



วารสารนิติศาสตร์

มหาวิทยาลัยธรรมศาสตร์

THAMMASAT LAW JOURNAL



วารสาร ปีที่ 44 ฉบับที่ 1 มีนาคม 2558
นิติศาสตร์



Vol. 44 No. 1 March 2015

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บทความหรือข้อความคิดเห็นใดๆ ที่ปรากฏในวารสารนิติศาสตร์เป็นวรรณกรรม
ของผู้เขียนโดยเฉพาะ คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ และบรรณาธิการไม่จำเป็นต้องเห็นด้วย

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ผู้จัดการ

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คำแนะนำสำหรับผู้เขียน



คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ จัดพิมพ์ “วารสารนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์” ขึ้น โดยมีวัตถุประสงค์เพื่อเผยแพร่ความรู้ทางวิชาการด้านนิติศาสตร์ หรือความรู้ที่เกี่ยวข้องกับทางนิติศาสตร์ซึ่งมีเนื้อหาสาระที่น่าสนใจและมีคุณค่าทั้งในด้าน ทฤษฎีและปฏิบัติ ในรูปแบบของวารสารทางวิชาการ อีกทั้งเป็นการส่งเสริมให้บุคคล ทั้งภายในและภายนอกสามารถนำเสนอผลงานทางวิชาการเพื่อตีพิมพ์เผยแพร่สู่สาธารณะได้ อีกด้วย

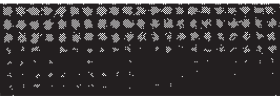


(1) บทความวิชาการ หมายถึง บทความที่นำเสนอการวิเคราะห์หรือวิจารณ์ กฎหมายทั้งทางทฤษฎีและทางปฏิบัติที่จะก่อให้เกิดประโยชน์ในด้านองค์ความรู้หรือการนำไป ประยุกต์ใช้ต่อไป

(2) บทความวิจัย หมายถึง บทความที่เขียนขึ้นจากงานวิจัยทางนิติศาสตร์ เพื่อนำเสนอข้อค้นพบหนึ่งข้อค้นพบจากงานวิจัยอย่างเป็นระบบ

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การเตรียมต้นฉบับ ผู้เขียนควรพิมพ์ด้วยกระดาษ A4 พิมพ์หน้าเดียว โดยจัดพิมพ์ด้วย Microsoft Word for Windows และควรตรวจสอบความถูกต้องของการสะกดคำและไวยากรณ์ รวมทั้งความสม่ำเสมอของการใช้คำที่ทับศัพท์ภาษาอังกฤษทั้งบทความ ทั้งนี้ ผู้เขียนควร รมณ์ตระวังในเรื่องต่อไปนี้

(1) ชื่อเรื่องไม่ยาวเกินไปแต่ครอบคลุมสาระทั้งเรื่อง

(2) ชื่อผู้เขียนและชื่อบทความมีทั้งภาษาไทยและภาษาอังกฤษ

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The Issue of Freezing without Delay in Counter Financing of Terrorism and the Implementation under Indonesian Law

Go Lisanawati*

บทคัดย่อ

ข้อความตอนสำคัญจากตราสารระหว่างประเทศและมาตรฐานระหว่างประเทศอื่น ๆ ซึ่งเกี่ยวกับการจัดหาเงินทุนให้การก่อการร้าย ได้แก่ ผู้ก่อการร้ายรายบุคคล และ/หรือกลุ่มของผู้ก่อการร้าย (ทั้งผู้ก่อการร้ายหัวรุนแรงและผู้ก่อการร้ายเคร่งศาสนา) สามารถมีอยู่ ดำรงชีวิต และปฏิบัติการได้เป็นอย่างดีโดยอาศัยกิจกรรมการจัดหาเงินทุน ทั้งที่เป็นกิจกรรมที่ชอบด้วยกฎหมายและ/หรือ กิจกรรมที่มีชอบด้วยกฎหมาย การจัดหาเงินทุนให้การก่อการร้ายมิได้พิจารณากระบวนการฟอกเงินว่าเป็นเป้าหมายหลักสำหรับการทำกิจกรรมทางการเงิน หากแต่เน้นไปที่กระบวนการในการได้มาซึ่งทุนเป็นจำนวนมากเพื่อที่จะสนับสนุนและทำให้ผู้ก่อการร้ายสามารถกลับมาเคลื่อนไหวให้บรรลุวัตถุประสงค์ของตน หนึ่งในระบบที่สำคัญซึ่งถูกนำมาใช้ในบริบทของการจัดหาเงินทุนให้การก่อการร้ายคือ การใช้วิธีการรับทรัพย์สินซึ่งเป็นกลไกสำคัญเพื่อตัดการสนับสนุนอาชญากรรมและรากเหง้าของกิจกรรมการก่อการร้าย กลไกการอายัดโดยปราศจากความล่าช้าซึ่งถูกระบุไว้ในข้อมติของคณะมนตรีความมั่นคงแห่งสหประชาชาติที่ 1267 (UNSCR 1267) ควรจะถูกนำมาใช้ในกฎหมายภายในเพื่อที่จะตอบโต้กับการจัดหาเงินทุนให้การก่อการร้าย กฎหมายหมายเลข 9 ปี ค.ศ. 2013 ของสาธารณรัฐอินโดนีเซียเกี่ยวกับการป้องกันและกำจัดการจัดหาเงินทุนให้แก่อาชญากรรมการก่อการร้ายได้ควบคุมความล่าช้าเกินควรสำหรับการอายัดเงินทุนของผู้ก่อการดังที่ระบุไว้ในมาตรา 22 นอกจากนี้ยังมีกระบวนการซึ่งใช้ระยะเวลาอันยาวนานอีกกระบวนการหนึ่ง ซึ่งควรถูกทำให้เกิดผลในการปิดกั้นกระบวนการในการได้มาซึ่งทุน งานเขียนนี้ประเมินอุปสรรค รวมถึงโอกาสในการใช้การอายัดโดยปราศจากความล่าช้าให้เกิดผลในบริบทของประเทศอินโดนีเซีย

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Abstract

The important passages through the international instruments and other international standard relating with financing of terrorism is that individual terrorist and/or terrorist organization, both of extremist and fundamentalist terrorist, can exist, live, and operate well from the activity of financing, through legal and/or illegal activity. Financing of terrorism does not put laundering process as the main goal to do their financing activity, but relied more on the process how to get huge funding to support and re-activated the terrorist in order to achieve their purpose. One of the important regimes which are approached in the context of financing of terrorism is using asset forfeiture as an important mechanism to cut the blood of crime and the root of terrorism activity. Freezing without delay mechanism as mentioned in the United Nation Security Council Resolution (UNSCR 1267) should be implemented in domestic legislation to counter financing of terrorism. The Law Number 9 of 2013 of the Republic of Indonesia concerning Prevention and Eradication on Financing of Terrorism Crime regulates undue delay for terrorist fund freezing as mentioned in Article 22. Further, there are also another long process which should be implemented in blocking the process. This working paper will assess the obstacles as well as the opportunity to implement the freeze without delay in Indonesian context.

