



# THE 3<sup>rd</sup> INTERNATIONAL CONFERENCE AND CALL FOR PAPER

“Legal Development in Various Countries”



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

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2017

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## **The 3<sup>rd</sup> PROCEEDING**

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## INFORMATION OF THE CONFERENCE AND CALL PAPER

**WORLD CLASS ISLAMIC UNIVERSITY**  
**UNISSULA**  
SULTAN AGUNG ISLAMIC UNIVERSITY

# Welcome to Participants on International Conference

## “LEGAL DEVELOPMENT IN VARIOUS COUNTRIES”

*This conference tries to reviews different theories of legal development in order to highlight their similarities and differences. And focusing on the development of law in both developed and developing countries and its role in shaping a good future.*

**KEYNOTE SPEAKER:**  
**Prof. Henning Glaser**  
Thammasat University, Thailand

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

Organized by : Faculty of Law Sultan Agung Islamic University (UNISSULA) Semarang-Indonesia

**SPEAKERS :**

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Nagoya University, Japan
2. Prof. Dr. Ruzian Markom  
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Indonesia, September 05<sup>th</sup> 2017

**WORLD CLASS ISLAMIC UNIVERSITY**  
**UNISSULA**  
SULTAN AGUNG ISLAMIC UNIVERSITY

# International Conference

**5**  
September  
2017

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**Organized by : Faculty of Law UNISSULA Semarang-Indonesia**

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

**FACULTY OF LAW**  
Sultan Agung Islamic University

This Conference And Call Paper was held by the Faculty of Law, Sultan Agung Islamic University (UNISSULA) Semarang, on:

Day: Tuesday

Date : September 5<sup>th</sup> 2017

Time : 08:00 - 15:00 pm

Place : Imam AsSyafei Building 3<sup>rd</sup> Floor

Faculty of Law, Sultan Agung Islamic University, Semarang, Indonesia

Jl. Raya Kaligawe Km. 4 PO. BOX.1054 Telp. (024) 6583584 Fax.(024)6582455  
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AND CALL FOR PAPER  
“LEGAL DEVELOPMENT IN VARIOUS COUNTRIES”**

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## PREFACE

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Assalamu'alaikum, Wr. Wb

First of all, let's say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can finish this conference proceeding without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers: **Prof. Henning Glaser from Thammasat University, Prof. Shimada Yuzuru from Nagoya University, Hilaire Tegan, Ph.D from Sorbone University, Prof. Dr. I Gusti Ayu Ketut Rachmi Handayani, MM from SebelasMaret University, Dr. Zaharudin from Universiti Utara Malaysia, and Dr. Anis Mashdurohatun, S.H., M.Hum from Sultan Agung Islamic University.**

This is our third International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academician and practitioner to be discussed as guidelines to exchange and discuss views on the most important recent on Legal Development happens in both developed and developing countries and its role in shaping a good future, and to discuss the challenges and practical aspects in integrating competition law enforcement and guidelines to develop legal state in accordance with the diversity of all countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.

See you in our fourth International and call for paper next year.

Wassalamualaikum, Wr. Wb

Semarang, September 5<sup>th</sup> 2017

**Chairman of the Committee,**



**Dr. Anis Mashdurohatun, S.H., M.Hum**  
**NIDN : 06-02105-7002**

## GREETING FROM THE DEAN OF FACULTY OF LAW

---

*As-salamu'alaikum Wr. Wb.*

Thank to Allah SWT is an absolute act that we must say after conducting the International Conference and Call for Paper by theme: “**Legal Development in Various Countries**” which is held by Faculty of Law, Sultan Agung Islamic University (UNISSULA) Semarang, on September 5<sup>th</sup> 2017.

This conference tries to reviews different theories of legal development in order to highlight their similarities and differences. In the end, as in contract theories, no monist view of legal development possesses the explanatory power needed to understand how law has come to be and where it may take us in the future. What we do have is a foundation built on at least two millennia of legal history. The intellectual starting point for this project is Nathan Isaacs' unfinished work on a cycle theory of legal development. His view of legal development takes issue with Henry Sumner Maine's thesis that development in advanced legal systems is progressive in nature. And, more importantly for the current undertaking, that this progression is linear in nature. Instead, Isaacs' review of thousands of years of Jewish legal development indicated that legal development perpetually progressed in cycles.


Therefore, to discuss more about legal development or law reform, Faculty of Law, Sultan Agung Islamic University is confidence to conduct a conference by the theme “**Legal Development in Various Countries**” focusing on the development of law in both developed and developing countries and its role in shaping a good future.

