International Journal of Education and Social Development
ISSN: 3078-9931 (Print), ISSN: 3078-2287 (Online) | Vol. 4, No. 1, 2025

Controversies and Normative Selection Regarding the Criteria for Determining "Commencement"

Wanhong Zhang

School of Law, Beijing Normal University, Beijing, 100875, China

Abstract: The "commencement" is pivotal for identifying criminal attempt and serves as the basis for punishment, yet its determination standard remains contentious in both theory and practice. Research reveals that judicial practice employs inconsistent criteria for judging "commencement" (e.g., formal objective theory, substantive objective theory, and subjective theory), leading to inconsistent rulings, undue expansion of the scope of attempt punishment, and risks of subjective conviction. Traditional theory and practice treat impossible attempt as a subset of criminal attempt, typically applying the formal objective theory to determine "commencement" and punishing it based on social harm as a substantive criterion—a foundation still rooted in the objective theory of attempt. This has fueled disputes between theory and practice regarding the basis for punishing attempts and the punishability of impossible attempts. A viable theory of attempt must begin with legislation while accommodating judicial practice. Thus, grounded in China's legal framework and practice: The subjective-objective mixed theory of attempt should be established as the basis for punishment; The formal objective theory, integrated with subjective and objective elements, must be consistently applied to identify "commencement"; The concrete danger theory should distinguish attempt from impossible attempt, clarifying the boundary between crime and non-crime.

Keywords: Commencement, Criminal Attempt, Impossible Attempt, Subjective-Objective Mixed Theory of Attempt, Concrete Danger Theory.

1. Introduction

Judicial practice remains inconsistent in applying standards for determining "commencement", reflecting the unresolved theoretical debate between substantive and formal objective theories. A critical question demands clarification: Should we adhere to a unified doctrine, select theories on a case-by-case basis, or establish a new standard? This issue intrinsically connects to the framework of attempt liability, particularly evident in the divergence regarding the punishability of impossible attempts, where prevailing theory largely advocates for non-punishment. At the same time, traditional views and judicial practice impose penalties. The conflict between theory and practice urgently requires resolution.

2. Theoretical Controversies over the "Commencement" Identification Standard

The current debate *de lege lata* centers on whether the formal objective theory or the substantive objective theory should uniformly define "commencement". Concurrently, the demarcation between impossible crime and punishable attempt remains contested, primarily manifesting as a dichotomy between the concrete danger theory and objective danger theory.

2.1. Formal Objective Theory and Substantive Objective Theory

2.1.1. Formal Objective Theory

It is generally accepted that the prevailing judicial practice and theoretical doctrine in China regarding the determination of "commencement" adhere to the formal objective theory (also termed the subjective-objective integrated theory). This doctrine defines "commencement of a crime" as follows: "The offender has begun to perpetrate the conduct specified in the statutory elements of a specific crime under the Special Part of *the Criminal Law*, exhibiting two fundamental characteristics: Subjectively, the will to commit the specific crime directly governs the objective act and manifests fully through its execution; Objectively, the offender has initiated conduct directly fulfilling the objective aspects of the crime's statutory elements, thereby preliminarily endangering or exposing protected legal interests to an actual threat[1]." This approach diverges from Japan's purely formal objective theory by integrating formal (satisfying statutory elements) and substantive (endangering protected legal interests) assessments, aligning with China's foundational principle of subjective-objective unity in defining crimes. The eclectic theory shares this core requirement for unified subjective-objective determination.

However, proponents of the substantive objective theory identify defects in the formal approach: its criteria remain ambiguous and may, in certain scenarios, lead to premature or delayed identification of commencement[2].

2.1.2. Substantive Objective Theory

The Substantive Objective Theory remains an influential doctrine in China, divided into the conduct-based approach and the result-based approach according to the perspectives of wrongfulness of conduct and wrongfulness of result. The conduct-based approach identifies commencement as initiating conduct with immediate danger, while the result-based approach requires the danger to protected legal interests to reach an imminent degree[3]. Their conclusions align in most crimes but may diverge in special contexts like crimes with spatial separation.

However, this theory exhibits significant flaws: Firstly, it disregards the actor's subjective intent, risking inaccurate judgments; Secondly, the threshold for "imminent" danger lacks a clear definition; Thirdly, absent formal constraints, it may misclassify non-statutory conduct as concretely dangerous, unduly expanding attempt liability, and potentially

violating the principle of legality[4]. To mitigate these risks, some scholars advocate integrating formal criteria (essentially an eclectic approach), emphasizing substantive interpretation of statutory elements. While attempting reconciliation, this faces criticism: the Substantive Objective Theory inherently rejects formal elements (e.g., subjective requirements), failing to resolve legality concerns. Moreover, it cannot reasonably explain the commencement determination for abstract endangerment offenses or crimes like unexplained sources of huge property[5].

