

## A Comparative Study on the Arrangement of Military Judicial Power

Wenqiong Fang<sup>1,a</sup> and Deng Pan<sup>2,b,\*</sup>

<sup>1 2</sup>Department of National Defense Economy, Army Service University of PLA, Lecturer,  
No.122, Luojiadun Community, Qiaokou District, Wuhan City, Hubei Province, China

<sup>a,b</sup>email, 78828070@qq.com

**Keywords:** Military, Military Judicial Power, Allocation Research.

**Abstract.** The arrangement of military judicial power is the basic problem of military judicial system construction and theoretical research. The research will help to grasp the deep contradictions and fundamental problems faced by China's military judicial practice, improve the military judicial system with Chinese characteristics, and enhance the ability of military judicial support, Promote the development of military judicial science. In this paper, through the current situation of China's military judicial system, foreign military judicial power and other related issues, the allocation of our military judicial power put forward some ideas.

### 1. Introduction

An important goal of judicial reform in our country is judicial independence, which is the basic prerequisite for the realization of judicial justice. Therefore, military justice must also maintain its independence. What is the status quo of our military justice system? How should our military judicial power be configured to meet the real needs of the current judicial reform and to achieve independence and justice in military justice? Are foreign military justice systems worthy of our reference? This paper starts from these problems, and makes a preliminary discussion on the allocation of military judicial power.

### 2. The Development and Present Situation of China 's Military Judicial System

#### 2.1 The Development of Military Judicial System in China

China's military judicial system was first born in the 1932 period of the land revolution, until now, China's military judicial system has undergone four stages of development. The first stage was from 1954 to 1965, into the national judicial system stage. The Constitution of the May 4th Movement and the Organic Law of the First People's Court and the Organic Law of the People's Procuratorate clearly stipulate the pattern of military judicial hierarchy under the jurisdiction of the specialized people's court, the special people's procuratorate, the specialized people's court, including the military court. The second stage began with the "Cultural Revolution" in 1966, the military judicial organs of the normal work and organizational construction by the impact of damage, the military judicial power gradually weakened the stage. The third stage was 1969 to 1978, the military judicial system was completely destroyed, and the military judiciary was completely paralyzed. The fourth stage is from 1978 to the present, the military judicial system has been rebuilt and developed. After the Cultural Revolution, the People's Liberation Army Military Court, the People's Liberation Army Military Procuratorate and the military, arms and ordinances of 22 large units of the military court, military procuratorate to resume reconstruction and gradually enter the development period.

For a long time, according to the spirit of the Central Military Commission's streamlining, reform and adjustment, the military judiciary has undergone several changes, but the military judicial organs of the leadership system and the PLA, large units, grass-roots institutions of the three settings pattern remains unchanged. The Chinese People's Liberation Army Military Court is the highest level in the

military, large army area military court is the second level, corps and military units of the military court is the third level. Correspondingly, the Chinese People's Liberation Army Military Procuratorate is the highest level, large army area military procuratorate, naval military procuratorate, air force military procuratorate is the second level, the regional military procuratorate, the Air Force level military procuratorate and the naval fleet procuratorate is the third level.

## **2.2 There is not enough emphasis on the independence of military justice**

At present, the prosecution and punishment of criminal crimes is still an important goal of the military judicial system. Military judicial independence and judicial justice and the protection of military rights are placed in a secondary position. Although the legal profession of our country has carried out in-depth and systematic research on judicial independence, and achieved significant research results, but because of the particularity of military justice, the legal profession rarely on the issue of military judicial independence. Due to certain factors, even in the military jurisprudence, few people have conducted systematic research on military judicial independence. Military justice is an important part of our judicial system. Even if the judicial system reform in China has successfully achieved judicial independence and judicial justice, but if the military research and practice of military justice cannot follow the pace of national judicial reform, then the value of China's judicial reform goals cannot be successfully achieved.

## **2.3 There are many factors that restrict the independence of military justice**

The factors that restrict the achievement of the independent objectives of military judicature are multifaceted, both the influence of traditional ideas and the limitations of theoretical research, and the constraints of realistic military justice system. The lack of research on the independence of military judicial independence and the restriction of the current military judicial system are the main factors influencing the realization of the independent goal of military justice.

### *2.3.1 The Nature of Military Judicial Power and the Independence of Military Judicial Power*

Military independence is the first independent of the military judicial power. Military judicial power is different from the ordinary judicial power. And there is a fundamental difference between military judicial power and military command power. The nature of military jurisdiction is closely related to the independence of military jurisdiction. Many aspects of the current military judicial system still reflect the characteristics of the military judicial power attached to the military commander. "If the judicial power and administrative power are combined, the judge will hold the power of the oppressor." In Western countries, military command power is a special form of executive power. In our country, although the military commander and executive power are two different state powers, but the military judicial power and military commander power mixed with the practice, greatly affected and restricted the realization of independent military justice goals.

