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Unity and Diversity of the Public Prosecution Services in Europe

A study of the Czech, Dutch, French and Polish systems

Proefschrift

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To my brother,

Nous avons aujourd'hui une loi admirable, c'est celle qui veut que le Prince, établi pour faire exécuter les lois, prépose un officier dans chaque tribunal pour poursuivre en son nom tous les crimes, de telle sorte que la fonction des délateurs est inconnue parmi nous.

Montesquieu, De l'esprit des lois, 1748, L. VI, Chap.*

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Abbreviations

App.	Application
Bull. Crim.	Bulletin des arrêts de la chambre criminelle
č.	Číslovka
Cass. Crim.	Cassation Criminelle (criminal case law of the French Supreme Court)
CC	Criminal Code
CIC	Code d'Instruction Criminelle
CPC	Code of Criminal Procedure
Dz.U.	Dziennik Ustaw
HR	Hoge Raad
JO	Journal Officiel
K	Wetboek van koophandel
MvT	Memorie van Toelichting
NJ	Nederlandse Jurisprudentie
No.	Numéro
Nr.	Number
OJ	Official Journal
OM	Openbaar Ministerie
Poz.	Item
PPS	Public Prosecution Service
Sb.	Sbírka
Stcrt.	Nederlandse Staatscourant
Stb.	Staatsblad van het Koninkrijk der Nederlanden
WOB	Wet Openbaarheid Bestuur

Research programme of the Research School of the Groningen Faculty of Law 'Incorporation and Adjustment – Reception of Legal Transplants'

The present research will be part of the research programme of the Research School of the Groningen Faculty of Law 'Incorporation and Adjustment – Reception of Legal Transplants'.

The initial framework of the programme provides

> Traditionally, at least since the French Revolution, legal systems are very much the property of the nation-state and fixed to a specific territory, a jurisdiction. Even under these circumstances, there has been an exchange of legal principles, concepts and approaches between systems. Historically speaking, the legal system of a nation-state can be analysed as the product of a long development of incorporation and adoption of all kinds of influences.
>
> Legal systems vary widely as to the extent to which adoption was the random result of social and legal forces or the outcome of a purposeful action or a structured process. An old example of the latter is the way in which the Napoleonic Code found its way through much of Europe in the wake of French occupation. There is a growing literature on adoption and incorporation that tries to systematise and analyse these movements between legal systems.
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> In a globalizing society, legal systems tend to become far more intertwined than they have been thus far. The processes of adaptation and incorporation receive new and far stronger impetus. A very specific example of this is the extension of the European Union. The EU needs to adopt what is called the *acquis*, the totality of legal principles, concepts and arrangements and incorporate that in their own legal systems.
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> The present programme is designed to study this process in order to answer two overall questions
>
> A. What are the properties of a legal system that hamper or facilitate adoption and incorporation?
>
> B. What are legal, institutional and societal factors that influence the adoption and incorporation of external legal material into a legal system?

> In separate projects, these subjects can be studied in detail in specific legal areas. The questions are relevant both from a theoretical perspective, to gain an understanding of the process of adoption and incorporation, and from a practical point of view, to improve actual attempts to incorporate legal concepts from other legal systems.

Although the purpose of this paper will not be to answer these two questions directly, they will be as an Ariadne's Thread, guiding us through to the objectives of my assignment.

Chapter 1
Introduction

1.1 The central object, scope and general aim of the study

From being a necessary intermediary between the people, the Crown and the judges during the French *Ancien Régime*, the institution of public prosecutors has become an indispensable state body whose main function in the continental legal tradition is to prosecute criminal offences and represent society before the courts against the persons charged with these offences.[1]

This study will be carried out from a comparative and historical perspective in the Czech Republic, France, Poland and the Netherlands. For each country, the organisation and the structure of the public prosecution service (PPS) will first be discussed, then the focus will be on the PPS's function in the preliminary phase of the criminal process – thus, before the first instance hearing – and in the system of legal remedies against judgements in the criminal justice system.[2] Such a comparison will be possible because the public prosecution services in these four countries are actually transplants of the same institution. The origins of this transplant in France will be

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* 'We have at present an admirable law, namely, that by which the prince, who is established for the execution of the laws, appoints an officer in each court of judicature to prosecute all sorts of crimes in his name; hence the profession of informers is a thing unknown to us.' Montesquieu 1975.

[1] In this thesis, the terms PPS, public prosecution service, public prosecution, prosecution authority, public ministry and State prosecution will be used interchangeably. However, in the historical chapter concerning the origins of the PPS, specific terminology such as *gens du roi* may be used, and *Prokuratura* will be preferred when referring to the Communist systems.

[2] For obvious reasons of focus constraint, the scope of this research will not exhaustively address aspects such as the relationships between the police and public prosecutors and between courts and public prosecutors, the position of the PPS during a court case hearing, the rights and duties of the PPS in the execution of sentences and the supervision of places of detention, or the rights and duties of the PPS in non-criminal cases.

traced before its organisation, functioning and development are described in Communist Czechoslovakia and Poland. Finally, the current organisation and functioning of the prosecution service in these four countries will be reported.[3]

The aim of this research is to enhance firstly the understanding of human justice through history by tracing different systemic developments of a single institution up to the modern period and secondly, the functioning of several domestic legal institutions established for resolving legal issues common to all countries. In practical terms, this comparison will seek common features in the organisation and functions of the PPS that do not, for example, depend on a country's political regime. The finding of a common and constant structure to the organisation and the operating principles applied to the PPS could be useful in enhancing judicial cooperation and mutual recognition of judicial decisions, especially between the Member States of the European Union. It could also assist in preparing for the harmonisation of criminal procedure and criminal law in these states to the extent necessary to combat crime and terrorism. The Member States of the European Union set as a basic objective of the Union the establishment of an 'area of freedom, security, and justice' in Europe (Article 2 Treaty on the European Union, hereafter EU, as amended by the Treaty of Amsterdam).[4] The achievement of this objective depends, particularly, on close cooperation between different judicial systems and the approximation, where necessary, of rules on criminal matters (Article 29 EU). Cooperation implies trust between judicial authorities. One way to enhance this trust is to demonstrate that judicial institutions function efficiently in all Member States. Even where there is systemic or legal diversity, we will discover how PPSs function, based on and with respect to the same fundamental principles of law specific to democratic countries.[5]

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[3] Although I will not attempt to provide a definition of Communism and Socialism, I noticed that both words and their corresponding adjectives were often used interchangeably in many journal articles written during Poland's and Czechoslovakia's Communist periods. This is especially true of the term Socialist Legality, which relates particularly to Communist systems. I will therefore not politically distinguish between the two ideologies in this paper.

[4] For the latest, consolidated version of the Treaties, see OJ 321 E/01 of 29 December 2006.

[5] However, within the Member States of the European Union, Article 6 (1) EU provides: 'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.'

1.2 The use of legal transplants in this study

Watson has defined a legal transplant as[6]

> The moving of a rule or a system of law from one country to another, or from one people to another.

Although it is not the purpose of this work either to discuss Watson's theory or to explain it, *legal transplant* terminology is useful in two particular ways.[7] Firstly, the public ministry *is* as such a legal transplant, and secondly, transplants of other legal institutions have influenced the public ministry.

The public prosecution service is a legal transplant because it was created in one country and moved into other legal systems where no similar institution previously existed. This institution can be split into two prototypes. The first was conceived during the French *Ancien Régime* and evolved into the second prototype, taking its definitive form after the Revolution. The pre-Revolution prototype influenced Russia where it became the *Prokuratura*. Inspired essentially by the French *Ministère Public*, Peter the Great created the Russian *Prokuratura* in 1722. Catherine the Great and Alexander the First reformed the institution. It was abolished partly in 1864 and completely in 1917. In 1922, combining the Petrine, Catherine the Great's and Alexander the First's models, Lenin established the *Prokuratura* of the Russian Soviet Federated Socialist Republic.[8] The post-Revolution prototype – along with the French 1808 *Code d'Instruction Criminelle* – was transplanted or has greatly influenced the criminal justice systems of almost all continental law countries.[9]

Other legal transplants have influenced the PPS in many countries throughout history. In Russia, the Marxist-Leninist theory of the rejection of the separation of powers and Soviet legislation moulded the *Prokuratura* into an institution equipped with a general political supervisory role and, naturally, with the prosecution of crimes. After the Second World War, this Soviet *Prokuratura* was transplanted along with the Socialist system into all Communist countries and particularly into Czechoslovakia and Poland, where the French post-Revolution prototype was already in place. There too, a combination of intertwined legal loans influenced the public ministry. On the one

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[6] Watson 1974, p. 21.

[7] Watson's theory on legal transplant has attracted a lot of criticism and commentary; see for example Kahn-Freund 1974, p. 1; Ewald 1995, p. 489; Ajani 1995, p. 93.

[8] Butler 2003, p. 172; Johnson 1969, p. 133; Oda 2002, p. 157.

[9] E.g. Esmein 2000; Delmas-Marty & Spencer 2002, p. 415; Huber 1992, p. 557.

hand, the legislation in place could not be completely erased, and it thus influenced the Soviet transplant, on the other hand, the Soviet legislation was imposed and necessarily influenced the legislation in place. Lately, since the collapse of Communism, the accession process to the European Union has accelerated legal reforms in the domestic criminal justice systems of former Communist nations.[10] In countries with a Socialist system, the separation of powers was re-established and the Soviet *Prokuratura* abolished. New candidates for membership of the European Union had to borrow massively from Western institutions and regulations in order to adapt their systems to European standards and make their judicial organisation compatible with those of the existing Member States.

1.3 The context of Czech and Polish accession to the European Union

In order to establish a Communist system, Socialist legal systems rejected the idea of the separation of powers and the Western notion of the Rule of Law.[11] A powerful prosecution service was one of the tools contributing to this goal through the strict observance of Socialist Legality.[12] The PPS was not only an institution for prosecuting crimes, but also a political institution supervising the State administration and society. The organisation and functioning of such an institution was, of course, adapted to this situation, which did not always seem compatible with the conditions prevailing in democratic countries governed by the Rule of Law.[13] When the Communist system collapsed, the Czech Republic and Poland, as other previously Socialist countries, reintroduced the principle of the separation of powers into their systems. Therefore, considerable

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[10] Ajani 1995, p. 93.

[11] Academic literature on the subject is extremely abundant, see e.g. Gönenç 2002, p. 83; Pomorski 1989, p. 581.

[12] As we will see, Communist countries used the concept of Socialist Legality, which entailed the strict observance of the law of the country by all agencies of the government administration and by individual citizens and in the expression of the interests and the will of the people. However, the one party decision-making process and the absence of a separation between the different functions of the regime – legislative, executive and adjudicative – were incompatible with a number of requirements of modern democracy that imply, in particular, political diversity and the limitation of the government's power. On the question of the compatibility of the *Prokuratura* with democratic countries see Edition du Conseil de l'Europe 1996 and Edition du Conseil de l'Europe 1998.

[13] However, we should note that the concept of the Rule of Law is vague and covers different notions, which often vary from one legal tradition to another; see e.g. Rosenfeld 2001, p. 1307; Craig 1997, p. 467.

amendments to legislation and State organisation were required. The first steps towards accession to the European Union were undertaken rapidly once the democratisation process started.[14]

Accession to the European Union implied that the Czech Republic and Poland met the pre-conditions to accession, the so-called Copenhagen criteria set up in 1993[15]

- to have stable institutions guaranteeing democracy, the Rule of Law, human rights and respect for and protection of minorities
- to ensure the existence of a functioning market economy and the capacity to cope with competitive pressure and market forces within the Union
- to accept the Community *acquis* and be able to take on the obligations associated with membership, including adherence to the aims of political, economical and monetary union

In order to assess and monitor the progress of the candidate countries as they progressed towards accession to the EU, a system of legal and political documents was established and addressed to the candidate countries.[16]

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[14] Czechoslovakia and Poland signed an Association Agreement with the European Communities and the Member States on 16 December 1991. After Czechoslovakia's dissolution, new separate agreements were signed by the Czech Republic and Slovakia in 1993. The Czech Republic and Poland filed their applications to join the Communities on 17 January 1996 and 5 April 1994 respectively. For a clear overview of the history of enlargement, see Kochenov 2007.

[15] Presidency Conclusions, Copenhagen European Council of 21, 22 June 1993, § 7. On the criteria, see Hillion 2004, p. 1.

[16] With regard to the Czech Republic and Poland, particular attention should be paid to

• European Commission, Agenda 2000 – Opinion on Poland's Application for Membership of the European Union, Brussels of 15 July 1997, Doc/97/16; released on the same date: Opinion on the Czech Republic's Application for Membership of the European Union, Doc/97/17

• European Commission, Regular Reports from the Commission on Progress towards Accession by the Czech Republic and Poland of 4 November 1998, of 13 October 1999, of 8 November 2000, of 13 November 2001: Czech Republic SEC(2001) 1746, Poland SEC(2001) 1751, of 9 October 2002, COM(2002) 700 final: Czech Republic SEC(2002) 1402, Poland SEC(2002) 1407

• European Commission, Comprehensive Monitoring Reports on Czech Republic's and Poland Preparation for Membership of 5 November 2003

• Council Decision of 30 March 1998 on the principles, priorities, intermediate objectives and conditions contained in the accession partnership with the Czech Republic (98/267/EC) and released on the same date as that of the Republic of Poland (98/260/EC)

As early as 1997, the Commission concluded that the Czech Republic and Poland fulfilled the first and second Copenhagen criteria.[17] Firstly, this opinion implied that the Czech and Polish PPSs and judicial systems were State institutions guaranteeing democracy, the Rule of Law, human rights and respect for and protection of minorities. This transformational challenge was not easy for new countries because there was no clear single model PPS to be adopted and each country had to transform its system with respect to its constitutional traditions, not to mention the fact that there are no official European Union definitions of democracy or the Rule of Law. Secondly, the Commission noted that both countries were in a position to integrate the existing *acquis* in fields related to criminal procedure and criminal law and were able to take on the obligations of membership and integrate the future *acquis* in the fields related to criminal procedure and criminal law. Subsequent legal and political documents broadly traced the candidate countries' progress in the area of judicial capacity and noted important criminal justice reforms.[18] Accession negotiations with the Czech Republic and Poland were opened following the political decision made during the Luxembourg European Council in December 1997.[19] After the conclusion of the negotiations, the Czech Republic and Poland signed the Accession Treaty with the Member States of the Union on 16 April 2003 and accession followed in May 2004.[20]

In order to attain the accession objective, national and foreign experts worked together on the transformation of the *Prokuratura* into a prosecution authority compatible with the democratic principles of law. Although the Conventions of the Council of Europe and the Recommendations adopted by the Committee of Ministers

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[17] European Commission, Agenda 2000 – Opinion on Poland's Application for Membership of the European Union, Brussels of 15 July 1997, Doc/97/16, p. 114; released on the same date: Opinion on the Czech Republic's Application for Membership of the European Union, Doc/97/17, p. 114.

[18] E.g. European Commission, Regular Reports from the Commission on Progress towards Accession of 13 October 1999 by the Czech Republic, pp. 13–14, 50–54, 71–72; European Commission, Regular Reports from the Commission on Progress towards Accession of 13 October 1999 by Poland pp. 50–54, 72–74; European Commission, Regular Reports from the Commission on Progress towards Accession of 13 November 2001 by the Czech Republic: SEC(2001) 1746, pp. 18–20, 88–93; European Commission, Regular Reports from the Commission on Progress towards Accession of 13 November 2001 by Poland SEC(2001) 1752, pp. 19–21, 85–92.

[19] Presidency Conclusions, Luxembourg European Council of 12, 13 December 1997, § 27.

[20] OJ L 236/17 of 23 September 2003.

of the Council of Europe provided experts with useful models, no existing legislation clearly established such principles.[21] A domestic interpretation and implementation of these Conventions and Recommendations was necessary in order for the PPS to mesh properly with all the other parts of the judicial system. The transformation of the *Prokuratura* meant that candidate countries needed a prosecution authority capable of providing Member States with efficient cooperation and mutual assistance in criminal matters. Here, diversity was particularly challenging because the institution of the public prosecution is central to State sovereignty.[22]

Although the notion of the *acquis communautaire* remains vague and difficult to grasp,[23] with regard to the integration of the existing *acquis* criterion, modifications were easier to make since the *acquis* consisted of existing legislation, objectives and treaties.[24] Before the 1999 Treaty of Amsterdam, candidate countries had to adopt and implement the Council of Europe Conventions in particular, such as the 1950 European Convention for the Protection of Human Rights, the 1957 European Convention on Extradition or the 1959 Convention on Mutual Assistance in Criminal Matters.[25] Major issues, such as the right to a fair trial or the balance between the defendant's rights and the need to ensure effective prosecution,

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[21] E.g., Council of Europe (1987) The Simplification of Criminal Justice. Recommendation No. R. (87) 18 and explanatory Memorandum; Recommendation Rec(2000)19 Adopted by the Committee of Ministers of the Council of Europe on 6 October 2000 and Explanatory Memorandum on The Role of Public Prosecution in the Criminal Justice System.

[22] J. Monar described diversity as 'a generic denominator for differences between the justice and home affairs systems of the eastern applicant countries on the one hand, and the EU justice and home affairs acquis on the other', see Monar 2000, p. 33. For example, Article 2 of the Joint Action of 29 June 1998 adopted by the Council of the European Union on the creation of the European Judicial Network (OJ L 191/4 of 7 July 1998) required that 'The European Judicial Network shall be made up, taking into account the constitutional rules, legal traditions and internal structure of each Member State, of the central authorities responsible for international judicial cooperation and the judicial or other competent authorities with specific responsibilities within the context of international cooperation, both generally and for certain forms of serious crime, such as organised crime, corruption, drug-trafficking or terrorism.'

[23] Delcourt 2001.

[24] Peers 2006, p. 429; Monar 2000.

[25] Respectively, ETS No 005, ETS No 024 and ETS No 30. The Czech Republic and Poland signed the ECHR on 21 February 1991 and 26 November 1991 respectively; the Extradition Convention on 13 February 1992 and 19 February 1993 respectively; and the Convention on Mutual Assistance in Criminal Matters on 13 February 1992 and 9 May 1994 respectively.

played an important role in the transformation of the PPS in the candidate countries. The Treaty of Amsterdam established the objective of judicial cooperation between Member States. In particular, intergovernmental instruments were established, such as the Council and Commission Action Plans, and Council Joint Actions. These new instruments led to the adoption of important European legislation in the Justice and Home Affairs domain of the European Union, which also influenced modifications of the PPS.[26] The third pillar *acquis* started to grow particularly strongly after Amsterdam, demanding tremendous efforts from applicant countries to approximate their domestic laws.[27] The creation of Eurojust and the adoption of the European arrest warrant stand out from the examples of *acquis* implementation as innovations which implied the creation of a special division in the organisation of the PPS in every Member State.[28]

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[26] The 1992 Maastricht Treaty, i.e. Treaty on European Union, established three approaches to European integration, the so-called three pillars. The first pillar consolidates the three Community Treaties (the 1952 Treaty establishing the European Coal and Steel Community, the 1958 Treaty establishing the European Economic Community and the 1958 European Atomic Energy Community). The second pillar comprises the Common Foreign and Security Policy. The third pillar consists of Justice and Home Affairs and covers areas such as immigration, asylum, the harmonisation of criminal law and criminal procedure, police and judicial cooperation in the detection and prosecution of crime. The 1997 Treaty of Amsterdam moved immigration and asylum policies to the first pillar, keeping police and judicial cooperation alone under the third. On third pillar issues, see Peers 2006.

[27] See, e.g., Łazowski 2003, p. 157.

[28] The Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice (OJ C 19/1 of 23 January 1999) adopted by the JHA Council of 3 December 1998 set up strategic guidelines for the implementation of such an area. It was followed in 1999 by a special meeting of the European Council held in Tampere. Among other important resolutions affecting cooperation against crime, the Council agreed on the creation of Eurojust, a specific organisation consisting of 'national prosecutors, magistrates, or police officers of equivalent competence, detached from each Member State according to its legal system'. Eurojust was established by the Council Decision of 28 February 2002 setting up Eurojust with a view to strengthening the fight against serious crime (OJ L 63/1 of 6 March 2002). The Council also established the principle of mutual recognition in criminal matters as the cornerstone of judicial cooperation in both civil and criminal matters within the Union. As the first measure implementing this principle, the European arrest warrant was adopted by the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190/1 of 18 July 2002).

The vagueness of the pre-accession criteria and national legal diversity makes it very difficult to understand how a public prosecution service should be organised and function in criminal justice in order for a candidate country to be accepted as a Member State of the European Union. This issue is, however, of tremendous importance because the efficient combating of crime and terrorism requires a coherent system of criminal justice in Europe. The legal diversity proper to each Member State should be respected; however, a certain amount of harmonisation in the organisation and the functioning of the PPS might be necessary.

1.4 Formulation of central questions

Regarding the Czech Republic, the Commission notified that

> The State Prosecutor is appointed by the government on a proposal by the Minister of Justice, who appoints the other members of the State Prosecutor's Office. They are subject to the hierarchical authority of the Minister.[29]

whereas, in the case of Poland, the Commission reported that

> There is no clear separation of functions of the Minister of Justice and the Attorney-general. Draft legislation addressing this issue is being discussed within the government. It is aimed at separating the two functions, but the provisions as currently formulated will not result in the Attorney-general becoming more independent. Further initiatives could be considered to address the question of the hierarchical link to a political authority that may influence indirectly and obliquely the activity of the public prosecutor.[30]

These quotes offer an example of diversity in the structures of the PPSs in existence in applicant countries. While the Commission approved of public prosecutors being subject to the hierarchical authority of the Minister of Justice in the Czech Republic, it disapproved of the Minister of Justice himself holding the functions of general prosecutor in Poland. In the face of this kind of assessment we could ask ourselves why the general prosecutor should be independent of the Minister of Justice? To what extent should the general prosecutor be more independent? Should a

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[29] European Commission, Agenda 2000 – Opinion on the Czech Republic's Application for Membership of the European Union, Brussels of 15 July 1997 Application for Membership of the European Union, Doc/97/17, p. 12.

[30] European Commission, Comprehensive Monitoring Report on Poland's Preparations for Membership of 5 November 2003, p. 15.

public prosecutor be isolated from all political influence? Can political influence on public prosecutors be abusive? Is the independence of the PPS a safeguard against such abuses? In addition to this, what can the concrete and technical influence of the general prosecutor be on pending criminal cases? What is the situation in existing Member States?[31]

The answer to these questions is unlikely to be found in any European Regulation or Directive because they depend on the way each State is organised. Neither the European Community nor the European Union has the jurisdiction to decide on how a State or its prosecution service should be organised. Nevertheless, it is to be expected of candidate countries that their PPSs comply to some model. What should this be? Are the respective PPSs of the Member States all the same? To what extent do they differ? Are there European PPS standards? How far can national diversity in the organisation of a PPS and its role in criminal prosecutions extend in a given Member State while at the same time complying with the pre-accession criteria?

1.5 Method

To answer these central questions, a thorough study of the implementation of patterns provided by the Conventions of the Council of Europe and the Recommendations adopted by the Committee of Ministers of the Council of Europe (see above) would have been an option. However, such a method would have been back-to-front and would have risked missing important modifications that might not be related to these instruments. Therefore, I prefer to trace the historical and legal adaptations of the PPS from its inception to its current state.

In order to comply with the aim of the dissertation and the central question, I will have to compare at least two Member States with two acceding countries. Firstly, the two Member States will have to be of the continental legal tradition with comparable PPSs. As the country where the public ministry was borne, the choice of France was obviously inevitable. Given the important similarities between the Dutch and the French systems, the Netherlands seemed well suited to being the second Member State. Secondly, the two acceding countries required Communist experience and involvement in the same wave of accession. Out of the eight old Communist countries,

[31] These issues will not be specifically addressed in this research; for more details see, Marguery 2007, p. 67.

Poland and the Czech Republic turned out to be the most comparable in terms of possessing similar historical French influence, legal systems and language.

The study of the Polish and the Czech systems has been a practical challenge for me because I do not read their languages. In order to analyse these systems I had to rely on existing official translations of legal materials prepared in English or French, and journal articles on issues related to the topics also written in these languages. I made draft translations of laws and articles with the help of accurate translation software and had these translations checked by native speakers.[32] My country reports are based on the analysis of these materials.

I had the great pleasure of meeting a number of specialists in criminal law, public prosecutors and judges from each of the countries in this research. These people provided me with the most accurate assistance and spent a great deal of time answering questions and reading my country reports. Without their help, this study would not have been possible. I would therefore like to express my gratitude to Prof. Dr Jaroslav Fenyk, Dr Tomas Grivna (the Prague Faculty of Law), Prof. A. Murzynowski, Dr M. Rogacka-Rzewnicka and Dr K. Girdwoyń (Warsaw University School of Law and Administration).[33]

English legal terminology was another difficulty I had to cope with. Since English is not my mother language, I had to be very careful when picking a word out of an English dictionary in order to describe a foreign legal notion. Firstly, the differences between the English and the American legal systems could be source of discrepancy. Secondly, words seemingly alike in two different languages could actually be false friends and the meaning of the first might not match the meaning of the second. For example, the American 'crime' does not mean the same as the French *crime*. While the first consists of any activity prohibited by Criminal Law, the second refers only to certain types of grave offences provided for in the French Criminal Code. The word 'jurisdiction' in English/American legal terminology is the power of a court to hear and decide a case before it, whereas it means 'court' in French. Lastly, a legal concept in one language

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[32] I would like to express my gratitude to Marta Nowak-Lulko (professional Polish translator) and Mikulas Prokop (PhD student in law at the University of Groningen). The software used for the Polish translation is 'English translator 3' from Techland.