2.2. The Concrete Danger Theory and Objective Danger Theory

The punishability of impossible attempt remains contentious under Chinese criminal law, which lacks explicit provisions. Traditional doctrine treats it as the counterpart to possible attempt, defined as failure to consummate a crime due to factual error (including instrument-based and object-based impossibility). Judicial practice distinguishes absolute impossibility (superstitious offense, non-punishable) from relative impossibility (punishable attempt). The prevailing theoretical approach, grounded in perspectives of wrongfulness of conduct or wrongfulness of result, adopts the concrete danger theory and objective danger theory as criteria for demarcating punishable attempt from non-criminal impossibility (i.e., crime vs. non-crime).

2.2.1. The Concrete Danger Theory

Guided by the Dual Wrongfulness of Conduct Doctrine, some Chinese scholars advocate distinguishing punishable attempt from non-criminal impossibility through the Concrete Danger Theory. This theory posits that danger should be assessed at the time of conduct based on the perception of a reasonable person or the actor's specific knowledge, combined with empirical understanding or relevant causal laws. An affirmative conclusion establishes punishable attempt; a negative finding yields non-criminal impossibility[6]. The framework comprises: (1) Temporal criterion: Danger must be perceptible to the public or actor at the time of conduct as a prerequisite for attempt liability; (2) Perspectival criterion: Incorporates viewpoints of both the reasonable person and the actor; (3) Evidentiary basis: As legal evaluation is normative and value-laden, it must rely on empirical knowledge accepted by the community—including empirical rules and scientific principles consistent with such knowledge. The theory requires an objective observer to assess danger by: Analyzing circumstances existing at the time of conduct; Projecting probable developments of the situation; Evaluating risk through the lens of general empirical knowledge and the actor's specific knowledge.

However, scholars identify critical flaws: Ambiguity in application; Convergence with conclusions drawn under the Abstract Danger Theory due to overlapping evaluative criteria; Unscientific exclusion of ex post verified facts; Tendency to unduly expand the scope of attempt liability; Risk of unduly restricting attempt liability in specific scenarios[7].

2.2.2. Objective Danger Theory

Scholars endorsing the wrongfulness of result as the essence of unlawfulness generally adopt the Objective Danger Theory to demarcate punishable attempt from non-criminal impossibility. This theory evaluates danger by: Considering all objective, concrete circumstances at the time of conduct; Incorporating ex post verified facts; Applying scientific causal laws (from a scientifically informed perspective). If danger exists, punishable attempt is established; otherwise, non-criminal impossibility results[8]. However, its ex post methodology would logically conclude that all attempts are non-punishable impossibilities. Thus, proponents of a modified objective danger theory argue that attempt liability requires: (1) Objectively: Conduct posing imminent danger to protected legal interests; (2) Subjectively: Corresponding criminal intent.

Critics nevertheless highlight flaws: The ex post methodology of the classical theory is fundamentally questionable; it negates danger in manifestly risky acts due to ex post bias; it reverts to ex ante assessment (resembling the Concrete Danger Theory) when using adjudication-time benchmarks; "Danger" cannot be purely objective—no such absolute concept exists[9].

Key question for China's judicial practice: What criteria are applied to identify "commencement" in punishable attempts? The following analysis examines reference cases from the Reference to Criminal Trial (Issues 1–136) to resolve this.

3. Current Status of Judicial Practice Regarding the "Commencement" Identification Standard

This study examined 1,638 cases using the keywords "commencement," "preparation," "attempt," and "impossible attempt." Given that identifying commencement is pivotal for distinguishing preparation, attempt, and impossibility, 59 qualified cases involving substantive application of commencement standards were selected for analysis. As judicial opinions rarely explicitly endorse doctrinal positions, the standards applied were inferred by synthesizing case facts and reasoning in verdicts.

3.1. Practical Issues in Applying the "Commencement" Identification Standard

Judicial analysis of the 59 reference cases reveals a lack of uniformity in applying commencement standards. Crucially, the core tenets of competing doctrines diverge significantly—whether emphasizing subjective intent, objective danger, or a hybrid approach—potentially yielding divergent conclusions on attempt liability. Applying inconsistent criteria across cases inevitably generates confusion in judicial understanding and application.

3.1.1. Cases Applying the Formal Objective Theory

It is generally held that both possible attempts and impossible attempts employ the Formal Objective Theory to identify "commencement." Court rulings confirm this theory's application in impossible attempt cases.

In Case 77, the offender attempted to sell an intersex individual (predominantly male) as a bride. The court deemed this an object-based impossibility due to mistaken identity. Citing Article 240 of *the Criminal Law*—which defines trafficking in women or children as abducting, kidnapping, purchasing, selling, transporting, or transferring such persons for profit—the judgment held that the conduct satisfied all statutory elements of the crime. Although the outcome failed due to a factual error, the act's social harm warranted conviction for trafficking in women (attempt) [10].

Similarly, in Case 835, offenders conspired to sell their biological child to an undercover anti-trafficking volunteer (making completion objectively impossible). The court ruled that transporting the child to the meeting site constituted

"commencement," but external factors prevented consummation, establishing attempted trafficking.

