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The 2nd Proceeding "Indonesia Clean of Corruption in 2020"



"Comparative Law System of Procurement of Goods and Services around Countries in Asia, Australia and Europe"



IMAM AS SYAFEI BUILDING
Faculty of Law, Sultan Agung Islamic University
Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

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TABLE OF CONTENTS

Front Page	i
Information of the International Seminar	ii
Committee Composition	iii
Preface.....	iv
Greeting From The Dean Faculty of Law	vi
INDONESIA’S KPK AND NSW’S ICAC: COMPARISONS AND CONTRASTS	
Prof. Simon Butt	1
CAN INDONESIA FREE ITSELF FROM CORRUPTION IN 2020?	
Prof. Dr. Hikmahanto.,S.H.,LLM	4
AN ACT TO ESTABLISH THE ANTI-CORRUPTION AGENCY, TO VEST POWERS ON OFFICERS OF THE AGENCY AND TO MAKE PROVISIONS CONNECTED THEREWITH.	
Rohimi Shapiee.....	7
STRATEGY TO CREATE INDONESIA FREE CORRUPTION IN 2020	
Dr. Jawade Hafidz, S.H., M.H	11
THE NETHERLANDS INGLOBAL CORRUPTION	
Siti Malifah Marlou Feer, M.A.	28
ROBUST YET FRAGILE: EFFORTS IN COMBATING CORRUPTION IN INDONESIA	
Laras Susanti.,S.H., LLM.....	33
LEGAL STATUS OF AKTOR’S FOR CORRUPTION (In the Perspective of Islamic Law)	
Sumarwoto Umar	37
THE ROLE OF LAW IN THE POVERTY REDUCTION STRATEGY	
Lantik Kusuma Aji	46
THE INDEPENDENCY OF THE INSTITUTION FOR THE PROTECTION AND THE ESTABLISHMENT OF HUMAN RIGHTS TOWARDS THE GLOBALIZATION ERA 2020	
Khalid	55
THE URGENCY OF ANTI CORRUPTION EDUCATION FOR COLLEGES IN INDONESIA	
Siska Diana Sari.....	62
THE PROBLEMS OF DIVORCE IN CUMULATION AT THE RELIGIOUS COURTS BASED ON THE PRINCIPLES OF SIMPLE, FAST AND LOW COST	
Elis Rahmahwati.....	78
DISPARITIES DECISION RELATED TO INTERPRETATION OF ARTICLE 2 AND 3 CORRUPTION ERADICATION ACT	
Agung Widodo.....	87
DIVERSITY ADULT AGE LIMITS POSITIVE LAW IN INDONESIA (Studies in Multidisciplinary Perspective)	
Muhammad Andri	102

THE APPLICATION OF BALANCE IDEA IN SETTLEMENT OF DOCTOR MALPRACTICE CASE THROUGH PENAL MEDIATION Yati Nurhayati.....	111
MODERNIZATION LAW AS A CRIME CORRUPTION VERY EXCEPTIONAL THROUGH ENFORCEMENT OF ETHICS Dr. Sukresno, SH, M.Hum	118
CORRUPTION POTENCIES IN LAND USE POLICY (A Case Study in Kuningan Regency) Haris Budiman	126
CORRUPTION PREVENTION AND CONTROLS INP Budiarta	133
ISLAMIC LAW VALUES TRANSFORMATION IN THE RECONSTRUCTION OF THE LEGALITY PRINCIPLE OF INDONESIAN CRIMINAL CODE Sri EndahWahyuningsih	145
JUSTICE AND CHARITY IN JAKARTA’S NORTH COAST RECLAMATION PROCESS THAT WILL LEAD TO INDONESIA CLEAN OF CORRUPTION Untoro	155
CORRUPTION CRIMINAL SANCTIONS WITH VALUES OF JUSTICE-BASED Zulfiani.....	162
THE REFLECTION OF ISLAMIC BANKING IN THEORY AND PRACTICE Anis Mashdurohatun	171
THE IMPLEMENTATION OF LOCAL WISDOM SIRI’NA PACCE AS AN EFFORT OF CORRUPTION ERADICATION IN INDONESIA Muh. Afif Mahfud.....	181
DISCOURSE POLITICAL LAW IN INDONESIA ON A COMPLETION OF PLATO PHILOSOPHY Adrianus M. Nggoro,SH.,M.Pd.....	189
STUDY OF INDONESIA’S PARTICIPATION IN ICSID Agus Saiful Abib.....	202
NOTARY ROLE IN THE IMPLEMENTATION OF EXECUTION PROCUREMENT OF GOODS AND SERVICES ARE FREE OF CORRUPTION BASED ON THE PRINCIPLE OF GOOD GOVERNANCE Aris Yulia	211
ANALYSIS WIRETAPPING AUTHORITY UPPER KPK LAW ENFORCEMENT IN THE PERSPECTIVE OF HUMAN RIGHTS Ariyanto,SH.,MH.....	221
SOCIAL WORKING PENALTY AS SOLUTION IN ERADICATING CORRUPTION IN INDONESIA Desy Maryani.....	232
LEGAL POLITICSOF EMPLOYMENT IN TERM OF PART OF TASK HANDOVER TO OTHER COMPANIES IN INDONESIA Endah Pujiastuti.....	244

