PHILOSOPHICAL AND COMPARATIVE STUDIES BETWEEN THE CONCEPT OF CRIMINAL ATTEMPT IN INDONESIAN PENAL CODE AND SOUTH KOREAN PENAL CODE

THESIS

By:

MUHAMMAD OSCAR DHARMA PUTRA MULYA

Student Number: 16410119

INTERNATIONAL PROGRAM

UNDERGRADUATE STUDY

FACULTY OF LAW

UNIVERSITAS ISLAM INDONESIA

YOGYAKARTA

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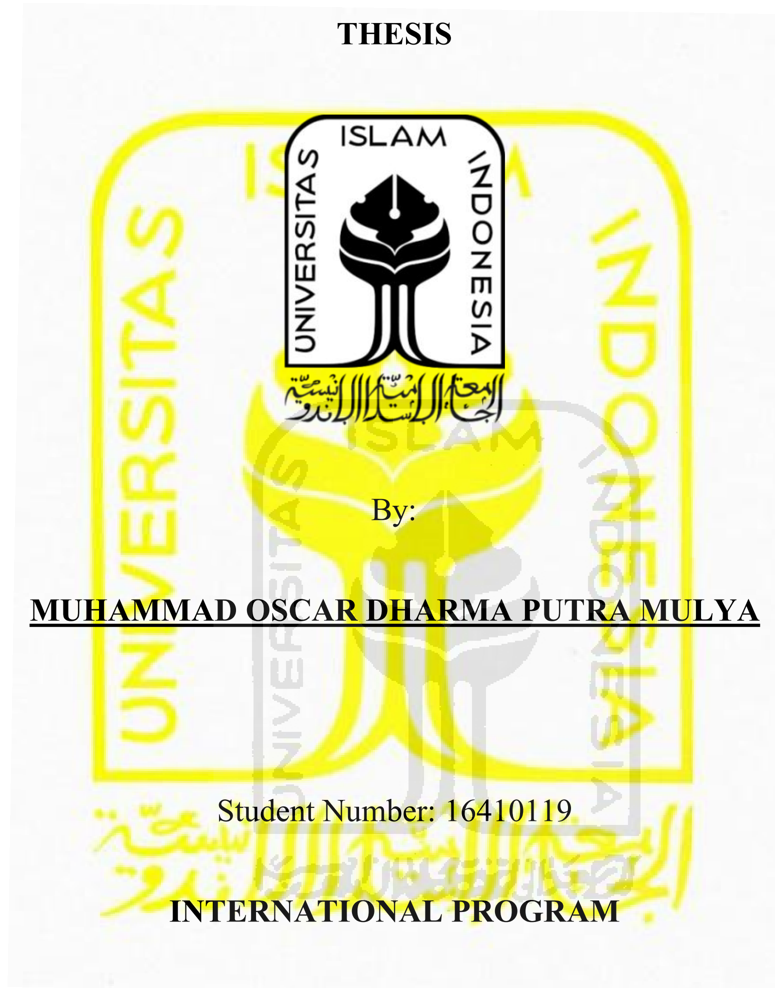

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Has Been Examined and Approved by Thesis Advisor submitted before the Board of Examiners in Final Thesis Examinations

Date on July 8, 2020

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Thesis Supervisor

(Dr. Aroma Elmina Martha, S.H.,M.H.)

NIK. 934100103

بِسْمِ اللهِ الرَّحْمٰنِ الرَّحِيْمِ

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THESIS

This bachelor degree thesis has been approved by Thesis Supervisor to be submitted in front of Board of Examiners in an oral exam

At the Date of:

Yogyakarta,

Language Advisor,

<u>Ima Dyah Savitri, S.S., M.A.</u>

بِسْمِ اللهِ الرَّحْمٰنِ الرَّحِيْمِ

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Yogyakarta, 8th July 2020

Board Examiners	**Signature**
1. Dr. Aroma Elmina Martha, S.H.,M.H.	
2. Dr. Mahrus Ali, S.H.,M.H.	
3. Drs. Agus Triyanta, M.A.,M.H.,Ph.D.	

Universitas Islam Indonesia

Faculty of Law

Dean,

Dr. Abdul Jamil, S.H., M.H.

NIP: 904100102

SURAT PERNYATAAN

ORISINALITAS KARYA TULIS ILMIAH BERUPA TUGAS AKHIR

MAHASISWA FAKULTAS HUKUM UNIVERSITAS ISLAM INDONESIA

Bismillahirrahmanirrahim

Yang bertanda tangan di bawah ini, Saya:

Nama : **MUHAMMAD OSCAR DHARMA PUTRA MULYA**

NIM : **16410119**

Adalah benar-benar Mahasiswa Fakultas Hukum Universitas Islam Indonesia yang telah melakukan penulisan Karya Tulis Ilmiah (Tugas Akhir) berupa Skripsi dengan judul: **PHILOSOPHICAL AND COMPARATIVE STUDIES BETWEEN THE CONCEPT OF CRIMINAL ATTEMPT IN INDONESIAN PENAL CODE AND SOUTH KOREAN PENAL CODE**. Karya Ilmiah ini saya ajukan kepada Tim Penguji dalam Ujian Pendadaran yang diselenggarakan oleh Fakultas Hukum Universitas Islam Indonesia.

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Demikian surat pernyataan ini saya buat dengan sebenar-benarnya, dalam kondisi sehat jasmani dan rohani, dengan sadar dan tidak ada tekanan dalam bentuk apapun dan oleh siapapun.

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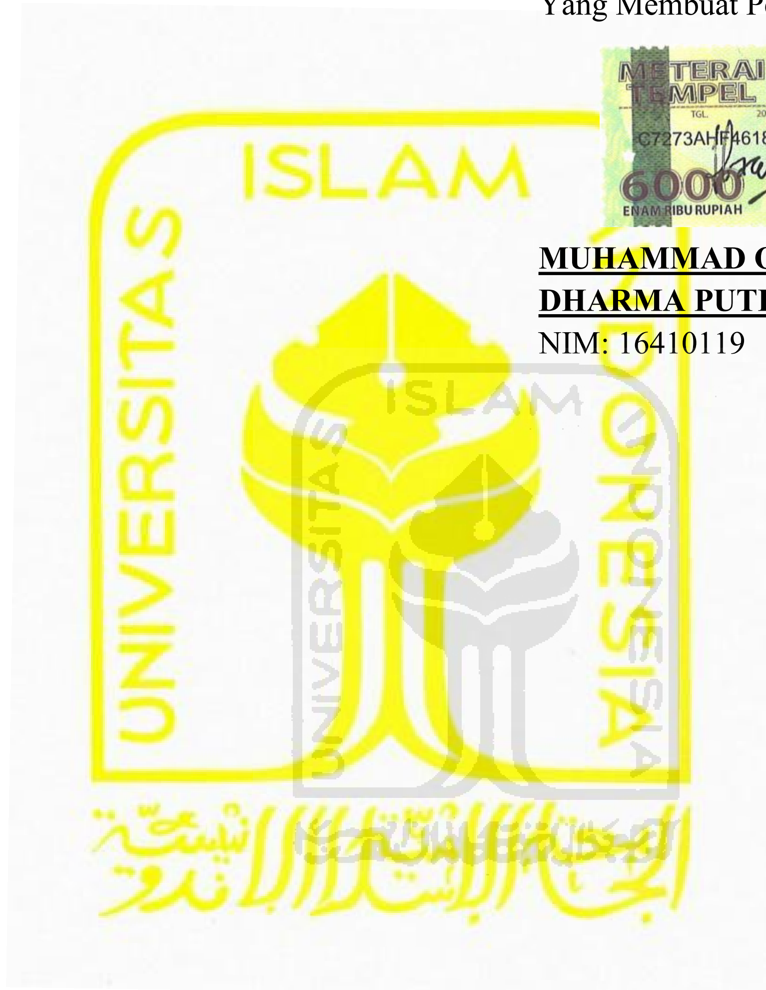

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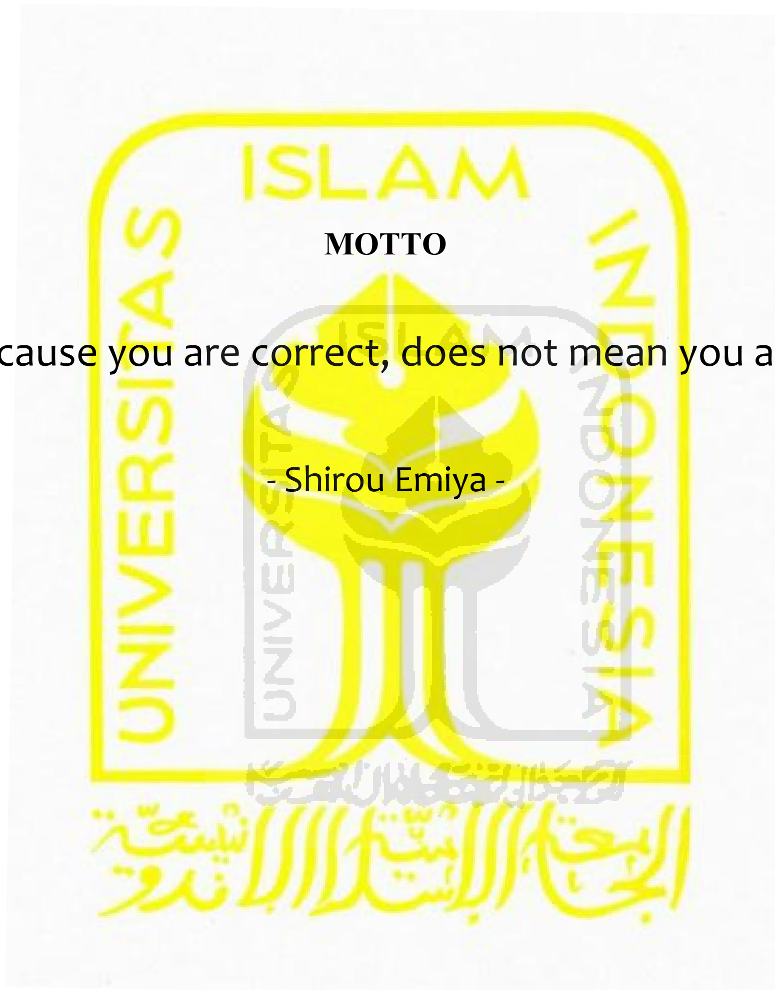
ENAM RIBU RUPIAH

MUHAMMAD OSCAR DHARMA PUTRA MULYA
NIM: 16410119

CURRICULUM VITAE

1. Name : Muhammad Oscar Dharma Putra Mulya
2. Place of Birth : Pontianak
3. Date of Birth : 13th December 1995
4. Gender : Male
5. Address : Jalan Purnama, Gg. Purnama 8 No. 11 RT 03 / RW 015, Kel. Parit Tokaya, Kec. Pontianak Selatan, Kalimantan Barat (78121)
6. Parent Identity
   a. Father : Mulyadi Sanjaya
      Occupation : Private Employee
   b. Mother : Yuliana, S.H., M.H., M. eng.
      Occupation : Civil Servant
7. Education
   a. Elementary School : SD Muhammadiyah 02 Pontianak
   b. Junior High School : SMP Negeri 3 Pontianak
   c. Senior High School : SMA Negeri 1 Pontianak
   d. College : Universitas Islam Indonesia

11. Organization Experiences :
   a. Juridical Council of International Program
12. Competitions :
   a. -
13. Conferences :
   a. -
14. Publications :
   a. -



MOTTO

“Just because you are correct, does not mean you are right”

- Shirou Emiya -

DEDICATION

This thesis sincerely dedicated to:

Allah *Subhanallahu wa ta'ala*,

The gift of your blessing and compassion has given me the courage and strength to achieve new knowledge and experience which made it possible to complete this thesis;

My beloved parents,

who have provided me continuous support and affection;

My beloved brother,

who always accompany and support me in hard times;

All of my lectures of Faculty of Law, Universitas Islam Indonesia,

who have taught and guided me all these years;

All of my friends,

who always be on my side in easy and hard times;

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This thesis was written and complied as a part of requirement to achieve bachelor degree in International Program, Faculty of Law, Universitas Islam Indonesia. I realize that there is still a lot of room for improvement for this thesis, hence any kind of suggestions will be gladly accepted and considered, for the better future of our education system.

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Yogyakarta, 30 May 2020
Author,

Muhammad Oscar Dharma Putra Mulya

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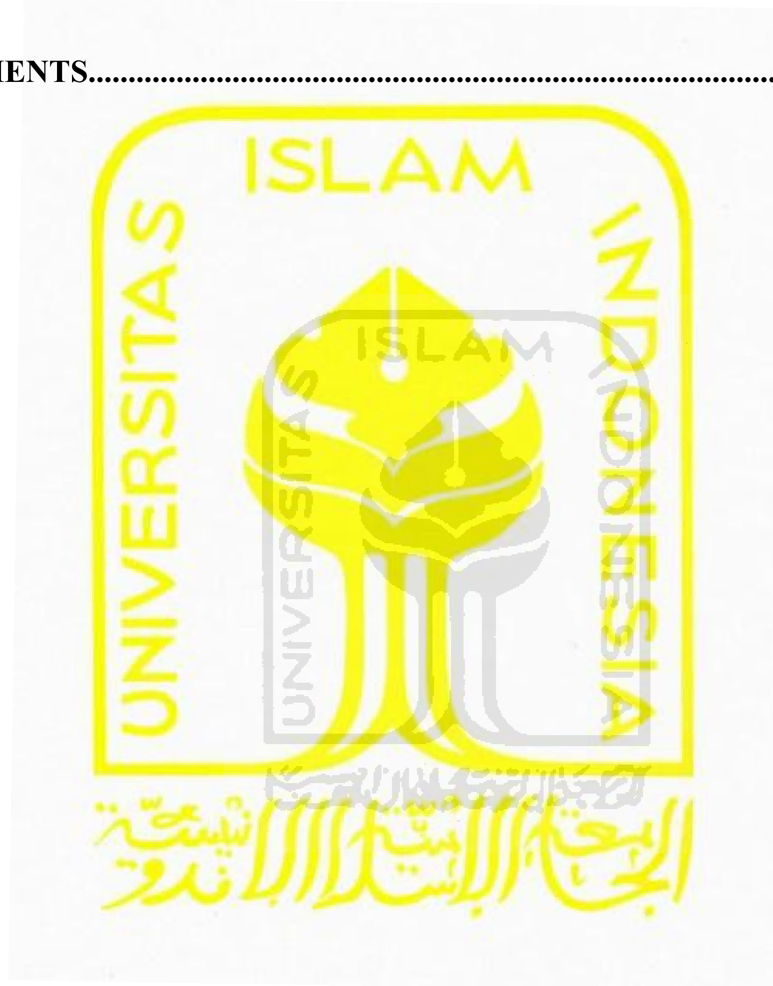


ABSTRAK

Penelitian ini bertujuan untuk menganalisis perbandingan antara konsep tindak pidana percobaan di dalam KUHP Indonesia, Rancangan Kitab Undang-Undang Hukum Pidana Indonesia, dan UU Tindak Pidana Korupsi Indonesia dengan konsep di dalam KUHP dan juga UU Pemberian Tak Patut dan Gratifikasi Korea Selatan. Penelitian dilakukan dengan menitikberatkan pada perspektif filosofis dan hukum perbandingan, untuk menentukan apakah terdapat persamaan dan perbedaan antara konsep tersebut. Penelitian ini dilakukan dengan menggunakan metode normatif, dengan melakukan analisis terhadap undang-undang terkait konsep tindak pidana percobaan di sistem hukum Indonesia dan Korea Selatan. Penelitian ini dilakukan dengan menggunakan metode Constantinesco dengan cara menggambarkan persamaan dan perbedaan tersebut dalam kedua sistem hukum tersebut. Hasil penelitian ini menunjukkan bahwa terdapat perbedaan secara rasional yang dimiliki oleh ahli hukum untuk memidana tindak pidana percobaan. Rasional utama dalam penjustifikasian pemberian sanksi pada tindak pidana kejahatan percobaan didasarkan pada pendapat dari kelompok Utilitarian dan Retributivis. Kelompok Utilitarian menitikberatkan pada teori fungsi pencegahan, sedangkan kelompok Retibutivis menitikberatkan pada teori balasan. Persamaan pada tindak pidana percobaan KUHP Indonesia dan Korea Selatan, ditemukan pada kedua Undang-Undang tersebut tidak mengenal sanksi untuk percobaan dalam pelanggaran, sama-sama mengharuskan adanya unsur niat untuk memidana tindak pidana kejahatan percobaan. Adapun perbedaannya pada pengurangan sanksi untuk kejahatan tercobaan diatur dengan sangat spesifik didalam KUHP Korea Selatan. Sedangkan KUHP Indonesia tidak menjelaskan pengurangan sanksi tersebut secara spesifik. Selanjutnya, kelebihan pengaturan konsep dalam KUHP

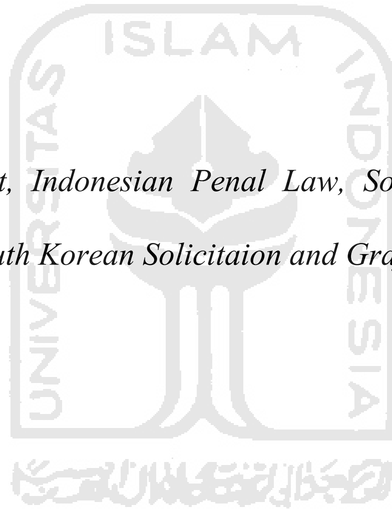
Indonesia adalah tercantumnya unsur niat yang memberikan kepastian hukum, namun tidak dijelaskan secara rinci mengenai definisi permulaan pelaksanaan. Sedangkan dalam Rancangan KUHP Indonesia, unsur niat dihilangkan, namun definisi permulaan pelaksanaan dijelaskan secara rinci. Adapun kelebihan dalam KUHP Korea Selatan adalah pengurangan sanksi untuk kejahatan percobaan diatur sangat spesifik, namun kekurangannya adalah tidak dijelaskan mengenai fase pelaksaanan permulaan sehingga sulit menentukan kapan permulaan dari fase tersebut. Selanjutnya, untuk perbandingan konsep kejahatan percobaan dalam Undang-Undang Tindak Pidana Korupsi (UU Tipikor) di Indonesia dan Undang-Undang Pemberian Tak Patut dan Gratifikasi Korea Selatan, adalah bahwa jika UU Tipikor Indonesia mengatur dengan jelas konsep percobaan untuk melakukan korupsi yang diformulasikan sebagai delik materiil, UU Tipikor Korea Selatan bahkan tidak mengenal istilah kejahatan korupsi, melainkan kejahatan suap dan gratifikasi, dan UU tersebut juga tidak mengatur tentang konsep percobaan untuk melakukan suap dan gratifikasi tersebut.

