

# Michigan Journal of International Law

---

Volume 35 | Issue 2


---

2014

## An Evaluation of the Prospects for Successful Implementation of the Convention on the Rights of Persons with Disabilities in the Islamic World

Brenton Kinker  
*University of Michigan Law School*

Follow this and additional works at: <https://repository.law.umich.edu/mjil>

 Part of the [Civil Rights and Discrimination Commons](#), [Disability Law Commons](#), [Human Rights Law Commons](#), and the [Religion Law Commons](#)

---

### Recommended Citation

Brenton Kinker, *An Evaluation of the Prospects for Successful Implementation of the Convention on the Rights of Persons with Disabilities in the Islamic World*, 35 MICH. J. INT'L L. 443 (2014).  
Available at: <https://repository.law.umich.edu/mjil/vol35/iss2/4>

This Note is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

## NOTE

# AN EVALUATION OF THE PROSPECTS FOR SUCCESSFUL IMPLEMENTATION OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES IN THE ISLAMIC WORLD

*Brenton Kinker\**

INTRODUCTION.....	444
I. HISTORY OF THE CONVENTION.....	445
A. <i>The Movement Behind the Convention</i> .....	445
B. <i>Provisions of the CRPD</i> .....	448
C. <i>Disability as Used by the Convention</i> .....	451
II. HISTORY OF ISLAMIC LAW .....	453
A. <i>Sources of Islamic Law</i> .....	453
1. The Qur'an.....	454
2. The Sunnah .....	455
3. Ijma.....	457
4. Qiyas.....	457
5. Ijtihad.....	458
B. <i>Disability as defined in Islamic law</i> .....	459
III. COMPARING THE TWO LEGAL FRAMEWORKS.....	460
A. <i>Political Rights</i> .....	460
1. Political Rights under the Convention .....	460
2. Political Rights in Islamic Law .....	462
B. <i>Economic Rights</i> .....	464
1. Economic Rights under the Convention .....	464
2. Economic Rights in Islamic Law .....	465
C. <i>Social Rights</i> .....	467
1. The Right to Social Security and Health .....	467
2. The Right to Education.....	472
D. <i>Cultural Rights</i> .....	474
1. Cultural Rights under the CRPD .....	474
2. Under Islamic Law .....	474
E. <i>Civil Rights</i> .....	477
1. Women.....	477
2. Legal Capacity of the Mentally Disabled .....	479
CONCLUSION .....	483

---

\* J.D., 2012, University of Michigan Law School. I am grateful for the dedicated editors of the *Michigan Journal of International Law* who made this paper possible. I am also thankful for the guidance provided by Dr. Vira Zemlyanska and Dr. Uma Sajjan.

## INTRODUCTION

The Convention on the Rights of Persons with Disabilities<sup>1</sup> (CRPD) is a ground-breaking human rights treaty focused on the protection of the disabled. Like the Convention on the Rights of the Child<sup>2</sup> and the Convention to End All Forms of Discrimination Against Women,<sup>3</sup> the CRPD expressly extends many of the protections laid out in existing, general human rights treaties to persons with disabilities. As U.N. Secretary General Kofi Annan remarked, the CRPD was “the first human rights treaty to be adopted in the twenty-first century; the most rapidly negotiated human rights treaty in the history of international law; and the first to emerge from lobbying conducted extensively through the Internet.”<sup>4</sup> Supporters hoped that a set of international minimum standards would galvanize individual nations to pass their own domestic legislation respecting similar rights.<sup>5</sup>

As of October 2013, a number of predominantly Muslim nations have signed and ratified the CRPD, among them Algeria, Egypt, Iran, Lebanon, Syria, and the United Arab Emirates.<sup>6</sup> Although only Iran and Egypt entered reservations to the Convention, the perceived conflicts between Islamic Law and the Convention’s human rights framework were discussed throughout negotiations and questions still remain as to how the Convention’s obligations will be shaped by Islamic law. At the very least, because many citizens of Muslim nations turn to religious leaders for questions relating to both political issues and Islamic law,<sup>7</sup> implementation of the CRPD will necessarily be influenced by religious views.<sup>8</sup>

This question of implementation will also be influenced by history. The Universal Declaration of Human Rights (UDHR) debates occurred in December 1948, when many Muslim majority nations were just gaining independence from their powerful colonizers. Although a number of the UDHR’s provisions were non-controversial, many led to genuine conflict

---

1. Convention on the Rights of Persons with Disabilities, *opened for signature* Dec. 13, 2006, 2515 U.N.T.S. 3 (entered into force May 3, 2008) [hereinafter CRPD].

2. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC].

3. Convention on the Elimination of All Forms of Discrimination against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13 (entered into force Sept. 3 1981).

4. Press Release, Secretary-General, Secretary-General Hails Adoption of Landmark Convention on Rights of People with Disabilities, U.N. Press Release SG/SM/10797 (Dec. 13, 2006), available at <http://www.un.org/News/Press/docs//2006/sgsm10797.doc.htm>.

5. *See id.*

6. *See* CRPD *supra* note 1.

7. As opposed to political leaders, who are often seen as corrupt and influenced by foreign states. *See* IRENE OH, THE RIGHTS OF GOD: ISLAM, HUMAN RIGHTS, AND COMPARATIVE ETHICS 6 (Sumner B. Twiss et al. eds., 2007).

8. *See* MAJID TURMUSANI, DISABLED PEOPLE AND ECONOMIC NEEDS IN THE DEVELOPING WORLD: A POLITICAL PERSPECTIVE FROM JORDAN 48 (2003) (“In reality, however, Muslim society has often failed to live up to [Islam’s ideal of equality] as disabled people continue to be excluded from mainstream society on religious grounds as much as on other social and economic grounds.”).

and resistance, with fledgling Muslim nations ultimately losing many of these debates to more powerful nations and their allies.<sup>9</sup> Accordingly, formal political acceptance of human rights treaties may nonetheless mask internal disagreement and debates as to implementation.<sup>10</sup>

Yet these previous human rights treaties are important to the CRPD. The CRPD closely follows the format of the Convention on the Rights of the Child (CRC), restating basic human rights principles and then applying them to its targeted group.<sup>11</sup> Starting with introductory Articles of universal application,<sup>12</sup> it progresses to specific substantive and procedural rights,<sup>13</sup> and creates a monitoring system to oversee implementation.<sup>14</sup> Finally, the Convention lays out the process by which it enters into force, and by which reservations and amendments might be made.<sup>15</sup> This note will focus on Articles 1-30, as Shari'a does not concern itself with modern monitoring mechanisms of multilateral agreements.

This note will examine the CRPD's aspirations in light of Islamic law, comparing whether the two are—or can be—consistent. Part I will provide background on the CRPD, including the intent of the treaty, the negotiations leading to the final wording, and the solid obligations it contains for state parties. Part II examines the background of Shari'a and its provisions regarding disability. Part III compares the treatment of the disabled under Islamic law with that required by the CRPD in order to gauge consistency. Where tensions exist, alternative interpretations of both Islamic law and the CRPD are proposed that might facilitate balance between Shari'a principles and those of the CRPD.

## I. HISTORY OF THE CONVENTION

This Part explores the history of the Convention as well as its impetus, and then provides a brief definition of disability under the CRPD and other international instruments.

### A. *The Movement Behind the Convention*

The CRPD is the end result of a movement beginning in the early 1970s that raised the profile of persons with disabilities and demanded in-

---

9. OH, *supra* note 7, at 20.

10. See, e.g., Kamran Hashemi, *Religious Legal Traditions, Muslim States and the Convention on the Rights of the Child: An Essay on the Relevant UN Documentation*, 29 HUM. RTS. Q. 194, (2007) (discussing the importance of Islamic law for implementation by Muslim countries of the Convention on the Rights of the Child).

11. Michael Ashley Stein & Janet E. Lord, *Jacobus Tenbroek, Participatory Justice, and the UN Convention on the Rights of Persons with Disabilities*, 13 TEX. J. C.L. & C.R. 167, 174 (2007).

12. See CRPD, *supra* note 1, arts. 1–7.

13. *Id.* arts. 8–30.

14. *Id.* arts. 31–40.

15. *Id.* arts. 41–50.

ternational action to protect this population.<sup>16</sup> The United Nations responded to this movement by adopting the Declaration on the Rights of Mentally Retarded Persons in 1971,<sup>17</sup> and in 1975 adopted the Declaration on the Rights of Persons with Disabilities.<sup>18</sup> In 1982, the General Assembly formulated the World Programme of Action Concerning Disabled Persons in an attempt to encourage state action to achieve equality for their citizens with disabilities.<sup>19</sup> Finally, in 1993 the United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities were adopted to encourage cooperation and the creation of policymaking guidelines.<sup>20</sup>

Despite the tremendous progress made between the 1970s and 1990s, the existing framework was still inadequate for the protection of persons with disabilities.<sup>21</sup> The initiatives of these two decades “lack[ed] legally binding character, and also set forth an outmoded, medical and charity-based understanding of disability.”<sup>22</sup> For example, Article 1 of the 1971 Declaration on the Rights of the Mentally Handicapped affirms that “the mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings.”<sup>23</sup> However, no other human rights treaty guarantees rights based on “feasibility,”<sup>24</sup> and such language arguably runs contrary to Universal Declaration of Human Rights’ Article 1, which states that “all human beings are born free and equal in dignity and rights.”<sup>25</sup>

These previous attempts to combat discrimination against persons with disabilities were also incomplete in their protections and generally

16. ANDREAS DIMOPOULOS, ISSUES IN HUMAN RIGHTS PROTECTION OF INTELLECTUALLY DISABLED PERSONS 68 (Sheila McLean ed., 2010).

17. Declaration on the Rights of Mentally Retarded Persons, G.A. Res. 2856 (XXVI), U.N. GAOR, 26th Sess., Supp. No. 29, U.N. Doc. A/8429, at 93 (Dec. 20, 1971).

18. Declaration on the Rights of Disabled Persons, G.A. Res. 3447 (XXX), U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/10034, at 88 (Dec. 9, 1975) [hereinafter Declaration].

19. World Programme of Action Concerning Disabled Persons, G.A. Res. 37/52, U.N. GAOR, 37th Sess., Supp. No. 51, U.N. Doc. A/37/52, at 185 (Dec. 3, 1982) (providing that “Member States should urgently initiate long-term programmes to achieve the objectives of the World Programme of Action; such programmes should be an integral component of the nation’s general policy for socio-economic development.”).

20. Standard Rules on the Equalization of Opportunities for Persons with Disabilities, G.A. Res. 48/96, U.N. GAOR, 48th Sess., Supp. No. 49 U.N. Doc. A/48/49, at 202 (Dec. 20, 1993).

21. Michael Ashley Stein & Janet E. Lord, *Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities*, in THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, EUROPEAN AND SCANDINAVIAN PERSPECTIVES 17, 21–23 (Oddny Mjöll Arnardottir & Gerard Quinn eds., 2009).

22. *Id.* at 22.

23. DIMOPOULOS, *supra* note 16, at 69 (referencing Declaration on the Rights of Mentally Retarded Persons, *supra* note 17, at 96).

24. *Id.* at 69.

25. *Id.* (referencing the Universal Declaration of Human Rights art. 1, G.A. Res. 217 (III)A, U.N. Doc A/RES/217(III), art. 1 (Dec. 10, 1948) [hereinafter UDHR]).

obtained poor results. At the beginning of the 21st century, vast inequalities still existed for the disabled in society. For example, in Orissa, India, a study found that 25% of women with intellectual disabilities had been raped, 6% of women with disabilities had been forcibly sterilized, and virtually all sampled were the subject of domestic abuse.<sup>26</sup> During the same era, global literacy rates for the disabled hovered around 3%, and unemployment among persons with disabilities was as high as 80% in some countries.<sup>27</sup> A British study in 2004 found that disabled victims of rape and violence were less likely to obtain police intervention, legal protection, and preventative care.<sup>28</sup>

These results also occurred despite the clear obligations declared in the two most important general human rights treaties. The Universal Declaration of Human Rights (UDHR) of 1948, for instance, expressly declares that all are equal before the law,<sup>29</sup> that all have the right to education,<sup>30</sup> and that all have an equal right to work.<sup>31</sup> Similarly, the International Covenant on Civil and Political Rights secures the right to education,<sup>32</sup> the right to an adequate standard of living,<sup>33</sup> and the right to work.<sup>34</sup> Thus, even though “[t]heoretically there was no need for a new convention” to obtain actual protections for the disabled,<sup>35</sup> the General Assembly in 2001 nevertheless created an ad-hoc committee to explore

---

26. Factsheet on Persons with Disabilities, U.N. ENABLE, <http://www.un.org/disabilities/default.asp?navid=33&pid=18> (last visited Mar. 15, 2014).

27. *Id.* at 2.

28. *Id.* at 3.

29. UDHR, *supra* note 25, art. 7.

30. *Id.* art. 26.

31. *Id.* art. 23.

32. Int'l Covenant on Econ., Soc., and Cultural Rights, G.A. Res. 2200, U.N. Doc. A16316, art. 13 (Dec. 16, 1966) [hereinafter ICESCR], available at <http://www2.ohchr.org/english/law/cescr.htm>.

33. *Id.* art. 11.

34. *Id.* art. 6.

35. Statements made on the Adoption of the Convention on the Rights of Persons with Disabilities, *New Zealand*, U.N. ENABLE, available at <http://www.un.org/disabilities/default.asp?id=155#nz> (last visited Mar. 15, 2014). As Ambassador MacKay, Chair of the Ad Hoc Committee noted:

Theoretically there was no need for a new convention, because the existing human rights instruments apply to persons with disabilities, in just the same way that they do to everyone else. The reality, unfortunately, has not followed the theory. The existing human rights instruments have fallen far short in their protection of the human rights and fundamental freedoms guaranteed to persons with disabilities. This does not mean States have deliberately avoided their obligations. But many of the obligations under other instruments are set out in quite a broad and generic way, which can leave grey areas for their practical implementation in respect of particular groups.