RESOLUTION OF DISPUTES OF OUTSOURCING WORK FORCE IN THE COMPANY EMPLOYING OUTSOURCING SERVICE Pupu Sriwulan Sumaya	256
THE APPLICATION OF CORRUPTION LAW TO WARD CRIMINAL ACT IN THE FIELD OF FORESTRY Ifrani	267
THE EFFORTS OF ERADICATION OF CORRUPTION THROUGH INSTRUMENTS OF MONEY LAUNDERING LAW AND RETURN ACTORS' ASSETS Yasmirah Mandasari Saragih.....	276
AFFIRM ROLE OF EXISTENCE <i>RECHTSVERWERKING</i> TO ACHIEVING LEGAL CERTAINTY IN LAND REGISTRATION Rofiq Iksamana, Setiono, I Gusti Ayu Ketut Rachmi Handayani, Oloan Sitorus.....	287
ANTI-CORRUPTION EDUCATION AT AN EARLY AGE AS A STRATEGIC MOVE TO PREVENT CORRUPTION IN INDONESIA Ida Musofiana.....	304
FREED INDONESIA'S CORRUPTION BETWEEN HOPE AND REALITY Dr. Tongat, SH., M.Hum., Said Noor Prasetyo, SH., MH.....	313
UTILIZATION OF INDONESIA MARINE RESOURCES IN AN EFFORT TO REALIZE INDONESIA TOWARDS THE SHAFT OF THE MARITIME WORLD Dr.Lathifah Hanim, SH.M.Hum., M.Kn. and Letkol (mar) MS.Noorman, S. Sos., M.Opsla.....	319
POTENTIAL CORRUPTION IN THE VALIDATION POLICIES ON ACQUISITION TAX OF LAND AND OR BUILDING Lilik Warsito.....	325
THE EFFORT OF LAW ENFORCEMENT IN COMBATING CORRUPTION IN SOUTH SUMATERA Sri Suatmiati.....	334
ETHICAL PERSPECTIVE AND THE MAPPING OF NORM IN CORRUPTION ACT Siti Zulaekha.....	344
AN EXPANSION OF CONCEPT THE STATE ECONOMIC LOSS IN CORRUPTION IN INDONESIA Supriyanto, Hartiwiningsih, Supanto.....	354
JURIDICAL STUDIES ON SUBSTANCE AND PROCEDURE OF THE DISMISSAL OF THE PRESIDENT AND/OR VICE-PRESIDENT AFTER THE REFORMATION Siti Rodhiyah Dwi Istinah.....	364
THE ROLE OF THE SHARIA SUPERVISORY BOARD IN THE FRAMEWORK ENFORCING SHARIA PRINCIPLES AT THE INSTITUTE OF ISLAMIC BANKING IN SEMARANG Aryani Witasari.....	376
SEMARANG CITY GOVERNMENT ROLE IN CONSERVATION AND ENVIRONMENTAL PROTECTION TO THE CAPITAL OF THE NATIONAL HERITAGE IN INDONESIA Achmad J Pamungkas (<i>Indonesia</i>), Carlito Da Costa (<i>Timor Leste</i>)	390

