

A Comparative Study of The Syafiiian Mazhab & The Maliki Mazhab from Islamic Law Perspective Regarding The Return of Property as A Result of A Canceled Marriage

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Abstract. *A comparative study of four schools of jurisprudence is urgently needed to overcome legal uncertainty in Indonesia regarding the return of inherited assets if the marriage is annulled. The increasing number of marriage annulments in 2024, coupled with differences in interpretations of schools of thought and positive law, makes this study crucial for creating legal certainty, justice and harmonization between Islamic law and positive law in Indonesia. This study will recommend practical solutions to avoid conflict and protect the rights involved. This research uses a normative method with a literature study approach to analyze Islamic law regarding the return of inherited assets when a marriage is annulled. Comprehensive law for fair dispute resolution and the results of the discussion are that the Shafi'i and Maliki schools have different opinions regarding the withdrawal of offerings before the wedding. Shafi'i takes into consideration the giver's intentions, allowing withdrawal if it is for marriage and annulled, despite internal differences of opinion. Malikis are stricter, generally prohibiting withdrawals except from father to son, with the potential exception of pre-covenant dowries. These differences, plus internal differences of opinion within the two schools, demonstrate the complexity of this issue. Implementation in Indonesia faces challenges: differences in sectarian interpretations, difficulty proving intent, gender inequality, and a lack of a modern legal framework. Comprehensive legal reform, increasing legal awareness, and harmonization of Islamic-positive law are very necessary to create justice.*

Keywords: *Comparative; Islamic; Law; Property.*

1. Introduction

Marriage is an agreement that binds a man and a woman to become husband and wife. The institution of marriage is prescribed by Islam based on the Holy

Qur'an, Hadith of the Prophet S.A.W. and Ijma'/consensus of Islamic scholars.¹ Marriage is a very important institution in society, in the Islamic religion marriage is the sunnah of the Prophet Muhammad, peace be upon him, where every member of his community is required to follow it.² According to Dadang Hawari, marriage is a bond between a man and a woman as husband and wife based on law (law), religious law or applicable customs.³

One aspect that often causes complexity and legal disputes is inheritance, namely gifts from the woman's family to her future husband. The status and law of returning the inherited assets becomes very crucial when the marriage ends in annulment, either before or after the marriage ceremony. The lack of clarity in regulations in Indonesia regarding inherited assets in the context of marriage annulment, combined with significant differences of opinion between the four main schools of jurisprudence, namely Hanafi, Maliki, Syafi'i and Hanbali, creates legal uncertainty and the potential for significant conflict.⁴

Comparative studies of these schools of thought are very urgent to understand these differences of opinion and formulate solutions that are fair and in accordance with Islamic law that accommodate dynamic social and cultural contexts. Differences of opinion between schools of thought are not just differences in interpretation of the text of the text, but are also rooted in differences in understanding of the social-historical context and the priority values adhered to by each school of thought in determining the law. The Hanafi school, for example, may emphasize aspects of justice and balance in agreements, while the Syafi'i school may prioritize aspects of contract clarity and protection of women's rights. These differences result in various views regarding the legal conditions for giving inherited assets, the legal implications if the contract is cancelled, and the mechanism for restitution if the marriage is annulled.

The year 2024 marks the development of various current issues which further strengthen the urgency of this comparative study. The increasing number of marriage annulments, either due to divorce before or after the contract, or the cancellation of marriages before the marriage ceremony, has resulted in a spike

¹ Maimun, "Jurnal Al-Mizan: Jurnal Hukum Islam Dan Ekonomi Syariah", Institut Agama Islam (IAI) Al - Aziziyah Samalanga Bireuen Aceh, ISSN: 2354 – 6468, Published: 30 – 06 – 2022.

² Muhammad Saleh Ridwan, "Perkawinan dalam Perspektif Hukum Islam Dan Hukum Nasional," (Makassar: UIN Alauddin University Pres, 2014), h. 3.

³ Dadang Hawari, "Merriage Couseling Marriage Couseling, Konsultasi Perkawinan", (Jakarta: Universitas Indonesia Fakultas Kedokteran 2006), h. 58

⁴ Imelda Ni'matul, "Muhammad Aqil Alfatoni, Nadia Oktavia Nur Niba, "TARUNALAW: Journal of Law and Syariah Published by Sekolah Tinggi Agama Islam Taruna Surabaya Vol. 02 No. 02, July 2024, Pp. 138-150.

in cases of property disputes.⁵ The factors contributing to this increase are very diverse, ranging from increasing legal awareness, changes in the mindset of modern society, to the complexity of household problems in the era of globalization. The development of information and communication technology makes access to legal information easier, but also creates its own challenges. The rapid and widespread dissemination of information via social media and the internet is often accompanied by inaccurate, even misleading, information, which can muddy the situation and trigger misunderstandings in understanding the law.

This situation is exacerbated by the existence of diverse legal interpretations, even among Islamic legal experts themselves, so that an in-depth and comprehensive study is needed to create harmonization and legal certainty. The development of positive law in Indonesia regarding family and marriage law also needs to be studied critically. Is there harmonization or contradiction between positive law and the principles of Islamic law regarding inherited assets? Has positive law accommodated differing schools of opinion or has it created legal ambiguity and vagueness? Studying this matter is very important to ensure that there is good synergy between positive law and religious law in order to create a just and effective legal system.