Finally, we thank to the presenters, article senders, and comittee who have contributed in this event, so that this international seminar ran well.

*Wassalamu'alaikum Wr. Wb.*

Semarang, September 5<sup>th</sup> 2017

Dean,



**Prof. Dr. Gunarto, SH, SE, Akt, M.Hum**  
NIDN.062004670

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## COMPARATIVE RULES ON DETENTION IN SOME COUNTRIES

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### Abstract

Detention is a form of deprivation of one's freedom of movement. Within detention there is a conflict between two principles: the right of one's human rights which must be respected on the one hand, and the interests of public order on the other side which must be maintained for the people or society of the criminal acts of the suspect or defendant. Therefore, detention should be done if necessary once. The mistakes in detention can result in fatalities for many parties including arrest.

Theories distinguish the validity (*rechwaardigheid*) and the necessity (*noodzakelijkheid*) of detention. The rethare (*rechwaardigheid*) of detention is objective and absolute, meaning that it can be seen in the laws of what deliberations can be made against the suspect or defendant. Whereas the necessity (*noodzakelijkheid*) of detention is relative because it determines whether or not detention is necessary to be held depending on the appraisal of the competent authority who will make the detention.

Thus a suspect or defendant from the first detention of him in the framework of the investigation to the cassation level may be held for a maximum of 400 (four hundred) days. Under Article 29 of the Criminal Procedure Code provides that the detention of a suspect or defendant may be extended again.

**Keywords:** detention, comparison, suspect. Defendant.

### Introduction

Article 1 point 21 of the Criminal Procedure Code (KUHAP) specifies that the detention is the placement of a suspect or defendant in a certain place by an investigator or public prosecutor or judge by his opinion, in matters and according to the manner laid down in this law.

Detention is a form of deprivation of one's freedom of movement. Within detention there is a conflict between two principles: the right of one's human rights which must be respected on the one hand, and the interests of public order on the other side which must be maintained for the people or society of the criminal acts of the suspect or defendant. Therefore, detention should be done if necessary once. The mistakes in detention can result in fatalities for many parties including arrest.<sup>1</sup>

---

<sup>1</sup> Andi Hamzah, 2001, *Hukum Acara Pidana Indonesia*, Jakarta: Sinar Grafika, page 127.

Article 21 of the Criminal Procedure Code regulates the validity as well as the need for detention. Theories distinguish the validity (*rechwaardigheid*) and the necessity (*noodzakelijkheid*) of detention. The rethare (*rechwaardigheid*) of detention is objective and absolute, meaning that it can be seen in the laws of what deliberations can be made against the suspect or defendant. Whereas the necessity (*noodzakelijkheid*) of detention is relative because it determines whether or not detention is necessary to be held depending on the appraisal of the competent authority who will make the detention. The provisions concerning the validity (*rechwaardigheid*) of detention are included in Article 21 paragraph (4) of the Criminal Procedure Code, whereas the need (*noodzakelijkheid*) of detention is included in Article 21 paragraph (1) of the Criminal Procedure Code.

Article 21 paragraph (1) of the Criminal Procedure Code stipulates that the order of detention or continued detention of a suspect or defendant suspected of having committed a crime on the basis of sufficient evidence, is based on the concern of a suspect or defendant:

1. Escape.
2. Damage or eliminate evidence.
3. Repeat offenses.

Article 21 paragraph (4) of the Criminal Procedure Code stipulates that detention shall be imposed on a suspect or defendant committing a crime and / or trial or providing assistance in the offense in the event that the offense is punishable by imprisonment of 5 (five) years or more, (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, Article 506 of the Criminal Code, Article 25 and Article 26 of *Rechtenordonnantie* (Violation of the Customs Ordinance, last modified by *Staatsblad* Year 1931 Number 471), Article 1, Article 2 and Article 4 of the Criminal Act Immigration (Law Number 8, 1955, *State Gazette* Year 1955 Number 8), Article 36 Paragraph (7), Article 41, Article 42, Article 43, Article 47 and Article 48 of Law Number 9 Year 1976 regarding Narcotics (*State Gazette of the Republic of Indonesia* Year 1976 Number 37, Supplement to *State Gazette* Number 3086).

