

PROHIBITION OF WAR AS AN INSTRUMENT OF NATIONAL POLICY BY A PIONEER CONSTITUTION

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I. Formulation of the Issue and a Brief Historical Outline

To form a basis for analysis of the content of a constitutional provision incorporated in the 1921 Constitution of Turkey, a brief outline will be given of the main features of the Constitution's development and its epoch-making role in Turkish constitutional and political history. In fact, the Constitution on which we shall focus our attention, was made on 20 January 1921, when Turkey was passing through the greatest crisis in her history: almost five months before the adoption of the 1921 Constitution, that is to say, on 10 August 1920, the Treaty of Sévres and its humiliating conditions were signed by the Sublime Porte. The so-called peace treaty was designed in such a meticulous pattern that great powers of those days had rarely missed any effective measure which would facilitate the amputation of the «Sick Man». Almost every implement was provided to carry out that political surgery: Right to intervene and occupy; right to appoint the administrators and the police; right to control the state's tariff and financial affairs; right to administer and control of the state budget; and the like. «This peace», above all, as one historian has succinctly pointed out, «made Turkey completely dependent politically, economically and in every financial respect on the three Great powers of Western Europe. Turkey... had been made to consent to a tripartite division

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which exposed the country to an uncertain fate». (1) Another scholar admitting its severity wrote that «the Treaty of Sévres was very harsh, and would have left Turkey helpless and mutilated, a shadow state living on the sufferance of the powers and peoples who were annexing her richest provinces. It was far more severe than that imposed on a defeated Germany...» (2) If that Treaty were ever to be implemented, (3) almost nothing would have left of the Turkish Fatherland, Anatolia, let alone those appetizing territories of the Ottoman Empire. In short, there were only two Latin words that could be properly used for the stipulations and political consequences of that Treaty: *V i e t a r m i s*. It would not be appropriate in this brief outline to proceed step by step through the political history of the Turkish National Struggle and War of Liberation, but at this point it would be appropriate to refer to the sharp contrast between Western ideals and principles of which peace, security, self-government and self-determination were, and still are prominent, and the political behaviour of the victorious powers, who in that period felt themselves free of all those values to violate the territorial integrity and sovereignty of a nation. (4) What can one expect at that very time of national disaster and mourning from a newly convened national legislature of an emerging nation-state to insert in its first constitution about the concept of war and the power of declaring it? A full answer of this question will follow later on, but it is important even here to say that the 1921 Constitution of Turkey has not granted the Grand National Assembly «the

¹ Gerhard SCHULZ, *Revolutions and Peace Treaties 1917-1920*, London 1974, p. 215.

² Bernard LEWIS, *The Emergence of Modern Turkey*, 2nd edit., London 1968, p. 247.

³ «The Treaty of Sevres was stillborn, and Italy, led by Giolitti and Sforza, acted wisely in recognizing the rising force of nationalistic Turkey and in promptly coming to terms with it. France took a similar position; but not until their Greek client had met disaster did the British come to terms with Kemal...» René Albrecht-CARRIE, *Italian Foreign Policy, 1914-1922*, (*The Journal of Modern History*, vol XX, 1948, p. 337).

⁴ A Western author for instance, in his comment upon *s e l f - d e t e r m i n a t i o n*, has put the matter candidly: «self-determination... had been proclaimed as a dogma of universal application, but in practice it was not intended by the Western allies to reach significantly beyond the confines of Europe or, even there, to penetrate into the territory of the victors». Rupert EMERSON, *From Empire to Nation*, Boston 1962, pp. 3, 4. Italics are mine.

right to declare war», but, on the contrary, «the right to declare a defence of the Fatherland».

The 1921 Constitution was the first legal document of a new-born nation-state in which the constitution-maker had openly enacted the rules of national sovereignty and self-government in contrast with the monarchical Ottoman constitutions. Thus the Constitution prescribed ⁽⁵⁾: «Sovereignty is unreservedly and unconditionally vested in the nation. The form of administration is based on the principle of self-government» (Art. 1); «the legislative authority and executive powers are concentrated and manifested in the Grand National Assembly». (Art. 2) These provisions of the 1921 Constitution call attention to the fact that «with the break-up of dynastic empires (here, the Ottoman Empire) there comes a radical change in the basis of political sovereignty and in the kind of legitimacy sought and claimed by political institutions». ⁽⁶⁾ What, in fact, emerged at that time was the principle of representation and national sovereignty, and this marked a breach with the monarchical past, of the profoundest political and legal significance. What is more, the Sultanate was declared abolished and by this means a system of monarchical rule had been overthrown that had lasted without a break for six centuries. In order to give an idea of what matters were dealt with in the 1921 Constitution, we shall briefly glance at some structural features of it. The text of the Constitution was very brief. It contained only twenty-four articles. No preamble, no chapters, (with one exception) ⁽⁷⁾ even no titles and subtitles were included in the text. We infer, however, from the statements of the official spokesman (rapporteur) of the special commission which studied the Draft Constitutional Law that the first nine articles of the text were designed to cover the fundamental principles of the Constitution. ⁽⁸⁾ Moreover, nothing was said in the Constitution about the rights and freedoms of individuals, and the judiciary. In reality, the Turkish constitution-maker had no spare time to make a much more detailed constitution,

