

# THE HISTORICAL JOURNEY OF THE LEGAL CHANGE IN THE HANAFĪ SCHOOL ABOUT THE COMPENSATION OF BENEFITS\*

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## Abstract

The non-compensation of benefits is a basic rule according to the Hanafi school (*madhhab*). However, the late Hanafi scholars (*muta'akhhirūn*) made some exceptions to this established rule (*zāhir al-riwāya*) in the madhhab. The exceptions to this rule are the benefits (*use-values*) of endowment property, orphans' property and property set up for profitable use (*mu'add li-l-istighlāl*). The late

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Ḥanafīs accepted the view that benefits could only be compensated in these three places by slightly stretching the relevant rule. Fatwās (*legal opinions*) on this subject were initially discussed in wāqī'āt literature. Later they gained a certain authority by being repeated in many works of the same genre. Finally, this view which has been accepted by the Ḥanafī Sheikhs (*mesāikh*), has become a part of the doctrine by taking its place in the later standard texts and legal commentaries (*shurūh*) of the school. In this study, the question how the rule of *zāhir al-riwāya* in the Ḥanafī school about the compensation of benefits (*damān al-manāfi*) was revised by the late Ḥanafīs will be discussed. Additionally, the question “when the exceptions mentioned were arised” will be searched. The incorrectness of some views that have been claimed recently on the subject will be examined by the help of the examples in the Ḥanafī legal literature.

**Keywords:** Islamic Law, Compensation of benefits (*damān al-manāfi*), Endowment property, Orphans' property, Mu'add li-l-istighlāl

### Menfaatlerin Tazminiyle İlgili Hanefi Mezhebinde Yaşanan Hukuki Değişimin Tarihi Serüveni

#### Öz

Menfaatlerin tazmin edilmemesi, Hanefi mezhebine göre temel bir kuraldır. Ancak müteahhir Hanefi âlimleri, mezhepteki yerleşik bu kurala (*zāhirü'r-rivāye*) bazı istisnalar getirmişlerdir. Vakıf malı, yetim malı ve kiraya verilmek üzere hazırlanmış (*mu'addün li'l-istiğlāl*) malların menfaatleri (kullanım bedelleri) bu kuralın istisnalarıdır. Müteahhir Hanefi âlimleri ilgili kuralı biraz esneterek menfaatlerin sadece bu üç yerde tazmin edileceği görüşünü benimsemişlerdir. Bu konuyla ilgili fetvâlar başlangıçta vâkıât/fetâvâ türündeki kitaplarda gündeme getirilmiş, sonrasında aynı türdeki pek çok eserde tekrarlanarak belirli bir otorite elde etmiş ve nihayetinde Hanefi meşâyihinin kabulüne mazhar olan bu görüş, mezhebin daha sonraki hukuk metinlerinde ve şerhlerde yerini alarak doktrinin bir parçası olmuştur. Bu çalışmada, menfaatin tazminiyle ilgili Hanefi mezhebindeki *zāhirü'r-rivāye* kuralının sonraki Hanefi meşâyih tarafından nasıl revize edildiği, bununla ilgili zikredilen istisnaların yaklaşık olarak ne zaman ortaya çıktığı ve bu konuya dair yakın zamanda ileri sürülen bazı iddiaların doğru olmadığı Hanefi hukuk literatüründeki örneklerden hareketle gösterilecektir.

**Anahtar Kelimeler:** İslam hukuku, Menfaatlerin Tazmini, Vakıf Malı, Yetim Malı, Mu'addün li'l-istiğlāl.

### Introduction

The non-compensation of benefits is a basic rule according to the Ḥanafī school. But, the late Ḥanafī scholars (*muta'akhkhirūn*) made some exceptions to this established rule (*zāhir al-riwāya*) in the madhhab. The exceptions to this rule are the benefits (use-values/*manāfi*) of endowment property, orphans' property and property set up for profitable use (*mu'add li-l-istighlāl*). The late Ḥanafīs accepted the view that benefits (*manāfi*) could only be compensated in these three places by stretching the relevant rule a

little. Legal opinions (*fatwās*) on this subject were initially discussed in *wāqī'āt* literature. Later they gained a certain authority by having been repeated in many works of the same genre. Finally, this view which the Hanafī Sheikhs accepted has become a part of the doctrine by taking its place in the later standard texts and legal commentaries (*shurūh*) of the school.

Although it cannot be determined exactly when these exceptions about the compensation of benefits occurred, some views have recently raised on this issue. Samy Ayoub states in part of his book titled “*Law, Empire and the Sultan: Ottoman Imperial Authority and Late Hanafī Jurisprudence*” that the rule on the compensation of benefits was revised by the late Hanafī scholars and that Haşkafi (d. 1088/1677) and Ibn ‘Ābidīn (d. 1252/1836) opposed the basic rule of the early period of the madhhab by taking a stand for this new view.<sup>1</sup> In another part of his work, Ayoub claims that the view on non-compensation of benefits was revised by Baghdādī (d. 1032/1623) and Ibn ‘Ābidīn and this view was also legislated in Majalla.<sup>2</sup> However, when the relevant sources are closely examined, it is quite obvious that these claims of Ayoub are not correct.<sup>3</sup> It is true that the late Hanafīs made a revision on this issue and brought some exceptions to the basic rule in the madhhab. However, it is impossible to accept the argument that the change in question was made by Baghdādī and Ibn ‘Ābidīn; and that Haşkafi and Ibn ‘Ābidīn opposed the basic rule in the madhhab. Finally; the fact that this view became law in Majalla is also hard to accept as a result of the aforementioned process. Because, the exceptions about the compensation of benefits were mentioned long before the date he claimed (about 500 years ago) and this rule became part of the Hanafī legal doctrine. On the other hand, if we come to the claim that Haşkafi and Ibn ‘Ābidīn opposed this rule, which is “*zāhir al-riwāya*” in the madhhab, there is no expression in their works pointing to this. On the contrary, Haşkafi and Ibn ‘Ābidīn stated that the benefits would not be compensated. However, they clearly expressed that the benefits would be compensated if this belonged to an endowment and to an orphan or it was set up for profitable

<sup>1</sup> Samy A. Ayoub, *Law, Empire and the Sultan: Ottoman Imperial Authority and Late Hanafī Jurisprudence* (New York: Oxford University Press, 2020), 2.