[33] I also would like to express my gratitude to my colleagues of Utrecht University, Professor Sacha Prechal and Professor Barbara Kwiatkowska for their respective contribution at reviewing Czech and Polish words used in this book.

bears more than only an objective technical definition; it is also the mirror of the legal system from which it originates. It cannot be understood outside its legal context. For example, the French *juge d'instruction* and the Dutch *rechter-commissaris* can both be translated as 'investigating judge' in English although their role is not the same in both systems.

In order to address the difficulty, I have always tried firstly to remain neutral when using English legal terminology since I am not attempting to compare one or more systems with those of North America or England and Wales. The English language is purely used as an instrument to communicate the findings of my research and not to provide definitions referring to the English or American legal systems (nevertheless, where possible, I have always tried carefully to avoid false friends). Even where I have used several dictionaries in order to check a definition, I often provide the original in brackets.[34] In doing so, readers familiar with one or the other system should be able to place a notion within its context.

Secondly, I not only looked for the translation of foreign legal concepts in dictionaries but also took special care to look at their meaning in the legal context. In this context I traced the legal conditions of the notion and its legal consequences (e.g. for the French *juge d'instruction* 3.2.1 and 3.4.3.2.2, and for the Dutch *rechter-commissaris* 4.2.1 and 4.4.3.2.1). Here my purpose was not to provide an exhaustive list of conditions and consequences relating to each concept but rather to enumerate those which I deemed relevant for the comparison. Although I took care to avoid oversimplifications by providing as many details as possible, I set limits to the description of the legal context for the relevant concepts. The purpose of the thesis is to give a general outline of how public prosecutors' offices are organised and function within the four systems proposed, not to provide an exact comparison between the criminal procedures of these countries. Therefore, the exactitude of the translations goes as far as was necessary to meet this purpose. For example, in order to say that a prosecutor has the right to halt a criminal proceeding, I mainly use the word *dismissal*, which literally means 'decide or say that something is not important'. This translation may be more precise in certain situations (e.g. where the consequences of an offence did not cause a grave prejudice or a severe social harm therefore it is not important to prosecute it) than others (e.g. where there is no evidence that a crime has been

[34] For a list of dictionaries refer to the bibliography at the end of this book.

procedure.[38] In order to derive such classification categories, comparatists study foreign systems and try to work out standards and variations within these systems. Such grouping is difficult, especially as each country has its own individual culture, which deeply and uniquely influences the legal system. As a result, attempting to group different national legal solutions under a single heading necessarily carries the risk of drawing parallels between notions that are actually very different. Although I am aware of this risk, it seems to me that comparison is possible and very useful if it is limited to well-defined, specific notions and if the systems have some basic similarities, as with the Netherlands, the Czech Republic, Poland and France which all belong to the continental law group. For example, these countries share the same general principles of law, such as the principle of legality (*nullum crimen, nulla pœna sine lege*), the principle of *res judicata*, and the principle that there should be a statute limiting the time for prosecution of crimes.

Generally, this kind of comparison can enhance the understanding of human justice. More specifically, it can enhance the understanding of the functioning of a system and, in particular, the functioning of one or several domestic legal institutions aimed at resolving legal issues common to all countries. From a domestic point of view, the use of comparison remains one of the best methods of discovering useful institutions and uncovering the reasons for a system's malfunction. From a supranational point of view, such as that of the European Union, comparison provides the necessary tools for efficient cooperation and harmonisation. It demonstrates that all Member States give the same level of attention to fundamental principles of justice and human rights. Such a demonstration is necessary to enhance mutual trust. To achieve this objective I followed the same plan for each country report, setting out the organisation of the PPS and its functions within the criminal process. With regard to the organisation of the PPS, I focused on its position within the State organisation, its structure and the relationships within the service. I gathered the comparisons in the functions of the PPS in the criminal process under one heading.

Finally, I came to the conclusion that the organisation of the PPS and its functions in the criminal process converge at certain points

[38] E.g. Pradel 2002; Esmein 2000; Delmas-Marty & Spencer 2002; Corstens & Pradel 2002; Hatchard, Huber & Volger 1996; Delmas-Marty 1995; Van Den Wyngaert 1993.

committed). However, the important point is to know that a prosecutor has the right to stop a criminal proceeding. The reasons why he takes such a decision can be studied separately.

Finally, native speakers and The Language Centre at the University of Groningen checked the manuscript.[35]

Each country report comprises[36]

- a brief historical and political overview relating to the criminal justice system
- an overview of each country's criminal justice system, i.e. the different criminal courts and decisions they make
- the organisation of the public prosecution service, i.e. the structure, hierarchical relationships between the different parts of the service, the rights and obligations of public prosecutors and their disciplinary and penal responsibilities
- the functions of the public prosecution service in the preliminary phase of the criminal process, e.g. the rights and obligations of the service in this phase and the supervision of the superior prosecutors over lower prosecutors during this phase
- the functions of the public prosecution service *after* the preliminary phase of the criminal process, i.e. the preparation of the indictment, the position of the prosecutor during the hearing and the subsequent forms of review available

The reader may be surprised by the absence of any conclusion at the end of each country report. The most remarkable elements of each report and any possible conclusions are instead discussed in Chapter 9 where I compare all the systems.

Indeed, my discussion compares the similarities and differences between the countries. Since the first International Congress for Comparative Law in 1900, several authors have attempted to compare the world's legal systems and to group these systems into families, such as the Common Law family, the Romano-Germanic family or the Socialist family.[37] Several authors have published important comparative work on criminal law and criminal

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[35] I would like to express my gratitude to Ayesha Desousa, Max Ian Avruch and Nissim Kanekar for their precious help.

[36] The reports are up to date up to the time of their writing, which is August 2006 for the Polish system, September 2006 for the Czech, October 2006 for the Dutch and November 2006 for the French ones. Nevertheless, on several occasions I have taken certain recent modifications into account.

[37] For an overview see, Zweigert & Kötz 1998, p. 63; David & Jauffret-Spinosi 1992.

although remain very different from one system to another. Where there is diversity, I concluded that differences should not go beyond certain limits.

Chapter 2
Origins of the public prosecution services in continental law systems

The origins of the public prosecution service cannot be dissociated from the history of the French royal system of the *Ancien Régime* and of the Napoleonic reforms that followed the French Revolution. Indeed, this institution was entirely the creature of these systems. Therefore, it is necessary to trace the main developments that took place up to 1808 and 1810 when the *Code d'Instruction Criminelle* and *Code Pénal* were issued. The purpose of this chapter is not to give a detailed overview of these old systems but to explain the components that favoured the birth and the development of the *gens du roi*. It was probably because solutions to legal problems and the repartition of State functions had yet to be clearly established that the need arose for the king to create a strong institution, which would help settle these issues and seize absolute power in France.

Indeed, the French medieval era consisted not only of diverse sources of law – such as customary law, canonical law, Roman law or royal law – but also of diverse judicial systems (seigniorial, municipal, ecclesiastical and royal), competing and overlapping with each other.[39] As early as in the twelfth century, in addition to the seigniorial, municipal and ecclesiastical courts, the Crown had created different institutions for collecting royal fines, defending the rights of the Crown and eventually for the ministering of justice.[40] The system took the form of a judicial system with multiple levels, lower courts and courts of appeal. Royal absolutism gained ground progressively over the three centuries from the thirteenth to the

[39] Hilaire 1976, p. 31–118.
[40] For the first decree concerning royal judiciaries, see Ordinance of 1190 in Jourdan 1822a.

sixteenth century, and the royal laws and judicial system became the centralised component of the French legal system, to the detriment of other systems.[41]

The king gradually imposed his system of laws and institutions on the seigniorial, municipal and ecclesiastical systems (2.1). *Procureurs du roi* and *avocats du roi* did not appear by way of transplantation from a Roman institution or innovative statute, but after a long maturation process (2.2). They definitively played a major role in the struggle for power because they carried out essential political and judicial functions (2.4) at all levels of society and of the realm (2.3). The French Revolution put an end to royal absolutism and to the old judicial system (2.5). The *procureurs du roi* and *avocats du roi* became the *ministère public*, a basic prototype of the modern public prosecution service (2.6), that spread all over Europe and was adapted with more or less important modifications to varying judicial and political systems.[42]

2.1 French royal judicial system of the *Ancien Régime*[43]

2.1.1 Lower courts

At the lowest level and within a small part of France, the *prévôts* had a military role as well as financial and judicial ones. Above them, and operating within larger areas, *baillis* (North France) and *sénéchaux* (South France) directly represented royal sovereignty and supervised the *prévôts*. They had jurisdiction over main civil and criminal cases in the first instance, and in appeals over rulings of the *prévôts* and the seigniorial courts. With the development of the king's power, their role in dispensing justice was progressively seen as a royal function. Therefore, a hierarchical appeal before a royal court, or *cour souveraine*, as a form of judicial review for all types of decisions was necessary for the king to supervise the implementation of royal legislation. These royal courts were established as *parlements*. Judgements made by *baillis* and

[41] Hélie 1866, p. 267.
[42] Pradel 2002, p. 372; Delmas-Marty & Spencer 2002, p. 416; Huber 1992, p. 557.
[43] This chapter does not aim to provide an exhaustive description of the *Ancien Régime* legal system. I will not discuss the exceptional courts and procedures because this would not add anything to the legal definition of the public ministry within the meaning of the present thesis. The French *Ancien Régime* is considered as commencing with the reign of Francois I in 1515 and ending with the Revolution in 1789. However, for the purposes of this research, texts issued earlier will be considered.

sénéchaux could in turn be challenged before a *parlement*. Thus, some cases could be appealed twice.

2.1.2 The *parlements*

A special section of the *curia regis* (King's council) aimed at the settlement of the multiplying judicial issues was created during the 12th century. It eventually became an institution of its own, known as *parlementum* or *parlement.*[44] Louis VI (Saint Louis, 1214–1270) developed the *parlements* and their judicial functions. The first *parlement* had its seat in Paris and had general territorial jurisdiction over the realm until the fifteenth century.[45] Other *parlements* were created in France with different territorial jurisdictions (for instance the *parlement* of Toulouse in 1410, the *parlement* of Grenoble in 1453, the *parlement* of Bordeaux in 1462 and the *parlement* of Dijon in 1476).[46] By the end of the eighteenth century, the jurisdiction of the *parlement* of Paris encompassed one third of the realm.[47]

Parlements were courts with judicial and legislative functions. Many decisions made by all types of judiciaries were challenged before this court by way of appeal.[48] The judgements of a *parlement*, in the form of *arrêts de règlement*, were binding upon every lower court, and in this way contributed strongly to the uniformity of the French criminal law.[49] The *parlements* became very powerful not only from the *arrêts de règlement* but also because new royal laws or regulations required registration in the *parlements* to be enforceable. Therefore, they had general authority over the courts in the realm and became a cornerstone of the *Ancien Régime* justice and political system. The public ministry played an important part in the functioning of the decision-making power of the *parlement* because it could launch procedures *ex officio* or make legal comments as a party in ongoing procedures when the interests of the Crown were affected. A specific criminal section of the *parlement* of Paris (the *Tournelle*) had exclusive jurisdiction over important criminal cases.

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[44] Timbal 1957, p. 149.
[45] Raynal 1964, p. 67.
[46] Hélie 1866, p. 293.
[47] Andrews 1994, p. 23.
[48] Bluche 1960, p. 48.
[49] Hélie 1866, p. 293.

2.1.2.1 Arrêts de règlement

In day-to-day practice, *parlements* adjudicated cases in the first or final *ressort*.[50] Such cases could throw up an important legal issue in their process (for instance, issues affecting the determination of the jurisdiction of a court *ratione personae* or *ratione materiae*). In order to answer the issue, the *parlement* arrived at a decision with exceptional binding force, i.e. an *arrêt de règlement.* This type of decision was, in principle, definitive and could not be reviewed (unless the king decided otherwise) and was binding upon all courts within the territorial jurisdiction of the given *parlement.* The rulings could be overruled only by a royal act. In fact, these courts delivered judgements possessing the general and quasi-permanent scope of legislative acts.

2.1.2.2 The registration function

The registration function had two purposes

- to provide the king with legal advice over his regulation's drafts (such as *Ordonnances* and *Lettres royales*)
- and to provide these regulations with a binding force and ensure their publicity

In particular, an act that was not registered did not have a binding force. The *parlements* could refuse registration and make comments to the king, the so-called *remontrances*.[51] In response to these *remontrances*, the king decided whether or not to modify his act by means of *lettres de jussion.* Judges could maintain their position, oppose the *lettres* and send an *itératives remontrances*.[52] The last word belonged, in principle, to the king but if the *parlement* persisted in its opposition, the king could call the *parlement* for an extraordinary session, called *lit de justice*. There, the king explained and imposed his point of view in order to force the *parlement* to register the act.[53]

In fact, whilst judges of the *parlement* considered it their right to make *remontrances* as a real legislative power, the king regarded it as a mere administrative formality. This mechanism was a source of constant tension and led to several crises, one of which was the so-

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[50] A decision is made in final *ressort* when further appeal in the case is not available. A court whose decision is admissible to challenge before an upper court by way of appeal is made in first *ressort*.
[51] Article 5 of Title 1 of the Ordinance of 1667 in Jourdan 1829a, p. 105.
[52] Ellul 1956, p. 311.
[53] Timbal 1957, p. 206; Ellul 1956, p. 253–310.

called *fronde des parlements*, which severely affected the judicial administration during the eighteenth century. *Parlements* often considered legal reforms in opposition to the king and sometimes favourable to the nobility or the people (the judges were themselves nobles). The climax of the crisis came in 1771 when magistrates of the *parlements* went on strike in order to support their colleagues at the *parlement* of *Bretagne* against the local royal governor, who had issued a regulation for the creation of new taxes. Louis XV empowered Chancellor Maupeou with extensive powers and as a result the latter seized the opportunity to arrest and exile the reluctant magistrates and reform the justice system.[54] The *parlement* of Paris was singled out for particular suppression and its jurisdiction was divided into ten smaller districts. Following this reform, magistrates were directly appointed by the king and lost the right to own their office (see 2.3.2 about the *vénalité des offices*). However, the reform did not last and the young Louis XVI reinstated the old system after the death of Louis XV.

2.2 Birth of the prosecution service

2.2.1 Non-Roman origins of the public ministry

Certain authors have explained the public ministry as the descendant of a number of old Roman institutions such as the *censeurs*, the *defensores civitis*, the *irénarques*, the *questeurs* or the *procurators cæsaris*.[55] Rassat demonstrated successfully in her PhD thesis that whilst the functional origins of the institution are found in the seventh century, it is only much later, in the fourteenth century, that the first legal statute regulating the institution was issued.[56] This text, the royal ordinance issued on 23 March 1302 by Philippe le Bel, gives details of the *procureur du roi*, their existence and their functions.[57] The public ministry did not originate in the Roman institutions because the accusatory procedure prevailed during this period. Private parties (i.e. the victims or their families) necessarily prosecuted crimes. These private complainants risked falling foul of

[54] At the same time Maupeou was appointed *Chancelier de France* and *Garde des sceaux*, i.e. he performed a supervisory role over the justice system, equivalent to a Justice Minister. See Timbal 1957, p. 206; Ellul 1956, pp. 209, 345.
[55] Garaud 1907, p. 162.
[56] Rassat 1967, p. 7.
[57] Ordinance of 1302 in Jourdan 1822. Although it is not the purpose of this research to resolve the issue, I shall mention here a discordance between the date of this text (1303) given by main authors such as Carbasse 2000, p. 51, and that given (1302) in the famous compilation of old French laws, *Isambert*.

the law of retaliation (*lex talionis*), which stipulated that criminals should receive as punishment precisely those injuries and damages they had inflicted upon their victims (an eye for an eye). A plaintiff who failed to prove the culpability of the accused in such a procedure could suffer the sentence instead of the accused. This legal theory was closer to the idea of revenge than the later notion of an institution aimed mainly at prosecution of crimes in the interest of and on behalf of society, irrespective of whether the plaintiff participates in the proceedings or not (see 2.2.2.2).

2.2.2 Functional birth of the public ministry

In order to determine the origins of the public ministry, the functions of the body should be considered and not the body itself because these functions appeared long before 1302. The public ministry was not created *ex nihilo* but rather, the functions of several institutions developed gradually into a *ministère public*. Breaking with traditional legal history, Rassat makes a distinction between *procureurs du roi*, which appeared first, and *avocats du roi*. It is also important to note the inception of the idea of public prosecution and inquisitorial criminal proceedings, which played an important role in the development of the institution.

2.2.2.1 From the saïon *to the* gens du roi

During the seventh century, kings entrusted servants, the so-called *saïons* or *graffions*, with some administrative functions such as the supervision of the exploitation of the realm and Crown estate, and fiscal functions such as the collection of taxes. In addition to these functions and where necessary, a *saïon* could find himself supervising royal cases before seigniorial courts and enforcing the judgements of these courts because many sentences carried fines.

Between the tenth and the thirteenth centuries, the power of the Crown decreased but the *saïon* or *graffion*'s functions did not disappear. These functions were taken over, because they affected the Church, by the ecclesiastic *advocatus* and *vicedominus*, later unified under the title of *advocatus episcopi*.[58]

With the reappearance of the king's sovereignty in the thirteenth century, while ecclesiastic *advocatus episcopi* carried out their functions for the Church, a new royal officer, the so-called *bailli*, similarly did the same for the king. These *baillis* thus had administrative functions, i.e. the administration of the realm and the

[58] Rassat 1967, p. 16.

supervision of tax collection. In addition, when a case tried by a seigniorial or ecclesiastical court personally interested the king, a *bailli* would act for him as a plaintiff or defendant. It seems that *baillis* were also replaced by *procureurs du roi* in the execution of several of their functions.[59] Although the true reason for this is not very clear, the possibilities include an increasing workload for *baillis*, the *baillis'* refusal to perform investigations and the impossibility of being a judge in cases coming under their jurisdiction whilst also representing the Crown as a party. Indeed, *baillis* had the jurisdiction to represent the king and to adjudicate (see 2.1.1).

These *procureurs du roi*, mainly empowered with administrative functions, should not be confused with the *procureur* of individuals, who was only an *auxiliaire de justice* tasked with drafting the documents required for judicial proceedings. These private or common *procureurs* were an established class of legal professionals but did not have the functions of a *procureur du roi*. Nevertheless, a number of *procureurs du roi* ended up performing some of the functions of common *procureurs* to increase their income.

Within the seigniorial justice system, *procureurs fiscal,* also known as *fiscal,* were empowered with functions similar to *procureurs du roi.* In turn, the ecclesiastical system possessed the *promoteur d'Eglise.* Originally, *promoteurs d'Eglise* and *procureurs fiscal* respectively administered seigniorial and ecclesiastical estates. Progressively, with the development of royal power across the realm, they also became the deputies of the *procureurs généraux du roi* in the non-royal jurisdictions.[60]

Procureurs du roi could administer the Crown estate, supervise procedures concerning royal issues, carry out criminal sentences and institute criminal prosecutions in the name of the Crown. This last task was necessary because the sentence could result in a fine paid to the Crown. However, *procureurs du roi* were not allowed to submit verbal opinions at trials. This right was granted to them later. The specific judicial function of pleading in hearings belonged to *avocats,* who had already been in existence for many years. When the intervention of the king in a verbal proceeding was necessary, *procureurs du roi* would instruct private *avocats* to handle the hearing. Gradually, these private *avocats* became *avocats du roi*

[59] It is not clear whether the title of *procureur du roi* was created *ex nihilo* or whether existing private *procureur* were entrusted with a part of the *baillis'* functions. Rassat seems to favour the former explanation.

[60] Two legal theories oppose this understanding of the issue, see 2.3.3.3.

with the Crown as their exclusive client. Therefore initially, the *procureurs du roi* mainly had administrative functions, with the judicial functions arising only where necessary. Only the *avocats* and later the *avocats du roi* had exclusively judicial functions.

The *procureurs du roi* and *avocats du roi* gathered in the *compagnie des gens du roi* (Crown officer's society). In order to perform their functions, *procureurs du roi* and *avocats du roi* had to swear the same oath as other magistrates (such as *sénéchaux* or *baillis*). The following is an extract of this original oath

> …for so long as they (the *procureurs du roi* and the *avocats du roi*) retain their functions or remain in charge of the administration granted to them, they swear to deliver fair judgement to any man, grand or lowly, foreigner or local, of any social class and on any subject whatever their nationality or their identity. They swear to perform these functions in preserving and serving diligently the local uses and approved customs. They swear to fairly preserve and serve our rights (the rights of the Crown), without reduction or impediment and without prejudice to the rights of others. (Author's translation)[61]

They exclusively represented and assisted the king. Purely from the standpoint of the interests of the Crown, the officers of the Crown came to the defence of society and, to a limited extent, the prosecution of crimes in the public interest (see 2.4). A certain idea of a uniform criminal policy emerged. According to the oath, the *gens du roi* were duty bound to protect society since they had fairly and diligently to carry out their duties to the people and to the royal laws and local customs. The embodiment of the institution as specifically upholding the law and safeguarding the public interest evolved from the political need to enhance the Crown's power over the French realm.

By the end of the sixteenth century, with the adoption in May 1586 of an ordinance for the public ministry, the birth of the institution seems to have been achieved in its main features. The criminal ordinance of 1670 on the organisation of the criminal justice system also completed, importantly, the functions of the public ministry.[62] The principle, but only the principle, of a public body active in criminal proceedings as a party supporting public interests, was born.[63] However, this body must be distinguished from the institution as it is

[61] Carbasse 2000, p. 51.
[62] Jourdan 1829b.
[63] Hilaire 1976, p. 121.

understood today, which was only truly established by the Napoleonic reforms. The *Ancien Régime*'s institution was only a rough analogue of the institution established by those reforms.

2.2.2.2 The concept of public prosecution and the inquisitoire procedure[64]

The birth of the public ministry should not be assimilated with the origin of the right of a public body to prosecute *ex officio* a person accused of having committed a crime by a private person. Indeed, it is beyond doubt that crimes may endanger order and the foundations of any society. Therefore, a system is necessary which provides anyone with authority in that society, especially judges, with the right to prosecute a criminal *ex officio*. However, a criminal process was always held on behalf of a private party, whether as victim or private complainant. The Crown was also considered a private party.

Criminal proceedings were already mainly the preserve of private parties before the beginning of the *Ancien Régime*. Several existing institutions were aimed at the resolution of disputes and at repairing losses suffered by victims of crime. For instance, there was the *duel judiciaire* or trial by combat, where two parties in dispute fought in single combat, and the victor was proclaimed as right. The victim, their family or a complainant (a private person), could also bring a complaint to the judges and accuse someone of a crime. The judge would then hear the parties and apply various systems of adjudication, such as trial by ordeal (the guilt or innocence of the accused being determined by subjecting him or her to a painful task). Once the judgement was passed, the judge applied the law of retaliation (*lex talionis* see above 2.2.1). The complainant was obliged to continue prosecution until judgement was delivered, as already stated. This legal theory was closer to the idea of revenge than that of justice or public interest, therefore, it explains to a certain extent the need for establishing *public* prosecutions. However, someone accused of a flagrant crime could be prosecuted and sentenced by a judge without a victim's or a complainant's complaint because the judge was, somehow, a direct witness to the crime.

Later, the notion developed that the law of retaliation was morally unacceptable because crimes remained unpunished if the victim refused to risk retaliation, had died without family or no complainant

[64] Carbasse 2000, p. 30.

brought an accusation. Justice had to prevail for the sake of the nation. Therefore, the need gradually appeared for a prosecution in the absence of a victim. Pope Innocent III (1160–1216) was the first leader to decide that ecclesiastical criminal proceedings could be instituted *ex officio* in the absence of a private complainant against non-flagrant crimes for which a longer investigation had been carried out. During the era of the Church Inquisition, the *promoteur d'Eglise* was empowered to assist officials in the discovery of and inquiry into crimes. Later, the same *promoteur* would be granted the right to institute criminal prosecutions *ex officio* and to supervise investigations. Inspired by the ecclesiastical *inquisitoire* procedure, royal criminal justice would gradually abandon its accusatorial procedure. The right to institute a criminal prosecution (*action publique*) and to investigate crimes in the absence of private parties would be granted to judges in case of grave felonies (see for a definition of crimes during the *Ancien Régime* 2.4.2.1). If this right, at least in principle, was not yet recognised in the corps of the *procureur*s *du roi*, a representative thereof would however, always participate in the proceedings once the interests of the Crown were affected.

In fact, all of these factors together explain the development of the public ministry over the centuries. The institution was already in place on the formation of special magistrates (*procureurs du roi* and *avocats du roi*), with the right to institute prosecutions and carry these out as parties to the criminal process, with or without a victim, private complainant or denunciator, and on behalf of the king – the representative of God and society.