Globalization and modernization have brought significant changes to the social and cultural values of Indonesian society⁶. This change has an impact on the dynamics of married life and the interpretation of Islamic law regarding inherited assets. How can Islamic law adapt to these social changes without compromising the essential principles of sharia? How can a balance be achieved between tradition and modernity in regulating the law on inherited property? Religious institutions, such as Islamic boarding schools, Islamic community organizations, and even religious courts, have a very important role in providing guidance, dispute resolution, and legal interpretation regarding this issue.

However, consistency and in-depth understanding of the differences in schools among these stakeholders still needs to be improved. This study will analyze the capacity and role of these institutions in providing fair and consistent solutions. In conclusion, a comparative study of schools of thought from an Islamic legal perspective regarding the return of inherited assets due to annulled marriages is very urgent in 2024.

This study will not only provide a comprehensive understanding of different schools of thought, but will also produce practical and applicable

⁵ Asnawi, "Pembatalan Nikah dan Akibat Hukumnya (Analisis Perspektif Hukum Islam dan Peraturan Perundang-Undangan)", JURNAL AL-FIKRAH ISSN: 2085-8523 (P); 2746-2714 (E), Published: 30-12-2020

⁶ Andika, "Dampak Globalisasi terhadap Eksistensi Budaya", Ad-Dariyah: Jurnal Dialektika, Sosial dan Budaya 2(1), 2021.

recommendations to create legal certainty, justice and harmonization between Islamic law and positive law. This study will help formulate a solution that accommodates the current context, avoids legal conflicts, and protects the rights of the parties involved in disputes over inherited property. It is hoped that this research can provide a valuable contribution to the development of contemporary fiqh and the strengthening of a more just and effective Indonesian legal system.

Based on the description above, it can be concluded that the following problems are the opinions of each of the Shafi'i and Maliki schools of thought regarding the law of returning *saserahan* assets if the marriage is annulled before and after the marriage agreement and how does the implementation of the law on returning inherited property from the Syafi'i and Maliki Schools compare in practice in society, and what are the challenges.

2. Research Methods

This research uses a normative method with a literature study approach to analyze Islamic law regarding the return of inherited assets if the marriage is annulled. Data were obtained from Islamic jurisprudence books, Islamic legal literature, ulama fatwas, Law No. 1 of 1974, and other legal documents. Data analysis uses content and comparative analysis to compare the opinions of schools of thought, identify similarities and differences, and analyze consistency and harmony between schools of thought. The theoretical framework of *ushul fiqh* and *qawaid fihiyyah* is used to understand the legal basis used. This method produces conclusions based on in-depth and comprehensive legal analysis, contributing to the understanding of Islamic law regarding inherited assets and fair dispute resolution.

3. Results and Discussion

3.1. Opinions of each of the Shafi'i and Maliki schools regarding the law of returning inherited assets if the marriage is annulled before and after the marriage agreement

The discussion in this section will discuss the withdrawal of items handed over to the sermon. Thus, it is necessary to know in advance the legal source of the determination of the surrendered goods. It has been explained previously regarding the theory of giving, which can be called a gift itself, a gift and a gift. As the word of Allah SWT Q.S. An-Nisa' verse 4:

﴿أَتُوا النِّسَاءَ صَدُقَاتِهِنَّ نِحْلَةً فَإِنْ طِبْنَ لَكُمْ عَنْ شَيْءٍ مِّنْهُ نَفْسًا فَكُلُوهُ هَنِيئًا مَّرِيَّةً﴾

Meaning: Give a dowry to the woman (who you marry) as a willing gift. Then, if they hand over to you some of that (dowry) happily, accept it and enjoy the gift with pleasure.

تَهَادُوا تَحَابُّوا

Meaning: "You should give each other gifts, you will surely love each other."

Based on the legal sources above, scholars agree on the permissibility of giving and even condemn it as a sunnah act, this is because there is an act of helping each other. The results of this conclusion are in accordance with the literature from the Shafi'i School such as Syarh al-Muhazzab and Mughni al-Muhtaj. Apart from that, this is also based on what is explained in the literature of the Maliki School, namely al-Muwattha', Syarh al-Kabir and al-Mabsut li al- Sarkhasyi.⁷

According to the Hadith, the prophet Rasulullah shallahu alaihi wasallah said:

العَائِدُ فِي هَبَّتِهِ كَالْكَلْبِ يَقِيءُ ثُمَّ يَعُودُ فِي قَيْئِهِ

Meaning: The parable of a person who takes back his gift is like a dog that vomits and then swallows the vomit again. (HR Bukhari and Muslim).

Based on the hadith above, scholars have different opinions regarding the recall of gifted items. The Maliki school of thought states that it is not permissible to take back a gift unless it is a gift from a father to his child.⁸ The determination of the law also takes into account the intention of the gift so that several laws emerge between the Syafi'i School and the Maliki School. Gifts to women who are being preached need to be seen in terms of the agreement of the giver, whether the gift is in the form of a dowry or a gift.⁹

From Umar radhiyallahu 'anhu, that Rasulullah sallallaahu 'alaihi wa sallam said, "Action depends on one's intention, and a person only gets according to his intention. Whoever emigrated to Allah and His Messenger, then his emigration was to Allah and His Apostle, and whoever emigrated because of the world or because of the woman he wanted to marry, then his emigration was according to where he emigrated." (HR. Bukhari, Muslim) From the details of the law on taking back donated items above, it can be concluded that there are legal differences in terms of the intention of the giver. The legal differences based on the intention of the giver here are based on intention.

all things are based on his intentions. In more detail, Wahbah Zuhaili explains in his book, namely:

⁷ Wizarat al-Awqaf wa Syu'uni al-Islamiyyat, al-Mausu'ah al-Fiqhiyyah al-Kuwaitiyah, Juz 42, 121.

