even the flow of earnings exemptions as is done in Australia; • Developing employment start-up benefits of up to \$500 for any employment-related activity as in Ontario; and • Raising asset limits to be eligible for benefits to \$100,000 as in Alberta. While the above changes would significantly reduce barriers to employment, they are not in and of themselves sufficient. Many [PWDs]...require additional training and support to successfully transition into paid employment.⁸²⁸

In my opinion, PWDs should be able to participate in employment without the risk of losing welfare benefits. In order to find an answer to the struggle between the income equity of employment prospects and the economic security of disability cash benefits, the social welfare system must ensure the adequacy of these disability cash benefits at a high level (to cover the additional urgent disability needs which most likely will increase to perform any job outside their home) with unlimited amounts of exemption for earnings from employment (to remove all barriers to employment). It must also eliminate the poverty conditionality that is attached to the means-tested income support for PWDs (to allow PWDs to have an employment income, to own assets, and to move out their persistent poverty). In addition, the government has an additional responsibility to provide (non cash) disability supports (i.e. goods and services) that reduce disability barriers to employment, which is a separate responsibility from the government’s responsibility to provide income support (i.e. disability cash benefits to cover costs for daily living disability needs at home).

⁸²⁸ *Ibid* at 21.

Therefore, to clarify, in my opinion, social welfare benefits for PWDs should include three parts (i.e. three kinds of social benefits with different objectives):

1. The first social benefit is a means-tested social income assistance to address the problem of poverty; therefore, this income replacement amount for PWDs should be similar to the income replacement amount that is provided to any other poor people.
2. The second social benefit is a universal disability benefit to ensure the minimum level of all BHCs as a BHR for PWDs (i.e. disability cash benefits to cover costs for daily living disability needs at home). This benefit can be justified by extending the rationale for a permanent higher rate of benefits for PWDs. This universal disability benefit should be provided to all PWDs regardless of their income or their assets. Therefore, this disability benefit should be permanent and should continue even after beginning employment. However, this amount should be provided with the understanding that it is more simplistic rather than realistic, because some individuals with severe disabilities may never reach this minimum level of all BHCs. Therefore, this amount should be provided equally to all PWDs regardless of their needs.
3. The third social benefit is needs-tested disability supports to provide (non cash) disability supports (i.e. goods and services) that reduce all disability barriers to employment and social participation (e.g. to cover the additional urgent disability needs which most likely will increase to perform any activity outside of their home). These disability supports should be provided to PWDs regardless of their income or their assets. Therefore, these disability supports should be permanent and should continue even after beginning employment. However, these disability supports should be provided on a case-by-case

basis depending on their needs (i.e. reasonable disability accommodation with cost-effective analysis; for example, some individuals with severe disabilities may need extremely costly tools in order to be able to perform some jobs, which means wasting too much money, while ignoring the daily living disability needs of others).

Although PWDs should have the equal right to participate in full-time paid-employment while their disability related expenses (i.e. the minimum level of all BHCs) are covered by the social policy, social income assistance programs under the residual model of welfare cover these disability needs only after the individual has exhausted all of his/her other resources. It is important to note here that covering disability related expenses should be considered as guaranteed universal BHRs and not as temporary allowances.

Lightman argues that minimalist government, privatization, and ignoring poverty should not be the only set of policy prescriptions available. He argues that vulnerable and dependent people need to be empowered so that they might exercise their full rights and responsibilities as capable consumers in today's society. This requires a commitment to social inclusion, their full participation in decision-making, and substantive policy initiatives directed at redressing “inequalities in wealth, income, and human resources”.⁸²⁹

⁸²⁹ Lightman, *supra* note 82 at 259.

4.4 What lessons can be learned from the Canadian experience for the social welfare development in the MENA?

The most important lessons that should be learned from the Canadian experience for the social welfare development in the MENA are as follows:

1. The Canadian experience shows that these different social welfare models have different effects on recipients;⁸³⁰ moreover, it shows that social welfare models do not inevitably progress towards the third model (i.e. Esping-Andersen's social democratic model of welfare); they can regress. According to Lightman,

the initiatives of our welfare state [in Canada] have led to a distinct narrowing of the gap between rich and poor. Primary distribution of resources and incomes, the result of labour market activity, is highly uneven in any capitalist society and over time, the gap widens. Social welfare measures, consciously introduced, narrow the differentials between rich and poor, and they certainly did so to some extent in post-war Canada. The retreat from the welfare state, which began after 1973 and continued to the end of the century, widened the gap. In the absence of meaningful social welfare interventions, unconstrained capitalism again rewards the rich and ignores the poor.⁸³¹

2. The Canadian experience shows that the presence of some social conditions can move a country from one model of social welfare to another. The Great Depression of the thirties and the Second World War were influential forces in the shift from a residual model of welfare to an institutional model of welfare in Canada under public pressure. Similarly, the high levels of unemployment and extreme poverty (that are resulted from the current civil wars with many casualties, disabilities, destruction and general chaos with its insecurity and instability) in the MENA would require (under public pressure) a shift in

⁸³⁰ The idea that different Canadian social welfare models have different effects on recipients is similar to the discussion of Esping-Andersen's three social welfare models and their different effects on recipients. See section 4.2, above, for more on this topic.

⁸³¹ Lightman, *supra* note 82 at 31.

the direction towards Esping-Andersen's social democratic model of welfare. Most of these armed conflicts in the MENA started with peaceful protests demanding changes and reflecting public dissatisfaction with the current conditions (including the high levels of unemployment and extreme poverty). Therefore, under this public pressure, it is not possible to continue with the current governmental social welfare systems that depend on SI programs, because poor, unemployed people who do not contribute to these programs would not benefit. It is also not possible to continue with the current non-governmental social welfare systems that depend on the social income assistance programs managed by Islamic NGOs, because the secular people distrust the activities of these Islamic NGOs. On the other hand, governments in the MENA claim that they cannot afford social income assistance programs, and (at the same time) Islamic NGOs distrust the secular governments to provide social income assistance programs due to their widespread corruption.⁸³²

3. The Canadian experience shows that the presence of some economic conditions can move a country from one model of social welfare to another model of social welfare. The social programs in Canada began to crash after the October war of 1973 between Israel and its Arab neighbors, and the resulting world oil crisis and global inflation. Some social

⁸³² Moreover, the casualties of these armed conflicts (as deserving heroes) would drive the development of disability policy. Therefore, the only solution is to provide to particular groups (including PWDs) universal benefits that are based on BHRs and do not depend on the discretion of the government (in addition to providing means-tested benefits for the poor). Moreover, it is possible to impose *Zakāh* as a governmental tax/revenue to pay for these social programs, because *Zakāh* would be the most acceptable social tax in the religious Islamic background of the MENA based on Islamic moral values. However, this shift in the direction toward Esping-Andersen's social democratic model of welfare (i.e. universal benefits) does not necessarily mean that social welfare systems in the MENA would fit perfectly under this model of welfare; i.e. they would move closer to it (rather than to any other model of welfare), but they would stop short of achieving this goal. Moreover, regardless of their differences, most countries in the MENA are sufficiently similar in facing the same problems; therefore, most countries in the MENA should adopt similar models. Implementing a social democratic model in the MENA is more complex than my proposed social welfare system model.

programs in Canada were downsized, off-loaded, or removed. According to Lightman, “[t]he post [Second World War] consensus between capital and labour in Canada was premised on an ever-expanding economic pie to be shared by the two parties”⁸³³ (i.e. a 'win-win' situation). However, the dramatic increases in world oil prices led to a conflict between capital and labor, because the economic pie was no longer expanding with the result that a larger share for labor would mean a lesser share for capital, and a larger share for capital would mean a lesser share for labor (i.e. a zero-sum game). With this shrinking of the economic pie, there was no longer a surplus growth to fund new social welfare programs (or even to fund some of the existent programs). Therefore, “[t]he welfare state [in Canada] came to be seen as an unaffordable luxury.”⁸³⁴ Therefore, this shift in the direction towards Esping-Andersen’s social democratic model of welfare in the MENA would not be possible without security, stability, and economic growth in the MENA.⁸³⁵

4. The Canadian experience shows that the decentralization of social welfare services (i.e. when the federal government reduced its participation in several areas of social welfare and provided more authority to the provinces), the lack of federal transfers to the provinces, and the lack of national standards (which the provinces should be required to

⁸³³ *Ibid* at 20.

⁸³⁴ *Ibid*. However, this argument (i.e. the economic crisis of the 1970s was caused by the OPEC oil embargo) is debated by some economic historians (such as Robert Brenner) who think the economy was already in recession prior to the war. See Robert Brenner, “The Economics of Global Turbulence” (1998) 1:229 *New Left Review* 1.

⁸³⁵ It is obvious that conditions in some countries in the MENA would have to change for my proposed model for social welfare systems to be realistic (i.e. security, stability and economic growth). For other countries in the MENA, it is expected that some of these countries might face the similar problems sooner or later due to the public anger boiling under the surface for the similar reasons (the high levels of unemployment and extreme poverty). However, for other countries in the MENA, it would be difficult to apply my proposed model for social welfare systems (due to their attachment to classical interpretations of the *Qur’ān* that are based on specific schools of Islamic *Fiqh*) unless they accept my new interpretation of the *Qur’ān* that is based on my progressive Islam perspective and takes into consideration both the liberal and Islamic moral values. See section 5.5, below, for more on this topic.

meet in order to get the federal transfer payments) are the main reasons for the deterioration of social welfare services in Canada. According to Stainton, considering the separation of powers, the British North America Act of 1867 (which is a part of the Canadian Constitution) gives the constitutional jurisdiction over health, education and social services to the provinces. The federal government has had to find ways to influence social policy without contravening this provincial jurisdiction. Later, a constitutional amendment gave power over UI to the federal government leading to the UI Act of 1940. Subsequently, the main tool for influencing social policy federally has been through cost sharing mechanism where the federal government would agree to pay part of the cost, if the provinces agree to certain terms and conditions. The first of these was the federal Hospital Insurance and Diagnostic Services Act of 1956, which enabled federal-provincial cost sharing of hospital services with the provinces. In 1966, the CAP was passed, which allowed for 50/50 federal-provincial cost sharing for a variety of health, education and social services with the provinces so long as the provinces agreed to abide by a range of conditions. Therefore, it set minimal standards, which the provinces were required to meet including: availability of assistance to everyone in a demonstrable need, work for welfare is prohibited, residency requirements are prohibited, preventative measures are allowed, and benefits must be sufficient to meet basic needs.⁸³⁶ This stayed in place until 1996 when the CAP was ended and was replaced by the Canada Health and Social Transfer (CHST) that eliminates the direct federal-provincial cost sharing and the policy requirements. Under the CHST, there was generally much lower

⁸³⁶ Stainton, *supra* note 82 at 5, 16, 19-21.

funding than under the CAP, so it caused deterioration in social welfare services. Therefore, we start to see the provinces start cutting back on social income assistance and increasing conditions. However, the policy requirements remain for health services under the 1985 Canada Health Act that affirms four core principles: portability, public administration, comprehensiveness, and accessibility.⁸³⁷ Therefore, transfer payments under the CAP and later the CHST were necessary as the federal government could encourage the provinces to implement welfare reforms. Therefore, the decentralization of social welfare services may reduce national standards and equity; it may cause gaps in vital social programs, differentiated services across the country, and deterioration in social welfare services.

Due to the fact that not all social and economic problems could be laid at the feet of the individual and not all people could fulfill all of their needs independently, a comprehensive system of social welfare should be established to protect citizens as a social safety net and to provide a minimum level of social security (which is an essential element of the concept of citizenship). Therefore, we should discuss the fundamental principles that the development of social programs in the MENA should be founded on.

⁸³⁷ *Ibid*, at 24, 27.

4.5 What are the fundamental principles that social programs should be founded on?

The development of social programs in the MENA should be founded on the following fundamental principles that should guarantee the following four objectives:⁸³⁸

1. Ensuring integrity of the system: This objective can be realized using principles such as entitlement, protection from fraud, and no manipulation of social policy.
 - Entitlement: i.e. qualification for social programs should not be discretionary and recipients should have the sense of entitlement/the guaranteed BHR to benefits and services (so people can demand accountability from the public and the private sector officials).
 - Protection from fraud: i.e. solving the problem of fraudulent (including disability) claims by a clear definition of disability and a better and serious eligibility process.
 - No manipulation of social policy: i.e. not serving the economic (and the psychological) priorities of the powerful at the expense of the vulnerable. Although the income tax system can be a highly effective and efficient way to redistribute income from the powerful to the vulnerable, the income tax system could also be manipulated quietly to serve the interests of the powerful. At the same time, other social programs (such as public education and health care), which are originally intended to serve the needs of the vulnerable, could also be turned around to serve the interests of the powerful (such as the expensive post-secondary education and the

⁸³⁸ Although these principles (which I formulated based on the lessons that should be learned from the Canadian social welfare experience for the social welfare development in the MENA) make a great deal of intuitive sense, they are also supported by many supportive sources for these principles. Whereas some of these principles are incorporated into International Covenants on Human Rights and other international instruments, some of these principles are incorporated into national constitutions and domestic laws, and some of these principles are incorporated by liberal equality theorists such as Rawls and Dworkin, etc.

- expensive psychiatry services). On the other hand, social programs that served only the poor (such as social income assistance) most likely will come under persistent attack from the rich, who neither need nor use their benefits.
2. Ensuring funding for the system: This objective can be realized using principles such as public administration, cooperation, and sustainability.
 - Public administration: i.e. placing the responsibility for the distribution of social welfare on the state.⁸³⁹
 - Cooperation: i.e. a more collaborative union between the individual and the state, and a collaborative union between the government and the non-profit, voluntary NGOs.
 - Sustainability: i.e. sustaining social programs and services by ensuring adequate, affordable, stable and sustainable funding for social programs.
 3. Ensuring fairness in the system: This objective can be realized using principles such as equality, universality, and priority.
 - Equality: i.e. minimizing the gaps in incomes and in wealth with active government involvement, both through its delivering of social benefits and its raising of revenue through an income tax.⁸⁴⁰
 - Universality: i.e. ensuring that all individuals have access to social benefits.

⁸³⁹ This issue about whether governments should act rather than individuals will be discussed further in subsection 4.8.2 & subsection 4.8.5.1, below.

⁸⁴⁰ While the government transfers can protect the poorest citizens' market incomes from shrinking towards zero, income taxes (which should be drawn mostly from the richest citizens) can provide the resources necessary for redistribution and they can be used as the most progressive measure of all measures directed towards increasing equality. However, the main redistributive mechanism is the differential tax rates in the income tax system, which can act as a redistributive mechanism itself through progressive taxation (i.e. the wealthy pay a higher percentage of their income than the poor). Then, tax revenue is used to fund specific programs such as OAS.

- Priority: i.e. individuals who experience more than their fair share of the costs of socioeconomic problems should be compensated for these costs.
4. Ensuring freedom and no dependency on the system: This objective can be realized using principles such as portability, de-commodification, adequacy, participation, incentive to work, and balancing between equity and efficiency.
- Portability: i.e. allowing people to move around the country without losing their benefit; however, this issue is less crucial in a unified (i.e. not a federal) system.
 - De-commodification: i.e. individuals should be able to “freely, and without potential loss of job, income, or general welfare, opt out of work [(within specific parameters such as child care, health issues, etc.)] when they themselves consider it necessary.”⁸⁴¹ On the other hand, PWDs should be able to participate in employment without the risk of losing welfare benefits.
 - Adequacy: i.e. guaranteeing a minimum standard of living.
 - Participation: i.e. enhancing and maximizing the potential of the individual by eliminating the social and economic barriers to full participation in the society and ensuring the best possible participation of individuals.
 - Incentive to work: i.e. the government has the responsibility to provide (non-cash) goods and services that reduce disability barriers to employment, which is a separate responsibility from the government’s responsibility to provide disability cash benefits (to cover costs for daily living disability needs at home).

⁸⁴¹ Esping-Andersen, *supra* note 81 at 23.

- Balancing between equity and efficiency: i.e. finding an answer to the struggle between the income equity of employment prospects and the economic security of disability cash benefits. This can be done by ensuring the adequacy of these disability cash benefits at a high level with unlimited amounts of exemption for earnings from employment (to remove all barriers to employment) and eliminating the poverty conditionality that is attached to the means-tested income support for PWDs (to allow PWDs to have employment income while receiving disability cash benefits. to own assets, and to move out of their persistent poverty).⁸⁴²

4.6 The applicability of Esping-Andersen's typology for the development of social welfare in the MENA

Due to the fact that the MENA's states cannot be described as fully developed capitalist countries, it is difficult to apply Esping-Andersen's typology, which is focused on the welfare state in capitalist free market economies and liberal democratic free Western societies. However, I will try to use my imagination to see which type of Esping-Andersen's welfare models can be applicable to the MENA's states. There are three possibilities for the development of social welfare in the MENA:

- If we consider only the governmental social welfare systems in the MENA, it would look like that the MENA's states can be grouped under Esping-Andersen's conservative model of welfare, because the effect on redistribution is minimal, and the state has a central role

⁸⁴² This means that the government should find an optimal balanced benefits level, which can provide for the disability related needs and can provide some incentive to work. At the same time, the government should also allow for the continuation of benefits for disability related needs even after beginning employment.

both in legitimating social rights and in maintaining differences related to status and class. The focus is on the role of family support and on SI programs.

- If we consider the non-governmental social welfare systems in addition to the governmental social welfare systems in the MENA, it would look like MENA's states can be grouped under Esping-Andersen's liberal model of welfare, because social assistance is provided mostly through a means-tested low level of benefits.
- However, for the future development of social welfare in the MENA, if the governmental social welfare systems take into their consideration my progressive Islam perspective about social justice (with my new interpretation of the *Qur'ānic* rules about *Zakāh*), it can easily take the direction towards Esping-Andersen's social democratic model of welfare, where the goal would be to promote equality of the highest standards through universal provision and de-commodification of social rights.

4.6.1 The governmental social welfare systems in the MENA (Esping-Andersen's conservative model of welfare)

The Mandatory Government of Palestine led the way by providing for compensation for work injuries in 1926. Then, work injury compensation provisions were introduced in Egypt and Iraq in 1936, in Syria in 1941, and in Lebanon in 1943. Then, social welfare systems in the MENA were expanded after the Second World War. Turkey started programs for work injury and maternity in 1945, old age in 1949 and sickness in 1950 to become the first country in the MENA with a multi-insurance social welfare system.⁸⁴³

⁸⁴³ Dixon, *supra* note 84 at 165.

As a result of the political independence of the MENA's states, social welfare systems blossomed in the MENA during the 1950s. In order to provide benefits in the event of old age, disability and survivorship, Egypt experimented with the social income assistance in 1950 (which was subsequently downgraded to a minor role). In 1959, Syria widened its social welfare system to provide old age, disability and death benefits. In Turkey, Egypt and Iraq, social welfare measures covered all the long-term unforeseen events (such as disability) as well as work injury, but to a lesser extent for sickness, maternity and unemployment by the end of the 1950s. In 1963, Jordan took its first social welfare steps hesitantly by introducing paid maternity leave and a workmen's compensation system. Also in 1963, Lebanon expanded its SI system to include long-term unforeseen events as well as sickness and maternity. In 1969, new programs were taken in Saudi Arabia culminating in the creation of a SI system covering long-term benefits and work injuries and the introduction of paid sick leave. In 1976, Kuwait and Bahrain adopt the SI strategy. Both countries provide contributory old age, disability and death benefits as well as work injury benefits. In 1978, Jordan took a significant step by following the footsteps of Bahrain and Kuwait.⁸⁴⁴

The following Table gives an overview of the available information about the current governmental social welfare systems in the MENA. Although Indonesia, Malaysia, and Pakistan are not part of the MENA, they are included into our consideration in this table, because they are among the few Muslim countries (together with Saudi Arabia, Sudan, and Yemen) where *Zakāh*

⁸⁴⁴ *Ibid.*

is obligatory and is collected in a centralized manner by the state. On the other hand, I did not include Israel (although it is located in the MENA) into my focus, because it cannot be considered among Muslim countries (although an important portion of its population is Muslim).

