

# Washington International Law Journal

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Volume 31 | Number 3

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6-1-2022

## Well-Known Signs: Models of Disability in Early Modern Islamic Law and Current American, European, and Pakistani Jurisprudence

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### Recommended Citation

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# WELL-KNOWN SIGNS: MODELS OF DISABILITY IN EARLY MODERN ISLAMIC LAW AND CURRENT AMERICAN, EUROPEAN, AND PAKISTANI JURISPRUDENCE

Elicia Shotland

*Abstract:* Current American, European, and Pakistani legal structures are often insufficient to ensure rights of disabled people, particularly rights of equal access to courts and to act as a witness in court. As the disability rights movement gains ground, judges and legislation drafters are struggling to shift modes of jurisprudence from a medical model that conceptualized disability as a permanent physical affliction to the social model, which locates disability in an individual's relation to their built and social environments. A review of historical records concerning deaf and hard of hearing participants in legal processes from the Ottoman Empire shows that the social model of disability was alive and well in Classical Islamic jurisprudence, long before it appeared in American and European contexts. Given the limitations of both twentieth century and early modern legal systems, this article argues for a syncretic approach to disability rights development using the tools provided by the Convention on the Rights of Persons with Disabilities (CRPD).

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## INTRODUCTION

In 1541, Jar Allah b. Fahd made a dangerous enemy: the bald men of Mecca. Ibn Fahd (1486–1547) had written a book entitled *Al-Nukat al-Ziraf fi man Ibtuliyya bi al-`Ahat min al-Ashraf* (roughly, Witty Anecdotes on Luminaries Afflicted with Disabilities) containing amusing tales to entertain the reader, including the trials and tribulations of a number of famous bald men. Groups of incensed bald men destroyed copies of the book; someone requested, and received, a scholarly opinion on the legality of publishing it in the first place (verdict: illegal); a mud-slinging campaign impugned Ibn Fahd’s entire family and their ancestors.<sup>1</sup> Ibn Fahd had classed baldness alongside disabilities like blindness and deafness—and in the early modern Islamic world, he wasn’t wrong.

Disability in the Islamic law of the early modern period straddled an uncomfortable line between an expression of God’s ineffable perfection—which ought to be included and accepted in religious and social life—and a theological worry concerning a possible punishment for the collective faults of humanity. Islamic scholars developed an approach to disability inflected by the ethics of excluding people with disabilities from social life, which was integrated into judge-made law. These practical jurisprudential rulings and court practices came 500 years before the approach to disability in modern states that the World Health Organization (WHO) now endorses as

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<sup>1</sup> Mohammad Ghaly, *Writings on Disability in Islam: the 16th-Century Polemic on Ibn Fahd’s “al-Nukat al-Ziraf,”* 13/14 ARAB STUD. J. 9, 11–12 (2006).

best practices—an approach based on what WHO calls the biopsychosocial model of disability rights, or more typically referred to as the social model.<sup>2</sup>

As Western human rights law catches up to the attitudes expressed in early modern Islamic law, a variety of modern day systems are present: 1) the traditional medical model approach, as expressed in the common law, 2) the social model, as developed by disability rights activists and adopted into WHO best practices, 3) the traditional Islamic system, which was significantly integrated into the Ottoman system of law and court practice, and 4) the post-colonial majority Muslim state system, which demonstrates hybrid approaches, including elements of the pre-colonial, Islamically inflected legal order and the common law-inflected colonial order.

Under pressure from activists, American and European law is abandoning the medical model of disability and moving to a social model of disability. The social model better carves space for people with differing ability levels to inhabit in their societies. In doing so, Western states are taking an approach to disability similar to the classical Islamic law approach implemented in the Ottoman Empire 500 years ago. However, Pakistan, a modern nation trying to incorporate both Western and classical Islamic ethical principles, demonstrates that fulfilling the promise of these models of disability requires deliberate attention. If development and implementation of the social model are to succeed, both domestic and international legal codes should critically address the ways in which early modern Islamic thinking on disability may benefit the current international conception of disability rights and discard traditions that impede accommodation.

Section I outlines the Ottoman and Western definitions of disability, and how different definitions determined the kinds of accommodations that were available. Section II of this article explores the social and medical models of disability as they underlie the cases examined in Section III. The American and European systems remain hindered by their past use of the medical model, which has yet to be fully removed from the notion of disability. Classical Islamic jurisprudence as implemented in the Ottoman Empire indicates a social model of disability. In contrast, disability law in modern Pakistan is attempting to carry forward its own social model. While

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<sup>2</sup> *Towards a Common Language for Functioning, Disability and Health: The International Classification of Functioning, Disability and Health*, WORLD HEALTH ORGANIZATION [WHO], WHO/EIP/GPE/CAS/01.3 (2002). This document makes a somewhat odd claim that the social model locates disability solely in lack of social support, which is not true either in common usage or scholarship, but then this was WHO's first attempt at adopting a new model. For more on how WHO came to adopt this model, see Derick T. Wade & Peter W. Halligan, *The biopsychosocial model of illness: a model whose time has come*, 31 CLINICAL REHAB. 995 (2017).

Pakistan shares a common ancestor with the Ottoman Empire, it has failed to fully articulate or integrate its model into the legal system due to the British invasion of the subcontinent. Section IV argues that, because all three systems could benefit their deaf and hard of hearing participants in different ways, synchronizing all three approaches is necessary to advance disability rights worldwide.<sup>3</sup>

United States federal law was one of the first modern legal systems to mandate accommodations for disability in public life. However, United States law tends to ignore invisible disability, creating adverse consequences for deaf and hard of hearing United States citizens. General ignorance of the many forms of disabilities has limited the promise and efficacy of the Americans with Disabilities Act (ADA) in providing equal access to legal systems.<sup>4</sup> Section II(B) examines the systematic denial of the rights of the deaf and hard of hearing in the United States in the court system.

In the European Union, disability rights are not enumerated but instead fall under the non-discrimination clause of the European Convention on Human Rights. To clarify the European Convention on Human Rights, the European Union created a framework directive guaranteeing equal accommodation for disabilities without defining the term “disability.” The European Court of Justice (ECJ) has had to define the nature of disability and the requirements for an effective accommodation. While this has allowed the European Union to modify the definition of disability as social and scientific understanding progresses, it has created inconsistent definitions which create uncertainty for disabled parties seeking to enforce their rights of access. Section II(C) discusses certain flagship ECJ decisions

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<sup>3</sup> Clarification of terms used in this article: “deaf or hard of hearing” refers to people who have some form of hearing loss. 2–3 children out of 1,000 in the United States are born with a detectable form of hearing loss in one or both ears, defined as hearing loss “averaging 30–40 dB or more in the frequency region important for speech recognition (approximately 500 through 4000 Hz),” typically referred to as congenital hearing loss. Betty Vohr, *Overview: infants and children with hearing loss—part I*, 9 MENTAL RETARDATION DEV. DISABILITIES RSCH. REVS. 62 (2003). Hearing loss may occur later in life through noise exposure, infection of the ear, injury, neurological problems, ototoxicity, or simply age. See *Statistics and Epidemiology*, NAT’L INST. ON DEAFNESS & OTHER COMM’N DISORDERS, <https://www.nidcd.nih.gov/health/statistics/quick-statistics-hearing> (last updated Mar. 25, 2021)

<sup>4</sup> See the Findings and Purpose section of the Americans with Disabilities Act (ADA), explaining Congress’ findings that “discrimination against individuals with disabilities continue[s] to be a serious and pervasive social problem.” Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 126, § 12101(a). However, less than twenty years sufficed to show that the ADA had not removed the problem. The ADA Amendments Act of 2008 found that, despite the passage of the ADA in 1990, subsequent legal holdings “have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect.” ADA Amendments Act of 2008, Pub. L. 110-325, § 2, Sept. 25, 2008.

on disability and the ways in which these decisions support or diminish access to justice for the deaf and hard of hearing.

The Hanafi-inflected jurisprudence of the Ottoman Empire applied a conceptual right of access to its courts that strongly resembled the modern social disability model. Ottoman rulers and scholars, as expressed in the legal code known as the Mecelle, recognized Deaf citizens as competent persons capable of participating in civil life, in court, and in contract, supporting sign language use as a valid form of communication.<sup>5</sup> Section IV(B) summarizes some of the history and jurisprudence surrounding deaf and hard of hearing people using the Hanafi school of Classical Islamic Law in the Ottoman Empire. Section IV(C) examines two human rights judgements handed down by the Supreme Court of Pakistan, which show some of the difficulties modern Hanafi law-inflected courts in Pakistan face.

## I. IS THE MAP THE TERRITORY? WHEN A DEFINITION OVERCOMES INTENTION

One of the fundamental questions of disability rights is what constitutes a disability.<sup>6</sup> The Ottoman approach to disability law shares a large number of similarities with a concept developed by disability rights activists in the last fifty years known as the social model of disability. The social model locates disability in the ways the social and built environments are not responsive to the needs of the people inhabiting it.<sup>7</sup> The Ottomans saw disability so broadly that swathes of a community could have a disability; the result was that appropriate accommodations had to be built (including for the madness of poets!) lest so many people be excluded that society cease functioning.<sup>8</sup>

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<sup>5</sup> A subsection of deaf and hard of hearing people will be Deaf: members of a linguistic community with shared history and culture. *Community and Culture—Frequently Asked Questions*, NAT'L ASS'N OF THE DEAF, <https://www.nad.org/resources/american-sign-language/community-and-culture-frequently-asked-questions/> (last visited May 22, 2022); see also Lilit Marcus, *Twista ASL Interpreter's Viral Moment Misses the Point, Opinion*, CNN (Aug. 23, 2019, 6:20 AM), <https://www.cnn.com/2019/08/23/opinions/asl-interpreter-twista-video-deaf-culture-marcus/index.html>. Because the deaf/Deaf distinction was born in the United States, the language in question is American Sign Language (ASL), but I have applied it in this article to any community which shares culture and history through its respective sign language. Any errors are my own.

