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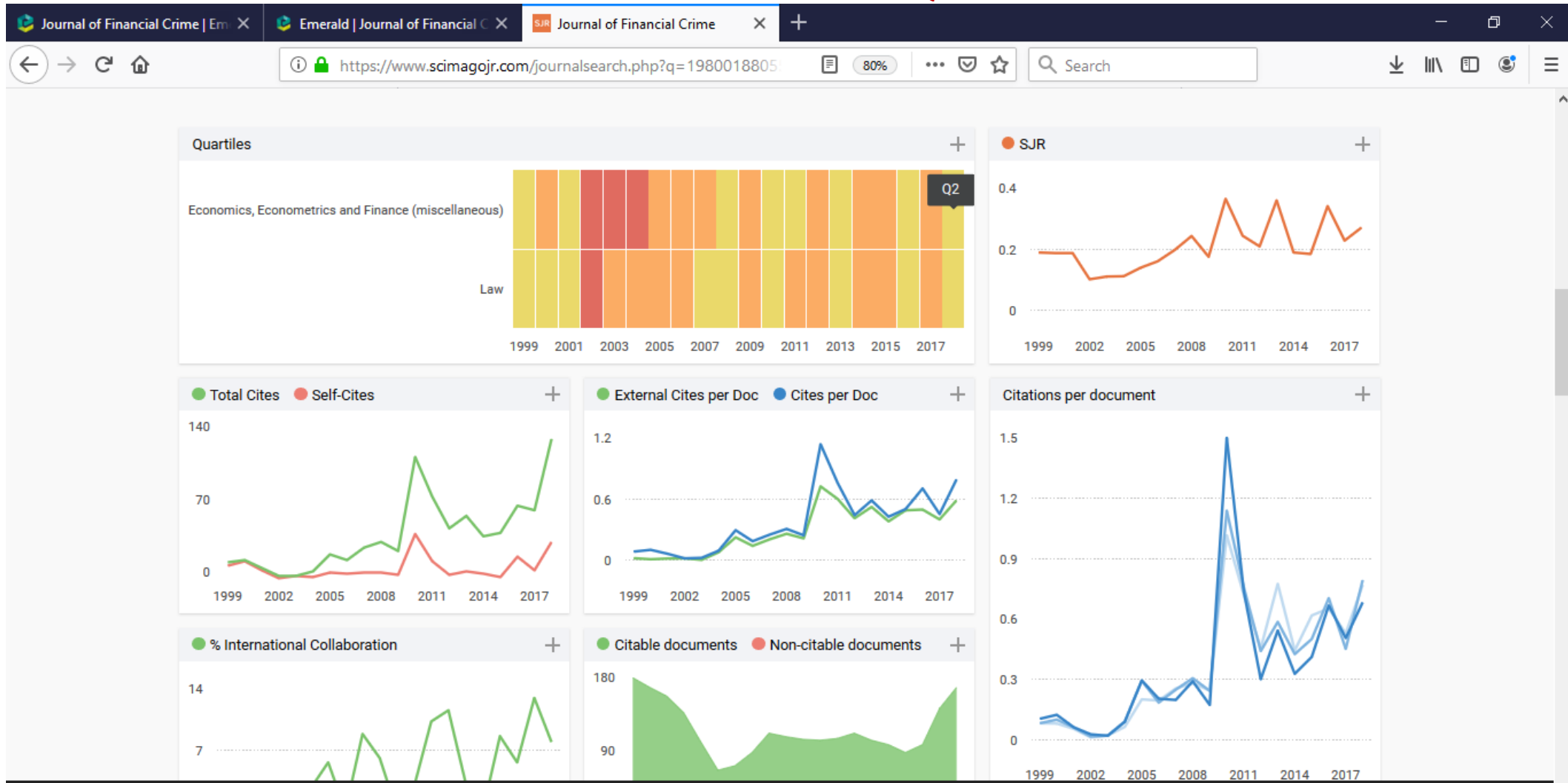
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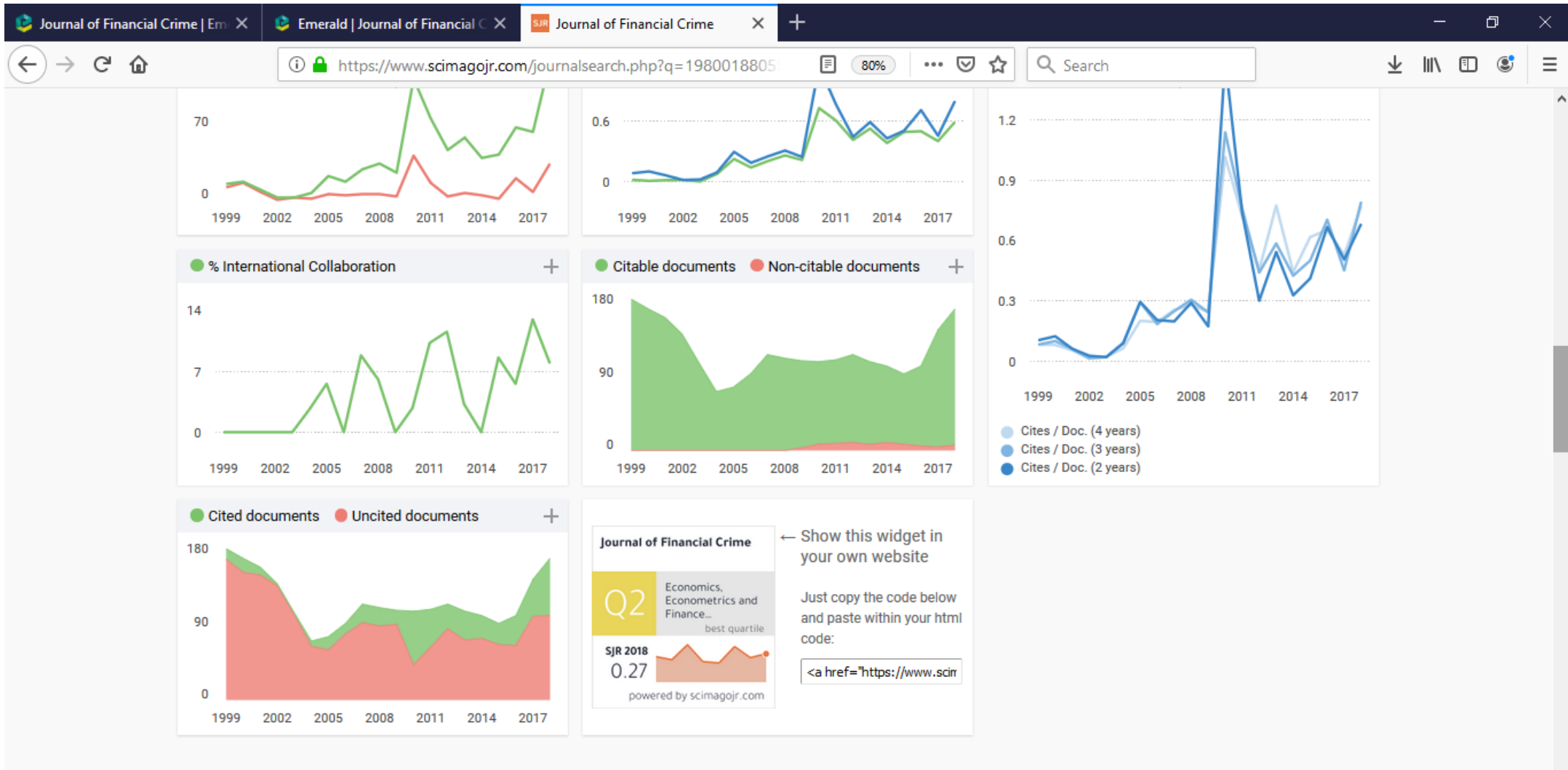
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Revealing the unexplained wealth in Indonesian corporation: A revolutionary pattern in non-conviction-based asset forfeiture