<sup>2</sup> Ayoub, *Law, Empire and the Sultan*, 146-148.

<sup>3</sup> See also. Bayram Pehlivan, “Samy A. Ayoub. Law, Empire and the Sultan: Ottoman Imperial Authority and Late Hanafī Jurisprudence.”, *Divan: Disiplinlerarası Çalışmalar Dergisi* 25, sy 48 (01 Ekim 2020): 212-214.

use (*mu'add li-l-istighlāl*).<sup>4</sup> At the same time, the claim that the view about the compensation of benefits became the law in Majalla is not correct. Because, when the relevant articles in Majalla, its commentaries and other sources are reread, it is clearly seen that this opinion has not been legislated in Majalla and that the view of non-compensation of benefits is a basic rule in the madhhab, but that the benefits will only be compensated in the three aforementioned places by exempting from the general rule.

The aforementioned problems require a detailed research on this issue. In this study, it will be pointed out that how “*zāhir al-riwāya*” in the Ḥanafī madhhab about the compensation of benefits was revised by the late Ḥanafī Sheikhs and that approximately when the exceptions were arised and that the claims mentioned above are not true if the examples in the Ḥanafī legal literature are examined.

### **The Basic Rule About The Compensation of Benefits in The Ḥanafī Madhhab**

According to the predominant understanding in the Ḥanafī madhhab, the benefits are not considered as commodity. For this reason, the use of real estate that has been usurped (*manāfi' al-maghsūb*) do not create any responsibility by usurpation and their use-values (*manāfi'*) are not compensated.<sup>5</sup> Because, according to Ḥanafīs, a person who seizes a real estate is considered to have usurped its benefits, not itself. This understanding, common in the Ḥanafī tradition is quoted and explained as follows from the work named *al-Fawā'id a-fiqh* of Abū Ja'far al-Hindwānī (d. 362/973), who is famous with the nickname “Junior Abū Ḥanīfa” (Abū Ḥanīfa al-Saghīr):

*“Real estates do not create any responsibility by usurpation (ghasb) according to Abū Ḥanīfa and Abū Yūsuf. Because,*

<sup>4</sup> 'Alā' al-Dīn al-Ḥaškafī, *al-Durr al-Mukhtār fī Sharḥ Tanwīr al-Abṣār* (Beirut: Dār al-Kutub al-Ilmiyya, 2002), 614; Muḥammad Amīn Ibn 'Ābidīn, *Radd al-Muhtār 'alā 'l-Durr al-mukhtār* (Beirut: Dār al-Fikr, 1412), 6/186.

<sup>5</sup> Muḥammad b. Isrā'īl Badr al-Dīn Ibn Qāḍī Simāwnā, *Jāmi' al-Fuṣūlāyn* (Cairo: 1300), 2/128; Fuḍayl Chalābī, *ad-Damānāt fī al-furū' al-Ḥanafīyyah* (Istanbul: Suleymaniye Library, Nuruosmaniye Collection, no: 1965), vr. 78<sup>a</sup>. For detailed information, see. Nuri Kahveci, “İslam Hukuku Açısından Menfaatlerin Tazmini”, *Kahramanmaraş Sütçü İmam Üniversitesi İlahiyat Fakültesi Dergisi* 4/8 (2006), 41-63.

*the person who seizes the real estates usurps its benefits, not itself. The benefits, however, are not commodity. The result is as follows: The person who usurps, prevents the owner from benefiting the real estate. The usurper has become a sinner because it hinders the owner; however, he isn't responsible for compensation. It is just like this: If a person prevents the owner from reaching his flock, and if, therefore, the flock is destroyed, this person who prevents him is not responsible for compensation.*"<sup>6</sup>

As can be understood from the passage above, Hanafis think that the commodity must be a physical/material entity. Although the Hanafī legal doctrine adopted as a basic rule that the benefits would not be compensated, the late Hanafī scholars (*muta'akhhirūn*) came up with some exceptions around these views over time.

### **The Exceptions About The Compensation of Benefits**

It has not been determined exactly when these exceptions about the compensation of benefits appeared. However, some views have been put forward on this issue recently. Ayoub claims that Baghdādī and Ibn 'Ābidīn first revised the rule on non-compensation of benefits in the Hanafī School.<sup>7</sup> But, the exceptions about the compensation of benefits had been mentioned approximately 500 years before the date Ayoub claims and this rule had become part of the Hanafī legal doctrine. In another study, Yunus Araz states that these exceptions were first mentioned in Qādī Khān's book named *Fatāwā Qādī Khān*, as far as he could reach.<sup>8</sup> However, as will be seen in detail below, Hanafī jurists such as Al-Haṣīrī (d. 500/1107), Zahīr al-Dīn Abd al-Raṣhīd al-Walwalījī

<sup>6</sup> This passage has been translated into English from the Arabic original. See for this. Chalābī, *ad-Damānāt* (Nuruosmaniye Collection, no: 1965) vr. 78<sup>a</sup>. See also. 'Imād al-Dīn al-Marghīnānī, *Fuṣūl al-iḥkām fī uṣūl al-aḥkām* (Istanbul: Suleymaniye Library, Yazma Bağışlar Collection, no: 990), vr. 352<sup>a</sup>; Ibn Qādī Simāwnā, *Jāmi' al-Fuṣūlāyn*, 2/128.

