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LEGAL ASPECTS OF THE GRANT OF THREE SEATS TO RUSSIA IN THE UNITED NATIONS CHARTER

N. S. TIMASHEFF†

I.

AMONG the signatories of the Charter of the United Nations, signed in San Francisco on June 26, 1945, one finds, in addition to the representatives of the Union of Soviet Socialist Republics, representatives of the Byelorussian Soviet Socialist Republic¹ and of the Ukrainian Soviet Socialist Republic, in other words, of two of the sixteen constituent republics² composing the Soviet Union. Consequently, all the three States are entitled to seats in the General Assembly of the new organization. A double anomaly appears in these facts: (1) In an international organization, both a federal government and governments of subsidiary federated units appear as coequal partners;³ (2) out of the sixteen constituent republics of the Union, only two are allowed to play that unusual part, though nothing, in the Constitution of the Soviet Union, could be found implying a privileged position of these two as compared with the remaining fourteen.

In the opinion of the representatives of the Soviet Union, the second of these anomalies is just a temporary one: Speaking at a meeting of the heads of the delegations of the individual nations, Dmitry Z. Manuilsky, chairman of the Ukrainian delegation at the United Nations Conference, pointed to the fact that there were a number of small nations of Eastern Europe which were not represented at the conference. This statement was taken by those present as an indication that the entrance of the Ukraine and Byelorussia into the new organization

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1. The Byelorussian Republic is commonly called White Russia. The text follows the official publication of the Charter by the Department of State (Publication No. 2353, Conference Series No. 74).

2. The term "constituent republic" is used to designate the members of the Soviet Union, in contradistinction to the "autonomous republics" which are territorial subdivisions of the constituent republics. The English terminology differs from author to author; the above text follows the translation of the Constitution of 1936 by Mrs. Anne Louise Strong which, in the present writer's opinion, is the best available; STRONG, *THE NEW SOVIET CONSTITUTION* (1937) 121-161.

3. There is an obvious difference as compared with the signature of the Charter by representatives of the United Kingdom of Great Britain and Northern Ireland and representatives of the dominions: the signature of the former does not cover the dominions whereas the signature of the representative of the Soviet Union also covers the areas of the Ukraine and Byelorussia.

would be followed by requests that other Soviet States should eventually be represented.⁴

Whether such a request will ever be granted, depends on a decision of the General Assembly of the new organization upon the recommendation of the Security Council,⁵ and very definitely this decision will be political, just as the grant of membership to the Ukraine and Byelorussia was: it is well known that this grant was part of a deal between the "Big Three" concluded at Yalta. The political aspect of the question is beyond the scope of this paper. The problem to be discussed here is this: Is there any juridical ground for granting two, or more, of the constituent republics of the Soviet Union membership in the United Nations and, consequently, seats in its General Assembly? In other words: Is the legal status of these republics identical with, or similar to that of the sovereign nations who have signed the Charter?

The discussion of this problem can be best initiated by establishing these facts:

1. The Union of the Soviet Socialist Republics, as organized according to the original Constitution of July 6, 1923, and by the new (so called, Stalin) Constitution of December 5, 1936,⁶ is a federal state involving the existence of a federal government and of a number of governments of the constituent republics.⁷

2. Up to February 1, 1944, there was no doubt that the constituent republics of the Union could not be conceived as virtual members of an international organization since foreign relations and military affairs were numbered among the exclusive powers of the federal government.

3. On February 1, 1944, a Constitutional Amendment was passed by the Supreme Soviet of the Union⁸ granting the constituent republics participation in the conduct of foreign relations and military affairs, with the special purpose of raising the international status of the repub-

4. N. Y. Times, June 19, 1945, p. 8, col. 2.

5. Charter, Art. 4, § 2.

6. In this paper, the real meaning of the Constitution in the light of the one-party system (referred to in Article 126 of the Constitution of 1936) will be touched upon only incidentally.

7. The number of the constituent republics was originally 4; it was raised to 7 in 1924, to 11 in 1936 (by the new Constitution) and to 16 by the annexations of 1939-40 which resulted in the admission of the Estonian, Latvian, Lithuanian, Finno-Karelian and Moldavian republics.