*Id.*

“proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities.”<sup>36</sup>

The ad-hoc committee held its first session in 2002, and its work would eventually culminate in the Convention on the Rights of Persons with Disabilities.<sup>37</sup> The purpose of the Convention was to “ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”<sup>38</sup> Its entry into force signaled a paradigm shift in the international treatment of those with disabilities.<sup>39</sup> As the culmination of a decades long advocacy effort by NGOs, private individuals, and national governments to change the status quo,<sup>40</sup> the Convention was negotiated and entered into force in less than five years, on May 3rd, 2008.<sup>41</sup> It also had the highest number of signatories on opening day—82—of any treaty in the history of the UN.<sup>42</sup> As described by the UN, the CRPD is “the first comprehensive human rights treaty of the 21st century.”<sup>43</sup>

### B. Provisions of the CRPD

The Convention is uniquely comprehensive in that it integrates civil, political, social, and economic rights for persons with disabilities within a single framework.<sup>44</sup> The CRPD therefore rejects the notion that rights can be disentangled, and affirms that all rights are interrelated, unlike many previous United Nations human rights treaties.<sup>45</sup> Perhaps even more importantly, the Preamble describes disabilities not as an individual’s condition, but as the flawed interaction between the impairment and society: “Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudi-

---

36. G.A. Res. 56/168, ¶1, U.N. Doc. A/RES/56/168 (Dec. 19, 2001).

37. See Review of the Work of the *Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, U.N. ENABLE, <http://www.un.org/disabilities/default.asp?id=1423> (last visited Mar. 15, 2014).

38. Rodrigo Jiménez Sandoval, *Gender in the Convention on the Rights of Persons with Disabilities*, 60 ALA. L. REV. 1197, 1199 (2009).

39. Janet E. Lord & Michael Ashley Stein, *Social Rights and the Relational Value of the Rights to Participate in Sport, Recreation, and Play*, 27 B.U. INT’L L.J. 249, 254 (2009).

40. Arlene S. Kanter, *The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities*, 34 SYRACUSE J. INT’L L. & COM. 287, 288 (2007).

41. *Id.* The CRPD entered into force on May 3, 2008. Landmark UN Treaty on Rights of Persons with Disabilities Enters into Force, U.N. NEWS CENTRE (May 3, 2008), <http://www.un.org/apps/news/story.asp?NewsID=26554&Cr=disab&Cr1>.

42. Information on the *Convention on the Rights of Persons with Disabilities and Optional Protocol*, U.N. ENABLE, <http://www.un.org/esa/socdev/enable/conventioninfo.htm> (last visited Mar. 15, 2014).

43. *Id.*

44. Arlene S. Kanter, *The United Nations Convention on the Rights of Persons with Disabilities and Its Implications for the Rights of Elderly People under International Law*, 25 GA. ST. U. L. REV. 528, 553 (2007).

45. See *id.* at 554.

nal and environmental barriers that hinders their full and effective participation in society on an equal basis with others . . . .”<sup>46</sup>

Also recognizing the “indivisibility, interdependence and interrelatedness” of the rights it contains,<sup>47</sup> the CRPD echoes the principles of the Vienna Declaration.<sup>48</sup> The CRPD thereby “renders traditional distinctions between formal and substantive equality largely irrelevant by providing broad mandates and setting forth an equality framework that reflects and expands upon formal equality.”<sup>49</sup>

The CRPD also contains important monitoring and implementation obligations for member states.<sup>50</sup> For instance, to “help assess the implementation of State Parties’ obligations,” and to ensure better data regarding the barriers faced by persons with disabilities, Article 31 requires member states to undertake robust data collection and statistical analysis.<sup>51</sup> State Parties are also required to designate a point of contact agency for implementation of the treaty, and must involve civil society in the monitoring process.<sup>52</sup>

Additionally, states must submit a comprehensive report on measures taken to operationalize the CRPD and any progress made within two years after the entry into force of the Convention.<sup>53</sup> Thereafter, parties to the CRPD must submit subsequent reports at least every four years or whenever the Committee so requests.<sup>54</sup> A Guidelines document outlines the areas of interest about which these reports must provide information.<sup>55</sup> As an example, the first report submitted by Tunisia tracks the Articles and requirements of the CRPD, lists recent domestic reforms that have impacted persons with disabilities, and provides a categorized demographic and statistical overview of the domestic disabled population.<sup>56</sup>

---

46. CRPD, *supra* note 1, pmb1, para. (e).

47. *Id.* para. (c).

48. Lord, *supra* note 39, at 260 n. 62.

49. *Id.* at 259.

50. *See* CRPD, *supra* note 1, arts. 31–40.

51. *Id.* art 31.

52. *Id.* art 33.

53. *Id.* art 35.

54. *Id.*

55. *See* Comm. on the Rights of Persons with Disabilities, Guidelines on Treaty-Specific Document to be Submitted by States Parties under Article 35, Paragraph 1, of the Convention on the Rights of Persons with Disabilities, 2nd Sess., Oct. 19–23, 2009, U.N. Doc. CRPD/C/2/3 (Nov. 18, 2009), available at <http://www2.ohchr.org/SPdocs/CRPD/CRPD-C-2-3.doc>. A number of states actively compile such information. For example, Australia maintains a “Disability Services National Minimum Data Set on government-funded disability services . . . . provid[ing] nationally comparable data.” *Australia’s Initial Report Under the Convention on the Rights of Persons with Disabilities*, ¶202, AUSTRALIAN GOV’T <http://www.ag.gov.au/RightsAndProtections/HumanRights/ReportCRPD/Pages/PartDArticles3133.aspx> (last visited Mar. 15, 2014).

56. *See* Implementation of the International Convention on the Rights of Persons with Disabilities, Initial Report Submitted by Tunisia, July 1, 2010, U.N. Doc. CRPD/C/TUN/1 (July 14, 2010).



A State will occasionally request an impartial observer to offer recommendations on how it can best implement the CRPD and to chart its progress. Recently, Qatar invited Shuaib Chalklen, the U.N. Special Rapporteur on Disability to engage civil society and the government in dialogue on the implementation of the CRPD.<sup>57</sup> After a brief inspection, Mr. Chalklen was able to recommend concrete policies that would further enable Qatar to meet the needs of its disabled citizens. Should voluntary implementation of the CRPD fail, an Optional Protocol addresses group complaints,<sup>58</sup> enabling the Committee on Persons with Disabilities to decide whether a party has been wronged, but with only the power to recommend corrective actions.<sup>59</sup>

Because the Convention has not been ratified by all signatories (for example, the United States and Libya), those signatories that have not ratified it are governed by the Vienna Convention on the Law of Treaties, which requires mere signatories to “refrain from acts which could defeat [the Convention’s] object and purpose.”<sup>60</sup> Those States that have ratified the Convention also have affirmative obligations with regard to the rights guaranteed by the Convention. Specifically, a “party may not invoke the provision of its internal law as justification for its failure to perform a treaty.”<sup>61</sup>

Both the Islamic Republic of Iran and Malaysia have drawn ire from the international community for their reservations to the CRPD, which seemingly defeated the Convention’s central object and purpose.<sup>62</sup> Iran, for instance, asserted that it did not consider itself bound by any provision

---

57. U.N. Special Rapporteur on Disability, *Mission to Qatar: Preliminary Observations*, (Mar. 9–13, 2010) (by Shuaib Chalklen), available at [http://www.un.org/disabilities/documents/specialrapporteur/qatar\\_2010.doc](http://www.un.org/disabilities/documents/specialrapporteur/qatar_2010.doc).

58. U.N. Secretary-General, *Final Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, U.N. Doc.A/61/611 (Dec. 6, 2006) [Hereinafter *Optional Protocol*], available at [http://treaties.un.org/doc/source/docs/A\\_61\\_611\\_E.pdf](http://treaties.un.org/doc/source/docs/A_61_611_E.pdf).

59. *Id.* art. 6.

60. Vienna Convention on the Law of Treaties art. 18, May 22, 1969, 1155 U.N.T.S. 331.

61. *Id.* art. 27.

62. See CRPD, *supra* note 1. For a sampling of the anger generated by Iran’s reservation, consider Mexico’s comment (one of the nine comments) addressing the international community’s concern:

*With regard to the reservation made by the Islamic Republic of Iran upon accession:*

[T]he United Mexican States has concluded that . . . the declaration is worded in such a way that it could hinder the realization of normative provisions of the Convention, including those of articles 4 and 1, and thus is in breach of article 46 of the Convention and article 19 of the Vienna Convention on the Law of Treaties. . . The claim that domestic laws take precedence over the provisions of treaties that are in force for the Parties is therefore inadmissible.

*Id.*

of the CRPD inapplicable with its own domestic rules.<sup>63</sup> Although these reservations engendered an outcry from the international community,<sup>64</sup> all formal condemnations importantly included language suggesting the CRPD was binding upon these two condemned countries.<sup>65</sup>

### C. *Disability as used by the Convention*

“Disability” is a contentious and complex term and thus has no uniform definition under international law.<sup>66</sup> For instance, the World Health Organization (WHO) defines disability as “an umbrella term, covering impairments, activity limitations, and participation restrictions.”<sup>67</sup> Under this definition, “impairment” refers to “a problem in body function or structure”; “activity limitation” refers to “a difficulty encountered by an individual in executing a task or action”; and “participation restriction” refers to “problem[s] experienced by an individual in involvement in life situations.”<sup>68</sup>

This language is similar to that used by the United Nations Declaration on the Rights of Disabled Persons, which defines the term “disabled person” to mean “any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of a deficiency, either congenital or not, in his or her physical or mental capacities.”<sup>69</sup>

Interestingly, the CRPD itself does not define disability, though the Committee did examine multiple potential definitions of disability, including the definition contained in the 1999 Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, as well as the term’s treatment under municipal law.<sup>70</sup> Some Committee members feared that without a solid definition of disability, States would rely on inadequate domestic laws to exclude people from legal pro-

---

63. *Id.*

64. *Id.*

65. *Id.*

66. *See, e.g.,* Adam M. Samaha, *What Good is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251, 1252 (2007) (discussing the various definitions and models of disability).

67. *Health Topics: Disabilities*, WORLD HEALTH ORGANIZATION [WHO], <http://www.who.int/topics/disabilities/en/> (last visited Mar. 15, 2014).

68. *Id.*

69. Declaration, *supra* note 18.

70. *See also* Press Release, General Assembly, Disability Convention Drafting Committee Discusses International Monitoring, International Cooperation, Definition of Disability, U.N. Press Release SC/4709 (Aug. 15, 2006), *available at* <http://www.un.org/News/Press/docs/2006/soc4709.doc.htm>. The 1999 Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities defined “disability” as: “[A] physical, mental, or sensory impairment, whether permanent or temporary, that limits the capacity to perform one or more essential activities of daily life, and which can be caused or aggravated by the economic and social environment.” Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons With Disabilities art. 1, *adopted* June 7, 1999, AG/RES. 1608 (XXIX-O/99) (entered into force Sept. 14, 2001), *available at* <http://www.oas.org/juridico/english/ga-res99/eres1608.htm>.

tection and thereby undermine the Convention.<sup>71</sup> However, the Chairman of the Committee noted at the end of the 7th session of negotiations that “[v]iews are divided as to whether it is necessary to define ‘Disability’ and ‘Persons with disabilities.’ I tend to think that we don’t, as this will be very difficult, and there is a risk that we will unintentionally exclude someone.”<sup>72</sup>

The closest the CRPD comes to a definition of disability is in Article 1, where it states “[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”<sup>73</sup> This monolithic description is true to the Chairman’s wishes that it does not exclude, but also seems to do a poor job of defining just who deserves what protections. Nevertheless, the result of this description, in the words of the National Human Rights Institutions, was a Convention that “[views] persons with disabilities as subjects and not as objects,” as people with rights, not a “problem” that society must somehow deal with.<sup>74</sup> This view is present in Article I of the Convention, which asserts, “[t]he purpose of the Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”<sup>75</sup> The CRPD thereby avoids defining “disability” so that its enshrined rights may be interpreted broadly across diverse human conditions and legal systems.

Furthermore, although the CRPD lacks a definition of “disability,” it *does* speak of discrimination on the basis of a disability as “any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment, or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”<sup>76</sup> Non-discrimination also appears as one of the General Principles in Article 3.<sup>77</sup>

---

71. Arlene S. Kanter, *The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities*, 34 SYRACUSE J. INT’L L. & COM. 287, 291 (2007).

72. U.N. Ad Hoc Comm. on a Comprehensive and Integral Int’l Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Letter Dated 7 October 2005 from the Chairman to all Members of the Committee, ¶17, 7th Sess., Jan. 16–17, 2006, U.N. Doc. A/AC.265/2006/1 (Oct. 14, 2005).

73. CRPD, *supra* note 1, at 7.

74. Ad Hoc Comm. on a Comprehensive and Integral Int’l Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Statement on behalf of National Human Rights Institutions, 9th Sess., Aug. 14–25, Dec. 5, 2006, (Dec. 5, 2006), *available at* <http://www.un.org/esa/socdev/enable/rights/ahc8.htm>.

75. CRPD, *supra* note 1, at 7.

76. *Id.*

77. The Convention addresses non-discrimination as one of the principles of the instrument in Article 3:

The Principles of the present Convention shall be: A) Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons; B) Non-discrimination; C) Full and effective participation

Similarly, Article 4 requires states to take appropriate steps to eliminate discrimination on the basis of disabilities and consult with those living with disabilities, including children, through civil society organizations.<sup>78</sup> And, affirming these measures, Article 5 requires equality before the law and equal benefit of the law, while Articles 6 and 7 specify non-discrimination for women<sup>79</sup> and children.<sup>80</sup>

## II. HISTORY OF ISLAMIC LAW

This Part briefly examines the history, jurisprudence, and general principles underlying the application of Islamic law. It then defines the scope of disability in Islamic legal thinking.

### A. Sources of Islamic Law

At its core, Islam entails a belief in the fact of a single God<sup>81</sup> (Allah) and adherence to Allah's commandments.<sup>82</sup> As Islam rapidly expanded, so too did the interpretations that came to be applied to Allah's commandments. Jaded by Umayyad application of Islamic Law (Shari'a), different schools of legal thought began to grow in the major cities of the Islamic empire.<sup>83</sup> From these different schools, four sources of law (*usul al-fiqh*) became authoritative bases for legal judgments.<sup>84</sup> Because the potential range of human actions are infinite, Islamic law grounds judgment (*dalil*) primarily within two sources: the Qur'an and the Sunna.<sup>85</sup> Secondly, *ijtihad*, *dalil* based on the consensus of the Islamic community (*ijma*), and the practice of analogies based on reason and similarity (*qiyas*), can be used to arrive at truth, though all of these sources are themselves rooted in

---

and inclusion in society; D) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; E) Equality of opportunity; F) Accessibility; G) Equality between men and women; H) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

*Id.* art. 3.

