Vol 35 No 01: January - June 2018
DOI: http://dx.doi.org/10.32678/alqalam.v35i1.1106

# "IBN RUSHD AS JURIST" AND HIS *FATWĀ* ON LEGAL CAPACITY[1]

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***Abstract***

*Legal capacity is one of the major topics in Islamic law on personal status. The Qurʾān deals with this subject, for example in Q 4: 5-6. However, it only discusses the issue of legal capacity in relation to orphans and minors. Based on the loose Qurʾānic concept of orphans and minors, the jurists of the classical period attempted to understand what was meant by legal capacity in Islam and how ought to operate in a Muslim society. One of the most remarkable jurists who tackled this issue was Ibn Rushd (520/1126-595-1198). In his celebrated collection of fatwā, the Fatāwā ibn Rushd, he explored the issue of legal capacity based on questions brought to him, who at a time sit as a qāḍī in Sevilla and Cordoba.*

**Keywords:** *Averroes, legal capacity, personal status, guardianship, Muslim Spain.*

## A. Introduction

Abu al-Walīd Muḥammad b. Aḥmad b. Muḥammad Ibn Rushd al-Qurṭubi al-Mālikī, known in the Medieval West by the Latinized name of Averroes, is famous in modern academia as a master of natural sciences (physics, medicine, biology, astronomy), theology, and philosophy. He was born in Cordova in 520/1126 and died in Marrākush in 595/1198. His significant commentaries on Plato and Aristotle have led modern scholars to designate him as "the commentator of Aristotle."[2] His stunning career in philosophy, natural sciences and theology, however, did not lead him to approach philosophy and religion as two distinct domains. On the contrary, Ibn Rushd was a Muslim thinker who advocated the importance of philosophy in acquiring an understanding of the world, relationships between individuals, and the structure of society. Ibn Rushd certainly was aware that there was a huge gulf between theoretical issues of theology and philosophy on one hand, and the practical issues of law on the other. In fact, in some of his commentaries, Ibn Rushd seems active in harmonizing philosophy and religion, or more specifically, in blending moral society into the *sharīʿa*.[3] Yet,

it is on this latter issue that Ibn Rushd has been overlooked by modern scholars. Hence, serious attempts to look at his legal discourse are highly significant for the study of Islamic legal history as well as the study of law and society today.

Insofar as the issue of Ibn Rushd's legal discourse and career is concerned, there has only been three serious works written to date: Brunschvig's "Averroès Juriste," published four decades ago; Dominique Urvoy's monograph, which contains some discussion of Ibn Rushd's career as a jurist; and an unpublished 1991 doctoral thesis by Asadullah Yate from Cambridge University, which highlights Ibn Rushd career as a jurist in the Mālikī school of law.[4] Although Ibn Rushd has written volumes on *uṣūl*, and was himself an appointed *qāḍī* in Seville and Cordoba, his treatises on legal discourse remain nearly unnoticed in academia because of the propensity of scholars to study his works on philosophy and theology.[5] The indifference of modern scholars toward Ibn Rushd's discussion of Islamic law may have a direct correlation with the modern scholars' lack of interest in studying the legal history of the Muslims in Spain.

Regardless of this paucity, historical records have sufficiently confirmed that Ibn Rushd was an expert not only in philosophy and theology (*kalām*), but also in interpreting God's law. We are told that during his peak position as state-appointed *qāḍī*, he enjoyed the position the most learned man in Andalus. His legal works, *Bidāyat al-mujtahid wa nihāyat al-muqtaṣid* and the *fatwa* collection known as the *Fatāwā Ibn Rushd*, are masterpiece that became the subject of study and memorization among students of Islamic law. These two attest that Ibn Rushd was not only a speculative thinker, but also a jurist, and to some extent, a *mujtahid* within the Māikī school of law, who was very concerned with the practical needs of his society.[6]

In this article, I attempt to bridge the gap between the much-studied aspects of his philosophical and theological thought and the unelaborated aspects of his juristic career in the Mālikī school of law, as well as to explore the issue of legal capacity as it pertained to the Muslims of Andalus.

## B. A brief history of Muslim in Spain

Before we move on, it is worthwhile to briefly look at Ibn Rushd's historical context in Medieval Spain. Muslims of Andalus are a mosaic of Muslim *umma* that have a different historical foundation from the rest of the Eastern Muslim community. What is interesting here is that despite the

Muslims of Spain experienced many conflicts and were faced with continuous anti-Islamic forces, they remained loyal to the Mālikī school of law (*madhhab*). Some scholars argue that the option to be loyal to 'the people of Medina' was chosen because of the straightforward theoretical solutions to social problems offered by Mālikī's doctrine.[7] Historical records, however, show that the allegiance of the Muslims in Spain to the Mālikī school was more pragmatic in nature: the Mālikī school was chosen by the Ummayyad dynasty in a bid to gain support from the *ʿulamāʾ* for the newly established caliphate. In this case, there are copious historical records on the arrival of Muslims in Andalus, especially from the early conquest of the Iberian Peninsula under the Umayyad caliph in Syria, al-Walīd. One record claims that the conquered were led by the governor of Ifriqiyya Mūsā b. Nuṣayr and his military commander, Ṭāriq. Following the political turbulence in Damascus and the threat of persecution of the Abbasid, ʿAbd al-Raḥmān the successor of al-Walīd escaped Syria to the peninsula and established an Umayyad caliphate there.[8]