<sup>7</sup> Ayoub, *Law, Empire and the Sultan*, 117.

<sup>8</sup> Yunus Araz, *İslam Hukukunda Menfaatın Tazmini* (Erzurum: Atatürk Üniversitesi, Sosyal Bilimler Enstitüsü, Doktora Tezi, 2016), 165.

(d. 540/1146) and Burhān al-Dīn al-Bukhārī (d. 570/1174?)<sup>9</sup> had mentioned these exceptions before Qāḍī Khān (d. 592/1196).

As far as we can reach, we first see the ruling that the benefits (use-values/*manāfi*) of endowment properties and the commodities set up for profitable use (*mu'add li-l-istighlāl*) will be compensated, in Haṣīrī's book named *al-Hāwī fi 'l-fatāwā*. This issue is firstly addressed in the endowment section (*Kitāb al-Waqf*) of his book. The subject of fatwā here is whether it is valid for the trustee to leave a house belonging to the endowment as a pledge in return for a loan. In this work, it is stated that it is not valid for the trustee to make such a disposition, for the benefits of the endowment have become unworkable in this way and that therefore the mortgage holder of the house (*murtahin*) must pay similar fee (*ajr-i misl*), because it is *mu'add li-l-istighlāl*.<sup>10</sup> Later, Haṣīrī mentions the subject of *mu'add li-l-istighlāl* from these exceptions in the leasing (*ijāra*) section (*Kitāb al-Ijāra*). The discussion here is whether a fee is required for the person staying at the inn (*khān*). In the mentioned part of the work, two views are mentioned about this situation. Muhammed b. Seleme says that the staying person will pay the fee; on the other hand, Nuṣayr b. Yahyā states that the fee is not required just because the person stays in the inn, but that the fee will be required for istiḥsān, if the person staying continues staying after the owner of the inn has demanded an accounting. Because, according to him, if the person continues staying after the owner of the inn, it means he is willing to pay.<sup>11</sup> Although it is defined in this way in the leasing section of Haṣīrī, the expression "*mu'add li-l-istighlāl*" is not mentioned directly here. However, this concept is pointed out by the expression "*mu'add li al-khīrā*" (معد للكري) in the version of this issue in the book of Burhān al-Dīn al-Bukhārī's *al-Muḥīṭ al-Burhānī*.<sup>12</sup>

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<sup>9</sup> The date of death of Burhān al-Dīn al-Bukhārī is recorded as 616 hijri in the sources in a very common way. However, Murteza Bedir explains in detail that this date is wrong and states that the date of his death is around 570 Hijri. For detailed information, see. Murteza Bedir, *Buhara Hukuk Okulu* (İstanbul: İSAM Yayınları, 2014), 35-36.

<sup>10</sup> Mahmud b. Ibrahim b. Anush al-Bukhārī al-Haṣīrī, *al-Hāwī fi 'l-fatāwā* (Istanbul: Suleymaniye Library, Hekimoğlu Ali Paşa Collection, no: 402), vr. 48<sup>a-b</sup>. The aforementioned narration has been removed from the question-answer format in Burhān al-Dīn's version in his work and attached at the end of the narration "*even if it is not mu'add li-l-istighlāl, but the similar fee (ajr-i misl) is required to protect the endowment*". See also for these. Bkz. Burhān al-Dīn al-Bukhārī, *al-Muḥīṭ al-Burhānī fi al-Fiqh al-Nu'manī* (Beirut: Dār al-Kutub al-'Ilmiyya, 2004), 6/148. See also for this. Hasan b. Mansūr al-Uzjandī al-Farghānī Qāḍī Khān, *Fatāwā Qāḍī Khān* (Beirut: Dār al-Kutub al-'Ilmiyya, 2009) 2/196, 208; 3/221.

<sup>11</sup> Haṣīrī, *al-Hāwī fi 'l-fatāwā* (Hekimoğlu Ali Paşa Collection, no: 402), vr. 133<sup>b</sup>.

<sup>12</sup> Burhān al-Dīn al-Bukhārī, *al-Muḥīṭ al-Burhānī*, 7/435

However, the same attitude is shown in case of usurpation of aforementioned places. As far as we can reach, Al-Walwalijī, is the first to refer to these exceptions in the context of usurpation. He stated in the endowment section (*Kitāb al-Waqf*) of his book named *al-Fatāwā al-Walwāljiyyāh* that they will be compensated in order to protect the endowment in case of the usurpation of the endowment's real estates and homes and their benefits. In addition, he expressed in the leasing (*ijāra*) section of his work that the fee is necessary in case of the usurpation of a child's land.<sup>13</sup> Later, Burhān al-Dīn al-Bukhārī (He is also known as *Burhān al-Sharīʿā*.) stated these exactly, but also reported Al-Walwalijī's fatwā on this issue.<sup>14</sup> Burhān al-Sharīʿā also mentioned the subject of *muʿadd li-l-istighlāl* in another part of the leasing section of his work. The issue discussed here is whether a fee will be required for the second month, if the house is rented for a month and is stayed there for two months without a contract. Regarding this issue, first of all, it has been reported that the fee is not required for the second month in case of staying without a new contract, and the person who stays this way becomes usurper. Also it is notified that it is expressed in this way in the majority of the narratives in the leasing sections; on the other hand, it is stated in some narrations that a similar fee (*ajr-i misl*) is required. The narratives that the fee is not required are based on the rule of the *zāhir al-riwāya* in the book *Kitāb Al-Asl* which belongs to Muḥammad b. Hasan ash-Shaybānī. In this book, it is said that the fee is not required for the person who works for two months in the bathhouse rented for a month to work; because no contract has been made for the second month. Shams al-Aʿimma al-Ḥulwānī (d. 448/1056) states that even if this house is *muʿadd li-l-istighlāl*, this issue in the *zāhir al-riwāya* will be an evidence for the fact that “the fee is not required without a contract”. As seen, it is *zāhir al-riwāya* that no fee is required in case of using real estates without any contract. Thus, the majority of the narratives that the fee is not required without a contract denote this rule in the madhab. However, Al-Bukhārī stated that he attached the opinion of the *zāhir al-riwāya* which stated that the fee is not required for situations where the house is not *muʿadd li-l-istighlāl*; and the narrations which stated that the similar fee (*ajr-i misl*) is required for situa-

<sup>13</sup> Zahīr al-Dīn Abd al-Rashīd al-Walwalijī, *al-Fatāwā al-Walwāljiyyāh* (Beirut: Dār al-Kutub al-ʿIlmiyya, 2003), 3/98, 343.

