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Inconsistencies in the Hanafi School's View of Children's Legal Competence

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Abstract: This article examines the inconsistencies of the Hanafi school of thought regarding the legal capacity of children. The study of this issue is to prove whether or not there is harmony between the legal *istinbat* method (*ushul fiqh*) used and the legal product (*fikih*) created. In fiqh proposal it is determined that children do not have legal capacity so they are freed from all forms of legal imposition (*taklif*). The problem studied is the inconsistency of children's legal skills and arguments against this problem. This paper is based on qualitative data in the form of books on *ushul fiqh* and *fiqh* of thought from the Hanafi school of thought. Data is given meaning through *verstehen*, namely understanding by using a divergent, creative, and innovative mindset so that deeper meaning is found. After that, the data was analyzed using content analysis, namely taking inventory of data, simplifying it, and generalizing it. This is done interactively between the three components; data reduction, data presentation, and data verification. The results of the research show that there is an inconsistency in the Hanafi school of thought regarding legal competence. Inconsistency is seen in three ways; the standard has been and has not been the functioning of reason related to the age phases of the child, determining the impact of the benefits and harms contained in legal actions, and the scope of legal subjects. Thoughts on the legal skills of children other than the Hanafi school of thought which have not been studied in this paper need further research.

Keywords: Hanafi school, child legal competence, *mumayyiz*, *Islamic law*

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Abstrak: Artikel ini mengkaji inkonsistensi pemikiran mazhab Hanafi tentang kecakapan hukum anak. Kajian tentang isu ini untuk membuktikan ada dan tidaknya keselarasan antara metode istinbat hukum (ushul fikih) yang digunakan dengan produk hukum (fikih) yang dilahirkan. Dalam ushul fikih ditentukan bahwa anak tidak memiliki kecakapan hukum sehingga dibebaskan dari segala bentuk pembebanan hukum (taklif). Masalah yang dikaji adalah bentuk inkonsistensi kecakapan hukum anak dan argumentasi terhadap persoalan tersebut. Tulisan ini didasarkan atas data kualitatif berupa kitab-kitab ushul fikih dan fikih pemikiran mazhab Hanafi. Data diberi pemaknaan melalui *verstehen* yakni pemahaman dengan menggunakan pola pikir yang divergen, kreatif dan inovatif sehingga ditemukan makna yang lebih mendalam. Setelah itu, data dianalisis menggunakan *content analysis* (analisis isi), yaitu menginventarisir data, menyimplifikasikan, dan menggeneralisasikannya. Hal ini dilakukan secara interaktif antara tiga komponen; reduksi data, penyajian data, dan verifikasi data. Hasil penelitian menunjukkan terjadinya inkonsistensi mazhab Hanafi tentang kecakapan hukum. Inkonsistensi terlihat dalam tiga hal; standar sudah dan belum berfungsinya akal terkait dengan fase-fase usia anak, penentuan dampak manfaat dan bahaya yang terkandung dalam perbuatan hukum, dan cakupan subyek hukum. Pemikiran kecakapan hukum anak selain mazhab Hanafi yang belum dikaji dalam tulisan ini perlu dilakukan penelitian lebih lanjut.

Kata Kunci: Mazhab Hanafi, kecakapan hukum anak, *mumayyiz*, hukum Islam

Introduction

The exegeses of the Qur'an offered by major Islamic scholars (*ulama*) often spark controversy in society. This can be seen, for example, in the inconsistency with which the Hanafi school views the legal competence of children. In the Hanafi approach to *fiqh*, children are seen as having legal competence in some provisions but not others. Further complicating this issue and creating confusion, different age limits are found in different provisions. In Indonesia context, a third factor exacerbates the situation, the standards for legal competence provided by the national legal code differ from those offered by Islamic jurisprudence. Recognizing that small Indonesian Muslims follow the Hanafi school, it is important to seriously consider the inconsistencies in that school's understanding of children's legal competence.

Generally speaking, the literature on the legal competence of children falls into three categories. In the first, studies examine the mental aspects of

competence,¹ including the cognitive capacity of individuals,² the legal competence of disabled persons,³ and the legal competence of children in childcare.⁴ Studies in the second category focus on the legal competence of girls.⁵ In the third category, studies of children's legal competence concentrate on age.⁶ This literature has highlighted how different age categories interplay with the legal competence of children, as understood by Islamic jurisprudence.

No study to date has examined the inconsistencies in the Ḥanafī school's understanding of children's legal competence. The current article seeks to fill this gap by exploring the Ḥanafī school's view of children's legal competence, mapping cases of inconsistency and analyzing their causes. Central to this discussion will be two research questions: (1) how is the legal competence of children viewed inconsistently by the Ḥanafī school? and (2) what inconsistencies exist in the Ḥanafī school's view of the legal competence of children?

This article departs from the assumption that, according to the principles of Islamic jurisprudence, children have no legal competence. As a result, children are free from all *taklīf* (legal burdens), but also not obligated, allowed, or permitted to do legal acts.⁷ However, inconsistency is evident in

¹ Rosie Harding, "Legal Constructions of Dementia: Discourses of Autonomy at the Margins of Capacity," *Journal of Social Welfare and Family Law* 34, no. 4 (2012), p. 425–42. Penelope Weller, "Reconsidering Legal Capacity: Radical Critiques, Governmentality and Dividing Practice," *Griffith Law Review* 23, no. 3 (2014), p. 498–518.

² Mirko Pečarič, "Universal Capacity to Generalise Legal Principles by Combining Reason, Logic, Morals and Their Counterparts," *Theory and Practice of Legislation* 3, no. 1 (2015), p. 1–22.