When ʿAbd al-Raḥmān I established an independent government in Cordoba on May 15, 756, he knew that his political authority was not as strong as the political authority of the Abbasid caliphate in Baghdad. Therefore, in order to ensure the continuity of his command in the peninsula, ʿAbd al-Raḥmān needed full support not only from the Umayyad clients (*mawālī banī Umayya*) and the Islamized Barber, but also from the class of learned Muslims. That is to say, ʿAbd al-Raḥmān wanted to gain the *ʿulamāʾ*'s legitimacy for the newly-created state, because he recognized that only the *ʿulamāʾ*, who had direct influence on the masses, could assure him that his justice and attachment to the faith would be respected.[9] Furthermore, the policy of aligning power with the *ʿulamāʾ*, or to use their moral standard in legitimizng the government, found it finest form during the time of Hishām I, the successor of ʿAbd al-Raḥmān I, whose interest in *fiqh* led him to befriend the pupils of Mālik b. Anas, such as ʿAbd al-Raḥmān b. al-Qāsim and the *aṣḥāb* of Ibn ʿAbd al-ʿAzīz.[10]

In the Abbasid context in the East, it is generally known that during Harun al-Rashīd, the disciples of Mālik in Baghdad and Medina desired the teaching of their master to be the official rite of the state. However, Mālik himself was reluctant to support the caliph because of his policy toward the Alīds, whom the people of Medina held in high esteem. The denunciation of Mālik's involvement in caliph administration, nonetheless, did not obliterate the desire of his students to use his teachings as official law. When the ruler

of the West offered a way to realize Mālik's standard of behavior and jurisprudence as official rite of the people of Andalus, the pupil of Mālik readily accepted the offer. In other words, the establishment of Mālik juristic discourse in Andalus was made possible because of the ruler's interest in gaining the support of the *ʿulamāʾ*, as well as the *ʿulamāʾ*'s desire to apply their concept of ideal society and jurisprudence within the Umayyad state. However, we must bear in mind that the development of Mālik doctrine in Andalus was not without problems. Before being overruled by Mālik's disciples, Andalus had previously opted for the doctrine of the Syrian jurist al-Awzāʿī. The competition between al-Awzāʿī and Mālik eventually came to an end after the former died in 157/774, and that legal problem could no longer be referred to him. Mālik, on the other hand, only died after 179/795.[11]

## 1. Legal Capacity in Islamic Law

In his book *An Introduction to Islamic Law* (1982), Joseph Schacht suggests that legal capacity in Islamic law begins with birth and ends with death. Following this reasoning, the child or even the unborn child has the capacity to inherit, or in the case of a slave, she/he can be manumitted, but she/he would never have the capacity to dispose of his/her wealth or have the ability to contract unless they fulfilled certain conditions. Schacht has also distinguished two elements of legal capacity: the capacity of obligation (*ahliyyat al-wujūb*), which means the capacity to acquire rights and duties; and the capacity of execution (*ahliyyat al-adāʾ*), which includes the capacity to contract, and to fulfill one's obligation.[12]

However, to gain full legal capacity, a Muslim man or a woman must first fulfill certain conditions. Schacht explains that several prerequisites must be met before one is considered having full legal capacity: sanity (*ʿāqil*) and being of age (*bāligh*); he must also be fully responsible (*mukallaf*).[13] The insane (*majnūn*), small children (*ṭifl*), the idiot (*maʿtūh*), and the minor (*ṣabī*, *ṣaghīr*)are considered wholly incapable, but can incur certain financial obligations. They also have the capacity to conclude purely advantageous transactions and accept donations and charitable gifts.[14]

In addition to these conditions identified by Schacht, another important requirement that is no less significant in the discussion of legal capacity is the condition of *safah.* Ibn Manẓūr al-Ifrīqī, in his celebrated *Lisān al-ʿArab,* mentions the wide usage of the term *safah* in diverse contexts relating to ignorance (*jahl*), shallowness (*khiffa*), and lack of responsibility and

understanding (*naqṣ al-ʿaql*).[15] Due to a possible broad interpretation, Muslim scholars since the early centuries of Islam have offered different opinions on the definition of who are the irresponsible or the ignorant (*al-safīh*). They have not reached a consensus on determining what the legal implications would be for someone who is considered *al-safīh*. Saʿid b. Jubayr was of the opinion that *al-safīh* (plural *al-sufahāʾ*) are orphans.[16] Similarly, Saḥnūn mentioned that minors, whether orphans or not, also fall in the category of *al-safīh.*[17] Other scholars claim that women are *al-sufahāʾ*.[18] A more specific reference to *safah* was made by Ibn Ḥazam, a former Shāfiʿī jurist who then became an independent-minded follower of the Ẓāhirī school of law in Andalus. He was of the opinion that *al-safīh* refers to 'bad languages,' 'the obstinate infidel,' and 'the minor or insane.'[19]

Ibn Rushd, on the other hand, employs the term *safah* in the narrow context of financial mismanagement, particularly referring to someone who is irresponsible and undervalues his own wealth.[20] Based on the Qur'anic passage Q 4:5; "Do not give the wealth which God granted you in support to the responsible (*al-sufahāʾ*); feed them from it and cloth them, and speak to them in good parlance," Ibn Rushd believes this implies that a man or woman who has reached majority (*bulūgh*) can be regarded as a *safīh* if he/she is found financially irresponsible or is a spendthrift (*mubadhdhir*).[21]

