

Research on the Influencing Factors of Discretionary Non-prosecution

Xiaoyu Han

Ocean University of China, Shandong, China

18953492836@139.com

Abstract. With the structure of criminal offenses in China changing remarkably in the past 20 years, the number of misdemeanors and their proportion in accepted cases have increased significantly. Thus, misdemeanor cases replace felony ones and become the focus of judicial work. Guided by the theory of suiting punishment to crime, the strategy of crime governance should be optimized to meet the needs of misdemeanor governance. The discretionary non-prosecution system, as a system that can best embody the spirit of discretion in the non-prosecution system, is particularly crucial in misdemeanor governance. It can not only bear the vital function of procedure diversion during the examination and prosecution, but also promote the rationalization of the relationship between crime and punishment. However, due to the general legal provisions and fuzzy standards in judicial practice, the application of the discretionary non-prosecution system is limited and fails to play its due role. This paper aims to summarize the practical operation rules of discretionary non-prosecution through empirical analysis and Internet technology and reinterpret the definitions of important concepts in discretionary non-prosecution, such as “minor crime circumstances”, “no need to impose punishment”, and “exemption from punishment” and their relationship, so as to promote the correct understanding and application of discretionary non-prosecution conditions in judicial practice.

Keywords: Discretionary Non-prosecution; Influencing Factors; Empirical Analysis.

1. Raise of Questions

In the past 20 years, great changes have taken place in China’s criminal structure, which is mainly reflected in the sharp decline in the proportion of serious violent crimes. According to relevant data, the number of people prosecuted by procuratorial agencies for serious violent crimes has dropped from 162,000 in 1999 to 60,000 in 2019,[1] with an average annual decline of 4.8%.[2] At the same time, the number and proportion of misdemeanor cases have been rising, which accounts for more than 80% now.[3] Up against the decreasing number and proportion of felonies as well as the rising number and proportion of misdemeanor cases, how the judicial agencies should adapt to the crime trend and adjust the crime governance strategy has become the primary goal of current criminal justice. Therefore, the judicial agencies should focus on misdemeanor governance at present. [4]

However, the current strategy of China’s criminal justice governance still depends on the principle of severe punishment for felonies, whose judicial concept and function are not suitable for the requirements of misdemeanor governance. Guided by the principle of adapting crime to punishment, misdemeanor governance depends more on the lenient criminal policy, such as non-prosecution, exemption from criminal punishment, and probation. Besides, the non-prosecution system plays a key role in misdemeanor governance, which is also imperative to adapt the strategy of crime governance to the changing crime structure at present. Specifically, the non-prosecution system means that after people’s procuratorate examines the cases transferred by the reconnaissance agencies for prosecution, the conditions that meet terminating criminal proceedings stipulated by law should be confirmed, which should not or need not convict criminal suspects, thus deciding not to prosecute them and realizing the diversion of cases before prosecution.[5] The non-prosecution system conforms to the flexible and lenient sentencing requirements in misdemeanor governance, which promotes the rationalization and equalization of the relationship between crime and punishment and improves judicial efficiency. China’s non-prosecution system mainly includes statutory non-prosecution, discretionary non-prosecution, conditional non-prosecution, and non-prosecution for

insufficient evidence. The procuratorial agencies have no discretion over statutory non-prosecution and non-prosecution for insufficient evidence, so they must make a decision of non-prosecution. In addition, conditional non-prosecution is finally manifested as special discretionary non-prosecution. Hence, discretionary non-prosecution is particularly critical in misdemeanor governance because of its close relationship with the procuratorate's discretion and its initiative in application. According to Paragraph 2 of Article 177 of the *Criminal Procedure Law*, the case of discretionary non-prosecution should be in slight crime circumstances without being sentenced to punishment or exempted from criminal punishment. Due to the vague definition of substantive conditions applicable to discretionary non-prosecution in this law and unclear discretionary standards, insufficient system supply exists in the practice of discretionary non-prosecution for misdemeanor cases. Therefore, based on the discretionary non-prosecution decision in judicial practice, this paper quantitatively and qualitatively analyzes the structure of discretionary non-prosecution factors, the determination of minor crime circumstances, and the factors exempted from punishment or sentenced to punishment. Moreover, the obtained data is compared and linked with relevant theoretical research results, so as to propose suggestions for promoting the discretionary non-prosecution application.

