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The present publication includes reports presented during the Conference devoted to the 85th Anniversary of the Faculty of Law of the Yerevan State University. Articles relate to different fields of jurisprudence and represent the main line of legal thought in Armenia. Authors of the articles are the members of the Faculty of Law of the Yerevan State University. The present volume can be useful for legal scholars, legal professionals, Ph.D. students, as well as others who are interested in different legal issues relating to the legal system of Armenia.

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DEFENSIBILITY AS THE PRINCIPLE OF STATE CONSTRUCTION: CONCEPT AND NORMATIVE CONTENT

Artur Vagharshyan¹

In modern state science, the theoretical structure of the country's defense problem is largely built on a functional approach, that is, the state implements a number of external and internal functions, one of which is of primary importance and the country's defense activity. However, historical experience confirms that the traditional defense functionalized defense systems do not always justify themselves or successfully fulfill the task they are facing. The vivid example of this is the lessons of the defense policy of the First Republic of Armenia.²: During World War II, the European countries could not stand German military strikes, even the Soviet state with militarized governance. One of the reasons for the disadvantage was the shortcomings of the theory. These historical examples confirm that the functional theoretical approach to defense of the country does not create active constitutional forms and institutions. It generates a general commitment for the governing subject, and the proper, quality, effective performance of the general commitment has very few guarantees. On the other hand, the subject may be unable or legally constrained to act on its organizational side and ability to possess its power fully, because the objective conditions or objective law do not allow him to emerge, act, exhibit his or her potential abilities, despite his wishes and inward motivations.

In the political reality it is possible even the absence of desire and motives to act in the ruling entity, whether it is a king

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² For more details see **Վաղարշյան Ա.Գ.**, Հայաստանի առաջին հանրապետության գործադիր իշխանության համակարգը (1918-1920 թթ.): Եր., ԵՊՀ հրատ.,- ԵՊՀ, 2012 (Vagharshyan A.G. The System of the Executive Power in the First Armenian Republic (1918-1920). Yerevan 2012) pp. 231-241:

(monarchy), an elected head of state (republic). Thus, the roots of inactivity can also be subjective-psychological. An example of the inability of the governing entity in the history of Armenia is the Arshakunyats Kingdom, in which the king may have the desire to do so, but under conditions of objectivity and the ministerial system, it could not have ability. Another example is the First Republic of Armenia where the public authority had the desire to maintain a commitment to protect the country, but as a result of the misconceptions and the usual operational approach to resolving defensive issues, the governance body displayed a lack of defense capabilities. These examples speak negatively about the functional approach with regard to organizing the defense. It follows from the mentioned that the science should carry out an in-depth research, a new, alternative conceptual solution, a new organizational-functional framework for building a country's defense, define its normative legal content, requirements and rules.

As an alternative to the functional approach to the organization of the country's defense, we are proposing a primary task - a framework for the implementation of the goal, based on the principle of defensibility. Let's try to define this principle, then open its normative requirements, correlation with other state-legal principles.

Before that, let's attempt to find out the meaning and genealogy of the term "defensibility". If this term for is somewhat extraordinary and new for the jurisprudence then it is widely used in military science and security¹. The term "national security", "danger", "threat", "security threat", "military security", "defense security", "national interests" are commonly used in the security concept with

¹ Today, we can already state the existence of two well-known fields of knowledge - security (securitology) and military science (or military martial arts) (for more details see **Халипов В.Ф.**, Энциклопедия власти. М.: Академический Проект; Культура, 2005 (Khalipov V. F. Encyclopedia of Power. Moscow, 2005) pp. 309-321).

their theoretical or normative content¹. In this regard, a research problem arises with regard to the meaning and the definition of the term "defensibility" mentioned above and proposed. The concept of "defensibility" of a state used in military science is defined in encyclopedias as "a degree of state preparedness to protect against aggression characterized by military, economic, scientific, social and moral-political abilities." According to another definition, "defensibility is the ability of the state to repel foreign military aggression with the combination of all forces, resources and means under its disposal"²

Thus, among the concepts of "security", "national security", "military security", "defensibility" is the first one is the broadest, and the second one, i.e. "military security" is a subtype of the first one³. The concept of "national security" is also more inclusive than the concept of "defensibility" of the state. Consequently, "military security" in its turn is more comprehensive for the concept of "defensibility of the state". In the above sense, "defense" is considered to be "a separate component of military security."

