

Research on the Binary Model of Discretionary Non-prosecution in Adult Misdemeanor Cases

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Abstract: The formation of a criminal structure dominated by misdemeanors reflects the enormous potential of the discretionary non-prosecution system in managing misdemeanors. However, by analyzing the current binary model of discretionary non-prosecution in adult misdemeanor cases, there are problems such as the lack of a uniformly applied legal basis, the tendency to formalize inspections, the lack of a proper interface between criminal and administrative activities, and the ineffectiveness of special prevention. Therefore, the binary model can be rethought from the perspective of procedural law, and a new discretionary non-prosecution binary model can be formed by perfecting the existing relative non-prosecution system and constructing a conditional non-prosecution system for adult misdemeanor cases, combining the pre-conditional non-prosecution model and the post-prosecutorial opinion model.

Keywords: Misdemeanor governance; Prosecution discretion; Conditional non-prosecution

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1. Introduction

The purpose of punishment has gradually shifted from the theory of retributive punishment to the theory of preventive punishment, along with the expansion of the path of incrimination and the gradual reorganization of the structure of crime towards misdemeanors. Based on consultative and restorative justice considerations, the pathway to conviction should be improved promptly. Compared with the substantive path of criminalization, which is limited by the overall trend of current criminal legislation and the overall strategy of crime management, the exploration of the procedural path of criminalization in misdemeanor cases has become the focus of research.

Adult misdemeanor cases show the characteristics of many and simple and targeted procedural crime paths are mostly around the non-prosecution discretion. The non-prosecution discretion of the procedural optimization operation is directly related to the prosecutor's office doing a good job for each misdemeanor case with high quality and efficiency. The non-prosecution of adult misdemeanor cases in judicial practice relies mainly on the relative non-prosecution system, using a combination of two types of handling modes before and after the non-

prosecution to achieve the effect of crime prevention. However, in judicial practice, the applicable procedures for adult misdemeanor cases vary from place to place. There are many problems in the operation of the model. Hence, it is urgent to further analyze and explore the theoretical and practical aspects of how to grasp the procedural positioning of the model and improve the model structure.

2. Empirical examination and functional dilemma of the dualistic model of discretionary non-prosecution in adult misdemeanor cases

Taking before and after the decision not to prosecute as a node, the processing mode can be divided into the front-type pro bono service mode and the rear-type prosecutorial opinion mode. Through the analysis of the two types of processing mechanisms, the operational status of the practice can be fully uncovered, based on which the corresponding path of improvement is proposed.

2.1. Review of the front-loaded pro bono model for adult misdemeanor cases

2.1.1. The rise of the social pro bono service model for adult misdemeanor cases

The long absence of a mechanism for prior examination of criminal suspects led to the inability of the procuratorial authorities to conduct a substantive examination of the remorsefulness of the person to be non-prosecuted when applying relative non-prosecution, and thus the model of social welfare services for adult misdemeanor cases has emerged^[1].

The Ruian City People's Procuratorate in Zhejiang Province joined hands with public interest organizations to create a lighter treatment of "drunk drivers through public service in exchange for non-prosecution" in 2017. Then, the procuratorates around the world carried out the expansion of the application of the model of social welfare services to explore, and gradually from the scope of application of drunk driving cases to theft, fraud, and other light criminal cases. Multiple innovative parties proposed to purchase public welfare services to implement the non-prosecution of the governance model. The proposed non-prosecutor voluntarily chooses whether or not to participate in social welfare services, and the procuratorate uses the overall performance as a reference for deciding whether or not to prosecute, thus realizing the dual effect of punishing crime and preventing crime.

2.1.2. Analysis of the problems with the front-loaded pro bono model for adult misdemeanor cases

The front-loaded public service model relies mainly on relative non-prosecution in judicial practice, with the normative documents issued by localities to stipulate the applicable standards, but due to geographical differences and other reasons lead to differences in detailed standards and operational procedures.