2. Normative Understanding of Discretionary Non-prosecution

According to Paragraph 2 of Article 177 of the *Criminal Procedure Law*, "If the circumstances of the crime are minor without a need to impose a penalty or exempt from the penalty according to the penalty provisions, the people's procuratorate may make a decision of non-prosecution." Four key words including minor crimes, no need to be sentenced to punishment, exemption from criminal punishment, and discretionary non-prosecution can be found. However, there is still a lack of theoretical consensus on how to understand concepts of minor crime, no need to be sentenced to punishment, exemption from criminal punishment as well as their logical relationships, which need in-depth discussion.

Due to the legislation vagueness, relatively uniform applicable standards are insufficient for the determination of minor criminal circumstances. Some scholars believe that minor crime refers to the crime light in accusation and sentencing circumstances, while others hold that urgent crime only means "minor sentencing circumstances". [6] This increases the difficulty of discretionary non-prosecution practice, and prosecutors can only judge whether cases are minor crimes according to laws and experiences. Hence, it is necessary to accurately identify the standard of minor crimes and reduce the subjective judgment of discretionary non-prosecution.

As for the relationship between "minor crime" and "no need to be sentenced or exempted from criminal punishment", the mainstream in academia holds that minor crime is a prerequisite for discretionary non-prosecution, which is also a common prerequisite for deciding "no need to be sentenced" or "exemption from criminal punishment". According to Chen Guangzhong, within the scope of minor crime, the decision of non-prosecution can only be applied if the conditions of no need to be sentenced or exempted from criminal punishment are met.[7] First of all, from the perspective of legislative purpose, discretionary non-prosecution does not aim to prosecute crimes with little social harm and criminal suspects with low social danger, so as to save judicial resources and to repair social relations. If the circumstances of the crime are minor, the omission is a prerequisite for discretionary non-prosecution and the people's procuratorate needs to exempt misdemeanor and felony from criminal punishment, which increases the burden of judicial procedure. In addition, from the perspective of liberal arts interpretation, the word "or" connects "no need to be sentenced to punishment" and "exemption from criminal punishment", so the two are juxtaposed and "minor crime" serves as its premise. Contrary to the former view, another view holds that the minor circumstances of the crime are only the condition of "no penalty is required according to the criminal law", not the condition of "exemption from punishment". As long as it belongs to the "exemption from punishment", no matter whether the crime is minor or not, discretionary non-prosecution can be

applied. [8] Since such a view has not been widely accepted, this paper will not make further related discussion.

After determining that the case belongs to “minor criminal circumstances”, the judge should tell whether the parties “do not need to be sentenced to punishment” or can be “exempted from criminal punishment” according to other factors such as specific criminal circumstances, criminal motives, and behavioral consequences. In theory, “no penalty is required” and “exemption from criminal punishment” are two modes of decision of non-prosecution, and the factors considered by the procuratorate in making these two decisions are different. “Exemption from criminal punishment” is mainly decided for cases with statutory circumstances of exemption from punishment.[9] The “statutory” here includes the general provisions of punishment, the specific provisions of punishment, and judicial interpretation. For example, Paragraph 1 of Article 67 of the *Criminal Law* stipulates that criminals who surrender themselves can be exempted from punishment if the crime is relatively minor. According to Article 68 of the *Criminal Law*, those who have made great meritorious deeds may be mitigated or exempted from punishment. “Surrender” and “great meritorious deeds” in these two laws can be regarded as statutory exemptions from punishment when the crime circumstances are minor. The discretionary non-prosecution decision of “no need to impose a penalty” is aimed at the situation that the perpetrator is discretionarily exempted from criminal punishment according to Article 37 of the *Criminal Law* regardless of statutory exemption from punishment.[10] In other words, the procuratorial agency comprehensively considers the facts of the case and the performance of the criminal suspect. After examining the facts of the case, according to the criminal means, harmful consequences, criminal motives, etc., the procuratorial agency makes a discretionary decision not to prosecute cases with less subjective malignancy, less social harm, and less social danger.

