

CONFISCATION OF ASSETS AS ‘ŪQŪBAH MĀLĪYAH IN THE SHĀFI‘I MADHHAB

Abd. Basith Junaidy

UIN Sunan Ampel Surabaya, Indonesia

E-mail: basithjunaidy71@gmail.com

M. Ainun Najib

UIN Sunan Ampel Surabaya, Indonesia

E-mail: mhainunnajib@gmail.com

Gatralina Sekar Harum Ael Yanda

Al-Azhar University, Cairo, Egypt

E-mail: gatraalina@gmail.com

Abstract: Asset confiscation is currently a hot topic of discussion in the international space. Many countries are trying to make new rules regarding asset confiscation, such as Indonesia and the Netherlands. This initiative cannot be separated from the UNCAC international convention, which requires all state parties to make their positive law. Islamic law also recognizes the confiscation of assets, especially in the Shāfi‘i school of thought, which is known to be strict in its determination. Therefore, the main question in this research is how Islamic law, especially the Shāfi‘i school of thought, views this phenomenon as a law in Islam. This research is normative legal research that focuses on analyzing and interpreting Islamic legal norms to explain the phenomenon of asset confiscation. The results of this study indicate that asset confiscation has begun to be used as the primary punishment in criminal and civil forfeiture models. The Shāfi‘i school stipulates asset confiscation as *‘uqūbah māliyah*, which can be applied both in violation of God’s rights and human’s rights.

Keywords: Asset Forfeiture; Fiqh; Shāfi‘i Madhhab.

Introduction

The development of modern times makes crime more complex. Every crime, of course, will get a social reaction, informally

coming directly from the community or formally through the mechanism of the criminal justice system. In social psychology, social reactions are expressions of anger at what the perpetrator has done or a desire to repay the perpetrator who has done something hurtful to the victim.¹ The government provides a legal retaliation mechanism through criminal policies to stop the chain of retaliation. The criminal procedure that was motivated to satisfy the anger of the victim and society then took the form of corporal punishment. Physical punishment as a representation of absolute theory has many advantages, namely its definite nature, definite in the sense that the impact of this crime can be directly felt by both the perpetrator, the victim and the community. That is what makes the absolute theory still widely used today.²

However, along with the development of the era, many criminal acts were committed based on profit, so physical punishment alone was not enough to stop them. Because of this, there has been a political renewal of discipline, which initially focused only on retaliation. Now, it is directed at protecting society, balance and harmony in the community by giving full attention to the interests of society, the state, victims and even perpetrators of crimes.³ The above fact was then responded to well by the United Nations (UN), where the crime of corruption, which became an icon of crime based on profit, made a new rule to eradicate it. The law was contained in the United Nations Against Corruption (UNCAC) 2003 and was later ratified by many countries, including Indonesia. In the convention, the United Nations ordered member countries to renew their criminal code. They began to consider

¹ Iqrak Sulhin, "Sekilas Perkembangan Teori Penologi," a paper presented at the 4th *Symposium and Training on Criminal Law and Criminology*, organized by the Indonesian Society for Criminal Law and Criminology and the Research Institute, Universitas Nusa Cendana, Kupang, East Nusa Tenggara, on 26 April 2017, 1-14.

² Shlomo Shoham, Ori Beck and Martin Kett, *International Handbook of Personology and Criminal* (Boca Raton: CRC Press, 2008).

³ Sahat Maruli T. Situmeang, *Diktat Mata Kuliah Penologi* (Bandung: Fakultas Hukum Universitas Komputer Indonesia, 2019), 21.

deprivation without punishment as positive law, as stated in Article 54 paragraph (1) letter (c) UNCAC.⁴

Therefore, many countries are trying to create new favourable laws that regulate asset confiscation, including Indonesia and the Netherlands. Indonesia made rules regarding asset confiscation in the Asset Confiscation Bill. The bill has been included in two Prolegnas periods, 2015-2019 and 2020-2024,⁵ but it still needs to be ratified. Meanwhile, the Netherlands created a bill on asset confiscation in the Criminal Justice Approach to Subversive Crime II. According to the Minister of Justice and Security, Grapperhaus, this legal instrument can support confiscating assets, which is difficult due to the lengthy criminal justice process.⁶ Apart from convention orders, many countries have made new rules regarding asset confiscation due to the awareness that corporal punishment is not enough to reduce crime rates, especially profit-oriented ones. This is because a profit-based crime has been conceptualized maturely, where the perpetrators know they will not be released from punishment. So they make calculations using “crime mathematics,” where as long as the cost of the crime is greater than the sentence imposed, the offence will continue to be committed.⁷

At this point, one can see the importance of making asset confiscation a priority for punishment, where in the crime formula, assets are the blood that lives them. So, to be able to suppress and eliminate crime, assets must be destroyed. So this is the position of this research to explain how the position of confiscation of assets in Indonesia, both within the Criminal Code and outside the Criminal Code, and as a comparison, the Netherlands will also be taken as a sample. Confiscation of assets is not a new concept.

⁴ Theodore S. Greenberg et al., *Stolen Asset Recovery; A Good Practices Guid for Non-Conviction Based Asset Forfeiture* (Washington, DC: The International Bank for Reconstruction and Development, 2009), 380.

⁵ Irwan Hafid, “Perampasan Aset tanpa Pemidanaan dalam Perspektif Economic Analysis of Law,” *Jurnal Lex Renaissance*, Vol. 6, No. 1 (2021), 465-480.

⁶ Goverment of the Netherlands, “New Legal Instruments for the Confiscation of Criminal Assets,” *Goverment.NL* (last modified 2021), <https://www.government.nl/latest/news/2021/11/17/new-legal-instruments-for-the-confiscation-of-criminal-assets>; accessed 14 July 2023.