The link between these three concepts is the concept of "defense." "The defense is a system of political, economic, military,

¹ See **Фомин С.А.** Обеспечение национальной безопасности: курс лекций. М., 2014 (Fomin S.A. Ensuring the National Security: Lectures. Moscow 2014) pp 9-109, **Анохин Ю.В., Гадельшин Р.И.**, Национальная безопасность: Теоретические и терминологические аспекты (Anokhin U.V., Gadelshin R.I., National Security: Theoretical and Terminological Aspects) available at: <https://cyberleninka.ru/article/n/natsionalnaya-bezopasnost-teoreticheskie-i-terminologicheskie-aspekty>:

² See **Белов В.К., Воронов А.Ф., Голенко Е.Н.** и др. Военное право. Серия "Право в вооруженных силах - консультант". М., За права военнослужащих, 2004 (Belov V.K., Voronov A.F., Golenko Y.N. et al, Military Law. Series "Law in the Armed Forces- Consultant" Moscow 2004).

³ Other types of security include international, economic, inter-political, social, spiritual-cultural, informational, ecological, energy, fire, food, etc. (for more details see **Фомин С.А.** Обеспечение национальной безопасности: курс лекций. М., 2014 (Fomin S.A. Ensuring the National Security: Lectures. Moscow 2014)). P. 224):

social, legal and other measures and activities to ensure the sovereignty, territorial integrity and security of the republic."¹ Thus "military security" and "defense" are not identical concepts.² Defense is the core defense activity aimed at rebuffing the state of the aggression and, if necessary, military assistance. In this sense, "defense" coincides with the concept of "external defense function of the country" used in the state science. The subject of military security is the objectives, tasks and functions of the state aimed at preventing, preventing and neutralizing any military threats.

And now let's try to find out the relationship and conceptual difference of the term "state defensibility", used in military science and security, and the meaning of the term proposed by us - "defense capacity as the principle of organizing the state and society". From a military perspective, defensibility means that the state is protected from military, economic, scientific, social, or moral-political aggression or armed action. In this sense, the main thing is not the subject of defensibility, but its accumulated abilities in the economic, military (whether it has army or not, its combat readiness), social, moral and political spheres. In other words, defensibility indicates the effectiveness of the defense function of the state, the qualitative aspect of its content, the sum of which is called defensibility

¹ The term "defense" is used here was abolished from the Article 1 of the RA Law on Defense. The Russian law defines defense as a system of political, economic, military, social, legal and other means of preparation for armed defenses, as well as the defense of the integrity and territorial integrity of the state.

² In security, most are recognized by military security and defense. A part of the authors understands the outer aspect of military security, and its inner side (the state and society's activities) is aimed at preparing for the resistance to possible military threats. Other authors identify defensive security as the state's military and economic potential, eliminating the potential dangers of its independence and territorial integrity. They include two components, the Armed Forces and the Protective Industrial Complex in the security (see **Фомин С.А.** Обеспечение национальной безопасности: курс лекций. М., 2014 (Fomin S.A. Ensuring the National Security: Lectures. Moscow 2014). pp 106-107).

Meanwhile, first of all, the subject of defensibility is emphasized in the concept, i.e. the state as a whole, the institutional qualitative aspects of it and its components (government agencies, employees, etc.), which ultimately transforms the state into a defensive, targeted organizational structure, into a subject with the effective ability to act. It is still in the domain of research (interest) in the field of security and military sciences, whether in what direction and in what context this "capable" entity is to carry out its activity. The jurisprudence is more focused on the organizational character of the institution, its adaptation to its intended purpose, and in the case of its existence, its functioning and protection, which we call defensibility.