Judicial practice treats all objectively unconsummatable acts (excluding superstitious offenses) as punishable attempts, aligning with traditional doctrine. However, determining attempt liability for unconsummatable acts requires assessing not only "commencement" but also whether the conduct posed a danger to protected legal interests. Undifferentiated punishment of impossibility and attempt denies the former's independent doctrinal value and unduly expands attempt liability.

3.1.2. Cases Applying the Substantive Objective Theory

Theoretical critiques of the Substantive Objective Theory are substantiated by case analysis, revealing operational dilemmas that risk violating the principle of legality: (1) ambiguous interpretation of "imminent" danger; (2) potential overextension of attempt liability.

Applying this theory to identify "commencement" may unduly expand liability, primarily through premature determinations. Cases 36, 139, and 643 exemplify this: In Case 36, the court applied the Substantive Objective Theory, ruling that boarding a victim's taxi intending future robbery constituted "commencement"; in Case 643, three opinions emerged regarding the termination stage: (1) Preparation for robbery; (2) Attempted robbery (Substantive Objective Theory): Entering a confined taxi created "imminent danger" to life or property interests, justifying early commencement; (3) Abandonment during preparation (Substantive Objective Theory): Directing the driver to a location was preparatory; merely "riding in the taxi" lacked imminent danger absent imminent violence or threats. The court adopted Opinion 3. Cases 36 and 643—factually analogous yet reaching divergent conclusions under the Substantive Objective Theory—expose its core flaw: the absence of formal criteria and an unambiguous definition of "imminence" invites inconsistent interpretation and application. The conflict between the second and third opinions in Case 643 epitomizes this dilemma. Contrastingly, in Case 139, the court applied the Formal Objective Theory, holding that only initiating statutory methods of violence or threats constitutes "commencement." Thus, boarding a taxi, awaiting a robbery opportunity, remained preparation due to interruption by external causes. Under the Substantive Objective Theory's logic, boarding a taxi intending future robbery cannot satisfy "imminence" for robbery, yet Case 36 and the second opinion in Case 643 prematurely recognized commencement.

Fundamentally, without formal constraints, the Arbitrary interpretation of "imminent" danger risks expanding statutory conduct beyond legislative intent, violating the principle of legality. Erratic commencement determinations (premature or delayed) unduly expand attempt liability.

3.1.3. Cases Applying the Subjective Theory

While the Subjective Theory—rooted in subjectivist criminal law tenets—is largely abandoned in Chinese academic discourse, certain judicial interpretations governing specific offenses implicitly adopt its standards for determining "commencement."

3.1.3.1. Analysis of Cases Applying the Subjective Theory

Cases employing the Subjective Theory to identify "commencement" share a common feature: the actors engaged in purchasing and storing illicit goods for future sale, where actual "sale" had not yet occurred. These primarily involve offenses such as selling fake or substandard products, selling counterfeit drugs, and selling goods bearing counterfeit registered trademarks—all requiring "sales amount" or "illegal gains" as essential criteria for conviction or sentencing.

Under Articles 140, 141, and 214 of *the Criminal Law*, the core conduct for these offenses is the act of selling, defined as transferring goods through retail, wholesale, direct sales, or commission-based distribution[11]. Selling constitutes a procedural conduct, encompassing stages like identifying buyers, contracting, transaction completion, and payment or delivery. The actual transfer marks consummation; preparatory acts (purchasing or storing for future sale) belong to the preparation phase[12]. Scholars explicitly state that procuring illicit goods valued over ¥50,000 for intended sale—if intercepted before any sale—should constitute preparation[13]. Nevertheless, courts in these cases ruled that actors had "commenced" the crime based solely on their purpose demonstrated through purchasing or storing acts—even when: No goods were sold; No protected legal interests were infringed (market order or consumer rights remained unharmed). For example, in Case 131, the court inferred "commencement" from procuring high-value counterfeit trademark goods absent evidence of non-sale intent. In Cases 456 and 677, identical reasoning applied.

Thus, guided by judicial interpretations, courts classify "unsold" preparatory acts as "commencement" by adopting the Subjective Theory standard.

3.1.3.2. Legislative Embodiment of the Subjective Theory's Stance

The application of the Subjective Theory to determine "commencement" in such cases stems directly from relevant judicial interpretations adopting its tenets for sales offenses.

Article 140 of *the Criminal Law* stipulates that producing or selling fake or substandard products constitutes a crime only when reaching a threshold of severity—specifically, a sales amount exceeding ¥50,000. Thus, "sales amount" is pivotal for establishing guilt. When no sale occurs, proving this amount becomes practically untenable. To provide clear judicial standards and enhance crackdowns on such crimes[14], *the Interpretations Concerning Certain Issues in the Application of Law in Handling Criminal Cases of Producing or Selling Fake or Substandard Commodities* not only defines "sales amount" but also qualifies unsold conduct by its criminal character: "Article 2: Where fake or substandard products remain unsold but their value reaches three times the sales amount threshold under Article 140, conviction and punishment shall apply for the crime of producing or selling fake or substandard products (attempt)." This provision is problematic because the statutory conduct ("selling") remains unperformed. Judicial interpretations adopt this stance primarily due to criminal policy imperatives, as noted in Case 131, failing to penalize storing large volumes of unsold goods would impede prosecution, foster impunity, and undermine crime deterrence and legal balance. Evidentiary challenges: Per Case 456, the transience and concealment of such crimes complicate evidence collection (e.g., sales volume, price, disposition). Mechanistically requiring consummated sales would ignore legislative intent and contradict enhanced punitive policies.