⁸ Ad-Dasuqi, Hasyiah ad-Dasuqi, ala al-Syarh al-Kabir, Juz 4, 101

⁹ Ummi Sumbulah "Islam Jawa Dan Akulturasi Budaya: Karakteristik Variasi Dan Ketaatan Eksesif, Jurnal El- Harakah 14 No. 1, 1 2012, h 61.

"The meaning of this rule is that all of a person's actions or words have a legal impact arising from his actions based on his intentions, not the external actions of that person's actions or words."

The application of this rule has an impact on the problem of taking back items handed over to sermons, when the giver intends to give it as a gift then it is not permissible to ask for it back. This provision is based on gift law which falls within the scope of gifts. The Shafi'i school of thought is of the opinion that it is not halal for the giver to take or ask for back an item that has been given unless it is given by a parent to his child.¹⁰

Based on the hadith, it is not halal for someone to give a gift or bequest, then take it back, except for the father to his child, and the parable of the person who gives and then takes it back is like a dog that eats, when it is full it vomits and then eats the vomit.¹¹

Wahbah Zuhaili has explained that the dowry is given before the marriage contract, namely during the sermon, as explained in the sub-chapter of the Shafi'i School that the giver may take back the dowry that was given first.

Wahbah Zuhaili in the same book "al-Fiqh al-Islami wa Adillatuhu" adds regarding giving dowry, namely Article 8 of the Ottoman Law Concerning Family Rights which states "if one of the two parties cancels the sermon or dies when they want to get married, So if the dowry is still there, you can take it back, if it is damaged, you can ask for a replacement." However, the Syrian Law in Article 4 details this problem from the perspective of the applicant or the party being proposed to based on usual customs. The first problem is cancellation from the applicant's side, if the applicant gives an item (جهاز) (then the party being proposed to is given the option to return the mitsl dowry or the item itself. The second problem is cancellation from the party being proposed to, then he is obliged to return the dowry or the value of the item the.

The data presented by Wahbah Zuhaili above states that the dowry given before the marriage contract takes place, if the marriage contract does not take place, the giver may take it back. It's just that the Syrian Law details this problem by looking at who is canceling it.

Based on the legal sources above, laws contained in the books of Shafi'iyyah scholars were produced, such as those explained by Abu Bakar Syatho in his essay "I'anah at-Thalibin", that the giver of the donated goods may take the goods back during the procession. The sermon did not reach the next level, namely marriage. Note that the gift is intended for wedding purposes

¹⁰ Ismail, "Khitbah Menurut Perspektif Hukum Islam, Jurnal Al-Hurriyah", Vol. 10, No. 2, 2009, h. 64.

¹¹ Abu Dawud, Sunan Abu Dawud, Juz. 2, (Beirut: Dar al-Kutub al-Ilmiyyah, 1996), 385.

The data presented by Wahbah Zuhaili above states that the dowry given before the marriage contract takes place, if the marriage contract does not take place, the giver may take it back. It's just that the Syrian Law details this problem by looking at who is canceling it. Based on the legal sources above, laws contained in the books of Shafi'iyyah scholars were produced, such as those explained by Abu Bakar Syatho in his essay "I'anah at-Thalibin", that the giver of the donated goods may take the goods back during the procession. The sermon did not reach the next level, namely marriage. Note that the gift is intended for wedding purposes.

If a person gives something to the person he is preaching to and then he does not marry her, then the gift may be withdrawn until he insists, even if the annulment is due to him or because of his death. As told in Hasyiah Jamal: someone proposes to a woman and he gives her an item with the intention of marrying her and does not continue with the marriage, so is it permissible to take back the item he gave her for the purpose of marriage or something else? That he may take back the items offered from the person who was given them, whether in the form of food, drink, clothing or jewelry. This is also an annulment from himself, from the woman or the deceased, because if the gift is intended for marriage then he can take it back if the item is still intact or with a replacement if the item is damaged.

Muhammad Syatho explained an issue regarding whether it is permissible to ask for a gift back that was intended to marry the woman he preached when it did not progress to marriage? So the applicant's gifts in the form of food, drink, clothes and jewelry may be asked for back if the marriage does not take place. You may even ask for it by force or if the item is still there and have to replace it if it is damaged.

Shaykh Sulaiman al-Jamal also explains this in his book "Hasyiah al-Jamal": asked about someone proposing to a woman and he gives her something with the intention of marrying her and does not continue with the marriage, then is it permissible to take back the thing he gave for the purpose of marriage or something else? That he may take back the items offered from the person who was given them, whether in the form of food, drink, clothes or jewelry. This is also an annulment from himself, from the woman or the deceased, because if the gift is intended for marriage then he can take it back if the item is still intact or with a replacement if the item is damaged. It seems clear that this opinion does not need to be disputed because there is no intention as a gift or wedding purpose. Due to the description of the problem, if it is intended as a gift, there is no difference of opinion regarding the inability to withdraw it.

Sheikh Jamal's explanation is in line with what Abu Bakar Syatho said. However, Shaikh Jamal explained in more detail that this happened because the giver did not intend to give the gift as a gift but rather as a goal to carry out the marriage,

so if the giver intended to give the gift as a gift then he was not allowed to take the gift back.

