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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