³ Eilionoir Flynn and Anna Arstein-Kerslake, "Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity," *International Journal of Law in Context* 10, no. 1 (2014), p. 81–104.

⁴ Elsje Bounthuys, "Legal Capacity and Family Status in Child-Headed Household: Challenges to Legal Paradigm and Concepts," *International Journal of Law in Context* (2010).

⁵ Mahdi Zahraa, "The Legal Capacity of Women in Islamic Law," *Arab Law Quarterly* 11, no. 3 (1996), p. 245–63.

⁶ Novi Ratna Sari, "Komparasi Syarat Sahnya Perjanjian Menurut Kitab Undang-Undang Hukum Perdata Dan Hukum Islam," *Repertorium* 4, no. 2 (2017), p. 79–86. Sanawiah Sanawiah and Muhammad Zainul, "Batasan Kedewasaan Dan Kecakapan Hukum Pewasiat Menurut Kompilasi Hukum Islam Dan Kitab Undang-Undang Hukum Perdata," *Jurnal Hadratul Madaniyah* 5, no. 1 (2018), p. 1–12. Siti Khoiriah, "Kontroversi Kecakapan Anak Dalam Hukum," *Wacana Publik* 13, no. 01 (2019), p. 13–17.

⁷ `Ali bin Muḥammad Al-Āmidī, *Al-Iḥkām Fī Uṣūl Al-Aḥkām* (Beirūt: Dār al-Kutub al-Ilmiyyah, 1986). Bik Al-Khudārī, *Uṣūl Al-Fiqh* (Beirūt: Dār al-Fikr, 1998). `Abd al-Wahhāb Khallāf, *Ilm Uṣūl Al-Fiqh* (Kuwait: Dār al-Qalam, 1978). Wahbah Al-Zuhaylī, *Ilm Uṣūl Al-Fiqh Al-Islāmī* (Beirūt: Dār al-Fikr al-Islāmī, 1986), Vol. II. Mas`ūd bin Al-Taftazānī,

the Ḥanafī school's view of children's legal competence. This is evident in two main areas: the standards for determining mental competence vis-à-vis the rights of Allah (*ḥuqūqullāh*) and the rights of humanity (*ḥuqūq al-'ibād*) and the standards for identifying the benefits or dangers inherent in legal acts. These elements may be viewed within the context of children's development: before the age of discernment (*ṣabī ghayr mumayyiz*), after the age of discernment (*ṣabī mumayyiz*), and the age of majority (*bāligh*).

The Ḥanafī school is one of the four schools of thought (*maddhab*) that guide Islamic jurisprudence. The Ḥanafī school, identified with *ra'yi* (rationalist) thought, often differs from other schools, both traditionalist (*madhhab ahlul hadīth*) and moderate (between *ahlur ra'yi* and *ahlul hadīth*).⁸ Within the context of the research questions, it is important to highlight the inconsistencies between the Ḥanafī school and other *maddhab*. It is due to these differences that the Ḥanafī school's understanding of the legal competence of children is interesting to study, especially given that these inconsistencies have been controversial within the Muslim community.

Primary and secondary data were collected for this study. Primary data were collected from Ḥanafī texts that were deemed representative, including texts on *ushul fiqh* and *fiqh*. As noted by Ibrahim⁹, the exemplary text of *ushul fiqh* from the Ḥanafī school is *Kitāb Uṣūl al-Sarakhsī* (w. 483 H). Meanwhile, according to Mahmasani,¹⁰ Ḥanafī views of *fiqh* are best represented by texts such as *Kitāb al-Mabsūt* by al-Sarakhsī (w. 490 H), *Kitāb Badā'i' al-Ṣanā'i' fī Tartīb al-Syarā'i'* by al-Kāsānī (w. 587 H), and *Kitāb Radd al-Muhtār 'Ala al-Durr al-Mukhtār Sharḥ Tanwīr al-Abṣār* by Ibnu 'Abidin (w. 1252 H). Secondary data, meanwhile, were collected from studies of Ḥanafī thought, *ushul fiqh*, and *fiqh*, as related to children's legal competence. All of these data were necessary for this qualitative study.

This study seeks to understand a particular phenomenon through careful data collection and honed analysis. Data collection and analysis were

⁸ Umar, *Al-Talwīḥ 'Alā Al-Tawdīḥ* (Beirut: Dār al-Kutub al-'Ilmiyyah, 2011). Aḥmad bin Maḥmūd Ibnu Qudāmah, *Rawḍah Al-Nāzir Wa Junnah Al-Munāzir* (Kairo: Maktabah al-Kulliyah al-Azhariyyah, 1991). Abū Zahrah, *Uṣūl Al-Fiqh* (Beirut: Dār al-Fikr al-'Arabi, 1989).

⁹ Muḥammad Adīb Sāliḥ, *Tafsīr Al-Nuṣūṣ Fī Al-Fiqh Al-Islāmī Dirāsah Muqāranah* (Damaskus: Manshurāt al-Maktab al-Islāmī, 1985). Muṣtafā Sa'īd Al-Khīn, *Āthār Al-Ikhtilāf Fī Al-Qawā'id Al-Uṣūliyyah Fī Ikhtilāf Al-Fuqahā'*, ed. Muassasah Al-Risālah (Beirut, 1981); Ḥasan Aḥmad Al-Khaṭīb, *Al-Fiqh Al-Muqāran* (Kairo: Dār al-Ta'lif, 1957).

¹⁰ 'Abdul Wahhāb bin Sulaymān Ibrāhīm, *Al-Fikr Al-Uṣūlī Dirāsah Tahliyyah Naqdiyyah* (Beirut: Dār al-Shurūq, 1984).