Keywords: Freezing without delay, counter financing of terrorism, threat and opportunity, mechanism of blocking



1. What is Financing of Terrorism?

The International Convention for the Suppression of the Financing of Terrorism is actually designed to tackle the involvement of funds of person and/or corporation for individual terrorist or terrorist organization's activity. Interrelated with element of a crime of the financing of Terrorism, Neil Boister explained:

The material element of crime is the 'collection or provision' of funds. This can be done by any means, direct or indirect, but it must be unlawful. 'Funds' do not include only money, but mean 'asset of every kind. The mental element of the crime is far more complex. Provision or collection of funds must be wilful, but it must occur with either the intention or the knowledge that the funds are to be used to carry out on of a (by implication terrorist) set of actions. The first set of actions incorporates by reference the acts criminalized in previous conventins – hijacking, hostage-taking, etc. The second set of actions must be intended to cause death or serious injury to a limited class of persons-civilians and non combatants. But the ulterior purpose of the intentionally violent act is critical: intimidation of a population or compulsion of a government or IGO to do or not to do something. The funding does not actually have to result in the commission of a hijacking, etc or of violence (article 2(3)); it need only be intended for that purpose.¹

As described by Neil Boister above, it can be understood that financing of terrorism has the same dangerous effect as terrorist itself. The element of financing of terrorism is stressing out in the element of *mens rea*. Intentional criminal act which is using the theory of willfully and theory of knowledge (*met welen and met weten*). Other perspectives are given by another scholar which mentioned that terrorist financing actually has its myth. Jean-Charles Brisard through his research mentioned that there are myth related with Saudi terrorist financing:

First myth is that terrorism doesn't need money to terrorize... This trend has proven to be correct when dealing with simple-structured organizations, Palestinian type in the 70s and Algerian type in the 80s... But to apply that idea

¹ Neil Boister. 2012. *An Introduction To Transnational Criminal Law*. Oxford University Press, Great Britain, p. 68.

to the entire al-Qaida network is not only irrelevant but simply turns to an end the war against terrorism financing...

Another myth impeding the war against terrorism financing is that al-Qaida uses offshore facilities to cover its operations...

The third myth is to focus on the Hawala alternative remittance system as the main tool for moving terror money... Hawala is an informal system to transfer money. It is based on a short term, discountable, negotiable, promissory note (or bill of exchange). While not limited to Muslims, it has come to be identified with "Islamic banking". The system is mostly use in Pakistan, India, the Gulf countries and Southern Asia...

The fourth myth us that the Saudia never financed or intended to finance al-Qaida because it would have been contrary to their own interest... Saudi Arabia has proven in the past it could play a risky game not to undermine its own security...²

Other problems related with financing terrorism is the challenge which may be faced by nations. Jean-Charles Brisard mention there are four challenges which are including Cultural challenge, Political challenge, Financial Challenge, and Legal Challenges. Culturally, law enforcement agencies and officials face a dramatic change as they were used to deal with organized structures or State-sponsored organization. Legal challenge is dealing with a state that doesn't fully apply and effectively implement international or common prevention statutes and principles regarding terrorism.³ Mellisa Bull added: "Mary Douglas' work on risk development from Durkheim's explanation of the relations between crime and the conscience collectives. She draw attention to the implication of political judgements that are made about the relationship between the idea of risk and the structure of institutional authority, noting the role of the idea of risk in societal conversation about morality and identity..."⁴

Financing of Terrorism can be categorized as an Organized Crime. In conducting the activity, person and/or corporations can collect funds in a well organized manner.

² Jean-Charles Brisard. "Terrorism Financing: Roots and trends of Saudi Terrorism Financing", Article, Report prepared for the President f the Security Council, United Nations, 19th of Dec, 2002, downloaded from: <http://www.investigativeproject.org/documents/testimony/22.pdf>, pp. 6 – 10.

³ *Ibid*, pp. 29-34.

⁴ Mellisa Bull. **Punishment & Sentencing: Risk, Rehabilitation and Restitution**. Oxford University Press. Australia& New Zealand, 2010, p. 107.



According to the characteristic of Organized Crime, Geoff Dean, Ivar Fashing, and Petter Gottschalk have reminded about the possibility of illegal business entrepreneurialism in organized crime matter, that is “criminal entrepreneurs could not operate as successfully as they do without the involvement at some level of a host of ‘legitimate’ professionals smoothing the way forward for their crime business”⁵ It means that authorized law enforcers shall be aware about the possibility of professionals involved in legal business entity that maybe connected with illegal business to do illegal activity on financing terrorism.

Indonesia as a part of United Nations has commitment to guarantee the peacemaking life of their citizen and other nation. Therefore, International standard requires every nation to comply by regulating the anti terrorist financing. This Anti financing of terrorism Law Number 9 of 2013 was actually enacted to put Indonesia as an International participant country in order to counter the financing of terrorism. In this sense, Indonesia is trying to comply with the ratification process after signing the International Convention For the Suppression of the Financing of Terrorism into the Law Number 6 of 2006 concerning the ratification of the International Convention For the Suppression of the Financing of Terrorism. Regarding the consideration point of the Law Number 9 of 2013, in order to protect nation, to achieve social welfare, to enlighten Indonesian citizen, and to maintain world peace based on freedom, eternal peace, and social justice, Government of Indonesia should take decisive action against all threats which can interfere security of citizen and sovereignty of nation, including terrorism criminal act and other activity which support terrorism. Based on that reality, the financing mechanism is considering as the main factor which is fully supporting terrorism act. The Government of Indonesia should regulate financing of terrorism. Every single action which is against the effort to combat terrorism must be punished.

The International Monetary Funds and The World Bank defined the financing of terrorism as the financial support, in any form, of terrorism or of those who encourage, plan or engage in it.⁶ Thus Sener Dalyan in his paper explained:

⁵ Geoff Dean, Ivar Fashing, and Petter Gottschalk. **Organized Crime: Policing Illegal Business Entrepreneurialism**. Oxford University Press, 2011, p. 93.