<sup>6</sup> George L. Engel, *The Need for a New Medical Model: A Challenge for Biomedicine*, 196 SCI. 129 (1977).

<sup>7</sup> Simon Ungar, *Disability and the Built Environment*, GLASGOW CALEDONIAN UNIV. (transcript of lecture given at the Center for Psychotherapeutic Studies at the University of Sheffield, 2011), <http://homepages.phoncoop.coop/vamos/work/lecturenotes/sun/LectureNotes/city/>.

<sup>8</sup> SARA SCALENGHE, *DISABILITY IN THE OTTOMAN ARAB WORLD, 1500–1800*, at 3, 165 (2014).

The United States and Europe, however, started out with the medical model of disability and tried to adapt disabled individuals to an environment that was not responsive to their needs, rather than adapting the environment to them. When that did not succeed, the result was to exclude disabled individuals entirely.<sup>9</sup> The medical model created an “other” of disability versus ability, resulting in a very narrow definition of disability that necessitated no systematic changes to accommodate it.<sup>10</sup> As American and European systems have adopted the social model and modern legal systems both draw on their Islamic legal histories and incorporate rights-based law into their codes, all three systems have begun to converge and mirror each other in ways that have solidified the development of the social model of disability.

A. *Converging Models and the Drive to Define Disability*

United States and European systems initially used the medical model of disability.<sup>11</sup> Under this model, disabilities are an impairment located exclusively in an individual’s inability to do certain things, such as seeing at a particular distance or expressing certain emotions under certain conditions.<sup>12</sup> This inability was a problem to be overcome by the individual adapting themselves to “normal” environments, or “fixed” by doctors.<sup>13</sup> If neither of these options were possible, the individual was to be restricted to specially designed environments that catered to them, which too often was institutions. This model led to individuals’ sequestration and alienation from wider society, and many people were institutionalized.<sup>14</sup> The social model is now instituted because of sustained advocacy from the disability rights movement. This movement, on the contrary, posits that disabilities are a

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<sup>9</sup> Douglas C. Baynton, *Disability and the Justification of Inequality in American History*, in *THE NEW DISABILITY HISTORY: AMERICAN PERSPECTIVES* 33, 50 (Paul K. Longmore & Lauri Umansky, eds., 2001).

<sup>10</sup> Ungar, *supra* note 7, at *Individual Models*.

<sup>11</sup> Engel, *supra* note 6.

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

<sup>13</sup> Wade & Halligan, *supra* note 2.

<sup>14</sup> Congress acknowledged this when drafting the ADA: see Americans with Disabilities Act, 42 U.S.C.A. § 12101 (Findings and Purpose). In the opinion for *Olmstead v. L. C.*, 527 U.S. 581 (1999), Justice Ginsberg drew on the historical findings of Congress and the modern findings of medical professions in deciding that institutionalization of people with mental disabilities, when effective care is available in the broader community, is “unjustifiable...isolation...[that] perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life” that occurred too often even after the passage of the ADA. *Olmstead*, 527 U.S. at 15.

failure of wider society to accommodate the needs of its members.<sup>15</sup> It focuses on altering built and social environments to support access, such as removing large obstacles above the reach of a cane and protecting people's rights against discrimination at work.<sup>16</sup>

While disability rights in European, Islamic, and U.S. contexts may fall short of perfect implementation, these three disparate systems are beginning to overlap. Jurists and code law in the Ottoman Empire desired to include a wide swathe of people in civil life.<sup>17</sup> Access to courts was especially important, and rulers were sometimes willing to make substantial accommodations in doing so.<sup>18</sup> Those different approaches also give each system its particular weaknesses. Critical comparisons of historical and present thinking on disability can facilitate internationally consistent disability rights and achieve accessible societies for all.

The initial disparate treatment of disability in Islamic and Western legal codes is a result of very different models of what disability is and how it should be treated. Five hundred years ago, the Ottoman Empire, in its implementation of classical Islamic ethical principles into law, used a model that functioned akin to the social model of disability seen in the modern West. Historically, however, the Western social model of disability is new and is still reckoning with the damages done by the prior medical model of disability.

## II. DEVELOPING DISABILITY LAW IN THE WESTERN WORLD

### A. *Othering Created an Artificially Narrow Conception of Disability in Western Law*

The medical model of disability as used in Western nations historically labelled people with disabilities squarely as the "Other" until sustained effort from twentieth century disabled activists pushed legislatures into recognizing disabilities as a part of social life.<sup>19</sup> This othering created the medical model of disability, which effectively cut people with

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<sup>15</sup> See Victor Finkelstein, *To Deny or Not to Deny Disability*, in *HANDICAP IN A SOCIAL WORLD: A READER* (Ann Brechin, Penny Liddiard, & John Swain, eds., 1981).

<sup>16</sup> Ungar, *supra* note 7, at *Barriers*.

<sup>17</sup> SCALENGHE, *supra* note 8, at 35.

<sup>18</sup> THE MEJELLE: BEING AN ENGLISH TRANSLATION OF MAJALLAHEL-AHKAM-I-ADLIYA AND A COMPLETE CODE ON ISLAMIC CIVIL LAW, art. 1586 (Charles Tyser, D.G. Demtriades & Ismail Haqqi Efendi, trans.) (1967), discussed *infra* note 69.

<sup>19</sup> See *infra* note 28.

disabilities out of social life. In the early twenty-first century, the social model replaced the medical model, greatly expanding the rights of disabled people and emphasizing the need for societies in which all people could participate regardless of ability.

Separation and exclusion were core factors of the medical model of disability, which posited that disabilities were the result of an individual's impairments. Therefore, those with a disability required medical treatment and seclusion when they failed to work around their physical or mental limitations to sufficiently "participate" in society.<sup>20</sup> As a result, those with disabilities in the Western world have often faced institutionalization and exclusion from the rest of society.<sup>21</sup> In the case of children with congenital deafness, this was especially damaging because the preferred practice was to raise deaf children to lip-read and speak, without exposing them to sign language until later in childhood. Psychologists now recognize that doing so causes language acquisition and developmental delays, including executive function impairment, trouble becoming literate and numerate, and issues with verbal memory organization.<sup>22</sup> Because so few deaf children are born to Deaf parents, these delays further isolated children from their communities.

Under the medical model, a disability was an essential element of a person. A disability that was temporary or could be cured by medical intervention was not a true disability, or at least not enough of one to require accommodation. The Supreme Court said in *City of Cleburne v. Cleburne Living Center, Inc.* that the disabled are "different, immutably" from an "us" that included the Court.<sup>23</sup> Despite the ADA's attempts to include people with disabilities, protections for disabilities in the Act "shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less."<sup>24</sup> The ECJ agreed in *Sonia Chacón Navas v. Eurest Colectividades SA*, ruling (somewhat circularly) that disability required "physical, mental or psychological impairments ... [that] hinder the participation of the person concerned in professional life ... over a long period of time."<sup>25</sup> As Jasmine Harris points out, this medical conception ignores the reality that "disability is pervasive in society and it is one of the only identity groups everyone will

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<sup>20</sup> David L. Hosking, *A High Bar for EU Disability Rights*, 36 INDUS. L.J. 228, 229 (June 2007).

<sup>21</sup> Americans with Disabilities Act, 42 U.S.C.A. § 12101 (West 2009).

<sup>22</sup> See generally Tom Humphries, et al., *Ensuring language acquisition for deaf children: What linguists can do*, 90 LANGUAGE e31 (2014).

<sup>23</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985).

<sup>24</sup> 42 U.S.C.A. § 12102(3)(B).

<sup>25</sup> Case C-13/05, *Sonia Chacón Navas v. Eurest Colectividades SA*, 2006 E.C.R. I-6488.

become a part of as they age” and lose hearing, mobility, and mental acuity.<sup>26</sup> Even an ordinary injury in an otherwise able-bodied person can require accommodations otherwise reserved for a disability, as anyone who has ever been unable to manage stairs with a broken leg or a door with an injured shoulder can attest.

The medical conception, so common in Western law until recently, is largely unable to deal with the realities of disability and unable to grant affected individuals full participation in their communities. Awareness of this ineffectiveness, through long-term activism, led to the rise of the social model. However, deaf and hard of hearing Americans still face barriers with their origins in the medical model, which legislation has only partially ameliorated.

*B. Best Intentions: Expanding Access in the American Context through the Americans with Disabilities Act*

Deaf Americans face significant structural barriers to legal access largely due to the general public’s ignorance of the need for accommodations.<sup>27</sup> This ignorance can be traced back to the medical model of disability, which primes Americans to think of disability as something visible and “Other.” In the United States, the ADA, a landmark piece of legislation, became a model for disability legislation worldwide. It granted rights of public access to people with disabilities, including deaf and hard of hearing ones.<sup>28</sup> However, deafness in the American context is not highly visible, and this limits the ADA’s efficacy for deaf and hard of hearing Americans.

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<sup>26</sup> Jasmine E. Harris, *The Frailty of Disability Rights*, 169 U. PA. L. REV. ONLINE 29, 45 (2020).