Ibn Hajar al-Haitami was once asked about the ownership status of the items handed over to the sermon, he answered in his book entitled "al-Fatawa al-Fiqhiyyah al-Kubro":

asked about the person who proposed to a woman, then accepted her and gave her a property called *jihaz*, whether the woman he proposed to would own or not, explain to us? Then it was answered that what is used as *ibroh* is the intention of the applicant who gives it. If he intends it as a gift then the gift becomes the right of the person who is given it. If the gift is intended as part of the dowry then the law is the same as dowry even though it is not of the dowry type. If it is not intended as a gift or part of the dowry, whether there is an intention or not to take back the inherited item, if there is no marriage, the person who was given it cannot have it and has the right to take it back.

In the example (literature) above, Ibnu Hajar al-Haitami asked a question about someone who gave a sermon to a woman and then he gave her gifts such as bridal equipment, would these gifts belong to the woman being preached to? Ibn Hajar al-Haitami answered this with several classifications taking into account the intentions of the giver, namely:

- 1) If the gift is intended as a gift, the gift becomes the right of the person who is given it
- 2) If the gift is intended as part of the dowry then the law is the same as dowry.
- 3) If it is not intended as a gift or part of a dowry, whether there is any intention or no intention to take back the gift of the item if there is no marriage, then the person given cannot own it and has the right to take it back.

The provision of gift items is that if the giver intends to give a woman as part of the dowry, then if the sermon fails and no marriage takes place, the giver may take back the items given which he considers to be a dowry. The reason for this permissibility is because the dowry is the wife's right if a marriage contract has taken place, whereas in this case the marriage contract cannot be carried out. As Wahbah Zuhaili explains in his book:

"If the applicant gives a dowry first, he may ask for it back, whether the item is still there or damaged, at the price of the item or the item is the same as the item that was given because the sermon was invalidated. This ability applies to both the applicant and the applicant."

There is a problem if there is a difference of opinion between the applicant or the person being proposed to regarding whether the gift is considered a gift, a gift for the continuation of the marriage, a dowry or none of the three. So it is necessary to know the intention of the giver or the words of the giver when giving this gift item. Shafi'iyah scholars have explained this incident, as explained in the book *Bughyah al-Mustasyidin*, namely the problem: a person gives property to the woman he is proposing to with the intention of giving it as a dowry, then the woman he is proposing to denies it, then the one who is justified is the woman he is proposing to if this gift is given. given before the ceremony (marriage), but if the gift is given after the ceremony (marriage) then the applicant is justified. My opinion (musannif) is in line with the *tuhfah* book, Ibn Hajar argued in his *fatawa* and Abu Mahromah said: what is considered correct is the applicant absolutely, taken from the words of the ulama that women can still be justified if the applicant brings witnesses with the intention of the gift.

The provisions on the ability to take back the items handed over can also be reviewed from who cancels or does not agree to the continuation of the marriage contract. Shafi'i scholars have different opinions regarding this matter, as explained by Musannif *Bugyah*:

This means: Problem: the applicant gives property to the woman he is proposing to with the intention of continuing the marriage, so he may take it if the contract (*khitbah*) fails. This opinion is reinforced by Ibn Hajar al-Haitami in the book *Tuhfah alMuhtaaj*, while he has another opinion in his *fatwa*: If the applicant gives a gift to the woman he proposed to and the *khitbah* is invalidated, then it is considered that if the woman cancels it, he may take it back for the purpose If the prize is not achieved, if it is the applicant who cancels it, they are not allowed to take it back because of the suitability of the „illat. Imam Romli gave a *fatwa* that he could ask for it back absolutely, meaning whether it was canceled by the applicant or the person being proposed to. Likewise, when the applicant dies, they may take it back if the item is still there and ask for a replacement if the item is damaged, whether in the form of food, drink or jewelry.

As the opinions of the Shafi'i School of thought have been explained, the next step will be to explain the opinions of the Maliki School of thought. Muhammad bin Abdullah al-Kharasi al-Maliki explained about the permissibility of giving gifts to 'iddah women because this is included in the *khitbah* in *kinayah*, but it is not permissible to give support to 'iddah women. This ability to give gifts also applies when giving sermons to women who are not in their 'iddah period. If the woman has received a gift and then marries someone else, the suitor cannot ask for it back. The editor in the book *Syarh Mukhtasar Khalil li alKharasyi* states:

Meaning: It is permissible to give gifts to 'iddah women, because in gifts there is a feeling of love, it is also not considered as *sharih khitbah*, different from giving a living. If someone gives *infaq* or a gift and then the woman marries someone

else, then she is not allowed to ask for it back. This law also applies to men who give gifts to women other than 'iddah.

This opinion is in line with the explanation of Ali as-Sha'idi al-'Adawi in his book entitled "Hasyiah al-'Adawi ala Kifayah al-Talib alRabbani". 121 However, as-Shawi in his book "Hasyiah as-Shawi ala asSyarh as- Shaghir" adds an opinion regarding the permissibility of applicants asking for the return of gifts they have given to women if they cancel the sermon from the woman.

Meaning: It is permissible to give gifts to women who are in the 'iddah period, such as giving plants, fruit and so on, while it is not permissible to give alms. If the woman marries someone else, then he cannot ask for her back. Likewise, if someone gives a gift or *infaq* to a woman who is not in her 'iddah period, then the woman refuses it, even though the refusal is from the woman's side except for the *'urf* or conditions. It is said: if the woman refuses, the applicant may ask for it again. As-Shawi stated the opinion of the permissibility of taking back a gift with the words "فيل", while Shaykh ad-Dardiri reinforced the opinion of the permissibility of taking back a gift if the woman cancels it is the opinion of the *aujah* (favored).

