

# THE NEW LEGAL STATUS OF THE BULGARIAN PROSECUTOR'S OFFICE

EKATERINA PANAYOTOVA TRENDAFILOVA-BATCHVAROVA\*

*In our modern, liberal democratic societies we take the independence of the judiciary for granted and view the proper function of prosecutors and attorneys general as limited to initiating and conducting criminal prosecutions. But these concepts and role-definitions have been far from universal. For a time in 14th century France, then under Peter the Great and his immediate successors in Russia, and again in the former Soviet Union and communist regimes of Eastern Europe, the office of the prosecutor was assigned an additional function: supervision - not only of the judicial system but of the entire state bureaucracy and society. Because this supervisory power was used to subordinate human rights to the interests of the state and ruling party, the challenge of the post-Soviet years has been to restore the judiciary's independence and limit the authority of prosecutors to prosecution of criminal trials. The author examines Bulgaria's response to this challenge, with special consideration of Bulgaria's new (1991) Constitution, its newly established Constitutional Court, and the likely efficacy of these institutions in safeguarding human rights.*

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\* Senior Lecturer, University of Sofia, Bulgaria. Professor Trendafilova-Batchvarova has served as Deputy District Attorney of Sofia's District Court, as Bulgaria's Representative to the U.N. Commission for Crime Prevention and Criminal Justice, and as a participant in drafting criminal justice legislation for Bulgaria's Ministry of Justice. She is the author of 40 publications dealing with different issues of constitutional law, administration of justice and criminal justice, and was a Fulbright Fellow at the University of California, Davis in 1997. This article was presented to the Seventh Annual Fulbright Symposium on International Legal Problems / Sixth Regional Meeting of the American Society of International Law held at the Golden Gate University School of Law, San Francisco, on March 21, 1997.

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## I. INTRODUCTION

After the collapse of communism, the countries of Eastern and Central Europe made fundamental changes within a short period of time. These changes affected all aspects of life - political, social and economic. The constitutional and legal system was no exception. It also underwent radical reform. In 1991 a new Constitution replaced Bulgaria's old socialist Constitution.<sup>1</sup>

For the first time in modern Bulgarian history, the new Constitution recognized the principle of separation of powers. Article 8 divides the state power into legislative, executive and judicial branches. The judicial branch includes judges, prosecutors and investigators.<sup>2</sup>

The infringements on the independence of judges, prosecutors and investigators in the socialist past made the legislature very cautious when determining to which branch of government prosecutors and investigators should belong.<sup>3</sup> There were long discussions and a number of different proposals. Some thought that the Prosecutor's Office should be part of the executive branch, as it is in most European countries (e.g., Austria, Germany, France, Sweden, Norway, Denmark, and Finland), while others believed that the Parliament should choose the chief prosecutor.

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1. *Constitution of the Republic of Bulgaria*, adopted 12 July 1991, in III CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Oceana Publications, Inc. 1992) Interim and Concluding Provisions, sec. 9 [hereinafter *Const. 1991*]; *Constitution of the People's Republic of Bulgaria*, adopted 18 May 1971, *id.* [hereinafter *Const. 1971*].

2. Bulgarian law has long required the investigation of crime to be carried out by officials with a legal education. A legal education is considered extremely important because the pre-trial stage of criminal proceedings requires knowledge of many special legal issues. Although investigators are similar in many respects to American detectives, under Bulgarian law they are not part of the police, and they, like judges and prosecutors, must be lawyers. In the Bulgarian system, the police respond to crimes and receive crime reports. They may assist the investigators, but they do not themselves conduct investigations.

3. There was never any doubt that judges should be placed in the judicial branch, as in any legal system recognizing the principle of the separation of powers.

Ultimately the new Constitution placed the prosecutors in the judicial branch,<sup>4</sup> a decision that differs from the approach of most Western systems but is similar to that used by Italy.<sup>5</sup> The idea was to prevent interference in the work of the prosecutors by the executive branch and to insulate the prosecution from the kind of political influences represented in Parliament.<sup>6</sup> In a country with only a few years of experience in democracy, the Bulgarian people were very sensitive about the independence of the prosecution. The Constitution sought to respond to the people's expectations and demands that judges, prosecutors and investigators be given a place in the governmental structure that would allow them to defend the interests of society against arbitrary violations of the rights of its citizens.