Kata kunci : Tindak Pidana Percobaan, Kitab Undang-Undang Hukum Pidana Indonesia, Kitab Undang-Undang Hukum Pidana Korea Selatan, Undang-Undang Tindak Pidana Korupsi Indonesia, Undang-Undang Pemberian Tak Patut dan Gratifikasi Korea Selatan, Perbandingan Hukum

ABSTRACT

The purpose of this research is to analyse the comparison of concept of criminal attempt in Indonesian Penal Code, Draft of Indonesian Penal Code, and Indonesian Corruption Law with such concept in South Korean Penal Code and also South Korean Improper Solicitation and Graft Act. This research focuses on the philosophical and comparative law perspective, to determine whether there are similarities and differences between those concepts. This research uses normative methodology, by analysing the laws in regards with the concept of criminal attempt in Indonesian and South Korean legal system. This research is conducted using Constantinesco method to describe such similarities and differences. The result of this research shows that there is difference of rationale proposed by legal scholars to punish criminal attempt. The rationale is based from the theories of Utilitarianist and Retributivist. The Utilitarianists focus on the theory of deterrence function, while Retributivists focus on the theory of retribution. The similarities between the concept of criminal attempt in both Indonesian and South Korean Penal Code are that both Penal Codes do not punish attempt of misdemeanor, and both require the element of intention to punish the offender. As for the difference is that the mitigation for the punishment of criminal attempt is regulated in a very detailed way in South Korean Penal Code, while Indonesian Penal Code does not regulate the mitigation specifically. Then, the advantage of the concept in Indonesian Penal Code is the stipulation of the element of intention that gives legal certainty, while the disadvantage is that the stage of preliminary conduct is not defined clearly. While in Draft of Indonesian Penal Code, the element of intention is removed, but the stage of preliminary conduct is defined clearly. As for the advantage of the concept in South Korean Penal Code is that the

mitigation for the punishment of criminal attempt is regulated very specifically, but there is no clear-cut definition on the commencement stage, causing an issue to determine the starting point of the stage. Then, for the comparison of concept of criminal attempt in Indonesian Corruption Law and SouthKorean Improper Solicitaion and Graft Act, it is that while Indonesian Corruption Law regulates criminal attempt clearly by the formulation of materiil delict, South Korean Corruption Law does not even recognize about the crime of corruption, instead, they equalize it with the term of bribery and graft, in which there is also no regulation regarding the matter of attempting to commit bribery and graft.



Key words : Criminal Attempt, Indonesian Penal Law, South Korean Penal Law, Indonesian Corruption Law, South Korean Solicitaion and Graft Act, Comparative Law

CHAPTER I

INTRODUCTION

A. BACKGROUND OF STUDY

Comparative Law or Comparative Jurisprudence means the study of principles of legal science by the comparison of various systems of law.[1] Zweigert and Kotz also give their opinion on the definition of Comparative Law, in which they describe Comparative Law as 'an intellectual activity with law as its object and comparison as its process'.[2]

It is important to note that Comparative Law shares resemblance with what is acknowledged by Foreign Law, however, both of them are different, in the sense that in the context of Comparative Law, the purpose of the study is to compare, as the name suggests, the different principles in some legal systems. On the other hand, in the context of Foreign Law, the purpose of the study is only to know about the

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[1] Barda Nawawi Arief, *Perbandingan Hukum Pidana*, Eleventh Edition, PT RajaGrafindo Persada, Jakarta, 2014, p. 3.

[2] Peter De Cruz, *Comparative Law in A Changing World*, Second Edition, Cavendish Publishing Limited, Great Britain, 1999, p. 3.

legal system in foreign country, literally as it is, without the intention to compare it with other legal systems.[3]

There are two kinds of Comparative Law known, as classified by Jaakko Husa, which are Macro Comparative Law and Micro Comparative Law.[4] Micro Comparative Law is related with specific cases or regulations, while Macro Comparative Law is focused on wide-scale legal issue, such as the classification and systematization of legal system.[5] As for the method in conducting Comparative Law, there are two methods which are well-acknowledged, which are Constantinesco method and Kamba method. This writing uses Constantinesco method, in which this method will be explained in later part.

Since it is clear from the above definitions that the object of Comparative Study is legal science, and for the purpose of this writing, the legal science that would be taken to be compared is the concept of the criminal attempt which is stipulated in Indonesian Penal Code and South Korean Penal Code, which means the object taken is only related with specific regulation in the legal systems, then the kind of Comparative Law which is used is Micro Comparative Law. The reason of why the writer decided to take this topic is because South Korean Penal Code and Indonesian Penal Code have a lot of differences in the context of the concept of criminal attempt, which for instance, regarding the length of punishment for the offender, and also the kind of crimes which attempt can be punished.[6] Therefore,

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[3] Barda Nawawi Arief, *Loc. Cit.*

[4] Barda Nawawi Arief, *Op. Cit.,* p. 23.

[5] *Ibid.*

[6] Barda Nawawi Arief, *Op. Cit.,* p. 108-109.

South Korean Penal Code is taken as the object of comparison which will be interesting to be discussed.

The first part of this writing discusses about the rationale of punishing the act of criminal attempt, which is reviewed from the perspectives of Utilitarian and Retributivist group, and also the concept of criminal law and criminal attempt in general, while the second part discusses about the comparison between the concept of criminal attempt in Indonesian Penal Code and South Korean Penal Code, which will cover the similarities, differences, and also the comparison between the concept of criminal attempt in Indonesian Corruption Law and South Korean Improper Solicitation and Graft Act, while the third part discusses about the advantages and disadvantages of such concept which is adopted in both Penal Codes. The reason why the perspectives of Utilitarian and Retributivist group is used to provide the rationale for punishing criminal attempt is because both of this groups have different reasons in determining the culpability of criminal attempt offender, which will also affect the grading of punishment for such offender.[7]

B. PROBLEM FORMULATION

1. How is the rationale and grading of punishment in the penalization of criminal attempt based on philosophical perspective?

[7] Joshua Dressler, *Understanding Criminal Law*, Seventh Edition, Matthew Bender & Company, Inc., United States of America, 2015, p. 183-184.

2. How are the similarities and differences between the concept of criminal attempt in Indonesian Penal Code and South Korean Penal Code?

3. How are the comparison between the concept of criminal attempt in Indonesian Corruption Law and South Korean Improper Solicitation and Graft Act?

4. How are the advantages and disadvantages between the concept criminal attempt stipulated in Indonesian legal sources and South Korean legal sources?

C. PURPOSE OF STUDY

1. To know the rationale and the grading of punishment in the penalization of criminal attempt based on philosophical perspective.
2. To analyse the similarities and differences between the concept of criminal attempt stipulated in Indonesian Penal Code and Korean Penal Code.
3. To analyse the comparison between the concept of criminal attempt in Indonesian Corruption Law and South Korean Improper Solicitation and Graft Act.
4. To find out the advantages and disadvantages of the concept of criminal attempt adopted in Indonesian Penal Code and Korean Penal Code.

D. LITERATURE REVIEW

This part reviews the theories or bases used for this research proposal, which are taken from various literatures.

1. Rationale in Penalizing Criminal Attempt based on Philosophical Perspective

The main reason or rationale for the penalization of criminal attempt is the need to stop a criminal who has failed in finishing a criminal conduct, while also providing the ground or basis for the law enforcers to intervene a commission of a criminal act before it reaches its completion, or in other words, provides prevention for the completion of a crime.[8] This rationale is explained deeper by two groups, which are Utilitarian and Retributivists group, in which both of these groups argue that criminal attempt shall be punished, but from two different point of views. Their point of views will be reviewed later in Chapter II and III.

2. Definition of Criminal Law

Criminal law has the purpose to prevent harm to the community, to give protection towards the security of individual interests, and also the assurance of the survival of the group.[9] Criminal law can also be referred as the expression of social and moral criticism governed by highly-authoritative social rules, which are essentially prohibitive, restrictive, and coercive.[10] George,in his

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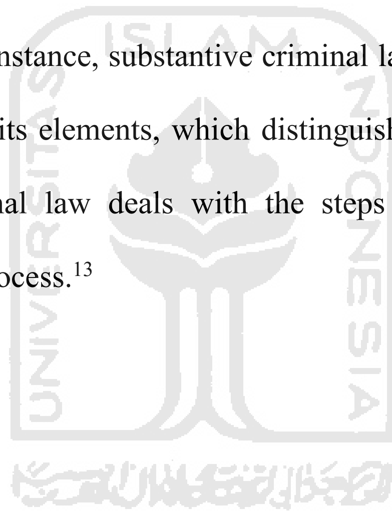
[8] Wayne R. Lafave, *Principles of Criminal Law*, Second Edition, West, United States of America, 2003, p. 458.

[9] L B Curzon, *Frameworks : Criminal Law*, Eighth Edition, Pearson Professional Limited, 1997, p. 3.

[10] *Ibid*.

writing on the social basis of criminal law, argues that criminal law in the modern society shall be seen as a body of norms, formally promulgated through specified governmental organs, contravention of which warrants the imposition of punishment through special proceedings maintained in the name of the people or state.[11] Furthermore, criminal law can be classified into two parts, which are substantive criminal law and procedural criminal law, in which substantive criminal law deals with the determination of which act shall be considered as crime along with the punishment accompanying such act, while procedural criminal law deals with the steps or procedures to punish someone who commits a crime.[12] For instance, substantive criminal law deals with the concept of homicide along with its elements, which distinguishes it from manslaughter, while procedural criminal law deals with the steps to punish the homicide offender until the trial process.[13]



[11] *Ibid*.

[12] Jocelyn M. Pollock, *Criminal Law*, Tenth Edition, Anderson Publishing, 2013, New York, p. 6.

[13] *Ibid.*

3. Concept of Criminal Attempt

Criminal attempt can be interpreted as an act done with the intention to commit a crime, beyond mere preparation, but failed in its completion.[14] It can also be defined as an overt act committed with the intention to commit the crime which and except for the intervention of some causes preventing the carrying out of such intention, would have resulted in the completion of the crime intended.[15] There are some traditional elements of criminal attempt which are recognized in Common Law, which are the specific intent to commit a crime, an overt act toward its commission, the apparent possibility of commission, and the failure of consummation.[16]

The general consensus of the first element, which is the specific intent, is that there must be a proof that the offender of criminal attempt intended to commit the specific crime directed by such attempt, and that the offender intended the outcome of such crime.[17]

The second element, the overt act toward its commission, can be proven by using substantial step test, in which to prove the attempt it is required the conduct which really complies with the offender's purpose.[18] Therefore, it has to be differentiated between an act which is only a mere preparation and an act which is overt act, since a mere preparation is not recognized as a substantial

[14] *Ibid*., p. 129.

[15] *Ibid.*

[16] *Ibid*., p. 130.

[17] *Ibid*.

[18] *Ibid*., p. 131.

step.[19] The examples of this overt act can be seen in the act of spreading gasoline in the victim's residence in the case of attempted arson, and waiting the chance to shoot the victim in the case of attempted murder.[20]

As for the third element, which is the apparent ability, it means that a person can be held responsible or not for committing criminal attempt even though the crime they intended is impossible from happening, in which the responsibility is determined from the type of the impossibility itself, which is classified into two, which are factual impossibility and legal impossibility.[21] In the context of factual impossibility, the offender still has the responsibility of committing criminal attempt since factual impossibility cannot be used as a defense, for instance, the attempt to shoot someone with an unloaded gun, while in the context of legal impossibility, the offender does not have the responsibility of committing criminal attempt since there is no law violated even if the attempt is successful, for instance, attempting to drive 60 km/hour in a country while the speed limitation in such country is 65 km/hour.[22]

Then, the fourth and the last element, which is the failure of consummation, deals with the causes of unsuccessful crime, which can be classified into two causes, which are the voluntary abandonment from the offender, which can be accepted as legal defense, and the involuntary abandonment, which is caused by intervention from other circumstances or

[19] *Ibid*.

[20] *Ibid*.

[21] *Ibid*.

[22] *Ibid*., p. 132-133.

external reasons, which cannot be accepted as legal defense. The example of the intervention from other circumstance is when a crime is not finished because of the sudden appearance of police officer in the scene.[23]

While the concept of criminal attempt stipulated in the current Indonesian Penal Code and Korean Penal Code can be seen below, however, the detailed explanation of the elements in those Codes will be reviewed further in later chapter.

The matter of criminal attempt in Indonesia is regulated in Indonesian Penal Code, Book I, Chapter IV, Article 53.[24]

Article 53 states that :[25]

> " (1) Attempting to do a crime is criminalized, if the intention is proven by preliminary conduct, and such conduct is unfinished not merely because of the criminal's own intention.
>
> (2) The maximum core sanction in the context of attempt of a crime is reduced by 1/3.
>
> (3) If the crime is punishable by death penalty[26] or long-life sentence[27], the maximum sanction which can be imposed is fifteen (15) years.

[23] *Ibid*., p.135.

[24] Mohammad Ekaputra, 'Percobaan (Poging)', USU Digital Library, 2002, p. 1.

[25] Article 53 of Indonesian Penal Code.

[26] The term that applies to capital punishment and is the worst penalty given for committing a murder or an atrocious assault. Taken from https://thelawdictionary.org/death-penalty/ . Last accessed 13rd May 2019.

[27] Means that the defendant will be imprisoned until the end of his/her life. Eddy O.S Hiariej, *Prinsip-Prinsip Hukum Pidana*, First Edition, Cahaya Atma Pustaka, Yogyakarta, 2014, p. 396.

(4) Additional penal sanction for the criminal attempt is equalized with finished conduct or delict."

As for the matter of criminal attempt in South Korean Penal Code, it is stipulated in Article 25 and 29 of the Code, in which Article 25 states that :[28]

" (1) When an intended crime is not completed or if the intended result does not occur, it shall be punishable as an attempted crime.

(2) The punishment for attempted crime may be mitigated than that of consummated crime."

While Article 29 of Korean Penal Code states that:[29] "*The punishment for attempted crimes shall be specifically provided in each Article concerned.*"

3. Comparative Law Methods

There are two methodologies which are well-known in the scope of Comparative Law, which are Constantinesco method and Kamba method. Kamba explains that the similarities and differences are the substances that must exist in Comparative Law, in which he emphasized that there are three phases in his method, which are descriptive, analytical, and explanation phases. He also

[28] Article 25 of Korean Penal Code.

[29] Article 29 of Korean Penal Code.

states that functional approach and problem-solving approach are essential tool for cross-cultural comparison, or the comparison between different culture.[30]

However, for the purpose of this writing, since it uses Constantinesco method, it will only be explained regarding Constantinesco method in detail. There are three phases in Constantinesco method, which is described as follow :

The first phase consists of some steps, in which the first is to study some concepts for later examining them at their original source. Next, to study such concepts in their complexities and totality from their legal sources with full consideration, in the sense that it is needed to review the hierarchy of those legal sources, for then interpreting it with the proper method which suits with the legal order.

As for the second phase, it consists of the activity of understanding the concepts compared, in the sense that such concepts should be implemented or integrated into one's own legal system, to have understanding regarding the influence towards the implementation of those concepts by determining the elements and factors from within or outside the legal system, and also by studying the social sources of a positive law applied in a state.

[30] *Ibid*., p. 11-12.

Finally, the third and the last phase, consists of the activity to place those concepts on the same line, in the sense that those concepts need to be identified in a critical and systematize way to know their relationships.[31]

4. Advantages and Disadvantages of Using Comparative Law

There are some advantages which can be achieved by studying about Comparative Law, which can be reviewed from some aspects.

The first aspect is from cultural aspect, in the sense that if someone studies about various legal systems in the world, it is arguably that they will have better understanding on their own state's legal system, and not to mention that his knowledge and insight on such legal systems will be broader than other people.[32]

The second aspect is from the professionalism aspect, in the sense that the understanding of other state's legal systems will help the professionals, for instance, advocate, in constructing a good defense or lawsuits, or to help legislators in making new laws or amend the existing one by learning about the laws of other states. As for the third and the last aspect is from the scientific aspect, in which it is useful to be able to understand the general principles consisted in existing legal systems, so that they can be used for the development

[31] *Ibid*., p. 10-11.

[32] Konrad Zweigert and Hein Kotz, *Introduction to Comparative Law*, Second Revised Edition, Clarendon Press, 1987, Oxford, p. 19-20.

of law in certain state, or even to be able for the state to do harmonization or unification of laws.[33]

Aside from having advantages, conducting Comparative Study also has its own disadvantages or weaknesses. The first disadvantage that could be argued is regarding the language barrier[34], since if we want to study about another state legal system, then we will also have to deal with the mother language of such state, since their legal systems, including their legal sources, will be provided or stipulated by using their mother language. Therefore, studying about other state legal system takes a long process rather than by just studying one's own legal system. While the second disadvantage is the tendency that a researcher who conducts Comparative Study only masters their own national legal system, and has a narrow understanding regarding another state's legal system, and thus, the result of the Comparative Study will not be as complete as intended.[35]

[33] Munir Fuady, *Perbandingan Ilmu Hukum*, First Edition, PT Refika Aditama, Bandung, 2007, p. 19-20.

[34] *Ibid*., p. 2.

[35] *Ibid*., p. 24.

E. TERMS AND DEFINITIONS

This part consists of the terms used in this research proposal along with their definitions.

A. Philosophy, means the most basic beliefs, concepts, and attitudes, of an individual or group.[36]

B. Utilitarian, a group which supports penalization of criminal attempt based on the prevention purpose.[37]

C. Retributivist, a group which supports penalization of criminal attempt based on the culpability and harm-inflicted reasonings.[38]

D. Comparative Law, or which is also known as Comparative Study, means a method to describe the systematic study of particular legal traditions and legal rules on a comparative basis, in which it requires two or more legal traditions, legal systems, or selected aspects of such systems as comparison.[39]

E. Criminal Attempt, which means that the commission of a crime which is not finished because of some factors, which can either be from the criminal's own or other person's will.[40]

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[36] Taken from https://www.merriam-webster.com/dictionary/philosophy. Last accessed 15th December 2019.

[37] Joshua Dressler, *Op. Cit.*, p. 183.

[38] Joshua Dressler, *Op. Cit.*, p. 184.

[39] Peter De Cruz, *Loc. Cit.*

[40] Article 53 of Indonesian Penal Code and Article 26 of Korean Penal Code.

F. Preparation Phase, which means the phase related with the criminal attempt in which the criminal just committed an act which is still far from the realization of the crime intended.[41]

G. Preliminary Conduct, which means the phase related with the criminal attempt in which the criminal already expressed their intention which is close to the commission of a crime.[42]

F. RESEARCH ORIGINALITY

1. Astri Khairisa, *Percobaan Melakukan Kejahatan Ditinjau Dari Perspektif Hukum Pidana Indonesia dan Hukum Pidana Islam, 2018*.[43]

The research which is conducted by Astri Khairisa concluded that there are some differences between the concept of criminal attempt which is applied in Indonesian Criminal Law and Islamic Criminal Law, and the research is also really detailed. However, even though she already conducted a Comparative Study, since the scope of the comparison is different with the scope which the writer is undertaking currently, which is the comparison of the concept of attempt applied in Indonesian and South Korean law, then the writer could argue that the writer's writing is original.

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[41] Mahrus Ali, *Dasar-Dasar Hukum Pidana*, Third Edition, Sinar Grafika, Jakarta, 2015, p. 199.

[42] *Ibid*., p. 198.

[43] Astri Khairisa, 'Percobaan Melakukan Kejahatan Ditinjau Dari Perspektif Hukum Pidana Indonesia dan Hukum Pidana Islam', Jurnal Hukum, 2018, hlm. 31-32.

2. Vidya Prahassacita, *Tinjauan Atas Kebijakan Hukum Pidana Terhadap Penyuapan Di Sektor Privat Dalam Hukum Nasional Indonesia : Suatu Perbandingan Dengan Singapura, Malaysia, Dan Korea Selatan, 2017*.[44]

The research which is done by Vidya Prahassacita concluded that there are differences between the measures applied for the crime of bribery applied in Indonesian, Singapore, Malaysian, and South Korean Law, and thus, Vidya also already conducted a Comparative Law. However, since the object of comparison is different with what the writer is undertaking, which is the comparison of the concept of attempt stipulated in Indonesian and South Korean Law, then it is safe for the writer to argue that this writing is free from plagiarism.

3. Kuswardani, *Bentuk-Bentuk Kekerasan Domestik Dan Permasalahannya (Studi Perbandingan Hukum Indonesia dan Malaysia), 2017*.[45]

The research undertaken by Kuswardani is detailed in distinguishing between the case of domestic violence which happens in Indonesia and Malaysia, and so, it could also be said that Kuswardani also already conducted a Comparative Law. However, once again, since the area of comparison is different, which is the case of domestic violence with the concept of criminal attempt, the writer can argue that the research done by the writer at the moment is original.

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[44] Vidya Prahassacitta, 'Tinjauan Atas Kebijakan Hukum Pidana Terhadap Penyuapan Di Sektor Privat Dalam Hukum Nasional Indonesia : Suatu Perbandingan Dengan Singapura, Malaysia, Dan Korea Selatan', Jurnal Hukum dan Pembangunan, vol. 47, no. 4, 2017, p. 21.