¹¹ Subḥī Maḥmasānī, *Al-Awdā' Al-Tashrī'iyyah Fī Al-Duwal Al-'Arabiyyah Mādīhā Wa Hādīruhā* (Beirut: Dār al-'Ilm lil Malāyīnī, 1981).

conducted through analysis and reflection/comparison. This study began with a *desk review* of primary and secondary sources, after which 'core' texts were identified and selected. These core texts were used to understand Ḥanafī thoughts regarding *usul fiqh* and *fiqh*. After texts were selected and their contents mapped, analysis was conducted through *verstehen*, thereby using divergent, creative, and innovative analysis to understand texts from their own point of view. In this manner, the explicit and implicit meanings of the texts were identified and associated with their broader contexts, thereby obtaining a deeper and broader meaning.¹¹

Ḥanafī School and Children's Legal Competence in Islamic Law

1. Inconsistency in the Ḥanafī School

To date, no study has specifically investigated the inconsistencies in the Ḥanafī school's understanding of children's legal competence. Studies of the Ḥanafī school have, for example, explored how Imam Abu Hanifah ascertained the authenticity of hadiths -especially *ahad* hadiths (i.e., those hadiths reported by only a few people)- and used these hadiths as the basis for jurisprudence. Most imams have been cautious when using Hadiths as the basis for legal consideration, paying particular attention to their transmission.¹² Ḥanafī imams, meanwhile, commonly use *mursal* hadiths (i.e., hadiths that omit the narrator) as legal references, suggesting that the chain of transmission (*sanad*) is of little importance to them. Conversely, when dealing with *aahad hadiths*, Ḥanafī imams place great emphasis on transmission. This indicates an inconsistency in their approach to jurisprudence.¹³

One inconsistency in Ḥanafī jurisprudence lies in its approach to the debts of the recently deceased. Most ulamas hold that the debts of the deceased must be paid in full before the estate is divided amongst the heirs. Ulamas of the Ḥanafī school, meanwhile, believe that heirs are not obligated to pay the debts of the deceased. Repaying such debts is understood as a form of worship; as such, any obligation ends with the death of the indebted.¹⁴ In regards to

¹¹ Noeng Muhadjir, *Metodologi Penelitian Kualitatif* (Yogyakarta: Rake Sarasin, 1998).

¹² Busthomi Ibrahim, "Hadis Dalam Pemikiran Abu Hanifah," *Junal Saintifika Islamica* 2, no. 2 (2015), p. 15–24.

¹³ Ibrāhīm, *Al-Fikr Al-Uṣūlī Dirāsah Taḥlīliyyah Naqdiyyah*.

¹⁴ Asdar Yusuf, "Controversy of Islamic Law on The Distribution of Inheritance to the Heirs of Different Religion," *HUNAFa: Jurnal Studia Islamika* 14, no. 2 (2017), p. 377–403. Asni Zubair, et.al., "The Construction of Inheritance Law Reform in Indonesia: Questioning the Transfer of Properties through Wasiat Wājibah to Non-Muslim Heirs," *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 6, No. 1 (2022).

apostasy and inheritance, Hanafi views also differ from those of other schools. *Ulamas* of the Maliki, Syafi'i, and Hanbali schools hold that Muslims may not bequeath their property to family members who have left Islam, as through their apostasy they have become *kafir* (unbelievers). Hanafi *ulamas*, meanwhile, hold that Muslims may leave property to family members.¹⁵

2. Legal Competence of Children

Masson¹⁶ defines children's rights as human rights that are suited to the specific conditions of children, including their particular vulnerabilities, characteristics, and needs. Children's rights, thus, have two components. First, children have the same human rights as adults, including the right to non-discrimination and freedom of expression as well as civil, health, education, social, and economic rights. Second, children have specific rights designed to protect them from violence and exploitation.¹⁷ Historically, legal decisions that affect children have often been made without involving them as legal subjects, as children are commonly perceived as lacking the social and cognitive abilities needed.¹⁸ As such, children require specific legal protections until they reach the age of majority.

In Indonesia, there are no fixed standards regarding the age at which children may be deemed legally competent.¹⁹ Owing to this lack of uniformity, problems are common when ascertaining whether children are legally competent. As noted by,²⁰ several standards may be referenced: 1) the age of majority set by Article 330, Paragraph (1), of the Indonesian Civil Code (age 21); 2) the age of majority set by Law No. 2 of 2015 regarding Notary Publics (age 18); 3) the age of majority set by Law No. 13 of 2003 regarding Labor (age 18).²¹ Likewise Law No. 11 of 2012 concerning the juvenile justice system and Qanun Jinayat in Aceh 2014, the age limit for adulthood is 18

¹⁵ Asdar Yusuf, *Controversy of Islamic Law...*, p. 377-403.

¹⁶ Judith Masson, "Public Child Law - a Service Priority?," *Journal of Social Welfare and Family Law* 34, no. 4 (2011), p. 361-77.

¹⁷ Ali Kemal Tekin, "Improving Child Rights in the Gulf: Expectations from the Brand-New Child Law of Oman," *Children and Youth Services Review* 50 (2015), p. 12-19.

¹⁸ Anne C. Dailey and Laura A. Rosenbury, "The New Law of the Child," *Yale Law Journal* 127, no. 6 (2018), p. 1448-1741.

¹⁹ Khoiriah, *Kontroversi Kecakapan Anak Dalam Hukum*.

²⁰ Ni Nyoman Endi Suadnyani, et.al., "Kecakapan Berdasarkan Batasan Usia Dalam Membuat Perjanjian Dihadapan Notaris," *Kertha Semaya* 5, no. 1 (2017), p. 1-5.