Meaning: It is permissible to give gifts to 'iddah women, it is not permissible to provide maintenance. If he gives a gift or *infaq* and then the woman marries someone else, he cannot take it back. This law also applies to women other than women who are in the 'iddah period, even if it is canceled by the woman. Meanwhile, the opinion that is *aujah* (favored) states that women are obliged to return the gift if the cancellation comes from the woman's side except according to the *'urf* and conditions.

Ad-Dasuqi al-Maliki commented on the above statement: Meaning: The word *Aujah*, namely this detail, was explained by as-Syamsu al-Laqani, the author of the book *Mi'yar* and Ibn Ghazi emphasized this detail. Namely, if the annulment comes from the woman's side because the gift intended for marriage is not consummated, whereas if the annulment comes from the giver then taking it back is not permitted. This opinion is also supported by as-Syamsu al-Laqani, author of the books *Mi'yar* and Ibn Ghazi. The reason for being allowed to take a gift that has been given to a woman who has been proposed to is if the woman cancels because the purpose of the gift has not been achieved. Meanwhile, if the cancellation comes from the man's side, then he cannot take it back with one opinion.

The following is a comparative table of the law on returning inherited assets (dowry/gifts) if the marriage is annulled before and after the marriage ceremony, according to the Shafi'i and Maliki schools, based on the data you provided. Please keep in mind that this is a summary and some points may require further

explanation based on the specific context of the case. Consultation with a fiqh expert is highly recommended for real cases.

Legal Comparison Table of Return of bridal dowry

ASPECT	MAZHAB SYAFI'I	MAZHAB MALIKI
Before Ijab Kabul	If the intention is as a dowry (mahr): It may be taken back, whether the item remains intact or damaged (replaced with its value or a similar item). The person who cancels the engagement does not always matter, although some opinions state that it may be taken back if the cancellation is from the woman's side. If the intention is as a gift: It cannot be taken back, except in the case of a gift given by parents to their child. If the intention is unclear: The giver's intention is considered. If the giver intended it for marriage and the giving was not as a gift, then it may be taken back.	If the intention is as a dowry (mahr) or engagement gift (<i>saserahan</i>): It cannot be taken back except for gifts given by a father to his child. The stronger opinion (<i>aujah</i>) states that it may be taken back if the cancellation is from the woman's side, as the purpose of the gift was not fulfilled. If the intention is as a gift: It cannot be taken back.
After Ijab Kabul	It is not relevant because the marriage contract (<i>nikah</i>) has already taken place. The dowry (mahr) becomes the wife's right.	It is irrelevant because the marriage contract (<i>akad nikah</i>) has already occurred, and the dowry (mahr) has become the wife's rightful possession.
Key Considerations	The giver's intention (whether as dowry or a gift) and the fulfillment of the marriage purpose are key considerations. Some opinions take into account who initiated the cancellation of the engagement.	The giver's intention (whether as dowry or a gift) and the fulfillment of the marriage purpose are key considerations. The stronger opinion (<i>aujah</i>) considers who initiated the cancellation of the engagement.
Legal Sources	The Hadith, opinions of Shafi'i scholars such as Wahbah Zuhaili, Abu Bakar Syatho, Ibn Hajar al-Haitami, and the author of <i>Bugyah al-Mustarsyidin</i> . Ottoman and Syrian laws (as additional references).	Opinions of Maliki scholars such as Muhammad bin Abdullah al-Kharasi and Ali as-Sha'idi al-'Adawi.

In the explanation of the table, the points are as follows:

1. Main Difference:

The main difference between the Shafi'i and Maliki schools lies in their flexibility regarding the return of engagement gifts if the marriage is annulled before the contract (*ijab kabul*). The Shafi'i school emphasizes the giver's intention (whether as dowry or a gift), while the Maliki school, although also considering intention,

holds a stronger opinion (*aujah*) that allows the return if the cancellation comes from the woman's side.

2. Giver's Intention:

Both the Shafi'i and Maliki schools place significant emphasis on the giver's intention. This intention must be proven through words or actions, not merely internal thoughts. If the intention was as a gift, returning it is generally not allowed (except in specific cases such as gifts from parents to children). If the intention was as dowry, returning it is generally allowed before the marriage contract.

3. Role of the Cancelling Party:

Although the Shafi'i school emphasizes intention, some opinions within it consider who initiates the cancellation of the engagement. In the Maliki school, the stronger opinion (*aujah*) permits the return if the cancellation originates from the woman's side, as the purpose of the gift (marriage) was not fulfilled.

4. Condition of Items:

Both the Shafi'i and Maliki schools consider the condition of the engagement gifts. If the items are damaged, the giver typically has the right to request compensation, either in monetary value or with a similar item.

5. No Consensus:

It is important to note that there is no single consensus in either school. Differences in opinion among scholars highlight the complexity of this issue and the need for careful consideration based on the specific context of each case.

6. Consultation with Fiqh Experts:

Due to the complexity and differing opinions, it is highly recommended to consult with fiqh experts to obtain accurate advice tailored to your specific situation. Do not rely solely on this summary.

7. Positive Law:

Keep in mind that positive law (state regulations) may have different rulings. These should be considered separately and may not always align with Islamic fiqh rulings.