For similar reasons the investigators were removed from the Ministry of the Interior. They were placed in a newly created National Investigation Agency. This agency was established as an independent body and made part of the judiciary.

## II.

The Law for the Judicial Power of 1994 created a new legal framework for the structure, organization and functions of the Prosecutor's Office.<sup>7</sup> Previously the Prosecutor's Office was closely affiliated with the ruling communist party. The Attorney General, according to article 78(16) of the socialist Constitution of 1971, was "elected" by Parliament (National Assembly). In fact only one candidate, previously approved by the central committee of the ruling communist party, was nominated. There was no open competition among candidates. The Attorney General was a person close to the ruling party, conforming the fulfilment of his duties with its policies.

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4. *Const. 1991* art. 117(2).

5. In Italy, prosecutors are members of the judicial branch. They have the same status as judges. For more details see G. Tinebra, *The Role of the Pubblico Ministero in Italy*, *REVUE INTERNATIONALE DE DROIT PENAL* 593, 594 (1993).

6. For details on the debates and arguments, see E. Trendafilova, *The Separation of Powers and the Prosecutor's Office*, 59 *MODERN LAW REVIEW* No. 6. (1996).

7. See *HANDBUCH WIRTSCHAFT UND RECHT IN OSTEUROPA*.

Under the socialist regime the structure of the Prosecutor's Office was hierarchically organized and extremely centralized. The Attorney General appointed every single prosecutor in the country. He also decided all the promotions, demotions and dismissals of the prosecutors throughout the whole system. The prosecutors were obliged to follow the orders and instructions of their superiors and of the Attorney General.

The new Constitution and the Law for the Judicial Power provide a new policy for judges and other members of the judicial branch - prosecutors and investigators. They are not elected, but are appointed for life after a probation period of three years. Following the Italian model, the new Constitution established a Supreme Judicial Council<sup>8</sup> which is authorized to appoint, promote and dismiss all ordinary judges, prosecutors and investigators. The Supreme Judicial Council also nominates the Chairperson of the Supreme Cassation Court, the Chairperson of the Supreme Administrative Court, the Attorney General and the Director of the National Investigation Agency. The President of Bulgaria appoints these officers.

The Law for the Judicial Power creates safeguards for the independence of prosecutors when prosecuting individual cases and to some extent decentralizes the Prosecutor's Office.

Membership in the ruling Communist Party was an important prerequisite in the socialist era for becoming a prosecutor or at least for a successful professional career. After the change in regimes, a new law was adopted, prohibiting state officials, including prosecutors, from membership in a political party or other political activity. The Law for the Judicial Power confirms this provision. Members of the judiciary are free to join together in a union or in union-like activity for the purpose of defending

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8. *Const. 1991* art. 130. The Supreme Judicial Council is an independent body with 25 members. Members must be lawyers with high professional and moral qualities and no less than 15 years of legal practice. The Chairperson of the Supreme Cassation Court, the Chairperson of the Supreme Administrative Court and the Attorney General are ex officio members of the Supreme Judicial Council. Eleven members are elected by Parliament and eleven by the judicial branch. *Id.* The idea of the legislature was to ensure the independence of the Supreme Judicial Council, on the one hand, and to create it as a widely representative body, on the other hand.

their independence and professional interests. This union may sponsor seminars or courses in which judges, prosecutors, investigators and university professors discuss issues of professional importance or take other actions to improve the education and training of its members. However, the law forbids the union from merging or acting together with organizations that are not judicial.

### III.

One of the crucial steps in creating the new Bulgarian legal framework was to redefine the role of the prosecutor (procurator). Under the socialist regime the role of the prosecutor differed considerably from that of prosecutors in Western countries. Article 133(1) of the socialist Constitution of Bulgaria gave the Attorney General a "supervising power"<sup>9</sup> over the executive, local authorities, enterprises, mass organizations, public officials and citizens.<sup>10</sup> This "supervising" power was considered to be the prosecutor's basic function. The prosecutor also had the power to conduct prosecutions and, in some cases, criminal investigations.

9. *Const. 1971, supra note 1.* In Bulgarian, this power is called *nadzor*. In the Western literature, the term is usually translated as "supervising power" and this article follows the usual practice. The term could also, however, be translated as "oversight power." In reality, there is no perfect translation as the Bulgarian term involves a combination of supervision and oversight.