[45] Kuswardani, 'Bentuk-Bentuk Kekerasan Domestik Dan Permasalahannya (Studi Perbandingan Hukum Indonesia dan Malaysia)', Jurnal Hukum dan Pembangunan, vol. 47, no. 4, 2017, hlm. 436.

G. RESEARCH METHODS

This research would be conducted with the specifications as follow:

A. Research Type

This research is a Normative Legal Research since it would be mostly done by reviewing prevailing laws and regulations, and also legal theories or doctrines. Furthermore, this research is done by philosophical and comparative method, based on Micro Comparative Law approach, which is by using Constantinesco method to be exact.

B. Research Focus/Research Object

1. Rationality of punishing criminal attempt and the grading of such punishment
2. Similarities and differences of concept of criminal attempt stipulated in Indonesian Penal Code and South Korean Penal Code

C. Legal Material/Source of Data

The source for this research is the concept of criminal attempt which is stipulated in Indonesian Penal Code, Draft of Indonesian Penal Code, Indonesian Corruption Law, and Korean Penal Code. In other words, the source of data would be primary legal materials in the form of Indonesian and Korean Laws and Regulations, secondary legal materials in the form of text books, scientific journals, and internet news, while the tertiary legal materials are in the form of on-line dictionaries.

D. Method of Collecting Material/Data

Since this research is based on Normative Legal Research, then the data is collected through reviewing some literatures and journals which have relevancies with the topics discussed, which is the concept of criminal attempt stipulated in Indonesian Penal Code, Draft of Indonesian Penal Code, Indonesian Corruption Law, and South Korean Penal Code.

E. Research Approach

This research is undertaken by normative methods research approach, which is since the objects of this research are the laws and regulations regarding the philosophy criminal attempt, to determine whether there are similarities and differences with such concept in Indonesian Penal Code and South Korean Penal Code, by using micro comparison method, which is Constantinesco method, for then analyzing the advantages and disadvantages of the concept of criminal attempt adopted in Indonesian Penal Code and South Korean Penal Code.

F. Data Processing

The similarities and differences, and also advantages and disadvantages between the concept of criminal attempt adopted in Indonesian Penal Code and Korean South Penal Code will be analyzed by using micro-comparison method, which is by using Constantinesco method to be exact. The steps for undertaking this method are listed as follow.

1. Study of concepts from various legal sources along with their complexities for then interpreting it.

2. Understanding such concepts to be able to be implemented and integrated in own legal system by also analysing the influence of such implementation.

3. Identifying the compared concepts in a critical and systematic way to know their relationship.

G. Data Analysis

The data is processed by using descriptive qualitative method. Descriptive qualitative method, as the name suggests, is a combination of two kinds of methodology used in research, in which those methodologies are descriptive and qualitative methodology. Descriptive method means the method of collecting data based on the supporting factors towards the research object, for then to find the role of those factors, while qualitative method means the method of collecting data which is related to the perception, idea, and the belief of the person who would be interviewed, in which all of these matters cannot be measured by numbers.[46] Therefore, since the research object in this writing is to know the rationale and the grading of punishment related with the concept of criminal attempt, and also the comparison between such concept stipulated in Indonesian Penal Code and South Korean Penal Code, then the factors contributing to such comparison will be analyzed, in which the data will also be completed by the interview conducted with the legal expert in the matter of criminal attempt. To conclude, it can be simplified that descriptive qualitative method is a thorough and in-depth methodology towards the research object.

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[46] Aan Prabowo and Heriyanto, 'Aanalisis Pemanfaatan Buku Elektronik (E-Book) Oleh Pemustaka di Perpustakaan SMA Negeri 1 Malang', Jurnal Ilmu Perpustakaan, vol. 2, no. 2, 2013, p. 5.

CHAPTER II

THEORETICAL REVIEW

A. General Overview on Comparative Law

1. Concept of Comparative Law

Comparative Law means a method of studying law by analysing and reviewing different systems of law in the world, from their normative aspects, legal rules, jurisprudence, or even from the opinion of competent scholars in such field, with the purpose to find the similarities and differences between those legal systems, and also to find the cause for such similarities and differences from the historical, sociological, analytical, and normative aspect.[47] Comparative Law can also be defined as the research which has the purpose or aim to explain the similarities and differences between legal systems, and which, at the same time, is theoretically informed and empirically supported.[48]

[47] Barda Nawawi Arief, *Perbandingan Hukum Pidana*, 11th Edition, PT RajaGrafindo Persada, Jakarta, 2014, p. 3.

[48] Julie De Coninck, 'The Functional Method of Comparative Law : Quo Vadis?', The Rabel Journal of Comparative and International Private Law, Bd. 74, H. 2, 2010, p. 320.

These definitions by Black's Law Dictionary are then simplified to the study of principles of legal science by the comparison of various systems of law.[49]

Zweigert and Kotz also give their opinion on the definition of Comparative Law, in which they describe Comparative Law as 'an intellectual activity with law as its object and comparison as its process'.[50]

Comparative Law itself, according to Hug, can be classified into five classifications of comparative studies, which are : (a) foreign and domestic systems comparison to identify their differences and similarities; (b) studies with the purpose to analyse solutions for legal problems in various systems systematically and objectively; (c) studies with the purpose to investigate the causal relationship between different legal systems; (d) studies with the purpose to compare several stages of different legal systems; and (e) studies which try to analyse or discover legal evolution according to systems and periods.[51]

On the other hand, Jaakko Husa, also makes classification towards Comparative Law, which could be argued to be more known in the legal studies, and also which is used in this writing, in which he classifies it into two groups, which are Macro Comparative Law and Micro Comparative Law.[52] Macro Comparative Law deals with the comparison of wide scope of legal

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[49] Accessed from thelawdictionary.org/comparative-jurisprudence/. Last accessed 11th October 2019.

[50] Peter De Cruz, *Comparative Law in A Changing World*, Second Edition, Cavendish Publishing Limited, Great Britain, 1999, p. 3.

[51] *Ibid*.

[52] Barda Nawawi Arief, *Op. Cit*., p. 23.

issue, for instance, the systematization and the classification of legal system, while Micro Comparative Law deals with a narrower scope, in which it concerns on the comparison of specific rules or regulations.[53] Therefore, since this writing focuses only on specific regulation, which is the concept of criminal attempt, then it could be argued that this writing will use Micro Comparative Law method in conducting the comparison.

Even though Comparative Law deals with foreign legal systems, it is important to note that it is different with Foreign Law. The difference is that the purpose of Comparative Law is to compare two or more legal systems in the world, while the purpose of Foreign Law is only to study or to gain knowledge regarding various legal systems in the world without the intention to make comparisons between all of them.[54]

2. Advantages and Disadvantages of Using Comparative Law

The functions or advantages of using Comparative Law in present era could be seen from many aspects or scope. For instance, in the context of academic tradition, especially for undergraduate or postgraduate students, assessing the subject of Comparative Law as one of the materials thought to them will give some benefits. First, it will enable the students to be more critical and understand more about the essence or the purpose of the law which they are currently studying, in the sense that they will not accept the law just as it is given in their system of law, instead, they can then compare such law by

[53] *Ibid*.,

[54] Barda Nawawi Arief, *Loc. Cit.*

looking at laws in other jurisdictions, to know whether such law in their own legal system has the same validity with similar law in the other jurisdiction, which in other words, will give them wider knowledge related with different existing legal systems in the world.[55] Second, nonetheless to say, studying about Comparative Law will enable the students to get more knowledge regarding the interaction between different disciplines, ideas, and cultures consisted in other legal systems so that their perception and analytical skills in reviewing about foreign cases, for instance, will also be increased.[56] Comparative Law might also able to inspire the students to learn more and rethink about the biases consisted in their own cultural and legal education.[57]

Other uses of Comparative Law could also be seen in the context of research for drafting legislations, that as Paton said, there will be no jurisprudence without Comparative Law.[58] Such use of Comparative Law in this context, perhaps, could be traced back to Ancient times when Greeks and Romans compared both of the countries' model of laws with the purpose to consider the possibility to adopt such kind of model in their own territory, which in other words, this use of Comparative Law is to aid the legislators in certain area in enacting their own legislations.[59] Other example of such usage to aid legislators, according to Grossfeld, could also be seen from some other

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[55] Peter De Cruz, *Op. Cit*., p. 19.

[56] *Ibid*.

[57] Gunter Frankenberg, 'Critical Comparisons : Re-thinking Comparative Law', vol. 26, no. 2, 1985, p. 412.

[58] Peter De Cruz, *Loc. Cit*.

[59] *Ibid*., p. 20.

facts, for instance, the term income tax which however was originally known in England, was actually impersonated by German legislators, or the fact that some concepts consisted in German Civil Code, adopted the concepts of 1881 Swiss Law of Obligations, while German Civil Procedure Code was strongly influenced by Austrian Law.[60]

The use of Comparative Law can also be seen in Professionalism aspect, in the sense that the understanding of other state's legal systems will help the professionals, for instance, advocate, will be greatly assisted in making a lawsuits or defence, or like it has been stated in previous paragraph, it will help legislators in making new Laws or amend their existing Law by analysing and comparing such Law with the Law from other territories. Last but not least, the use of Comparative Law can also be seen from the scientific aspect, in the sense that it will help interested parties to fully understand the concepts consisted in various existing legal systems, so it will raise a possibility for some states to achieve harmonization or unification of laws by comparing their laws with the laws of other states.[61]

However, conducting Comparative Study also has its own disadvantages or weaknesses. The first disadvantage that could be argued is regarding the language barrier[62], since the study of another state legal system, needs the ability to deal with the mother language of such state, since their legal systems, including their legal sources, will be provided by using their mother language.

[60] *Ibid*.,

[61] Munir Fuady, *Perbandingan Ilmu Hukum*, First Edition, PT Refika Aditama, Bandung, 2007, p. 19-20.

[62] *Ibid*., p. 2.

Therefore, studying about other state legal system will take a long process rather than by just studying one's own legal system. While the second disadvantage is the tendency that a researcher who undertakes Comparative Study only understands their own national legal system, and has a limited understanding regarding another state's legal system, and thus, the result of the Comparative Study will not be as what it is desired to be.[63]

3. Methodologies in Comparative Law

There are some methodologies recognized in conducting Comparative Law, in which the 2 major ones are Kamba and Constantinesco method.

In Kamba method, it is emphasized that there must be similarities and differences as the result of Comparative Law. There are 3 phases in this method, which are descriptive, analytical, and explanation phases. Also, this method stressed on the importance of problem solving approach and functional approach in conducting cross-cultural comparison, or the comparison among different cultures.[64] However, since this writing will not use Kamba method, and instead, will use Constantinesco method, the method which will be explained in detail is Constantinesco method.

In Constantinesco method, there are also 3 phases, in which there are certain activities consisted in each of the phases. The first phase consists of some activities, in which the first is to study some concepts for later examining them at their original sources. Next, to study such concepts in their

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[63] *Ibid*., p. 24.

[64] Barda Nawawi Arief, *Op. Cit.,* p. 12.

complexities from their legal sources with full consideration, which means that it is needed to review the hierarchy of those legal sources, for then interpreting it with the proper method which suits with the legal order.[65]

As for the second phase, it consists of the activity of understanding the concepts compared, in the sense that such concepts should be integrated or implemented into one's own legal system, to have understanding regarding the influence towards the implementation of those concepts by determining the elements and factors from within or outside the legal system, and also by studying the social sources of a positive law applied in a state.[66]

Finally, the third and the last phase, consists of the activity to place those concepts on the same line, in the sense that those concepts need to be identified in a critical and systematize way to know the their relationships.[67]

However, regardless of the methodology undertaken in conducting Comparative Law, it can be concluded that the process of the comparison has the purpose lead the comparativists to the conclusions on the distinctive characteristics of each individual legal system compared and/or the commonalities regarding on how the law deals with the particular subject compared.[68]

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[65] *Ibid*., p. 10.

[66] *Ibid*., p. 11.

[67] *Ibid*.

[68] John C. Reitz, ' How to Do Comparative Law', The American Journal of Comparative Law, vol. 46, no. 4, 1998, p. 624.

B. The Concept of Criminal Law and Criminal Attempt

1. General Concept of Criminal Law

As it has been slightly reviewed in the previous chapter, criminal law is mainly classified into two groups, which are substantive criminal law and procedural criminal law, in which the first group mainly concerns with determining which act and mental state, along with the attendant consequences or circumstances that are needed as the elements of crimes, while the latter concerns on the legal steps of a criminal proceeding, which starts from the investigation process to the granting of punishment.[69] Since this research deals with the matter of criminal attempt, which is one of the types of crimes, then this sub-chapter main concern will be on the substantive criminal law.

Substantive criminal law has the purpose to prevent harm to the society, declare which conduct is criminal while also prescribing the sanction that shall be imposed for the conduct.[70] This substantive criminal law also covers the matters of general principles of liability.

The term "conduct" above, deals with two different matters, which are first, the act or the omission to act while there is an obligation to do such act, and second, the state of mind underlying such act or commission. These two matters are what is known to be related with criminal liability. It is clear that the people who commit criminal act will be liable or culpable for their conduct,

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[69] Jocelyn M. Pollock, *Criminal Law*, Tenth Edition, Anderson Publishing, 2013, New York, p. 6.

[70] *Ibid.*

however, those who assist or encourage such conduct can also be deemed liable. However, it is important to note that before someone can be deemed liable or guilty, there are some elements that must be proven, regardless of the crime, which are parties to the crime, the criminal act or omission (*actus reus*), the criminal state of mind (*mens rea*), causation, and concurrence.[71] These elements will be reviewed in sequence.

The first element that will be discussed is the parties to the crime. Ideally, when a crime occurs, the possibility is that there is one or several criminals liable. For instance, in the crime in which someone, named X, who shoots another person, it is possible that not only X liable for that act, but also other person who might have planned the killing, or other person who gave the gun to X even though it is known by him that X will use such gun to shoot another person.[72]

In common law theory, in the context of parties to the crime, it is known four categories in which someone can be found guilty of a crime, in which those categories are principals in the first degree, principals in the second degree, accessories before the fact, and accessories after the fact.[73]

The first category, principals in first degree, means the person who actually conducts the act which causes the happening of a crime. Also, the person who present and substantially participate during the happening of the

[71] *Ibid*., p. 37.

[72] *Ibid*., p. 38.

[73] *Ibid*.

crime is also considered as principals in first degree, if the crime is at least finished or attempted by at least one person.[74]

The second category, principals in second degree, means the person who helps or abets the principal in first degree while they are committing a crime, or encourages the commission of such crime. The difference between principal in second degree with principal in first degree is that they do not commit the crime personally, and also, their presence can either be actual or constructive, in the sense that they constructively present during the assistance of the principal in the first degree, but there is a distance that makes them not actually present. The example of principal in the second degree is the driver of a getaway car used for commencing robbery.[75]

The third category, accessory before the fact, means the person who counsel, procure, or command the principal in the first degree to conduct a crime, however, their whereabouts is too far from enabling him to take part directly in such crime. Therefore, the difference between principal in the second degree and accessory before the fact is that principal in the second degree must be present during the commission of the crime, while accessory before the fact does not need to be present during such commission of crime.[76]

As for the fourth category, accessory after the fact, means the person who receives, comforts, or assists another person while knowing that such person

[74] *Ibid*.

[75] *Ibid*., p. 39.

[76] *Ibid*., p. 40-41.

has committed crime, with the purpose so that that person is able to avoid arrest, prosecution, or conviction. There are some criteria that must be fulfilled in order to deem someone as accessory after the fact, which are first, the crime has been committed, second, the person considered to be accessory after the fact knows that the crime has been committed, and third, they have intention to protect the criminal from the law.[77]

The second crime-constituting element that will be discussed is the criminal act or omission, or what is known as *actus reus*. Actus reus means the conduct of accused person along with all of the consequences and circumstances, or in other words, external elements, that must be proved. This proofing of actus reus is very essential, in the sense that if it is impossible to prove the act, then the accused person cannot be deemed of committing the alleged crime. This event is caused due to the fact that the law cannot punish someone just because of their thoughts nor their status.[78]

In regards with the concept of actus reus, model penal code suggests that the act committed by the criminal must be voluntary, in the sense that the act is not carried out by reflexes or unconsciousness.[79] An act can only be deemed as voluntary or intended only when the consequences are desired and foreseen, or foreseen as substantially certain to be resulting from muscular movement, and the relevant circumstances surrounding the act, either pure and consequential,

[77] *Ibid*., p. 41.

[78] *Ibid*., p. 46.

[79] *Ibid*., p. 47.

are known to exist or hoped to exist.[80] However, in other case, this requirement can be dismissed, which is in the case where someone can be deemed liable of a crime due to their failure to act.[81] This scenario of omission generally can be seen in homicide case in which the defendant's conviction is based on the theory that they have failed to undertake the measures necessary to save the life of the victim.[82]

It is important to note that this voluntariness is different with what is called by motive. According to Mr. Justice Stephen, intention to do something is consistent with whatever the motives might be, and may remain unchanged while the motives might. For instance, the intention to kill another person may be the result of various motives, either to defend someone's lives, or because of official duty. Therefore, intention is a much more definite thing than motive, and occasionally might have greater importance in criminal cases.[83]

The third element of crime that will be discussed is regarding the criminal state of mind or *mens rea*. Hall defines *mens rea* as the state of mind represented in the intentional or reckless doing of a morally wrong act, in the sense that such act is morally culpable, even though the wrongdoer might have reasonable motive to commit such act, since morality is objective that it might

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[80] J.C. Smith, 'Two Problems in Criminal Attempts', Harvard Law Review, vol. 70, no. 3, 1957, p. 421-425.

[81] Jocelyn M. Pollock, *Op. Cit*., p. 49.

[82] Jocelyn M. Pollock, *Op. Cit*., p. 50.

[83] Walter Wheeler Cook, 'Act, Intention, and Motive in the Criminal Law', The Yale Law Journal, vol. 26, no. 8, 1917, p. 658-659.

be opposed validly to individual opinion.[84] As it has been discussed previously, law is able to punish someone when there is the act, or *actus reus*, and also the criminal mind, or *mens rea*. There are some requirements of *mens rea* that are known, which are specific intent, general intent, and negligence.[85] A Michigan court suggests that specific intent needs needs a particular criminal intent beyond the act committed, while general intent only needs the intent to commit the prescribed physical act. The example of such difference can be seen in the case in which a someone planned a murder by waiting in the victim's room, and shot the victim when the victim enters the room, with the case in which someone grabbed a gun and shoot another person during an argument.[86]

The next crime-constituting element that will be discussed is the causation. In order to determine whether someone is guilty or not, it must be confirmed that their act caused the result. Furthermore, it is also known the concept of proximate causation, which means that a person's conduct will be considered as the proximate cause of the result when there is no superseding factors in between the act and the result. This intervening and superseding factor can be defined as those that are unforeseeable and unnatural, that will break the chain between the act and the result. The example of the case in which the condition is unforeseeable and unnatural is where there is a defendant that shoots a victim, but later when the victim is taken to the hospital, the victim is killed by a

[84] Livingston Hall, 'General Principles of Law by Jerome Hall', Harvard Law Review, vol. 60, no. 5, 1947, p. 848.

[85] Jocelyn M. Pollock, *Op. Cit.*, p. 56.

[86] Jocelyn M. Pollock, *Op. Cit.*, p. 57.

homicidal nurse. This event shows that there is an intervening and superseding factor that breaks the causal chain between an act and the result of such act.[87]

The last element of crime, concurrence, means that the physical act and state of mind must exist at the same time. The example can be seen in the case in which A planned to kill B, in the sense that A has bought gun to shoot B. While driving to the planned location to meet B, A send a message to B, to ask about B's location. However, during the trip, A accidentally hits B who happens to pass in front of A's car, causing the death of B. This event shows that even though A has the intent to kill B and causes the death of B, there is no concurrence between A's *actus reus* and *mens rea*. A, however, can still be charged with negligence manslaughter.[88]

2. General Concept of Criminal Attempt

This part discusses the arguably most important matter of this writing, which is the concept of criminal attempt itself, as the title suggests. However, it only covers the concept of criminal attempt in general, while the discussion and analysis for the comparison of such concept stipulated in Indonesian Penal Code and South Korean Penal Code will be delivered in Chapter III.