78. *Id.*

79. *Id.* art. 5.

80. *Id.*

81. "And your god is one God. There is no deity [worthy of worship] except Him, the Entirely Merciful, the Especially Merciful." Qur'an 2:163.

82. See JOHN L. ESPOSITO, *WOMEN IN MUSLIM FAMILY LAW 1* (1982) (identifying the basis of Islamic belief).

83. *Id.* at 2.

84. *Id.* Within each school, Shari'a was studied and distilled in an effort to undertake such judgments within a divine understanding (*fiqh*). See *id.* at 9.

85. See *Muwatta Malik*, 46:3, available at <http://sunnah.com/urn/416890> ("I have left two matters with you. As long as you hold to them, you will not go the wrong way.").

the Qur'an and the Sunna.<sup>86</sup> Like all law, Shari'a represents a reasoned extension of core principles.<sup>87</sup>

Shari'a is not monolithic. The primary sources of law address some topics in depth, while ignoring others. Insofar as ignored areas are not covered by a means of Islamic jurisprudence (*fiqh*), the default guidance of the Qur'an is permissibility.<sup>88</sup>

Shari'a is overwhelmingly concerned with the practical aspects of life in the religious community (*ummah*), and does not distinguish between the public and private or state action and individual requirements.<sup>89</sup> As such, it should be noted that "[i]n terms of subject matter the hold of Shariah was and is strongest in the area of personal status (marriage, divorce, maintenance, matters of minors such as custody and guardianship, and inheritance), and weakest or non-existent in areas such as penal law, taxation, and constitutional law."<sup>90</sup>

### 1. The Qur'an

The Qur'an is an amalgamation of revelations of Allah to Muhammad between (approximately) 610 A.D. and 632 A.D., and ending with Muhammad's death.<sup>91</sup> The Qur'an is the revelation of Allah to mankind detailing the divine path to be followed: "Here is a plain statement to men, a guidance and instruction to those who fear God."<sup>92</sup> Textually, the Qur'an is divided into 144 *suras* (chapters), containing 6,236 *ayat* (verses),

---

86. ESPOSITO, *supra* note 82, at 7-8.

87. ABDULLAHI AHMED AN-NA'IM, *TOWARD AN ISLAMIC REFORMATION* 11 (1st ed. 1990) ("The sources and development of Shari'a will show that Shari'a, as known to Muslims today, is not divine in the sense of being direct revelation. Rather, it is the product of a process of interpretation of, and logical derivation from, the text of the Qur'an and Sunna and other traditions.").

88. YUSUF AL-QARADAWI, *THE LAWFUL AND THE PROHIBITED IN ISLAM* 7 (2d. ed. 2001).

The first asl', or principle, established by Islam is that the things which Allah has created and the benefits derived from them are essentially for man's use, and hence are permissible. Nothing is haram except what is prohibited by a sound or explicit nas (i.e. text) from the Law-Giver. . . He has prohibited only a few things for a specific reason. In Islam the sphere of prohibited things is very small, while that of permissible things is extremely vast. There is only a small number of sound and explicit texts concerning prohibitions, while whatever is not mentioned in a nas as being lawful or prohibited falls under the general permissibility of things and within the domain of Allah's favour.

*Id.* at 6-7.

89. See KEITH HODKINSON, *MUSLIM FAMILY LAW: A SOURCEBOOK* 1 (1984) (noting that Shari'a makes "little distinction between moral, ethical and (in a Western sense) legal questions").

90. JOSEPH SCHACHT, *AN INTRODUCTION TO ISLAMIC LAW* 76 (1964).

91. Bharathi Anandhi Venkatraman, *Islamic States and the United Nations Convention on the Elimination of all Forms of Discrimination Against Women: Are the Shari'a and the Convention Compatible?*, 44 AM. U.L. REV. 1949, 1965 (1995).

92. Qur'an 3:138.

and is considered the authoritative word of Allah. Out of these 6,236 ayat, only 80 provide legal requirements.<sup>93</sup> Therefore, the Qur'an is not a "law book, i.e., not a collection of prescriptions providing a legal system."<sup>94</sup> Instead, the Qur'an is seen by Sunni scholars as reforming pre-Islamic tribal practices via a gradually evolving legal and moral system.<sup>95</sup>

Consider for example, as Esposito does,<sup>96</sup> the evolution of the law regarding alcohol:

In the early years the use of alcohol and gambling had not been prohibited and hence, the old custom continued to be followed. The first prescriptions against the old custom is given in the form of advice: "They ask thee concerning wine and gambling. Say: In them is great sin and some profit, for man; but the sin is greater than the profit" (II:219). Later, Muslims were prohibited from offering prayers in drunkenness: "O ye who believe! Approach not prayers with a mind befogged, until ye can understand all that ye say" (IV:43). Later still, liquor and gambling were fully prohibited with the explanation: "Satan's plan is [but] to excite enmity and hatred between you with intoxicants and gambling, and hinder you from the remembrance of God and from prayer: Will ye not then abstain?" (V:94).

These and other such prohibitions were enacted as to a range of behavior, from inheritance rights<sup>97</sup> to the status of women in marriage.<sup>98</sup>

## 2. The Sunnah

As Esposito notes, the Sunnah, or the behavior of the Prophet Muhammad, is divided into three categories: 1) the statements and sayings of Muhammad (*al-sunnah al-qawliyah*), 2) Muhammad's actions (*al-sunnah al-filiyah*), and 3) Muhammad's approval of or silence toward practices he has knowledge of (*al-sunnah al-taqiririyah*).<sup>99</sup> Combined, the Sunnah is considered an authoritative source of God's will: "O ye who believe, obey God and obey the Apostle . . . if ye differ in anything, refer it to God and His Apostle."<sup>100</sup> Consider also the pronouncement of sura 33, ayat 21: "Ye have indeed in the Apostle of God a beautiful pattern of conduct for any one whose hope is in God and the Final Day."<sup>101</sup> The Sunnah of the Prophet was recorded in the *hadiths*, a compendia of Muhammad's actions and sayings.

---

93. ESPOSITO, *supra* note 82, at 3.

94. *Id.* at 2.

95. HODKINSON, *supra* note 89, at 8.

96. Esposito, *supra* note 82, at 4.

97. Venkatraman, *supra* note 91, at 1966-67.

98. ESPOSITO, *supra* note 82, at 4.

99. *Id.* at 5-6.

100. Qur'an 4:59.

101. Qur'an 33:21.

The *hadiths* are diverse sets of writings, and early on there were concerns about fabricated *hadiths*. The Umayyad caliph Umar II (d. 720) supposedly compiled the first *hadith* collections in an official manner.<sup>102</sup> Compilation was so long in coming because the Prophet, and the first four Caliphs, were concerned that any written material other than the Qur'an might be confused as the authoritative word of Allah.<sup>103</sup> Because they were not authoritatively assembled until the 9th century, Muslims feared that the *hadith* may have been corrupted.<sup>104</sup>

“Recognition that the *hadith* literature included many fabrications led to a concerted effort to distinguish more clearly authentic traditions. These *hadiths* were evaluated through a painstaking attempt which produced the new Muslim science of *hadith* criticism (*mustalah al-hadith*).”<sup>105</sup> Painstaking effort was taken to sort *hadiths* into trustworthy and untrustworthy categories, based on the genealogy of narration,<sup>106</sup> as well as the analysis of its *matn* (matter).<sup>107</sup> Thus, Muslims view with scepticism weak *hadiths*, but generally believe the stronger *hadiths* to be authentic. Most Muslim scholars consider the traditional canonical *hadith* collections as authentic,<sup>108</sup> but there is still disagreement over trustworthiness even within these collections.

---

102. See HERBERT BERG, *THE DEVELOPMENT OF EXEGESIS IN EARLY ISLAM, THE AUTHENTICITY OF MUSLIM LITERATURE FROM THE FORMATIVE PERIOD* 7 (2000).

103. *Id.*

104. See S. G. Vesey-Fitzgerald, *Nature and Sources of the Shari'a*, in 1 *LAW IN THE MIDDLE EAST* 85 (Majid Khadduri & Herbert J. Liebesny eds., 1995).

That there has been wholesale fabrication of traditions is universally admitted by Muslim and Western scholars alike. Indeed, the existence and danger of such fabrication was well known from almost the earliest period of Islam. At first it may have been innocent enough. Many of the Companions were people who had known the Prophet intimately; and the psychological step from feeling confident of what the Prophet's view would probably have been to persuading oneself that he had in fact so decided is one which an honest mind might easily take without being conscious that it has crossed the border between opinion and fact. As time went on, many of the traditions were obviously attempts to read back the controversies, or the conditions of later ages, into that earlier period from which guidance was sought.

*Id.* at 93.

105. ESPOSITO, *supra* note 82, at 6.

106. These categories are: *mutawatir* (continuous), *mashhur* (well-known), and *ahad* (isolated), with *ahad* considered the weakest chain of narrative. *Id.*

107. This method was used by “asking if this matter contradicted the Qur'an, a verified tradition, reason, or the consensus of the community.” *Id.*

108. Berg outlines the compilations of *hadith* with classical canonical status as: *al-Jami'al-sahih* of Abu Abd Allah Muhammad ibn Isma'il al-Bukhari (d. 870), and *al-Jami al-sahih* of Abu al-Husayn Muslim ibn al-Hajjaj (d. 875), and the following to a lesser extent: *Kitab al-sunan* of Sulayman ibn al-Ash-ath Abu Da-ud al-Sijistani (d. 889), *al-Jami al-sahih* of Abu Isa Muhammad al-Tirmidhi (d. 892-3), the *Kitab al-sunan* of Ahmad ibn Shu-ayb al-Nasa'i (d. 915), and *Kitab al-sunan* of Abu Abd Allah Muhammad ibn Yazid al-Raba'I al-Qawzini ibn Majah (d. 887). BERG, *supra* note 102, at 6.

### 3. Ijma

*Ijma* (consensus) is a form of Islamic legal reasoning stemming from the Prophet's *hadith* that his people would "never agree upon an error."<sup>109</sup> Essentially, when the community agrees on a course of action, it is sanctioned. *Ijma* has been touted as consistent with democracy, and in early Islam such was the case. However, eventually Islamic jurists restricted the term to mean only the consensus of the *Ullamah* (religious scholars).<sup>110</sup> Still, varying definitions of *Ijma* exist, suggesting scholars have not come to concrete agreement on the use of the term.<sup>111</sup>

*Ijma* is understood to need the broad approval of the *Ullamah* after consultation (*Shu'ra*) and juristic reasoning (*Ijtihad*) before coming to a binding agreement with precedential value (*Ijma*).<sup>112</sup> Still, refusal to follow *Ijma* is treated differently than refusal to follow the Qur'an, or the *Sunnah*.<sup>113</sup>

### 4. Qiyas

*Qiyas* is a form of deductive analogy whereby prohibitions in the Qur'an and *Sunnah* are extended to other subjects.<sup>114</sup> Central to this form of reasoning is application of the *Illa* (reason, or cause) behind a rule in

109. See JONATHAN P. BERKEY, *THE FORMATION OF ISLAM: RELIGION AND SOCIETY IN THE NEAR EAST* 146-47 (2003).

110. Ziauddin Sardar, *Rethinking Islam*, 509 *INDIA SEMINAR* 48 (2002). Sardar notes that:

Similarly, the idea of *ijma*, the central notion of communal life in Islam, has been reduced to the consensus of a select few. *Ijma* literally means consensus of the people. The concept dates back to the practice of Prophet Muhammad himself as leader of the original polity of Muslims. When the Prophet Muhammad wanted to reach a decision, he would call the whole Muslim community – then, admittedly not very large – to the mosque. A discussion would ensue; arguments for and against would be presented. Finally, the entire gathering would reach a consensus. Thus, a democratic spirit was central to communal and political life in early Islam. But over time the clerics and religious scholars have removed the people from the equation – and reduced *ijma* to 'the consensus of the religious scholars'.

*Id.* at 50.

111. See Mohammad Omar Farooq, *The Doctrine of Ijma: Is There a Consensus?* 7 (June 2006) (unpublished manuscript) (on file with the Michigan Journal of International Law). For example, *Ijma* has been defined variously as: "[a]greement of all the people of binding and loosing who belong to the community of Muhammad, in a certain period of time, on a rule about a certain incidence," "[a]greement of the community of Muhammad on a religious point," and "[a]greement of a group (*jama'ah*) on a certain matter of by action or abandonment." *Id.*

112. Urfan Khaliq, *Beyond the Veil?: An Analysis of the Provisions of the Women's Convention in the Law as Stipulated in Shari'ah*, 2 *BUFF. J. INT'L L.* 1, 11 (1995).

113. Ahmad Shafaat, *The Meaning of Ijma'*, *ISLAMIC PERSPECTIVES* (1984), <http://www.islamicperspectives.com/MeaningofIjma.htm>.

114. See Khaliq, *supra* note 112, at 11–12.



the Qur'an or *Sunnah* to a novel or unaddressed circumstance.<sup>115</sup> Though early Muslim communities relied heavily on the Qur'an, *Sunnah*, and *Ijma* (as well as *Ijtihad*, discussed below) as sources of law, *Qiyas*, although developed later, ultimately grew into a comprehensive source of legal obligations, "overreached the Qur'an and the *Sunnah*."<sup>116</sup>

### 5. Ijtihad

When a matter cannot be solved by appeal to the Qur'an or *Sunnah*, and there is no consensus on the topic—either via *ijma* or *qiyas*—scholars turn to their reasoning abilities (*ijtihad*).<sup>117</sup> Specifically, *ijtihad* refers to the "personal effort undertaken by the jurist in order to understand the source and deduce the rules or, in the absence of a clear textual guidance, formulate independent judgments. . . ."<sup>118</sup> Such reasoning is supposed to reflect how the Prophet himself would adjudicate cases before him.<sup>119</sup>

Beginning in the eighth and ninth centuries, schools of law (*madhabbs*) incorporating a specific type of *ijtihad* began to emerge.<sup>120</sup> These *madhabbs* were designed to insulate Islamic scholars from politics and thereby enable them to pursue independent enquiry.<sup>121</sup> The *madhabbs* began to develop a body of precedent, with the Maliki school of law developing such a system two centuries before the tradition emerged in England.<sup>122</sup>

---

115. See ESPOSITO, *supra* note 82, at 6–7. The jurist Shihab al-Din al-Qarafi described *Qiyas* as "establishing the relevance of a ruling in one case to another case because of a similarity in the attribute (reason or cause) upon which the ruling was based." *Id.* at 6.