<sup>14</sup> Burhān al-Dīn al-Bukhārī, *al-Muḥīṭ al-Burhānī*, 7/460, 653.

tions where the house is *mu'add li-l-istighlāl*. He also remarked that the Sheikhs (*mesāikh*) of his time deemed necessary for the fee.<sup>15</sup>

Qāḍī Khān (d. 592/1196) is also among those who mentioned exceptions about the benefits of the real estates that was usurped. These exceptions are mentioned in various parts of his book named *Fatāwā Qāḍī Khān*.<sup>16</sup> According to the narration of Qāḍī Khān, some Ḥanafī jurists stated that the usurper will pay a similar fee (*ajr-i misl*) for the endowment and for the child, in case of the usurpation of the real estates belonging to young children and endowment; but, the person is not responsible for compensation according to the rule of the *zāhir al-riwāya*.<sup>17</sup> Unlike the others, it is clearly stated in Qāḍī Khān's book for the first time that the relevant provision is apparent. Although Ḥanafī jurists Kāsānī (d. 587/1191) and Marghīnānī (d. 593/1197) are contemporary of Qāḍī Khān, these exceptions are not mentioned in their books.<sup>18</sup> Especially the absence of these exceptions in Marghīnānī's *al-Hidāya* shows that it has not yet become part of the doctrine. Because this book of Marghīnānī reveals the legal doctrine (*zāhir al-riwāya*) which we can state the backbone of Ḥanafī law.

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Although these exceptions are not mentioned in the compensation section of Usrūshanī's book named *al-Fuṣūl fī al-mu'āmalat*, only endowment property and orphans' property are mentioned in the 'Imād al-Dīn al-Marghīnānī's *Fuṣūl al-iḥkām* and Shaykh Badr al-Dīn's *Jāmi' al-Fuṣūlāyn* and Fudayl Chalābī's *ad-Damānāt* which are the continuation of the same genre about the compensation of real estates that was usurped. The fatwās related to the subject in all three works consist of the repetitions of the related fatwās in the books of Al-Walwalijī and Burhān al-Sharīf.<sup>19</sup>

In the beginning, these exceptions were not mentioned in the works that are the "basic texts" in the Ḥanafī school, such as Marghīnānī's *al-Hidāya*. Even though, Badr al-Dīn 'Aynī (d.

<sup>15</sup> Burhān al-Dīn al-Bukhārī, *al-Muḥīṭ al-Burhānī*, 7/435-436; Qāḍī Khān, *Fatāwā Qāḍī Khān*, 2/196.

<sup>16</sup> Qāḍī Khān, *Fatāwā Qāḍī Khān*, 2/196, 208; 3/221.

<sup>17</sup> Qāḍī Khān, *Fatāwā Qāḍī Khān*, 2/208.

<sup>18</sup> 'Alā' al-Dīn Abū Bakr b. Mas'ūd al-Kāsānī, *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'* (Beirut: Dār al-Kutub al-Ilmiyya, 1986), 7/145; Burhān al-Dīn 'Alī b. Abī Bakr al-Marghīnānī, *al-Hidāya sharḥ Bidāyatal-mubtadi'* (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, n.d.), 4/304-305.

<sup>19</sup> 'Imād al-Dīn al-Marghīnānī, *Fuṣūl al-iḥkām* (Yazma Bağışlar Collection, no: 990), vr. 352<sup>b</sup>; Ibn Qāḍī Simāwnā, *Jāmi' al-Fuṣūlāyn*, 2/128; Chalābī, *ad-Damānāt* (Nuruosmaniye Collection, no: 1965), vr. 78<sup>b</sup>, 80<sup>b</sup>.

855/1451) one of the commentators of *al-Hidāya* explained the attitude of the Ḥanafī Sheikhs on this issue and stated that the benefits will be compensated in case of usurpation and destruction of the properties set up for profitable use (*mu'add li-l-istighlāl*). Afterwards, he reported the above opinions in the wāqī'āt literature. 'Aynī stated based on the book named *al-Fatāwā al-Kubrā* (probably belongs to Sadr al-Shahīd), that, the benefits of the dedicated real estates will be compensated to protect the endowment and that whether it does not matter whether the real estates a *mu'add li-l-istighlāl* or not. In addition to this, 'Aynī stated that the late Ḥanafīs gave fatwā according to the Shāfi'ī madhab on matters such as income-generating movables and immovables commodity endowment property, orphans' property with the quotation from Al-Zāhidī's book (d. 658/1260) named *al-Mujtabā*.<sup>20</sup> Although Zayla'ī (d. 743/1343) does not mention these exceptions in his work named *Tabyīn al-Ḥaqā'iq*, the narration in 'Aynī's *al-Bināya* was exactly repeated in the annotation (*hāshiyat*) of Chalābī (d. 1021/1612) which is written on this work.<sup>21</sup>