However, applying the Subjective Theory to sales commencement: Revives subjectivist criminal law tenets; Prematurely advances commencement timing; Expands the definition of "selling" beyond statutory bounds; Creates conflicts within normative evaluation frameworks and logical contradictions in statutory wording, perpetuating scholarly

disputes[15].

3.2. Negative Consequences of Inconsistent Identification Standards

Given the problematic application of "commencement" standards in practice, the following adverse consequences arise:

3.2.1. Inconsistent Rulings Undermine Judicial Fairness

Applying divergent criteria to determine "commencement" may result in inconsistent rulings for factually similar cases, as demonstrated by the aforementioned cases where identical core facts yielded contradictory conclusions.

Cases 36, 139, and 643 illustrate this divergence:

(1) Case 36: The offenders conspired to rob a truck driver. After boarding the victim's vehicle, they did not immediately commit robbery but killed and robbed him after he drove some distance. The court ruled that boarding the victim's vehicle with robbery intent to rob constituted "commencement of crime preparation." Under Article 236 of *the Criminal Law*, the act of perpetration of robbery is "using violence, coercion, or other forcible methods against persons to seize property or compel immediate surrender[16]." Thus, boarding a victim's vehicle for robbery neither constitutes violence or coercion nor equivalent forcible methods and does not qualify as statutory conduct for robbery. Nevertheless, the court held that although the act was non-statutory, it created "imminent danger to legal interests," thereby establishing "commencement." This confirms the court's application of the Substantive Objective Theory.

(2) Case 139: Similarly, targeting a driver, offenders hired a taxi to a remote location intending robbery, but aborted due to a lack of opportunity; the alerted driver reported them. The court held that robbery liability requires initiating statutory methods of violence or threats, and only such initiation constitutes "commencement." Thus, boarding the victim's vehicle alone established mere preparation. The ruling explicitly applied the Formal Objective Theory.

3.2.2. Undue Expansion of the Scope of Punishable Attempt Liability

"Commencement" serves as the critical demarcation between preparatory acts and punishable attempts. Its accurate determination impacts not only the qualitative characterization of conduct but also sentencing and punishment.

First, under Articles 22 and 23 of *the Criminal Law* and relevant judicial interpretations, Punishment for preparatory acts is less severe than for punishable attempts. While *the Criminal Law* adopts a general principle of punishing incomplete offenses, legislative intent considers "punishable attempts more deserving of penalty than preparatory acts," as evidenced by sentencing guidelines and specific provisions. Second, judicial practice treats the punishment of preparatory acts as exceptional. Adjudicative organs routinely exclude preparatory acts from criminal liability under Article 13 of *the Criminal Law*—for instance, by declining prosecution for preparatory acts involving minor offenses. In this context, "commencement" functions as the substantive boundary of criminal liability.

However, applying either the Subjective Theory or Substantive Objective Theory to determine "commencement" unduly expands the scope of punishable attempt liability, risking punishing non-culpable conduct. Although neither criminal legislation nor theoretical doctrine provides clear boundaries for attempt punishment, it is unequivocal that prematurely identifying "commencement" inevitably broadens this scope[17]. This expansion manifests in two critical dimensions: Classifying conduct that does not satisfy statutory elements under the Special Part as "commencement" of perpetration hollows out the fundamental essence of the principle of legality. Such judicial practice fails to reconcile legislative adherence with the unity of formal and substantive rationality, ultimately undermining safeguards for citizens' liberty and fundamental human rights; Classifying acts that should constitute preparation as punishable attempts divorces crimes from commensurate penalties. This prevents criminal law from realizing its pursuit of fairness and justice, frustrates the penal goals of general and special prevention, and thus abandons the principle of proportionality between crime, culpability, and punishment.

Furthermore, affirming the punishability of all impossible attempts except superstitious offenses similarly results in undue expansion of attempt liability.

3.3. Subjective Conviction Violates the Principle of Unity of Subjectivity and Objectivity

The Subjective Theory, grounded in subjectivist attempt doctrine, exhibits significant flaws—including theoretical inconsistencies, ambiguous criteria, premature commencement of expanding attempt liability, and erroneous foundations. Consequently, it has been rejected by criminal law theories worldwide.

This theory posits that crime is a manifestation of criminal intent, and "commencement" is determined by the execution and certainty of that intent—i.e., when the actor's dangerous intent becomes apparent. Its core defect lies in: preparatory acts equally manifest criminal intent, yet this theory blurs the boundary between preparation and perpetration, effectively expanding attempt liability into the preparatory stage.

