

The Quagmire of Impossible Attempts – How to Distinguish between Punishable and Non-punishable Cases of Criminal Attempt?*

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* It is worth mentioning that the inspiration for the name of my article is founded from R.A. Duff's fascinating monograph on the subject of field, *Criminals Attempts*, Oxford 1996.

1 Introduction

The most essential element of criminal attempt is *failure*: the offender fails to complete a crime which he intended to commit.¹ So, A fails to complete manslaughter² (the Finnish Penal Code Ch. 21 Sec. 1) if he pulls the trigger intending to kill B at whom he is aiming it but because A is inexperienced with guns, the bullet hits a tree next to B. It is self-evident that he can't be convicted for the completed crime. However, this failure does not preclude criminal liability; the defendant is normally guilty of an attempted manslaughter (assuming that the prosecution can prove A acting intentionally).³

At first sight, the above described failure seems to refer to the fact that the agent's act didn't fulfil requirements which are described in law text concerning the element of an offence i.e. one cannot commit manslaughter without killing the person. However, depending on the lexical meaning of law text, the way how the law of attempt is interpreted and constructed in case law and jurisprudence, one may also describe attempt *as a form of mistake*: the agent believes to commit a crime, but against his belief the crime is not be committed. So, when the concept of criminal liability is normally judged by starting to ask whether the requirements for the element of offence (actus reus, Objektiver Tatbestand) are fulfilled, in the law of attempt the emphasis can be seen to lie on the agent's intention (mean rea, Subjektiver Tatbestand).⁴

But, what if B pulls the trigger of an unloaded gun, believing it to be loaded and intending to kill the person at whom he is aiming at it? Compared with the case where the bullet shot by A hit a tree next to the intended victim, we might say that B fails to complete manslaughter *and* his success was impossible: B was not able to kill the person with an unloaded gun.⁵ So, certain kinds of impossibility have been thought to preclude liability for a criminal attempt. Could this example be viewed as one of those cases where the agent is not held liable for attempted manslaughter?

1 I have used the gender-specific "he" in this article, when referring to agents, defendants and offender. This can be explained on the ground that according to statistics the vast majority of them are male.

2 Or depending on facts and state of affairs in the concrete case he fails to complete murder (Ch. 21 Sec 2).

3 According to Ch. 5 Sec. 1 of the Finnish Penal Code (*rikoslaki*) "an attempt of an offence is punishable only if the attempt has been denoted as punishable in a provision on an intentional offence". This means that the law of attempt applies e.g. for manslaughter.

4 This seems to be the paradigmatic starting point e.g. both in German and English jurisprudence. See more Kindhäuser, Urs, *Strafrecht, Allgemeiner Teil, 3. völlig neu überarbeitete Auflage*, Baden-Baden 2008, p. 235; Kühl, Kristian, *Strafrecht, Allgemeiner Teil, 6., neu bearbeitete Auflage*, München 2008, p. 432; Duff 1996, p. 5-32; Smith & Hogan, *Criminal Law, Tenth Edition*, London 2002, p. 328-333 and Ashworth, Andrew, *Principles of Criminal Law, Fifth Edition*, Oxford 2006, p. 447-449.

5 It is obviously possible to kill another person by hitting him to head with an unloaded gun but I see no reason to discuss about this highly unusual - even academic - alternative in this context.

To answer this question is not an easy task. First of all, we must decide how to describe the offender's act before we can ask whether it is a punishable or a non-punishable attempt. One should bear in mind how Swedish *Nils Jareborg* has numerous times pointed out the importance of describing the features of action: we are challenged to decide what *judicially relevant features of action* are in a concrete case.⁶ But, should we describe B:s action in terms of his own beliefs i.e. as "pulling the trigger of (what he believes to be) a loaded gun"; or in terms of actual facts, as "pulling the trigger of an unloaded gun"? Or could it be more adequate to describe it in terms of what a reasonable person would have believed to be case as following: a) if his belief that it was loaded was unreasonable as "pulling the trigger of an obviously unloaded gun" or b) if his belief was reasonable as "pulling the trigger of what is probably a loaded gun"?⁷

Secondly, the *normative structure of criminal law* sets certain limits to our reconstruction of law of impossible attempt. A special feature of importance in German and Nordic law is the basic commitment to certain doctrine of sources of law i.e. the legislated acts passed by formally competent legislative organ (national parliament) is the source of law par excellence.⁸ Within criminal law this is embodied in common *nulla poena sine lege* -principle.⁹ This is literally stated in the Penal Code (Ch. 3 Sec. 1): "A person may be found guilty of an offence only on the basis of an act that has been specifically criminalized in law at the time of its commission", as well as in the Art. 8 of the Constitution (*Perustuslaki* 2000).

It should be noted that the lexical meaning of the Penal Code differs from the lexical meaning of the Constitution. Some researchers are troubled of this state of affairs,¹⁰ but I personally don't see great dangers in this confusion: the normative content of *nulla poena sine lege* -principle cannot be derived only reading it from the lexical meaning of law text; these statutes have also to be interpreted.

One of the most important and interesting questions concerning *nulla poena sine lege* -principle is the *boundaries of interpretation*. When and how is it possible to define the limits of allowed criminal law interpretation? Putting it simply, interpretation of the law text may not cross the outer line of words i.e. the result of interpretation must be anchored to lexical meaning of the law text (*verbal meaning of statute*). Furthermore, certain terms used in the law text can be interpreted giving them precise judicial-technical meaning. Such terms as intent, negligence and property are fair examples, because their judicial-technical

6 Jareborg, Nils, *Allmän kriminalrätt*, Uppsala 2001.

7 See from these distinctions Duff 1996, p. 76.

8 Tapani, Jussi - Tolvanen, Matti, *Rikosoikeuden yleinen osa - Vastuuoppi*, Helsinki 2008, p. 114-135; Frände, Dan, *Yleinen rikosoikeus*, Helsinki 2005, p. 50-58 and Jescheck, Hans-Heinrich - Weigend, Thomas, *Lehrbuch des Strafrechts, Allgemeiner Teil*, 5., vollständig, neubearbeitete und erweiterte Auflage, Berlin 1996, p. 134-135.