⁶ The World Bank and International Monetary Funds, “Reference Guide to Anti Money Laundering and Combating the Financing of Terrorism”, **Monograph**, Washington DC, 2003.

However, limiting the resources available to terrorist groups by effective financial control can prevent some attacks from taking place; stopping the transfer of even small amounts of money may save lives, or at least can reduce the possible impact of attacks which cannot be prevented. Indeed, besides the operational costs terrorist groups need funds for “planning, recruitment, procurement, preparation, delivery of materials, communications, persuasion, propaganda, incitement, infrastructure of safe houses/sleeper cells, reconnaissance of targets, and assault on targets. (Rudner, 2006:32-58). In addition, CFT can provide assistance in investigation how a terrorist attack has been carried out, identifying and detaining other members and supporters of the group having committed the act of terrorism, and better understanding the group’s modus operandi and organizational structure. In short, “financial controls can perform preventive, deterrent, investigative, and analytical functions, all of which are vital for curtailing acts of terrorism”. (Biersteker/Eckert 2007a:3). In other words CFT constitutes the decisive and core part of the comprehensive fights against terrorism.⁷

The International Convention for the Suppression of the Financing of Terrorism, in Article 2, mentions that:

Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

- (a). An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or
- (b). Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities of armed conflict, when the purpose of such act, by its nature or contract, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

⁷ Sener Dalyan, “Combating the Financing of Terrorism: Rethinking Strategies for success”, *Paper, Defence Against Terrorism Review* Vol 1. No. 1, Spring 2008, 137-153, ©COE-DAT, ISSN: 1307-9190, p. 138.



Therefore, the Convention provides on how terrorist activities need the support of any funding, both from legitimate sources and/or illegal sources. Financing of Terrorism is different from Money Laundering regarding the source of funds. Both of crimes can be obtained from illegal activities, but financing of terrorism can be obtained from legal activity. Financing of terrorism funding sources varies more than money laundering. Hardoin/Weichhardt, as quote by Sener Dalyan, explains:

Terrorism is funded from various sources and in many different ways, the methods and sources used vary from country or region to region as well as terrorist groups to terrorist groups. Especially in the past, one way of funding terrorism was the support provided by states. However, as a result of the constant response of the international community, especially of UNSC resolutions authorizing economic sanctions used to persuade state sponsors...

With the decline of the state sponsorship, instead of decreasing their activities, terrorist turned towards and relied increasingly on private financing...

Legitimate business are used by terrorist groups and their supporters either to raise funds in support of logistic and operational requirement or to cover some activities of terrorist groups and as a front for money laundering (Chandler, 2005:3). The abuse of some charities constitutes another legitimate terrorist funding sources. Possible indirect fund transfers to terrorist from local authorities under the umbrella of legitimate business, door to door requests, personal donations, cultural events indirectly organised by terrorist groups, investment in stocks, real estate, sale of publications, appeals to wealthy members of the community, collection of membership dues can also be exemplified for the financing of terrorism in the sense of legitimate funding.⁸

While Claudia Costa Storti and Paul De Grauwe explains about the typical operational characteristic of terrorist groups and the financing as below:

1. Low costs/low technology made possible some recent attacks with a great impact on human lives, on nations, and on economies (e.g., 9/11 New York, Madrid, London, and Mumbai);
2. Flexible and decentralized organizations with independent decisions and actions;
3. Common ideology with indiscriminate targets (no purpose related to profit);

⁸ Ibid, p. 139-140.

4. Financial means are needed to plan and execute (future) terrorist attacks; there is only a limited need to hide assets; and
5. Self-financing with possible criminal activities but also obtaining money from legal sources (e.g. donations and charity organizations).

Terrorist use different sources of money, depending on their motivations, their mode of operations, and the resistance they face from law enforcement.⁹

In fact, the financing of terrorism is as dangerous as the terrorist activities itself, and maybe more dangerous than the terrorist activities since it can manifest in many forms. Concerning on the effect of financing of terrorism, The Financial Action Task Force (FATF) Recommendation on International Standards on Combating Money Laundering and The Financing of Terrorism and Proliferation of 2012 mentioned that:

Countries need to have the authority, and effective procedures or mechanisms, to identify and initiate proposals for designations of persons and entities targeted by Resolution 1267 (1999) and its successor resolutions, consistent with the obligations set out in those Security Council resolutions. Such authority and procedures or mechanisms are essential to propose persons and entities to the security council for designation in accordance with Security Council list based programmes, pursuant to those Security Council resolutions. Countries also need to have the authority and effective procedures or mechanisms to identify and initiate designations of persons and entities pursuant to S/RES/1373 (2001), consistent with the obligations set out in the Security Council Resolution.

There are 3 (three) major responsibilities concerning the countries to identify a competent authority:

1. Proposing to the 1267 Committee, for designation as appropriate, persons and entities that meet the specific criteria for designation, as set forth in Security Council resolution 1989 (2011) (on Al-Qaida) and related resolutions, if that authority decides to do so and believes that it has sufficient evidence to support the designation criteria;
2. Proposing to the 1988 committee, for designation as appropriate, persons and entities that meet the specific criteria for designation, as set forth in

⁹Claudia Costa Storti and Paul De Grauwe. *Illicit Trade and The Global Economy*. 2012. Massachusetts Institute of Technology, Cambridge – Massachusetts – London – England, p. 33



- Security Council Resolutions 1988 (2011) (on the Taliban and those associated with the Taliban in constituting a threat to the peace, stability and security of Afghanistan) and related resolutions, if that the authority decides to do so and believes that it has sufficient evidence to support the designation criteria; and
3. Designating persons or entities that meet the specific criteria for designation, as set forth in resolution 1373 (2001), as put forward either on the country's own motion or, after examining and giving effect to, if appropriate, the request of another country, if the country receiving the request is satisfied, according to applicable legal principles, that a requested designation is supported by reasonable grounds, or a reasonable basis, to suspect or believe that the proposed designee meets the criteria for designation in resolutions 1373 (2001).

Those three major responsibilities in identifying persons or entities involved or to be involved in the terrorism action such as Al-Qaida and the Taliban refers to the criteria of:

- Should has enough and sufficient evidence to decides designation criteria; and
- In related with the requesting and requested process of mutual assistance, and to apply the principles, there should be reasonable grounds, or a reasonable basis in suspecting or believing the designation criteria.