⁵ For the Turkish text of the above-mentioned Constitution and other documents of importance, see A. Şeref GÖZÜBÜYÜK - Suna KILI, *Türk Anayasa Metinleri*, Ankara 1957, pp. 85-87.

⁶ Eugene KAMENKA, *Nationalism, the Nature and Evolution of an Idea*, London 1976, p. 14.

⁷ The only title it contained was about local-government. See (Art. 10).

⁸ T.B.M.M. Zabıt Ceridesi, *Devre* : 1, 2 nci basılış, 1943, c: 6, s. 359. (The Record of the Grand National Assembly of Turkey, reprinted 1943, vol. 6, p. 359).

because the state of emergency at the time was so pressing that even the Constitution's itself had been speedily debated. There were, nevertheless, an account of details of facts or events in the official records of the Grand National Assembly which implied its deep respect for the rights and freedoms of individuals and the administration of justice. This brevity in the form and content of the 1921 Constitution can not be considered as a serious defect in constitution-making, because some factors and forces which happen to be at work when a constitution is drafted, would mould its procedure as well as its substance. On the other hand, the worth of a constitution can not be judged by its lengthy and verbose appearance. As one writer has put it rightly: «no constitution, written or unwritten, is worth more than the political temper of the community allows it to be worth. The best of paper constitutions is worthless if applied to an unstable, divided or intolerant community. The worst of paper constitutions can evolve into something better in the right political atmosphere...»⁹) Briefly, then, the 1921 Constitution had been a true guide to a people, who, with a long common past and a desire to enjoy a common future, was struggling to embody itself in a new political form: Nation-state. In this respect, 1921 Constitution has still a distinguished place and importance in the Turkish constitutional history.

II. The International Dimension and Legal Value of the 7 th Article.

Generally speaking, constitutions empower legislatures to make peace and war between states. Almost all of the world constitutions, old and new ones alike, employed such words as «to make peace, and to declare war» in their related provisions while vesting the exercise of these powers in legislative assemblies. Here, to compare ohronologically with the 1921 Constitution, we particularly selected constitutions which were adopted between the years of 1919 and 1920. Thus, in the constitutions of three European countries, i. e. Czechoslovakia (Constitution of 1920, Art. 54), Denmark

⁹ Ronald BUTT, *The Power of Parliament*, London 1967, p. 2. On the other hand, it is interesting to note that in an old case, the Supreme Court of the United States had decided about the length of a constitution, as follows: «Its (constitution's) nature... requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the the nature of the objects themselves». *McCulloch v. Maryland* 17 U.S. 4 (*Wheat*) 316. 1819.

(Constitution of 1920, Art. 18), and Finland (Constitution of 1919, Art. 33), no reservation was made in using the word «war». The constitution-makers of these countries merely prescribed for the powers of their legislatures or (with the consent of the former) executives, of declaring war. Undoubtedly, there was nothing strange about their legal behaviour, since it has been the common trend in constitution making. By following this common trend, the 1921 Constitution, could have authorised the Grand National Assembly in the same manner. But, it did not. On the contrary, it did something out of the way and bestowed upon the legislature (the Grand National Assembly) only the right to declare defence of the Fatherland. Thus, it is in this fact that the strength and significance of the provision of 1921 Constitution resides. The reason for us attaching considerable importance to the 7th Article of the 1921 Constitution lies not merely in its words, but also in the realities we use words to talk about. We shall, therefore, endeavour to throw light on the contents of the words of the 7th Article by making a short journey round the world of international law and politics.

