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Herbert Hausmaninger*

The Committee of Constitutional Supervision of the USSR**

Introduction

Prior to the introduction of a Committee of Constitutional Supervision of the USSR (Komitet konstitutsionnogo nadzora SSSR) by constitutional amendment (article 125) on December 1, 1988, Soviet political theory had generally rejected the idea of judicial review over the constitutionality of legislation as incompatible with the fundamental “supremacy” of parliament.¹ Constitutional supervision in the USSR had been assigned to the Presidium of the Supreme Soviet, a standing body of the infrequently meeting Soviet parliament. Under article 121(4) of the 1977 Constitution, the Presidium had the power to “ensure observance of the Constitution of the USSR and conformity of the Constitutions and laws of Union Republics to the Constitution and laws of the USSR.” In the “period of stagnation” preceding Gorbachev’s perestroika, there was rarely a need to apply this provision.² Recent conflicts between republics and the central government, however, have led the Presidium to issue a number of decrees voiding new republic legislation, including amendments to republican constitutions that violated the Constitution of the USSR or federal law.³

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** This article was submitted on Feb. 21, 1990. It reflects the author’s appraisal of the legal and political situation up to that date. Note, however, that on Mar. 14, 1990, a special session of the Congress of People’s Deputies adopted the “USSR Law on the Establishment of the Post of President of the USSR and the Introduction of Changes and Additions to the USSR Constitution (Fundamental Law).” Izvestiia No. 75, Mar. 16, 1990, at 2, col. 1. Some of these changes also affect the Committee of Constitutional Supervision.


Before 1988, Soviet legal scholars had debated various models of constitutional supervision in an attempt to create a special state organ to resolve conflicts of this type. They considered formation of a special committee attached to the Presidium of the Supreme Soviet or to the Soviet of Nationalities, assignment of the function of constitutional supervision to the Supreme Court of the USSR, and creation of a separate constitutional court. None of these models was ultimately adopted.

The first model, a special committee at the Presidium or one of the chambers of the Supreme Soviet, found very little support because it would have assigned a merely auxiliary and dependent role to the institution of constitutional supervision. Although Hungary had adopted this model in 1984, Soviet scholars and politicians apparently were prepared to develop a stronger instrument.

The second model, a special division of the Plenum of the Supreme Court of the USSR also elicited a cool reception. Although the Supreme Court possessed the professional competence to handle the legal aspects of constitutional supervision, as it had to a limited extent under the 1924 Constitution, the Soviet jurists rejected this model. They argued that the Supreme Court's composition and structure seemed to render it incapable of assuming new functions. One should probably not quarrel with this explanation. There are, indeed, good reasons why Western European states like Austria or Germany have not entrusted constitutional jurisdiction to ordinary courts staffed with career civil service judges trained mostly in civil and criminal law. The special function of constitutional review requires the participation of more independent-minded legal scholars and practitioners, some of whom should have acquired political experience and all of whom should have a keen perception of the political quality that differentiates constitutional interpretation from ordinary legal decision making.

The third model, a separate constitutional court with special jurisdiction in which experts endowed with independence would adjudicate conflicts in a judicial procedure, appeared very attractive to Soviet legal scholars. This model, however, clashed with the deeply ingrained principle of "supremacy" of parliament; the former Supreme Soviet and the present Congress of People's Deputies were to be the highest organs of state power in the USSR and, as such, beyond judicial review. At least for the time being, this model was rejected as being too radical, even

6. Topornin, supra note 2, at 35.
7. Id.
9. Topornin, supra note 2, at 36.
though Poland had created a Constitutional Court in 1985 whose functions, like those of the present Soviet Committee of Constitutional Supervision, duly respect the supremacy of parliament.10

The Soviet constitutional amendments of December 1, 1988, established a Committee of Constitutional Supervision ("CCS") that corresponds to none of the above-mentioned models.11 On December 23, 1989 the Congress of People's Deputies revised article 125 of the Constitution, passed a Law on Constitutional Supervision in the USSR, and elected the Chairman (Professor Sergei S. Alekseev) and Deputy Chairman (Professor Boris M. Lazarev) of the CCS. Twenty five members of the CCS are to be elected at the next session of the Supreme Soviet.12 The CCS is certainly a better solution than models one and two, and although falling short of model three, it seems to be a promising step toward a genuine Western European-type constitutional court.

This Article will trace in detail the legislative process that led to the establishment of a Committee of Constitutional Supervision of the USSR and may provide insight into several aspects of an emerging political and legal culture in the Soviet Union. On the political side, one may observe the development of democratic procedures and substantive input in legislative and appointive decisions by an unexpectedly assertive legislature, the Congress of People’s Deputies. In the unfolding dialogue between the Congress and its presiding officer, Mikhail S. Gorbachev has demonstrated his mastery of the art of the forward-moving compromise.13 On the legal side, one may note the considerable momentum in the Soviet Union's approach toward a Western style rule of law as evidenced by the dynamic generation and evolution of reformative ideas on constitutional supervision between December 1, 1988 and December 23, 1989.

I. Legislative History of the Committee on Constitutional Supervision

A. Introduction: Constitutional Changes of Soviet Institutions in 1988

One of the five resolutions passed by the All-Union Conference of the Communist Party of the Soviet Union ("CPSU") in June 1988 bears the title "On Legal Reform."14 It calls for comprehensive reform of the Soviet legal system, including measures "to secure the supremacy of the

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12. For the text of the four respective enactments, see Izvestiia No. 360, Dec. 26, 1989, at 1 and 3.
14. The other four resolutions are entitled: "On Democratizing Soviet Society and Reforming the Political System," "On Combating Bureaucracy," "On Relations Between Soviet Nationalities," and "On Glasnost." All five were printed in Pravda
In a rather inconspicuous place, at the end of point 3, the Resolution suggests an institutional innovation of potentially far-reaching effect and a major step on the road toward a future “(Socialist) State Under the Rule of Law” (sotsialisticheskoe pravovoe gosudarstvo):16 “To make law and government decisions conform strictly to the requirements of the Constitution of the USSR, it would be useful to set up a Committee for Constitutional Supervision. . . .”17

In early compliance with this Party mandate, the Supreme Soviet enacted sweeping changes in the “Brezhnev” Constitution of 1977. The “USSR Law on Amendments and Additions to the USSR Constitution (Fundamental Law)”18 altered or newly introduced no fewer than 55 of a total of 174 articles.19 Among the additions, a new article 125 established a Committee of Constitutional Supervision of the USSR (Komitet konstitutsionnogo nadzora SSSR).

The revised Constitution also provided for a new electoral system and for a new two-tiered structure of the federal parliament. Under article 108 of the Constitution, a 2,250 member Congress of People’s Deputies of the USSR (S“ezd narodnykh deputatov SSSR) was established as the “supreme organ of state power of the USSR.”20 The Congress was meant to meet briefly once a year21 to decide the most important political questions, such as changing the Constitution,22 approving long-term state plans,23 and electing the Chairman of the Supreme Soviet.24

Among the 13 points on the list of issues assigned to the exclusive jurisdiction of the Congress we find point 11: “Election of the Committee of
Constitutional Supervision of the USSR."

A Supreme Soviet, according to the amendment, shall conduct regular legislative and appointive activity as "the standing legislative, administrative and monitoring organ of USSR state power." The Supreme Soviet consists of 542 deputies elected by the Congress from among its members to function as a "working legislature," holding two sessions of approximately four months each per year.

B. Congressional Debates and Republic Concerns in 1989

The First Congress of People's Deputies was elected under the revised Constitution on March 26, 1989 and began its first session on May 25. Its lively and critical debates and its rigorous assertion of constitutional prerogatives are still vividly remembered. Point 8 on the Congress Agenda was the election of the Committee of Constitutional Supervision of the USSR. The question came up in the afternoon session of June 8.

1. Composition of the Committee

Chairman of the Supreme Soviet Mikhail S. Gorbachev, functioning as presiding officer, pointed out that under the Constitution, the Committee was to be elected by the Congress for a term of ten years from among "specialists in the field of politics and law" and to consist of a chairman, a deputy chairman, and twenty-one members, including one representative from each of the fifteen union republics. He submitted the proposal to elect Vladimir N. Kudriavtsev (Vice-President of the USSR Academy of Sciences) Chairman of the Committee of Constitutional Supervision and to elect Boris M. Lazarev (Head of a Sector of the Institute of State and Law, USSR Academy of Sciences) Deputy Chairman of the Committee.

In the ensuing debate one deputy critically remarked that he could not detect a single non-Party person among the proposed membership of the Committee. Another deputy saw in Kudriavtsev's professional activities "desires to please the authorities without fail," and he bluntly suggested: "We had our fill of compromisers a long time ago." This theme was elaborated by the well-known poet E. A. Evtushenko; he attacked the proposed chairman for never having spoken up in defense of dissidents and for having implicitly supported the odious article 11.1

25. Id. art. 108(11) at 87.
26. Id. art. 111, sec. 1 at 89.
29. Id. art. 111, sec. 1 at 89.
30. Id.
31. The deputy was N. N. Vorontsov, biologist, Academy of Sciences of the USSR, Moscow. Id.
32. The deputy was V. I. Kolotov, newspaper editor, Vyborg, RSFSR. Id.
of the April 8 Edict (ukaz) of the Presidium of the Supreme Soviet.\textsuperscript{33}

Kudriavtsev was ably defended by A. M. Iakovlev,\textsuperscript{34} who vouched for the nominee's integrity\textsuperscript{35} and stressed his quietly effective work to change the edict in talks with the Politburo.\textsuperscript{36} When Kudriavtsev replied to his critics, he emphasized his work for the humanization of Soviet criminal law and engaged in specific self-criticism: "Seeing shortcomings in Art. 11.1, I didn't say anything about it in my commentary. Perhaps it was wrong on my part to keep silent about it, but on that very day I spoke with several leaders about it. . . ."\textsuperscript{37}

Another major complaint, raised by Deputy A. M. Obolenskii,\textsuperscript{38} concerned the late submission of the list of candidates for membership in the Committee of Constitutional Supervision. The deputies had received the list on the very day of voting, and they deplored the scarcity of accompanying biographical information.\textsuperscript{39} Obolenskii and ten of the subsequent nineteen speakers urged a postponement of the election to the fall session of the Congress.\textsuperscript{40}

2. Republic Opposition to the CCS

The most serious objections to the immediate election of the Committee, however, came from the representatives of one of the Baltic republics. Deputy R. V. Gudaitis,\textsuperscript{41} speaking on behalf of the majority of the

\textsuperscript{33} The speaker was the Deputy from Kharkov, Ukraine. \textit{Id.} at 23. For the Edict (ukaz), see Izvestiia No. 101, Apr. 10, 1989, at 2, col. 1, cols. 2-3 and 41 \textit{CURRENT DIG. SOV. PRESS} No. 15, May 10, 1989, at 11. Article 11.1 reads "Public insults against or the discrediting of the supreme bodies of state power and administration of the USSR or other state agencies formed or elected by the USSR Congress of People's Deputies or the USSR Supreme Soviet, or officials appointed, elected or confirmed by the USSR Congress of People's deputies or the USSR Supreme Soviet, as well as public organizations and their all-Union agencies created in accordance with the procedure established by law and operating in accordance with the USSR Constitution—are punished by deprivation of freedom for a period of up to three years or by a fine of up to 2,000 rubles." \textit{Id.} It was narrowly interpreted by a subsequent Guiding Explanation of the Supreme Court of the USSR, see 41 \textit{CURRENT DIG. SOV. PRESS} No. 21, June 21, 1989, at 30-31, and ultimately repealed by the Congress of People's Deputies on June 8, 1989, see 41 \textit{CURRENT DIG. SOV. PRESS} No. 33, Sept. 13, 1989, at 27. For critical comments of legal scholars (including Kudriavtsev's), see Foreign Broadcast Information System, Soviet Series issue 89-074 (Apr. 19, 1989) and Foreign Broadcast Information System, Soviet Series issue 89-076 (Apr. 21, 1989).