3.2. Comparison of the Implementation of the Law on Returning Engagement Gifts (*Saserahan*) in the Shafi'i and Maliki Schools in Society, and the Challenges

The implementation of the law on returning engagement gifts in the Shafi'i and Maliki schools in contemporary Indonesian society faces various complex challenges rooted in differences in the interpretation of religious texts, gender power disparities, and the lack of a comprehensive modern legal framework. Although the basic principles of Islamic law¹² regarding marriage and inherited property is relatively clear, its application in practice often results in a variety of decisions and legal uncertainty, especially in cases of annulled engagements or marriages that have not yet been consummated. This is due to several key factors which will be explained in detail below.

Differences in Interpretation and Application of Law in the Syafi'i and Maliki Schools: The Syafi'i and Maliki schools, the two dominant schools of jurisprudence in Indonesia, have different approaches in determining the law on returning *saserahan* property. This difference centers on the interpretation of relevant hadith and fiqh rules, especially regarding the intention of the giver and the legal status of assets given before the marriage contract. The Shafi'i school tends to be more flexible, considering the giver's intentions as the main determining factor. If the property is intended as a gift, it cannot be withdrawn; but if it is intended as a dowry or part of a dowry, even though the marriage contract has not been carried out, it can be withdrawn if the engagement is broken. Differences of opinion among Shafi'i scholars emerged regarding who caused the annulment of the engagement.

Some scholars are of the opinion that property can be withdrawn if it is annulled¹³ comes from the woman's side, while others argue that this applies regardless of who breaks off the engagement. The Maliki school of thought, on the other hand, tends to be stricter. This school of thought generally prohibits withdrawing gifted assets, except in cases of gifts from father to son.¹⁴ Although there are exceptions for dowries given before the marriage ceremony, the Maliki School emphasizes the principle that gifts are final and cannot be withdrawn. Differences of opinion also exist among Maliki ulama, especially regarding the return of property if the cancellation comes from the woman.

¹² Nur Saniah, Abdulloh Munir, "Prinsip-Prinsip Dasar Hukum Islam Perspektif Al-Quran" Al-Kauniyah: Jurnal Ilmu Alquran Dan Tafsir, Vol. 3, No. 2 Desember 2022.

¹³ Muspita Sari, "Perbandingan Penarikan Hibah dengan Pembatalan Akta Notaris (Kajian Pasal 212 Kompilasi Hukum Islam dan Kitab Undang-Undang Hukum Perdata)", JURNAL AR-RISALAH E-ISSN 2986-3635 Program Studi Hukum Keluarga Islam Pascasarjana IAIN Bone, Vol 2 Nomor 2 Tahun 2022.

¹⁴ Alfia Raudhatul Jannah Zaitun Abdullah Ricca Anggraeni, "Pandangan Hukum Islam Tentang Hibah, Wasiat Dan Hibah Wasiatkajian Putusan Nomor 0214/Pdt.G/2017/Pa.Pbr", Jurnal Legal Reasoning, P-Issn 2654-8747, Vol. 1, No. 2, Juni 2019.

However, in general, the Maliki School of thought is more likely to not allow the withdrawal of *saserahan* assets compared to the Syafi'i School of thought.¹⁵ These differences in interpretation are reflected in legal practice in Indonesia. Religious courts, which have the authority to resolve marriage disputes, often face a dilemma in applying the law according to the facts of the case.¹⁶ The lack of clarity in the law and the diversity of interpretations result in inconsistent decisions, giving rise to uncertainty for the parties involved. This is further exacerbated by the lack of clear and integrated guidelines in applying these two schools of thought in the context of marriage law in Indonesia.

Challenges in Implementing Laws Relating to Evidence and Testimony: One of the biggest challenges in implementing the law on the return of inherited assets is proving the intention of the giver. Intention, as an important element in Islamic law, is often difficult to prove empirically. Proof of intent is generally based on testimony, witness statements, and other relevant evidence. However, limited evidence and difficulties in obtaining accurate and reliable testimony often hamper the law enforcement process. In many cases, there is only indirect evidence or subjective information, making it difficult to determine the true intentions of the person giving the inherited assets. This is exacerbated by the social reality that often does not document handover property transactions in writing.

Many engagements and gifts of inheritance are carried out informally, without strong written evidence. As a result, the legal process becomes more difficult and relies on the judge's interpretation of witness statements and limited evidence. The power imbalance between men and women also plays a role in this. Women are often in a weaker position in proving the giver's intent, as their access to evidence and information may be more limited. They often rely on the testimony of the man, who may be biased against himself. Furthermore, this challenge is exacerbated by differences in culture and traditions in various regions of Indonesia.

The practice of giving away property varies between regions, and this can cause difficulties in implementing uniform and fair laws. Customary law and local traditions sometimes conflict with interpretations of Islamic law, adding complexity to resolving disputes.¹⁷ All of these factors create legal uncertainty and injustice for the parties involved in disputes over inherited property. Gender

¹⁵ febrianti. B, wahid haddade, "musyfica ilyas Tinjauan terhadap hibah yang di tarik kembali perspektif hukum islam dan kuhperdata (studi kasus kecamatan somba opu kabupaten gowa)".

¹⁶ Sumirahayu Sulaiman, Kalijunjung Hasibuan, Amir Machmud, Dolfries Jakop Neunony, "Heri Budianto," Eksistensi Pengadilan Agama dalam Menyelesaikan Sengketa Pasangan Suami dan Istri", *Vol. 7 No. 8: Agustus 2024*.