While it is also already explained regarding the concept of criminal attempt in previous Chapter, it is better to discuss it once again in a more brief explanation for the purpose of the completion of this Chapter II.

[87] Jocelyn M. Pollock, *Op. Cit*., p. 61.

[88] Jocelyn M. Pollock, *Op. Cit*., p. 64.

Criminal attempt itself can be defined as the commission to conduct a crime which has been started, but is unfinished, or the will to commit a crime which has been manifested in a preliminary conduct.[89] An attempt can be done with the intention to bring a chain of consequences, for instance, someone who puts poison in a cup might have several intents, such as so that another person will take the cup, drink the poison, dies because of the poison, and leaves their property to the criminal after dying from the poison.[90] An attempt is considered as a crime because it either causes damage or the danger of possible damage. The example of criminal attempt can be seen in a case where a man tries to shoot another man, but fails to kill him, in which this case can be classified as an attempt to murder. In the other scenario, where a man tries to kill another man, but the shoot misses, it can also be classified as an attempt to murder. However, the difference between these two scenarios is that in the first one, there is already damage taken or experienced by the victim, whereas in the second scenario, there is the danger of possible damage.[91]

Before going further to the concept of criminal attempt stipulated in Indonesian Criminal Code and Indonesian Draft of Penal Code, and also Korean Law, it is better to know the base theory related with the penalization of the criminal attempt itself.

[89] *Memorie van Toelichting* on the construction of Article 53 of Penal Code.

[90] J. H. Beale, Jr. 'Criminal Attempts', Harvard Law Review, no. 16, vol. 7, 1903, p. 492.

[91] Edwin R. Keedy, 'Criminal Attempts at Common Law', University of Pennsylvania Law Review, vol. 102, no. 4, 1954, p. 466.

There are 2 theories related with such concept of penalization for the criminal attempt, which are subjective and objective theory.[92] J. E. Jonkers argued that the subjective theory emphasizes on the subject or the criminal who commits the criminal attempt, while objective theory emphasizes on the kind of conduct which is done by a criminal.[93] According to the objective theory, it is legal or allowed to punish someone who has committed the criminal attempt because the act has endangered a legal interest, even though it has not violated such interest, while according to the subjective theory, such punishment towards the criminal attempt is allowed because of the dangerous nature or characteristic of the criminal itself, in the sense that such criminal already presented their evil characteristic by committing the criminal attempt.[94] Furthermore, these 2 theories have impacts or consequences in two aspects, which are regarding the inability of attempt and the line between preparatory phase and preliminary conduct.[95] The inability of attempt is explained in the following paragraph, while the line between preparatory phase and preliminary conduct is explained in the next sub-chapter, along with the explanation regarding Indonesian and Korean legal sources regarding the concept of the criminal attempt.

The earliest case of inability of attempt, or in other words, in which the attempt has no possibility of success, happened in 1846, which was in *Regina v.*

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[92] Astri C. Montolalu, 'Tindak Pidana Percobaan Dalam Kitab Undang-Undang Hukum Pidana (KUHP), Jurnal Lex Crimen, vol. 5, no. 2, 2016, p. 75.

[93] *Ibid.*

[94] *Ibid.*, p. 76.

[95] *Ibid.*,

Goodchild case.[96] In this case, it was determined that the attempt to use tools to procure a miscarriage is a punishable conduct, even though the woman that becomes the object of miscarriage was not pregnant. This decision, however, departed in later case, which was in *Regina v. Collins* case, in which a person named Collins tried to pick from a woman's pocket, which in fact, turned to be an empty pocket.[97] It was determined in this case that an attempt to steal from an empty pocket cannot be considered as criminal attempt. However, this aberration was then overruled again twenty eight years later, in which English and American rule that ever since, such act constituted an attempted larceny, regardless of what the pocket consists of.[98]

Furthermore, in the context of inability of attempt, it is distinguished into 2 classifications, which are the inability of the tool used and the inability of the object.[99]

The inability of the tool is then classified into absolute inability and relative inability. The example of the absolute inability of the tool can be seen from the case where someone tries to give poison to other person, but instead, he did a mistake in which he gives sugar to that person, and thus, the sugar in this case could be recognized as the absolute inability tool since it has zero ability to kill, while the example of relative inability of the tool, on the other

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[96] Jerome B. Elkind, 'Impossibility in Criminal Attempts : A Theorist's Headache', Virginia Law Review, No. 1, 1968, p. 20.

[97] *Ibid*., p. 20-21.

[98] *Ibid*., p. 21.

[99] Astri C. Montolalu, *Op. Cit*., p. 76.

hand, could be seen from the case in which someone tries to poison other person, but, the dosage of the poison turns out to be too little to cause the death of a person, and thus, the person does not die by the effect of such poison.[100]

As for the inability of the object, it is also classified into absolute inability and relative inability. The example of the absolute inability of the object could be seen in the case in which someone tries to deliver an attack with the purpose of killing a dead body, which in this case, it means that the target of the attack has already died before the criminal delivers their attack. As for the example of relative inability of the object, it could be seen in the case in which someone tries to poison other person, but without their knowing, that person has high resistance towards such poison, and thus, that person does not die by that poison.[101]

It is important to note that based on objective theory, only relative inability of tool or object that could be penalized, since in regards with the absolute inability of tool or object, there is no legal interest which has been harmed or endangered. This case is different with subjective theory, since regardless of whether it is absolute or relative inability of the tool or object, all of the kind of attempt can be penalized, because the matter which is important based on this theory is that a criminal already showed their intent of committing a crime, regardless if the crime is finished or not.[102]

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[100] *Ibid*.

[101] *Ibid*.

[102] *Ibid*.

It is different with the theory proposed by Moeljatno, however, in which he proposed that to determine whether an attempt could be penalized or not, it is needed to see the unlawful nature of the attempt itself, in the sense that if the attempt is unlawful, then it will be classified as capable attempt.[103]

Furthermore, it is also important to note that according to Jan Remmelink, in Netherlands, the theory which is more likely to be supported is objective theory, which could be seen from the decision of Hoge Raad dated 7th May 1906, W. 8372[104], in which there was a case regarding a wife of the shop owner which tried to poison her sick husband or that shop owner with the mixture of tea and beer, in which she also added the residue of copper coin and medicine. However, by the Hoge Raad, it was decided that those mixtures could not kill someone or the absolute inable tool, and thus, it was decided that the wife did not commit the attempt of murder.[105]

Then, it is also important to note that there are some issues that might occur which is related with the general concept of criminal attempt, which for instance, is to determine which situation falls under the classification of attempt, and which one falls under the classification of mere preparation.

To resolve this issue, Virginia Supreme Court traditionally used what is called with physical proximity test. This standard suggests that an act must reach far enough toward the accomplishment or the completion of the desired

[103] Andi Sofyan and Nur Azisa, *Buku Ajar Hukum Pidana,* 1st Edition, Pustaka Pena Press, Makassar, 2016, p. 190.

[104] Decision of Hoge Raad dated 7th May 1906, W. 8372.

[105] Astri C. Montolalu, *Op. Cit*., p. 77.

result to amount or to be equalized with the commencement of the consummation. This standard highlights on the number of acts which must be accomplished remaining to be accomplished or finished. For instance, in the case of *Granberry v. Commonwealth*, the Court found sufficient acts for criminal attempt of rape when the acts that needed to be done were only penetration.[106] In other case, which is in *Slusher v. Commonwealth* to be exact, the liability for criminal attempt of malicious cutting and wounding was attempted when the defendant had drawn a knife on their victim.[107]

However, it must be noted that if there is a great temporal distance between the criminal acts and the completed crime, then the criminal final act cannot be considered as the commencement of consummation, and thus, no liability will be attached to such criminal.[108] This can be seen in the case of *West v. Commonwealth*, in which it is decided that driving a truck filled with bootlegging materials to a still which is still not operated did not constitute to an act of attempt. Besides the matter of temporal distance, the matter of spatial distance also plays a role in the determination of whether an act constitute to an attempt or not, in the sense that the last place where the last act of a criminal in the commission of their crime may negate the liability for criminal attempt. It can be seen from *Andrews v. Commonwealth* case, in which the supreme court reversed the decision for the criminal attempt to sell illegal whiskey, which is

[106] T. K. H., III, 'Reforming the Law of Inchoate Crimes', Virginia Law Review, vol. 59, no. 7, 1973, p. 1242-1243.

[107] *Ibid*., p. 1243.

[108] *Ibid*.

caused by the fact that the defendant fell asleep in the woods during their trip to a still to purchase stocks of whiskey.[109]

C. Concept of Punishment

As the topic for this writing involves the rationale and grading of punishment for criminal attempt, it is important to know what the definition of punishment is. There is a widely accepted definition of punishment, in which it is stated that punishment is the infliction of pain and/or penalties, or the deprivation of privileges, by an authorized person or a person on a person or persons that are believed to be guilty of having broken the law, or, more generally, of having done wrongdoing.[110] This definition suits with the definition or requirements of punishment proposed by Flew-Benn-Hart. According to him, punishment consists of some elements. First, punishment must involve pain or other consequences which are considered unpleasant. Second, punishment must be imposed upon the offences which are against legal rules. Third, the punishment must be imposed to a supposed or and actual offender for his offence. Fourth, the punishment must be administered or authorized by human beings other than the offender. Fifth and the last, the punishment must be administered by authorized legal institutions against which the offence is conducted.[111]

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[109] *Ibid*.

[110] Don Locke, 'The Many Faces of Punishment', Mind, New Series, vol. 72, no. 288, 1963, p. 568.

[111] Thomas McPherson, 'Punishment : Definition and Justification', Analysis, vol. 28, no. 1, 1967, p. 21.

The next substance that will be discussed is regarding the general theory for the justification of imposing punishment. Generally, there are four theories acknowledged, which are Deterence, Reformation, Retributive, and Revenge theory, in which all of them would be discussed in the following paragraph.

Punishment based on Deterrence theory, as the name suggests, has the purpose to deter a person from breaking the law, while punishment based on Reform theory has the purpose to reform the person who has broken the law. As for punishment based on Retributive theory, it has the purpose to punish a wrongdoer or a criminal to pay back the debt he had towards God or society, or to recreate the *status quo ante*, which translates to compensate towards the harm that the victim has experienced or suffered. This Retributive theory differs short with Revenge theory, in the sense that punishment based on Revenge theory, has the purpose so that the criminal or the offender is paid back for what he had done, while in the case of Retributive theory, the criminal is the one who has to pay the debt. In other words, Revenge theory has the purpose so that the criminal suffers the same evil or harm which he has created or inflicted, while Retributive theory has the purpose so that the criminal compensate for the evil or harm he has inflicted. In practical case, it could be seen by the example that from Retributive theory, a criminal has to pay back 200$ that he has stolen, while from Revenge theory, an amount of 200$ must be extracted from the criminal that has stolen the same amount of money.[112]

[112] Don Locke, *Op. Cit*., p. 569-570.

D. Basic Philosophy of Criminal Attempt

In the earliest time of English law, it was agreed that the principle that conducting an attempt was not considered as an offence. However, if, for instance, a man tried to kill another person by inflicting wound on them, that man could still be punished for wounding, and not for attempting to kill. Furthermore, if there is no physical damage which is inflicted because of the attempt, there will be no prosecution that is possible to be held. This situation existed until the sixteenth century, in which the Court of Star Chamber extended the scope of criminal law to attempts, however, the extension was only applied to the attempt of committing felonies.[113]

The modern doctrine of criminal attempt raised in 1801, in the case of *Rex* v. *Higgins*, which was a prosecution for misdemeanor of solicitation. In the case, Higgins asked a man's subordinate to steal some quantity of rope from the man's master, however, the plot was later discovered before that subordinated did anything and Higgins was then brought to trial. In the defence, Higgins' attorney stated that an attempt of committing misdemeanor itself was not a crime. However, the Court convicted Higgins based on the argument that every acts or attempt as tend to the prejudice of the community are indictable.[114] This event also marked the establishment of modern law of solicitation.[115]

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[113] Lawrence C. Becker, 'Criminal Attempt and the Theory of the Law of Crimes', Philosophy and Public Affairs, vol. 3, no. 3, 1974, p. 264.

[114] *Ibid*., p. 264-265.

[115] Jerome Hall, 'Criminal Attempt. A Study of Foundations of Criminal Liability', The Yale Law Journal, vol. 49, no. 5, 1940, p. 809.

The current situation in England now is that criminal attempt is classified as a misdemeanors, in which the maximum sanction would be maximum life imprisonment. However, in the practice, the Court ordinarily grants less punishment for attempts than that of consummated crimes, and in some situations, the statutes. The example can be seen in US constitution, in which it is stated that the punishment for grading system for criminal attempt consists of the punishment for completed crimes, but with reduced factor. On the other hand, in California, the punishment for criminal attempt is at maximum at no more than a half of the maximum punishment for that of completed crime. In small number of states, for instance, Illinois and Mississippi, however, the punishment for criminal attempt is equal to the completed crime. Nowadays, in the current practice, it is safe to say that criminal attempt is treated to be more lenient than the consummated crime, which can be supported by the following argument.[116]

The first argument is based on the reform argument, in the sense that it is argued that there is no point in differentiating between the punishment for criminal attempt and complete crime, because there is no less necessity to reform someone who failed in completing a crime and the one who succeed. Therefore, it is justifiable to punish criminal attempt and completed crime equally.[117]

On the other hand, there is the second argument which is based on the deterrence argument. If based on the reform argument it is argued that criminal attempt shall be treated with equal punishment as completed crime, in this

[116] Lawrence C. Becker, *Op. Cit*., p. 265.

[117] Lawrence C. Becker, *Op. Cit*., p. 266.

deterrence argument, it is argued that criminal attempt shall be punished with less severe punishment than the consummated crime. This is caused by the argument that less punishment for criminal attempt will not reduce or minimize the deterrent effect of the law, in the sense that when a criminal plans to commit a crime, the penalty or punishment that has deterrent effect is most likely the substance that he would choose to do. Furthermore, when a criminal does not only intend to commit a mere attempt, but to be succeed in their crime, the penalty for the criminal attempt will hold no force as deterrent. Therefore, based on the principle of minimizing pain, it is justifiable to punish criminal attempt with lesser punishment than the consummated crime.[118] It is also important to note that, in regards with this second argument, that Hart argued that the deterrence force which would exist by the imposition of fixed penalty for criminal attempt plays a significant role, in the situation in which a criminal plans to commit bank robbery, in the sense that if he fails, then he would still be punished by the verdict of attempt. It would be a totally different scenario if there is no fixed punishment for criminal attempt, in which if he fails, then no harm will be imposed to him, and if he success, then the gain will be worth the risk.[119]

Furthermore, there is also the third argument which is called by the Unequal Harm argument. As it could be seen from the two arguments above, we could conclude that those two arguments contradict with each other. This third argument, gives more justifying reason to punish criminal attempt with lesser punishment. The lesser punishment in this argument is supported by the proportionality and similar

[118] Lawrence C. Becker, *Op. Cit.,* p. 266-267.

[119] Paul J. Dietl, 'On Punishing Attempts', *Mind*, New Series, vol. 79, no. 313, 1970, p. 130.

treatment principle, in the sense that it is agreed that the severity of punishments given shall be proportionate or equal to the gravity of the wrongs or crimes done. It is also agreed that similar wrongs or crimes shall be treated with other similar wrongs or crimes with similar gravity, or in other words, non-successful crimes.[120]

E. Concept of Criminal Attempt in Islamic Penal Law Perspective

Before going further to the discussion of the concept of criminal attempt which is stipulated in Indonesian Penal Law and Korean Penal Law, it might also be a good opportunity to take a look at such concept which is stipulated in Islamic Penal Law or what is known as *Fiqh Jinayah* as a little comparison. If we are talking about *Fiqh Jinayah,* then we have to deal with what is called as *jarimah* or crime, and also *uqubah*, or the punishment.[121] It is important to note that the term *jarimah* resembles similarity with the term *jinayah*, which also means crime. The difference is that the term *jarimah* is generally used by fiqh scholars to express any conduct which is prohibited by Islamic Law or *sharia,* which is related with life and any other aspects, such as property, while the term *jinayah* is used to express prohibited conduct which is related with body or life, such as murder and injuries to body.[122]

Jarimah can be classified to some groups, and for the purpose of the relevancy towards this writing, the classification that will be discussed is the classification based on the severity of the penal sanction, and whether such

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[120] Lawrence C. Becker, *Op. Cit*., p. 267.

[121] Lysa Angrayni, 'Hukum Pidana Dalam Perspektif Islam Dan Perbandingannya Dengan Hukum Pidana Di Indonesia', Jurnal Hukum Islam, vol. 15, no. 1, 2015, p. 49.

[122] *Ibid*., p. 50.

sanction is regulated in Al-Qur'an and Hadits or not.[123] There are 3 kinds of *jarimah* based on such classification,which are *jarimah hudud*, *jarimah qishas/dhiyat*, *and jarimah ta'zir*.

Jarimah Hudud is the kind of *jarimah* which has the most severe sanctions, in which the crime transgresses the rights of Allah.[124] The punishment for *jarimah hudud* is already provided by *sharia*, in which such punishment is fixed and has no minimum or maximum limitation, and the punishment cannot be abolished by anyone, even the victim or the family of the victim of the crime.[125] There are seven kind of crimes which qualify as *jarimah hudud*, which are the crime of adultery, false accusation of adultery (*qadzaf),* drinking alcohol or *khamr*, theft, robbery, apostasy, and rebellion.[126]

Jarimah Qishas/Dhiyat, on the other hand, means the kind of *jarimah* which punishment is in the form of *qishas* or *dhiyat.*[127] *Qishas* itself according to Ibrahim Unais means the imposition of sanction which mirrors the form of the crime itself, which for instance, if the crime is murder or to take away someone's life, then the punishment would also be the taking of the criminal's life, as stipulated in Qur'an verse Al-Baqarah (178), which states that :[128]

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[123] *Ibid*.,

[124] *Ibid*., p. 51.

[125] *Ibid*.,

[126] *Ibid*.,

[127] *Ibid*.,

[128] Q.S. Al-Baqarah 178. Accessed from https://quran.com/2. Last accessed 5th January 2020.

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُواْ كُتِبَ عَلَيۡكُمُ ٱلۡقِصَاصُ فِي ٱلۡقَتۡلَىۖ ٱلۡحُرُّ بِٱلۡحُرِّ وَٱلۡعَبۡدُ بِٱلۡعَبۡدِ
وَٱلۡأُنثَىٰ بِٱلۡأُنثَىٰۚ فَمَنۡ عُفِيَ لَهُۥ مِنۡ أَخِيهِ شَيۡءٞ فَٱتِّبَاعُۢ بِٱلۡمَعۡرُوفِ وَأَدَآءٌ إِلَيۡهِ
بِإِحۡسَٰنٖۗ ذَٰلِكَ تَخۡفِيفٞ مِّن رَّبِّكُمۡ وَرَحۡمَةٞۗ فَمَنِ ٱعۡتَدَىٰ بَعۡدَ ذَٰلِكَ فَلَهُۥ عَذَابٌ
أَلِيمٞ ١٧٨

"O you who have believed, prescribed for you is legal retribution for those murdered - the free for the free, the slave for the slave, and the female for the female. But whoever overlooks from his brother anything, then there should be a suitable follow-up and payment to him with good conduct. This is an alleviation from your Lord and a mercy. But whoever transgresses after that will have a painful punishment."

As for *dhiyat*, according to Sayid Sabiq, means the property which should be given by a criminal to the victim or their family because of crime of murder or torture.[129]

Lastly, for the last kind of *jarimah*, which is *jarimah ta'zir,* means the crime which punishment is given based on the discretion of the judge, since the punishment for the *jarimah* is not stipulated in Qur'an nor Hadits.[130] The example of *jarimah w*hich falls in this qualification is the criminal attempt.