## 2. Legal Capacity in Ibn Rushd's view

In the anthology of *fatwā* collected by Mukhtār b. al-Ṭāhir al-Talīlī, Ibn Rushd does not explicitly mention legal capacity as an operative term in his corpus of Islamic law as Schacht has defined.[22] However, the absence of this term by no means reduces his concern for discussing the issue of legal capacity in a comprehensive way. With no abstract operative term to be defined, Ibn Rushd goes on to discuss the topic of legal capacity by pointing out on particular cases. As is his general pattern, before explaining his *fatwā*, Ibn Rushd always begins his discussion with questions, which were either directly brought to him or had been addressed by other jurist. In the following discussion of legal capacity, Ibn Rushd begins his *fatwā* by responding to the general concern surrounding the circumstances in which a person is to be allowed (*jawwaza*) to dispose of his/her wealth.

For Ibn Rushd, an individual has to reach certain points before he/she has the legal capacity to use his/her money (*lā yaṣiḥ li al-insāni fī mā lahu illa*

*bi ʿarbaʿa awṣāf*): he/she must have reached puberty or maturity (*al-bulūgh*), must be free (*al-ḥuriya*), as well as sound of mind (*kamāl al-ʿaql*) and has exhibited responsible behavior (*bulūgh al-rashid*).[23]

Regarding the status of freedom (*al-ḥuriya*), Ibn Rushd refers to the status of slaves and their relationships to their master. In Islamic law, it is a legal fact that a slave is usually considered an object subject to his master. However, as Schacht has brought up, a slave is still to be considered a person, and therefore can be a possessor of rights: she/he can get married (the male slave can marry up to two female slaves).[24] Ibn Rushd, in this case, does not provide further explanation as to the slave's capacity in marriage. For Ibn Rushd, a slave has neither the legal capacity to dispose of his wealth nor the right to use and enjoy the advantages or profits of another's property (usufruct); if he is involved in a transaction, his decision will be considered void *ab initio*.[25]

Ibn Rushd's explanation of *bulūgh al-rashid*, on the other hand, covers extensively men and women of different ages. In defining and supporting this idea, the philosopher uses the Qurʾān as a moral and legal source. He states that every person has a moral obligation to spend his money in accordance with the tenets of Islam. God forbids a Muslim to squander his wealth. If necessary, God advises Muslims to assign a guardian to protect the wealth (*māl*) of orphans.[26] It is undoubtedly from these Qur'anic passages that Ibn Rushd builds his binary opposition between *safah* and *rushd*, a concept central to his discussion on legal capacity.

*Categories of maturity (bulūgh)*

In his collection *fatwa,* Ibn Rushd gives detailed accounts of when a free man or woman is to be considered mature (*bulūgh*). For a man to be considered mature or an adult, he must have experienced the emission of semen, and for a woman, she must have experienced her first menstruation. However, both men and women can be considered mature, though they have not yet experience the emission of semen or menstruation, if they have shown signs of maturity (beard and mustache in case of men) or have reached certain ages.[27]

Certainly, Muslim jurists have never been in agreement in their discussion as to what age someone who has not experienced the emission of semen or menstruation is be considered mature. Ibn Rushd firmly acknowledges this fact and he restates that jurists offer different opinions

regarding age; some mark out the limit of maturity as fourteen years old, others fifteen years old, while others claim seventeen or eighteens years old.[28]

Likewise, there has also been disagreements among Muslim jurists in answering this question: what would be the status of someone who has reached the minimum age, but has not dreamed yet and has no sign of maturity such as a beard? Would he be considered mature? In his response to this question, Ibn Rushd mentions that some jurists would consider the person mature because he has reached a certain age, while others would answer in the negative since there has been no sign as to whether the person would be a good person or not. To bridge these two positions, Ibn Rushd suggests that we should ask the person whether he has experienced any other signs of maturity or not. Her/his answer would be our basis for determining whether he/she has matured or not.[29]

As regard to the definition of a healthy mind (*ʿaql*), the exact scope is plain and straightforward: she/he must be able to recognize the difference between a beast (*al-bahīma*) and an insane person (*al-majnūn*), recognize that the quantity of two is greater than one, or to acknowledge the indisputable fact that the sky is above us (*al-samāʾ fawqanā*) and the earth is under us (*al-arḍ taḥtanā)*.[30]

*Relationship between maturity (bulūgh) and responsible behavior (bulūgh al-rashid)*