Anastasia Suhartati Lukito
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Abstract

Purpose

The purpose of this paper is to analyze the unexplained wealth inside the corporation and to initiate and apply unexplained wealth order in the Indonesian corporation based on the Indonesian legal system and prevailing laws. An effective tool needs to be implemented because of the facts that numerous corporate illegal activities lead to economic and financial crime. Meanwhile, there are difficulties to implement the corporate criminal liability. Non-conviction-based asset forfeiture will be a way out to deal with the current condition.

Design/methodology/approach

This paper explores and analyzes the Indonesian legal system, particularly a non-conviction-based asset forfeiture for corporate illegal activities. This paper is based on the research paper conducted with the legal normative approach.



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Findings

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Practical implications

This paper can be a source to explore the unexplained wealth that can occur in the corporation and the way to overcome it through unexplained wealth order and non-conviction-based asset forfeiture.

Originality/value

This paper contributes by initiating a non-conviction-based asset forfeiture, which is implementing the *in rem* proceeding, to make sure the crime does not pay and the victim and society suffer less because of the corporate crime.

Keywords

Unexplained wealth Non-conviction-based asset forfeiture Unexplained wealth order
Corporate crime

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Revealing the unexplained wealth in Indonesian corporation

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A revolutionary pattern in non-conviction- based asset forfeiture

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Anastasia Suhartati Lukito

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and Department of Legal, Martin Suryana and Associates, Surabaya,
East Java, Indonesia*

Abstract

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Keywords Unexplained wealth, Non-conviction-based asset forfeiture, Unexplained wealth order, Corporate crime

Paper type Research paper

1. Introduction

With the fast growth of the economy in Indonesia, cases of economic crimes such as corruption and money laundering have grown tremendously and become an important issue. According to the Corruption Eradication Commission Annual Report 2017, the



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unlawful act or abuse of authority has become the highest percentage (42.18 per cent) compared with all of the corruption cases, followed by non-corruption cases (38.97 per cent) and bribery cases (7.78 per cent). Pusat Pelaporan Dan Analisis Transaksi Keuangan (PPATK), as Indonesian Financial Intelligent Unit also showed the suspicious transaction report goes to the government official, member of House of Representative and private companies as well.

In particular, there is an obligation for the government official, state apparatus and member of House of Representative to report his/her wealth before his/her appointment as the officials. This is part of the integrity pact from the official and to measure his or her wealth before and after the job. According to the taxation directorate-general, the percentage of wealth reported is still considered low. However, based on the report, only 173,688 of 312,207 persons comply with the regulation. Furthermore, 44.37 per cent of Politically Exposed Persons (PEPs) have not complied with the regulation. On the contrary, the high number of bribery and illegal tax cases in contrast with the low reported wealth might indicate the arising conditions of unexplained wealth.