Practical analysis confirms this: Applying the Subjective Theory to unsold goods in crimes like producing or selling fake or substandard commodities or intellectual property infringement essentially shifts attempt liability improperly into the preparatory phase. This undermines safeguards for human rights and the protection of legal interests.

Judicial authorities have recognized this flaw. The 2022 revision of the Interpretations on Handling Criminal Cases of Drug-Related Offenses deleted provisions equating "purchasing counterfeit drugs for sale" with "selling," correcting this bias. Therefore, analogous provisions reflecting the Subjective Theory stance in judicial interpretations for other offenses (e.g., producing or selling fake commodities or IP crimes) should likewise be abolished.

Crucially, past application of the Subjective Theory to these offenses was merely a product of specific-period criminal policies, not indicative of a systemic judicial shift. However, this policy warrants reflection: For crimes disrupting market economic order, if administrative measures can effectively maintain market stability and property security, criminal law must exercise restraint and deploy penalties judiciously.

4. The Ideal Choice for the "Commencement" Identification Standard

As established previously, theories regarding attempt liability—particularly the "commencement" identification

standard—exhibit not only internal controversies within academia and practice but also opposition between theory and practice. These disputes and divergences generate adverse consequences, blurring the boundaries of "commencement" and impeding accurate characterization of conduct. To foster positive interaction among theory, legislation, and adjudication; ensure precise legal qualification of acts; and provide judicial reference, we must re-examine the "commencement" standard and propose its ideal formulation.

4.1. The Basis for Punishing Attempts

The contradiction between theory and practice in determining "commencement" partly stems from scholars' neglecting China's legislative and judicial realities while uncritically transplanting Japan's Objective Theory of Attempt or Germany's Impression Theory, disregarding their fundamental incompatibility with domestic doctrine. Comparative legislative analysis demonstrates that China's basis for punishing attempts is the Subjective-Objective Mixed Theory of Attempt: Punishment rests on wrongfulness of conduct; Subjective wrongfulness: The actor's hostility toward the legal order; Objective danger to legal interests triggered by "commencement". Clarifying this theoretical foundation is essential to establishing the ideal standard for identifying "commencement".

4.1.1. Legislative Stance on the Basis for Punishing Attempts

Through comparative analysis of provisions governing incomplete offenses across: German Criminal Code (Sections 22, 23, 24) [18]; Japanese Criminal Code (Articles 43, 44) [19]; Chinese Criminal Code (Articles 22, 23, 24); Criminal Code of Taiwan Region (Articles 25, 26, 27); the following conclusions emerge:

First, China's basis for attempt punishment emphasizes objectivity while leaning toward subjectivity. Presumptive punishment of preparatory acts demonstrates concern for subjective culpability manifested during preparation. This derives from Soviet-Russian inheritance: Article 15(1) of the Criminal Code of the Russian Soviet Federative Socialist Republic stipulated: "Seeking or preparing means or tools for committing a crime, or intentionally creating other facilitating conditions, shall be deemed preparatory crime[20]." However, *Soviet-Russian law* did not penalize all preparatory acts, typically exempting liability via Article 51. Similarly, Chinese courts often exempt preparatory acts under Article 13's "proviso"—reflecting its objectivist foundation. Presumptive punishment for all attempts (Article 23) contrasts with: Germany (Section 23(1)): Presumptive punishment only for felony attempts; Japan (Article 44) and Taiwan: Exceptional punishment for attempts. This penal severity signifies China's subjectivist inclination. Treatment of abandoned attempts: China (Article 24(2)): Applies to preparatory and attempt stages (vs. Germany, Japan, Taiwan limited to attempt stage), with mitigation or exemption based on "harm caused"—reflecting objectivity. Japan or Taiwan: Mitigation or exemption discretionary. Germany (Section 24): Non-punishment—highlighting its subjectivist focus on the extent of subjective culpability. In summary, both China and Germany exhibit subjectivist leanings in attempt at punishment. Consequently, subjective attempt theory necessarily informs their punitive basis. While German theory and practice explicitly adopt a subjective-objective mixed theory, most Chinese scholars erroneously emphasize an objective theory, contradicting the legislative stance.

Second, the legislation of all aforementioned jurisdictions confirms that "commencement" is pivotal for distinguishing preparatory acts from punishable attempts. Each code stipulates that "commencement" marks the initiation of the act of perpetration. German Criminal Code §22: "An attempt to commit a crime occurs when the offender, based on their conception of the offense, directly commences the fulfillment of the statutory elements." This establishes commencement as a unified subjective-objective process: subjectively requiring "conception of the offense," objectively requiring "direct commencement toward fulfilling statutory elements." It formally anchors commencement assessment to statutory elements. Chinese Criminal Code Article 23 ("has commenced the commission of a crime") mirrors Germany's formulation in substance and structure. Conversely, Japan (Article 43) and Taiwan (Article 25) adopt purely objective phrasing ("commences the commission of a crime"), omitting subjective requirements—reflecting their objective attempt theory stance.