Defensibility is a characteristic feature of the state system – for self-preservation, self-reproduction, self-improvement, and not naked protection. The problem is that the ability to operate in a state of emergency, in a state of war, is the essence of the state bodies and legal institutes established for ordinary situations¹. A defense function is performed by any state which may be non-defensible, because the function is simply a direction of activity by which the actor may be inaccessible². In this connection, it is probably appropriate to cite one of the theorists of state government, G.V.Atamanchuk, who expresses the following thoughts about human actions, which are also relevant to the state: "It is well-known that every act begins with a desire to do something. At the same time,

¹ See **Վաղարշյան Ա.**, Պետության և իրավունքի տեսություն-1: Դասախոսություններ /ԵՊՀ.-Եր.: Հեղինակային հրատարակություն, 2016 (Vagharshyan A., Theory of State and Law. Lectures. YSU 2016), P. 206.

² Important that this does not contradict international law. The European Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 15) states that "in a war or other state of emergency threatening the life of the nation, any High Contracting Party may resort to measures which it to the extent that it requires the severity of the situation, provided that such measures are not deemed incompatible with other international obligations of the party. However, in that case, it is necessary to fully inform the Secretary General of the Council of Europe on the measures taken and the reasons for their inclusion."

it is well-known that it is not sufficient only to desire, one also needs to know, it is also insufficient to only know, one should be capable, and it is insufficient to be capable, one also needs to be able (to have strength, resources), to fulfill the desire, , The problem comes to management and to the state administration”¹.

Any principle, whether it is a state or a legal system, has its regulatory role not as an idea, but rather as a combination of the normative-mandatory requirements and rules resulting from the overall content of the principle. If a number of fundamental requirements derive from the principle of the rule of law state, which have a constitutional and legislative enshrinement and are exercised by legislative, law-enforcement, law protection practice, the problem of the theory is to formulate understandable, feasible, productive requirements and try to give them legal remedies based on the content of the principle of defensibility.

Certainly, the theory of public administration has already developed a concept on many aspects of public administration². However, these issues have been elaborated for public administration in general, largely based on the constitutional and systemic essential features and functions of its executive component. Consequently, all the requirements and rules imposed by the theory of public administration have a general meaning and are derived from the fundamental and general principles of the organization and operation of the state apparatus. In particular, according to G.V. Atamanchuk,

¹ See **Атаманчук Г.В.**, Теория государственного управления. Курс лекции.-М. Юрид. лит., 1997 (Atamanchuk G.V. Theory of State Governance. Lecuture. Moscow 1997), p. 7:

² Among these issues are the organizational structure of the state administration, its essential features, the state body as a component of the organizational structure of the state administration, the factors of statehood and state governance, the basis of the the possible structures of state bodies, the internal and external structuredness of the state body as a main structure of state administration, the requirements and rules for the organization of public (public) bodies (see **Атаманчук Г.В.**, Теория государственного управления. Курс лекции.-М. Юрид. лит., 1997 (Atamanchuk G.V. Theory of State Governance. Lecuture. Moscow 1997), pp. 129-146):

the inner structure of the state body should be based on specific requirements and rules and, in particular:

a) mobility, according to which the numerical composition and number of internal units of the state body are defined by optimal benchmarks;

b) efficiency, which determines the complexity of the internal and external relations of the state body, speed and maintenance of the access and exit of management information, timely decision making and its execution;

c) economical approach, which determines the cost of keeping the management apparatus (price) and its employees' expenses for managing activities.¹

As a supplement to the aforementioned requirements, we are proposing the following criteria for building of state apparatus on the basis of defensibility:

a) the state power and local government system are effective and specific to the extent, that in any situation, including war situation, there is no organizational-structural vacuum.

b) all public authorities have a clear command of their competence and are able to exercise it in any emergency or war-raising circumstances proceeding from their public-governmental mission.

(c) the public power system is filled with its service and work staff in the spirit of discipline, protection of motherland, capable of discipline and self-organization in emergency situations, willingness to self-sacrifice. This requirement also applies to the whole community.

A legally-established state body, the system of bodies should be structured so that it can achieve its goals, perform its functions,

¹ See **Атаманчук Г.В.**, Теория государственного управления. Курс лекции.-М. Юрид. лит., 1997 (Atamanchuk G.V. Theory of State Governance. Lecuture. Moscow 1997), pp. 144:

exercise its competence and powers.

The management system must be well-thought, so as to be able to safeguard the proper level of management in the assigned sector. For this purpose, it is necessary to precisely and clearly construct the competence and powers between the elements of the management system, their subversion, the cooperation and supplementation. From the above-mentioned requirements of the principle of defensibility, it is evident that a new theoretical thinking is required for the recognition and implementation of the principle, leaving aside the traditional, stagnated, textbook approaches and interpretations.