2.3 Organisation of the public ministry of the *Ancien Régime*

2.3.1 Structure of the public ministry of the *Ancien Régime*

According to Merlin, who described the French *Ancien Régime* as it neared its end, the public ministry consisted of a corps of magistrates watching over the interests of the Crown and society, present in every court and tribunal.[65] Offices or *parquets* consisted of royal officers or magistrates endowed with the public ministry's functions.[66] The *parquet* included different types of magistrates

[65] Merlin 1828, p. 212.

[66] *Parquet* literally means 'floor'. Authors give different reasons for the use of this word for prosecution service office. It was said that the members of the public ministry used to discuss cases one step beneath the judge's seat, thus on the floor.

present at every functional and geographical stage of the justice system. They were

- *procureurs généraux* and *avocats généraux*, who were present before the *parlements*[67]
- *procureurs du roi* and *avocats du roi*, who were present before the *bailliage* and *sénéchaussée* courts
- *substituts du procureur général* and *du procureur du roi* (deputies), who were respectively present before the *parlements* and the *bailliage* and *sénéchaussée* courts
- and the king, who could also be represented before the seigniorial jurisdictions by a *procureur fiscal* and before the ecclesiastical courts by a *promoteur*

2.3.2 The recruitment of *gens du roi*, rewards of office and subordination to the king

Although the position of judge was always more powerful, the position of the *gens du roi* was a very important and sought-after position.[68] In fact initially, the recruitment and remuneration of *procureurs* and *avocats* were different. The recruitment procedure varied, for example, from direct appointment by the *baillis* and *sénéchaux*, appointment by the king or by co-opting election. Eventually, the procedure became similar for both types of servant, who came to be regarded as undifferentiated magistrates.

The procedure was known as heredity or purchase of office (principle of *vénalité des offices*), which in practice amounted to co-option. Magistrates held their office and could sell it or transmit it to their descendants. The transmission of the office also consisted of the transmission of the function attached to the office. Beforehand, a formal inquest was undertaken into the personality of the purchaser as regards his capacity, solvency, age and integrity. The professional abilities of the applicant were appraised by his future

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It was also said the word related to a special room where the king's people used to meet; see Carbasse 2000, p. 19; Timbal 1957, p. 206; Ellul 1956, p. 305.

[67] It seems that until the end of the fifteenth century, the adjective *général* added to the title of *avocat* or *procureur* qualified those who did not specifically advise or represent the king, but might advise or represent anyone in general. After the fourteenth century for *procureurs* and the fifteenth for *avocats*, the common *procureurs* and *avocats* rarely used the adjective *général* anymore. Because of the general jurisdiction of the court where they had their office, *procureurs du roi*s (and later *avocats du roi*) at the *parlement* would make use of the adjective instead; see Carbasse 2000, p. 48; Lefèvre 1912, p. 13; Aubert 1894, p. 143.

[68] Andrews 1994, p. 55.

peers (it was very exceptional that an applicant failed to be appointed because of the outcome of an inquest).[69] After transmission of an office (e.g. of a *procureur général* or *avocat général*), the king issued a so-called *lettre de provision* necessary for the candidate in order to carry out his functions. The purchaser would also take the oath and eventually be officially established in his position.[70]

With time, it became more difficult, even impossible, to be appointed as a royal officer of the public ministry in *parlements* if the candidate was not the heir of a *famille de robe* (family of legal profession). Moreover, the prices of offices varied according to the importance of the city; it became almost impossible for a non-heir candidate to access the Parisian magistracy at the *parlement* of Paris. At the end of the *Ancien Régime*, the judicial institutions and the public ministry were composed of the members of a few large families, such as the Joly de Fleury family, from which three *procureur*s *généraux* and two *avocats généraux* at the *parlement* of Paris were appointed.[71] Thus, besides heredity, only people of great and rich families could afford a magistrate's office. Performing the functions of a magistrate during the *Ancien Régime* was not really a source of capital. The offices were not only very expensive but would only confer on the officeholder a small annual salary (*gages*).[72]

The position of deputies was initially slightly different because they were appointed directly by the *procureur général* or by the chancellor on the motion of the *procureur général* or on the recommendation of a very important person.[73] Eventually, deputies also became officeholders. It is striking to observe that people entrusted with important positions such as *procureur du roi* or *avocat du roi* did not reach these positions by virtue of their knowledge of the law; although originally only the best lawyers were appointed as representatives of the Crown.

However, with the royal centralism that developed over the centuries, the Chancellor of France, as the Crown's assistant and adviser on justice issues, became a very important figure. As the first officer of the Crown supervising the department of justice, and he played a considerable role in the appointment process of

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[69] Carbasse 2000, p. 144.
[70] Ellul 1956, p. 327.
[71] Carbasse 2000, p. 154.
[72] The judges obtained some additional revenue from judicial fees – the so-called *épices* paid by the parties.
[73] Carbasse 2000, p. 184.

magistrates and, therefore, of members of the public ministry.[74] This role evolved throughout the various eras of the *Ancien Régime,* for example the *fronde* crisis.[75]

The officers of the public ministry were accountable to the king and in practice, to his chancellor.[76] In addition to the oath common to all magistrates, *procureurs du roi* and *avocats du roi* would swear a special oath to strictly follow the orders of their king, who preserved strict authority over his officers and could push a reluctant *procureur* to resign in the event of a breach of duty. Nevertheless, the functions of the institution were so vital to the Crown that very few cases of dismissal are known.[77] In principle, *gens du roi* were bound to comply with royal orders in their political functions and in their judicial functions (see 2.4.1). Indeed, although very rare in practice, the king could take the place of one of his *gens* who did not carry out his orders.

2.3.3 Position of the *gens du roi* in the judicial system

The king considered the public ministry to be his eyes and ears in the realm. While *gens du roi* were subordinate to the Crown (the source of all powers), the institution was in some respects independent from the judges, the people and ultimately from the king. Contrary to assumptions about this epoch, the independence and the quality of the magistracy were fairly good. This was perhaps because the magistrates were almost impossible to remove and also due to their position as necessary intermediaries between the people, the Crown and the judges. In addition, the *familles de robe* maintained a tradition of excellence.[78] The king's officers developed their own conception of justice, which could diverge from that of the king's because they held a powerful and prestigious position, especially in Paris where most political life took place.

2.3.3.1 Relations with the king

Even though they were, in principle, subordinate to the Crown, *procureur*s and *avocats* also functioned as part of the magistrates'

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[74] (The use of the third person masculine pronoun throughout refers to men and women alike); Ellul 1956, p. 238.
[75] See on the *fronde* crisis 2.1.2.2.
[76] Merlin: 'Répertoire universel et raisonné de jurisprudence' [1825–1828] Tarlier, n.20, 224.
[77] During the 16th century, however, religious war led to the dismissal of Protestant prosecutors; see in Rousselet 1957, p. 195; Carbasse 2000, p. 147.
[78] Ellul 1956, p. 328.

corps, as did the judges. A certain concept of solidarity between magistrates and members of the *parquet* operated as a safeguard against excessive subordination. The king feared this and with good reason, as demonstrated during the *fronde*, which resulted in a strike by the judiciary. Because of this solidarity and the relative permanence of their tenure, the *gens du roi* gained a certain independence from the Crown. In particular, the patrimonial character and the *vénalité des offices* remained features of the public ministry, providing these magistrates with a certain independence that undermined the authority of the king and his chancellor.

This independence could be observed in the registration procedure *procureurs du roi* and *avocats du roi* followed for new royal laws (see 2.1.2.2). It was the duty of the *procureur* to formally request such registration. On the one hand, they could not refuse to request the registration because they acted as simple intermediaries between the Crown and the court. On the other hand, they were able to submit a verbal opinion – generally, from the *avocat général* – that could be contrary to the royal opinion. There is, unfortunately, very little trace of such submissions.[79] This opinion was heard during the audience of registration, following which the *parlement* could address *remontrances* to the Crown. There is no doubt that the public ministry used this right to influence both judges and ministers.

For example, in 1776 the Minister of Finance, Turgot, convinced the king to suppress the *corvées*.[80] Turgot proposed to replace the *corvées* with a tax levied on the owners' estates, i.e. the lords. The people's complaints against the *corvée* were reported to the *procureur général* (Guillaume François Louis Joly de Fleury), who, however, issued a written opinion in favour of the maintenance of the *corvées*.[81] The *parlement* of Paris decided not to register the royal regulation following the opinion of the *procureur général*. Eventually, on 12 March 1776, Louis XVI called a session of the *lit de justice*. Following the written opinion of the *procureur général* at the hearing, the *avocat général* (Antoine-Louis Séguier) submitted a famous plea against the royal regulation. Nevertheless, the *parlement* registered the regulation, but the pleas and the opinion so impressed the king that Turgot was dismissed a few weeks later and

[79] Carbasse 2000, p. 205.

[80] *Corvées* were services compulsory for anyone who did not enjoy privilege (i.e. was not from the nobility), requiring them to work for free for local lords.

[81] For instance, wardens complained that they could not watch over prisoners because they had to do their *corvée* for the lord of the district.

the *corvées* were eventually restored.[82] Today, it has been demonstrated that Joly de Fleury, Séguier and the judges of the *parlement* were owners of estates. They were naturally opposed to a reform that would directly hinder their private interests.[83] Whilst *procureurs* definitively had the duty to obey the king (after the decision of the *parlement* the *procureur général* did the work necessary for the registration of the regulation irrespective of his opinion), they remained free to develop their own point of view contrary to that of the royal ministers.

2.3.3.2 Relations with the judges

Procureurs, *avocats* and their deputies were not accountable to judges and were thus also independent in this sense. Of course, there was no legal mechanism to organise a clear separation between the functions of judge and *procureur*, and in a way, being one or the other was more a question of politics than of legal requirements. Ambitious *procureurs* could rise through the social tiers to become judges, giving way to some external pressures and balancing their independence. Nothing prevented a *procureur* from being appointed president of a *parlement* or *conseiller.* It was even possible to carry out both functions simultaneously.[84]

With regard to criminal proceedings, judges were more important than *gens du roi*. The role of *procureurs* or *avocats* as parties to criminal proceedings was not as precisely established as today and the separation of functions between judges and *procureurs* was rather blurred. There was actually no monopoly over public prosecution held by the public ministry (see 2.4.2.1) and it was said that *tout juge est officier du ministère public* (every judge is an officer of the public ministry*)*. As long as the interests of the Crown were not involved, the public ministry had two main rights in criminal proceedings: to deliver an opinion on the case and to hear an appeal. However, it could only participate as a joined party, not as a main party. The submission of an opinion by the public ministry in a case was a pure formality without any binding force on the judge. Not only could the judge perform his duties if a *procureur* did not deliver an opinion in a case, but if the Crown representative refused to give an opinion or if the court did not appreciate this opinion, a judge could take over the functions of the public ministry and submit

[82] Carbasse 2000, p. 208.
[83] Bisson 1961, p. 66.
[84] Carbasse 2000, p. 153.

an opinion in the name of the *procureur*.[85] Moreover, the public ministry could not assist in the courts' deliberations unless they were authorised to do so by the president of the court.[86] With regard to appeal proceedings, the power of the appellate court to increase a sentence was independent of whether the public ministry had lodged the appeal *a minima* or not.[87]

If *procureurs* had a weak position in the criminal process, they enjoyed an important and respected social and political position. They had few pressures to fear and could afford to be independent, performing useful functions in court. Their opinions, characterised by a sense of justice and a broad knowledge of law, were esteemed by judges, who could not in any case exercise all the necessary judicial functions and thus needed the opinions of a *procureur*.

2.3.3.3 Subordination and sharing of responsibility between representatives of the public ministry

Until the end of the *Ancien Régime*, it seems difficult to conclude that the public ministry could become the unified and hierarchical institution we know today. Two theories provide different views on this issue. Rassat considers there to be no general unity of the public ministry; subordination could not really exist between *avocats du roi* and *procureurs*.[88] It seems that subordination was unlikely, if not impossible, because *avocats* mainly acted in civil proceedings by way of verbal submissions. On the other hand, *procureurs* had administrative functions and when they held judicial functions, they acted in writing.

For Lefèvre, the functional subordination between the members of the public ministry varied according to the hierarchy extent among members of the institution and according to the distinction between *procureurs* and *avocats du roi*. *Gens du roi* were subordinate to the king and to their direct superior. Nevertheless, this subordination was relative because of the quasi-irrevocability that magistrates enjoyed as owners of their office. The *procureur général* was, in principle, the chief of the public ministry within the *parquet* of a *parlement* because

- he represented the Crown before *parlement*

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[85] Rassat 1967, p. 29.
[86] Article 2 of Title 24 of the 1670 Ordinance.
[87] By way of an appeal *a minima*, the public ministry would ask the appellate court to increase a sentence.
[88] Rassat 1967, p. 55; and contra Lefèvre 1912, p. 93.

- the *avocat général* was subordinate to him
- he supervised deputies in the *parquet* of the *parlement*
- he supervised the *procureurs du roi* before the *bailliage* and *sénéchaussée* courts
- and he supervised the *procureurs fiscaux* before the seigniorial jurisdictions even though the latter were not royal officers[89]

There was no hierarchical link between *procureurs du roi* themselves and the *gens du roi* and *procureurs fiscaux* who were also subordinate to their lords. Every *gens du roi* was a deputy of the *procureur général*. In *parlements*, the *procureur général* had deputies to replace him when he could not attend the audience. They acted in his name and in his place and had theoretically less independence than *procureurs* in other courts. At trial, *procureurs* had, in principle, to submit written opinions in accordance with their superiors' instructions and in accordance with the legal views of the Crown (in practice, of the chancellor).

The *avocats du roi* and their deputies were organised in the same way as *procureurs* and their deputies. Before the *parlement*, the *avocat général* was dependent on the *procureur général.* In lower courts, the *procureur du roi* was the chief of the *parquet*.[90] He supervised his deputies, of course, but also had disciplinary rights over the *avocats du roi,* who were in theory heavily subordinated to him. He could dismiss an *avocat du roi* who breached his duty by committing errors. In fact, *avocats* always exercised their functions in the name of a *procureur* because *procureurs* were the true representatives of the Crown. In principle, a *procureur du roi* could take over the functions of an *avocat du roi* at trial at any time. Every legal act of procedure made by an *avocat du roi* required the signature of a *procureur du roi*.

However, as has already been noted, the two types of magistrates had different origins and functions (see 2.2). For this reason, *avocats du roi* progressively developed a certain autonomy in their functions and had specific tasks that, in principle, could not be overridden by *procureurs*. In this respect, they gained independence for several reasons

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[89] Here there are also two opposing points of view among scholars – for Rassat, there was no subordinate relationship between *procureurs généraux* and *procureurs fiscaux*, see Rassat 1967, p. 55; while, for an opposing view, see Carbasse 2000, p. 120.
[90] Lefèvre 1912.

- *avocats du roi* could receive orders directly from the king, thus overriding the authority of the *procureurs du roi*
- *avocats du roi* and *procureurs du roi* were held jointly and separately responsible for the exercise of their duties
- infringements to the right of *procureurs du roi* to sign every legal act were tolerated
- and there were legal limitations to the right of a *procureur* to dismiss the *avocats du roi*

Of course, *avocats du roi* and *procureurs du roi* used to work with and not against each other. Therefore, they always tried to reach a common opinion in specific cases. It also happened that *procureurs* asked for the advice of *avocats* in certain matters. Similarly, *procureurs* progressively admitted that, according to the circumstances of the case during the hearing, the opinion of an advocate could differ from the written opinion of the prosecutor. In the event that there was a difference of opinion between a *procureur* and an *avocat*, the latter remained independent and could plead his own opinion at the hearing. This practice is the origin of the principle *la plume est serve, mais la parole est libre* (the pen is servient but the word is free), which is a feature of every prosecution service in civil law countries today.

Magistrates could also be held criminally liable for their offences. However, only royal courts had jurisdiction over the penal responsibility of magistrates. The procedure was more rigorous than usual for certain crimes (e.g. *lèse majesté*) because the exceptional position of magistrates was considered to be an aggravating circumstance.[91]

2.4 Tasks and functions of the public ministry during the *Ancien Régime*

2.4.1 Defence of the interests of the king

No text truly deals with the early functions of the institution in any depth. Although several royal ordinances and decrees enumerated the rights and obligations of *gens du roi*, they did not provide a clear and sharp definition of these functions. The tasks of the public ministry used to be very diverse and very broad. At its outset, its main task was to secure the welfare of the Crown by any means possible. Once established, the monarchy was absolute and the

[91] Articles 10 and 11 of Title 1 of the 1670 Ordinance.

source of all powers. The task of the public ministry was above all to maintain and even extend this power.[92] As Henrion de Pansey wrote

> Through these magistrates (those of the public ministry), the King could see and hear everything, was everywhere. He would supervise the enforcement of laws, the conduct of judges, and the actions of every citizen; He would participate in the law-making process with regard to public safety regulations and would enforce these regulations; eventually he would attend the meetings of every corps and corporations of the State. (Author's translation)[93]

Gens du roi used to supervise and manage the Crown property and estates. The institution could commence proceedings against anyone who had undermined the Crown's interests. It meant, for instance, that a farmer reluctant to pay his taxes or his rent to the Crown could be brought to court by a *procureur*. In pending proceedings instituted by another party, the public ministry could also intervene at any time and act as a joined party in order to secure the rights of the Crown, if necessary.[94]

The notion of royal property and estates was very broad and could consist of regulations carrying taxes levied on the exploitation of land, as well as regulations concerning the production of goods by the citizens. Because of the broad definition of the interests of the Crown, the *parquet* had an important role to play in the extension of the realm. Indeed, decisions of lords and ecclesiastical institutions could be challenged if they conflicted with royal interests. By this means, the Crown weakened the position of those who opposed its power. As soon as a royal regulation, especially one involving tax, was undermined in a local dispute, the public ministry challenged the lord or ecclesiastic's jurisdiction to hear the case. Everything that involved the Crown was considered as a *cas royal* and would have to be exclusively dealt with by a royal court. The public ministry increased the list of those royal cases considerably and progressively limited the jurisdiction of other systems.

A struggle for the power to make rules, e.g. to create taxes, and the power to enforce them took place between the king and other

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[92] Prélot & Boulouis 1990, p. 124.
[93] De Pansey 1818, p. 187. The distinction between *corps* and *corporation* is rather slight but nonetheless important in this context. A *corps* was a group with a legal existence and a function in the state organisation, while a *corporation* was also a group with legal competence but not necessarily connected to the state organisation.
[94] Carbasse 2000, p. 55.

important lords and clergymen of the *Ancien Régime*. The wide repartition of the *procureurs du roi* and the *avocats du roi* across the realm made the public ministry the ideal tool for a monarchic absolutism seeking to gain ever more power over the lords and the clergy, and had very little to do with the welfare of the people. The purpose of the public ministry in the early days of the *Ancien Régime* was, and remained above all, political.

During the fourteenth century, the people considered the *gens du roi* as abusive because they were very powerful and only represented the interests of the Crown. However, *procureurs du roi* had to enforce the law in order to protect the royal interests, and the purpose of law was not only to serve the interests of the Crown but also the interests of society. The idea emerged that the king was the representative of society before the courts, and it followed that his interests converged at a certain point with the interests of the people. The public ministry's functions also came to the defence and the protection of public welfare – criminal justice is one of the best examples of this.[95] Indeed, the prosecution of grave felonies was not only a matter for the victim but also a matter for the king as representative of God's justice on earth and consequently of society. The growth of the economy and, last but by no means least, the collection of taxes depended on a realm where crime was combated.

2.4.2 The defence of the interests of society by a public ministry

The Crown was indeed the source of all powers, and thus the source of all laws. However, this was by the will of God. Being the representative of God on earth, the king also needed to safeguard the welfare of the people that God had placed under his protection. It meant that on the one hand laws should aim to protect the people against any abuses and, on the other, that these laws should be respected and enforced. By the end of the eighteenth century, the public ministry had two main purposes: the protection of the interests of the Crown and the protection of society's interests.[96] The protection of society was achieved by means of judicial functions (i.e. the intervention of the public ministry in civil and criminal proceedings) and supervisory powers (i.e. the supervision of everything that involved *ordre public* (public safety) and *sûreté* (public security)).

[95] Hélie 1866, p. 302.
[96] De Ferrière 1769, p. 208.

2.4.2.1 Institution of and participation in judicial proceedings

Civil proceedings in the *Ancien Régime* mainly involved hearings. Verbal submissions were paramount and civil cases were therefore often dealt with by an *avocat* rather than a *procureur*. Accordingly, where the interests of the Crown were at issue, the *avocat du roi* would intervene.

With regard to criminal proceedings, no statute clearly established the definitions of criminal offences until the 1670 Ordinance, and even this only provided a list of offences without describing the acts constituting these offences. Crimes were divided into two categories – petty crimes subject only to monetary penalties and *grand crimes* carrying defamatory, afflictive or capital sentences (e.g. theft, physical aggression or royal cases).[97] For petty crimes, arbitration between parties took place, whereas *grand crimes* were prosecuted before a court. The 1670 Ordinance was the first regulation that established with a certain precision the role of the public ministry in a prosecution.

In Paris, a victim could complain to a *lieutenant criminel* or to the police, while in other jurisdictions, a victim could complain to a local judge.[98] In the absence of a victim, a denunciation could be made to a *procureur du roi* or a *procureur fiscal*. Only a *lieutenant criminel* or a judge had, in principle, the right to order an investigation.[99] The public ministry would then join the case and provide support to the victim.

In the absence of a victim, the public ministry could institute proceedings only on receiving the complaint of a denunciator.[100] In the absence of both a denunciator and a victim, *procureurs* had the right to institute the procedure *ex officio*, but they rarely did so and, in practice, the judge remained the true initiator of the criminal trial.[101] It is important to note that a *procureur* had no power to prevent a judge from instituting proceedings.[102]

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[97] Articles 11 and 12 of Title 1 of the 1670 Ordinance provide that royal cases consisted of, for example, treason and sedition, sacrilege and profanity, rebellion against orders or agents of justice, illicit bearing of arms, riot, illegal assembly and public violence, counterfeiting of money, crimes by officers of State, crimes by soldiers, etc.

[98] The *lieutenant criminel* was the second highest officer of the *baillage* of Paris, the so-called *Châtelet*, and presided over all sessions of the criminal section.

[99] Articles 1, 2, 3, 4 and 5 of Title 3 of the 1670 Ordinance.

[100] Article 6 of Title 3 of the 1670 Ordinance.

[101] Article 8 of Title 3 of the 1670 Ordinance; Rassat 1967, p. 28.

[102] Rassat 1967, p. 28.

The public ministry had a few functions during the preliminary investigation but these were very limited because the victim conducted the investigations and, in the absence of a victim, the *lieutenant criminel* or another officer ordered by the judge investigated and interrogated the suspect. The judge remained the main actor – he was not bound by the opinion of the *procureur*. Documents and materials for the case, however, had to be communicated to the *procureur du roi* (as witness depositions).[103] They supplied the opinion demanded by the Crown's interest or the interest of justice.[104] These opinions amounted in practice to requests for a witness hearing or specific investigations.[105]

Once the preliminary investigation was completed, the competent *procureur* submitted his final written *réquisitoire* and the *avocat* delivered the verbal submission during the hearing.[106] The *procureur* had the right to challenge the decisions of the lower courts by way of appeal before the *parlement*. If the accused was sentenced to death or corporal punishment, the case was automatically and invariably remanded to the *parlement* for a rehearing.[107] The *procureur général* carried out the proceedings before the *parlement*.

2.4.2.2 Judicial supervisory functions

2.4.2.2.1 Supervision of courts

When exercising their judicial competence, royal, seigniorial and ecclesiastical courts were all subject to the supervision of *procureurs généraux*. This function was performed by way of appeal against every decision and by way of *remontrance*.

On appeal, the *parquet* challenged decisions made by royal and non-royal judiciaries as soon as it considered that a royal law had been wrongly applied to a case. This appeal was an *appel de faux jugement* (review of wrong judgement).[108] The decisions of the ecclesiastical judiciaries concerning disciplinary actions against clergymen or religious orders, for instance, could be challenged by way of *appel comme d'abus.*[109] In principle, an upper royal court was

[103] Articles 106 and 108 of the 1670 Ordinance.
[104] Article 107 of the 1670 Ordinance.
[105] Article 3 of Title 14 of the 1670 Ordinance.
[106] Article 115 of the Ordinance of 1498 in Jourdan 1827, p. 366; Article 1 of Title 24 of the 1670 Ordinance.
[107] Article 6 of Title 24 of the 1670 Ordinance.
[108] Ellul 1956, p. 215.
[109] Timbal 1957, p. 206; Ellul 1956, p. 364.

competent to hear these appeals, unless the case involved clergymen over whom only the upper ecclesiastical courts had jurisdiction.