9 See Frände, Dan, *Den straffrättsliga legalitetsprincipen*, Ekenäs 1989.

10 See e.g. Matikkala, Jussi, *Näkökohtia rikosoikeuden yleisiä oppeja koskevan lainsäädännön uudistamiseksi annetusta HE 44/2002:sta*, in *Rikosoikeudellisia kirjoituksia VII* Pekka Koskisella 1.1.2003 omistettu, Helsinki 2003, p. 215-230.

meanings are construed in criminal legal dogmatics and case law of courts. However, *nulla poena sine lege* -principle allows judges to use teleological interpretation.¹¹ But, the paradigmatic opinion in German and Nordic legal dogmatics seems to be that teleological interpretation can never totally exclude other methods i.e. lexical, systematic and contextual interpretation.¹²

One may soon discover that the discussion concerning the boundaries of allowed criminal law interpretation circles around the interpretation of the element of offence. However, *nulla poena sine lege* -principle concerns even the general conditions of criminal liability which are included to the first chapters (Ch. 3–5) in Penal Code. What comes to the interpretative space of courts concerning general principles and concepts of criminal law, it seem justified to claim that it is bigger. This could be explained by different structure and purpose of this principles and concepts (principles of adjudication) compared with the provision of the single offence (rules of conduct).¹³

Hence, I will start my analysis concentrating on the lexical meaning of the Penal Code. As mentioned earlier, this is the traditional and paradigmatic starting point in Romano-Germanic and Nordic criminal law.¹⁴ According to the Penal Code (Ch. 5 Sec. 1) an act has reached the stage of an attempt at an offence when the offender has begun the commission of an offence and brought about the danger that the offence will be completed. An attempt at an offence is involved also when such a danger is not caused, but the fact that the danger is not brought about is due only to coincidental reasons.¹⁵

As we can see from the lexical meaning of the provision, the legislator has formulated the elements of criminal attempt from *objectivist*'s perspective (Duff) or act-centred approach (Ashworth)¹⁶; the agent is liable e.g. for attempted fraud (Ch. 36 Sec. 1) proving that 1) he has begun the commission of an offence i.e. he has begun to deceive the other person by presenting false information about economical state of affairs (*conduct element*)¹⁷ and 2) he has brought about the sufficient danger that the fraud will be completed i.e. the danger for the

11 The concept of “intention-interpretation” used by Jareborg 2001, p. 108-111 is understood pretty much the same as teleological interpretation.

12 Husa, Jaakko - Tapani, Jussi, *Germanic and Nordic Fraud - A Comparative Look Under the Surface of Commonalities*, Global Jurist Advances, Vol. 5, No. 2, Article 2. See also Peczenik, Aleksander, *Vad är rätt?*, Stockholm 1995, p. 369, 375-377.

13 This is the key point made by Paul H. Robinson, *Rules of Conduct and Principles of Adjudication*, University of Chicago Law Review 1990, p. 731-733.

14 However, the English law of attempt is also based on statutory law due to provisions of Criminal Attempt Act 1981, s. 1 (1-3). See e.g. Smith & Hogan 2002, p. 328-349.

15 I use here the concept of coincidental reasons due to the unofficial translation used by Foreign Ministry of Finland. One could argue that the better alternative would be the concept of extrinsic facts (reasons). See e.g. Duff 1996, p. 83-85.

16 Ashworth 2006, p. 453-454 uses the concept of fault-centred and act-centred approach whereas Duff speaks about subjectivist and objectivist view.

17 The essential element of fraud is *deception*. According to Oxford English Dictionary the word deceive means “To cause to believe what is false; to mislead as to a matter of fact, lead into error, impose upon, delude, ‘take in’”.

economic damage caused by deception (*danger element*). As the title of my article implicates I will focus on the last sentence of this provision, which I also find simultaneously the most interesting and most problematic element in the law of attempt: the agent is convicted for attempt of an offence also in that case where he has not caused the sufficient danger, but the fact that the danger is not brought about is due only to coincidental reasons. How should we interpret this formulation? Does it refer to the agent's own beliefs or to some objective standards?

The aim of this study is modest one because I do *not* try to identify and justify principles which underpin doctrines of impossible attempts. Instead of that I will analyze the logical structure of provision regarding liability for attempt (Ch. 5 Sec. 1) in order to find out where we will meet the biggest problem of law of impossible attempts.

I start my article trying to identify the legal doctrines which legislatures, courts and jurisprudence have developed or adopted. As I pointed out earlier the starting point of my analysis will be the law text of criminal code, but detailed attention will also be paid to cases.¹⁸ This chosen perspective has to be explained with few words regarding my theoretical-methodological *essentials*.

2 The Hermeneutical Dimension of Criminal Law¹⁹

One could argue that the essential feature of criminal law theory almost everywhere is focusing on the general part of the criminal law i.e. on the part which supposedly contains general doctrines, rules, and definitions. It is question about principles and features that could apply not just across a particular system of criminal law (e.g. property offences), but across all legal system (including special part of criminal law).²⁰

The law of attempt is normally codified in the general part of criminal law, but it seems anyway impossible to divide criminal law to two separate parts: to the general and to the special part of criminal law (the part containing the definitions of particular offences). Instead of that "the law exhibits a spectrum of doctrines, rules and definitions ranging from the most specific (or 'special'), in particular those defining offences, to the most general".²¹ The only way to grasp and assess any doctrine, whether we speak about law of attempt in German and Nordic law or in common law (especially England), is to understand it as it

18 It should be emphasized that one of the main characteristics of Roman-German type of law is that there is no legally binding precedence of higher court's decisions on lower courts i.e. there is no *stare decisis*.

19 This chapter is partly based on the article Tapani, Jussi, *HD och medgärningsmannaskap - vart är vi på väg?*, Tidskrift utgiven av Juridiska föreningen i Finland (JFT) 5-6/2008. I have also discussed more on these topics in Tapani, Jussi, *Tuomari ja rikosoikeuden yleiset opit*, Oikeustiede-Jurisprudentia 2006, p. 295-397.

