未遂犯研究

著 张永江

法律出版社
LAW PRESS·CHINA

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图书在版编目(CIP)数据

未遂犯研究/张永江著. —北京:法律出版社,2008.4

ISBN 978-7-5036-8231-5

Ⅰ.未… Ⅱ.张… Ⅲ.犯罪未遂-研究-中国 Ⅳ.D924.114

中国版本图书馆CIP数据核字(2008)第027185号

未遂犯研究	张永江 著	责任编辑 王旭坤 装帧设计 汪奇峰

开本 A5	**印张** 9.375 **字数** 199千
版本 2008年4月第1版	**印次** 2008年4月第1次印刷
出版 法律出版社	**编辑统筹** 法学学术出版分社
总发行 中国法律图书有限公司	**经销** 新华书店
印刷 北京北苑印刷有限责任公司	**责任印制** 陶 松

法律出版社/北京市丰台区莲花池西里7号(100073)

电子邮件/info@lawpress.com.cn	销售热线/010-63939792/9779
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中国法律图书有限公司/北京市丰台区莲花池西里7号(100073)

全国各地中法图分、子公司电话:

第一法律书店/010-63939781/9782	西安分公司/029-85388843
重庆公司/023-65382816/2908	上海公司/021-62071010/1636
北京分公司/010-62534456	深圳公司/0755-83072995

书号:ISBN 978-7-5036-8231-5 **定价**:23.00元

序

贾宇*

本书是张永江博士在其博士学位论文的基础上修改而成的。在著作付梓之际，永江邀我为其作序，作为他的博士生指导老师，我欣然应允。

自中世纪意大利法学家提出未遂犯之概念，刑法学界对未遂犯的系统研究从未间断。1810年《法国刑法典》在世界上首次确立未遂犯之立法例，更使得未遂犯之处遇成为各国刑法典中不可或缺的一项制度。未遂犯理论的证成不仅牵涉刑法学中的犯罪构成要件理论，其与刑事政策、法哲学之密切关联亦被广泛认可。正是因为刑法学界对于未遂犯理论的深入研讨，使其在学说、立法、司法中多有歧异之见。

永江博士在占有丰富的外文资料的基础上，对未遂犯基础理论的演变、发展的进程进行了历史性的回顾与反思，并结合各国立法例对未遂犯处遇的必要性进行了理论释评。首先，对大陆法系的未遂

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犯处罚根据的理论进行了述评。未遂犯之处罚根据素有主观与客观之争。作者认为,对于在主客观相统一的整体评价体系下的我国刑法,折中说似乎更为妥当。对于未遂犯之成立要件,作者从既遂的故意、着手实行犯罪、没有达到既遂和非自愿性四个方面予以界定并进行充分论证,是对现行刑法中未遂犯的妥当解释。未遂犯的处罚范围和处罚原则是一个立法理性在司法中践行的难题,各国刑法典的规定不一,大体可分为三种模式,即概括主义、列举主义和综合主义。我国现行刑法典没有对未遂犯的处罚范围作出明文规定,似乎处罚所有犯罪的未遂。作者主张在确定未遂犯处罚范围的问题上,也应当从折衷未遂论的立场出发,先在主观方面加以限定,将未遂犯只限定在直接故意犯罪中,排除过失犯罪和间接故意犯罪存在未遂犯的可能,然后在客观方面加以限定,即行为只有在其对刑法所保护的重大利益造成严重危险或者严重威胁的时候,才能作为未遂犯处罚,而对其他危险较小的轻罪的未遂,则不予刑事处罚,而由行政法律来解决。其次,讨论了未遂犯认定存在争议的几种犯罪,本书认为举动犯只有成立与否的问题没有成立未遂犯的余地;不真正不作为犯存在未遂犯的可能,而真正不作为犯不以危害结果的发生为要件,行为一旦违反义务,不实施所要求实施的行为,犯罪就成立,不存在未遂的问题;在基本犯罪是未遂而发生了严重危害结果的情况下,结果加重犯存在未遂的可能性;教唆犯的未遂仅存于刑法第29条第1款,即教唆犯未遂的范围仅限于被教唆者犯罪未遂或着手后中止的情形,而刑法第29条第2款所规定的教唆犯则属于预备形态;我国刑法中所规定的危险犯就是其相对应的实害犯的未遂犯。这些观点均颇有见地。