<sup>27</sup> Knowledge of need for accommodations among the public is better now than it was, but even well-meaning accommodations can be redundant or unhelpful. A conversation about helpful vs. well-intended accommodations took place on Reddit and Twitter in December 2021, when a worker posted to Reddit asking if he was in the wrong for stopping his coworker’s attempts to teach their office cat (called Jorts) to open doors, resulting in Jorts not only failing to learn but being routinely being trapped in a closet (alongside his feline coworker Jean, who could open doors, but not the closet door). The man (and the office’s Human Resources department) subsequently learned that the coworker had been applying margarine to Jorts to teach him to groom himself better; because the other office cat Jean groomed him often, as cats do as part of their own social rituals, she became ill and required veterinary help. Disability rights advocates on Twitter quickly adopted “are you helping, or are you buttering the cat?” to indicate well-meaning accommodations that fail to address the issue in a workable way. While light-hearted, the story of Jorts and Jean illustrates the general public’s ignorance of when accommodations are needed and how they should be addressed. The entire saga can be read on Twitter. Jorts (and Jean), TWITTER, @JortsTheCat, <https://www.twitter.com/JortsTheCat> (last accessed Jan. 4, 2022)

<sup>28</sup> Stanley S. Herr, *The International Significance Of Disability Rights*, 93 AM. SOC’Y INT’L L. PROC. 332, 332–34 (1999).

1. *The Americans with Disabilities Act Fails to Fully Implement Equal Access Because of its Conformity to the Medical Model*

Under the ADA, no disabled person may “by reason of . . . disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity . . . .” Public entities are defined as “any State or local government [or] any department, agency, special purpose district, or other instrumentality of a State or States or local government.”<sup>29</sup> The ADA includes Deaf individuals: “disability means...a physical or mental impairment that substantially limits one or more major life activities... [such as] hearing . . . .”<sup>30</sup> Because courts are instrumentalities of the government, Deaf people are required to be accommodated under the ADA in legal proceedings and be granted the same right to legal representation that hearing citizens already enjoyed.<sup>31</sup>

Despite these requirements, state and local governments are often ignorant of ADA requirements or unwilling to provide accommodations.<sup>32</sup> One such instance led to a 2018 lawsuit, *Coen v. Georgia Department of Corrections*, filed by the American Civil Liberties Union (ACLU) against the state of Georgia alleging that Georgia courts, prisons, and jails routinely denied Deaf defendants their rights under the ADA. The initial complaint named fourteen plaintiffs who had been denied language interpretation to such an extent that many had not learned the charges against them until after they had been arrested, tried, convicted, and paroled. The second amended complaint was not filed, and the case was eventually dismissed for unknown reasons.<sup>33</sup> The Deaf plaintiff in *Zemedagegehu v. Arlington County Board* had pled guilty to misdemeanor theft without understanding the charges. The plaintiff’s accuser only later informed police that he had been mistaken, that

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<sup>29</sup> 42 U.S.C.A. §§ 12131–12134.

<sup>30</sup> *Id.* § 12102.

<sup>31</sup> *Lawyers and Legal Services*, NAT’L ASS’N OF THE DEAF, <https://www.nad.org/resources/justice/lawyers-and-legal-services/> (last visited May 22, 2022).

<sup>32</sup> *See, e.g.,* *City and County of San Francisco v. Sheehan*, 575 U.S. 600 (2015) (finding city police routinely failed to accommodate the needs of people with mental illness in violation of their rights under the ADA); *S.R. v. Kenton County Sheriff’s Office*, 302 F. Supp. 3d 821 (E.D. Ky. 2017) (finding that school police officer shackled two children with ADHD for being unruly); *White v. Hesse*, No. 5:19-CV-01145 (W. D. Okla. Dec. 10, 2019) (challenging state courts’ cash bail for disabled defendants).

<sup>33</sup> Proposed Second Amended Complaint, *Coen v. Georgia Department of Corrections*, No. 5:16-CV-353-MTT, 2018 WL 4365503 (M.D. Ga. June 20, 2018).

his property had not been stolen and he had found it. The convicted man's lawyers have not yet succeeded in having that conviction overturned.<sup>34</sup>

Although the protections for Deaf Americans are theoretically strong as drafted in the statute, Congress' intellectual limitations when drafting the ADA result in the ADA's provisions being less effective in practice. For much of the nineteenth and twentieth centuries, the United States followed the medical model medical model of disability, as discussed further in Section III. People with disabilities were either secluded from larger society or pressured into hiding their disability and appearing "normal," a practice spearheaded by none other than Alexander Graham Bell. Graham Bell insisted at the 1880 Second International Congress on Education of the Deaf in Milan that deaf children should be taught to speak, rather than to sign. He also convinced the other delegates, who were all hearing, which lead to severe consequences.<sup>35</sup> Deaf Americans became, in a sense, invisible—hearing loss rarely manifests visibly and when deaf children were taught to read lips and use spoken English, hearing Americans could not necessarily tell a person was deaf. As such, deafness became a seemingly invisible disability. The ADA's text unfortunately does not succeed in dispelling this illusion: the statement of purpose speaks of "physical or mental disabilities," but fails to address the need to speak another language.<sup>36</sup> Americans, even in state and federal governments, are primed to think of disability as something like a missing limb rather than a lack of a specific sensory input.

Although the United States has strong aspirations to full access for Deaf people, it often fails to make those aspirations a reality. The medical model effaces disabilities that are not readily apparent, creating a false expectation that the need for accommodation will be immediately visible. As a result, for many if there is no immediate visible need, and subsequently no reason to provide accommodation. Despite all the ADA has done to adopt

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<sup>34</sup> Abreham Zemedagegehu's experiences in an Arlington jail are described in the complaint from *Zemedagegehu v. Arlington County Board*. Complaint, *Zemedagegehu v. Arlington Cnty. Bd.*, No. 1:15-CV-00057 (E.D. Va. Jan 15, 2015). See generally Rachel Weiner, *This Deaf Immigrant was Ignored in Jail. Now He Will Get \$250,000*, WASH. POST (Nov. 19, 2016), [https://www.washingtonpost.com/local/public-safety/deaf-man-wins-250000-settlement-from-arlington-jail/2016/11/18/f44f6fce-adc9-11e6-8b45-f8e493f06fcd\\_story.html?utm\\_term=.a5000356410b](https://www.washingtonpost.com/local/public-safety/deaf-man-wins-250000-settlement-from-arlington-jail/2016/11/18/f44f6fce-adc9-11e6-8b45-f8e493f06fcd_story.html?utm_term=.a5000356410b).

<sup>35</sup> Alexander Graham Bell's wife and mother were both deaf. Perhaps he wasn't willing or able to communicate with them well enough to ask them what they wanted out of their educations. Kelly Kasulis, *The Strange Reason Deaf Children Aren't Taught Sign Language*, MIC (Oct. 27, 2017) <https://www.mic.com/articles/185597/deaf-children-language-deprivation-alexander-graham-bell>; see also Donald F. Moores, *Partners in Progress: The 21st International Congress on Education of the Deaf and the Repudiation of the 1880 Congress of Milan*, 155 AM. ANNALS DEAF 309, 309 (2010).

<sup>36</sup> 42 U.S.C.A. § 12101(a)(i).

the social model of disability, the medical model has not released its hold on the expectations of government actors.

*C. Duration Makes Disability? Access in the European Union Context*

The European Union has struggled with governing disability rights and has given ECJ rulings a somewhat ping-pong character. Under the court, similar-seeming cases may have highly divergent outcomes depending on the date a case was argued. The European Convention on Human Rights skirted disability discrimination, saying only that, “[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”<sup>37</sup> Because the European Convention on Human Rights explicitly declines to define these rights, in 2000 the European Union created the Framework Directive on Employment 2000/78 (Framework Directive) directing member states to create legislation addressing disability discrimination in employment and creating a cause of action for citizens of the European Union who have suffered employment discrimination on account of age, disability, gender, etc.<sup>38</sup> The Framework Directive states that “[i]n order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided.”<sup>39</sup> “Disability” is not further defined. Although the Framework Directive focuses on employment discrimination, its interpretation has been critical for defining which disabilities entitle a European Union citizen to accommodation and which discrimination claims are entitled to remedy.<sup>40</sup>

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<sup>37</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 14, ETS No. 005 [hereinafter European Convention on Human Rights]. The European Court of Human Rights (ECHR) is the judicial treaty body that adjudicates claims brought under the European Convention on Human Rights, European Convention on Human Rights, Section II, Article 19.

<sup>38</sup> 1 Smit & Herzog on the Law of the European Union § 6.06 TEU (2020); Council Directive 2000/78, 2000 O.J. (L 303) 16 (EC).

<sup>39</sup> *Id.* art. 5.

<sup>40</sup> Eilionoir Flynn, *New Decision on Disability Discrimination from the CJEU*, EUR. L. BLOG (Apr. 12, 2013) <https://europeanlawblog.eu/2013/04/12/new-decision-on-disability-discrimination-from-the-cjeu/>.

## 2. *Interpreting the European Convention on Human Rights*

At different times in the last two decades, European Union courts have interpreted “disability” broadly, then narrowly, and then broadly again. Most of the relevant cases discussed in this article focus on discrimination in employment. In 2005, the ECJ held in *Mangold v. Helm* that limiting employment contracts for workers over fifty-eight was discriminatory. In defining age discrimination, the court decided that the Framework Directive could negate a member state’s law when it lacked the incorporation of “the general principle of equal treatment.”<sup>41</sup> In the disability context, *Mangold* implied that equality for those with disabilities is a fundamental underpinning of European Union non-discrimination law.<sup>42</sup> In a turn of events, the ECJ rejected *Mangold* a few years later in *Chacón Navas v. Eurest Colectividades SA*. There, the court held that chronic illness and temporary disability were *not* protected under the Framework Directive, creating a much higher bar for plaintiffs whose employment was terminated because they needed certain accommodations, however temporary.<sup>43</sup> In 2013, the Court reversed itself again, deciding in both *Ring v. Dansk Almennyttigt Boligselskab* and *Skouboe Werge v. Pro Display A/S* that temporary disability, specifically injuries that caused chronic pain and inability to work, were disabilities and should be accommodated as such.<sup>44</sup>

Following these cases, it seems probable that deaf and hard of hearing people would meet the bar for a disability requiring accommodation, but the ECJ has not addressed the disability status of hearing loss or determined which rights would attach thereto. Outside of the employment cases typically handled by the ECJ, the European Court of Human Rights (ECHR) has struggled to locate the rights of deaf and hard of hearing people in disability, often instead justifying decisions on the grounds of inhumane treatment, respect for family life, or disproportionate state action.<sup>45</sup>

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<sup>41</sup> Case C-144/04, *Mangold v. Helm*, 2005 E.C.R. I-9981, ¶ 76.

