

檢察官定位與指令拘束 ——德國法的視角啟發

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摘 要

檢察官扮演介於法官與警察之間的法律守護人，不但必須履行客觀義務與遵守法定原則，更須將法價值的實現作為其存在的根本意義，而與一個把法律當作工作制約的行政官有所區別。

檢察官在憲法的權力分立意義上屬於行政權，而不在憲法第七章有關「司法」的規範範圍內。因此，憲法第 80 條對於從事審判工作的法官，要求須依據法律獨立審判，卻未明文對檢察官做此要求；立法機關更在法院組織法第 63 條與第 64 條分別規定，檢察總長與檢察長對檢察官的指揮監督權以及職務承繼權與移轉權。不過，在刑事程序的任務上，檢察官與刑事法官皆屬廣義的刑事司法機關，透過彼此的分工與制衡，發現真實，並實現保障人權價值在內的司法正義（司法院大法官釋字第 392 號參照）。因此，在追求法律意旨實現的誠命下，司法人員人事條例第 3 條將檢察官與法官合稱為「司法官」，實屬妥適。

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由於檢察官在刑事程序的任務趨近於法官，自須使檢察官猶如法官般地，得以依其確信認事用法。檢察官不同於一般行政公務員，對於上級指令權的限制，亦不能只求不違背法令即可，而須考量到檢察官的司法屬性。據此，檢察首長不應透過指令權強迫檢察官違反自己確信行事，如欲貫徹自己觀點，亦只能行使職務承繼權、職務移轉權，以維持檢察官的司法屬性。

關鍵詞：法律守護人、法定原則、法價值、檢察官、檢察指令權、司法官、行政官、客觀義務

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Discussion on the Position of Prosecutors and the Restriction on Orders Regarding Prosecutorial Matters —From the Perspective of German Law

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Abstract

Prosecutor, as the guardian of law subduing between judiciary and police, may not only comply with objective obligation principle of legality, but especially regard demonstrating the legal value as their essential mission. In contrary, executive official, who regards the law as a bound toward the policies, is fundamentally distinct from prosecution system.

Under the scheme of separation of powers in constitution, prosecutor was assigned to the executive branch, so the Section 7 (Judiciary) did not include prosecution system within; hence, Constitution Article 80 only dictated that judges shall hold trials independently. Besides, Legislative Yuan had separately entitled the right of instruction and supervision and the right to take over or commission official tasks to prosecutor general and chief prosecutor in Article 63 and 64 of Court

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Constitution Act. However, within discharging duty in criminal proceedings, prosecutors and judges are both regarded as the generalized judiciary, which counterbalanced and duty-divided with each other to discover the legal fact within cases, and to accomplish the judicial justice and the human right protection (see Interpretation No. 392 of Judicial Yuan). Thus, at the behest of the law, it is accurate to position prosecutor and judge as “judicature” jointly in Article 3 of Jurisdiction Personnel Management Act.

There is an obligation for prosecutors to identify cases within the *opinio juris*, since the role of prosecutor resemble judges under the criminal proceedings. Consequently, the restriction on the right to command between superior and subordinate prosecutor could not only submit to the law, but also ponder the character as judicature, which significantly dissimilar from general executive public official.

Whereupon, prosecutor general could not oblige subordinate prosecutors to alter their *opinio juris* by the right to command. So as to the implementation of the *opinio juris* of prosecutor general himself/herself, in case of discrediting the judicature character of prosecutor, he/she could only exercise the right to retract or transfer.

Keywords: Guardian of Law, Principle of Legality, Legal Value, Prosecutor, Right to Command, the Judicial Officer, the Administrative Officer, Objective Obligation