摘　要

我国犯罪结构已经转变为以轻罪为主的模式，轻罪治理已经成为刑事诉讼的重要课题。为适应轻罪治理需要，最高人民检察院提出要在轻罪案件领域依法少捕慎诉慎押的工作要求，检察机关需要充分运用不起诉裁量权以实现轻罪案件的繁简分流，适应轻罪治理的现实需要。裁量不起诉是指检察机关对于符合起诉条件的犯罪嫌疑人，可以通过行使自由裁量权决定对该犯罪嫌疑人起诉或者不起诉的制度。裁量不起诉的前提是符合起诉条件，本质在于自由裁量权的行使，公共利益的考量、诉讼效益的需要、刑事追诉的必要性以及刑罚目的观的转变为裁量不起诉提供正当性基础。轻罪治理对裁量不起诉制度提出新要求，现有的裁量不起诉模式是否能够适应轻罪治理的需要，能否满足慎诉的工作要求。因此需要对现行的裁量不起诉的立法与司法进行梳理，探究我国现行的裁量不起诉模式能否适应现实需要，是否需要转型等。

通过对裁量不起诉的相关立法分析发现，酌定不起诉的立法限制较为严格，酌定不起诉只能适用于法定刑三年以下有期徒刑并且存在刑罚免除事由的刑事案件，在现行法下实际上属于微罪不处罚。此外，附条件不起诉的适用范围为宣告刑一年以下有期徒刑的微罪案件，同样属于微罪不起诉。虽然核准不起诉突破了微罪的限制，但是实践中并没有相关案例。在司法现状方面，对学者们相关的实证研究梳理发现，裁量不起诉在实践中也主要表现为微罪不起诉。裁量不起诉局限于微罪不起诉造成了不起诉裁量空间有限、起诉不具有公共利益的案件无法裁量不起诉、检察机关的公共利益职责难以实现以及不起诉的分流作用难以实现等现实问题。

实际上，基于公诉的公益属性，公共利益才应当是裁量不起诉的标准，可以将司法实践中的认罪认罚、和解、犯罪情节轻重等因素纳入公共利益考量范围，以有无公共利益作为裁量不起诉的标准，进而构建公共利益裁量不起诉模式。如上所述，裁量不起诉局限于微罪不起诉模式的弊端明显，在轻罪治理以及现代化社会治理的背景下，裁量不起诉由微罪不起诉向公共利益不起诉模式转型有以下现实必要性：扩张并且规范不起诉裁量权、促进检察机关履行公益职责、挽救和教育犯罪行为人、实现刑事案件繁简分流以及适应现代化社会治理需要。

此外，对英、美、法、德等国家的公共利益裁量不起诉研究来看，这些国家都强调公共利益裁量不起诉模式，以公共利益作为裁量不起诉的标准。而且有着

较为明确的公共利益考量因素指引，考量的因素也相对多元丰富，包括诉讼经济、被害人利益以及犯罪嫌疑人利益等广义的公共利益。最后，这些国家也注重规范公共利益审查，包括不起诉司法审查程序、不起诉法院同意程序、起诉替代措施以及律师的有效参与等。

在结合我国国情的基础上，可以从以下几个方面构建我国的公共利益裁量不起诉模式。其一，明确利益平衡、惩罚犯罪与人权保障相统一以及诉讼效益原则等公共利益的裁量原则。其二，明确公共利益裁量不起诉模式原则上适用于轻罪案件，轻罪案件是指宣告刑在三年以下有期徒刑的案件，例外适用于涉及重大立功或者国家重大利益的严重刑事案件。其三，从犯罪行为本身、犯罪嫌疑人的情况、事后表现、被害人情况、诉讼经济、社会公众、国家利益等方面细化公共利益的考量因素。其四，从设置独立的审查阶段和构建审查听证程序来构建独立的公共利益审查程序。其五，从针对被不起诉人设定一般义务与特殊义务，强化跟踪教育与监督考察机制，加强与行政处罚等替代措施的衔接等方面完善公共利益裁量不起诉后的替代措施。

【关键词】不起诉 裁量权 微罪不诉 公共利益

Abstract

The structure of crime in China has shifted to a predominantly misdemeanor pattern, and the management of misdemeanors has become an important issue in criminal proceedings. In order to meet the needs of misdemeanour governance, the Supreme People's Procuratorate has proposed the requirement of fewer arrests, more cautious prosecutions and more cautious detentions in the area of misdemeanour cases in accordance with the law, and the procuratorial authorities need to make full use of their discretionary power not to prosecute in order to achieve a simpler and more complex diversion of misdemeanour cases, and to adapt to the realistic needs of misdemeanour governance. Discretion not to prosecute refers to the system whereby the procuratorial authorities can decide to prosecute or not to prosecute a suspect who meets the conditions for prosecution by exercising their discretionary power. The premise of discretionary non-prosecution is to meet the conditions for prosecution, and the essence lies in the exercise of discretion, the consideration of public interest, the need for procedural efficiency, the necessity of criminal prosecution, and the transformation of the view of the purpose of punishment to provide a justifiable basis for discretionary non-prosecution. The management of misdemeanors has put forward new requirements for the system of discretionary non-prosecution; whether the existing model of discretionary non-prosecution is able to adapt to the needs of misdemeanor management, and whether it is able to meet the requirements of prudent prosecution. Therefore, it is necessary to sort out the existing legislation and judicial system of discretionary non-prosecution, and to explore whether the existing model of discretionary non-prosecution in China can meet the needs of reality and whether it needs to be transformed.