While SI measures⁸⁴⁵ are the main form of social welfare in the MENA, social income assistance measures (that were playing a supplementary role) and employer liability (EL) measures⁸⁴⁶ have been largely replaced by SI programs over the years. Moreover, in the following table, only Indonesia and Malaysia are using the provident funds (PF).⁸⁴⁷ Most social welfare measures in the MENA are financed by employee contributions, employer contributions and government contribution to SI programs. Usually, government contributions are tied either to employee earnings or employee and employer contributions. Usually, maximum and minimum earnings are specified for the purposes of calculating these contributions. In Indonesia, Malaysia, Mauritania, Morocco, Pakistan, Sudan, and Syria, the social welfare measures are financed without any government contribution. In addition, employers in Lebanon, Libya, and Morocco are required to pay the entire cost of EL programs.

⁸⁴⁵ SI systems base the eligibility for pensions and other periodic payments on length of employment or self-employment or, in the case of family allowances and work injuries, on the existence of the employment relationship itself. The amount of pensions (long-term payments) and of other periodic (short-term) payments in the event of unemployment, sickness, maternity, or work injury is usually related to the level of earnings before any of these contingencies caused earnings to cease.

⁸⁴⁶ Under the Employer-Liability systems, employees are usually protected through labour Laws that require employers, when liable, to provide specified payments or services directly to their employees. Specified payments or services can include the payment of lump-sum gratuities to the aged or disabled; the provision of medical care, paid sick leave, or both; the payment of maternity benefits or family allowances; the provision of temporary or long-term cash benefits and medical care in the case of a work injury; or the payment of severance indemnities in the case of dismissal. Employer-liability systems do not involve any direct pooling of risk, since the liability for payment is placed directly on each employer. Employers may insure themselves against liability, and in some jurisdictions such insurance is compulsory.

⁸⁴⁷ These PF are compulsory savings programs, in which regular contributions withheld from the employees' wages are enhanced by employers' contributions. These contributions are invested for each employee in a single, publicly managed fund for later repayment to the employee when defined contingencies occur.

The following table [which I created according to information that I gathered from the United States of America Social Security Administration (USA-SSA) website] includes only the social programs, which are established by statute that insure individuals against interruption or loss of earning power and for certain special expenditures arising from marriage, birth, or death. It also includes allowances to families for the support of children. Protection of the insured person and dependents usually is extended through cash payments to replace at least a portion of the income lost as the result of old age, disability, or death; sickness and maternity; work injury; unemployment; or through services, primarily hospitalization, medical care, and rehabilitation.⁸⁴⁸

Table 1 The current governmental social welfare systems in Muslim countries

Benefits	Old Age, Disability, and Survivors	Sickness and Maternity	Work Injury	Unemployment	Family Allowances
Algeria	SI	SI	SI	SI	SI
Bahrain	SI		SI	SI	
Egypt	SI	SI	SI	SI	
Indonesia	SI, PF	SI	SI		
Iran	SI	SI	SI	SI	SI
Jordan	SI	SI	SI	SI	
Kuwait	SI		SI		
Lebanon	SI	SI	EL		SI
Libya	SI	SI, EL	SI, EL		

⁸⁴⁸ See USA-SSA, *supra* note 84.

Benefits	Old Age, Disability, and Survivors	Sickness and Maternity	Work Injury	Unemployment	Family Allowances
Malaysia	SI, PF	PF	SI		
Mauritania	SI	SI	SI		SI
Morocco	SI	SI	EL		SI
Oman	SI		SI		
Pakistan	SI	SI	SI, EL		
Qatar	SI				
Saudi Arabia	SI		SI		
Sudan	SI	SI	SI		
Syria	SI		SI		
Tunisia	SI	SI	SI	SI	SI
Turkey	SI	SI	SI	SI	
Yemen	SI	SI	SI		

Governments in the MENA have not used social welfare to lighten the burden of poverty or to redistribute resources. This SI policy (as the main form of social welfare systems in the MENA) with its limited coverage ensures that it benefits only people in the wage-earning urban middle class to keep them out of poverty. Therefore, it is not beneficial to most people in the MENA. However, the common combination in the MENA of this limited coverage, low benefits, contribution ceilings, inflation, and inefficient administration has meant that SI systems does not

always protect the living standards of members of this wage-earning urban middle class, especially those who are in lower-paid jobs.⁸⁴⁹

The gaps in the SI safety net in the MENA ensure that this SI policy has a very limited impact on poverty and inequality. Those who fall through the SI safety net feel ashamed. Unavoidably, those in the following groups are regarded as family responsibilities and consequently, they are not regarded as the appropriate subject of SI: the young unemployed seeking their first job, women who are not in covered employment, single parent families, and low or irregular wage-earners. The idea that a society should provide an income supplement (as a social assistance) to its members who have specific income needs has not gained significant support in the MENA (regardless of their ability to meet those needs), because of its “public charity” image. Even in the few countries that had social income assistance, this social income assistance has been commonly seen as the tool that keeps the society’s failures above an acceptable standard of living. This social income assistance had been used in combination with a SI system (in order to fill the gaps that were in these SI systems). In addition, the administrative practices commonly designed to minimize the social income assistance expenditure. This social income assistance has been seen as a luxury that most MENA’s states are unwilling or unable to afford.⁸⁵⁰

During the last four years, under what has been called “the Arab Spring”, there have been major, unexpected, and rapid political changes in most MENA’s states (especially in Bahrain, Egypt, Jordan, Kuwait, Lebanon, Libya, Saudi Arabia, Sudan, Syria, Tunisia, Turkey, and Yemen)

⁸⁴⁹ Midgley, *supra* note 84 at 176.

⁸⁵⁰ Dixon, *supra* note 84 at 174.

combined with armed violence and civil wars with many casualties, disabilities, destruction, and general chaos with its insecurity and instability, which exacerbate the high levels of unemployment and extreme poverty. However, these rapid political changes in the MENA have been faster than any legal reform regarding the governmental social welfare systems in the MENA; therefore, there have been no major changes to the governmental social welfare systems in the MENA as described above.

Therefore, in theory, if we limit our consideration only to the governmental social welfare systems in the MENA, it would look like that the MENA's states can be grouped under Esping-Andersen's conservative model of welfare, because they do not offer universal benefits or even means-tested benefits. They mostly focus on contribution-based benefits under SI programs,⁸⁵¹ which are set out in their civil laws that were inherited from the European colonial powers' civil laws (for example, the Syrian Civil Law was inherited from the French Civil Law). Therefore, it is no surprise that for example, Syria (like France) can be considered under Esping-Andersen's conservative model of welfare.

4.6.2 The non-governmental social welfare systems beside the governmental social welfare systems in the MENA (Esping-Andersen's liberal model of welfare)

Secularizing, centralizing, and expanding of the governmental power and reform policies (which were started by the Ottoman Empire rulers) are continued by the European colonial powers (after the First World War) and by the post-independence powers. These policies have resulted in

⁸⁵¹ USA-SSA, *supra* note 84.

suppressing, controlling, nationalizing, and abusing of *Waqf* (Islamic Endowment), and have resulted in damaging, degrading, and reducing the powers of the religious authorities. On the other hand, Islamist groups affirm that the socio-economic and political ills of the MENA are created by the secular state's downgrading, limiting Islam to the private area, and secularizing its institutions and policy based on the Western political philosophy as a result of the increasing Western colonization and domination.⁸⁵²

The NGOs that have been providing social welfare services (and particularly Islamic NGOs) are considered as practical responses for addressing socio-economic ills of the MENA, which resulted from urbanization, migration, and industrialization. They are the product of the extension of the market, the intense governmental intrusion in the economic and social life, the state's failure to provide adequate social welfare protection, the expansion of public secular education, and the dissatisfaction of the educated middle class with the state's failure to provide adequate social welfare services. Islamic NGOs are a form of putting Islam into practice by creating alternative institutions (e.g. Islamic medical clinics) to those of the secular state, and demonstrating their superiority (as compared with the struggling secular state) and their capability to provide all kinds of social welfare services.⁸⁵³

The mixture between Islamic visions of creating an ideal socio-political environment (by restaging conditions similar to those of early Islamic time) and contemporary Islamic welfare practices is one step towards a modern Islamic project, which is trying to interpret Islam in

⁸⁵² Clark, *supra* note 85 at 9.

⁸⁵³ *Ibid* at 10.

political terms (including the determination to stand on an equal footing with the West). Social movements are essential for establishing social welfare systems, either by using ethical pressure on the governments or by carrying out services by themselves. Islamic movements in the MENA struggle (politically and logistically) to establish social welfare systems within the background of repressive political systems and ineffective promises for social welfare. The Islamic opposition in Muslim countries (whether officially accepted or not) is the most active in developing welfare services. Islamic activists in the MENA are trying to create ‘states within states’. For example, many medical clinics in Egypt are managed by the Muslim brotherhood movement. In Palestine, there is a comprehensive network of committees and subcommittees running schools, clinics, day-care centers, sewing centers, building roads, houses, raising domestic animals, Islamic banking and Islamic commercial enterprises, etc.⁸⁵⁴

Islamic NGOs are in the center of the struggle between secular forces and religious forces in the MENA. Therefore, any Islamic social welfare activity became politically charged regardless of the intent (political or not) of those providing these social welfare activities. These social welfare activities suspiciously became a symbolic political performance implying frustration with the secular state and its institutions. This fact limited Islamic NGOs’ ability to create a comprehensive social welfare system. Therefore, there is a symbolic struggle between Islamic NGOs and the secular state contesting the boundaries between private and public, and the boundaries between religious and secular. There is also a symbolic struggle over the nature of authority, the right to rule, the right of interpretation of Islamic Law, and the consequent rise of

⁸⁵⁴ Lundblad, *supra* note 85 at 197.

alternative and competing sources of sacred authority. This competition resulted in the duplication of social welfare services in some areas and the absence of social welfare services in other areas or for some people. In addition, MENA's states (burdened with their massive debts) have been withdrawing from social areas that they have controlled in the past (such as health care). On the other hand, Islamic NGOs have been very successful in filling these gaps. Therefore, this would explain the limited scope of the governmental and the non-governmental social welfare systems.⁸⁵⁵

This struggle between Islamic NGOs and the secular state resulted in a social welfare system that is dependent on charities and volunteerism resulting in a limited scope (or non-existent) of social services and low level of social benefits. In addition to these circumstances, the high level of living costs and the low level of salaries result in commodifying citizens and their labor, because people are not able to survive outside of the market. Moreover, they need two jobs or incomes to survive these harsh economic conditions. For example, there is currently no actual middle class in Egypt. In Egypt, there are three classes: rich, poor and very poor. Most of the middle class (even the educated or skilled professionals) in Egypt comes closer to being of a poor class than a middle class. As Janine A. Clark noted, "In Egypt, for example, we find medical doctors driving taxis. They continue to belong to the new middle class despite the fact that they are only practicing their profession part-time or may have relatively low incomes."⁸⁵⁶

⁸⁵⁵ Clark, *supra* note 85 at 11-12.

⁸⁵⁶ *Ibid* at 10.

Therefore, in theory, if we limit our consideration only to the governmental social welfare systems in the MENA, the MENA's states could be grouped under Esping-Andersen's conservative model of welfare, where they depend on SI programs. However, in practice, if we look at the big picture and take into our consideration the non-governmental social welfare systems beside the governmental social welfare systems in the MENA, the MENA's states could be grouped under Esping-Andersen's liberal model of welfare, where they depart from Esping-Andersen's idea of de-commodification.

However, the above description of circumstances is applicable only prior to "the Arab Spring". During the last four years, there have been major, unexpected, and rapid political changes in some MENA's states where the Islamic movements moved to the center of power. For example, the formerly banned Muslim brotherhood movement has moved to the center of power and formed an official political party which controlled the government in Tunisia and Libya. They are trying to do the same in Syria, Jordan, Yemen, and Egypt (where they are trying to regain political power). Therefore, the Islamic movements in some MENA's states were able to turn the table upside down where religious forces became the official government and the secular forces became the official opposition. Unfortunately, to my surprise, these rapid political changes in the MENA have not been accompanied with any improvement to the governmental social welfare systems in the MENA, because the struggle between secular forces and religious forces continues with intense armed violence and civil wars with many casualties, disabilities, destruction and general chaos. In addition, this struggle with its insecurity and instability most likely will delay reforming the current secular governmental social welfare systems with a consideration of Islamic moral values for a long time.

4.6.3 A new Islamic perspective on social welfare and the *Qur'ānic* rules about *Zakāh* (in the direction towards Esping-Andersen's social democratic model of welfare)

Muslim scholars disagree on the interpretation of verse 9 (al-Tawbah):60 of the *Qur'ān*, which identifies the permitted beneficiaries of *Zakāh*. As we have seen in Chapter 3, the distribution of *Zakāh* funds has been commonly misinterpreted as a matter of free choice only within specified limits. However, in my opinion, it is impermissible to dispense *Zakāh* to other than these permitted categories of beneficiaries and there is a specific priority ranking among all of these categories (and it is not a matter of free choice). As we have seen in Chapter 3, in my opinion, verse 9 (al-Tawbah):60 of the *Qur'ān* listed the following eight permitted categories of beneficiaries of *Zakāh*, which should be interpreted (with a commitment to social justice and a consideration of both liberal and Islamic moral values) as follows:

1. Category 1: This category should include all poor people (Muslim poor and non-Muslim poor). In addition, this category has the highest priority over all of the other major categories. Moreover, although all of the poor deserve help, there is a priority ranking within the poor category. This priority ranking among all of the subcategories within the poor category is similar to the priority ranking among all of the other major categories.⁸⁵⁷
2. Category 2: This category should include people who are in harsh circumstances due to having special needs (such as PWDs, elderly people and orphans). This category has the second priority after the poor category. These people with special needs do not have to be

⁸⁵⁷ See subsection 3.6.2.1.1, above, for more on this topic.

poor to be eligible for social assistance. However, if anyone of these people is poor, s/he has the highest priority over all of the subcategories within the poor category.⁸⁵⁸

3. Category 3: This category should include people who devoted their time to do charitable work (such as any voluntary job that involves social justice or environmental protection). This category has the third priority among all of the other major categories. These people do not have to be poor to be eligible for social assistance. However, if anyone of these people is poor, s/he has the second priority among all of the other subcategories within the poor category.⁸⁵⁹
4. Category 4: This category should include people who are looking for the truth and searching for God such as students (and their teachers) and researchers (and their assistants). This category has the fourth priority among all of the other major categories. These people do not have to be poor to be eligible for social assistance. However, if anyone of these people is poor, s/he has the third priority among all of the other subcategories within the poor category.⁸⁶⁰
5. Category 5: This category should be limited to people who are living in abusive relationships (such as women under abuse, children under abuse, elderly people under abuse, and PWDs under abuse). This category has the fifth priority among all of the other major categories. These people do not have to be poor to be eligible for social assistance. However, if anyone of these people is poor, s/he has the fourth priority among all of the other subcategories within the poor category.⁸⁶¹

⁸⁵⁸ See subsection 3.6.2.1.2, above, for more on this topic.

⁸⁵⁹ See subsection 3.6.2.2.1, above, for more on this topic.

⁸⁶⁰ See subsection 3.6.2.2.2, above, for more on this topic.

⁸⁶¹ See subsection 3.6.2.2.3, above, for more on this topic.

6. Category 6: This category should be limited to people who are forced to borrow due to their harsh circumstances and are not able to repay their debts for reasons outside their control. Therefore, these people will be able to prove their eligibility as long as they did not deliberately borrow outside of their personal emergencies and they did explore all of their resources that are available to them for repaying their debts. This category has the sixth priority among all of the other major categories. These people do not have to be poor to be eligible for social assistance. However, if anyone of these people is poor, s/he has the fifth priority among all of the other subcategories within the poor category.⁸⁶²
7. Category 7: This category should be limited to people who spiritually and/or physically struggle for God's cause in peace time and they devoted their whole life for this struggle for righteous causes. Although this category justifies the receiving of *Zakāh* by NGOs that are specialized in helping one of the other major categories, they receive *Zakāh* not for their own benefit, but for the benefit of whom they are helping; these NGOs have to pass on *Zakāh* to their beneficiaries. Moreover, this category should include caregivers who are single parents, who take care of disabled or elderly family member or friend, or who are foster parents for an orphan. It should also include individuals who open their home for other human beings to help them to freedom from abuse and individuals who help/sponsor refugees. This category has the seventh priority among all of the other major categories. These people do not have to be poor to be eligible for social assistance.

⁸⁶² See subsection 3.6.2.2.4, above, for more on this topic.

However, if anyone of these people is poor, s/he has the sixth priority among all of the other subcategories within the poor category.⁸⁶³

8. Category 8: This category should be limited to refugees. This category has the eighth priority among all of the other major categories. These people do not have to be poor to be eligible for social assistance. However, if anyone of these people is poor, s/he has the seventh priority among all of the other subcategories within the poor category.⁸⁶⁴

Therefore, *Zakāh* is a social tax for the benefit of the whole society in a system of social security between those who are able to pay *Zakāh* and those who should receive *Zakāh* to achieve social justice. As we have seen in Chapter 3, all of the above eight categories are in general terms; they are not limited to believers only nor to Muslims only. Moreover, according to my own interpretation of verse 9 (al-Tawbah):60 of the *Qur'ān* (with a commitment to social justice and a consideration of both liberal and Islamic values), all of these categories of beneficiaries have common characteristics, because they are all people with special challenges and they are not able to free themselves from their harsh circumstances (i.e. they are compelled not by their own free choice and outside their control), and these alms should relieve them from these harsh circumstances. Moreover, it is also very important to notice that categories 2 - 8 are not part of category 1 (the poor), which means they do not have to be poor to be eligible for social benefits. Therefore, my own interpretation of verse 9 (al-Tawbah):60 of the *Qur'ān* (with a commitment to social justice and a consideration of both liberal and Islamic values) confirms that these categories of beneficiaries should have a guaranteed universal BHR to social welfare regardless

⁸⁶³ See subsection 3.6.2.2.5, above, for more on this topic.

⁸⁶⁴ See subsection 3.6.2.2.6, above, for more on this topic.

of their assets and their employment incomes. Therefore, citizens would be able to “freely, and without potential loss of job, income, or general welfare, opt out of work [(within specific parameters such as child care, health issues, etc.)] when they themselves consider it necessary.”⁸⁶⁵

Therefore, for the future development of social welfare in the MENA, if the governmental social welfare systems take into their consideration my progressive Islam perspective on social welfare (with my new interpretation of the *Qur’ānic* rules about *Zakāh* that has a commitment to social justice and a consideration of both liberal and Islamic values) in addition to some compromises and cooperation (and mutual trust) with the opposition, it can easily take the direction towards Esping-Andersen’s social democratic model of welfare (that promotes equality of the highest standards through universal provision and de-commodification of social rights).⁸⁶⁶ Although it is a wonderful dream, I acknowledge that it would be impossible to implement this dream in real life without any security and stability, because the struggle between secular forces and religious forces in the MENA (with its insecurity and instability) will most likely delay (for long time)

⁸⁶⁵ Esping-Andersen, *supra* note 81 at 23.

⁸⁶⁶ We should note here that although some portions of my new proposed model of social welfare (that I set out later in this Chapter 4) seem to incorporate elements of Esping-Andersen’s liberal model of welfare (such as means-testing both in the form of priority for the poor, means-tested vouchers, and needs-tested vouchers), other portions of my new proposed model of social welfare will also incorporate elements of Esping-Andersen’s social democratic model of welfare that provide universal benefits (such as refundable tax credits for certain groups regardless of their income). Therefore, means-testing measures in my new proposed model of social welfare in the MENA could be considered as exceptions (i.e. not the major rule). Moreover, I am recommending my new proposed model of social welfare to be in addition to (and not to replace) the current SI programs that focus on contribution-based benefits. Therefore, social welfare systems in the MENA could take the direction towards Esping-Andersen’s social democratic model of welfare, but may not perfectly fit under Esping-Andersen’s social democratic model of welfare. Moreover, my proposed model for social welfare systems in the MENA would be similar to the Canadian social welfare system, which combines universal benefits, contribution-based benefits, means-tested benefits, and needs-tested benefits.

reforming the current secular governmental social welfare systems with a consideration of my new interpretation of the *Qur'ān*.