⁷ Riza Alifianto Kurniawan, “Perampasan Aset Hasil Tindak Pidana Narkotika sebagai Alternatif Pemidanaan dalam Tindak Pidana Narkotika,” *Jurnal Judiciary*, Vol. 5, No. 1 (2013), 45-59.

Islamic law has long recognized asset confiscation, categorized as '*uqubah malyah*. Apart from being the main punishment in the type of punishment (*ta'zir*), '*uqubah malyah* is also a substitute punishment in the type of punishment *qisas* if the victim or his family forgives.⁸ At the same time, this breaks the orientalist perception that Islam is inhumane in applying punishment,⁹ even though Islam has provided alternatives in *qisas* punishment. Still, the decision is entirely up to the victim to determine as a consequence of Adam's rights.

Furthermore, '*uqubah malyah* is also designated as a crime of '*uqubah taba'iyah* in the *hudud* crime category of theft. '*Uqubah taba'iyah* is an additional punishment that follows a sentence without requiring a decision from the Court, in the sense that '*uqubah taba'iyah* is automatically imposed on the offender when the main sentence is imposed. The al-Shaf'i madzhab stipulates '*uqubah malyah* as '*uqubah taba'iyah* as '*uqubah takmiliyah* where the determination requires a decision from the Court.¹⁰ The Shāfi'i school was then used as a parameter to study the phenomenon of asset confiscation, and the Shāfi'i school was chosen because it has stricter provisions than other schools. This is because asset confiscation is at a critical time to be immediately implemented and prioritized, and the Shāfi'i school of thought is the right school of thought to explain it. So this is where the urgency of this research is, where the aim is to encourage the application of assets in Indonesia using comparative studies with the Netherlands and Islamic law. This encouragement is based on the conditions of criminal acts with profit motives that are still very high in Indonesia, especially corruption.

Structurally, this research begins by explaining general matters regarding asset confiscation, then goes into more specific issues, namely the legal conditions for asset confiscation in Indonesia, and finally, a comparison is made with the legal requirements for asset

⁸ Muḥammad b. Idrīs al-Shāfi'i, *Tafsīr al-Imām al-Shāfi'i*, Vol. 1 (Riyadh: Dār al-Tadmāriyah, 2006), 256.

⁹ Habib Shulton Asnawi, "Hak Asasi Manusia Islam dan Barat: Studi Kritik Hukum Pidana Islam dan Hukuman Mati," *Supremasi Hukum*, Vol. 1, No. 1 (2012), 25-48.

¹⁰ Muhammad Nur, *Pengantar dan Asas-Asas Hukum Pidana Islam* (Banda Aceh: Yayasan PeNa Aceh, 2020), 58.

confiscation in the Netherlands. After that, the two phenomena in the form of legal conditions were studied by the fiqh of Shāfi‘ī madhhab. This research is normative legal research, which examines law as a concept of norms or rules that apply in society and becomes a reference for everyone's behaviour.¹¹ This study focuses on analysing and interpreting Islamic legal norms to explain the phenomenon of asset confiscation. This research uses a comparative approach, which explains the comparison of asset confiscation in Indonesia, the Netherlands and Islamic law, and finally, fiqh of Shāfi‘ī as an analytical tool.

Asset Confiscation in Indonesia

Linguistically, “confiscation” means taking by force; seize, with the verb to hold, which means to take by force; catch; robber; sabotage; plunder; confiscate. In the Kamus Besar Bahasa Indonesia (KBBI/the Great Dictionary of the Indonesian Language), confiscation is defined as looting, confiscation, robbery and confiscation cases. Based on the definition above, confiscation can be interpreted as forcibly taking, confiscating or confiscating something.¹²

More clearly, Article 2, letter g of the United Nations Convention Against Corruption (UNCAC) states that “confiscation, which includes confiscation where applicable, means permanent confiscation of property by order of a court or other competent authority.”¹³ An equivalent meaning is taking, which is defined as confiscation, revocation and elimination of the rights of the perpetrator of a criminal act. In principle, both have the same meaning, but in practice, deprivation is the dominant law of criminal law, while retrieval is dominated by criminal and civil law.¹⁴ Meanwhile, assets in the KBBI are defined as the state of

¹¹ Muhammin, *Metode Penelitian Hukum* (Mataram: Mataram University Press, 2020), 29.

¹² Pusat Bahasa Departemen Pendidikan Nasional, *Kamus Besar Bahasa Indonesia* (Jakarta: Pusat Bahasa, 2008), 1162.

¹³ United Nations, *United Nations Conventions Against Corruption* (New York, 2004).

¹⁴ Moh. Khasan and Ja’far Baehaqi, *Perampasan Aset Terpidana Korupsi dalam Kajian Hukum Pidana dan Fiqh Jinayah* (Semarang: CV. Alinea Media Dipantara, 2021), 63.

assets and liabilities, riches, and capital.¹⁵ Wealth in the UNCAC is explained in Article 2 Letter d, which represents everything, whether material or immaterial, tangible or intangible, movable or immovable, and documents or legal instruments proving ownership rights or interests in these assets.¹⁶

Asset confiscation is based on the fundamental principle of justice, where the perpetrator must not profit from the crime he committed. The most apparent criminal law doctrine regarding the above principle can be seen in a case in England, where a wife, Florence Maybrick, killed her husband using poison. Then his lawyer, Richard Cleaver, 1981 filed an appeal but not on the main issue of the murder, but because the insurance policy that had been bequeathed to his client could not be cashed out because the Court of First Instance froze it. After all, the perpetrator of the crime (Florence Maybrick) should not benefit from it. His actions (obtaining an insurance policy from the husband he killed).¹⁷

Law in Indonesia in dealing with crime initially still used the paradigm of pursuing, arresting and detaining the perpetrators (following the suspect). This paradigm focuses on how to ensure that perpetrators are punished for the crimes they have committed. However, the fact that in criminal acts, wealth, proceeds and assets are the "blood that feeds crime" has resulted in a shift in the paradigm of handling criminal acts to focus more on following the money.¹⁸

This paradigm shift has an impact on the orientation of punishment, which was originally from punishing the perpetrator to protecting the community. In punishment, the focus of the law is not only on the perpetrators but also gives attention to victims of crime. In several criminal acts with large losses, as stated by Beker and Posner, quoted by Silva Da Rosa, recovering losses

¹⁵ Pusat Bahasa Departemen Pendidikan Nasional, *Kamus Besar Bahasa Indonesia*, 97.