Further, the FATF added qualification that the competent authorities of countries when deciding whether or not to make a proposal for designation, they should apply an evidentiary standard of proof of "reasonable grounds" or "reasonable basis". Other important thing mentioned in UNSCR 1373 is in applying the legal standard of their own legal system regarding the kind and quantum of evidence in designating reasonable grounds or basis existing. The suspected persons (person and/or organization) should be decided whether involved or not in terrorism activity. Countries should initiate a freezing mechanism. They should provides detailed information relating with the proposed name, sufficient identifying information to allow for the accurate and positive identification of persons and entities in particular, and other specific information supporting a determination that the person or entity meets the relevant criteria for designation.

There are several procedures should be implemented by country in proposing names, both under UNSCR 1267 (1999) and UNSCR 1373 (2001) and its successor resolutions, such:

- Follow the procedures and standard forms for listing;
- Providing as much relevant information as possible on the proposed name, the sufficient identifying information to allow for the accurate and positive identification of individuals, groups, undertaking, and entities, and to the extent possible, the information required by interpol to issue a special Notice;
- Providing a statement of case which contains as much detail as possible on the basis for the listing. It is including the specific information supporting a determination that the person or entity meets the relevant criteria for designation; the nature of information supporting documents or information that can be provided; details of any connection between the proposed designee and any currently designated person or entity.

Thus before the proposed name is released, the requesting country should provide a good will to the requested country by providing information and/or document as detail as required in both of UNSCR 1267 (1999) and UNSCR 1373 (2001).

In 2013, Indonesia has legislated the Law Number 9 of 2013 concerning Prevention and Eradication of Financing of Terrorism, in order to cut-off funding to terrorist. Another purpose of anti financing terrorism legislation is relating with the issue that during the time, the people who provide or facilitate or support or fund terrorism have never been touched. The problem of terrorism is not only relating with focus on deradicalization of terrorist, but also on how to cut-off the financing, even the law of anti-terrorism has already prohibited that action. When in 2011, the Financial Action Task Force valuing Indonesia in the position as a country which is not fully supportive or not providing sufficient progress in addressing the law of anti financing of terrorism as mentioned as the Convention for the Suppression of the Financing of Terrorism of 1999. Thus in 2012, Indonesia has been classified as non-cooperative countries. As reported by Ben Otto:

The law calls for up the life imprisonment for people convicted of financing terrorism. Companies can face fines of as much as 100 billion rupiah (\$10.4 million) and the seizure of assets.



The law also creates strict procedures for law-enforcement officials to name a person or corporation a terrorist suspect, stipulating that the head of the National Police must ask the Central Jakarta Court, a district-level court in the capital, to validate a request to place a person or corporation on a terrorist suspect list. The court will have 30 days to make a decision.

Indonesia saw a number of large-scale terrorist attacks a decade ago, include the bombing in Bali in 2002 that killed more than 200 people, but improved counter terrorism effort since then have proved largely successful in quashing the biggest threats. Still, state security experts say militants continue to operate out of strongholds and training campus in Central Java and Eastern provinces of Central Sulawesi and West Nusa Tenggara.¹⁰

The article above has just ensured that the contribution of financing funding to the terrorist activities can endanger Indonesia as a peaceful country and the whole world since the terrorist could continue their cells development and operate their activities.

Otherwise, on February 22, 2013, Indonesia faced a deadline from the Organization for Economic Cooperation and Development's (OECD) Financial Action Task Force to strengthen Indonesian's legal resolve against terrorist organizations. If Indonesia ignore it, Indonesia will face suspension from OECD. Even though Indonesia already has the Law on Terrorism and financing of terrorism. Normally, there is no country welcoming that suspension threat since it will give great impact to the economic life of a country. Its emergencies put Indonesian Law on Counter Financing of Terrorism as the heart of the terrorist eradication. Barret, as quote by Adam Fenton and David Price, mentioned: "while CFT has not been a central element in Indonesia's counter terrorism operations to date, globally, it has been a key importance in the war on terror and the prevention of major international terrorist attacks".¹¹ From the "follow the money" approach, it can be said that through cutting the money as the heart of the crime itself will stop the circulation of the crime. It means that the benefit of cut-off approach should be precisely used.

¹⁰ Ben Otto, "Indonesia Passes Law to Fight Terror Financing", Article, downloaded from <http://online.wsj.com/news/articles>

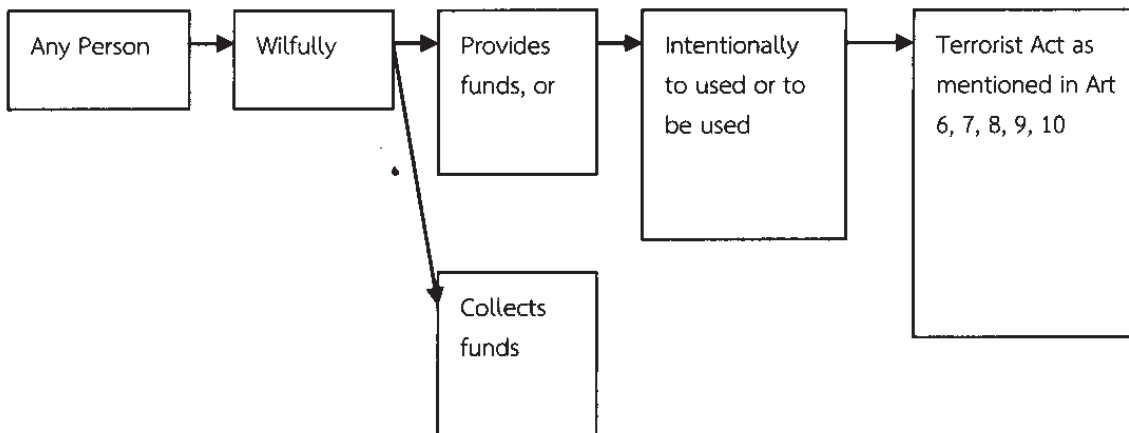
¹¹ Adam Fenton and David Price. "Forbidden Funds – Indonesia's New Legislation for Countering the Financing of Terrorism", Article, Australian Journal of Asian Law, 2014, Vol 15 No. 1, Article 7: 1 – 19 (p. 2).

