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Is The Intangible Compensated? The Problem of Compensation for Intangibles in Ḥanafī Madhhab and Late Ottoman Law

Var Olmayan Tazmin Edilir mi? Hanefî Mezhebinde ve Son Dönem Osmanlı Hukukunda Maddi Olmayan Şeyin Tazmini Problemi

Muhammed Emin KIZILAY

Dr. Öğretim Üyesi, Bandırma Onyedi Eylül Üniversitesi İslami İlimler Fakültesi
Temel İslam Bilimleri Bölümü
Asst. Prof., Bandırma Onyedi Eylül University Faculty of Islamic Sciences
Department of Basic Islamic Sciences
Balıkesir/Türkiye
eminkizilayzade@hotmail.com
ORCID: 0000-0002-2082-0597

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Abstract: *One feature distinguishing the fiqh madhhabs that emerged in Islamic history from each other is their theological and philosophical views. When the jurisprudence of the madhhabs is analysed, it is seen that the practical rulings emerge according to a particular theological and philosophical background. For example, the ontological background of the Ḥanafīs is reflected in their views on property (māl), which is one of the most fundamental issues of law. They considered existence from a material point of view. They did not accept the benefits that do not have a material existence and arise depending on the substance of material assets as property in law. What is not proper-*

ty cannot be damaged. Therefore, it cannot be compensated. The Ḥanafīs adhered to their ontological principles to maintain their legal consistency. However, these principles caused some problems to arise over time. Although they overcame these problems with the principle of necessity, this was not enough to eliminate the problem. This problem came to the agenda even in the last periods of the Ottoman Empire. However, there was a new systematics in the field of law then. The issue was dealt with in the articles of law, not in the theoretical texts in which the accumulated knowledge of the madhhab was transmitted. The ontological principles of the Ḥanafīs were distributed to many areas of law within the new system. However, in the last period of the Ottoman Empire and contemporary studies, only the part of the subject reflected in the law of obligations has been addressed. However, areas such as the Press Law and the Penal Code also seem to have been ignored. When the other legal texts are analysed, a situation different from that in Mejelle stands out. The Press Law and the Penal Code had already done what the Mejelle commissions could do much later. In these laws, things that do not exist in material terms are legally recognised as property.

***Keywords**: Islamic Law, Ḥanafī Madhhab, Ottoman Law, Liability, Damage.*

***Öz:** İslam tarihinde ortaya çıkan fıkıh mezheplerini birbirinden ayıran özelliklerden biri kelamî ve felsefî görüşleridir. Mezheplerin içtihatları incelendiğinde amelî hükümlerin belirli bir kelamî ve felsefi arka plana göre ortaya çıktığı görülür. Örneğin Hanefîlerin sahip oldukları ontolojik arka plan hukukun en temel konularından biri olan mülkiyet ile ilgili görüşlerine yansımıştır. Onlar varlığı maddi açıdan ele almışlardır. Maddi bir varlığı olmayan, maddi varlıkların cevherlerine bağlı olarak ortaya çıkan menfaatleri hukuken mal kabul etmemişlerdir. Mal olmayan şeyin zarara uğraması mümkün değildir. Dolayısıyla tazmin edilmesi de söz konusu değildir. Hanefîler hukuki tutarlılıklarını korumak için ontolojik ilkelerine son derece bağlı kalmışlardır. Fakat bu ilkeler zamanla bazı problemlerin ortaya çıkmasına sebep olmuştur. Bu problemleri zaruret prensibiyle aşmayı başarmışlarsa da bu, sorunu tamamen ortadan kaldırmaya yetmemiştir. Osmanlı'nın son dönemlerinde dahi bu sorun gündeme gelmiştir. Lakin artık hukuk sahası yeni bir sistematiğe sahiptir. Konu mezhep birikiminin aktarıldığı teorik metinlerde değil, kanun maddelerinde ele alınmıştır. Hanefîlerin ontolojik ilkeleri yeni sistemin içerisinde hukukun birçok alanına dağılmıştır. Lakin hem Osmanlı'nın son döneminde hem de günümüzde yapılan çalışmalarda bunun sadece borçlar hukukuna yansıyan kısmı ele alınmıştır. Hâlbuki basın kanunu ve ceza kanunu gibi alanlar göz ardı edilmiştir. Mecelle ile dönemin diğer kanun metinleri mukayese edildiğinde farklı bir tablo ortaya çıkmaktadır. Mecelle'de madden var olmayan şeyler hukuken mal sayılmamış ve bu, uzun süre sonra tadil komisyonları tarafından değiştirilebilmiştir. Lakin basın ve ceza kanunlarında madden var olmayan şeylerin mal hükmünde kabul edildiği görülmektedir.*

***Anahtar Kelimeler**: İslam Hukuku, Hanefî Mezhebi, Osmanlı Hukuku, Sorumluluk, Zarar.*

Genişletilmiş Özet

Hanefîlerin en belirgin özelliklerinden biri, amelî sahada görüş belirtirken kendi felsefi anlayışlarıyla tutarlılık içinde olmaya gayret etmeleridir. Eşya tasavvurları da-

hil hukukun birçok alanında bunları müşahede etmek mümkündür. Hanefiler varlığı *ayn*/*cevher* ve *deyn*/*araz* şeklinde ikiye ayırmışlardır. Ayn maddenin kendisi, araz ise ayn'ın kullanımını ve istifadesini mümkün kılan suretidir. Örneğin bir binek hayvanı ayn olup ona binmek veya yük taşıyarak sağlanan menfaatler arazdır. Kısacası arazlar maddi varlığı olmayan şeylerdir ve bu sebeple Hanefîlere göre arazların zarara uğraması mümkün değildir. Dolayısıyla zarar olmadığında bunun izalesi veya tazmini de mümkün değildir. Hanefîlerin mezkûr felsefî düşünceleri sorumluluk hukukuna dair görüşlerine tesir etmiş, eşya tasavvurlarını ve zarar ile ilgili görüşlerini şekillendirmede etkili olmuştur. Zarar, İslam sorumluluk telakkisinin unsurlarından biri olup eşya hukukuyla yakından ilgili bir kavramdır. Zira Hanefîlere göre zarar, bir hakka konu teşkil eden maddi varlığın zedelenmesidir. Dolayısıyla zarardan söz edebilmek için maddi bir varlıktan söz edebilmek gerekir. Onlara göre ise ayn'lara bağlı olarak meydana gelen menfaatler; henüz ortaya çıkmamış muhtemel kazanç veya kayıplar; acı, ızdırap; onur ve gururda meydana gelen zedelenmeler maddi birer varlık değildir. Binaenaleyh Hanefîlerin sorumluluğun doğmasında esas aldıkları nokta, eşya tasavvurlarıdır.

Modern hukukta ise zarar maddi ve manevi olarak ikiye ayrılmaktadır. Mağdurun iradesi dışında mal varlığının aktif kısmında bir azalma veya pasifinde bir artma meydana getiren zararlar maddi zarardır. Kişinin sahip olduğu mal ve haklar aktif kısmı, borç ve yükümlülükler ise pasif kısmıdır. Fakat bu zarar bilfiil malvarlığının aktifinde bir azalma veya pasifinde bir artışın yanında muhtemel bir artış veya azalmayı da kapsamaktadır. Sözgelimi müessir bir fiil sonucu mağdurun çalışma kaybından dolayı elde edemediği muhtemel kazançları maddi zarardır. Modern hukukta manevi zarar ise namus, haysiyet, şeref, kişilik hak ve hürriyetleri gibi manevi varlıklara yönelik saldırı neticesinde meydana gelen acı, üzüntü ve kederlerdir. Bu tür zararlarda kişinin mal varlığında bir eksilme veya muhtemel bir kâr yoksunluğu bulunmamaktadır. Yalnızca duygu ve his âleminde meydana gelen birtakım olumsuz sonuçlar mevcuttur.