<sup>42</sup> David L. Hosking, *A High Bar for EU Disability Rights*, 36 *INDUS. L.J.* 228, 231 (2007).

<sup>43</sup> *Id.* at 234; Case C-13/05, *Chacón Navas v. Eurest Colectividades SA*, 2006 E.C.R. I-6467.

<sup>44</sup> Joined Cases C-335/11 & C-337/11, *Jette Ring v. Dansk Almennyttigt Boligselskab & Lone Skouboe Werge v. Pro Display A/S*, 2013 O.J. C156/6.

<sup>45</sup> *See, e.g.,* *Ābele v. Latvia*, App. Nos. 60429/12 & 72760/12, ¶¶ 68–75 (Oct. 5, 2017), <https://hudoc.echr.coe.int/eng?i=001-177351> (holding that detaining a Deaf man in cells of about three square meters for five years, without access to anyone else who could sign, was inhuman treatment); *Jasinskis v. Latvia*, App. No. 45744/08, ¶¶ 59–68 (Dec. 21, 2010), <https://hudoc.echr.coe.int/eng?i=001-102393> (holding that the medical neglect of a Deaf man with a head injury, in which police turned away the ambulance called for the man, held him for seven hours without medical intervention despite his banging on the walls of his cell for help, and failing to call an ambulance until he had spent seven hours comatose

*D. The Social Model Has Largely Displaced the Medical Model in Western Legal Systems*

In 2007, the United Nations released the Convention on the Rights of Persons with Disabilities, “recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and ... barriers that hinders their full and effective participation in society on an equal basis with others.”<sup>46</sup> This tracks with the World Health Organization’s 2002 “biopsychosocial model,” which situates disability within the relationship between limitations on a person’s body and/or mind and an unresponsive social environment.<sup>47</sup> The Convention of the Rights of Persons with Disabilities puts the onus on governments to fulfill their obligations to their disabled citizens and “ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities, without discrimination of any kind on the basis of disability.”<sup>48</sup> The biopsychosocial model of disability in Western law is slowly moving away from the medical model that requires a person “prove the legitimacy of your disability ... [in] direct contention with social norms” to receive full access to society.<sup>49</sup>

III. OLD IS NEW AGAIN: DEVELOPING DISABILITY LAW IN THE OTTOMAN EMPIRE AND MODERN PAKISTAN

Because Islamic law exists to apply the ethical precepts of Islam—both textually and through scholarly interpretation—it made no attempt to claim that its conception of legal rights of individuals was rooted in a universally applicable moral philosophy decoupled from its social, political, and religious origins. Authority on Anglo-Muhammadan law and prolific

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and unresponsive, was a violation of Art. 2 Right to Life under the European Convention on Human Rights); *Nasri v. France*, App. No. 19465/92, ¶¶ 33–46 (July 13, 1995), <https://hudoc.echr.coe.int/eng?i=001-57934> (finding where deporting a deaf man with little sign language proficiency to Morocco, where he spoke none of the languages and where none of his family resided, was a violation of Art. 8 Respect for Family Life). Although all of these cases used the deaf party’s disability as an aggravating factor, none of them relied on the Article 13 right to not be discriminated against on account of disability status.

<sup>46</sup> Convention on the Rights of Persons with Disabilities, *entered into force* May 3, 2008, 2515 U.N.T.S. 44910.

<sup>47</sup> Hosking, *supra* note 42, at 229.

<sup>48</sup> Convention on the Rights of Persons with Disabilities, art. 4.1.

<sup>49</sup> Harris, *supra* note 26, at 49–50.

Islamic legal scholar and author Professor Asaf Ali Asghar Fyzee explains that Moghul rulers applied each community's religious law to that community only, rather than attempting to create an overarching secular legal code.<sup>50</sup> The rulers felt that it would be inequitable to apply a different belief's law to believers of other faiths.<sup>51</sup> Although Islamic legal scholars could impose limitations on the rights of people with disabilities, people with disabilities were more integrated into their communities as a default. This social integration tracks with the social model of disability; it bears little resemblance to the medical model at all.

*A. Disability is Defined Against Its Particular Social Backdrop and Integrated into Law through the Islamic Scholarly Tradition*

As seen in Ibn Fahd's ill-fated book on disabled public figures (which included bald men!), early modern Islamic societies did not define disability in the same way most legal systems do today. Baldness was commonly classed with disability, as were diseases like leprosy.<sup>52</sup> Speech disorders, such as lisping, received special attention from scholars deciding legal rights of people with disabilities.<sup>53</sup>

Social attitudes toward disability were often deeply ambiguous. As Ibn Fahd's difficulties illustrate, mocking those with disabilities invited legal and sometimes violent social censure, although not every disability was accommodated to the same extent.<sup>54</sup> For example, transgender and intersex

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<sup>50</sup> ASAF A. A. FYZEE, *CASES IN THE MUHAMMADAN LAW OF INDIA, PAKISTAN, AND BANGLADESH* xx–xxi (2d ed., Tahir Mahmood ed., Oxford Univ. Press 2005). Anglo-Muhammadan law refers to the body of law built by British invaders on the Indian subcontinent. The Moghuls were the leaders of an expansive empire encompassing modern-day India, Bangladesh, and Afghanistan. The Moghuls' founder, Zahir ud-Din Muhammad, better known as Babur, was a Muslim and his empire brought Islamic legal systems to the subcontinent. For more on the Moghul Empire, see CHRISTOPH BAUMER, *THE HISTORY OF CENTRAL ASIA: THE AGE OF ISLAM AND THE MONGOLS* (2018).

<sup>51</sup> *Id.* Although the Moghuls were not unique in this respect, the level of tolerance for polytheism and the various Abrahamic faiths under Islamic rulers varied widely depending on location, political and social pressures, and the temperament of the ruler. For an overview of a similar situation, the fractious *convivencia* of Al-Andalus (Islamic Spain) see generally MATTHEW GABRIELE & DAVID M. PERRY, *THE BRIGHT AGES: A NEW HISTORY OF MEDIEVAL EUROPE* [CH. 10] (2021).

<sup>52</sup> Ghaly, *supra* note 1.

<sup>53</sup> See generally Shady Hekmat Nasser, *We have sent it down as an Arabic Qur'an: Praying behind the Lisper*, 23 *ISLAMIC L. SOC'Y* 23 (2016).

<sup>54</sup> Ghaly, *supra* note 1; Hekmat Nasser, *supra* note 53, at 41 (charting out which types of lisps were impediments to leading prayer; lisps who were "not making an effort to improve" were restricted in which prayers they could lead and when, compared to lisps who were engaging in some sort of early speech therapy).

people were considered disabled in that their mutable gender identity did not allow them to contract marriage and complicated their inheritances.<sup>55</sup> For those who wanted surgery, whether for reasons of cosmetics or sexual function, it was available up to the medical limitations of an era before plastic tubing and anesthesia; surviving records also indicate that the last word on a person's gender identity was their own.<sup>56</sup> Mental illness, however, was not tolerated if it carried the potential for social instability, like a man who believed himself to be the sultan.<sup>57</sup>

When disability caused pain or the loss of cherished activities, it entered the realm of theodicy: the theologian's question of why God allows bad things to happen. Islamic theologians had extra difficulties to contend with in disability theodicy. In Islam, God is perfect and omnipotent, so the idea that God is correcting an imperfect world implies that God created an imperfect world, and thus imperfect himself, rendering an unacceptable conclusion.<sup>58</sup> Unfortunately, this led to the belief that disability and disease were a punishment for immorality.<sup>59</sup> However, the Mu'tazilites, an Islamic Golden Age school of rationalism, rejected this argument. They instead believed that human understanding is simply too flawed.<sup>60</sup> Many theologians have fallen back on this, positing that "if a particular evil occurs to you without seeing any good beneath it... query whether your reason might not be deficient... ." <sup>61</sup> Disability was inexplicable: it could strike anyone, at any time, simply as a function of God's creation.

Disability against an Islamic social backdrop was more fluid than the modern Western conception: it was not limited to physical or mental impairment, but instead encompassed gender identity, non-injurious physical characteristics, temporary conditions, and even the "divine madness" of poets and lovers.<sup>62</sup> It is not surprising, then, that because disability could

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<sup>55</sup> SCALENGHE, *supra* note 8, at 124–25, 131–32.

<sup>56</sup> *Id.* at 133–34, 141–42, 146.

<sup>57</sup> Michael Dols, *Insanity and its Treatment in Islamic Society*, 31 MED. HIST. 1, 2 (1987). Dols includes a segment of al-Maqrīzī's chronicle of late-medieval Egypt: it describes a man who, in 1352, became infamous in Cairo for wandering about the city claiming to be the former sultan, Abu Bakr ibn Qalāwun. The man's mother, who lived in Gaza, confirmed that her son suffered delusions, typically two to three times a year. Eventually the self-proclaimed sultan gathered enough of a following that the Cairene government worried about his potential as a political threat and committed him to a hospital for the insane.

<sup>58</sup> MOHAMMED GHALY, ISLAM AND DISABILITY: PERSPECTIVES IN THEOLOGY AND JURISPRUDENCE 48 (2010).

<sup>59</sup> *Id.* at 92.

<sup>60</sup> *Mu'tazilah*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Mutazilah> (last visited May 22, 2022).

<sup>61</sup> GHALY, *supra* note 58, at 76.

<sup>62</sup> Dols, *supra* note 57, at 4–5.

affect any member of the community, accommodations were better integrated into social life.