20 Duff, R. A. - Green, Stuart P., *Introduction: The Special Part and its Problems*, in *Defining Crimes, Essays on the Special Part of the Criminal Law*, Oxford 2005, p. 1.

21 Duff, R. A., *Answering for Crime, Responsibility and Liability in the Criminal Law*, Oxford and Portland, Oregon 2007, p. 4 and Duff - Green 2005, p. 2-3.

worked out in relation to particular, concrete cases.²² Putting it in other words, the content of law is created by courts when they interpret certain provision of criminal law in concrete cases.²³ The dynamic concerning application and interpretation of criminal law lies in the fact that criminal liability will be set up every time in a concrete criminal process.²⁴

Furthermore, this dynamic element of law is related to another essential element of general principles and concepts of criminal law i.e. to the *context* in which the agent acts and in which we will assess his or her act judicially. This means that when one has to describe the legal decision (in a criminal case), it normally will be understood as logical syllogism consisting of norm premise and fact premise.²⁵ Described in other words, the decision consists of following elements: 1) the judicially relevant facts described in the law text (the element of an offence in criminal law), 2) the concrete facts by which a prosecutor tries to show that the element of an offence exists in the case and 3) the legal consequence of the existence of the element of an offence i.e. liability for certain crime. Nevertheless, this formal description doesn't seem to capture the very nature of judicial adjudication, because in practice both norm premise and fact premise need to be interpreted.

Admittedly, the judicial decision must be formed in a way that it seems to fulfil the description of logical syllogism. However, I argue that we should adopt the hermeneutical approach to judicial adjudication: in the sense of legal hermeneutics the element of an offence (e.g. fraud provision) and facts and circumstances (i.e. false information regarding economical state of affairs and economical damage) will be constructed in several hermeneutical levels. This means literally that when the judge "moves" in the hermeneutical spiral from one level to another, he will always face the "better" understood element of the offence and "better" understood facts.²⁶ Putting it in other words, "to understand is to understand oneself in front of the text"²⁷ and in addition to that even to understand oneself in front of the facts.

The essential element of judicial decision in criminal cases consists of *comparison* between the element of offence and those facts which has been proved with different means of evidence.²⁸ However, one has to bear in mind that the judge always assesses the fulfilment of the general conditions of

22 Duff 1996, p. xi.

23 Frände 2005, p. 50-51.

24 See Hassemer Winfried, *Tatbestand und Typus, Untersuchungen zur strafrechtlichen Hermeneutik*, Köln, Berlin, Bonn, München 1968, p. 126.

25 See e.g. Tolonen, Hannu, *Oikeuslähdeoppi*, Helsinki 2003, p. 2.

26 Hassemer 1968, p. 107-108, who speaks about "eine Entfaltung von Tatbestand und Sachverhalt aneinander in der Kategorie der Gleichzeitigkeit".

27 Ricœur, Paul 1995, *Hermeneutics and the Human Sciences, Essays on language, action and interpretation*, Edited, translated and introduced by John B. Thompson, Paris 1995, p. 143.

28 Tolvanen, Matti, *Tosiseikat rikosprosessissa*, in Juhlajulkaisu Eero Backman 1945 - 14/5 - 2005, Turku 2005, p. 305.

criminal liability (act, causality, intention etc.)²⁹ in certain *context*. This relevant context is formed e.g. by the provision of criminal law (e.g. fraud Ch. 36 Sec. 1 of the Penal Code) applied in concrete case and relevant problems relating to case's facts.³⁰ Furthermore, instead of one hermeneutical spiral I argue that the judicial decision in criminal cases consists of three hermeneutical spirals: 1) the element of an offence – facts, 2) the element of an offence – the general conditions of criminal liability and 3) the general conditions of criminal liability – facts. This can be clarified in the following picture:

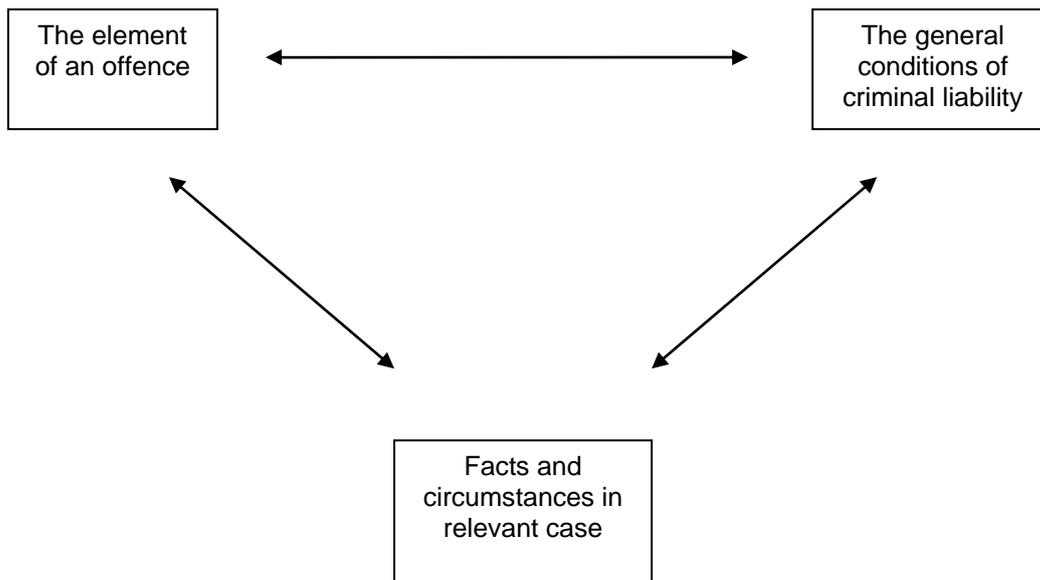


Figure 1. The element of an offence, the general conditions of criminal liability and facts

It should be noted that there is a lack of three additional hermeneutical spirals in the figure. In other words, there are totally six spirals of importance in criminal law: 1) the element of an offence – facts, 2) the element of an offence – the general conditions of criminal liability, 3) the general conditions of criminal liability – facts, 4) the element of an offence – norms outside of the scope of criminal law,³¹ 5) the general conditions of criminal liability – norms outside of the scope of criminal law and 6) norms outside of the scope of criminal law – facts. Those three additional spirals are especially of great importance when it concerns the cases related to the economic crimes.