\textsuperscript{34} Professor of Law, Head of a Sector in the Institute of State and Law of the USSR Academy of Sciences, Moscow. Kudriavtsev had been Director of this Institute for 15 years until 1989.

\textsuperscript{35} "Of course, all of us are children of our times . . . We did not always muster the courage to speak the truth in time. We did not always rise to the level of, say, Academician Sakharov, who alone, perhaps, spoke the truth when we remained silent. All this is true. And perhaps we are all guilty of this. But to say that he said something against his conscience or against truth and honor—that never happened. . . ." 41 \textit{CURRENT DIG. SOV. PRESS} No. 31, Aug. 30, 1989, at 22.

\textsuperscript{36} \textit{Id.} at 23.

\textsuperscript{37} \textit{Id.} at 24.

\textsuperscript{38} Design engineer, Leningrad. \textit{Id.} at 23.

\textsuperscript{39} \textit{Id.}

\textsuperscript{40} \textit{Id.}

\textsuperscript{41} Writer, Vilnius, Lithuania. \textit{Id.} at 22.
Lithuanian delegation, announced that he and his colleagues would refuse to participate in such an election for a variety of reasons, the three most important of which appear to have been:

- first — the Congress has identified a constitutional crisis, in the form of internal contradictions in the Basic Law dating from the time of stagnation, and the need to create a new USSR Constitution, not to exercise supervision over compliance with an outdated document;
- second — there is still no actual law on constitutional review in the USSR;
- third — the powers of the USSR Constitutional Review Committee, as stipulated in the Constitution with the relevant additions, permit this body to infringe on the sovereign rights of the Union republics. . . .

A Latvian deputy, A. A. Plotnieks, subsequently argued that the Congress should restrict the powers of the Committee by changing article 125 of the Constitution. In his view, the CCS should not be able to suspend provisions of Republic constitutions found to be at variance with the Union Constitution.

A large majority of the 2,250 deputies voted to establish the CCS. Only 433 deputies voted against, 61 abstained, and about 50 Lithuanian deputies walked out in protest of the CCS issue. This stunning political eclat moved deputy F. M. Burlatsky to suggest “that the discussion of this question be postponed until tomorrow, and that . . . Mikhail Sergeevich Gorbachev personally be asked to enter into talks with representatives of the Lithuanian delegation.” Gorbachev and the Congress immediately adopted Burlatsky’s proposal without a vote. The Congress, thereby, apparently intended to nullify the election of the CCS.

During the next day’s Congressional session, Gorbachev reported on his discussions with the deputies from Lithuania and Estonia and asked the Congress to form a Commission to Prepare a Draft Law of the USSR on Constitutional Supervision in the USSR. The Congress established the twenty-three member Commission with ten votes against the proposal and twenty-five abstentions.

On November 10, 1989 the Commission, chaired by Deputy D. A. Kerimov, submitted the Draft Law and a proposal to amend article

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42. Id.
43. The deputy was a Professor of Law, Riga. Id. at 23.
44. Id.
45. Id. at 29. For a detailed account see Izvestiia No. 161, June 10, 1989, at 9, col. 1.
46. The deputy was a commentator for Literaturnaia Gazeta, Moscow. 41 CURRENT DIG. SOY. PRESs No. 31, Aug. 30, 1989, at 29.
47. Id. As the subsequent proceeding in the Congress demonstrates, the vote was simply ignored.
50. Professor of Law at the Academy of Social Sciences attached to the Central Committee of the CPSU.
125 of the Constitution to the Presidium of the Supreme Soviet. On
November 13, the Supreme Soviet endorsed the agenda for the Second
Session of the Congress of People’s Deputies that was to begin on
December 12. The agenda included as item 6 “The Draft Law on
Constitutional Supervision in the USSR,” and as item 7 “Election of the
Committee of Constitutional Supervision of the USSR.” Both items
were apparently adopted without opposition.

When the Congress discussed its own agenda on December 12,
however, a number of deputies demanded to drop items 6 and 7. Profes-
sor A. A. Plotnieks, speaking on behalf of ninety-two Estonian, Lithu-
anian, and Latvian deputies, spelled out three major reasons for
postponing the establishment of a CCS until a “perestroika” of the
Union Constitution had been accomplished. First, to let the Commit-
tee enforce an obsolete “Brezhnev” Constitution over technically
unconstitutional perestroika legislation would put a “legal muzzle” on
perestroika. Second, the Nationalities Policy platform of the CPSU
envisages the redistribution of jurisdiction between the union and the
republics. This task has not yet been accomplished. Article 74 of the
existing Constitution gives union law absolute priority over republic
law, while the new Nationalities Policy platform recognizes areas in
which republic legislation will enjoy priority. Third, article 76 of the
Constitution establishes union republics as sovereign states. This sov-
eignty is violated if republic laws may be declared ineffective at any
moment.

The next speaker fully endorsed Plotnieks’s argument, adding that
the Draft Law should have been submitted to the Supreme Soviet,
because the latter’s Chamber of Nationalities would have provided a
proper forum for the airing of views and for the protection of republics’
interests; to decide this question in the Congress would be undemo-
ocratic and would violate the equality of the republics.

In the ensuing debate, a deputy from Moldavia supported the posi-
tion of the Baltic republics, while a Russian deputy introduced a new

51. Izvestiia No. 316, Nov. 11, 1989, at 1, col. 5.
52. Izvestiia No. 319, Nov. 14, 1989, at 1, col. 2.
53. Id.
54. See Priniaty vazhnye resheniia” [Important Decisions Adopted], id. at 2, col. 5 (corre-
spondents’ report).
55. For excerpts from this debate in English, see 41 CURRENT DIG. SOV. PRESS
No. 50, Jan. 10, 1990, at 6-8.
57. “The laws of the USSR shall have the same force in all Union Republics. In
the event of a discrepancy between a Union republic law and an All-Union law, the
law of the USSR shall prevail.” KONST. SSSR [CONSTITUTION OF THE
USSR]. (1977), art. 74.
58. “A Union Republic is a sovereign Soviet Socialist state that has united with
other Soviet Republics in the Union of Soviet Socialist Republics. . . .” Id. art. 76.
59. The speaker was E. V. Bichkauskas, an investigator from Vilnius, Lithuania.
60. L. I. Iorga, id. at 5, col. 2.
reason for excluding item 6 from the agenda: Why should a simple, specific law occupy the attention and valuable time of the Congress rather than being discussed by the Supreme Soviet?\(^{61}\)

Despite the opposition from the Baltic and Moldavian deputies, the majority of deputies clearly favored inclusion of item 6 in the agenda. Russian deputies, including some living in Baltic republics,\(^ {62}\) pointed to recent discriminatory legislation in the Baltic republics that clearly violated the rights of non-Baltic citizens under the USSR Constitution, and they emphasized the immediate need for a state organ that would provide a civilized procedure of conflict resolution between the union and the republics.\(^ {63}\)

The Congress eventually decided to leave consideration on the Draft Law creating the CCS on the agenda by a large majority.\(^ {64}\) Once this had been decided, it appeared logical to the Congress to retain item 7 (election of the CCS) as well.\(^ {65}\)


During the morning session of the Congress on December 21, Chairman of the Supreme Soviet Mikhail S. Gorbachev called on Deputy D. A. Kerimov to report on the Draft Law on Constitutional Supervision in the USSR.\(^ {66}\)

To begin, Professor Kerimov emphasized the functions of the Constitution as the legal basis of all legislation. A mechanism of constitutional supervision would ensure the conformity of all other normative acts with the Constitution. He pointed out that by the 1950s all civilized countries of the world had established some kind of constitutional supervision, or monitoring, or constitutional court.\(^ {67}\) Kerimov deplored the absence of such an organ in the history of Soviet government. Often deftly circumvented, simply ignored, or flagrantly violated, constitutional principles and norms also generally were overwhelmed by the

\(^{61}\) A. V. Levashev, \textit{id.} at 4, col. 3. Under the Constitution, both the Congress (art. 108) and the Supreme Soviet (art. 113) may adopt laws, but laws of the Supreme Soviet must not contradict laws of the Congress, and they may be annulled by the latter. Only the Congress may change the Constitution.

\(^{62}\) V. I. Iarovoi, \textit{id.} at 5, col. 5; E. V. Kogan, \textit{id.} col. 6.


\(^{64}\) 1,595 deputies voted for the proposal, 437 voted against, and 42 abstained. \textit{id.} at 5, col. 8.

\(^{65}\) \textit{id.}


heavy load of government directives and countless orders and instructions of ministries and agencies. The “Fundamental Law” deteriorated into a fiction, a seemingly democratic facade designed to hide the lawlessness and arbitrariness of the periods of the cult of personality,68 of voluntarism,69 and of stagnation.70

And, Kerimov continued, violations of the Constitution occur even today. The establishment of the Committee of Constitutional Supervision is urgent and cannot wait until a full-scale renewal of the existing Constitution has been accomplished. Kerimov explicitly refuted the arguments raised by those deputies who insisted that the old “Brezhnev” Constitution does not live up to the new demands and tasks of perestroika and should thus not be enforced. Although in part obsolete, the Constitution of 1977 also contains democratic norms that must be observed, such as those referring to the sovereignty of republics.71 An organ of constitutional supervision could identify constitutional provisions that impede perestroika and recommend to the Congress that such provisions be changed or repealed. The new legislation on ownership, land, socialist enterprises, the tax system, economic and social administration in the republics, local self-government, and local economy will contain basic provisions that will be incorporated in the Constitution gradually. A mechanism is required to ensure the enforceability of these laws. Constitutional supervision must serve as a link in this mechanism. If one wants to be serious about implementing a state under the rule of law (pravovoe gosudarstvo), one must recognize that the function of this state is not just to produce laws, but also to supervise the observance and application of these laws by all participants in legal relations.

