

## **The Objective and Legal Obligation of the Prosecutor in the Comparison of China and Western Countries**

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**Abstract:** The objective and legal obligation of prosecutor cannot fully separated from the power of public prosecution from the procuratorial organ. In Western developed countries, the objective and legal obligation has little effect on prosecutors; In China, the objective and legal obligation is limited. The conflict between the function of the prosecution and the performance of objective and legal obligation is inborn. The procuratorial organ can only choose to fight crimes or to protect human rights.

At present, the world has given the prosecutor objective and legal obligation. It is widely recognized that the combination of its function and the prosecutor's allegations of crime is not an impossible task. Some even believe that one of the reasons for building the system of prosecutor in European is that prosecutors could maintain the legitimacy of the investigation process as legal experts to avoid abusing human rights.

The objective and legal obligation of the prosecutor is not enough to prevent the taking of prosecution from being removed from the procuratorial organ. "The rational person tends to overestimate reason, and tends to think that people must attribute the advantages and opportunities of the civilization to deliberate design rather than to conventional rules", as the referee of the athletes in the meanwhile, admittedly, the prosecutor's objective and legal obligation and functions of taking of the public prosecution are not absolutely non-fusion, however, a perfect fusion of both is always difficult to practice, is not satisfactory. The specific answer to the question could be explained by the influence of the objective and legal obligation in the Western countries, the influence in Chinese context and the direction of the objective and legal obligation of the prosecutor in future.

### **1. In Western Developed Countries: The Objective and Legal Obligation Has Little Effect on Prosecutors**

Yu-hsiung Lin said: "the procuratorial organs should comply with the objective obligation, keep impartial, rational and prudent". It is that the objective and legal obligation, which asks prosecutors exceeding the role of taking public prosecution and insisting on the objection and impartiality to the fact and being loyalty to the law. This obligation is extended from the prosecutor to maintain the social order and the arrangement of judicial system, means it has inhibited one impulse of striking crime, which comes from the role of prosecutor, weakens excessive enthusiasm which is often difficult to avoid, for the purpose of striking crime. At present, the world's prosecutors generally have the objective and legal obligation. However, the prosecutor's objective and legal obligation is not to be performed well in the practice of these countries.

The common law countries implement generally the mode of "the separation of procuratorial organ and police station", the police organ is responsible for investigating criminality, the procuratorial organ is responsible for prosecuting. For example, as a result of a criminal action against mechanism in America, the objective and legal obligation of prosecutor tend to be diluted by

strong passion for prosecution or even ignored.

In 1971, in the case of *Coolidge against New Hampshire* in the United States, the state's chief procurator issued the writ of the suspect in this case, meanwhile, he also personally investigated the case and served as the chief prosecutor of the case. The state argued that the chief procurator was a super sheriff and neutral, however, that the Supreme Court issued a denial and explained "cannot ask the procurator or police to keep necessary neutrality for their own case", because even if the chief procurator had served as a magistrate and knew all about the case, however, as the prosecutor, he still had benefit of prosecution, he could not realize neutral and detached. In 1971, in another ruling in the United States, the Supreme Court believed that the administration officials don't almost accept any punishment, because of the discretion, but they often change their original, objective and neutral position, because of all kinds of pressure, from the perspective of history, therefore, as one of an administrative officials system, the prosecutors also didn't have a neutral and objective stance. In 1977, in the case of *Connery against Georgia*, the magistrate who issued a judicial writ could each get \$5, but he rejected without any reward, himself and the behavior of deciding to whether issue writs has some kind of relationship of personal, direct and real money, the detached, objective and neutral stance naturally was difficult to maintain, as a result, the Supreme Court ruled that the behavior of issuing writ violated the constitution. All in all, the federal court of America argued that whether officials could be detached is not necessarily determined by their identity, but by their behaviour. In short, it is precisely that the judge can achieve the neutral and transcendent demands of the judges, so the issuing of the judicial writs which contain compulsory security is handed over to the judge in England and the United States. In the meanwhile, from the trend of their relationship, the prosecutor and police is becoming increasingly close, even Britain has decided the procuratorial organ should send lawyers to police authorities to strengthen relations.

The combination of prosecutor and police is the common mode of the relationship in the civil law countries. However, even in Germany where the objective obligation of prosecutor is attached great importance to, the realistic situation is not optimistic, so that "from the point of view of psychology, the objective obligation of prosecutors and its accusation function are conflict" also is admitted by German scholars. Although the law states that the prosecutor could appeal through the courts, it doesn't mean that this situation has to happen, it rarely happens, as a matter of fact, the prosecution will not be taken, because of requirements of the prosecution's efficiency and professional, when it is discovered, but once the prosecution is taken, the German prosecutors are not inferior to the American prosecutors, the role is similar to prosecutors in the USA and British, Thomas Weigend said.