¹⁶ United Nations, *United Nations Conventions Against Corruption*.

¹⁷ Refki Saputra, "Tantangan Penerapan Perampasan Aset tanpa Tuntutan Pidana (Nonconviction Based Asset Forfeiture) dalam RUU Perampasan Aset di Indonesia," *Integritas*, Vol. 3, No. 1 (2017), 115-130.

¹⁸ Syahrial Syakur, "Perlindungan Hukum Korban Fintech Robot Trading Melalui Perampasan Aset Pelakunya," *Majalah Hukum Manisional*, Vol. 52, No. 2 (2022), 226-243.

from the crime is more profitable than simply imprisoning them.¹⁹ Confiscation of assets is a way that can be taken to be able to recover losses from a crime. Several legal umbrellas underlie punishment in the form of confiscation of assets in Indonesia, both within and outside the Criminal Code.

Confiscation of Assets in the Criminal Code

Confiscation of assets in the Criminal Code can be seen in article 10, which contains the types of crimes in the Criminal Code. Article 10 explains that punishment is divided into two parts. The main punishment includes the death penalty, prison, confinement, fine, and cover. Then, there are additional penalties, including revocation of certain rights, confiscation of certain goods, and announcement of the judge's decision.

In plain view, confiscation of assets in Article 10 above includes additional penalties for confiscating certain items. The word "certain" means that not all the convict's property can be confiscated. This is because the criminal law no longer recognizes the appropriation of all assets, that used to be known as general confiscation.²⁰ Current legal conditions focus more on confiscating convicts' possessions obtained from crimes (*corpora delicti*) and items used to commit crimes (*instrumenta delicti*).²¹ This is in line with Article 39, paragraph (1) of the Criminal Code, which states that objects that can be confiscated are only items belonging to the convict obtained from a crime or intentionally used to commit a crime.²²

Furthermore, paragraph (3) explains that confiscation can only be carried out on goods that have been confiscated. This makes the scope of goods that can be confiscated even narrower because they are only limited to confiscated goods, goods obtained from crimes or used to commit crimes. Those that are not subject to

¹⁹ Silva Da Rosa, "Perlindungan Terhadap Pelaku Tindak Pidana Korupsi Dalam Pelaksanaan Perampasan Aset Secara Tidak Wajar," *Jurnal Bina Mulia Hukum*, Vol. 2, No. 2 (2018), 206-216.

²⁰ Arizon Mega Jaya, "Implementasi Perampasan Harta Kekayaan Pelaku Tindak Pidana Korupsi," *Cepalo*, Vol. 1, No. 1 (2017), 19-28.

²¹ I Ketut Mertha, *Buku Ajar Hukum Pidana* (Denpasar: Fakultas Hukum Universitas Udayana, 2016), 174.

²² Duwi Handoko, *Kitab Undang-Undang Hukum Pidana* (Pekanbaru: Penerbit Hawa dan Ahwa, 2018) 12.

confiscation cannot be confiscated. In Article 39, paragraph (1) of the Criminal Procedure Code, the following items can be confiscated: a) objects or bills of the suspect or defendant which are wholly or partially allegedly obtained from criminal acts or as the result of criminal acts; b) objects that have been used directly to commit a criminal act or to prepare it; c) objects used to obstruct criminal investigations; d) objects specifically made or intended to commit criminal acts; e) other objects that have a direct relationship with the crime committed.

So, with the description above, it can be understood that the additional punishment in the form of deprivation is indeed focused on *corpora delicti* and *instrumenta delicti*. However, suppose the meaning of dispossession is taken back to its original meaning, as defined by Brenda Grantland. In that case, that is “a process in which the government permanently takes property from the owner, without paying fair compensation, as a penalty for an offence committed by the property or owner,” confiscation of assets can not only be understood as an additional crime in Article 10 of the Criminal Code but also includes the main crime.

The definition given by Brenda above provides an understanding that asset confiscation is part of the punishment for property. Article 10 of the Criminal Code contains punishment in the form of property, not only in additional punishment but also in the main punishment in the form of fines. In short, deprivation, in a broad sense, also includes fines. This is in line with what Prof. I Ketut Martha et al. expressed that a fine is a crime of confiscating the convict's property.

The inclusion of fines in the category of confiscation provides a breath of fresh air because the majority of the proceeds of confiscation are prioritized to belong to the state, even though those who are harmed in a crime are not only the state but also individuals who are victims of a crime, in line with what was expressed by Tania Irawan, as quoted by Erdianto Effendi, that ideally the process of recovering assets is the recovery of victims' losses, not just being declared confiscated for the state, but being returned to those who are entitled.