Hanefîlerde mali sorumluluk ancak maddi varlığı olan şeylerin zarara uğramasıyla mümkün olmaktadır. Maddi zararın karşılığı ise, kişinin mal varlığı ve bedenine yönelik meydana gelen fiilî zararlardır. Dolayısıyla Hanefî fıkhında mal varlığının pasifindeki muhtemel azalmalar veya aktif kısmındaki muhtemel artışların engellenmesi zarar olarak mütalaa edilmemiştir. Sadece hâlihazırda meydana gelen mal varlığının aktifindeki azalma veya pasifindeki artma zarar olarak kabul edilmektedir. Bu sebeple Hanefîler açısından bir maddi-manevi zarar ayrımı yapılacak olursa manevi zarar menfaatlere yönelik haksız fiilleri, muhtemel kâr kayıplarını ve maddi bir karşılığı olmayan kişilik haklarına yönelik haksız fiilleri kapsamaktadır. Bunlardan ilki modern hukukta kârdan mahrum kalma şeklindeki maddi zarara karşılık gelmektedir. İkincisi ise modern hukuktaki manevi zarar anlayışına uymaktadır. Hanefîlerin manevi zarar kapsamında değerlendirdikleri şeyler ise tazmine konu olmaz. Yani Hanefîler sorumluluk için kişinin mal varlığında meydana gelen maddi azalmayı dikkate almaktadırlar.

Hanefîler felsefi anlayışlarından kaynaklanan bu görüşlerini katı bir şekilde uygulamışlardır. Fakat zaman içerisinde bazı sorunların çıkması, görüşlerinin esnetilerek birtakım istisnai hükümlerin çıkmasına sebep olmuştur. Ortaya çıkan sorunların çözümü için tazir gibi yaptırımlar öngörülmüşse de istenilen sonuca ulaşılamamıştır. Bunun en açık göstergesi, taziri bir çözüm olarak sunan Serahsî'den çok kısa bir süre

sonra vakıf ve yetimlere ait mallar ile gelir getirmesi için elde edinilen (muaddün li'l-istiğlâl) mallar için getirilen istisnai hükümlerdir. Bu hükümler hicri beşinci yüz yılın sonlarına doğru Hanefî fetâvâ/vâkıât literatürüne girmeye başlamış ve zamanla mezhepte genel kabul görmüştür. İstisnaların ilk olarak vâkıât türü eserlerde yer alması ise bunların zamanla toplumsal bir ihtiyaç olarak doğduğunu göstermektedir. İstisnalar ortaya çıktıktan yaklaşık on dört yüzyıl sonra Mecelle'de bir kanun koduna dönüşmüştür. Fakat Mecelle'de Hanefîlerin anladığı tarzda manevi tazmine dair hükümlere yer verilmemiştir. Mecelle şârihlerinden Ali Haydar Efendi, dönemin fukahasının istişaresi sonucu bunun değiştirilmesi gerektiğini savunmuş, Mecelle'nin yürürlüğe girmesinden yaklaşık elli yıl sonra isteği gerçekleşmiştir. Mecelle Cemiyeti yaptığı tadil çalışmalarıyla Şafiî mezhebinin görüşünü benimsemiş ve menfaatlerin ecr-i misil ile tazmin edileceğini kabul etmiştir. Lakin göz ardı edilen nokta, Hanefîlerin tazmin ile ilgili görüşleri ontolojik anlayışlarının bir uzantısıdır. Buna göre sadece menfaatler değil, muhtemel kazançlar ile manevi değerlerde meydana gelen zararlar da birer arazdır ve tazmine konu olmazlar. Halbuki Osmanlı kanunlarında muhtemel kazançlar ve manevi zararların tazmin edileceğine dair Mecelle öncesi bazı düzenlemeler yapılmıştır.

Mecelle'den çok önce 1858 tarihli Ceza Kanunnâme-i Hümayunu'nda ölümle sonuçlanmayan bazı yaralama olaylarında mağdurun mahrum kaldığı kârların tazmin edileceği kanunlaştırılmıştır. Bu kanunda kişilik haklarına, haysiyet ve şerefe yönelik haksız fiillerde manevi tazminata dair bir hüküm bulunmazken 1911 tarihinde kanunda yapılan değişiklik ile birlikte manevi tazminat da kanunlaşmıştır. Kanun değişikliğinden iki yıl önce 1909 tarihli Matbuat ve Matbaalar Kanunu'nunda ise herhangi bir süreli yayında kendisi aleyhinde yayın yapılan kişinin manevi zarara uğradığı gerekçesiyle dava açabileceği, muhakeme sonucu haklı çıkması durumunda maddi ve manevi tazminat talep edebileceği kanunlaştırılmıştır. Sonuç olarak Osmanlı'da menfaatlerin tazmininden daha önce Hanefîlerin ontolojik ilkelerindeki istisnalar genişletilmiştir.

Bugün menfaatlerin tazmini ile ilgili yapılan çalışmalar genellikle Mecelle etrafındaki tartışmalara yoğunlaşmaktadır. Halbuki Mecelle'de klasik Hanefî doktrinine katı bir şekilde bağlı kalınmışsa da hukukun diğer alanlarında yapılan kanunlar için aynısı geçerli değildir. Mecelle heyetinin başındaki Ahmet Cevdet Paşa 1858 tarihli ceza kanununu hazırlayan komisyonun da başkanıdır. Dolayısıyla Mecelle'yi kendi döneminden çıkartarak salt bir kanun metni olarak okumak hatalıdır. Bütün bir döneme bütüncül bir bakışla bakmak gerekir. Aynı dönemde basın ve matbaa kanunu ve ceza kanunları yapılmıştır. Bu kanunlarda maddi varlığı olmayan şeylerin tazmin edileceği kabul edilmiştir. Sonuçta Hanefîlerin tazmin anlayışları ve tarihî süreçteki tutumları belirli bir sistem içerisinde değişmiştir.

Introduction

One of the most prominent characteristics of the Ḥanafī *mujtahids* is that they endeavoured to be consistent with their philosophical understanding while expressing their opinions on legal issues. They attached great importance to this since the establishment of the school. One of the most striking examples of their

consistency with their philosophical understanding is their jurisprudence on the law of liability. Their views on this subject show how they reflected their conception of existence in the field of law. Ḥanafīs divide existence into *jawhar* (substance) and *aradh* (accident). The substance is the essence of a thing, the natural structure from which objects are formed.

On the other hand, an accident is the form that makes it possible to use and benefit (use-values/*manāfiʿ*) from the substance. For example, a riding animal is a substance, but riding it and making it carry loads is an accident. In short, accidents are things that do not have material existence. Therefore, according to Ḥanafīs, accidents cannot be damaged. When there is no damage, there is no cancellation or compensation.[1] Early Ḥanafīs strictly tried to apply this rule, which they derived from their philosophical understanding. However, what happens if social needs require otherwise? This question was asked centuries ago and kept the Ḥanafīs very busy. Although they could maintain their approaches with some exceptions, this was not enough to solve the problem completely. Especially with the development of industrial society and the crowding of cities, the subjects of liability law have expanded. Yet, is it possible to respond to new events with the old rules?

The principle that intangibles cannot be compensated for was strictly applied in the Ottoman Empire, which accepted Ḥanafīsm as the official school. Even in the latest period of the state, this principle was influential in preparing legal texts. Moreover, this principle is not specific to any area of law. It refers to the general rule of the school (*qiyās*), which covers the entire Ḥanafī *fiqh*. When the law was divided into different branches with the innovations in the field of law in the West, the Ottoman Empire followed suit. Thus, special laws were enacted for different branches of law. Among these, the regulations on the law of obligations and the law of property have been analysed in contemporary studies. But was this principle also strictly applied in other laws of the period? In the field of law of obligations, the regulations in the *Medjelle* were stretched over time, and the views of other schools were accepted. How did the process work in other laws? Did these laws include compensation for things that do not have material existence (accident)? If so, how was its implementation? This article seeks answers to these questions.