作者以对我国未遂犯之立法规定的固有缺陷进行必要性检讨为

前提,在概念、处罚原则和处罚范围三个方面提出了较为完善的建议。通读全书,其理论创新之处体现在以下方面:首先,认为我国未遂犯的处罚根据为折衷的未遂论,并在全书(在研究未遂犯的成立要件,认定不能犯,讨论未遂犯的处罚范围,及对处罚原则和对我国未遂犯的立法进行检讨并提出完善建议部分)始终贯穿这一思想。用犯罪客体理论来区分既遂、未遂,认为"没有达到既遂",是指行为人实施了刑法分则所规定的实行行为但没有对法益造成实害,而仅对法益造成威胁,它是区别未遂犯与既遂犯的关键。其次,认为不能犯不宜归入未遂犯,理论上应重新界定不能犯的概念,从而缩小未遂犯的范围。建议刑法典中应增设不能犯条款,即可以在第23条中增加一款作为第3款:行为依其性质不能发生犯罪结果,但有危险的,应当比照既遂犯从轻或者减轻处罚。行为不能发生犯罪结果,又无危险的,不处罚。再次,认为教唆犯的未遂仅存于刑法第29条第1款,即教唆犯未遂的范围仅限于被教唆者犯罪未遂或着手后中止的情形,而刑法第29条第2款所规定的教唆犯则属于预备形态;我国刑法中所规定的危险犯就是其相对应的实害犯的未遂犯。最后,认为我国刑法分则共有80个罪名有未遂形态,因此完全可以采用列举方式直接规定犯罪的未遂形态,当然立法者还需结合司法实践和现实情况,对法定刑不在此范围内的需要处罚未遂犯的加以单独规定。这大大缩小了未遂犯的范围,符合刑罚谦抑的原则。

当然,受限于学识与精力,该书尚存不少有待完善的地方,本书的一些观点亦有可商榷之处:文中涉及有关英美法系未遂犯的理论探讨较少,如英美法系关于着手认定的认定;对我国未遂犯的处罚根据的理论还研究得不够深入;探讨着手则需研究实行行为,而文中对实行行为论述较少等。基于此,我希望永江能够对此问题展开进一

步的研究，并以此为基础扩展到刑法学的其他相关理论。同时，我亦热切期盼永江能够与学界关注此领域的同仁继续深入探讨而博取百家之长。

我相信，该书仅是永江博士在学海求知的过程中产生的一朵浪花，而绝非其学术征程的登峰问鼎之作。在未来漫漫修远的为学、求索路上，一定会有永江更具分量的研究成果问世。

是为序！

贾宇

谨识于古城长安

2007 年 6 月 15 日

摘　要

未遂犯，是犯罪未完成形态之一。早在中世纪，意大利的法学家就提出了未遂犯的概念，但从世界范围来看，封建时代的刑法里都没有关于未遂犯的一般概念和处罚原则的规定。1810 年的《法国刑法典》是世界上最早的规定未遂犯的立法例，由此开始了刑法学界对未遂犯的系统研究。时至今日，未遂犯已成为世界各国刑法典中不可或缺的一项制度。本文主要从未遂犯的沿革和概念、未遂犯的处罚根据、未遂犯的成立要件、不能犯、未遂犯的处罚范围和处罚原则、未遂犯的立法完善六个方面加以论述。

第一章从未遂犯的沿革与立法例入手，分析了未遂犯的概念和种类。首先，介绍了未遂犯的沿革和立法例。在大陆法系有以德国刑法典为代表的广义未遂犯的立法例和以法国刑法典为代表的狭义未遂犯的立法例，而意大利刑法典则开创了以“犯罪行为的相称性”和“犯罪行为指向的明确性”作为确定未遂行为客观标准的立法模式，使其未遂犯制度在各国刑法制度中独树一帜。在英美法系国家里，“未遂”起源于早期的威胁罪即“企图实行伤害”，是一种最普通的预备罪。英国《1981 年犯罪未遂法》对未遂犯进行了界定，从此普通法的未遂罪判例就不再具有约束力了。美国各州刑法对未遂的定