The reason is that the objective and legal obligation is full of contradictions. On the one hand, the prosecutor has to be full of enthusiasm, like the victims who hope to punish the criminal, for the realization of the functions of public prosecution, on the other hand, the prosecutor who obeys with the provisions of the objective and legal obligation should remain calm, rational, objective and neutral, which is required to keep in all moment. The conflicting roles have violated the structure of criminal suit, which contains prosecution, defence, and neutral judgment control, and the psychology regularity, so, the ordinary prosecutors are often difficult to carry out, to fulfill the objective and legal obligation and to strike crime are impossible at the same time. It is fundamental regularity of the human subject that regulating other people is easy and regulating oneself is hard, any violation of this essential regularity must end in failure. The role of that contradiction makes the prosecutors have to do so much less to fulfill the obligative and legal obligation, in the modern western world, and that the criminal justice system does not endow the prosecutors the judicial powers, which obtain powers of the judge of decisions of personal coercive measures, the conviction, and the sentencing. Of course, this does not mean that the objective obligation is meaningless for the prosecutor, but it has a very limited effect.

The western countries mainly implement to protect human rights by applying the system of protecting rights and the system of writ, such as the right of remaining silent, because of its limited influence. In the west countries, the relations of them is closely related to each other, and the relationship between the two is very close. The main aspect of the relationship is cooperation. Its

litigation activities are homogeneous in nature and purpose, and their purposes are to serve jointly the prosecution of crimes --- to fight crime, not to protect the human rights which are pointed to by the objective obligations, and the objective and legal obligation does not enable the prosecutors to maintain an extremely neutral position. In other words, no matter in which system of the criminal action, no matter in which country, the role of conflict and bias of prosecution are inevitable to exercise the power of prosecution, when the objective obligation of the prosecutor is fulfilled in the meanwhile. Certainly, the establishment of objective and legal obligation of prosecutors helps to weaken attacking to maintain balance of prosecution power, right to defense, and judicial authority, but because of its role is limited, we shouldn't have higher expectation with that it helps prosecutors to be neutral and detached quasi judicial judges, but alert exaggeration which comes from some scholars and officials for the objective obligation.

## **2. In Chinese Context: How about the Objective and Legal Obligation?**

In China, the introduction of the objective obligation of the prosecutor has its positive significance, but its utility is debatable. In China, as the key points of that the law of prosecutor article 3 "the procurators must faithfully implement the constitution and the law" and "criminal procedural law" article 6 "based on facts and take law as the criterion", China established the legal and objective obligations of prosecutor through a series of objective laws. It is well known that China and western developed countries have very different constructions of investigative systems. In the western countries, dominants not only the judicial organ writ system, and the protection system of rights of the criminal suspect is relatively perfect, but also the criminal suspect has the right to defend in silence at the same time, however, the judicial organ in our country is not involved in investigation phase. The only procuratorial organ that can guarantee the rights of criminal suspect is usually confined, because of the external pressure of existence, internal appraisal system and the absence of necessary independence, so, carry out rarely the supervision of investigation. In the meanwhile, although the Chinese constitution and laws endow the procuratorial organ the power of legal supervision, in practice, the exercise of the power is often met with resistance, the correct notification of procuratorial organs do not have executive effectiveness. In addition, because the cooperation of Chinese policemen and prosecutors is more and the restraint is insufficient, when auditing the evidences, the prosecutors often pay attention to entity and despise procedures, rarely question of illegal evidence, so that the prosecution rate, and arrest rate are high, the withdrawal of the suit, not to prosecute, and withdrawal of cases are very rare. Not only so, the prosecutors often are succumbed to the social influence and pressure of local party and political, as has been evident in the major unjust cases in recent years. Of course, the most fundamental problem lies in the fact that the procuratorial organ itself is the organ of public prosecution of taking and the investigative organ of duty-related crimes, there is a natural relation between the prosecution of the case and prosecutorial occupation, and the prosecutors also have original impulse and desire for taking prosecutions.

## **3. The Prosecutor's Objective and Legal Obligation: Where to Go?**

For the objective and legal obligation of procurator, some people argue that its utility is limited, and it need to stay alert to overestimate its utility, its related institutional arrangement and follow up, in the meanwhile, submit proposals, such as obeying the general law of litigation, preventing it from damaging the basic litigational structure and maintaining the function of litigational structure and reforming the system of internal management. Although such a method has its positive significance, it cannot wipe off the abuses of procuratorial function fundamentally. Now that the conflict between the prosecution function and the performance of objective and legal obligation is inborn, it is difficult to perfect fusion, why could not we separate the procuratorial non-binding power from the prosecutorial organ without changing the nature of prosecutorial power, to construct the external constraint system of police power?

#### 4. Conclusions

The prosecutor's objective and legal obligation in the west has little effect, is unworthy of the name in the present China. Because of the law of justice and the nature of human selfishness, the procuratorial organ can only select one in the function of fighting crimes and safeguard human rights, select both would be tantamount to climb a tree to look for fish. It is therefore that the power of the traditional prosecution should achieve differentiation in the next reform, the power of deciding public prosecution and the power of taking public prosecution should be exercised by different organs. Due to the limitations of the research level, my knowledge of the law of justice is hardly comprehensive. Other than that what are mentioned in the article, does this kind of functional differentiation line with other objective laws? These questions need to be further studied.

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