

# Fundamentals of Military Law

Jian Zhou

# Fundamentals of Military Law

A Chinese Perspective



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# Introduction

The science of military law is an independent branch of jurisprudence. Since the academic circle proposed to establish the subject of the science of military law for the first time in 1984,<sup>1</sup> the study in the subject has been constantly deepened with profound achievements. However, due to inadequate attention on building the framework of the subject system of the science of military law, the jurisprudential circle has difficulties in understanding the research results of the subject, and at the same time, the research approach in the science is also confined. It has not only affected the value and status of the science of military law, but also impeded the improvement of the study in the subject.

## Reflection on the Science of Military Law

Every subject has its value worthy of pursuit. The precondition for realizing the value of a subject is the scientific framework of its system, while the key lies in the scientific classification, combination and logic ranking. Classification and combination refers to the decomposition of the subject study into certain structural plates (components of the subject system) which are independent to, coordinated with and closely related to each other. These plates, after recombination, can be restored to the complete content of the subject. The purpose of classifying the subject content under certain standard is: firstly, to integrate the unordered fragments of the study into

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<sup>1</sup>Zhang Youyu, Pan Nianzhi, two famous jurists pointed out, in Encyclopedia of China (the Volume of Law) polished in 1984, that military law is an independent branch law; the science of military law plays an important role in the studies of law. See also *the Modern Military Law*, edited by the Political Department, the General Staff Headquarters, the People's Liberation Army, China, China's Workers' Publishing House, 1996, p. 151.

rational and ordered plates, so that the subject content can be understood in sections; secondly, to grasp the overall subject content through understanding every plate.

We should notice that to achieve such effect, the subject content should be classified by a certain standard, what's more important, it should be classified on a fundamental principle: the principle of the same standard. That is to say, one whole object should be classified by the same and the sole standard. To violate this principle is to make the logic mistake of "different standards of classification".<sup>2</sup> According to the general principle of the logic, if classifying one set by two or more standards at the same time, there will be duplication in the element of the subsets, or the absence of some element in the subsets, or both at the same time.<sup>3</sup> We should try to avoid such situation in building the framework of the subject system. Otherwise, some study will be duplicated while some will be absent. As a result, the outside world cannot have a clear and complete understanding of the subject, and the objective and value of classification and combination cannot be realized. Of course, the principle of one standard means one standard for one classification and does not exclude another standard for another classification of various subsets.<sup>4</sup> In short, the principle is to ensure the independence of various content plates of the subject system, the specification of the logic thread in recombination, the completeness of the subject content after recombination, and to guarantee that the outside world can understand the study of the subject.

The subject content, after logic ranking, is divided into relatively independent plates, which are also the organic components of the overall subject study, so there are various connections between the plates, providing the basis for the logic ranking. Therefore, when building the framework of the subject system, we must analyse accurately the inner connections between the plates, based on which, we put in order all the components of the subject. For example, in jurisprudence, when analysing the operation of law, the logic ranking is arranged mostly based on the order of the operation of law, such as legislation, observation of law, enforcement of law, judiciary and legal supervision.<sup>5</sup> The science of civil law arranges the position of its components based on the elements of civil legal relations, which are subject, object and content, putting the subject of civil legal relations (legal natural

<sup>2</sup>The Teaching and Research Department of Philosophy and Logic, edited, Renmin University, *Logic*, Renmin University Press, 1996, p. 36.

<sup>3</sup>There will be logic mistakes of "incomplete division" or "duplicate subsets". See also *Logic*, edited by the Teaching and Research Department of Philosophy and Logic, Renmin University, Renmin University Press, 1996, p. 37.

<sup>4</sup>"The same standard should be applied in the continuous divisions, different standards might be applied in the divisions at different levels." See also *Logic*, edited by the Teaching and Research Department of Philosophy and Logic, Renmin University, Renmin University Press, 1996, p. 37.

<sup>5</sup>See the following books on jurisprudence: LI Long (edited), *Jurisprudence*, Wuhan University Press, 1996; Zhang Wenxian (edited), *Jurisprudence*, Law Press, 1997; Sun Guohua, Zhu Jinwen (edited), *Jurisprudence*, Law Press, 1999; Shen Zunlin (edited), *Jurisprudence*, Peking University Press, 2000; GONG Pixiang (edited), *Jurisprudence*, Fudan University Press, 2002.

person, legal person and unincorporated organizations) in adjacent position, and the object (thing, securities and intellectual property) in adjacent position.<sup>6</sup> The advantage of such logic ranking is obvious to both researchers and learners.

There should be two symbols of the maturity of the study on military law: first, rich and complete study content; second, scientific and systematic structural system. If being lack of any, the subject will fail to reach the standard of a mature subject of jurisprudence. Without rich and complete content, the subject is insubstantial and immature, and needs to be further strengthened; without scientific and systematic structural system, it cannot be called as a complete and strict subject, which will pose difficulties for the outside world to understand the object and scope of the study.