Kerimov then informed the deputies of the high quality of his Commission’s work, of its extensive consultation with experts of constitutional law, its studies of the theory and practice of constitutional supervision of socialist and capitalist countries, and its discussions with foreign specialists. He also remarked that the Commission, in the course of its work on the Draft Law, was going to propose a developed and expanded article 125 of the Constitution to Congress. He then provided brief comments on the most important specific features of the legislative drafts submitted to the deputies.72

68. Khrushchev’s characterization of Stalin’s political style.
69. Brezhnev’s label for Khrushchev’s politics.
70. Gorbachev’s view of Brezhnev’s rule.
71. “A Union Republic is a sovereign Soviet socialist state that has united with other Soviet Republics in the Union of Soviet Socialist Republics. Outside the spheres listed in art. 73 of the Constitution of the USSR, a Union Republic exercises independent authority on its territory. A Union Republic shall have its own Constitution conforming to the Constitution of the USSR with the specific features of the Republic being taken into account.” Konst. SSSR (1977), art. 76.
72. See the discussion of the respective legislative enactments infra at notes 82-85 and accompanying text.
When Kerimov had ended his report, presiding officer Gorbachev took the unusual step of giving a "co-report" before opening the debate. He described the existing legal situation regarding republic law violating the Union Constitution. Under article 74 of the Constitution of the USSR, federal law prevails over republic law, and under article 119, section 5, the Presidium of the Supreme Soviet already monitors the observance of the Constitution and ensures the conformity of constitutions and laws of republics with the Constitution and laws of the USSR. The creation of a Committee of Constitutional Supervision will only improve this situation. The CCS is needed to make progress toward a state under the rule of law; it will consist of the most outstanding experts, and it provides a mechanism of cooperation with all republics. Although the opposition of the Baltic republics had recently been joined by the Interregional Group of Deputies, Gorbachev urged the Congress not to become involved in "a political game the aims of which are incomprehensible."

After Gorbachev's "co-report," Deputy I. N. Griazin presented a minority view on behalf of four Commission members. This "disagreeing opinion" (osoboe mnenie) raised serious objections to individual provisions of the drafts (article 125 of the Constitution, and articles 10, 11, and 22 of the Law), to the extent the provisions would subject republic constitutions and laws to CCS supervision. The minority report argued that the republics as sovereign states are not subordinate to any federal organs, that they could only submit voluntarily to self-imposed duties, and that all provisions limiting the republics' right to sovereign legislation should be removed from the drafts.

In three meetings on December 21 and 22, the Congress heard the views of twenty-five deputies, twenty of whom supported the immediate establishment of the CCS. Of the four opponents other than Griazin (Estonia), Khadyrke (Moldavia) emphasized the need for a voluntary agreement among the republics concerning the nature of the federation and the corresponding necessity to submit the Draft Law on the CCS to the Council of Nationalities of the Supreme Soviet. Skudra (Latvia) argued along similar lines, stressing that article 6 of the Law on Constitutional Supervision should accord the republics the right to approve their candidates for membership in the CCS, and that article 10 of the

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74. Id. at col. 7.
76. Buachidze (Gruzia), Griazin (Estonia), Skudra (Latvia), and Smailis (Lithuania). Izvestiia No. 356, Dec. 22, 1989, at 10, col. 8.
Law, which enumerates legal acts subject to the supervision of the CCS, should exclude all reference to republic legal acts. Abuladze (Gruzia), although generally in favor of constitutional supervision, pleaded against moving too fast. Moteka (Lithuania) finally read a declaration of the Parliamentary Group of Baltic Republics claiming that the Law on Constitutional Supervision would constitute a counterproductive violation of republic rights. He demanded that the Congress should postpone the Draft and seek consensus. Otherwise, he threatened, the Baltic deputies would not participate in the vote.

4. Modifications of the Legislative Drafts After the First Reading in the Congress

During the noon recess on December 22, the Kerimov Commission examined the numerous proposals for modification and adopted a number of fundamental changes in the legislative drafts before the Congress. Kerimov reported and explained these changes in the afternoon meeting and also gave detailed attention to those suggestions that were not adopted by the Commission. There were three especially important changes.

First, the Decree (postanovlenie) On Putting into Effect the Law of the USSR “On Constitutional Supervision in the USSR” is to provide that the Law goes into effect on January 1, 1990, with the exception of the provisions referring to republic constitutions and laws. These provisions should become effective simultaneously with future changes in the part of the Union Constitution dealing with the national-state structure of the USSR.

Second, article 21 of the Draft Law on Constitutional Supervision is to provide that legal acts violating basic human rights or freedoms protected by the Constitution of the USSR, or by international agreements to which the USSR is a party, are to lose their force immediately with the adoption of the respective finding by the CCS. This will require a corresponding addition to article 125 of the Constitution and a modification of the Introductory Decree. The temporary suspension of constitutional supervision of republic constitutions and laws, therefore, does not apply to violations of human rights.

Finally, article 25 of the Law and article 125 of the Constitution should provide for twenty-five (instead of twenty-one) members of the CCS, including four from the autonomous formations.

The Committee also adopted five other changes of lesser impor-

80. Id. at col. 6.
83. Below the level of “sovereign” union republics (and included in their territories) the Soviet Constitution recognizes three types of “autonomous” formations: autonomous republics (art. 82), autonomous regions (art. 86), and autonomous areas (art. 88). At present there are 20 autonomous republics, 8 autonomous regions, and 10 autonomous areas in the USSR.
tance affecting articles 1, 3, 12, 16, and the former article 28 of the Draft Law. The Committee rejected a great number of proposed changes, particularly changes to articles 5, 6, 9, 10, 12, 16, 17, 19, and 24. Most of these will be referred to in the following examination of the Law on Constitutional Supervision in the USSR. 85

II. The CCS: Legal Foundations

A. The Law on Constitutional Supervision in the USSR

The Law on Constitutional Supervision in the USSR adopted by the Congress of People's Deputies of the USSR on December 23, 1989 is comprised of thirty-one articles grouped into five parts: General Provisions, Membership and Process of Election of the CCS, Jurisdiction and Procedure of the CCS, Status of Persons Elected to the CCS, and Other Questions of the Organization of the CCS.


Article 1 defines the aims of constitutional supervision in the USSR. It is to ensure "the conformity of acts of state organs and social organizations with the Constitution of the USSR and the constitutions of union republics and autonomous republics" and to protect "constitutional human rights and freedoms, rights of the peoples of the USSR, and the democratic principles of Soviet society." 88

The inclusion of the protection of human rights in this catalog of purposes of constitutional supervision was suggested by Deputies Sobchak and Umarkhodzhaev and adopted without opposition.

Article 2 establishes several systems of constitutional supervision to correspond with the governmental organization of the Soviet Union. Thus, the article introduces the CCS of the USSR and provides for organs of constitutional supervision to be created in the union republics and autonomous republics. The Commission report on the Draft Law made clear that the republics may establish their own organs to supervise the conformity of republic law with republic constitutions. These organs would act in complete independence from the CCS of the USSR.

Article 3 lays down the fundamental principles guiding the activity of all organs of constitutional supervision: socialist legality, collegiality, and glasnost. The organs are independent and subject only to the Con-

84. Old article 28 is article 27 of the revised Draft.
85. See infra notes 86-130 and accompanying text.
87. 1,639 deputies voted for the Law, 137 against, and 103 abstained. Izvestiia No. 359, Dec. 25, 1989, at 2, col. 3.
88. The wording was proposed by Deputy Kugul'tinov. See Kerimov's second report, Izvestiia No. 358, Dec. 24, 1989, at 2, col. 7.
89. Id. See infra notes 133-135 and accompanying text for a discussion on the limits of this protection.
stitution, and any interference in their work is inadmissible and punishable.

Article 4 assigns the task of legislation on constitutional supervision to the Union and to union and autonomous republics.

2. Membership and Election Process

Article 5 provides that members of the CCS be elected from among "specialists in the area of politics and law."\(^9\) There shall be a chairman, a deputy chairman, and twenty-five members, including one from each republic. In a last minute political compromise, the Congress increased the membership from twenty-one to twenty-five in order to accommodate four additional members from autonomous formations of the USSR;\(^9\) however, the Law does not clearly reflect this compromise. This specification appears only in section 3 of the Decree (postanovlenie) "On the Election of the CCS of the USSR"\(^9\) which instructs the Supreme Soviet to elect the first members of the Committee at its next regular session.\(^9\) Thus, legally, the four seats for experts from autonomous formations have been secured only for the first slate of members.

Under article 6 of the Law, the Chairman, Deputy Chairman and members of the CCS are to be elected by the Congress of People's Deputies for periods of ten years each. The Chairman of the Supreme Soviet shall propose nominees to the Congress.\(^9\) For election, nominees must receive a majority vote from the Congress.\(^9\) In order to guarantee continuity in the work of the CCS, the Law provides for staggered elections. One half of its membership is to be renewed every five years.

Article 6, however, has constitutional infirmities and thus is a blatant example of poor legislative draftsmanship. Article 125 of the Con-

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\(^9\) The establishment of minimum and maximum age requirements, as suggested by Deputy Kryzhkov, was rejected by the Commission as arbitrary and without scientific foundation. Izvestiia No. 358, Dec. 24, 1989, at 2, col. 8.

\(^9\) Some deputies had proposed to increase the membership to 40 or more, in order to include members from all (i.e. 20) autonomous republics. This request was refused by the Commission. Id. The original demand to increase the number to 30 in order to accommodate representatives of autonomous formations was voiced by Deputy Khugaev (Yugo-Osetian Autonomous Region, Gruzian Republic) in the Congress meeting. Izvestiia No. 358, Dec. 24, at 2, col. 1.

\(^9\) Izvestiia No. 360, Dec. 26, 1989, at 3, col. 7. Moreover, Congress apparently forgot to include the revised number of 25 members in art. 5. As published in "Izvestiia," however, the Law does contain a membership number of 25. Id.

\(^9\) In its meeting on Dec. 23 the Congress of People's Deputies was running out of time and thus called on the Supreme Soviet to perform this function. See infra notes 143-162 and accompanying text.