When the 1921 Constitution was written, the right to go to war was still an unquestioned prerogative of sovereignty, and its exercise had to be provided for in the Constitutions. Up to the twentieth century, the right to wage war was considered as an assertion and symbol of sovereignty. This right was conceded to the sovereign state, and was indeed the hallmark of its sovereignty. German historian Treitschke summed up the matter, when he said: «Every sovereign state, has the unquestionable right to declare war when it desires to do so»,⁽¹⁰⁾ Time and time again, men, throughout the world, compelled their adversaries to dictate their will by means of physical force which manifested itself in various forms, and even under some false pretences. It would be proper to say with an eminent Frenchman, Satirist La Bruyere that «in all ages men, for the sake of some small patch of ground, have agreed among themselves to despoil each other, to burn, slay, slaughter one another; and to do this more ingeniously and more surely, they have invented fine rules which are known as the art of war...»⁽¹¹⁾ Even today, nations as a whole are doing their valiant best to manufacture more and more refined articles for Von

¹⁰ Quoted in J. L. BRIERLY, *The Outlook for International Law*, Oxford 1944, pp. 21, 22.

¹¹ La BRUYERE, *Characters*, London 1970, p. 167. Italics are mine.

Treitschke's sumptuous «Miss Universe». ⁽¹²⁾ Much more is now spent on weapons and war materials than was ever spent in the past. Hence, everywhere, the sum of money appropriated for weapons by means of defence budgets has been undoubtedly enormous. ⁽¹³⁾ Facts and figures, concerning the matter, point out that some allocations are even beyond the means of advanced industrial countries, let alone advancing ones. To discuss such a vast subject as war with all its ramifications, is not the object of this study. It would suffice here to say that that persistent character ⁽¹⁴⁾ of war caused modern writers ⁽¹⁵⁾ to regard it simply as a fact or an event. Before 1914, war and the use of force were accepted as legitimate means of securing national interests when diplomacy failed to achieve the desired objects. The attitude of international community, however, has gradually changed towards this «fact or event» by attempting to humanize the conduct of war, to limit the right to wage war, and eventually to exclude any such right altogether in the case of the individual state. The main stages in this development were: Hague Peace Conferences of 1899 and 1907; the Covenant of the League of Nations in 1920; and the Briand-Kellogg (Pact of Paris) in 1928; and the Charter of the United Nations. In the light of these international developments, the value of the words which were inserted into the 1921 Constitution could not be underestimated as a means of limiting war and of thereby preserving peace. Eight years before the Briand-Kellogg Pact, twenty four years before the Charter of the United Nations, and just one year after the Covenant of the League of Nations, the men who drew up the 1921 Constitution decided that the emerging-

¹² Quoted in BRIERLY, op. cit., 19.

¹³ Recently a Swiss daily has reported that in 1977 Switzerland had exported 513 m francs of war materials to various European, and other countries. Among them were: W. Germany (216 m), Spain (55 m), Holland (51 m), and Austria (45 m). The rest of the material (146 m) was delivered to other 55 countries of the world, *Neue Zürcher Zeitung*, Samstag 21. Januar 1978, Fernausgabe Nr. 16.

¹⁴ Taking most violent disturbances of European history chronologically, Leslie Lipson wrote about this character of war, as follows: «Major convulsions recurred with frightening regularity. The Thirty Years' War (1618 - 48), the War of the League of Augsburg (1688 - 97), the War of the Spanish Succession (1701 - 13) the Wars of the French Revolutions (1793 - 1895), World War I (1914 - 18), and World war II (1939 - 45). These were interspersed with more limited conflicts, so that scarcely a decade went by without an outbreak of hostilities somewhere». *The Great Issues of Politics*, Third Edit., N.J. 1965, p. 350.

¹⁵ BRIERLY, op. cit., p. 22.

state would not resort to war as an instrument of national policy. When the Turkish Constitution-makers empowered the Grand National Assembly not to declare war, but only to declare defence of the Fatherland (Art. 7), they had really made a long step towards future. It is important to stress that the evidence of this conduct of affairs can be observed and read not only in the 7th Article of the 1921 Constitution, but also in the following historical and political Turkish documents of that period: Amasya Circular (June 22, 1919), resolutions of the Erzurum and Sivas Congresses (August 7, 1919, September 11, 1919). Although they were all related to the Turkish National Struggle and Liberation Movement, the word war was never employed by them. On the contrary, the authors of these documents preferred to use the word of self-defence. As it was proclaimed in the Declaration of the Grand National Assembly which was published on 21 October 1920 that the Grand National Assembly had been convened with the purpose of self-defence against the attempts of imperialistic powers on the life of the Turkish state and nation, Again, in the same Declaration it was written that the Grand National Assembly had established a standing army to defend the existence and independence of the nation against aggressions of the imperialistic and capitalistic Powers resolutely. ⁽¹⁶⁾ Having drawn its inspiration from international law as well as these documents, the 1921 Constitution formulated in its 7th Article an inalienable right of a state to protect itself against an illegal attack. When «an injury to that which belongs to us» is done, we «defend and strive to retain what is ours». ⁽¹⁷⁾ Viewed in this light, it seems to us reasonable to argue that the afore-mentioned provision of the 1921 Constitution prohibited war and the use of force in any form, save in self-defence. The right of self-defence, on the other hand, had its origin directly, and chiefly in the fact that nature commits to each person and state their own preservation. Moreover, there can be no doubt that a right of self-