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[129] Lysa Angrayni, *Op. Cit.*, p. 52.

[130] *Ibid*., p. 53.

Then, if we are talking about the matter of the criminal attempt, it means that we are dealing with the one of the phases in the commission of a crime, which according to Abd-Al Qadir Awlah, consist of 3 phases in total, which are :

1. Phase of Thought and Planning (*Marhalah al-Tafkir*)

This is the phase in which a criminal thinks and plans about committing a crime. However, since the thought and plan are still in the criminal's mind, he cannot be punished. This is based on the words of Prophet Muhammad SAW, in which it is stated that :[131]

Abu Hurairah radiallahuanhu says : Rasulullah shalallahu 'alaihi wasalam states that : "Allah forgives my ummah for what they have in their heart, as long as it is not yet done or said."

2. Phase of Preparation (*Marhalah al-Tahdir*)

There are 2 possibilities in this phase, in which the criminal can either be punished if the preparation itself is a crime, for instance, the act of the criminal to make someone unconscious to steal their property, and not

[131] Astri Khairisa, 'Percobaan Melakukan Tindak Pidana Ditinjau Dari Perspektif Hukum Pidana Indonesia dan Hukum PIdana Islam', Jurnal Hukum, 2018, p. 13.

punished otherwise, if for instance, the criminal only prepares the tool for the commission of the crime intended, such as a knife.[132]

3. Phase of Commission (*Marhalah al-Tanfidz*)

The last phase is the commission of the crime or *jarimah* itself. If the crime is fully-completed by the criminal, then they will be imposed with sanction for completed crime, otherwise, the sanction imposed shall be the sanction for unfinished crime or attempt, which is different from finished crime. For instance, the sanction for attempting to do adultery shall not be equalized with the sanction for committing complete adultery, which is in the form of stoning with rocks or *rajam, a*nd the sanction for attempting to steal shall not be equalized with the sanction for committing complete theft, which is by cutting the hands of the offender or criminal.[133] The important reason of why such sanction in attempt of crime and finished crime shall be distinguished is because if otherwise, the criminal will not have a reason to cancel their commission of a crime, since even if they decide to not finish their crime, they will still be imposed with sanction which is equal with finished crime if they finish such commission of crime.[134]

There are 2 causes which might lead to the incompletion of a *jarimah*, which are first, because of forced situation, such as in the case where the criminal is caught before finishing their crime, and the second, because of

[132] *Ibid*., p. 14.

[133] *Ibid*., p. 15-16.

[134] *Ibid*., p. 16.

the criminal’s own intention, which might be caused either by regret or another cause.[135]

The first cause, which is a forced situation, will not affect the criminal’s liability as long as he already did a conduct in the form of *jarimah* or fault, such as making someone unsconsious to steal their property whcih has been explained above. While for the second cause, if the *jarimah* committed is in the form of *jarimah hirabah* (disturbance of security), the criminal will be forgiven as long as they express their regret after committing the crime. This suits with the essence of Qur’an verse Al-Maidah (34), which states that :[136]

إِلَّا ٱلَّذِينَ تَابُواْ مِن قَبۡلِ أَن تَقۡدِرُواْ عَلَيۡهِمۡۖ فَٱعۡلَمُوٓاْ أَنَّ ٱللَّهَ غَفُورٞ
رَّحِيمٞ ٣٤

“Except for those who return (repenting) before you apprehend them. And know that Allah is Forgiving and Merciful.”

[135] *Ibid*., p. 17.

[136] QS. Al-Maidah : 34. Accessed from https://quran.com/5. Last accessed 5th January 2020.

By this logic, since even a finished crime shall be forgiven by the regret of the criminal, then the same case will also apply in the case of committing an attempt of a crime.[137]

The next substance that will be discussed is regarding the grading of punishment for the crimes falling under the category of *jarimah ta'zir*. As it has been explained above, the sanction or punishment for *jarimah ta'zir* will be based on the result of the *ijtihad* of the judge. However, it then raises a question. How severe should the judge punish criminal attempt?

Islamic scholars have different opinion regarding this issue. The first argument is proposed by Abu Hanifah, Syafi'iyah and Hanabilah clerics, by which they state that the punishment for crime or *jarimah ta'zir* shall not be more than the punishment for the lowest *had* or the punishment which has been set and fixed by Allah, in which such punishment shall be reduced by one *dera* (whip). As for the second argument, it is proposed by Malikiah clerics, by which they argue that a judge or imam could punish *jarimah ta'zir* with as much *dera* as suffice, even though it would be more than the highest *had* punishment.[138]

From the above explanation, it is evident that the sanction or punishment for *jarimah ta'zir* cannot be equalized with the sanction for *jarimah hudud* or *jarimah qishas/dhiyat,* in which this is based on the proportionality principle which becomes the basis of the law-making in

[137] *Ibid*.

[138] Yuli Kasmarani, 'Tinjauan Fiqh Jinayah Terhadap Percobaan Kejahatan', Thesis, 2016, p. 35-36.

حد ثنا محمد بن جعفر حد ثنا شعبة عن سيا ر عن الشعبي عن جا بر بن

Islamic Law itself.[139] In other words, punishment for a criminal cannot be more than what it has been stated by *sharia'*, in which this principle could be seen from a *Hadith* from H.R. Ahmad, which states that:[140]

"Has come to inform us from *Muhammad bin Ja'far* from *Syu'bah* from *Sayyar* from *al-Sya'ya* from *Jabir bin Abdullah*: Prophet Muhammad says : Whoever gives punishment for someone to the limit of *had* even though the crime they commit is not categorized under the crime threatened by punishment of *had*, then they have broken their limits."

Another reason of why the punishment for criminal attempt shall be lower or mitigated than finished crime in Islamic Law is for the encouragement for the criminal to stop their commission of crime before it is finished, since if the sanction for criminal attempt is the same with

[139] *Ibid*., p. 49-50.

[140] H.R. Ahmad on proportionality principle in punishment

finished crime, then the criminal shall have no more reason to stop their commission of crime before it is finished.[141]

[141] Yuli Kasmarani, *Loc. Cit.*

CHAPTER III

RESULTS AND FINDINGS

A. Rationale for Punishing Attempt and Grading of Punishment

1. Rationale for Punishing Attempt

In the earliest cases of attempts, there is no definite regulation regarding the matter of criminal attempt, in the sense that the conviction at the time was based on the legal maxim *voluntas reputabitur pro facto*[142], which means that the will is taken for the deed, in the sense that a desire or intention shall be taken the same as the act resulted.[143] However, it does not mean that this generalization leads to the punishment of mere intent by the courts.[144] It is because based on the historical analysis of doctrine of attempts conducted by Mr. Sayre, it only acts as a shorthand expression for the idea that a criminal conduct that would have easily resulted to the completion of such crime, it does not literally mean that the perpetrator will not be punished at all.[145] This was

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[142] Francis Bowes Sayre, 'Criminal Attempts', Harvard Law Review, vol. 41, no. 7, 1928, p. 821.

[143] Thurman W. Arnorld, 'Criminal Attempts. Rise and Fall of an Abstraction', The Yale Law Journal, vol. 40, no. 1, 1930, p. 58.

[144] *Ibid.*, p. 59.

[145] *Ibid.*

shown in the earliest case of attempted subordination of perjury, in which the court in convicting the defendant, followed the line of thought that any kind of effort to corrupt a witness was of itself a complete substantive offence.[146]

Later, the legal maxim *voluntas reputabitur pro facto* developed into other theories proposed by some groups, in which those groups proposed different kinds of rationale for punishing criminal attempt. The examples of those groups are utilitarian and retributivist group, and thus, the rationale for punishing criminal attempt in this part shall be reviewed by using their perspectives.

The first argument from Utilitarian perspective contributing to the rationale of punishing the crime of attempt could be seen from the statement of Professor H.L.A. Hart, who ever questioned the justification for imposing punishment for the crime of attempt. He argued that every person who intends to commit criminal offence has the goal to finish it, or in other words, complete such crime, and thus, the punishment that would be imposed to the attempt of such crime, in which the crime is not finished, is not effective.[147] However, it is important to note that everyone who intends to commit crime, also believe that if they succeed in committing such crime, they will avoid getting caught, so they will risk the sanction for the crime which they intend to commit. While on the other hand, if the commission of the crime fails, they will argue that the

[146] *Ibid*.

[147] Joshua Dressler, *Understanding Criminal Law*, Seventh Edition, Matthew Bender & Company, Inc., United States, 2015, p. 183.

failure is caused by their poor execution of the crime.[148] This is the reason of why the argument proposed by Hart above is misleading, and thus, the imposing of sanction for the crime of attempt is justifiable.[149]

The second argument from Utilitarian Perspective that could be used as the rationale or justification for punishing the crime of attempt can be seen from the subjectivist theories, in which it is argued that everyone who attempts to commit a crime is dangerous, solely by their nature, regardless if it causes legal harm or not, or whether the commission of such crime is completed or not.[150]

As for the third argument, it is related with the purpose of preventive law enforcement, in which the punishment for the criminal attempt is needed to give the authority for the police officers to terminate the commission of a crime before it is completed or finished.[151] It is also based on the fact that punishment acts as a necessary tool for preventing future crime while at the same time promoting public's order and well being.[152]

Next, it will be discussed about the rationale for punishing the crime of attempt based on Retributive Perspective. However, it is important to note that there are 2 basis used by the retributivists to justify such punishment.[153] The

[148] *Ibid*.,

[149] *Ibid*.,

[150] *Ibid*.,

[151] *Ibid*.,

[152] Jean Hampton, 'The Moral Education Theory of Punishment', Philosophy and Public Affairs, vol. 13, no. 3, 1984, p. 211.

[153] Joshua Dressler, *Op. Cit*., p. 184.

first basis is regarding the culpability of the criminal who commit the attempt of crime, in which the culpability-retributivists propose that a criminal who shoots other person, but missed, has the same moral liability as the criminal who succeed in shooting that other person. The reason is that because the difference between those 2 criminals is the misfortune causing the bad aiming of the weapon used to shoot or the reflex of the victim to avoid the shooting.[154] This justifies the penalization of the criminal. As for the second basis, it is related to the matter of the harm caused, in which harm-retributivists argued that a criminal who attempts to commit crime, has caused danger towards the society by their action,in the sense that they disturb or cause hindrance towards legal order.[155] Therefore, the imposing of sanction towards the offender is needed to restore such legal order in the society.

2. Grading of Punishment

The next question that raises after it is clear whether the attempt to commit a crime should be punished or not is regarding the grade or the level of punishment which shall be imposed towards the offender. This issue will also be discussed by reviewing the perspectives from the utilitarianist. and retributivists.

There are some dissenting arguments, even from the utilitarianists themselves, of whether the grade of punishment for crime of attempt shall be equal to consummated or finished crime, or lesser than such.

[154] *Ibid.*,

[155] *Ibid.*,

The group which argues that such punishment shall be equal based their opinion on the thoughts that a criminal who attempts to commit crime is as dangerous as the criminal who succeed in committing crime.[156] The example can be seen from a scenario in which there are 3 people, who are A, B, and C, in which each of them has the will to shoot another person, which can be described as V1, V2, and V3. A aims gun to V1, but before they get the chance to pull the trigger, they are caught by people nearby. While in the case of B, they shot V2 and the bullet hits V2, but V2 is brought to the hospital after the shooting, and by the effort of medical personnel, V2 does not die. As for the case of C, they shot the victim and the victim dies. This utilitarian group argues that the punishment which shall be imposed to A, B, and C, are equal, regardless the effect towards the victim, by using subjectivists theory, which treats the criminals in the scenario above as equally dangerous from each other, as their intentions are all the same, which is to kill the victims. The only thing that makes the result of their intention different, is because of luck factor involved that intervenes in saving the victim's lives.[157]

The other group, which argues that the punishment given for the crime of attempt shall be mitigated or reduced, based their opinion on the function of such mitigation as an encouragement for the criminal to regret and to realize that their conduct is wrong, which will also become the consideration for the criminal to stop their conduct before their crime is finished. For instance, if a criminal who just entered a bank with the intention to rob it already becomes

[156] *Ibid.*,

[157] *Ibid.*,

the subject for the punishment applied for a finished robbery, then they will have no reason to stop their conduct and just finished the crime, since the punishment for the attempt of robbery and complete or finished robbery will just be the same.[158]

Now, regarding the grading of punishment towards attempt from retributivists perspective, it is also interesting to note that there are 2 dissenting opinions from the group, which are from culpability-retributivists and harm-retributivists.

Culpability retributivists argue that the punishment which shall be imposed upon an attempt shall be equal with a completed crime, in which this argument is based on the thoughts that the luck, which contributes to the failure or success of a commission of a crime, should have no role in determining the grade of the punishment, because the sole fact of a failure in a commission of criminal attempt cannot show the wrongdoer to be less deserving of the punishment rather than those who succeed in their attempts.[159] It is by the reason that someone should be punished in proportion based on their moral culpability, which depends on the person's choice of whether they want to commit a crime or not, and not based on what is beyond their control, which is the harm which they intend to inflict towards the victim.[160]

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[158] *Ibid.*,

[159] R. A. Duff, 'Auctions, Lotteries, and the Punishment of Attempts', Law and Philosophy, vol. 9, no. 1, 1990, p. 1.

[160] Joshua Dressler, *Op. Cit.*, p. 185.

The other retributivists group, which is harm-retributivists, argue that the punishment for attempt shall be distinguished from the punishment for a complete crime, in which this is based on the thoughts that the punishment imposed shall be proportionate to the culpability and harm. It is because criminal law intends to punish based on the results caused by the harm, and not just only because of culpable thoughts of the criminal. The criminal who succeed in completing their crime and the one who does not, have the same moral blameworthy, to be imposed with penal sanction, but, since the harm which is caused by a failed commission of a crime or attempt will be less than the harm caused by a successful commission of a crime, then the sanction for attempt shall definitely be lower than the successful or consummated crime.[161]

Then, another question might rise. Why should the law punish the attempt which causes harm to be more severe than the attempt which does not, or, in other words, why should the law punish a successful attempt more severely than the unsuccessful one? The answer can be analyzed by looking back at the case in which A attempts to shoot B and succeed, resulting in the death of B, and at the case in which C attempts to shoot B, but failed. In both cases, it might be easy to conclude that A deserves more severe punishment than C, but for what reason?

One of the rationale that can be proposed to justify that A deserves more severe punishment than C is based on the kind of the attempt itself, which can

[161] *Ibid.*

be classified as wholehearted and half-hearted attempt.[162] Even though both of these kind of attempt has the same *mens rea*, but wholehearted attempt is worse, since it consists of more careful planning, more precaution against failure, more persistence, and more tries. Wholehearted attempt is more dangerous since it is more likely to succeed, knowingly and wrongfully subjects to its victim. Therefore, wholehearted attempt deserves more urgent deterrence, in the sense of it needs more severe punishment than the half-hearted one.[163] It is also based on the society's judgment that the wholehearted attempt that succeed, for instance, in the case of homicide, that the successful homicide is more damaging than the unsuccessful one, due to the fact that having someone's life taken is also more damaging than having someone's life partially taken.[164]

There is another theory which is still related with retributivism, which is based on loss-based approach, proposed by Hyman Gross, in which he stated that there should be a middle way to grade the punishment for various kind of attempts, which is based on their dangerousness.[165] This theory is classified into three kinds of impossibilities, in which these impossibilities will affect the grading of the punishment itself.

[162] David Lewis, 'The Punishment that Leaves Something to Chance', Philosophy and Public Affairs, vol. 18, no. 1, 1989, p. 56.

[163] *Ibid.*

[164] John S. Strahorn, Jr., 'The Effect of Impossibility on Criminal Attempts', University of Pennsylvania Law Review and American Law Register, vol. 78, no. 8, 1930, p. 968.

[165] Michael Davis, 'Why Attempts Deserve Less Punishment than Complete Crimes', Law and Philosophy, vol. 5, no. 1, 1986, p. 7.

The first impossibility is called by manifest impossibility, which means that the failure of the commission of a crime, or in other words, an attempt, is caused due to an irrational effort to kill someone, for instance, the use of a toy gun to shoot another person.[166] According to Gross, the punishment for this manifest impossibility is at the lowest level of punishment since the act committed is not dangerous at all.[167]

The second impossibility is called by overt impossibility, which means that the failure of the commission of a crime is caused by the use of a weapon which everyone knows, except for the perpetrator, to be insufficient to kill another person, for instance, the use of some pistol that everyone knows to be insufficient to kill because it consists of blank cartridge, but the perpetrator is happened to not know of this issue.[168] According to Gross, this kind of impossibility will contribute to a higher grade of punishment than manifest impossibility, because it is at a more dangerous level.[169]

The last kind of impossibility is called by covert impossibility, which means that the failure of the commission of a crime fails because of the use of tool which ordinarily dependable, but somehow fails to kill the target, for instance, the use of ammunition that even though hits the target, but does not kill that target.[170] According to Gross, the grading of the punishment for this

[166] *Ibid*.

[167] *Ibid*.

[168] *Ibid*.

[169] *Ibid*.

[170] *Ibid*.

event of covert impossibility should be as severe or equal to the completed crimes since it has the same level of dangerousness or severity as such completed crime.[171]

B. Similarities and Differences of Concept of Criminal Attempt in Indonesian and South Korean Law

1. Similarities and Differences of Concept of Criminal Attempt in Indonesian Penal Code and South Korean Penal Code

Before going further to the similarities and differences between the concept of criminal attempt in Indonesian Law and Korean Law, it would be better to remember that the comparison in this writing will be conducted by using Constantinesco method.

Then, for the first comparison, let us analyze the concept which is stipulated in Indonesian Penal Law and Korean Penal Law.

As it has been discussed in the previous chapter, the concept of attempt in the currently existing Indonesian Penal Code is stipulated in Article 53[172], which for better understanding, will be provided here.

> " (1) Attempting to do a crime is criminalized, if the intention is proven by preliminary conduct, and such conduct is unfinished not merely because of the criminal's own intention.

[171] *Ibid.*, p. 8.

[172] Article 53 of Indonesian Penal Code.

(2) The maximum core sanction in the context of attempt of a crime is reduced by 1/3.

(3) If the crime is punishable by death penalty[173] or long-life sentence[174], the maximum sanction which can be imposed is fifteen (15) years.

(4) Additional penal sanction for the criminal attempt is equalized with finished conduct or delict."

Then, for the concept of crime of attempt stipulated in Korean Penal Code, which is in Article 25[175] to be exact, will also be provided below.

" (1) When an intended crime is not completed or if the intended result does not occur, it shall be punishable as an attempted crime.

(2) The punishment for attempted crime may be mitigated than that of consummated crime."

There are some similarities and differences that we can take from the two provisions above. The first is the similarity and difference of Article 53 (1) of Indonesian Penal Code and Article 25 (1) of Korean Penal Code. In both clauses of the Articles, it is stated that an attempt is justifiable to be punished if there is intention preceding such attempt, or in other words, the attempt that can be punished is the attempt which is done based on the criminal's own intention, and not based on negligence. This also shows that there is the element of will or *mens rea* which shall be had by the criminal. However, these

[173] The term that applies to capital punishment and is the worst penalty given for committing a murder or an atrocious assault. Taken from https://thelawdictionary.org/death-penalty/ . Last accessed 13rd May 2019.

[174] Means that the defendant will be imprisoned until the end of his/her life. Eddy O.S Hiariej, *Prinsip-Prinsip Hukum Pidana*, First Edition, Cahaya Atma Pustaka, Yogyakarta, 2014, p. 396.

[175] Article 25 of Korean Penal Code.