4.7 Some comparison between social welfare systems in the MENA and the Canadian social welfare system (as an example of Western social welfare systems)

Due to the fact that most people in Canada believe in the separation of church and state, the Canadian social welfare system is based on the secular liberal principles. While the *Qur'ān* in the MENA has a very strong message and a powerful energizing force as a natural law source for the right of people with special challenges to the money of rich people, social welfare entitlements in Canada do not depend on a religious foundation, because any social welfare entitlement in Canada must be supported by a current positive law (human made law). Although Canada has a comprehensive social welfare system (as compared with social welfare systems in the MENA), this Canadian social welfare system is missing the natural law source of rights, which means that any social welfare entitlement in Canada is a temporary allowance (or temporary benefit allowed by the current government), and cannot be described as a guaranteed right. This means that any social welfare entitlement in Canada can be cancelled or modified at any time with changes to the current positive law rules as a result to any change in the government or any change in the balance of power between the different political parties or between the diverse interest groups and social movements.⁸⁶⁷ This would explain the shift (in Canada) from a residual model of welfare (or Esping-Andersen's liberal model of welfare) to an institutional model of welfare (or

⁸⁶⁷ However, some aspects of the Canadian social welfare system may be protected by the *Canadian Charter of Rights and Freedoms*, which is difficult to change. At the same time, any hypothetical natural law version may be also subject to differing interpretations of that law.

Esping-Andersen's social democratic model of welfare) after the Second World War and the swing back to the residual model of welfare after the early 1970s.

The *Qur'ān* has a very strong message and a powerful energizing force as a natural law source for the right of people with special challenges to the money of rich people. Unfortunately, this natural right has not been translated in reality into comprehensive social welfare systems (either governmental or non-governmental) in the MENA. Although the Islamic non-governmental social welfare systems in the MENA are supported by the natural law source of rights, they are missing clear and detailed definitions of these rights. Due to the fact that Islamic rules in the *Qur'ān* and other religious scriptures must stay in vague and general terms in order to be applicable to anyone in any circumstances at any period of time, these vague and general terms have led to diverse interpretations (some of which might be criticized as tools for political implementation) of these Islamic rules. Therefore, the Islamic non-governmental social welfare systems in the MENA do not agree on clear and detailed definitions of social welfare entitlements based on Islamic rules in the *Qur'ān* and other religious scriptures. For the future development of social welfare in the MENA, if the governmental social welfare systems take into their consideration my new interpretation of the *Qur'ānic* rules about *Zakāh* (that has a commitment to social justice and a consideration of both liberal and Islamic values) in addition to some compromises and cooperation with the opposition, it can easily take the direction towards Esping-Andersen's social democratic model of welfare.

On the other hand, like Canada, the governmental social welfare systems in the MENA have clear definitions of the social welfare entitlements based on the current positive laws (human

made laws). However, these definitions of the social welfare entitlements in the MENA have a limited scope; they are not as comprehensive as the definitions of the social welfare entitlements in Canada, because the comprehensiveness of these definitions of the social welfare entitlements may result only from the free political activities of the diverse interest groups and social movements by claiming, advocating and achieving entitlements. This would explain the fact that if we limit our consideration only to the governmental social welfare systems, the MENA's states could be grouped under Esping-Andersen's conservative model of welfare, where they are limited to SI programs, which are set out in their civil laws that were inherited from the European colonial powers' civil laws.

Due to the fact that Islamic charitable NGOs (mostly managed by the Middle class) in the MENA represent an alternative to the secular state's institutions and even to the government and state type, most governments in the MENA have resisted Islamic charitable NGOs' social activities. On the other hand, the rich class in Canada has been encouraged by the Canadian government to set up charitable NGOs; they have been benefiting from tax incentives such as income deductions and tax credits for gifts and donations. While the struggle between the secular forces and the religious forces in the MENA has led to limited social welfare systems in the MENA, the free political activities of the diverse interest groups and social movements (by claiming, advocating and achieving entitlements) led to the creation of a more comprehensive social welfare system in Canada. The lack of freedom of association and the restrictions on political activities in the MENA have restricted the efforts of the diverse interest groups and social movements, and have limited the scope of social welfare systems in the MENA. In practice, if we look at the big picture and take into our consideration the non-governmental social

welfare systems beside the governmental social welfare systems in the MENA, it would look like MENA's states can be grouped under Esping-Andersen's liberal model of welfare, where they depart from Esping-Andersen's idea of de-commodification.

4.8 A new proposed model for social welfare systems in the MENA

In order to describe how my proposed model for social welfare systems in the MENA would look like based on my new interpretation of the *Qur'ānic* rules about *Zakāh*, I have to address the allocation of social benefits and the financing of social services, because looking at only one side of the redistributive cycle would necessarily result in a partial view. If we look only at the allocation of social benefits without any regard for generating resources, it would result in a partial view, or if we look only at the financing of social services without any regard for how the money is spent, it would also result in a partial view.

Under this new social welfare model for the MENA, I have to address the allocation of social benefits including: how should the social benefits be delivered (i.e. comparing between governmental delivery of services and non-governmental delivery of services); in what form should the social benefits be provided (i.e. comparing between in-kind benefits, cash benefits, and vouchers); and to whom should the social benefits be given (i.e. comparing between universal benefits, means-tested benefits, and needs-tested benefits).

Under this new social welfare model for the MENA, I also have to address the financing of these social services (i.e. how should resources be generated within the society in order to pay for the activities of the welfare state) including: the governmental tax system (i.e. should *Zakāh* be a

separate governmental tax system where all money collected from *Zakāh* has to be spent on social welfare only) and the non-governmental voluntary sector (i.e. how should the non-governmental voluntary sector provide the social services).

However, before describing my proposed model for social welfare systems in the MENA, I have to discuss the different parts of the total welfare spending for social policy. Therefore, I have to discuss the following points:

- What are the parts of the total welfare spending for social policy?
- How should the social benefits be delivered (comparing between governmental delivery of services and non-governmental delivery of services)?
- In what form should the social benefits be provided (comparing between in-kind benefits, cash benefits, and vouchers)?
- To whom should the social benefits be given (comparing between universal benefits, means-tested benefits, and needs-tested benefits)?
- How should resources be generated within the society in order to pay for the activities of the welfare state?
- Connecting the dots as a conclusion.

4.8.1 What are the parts of the total welfare spending for social policy?

According to Richard Titmuss, the total welfare spending for social policy should be compared to an iceberg, in which social welfare spending represents the visible tip. Below the surface, there are two other submerged parts of the iceberg: occupational welfare spending (i.e. benefits delivered through occupation, such as employment based pensions) and fiscal welfare spending

(i.e. benefits delivered through the tax system, such as tax credits). Similar to the submerged parts of an iceberg, occupational welfare spending and fiscal welfare spending are both much larger and less visible than social welfare spending (i.e. the visible tip of the iceberg). Therefore, social welfare spending represents a small (but highly visible) part of the total welfare spending for social policy.⁸⁶⁸

Due to the fact that social welfare spending (which supposedly should direct benefits from the rich to the poor) is highly visible, it is under constant scrutiny. On the other hand, due to the fact that occupational welfare spending and fiscal welfare spending (which most likely will benefit the wealthiest groups more than others) are the two larger hidden parts of the welfare iceberg, they are largely hidden from public scrutiny. Therefore, according to Lightman, if all of the three types of welfare spending for social policy are taken into consideration, the result would be that the total welfare spending (i.e. occupational welfare spending, fiscal welfare spending, and social welfare spending together) redistributes income from the poor to the rich.⁸⁶⁹ Lightman notes that

Canadians

tended to discount empirical evidence that has long made clear that the big welfare state did not and would not fulfill its early promises, as government redistribution often benefited the wealthy at the expense of the poor and middle classes. As shown in Richard Titmuss's original iceberg of social welfare..., the hidden or submerged parts—occupational, fiscal (and corporate) welfare—have become ever larger, with their highly regressive impacts, while we did not notice (or acknowledge) that the social welfare tip of the iceberg was melting away before our eyes.⁸⁷⁰

⁸⁶⁸ Richard Morris Titmuss, “The role of redistribution in social policy” in Pete Alcock et al, eds, *Welfare and Well-Being: Richard Titmuss Contribution to Social Policy* (Bristol: Policy Press, 2001) at 106.

⁸⁶⁹ Lightman, *supra* note 82 at 38.

⁸⁷⁰ *Ibid* at 256-57.

Therefore, economic policy and the tax system should be incorporated as central to the broader idea of the social policy. However, most of the social welfare literature focuses only on delivering services and meeting needs, without any regard to the needed financial resources and how they would be generated. Lightman argues that social policy

represents a broad umbrella, subsuming within it what we commonly think of as economic policy. Economic policy is a subset of social policy, and all social policy involves choice: no absolute economic imperatives tie our hands and preclude debate over alternatives and options. Economic policy involves choices, just as do decisions about whether to allocate social benefits universally or selectively, as cash or in-kind.⁸⁷¹

However, I will not focus in this dissertation on occupational welfare spending, because most of the welfare policies in the MENA already included the SI system, which is based on employment contributions. Although most of SI systems in the MENA require important reforms, I will focus only on the other two parts of the total welfare spending for social policy, which are social welfare spending (i.e. benefits based on unemployment, such as social income assistance) and fiscal welfare spending (i.e. benefits delivered through the tax system, such as tax credits). However, I must be clear here that my proposed model for social welfare systems in the MENA is to supplement (and not to replace) SI systems in the MENA.

4.8.2 How should the social benefits be delivered (comparing between governmental delivery of services and non-governmental delivery of services)?

I agree with An-Na'im and Abdel Halim on their 'rights-based' approach that

refers to a change in popular attitudes regarding charitable giving, whereby the giver feels a sense of moral and social obligation to give, and the beneficiary has a sense of entitlement to receive 'as of right'. The notion of a right to receive is of course the other

⁸⁷¹ *Ibid* at 259.

side of the coin of the duty or obligation to give, which is a deeply embedded religious belief among all Muslims. ... [T]here is a 'value added' to emphasizing the rights-dimension over a vague and highly subjective sense of obligation or duty that is not owed to any person or cause in particular.⁸⁷²

However, I disagree with An-Na'im and Abdel Halim, because they are not concerned with creating new legal obligations or imposing legal rights as such. They state

While legal rights are premised on the ultimate possibility of coercive enforcement by state agents and institutions as a last resort, the idea of moral and social rights we are proposing relies on ethical and social motivation and implementation, and not state intervention to coerce compliance. This critical distinction is clearly indicated by the fact that we are calling for a rights-based approach to charitable giving that is implemented through civil society organizations and not state institutions. It is true that legal norms and institutions are relevant to the practical operation of the philanthropic activities of civil society organizations, but it should be noted that the object of legal regulation is only to ensure the realization of the moral and social duty to give and the right to receive framework we are proposing; not to impose a duty owed to the state or right to receive from it.⁸⁷³

In addition to the problems that are related to the philanthropic NGOs (such as accountability), these philanthropic NGOs would be most likely biased towards one political standpoint (e.g. only Muslim recipients and excluding non-Muslim recipients or maybe even more distinction between *Sunnī* Muslim recipients and *Shī'ah* Muslim recipients). These biases would lead to political implementations of *Zakāh*, which I reject. Therefore, I would support the 'rights-based' approach as long as it is implemented by confirming (and enforcement of) legal rights through secular governmental institutions.

This issue is similar to the problem of privatization of social services in Canada. According to Lightman, privatization of social service delivery

⁸⁷² An-Na'im & Abdel Halim, *supra* note 45 at 3.

⁸⁷³ *Ibid* at 4.

refers to a mode of service delivery, outside the boundaries of government. The term is broad, and refers to a general approach rather than to a specific policy. It encompasses delivery by families, the voluntary sector, and for-profit businesses. Market criteria (such as profit or ability-to-pay) may or may not influence the allocation of benefits. The sole condition is that service delivery must be non-governmental. Commercialization [of social service delivery], a subset of privatization, refers only to services provided on a for-profit basis. ... [On the other hand,] Welfare pluralism [of social service delivery] refers to that form of service delivery in which the state is funder, but not direct service provider. Suppliers [in Canada], either for-profit or not-for-profit, compete for the direct provision. Often the selection of direct service provider is delegated to a third party. Market criteria such as efficiency and the ability to satisfy consumers are relevant (though not always determining) in the choice of supplier. A pluralist approach is found in the practices of case management in which a worker assesses the client's needs and arranges for the requisite services. A child-care voucher, which carries with it a public subsidy and may be used at any 'approved' location, also reflects welfare pluralism.⁸⁷⁴

The argument for the privatization of social service delivery mostly builds on the belief that the private sector is better able to deliver services with more efficiency (less costly and better services per dollar spent) than is the government. Therefore, a given level and quality of services can be provided by the private sector more cheaply outside of the government. While the impersonal bureaucratic governmental services are focused on meeting the needs of providers rather than of those being served, the private sector is less bureaucratic, more flexible, more prepared to innovate, and more sensitive to consumers' needs and wishes. Lightman states

The move towards privatization [in Canada] began as a slow pulling away from the structures and forms of the post-war welfare state, disillusionment with its outcomes, and disengagement from its processes. New forms of public discourse that talked of 'consumer empowerment' were incompatible with insensitive and rigid bureaucratic and political decision-making. In its place, there emerged a new embrace of the market, with its promise of consumer sovereignty and control over decision-making. The reduction of bureaucratic control would also generate increased efficiency and effectiveness, which in turn would help address the emerging fiscal crisis of the state. Reducing the welfare state was seen as the way to cut government spending, thereby to reduce annual deficits and to generally put Canada's fiscal house in order.⁸⁷⁵

⁸⁷⁴ Lightman, *supra* note 82 at 88.

⁸⁷⁵ *Ibid* at 87.

However, many privatization activities have problems with accountability, irreversibility, conflict of interest, and fundamental gender bias. According to Lightman, “[m]any privatizations in Canada appear to be ideologically driven, as evaluations of privatized activities often do not occur, based on explicit political decisions.”⁸⁷⁶ He adds

There undoubtedly are many cases where commercial service delivery is cheaper (usually because of reduced labour costs), though the impact on quality remains unclear. Not-for-profit delivery... is often successful, because community groups can work more cheaply and in a more sensitive manner than government providers. But when the focus is restricted to commercial for-profit provision of service, the evidence overwhelmingly suggests that quality is rarely maintained and promised cost savings are often elusive or non-existent. The case for commercial delivery, it appears, may have to rest on ideology, an approach for which no evidence is either required or desired.⁸⁷⁷

In my opinion, giving the problems related to both the public sector service delivery and the commercial (for-profit) sector service delivery, the best mode of service delivery is the welfare pluralism of social service delivery where the government is the funder, but the service provider must be non-profit NGOs. In order to ensure the public interest, there is a need for some government intervention in the form of comprehensive regulation (including registration, accreditation, licensing, and inspection) for these non-profit NGOs.

⁸⁷⁶ *Ibid* at 107. According to Lightman,

Lower taxation and a smaller public sector [in Canada] become ends in themselves, not merely means to efficiency and effectiveness, which in practice now become secondary goals. This leads directly to the residualist view that government should not provide any benefits or services, except as a last resort and on a temporary basis. While the place of the voluntary sector did not erode entirely, commercial for-profit approaches began to assume centre stage. What began as a gradual loss of support for the early welfare state acquired considerable momentum as the case for commercial delivery of services. Undoubtedly this trend was accelerated by the Free Trade Agreement with the United States, and subsequently NAFTA, which gave to corporations legal rights that superseded those of sovereign governments. Commercialization, once introduced, becomes virtually impossible to reverse. *Ibid* at 87.

⁸⁷⁷ *Ibid* at 109.

4.8.3 In what form should the social benefits be provided (comparing between in-kind benefits, cash benefits, and vouchers)?

Neil Gilbert and Paul Terrell have categorized the social benefits in different forms of allocation based on their basis of transferability (i.e. the extent to which the social benefit must be used by the recipient or could be transferred to another person):⁸⁷⁸

1. Goods: Including solid in-kind products that could be freely transferable to others or converted to cash (such as food and clothing) and other solid in-kind products that could be less transferable (such as public housing).⁸⁷⁹
2. Services: Including one-on-one activities that are not transferable to others, because they are delivered by one provider to one client based on his/her needs (such as counseling, home care).
3. Cash: Including both the direct cash payments (such as social income assistance payments) and benefits delivered through the tax system (i.e. all income exemptions, income deductions, and tax credits). It provides the greatest consumer choice and freedom, because it is the most transferable among all other forms of benefits allocation.
4. Credits: Including rebates (such as rebates delivered through the tax system),⁸⁸⁰ concessions (such as reduced rates for seniors), and vouchers (such as food stamps in

⁸⁷⁸ Neil Gilbert & Paul Terrell, *Dimensions of social welfare policy*, 4th ed (Boston: Allyn & Bacon, 1998) at 122.

⁸⁷⁹ According to Lightman,

Undoubtedly one of society's earliest forms of charitable activity was to deliver food to the worthy, but destitute, widow with small children. Today, one of the fastest growing areas of activity in the social welfare field [in Canada] is the food bank. We have come full circle: from 'food hamper to the deserving poor' all the way back to 'food hamper to the deserving poor'. We have attempted, but seemingly discarded, other approaches—money without conditions or entitlements; money with programmatic conditions; money with sanctions; training programs; opportunities; we have even flirted with the idea of giving the poor control over their own lives. But we seem to be back to where we were a hundred—or many hundred—years ago: limited benefits delivered as tangible commodities to those truly in need. Lightman, *supra* note 82 at 111-12.

USA). These benefits are not transferable to others, because the benefit cannot be received unless the recipient used it.

5. Power: Including reallocation of control or authority from a group or a person to another person in order to ensure client participation in service delivery. Therefore, it is not transferable to others.⁸⁸¹
6. Opportunities: Including preferential treatment to redress past systemic discrimination (such as those in the affirmative action programs) and rewards for past contributions (such as those in the preferential programs for war veterans or seniors). These benefits are not transferable to others, because it must be used by the particular targeted groups.

However, the services category should be combined with the goods category as one category, which is the in-kind form of benefits allocation category. Moreover, the power category should be combined with the opportunities category as one category, which is the access to participation form of benefits allocation category (i.e. process-oriented benefits that are used to permanently transform the fundamental structures of the society to address the causes of inequality). Unlike these access benefits, in-kind benefits are used to provide goods and services for temporary

⁸⁸⁰ Tax credits are included in the previous category of social benefits (i.e. Cash), because they would result in cash benefits for the recipient; even the non-refundable tax credits would result in cash benefits, because they would reduce the tax liability of the recipient. Moreover, tax credits should not be included in the credits category of social benefits, because some tax credits are transferable to others if the recipient does not need to use them (e.g. DTC). On the other hand, rebates delivered through the tax system (i.e. refunds for actual payments) are not transferable to others, because the benefit cannot be received unless the recipient used it. However, the Canadian tax system uses the same term (i.e. tax credits) for both kinds of social benefits (i.e. tax credits and rebates).

⁸⁸¹ According to Lightman,

the Canadian Mental Health Association, for example, often requires that consumer-survivors (clients) sit on all boards and committees of the organization, though how much actual power this conveys is uncertain. Feminist counseling is organized horizontally rather than hierarchically, to minimize the power of the 'helpers'. The concept can extend more broadly to a system in which dependent people have control over their lives. *Ibid* at 114.

assistance (as exceptions to the primacy of the market without a commitment to redress fundamental inequalities).⁸⁸² Access benefits (power or opportunities) are conditional (i.e. they open the doors to the receipt of other benefits, but they do not have substantive value in themselves).⁸⁸³ Access benefits are related to anti-discrimination laws, which are outside of my focus (although these access benefits are very important and necessary especially for PWDs). Therefore, I will limit my focus on the other forms of benefits allocation (i.e. in-kind benefits, cash benefits, and credit benefits).⁸⁸⁴

The delivery of in-kind benefits is most likely accompanied by complex and expensive bureaucratic or administrative arrangements. On the other hand, the cash form of benefits allocation category is the simplest to administer among all other forms of benefits allocation.⁸⁸⁵

According to Lightman,

The early builders of the welfare state [in Canada] saw in-kind delivery as essential to the meeting of needs; the world they wished to replace was marked by inadequate housing, health, and education for the poor. The only certain way to meet these needs was to

⁸⁸² According to Lightman,

Redistribution of income, while necessary to some extent, is not sufficient: If the total wealth in Canada were divided absolutely equally today among the total population, the fundamental inequalities would have reappeared by tomorrow, unless the allocative systems and structures were simultaneously altered. *Ibid.*

⁸⁸³ According to Lightman,

To these six categories we may add a seventh, perhaps the obverse of opportunity, which entails a *requirement*, that individuals do something or meet some criterion—a negative benefit to, or sanction of, recipients. Like opportunities, *requirements* do not convey substantive content, but are contingent, opening or closing doors to other benefits. A requirement may entail searching for work as a condition of receiving income assistance, or it may prohibit smoking in exchange for a bed in an emergency shelter. See *Ibid.*

⁸⁸⁴ Limiting my discussion to benefits other than these access benefits does not mean that I deny their importance or the importance of elimination of barriers for PWDs. My focus is primarily on social welfare laws. These access benefits can be best covered by anti-discrimination laws and the duty to accommodate PWDs. However, it could be argued that some of these access benefits (such as assistive technologies) might be provided in my proposed model for social welfare systems in the form of needs-tested vouchers to cover the immediate needs of PWDs. See subsection 4.8.4, below, for more on this topic.