Remontrances were a powerful supervisory tool used by the public ministry when a legal question needed to be resolved in pending proceedings, a judicial dysfunction had occurred, or if a law required amendment. Indeed, the implementation of royal regulations often gave rise to misinterpretation and conflicts of competence. Frequently a lower court did not perform its duty correctly or at all – in these cases disputes could remain unresolved. This happened because in the absence of clear jurisdictional delimitation it could be difficult to determine which of the seigniorial, ecclesiastical or royal courts was competent to try certain criminal acts, and overlaps were common within the same district. However, a judge could also use this legal imprecision to evade his duty to judge. The *procureur* would then carry out an exact analysis of the problem and address the *parlement* with a list of arguments or *remontrances* based on legal grounds. The *parlement* would eventually take a decision called *arrêt sur remontrances*, which had general binding force in the district or the province affected. This kind of decision could even take the form of an *arrêt de règlement* (see 2.1.2.1). Although the public ministry remained the representative of the Crown, it was also *les yeux constamment ouverts du parlement* (the ever-open eyes of the *parlement*).[110] This situation could leave *procureurs* in an uncomfortable position, especially during the *fronde des parlements*.[111] Despite this, *procureurs* often found the best solution was to position themselves between the interpretation of the law as provided by the *parlement* and the interpretation provided by the Crown.

2.4.2.2.2 Supervision of *parlements*

By way of *remontrances*, *procureurs généraux* also supervised the magistrates of the *parlement* during special periodic meetings called *mercuriales.* The purpose of these was to remind magistrates of their duties. In theory, the Crown could supervise judicial power. This procedure was also used to modify the opinion of the *parlement* concerning the interpretation of specific laws. In actuality, the disciplinary role of the *mercuriales* would eventually relax and the *remontrances* remain only as an interpretative form of review.

[110] Carbasse 2000, p. 103.
[111] See on the *fronde* crisis 2.1.2.2.

Indeed, by the end of the *Ancien Régime*, the Crown held little supervisory power over the judges, who had gained a strong and powerful position and were almost irremovable. If the judges felt the Crown to be too threatening, the former could resign from their functions, thus weakening the power of the Crown.

2.4.2.3 General supervisory functions

Above all, the public ministry of the *Ancien Régime* was a body of political supervision. Because of their presence across the country, the *gens du roi* were a fantastic intelligence service expanding the power of the Crown everywhere. They were aware of almost everything occurring in the cities or in the realm. Therefore, the public ministry was in charge of the so-called *haute police* (high police), i.e. the protection of the *ordre public* (public safety) and *sûreté* (public security).[112]

Outside the scope of the criminal justice system, other matters were very diverse and covered almost everything affecting the safety and convenience of society, such as economic regulations or labour regulations. Prosecutors took care to ensure that everyone correctly enforced the law. They could intervene at any time to denounce regulations, customs or laws wrongly raised or interpreted according to the royal rule of law, by any private or public body. Prosecutors could also institute proceedings before local courts in order to regulate issues concerning the *haute police*.[113] The supervisory function of the public ministry also led to the defence of some specifically vulnerable groups and institutions such as orphans, widows, minors and hospitals.

In addition, when a reform was carried out, *procureurs généraux,* with the aid of their deputies throughout the realm, would directly follow how such a reform worked and was perceived by the people. Once this information was gathered, the general prosecutor would inform the *parlement* and the chancellor of the outcome of the report, thus allowing them to make the best decision. Information concerning the enforcement of the law could also be gained by way of investigations carried out *ex officio* by *procureurs*. Furthermore, even without investigations, people could address the local *parquet* with positive and negative comments about everything that affected their day-to-day lives and problems.

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[112] Carbasse 2000, p. 105.
[113] Merlin 1828, p. 216.

Procureurs du roi also regularly visited jails and collected information related to the enforcement of sentences, as well as prisoners' complaints.[114] The reports from these visits provided an accurate idea of the state of criminality and had to be sent to the general prosecutor of each district every six months.[115] These reports made the main legal reforms, such as the 1670 Ordinance, possible and effective.[116]

2.5 Important developments in the French judicial system through the Revolution until the Napoleonic reforms

The French Revolution brought about many changes in the judicial system. Some of these did not last beyond the first years of the 19th century but many were definitive.[117] Important developments include

- the suppression of the *vénalité des offices*; other means of recruitment, such as the appointment and election of magistrates, replaced the ownership of offices
- the barring of judges from deciding cases submitted to them by way of general and regulatory provisions[118]
- most importantly, the theory of separation of powers, one of the leitmotifs of the *révolutionnaires*, was established in Article 16 of the Declaration for the Protection of Human Rights on 26 August 1789[119]

The law issued on 16 and 24 August 1790 established several basic institutions that still characterise the current judicial organisation, such as[120]

- at the local level (*cantons*), justices of the peace (*juges de paix*) for civil matters and the communal corps (*corps municipaux*) in penal matters

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[114] Article 35 of Title 13 of the 1670 Ordinance.
[115] Article 20 of Title 10 of the 1670 Ordinance.
[116] Carbasse 2000, p. 98.
[117] Bruschi 2002, p. 71.
[118] Article 5 of the Code Civil: 'judges are forbidden to decide cases submitted to them by way of general and regulatory provisions'; translation provided at http://www.legifrance.gouv.fr/html/index.html.
[119] 'Any society in which the guarantee of rights is not ensured, nor a separation of powers worked out, has no constitution'. (Author's translation).
[120] See at <http://gallica.bnf.fr/>, France, Assemblée nationale constituante (1789–1791): 'Décret sur l'organisation judiciaire, du 16 août 1790, sanctionné par lettre patente du 24 du même mois' in Archives parlementaires de 1787 à 1860: recueil complet des débats législatifs et politiques des Chambres françaises. Première série, 1787 à 1799. Tome XVIII, Du 12 août 1790 au 15 septembre 1790, 106.

- at the district level (*districts*), first instance judges (*juges de première instance*) competent in all matters unless the law provided otherwise. These judges were also competent in appeals lodged against decisions made by justices of the peace, communal corps and first instance judges of other jurisdictions

The 1790 legislation also referred to the Montesquieu theory of separation of powers and prohibited judges from interfering in any way with the actions of the administration.[121] Such interference was considered an abuse of powers.[122] This act also established

- the principle that every defendant should be able to challenge the judgement that convicted him (*double degré de juridiction*)
- the principle that justice is equal for all citizens (*égalité de tous les citoyens devant la justice*)

A *Tribunal de cassation* was also established. It later became the *Cour de cassation*.[123] With the 1799 coup (*coup d'État du 18 brumaire an VIII* – 9 November 1799), Napoleon took power and carried out important legal reforms, such as the creation of *Tribunaux d'appel*, which became the *Cours d'appel,* and the creation of a *Conseil d'État* to advise the government on administrative matters. The law issued on 20 April 1810 *sur l'organisation de l'ordre judiciaire et l'administration de la justice*, based the judicial system on a hierarchical organisation. In addition, criminal laws were brought together in 1808 into a *Code d'Instruction Criminelle* and in 1810 into a *Code Pénal*.[124] These codes subcategorised criminal offences into three categories

- *contraventions* (petty crimes) carrying penalties or fines of up to fifteen francs or five days deprivation of liberty

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[121] This separation of administrative and judicial functions would be one of the reasons for the eventual creation of two separate judicial systems (*ordres de juridictions administratif et judiciaire*) with two separate systems of courts and laws, see Vincent, Guinchard, Montagnier & Varinard 2003, p. 90.

[122] Article 13 of Title 1: 'Judicial functions are distinct and remain forever separate from administrative functions; judge may not, on pain of forfeiture, interfere in any way whatever in the activities of administrative officials nor subject them to judicial proceedings concerning their functions'; translation from Merryman 1996, p. 111.

[123] By this time, the *Tribunal de cassation* was an organ entirely dependent on the *Corps législatif* body empowered with the legislative function. The *Cour de Cassation* was established as independent from the legislative body in 1837.

[124] Copies of these codes may be found at <http://ledroitcriminel.free.fr/la_legislation_criminelle/anciens_textes.htm>.

- *délits* (misdemeanours) provided by the Forest Code and all offences carrying penalties between five days and five years deprivation of liberty, and fines of more than fifteen francs[125]
- and *crimes* (felonies) carrying penalties that are *afflictive ou infamante* (such as death, transportation, imprisonment, iron collar, etc)

The courts and their jurisdictions were

- *Tribunal de police* judging *contraventions*
- *Tribunal correctionnel* judging *délits*
- and *Cour d'assises* judging *crimes*

2.6 The public ministry through the Revolution up to the Napoleonic reforms

2.6.1 A State institution

The law issued on 16 and 24 August 1790 separated the public ministry into two organs

- the *commissaires du roi*, supervising the exact application of the law, were appointed for life by the king
- the *accusateurs publics* appointed by the people were empowered with the right to support accusation before the courts in criminal cases. However, this body could not institute a criminal prosecution

The 1790 Act set out that the members of the public ministry were the representatives of the executive before the courts.[126] The legislators here misinterpreted the nature and the functions of the public ministry. During the *Ancien Régime*, the king was the supreme sovereign and the *gens du roi* the representative of this sovereign power.

They were to remain as such but sovereign power devolved to the nation as Article 3 of the 1789 Human Rights Declaration provided that the principle of all sovereignty lies in the nation (see 3.1.2). As a

[125] There is no upper limit to fines because they remain unascertained for certain crimes. For instance, for the crime of forgery, the maximum fine is equal to a quarter of the unlawful gain obtained by way of forgery. During the first half of the 19th century, criminal prosecutions consisted primarily of criminal offences related to forests (such as theft of wood). A comparison could be drawn with today's traffic violations, see Bruschi 2002, p. 76.

[126] Article 1 of Title 8 (Author's translation).

consequence, the public ministry should have become the representative of the nation but not of the executive.

During the reign of terror (1792–1794), the public ministry became an oppressive institution under the influence of political leaders. It carried out prosecution without real process (out of 25,000 political dissidents, 17,000 were executed);[127] *commissaires du roi* were suppressed in 1792 during the Convention and recreated by the Constitution of *5 Fructidor An III* (22 August 1795). Article 63 of the 1799 Constitution (*Constitution de l'an VIII*) brought the two functions of the *parquet* together in the institution called *commissaire du gouvernement*. The law of *7 Pluviose An VIII* (27 January 1801) detailed the unity of the *parquet* and established the secrecy of criminal investigations and the publicity of trials.

From then on, the public ministry remained unified and established as a judicial body hierarchically organised under the authority of the executive power. During this epoch, officers of the public ministry gained their ambiguous status as civil servants on the one hand and magistrates on the other. Indeed, prosecutors and judges were recruited and appointed in the same way, in a sense, they were both magistrates and members of the judiciary. Therefore, during a career as a magistrate, a prosecutor could carry out the function of a judge and vice versa. Magistrates had the same education and took the same oath. However, unlike judges, prosecutors were bound by specific disciplinary rules. They were not independent but strictly dependent on the authority of the Minister of Justice who had the discretionary power to recall them. They were also under the supervision of their superiors. Judges were impartial, whereas prosecutors were party to the criminal process, supporting the accusation.

2.6.2 A hierarchical and pyramidal institution

The *commissaire du gouvernement* became the *procureur général* and the law of 7 Pluviose An VIII (27 January 1801) established *substituts du commissaire du gouvernement* in each district (the so-called *arrondissements*) as deputies of the *commissaires* who were appointed and removed at the discretion of the executive. These officers later became *Procureurs de la République* and the heads of the *parquet* in every *Tribunal correctionnel* and *Cour d'assises*. The substitutes were entirely dependent on their *commissaire*. In each *Tribunal de police*, the functions of the public ministry were entrusted

[127] Carbasse 2000, p. 232.

to police commissars defined as auxiliaires (*assistants*) of the *Procureurs de la République*. The institution thus consisted of three levels, headed by two offices, the general prosecutors and the chief district prosecutors.

According to the principle of hierarchy, a superior had the right to supervise and conduct judicial actions carried out by his deputies in proceedings and to order them to act in particular ways. Each member of the public ministry was subordinate to, and dependent on, his immediate superior and compelled to carry out his orders, while the whole institution was under the authority of the executive. Article 27 CIC provided that the *procureur du roi* was obliged to inform the general prosecutor forthwith about the knowledge of all *délits* and to carry out his instructions affecting all further actions.[128]

The CIC also established that general prosecutors and chief district prosecutors could be substituted by deputies who were also public prosecutors. The general principle of substitution would stem from this situation.

2.6.3 A function in the criminal process

The CIC organised the rights and obligations of the *parquet* in the criminal process. Article 1 CIC provided that

> Action for the execution of penalties is only provided to those civil servants established by law.[129]

Concretely, the public ministry had no monopoly as yet over prosecutions and it shared the right to institute prosecutions with other administrations – such as Customs or the Water and Forests Administration – and the victim of the offence. However, in practice these administrations only had the right to prosecute specific crimes provided by statutes, and they gradually left the settlement of disputes to 'negotiation' rather than prosecution. Although the victims of criminal offences could still directly summon the accused before the *Tribunal correctionnel* (Article 64 CIC) or pass on a complaint to the investigating judge (Article 63 CIC), in practice they often preferred to rely on the professionalism, competence and power of the public prosecutors.

The CIC organised the phases of the criminal process into the investigation carried out by an investigating judge and the indictment

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[128] Cases concerning *crimes* were directly forwarded to the investigating judge under the supervision of the general prosecutor. The general prosecutor had the jurisdiction to prosecute *crimes* before the *Cour d'assises*.
[129] Author's translation.

carried out by a prosecutor and other complainants. The public prosecutor had no power of investigation and no discretion to decide whether or not a criminal act brought to his knowledge by a victim or by any other means should be prosecuted. A strict principle of legality underpins the code. Criminal offences in the jurisdiction of a *Tribunal correctionnel* could be brought to the knowledge of a public prosecutor by way of *plainte*, *dénonciation* or *procès-verbal*. The prosecutor could then directly summon the suspect before the court or remit the case by warrant to an investigating judge. If the offence had the characteristics of a felony (*crime*), a judicial investigation had to be instituted. The general prosecutor then prosecuted the felony before the *Cour d'assises*.

However, if such an offence was committed in *flagrant délit*, the CIC provided the chief district prosecutor with investigative powers to be exercised before informing the investigating judge. In applying these powers, the prosecutor could visit the scene of a crime, make all necessary observations and interviews and issue a warrant to arrest a suspect for interview (*mandat d'amener*). During the nineteenth and twentieth centuries the position of the prosecutors in criminal investigations increased considerably to the detriment of the investigating judges. The right to dismiss a case and the opportunity principle were not provided by the code.[130] However, in 1817 the Minister of Justice advised public prosecutors to prosecute only criminal offences that endangered the *ordre public*. Indeed, for all kinds of reasons, especially economic, it was impossible to prosecute all crimes. Several reforms during the nineteenth century – such as the right, in 1863, for prosecutors to act in case of *flagrant délit* in place of investigating judges – strengthened the right to dismiss a case.[131]

Most importantly, the CIC provided that the rights to investigate crimes, to gather evidence and to bring suspects to court were exercised by several officers such as the chief of the police, the investigating judge, the *gendarmerie* officers and the *procureur du roi* and his deputies (Article 8 CIC). Officers empowered with this right also had the right to summon the police and thus, to instruct the police. Furthermore, the CIC required that anyone with knowledge of a crime should inform the *procureur du roi* forthwith. In the absence of an informer, the chief prosecutor drew up the report. Clearly, the

[130] For a definition of the opportunity principle in the current French system see 3.4.2.2.
[131] Bruschi 2002, p. 91.

CIC placed the public ministry and, above all, the chief district prosecutor, at the cornerstone of the criminal justice system: between the people, the police force, the courts and the government.

Finally, the CIC also organised the right of the public ministry to challenge orders of investigative judges by way of opposition appeal and the judgement of courts by way of appeal and cassation appeal.

2.7 Epilogue

In the eyes of some authors, the institution of the public ministry was entirely brought down by the Revolution.[132] For others, the institution remained, but its functions were distributed among different bodies.[133] It is certainly true that with the end of the absolute monarchy and the implementation of the separation of powers, the *gens du roi* disappeared as a political organ. Even though the Estates-General's drafts or *cahiers des états généraux* handed over in 1789 by leaders of the different Estates did not specifically reproach the members of the public ministry of the *Ancien Régime*, it was not possible for the revolutionaries to permit such a powerful institution, involved in every stage of the State decision-making process, to survive.[134]

In practice, the *procureurs du roi* and *avocats du roi* of the *Ancien Régime* were not appointed by the Crown and were almost irremovable. Moreover, the institution did not have a true hierarchical and pyramidal organisation. Post-Revolution developments in principles of justice resulted in a clear organisation consisting of public prosecutors appointed by and fully dependent on the executive. Functions were also clarified or concretely described in codes of law. The role of the public ministry in civil proceedings remained more or less identical. As regards its role in criminal prosecution, the Revolution did not really suppress the public ministry as a function because it did not really exist.[135] Prosecutors had almost no role in prosecution, and even if they could prosecute *ex officio*, there was virtually no statute of substantive criminal law

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[132] E.g. Esmein 1969, p. 429.
[133] E.g. Hélie 1866, p. 439.
[134] Estates-General were general assemblies ordered by the king (often at the outset of a crisis) and consisting of representatives of the three groups of French society, i.e, the First Estate (the clergy), the Second Estate (the nobility) and the Third Estate (in theory, all of the commoners, in practice, the bourgeoisie); Bruschi 2002, p. 73 ; Robert & Oberdorff 1995, p. 5.
[135] Rassat 1967, p. 33.

upon which to ground a prosecution. Victims and judges were the main actors in the criminal process. With the Napoleonic reforms, the situation changed to one where the public ministry had a dominant position in the prosecution process. Because of its general jurisdiction to prosecute all criminal acts, public prosecutors rapidly gained more importance than the other prosecution institutions provided for by the CIC. Of course the institution adapted to social and political changes during the nineteenth and twentieth centuries, but the most important features remained the same. One example of the changes that will come to light in the country comparisons later in this study is the constant trend towards an increase in the number of cases handled by public prosecutors and an increase of investigative powers to the benefit of the *parquet* in prosecution policies. The powers of the investigating judge progressively diminished to the benefit of prosecutors. Indeed, it is striking to see that among the recipient countries of the French prosecution prototype, the institution of the investigative judge was hardly – or in some cases not – transplanted and often disappeared over the years.[136]

[136] It does not exist in Poland or the Czech Republic. In the Netherlands, a *rechter-commissaris* only has jurisdiction to decide specific issues in ongoing cases. Moreover, the initiative to involve a *rechter-commissaris* in a case lies with the broad discretionary power of the PPS.

Chapter 3
France – organisation of the prosecution service and its functions in the criminal process[137]

It is striking that after more than two hundred years, the organisation of the Napoleonic prototype of the PPS did not really change. To be precise, the prototype necessarily changed to keep pace with changes in society and legislation, but it retained several fundamental features from its origins. Constitutional and legal provisions modified the criminal judicial system over the years and today regulate the current French public ministry (3.1 and 3.2). However, the latter remained a twofold institution. On the one hand, it is strictly formed into an almost military hierarchy where rules for appointment, discipline and subordination obey statute and ill-defined political responsibility, on the other, it is increasingly empowered with the functional independence necessary for the upholding of a progressively harmonised criminal law (3.3). Within the preliminary phase of the criminal process (3.4), the functions of the PPS have been clarified since the *Code Napoléon*, and particularly with regard to the opportunity principle or the police investigation. Although the investigating judge is still a fundamental element of this phase of criminal justice, recent amendments have considerably developed the powers of public prosecutors, for example in settling cases using alternatives to prosecution or to full hearings. Finally (3.5), the PPS also carries out its task of upholding the law in the public interest during the hearing of cases in the first instance, on appeal and before the Supreme Court. Prosecutor intervention is characterised by a general right to challenge almost

[137] Molins 2004; Verrest 2000; Rassat 1967; Rolland 1955.

any decision made by a judge or a court by means of ordinary and extraordinary forms of review.

3.1 Historical developments[138]

3.1.1 Provisions concerning judicial power in the 1958 Constitution

From the Napoleonic era, and for almost a century and a half after, the organisation of the judiciary in France remained more or less the same.[139] In 1883 a High Council of the Judiciary (*Conseil Superieur de la Magistrature*) was created, with the aim of assisting the government in the appointment and discipline of magistrates. Finally, the French Constitution of 5 October 1958 and several major laws adopted the same year provided the final features of the current system and repealed important provisions of the 20 April 1810 Act on the organisation of the judicial system (for more on this Act, see 2.5).[140] These laws established the present geographical partitioning of the courts and the status of the magistrates. The Constitution has been amended many times since 1958 and today provides that

- the President of the Republic is the guarantor of the independence of the Judiciary
- he is assisted in this task by the High Council of the Judiciary consisting of two sections
  - a section with jurisdiction over judges (*magistrats du siège*)
  - a section with jurisdiction over public prosecutors (*magistrats du parquet*)
- a separate act determines the status of the members of the Judiciary
- judges may not be removed from office
- the Judiciary, guardian of individual liberty, enforces this principle under the conditions stipulated by legislation

Public prosecutors and judges are members of the same professional corps, i.e. the *magistrature*, which is supervised by the High Council of the Judiciary. This council is now composed of

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[138] Vincent, Guinchard, Montagnier & Varinard 2003; Stéfani, Levasseur & Bouloc 2001.

[139] The most important modifications of the judiciary, above all, concerned the administrative side of the law, with a progressive establishment of the administrative judicial system.

[140] An official English translation of the 1958 Constitution can be found at http://www.assemblee-nationale.fr/english/8ab.asp.

twelve members – six magistrates (appointed by their peers) and six other persons – such as the President of the Republic, the president of the Senate and the president of the National Assembly.[141] Although the council has no binding powers, it plays an important role in the status of magistrates (see 3.3.2.1 and 3.3.5.2). An order adopted in 1958 (the 1958 Order) determined the status, functions and organisation of the *magistrature*.[142] A new Criminal Procedure Code (*Nouveau Code de Procédure Pénale*) was adopted in 1957, while the new Criminal Code was adopted in 1992 and came into force only in 1994.

3.1.2 The structural and functional position of the prosecution service in the State organisation

During the Old Regime, prosecutors carried out their functions in the name of the king, who was the sole sovereign, combining executive, legislative and judicial functions. Article 3 of the 1789 Human Rights Declaration provided that the principle of all sovereignty resides in the nation. The public ministry's magistrates were established as the nation's representatives and not exclusively as the agents of the executive before the courts. It was advocated that in a democratic country, the nation expresses itself in two ways – by the law enacted by its parliament on the one hand, and by the decisions of its government on the other. In order to represent the nation, the public ministry must necessarily act on behalf of the government and uphold the law. Both prosecutors and judges are considered magistrates belonging to the judiciary (*autorité judiciaire*) in the French system, but they do not possess the same status or the same functions. While on the one hand prosecutors belong to the judiciary (*principe de l'unité du corps judiciaire*), they do not enjoy the constitutional independence of judges because they are subordinate to their superiors (*principe de la subordination hiérarchique*).[143] The Constitutional Court has decided that public prosecutors are magistrates and hence watch over individual liberty as judges do; however this task does not exempt them from being subordinate to the Minister of Justice.[144] In this context, the

[141] The six magistrates from the two sections are different, while the six other members are the same for both sections.
[142] Ordonnance n. 58-1270 du 22 décembre 1958, portant loi organique relative au statut de la magistrature, JO du 23 décembre 1958, 11551. The present paper is based on this 1958 Order as amended by the 2004 Act, see loi n. 2004-192 du 17 février 2004, JO du 2 mars 2004.
[143] Favoreu 1994.
[144] CC 93-323, 5 août 1993, RJC, I.535 and CC 93-326, 11 août 1993, RJC, I.551.

Constitution states that there is one corps of magistrates and that within this corps, there are two functional classes, judges and prosecutors. This distinction explains how the rules for appointment and discipline may be different for the two categories: two separate sections of the High Council of the Judiciary are therefore necessary.

Indeed, the structural position of the prosecution is determined mainly by the 1958 Order and its functional position by the Criminal Procedure Code. The 1958 Order established the prosecution service on a very hierarchical basis. The Minister of Justice sits at the apex of the structure, with authority over the magistrates of the public ministry (Article 5, 1958 Order). The public ministry is the critical link for the implementation of the government's domestic criminal policy. This implementation is carried out by way of general instructions and specific directives in pending cases. These instructions are necessary for prosecutors to implement the government's policy and make decisions about whether or not to prosecute specific issues (opportunity principle, see 3.4.2.2). As a link between the government and the judiciary, public prosecutors are also entitled to provide the judge with the official opinion of the executive.

Public prosecutors are also, in all matters and at all times, instruments of the law, charged with interpreting and upholding the law and individual liberties. Therefore, in criminal matters, the law grants prosecutors the right to initiate and exclusively carry out criminal prosecution. Article 31 CPC stipulates

> The public prosecutor exercises the public action and formally requests the law to be enforced.[145]

A public action (*action publique*) consists of a public prosecution for the imposition of penalties (see 3.4.2.1). Only magistrates are competent to interpret the law in its application. However, the public ministry is free to act if the interests of the law diverge from the interest of the executive. We will see that the public ministry is a hierarchical institution acting under the authority of the Minister of Justice (see 3.3.2.2), but also enjoys a certain functional independence in the criminal process (see 3.3.3). In 2004, an amendment to the Criminal Procedure Code reinforced the position of the government with respect to the criminal policy implemented by

[145] Translations of French laws and codes are provided at <www.legifrance.org>. Although Article 1 CPC translates '*action publique*' as 'public prosecution' (see 3.3.2.2), the translator sometimes uses 'public action' instead.

the prosecution services.[146] Without providing the Minister of Justice with new powers over prosecutors, the amendment introduced a new provision into the CPC (Article 30) according to which the Minister of Justice implements the criminal prosecution policy (*politique d'action publique*) and therefore gives general instructions affecting prosecution to the prosecution services (see 3.3.2.2).