¹⁷ Rahmat Nurdin, "Pertentangan Antara Hukum Adat Dengan Hukum Islam Dalam Perkawinan (Studi Kasus Larangan Perkawinan Sesuku di Minangkabau)", *Hukum Keluarga, Pascasarjana Universitas Islam Negeri Sunan Gunung Djati Bandung Jalan Soekarno Hatta, Bandung*.

Power Disparities and Legal Justice. The aspect of gender inequality is a serious challenge in implementing the law on the return of inherited assets. Women are often in a less empowered position in the legal process, both because their access to information, evidence and legal resources is limited, and because social and cultural norms tend to favor men.

In many cases, women are forced to accept rulings that are detrimental to them due to a lack of legal knowledge, support, and access to attorneys. This power imbalance is exacerbated by the fact that the possessions often consist of items of significant value to women, such as jewelry, household items, or cash. Losing these assets can have a major impact on a woman's economic and social life, especially if the engagement is broken for reasons beyond her control. In practice, legal processes are often unable to protect women's rights fairly, because existing laws do not fully accommodate the reality of gender inequality.

In addition, social and cultural norms still often place women in a subordinate position in engagement and marriage relationships. Social and family pressure can make women reluctant to claim their rights to inherited property, even though they have the legal right. This causes many cases of law violations to go unreported and not legally processed. Therefore, efforts need to be made to increase legal awareness among women and provide adequate support for them to demand their rights. Lack of a Comprehensive Modern Legal Framework: Marriage law in Indonesia is still largely based on classical Islamic law, which is often unable to accommodate the complexity of contemporary issues. The lack of a comprehensive and systematic modern legal framework in regulating inherited assets has resulted in legal ambiguity and inconsistencies in its application. Existing laws are not yet fully able to overcome modern challenges, such as the emergence of various forms of more complex prenuptial transactions and agreements.

Existing regulations are often general in nature and lack specificity in dealing with various scenarios that may occur in cases of annulled engagements and marriages. This causes judges to have to rely on their own interpretation of classical law, so court decisions can vary across regions and courts. A lack of standardized procedures and clear guidelines also exacerbates this problem. Furthermore, the lack of harmonization between Islamic law and Indonesian positive law is also a challenge in implementing the law on returning *saserahan* property.

Sometimes there is a conflict between the norms of religious law and state law, especially in terms of evidence, legal procedures and sanctions for violations. This causes uncertainty and difficulty in resolving disputes. Therefore, it is necessary to revise and refine marriage laws that are more comprehensive and modern, which can accommodate contemporary social and cultural realities and provide legal certainty for the parties involved. Solutions and Recommendations:

To overcome challenges in implementing the law on the return of inherited assets, several strategic steps are needed. First, efforts need to be made to increase legal understanding and awareness among the public, especially regarding women's rights and relevant legal processes. This can be done through legal education, outreach and wide dissemination of information. Second, there is a need to improve the existing legal framework, taking into account modern aspects and the complexity of contemporary problems.

Marriage law needs to be revised and simplified to make it easier to understand and apply in practice. Third, there is a need for training and capacity building for law enforcement officers, especially judges and religious court officers, in implementing the law on the return of handed over property fairly and consistently. This training should cover legal aspects, procedures and gender perspectives. Fourth, there needs to be a more effective mechanism to prove the intention of the giver and protect women's rights in the legal process. This can be done through strengthening written evidence, using information technology, and legal assistance for underprivileged women. Fifth, efforts are needed to reduce gender power disparities in the legal process. This can be done through empowering women, increasing their access to legal information and resources, and protecting them from social and family pressures. Sixth, there needs to be coordination and harmonization between Islamic law and Indonesian positive law in regulating *saserahan* assets. This can be done through dialogue and discussion between stakeholders, including ulama, government and legal practitioners.

Finally, there is a need for further research regarding the legal practice of returning *saserahan* property in Indonesia, to identify existing problems and formulate more effective solutions. This research must involve a gender perspective and consider the diversity of cultures and traditions in various regions of Indonesia. With these comprehensive efforts, it is hoped that the implementation of the law on the return of inherited assets can be fairer, more consistent and in accordance with the principles of justice and equality.

4. Conclusion

The opinion of the ulama regarding the withdrawal of gifts (*saserahan*) before the wedding differs between the Syafi'i and Maliki schools. The Shafi'i school of thought emphasizes the intention of the giver; if it is a gift, it cannot be withdrawn, but if it is a dowry or for the purpose of marriage, it can be withdrawn if the marriage is annulled, even though there are differences of opinion regarding the role of the annuler. The Maliki school of thought is stricter, generally prohibiting withdrawal except in cases of gifts from the father to the child, with the potential exception of dowry before the marriage ceremony. These differences demonstrate the complexity of Islamic law and the importance of considering context and intent in its application. Both the Shafi'i and Maliki

schools have internal differences of opinion, showing how complex this issue is and the importance of deeper study to reach more comprehensive and fair conclusions. And the implementation of the law on returning inherited assets in Indonesia faces big challenges. Differences in interpretations of the Shafi'i and Maliki schools, difficulties in proving the intention of the giver, gender inequality, and the lack of a comprehensive modern legal framework lead to legal uncertainty and injustice. Comprehensive legal reform, increased legal awareness, training for law enforcement officers, more effective mechanisms to protect women's rights, and harmonization between Islamic law and positive law are needed to create a fairer and more consistent system in handling disputes over inherited property.