²¹ Clare Huntington, "Early Childhood Development and the Law," *Southern California Law Review* 90 (2017), p. 755-910. See also Zanariah Binti Noor and Nazirah Lee. "Preserving Child's Faith in Malaysian Law: A Maqasidic Approach," *Ulumuna: Journal of Islamic Studies* 27, No. 1 (2023).

years while the Compilation of Islamic Law stipulates that the age of marriage is 19 years for men and 16 years for women.²² According to several legal rules that legal competence is required for individuals to carry out legal actions. Only once individuals reach the age of majority, and thus are assumed to have legal competence, do they have the authority to fulfill their rights and obligations and to participate in legal acts.

3. Inconsistency in Islamic Law

Fiqh is the field dealing with what is permissible and prohibited in Islam, as well as more general matters of *sharia* (Islamic law) and its precepts.²³ *Fiqh* provides *ulamas* with a system for understanding how Muslims are expected to behave and act, as well as references to consider before passing judgment and issuing fatwas.²⁴ As such Iskandar describes,²⁵ *fiqh* as Islamic jurisprudence, as human understandings of divine truths revealed through the Qur'an and the Sunnah (the collected teachings and practices of the Prophet Muhammad). Scholars of *fiqh*, known as *fuqaha*, have significant authority in Muslim communities. Where those in power are Muslim, they must follow the instructions of the *fuqaha* to ensure that their laws are implemented in accordance with Islamic teachings. Khumayni describes that *fuqaha* as representatives of the Prophet. According to Hakim,²⁶ only *fuqaha* can ensure that Islamic ideals are realized in the implementation and enforcement of laws, thereby ensuring the integrity of the community and the nation.

To ensure that everything reflects Islamic values, a *fuqaha* must closely follow the principles of Islam. As stated by Alam Rizvi,²⁷ in implementing Islamic law, a *faqih* must closely adhere to the Qur'an and

²² Analiansyah and Ali Abubakar, "Children Handling Procedure in Islamic Criminal Offense in Aceh," *Ahkam: Jurnal Ilmu Syariah* 21, No. 1 (2021). Qodariah Barkah et.al., "Abandonment of Women's Rights in Child Marriage; An Islamic Law Perspective," *Al-Ihkam: Jurnal Hukum dan Pranata Sosial* 17, No. 2 (2022).

²³ Umdatul Baroroh, "Understanding Methodology of Fiqh Sosial," *Santri: Journal of Pesantren and Fiqh Sosial* 1, no. 1 (2020), p. 27–42.

²⁴ Ahmad Badri Abdullah et al., "Postmodernism Approach in Islamic Jurisprudence (Fiqh)," *Middle East Journal of Scientific Research* 13, no. 1 (2013), p. 33–40.

²⁵ Mizaj Iskandar, "Fiqh Anticipation: Mitigation Concept Based on Islamic Law," *IOP Conference Series: Earth and Environmental Science* 273, no. 1 (2019), p. 1–9.

²⁶ Sudarnoto Abdul Hakim, "Islam and Government: An Analytical Review on Khumayni's Kashf Al-Asrār and Wilāyat Al-Fāqih," *Indonesian Journal of Islam and Muslim Societies* 8, no. 1 (2018), p. 147–71.

²⁷ M. Mahtab Alam Rizvi, "Velayat-e-Faqih (Supreme Leader) and Iranian Foreign Policy: An Historical Analysis," *Strategic Analysis* 36, no. 1 (2012), p. 112–27.

Hadiths while simultaneously allowing space for *ijtihad* (individual interpretation). When a *faqih* considers only the worldly, he cannot represent the Prophet or act justly. In practice, however, there are often inconsistencies between the decisions of *fuqaha* and Islamic doctrine. One article exploring the inconsistencies and incoherencies in Islamic inheritance law was penned by Khalid.²⁸ *Fuqaha*, Khalid writes, have long employed a patrilineal approach when determining the kinship of heirs who are not directly related. Women who are distantly related to the deceased may only receive an inheritance when there is no *ashab al-furud nasabiyyah* or other *ashab*. As such, the grandparents, brothers, and sisters of mothers, as well as the grandchildren born to daughters, are deemed *dhawi al-arham*. This is problematic, however, where the Qur'an allows all kin (including those along the matrilineal line) to receive an inheritance. Where *fuqaha* acknowledge that family members along the matrilineal line may receive an inheritance, they only allow a smaller share.

Inconsistency is also evident in various schools' understanding of children's legal competence. According to the Syafi'i and Hambali schools, as well as many in the Maliki and Ḥanafī schools, children gain legal competence at the age of fifteen. For followers of the Dzahiri school, meanwhile, the age of majority is 19 years.²⁹

Children's Legal Competence in the Ḥanafī School's

The inconsistencies in the Ḥanafī school's understanding of children's legal competence are evident in two points. First, the standard for understanding the ability to think rationally and realize divine rights (*ḥuqūqullāh*) and human rights (*ḥuqūq al-'ibād*). Second, the ability to ascertain the benefits and dangers inherent to legal acts. This will be detailed below.

1. Inconsistency Regarding Rational Thought

The first inconsistency lies in the understanding of children's ability to think rationally. *Ulamas* of the Ḥanafī school divide children's legal competence into three categories, based on their mental development: before the age of discernment (*ṣabī ghayr mumayyiz*), after reaching the age of discernment (*ṣabī mumayyiz*), and the age of majority (*bāligh*). Each has its

²⁸ Muhammad Khalid Masud, *Islam and Modernity* (UK: Edinburgh University Press, 2009).