义各不相同,《美国模范刑法典》列举了已经足以确证犯罪意图的七种情况都是未遂犯,这表明法典起草人想通过扩大未遂范围来遏制危险人物。在我国,20世纪初制定的《钦定大清刑律》首次规定了未遂犯的概念和处罚原则。1979年刑法典和现行刑法典分别在第20条和第23条规定了未遂犯。其次,阐释了广义的未遂犯和狭义的未遂犯的概念,并对未遂犯的分类作了介绍。

第二章探讨了未遂犯的处罚根据。首先,对大陆法系的未遂犯处罚根据的理论进行了述评。主观的未遂论,认为犯罪行为是行为者的意思或性格的表现,未遂犯的处罚根据是实现犯罪的行为者的意思或性格的危险性的外部表现。主观的未遂论只注重行为人的主观面而忽视其客观面,理论上具有片面性。客观的未遂论,认为未遂犯的处罚根据是惹起构成要件结果的客观危险性。与主观的未遂论相比,客观的未遂论限定了未遂犯的处罚范围。但问题是如果不考虑行为人的主观要素,则无法判定行为人的行为究竟是既遂还是未遂。折衷的未遂论认为,未遂犯的处罚根据在于实现犯罪的现实危险性和行为人的主观恶性。如今折衷的未遂论已为多数人所接受,而且当今各国的刑法对未遂的规定,实际上是主观的未遂论与客观的未遂论相调和的产物。其次,本文在评析我国刑法学界关于我国未遂犯处罚根据的各种学说的基础上认为,折衷的未遂论应是我国未遂犯的处罚根据,而事实上我国新刑法也采取了折衷的未遂论的立场。

第三章研究了未遂犯的成立要件。本文认为我国未遂犯的成立须具备四个要件:既遂的故意、着手实行犯罪、没有达到既遂和非自愿性。首先,所谓"既遂的故意",是指行为人着手时就已明知自己的行为会发生危害社会的结果并积极追求这种结果的发生。将"既遂

的故意”明确规定为未遂犯的构成要件既可以将未遂犯的范围仅限定为直接故意的犯罪，从而排除间接故意与过失犯未遂的可能性。也可以将“未遂的教唆”等情形排除在未遂犯之外，从而缩小未遂犯的处罚范围。其次，所谓“着手实行犯罪”，是指行为人基于既遂的故意开始实施刑法分则规范里具体犯罪构成要件中的实行行为，它是区别未遂犯与预备犯的关键。本文对着手认定有争议的犯罪进行了探讨，认为应以被利用者的行为为标准认定间接正犯的着手；原因自由行为是以开始实施结果行为时为着手；隔地犯是当爆炸物等危险物品到达对方时，才是实行的着手；教唆犯是当被教唆人基于既遂的故意开始实施刑法分则规范里具体犯罪构成要件中的实行行为时，才是实行的着手；不作为犯的着手应该是“他人的行为或外部的自然进程”给被害人带来直接危险或者使原来的危险增大时，即具有作为义务的行为人面对保护法益遭受急迫而具体的危险时，仍然采取不作为而导致不法结果可能发生时，则为实行的着手。再次，所谓“没有达到既遂”，是指行为人实施了刑法分则所规定的实行行为但没有对法益造成实害，而仅对法益造成威胁，它是区别未遂犯与既遂犯的关键。最后，所谓“非自愿性”，是指违背行为人意志，并足以阻止其犯罪行为达到既遂的各种主客观情况，它是区别未遂犯与中止犯的关键。

第四章立足于国外不能犯的立法例和理论观点试图厘清不能犯与未遂犯的界限。我国刑法规定没有不能犯，司法实践中一般将不能犯作为未遂犯来处理。实践中不能犯现象的存在与立法上不能犯的阙如在给不能犯理论带来繁荣的同时也给司法实践带来混乱。本文认为，不能犯不宜归入未遂犯，理论上应重新界定不能犯的概念。建议刑法典中应增设不能犯条款，即可以在第 23 条中增加一款作为