Many cases in Indonesia showed that the companies being used as a tool to cover and hide the unexplained wealth. Because people know that the transaction or asset owned by companies is often considered as a clean and clear asset, many offenders use the company account or company asset to cover up the unexplained wealth. Moreover, this condition becomes a preferable method to hide the unexplained wealth because of the weakness to handle and put charges against the companies. The unexplained wealth will remain safe and steady if there is no conviction against the company itself. This reality contrasts with the principle of crime does not pay.

Although there is a Supreme Court Regulation Number 13 of 2016 concerning the Procedure of Corporation Criminal Handling Case as a rule to indict the companies, the reality proves that to put charges on the companies was never easy. Therefore, to recover the proceeds of crime following the *in rem* proceeding is through Unexplained Wealth Order as the revolutionary pattern to the non-conviction-based asset forfeiture. Seizing and forfeiting companies' assets through unexplained wealth order is a way to overcome the difficulties of putting a corporation under corporate criminal liability.

This article aims to reveal and analyze the unexplained wealth inside the corporation and to initiate and apply unexplained wealth order in the Indonesian corporation based on the Indonesian legal system and prevailing laws.

2. The corporation involvement in the proceeds of crime vs unexplained wealth order as a tool

As explained earlier that the involvement of corporation in the economic and financial crime is unavoidable. The corporation commonly taking place as a part to conceal the unexplained wealth. This condition has been notified in the consideration of the following regulations such as:

- Indonesian Supreme Court Regulation Number 13 of 2016 on Case Handling Procedure for Corporate Crimes.

Consideration

In reality, the corporation may be a place to hide wealth resulted from crime which is untouched by legal proceedings of criminal liability. Although many Indonesian laws put the corporation as a subject of criminal act which can be held liable, however, legal matters with the corporation as its subject which can be submitted under criminal proceeding are still very limited, because of the unclear procedure and investigation of the corporation.

- Indonesian Presidential Regulation Number 13 of 2018 on Application on The Principle of Recognizing Beneficial Ownership of Corporation in The Framework of Prevention and Eradication of Money Laundering Criminal Act and Terrorism Financing Criminal Act

Consideration

Corporation can be a tool both directly or indirectly used by the offender who is the beneficial owner of the wealth that comes from money laundering and terrorism financing criminal act because the current situation has no regulation; therefore, the application of the principle of recognizing beneficial ownership from the corporation is needed.

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In terms of illegal enrichment and unexplained wealth, there is a different perspective between the two terms. Illegal enrichment shows the fund gained definitely from the form of a criminal act, whereas the unexplained wealth shows the particular funds were not always derived from the criminal act. The principle of illegal enrichment is using in-personam proceeding while the Unexplained Wealth is using in-rem proceeding.

Therefore, unexplained wealth orders are a relatively recent development in confiscation and forfeiture law, targeting the proceeds of criminal activities without a predicate offense. They are designed to further strengthen the fight against organized crime, by enhancing the powers of the state in depriving criminal enterprises of their illicitly acquired property, particularly those individuals for whom insufficient evidence exists for a criminal conviction (Hamilton, 2011, p. 9). The unexplained wealth order can be effectively used to overcome the hurdle/difficult condition because of several legal facts such as the offender was not proven guilty or the perpetrator was found dead.

Literally, the general principle of unexplained wealth order is to shift the burden of proof from the investigator to the person/corporation being investigated. Thus, it will be easier to confiscate illegal property or funds. Because of the condition that the unexplained wealth comes either from a natural person or the legal person, the court may issue the decision that the accused person or legal person shall provide a statement:

- setting out the nature and extent of their interest in property that is valued at more than a certain amount of money;
- giving explanation on how they obtained the property or funds, including how any costs were met;
- giving details of the settlement where the property is held on trust; and
- settings out any other information connected to the property or funds as may be required by the order.

The court may also concurrently impose a supporting interim freezing order if it considers one necessary to reduce the risk of the respondent disposing of the property before they have complied with the terms of the unexplained wealth order.

The respondent must comply with an unexplained wealth order within a specified period of time; the repercussions for failing to comply can be severe:

- If the respondent fails to comply, the property may be presumed to be a recoverable asset for the purposes of any proceedings taken in respect of the property under the prevailing laws.
- If the respondent is found to have made a statement that they know to be false or misleading, or recklessly makes a statement of this nature, they could be convicted of an offense.

According to Transparency International, unexplained wealth orders are part of non-conviction-based asset confiscation, but contain some specificities:

- They do not require criminal convictions.
- They shift the burden of proof to the property owner who must prove a legitimate source for his wealth.
- The forfeiture proceeding is instituted against a person rather than against the property.

Provided that the law establishing unexplained wealth orders provides enough guarantee to avoid the mechanism to be abused and to ensure constitutional guarantees, such as due process and presumption of innocence, are respected. They can be considered an effective anti-corruption tool in the recovery of stolen assets. Their success also depends to a great extent on the existence of an independent body tasked to investigate and request such orders ([Transparency International, 2015](#)).

The unexplained wealth order is an order requiring the respondent to provide a statement setting out the nature and extent of their interest in a property and to explain how the respondent obtained the property. Unexplained wealth order does not require a criminal conviction, the enforcement authorities may apply for one based only on suspicion and the burden of proof is reversed, leading some to complain that unexplained wealth order is unjust. Unexplained wealth order is an order made by the High Court. Once served upon a respondent, it requires them to provide information about how they acquired the asset (s) referred to within the order. Pending the response, the authorities may apply for a freezing order over the property to prevent the respondent from dealing with or disposing of it. If the respondent fails to provide an explanation within a given timeframe or provides unsatisfactory evidence, it will raise a presumption that the asset constitutes recoverable property for the purposes of civil recovery.