²⁹ Hakim, "Islam and Government: An Analytical Review on Khumayni's Kashf Al-Asrār and Wilāyat Al-Fāqih."

legal consequences. Before reaching the age of discernment, children are held to be incapable of rational thought (*'adam al-'aql*). After reaching the age of discernment, children are seen as having a rational mind that is only beginning to develop (*nuqṣān al-'aql*). Finally, children who have reached *bāligh* are believed to have a fully functional rational mind (*kamāl al-'aql*).³⁰

Inconsistencies in how the Ḥanafī school views the legal competence of children before the age of discernment (*ṣabī ghayr mumayyiz*), are evident in the distinction between *ḥuqūqullāh* and *ḥuqūq al-'ibād*. In legal acts associated with *ḥuqūqullāh*, children before the age of discernment are considered to not have legal competence. Their words have no legal consequences, and their deeds receive no legal sanctions. Before the age of discernment, children are not required to have faith or conduct worship, be it through physical acts (*badaniyah*) or property (*māliyyah*). Before the age of discernment, children are not required to pray (*salah*), give alms (*zakat*), fast during Ramadhan, or undertake the hajj pilgrimage. In criminal law, likewise, *ṣabī ghayr mumayyiz* do not have legal competence, and thus cannot be subjected to *qisās*, *ḥudūd*, or *ta'zīr* (be it as punishment or as a teaching tool). In such matters, the *wali* (guardian) may not replace them and undertake legal action in their name (*adā' al-wali laysa ka'adā'ihī*). Meanwhile, in matters of *ḥuqūq al-'ibād*, children who have not reached the age of discernment are deemed to have legal competence. As such, *ṣabī ghayr mumayyiz* are required to replace all material goods that they have damaged or lost. This is permitted, as the lost objects are deemed the child's property rather than acts in which the children can be represented (*adā' al-wali ka'adā'ihī*).³¹

Children who have reached the age of discernment, meanwhile, are seen as having minds that are still developing, and thus they do not have full

³⁰ Muḥammad Amīn Ibnu 'Abidīn, *Radd Al-Muḥtār 'Alā Al-Durr Al-Mukhtār Sharḥ Tanwīr Al-Abṣā* (Beirut: Dār al-Kutub al-'Ilmiyah, 1994), Vol. IX, p. 199–204. Muḥammad bin Ahmad bin Abi Sahl Al-Sarakhsī, *Kitāb Al-Mabsūt* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1993), Vol. XXIII, p. 156–58; Abī Bakr b. Mas'ūd Al-Kāsānī al-Ḥanafī, *Itāb Badā'i' Al-Ṣanā'i' Fī Tartīb Al-Syarā'i'* (Beirut: Dār al-Kutub al-'Ilmiyyah, 2010), Vol. I, p. 171.

³¹ Muḥammad bin Ahmad bin Abi Sahl Al-Sarakhsī, *Uṣūl Al-Sarakhsī* (Hindia: Iḥya' al-Ma'arifi, 1990), p. 333–37. 'Abd al-Qadīr Awdah, *Al-Tasyrī' Al-Jinā'ī Al-Islāmī* (Beirut: Muassasah al-Risālah, 1992), Vol. I, p. 601. Imran Ahsan Khan Nyazee, *Theories of Islamic Law The Methodology of Ijtihad* (Selangor: The Other Press, 2002), p. 90. Imran Ahsan Khan Nyazee, *Islamic Jurisprudence* (Selangor: The Other Press, 2003), p. 114. Al-Sarakhsī, *Kitāb Al-Mabsūt*, Vol. XIII, p. 156–58. Al-Kāsānī al-Ḥanafī, *Itāb Badā'i' Al-Ṣanā'i' Fī Tartīb Al-Syarā'i'*, Vol. X, p. 86–89. Ibnu 'Abidīn, *Radd Al-Muḥtār 'Alā Al-Durr Al-Mukhtār Sharḥ Tanwīr Al-Abṣā*, Vol. IX, p. 198–203. Muḥammad Abu Zahrah, *Al-Jarimah Wa Al-Uqubah Fi Al-Fiqh Al-Islamī* (Beirut: Dar al-Fikr al-'Arabi, 1998), p. 477–82. Muḥammad Abu Zahrah, *Ushul Al-Fiqh* (Beirut: Dar al-Fikr al-Arabi, 1913), p. 333–34.

legal competence. Nevertheless, they are allowed to do some legal acts. In *ḥuqūqullāh*, *ṣabī mumayyiz* are deemed to lack legal competence (*la wujūb al-adā'*) to be compelled to undertake physical worship such as *salah*, fasting, and the hajj pilgrimage; however, they are permitted to do so, and their worship is considered valid (*ṣiḥḥah al-adā'*). As such, they count toward the minimum number of congregants necessary for congregational prayers to be deemed valid, except Friday prayers, for which they are not counted. In matters of criminal law, *ṣabī mumayyiz* who do criminal acts are not required and may not be subjected to *had* and *qiṣāṣ* as punishment. They may, however, be subjected to *ta'zīr*, i.e., preventative measures and corporal punishment.³²

Sabī mumayyiz are viewed as having legal competence in matters of *ḥuqūqullāh*, mostly in worship through property (*māliyyah*) rather than pure (*mahdah*) worship. As such, children who have reached the age of discernment must pay *zakat fitrah* when they receive property from their *wali*. Likewise, when *sabī mumayyiz* commit a crime for which *qiṣāṣ* (retributive justice) is required, they are compelled to pay *diyat* (a material fine). If the amount expected is more than a third of the entire fine, this burden must be borne by the family; if the amount to be paid is less than a third, the burden must be borne by the *ṣabī mumayyiz*.³³