\(^9\) Deputies repeatedly demanded the right of republics to propose "their" candidates, and some proposed a contested election of members in the Congress, but the Commission upheld Gorbachev's constitutional prerogative under art. 121(3) to present "his" candidates for confirmation (or rejection), emphasizing that he would naturally consult with the republics. See Kerimov's second report, Izvestiia No. 358, Dec. 24, 1989, at 2, col. 8.

\(^9\) At least 1,126 out of the total number of 2,250.
stitution, as enacted on Dec. 1, 1988, provided for an office term of ten years for the CCS. It said nothing about renewal of one half of the membership every five years. The Kerimov Commission obviously considered it useful to introduce this idea into the Law and at the same time decided to elect the individual members for ten-year terms. It seems that the election of individuals would have, after a while, produced the desired effect of staggered elections in a perfectly natural way (death, incapacitation, and other cases of premature resignation). By putting the five year renewal clause in article 6 of the Law, the Commission resorted to a less than elegant and apparently unconstitutional solution. One half of the first membership would be elected for only five years. Aside from the obvious impossibility of renewing one half of a total membership of twenty-seven (chairman, deputy, and twenty-five members), it is unseemly and awkward to first have the Supreme Soviet elect twenty-five members of the CCS for ten year terms, and then have them draw lots from the Chairman by which thirteen of them (clearly not including chairman and deputy chairman this time) would have their terms reduced to merely five years.

Furthermore, Commission Chairman Kerimov indicated that he envisaged the re-election of some of those thirteen members, who were initially permitted to serve only five years, to subsequent ten-year terms. This would certainly upset the renewal principle of article 6. The unresolved contradiction between the ten-year term and the renewal clause in article 6 was noticed by Deputy Umarkhodzhaev, but his observation went unheeded.

In the plenary debate, Deputy Ibragimov suggested to include the oath to be taken by the members of the CCS in the text of the law. Article 7 sets forth the formulation: “I solemnly swear to fulfill conscientiously the duties imposed on me as a member of the CCS of the USSR, and in doing so, to obey all provisions of the Constitution of the USSR and nothing but these.” The Chairman of the Supreme Soviet shall administer this oath.

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96. The text of art. 125 of the Constitution of the USSR as amended Dec. 23, 1989 makes no exception to the rule that the period of office of persons elected to the CCS is ten years. In addition, it makes no reference to a principle of renewal. See infra notes 121-123 and accompanying text.


99. See Kerimov’s reply to Deputy Ibragimov’s suggestion to expressly prohibit reelection of members in Izvestia No. 358, Dec. 24, 1989, at 2, col. 8. Members of the Yugoslav and the Polish Constitutional Court serve for eight years, and members of the German Constitutional Court serve for 12 years. They may not serve a second term.


101. Id. at 10, col. 1.
Article 8 contemplates four situations of premature termination of membership to the CCS. Such termination may occur at a member's own request, in case of incapacity for reasons of health, where there has been a violation of the oath of office, or in light of a criminal conviction. The Congress may, upon the proposal of the Chairman of the Supreme Soviet, decide to relieve a member of his duties. When the Congress is not in session, the Supreme Soviet may suspend members who have violated their oath or whose criminal conviction has entered into legal force.

Since the Constitution contains no provision for the premature dismissal of the members of the CCS, their removal from office against their will before completion of their constitutional term of ten years appears to be barely constitutional. The same criticism applies to article 9 which provides for a supplementary election to fill the remainder of the term of a member who has prematurely left office. The Constitution recognizes only ten-year terms for the members. Article 9 of the Law seems to be another remnant of the previous rule providing for a ten-year term of the Committee. The article excludes a supplementary election if the remaining period is shorter than one year. Surprisingly, articles 8 and 9 do not mention the premature death of a member.

3. Jurisdiction and Procedure

Article 10 of the Law describes the subject matter jurisdiction of the CCS. The Committee will check the following legislative acts for conformity with the Constitution of the USSR: a) Drafts of laws (zakony) of the USSR and of other acts submitted for consideration by the Congress of People's Deputies; b) Laws of the USSR and other acts already adopted by the Congress; and c) Constitutions of union republics.

The CCS will monitor the conformity of certain legislative acts to the Constitution of the USSR and laws of the USSR adopted by the Congress: a) Laws of the USSR and other acts adopted by the Supreme Soviet; b) Decrees (postanovlenia) of the Soviet of the Union and of the Soviet of Nationalities; and c) Draft acts submitted for consideration by these organs.

Finally, article 10 subjects the following types of laws to scrutiny for conformity with the Constitution of the USSR and laws of the USSR adopted by the Congress and the Supreme Soviet: a) Edicts (ukazy) and decrees (postanovlenia) of the Presidium of the Supreme Soviet; b) Regulations (rasporiazhenia) of the Chairman of the Supreme Soviet; c) Laws of union republics; d) Decrees (postanovlenia) and regulations

102. The provisions are similar to those of the respective Polish statute of 1985. See Ludwikowski, supra note 1, at 101.
103. The proposal by Komsomol deputies not to fill these vacancies was rejected by the Commission. See Kerimov's second report, Izvestia No. 358, Dec. 24, 1989, at 2, col. 8. Kerimov argued that the Constitution has only regular elections in mind, whereas art. 9 of the Law applies to special elections. Id.
104. Cf. supra notes 94-100 and accompanying text (discussion of art. 6).
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(rasporiazheniia) of the Council of Ministers of the USSR; e) International treaties and other obligations of the USSR and union republics submitted for ratification or confirmation; f) Guiding explanations (rukovodiaschие raz"iasneniia) of the Plenum of the Supreme Court of the USSR; g) Acts of the Procurator General of the USSR and the Chief State Arbitrator of the USSR that have normative character; and h) Normative legal acts of other state organs and social organizations that lie outside the constitutional scope of Procuracy supervision. The supervisory function of the CCS does not extend to individual judgments and other court decisions, decisions by organs of investigation, the Procuracy, and State Arbitration.

Article 11 empowers the CCS to decide jurisdictional disputes arising from the federal structure of the USSR: a) between the USSR and republics, b) between union republics, and c) between union republics and national-state or national-territorial formations.

The CCS shall decide disputes arising over the constitutionality of acts adopted by organs of state power and administration upon the initiative of any party to the dispute.

Article 12 lists the organs entitled to submit questions to the CCS. The Congress may submit questions concerning the drafts of laws and other acts under consideration by the Congress. With respect to existing laws of the USSR and other acts adopted by the Congress, one-fifth of the people's deputies, the Chairman of the Supreme Soviet, or supreme organs of state power of republics may raise an issue with

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105. Deputy A. M. Iakovlev (Professor of Law, Academy of Sciences, and a member of the Kerimov Commission) insisted on the independence of courts and wanted to exclude the guiding explanations from supervision by the CCS. Deputy Semenko (Chairman of a regional court and also a commission member) supported the original draft. Kerimov argued against Iakovlev and prevailed, pointing out that there would be no interference with individual court decisions, but only an examination of general decrees (i.e. guiding explanations) of the Supreme Court that had in the past frequently exceeded and changed the law. Izvestiia No. 358, Dec. 24, 1989, at 3, col. 1. See also Iakovlev's broader request to also exclude from supervision normative acts of the Procuracy and the Chief Arbitrator in Izvestiia No. 357, Dec. 23, 1989, at 7, col. 1.

106. Procurator General (and Deputy) Sukharev wanted to exclude social organizations from supervision by the CCS, pointing out that they were subject to Procuracy supervision under art. 164 of the Constitution. Kerimov replied that there were important acts of these organizations beyond the scope of Procuracy supervision, e.g. Joint Ordinances of the Central Committee of the CPSU with the All-Union Council of Labor Unions or with the Council of Ministers of the USSR. Sukharev's request was declined. Izvestiia No. 358, Dec. 24, 1989, at 3, col. 1.

Procuracy supervision of state organs extends from the normative acts of individual ministries downwards. It does not encompass acts of councils of ministers or of legislative bodies. Konst. SSSR (1977), art. 164.

107. An unidentified deputy (whom Kerimov mistakenly assumed to be speaking on behalf of the Interregional Group of Deputies, but this was later denied by Deputy Fomenko, see Izvestiia No. 358, Dec. 24, 1989, at 3, col. 3) suggested not to grant this right to the Chairman of the Supreme Soviet, but Kerimov insisted that the Chairman was one of the guarantors of the Constitution. Id. at 3, col. 1. Deputy Obolenskii wanted every deputy to have the right to exercise this initiative, but Kerimov's second report explained that individual deputies should take their requests to
the CCS. The Congress, the Supreme Soviet, the Presidium of the Supreme Soviet, or supreme organs of state power of union republics may challenge constitutions and laws of union republics. The Congress, one-fifth of the deputies of the Supreme Soviet, the Chairman of the Supreme Soviet, or supreme organs of state power of republics may contest laws of the USSR and other acts adopted by the Supreme Soviet, decrees of the Soviet of the Union and the Soviet of Nationalities, draft acts of these organs, decrees and regulations of the Council of Ministers of the USSR, and international treaties and other obligations of the USSR and the republics. Finally, the Congress, the Supreme Soviet, its chambers, the Presidium of the Supreme Soviet, the Chairman of the Supreme Soviet, permanent commissions of the chambers and committees of the Supreme Soviet, the Council of Ministers, supreme organs of state power of union republics, the Committee of People's Control, the Supreme Court of the USSR, the Procurator General, the Chief State Arbitrator, all-Union organs of social organizations, and the Academy of Sciences of the USSR may raise issues pertaining to normative legal acts of other state organs and social organizations.

Moreover, the CCS may, on its own initiative, examine for conformity with the Constitution and laws of the USSR all acts of the supreme organs of state power and administration of the USSR and of other organs formed or elected by the Congress of People's Deputies and the Supreme Soviet of the USSR.

If organs of state administration, courts, procuracy or other legal protection or application agencies, social organizations, or citizens discover discrepancies between a law or other normative act and the Constitution of the USSR, they may bring this legal defect to the attention of an organ entitled to submit the matter to examination by the CCS. The CCS has the right to refuse requests to conduct an examination on the ground that the request falls outside its sphere of jurisdiction. Article 13 requires that the majority of members participating in the session agree when accepting matters for examination upon the CCS's own initiative.

The Chairman of the CCS exercises general leadership and calls sessions at his discretion or at the request of at least three members. The Deputy Chairman exercises functions transferred to him by the Chairman and exercises all functions of the Chairman in case of the latter's incapacitation. Should both the Chairman and Deputy Chairman be incapacitated, article 14 authorizes the CCS to elect from among its members a temporary chairman.