116. Mohammad Omar Farooq, *Qiyas (Analogical Reasoning) and Some Problematic Issues in Islamic Law* 4 (June 2006) (unpublished manuscript) (on file with author).

117. See Irshad Abdal-Haqq, *Islamic Law: An Overview of its Origin and Elements*, 7 J. ISLAMIC L. & CULTURE 27, 35 (2002).

118. Tariq Ramadan, *Ijtihad and Maslaha: The Foundation of Governance*, in ISLAMIC DEMOCRATIC DISCOURSE: THEORY, DEBATES AND PHILOSOPHICAL PERSPECTIVES 3, 9-10 (M.A. Mugtedar Khan ed., 2006).

119. In the following exchange, the Prophet asked one of his judges, Mu'adh Ibn Jabal, how he would adjudicate cases before him:

According to what shalt thou judge? He replied: According to the Book of God. And if thou findest nought therein? According to the Sunnah of the Prophet of God. And if thou findest nought therein? Then I will exert myself to form my own judgment. Praise be to God who has guided the messenger of His Prophet to that which pleases His Prophet.

Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origin and Elements*, in UNDERSTANDING ISLAMIC LAW: FROM CLASSICAL TO CONTEMPORARY 1, 20 (Hisham M. Ramadan ed., 2006).

120. See Adham A. Hashish, *Ijtihad Institutions: The Key to Islamic Democracy Bridging and Balancing Political and Intellectual Islam*, 9 RICH. J. GLOBAL L. & BUS. 61, 70-71 (2010).

121. *Id.*

122. See John A. Makdisi, *The Islamic Origins of the Common Law*, 77 N.C.L. REV. 1635, 1705 (1999).

Between the ninth and thirteenth centuries, however, the *madhabbs* slowly stopped independent interpretation<sup>123</sup> due to their slow erosion and co-option by the state. Eventually, this process destroyed the political institutions that had sustained the *madhabbs*.<sup>124</sup> “This cessation of independent interpretation, or *ijtihad* as it is called, and the concomitant institutionalization of *taqlid*, or blind following, as it is most commonly referred to, has led modern observers, Muslim and non-Muslim alike, to the conclusion that Shari’ah is doggedly impervious to change.”<sup>125</sup> Although many scholars agree that these developments “closed the gate of *ijtihad*,” others nevertheless question whether “*ijtihad* could, or ever did, come to a halt.”<sup>126</sup>

### B. Disability as Defined in Islamic Law

In classical Arabic, there is no overarching term for disability. In contemporary literature, terms such as *ashab al-’ahat*, *dhawu al-’ahat* (bearer or possessor of defects) or *ajaza* (pl. *ajiz*, meaning weak person, but can also include the elderly) are used.<sup>127</sup> “Only with regard to marriage do medieval *fiqh* scholars speak in a generalized manner of the ‘*uyub* (pl. of ‘*ayb*, translated as impairments, defects, deformities) which interfere with the proper flow of marital life.”<sup>128</sup> These *uyub* can be general, including mental, sexual, or other impairment that impedes “contracting, consummation, contracting, or maintaining of a healthy marriage.”<sup>129</sup>

Meanwhile, Shari’a itself defines diseases based not on the organ affected, but rather on the social interference it causes.<sup>130</sup> When dealing with an obligation as important as marriage,<sup>131</sup> it makes sense to have a well-developed jurisprudence.

123. See Sherman A. Jackson, *Shari’ah, Democracy, and the Modern Nation-State: Some Reflections on Islam, Popular Rule, and Pluralism*, 27 *FORDHAM INT’L L.J.* 88, 90 (2003).

124. See Hashish, *supra* note 120, at 74.

125. Jackson, *supra* note 126.

126. Mohammad Fadel, *Adjudication in the Maliki Madhhab: A Study of Legal Process in Medieval Islamic Law* 7 (Dec. 1995) (unpublished Ph.D dissertation, University of Chicago).

127. See VARDIT RISPLER-CHAIM, *DISABILITY IN ISLAMIC LAW* 4 (2007); *THE HANS-WEHR DICTIONARY OF MODERN WRITTEN ARABIC* 692 (J.M. Cowan ed., 4th ed. 1977) (defining “*ajaza*” as “to be weak, lack strength, be incapable [of], be unable [to do something].”). From the same root as “*ajaza*” comes ‘*ujuz* meaning “old age,” and ‘*ajuz* meaning “old woman; old man; old, advanced in years.” *THE HANS-WEHR DICTIONARY OF MODERN WRITTEN ARABIC*, *supra*; see also Ahmad S. Alsaif, *The Rights of Disabled Persons and Discrimination* 50 (2008) (unpublished Ph.D dissertation, New Castle University), available at <https://theses.ncl.ac.uk/dspace/bitstream/10443/1047/1/Alsaif%2008.pdf> (discussing the terms used in the Quran for disabilities).

128. RISPLER-CHAIM, *supra* note 127, at 4.

129. See *id.*

130. *Id.*

131. “Whoever gives for the sake of Allah, withholds for the sake of Allah, loves for the sake of Allah, hates for the sake of Allah, and marries for the sake of Allah, he has indeed perfected his faith.” Hadith 4:11:2521, available at <http://sunnah.com/urn/678270>.

Islamic law does not perceive disabilities as an expression of divine anger, but rather as a grand test: “We created man from a drop of quickening fluid to test him.”<sup>132</sup> But the test extends beyond the disabled to the whole community.<sup>133</sup> Even the atonement and redemption of sins may be attained through disability and disease: “Whoever dies in any illness is a martyr.”<sup>134</sup> In one *hadith*, Muhammad stated “No fatigue, no disease, nor sorrow, nor sadness, nor hurt, nor distress befalls a Muslim, even if it were a prick he receives from a thorn, but Allah expiates some of his sins for that.”<sup>135</sup> This dual thinking—the classification of disability in relation to the social functions it impacts, and the acceptance of disease as a condition of life—informs Shari’a and the rights of the disabled.

### III. COMPARING THE TWO LEGAL FRAMEWORKS

Broadly speaking, the CRPD prohibits discrimination based on disability and demands that disabled persons are able to exercise rights in the “political, economic, social, cultural, civil, or any other field.”<sup>136</sup> This Part will address each of these fields in turn, contrasting Islamic prescriptions with those contained in the CRPD.

#### A. Political Rights

This section addresses freedom of expression and the right of citizens under Islamic law to participate in government. Because Islamic law has no real translation of the modern concept of “political rights,” this Note uses the term to mean those rights necessary to permit direct participation in public affairs. These ideas will be compared to the two CRPD Articles addressing political rights: Article 21 (“Freedom of expression and opinion, and access to information”),<sup>137</sup> and Article 29 (“Participation in political and public life.”)<sup>138</sup>

##### 1. Political Rights under the Convention

Article 21 of the CRPD enshrines the right to “freedom of expression and opinion,” and “the freedom to seek, receive and impart information

---

132. Qur’an 76:2; *see also* MAJID TURMUSANI, *DISABLED PEOPLE AND ECONOMIC NEEDS IN THE DEVELOPING WORLD: A POLITICAL PERSPECTIVE FROM JORDAN* 52 (Ashgate 2003) (“The dominant Islamic faith and its teaching attributes everything that occurs, and all that exists in the world, to the will of God. Therefore, society tends to perceive disability as an act of God testing the faith of individuals to determine who is able to accept and tolerate their fate with gratitude and patience and those who are not.”).

133. Qur’an 29:2-3 (“Do men think that they will be left (at ease) because they say, We believe, and that they will not be tested with affliction? We did test those before them, and Allah will certainly know (by bringing it to the world of reality) those who are true from those who are false”).

134. RISPLER-CHAIM, *supra* note 127, at 7.

135. *Hadith*, Al-Bukhari, 7:70:545, available at <http://sunnah.com/urn/52930>.

136. CRPD, *supra* note 1, art. 2.

137. *Id.* art. 21.

138. *Id.* art. 29.

and ideas on an equal basis with others.”<sup>139</sup> This freedom of communication extends to “all forms of communication of [the disabled person’s] choice.”<sup>140</sup>

These rights mirror those guaranteed to all people by Article 19 of the Universal Declaration of Human Rights, reaffirmed in Article 5(d) of the CERD, the central provision of Article 19 of the International Convention on Civil and Political Rights (ICCPR), and enshrined in Articles 12 and 13 of the CRC.

The “seek, receive and impart” language, in particular, mirrors that of Article 19 of the ICCPR, but the CRPD goes further by adding language protecting expression of “all kinds” and guaranteeing the form “regardless of frontiers.” These guarantees, if considered in light of the International Covenant on Economic, Social and Cultural Rights (ICESCR), could arguably apply to the private market and not only public documents.<sup>141</sup>

The language in Article 21 surrounding availability of information was animated by a concern that public documents needed to be accessible.<sup>142</sup> There were also worries that private entities need not make their materials available.<sup>143</sup> Ultimately, the final text of the CRPD requires only that material be made available by public, not private entities.<sup>144</sup> Despite this, by integrating disabled people’s opinions and political thought into the realm of protected expression, the CRPD both advances previously protected principles of non-discrimination and creates the potential for disabled persons themselves to address the state’s handling of disabilities and any analogous regulations governing private bodies.

Article 29 of the CRPD similarly concerns itself with the political life of persons with disabilities. It enshrines the right to vote, including with assistance. Although the degree of assistance was fiercely debated, the

---

139. *Id.* art. 21.

140. *Id.*

141. Given the increasing commitment of Governments around the world to market-based policies, it is appropriate in that context to emphasize certain aspects of States parties’ obligations. One is the need to ensure that not only the public sphere, but also the private sphere, are within appropriate limits, subject to regulation to ensure the equitable treatment of persons with disabilities. In a context in which arrangements for the provision of public services are increasingly being privatized and in which the free market is being relied on to an ever greater extent, it is essential that private employers, private suppliers of goods and services, and other non-public entities be subject to both non-discrimination and equality norms in relation to persons with disabilities.

Comm. on Econ., Soc. and Cultural Rights, General Comment No. 5: Persons with Disabilities, ¶11, 11th Sess., U.N. Doc. E/1995/22 (Dec. 9, 1994) [hereinafter General Comment No. 5].

142. MARIANNE SCHULZE, UNDERSTANDING THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, A HANDBOOK ON THE HUMAN RIGHTS OF PERSONS WITH DISABILITIES 120 (2010), available at <http://hrbaportal.org/wp-content/files/1286466464hicrpdmanual.pdf>.

143. *Id.*

144. *See id.*

principle that persons with disabilities be able to participate “full[y] and effective[ly]” was accepted in the final text.<sup>145</sup> Article 29 also protects the right to “participat[e] in non-governmental organizations and associations concerned with the public and political life of the country,”<sup>146</sup> for example, unions and other associations. As the Committee on Economic, Social and Cultural Rights (CESCR) explained, “[t]rade union-related rights. . . apply equally to workers with disabilities and regardless of whether they work in special work facilities or in the open labour market.”<sup>147</sup> Because freedom of expression, assembly and association are so vital for the exercise of political rights, they must be protected by positive measures to overcome ignorance, comprehension barriers, and disabilities and ensure access by all.<sup>148</sup>

In order to effectuate such positive measures, Article 29 obliges States to promote the participation of disabled people in public and political life and emphasizes the role played by NGOs in securing such participation.<sup>149</sup> Unlike the Human Rights Committee’s interpretation of political life, there is no exception based on “established mental incapacity” under the CRPD.<sup>150</sup>

## 2. Political Rights in Islamic Law

Consultation of the community (*shura*) by leaders is an important aspect of political legitimacy, and has been interpreted as requiring consent before political action is taken.<sup>151</sup> The 42nd *sura*, 38th *ayat* reads: “Those who hearken to their Lord, and establish regular prayer; who (conduct) their affairs by mutual consultation; who spend out of what We bestow on them for sustenance [are praised].”<sup>152</sup> A number of parliaments in the Muslim world have “*shura*” in their names, including: the Majlis-i-Shura of Pakistan, the Shura Council of Egypt, and the Shura Council of Oman.

Although the verses addressing *shura* in the Qur’an do not delineate who is entitled to be consulted, they have been interpreted to mean that every individual is entitled to assume public office and people have the

145. See *id.* at 164.

146. CRPD, *supra* note 1, art. 29(b)(i).

147. General Comment No. 5, *supra* note 141, ¶26.

148. See Human Rights Comm. [HRC], General Comment No. 25: the Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, ¶1, 57th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.7 (Jul. 12, 1996).

149. Anna Lawson, *The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?*, 34 SYRACUSE J. INT’L L. & COM. 563, 606 (2007).

150. See, e.g., HRC, *supra* note 148, ¶3–4 (“The exercise of these rights by citizens may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable. For example, established mental incapacity may be ground for denying a person the right to vote or to hold office.”).

151. See HAIFAA A. JAWAD, *THE RIGHTS OF WOMEN IN ISLAM: AN AUTHENTIC APPROACH*, 83 (1998).

152. Qur’an 42:38.

right to remove their rulers.<sup>153</sup> For example, in Abu-Bakr's address when he succeeded Muhammad as the head of the Islamic state, he stated:

The weak among you shall be strong with me until their rights are vindicated; and the strong among you shall be weak with me until, if the Lord wills, I have taken what is due from them. . . Obey me as long as I obey Allah and His messenger. When I disobey Him and His Prophet, then obey me not.<sup>154</sup>

Modern interpretations of Islamic law consider the disabled to be capable of exercising their political rights on an equal basis with others,<sup>155</sup> and of "participat[ing] in as many aspects of the community's life as possible."<sup>156</sup> A number of scholars have suggested the only way for a state to fulfill the obligation of *shura* is to set up an elected assembly.<sup>157</sup> None of these teachings separate out the disabled, suggesting that they are considered a part of the community with these rights to offer *shura*.<sup>158</sup> Islamic law therefore exhibits a commitment to the same principles that underlie the freedom of political participation enshrined in Article 21 of the CRPD.