STUDYING THE WISDOM OF ZAKAT Moch. Gatot Koco (Indonesia), Basuki R Suratno (Australia)	398
HOMOLOGATION RECONSTRUCTION IN BANKRUPTCY THAT IS BASED ON DIGNIFIED JUSTICE Agus Winoto	410
RECONSTRUCTION OF EXECUTIVE AND LEGISLATIVE AUTHORITY IN MAKING GOOD GOVERNANCE (GOOD GOVERNANCE) VALUES BASED ON WELFARE Mohamad Khamim	420
THE TASK RECONSTRUCTION AND BPKP'S AUTHORITY IN THE CASE OF JUSTICE VAUE BASED CORRUPTION Sarbudin Panjaitan	429
THE RECONSTRUCTION OF MADLIYAH AND IDDAH MAINTENANCE AND MUT'AH IN DIVORCE CASE FOR JUSTICE AND WELFARE Mustar	438
JURIDICAL ANALYSIS OF THE ALLEGED CRIMINAL OFFENSE TO MANUFACTURE A NOTARY DEED Subiyanto	446
REVITALIZATION DEAL IN AKAD HYBRIDS IN SHARIA BANKING VALUE BASED ISLAMIC JUSTICE Masduqi	452
RECONSTRUCTION OF LEGAL PROTECTION DISTRICT HEAD IN THE ELECTION IMPLEMENTATION OF VALUE-BASED JUSTICE Kukuh Sudarmanto Alugoro	462
ABUSE OF AUTHORITY OFFENSE THEOLOGICAL RECONSTRUCTION LAW ERADICATION OF CORRUPTION (LAW NUMBER 31 OF 1999 JO. LAW NUMBER 20 OF 2001) BASED ON VALUE OF JUSTICE As'adi M. Al-ma'ruf	472
RECONSTRUCTION OF THE DAILY PAID WORK AGREEMENT IN THE EMPLOYMENT LAW BASED ON JUSTICE Christina N M Tobing	479
THE LAW AND THE IMPACT OF MARRIAGE SIRRI Sahal Afhami	489
CRIMES AGAINST CHILDREN AS ACTORS Muhammad Cholil	503
RECONSTRUCTION OF CRIMINAL PROCEDURAL LAW (KUHP) ABOUT THE DETENTION Muhammad Khambali	512

BASED ON JUSTICE PROBLEMS OF DISPUTE RESOLUTION REGIONAL CHIEF ELECTION (GOVERNOR, REGENTS AND MAYOR)	
Esti Ningrum	520
RECONSTRUCTION REGIONAL MINIMUM WAGE (UMR) IN RENEWAL OF EMPLOYMENT LEGAL REMEDIES BASED INDONESIA THE VALUE JUSTICE PANCASILA	
Urip Giyono	531
IMPLEMENTATION OF LAW AS TO MAINTAIN SECURITY IN THE CONTEXT OF PROFESSIONAL POLICE POLMAS (CASE STUDY IN LAMPUNG POLICE)	
Muhammad Yaman	539
RECONSTRUCTION OF CRIMINAL SANCTIONS PENAL CODE ACTORS ON ABORTION CRIME BASED ON THE VALUE OF JUSTICE	
Hanuring Ayu Ardhani Putri	549
REGISTRATION FIDUCIARY GUARANTEE REALIZE LEGAL PROTECTION OF CREDITORS AND DEBTOR	
Ansharullah Ida	556
RECONSTRUCTION OF LEGAL DISPUTES MEDIATION IN HEALTH CARE FOR PATIENTS HOSPITAL BASED ON THE VALUE OF JUSTICE	
Teguh Anindito	569
RECONSTRUCTION OF CRIMINAL SANCTIONS AGAINST CRIME OF ACTORS AND MURDER MURDER IN PLAN BASED ON VALUE OF JUSTICE CRIMINAL CODE	
Maria Marghareta Titiek Pudji Angesti Rahayu Teguh Anindito	579
IMPLEMENTATION OF PENAL MEDIATION IN CRIMINAL LAW	
Aji Sudarmaji	587
FAIR SETTLEMENT RECONSTRUCTION OF PROBLEMATIC CREDIT DISPUTE AT BANK RAKYAT INDONESIA (STUDY CASE AT MEDAN-SINGAMANGARAJA BRI BRANCH OFFICE)	
Bachtiar Simatupang	594
RECONSTRUCTION OF THE WASTE MANAGEMENT LAW BASED ON WELFARE VALUE	
M. Hasyim Muallim	616
RECONSTRUCTION LAW OF PUNISHMENT AGAINST CHILDREN NARCOTICS ABUSE-BASED PROGRESSIVE LAW	
Salomo Ginting	625
LEGAL PROTECTION PROBLEM OF WIFE AND CHILDREN OF POLYGAMY SIRRI IN INDONESIA	
Muhlas	639