2 clauses also contain differences, in the sense that Article 25 (1) of Korean Penal Code does not explicitly mention about the term of "preliminary conduct", while Article 53 (1) of Indonesian Penal Code does. Even though Korean Penal Code does not use the term "preliminary conduct", there is still differentiation between the preparation stage and the other phase which is recognized as the commencement stage of the crime, in which these 2 terms could be seen from the provision of Article 28[176] of Korean Penal Code, which states that: "*When a conspiracy or the preparatory action for a crime has not reached commencement stage for the commission of the crime, the person shall not be punishable, except as otherwise provided by Acts*."

Therefore, based on the stipulations of Article 28 of Korean Penal Code above, it could be concluded that Korean Penal Law also distinguishes between the preparation stage and the stage after which is closes to the realization of the crime, which is commencement stage, even though the current Indonesian Penal Law does not stipulate directly about the preparation stage, but since it is stated about the preliminary conduct stage, it could also then be concluded that the preparation stage and preliminary conduct stage in Indonesian Penal Law are two different phases in a crime of attempt.

Then, another difference can also be seen from the stipulations of Article 53 (2) of Indonesian Penal Code and Article 25 (2) of Korean Penal Code. Article 53 (2) of Indonesian Penal Code states that the maximum sanction which shall be imposed upon the offender attempting to commit crime is 1/3 of

[176] Article 28 of Korean Penal Code.

the sanction of the crime attempted to be committed. However, this is not the case with Article 25 (2) of Korean Penal Code, in which it is only stated that the sanction for the crime of attempt may be reduced from the sanction of finished or consummated crime, which means that this clause does not explicitly mention about the grading of such sanction, whether it is a half or a third of the sanction of consummated crime.[177] The grading of such sanction, however, can be found in separate article in Korean Penal Code, which is in Article 55[178], regarding the mitigation of punishment, which has also been discussed in the previous chapter. Article 55 of Korean Penal Code will be provided below.

> "Statutory mitigation shall be as follows:
>
> 1. When a death penalty is to be mitigated, it shall be reduced to imprisonment, with or without prison labor, for life or for at least 20 years up to 50 years.
>
> 2. When imprisonment for life, with or without prison labor, is to be mitigated, it shall be reduced to imprisonment, with or without prison labor, for at least ten years up to 50 years.
>
> 3. When limited imprisonment or limited imprisonment without prison labor is to be mitigated, it shall be reduced by one half of the term of the punishment.
>
> 4. When deprivation of qualifications is to be reduced, suspension of qualifications for at least seven years shall be imposed.
>
> 5. When suspension of qualifications is to be mitigated, it shall be reduced by one half of the term thereof.

[177] Interview with Mrs. Ryu Jin Hwa, Criminal Law Professor at Youngsan University, November 11, 2019.

[178] Article 55 of Korean Penal Code.

> 6. When a fine is to be mitigated, it shall be reduced by one half of the maximum amount thereof.
>
> 7. When a detention is to be mitigated, it shall be reduced by one half of the maximum term thereof.
>
> 8. When a minor fine is to be mitigated, it shall be reduced by one half of the maximum amount thereof.
>
> (1) When there are several grounds for which punishment is to be reduced by Acts, it may be repeatedly mitigated."

Judging from the provision of Article 55 (1) above, it can be seen that the mitigation of the sanction is different from each kind of crime, in the sense that the crime which is threatened by death penalty and the crime which is threatened by life imprisonment, has different kind of mitigation. This also bears difference with the stipulation in Article 53 (3) of Indonesian Penal Code, which equalizes the sanction for the attempt to commit crime threatened by death penalty or life imprisonment. Based on this fact also, it could then be concluded that the sanction for the crime of attempt in Korean Penal Law is different, depending on the crime related with the attempt. The proof of this theory can be seen from the next article, which is Article 29[179], which states that: "*The punishment for attempted crimes shall be specifically provided in each Article concerned*."

Based on the stipulation above, it is now clear that each kind of crime has specific grade of punishment for its attempt. Furthermore, it is also important to note that not all kind of attempt of crimes can be punished according to this Article. The list of attempts of crimes which can be imposed with penal

[179] Article 29 of Korean Penal Code.

sanction, some of them are the attempts to use explosives, attempt to escape and harboring criminals, and attempt to excavate graves.

This is similar with the stipulations of Article 54 of Indonesian Penal Code, which states that the attempt to do offence is not penalized, which also means that not all kind of attempt shall be criminalized, in which only attempt to commit felony shall be punished. This is also supported by the fact that Korean Penal Law only consists of 2 parts, which are General Provisions and Individual Crimes, in which in the Individual Crimes part it does not distinguish between the felony and offence, which is not the case with Indonesian Penal Law which consists of 3 parts, which are General Rules, Felony, and Offence, and thus, distinguish between the felony and offence.

2. Similarities and Differences of Concept of Crime of Attempt in Draft of Indonesian Penal Code and South Korean Penal Code

The next comparison which will be discussed is between the concept of crime of attempt which is stipulated in Draft of Indonesian Penal Code and Korean Penal Code. The stipulation of the concept of crime of attempt stipulated in Draft of Indonesian Penal Code from Article 15 to 20 will be provided below.

Article 15[180] of the Draft of Indonesian Penal Code states that:

" (1) Preparation to commit a crime happens when the criminal tries to get or to prepare the media in the form of tool, gather information or to plan for the conduct, or to do similar thing intended to create a condition for the commission of a conduct directed for the completion of a crime.

(2) Preparation to commit a crime is penalized if it is determined explicitly by the Law.

(3) The penal sanction for the attempt to commit a crime is 1/2 from the maximum penal sanction threatened for the related crime.

(4) The attempt to commit a crime which is threatened by death penalty or life-long sentence will be in the form of maximum 10 years imprisonment.

(5) Additional punishment for the preparation to commit crime is equal with the additional punishment for related crime."

While Article 16[181] of the Draft of Indonesian Penal Code states that: "*Preparation to commit a crime is not penalized, if the criminal stops, leaves, or prevents the possibility for the condition as stipulated in Article 15 (1) from happening*."

[180] Article 15 of Draft of Indonesian Penal Code.

[181] Article 16 of Draft of Indonesian Penal Code.

Then, Article 17[182] of the Draft of Indonesian Penal Code, states that:

" (1)Attempting to do a crime is punished, if the criminal has committed the preliminary conduct of the crime meant, but it is not finished, or not reached the result, or not causing prohibited effect, not just because of the criminal's own intention.

(2) Preliminary conduct as meant in clause (1) happens if :

a. Such conduct is meant for the commission of a crime;

b. Such conduct is close or has potential to cause the intended crime;

(3)The maximum sanction for attempting to do crime is 2/3 of the maximum sanction for the crime attempted

(4) If the crime is punishable by death penalty or long-life sentence, the maximum sanction which can be imposed is fifteen (15) years.

(5) Additional penal sanction for the crime of attempt is equalized with sanction for the attempted crime."

As for Article 18[183] of the Draft of Indonesian Penal Code, it states that:

"(1) Is not penalized if after committing preliminary conduct as stipulated in Article 18 (1):

a. the criminal does not finish their conduct voluntarily; or

b. the criminal by their own intention prevents the accomplishment of the goal or the effect of their conduct.

(2) In the event where the conduct as stipulated in clause (1) b has caused losses or if the Law assumes it as a stand-

[182] Article 17 of Draft of Indonesian Penal Code.

[183] Article 19 of Draft of Indonesian Penal Code

alone crime, the criminal could be held responsible for such conduct."

While Article 19[184] of the Draft of Indonesian Penal Code states that: "*The attempt to commit crime which is only threatened by fine of Category II is not penalized.*"

The first comparison between the concept of crime of attempt stipulated in Draft of Indonesian Penal Code and Korean Penal Code can be seen from the contents of Article 15 (1) of Draft of Indonesian Penal Code. In the article it is explicitly stated about the preparation phase, in which it is not the case compared to the stipulation of the current Indonesian Penal Code. It is also important to note that in Article 15 (1) of Draft of Indonesian Penal Code, the element of will has been eliminated, which makes it different from the stipulation of Article 25 (1) of Korean Penal Code, which states explicitly about the requirement for an attempt to be punished, which is that it must be in the form of intended crime. There are some reasons that can be referred to as to why such element of will is eliminated, which will be described below.

The first reason is because according to Loebby Luqman, there is no single person that is able to know the intention of other people, in the case of which such intention is not stated verbally or explicitly, or in other words, it is impossible to know other people's intention if such intention is not realized or

[184] Article 20 of Draft of Indonesian Penal Code.

transformed into a real conduct.[185] The next reason is because someone who just had the intention to commit a crime, cannot be punished, since by having only such intention, there is no legal interest which is harmed.[186] This also fits with the rules in Islamic Law, which has also been discussed before in the previous chapter, that someone cannot be punished just because of the evil mind in his thoughts.[187]

However, this elimination of the element of will in the article could then raise a question. Will the attempt of crime which is based on the negligence be punished with the same sanction as if the crime is intended? Judging from the stipulation of Article 17 of Draft of Indonesian Penal Code, the answer would be no, since the conduct which is considered to be punishable is the conduct which has reached preliminary conduct, in the sense that such preliminary conduct must be directed towards the crime itself. For instance, if someone drinks alcohol and got drunk, then he drove a car with fast speed, which turns out to almost hit a pedestrian due to negligence, he could not be charged with attempt of murder, since he arguably did not have the intention to murder someone at the first place, but he can still be charged with traffic crime instead for driving unsafely.

It is a bit different case with the regulation in Korea in regards with the case of negligence to almost hitting someone caused by drunk condition. This

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[185] Mohammad Eka Putra, 'Poging', USU Digital Library, 2002, p. 6.

[186] *Ibid*.

[187] *Ibid.*

case can be seen from the provision of Article 10[188] of Korean Penal Code, which states that:

> “(1)The act of a person, who, because of mental disorder, is unable to make discriminations or to control one’s will, shall not be punished.
>
> (2)For the conduct of a person, who, because of mental disorder, is deficient in the abilities mentioned in the preceding paragraph, the punishment shall be mitigated.
>
> (3)The provisions of the preceding two paragraphs shall not apply to the act of one who, in anticipation of danger of a crime, has intentionally incurred one’s mental disorder.”

From the provision of Article 10 of Korean Penal Code above, it could be concluded that in the case of someone who got drunk and then drove a car which has the potential to hit and kill someone else, they cannot be exempted from the punishment, since the drunk condition is incurred or intended by themselves, even though he knows or shall know that if he drives while in drunk condition, it might be dangerous for other people.[189]

The next comparison can be viewed from the stipulation of Article 15 (2) of Draft of Penal Code, in which it is stated that preparation of crime will be penalized if the law desires so. It is actually similar with the regulations in Korean Penal Act, in which not all kind of preparations shall be punished. Although, as it has been stated before, the matter of preparation and the attempt

[188] Article 10 of Korean Penal Code.

[189] Interview with Mrs. Ryu Jin Hwa, Criminal Law Professor at Youngsan University, November 13, 2019.

in Korean Penal Law seems to be separated from each other, in the sense that there are some criteria of crimes which preparation shall be punished, some which attempt shall be punished, and some which both of them are determined to be punished. For instance, the attempt to commit crime of excavating grave is punished, while the preparation to use explosives is punished, and both preparations and attempt to commit the crime of escape and harboring criminal is punished. The reason for why only some preparation of crimes can be punished is due to the degree of the severity of the crime. If the crime is recognized as a really severe case by the government, then the preparation for such crime will as well be punished.[190]

As for the next comparison, it will be taken from the stipulation of Article 15 (3) of Draft of Indonesian Penal Code, in which it is stated that penal sanction for the crime of attempt shall be 1/2 from the maximum sanction. While in Korean Penal Act, as it has been discussed previously, the mitigation of sanction will be determined depending on the kind of crime, as stipulated in Article 55 of Korean Penal Code. This also leads to the difference between the stipulation in Article 15 (4) of Draft of Indonesian Penal Code and Article 55 (1) of Korean Penal Code, in which the punishment in Draft of Indonesian Penal Code for the attempt to commit crime threatened by death penalty or life imprisonment is maximum 10 years, while such punishment in Article 55 (1) for crimes threatened with death penalty is imprisonment, with or without prison labor, for life or for at least 20 years up to 50 years, and imprisonment,

[190] Interview with Mrs. Ryu Jin Hwa, Criminal Law Professor at Youngsan University, November 13, 2019.

with or without prison labor, for at least ten years up to 50 years, for crimes threatened with life imprisonment.

Then, from the stipulation of Article 16 of Draft of Indonesian Penal Code, which states that the preparation to commit a crime will not be penalized if the offender stops, leaves, or prevents the possibility for the condition stipulated in Article 15(1) from happening, we can see the difference between this article and Article 26 of Korean Penal Code, which will be provided once below for easier review.

Article 26[191] of Korean Penal Code states that: "*When a person voluntarily ceases his criminal act which he began or prevents the result of the culmination thereof, the punishments shall be mitigated or remitted*."

As it can be seen from Article 16 of Draft of Indonesian Penal Code and Article 26 of Korean Penal Code above, it can be concluded that there are similarities and differences in them. The similarity is that both of the Articles discuss about the criminal's own intention or will to cease or to stop their commission of crime, while the difference is regarding the matter of the punishment, in which the preparation which is stopped by the criminal's own will in Draft of Indonesian Penal Code will not be punished, while the same case in Korean Penal Code can either be punished with mitigation or not punished at all.

As for the next comparison, we will take the provisions of Article 17 (1) of Draft of Indonesian Penal Code as comparison with Korean Penal Code, in

[191] Article 26 of Korean Penal Code.

which it is stated that an attempt to commit a crime can be punished if there is already preliminary conduct of the crime intended, but it is not finished, or not reached the result, or not causing prohibited effect, not just because of the criminal's own intention. This provision shares the similar concept with the provision of Article 25 (1) of Korean Penal Code, in the sense that a crime can be punished as an attempt if it is not finished or the result which is desired by the criminal does not happen.

Still related to Article 17 of Draft of Indonesian, the next comparison will be from Article 17 (3) and (4), which is similar with our discussion in above parts, in which if the mitigation of sanction in Draft of Indonesian Penal Code is directly determined for general and for crimes threatened with death penalty or life imprisonment, in Korean Penal Code, such mitigation is determined specifically depending on the kind of crimes, and not only just for crimes threatened with death penalty and life imprisonment. The difference between the stipulation in this Article 17 (3) and (4) of Draft of Indonesian Penal Code with Article 15 (3) and (4) of Draft of Indonesian Penal Code is that if Article 15 discusses about the matter of preparation stage in an attempt, this Article 18 discusses about the stage of preliminary conduct.

Next comparison will be based on Article 18 of Draft of Indonesian Penal Code, in which it is stated that the criminal will not be punished if after getting through the phase of preliminary conduct, the criminal voluntarily stops the commission of such crime or prevents the result of such crime. This is similar with the provision in Article 26 of Korean Penal Code regarding voluntarily ceased crime.

Then, regarding the next article, which is Article 19 of Draft of Indonesian Penal Code, it is stipulated that the attempt of committing crime which the sanction is Category II fine will not be punished. This regulation clearly does not exist in Korean Penal Code, since the Code only specifies about the classification of fine and minor fine, and also, Article 55 (1) of Korean Penal Code regarding mitigation of sanction specifies that the mitigation for crime threatened by fine or minor fine will be one half of the maximum amount of sanction applied for that crime, which means that there will still be sanction for attempt to commit crime threatened by fine.[192]

Another important thing to note that in Article 27 of Korean Penal Code, in which it is stated that: "*Even though the occurrence of a crime is impossible because of the means adopted for the commission of the crime or because of mistake of objects, the punishment shall be imposed if there has been a resulting danger, but the punishment may be mitigated or remitted*."

From the provision of Article 27 of Korean Penal Code above, it can be concluded that Korean Penal Code adopts objectivity theory, which can be proven by the phrase of "if there has been resulting danger", which means that there has already been some legal interest which is endangered.

As it has been compared all of the similarities and differences of the concept of crime of attempt which is regulated in Indonesian Penal Law and

[192] Interview with Mr. Myong Jun Hwang, Criminal Law Professor at Youngsan University, November 18, 2019.

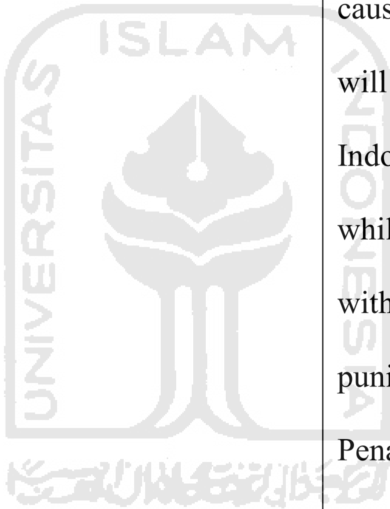
Korean Penal Law, those similarities and differences will be provided in the table below for giving easier understandings to the readers.

Sources of Comparison	Similarities	Differences
Indonesian Penal Code and Korean Penal Code	1. The element of intention is needed in both Codes to penalize the crime of attempt. 2. Not all kind of attempt shall be punished, in which only felony in Indonesian Penal Code shall be punished, while only specific crimes in Korean Penal Code which attempt shall be punished.	1. Indonesian Penal Code explicitly mentions about the phase of preliminary conduct, while Korean Penal Code does not explicitly mention about the term preliminary conduct, however, it uses the term preparation action and commencement stage, in which the commencement stage could be equalized with the term preliminary conduct in Indonesian Penal Code. 2. The maximum sanction for committing attempt in

		Indonesian Penal Code is 1/3 of the maximum sanction of intended crime, while the sanction for committing attempt in Korean Penal Code is determined based on the kind of crimes, which could be mitigated from the sanction of related crimes.
Draft of Indonesian Penal Code and Korean Penal Code	1. Both Codes mention explicitly about the separation of preparation stage or preparatory action and preliminary conduct or commencement stage. 2. Preparing to commit an attempt can be penalized if it is desired so by the Law. 3. It is needed the element of criminal's own will to stop committing a crime	1. There is no element of will or intention stipulated in Draft of Indonesian Penal Code to penalize an attempt, while such intention is needed to penalize an attempt in Korean Penal Code. 2. The maximum sanction for committing attempt in Draft of Indonesian Penal Code is 1/2 of the

	for possibility of reduced punishment. 4. An attempt must reach the stage of preliminary conduct or commencement stage in order for it to be punished. 5. Both Indonesian Penal Code and Draft of Indonesian Penal Code, and also South Korean Penal Code adopts objectivity theory.	maximum sanction of the intended crime, while the sanction for committing attempt in Korean Penal Code is determined based on the kind of crimes, which could be mitigated from the sanction of related crimes. 3. Punishment for attempt to commit crime threatened by death penalty or life imprisonment is maximum 10 years in Draft of Indonesian Penal Code, while such punishment in in Korean Penal Code for crimes threatened with death penalty is imprisonment, with or without prison labor, for life or for at least 20 years

		up to 50 years, and imprisonment, with or without prison labor, for at least ten years up to 50 years, for crimes threatened with life imprisonment. 4. The unfinished crime caused by criminal's own will not be punished in Indonesian Penal Code, while it could be punished with mitigation or not punished at all in Korean Penal Code. 5. Draft of Indonesian Penal Code does not penalize the attempt for committing crime which the sanction is in the form of Category II fine or minor fine, while Korean Penal Code still penalize



		the attempt for the crime threatened by minor fine.

Then, since it has been stated previously that the comparison of law, or Comparative Law in this research was conducted by Constantinesco method, then it shall be connected between the steps in Constantinesco method with the result of comparison that has been done. As a reminder, there are three steps consisted in Constantinesco method, which will be reviewed by sequence.

The first step is to learn some concepts which need to be compared, for then analyzing them later with full consideration, while also considering their legal hierarchies. This step has been done in the sense that we have studied about specific legal issue, which is the comparison between the concept criminal attempt in Indonesian Penal Code and South Korean Penal Code, in which the sources, have the same hierarchy in each of the State, which are Penal Codes.