Third, provisions on abandoned attempts explicitly demonstrate China's subjective-objective mixed theory position. Germany (§24): Non-punishment for voluntary abandonment—prioritizing subjective attempt theory by focusing intensely on the actor's mentality. Japan (Article 43) and Taiwan (Article 27): Discretionary mitigation or exemption—reflecting the objective attempt theory by penalizing the objective danger caused, irrespective of whether subjective culpability persists. China (Article 24(2)): Exemption if no harm caused; Mitigation only if harm caused. This embodies the subjective-objective mixed theory: No punishment when subjective culpability is eliminated and no objective harm occurs; Only mitigation permitted when subjective culpability vanishes but objective harm to legal interests materializes.

4.1.2. Adherence to the Subjective-Objective Mixed Theory of Attempt

Analysis and comparison of the aforementioned legislative provisions definitively establish that China's stance on the basis for punishing attempts is the Subjective-Objective Mixed Theory of Attempt. From an interpretive (rather than amendment-oriented) perspective, endorsing this theory aligns with the legislative spirit of current law, harmonizing both statutory provisions and judicial practice.

First, China's statutory framework governing preparatory acts, punishable attempts, and abandoned attempts inherently necessitates a mixed-theory foundation. Within China's criminal law context, the Subjective-Objective Mixed Theory of Attempt signifies that: Subjectively, punishment is based on the actor's hostility toward the legal order; Objectively, punishment rests on the "objective danger to legal interests or occurrence of harmful consequences" arising from "commencement"; Unified, these elements constitute the basis for attempt liability. This theory acknowledges the fundamental role of conduct while equally emphasizing the actor's subjective dimension.

Second, China's statutory provisions exhibit substantial alignment with *German criminal law* regarding the conceptual basis for punishing attempts. The prevailing doctrine in German legislation and practice is the Impression Theory, which anchors punishment to the manifested hostility toward the legal order (as in subjective theory) but further requires conduct "shaking confidence in the legal order" through attempted offense realization. Even absence of results, the actor's behavior provides grounds for sanctioning

disruptions to social peace[21]. Regarding attempt liability, both China and Germany demand unity of subjectivity and objectivity. Additionally, while Taiwan's amended Criminal Code explicitly adopts the objective attempt theory, the Subjective-Objective Mixed Theory remains the prevailing doctrine in its academic discourse[22].

Finally, adopting the Mixed Theory aligns with China's historical jurisprudential foundations and better reflects its criminal law philosophy. *Soviet-Russian criminal law*, a tributary of German doctrine, stipulated in Article 15(2) of its Criminal Code: "Any intentional act directly aimed at committing a crime, which remains incomplete due to circumstances beyond the actor's control, constitutes an attempt[23]." This mirrors the German and Chinese attempts at provisions by integrating subjective and objective elements.

4.2. The Identification Standard for "Commencement"

Building upon the adoption of the Subjective-Objective Mixed Theory of Attempt as the basis for punishing attempts, we must adhere to the Formal Objective Theory tinted with subjective-objective unity as the standard for identifying "commencement." For distinguishing between punishable attempts and non-criminal impossibility, the Concrete Danger Theory should serve as the benchmark.

4.2.1. Adhering to the Formal Objective Theory to Identify Commencement

First, the Formal Objective Theory aligns with the principle of unity of subjectivity and objectivity, insisting on assessing "commencement" through both formal and substantive dimensions. Criminal law norms must uphold social order while simultaneously protecting vital societal interests—namely, protected legal interests. Consequently, determining commencement based solely on subjective or objective considerations is inadequate; the Formal Objective Theory integrating subjectivity and objectivity is preferable.

Second, the critique that "applying the Formal Objective Theory prematurely identifies commencement" does not reflect an inherent flaw in the doctrine itself. Some argue that this theory lacks clear criteria for defining the act of perpetration, risking premature or delayed commencement determinations—often citing false accusation and insurance fraud as examples. In false accusation: From an interpretive perspective, fabricating criminal facts constitutes preparatory conduct, while filing accusations with judicial authorities to disrupt operations and infringe personal rights qualifies as an act of perpetration. However, under the Formal Objective Theory's literal application, "fabrication" alone would be deemed commencement despite posing no imminent threat to legal interests, thus advancing the timeline. In insurance fraud, fabricating insured items or forging accident evidence are preparatory acts. Deeming such fabrication as "commencement" advances the timeline; only submitting claims to insurers constitutes perpetration, making claim initiation the true "commencement." Prevailing scholarly opinion and judicial practice (e.g., Cases 198 and 296) endorse this "claim-submission doctrine," holding that commencement occurs when claims are filed. Crucially, this premature identification stems not from the Formal Objective Theory but from legislative dilemmas. The theory defines commencement as conduct satisfying statutory elements under the Special Part. However, China's criminal code employs an integrated legislative model that merges preparatory and the act of perpetration within single statutory provisions—exemplified by the aforementioned offenses[24]. Ordinarily, statutory elements describe the act of perpetration, and the Formal Objective Theory faces no ambiguity in identifying commencement. Exceptionally, when the code integrates the preparatory and act of perpetration, any standard—including the Formal Objective Theory—mechanically encompasses preparatory acts as "commencement" if the distinction is disregarded.