2. The Criminalisation of Financing of Terrorism Act under The Law Number 9 of 2013

There are 2 (two) legal platform that can be used to combat financing of terrorism before the Law number 9 of 2013 was enacted. Those laws are Anti - Terrorism Law and The Law Number 8 of 2010 concerning prevention and eradication of money laundering. Article 11 of Anti-Terrorism Law regulate:

Shall be punished with imprisonment for a minimum of 3 (three) years and a maximum of fifteen (15) years, any person who willfully provides or collects funds with the intention to be used or should know will be used in part or in whole to commit criminal acts of terrorism as defined in Article 6, Article 7, Article 8, Article 9, and Article 10.

Article 11 of Anti-Terrorism Law above criminalized the action of any person who intentionally (knowingly and wilfully) provides or collects any funds for used or to be used as a part or as a whole to commit Terrorism. The elements of this article shall be:



Whether Article 6 of the Anti-Terrorism Law states that:

Any person who intentionally using violence or the threat of violence to cause a terror atmosphere or fear to people massively or cause a mass victims, by depriving freedom or losing person's life and property, or cause a damage or destruction of strategic vital objects or environment or public facilities or international facilities, shall be punished with death or life imprisonment or imprisonment for a minimum of 4 (four) years and a maximum of 20 (twenty) years.

Other is Article 7, which is regulated similarly with Article 6, but with one specific element of *mens rea*, as:

Any person who intentionally using violence or the threat of violence **willfully** to cause a terror atmosphere or fear to people massively or cause a mass victims, by depriving freedom or losing person's life and property, or cause a damage or destruction of strategic vital objects or environment or public facilities or International facilities, shall be punished with death or life imprisonment.

The element of *mens rea* of Article 7 above is resulting to the maximum penal sanction which is heavier than Article 6. While others articles, such as Article 8 is relating to the terrorism action relating with the safeguard measures of airplane, or buildings, or endangering people in the airplane or etc. Article 9 is relating to the act of submitting, controlling, carrying, or having firearms, ammunition, explosives or harmful ingredient which can cause terrorism action. Article 10 is relating with the use of chemical weapon, biological weapons, radiological weapons, radiological, microorganism, etc which can endanger people, destruct strategic vital objects, environment, public facilities, or international activities.

Then Article, 13 of Anti Terrorism Law states:

Any person who willfully gives aid or ease of perpetrators of terrorism, with:

- a. give or lend money or other goods or assets of the perpetrators of criminal acts of terrorism;
- b. concealing the perpetrators of terrorism; or
- c. concealing information about terrorist acts,

is shall be punished with imprisonment of at least three (3) years and a maximum of fifteen (15) years.

That Article 13 is actually trying to prohibit any action that can make terrorism easily conducted. Through Article 11 and Article 13 of the Law of Anti-Terrorism shows that Indonesia has not only prohibited terrorist action, but also financing of terrorism. Another important thing also is that Indonesia is also aware of the issue of asset freezing. It can be understood from Article 29, which mentioned: "The investigator, prosecutor, or the judge has authorized to order the banks and financial institutions to do the blocking of assets of any person who is known or reasonably suspected to be the proceeds of crime, terrorism and / or criminal offenses relating to terrorism".

Another legal basis is The Law on Anti Money Laundering (the Law Number 8 of 2010) in Article 2 subparagraph (2) has regulated that:

Assets of which are recognized or of which are reasonably alleged to be used and/or directly or indirectly used for the terrorist activity, terrorist organization, or individual terrorism, shall be equalized as the result of criminal act as set forth...". Article 2 mentions the financing of terrorism as an initial or a predicate of crime.

Both of Law of Anti Terrorist and Anti-Money Laundering has shown the will of the Government of Indonesia in prohibiting the criminal act of terrorist financing in the same way to criminalize terrorist act and money laundering act itself.

United Nations Security Council resolution criminalized the financing of terrorism, as:

<p>(i) Any person or entity:</p> <ul style="list-style-type: none"> - Participating in the financing - Planning; - Facilitating; - Preparing; or - Perpetrating <p>Of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of:</p> <ul style="list-style-type: none"> - Supplying, selling, or transferring arms and related material to - Recruiting for; or - Supporting acts or activities: <p>a. Al-Qaida, or any cell, affiliate, splinter group or derivative thereof;</p> <p>b. Designated and other individuals, groups, undertakings and entities associated with the Taliban in constituting a threat to a peace, stability and security of Afghanistan</p>	<p>UNSCR 1267 (1999), 1989 (2011) and their successor; UNSCR 1267 (1999) 1988 (2011) and their successor</p> <p>UNSCR 1267 (1999), 1989 (2011) UNSCR 1267 (1999), 1988 (2011)</p>
<p>(ii) any undertaking owned or controlled, directly or indirectly, by any person or entity designated</p>	<p>UNSCR 1267 (1999), 1989 (2011) and</p>



under subsection mentioned, or by persons acting on their behalf or at their direction.	UNSCR 1267 (1999), 1988 (2011)
<ul style="list-style-type: none"> - Any person or entity who commits or attempts to commit terrorist act, or who participates in or facilitates the commission of terrorist acts; - Any entity owned or controlled, directly or indirectly, by any person or entity designated under the subsection mentioned; or - Any person or entity acting on behalf of, or at the direction of, any person or entity designated under subsection mentioned 	UNSCR 1373 (2001)

The criminalisation as mentioned by UNSCR above obliged countries to obey and criminalize in the same matter. Therefore, countries should provide themselves also with a mechanism through which a designated person or entity can challenge their designation, with a view to having it reviewed by a competent authority or a court. Court and or competent authority shall be very careful relating with designated person or entity who is involved and engaged to the terrorism activities through financial tools.