One of the countries that implemented the unexplained wealth order is the UK. Unexplained wealth order can be issued against individuals but also other structures that hold property such as companies and trusts. A PEPs (and even one of their family members or business partners) may be caught even if there is no suspicion that he or she is involved in a criminal offense, and others may be caught if someone connected to them is suspected of committing a criminal offense. Although welcomed by many as a useful additional tool against the laundering in the UK of the proceeds of grand corruption overseas and serious crime, unexplained wealth orders are potentially very wide in scope and draconian in nature so will need to be subject to careful scrutiny by the courts. Moreover, the unexplained wealth orders can be imposed on individuals such as PEPs as well as on corporation. It also goes to the corporation who give its acquiescence to the proceeds of crime.

Unexplained wealth orders are part of non-conviction-based asset confiscation because they do not require criminal convictions. In traditional confiscation, the state must demonstrate that the property is derived from or facilitate a crime. In an unexplained wealth order proceeding, the state is only required to show on civil standard of proof-preponderance of evidence (that it is more likely than not) that the respondent owns or possesses unexplained wealth, without specifically identifying the criminal activity that originated the wealth. One of the differences is the reversed burden of proof. Once the state discharges its burden of proof, the burden shifts to the respondent to show that the property is lawful ([Hamilton, 2011](#), p. 11).

Moreover, Monty Raphael in his book *“Bribery, Law and Practice”* mention in its 2014 report, *“Few and Far: The Hard Facts on Stolen Asset Recovery”*, the Stolen Asset Recovery

Initiative (StAR) stressed that a criminal conviction is not always the most effective method for recovering the proceeds of corruption and recommended that states should use multiple avenues for asset recovery, including unexplained wealth orders, a relatively recent development in confiscation and forfeiture jurisprudence, when tackling grand corruption (Raphael, 2016, p. 188).

The drive to confiscate criminal assets has increasingly come to the fore of policy efforts to tackle crime. The benefits of targeting such assets are widely said to include: preventing criminal money from being used to finance other criminal activities; preventing such money from corrupting legitimate society; deterring crime by reinforcing the idea that crime does not pay; and removing negative role models from society (King, 2018, p. 377). The confiscation measures are concerned not so much with punishing individuals for their past wrongs but with achieving specific criminal justice objectives, including disgorging offenders of their ill-gotten gains, disabling the financial capability of criminal organizations and compensating victims of crime (Ryder, 2012, p. 37).

3. Initiating unexplained wealth order and non-conviction-based asset forfeiture in Indonesia

As it is mentioned the important thing to overcome the criminal cases in particular economic crime, unexplained wealth order and non-conviction-based asset forfeiture will be the effective and efficient tools. Therefore, the legislations and regulations should be built as the legal norm dealing with unexplained wealth. The legal norm should be applied both to the natural person as well as the legal person (corporation).

The importance of confiscating proceeds of crime has long been recognized as an effective tool in disrupting the activities of economic crime. The underlying profit or financial gain is the main motive for criminals to engage in criminal activities. Indeed, removing the profit motive is considered to act both as a preventive and a deterrent to criminals by diminishing their capacity to invest in future criminal activities (Hamilton, 2011, p. 11).

There are generally two types of forfeiture used internationally to recover the proceeds and instrumentalities of crime: non-conviction-based asset forfeiture and criminal forfeiture. They share the same objective, namely, the forfeiture by the state of the proceeds and instrumentalities of crime. Both share common, twofold rationales. First, those who commit unlawful activity should not be allowed to draw profit from their crimes. This is because of the principle the crime does not pay. Proceeds should be forfeited and used to compensate the victim, whether it is the state or an individual. Second, unlawful activity should be deterred. Removing the economic gain from crime discourages the criminal conduct in the first instance. Forfeiture of instrumentalities ensures that such assets will not be used for further criminal purposes; it likewise serves as a deterrent where criminal and non-conviction-based asset forfeiture differ in the procedure used to forfeit assets. The main distinction between the two is that criminal forfeiture requires a criminal trial and conviction, whereas non-conviction-based asset forfeiture does not.

Criminal forfeiture is an *in personam* order, an action against the person. It requires a criminal trial and conviction and is often a part of the sentencing process. Some jurisdictions apply a lower standard of proof (the balance of probabilities) for the forfeiture process than for the criminal portion of the process. Nonetheless, the requirement of a criminal conviction means that the government must first establish guilt “beyond a reasonable doubt” or such that the judge is “intimately convinced” (intimate conviction). Criminal forfeiture systems can be object-based, which means that the prosecuting authority must prove that the assets in question are proceeds or instrumentalities of the crime. Alternatively, they can be value-

based regimes, which allow for the forfeiture of the value of the offender's benefit from the crime, without proving the connection between the crime and the specific object of property (Greenberg *et al.*, 2009).

The purpose of the non-conviction-based asset forfeiture through unexplained wealth order is to return the unexplained wealth to the government or to the people who have the right. Indonesia does not have a precise unexplained wealth order regulation as it is regulated in several countries such as Australia, Ireland and UK. But, because the Indonesian Government already ratified United Nations Convention against Corruption (UNCAC) with Indonesian Law Number 7 of 2006, thus it is pretty obvious that Indonesia has to build the path to the non-conviction-based forfeiture and unexplained wealth order.