Although Ibn Rushd defines the boundaries of maturity (*bulūgh*), he does not give any detailed explanation as to whether someone who is considered mature would have the ability to act in a responsible way (*bulūgh al-rashid*) and would not be considered a spendthrift (*al-safīh*). However, he offers a simple way of determining the mature capacity of an individual, that is, by looking at the manner in which he spends his wealth; whether it is in accordance with the moral basis revealed by the Qurʾān 4:6 or not. The Qurʾān says: "And test the orphans until they attain the age of marriage; then if they show responsible behavior, give them their goods." Furthermore, Ibn Rushd explains in detail that there were four ways (*aqsām*) of determining if someone has the ability to act in responsible way (*bulūgh al-rashid*):

i. If a person is generally known to have the capacity or the potential to use his wealth in an extravagant and irresponsible way, then he should not be considered responsible and therefore should be legally treated in

accordance with his behavior (*ḥāl al-aghlabu min ṣāḥibihā al-safah fayaḥkumu lahu fīhā biḥukmuhu*).[31]

ii. If a person is known to be responsible, and will most likely continue to be responsible in spending his wealth, then he should be legally considered as behaving responsibly (*wa in ẓahara rashadahu, wa ḥāl al-aghlabu min ṣāḥibihā al-rashad fayaḥkumu lahu fīhā biḥukmuhu*).[32]

iii. If a person had previously been known to be capable of extravagance and irresponsibility in the use of his wealth, but it had not yet been formally determined whether he was responsible or not, and it is subsequently found that he is negligent in his actions, then he should be legally defined as irresponsible (*wa in ʿalama sufuhahu, wa hāl muḥtamalah li al-rashad wa al-safahu, wa al-aẓharu fīhā al-safah fayaḥkumu lahu fīhā biḥukmuhu mā lam yaẓhuru rashaduhu*).[33]

iv. The fourth category of persons is similar to the previous one, only he is not negligent in the use of his wealth. He should therefore be legally determined as being responsible or accountable (*wa ḥāl muḥtamalatu ayḍan li al-rashad wa al-safahu, wa illā ẓaharu min ṣaḥibihā al-rashad fayaḥkumu lahu bihi mā lam yaẓhuru safahu*).[34]

In addition to the four categories discussed above, Ibn Rushd adds another specific category regarding a person who is deemed irresponsible: if he has not yet matured (*al-ṣaghīr*), then he cannot be considered responsible. In this case, Ibn Rushd explains that there was no dispute between Mālik and his associates about the legal rights of this person; if the person has not dreamed and experienced the emission of semen (man) or menstruation (woman), the person is not legally allowed to rule over his own wealth. He does not have the legal capacity to donate his wealth (*hibah*), give to charity (*ṣadaqah*) and or make any financial contracts.[35]

## 3. Legal capacity of women

The discussion of the legal capacity of women consists of many details that would not be found in a discussion on the legal capacity of men. The following situations would not allow a woman to have legal capacity to act in her own name: a woman who has not yet experienced sexual intercourse (*al-bakara*), a woman still under the control of her father or a guardian, a woman who has not yet reached menopause (*taʾnas*) according to the opinion of the *madhhab* from which we derive the limits of menopause,[36] a woman who has not yet married, or a woman who is married but the marriage has not yet been consummated. Her competence in controlling her wealth and any other acts

that have legal consequences would thus be contingent on her father or her legal guardian.[37]

Once she reaches maturity, a woman under guardianship is required to show how she plans to spend her wealth. If the community finds that she has been responsible in her decision, she will be considered as having full legal capacity.[38] On the contrary, if the community finds that she is a spendthrift, she will be judged as having been irresponsible in her actions and therefore would not be accorded legal capacity. However, this order would not be the same for a virgin whose father has died and has not assigned her a guardian. In such a case, Ibn Rushd explains that there has been no consensus on such a situation among Mālik's associates (*aṣḥāb*).[39]

Nevertheless, in the cases of a virgin who has not yet been judged responsible or not, or of a woman who has reached maturity, or of a woman who has married but has not been living with her husband according to the minimum period of time as derived from the opinion of *madhhab*, her legal capacity to contract or to act in other financial situations would be contingent on her father or her husband.[40]

As for a woman who has been considered responsible and has never been a spendthrift, or a virgin who has reached menopause according to the opinion of the *madhhab* from which we derive the limits of menopause, Ibn Rushd offers two opinions: (i) if her father or guardian claims that she is not responsible, then she would not have the legal capacity to act in any financial and non financial contracts; these decisions would remain contingent of her father or guardian; (ii) if she is married and has had sexual intercourse with her husband, then she should be considered as having full legal capacity.[41]

## 4. Legal capacity of menopause woman

It is generally agreed upon that a virgin who has not yet experienced her first menstruations cannot be considered as having full legal capacity, unless she has reached the age of maturity. However, in some conditions, a menopausal woman (*taʾnas*) can have legal capacity and be permitted to act on her own behalf. Although there has been some disagreement among Muslim jurists as to when a woman can be considered menopausal, Ibn Rushd tries to present the conditions in three categories:

a. If she has a father

The legal status of a woman who lives under the protection of her father until her marriage, and whose husband has consummated the marriage, is determined by the husband. If her husband knows that she would be responsible in her actions, then she can get out from under her father's guard and be considered mature and responsible. She will also be legally permitted to spend her wealth. Conversely, if her husband finds that she has been irresponsible in her use of wealth, she will not be considered mature. Similarly, a woman who is living with her father, is married and whose husband has consummated the marriage, but has not reached menopause, and has never been a spendthrift, could be considered mature and responsible.[42]

In determining the minimum age of menopause (*taʾnas*), Ibn Rushd notes that there has been no agreement among Muslim jurists. While some say forty years old, others set the minimum age at fifty or sixty years old. The opinion of Mālik, however, was that if she remained with her father, her actions would not be considered valid without her father's consent, unless she has reached the age of menopause.[43]