⁸⁸⁵ However, although education could be delivered through cash transfer to be spent at private schools, there are other reasons to favor public schools. On the other hand, delivering food in kind is likely more costly than cash benefits and more intrusive or paternalistic.

deliver them as tangible services.^[886] ... To these pioneers, the paternalism of this approach was acceptable,^[887] and such considerations as individual autonomy and the freedom to choose were deemed less important. These latter values remained high priorities to those favouring a residual value system, with minimal state intrusion ^[888]. In recent years many who formerly assumed paternalism was benevolent now tend to equate it with condescension or social control. They see a stigma or inferior status inherent in the receipt of in-kind benefits such as food hampers or public housing. These people ... often advocate for cash payment. They argue for 'client empowerment' and freedom in the active sense of control over one's own life.⁸⁸⁹

Although cash benefits (unlike in-kind benefits) allow the recipients to choose freely (as they wish) how to spend this money, consumers are not always capable of making an informed choice (i.e. unlike the government, individuals may act 'unwisely', because they lack comprehensive information)⁸⁹⁰ and reliance on the market is not always desirable. For example, in communities with tight housing markets (i.e. high prices for housing), providing poor people with sufficient

⁸⁸⁶ According to Lightman,

The architects of Britain's post-war welfare state wanted to ensure that benefits were actually received by the intended recipients, and with minimal stigma. Permeating their work were memories of the Great Depression and the Poor Laws when benefits were given grudgingly and in a highly personalized and demeaning manner. Two building blocks emerged: in-kind distribution and universal eligibility for benefits. *Ibid* at 111.

⁸⁸⁷ This was based on the idea that the government knows better than the individual what s/he needs, even if that is not what s/he wants; the government shall ensure that s/he gets what s/he needs. Therefore, it was acceptable that the government interferes in the individual's freedom for his/her own good.

⁸⁸⁸ According to Lightman,

Those embracing a residual value system [in Canada] ... today tend to be the strongest supporters of the food bank system, because the approach replaces the oppressive hand of the state with voluntary neighbourhood activity. As well, residualism has adopted paternalism to ensure through meager benefits and overt coercion that all helping activity is devoted towards ending dependence (and that support intended for children is not transformed into beer for adults). *Ibid* at 116-17.

⁸⁸⁹ *Ibid* at 116.

⁸⁹⁰ According to Lightman,

In some sense, any decision by the state (or community) to restrict the absolute freedom of individuals involves paternalism: we install traffic lights and set rules for driving to protect motorists and pedestrians; we have public fire and police protection, and national defence, which individuals receive whether they want them or not; we require parents to educate their children to a certain minimum standard; through [CPP] we force wage-earners to save for their old age; through Workers' Compensation systems we require employers to insure against workplace injuries; through medicare we give people a package of health services without direct user charge. ... [L]eft to their own devices, many individuals would make inadequate provision for income in their old age because they cannot anticipate their future needs. *Ibid* at 117.

cash benefits would likely not resolve their housing problem; therefore, the in-kind provision might address the problem of homelessness. Therefore, providing cash benefits may lead to the prospects-regarding equality of opportunity between poor people and rich people, but it may not lead to the equality of result due to the merciless free market. On the other hand, providing in-kind benefits may lead to the equality of result between poor people and rich people by avoiding the harshness of the free market.

Therefore, in order to avoid the problems that are related to in-kind benefits and in order to avoid the problems that are related to cash benefits, the provision of credit benefits (i.e. rebates, concessions, and vouchers) would be preferable when consumers would most likely make unwise choices. Although both rebates (such as those delivered through the tax system), concessions (such as reduced rates for seniors) are very important and necessary especially for the low-income individuals and families, they are supplemental compared to vouchers that can be used to cover the basic necessities of life for the poor (such as food stamps in USA), and to cover the immediate needs for the other groups (such as for disability needs). Therefore, within credit benefits, my focus will only be on vouchers that can be used to cover the basic necessities of life for the poor, and to cover the immediate needs for the other groups. While the equality of opportunity requires cash benefits, the equality of result requires in-kind benefits. On the other hand, as we will see below, vouchers take into consideration both the equality of opportunity (similar to cash benefits) and the equality of result (similar to in-kind benefits). However, the standard objection to vouchers is that they create a stigma which further devalues people who rely on state supports.

In my opinion, considering the problems that are related to in-kind benefits, the provision of cash benefits would be preferable (to ensure consumers' empowerment and freedom). However, if the benefits are related to the basic necessities of life or the immediate needs, these benefits are too important; they should not be left to the harsh free market. In order to minimize the consumer's unwise choice, parameters should be set for what the funds can be used for with a reporting mechanism. Therefore, vouchers would be the preferred form of benefits allocation for the benefits that are related to the basic necessities of life for the poor and the immediate needs for the other groups (to enhance their chance for well-being and, at the same time, to consider their wishes and priorities). Vouchers can combine the best elements of both cash and in-kind benefits. Similar to in-kind benefits, vouchers should not be transferable to others, because the benefit cannot be received unless the recipient used it (i.e. the equality of result). Similar to cash benefits, vouchers provide a choice, but it is a controlled choice. This means that the benefit must be used within selected boundaries, but within those boundaries, there could be many choices (i.e. the equality of opportunity). For example, a daycare subsidy voucher must be used within licensed and inspected daycare settings, but the consumer has the choice to use it in any qualified setting.

In order to avoid the issue that voucher could be subject to market forces (i.e. how much and of what quality vendors are prepared to provide for voucher users?), the service provider should be allowed to charge a fee for non-voucher users. Therefore, including the rich with the poor as clients receiving the same service from the same service provider would guarantee good quantity and good quality for the provided services, because fee-paying customers would demand the

quality of service.⁸⁹¹ Moreover, these vouchers should be given in the form of a regular credit card⁸⁹² (indistinguishable from those used by others)⁸⁹³ so even the service provider should not be able to distinguish if the holder of this credit card is a voucher user or non-voucher user. Therefore, the service provider would charge a fee for the provided services regardless whether his/her customer pays cash, uses a debit card, or uses a credit card and regardless whether the repayment for this charge from this credit card would be the government's liability or his/her own liability. Giving these vouchers in the form of credit cards would guarantee the quality of service and would also address the issue of stigma, which is the main criticism against their use (for example, food stamps in USA are a highly stigmatized form of welfare). On the other hand, the issue of stigma is the main argument for universal benefits (i.e. it is better to provide universal non-stigmatizing benefits and use a progressive tax system to cover the benefit—so the wealthy 'pay back' cost through higher taxation). Therefore, for benefits that are beyond these

⁸⁹¹ Some critics would argue that some service providers may not feel that they have to offer good quantity and good quality, because they may not be interested in attracting the rich as long as they have guaranteed income from voucher users as a safety net. However, this problem can be solved by requiring service providers (e.g. a housing provider) to include (for a certain percentage) the rich (i.e. non-voucher users) in their services in order to be allowed to continue with their services. Moreover, including the rich with the poor as clients receiving the same service from the same service provider would also address the issue of stigma, because the rich cannot claim that they are better than the poor by using better services (e.g. a better housing).

⁸⁹² See subsection 4.8.6, below, for more on this topic.

⁸⁹³ Therefore, the only people who would know the real purpose behind this credit card should be the holder of this credit card, the government and the credit card company. However, how would this system prevent misuse of these credit cards? Credit card companies usually know where the card was used, but they do not usually know what it was used for. As we have seen above, in subsection 4.8.2, the service provider must be a registered (with legal status and charitable registration), accredited, licensed, and inspected (by the government) non-profit NGO. Therefore, the holder of this credit card should have the freedom to choose between these non-profit NGOs and s/he should have many choices within anyone of these NGOs. S/he would not be able to misuse this credit card, because these NGOs are already accredited, licensed, and inspected by the government; they cannot provide goods or services that are not approved by the government. Ideally, every one of these NGOs should be specialized and dedicated to provide only one service (e.g. only housing or only food) in order to guarantee good quality for the provided service, which would attract the rich. Therefore, the recipient should not be able to use this credit card for services other than those for which the grant was given (e.g. it could not be used for housing rather than food). On the other hand, if the holder of this credit card tries to use it outside of these NGOs, the credit card company would know and this transaction would be denied. This disapproval is not an issue of stigma; instead, it is an issue of violating the terms of the contract between the holder of this credit card and the government.

basic necessities of life and immediate needs, cash would be the preferred form of benefits allocation (to ensure consumers' empowerment and freedom).

As long as the basic necessities of life and immediate needs are covered by vouchers, there is no need to provide direct cash payments. Therefore, cash benefits in this dissertation would be limited to benefits that are delivered through the tax system (i.e. all income exemptions, income deductions, and tax credits). Although all income exemptions and income deductions are very important and necessary especially for PWDs and low-income families with children, they are related to the general income tax system, which is outside of my focus in this dissertation. Therefore, within cash benefits, I will focus only on tax credits, which have to be refundable tax credits (as a progressive tool with a commitment to reduce fundamental inequalities). Therefore, in my opinion, the *Zakāh* system should have only two preferred forms of benefits allocation:

1. Vouchers would be the preferred form of benefits allocation for the benefits that are related to the basic necessities of life for the poor and the immediate needs for the other groups (to enhance their chance for well-being and, at the same time, to consider their wishes and priorities).
2. Refundable tax credits for some groups (as a progressive tool with a commitment to reduce fundamental inequalities).

4.8.4 To whom should the social benefits be given (comparing between universal benefits, means-tested benefits, and needs-tested benefits)?

Social benefits could be universal benefits, means-tested benefits, needs-tested benefits, or contribution-based benefits, which can be described as follows:

1. A universal benefit means a benefit that is directed to everyone within a designated group; its amount does not vary with the income level of recipients, and without regard to prior contributions (such as, in Canada, medicare, public education, and OAS).⁸⁹⁴
2. A means-tested benefit means the amount of the benefit changes as the income level of recipients change (such as social income assistance programs).
3. A needs-tested benefit means the eligibility for the benefit is dependent on the needs of the recipient (such as programs to address the needs of PWDs).
4. A contribution-based benefit means a benefit linked to prior contributions; it can be found in SI programs [such as, in Canada, CPP and employment insurance (EI)].

However, as I have noted above, although most of SI systems in the MENA require important reforms,⁸⁹⁵ my focus in this dissertation will only be on universal benefits, means-tested benefits, and needs-tested benefits; I will not focus on contribution-based benefits. In Canada, universal programs usually include: medicare (covering the entire population, except people who are newly resident in Canada during a specified waiting period), public education (covering children up to the minimum school-leaving age), and OAS (covering only those resident in Canada for at

⁸⁹⁴ Lightman discusses the debate over universal allocation as compared to selective provision in terms of effectiveness and efficiency. He argues that the case for universality (in Canada) continues to echo; however, it is focused on a limited number of in-kind programs: Medicare (the single social program distinguishing Canadian social policy from that of USA) and childcare (where the case for universality is so compelling that the debate will not go away). Otherwise, government (particularly the federal government) has shifted from universal in-kind programs to a narrower income distribution (mostly delivered through the income tax system). Therefore, today, the simple categories of “universal” and “selective” are no longer useful; the questions are no longer whether recipients are to be “all” or “some”, but rather “who among the some”. *Ibid*, at 135-44.

⁸⁹⁵ I must be clear here that my proposed model for social welfare systems in the MENA is to supplement (and not to replace) SI systems in the MENA.

least 10 years and aged 65).⁸⁹⁶ While OAS benefits are cash benefits, Medicare benefits and public education benefits are in-kind benefits. However, as I have noted above, the *Zakāh* system should have only two preferred forms of benefits allocation: vouchers and refundable tax credits. Therefore, health care needs and education needs (under my proposed *Zakāh* system) are not universal benefits, because they are covered by vouchers, which could be means-tested benefits or needs-tested benefits; therefore, vouchers should be directing benefits to those most in need (i.e. not wasting money on those who can look after themselves). However, again, these vouchers should be given in the form of credit cards in order to address the issue of stigma.

While refundable tax credits are (in principle) universal benefits (similar to non-refundable tax credits) directed to everyone (who will be treated roughly the same) within a designated group (with minimum administrative delivery costs), refundable tax credits are (in practice) means-tested benefits, because (unlike non-refundable tax credits) the lower the income, the greater cash the beneficiary receives.⁸⁹⁷ Due to the fact that even the rich will receive these refundable tax credits and these credits will be translated into a reduced liability for tax, the rich will have an interest in politically supporting a high level for these refundable tax credits.⁸⁹⁸ Therefore,

⁸⁹⁶ While OAS program is universal (in theory) in the sense that all people over a certain age can receive it, it is clawed back (in practice) up to 100% from those with incomes above a certain level.

⁸⁹⁷ This is the most important difference between refundable tax credits and non-refundable tax credits. See section 2.6, above, for more on this topic. Therefore, people with severe disabilities who have no income would receive the full amount of the refundable tax credits in addition to the social assistance benefits that do not depend on prior contributions (i.e. means-tested vouchers to cover their basic necessities of life and needs-tested vouchers to cover their immediate disability needs).

⁸⁹⁸ We should note here that the term “refundable tax credits” means cash benefits delivered through the tax system refunded in the tax return; however, the amount of these credits is determined based on which category of beneficiaries of *Zakāh* the recipient belong to and on the total available amount in the *Zakāh* account. This amount for a refundable tax credit can be claimed in his/her tax return regardless of his/her income. However, his/her liability for tax would be deducted from his/her refundable tax credit amount. Therefore, the actual cash amount received by the beneficiary would be affected by his/her liability for tax but not by his/her income. Therefore, if the

refundable tax credits combine the best elements of both universal benefits and means-tested benefits. While vouchers to cover the basic necessities of life for the poor are means-tested benefits, vouchers to cover the immediate needs for the other groups are needs-tested benefits. Due to the fact that eligibility for selective programs (i.e. means-tested benefits and needs-tested benefits) is usually based on an individualized assessment, qualification for these selective programs tends to be discretionary. However, under my proposed *Zakāh* system, qualification for vouchers should not be discretionary, because the recipients have an entitlement to these vouchers based on their universal BHRs.⁸⁹⁹ Moreover, these vouchers can help to target benefits, to address diversity, and to minimize costs.

As we have seen in Chapter 3, there should be (in theory) a specific priority ranking among all of the eight permitted categories of beneficiaries of *Zakāh* that are listed in verse 9 (al-Tawbah):60 of the *Qur'ān*. However, this priority ranking would be translated in practice into the idea that people in the category with the higher priority should receive a larger portion of *Zakāh*. It would also be translated in practice into the idea that in case of inadequate resources in the society, people in the category with the lower priority would be barred from benefiting from *Zakāh* in order to guarantee that people in the category with the higher priority would benefit from *Zakāh*.

As we have seen in Chapter 3, there is a priority ranking within category 1 (the poor). This priority ranking among all of the subcategories within the poor category is similar to the priority

beneficiary has no income (i.e. the beneficiary has no liability for tax), s/he will still be able to claim in his/her tax return and receive the full amount for his/her refundable tax credit without any deduction.

⁸⁹⁹ While entitlements to means-tested vouchers are based on the BHRs (described in Chapter 3) that are related to category 1 (the poor), entitlements to needs-tested vouchers are based on the BHRs (also described in Chapter 3) that are related to all of the other major categories of beneficiaries of *Zakāh*.

ranking among all of the other major categories of beneficiaries of *Zakāh*. Therefore, this priority ranking among all of the subcategories within the poor category would be translated in practice into the idea that people in the subcategory (among the poor) with the higher priority should receive a larger portion of *Zakāh* (e.g. poor PWDs would receive needs-tested vouchers to cover their immediate disability needs in addition to means-tested vouchers to cover their basic necessities of life). It would also be translated in practice into the idea that in case of inadequate resources in the society, people in the subcategory (among the poor) with the lower priority would be barred from benefiting from *Zakāh* in order to guarantee that people in the subcategory (among the poor) with the higher priority would benefit from *Zakāh*.

As we have seen in Chapter 3, people in category 2 (PWDs, the elderly, and orphans) do not have to be poor to be eligible for social assistance. However, if anyone of these people is poor, s/he has the highest priority over all of the subcategories within the poor category. Therefore, in case of inadequate resources in the society, it would be possible that people in all of the other subcategories (among the poor) with the lower priority would be barred from benefiting from *Zakāh* in order to guarantee that poor PWDs, poor elderly, and poor orphans would benefit from *Zakāh*.

Although category 1 has a priority over category 2 in theory, this priority would be translated in practice only into the idea that in case of inadequate resources in the society, people in category 2 would be barred from benefiting from *Zakāh* in order to guarantee that people in category 1 would benefit from *Zakāh*. However, in my opinion, due to the fact that category 1 (*al-Fuqarā'*) and category 2 (*al-Masākīn*) are mentioned in the *Qur'ān* many times together, separately or

interchangeably, category 1 (the poor) and category 2 (PWDs, the elderly, and orphans) should have equal portions of *Zakāh*.⁹⁰⁰

As we have seen in Chapter 3, as opposed to the first two categories (which they do not require exercising the individual responsibility), category 3 (volunteers for social justice or environmental protection) and category 4 (students and their teachers; and researchers and their assistants) have less priority than the first two categories, because they require the lack of irresponsibility after receiving *Zakāh* to keep their eligibility for the following year (i.e. they did not commit any corruption during their voluntary job or they did not waste their time in the previous year for something other than study or research). Therefore, both category 3 and category 4 should have smaller portions of *Zakāh* than the first two categories.⁹⁰¹

Although category 3 has a priority over category 4 in theory, this priority would be translated in practice only into the idea that in case of inadequate resources in the society, people in category 4 would be barred from benefiting from *Zakāh* in order to guarantee that people in category 3 would benefit from *Zakāh*. However, in my opinion, due to the fact that both categories 3 and 4 are related to the same BHRs (i.e. the BHR to protected sustainable environment, the BHR to practical social cooperation, the BHR to absolute equality and non-discrimination, and the BHR to responsible freedom of conscience), category 3 (volunteers for social justice or environmental protection) and category 4 (students and their teachers; and researchers and their assistants)

⁹⁰⁰ It must be mentioned here that these conclusions as well as the following conclusions are my own ideas; however, these ideas and priorities are supported by my own reinterpretation (in Chapter 3) of the *Qur'ān* and the *Qur'ānic* BHRs.

⁹⁰¹ See subsection 3.6.2.2, above, for more on this topic.

should have equal portions of *Zakāh* (but smaller portions of *Zakāh* than the first two categories).⁹⁰² Therefore, in my opinion, the total of both categories 3 and 4 should have a portion of *Zakāh* that is equal to the portion of category 1 or category 2.

As we have seen in Chapter 3, *Zakāh* belongs to all of the first four categories (the poor, PWDs, the elderly, orphans, volunteers for social justice or environmental protection, students and their teachers, and researchers and their assistants) as a matter of ownership for them; they receive it directly. Therefore, those people have the right to automatic wealth redistribution for social justice (i.e. universal benefits).⁹⁰³ This means that those people will be eligible for this year or keep their eligibility for the following year with a simplified straightforward method by providing specified documents (i.e. a tax return for low income poor, a doctor letter for

⁹⁰² People in categories 3 and 4 have common characteristics, because they are missing the occupation of time/when (i.e. do you engage when you wish to engage?) dimension of access (i.e. their BHR to responsible freedom of conscience and their BHR to absolute equality and non-discrimination might be denied). For example, volunteers (who dedicated their time to help others) are missing this occupation of time/when dimension of access, because their dedication to their voluntary work most likely would occupy their time; therefore, they would not have enough time to do other things that they wish to do. Students (who dedicated their time to advance knowledge for the benefit of the whole society) are also missing this occupation of time/when dimension of access, because their dedication to their study most likely would occupy their time; therefore, they would not have enough time to do other things that they wish to do. Some critics would argue that volunteering does limit one's time for other activities, but so does working or childcare. Should workers and those with children also be included? However, I would argue that although working does limit one's time for other activities, it is compensated with income earned from paid jobs (unlike volunteering); therefore, workers do not need social income assistance. On the other hand, while researching and studying could be paid jobs (unlike volunteering), researching and studying would advance knowledge for the benefit of the whole society (unlike any other job). Moreover, I would argue that although childcare does limit one's time for other activities, it is expected that for two parents family (unlike caregivers who are single parents), childcare would occupy the time of one parent while the other parent can earn income for the whole family. On the other hand, caregivers who are single parents (who are not poor) are included in category 7 of beneficiaries of *Zakāh*.