8. According to Article 146 of the Constitution of 1936, constitutional amendments are effected by decisions of the Supreme Soviet of the Union (roughly corresponding to the Congress of the United States) adopted by a two-thirds majority of a joint session of the two houses of which it consists. In contrast to the American practice, the amendments are not numbered and are incorporated into the text of the Constitution.

lics.⁹ Obviously, this Amendment cannot be understood outside of the framework of the Union, a relationship between the Soviet Union and the constituent republics as stated in the Constitution, which will be later developed.

II.

Article 13 of the Constitution of 1936 explicitly states that the Union of the Soviet Socialist Republics is a federal state formed on the basis of the voluntary union of several Soviet Socialist republics, equal in rights. Since this Constitution was enacted by the legislative body of an already existing Union,¹⁰ no direct reference to the origin of the latter is made. But it may be assumed that the legal basis of the original Constitution of 1923, the Treaty of Union signed December 30, 1922, by the four original republics, is still in force. This points to the fact that the origin of the Soviet Union is different from that of the United States and is rather similar to that of the German Empire (1871). In this Treaty of Union it was not the people of the Soviets as a collective unit, but the peoples of the individual republics as represented by their governments who decided "to unite into one federal State."

This difference of origin does not however imply any basic political difference in the organization of the two Unions, the Soviet and the American. The main principle of the Union-constituent republics relationship is namely this: a certain number of powers enumerated in Article 14 of the Constitution are delegated to the Union and, according to Article 15, outside of these limits ". . . each constituent republic shall exercise state power independently."¹¹ The list of the powers delegated to the Union is however much longer than that comprised in Article I, Section 8 of the Constitution of the United States, and this for two reasons: (1) the practice of the United States and of other federations concerning "implied powers" has been taken into considera-

9. In a speech at the meeting of the Supreme Soviet, Mr. Molotov, the People's Commissar for Foreign Affairs, said: "The absence of special provisions in the Soviet Constitution as regards the rights of the constituent republics to exchange representations with other states and to maintain foreign relations is sometimes interpreted to the direct detriment of the interests of the Soviet Union as a whole. The proposed amendment will serve to eliminate facts of this kind." This speech was published in *Izvestia* (the official paper of the Supreme Soviet), February 2, 1944. Later on, this speech will be referred to as "Molotov's speech."

10. It was then the Union Congress of the Soviets (superseded in 1936 by the Supreme Soviet of the Union).

11. This is a counterpart of the Tenth Amendment of the United States Constitution which is commonly considered to be merely declaratory and to have "added nothing to the instrument as originally ratified." *United States v. Sprague*, 282 U. S. 716, 733 (1931); *United States v. Darby Lumber Co.*, 312 U. S. 100, 123 (1941).

tion, and a number of particular powers have been consequently explicitly mentioned; (2) the Soviet Union is a socialist State exercising a number of activities which, in other states, are carried out by private individuals, and a large part of these activities belong to the federal level.

For the purposes of this paper it is sufficient to note that the list of the federal powers, as stated in the Constitution of 1936, comprised these items:¹² "(a) Representation of the Union in international relations, conclusion and ratification of treaties with other states; (b) Questions of war and peace . . . ; (g) Organization of the defense of the USSR and the direction of all the armed forces of the USSR."

In Articles 17, 18, 57-63 and 79-88 of the Constitution¹³ devoted to the structure and powers of the constituent republics no mention of foreign relations or military affairs was made, and the fact that, prior to February 1, 1944, diplomacy and national defense were entirely under the jurisdiction of the Union was stressed in Molotov's speech at the session of the Supreme Soviet devoted to the Constitutional Amendment.¹⁴ In these regards, the Soviet Constitution was more centralized than the Constitution of the United States which recognizes the possibility of the states entering into direct relations with foreign powers, provided the consent of Congress is obtained,¹⁵ and keeps within the hands of the state authorities the actual training of the militia, the

12. The individual clauses are designated by letters of the Russian alphabet; by necessity, they must be replaced by letters of the Latin alphabet.

13. These articles have no counterpart in the American Constitution which is satisfied with the guaranty of the republican form of government in the individual states (Art. IV, § 4). "All the States had governments when the Constitution was adopted. . . . These governments the Constitution did not change." *Minor v. Happersett*, 21 Wall. 162, 175 (U. S. 1874). In the United States, the Constitution recognizes state powers resident in the state before the Constitution was adopted; the Constitution circumscribed and limited the powers of the federated states. On the contrary, the major lines of the constitutions of the constituent republics are fixed by the Constitution of the Soviet Union.