Therefore, discretionary non-prosecution cases should meet two independent conditions, including the circumstances of the crime being minor, and no need to impose a penalty or be exempted from criminal punishment. It should be noted that the expression uses “can” rather than “should” to make a decision not to prosecute, that is to say, even if these two conditions are met, the people’s procuratorate may not make a decision not to prosecute. Under the clear hierarchical structure of the applicable conditions of discretionary non-prosecution, the substantive basis of the discretionary non-prosecution by the people’s procuratorate has a great influence on the rate of non-prosecution of misdemeanors. Hence, the following chapter will sort out the reasons for discretionary non-prosecution in the decision of non-prosecution, so as to analyze the influencing factors of the non-prosecution decided by the procuratorate from a quantitative perspective.

3. Practical Observation on the Influencing Factors of Discretionary Non-prosecution

To explore the substantive basis of the discretionary non-prosecution decided by procuratorate in practice, this paper takes 930 discretionary non-prosecution decisions in May 2022 as samples to make data analysis on the determination of minor crimes, the considerations of exemption from punishment, and the considerations of no need to impose punishment by the procuratorate’s non-prosecution decision. Besides, it sorts out the charges, statutory penalties, and the considerations of the procuratorate’s non-prosecution decision to compare their frequency.

(1) Judicial Determination of Minor Crimes

How to determine the standard of “whether the circumstances of the crime are minor” is the substantive basis for reasonably and legally deciding discretionary non-prosecution, which is also the core issue for correctly applying discretionary non-prosecution. Academic discussion on minor criminal circumstances often focuses on statutory punishment and charges. To quantitatively analyze the standard of “minor crime”, this section sorts through the standard of minor crime from aspects of crime and statutory maximum penalty.

Firstly, after counting the crimes in 930 non-prosecution decisions, the following table is obtained. The crime of dangerous driving appeared 339 times, accounting for the largest proportion about

36.5%, which is followed by the crime of intentional injury appearing 115 times, accounting for about 12.0%. Theft and traffic accident crimes occurred 108 and 81 times respectively, accounting for 11.6% and 8.7%. Other crimes such as helping information network criminal activities, fraud, opening casinos, selling toxic harmful food, and so on decrease in number.

Table 1. Statistical Table of Crimes Not Prosecuted at the Discretion of Procuratorial Agency

Charges	Quantity	Probability
Crime of dangerous driving	339	36.5%
Crime of intentional injury	115	12.0%
Theft	108	11.6%
Crime of causing traffic casualties	81	8.7%
Crime of helping information network criminal activities	32	3.4%
Crime of fraud	27	2.0%
Crime of opening a casino	19	2.0%
Selling toxic and harmful food	16	1.7%
Crime of deforestation	13	1.4%
Crime of illegal hunting	12	1.3%
To cover up or conceal the offence of a crime	10	1.3%
Other charges	158	17.0%
Total	930	100.0%

Secondly, the statutory maximum penalty is an important formal factor to judge whether a criminal act is minor. For the same crime, different statutory maximum punishments are often set according to the crime seriousness. Because the crime circumstances are minor in discretionary non-prosecution cases, the statutory maximum penalty referred to in this section is the statutory maximum penalty for a crime with minor circumstances. At the same time, when sorting out the statutory maximum punishment of 930 non-prosecution decisions, the higher statutory maximum punishment does not include the lower one. In other words, the number of cases with the statutory maximum punishment of less than ten years does not include the number of cases with other statutory maximum punishment, but only includes cases with the statutory maximum punishment of ten years stipulated in the law.

Table 2. Statistical Table of the Statutory Maximum Penalty for Non-prosecution at the Discretion of Procuratorial Agency

Statutory maximum penalty	Be sentenced to criminal detention and fined	Less than one year	Less than two years	Less than three years	Less than five years	Less than seven years	Less than ten years	Total
Number of cases	341	11	7	497	70	3	1	930
Proportion	36.67%	1.18%	0.75%	53.44%	7.53%	0.32%	0.11%	100.00%

According to Table 2, there are 341 cases with the highest penalty of criminal detention and fine, accounting for 36.67%; 11 cases less than one year, accounting for 1.18%; 7 cases less than two years, accounting for 0.75%; 497 cases less than three years, accounting for the largest proportion for 53.4%; 70 cases less than five years, 3 cases less than seven years, and 1 case less than ten years, accounting for 7.53%, 0.32%, and 0.11% respectively.