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108. This suggestion of Deputy Leskin was adopted by the Commission after the plenary debate. See Kerimov's second report, Izvestiia No. 358, Dec. 24, 1989, at 2, col. 7.
Article 15 provides for the confidentiality of deliberations. Members of the CCS must not publicly state their opinion on matters under examination until a finding has been adopted.

Article 16 describes the procedure of preparing matters for examination by the CCS. The Chairman assigns the preparation of a matter to one or several members and fixes a time limit that is not to exceed six months.\(^\text{109}\) In the course of preparation, the members of the Committee have a right to solicit all pertinent documents and additional information from state organs or social organizations, hear explanations by officials of the respective organs and organizations, and consult with scholars and practitioners.

Any officials of state organs and social organizations who refuse to submit the requested documents or other information, or who communicate false information, will be subject to legal liability.

Article 17 sets forth the CCS's procedure for examining questions. Within one month after the conclusion of the preparatory work, the Chairman puts the matter before a session of the CCS. Members receive the draft opinion and pertinent materials no later than fifteen days prior to the session. The quorum required for opening the session is two-thirds of the members. Sessions are generally to be open. They may be closed to the public only to safeguard a state secret or other legally protected secrets. The right to participate and speak at the session is not restricted to representatives of the organ which initiated the proceeding in the CCS or the organ that issued the act under examination but is also accorded to the Chairman and the Deputy Chairman of the Supreme Soviet; the chairmen of chambers, committees (Supreme Soviet), and commissions (chambers of the Supreme Soviet); the Chairmen of the Council of Ministers, the Committee of People's Control and the Supreme Court of the USSR; the Procurator General; the Chief State Arbitrator; and the Minister of Justice.\(^\text{110}\)

The Chairman of the CCS, or a member authorized by him, first delivers a report on the issue. Then the representatives of the organ initiating the examination and of the organ that has issued the act under examination may state their views. The CCS may decide to hear other persons as well. Then a finding is adopted in a secret meeting of members only. The finding is announced in open session and subsequently published.

Article 18 defines the finding (zakliuchenie) of the CCS as a statement of conformity or nonconformity of the examined act or draft (or its individual provisions) with the Constitution or laws of the USSR and, in appropriate cases, with international obligations of the USSR.

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109. Deputy Alekseenko suggested reducing this period to three months, but Kerimov in his second report replied that there may be difficult cases in which a shorter period would not suffice. Izvestiia No. 358, Dec. 24, 1989, at 3, col. 1.

110. Deputy Shekhovtsov proposed to extend this right to all people's deputies of the USSR. Gorbachev rejected the idea but suggested that individual deputies might be invited as guests. Id. col. 4.
ing must consist of a reasoned written opinion. It is adopted by a simple majority of the total membership (i.e., at least fourteen out of twenty-seven). Members have no right to abstain from voting. In case of a tie, the Chairman casts the deciding vote. Dissenting opinions may be put in writing and will be attached to the finding.

Once the CCS makes a determination as to the legality of a congressional act, whether it is already adopted or is still under consideration, the supervisory body must submit its findings to the Congress pursuant to article 19. If the CCS has made determinations affecting the constitutions or laws of union republics, it may submit these findings to either the Congress or to the Supreme Soviet. These findings do not suspend the applicability of USSR laws or other adopted acts of the Congress, and they do not suspend the effect of republic constitutions or individual provisions therein. If the CCS makes a finding of constitutional nonconformity with regard to congressional acts or republic constitutions (or individual provisions therein), the Congress may reject the finding upon a two-thirds majority vote (i.e., 1,500 of 2,250) at the following congressional session.

According to article 20, the CCS must communicate its findings to the organ that issued the act, the organ on whose initiative the act was examined, and the Presidium of the Supreme Soviet.

Article 21 establishes that, with the exception of the acts mentioned in article 19, a finding of non-conformity with the Constitution or laws of the USSR suspends the applicability of an act or any of its individual provisions until the constitutional infirmity is eliminated. The finding of nonconformity is published and circulated in the same procedure as the suspended act.

The Law is less patient when it comes to protecting human rights. If the CCS finds that a normative legal act or any of its individual provisions violates fundamental human rights and freedoms secured by the Constitution of the USSR or by international acts to which the USSR is a party, the act or provision is immediately deemed invalid.

Article 22 addresses the procedure for eliminating the nonconformity of a legal act with the Constitution and laws of the USSR. The organ that issued the act in question has a three-month period to make the appropriate changes. If necessary, the Presidium of the Supreme Soviet may extend this period. If the nonconformity is not rectified within the established period, the CCS may request that the Congress, the Supreme Soviet, or the Council of Ministers change the nonconforming

111. The quorum was raised to this level from the original text (majority of those present) at the suggestion of Deputy Shekhovtsov following Kerimov's second report. Id. col. 3.

112. Deputy Sobchak had suggested to give the CCS the power to suspend not only laws but also constitutions of republics. The Baltic republics strongly opposed this idea, and the Commission adopted a compromise solution. Id. col. 1.

113. In the discussion of Kerimov's second report, Deputy Alekseenko proposed to let the CCS itself decide on the necessity of an extension, and Kerimov seemed at that time disposed to accept this suggestion. Id. col. 4.
act. If the Supreme Soviet rejects the CCS finding, the matter is raised before the Congress which will render a final decision. Upon a two-thirds majority vote, the Congress may reject the CCS finding. Short of this majority, the finding of the CCS will stand, and the act in question will immediately become invalid.

Article 23, the last of the procedural provisions of the Law, provides that the CCS may propose the preparation and adoption of legislation to the Congress or the Supreme Soviet. Thus, the Law reflects article 114 of the Constitution of the USSR which guarantees the CCS (among a great number of other bodies) the right to exercise legislative initiative.

4. The Status of Elected Members

Article 24 stipulates that, in the exercise of their duties, members of the CCS are independent and subject only to the Constitution of the USSR. They must neither ask for nor accept instructions from any state organ, social organization, or official.

Under article 25, members of the CCS may not serve as people's deputies or as members of organs whose acts are subject to constitutional supervision.

Members of the CCS have the right to attend the sessions of the Congress, the Supreme Soviet, and the Presidium of the Supreme Soviet under article 26.

According to article 27, members enjoy immunity from criminal liability, from arrest, and from measures of administrative punishment imposed by courts. The CCS may lift the immunity by a two-thirds majority secret vote. There is no liability for views voiced or votes cast in the CCS.

5. Other Matters of the Organization and Activity of the CCS

The Law lists several additional provisions of organizational importance. The CCS adopts its own Rules of Procedure under article 28. Article 29 provides that findings and other materials of the CCS are to be published in the legal gazette of the USSR, the Vedomosti S\"ezda.

114. Deputies Kirillov and Ananavichius had suggested that members of the CCS should relinquish their Party membership. Kerimov rejected this proposal, saying that the Commission assumed that its members would be honest people who would not accept orders, and to deny them membership in social organizations would violate their human rights. See Kerimov's second report, id. col. 2.

115. Prior to the adoption of the Law and the corresponding change in art. 125 of the Constitution, Professor B. Lazarev considered such an exclusion unwarranted, because under the 1988 constitutional amendments, the CCS had not been granted supervisory power over laws of the Congress. It seems surprising that he did not seem interested in strengthening the independence of the CCS from the Congress. See Lazarev, Konstitutsionnyi nadzor [Constitutional Supervision], SOTS. ZAK. no. 7, at 3, 4 (1989).

116. Article 25 also excludes members from serving in leading organs of social organizations. Cf. Kerimov's reply to Deputy Kirillov, supra note 114.

117. The secret vote was introduced into this text on the proposal of Deputy Plotnikov. Izvestiia No. 358, Dec. 24, 1989, at 2, col. 8.
narodnykh deputatov SSSR i Verkhovnogo Soveta SSSR. The CCS is to establish a Secretariat according to article 30. Finally, the CCS is to use a seal with the state emblem of the USSR, as provided in article 31.

B. The New Article 125 of the Constitution of the USSR

When Professor Kerimov, Chairman of the Commission of the Congress of People’s Deputies entrusted with drafting the Law on Constitutional Supervision in the USSR, delivered his report to the Congress, he explained that in the course of the Commission’s work it had become necessary to make some adjustments to article 125 of the Constitution. Additional changes were proposed by deputies during the debate of the Draft Law that followed in the Congress, and a number of these were subsequently adopted.

A structural change proposed by the Kerimov Commission concerns the elections to the Committee of Constitutional Supervision. The original article 125 of the Constitution, adopted on December 1, 1988, contemplated the election of a Committee for a ten-year term. In order to ensure continuity on the CCS, the Kerimov Commission formulated the new article 125 which provided for the election of individual members to the CCS for ten-year terms. Yet, neither the Commission nor the Congress introduced language that would adequately provide a constitutional basis for the five-year terms slated for half of the initial committee members in article 6 of the Law and section 2 of the Introductory Decree.

The increase in the original number of members from twenty-one to twenty-five was in response to a request in the plenary debate to add four members from autonomous formations. Whereas the old article 125 had spoken of fifteen “representatives” (predstaviteli) from union republics to be included in the membership, the Kerimov Commission rejected this idea. Members would, indeed, come from republics as well as autonomous formations, but they should not be considered their representatives.

The Kerimov Commission also introduced a number of interesting changes in the list of functions of the CCS. In section one, the provision that the CCS may issue findings (zakliuchenia) on the constitutionality of draft laws of the Congress was expanded to include other draft acts of

120. See supra notes 96-100 and accompanying text.
122. See infra notes 145-158 and accompanying text.
123. See infra text accompanying note 141.
124. See infra notes 145-158 and accompanying text.
the Congress as well.\textsuperscript{126} In section two, an obvious gap in the old article was filled by including supervision of laws (and other acts) already adopted by the Congress. The original omission was apparently intentional in order to protect the "supremacy" of the Congress.\textsuperscript{127}

Section three in the new article 125 provides that requests for supervision concerning any acts of the Congress can be made by at least one-fifth of the members of the Congress (a provision which introduces an important minority right), the Chairman of the Supreme Soviet (a provision which may constitute a significant step in the development of a system of checks and balances), and supreme organs of state power of the republics (a major enhancement of republic rights). The old formulation concerning supervision over republic constitutions and laws had not mentioned which organs could make such requests to the CCS. The new formulation grants this initiative to the Congress, the Supreme Soviet, the Presidium of the Supreme Soviet, and supreme organs of state power of the republics. It also specifies that the respective findings of the CCS are to be submitted to the Congress or the Supreme Soviet.