²⁹ Most of these general conditions for criminal liability have been included to the first Chapters of Penal Code (see Ch. 3-5).

³⁰ See also Duff - Green 2005, p. 10-16.

³¹ The concept of "norms outside of the scope of criminal law" refers e.g. to regulation of tax law which will be needed when applying and interpreting the provision of tax fraud.

3 Impossibility of Impossible Attempts?

3.1 General Remarks

As mentioned earlier, Finnish law of attempt is supposed to reflect the objectivist or act-centred view: the offender has to begin the commission of an offence and to bring about the danger that the offence will be completed. This danger is normally described as a *concrete* danger i.e. it should be de facto possible for offender to complete the offence and this possibility has even to be plausible.³² In order to assess the fulfilment of danger element the attention will be paid 1) to ontology i.e. is it possible to form hypothetical causal chain between the act and the effect of the offence (*ex post* perspective) and 2) to probability of the effect of the offence i.e. how the offender has judged the probability of the result of the offence in the event of act (*ex ante* perspective).³³

Although jurisprudence has made the last two hundred years progress concerning the concept of danger, we still see clearly how the objective view has been influenced by German *P.J.A. Feuerbach*, who wrote in 1808 that the act of the offender must be objective dangerous. According to him the act will not be viewed punishable only due to the criminal intent related to the act.³⁴ Therefore, there is no attempted manslaughter when somebody goes to a chapel in order to pray the death for his enemy.³⁵

This example presented by Feuerbach leads us to the problematic area of impossible attempts. We could basically sort out two main categories of impossible attempts: impossibilities concerning *missing objects* of action and *inadequacy of tools* used in action.³⁶ Furthermore, these categories could be divided into several subcategories.³⁷ It would be possibly for example to divide missing objects category into following subcategories: a) the offender will obtain any wallet from the pocket of a person in crowd, 2) the offender will obtain A:s wallet, which exists, but which is not in A:s pocket in the event of the act and c) the offender will obtain A:s wallet, which does not exist, because A has thrown it away last week.³⁸ In addition to that we could list particular examples, both actual and hypothetical. But, it is much harder to specify the kinds of case which should not be criminal attempts. These can be explained

32 Government Bill 44/2002, p. 137.

33 See Jareborg 2001, p. 166-168 and Frände 2005, p. 85-86.

34 Feuerbach, Paul Johann Anselm, *Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts, Vierte, seht verbesserte Auflage*, Giefen 1808, p. 43 footnote b: "Die rechtswidrige Absicht allein giebt keiner Handlung das Merkmal der Rechtswidrigkeit".

35 Feuerbach 1808, p. 43-44 footnote b. Interestingly, this problematic seems to be common everywhere. See e.g. Duff 1996, p. 82 who refers to the case of Dahlberg from year 1907.

36 This seems to be the starting point in jurisprudence. See e.g. Wennberg, Suzanne, *Försök till brott*, Stockholm 1985; Duff 1996; Kindhäuser 2008 and Kühl 2008.

37 Smith & Hogan 2002, p. 343-344 use slightly different categorization: besides these two groups there is additional one group consisting of cases where the crime is impossible in the sense that the intended result is not a crime but D, because of his ignorance or mistake of criminal law, believes that it is.

38 See Wennberg 1985, p. 227-230.

partly by the relativity of impossibilities: the impossibilities are almost in every case relative to our descriptions of actions and circumstances; given different descriptions, the impossibilities become possibilities.³⁹ I start my analysis with missing objects.

3.2 *Missing Objects*

Assertions of impossibility have following form: Given C, it is impossible that A should do X by doing Y. With Y is meant the crime which the agent allegedly attempts to commit, Y is the action alleged to constitute the attempt, and with C is meant those circumstances rendering the commission of that crime by doing that action impossible.⁴⁰ Sometimes doing Y is otiose from natural science's perspective. Given that B is already dead, it is impossible for A to kill B by doing anything. So, here we find an example of impossible attempt which seems to be easy to understand even for the layman. The impossibility is primarily based on the concept of causality used in natural science. Therefore, if A intends to kill B, goes to his/her apartment, breaks into the house, finds B lying in the bed and shoots him/her, A should not be held liable for attempted manslaughter assuming proved that B was dead before shooting.⁴¹ To be sure, we would convict A for a few other kinds of completed crimes (e.g. for invasion of domestic premises, Ch. 24 Sec. 1), but these other completed crimes are not interesting in this context.

It should be noted that e.g. in England the Criminal Attempts Act 1981, s. 1 (2) states that a person may be guilty of attempting to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible. This has interpreted to mean that the minimum condition for criminal liability of attempt is an intention to commit the offence (Act s. 1 [1]), where up it is immaterial that it is in fact impossible to commit that offence. If D and E agree that they will murder P, D shoots at P's heart but P is already dead, D and E are guilty of conspiracy to murder and D of attempted murder.⁴² The proper construction of the Criminal Attempts Act had been a matter of acute controversy but it was settled in the decision of House of Lords in Shivpuri (1986) that in the English law of attempt D is judged on the facts as he or she believed them to be.⁴³

One might ask in "dead man's case", whether we are willing to preclude liability of attempt arguing that A has not brought about the danger that manslaughter will be completed or instead claiming that A could not have acted according to the lexical meaning of provision concerning manslaughter ("a person who kills

39 See more Jareborg 2001.

40 Duff 1996, p. 78.

41 See explicitly Government Bill 44/2002, p. 133. Ch. Salmiala, Bruno A., *Yritysoppi ja tunnusmerkistön puutteellisuusteoria*, Defensor Legis (DL) 1955, p. 108 and Liljenfeldt, Robert, *Något om teori och praxis rörande s.k. otjänliga försök*, JFT 1984 p. 273.