Currently, the relevant regulations provide macro-level provisions for the application of the SPS model in DUI cases, but since in practice the model has been gradually expanded to most adult misdemeanor cases, there is a certain degree of universality, and there are similarities and differences in the subjective and objective aspects of different cases, so the opinion cannot cover all types of misdemeanor cases. At the same time, the operation of the mechanism and the traditional relative non-prosecution of procedural settings are quite different in the procedural positioning of the controversy, so the operation of the pre-charge inspection mechanism still lacks a clear legal basis as well as procedural support. In addition, due to the limitations of the prosecution period, the pre-prosecution visits in adult misdemeanor cases are shorter and less focused, and there is a risk that the preventive effect of the pre-prosecution service model will be reduced to a mere formality.

2.2. Review of the rear-type prosecutorial opinion model in adult misdemeanor cases

2.2.1. Operation of the rear-type prosecutorial opinion model in adult misdemeanor cases

Misdemeanor case perpetrators handled by the procuratorial organs that make the decision not to prosecute would only produce the legal effect of exemption from the conviction and sentence, which is not a punishment for the crimes, resulting in the harm caused completely disregarded. Therefore, based on the consideration of crime prevention and the public interest of society, the procuratorial authorities will, depending on the specific circumstances of the case, apply non-criminal treatment to the non-prosecuted person, such as admonition and the issuance of a procuratorial opinion letter to be transferred to the competent authorities for administrative punishment.

As procedural crimes and non-criminal penalties may involve several departmental subjects, a corresponding follow-up mechanism is formed, in which the reverse interface between administrative law enforcement and criminal justice is more prominent in practice. In addition to admonitions and other non-penal treatment methods implemented by the procuratorial authorities following the law, if the person not prosecuted meets the conditions for administrative punishment, the procuratorial authorities shall issue a procuratorial opinion and transfer the case to the relevant competent administrative organ for disposal, while doing a good job of following up and supervising the case.

2.2.2. Difficulties in the operation of the post-dispositional prosecutorial opinion model in adult misdemeanor cases

In specific practice, the real realization of non-prosecution after the seamless integration of criminal lines and prosecutorial tracking and supervision of very few cases, exposing the case has not been moved, there are cases difficult to move, the moved case is not dealt with, and other problems and difficulties^[2].

Based on the traditional thinking of criminal prosecution and the limitations of the supervisory vision, the procuratorial organs find it difficult to search the administrative subject and slack in issuing targeted procuratorial opinions. In addition, some administrative authorities do not make clear the differences between criminal justice and administrative law enforcement standards when they decide to impose administrative penalties, leading to confusion and thus misidentification in the specific determination of cases of criminalization, while in practice the procuratorial authorities are negligent in carrying out effective legal supervision of the implementation of the situation, resulting in an ineffective mechanism of convergence that does not play a substantial part in the effectiveness of the mechanism. Given the one-time and final nature of the relative decision not to prosecute, once the procuratorial authorities have made a decision not to prosecute, even if the non-prosecuted person is unrepentant or if the non-penal treatment is effectively implemented, it will not affect the outcome of the non-prosecution^[3]. As a result, the follow-up mechanism for non-prosecution of misdemeanor cases does not explicitly reflect the tendency to take special preventive considerations into account, which is contrary to the original intent of the decision not to prosecute.

3. Path to improve the binary model of discretionary non-prosecution in adult misdemeanor cases

Improving the binary model of discretionary non-prosecution in adult misdemeanor cases is a systematic project, which not only needs to be based on the provisions of the procedural law to explore the institutional basis for it but also needs to be perfected in the details of the operation of the model.

3.1. Improving the model of post-prosecution prosecutorial opinion for relative non-prosecution in adult misdemeanor cases

In the judicial practice of the gradual decriminalization of crime, the improvement of the model of follow-up prosecutorial opinion on the relative non-prosecution of adult misdemeanor cases has become crucial. It is an important way of disposing of misdemeanor cases in a high-quality and efficient manner solving the deep issue of governance.