⁹⁰³ We should note here that while people in categories 2 - 4 should receive their refundable tax credits as universal benefits (i.e. regardless of their level of income or their prior contributions), people in category 1 (the poor) receive their vouchers to cover their basic necessities of life as means-tested benefits (i.e. based on their low income due to being poor by definition) and their vouchers to cover their immediate needs as needs-tested benefits (i.e. based on their needs due to their limited resources by definition). If they have high level of income and/or assets, they would not be poor and they would not be eligible to be one of the beneficiaries of *Zakāh*. Therefore, social benefits provided to the poor have to be means-tested benefits and/or needs-tested benefits, but they receive their vouchers regardless of their prior contributions. However, means-testing and/or needs-testing do not deny the fact that the poor people have the right to automatic wealth redistribution for social justice as we have seen in Chapter 3.

disability, ID for old age, death certificate for both parents of the orphan, work experience letter for volunteer, or enrolment letter for students and researchers). On the other hand, *Zakāh* could be spent within any of the last four categories (including: caregivers who are single parents, who take care of disabled or elderly family member or friend, or who are foster parents for an orphan; refugees and their sponsors; debtors forced to borrow due to their harsh circumstances and not able to repay their debts for reasons outside their control; women, children, elderly people, PWDs under abuse; and people who open their home for others to help them to be free from abuse) on a case-by-case basis (i.e. selective benefits), but they receive it indirectly (e.g. through another person or a NGO) for their own benefit. Therefore, those people cannot be eligible for this year or keep their eligibility for the following year unless they go through a complex process and only after they get an official decision every year on their own particular case for their eligibility or for keeping their eligibility (i.e. they are designated as refugees, they declared their bankruptcy, they are under abusive relationships, or they are designated to help someone in one of the major categories). In addition, people in categories 5 and 6 have to prove their lack of irresponsibility before receiving *Zakāh* to confirm their eligibility for this year (i.e. they did not deliberately play any part of subjecting themselves to a bondage or to an abusive relationships; or they did not deliberately borrow outside of their personal emergencies and they did explore all of their resources that are available to them for repaying their debts). In addition, people in categories 7 and 8 have to prove that they made responsible choices in spending *Zakāh* for the previous year to be eligible for the following year.⁹⁰⁴

⁹⁰⁴ See subsection 3.6.2.2, above, for more on this topic.

As we have seen in Chapter 3, in addition of being related to exercising individual responsibility, the last four categories are related to guaranteeing the BHR to be consulted (i.e. right to a free democracy). On the other hand, the first four categories are related to guaranteeing the BHR to absolute equality and non-discrimination; they have priority over the last four categories.⁹⁰⁵ Therefore, in my opinion, due to the fact that *Zakāh* could be spent within any of the last four categories on a case-by-case basis (i.e. selective benefits) and they do not have any ownership over *Zakāh*, people in these last four categories could be barred from benefiting from *Zakāh* in order to guarantee that people in the other categories would benefit from *Zakāh* in case of inadequate resources in the society. Moreover, this priority ranking would be translated in practice into the idea that people in the last four categories should receive smaller portions of *Zakāh* than the first four categories. Therefore, in my opinion, the total of the last four categories should have a portion of *Zakāh* that is equal to the portion of category 1, category 2, or the total of categories 3 and 4.

⁹⁰⁵ People in the last four categories of beneficiaries of *Zakāh* have common characteristics, because they are missing the transition/change (i.e. are you prepared for change?) dimension of access (i.e. their BHR to responsible freedom of conscience and their BHR to be consulted might be denied). For example, people who are living in abusive relationships (such as women under abuse, children under abuse, elderly people under abuse and PWDs under abuse) are missing this transition/change dimension of access, because they did not deliberately play any part of subjecting themselves to an abusive relationships; therefore, they would not be prepared for this change. People who are forced to borrow due to their harsh circumstances (and they are not able to repay their debts for reasons outside their control) are also missing this transition/change dimension of access, because they did not deliberately borrow outside of their personal emergencies; therefore, they would not be prepared for this change. People who dedicated their entire life (and not only their time) to help others (such as caregivers who are single parents or who take care of disabled or elderly family member or friend or who are foster parents for an orphan; individuals who open their home for other human beings to help them to freedom from abuse; and individuals who help/sponsor refugees) are also missing this transition/change dimension of access, because they did not plan for these unexpected harsh situations; therefore, they would not be prepared for this change. Refugees (who have been forced to flee) are also missing this transition/change dimension of access, because they did not plan to leave their old lives and to start new lives in new locations; therefore, they would not be prepared for this change.

Due to the fact that this fourth part of *Zakāh* should cover the immediate needs of people in the last four categories on a case-by-case basis (i.e. selective benefits), that category 7 should include anyone who is designated to help another person in the other major categories, and that the helped has a priority over the helper, it would be justifiable to include the immediate needs of the helped in addition to the immediate needs of the helper. Therefore, this fourth part of *Zakāh* should cover the immediate needs of all categories.

Therefore, based on my own ideas of what would work best, I recommend that all funds that are collected from *Zakāh* should be divided into the following four parts:

1. The first part should be spent only on category 1 (the poor) in the form of means-tested vouchers to cover the basic necessities of life.
2. The second part should be spent only on category 2 (PWDs, the elderly, and orphans) in the form of refundable tax credits.
3. The third part should be spent on both category 3 (volunteers for social justice or environmental protection) and category 4 (students and their teachers; and researchers and their assistants) in the form of refundable tax credits.
4. The fourth part should be spent on all categories in the form of needs-tested vouchers to cover their immediate needs.

4.8.5 How should resources be generated within the society in order to pay for the activities of the welfare state?

Due to the fact that those individuals (in the society) who pay for the activities of the welfare state may not be the same people who benefit from the activities of the welfare state, issues of

financing for redistribution within the society are very important. Under my proposed *Zakāh* system, there should be three general sources of financing for redistribution including the government, the voluntary sector, and the users. As we have seen above, under my proposed *Zakāh* system, while the service provider must be non-profit NGOs, the government intervention should be limited to funding and comprehensive regulation (including registration, accreditation, licensing, and inspection) for these NGOs. Therefore, in addition to the government funding, an important source of revenues (which is outside of the government, although it is dependent on the government funding) is the non-governmental voluntary sector. Therefore, I have to discuss the following points:

- Should *Zakāh* be a separate governmental tax system (where all money collected from *Zakāh* has to be spent on social welfare only)?
- How should the non-governmental voluntary sector provide the social services?

4.8.5.1 Should *Zakāh* be a separate governmental tax system (where all money collected from *Zakāh* has to be spent on social welfare only)?

In a few Muslim countries (such as Indonesia, Malaysia, Pakistan, Saudi Arabia, Sudan, and Yemen), *Zakāh* is obligatory and collected in a centralized governmental system.⁹⁰⁶ In many other Muslim countries, *Zakāh* is voluntary and collected through a decentralized non-governmental system (where *Zakāh* committees are established to collect and distribute of these

⁹⁰⁶ Kuran, “Islamic Fundamentalism”, *supra* note 54 at 320; Tripp, *supra* note 54 at 125; and Visser, *supra* note 54 at 30.

Zakāh funds).⁹⁰⁷ On the other hand, in Bahrain, Bangladesh, Jordan, Kuwait, and Lebanon, *Zakāh* is regulated by the governmental system, but contributions are voluntary.⁹⁰⁸

Due to the fact that (under my proposed *Zakāh* system) the government has to be the funder of social services, the government has the responsibility to collect the required money for these social services and the government has the right to generate revenue so that it can do the tasks it is expected to perform. Therefore, *Zakāh* as a payment to the government is mandatory (i.e. *Zakāh* is a legal obligation to pay regardless of whether the taxpayer wishes to participate and regardless of whether the taxpayer approves of the expenditure); the government transfers money from the private uses to the public uses that are chosen according to the 'collective will' of its people (i.e. not individually). According to Lightman, “Conscious government decisions determine what it will take (through direct taxes) and what it will not take (through tax expenditures). It also sets the context in which others can raise revenues, for example, by defining what constitutes a registered charity allowed to issue tax receipts to donors.”⁹⁰⁹

As we have seen in Chapter 3, there are eight permitted categories of beneficiaries of *Zakāh*, which are listed in verse 9 (al-Tawbah):60 of the *Qur’ān*. In my opinion, it is not possible to have these words in this verse with this specific order (as we have seen) and with specific prepositions (as we have seen) without any reason. Moreover, verse 9 (al-Tawbah):60 ends with the phrase: “[This is] an obligation [imposed] by Allāh; and Allāh is full of knowledge and

⁹⁰⁷ Clark, *supra* note 85 at 153.

⁹⁰⁸ Kogelmann, *supra* note 54 at 68; and Visser, *supra* note 54 at 30.

⁹⁰⁹ Lightman, *supra* note 82 at 162.

wisdom”,⁹¹⁰ which confirms that it is impermissible to dispense *Zakāh* to other than these eight permitted categories. Therefore, in order to guarantee that *Zakāh* money will not be dispensed to other than these eight permitted categories, *Zakāh* has to be a separate governmental tax system, where all money collected from *Zakāh* has to be spent on social welfare only.

Moreover, as we have seen in Chapter 3, some interpretations of category 3 (*al-‘Āmilīna ‘alayhā*) allowed the *Zakāh* funds to be spent on the administration of a centralized *Zakāh* collection system.⁹¹¹ The existence of this category has sometimes allowed a large proportion of *Zakāh* to be applied for state purposes by certain rulers in an abusive way. For example, in the late nineteenth century, in the Ibadate imamate of Oman, *Zakāh* became more like a tool for state purposes than a form of religious alms.⁹¹² This practice may still be flourishing today in Pakistan, where official corruption has been diagnosed by reviewing *Zakāh*’s absorption into the state taxation system in 1980.⁹¹³ Therefore, in order to guarantee that *Zakāh* money will not be misused for other state purposes outside the area of social welfare, *Zakāh* should not be integrated into the general tax system. This means that the government should have two separate accounts: one account for *Zakāh* and another account for the general tax.⁹¹⁴ However, these two accounts should complement each other. While vouchers should be paid out directly from the *Zakāh* account, refundable tax credits should be paid out as a part of the general tax return, because these credits will be translated (in practice) into a reduced tax liability for the rich and

⁹¹⁰ The *Qur’ān*: 9 (al-Tawbah):60.

⁹¹¹ Ahmed & Gianci, *supra* note 54 at 479.

⁹¹² John Craven Wilkinson, *The Imamate Tradition of Oman* (Cambridge: Cambridge University Press, 2009) at 226-48.

⁹¹³ Novossyolov, *supra* note 54 at 160-74; and Roy, *supra* note 54 at 427-56.

⁹¹⁴ This is similar to UK, which has both income taxes and mandatory SI taxes. The UK National Insurance scheme is essentially a separate tax dedicated to health and social welfare services.

cash assistance for the poor (although the actual money for these credits will be taken out from the *Zakāh* account).

The amount of *Zakāh* that should be paid by the citizen depends on the type of the assets that s/he possesses. While the *Qur'ān* does not specify the types of assets that should be *Zakāh*able (i.e. taxable), nor specify the percentages that should be given, the *Sunnah* discussed many legal aspects of *Zakāh* (i.e. the rate of *Zakāh*, the types of assets that should be *Zakāh*able, the principle of a one-year holding period, and the minimum *Zakāh*able income).⁹¹⁵ Personal assets that are for personal use only (such as the primary residence, household furniture, and personal clothing) should be exempt from *Zakāh*. *Zakāh* should be payable only on new assets (uninterruptedly owned for at least one year) that are equal or above the minimum *Zakāh*able income (i.e. *Niṣāb*).⁹¹⁶ *Niṣāb* is the value of 85 grams of gold at world prices. The *Zakāh*able income is the total value of all new *Zakāh*able assets.⁹¹⁷ While the rate of *Zakāh* that should be paid on cash is 2.5%, the rate of *Zakāh* that should be paid on the other assets is a rate ranging from 2.5% to 20% depending on the type of these assets. The rate varies from 2.5% of the asset's value (for most objects) and up to 20% of the asset's value (such as inherited agriculture land or investment income from mining).⁹¹⁸

⁹¹⁵ Houtsma, *supra* note 54 at 1202-05.

⁹¹⁶ *Zakāh* is an income tax and not a property tax, because the main goal of *Zakāh* is to purify the individual and his/her assets. For example, if an individual paid *Zakāh* on new 85 grams of gold for the last year, these certain grams of gold would be purified; there would be no need to purify them again by paying another *Zakāh* on them again in the following years. Therefore, *Zakāh* would be necessary to purify only any new money or gold that the individual did not already pay *Zakāh* on them in the last years to purify them. Therefore, *Zakāh* should be interpreted as an income tax (not as a property tax).

⁹¹⁷ Ahmed & Gianci, *supra* note 54 at 479.

⁹¹⁸ Kuran, "Islamic Fundamentalism", *supra* note 54 at 318; Timur Kuran, *Islam and Mommon: The Economic Predicaments of Islamism* (Princeton: Princeton University Press, 2010) at 19.

While the progressive general governmental tax system can be designed to pursue a horizontal equality (i.e. taxpayers at the same income level with differing needs should pay different taxes that reflect these different needs) and vertical equality (i.e. taxpayers pay a higher tax rate and an increasing share of their incomes as these incomes increase), the *Zakāh* system is progressive in term of occupational or practical equality. This means that the harder it is to earn the income (i.e. in regard to the complexity of the job), the lower the *Zakāh* rate; the easier it is to earn the income, the higher the *Zakāh* rate. Therefore, this occupational or practical equality would explain the difference in the *Zakāh* rate ranging from 2.5% to 20% depending on the type of assets and the resulting income from these assets.

While the general governmental tax system can be designed to make important alterations to the behavior of individuals and encourage people to save (such as, in Canada, no taxation on the Registered Retirement Saving Plan or the Registered Education Saving Plan can encourage people to save more than they otherwise might for their old age or for their children's education), the main goals of *Zakāh* are redistributing income, pursuing equality, and purifying the individual and his/her wealth.⁹¹⁹ However, adding *Zakāh* on top of the general governmental tax system will technically increase the total tax amount that the individual should pay, which will

⁹¹⁹ Due to the fact that the main goals of *Zakāh* are redistributing income and pursuing equality and social justice in the society, these goals should be applicable to everyone in the society (i.e. Muslims as well as non-Muslims). In my opinion, my proposed *Zakāh* system should include Muslims as well as non-Muslims. Therefore, non-Muslims should be included among the beneficiaries of *Zakāh*; at the same time, non-Muslims should also be included among the payers of *Zakāh*. Therefore, it would be possible to include the non-Muslims (under this new model for the social welfare) to pay a social tax amount that is similar to the *Zakāh* amount that is paid by Muslims. Some critics would argue that requiring non-Muslims to pay into the *Zakāh* system would change the definition of a “Muslim”, because *Zakāh* is often mentioned together with *Ṣalāh*. However, I have argued that there is a main difference between *Ṣalāh* and *Zakāh*. While *Ṣalāh* is related to the relationship between the human being and God, *Zakāh* is related to the relationship between the human being and other human beings to achieve social justice for the benefit of the whole society. Therefore, my proposed *Zakāh* system should include Muslims and non-Muslims.

be (in practice) translated into a higher tax rate for the rich. Therefore, government “minimalists” would reject this paternalistic role of the government in society (i.e. altering behavior, redistributing income, and pursuing equality) in favor of self-reliance and individual responsibility; they would reject any increase in taxation.

4.8.5.2 How should the non-governmental voluntary sector provide social services?

Lightman argues that “[s]evere cutbacks in publicly provided social services [in Canada] have placed increasing demands on the voluntary sector, expectations that volunteers are simply incapable of addressing. Burnout seriously affects paid professional staff in many social agencies, and, one can assume, volunteers as well.”⁹²⁰ He states

Today [in Canada] there is diminished access to ongoing or sustaining financing from government [to the non-governmental voluntary sector] and increased project and contract-based funding. Agency workers often comment that they spend all their time 'scrambling' to secure money from multiple sources and filling out progress reports—and no longer have time to deliver services.⁹²¹

As we have seen above, under my proposed *Zakāh* system, while the service provider must be non-profit NGOs, the government intervention should be limited to funding and comprehensive regulation (including registration, accreditation, licensing, and inspection) for these NGOs. The

⁹²⁰ Lightman, *supra* note 82 at 228. According to Lightman,

A small part of the total economy [in Canada], voluntary action is extremely important in certain areas—the social and health services, recreation, and culture. According to the National Survey of Giving, Volunteering and Participating (NSVGP, 2001), 22 million Canadians, (i.e. 91 per cent of the population aged 15 and over) made financial or in-kind contributions to charitable and non-profit [NGOs] between 1 October 1999 and 30 September 2000. More than \$5 billion was donated to charities, an increase of 11 per cent over the estimate from a comparable survey in 1997. Some 27 per cent of the population 15 and over served as volunteers during 1999-2000—a decrease from 31 per cent in 1997. In the aggregate, these volunteers provided more than 1 billion hours of service, equivalent to 549,000 full-time jobs. There are an estimated 175,000 voluntary [NGOs] in Canada, of which just under half are registered charities. *Ibid* at 223-24.

⁹²¹ *Ibid* at 163.

government should encourage donations from individuals and volunteering by individuals in these NGOs. The government should define what constitutes a registered charity (with legal status and charitable registration). This legal status should allow non-profit NGOs to issue tax receipts to donors and volunteers. Therefore, this status confers distinct financial and other benefits on both these NGOs and those who contribute to these NGOs. In addition, the government should allow these NGOs to charge payments to users who are not eligible for the governmental vouchers.

Therefore, in my opinion, under my proposed *Zakāh* system, these non-profit NGOs should have the following distinct sources of revenue in order to be able to deliver social programs and provide social services:

1. Government funding: This source of revenue should include governmental vouchers to cover the basic necessities of life for the poor (which are means-tested benefits) and governmental vouchers to cover the immediate needs for the other groups (which are needs-tested benefits). This source of revenue should also include the general tax exemptions for the income of these non-profit NGOs.
2. Donations: The government can encourage donations from individuals to these non-profit NGOs by defining what constitutes a registered charity (with legal status and charitable registration) and allowing these NGOs with such a legal status to issue tax receipts to donors. Then, with these tax receipts for donations, donors can claim income deductions

on their income tax return.⁹²² Although the rich tend to give more (both in money and time) to these NGOs, the rich should not influence the identification of priorities for these NGOs,⁹²³ because these priorities should be identified according to the needs of beneficiaries of *Zakāh* categories. Moreover, the government should ensure that activities of these NGOs are equally spread across the society, and not concentrated in specific areas.⁹²⁴

3. Volunteering: The government can encourage volunteering by individuals in these non-profit NGOs by allowing these NGOs with a registered charitable legal status to issue tax receipts to volunteers (based on the full market compensation for their hours of service).⁹²⁵ Then, with these tax receipts for volunteering, volunteers can claim non-

⁹²² These tax benefits (for donations) would help to avoid the danger that if people pay mandatory *Zakāh*, they would be less likely to make other charitable contributions.

⁹²³ According to Lightman, “[s]ome [food] banks offer predefined hampers; others permit users to choose among narrow sets of alternatives. In all cases, what is available depends in small part on private donations and in large part on corporations’ surplus food stocks. Supplies, therefore, do not correspond to people’s (especially children’s) nutritional needs, but instead reflect what others wish to donate or to dispose of.” *Ibid* at 229.