Ibn Nujaym (d. 970/1563) clearly mentioned in his book *al-Aṣbāḥ wa al-Naṣā'ir* that the benefits would be compensated only in three places and that these are endowment property, orphans' property, and property set up for profitable use (*mu'add li-l-istighlāl*).<sup>22</sup> Ibrāhīm al-Ḥalabī (d. 956/1549) states in his book *Multaqā al-Abḥur* that only the benefits of endowment properties would be compensated. However, Shaykh-Zāda Abdurrahman (d. 1078/1667) who wrote an annotation on this book, said that the benefits of the orphans' property and the *mu'add li-l-istighlāl* would be compensated in addition to the endowment property.<sup>23</sup> Ḥaṣkafī (d. 1088/1677) who is the contemporary of Shaykh-Zāda included all these narratives in his work *al-Durr al-mukhtār*.<sup>24</sup> Later, Ibn 'Ābidīn stated in his book *Radd al-Muḥtār* that the benefits would not be compensated; however, he stated that if the real estates

<sup>20</sup> Badr al-Dīn al-'Aynī, *al-Bināya Sharḥ al-Hidāya* (Beirut: Dār al-Kutub al-'Ilmiyya, 2000), 11/251.

<sup>21</sup> Zayla'ī, Fakhr al-Dīn 'Uthmān b. 'Alī, *Tabyīn al-Ḥaqā'iq Sharḥ Kanz al-Daqā'iq* (Bulāq: al-Maṭba'a al-Kubrā al-Amīriyya, 1313), 5/234.

<sup>22</sup> Zayn al-Dīn Ibn Nujaym, *al-Aṣbāḥ wa-l-Naṣā'ir* (Beirut: Dār al-Kutub al-'Ilmiyya, 1419), 243.

<sup>23</sup> 'Abd al-Raḥmān b. Muḥammad Shaykh-Zāda (Dāmād Efendī), *Majma' al-Anhur fī Sharḥ Multaqā al-Abḥur* (Beirut: Dār al-Kutub al-'Ilmiyya, 1998), 2/601-602; 4/81, 94.

<sup>24</sup> Ḥaṣkafī, *al-Durr al-Mukhtār*, 614.

usurped belongs to an endowment and to an orphan or it is set up for profitable use (*mu'add li-l-istighlāl*), the benefits of the three mentioned things will be compensated and he adds that this is clearly explained.<sup>25</sup>

This subject which was dealt with for the first time in Haşīr's *al-Hāwī fi 'l-fatāwā* had not become a part of the doctrine for about four centuries until the work of 'Aynī's *al-Bināya* and has continued to be discussed in books in wāqī'āt literature. In fact, these exceptions about the compensation of benefits (*damān al-manāfi'*) are mentioned in the wāqī'āt literature, such as 'Imād al-Dīn al-Marghīnānī's *Fuṣūl al-ihkām* and Shaykh Badr al-Dīn's *Jāmi' al-Fuṣūlāyn* and Fudayl Chalābī's *ad-Damānāt*. However, this subject was not discussed in the books of later periods that dealt with the legal doctrine of the madhab and in the annotations written on them such as Mawṣilī's (d. 683/1284) *al-Mukhtār* and Abū al-Barakāt al-Nasafī's *Kanz al-Daqā'iq* (d. 710/1310) and Zayla'ī's *Tabyīn al-Ḥaqā'iq* and Al-Bābārtī's *al-'Ināya* (d. 786/1384).

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As seen, the fatwās stating that the benefits could only be compensated in these three places were initially discussed in wāqī'āt literature. However, as seen above, these exceptions gained a certain authority by being repeated in many works of the same genre as time progresses. Finally, this view which was accepted by the Ḥanafī Sheikhs, has become a part of the doctrine by taking its place in the later standard texts and legal commentaries (*shurūh*) of the school.

In conclusion, the rule of the zāhir al-riwāya in the Ḥanafī school, which we can express as “*The benefits of the real estates that have been usurped are not compensated*” has turned into the following statement by the the fatwās and interpretations of the Ḥanafī Sheikhs: “*The benefits of the real estates that have been usurped are not compensated. However, if the real estate belongs to an endowment and to an orphan or it is set up for profitable use (mu'add li-l-istighlāl), their benefits are compensated in this case.*” Thus, we can easily say that this rule in the Ḥanafī school has become a part of the doctrine by slightly stretching the relevant rule.

<sup>25</sup> Ibn 'Ābidīn, *Radd al-Muhtār*, 6/186.

## The Compensation of Benefits in Ottoman Law

As seen, the non-compensation of benefits is a basic rule according to the Ḥanafī school; however, the late Ḥanafīs (*muta'akhhirūn*) made some exceptions to this established rule (*zāhir al-riwāya*) in the madhhab and adopted the view that the benefits (use-values) of endowment property, orphans' property and mu'add li-l-istighlāl would be compensated.<sup>26</sup> Furthermore, this view of the late Ḥanafī scholars was preferred and applied in Ottoman law. As a matter of fact, the related fatwā examples included in the fatwā journals (*majmū'a*) that are considered valid (*mu'tabar*) in the Ottoman law such as *Fatāwā Ali Efendī*, *Fatāwā Feyziyye*, *Bahjat al-Fatāwā* and *Natījat al-Fatāwā* reveal this situation.<sup>27</sup> As it is clearly seen in these fatwās, the Ottoman jurists adopted the view of the late Ḥanafīs about the compensation of benefit and the attitude on this issue was reflected in the fatwās likewise. Although this rule of the *zāhir al-riwāya* in the madhhab continued until the beginning of the 20th century, some Ḥanafī jurists opposed it. For example, Kamāl al-Dīn b. al-Humām (d. 861/1457) who is one the 15<sup>th</sup> century Ḥanafī jurists has stated that the compensation of benefits should not be limited to these three areas in the places and times when the usurpation was common; and that it is necessary to give a fatwā about the benefits of an usurped property will be compensated absolutely. Likewise, his student Ibn Amīr Hājī (d. 879/1474) has expressed that it would not pose a problem to give a fatwā about the necessity of the compensation of benefits absolutely in order to keep people from usurpation and protect the properties of weak people.<sup>28</sup> From this point of view, it is possible to say that Ibn al-