### *2.3.2 The Influence of the Departure Method of Military Court on Military Judicial Independence*

Constitution and the Constitution of the People's Court stipulate that the military court is a special people's court in China, but there is no clear provision for the establishment of a military court. At present stage, the military court is set up according to the system of the armed forces in accordance with the three levels, namely the PLA military court, the military unit military court and the grassroots military court. Although the military courts have been listed separately from the military political organs since 1998, they are no longer confused with other functional departments of the political organs. However, the military courts at all levels still accept the leadership of the political organs and the party committees at the same level, implement strict case approval system, When dealing with criminal cases is also largely affected by the same level of political organs and the influence and constraints of the party committee. The result is the destruction of judicial independence and the unity of the national legal system, but also led to the localization of judicial power.

## **2.4 The concept of military justice is lagging behind**

With the development of national judicial reform, military judicial construction has also entered a new historical stage, but our military judicial concept is lagging behind. Mainly in the military judicial thinking often obey the immediate needs, the lack of predictive thinking; military justice concept of heavy experience, light theoretical research and innovation; military judicial theory to the national judicial theory for the thinking of the reference system, the lack of military judicial theory based on my lack of innovation Military characteristics, grasp the development of our army and the development trend of the advanced content.

## **3. Research on Foreign Military Judicial Power**

### **3.1 French military judicial power unified in the national judicial power**

In 1965, France promulgated the "Military Judicial Code" and established a unified military trial system in the territorial sphere. The main contents include: the military authorities are responsible for the prosecution of military criminal cases; the establishment of military officers in the army as a permanent military court; Military trials apply to specialized military criminal proceedings. In the 1980s, the French Parliament reformed the military justice system and abolished the permanent military tribunals in 1982, which stipulated that all military cases of all military nature were considered by the ordinary courts. Since then, the French military trial is divided into wartime and peace, based on the national general law, with the revised "military trial code" as an important basis.

#### *3.1.1 Military trial organization system*

France to implement the two trial final, the highest judicial organs (the Supreme Court) on the military trial to enjoy the right of final adjudication, military judicial power unified in the national judicial power. Prisoner crime cases were heard by ordinary courts. The general criminal justice system in France is mainly composed of the Supreme Court, the Court of Appeal, the Serious Crimes Court, the Misdemeanor Court and the Violent Court, but not all ordinary courts have jurisdiction over military and military cases, only the Minister of Justice and The courts designated by the Secretary of Defense jointly and in the form of a judicial bulletin are entitled to hear cases of military crimes and military crimes. During the war, France set up a wartime military court, which consisted of higher military courts and homeland tribunals. The former is located in Paris, responsible for the trial of senior officers of wartime officers (including marshal and the Admiral, other officers and officers of the General Staff of the military) criminal cases; the latter responsible for the trial of other military crimes in wartime cases.

#### *3.1.2 Jurisdiction system*

In peacetime, a criminal case under the jurisdiction of a felony court without a jury or a jury: A military officer, including a professional soldier, a soldier employed in a contract or a person who has completed a service in accordance with the conditions laid down in the Civil Service Code. Other personnel, including military and criminal cases involving military personnel, such as military and criminal cases involving military personnel, military personnel, military prisoners and other personnel, including military service cases. During the war, the wartime military tribunals have jurisdiction not only for the military nature of military and paramilitary personnel, but also for the crimes of ordinary law committed against them, but also for the crimes committed by civilians against the fundamental interests of the State.

### **3.2 The military jurisdiction of the United States under the military commander, by the national judicial power of a certain checks and balances**

In the United States military judicial process, the judicial power under the command of the right, military justice is the control and control of the military a tool and means. This practice of judicial power and administrative power is required by the special nature of the army, which is completely

different from the American ordinary court, which emphasizes the separation of powers and the independence of the judiciary. In the early days of the War of Independence, the United States, in the course of formulating its own military law on the basis of the British war law, transplanted the contents, forms and ideas of the British war law as a whole and built its own form of military law. From the course of the development of the entire military law of the United States, the military court is simply an administrative tool used by the commander to maintain discipline. The Supreme Court of the United States had declared in 1885 that military courts operating within the jurisdiction of the military courts did not form part of the American justice system. Therefore, the military court has become a part of the national military administrative power but the exercise of the judicial power of the tool.