3.2 The present French criminal courts system[147]

3.2.1 First instance

In 'the first instance', two specific judges may participate in the criminal process during the investigative phase of a case. If the case is complicated or if the offence is serious (a requirement for some offences), an investigating judge (*juge d'instruction*) is involved in tracing the suspect, inspecting the evidence and deciding whether matters should be referred to a court. In addition to the investigating judge, a liberty and custody judge (*juge des libertés et de la détention*) decides upon the preliminary detention of suspects during the preliminary proceedings.

According to the gravity of the offence as provided for by the Criminal Code and according to the Criminal Procedure Code, a person charged with a criminal offence can be judged by [148]

- a 'lay magistrate', i.e. the *juge de proximité*, with jurisdiction in the same territorial area as the police courts, to hear certain minor offences that do not lead to a custodial sentence[149]

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[146] Loi n. 2004-204 du 9 mars 2004, portant adaptation de la justice aux évolutions de la criminalité, JO 10 mars 2004, 4567.

[147] At the time of writing, draft legislation modifying in depth the French judicial system to a considerable extent is under discussion. This draft may lead to a complete reorganisation of judiciaries, entailing the suppression of existing courts and the creation of new ones.

[148] According to the gravity of the acts, the Criminal Code establishes three types of criminal offences – petty offences (*contraventions*), misdemeanours (*délits*) and felonies (*crimes*). The petty offences are classed into five different categories (*contraventions de 1ère, 2ième, 3ième, 4ième et 5ième classe*).

[149] The lay judge has the jurisdiction to judge petty offences of the four first *classes*. The purpose of the 9 September 2002 Act establishing this new judge was to relieve the pressure of an increasingly heavy workload on the courts and to expedite the justice process. However, the territorial jurisdiction of the lay judges is the same as the police court with which they also share the same infrastructure (clerks, offices, etc.).

- one of the 493 police courts (*tribunaux de police*) with jurisdiction to hear certain minor offences that do not carry a sentence of imprisonment[150]
- the criminal section (*Tribunal correctionnel*) of one of the 186 district courts (*Tribunal de grande instance*) with jurisdiction to hear important cases that may carry a sentence of imprisonment[151]
- a *Cour d'assises*, composed of three professional judges (one president and two assessors) and nine jurors. In principle, there is one *Cour d'assises* in each district (*département*). The *Cour d'assises* judges the most severe crimes, carrying sentences up to life imprisonment[152]
- a youth judge (*juge pour enfants*), a youth tribunal (*Tribunal pour enfants*) and youth *Cour d'assises* (*Cour d'assises des mineurs*), according to the gravity of the offence[153]
- the High Court of Justice (*Haute cour de justice*), with jurisdiction to judge the President of the Republic in cases of high treason (Article 68, 1958 Constitution)
- the Court of Justice of the Republic (*Cour de justice de la République*), with jurisdiction to judge members of the government accused of committing a criminal offence while in office (Articles 68-1 and 68-2, 1958 Constitution)[154]

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[150] The police court has jurisdiction to judge petty offences of the *5ième classe* and of the other *classes* if these were committed at the same time as a *5ième classe* offence.

[151] The criminal section of the district court consists of a single judge or a panel of three judges and has jurisdiction to judge misdemeanours and petty offences where the accused has committed several offences at the same time, at least one of which is a misdemeanour.

[152] The *Cour d'assises* has jurisdiction to judge serious felonies, and other offences when committed by the accused at the same time as a felony. Proceedings before a *Cour d'assises* are specific to France and cannot really be compared with proceedings in the three other countries studied here. For this reason, common proceedings before police and district courts will form the main focus of this thesis.

[153] A prosecutor specializing in youth cases and designated by the general prosecutor of the competent court of appeal represents the public ministry before the youth courts. Youth court judges and the youth courts are both *jurisdictions spéciales* and only have jurisdiction over specific acts and persons as provided by law. They are not a section of the *Tribunal correctionnel*.

[154] Only misdemeanours and felonies may be tried before this court.

Since 2004, the jurisdiction of certain district courts (*juridictions interrégionales*) has been extended to cover multiple districts, where proceedings concern organised crime.[155]

3.2.2 Appeal level

Not all decisions made in the first instance can be challenged by way of appeal. This depends both on the court that made the decision and on the severity of the penalty. When an ordinary form of review is opened against a decision, this is called a decision made in the first instance and in the first resort. A decision is made at the final instance when it cannot be challenged by way of an ordinary form of review.[156] When appeal is impossible and the decision is made in the last resort, a cassation appeal may be still available. If the decision can be challenged by way of appeal, the following courts have jurisdiction

- the criminal section of one of 35 courts of appeal (*chambres correctionnelles de la Cour d'appel*) to judge appeals against decisions made in the first instance by a lay judge, a police court or a district court
- the *Cour d'assises d'appel* judges appeal against decisions made by the *Cour d'assises*. Since 2000, decisions made by the *Cour d'assises* may be challenged by way of appeal[157]
- the criminal investigation section (*chambre de l'instruction*) hears appeals against the decisions of investigating liberty and custody judges

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[155] Loi n. 2004-204 du 9 mars 2004, portant adaptation de la justice aux évolutions de la criminalité, JO 10 mars 2004, 4567. If an organised gang, as under Article 706-73 CPC, commits a crime, the jurisdiction to handle this crime is extended to a court that would normally not have jurisdiction to handle it. This extension of jurisdiction is intended to assist in combating with more efficiency complex crimes involving acts committed in different districts by different suspects and crimes associated with the main crime. This new regulation applies especially to complex economic and financial crimes.

[156] Stéfani, Levasseur & Bouloc 2001, p. 882.

[157] Loi n. 2000-516 du 15 juin 2000, renforçant la protection de la présomption d'innocence et les droits des victimes, JO 16 juin 2000, 9038. Until 2000, judgements made by the *Cour d'assises* could only be challenged by way of cassation appeal. Apart from the number of jurors (12 rather than 9), appellate assizes courts are identical to first instance assizes courts. The procedure applicable before a first instance assizes court is also applicable before the appellate court. The court has the same jurisdiction as the first instance assizes and the prosecutor who participated in the first instance may also be designated to participate in the appeal session; see Circulaire Crim. 00-14 F1 du 11 Décembre 2000 sous Article 380-1 CPC (2006).

3.2.3 Supreme Court

At the highest level, the criminal section of the Supreme Court (*Cour de cassation*) judges cassation appeals lodged against decisions made in the last resort. The Supreme Court only decides whether the lower court applied the law correctly but does not judge the evidence (see 3.5.4.1). It may judge revision appeals against valid and definitive decisions if an error of fact is discovered in the case (see 3.5.4.3). The Supreme Court also provides legal advice to courts that request it.

3.2.4 Types of judicial decisions

Various types of decisions are made by the different authorities at the various stages of the criminal process. Their classification is useful in determining whether, and by what means, a decision may be challenged. The authorities empowered to do justice can issue the following

- decisions made before enouncing the law (*décision avant dire droit*)
- decisions setting out a lack of competence (*décision d'incompétence*)
- judgements enouncing the law, including
  - judgement of acquittal[158]
  - judgement exempting the accused from a penalty (*décision d'exemption de peine*)
  - judgement of conviction (*décision de condamnation*)

3.3 Organisation of the French PPS

3.3.1 Structure of the public ministry

3.3.1.1 The structure of the public ministry

Since the Napoleonic reforms, the public ministry, consisting of representative units of the prosecution service (*parquet*), is divided into three levels matching the seats of the courts

[158] The term *relaxe* is used for a judgement made by the *Tribunal correctionnel*, *Tribunal de police* and the *juge de proximité* whereas the term *acquittement* is used for a judgement made by the *Cour d'assises*. Technically there is no difference between the two terms.

- the general prosecutor's office (*Parquet général près la Cour de cassation*) within the jurisdiction of the Supreme Court. This office exercises no authority over other offices
- appellate offices (*Parquets généraux près la Cour d'appel*) established within each appellate court and having authority over prosecutors acting before all second instance courts and *Cours d'assises* with resort to the court of appeal and the chief district prosecutor
- district offices (*Parquets du Procureur de la République près le Tribunal de grande instance*) established within each district court and having authority over prosecutors carrying out their functions before all first instance courts below a district court (*juge de proximité*, *Tribunal de police*, *juge* and *Tribunal des enfants*)

*3.3.1.2 The general prosecutor's office at the Supreme Court (*Parquet général près la Cour de cassation*)*

This includes

- a general prosecutor at its head (*Procureur général près la Cour de cassation*)
- several advocate generals (*Avocats général près la Cour de cassation*)

The prosecutor's office at the Supreme Court is subordinate to the Minister of Justice. It is also part of the prosecution service but does not really carry out prosecution functions. Therefore, the instructions of the Minister of Justice have a limited scope with regard to prosecutors at the Supreme Court and may only affect, for example, orders to institute a cassation appeal in the interest of the law or a revision appeal (see 3.5.4.1 and 3.5.4.3). The general prosecutor may choose to delegate part of his functions to his direct deputies, i.e. the advocate generals. The latter carry out their functions in the name of the general prosecutor, with advocate generals of the first rank substituting for the general prosecutor when necessary. The general prosecutor's position is outside the hierarchy of the prosecution service. He discharges his functions only within the jurisdiction of the Supreme Court.

Indeed, prosecutors at the Supreme Court do not institute criminal proceedings, they participate in cassation proceedings before the Supreme Court as joined parties (*partie jointe*). In other words, in cassation proceedings an advocate general ensures the correct application of criminal law. This implies that an advocate general

does not represent the public ministry as a defendant or plaintiff but gives independent legal advice on legal issues.[159] There is one exception to this principle as regards criminal proceedings instituted against government ministers or the President of the Republic before the Court of Justice of the Republic or before the High Court of Justice.[160] Within the jurisdictions of the High Court of Justice and the Court of Justice of the Republic, the general prosecutor of the *Cour de cassation* represents the prosecution service. The only circumstances under which the general prosecutor may institute proceedings in common cases is an extraordinary appeal in the interests of the law (*pourvoi en cassation dans l'intérêt de la loi*). In this way he can challenge every decision, *ex officio* or on instruction of the Minister of Justice (see 3.5.4.1).

*3.3.1.3 The public prosecutor's office at the appellate court (*Parquet général*)*

There are 35 appellate prosecutors' offices, each of which includes

- a general prosecutor (*procureur général*)
- several deputies (*avocats généraux and substituts généraux*)

As the office head and the superior of public prosecutors acting within the territory of the appellate court, the general prosecutor has the following administrative functions.[161] He

- administers the appellate office
- supervises the application of the criminal law within the jurisdiction of and with resort to the court of appeal, and supervises security in all courts
- ensures the smooth functioning of all the prosecution offices with access to the court of appeal
- coordinates the work of the chief district prosecutors
- coordinates the implementation of the criminal prosecution policy by the lower offices
- supervises the police officers and police agents of the jurisdiction of the court of appeal

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[159] The general prosecutor's office does therefore not play an important part in the present thesis which is especially focused on the functions of the prosecution service in the common criminal process.
[160] The criminal proceedings before these two courts have a specific character and for this reason fall outside the scope of the present research.
[161] Loi du 20 avril 1810, article 45, Sirey, Duvergier & De Villeneuve 1821, p. 78.

While the general prosecutor has authority over public prosecutors acting in all offices within the territorial jurisdiction of the court of appeal (Article 37 CPC), he has no disciplinary power over them. This power lies with the Minister of Justice, and the general prosecutor is also accountable.

The general prosecutor institutes criminal prosecution within the scope of the appellate court. He personally represents, or with assistance from the advocate generals, the public ministry before (Article 34 CPC)

- the court of appeal
- the criminal investigation section of the court of appeal (*Chambre de l'instruction*)
- and the *Cour d'assises* if its seat lies in the jurisdiction of and can resort to the court of appeal

Advocate generals and general deputies do not have inherent powers – they discharge their functions only as deputies of the general prosecutor. The general prosecutor distributes tasks and functions to his deputies. He may participate in whatever proceedings he desires.

3.3.1.4 The district offices

There are 181 district offices, each of them including

- the chief district prosecutor (*Procureur de la République*)
- and deputies (*premier substituts and procureurs adjoints*)

The chief district prosecutor is the head of his office and therefore has the exclusive power to organise and administer this office. Deputy prosecutors do not have inherent powers, they act only as deputies of the chief district prosecutor (Article 39 CPC). The chief district prosecutor distributes tasks and functions to his deputies and may take over tasks carried out by them at any moment or change the distribution of functions (Article L 311-15, *Code de l'Organisation Judiciaire*). However, since 2004, the general prosecutor of the appellate court superior to the chief district prosecutor appoints prosecutors dealing with organised crime or complex financial and economic crime (Article L. 650-1 § 2, *Code de l'Organisation Judiciaire*). The chief district prosecutor can issue to his office staff any orders or instructions he deems necessary. The district office has jurisdiction to prosecute all crimes committed within the district territory. The chief district prosecutor has the right to challenge by way of appeals to the courts within the district, independent of the

opinion of his deputy in the case. The chief represents the public ministry personally or with the assistance of his deputies before

- the district court
- all courts of first instance with resort to the district court (*tribunaux de police* and *juges de proximité*)[162]
- the *Cour d'assises*, if it has its seat within the district court
- the investigating judge

3.3.1.5 Ranking and the general principle of substitution

The attribution of competences within the prosecution service depends on the ranking of a prosecutor and on the decision of his superior. There are three ranks of magistrates – first rank, second rank and 'out of ranking'.[163] The functions of the highest magistrates are 'out of ranking' (i.e., magistrates of the Supreme Court, general prosecutors, advocate generals of the appellate courts and the chief district prosecutor), after this come the first rank and finally the second rank magistrates. The head of each office decides on the distribution of competences within his office.

According to the principle of general substitution or indivisibility, every prosecutor is a representative of their office. Independent of rank or the delegation of powers that the chief may have decided upon, any prosecutor from a district office possesses the right to carry out any and all acts of criminal prosecution.[164] When a prosecutor performs an act, he does so for the office. As a result, a prosecutor within an office can replace another during the course of a single case or trial. Different prosecutors can perform different acts within one set of criminal proceedings.

However, indivisibility and substitution do not mean that a prosecutor discharging his duties in a district cannot become a judge in the same district. A judge who was previously a prosecutor in a given district, may decide upon cases instigated while he was still prosecutor, unless it is shown that he participated, directly or

[162] Before the police court and the lay judge, diverse bodies may also represent the public ministry such as a police officer (with the rank of commissaire de police, commandant de police or capitaine de police), an agent of the water and forest administration and in exceptional cases, the mayor of the city where the police court has jurisdiction.

[163] Within each rank there are also levels depending on the seniority of the magistrate.

[164] Cass. Crim. 3 juill. 1990, Bull. Crim. n. 275.

indirectly, in the proceedings of that case (in principle, according to Article 669 CPC, a prosecutor cannot be disqualified).[165]

3.3.2 Subordination

3.3.2.1 Appointment of the organs of the public ministry

Public prosecutors are subordinate to the Minister of Justice, who appoints and may recall them. The same rules apply to the recruitment of judges and prosecutors. They can move between posts. Most magistrates are appointed after having passed a competitive examination and after being educated at the National School of Magistrates (*Ecole Nationale de la Magistrature*). However, active persons who meet specific requirements provided by law (such as professionals with specific experience, specific titles or diplomas) may be directly recruited and appointed as magistrates. The 1958 Order sets out the following general requirements (Article 16) for a person to be eligible to become a magistrate

- in principle, he must possess a French university degree requiring four years of study, with exceptions for certain categories of professionals
- he must be of French nationality
- he must be of good character
- he must be entitled to his civic rights
- he must have discharged his obligations under the Code of Military Duty
- he must meet the health requirements set for the exercise of the functions of magistrate

In contrast to judges, prosecutors are subordinate to and removable by the Minister of Justice. Technically, the Minister of Justice moves the President of the Republic to appoint a prosecutor by way of order, though the President may not exercise his discretion. After training at the National School of Magistrates, trainees apply to be appointed judges or prosecutors. The Minister of Justice refers these applicants to the High Council of the Judiciary. The section of the Council with jurisdiction over public prosecutors advises the Minister on the appointment of prosecutors. The advice is never binding and the Minister of Justice may decide to waive it. The advice is not required for the appointment of the general prosecutor at the

[165] Cass. Crim. 17 déc. 1964, JCP 1965. II. 14042, note Combaldieu.

Supreme Court and for general prosecutors at the appellate courts because they are appointed by the cabinet.

A magistrate may be appointed to a position for a maximum of five years (*détachement judiciaire*). This appointment is effected by order of the Minister of Justice after a binding opinion of a *Commission d'avancement*. This commission is composed of the First President of the *Cour de cassation*, the president, the general prosecutor of the *Cour de cassation*, and several other judges and prosecutors. In its opinion, the commission establishes the functions of this magistrate. The appointment comes into force only after a six-month probation period.[166]

3.3.2.2 Authority of the Minister of Justice over the public ministry

The Minister of Justice is a member of the cabinet, but is not a public prosecutor and does not exercise the tasks and functions of the public ministry.[167] He is politically responsible to parliament, however, the latter may only pass a vote of non-confidence against the whole government and not against an individual minister.

According to Article 5 of the 1958 Order, public ministry magistrates are under his authority. The 2004 amendment of the CPC provided a new Article 30 to the CPC, as follows

> The Minister of Justice carries out the prosecution policies determined by the government. He ensures the coherence of their application throughout the national territory.
>
> To these ends, he sends general instructions about prosecutions to the prosecutors attached to the public prosecutor's office.
>
> He may denounce violations of the criminal law of which he has knowledge to the prosecutor general, and charge him, by means of written instructions attached to the case file, to initiate prosecutions or to cause them to be initiated, or to seize the competent court of such written orders that the Minister considers to be appropriate.[168]

This new provision does not provide the Minister of Justice with new rights or powers. It was only introduced to strengthen the consistency and the effectiveness of the criminal policy by

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[166] Sections 4 and 5 of the 1958 Order.

[167] According to Article 8 of the 1958 Constitution, the Minister of Justice is appointed by the President of the Republic based on a motion of the Prime Minister. The President also decides on his dismissal at the Prime Minister's motion.

[168] Translations of French laws and codes are provided at <www.legifrance.org>.

establishing more accurately the connection between the Minister of Justice and the public prosecution.[169]

The Minister of Justice may also give general instructions affecting the *action publique*.[170] This right is actually implied by the general power of the government to determine and conduct national policy (Article 20, 1958 Constitution).[171] Under the previous system, the Minister of Justice could only address general prosecutors (*procureurs généraux*) with general instructions.[172] However, in practice it was quite common for general instructions to be addressed to all prosecutors. The new Article 30 clarifies matters. Nevertheless, these instructions should remain extremely general and only provide the *parquet* with general advice, especially affecting the enforcement of new criminal legislation. These instructions are solely advisory and have no binding effect on prosecutors because, besides national criminal policy, every district should be able to adapt to the particular circumstances of local criminality. The chief district prosecutors have, therefore, the important power to interpret and implement these directives (see 3.3.3.1).

The Minister of Justice has the right to give specific instructions but he cannot issue them directly to a lower prosecutor. Only the general prosecutor of the appellate court may be the recipient of such instructions. The general prosecutor forwards the instructions to the competent chief district prosecutor, who will, in turn, then either carry out the required act himself or issue orders to the deputy in charge of the case. By way of specific instructions, the Minister of Justice may only

- order the institution of criminal proceedings in a specific matter
- order a specific opinion to be delivered in a pending case (*réquisition*) when the matter has already been referred to a court. For example an opinion on

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[169] See <http://www.assemblee-nationale.fr/12/rapports/r0856-t1.asp>, France, Assemblée Nationale n. 856: 'Rapport sur le projet de loi (n. 784), portant adaptation de la justice aux évolutions de la criminalité', tome I (2ième partie), 82.

[170] The *action publique* is established by Article 1 of the CPC as the public prosecution for the imposition of penalties (see 3.4.2.1).

[171] General instructions (*circulaires*) are the normal means by which ministers inform civil servants of government policies. These instructions may be published. They are only binding on civil servants and the administration but not on citizens. However, a citizen may rely on an instruction even though the recipient of that instruction did not apply it; see Trotabas & Isoart 1998, p. 338.

[172] Malibert 1994, p. 8.

- the dismissal of the case
- the penalty

Moreover, instructions concerning specific matters must be written and attached to the file handed to the court at the hearing. In theory, the Minister of Justice does not have the right to instruct a prosecutor not to institute a prosecution. However, the law does not clearly prevent such instructions from being issued.

*3.3.2.3 The subordination of the lower members of the public ministry to their superiors (*la plume est serve*)*

According to Article 5 of the 1958 Order, magistrates of the *parquet* are also under the direction and supervision of their hierarchical chiefs. This subordination obliges lower prosecutors to follow the instructions of their superior when acting through written submissions. The first sentence of Article 33 CPC provides

> The public prosecutor is bound to make written submissions in conformity with the instructions given under the conditions set out in Articles 36, 37 and 44.

General prosecutors of appellate offices direct their own deputies. They may take over a deputy's functions where he refuses to carry out the chief's orders. General prosecutors are also responsible for the implementation of criminal policy within the ambit of their activities. They may instruct chief district prosecutors with access to the court of appeal (Article 36 CPC). These specific instructions will be in writing and attached to the file. The general prosecutor may thus order a chief district prosecutor to

- institute a criminal prosecution
- take the necessary steps for the institution of a criminal prosecution
- give a specific written opinion (such as the dismissal of the case or a specific penalty)
- act or refrain from acting in a specific way

A general prosecutor also has the right to challenge decisions made by a first instance court or an investigating judge by way of appeal. However, a general prosecutor does not have the right to order a chief district prosecutor not to prosecute a case.

Without prejudice to any specific reports drafted at the request of the general prosecutor, the chief district prosecutor sends the general prosecutor an annual report on the activities and management of his office, as well as on the application of the law (Article 35 § 3 CPC).

With this information, the general prosecutor decides whether information should be forwarded to the Ministry of Justice.

At the district level, prosecutors of the district court and staff empowered with prosecution functions before other first instance courts (see 3.3.1.4) are subordinate to the chief district prosecutor, who has rights equivalent to the general prosecutors. In principle, public prosecutors are subordinate to their chief; however, in the absence of instructions or orders from the chief, the deputies remain free to act.

3.3.3 Limits to subordination

*3.3.3.1 Chief district prosecutor's own power of decision (*pouvoir propre*)*

Article 40 of the CCP provides that a chief district prosecutor receives complaints and denunciations and decides how to deal with them. Once the facts have been brought to his attention, he must alone decide within his territorial jurisdiction if it is appropriate to

- initiate a prosecution
- implement alternative proceedings to a prosecution
- or dismiss the case without taking any further action

This power of decision belongs to the chief district prosecutor and no one can force him to act or refrain from acting. In application of this *pouvoir propre,* the chief district prosecutor is the only official to take the local circumstances of criminality into account and thus to interpret general directives issued by the Minister of Justice. Even if his actions are performed in opposition to a superior instruction, they remain legal and effective. A superior can only attempt to convince him to change his opinion.[173] Of course, the fact that he may refuse to act on a superior's instruction does not mean that a chief district prosecutor would not be liable for a breach of duty (see 3.3.5.2).

Neither the Minister of Justice nor the general prosecutor superior to a chief district prosecutor can issue an order not to instigate a prosecution. The law does not clearly provide for such circumstances and it has hence been the subject of interpretations.[174] In 1995, the Ministry of Justice stated in a directive that the Minister of Justice has no right to prevent the initiation of a

[173] Cass. Crim. 12 mai 1992, Recueil Dalloz 1992, 427, note Mayer; Molins 2004, p. 4.
[174] Rassat 1967, p. 100.

prosecution.[175] However, once a criminal prosecution is instigated, the Minister or the competent general prosecutor may order the prosecutor in charge of a case to deliver a written opinion before the court leading to the dismissal of the case. Specifically, the general prosecutor who is the direct superior of the chief district prosecutor may directly challenge the judgement of a lower court by way of appeal (Article 497 CPC).

*3.3.3.2 Freedom to speak at the hearing (*la parole est libre*)*

Article 5 of the 1958 Order also provides that prosecutors are free to speak at the session. The second sentence of Article 33 CPC notes

> The public prosecutor is free to make such verbal submissions as it believes to be in the interest of justice.

Indeed, during a session the public ministry's representative is independent, regardless of his position in the hierarchy. This provision should not be understood to imply that a deputy can oppose a superior's order (if this occurs, disciplinary proceedings can be instigated if the interests of justice have been undermined). If a prosecutor is ordered to make specific written and/or verbal submissions, this should be obeyed. However, he has the right to declare at the hearing that he acts on his superiors' orders contrary to his own opinion.

If a prosecutor does not receive an order, which is most often the case, he can decide to request a verdict of acquittal in his closing statement even though his written submission recommended conviction. The court is not bound to follow the written opinion over the verbal one.