第3款:行为依其性质不能发生犯罪结果,但有危险的,应当比照既遂犯从轻或者减轻处罚。行为不能发生犯罪结果,又无危险的,不处罚。

第五章讨论了未遂犯的处罚范围和处罚原则。首先,就未遂犯的处罚范围而言,各国刑法典的规定不一,大体可分为三种模式,即概括主义、列举主义和综合主义。我国现行刑法典没有对未遂犯的处罚范围作出明文规定,似乎处罚所有犯罪的未遂。本文认为在确定未遂犯处罚范围的问题上,也应当从折衷未遂论的立场出发,先在主观面加以限定,将未遂犯只限定在直接故意犯罪中,排除过失犯和间接故意犯罪存在未遂犯的可能,然后在客观面加以限定,即行为只有在其对刑法所保护的重大利益造成严重危险或者严重威胁的时候,才能作为未遂犯处罚,而对其他危险较小的轻罪的未遂,则不予刑事处罚,而由行政法律来解决。其次,讨论了未遂犯认定存在争议的几种犯罪,本文认为举动犯只有成立与否的问题没有成立未遂犯的余地;不真正不作为犯存在未遂犯的可能,而真正不作为犯不以危害结果的发生为要件,行为一旦违反义务,不实施所要求实施的行为,犯罪就成立,不存在未遂的问题;在基本犯罪是未遂而发生了严重危害结果的情况下,结果加重犯存在未遂的可能性;教唆犯的未遂仅存于刑法第29条第1款,即教唆犯未遂的范围仅限于被教唆者犯罪未遂或着手后中止的情形,而刑法第29条第2款所规定的教唆犯则属于预备形态;我国刑法中所规定的危险犯就是其相对应的实害犯的未遂犯。最后,阐述了各国刑法所规定的三种未遂犯处罚原则,即"不减主义"、"必减主义"和"得减主义",并对我国现行刑法所规定的"对于未遂犯,可以比照既遂犯从轻或者减轻处罚"这一"得减主义"处罚原则的含义作了阐释。

第六章对我国未遂犯的立法作了检讨并提出了完善建议。本文首先指出了我国刑法所规定的未遂犯在概念、处罚原则和处罚范围三个方面存有缺陷，接着提出了完善我国未遂犯的立法设想。

关键词：未遂犯　处罚根据　成立要件　不能犯　处罚范围和原则　立法完善

Abstract

The attempted offense is a kind of criminal pattern of incompleteness of crime. as early as middle ages, Italian jurist brought forward the concept of attempted offense. But from a global perspective, there existed no general concept and punishment principle about the attempted offense in all criminal laws in feudal period. "The French Penal code" (1810) is the earliest legislation which provides the attempted offense in the world, Thus a systematic study about the attempted offense started in criminal jurisprudence circles. At this late hour the attempted offense has become an important system in Penal codes of all countries. This thesis expounds the attempted offense in following six respects: the evolution and concept of attempted offense, the basis of bearing criminal responsibility for the attempted offense, constitutive requirements of the attempted offense, impossibility, the scope and principle of punishment of the attempted offense and the legislative improvement of the attempted offense.

The first chapter analyses the concept and classification of attempted offense to start with its evolution and legislation. Firstly, it introduces he evolution and legislation of attempted offense. There is legislation about

the attempted offense in a broad sense which "The German Penal code" is a representative of it and the attempted offense in the narrow sense which "The French Penal code" is a representative of it in the Continental law system. But "The Italian Penal code" initiates the legislative model which refers "according with the criminal act" and "pointing to the criminal act evidently" to the objective standard of determining the criminal attempt, it develops a school of its own about the attempted offense. Attempt in the Anglo-American law system originates from "assault" namely "attempting to commit a battery" which is a very ordinary preparatory crime. "Criminal attempts act 1981" defines attempt, thus the legal precedent about attempt in the common law no longer has the binding force. The definition of attempt in the criminal law in the American various states is different. "American Model Penal Code" enumerates seven kinds of situations of the attempted offense which sufficiently proves the criminal intent; it indicates that the code drafter wanted to contain dangerous characters by expanding attempt's scope. In China, "Criminal Law of Qing Dynasty Approved by Emperor" drafted at the beginning of 20th century prescribed the concept and the principle of punishment of the attempted offense for the first time. In 1979 and the present Criminal Law of the People's Republic of China (hereinafter referred as "the Criminal Law") separately prescribed the attempted offense in Article 20 and 23. Secondly, it interprets the concept of the attempted offense in a broad sense and in the narrow sense and introduces the classification of attempted offense.