Once integrated into social life, disabilities could be integrated into the law. Classical Islamic law was a living tradition of scriptural interpretation by jurists and scholars. This tradition is known as *fiqh* and is the body of Islamic ethical-legal opinion. As the tradition developed, four main schools became prominent. Where the Quran and *hadith* were silent or ambiguous on ethical behavior for a given situation and the divine justification for that behavior, these schools differed in their interpretations.<sup>63</sup> Across the schools, some basic precepts held true—the availability and reliability of testimony, for example, was a major requirement of Islamic legal practice and drove the creation of several accommodations.<sup>64</sup>

To make a contract, the base form of Islamic legal action, a person had to assent; to give testimony, they had to speak.<sup>65</sup> In the eras before widespread literacy, court proceedings throughout Islamic law history were largely spoken. When the spoken word is required, deafness is a hurdle because many people with congenital deafness have difficulty acquiring spoken language.<sup>66</sup> In theory, a deaf or hard of hearing person in this period might not have had the capability to be involved in legal process. Given the importance of contracts, the inability to be involved in the legal process

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<sup>63</sup> For those unfamiliar: a hadith is a reported saying of Prophet Mohammed, originally part of Islam's oral tradition. They exist now in written compilations. Authentication of hadiths is the subject of hundreds of years of debate, and schools and sects have formed around the acceptance or rejection of specific ones. See JONATHAN BROWN, MISQUOTING MUHAMMAD 8 (2015).

<sup>64</sup> David S. Powers, *Four Cases Relating to Women and Divorce in Al-Andalus and the Maghrib, 1100–1500*, in DISPENSING JUSTICE IN ISLAM: QADIS AND THEIR JUDGEMENTS (Muhammad Khalid Masud et al. eds., 2012), at 393, 399–400, 405–06; Baber Johansen, *Signs as Evidence: the Doctrine of Ibn Taymiyya (1263–1328) and Ibn Qayyim al-Jawziyya (d. 1351) on Proof*, 9 ISLAMIC L. SOC. 168, 169 (2002).

<sup>65</sup> Leslie Pierce, *A New Judge for Aintab: the Shifting Legal Environment of a Sixteenth-Century Ottoman Court*, in DISPENSING JUSTICE IN ISLAM: QADIS AND THEIR JUDGEMENTS 72–73 (Muhammad Khalid Masud et al. eds., 2012).

<sup>66</sup> Deaf children born to Deaf parents whose primary language is a sign language develop language at comparable benchmarks to hearing children. Deaf or hard of hearing children born to non-signing parents are at high risk of language delays. Hearing children at three and a half years used an average of 210 words in sentences of around three words in a thirty minute play session, while orally educated (i.e., non-signing) Deaf children of the same age used thirty-five words in sentences of an average one and a half words each. See C.R. Marshall et al., *Semantic Fluency in Deaf Children Who Use Spoken and Signed Language in Comparison with Hearing Peers*, 53 INT'L J. LANGUAGE COMM. DISORDERS 157, 163 (2018); Johanna Grant Nicholas & Ann E. Geers, *Effects of Early Auditory Experience on the Spoken Language of Deaf Children at 3 Years of Age*, 27 EAR & HEARING 286, 288 (2006). While it's difficult to quantify the language acquisition progress made by sixteenth and seventeenth century children, a deaf or hard of hearing child in the early-modern period would have had a more difficult time becoming fluent in the spoken languages of their region than their hearing peers.

would render a person less than a full adult, akin to a child. However, classical schools of Islamic thought did not agree that deaf and hard of hearing people could not contract. They did differ on when, how, and to what extent they could participate.<sup>67</sup>

All four classical schools agreed that a Deaf person who did not use spoken language could sign a marriage contract, although they differed as to method.<sup>68</sup> In the case of deafness acquired later in life, the solution was fairly simple: written words could be substituted for spoken. Doing so in writing was uniformly accepted, but when it came to sign languages, schools differed in sophistication. While signing was generally available in Hanafi jurisprudence, some Hanafi and Shafi'i (two of the major Golden Age schools of jurisprudence) scholars specified that signing was the less-preferred option if the person was literate. A person who could write their case must do so, and sign language or gesture was not acceptable if the person could speak.<sup>69</sup> One Shafi'i jurist, however, opined that there was no reason a Deaf man could not be a *qadi*, or judge, provided he had an interpreter when necessary.<sup>70</sup> However, the Shafi'is also held that being unable to use spoken language was a defect that was cause for annulment of a marriage. The Hanbalis, typically, disagreed.<sup>71</sup> An eighteenth century fatwa (an advisory legal judgement) from the Ottoman Empire confirmed that a Deaf man could arrange his daughter's marriage contract through the use of the sign language in which he was fluent (*bi isharatihi al-ma'huda*) and a divorce could be arranged the same way.<sup>72</sup> A Deaf Hanafi woman could likewise appoint a proxy-interpreter and convey her decisions through him, although this was not always allowed by jurists of different schools.<sup>73</sup> The only exceptions to sign language use were those who could neither see

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<sup>67</sup> The four major classical schools of Sunni Islamic legal thought are the Hanbali, the Shafi'i, the Maliki, and the Hanafi. There are numerous offshoots and independent schools, to say nothing of the Shi'ite legal traditions. Their long and rich history is outside the scope of this article. See, e.g., CLARK LOMBARDI, *STATE LAW AS ISLAMIC LAW IN MODERN EGYPT: THE INCORPORATION OF THE SHARI'A INTO EGYPTIAN CONSTITUTIONAL LAW* 16 (2006); GHALY, *supra* note 58, at 152 (citing AHMAD B. MUHAMMAD AL-HAMAWI, *GHAMZ 'UYUN AL-BASA'IR FIR SHARH AL-ASHBAH WA AL-NAZA'IR* (1985).

<sup>68</sup> Sara Scalenghe, *The Deaf in Ottoman Syria, 16th–18th Centuries*, 12/13 ARAB STUDIES J. 10, 14–15 (2005).

<sup>69</sup> THE MEJELLE: BEING AN ENGLISH TRANSLATION OF MAJALLAHEL-AHKAM-I-ADLIYA AND A COMPLETE CODE ON ISLAMIC CIVIL LAW, art. 1586 (Charles Tyser, D.G. Demtriades, Ismail Haqqi Efendi, trans.) (1967); see also SCALENGHE, *supra* note 8, at 42.

<sup>70</sup> GHALY, *supra* note 58, at 158.

<sup>71</sup> *Id.* at 43.

<sup>72</sup> SCALENGHE, *supra* note 8, at 42.

<sup>73</sup> For a discussion on guardianship in contracting a marriage, see KNUT VIKØR, *BETWEEN GOD AND THE SULTAN: A HISTORY OF ISLAMIC LAW* 299–308 (2005).

nor speak, as presumably they could not use sign language without sight.<sup>74</sup> Jurists trained in the Classical Islamic legal tradition had a wealth of precedent and interpretation when creating accommodations for the deaf and hard of hearing.

Outside of the precedential system of scholars and individual judges lay the laws of state, called *siyāsa sharʿiyya*. Rulers in the Islamic world who wished to ensure their political and religious legitimacy had to take care that their laws, and the practices of their courts, did not conflict with Islam's ethical values.<sup>75</sup> Such a ruler had two principal options: they could appoint religious and legal scholars to run their law courts, applying the dense body of *fiqh* built up over hundreds of years, or they could enact statutory law that both complied with scriptural rules and was in the public interest.<sup>76</sup> Many rulers did both, by appointing scholars to act as judges and creating supplementary statutes.

Ottoman law, both as codified and in the living practice of jurists, is remarkable for recognizing deaf and hard of hearing citizens as capable of social and legal participation, and for providing significant sign language accommodations for court participants. Of all the early-modern jurisprudence that today survives, the Ottoman Empire is one of the most complete and accessible sources because the difficulties of managing such a large and fractious territory necessitated maintaining good records.<sup>77</sup> The Ottoman sultans elected the dual approach to crafting legitimate Islamic legislation: they appointed classically trained Islamic scholars as jurists and judges, and directed them to make their rulings according to the rulers' statutes (when one was on point) and to their own *fiqh* training when there was no applicable law.<sup>78</sup> Many Ottoman rulers favored the Hanafi school and often appointed Hanafi-trained scholars as judges, meaning their records draw on that classical tradition.

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<sup>74</sup> MEJELLE, *supra* note 69, art. 1686. Tactile signing is now used for communication by those with both hearing and visual deficits, but if it was in widespread use during the Ottoman Empire, the records have been lost.

<sup>75</sup> See VIKØR, *supra* note 73.

<sup>76</sup> See Johansen, *supra* note 64, at 181.

<sup>77</sup> Pierce, *supra* note 65, at 72.

<sup>78</sup> See VIKØR, *supra* note 73, at 145.