3.3.4 Other rights and duties of French prosecutors

When appointed and before taking their position, all magistrates take the following oath (Article 6, 1958 Act)

> I swear to perform my functions rightly and faithfully, to keep with trust the secret of the deliberation and to always behave as an honourable and loyal magistrate. (author's translation)

In addition to their hierarchical obligations, magistrates are also obliged to preserve the dignity of their position, i.e. they must always behave with honour, dignity and tact (*honneur, dignité* and *délicatesse*). They must not

[175] See 'Précision ministérielles' under Article 36 of the French CPC (2006).

- participate in political demonstrations incompatible with this obligation
- show any hostility towards the system of government in place in the country
- participate in a political decision-making process
- participate in concerted action aimed at preventing the functioning of the judiciaries
- engage in any other professional activity except for academic, scientific, artistic and literary activities
- strike

The law does not establish the shape and the scope of these obligations with precision. The control over magistrates exercised by the disciplinary power is determined by the context in which the behaviour of the magistrate in question took place (see 3.3.5.2).

3.3.5 Criminal and disciplinary responsibility of prosecutors

3.3.5.1 Penal responsibility of members of the public ministry

Members of the prosecution service do not enjoy any criminal immunity and are responsible for any criminal offences that they commit while in office. They have the right to be tried in a jurisdiction other than the one where they carry out their functions.

3.3.5.2 Disciplinary responsibility of members of the public ministry

Article 43 of the 1958 Order provides that any breach by a magistrate of his professional duties or failure to preserve his honour, dignity or *délicatesse*, is a disciplinary breach.[176] The breach is investigated by the central administration of the Ministry of Justice. If the magistrate is a public prosecutor, his responsibility is considered in the light of his obligation of subordination. Before the instigation of disciplinary proceedings, a magistrate who committed a breach might only receive a warning from one of his superiors.

The Minister of Justice may institute disciplinary sanctions against public prosecutors (Article 48, 1958 Order). However, no sanction shall be imposed before the section of the High Council of the

[176] E.g. the High Council of the Judiciary decided that a prosecutor committed a breach of his professional duty and of *délicatesse* because he published an article about another prosecutor in a professional review that could harm victims of anti-Semitism. See <http://www.conseil-superieur-magistrature.fr/rapports-annuels/rapport1999/rapport1999-partie5.htm>.

Judiciary with jurisdiction for public prosecutors has heard the prosecutor and issued an opinion related to the sanction. The Minister of Justice is not bound by the opinion. He may impose a stricter sanction, which would, however, require a fresh opinion from the Council (Article 66, 1958 Order).

Article 45 of the 1958 Order provides that the disciplinary action against a magistrate can entail

- a reprimand noted in the magistrate's file
- transfer to a different location
- discharge from certain functions
- demotion in the hierarchy[177]
- compulsory retirement
- discharge from his or her functions with or without the right to a pension

3.4 The functions of the French PPS in the preliminary phase of the criminal process

3.4.1 Functions in fields other than the criminal process

The French public ministry primarily has a role in the criminal process but is also very active in other fields of law, such as civil and commercial law. In civil law, public prosecutors can intervene in cases *ex officio* where provided by law, or can join a case in order to deliver an opinion related to the proper application of the law, such as in cases affecting minors or guardianship and those affecting French nationality. One of the purposes of the intervention of the public ministry is in the upholding of public safety.[178] In commercial cases, the public ministry intervenes in bankruptcy cases, among others. The public ministry also supervises certain professions (e.g. notaries) and detention centres (prisons). In addition, after a judgement has closed a criminal process, the prosecution service is responsible for the enforcement of this judgement.

[177] Such demotion may consist of demotion in rank from one level to another or from the first rank to the second, or temporary suspension for a maximum of one year with total or partial withholding of salary.

[178] Article 6 of the Civil Code stipulates that statutes relating to public safety and morals may not be derogated from by private agreements.

3.4.2 General principles concerning the preliminary proceedings of the criminal process

3.4.2.1 Distinction between action publique *and* action civile

The commission of a criminal offence gives rise to two types of judicial actions, public prosecution (*action publique*) and civil claims (*action civile*). A criminal court is not only competent to impose criminal penalties but can also award the victim of a criminal offence with damages, as a civil court would do.

Article 1 CPC stipulates that public prosecution for the imposition of penalties is initiated and exercised by the judges, prosecutors or civil servants to whom it has been entrusted by law. The injured party under the conditions determined by the CPC may also initiate this prosecution. In fact, the *action publique* belongs to society and not the public ministry, which only has the right to exercise it. This means that a public prosecutor who lodges an appellate action (such as an appeal or a cassation appeal) has no right to withdraw it.

Article 2 § 1 CPC stipulates that a civil action pursuing compensating damage suffered as a result of a felony, a misdemeanour or a petty offence is open to anyone having personally suffered damage directly from the offence.

When a criminal offence has caused damage to someone, both types of action can be initiated and exercised in different ways. For example

- the victim of an offence can initiate proceedings but cannot carry them out; he may only bring a civil claim and join the public prosecution to request damages. The prosecutor carries out the prosecution on the basis of evidence provided by the victim
- a public prosecutor cannot initiate a civil claim but may only initiate a prosecution. Once the prosecution is initiated, the victim may join the proceedings and lodge his civil claim
- if a victim has initiated prosecution and requested damages, he may always drop the civil claim but this has, in principle, no effect on the prosecution

*3.4.2.2 The opportunity principle (*l'opportunité des poursuites*)*

The law provides the right to dismiss a matter only to the prosecution service.[179] Once the prosecution service is notified of a crime, the chief district prosecutor may dismiss the case for

- technical reasons (see 3.4.3.2.1)
- or reasons provided by the general interest (*l'intérêt général*)

If the facts constitute an offence established by law, the chief district prosecutor is free to appraise whether the suspect will be brought to court. When he considers that facts brought to his attention constitute an offence committed by a person whose identity and domicile are known, and for which there is no legal provision blocking further prosecution, the chief district prosecutor with territorial jurisdiction decides whether it is appropriate

- to file an indictment with the court (*mise en mouvement de l'action publique*)[180]
- to offer alternative proceedings to court prosecution (see 3.4.3.2.3)
- or to dismiss the case (*classement sans suite*) on grounds of opportunity, e.g. if
  - it is the first offence committed by the suspect
  - if the damages caused by the offence are very small
  - if the public safety has suffered virtually no harm
  - if the victim withdraws his complaint

The complainant and the suspect are notified of the decision to dismiss a case. In addition to the national criminal policy defined by the Minister of Justice, there are local criminal policies adapted to local circumstances. In general, chief district prosecutors comply

[179] The police and the other officers with the power to investigate, as well as any public body or civil servant in office, are required to notify the chief district prosecutor of any crime that comes to their knowledge without delay (Article 19, 27, 29 and 40 § 2 CPC).

[180] In very exceptional circumstances, the decision to prosecute depends on a formal notice, or a complaint from a victim or an authority, such as cases concerning criminal offences committed by a French national outside the territory of the French Republic (Article 113-8 CC) or concerning criminal tax offences. For more, see Stéfani, Levasseur & Bouloc 2001, p. 535. Also, in exceptional instances, an organ other than the chief district prosecutor may make the decision to prosecute (e.g. the tax authorities, the water and forest authority, the roads and mines authority or the customs authority).

with the Minister's directives for the most part, but in practice there are disparities.[181]

3.4.2.3 Control over opportunity

The government issues directives with respect to the implementation of criminal statutes and new regulations, and concerning the opportunity principle (*politique pénale*). However, there is no uniformity in the implementation of these directives between districts because of the chief public prosecutor's own discretion in decision-making (see 3.3.2.2 and 3.3.3.1).

A decision by the prosecution service to dismiss a case is no guarantee to the suspect that he will not be charged and prosecuted. In fact, as long as the time limit to prosecute has not elapsed, the competent chief district prosecutor may still reopen the case and take a new decision on the charge.

Moreover, any person reporting an offence to the chief district prosecutor can lodge an appeal with the general prosecutor if, following his report, a decision is made to dismiss the case without further action (Article 40-3 CPC). If the general prosecutor feels that the appeal is well founded, he may instruct the chief district prosecutor to initiate a prosecution. The instruction is in writing and attached to the file. This new provision established by the 2004 amendment does not provide the victim a guarantee against a second dismissal. Therefore, the victim could choose to initiate the proceedings himself.

The victim may initiate proceedings and directly summon the suspect before a criminal court (*citation directe*) or before an investigating judge (*plainte avec constitution de partie civile*). In principle, the victim of a criminal offence may always initiate such proceedings but, in practice, this is done when the prosecution refuses to prosecute. Such an action is possible, of course, if the victim meets the requirements provided by the CPC for the institution of criminal prosecutions. The prosecutor must participate in the proceedings but he has the right to submit an opinion arguing for the dismissal of the case. However, this submission cannot be justified for opportunity reasons.

[181] E.g. disparities in staff resources, the scale of certain crimes and disparities in populations explain disparities in local criminal policies, see Hodgson 2005, p. 228.

3.4.2.4 The phases of the preliminary proceedings

The first phase of the criminal process is, in general, the discovery of and research into the criminal facts by the police (*enquête préliminaire*). This phase mainly involves the police and ends with a decision on the charge by the chief district public prosecutor (*décision sur la poursuite*). The prosecution phase (*poursuite*) may follow the investigation phase if the public prosecutor does not decide to dismiss the case and does not decide on alternative proceedings to prosecution. The prosecutor can then charge the suspect and summon him before the court or refer the case to an investigating judge. In France, a judicial investigation is compulsory in certain cases, such as felonies (Article 74 CPC), or felonies and misdemeanours committed by juveniles. A judicial investigation can also be requested in other cases by the victim or the public prosecutor.[182]

3.4.3 The role of the French prosecution service in the preparatory criminal proceedings

*3.4.3.1 First phase – the investigation (*enquête de flagrance *and* enquête préliminaire*)*

There are two types of investigation – the *flagrante delicto* inquiry and the preliminary inquiry.[183] These inquiries consist of a number of police acts with the purpose of discovering the truth and upholding public safety.[184] In addition to facts discovered by the police, anyone with knowledge concerning a criminal offence may complain to

- a public prosecutor
- the judicial police (*police judiciaire*)[185]

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[182] The present paper will not elaborate on the judicial investigation because it is outside the scope of the preliminary proceedings conducted by the prosecution service. Indeed, the public prosecutor only has the role of a party, while the investigating judge has the main role and power of decision.

[183] According to Article 53 CPC, a flagrant felony or misdemeanour is a felony or misdemeanour in the process of being committed or which has just been committed. The felony or misdemeanour is also flagrant where, immediately after the act, the suspect is pursued by hue and cry, or is found in the possession of articles, or has on or about him traces or clues that give grounds to believe he has taken part in the felony or misdemeanour.

[184] Buisson 2002.

[185] The judicial police consists of officers of different ranks (*officiers de police judiciaire, agents de police judiciaire, fonctionnaires* and *agents chargés de fonctions de police judiciaire*) empowered with different prerogatives during the preliminary proceedings. Officers belonging to various corps, including certain

The victim of a criminal offence may also complain directly to

- an investigating judge[186]
- a criminal court[187]

In a *flagrante delicto* investigation, the police notify the prosecutor of the investigation from the outset (Articles 53 and 54 CPC), whereas in preliminary inquiries the prosecutor may be unaware of the proceedings until a specific act needs his approval, or until the matter is reported to him. Once informed, the public prosecutor orders the police to carry out an investigation in *flagrante delicto* for eight days. Under certain conditions, the prosecutor extends this period by an additional eight days. In practice, the police carry out the preliminary inquiry *ex officio* or on the instructions of a public prosecutor. From the end of the custody period (*garde à vue*), a preliminary inquiry can last six months. Once this period has elapsed, the suspect has the right to ask the prosecutor to make a decision on further prosecution or on dismissal. The prosecutor then has one month to prosecute further, dismiss or ask a judge to extend the period of inquiry.

In *flagrante delicto* investigations, the police are empowered with more prerogatives and compulsive powers than in preliminary inquiries. During a preliminary inquiry, no coercive measures can be taken without the consent of the person involved or without the authority of a magistrate (e.g. sealing off the area of the crime, preventing witnesses from leaving, carrying out identity checks, seizing material evidence, etc). However, in a *flagrante delicto* inquiry, the police have greater powers. The public prosecutor, who

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officers of the gendarmerie, the city mayor, and certain officers of the national police, are, by right, officers of the judicial police. Only the *officiers de police judiciaire* have the right to institute an inquiry and have coercive powers such as the taking of a suspect into custody.

[186] An investigating judge may only be brought into a case and act upon a warrant issued by the prosecutor (*réquisitoire à fin d'informer*) or by complaint from the victim (*plainte avec constitution de partie civile*). If he has knowledge of facts that may constitute a criminal offence, he must communicate forthwith to the chief district prosecutor the complaints or the official records which establish its existence (Article 80 CPC).

[187] If the victim directly summons the suspect before a criminal court, there are no preliminary proceedings and investigations will only take place at the hearing. The victim shall provide the court and the public prosecutor participating in the hearing with sufficient elements concerning the existence of a criminal offence. The public prosecutor participating in the hearing is competent to carry out the prosecution and may request the imposition of a penalty based on these elements.

is immediately notified, can visit the scene of the offence personally and take charge of investigations (Article 68 CPC).

A police officer may, where deemed necessary for an inquiry, arrest and detain any person (*garde à vue*) if there are plausible reasons to suspect that they have committed or attempted to commit an offence. At the beginning of the arrest and custody, the officer must inform the district prosecutor. The person thus placed in custody may not be held for more than twenty-four hours, extendable upon written decision of the prosecutor for a further period of up to twenty-four hours. The district prosecutor may make this authorisation conditional on the prior production before him of the person detained.

*3.4.3.2 Second phase – the prosecution phase (*poursuite*)*

3.4.3.2.1 Verification of the admissibility and the opportunity to prosecute

When the police (and/or the prosecutor) consider that the investigation is complete, or that there is enough evidence to bring a suspect before the court or institute a judicial investigation, the matter is officially reported to the public prosecutor. Instead of prosecuting, the public prosecutor is empowered with the right to dismiss a case for technical or opportunity reasons, or to settle it by other means. Therefore the public prosecutor, upon receiving a case dossier, will first check whether a prosecution is admissible and opportune. The following verifications are undertaken

- that the prosecution is not inadmissible due to (Article 6 CPC)
  - the death of the defendant
  - expiry of the limitation period
  - amnesty
  - repeal of the criminal law
  - *ne bis in idem*
  - the case has been settled by way of transaction where provided by law
  - conditional suspension of prosecution
  - the withdrawal of a complaint, where such complaint is a condition necessary to prosecution
- the criminal qualification of the facts
- the capacity in which the suspect is involved in the facts (suspect, accomplice)
- the existence of pleas such as self-defence

- the existence of reasons to exempt the suspect from criminal responsibility (e.g. insanity)
- the appropriate jurisdiction for the prosecution
- the opportunity for prosecution (see 3.4.2.2)

3.4.3.2.2 Further prosecution

If the prosecution is admissible, the chief district prosecutor may decide

- to refer the case to an investigating judge by warrant (*réquisitoire à fin d'informer*). Once a judicial investigation commences, the public prosecutor loses his *dominus litis* position and becomes a party to the proceedings. However, he retains certain important rights during the judicial investigation, such as to give his opinion on the acts carried out by the judge, to request an act by warrant and to challenge all the decisions of the investigating judge. Once the investigation is complete, the investigating judge decides whether to summon the accused to court (*ordonnance de renvoi*) or not (*ordonnance de non lieu*)
- to issue an indictment and summon the accused before the court. There are various types of indictment
  - summons procedure (*citation directe*) – for matters of lesser urgency; here, a bailiff serves the indictment on the defendant and summons him to the hearing
  - the immediate appearance procedure (*comparution immédiate*), where the accused is heard on the day of completion of the police inquiry
  - finally, the judicial 'rendez-vous' (*convocation par procès-verbal*) can be used for less serious cases, with the defendant ordered by writ to appear in court within a short period (between 10 days and 2 months)

3.4.3.2.3 Settlements alternative to prosecution or to a full hearing

If the prosecution is admissible, the public prosecutor may also take a number of decisions, out of court, prior to any public prosecution, when such a measure is likely to secure damages to compensate the victim or to put an end to the disturbance resulting from the offence, or to contribute to the rehabilitation of the offender. These include (Article 41-1 CPC)[188]

[188] This procedure applies only to minor offences such as occasional use of soft drugs.

- bringing to the attention of the offender the duties imposed by law
- referring the offender to a public health, social or professional organisation
- requiring the offender to regularise his situation under any law or regulation
- requiring the offender to make good the damage caused by the offence
- put in motion, with consent of the parties, a mediation between the offender and the victim

These procedures suspend the limitation period for public prosecution, meaning that a prosecution can always be commenced as long as the statute of limitation has not elapsed. Where these measures are not carried out owing to the offender's behaviour, the prosecutor may propose a conditional dismissal or institute a prosecution.

Prior to any prosecution, if the accused acknowledges his guilt for an offence carrying a penalty of a fine or up to five years imprisonment, the public prosecutor may propose a conditional dismissal (*composition pénale*). For example, the following conditions can be proposed (Article 41–2 CPC)

- the payment of a mediatory fine to the Public Treasury
- the surrender of his vehicle
- the surrender of the offender's driving licence
- unpaid work for the benefit of the community for a maximum of sixty hours over a period which may not exceed six months

Only the president of the district court can approve a conditional dismissal. The implementation of the conditions is a plea of *res judicata* and no further prosecution will be possible unless new facts are discovered. Nevertheless, conditional dismissal does not have all the effects of a judgement. If the accused does not implement the conditions, the public prosecutor decides on further prosecution.

Eventually, the public prosecutor can propose to the accused charged with an offence carrying a penalty of a fine or imprisonment of up to five years, one or more of the main or additional penalties incurred, such as imprisonment (Article 495–7 and 495–8 CPC). This hearing, after prior admission of guilt (*comparution sur reconnaissance préalable de culpabilité*), is only possible if the accused acknowledges his guilt. Such a case is brought to court.

However, the hearing will be limited to the validation of the prosecutor's proposal. Important distinctions from the previous proceedings are that the prosecutor may recommend a jail sentence and, particularly, that the approval order made by the court has the effect of a guilty verdict. It is, therefore, not an alternative to public prosecution.[189]

The PPS has the right to use the simplified procedure where provided for by law.[190] According to this procedure, the public prosecutor will refer the case to a judge who can decide the case without hearing by way of criminal order. The judge decides the guilt or innocence of the accused. No custodial sentence is possible. The ordinance is referred to the PPS, which can file an opposing appeal or notify the parties.[191] The accused can file an opposing appeal against the order once he is notified of it.

3.4.4 The role of the French prosecution service in the supervision of the preliminary proceedings

3.4.4.1 Competence of the public ministry in the investigation

In addition to judicial investigations conducted by the investigating judge, judicial police operations are carried out under the direction of the district prosecutor by the officers, civil servants and agents designated by the CPC (Article 12 CPC). In fact, public prosecutors conduct *flagrante delicto* and the preliminary inquiries. A public prosecutor has all the powers of a judicial officer and may choose which service of the police will investigate a case as well as instructing the officers carrying out the investigation. In order for the prosecutor to exercise his supervisory duties over the investigation, the police are, in principle, under an obligation to inform the competent prosecutor about all criminal offences without delay and to send to him all relevant reports they have recorded. However, in practice, the police do not always record all infractions encountered because they do not have the capacity, the means or the time to do so.

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[189] Pradel 2004.

[190] Article 495 CPC provides: 'The following may be dealt with by the simplified procedure set out in the present section: 1 misdemeanours provided for by the Traffic Code and related petty offences under this Code; 2 misdemeanours in relation to the regulations governing road transport; 3 misdemeanours in Title IV of Book IV of the Commercial Code which are not punishable by a sentence of imprisonment.'

[191] On opposing appeal see below 3.5.3.2.

When a public prosecutor instructs the police, he fixes the time limit within which the inquiry must be completed. Where the inquiry is being carried out at the police's own initiative, they supply the district prosecutor with a progress report once it has been running for more than six months (in case of preliminary inquiry only). The police carrying out a preliminary inquiry into a felony or misdemeanour must inform the district prosecutor as soon as a person has been identified against whom there is evidence of the commission or the attempted commission of an offence. The police may make decisions on the custody of suspects without the authorisation of the prosecutor.[192] The prosecutor's authorisation is only needed for extension of the custody period above twenty-four hours. Therefore, while the police may detain a suspect in custody, the public prosecutor controls the reasons motivating the decision and the possible extension or the ending of such custody.

The police forces act under the supervision of the general prosecutor of the appellate office (Articles 38 and 75 CPC), who can instruct them to collect any information he considers useful for the proper administration of justice, and may instruct the police forces to institute a preliminary inquiry. In specific cases, the general prosecutor may request the communication of all files and check whether the law has been respected.

3.4.4.2 Appeal of orders

During judicial investigations, the public prosecutor before the *Chambre de l'Instruction* may challenge the orders of an investigating judge. Since 1 January 2001, the investigating judge cannot decide on preliminary detention. The liberty and custody judge decides, on request from the investigating judge, or in cases under the immediate appearance procedure (see 3.4.3.2.2), on request from the public prosecutor. Similarly, the public prosecutor may also challenge the orders of the liberty and custody judge.

The general prosecutor has the specific right to lodge an appeal against any order of an investigating judge or a liberty and custody judge, even though he may not be actually involved in the investigation (Article 185 § 4 CPC). By exercising this right, the general prosecutor supervises not only the investigation but also the decisions made by the chief district prosecutors. Indeed, the general prosecutor can deliver another opinion on a case in the first

[192] Only a high-ranking police officer may decide on custody.

instance. However, the CPC does not specify how the general prosecutor is to be informed about the first instance investigation.[193]

3.5 The role of the French PPS after the preliminary proceedings

3.5.1 Preliminary verifications

In judicial investigations, the investigating judge decides to summon an accused before the court. Prior to the trial, the accused or the public prosecutor may challenge this decision to charge and summon (*mise en accusation*) by means of a request for verification. Depending on the qualifications of the court competent to hear the case (*Cour d'assises* or district court), the *Chambre de l'Instruction* or the district court performs this verification. In proceedings without judicial investigation, the court of first instance may perform a verification of the indictment if the accused requires it. The accused must request such verification *in limine litis* before the court begins its study of the case.

Verification consists of a decision on the validity of the proceedings but is not a ruling on the main issue. The court may decide *ex officio* to check the indictment and annul the proceedings if the breach of law is particularly grave (*nullité d'ordre public*). Otherwise, the hearing continues and the verification request is rejected.

3.5.2 First instance hearing

If the indictment is valid and meets all legal requirements, the court is competent (*le tribunal est saisi*) to judge the case and the hearing will start on the date and time provided for in the summons. From the moment the indictment is validly received by the clerk of the court, the public prosecutor may no longer dismiss the case. At the session, a short investigation takes place – hearings before the *Cour d'assises* effectively start with the selection of the jury, followed by an investigation, which may be quite long. The victim or his lawyer then submits verbal and sometimes written observations, in which he may request damages. The chief public prosecutor participates in the session and submits his opinion verbally or in writing. As has already been shown, the prosecutor is free to deliver a verbal opinion different from his written one, but he must meet the instructions of his superior (see 3.3.3.2). It is open to the prosecutor

[193] Stéfani, Levasseur & Bouloc 2001, p. 722.

to recommend a particular sentence. Replies are always possible and the accused always has the last word.

3.5.3 Position of the public prosecutor in the ordinary forms of review

*3.5.3.1 Appeal (*appel*)*

An appeal is a form of review available against judgements or decisions to obtain their reversal by a higher court. Judgements made by a district court may be challenged by way of appeal in any cases, whereas police court judgements can only be challenged in certain cases (e.g. if the sentence carries a fine higher than a given amount). Appeal against orders issued by an investigating judge or by the liberty and custody judge are also possible under certain circumstances (see 3.4.4.2).

The accused, the victim (in civil actions only), the chief district prosecutor and the general prosecutor have the right to lodge appeals against decisions made by district courts. In the case of judgements made by the police court, representatives of the public ministry, and thus also high-ranked police officers, have the right to lodge an appeal as long as they have participated in the court proceedings.

An appeal must be filed within ten days of the date of the judgement. In the event of an appeal filed by one of the parties within ten days, the other parties have an additional five days in which to lodge their appeals. This means that a public prosecutor or a victim who did not initially appeal, will have a total of 15 days to lodge his appeal. The general prosecutor may file an appeal within two months of the date of the judgement (Articles 505 and 548 CPC). If the public ministry lodged an appeal first, it has no right to withdraw it.[194]

The appeal suspends the execution of the challenged decision (*effet suspensif*) and the proceedings are automatically transferred to the court of appeal (*effet dévolutif*). The general prosecutor becomes competent to serve the new indictment. The appeal may be limited to specific parts of the judgement (e.g. the sentence) and the court of appeal will only review the issues raised in the appeal. An appeal by the accused alone cannot result in an aggravation of the

[194] The law provides that in certain cases, the victim has the right to withdraw his appeal. Such a party may file an appeal before the public ministry. If the first appellant withdraws his appeal, the appeal of the public ministry is automatically withdrawn.

sentence or of the civil award. Therefore, it is usual that the public prosecutor files a concurrent appeal (*appel incident*). If the public prosecutor alone files an appeal, this will not affect the civil award. The court of appeal re-hears the case in full because it is a second level of jurisdiction.