An analysis of the relevant legislation on discretionary non-prosecution reveals that the legislative restrictions on discretionary non-prosecution are more stringent, with discretionary non-prosecution being applicable only to criminal cases in which the statutory sentence is less than three years' imprisonment and in which there are grounds for exemption from punishment, which is in fact a form of microcrime non-punishment under the current law. In addition, the scope of application of conditional non-prosecution is micro-crime cases in which the sentence imposed is

less than one year's imprisonment, which also fall into the category of micro-crime non-prosecution. Although approved non-prosecution breaks through the limitations of micro-crimes, there are no relevant cases in practice. In the judicial status quo, scholars relevant empirical research combing found that discretionary non-prosecution in practice is also mainly manifested in micro-crime non-prosecution. Discretionary non-prosecution is limited to micro-crime non-prosecution caused by non-prosecution discretionary space is limited, prosecution does not have the public interest of the case can not be discretionary non-prosecution, the public interest of the prosecutorial organs of the duty is difficult to realize as well as non-prosecution of the diversion of the role of the difficult to realize the real problem.

In fact, based on the public interest attribute of public prosecution, public interest should be the criterion for discretionary non-prosecution, and factors such as guilty pleas, settlements, and the severity of the crime in judicial practice can be included in the scope of public interest consideration, so that the public interest can be taken as the criterion for discretionary non-prosecution, and the public interest model of discretionary non-prosecution can then be constructed. As mentioned above, the disadvantages of discretionary non-prosecution limited to micro-crime non-prosecution mode are obvious, in the context of misdemeanor management and modernized social governance, there are the following practical necessities for the transformation of discretionary non-prosecution from micro-crime non-prosecution to public-interest non-prosecution mode: expanding and regulating non-prosecution discretionary power, promoting procuratorate to perform the duty of public interest, saving and educating the criminal offenders, realizing the diversion of the complexity and simplicity of the criminal cases, and adapting to the needs of modern social governance.

In addition, the study of public interest discretionary non-prosecution in the United Kingdom, the United States, France, Germany and other countries shows that these countries have emphasized the public interest discretionary non-prosecution model, taking the public interest as the criterion for discretionary non-prosecution. And there is a clearer public interest considerations guidelines, considerations of very diverse and rich, including litigation economy, the interests of the victim and the

interests of criminal suspects and other broad public interest. Finally, these countries also emphasize the regulation of public interest review, including the judicial review process of non-prosecution, the consent process of the non-prosecution court, alternative measures to prosecution and the effective participation of lawyers.

On the basis of China's national conditions, China's public interest discretionary non-prosecution model has been constructed in the following aspects. Firstly, it clarifies the public interest discretionary principles such as balance of interests, harmonization of punishment of crimes and human rights protection, and the principle of procedural efficiency. Secondly, it is made clear that the principle of public interest discretion not to prosecute applies to misdemeanor cases, which are cases where the sentence pronounced is less than three years' imprisonment, with the exception of serious criminal cases involving major merits or major national interests. Third, the public interest considerations are refined in terms of the criminal act itself, the circumstances of the suspect, the performance after the fact, the circumstances of the victim, the economy of the litigation, the public, and the interests of the State. Fourth, constructing an independent public interest review procedure by setting up an independent review stage and constructing a review hearing procedure. Fifth, the public interest alternative measures for discretionary non-prosecution should be improved in terms of setting up general and special obligations for non-prosecuted persons, strengthening the mechanism for follow-up education and supervision, and reinforcing the connection with administrative penalties and other alternative measures.

【 Key words 】 Non-prosecution; Discretion; Non-prosecution of venial misdemeanor; Public interest

目　录

导论

（一）研究背景

目前我国刑事犯罪领域已呈现犯罪结构轻罪化的显著特征，社会危害较大的严重暴力犯罪案件数量在不断减少，相应地，被判处重刑的比例也在不断下降。相反，社会危害较小的轻微犯罪案件数量已呈现上升的态势，同时，被判处的刑罚也随之不断降低。[1]可见，轻罪时代已经来临，因此构建轻罪治理体系也成为2023年度十大刑事检察热词之一。[2]根据最高人民检察院的相关统计，2018—2022年全国检察机关起诉的前五位罪名依次为：危险驾驶罪、盗窃罪、诈骗罪、故意伤害罪、寻衅滋事罪等，[3]其中轻罪罪名明显主导。犯罪结构的重大变化对我国刑事诉讼治理提出了新的要求，刑事诉讼治理应当适应轻罪治理的需要，同时也需要适应现代化社会治理的要求。最高人民检察院最新发布的检察改革工作规划也明确指出要构建我国的轻罪治理体系，强调治罪与治理的并重。犯罪结构的轻罪化一方面需要应对数量不断增加的案件，在有限的检察资源下，需要检察机关充分利用不起诉裁量权进行案件分流，因此需要合理地扩张裁量不起诉权。另一方面，轻罪时代的到来也意味着社会治理的转型，应充分发挥刑事法律的风险预防和社会控制功能。[4]这也就意味着需要通过裁量不起诉进行社会治理和风险控制，不能一味地对犯罪进行追诉和惩罚。此外，随着社会发展，利益冲突与社会矛盾不断复杂化，检察机关在裁量不起诉时也要进行相应的利益权衡，更有效地化解社会矛盾。本文将对合理扩张不起诉裁量权进行研究，同时通过公共利益裁量不起诉模式以权衡个人利益与公共利益，以适应现代社会治理的需要。