42 Smith & Hogan 2002, p. 346.

43 See Ashworth 2006, p. 454 and Smith & Hogan 2002, p. 345.

another”):⁴⁴ it seems impossible to describe A:s action as “beginning to kill another”, because nobody can kill the person who is already dead. Putting it in other words, an attempt must be directed at an object upon which it is possible to commit the crime; the dead person is not such object in manslaughter. However, I don’t see useful to discuss if we could solve the problems regarding impossible attempts *only* by analyzing the relationship between interpretation of the element of offence and law of attempt i.e. the discussion which is known under the title “Mangel am Tatbestand” (deficiency in the element of offence) e.g. in older German jurisprudence.⁴⁵

Another classical example used in the law of attempt concerns theft. What if the defendant has put his hand into the pocket which happens to be empty? Or how should we judge the course of events where A breaks into 17 cars intending to steal whatever property there are in cars, but he finds only from four cars something to steal? It should be noted that latter example is based on the case of Supreme Court of Finland (KKO1988:109 [voting]).

The objectivist approach adopted in the Penal Code of Finland doesn’t seem allow us to use following *subjectivist* argumentation based on intention: why could we not convict A for theft (Ch. 28 Sec 1), if he attempted to obtain (appropriate) movable property from the possession of the owner of the car although it was impossible to do so (the pocket was empty, there were no property to obtain), so long as A believes it to be possible? Shouldn’t A:s act be viewed criminal and punishable *exactly* because breaking into cars is done with unlawful and malicious intent? His state of mind is just as blameworthy as it would be if the facts were as they are believed to be.⁴⁶

It should be noted that the concept of “an intent to commit offence” does not mean in Finnish legislation, case law and jurisprudence that *intent* would require the causing the consequence to be the offender’s main purpose (direct intention).⁴⁷ According to the Penal Code (Ch. 3 Sec 6) an offender has caused the consequence described in statutory definition intentionally if the causing of the consequence was the offender’s purpose or he/she had considered the consequence as a certain or quite probable result of his / her action. A consequence has also been caused intentionally if the offender has considered it as certainly connected with the consequence that he / she has aimed for. It has literally stated that the lowest grade of intent i.e. the agent has considered the consequence as a quite probable result of his / her action fulfils the requirement of intention.⁴⁸

44 Honkasalo, Brynolf, *Suomen rikosoikeus, Yleiset opit, II osa, Toinen, korjattu painos*, Helsinki 1967, p. 163.

45 See critically from Finnish point of view Salmiala 1955, p. 98-115 and Salovaara, Niilo, *Rikoksen yrityksestä, Erityisesti n.s. kelvotonta yritystä silmällä pitäen*, Helsinki 1948, p. 168-189.

46 Ashworth 2006, p. 453.

47 See more on the meaning of intent in law of attempt Duff 1996, p. 6-32.

48 Government Bill 44/2002, p. 135. See already Salovaara 1948, p. 212-213. See generally from the law of criminal intent in Denmark, Finland, Norway and Sweden Matikkala, Jussi, *Dolus Nordicus*, Nordisk Tidskrift for Kriminalvitenskap (NTfK) 2006, p. 127-140.

But how would *objectivist* argue if he would like to convict A for attempted theft because he intended to obtain moveable objects from cars which were empty? Firstly, the objectivist would claim that the agent has undoubtedly begun the commission of an offence by breaking into cars. Secondly, he would be still forced to admit that the defendant has not succeeded to cause the sufficient danger: because of missing objects it was impossible to cause that kind of danger. However, the fact why the danger [for completed theft J.T.] is not brought about was only due to coincidental reasons. But, what are actually these coincidental reasons and how could we describe the meaning of this essential concept in law of attempt?

It should be noted that instead of the vague concept of impossible attempt Finnish legislator chose to use the concept of coincidental reason in the law text in order to refer to those cases where the danger for completed offence is not brought about but this was only due to coincidental reasons. One was able to find relevant argumentation and model for legislative work from Sweden where the concept of the coincidental reasons is also used in the law text (*tillfälliga omständigheter* Ch. 23 Sec 2).⁴⁹ So, already in 1940 it was presented in the preparatory works of Swedish penal code (*Strafflagen*, since 1962 *Brottsbalken*), that the agent is held liable for attempted theft when he tries to obtain the wallet from A:s pocket in a crowd, but fails in attempt, because A has put the wallet to another pocket or forgotten it at home.⁵⁰

Swedish *Suzanne Wennberg* has analyzed the meaning of the concept of coincidental reasons. She argues that we have to define this concept with the help of the concept of abstract danger in order to be able to punish impossible attempt. This would mean that in the concrete case we will act following: we have to exclude from the course of event those circumstances which actually led to the result that the concrete danger for the offence to be completed was not brought about. In other words, it would be enough for liability of attempt that the act from the general point of view includes the risk for the offence to be completed.⁵¹ One could also use the concept of implicit endangerment; this concept includes those acts which are of a kind that might cause or contribute to the occurrence of some primary harm.

However, I am not convinced that we can so easily change the requirement of concrete danger into the concept of abstract danger in order to tackle the problems arising from the concept of coincidental reason. On opposite, the logical structure of endangerment based on the concept of abstract danger and argumentation regarding this kind of action differs from the argumentation concerning the liability of attempt, as seen from objectivist's perspective. On

49 See also from the comparative point of view Cornils, Karin, *Schweden*, in Sieber, Ulrich - Cornils, Karin (Hrsg.), *Nationales Strafrecht in rechtsvergleichender Darstellung*, Allgemeiner Teil, Teilband 3, Berlin 2008, p. 921-924.

50 Statens offentliga utredningar (SOU) 1940:19, p. 49-50. See also Wennberg 1985, p. 224-226.

51 Wennberg 1985, p. 219. See even Lahti, Raimo, *Oikeustapauksia, Korkeimmasta oikeudesta nro 1*, DL 1989, p. 8-9.

what grounds could we say that putting your hand into another's empty pocket is generally viewed abstractly dangerous?