The second chapter discusses the basis of bearing criminal responsibility

for the attempted offense. Firstly, it makes the commentary on the theory of the basis of bearing criminal responsibility for the attempted offense in the Continental law system. Subjectivism thinks that the criminal act represents the doer's intention or character, the basis of bearing criminal responsibility for the attempted offense is the dangerous exterior performance of the realization of he doer's intention or character. Subjectivism only pays attention to the doer's subjective aspect but neglects his objective aspect, theoretically it has one-sidedness. Objectivism thinks that the basis of bearing criminal responsibility for the attempted offense is objective danger which causes the result in the constitutive requirements. Comparing with subjectivism objectivism limits the scope of punishment of the attempted offense. But the problem is that if we don't consider the doer's subjective aspect, we are unable to determine the doer's act is the attempted offense or the accomplished offense. Eclecticism thinks that the basis of bearing criminal responsibility for the attempted offense lies in both of the real danger of realizing the crime and the doer's subjective evil character. Now Eclecticism has been accepted by most people, moreover now provision about the attempted offense in the various countries' penal code in fact is the compromise of subjectivism and objectivism. Secondly, this thesis discusses various theories about the basis of bearing criminal responsibility for the attempted offense in China and thinks that Eclecticism should be the basis of bearing criminal responsibility for the attempted offense in China; in fact the present "the Criminal Law" in China adopts the standpoint of eclecticism.

The third chapter studies constitutive requirements of the attempted

offense. This thesis thinks that the attempted offense in China must have four constitutive requirements: "the intent of the accomplished offense", "set about an offense", "without accomplishing offense" and "against the doer's will". Firstly, so-called "the intent of the accomplished offense" means that when he sets about an offense the doer clearly knows that his act will entail harmful consequences to society but who wishes such consequences to occur. As one of constitutive requirements of the attempted offense "the intent of the accomplished offense" can limit the attempted offense in the crime with the actual intent, thus remove the crime with indirect intent, negligent crime and indirect instigation from the attempted offense, thus reduce the scope of punishment of the attempted offense. Secondly, so-called "set about an offense" means that the offender with the intent of the accomplished offense has already started to commit a crime provided in the Specific Provisions of "the Criminal Law". It is the key to distinguish between the preparatory crime and the attempted offense. This thesis discusses a few disputed situations of defining "set about an offense". It thinks that the start of the act of a cat's paw should be the start of the act of indirect guilt; the start of the act of consequence should be the start of the act of actio libera in causa; the start of the act of offense of segregation by location should be the time when dangerous things such as explosives reach the opposite party; the start of the act of the abettor should be the time when the instigated with the intent of the accomplished offense has already started to commit a crime provided in the Specific Provisions of "the Criminal Law"; the start of the act of criminal omission should be the time when "other people's

behavior or the exterior natural advancement" brings the direct danger to the victim or causes the original danger to increase, namely the doer with the duty to act facing the legal interest to suffer urgent and concrete danger still fails to act, thus possibly causes the illegal result to occur. Thirdly, so-called "without accomplishing offense" means that the offender has already committed a crime provided in the Specific Provisions of "the Criminal Law", then he has not caused damage but only the threat to the legal interest. it is the key to distinguish between the attempted offense and the accomplished offense. Lastly, so-called "against the doer's will" means all kinds of situations which sufficiently prevent the doer achieving the accomplished offense. It is the key to distinguish between the attempted offense and discontinuation of a crime.

The fourth chapter tries to distinguish between the attempted offense and impossibility on the basis of foreign legislation and theory. There is no impossibility in the "the Criminal Law" and impossibility is generally punished as the attempted offense in the judicial practice. The situation which there is impossibility in the practice but no impossibility in the legislation not only brings the prosperity to theory but also brings chaotic to the judicial practice. This thesis thinks that impossibility isn't suitable to be included in the attempted offense; the concept of impossibility should be interpreted afresh. This thesis suggests that the provision of impossibility should be added in "the Criminal Law", namely the third paragraph is put in Article 23: an offender, whose act in the nature doesn't cause damage but only the threat to the legal interests, in comparison with who completes the crime, shall be given a lighter or