During this time, Indonesia was categorized as the countries who is enabled to suppress the financing of terrorism effectively through the legal system. Now, Indonesia can be categorized equally with countries who has concerns about financing of terrorism eradication. Under the Law Number 9 of 2013, the criminalization of financing terrorism acts, are:

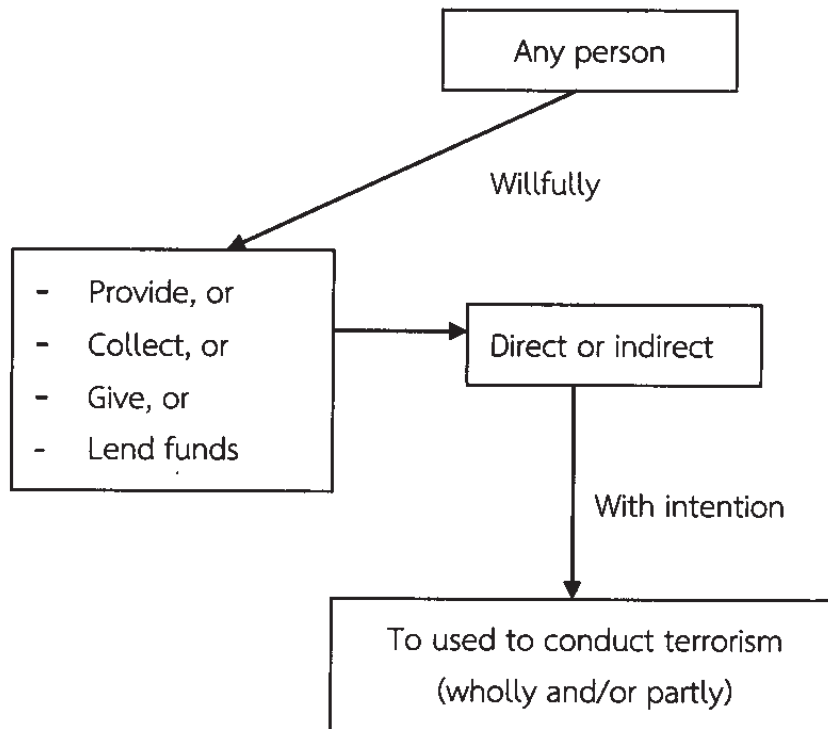
1. Criminal acts of financing of terrorism as mentioned in Article 4 – Article 6
2. Other criminal act related to financing of terrorism as mentioned in Article 9 – Article 10.

For the criminal acts of financing of terrorism as mentioned in Article 4, stated that:

Any person who willfully provide, collect, give, or lend funds, directly or indirectly, with intention to used wholly or partly to conduct terrorism, terrorist organizations, or terrorist shall be punished as a criminal act of financing of

terrorism for imprisonment of 15 (fifteen) years and fine of Rp. 1.000.000.000,00 (one million rupiahs).

The elements of Article 4 are:



Article 5 of the Law Number 9 of 2013 states that:

Any person who does conspiracy, attempt, or assistances of criminal offense of financing of terrorism shall be punished as a criminal act of financing of terrorism as same as Article 4

Thus, Article 6 of the Law Number 9 of 2013, states:

Any person who intentionally plans, organiser, or incites/encourages others to commit the offence set out in the Article 4 shall be punished as committing the offence of terrorist financing with a penalty of life imprisonment or a maximum of 20 (twenty) years imprisonment

Article 5 is actually other variant of the criminal act as conspiracy, attempt, or assistances, which can easily make the act of financing of terrorism. Article 6 is about act of planning, organizing, or encouraging other people to do the financing of terrorism. Adam Fenton and David Price comments on Article 6 as below:



This Article (- Article 6, writer) is interesting. First, because it provides two seemingly contradictory penalties, that is life imprisonment or a maximum of 20 years. Secondly, the penalty here for planning, organising or inciting is harsher than the penalty in art 4, and arguably far wider in scope. It is conceivable that the section could apply to fiery speeches by Islamist clerics (taklim) that include a call to make donations to jihadist groups. Clearly where the group was listed that would constitute a crime. Where it is known, or ought to be known, that the funds would be used for a terrorist act, this would also constitute a crime under art 6 and expose the speaker to a maximum penalty of life imprisonment. The penalty's harshness presumably reflects the gravity of the offence for those in positions of authority, such as clerics or teachers, to abuse their position by encouraging others to commit the crime of funding terrorism.¹²

Regarding with the comment from Adam Fenton and David Price above, it can be understood from the perspective of sanction system in Indonesia. Due to Article 10 of Criminal Code (or KUHP), the punishment is:

Basic punishment:

1st, capital punishment

2nd-ly, imprisonment, inter alia with Article 12, the imprisonment is for life or temporary

3rd-ly, light imprisonment,

4th-ly, fine

5th-ly, penalties cover (is a penalty which is imposed to people who commit a crime punishable by imprisonment, as driven by the intent that should be respected)

Additional punishment:

1st, deprivation of certain rights

2nd-ly, forfeiture of a specific property

3rd-ly, publication of a judicial verdict

According to Article 10 of Criminal Code of Indonesia, especially relating with basic punishment, it can be said that the first place of punishment is the highest punishment. About the imprisonment, Indonesia has life imprisonment, and the other is temporary imprisonment, minimum is 1 day, and maximum is 15 years. While the form

¹² *Ibid*, p. 11.

of 20 years of imprisonment is a form of punishment which will be implemented under special circumstances categorized as gravity of punishment. Because 20 years of imprisonment is a special punishment as a gravity, then the position is below the capital punishment and life imprisonment. Thus before capital punishment, it shall be considered to impose life imprisonment. Before life imprisonment shall be imposed, then it shall be considered to imposed the 20 years of imprisonment. It means before imposing with the highest penalty, there should be a consideration to impose the lower penalty first.

In relation with the issue of penalty of Article 4 and Article 6, it can be justified in the sense that what people plans, organize, and what encourages people to commit Article 4, can be considered as the same level of actor of terrorist financing itself. Article 9 and Article 10 are categorized as other crimes related to terrorist financing. Article 9 is called as Anti Tipping off provision, and Article 10 stipulates directors, commissioners, managers, or staff of Financial Service Providers (FSPs) from providing information regarding a suspicious transaction to any customer, directly or indirectly.

3. Freeze Without Delay In the Perspective of Indonesian Law

The FATF 2012 part C regarding Freezing and Prohibiting dealing in funds or other designated persons and entities mentioned some important explanations. It mentioned that the obligation for countries to take freezing action upon the funds and/or other assets of designated persons or entities, and prohibit it. The freezing should without delay. Completely, the FATF mentioned:

For resolution 1373 (2001), the obligation for countries to take freezing action and prohibit the dealing in designation at the (supra) national level, as put forward either on the country's own motion or the request of another country, if the country receiving the request is satisfied, according to applicable legal principles, that a requested designation is supported by reasonable grounds, or a reasonable basis, to suspect or believe that the proposed designee meets the criteria for designation in resolution 1373 (2001)...

Countries should require all natural and legal persons within the country to freeze without delay and without prior notice, the funds or other assets of designated persons and entities. The obligation should extend to: all funds or other assets that are owned or controlled by the designated person or entity,

and not just those that can be tied to a particular terrorist act, plot or threat; those funds or other assets that are **wholly or jointly owned or controlled, directly or indirectly**, (-underline by the writer) by designated persons or entities; and the funds or other assets derived or generated from the funds or other assets owned or controlled directly or indirectly by designated persons or entities, as well as funds or other assets of persons and entities acting on behalf of, or at the direction of, designated persons or entities.