Such a revolution took place in the state-legal thought and thinking in the 1990s, when the power division, decentralization, demonstration, democratization and other concepts were new to us. The peculiarities of our republic dictated that it was the right time to stand up for the traditional thinking, taking into account the facts of reality, to develop a framework of principles and requirements for building a state (state building) creatively.

The **first imperative problem** arising from the principle of defensibility requires During the statehood, the governance system, from the general form to every state body and its competence, should be subject to a unique, as well as a differentiated regulation. The result of that regulation should be such a realistic effect as the ability of the public administration system to operate continuously, with a continuous effort to achieve success and the goal.

The unified regulation implies the establishment of a public administration system in accordance with the constitutional principles and the fundamental, general, sectoral and concrete principles of the organization and operation of the state system, as well as in accordance with the requirements and rules deriving from those principles. However, even in this case, the vision of the public administration system and its separate branches (mostly executive) and the bodies created should be monitored based on the principle of

defensibility. For example, is some state agency capable of producing a vacuum in the government system in case of certain circumstances? We can bring many examples, even from our republic. Let's envisage the situation of the Armenian government in 1998 in connection with President of the Republic of Armenia Ter-Petrosyan's resignation, if the Constitution did not enshrine the power transfer. The government vacuum could have created a deep political crisis. If the ordinary circumstance, i.e. the president's resignation in ordinary circumstances can cause a complicated and vacuum situation with unpredictable consequences, what would be the consequence in case of an emergency or military situation? The process of velvet *coup d'etat* once again confirms the dangerousness of the power vacuum, in the military-political sphere.

The **second problem** that is derived from the principle of defensibility is the so-called differentiated regulation. The state (public) body (legal structure) must have a duality (in the case of the legal structure – duality of the content). First, the competence of the public authority or the legal structure content in a peaceful, ordinary environment, second, the competence of the state body, as well as the content of the legal structure regulation in an emergency, war situation. Interestingly, there are elements of such approach in the provisions of the RA Constitution. For example, the prohibition on elections or referendum in the conditions of war. In the case of state bodies, the solution to this problem is that the Constitution or the laws contain provisions, specific requirements for the establishment of a particular body or bodies, and their competence in the state of emergency and war. Such a regulation is meant to provide centralization and concentration in the public management system. At the same time, these peculiarities can be deviated, make reservations from other common principles and there is no obstacle for that to neither in the theory nor in international law.

The principle of defensibility requires the state machinery to be constructed in such a way as to be able to perform its tasks in a state of emergency and war, to give a worthy retaliation to the enemy. This capability is not a machine-based feature but should be formulated and implemented by special state-legal institutions that will eventually enable the Republic to quickly and efficiently manage all administrative tasks in a military state. The introduction of such a system will enable the state machine to maintain stability, that is, to maintain its main characteristics and fulfill its objectives, despite the various types of destructive effects.

The principle of defensibility, which was being discussed, is proposed as the principle of organization and functioning of public power. Forming a unified system of principles of the organization and functioning of the system of government, within complex systemic mutually agreed and interconnected relations, have different levels of regulation, as well as legal force. On this basis they are subject to several criteria of classification. For example, the principles of the organization and operation of the state are divided into the following levels: a) fundamental principles, b) general principles, c) the principles inherent in each branch of the state power, d) principles specific for a particular state body.¹ Under this comparative approach of the elements of the system, the place of the principle of defensibility is among the general principles of the organization and operation of public power. Defensibility as a principle cannot belong only to one branch of power, only one specific state body. Defensibility must become a feature of the whole state, to relate to all elements of the system, so it must be at least a general principle of the organization and functioning of the state apparatus.