The socialist law defined six different kinds of prosecutorial activities: common supervision; supervision over three phases of criminal cases (i.e. the investigation, the trial stage, and the execution of sentences); supervision in civil cases; and supervision in administrative cases.

Prosecutors responsible for the "common supervision" reviewed the actions of the executive branch, local authorities, state enterprises, mass organizations, public officials, and citizens. Following a monthly schedule, for example, they visited the state enterprises to inspect their work and review their files. If the prosecutor came across a violation of the law, prosecution ensued. The prosecutor's supervisory power was not limited, however, to investigating violations of law. If the prosecutor observed something that was not working well, he was expected to call this to the attention of higher authorities even though no violation of law was involved. The prosecutor was not, however, allowed to interfere with the work of the enterprise.

Although the common supervisory work of the prosecutor's office was considered extremely important in the socialist system, it was not highly valued by the prosecutors themselves. The most professional of the prosecutors generally sought to avoid such work in favor of criminal prosecutions.

10. One result of this constitutional function was that prosecutors had higher social status than judges. Most respected, or more correctly, feared, by ordinary people, were the police and investigators, who were officers of the Ministry of the Interior.

In principle, however, even the prosecutor's prosecutorial function arose out of the more general power to supervise. The two functions overlapped and reinforced each other. When the prosecutor prosecuted a case, he was not only the prosecuting party but also exercised supervision over the way the criminal case was tried. The court was therefore also subject to the supervisory power of the prosecutor. Although the court was not formally bound by the opinion of the prosecutor in reaching its judgement, the judge was always conscious of the prosecutor's supervisory power and there was a serious question as to what political and psychological influence the prosecutor's supervisory power had on the court.<sup>11</sup> This consideration explains the heated debates over the course of many years as to what role the prosecutor should play in criminal cases - a prosecuting authority as in most modern democratic systems, a general supervisory role, or both.<sup>12</sup>

#### IV.

The idea of giving the prosecutor a supervisory role over the system did not originate in the socialist countries. It has long roots in European history.

A prosecutor's office was first established in France during the 14th century. Its initial purpose was to look after the fiscal interests of the king. Soon, however, as the king received information about arbitrary abuses of power by the feudal

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11. J. Herrmann, *The Role of the Prosecutor or Procurator (Synthesis Report)*, INTERNATIONAL REVIEW OF PENAL LAW, CRIMINAL JUSTICE AND HUMAN RIGHTS 543 (1993).

12. Some authors took the position that the prosecutor in criminal proceedings should perform an exclusively supervisory function. Others maintained that the prosecutor combined supervision with prosecution. According to that opinion, the prosecutorial function was implied in the general supervisory power of the Prosecutor's Office; however, after initiating criminal proceedings, the prosecutor was not to abandon his main duty of supervision. (That supervisory power, exercised by the prosecutor as an integral part of his prosecutorial function, ran through the entire process like a "red thread.") A third group of authors regarded the prosecutor as both a party in initiating criminal proceedings and a supervisory state organ in overseeing how they were carried out. And finally, there were lawyers who thought of the prosecutor as having only a prosecutorial function both in initiating and conducting criminal proceedings. However, because of the provisions of the socialist Constitution, with its concentration of supervisory power in the Office of the Attorney General, this view did not prevail.

landlords in the exercise of their judicial functions, he decided to take the judicial power into his own hands. Having no other suitable institution, the king entrusted the prosecutor's office with the additional tasks of investigating, prosecuting and trying criminal cases.<sup>13</sup> In time, the prosecutorial and judicial functions displaced the fiscal duties and became the only duty of the prosecutor's office. Over time other European states accepted the French model - the Netherlands, most of the Swiss cantons, Spain, Norway, Italy, and others. In these countries the prosecutor's office was established as a judicial body, exercising only the duty of prosecution.

The prosecutor's supervisory function first appeared in Russia. Peter the Great, who wanted to turn Russia into a strong and powerful empire, demanded that his personal will be respected and fulfilled by everyone in his monarchy. To that end, he undertook a series of radical reforms.

Peter urgently needed an effective control mechanism to support these reforms throughout the vast Russian Empire. He seized on the institution of the French Prosecutor's Office. In a visit to France Peter was very much impressed by the respect and attention which the members of the Parliament gave to the speech of the Prosecutor General. He could see the extremely important role the prosecutor played in French society.