Freedom of expression is similarly guaranteed by the CRPD, "including the freedom to seek, receive and impart information and ideas on an equal basis with others."<sup>159</sup> However, this language merely requires non-discrimination, so compliance with Article 21 is possible even if content of expression is curtailed, as long as any such restrictions are universal and not limited to the disabled alone. Broadly speaking, Islam permits freedom of expression (*Hurriyat al-ra'y*), but subordinates such expression to the needs of the broader community.<sup>160</sup>

---

153. See *Universal Islamic Declaration of Human Rights art. XI*, AL-HEWAR CENTER (1999), <http://www.alhewar.com/ISLAMDECL.html>; see also, Asma Afsaruddin, *The "Islamic State": Genealogy, Facts, and Myths*, 48 J. CHURCH & ST. 153, 166-67 (2006) (discussing *shura* and its interpretations).

154. *The Rightly-Guided Caliphs*, EL AZHAR, <http://www.elazhar.com/islamichistory/Chapter3-1.htm> (last visited Mar. 15, 2014).

155. With the possible exception of holding the position of Caliph. PRINCETON ENCYCLOPEDIA OF ISLAMIC POLITICAL THOUGHT 476 (Gerhard Bowering et al eds., 2013).

156. Riffat Hassan, *Are Human Rights Compatible with Islam? The Issue of the Rights of Women in Muslim Communities* §5, THE RELIGIOUS CONSULTATION, <http://www.sacredchoices.org/hassan2.htm> (last visited Mar. 15, 2014).

157. See 'Allamah Abu al-'A'la Mawdudi, *Human Rights in Islam*, INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA, ch. 3 § 15, [http://www.witness-pioneer.org/vil/Books/M\\_hri/index.htm#15\\_The\\_Right\\_to\\_Participate\\_in\\_the\\_Affairs\\_of\\_State](http://www.witness-pioneer.org/vil/Books/M_hri/index.htm#15_The_Right_to_Participate_in_the_Affairs_of_State) (last visited Nov. 22, 2013).

158. Some scholars have gone so far as to suggest that *Shura* encompasses non-Muslim voices and attitudes, with the potential to even be part of the consulted counsel. See Nehaluddin Ahmad, *The Modern Concept of Secularism and Islamic Jurisprudence: A Comparative Analysis*, 15 ANN. SURV. INT'L & COMP. L. 75, 100 (2009) ("However, in regard to a Parliament or a Legislature of the modern conception, which is considerably different from the *Shura* in its traditional sense, this rule could be relaxed to allow non-Muslims to become its members provided that it has been fully ensured in the constitution.").

159. CRPD, *supra* note 1, art. 21.

160. Qur'an 6:108 ("Believers, do not say bad words against the idols lest they (pagans) in their hostility and ignorance say such words against God. We have made every nation's

This idea—that societal order comes before any absolute freedom of expression—is expressed in a number of *ayats*.<sup>161</sup> Other limits on expression in the Islamic legal tradition include a prohibition on depictions of the prophet Muhammad—a tradition anchored in the *hadiths*, although there is no specific *sura* to this effect. Although these prohibitions may appear to contradict the CRPD, they do not uniquely burden the disabled. Instead, under Islamic law, the disabled possess rights of expression commensurate with the rest of society.<sup>162</sup> Under this reading of Islamic law, such restrictions would thus not interfere with state obligations under Article 21 of the CRPD. The weak, blind, and impotent possess rights commensurate with the rest of society, to the extent public order and sacred images are involved.

### B. Economic Rights

This section analyses economic rights, focusing on Article 27 of the CRPD, which exhorts states to “recognize the right of persons with disabilities to work.”<sup>163</sup>

#### 1. Economic Rights under the Convention

Rights to work and employment are addressed in Article 27 of the CRPD, which upholds “the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities.”<sup>164</sup> Article 27 also extends to the disabled a right to “reasonable accommodation,” while prohibiting discrimination “on the basis of disability with regard to all matters concerning all forms of employment.”<sup>165</sup>

Thus, although Article 27 may be intended to guarantee full employment, it does not require that work be guaranteed the disabled—only that the disabled have the same access to employment opportunities as others. However, Article 27 does require States to take proactive steps to “[p]romote the employment of persons with disabilities in the private sector” and “[p]romote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.”<sup>166</sup> The wording of Article 27 also recognizes the right of persons with disabilities to gain a living by work “freely chosen,” or “accepted in a labour market

---

deeds seem attractive to them. One day they will all return to their Lord who will inform them of all that they have done.”).

161. See Qur’an 4:83, 34:46.

162. Article 21 of the CRPD also requires “promoting the use of sign languages” and facilitation of other methods of communication. CRPD, *supra* note 1, art. 21. Islamic law does not seem to be heavily concerned with these questions of access.

163. CRPD, *supra* note 1, art. 27.

164. *Id.*

165. *Id.*

166. *Id.*

or work environment”.<sup>167</sup> However, this right is only guaranteed on an “equal basis with others”; municipal employment restrictions will only run afoul of the CRPD to the extent they are not uniform and targeted at the disabled specifically.<sup>168</sup>

Despite the broad protections provided under the final text of Article 27, an early version of the Article drew criticism for its qualification that the right to employment would be limited “in accordance with national laws of general applications” relating to the exercise of rights of persons with disabilities.<sup>169</sup> The International Disability Caucus (IDC) opposed the language, arguing that such language could be used as an excuse by States to undercut the rights of the Convention.<sup>170</sup> The final text thus adopted the IDC’s proposed “on an equal basis with others” language.<sup>171</sup> This language emphasizes the desire for equal opportunity rather than equal outcome in employment, mirroring the emphasis of the ICESCR.<sup>172</sup>

To accomplish these goals, the CRPD requires legislation to “prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and health working conditions.”<sup>173</sup>

## 2. Economic Rights in Islamic Law

Islam regards hard work and earning a livelihood as virtuous.<sup>174</sup> Proper payment for value received from work is similarly important,<sup>175</sup> and the work may not be contrary to moral teachings.<sup>176</sup> The *ayat* An-Nisa makes this clear.<sup>177</sup> Even Muhammad worked for a time as a shepherd,

---

167. *Id.*

168. *Id.* Analogies may be drawn between the language of Article 27 of the CRPD and the language of the International Convention on Economic, Social and Cultural Rights, where scholars have recognized that the freedom of choice of employment does extend to work legally prohibited by the State. *See, e.g.,* MASHOOD A. BADERIN, *INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW 176-77* (2003) (arguing that in contrast to ICESCR Article 6, Articles 2(2) and 3 bar legislation inhibiting the choice of employment).

169. Int’l Disability Caucus, *Nothing About Us Without Us* 46 (Working Paper No. 08/18, 2006), available at <http://www.un.org/esa/socdev/enable/rights/ahc8docs/ahc8idcwam18augf.doc>.

170. *Id.*

171. CRPD, *supra* note 1, art. 27.

172. Eric G. Zhang, *Employment of People with Disabilities: International Standards and Domestic Legislation and Practices in China*, 34 SYRACUSE J. INT’L L. & COM. 517, 532 (2007).

173. CRPD, *supra* note 1, art. 27 ¶1(a).

174. Hadith, al-Bukhari, 1:543, available at <http://sunnah.com/riyadussaliheen/1/543> (“The Prophet said, ‘No food is better to man than that which he earns through his manual work. Dawud, the Prophet of Allah, ate only out of his earnings from his manual work.’”).

175. *See* Hadith, al-Bukhari, 3:36:470, available at <http://sunnah.com/bukhari/37>.

176. For example, prostitution, selling dogs, or fortune telling. *See*, Hadith, al-Bukhari, 7:63:258, available at <http://sunnah.com/bukhari/68/91>.

177. Qur’an 4:32 (“To men is allotted what they earn, and to women what they earn.”).



and Muslims are permitted to do work during the *Hajj*.<sup>178</sup> Ideally, positions are entrusted to the capable, with no regard to other qualities.<sup>179</sup> Islam is rife with such examples, including the oft-recited story of Abdullah Umm Maktum, a blind man who achieved fame as an avid student, eventual governor of Medina, leader of prayer, and commander of military expeditions—appointed for all these tasks by Muhammad himself.<sup>180</sup>

Contemporary jurists have drawn on these historical examples, issuing *fatwas* (religious rulings) that encourage the right of the disabled to work.<sup>181</sup> Many of these rulings are also informed by two key verses of the Qu’Ran: “No one shall be charged beyond his capacity,”<sup>182</sup> and “Allah asketh naught of any soul save that which He hath given it.”<sup>183</sup> For example, those who are sick should not perform the prayer movements if such performance could cause a deterioration in health.<sup>184</sup>

Insight into Islamic law’s treatment of the disabled with respect to employment can also be drawn from the debate surrounding whether a disabled man may lead prayers. There is currently a split of opinion on this issue. Some scholars think the disabled may lead, as long as they are able to perform the movements associated with leading the prayers.<sup>185</sup> This finds its support primarily in the *hadith* of Muhammad, who said “[the] Imam has been appointed to follow: so if he makes *takbir* follow him in *takbir*, if he performs bows, follow him; if he prostrates, prostrate after him; likewise, if he prays sitting, you also pray sitting.”<sup>186</sup> Others rely for support on A’ishah, Muhammad’s wife, and her *hadith*, according to which, when the Prophet was ill, his followers stood behind him praying while he remained seated.<sup>187</sup> It is important to distinguish that within this controversy the disabled are not prohibited from leading because they

178. Qur’an 2:198.

179. Note that this only applies to Muslims. Non-Muslims in an Islamic state will fall under other restrictions consistent with their *dhimmi* status.

180. See Qur’an 80: 1-16; Abdullah ibn Umm Maktum, WITNESS PIONEER, [http://www.witness-pioneer.net/vil/Articles/companion/abdullah\\_ibn\\_umm\\_maktum.htm](http://www.witness-pioneer.net/vil/Articles/companion/abdullah_ibn_umm_maktum.htm) (last modified Nov. 5, 2004). Another example is ‘Atta Ibn Abi Rabah, who was lame as a result of paralysis, was considered the greatest Mufti in Mecca, and was honored by the Caliph ‘Abdul-Malik Ibn Mawaran. Yusuf Al-Qaradawi, *Fatwa: Taking Care of the Disabled*, FATWA MANAGEMENT SYSTEM (Dec. 18, 2003), <http://infad.usim.edu.my/modules.php?op=modload&name=News&file=article&sid=10793>.

181. See Al-Qaradawi, *supra*.

182. Qur’an 2:233.

183. Qur’an 65:8.

184. Rispler-Chaim, *supra* note 127, at 26.

185. See *id.* at 25 (describing the preferences among the different schools of thought as to who may lead prayers).

186. Sheikh Ahmad Kutty, *Fatwa: Can a Disabled Person Lead the Prayer Sitting?*, FATWA MANAGEMENT SYSTEM (Oct. 24, 2004), <http://infad.usim.edu.my/modules.php?op=modload&name=News&file=article&sid=7026>. For a definition of “*takbir*” see *Takbirah al-Ihram*, AL-ISLAM.ORG, <http://www.al-islam.org/commentary-prayer-professor-muhsin-qaraati/takbirah-al-ihram#meaning-takbir>.

187. *Id.*

have some “imperfection,” but rather because the nature of the job requires certain movements. Still, even within this paradigm views differ. The Shi’as consider a healthy man preferable to a blind man, and the Hanafis consider the blind incapable of leading prayer because they may not be aware of impurities.<sup>188</sup>

One contemporary example of the extent to which Islamic law might be commensurate with efforts to secure economic rights for the disabled can be found in Syria. After passage of the CRPD, Syria passed Law No 17/2010, requiring that certain employers with more than 50 employees must “recruit 2% of their total staff from among . . . vocationally rehabilitated [disabled] workers designated by public employment agencies.”<sup>189</sup> This quota is judicially enforced through the provision of both a civil fine between 5,000-10,000 Syrian Pounds.<sup>190</sup> Additionally, employers who violate Article 136 will be forced to deposit the equivalent of their minimum wage in the Fund of Disabled Workers to finance small, medium and micro enterprises.<sup>191</sup>

Not only does Syria attempt to encourage participation in the work force through quotas, but it also takes steps to ensure that employers adjust workplace condition to enable workers with disabilities to perform their jobs without exposure to occupational hazards.<sup>192</sup> Finally and importantly, Law No 17/2010 reaffirms that persons with disabilities are entitled to any and all rights prescribed to other workers,<sup>193</sup> and guarantees them government protection to perform their jobs.<sup>194</sup>

### C. Social Rights

This section focuses on the social security guarantees, employment considerations, and educational aspirations within the CRPD and Islamic law. The right to health and social security will be considered together, because the two are often linked in Islamic literature.

#### 1. The Right to Social Security and Health

##### a. Social Security and Health under the Convention

As with the provision discussed above, Article 25 does not guarantee disability-specific health services, but instead mandates that persons with disabilities have access to “the same range, quality and standard of free or affordable health care programs as provided to other persons.”<sup>195</sup> Theo-

---

188. RISPLER-CHAIM, *supra* note 127, at 25.

189. Labour Law No. 17/2010 art. 136 (Syria), available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---ilo\\_aids/documents/legaldocument/wcms\\_145645.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_145645.pdf).

190. *Id.* art. 266(b).

191. *Id.* art. 136(c).

192. *Id.* art. 137(b).

193. *Id.* art. 137(a).

194. *Id.* 137(c).

195. CRPD, *supra* note 1, art. 25(a).

retically, this right is protected by a number of treaties<sup>196</sup> and international organizations,<sup>197</sup> but as implied in the CRPD's Preamble,<sup>198</sup> such protections were insufficiently enforced for persons with disabilities.