If we view attempts as *attacks* on legally protected interests,⁵² we can see where the difference between attacks (attempt) and endangerment lies. Attempt as an attack is essentially, not merely potentially harmful. It is an action which is structured by the intention to harm certain legally protected interest, displaying practical hostility towards it. By contrast, endangerment consists of action which is only potentially harmful. It often consists of a failure of proper concern: the agent fails to take proper steps to avoid or even to notice the danger that his conduct creates. Acting so he takes the risk that he will cause harm to others.⁵³

The above described *Wennberg's* view could be linked to discussion regarding present and apparent abilities to commit a crime.⁵⁴ If the would-be poisoner administers an inadequate dose and has no more poison to hand, he would be convicted, because his act is dangerous in terms of human foresight. What matters is not the actual danger posed by the defendant's action, but the apparent danger, as it appears to outside observation.

However, the closer look into discussion reveals the similarities between coincidental reasons and intrinsic impossibilities. Cases of merely extrinsic impossibilities are, according to *Duff* cases in which only given some extraneous fact it is impossible to commit a crime by doing the relevant act. It is intrinsically possible to steal by putting a hand into another's pocket. But, given the contingent fact that this pocket is empty, it is extrinsically impossible to steal by putting a hand into pocket.⁵⁵

So, there seems to be basically three alternatives regarding how to judge and assess the meaning of coincidental reasons: 1) we would try to assess what the agent has thought in the event of the act (subjectivist view), 2) we would try to assess what the reasonable man would have thought in the event of the act (objectivist view) and 3) we would try assess what the agent has thought and the reasonable man would have thought in the event of the act (the combination of subjectivist and objectivist view).

Finnish legislator has chosen the combination of subjectivist and objectivist view which was already argued by *Wennberg*.⁵⁶ Instead of trying to judge what the agent thought in the event of act, we shall judge by the objective criterion the situation from the agent's point of view i.e. we must ascribe to this observer the knowledge and beliefs of a reasonable person. It is utterly important to evaluate

52 See Duff 1996, p. 221-228 and 363-374.

53 Duff, R. A., *Criminalizing Endangerment*, in *Defining Crimes, Essays on the Special Part of the Criminal Law*, Oxford 2005, p. 46 and Duff 1996, p. 364-365.

54 Duff 1996, p. 80-83.

55 See Duff 1996, p. 83-84.

56 It should be noted that even the German law of attempt which is based on the subjectivist view is often viewed as a combination of the subjectivist and objectivist element. See more Kühl 2008, p. 442-444 and generally on different meaning of the concepts of subjectivism and objectivism in law of attempt Duff 1996, p. 147-236.

which are those alternative ways to act from which the agent could choose in the event of an act. If there are several ways which can lead to the result, but the agent by accident chose the one which was not successful, the danger was not brought about only due to coincidental reasons.⁵⁷ As an example can be mentioned the case where the offender breaks into a house in order to obtain the valuable painting, but the painting was temporarily moved to another place. The offender had several ways to act but he chose unluckily the wrong moment for break-in.⁵⁸

Furthermore, in the case of break-in into 17 cars (KKO 1988:109 [voting]) one could even argue that the agent is held liable for attempted theft because those acts which involved breaking into empty cars were partly of some larger larcenous enterprise which would involve other, non-empty cars.⁵⁹ Therefore, *Raimo Lahti* argues the agent's acts seen as a whole indicate that the crime was not committed only due to coincidental reasons: the agent intended to steal something from 17 cars, from which 9 cars had radio, but the offender succeeded to steal only 4 of them.⁶⁰

Nevertheless, there are certain advantages concerning the use of concept of coincidental reason. One of them is connected to problems regarding the discussion about *special object* of crime; the agent breaks into the house, finds nothing to steal and therefore tries to avoid conviction claiming that he tried to steal the special object from the house which he surely knows doesn't exist in that place.⁶¹ But, one could easily argue that the defendant didn't bring about the danger that the crime was completed only due to coincidental reasons.

However, it seems rather difficult to distinguish and describe those criteria which give the content for the meaning of coincidental reason. As I have already mentioned, impossibilities are almost in every case relative to our descriptions of actions and circumstances; given different descriptions, the impossibilities become possibilities.⁶² This is stated also in preparatory legislative works following: the attempt is punishable if we afterwards can *easily* modify course of events so that the offence could have been completed.⁶³ But, isn't it almost always possible to modify course of event so that the offence could have been completed? Let me clarify this problematic by comparing the example concerning the breaking into the house in order to steal the valuable painting and the dead man's case. Couldn't we modify course of event in dead man's case claiming that the agent chose only the wrong moment? If he only had come two days earlier when the man was still alive, he could have brought about the

57 See more Wennberg 1985, p. 227.

58 So Government Bill 44/2002, p. 137.

59 See more from this argumentation Duff 1996, p. 89 referring to case law (especially *Haughton v Smith* 1975 and *Nock* 1978).

60 Lahti 1989, p. 10.

61 This problematic is highlighted by Liljenfeld 1984, p. 272-273.

62 This is particularly pointed out by Duff 1996, p. 84.

63 Government Bill 44/2002, p. 137.

sufficient danger for the offence to be completed. Furthermore, one could argue that heading to the apartment equipped with efficient tools e.g. knife or gun means that the act from the general point of view includes the risk for the offence to be completed – though the target was already dead.

This example – in addition to the argumentation concerning the concept of abstract danger – should reveal us how vulnerable is the concept of coincidental reasons. I would like to argue that we don't have any solid ground for our analysis and assessment. Even if we try to use the criteria based on time dimension presented by Wennberg, the problem remains. Why should we punish the agent for attempted theft when he breaks into the house in order to steal oriental china, which accidentally was few days earlier broken down, but exclude liability for attempted theft if the oriental china was broken down already a year ago?⁶⁴ Where do we get the right time dimension for our judgement?⁶⁵ Is it few minutes, few hours, few days, few weeks or few months? And if we would like to describe an attempt as an attack on some legally protected interest, an attack needs also an actual object or at least some apparent prospect of success.⁶⁶ But, when can we claim that an object is present? I will return to this matter later at the end of next chapter.