<sup>26</sup> For details, see. Haşirî, *al-Hāwī fi' al-fatāwā* (Hekimoğlu Ali Paşa Collection, no: 402), vr. 48<sup>a-b</sup>, 133<sup>b</sup>; Walwalijî, *al-Fatāwā al-Walwāljiyyāh*, 3/98, 343; Burhān al-Dīn al-Bukhārî, *al-Muḥīṭ al-Burhānî*, 6/142, 148; 7/435-436, 460, 653; Qādî Khān, *Fatāwā Qādî Khān*, 2/196, 208; 3/221; 'Aynî, *al-Bināya*, 11/251; 'Imād al-Dīn al-Marghīnānî, *Fuṣūl al-iḥkām* (Yazma Bağışlar Collection, no: 990), vr. 352<sup>b</sup>; Zayla'î, *Tabyīn al-Ḥaqā'iq*, 5/234; Ibn Qādî Simāwnā, *Jāmi' al-Fuṣūlāyn*, 2/128; Chalābî, *ad-Damānāt* (Nuruosmaniye Collection, no: 1965), vr. 78<sup>b</sup>; Ibn Nujaym, *al-Aşbāḥ wa-l-Nazā'ir*, 243; Shaykh-Zāda, *Majma' al-Anhur*, 4/94.

<sup>27</sup> Çatalcalı Ali Efendî, *Fatāwā Ali Efendî* (Istanbul: Suleymaniye Library, Pertevniyal Collection, no: 345), 2/569-575; Feyzullah Efendî, *Fatāwā Feyziyye* (Istanbul: Suleymaniye Library, Pertevniyal Collection, no: 347), 461-464; Yenişehirli Abdullah Efendî, *Bahjat al-Fatāwā* (Istanbul: Suleymaniye Library, Pertevniyal Collection, no: 327), 472-475; Dürrizāde Mehmed Arif Efendî, *Natījat al-Fatāwā*, Istanbul: Suleymaniye Library, Pertevniyal Collection, no: 354), 468, 471, 475, 488.

<sup>28</sup> Muḥammad Ibn Amīr Hājī *Al-Taqrīr wa-al-Taḥbīr 'alā Tahrīr Ibn al-Humām* (Beirut: Dār al-Kutub al-'Ilmiyya, 1403/1983), 2/130; 3/204. See also. Abdullah Kahraman - Nizamettin Ka-

Humām and his student Ibn Amīr Hājj thought like the Shāfi'īs on this issue.

Although Ibn al-Humām and his student Ibn Amīr Hājj stated that the benefits of all properties must have been compensated absolutely, the opinion of late Ḥanafīs was dominant and applied in the Ottoman state. Indeed, the fact that there is no example of a case about the compensation of benefits of the properties except for these three places confirms that the prevailing opinion within the madhab was based. This understanding which has been maintained for centuries, was later legislated in the 596<sup>th</sup> article of Majalla as follows:

*“If a person uses a property without the permission of the owner, he/she is not required to compensate the benefits (use-values/manāfi‘) of the property as usurpation. However, the benefits must be compensated and a similar fee (ajr-i misl) should be paid 1) in any case if this property belongs to an endowment or to an orphan and 2) in case of nothing to be interpreted on the property or a contract if it is set up for profitable use (mu‘add li-l-istighlāl). For example, if a person stays in someone else’s house for a period of time without permission and a contract for rental agreement, he/she doesn’t have to pay a fee. However, if this house belongs to an endowment or to an orphan, the person has to pay the fee of the period of stay, regardless of whether or not there is something to be interpreted on the property or a contract.”<sup>29</sup>*

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In the commentary of this article; Ali Haydar Efendi reveals the established view (*ẓāhir al-riwāya*) of the madhab by stating that Ḥanafī Imams are in accord that the benefits should not be compensated; however, according to Imam ash-Shāfi‘ī, the benefits of all goods (Whether or not it is an endowment property, orphan’s property or a mu‘add li-l-istighlāl) which were used by usurpation would be compensated like a seized property.<sup>30</sup> In the following

rataş, “İbn Hümam’ın Mezhebine Muhalif Bir Görüşü: Menfaatlerin Tazmini Meselesi”, *Ko-caeli İlahiyat Dergisi*, 1/2 (Aralık 2017): 43-70.

<sup>29</sup> This passage has been translated into English from the Arabic original. See for this. Ali Haydar, *Durar al-Ḥukkām Sharḥ Majallat al-Aḥkām* (İstanbul: Matbaaa-i Tevsi-i Tıbaat, 1330), 1/949-955.

<sup>30</sup> Ali Haydar, *Durar al-Ḥukkām*, 1/949.

parts of his statements, Ali Haydar Efendi states that the benefits of the orphan's property and the endowment property would not be compensated, but the late Ḥanafīs gave this permission contrary to the general rule. In addition, he explains that the benefits have great value in his own time and that the jurists of the century should consult and make a decision on this issue of by acting with the view of the Shāfi'ī madhhab.<sup>31</sup>

Ali Haydar Efendi, invites the jurists of the century to consult on the compensation of benefits and to take a decision on this matter. However, it is seen that the expressions which he said here in a soft tone, gained more certainty in the comment of article 1801. As a matter of fact, he states that at this time when injustice is increasing gradually, the benefits must be compensated absolutely and it is obvious that it is necessary to act with the view of the Shāfi'ī madhhab on this issue.<sup>32</sup> Ali Haydar Efendi's invitation and wish on this issue came true while he was alive, as this issue was negotiated at the first amendment (*ta'dīl*) meeting held by the Majalla commission, and the opinion was adopted that the benefits would be compensated like other commodity (*ā'yān*). This situation is mentioned as follows in Ali Haydar Efendi's book "*al-Majmu'at al-Jadīdah fī al-Kutub al-'Arba'ah*" which he prepared as an addition to Majalla:

*"The benefits (manāfi') are also a valuable property (mutaqawwim) like other commodities. Accordingly, if a person uses someone else's movable or immovable property or makes it disfunctional, he must pay its fee. Likewise, if a person destroys the benefits of something like a road or a ribāṭ and a masjid, for example if he occupies the road, then he must compensate its benefits. Annotation: This article was written and accepted according to the Shāfi'ī school."*<sup>33</sup>

As understood, although the non-compensation of benefits is a basic rule in the Ḥanafī school; the late Ḥanafīs have adopted the view that the benefits will be compensated in the three places afo-

<sup>31</sup> Ali Haydar, *Durar al-Ḥukkām*, 1/950.