Considering Article 52 point 1 United Nations Against Corruption that clearly stated the countries should:

Consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.

Hence, the Indonesian Government has ratified this convention under Indonesian Law Number 7 of 2006; therefore, the Indonesian Government realize that non-conviction-based forfeiture should be enacted.

The current legislation in Indonesia showed that in the several regulations regarding corruption and money laundering cases, the government implicitly governing the possibility for non-conviction-based asset forfeiture. The following corruption laws such as Indonesian Law Number 31 of 1999 and Indonesian Law Number 20 of 2001 has mentioned the obligation of the defendant in corruption cases to prove that his/her wealth was not originated from the corruption cases (Article 37 A subsection [1] Indonesian Law Number 20 of 2001). In the event that the defendant cannot prove that his/her wealth is proportional to the amount of his/her income or any additional income from his/her wealth, the information shall be used to strengthen the existing evidentiary material that the defendant has committed a corruption offense (Article 37 A subsection [2] Indonesian Law Number 20 Year 2001)[1].

Article 38B subsection (2) Indonesian Law Number 20 Year 2001 even clearly regulating:

In the event that the defendant cannot prove that the wealth as referred to in paragraph (1) does not originate from corruption offense, the wealth shall be considered as originating from corruption offense either and the judge shall be authorized to decided that the wealth shall be partially or entirely confiscated for the state[2].

However, the confiscation is through criminal process. The confiscation could only be obtained from civil suit by the prosecutor when there are three kinds of conditions:

The perpetrator is not proven guilty but on the contrary, there are state financial losses.

The perpetrator is found dead before any court decision; or if after a decision had been made the court has already gained fixed legal strength, and it is known that there still exists wealth owned by the perpetrator believed to have originated from corruption offenses, which has not been confiscated for the state[3].

In regard to money laundering, Indonesian Law Number 8 of 2010 also promulgated the certain article dealing with the asset forfeiture as mentioned under article 67 as follows:

- In the event that there is no one/or third party who proposes for the objection within 20 (twenty) days since the date of temporary discontinuity of transaction, PPATK submits the handling of Assets of which are known or reasonably alleged the result of criminal crime to the investigator to be investigated.

- In the event that the alleged as perpetrator of the criminal crime is not found within 30 (thirty) days, the investigator could propose to the local court to decide such assets as the state's treasury or returned to the entitled person.
- The Court as set forth in section (2) should decide within 7 (seven) days.

Under this article, it is showed that there is an initiation for non-conviction-based asset forfeiture for the unknown assets. Furthermore, in Article 79 subsection (4) Indonesian Law Number 8 of 2010 mentioned: "In the event that the defendant passed away before the verdict is decided and there are the evidence of which strong enough that the defendant has committed the criminal action of Money Laundering, upon the demand of prosecuting attorney the judge decides to perform confiscation against the asset confiscated"[4]. Thus, in Article 81 Indonesian Law Number 8 Year 2010 stated: "In the event that it is obtained the evidence that strong enough that there is still the Asset of which have not been confiscated, the judge orders the persecuting attorney to perform the confiscation against the Assets in question"[5].

Although in some regulating is implicitly leads to the non-conviction-based asset forfeiture, but still Indonesia lack of statutory authority to forfeit assets in certain criminal cases, lacks of comprehensive, non-conviction-based assets forfeiture stature. Such a statute is a powerful tool which permits the recovery of stolen assets and assets used to facilitate criminal activities where it is impossible or impractical to bring criminal charges against the perpetrator. These situations arise, for example, where a criminal defendant flees or dies before trial, where a crime has been committed but there are problems with evidence or proof at trial, or where immunity from prosecution or a lack of political will precludes criminal prosecution. Non-conviction-based asset forfeiture has proven to be such a useful tool to recover assets stolen through corruption that the UNCAC urges countries to implement non-conviction-based asset forfeiture legislation.

Generally, an interagency drafting team consisting of representatives of Indonesia's FIU, the Attorney General's Office, the Ministry of Law and Human Rights, the Ministry of Finance and the Corruption Eradication Commission met and worked upon a non-conviction-based asset forfeiture law. Thus, the team has initiated an initial draft of the non-conviction-based law.

While the Government of Indonesia has the draft on Stolen Asset Forfeiture, which still could not be considered as the prevailing laws, the several regulations in Indonesia that have implicitly mentioned about non-conviction-based asset forfeiture are identified as follows:

- Indonesian Law Number 8 of 2010 on Prevention and Eradication on Money Laundering Crimes.
- Indonesian Law Number 9 of 2013 on Prevention and Eradication on Terrorism Financing Criminal Act.
- Indonesian Supreme Court Regulation Number 1 of 2013.
- Indonesian Supreme Court Circular Letter of 2013.
- Indonesian Supreme Court Regulation Number 13 of 2016 on Case Handling Procedures for Corporate Crimes.
- Indonesian Financial Services Authority Regulation Number 12/POJK.01/2017 on Applying Anti Money Laundering and Prevention of Terrorism Financing Programs in The Financial Services Sector (article 43).

- Indonesian Presidential Regulation Number 13 of 2018 on Application on The Principle of Recognizing Beneficial Ownership of Corporation in The Framework of Prevention and Eradication of Money Laundering Criminal Act and Terrorism Financing Criminal Act.
- Initialing draft on asset forfeiture law.

