

Study of the Relative Non-Prosecution in Cases Related to Admitting Guilt and Accepting Punishment

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Abstract: The establishment of the leniency system for admitting guilt and accepting punishment is in favor of expanding the application of relative non-prosecution, but the application rate in practice is low. Traditional reasons for this problem include vague application standard, complicated procedure and unreasonable assessment index. It is also due to “prosecution-oriented” of the leniency system, the unclear impact of admitting guilt, as well as institutional risks. To promote the application of relative non-prosecution in cases related to admitting guilt and accepting punishment, it is necessary to clarify the application standard and improve the procedures of notification, negotiation as well as signing recognizance. The victim should effectively participate in the process of deciding not to prosecute. In addition, the people’s procuratorate shall be prohibited from initiating a public prosecution even though the suspect reneges on the admission of guilt after non-prosecution.

1. Introduction

In October 2019, the Supreme People’s Court, the Supreme People’s Procuratorate, the Ministry of Public Security, the Ministry of State Security issued the Guiding Opinions on the Application of the Leniency System for Admitting Guilt and Accepting Punishment (hereinafter to be referred as Guiding Opinions) required to expand the application of relative non-prosecution in cases related to admitting guilt and accepting punishment. However, in practice, the application of relative non-prosecution in these cases is poor. Surveys show that the people’s procuratorate rarely applies non-prosecution procedure in cases related to admitting guilt and accepting punishment.¹ The application rate of non-prosecution has not increased with the extension of the leniency system for admitting guilt and accepting punishment, but still in a low level.² At present, only approximate 5% of the accused have not been prosecuted in cases where the leniency system for admitting guilt and accepting punishment was applied, but nearly 40% of them got a suspended punishment sentence.³ In short, the application of relative non-prosecution in cases related to admitting guilt and accepting punishment is frozen.

In view of this, this paper analyzes reasons for this problem, points out the agreement between relative non-prosecution and the leniency system for admitting guilt and accepting punishment, and then recommends several measures to improve it.

2. The Problems of Relative Non-Prosecution in Cases Related to Admitting Guilt and Accepting Punishment

Actually, the application rate of relative non-prosecution in Chinese criminal procedure has always been low. Commentators have listed two reasons. First, the application standards of relative non-prosecution are vague. Secondly, the procedural control and assessment mechanism are complicated.⁴ After the establishment of the leniency system for admitting guilt and accepting

punishment, these situations remain unchanged. For instance, what circumstances of a crime are minor remains unclear. Another example is that while the reform of judicial accountability has granted more discretion to prosecutors, non-prosecution decisions still need the approval of the president of a people's procuratorate. Certainly, these factors continue to go against the application of relative non-prosecution in cases related to admitting guilt and accepting punishment.

Besides, the prosecution-oriented of the leniency system for admitting guilt and accepting punishment, the unclear impact of admitting guilt to non-prosecution, and the risks also undermine the prosecutor's motivation to make a non-prosecution decision.

2.1 The Prosecution-Oriented of the Leniency System for Admitting Guilt and Accepting Punishment

While the leniency system for admitting guilt and accepting punishment is applicable to all cases according to the law, it is actually designed on the basis of prosecution cases rather than non-prosecution cases. First, "accepting punishment" usually refers to recognizing the sentencing recommendation which merely exists in prosecution cases. Some commentators argued that sentencing recommendation is the core of the leniency system for admitting guilt and accepting punishment.⁵ Secondly, the recognizance to admit guilt and accept punishment (hereinafter to be referred as recognizance) is available in prosecution cases. According to Article 174 of Criminal Procedure Law, the criminal suspect shall sign a recognizance if he or she voluntarily admits guilt and agrees with the sentencing recommendation and the applicable procedures. The sample of recognizance also contains the contents of sentencing recommendation and trial procedure.⁶ Thirdly, other procedures such as fast-track procedure, the procedure of amending the sentencing recommendation, the procedure of examining the voluntariness, authenticity and legality of admitting guilt and accepting punishment exist nowhere other than prosecution cases. In this sense, making a non-prosecution decision deviates from the "right track".