Furthermore, judicial practice should cease applying the Subjective Theory to determine "commencement" for crimes such as selling fake or substandard products, selling counterfeit drugs, and selling goods bearing counterfeit registered trademarks. These offenses are codified under Chapter III of *the Criminal Law* ("Crimes Disrupting the Order of the Socialist Market Economy"). One criminal policy objective here is safeguarding China's normal market economic order and securing economic activities. Crimes under this chapter fall within the category of administrative offenses. For conduct in such crimes: If acts constitute preparation, they should be punished as preparatory offenses; If they fail to reach the threshold of criminal liability, they can be fully addressed through administrative sanctions. Since such illegal activities are predominantly profit-driven, imposing pecuniary penalties (e.g., fines) under administrative law equally achieves the goal of maintaining market order. Consequently, out of restraint in criminal law, conduct involving "unsold goods" that does not constitute a crime should not incur criminal penalties. Therefore, judicial interpretations that expand the scope of the act of perpetration for selling fake or substandard products, counterfeit drugs, and trademark-infringing goods—as discussed previously—should be modified or abolished by judicial authorities.

4.2.2. Applying the Concrete Danger Theory to Determine Impossibility

In cases potentially involving non-punishable impossible attempts, the conduct may formally satisfy statutory elements but requires assessment for whether it poses a real and imminent danger to legal interests. Adhering to the principle of unity between subjectivity and objectivity, the concrete danger theory must be applied to distinguish impossible attempts from attempted crimes.

First, the concrete danger theory is justified based on legislative intent and social reality. A key aspect of assessing wrongfulness lies in a conduct's violation of norms, which—consistent with the normative theory of responsibility—necessitates consideration of public normative recognition. If an ordinary person perceives the danger of harm, an attempted crime is established. Even if the general public remains unaware, an attempted crime may still be found if the actor exploits the victim's special circumstances known exclusively to them. Here, "danger" refers to a perceptible risk—grounded in the knowledge of objective facts by ordinary people or actors under specific conditions—that the conduct could achieve the intended criminal outcome. This encompasses both the public's sense of peril and their demand for safety. Take Case No. 77 as an example: The defendant conspired with others to sell a "young woman," Wang, to Tan as a wife. When Tan attempted to consummate the marriage, he discovered the victim's genitalia differed from those of a typical female and returned Wang to the defendant, Zhang Shilin. Investigation revealed the victim was a "predominantly male intersex individual." The court held that the defendant's actions constituted the crime of trafficking women (attempted). Applying the concrete danger theory to

assess risk: An "objective observer" at the time of the conduct, drawing on empirical knowledge (including public understanding and the actor's specific awareness), would view Wang as a "young woman." Trafficking her as a wife would sufficiently lead ordinary people to perceive a danger of actual women being trafficked. The actor would believe their conduct could achieve the purpose of trafficking women and thus complete the crime. Therefore, establishing an attempted crime is justified. In essence: If conduct constitutes an impossible attempt (i.e., poses no danger), it may be tolerated even if repeated. If it constitutes an attempted crime, punishment is necessary—even absent actual harm—as it violates the public's normative consciousness, serving the goal of general prevention[25].

Secondly, the traditional theoretical and practical stance of categorizing all objectively impossible attempts as attempted crimes is untenable. The prevailing doctrine in Chinese criminal jurisprudence lacks the concept of impossible attempt, recognizing only impossible attempted crime—subsumed under attempted crimes—where "commencement" is determined by applying the formal objective theory, with punishment justified by social harmfulness. Some scholars consequently criticize that traditional Chinese criminal theory and judicial practice essentially adopt the purely subjective theory or abstract danger theory to distinguish impossible attempts from attempted crimes, deeming this fundamentally erroneous. However, such critiques reflect introspection and skepticism toward traditional criminal theory, aiming to achieve both legal interest protection and human rights safeguards. The German criminal code's "gross ignorance" (groben Unverstand) standard limiting punishment for impossible attempts similarly embodies this reexamination of punishability. Certain Chinese scholars initially adhered to the theory of subjective-objective unity regarding punishment for impossible attempted crimes, asserting social harmfulness as the scientific basis for their criminalization and liability. Later, however, they endorsed the concrete danger theory[26]. This shift in position unmistakably acknowledges flaws in traditional criminal theory. Put plainly, China's judicial practice should no longer uniformly punish all impossible attempts as impossible attempted crimes under traditional theoretical guidance. Instead, it must scientifically differentiate between impossible attempts and attempted crimes, thereby properly qualifying the perpetrator's conduct.