¹ See **Վաղարշյան Ա.**, Պետության և իրավունքի տեսություն-1: Դասախոսություններ /ԵՊՀ.-Եր.: Հեղինակային հրատարակություն, 2016, (Vagharshyan A., Theory of State and Law. Lectures. YSU 2016) P. 192:

When deciding on the role of defensibility principle and its place in the sequential chain of legal regulation, it should be borne in mind that the principles of the organization and operation of the public authority and the legal system have different sources (forms) of enshrinement. In this case, the new classification criterion of principles emerges, which is the legal force of the legal form – the normative legal act enshrining the principle, and its place in the subordination of the normative acts. Under this criterion, principles that are enshrined by the Constitution (constitutional) and other normative acts, including the laws (sub-constitution) are possible. It is obvious that, given the importance of the defense sector for us, defensibility should be attributed to the status of constitutional legal principle, and respective legal force. By doing so, it will confer the nature of ascendancy, supremacy and priority of the requirements deriving from the principle of defensibility over legal and sub-legal principles. Such a legal force is the ultimate legal guarantee of its implementation and enforcement.

Thus, the enshrinement of the proposed defensibility principle is necessary just because, in the long run, the state with a long-term legal solution will acquire a new quality, defense capacity, and thus be not only legal, social, democratic, but also defensible. The Constitutional reservation is a guarantee that the principle will be able to pave the way throughout the whole of the legal-political turmoil, regardless of the political will and other subjective factors that are quite influential in the governance process.

The implementation of any legal principle, provision in the legal regulation mechanism, ranging from the creation to the enforcement in a broad sense, apart from the guarantees (legal guarantees) also has the need for general public and individual-human or conscious guarantees. On the other hand, the requirements arising from the principle of defensibility are concerned not only with the public administration system, but also equally with the public and citizens

of the country.¹: Not only the Armenian state, but also the Armenian people and RA citizens should be able to defend themselves. History lessons suggest that the spiritual, moral and legal qualities of the population are an important component in the national security and defense system. There are two basic strategies: massiveness ("numbers") or "spirit", which are used and applied in the eternal struggle for survival. We were deprived of the first "pleasure" at the time and we are deprived of that today. Consequently, the second should be the strategy of our existence. That is to say, the pledge of survival of a small nation is a special national-patriotic spirit. This special spirit will also give the organizational structure the result we expect from history. In order to establish a spiritual, moral and legal component of the national security and defense system it is necessary to have a state policy. Patriotism and legal obedience are not natural, rather shaped, temperamental and upbringing qualities.

As a result of knowledge, sophistication and volition, a new psychological, intellectual-sensual-volitional form of national-patriotic stance emerges. This position is the individual's prejudice in a way to perceive and evaluate the reality, public processes, and willingness to act in accordance with the value system. The position must reach a degree of conviction, turn into a person's inner plan and action plan. With this unquestionable reality, any reform concept, especially the public education system, should be taken into account at all levels.

It is important to note that the constitutional principles can be of several types: the first are the "fundamental principles of the constitutional order" and then the principles relating to the separate constitutional legal institutions are in the forefront. In order to apply

¹ The applicability of these requirements to the citizens is conditioned by the obligation to participate in the protection of the Republic of Armenia with the bearer of responsibility prescribed by the Constitution. These constitutional obligations are, in contrast to other obligations, only citizens. Non-citizens are not subjects of that obligation.

the legal requirements arising from the principle of defensibility to the public authority structure and society (people) and citizens, the principle should have the legal status and legal force of the "basis of the constitutional order".

There is no legal- technical, or international legal obstacle to such a resolution. Such a solution is the manifestation of the sovereignty of the Republic of Armenia and the necessary geopolitical and other peculiarities of Armenia.

The principles of the organization and operation of the state apparatus have been elaborated, substantiated and put into practice in the centuries-old history of the state apparatus. The principles underlying the organization and operation of each state's state structure have an objective and subjective arrangement.

The model of modern democratic, social and legal state promotes the harmonization of the principles of the state system. However, it should be borne in mind that specific conditions of the real state may cause the circumstance of reviewing or completing the principles. It is accepted in State science that the factors influencing the formation, functioning and sustainable development of any state are: economic conditions, the political system and the peculiarities of the life, official, including the legal ideology, the basic principles of the state structure, the political and moral-ethical qualities of the society; problems and goals facing them, and so on. The scope of the general principles of the state apparatus is also conditioned by historic conditions, national composition, and cultural features of the given state.