On his return to Russia in 1721, Peter immediately took steps to establish a similar institution. He appointed a Procurator General to the Senate, which was the highest executive body in the empire. The Procurator General enjoyed the full confidence of the Tsar and was responsible only to the monarch for his actions. In case of intentional abuse of power, however, the Procurator was to face the death penalty.

The only function Peter imposed on his Procurator General was to supervise the Senate. The Russian word for supervision, *nadzor*, accurately describes the mission of the Procurator

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13. This was a typical example of an inquisitorial process in which one and the same person investigated, prosecuted and decided the case.

General: *nad* means "over" and *zor* comes from the word *vzor*, which means "look." Hence, with the Senate being the highest executive body in the empire, the role of the Procurator General extended "to look over" everything and everyone in the huge Russian Empire.

The Procurator General's exclusive duty was to attend the sessions of the Senate. He did not participate in its internal work. His function was to observe whether the work of the Senate was in conformity with the Tsar's Decrees. If it was not, the Procurator General reminded the Senate of its obligation to fulfil the Tsar's will. In case the Senate did not follow the Tsar's directives, the Procurator General informed the monarch. Lower level procurators were appointed throughout the territory of the Russian Empire. They did not participate in the work of the local authorities. Their only obligation was to supervise them.

The Russian Procurator's Office at that time was not organized hierarchically. Each individual procurator was subordinate directly to the Procurator General, but independent from all the other procurators; each had to fulfil the Procurator General's mandatory instructions. Thus, the Tsar could, by relying on the person whom he most trusted, exercise direct control over all the procurators in Russia. The idea was to avoid the corrupting effect of a multilevel bureaucracy and the possible "dilution" of personal responsibility.<sup>14</sup>

The Russian model placed the procurator over all the state authorities and gave the procurator the exclusive power to supervise them. The procurator had no function other than supervision. He had access to every kind of activity in the country. Peter himself stated the duties of the Procurator General: "Here is my eye, through which I shall see everything; he knows all my intentions and desires, you all must do what he considers to be good, and even if it seems to you that he acts

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14. It is interesting to note that this system can also be found in the modern Italian Prosecutor's Office. In Italy no hierarchical dependence exists among the various Offices of the Pubblico Ministero. Each office is absolutely independent in performing its institutional activities and has complete control over its powers. See Tinebra, *supra* note 5, at 594.



against my interests and the interests of the state, you must regardless of that fulfil his orders.”<sup>15</sup> The Procurator’s Office was “the eye of the Tsar,” which could reach the remotest parts of the Russian Empire to ensure that the personal will of the monarch was being respected and fulfilled.

The foregoing summary shows how the French model of the Prosecutor’s Office was established in Russia, but with a single and totally new task: supervision. It was not a prosecuting body. The procurators did not participate in criminal trials to present the case on behalf of the prosecution. They attended trials, but only to exercise their supervisory power. This power included reminding the court what its obligations were and even suspending its decisions and orders.

The procurator’s supervisory power was preserved during the time of Catherine the Great and successive Russian monarchs until the reign of Alexander II. Alexander sought to modernize Russia. After freeing the serfs, he undertook a total reform of the empire including the military and judiciary. As part of his immense judicial reform, Alexander abolished the procurator’s supervisory power in 1864. Like the similar agencies in the Western European countries, the Procurator’s Office became exclusively a prosecuting body.<sup>16</sup> This reform had immense significance. The procurator’s supervisory power over the court had undermined the independence of the judicial institution and deprived it of the respect it deserved.

## V.

Russia was not the only country to give its prosecutors supervisory power. France also used this system for a brief time. The Napoleonic *Code d’Instruction Criminelle* of 1808 added a new supervisory power to the prosecutor’s existing monopoly on prosecution. The basic aim of this new power was to establish control over the corrupt police apparatus. The prosecutor became a supervising as well as a prosecuting body. The Prosecutor’s

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15. S. VELTCHEV, *THE PROCURATOR’S SUPERVISORY POWER* 84 (1928).

16. *Id.* at 95; Herrmann, *supra* note 11, 533.

Office was also reorganized with a centralized and hierarchically organized structure.<sup>17</sup> The supervisory function of the prosecutor gradually disappeared with the democratic developments in the countries of Western Europe (including France) during the end of the 18th and the beginning of the 19th century.