What is system? It is “an organic whole composed of several relevant matters that are interrelated and mutually constraining”.<sup>7</sup> The system of military law refers to the systematic organic whole of this subject after classification, combination and logic ranking based on certain standard. On this basis, we can give a definition on “the subject system of military law”: it is an organic whole of the study content of military law after classification, combination and logic ranking based on certain standard.

Viewing from the definition, the relation between the study content and structural system of a subject is the dialectical relation between content and form: the content determines the form, while the form manifests the content. The rich phenomenon of the military law must be expressed by scientific and systematic subject system. The study content determines the composition of the basic plates of the subject system; the changes in contents decide changes in structural system. Therefore, the framework building of the subject system cannot go beyond the study content; meanwhile, the scientific subject system can reflect the study content accurately, indicating the logic relation and study scope of its components.

The value of building a scientific subject system of military law lies in classifying and ranking the complex subject content into organized and logical plates with strong inner connections, so as to facilitate the understanding and application of the subject content. It is fair to say that this function is also the foundation of the value of the subject system: to manifest the content, facilitate the understanding and application.

To build a scientific subject system of military law enables us to introduce our research outcomes to the society and expect them to be acknowledged and accepted. At the same time, the researcher of military law should also explore new frontier with new vision within the scientific subject system, laying foundation for the constant innovation and enrichment of the subject. “The purpose of knowing the world is to reform the world”. It is a simple but important viewpoint of the epistemology of Marxism. As a rational knowledge of human perception, a subject’s main function is to guide people’s social practice. Without such function, the subject is useless and

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<sup>6</sup>See the following books on the science of civil law: Tong Rou (edited), *China’s Science of Civil Law*, Chinese People’s Public Security University Press, 1990; Shen Weixing (edited), *the Science of Civil Law*, Peking University Press, 2003; Wang Liming (edited), *the Science of Civil Law*, China Financial and Economic Publishing House, 2003.

<sup>7</sup>*Cihai*, Shanghai Lexicographical Publishing House, 2000, p. 274.

cannot be accepted by the society, which means the existence of a subject is based on its usefulness to the society. However, whether a subject can guide the social practice correctly is up to the society's understanding on the subject. The more and deeper the understanding, the better people can apply the subject content to their behaviour. When people find that they cannot grasp the subject content accurately, it means that the subject cannot guide people's behaviour effectively, and its usefulness will be doubted and its existence will be a problem.

A scientific and complete subject system is so important that we should never neglect it when carrying out the study on the subject. Despite that the study on military law started relatively late in China, there have been a lot of achievements today. The publishing of large amounts of works on military law has proved the depth and prosperity of the study on military law.<sup>8</sup> All kinds of discussions and exchanges on military law have enriched the views on the study, bringing new theoretical basis and research approaches, which have played an immeasurable role in promoting the establishment and improvement of the subject system of military law.

I have paid close attention to the building and improvement of the subject system of military law since I entered this field.<sup>9</sup> Because the study on military law has surpassed the primary stage, it is time for researchers to think about how to build the subject system scientifically and put it into action. On the one hand, the research achievements of military law need to be demonstrated in a better form, so as to realize its subject value; on the other hand, the researchers need a scientific subject system to get new thinking, find new problems and make up new loopholes.

Viewing from the present published works on military law in China, there are some deficiencies in the arrangement of the subject system, which lead to the confusion of the outside world on the subject, as well as predicament for the subject study.

*A Course in the Science of Military Law* published by the Law Press in 1992 made a relatively comprehensive summary on the existing research achievements of military law; *the Dictionary of the Science of Military Law* edited by Yang Fukun and Zhu Yangming and published by the National Defence University Press in 1993 introduced comprehensively and systematically the knowledge of the subject with 22 categories and 2440 headwords; *the Science of Military Law* edited by Chen Xuehui and published by the PLA Press in 1994 had been listed as the priority project in the Eighth Five-Year Plan of national social science, and praised by the

<sup>8</sup> (Soviet Union) Goor (edited), *the Science of Military Law*, translated by He Xiquan, Gao Wa, PLA Publishing House, 1997; Tu Men (edited), *a Course in the Science of Military Law*, Law Press, 1992; Chen Xuehui, *a Course in the Science of Military Law in China*, Shanxi People's Publishing House, 1994; Li Keren (edited), *a Course in the Science of Military Law in China*, Shanxi People's Publishing House, 1998; Zhang Shanxin, *the Studies of Military Law*, the Military Science Press, 2002, etc.