我国检察机关是法定的法律监督机关，作为公共利益的代表者与维护者发挥着重要的法律监督职能。党的二十大报告强调要继续加强检察机关的法律监督工作，检察机关需要切实履行维护公共利益的职责。人民检察院是保护国家利益以及社会公共利益的重要力量和组织，是国家监督体系的重要组成部分。实际上，检察机关也在不断履行公共利益职责，对环境污染、食品安全、生态环境破坏、虚假宣传、违法履职等领域提起民事公益诉讼、刑事附带民事公益诉讼、行政公益诉讼等以维护公共利益。但是实际上，公诉才是检察机关履行公共利益职责最

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[1] 参见卢建平：《轻罪时代的犯罪治理方略》，《政治与法律》2022年第1期，第51页。
[2] 参见马菲菲、操余芳：《2023年度十大刑事检察热词》，《检察日报》2023年12月26日，第5版。
[3] 参见靳高风等：《2022—2023年中国犯罪形势分析与预测》，《中国人民公安大学学报（社会科学版）》2023年第2期，第3页。
[4] 参见杨先德：《积极刑法立法下的扩大追诉现象及其司法规制》，《中国刑事法杂志》2021年第6期，第127页。

重要的形式，不可片面地认为检察机关提起公诉就是维护公共利益，实际上检察机关对轻微案件或者起诉不具有甚至有损公共利益的案件提起公诉也是公诉权的滥用，[5]此种消极滥用同样没有正确履行公共利益职责。因此，检察机关需要重视裁量不起诉中的公共利益考量，但是应当如何进行公共利益考量呢？本文将对此展开研究，以促进检察机关充分合理地行使不起诉裁量权，正确履行公共利益职责。

2020 年，最高人民检察院提出少捕慎诉慎押刑事司法理念，以改变“构罪即捕，一押到底，一诉了之”的司法顽疾。[6]随着少捕慎诉慎押刑事司法理念的推行，实务中出现单纯为了不捕率、不起诉率而变相扩张少捕慎诉慎押适用面的问题，因此，最高人民检察院将其调整为轻罪案件领域内依法少捕慎诉慎押的工作要求。最高人民检察院检察长应勇在调研时强调“要重视和加强轻罪治理体系的理论研究与司法实践探索，把依法少捕慎诉慎押作为办理轻微刑事案件的具体工作要求。”[7]此次调整是为了防范羁押措施与不起诉裁量权的滥用，但是应当如何防止不起诉裁量权的滥用呢？本文将对裁量不起诉的具体裁量标准，以及裁量不起诉的程序控制展开研究，在完善裁量不起诉的程序控制后，对于进一步扩大裁量不起诉的适用领域加以研究，在扩张不起诉裁量权的同时规范其适用。

（二）文献综述

1、国内研究现状

早在上世纪，就有学者对裁量不起诉以及起诉便宜主义等进行研究，本世纪初，对于不起诉裁量权、裁量不起诉制度以及裁量不起诉的比较研究逐步增加。随着犯罪结构变化以及社会经济的发展，学者们对于裁量不起诉进行了充分的研究与反思，对于裁量不起诉的概念、分类、理论基础以及裁量不起诉的适用条件、现状、问题及其成因进行进一步研究，并提出相应的完善方案。此外，学者们特别关注公共利益因素在裁量不起诉中的作用。下面就其中的代表性研究作简要介绍。

其一，裁量不起诉的概念与分类。早在上世纪，就有学者指出裁量不起诉是指检察机关对于符合充分的证据条件以及追诉条件的刑事案件，基于自由裁量权可以决定是否提起公诉。[8]此后，有学者对其加以细化和延伸，认为起诉裁量权

[5] 参见谢小剑：《公诉权滥用形态的发展》，《中国刑事法杂志》2009 年第 11 期，第 79 页。
[6] 参见张建伟：《少捕慎诉慎押的基本内涵与适用准则》，《人民检察》2022 年第 15 期，第 6 页。
[7] 巩宸宇：《最高检调研组在山西调研》，来源于最高人民检察院官网，访问地址：https://www.spp.gov.cn/tt/202309/t20230915_628266.shtml，最后访问日期：2024 年 3 月 3 日。
[8] 参见柯葛壮：《论起诉裁量原则与免予起诉》，《政治与法律》1992 年第 2 期，第 35 页。