Among them, the procedure of signing a recognizance deserves more attention because it places the prosecutor in a dilemma if he wants to make a non-prosecution decision. To illustrate, if the prosecutor requires the suspect to sign a recognizance, it is "illegal" because the recognizance exist in prosecution cases in accordance with the law. But if he does not, then the case cannot be identified as a case related to admitting guilt and accepting punishment. In practice, the prosecutor often requires the suspect to sign a recognizance. However, because the prosecutor cannot make a non-prosecution decision independently, he cannot give the suspect a promise of non-prosecution. To solve this problem, prosecutors have created two kinds of recognizance: (1) Accepting sentencing recommendation or non-prosecution, such as accepting a fixed-term imprisonment of six months or relative non-prosecution. (2) Accepting sentencing recommendation. It is rare for a recognizance contains only the content of non-prosecution. Therefore, the prosecutor can easily initiate a public prosecution when the recognizance contains the content of sentencing recommendation. Moreover, the suspect and defender or duty lawyer are also subject to the sentencing recommendation, which impedes their presentations of non-prosecution opinions.

2.2 The Unclear Impact of Admitting Guilt

In cases where the suspect admits guilt and the prosecutor makes a non-prosecution decision, there are two logical relations between admitting guilt and a non-prosecution result. One is that no causality exists between them. For example, in cases where the circumstances of a crime are so minor that no criminal punishment is necessary, prosecutor could decide not to initiate a public prosecution without the suspect's admission of guilt. Another relation is that admitting guilt promotes the non-prosecution decision. To illustrate, the prosecutor will initiate a public prosecution if the suspect refuses to admit his guilt.

Theoretically, admitting guilt should have a positive impact on the decision not to prosecute. In practice, however, whether and to what extent, admitting guilt plays a role in a decision not to prosecute is very difficult to be assessed. Legal document is vague on this issue. Article 8 of the Guiding Opinions provides that the reduction of or exemption from punishment shall be based on the law. In other words, a decision not to prosecute can only be rendered based on legal provisions.

Nevertheless, it is noticeable that neither the Criminal Law nor the Criminal Procedure Law provides that admitting guilt and accepting punishment could lead to non-prosecution or exemption from punishment. Therefore, the prosecutor is free to evaluate the effect of the suspect's admission of guilt, and the result is often unpredictable. For example, an empirical study indicates that a significant number of prosecutors believe that admitting guilt and accepting punishment does not contribute to non-prosecution decisions. By contrast, some prosecutors may make a decision to prosecute if the suspect admits his guilt since the prosecution work becomes easier where the suspect confesses and admits his guilt.⁷ To put it differently, admitting guilt and accepting punishment occasionally leads to prosecution rather than non-prosecution.

2.3 Two Great Risks in Non-Prosecution in Cases Related to Admitting Guilt and Accepting Punishment

First, it may undermine the authenticity of admitting guilt and accepting punishment which is the foundation of the leniency system. For one thing, "leniency" may lead to false confessions. An innocent person may choose to plead guilty for avoiding detention or heavy punishment if found guilty. Compared to a light punishment such as lower sentence, the attraction of non-prosecution to a suspect is much harder to resist. Thus, even an innocent suspect is likely to admit guilt if the prosecutor promises him a non-prosecution decision on condition that the suspect confesses. More importantly, false confessions and admissions are hard to be identified because the criminal procedure is simplified in cases related to admitting guilt and accepting punishment. It is particularly true in the non-prosecution cases where the judicial review is absent.

Secondly, it may cause the abuse of non-prosecutorial discretion. As mentioned earlier, the court usually does not have the chance to review non-prosecution cases which is completely controlled by the prosecutor. Under the background that the procuratorate takes the leading responsibility in the leniency system for admitting guilt and accepting punishment, the prosecutor may abuse the discretion to make a non-prosecution decision. Undoubtedly, once the non-prosecutorial discretion is used improperly, the legislature and the public would distrust the procuratorate. This is unfavorable for making a non-prosecution decision in practice.

It also should be mentioned that assessment index of application rate for the leniency system may increase these two risks. The assessment index requires the application rate for the leniency system should reach no less than 70%, even more than 80% in all cases. To meet this requirement, the prosecutor may either induce the suspect to admit guilt and accept punishment or lower the threshold for the application of the leniency system for admitting guilt and accepting punishment.⁸ For instance, to attract the suspect to choose the leniency procedure, the prosecutor may find the principal as accessory, reduce the criminal fact or amount. It is obviously a violation of the authenticity of admitting guilt and accepting punishment, as well as a sort of abuse of non-prosecutorial discretion.

3. The Agreement between the Leniency System for Admitting Guilt and Accepting Punishment and the Relative Non-Prosecution System

The leniency system for admitting guilt and accepting punishment and the relative non-prosecution system should promote each other because their values and functions are compatible.