Ömer Nasuhi Bilmen›s (d. 1971) article titled «İslam Hukukunda Manevi Zararların Tazmini" on moral damages is essential.[2] In his study, the author has dealt with the issues that may correspond to moral damages in Ḥanafī theories in

1 Burhān al-Dīn al-Buhārī, *al-Muḥīṭ al-Burhānī fī al-Fiqh al-Nuʿmanī*, (Beirut: Dār al-Kutub al-ʿIlmiyya, 2004), 8/546; Fakhr al-Dīn ʿUthmān b. ʿAli Zaylaʿī, *Tabyīn al-Ḥaqāʾiq (Together with Shalabī's Ḥāshiya)* (Cairo: Dār al-Kitāb al-Islāmī, 1896), 5/234; Shaykh-Zāda Dāmād Efendī, *Majmaʿ al-Anhur fī Sharḥ Multaqā al-Abḥur* (Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, ts.), 2/467.

2 Ömer Nasuhi Bilmen, "İslam Hukukunda Manevi Zararların Tazmini", *Istanbul Üniversitesi Hukuk Fakültesi Mecmuası* 6/4 (1940), 798-812.

comparison with Western law. Abdullah Benli, in his doctoral thesis titled "İslam Hukukunda Manevi Tazminat", analysed all aspects of moral damages and examined them comparatively. Ahmet Ekşi examined the term *Ḥukūmat al-ʾalam* as a type of moral damage in his article titled "İslam Hukukunda Bir Manevi Tazminat Türü Olarak Hükümetü'l-Elem". The last two studies have mentioned that moral damage in fiqh covers a part of the material damage in positive law.[3] However, there is no detailed analysis of the Hanafīs' understanding of existence. On the other hand, Yunus Araz prepared a doctoral thesis on the compensation of interests and published it as a book.[4] Abdullah Kahraman and Nizamettin Karataş also wrote an article titled "İbn Hümam'ın Mezhebine Muhalif Bir Görüşü: Menfaatlerin Tazmini Meselesi". This study includes the articles of Seyyid Nesib Efendi (d. 1930), one of the late Ottoman jurists, written in *Jarīda ʿAdliyya*. In these articles, Seyyid Nesib analyses the Hanafi faqih Ibn al-Humām's view on the compensation of benefits contrary to his madhhab. Sayyid Nesib characterises Ibn al-Humām's view as the most suitable for the needs of his time.[5] The information that the Ḥanafīs' views on benefits stem from their understanding of existence can be found in Hasan Hacak's doctoral thesis titled "İslam Hukukunun Klasik Kaynaklarında Hak Kavramının Analizi".[6] In addition, many studies have been conducted on the late Ottoman law. Although there are studies on many areas of law in these studies, there is no study that deals with moral compensation and compensation of benefits together. In these studies, the focus was especially on benefits, and the subject was not dealt with under the title of Intangible. Our study has a unique place in terms of closing this gap.

1. Damage and Compensation in Ḥanafīs

Damage can be defined as causing harm to others, creating a fault, or any torment that touches a person's property, life, virtue, or feelings. In legal terms, it can also be defined as "the damage or destruction of the asset or value that constitutes the subject of the right."[7] From this point of view, the damage is divided into three parts: Property, bodily integrity, honour, and dignity. These three elements represent three of the five things protected by Islam.[8]

Damage is either addressed as actual loss or loss of earnings (lost profits). For example, medication and treatment costs because of injury are actual losses.

3 Abdullah Benli, *İslam Hukukunda Manevi Tazminat* (Kayseri: Erciyes University Institute of Social Sciences, Doctoral Thesis, 1997), 39; Ahmet Ekşi, "İslam Hukukunda Bir Manevi Tazminat Türü Olarak Hükümetü'l-Elem", *Journal of Islamic Law Studies* 21 (2013), 221-222.

4 Yunus Araz, *İslam Hukukunda Menfaatin Tazmini* (Bursa: Emin Yayınları, 2016).

5 Abdullah Kahraman - Nizamettin Karataş, "İbn Hümam'ın Mezhebine Muhalif Bir Görüşü: Menfaatlerin Tazmini Meselesi", *Kocaeli İlahiyat Dergisi* 1/2 (2017), 43-70.

6 Hasan Hacak, *İslam Hukukunun Klasik Kaynaklarında Hak Kavramının Analizi* (İstanbul: Marmara Üniversitesi Sosyal Bilimler Enstitüsü, Doktora Tezi, 2000), 184-185.

7 Bilal Aybakan, "Zarar", *TDV İslam Ansiklopedisi* (Istanbul: TDV Yayınları, 2013), 44/131.

8 Muḥammad Aḥmed Sirāj, *Ḍamān al-ʿudvān fī al-Fiqḥ al-Islāmī* (Beirut: al-Muassasa al-Jāmiʿiyya li al-Dirāsāt va an-Nashr, 1993), 118.

The profit deprived is the possible profit that cannot be obtained due to loss of labour.[9] In general, all kinds of damage are prohibited in Islam. According to the hadith codified by the *Medjelle*, causing harm and responding to harm with harm is prohibited.[10]

Up to this point, there is a consensus on damage. However, there are different approaches regarding the nature and scope of the damage. Especially in the Ḥanafī madhhab, financial responsibility is only possible if the things with material existence are damaged. Damages to benefits or personality are not subject to compensation.[11] In other words, Ḥanafīs consider the material decreases in the person's property for liability.

Damage is divided into two depending on the nature of the right destroyed or damaged: Material damage and moral damage. In general, if the lost right has an economic value, it is referred to as material damage. When personality rights that do not have an economic value are damaged, it is called moral damage.[12]

1.1. Material Damage

Damages that cause a decrease in the active part of the asset or an increase in the passive part of the asset against the will of the injured party are material.[13] Asset refers to the rights and responsibilities of the person with monetary value.[14] The active aspect of the asset is the goods and rights owned by the person. The passive aspect is debts and liabilities.[15] In contemporary law, it is accepted that material damage is realised in the form of actual damage and deprivation of profit. Actual damage is the decrease in the current active part or increase in the passive part of the assets because of the unlawful act. In the material damage in the form of deprivation of profit, there is no decrease in the active part or increase in the passive part of the asset. However, with the unlawful act causing the damage, a possible future increase in the active part of the asset or a possible decrease in the passive part is prevented.[16] To sum up, the partial or complete prevention of possible asset increases is today expressed as deprivation of profit and is considered material damage.

9 Turgut Akıntürk - Derya Ateş, *Borçlar Hukuku Genel Hükümler Özel Borç İlişkileri* (Istanbul: Beta Yayınları, 2019), 91.

10 Medjelle, Art. 19, Ali Haydar Efendi, *Durar al-Ḥukkām Sharḥ Majallat al-Aḥkām*. (Istanbul: Matbaa-ı Ebü'z-Ziya, 1330), 1/73; Mehmed Âtıf Bey, *Mecelle-i Ahkâm-ı Adliyye Şerhi ve Kavâid-i Külliye-i Fıkhiyye'nin İzahı* (İstanbul: Evkâf-ı İslâmiyye Matbaası, 1339), 26.

11 Vahba Zuḥaylī, *Naẓariyya al-Ḍamān* (Beirut: Dār al-Fikr, 2018), 29.

12 Aybakan, "Zarar", 44/131.

13 Alī al-Khafīf, *al-Ḍamān fī al-Fiqḥ al-Islāmī* (Cairo: Dār al-Fikr al-'Arabī, 2000), 46; Sirāj, *Ḍamān al-'udvān*, 120; Sami Narter, *Kusursuz Sorumluluk Haksız Fiil Sorumluluğu ve Tazminat Hukuku* (Ankara: Adalet Yayınevi, 2016), 420.