The following discussion will be more complex as we look at the situation of a woman who is living with her father and has been married for less than one year. In such a case, Ibn Rushd is of the opinion that the legal status of the woman to act on her own is withheld for one year to three years, depending on the jurist, before she can be considered mature and responsible. During this interim period, she will not be permitted to engage in any transaction or contract. Decisions made during this waiting time can be revoked. Only after this period has passed can she obtain legal capacity. In addition, she is also required to show that she is capable of responsible behavior, thus proving maturity and responsibility.[44]

In the case of a woman whose husband has died before the one, two or three-year anniversary, depending on which timeframe is considered valid, Ibn Rushd offers two opinions: first, if she has married, regardless of the length of marriage, she will be considered fully capable in all her decision; second, if she has married and her husband dies, she must return to her father if her father is still alive.[45]

b. If her father had assigned a guardian prior to his death

The legal capacity of a woman whose father had assigned her a guardian before his death, since she was known to be extravagant and irresponsible in spending his wealth, or in the case of a court assigning her a guardian after the

death of her father, remains with her guardian. Even if she has married and is accompanied by her husband, her guardian retains control of her wealth, unless she has proven that she is responsible (*rushd*).[46]

c. If she is an orphan

In the case of an orphan - if she has a guardian assigned by her father or assigned by the court, or if she has been married for a long period of time and her husband has had sexual intercourse with her, or if she has reached menopause - she cannot release herself from her guardian unless the guardian release her. According to Ibn Rushd, this is a well known opinion among Mālikī jurists (*hadhā huwa al-mashhūr fī al-madhhab*). [47] The less popular opinion, however, according to Ibn Rushd, says that once she reaches menopause or marries, she should be allowed to free herself from her guardian and be permitted to act on her own behalf.[48]

In the case of an orphan who has no guardian assigned to her by her father, Ibn Rushd offers two further opinions. The first, which is held by Saḥnūn, says that once she has reached maturity and experienced menstruation, her actions can be considered legitimate. The second, in contrast, posits that unless she has reached menopause (*taʾnas*), she will not considered as having legal capacity for any of her actions.[49]

Jurists of the medieval period, as Ibn Rushd informs us, never reached a consensus as to what age a woman can be considered menopausal. Here, Ibn Rushd lists supplementary opinions: some jurists are said to believe that the period of menopause begins after thirty years of age, while others emphasized forty years, and some others gave a range of between fifty to sixty years. Another argument claims that regardless of her age, if she has been with her husband for one to three years, depending on which one we consider to be legitimate, then she can be regarded as in a similar position as a menopausal woman and therefore all her actions should be considered legal.[50]

## 5. Legal capacity of man

Unlike our previous discussion concerning the legal capacity of a woman, the legal capacity of a man is less complex. Muslim jurists had come to an agreement that a young man who is not mature and is still under the protection of his father would not have the legal capacity to donate (*hibah*) or conclude any financial contract without his father's consent. Once he has reached maturity, he may fall in one of three categories: *First*, if he is known

to be sound of mind and has been responsible in spending his wealth, then he should be considered responsible or *rushd*.[51]*Second*, if he is usually known to be extravagant in spending his wealth, and should he be determined to continue this behavior, then he is be considered irresponsible or *safah*.[52]*Third*, if it has not been determined whether he is responsible or extravagant, then there are two possibilities. In one case, an observation of his behavior will lead to a determination of whether he has been responsible for his wealth or not. This opinion, according to Ibn Rushd, is held by Yaḥyā, from Ibn al-Qāsim in his book *al-Ṣadaqāt wa al-hibāt*, who said that if the man has been responsible, he must be considered mature and should not remain under his father or guardian's supervision, unless there is reason to believe otherwise.[53]

The second opinion maintains that as long as the man has not been wasteful, he should be allowed to act alone in all of his transactions. If he is found to be excessive and irresponsible, then his father or guardian has the right to intervene. According to Ibn Rushd, this is the opinion of Mālik, which was reported by Ziyād, and has been clearly stated in the *Mudawwana* of Saḥnūn.[54]

In the case of a man whose father has died, and who himself has not yet matured (*bulūgh*), but the court has assigned him a guardian, then the guardian will take on the role of his father. However, if he has reached maturity and has been responsible (*rushd*), who can release him from the guardian's control? According to Ibn Zarab, if the guardian was assigned by *qāḍī*, then only the *qāḍī*has the right to release him from the guardian.[55] Some jurists are reported to have said that the man is permitted (*jāʾiz*) to release himself from his guardian once he has reach maturity, while others claim that the man should not be permitted to release himself from his guardian unless he has proven that he is responsible for his wealth.[56]

If a father had assigned him a guardian before his death, Ibn Rushd, following Ibn al-Qāsim in his *Kitāb al-wāṣiyā al-Ūla*, says that he does not specifically need a *qāḍī*'s decision to release himself once he has matured and has been responsible in all his action. In the absence of a *qāḍī*'s decision, however, he still needs someone to release him from his guardian.[57]

## C. Interjection and relations between guardian and ward

In the corpus of Islamic law, there has been massive debate over whether someone who is considered irresponsible, extravagant, or a spendthrift (*al-safīh*) should be under interdiction or not.[58] Al-Shāfiʿī, for example, in his