When Bulgaria gained its freedom from Turkey in 1878, it created a Prosecutor's Office using the post-Alexander II Russian model. Like the procurator in Russia and the other European countries at that time, the Bulgarian prosecutor had no supervisory power. In criminal trials the prosecutor was exclusively a prosecuting authority. He had no power to control the court. It was the court's duty to guard against infringements of the law, including the actions of the prosecutor. The prosecutor was not superior to the other parties and, like the other parties, was under the legal control of the court.

## VI.

In Russia the supervisory power of the procurator was revived after the October Revolution of 1917. The communist regime abandoned the old procurator system and substituted a so-called "peoples' prosecution." The revolutionaries sought to transfer the prosecutorial power to ordinary people. Thus if someone committed a crime, there was no special agency to prosecute him. Anyone could take the stand and prosecute the criminal on behalf of the general citizenry. After several years, however, it became clear that it was impossible to combat criminality successfully without a specialized prosecuting body.

The institution of the procurator was consequently revived in the judicial reform of 1922. This reform not only recreated the procurator's prosecuting function, but made an even more

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17. DER STRAFPROZESS IM SPIEGEL AUSLÄNDISCHER VERFAHRENSORDNUNG 17 (1990); B. Huber, *The Office of the State Prosecutor in Europe: An Overview*, INTERNATIONAL REVIEW OF PENAL LAW, CRIMINAL JUSTICE AND HUMAN RIGHTS 560 (1993).

dramatic change: It created a prosecutorial power to supervise the execution of the "revolutionary legislation."<sup>18</sup>

The new Soviet State urgently needed a political body capable of guarding the new social order. Turning to the idea of Peter the Great, it founded the institution of the Soviet Procurator. The re-established Procurator's Office had the same principal function as in Peter the Great's time - supervision over everything and everyone in the country. Now, however, the purpose of the new supervisory power was to protect the interests of the Soviets. The discussions on the first draft of the Law for the Procurator's Office put special emphasis on the prosecutor's power to watch over the carrying out of the revolutionary legislation. The office was directed to fight the bourgeois and counter-revolutionary elements of the society.<sup>19</sup>

The Soviet procurator also had the obligation to combat criminality. Criminality was thought to undermine the very foundations of the Soviet order and its revolutionary achievements. In addition to participating in criminal trials on behalf of the prosecution, the procurators were supposed to look to see whether the courts were conforming to the policy of the Communist Party, of the Soviets and of the working class.<sup>20</sup> The sentence of the court could be considered illegal and unfounded not only when it was contradictory to the law, but also when the court had not understood its political meaning, that is, when it had failed to evaluate the political significance of the crime.<sup>21</sup>

After World War II most of the socialist countries adopted the Soviet concept of the supervisory power of the procurator. The fact that the procurator participated not only in criminal cases

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18. M. TZELZOV, A COURSE IN SOVIET CRIMINAL PROCEDURE 688 (1957).

19. N. POLIANSKII, QUESTIONS ON THE THEORY OF THE SOVIET CRIMINAL PROCEDURE 77 (1956).

20. TZELZOV, *supra* note 18, at 196.

21. POLIANSKII, *supra* note 19, at 79.

but also in civil and administrative trials<sup>22</sup> clearly demonstrated his supervisory power.

## VII.

With the collapse of communism, the supervisory role of the prosecutor became a major topic in the debates about legal reform. The prevailing opinion favored abolishing the prosecutor's supervisory power. Of particular concern was the control that the prosecutor exercised over the court in criminal, civil and administrative cases. The belief was that the prosecutor should not be granted a special role in relation to the court. In a democratic legal system the court is the institution that must decide disputes between the state and its citizens and between citizens themselves when other organs of government cannot do so. The court must be free to evaluate the facts and make its decisions according to the law. Any kind of control over its work undermines the very foundation of democracy. Perhaps nothing is as crucial to a democratic society as a truly independent judiciary.<sup>23</sup>

Although the prevailing opinion favored abolition, there are still firm supporters of the supervisory function of the prosecutor. These supporters believe that the only reason for the prosecutor to participate in trials is to take measures against violations of the law by the participants and by the court.<sup>24</sup> These are, however, isolated opinions. At least to a substantial degree, all of the former socialist countries have now abolished the prosecutor's power of general supervision. In the former Yugoslavia this was done in the 1960's. In the rest of the

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22. At the beginning of the 20th century some of the Western European legal systems also provided for participation of the prosecutor in civil cases, e.g., Austria and Germany. Fearing that this might be considered a kind of a legalized control by the prosecutor over the court, the Austrian legislature excluded that provision. The German legislature reduced it to a minimum. The same considerations influenced the Bulgarian legislature in 1922 to abolish the participation of the prosecutor in civil cases. See VELTCHEV, *supra* note 15, at 159.