14 Hacak, *İslam Hukukunun Klasik Kaynaklarında Hak Kavramının Analizi*, 136.

15 Narter, *Tazminat Hukuku*, 419.

16 Nuri Kahveci, *İslam Borçlar Hukukunda Tazminat* (Erzurum: Atatürk University Institute of Social Sciences, Doctoral Thesis, 1997), 85; Benli, *İslam Hukukunda Manevi Tazminat*, 35; Narter, *Tazminat Hukuku*, 421.

In Ḥanafīs, the equivalent of material damage is the actual damage to one's property and body.[17] In particular, in Ḥanafī jurisprudence, preventing a possible decrease in the passive part of the asset or a possible increase in the active part of the asset, expressed as deprivation of profit, is not considered damage. To be considered as damage, there only needs to be an actual decrease in the active part of the asset or an actual increase in the passive part.[18] For example, if a free person is detained by force, the provisions of extortion do not apply.[19] The person forcibly detained is held back from work. Therefore, he cannot earn money and is deprived of any potential profit from the active part of his assets.

The Ḥanafī views on damage and compensation are related to their view of property. The madhhab's definition of property is summarised in the *Medjelle* as follows: "Property consists of something desired by human nature and which can be put aside against time of necessity. It comprises movable and immovable property."[20] The condition of bearing the quality to be put aside in case of a possible necessity in the definition is meant to show that benefits are not property. According to Ḥanafīs, property must be storable for the times of necessity. Benefits, on the other hand, cannot be put aside, so they are not commodities. They only come into one's possession by providing advantages depending on their tangibility. They become commodities when put as subject to contract or dependently on *'ayn* (physical presence of properties).[21] According to the other madhhabs, benefits are also property and are compensated when they are damaged.[22]

However, Abū Yūsuf (d. 182/798) and al-Shaybānī (d. 189/805), the founding imāms of the madhhab, ruled for compensation for things that do not have material existence in some cases. For example, if the damage is done to the body and then this damage disappears completely, according to Abū Yūsuf and al-Shaybānī, compensation is required due to the pain and distress suffered. This is because, even though the harmful result disappears, the unlawful act to the body (*jināyah*) that caused this result has occurred.[23] The fact that two of the founding imams of the *madhhab* hold this view is essential for determining their perspective on liability. They did not care that the damage was not permanent (such as wound healing). Instead, they considered the existence of the damage in the outside world and the continuation of its effects for a while sufficient for liability to arise.

17 Benli, *İslam Hukukunda Manevi Tazminat*, 34.
18 Alī al-Khafīf, *al-Ḍamān*, 46; Kahveci, *İslam Borçlar Hukukunda Tazminat*, 85.
19 Badr al-Dīn ʿAynī, *al-Bināya Sharḥ al-Hidāya* (Beirut: Dār al-Kutub al-ʿIlmiyya, 2000), 11/273.
20 Medjelle, Art. 126, Ali Haydar Efendi, *Durar al-Ḥukkām Sharḥ Majallat al-Aḥkām*, 1/228.
21 Hacak, *İslam Hukukunun Klasik Kaynaklarında Hak Kavramının Analizi*, 184-185.
22 Kemal Yıldız, *İslâm Sorumluluk Hukuku Akit Dışı Sorumluluk* (Istanbul: İFAV Yayınları, 2013), 132; Hacak, *İslam Hukukunun Klasik Kaynaklarında Hak Kavramının Analizi*, 186.
23 Zaylaʿī, *Tebyînü'l-Hakāik*, 6/137.

1.2. Moral Damage

Moral damages are tortious acts against intangible things. For example, pain, sorrow, and grief resulting from an attack on a person's honour, spiritual feelings, personal rights, and freedoms are moral damages.[24] Moral damage does not lead to a decrease in the person's assets and does not adversely affect his economic existence. It only causes negative consequences in terms of emotions and feelings.[25]

Under Turkish Law, the scope of moral damage can be defined as pain and grief because of damage to the body, reputation, honour, and dignity. Likewise, damage to aesthetic maturity and the inability of some organs to perform their functions are also moral damages. In such damages, the victim's treatment costs and deprived earnings represent material damage, while pain, grief, and psychological breakdown, which have no material equivalent, represent moral damage. Damage to reputation, dignity, and honour by swearing is also considered moral damage.[26]

The boundaries of the meaning of moral damage in *fiqh* are yet to be clearly defined in contemporary *fiqh* studies. In this sense, moral damage is used as a term for the torts against benefits and those against personality rights without a material equivalent. The former corresponds to material damage in the form of profit deprivation in modern law, while the latter corresponds to moral damage. This second part, especially in contemporary Arabic literature, is called *adabī damage* to avoid confusion. In *fiqh* studies, on the other hand, moral damage is considered to include damage to benefits.[27] There are justified reasons for this. This is because, in pre-modern *fiqh* literature, the object of the tort is not handled as it is in modern law. Ḥanafīs stipulated that the object of the unlawful act must have a material structure for financial liability. Therefore, according to them, benefits that are not material assets cannot be damaged. Therefore, they cannot be compensated. In the case of damages to the body's integrity, if a complete recovery is realised, no material and permanent damage can be mentioned. Only the pain and suffering of the victim remains. These are accidents and are not material. Compensation for an intangible thing is also unthinkable.[28] As a result, the equivalent of material damage in the form of deprivation of profit and moral damage to personal rights in Ḥanafī jurisprudence are the damages that occur in things that are not of the substance type and do not have a material structure.

24 Benli, *İslam Hukukunda Manevi Tazminat*, 40.

25 Kemal Tahir Gürsoy, "Manevi Zarar ve Tazmini", *Journal of Ankara University Faculty of Law* 30/1 (1973), 7-8.

26 Benli, *İslam Hukukunda Manevi Tazminat*, 41; Emrah Gökmen, *İslam Hukukunda ve Türk Hukukunda Adam Çalıştıranın Sorumluluğu* (Istanbul: On İki Levha, 2022), 110-111.

27 Alī al-Khafīf, *al-Ḍamān*, 44; Ṣubḥī al-Maḥmaṣānī, *al-Naẓariyya al-'âmma li al-mu'jabāt va al-'uqūd fī al-sherī'a al-Islāmiyya* (Beirut: Dār al-'Ilm li al-Malāyīn, 1983), 1/171; Zuhaylī, *Naẓariyya al-Ḍamān*, 53; Sirāj, *Ḍamān al-'udvān*, 151.

28 ʿAlāʾ al-Dīn Abū Bakr b. Masʿūd Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ fī Tartīb al-Sharāʾi* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1986), 7/317; Dāmād Efendī, *Majmaʿ al-Anhur*, 2/630.