5. Conclusion

Regarding the divergent theories on the criteria for determining "commencement," the punishability of impossible attempted crimes, practical controversies, and the conflict between theory and practice, this study reexamines—based on China's current judicial realities and legislative framework—the grounds for punishing attempted crimes, the criteria for identifying "commencement," and the distinction between impossible attempts and attempted crimes. It proposes reconsiderations aligned with legislation and judicial practice while adhering to criminal law principles, aiming to foster constructive interaction among theory, legislation, and judicial practice, and to provide references for judicial implementation.

In brief: First, comparative analysis reveals that China's legislative stance on punishing attempted crimes follows a hybrid subjective-objective theory of attempt; Second, adherence to the formal objective theory—with subjective-objective unity as its foundation—serves as the unified standard for determining "commencement," ensuring scientific rigor and practical operability in judicial application; Finally, applying the concrete danger theory to distinguish impossible attempts from attempted crimes clarifies the boundary between criminal and non-criminal conduct, thereby realizing the criminal law's fundamental purposes.

References

[1] Gao Mingxuan & Ma Kechang (eds.), Criminal Law (10th ed.), China Legal Publishing House, 2023, p. 152.

[2] Zhang Mingkai, Criminal Law (6th ed., Vol. I), Law Press, 2021, pp. 454–455.

[3] Zhang Mingkai, Criminal Law (6th ed., Vol. I), Law Press, 2021, p. 440.

[4] Zhang Mingkai, Theory of Attempt, Law Press, 1997, pp. 62–63.

[5] Ma Rongchun, A Doctrinal Restatement of Criminal Commencement: Doctrinal Confrontation, Propositional Revalidation, and Concrete Solutions, SJTU Law Review No. 2 (2022), pp. 73–74.

[6] Zhou Guangquan, General Principles of Criminal Law (4th ed.), Renmin University Press, 2021, p. 299.

[7] Zhang Mingkai, Wrongfulness of Conduct vs. Wrongfulness of Result, Peking University Press, 2012, pp. 221–224.

[8] Li Hong, Reflections on General Principles of Criminal Law, Renmin University Press, 2016, pp. 403–404.

[9] Zhou Guangquan, General Principles of Criminal Law (4th ed.), Renmin University Press, 2021, pp. 300–302.

[10] Zhou Feng (ed.), New Interpretations of Criminal Offenses (Vol. 2), China Legal Publishing House, 2019, p. 1069.

[11] Zhou Feng (ed.), New Interpretations of Criminal Offenses (Vol. 2), China Legal Publishing House, 2019, p. 885.

[12] Li Xihui, Complex Issues in the Crime of Producing or Selling Fake or Substandard Products, People's Procuratorial Semimonthly No. 18 (2008), pp. 8–9.

[13] Qu Xinjiu, Consummated, Attempted, and Preparatory Stages of Producing or Selling Fake or Substandard Products, People's Procuratorial Semimonthly No. 10 (1998), p. 15.

[14] Chen Hongbing, The Legal Interests Protected by the Crime of Producing or Selling Fake or Substandard Commodities and Their Implications, Politics and Law No. 3 (2011), p. 47.

[15] Zhang Weike, On Sales Conduct in Economic Crimes: Perspectives from Selling Counterfeit Drugs, Journal of People's Public Security University No. 4 (2022), p. 83.

[16] Zhou Feng (ed.), New Interpretations of Criminal Offenses (Vol. 2), China Legal Publishing House, 2019, p. 885.

[17] See Shi Juhang, The Scope of Punishment for Attempted Offenses and Reconstruction of Its Rules, Politics and Law No. 12 (2020), p. 151.

[18] He Laijie & Lin Yuxiong (eds.), German Criminal Code, Yuanzhao Publishing, 2019, pp. 29–30.

[19] Gan Tiangui & Yu Zhenhua (eds.), Japanese Criminal Code: Translation and Analysis, Wunan Books, 2018, pp. 55–56.

[20] Belyayev & Kovalyov (eds.), Soviet Criminal Law General Part, Ma Gaixiu & Zhang Guangxian (trans.), Masses Publishing, 1987, p. 205.

[21] Roxin, German Criminal Law: General Part (Vol. 2), Wang Shizhou et al. (trans.), Law Press, 2013, pp. 264–265.

[22] Chen Ziping, The Basis for Punishing Attempts: Reflections from a Comparative Law Perspective, Peking University Law Journal No. 2 (2021), p. 535.

[23] Belyayev & Kovalyov (eds.), Soviet Criminal Law General Part, Ma Gaixiu & Zhang Guangxian (trans.), Masses Publishing, 1987, p. 207.

[24] Zhang Mingkai, Substantive Interpretation Under Integrated Legislative Models of Preparatory and Act of Perpetration, Oriental Law No. 4 (2023), p. 86.

[25] Zhou Guangquan, The Development of Act Wrongfulness Theory in the Chinese Context (Law Press, 2015), p. 285.

[26] Zhao Bingzhi, Theory and Practice of Attempted Crimes (Renmin University of China Press, 1987), pp. 178–180.