14. According to Molotov's speech, even prior to the Constitutional Amendment of February 1, 1944, there were, in the Red Army, national army formations (Lithuanian, Estonian, Latvian, Georgian and so on). These were, however, detachments composed of nationals of the individual republics (just as in the Army of the United States there may be divisions composed of New Yorkers, Texans, and so on), but having had no legal attachment to the political framework of the several republics.

15. Art. I, § 10, cl. 3. "There have been few instances in which the States have sought, . . . to enter into agreements with foreign States, and there are therefore few cases in which the courts have been called upon to determine what kinds of agreements may thus, with congressional approval, be entered into between the States and foreign States." 1 WILLOUGHBY, *THE CONSTITUTION OF THE UNITED STATES* (2d ed. 1929) 306. The reason is obvious: "If these compacts are with foreign nations, they interfere with the treaty-making power, which is conferred entirely on the general government." *Barron v. Mayor, etc. of Baltimore*, 7 Pet. 243, 249 (U. S. 1833).

appointment of militia officers¹⁶ and the entire government of the militia forces except when they have been called into the service of the federal government.¹⁷ But the provisions of the Soviet Constitution of 1936 have been changed in 1944; the change will be studied in a later section.

Returning to the general structure of the Union-constituent republics relationship, one more similarity with the United States Constitution can be stressed: According to Articles 19 and 20 of the Soviet Constitution: "The laws of the USSR shall have like force in the territories of all constituent republics: In case of conflict between a law of a constituent republic and a law of the Union, the all-Union law shall prevail." This is a restatement of Article VI, Section 2, of the Federal Constitution making "This Constitution and the laws of the United States which shall be made in Pursuance thereof . . . the supreme Law of the Land. . . ."¹⁸

In two other regards, significant differences appear between the Russian and American patterns of a Constitution. First of all, Article 17 of the Soviet Constitution reserves to each of the constituent republics the right freely to secede from the Union.¹⁹ Secondly, whereas the government of the United States is dual²⁰ and ". . . the Federal and State Governments act independently of each other,"²¹ the govern-

16. Art. I, § 8, cl. 16. As has been authoritatively stated, "Whilst Congress shall prescribe . . . a uniform militia system for the States, securing the enrollment of all able-bodied white male citizens, and maintaining the system of discipline and field exercise observed in the regular army, yet that the details of militia organization and management [are] left to the State governments." *Power of President to Create a Militia Bureau in the War Department* (1861) 10 OPS. ATT'Y GEN. 11, 13; CONWAY, *A State's Power of Defense* (1942) 11 FORDHAM L. REV. 170-192; BECKWITH, HOLLAND, BACON, MCGOVERN, *LAWFUL ACTION OF STATE MILITARY FORCES* (1944).

17. *United States ex rel. Gillett v. Dern*, 74 F. (2d) 485 (App. D. C. 1934).

18. In contradistinction to the United States Constitution, the Soviet Constitution, in these articles, is not *stated* to be the supreme law of the land. This is due to the fact that in Russian legal terminology, the Constitution is called and understood to be "The Fundamental Law."

19. The real unity of the Soviet Union is based on the unity of the Communist Party which is one for the whole area. Directions against the use of the right of secession were addressed to the members of the Party immediately after the formation of the Union. In the thirties, a number of trials took place in different parts of the Union against persons who allegedly desired to use the right of secession. Compare the contrary doctrine regarding the rights of secession in America under the United States Constitution. *Texas v. White*, 7 Wall. 700 (U. S. 1868).

20. "The Constitution contemplates a national government free to use its delegated powers; also state governments capable of exercising their essential reserved powers. . . ." *Helvering v. Therrell*, 303 U. S. 218, 223 (1938).

21. 1 *WILLOUGHBY*, *op. cit. supra* note 15, at 120; *Ableman v. Booth*, 21 How. 506 (U. S. 1859).

mental organization of the Soviet Union is carried out on three levels: (1) Union, (2) republican (corresponding to state in America) and, (3) between them, joint, Union-republican administration. For the understanding of the bearing of the Constitutional Amendment of February 1, 1944, this is a highly important point and therefore detailed explanation is needed.