2. Moral Damage and Exceptions

The Ḥanafī view that benefits within the scope of moral damages cannot be compensated has caused some problems over time. Nevertheless, al-Sarakhsī (d. 483/1090), a critical Ḥanafī jurist who lived in the fifth century, states that the inequality between substance and accident/benefit cannot be ignored even to prevent injustice and protect the benefits people derive from their property. A benefit subjected to an unjust act has no equivalent in terms of substance/material goods because it is an accident. Therefore, it is unthinkable to compensate the benefit which has no equivalent. Al-Sarakhsī states that punishments such as imprisonment can be introduced to protect people's property and the benefits they derive from it.[29]

However, historical data shows that more than the solution he offered was needed. Penalties such as imprisonment or other punishments must have been insufficient to protect people's property because some exceptions had to be made in the Ḥanafī *fatāwā/wāqiʾāt* literature on the usurpation and compensation of benefits immediately after al-Sarakhsī. In a study that traces these exceptions in the Ḥanafī literature, it is stated that the first work in which exceptions are mentioned is the work entitled *Fatāwā QāḌīkhān* (d. 592/1196) by QāḌīkhān.[30] Another study, which analyses the related wāqiʾāt literature in more detail, states that these exceptions are found in earlier sources. Accordingly, the first records on the compensation of endowment properties and the commodities set up for profitable use (*muʻadd li-l-istighlāl*) are found in *al-Ḥāwī fī al-fatāwā* by Mahmud b. Ibrahim b. Anush al-Haṣīrī (d. 500/1107). Zahīr al-Dīn Abd al-Rashīd al-Walwalijī (d. 540/1146), who died about forty years after al-Haṣīrī, discussed these exceptions, especially in the context of usurpation, in his *al-Fatāwā al-Walwāljiyyāh*.[31] The famous Ḥanafī jurist Burhān al-Dīn al-Bukhārī (d. 570/1174?) also quoted al-Walwalijī in his *al-MuḤīṭ al-Burhānī*.[32] The fact that these exceptions were not included in famous works such as *Badāʾiʿ al-Ṣanāʾiʿ* and *al-Hidāya*, which were written at the time when the exceptions began to be included in the works of the fatāwā/wāqiʾāt genre and included the main views of the madhhab, is interpreted as that the exceptions had not yet become a part of the established rules of the *madhhab* at that time.[33]

In conclusion, considering that al-Haṣīrī died at the beginning of the sixth century, al-Walwalijī in the middle of the same century, and Burhān al-Dīn al-Bukhārī and QāḌīkhan at the end of the same century, it is seen that punishments such as imprisonment were insufficient to protect people's property from

29 Shams al-'Aimma al-Sarakhsī, *al-Mabsūṭ* (Beirut: Dār al-Mʿarifa, 1993), 11/80.
30 Araz, *İslam Hukukunda Menfaatin Tazmini*, 228
31 Kamil Yelek, *Gasp ve İtlaf Bağlamında Hanefî Sorumluluk Hukuku* (Istanbul: Istanbul University Institute of Social Sciences, Doctoral Thesis, 2019), 163-165.
32 al-Buhārī, *al-Muḥīṭ*, 7/653.
33 Araz, *İslam Hukukunda Menfaatin Tazmini*, 228; Yelek, *Gasp ve İtlaf Bağlamında Hanefî Sorumluluk Hukuku*, 165.

tortious acts, very soon after al-Sarakhsī. The fact that the exceptions first appeared in the works of fatāwā/wāqiʾāt shows that these exceptions emerged as a social need over time. In later periods, these fatwās that emerged as exceptions became part of the madhhab's doctorate.[34] Also, they became a code of law about fourteen centuries after the fifth century.[35]

In *Medjelle*, there is no regulation regarding the compensation of the benefit and the necessity of a similar fee (*ajr-i misl*) as a legal consequence of a usurped thing excluding the above-cited exceptions: orphans' property, endowment property, and property possessed for profitable use.[36] About the other things benefits, the Ḥanafī opinion that the benefits cannot be compensated has been codified.[37] Only the return of the usurped property and the principles of compensation for cases where the return is impossible are regulated.[38]

Ali Haydar Efendi, one of the commentators of the *Medjelle*, cites the opinion of the late Ḥanafī scholars (mutaʾakhkhirūn) that the benefits derived from the property belonging to waqfs and orphans will be compensated. Subsequently, he states that the jurists of his period should consult and decide on the compensation of the benefits of all properties because it is an undeniable historical reality that people need and attach importance to benefits.[39]

This wish shows that the existing view did not meet the needs of that day. Indeed, in 1338/1922, a report was published in *Jarīda ʿAdliyya* on the issue that benefits would be considered within the scope of property. The Medjelle Committee[40] amended some articles of the *Medjelle* and adopted the view of the Shāfiʿī madhhab.[41] Two years later (1340/1924), the same committee again published a report in *Jarīda ʿAdliyya* stating that benefits were not considered valuable property (*mutaqawwim*) was incompatible with the economic understanding of the period. The *Medjelle* article, which codified Ḥanafī jurisprudence, was corrected, and the opinion of the majority of Sunni madhhab that the benefits of all kinds of goods would be compensated was accepted. Thus, the relevant

34 ʿAynī, *al-Binâya* 11/251; Dāmād Efendī, *Majmaʿ al-Anhur*, 2/467; Shaykh Niẓām Burhānpurlu, *al-Fatāwā al-hindiyya* (Beirut: Dār al-Fikr, 1892), 4/427; Muḥammad Amīn Ibn ʿĀbidīn, *Radd al-Muḥtār ʿalā ʾl-Durr al-mukhtār* (Beirut: Dār al-Fikr, 1992), 6/186.

35 Medjelle, Art. 596, Ali Haydar Efendi, *Durar al-Ḥukkām Sharḥ Majallat al-Aḥkām*., 1/949; Mehmet Âtıf Bey, *Mecelle-i Ahkâm-ı Adliyye'den Kitâbü'l-İcârât* (İstanbul: Matbaʿa al-Khayriyya, 1330), 126.

36 Medjelle, Art. 890, 891, Ali Haydar Efendi, *Durar al-Ḥukkām Sharḥ Majallat al-Aḥkām*., 2/772, 780-781; Mehmed Âtıf Bey, *Mecelle-i Ahkâm-ı Adliyye Şerhi: Kitâbü'l-Gasb ve'l-İtlâf* (İstanbul: Matbaʿa al-Khayriyya, 1332), 7-8.

37 The title of the second book, the eighth bāb, the first chapter is Ḍamān-ı manfaʿat (compensation of benefit). Medjelle, Art. 596, Ali Haydar Efendi, *Durar al-Ḥukkām Sharḥ Majallat al-Aḥkām*., 1/949; Âtıf Bey, *Kitâbü'l-İcârât*, 126.

38 Medjelle, Art. 890, 891, Ali Haydar Efendi, *Durar al-Ḥukkām Sharḥ Majallat al-Aḥkām*., 2/772, 780-781; Mehmed Âtıf Bey, *Mecelle-i Ahkâm-ı Adliyye Şerhi: Kitâbü'l-Gasb ve'l-İtlâf* (İstanbul: Matbaʿa al-Khayriyya, 1332), 7-8.

39 Ali Haydar Efendi, *Durar al-Ḥukkām Sharḥ Majallat al-Aḥkām*., 1/950.

40 Mehmet Âkif Aydın, "Mecelle-i Ahkâm-ı Adliyye", *TDV İslam Ansiklopedisi* (Ankara: TDV Yayınları, 2003), 28/234; Ahmet Akgündüz, *Karşılaştırmalı Mecelle-i Ahkâm-ı Adliye* (Istanbul: Osmanlı Araştırmaları Vakfı, 2013), 32.

41 Cerîde-i Adliyye, 3/143, 1338/1922.

articles of the *Medjelle* were also amended, and it was accepted that the benefits would be compensated with a similar fee.[42]

Lost Profits

There have been some changes in the provisions of the madhhab regarding the lost profits within the scope of moral damages over time. The Ḥanafīs did not accept compensation for the deprivation of possible earnings or profits since it is not a tangible asset. However, it is accepted that the profits deprived due to the assault causing bodily harm will be compensated.