Confiscation of Assets Outside the Criminal Code

Confiscation of assets outside the Criminal Code is the most important part of the legal instrument for confiscation of assets because asset confiscation aims to return assets obtained from a crime that causes huge losses, both for the state and individuals. It is recorded that Money Laundering and Narcotics Crimes rank in the top three as crimes outside the Criminal Code, which cause the greatest losses. Therefore, confiscation of assets outside the Criminal Code can be found in laws with the category of extraordinary crime, such as Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Corruption Crimes, then Law Number 35 of 2009 concerning Narcotics, and Law Number 8 of 2010 concerning Prevention and Eradication of the Crime of Money Laundering.

Confiscation of assets in criminal acts of corruption focuses on property obtained from criminal acts and does not touch the perpetrator's personal property. Except if the assets obtained have been used up, then the perpetrator must pay a replacement money equivalent to that obtained from the criminal act of corruption. The legal basis can be seen in Article 16 paragraph (1) of Law Number 31 of 1999 concerning the Eradication of Corruption Crimes, which is stipulated as an additional punishment: a) confiscation of tangible or intangible movable property or immovable property used for or obtained from criminal acts of corruption, including companies owned by convicts where criminal acts of corruption were committed, as well as goods that replace these goods; b) payment of replacement money in the maximum amount equal to the assets obtained from the criminal act of corruption; c) closure of all or part of the company for a maximum period of 1 (one) year; d) revocation of all or part of certain rights or elimination of all or part of certain benefits, which have been or may be granted by the government to convicts.

Confiscation in corruption crimes uses a reverse proof mechanism, where the defendant must prove whether his assets are part of the crime. If the defendant cannot prove this, the assets are declared the proceeds of a criminal act. The judge has full discretion to determine whether all the assets will be confiscated or only part. As a confiscation using the *personam* mechanism, of course, the basis for this confiscation of assets is the defendant's

fault, so that when the defendant is declared innocent by the Court, confiscation cannot be carried out.

The weakness of confiscation in the Corruption Law is that it takes a long time. To confiscate assets, one must wait for a decision with permanent legal force (*inkracht*) that the defendant is guilty. The impact of the length of this process is the possibility that the accused can hide or launder assets that he has obtained from the proceeds of the crime. Another weakness is that it is an additional, facultative crime. Adami Chazawi, as quoted by Tommy and Sularto, stated that an additional penalty is not an imperative, whose decision is fully left to the judge.²³ This can give the defendant a chance to escape the crime of confiscation of assets.

Confiscation of assets in corruption can also be carried out through civil proceedings when the judge's decision has been confirmed. Still, there are assets belonging to the convict which are reasonably suspected to have originated from criminal acts of corruption by bringing charges against the convict or his heirs. This type of confiscation is not categorized as confiscation of assets in rem because even though it uses civil action, it is based on the perpetrator's punishment. Furthermore, confiscation of assets in narcotics crimes focuses on article 101 paragraph (1) of Law Number 35 of 2009 concerning Narcotics, which states: "Narcotics, narcotics precursors, and tools or goods used in narcotics and narcotics precursor crimes or related to narcotics and narcotics precursors and their proceeds are declared confiscated for the state."

Confiscation of assets in the Narcotics Law is focused on tools or goods used to commit crimes because they are based on the principle that crimes occur because of opportunity. Opportunity does not only mean a supportive situation but also adequate equipment to commit a crime.²⁴ Not only that, but regulation of asset confiscation in narcotics crimes is also needed to minimize or even eliminate the profits derived from crime because if there is no regulation of asset confiscation, and the cost of the crime is

²³ Deepend Tommy Sibuba, Sularto R.B. and Budhi Wisakono, "Kebijakan Hukum Pidana dalam Perampasan Aset Hasil Tindak Pidana Korupsi di Indonesia," *Diponegoro Law Review*, Vol. 5, No. 2 (2016), 1-7.

²⁴ See Article 38 C of Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 on the Eradication of Corruption Crimes.

promising, crime will always occur.²⁵ Therefore, the results of narcotics crimes are also a focus in deprivation²⁶ to prevent crime from occurring due to the sufficient cost of the crime. Furthermore, the Narcotics Law also allows the confiscation of assets at the request of other countries,²⁷ and this is to strengthen relations between countries in dealing with narcotics crimes, which have become transnational crimes.²⁸

The peak of all the criminal acts above is money laundering. A crime is committed because there is profit, and profits obtained in large amounts must be hidden so that they are not detected as the result of a crime. Money laundering has an important role in hiding the proceeds of crime; money laundering is also known as money bleaching. With money laundering, wealth obtained from the proceeds of criminal acts appears as “sacred” property that has nothing to do with crime.²⁹ To avoid this, it is very important to confiscate assets against perpetrators of money laundering crimes, whether from corruption or narcotics.

Confiscation of assets in money laundering crime is an additional crime after the main crime in the form of a fine.³⁰ Money laundering crime is very closely related to previous criminal acts because the assets that are “laundered” must be the proceeds of a crime. However, prosecution and examination in Court do not need to wait for proof of the predicate criminal act. Like other criminal acts with the title extraordinary crime, evidence in money laundering crime also uses reverse evidence.³¹

Aside from being an additional punishment, asset confiscation in ML can also be used as a replacement crime if a corporation cannot pay the fines stipulated. The confiscated assets were taken

²⁵ Kurniawan, “Perampasan Aset.”

²⁶ See Article 101 paragraph (3) and Article 136 of Law Number 35 of 2009 on Narcotics.

²⁷ See Article 102 of Law Number 35 of 2009 on Narcotics.

²⁸ Kurniawan, “Perampasan Aset.”

²⁹ Marulak Pardede, *Dinamika Sistem Hukum Pemidanaan (Narkotika dan Pencucian Uang)* (Jakarta: BALITBANGKUMHAM Press, 2021), 8. <https://doi.org/10.30641/kumham.press.61>.