Finally, upon reaching the age of majority (*bāligh*), children are viewed as having fully developed rational minds (*kamāl al-'aql*). In the Ḥanafī school, adulthood can be ascertained based on one of two factors: '*alāmah* (signs) or age. For male children, the main markers of adulthood are *iḥtilām* (dreams of sexual intercourse) and the ability to impregnate someone; these normally occur around the age of twelve. For female children, meanwhile, the main markers of adulthood are menstruation, *iḥtilām*, and the ability to be pregnant; these occur after the girl has reached the age of nine. Where such

³² 'Abd al-Raḥmān Al-Jazīrī, *Kitāb Al-Fiqh 'Ala Al-Madhāhib Al-Arba'ah* (Kairo: Dār al-Hadīth, 1998), Vol. II, p. 310. Muhammad bin Ahmad bin Abi Sahl Al-Sarakhsī, *Kitāb Al-Mabsūt* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1993), Vol. XIII, p. 156–58. Al-Sarakhsī, *Uṣūl Al-Sarakhsī*, 1990, Vol. II, p. 310. Al-Kāsānī al-Ḥanafī, *Itāb Badā'i' Al-Ṣanā'i' Fī Tartīb Al-Syarā'i'*, Vol. X, p. 87–90. Ibnu 'Abidīn, *Radd Al-Muḥtār 'Alā Al-Durr Al-Mukhtār Sharḥ Tanwīr Al-Abṣā*, Vol. IX, p. 198–203. Abdul Qadir Audah, *Al-Tasyri' al-Jinaiy Al-Islamiy*, vol. 2 (Beirut: Muassasah al-Risalah, 1987), Vol. I, p. 602. Zahrah, *Ushul Al-Fiqh*, p. 334–35.

³³ Al-Sarakhsī, *Kitāb Al-Mabsūt*, Vol. XXIII, p. 158–60; Al-Sarakhsī, *Uṣūl Al-Sarakhsī*, Vol. II, p. 341–44. Ibnu 'Abidīn, *Radd Al-Muḥtār 'Alā Al-Durr Al-Mukhtār Sharḥ Tanwīr Al-Abṣā*, p. 217–18; Zahrah, *Ushul Al-Fiqh*, p. 334–35. Zahrah, *Al-Jarimah Wa Al-Uqubah Fi Al-Fiqh Al-Islamiy*, p. 480–81. Awdah, *Al-Tasyri' Al-Jinā'i Al-Islāmī*, Vol. I, p. 602. Al-Jazīrī, *Kitāb Al-Fiqh 'Ala Al-Madhāhib Al-Arba'ah*, Vol. II, p. 310.

signs of adulthood do not occur, adulthood is determined by age: seventeen for girls and eighteen/nineteen for boys.³⁴

Upon reaching *bāligh*, children are viewed as having fully developed minds. As such, all legal obligations are theirs, both in matters of *ḥuqūqullāh* and *ḥuqūq al-'ibād (wujūb al-adā')*. Children who have reached the age of *bāligh* are required to bear all legal burdens, including *salah*, fasting, and the hajj pilgrimage. Where children who have reached the age of majority commit a crime, they may be subjected to *qiṣās*, *ḥudūd*, and other punishments. At this age, children are accountable for all legal acts, both civil and criminal.³⁵

2. Inconsistency in Prohibitions against Children doing Legal Acts

Second, there is inconsistency in prohibitions against children doing legal acts (*ḥukm al-ḥijr*). Such prohibitions fall into two categories: prohibitions related to property and prohibitions related to the *tasarruf* of property. Inconsistency can be seen, for example, in the prohibition against giving property to children who have yet to reach the age of discernment, as they are deemed to lack the legal competence necessary. Giving property to *ṣabī ghayr mumayyiz* is equated to damaging or wasting that property. *Sabī mumayyiz*, meanwhile, are considered to have some legal competence, and thus may be given property as their rational minds emerge. *Wali* may also allow *ṣabī mumayyiz* to undertake mercantile activities as a means of testing them.³⁶

Two forms of *tasarruf* are acknowledged in matters of property: legal acts associated with *qawliyah* (words) and legal acts associated with *fi'liyyah* (deeds). The permission to do a legal act is informed by its benefits and/or dangers. Legal acts fall into three categories: purely beneficial, purely dangerous, and containing both benefits and dangers. Inconsistencies are evident in the consideration of these values. For *ṣabī ghayr mumayyiz*, there is no such consideration, and thus children of this age have no legal

³⁴ Al-Sarakhsī, *Kitāb Al-Mabsūt*, Vol. IX, p. 184. Al-Kāsānī al-Ḥanafī, *Itāb Badā'i' Al-Ṣanā'i' Fī Tartīb Al-Syarā'i'*, Vol. VII, p. 171–72. Ibnu 'Abidīn, *Radd Al-Muhtār 'Alā Al-Durr Al-Mukhtār Sharḥ Tanwīr Al-Abṣā*, Vol. IX, p. 225–27.

³⁵ Al-Sarakhsī, *Kitāb Al-Mabsūt*, Vol. XXIII, p. 157. Al-Sarakhsī, *Uṣūl Al-Sarakhsī*, Vol. II, p. 347. Al-Kāsānī al-Ḥanafī, *Itāb Badā'i' Al-Ṣanā'i' Fī Tartīb Al-Syarā'i'*, Vol. VII, p. 171. Ibnu 'Abidīn, *Radd Al-Muhtār 'Alā Al-Durr Al-Mukhtār Sharḥ Tanwīr Al-Abṣā*, Vol. IX, p. 204. Awdah, *Al-Tasyrī' Al-Jinā'ī Al-Islāmī*, Vol I, p. 602. Zahrah, *Ushul Al-Fiqh*, p. 335–36.