Particularly for the corporate activities relating with money laundering crime, the corporate wealth can be a subject of confiscation. This is regulated under Article 21 subsection (2) Indonesian Supreme Court Regulation Number 13 of 2016 on Case Handling Procedures for Corporate Crimes: “Corporate Wealth which can be a subject of confiscation is a property as stipulated by the Code of Criminal Procedure”.

Under the aforementioned article, the confiscation of the corporate wealth follows the criminal procedure and conviction-based forfeiture. On the other hand, it will be contrary with article 67 Indonesian Law number 8 of 2010. Therefore, it is urgently needed for the Government to stipulate the asset forfeiture law as an umbrella for the asset forfeiture both for a natural person as well as the legal person.

After the issuance of those regulations, the Indonesian Government was not focusing implicitly only to chase the perpetrator but to chase the illegal funds both individually owned or legal person owned. But one of the weaknesses of the supreme court regulation is only the procedural regulation and does not have an external impact. It does not deal with crimes and does not expand the sanctions imposed by the laws governing various crimes.

Whilst the huge level corruption from developing countries and hidden overseas are creating a huge number of stolen asset. But the stolen asset recovery showed the low percentage of the stolen asset. This condition requires the stolen asset recovery to deal with illegal funds proceed such of criminal activities, corruption and tax evasion crime. According to [Casella \(2018, p. 428\)](#), punishment, of course, serves multiple purposes. One is to force the wrongdoer to face the consequences of his crime, but another is to deter others from following him down the same path. The point of committing crimes involving property is to make money. The criminal who gets to enjoy lavish and notoriously open lifestyle based on the fruits of his criminal wrongdoing serves as a role model for would-be followers ([Casella, 2018, p. 428](#)). “Always follow the money” and make sure that “crime does not pay has been sound advice in anti-corruption law enforcement and policy makers” circle for decades ([Ziouvass, 2018, p. 592](#)).

As the World Bank and United Nations Office on Drugs and Crime (UNODC) mentioned that asset recovery in corruption cases includes the uncovering of corruption and the tracing, freezing, confiscating and returning of funds obtained through corrupt activities. It is particularly vital for developing countries to see their national wealth corruptly exported. There are several barriers to asset recovery. Once stolen assets are transferred abroad, recovery is extremely difficult. In developing countries, this difficulty results from limited legal, investigative and judicial capacity, as well as inadequate resources. Further, the lack of resources affects the ability of a state to make requests to countries holding the stolen assets. The problem is exacerbated in developed countries where assets are hidden or where necessary laws may be lacking to respond to requests for legal assistance.

Moreover, the lack of non-conviction-based asset forfeiture laws in some countries makes it difficult when the officials engaged in stealing assets have died, fled or have immunity. The United Nations and other relevant organizations attach a high priority to the problem of cross-border transfers of illicitly obtained funds and the return of such funds. Confiscating assets is an important tool in the fight against corruption. It serves as both a sanction for improper, dishonest and corrupt behaviors and a deterrent as the incentive to commit

corruption is removed. Further, it incapacitates the offenders by depriving them of their assets and instruments of misconduct. It also repairs the damage done to victim populations when financial resources are confiscated from the offenders and ideally are directed toward economic development and growth in that country. Finally, asset recovery promotes accountability and positively affects the rule of law. The asset recovery process involves four steps:

- (1) Identification.
- (2) Investigation, tracing, freezing and seizing.
- (3) Confiscation or forfeiture.
- (4) Return of the stolen assets to the owner.

The StAR Initiative which has been launched by the World Bank and UNODC was designed to do the following:

- urge countries to ratify UNCAC and apply the framework;
- lower the barriers to asset recovery;
- build technical capacity to facilitate asset recovery;
- help to deter such flows and eliminate safe havens for corruption;
- generate and disseminate knowledge on asset recovery;
- advocate for implementation of measures that reduce barriers to asset recovery;
- support national efforts to build institutional capacity for asset recovery; and
- monitor recovered funds if requested.

Each country has to maintain its own asset recovery system.

Actually, criminal forfeiture and non-conviction-based asset forfeiture share the same objective, but their procedures are different. Criminal confiscation can only occur after a criminal conviction. Non-conviction-based asset forfeiture, on the other hand, can operate separately from the criminal justice system or alongside it, and it allows for the restraint, seizure and forfeiture of stolen assets without a finding of guilt in the criminal context. Non-conviction-based asset forfeiture only requires a finding that the property is tainted, either as the proceeds of a crime or as an instrument of criminal activity.

Non-conviction-based asset forfeiture is an action against the asset itself (e.g. money, property, etc.), not the person. After a non-conviction-based asset forfeiture order, the defendant forfeits the thing itself subject to any innocent owners. There are generally three ways non-conviction-based asset forfeiture is available. First, it can form part of criminal proceedings without requiring a final conviction or finding of guilt. In this regard, non-conviction-based asset forfeiture tools are incorporated into criminal legislation. The second method is through a separate proceeding normally governed by the rules of civil procedure and can occur independently or parallel to criminal proceedings. The final method is administrative confiscation, which can occur in some jurisdictions and does not require a judicial determination.