According to the widespread view in the madhhab, to award compensation, a permanent scar must be left on the body, which must be measurable in material terms.[43] However, according to some Ḥanafī jurists, Abū Yūsuf being, in the first place, pain and suffering, which have no material equivalent, can also be a reason for compensation. For this type of compensation, the term *arsh al-ʾalam* or Ḥukūmat al-ʾalam is used.[44] In the literature, the term *Ḥukūmat al-ʿadl* is also used for this type of compensation.[45]

According to Abū Ḥanīfa, in torts against the body, the perpetrator is not liable if the recovery is complete and no scar or defect is left on the body. Al-Shaybānī thinks that the perpetrator should compensate the victim for the treatment expenses. According to Abū Yūsuf, the perpetrator is liable for the pain and suffering due to *arsh al-ʾalam*.[46]

According to Abu Yusuf, even though the body has been healed and aesthetic maturity has been achieved, it is impossible to ignore pain and suffering.[47] For this reason, the pain and suffering of the victim are considered valuable property according to *istiḥsān* (juristic preference).[48] Therefore, even if the wound is healed, compensation is required for the pain and suffering.[49] Al-Shaybānī's view, on the other hand, is based on the understanding of indirectly causing damage (*tasabbub*) rather than considering the pain and suffering as a valuable property. This is because the victim's treatment expenses cause a decrease in his assets. This decrease is considered material damage. The reason for the occurrence of

42 Cerîde-i Adliye, 25/907, 1340/1924.
43 Ekşi, "İslam Hukukunda Bir Manevi Tazminat Türü Olarak Hükümetü'l-Elem", 221-222.
44 Kāsānī, *Badāʾiʿ al-Ṣanāʾi*, 7/317; Burhān al- Dīn Marghīnānī, *al-Hidāya sharḥ Bidāyat al-mubtadiʾ*, (Cairo: Dār al-Salām, 2012), 4/1656; ʿAynī, *al-Binâya*, 13/210.
45 Kāsānī, *Badāʾiʿ al-Ṣanāʾi*, 7/323; ʿAbd al-Qādīr ʿŪda, *at-Teshrīʿ al-Jinâī al-İslâmî* (Beirut: Muassasa al-Risāla Nāshirūn, 2013), 1/661.
46 Marghīnānī, *al-Hidāya*, 4/1656; 'Abd Allāh b. Maḥmūd al-Mavṣılī, *al-Ikhtiyār li taʿlīl al-Mukhtār* (Beirut: Dār al-ʿArkām, ts.), 2/499-500; Zaylaʿī, *Tebyînü'l-Hakāik*, 2/138; ʿAynī, *al-Binâya*, 13/211; Dāmād Efendī, *Majmaʿ al-Anhur*, 2/630; Ibn ʿĀbidīn, *Radd al-Muḥtār*, 4/586.
47 al-Mavṣılī, *al-Ikhtiyār*, 2/499-500; Zaylaʿī, *Tebyînü'l-Hakāik*, 2/138; Dāmād Efendī, *Majmaʿ al-Anhur*, 2/630.
48 Marghīnānī, *al-Hidāya*, 4/1656; Ibn ʿĀbidīn, *Radd al-Muḥtār*, 4/586.
49 Kāsānī, *Badāʾiʿ al-Ṣanāʾi*, 7/317.

the damage is the offence causing the injury.[50] As in the case of indirect damages, al-Shaybānī must have thought there was an appropriate causal link between the damage suffered by the victim and the act of assault causing bodily harm. For this reason, he wanted to eliminate the damage suffered by the victim. He concluded that the treatment costs would be compensated by the perpetrator of the assault to eliminate the damage.[51]

In the Ḥanafī madhhab, for a commodity to be regarded as valuable property, it must be present and muḥraz.[52] Although pain and suffering are present, they are not muḥraz. Muḥraz means actual domination over the property.[53] Ensuring this dominance depends on the permanence of the property.[54] Like the benefits, pain and suffering exist, but their existence is not permanent. Despite all this, it is crucial that Abū Yūsuf made pain and suffering subject to compensation.

Abū Bakr al-ḥaddād (d. 800/1398), a Ḥanafī jurist who lived in the eighth century after Hijrah, included a meaningful statement about the act of assault causing bodily harm in his study on *al-Mukhtaṣar* of al-Qudūrī (d. 428/1037). Discussing the nature of the concept of Ḥukūmat, al-ḥaddād states that this term is understood as the income that the victim needs to make a living during the period when he cannot work.[55] Some three centuries later, Ḥaskafī (d. 1088/1677), another Ḥanafī jurist who was a *qāḌī* of Damascus, quoted Ḥaddād's statement. He states that the term *Ḥukūmat* is interpreted as the income and treatment expenses of the victim until he recovers.[56] Al-'Imādī (d. 1171/1758), another Ḥanafī jurist who was also a *muftī* in Damascus in the twelfth century, also favours this interpretation. Ibn 'Ābidīn (d. 1252/1836), a recent Ḥanafī jurist from Damascus, also states that this interpretation is correct. However, he adds a condition: the victim must be poor. In this case, the treatment expenses and the victim's needs until he recovers are compensated. If the victim is a wealthy person, the perpetrator shall only compensate for the treatment expenses.[57]

This *fatwā* is obviously contrary to the classical view in the Ḥanafī madhhab. However, *muftīs* of different centuries, such as Ḥaskafī and Al-'Imādī, preferred this dissenting view (*shādh*). In addition, Ibn 'Ābidīn's support for this view may indicate the social need for the subject. The fact that Ibn 'Ābidīn stipulates that the victim must be poor shows that this contrary view emerged due to necessity.

50 Marghīnānī, *al-Hidāya*, 4/1656; al-Mavṣılī, *al-Ikhtiyār*, 2/499-500; Zaylaʿī, *Tebyînü'l-Hakāik*, 2/138; Dāmād Efendī, *Majmaʿ al-Anhur*, 2/630.

51 Molla Hüsrev, *Durar al-ḥukkām fī sharḥ Ghurar al-aḥkām* (Dār Iḥyāʾi al-Kutub al-'Arabī, ts.), 2/98.

52 Al-Sarakhsī, *al-Mabsūṭ*, 11/79; Zaylaʿī, *Tebyînü'l-Hakāik*, 3/83; ʿAynī, *al-Bināya*, 11/251; Kahraman - Karataş, "Menfaatlerin Tazmini Meselesi", 52.

53 Hamza Aktan, "İhrâz", *TDV İslam Ansiklopedisi* (Istanbul: TDV Yayınları, 2000), 21/543.

54 Kahraman - Karataş, "Menfaatlerin Tazmini Meselesi", 52.

55 Abū Bakr al-ḥaddād, *al-Javhara al-Nayyira* (Cairo: Matbaʿa al-Khayriyya, 1904), 2/131.

56 ʿAlāʾ al-Dīn Ḥaṣkafī, *al-Durr al-Mukhtār fī Sharḥ Tanwīr al-Abṣār*, (Beirut: Dār al-Kutub al-ʿIlmiyya, 2002), 713.

57 Muḥammad Amīn Ibn ʿĀbidīn, *al-ʿUqūd al-durriyya fī tenqīḥ al-Fātwā al-Ḥāmidiyya*. (Beirut: Dār al-Mʿarifa, ts.), 2/255.

This is because there is no difference between the victim being poor or wealthy in terms of being deprived of the profit obtained during the healing process. The main thing is that neither of them should be compensated. However, depriving the poor person of his livelihood will cause him and his dependents great financial hardship and moral damage.