³⁰ See Article 7 paragraph (2) of Law Number 8 of 2010 on the Prevention and Eradication of Money Laundering Crimes.

³¹ Regina Rahma Utami, “Perampasan Aset Pada Perkara Tindak Pidana Pencucian Uang yang Berasal dari Tindak Pidana Narkotika,” *Jurnal Ilmu Sosial dan Pendidikan*, Vol. 4, No. 4 (2020), 79-85.

from the assets belonging to the corporation or the corporation's controller, and the assets taken were adjusted to the fines imposed.³² Confiscation of assets in the Money Laundering Law uses a *in personam* mechanism, so for confiscation to be carried out, there must be an *inkracht* decision from the Court. However, suppose the defendant dies before a court decision is made. In that case, confiscation of fixed assets can be carried out as long as there is strong evidence that the deceased defendant has committed money laundering crime, and this cannot be appealed.³³

Confiscation of Assets in the Criminal Procedure Code

The Criminal Procedure Code, commonly known as the Criminal Procedure Code, is formal criminal law which functions to enforce and maintain the existence of material criminal law. As the executor of the material law that regulates asset confiscation, the Criminal Procedure Code also regulates asset confiscation. Asset confiscation in the Criminal Procedure Code is oriented towards goods or objects that have been confiscated, in the sense that the provisions for asset confiscation in the Criminal Procedure Code are only limited to items that have been subject to confiscation.

Apart from confiscation of assets, to recover losses, the Criminal Procedure Code also recognizes compensation in Article 98, whose demands can be combined with criminal charges.³⁴ The basis of this article is the victim's difficulty in obtaining the fulfilment of his rights through civil channels. However, based on data from Erdianto Effendi, none of the 16 prosecutors in several provinces implemented Article 98.³⁵

As a law enforcer who implements formal and material criminal law, the prosecutor's office also has the authority to carry out seizures as specifically regulated in Article 30 A of Law Number 11 of 2021 concerning Amendments to Law Number 16

³² See Article 9 paragraph (1) of Law Number 8 of 2010 on the Prevention and Eradication of Money Laundering Crimes.

³³ See Article 79 paragraphs (4) and (5) of Law Number 8 of 2010 on the Prevention and Eradication of Money Laundering Crimes.

³⁴ See Article 98 paragraph (1) of the Criminal Procedure Code.

³⁵ Erdianto Effendi, "Penjatuhan Pidana Ganti Rugi sebagai Pidana Pokok dalam Kejahatan terhadap Harta Benda," *Jurnal Usm Law Review*, Vol. 5, No. 2 (2022), 618-632.

of 2014 concerning the Prosecutor's Office of the Republic of Indonesia which states "in asset recovery, the Prosecutor's Office has the authority to carry out activities to trace, confiscate and return assets obtained from criminal acts and other assets to the state, victims or those entitled to them."

"Assets acquired from criminal acts" means assets obtained from criminal acts, assets used to commit criminal acts, and assets related to criminal acts. The intended criminal acts cover all general (conventional) crimes and specific criminal acts such as corruption, narcotics, money laundering, etc.³⁶

All of the descriptions above constitute confiscating assets using criminal mechanisms, commonly known as *in personam* mechanisms. The criminal mechanism focuses demands on the perpetrator of a criminal act as the object, while assets are only secondary. Apart from criminal mechanisms, there are also civil mechanisms, known as *in rem*. This mechanism focuses prosecution on assets, which uses the legal fiction that assets are "individuals" who are also responsible for a crime.³⁷

Indonesia does not yet recognize the term confiscation *in rem*. The description above shows that all asset confiscation mechanisms in Indonesia still focus on prosecuting criminals rather than their assets, both in the Criminal Code, Criminal Procedure Code and outside the Criminal Code. However, several articles in the Corruption Law are believed to be part of confiscation *in rem*. This was stated by Fathin Abdullah, Triono Eddy, and Marlina stated that articles 32, 33 and 34 of Law Number 31 of 1999, as well as article 38 C of Law Number 20 of 2001, were part of extortion *in rem*.³⁸

Article 32 explains that when the defendant does not have sufficient evidence to be convicted in criminal acts of corruption, a

³⁶ Yahman, *Pengantar Hukum Acara Pidana* (Pasuruan: CV Penerbit Qiara Media, 2021), 75.

³⁷ Direktorat Hukum PPATK, *Kajian Hukum; Permasalahan Hukum Sepert Perampasan Aset dalam Undang-Undang Nomor 8 Tahun 2010 tentang Pencegahan dan Pemberantasan Tindak Pidana Pencucian Uang dan Upaya Pengoptimisasinya* (Jakarta: Pusat Pelaporan dan Analisis Transaksi Keuangan [PPATK], 2021), 35.

³⁸ Fathin Abdullah, Triono Eddy and Marlina, "Perampasan Aset Hasil Tindak Pidana Korupsi tanpa Pemidanaan (Non-Conviction Based Asset Forfeiture) Berdasarkan Hukum Indonesia dan United Nations Convention Against Corruption (UNCAC) 2003," *Jurnal Ilmiah Advokasi*, Vol. 9, No. 1 (2021), 19-30.

civil lawsuit can be filed. Meanwhile, article 33 explains that a civil lawsuit can also be filed when a suspect dies. Meanwhile, article 34 explains that civil lawsuits can be filed against dying defendants. Likewise, article 38C states that when a convict has received a binding decision but there are assets that have not been confiscated, a civil lawsuit can be filed. All of the provisions above can apply when it is clear that there has been a loss to the state, with the State Attorney or agency that has suffered the loss to carry out civil prosecution against the heirs.³⁹

The four articles above are by the provisions of Article 54 paragraph (1) letter c UNCAC, which encourages confiscation of assets without conviction in cases where the perpetrator cannot be prosecuted on the grounds of death, escape or absence or in other appropriate cases.⁴⁰

However, the four articles above do not fulfil several provisions regarding confiscation in rem. This provision is a civil arrangement in Indonesia where the burden of proof is still on the prosecutor, in this case, JPN or the aggrieved party, while in rem, the burden of proof is left on the defendant.⁴¹ Another provision is that confiscation in rem uses legal fiction that the guilty person is the asset, not the person, so the confiscation does not intersect with criminal justice.⁴² Meanwhile, the four articles above can be implemented once they have gone through the criminal justice process. So, in the author's opinion, the provisions in articles 32, 33, 34, and 38C are not fully suitable to be said to be an in rem mechanism.