IDEAL RECONSTRUCTION OF REHABILITATION PUNISHMENT FOR NARCOTICS ADDICTS AND ABUSER'S VICTIMS JUSTIFIED BASED ON THE LAW OF THE REPUBLIC OF INDONESIA NO. 35 YEAR 2009 (CASE STUDY IN SUMATERA UTARA PROVINCE)	
Ahmad Zaini	648
IMPLEMENTATION OF ACCELERATION SYSTEMATIC LAND REGISTRATION FULL IN HUMBANG HASUNDUTAN DISTRICT	
Ruslan	658
RECONSTRUCTION OF STATUS AND AUTHORITY OF THE SHARIA COURT IN THE NATIONAL JUDICIAL SYSTEM BASED ON JUSTICE	
Jufri Ghalib	667
RECONSTRUCTION OF LIABILITY NOTARY PUBLIC OFFICERS TO ACT AS A VALUE-BASED JUSTICE	
Elpina	679
RECONSTRUCTION OF CONSUMER PROTECTION LAW IN MAKING THE BALANCE BUSINESS BASED BUSINESS AND CONSUMER VALUE OF JUSTICE	
Ramon Nofrial	693
RECONSTRUCTION OF LAND USED RIGHT EIGENDOM VALUES BASED ON JUSTICE AND LEGAL CERTAINTY	
Hakim Tua Harahap	706
RECONSTRUCTION OF DIVERSION CONCEPT IN CHILD PROTECTION OF CONFLICT WITH THE LAWS BASED ON THE VALUE OF JUSTICE	
Ulina Marbun	726
RECONSTRUCTION OF PARATE EXECUTION MORTGAGE RIGHTS TO LAND BASED ON THE VALUE OF JUSTICE	
Zaenal Arifin	740
THE RECONSTRUCTION OF DIVORCE DUE TO MARITAL STATUS UNDER THE UNAUTHORIZED GUARDIAN AS VALUE OF JUSTICE	
Abdul Kholiq	751
THE RECONSTRUCTION OF LEGAL AID LAW FOR CHILDREN WHO GET CONFLICT WITH LAW IN PROCESS OF JUSTIFICATION FOR CHILDREN BASED ON THE VALUE OF PANCASILA	
Adi Mansar	767
MEDIATION RECONSTRUCTION AS ONE OF THE ALTERNATIVE SETTLEMENT OF DECLINE IN THE COURTS BASED ON THE VALUE OF JUSTICE (Study at the Simalungun District Court)	
Mariah S.M. Purba	778
POLYGAMIC POLICY IN INDONESIA (Analysis of Polygamic Arrangements and Practices 1959-2015)	
Warman	790