According to Articles 64 and 79 of the Constitution, the highest executive and administrative organ of the Union and of each of the constituent republics is the Council of People's Commissars. Articles 77, 78 and 83 of the Constitution enumerate the commissariats the heads of which form the Councils just mentioned²² and, in combination with other articles, divide them into three classes: (1) Union, (2) Union-republican and (3) republican. In this division, the tripartite division of the Soviet administration is manifested.

(1) The Union commissariats ". . . direct the branches of state administration entrusted to them throughout the territory of the U.S.S.R. either directly or through organs appointed by them" (Article 75); in their activity, the constituent republics do not participate. But representatives of these commissariats are appointed to the Councils of People's Commissars of the constituent republics (Article 83) and participate in their deliberations and decisions with the same rights as the commissars of the constituent republics.²³ For the purposes of this paper it must be stressed (1) that the Union commissariats approximately correspond to the departments forming the federal administration in this country and (2) that, up to February 1, 1944, the Commissariats for Foreign Affairs and Defense belonged to this category.

(2) The very existence of Union-republican commissariats forms a particularity of the Soviet structure; their activity can be characterized as joint administration of the Union and the constituent republics. If a branch of state activity, say, police, public health or justice, is under joint administration, then there exists: (1) one central commissariat directing the activity throughout the Union, its head being a member of the Union Council of People's Commissars, and (2) sixteen commis-

22. The enumeration, in the Constitution, of the individual Commissariats (as well as of the territorial divisions of the constituent republics) is the cause of the frequency of constitutional amendments.

23. It is noteworthy that according to Article 67 of the Constitution of 1923, the representatives of the Union Commissariats in the constituent republics enjoyed either full membership in the Council of the People's Commissars of the republic, or merely a deliberative voice in its midst, depending on a decision of the supreme legislative body of the republic. To understand what the provision of the Constitution of 1936 really means, one should imagine that the President of the United States would be granted the power to appoint his representatives to the governors' councils of the individual states.

sariats, one in each of the constituent republics, its head being a member of the Council of the People's Commissars of the republic, but, in addition to this, an officer subordinate to the Union commissar.²⁴ As a rule, the central commissariat directs the branches of state administration entrusted to it through like-named People's Commissariats of the constituent republics, but it may directly administer a definite number of enterprises. (Article 76). The term "enterprise", though exactly translating the Russian term, is a misnomer. Some of the joint commissariats really directly administer large economic units, but other ones directly administer big hospitals, concentration camps and the like. To make the relationship of the central and the "like-named" republican commissariats entirely clear, Article 87 of the Constitution states that in the constituent republics the Union-republican commissariats are subordinate both to the Council of the People's Commissars of the constituent republic and to the corresponding Union-republican commissariat of the Union.²⁵ This is a structure to which no counterpart exists in the United States. Anticipating further discussion, it may be stated right now that, after the Constitutional Amendment of February 1, 1944, the administration of foreign and military affairs has been entrusted to commissariats of this type.

(3) Finally, the republican level of administration (corresponding to state administration in this country) is represented by republican commissariats the heads of which participate in the Councils of People's Commissars of the constituent republics and are subordinate to these Councils, but to no person or agency on the federal level.²⁶ Today the number of these commissariats is small; only public education, local industry, local transportation, social security and public utilities are organized according to this pattern.²⁷ Since it is only on this level that the constituent republics exert an autonomy similar to that of the states in this country, the limited scope of their autonomy is beyond dispute.

24. The system of joint administration was used in the German Empire and was expanded by the Weimar Constitution. Whether the drafters of the Soviet Constitution were aware of this precedent, is unknown.

25. This dual subordination could bring about insoluble conflicts. In reality, none occur since all the persons involved (People's Commissars of different ranks) belong to the Communist Party and consequently receive consistent directions from the top of the Party organization.

26. This is correct on the constitutional level. In reality, as members of the Party, the heads of the republican commissariats are under the orders of the central agencies of the Party located in Moscow.