³⁶ Al-Sarakhsī, *Kitāb Al-Mabsūt*, Vol. XXIII, p. 158. Al-Sarakhsī, *Uṣūl Al-Sarakhsī*, Vol. II, p. 336–37. Al-Kāsānī al-Ḥanafī, *Itāb Badā'i' Al-Ṣanā'i' Fī Tartīb Al-Syarā'i'*, Vol. X, p. 86–89. Ibnu 'Abidīn, *Radd Al-Muhtār 'Alā Al-Durr Al-Mukhtār Sharḥ Tanwīr Al-Abṣā*, Vol. IX, p. 198–202.

competence. *Ṣabī ghayr mumayyiz* may not, for instance, commit *talak* (divorce), free slaves, make an *iqrār* (legal confession), or conduct transactions, even with the permission of their *wali*. Likewise, they may not receive *hibah* (gifts), *sadaqah* (alms), or *wasiat* (inheritances). Where such acts are committed, they are deemed invalid, as children of this age lack the legal competence (*ahliyyah*) necessary.³⁷

Meanwhile, the legal competence of *ṣabī mumayyiz* depends on the type of legal act involved (i.e., wholly beneficial, wholly dangerous, or containing both benefits and dangers). If a legal act is wholly beneficial, then *ṣabī mumayyiz* are considered to have legal competence. *Ṣabī mumayyiz* may accept gifts and alms, and such acts are valid. If an act solely contains *ḍarar* (danger, harm), then *ṣabī mumayyiz* lack legal competence; as such, they may not give gifts, alms, or inheritances, and any such acts are invalid. The permission of the *wali* has no bearing, as where the *wali* may act in the child's stead. Finally, where a legal act contains both benefits and dangers, *ṣabī mumayyiz* may act with the permission of their *wali*. As such, children of this age may conduct business transactions, work together to irrigate crops, rent property, and make/take loans, so long as they have permission. Children without a *wali* have the full authority to make their own decisions.³⁸

Meanwhile, for acts that are categorized as *fi'liyyah*, all children are deemed legally competent, no matter their developmental stage. Children, even those classified as *ṣabī ghayr mumayyiz* and *ṣabī mumayyiz*, are expected to be responsible for their deeds. If a child commits *ghasab* and damages the property of another, that child is required to replace the property.³⁹

Once children reach the age of majority, all of the above prohibitions become null and void. This includes the prohibition against doing things that

³⁷ Al-Sarakhsī, *Kitāb Al-Mabsūt*, Vol. XXIII, p. 158. Al-Sarakhsī, *Uṣūl Al-Sarakhsī*, Vol. II, p. 347–48. Al-Kāsānī al-Ḥanafī, *Itāb Badā'i' Al-Ṣanā'i' Fī Tartīb Al-Syarā'i'*, Vol. X, p. 86–89. Ibnu 'Abidīn, *Radd Al-Muḥtār 'Alā Al-Durr Al-Mukhtār Sharḥ Tanwīr Al-Abṣā*, Vol. IX, p. 198–202. Imran Ahsan Khan Nyazee, *Theories of Islamic Law* (Pakistan: Islamabad Islamic Research Institute Press, 1994), p. 86–88. Nyazee, *Islamic Jurisprudence*, p. 118–20.

³⁸ Al-Sarakhsī, *Kitāb Al-Mabsūt*, Vol. XXXIII, p. 158. Al-Sarakhsī, *Uṣūl Al-Sarakhsī*, Vol. II, p. 347–48. Al-Kāsānī al-Ḥanafī, *Itāb Badā'i' Al-Ṣanā'i' Fī Tartīb Al-Syarā'i'*, Vol. X, p. 86–89. Ibnu 'Abidīn, *Radd Al-Muḥtār 'Alā Al-Durr Al-Mukhtār Sharḥ Tanwīr Al-Abṣā*, Vol. IX, p. 198–202. Nyazee, *Theories of Islamic Law*, p. 86–88. Zahrah, *Ushul Al-Fiqh*, p. 334.

³⁹ Al-Sarakhsī, *Kitāb Al-Mabsūt*, Vol. XXIII, p. 158. Al-Sarakhsī, *Uṣūl Al-Sarakhsī*, Vol. II, p. 347–48. Al-Kāsānī al-Ḥanafī, *Itāb Badā'i' Al-Ṣanā'i' Fī Tartīb Al-Syarā'i'*, Vol. X, p. 86–89. Ibnu 'Abidīn, *Radd Al-Muḥtār 'Alā Al-Durr Al-Mukhtār Sharḥ Tanwīr Al-Abṣā*, Vol. IX, p. 198–202.

solely contain danger. Such children can also do legal acts that contain both benefits and dangers without the permission of their parents. Owing to their fully developed minds, such children are deemed to have the same legal competence as adults.

The above discussion has highlighted several inconsistencies in the Ḥanafī school's view of children's legal competence, as evidenced in the literature on the school's *fiqh* and thought. This inconsistency will be discussed further below.

The Concept of Ḥanafī School's of Children's Legal Competence

This discussion has identified several inconsistencies in the Ḥanafī school's understanding of children's legal competence, as well as the justification for such inconsistencies. This inconsistency is evident in two areas: first, the identification of *ṣabī ghayr mumayyiz* as '*adam al-'aql*' (incapable of rational thought) and *ṣabī mumayyiz* as *nuqṣān al-'aql* (only beginning to develop rational thought). Second, the benefits and values contained within legal acts. Such inconsistencies are closely associated with two elements: the different development of children and the treatment of legal acts (deeds).