Section four of the new article 125 expands the scope of supervision by adding that "international treaty and other obligations of the USSR and the union republics" are to be examined with respect to their conformity with the Constitution and laws of the USSR. In addition, the new article 125 provides that one-fifth of the deputies to the Supreme Soviet and the Chairman of the Supreme Soviet should be added to those governmental organs enumerated in the old text of article 125 (namely, the Congress and supreme organs of state power of the republics) that may challenge acts and draft acts of the Supreme Soviet and its chambers as well as acts of the Council of Ministers of the USSR. CCS findings in these areas are to be addressed to the Supreme Soviet.

In section five, concerning the supervision of "normative acts of other state organs and social organizations," the new article 125 restricts the jurisdiction of the CCS to those acts that are not subject to Procuracy supervision pursuant to article 164 of the Constitution of the USSR.\textsuperscript{128} This imposes a serious limitation on the supervisory activity of the CCS to the extent that it prohibits the CCS from reaching below the level of councils of ministers. Many illegal acts are obviously passed by individual ministries (which will be subject only to Procuracy supervision). On the other hand, the new article 125 extends the right to direct

\textsuperscript{126} Under art. 108 of the Constitution, the Congress may adopt laws and decrees \textit{(postanovleniia)}. For two recent examples of apparently unconstitutional Decrees of the Congress see infra note 141 and notes 156-162 and accompanying text.

\textsuperscript{127} Cf. Topornin, \textit{supra} note 2, at 36; Lazarev & Sliva, \textit{supra} note 19, at 14.

\textsuperscript{128} "Supreme power of supervision over the strict and uniform observance of laws by all ministries, state committees and departments, enterprises, institutions and organizations, executive-administrative bodies of local Soviets of People's Deputies collective farms, co-operatives and other public organizations, officials and citizens is vested in the Procurator-General of the USSR and procurators subordinate to him." KONST. SSSR (1977), art. 164.
requests to the CCS to include all organs entitled to exercise legislative initiative under article 114 of the Constitution.\textsuperscript{129}

A separate subsection of the new article 125 summarizes those instances in which the CCS may issue findings on its own initiative. Under the old article 125, this right had been granted specifically with respect to all situations listed separately in points 1, 2, and 4. Under the new formulation of article 125, the CCS may issue findings concerning "acts of the supreme organs of state power and administration of the USSR and other organs formed or elected by the Congress of People's Deputies of the USSR and the Supreme Soviet of the USSR." This formula prevents the CCS from taking the initiative with respect to draft acts of these organs, to normative acts of republics and lower state organs, and to acts of social organizations.

The old article 125 gave suspensive effect to all findings of nonconformity issued by the CCS. The new article 125 takes a step backward by creating a category of non-suspensive findings regarding laws of the Congress or republic constitutions. These normative acts are expressly excluded from suspension in deference to the highest organs of state power. The new article, like the old, contemplates that the very organs that issued the unconstitutional and illegal acts should remedy the deficiencies. In case of non-compliance, the CCS may seek to enforce its findings on an organ or official by appeal to the appropriate superordinate governmental body: the Congress, the Supreme Soviet, or the Council of Ministers of the USSR. The new article specifies that a finding may be rejected only by two-thirds of the total number of Deputies in the Congress (i.e., 1,500 of 2,250). This suggests that in cases of stubborn non-compliance, the CCS must pursue the question all the way up to the Congress. But the Constitution makes no provision for situations in which the Congress remains inactive or fails to reach the two-thirds majority required for rejection. It is without explicit constitutional foundation that article 22 of the Law on Constitutional Supervi-

\textsuperscript{129.} See the enumeration in art. 12 of the Law, supra text following note 107. Under the "USSR Law on the Establishment of the Post of President of the USSR and the Introduction of Changes and Additions to the USSR Constitution (Fundamental Law)" of March 14, 1990, Constitution art. 125 (old) is now art. 124. Sections 2 to 5 of the article were reformulated to respond to the new office of President of the USSR. In sec. 2, the President of the USSR replaces the Chairman of the Supreme Soviet as one of the organs entitled to challenge laws and other acts of the Congress before the CCS. A new subsection empowers the Congress and the Supreme Soviet to contest decrees (\textit{ukazy}) of the President of the USSR as being contrary to the Constitution or laws of the USSR. In sec. 3, the President of the USSR and the Chairman of the Supreme Soviet may ask the CCS for findings on the conformity of republic constitutions with the USSR Constitution and of republic laws with federal laws. In sec. 4, the President of the USSR assumes the right previously granted to the Chairman of the Supreme Soviet to challenge acts of the Supreme Soviet and of the Council of Ministers of the USSR. The respective findings of the CCS are to be communicated to the Supreme Soviet or the President of the USSR. Finally, in sec. 5, the President of the USSR, rather than the Chairman of the Supreme Soviet, may contest other normative acts of state organs or social organizations. Izvestiia No. 75, Mar. 16, 1990, at 3, col. 5.
sion in the USSR establishes the sensible rule that in the latter case the act (or its respective provision) automatically expires.

The new article 125 contains a dramatic novelty that may provide the starting point for a development in the direction of a genuine constitutional court. It states, ”[a]n act or its particular provisions violating rights and freedoms of citizens lose their force immediately on the adoption of the respective finding.” The new provision is part of a subsection of article 125 that initially established the suspensive effect of all findings, with the exception of those regarding laws of the Congress and republic constitutions. Does the nullifying effect of findings on civil rights violations extend to this basically “protected” category of norms as well? Neither the Constitution nor the Law contains an unambiguous statement to this effect, but the debate in the Congress, to which this formulation obviously responds, points very strongly toward nullification. 

C. The Introductory Decree

After enacting the Law on Constitutional Supervision in the USSR on December 23, 1989, the Congress of People’s Deputies adopted the Decree On Putting into Effect the Law “On Constitutional Supervision in the USSR.” The Decree contains three sections. First, the Decree orders the Law into effect as of January 1, 1990. The provisions of the Law regarding supervision of the conformity of the constitutions and laws of republics with the Constitution and laws of the USSR, however, will become effective only after modifications have been made to the part of the Constitution which regulates the national-state structure of the USSR. This delay is an exception; it is not to affect the exercise of supervision over normative legal acts which violate the rights and freedoms of citizens as of January 1, 1990.

Second, the Decree seeks to implement the principle of renewal of the membership of the CCS established in article 6 of the Law. Immediately after the first election of the members, the Chairman of the Committee will determine by lot the thirteen members whose functions will expire after five years. In subsequent elections, every member of the Committee is to be elected for ten years.

Third, concerning the protection of their labor rights and other conditions safeguarding the exercise of their functions, the members of the CCS are placed on the same footing as people’s deputies of the USSR.

Aside from a political appraisal to be attempted at a later point in

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130. See infra notes 136-141 and accompanying text.
132. This is Part III of the Constitution containing Chapters 8 (The USSR — a Federal State), 9 (The Union Soviet Socialist Republic), 10 (the Autonomous Soviet Socialist Republic), and 11 (The Autonomous Region and Autonomous Area).
all of these provisions invite critical comment from a legal perspective. In the first section, the political compromise to suspend the application of constitutional supervision over republic constitutions and laws has been expressed in a legally questionable form. Is it possible to suspend a constitutional provision by a simple decree (postanovienie)? Furthermore, the language “this exception does not extend to the exercise of supervision . . . over normative legal acts violating rights and freedoms” is not entirely clear. Does it provide an “exception to the exception” referring to all normative legal acts of the republics? Or should the sentence be read as a total exemption from supervision for republic constitutions and laws and as a mere confirmation of the CCS’s role in the supervision of federal normative acts violating the federal constitution and federal law (and possibly also certain republic normative acts below the level of republic constitutions and republic laws)?

Legislative history seems to confirm the first and broadest interpretation. At the end of Kerimov’s report on revisions proposed by the Commission on the various drafts as a result of the preceding debate, Gorbachev expressly asked Kerimov to explain the changes in this section of the Decree. Kerimov replied, “[w]hatever exceptions we made, they must not touch on human rights. Therefore we also proposed to include subsection 3 in article 21 of the Draft Law . . . If by any normative legal act or its individual provisions, fundamental human rights and freedoms are violated that are secured in the Constitution of the USSR or in international treaties ratified by the USSR, then this entails the loss of force of such an act or its individual provisions from the time of adoption of a respective finding of the Committee.”

Perhaps it was for political reasons that Kerimov was less explicit than he might have been, but he left no doubt that in protecting human rights and freedoms the Committee would, from the start, scrutinize both republic and federal law. And both article 125 of the Constitution and article 21, section 3 of the Law suggest an intent to create a special rule guaranteeing the highest possible protection of civil rights through immediate nullification of all legal acts regardless of their level in the hierarchy of norms. This was certainly not planned from the start, and the import of this amendment was hardly realized by most deputies. There was no outcry from the Baltic deputies that most of the suspension effect would thus be lost through the back door that opened the way for civil rights scrutiny. There was little protest from those who, like Kerimov himself, had repeatedly insisted in the course of the debate

133. See infra notes 163-192 and accompanying text.


135. Id.

136. Article 125 of the Constitution, Izvestiia No. 360, Dec. 26, 1989, at 3, col. 8, the Law (art. 21, sec. 3), id. at col. 5, and the Decree (sec. 2), id. at col. 4, uniformly speak of “rights and freedoms of citizens.”

137. Deputy Griazin (Estonia), who was obviously disturbed by this formula, wanted to know how it would be interpreted and demanded further discussion of the
that the political system was not yet ready for the establishment of a constitutional court which had the power to nullify rather than merely suspend unconstitutional legal norms or even only admonish the organs that had adopted them. What looks like unnecessarily obscure wording, for which hasty legislative drafting should be faulted, may in fact have been a clever stroke of political ingenuity on the part of a coalition of politicians striving to establish at least some constitutional supervision over the republics by the CCS right away and of jurists who sought a constitutional court “with teeth”.

Section 2 of the Decree is apparently unconstitutional. Article 125 of the Constitution makes no exception to the rule that the election of every member of the CCS is to be for a ten-year term. Although this exception is to apply only to the first election, this transitional provision should have been enacted on the constitutional level. It will be interesting to see the reaction of the Committee members whose work will be subjected to such an inauspicious beginning.