If the appeal court considers that

- the appeal is out of time or irregularly filed, it declares it inadmissible
- the appeal, although admissible, is not justified, it upholds the challenged judgement
- there is no felony, misdemeanour or petty offence, the facts are not proved or not imputable to the defendant, it dismisses the prosecution and quashes the judgement
- there has been a breach of any of the formalities prescribed by law under penalty of nullity, or a non-corrected failure to comply with such a formality, the court may quash the decision, transfer the case to itself and then decide on the merits (Article 520 CPC)[195]

*3.5.3.2 Opposing appeal (*opposition*)*

Any person correctly summoned who does not appear on the day and at the time fixed by the summons is tried by default. Only the defendant may challenge this judgement by way of opposing appeal.[196] The public prosecutor shall be informed about the appeal and the session. The judgement by default is a nullity in all its provisions if the accused files an opposing appeal. A new session will then take place before the same court, which pronounces a fresh judgement.

This remedy is also available to the PPS and the accused against a criminal order made by a judge in simplified proceedings (see 3.4.3.2.3). From the day the order is communicated, the public prosecutor has ten days and the defendant forty-five (or thirty in case of *contravention*) to appeal. If an opposing appeal is filed, the case is dealt with by the criminal court (*Tribunal correctionnel*,

[195] When using this specific right (*droit d'évocation*), the court of appeal will actually judge the case as a court of first instance would do. There is no limit to the modification of the penalty.

[196] The accused may choose to challenge the judgement by way of appeal instead of opposing appeal.

Tribunal de police or *juge de proximité*) in application of the common procedure.

3.5.4 Position of the public prosecutor in the extraordinary forms of review

*3.5.4.1 Cassation appeal (*pourvoi en cassation*)*

The Supreme Court is not a third level of jurisdiction; accordingly, when a cassation appeal is lodged, the court only verifies whether the law has been correctly applied. The time limit to file an appeal is five days from the date of judgement. Such an appeal is strictly limited to the following grounds

- the court that made the decision was unlawfully constituted
- this court lacked jurisdiction to try the case or acted *ultra vires*
- the court did not comply with legal formal requirements, entail the absolute nullity of the decision
- violation of the criminal substantive law due to a wrong or inexact interpretation of the law

In principle, all decisions made by a judge, a court or an investigating judge at final instance may be challenged by way of cassation.[197] In order to challenge a decision, the party to the process must have an interest in the review of the decision and be affected by it. The prosecution service may challenge all decisions affecting the prosecution, but not decisions affecting only the civil action, unless these affect the general interest. However, against an acquittal pronounced by the *Cour d'assises*, the public ministry may only file a cassation in the interest of the law (see below). Once a public prosecutor has lodged a cassation appeal, he cannot withdraw it.

The Supreme Court only judges issues of law submitted within the limits of the appeal. The appeal may or may not be limited to certain issues. The general prosecutor or an advocate general at the Supreme Court represents the public ministry. The Supreme Court first verifies if it has jurisdiction to hear the appeal. If it has jurisdiction, it may decide to

- reject the appeal if there is no violation of the law. This decision ends the proceedings

[197] However, certain decisions can never be challenged by way of cassation, e.g. decisions of the High Court of Justice.

- quash (*casser*) the challenged decision and in general remand the case to a court that has the same level as the one that made the decision. This court can hear the case only within the limits established by the Supreme Court but may freely judge within these limits. A second cassation appeal is available against the new decision[198]
- quash the challenged decision and not remand the case. In these exceptional cases, the court pronounces a judgement and can consider questions on facts because they do not need any specific inquiry (e.g. if the criminal offence has been amnestied, the limitation period has expired, etc.). It may also decide that only a part of the decision challenged is valid and enforceable

*3.5.4.2 Cassation appeal in the interest of the law (*cassation dans l'intérêt de la loi*)*

This form of review may be used against valid decisions made without appeal that are irrevocable because the time limit to lodge a cassation appeal has elapsed or because such an appeal was not possible. The appeal may be filed against a decision made in favour of the accused or not. The general prosecutor at the Supreme Court reports to the criminal section any judicial acts, first instance or appeal judgements violating the law, in order to maintain the unity of case law and uphold the Rule of Law. The general prosecutors at appellate courts have the right to lodge appeals against acquittals made by a *Cour d'assises*. The purpose of the review is to seek the redress of a breach of the law and preserve the coherence of case law and the exact observance of the law. The general prosecutor has the right to appeal either on his own initiative or on a written order of the Minister of Justice. The Supreme Court can

- declare the appeal inadmissible
- reject the appeal
- quash the challenged decision. In this case, the execution of the decision continues and the situation of the parties is unaltered. The quashing of the judgement is purely theoretical and aimed only at reminding lower courts what the case law of the Supreme Court is with regard to the legal issue affected by the case

[198] In the case of a second cassation appeal being filed on the same grounds as the previous, the Supreme Court judges as an *Assemblée plénière*. The decision taken by the *Assemblée plénière* is binding on the court to which the case is remanded for a second time.

*3.5.4.3 Revision (*révision*)*

Definitive judgements without appeal may be challenged by way of *révision* if there is an error of fact that becomes known after the trial, unless the error affects a decision of acquittal, in which case revision is impossible.[199] Revision is available against decisions of a district court or a *Cour d'assises*. Revision is available to the Minister of Justice, the convicted person or, after the death or the declared absence of the convicted person, his spouse, children, parents, universal legatees or part-universal legatees, or by those persons to whom this task has been entrusted by the convicted. If the revision is admissible, the Supreme Court judges the case with regard to the facts and the law.[200] The general prosecutor or an advocate general at the Supreme Court represents the public ministry in the proceedings and submits oral or written opinions.

The Supreme Court may

- quash the decision and remand the case to a court of the same level as the one that made it. This court will rehear the case
- quash the decision without remanding the case. The Supreme Court replaces the decision challenged by its own decision

If a decision is quashed by way of revision, the victim of the error has a right to damages.

*3.5.4.4 Pardon (*grâce*)*

According to Article 17 of the Constitution, the President of the Republic has the right to grant pardon. However, a pardon only entails an exemption with respect to the enforcement of the sentence. There is no formal procedure for the filing of a petition.

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[199] The grounds for revision can be that
• after a conviction for homicide, documents are presented which are liable to raise the suspicion that the alleged victim of the homicide is still alive
• after a sentence has been imposed for a felony or misdemeanour and a new first instance or appeal judgement has sentenced for the same offence another accused or defendant and where, because the two sentences are irreconcilable, their contradiction is proof of the innocence of one of the convicted persons
• since the conviction, one of the examined witnesses has been prosecuted and sentenced for perjury against the accused or defendant; the witness thus sentenced may not be heard in the course of the new trial
• after the conviction, a new fact occurs or is discovered which was unknown to the court on the day of the trial, which is liable to raise doubts about the guilt of the person convicted

[200] The application for revision is made to a special committee that decides whether the appeal can be heard or not.

Anyone who has a moral or material interest may file a petition for pardon. No provision prevents the public ministry from filing such a petition in the public interest. The Minister of Justice collects all petitions, investigates the applications for pardon and decides which petitions might be of interest to the President.

Chapter 4
The Netherlands – organisation of the prosecution service and its functions in the criminal process

As has very often been the case for other policies (e.g. soft drugs and euthanasia), the Dutch legislation is once again at the *avant-garde* of changes in society and of legal systems considered to be progressive.[201] The transplantation of the French Napoleonic PPS prototype and criminal judicial system was almost complete by the end of the nineteenth century (4.1). However, amendments made the judicial system more efficient with the transfer of the local court jurisdiction to the district court and the possibility to depart from the territorial jurisdiction of criminal courts established by the CPC (4.2). With the creation of a Board of General Prosecutors (hereafter, the Board) and the parting of the *procureur-generaal*'s office at the Supreme Court from the PPS, the latter has broken from the classical pyramidal hierarchy that has always characterised the French PPS and still does. The newly organised institution provides public prosecutors with more autonomy from the executive and more unity (4.3). Within the preliminary phase of the criminal process (4.4), a long-standing practice of public prosecution has moulded a precise and almost automatic implementation of the opportunity principle. Although the institution of the investigating judge is still in force in the Dutch system, it has, however, a very limited jurisdiction in comparison with the PPS, whose powers to settle cases out of court have increased. Finally (4.5), the PPS also carries out its task of upholding the law in the public interest during the hearing of a case in the first instance and at appeal. The prosecutors'

[201] Starobin 2004.

intervention is characterised by a general right to challenge almost any decision made by a judge or a court by means of ordinary and extraordinary forms of review. The Dutch prosecution service preserved the right to appeal in cassation. However, its position before the Supreme Court has changed to the benefit of the independent *procureur-generaal*.

4.1 Historical developments[202]

4.1.1 The 1811 transplantation of the French judicial organisation into the Dutch system and the 1827 Act on judicial organisation

The transplantation of an important part of the French legal system was a result of the French occupation between 1810 and 1814. The Netherlands became an annex of the French Empire. When trying cases, courts applied French laws such as the *Code Civil,* the *Code Pénal* and the *Code d'Instruction Criminelle*. The Napoleonic pyramidal court system and the French prosecution service were also imported. Criminal offences were distinguished into three categories (*crimes*, *délits* and *contraventions,* see 2.5). For *crimes* (*misdaden*)*, hoven van assisen* and a *Keizerlijk Hof* were competent, whereas *délit* (*delicten*) were tried in district courts and *contraventions* (*overtredingen*) in local courts and by justices of the peace (*vrederechters*).[203] Cassation appeal could be lodged against decisions made by these courts, however, this appeal would be heard in Paris by the *Cour de cassation*. A Supreme general prosecutor's office was established at the top of the prosecution service (*het openbaar ministerie*). The general prosecutor at the *Keizerlijk Hof*, directly subordinate to the Minister of Justice in Paris, was entrusted with the functions of the public prosecution. The other public prosecutors (*officieren van justitie*) were only representatives of the general prosecutor and were directly subordinate to him.[204]

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[202] Corstens & Tak 1982; Cliteur 1999; Van Boven 1999.

[203] In criminal cases the *Keizerlijk Hof* directed the proceedings until the issuance of an indictment, and thereafter referred the case to the competent *Hof van Assisen*. Today, Dutch Criminal Law only distinguishes two types of offences – so-called crimes (*misdrijven*) and misdemeanours (*overtredingen*).

[204] A specific rank of prosecutors (*procureur crimineel*) prosecuted the most serious crimes before special courts called *Hoven van Assisen* were established at the regional level.

In 1813, the independence of the Netherlands was restored. A new act passed in 1827 reorganised the system.[205] A Supreme Court (*Hoge Raad*) was established at the head of the court's system, made up of regional courts (*provinciale hoven*), district courts (*arrondissement*) and local courts (*kantongerechten*).[206] However, this act only came into force in 1838. It was thereafter modified many times, especially with regard to the number of courts and tribunals. Finally, in 1933 the judicial system was reorganised into five regional courts and regional prosecutors' offices, nineteen district courts and district prosecutors' offices, and sixty-two local courts. In 1957 the local offices were absorbed into the district offices. Jurisdictions and the prosecution service were organised on a pyramidal and hierarchical basis. The hierarchy consisted of the Minister of Justice as the head of the PPS, the five general prosecutors of the appellate prosecution offices directly subordinate to him and the heads of district offices directly subordinate to the competent general prosecutor.[207] Recently however, important changes have affected the prosecution services. General prosecutors were assembled into a national Board, established as the real prosecution head. The prosecution remained, however, under the authority of the executive. The 1827 Act on judicial organisation, as amended, is still the basis of the current system.

4.1.2 The position the prosecution service in the State organisation in the 1827 Act

In 1827 the Act on judicial power established the prosecution service on a very hierarchical basis. The question of the position of the prosecution in the State organisation and with regard to the Montesquieu *trias politica* has been an ongoing debate in the Netherlands, as in other countries. This is an important question, especially because it establishes to what extent a prosecutor is free in his function and independent from political influences and risks of abuse. The prosecution was first headed by the King and later by the Minister of Justice.

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[205] Wet op de Zamenstelling der Regterlijke Magt en het Beleid der Justitie van 18 april 1827, *Stb*. 1827, 20; the present research is based on the 1827 Act as published after the last modification made on 3 February 2005 (*Stb.* 71). All quotes from the 1827 Act as amended are the author's unofficial translations. Terms in parenthesis are always added by the author.

[206] Until 1838, the Supreme Court of the Netherlands was called *Hoog Gerechtshof*.

[207] The office of the Supreme Court has not been part of the prosecution service since 1994. In order to prevent confusion, the title 'general prosecutor' will be replaced hereafter by the Dutch title *procureur-generaal.* See 4.3.1.2.3.

The Dutch system adopted the French legal theory, which establishes prosecutors as *gens du roi.* As a consequence, certain authors put forward several arguments to defend the view that the prosecution service is considered to be an *executive* institution and not a part of the judicial branch.[208] One of these arguments is an interpretation of Article 117 § 1 of the Dutch Constitution, which specifies that members of the judiciary responsible for the administration of justice (i.e. having the power to make judgements) and the General Procurator at the Supreme Court, are appointed for life by royal decree.[209] Appointment for life is one of the conditions that fosters the independence of the judiciary. Applying this condition to general prosecutors is only an exception. *A contrario*, other members of the prosecution service are dependent on the executive that appoints and may dismiss them; therefore, they are part of the executive. Moreover, according to ex-Article 5 of the 1827 Act, employees of the prosecution service were obliged to execute orders (*de bevelen*) given to them by the executive, i.e. by the Minister of Justice.

Other authors advocate that the prosecution service belongs to the *judicial* power.[210] They offer another interpretation of Article 117 § 1, according to which there are members of the *judiciary* responsible for the administration of justice, and consequently, that there are members of the *judiciary* who are *not* responsible for the administration of justice, i.e. public prosecutors. Article 116 § 2 of the Dutch Constitution also provides that the law establishes the organisation, composition and competencies of the judicial power. This provision applies to both judges and prosecutors. Consequently, prosecutors are part of the judicial power. Moreover, judges and prosecutors take the same oath and, for that reason, belong to the same corps.[211]

Both views acknowledge that public prosecutors were *gens de la loi.* Indeed, it is the law that establishes the function of prosecution and prosecutors, who must also comply with the law when they carry out

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[208] The Minister C.F. van Maanen responsible for the enactment of the 1827 Act advocated a public ministry belonging to the executive and not to the judicial power, see Cliteur 1999; also Corstens 1997.

[209] The Queen and one or more ministers co-sign royal decrees concerning the appointment of high-ranking civil servants, but the decision is in fact taken by the minister or ministers because only ministers are democratically responsible to the Parliament. An unofficial translation of the Constitution is available at <http://www.servat.unibe.ch/law/icl/nl__indx.html>.

[210] See e.g., Meijers 1987.

[211] Remmelink 1991.

these functions. In addition, ex-Article 4 of the 1827 Act obliged the prosecution service to uphold the law(s) (*de handhaving der wetten*), to prosecute all crimes and to enforce court decisions. The prosecution service was bound on the one hand to implement criminal policies of the executive and, on the other, the laws issued by parliament. With time and experience, a 'principle of criminal legality' (*strafvorderlijk legaliteitsbeginsel*) emerged. According to this principle, instructions of the Minister of Justice to the prosecution service must comply with the law but the prosecution service must also enjoy a necessary independence to make decisions according to the law, which could be contrary to the Minister's instruction if necessary. The law should protect prosecutors from a Minister's illegal order. The Minister of Justice is indeed responsible before the parliament for the decisions he makes or refrains from making. The Minister became accustomed to carefully weighing the instructions he gave or refrained from giving to members of the prosecution service because he is accountable for all actions and omissions of the prosecution service.[212] For their part, members of the prosecution service should not be held responsible for carrying out instructions given to them in conflict with the law. It seems that the Dutch prosecution service has an intermediate position between the executive and the judiciary. Prosecutors are members of the judicial power who do not adjudicate and do not enjoy the same independence as judges. However, prosecutors are also civil servants carrying out their functions under the authority of the Minister of Justice and disciplinary provisions are binding on them. Other authors consider this controversial position of the prosecution in the State organisation as *sui generis,* the prosecution service being both a judicial institution and an administrative body.[213] In this context in 1993, the Dutch Parliament asked the Minister of Justice to establish a commission to study the functioning of the prosecution service and research the reasons for several dysfunctions and certain disunity.[214] The report issued in 1994 proposed solutions that led to an important reform in 1999.[215] This amendment modified the prosecution organisation and clarified the relationship extant

[212] Corstens 2005, p. 111, writes that the Minister of Justice handles the prosecution service with kid gloves, *de minister pakt het OM met fluwelen handschoenen aan*.
[213] See e.g., Bootsma 1995.
[214] Rapport van de Commissie Openbaar Ministerie 1994.
[215] Wet van 19 april 1999, *Stb.* 1999, 194.

between the Minister of Justice and the prosecution service (see 4.3.1.1, 4.3.1.1.1 and 4.3.3.2). Article 1 of the 1827 Act as amended clearly establishes prosecutors of the Dutch public prosecution service as judicial officials (*rechterlijke ambtenaren*), but prosecutors remain under the Minister of Justice's authority. According to Article 124 of the 1827 Act, the prosecution service is responsible for the criminal enforcement of the legal order (*de rechtsorde*) and for other tasks provided by law. From the upholding of the law in general, the task of the PPS now focuses especially on the upholding of the criminal law, and of other laws when so provided.

4.2 The current Dutch criminal judicial system[216]

4.2.1 The first instance

Article 45 of the 1827 Act establishes that district courts (*rechtbanken*) have jurisdiction over all criminal matters in the first instance unless otherwise provided by law (see 4.2.2 jurisdiction of the Supreme Court). Nineteen district courts composed of three judges (or a single judge for small cases) have jurisdiction over crimes (*misdrijven*). Upon a decision of the public prosecutor, crimes of a simple nature may be judged by a single judge of a district court (*politierechter*).[217]

There were sixty-one local courts (*kantons*). Local court jurisdiction is now transferred to the district courts' jurisdiction.[218] Within each district court, Article 382 CPC establishes local single judges (*kantonrechters*). These local judges have jurisdiction over misdemeanours (*overtredingen*) unless otherwise provided for by law.

The Criminal Code establishes which criminal acts are crimes and which are misdemeanours. In principle, according to Article 2 CPC, proceedings shall be instituted within the territorial jurisdiction (*relatieve competentie*) of the district court where

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[216] See also Corstens 2005; Tak 2003; Van Daele 2003.

[217] Article 368 of the CPC establishes that the *politierechter* competence depends on the decision of the public prosecution. Such a decision may be made if the acts constituting the crime are of a simple nature and easy to prove and when no more than one year's imprisonment is provided by the law as a sanction for the crime in question. The *politierechter* may decide to transfer the matter to the district court if he deems it necessary or if he grants a transfer motion made by the defendant.

[218] The 1827 Act was modified in 2001 to simplify the administration of justice. Wet van 6 december 2001 tot wijziging van de Wet op de rechterlijke organisatie, *Stb.* 2001, 582.

- the acts have been committed
- the suspect lives or has his domicile or place of residence
- the suspect is located
- the suspect had his last domicile or place of residence
- or the suspect has been prosecuted for another criminal act within the jurisdiction[219]

In case of jurisdictional overlap, the public prosecutor chooses the court to hear the case. However, a recent government decree establishes a system of *de facto* jurisdictional substitution.[220] According to this decree, certain cases can be tried in other courts than the normally competent court upon a decision of the Justice Council (*Raad voor de Rechtspraak*).[221] For example, laborious and complicated cases (so-called *megazaken*) can be tried in any district court. The decision by which a district court will try a given *megazaak* is made according to a set of criteria.[222] The most important of these criteria is the session capacity of the different courts. As a consequence, the legal competence of the prosecution service to prosecute an accused before a foreseeable and accessible court may be circumvented in application of this decree and result in a completely different competence established by the decision of a 'bureaucratic organ'. Of course, the legal competence remains the principle and the competence's substitution the exception, but the legality of the decree with respect to Article 6 of the European Convention for the Protection of Human Rights is questionable because the accused shall have the right to be tried before a tribunal 'established by law'.[223]

The institution of the investigating judge also exists in the Dutch system. In the first instance, there are several types of proceedings,

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[219] There is also a specific jurisdiction for criminal acts that have been committed at sea and matters that are prosecuted by the national prosecutor's office (*landelijk parket*).

[220] Besluit nevenvestigings- en nevenzittingsplaatsen van 10 december 2001, *Stb.* 2002, p. 616.

[221] The Justice Council is an independent judicial organ that is a link between the Minister of Justice and other judicial organs. One of its main functions is to take care that judiciaries correctly perform their tasks.

[222] Formally speaking the decision is made by the board of the competent district court. The board issues this decision upon an advice of the Organisation for the Coordination of Laborious Cases (*Landelijk Coördinatiecentrum Megazaken*). The Organisation for the Coordination of Laborious Cases is also part of the judiciary.

[223] See on this issue Knigge 2005.

depending on the circumstances of the case and the gravity of the offence committed

- the normal proceedings with a preliminary investigation conducted by the police under supervision of a public prosecutor with, where necessary, investigation measures taken by an investigating judge. These cases may be tried before a local or district court established as a panel of judges or a single judge. Less serious offences are tried by a local court (*katonrechter*) or by a *politierechter* following a simplified procedure
- there are also two specific sections in the district courts established as a panel of judges or a single judge with special procedural rules
  - the economic section hearing cases on economic and environmental offences[224]
  - the juvenile section hearing cases on crimes committed by minors
- a section of the Arnhem district court (*militaire rechter*) has jurisdiction over criminal offences committed by military staff

4.2.2 Appellate courts and the Supreme Court

Article 60 of the 1827 Act establishes that regional courts (*gerechtshoven*) have jurisdiction to review judgements made in the first instance by district courts and challenged by way of appeal (*hoger beroep*). There are five courts of appeal.

There is one Supreme Court in the country and Article 78 § 1 of the 1827 Act provides that this *Hoge Raad* has jurisdiction to judge

- cassation appeals (*beroep in cassatie*) lodged against certain acts and decisions (*handelingen, arresten, vonnissen* and *beschikkingen*) of courts of appeal and district courts
- cassation appeals lodged by the general prosecutor in the interest of the law (*cassatie in het belang der wet*)

Within the Supreme Court, the criminal section gives advice or information to the government on criminal legal issues. In the first instance, it has jurisdiction over cases concerning special offences and allegations of crimes committed by ministers, State secretaries and MPs (Article 76 § 1, 1827 Act). Finally, it pronounces judgement in matters of conflict between jurisdictions and in matters of revision (*herziening*, see 4.5.4.2).

[224] Wet op de economische delicten van 22 juni 1950, *Stb*. K. 258.

4.2.3 Types of decisions

During the criminal process there are different types of judicial decisions made by the different authorities acting from its commencement until its closing. Their classification has bearing on whether a decision can be challenged, and if so by which means. During the preliminary proceedings, most of the decisions are made by a public prosecutor and on certain occasions provided by law, by a judge or an investigating judge.

According to Article 138 CPC, there are two types of judicial decisions in criminal matters (*beslissingen van strafrechters*) made during or at the close of criminal proceedings

- orders (*de beschikkingen*), which are not made during court hearings. During the criminal process, the council section of a court (*de raadkamer*) can deliver a decision in the form of an order if the law does not prescribe that this decision must be made in the form of a judgement
- judgements (*de uitspraken*) made during the court hearing. There are three types of judgement: accessory, final and intermediate. Final judgements may declare the indictment void (*nietigheid dagvaarding*), the court incompetent (*onbevoegdheid van de rechtbank*) or the public prosecutor inadmissible (*niet-ontvankelijkheid van de officier van justitie*), but usually deliver a verdict of acquittal or definitive dismissal (*vrijspraak* and *ontslag van alle rechtsvervolging*), a judicial pardon (*rechterlijk pardon*) or a finding of guilty with sanction (*veroordeling tot enigerlei sanctie*)[225]

4.3 Organisation of the Dutch PPS[226]

4.3.1 The structure of the prosecution service

4.3.1.1 The new structure of the prosecution service since 1999

According to Article 134 of the 1827 Act as amended in 1999, the Dutch prosecution service is composed of four different bodies

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[225] Whilst a verdict of acquittal decides that an accused is discharged because of the insufficiency of the evidence, a judgement on definitive dismissal is given when the facts do not constitute a criminal offence or when the accused cannot be held criminally liable.

[226] See Corstens 2005; Tak 2004-2005, p. 356; Van Daele 2003; Corstens & Tak 1982.

- the general prosecutors' office (*parket-generaal)*
- five regional offices (*de ressorts-parketten*)
- nineteen district offices (*de arrondissementsparketten*)
- the national office (*het landelijk parket*)

There is no hierarchy between the last three bodies. Regional, district and national prosecutors' offices cannot give each other instructions, however, they do meet regularly in plenary discussion groups (*OM breed beraad*). The function of these meetings is to maintain the unity (*eenheid*) of the prosecution service. The general prosecutors' office is composed of the Board of General Prosecutors (*het College van procureurs-generaal*) and other civil servants. This Board is the functional head of the prosecution service; one of its members takes part in the regular meetings with the other offices. The 1999 amendment replaced the classical pyramidal prosecution organisation with a flat hierarchy and organisation.