An acquittal from criminal charges does not bar non-conviction-based asset forfeiture proceedings. Article 54 of UNCAC requires all state parties to consider forfeiting the proceeds of crime without a conviction. It also obliges state parties to enable domestic authorities to recognize and act on an order of confiscation issued by a court of another state party. This is broadly worded and could include non-conviction-based asset forfeiture orders. Further, it obliges state parties to permit competent authorities to order the

confiscation of property of foreign origin acquired through convention offences. Again, this is broadly worded and could include non-conviction-based asset forfeiture orders. However, many jurisdictions have yet to put in place procedures allowing non-conviction-based asset forfeiture. Non-conviction-based asset forfeiture is particularly important for asset recovery in circumstances when there is a lack of evidence to support a criminal conviction (beyond a reasonable doubt). For example, when the offender is dead (bringing to an end criminal proceedings), has fled the jurisdiction, is immune from prosecution, is unknown, or the property is held by a third party who is aware (or willfully blind) that the property is tainted. For these reasons, the StAR Initiative views non-conviction-based asset forfeiture as a “critical tool for recovering the proceeds and instrumentalities of corruption”.

Confiscation can be either property-based or value-based. In a property-based order, assets linked to illicit activities are specifically targeted for confiscation. In a value-based order, a monetary amount is calculated based on the value of the benefit, advantages and profits a person gained from illicit activities.

Criminal proceedings and non-conviction-based asset forfeiture operate together to achieve the best results. Both procedures can occur without violating double jeopardy because non-conviction-based asset forfeiture is not considered a punishment or a criminal proceeding. In both methods, it must be established that the targeted assets derived directly or indirectly from the commission of the crime. For both criminal and non-conviction-based asset forfeiture, confiscated proceeds go to the prosecuting state treasury, unless compensation for victims is ordered as well.

Currently, Indonesia is pursuing on draft on assets forfeiture law as the legal basis of non-conviction-based asset forfeiture. This will be the critical tool to recovering the proceeds and instrumentalities of corruption, money laundering crime and any other kind of economic crime. Thus, it can explicitly lead to the *in rem* proceeding.

Non-conviction-based asset forfeiture is useful in a variety of contexts, particularly when criminal forfeiture is not possible or available for the conditions such as:

- The violator is a fugitive. A criminal conviction is not possible if the accused is a fugitive.
- The violator is dead or dies before conviction. Death brings an end to criminal proceedings.
- The violator is immune from criminal prosecution.
- The violator is so powerful that a criminal investigation or prosecution is unrealistic or impossible.
- The violator is unknown and assets are found (for example, assets found in the hands of a courier who is not involved in the commission of the criminal offense). If the asset is derived from crime, an owner or violator may be unwilling to defend civil recovery proceedings for fear that this would lead to a criminal prosecution. This uncertainty makes a criminal prosecution of a violator very difficult, if not impossible.
- The relevant property is held by a third party who has not been charged with a criminal offense but is aware – or is willfully blind to the fact – that the property is tainted. Whereas criminal forfeiture may not reach the property held by bona fide third parties, non-conviction-based asset forfeiture can forfeit the property from a third party without a bona fide defense.
- There is insufficient evidence to proceed with criminal prosecution. In such scenarios, non-conviction-based asset forfeiture is possible because it is an *in rem*

action against the property, not the person, or a criminal conviction is not required, or both (Greenberg *et al.*, 2009, p. 15).

Non-conviction-based asset forfeiture can also be useful in the following situations:

First, the violator has been acquitted of the underlying criminal offense as a result of lack of admissible evidence or a failure of meeting the burden of proof. This applies in jurisdictions in which non-conviction-based asset forfeiture is established on a standard of proof that is lower than the criminal conviction standard. While there may be insufficient evidence for a criminal conviction beyond a reasonable doubt, there still could be sufficient evidence to show that the assets are derived from illegal activity on a balance of probabilities.

Second, the forfeiture is uncontested. In jurisdictions in which non-conviction-based asset forfeiture is conducted as a civil proceeding, default judgment procedures are used to forfeit the assets, resulting in time and cost savings.

Non-conviction-based asset forfeiture can be particularly effective in divesting the politically corrupt of the fruits of their crimes and restoring those funds to the citizens of the victimized state. Whereas non-conviction-based asset forfeiture should never be a substitute for criminal prosecution, in many instances (particularly in the context of official corruption). Non-conviction-based asset forfeiture may be the only tool available to recover the proceeds of those crimes and to exact some measure of justice. The influence of corrupt officials and other practical realities may prevent criminal investigations entirely, or until after the official has died or absconded. It is common for a corrupt official who robs a country to also attempt to obtain immunity from prosecution. Because a non-conviction-based asset forfeiture regime is not dependent on a criminal conviction, it can proceed regardless of death, flight or any immunity the corrupt official might enjoy (Greenberg *et al.*, 2009, pp. 14-15).

Specifically in Indonesia, because of the huge number of PEPs, some of them are taking part as the commissioner or director of corporation. It may lead to the unexplained wealth in the corporation. Therefore, to discourage illegal practices, one of the effective tools is by initiating the unexplained wealth order. The benefit to apply unexplained wealth order are as follows:

- Reversal burden of proof;
- Using civil standard procedure – balance of probability instead of beyond reasonable doubt (criminal law procedure); and
- The purpose is to confiscate the asset, rather than to criminalize the offender.

This unexplained wealth orders can also be said as a part of the crime prevention. According to Sutton *et al.* (2014, p. 29) crime prevention is a complex process: far more complex than “law and order” (Sutton *et al.*, 2014, p. 29). But it can be effectively implemented to minimize the criminal to gain profit from their crime or illegal activities. It can be similarly implemented to the corporation which corporation can be misuse as means of the corruption cases, money laundering cases and any other corporate crimes. Therefore, according Blair (2016, p. 447), the limit of the law mean that it is important to encourage an appropriate corporate culture to support the legal framework.