B. *Law Ancient: Hanafi fiqh and the “Well-known Signs” of the Ottoman Mecelle*

In the late nineteenth century, Sultan Abdulaziz (r. 1861–76) formed a committee of scholars (the “Commission”) to craft the Mecelle,<sup>79</sup> a civil legal code consistent with Hanafi scholarship. The Mecelle became the civil legal code of the Ottoman Empire in the late nineteenth century.<sup>80</sup> As Islamic legal scholars, the Commission were steeped in the *fiqh* rulings by Islamic jurists, of their own school others, and that *fiqh* tradition is embedded in the code. However, the Commission drafted the Mecelle with the understanding that it was to reflect the best of the Hanafi *fiqh*, in which many of them were trained.<sup>81</sup>

Reflecting the general understanding, and qualifications, of Hanafi *fiqh* and the social conditions of the Ottoman Empire, when the Mecelle<sup>82</sup> speaks of sign language, it nearly always accompanies it with a qualifier: “well-known.”<sup>83</sup> And signing was well-known. As historian Dr. Sara Scalenghe found, the Ottoman Empire had a long history with sign languages. The sultans of the fifteenth and sixteenth centuries employed tens of Deaf courtiers as attendants, messengers, and executioners, who signed rather than spoke.<sup>84</sup> Hearing members of court adapted sign language as a fashion, and perhaps for convenience.<sup>85</sup>

“Well-known” also points to the importance of family structure in the Islamic law context. The Mecelle recognizes that sign language might only be known by a Deaf person’s immediate family and social circle. Before globalization, family groups generally stayed put and did not travel. As a result, Arabic sign languages show more regional variation than the spoken dialects, and some languages are unintelligible outside a Deaf speaker’s own

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<sup>79</sup> Adopted into Turkish from the Arabic مجلة الاحكام (majallat al-aḥkām), lit. “code of law.” See Norman Calder et al., *Law*, in THE OXFORD ENCYCLOPEDIA OF THE ISLAMIC WORLD (2009); مجلة, THE HANS WEHR DICTIONARY OF MODERN WRITTEN ARABIC 153 (4th ed., J. Milton Cowan ed., 1994).

<sup>80</sup> *Report of the Commission Appointed to Draft the Mejelle*, 1 ARAB L.Q. 367, 367–79 (1985) (first released Mar. 10, 1869). The Commission refers to the source of law used as “Muhammadan jurisprudence,” which at the time referred to the Hanafi School.

<sup>81</sup> BRINKLEY MESSICK, *THE CALLIGRAPHIC STATE: TEXTUAL DOMINATION AND HISTORY IN A MUSLIM SOCIETY* 56 (1993).

<sup>82</sup> Archaic spelling “Mejelle,” the Ottoman codification of Hanafi law. *Report of the Commission*, *supra* note 80.

<sup>83</sup> MEJELLE, *supra* note 69.

<sup>84</sup> SCALENGHE, *supra* note 8, at 21–23.

<sup>85</sup> *Id.*

family.<sup>86</sup> This means that Deaf children were being brought up to sign within their own families and communities rather than being sent away; their disability did not remove them from their position in family or society, and family and society adapted to their relative's needs.

In this context, the Ottoman legal system made significant accommodations to enable Deaf legal participation. A person who signs, as the drafters of the Mecelle understood, is not moving arbitrarily: they are speaking, with all the regulation that language entails. The judges appointed by the sultans in the several hundred years before the drafting of the Mecelle made rulings suggesting that they understood the same. Hearing members of the Ottoman court could not have learned to sign if the signs used did not possess the structures and regularities of spoken language. And that the judges recognized this can be inferred from their rulings allowing sign language in place of spoken language in contract and other legal proceedings.

Actual Ottoman practice demonstrates that judges and officials familiar with, or trained in, Hanafi fiqh, were inclined to grant many of the accommodations to deaf and hard of hearing people that their apparent view of full personhood for deaf participants would require. A Deaf witness's "well-known signs," in the Mecelle, were to be given the same status as "explanation by speech," and an interpreter was allowed in all cases.<sup>87</sup> A Deaf person could swear an oath or make a verbal contract in sign language.<sup>88</sup> The Empire boasted prestigious deaf officials, including 'Ali al-Shami and Muhammad ibn Da'ud, who wrote what they could not speak.<sup>89</sup>

### C. *Law Modern: Law Enforcement Gatekeepers in Pakistan and Their Barriers to Equal Access*

Although Pakistani courts profess similar principles of access to courts as the Ottomans did, these modern courts are often difficult to access for the deaf and hard of hearing as a result of the law enforcement gatekeepers imposed by the British colonization of the 19th and 20th

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<sup>86</sup> Mahmoud Abdel-Fattah, *Arabic Sign Language: A Perspective*, 10 J. DEAF STUDIES & DEAF EDUC. 212, 212–213 (2005).

<sup>87</sup> MEJELLE, *supra* note 69, arts. 70–71, 1586.

<sup>88</sup> *Id.* arts. 436, 1752.

<sup>89</sup> 'Ali al-Shami was a sixteenth century imam of the Mosque of the Prophet Muhammad in Medina; Muhammad ibn Da'ud was the seventeenth century chief judge of Damascus, known as Riyadi the Deaf. SCALENGHE, *supra* note 8, at 18–9.

centuries.<sup>90</sup> Specifically, police often fail to assign deaf participants the same credibility as hearing ones, and prosecutors do not give testimony from deaf witnesses the same consideration as hearing witnesses.<sup>91</sup> In two recent cases before the Supreme Court of Pakistan, courts and police failed to provide sign language interpretation for deaf complainants, and so dismissed their complaints, and during prosecution muddled or discounted their testimony. The Supreme Court then had to step in to enforce equal access.

Pakistan is illustrative of ways countries and courts have drawn on Islamic law traditions as they develop state law in a post-colonial world, although the results may not be all that the government, or the people desired. Although many Pakistani statutes and precedents draw on the Hanafi school in one way or another, the law of modern Pakistan is not the direct successor of the Ottomans' Islamic law. Before the British invasion and occupation of the subcontinent, Indian rulers dealt with Islamic law similarly to Ottomans: the rulers appointed judges, often from the Hanafi school, and created their own laws not inconsistent with the jurists' *fiqh*. Those rulers were not only implementing Islamic law: historically, Pakistan, India, and Bangladesh all trace their Islamic law tradition to the Moghuls, who ruled the region from the eighth century to the nineteenth before being overturned by British conquest.<sup>92</sup> The Moghuls, like the Ottomans, were influenced by Hanafi precedent. However, as the Ottomans and the Moghuls were contemporaries for at least part of their respective empires, their practices reflect a common ancestor rather than one succeeding the other. Today's law in Pakistan is therefore not the direct successor to the Ottoman's law. Moreover, the British conquest was a caesura in the development of Islamic law in Pakistan. English lawyers introduced common-law techniques to the legal practices already in place. Some of these modifications were wholesale adoption of English methods into courts

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<sup>90</sup> Policing as we know it now shifted from the medieval English system of shire reeves (local guardians) and constables charged with raising the hue and cry (i.e., rousing the community to detain a person suspected of a crime) to the modern professional police forces beginning in the early nineteenth century with Sir Robert Peel's 1829 Metropolitan Police Act. This system was then brought into India and Pakistan by the British when they consolidated their colonial power after the Rebellion of 1857. For further reading, see generally FRANK BARLOW, *THE FEUDAL KINGDOM OF ENGLAND, 1042–1216* (5th ed. 1999); DOUGLAS HURD, *ROBERT PEEL: A BIOGRAPHY* (2017); J. L. Lyman, *The Metropolitan Police Act of 1829*, 55 J. CRIM. L. CRIMINOLOGY 141 (1964); BIPAN CHANDRA, *INDIA'S STRUGGLE FOR INDEPENDENCE* (1987); Chaudhry Hasan Nawaz, *The Criminal Justice System in Pakistan: Contemporary Problems in Securing Efficient Administration of Criminal Justice*, FED. JUD. ACAD. (PAKISTAN) (2012), <https://www.fja.gov.pk/files/articles/TheCriminalJusticeSysteminPakistan.pdf>.

<sup>91</sup> Assessing credibility of witnesses was one of *the* tasks of a judge in the Classical tradition. See Johansen, *supra* note 64, at 169.

<sup>92</sup> FYZEE, *supra* note 50, at xxi.

accustomed to the *fiqh* tradition; others modified or replaced rulers' statutes.<sup>93</sup> The new statutes sometimes codified *fiqh*, sometimes replaced rulers' statutes with British ones, or substituted the practice of one Classical legal school with that of another. An example of the latter practice is the case of the Dissolution of Muslim Marriages Act of 1939, which replaced the Hanafis' rules on divorce with the Malikis', in response to the community's "dissatisfaction" with the stricter Hanafi rules.<sup>94</sup>

The British also imported the concept of professional police forces and criminal prosecutors, the latter with the creation of the Penal Code of 1860. Though the Pakistani police have undergone reforms since Partition and the formation of the Islamic Republic of Pakistan, the police are a remnant of the British legal system, and not the Moghul Hanafi one.<sup>95</sup> Likewise, criminal prosecutors stem from the British criminal legal system. Before the British occupation, complainants would approach judges or other legal scholars directly to ask for an opinion, as was the case across much the Islamic world.<sup>96</sup> The imposition of a police force was as much to monitor and stifle dissent as to maintain peace. A police force hadn't been necessary before—judges examined witnesses to an event rather than outsourcing to a separate investigative body.<sup>97</sup> Since becoming an independent nation, Pakistan's constitution obliges its government not to make statutes that would conflict with Islamic ethical precepts, and to ensure its courts' rulings are consistent with the same.<sup>98</sup> Not all of those precepts come from the Hanafi tradition. Many statutes are influenced by modernist interpretations of Islamic law that grew over the twentieth century.<sup>99</sup> Many jurists have

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

<sup>94</sup> *Id.* at xxxiv–xxxv.

<sup>95</sup> Immigration and Refugee Board of Canada, *Pakistan: Structure of the police force; institutions and/or agencies that have been set up to receive and investigate complaints made by the public against members of the police; recourse available to individuals who file complaints against the police (January 2000–March 2004)*, REFWORLD (Apr. 1, 2004), <https://www.refworld.org/docid/41501c43e.html>. The Partition of India was the 1947 division into the Dominion of India (now the Republic of India) and the Dominion of Pakistan (now further divided into the Islamic Republic of Pakistan and the People's Republic of Bangladesh).

<sup>96</sup> FYZEE, *supra* note 50, at xx. For descriptions of how justice-seekers obtained adjudication of their cases, see generally PIERCE, *supra* note 65, and POWERS, *supra* note 64.