Therefore, in an effort to implement confiscation in rem, Indonesia has ratified UNCAC into Law Number 7 of 2006, where the consequence of this ratification is that Indonesia must adjust the legal regulations regarding asset confiscation to the existing

³⁹ See Law Number 31 of 1999 and its amendment, Law Number 20 of 2001, on Corruption Crimes.

⁴⁰ United Nations, *United Nations Convention Against Corruption 2003*, trans. United Nations Office on Drugs and Crime (Jakarta: UNODC, 2009).

⁴¹ Sudarto, Hari Purwadi and Hartiwiningsih, "Mekanisme Perampasan Aset dengan Menggunakan Non-Conviction Based Asset Forfeiture sebagai Upaya Pengembalian Kerugian Negara Akibat Tindak Pidana Korupsi," *Jurnal Pasca Sarjana Hukum UNS*, Vol. 5, No. 1 (2017), 109-118.

⁴² Kurniawan, "Perampasan Aset."

regulations in UNCAC.⁴³ To adapt to UNCAC, Indonesia created a Bill on Confiscation of Assets Related to Criminal Offenses. In the Academic Text of the Bill, it is explained that what is meant by confiscation of assets is a coercive effort carried out by the state to take over control and/or ownership of Criminal Offense Assets based on a court decision. Has permanent legal force without being based on the punishment of the perpetrators.⁴⁴

Then, in the Asset Confiscation Draft Bill, a clearer distinction was made between *in personam* and *in rem*. *In rem* is an action by the state to take over assets through a court decision in a civil case based on stronger evidence that the assets are suspected to have originated from a criminal act or were used for a criminal act. Meanwhile, *in personam* with the term Criminal Forfeiture is the state's demanding to take over assets through a court decision in a criminal case.⁴⁵

Asset Confiscation in the Netherlands

Dutch material law recognizes two types of criminal offences, including principal punishment and additional punishment. Article 9 of the Dutch Criminal Code states that the principal crimes include imprisonment, imprisonment, social work, and fines. Meanwhile, additional penalties include revocation of certain rights, placement in state educational institutions, confiscation of goods, and announcement of the judge's decision.⁴⁶

The description above shows that confiscation is part of an additional punishment, which in Dutch is known as *verbeurde-verklaring van bepaalde voorwerpen*. Because it is an additional punishment, deprivation is optional or not mandatory.⁴⁷ This is a

⁴³ Sudarto, Purwadi and Hartiwiningssih, "Mekanisme Perampasan Aset."

⁴⁴ Badang Pembinaan Nasional KEMENKUMHAM, *Naskah Akademik Rancangan Undang-Undang tentang Perampasan Aset Tindak Pidana* (Jakarta: Badan Pembinaan Hukum Nasional Kementerian Hukum dan Hak Asasi Manusia Republik Indonesia, 2022).

⁴⁵ "Draf Rancangan Undang-Undang Republik Indonesia Perampasan Aset," www.legalitas.org.

⁴⁶ Ahmad Bahie, "Perbandingan Jenis Pidana dan Tindakan dalam KUHP Norwegia, Belanda, Indonesia, dan RUU KUHP Indonesia," *Sosio-Religia*, Vol. 7, No. 4 (2008), 1-15.

⁴⁷ Tristam Pascal Moeliono (ed.), *Terjemahan Beberapa Bagian Risalah Pembahasan Wetboek van Strafrecht dan Wetboek van Strafrecht Voor Nederlandsch Indië* (KUHP

weakness of confiscation in the Netherlands because it is not an obligation. However, under Dutch criminal law, all objects can be confiscated for a fine if the defendant fails to comply with the terms set by the Court.⁴⁸

Asset confiscation is an important part of the Netherlands, which faces serious financial crime problems.⁴⁹ Regulations regarding confiscation of assets can also be seen in Article 72, Chapter 4 of the ICC which states that the Dutch government, on orders from the International Criminal Court, applies fines, confiscates assets generated directly or indirectly from crimes, and compensates victims.⁵⁰ In confiscation using the Dutch *in personam* system, there is a provision that the assets that can be confiscated are only assets that have been confiscated. Based on articles 33, 33a and 36a of the Dutch Criminal Procedure Code, the Court can decide that criminal instruments that have been confiscated must be confiscated and then destroyed or handed over to the state.⁵¹

Based on Article 94 of the Dutch Criminal Procedure Code, several assets can be confiscated as evidence and then confiscated, with the criteria that these assets are considered dangerous and threaten the community, then assets related to crime. This is also the case with goods or assets used in connection with a crime or obtained through a crime.⁵² At this point, it can be understood that with an *in person* mechanism, asset confiscation can be carried out on objects that have been confiscated, and there is a stipulation from the Court for confiscation.

Belanda dan KUHP Indonesia) (Jakarta Selatan: Institute for Criminal Justice Reform [ICJR], 2021), 112.