3.3 *Impossible Tools*

It should be noted that the concept of impossible tools doesn't refer only to unloaded guns or other equipments which can't lead to the result intended by the offender. Instead of narrow understanding regarding the concept of impossible tools this concept captures possible ways to use the tool in order to achieve the intended result. As a good example could be mentioned fraud, where it is hardly possibly to talk about tools. However, we might ask if one who's false representations are extremely absurd, actually so absurd that they cannot deceive a reasonable prudent man, is guilty of attempting to obtain by false pretence.⁶⁷

Why it is worth of mentioning fraud in this context, can be explained partly by the key conception of fraud i.e. victims' state of mind (Danish *vildfarelse*, Norwegian *villfarelse*, Swedish *villfarelse*, Finnish *erehdys*, German *Irrtum*) i.e. the deception must be an operative cause allowing a defendant to obtain the property. This concept shall not be analyzed merely focusing on defendants' conduct i.e. has he passed deliberately false, misleading or insufficient information to victim.⁶⁸ Apart from that it should also be looked into, what kind

64 Cf. Wennberg 1985, p. 230, who argues liability for the offender in first case but acquittal for the offender in second case.

65 See also Liljenfeldt 1984, p. 266. Furthermore, Salmiala 1955, p. 102 uses the example where the offender intends to shoot a person lying in the bed, but the person feels sick, gets up and is no longer in the bed in the event of act.

66 Duff 1996, p. 89-92, who discuss about the connection between theories of missing objects, abilities and attacks.

67 See Wennberg 1985, p. 240 and Duff 1996, p. 83.

68 According to Oxford English Dictionary the word information means 'knowledge communicated concerning some particular fact, subject, or event; *especially* contrasted with *data*.'

of conclusions victim is legally entitled to draw from defendant's conduct and what legitimate expectations constitute victims' decision-making.⁶⁹

What comes to impossible tools in fraud there is one interesting, though older case from Supreme Court of Finland (KKO 1978 II 91). The agents had made counterfeit receipts attempting to obtain various goods from the store. Nevertheless, by accident the personnel found out about the plan and decided to set up a trap to the offenders. Later the offenders collected merchandise, tried to get them out from store with the help of the receipts. At that precise moment they fell on to the trap and they were caught by the police. However, they were later acquitted for attempted fraud. In Finnish jurisprudence e.g. *Ari-Matti Nuutila* holds the judgement right by arguing that deception could not be succeeded from ex post perspective.⁷⁰

This judgment was given during the time when the concept of coincidental reasons was unknown in the law text of the Penal Code. But, could – and should – we at present interpret this conception so that the agents would be held liable for attempted fraud because their plan was revealed to the personnel? It must have been an unexpected surprise for the defendants but this is also the case looking from the outside. One could quite easily argue that it is intrinsically possible to obtain goods using counterfeit receipts. But, given the contingent fact that the plan was exposed to the personnel, it is extrinsically impossible to obtain goods with help of *exactly these receipts*. Personally I think that nowadays courts would be rather willing to convict the defendants arguing that it was a coincidental reason that the plan has been exposed to the personnel and therefore the danger of the crime to be completed was not brought about. Putting it in other words, the court could claim that the defendants' actions were apparently or intrinsically adapted to their criminal end and as rational agents they must have been using suitable means or tools.⁷¹

Furthermore, there are certain similarities between the fraud case from 1978 and the case of Supreme Court from year 2006 (KKO 2006:26 [voting]), where the defendant was accused of tax fraud. According to Ch. 29 Sec. 1 a person who 1) gives a taxation authority false information on a fact that influences the assessment of tax, 2) files a tax return concealing a fact that influences the assessment of tax, 3) for the purpose of avoiding tax, fails to observe a duty pertaining to taxation, influencing the assessment of tax, or 4) acts otherwise fraudulently, and thereby causes or attempts to cause a tax not to be assessed, a tax to be assessed too low or a tax to be unduly refunded, shall be sentenced for tax fraud to a fine or to imprisonment for at most two years.

The course of events was following: the defendant had made around 100 000 €profit in stock market. At this time (year 1999) everyone was obliged to file a

69 See from comparative perspective regarding Nordic and German law of fraud Husa - Tapani 2005.

70 Nuutila, Ari-Matti, *Rikoslain yleinen osa*, Helsinki 1997, p. 331. Cf. Wennberg 1985, p. 241, who seems to accept the conviction due to coincidental reason even in that case where the agent couldn't deceive another because the other person had already relevant information concerning state of affairs.

71 So Duff 1996, p. 85. See also Wennberg 1985, p. 248.

tax return on the 31st of January. Nonetheless, the agent didn't file any tax return. Later the tax authority demanded a supplement to the tax return which he then gave. But even then he didn't mention his profit from the stock market. Therefore, the prosecutor claimed that he had attempted to cause around 17 000 € tax not to be assessed in his personal taxation. What interests us here is the fact that the taxation authority had got the information regarding the sell-outs in stock market before the defendant had filed his tax return including false information. Should we now acquit him because it was impossible to bring about the danger a tax not be assessed? How is it possible to deceive taxation authority if they already have right and relevant information concerning assessment of tax?

Again, one could argue that the defendant's action was intrinsically adapted to the criminal end and it was due to coincidental reason that the danger for committed crime was not brought about. However, in this case that kind of argumentation doesn't seem to convince. It is not a mere coincidental reason that the taxation authority got the right information; according to legislation of stock market taxation authority should always get information regarding the profit of sell-outs in stock market. Hence, the scope of the concept of coincidental reason should be limited to those cases where the taxation authority *doesn't get* this kind of information.

I don't discuss here details concerning the structure of tax fraud.⁷² Furthermore, I don't discuss the question about the prosecutor's success to describe the agent's act properly i.e. if both the agent's intention and the element of attempt could have been assessed properly enough.⁷³

The discussion above has concerned quite specific area of impossible tools. It seems to be quite clear that in following case the agent is held liable for attempted manslaughter (Supreme Court of Finland, KKO 1993:103). A decided to kill B and C, who were parents of his ex-girlfriend. In order to fulfil his plan A travelled several hundred kilometres to B's and C's house. It became night when A began the commission of manslaughter. He used flashlight in order to be able to head with a loaded gun through the window to sleeping B and C. Then he discharged, but the gun didn't function; A decided to load it again and fired. Same happened even this time i.e. he didn't succeed in discharging, so finally he gave up the attempt.