Particularly on case handling procedure on corporate crime, the Indonesian Supreme Court has promulgated Supreme Court Regulation Number 13 of 2016 with some characteristics:

- Corporate asset confiscated is still using Criminal Procedure Code (Article 21).
- Corporate Asset Forfeiture is based on criminal conviction (Article 31).

- Bankruptcy or Dissolution of company process as any attempt to avoid corporate asset forfeiture (Article 16).
- Corporate asset forfeiture after dissolved company could only be seized under civil law suits (Article 8).
- The indictment for corporations and/or its boards with the extent on definition of its boards (including those who do not have the authority to represent the company but in reality they can control or they may influence the corporation's policy which may be qualified as criminal action).
- In the event that board has quit or died, does not resulting in loss of liability for the corporation.

The aforementioned characteristics, on the other hand, is not appropriate with the platform of non-conviction-based asset forfeiture in Indonesia. Hence, the asset forfeiture law will be a way out to overcome the different forfeiture either through criminal forfeiture or civil forfeiture.

Nevertheless, the purpose of non-conviction-based asset forfeiture and unexplained wealth order could not stand alone to achieve the goal to minimize the corporate illegal behavior, particularly on economic and financial crime. The moral and ethical business values inside the corporation play an important role to reducing such corporate crime. Gray as it is quoted by Goldstraw-White and Gill (2016, p. 847) mention that the introduction of anti-bribery and corruption legislation has imposed compliance obligations on organization and more generally raised awareness of good practice in this area. It has also confirmed the responsibility of the board to set the culture of the organization to avoid unethical behavior becoming embedded in institutional practices (Goldstraw-White and Gill, 2016, p. 847). Furlong *et al.* (2017, p. 205) even mentioned that regulators continue to try to legislate and regulate what they defined as morally-driven behavior.

To minimize the corporation being misused by the criminals, parallel with the non-conviction-based asset forfeiture, in the crime prevention perspectives should also cultivate the moral and ethical values inside all of the corporate directors, commissioners and shareholders. It is through moral education and moral cultivation to ring the bells of the directors to behave ethically (Lam and Goo, 2015, p. 469). Especially corporation has a great external and internal dimension of corporate power (Moore and Petrin, 2017, p. 5). Hence, to build cultural and ethical business values in every corporate activities is a necessity.

4. Conclusion

Unexplained wealth orders are a relatively recent development in confiscation and forfeiture law, targeting the proceeds of criminal activities without a predicate offense. The unexplained wealth order can be effectively used to overcome the hurdle/difficult condition because of several legal facts such as the offender was not proven guilty or the perpetrator was found dead. The general principle of unexplained wealth order is to shift the burden of proof from the investigator to the person/corporation being investigated. Thus, it will be easier to confiscate illegal property or funds.

Because of the huge number of PEPs, some of them are taking part as the commissioner, director or shareholder in the corporation. It may lead to the unexplained wealth in the corporation. Therefore, to discourage illegal practices, one of the effective tools is initiating the unexplained wealth order. The easiness to apply unexplained wealth order are:

- Reversal burden of proof;
- Using civil standard procedure – balance of probability instead of beyond reasonable doubt (criminal law procedure).
- The purpose is to confiscate the asset, rather than to criminalizing the offender. This Unexplained Wealth Orders can also be said as a part of the crime prevention.

The current legislation in Indonesia showed that in the several regulations regarding corruption and money laundering cases, the government implicitly governing the possibility for non-conviction-based asset forfeiture, in particular in the Indonesian Law Number 20 of 2001 and Indonesian Law Number 8 of 2010. It is also in line with the ratification of UNCAC through Indonesian Law Number 7 of 2006. The law enforcement on economic and financial crime should follow an effective tool which is through non-conviction-based asset forfeiture.

Therefore, in regards to any corporate activities relating to money laundering crime, corporate wealth can be a subject of confiscation. The confiscation of corporate wealth should not only follow the criminal procedure and conviction-based forfeiture. Hence, to be consistent with the article 67 Indonesian Law number 8 of 2010 which is initiating the non-conviction-based asset forfeiture. Thus, it is urgently needed for the government to stipulate the asset forfeiture law as an umbrella for the asset forfeiture both for a natural person as well as the legal person. After the issuance of that regulation, the law enforcement was not focusing only to chase the perpetrator but to chase the illegal funds both individually owned or corporate owned.

Indonesia is pursuing a draft on assets forfeiture law as the legal basis of non-conviction-based asset forfeiture. This will be the critical tool for recovering the proceeds and instrumentalities of corruption, money laundering crime and any other kind of economic crime. Thus, it can explicitly lead to the *in rem* proceeding.

The purpose of non-conviction-based asset forfeiture and unexplained wealth order could not stand alone to achieve the goal to minimize the corporate illegal behavior, particularly on economic and financial crime. The moral and ethical business values inside the corporation play an important role to reduce such corporate crime.

Notes

1. See details in Article 37B of Indonesian Law Number 20 Year 2001.
2. See details in Article 38B of Indonesian Law Number 20 of 2001.
3. See details in Article 38C of Indonesian Law Number 20 of 2001.
4. See details in Article 79 of Indonesian Law Number 8 of 2010.
5. See details in Article 81 of Indonesian Law Number 8 of 2010.

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Further reading

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