The cornerstone of Article 25 of the CRPD is its provision to the disabled of the right to the enjoyment "of the highest attainable standard of health,"<sup>199</sup> although this standard itself is never defined within the CRPD.<sup>200</sup> Instead, this provision has been interpreted via the CESCR such that the right to health is not to be understood as a right to be healthy. Instead, the right includes both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. The entitlements include a wide range of socio-economic factors that promote conditions in which people can live a healthy life,<sup>201</sup> and which provide equality of opportunity for people to enjoy the highest attainable level of health.<sup>202</sup> These CESCR concepts are understood to be incorporated within the CRPD.

However, the reference to "reproductive health" in Article 25 of the CRPD caused a heated debate because of its potential application to abortions.<sup>203</sup> Neither Egypt nor Iran made reservations to the treaty, but both nations made similar statements as to the term's applicability: "Iran accepts the phrase 'sexual and reproductive health' with the understanding that the phrase does not include abortion, and that its use in article 25 (a) does not create any abortion rights and cannot be interpreted as constituting promotion of abortion."<sup>204</sup> (Similarly, despite agreeing with the broad outlines of Article 25, it was this language that caused the Holy See to forego signing the CRPD.)<sup>205</sup>

196. See ICESCR, *supra* note 32, art. 12(1); see also, CRC, *supra* note 2, art. 24(1).

197. See, e.g., Constitution of the World Health Organization [WHO], pmbl., *opened for signature* July 22, 1946, 14 U.N.T.S. 185 (entered into force Apr. 7, 1948), available at [http://www.who.int/governance/eb/who\\_constitution\\_en.pdf](http://www.who.int/governance/eb/who_constitution_en.pdf).

198. The Preamble mentions the CRPD's desire to "redress[ ] the profound social disadvantage of persons with disabilities and promote their participation in the civil, political, economic, social and cultural spheres with equal opportunities, in both developing and developed countries." CRPD, *supra* note 1, pmbl.

199. *Id.* art. 25(1).

200. *Id.* art. 25.

201. CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health, ¶4, 22nd Sess., U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

202. *Id.* ¶8.

203. See SCHULZE, *supra* note 142, at 140.

204. U.N. GAOR, 61st Sess., 76th plen. mtg. at 5, U.N. Doc. A/61/PV.76, (Dec. 13, 2006).

205. H.E. Msgr. Celestino Migliore, *Intervention by the Holy See at the 76th Plenary Meeting of the General Assembly of the United Nations on Human Rights and Fundamental Freedoms*, VATICAN: THE HOLY SEE (Dec. 13, 2006), [http://www.vatican.va/roman\\_curia/secrariat\\_state/2006/documents/rc\\_seg-st\\_20061213\\_un-rights-persons\\_en.html](http://www.vatican.va/roman_curia/secrariat_state/2006/documents/rc_seg-st_20061213_un-rights-persons_en.html); see SCHULZE, *supra* note 142, at 74.

One other area of contention was the right to rehabilitation. Yemen and Israel both called for a “right to health and rehabilitation”,<sup>206</sup> while Australia was reluctant to create such a broad right,<sup>207</sup> and Algeria called for “rehabilitation” to be better defined.<sup>208</sup> In the end, the right to health-related rehabilitation was included as part of Article 25, but these debates are nonetheless informative in that they show not only where the parties differed, but where they agreed. For example, there was no major opposition to the right to health language, or the anti-discrimination language in this Article, only disagreement over the form implementation would take.

Another key Article as to the health of the disabled is Article 28 of the CRPD, which ensures two distinct human rights to persons with disabilities: an “adequate standard of living for themselves and their families, including adequate food, clothing and housing . . .” and “social protection and to the enjoyment of that right without discrimination on the basis of disability . . .”<sup>209</sup> Despite a debate over whether to divide these two rights into different Articles, they were kept together,<sup>210</sup> and the use of the word “social protection” followed that of the International Covenant on Economic, Social and Cultural Rights (CESCR).<sup>211</sup> Indeed, the CESCR was seen as a template from which the CRPD could be constructed.<sup>212</sup>

Though Article 28 provides for the basic needs of persons with disabilities, its scope is limited by socio-economic status,<sup>213</sup> with the Convention text requiring only that states provide training and financial assistance for persons with disabilities living *in situations of poverty*.<sup>214</sup> Paragraph 2(c) could therefore be seen as excluding persons with disability from social programs that are not considered poor. This interpretation would keep the burden of disability-related costs on all but the poorest disabled persons themselves, thereby perpetuating, at least potentially, the economic discrimination against those living with disabilities.<sup>215</sup> Still, this language was an improvement over earlier iterations, one of which stated that State assistance “should not become a disincentive [for disabled persons] to develop themselves,” and was seen as allowing States a way out from their social security obligations.<sup>216</sup> It seems that in the end, the Committee de-

---

206. See U.N. Convention on the Human Rights of People with Disabilities Ad Hoc Committee Daily Summaries, U.N. ENABLE (Aug. 8, 2005) [hereinafter Ad Hoc Comm. Daily Summaries], <http://www.un.org/esa/socdev/enable/rights/ahc6sum8aug.htm>.

207. *Id.*

208. *Id.*

209. CRPD, *supra* note 1, art. 28.

210. See SCHULZE, *supra* note 142, at 155.

211. *Id.*; see also ICESCR, *supra* note 32, art. 9.

212. See Ad Hoc Comm. Daily Summaries, *supra* note 206.

213. CRPD, *supra* note 1, art. 28(2)(c).

214. *Id.*

215. Int'l Disability Caucus, *supra* note 169, at 48.

216. Ad Hoc Comm. on an Int'l Convention, *Chair's Draft Elements of a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and*

cided that a middle route, addressing the most disadvantaged of persons with disabilities, would be the best.

Additionally, Article 28 recognizes “the right of persons with disabilities to an adequate standard of living for themselves and their families.”<sup>217</sup> It is the “State Parties” which are obliged to perform this task, and in so doing may not discriminate on the basis of disability.<sup>218</sup> These obligations extend to providing access to “poverty reduction programmes,” “public housing programmes,” and “retirement benefits.”<sup>219</sup>

Similarly, Article 25 of the CRPD recognizes that “persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability.”<sup>220</sup> Not only must states must protect disabled persons by preventing discriminatory denial of health care or health services on the basis of disability,<sup>221</sup> but they must also affirmatively provide health services needed by persons with disabilities specifically because of their disabilities<sup>222</sup> and provide persons with disabilities the same range, quality and standard of free or affordable health care as provided to other persons.<sup>223</sup>

#### b. Social Security and Health in Islamic Law

Disabled persons, like all who have need, have certain entitlements under Islamic law which must be met by the community. One *hadith* states: “Allah will remove his protection from the people of an area who allow one hungry person to wander amongst them.”<sup>224</sup> Scholars have interpreted this verse to require state intervention when the needs of its disabled people are not met.<sup>225</sup> Similarly, the Qur’an reads “No blame is there upon the blind nor any blame upon the lame nor any blame upon the sick,”<sup>226</sup> and scholars have interpreted this verse broadly.<sup>227</sup>

---

*Dignity of Persons with Disabilities* art. 26, U.N. ENABLE (Dec. 2003), <http://www.un.org/esa/socdev/enable/rights/wgcontrib-chair1.htm>.

217. CRPD, *supra* note 1, art. 28.

218. *Id.*

219. *Id.*

220. *Id.* art. 25.

221. *Id.* art. 25(f).

222. *Id.* art. 25(b).

223. *Id.* art. 25(a).

224. RISPLER-CHAIM, *supra* note 127, at 126.

225. *Id.* (citing Musa al-Basit, *The Rights of the Physically and Mentally Challenged in the Islamic Shari’a* (Um El-Fahem Ctr. Contemp. Stud. 2000)); see MUHAMMAD SHARIF CHAUDHRY, *WHAT IS ISLAM: GIST OF TEACHINGS OF ISLAM ON ALL IMPORTANT FIELDS OF HUMAN LIFE* ch. 17, (2003), available at <http://www.muslimtents.com/shaufi/>.

226. Qur’an 24:61.

227. The twelfth century scholar Al-Qurtubi interpreted the verse thus:

Allah lifted the blame from upon the blind person with regard to duties whose performance requires seeing; similarly for the lame, with regard to duties that involve walking, and all activities that cannot be performed with lameness; and for the sick, for whatever influences the sick, by canceling the activity at that stage and

Additionally, the Prophet is reported to have said “The government is the guardian of anyone who has no other guardian.”<sup>228</sup> Such guidance led to the view, especially in the classical age, that Islamic states which do not provide for the disabled and needy would not be owed allegiance.<sup>229</sup> Even today, the right to social security for the disabled is upheld in the Universal Declaration of Islamic Rights.<sup>230</sup>

One of the fundamental duties of Muslims is payment of the *zakat*,<sup>231</sup> a tax of 2.5% of one’s savings each year to be used to help the needy. Historically, this payment was so important that Caliph Abu Bakr, one of the “Rightly Guided Caliphs,” waged war against those who refused to pay it,<sup>232</sup> and Caliph Omar bin al-Khattab developed the first social welfare system in Arabia.<sup>233</sup> Consistent with the importance of *zakat*, one *hadith* of the Prophet reads “The son of Adam has basic rights for three things: a house to live in, a piece of cloth to cover his body, a loaf of bread and water.”<sup>234</sup> Modern scholars still consider *zakat* important as one of the five pillars of Islam, and its existence shows the importance of caring for the needy in Islamic jurisprudence.

These aspirations are often carried out in the Middle East through social security systems of varying capacity. Although laws may exist to guarantee access to services, results do not always follow. For example, Morocco has a robust legislative framework for addressing work-related injuries, but in 2002 “only 22 percent of the labor force was covered by

---

postponing it to another date, or finding an alternative; another option is to waive some of the prerequisites and principles of the worship, as is evident in the prayer of the sick. There is no blame on them in all the acts as long as the impediment so dictates.

RISPLER-CHAIM, *supra* note 127, at 127 (quoting Al-Qurtubi, *al-Jami’ liAhklam al-Qur’an*, 7,4705.)

228. CHAUDHRY, *supra* note 225, ch. 15 (citing Abu Daud, Tirmizi).

229. *Id.*

230. UIDHR, *supra* note 156, art. 18 (“Every person has the right to food, shelter, clothing, education and medical care consistent with the resources of the community. This obligation of the community extends in particular to all individuals who cannot take care of themselves due to some temporary or permanent disability.”).

231. It is not righteousness that ye turn your faces towards East or West; but it is righteousness, to believe in Allah and the Last Day, and the Angels and the Book, and the Messengers; to spend of your substance, or of love for Him, for your kin, for orphans, for the needy, for the wayfarer, for those who ask, and for the ransom of slaves; to be steadfast in prayer, and give Zakat, to fulfill the contracts which ye have made; and to be firm and patient, in pain (or suffering) and adversity, and throughout all periods of panic, such are the people of truth, the God-fearing.

Qur’an 2:177.

232. See Ibrahim B. Syed, *Social Security in Islam*, ISLAMIC RESEARCH FOUND. INT’L, [http://www.irfi.org/articles/articles\\_251\\_300/social\\_security\\_in\\_islam.htm](http://www.irfi.org/articles/articles_251_300/social_security_in_islam.htm) (last visited Mar. 15, 2014).

233. SOCIAL WELFARE IN THE MIDDLE EAST 71 (John Dixon ed., 1987).

234. Syed, *supra* note 232.

social security provisions.”<sup>235</sup> Despite a fundamental right to health-care,<sup>236</sup> “[p]hysical rehabilitation services by government-sponsored programs vary significantly among countries in the region and tend to be concentrated in urban areas. Some countries provide medical services only for certain type of disabilities, leaving other disability groups without access to care.”<sup>237</sup> In Bangladesh for instance, despite promulgating a National Policy for Disability in 2005 and ratifying the CRPD, Bangladeshis with disabilities lack access to “adequate education, health services, and safety nets.”<sup>238</sup> This “poor implementation of existing policies” is due to under-funding, under-staffing, insufficient monitoring, and weak institutional service delivery structures.<sup>239</sup> Strong legal frameworks, as in the case of Bangladesh, do not in themselves guarantee empowerment of persons with disabilities.

## 2. The Right to Education

### a. Education under the Convention

Educational development is considered in Article 24, which provides that “States Parties shall ensure an inclusive education system at all levels and lifelong learning . . .”<sup>240</sup> This learning covers not only “talents and creativity,” but also “mental and physical” abilities.<sup>241</sup> States must also take measures to ensure the means and format of training will be accessible to the targeted community.<sup>242</sup> States are required to ensure such an education system in order to realize “the full development of human potential and sense of dignity and self-worth.”<sup>243</sup> Full and equal participation in the general education system is required by the CRPD—as is a system that addresses the special needs of disabled persons.<sup>244</sup>

### b. Education under Islamic Law

Education sufficient for an individual to distinguish between right and wrong is required under Islamic law. For example, in the Qur’an, *surah Ta-Ha* stresses the value of knowledge and its acquisition: “High above all

---

235. World Bank, *A Note on Disability Issues in the Middle East and North Africa*, at 11 (2005).

236. See Hassan Chamsi-Pasha & Mohammed Ali Albar, *Western and Islamic Bioethics: How Close is the Gap?*, 3 *AVICENNA J. MED.* 8, 11 (2013) (“Islam considers access to health care as a fundamental right of the individual.”).

237. World Bank, *supra* note 235, at ii-iii.

238. World Bank, *Project Appraisal Document on a Proposed Credit in the Amount of SDR 21.9 Million*, at 2, Report No. 41795-BD, (2008), available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2008/06/16/000333037\\_20080616025100/Rendered/PDF/417950PAD0P1061ly100IDAR20081021911.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2008/06/16/000333037_20080616025100/Rendered/PDF/417950PAD0P1061ly100IDAR20081021911.pdf).

239. *Id.*

240. CRPD, *supra* note 1, art. 24.

241. *Id.* art. 24.