<sup>9</sup> Some of books written by Zhou Jian: *History of Military Law* (1998); *On Military Law* (2000); A series of books on the Comparative Studies of Military Law (2002) (*the tradition of Chinese Military Law, US Military Law, UK Military Law, Russian Military Law, Japanese Military Law*); A series of books on Lawfare (2004): *an Introduction to Wartime Military Law, Law of War, Wartime Military Administrative Law, Wartime Military Criminal Law, Wartime Military Criminal Procedure Law*, etc. All were published by Haichao Publishing House.

state verification group as a Marxist monograph with Chinese features that explained comprehensively and systematically the theory of military law. The publishing of these works had signified the establishment of the subject of the science of military law in China. Since then, the building of the subject has been expanded towards three directions of history, theory and specialty, with a series of monographs and thesis published, further enriching the research approach of the subject system of the science of military law.

As for the subject system of the science of military law, the academic circle has put forward three kinds of opinion successively: the first, which is also the earliest, holds that the system should be consisted of the pandect of theory of military law, the sub-pandect of the categories of military law, historic development of military law and comparison of foreign military laws. The second view holds that the system should include the jurisprudence of military theory, military branches, military history and military legal system, as well as comparative study on military law, the law of war in international law and related contents, etc. The second view inherits all opinions of the first one with new expressions and adds the contents of military legal system and the law of war. The third view, on the basis of the second one, has two more sub-pandects: one is the science of military law operation, including the science of military legislation, military judiciary, military legal consultant and military legal education; the other is the interdisciplinary subject of military law, including the science of military legal sociology, military legal behaviour, military legal psychology, military legal logic, military criminology, etc.

The existing subject system of military law is mostly classified by two or even three standards at one level. For example, the study on the norm of military law is carried out by two standards: the nature and the means of the military social relations adjusted by military law. The coexistence of both standards will definitely lead to various drawbacks mentioned before. Viewing from the practice of military law study, when the subject contents are classified by two standards, the main problem is the duplication of study and the absence of certain contents. Because when both standards are applied, each cannot exhaust all the classification of the subject contents. For example, when classified by the means of adjustment, the military law falls into the categories of military criminal law and military administrative law, but obviously, military law also uses civil means to adjust military social relations, which is absent in this kind of classification. In face of such framework of the subject system of military law, the outside world has difficulties in understanding the contents of the norms of military law and the scope of the social relations adjusted by military law. It is the unshirkable responsibility of the researchers to facilitate the understanding of the outside world. Moreover, if the subject contents are classified by two standards, there will not only be problem in outside world's understanding of the subject contents of military law, but also doubts on the relations between military law and other jurisprudence branches, such as criminal law and administrative law.

If we classify military law into military criminal law and military administrative law by the standard of "means", the contents and direction of the subject study have no difference with the study on the science of criminal law and administrative law.



People may doubt whether the study on these two problems is necessary and whether military law is an interdisciplinary subject pieced together by other legal subjects such as criminal law and administrative law. Such problems require researchers in the science of military law to think deeply. The following consensus should be reached: the reason why the military law can become an independent subject of jurisprudence lies in that it has special and irreplaceable object of study, so the military law system should do the best to embody its uniqueness in the object of study. Obviously, the standard of “means” cannot meet the demand.

## **Reconstruction of the Science of Military Law**

As is mentioned above, to build a scientific subject system of military law, we must follow the objective law and approach of building a subject system and use scientific principles and means based on the logic starting point and important concepts of military law, so as to build a system that can reveal the phenomenon and law of the subject creatively.<sup>10</sup>

To build a scientific subject system of military law, we must firstly follow the principle of one standard, which means to classify the subject content based on unified standard; secondly, arrange and reorganize all classified parts based on their inner connections in a scientific way. Indeed, there are many standards for classification, among which, some are suitable for the building of the subject system of military law, while some are not. For example, the aforementioned standard of “means” is not suitable for the classification of the subject content of military law, because the subject system classified based on this standard will deprive the subject content of military law of its particularity. Therefore, we need to select “an optimal standard”.

We hold that if a kind of standard can be applied to classifying the subject content and building the subject system of military law, it should be in possess of the following qualities:

First, as an independent branch of jurisprudence, military law should use a standard that can facilitate the outside world’s accurate understanding of its unique subject content.

Second, as an applicable branch of jurisprudence with practical value, military law should use a standard that can facilitate the legislative body’s classifying and integrating the subject, checking deficiency, improving the subject’s role in adjusting military social relations, increasing the efficiency of military and civilian bodies in searching for the legal provisions required to adjust certain military social relations, so as to realize the value of military law as a norm, which is to guide, evaluate, predict, educate, enforce, etc.

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<sup>10</sup>This is also author’s constant view on the construction of the subject system of military law; see also Zhang Shanxin, Li Ang, Zhou Ji, *the Science of Military Law*, the Military Science Press, 2001, p. 1.