<sup>97</sup> See CHANDRA, *supra* note 90; see VIKØR, *supra* note 73, at 151 (discussing how judges and scholars functioned as courts of first instance and courts of appeal, respectively; the common denominator was that parties approached the courts to begin an action); see generally PIERCE, *supra* note 65, and FYZEE, *supra* note 50.

<sup>98</sup> See PAKISTAN CONST. pmbl. ("Wherein the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed...").

<sup>99</sup> For discussion on modernism and codification in Islamic law, see generally MESSICK, *supra* note 81.

been trained in, and hand down rulings out of, the Anglo-Muhammadan system imposed by the British rather than the Hanafi school.

Despite its historical connection to the Hanafi jurisprudence, Pakistan's legal system has failed to reconcile its Islamic traditions with the remnants of the British system it wished to keep. The following cases demonstrate the tensions between the courts, who would like to facilitate access, and the practices of the police forces, who are often unable or unwilling to do so.

### 1. *Case One*

In *Human Rights Case No. 42389-P of 2013*, a Deaf woman in the Nankana Sahib district of Pakistan attempted to report a sexual assault in her home by at least two men.<sup>100</sup> Local police ignored her until she went to the district's magistrate to request a medical examination and investigation.<sup>101</sup> The magistrate ordered a medical examination, and the police (perhaps, as a lower court suggested, fearing public pressure) opened an investigation.<sup>102</sup> Although the victim's brother was hearing and had interpreted for her in applying to the magistrate and the police, the investigating officer's report indicated that the officer did not bring an interpreter but instead attempted to communicate with the victim directly, although he could not sign.<sup>103</sup> The officers made no written report of this interview at the time. The police did not obtain a written statement from the victim until two months later.<sup>104</sup> Despite this, the investigating officers claimed that the victim was not credible because there was a discrepancy between her statement and her brother's as to the number of attackers.<sup>105</sup>

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<sup>100</sup> Human Rights Case No. 42389-P/2013, (2014) SMCR (SC) 515, ¶¶ 1–1.2 (2013) (Pak.).

<sup>101</sup> *Id.* ¶ 1.4. In Pakistan, forty to fifty local police officers report to a Station House Officer, or S.H.O. The S.H.O. reports to the District Police Officer. All District Police Officers in a province report to the Provincial Police Officer, who manages police operations for the entire region. District magistrates are appointed by the provincial governments; subordinate magistrates try all criminal cases in their sub-district which carry sentences of up to three years imprisonment. To initiate a prosecution, police must submit a complaint to their local magistrate. However, given widespread public opinion of police as corrupt, the victim in this case bypassed the police to bring her case directly to the magistrate. *See generally* Immigration and Refugee Board of Canada, *supra* note 95; Nawaz, *supra* note 90; WORLD JUSTICE PROJECT, THE RULE OF LAW IN PAKISTAN: KEY FINDINGS FROM THE 2017 EXTENDED GENERAL POPULATION POLL & JUSTICE SECTOR SURVEY (2017).

<sup>102</sup> Human Rights Case No. 42389-P/2013, (2014) SMCR (SC) 515, ¶ 1.2 (2013) (Pak.).

<sup>103</sup> *Id.* ¶ 1.3.

<sup>104</sup> *Id.* ¶ 1.4.

<sup>105</sup> *Id.* ¶ 1.4.

The Supreme Court ordered a new investigation on the basis that the police had been negligent in discounting the victim's testimony.<sup>106</sup> The court opined that the police were negligent in failing to investigate the victim's case:

“[I]t appears that the DPO, Muntazir Mehdi, being in [a] supervisory position did not probe diligently into the inquiry conducted by his juniors and exonerated the culprits on the ground that there was contradiction in the statements of the victim and her brother ... on account of his criminal negligence a poor lady who is deaf and dumb [was] subjected to criminal act [without redress].”<sup>107</sup>

Where the Court addresses the victim's credibility, it notes acidly that even if there were discrepancies in the victim's account and the secondhand account of her brother, her medical exam corroborated that she had been attacked.<sup>108</sup> In declaring negligence, the court assumed that the police had a responsibility to investigate the deaf victim's complaint. At no point does the Court express doubt about her rights to bring a grievance through the court process, and to have that grievance treated seriously. As far as the Court is concerned, a deaf woman's complaint is just as credible as anyone else's. Likewise, the reports by the District and Sessions Judge examined in the opinion note that once she succeeded in speaking with the District Magistrate, the court system bypassed the police and transferred investigation of the case out of the district to another investigator.<sup>109</sup> The law, according to the Court, was supposed to provide the victim access, including in sign language, much like the Ottoman Hanafi law. It was the English-created law enforcement structure that impeded access.

## 2. *Case Two*

In 2017, the Supreme Court of Pakistan decided *Muhammad Mansha v. State*, which explored in depth the process due deaf witnesses and defendants. In this case, a breakdown occurred through prosecutorial conduct. A man in Bahawalnagar district was accused of vandalism in a

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<sup>106</sup> *Id.* ¶ 2.

<sup>107</sup> *Id.* ¶¶ 1–1.2.

<sup>108</sup> *Id.* ¶ 2.

<sup>109</sup> *Id.* ¶ 1.10.

mosque and the only witness was deaf and communicated exclusively through sign language.<sup>110</sup> The interpreter for the witness was also a witness for the prosecution.<sup>111</sup> In the judgment vacating the conviction and sentence, the Court noted that under the Qanun-e-Shahadat Order of 1984, which governs admissible evidence and witnesses, “[a]ll persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them...,” including deaf witnesses.<sup>112</sup> However, the prosecution did not assess the witness’s level of language acquisition before calling him to testify. Additionally, the prosecution erred in allowing their own witness to interpret for the deaf man, without an independent assessment of his capability or his oath as required by the expert witnesses requirement of the Qanun-e-Shahadat.<sup>113</sup>

In this case, the deaf witness might not have seen the crime. He was paraded as the mouthpiece of the prosecution. Whether his testimony was his own words remains open to question. The prosecutor did not consider potential conflicts of interest and failed to understand that the witness was not an extension of the complainant. In forcing the witness to speak only through another party, the prosecutor denied him the ability to testify on his own terms and in his words. Although he was competent in Pakistan’s codified Islamic law, he was treated as incompetent as subordinate to a hearing party. Like in the *Human Rights Case*, a Hanafi-influenced law dictated access. Since these cases, neither the courts nor the legislature have made real efforts to remove law enforcement as gatekeepers. As a result, access for deaf and hard of hearing people is not as expansive as the law mandates.

#### IV. CONVERGING SYSTEMS: AS MODERN STATES ADAPT THE SOCIAL MODEL OF DISABILITY RIGHTS WESTERN SOCIETIES ARE CREATING A FRAMEWORK MORE IN LINE WITH THE MODELS BASED ON CLASSICAL ISLAMIC ETHICAL PRINCIPLES

Western disability models are just now catching up to the framework of disability present in the early modern Islamic world. The Ottoman Empire

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<sup>110</sup> Muhammad Mansha v. State, (2019) SCMR (SC) 64, ¶ 2 (Pak.).

<sup>111</sup> *Id.* ¶ 4.

<sup>112</sup> *Id.* ¶ 3; Qanun-e-Shahadat [Law of Evidence] Order, No. 10 of 1984, PAK. CODE (1984), ch. II § 3.

<sup>113</sup> *Id.*

accepted disability as an unremarkable part of society—its rulers and jurists adapted their statutes and rulings to fit the needs of communities that included people who could not hear or speak, who lisped, who had an ambiguous gender identity, or who were touched by divine madness. To illustrate, one of the roles of the state under Islamic law was to collect and distribute social welfare benefits to those unable to work due to their disability.<sup>114</sup> Western law, by contrast, had until the 1970s separated the disabled from abled society, on the basis that the two were fundamentally incompatible. Even in the last few decades, the medical model, placing the burden of managing disability on the individual, was the predominant disability model—and still haunts United States law. The current social model of disability that is starting to take precedence in Western law echoes the community focus of early modern Islamic thinking on disability and codifies it in secular international law.

What are the implications for disability rights internationally? The COVID-19 pandemic threw the tensions within disability law into relief. The unique nature of the disease has created a class of people who, despite having recovered, are still experiencing pulmonary, cardiac, and cognitive symptoms that require them to modify their engagement with work, community, and everyday life.<sup>115</sup> Although under the Americans with Disabilities Act, they would not be eligible for accommodations, they experience severe hardship without them. European Union sufferers may have better luck following the Ring and Werge decisions (which moved temporary conditions into the category of disabilities requiring accommodation), but this has not yet been tested in court. Less wealthy countries like Pakistan may have a stronger incentive to accommodate COVID long-haulers due to fragile medical infrastructure. But given the inconsistent application of non-discrimination law by state entities in Pakistan, the state may be unable to enforce the law.

To fulfill the promise of the social model of disability rights, international and national legislators should make careful comparative study of historical rights across legal systems, because no single legal system

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<sup>114</sup> GHALY, *supra* note 58, at 242–44. For a discussion on underlying historical reasons delineating the role of the state in Islamic finance, see Mohammed Fadel, *Riba, Efficiency, and Prudential Regulation: Preliminary Thoughts*, 25 WIS. INT'L L.J. 655, 665–702 (2008).

<sup>115</sup> See Edith L. Graham et al., *Persistent neurologic symptoms and cognitive dysfunction in non-hospitalized Covid-19 “long haulers,”* 8 ANNALS CLINICAL TRANSLATIONAL NEUROLOGY 1073, 1073 (2021).

available today provides a complete framework for giving people with disabilities full involvement in their societies.