⁹²⁴ According to Lightman,

Coverage [of NGOs’ activities in Canada] may be uneven and equity may be lacking. Services may be provided only in certain geographic areas or only certain types of services will be delivered. Decentralized decision-making by volunteers regarding local needs and priorities may merely reflect the values and interests of the volunteers. What volunteers are willing to do will be done, but the rest will remain unaddressed. The greatest increases in volunteer activity in Canada over the last decade have been in the areas of environment and arts and culture. While these are obviously important, people across Canada remain hungry and homeless. Issues that are trendy may attract people and money, while more urgent concerns are left by the side. *Ibid*.

⁹²⁵ This would provide an answer to the problems of unpaid volunteers, poorly paid workers, and paid volunteers. According to Lightman,

There is a group of workers whose status and working conditions place them somewhere between volunteers and paid workers. They are often known as *paid volunteers*, though the label is inappropriate. They are overwhelmingly women, found in such areas as home child care (usually unlicensed) or fostering. They are paid a wage or fee, greater than expenses but less than full market compensation. The wage makes them workers, but the below-market levels of payment make them partial volunteers. The wage payment formalizes the relationship with the client, and may entail minimum standards or modest training; it allegedly helps the poor to undertake tasks as workers they could not do otherwise. Yet, the situation is profoundly exploitative of women as workers. As these tasks are often viewed as an extension of the woman’s traditional unpaid parenting and housekeeping roles, the modest payments are presented as a significant step forward: modest pay is better than no pay. Full market compensation is deemed economically and socially unacceptable because of the high cost to taxpayers. The reluctance of taxpayers to

refundable tax credits on their general income tax return. This would help recruitment of volunteers. Moreover, volunteers would also gain workplace experience. I have to note here that these non-refundable tax credits for volunteering should be in addition to the refundable tax credits that volunteers can receive as beneficiaries of *Zakāh*. However, these tax receipts for volunteering must be conditioned by the commitment to perform the voluntary job. Therefore, these tax receipts for volunteering must not be given to any volunteer who did not perform any of his/her appointed duties. This would guarantee that the vulnerable recipients' needs will be met. Moreover, volunteers must receive skills development (in formal structured professional training programs) before they are assigned any volunteering duties to protect the public interest and the needs of those receiving the services.⁹²⁶

4. User fees and premiums: In order to provide additional source of revenue for these non-profit NGOs, the government should allow these NGOs to charge payments to users who are not eligible for the governmental vouchers. While users who are eligible for the governmental vouchers use their vouchers and do not pay cash fees for a service that they utilize, users who are not eligible for the governmental vouchers may pay a fee for a service that they utilize (i.e. a payment at the point of use, which can be based on units of service, time, or complexity of process), or they may pay a premium for a service that they expect to utilize (i.e. a payment in advance of use against later use, but it is not

pay for services they want translates directly into exploitation of vulnerable women who are expected to subsidize the lifestyles of their more affluent customers by accepting substandard wages. *Ibid* at 230.

⁹²⁶ According to Lightman,

Volunteers replacing professional staff in hospitals may endanger both quality service delivery and, on occasion, even the lives of patients. An untrained worker on a crisis counselling line or in a hospice may cause great though inadvertent harm, and because the training of volunteers is inevitably brief, the outcomes are more uneven than in formal structured training programs. *Ibid* at 229.

directly linked to specific usage). On the other hand, non-users do not pay fees. Individuals usually wish to use the public social services more than the state would be able to support (i.e. the demand here always exceeds the supply). Access to the public social services must be rationed, either by administrative decisions or through the pricing mechanism. Therefore, user fees and premiums reflect the economic market (i.e. prices serve to allocate resources and consumers decide their own needs and priorities). If consumers pay directly for services, they should thereby demand choice and quality that meet their standards and criteria. If consumers are dissatisfied with what is offered by the service provider, consumers can go elsewhere. This competition for the consumers' satisfaction should lead service providers to be creative, innovative, and increasingly efficient; they will not lose their ability to advocate effectively and to give voice to consumers. Therefore, charging payments to users who are not eligible for the governmental vouchers (who would most likely be the rich) would guarantee consumers' choice and quality that meet their standards and criteria. Therefore, social programs (in which some of their consumers are poor and dependent on the governmental vouchers) do not have to be poor programs in quality and efficiency.⁹²⁷ However, charging user fees by these service providers does not deny their status as non-profit NGOs, because these fees are necessary additional source of revenue for these NGOs in order to enable them to

⁹²⁷ According to Lightman, “an increase in price may actually lead to increased usage by the rich, resulting from the enhanced status or snob appeal of a service associated with higher levels of payment.” *Ibid* at 221. He explains that A fee may be expected to raise the cost of a service: when price increases, people will buy less of it. If the price of apples (or counselling) goes up, people will normally buy fewer apples (or counselling sessions). However, in some situations this fundamental economic relationship does not apply. For example, people may actually buy more of something—a Porsche or advanced cosmetic surgery—if the price goes up, reflecting its enhanced status value. In other cases, if the price change is minor or the service is 'essential' (such as bypass surgery), consumers may absorb additional fees, perhaps with little fuss. Some services delivered by social workers are compulsory, often under court order, and consumers therefore are not free to alter their usage patterns. *Ibid* at 198.

provide services. Moreover, in cases, where would be a surplus in the NGO's annual budget, this surplus should not be distributed among its members as their personal profits; instead, it should be added to its annual budget as an additional revenue for the following year.⁹²⁸

4.8.6 Connecting the dots as a conclusion

In order to describe how my proposed model for social welfare systems in the MENA would look like based on my new interpretation of the *Qur'ānic* rules about *Zakāh*, I have to connect all of the above points together as follows:⁹²⁹

1. Although most of SI systems in the MENA require important reforms, my proposed model for social welfare systems in the MENA is to supplement (and not to replace) these SI systems.⁹³⁰
2. While the service provider must be non-profit NGOs, the government's intervention should be limited to funding and comprehensive regulation (including registration, accreditation, licensing, and inspection) for these NGOs.

⁹²⁸ Due to the fact that these non-profit NGOs would be dependent on government's funding, donations, and volunteering, adding user fees to the mix as additional source of revenues most likely would result in adding a surplus from the previous year to the NGO's annual budget as additional revenue for the following year. This means that these service providers may have more revenues every year and their abilities to provide services may grow every year. This would be reflected in lower prices, more quantity, and/or better quality. This would attract more customers (including the rich). With more customers, they would have more revenues every year. Therefore, it is possible to imagine that their business may grow every year until they may become the best businesses, which may also address the issue of stigma in the future.

⁹²⁹ Although all of the following points would repeat my earlier discussions (in subsections 4.8.2 through 4.8.5, above), it is necessary here to summarize my earlier discussions and to point out these ideas again to help me describe how my proposed model for social welfare systems in the MENA would look like. Moreover, I should clarify that when I do not cite any source for some of my propositions, this means that I derived the details of these propositions from my own ideas of what would work best.

⁹³⁰ For example, if a worker was disabled on the job and was covered by the SI system, his/her *Zakāh* benefits would be in addition to his/her SI benefits (as part of category 2: i.e. PWDs). His/her SI benefits would not affect his/her eligibility for *Zakāh* benefits, because all categories of beneficiaries of *Zakāh* (except category 1: i.e. the poor) are not income related.

3. The government has the responsibility and the right to generate revenue so that it can do the tasks it is expected to perform. Therefore, *Zakāh* as a payment to the government should be mandatory.
4. In order to guarantee that *Zakāh* money will not be misused for other state purposes outside the area of social welfare, *Zakāh* has to be a separate governmental tax system, where all money collected from *Zakāh* has to be spent on social welfare only. This means that the government should have two separate accounts: one account for *Zakāh* and another account for the general tax. However, these two accounts should complement each other. While vouchers should be paid out directly from the *Zakāh* account, refundable tax credits should be included in the general tax return, because these credits will be translated into a reduced tax liability for the rich and cash assistance for the poor (although the actual money for these credits will be taken out of the *Zakāh* account).
5. Personal assets that are for personal use only (such as clothing, household furniture, and one residence) are exempt from *Zakāh*. *Zakāh* is payable only on new assets continuously owned over the last year that are equal or above the *niṣāb* (i.e. the minimum *Zakāh*able income). The *Zakāh*able income is calculated by adding the value of all new *Zakāh*able assets (gold, silver, cash, stocks, merchandise for business, livestock, etc.).
6. The *Zakāh* system is progressive in terms of occupational or practical equality, which means that the more difficult it is to earn the income, the lower the *Zakāh* rate; and the easier it is to earn the income, the higher the *Zakāh* rate. Therefore, this occupational or practical equality would explain the difference in the *Zakāh* rate ranging from 2.5% to 20% depending on the type of assets and the resulting income from these assets. The rate

varies from 2.5% of the asset's value (for most objects) and up to 20% of the asset's value (for certain agriculture and mining).⁹³¹

7. Adding *Zakāh* on top of the general governmental tax system will technically increase the total tax amount that the individual should pay, which will be (in practice) translated into a higher tax rate for the rich.
8. Due to the fact that the main goals of *Zakāh* are redistributing income and pursuing equality and social justice in the society, these goals should be applicable to everyone in the society (i.e. Muslims as well as non-Muslims). Therefore, non-Muslims should be included among the beneficiaries of *Zakāh* and the payers of *Zakāh*. Therefore, it would be possible to include the non-Muslims to pay a tax amount that is similar to the *Zakāh* amount that is paid by Muslims.
9. There are eight permitted categories of beneficiaries of *Zakāh* with a specific priority ranking among all of them as follows: category 1 (the poor); category 2 (PWDs, the elderly, and orphans); category 3 (volunteers for social justice or environmental protection); category 4 (students and their teachers; and researchers and their assistants); category 5 (people who are living in abusive relationships such as women under abuse, children under abuse, elderly people under abuse and PWDs under abuse); category 6 (debtors who are forced to borrow due to their harsh circumstances and are not able to repay their debts for reasons outside their control); category 7 (caregivers who are single parents or who take care of disabled or elderly family member or friend or who are foster parents for an orphan; people who open their home for others to help them to be free

⁹³¹ Agriculture work or mining work is 'hard' work; however, I am referring to assets such as inherited wealth or investment income, and not to 'wages' for labor.

from abuse; and sponsors of refugees); and category 8 (refugees). Moreover, there is a priority ranking within category 1 (the poor). This priority ranking among all of the subcategories within the poor category is similar to the priority ranking among all of the other major categories of beneficiaries of *Zakāh*.⁹³²

10. All funds that are collected from *Zakāh* into the governmental *Zakāh* account should be divided into four parts. The first part should be spent only on category 1 (the poor) in the form of means-tested vouchers to cover their basic necessities of life. The second part should be spent only on category 2 (PWDs, the elderly, and orphans) in the form of refundable tax credits. The third part should be spent on both category 3 (volunteers for social justice or environmental protection) and category 4 (students and their teachers; and researchers and their assistants) in the form of refundable tax credits. The fourth part should be spent on all categories in the form of needs-tested vouchers to cover their immediate needs.
11. The government should regulate an amount for the minimum standard of living (and adjust it annually) as a poverty line to determine eligibility for category 1 (the poor). Every individual in the poor category should receive means-tested vouchers to cover the basic necessities of life in an amount that is up to the minimum standard of living amount; they must be used within any licensed, inspected, and qualified service provider. These means-tested vouchers can be given in the form of a prepaid credit card with a monthly maximum limit that would help the recipient to get above the poverty line (i.e. this monthly maximum limit is based on the income of the recipient who should not have

⁹³² In order to describe my proposed model for social welfare systems in the MENA, I have to repeat here my list of the eight permitted categories of beneficiaries of *Zakāh* (with my specific priority ranking among all of them), which I discussed in more detail in subsection 3.6.2 above.

any asset in excess of his/her personal use). Within this monthly maximum limit, there should be a weekly maximum limit to regulate the recipient's spending. However, if the recipient did not spend the whole monthly maximum limit, the remaining amount should not rollover to the next month; instead, this remaining amount should be refunded to the governmental *Zakāh* account. If the total of all refunded remaining amounts has not been used for this year, it should be carried over to the next year as a surplus for the whole governmental *Zakāh* account to be used in the next year. Therefore, in this way, there should be (most likely) a surplus every year and the governmental *Zakāh* account should grow every year as long as there is a stable economic growth.⁹³³

12. In case of inadequate resources in the society, people in the category with the lower priority would be barred from benefiting from *Zakāh* in order to guarantee that people in the category with the higher priority would benefit from *Zakāh*.
13. Therefore, if there is not enough money in the first part above to cover all the poor, the needed money should be taken out of the fourth part above until it covers all the poor. Moreover, if the total of all monies in both the first and the fourth parts above is not enough to cover all the poor, the needed money should be taken out of the third part above until it covers all the poor. Likewise, if the total of all monies in the first, the fourth

⁹³³ I would argue that there should be a surplus every year as long as there is a stable economic growth. However, if there is no security, no stability, and no economic growth, the resources in the society would be most likely inadequate and people would pay less *Zakāh*; there would be no surplus in the governmental *Zakāh* account. Therefore, it would be necessary to have in place a list of priority ranking among beneficiaries of *Zakāh*. This priority ranking means that people in the category with the higher priority should receive a larger portion of *Zakāh* (i.e. individuals who experience more than their fair share of the costs of socioeconomic problems should be compensated for these costs). This priority ranking also means that in the case of inadequate resources in the society, people in the category with the lower priority would be barred from benefiting from *Zakāh* in order to guarantee that people in the category with the higher priority would benefit from *Zakāh*.

and the third parts above is not enough to cover all the poor, the needed money should be taken out of the second part above until it covers all the poor.

14. However, if there is not enough money available in the whole governmental *Zakāh* account to cover all of the poor, people in the subcategory (among the poor) with the lower priority would be barred from benefiting from *Zakāh* in order to guarantee that people in the subcategory (among the poor) with the higher priority would benefit from *Zakāh*. For example, similar to categories 3 - 8, people in category 2 (PWDs, the elderly, and orphans) do not have to be poor to be eligible for social assistance. However, if anyone of these people (PWDs, the elderly, and orphans) is poor, s/he has the highest priority over all of the subcategories within the poor category. Therefore, in case of inadequate resources in the society, it would be possible that people in all of the other subcategories (among the poor) with the lower priority would be barred from benefiting from *Zakāh* in order to guarantee that poor PWDs, poor elderly, and poor orphans would benefit from *Zakāh*.

15. Likewise, if there is enough money in the first part above to cover the poor, but there is not enough money in the second part above to cover all PWDs, the elderly, and orphans, then, the needed money should be taken out of the fourth part above until it covers all PWDs, the elderly, and orphans. However, if there is enough money in the first part above to cover the poor, but the total of all monies in both the second and the fourth parts above is not enough to cover all PWDs, the elderly, and orphans, then, the needed money should be taken out of the third part above until it covers all PWDs, the elderly, and orphans. In addition, all monies that are available to cover all PWDs, the elderly, and orphans should be divided equally among all of them in the form of refundable tax credits

(regardless of their income, their assets and their needs in order to minimize the administrative delivery costs). These refundable tax credits most likely would be increased annually based on the idea that the governmental *Zakāh* account should grow every year.

16. I recommend that the government should determine the minimum amount of these refundable tax credits for PWDs, the elderly, and orphans based on the minimum wage for a full time job for a personal care attendant, because most of these people would need a personal care attendant. However, there is no maximum amount, because the actual money that would be received by each one of them would depend on the available total amount for this category 2, which should be divided equally among all of them.

17. Likewise, if there is enough money in both the first and the second parts above, but there is not enough money in the third part above to cover all volunteers, students (and their teachers), and researchers (and their assistants), then, the needed money should be taken out of the fourth part above until it covers all volunteers, students (and their teachers), and researchers (and their assistants). In addition, all monies that are available to cover all volunteers, students (and their teachers), and researchers (and their assistants) should be divided equally among all of them in the form of refundable tax credits (regardless of their income, their assets and their needs in order to minimize the administrative delivery costs). These refundable tax credits most likely would be increased annually based on the idea that the governmental *Zakāh* account should grow every year.

18. I recommend that the government should determine the minimum amount of these refundable tax credits for volunteers, students (and their teachers), and researchers (and their assistants) based on the minimum wage for a minimum number of hours (as a

compensation for their time of volunteering or studying). However, the actual money that would be received by each one of them would depend on the available total amount for these categories 3 and 4, which should be divided equally among all of them.

19. Therefore, in order to include someone in category 3 (volunteers for social justice or environmental protection) or in category 4 (students and their teachers; researchers and their assistants), s/he should provide this minimum number of hours of volunteering or studying. However, people in both categories 3 and 4 are required to have the lack of irresponsibility after receiving *Zakāh* to keep their eligibility for the following year (i.e. they did not commit any corruption during their voluntary job; or they did not waste their time in the previous year for something other than study or research).
20. Due to the fact that *Zakāh* could be spent within any of the last four categories on a case-by-case basis (i.e. selective benefits) and they do not have any ownership over *Zakāh*, people in these last four categories could be barred from benefiting from *Zakāh* in order to guarantee that people in the other categories would benefit from *Zakāh* in case of inadequate resources in the society. Therefore, in case of inadequate money in the fourth part above, people in the category 8 would be eliminated for the benefit of the other categories. If this is not enough, categories 8 and 7 would be eliminated for the benefit of the other categories and so on.
21. People in the first four categories will be eligible for this year (or keep their eligibility for the following year) with a simplified straightforward method by providing specified documents (i.e. a tax return for low income poor, a doctor letter for disability, ID for old age, death certificate for both parents of the orphan, work experience letter for volunteer, or enrolment letter for students and researchers).

22. People in the last four categories cannot be eligible for this year (or keep their eligibility for the following year) unless they go through a complex process and only after they get an official decision on their own particular case for their eligibility (i.e. they are designated as refugees, they declared their bankruptcy, they are under abusive relationships, or they are designated to help someone in one of the other major categories).
23. In addition, people in categories 5 and 6 have to prove their lack of irresponsibility before receiving *Zakāh* to confirm their eligibility for this year (i.e. they did not deliberately play any part of subjecting themselves to a bondage or to an abusive relationships; or they did not deliberately borrow outside of their personal emergencies and they explored all of their resources that are available to them for repaying their debts). In addition, people in categories 7 and 8 have to prove that they made responsible choices in spending *Zakāh* for the previous year to be eligible for the following year.
24. In regard to needs-tested vouchers to cover the immediate needs of all categories, these vouchers must be used within any licensed, inspected, and qualified service provider. Moreover, these vouchers can be given in the form of a credit card with an annual maximum limit based on the estimated costs of specified qualifying needs of each category (regardless of their income and their assets). However, this credit card should not be prepaid, instead all charges on it should remain interest-free loans until the recipient proves his/her eligibility for *Zakāh* based on the requirements above. When the recipient proves his/her eligibility, then, all justifiable charges will be deleted. Therefore, considering all these difficulties, extra monies most likely would remain into this fourth part above. If the total of all remaining amounts has not been used for this year, it should

be carried over to the next year as a surplus for the whole governmental *Zakāh* account to be used in the next year. Therefore, in this way, there should be (most likely) a surplus every year and the governmental *Zakāh* account should grow every year.⁹³⁴

25. Due to the fact that eligibility for selective programs (i.e. means-tested benefits and needs-tested benefits) is usually based on an individualized assessment, qualification for these selective programs tends to be discretionary. However, under my proposed *Zakāh* system, qualification for vouchers should not be discretionary, because the recipients have an entitlement to these vouchers based on their BHRs.