Afterwards in the technical investigations it could be stated that the gun couldn't have been discharged because safety was on and therefore gun's hammer didn't reach detonating cap. It is justified to argue for liability of attempted manslaughter on several grounds: a) A had used the gun before i.e. he had shot before with same gun, b) in the event of act the gun was loaded and suitable for using it to the criminal end and c) it was only coincidental reason both from the agent's and the reasonable man's point of view that the crime was

72 See more Sahavirta, Ritva, *Verorikokset*, in Lahti, Raimo - Koponen, Pekka (toim.), *Talousrikokset*, Helsinki 2007, p. 193-205 and Tapani, Jussi, *Veropetos*, in Frände, Dan et al., *Keskeiset rikokset*, Helsinki 2006, p. 508-519.

73 See more from these questions Tapani 2006, p. 295-397.

not completed; A hadn't notice the special feature of the gun i.e. one could make loading and discharging movements with gun even when safety was on. Nonetheless, it must be pointed out that the court didn't use argumentation based on the concept of coincidental reasons.⁷⁴

Sometimes it is rather difficult to distinguish how the court had interpreted the concept of coincidental reasons. I try to make my point clear with following example based on the fresh judgment of the district court of Turku in Finland.⁷⁵ The course of events can be summarized following: The group consisting of professional criminals intended to rob a money transfer vehicle. They succeeded to get inside information from a man who worked in the company taking care of money transfers. The group planned the crime very carefully and skilfully: they hired an apartment in Finland, they hired several vehicles with false names, they used prepaid cards in mobile phones, and they made careful surveillance in order to know the routes and timetables of money transfers vehicle. In addition they had a lot of guns and ammunition.

So, the group managed to commit one successful robbery wherein the catch was about 1,5 million Euros. Right after that completed crime they started to plan a new crime, again a robbery of a money transfer vehicle. However, this time the plan was revealed to the police who began surveillance. The group intended to rob a money transfer vehicle when it was staying parked in a parking place of a store. They left one man to the place where he could see the vehicle coming. So, his task was to inform other men who sat in the cars about two kilometres away from the parking place ready to start engines immediately after getting the sign from the "target man". Then the money transfer vehicle came to the parking place, the target man gave the sign, others started to head to the money transfer vehicle, but they moved only few meters because the police had set up the trap and closed the way.

How should we judge the course of events? One possibility, as district court did, is to argue that the act had reached the stage of an attempt of robbery when the offenders had begun the commission of robbery by starting cars and heading to the parking place equipped with two machineguns, pistol and ammunition. In addition they had brought about the concrete danger that the robbery was to be completed. However, when the requirement of concrete danger is fulfilled, it is not necessary to say that the trap set up by the police was only coincidental reason from the defendants' point of view.

Nevertheless, I see no grounded reason to criticise or question district court's decision concerning the starting point of attempt. It seems artificial to try to decide an exact point between the parking place and the groups hiding place which should constitute the starting point of an act. Should the offenders have been 20 meters, 100 meters, 500 meters or 1 kilometre away from the money transfer vehicle? But, is it possible to claim that even the requirement of concrete danger was fulfilled? Personally, I am not totally convinced that the

74 See also about Swedish case law Wennberg 1985, p. 232-240.

75 The judgment of district court of Turku 19.12.2008, R 08/3030. It should be mentioned that the case arouse a lot of interest, and therefore the court's decision is available in the homepage of magistrate's court.

group's action managed to bring about concrete danger for that robbery was to be completed. The crucial point is the interpretation of police's action i.e. that the police knew about the plan and was capable of hinder the act. If we argue that the requirement of concrete danger was not fulfilled, we are again back in the meaning of concept of coincidental reason. Hence, we would be forced to argue on what grounds we could view the police's action only as coincidental reason in law of attempt.

4 Conclusion

It seems to be almost an impossible attempt to find and create solid normative criteria for interpretation of the concept of coincidental reasons used in Finnish Penal Code. The excellent analysis made by Duff shows us how creative courts have been when developing different theories regarding impossible attempts.⁷⁶ These theories allow courts to convict or acquit the defendant depending on the premises of the theory. Although the legislator has used specific concept in law text it doesn't mean that the interpretative space is smaller. On the contrary, the legislative preparatory works leaves courts relatively open hands, often to a punitative direction.

So, is the only alternative to raise one's hands and to give up admitting that the concept of impossibility really leads us to an imaginary quagmire? Although this would be a tempting idea, I see no reason for such pessimism on two grounds. Firstly, I argue that the analysis above reveals us quite obviously what is the essential element of general principles and concepts of criminal law: the hermeneutic dimension of criminal law i.e. as in other area of law even the law of attempt is made by courts in concrete cases. Secondly, this hermeneutic dimension doesn't mean in any way that the doctrine of impossible attempt is based on pure chaos. We should be able to find certain principles underpinning the law of attempt which help courts to assess whether requirements of criminal attempt are fulfilled. This concerns even the doctrine of impossible attempts. Hence, it is of great importance to continue further study on the relationship between justifying and interpretation of impossible attempts i.e. which are those ground rules concerning justifying attempts and how these justifying grounds influence on the interpretation of the law of impossible attempts. So, there we will meet e.g. the view represented by German *Kindhäuser*: we will punish the defendant for attempted crime because he has manifested through his act that he doesn't want to follow the valid *norm*. Even the agent who commits an impossible attempt manifests his willingness to break the norm included in criminal law.⁷⁷ Though, it has to be another story how this relationship could be constructed.

⁷⁶ Duff 1996, p. 76-115.

⁷⁷ See Kindhäuser 2008, p. 237 and Kindhäuser, Urs, *Gefährdung als Straftat, Rechtstheoretische Untersuchungen zur Dogmatik der abstrakten und konkreten Gefährdungsdelikte*, Frankfurt am Main 1989, p. 134-135.