Details of the detention of a suspect or defendant in Indonesian criminal procedure law, under the provisions of Article 24, Article 25, Article 26, Article 27, Article 28 of the Criminal Procedure Code, as follows:

1. Detention by Investigator or Investigator Assistant no later than 20 days.
2. Extension by the Prosecutor shall be no later than 40 days.
3. Detention by the Prosecutor shall not exceed 20 days.
4. Extension by the Chairman of the District Court for a maximum of 30 days.
5. Detention by a District Court Judge shall not exceed 30 days.
6. Extension by the Chief Justice of the District Court shall be no later than 60 days.
7. Detention by a High Court Judge shall not exceed 30 days.
8. Extension by the President of the Court of Appeal at the latest 60 days.
9. Detention by MARI up to 50 days.
10. Extension by the Chair of MARI shall be no more than 60 days.

Thus a suspect or defendant from the first detention of him in the framework of the investigation to the cassation level may be held for a maximum of 400 (four hundred) days. Under Article 29 of the Criminal Procedure Code provides that the detention of a suspect or defendant may be extended again.

Article 29:

- (1) Excluded from the period of detention referred to in Article 24, Article 25, Article 26, Article 27 and Article 28, for the purpose of examination, the detention of a suspect or defendant may be extended on the grounds that it is reasonable and unavoidable because:
  - a. suspects or defendants suffering from severe physical or mental disorders, as evidenced by a doctor's certificate, or
  - b. cases being examined are threatened with imprisonment of nine years or more.
- (2) The extension referred to in paragraph (1) shall be issued for a maximum of thirty days and in the event that such detention is still required, may be extended for a maximum of thirty days.
- (3) The extension of detention on the basis of request and inspection report in the level of:

- a. investigations and prosecutions are given by the chairman of the district court.
  - b. examination in the country court is given by the head of the high court.
  - c. an appeal-is given by the Supreme Court.
  - d. a cassation examination was given by the Chief Justice of the Supreme Court.
- (4) The use of the authority of extension of detention by the official referred to in paragraph (3) shall be done gradually and with full responsibility.
- (5) The provisions referred to in paragraph (2) shall not exclude the possibility of the release of a suspect or defendant from detention before the expiration of the period of detention, if the interests of the examination have been fulfilled.
- (6) After sixty days, although the case has not yet been examined or has not been terminated, the suspect or defendant shall be released from detention by law.
- (7) To the extension of detention in paragraph (2) a suspect or defendant may file an objection at the following levels:
- a. investigation and prosecution to the chairman of the High Court.
  - b. the examination of the district court and the appeal to the Chief Justice of the Supreme Court.

Article 22 of the Criminal Procedure Code states that there are 3 types of detention of a suspect or defendant, namely:

1. detention of detention of state homes.
2. house arrest.
3. city detention.

Detention of a suspect or defendant may be transferred to the type of detention from one type of detention to another. The authorized official transfers one type of detention to another type of detention is the investigator or the public prosecutor or judge.

### **Problem Formulation**

The formulation of a problem in this paper entitled "Comparative Rules on Detention in Some Countries" is how regulations on the detention of suspects or defendants in other countries such as Malaysia and the Netherlands?



## Discussion

In a number of countries such as Malaysia, Japan, Netherlands, America, France have set clearly how long a person should be subject to detention. According to Andi Hamzah, in some of these countries, the suspension of detention takes precedence over detention.<sup>2</sup> In this paper we will discuss comparative regulations on detention in Malaysia and the Netherlands.

### 1. Regulation of detention in Malaysia

In Malaysia the rules of detention are governed by the Criminal Procedure Code, as follows:<sup>3</sup>

a. Section 28, How person arrested is to be dealt with and detention for more than twenty-four hours:

(1) a police officer making an arrest without a warrant shall without unnecessary delay and subject to the provisions herein as to bail or previous release take or send the person arrested before a magistrate.

(2) no police officer shall detain in custody a person arrested without a warrant for a longer period than under all the circumstances of the case is reasonable.

(3) such period shall not in the absence or after the expiry of a special order of a magistrate under section 117 exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the magistrate.

b. Section 28A, Rights of person arrested:

(1) a person arrested without a warrant shall be informed as soon as may be of the grounds of his arrest by the police officer making the arrest.

(2) a police officer shall, before commencing any form of questioning or recording of any statement from the person arrested, inform the person that he may:

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<sup>2</sup> <https://nasional.sindonews.com/read/1014737/13/ternyata-ada-salah-tafsir-soal-proses-penahanan-sesuai-kuhap-1434728526> accessed December 14, 2016 at 20.00 pm.