<sup>32</sup> Ali Haydar, *Durar al-Ḥukkām*, 4/695-696.

<sup>33</sup> This passage has been translated into English from the Arabic original. See for this. Ali Haydar, *al-Majmu'at al-Jadīdah fī al-Kutub al-'Arba'ah* (Dersaadet: Hukuk Matbaası, 1332), 138.

rementioned, by excepting the general rule (*zāhir al-riwāya*). This understanding which has dominated Ottoman law for centuries, has become an article (*rule*) in Majalla; however, the view that “*the benefits should also be accepted as commodity and they will be compensated absolutely*” was preferred. Thus, there has been a radical change in the Ḥanafī fiqh doctrine on the subject of the compensation of benefits.

### Conclusion

The early Ḥanafī scholars (*mutaqaddimūn*) adopted the view of non-compensation of benefits as a principle. However, the late Ḥanafīs (*muta’akhhirūn*) brought some exceptions to the established rule (*zāhir al-riwāya*) in the madhhab by bringing this issue to the agenda in the type of wāqī’āt works. The exceptions to this rule are the benefits (use-values) of endowment property, orphans’ property and property set up for profitable use (*mu’add li-l-istighlāl*). The late Ḥanafīs accepted the view that benefits (*manāfi*) could only be compensated in these three places by stretching the relevant rule slightly. Legal opinions (*fatwās*) on this subject were first discussed in the type of wāqī’āt books. Later they gained a certain authority by being repeated in many works of the same genre. Finally, this view which was accepted by the Ḥanafī Sheikhs has become a part of the doctrine by taking its place in the later standard texts and legal commentaries (*shurūh*) of the school. In other words, the rule of the *zāhir al-riwāya* in the Ḥanafī school, which is expressed as “*The benefits of the real estates that have been usurped are not compensated*” has turned into the following statement by the the *fatwās* and interpretations of the Ḥanafī Sheikhs: “*The benefits of the real estates that have been usurped are not compensated. However, if the real estate belongs to an endowment and to an orphan or it is set up for profitable use (mu’add li-l-istighlāl), their benefits are compensated in this case.*” As seen, this rule in the Ḥanafī school has become a part of the doctrine by stretching the relevant rule a little.

Also, the opinion of the late Ḥanafīs was preferred in the Ottoman law where the Ḥanafī madhhab was applied in practise and the attitude that the benefits would be compensated in the three places aforementioned was reflected in the *fatwās* exactly. This understanding, which dominated in Ottoman law for centuries,

became the rule in Majalla. However, with a later decision, the view that “*The benefits should also be accepted as commodity and they will be compensated absolutely.*” was preferred and a radical change was experienced in the relevant issue.

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# Menfaatlerin Tazminiyle İlgili Hanefî Mezhebinde Yaşanan Hukuki Değişimin Tarihi Serüveni

Kamil YELEK \*

## Ayrıntılı Özet

Menfaatlerin tazmin edilmemesi, Hanefî mezhebine göre temel bir kuraldır. Ancak müteahhir Hanefî âlimleri, mezhepteki yerleşik bu kurala (*zâhirü'r-rivâye*) bazı istisnalar getirmişlerdir. Vakıf malı, yetim malı ve kiraya verilmek üzere hazırlanmış (*mu'addün li'l-istiğlal*) malların menfaatleri (kullanım bedelleri) bu kuralın istisnalarıdır. Müteahhir Hanefî âlimleri ilgili kuralı biraz esneterek menfaatlerin sadece bu üç yerde tazmin edileceği görüşünü benimsemişlerdir.

Menfaatlerin tazminiyle ilgili bu istisnaların ne zaman ortaya çıktığı tam olarak tespit edilemeye de, yakın zamanda bu konuya dair bazı görüşler ileri sürülmüştür. Samy A. Ayoub "*Law, Empire and the Sultan: Ottoman Imperial Authority and Late Hanafî Jurisprudence*" isimli kitabının bir bölümünde menfaatlerin tazminiyle ilgili kuralın müteahhir Hanefî âlimleri tarafından revize edildiğini, Haskefî (öl. 1088/1677) ile İbn Âbidîn'in bu yeni görüşten yana tavır alarak mezhebin erken dönemindeki temel kurala karşı çıktıklarını ifade etmektedir. Ayoub kitabının bir başka yerinde ise, menfaatlerin tazmin edilmemesiyle ilgili görüşün Bâğdâdî (öl. 1032/1623) ile İbn Âbidîn (öl. 1252/1836) tarafından revize edildiğini ve bu görüşün Mecelle'de de kanunlaştırıldığını iddia etmektedir. Ancak kaynaklara bakıldığında Ayoub'un bu iddialarının isabetli olmadığı son derece aşıkârdır. Müteahhir Hanefî âlimlerin bu konuda bir revizyon yaparak mezhepteki temel kurala bazı istisnalar getirdiği doğrudur. Ancak söz konusu değişimin Bâğdâdî ve İbn Âbidîn tarafından yapıldığı, Haskefî ile İbn Âbidîn'in mezhepteki temel kurala karşı çıktıkları ve bu görüşün Mecelle'de kanun haline geldiği iddialarının kabul edilebilir bir tarafı yoktur. Çünkü menfaatlerin tazminiyle ilgili istisnalar, Ayoub'un iddia ettiği tarihten çok daha önce (yaklaşık olarak 500 yıl önce) dile getirilerek Hanefî hukuk doktrininin bir parçası haline gelmiştir.