⁴⁸ Daan Folgering and Niels van der Laan, "Netherlands; Getting the Deal Through—Asset Recovery," *Legal Experience Advocaten and De Roos & Pen* (2015), 112-117.

⁴⁹ Remko Roosjen, "Pre-Judgment Arrest of Assets In the Netherlands," *Maak Law* (last modified 2023), <https://www.maak-law.com/pre-judgment-arrest-of-assets-in-the-netherlands/#:~:text=>; accessed on 14 July 2023. The Netherlands has a stringent asset forfeiture system, transfer away assets that are subject to confiscation.

⁵⁰ International Criminal Court Implementation ACT Kingdom of the Netherlands (Kingdom of the Netherlands, 2002).

⁵¹ Folgering and Laan, "Netherlands; Getting the Deal."

⁵² Ibid.

In *rem* mechanism, the Netherlands does not yet have a national law regulating it, which is proven by the Minister of Justice and Security, Grapperhaus, who is currently trying to submit a Bill on *Criminal Justice Approach to Subversive Crime II*. This bill contains an instrument for confiscating assets without punishment, which can support the process of confiscating assets, which is difficult to carry out due to the lengthy criminal justice process. The statement of Minister Grapperhaus reinforces this:

Criminals are motivated by money, but their drug money is anything but a safe asset. We are not just going after their assets, their luxury villas, expensive watches, cars and yachts. We are also directly targeting their criminal operations. We are increasingly depriving criminals of opportunities to invest in further illegal activities. In this way, we prevent dirty money from circulating in society and being used in the legal economy or reinvested in criminal activities.⁵³

However, as a member of the European Union, the Netherlands continues to adopt *in rem* asset confiscation even though it does not yet have national laws.⁵⁴ This is based on Member States through 4 Framework Decisions (2001/500/JHA; 2003/577/JHA; 2005/212/JHA; and 2006/783/JHA) and the Directive on Freezing and Confiscation of the Proceeds of Crime in the European Union (2014/42/EU) (the “2014 European Union Directive”), in which the European Union encourages its members to implement *in rem* asset confiscation to cover the deficiencies of the *in personam* mechanism.⁵⁵ Furthermore, the 2012 Financial Action Task Force (last updated in 2019) guided confiscation *in rem* for asset recovery as follows:

Countries should consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requir-

⁵³ Goverment of the Netherlands, “New Legal Instruments.”

⁵⁴ Manuel Galvis Martínez, “Forfeiture of Assets at the International Criminal Court: The Short Arm of International Criminal Justice,” *Journal of International Criminal Justice*, Vol. 12, No. 2 (2014), 193-217.

⁵⁵ Council of Europe, *The Use of Non-Conviction Based Seizure and Confiscation* (Economic Crime and Cooperation Division Action against Crime Department Directorate General Human Rights and Rule of Law, 2020), www.coe.int/econcrime.

ing a criminal conviction (non-conviction-based confiscation) or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation to the extent that such a requirement is consistent with the principles of their domestic law.⁵⁶

The development of confiscation *in rem* in the European Union boils down to two main points, including confiscation with the aim of recovery using criminal proceedings but not relying on criminal punishment (prosecuting individuals but not necessarily punishing them) and confiscation aimed at assets without involving individuals who are completely independent of criminal proceedings.⁵⁷ The Netherlands has implemented both mechanisms⁵⁸ and is trying to create its national law regarding confiscation *in rem* through the *Criminal Justice Approach to Subversive Crime II* Bill, as expressed by Minister Grapperhaus above.

Confiscation of Assets in Islam and Its Concept in the Shāfi'i Madhhab

Islamic law does not recognize asset confiscation as a form of punishment because, in Islamic law, there are only three forms of punishment, namely '*uqubah badaniyah* (punishment imposed on the body such as the death penalty), '*uqubah nafsiyah* (punishment against the soul, such as threats), and '*uqubah māliyah* (punishment against property).⁵⁹ *Uqubah māliyah* is popular with the terms *diyah* and *kaffarah* in criminal *qisās* as a substitute punishment if the victim or family forgives.⁶⁰ *Diyah* as '*uqubah māliyyah* is a form of compensation for what the perpetrator did to the victim, the severity of which is determined according to the severity of the crime committed. Meanwhile, *kaffarat* is a form of erasing sins because they have violated God's provisions.⁶¹

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Martínez, "Forfeiture of Assets at the International Criminal Court."

⁵⁹ Sahid, *Epistemologi Hukum Pidana Islam; Dasar-Dasar Fiqh Jinayah* (Surabaya: Pustaka Idea, 2015), 94.

⁶⁰ Muhammad b. Qāsim, *Fatḥ al-Qarib al-Mujib* (Surabaya: Nurul Huda, 2006), 50.

⁶¹ Muhammad b. Jarīr al-Ṭabarī, *Jāmi' al-Bayān 'an Ta'wīl Ayy al-Qur'ān*, Vol. 1 (Makkah: Dār al-Tarbīyah wa al-Turath, n.d.), 329.