*Kitāb al-Umm* held the position that the irresponsible or the spendthrift, because of its similar *ʿilla* with the minor, should be interjected.[59] Mālik and the two disciples of Abū Ḥanīfa, Abū Yūsuf and al-Shaybānī were also reported to have denied the rights of the *safah* to formalize contracts and buying or selling without the prior consent of his guardian.[60] Abū Ḥanīfa, on the contrary, was reportedly against the decision to intervene the spendthrift because he considered the act of the interdiction or the denial of legal capacity as more harmful to the person than his own irresponsible acts.[61] Ibn Rushd, however, as we have seen from the foregoing discussion, was on the side of Muslim jurists who supported the interjection. His *fatwā* on legal capacity and his discussion of the categories of the responsible and irresponsible in spending someone's wealth reflect his strong position on interdiction and the necessity of assigning a guardian.

In the following paragraph, I shall discuss how Ibn Rushd explains the relationship between a guardian and his ward, to what extend a guardian has a right to intervene in his ward's activities, and what action can legally be taken by a ward without the prior consent of his guardian.

Although the term *safah* has a broad meaning, as seen in the discussion on legal capacity, Ibn Rushd employed the term *safah* to refer to the Qur'anic competency of spending wealth. We have also noted that Ibn Rushd did not recognize any legal capacity to those he considered irresponsible, spendthrifts or any other related term of *safah*. However, Ibn Rushd emphasizes that in the case of rituals, someone who is considered *safah* has the same the capacity of obligationsuch as fasting and praying as someone who is considered mature, responsible, and in possession of a perfect mind (*kamāl ʿaql* and *bulugh al-rashid*) except for the minor and the insane. He can also be punished (*qiṣāṣ*) if he commits a wrong.[62]

Beyond the issue of the Qur'anic morality of spending wealth, Ibn Rushd recognizes that someone who is considered *safah*, whether under guardianship or not, can still be allowed to engage in some legalactivities. In some cases of guardianship, the guardian may intervene him, although there has been no clear cut position on this legal question. For example, a person who is considered *safah* still has the right to divorce (*ṭalāq*) his wife without the consent of his guardian, and his action will remain valid. Likewise, he also has the right to manumit a slave (*'ataqa*).[63]

However, in other cases, Ibn Rushd quoted Muḥammad Ibn al Mawāz as saying that if the person engages in activities that will result in any financial

consequences in his life, such as donations (*hibah*), charity (*ṣadaqah*), or even manumitment of a slave, (*'ataqa*), he will have to ask permission from his guardian. This implies that the guardian will analyse whether his ward's decision would significantly affect his life or not. If the guardian finds that his decision will negatively impact his life, the guardian can intervene him. Nevertheles, if the person receives financial benefits from others, for example, a creditor forgives him his debt, he can legally accept it without the consent of his guardian.[64]

In the case of divorce, due to the financial responsibility it may resulted in, Ibn Rushd mentions a significant difference among Muslim jurists on whether a *safih* is still responsible for the payment of his wife's expenses. The first argument, held by Mālik, posits that although the person is considered a *safih*, he would never be discharged from his obligation to pay his due to his wife. On the contrary, the second argument holds that the husband is not responsible to pay his due because he is under the supervision of someone else. A third argument requires an analysis of the person's financial situation. If the person has the capacity to pay his due, he must pay. However, if he has very limited financial freedom, then he is not obliged to pay his due.[65] Ibn Rushd indicates that the third argument has become the opinion of the majority of jurists. However, he does not explicitly mention which position he himself held.

The relationship between a guardian and his ward became more complex as the Cordoban *qāḍī* faced further marital issues. One case brought before him considered the following problem: what happens when a person, who is considered *safah* and has a guardian, has married a woman without the consent of his guardian and then dies? The question requiring his *fatwā* is how the guardian ought to consider the wife of his ward, who by law is allowed to inherit from her husband. In regards to this specific problem, Ibn Rushd offers three answers: the first says she does not inherit, unless she has had sexual relations with her husband; the second says she can undoubtedly inherit; and the third says that she has a right to inherit, but the guardian must look at the marital situation. That is to say, if the marriage was acceptable, she would be able inherit.[66]

Another problematic case brought before Ibn Rushd was whether a guardian could force his ward to marry without the latter's approval. Again, in answering this question, Ibn Rushd offers two answers: the first says that the guardian cannot force his ward to marry without his consent, and the second says the guardian can force his ward to marry regardless of the ward's

consent.[67]

Likewise, in the case of divorce between the person who is considered *safah* and his wife, similar questions were brought before him. Does a guardian have the right to divorce his ward's wife? Again, Ibn Rushd does not specifically answer this question. One position claims that the guardian has the right to divorce his ward's wife, but another insists that the guardian does not have such a right.[68]

## D. Conclusion and remarks

After reading Ibn Rushd and his selected *fatwā*, we can gain some conclusion which may enrich our understanding of Ibn Rushd and his legal discourse. *First*, Ibn Rushd neither begins his discussion on legal capacity from an abstract idea, nor does he mention the term legal capacity in his selected *fatwa.* However, from the general concern surrounding the circumstances in which a person is to be allowed (*jawwaza*) to dispose of his/her wealth, he discusses the issue of legal capacity, and that discussion has included the capacity to acquire rights and duties and the capacity of execution as indicated by Schacht.