Next, the second step, is understanding the issue compared to look for the possibility for the concepts compared to be integrated in each legal system, and the influence or effect afterwards. Based on the result of comparison, it could be seen that both Indonesian Penal Code and South Korean Penal Code has some differences and similarities in addressing the issue of criminal attempt. For instance, what could be implemented in Indonesian Penal Code is the regulation that the punishment for attempt which is applied in South Korean Penal Code will be determined by the mitigation, depending on the kind of

crimes attempted, not just 1/3 of the maximum penal sanction imposed for the related successful crimes. This way, the judge will be given more freedom in granting the penal sanction for the attempter, even though it could not be denied that it will infringe the concept of legality principle adopted in Indonesian Penal Code.

As for the last step in Constantinesco method, is the activity to analyze the concepts compared in a critical and systematize way to know their relationships. As it could be seen above, from the similarities and differences stipulated in Indonesian Penal Code and South Korean Penal Code, it could be raised some questions on how comparison could exist. For instance, the reason of why South Korean Penal Code does not punish the attempt for misdemeanor or wrongdoing is because its Penal Code itself only consists of two parts, which are General Provisions and Individual Crimes, in which the Individual Crimes part does not distinguish between felony and misdemeanor, while the reason for why Indonesian Penal Code does not punish such attempt is because it has been stated literally in Article 54 of Indonesian Penal Code that attempting to commit misdemeanor will not be punished at all.

C. Comparison of Concept of Criminal Attempt in Indonesian Corruption Law and South Korean Improper Solicitation and Graft Act

As it has been analysed the concept of the criminal attempt stipulated in Indonesian Penal Code and Draft of Indonesian Penal Code, the next source regarding the concept of criminal attempt which will be discussed is the stipulation in Indonesian Corruption Law, or Law Number 31 of 1999 which has been amended by Law Number 20 of 2001.

The concept of criminal attempt is stipulated in Article 15 of Law Number 31 of 1999, which states that : "*Anyone who commits attempt, cooperation, or evil conspiration to conduct corruption, is penalized with the same sanction as stipulated in Article 2, 3, 5 to Article 14*."[193]

Just for slight information and as example, Article 5 of Law Number 20 of 2001[194] consists of the sanction for everyone who gives or promises something to civil servant or state apparatus with the intention so that the civil servant or state apparatus do or do not do something in their position, which contravenes with their duties, or everyone who gives or promises something to civil servant or state apparatus because of or which has relationship that contravenes with their duties, done or not done in their position, which is in the form of minimum 1 year and maximum 5 year of imprisonment, and or minimum fine

[193] Article 15 of Law No. 31 of 1999.

[194] Article 5 of Law No. 20 of 2001.

of 50 million IDR and maximum fine of 250 million IDR. On the other hand, Article 2 (1) of the Act[195] consists the punishment for everyone who unlawfully commits illicit enrichment towards self, other person, or corporation that causes losses to state's finance or economy, which is in the form of life-long imprisonment, or minimum 4 years imprisonment and maximum 20 years imprisonment, and minimum fine of 200 million IDR and maximum fine of 1 trillion IDR.

Therefore, Article 15 of Law Number 31 of 1999 consists of the regulation in the sense that someone who attempts to commit crime as stipulated in Article 5, will be punished with the same criminal sanction as if the conduct itself is finished. The issue of why this attempt of corruption could be equalized with finished delict will be explained in this sub-chapter.

There are 2 theories that could be used related with the concept of criminal attempt, which are subjective theory and objective theory, in which in regards with objective theory, Simons stated that it is needed to determine whether there has been preliminary conduct or not in a case, in which he differed it into the determination in formiil delict and in materiil delict. In formiil delict, which means the delict which does not concern on the result of a crime, in which preliminary conduct is assumed to exist just because certain act in a provision has been done, for instance, the act of "taking" stipulated in Article 362 of Indonesian Penal Code.[196] While on the other side, materiil delict means the

[195] Article 2 (1) of Law No. 31 of 1999.

[196] Article 362 of Indonesian Penal Code.

delict which concerns on the result of a crime, in which preliminary conduct is assumed to exist if the result intended in a delict can be achieved directly without the need for the criminal to commit various conducts, for instance, the death of somebody that could be achieved directly as stipulated in Article 338 of Indonesian Penal Code.[197]

Then, by looking at the stipulations of Article 5 to 14 of Indonesian Corruption Act, it can be noticed that all of those Articles are formulated in formiil way, which for instance, according to Article 5[198], as long as the act of "promising" already committed, regardless of whether the promise is fulfilled or not. Therefore, by referring to the objective theory in formiil context, it could be concluded that preliminary conduct happens when something is given or promised, and thus, justifies the penalization for the attempt. As for the reason of why the sanction of criminal attempt in Article 15 of Indonesian Corruption Act is equalized with finished or complete delict, is then because based on the concept of formiil delict, as long as a certain conduct stipulated in a delict is already committed, then it will automatically become a finished delict. Henceforth, the sanction for criminal attempt as stipulated in Article 5 to 14 of Indonesian Corruption Act is then equalized with finished delict.

It is also important to look at Article 2 and 3 which are also stipulated in Article 15 of Indonesian Corruption Act. The important thing to note is that previously, both Article 2 (1) and 3 of Indonesian Corruption Act were

[197] Article 338 of Indonesian Penal Code.

[198] Article 66 of Law No. 21 of 2001

formulated in formiil way, however, by the Decision of Constitutional Court No. 25/PUU-XIV/2016[199], they are shifted to materiil delict, by the elimination of the phrase “may” which was previously stipulated in the Articles, since it was argued that such phrase might raise legal uncertainty. Based on this issue, it could then be seen that the objective theory of criminal attempt proposed by Simons in regards with materiil delict, in which the theory states that as long as the result intended in a delict could be achieved directly without various commission of acts, then preliminary conduct is considered exist, and thus, justifies the punishment. Therefore, since the losses of state’s finance or economy stipulated in the Article could be achieved directly without the need of the criminal to commit other activities other than the illicit enrichment, then it could be concluded that preliminary conduct exists in the article.

However, the issue is that materiil delict could only be assumed as finished delict if the result intended is indeed happened. Hence, why does the sanction for the attempt of committing Article 2 (1) and 3 is equalized with finished delict? It is because the provision of Article 2 (1) and 3 of Indonesian Corruption Act is still using the concept before the issuance of Constitutional Court Decision No. No. 25/PUU-XIV/2016, therefore, the sanction stipulated in Article 15 of Indonesian Corruption Act is still applying the sanction for the status of Article 2(1) and 3 as formiil delict.

The next comparison will be regarding the concept of attempt in committing corruption applied in Korean Penal Law. However, it is important to note that Korean Penal Law does not specifically regulates about the crime

[199] Constitutional Court Decision No. 25/PUU-XIV/2016.

of corruption, in the sense that only few articles in the Korean Penal Code which do so, in which one of the Article itself is Article 129. Article 129 states that:[200]

> "(1) A public official or an arbitrator who receives, demands, or promises to accept a bribe in connection with his duties, shall be punished by imprisonment for not more than than five years or suspension of qualifications for not more than ten years.
>
> (2) If a person who is to become a public official or arbitrator receives, demands, or promises to accept a bribe in response to a solicitation, in connection with the duty which he is to perform and he actually becomes a public official or arbitrator, imprisonment for not more than three years or suspension of qualifications for not more than seven years shall be imposed."

What can be concluded from the article above is that Korean Penal Law does not recognize the term corruption, instead, it classifies the crime in the form of bribery. Hence, since there is only few Article regarding corruption, it shall be noted of another source of law in South Korea to be able to discuss the

[200] Article 129 of Korean Penal Code.

issue properly. Just like the case in Indonesia, in which the matter of corruption is regulated in Indonesian Corruption Law, the matter of corruption in Korea is also regulated in a special act known as The Improper Solicitation and Graft Act.[201] The purpose of the Act, as stipulated in its Article 1, is to ensure that public servants, etc., perform their duties in a fair manner and to secure public confidence in public institutions, by prohibiting any improper solicitation made to public servants, etc., and by prohibiting public servants from receiving money, goods, etc.[202] Therefore, based on this provision of Article 1, we could then conclude that the scope of application of this Act is only applied for civil servants. It is also interesting to note that in this Act, it is also not recognized explicitly about the crime of corruption, rather, Korean Law uses the term solicitation, which in can be equalized as bribery in Indonesia, and also graft.

There are 2 major articles in Korean Improper Solicitation and Graft Act related to the solicitation and graft which shall be discussed first. The first is Article 6, which states that: "*Upon receipt of an improper solicitation, no public servant, etc. shall perform his/her duties as solicited.*"[203]

[201] Korean Improper Solicitation and Graft Act.

[202] Handbook of the Improper Solicitation and Graft Act, 2017, p. 3.

[203] Article 6 of Korean Improper Solicitation and Graft Act

While the next article would be Article 8 (1), which states that:[204]

> "No public servant, etc. shall accept, request, or promise to receive any money, goods, etc. exceeding one million won at a time or three million won in a fiscal year from the same person, regardless of any connection to his/her duties and regardless of any pretext such as donation, sponsorship, gift, etc."

As it can be seen from both of the provisions above, it could be concluded that Article 6 deals with the matter of improper solicitation, while Article 8 (1) deals with the matter of graft. While the provision of Article 6 might seem to be clear, it might not be the case with the provision of Article 8, since there are some substances that should be discussed first before going to the sanction related to both provisions.

The first substance that would be discussed is regarding the phrase "same person" in Article 8. In regards with such phrase, it is ruled that it is not important whether the money or goods is given directly or through the involvement of third party, instead, it is important to know who the actual provider of the money or the goods is, or in other words, the source of the money or the goods. The explanation can be seen from the following case.

[204] Article 8 (1) of Korean Improper Solicitation and Graft Act.

Let us say that there is an architect, who also happens to be a public official, who receives money and goods from three employees of Company A for certain inappropriate purpose. Employee 1 of the company gives a bottle of alcohol worth of 700.000 won to the architect, while Employee 2 of the company gives souvenirs worth of 300.000 won to him, and Employee 3 of the company treats the architect with meal worth of 300.000 won. From this case, even though it could be seen that there are 3 employees that are involved in the giving of money and goods, they are still the employees of the same company, and thus, it could be assumed that the purpose of such deliverance of money and goods is in the same intention, and comes from the same source, which is Company A.[205]

The next substance will be related to the phrase "same time", which will also be explained by a simple case. The example of the case can be seen in an event where a head of department of A public corporation (A), head of department of B public corporation (B), and CEO of C public corporation (C) had dinner together. In the event, C paid 600.000 won to A and B for the dinner. Later at 11 pm, three of them drink wine and C paid 3 million won to A. Based on this case, since there is a spacial and temporal proximity to the events of dinner and drinking wine, those events can be considered as one occasion or at "same time".[206]

The last thing which will be discussed is regarding the phrase "fiscal year".

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[205] Handbook of the Improper Solicitation and Graft Act, 2017, p. 90.

[206] Handbook of the Improper Solicitation and Graft Act, 2017, p. 91-92.

Fiscal year as stipulated in the article means the fiscal year of the public institution in which a public official who happens to receive prohibited advantages is in. The fiscal year of governmental institutions, local governments and public agencies usually starts on the 1st January of each year, and ends on the 31st December of each year.[207]

Then, moving on to the sanction related with the violation of Article 6 and 8 (1), which are stipulated in Article 21 and Article 22 (1) point 1 and Article 22 (2) point 2. The first Article, which is Article 21, states that: "*The head of a relevant institution, etc. shall take disciplinary action against any public servant, etc. who violates this Act or an order issue pursuant to this Act.*"[208]

While Article 22 (1) point 1 states that :[209]

> "Any of the following persons shall be subject to imprisonment with labor for not more than three years or a fine not exceeding 30 million won :
>
> 1. A public servant, etc. (including private persons performing public duties under Article 11) in violation of Article 8 (1) : *Provided*, that the foregoing shall not apply if a public servant,

[207] Handbook of Improper Solicitation and Graft Act, 2017, p. 92.

[208] Article 21 of Korean Improper Solicitation and Graft Act.

[209] Article 22 (1) point 1 of Korean Improper Solicitation and Graft Act.

etc. Reported, returned, delivered, or expressed an intention to reject prohibited money, goods, etc., pursuant to Article 9 (1), (2), or (6)."

While Article 22 (2) point 1 states that:[210]

"Any of the following persons shall be subject to imprisonment with labor for not more than two years or a fine not exceeding 20 million won :

1. A public servant, etc. (including private persons performing public duties under Article 11) who accepts improper solicitation and performs his/her duties as solicited, in violation of Article 6."

Both of the provisions above stipulate clearly about the sanction towards the act of improper solicitation and also graft, which can be in the form of disciplinary action and also imprisonment and fine. However, it is important to note that Korean Improper Solicitation and Graft Act does not regulate about the matter of attempt to commit improper solicitation and graft.

[210] Article 22 (2) point 1 of Korean Improper Solicitation and Graft Act.

Then, it shall be compared about the provisions in South Korean Improper Solicitation and Graft Act above with the provisions in Indonesian Corruption Law.

As it could be seen from Article 129 above, it is stipulated clearly that the scope of the article is applied for public official, arbitrator, or the person who would become public official or arbitrator. This article also directly stipulates about the sanction for the offender, which is in the form of imprisonment for not more than than five years or suspension of qualifications for not more than ten years for clause 1, and imprisonment for not more than three years or suspension of qualifications for not more than seven years for clause 2. However, it is important to note that Korean Penal Law does not penalize the attempt to commit the crime as stipulated in this Article 129. The reason of why the sanction for the attempt is not regulated could be seen from the stipulations itself. The stipulation consists of the phrase "receives, demands, or promises", in which this is similar with the stipulation of Article 5 of Indonesian Corruption Law, or Law Number 20 of 2001[211] to be exact, which for the purpose of reminding the readers, will be stipulated once more:

[211] Article 5 of Indonesian Corruption Law.

"(1) Is punished with minimum period of 1 year imprisonment and maximum period of 5 year imprisonment and minimum fine of 50 million IDR and maximum fine of 250 million IDR for everyone that :

a. gives or promises something to civil servant or state apparatus with the intention so that such person does or does not do something in their position, which contravenes with their duties; or

b. gives something to civil servant or state apparatus because of or which is related with their duties, which is done or not done in their position.

(2) For civil servant or state apparatus who receives giving or promises as stipulated by clause (1) a or b, is punished with the same punishment as stipulated by clause (1)."

It is fair to compare both Article 129 of Korean Penal Code and Article 5 of Law Number 20 of 2001 since both of the articles regulate about the crime of bribery, as Korean Penal Code recognizes bribery instead the normal kind of corruption. Then, as it has been discussed in the previous chapter, this Article 5 is stipulated in formiil way, in the sense that even though the other party does not receive the giving or promise as stipulated by the Article, the delict will be considered as finished delict, and thus, the sanction will be the same with such finished delict. In other words, even attempting to commit the crime in Article

5 is considered as finishing a delict, in which it is stated further in Article 15 of Indonesian Corruption Law. Then, it is evident from Article 129 of Korean Penal Code that it is also stipulated in formiil way as what the case is with Article 5 of Indonesian Corruption Law. This is the reason why Korean Penal Law does not specify further about the sanction for the attempt to commit the crime in Article 129, since the article itself already explained implicitly that even attempting to commit such crime, even though the other party does not receive the giving or promise, the offender will still be punished with the same sanction which is stipulated in such article.[212] Therefore, what can be concluded is that, the sanction for the attempt to commit corruption, which is bribery to be exact, is stipulated clearly in Indonesian Corruption Law, while in Korean Penal Law, it is not stipulated explicitly, even though both Penal Laws treat the attempt to commit bribery the same as the finished bribery. Another comparison which might matter is that the scope of Article 5 of Indonesian Corruption Law applies for everyone who gives or promises something to civil servant and also the civil servant who receives such giving or promises itself, while the scope of Article 129 of Korean Penal Code applies for public official or arbitrator, or soon to be public official or arbitrator.

Then, from the stipulation of Article 6 and 8 (1) of Korean Improper Solicitation and Graft Act, it could be seen from the provision of these 2 articles above, they consist of no sanction. The sanctions, however, are

[212] Interview with Mr. Myong Jun Hwang, Criminal Law Professor at Youngsan University, November 18, 2019.

regulated in separated Articles, which are in Article 22 (1) point 1 and Article 22 (2) point 1.

Then, as it could be seen from the provisions of Article 22 (1) point 1 and 22 point (2) point 1 above, the sanctions are stipulated clearly for those violating Article 6 and Article 8 (1). However, it is also important to note that the Korean Improper Solicitation and Graft Act does not regulate about the matter of attempt of committing the crime related to solicitation and graft itself. The reason for the lack of such regulation might be clear from the provision of Article 8 (1), since the logic used related with Article 129 of Korean Penal Code could also be applied for this Article, because Article 8 (1) also uses the phrase "promise", in the sense that even though the party does not fulfil such promise, the provision will still be applied, since Article 8 (1) is also formulated in formiil way. However, that might be not the case with the stipulation of Article 6. Article 6 is clearly regulated in materiil way, in the sense that the provision is only applied for the public servant who receives solicitation, which means that there has to be the acceptance of the solicitation. The matter of attempting to receive the solicitation, however, is not stipulated, and the reason for this issue is still to be discussed by the Korean scholars. The disadvantage is then, since both Korean Penal Law and Korean Improper Solicitation Act do not state clearly regarding the punishment for the attempt to commit bribery or graft, hence, it gives no legal certainty whether the attempt

to commit such crimes is punished with the same punishment as finished bribery or graft or even not punished at all.[213]

D. Advantages and Disadvantages of Concept of Criminal Attempt in Indonesian Penal Law and South Korean Penal Law

1. Advantages and Disadvantages of Concept of Criminal Attempt in Indonesian Penal Law

As it has been discussed about all of the comparisons which include the similarities and differences of the concept of attempt regulated in Indonesian Penal Law and Korean Penal Law, the next part of this writing is regarding the advantages and disadvantages of having such concept in each of the country. The discussion will be started from such advantage and disadvantage of the said concept in Indonesian Penal Law, which starts from Indonesian Penal Code and Draft of Indonesian Penal Code, which then will be continued by discussing the advantage and disadvantage from South Korean Penal Law, which is from South Korean Penal Law.

The first source that will be discussed is from Indonesian Penal Code. As it has been explained above in the previous parts regarding the substances of articles related to the concept of attempt in such source, there are some conclusions that we could take regarding the advantage and disadvantage of the concept. The first advantage could be seen from the stipulation of Article 53 (1)

[213] Interview with Mrs. Ryu Jin Hwa, Criminal Law Professor at Youngsan University, November 20, 2019.

which has been provided above. From the article it is evident that the law has provided clear requirement for the justification of penalizing an attempt, which is that the attempt must be accompanied by intent. This provides legal certainty for the people, in the sense that an attempt of a crime which is caused by the perpetrator's negligence, or in other words, without the knowing of the perpetrator, will not be punished, which will also protect them. The needs for the crime to enter the stage of preliminary conduct also contributes to the aspect of legal certainty, since it makes sure that an attempt that has just reached the preparatory stage will not be punished. However, the disadvantage here is that there is no clear-cut definition regarding the terms of preparation stage and preliminary conduct, hence, the standard for defining the start or the end of both of those stages could then cause problem.

There is also another advantage that could be taken from the stipulation of Article 53 (2), in the sense that the crime of attempt will have a lower punishment than the consummated crime, which can be a psychological factor for the perpetrator to stop his crime before it is finished with the consideration of such lower punishment. Therefore, the advantage here is that there is a clear difference between the punishment for the attempt and consummated or finished crime.

The next article that will be discussed regarding its advantage or disadvantage is Article 15 (1) of Draft of Indonesian Penal Code. In this article, it is stipulated clearly regarding the preparatory phase or stage, unlike the provision in Article 53 of Indonesian Penal Code. This leads to the clearness to determine whether an act has reached preparatory phase or preliminary conduct.

Furthermore, based on Article 15 (2), it is also clear that the act which only reaches preparatory stage will not be punished unless the law stipulates so, which gives legal certainty to the offender.