First, both systems help to implement the criminal policy of combining leniency with strictness. According to Guiding Opinions, the leniency system for admitting guilt and accepting punishment is a significant measure to fully implement the criminal policy of tempering justice with mercy. To implement this criminal policy is also one important purpose of relative non-prosecution procedure. When the relative non-prosecution procedure was established in 1996 Criminal Procedure Law, legislators illustrated that relative non-prosecution procedure would be conducive to the criminal policy of combining leniency with strictness.⁹ Obviously, deciding not to prosecute in cases related to admitting guilt and accepting punishment is a lenient treatment to the criminal suspect who voluntarily admit guilt and sincerely repent of his crimes. It is therefore helpful to implement the

criminal policy tempering justice with mercy.

Secondly, both systems are conducive to optimizing the allocation of judicial resources. At present, the trial procedures for the cases related to admitting guilt and accepting punishment have developed into a “three-level descending” pattern, namely, ordinary procedure, summary procedure as well as fast-track procedure. It certainly improves the efficiency of the trial. But if we merely focus on improving the efficiency of trial procedure, it would be difficult if not impossible to save the judicial resources further. Take the fast-track procedure for example, the procedure could not be simplified anymore for the court investigation and court debate have been omitted. Thus, to further optimize the allocation of judicial resources, attentions should be paid on the pre-trial procedure. In this regard, the relative non-prosecution can significantly reduce the number of cases otherwise would enter into the court, further saving judicial resources and improving the efficiency of the whole criminal procedure.

Thirdly, both systems are conducive to strengthening judicial protection of human rights. The leniency system for admitting guilt and accepting punishment grants the accused a right to plead guilty and to be treated leniently. Article 5 of the Guiding Opinions provides: “the leniency system for admitting guilt and accepting punishment may apply to all criminal cases, and no criminal suspect or defendant may be deprived of the opportunity to receive lenient punishment by admitting guilt and accepting punishment.” Relative non-prosecution is also a protection of the suspects’ rights. For one thing, suspects who are not prosecuted remain legally innocent. They could avoid the consequences of a conviction, such as being labeled as a criminal, imprisonment, or losing jobs. For another, suspects could get rid of the criminal procedure, regain their freedom and return to society as soon as possible after a non-prosecution decision.

Additionally, it is usually beneficial to the rights and interests of the victim in practice. If the criminal suspect could get a non-prosecution decision, he will be definitely motivated to compensate the victim. The victim’s rights and interests thus will be protected adequately. All in all, it is hard to escape the conclusion that both suspects and victims could benefit from non-prosecution decisions in cases related to admitting guilt and accepting punishment.

4. Steps to Expand the Application of Relative Non-Prosecution in Cases Related to Admitting Guilt and Accepting Punishment

To promote the application of relative non-prosecution in cases related to admitting guilt and accepting punishment, it is necessary to clarify the application standard and procedure. Meanwhile, controlling the risks mentioned above is also helpful.

4.1 Clarify the Application Standard

As mentioned early, prosecutors are often confused about the criteria of non-prosecution because when circumstances of a crime are trivial and in which situation the criminal punishment is unnecessary are unclear. Therefore, this article advocates that “the circumstances of the crime are minor” can be defined as “generally refers to a sentence less than three-year imprisonment”, which is in line with the common distinction between misdemeanor and felony. As for being exempted from criminal punishment, the Criminal Law should be clear that if the suspect admits guilt and accepts punishment, a judgment to grant exemption from punishment may be rendered. At the same time, the Criminal Procedure Law should require the prosecutor to take into account the specific circumstances of admitting guilt and accepting punishment when deciding whether prosecute or not.

4.2 Standardize the Application Procedures

First, the notification procedure needs to be improved. When investigators and prosecutors notify suspects of the legal consequences of admitting guilt and accepting punishment, they should let the suspects know that the consequences of admitting guilt and accepting punishment include the possibility of non-prosecution decision. Of course, the notification shall be fully explained when necessary. It is also important to note that the investigator should not make a promise not to prosecute for it is the remit of the prosecutor, but should let the suspect understand that

non-prosecution is a possible consequence.

Secondly, clarifying negotiation procedure is necessary. When listening to the opinions of the suspect and his or her defender or duty lawyer, the prosecutor shall consult with them on whether the circumstances of the crime are minor, and whether it is possible to make a relative non-prosecution decision. Where the suspect and the defender or duty lawyer present an opinion of non-prosecution, the prosecutor shall assess it carefully.