According to the UNSC Resolution 2083 (2012), the assets freeze applies to individuals, groups, undertakings and entities whose names are referred to in the Al-Qaida Sanction list of the Al-Qaida sanctions committee. The term freeze without delay actually means:

Freeze without delay the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities, including funds derived from property owned or controlled directly or indirectly, by them or by persons acting on their behalf or at their direction, and ensure that neither these nor any other fund, financial assets or economic resources are made available, directly or indirectly for such persons' benefit, or by their nationals or by persons within their territory.

The FATF Recommendation explains that:

In relation to Paragraph 1 of SR III, the obligation referred to is a freeze without delay funds or other assets of designated individuals and entities. The INSR III defines "without delay", in relation to UNSCR 1373, to mean that assets should be frozen upon having "reasonable grounds, or a reasonable basis, to suspect or believe that a person or entity is a terrorist, one who finances terrorism or a terrorist organization".

"Without delay" must therefore be understood to apply also to the time taken to designate an individual or entity pursuant to UNSCR 1373.

UNSCR 1267 (1999) and UNSCR 1373 (2001) give a guideline in order to conduct freezing without delay to the terrorist related funds or other assets. The guidelines are:

- In relating with authority to freeze, unfreeze, and prohibition dealing in funds or other assets of designated persons, countries should prohibit by enforceable means of transfer, conversion, disposition or movement of funds or other assets.

Therefore there is 2 (two) option for providing the authority to freeze and unfreeze terrorist funds or other assets:

- (i) Empowering or designating a competent authority or a court to issue, administer and enforce freezing and unfreezing actions under relevant mechanisms, or
 - (ii) Enacting legislation that places responsibility for freezing the funds or other assets of designated persons publicly identified by a competent authority or a court on the person or entity holding the funds or other assets and subjecting them to sanctions for non-compliances.
- The authority to freeze and unfreeze funds or other assets should also extend to funds or other assets derived or generated from funds or other assets owned or controlled directly or indirectly by such terrorist, those who finance terrorism, or terrorist organisations.
 - The option that may choose by the authority should be clearly identifiable competent authorities responsible for enforcing the measures.
 - The competent authorities shall ensure that their nationals or any persons and entities within their territories are prohibited from making any funds or other assets, economic resources or financial or other related services available, directly wholly or jointly, for the benefit of: designated persons, terrorist; those who finance terrorism; terrorist organisations; entities owned or controlled, directly or indirectly, by such persons or entities; and persons and entities acting on behalf of or at the direction of such persons or entities
 - For freezing procedures, the Jurisdiction should develop and implement procedures to freeze the funds or other assets without delay and without giving prior notice to the persons or entities concerned.
 - Persons and entities holding such funds or other assets should be required by law to freeze them and should furthermore be subject to sanctions for non-compliance with this requirement.
 - Any delay between the official receipt of information provided in support of a designation and the actual freezing of the funds or other assets of designated persons undermines the effectiveness of designation by affording designated persons time to remove funds or other assets from identifiable accounts and places.



The procedures must ensure:

- (i) The prompt determination whether reasonable grounds or a reasonable basis exists to initiate an action under a freezing mechanism, and
- (ii) The subsequent freezing of funds or other assets without delay upon determination that such grounds or basis for freezing exist.

Regarding with this procedure, each jurisdiction should develop efficient and effective systems for communicating actions taken under their freezing mechanisms to the financial sector immediately upon taking such action. Thus each jurisdiction should provide clear guidance, particularly financial institutions and other persons or entities that may be holding targeted funds or other assets on obligations in taking action under freezing mechanisms.

- Jurisdiction should be able to freeze, if appropriate, seize any funds or other assets that they identify, detect, and verify, in accordance with applicable legal principles, for any funds or other assets as being used by, allocated for, or being made available to terrorist, including those who finance terrorists and/or organisation terrorists.
- Under the Convention on Terrorist Financing, the freezing or seizing mechanism **can be conducted in the context of a criminal investigation or proceeding, and shall be without prejudice to the rights of third parties acting in good faith** (vide SR III of FATF).

The Law Number 9 of 2013 of Republic of Indonesia, freezing (blocking) mechanism, as stated in the Article 22. Under the Article 22: “the blocking may be implemented to the assets which is directly or indirectly or known or suspected used or to be used, wholly or partly to financing of terrorism”. The meaning of freezing without delay is implemented once there is suspected used or to be used to the activity of terrorist financing. But, Article 23 gives its explanation that blocking as mention in this scheme as below:

- (1) Blocking as referred in Article 22 conducted by INTRAC, an Investigator, a Public Prosecutor, or a Judge by asking or ordering FSPs or Blocking the competent authority to performs.
- (2) Blocking mechanism as referred in Article 22 conducted by INTRAC, an Investigator, a Public Prosecutor, or a Judge with Court Order of Central Jakarta District Court to request or instruct FSP or another competent authority to performs.

- (3) **The request to performs blocking by INTRAC** (*underline by writer*) to FSP or to other competent authority as referred in the subparagraph (1) is categorized as an administration action.
- (4) The Request to performs blocking by INTRAC or order of an investigator, a public prosecutor, or a judge as referred in the subparagraph (1) shall be made in written form to the clearly indicating the following:
 - a. Name and position of the officers who request or ordered;
 - b. Identity of the designated person or corporation that the funds will be blocked;
 - c. The blocking reason; and
 - d. the funds located
- (5) FSPs or the other competent authority shall carry out the blocking immediately after the letter of request or order is received by INTRAC, an Investigator, a Public Prosecutor, or a Judge in accordance with the subparagraph (1) mentioned above.
- (6) Blocking mechanism is conducting in 30 (thirty) days periods of time.
- (7) FSP or other competent authority as referred in subparagraph (1) shall submit the minutes of blocking execution to:
 - a. INTRAC, investigator, public prosecutor, or judge; and
 - b. The parties that funds are blocked
- (8) The blocked funds shall remain in the FSP or other competent authority's concerned
- (9) In the case of an expiry time of blocking as mention in the subparagraph (1) ends, FSP shall terminate the blocking for law reason.