Section 3 would seem to be important enough to be included in the Law. It belongs there for systematic reasons, and it seems ill-placed in an introductory decree. Surprisingly, provisions on this subject were apparently included in the Draft Law as old article 27, but the article was subsequently stricken “because it had the same content as section 3 of the Draft Decree”

III. Election of the CCS

A. The Electoral Process in Action

As soon as the three legislative acts had been adopted in the morning session of December 23, Gorbachev, who presided over the entire discussion of these important issues, moved to the election of the Committee. He explained that Professor Kudriavtsev, whom he had initially proposed for the chairmanship, had suffered a serious illness and begged to be excused, and that there had been other changes in the

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138. In rejecting the Komsomol request to rename the CCS the “Constitutional Council” (Konstitutsionnyi sovet), Kerimov replied that this would signal the function of a constitutional court and stated “[w]e are not ready for this yet. In time we will effect this change.” Izvestiia No. 358, Dec. 24, at 3, col. 2.
139. Deputy Lauristin (Estonia) specifically criticized the newly emerging function of a constitutional court in the jurisdiction of the CCS. Id. at 6, col. 6.
140. Some jurisdictional problems might have arisen from the fact that the Presidium of the Supreme Soviet retained those supervisory powers over republic law that were not to be exercised by the CCS. Konst. SSSR, art. 119(5), reprinted in 15 Rev. Socialist L. No. 1 at 97. But art. 119 was repealed by the March 14, 1990 constitutional amendments, see supra note 129. Izvestiia No. 75, Mar. 16, 1990, at 3, col. 4.
141. See supra text accompanying notes 120-122.
142. See the Kerimov Commission proposals of changes to the Draft Law as presented by Gorbachev immediately prior to the final vote on Dec. 23. Izvestiia No. 359, Dec. 25, 1989 at 2, col. 2.
143. Id. col. 5.
original list of candidates as well. Some candidates had accepted other functions in the meantime, and some republics had recommended other candidates. Gorbachev then proposed Professor Sergei Sergeevich Alekseev as Chairman, extolling his virtues as responsible, cooperative, and a strong politician and jurist. And he then briefly characterized Professor Boris Mikhailovich Lazarev’s competence, whom he had selected as Deputy Chairman. Concerning the twenty-one members, he referred to written materials in the possession of the deputies.

Subsequently, Gorbachev proposed to include Professor Nikolai Vasilevich Fedorov, a Chuvash by nationality, among the members of the CCS in response to the demand of representatives from national-territorial formations below the republic level (autonomous republics, autonomous regions, and autonomous areas) to have a voice in the Committee. In doing so, Gorbachev tried to remove Professor Piskotin from the list, pointing out how important it was for the Congress that Piskotin would continue to function as editor-in-chief of the new journal Narodnyi Deputat [People’s Deputy]. This move would have preserved the original constitutional number of twenty-one deputies.

But, voices from the floor and written requests passed to the presiding officer delayed the voting process. The Estonian deputy Kiris withdrew his candidacy because he lacked the official endorsement of the Estonian Supreme Soviet. Gorbachev wanted to proceed to the vote and suggested to keep the “Estonian position” open. Then the Lithuanian delegation excused their candidate and did not recommend an alternative. Finally, an unidentified voice from the floor reminded the Chairman that the thirty-eight autonomous formations of the USSR had demanded four representatives on the Committee and that they had been led to believe in the preceding debate that this request would be granted. It was also suggested from the floor that this problem be solved by merely electing the Committee Chairman right away and letting him propose the members at the following session of the Supreme Soviet which would confirm them.

During a regular scheduled recess, Gorbachev adopted all of these proposals and put them to a vote. They were endorsed with overwhelming majorities. The number of members was raised to twenty-five, and the number of members to serve only five years was correspond-

144. Deputy Alekseev, Director of the Institute of Philosophy and Law, Urals Division of the Academy of Sciences of the USSR, had won the respect of Gorbachev and the Congress as Chairman of the Committee on Legislation, Legality, and Legal Order of the Supreme Soviet. Id.
145. Id.
146. Id. col. 6.
147. Id. col. 7.
148. Id. col. 8.
149. Id. col. 1.
150. Article 125 of the Constitution was changed with 1,604 votes pro, 64 against, 33 abstaining. The Congress forgot to change art. 5 of the Law, but Izvestiia No. 360, Dec. 26, 1989, at 1, col. 7, printed the “correct” number of 25.
ingly increased from eleven to thirteen. Alekseev was elected Chairman without the usual questioning by deputies; Lazarev became his deputy after giving a short recital of his career and a skillful answer about his views on the much debated article 6 of the Constitution (i.e., the "leading role" of the Communist Party). One deputy noticed that in article 99 of the Rules of Procedure (Reglament) of the Congress (adopted on December 20, 1989) the numbers also had to be changed from 21 to 25 and after this vote the Congress, without debate, adopted the decree to give the Supreme Soviet the instruction (poruchenie) to elect during its next ordinary session the members of the CCS. The Decree of the Congress of People's Deputies "On the Election of the Committee of Constitutional Supervision of the USSR," as published in Izvestiia, contains this instruction in its section 2. This section also spells out a mandate not mentioned when Gorbachev read the text to the Congress: in addition to one member from each republic, four members of the Committee should come from autonomous formations.

B. Assessment of the Electoral Process

The electoral process on December 23 had to be conducted under great time pressure. This may account for the seemingly desperate and clearly unconstitutional decision to refer the election of the Committee members to the Supreme Soviet. Article 108(11) of the Constitution expressly provides for the election of the CCS by the Congress of People's Deputies. The introductory clause to the enumeration of func-

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151. Decree on Putting into Effect the Law "On Constitutional Supervision in the USSR," Izvestiia No. 360, Dec. 26, 1989, at 3, col. 5. The need to change the number was pointed out by Deputy Pronin, a metal worker. Gorbachev, as presiding officer, was apparently surprised by this reminder: "Is it necessary to vote on this, too?" His mind may have been distracted by the revolutionary events in Rumania, and it attests to the political weight he attached to the issue of constitutional supervision that he personally presided over the entire debate of the Congress on this matter. The vote produced a majority of 1,642 for, 24 against, and 36 abstaining. Izvestiia No. 359, Dec. 25, 1989, at 3, col. 1.

152. 1,644 for, 42 against, and 47 abstaining. Id. col. 2.

153. 1,382 for, 219 against, and 121 abstaining. Id.


155. The change was voted 1,655 for, 54 against, and 25 abstaining. Izvestiia No. 359, Dec. 25, 1989, at 3, col. 2.

156. The decision was adopted 1,615 for, 66 against, and 40 abstaining. Izvestiia No. 359, Dec. 25, 1989, at 3, col. 2.


158. Id. col. 8. Section I decrees the election of Chairman Alekseev and Deputy Chairman Lazarev respectively. There was no vote on the entire text of the Decree. Id. col. 7.

159. Originally the Congress had been scheduled for seven working days. See Priniatyi vazhnye resheniia " (Important Decisions Adopted), Izvestiia No. 319, Nov. 14, 1989, at 2, col. 5 (correspondents' report). In fact it worked from December 12 to 24, taking off only Sunday, Dec. 17.

tions of the Congress in article 108 states that these are to be exercised exclusively by the Congress. Article 113 circumscribes the powers of the Supreme Soviet. Item 20 of the article empowers the Supreme Soviet to decide questions other than those enumerated in items 1 to 19, unless these have been reserved to the exclusive jurisdiction of the Congress. The Constitution contains no provision permitting the delegation of powers from the Congress to the Supreme Soviet. Thus, the "instruction" to the Supreme Soviet to elect the members of the CCS is patently unconstitutional. Should the Supreme Soviet act on the basis of this instruction (rather than deciding to refer the matter back to the next session of the Congress), the activity of the elected CCS would be seriously tainted by an unconstitutional election process. This unfortunate beginning of an otherwise promising venture could be somewhat offset by subsequent confirmation of the membership by the Congress. But even such a step would merely follow the unconstitutional practice of the Stalin and Brezhnev years to "legislate" primarily by means of edicts (ukazy) of the Presidium of the Supreme Soviet, and then have these acts subsequently endorsed and thereby raised to the formal level of "law" (zakon) by the Supreme Soviet at its next session, although the Constitution had given exclusive legislative power to the Supreme Soviet in the first place.

IV. Comparative Evaluation of the CCS

A. Structural Aspects

The CCS has been established as a separate and independent state organ. There is no provision in the Constitution or in the Law that would make it "accountable" or oblige it to "report" to the Congress. This is no mean accomplishment, given the general principle of the Constitution to subordinate all state organs to the control of the soviets. The members of the CCS not only enjoy full judicial inde-

161. "The Congress of People's Deputies of the USSR is empowered to take up for its examination and decide any question assigned to the jurisdiction of the USSR." Id. art. 108, at 85.

162. "Decides other questions within the jurisdiction of the USSR, apart from those questions which are the exclusive jurisdiction of the Congress of People's Deputies of the USSR." Id. art. 108(20), at 93.

163. I would thus disagree with Lazarev, "Razdelenie vlastei" i opyt Sovetskogo gosudarstva ["Separation of Powers" and the Experience of the Soviet State] in B. N. Toporinin ed., supra note 2, at 146, 157, who considers the CCS an instrument in the hands of the Congress. But Lazarev was writing between the constitutional amendments of 1988 and the adoption of the Law on Dec. 23, 1989, and he may take a stronger stand now that he has been elected Deputy Chairman of the CCS.

164. KONST. SSSR, art. 2, secs. 2 and 3, states "The people exercise power through Soviets of People's Deputies, which constitute the political foundation of the USSR. All other state bodies are under the control of, and accountable to, the Soviets of People's Deputies."

Cf. also LAW ON THE SUPREME COURT OF THE USSR of Nov. 30, 1979, art. 10, translated in W. E. BUTLER, COLLECTED LEGISLATION OF THE USSR AND CONSTITUENT REPUBLICS, VII-2 which states that "Judges and people's assessors of the USSR
pendence (election to ten-year terms and immunity from arrest and prosecution), but seem to be protected even more strongly than judges against improper intimidation or removal from office. Whereas judges may be recalled by the organ that elected them “for conduct incompatible with their high rank” and may also be subject to disciplinary liability for inappropriate conduct, there are no similar provisions for members of the CCS. Article 27 of the Law on Constitutional Supervision extends the immunity of members to include measures of administrative punishment applied by courts and requires for the lifting of immunity from prosecution the consent of two-thirds of the Committee in a secret vote. There is also an express protection of members against liability for views voiced in the deliberations of the CCS.

These quasi-judicial aspects of the structure of the CCS appear to be limited, however, by the composition and size of the Committee which may steer its work organization and procedures into a more political, quasi-legislative pattern rather than a predominately judicial one. A smaller body would probably find it easier to establish its authority on the basis of straightforward legal professionalism.

B. Functional Aspects

1. Examination of Sub-Statutory Acts

The most extensive and most important function of the CCS may well be the examination of sub-statutory acts (podzakonnye akty) that violate the Constitution or federal law. Professor A. M. Iakovlev estimates that this area of supervision may account for ninety percent of the Committee’s future activity. He and other Soviet scholars have repeatedly deplored the fact that legislative power and legislative acts have been inundated and paralyzed by normative material (frequently illegal) produced by the Councils of Ministers, ministries, and other executive

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166. Zakon SSSR o statusu sudei v SSSR, supra note 165, art. 18(1).