Then, regarding Article 17 (1), it can also be noticed that the phase of preliminary conduct is stipulated further than the provision of Article 53 (1) of Indonesian Penal Code. The advantage is that it is then evident to determine which phase that an act has reached. Article 18 (1), on the other hand, gives a mitigation for the offender that has reached the stage of preliminary conduct, in the sense that if they cease their act on their own will or intention, they shall not be punished, unless if there has caused losses, then the criminal could be held responsible. This provision shows that Draft of Indonesian Penal Code adopts objectivity theory, in the sense that the justification for punishing an attempt is seen from the existence of the result or danger. However, it is important to note that there is also a disadvantage with this article, in which there is no clear explanation regarding the severity of the punishment related to this voluntarily ceased attempt.

2. Advantages and Disadvantages of Concept of Criminal Attempt in South Korean Penal Law

The last substance that will be discussed in the last part of this chapter is regarding the advantages and disadvantages of concept of crime of attempt in Korean Penal Law, which the source will be from Korean Penal Code. The first substance that will be discussed is from Article 25 of Korean Penal Code. As it

has been explained in previous part, Article 25 (1) explicitly states about the element of intention which is needed for the justification of punishing the attempt. This gives a legal certainty in which the attempt which is based on negligence will not be punished. Then, from the stipulation of Article 25 (2), it is clear that the Law provides mitigation for the crime of attempt in the sense that the punishment can be lower than the finished crime. The further specification for the mitigation is provided in Article 55 (1) of Korean Penal Code, in which this gives more fairness in the sense that each kind of attempted crime will have their own grade of punishment, and not just determined with 2/3 of maximum penal sanction as in the case with Indonesian Penal Code or 1/2 of maximum penal sanction as in the case with Draft of Indonesian Penal Code.[214]

The next substance that will be discussed is regarding Article 27 of Korean Penal Code. This provision, as it has been discussed previously, adopts objectivity theory, hence, it is fair to punish the perpetrator if there has been resulting danger, instead of merely punishing the perpetrator based on their intention to commit crime as underlined by subjectivity theory.[215]

Then, for Article 28 of Korean Penal Code, the disadvantage that can be seen here is that the Law does not give clear-cut definition regarding the

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[214] Interview with Mrs. Ryu Jin Hwa, Criminal Law Professor at Youngsan University, November 20, 2019.

[215] Interview with Mrs. Ryu Jin Hwa, Criminal Law Professor at Youngsan University, November 20, 2019.

standard when commencement stage takes place, thus, it is hard to determine whether someone can be punishable or not.[216]

[216] Interview with Mrs. Ryu Jin Hwa, Criminal Law Professor at Youngsan University, November 20, 2019.

CHAPTER IV

CONCLUSION AND RECOMMENDATION

A. Conclusion

Based on the research that has been conducted in this writing from Chapter I to Chapter III, there are some key points that can be taken.

First, regarding the rationale and grading of punishment for criminal attempt based on philosophical perspective. The rationale is mainly based upon the perspectives of Utilitarian and Retributivism groups. Utilitarian group leaned their perspectives based on subjectivist theories. Utilitarian group also argued that the punishment for criminal attempt is needed for the preventive or deterrence function of the law. On the other hand, Retributivist group based their reasoning for the justification to punish criminal attempt based on the culpability of the criminal and the possibility of harm that could be caused by the attempt. As for the grading of the punishment for criminal attempt, Utilitarian group has two opinions, in which the first argument is that the punishment for attempt shall be equal to consummated crime, while the second argument is that such punishment for attempt shall be mitigated or reduced. As from the Retributivist group, there are also two dissenting opinions, in which the first opinion leans on the equal punishment for attempt as the completed crime while the second argument leans on the equality of the harm imposed, or in other words, retribution theory.

Second, is the comparison, which includes the similarities and differences between the concept of criminal attempt adopted in Indonesian Penal Code and South Korean Penal Code. The similarities between the concept of criminal attempt in both Indonesian and South Korean Penal Code are that both Penal Codes do not punish attempt of misdemeanor, and both require the element of intention to punish the offender. As for the difference is that the mitigation for the punishment of criminal attempt is regulated in a very detailed way in South Korean Penal Code, while Indonesian Penal Code does not regulate the mitigation specifically.

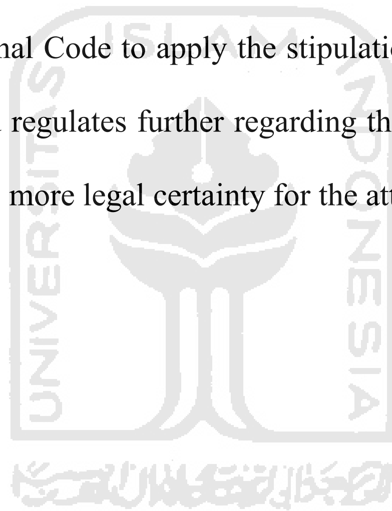
Third , for the comparison of concept of criminal attempt in Indonesian Corruption Law and South Korean Improper Solicitation and Graft Act, it is the fact that Indonesian Corruption Law regulates the attenmpt of committing the crime of corruption clearly by formulating it in materiil delict, along with the sanction which is equalized with finished delict, while on the other hand, South Korean Law does not recognize the term of crime of corruption, and only recognize about the crime of improper solicitation, bribery, and graft which is stipulated in the Improper Solicitation and Graft Act, which also does not regulate about the matter of attempting to commit bribery and graft itself, that becomes the disadvantage to then determine the sanction or punishment for such attempt.

Then, the fourth and the last, the advantage of the concept in Indonesian Penal Code is the stipulation of the element of intention that gives legal certainty, while the disadvantage is that the stage of preliminary conduct is not defined clearly. While in Draft of Indonesian Penal Code, the element of intention is removed, but the stage of preliminary conduct is defined clearly. As for the advantage of the concept in South Korean Penal Code is that the mitigation for the punishment of criminal attempt is

regulated very specifically, but there is no clear definition on the commencement stage, causing it an issue to determine the starting point of the stage.

B. Recommendation

The writer's recommendation would be for Indonesian Penal Code to try to adopt some concepts regarding criminal attempt which are stipulated in South Korean Penal Code. For instance, the adoption of the concept of punishment mitigation depending on the kind of crimes attempted, so such punishment in Indonesian Penal Code will not only be 1/2 of the maximum sanction of the crimes attempted. Another recommendation is for the current Indonesian Penal Code to apply the stipulation of Draft of Indonesian Penal Code, which explains and regulates further regarding the stage of preparatory act and preliminary conduct, to give more legal certainty for the attempted.



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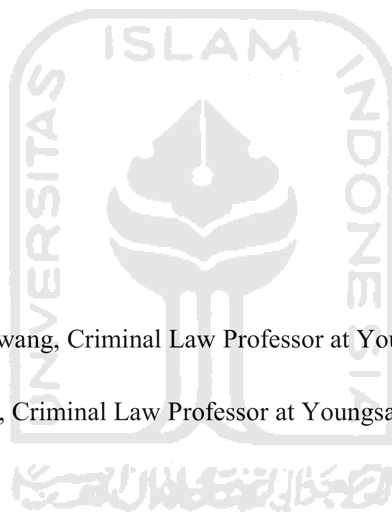
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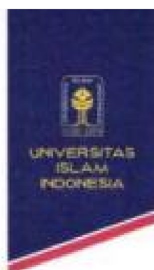

FAKULTAS
HUKUM

Gedung Mr. Moh. Yamin
Universitas Islam Indonesia
Jl. Taman Siswa No. 158 Yogyakarta 55151
T. (0274) 379178
F. (0274) 377043
E. fh@uii.ac.id
W. fh.uii.ac.id

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NIK	: **931002119**
Jabatan	: **Kepala Divisi Perpustakaan Fakultas Hukum UII**

Dengan ini menerangkan bahwa :

Nama	: Muhammad Oscar Dharma Putra Mulya
No Mahasiswa	: 16410119
Fakultas/Prodi	: Hukum
Judul karya ilmiah	: PHILOSOPHICAL AND COMPARATIVE STUDIES BETWEEN THE CONCEPT OF CRIMINAL ATTEMPT IN INDONESIAN PENAL CODE AND SOUTH KOREAN PENAL CODE

Karya ilmiah yang bersangkutan di atas telah melalui proses uji deteksi plagiasi dengan hasil **13**.%

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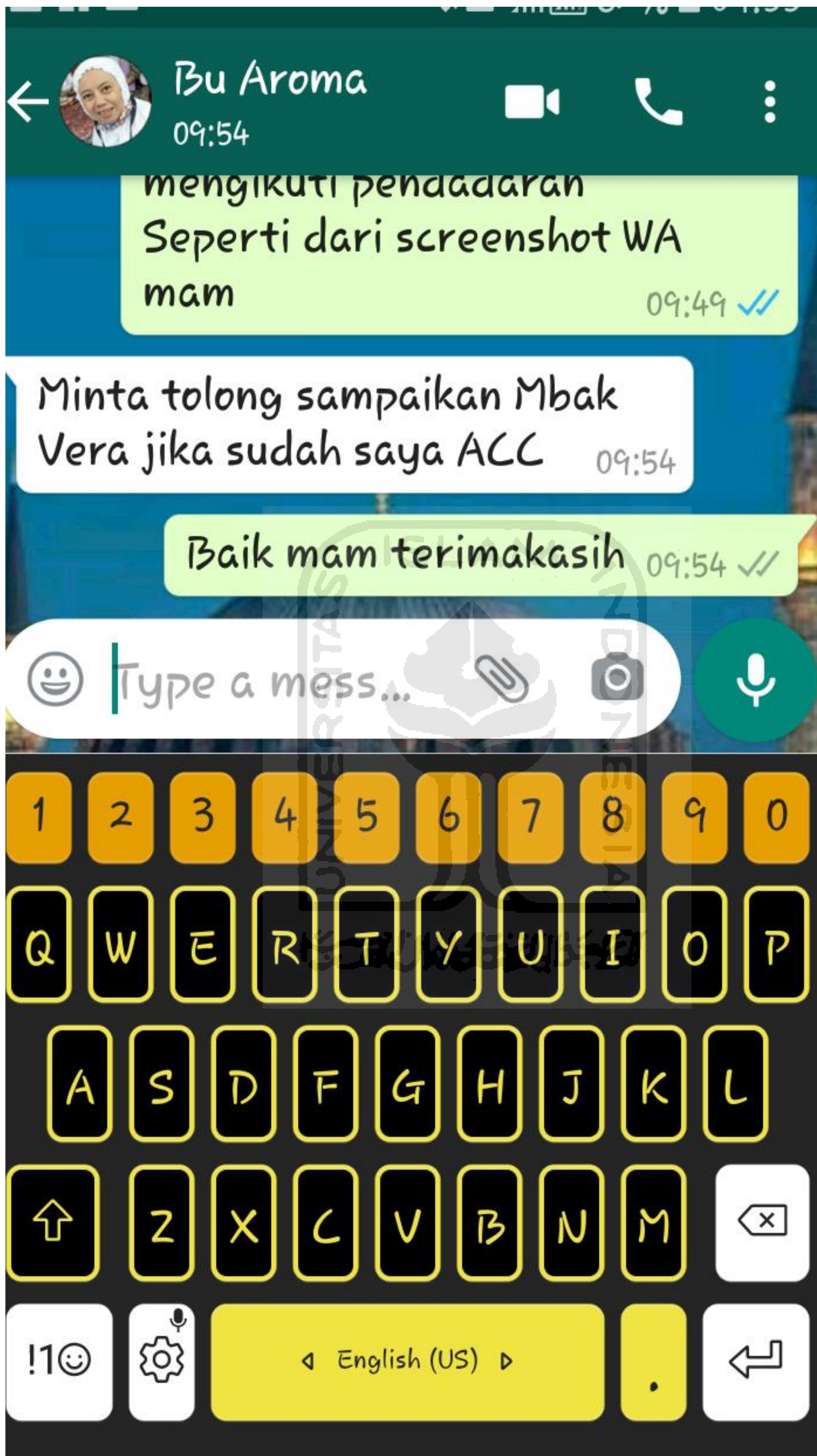
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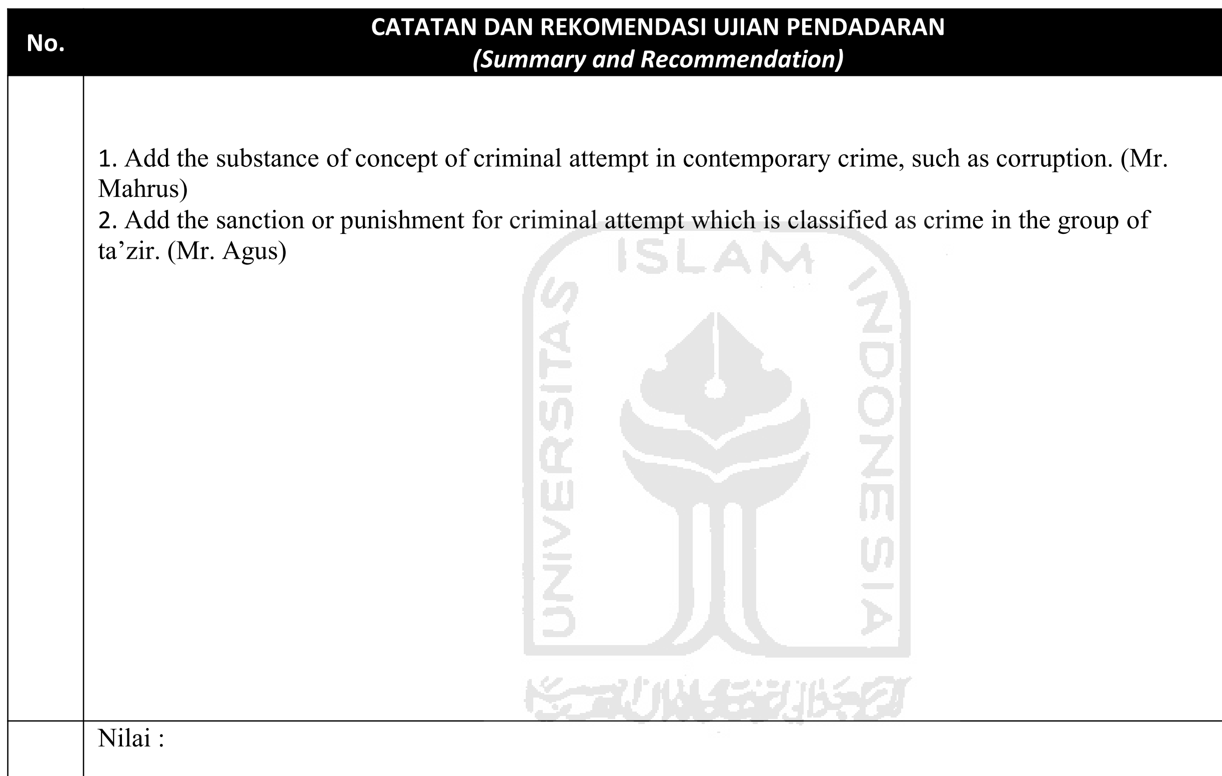
NIM *Student Number*	:	16410119
Judul Skripsi *Title*	:	Philosophical and Comparative Study of Concept of Criminal Attempt in Indonesian Corruption Law and South Korean Penal Law

No.	CATATAN DAN REKOMENDASI UJIAN PENDADARAN *(Summary and Recommendation)*
	1. Add the substance of concept of criminal attempt in contemporary crime, such as corruption. (Mr. Mahrus) 2. Add the sanction or punishment for criminal attempt which is classified as crime in the group of ta'zir. (Mr. Agus)
	Nilai :



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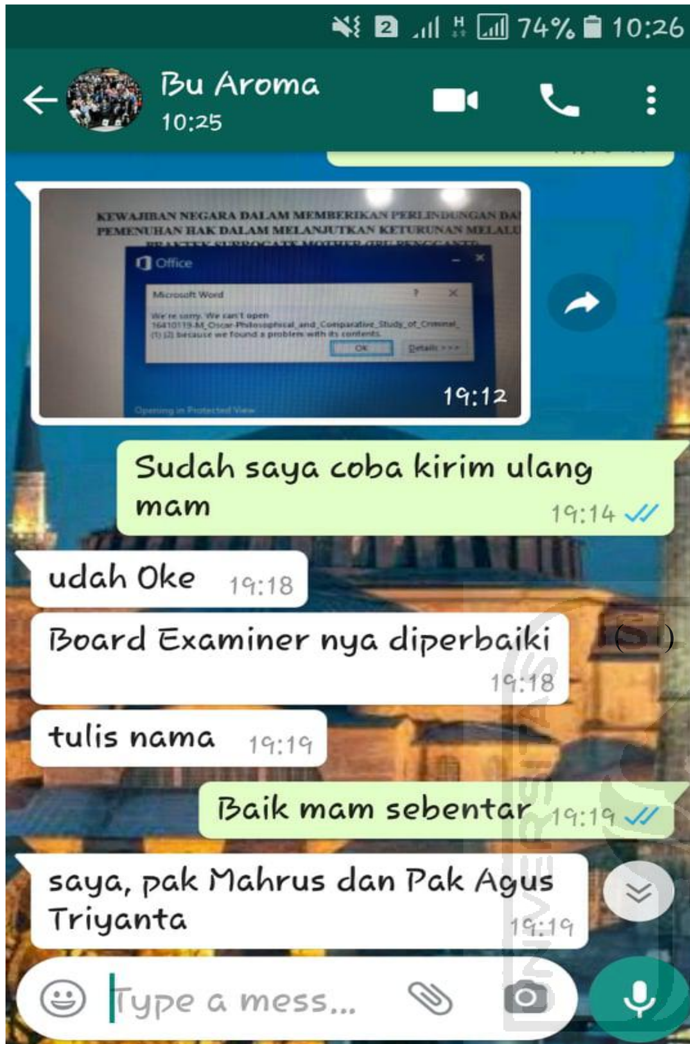
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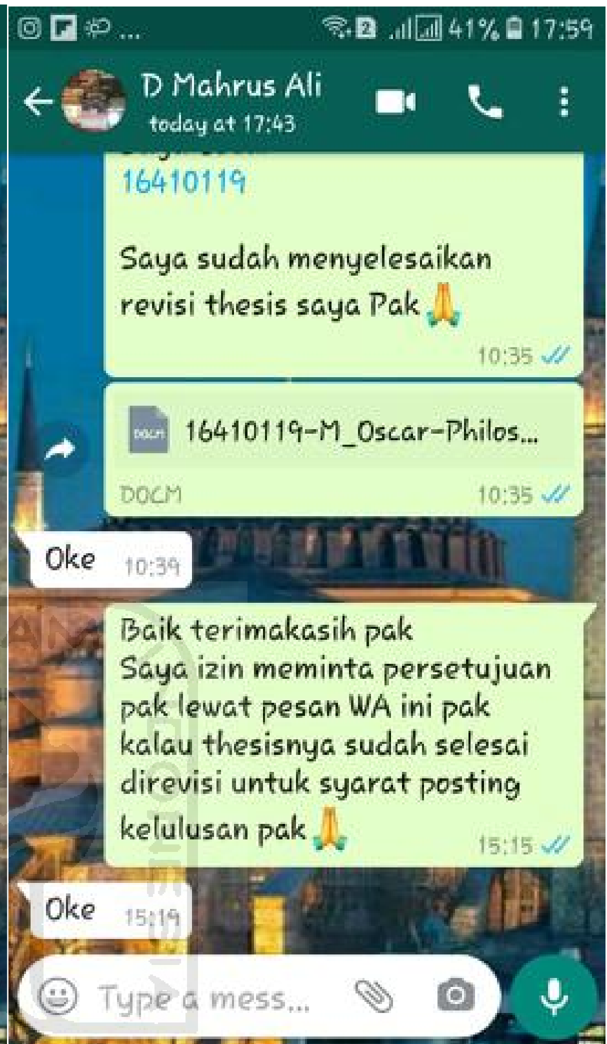
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