27. It is noteworthy that the original Union Constitution of 1923 granted the constituent republics a substantially larger scope of autonomy; internal affairs (including police), agriculture, justice and public health were entrusted to "republican commissariats," in addition to the branches mentioned in the text. The process of centralization started in 1930 and continued up to the Amendment of February 1, 1944.

III.

The Constitutional Amendment of February 1, 1944, which has preceded the Soviet claim for three seats in the United Nations Conference²⁸ has not brought about any substantial change in the political framework just described. The particular changes have been these: (1) the articles of the Constitution concerning the powers of the constituent republics have been reworded to acknowledge their participation in diplomatic and military affairs; (2) the list of the federal powers has been reworded, to give room to concurrent powers of the constituent republics in these affairs; (3) the People's Commissariats of Foreign Affairs and Defense have been moved from the rank of Union commissariats to that of Union-republican commissariats. More precisely:

1. The articles concerning the powers of the constituent republics have received these modifications. Article 18 which, prior to the reform, merely established the principle that the territory of the constituent republics could not be changed without their consent has been continued in this way: "Each constituent republic is entitled to enter into direct relations with foreign powers, conclude agreements with them and exchange with them diplomatic and consular representation. Each republic has its own military detachments." Moreover, Article 60 establishing the powers of the Supreme Soviet of a constituent republic has been expanded by these two items: (e) the creation of the representation of the republic in foreign relations and (f) the establishment of the method of the formation of the military detachments of the republic.

2. The change in the list of federal powers aiming at its restrictions has been carried out in a very awkward way, namely by the *addition* of new statements. Article 14, Section (a) of the Constitution has been continued by words of this import: the establishment of general relations between the individual constituent republics and foreign powers. Obviously, the word "general" must be emphasized, and the meaning of the addition is that relations of a more particular type do no longer belong to the powers of the Union. In a similar way, Section (g) of the same Article has been continued by words of this import: the establishment of the general principles of the organization of the armed forces of the constituent republics. The meaning is exactly the same as stated above: general principles must be opposed to technical questions which do not belong to the powers of the Union and therefore must belong to the jurisdiction of the constituent republics.

28. There exists however a reliable report according to which already in 1943 the Soviet Union claimed seven seats in the War Criminals Committee, one for each of the constituent republics on the territory of which atrocities had been committed (N. Y. Times, Dec. 21, 1943, p. 3, col. 1).

3. Most important is however the transformation of the Commissariats of Foreign Affairs and Defense into Union-republican ones. Up to the reform, they were Union commissariats; as has been shown above, this meant that, then, diplomatic and military affairs were conducted exclusively by the Union, whereas representatives of these commissariats in the Councils of People's Commissars of the constituent republics could exert some pressure on the agencies of the republics, to coordinate their activities with the diplomatic and military requirements.

If these commissariats would have become republican, this would have meant that, in the framework of the Constitution,²⁹ the constituent republics would have received the right to conduct independently their diplomatic and military affairs, with no interference from the Union level legally possible.

But this has not happened. The Constitutional Amendment has shifted military and diplomatic affairs to the level of "joint administration". This means that, both relating to foreign affairs and defense, there will be seventeen commissariats, one central in Moscow and one local in each of the constituent republics. According to the very Constitution, the central commissariats will direct their branches of administration partly through the local commissariats, partly directly, the embassies of the Union and the Union Army becoming "enterprises" in the meaning of Article 76 explained above. The local commissariats which will take the place of the former representatives of the Union commissariats in the individual republics, will carry out the limited diplomatic and military functions granted to the constituent republics by the Amendment, but, according to Article 87 of the Constitution, even relating to these affairs they remain in the state of subordination to the "like-named" central commissariats. The inevitable conclusion is this: the constituent republics have not been granted real autonomy in foreign and military affairs, but have been granted participation in these affairs which have become joint enterprises of the Union and the republics.