It is worth noting that in discretionary non-prosecution cases, the statutory maximum penalty of criminal detention and fixed-term imprisonment of not more than three years is dozens of times more than the statutory maximum penalty of not more than two years and not more than one year. Through sorting out the law and investigating the empirical analysis and research on discretionary non-prosecution over the years, this paper provides a relatively reasonable explanation for this phenomenon:

Firstly, through combing the main crimes involved in discretionary non-prosecution, it is found that the statutory maximum penalty for most crimes is less than three years and criminal detention, while the statutory maximum penalty of less than two years and less than one year is rare. The statutory maximum penalty of less than one year only includes the crime of infringing communication freedom stipulated in Article 252 and the crime of stealing across the country (border) stipulated in Article 322. Besides, the statutory maximum penalty of less than two years is also uncommon, including reselling identity documents, and producing and selling fake and shoddy products.

Secondly, the high proportion of cases in which the statutory maximum penalty is criminal detention is closely related to the high incidence of dangerous driving crimes in discretionary non-prosecution cases. A large number of discretionary non-prosecution cases in China are manifested as dangerous driving crimes. Other scholars have gathered statistics on the data of discretionary non-prosecution decisions made by Q District Procuratorate in the past five years, which found that the number of dangerous driving crimes accounted for 69.09% of all discretionary non-prosecution cases as of 2021. From January to August 2022, 56 cases of dangerous driving crimes were not prosecuted, accounting for 81% of all cases of non-prosecution. [11] This is also consistent with the above statistics on crimes. Because the legal maximum penalty for dangerous driving crime is criminal detention, the number of cases with discretionary non-prosecution is relatively high.

In addition, among the 11 main crimes of 930 discretionary non-prosecution cases as the research object, only two crimes have a statutory maximum penalty of less than five years, including the crime of opening a casino and selling toxic harmful food. The statutory maximum penalty for other crimes is less than three years.

(2) Other Considerations for the Discretionary Decision of Non-prosecution

Table 3. Statistical Table of Other Considerations for Procuratorial Agency's Discretion Not to Prosecute

Consideration factor	Exemption from criminal punishment		No penalty is required		Unstated	
	Frequency of occurrence	Probability	Frequency of occurrence	Probability	Frequency of occurrence	Probability
Confess guilt and accept punishment	188	94.95%	461	91.47%	204	90.27%
Confess	66	33.33%	130	25.79%	80	35.40%
Voluntarily surrender	56	28.28%	160	31.75%	42	18.58%
Truthful confession	56	28.28%	108	21.43%	55	24.34%
Get an understanding	44	22.22%	169	33.53%	63	27.88%
Compensation	32	16.16%	113	22.42%	38	16.81%
First-time offender	30	15.15%	98	19.44%	46	20.35%
Occasional offender	22	11.11%	61	12.10%	29	12.83%
No criminal record	12	6.06%	30	5.95%	17	7.52%
Repentance	9	4.55%	39	7.74%	27	11.95%
Small subjective malignancy	7	3.54%	13	2.58%	8	3.54%
Return stolen goods	5	2.53%	42	8.33%	11	4.87%
Accessory	4	2.02%	22	4.37%	3	1.33%
Students in school	3	1.52%	2	0.40%	1	0.44%

After determining that the case is a minor crime, other factors will also become the consideration for the procuratorate to decide not to prosecute. After considering other factors, the people's

procuratorate will generally determine whether the parties to the case meet the conditions of exemption from criminal punishment or do not need to be sentenced to punishment. The following data analysis sorts out the considerations for deciding the exemption from criminal punishment and no need to be sentenced to punishment, and only specifies the considerations for deciding not to prosecute. To make a clearer comparison between the considerations of exemption from criminal punishment, no penalty is required, and no penalty is specified, the probability in the table is equal to the number of times that consideration occurs in all cases of exemption from criminal punishment/no penalty is required/no penalty is specified, divided by the number of cases of exemption from criminal punishment/no penalty is required/no penalty is specified.