Factors that are crucial to the functioning and sustainable development of the unified state system are also the acknowledgment of the state in the modern era, its legal recognition, conditioned by the state's foreign political status as well as the state's geopolitical position. The latter two factors are essential for the construction and operation of the third Republic of Armenia as well as the Artsakh

Republic state system. For example⁴, the danger threatening Artsakh as a state of sovereignty and territorial integrity is always the external political factor.

Consequently, the main problem facing the Artsakh public and the state is the defense of the country, the constant strengthening of its defense capacity. In the ordinary course, any state carries on the protection of the country. However, the extraordinary conditions of Karabakh and the problem facing it, before the creation of international legal guarantees of independence and territorial integrity, are dictated by a substantial rearrangement in the state constitution, not being satisfied by the implementation of the conventional defensive function.

Thus, the specific conditions of the particular state and the additional threats to it raise new challenges, the meaning of which is one of the priorities of science. Considering the peculiarities and geopolitical situation of the two Armenian states, we propose to make theoretical reorganization of the state apparatus of the Republic of Armenia and Artsakh and make the defensibility as a principle of organization and functioning of state apparatus.

Opponents may argue that there is a theoretical contradiction between the principles of defensibility and other principles of organizing and operating the state system. Let's try to combine these principles to prevent such judgments.

Does the normative content above the defensibility principle contradict the principle of separation and balance of power? The latter demands the structural, functional, personal separation of the authorities through well-thought effective checks and balances. The principle of defensibility makes it clearer the separation of powers in the field of defense, as well as requires that the management of this sector be secured in a centralized executive power system (in any model), complemented by parliamentary legislation and oversight. Each state body feels itself as a participant in the defense of the

motherland and with liable, with a clear authority. We do not see any theoretical and practical contradiction between these requirements and the demands emanating from the principle of separation and balance of power.

The next fundamental principle of the organization and operation of the state apparatus is democracy or rule of the people. Defensibility does not deny democracy, does not mean a militarized state and society. It merely emphasizes and requires that the democratic institutions, structures, and entities of a democratic state comply with the normative requirements of the principle of defensibility, that the democratic state should also be defensible and the defense of the homeland is the whole nation's and everyone's duty. Defensibility implies popular initiative and active participation.

We bring the example of the US to possible opponents. If we judge the so-called modern democracy standards, it's hardly possible for anyone to convince us and justify that the United States is not a democratic country. However, along with the democratic character of the US as a state, many authors describe it as a highly secure and defensible one. Thus, the American author A. Schlesinger, exploring the whole story of the United States and comparing it with other countries came to a very interesting conclusion: "The foundations of the state¹, not the dynamics of the development of capitalism, have led him to strive to have influence on the world ... Political and strategic motives, national power and national security are endowed with their own viability and power, independent of the ideological system and property."²

¹ Arthur Schlesinger uses the phrase "**Raisons d'etat**", the most suitable translation of which is "**the foundations of the state.**" The foundations of the state by their content are very close to the construction and operation of the state, so we can say that the United States has given such quality to the logical principles of its creation and functioning.

² See **Шлезингер-младший Артур М.** Циклы американской истории. Пер. с англ. М., 1992 (Shlesinger junior Arthur M. Cycles of the American History. Translation from English. Moscow 1992), p. 688:

The said justifies the claim that the principle of defensibility by its nature and the normative content (requirements) can not contradict to any one of the current principles of organizing and operating the state apparatus, because the way of realization of all requirements is the constitutional path of contemporary society's constitutional order, consistent with the basics, provided that the essential requirements for the principle of separation of powers are strictly observed.

Of course, the concept of social and legal state is the historical and cultural achievement of the European peoples, reflection of the distressful experience of political and legal life of more than a thousand years. The distressful experience of the European peoples had an inner aspect, it was an internal issue not an external one. The outcome of the struggle against the inequality and for the freedom in the domestic sphere became the three concepts of the state, which were transferred to the constitutional regulation as the fundamental principles of the state.

For Armenia and the Armenian people, the distressfulness has an external aspect: all his historical misfortunes were the constant attacks and strife of foreigners, which later turned into a foreigner's yoke and oppression. Consequently, the reflection of our afflicted life should become a concept of a defensible state, turn into the fundamental principle of our basic law, and thereby provide a new quality to social, legal, democratic state inherited from Europe.