5. References

Books:

- Amirudin & Zainal Asikin, *Pengantar Metode Penelitian Hukum*, cet. IX, RajaGrafindo Persada, Jakarta.
- Peter Mahmud, "Marzuki," *Pengantar Ilmu Hukum*. Jakarta : Kencana Prenada, S.R Sianturi, 1998, *Asas-Asas Hukum Pidana & Penerapannya di Indonesia Cetakan ke-2*, Alumni Ahaem Pthaem, Jakarta,
- Satjipto Rahardjo, 1987, "Masalah Penegakan Hukum". Bandung: Sinar Baru,

Journals:

- Abdul Bari Awang & Imam Mahdie, 2018. "Peminangan atau Melamar, & Akibatnya Menurut Hukum Islam Serta Undang-Undang Islam di Indonesia," *Fikiran Masyarakat*, Vol. 6, No. 2,
- Ahmad Zuhri, Syukri, Tuti Handayani, 2018. Konsep *Khitbah* (Peminangan) Dalam Perspektif Hadis Rasulullah Saw, *Jurnal Ilmu Kewahyuan*, Vol. 4, No. 2,
- Alfia Raudhatul Jannah Zaitun Abdullah Ricca Anggraeni, 2019. "Pandangan Hukum Islam Tentang Hibah, Wasiat & Hibah Wasiatkajian Putusan Nomor 0214/PDT.G/2017/PA.PBR", *Jurnal Legal Reasoning*, P-ISSN 2654-8747, Vol. 1, No. 2, June
- Andika, 2021. "Dampak Globalisasi terhadap Eksistensi Budaya", Ad-Dariyah: *Jurnal Dialektika, Sosial & Budaya* 2(1),
- Anwar M. Roem , Yulianus P. Aituru , Zonita Zirhani Rumalean, Muslim," 2024. "Pembatalan Nikah & Akibat Hukumnya (Analisis Perspektif Hukum Islam & Peraturan Perundang-Undangan)", *Jurnal Al-Fikrah* ISSN: 2085-8523 (P); 2746-2714 (E),
- Fahmi Irvani, 2020. Tradisi Mahar dalam Budaya Sunda, Ditinjau dari Perspektif Hukum Islam, *Journal of Islamic Law*, Vol 4 No. 1.
- Hikmah Hariyati, 2023. *Saserahan* Menurut Aktivis Muhammadiyah: Akulturasi Budaya Dalam Pernikahan Adat Jawa. *Jurnal AL-MAQASID*, Vol. 9, No. 1,

- Imelda Ni'matul, 2024, "Muhammad Aqil Alfatoni, Nadia Oktavia Nur Niba, "TARUNALAW: Journal of Law and Syariah Published by Sekolah Tinggi Agama Islam Taruna Surabaya Vol. 02 No. 02, July p. 138-150.
- Imelda Ni'matul, Muhammad Aqil Alfatoni, Nadia Oktavia Nur Niba, 2024. "TARUNALAW: Journal of Law and Syariah Published by Sekolah Tinggi Agama Islam Taruna Surabaya Vol. 02 No. 02,
- Ismail, 2009. *Khitbah* Menurut Perspektif Hukum Islam, *Jurnal Al-Hurriyah*, Vol. 10, No. 2,
- Maimun, 2022. "Jurnal Al-Mizan: Jurnal Hukum Islam & Ekonomi Syariah", Institut Agama Islam (IAI) Al - Aziziyah Samalanga Bireuen Aceh, ISSN: 2354 – 64-68,
- Mawardi, Shokhibul Mighfar, Rahwan, 2022. *Lamaran (Khitbah)* Dalam Pernikahan Perspektif Pendidikan Islam, Vol. 3, No. 1,
- Meyrara Widya Putri, Fitriani Ulfah, 2024. *Peminangan/Khitbah & Problematika Yang Sering Terjadi*, Vol. 3, No. 1,
- Muspita Sari, 2022. "Perbandingan Penarikan Hibah dengan Pembatalan Akta Notaris (Kajian Pasal 212 Kompilasi Hukum Islam & Kitab Undang-Undang Hukum Perdata)", *JURNAL AR-RISALAH* E-ISSN 2986-3635 Program Studi Hukum Keluarga Islam Pascasarjana IAIN Bone, Vol 2 No.2
- Nur Saniah, Abdulloh Munir, 2022. "Prinsip-Prinsip Dasar Hukum Islam Perspektif Al-Quran" *Al-Kauniyah: Jurnal Ilmu Alquran & Tafsir*, Vol. 3, No. 2 December
- Rijal Pahlev, 2023, "Faktor Pendukung & Tantangan Menuju Kesetaraan Gender", *Jurnal Iman & Spiritualitas* eISSN: 2775-4596, Vol 3, No 2, p. 259-268.
- Saifuddin Sa'dan, Arif Afandi Arif Afandi, 2017. "Pengembalian Mahar Berganda Karena Pembatalan *Khitbah* dalam Pandangan Islam: Analisis terhadap Persepsi & Praktek Masyarakat Kuta Baro Aceh Besar," *Samarah: Jurnal Hukum Keluarga & Hukum Islam*, Vol 1 No. 1,
- Sumirahayu Sulaiman, Kalijunjung Hasibuan, Amir Machmud, Dolfries Jakop Neununy, Heri Budiando, 2024, "Eksistensi Pengadilan Agama dalam Menyelesaikan Sengketa Pasangan Suami & Istri", Vol. 7 No. 8: August
- Ummi Sumbulah. 2012. "Islam Jawa & Akulturasi Budaya: Karakteristik Variasi & Ketaatan Ekspresif, *Jurnal El- Harakah* 14 Vol 1, No 1.