26. In order for the non-profit NGOs to be able to deliver social programs and provide social services, the government should define what constitutes a registered charity (with legal status and charitable registration). This legal status should allow these NGOs to receive

⁹³⁴ Some critics would argue that a credit card with an annual maximum limit is not consistent with the biomedical model of disablement, because there would be limited needs-tested vouchers for medical treatment. I have argued that refundable tax credits for PWDs most likely would be increased annually based on the idea that the governmental *Zakāh* account should grow every year (as long as there is a stable economic growth). I should recognize that some people with severe disabilities may need additional amount (above the annual maximum limit) for medical treatment. Therefore, in order to solve this issue, if there is a surplus in the governmental *Zakāh* account, those PWDs with qualified needs should be provided with additional funding; however, this additional funding should be considered as an interest-free loan against the recipient's entitlements for the refundable tax credits and/or his/her entitlements for needs-tested vouchers for the following years. On the other hand, if there is no surplus in the governmental *Zakāh* account or if there is not enough money for needs-tested vouchers, we should notice here that the refundable tax credits for PWDs should cover these extra medical costs considering that PWDs have the highest priority to receive these refundable tax credits. Moreover, if the refundable tax credit is not enough to cover the medical treatment costs or if the monies in the governmental *Zakāh* account cannot cover the needs outside the poor category (i.e. there is no refundable tax credits for PWDs), those PWDs with qualified needs should be provided with an interest-free loan (from outside the governmental *Zakāh* account) against the recipient's entitlements for the refundable tax credits and/or his/her entitlements for needs-tested vouchers for the following years. Some critics would argue that covering costs directly related reasonable disability accommodation is a critical issue and these costs should not be loans. However, if those PWDs are not able to repay these interest-free loans in the following year, they would be considered as part of category 6 of beneficiaries of *Zakāh* as debtors who are forced to borrow due to their harsh circumstances and are not able to repay their debts for reasons outside their control. Therefore, in the following year, they would benefit from *Zakāh* twice as part of category 2 (PWDs) and as part of category 6 (debtors). Moreover, I have argued that in case of inadequate resources in the society, it would be possible that all people (other than poor PWDs, poor elderly, and poor orphans) would be barred from benefiting from *Zakāh* in order to guarantee that poor PWDs (as well poor elderly and poor orphans) would benefit from *Zakāh*. Therefore, my list of priorities among all beneficiaries of *Zakāh* would guarantee that these medical treatments for those PWDs (who have the highest priority) should be covered.

the general tax exemptions for their income and to issue tax receipts to donors and volunteers (i.e. it confers distinct financial and other benefits on both these NGOs and those who contribute to them).

27. Then, with these tax receipts for donations, donors can claim income deductions on their income tax return. Although the rich tend to give more (both in money and time) to these non-profit NGOs, the rich should not influence the identification of priorities for these NGOs, because these priorities should be identified according to the needs of beneficiaries of *Zakāh*. Moreover, the government should ensure that activities of these NGOs are equally spread across the society, and not concentrated in specific areas.
28. Moreover, with these tax receipts for volunteering (based on the full market compensation for their hours of service), volunteers can claim non-refundable tax credits on their general income tax return. This would help recruitment of volunteers. Moreover, volunteers would also gain workplace experience. These non-refundable tax credits for volunteering should be in addition to the refundable tax credits that volunteers can receive as beneficiaries of *Zakāh*.
29. However, these tax receipts for volunteering must be conditioned by the commitment to perform the voluntary job. Therefore, these tax receipts for volunteering must not be given to any volunteer who did not perform any of his/her appointed duties. This would guarantee that the vulnerable recipients' needs will be met. Moreover, volunteers must receive skills development (in formal structured professional training programs) before they are assigned any volunteering duties to protect the public interest and the needs of those receiving the services.

30. In addition, the government should allow these non-profit NGOs to charge payments to users who are not eligible for the governmental vouchers. While users who are eligible for the governmental vouchers use their vouchers and do not pay cash fees for a service that they utilize, users who are not eligible for the governmental vouchers may pay a fee for a service that they utilize or they may pay a premium for a service that they expect to utilize. On the other hand, non-users do not pay fees.
31. If consumers pay directly for services, they should thereby demand choice and quality that meet their standards and criteria. If consumers are dissatisfied with what is offered by the service provider, consumers can go elsewhere. This competition for the consumers' satisfaction should lead these non-profit NGOs to be creative, innovative, and increasingly efficient. They will not lose their ability to advocate effectively and to give voice to consumers.

Chapter 5: Conclusion

5.1 The roadmap for Chapter 5

Disability rights as an element of development policy is understudied. I noticed from my literature review of the relevant scholarly literature that there has been inadequate research concerning disability rights in the MENA, disability rights as a necessary prerequisite for economic efficiency and development, or the need for a better social welfare system for PWDs in order to implement the moral obligations (under religious laws and the principles of the objective morality). Therefore, I tried to focus on the following arguments:

- The huge international interest in the UNCRPD reflects the universal consensus on BHRs for PWDs including the universal BHR to social welfare for PWDs (more specifically, disability social income assistance).
- Liberal equality rights can be consistent (or logically subsumed) with Islamic moral principles.
- BHRs (including disability rights) can be derived from Islamic moral principles.
- Entitlements to disability supports can be justified and delivered through the governmental implementation of the Islamic social tax (*Zakāh*).
- This is feasible and can be designed and delivered in Islamic countries with similar or better results than the Western liberal social welfare systems.
- Such a system with specific reference to *Qur'ānic* teachings is both socially and politically preferable to the imposition of traditional Western approaches to rights and services.

- Social welfare laws in the MENA should be reformed to include disability social income assistance for PWDs.
- The standard of living for PWDs can be improved.
- A higher standard for international disability rights (as a part of universal BHRs) can be established.
- A higher standard for social justice can be established.

In this concluding chapter, first, I will discuss the conclusions of my research (including my new liberal equality theory to achieve justice for PWDs, my proposed Islamic version of my new liberal equality theory, my new interpretation of the *Qur'ānic* rules about *Zakāh*, and my proposed model for social welfare systems in the MENA). Second, I will discuss the following question: Is my proposed model for social welfare systems in the MENA able to implement the fundamental principles for the development of social programs that are learned from the Canadian experience? Third, I will offer some comments on limitations of the research in this dissertation. Fourth, I will discuss the potential applications of my conclusions (including the applicability of my proposed model for social welfare systems in Muslim countries, and its applicability in liberal non-Muslim countries). Fifth, I will suggest some possible future research directions drawing on the work of my thesis. Finally, I will offer a concluding statement.

5.2 Conclusions of the research and contributions to knowledge

I tried to offer my proposed model for social welfare systems in the MENA. I tried to discuss a model of how a system could work/would look like based on my new interpretation of the *Qur'ānic* rules about *Zakāh*. I tried to use my new liberal equality theory or my own

amalgamation of three different liberal equality theories (i.e. Nussbaum's BHCs theory, Rawls' social contract theory, and Arneson's RCP theory) to show the common ground between the liberal and the Islamic moral values (i.e. my proposed Islamic version of this new liberal equality theory). I tried to use this common ground to reinterpret the *Qur'ānic* rules about *Zakāh* with my own interpretation that has a commitment to social justice and a consideration of both liberal and Islamic moral values.

I tried to show how these moral rules can allow for the legal transplant of Western liberal secular social welfare rules into the MENA's religious Islamic background, the creation of a better model for social welfare systems in the MENA, and establishing a higher standard for international disability rights (specifically, the universal BHR to disability social income assistance) and social justice. Therefore, my most important contributions to knowledge are the following four conclusions of my research: my new liberal equality theory to achieve justice for PWDs, my proposed Islamic version of my new liberal equality theory, my new interpretation of the *Qur'ānic* rules about *Zakāh*, and my proposed model for social welfare systems in the MENA.

5.2.1 My new liberal equality theory to achieve justice for PWDs

In Chapter 2, based on my review of the different liberal equality theories, we discovered that every liberal equality theory (by itself) failed to adequately address the issues of justice for PWDs. We also discovered that we could create the best candidate liberal equality theory to deal with issues of justice for PWDs by building minimal justice into full justice by combining Nussbaum's BHCs theory (for minimal justice) with Rawls' social contract theory and Arneson's

RCP theory (for full justice). This combination would result in a new liberal equality theory that could be described as follows:⁹³⁵

- The basic structure (or the constitutional essentials) of a society should be arranged as to assure (as reasonably possible) that all citizens get to a minimum level of all BHCs.⁹³⁶
- So long as BHCs have been taken care of, “[e]ach person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value.”⁹³⁷
- So long as BHCs have been taken care of, “[s]ocial and economic inequalities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society.”⁹³⁸
- The least-advantaged should be defined using an objective scale of well-being with a commitment to freedom (as related to the minimum level of all BHCs), a commitment to fairness (as related to all basic needs that should include the primary goods of income, wealth and fundamental self-respect), and a commitment to justice (as related to the individual responsibility that is limited to the individual’s future choices only and without the requirement of the ability to be a fully cooperative citizen).

⁹³⁵ See section 2.8, above, for more on this topic.

⁹³⁶ Nussbaum requires that all citizens get to a minimum level of all BHCs. Nussbaum, *supra* note 30 at 70.

⁹³⁷ Rawls, *Political Liberalism*, *supra* note 50 at 5.

⁹³⁸ *Ibid* at 6.

This new liberal equality theory can be translated into practical terms by using anti-discrimination laws (to guarantee the access -for all individuals during their entire lives- to the minimum level of all BHCs) and social welfare laws (to achieve this threshold level of basic functioning -not only the access to this threshold level- and to eliminate any inequality above this threshold level in terms of income, wealth and fundamental self-respect) while considering the individual responsibility of the recipient of social assistance (in regard to his/her future choices). This new liberal theory could take into consideration all of the three kinds of support for PWDs including medical support, economic support, and social support.

5.2.2 My proposed Islamic version of my new liberal equality theory

In Chapter 3, based on my discussion of the compatibility between some liberal equality ideas and my progressive Islam perspective about social justice in the *Qur'ān*, we discovered that my own interpretation of the *Qur'ānic* social contract could be the Islamic version of my new liberal equality theory (or my own amalgamation of the above three different liberal equality theories). I noted that the terms and conditions of this *Qur'ānic* social contract guarantee all of the *Qur'ānic* BHRs, which are limited by individual responsibility. I noted that my list of BHRs serves the same function as all of Nussbaum's BHCs. It also serves the same function as Rawls's equal basic rights and liberties principle, Rawls's equal opportunity principle, and Rawls's difference principle.

Therefore, by revising my new liberal equality theory and replacing Nussbaum's BHCs and Rawls's three principles of justice with my list of BHRs, we would create an Islamic version of my new liberal equality theory as follows:

- The basic structure (or the constitutional essentials) of a society should be arranged as to assure (as far as reasonably possible) that all citizens have equal claims to a minimum level of all BHRs.
- So long as this minimum level of all BHRs has been taken care of, social and economic inequalities are to be to the greatest benefit of the least advantaged members of society.
- The least-advantaged should be defined by how many of these BHRs are absent while also considering the individual responsibility of the beneficiary (in regard to his/her future choices).
- In the case of conflict between these BHRs, these rights are to be ranked in the following order:⁹³⁹
 1. The highest priority is for the BHR to secured respected life.
 2. The BHR to secured respected life has priority over the BHR to social income assistance.
 3. The BHR to social income assistance has priority over the BHR to protected sustainable environment.
 4. The BHR to protected sustainable environment has priority over the BHR to practical social cooperation.
 5. The BHR to practical social cooperation has priority over the BHR to reasonable disability accommodation.

⁹³⁹ This list of BHRs with their priority ranking is a repeat of my list in subsection 3.5.2 above. However, due to the fact that I added this list of BHRs (instead of Nussbaum's BHCs and Rawls's three principles of justice) in order to revise my new liberal equality theory, it become necessary to repeat this list here in order to show how my Islamic version of my new liberal equality theory would look like.

6. The BHR to reasonable disability accommodation has priority over the BHR to absolute equality and non-discrimination.
7. The BHR to absolute equality and non-discrimination has priority over the BHR to responsible freedom of conscience.
8. The BHR to responsible freedom of conscience has priority over the BHR to be consulted (i.e. right to a free democracy).

Although the minimum level of the BHR to responsible ownership and the BHR to legitimate pleasure are guaranteed by this *Qur'ānic* social contract, they are not parts of the above priority ranking, because they should not affect the principles of social justice. They serve the same function as Dworkin's requirement that governments have to insure an equal initial sum of resources for each individual, because (according to my progressive Islam perspective) the *Qur'ān* guarantees that each human being has an equal portion of this worldly life's resources even though this portion could be in the possession of someone else. Therefore, *Zakāh* is the tool to be used by the government to correct these inequalities and to insure an equal initial sum of resources for each individual.

5.2.3 My new interpretation of the *Qur'ānic* rules about *Zakāh*

In Chapter 3, based on the common ground between liberal and Islamic moral values (i.e. moral principles that we can draw out of all terms and conditions of the *Qur'ānic* social contract including all of the *Qur'ānic* BHRs limited by consideration of individual responsibility), we discovered that we can reinterpret the Islamic rules about *Zakāh* in the *Qur'ān* with my own interpretation that has a commitment to social justice and a consideration of both liberal and

Islamic moral values. I noted that the *Qur'ān* took any speculation out of the equation of social justice by specifying the least advantaged in specific categories with specific priority ranking among them (i.e. it is not a matter of free choice). Therefore, it is impermissible to dispense *Zakāh* to other than the following eight permitted categories of beneficiaries of *Zakāh* listed in verse 9 (al-Tawbah):60 of the *Qur'ān*, which should be interpreted as follows:⁹⁴⁰

1. Category 1 (the poor) including the non-Muslim poor as well as the Muslim poor;
2. Category 2 (PWDs, the elderly, and orphans);
3. Category 3 (volunteers for social justice or environmental protection);
4. Category 4 (students and their teachers; and researchers and their assistants);
5. Category 5 (people who are living in abusive relationships such as women under abuse, children under abuse, elderly people under abuse, and PWDs under abuse);
6. Category 6 (debtors who are forced to borrow due to their harsh circumstances and are not able to repay their debts for reasons outside their control);
7. Category 7 (caregivers who are single parents or who take care of disabled or elderly family member or friend or who are foster parents for an orphan; people who open their home for others to help them to be free from abuse; and sponsors of refugees); and
8. Category 8 (refugees).

I noted that people in categories 2 - 8 do not have to be poor to be eligible for social benefits. Moreover, there is a priority ranking within category 1 (the poor). This priority ranking among

⁹⁴⁰ See subsection 3.6.2, above, for more on this topic.

all of the subcategories within the poor category is similar to the priority ranking among all of the other major categories of beneficiaries of *Zakāh*.

Moreover, I noted the difference in the degree of the required individual responsibility between all of the major categories of beneficiaries of *Zakāh* as follows:

- Categories 1 and 2 do not require any individual responsibility in order to confirm their eligibility for this year.
- Categories 3 and 4 require only the lack of irresponsibility after receiving *Zakāh* in order to keep their eligibility for the following year (i.e. as long as they did not commit any corruption during their voluntary job or as long as they did not waste their time in the previous year for something other than study or research).
- Categories 5 and 6 require the lack of irresponsibility before receiving *Zakāh* in order to confirm their eligibility for this year (i.e. as long as they did not deliberately play any part of subjecting themselves to a bondage or to an abusive relationships or as long as they did not deliberately borrow outside of their personal emergencies and they did explore all of their resources that are available to them for repaying their debts).
- Categories 7 and 8 require the individual responsibility (i.e. as long as they made responsible choices) in spending *Zakāh* for the previous year to be eligible for the following year.

In addition, I noted the difference in the method of verifying eligibility between the first four categories and the last four categories as follows:

- People in categories 1 - 4 should be eligible for this year (or keep their eligibility for the following year) with a simplified straightforward method by providing specified documents (i.e. a tax return for low income poor, a doctor letter for disability, ID for old age, death certificate for both parents of the orphan, work experience letter for volunteer, or enrolment letter for students and researchers).
- People in categories 5 - 8 cannot be eligible for this year (or keep their eligibility for the following year) unless they go through a complex process and only after they get an official decision every year on their own particular case (i.e. that they are under abusive relationships, that they declared their bankruptcy, that they are designated to help someone in one of the other major categories, or that they are designated as refugees).

5.2.4 My proposed model for social welfare systems in the MENA

In Chapter 4, based on my new interpretation of the *Qur'ānic* rules about *Zakāh* (with a commitment to social justice and a consideration of both liberal and Islamic moral values), I tried to provide my proposed model for social welfare systems in the MENA (as a supplement to and not a replacement of SI systems in the MENA), which can be described as follows:⁹⁴¹

1. The government should have two separate accounts: one account for *Zakāh* and another account for the general tax. While vouchers should be paid out directly from the *Zakāh* account, refundable tax credits should be paid out as a part of the general tax return (although the actual money for these credits should be taken out of the *Zakāh* account).

⁹⁴¹ See section 4.8, above, for more on this topic.

2. Personal assets that are for personal use only are exempt from *Zakāh*. *Zakāh* is payable only on new assets continuously owned over the last year that are equal or above the *niṣāb*. The *Zakāh* rate varies between 2.5% and 20% of the asset's value.
3. All funds in the governmental *Zakāh* account should be divided into four parts: the first part should be spent only on category 1 in the form of means-tested vouchers to cover the basic necessities of life; the second part should be spent only on category 2 in the form of refundable tax credits (divided equally among all of them); the third part should be spent on both categories 3 and 4 in the form of refundable tax credits (divided equally among all of them); and the fourth part should be spent on all categories in the form of needs-tested vouchers to cover their immediate needs.
4. In case of inadequate resources in the governmental *Zakāh* account, people in the category with the lower priority would be barred from benefiting from *Zakāh* in order to guarantee that people in the category with the higher priority would benefit from *Zakāh*. On the other hand, if the total of all refunded remaining amounts has not been used for this year, it should be carried over to the next year as a surplus for the whole governmental *Zakāh* account to be used in the next year.
5. Means-tested vouchers and needs-tested vouchers must be used within any licensed, inspected, and qualified service provider (who must be a non-profit NGO). The government's intervention should be limited to funding and comprehensive regulation (including registration, accreditation, licensing, and inspection) for these NGOs.
6. These NGOs with a registered charity status should receive the general tax exemptions for their income. This legal status should also allow these NGOs to issue tax receipts to donors and volunteers. Then, with these tax receipts for donations, donors can claim

income deductions on their income tax return. Moreover, with these tax receipts for volunteering, volunteers can claim non-refundable tax credits on their general income tax return. These non-refundable tax credits for volunteering should be in addition to the refundable tax credits that volunteers can receive as beneficiaries of *Zakāh*.

7. While users who are eligible for the governmental vouchers use their vouchers and do not pay cash fees for a service that they utilize, users who are not eligible for the governmental vouchers may pay a fee or a premium for a service.

5.3 Is my proposed model for social welfare systems in the MENA able to implement the fundamental principles for the development of social programs that are learned from the Canadian experience?

In Chapter 4, based on my discussion of the current social welfare systems in the MENA and comparing their development possibilities with models of Western social welfare systems (using the Canadian social welfare system as an example), we discovered lessons that can be learned from the Canadian experience for the social welfare development in the MENA. I noted that the development of social programs in the MENA should be founded on the following fundamental principles including: equality, adequacy, universality, entitlement, public administration, priority, participation, cooperation, de-commodification, balancing between equity and efficiency, incentive to work, sustainability, portability, protection from fraud, and no manipulation of social policy.⁹⁴²

⁹⁴² See section 4.5, above, for more on this topic.

- In regard to the fundamental principles of public administration and portability, I noted that according to my proposed model for social welfare systems in the MENA, *Zakāh* is a social tax (i.e. a mandatory payment to the government to achieve social justice). Due to the fact that the *Zakāh* system is centrally administrated by the central government, my proposed model for social welfare systems in the MENA would allow people to move around the country without losing their benefit.
- In regard to the fundamental principle of no manipulation of social policy, I noted that according to my proposed model for social welfare systems in the MENA, in order to guarantee that *Zakāh* money will not be misused for other state purposes outside the area of social welfare, *Zakāh* has to be a separate governmental tax system, where all money collected from *Zakāh* has to be spent on social welfare only (i.e. protecting the interests of the vulnerable).
- In regard to the fundamental principle of equality, I noted that according to my proposed model for social welfare systems in the MENA, the main goals of *Zakāh* are redistributing income and pursuing equality and social justice. The *Zakāh* system is progressive in term of occupational or practical equality, which means that the more difficult it is to earn the income, the lower the *Zakāh* rate; the easier it is to earn the income, the higher the *Zakāh* rate. Moreover, adding *Zakāh* on top of the general governmental tax system will result in a higher tax rate for the rich (i.e. minimizing the gaps in incomes and in wealth).⁹⁴³

⁹⁴³ Due to the fact that there is no income cut off for receipt of certain categories of *Zakāh*, this would mean that a wealthy individual might both receive *Zakāh* and pay into *Zakāh*. However, it must be noticed here that not all rich people would receive *Zakāh* (i.e. only the wealthy individual who fits into one of the eight permitted categories of beneficiaries of *Zakāh* would receive *Zakāh*). It must also be noticed here that not all rich people who have the same

- In regard to the fundamental principle of universality, I noted that according to my proposed model for social welfare systems in the MENA, while refundable tax credits are universal benefits (in principle) directed to everyone within a designated group (regardless of their income, their assets, and their needs), refundable tax credits are means-tested benefits (in practice), because the lower the income gets, the greater cash the beneficiary receives. Therefore, refundable tax credits combine the best elements of both universal benefits and means-tested benefits.
- In regard to the fundamental principle of entitlement, I noted under my proposed model for social welfare systems in the MENA, qualification for vouchers should not be discretionary. The recipients have the sense of entitlement to these vouchers based on their guaranteed BHRs in the *Qur'ān*.
- In regard to the fundamental principle of priority, I noted that according to my proposed model for social welfare systems in the MENA, there is a specific priority ranking among all of the eight permitted categories of beneficiaries of *Zakāh*. However, this priority ranking would be translated in practice into the idea that people in the category with the higher priority should receive a larger portion of *Zakāh*. It would also be translated in practice into the idea that in case of inadequate resources in the society, people in the category with the lower priority would be barred from benefiting from *Zakāh* in order to guarantee that people in the category with the higher priority would benefit from *Zakāh*.

income level will pay the same amount of *Zakāh*, because the *Zakāh* rate will depend on how easy the income can be earned (i.e. the harder it is to earn the income, the lower the *Zakāh* rate; and the easier it is to earn the income, the higher the *Zakāh* rate).