While European and American systems would be hard-pressed to pivot to follow Islamic law structures of textual interpretation, the conception of disability used by Hanafi scholars, as rooted in units of community rather than units of individual people, is adaptable in both the United States and the European Union. Likewise, modern systems with Islamic roots could incorporate the concept of individual rights-holders native to Western legal systems to boost enforcement of their existing law. Those systems should look closely at the Islamic law used before colonization, because the imported law also brought with it less useful attitudes toward disability that impede best practices. International treaties and customs already adopted worldwide, specifically the modification and integration into domestic law of the U.N. Convention on the Rights of Persons with Disabilities (CRPD), would allow all three systems to build on each other's strengths.

The CRPD has been ratified by every European Union member state, ratified by every Arab League member state save for Lebanon, and signed but not ratified by both Lebanon and the United States.<sup>116</sup> The CRPD obliges states parties to create domestic institutions to monitor and support rights for their disabled citizens; to collect data that will allow assessment of whether those domestic institutions are working as intended; establishes a committee to which states parties elect members; requires states parties to submit reports to the committee; and empowers the committee to make recommendations and request assistance from other U.N. treaty bodies.<sup>117</sup> The CRPD is not a legal tribunal and has no court and no legal jurisdiction.<sup>118</sup> However, individuals can submit complaints about violations of their rights under the CRPD to the Committee, which can then request a country visit or amelioration of the complaint by the state party.<sup>119</sup> Because the CRPD does not create an enforcement mechanism, the method by which states parties can adjudicate it will vary; regional human rights courts have the ability to enforce the rights under the CRPD for states party to that

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<sup>116</sup> *Status of Ratification Interactive Dashboard: Convention on the Rights of Persons with Disabilities*, OFFICE OF THE HIGH COMM'R FOR HUMAN RTS., <https://indicators.ohchr.org/>, (last visited June 18, 2021).

<sup>117</sup> Convention on the Rights of Persons with Disabilities, arts. 31–39.

<sup>118</sup> *Id.* For discussion of the ways in which treaty bodies can influence law without adjudication, see YOGESH TYAGI, *THE UN HUMAN RIGHTS COMMITTEE: PRACTICE AND PROCEDURE* (2011).

<sup>119</sup> Comm. on the Rts. of Persons with Disabilities, Rep. on the Work of Its Fifth Session, U.N. Doc. CRPD/C/5/4 (2011).

court's establishing treaty.<sup>120</sup> The CRPD defines disability as “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” and “recognize[s] the equal right of all persons with disabilities to live in the community, with choices equal to others...”<sup>121</sup> As noted above, this bears striking similarities to the focus of Islamic law on community amelioration of disability, albeit in a rights-based formulation. The CRPD can be a powerful tool for synthesizing a better disability rights approach.

For the European Union, the solution is relatively straightforward. The European Court of Rights has jurisdiction over claims brought under the European Convention of Human Rights.<sup>122</sup> Strictly speaking, this court would not have jurisdiction to adjudicate claims brought under the CRPD, which is an independent statute adopted by individual member states rather than the European Union as a whole. However, the European Union has adopted EU-specific versions of several larger treaties, including the European Social Charter (the forerunner of the more expansive International Covenant on Economic, Social and Cultural Rights) and the European Convention for the Prevention of Torture (modelled on the U.N. treaty of the same name).<sup>123</sup> The ECHR is generally willing to incorporate rights granted by outside treaties where there is general European consensus that the right should be part of its practice.<sup>124</sup> Given that every European Union member state has ratified the CRPD, the European Union could adopt the principles of the CRPD with little friction.

The process is more fraught in American law. The United States has not accepted the jurisdiction of the Interamerican Court of Human Rights, which would typically address claims under a human rights treaty.<sup>125</sup> The Supremacy Clause of the Constitution requires that any treaty, to have force in domestic law, be enforced through an act of Congress.<sup>126</sup> The United

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<sup>120</sup> See generally Ilias Bantekas & Lutz Oette, *Regional Human Rights Treaty Systems*, in INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE (3d ed. Cambridge Univ. Press 2020).

<sup>121</sup> Convention on the Rights of Persons with Disabilities, arts. 1, 19.

<sup>122</sup> European Convention of Human Rights art. 32.

<sup>123</sup> See generally European Social Charter of 1961 pmbl., Oct. 18, 1961, E.T.S. No. 35; European Social Charter (Revised) pt. III, art. B, May 3, 1996, E.T.S. No. 163.

<sup>124</sup> See *Selmouni v. France*, App. No. 25803/94 29 Eur. H.R. Rep. 403, 96–97, 101 (2000)

<sup>125</sup> The United States has not ratified the American Convention on Human Rights, which is required for states to consent to the Court's jurisdiction. See Inter-Am. Comm'n H.R., Report on Considerations Related to the Universal Ratification of the American Convention and other Inter-American Human Rights Treaties, OAS/Ser.L/V/II.152 (2014).

<sup>126</sup> *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

States has signed the CRPD, but not yet ratified it (which would be necessary to incorporate it into domestic law). The Senate vote in 2012 failed to ratify it, falling five votes short of the necessary two-thirds ratification requirement.<sup>127</sup> The current Administration could send it again for ratification, although given the obstructionist strategy of the Republican party, who presently hold 50 of the 100 Senate seats, success would be unlikely.<sup>128</sup> A better strategy would be to amend the Americans with Disabilities Act to incorporate the text of the CRPD, which would require the majority votes of usual legislation.<sup>129</sup>

Pakistan's legal system already contains the principles of Classical Islamic law that would allow full implementation of the social model, but the vestiges of British law, stemming from the same tradition that created the medical model of disability, create barriers to implementation of those principles. Pakistan has neither returned to pre-colonization structures (by abolishing its police force, for instance) nor reformed the current post-colonization structure to follow the social model (by explicitly applying disability rights legislation to all levels of government as the European Union has). While the Supreme Court of Pakistan hears some cases, those must filter through its system of appeals, which likely winnows out many cases. Moreover, for those cases to be adjudicated at all the law must recognize the specific right that has been violated. By turning to the Arab Court of Human Rights Pakistan, another regional human rights system, Pakistan and its neighbors could bypass the need to revamp their disability rights statutes. Pakistan is a member of the Organization of Islamic Cooperation, whose members also include all members of the Arab League.<sup>130</sup> The Arab Court of Human Rights was created by the Arab League through the Arab Charter on Human Rights, but its late creation (the first attempt, in 1997, failed to gain enough ratifiers; the current Charter

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<sup>127</sup> Press Release, Am. C.L. Union, ACLU Disappointed With Senate's Failure to Ratify Convention on the Rights of Persons with Disabilities (Dec. 4, 2012), <https://www.aclu.org/press-releases/aclu-disappointed-senates-failure-ratify-convention-rights-persons-disabilities>.

<sup>128</sup> *Party Division: 117th Congress (2021–2023)*, U.S. SENATE, <https://www.senate.gov/about/origins-foundations/parties-leadership.htm> (follow "Party Division" hyperlink; then scroll to 117th Congress) (last visited May 23, 2022).

<sup>129</sup> *The Americans with Disabilities Act Amendments Act of 2008*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, <https://www.eeoc.gov/statutes/americans-disabilities-act-amendments-act-2008> (last visited May 23, 2022).

<sup>130</sup> *Members of the OIC: Organization of Islamic Cooperation*, WORLDDATA.INFO, <https://www.worlddata.info/alliances/oic-islamic-cooperation.php>, (last visited May 23, 2022).

entered into force in 2008) means that the Court has yet to hear any cases.<sup>131</sup> If Pakistan sought admittance to the Arab League, or to join the Arab Charter on Human Rights, it would have a unique opportunity to shape a developing regional human rights court and would be able to shift a heavy burden of court cases to a conglomeration of states which can collectively provide more resources. In the alternative, Pakistan could grant additional individual rights to its citizens either under its own constitution, which espouses ideals of Islamic social justice, or the Islamic tradition of granting rulers of a country the ability to create any law which looks after the public welfare and does not demand sin.<sup>132</sup>

Existing international human rights law structures can provide the scaffolding to incorporate better disability law into domestic law, translate it between treaty contexts, and create adjudication structures where domestic law falls short of its ideals.

## CONCLUSION

Returning to *Witty Anecdotes on Luminaries Afflicted with Disabilities*, we can see that the broad Islamic legal conception of disability inclined the Ottoman Empire to create a robust system of accommodations for deaf and hard of hearing people attempting to access courts. This broad conception led to community-focused accommodations that strikingly mirror the social model of disability championed by disability rights activists in the West over the past twenty years. Yet the difficulty of enforcing this conception of disability rights across a legacy justice system containing fragments of a foreign common law has stymied the efforts of modern state Pakistan to provide broad accommodations for its deaf and hard of hearing citizens. Concurrently, United States law has moved away from the former medical model, which isolated disabled citizens from broader society. However, while the Americans with Disabilities Act attempts to enact a social model of disability and provide the broad accommodations detailed therein, the remains of the medical model blind lawmakers and courts to the actual needs of disabled citizens. The abandonment of the medical model is allowing American and European disability jurisprudence to reflect more of the social access values embodied in the Ottoman Hanafi-inflected jurisprudence, but the process has not been seamless. The European Union's

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<sup>131</sup> INTERNATIONAL COMMISSION OF JURISTS, *THE ARAB COURT OF HUMAN RIGHTS: A FLAWED STATUTE FOR AN INEFFECTIVE COURT* 10 (2015).

<sup>132</sup> See PAKISTAN CONST. pmb.; LOMBARDI, *supra* note 67, at 49.

integration of the social model of disability is more complete, but the ECJ's inconsistent attempts to identify a threshold of disability that necessitates accommodations has left much uncertainty about whether a disabled complainant could have their rights enforced. Luckily, the Convention on the Rights of Persons with Disabilities provides a scaffolding that can support these nations' development of disability rights, whether by joining or modifying a regional human rights court, incorporating a large multinational treaty into regional governing law, or translating treaty provisions to domestic law. As the first modern global pandemic drags on, Islamic and Western legal systems have much to teach each other about making their societies function for, and with, all their members.