It can be known from Table 3 that among the factors that do not need to be sentenced to punishment, confessing guilt and accepting punishment appear the most frequently, with a probability of 91.47%. Getting an understanding and voluntarily surrender appeared 169 times and 160 times respectively, accounting for 33% and 31.75%; confession 130 times, accounting for 25.79%; compensation 113 times, accounting for 22.42%; truthful confession, first-time offender, occasional offender, returning stolen goods, repenting, no criminal record, and accessory 108, 98, 61, 42, 39, 30 and 22 times respectively. Situations including the small subjective malignancy and students in school are less, which is 13 times and 2 times.

Among the considerations of exemption from punishment, confessing guilt and accepting punishment are the most common, appearing 146 times, accounting for 94.00%. Different from the consideration factors that do not need to be sentenced to punishment, the second consideration factor is confession, which appeared 66 times, accounting for 33.00%. Voluntarily surrender and truthful confession appeared 56 times, accounting for 28.00%. Getting the understanding of the victim appeared 44 times, accounting for 22.00%. Compensation for victims' losses occurred 32 times, accounting for 16.00%. First-time offenders and occasional offenders appeared 30 times and 22 times respectively, accounting for 15.00% and 11.00%. No criminal record and repentance appeared 12 times and 11 times respectively. All other factors have the number of individual digits. Moreover, the number of cases that do not need to be sentenced to punishment is nearly three times that of cases that are exempted from criminal punishment, which reflects that the conditions for exemption from criminal punishment may be stricter.

In the non-prosecution decision that does not specify whether it does not need to be sentenced or exempted from criminal punishment, confessing guilt and accepting punishment still appear the most frequently, 204 times, with a probability of 90.27%. Similar to the exemption from criminal punishment, the second place is a confession, which appears 80 times with a probability of 35.40%; There were 63, 55, 46, and 42 times of getting an understanding, truthful confession, first-time offense, and voluntarily surrender respectively, with probabilities of 27.88%, 24.34%, 20.35% and 18.58%. Different from no need to be sentenced to punishment and exemption from criminal punishment, the frequency of surrender ranked lower. Compensation, occasional offender, repentance, no criminal record, and returning stolen goods appeared 38, 29, 27, 17, and 11 times respectively, accounting for 16.81%, 12.83%, 11.95%, 7.52%, and 4.87%. All other factors appear in single digits.

4. Theoretical Reflection on Discretionary Non-prosecution

(1) Criteria for Judging Minor Criminal Circumstances

Minor crime is the basic condition for discretionary non-prosecution, [12] which is the precondition for further judging whether it can be exempted from punishment or does not need to be sentenced to punishment. Therefore, it is vital to accurately understand the judgment standard of "minor crime circumstances" in studying the consideration factors of discretionary non-prosecution. There are great differences in the academia on the criteria for judging the minor circumstances of a crime. One view holds that the minor circumstances of a crime refer to the situation where the crime and its circumstances are light. The other view is that regardless of misdemeanor or felony, as long as it belongs to a "minor crime", it should be included. [13] The difference between these two

viewpoints lies in whether a misdemeanor should be used as the judgment standard of discretionary non-prosecution. From the statistics of charges in the above judicial practice, we can know that most of the charges of discretionary non-prosecution are mainly misdemeanors in the traditional sense, such as dangerous driving crimes, traffic accidents crimes, theft crimes, crimes of helping information network activities, etc., consistent with the empirical research results of some scholars. [14] However, some cases of serious crimes in the traditional sense, such as negligent death and selling toxic harmful food, are also considered minor crimes. This proves that it is inappropriate to regard misdemeanor as one of the criteria for judging the minor circumstances of a crime, which will lead to the application of discretionary non-prosecution in a too small scope to cover some cases where the crimes that can be applied to discretionary non-prosecution are felonies. The reason for this situation is that there are often multiple levels of crimes in the same crime, and the severity of different situations of the same crime varies greatly. For example, multiple statutory punishments exist from control to the death penalty in the crime of intentional injury. If it is not combined with specific criminal circumstances, it is difficult to be defined as whether it meets minor criminal circumstances. Because academia generally regards fixed-term imprisonment of three years as the watershed between misdemeanor and felony, the third chapter of this paper also combs the data of the highest statutory penalty in the decision not to prosecute. Table 2 shows that although the statutory penalty for most discretionary non-prosecution cases is less than three years, there are still cases with the statutory maximum penalty of five years, seven years, and ten years, accounting for 7.96%. This is because even in the same criminal class of the same crime, the criminal circumstances of different cases may differ greatly. For example, the statutory maximum penalty is five years in prison, but a case with the crime of opening a casino and relatively minor circumstances may still be deemed as minor because of the specific circumstances. Hence, cases with minor criminal circumstances must meet the condition of a misdemeanor, which will trigger a smaller scope of minor criminal circumstances and omit some cases that can be considered minor criminal circumstances due to lenient circumstances. To judge whether a case belongs to a minor crime, it should be analyzed in combination with the specific crime circumstances.