On the basis of the very text of the laws of February 1, 1944, the system must function approximately in this way:

1. In addition to the ambassadors and consuls appointed by the Union, the constituent republics may appoint their diplomatic and consular representatives (provided that foreign powers will agree to receive them), and receive such representatives of foreign powers (provided that foreign powers will appoint them). The new representatives

29. On this occasion, the constitutional framework must be opposed to the framework of the Party statute which, as has already been mentioned, operates with the scheme of the one and indivisible Union Party.

will be under the immediate orders of the commissariats of the individual republics, but these commissariats must obey the directions of the central Commissariat of Foreign Affairs. The constituent republics may conclude agreements with foreign powers, but of a rather particular (in opposition to general) character. However, the ratification of such agreements belongs to the powers of the Union which has also preserved the power to conclude general agreements (treaties). Very definitely, the constituent republics have received no power to declare war and restore peace.³⁰ In this regard they are of a significantly inferior status than the British dominions. Incidentally, diplomatic relations with foreign powers belonged to the prerogatives of the States of the German Empire, according to the Constitution of 1871. Up to 1914, there were in St. Petersburg, in addition to the German ambassador, representatives of Bavaria, Wuerttemberg, Saxony and Baden, and in the same states and a few more, representatives of the Russian Empire were present. These representatives never were very busy; their main task was to congratulate the members of the ruling houses on the occasion of their birthdays and wedding anniversaries. Time and again, treaties on the extradition of criminals and on the execution of judicial decisions were signed.³¹ It is however, not easy to figure out what a representative of Uzbekistan in Belgium or a Brazilian minister in Turkmenistan could do. An agreement between the Ukrainian and Byelorussian republics on the one hand and Poland on the other hand has been reported as to the exchange of minorities.³² But hardly could any difficulty have arisen if the negotiations were conducted by the Union Commissariat and, moreover, Poland was then represented by a Soviet-made National Committee.

2. As to military affairs, the situation is this. Instead of the already existing military detachments consisting of nationals of a particular republic, military detachments constitutionally linked to these republics will be created. But the leading principles of their organization will be established by the organs of the Union, whereas the organs of the constituent republics will establish the methods of their formation. These military detachments will be under the immediate orders of the defense commissariats of the constituent republics. But the latter, superseding the representatives of the Union commissariat of defense in the particular republics, will, according to the very text of the Constitution, be

30. Art. 14, § (b) of the Constitution has not been amended.

31. In the old German Empire, civil and criminal justice belonged to the number of State powers. But, according to the Soviet Constitution, justice is part of the "joint administration;" therefore, separate treaties on extradition and the like are improbable.

32. N. Y. Times, September 15, 1944, p. 5, col. 1.

subordinate to the central Commissariat of Defense. By no means has the Union renounced the right to have a Union Army. Up to the end of the war, no particular reference to military detachments of the particular republics could be found in the leading Soviet press. Incidentally, the Ukrainian and White Russian (Byelorussian) "fronts" which have conquered Poland and Eastern Germany were neither armies of the corresponding republics nor armies consisting of their nationals.³³ The terms simply designated the location of these "fronts" at the beginning of the decisive offensive of 1944, in addition to such fronts as Baltic and Leningrad.

In conclusion it may be said that the new liberties granted to the constituent republics of the Soviet Union are strangely similar to rights belonging to the individual states of this country, whereas, up to the change, these republics were inferior in status as compared with the states of this Union. The military detachments of the constituent republics are analogous to the militia of the states, trained and officered by them, and the rather vague right of the states to have relations with foreign powers is analogous to the right of sixteen republics to conclude agreements with foreign powers; to the consent of the Congress the consent of the Central Commissariat of Foreign Affairs is a kind of counterpart. Only the right to exchange representatives with foreign powers exceeds the rights of the states. But, as has been shown above, these representatives are finally under the order of the central Commissariat of Foreign Affairs.

The corollary is this: if two or, later on, more constituent republics of the Soviet Union are entitled to seats in the General Assembly of the United Nations, then each of the forty-eight states of the United States is also entitled. No analogy with the members of the British Commonwealth of Nations is possible since these members are really entitled to independent diplomatic relations, including the right of war and peace, and to the raising of their own armies, whereas there exists no such thing as the diplomacy of the army of the Commonwealth. After discussion, the anomalies pointed to in the very beginning of this paper have not been disposed of, but, on the contrary, appear real and startling: the three Soviet seats in the General Assembly of the United Nations belong not to three independent political units, but to one and the same unit represented by its central and two subordinate local governments.

33. The names have deceived even outstanding columnists in this country who expressed their amazement at the fact that the major republic of the Union, the Russian one, did not participate in the common effort.

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