LAW ENFORCEMENT AGAINST CORRUPTION IN PERSPECTIVE OF HUMAN RIGHTS IN INDONESIA Sekhroni	798
THE PRINCIPLE OF NATURAL JUSTICE AND HUMAN'S RIGHT PROTECTION FOR CITIZENS IN ERADICATION OF CORRUPTION IN INDONESIA Indriyana Dwi Mustikarini	809
PREVENTING LAND MAFIA USING POSITIVE LAND REGISTRY SYSTEM Bambang Sulistyowati	816
UNRULY PASSENGER IN AVIATION: THE REGULATIONS AND CASES IN INDONESIA Adya Paramita Prabandari	826
EDUCATION ANTI-CORRUPTION IN INDONESIA: PROBLEMS, CHALLENGES AND SOLUTIONS Alwan Hadiyanto	839
SPIRITUAL URGENCY OF RELIGIOUS AND EXPENSES OF EVIDENCE IN COMBATING CORRUPTION IN INDONESIA Sulistyowati	852
SUE FOR THE STATE ADMINISTRATION OF JUSTICE IN INDONESIA Sarjiyati	863
CONSISTENCY MODEL OF COURT DESIGNATION TO FOSTER PARENT RIGHTS AUTHORITY DUE TO DIVORCE ON CHILDREN Erna Trimartini	873
AN INVESTIGATION AUTHORITY OF CRIMINAL ACT ON CORRUPTION IN CRIMINAL JUSTICE SYSTEM IN INDONESIA Sukmareni	885
PRO CONS THE EXISTENCE OF DEATH PENALTY IN CORRUPTION ACT OF 1999 IN INDONESIA Anis Rifai	903
PENAL MEDIATION IN SOLVING MEDICAL MALPRACTICE CASES AS AN ALTERNATIVE OF PENAL SANCTIONS BASED ON LOCAL WISDOM Sri Setiawati	913
SPECIAL PROTECTION OF CHILDREN IN CRIMINAL JUSTICE SYSTEM Achmad Sulchan	922
MORAL REFORM BUREAUCRACY AS PREVENTION OF ILLEGAL PAYMENTS TO INDONESIA CLEAN OF CORRUPTION Herwin Sulistyowati	932
STANCE AND AUTHORITY OF PEOPLE'S CONSULTATIVE ASSEMBLY DURING REFORMATION ERA 1945 Ahmad Mujib Rohmat	944

TAXES AND ALMS SEEN FROM ISLAMIC LAW	
Mohammad Solekhan	954
DIVERSION IN COURT (Case Studies in Karanganyar District Court)	
Anita Zulfiani	964
International Seminar	
Photos.....	971

**RECONSTRUCTION OF CRIMINAL PROCEDURAL LAW
(KUHAP) ABOUT THE DETENTION
BASED ON JUSTICE**

Muhammad Khambali

Student of Doctoral Program Faculty of Law Sultan Agung Islamic University

Email : hmkhambali@yahoo.com

Teguh Prasetyo

Faculty of Law Satya Wacana Christian University

Email : prof.teguh.prasetyo@gmail.com

Sri Endah Wahyuningsih

Doctoral Program Faculty of Law Sultan Agung Islamic University

Email : sriendahw@yahoo.com

A. Background

Detention is a form of deprivation of freedom of movement a person. In the custody of a conflict between two principles, namely the right to move someone who is a human right that must be respected on the one hand, and the interests of public order on the other side of which must be preserved for the people or the people of evil deeds suspect or defendant. Therefore, the detention should be performed if necessary at all. Defects in detention can lead to things fatal to many parties, including anchoring.¹

The provisions on the validity (*rechwaardigheid*) detention stated in Article 21 paragraph (4) Criminal Procedure Code, while the need to (*noodzakelijkheid*) detention stated in Article 21 paragraph (1) Criminal Code.