242. *Id.*

243. *Id.*

244. *Id.*

is Allah, the King, the Truth! Be not in haste with the Qur'an before its revelation to thee is completed, but say, "O my Lord! Advance me in knowledge."<sup>245</sup>

Even the Prophet himself stressed his role as a teacher.<sup>246</sup> Good education, as one *hadith* maintains, is one of the greatest gifts that can be given.<sup>247</sup> A Muslim is required to seek understanding of the Truth of Allah and Islam, and those who have been granted great knowledge will be rewarded: "Allah will raise up, to (suitable) ranks (and degrees), those of you who believe and have been granted knowledge. And Allah is well-acquainted with all you do."<sup>248</sup> Another *hadith* reports the Prophet having said: "The best among you (Muslims) are those who learn the Qur'an and teach it."<sup>249</sup> Indeed, even a number of prayers ask Allah for knowledge and understanding.<sup>250</sup>

Because Islamic law requires disabled persons to participate in the obligations incumbent upon all Muslims (to the extent of their ability),<sup>251</sup> knowledge of obligations and Islamic law must somehow be taught.<sup>252</sup> Despite objections that altering sermons could distract healthy believers, Sheikh al-Azhar Dr. Muhammad Sayyid Tantawi issued a fatwa which encouraged the use of sign language interpreters so that the deaf could understand the Friday sermon.<sup>253</sup> Indeed, such calls for education to fit the student are arguably a requirement of Islam.<sup>254</sup>

Tunisia implemented these requirements by making education compulsory for children and granting children with disabilities the right to edu-

245. Qur'an 20:114. Consider also the Qur'anic requirements for commencing a war: "And it is not for the believers to go forth [to battle] all at once. For there should separate from every division of them a group [remaining] to obtain understanding in the religion and warn their people when they return to them that they might be cautious." Qur'an 9:122.

246. For example, "God did not send me to be harsh, or cause harm, but He has sent me to teach and make things easy." Sahih Muslim 18:9:3506 available at <http://sunnah.com/muslim/18>.

247. Sahl bin Mu'adh bin Anas narrated that Allah's Messenger said, "Whoever teaches some knowledge will have the reward of the one who acts upon it, without that detracting from his reward in the slightest." Hadith, 1:1:240, available at <http://sunnah.com/urn/1252390>.

248. Qur'an 58:11.

249. *Hadith*, al-Bukhari 6:61:545, available at <http://sunnah.com/bukhari/66/49>.

250. For example, "Oh Lord, increase me in knowledge." Qur'an 20: 114. It was narrated from Jabir that: "the Messenger of Allah said: 'Ask Allah for beneficial knowledge and seek refuge with Allah from knowledge that is of no benefit.'" Hadith, Sunan Ibn Majah, 5:34:3843, available at <http://sunnah.com/ibnmajah/34/17>.

251. *Fatwa: How the Deaf & Mute Offer Salah*, FATWA MANAGEMENT SYSTEM, (Jun. 9, 2002), <http://infad.usim.edu.my/modules.php?op=modload&name=News&file=article&sid=7492>; see Qur'an 4:103.

252. Sheikh Muhammads Al-Munajjid, *Fatwa No. 13793: Obligatory Duties for Those Who are Deaf and Mute*, ISLAM QA, <http://www.islam-qa.com/en/ref/13793/> (last visited Mar. 15, 2014).

253. RISPLER-CHAIM, *supra* note 127, at 24.

254. See Norlain bint Muhammad Dindang, *The Need for Islamic Education According to the Quran and Sunnah*, ISLAMBASICS.COM (Aug. 27, 2003), <http://www.islambasics.com/view.php?bkID=138&chapter=1>.



education.<sup>255</sup> These aspirations have been reinforced by recent legislative action requiring state intervention to realize these rights.<sup>256</sup> Special needs children are provided education through both government and NGO centers, with the state providing material and technical support to associations managing these centers.<sup>257</sup> Although Tunisia's legislation specifically prohibits discrimination on the basis of sex, social class, race and religion, it does not yet expressly prohibit discrimination in education based on disabilities.<sup>258</sup>

Perhaps the mismatch between Tunisia, and many other Islamic countries' actions and the CRPD, could be seen as one of scope. While Islamic law requires education and participation for persons with disabilities, Islamic nations should understand that the intent behind education must extend outside of the mosque and into public education systems.

#### D. Cultural Rights

This section focuses on the potential conflict of freedom of religion and the status of non-Muslims under Islamic law.

##### 1. Cultural Rights under the CRPD

Cultural rights are not broadly defined in the CRPD, but for purposes of this Note, they include ensuring that people with disabilities have access to culture and can participate in the culture of their choice. This includes rights related to language, religion, cultural and artistic production, and participation in cultural heritage. The preamble of the CRPD expresses concern over discrimination on the basis of "language, religion, political or other opinion, national[ity], [and] ethnic[ity]."<sup>259</sup> Access to sites of cultural importance and the ability to participate in cultural life, along with support for their specific cultural and linguistic identity, is guaranteed under Article 40 of the CRPD.<sup>260</sup>

##### 2. Under Islamic Law

Although the Qur'an states "Let there be no compulsion in religion: truth stands out clear from error: whoever rejects evil and believes in Allah hath grasped the most trust-worthy hand-hold that never breaks. And

---

255. See Loi d'orientation 2002-80 du 30 juillet 2002 relative à l'éducation et à l'enseignement [Law 2002-80 of July 30 2002 relative to Education and Schooling], Journal Officiel de la République Tunisienne [J.O.][Official Gazette of Tunisia], July 30, 2002, p. 1735.

256. Initial Rep. Submitted by States Parties Under Art. 35 of the Covenant: Tunisia, Comm. on the Rights of Persons with Disabilities, ¶164, U.N. Doc. CRPD/C/TUN/1 (July 1, 2010).

257. *Id.* ¶176.

258. See, Implementation of the Convention on the Rights of Persons with Disabilities, Comm. on the Rights of Persons with Disabilities, ¶¶19-20, 4th Sess., U.N. Doc. CRPD/C/TUN/Q/1 (Oct. 4-8, 2010).

259. CRPD, *supra* note 1, pmb1.

260. See *id.* art. 30.

Allah heareth and knoweth all things,”<sup>261</sup> there are different categories of people in an Islamic society based off the religion they profess.

Islam views certain rights through the lens of individual religious orientation, as well as sex. As such, non-Muslims may either be *dhimmis* (certain monotheistic religions, and occasionally Hindus and Zoroastrians under the protection of the Islamic state),<sup>262</sup> or idolaters, who were often historically given the option of conversion, death or forced exile.<sup>263</sup> *Dhimmis* were required to pay a special tax (*jizya*),<sup>264</sup> and could continue in their beliefs without state interference.<sup>265</sup> Although an in-depth look at this status difference is beyond the scope of this note, it does appear to infringe on the rights guaranteed in the CRPD.

*Dhimmi* status involves discrimination based not on disability, but on religion. But because this discrimination has the potential to affect disabled persons, it must be seen through the eyes of the CRPD. For example, the CRPD requires that “persons with disabilities can effectively and fully participate in political and public life on an equal basis with others.”<sup>266</sup> This is inconsistent with the principle underlying *dhimmi*, in which non-Muslims were allowed to coexist “as long as they accepted a politically subordinate, tributary status.”<sup>267</sup> Today, only a handful of Islamic states relegate their religious minorities to *dhimmi* status, among them Saudi Arabia, the Sudan, Iran, and Oman.<sup>268</sup>

Aspects of this second-class status historically included *dhimmis* being barred from political and judicial office, unable to testify against Muslims in litigation, forbidden to marry Muslim women, or to stand in the presence of Muslims.<sup>269</sup> A number of these prohibitions violate the CRPD, including the bar on marrying Muslim women<sup>270</sup>, the inability to participate in political and judicial office<sup>271</sup>, and the refusal of Islamic courts to

261. Qur’an 2:256.

262. See DAVID D. GRAFTON, *THE CHRISTIANS OF LEBANON: POLITICAL RIGHTS IN ISLAMIC LAW* 21-22 (2003) (noting that *ahl al-kitab* was a theological term, and *dhimma* is a legal term, such that *dhimmi* is not exclusive to *ahl al-kitab*).

263. See *id.* at 17.

264. *Id.* at 22.

265. See *id.* at 17, 22; see also, Qur’an 2:256.

266. CRPD, *supra* note 1, art. 29(a).

267. Ann Elizabeth Mayer, *Islam and the State*, 12 *CARDOZO L. REV.* 1015, 1024-25 (1991).

268. Donna E. Arzt, *The Role of Compulsion in Islamic Conversion: Jihad, Dhimma and Ridda*, 8 *BUFF. HUM. RTS. L. REV.* 15, 36 (2002).

269. See *id.* at 27.

270. The CRPD affirms “The right of all persons with disabilities who are of marriageable age to marry and found a family on the basis of free and full consent of the intending spouses is recognized.” CRPD, *supra* note 1, art. 23(1)(a).

271. States must ensure that “persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected. . . .” *Id.* art. 29(a). Note that full participation in the CRPD is not modified by a requirement to believe in Islam.

accept the testimony of *dhimmis*.<sup>272</sup> Yet Islam understands *dhimmis* to be under the protection of the state, as the *Sunnah* relates, “Whoever wrongs a [*dhimmi*] or lays on him a burden beyond his strength, I shall be his accuser on the Day of Judgment.”<sup>273</sup>

In a position worse than the *dhimmis* were the apostates.<sup>274</sup> Apostasy, or *ridda*, means “to turn back,” and was traditionally understood to mean denouncing Islam to embrace *kufr* (unbelief).<sup>275</sup>

Although *ridda* jurisprudence is not often practiced as a political matter,<sup>276</sup> the doctrine represents an affront to the principles of the CRPD.<sup>277</sup> Any Islamic state that enforces this doctrine will fail a number of its obligations. Although most states, “in the normal course of attempting to coexist in the international order” finesse these disagreements between international norms and such interpretations of Islamic law so that they need not be carried out, “there is always the implicit potential for extremist interpretations leading to confrontation and conflict.”<sup>278</sup>

A number of human rights norms are contained within the four corners of the CRPD, beyond those protecting disabled persons from discrimination. For example, Article 10 requires that “State[ ] Parties reaffirm that every human being has the inherent right to life,”<sup>279</sup> and “State Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities.”<sup>280</sup>

---

272. These refusals were based on reference to *hadiths* “which maintained that the infidels were of a perverse and mendacious character because they deliberately persisted in denying the superiority of Islam.” BAT YE’OR, *THE DHIMMI: JEWS AND CHRISTIANS UNDER ISLAM* 57 (1985). Such restrictions violate Article 12’s equal recognition before the law that “State Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.” CRPD, *supra* note 1, art. 12(2).

273. C.G. WEERAMANTRY, *ISLAMIC JURISPRUDENCE* 86 (1988).

274. See ABDULLAHI AHMAD AN-NAIM, *ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARI’A* 118 (2008).

275. *Ridda* can occur in a number of ways:

According to Shari’a scholars, the ways in which *ridda* can occur include denying the existence or attributes of God; denying a particular messenger of God or that a messenger is truly a messenger of God; denying a principle that is established as a matter of religion, such as the obligation to pray five times a day or fast during the month of Ramadan; and declaring prohibited what is manifestly permitted (*halal*) or declaring permitted what is manifestly prohibited (*haram*).

*Id.* at 119.

276. See *id.* at 118.

277. “The principles of the present Convention shall be: (a) Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons; (b) Non-discrimination; (c) Full and effective participation and inclusion in society.” CRPD, *supra* note 1, art. 3.

278. Anthony Chase, *Legal Guardians: Islamic Law, International Law, Human Rights Law, and the Salman Rushdie Affair*, 11 AM. U.J. INT’L L. & POL’Y 375, 385-86 (1996).

279. CRPD, *supra* note 1, art. 10.

280. *Id.* art. 4.

These difficulties with apostasy have come up against some resistance by modern interpreters. For example, some hold that killing apostates is contrary to the principles and purposes of the Qur'an, as well as *surah 4 ayat 89*.<sup>281</sup>

### E. Civil Rights

Although civil rights are not defined in the CRPD, they are nonetheless interwoven into the rights protected by the Convention. This section considers civil rights in the context of equal treatment, focusing on the rights of women and the conceptions of legal capacity for mentally disabled persons.

#### 1. Women

##### a. Women under the Convention

Not only does the CRPD contain broad protections and references to other human rights treaties, it also contains explicit provisions for gender rights. Article 6 protects women with disabilities specifically ( "State Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women"),<sup>282</sup> while Article 8 requires, as part of "Awareness-raising," appropriate measures "[t]o combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex."<sup>283</sup> Additionally, the preamble stresses that: "[W]omen and girls with disabilities are often at greater risk, both within and outside the home, of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation."<sup>284</sup> As such, the CRPD requires certain protections for women so that "persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life."<sup>285</sup>

##### b. Women in Islamic Law

Islamic law distinguishes between women and men in a number of ways. For example, consider *sura 2, ayat 238* on the testimony of women:

Oh! Ye who believe! When ye deal with each other, in transactions involving future obligation in a fixed period of time reduce them to writing and get two witnesses out of your own men and if there are not two men, then a man and two women, such as ye

---

281. See Ahmad Shafaat, *The Punishment of Apostasy in Islam*, ISLAMIC PERSPECTIVES (Feb. 2006), <http://www.islamicperspectives.com/apostasy1.htm> (stating that only those apostates that made war against the Muslims could be slain; killing neutral apostates or apostates who wanted peace is forbidden).

282. CRPD, *supra* note 1, art. 6.

283. *Id.* art. 8.

284. *Id.* pmbl.

285. *Id.* art. 12(2).

choose, for witnesses so that if one of them errs the other can remind her.<sup>286</sup>

Such verses have been explained as a preference for men as witnesses because, as the traditional bread-winners, males were expected to be more familiar with transactions and thus better able to bear adequate witness.<sup>287</sup> Other explanations focus on the “emotional condition” of women.<sup>288</sup>

Traditional interpretation of the *Shari’a* has led to restrictions on women in more ways than just their testimony. Verse 4:34 of the Qur’an has been interpreted as establishing the guardianship of men over women, forbidding women to hold any public office “involving the exercise of authority over men.”<sup>289</sup> Although women are granted similar rights to opinion as men, their ability to effectuate their beliefs is prohibited by verses against associating with men<sup>290</sup> and other deeply ingrained cultural norms.

Women also face a variety of restrictions in family law. Although the Qur’an states “And women have rights equal to what is incumbent upon them according to what is just,”<sup>291</sup> Esposito notes that, “no Quranic verse supports the license of divorce presently awarded to males.”<sup>292</sup> In *Shari’a*, repudiation of marriage can be effectuated by the husband, unilaterally, without consent of his wife through *talaq*.<sup>293</sup> *Talaq* requires only the pronouncement of the word three times to annul the marriage, along with abstention from sexual contact for a designated period.<sup>294</sup> Women have no equivalent privileges under *Shari’a*.