It is also obvious that Ibn Rushd refers to the Qurʾān as the main source of his exploration of legal capacity. He has expanded the meaning of term *safah*, which the Qurʾān only uses to address the situation of minors and orphans, into a more general moral and legal concept of spending wealth. In this context, Ibn Rushd has created the binary opposition between *safah* and *rushd*. In order to define who is considered *safah* and *rushd*, Ibn Rushd, though not in any systematic order, has classified the capacity of men and women, as well as menopausal women. Broadening the application of these two terms, *safah* and *rushd*, from orphans and minors to men and women in general, Ibn Rushd supports the idea of extending interjection and guardianship to anyone who is considered irresponsible.

Second, it is interesting to note that although in some way Ibn Rushd does not specifically define his juristic position, he remains consistent with the standard teaching of Mālik and his associates. In some of his discussions on the legal capacity of women for example, he refers to the authority of Ibn al-Qāsim and Saḥnūn as the reliable source of the Mālikī school of law. On occasion, Ibn Rushd also mentions his agreement with the widely accepted opinion (*mashhūr*) in the *madhhab*, without specifically mentioning any authoritative names. In the case where Ibn Rushd does not explicitly mention his juristic position, he only offers various arguments within the Mālikī school of law and lets his readers to choose any legal position. In this case, Ibn Rushd provides room for disagreement

(*ikhtilāf*), which is highly beneficial for the survival and flexibility of Islamic legal concepts.

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[1]An earlier draft of this article was presented at a seminar of Islamic Law and theory of contract at the Institute of Islamic Studies, McGill University, Montreal, Canada.

[2] See R. Arnaldez, "Ibn Rushd," in *Encyclopaedia of Islam*, ed. V.L. Menage B. Lewis, C.H. Pellat, J. Schacht (Leiden, London: E.J. Brill, Luzac & Co., 1971). Ibn Rushd "the grandson" (*al-ḥafīd*) is not to be confused with Ibn Rushd "the grandfather"(*al-jadd*) who died in 520/1126. For a detailed biography of Ibn Rushd the grandson, see Ibn al-Abbār, *Kitāb al-Takmila li kitāb al-Ṣila* [=*Bibliotheca Arabico-Hispana V* and *VI*] (Madrid: Maṭbaʿa Rūkhas, 1886-87) vol. 1, 269-70; Yasin Dutton, "The Introduction to Ibn Rushd's *Bidayat al-Mujtahid*," *Islamic Law and Society* Vol. 1 No. 2 (1994): 188-205.

[3] For Ibn Rushd's commentaries on philosophy and religion, see Averroes, *Averroes on the Harmony of Religion and Philosophy*, trans. and int. G. Hourani (London: Luzac, 1961; reprinted in 1967; and 1976). For his specific approach to philosophy and *sharīʿa*, see Oliver Leaman, *Averroes and His Philosophy* (Oxford: Clarendon Press, 1988), 144-60.

[4] Dutton, "The *Introduction* to Ibn Rushd's *Bidayat al-Mujtahid*.", 188-189; R. Brunschvig, "Averroes Juriste," in *Etudes D'orientalisme Dediees a La Memoire De Levi-Provencal*, ed. Abdel Magid Turki (Paris: G.-P. Maissonneuve at Larose, 1962); Dominique Urvoy, *Ibn Rushd (Averroes)* (London and New York: Routledge, 1991); Asadullah Yate, "Ibn Rushd as Jurist," (unpublished PhD thesis: Cambridge University, 1991).

[5] It should be noted that despite scholarly interest on Ibn Rushd's philosophy, which has been progressively archived, many commentators fail to regard his works as 'real philosophical works' and tend to consider them as "the instrument of philological scholarship and literary criticism". See, Leaman, *Averroes and His Philosophy*, vii.

[6] In his collection of *fatwa,* Ibn Rushd explains the rank of *mujtahīd* within the Mālikī school. However, Ibn Rushd is ambiguous in defining his own position as a jurist within his juristic typology. Ibn Rushd is a *qāḍī,* but he is also a *mujtahid* in the sense that he does *ijtihād* within the Mālikī *madhhab*. For more information on the discussion of juristic typology, see Wael B. Hallaq, *Authority, Continuity, and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001), 2-7.

[7] For example, see, Leaman, *Averroes and His Philosophy*, 1.

[8] For information on the establishment of the caliphate in Andalus, see Janina M. Safran, *The Second Umayyad Caliphate* (Cambridge, MA: Harvard University Press, 2000), 119-140; Fernando de la Granja, "An Oriental Tale in the History of Andalus," in *The Formation of Al-Andalus Part 2*, ed. Maribel Fierro and Julio Samso (Aldeshot UK, Brookfield USA: Ashgate Variorum, 1998), 22.

[9] For more information on the role of the *ʿulamāʾ* in Andalus, see Hussain Mones, "The Role of Man of Religion in the History of Muslim Spain up to the End of the Caliphate," in *The Formation of Al-Andalus Part 2*, ed. Maribel Fierro and Julio Samso (Aldeshot UK, Brookfield USA: Ashaget Variorum, 1998), 51-53.

[10] See Mones, "The Role of Man of Religion in the History of Muslim Spain up to the End of the Caliphate," 54.