The first viewpoint of academia is inconsistent with the data obtained from combing the decision of non-prosecution, while the second viewpoint abandons the standard of misdemeanor and proposes that the circumstances of the crime are the key to judgment. However, it is too vague to be effectively used in judicial practice, which increases the subjective risk of judgment and easily impacts the principle of “statutory crime”. Therefore, the people’s procuratorate should clarify the judgment standard and judgment process of “minor crime circumstances”. Through the data observation, it is found that the crimes identified as minor crimes belong to the lightest of the crimes, that is, the lowest crime level with the highest statutory penalty, and the penalties at the lowest crime level include public surveillance or single fine. If the standard of minor crime is defined by the lowest crime level, it can include minor crimes and serious crimes premised on minor crimes. For example, the lowest crime level of a misdemeanor includes the statutory penalty of control or a single fine, while the crime level of minor crimes in some serious crimes also includes control or single fine. For instance, the crime of endangering national security includes the sentencing of “fixed-term imprisonment of not more than three years, criminal detention, public surveillance or deprivation of political rights”. Therefore, the author believes that the crime with minor circumstances should be located at the lowest crime level of its crimes, which can be sentenced to control or a single fine.

(2) Consideration Factors of Exemption from Criminal Punishment and No Need to Impose Punishment and Their Relationship

After judging the circumstances of the crime as minor and before making a decision not to prosecute, it is necessary to judge whether the crime is given a lighter punishment or whether it meets the condition of “no need to be sentenced or exempted from punishment”. Academia generally believes that no need to impose punishment and exemption from criminal punishment are two situations of discretionary non-prosecution. [16] This paper sorts through the consideration factors of the two situations separately and tries to explore their difference and relationships by combing the

circumstances where the people's procuratorate decides that it does not need to be sentenced to punishment.

After analyzing the factors considered by the people's procuratorate, this study deems that these factors can be divided into socially harmful factors and recidivism possibility factors. Because the social harmfulness of the crime has been regarded in the judgment of minor crime circumstances, the socially harmful factors in this stage mainly focus on making up for the crime consequences afterwards, including compensation, obtaining the victim's understanding, and returning stolen goods. The possibility of recidivism mainly evaluates the necessity of special prevention and considers the personal danger of the parties, such as the consistent performance of the offender before committing the crime and the confession and repentance after the crime. [17] Specifically, the possible factors of recidivism include confessing guilt and accepting punishment, repentance, voluntarily surrender, first-time offender, occasional offender, and so on. After comparing the probability of the factors that do not need to be sentenced to punishment with those that are exempted from criminal punishment, the author finds that the probability of the repeated possibility factor of confessing guilt and punishment in both exempting from criminal punishment and not needing to be sentenced to punishment is over 90%, which is more in line with the proposal of some scholars that "cases that confess guilt and accept punishment can be relatively non-prosecuted". [15] Among the factors that do not need to be sentenced to punishment, the socially harmful factor of obtaining the victim's understanding appears frequently. Among the factors that are exempted from criminal punishment, the proportion of the number of social risk factors in all factors is obviously lower than that in those who do not need to be sentenced to punishment. For confession, the possibility of recidivism accounts for a higher proportion of exemption from criminal punishment than it does not need to be sentenced. Compensation and return of stolen goods are lower in the consideration of factors exempting from criminal punishment than not needing to be sentenced to punishment. Hence, in judicial practice, the factors that do not need to be sentenced to punishment focus on social harmfulness, that is, obtaining the victim's understanding, compensation, returning stolen goods, etc., while the factors that are exempted from criminal punishment focus slightly on the possibility of recidivism, such as confession and truthful confession. This study believes that the difference between exemption from punishment and no need to impose punishment lies in the fact that the court pays more attention to socially harmful factors when deciding that there is no need to impose punishment. When deciding on exemption from criminal punishment, focus should be put on the recidivism possibility to determine that there is no need for special prevention.