- In regard to the fundamental principles of de-commodification, adequacy, incentive to work, participation, and balancing between equity and efficiency, I noted that according to my proposed model for social welfare systems in the MENA, people in categories 2 - 8 of beneficiaries of *Zakāh* do not have to be poor to be eligible for social benefits. Therefore, PWDs would be able to participate in employment without the risk of losing welfare benefits. This requires finding an answer to the struggle between the income equity of employment prospects and the economic security of disability cash benefits by ensuring the adequacy of these disability cash benefits at a high level with unlimited amounts of exemption for earnings from employment, and eliminating the poverty conditionality that is attached to the means-tested income support for PWDs. This would be a prerequisite and a step forward to implement the government's responsibility to provide (non-cash) goods and services that reduce disability barriers to employment. Therefore, this would lead to ensuring the best possible participation of individuals.
- In regard to the fundamental principle of protection from fraud, I noted that according to my proposed model for social welfare systems in the MENA, people in the first four categories of beneficiaries of *Zakāh* should be eligible for this year or keep their eligibility for the following year with a simplified straightforward method by providing specified documents (e.g. a tax return for low income poor). On the other hand, people in the last four categories of beneficiaries of *Zakāh* cannot be eligible for this year or keep their eligibility for the following year unless they go through a complex process and only after they get an official decision every year on their own particular case for their eligibility or for keeping their eligibility (e.g. they are designated as refugees). In addition, people in categories 3 and 4 are required to keep the lack of irresponsibility

after receiving *Zakāh* to keep their eligibility for the following year (e.g. they did not commit any corruption during their voluntary job). Therefore, they would lose their eligibility for the following year, if the government is able to prove their irresponsibility after receiving *Zakāh* (because they would lose their designation as volunteers, students, or researchers). In addition, people in categories 5 and 6 should have their lack of irresponsibility before receiving *Zakāh* to confirm their eligibility for this year (e.g. they did not deliberately borrow outside of their personal emergencies and they explored all of their resources that are available to them for repaying their debts). In addition, people in categories 7 and 8 have to show that they made responsible choices in spending *Zakāh* (to move out of their bad situation) for the previous year to be eligible for the following year.

- In regard to the fundamental principle of cooperation, I noted that according to my proposed model for social welfare systems in the MENA, while the service provider must be non-profit NGOs, the government's intervention should be limited to funding and comprehensive regulation (including registration, accreditation, licensing, and inspection) for these NGOs. The legal status for registered charities should allow these NGOs to receive the general tax exemptions for their income and to issue tax receipts to donors and volunteers. Therefore, the government can encourage donations from individuals to and volunteering by individuals in these NGOs. In addition, the government should allow these NGOs to charge payments to users who are not eligible for the governmental vouchers. If consumers pay directly for services, they should thereby demand choice and quality that meet their standards and criteria.
- In regard to the fundamental principle of sustainability, I noted that according to my proposed model for social welfare systems in the MENA, *Zakāh* is an affordable tax as

low as 2.5% of income. Moreover, due to the fact that *Zakāh* is obligatory and not optional, *Zakāh* can provide stable funding for social programs. This *Zakāh* system is sustainable, because the unused amounts for the current year should be carried over to the next year as a surplus for the whole governmental *Zakāh* account to be used in the next year. There should be (most likely) a surplus every year and the governmental *Zakāh* account should grow every year as long as there is a stable economic growth.⁹⁴⁴

5.4 Comments on limitations of the research

Although the research in this dissertation has some limitations, these limitations do not have any impact on the strengths of the research. The limitations of the research in my thesis can be described as follows:

- In considering my new interpretation of Islamic rules about *Zakāh*, most of my focus is on the *Qur'ān* itself, because it is less controversial than the *Sunnah*. Although the *Sunnah* does not contradict the *Qur'ān* on these matters, studying the *Sunnah* requires almost a lifetime's devotion, because it requires distinguishing the more from the less authentic. However, when *Aḥādīth* are cited, they are among the well-known ones that are affectionately and selectively repeated by devout Muslims, whereas the references to the *Qur'ān* are grounded in the standard text itself. Although the *Sunnah* illuminates the *Qur'ān*, the *Qur'ān* has ultimate precedence, because the *Qur'ān* is considered to be the eternal and unchallengeable speech of God, and a primary revelation.

⁹⁴⁴ See subsection 4.8.6, above, for more on this topic.

- In considering the different interpretations of verse 9 (al-Tawbah):60 of the *Qur'ān*, I acknowledge that I mixed contemporary ideas with ideas from 8 centuries ago and even ideas from 13 centuries ago. However, due the limited space in this dissertation, it is not possible to discuss all historical contexts and all historical development of all different interpretations of this verse, because in order to do this, I would need more than one book. Moreover, by discussing all historical contexts, I would lose my focus on what I need to explain. In addition, my approach did not include an analysis of Islamic *fiqh* literature for the same reasons (for the limited space and for not losing my focus). Despite some differences between all different schools of Islamic *Fiqh*, there is a degree of agreement about my own interpretation of verse 9 (al-Tawbah):60 of the *Qur'ān*. Although it is not a complete consensus, I am trying to show that in every period of time (i.e. contemporary, 8 centuries ago, and 13 centuries ago) and in every school of Islamic *Fiqh* (i.e. all *Sunnī* schools –including al-Ḥanafī school, al-Shāfi'ī school, al-Mālikī school, and al-Ḥanbalī school-, and all *Shī'ah* schools), we may find some seeds for my own interpretation and some support for my ideas.
- In considering the current governmental social welfare systems in the MENA, I included Indonesia, Malaysia, and Pakistan (which are not part of the MENA), because they are among the few Muslim countries (together with Saudi Arabia, Sudan, and Yemen) where *Zakāh* is obligatory and is collected in a centralized manner by the state. On the other hand, I did not include Israel (although it is located in the MENA) into my focus, because it cannot be considered among Muslim countries (although an important portion of its population is Muslim).

- In considering the government's responsibilities to address the income inequality, I noted that for people who cannot meet their income needs due to their inability to secure suitable employment with adequate compensation, the government is responsible through the tax system to redistribute resources and opportunities, because the system of primary distribution of resources has been inadequate for them. Although the other government's responsibilities to address the income inequality are important and necessary, my focus is primarily on the government's responsibility to redistribute resources and opportunities through the tax system.
- In considering whether PWDs need both anti-discrimination laws and social welfare laws, I noted that anti-discrimination laws must be supplemented by social welfare laws to provide adequate assistance to PWDs, because anti-discrimination laws require a complaint and this process can be long and costly. Social welfare laws avoid any doubt about whether governments have a positive obligation to support PWDs. Using social welfare laws (in addition to anti-discrimination laws) should guarantee achieving the threshold level of basic functioning (and not only the access to this threshold level) and eliminating any inequality above this threshold level in terms of income, wealth and fundamental self-respect. I acknowledge that anti-discrimination laws are necessary protections for PWDs. However, my primary focus is on social welfare laws.⁹⁴⁵
- In considering the parts of the total welfare spending for social policy, I focused only on two parts: social welfare spending (i.e. benefits based on unemployment, such as social

⁹⁴⁵ Some critics would argue that if my focus is primarily on social welfare laws and not on anti-discrimination laws, what is the source of the duty to accommodate PWDs? I would argue that the source of the duty to accommodate PWDs is the natural universal BHR to reasonable disability accommodation, which is derived from the *Qur'ān* according to my progressive Islam perspective and my own interpretation of the *Qur'ān*.

income assistance) and fiscal welfare spending (i.e. benefits delivered through the tax system, such as tax credits). However, I did not focus on occupational welfare spending (i.e. benefits delivered through occupation, such as employment based pensions), because most of welfare policies in the MENA already include the SI system, which is based on employment contributions (although most of them require important reforms). However, I must be clear here that my proposed model for social welfare systems in the MENA is to supplement (and not to replace) SI systems in the MENA. Therefore, my focus is only on universal benefits, means-tested benefits, and needs-tested benefits. I did not focus on contribution-based benefits, which are benefits linked to prior contributions and can be found in SI programs.

- In considering a new model for social welfare systems, I noted that the power benefits category (i.e. reallocation of control or authority from a group or a person to another person in order to ensure client participation in service delivery) should be combined with the opportunities benefits category (i.e. preferential treatment to redress past systemic discriminations, and rewards for past contributions) as one category, which is the access to participation form of benefits allocation category. These access benefits are process-oriented benefits that are used to permanently transform the fundamental structures of the society to address the causes of inequality. However, they are conditional (i.e. they open the doors to the receipt of other benefits, but they do not have substantive value in themselves). Although the provision of these access benefits is very important and necessary especially for PWDs, they are related anti-discrimination laws, which are outside of my focus. Therefore, I focused on the other forms of benefits allocation (i.e. in-kind benefits, cash benefits, and credit benefits).

- In considering all forms of benefits allocation, I noted that the provision of the credit benefits might include rebates, concessions, and vouchers. Although both rebates (such as those delivered through the tax system) and concessions (such as reduced rates for seniors) are very important and necessary (especially for the low-income individuals and families), they are supplemental as compared to vouchers. Therefore, within the credit benefits, I focused only on vouchers that can be used to cover the basic necessities of life for the poor and to cover the immediate needs for the other groups.
- In considering all forms of benefits allocation, I noted that as long as the basic necessities of life and immediate needs are covered by vouchers, there is no need to provide the direct cash payments. Therefore, the cash benefits in my thesis would be limited to the benefits that are delivered through the tax system (i.e. all income exemptions, income deductions, and tax credits). Although all income exemptions and income deductions are very important and necessary (especially for PWDs and low-income families with children), they are related to the general income tax system, which is outside of my focus. Therefore, within the cash benefits, I focused only on tax credits, which have to be refundable tax credits (as a progressive tool to reduce fundamental inequalities).
- In considering the governmental tax system, I noted that according to my proposed model for social welfare systems in the MENA, *Zakāh* has to be a separate governmental tax system, where all money collected from *Zakāh* has to be spent on social welfare only. This means that the government should have two separate accounts: one account for *Zakāh* and another account for the general tax. I focused primarily on the *Zakāh* account and I did not focus on the general tax account. Therefore, I did not discuss the issue of how to regulate the economic growth (in order to resolve the problems of inflation and

unemployment) by using the fiscal policy (i.e. increasing the overall purchasing power in the economy with tax cuts and/or more governmental spending; or reducing the overall purchasing power in the economy with cuts to governmental spending and/or raising taxes) as the private market, on its own, would not suffice.⁹⁴⁶

5.5 Potential applications of the research findings

In order to discuss the potential applications of my conclusions, I have to discuss the applicability of my proposed model for social welfare systems in Muslim countries and liberal non-Muslim countries.

Due to the fact that most people in the MENA are attached to their religious moral values and due to the struggle between the secular forces and the religious forces in the MENA, any legal reform has to be acceptable to both sides (i.e. the secular group and the religious group) in order to be an effective legal reform. Therefore, I recognize that there are two kinds of audience for my research project (i.e. the secular audience and the religious audience). If I based my research project only on Islamic moral values, my religious audience would agree with my conclusions, but my secular audience would be sceptical about my conclusions. On the other hand, if I based my research project only on the liberal concepts of equality, my secular audience would agree with my conclusions, but my religious audience would be sceptical about my conclusions. Therefore, I tried this almost-impossible challenge, which is trying to use both the Islamic and the liberal moral values at the same time.

⁹⁴⁶ While the monetary policy works through changes in interest rates and money supply, which must then filter through into the economy, the fiscal policy, on the other hand, works through changes in taxes and/or governmental spending with specific targets.

Due to the fact that my proposed model for social welfare systems is based on my new interpretation of the *Qur'ān* that takes into consideration both the liberal moral values and the Islamic moral values, I would argue that my proposed model for social welfare systems can be applicable in all countries in the MENA, because their populations include both kinds of people (i.e. the secular group and the religious group). Moreover, for the same reason, my proposed model for social welfare systems can be applicable in all Muslim countries (even outside of the MENA) if their populations include both kinds of people (i.e. the secular group and the religious group).

However, in the few Muslim countries (such as Indonesia, Malaysia, Pakistan, Saudi Arabia, Sudan, and Yemen) where *Zakāh* is obligatory and is collected in a centralized manner by the state, the majority of their populations are Muslims, and are attached to the classical interpretations of the *Qur'ān* that are based on specific schools of Islamic *Fiqh*. Therefore, it would be difficult to apply my proposed model for social welfare systems in these specific Muslim countries (i.e. Indonesia, Malaysia, Pakistan, Saudi Arabia, Sudan, and Yemen) unless they accept my new interpretation of the *Qur'ān* that takes into consideration both the liberal moral values and the Islamic moral values, which is based on my progressive Islam perspective.

However, I would argue that my proposed model for social welfare systems can be applicable in all Muslim countries (including Indonesia, Malaysia, Pakistan, Saudi Arabia, Sudan, and Yemen), because my new interpretation of the *Qur'ān* is based on a list of universal BHRs that

can be found in the UDHR and all other UN's human rights instruments (including the UNCRPD).

Due to the fact that most people in the West believe in the separation of church and state, the Western social welfare systems are based on the secular liberal principles. However, I have argued for the compatibility between the liberal and the Islamic moral values. Therefore, I would argue that my proposed model for social welfare systems can be applicable in all liberal non-Muslim countries (including Israel), because my proposed model for social welfare systems is based on a list of universal BHRs that can be found in the UDHR and all other UN's human rights instruments (including the UNCRPD).

5.6 Possible future research directions

Based on the limitations of the research, I would like to suggest the following possible future research directions drawing on the work of this dissertation:

- Due to the fact that my focus is primarily on the government's responsibility to redistribute resources and opportunities through the tax system, I would like to suggest doing research that discusses the other government's responsibilities to address the income inequality (i.e. the government's responsibility to create and to facilitate the creation of adequate jobs with suitable compensation and the government's responsibility to ensure that all citizens have access to these jobs on fair and equitable terms).
- Based on my new liberal equality theory, I would like to suggest doing research that discusses how to use my new liberal equality theory to provide the protection for PWDs

against all kinds of discrimination and to justify enacting or reforming anti-discrimination laws in liberal countries.

- Based on my new interpretation of the *Qur'ān*, I would like to suggest doing research that discusses how to use my new interpretation of the *Qur'ān* to find the roots of the anti-discrimination protection for PWDs in the *Qur'ān* and to justify enacting or reforming anti-discrimination laws in Muslim countries.
- Due to the fact that my focus is on social welfare spending (i.e. benefits based on unemployment, such as social income assistance) and fiscal welfare spending (i.e. benefits delivered through the tax system, such as tax credits), and not on occupational welfare spending (i.e. benefits delivered through occupation, such as employment based pensions), I would like to suggest doing research that discusses contribution-based benefits and SI systems in the MENA (which require reforms).
- Due to the fact that my focus is primarily on the *Zakāh* account as one of two governmental accounts (along with the general tax account) under my new model for the social system in the MENA, I would like to suggest doing research that discusses the general tax account. It should discuss the issue of how to regulate the economic growth (in order to resolve the problems of inflation and unemployment) by using the fiscal policy.
- Based on my new interpretation of the *Qur'ān* about *Zakāh* and my ideas about the *Qur'ānic* social contract as the basis for our worldly life, I would like to suggest doing research that reinterprets the rest of the *Qur'ān*. The new interpretation of the *Qur'ān* based on ideas presented in this dissertation would free the *Qur'ān* from the previous

misinterpretations that might be criticized as tools for political implementation. This would lead to peace and development in the MENA.

- Based on my new interpretation of the *Qur'ān*, I tried to show that according to the *Qur'ān*, equality has priority over liberty. However, I would like to suggest doing research that discusses this issue under Islamic Law in further detail.
- Due to the fact that my focus is only on the compatibility between liberal equality ideas and Islamic ideas, I would like to suggest doing research that discusses the compatibility between liberal equality ideas and some ideas in the other Abrahamic monotheistic religions such as Christianity and Judaism. It should discuss the compatibility between the liberal moral values and the moral values under Christianity and Judaism in order to arrive to a model that is similar to my proposed model for social welfare systems.
- Based on my discussion about the compatibility between liberal equality ideas and Islamic ideas, I would like to suggest doing research that discusses the compatibility between some liberal equality ideas and some ideas in the natural law theory in order to arrive to a model that is similar to my proposed model for social welfare systems.

5.7 Looking ahead

Notwithstanding PWDs' universal BHR to disability social income assistance under the UNCRPD, they are not receiving disability social income assistance in the MENA (although they are among the most vulnerable people). Therefore, these social welfare laws should be reformed to include disability social income assistance. In the MENA, neither the current governmental nor the current non-governmental social welfare systems by itself can cover the needs of its citizens. These governmental social welfare laws (that were inherited from the Western

colonists) did not progress as much as their Western counterpart social welfare laws. This required legal reform should consider the evolution of Western social welfare systems, which are based on liberal equality theories.

This required legal transplant of a liberal secular system into the MENA's religious Islamic background requires testing the compatibility between liberal equality ideas and Islamic ideas. In order to do this, I tried to choose one theory among all liberal equality theories that can be used to confirm the universal BHR to equality for PWDs and the universal BHR to social welfare (more specifically, disability social income assistance). Due to their failure, I tried to show that my own amalgamation of different liberal equality theories would best serve the interests of PWDs. This combination would result in a new liberal equality theory that could take into consideration all of the three kinds of support for PWDs including medical support, economic support, and social support.

Based on my new liberal equality theory, I tried to show the compatibility between Islamic ideas and these liberal equality ideas; I tried to show the common ground between the liberal moral values and the Islamic moral values. Then, based on this common ground, I tried to reinterpret Islamic rules about *Zakāh* with my own interpretation of the *Qur'ān* that has a commitment to social justice and a consideration of both liberal and Islamic moral values. Based on my new interpretation of the *Qur'ān*, I tried to offer a new model for social welfare systems in the MENA. For the future development of social welfare in the MENA, if the governmental social welfare systems take into their consideration my proposed model for social welfare systems (in addition to some compromises, cooperation with NGOs), it can easily take the direction toward

Esping-Andersen's social democratic model of social welfare (that promotes equality of the highest standards through universal provision and de-commodification of social rights).

Entitlements to disability income supports based on the above can be justified and delivered through the governmental implementation of my system of *Zakāh*. This is feasible as it can be designed and delivered in Islamic countries with similar or better results than in Western liberal countries. Such a system with specific reference to *Qur'ānic* teachings is both socially and politically preferable to the imposition of traditional Western approaches to rights and services. Therefore, this common ground between the liberal and the Islamic moral values can allow for the legal transplant of Western liberal secular social welfare rules into the MENA's religious Islamic background, and even the creation of a better model for social welfare systems in the MENA.

Although it is a wonderful dream, I acknowledge that it would be impossible to implement this dream in the real life without any security and stability, because the struggle between secular forces and religious forces in the MENA (with its insecurity and instability) most likely will delay (for long time) reforming the current secular governmental social welfare systems with a consideration of Islamic moral values.

More importantly, I wish to remind all human beings that we are all one big family (i.e. we are all brothers and sisters from the same father Adam and the same mother Eve), where all of its members have similar rights and obligations. We share moral values and wishes. We should help each other. We should always work towards peace and development for all of humanity.

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