Third, as a comprehensive branch of jurisprudence, military law should use a standard conducive to the establishment of its subsidiary subjects in relatively lower position within the system.

In building the subject system of military law, it is quite necessary for us to learn the experience of other branches of jurisprudence. Actually, the structural systems of each branch are surprisingly similar, which is to divide the subject content into the study on theoretical part and substantial part firstly. The theoretical part mainly introduces the unique legal phenomenon of different branches, such as the emerging process of the branch, the feature of the process of the legal relations, the basic principles, and the scope of adjustment and source of law of the branch. The breadth of the study is determined by how much is its uniqueness, which means it does not repeat the content that has already been introduced in the basic legal theory, but only introduces those absent in the basic legal theory or the contents embodying the uniqueness of the branch. After that, it will be classified and combined according to the nature of various legal phenomena. The study on the substantial part mainly refers to the study on the existing laws and regulations of the branch. It is generally classified into several parts to be studied by the standard of the nature of the social relations adjusted by the department law. As is proved by the fact, such system arrangement can make the study object and scope clear at a glance to the outside world, so people can find the parts they need easily to guide their behaviour and thus feel that the subject is mature. Further on, these mature department laws have provided rich practice for improving and reforming China's rule of law, realizing the social value of the subjects.

Through learning these beneficial experiences, we can make at least three conclusions on building a scientific subject system of military law: first, there should be only one standard in building the subject system at one level; second, the standards for classification in building subject system should possess all kinds of excellent qualities; third, whether the subject system is scientific and mature is mainly measured by how well it is accepted by and applicable to the society.

By far, we can clearly express our approach to building disciplinary system of science of military law:

As regards the research object of the discipline of science of military law, we have put forward the brand new concept of "core military law" in *Compendium of Military Law*. There should be two criteria for dividing the military law system: one is the attributes of social relations that are regulated by military law and the other is the way of regulation by military law. Military law in a broad sense falls into three categories: first, national defence law, i.e. legal norms of regulating various social relations in the field of national defence including conscription law, law on protection of military installations, national defence mobilization law and national defence education law; second, core military law, i.e. legal norms of regulating various social relations in the field of the building of armed forces, including military criminal law, military justice, military administrative law, military training law, military personnel act, laws on preferential treatment to servicemen, social

insurance law and military economic law; third, law of war, i.e. legal norms of regulating various social relations in the field of international military relations and armed conflict, including all sorts of international conventions, treaties, agreements and the principles, rules, regulations and customs of war which regulate the relations among the belligerent parties, and the relations between the belligerent states and neutral states, etc. The “core military law” among the three contains military law system in three aspects: military administrative law, also the generic term for all laws and regulations on military administration; military criminal law, also the generic term for laws and regulations on military crimes and the consequent penalty punishment; military justice, also the generic term for laws and regulations on the participation of military and servicemen in criminal, civil and administrative proceedings. The concept of “core military law” is created by taking regulative objects of military law as the starting point and standard unlike before when the academia defined the regulative objects of military law generally as “various social relations in the military field”. But because no further differentiation was made among these relations and no in-depth study was carried out, nor were there clarifications on the inner link between these relations and research on the conception of military law, the conception of military law was too broad without focus and hence hindered both the research per se and the development of science of military law. It is important for us to hold fast to regulative objects of military law and stick to the view that development of armed forces is the body and core of the development of national defence. In other words, the regulative objects of military law in essence refer to various social relations in the field of the building of armed forces that are defined, protected and restricted by military law. The “core military law” was brought forth to further divide the military law system so that military law is confined within a rather fixed limit to enable people to get clearer understanding on military law. What’s more, it also provides a new idea and approach to establishing, developing and improving the discipline of science of military law in a scientific manner.

With regard to the establishment of disciplinary system of military law, the universal practice in the academia is dividing it into general and specific theories. The former explores basic theories of military law in a broad sense while the latter has a wide scope covering almost everything concerning military affairs. I believe military law system is multi-tiered, comprising both broad sense and narrow sense. In a broad sense, military law includes national defence law, “core military law” and law of war, whereas in a narrow sense, it merely refers to “core military law”. As military law constitutes a special legal branch, three types of military law lead to three types of legal relations. It is difficult to incorporate them into a general system of basic theories and needs further division. Therefore, based upon the concept of “core military law”, I attempt to establish a new framework of theoretical system of science of military law, namely a theoretical system of science of military law composed of the basic category of science of military law, basic theory of military law, military administrative law, military criminal law and military justice. The system has not incorporated such content as “national defence law” and “law of

war” because they belong to another two types of jural relations though still in the larger scope of military law. The idea of establishing such new system highlights the inner link of studies on science of military law with the development of military law system and further concentrates the focus of study on science of military law. Hopefully, it will help push forward the studies on military law and the development of the discipline of science of military law by avoiding the blind pursuit of “being general and complete”.