In a text from the eighth-century Hijri, the dissenting view (*shādh*) was preferred in the *madhhab* centuries later. The commissioning of the necessity principle can explain this situation to respond to social life needs that emerged because of the change of time. There will inevitably be some changes in the theory due to changes in the needs of society and existing practices, causing some difficulties. Ibn ʻĀbidīn even states that with the change of custom, *qāḍīs* and *muftīs* should make judgments by considering the needs of the period they live in. Even the authoritative views of the *madhhab* (*ẓāhir al-riwāya*) may be abandoned due to the needs of the period.[58] The following statement he makes after the examples he gives to support his view is noteworthy: "The founding fathers would have held the same legal opinions had they encountered the same customs that the later jurists had to face."[59]

The Ottoman Penal Code of 1840, which came into force a few years after Ibn ʻĀbidīn's death, codified this dissenting view. According to the first article of the tenth chapter, the perpetrator of the offence of wounding with a weapon shall compensate the victim's medical expenses until he recovers.[60] The 1858 code, which came into force due to the inadequacy of the 1840 law, codified the same view. According to Article 177, those who destroy a limb because of wounding or battery shall compensate for the treatment costs and the *diyat*.[61] In historical documents, there are judicial decisions on the compensation of treatment costs in the same century.[62]

The 1858 Penal Code contains articles on the compensation of lost profits and treatment costs. Article 178 stipulates that if the victim is deprived of his/her work for more than twenty days because of injury or assault, the perpetrator shall compensate the victim for the costs of his/her treatment and the income he/she would have earned while he/she was healthy.[63] There is information on the application of this article in various case records.[64]

58 Muḥammad Amīn Ibn ʿĀbidīn, "Nashr al-ʻarf fī binā' ba'Ḍ al-aḥkām ʻalā al-ʻUrf", *Majmūʻat Resāʼil Ibn ʿĀbidīn*, ed. Muḥammad al-ʿAzāzī (Beirut: Dār al-Kutub al-ʿIlmiyya, 2014), 2/183-184.

59 Ibn ʿĀbidīn, "Nashr al-ʻarf", 2/176,179.

60 Said Nuri Akgündüz, *Tanzimat Dönemi Osmanlı Ceza Hukuku Uygulaması* (Istanbul: Rağbet, 2017), 166-167.

61 *Ceza Kanunnâme-i Humâyunu*, (Istanbul: Matbaa-ı Osmâniye, 1300), Art. 177, 80.

62 Ömür Yazıcı, *812 Numaralı Aydın Ayniyat Defteri'nin Transkripsiyon ve Değerlendirmesi* (Manisa: Celal Bayar University Institute of Social Sciences, Master Thesis, 2015), 277-278.

63 *Ceza Kanunnâme-i Humâyunu*, Art. 178, 80-81.

64 Vakâyi-i Zabtiyye, 39/3-4, Meclis-i Temyîz-i Beyoğlu, 1 Recep 1286/7 Ekim 1869; Yazıcı, *812 Numaralı Aydın Ayniyat Defteri*, 527-528.

Article 179 deals with the victim's injury to the extent that the victim will recover in less than twenty days. In this case, the perpetrator does not compensate an amount that varies according to the type of injury or the income level of the victim, such as treatment costs or unobtainable earnings. Instead, the perpetrator compensates a fixed amount of money (between one and five *majīdiya* of gold), which the judge has assessed.[65] There are also case records where a judgment was rendered under Article 179.[66] Article 183 regulates injuries caused by mistake and unintentional injuries. According to this article, in cases of accidental and unintentional injuries, the treatment expenses of the injured person shall be compensated by the perpetrator.[67] There are examples of the application of this article in the court records.[68]

Article 194 relates to those who intentionally cause another person to fall ill with medicines and the like and prevent them from earning an income. According to the article, such persons shall pay compensation between three *majīdiya* and twenty-five *majīdiya* to someone who falls ill and cannot work.[69] In some articles, the purpose of determining the amount of compensation by the legislature is that the possible earnings are not yet available. Thus, in determining the amount of compensation, it was aimed not to cause a second damage and to prevent the tortfeasor from being harmed by an unfair compensation. The main idea underlying this is the principle in the *madhhab* that no injury/harm shall be inflicted or reciprocated.

Other Exceptions to Moral Damages

The other thing Ḥanafīs thinks cannot be compensated because they are not considered value property is moral damages. Ömer Nasuhi Bilmen, one of the scholars of the late Ottoman and Republican periods, thinks that moral damages are not ignored in Islamic Law. According to him, moral damages are compensated in a way that ensures justice. The critical and essential thing here is to repair the damage suffered by the victim. [70] To him, what matters is the compensation for the damage. This cannot be done only by imposing financial responsibility on the perpetrator. [71] Some punitive sanctions may be imposed in return for moral damage, or the victim may retaliate against the perpetrator in kind for the moral damage suffered.[72] For example, according to the Ḥanafīs, the person who de-

65 *Ceza Kanunnâme-i Humâyunu*, Art. 179, 81.
66 Vakâyi-i Zabtiyye, 1/3, Meclis-i Temyîz-i Üsküdar; Meclis-i Temyîz-i Dersaâdet.
67 *Ceza Kanunnâme-i Humâyunu*, Art. 183, 83.
68 Vakâyi-i Zabtiyye, 1/3, Meclis-i Temyîz-i Dersaâdet; Vakâyi-i Zabtiyye, 2/3, Meclis-i Temyîz-i Dersaâdet.
69 *Ceza Kanunnâme-i Humâyunu*, Art. 194, 88.
70 Bilmen, "İslam Hukukunda Manevi Zararların Tazmini", 799; Kemal Yıldız, "Ömer Nasuhi Bilmen'in Manevi Tazminat Anlayışı", *Müftü ve Müderris Ömer Nasuhi Bilmen*, ed. Nail Okuyucu - Ayhan Işık (Ömer Nasuhi Bilmen Symposium, Istanbul: Marmara Akademi Yayınları, 2014), 323.
71 Yıldız, "Ömer Nasuhi Bilmen'in Manevi Tazminat Anlayışı", 323.
72 Bilmen, "İslam Hukukunda Manevi Zararların Tazmini", 801.

flowered a girl must pay *mahr* as financial responsibility.[73] Since virginity has no material equivalent, it is considered moral damage. Even if it is moral damage, the victim is not expected to bear the damage, and the amount of mahr is taken as a basis for compensation. In addition to the financial obligation, some sanctions were imposed on the offender. For example, the testimony of the person who slandered fornication was not accepted. The person who verbally insulted was shamed by being exposed in the place where he insulted.[74]

In Ottoman practice, there are also regulations on moral compensation. The 1858 Penal Code contains special provisions on rape and deflowering (*izāla-i bikr*). Articles 198 and 199 of the Code regulate the criminal sanctions for those who commit or attempt to commit the offence of sexual assault.[75] Article 200 regulates the civil and criminal responsibilities related to deflowering virginity. In the Ḥanafī school of thought, the view that the victim would be paid mahr in the case of deflowering was mainly expressed as taḌmīn-i bikr in Ottoman Law. In some records, however, the concept of mahr was used. In many case records, there are examples of the payment of moral damages for the violation of virginity.[76]

In the 1858 Penal Code, a three-article chapter on moral damages is devoted to the offences of insult and disclosure of confidential information (Articles 213, 214, 215).[77] In addition, Article 202 regulates criminal sanctions for acts such as verbal abuse and physical harassment that cause moral damage.[78] However, only criminal sanctions are included in these articles. Case records show that people who were insulted were penalised, according to these articles.[79] No information in these case records shows that the offenders paid moral compensation. The penal code of 1858 underwent significant amendments over time.[80] Especially in the amendment made in 1911, the articles on moral damage underwent a large-scale change. However, another law had directly included moral damages two years before this amendment. It was accepted that damages to the moral personality would be compensated differently from deflowering virginity. According to Article 12 of the Press and Printing Presses Law dated July 16, 1325 (July 29, 1909), a person against whom publications were made in a periodic may