Apart from being in the *qisās* category, ‘*uqūbah māliyah* can also be defined in the *jarimah ta’zir* category. In the criminal form of *ta’zir*, the term *ta’wid*, as explained by Fathi Duraini quoted by Abdul Aziz Dahlan, is a punishment whose level is completely left to the authorities and to determine the severity it is adjusted according to needs. *Ta’wid* is determined for all forms of immorality, whether leaving out obligatory things or doing things that are prohibited and not included in the category of *hudūd* or *kaffārah*, whether they relate to God’s rights (public affairs) or personal rights (benefits individual), or acts that violate the provisions of a country’s laws.⁶²

Furthermore, in the *hudūd* category, some penalties can be categorized as ‘*uqūbah māliyah*, namely returning or replacing stolen goods. Scholars differ, but al-Shāfi‘ī revealed the most stringent provisions. Mālik believes that whoever has their hand cut off does not need to replace the stolen item, and this is based on a ḥadīth from ‘Abd al-Rahmān b. ‘Awf.⁶³ Then Mālik added that if he commits theft during his free time (not in an emergency), even though his hand has been cut off, he is still required to pay compensation as a form of increased punishment.⁶⁴ On the other hand, al-Shāfi‘ī believes that every person who has been proven to have committed theft is required to return the stolen goods if they are still there and is required to compensate them if the goods have been damaged or lost, even after they have been sentenced to having their hands cut off.⁶⁵

The above description shows that the al-Shāfi‘ī school has more stringent provisions in terms of property because the principle is that the punishment of cutting off a hand is a separate part from compensation or returning stolen goods. After all, cutting off hands is a form of responsibility to God, while returning stolen goods is a form of responsibility to the victim. From this

⁶² Abdul Aziz Dahlan, *Ensiklopedia Hukum Islam* (Jakarta: Ichtiar Baru Van Hoeve, 2003), 1772.

⁶³ ‘An ‘Abd Rahmān b. ‘Awf inn al-Nabiy sallā Allāh ‘alayh wa sallam qāl: “lā yugbram al-sāriq idhā qim ‘alayh al-had.”

⁶⁴ Wahbah b. Muṣṭafā al-Zuḥaylī, *al-Fiqh al-Islāmī wa Adillatuh*, Vol. 6 (Damaskus: Dār al-Fikr, n.d.), 95.

⁶⁵ Muhammad al-Zuhrī, *al-Sirāj al-Wahhāj*, Eighth Edition (Beirut: Dār al-Kutub al-‘Ilmiyah, 2016), 345.

school of al-Shāfi'i, the concept of appropriation of assets emerged in part from *'uqubah mālīyah*.

al-Shāfi'i, in his book *Tafsīr al-Imām al-Shāfi'i*, explains that whatever is required by God, the government must seize it in any way. The rationale of this opinion is al-Isrā' [17]: 33.⁶⁶ The logic is that in every decree of God, there must be government intervention as the executor of that provision. The basic diction is “then we have truly made the government its guardian.” This verse shows that the government is the “representative of God” in the world, as was the concept brought by al-Shāfi'i. So it is not surprising that in al-Nisā' verse 59, it is explained about three groups that must be followed, namely God, His Messenger, and *ulī al-amr*. According to Ibn Wahhāb, what is meant by *ulī al-amr* is *ulama'* and *fuqaha'*, while according to Abū Hurayrah, it is *umārā'*.⁶⁷

Confiscation of assets, as expressed by al-Shāfi'i can be based on al-Isrā' [17]: 33 because in the science of *uṣūl al-fiqh* there is a principle that an *ibārah* is measured by its pronunciation In general, not specific reasons.⁶⁸ The *lafz* (words) “*faqad ja'ala*” is *'ām* (general) because this *lafz* is *jazā'* from the previous *lafz*.⁶⁹ So, from the description above, it becomes clear that in the concept of fiqh al-Shāfi'i, confiscation of assets is not a form of crime but rather an obligatory consequence of determining property crimes. As an illustration, God stipulates a diyat for murderers because they are guilty; diyat is a property crime, so diyat must be carried out by seizing what God has made obligatory, either directly (seizing the nominal diyat that has been determined) or indirectly (property owned by an offender to replace the nominal that is not met).

This concept is a good one to apply because, with just a fine, someone can avoid it because they are unable to pay. The applicable law in Indonesia does not contain a clause that when a person cannot pay the stipulated fine, his assets must be confiscat-

⁶⁶ al-Shāfi'i, *Tafsīr al-Imām al-Shāfi'i*, Vol. 2, 1030.

⁶⁷ 'Abd Allāh b. Wahhāb, *Tafsīr al-Qur'ān min al-Jāmi' li Ibn Wahhāb* (Beirut: Dār al-Gharb al-Islāmī, 2003), 100.

⁶⁸ Abū Zakariyyā Yahyā al-Rahūnī, *Tuhfah al-Mas'ul fi Sharḥ Muntahā al-Sūl*, Vol. 2 (Dubai: Dār al-Baḥts li al-Dirāsāt al-Islāmīyah wa Ihyā' al-Turāth, 2002), 110.

⁶⁹ Jalāl al-Dīn al-Mahallī, *al-Waraqāt*, trans. Fadil Sa'id An-Nadwi (Surabaya: Al-Hidayah, 2004), 56.

ed as a substitute for the fine. Such a clause is only found in money laundering crimes, where when a corporation cannot pay a fine, its assets can be confiscated.⁷⁰ However, this clause is no longer needed with the concept brought by al-Shāfi‘ī. Because every property crime is determined, the consequence is confiscation, and thus, the Dutch state has implemented it as described above.

Conclusion

In the end, confiscation of assets becomes the most important part of punishment. The complex motives for criminal acts mean physical punishment is not always effective in preventing it. Gradually, criminal acts are committed because of reasons for profit behind them, either directly or indirectly. However, until now, the confiscation of assets which can be the spearhead is only an additional punishment. With the concept developed by al-Shāfi‘ī, confiscation of assets does not need to be part of a criminal form; confiscation of assets is a logical consequence that must be taken when a property crime is imposed as a form of reforming the orientation of punishment. So with this concept, the state no longer needs to be bothered with establishing asset confiscation laws. The state only needs to strengthen the property crime sector, whether in the form of fines or replacement money, then asset confiscation becomes the executor behind it.

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⁷⁰ See Article 9 paragraph (1) of Law Number 8 of 2010 on the Prevention and Eradication of Money Laundering Crimes.

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