<sup>3</sup> Criminal Procedure Code, Act 593, published by the Commissioner of Law Revision, Malaysia, Under the Authority of the Revision of Laws Act 1968, 1 November 2012 downloaded from the link [http://54.251.120.208/doc/laws/Act\\_593 - Criminal Procedure Code \(CPC\).pdf](http://54.251.120.208/doc/laws/Act_593_-_Criminal_Procedure_Code_(CPC).pdf) dated 9-3-2017 at 21.00 pm.

- (a) communicate or attempt to communicate, with a relative or friend to inform of his whereabouts; and
  - (b) communicate or attempt to communicate and consult with a legal practitioner of his choice.
- (3) where the person arrested wishes to communicate or attempt to communicate with the persons referred to in paragraphs (2)(a) and (b), the police officer shall, as soon as may be, allow the arrested person to do so.
- (4) where the person arrested has requested for a legal practitioner to be consulted, the police officer shall allow a reasonable time:
- (a) for the legal practitioner to be present to meet the person arrested at his place of detention; and
  - (b) for the consultation to take place.
- (5) the consultation under subsection (4) shall be within the sight of a police officer and in circumstances, in so far as practicable, where their communication will not be overheard.
- (6) the police officer shall defer any questioning or recording of any statement from the person arrested for a reasonable time until the communication or attempted communication under paragraph 2(b) or the consultation under subsection (4) has been made.
- (7) the police officer shall provide reasonable facilities for the communication and consultation under this section and all such facilities provided shall be free of charge.
- (8) the requirements under subsections (2), (3), (4), (5), (6) and (7) shall not apply where the police officer reasonably believes that:
- (a) compliance with any of the requirements is likely to result in
    - (i) an accomplice of the person arrested taking steps to avoid apprehension; or
    - (ii) the concealment, fabrication or destruction of evidence or the intimidation of a witness; or

- (b) having regard to the safety of other persons the questioning or recording of any statement is so urgent that it should not be delayed.
  - (9) subsection (8) shall only apply upon authorization by a police officer not below the rank of deputy superintendent of police.
  - (10) the police officer giving the authorization under subsection (9) shall record the grounds of belief of the police officer that the conditions specified under subsection (8) will arise and such record shall be made as soon as practicable.
  - (11) the investigating officer shall comply with the requirements under subsections (2), (3), (4), (5), (6) and (7) as soon as possible after the conditions specified under subsection (8) have ceased to apply where the person arrested is still under detention under this section or under section 117.
2. Section 117, Procedure where investigation cannot be completed within twenty-four hours:
- (1) whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 28 and there are grounds for believing that the accusation or information is well founded the police officer making the investigation shall immediately transmit to a magistrate a copy of the entries in the diary hereinafter prescribed relating to the case and shall at the same time produce the accused before the magistrate.
  - (2) the magistrate before whom an accused person is produced under this section may, whether he has or has no jurisdiction to try the case, authorize the detention of the accused in such custody as follows:
    - (a) if the offence which is being investigated is punishable with imprisonment of less than fourteen years, the detention shall not be more than four days on the first application and shall not be more than three days on the second application; or
    - (b) if the offence which is being investigated is punishable with death or imprisonment of fourteen years or more, the detention shall not be more

than seven days on the first application and shall not be more than seven days on the second application.

- (3) the officer making the investigation shall state in the copy of the entries in the diary referred to in subsection (1), any period of detention of the accused immediately prior to the application, whether or not such detention relates to the application.
- (4) the magistrate, in deciding the period of detention of the accused person, shall take into consideration any detention period immediately prior to the application, whether or not such detention relates to the application.
- (5) the magistrate in deciding the period of detention of the accused shall allow representations to be made either by the accused himself or through a counsel of his choice.
- (6) if the magistrate has no jurisdiction to try the case and considers further detention unnecessary he may order the accused person to be produced before a magistrate having such jurisdiction or, if the case is triable only by the high Court, before himself or another magistrate having jurisdiction with a view to transmission for trial by the high Court.
- (7) a magistrate authorizing under this section detention in the custody of the police shall record his reasons for so doing.

c. Section 262, Detention of offenders attending in Court:

- (1) Any person attending a Criminal Court, although not under arrest or upon a summons, may be detained by that Court for the purpose of examination for any offence of which that Court can take cognizance and which, from the evidence, he may appear to have committed, and may be proceeded against as though he had been arrested or summoned.
- (2) When the detention takes place after a trial has been begun, the proceedings in respect of that person shall be commenced afresh and the witnesses re-heard.