### **3.3 Swiss military judicial power and national judicial separation**

Military judicial power is the power basis for military judicial organs to carry out military judicial activities. In the view of the Swiss legislator, military jurisdiction can only be derived from the military commander power and independent of the national jurisdiction. This feature is embodied in the legislation as a military judicial referendum enjoyed by the military judiciary, the specific performance is: the Swiss army set up regional military court, military appeals court and the highest military court three military trial organizations, the highest military court is the highest level Military trial body. In the case of an approved appeal, the Supreme Military Court did not participate in the specific hearing of the case and instructed the relevant military court to make a new decision in accordance with its established guidelines to ensure that the military criminal case was resolved entirely within the military. Thus, the civilian courts and the Supreme Court cannot participate in military justice; the highest military court is the Swiss military justice Court of Final Appeal. The separation of military judicial power from the judicial power of the state makes the national justice to be diversified. This is the main reason why the Swiss military justice system has been repeatedly attacked.

### **3.4 Russia's highest-level military judiciary in the "two high" system**

At present, Russia and its former "CIS" countries, the former Eastern European countries and Vietnam, Laos and other countries, are in the implementation of the highest level of military judiciary located in the "two high" system. "Supreme People's Court Military Court", "Supreme People's Procuratorate Military Procuratorate", as the highest military judicial organs; Supreme People's Court Military Court, the Supreme People's Procuratorate Military Procuratorate Attorney General, respectively, the Supreme People's Court Vice president of the Supreme People's Procuratorate Deputy Attorney General. The highest level of the military judiciary in the "two high" within the system can fully reflect the military judicial national judicial authority, from the judicial level to reflect the national sovereignty of national defense, the implementation of such a system, an effective solution to the Russian And other countries of the military judicial system of some drawbacks.

## **4. Rational allocation of military judicial power, to achieve independent and impartial military justice**

### **4.1 Follow the principle of independence of military justice, strengthen the military judicial organs of the national judicial authority**

Judging from the present situation of our country, the judicial jurisdiction of military justice is relatively weak, and the independence of military judicature is seriously inadequate. In addition to the appointing and dismissal of the president of People's Liberation Army Military Court and Military Procuratorate, the other military judicial personnel appointment also from the army. In addition to the judicial functions of the military judiciary, bear a large number of military organs of non-judicial tasks. This situation is not conducive to the military judicial organs of the independent exercise of judicial

power and procuratorial power. Military judicial activities are easily intervened by superiors or military authorities, which is not conducive to the personnel training of the military judiciary, the improvement of business and the normal exchange and reasonable flow of military personnel.

#### **4.2 Formulate military court, military procuratorate organization law**

"Two homes" organization law provides that the specialized people's court, specialized people's procuratorate organization and authority by the National People's Congress Standing Committee separately. However, the new China was established when the military court, the military procuratorate, still no organization law. It is understood that the military court, the Military Procuratorate Organization Law has been included in the National People's Congress legislative planning and plans, but failed to complete as planned. There are many factors, but one of the main reasons is due to the adjustment of military system reform and shelved. Comprehensive reform is a historical process, not to mention the military court, the Military Procuratorate does not necessarily involve some of the specific compilation of the situation; the military judicial organs of the organizational structure cannot be long in a state of uncertainty. The lack of organizational law, it is difficult to ensure that the military judiciary in accordance with the law to fulfill their powers, it is difficult to ensure that the military judicial power to achieve the lawful and effective.

#### **4.3 To restore the highest level of military judiciary located in the "two high" system**

Respectively, the "Supreme People's Court Military Court", "the Supreme People's Procuratorate Military Procuratorate", as the highest military judicial organs; Supreme People's Court Military Court, the Supreme People's Procuratorate Military Procuratorate Attorney General, respectively, the Supreme People's Court vice president The Deputy Prosecutor of the People's Procuratorate will set the highest level of the military judiciary in the "two highs". With the highest level of military judiciary located in the "two high" to adapt to the Supreme People's Court military court president and vice president, the Supreme People's Procuratorate Military Procuratorate procurator and deputy prosecutor, should be appointed by the National People's Congress Standing Committee.

#### **4.4 The Reform of Military Judicial Right**

China's military judicial allocation model, usually with the wartime did not make a distinction. To be precise, it is based on the usual military justice system and does not stipulate the wartime. This is a major absence in the current military justice system. Because any legal system should be pre-set in order to provide norms for people's behavior, but not after the legislation, it completely deviated from the track of the rule of law. Therefore, it is a major subject in the current military judicial research to intensify the study of the basic mode of the allocation of military judicial power in wartime and to set a relatively smooth hub for the peaceful transition of military justice.

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