¹⁶ For the Turkish texts of these documents, see Server FERİDUN, *Anaya salar ve Siyasal Belgeler* (Constitutions and Political Documents), İstanbul 1976, pp. 54-62. Italics supplied.

¹⁷ Hugo GROTIUS, *De Jure Belli Ac pacis*, Reprinted 1964, Bk. II, p. 186. Samuel PUFENDORF, *De Jure Naturae Et Gentium Libre*, Reprinted 1964 (Oceana), Vol. II, Bk. VIII, p. 1294.

defence exists under international law. ⁽¹⁸⁾ It is striking that a constitution as early as 1921 contained a provision which imposed upon the state an obligation to refrain from war similar to the Articles 2 (4) and 51 of the United Nations Charter. Indeed, the prohibition of war of any kind established by the United Nations Charter went far beyond that was established both by the Covenant of the League of Nations and, the Briand-Kellogg Pact: First, the charter by its Article 2 (4) prohibited the use or threat of force against the territorial integrity and political independence of any state. Second, by Article 51 it provided that «nothing in the present Charter shall impair the inherent right of individual or collective self-defence, if an armed attack occurs against a Member of the United Nations until Security Council has taken the measures necessary to maintain international peace and security». (italics supplied). By banning war the framers of the 1921 Constitution sought to achieve the same objects of the Charter. Again, the provision of the 1921 Constitution about the defence of fatherland is nothing more than «the inherent right of individual self-defence» of the Charter. What is, however, important to keep in mind, from legal point of view, is that the value of such a constitutional norm would be better estimated, if it is considered to be a commitment to abide by the rules of international law, and again, if it is to be interpreted as a precedence of the rules of international law about the prohibition of war over the municipal, or national law. As the words stand, they seem to mean something. In our view, then, the men who drew up 7 th Article of the 1921 Constitution had made a remarkable progress, be it a simple or modest one, towards the precedence of international law over national law. We may then conclude our remarks by comparing 7 th Article of the 1921 Constitution with the related Article (Art. 66), ⁽¹⁹⁾ and with the preamble of the 1961 Constitution of Turkey which is in force today. There is, indeed, a mutual relationship between these two provisions of Turkish constitutions. These relationships are of two main kinds: First, the new Constitution

¹⁸ GROTIUS, op. cit., p. 172. Hans Kelsen, Principles of International Law, New York 1952, p. 60.

¹⁹ The New Turkish Constitution adopted on 9 July 1961, reads in Article 66: «The authority to declare a state of war in cases deemed legitimate by international law, and exclusive of cases rendered necessary by international treaties...» (italics supplied) For an english version of the Constitution, see BLAUSTEIN - FLANZ, Constitutions of the Countries of the World, vol. XIII, New York 1973.

explicitly expressed in its preamble, which forms legally a part of it that the Constitution had drawn its inspiration from the principle of «peace at home, peace in the world», ⁽²⁰⁾ and also from the spirit of the Turkish National Struggle.

The second point to be observed is that framers of the 1961 Constitution occasionally declared in the introductory part of the Constitution (which states the purpose or occasion for framing it) that they in making the Constitution had taken into consideration the political philosophy of the Turkish National Struggle and Turkish constitutional tradition. Therefore, the provision of the new Constitution (1961) concerning «legitimate war» can be regarded a projected form of the historical provision about «the defence of Fatherland». It may finally be noticed that both of these constitutional provisions have shared the same opinion about the prohibition of war. In this respect, we consider 7th Article of the 1921 Constitution a pioneer clause which deserves to be praised from the point of view of national and international law.

²⁰ Since the establishment of the Turkish republic, «*peace at home, peace in the world*» has been a distinctive precept of its foreign policy.