Therefore, the competent authorities did or did not make an arrest (Article 20 of the Code of Criminal Procedure), the transfer of the type of detention (Article 22 of the Criminal Procedure Code), and the suspension of detention (Article 31 of the Criminal Code) against the suspect or defendant are at an institution or institutions, it provides opportunities for officials authorities detain, switching types of detention, detention suspend deviates by detaining suspects or defendants arbitrarily or even exceeds authority. Containment actions can also be used as a commodity "buy-sell" by detaining a suspect or defendant then "trade" to suspend the detention or transfer of the type of detention for the "price" certain.

Researchers do research on the regulatory limit of detention, including the detention and transfer of the type of suspension of detention of suspects or accused general crime. Researchers interested in conducting research on detention, including the transfer of the type of detention and the suspension of the arrest of the suspect or defendant, which further analyze the passage and find construction rules detention of suspects or defendants in the Criminal Code.

¹ Andi Hamzah, 2011, *Hukum Acara Pidana Indonesia*, Jakarta: Sinar Grafika, hlm 127.

B. Problem Formulation

The problem of this research will be studied by researchers with the contrast of the background described above, is how the reconstruction of the rules detention of the suspect or defendant in the Criminal Code that is based on values of justice?

C. Review of Theory

Reconstruction of rules detention of suspects or defendants in this study is the reconstruction of the legislation governing the arrest and detention, including the suspension of the transfer of the type of detention of suspects or defendants. Reconstruction of the Criminal Code, particularly regarding detention, including the suspension of the arrest of the suspect or the accused intended to reorganize fundamentally or to reconstitute the better for the implementation of detention including suspension and transfer of the type of detention of a suspect or defendant based on values of justice and expediency, not only merely achieving legal certainty.

To explain the regulations ideal reconstruction detention of the suspect or defendant based on values of justice, researchers used the theory, as follows:

1. Theory of justice dignity of Teguh Prasetyo as a grand theory. Justice theory postulates dignified departure from the system; working towards the goal, that is justice with dignity. Humanize justice, or justice to *nge wongke wong*.²
2. theories about enforcement of Lawrence M. Friedman as a middle theory. According to Lawrence M. Friedman, a legal system includes three components:³
 - (1) Legal structure, namely the parts that move in a mechanism, which is an institution created by the legal system and has the function to support the operation of the legal system (including the container of the legal system as legal institutions, and relationships or distribution of power inter-agency law);
 - (2) Legal substance that actual results published by the legal system, in the form of legal norms, both regulations, decisions used by law enforcement officials as well as by those regulated; and
 - (3) Legal culture in the form of ideas, attitudes, expectations and opinions about the law as a whole of factors that determine how the legal system where people obtain to accept legal or otherwise.
3. Theory of Satjipto Rahardjo progressive law as applied theory. law enforcement does not execute the law, but the spirit of deep made law, the necessary assessment of the behavior of lawless that empathy, dedication, a commitment to the plight of the nation and the courage to uphold justice

² Teguh Prasetyo, 2015, *Keadilan Bermartabat, Perspektif Teori Hukum*, Bandung: Nusamedia, hlm 2

³ Lawrence M. Friedman, 1975, *The Legal System: A Social Science Perspective*, New York, Russell Sage Foundation, halaman 10, sebagaimana dikutip Sri Endah Wahyuningsih, 2013, *Prinsip-Prinsip Individualisasi Pidana Dalam Hukum Pidana Islam*, Semarang: Badan Penerbit Universitas Diponegoro, hlm 4-5

for human happiness, for human welfare, the laws are only guidelines, necessary process to achieve substantial justice.

D. Discussion

There are some rights of suspects or defendants obtained the suspect or the accused, namely: The right to immediately obtain examinations; The right to freely provide information to investigators; The right to have legal representation at every level of examination; The defendant imposed detention is entitled to contact or receive personal physician visits for the sake of good health that has to do with the proceedings or not; The defendant has the right to sue for damages and rehabilitation; The defendant is entitled to apply for suspension of detention; The similarity of these cases are all victims of misguided law enforcement come from the poor and powerless against injustice, so that their voices can not be heard. They do not have the money to pay the bail surety; The bad situation in detention houses or other places used to detain a suspect or defendant in Indonesia, can now be said to have been in a state of acute over-crowded.