Thirdly, the suspect should sign the recognizance in relative non-prosecution cases. The recognizance which contains the content of non-prosecution not only provides an opportunity for the suspect and lawyer to present non-prosecution opinions, but also helps the prosecutor to evaluate the possibility of non-prosecution carefully, instead of initiating a public prosecution directly.

Finally, the relative non-prosecution approval process should be simplified. In practice, the prosecutor is often reluctant to make a relative non-prosecution decision for the approval process is complicated. Therefore, if the prosecutor could make a relative non-prosecution decision independently, the application rate of non-prosecution may increase accordingly. More importantly, the prosecutor who has the power to make a relative non-prosecution independently could effectively negotiate with the suspect and the defender or duty lawyer on the issue of non-prosecution. Otherwise, the prosecutor could not promise the suspect of a non-prosecution decision for it is out of the prosecutor's remit.

4.3 The Victim's Right to Participation

According to Criminal Procedure Law, the people's procuratorate shall, when examining a case, hear the opinions of the victim and the victim's litigation representative. In the course of non-prosecutorial discretion, listening to the opinions of the victims not only facilitates their meaningful participation in the decision-making process, but also is an effective supervision to the prosecutor. It thus keeps the non-prosecution decision fair and reasonable.

Additionally, where a people's procuratorate decides not to initiate a public prosecution for a case with a victim, it shall serve a written decision upon the victim in accordance with the law. Then, the victim may file a petition or institute an action in a court. Obviously, the petition and action of victims could largely prevent the prosecutor from abusing the non-prosecutorial discretion.

4.4 The Suspect's Right to Repentance

Guiding Opinions takes a negative attitude toward the suspect's repentance after non-prosecution. According to Article 51 of Guiding Opinions, if the criminal suspect denies his involvement after non-prosecution, the procuratorate could revoke the original decision of non-prosecution and institute a public prosecution. This provision delivers a clear message to the criminal suspect, to wit, if he reneges on the admission of guilt and acceptance of punishment, he may be prosecuted again. Undoubtedly, it deters the criminal suspect's retraction of his admission of guilt.

In practice, the retraction of the admission of guilt and acceptance of punishment usually increases the workload of the prosecutor, then may irritate the prosecutor and lead to a retaliatory prosecution. A study shows that a number of prosecutors arbitrarily make a prosecution decision after non-prosecution; some decisions of prosecution are retaliatory.¹⁰ In relative non-prosecution cases, whether and to what extent, admitting guilt and accepting punishment has worked is a subjective judgment of the prosecutor. Allowing re-prosecuting evidently "legitimate" the arbitrary prosecution decision, and the prosecutor could punish uncooperative suspects who renege on the admission of guilt. As a consequence, whether the suspect is innocent or not, he or she is unlikely to renege for fear of being re-prosecuted. It is obviously unfavorable to the authenticity of admitting guilt and accepting punishment.

In view of this, the provision of re-prosecution should be abolished. To specify, where the suspect reneges on his admission of guilt after non-prosecution, the people's procuratorate shall conduct an examination and make decisions as follows: if the criminal suspect has no criminal facts, or has any of the circumstances specified in Article 16 of the Criminal Procedure Law, the original decision not to prosecute shall be revoked, and another decision not to prosecute shall be made according to the law. Otherwise, the original decision not to prosecute should be sustained. Only in

this way can the suspect renege freely and help to guarantee the authenticity of the case.

5. Conclusion

Improving the leniency system for admitting guilt and accepting punishment is an important judicial reform currently. In the context of the surge of caseload, we should pay more attention to relative non-prosecution procedure whose values include saving judicial resources, improving the efficiency of criminal actions and realizing the criminal policy tempering justice with mercy. The prosecutor's non-prosecutorial discretion therefore should be expanded. At the same time, the huge risks should not be ignored.

To promote accurate application of relative non-prosecution in cases related to admitting guilt and accepting punishment, we should clarify the application standard and procedures. Particularly, the Criminal Law and Criminal Procedure Law should provide that admitting guilt and accepting punishment is a significant factor to render non-prosecution or exemption from punishment. Additionally, the suspect, defender, duty lawyer, as well as the victim should effectively participate in the decision-making process. After non-prosecution, the prosecutor should be forbidden to initiate a public prosecution even if the suspect reneges on his admission of guilt.

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