Sex in many ways determines roles, with men charged as providers.<sup>295</sup> For example, in the Middle East and North Africa, the difference between male and female employment rates are among the highest in the world.<sup>296</sup> In Afghanistan, 53% of males and 97% of females with disabilities are

286. Qur’an 2:282.

287. *Qur’an 2:282 Commentary*, THE AMERICAN MUSLIM (Nov. 1, 2006), [http://www.theamericanmuslim.org/tam.php/features/articles/quran\\_2282\\_commentary/](http://www.theamericanmuslim.org/tam.php/features/articles/quran_2282_commentary/).

288. *Id.*

289. AN-NAIM, *supra* note 278, at 109 (citing AUSAF ALI, *Contrast Between Western and Islamic Political Theory*, 1 MODERN MUSLIM THOUGHT 256, 256-63 (2000)).

290. *Id.* For example,

O wives of the Prophet, you are not the same as any other women, if you observe righteousness. Therefore, you shall not speak too softly, lest those with disease in their hearts may get the wrong ideas; you shall speak only righteousness. You shall settle down in your homes, and do not mingle with the people excessively, like you used to do in the old days of ignorance. You shall observe the Contact Prayers, and give the obligatory charity, and obey God and His Messenger.

Qur’an 33:32-33; *see also* Qur’an 33:53-59.

291. Qur’an 2:229.

292. ESPOSITO, *supra* note 82, at 134.

293. *See* DAVID PEARL, A TEXTBOOK ON MUSLIM PERSONAL LAW 100 (2 ed. 1987).

294. *Id.* at 102.

295. *See* Qur’an 4:35.

296. World Bank, *supra* note 235, at 8, ¶22.

unemployed, while the rate for those without disabilities are 25% and 94% respectively.<sup>297</sup> Similarly, in Jordan, women with disabilities have significant unemployment figures, do not progress as far educationally as their male peers, and have reduced marriage prospects. Jordan has acknowledged both these barriers to equality and its responsibility for changing the status quo.<sup>298</sup> Since the inception of the CRPD, Jordan has worked to integrate the substantive provisions of the CRPD into its domestic law to affirm the equality of men and women, both with and without disabilities.<sup>299</sup>

Islamic law and the CRPD appear to conflict as to treatment of women. The “different natures and roles” of women, as envisioned by Islamic law, violate the CRPD insofar as they allow disparate treatment. Even the concept of different roles may violate the CRPD’s principles.<sup>300</sup> Untangling cultural norms and stifling religious interpretations, along with reasoned *ijtihad*, however, could bring many Islamic countries into conformity with the principles espoused in the CRPD.

## 2. Legal Capacity of the Mentally Disabled

### a. Legal Capacity under the Convention

Legal capacity for persons with disabilities is dealt with in Article 12. In the Eighth Session of the Ad-Hoc Committee, “legal capacity” was a term of considerable contention, and would remain so throughout the negotiations. The draft of the Eighth Session contained a footnote, deleted before the final report, that read: “In Arabic, Chinese and Russian, the expression ‘legal capacity refers to legal capacity for rights’ and not the ‘capacity to act.’”<sup>301</sup> On December 5th, the Ad Hoc Committee deleted the footnote, and decided that for translation purposes, the language on legal capacity should be taken from the Convention on the Elimination of Discrimination against Women.<sup>302</sup>

297. Gov’t of the Islamic Republic of Afg., *Afghanistan National Disability Action Plan 2008-2011*, MINISTRY OF LABOR, SOC. AFFAIRS, MARTYRS & DISABLED (May 2008), [http://www.apminebanconvention.org/fileadmin/pdf/mbc/IWP/SC\\_june08/Speeches-VA/SCVA-StatusImplem-3June08-Afghanistan-ActionPlan-en.pdf](http://www.apminebanconvention.org/fileadmin/pdf/mbc/IWP/SC_june08/Speeches-VA/SCVA-StatusImplem-3June08-Afghanistan-ActionPlan-en.pdf).

298. *The Rights of Disabled People in the Hashemite Kingdom of Jordan*, NAT’L CTR. FOR HUMAN RIGHTS 43-44 (Mohammed Yaqoub ed., 2008), <http://www.nchr.org.jo/english/ModulesFiles/PublicationsFiles/Files/The%20Rights%20of%20Disabled%20people%20in%20the%20Hashemite%20Kingdom%20of%20Jordan%20As%20Per%20the%20National%20Legislative%20.pdf>.

299. *Id.*

300. For example, the CRPD’s General Principles in Article 3 state that “[e]quality between men and women” is one of the principles running through the Convention. CRPD, *supra* note 1, art. 3(g).

301. See Rep. of the Ad Hoc Comm. on a Compr. & Integral Int’l Convention on the Prot. & Promotion of the Rights & Dignity of Pers. with Disabilities (Annex II), art. 9(2), 5th Sess., Jan 24-Feb. 4, 2005, U.N. Doc. A/AC.265/2005/2 (Feb. 23, 2005).

302. *Press Conference on Convention Concerning Rights of Disabled Persons*, U.N. (Dec. 13, 2006), [http://www.un.org/News/briefings/docs/2006/061213\\_Disabilities.doc.htm](http://www.un.org/News/briefings/docs/2006/061213_Disabilities.doc.htm).

In its final form, Article 12 “challenges parentalistic policies relating to people who lack ‘capacity.’”<sup>303</sup> It requires that “persons with disabilities have the right to recognition everywhere as persons before the law,”<sup>304</sup> and “enjoy legal capacity on an equal basis with others in all aspects of life.”<sup>305</sup> States must guarantee the protection of these rights by taking “appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.”<sup>306</sup> Indeed, one of the motivations behind Article 12 was “to encourage people who are considered incapacitated to seek assistance, which they often don’t do for fear of being subjected to guardianship or worse—neglect, physical abuse or institutionalization.”<sup>307</sup>

Under the CRPD, conventional guardianship would be eliminated as currently practiced by many countries.<sup>308</sup> Article 17 requires respect for the “physical and mental integrity of the disabled on an equal basis with others.”<sup>309</sup> At the Ad Hoc Committee meeting, there was agreement that the disabled should be free from “forced interventions or forced institutionalization aimed at correcting, improving or alleviating any actual or perceived impairment.”<sup>310</sup> However, the Committee faced difficulties in defining “institutionalization” and “perceived,” such that the current wording of Article 17 was substituted instead.<sup>311</sup> The legal capacity guaranteed by the CRPD would limit the ability of a guardian to override the choice of a disabled person in regard to voting rights, marriage rights, and all other rights possessed by society at large. As Professor Kanter points out:

Article 12 of the Convention, therefore, seeks to address the needs of people who are considered “lacking capacity.” Instead of paternalistic guardianship laws which substitute a guardian’s decision for the decision of the individual, the CRPD’s supported-decision making model recognizes first, that all people have the right to make decisions and choices about their own lives.<sup>312</sup>

---

303. Kanter, *supra* note 44, at 559.

304. CRPD, *supra* note 1, art. 12(1).

305. *Id.* art. 12(2).

306. *Id.* art. 12(3).

307. Kanter, *supra* note 44, at 560.

308. *See id.* at 563.

309. CRPD, *supra* note 1, art. 17.

310. Rep. of the Ad Hoc Comm., *supra* note 301, art. 11 ¶¶38-42.

311. *See id.*

312. Kanter, *supra* note 44, at 563.

### b. Legal Capacity under Islamic Law

When Egypt signed the CRPD, it entered an interpretative declaration in the form of a reservation, distinguishing “legal responsibility” (*ahliyyat al-wujub*) and “capacity to perform” (*ahliyyat al-‘ada’*).<sup>313</sup>

*Ahliyyat al-wujub* in Islamic law is the “legal capacity for the acquisition of rights and obligations.”<sup>314</sup> This form of legal capacity is receptive and considered to fall into one of two categories: deficient (*naqis*) or complete (*kamil*).<sup>315</sup> Deficient receptive legal capacity is analogized to a person in a coma, or as Kamali does, to a fetus, who has rights to life and inheritance, but has no duties or accountability.<sup>316</sup> Complete receptive legal capacity is that enjoyed by a young child, capable of discharging, albeit through his guardian, certain obligations in respect, for example, maintenance, liability for loss (*daman*), and payment for services rendered to him.<sup>317</sup> All people maintain receptive legal capacity, even those in irreversible vegetative states.<sup>318</sup> The principle is derived from the following *hadith*: “The pen is lifted from three persons: the one who is asleep until he wakes, the child until he attains puberty, and the insane person until he regains his sanity.”<sup>319</sup>

The capacity to perform, known as *Ahliyyat al-‘adda’*, or active legal personality, is the legal capacity for execution<sup>320</sup> and the legal requisite for

---

313. The Arab Republic of Egypt declares that its interpretation of article 12 of the International Convention on the Protection and Promotion of the Rights of Persons with Disabilities, which deals with the recognition of persons with disabilities on an equal basis with others before the law, with regard to the concept of legal capacity dealt with in paragraph 2 of the said article, is that persons with disabilities enjoy the capacity to acquire rights and assume legal responsibility (*‘ahliyyat al-wujub*) but not the capacity to perform (*‘ahliyyat al-‘ada’*), under Egyptian law.

Declarations and Reservations, *supra* note 62, at 4.

314. *Glossary of Islamic Religious, Banking & Financial Terms*, 6 J. ISLAMIC L. & CULTURE 135, 136 (2001).

315. MUNIR AHMAD MUGHAL, ISLAMIC JURISPRUDENCE 88 (2007). Mughal gives the following example of how deficient and complete receptive legal capacity work:

A deficient receptive legal capacity is such where the responsible has the rights on others but no others on him, e.g., an embryo while in the womb of his mother has the entitlement to inheritance and will but no obligation in respect of the right of any one falls upon him. A complete receptive legal capacity is such where the responsible has [sic] rights and obligations from birth to death. He inherits and is inherited.

*Id.*

316. See M. H. KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 304 (3d ed., 2005).

317. *Id.*

318. *Id.* at 305.

319. KAMALI, *supra* note 316 (quoting Tabrizi, Mishkat, II, 980, Hadith no. 3287).

320. Glossary, *supra* note 314.



the exercise of rights and obligations.<sup>321</sup> Three forms of active legal personality are possible: totally lacking, deficient, and complete.<sup>322</sup>

A person lacking active legal personality such as an insane person, cannot be punished for actions committed while insane because he is unable to take responsibility.<sup>323</sup> His actions therefore have no legal consequences attached to them, except those existing under receptive legal personality.<sup>324</sup> “When a child or madman kills someone or destroys the property of another person, they can only be held liable with reference to their property, but not to their persons.”<sup>325</sup>

A person partially lacking in active legal personality, such as an older child (*al-sabi al-mumayyiz*) or someone who is mentally retarded (*ma'tuh*) who is not totally insane, but whose intellect is not fully formed or weak, possesses deficient active legal capacity.<sup>326</sup> Someone possessing deficient active legal capacity must obtain the permission of others to engage in certain financial transactions and other acts.<sup>327</sup> Such persons are able only to conduct transactions that are “totally to their benefit, such as accepting a gift or charity,” without the acquiescence of their guardian.<sup>328</sup> All other transactions require the approval of a guardian, otherwise they are void.<sup>329</sup>

Active legal capacity is characterized by intellectual maturity without factors that could seriously impact judgment.<sup>330</sup> Therefore, ordinary illnesses “and other conditions which do not impair the intellectual capacity of a person have no bearing on his active legal capacity.”<sup>331</sup> All adults are presumed to possess this form of capacity,<sup>332</sup> with only a few exceptions.<sup>333</sup>

The current text of the CRPD requires that “persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.”<sup>334</sup> Despite the letter from the Chair of the Arab Group, and an attempt to insert a footnote differentiating a different legal capacity, the final text dropped such language after insistence from a number of groups that that

321. See Mughal, *supra* note 315.

322. See *Legal Capacity*, THE MESSAGE OF ISLAM (Mar. 24, 2009), <http://english.islammmessage.com/articleDetails.aspx?articleId=626>.

323. *Id.*

324. *Id.*

325. KAMALI, *supra* note 316, at 305.

326. *Id.*

327. See Mughal, *supra* note 315, at 88-89.

328. KAMALI, *supra* note 316, at 305.

329. *Id.*

330. See *Legal Capacity*, *supra* note 327.

331. *Id.*

332. Kamali, *supra* note 316, at 305.

333. For example, a person experiencing a deathly illness (*marad al-mawt*) may be considered of deficient legal capacity because the fear associated with death could affect the mental faculties of the individual. *Id.*

334. CRPD, *supra* note 1, art. 12.

legal capacity should have a universal interpretation, and not one limited to national laws.<sup>335</sup>

When a person is denied the opportunity to engage in financial transactions, vote, procreate, or exercise his dignity as a person as fully as others because of his status as disabled, that individual is subject to discrimination by being denied his legal capacity to act. While all people inherently have deficient receptive legal capacity, to the extent that Islamic law denies persons with disabilities complete active legal capacity it violates the CRPD's requirement that "persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life."<sup>336</sup>

#### CONCLUSION

Islamic law, though rooted in history and religious texts, has the potential to be a dynamic force in the interpretation and application of human rights. Islamic law contains many of the same principles that animate the CRPD: non-discrimination, the right to life, assisting the needy, and empowering the weak, for instance. Compliance with the CRPD is largely based on non-discrimination provisions that require Islamic states to treat persons with disabilities as they do anyone else. Thus, insofar as these Islamic states are more broadly restrictive than Western liberal democracies, these restrictions do not necessarily signal incompatibility with the CRPD.

In the long term, the overlap between Islamic law and the CRPD suggests broad acceptance and continuing political action. However, the fragile state of many Islamic nations' economies will almost certainly impede the Convention's implementation. Still, much movement has been made towards creating domestic legal regimes compatible with the CRPD even under difficult economic conditions, and these steps are likely to continue.

---

335. See Press Conference, *supra* note 307.

336. CRPD, *supra* note 1, art. 12.