73 al-Buhārī, *al-Muḥīṭ*, 3/119.
74 Bilmen, "İslam Hukukunda Manevi Zararların Tazmini", 807-809.
75 *Ceza Kanunnâme-i Humâyunu*, Art. 198, Art. 199, 90.
76 Osmanlı Arşivi (BOA), Sadaret Mektubi Kalemi Meclis-i Vala Evrakı [A.MKT.MVL.], No. 138/1, Gömlek No. 10; Yazıcı, *812 Numaralı Aydın Ayniyat Defteri*, 314-315.
77 *Ceza Kanunnâme-i Humâyunu*, Art. 213, 214, 215, 99-100.
78 *Ceza Kanunnâme-i Humâyunu*, Art. 202, 93-94.
79 Vakâyi-i Zabtiyye, 1/3, Meclis-i Temyîz-i Dersaâdet; Vakâyi-i Zabtiyye, 2/4, Dîvân-ı Temyîz-i Üsküdar; Vakâyi-i Zabtiyye, 6/3, Meclis-i Temyîz-i Dersaâdet.
80 Mehmet Âkif Aydın, "Batılılaşma", *TDV İslam Ansiklopedisi* (Istanbul: TDV Yayınları, 1992), 5/482; Mustafa Şentop, *Tanzimat Dönemi Osmanlı Ceza Hukuku: Kanunlar-Tadiller-Layihalar-Uygulama* (Istanbul: Yaylacık Matbaası, 2004), 109; Mehmet Gayretli, *Tanzimat'tan Cumhuriyet'e Kanunlaştırma Çalışmaları* (Istanbul: Nizamiye Akademi Yayınları, 2015), 242.

file a lawsuit for moral damage. If the claimant is correct at the end of the trial, he/she can claim material and moral damages.[81]

Two years after the Press Law, an amendment was made to the penal code. Thus, Article 214, which regulates insult crimes, includes moral damage. Accordingly, the complainant may demand compensation as much as he/she wishes when he/she thinks he/she has suffered moral damage and material compensation. The court determines the amount of compensation according to the crime's gravity and the victim's position in society.[82] Article 214 was amended three years later, but the provision on moral damages was not changed.[83]

In the 1911 commentaries on the amendment, it is possible to access the legal understanding and practice of the period. Diran Yerganian, one of the Ottoman jurists of the period, states that until the amendment, there needed to be more clarity in the law regarding compensation for moral damages. Accordingly, when the damage caused by a legal transaction or non-fulfilment of a commitment is sued, the court considers the type of damage. If there is no material damage, the victim's claim for compensation is rejected. Even if a person's reputation, honour, and dignity are harmed, it is impossible to prove this materially. Therefore, the court does not consider the victim's claim. Yerganian also states that the first amendment in this regard was made in the Press Law. However, as a legal scholar and lawyer, he adds that the regulation on moral damages in the Press Law has yet to be fully implemented. Recognising the existence of moral damage and that it could be compensated did not fully comply with the legal thinking of the time. For this reason, the courts were highly conservative when deciding on moral damages. As a result, they determined tiny amounts when determining the amount of moral damages. He even states that some courts did not even dare to apply this article of law. These words of an academic jurist of the period indicate how difficult and painful the change in the legal mentality was.[84]

Artin Boshgezenian, another jurist of the period, states that moral damage had only recently entered Ottoman law. For this reason, he makes theoretical explanations about moral damage and tries to introduce it.[85] He defines damage as a diminution in the things themselves or their qualities. If the diminution is in material things, it is material damage and easy to detect. On the other hand, if

81 Matbuat ve Matbaalar Kanunu (Dersaadet: Hilal Matbaası, 1334), 8.

82 "28 Zilhicce 1284 Tarihli Kanun-ı Ceza'nın Bazı Mevâddını Muaddil Kanun", 6 Cemâziyelâhir 1329-22 Mayıs 1327, Düstur, 2nd edition, 3/436-460.

83 "28 Zilhicce 1284 Tarihli Ceza Kanunu'nun Bazı Mevâddını Muaddil Kanun-ı Muvakkat 15 Cemâziyelâhir 1332-28 Nisan 1330, Düstur, 2nd edition, 6/649.

84 Diran Yerganian, *Kanun-ı Ceza Dersleri* (Dersaadet: Becidyan Matbaası, 1326), 259-260.

85 Regarding Artin Boshgezenian, lawyer, member of the judiciary and MP for Aleppo: Şaduman Halıcı, "Osmanlı Basınına Yansıyan Şekliyle 1914 Meclis-i Mebusan Seçimlerinde Ermeniler", *Turkish Journal of History* 62 (2015), 127-180; Mustafa Ünal - Yasin Yılmaz, "Osmanlı Ceza Kanunnamesi Şerh Literatürü Üzerine Bir Derkenar", *Tanzimat Dönemi Osmanlı Ceza Hukukuna Giriş Mahmud Esad Seydişehri'nin Ceza Hukuku Dersleri*, ed. Mehmet Aykanat - İbrahim Ülker (Istanbul: On İki Levha, 2020), 30-31.

the diminution is in things that cannot be exchanged (*ashyā-i nāfi'a-i mā'naviyya*), this is moral damage. As can be seen, Boshgezenian also does not divide the damage according to the division in Turkish positive law. Like the Ḥanafī school, he evaluated the damage according to its ontological structure. According to Boshgezenian, it is not appropriate to compensate the intangible damage with a material asset. However, since no other remedy exists, it must be accepted out of necessity. The fact that it is difficult to determine the amount of moral damage is not a sufficient reason to ignore such damage.[86]

Conclusion

The philosophical thoughts of the Ḥanafīs profoundly influenced the madhhab's understanding of law. For example, the madhhab's approach to ontology influenced its provisions on the law of liability This can be seen by how they categorised the concept of damage. They did not categorise damage as material and moral; instead, they considered the ontological nature (substance-accident) of the damaged thing. For this reason, deprivation of profit and moral damages to personal rights, accepted as material damages in modern law, are in the same category. This is because these things are not substances and do not have a material structure. The Ḥanafīs strictly adhered to their ontological principles. However, they had to compromise their principles to meet the needs that emerged over time. This compromise is not an ordinary renunciation but a coherent legal manoeuvre based on necessity. For example, according to the classical *madhhab* view, lost income cannot be compensated. However, out of necessity, a Ḥanafī *mufti*, Ḥaskafī, preferred the opposite. Over time, this view entered the literature and was treated as an unimportant opinion, but as necessity increased, it became preferable. The emergence of a dissenting opinion due to necessity, its entry into the literature, and its subsequent preference indicates the system's effort to produce an alternative to respond to social needs. The subsequent acceptance of the contrary view is not an opposition/objection against the system of the madhhab. On the contrary, it stems from the systematic of the madhhab itself. The change occurred within the school's mechanisms in a way that responded to the need and did not disturb the consistency.

Over time, the preference for opposing views was also reflected in Ottoman practice. Today, studies on the compensation of benefits generally focus on the debates around *Medjelle*. However, although *Medjelle* strictly adhered to the classical Ḥanafī doctrine, the same is not valid for laws in other areas. Ahmet Cevdet Paşa, the head of the *Medjelle* committee, was also the head of the commission that prepared the penal code 1858. Therefore, it is erroneous to read the *Medjelle* as a mere legal text by removing it from its period. It is necessary to look at a whole period with a holistic view.

86 Artin Boshgezenian, *Kanun-ı Cezanın Mevâdd-ı Kâime ve Muaddelesi Hakkında Teşrih ve Tenkit* (Istanbul: Matbaa-ı Âmire, 1327), 225.

The Press and Printing Presses Law and the Penal Codes were enacted simultaneously as the *Mejelle*. These laws stipulated that intangibles could be compensated. In many case records, there are examples of compensation for intangibles. As a result, the Ḥanafīs' understanding of compensation and their attitude in the historical process changed. This change did not occur randomly but within a specific system. Rather than going outside the system, the systematics of the madhhab can be operated as in the historical process and respond to the needs of the time. Thus, change and development can be maintained consistently. As a result, when the systematic of the madhhab is applied and the historical process is considered, it can be said that intangibles can also be compensated.

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