The procuratorial and administrative organs should establish a systematic concept, uphold the principle of constraints and cooperation, and break the inherent functional limitations of thinking in practice. The former do not prosecute cases that meet the conditions should be transferred as far as possible, to enhance the quality of prosecutorial advice at the same time to strengthen the supervision of awareness of the implementation effect. The procuratorial organs should take a subjective initiative in understanding the transferred case situation and clarify the difference between the penalty and the execution of the case following the law. The latter takes a proactive approach to the cases referred by the procuratorial authorities to understand the circumstances of the cases, clarify the differences in penalties, and accurately recognize and promptly punish the cases following the law. At the same time, it is necessary to clarify the transfer of jurisdiction mechanism, the jurisdiction of different types of cases subject to clear provisions to prevent the emergence of jurisdictional disputes caused by cross-functional, and further improve the service system to ensure that the case information is complete and the error-free flow between the different subjects. In addition, high-quality and effective legal supervision contributes to the promotion and implementation of the relevant mechanisms, whether it is the pre-charge review of the prosecution or the prosecutorial advice to the administrative authorities after the decision not to prosecute, all of which are natural extensions of the right not to prosecute, and are an effective operation of the overall prosecutorial power^[4]. Therefore, the procuratorial organs should effectively fulfill their procuratorial duties, explore the establishment of an administrative law enforcement supervision mechanism, and further consolidate the main responsibility.

3.2. Constructing a model for front-loading conditional non-prosecution in adult misdemeanor cases

The main purpose of the penalty is to deter the perpetrator from committing further crimes against society and to prevent others from committing similar criminal acts^[5]. The pre-trial diversion system in the United States is seen as a national strategy for controlling criminal offenses, especially misdemeanor cases, and the system strongly encourages innovative approaches in its guideline norms^[6]. The front-loaded public service model is closer to conditional non-prosecution both in the process of non-prosecution decision-making and in the pursuit of substantive value, which lacks formal legitimacy but has substantive legitimacy^[7]. Therefore, the essence of constructing the model of front-loading conditional non-prosecution in adult misdemeanor cases is to provide procedural support for the conditional non-prosecution system by expanding the scope of its application and to further improve it based on the front-loading model of public service based on the concept of preventive crime governance.

Firstly, in terms of the conditions of application, the extension of the existing scope of application of conditional non-prosecution to adults should not be defined simply in terms of the crime or the length of the sentence, but rather a review of the substantive law should be carried out, and a screening of minor crimes should be carried out in the light of the actual situation^[8]. Secondly, in terms of the content of the study, the French prosecuting authorities often commission third-party organizations to carry out special training and education

activities for perpetrators of minor offenses, including, but not limited to, those on the dangers of drugs and domestic violence^[9]. The non-prosecution of a person should set up a targeted examination content, so the operation of the conditional non-prosecution model needs to be attached to the conditions that have a strong focus, a high degree of specialization, and other qualities^[10]. Finally, in terms of supervision mechanisms, to achieve a balance between crime prevention and the optimal allocation of judicial resources, a third party and specialized social organizations could be introduced to establish a systematic and linked work coordination mechanism to promote the combination of internal and external supervision.

4. Conclusions

Along with the expansion of the criminal circle and the increase in the number of criminal cases, the exercise of discretion not to prosecute by the procuratorial authorities is facing a greater test. From the perspective of procedural law, a model of pre-conditional non-prosecution in adult misdemeanor cases has been constructed to provide a legal basis for the pre-social service model, so that it and the relative non-prosecution system can form a dual model of discretionary non-prosecution combining the pre-conditional non-prosecution model with the post-prosecutorial opinion model. However, conditional non-prosecution and relative non-prosecution should be independent and complementary to each other at the level of legal contingency^[11]. Conditional non-prosecution is applied to perpetrators for whom supervisory visits are necessary, and vice versa for relative non-prosecution.

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Disclosure statement

The author declares no conflict of interest.

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