Before the age of discernment, children are deemed to lack legal competence in all matters related to *ḥuqūqullāh*; both those related to pure worship (*salah*, fasting, *zakat harta*, and the hajj pilgrimage) and those forms of worship where *māliyyah* (property) is dominant (*zakat fitrah*). In such matters, as well as the payment of *diyāt* (retribution) for *qīṣāṣ* (criminal acts), children identified as *ṣabī ghayr mumayyiz* have no obligation and *wali* may not act in their stead. Meanwhile, children who have reached the age of discernment have legal competence in matters of *ḥuqūqullāh* law where property is dominant. Such distinction is inappropriate, as such acts are in practice commonly undertaken by *wali*. Logically, *ṣabī ghayr mumayyiz* require more assistance from their *wali*, as their minds are less developed than their older peers. When acts may be undertaken by a *wali*, it is improper to distinguish between *ṣabī ghayr mumayyiz* and *sabiyy mumayyiz* based on their cognitive abilities, as both are treated as lacking the mental development necessary for action.

Meanwhile, the equal standing of *ṣabī ghayr mumayyiz* and *ṣabī mumayyiz* in matters of *fi'liyyah* implies that both have legal competence; this contradicts the identification of *ṣabī ghayr mumayyiz* as '*adam al-'aql*' and *ṣabī mumayyiz* as *nuqṣān al-'aql*. Because the Ḥanafī school holds that "no legal burdens may be borne by persons without rational minds", then those deemed

incapable of rational thought (i.e., children who have not reached the age of discernment) must by definition have no legal competence. As such, *ṣabī ghayr mumayyiz* who lose or damage the property of others must not be expected to replace it.

The second inconsistency lies in the benefits and dangers associated with legal acts. In this, the Ḥanafī school distinguishes between children who have not reached the age of discernment (*ṣabī ghayr mumayyiz*) and children who have reached the age of discernment (*ṣabī mumayyiz*). *Ṣabī ghayr mumayyiz* are viewed as having no legal competence, no matter the benefits or dangers inherent to the act. Meanwhile, for *ṣabī mumayyiz*, legal competence depends on the benefits and dangers that are inherent in the legal act. Where something is deemed purely beneficial, children who have reached the age of discernment have the legal competence to act. Where something contains both benefits and dangers, *ṣabī mumayyiz* may act with the permission of their *wali*. Finally, in purely dangerous matters, *ṣabī mumayyiz* have no legal competence, even if they obtain the permission of their *wali*. Such distinctions are highly subjective and prone to change; acts that were previously deemed entirely beneficial could ultimately become dangerous. For example, if a child does not use a gift that has been received, this may be understood as *isrāf* (acting in excess) and *tabdhīr* (squandering property), both dangers that should be avoided.

These inconsistencies in the Ḥanafī school's understanding of legal competence suggest that the principles of Islamic jurisprudence have not been realized in practice. The Hadith "رفع القلم عن ثلاث: عن الصبي حتى يحتلم..." (legal burdens are absolved for three groups: first, children who have not reached *bāligh*...) promotes the view that children should bear no legal burdens and thus have no legal competence. However, this hadith has not been applied for *ṣabī ghayr mumayyiz* in matters of *ḥuqūqullāh* or for *ṣabī mumayyiz* in other matters; children in these categories are seen as having a degree of legal competence. In matters of *ḥuqūq al-'ibād*, meanwhile, this hadith is applied solely to purely dangerous acts. Where acts are purely beneficial, meanwhile, this hadith is not applied, and thus *ṣabī mumayyiz* are perceived as having legal competence. Conversely, in matters of worship, the above-mentioned hadith is also applied to legal acts that are purely beneficial (*salat*, *zakat*, fasting, and the hajj pilgrimage), and in such matters children are seen as lacking legal competence.

Existing studies have yet to specifically examine the inconsistencies in the Ḥanafī school's view of children's legal competence. This study's innovation, thus, lies in its exploration of these inconsistencies. From the discussion in this article, it is increasingly apparent that Ḥanafī views

regarding children's legal competence must be reconsidered. It is necessary to consider both physical and spiritual maturity, where clear standards are set, it will no longer be necessary to distinguish between matters of *ḥuqūqullāh* and *ḥuqūq al-'ibād* or consider the benefits and dangers of legal acts.

Conclusion

This article has shown that the Ḥanafī school's understanding of children's legal competence. These inconsistencies may be attributed to two points: the identification of children who have not reached the age of discernment as *'adam al-'aql* (incapable of rational thought) and children who have reached the age of discernment as *nuqṣān al-'aql* (only beginning to develop rational thought), and consideration of the benefits and dangers of legal acts. Inconsistency has occurred because the legal competence of children is ascertained through abstract and subjective means, without any clear and objective standards. State and religious laws both claim their own truths, and this further exacerbates existing inconsistencies. Concrete and objective standards must be set, i.e., an age at which physical and mental maturity has been reached. Clear rules and understandings will minimize inconsistencies and limit debate between *fuqaha*. This study of the texts of the Ḥanafī school has found inconsistencies in its treatment of children's legal competence. This exploration of Ḥanafī school texts on the principles of Islamic jurisprudence has also found that legal competence is achieved at different ages. Ḥanafī scholars and *fuqaha* identify legal competence as being achieved at different ages. However, such a dichotomy does not mean that Ḥanafī thought is inaccurate. Rather, it may be attributed to scholars having different exegeses of texts and disagreeing on the correct interpretation. Further data should be collected from secondary sources to better understand the inconsistencies in Ḥanafī thought and the factors that cause them.

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