Regarding Article 23 above, it is clearly understood that there is a long process of conducting blocking or freezing mechanism. It can not be said that it is without delay since the process needed the court order from Central Jakarta District Court first in response to the request from INTRAC, Investigator, Public Prosecutor, or Judge to FSP or other competent authority to performs blocking or freezing to the determined funds. The law did not give the length of process from court to give order. Interrelated with the guidelines of UNSC Resolution 1267 and 1373 above: "Under the Convention on Terrorist Financing, the freezing or seizing mechanism **can be conducted in the context of a criminal investigation or proceeding**", it can be said that the Convention itself suggest that there is possibility to conduct the freezing or seizing mechanism

through a process of criminal investigation or proceeding first. As Indonesia's standpoint to implement the blocking mechanism in its way is because Indonesian law should respect the human rights principles and relates with presumption of innocence principle. People can not be treated as a guilty person without a court decision. This standpoint brings Indonesia to be categorized in Public Statement by FATF as high-risk and non-cooperative jurisdiction. Other guidelines of UNSCR 1267 and 1373 mentions: "and shall be without prejudice to the rights of third parties acting in good faith (vide SR III of FATF)" It can be said that there is a respect to the rights of third parties who has acted in good faith.

The provision as mentioned in Article 23 is no longer consistent. Article 23 (3) as quoted above, mentioned that the action of INTRAC in requesting FSPs or other competent authority to performs blocking, is categorized as an administrative action, while there are other action also which is coming from Investigator, Public Prosecutor, and Judge. What is the category for investigator, Public prosecutor, and judge in requesting FSP or another competent authority performs blocking? It is an investigation process or a proceeding process, but what should it be called as?

However, there is also Article 28, which can be determined in the process of asset freezing of terrorist. It is related with Funds Blocking of Designated Person or Corporation which is listed in the Suspected Terrorist and Terrorist Organisations' Lists. Article 28 explains:

- (1) Head of the National Police of Republic of Indonesia submit a list of suspected terrorist and terrorist organisations as referred in Article 27 any changes to the relevant Government agencies and subsequently delivered to the Supervisory and Regulatory Agency (LPP) for FSP and other competent authority.
- (2) The submission of a list of suspected terrorist and organization terrorist as referred to the subparagraph (1) shall be accompanied Blocking without delay requests against all the assets owned or controlled, either directly or indirectly, by a person or corporation.
- (3) FSP or other competent authority as referred in the subparagraph (1) shall performs blocking without delay against all funds owned or controlled, either directly or indirectly, by the person or corporation based on the lists of suspected terrorist and terrorist organisations that have issued by head of

the National Police of Republic of Indonesia based on the court order of Central Jakarta District Court as referred in the Article 27 subparagraph (6).

- (4) FSP or other competent authority has an authority to make the minutes of Blocking process as referred in the subparagraph (3) and shall submit it to the head of National Police of the Republic of Indonesia.
- (5) The Blocking mechanism as referred in subparagraph (3) is valid as far as the identity of person and corporation remain in the listed of suspected terrorist and organisations terrorist.

In understanding the construction of Article 28 above, it can be said that Article 28 is related closely to the requirement of UNSCR 1267 and 1373. Whereas the listed shall be designated by the Central Jakarta District Court. FSP and/or other competent authority will receive an order from one agency called as Supervisory and Regulatory Agency (LPP). In the draft of the Bill of Terrorist Financing Law (July 2011), there were a mechanism of suspension mechanism and blocking mechanism. Regarding to this mechanism, the Australian Government Attorney's General Department gives input to "replace concepts of "suspension of a transaction" with "not transferring, converting, disposing of or moving funds and other financial assets or economics resources" (derived from the FATF definition of "freeze" for Special Recommendation III).¹³ In other words, regarding to the issue of freezing without delay, it is important to prevent the flowing mechanism of the funds itself, which can be conducted by transferring, converting, disposing of or moving funds and other financial assets or economics resources. Thus, it is important to say that the law should be adequate in preventing the flow of funds for terrorist activity. In bridging the lack of the implementation of freezing without delay in Indonesian perspectives, Adam Fenton and David Price mention:

Yunus Husein, chairman of the committee which authorized the draft CFT Bill Report, and former head of PPATK, criticised the Law for that reason. In discussing the mechanism contained in arts 27 and 28 he pointed out that it would be possible for funds to be moved while the process proceeds (Hukumonline, 2013). One alternative, as adopted in the United States, for

¹³ Attorney-General's Department of Australian Government. "Indonesian Counter Financing of Terrorism Bill – additional comments arising from the CFT Study Tour", **Unpublished article**, 11 October 2011, p. 5.



example, is that the funds of anyone on the 1267 list, are automatically frozen. Further, the US mechanism for listing terrorist organisations provides for no automatic judicial oversight mechanism. Instead an “administrative record” is prepared by the US State Department, which is a compilation of information of information demonstrating that the criteria for designation have been satisfied. Congress is then notified of the intention to designate and given seven days to review the designation. The organization may apply to have the designation revoked (State, 2013)... Given that these mistakes have occurred in the past, and will likely occur again, it is understandable that the PPATK is concerned about a widespread backlash to the implementation of the laws. Despite some nervousness relates to wrongful freezing of their customers’ assets, bank and FSPs have generally been very supportive of the laws, although concern remains that a customer whose account is wrongfully frozen will claim compensation in the event that it results in some kinds of loss.¹⁴

Hence, the role of FSPs and other competent authority is major in preventing the movement of funds which is designed as financing of terrorism, and preventing from wrongfully freezing of transaction.

4. Conclusion

The law Number 9 of 2013 however is a law which is trying to response to the seriousness of any form of terrorist financing crimes, not only to meet the International obligation under UN Convention for the Suppression of the Financing of Terrorism, but also to fulfil the requirements in giving protection to the Indonesian citizens to have a peaceful life.

Even though in its practise, the existences of the law on anti financing of terrorism does not impacted properly in the world’s sight, since Indonesia remains in the public statement as high-risk and non-cooperative jurisdiction. Anyhow with the Law Number 9 of 2013, Indonesia has tried to prevent and eradicate the crime of terrorist financing. Thus, the law shall be implemented well and consistent in the future.

¹⁴Adam Fenton and David Price. *Op.Cit.*, p. 16

Regarding with the issue of the mechanism of freezing without delay, there is an obstacle to meet the requirement of International standards. The Government of Indonesia has standpoint that freezing without delay will be against the presumption of innocence principle and human right protection. Therefore in its practice, Indonesia is still using Court Order first in order to implement assets freezing (Blocking) mechanism.

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