According to this research, because there are many overlapping factors involved in the consideration of not needing to impose punishment and exempting from criminal punishment, the theoretical circle should make a clear distinction between them to guide judicial practice, such as enumerating the circumstances of lighter punishment or exemption from punishment and classifying them into socially harmful factors and recidivism possibility factors. In addition, the prosecutor should enumerate the circumstances of lighter punishment or exemption from punishment contained in the case and judge whether the conditions of discretionary non-prosecution are met. After confirming that the decision of non-prosecution can be made, the prosecutor should judge whether the decisive factor in making the decision of non-prosecution is the socially harmful factor or the recidivism possibility factor. If the socially harmful factors play a decisive role, then make a decision that there is no need to impose a penalty, otherwise, the decision of exemption from criminal punishment will be made. If these two types of factors play a decisive role together, the discretionary non-prosecution decision is made directly, which is not necessary to specify what discretionary non-prosecution is. At the same time, the prosecutor's discretion should be based on the statutory specific exemption from punishment, so as to avoid "arbitrariness of crime and punishment".

5. Conclusion

This paper takes the influencing factors of discretionary non-prosecution as the main research problem, which adopts empirical analysis to sort out 930 discretionary non-prosecution decisions of people's procuratorates. It is found that the case handlers divide the judgment criteria of discretionary non-prosecution into "minor criminal circumstances" and the consideration factors that do not need to be sentenced and exempted from criminal punishment. Moreover, the judgment criteria of minor criminal circumstances are statutory punishment and charges, and the consideration factors that do not need to be sentenced and exempted from criminal punishment are 14 indicators such as confessing guilt and accepting punishment, surrender, confession, getting the victim's understanding, and first offense. Two conclusions are obtained from this paper. (1) In judicial practice, the crime which is located in the lowest level of crime and can be sentenced to control or a single fine should be considered minor crime. (2) When the people's procuratorate makes a decision of non-prosecution, it focuses on considering the socially harmful factors when deciding not to impose a penalty, while mainly considering the recidivism possibility when making a decision to exempt from criminal punishment.

Different from previous studies, this paper selects 930 discretionary non-prosecution decisions from *China Procuratorial Documents Network* in May 2022, and makes descriptive statistics and analysis on these decisions, which is innovative in method. In addition, this paper has the following relatively new findings. (1) When formulating the standard of minor crime circumstances, we should take the crime level as the unit, not the crime. (2) The difference between exempting from criminal punishment and not needing to be sentenced to punishment is mainly reflected in its different emphasis on socially harmful factors and recidivism possibility factors.

However, this paper still has the following shortcomings: (1) As a theoretical support, the number of non-prosecution decision materials is small. (2) There is no precise definition of the need for no penalty and exemption from criminal punishment. First of all, although this paper creatively uses quantitative analysis to sort out the factors of discretionary non-prosecution, due to the limited creative manpower, the number of discretionary non-prosecution decisions as samples is small, which makes the conclusion incomplete and one-sided. Later scholars can study the decision of non-prosecution on a larger scale and enlarge samples of discretionary decision of non-prosecution as the research object, so as to make the conclusion more accurate. Meanwhile, this paper only studies the relationship and difference between not needing to be sentenced to punishment and exempting from criminal punishment. Due to the limited research samples, it cannot accurately define them. Research in the future can start from the concepts of not needing to be sentenced to punishment and exempting from criminal punishment, so as to make a more precise definition of the two, perfecting our discretionary non-prosecution system.

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