23. R. Cadahy, *The Independence of the Judiciary*, INTERNATIONAL REVIEW OF PENAL LAW 899 (1992).

24. V. Klochkov, *The Role of the Procurator in the Former USSR*, INTERNATIONAL REVIEW OF PENAL LAW 645 (1993).

countries, the process began after the radical political changes of 1989.

The new Bulgarian Constitution established the main role of the prosecutor as a prosecuting authority. It does not however, fully give up the idea of the supervisory function of the prosecutor. The Constitution (in article 118(3)) and the Law for the Judicial Power (in article 127(3)) still retain this idea as far as punishment and other coercive measures are concerned; the prosecutor is supposed to supervise their execution. The Constitution and the Law for the Judicial Power also authorize the prosecutor to participate in civil and administrative proceedings. Although the Constitution and the Law for the Judicial Power do not define the nature of this participation, it is presumed that the legislature intended the supervisory power to continue in this area as there is no prosecutorial function in these cases.

Even under the new Constitution, the prosecutor retains some authority to issue warrants. The Constitution entrusts the authority to order arrest, searches and seizures of homes and personal correspondence, and to prohibit publications related to crimes, to the judicial branch.<sup>25</sup> Under Bulgarian law, however, the judicial branch includes not only judges but prosecutors and investigators as well. This means that under the Constitution prosecutors and investigators, in addition to judges, are entrusted with the authority to order these special investigative measures. The new Constitution thus authorizes the continuation of the old socialist Code of Criminal Procedure (1975), which granted these powers to prosecutors and judges but not investigators.

The approach of the new Bulgarian Constitution in allowing prosecutors to have this kind of power seems misguided. Prosecutors are not neutral, detached and impartial observers. They are participants in the investigation. The power to order special investigative measures such as arrests, searches and seizures should be vested only in the courts.

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25. *Const. 1991* arts. 30, 31, 33, 34, 40.

The idea of judicial control is to provide real, effective constitutional guarantees for the rights of the citizens. Such guarantees can serve as a control exercised by an independent state body which is not involved in any investigation or prosecution and which exercises its authority in open and public hearings. As in other modern democratic systems, only a judge (or a court) should be authorized to exercise control.

### VIII. CONCLUSION

The basic approach of the new Bulgarian Constitution is to treat the Office of the Prosecutor as an ordinary government agency, rather than as a "super" agency with wide-ranging supervisory power. This approach is illustrated by the establishment of a new Constitutional Court, which is not subject to any prosecutorial supervisory power.<sup>26</sup>

Every modern legal system recognizes the need for a special authority in charge of judging the constitutionality of laws and decisions of the Parliament, President and of the executive branch. Following that prevailing legislative approach, the Bulgarian Constitution gives this power to the newly established Constitutional Court, the highest court in the country.<sup>27</sup> The new Constitution thus rejects the old socialist-era concept of the leading role of the (now) Attorney General and his office and the supremacy of its supervisory power. Instead, it authorizes the Constitutional Court to exercise that power. The prosecutor neither has an oversight role nor the final decision on problems of constitutionality. The Attorney General can only initiate a proceeding with the Constitutional Court, as can the President of Bulgaria, the Council of Ministers, one fifth of the members of Parliament, the Supreme Cassation Court and the Supreme Administrative Court.

The new Constitution thus entrusts the court with constitutional and judicial control, leaving the prosecutor mainly the duty to

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26. *Const. 1991* arts. 147-152.

27. In some countries -- e.g., Germany, France and Hungary -- this is the Constitutional Court while in others -- e.g., the U.S.A. -- it is the Supreme Court.

prosecute. It thereby elevates the prestige of the court and defines the leading role it should play in the new democratic society of Bulgaria. Even so, despite this new approach to the role of the Prosecutor's Office, there remains a certain ambiguity as to which state organ the new Constitution authorizes to control against arbitrary violations of human rights.