Factors that cause the arrest of the suspect or defendant is not justice due to non-fulfillment of rights of suspects or accused and does not dare to enforce a law enforcement paradigm progressive law, as follows: Regulation of the detention of the suspect or defendant who has a weakness (faint) as well as Article 21 paragraph (1) Criminal Code makes the competent authority to make arrests easily decide to detain a person; Authorized officer to make an arrest is still using the maximum containment mechanisms to the limit allowed by the Code of Criminal Procedure detention; The mechanism of transfer of the type of detention of suspects or defendants who are on the same official made official subjectivity is decisive in whether or not to grant the request transfer of the type of detention; The mechanism of suspension of detention of suspects or defendants who are on the same official made official subjectivity is decisive in whether or not to grant the request for suspension of detention; Demand surety guarantees in the form of money provides an opportunity to the authorities hold to tend to make an arrest in the hope of suspects or defendants will file a request for suspension of detention; Demand surety guarantees in the form of money provides an opportunity to the authorities to hold the surety to perform modification of the suspension of the surety; Required bail surety in demand may not be met by the suspect or defendant is poor; Their lack of regulations in the Criminal Code does not recognize the existence of judicial scrutiny (judicial supervision) in addition to a pre-trial mechanism.

E. Reconstruction

Reconstruction of rules detention of the suspect or defendant based on values of justice dignified to change, add to, or enhance the articles which contain the rules or conditions of detention, as follows:

1. Article 21 paragraph (1) Criminal Procedure Code after reconstruction formula, as follows:
perpanjangan arrest or detention or continued detention of a suspect or defendant who

allegedly committed the crime based on sufficient evidence and alleged suspects or defendants will:

- a. escape;
 - b. destroy or eliminate evidence and / or evidence;
 - c. influence witnesses;
 - d. committing a crime;
 - e. threatened her safety and with the consent or request of the suspect or the accused;
2. Article 21 paragraph (4) Criminal Procedure Code after reconstruction formula, as follows: The arrest may only be imposed on a suspect or defendant who committed the crime or trial as well as providing assistance in the offense in terms of:
- a. the criminal offense punishable by imprisonment of 5 years or more;
 - b. crime referred to in Article 282 paragraph (3), Article 296, Article 335 paragraph (1), Article 351 paragraph (1), Article 353 paragraph (1), Article 372, Article 378, Article 379 A, Article 453, Article 454, Article 455, Article 459, Article 480 and Article 506 Book of Law Criminal Law, Article 25 and Article 26 Rechtenordnantie (violation of the Ordinance of Customs and Excise, last amended by Gazette 1931 No. 471), Article 1, Article 2 and Article 4 of Law Immigration Criminal Act (Act No. 8 Drt. In 1955, the State Gazette 1955 No. 8), Article 36 paragraph (7), Article 41, Article 42, Article 43, Article 47 and Article 48 Law law No. 9 of 1976 on Narcotics (State Gazette of 1976 Number 37, Additional State Gazette No. 3086);
 - c. the suspect or defendant has no permanent residence or identity is not clear, although the criminal act suspected / indicted punishable by imprisonment of less than 5 years;
3. Article 23 paragraph (1) Criminal Procedure Code after reconstruction formula, as follows: At the request of the suspect or the accused judge commissioner can divert one type of detention to another type of detention referred to in Article 22.
4. Article 24 paragraph (1) Criminal Procedure Code after reconstruction formula, as follows: The detention order given by the investigators as referred to in Article 20 is done for a maximum of 10 days.
5. Article 24 paragraph (2) Criminal Procedure Code after reconstruction formula, as follows: The period as mentioned in paragraph (1) if necessary in the interests of unfinished inspection may be extended by the judge at the request of the investigating commissioner for a period of 14 days.
6. Article 25 paragraph (1) Criminal Procedure Code after reconstruction formula, as follows: The detention order given by the public prosecutor as referred to in Article 20, only applies maximum of 7 days.
7. Article 25 paragraph (2) Criminal Procedure Code after reconstruction formula, as follows: The period as mentioned in paragraph (1) if necessary in the interests of unfinished inspection may be

extended by the judge at the request of the public prosecutor commissioner for a period of 14 days.