167. Prosecution of judges can be authorized by the Supreme Soviet under art. 6. Foreign Broadcast Information Service, supra note 165, at 94.

168. The draft of the 1988 constitutional amendments had proposed a membership of 13 without reference to republic representation. Article 125 as adopted by the Supreme Soviet raised the number of members to 21, including representatives of each union republic. See Konst. SSSR, reprinted in 15 Rev. Socialist L. No. 1 at 103. Under the 1989 draft, members do not represent, but “come from” republics, and the final version adds four more members from autonomous formations. Cf. supra notes 91, 125, 148-158 and accompanying text.

The CCS is expected to put an end to the arrogation of power and its arbitrary exercise by executive organs and to re-establish the superiority of legislation over executive rule-making. But it may do so only with respect to acts of councils of ministers, not to those passed by individual ministries. According to articles 125 and 164 of the Constitution, the latter fall under exclusive Procuracy supervision. The successful defense of this monopoly by the politically powerful Procuracy imposes a serious restriction on the scope and effectiveness of the future work of the CCS. I have little doubt that sooner rather than later the supervision of all law-making by central executive-administrative organs (including individual ministries) will be entrusted to the CCS.

The CCS is in a strong position to the extent that it may examine these questions not only at the request of other state organs, but also on its own initiative. It is weakened, however, by the provision that it may merely suspend but not annul unconstitutional or illegal acts of this type under article 21. The organ that issued the illegal act is given a three-month period to rectify the situation. There may be reasons for giving agencies an opportunity to correct their faulty norms, but it should certainly be left to the CCS itself to grant this right as an exception. Likewise, it seems improper to empower the Presidium of the Supreme Soviet rather than the CCS, to extend the three-month period. Predictably, the publication of the finding of the CCS (article 21) will put pressure on the respective organ, but there are insufficient provisions for the case of non-compliance. The only option for the CCS is to pursue the question up to the Congress of People’s Deputies.

Soviet legislation on constitutional supervision could at least have adopted the provisions that were adopted for the (pre-perestroika) Polish Constitutional Court, that if the organ does not change its unconstitutional or illegal act within three months, the act automatically loses its force. The Yugoslav Constitutional Court, on the other hand, does not suspend but rather immediately nullifies illegal or unconstitutional sub-statutory acts.

170. Id. at 6, col. 8 and at 7, col. 1. See also Kerimov’s report to the Congress, supra notes 67-71 and accompanying text.
171. Note that the Polish Constitutional Court may examine orders and instructions by ministers. Ludwikowski, supra note 1, at 101.
172. Art. 12 of the Law.
173. Art. 21 of the Law.
174. Under art. 139(5) of the Austrian Constitution, the Constitutional Court may decide that an illegal ordinance will expire after a period of time up to six months (or in some cases, one year). See A. Blaustein & G. Flanz, 1 Constitutions of the Countries of the World.
175. Art. 22 of the Law.
2. Examination of Federal Statutes

In examining the constitutionality of federal statutes the CCS is restricted by the principle of "supremacy" of the legislature. This principle is acknowledged by all socialist countries, even if they have established organs of constitutional supervision in the form of constitutional courts. The Polish Constitutional Court submits its finding concerning unconstitutionality to the Sejm (lower house of parliament), which may adopt or reject the view of the Constitutional Court. The Yugoslav Federal Assembly has a period of six months to bring its law into conformity with the finding of the Constitutional Court. In case of non-compliance, the act (or its unconstitutional provision) automatically expires.

The Soviet solution shows greater emancipation from the "supremacy" of the legislature than the Polish model. The Congress of People's Deputies needs a two-thirds majority, the same majority that is required to change the Constitution, to reject a finding of the CCS. If this majority is not achieved, the act expires. There is, however, no provision that would let the act lose its force in case the Congress should remain inactive.

3. Advisory Role

Western constitutional courts do not offer advice to the legislator in the drafting stage. The original Soviet concept of the CCS under article 125 of the Constitution (as amended on December 1, 1988), however, envisaged such an advisory function with respect to draft legislation of the Congress of People's Deputies. Laws which the Congress had already adopted were to be entirely beyond examination by the CCS. These laws have now been included in the scope of supervision, but the advisory function concerning draft legislation remains a duty of the CCS. The Polish Constitutional Court, on the other hand, does not examine legislative drafts because the preliminary approval of a draft might be prejudicial to a later examination of the adopted statute by the Court.

One interesting function developed by the German Constitutional Court that may play a role in the future work of the CCS is the "admonitory decision" (Appellentscheidung). The German Court may, instead of voiding a statute outright, appeal to the legislature (with or without setting a time limit) to bring a statute in conformity with the constitution. This advice may contain more or less specific suggestions (including choices) for legislative action. Since the Soviet CCS enjoys the right to exercise legislative initiative it may occasionally choose this avenue,

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179. Kristan, supra note 177, at 72.
180. Article 23 of the Law.
rather than issue a finding, to address prospective advice to the legislator.

The very idea that the powerful German Constitutional Court may decide merely to admonish the legislator to change the statute, rather than to immediately nullify its effect, must appear attractive to those Soviet scholars (and CCS members) who are justifiably anxious not to offend the supremacy of parliament, but who are at the same time working toward eventually establishing an effective Soviet Constitutional Court.

4. Adjudication of Jurisdictional Disputes Between the Union and the Republics

One very important function of the Austrian and German constitutional courts is to adjudicate jurisdictional conflicts arising between the federal government and the member states and to pass on the non-conformity of legal acts in the context of a federal union. This function has also been intended for the Soviet CCS, but has been suspended until a new constitutional model for the relationship between the union and the republics has been devised. At this time it seems rather futile to speculate about the outcome of this intense political struggle. Gorbachev's plea in the Congress to transfer jurisdiction in this matter from a political organ, the Presidium of the Supreme Soviet, to a legal mechanism, the CCS, failed to persuade the advocates of republic sovereignty. The Yugoslav model of a highly decentralized federation, in which the constitutional court has no power to decide conflicts between the federal and the republic constitutions (these conflicts are considered political rather than legal questions), may itself prove unworkable with the disintegration of the unifying force of the League of Communists of Yugoslavia. The Soviet Union may find it equally difficult to "legalize" the resolution of serious controversies between the federal government and the centrifugal republics that are increasingly insisting on their sovereign rights. These "sovereign rights" have long laid dormant under a constitutional pattern that was designed in and for a situation of conflictless political and legal development in which all problems of constitutionality could be solved by a highly centralized and authoritative Communist Party apparatus.

5. Protection of Civil Rights

The boldest step taken by the Soviet legislature was the surprise "compromise" on Dec. 23, 1989, protecting civil rights against violation by

183. The Austrian Constitutional Court may suspend the expiration of an unconstitutional statute for a period up to one year under art. 140(5) of the Austrian Constitution. See A. Blaustein & G. Flanz, supra note 174.

184. Kristan, supra note 177, at 72.


186. Topornin, supra note 2, at 34.

187. See supra notes 130, 134-141 and accompanying text.
normative acts. In this area, supervision over republic law (including constitutions) is not suspended, and the findings of the CCS have immediate nullifying force. There is no indication in the Law how the decisions of CCS will be enforced, particularly if republic governments should choose to ignore them. But from a conceptual point of view this provision marks a further step from an advisory or admonitory to a genuine judicial function of the CCS.

6. *Adjudication of Individual Citizens’ Complaints*

One of the most prominent functions of Western (e.g., the German and Austrian) constitutional courts is the adjudication of constitutional complaints brought by individual citizens whose rights have been violated by state organs. Under article 7 of the Principles of Legislation of the USSR and the Union Republics on Court Structure, the ordinary courts are to protect citizens against violation of their constitutional rights by organs of state administration and officials. The USSR Law “On the Procedure of Complaints to the Court Against Unlawful Actions of Organs of State Administration and Officials Violating the Rights of Citizens,” adopted on November 2, 1989, regulates this procedure which does not, however, extend to normative acts of these organs or officials. It also remains to be seen whether this protection will be sufficient or whether, in the long run, this function will have to be transferred to a special constitutional court in order to ensure its effective exercise.

7. *Potential Role in Party and Election Disputes*

There are other functions exercised by Western constitutional courts, such as prohibiting political parties, deciding election disputes, or conducting impeachment trials, that may, in the course of further legalization of political processes in an increasingly pluralistic Soviet system,

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190. Izvestia No. 317, Nov. 12, 1989, at 2, col. 3. Normative acts (normativnye akty) differ from individual legal acts (e.g. a court sentence or an order of an enterprise director dismissing a worker) by their more or less general character, directed at the regulation of a certain type of social relationship, and by their repeated applicability. They range from the Constitution downward to orders and instructions of ministers, local executive committees, etc. See A. S. Pigolet, *Iuridicheskii entsiklopedicheskii slovar* (Legal Encyclopedic Dictionary) 254 (2d ed. 1987). Normative acts of state administration below the level of councils of ministers are subject to Procuracy supervision. See supra note 128 and accompanying text.

be included in the jurisdiction of a future constitutional court of the USSR.

V. Prospects
The CCS of the USSR in its present form represents a temporary compromise solution in a rapidly moving process of political and legal change. Like most legislation passed in this process, the institution of the CCS, its functions, and procedures will undergo frequent amendment and adaptation. Whereas some of the functions dealing with the separation of powers between the Union and the republics may be subject to substantial alteration before they will become effective in a revised system of federal (or confederative) relationships, other functions of the CCS (such as checking the legality of decrees adopted by the Council of Ministers of the USSR) may become immediately viable and help enforce, in a quasi-judicial procedure, the supremacy of the Constitution and respect for the statute in a well-defined hierarchy of norms. They, too, will be refined and adjusted as the entire political system moves closer to the Western style of conflict resolution through law. This process will certainly involve a redefinition of the jurisdictional spheres of the four organs most prominently involved with supervision of legislative and administrative legality: the CCS, the Presidium of the Supreme Soviet, the Procuracy, and the Courts. The predictable result is likely to be a strengthening of the CCS and its ultimate restructuring into a constitutional court. Already, the presently existing CCS has the potential of making a significant contribution to the establishment of a Soviet Rechtsstaat192 (pravovoe gosudarstvo, a state under the rule of law) and to the development of a more sophisticated Soviet legal culture.

192. On the origins of the notion of a Soviet state under the rule of law in the concept of Rechtsstaat of 19th century German theory of state and law, see Nercessians, Kontseptsiia Sovetskogo pravovogo gosudarstva v kontekste istorii uchenii o pravovom gosudarstve, in B. N. Topornin ed., supra note 2, at 45. See also Quigley, supra note 16.