[11] See Roger Idris, "Reflection on Malikism under the Umayyad of Spain," in *The Formation of Al-Andalus Part 2*, ed. Maribel Fierro and Julio Samso (Aldeshot UK, Brookfield USA: Ashgate Variorum, 1998), 85-88.

[12] Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Oxford University Press, 1982), 124.

[13] Ibid.

[14] Ibid., 124-25.

[15] Ibn Manẓūr al-Ifrīqī, *Lisān al-ʿArab* (Cairo: Dār al-Maʿrif, n.d), 2032-34.

[16] Sa'id's argument is based on the interpretation of Qurʾān Sura 4:2, where the assignment of a guardian for orphans is considered vital. See ʿAbdullah ʿAlwi Haji Hassan, *Sales and Contract in Early* Islamic *Commercial Law* (Islamabad: Islamic Research Institute, International Islamic University, 1994), 139.

[17]Oussama Arabi, *Studies in Modern Islamic Law and Jurisprudence* (The Hague, London, New York: Kluwer Law International, 2001), 104-05.

[18] This argument is held by Mujahid, but refuted by Ibn Ḥazm, who said that there is no evidence in the Qurʾān or the Tradition, which proves that women are *al-sufahāʾ*. See, Hassan, *Sales and Contract in Early Islamic Commercial Law*, 139.

[19] Arabi, *Studies in Modern Islamic Law and Jurisprudence*, 118. For further discussion of *al-Safih* according to Ibn Ḥazm, see Ibn Ḥazm al-Ẓāhirī, *al-Muḥallā,* 8 vols., ed. Muḥammad Harras (Cairo: Maṭbaʿat al-Imām, n.d.).

[20] Ibn Rushd, *Fatāwā Ibn Rushd*, ed. Mukhtār Ibn al-Ṭahiri al-Talīlī (Beirut: Dār al-Gharb al-Islāmī, 1978), 358-62.

[21] Ibid.

[22] My specific discussion of Ibn Rushd's argument of legal capacity refers to his argument in his collected *fatwā*, *Fatāwā Ibn Rushd*. See, ibid., 357-84.

[23] Ibid., 358.

[24] Schacht, *An Introduction to Islamic Law*, 127.

[25] Ibn Rushd, *Fatāwā Ibn Rushd*, 358.

[26] Q 9:67: "And those, who, when they spend, are neither extravagant nor niggardly, but hold a medium (way) between those (extremes)." Q 4:5-6: "And give not unto the foolish your property which Allah has made a means of support for you, but feed and clothe them therewith, and speak to them words of kindness and justice. And try orphans (as regards their intelligence) until they reach the age of marriage; if then you find sound judgment in them, release their property to them, but consume it not wastefully, and hastily fearing that they should grow up, and whoever amongst guardians is rich, he should take no wages, but if he is poor, let him have for himself what is just and reasonable (according to his work). And when you release their property to them, take witness in their presence; and Allah is All Sufficient in taking account."

[27] Ibn Rushd, *Fatāwā Ibn Rushd*, 359.

[28] Ibid.

[29] Ibid., 359-60.

[30] Ibid., 360-61.

[31] Ibid., 362.

[32] Ibid.

[33] Ibid.

[34] Ibid.

[35] Ibid., 363.

[36] There have been many arguments among the schools in defining when the period of menopause (*taʾnas*) begins. I shall discuss this matter in the next paragraph.

[37] Ibn Rushd, *Fatāwā Ibn Rushd*, 356.

[38] Usually there is someone in the community who acts as a 'testamentary guardian' (*al wasī al* mukhtar). See, Jamal J. Nasir CVO, *The Islamic Law of Personal Status* (The Hague, London, New York: Kluwer Law International, 2002), 188.

[39] Ibn Rushd, *Fatāwā Ibn Rushd*, 365.

[40] Ibid., 366.

[41] Ibid.

[42] Ibid., 372-73.

[43] Ibid., 373-74.

[44] Ibid., 375-76.

[45] Ibid., 376-77.

[46] Ibid.

[47] Ibid., 377.

[48] Ibid.

[49] Ibid., 378.

[50] Ibid., 378-79.

[51] Rather than being based on a personal judgment, it is assumed that there will be someone who may decide whether he is *rushd* or not. Ibid., 367.

[52] Then he is prevented from contracting and using money.

[53] Ibn Rushd, *Fatāwā Ibn Rushd*, 367.

[54] Ibid., 368.

[55] Ibid., 369.

[56]Ibid.

[57] Ibid.

[58] Oussama Arabi, "The Interdiction of the Spendthrift (*al-Safīh*): A Human Rights Debate in Classical Fiqh," Islamic Law and Society 7 no. 3 (2000): 300-24.

[59] For an exploration of al-Shāfiʿī's *Kitāb al-Umm* and his legal reasoning on the interdiction of the irresponsible, see Arabi, *Studies in Modern Islamic Law and Jurisprudence*, 107-08.

[60] Ibid., 109-10.

[61] Ibid., 113.

[62]Ibn Rushd, *Fatāwā Ibn Rushd*, 379.

[63] Ibid., 380.

[64] Ibid.

[65] Ibid.

[66] Ibid., 382.

[67] Ibid., 382-83.

[68] Ibid., 383.

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