The duration of detention of a suspect or defendant in Malaysia as set out in Section 28 subsection (3) jo Section 117 subsection (1) of Criminal Procedure Code (CPC) that if a person is arrested and detained and investigation can not be completed within 24 hours as referred to

Section 28 Criminal Procedure Code (CPC) and police are still required for investigation, the police immediately send a request to the judge to extend the detention of the suspect or defendant.

Under Section 117 subsection (2) provides that the authority of detention of the defendant in such a prisoner is as follows:

1. If a crime under investigation is punishable by a criminal sentence of less than 14 years imprisonment, the detention is not longer than 4 days, and the extension of detention is not longer than 3 days; or
2. If a crime under investigation is punishable by imprisonment or imprisonment of 14 years or more, detention is not longer than 7 days, and an extension of detention is not longer than 7 days.

The current case in Malaysia is the murder of Kim Jong Nam, North Korean ruler's eldest brother Kim Jong Un at Kuala Lumpur International Airport on Monday 13 February 2017. Malaysian Royal Police extended the arrest of Siti Aisyah, an Indonesian citizen suspected of involvement in the case of the murder. The extension period of detention is common with Malaysian law. Malaysian state authorities still need time to find solid evidence to bring the case to court. In Malaysia the maximum temporary suspension for the suspect is 14 days.<sup>4</sup>

## **2. Regulation of detention in the Netherlands**

The Dutch criminal procedure law is called *Wetboek van Strafvordering* (1926, partially partial amendment). In addition to arranging pre-trial detention, *Wetboek van Strafvordering* organizes arrests by police (*ophouden voor verhoor*, arrest for questioning). First, the police can arrest a suspect for 6 hours, not counting between midnight (24.00) and morning (9:00 am). for 9 hours is intended to provide an opportunity to rest to the person arrested, so that the concerned should not be checked.<sup>5</sup>

<sup>4</sup> <http://www.mediaindonesia.com/news/read/93431/penahanan-siti-aisyah-di-malaysia-diperpanjang/2017-02-22> accessed 9-3-2017 at 21.00 pm.

<sup>5</sup> Andi Hamzah, 2014, *Pre-Trial Justice Dan Discretionary Justice Dalam KUHAP Berbagai Negara*, Jakarta: Sinar Grafika page 90.

In case it is still required for investigative purposes, police officers may ask the prosecutor or deputy prosecutor (senior police) to place the suspect in police custody for 3 days, and may be extended by the prosecutor for 3 more days, totaling 6 days . Post arrest detention by police or ophouden voor verhoor (maximum 6 hours) and police custody or inverzekeringstelling (maximum 6 days), not pre-trial detention.<sup>6</sup>

The system of detention according to Dutch criminal procedure law, as follows:<sup>7</sup>

- Police arrest for 6 hours (not counted between 24.00 pm and 9.00 am).
- Police detention for 3 days may be extended by the prosecutor, to 6 days.
- Detention of a commissioner (rechtercommissaris) judge at the request of the prosecutor for 14 days.
- A 30-day court order detention based on a prosecutor's request, may be renewed twice (2 x 30 days), at the request of the prosecutor, to be 90 days.

According to Wetboek van Strafvordering, the arrest of detention may be granted, if it is assumed, if the detention is passed, will exceed the length of time imposed in the sentence later. The release may be accompanied by certain conditions or guarantees (such as bail in common law states). As in civil law countries (including Indonesia), freed prisoners while awaiting trial is rarely guaranteed by bail, but with the assurance of others or self.<sup>8</sup>

In the Netherlands, some of the requirements of a detainee being released from detention (in Indonesia called "suspension of detention") are not much different from the requirements for imprisonment, among others, as follows:

- Promises to be present when "suspension of detention" is canceled, and promises not to avoid if the person is convicted by a court later.
- Compulsory rehabilitation therapy in case he or she is a narcotic criminal or is required to attend training during the day in other cases.
- Compulsory to wear electronic devices to be monitored as long as not detained / not jailed.
- Compulsory to wear electronic appliance while under house arrest.

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<sup>6</sup> Ibid, page 91.

<sup>7</sup> Ibid, page 93.

<sup>8</sup> Ibid, page 95.

- Handing money to the court, as a guarantee for suspension of detention.<sup>9</sup>

## Conclusion

Detention in Indonesia is very long, which is detrimental to the suspect or defendant, the family of the suspect or defendant, and the state itself. Therefore, the rules of detention in the Indonesian Criminal Procedure Code (KUHAP) should be renewed, because they are not fair. Especially when associated with the principle of justice: simple, fast, and low cost.

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<sup>9</sup> Ibid, page 96.