8. Article 26 paragraph (1) Criminal Procedure Code after reconstruction formula, as follows: the district court judge hear the case referred to in Article 84, for the purpose of examination authorities issued arrest warrants for a maximum further 60 days.
9. Article 26 paragraph (2) Criminal Procedure Code after reconstruction formula, as follows: The period as mentioned in paragraph (1) if necessary in the interests of the investigation has not been completed, it can be extended by the chairman of the district court concerned for a maximum of 60 days.
10. Article 27 paragraph (1) Criminal Procedure Code after reconstruction formula, as follows: a high-court judge hear the case referred to in Article 87, for the purpose of examination is authorized to issue an arrest warrant continued for longer than 30 days.
11. Article 27 paragraph (2) Criminal Procedure Code after reconstruction formula, as follows: The period as mentioned in paragraph (1) if necessary in the interests of the investigation has not been completed, it can be extended by the head of the high court concerned for a maximum of 30 days.
12. Article 28 paragraph (1) Criminal Procedure Code after reconstruction formula, as follows: Supreme Court Judges who hear the case referred to in Article 88, for the purpose of examination is authorized to issue an arrest warrant continued for longer than 30 days.
13. Article 28 paragraph (2) Criminal Procedure Code after reconstruction formula, as follows: The period as mentioned in paragraph (1) if necessary in the interests of the investigation has not been completed, it can be extended by the US Supreme Court to a maximum of 60 days.
14. Article 29 paragraph (1) letter a Criminal Code after reconstruction, formulation is as follows: There is no reconstruction. Researchers proposed Article 29 paragraph (1) letter a Criminal Code removed.
15. Article 31 paragraph (1) Criminal Procedure Code after reconstruction formula, as follows: At the request of the suspect or the accused judge commissioner may suspend detention with bail money and / or based on the terms specified.
16. Article 31 paragraph (2) Criminal Procedure Code after reconstruction formula, as follows: Because of his judges commissioners may at any time revoke the suspension of detention in the case of the suspect or defendant violates the terms referred to in paragraph (1).
17. Article 77 of the Criminal Procedure Code after reconstruction formula, as follows: Judicial Commissioner is authorized to examine and decide, in accordance with the provisions stipulated in this law: a. whether or not, legitimate or not the arrest, detention, discontinuation or termination of the prosecution investigation.

18. Article 123 paragraph (1) Criminal Procedure Code after reconstruction formula, as follows:
Suspect, family or legal counsel may appeal the detention or arrest of the suspect to judge the type of commissioner.
19. Section 123 subsection (2) Criminal Procedure Code after reconstruction formula, as follows: To judge the commissioner may grant the request to consider about whether or not the suspects remain in custody or remain in a particular type of detention.
20. Furthermore, researchers propose additional article about the judge commissioner to be included in the Criminal Code, as follows:
 - (1) The Judicial Commissioner is authorized officials assess the course of investigation and prosecution, and other authority specified in this Act.
 - (2) Judicial Commissioner or Preliminary Examining Judge is authorized to determine or decide:
 - a. need / or unauthorized absence / of the arrest, detention, search, confiscate, or tapping;
 - b. cancellation or suspension of detention;
 - c. that the statements made by the suspect or defendant in violation of the right to not incriminate oneself;
 - d. evidence or statements obtained illegally can not be used as evidence;
 - e. compensation and / or rehabilitation for a person who is arrested or detained unlawfully or compensated for any property that was confiscated illegally;
 - f. suspect or defendant is entitled to or are required to be accompanied by legal counsel;
 - g. that investigation or prosecution has been carried out for unauthorized purposes;
 - h. termination of an investigation or prosecution termination that is not based on the principle of opportunity;
 - i. whether or not a case for prosecution to the court;
 - j. violation of the rights of suspects whatever else happens during the investigation stage.

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