Bu istisnalar, ilk olarak vâkıât/fetâvâ türündeki kitaplarda gündeme getirilmiştir. Nitekim Hanefî mezhebinin erken dönemlerinde telif edilen temel metinlerde böyle bir konuya temas edilmemiştir. Ulaşabildiğimiz kadarıyla, vakıf malları ile kiraya verilmek üzere hazırlanmış mallara ait menfaatlerin tazmin edileceği hususu ilk olarak Hasîrî'nin (öl. 500/1107) *el-Hâvî fi'l-fetâvâ* adlı eserinde görülmektedir. Daha sonra Zahrüddîn Abdürreşid el-Velvâlicî (öl. 540/1146), Burhâneddîn el-Buhârî (öl. 570/1174?) ve Kâdîhân (öl. 592/1196) gibi Hanefî fakihleri bu istisnaları eserlerinde zikretmiştir. Burhâneddîn el-Buhârî'nin (*Burhânüşşerîa*) *el-Muhît* adlı eseri ile Kâdîhân'ın *el-Hâniye*'sinde yer almasına rağmen özellikle onların çağdaşı olan Mergînânî'nin (öl. 593/1197) *el-*

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*Hidâye*'sinde bu istisnalara değinilmemesi, bunların henüz doktrinin bir parçası haline gelmediğini göstermektedir.

İlk defa Hasîrî'nin eserinde ele alınan bu konu, Aynî'nin (öl. 855/1451) *el-Binâye* adlı eserine kadar geçen yaklaşık dört asırlık süreçte de doktrinin bir parçası haline gelememiştir. Öyle ki, menfaatlerin tazminiyle ilgili bu istisnalar, İmâdüddîn el-Mergînânî'nin (öl. 670/1271) *Fusûlu'l-ihkâm*, Şeyh Bedreddin'in (öl. 823/1420) *Câmiu'l-fusûleyn* ve Fudayl Çelebi'nin (öl. 991/1583) *ed-Damânât* isimli vâkıât türündeki eserlerinde zikredilmesine rağmen Mevslî'nin (öl. 683/1284) *el-Muhtâr*'ı, Neseffî'nin (öl. 710/1310) *Kenzü'd-dekâ'ik*'i, Zeylaî'nin (öl. 743/1343) *Tebyînü'l-hakâik*'i ve Bâbertî'nin (öl. 786/1384) *el-Înâye*'si gibi mezhebin hukuk doktrinini ele alan sonraki dönem eserlerde ve bunlara yazılan şerh çalışmalarında yer almamıştır.

Menfaatlerin tazmin edilebileceğine ilişkin tartışmalar ve buna ilişkin fetvâlar, başlangıçta vâkıât/fetâvâ türündeki kitaplarda gündeme getirilmiş olsa da daha sonra aynı türdeki pek çok eserde tekrarlanarak belirli bir otorite elde etmiş ve nihayetinde Hanefî meşâyihinin kabulüne mazhar olan bu görüşler, mezhebin daha sonraki fûrû-ı fıkıh metinleri ile bu metinlere yazılan şerh çalışmalarında yerini alarak doktrinin bir parçası olmuştur. Bunun için Aynî'nin *el-Binâye*, Halebî'nin (öl. 956/1549) *Mülteka'l-ebhur*, İbn Nüceym'in (öl. 970/1563) *el-Eşbâh ve'n-nezâir*, Şeyhîzâde'nin (öl. 1078/1667) *Mecmaü'l-enhur*, Haskeffî'nin (öl. 1088/1677) *ed-Dürrü'l-muhtâr* ve İbn Âbidîn'in *Reddü'l-Muhtâr* adlı eserlerine bakılabilir.

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Diğer taraftan Haskeffî ile İbn Âbidîn'in mezhepteki zâhirû'r-rivâye olan bu kurala karşı çıktıkları iddiasına gelince, onların eserlerinde buna işaret eden herhangi bir ifade yoktur. Aksine Haskeffî ile İbn Âbidîn, menfaatlerin tazmin edilmeyeceğini, ancak gasbedilen şeyin vakıf malı, yetim malı veya mu'addün li'l-istiğlâl olması durumunda bunların menfaatlerinin tazmine konu olacağını açık bir şekilde ifade etmektedirler. Bununla birlikte menfaatlerin tazmin edilmesiyle ilgili görüşün Mecelle'de kural haline geldiği iddiası da isabetli değildir. Zira Mecelle'deki ilgili maddeler ile bunların şerhlerine ve diğer kaynaklara bakıldığında bu görüşün Mecelle'de kanunlaştırılmadığı, menfaatlerin tazmin edilmezliği görüşünün Hanefî mezhebinde temel bir kural olduğu, ancak genel kuraldan istisna edilerek menfaatlerin sadece bu üç yerde tazmin edileceği açık bir şekilde görülmektedir.

Yukarıda zikredilen problemler nedeniyle, menfaatin tazminiyle ilgili Hanefî mezhebindeki zâhirû'r-rivâye kuralın sonraki Hanefî meşâyih tarafından nasıl revize edildiği, zikredilen istisnaların yaklaşık olarak ne zaman ortaya çıktığı ve bu konuya dair yakın zamanda ileri sürülen iddiaların doğru olmadığı Hanefî hukuk literatüründeki örneklerden hareketle gösterilmiştir.

**Anahtar Kelimeler:** İslam hukuku, Menfaatlerin Tazmini, Vakıf Malı, Yetim Malı, Mu'addün li'l-istiğlâl.