4.3.1.1.1 The general prosecutors' office and the Board of General Prosecutors

The general prosecutors' office consists of the Board and its staff. As the head of the prosecution service the Board takes particular care that

- the heads of each office account in the same way to the Board
- the prosecution service in general accounts in the same way to the Minister of Justice

Before the 1999 amendment, general prosecutors used to meet regularly on an informal basis to provide the prosecution service with functional instructions. The Secretary General of the Ministry of Justice chaired the meetings on behalf of the Minister of Justice. The general prosecutors' meetings played an important role in the functioning of the prosecution service, nevertheless, criticisms were voiced. The general prosecutors' position, straddling national policy on the one hand and their role in their own district on the other, conflicted. In fact, this 'double loyalty' was prejudicial to the prosecution service's unity. From the general prosecutors' point of view, the Minister of Justice's responsibilities and those of the prosecution service do not always coincide and sometimes run counter to each other.[227]

[227] 'Paasbrief procureurs-generaal', *Trema* 1992, p. 291.

The 1999 amendment modified this arrangement and gave rise, officially, to the Board. It became a concrete organ enjoying more independence from the Minister of Justice and was composed of members exercising their competence only within the Board, though exceptions are possible to allow general prosecutors to maintain current practical professional experience in district or regional offices.

The Board, composed of three to five general prosecutors, one of whom is designated by royal decree as the chairman, is tasked generally to ensure

- that the prosecution service act as one unit
- that the prosecution offices carry out their functions optimally
- the supervision of the offices' activities

It not only has a role in the upholding of criminal justice but also in the prosecution service administration (e.g. organisation and financing of the institution). The Board meets every week and discusses organisational questions as well as criminal policy issues. Decisions are in general taken by the majority. The vote of the chairman is decisive if votes for the Board's decisions are divided. The Board can give general and specific instructions affecting the exercise of the functions (*de uitoefening van de taken*) and jurisdictions (*de bevoegdheden*) of the prosecution service. Instructions may affect questions on the implementation, priority or legality of policy provisions. Any organ of the prosecution service may be the recipient of these instructions (See 4.3.3.3). The duties of the general prosecutors of the Board are determined by the Board itself but certain duties of the chairman can be decided by the Minister of Justice.

4.3.1.1.2 The regional offices and the district offices

Regional offices (*ressortsparketten*) include

- a chief attorney-general (*hoofdadvocaat-generaal*)[228]
- several attorney-generals and deputies (*advocaten-generaal*)
- other staff

These prosecutors substitute for each other by right in regional offices. They may also exercise their functions as substitutes in

[228] The head may be replaced by one of his deputies in the case of absence (*plaatsvervangend advocaat-generaal*).

other regional offices. The staff of the office is subordinate to the chief of the office. The chief is directly subordinate to the Board. The chief of the office can issue general and specific instructions affecting the exercise of functions and jurisdictions of the office. In principle regional offices deal with appeals lodged against decisions made by lower courts. The chief of the office is free to administrate his office with regard to labour issues and procurement.

District offices (*arrondissement*) include

- a chief public prosecutor (*hoofdofficier van justitie*)[229]
- public prosecutors with different ranks[230]
- other staff

Public prosecutors substitute for each other by right in district offices. They may also exercise their functions as substitutes in other district offices. The chief is directly subordinate to the Board. The chief public prosecutor can give general and specific instructions to the staff of the office affecting the exercise of functions and jurisdictions of the office. District offices prosecute crimes committed within the jurisdiction of district courts (*kantongerecht* and *rechtbank*). However, as a result of the government decree on jurisdiction substitution, the restrictions of this territorial jurisdiction may be circumvented to a certain extent (see 4.2.1). The chief of the office is free to administrate his office with regard to labour issues and procurement.

4.3.1.2 Other offices with specific functions

4.3.1.2.1 The national prosecutor's office

The national prosecutor's office (*het landelijk parket*) includes

- a chief public prosecutor (*hoofdofficier van justitie*)[231]

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[229] The head may be replaced by one of his deputies in the case of absence (*plaatsvervangend hoofdofficier van justitie*) or by the chief public prosecutor active in another district.

[230] Since 2001, there are also simple session public prosecutors (*officieren enkelvoudige zittingen*) who have the same roles and obligations as public prosecutors with the exception of the right to participate in a full court session. The purpose of this new function is to treat minor criminal proceedings (*lichte misdrijven*) before the local single judges (*kantonrechter*) and single district court judges (*politierechter*); see Wet van 18 oktober 2001, *Stb.* 494 and *Kamerstukken II* 1999/00, 26 962, nr. 3, p. 4 (MvT).

- public prosecutors (*officieren van justitie*) with different ranks[232]
- other staff

The chief public prosecutor can give general and specific instructions affecting the exercise of functions and jurisdictions to the staff of the office. The office has national and international competence, such as investigation and prosecution of

- criminal cases above the regional scale
- organised crime and terrorism
- criminal cases that require important tax or financial expertise

In order to fulfil this role, the national office is divided into teams and offices such as economic and financial teams, specialised teams, international teams, expertise teams, a staff office and a management office.[233]

4.3.1.2.2 The functional prosecutor's office and other national services

This body (*het functioneel parket*) created in 2003 is composed of one head public prosecutor and several prosecutors appointed in The Hague district and delegated to this office. Its task is to fight against crime in the following domains: environment, economy, fraud, and the prosecution of cases where exceptional investigation services are required.[234]

4.3.1.2.3 The procureur-generaal's office at the Supreme Court (*het parket bij de Hoge Raad*)

The position of the Supreme Court office was significantly modified in 1994.[235] It is no longer part of the prosecution service and its members do not have *stricto sensu* prosecution functions (therefore, this study will not cover it, and the titles 'general prosecutor' and 'advocate-general' will be replaced by their Dutch titles).[236] However,

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[231] One of his deputies may replace the head in the case of absence (*plaatsvervangend hoofdofficier van justitie*).

[232] At this level there are also simple session public prosecutors (*officieren enkelvoudige zittingen*).

[233] The international team notably deals with Eurojust requests and questions.

[234] The functional office is now legally part of the national office; see Corstens 2005, p. 117; <http://www.om.nl/parket/functioneel/>.

[235] Wet van 2 november 1994, *Stb.* 803.

[236] It was thought that the general prosecutor's office at the Supreme Court should be considered as advising the court rather than as a prosecution organ, and should

the office is empowered with the tasks and functions of the prosecution service in the exceptional situations in which the Supreme Court is competent in the first instance to hear a case, such as against misdemeanours committed by ministers and deputies while in office (Article 76 and 111 of the 1827 Act, and Article 510 and 511 CPC).[237]

It includes

- a *procureur-generaal* at its head
- one deputy *procureur-generaal* (*plaatsvervanger*)
- several *advocaten-generaal*
- other staff

The *procureur-generaal* and the *advocaten-generaal* are appointed for life by royal decree. They are, in principle, independent from the government, the legislature, and the judiciary. In addition, the office advises the Supreme Court in cassation proceedings, gives legal opinions on disputed legal issues and lodges cassation appeals in the interest of the law (*cassatie in het belang der wet*). It is not possible for the Minister of Justice to give instructions to the *procureur-generaal* and the *advocaten-generaal*, and neither the *procureur-generaal* nor the *advocaten-generaal* has authority over the members of the prosecution service. Nevertheless, Article 122 of the 1827 Act provides that the *procureur-generaal* can inform the Minister of Justice if he feels that the prosecution service is not enforcing or properly executing the law as it carries out its functions. The *procureur-generaal* can request the Board to provide him with necessary information. Finally, Article 123 of the 1827 Act provides that the Board shall furnish the *procureur-generaal* with the assistance of the prosecution service in order for him to discharge his duties.

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therefore be distinguished from the public ministry; see Rapport van de Commissie Openbaar Ministerie 1994, p. 80.

[237] The prosecution of specific misdemeanours committed by ministers and deputies while in office is the only situation in which the *procureur-generaal*'s office is empowered with the tasks and functions of the prosecution service. However, such proceedings have not yet been instituted.

4.3.2 Distribution of competences within the prosecution service and the principle of substitution

4.3.2.1 Distribution of competences within the prosecution service

Prosecutors have different administrative and functional competencies within the institution according to their rank. The heads of office (the chief attorney-general and the chief public prosecutor) have administrative and supervisory tasks within his office (managing activity).

In criminal proceedings, the distribution of competence between prosecutors depends, in principle, on the jurisdiction of the office in which they are appointed. However, as will be shown (4.3.2.2), through the application of a general principle of substitution and unity, prosecutors may substitute for each other to carry out certain prosecutorial functions in criminal proceedings. The Dutch preparatory proceedings comprise several phases (see 4.4.2.3, 4.4.3.1, and 4.4.3.2); it is necessary to distinguish between the investigation phase of the criminal process (*opsporingsfase*) and the prosecution phase (*vervolgingsfase*). According to Article 141 CPC only public prosecutors (*officieren van justitie*) have the right to lead investigations in criminal matters.[238] Public prosecutors may investigate criminal matters themselves or order other officials to carry out certain actions (Article 148 CPC). Therefore, public prosecutors are in constant contact with police officers and are responsible for the legality of the investigative phase of a process. This responsibility does not end with the institution of a preliminary judicial investigation (see 4.4.3.2.1).[239]

Article 9 CPC provides the distribution of competence with regard to the prosecution phase. At the district court level (*rechtbanken*), public prosecutors are competent to make decisions affecting the prosecution of criminal facts falling within the competence of the district court (Article 9 § 1). The law specifies the conditions under which public prosecutors have jurisdiction within the territorial area of another court.[240] For example

- a prosecutor may carry out a specific investigation in a case already under investigation within another prosecutors' office if a

[238] Nevertheless, outside the prosecution service, other officials such as the police have investigative functions.
[239] 't Hart 2001, p. 28.
[240] In application of Article 146 § 1 CPC, these conditions are specified in the Police Act, Politiewet van 9 december 1993, *Stb*. 724.

colleague in this office so requests and if this is necessary for the investigation[241]

- a prosecutor investigating a case can carry out (or have carried out) specific acts within the legal competence of another prosecutors' office, but he shall inform his colleague (Article 10 § 1 and 2 CPC)

At the appellate court level, the attorney-generals are responsible for the prosecution of criminal cases in the jurisdiction of the appellate court (Article 9 § 3 CPC). They are also responsible for the improvement of the legal quality of the judicial work (attorney-generals and *officieren van justitie* in particular may consult each other in general matters or in specific cases before an appeal is lodged).[242]

Finally, at the national level (Article 9 § 2 CPC), public prosecutors working at the national and functional office are responsible for the prosecution of cases within the jurisdiction of their office (see 4.3.1.2).

4.3.2.2 General principle of substitution and unity

In principle the Dutch prosecution service is indivisible and forms a single organisation, the members of which are to a certain extent mutually interchangeable and carry out their functions in the name of the prosecution service. The right of prosecutors to substitute office for each other in their functions derives from the principle of unity. Indeed, in addition to their specific competences and functions, public prosecutors are competent to handle a case in another office during the hearing.[243] Outside the jurisdiction of one office, a substitute from the prosecution service who has exercised his functions in the first instance can also exercise his functions in the same case heard at appeal; this is not contrary to law.[244]

This principle of unity was enhanced by the 1999 amendment. In addition to the official general appointment after the selection and promotion procedure, the Board may temporarily appoint

- attorneys-general to substitute public prosecutors (Article 138 § 6, 1827 Act)

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[241] Corstens 2005, p. 302.
[242] See on this issue Van Daele 2003, p. 180.
[243] 't Hart 2001, p. 62.
[244] HR 23 juli 1957, *NJ* 1957, 515.

- public prosecutors to substitute attorney-generals (Article 136 § 7 and 137 § 6, 1827 Act)

The 1827 Act also provides the following substitutions between prosecutors as of right

- prosecutors of all districts may substitute for each other (Article 136 § 6, 1827 Act)
- prosecutors of the national prosecutors' office may substitute for each other (Article 137 § 5, 1827 Act)
- attorneys-general of all the courts of appeal may substitute for each other (Article 138 § 5, 1827 Act)
- the general prosecutors of the general office alone, may substitute for any other prosecutor of any other office of all ranks (Article 135 § 2 and 4, 1827 Act)

In 2001, the Supreme Court confirmed that public prosecutors may substitute for each other by right and are therefore empowered to make a decision affecting the prosecution of criminal facts in prosecutors' offices other than where they are appointed. The distribution of competence in Article 9 CPC does not impede this right.[245] The modifications made to the 1827 Act indeed 'circumvent' the judicial distribution of competences provided by the CPC because the temporary appointment of a specific prosecutor in another jurisdiction remains possible for the treatment of a specific case.

4.3.3 Subordination

4.3.3.1 Appointment of the prosecution service organs

Separate legislation establishes the appointment requirements and procedures for judicial officials in general.[246] Judicial officials follow the same training in law and are required to have completed it before appointment. Public prosecutors are appointed by the Queen and are removable.[247]

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[245] HR 9 oktober 2001, *NJ* 2001, 657.
[246] Wet rechtspositie rechterlijke ambtenaren van 29 november 1996, *Stb.* 590.
[247] It is interesting to note that the Queen appoints the members of the *procureur-generaal* office for life before the Supreme Court. This life appointment of the *procureur-generaal* before the Supreme Court is justified by the fact that the *procureur-generaal* has the right to prosecute ministers and deputies suspected of having committed a criminal offence. In being appointed for life, the *procureur-generaal* is established as an organ independent from the executive power.

In practice, the Minister of Justice plays a decisive role in the appointment of prosecution service organs because royal decrees are decisions signed by the Queen and one or more minister, but are in fact made by a minister. This decision may be made after the Minister of Justice has received the opinion of other public bodies such as the Board or the NVvR (*Nederlandse Vereniging voor Rechtspraak*-Dutch Association of the Judiciary). In particular, the Minister of Justice appoints

- the members of the Board, but only after recommendation of the Board itself and of the NVvR
- chief prosecutors or chief attorney-generals after a meeting of the Council of Ministers[248]
- public prosecutors and deputy public prosecutors, on motion of the head of the office concerned

The Minister of Justice may appoint a member of the prosecution service to functions outside the PPS or instruct him to temporally exercise activities other than his usual ones. It is also possible for members of the judiciary, such as judges, to become members of the prosecution service and vice versa.

4.3.3.2 Authority of the Minister of Justice over the prosecution service

The Minister of Justice supervises the consistency of the prosecution policy (*het vervolgingsbeleid*). As a member of the government, the Minister of Justice is not a member of the prosecution service and does not exercise its tasks and functions.[249] Nevertheless, the Minister of Justice is politically responsible for all actions of the prosecution service. Parliament may pass a vote of no confidence against him or the whole government, which may recall its Minister (*motie van afkeuring* or *wantrouwen*). That is why the Minister of Justice must be competent to instruct the prosecution service. According to Article 127 of the 1827 Act as amended, the Minister of Justice can issue general and specific instructions affecting the exercise of the functions and jurisdictions of the prosecution service. The law does not stipulate which members of

[248] The council of ministers is composed of ministers only whereas the cabinet is composed of ministers and State secretaries.
[249] A royal decree co-signed by the *minister-president* appoints and recalls the Minister of Justice.

the prosecution service are concerned by these instructions; it may thus apply to the entire institution.

The Minister of Justice can give general instructions affecting national policies towards certain types of criminal prosecution. Only opinions delivered in the form of an instruction are binding on the prosecution service. Usually, these instructions are published in an official journal. An opinion answering a request for information regarding the provisions of a new law has no legal effect unless it takes the form of an instruction.

The Minister may also give specific instructions. The Minister of Justice exercises his authority over all the organs of the prosecution service. The Minister of Justice may issue instructions via the Board. The latter communicate these to the heads of district and regional offices. Although rare in practice, every member of the prosecution service may receive direct instructions from the Minister of Justice. During the investigative phase proceedings, he may if he deems it opportune, instruct the prosecution to investigate certain criminal facts which the prosecution service previously decided not to. He can instruct a prosecutor to charge a particular suspect and bring him before the court, even if the prosecution had decided otherwise. During the hearing, the Minister may order the prosecutor to file an indictment and issue an opinion (*requisitoir*) with specific consideration of law. If the indictment has been filed or a first opinion already delivered, the Minister may order a modification thereof. Once a decision has been made in the first instance, or in appeal by the court, the Minister of Justice may order the competent prosecutor to lodge the relevant appellate remedy. Moreover, if this prosecutor has already lodged an appeal, the Minister of Justice may order it withdrawn. The instruction's recipient shall loyally follow the instruction given to him by the Minister of Justice.

In order for the Minister of Justice to exercise his authority over the prosecution service, the law establishes an obligation to inform. According to Article 129 of the 1827 Act

- the members of the prosecution service must provide the Board with information that it needs
- the Board has the same obligation towards the Minister of Justice

The Act does not mention a direct duty on lower prosecutors to inform the Minister. Certainly, the Minister can request information, but except for members of the Board, other prosecutors are not under a duty to inform *ex nihilo* the Minister. A regulation passed by

the Board, approved by the Minister of Justice and published, specifies when the Board should inform the Minister of Justice of the actions it wants to undertake (Article 131 § 4 and § 5, 1827 Act). According to this regulation, the Board also informs the Minister of Justice of events and criminal cases that affect the main lines of the maintenance of criminal law and order, or that are of special interest thereof, as well as cases indicated by the Minister.[250] This pre-information keeps the Minister of Justice aware of the criminal policy enforcement and places him or her in a position to determine whether to give instructions or not.

4.3.3.3 The subordination of the lower members of the prosecution service to their superiors

The 1999 amendment to the 1827 Act modified the subordination relations that existed for more than a century in the Netherlands. From a pyramidal system, subordination became horizontal. Regional offices no longer supervise district offices.[251] The general prosecutors, not the members of the Board, now perform the function of the regional office's head. The general prosecutors of the Board have national tasks and are directly accountable to the Minister of Justice (prosecutors and staff of the general office are subordinate to the Board). They also have territorial tasks because regional and district offices are accountable to them. In principle, the Board can issue general and specific instructions to the staff of every office affecting the exercise of the prosecution service's functions and jurisdictions (Article 130 § 4, 1827 Act). According to the explanatory memorandum of the 1999 Amendment, this right is unrestricted (*onbeperkt*) and may affect all the tasks and jurisdiction of the PPS.[252] District heads and regional offices are subordinate to the Board in the exercise of their functions (Article 139 § 1, 1827 Act). In order for the Board to exercise its supervisory role, the members of the prosecution service are obliged to provide it with any information needed or requested.

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[250] Art. 11 lid 1 van het Reglement van Orde College van procureurs-generaal van 31 mei 1999, *Stcrt.* 1999, p. 106.

[251] However, according to Article 148b of the CPC, public prosecutors are expected to assist prosecutors of the court of appeal's office in cases pending an appeal. This is not, however, a right to instruct. Also, according to Article 453 of the CPC, the attorneys-general of the regional office may withdraw an appeal lodged by the public prosecutor against the judgement made by a first instance court.

[252] *Kamerstukken II* 1996/97, 25 392, nr. 3, p. 10 (MvT).

During the investigatory phase, the subordination of public prosecutors to the Board is recalled in Article 140 CPC, according to which the Board watches over the investigations that take place at the regional and district levels and ensures that the investigation of criminal facts is carried out in a proper manner (*richtige opsporing*). Pursuant to this competence, the Board may issue orders to regional and district heads. This right supposes, of course, that the office head who receives an order also has the right to order his deputy with regard to a specific pending preliminary proceeding. The Board may make an assignment (*opdracht*) or issue directives (*aanwijzingen*) to the competent office head ordering him to supervise the legality of the decision.[253] The Board may commence a criminal prosecution, dismiss a case or take any other measure as provided by law.

Within the regional and district offices, public prosecutors are subordinate to the head of their office (Article 139 § 2). Consequently, public prosecutors are subordinate to the head of their office and to the Board. If the recipient opposes his instruction, this constitutes a breach in the duties accompanying the function of prosecutor. Disciplinary proceedings leading to suspension and dismissal may be instituted (see 4.3.6.2).

4.3.4 Limits to the subordination

4.3.4.1 Natural distance between the Minister of Justice and the prosecution service

The Minister of Justice's right to issue instructions may affect every member of the prosecution service and every general or specific jurisdiction of the prosecution service. However, the Minister of Justice should neither give constant instructions to the prosecution nor expose the institution to an unstable criminal policy. Decisions taken by the prosecution service can have major consequences for the liberty of the people and need a certain consistency. Moreover, it would be difficult for the Minister of Justice to justify frequent interventions before parliament. Usually, the Minister of Justice leaves the prosecution to act according to its legal jurisdiction and tasks. If the Minister is asked to justify a decision taken by the prosecution service in certain cases, he will refer to the competence and prudence of the prosecutors who handled the case. In fact the

[253] According to certain authors, no difference can be established between assignment and instructions, see De Jong & Knigge 2005, 124.

Minister will only use his power to issue instructions if there is a disagreement between him and the Board; no instruction is required if the Minister and the Board have the same view. The principle of ministerial accountability implies that parliament can indicate to the Minister of Justice to what extent he can instruct the prosecution (*vertrouwensregel*) and also question the Minister as to the reasons why he intervened or not in a given case.

The distance between the Minister and the prosecution is amplified by a rigidly structured procedure determining the way ministerial instructions should be given (see 4.3.4.2). Furthermore, instructions should always be legal and should respect international conventions and general principles of law, such as the right to a fair trial provided particularly by Article 6 § 1 of the European Convention for the Protection of Human Rights.[254] Interventions by the Minister of Justice should always be an exception. This distance between politics and prosecution depends on the purpose of the political intervention. There is a distinction between the weight accorded to general and specific instructions from the Minister of Justice. The more specific the instruction, the greater the risk of politics unduly influencing the prosecutors. Only a public prosecutor is competent to efficiently appreciate the circumstances of a case and the Minister of Justice is not a public prosecutor. Therefore, a public prosecutor should normally be free to decide whether or not a particular case should be taken to the court. Likewise, the more general an instruction, the shorter the possible distance between politics and prosecutors.[255] Instructions about the implementation of domestic or international laws can thus be issued freely by the Minister of Justice.[256]

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[254] E.g. if the Minister of Justice issues an instruction concerning a charge late in the process of a hearing, the suspect should be able to know and answer this change in the circumstances of the case within a 'reasonable' time in order for him to prepare his defence.

[255] De Doelder 1996.

[256] E.g. the instruction concerning the application of the law on the supply of information by public organs to citizens and private companies to the prosecution service; see '*Informatieverstrekking door politie en openbaar ministerie (WOB-circulaire)*' Circulaire van de Minister van Justitie aan de procureurs-generaal en de hoofdofficieren van justitie van 27 mei 1992, *Stcrt*. 1992, p. 111.

4.3.4.2 Procedure applying to the instructions given by the Minister of Justice

4.3.4.2.1 Positive instructions

No specific procedure or form is necessary for general instructions. The Minister may issue them verbally or by means of a letter or regulation to the Board, or any other members of the prosecution service.

Before giving any instruction concerning an investigation or a decision on the prosecution of criminal facts, the Minister of Justice should inform the Board (Article 128, 1827 Act). Thereupon, he should communicate the instruction and its reasons in writing to the Board. The Board may provide its opinion on the instruction. Except in the case of urgency, instructions of the Minister must be in writing and reasoned.[257] Exceptional verbal instructions must be issued in writing within a week. The instruction and the Board's opinion must be added to the criminal file. If the disclosure of a Minister's instruction in a particular case is contrary to the State interest, only an entry noting that an instruction has been issued is included in the file.[258]

4.3.4.2.2 Negative instructions

As regards instructions to not prosecute or to dismiss a case, the Minister of Justice shall request the Board to supply its opinion, and inform the two chambers of parliament as soon as possible of the instruction and the Board's opinion.

Direct instructions, positive and negative, from the Minister of Justice are only issued when the Board disagrees with the Minister's point of view. This kind of conflict is very rare.

4.3.4.3 La plume est serve, la parole est libre[259]

Instructions given by the Minister or any superior to the prosecutor participating in a hearing are binding upon him. As long as the circumstances of the case remain unchanged, the prosecutor participating in the hearing must carry out the instruction. It is

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[257] In an urgent case the Minister of Justice may instruct the prosecution at a stage in the proceedings where judgement will be handed down before the instruction is disclosed.

[258] For instance, if the instruction discloses circumstances affecting diplomatic relations with another State.

[259] Refer to 2.3.3.3 for an explanation of this expression.

necessary to distinguish between a Minister's written, reasoned instruction which is added to the files, from instructions given by other superiors.[260] The written 'public' instructions are a guarantee for the public prosecutor against being bound by illegal instructions that would prevent him from attending to circumstances disclosed during a hearing.[261] The prosecutor shall not carry out a Minister's instruction if it does not meet the requirements established by Article 128 of the 1827 Act.

According to the Code of Ethics, the prosecutor is empowered to pay specific attention to the arguments affecting the application of the law that the judge will objectively take into consideration in a case (on the Code of Ethics, see 4.3.5). Concerning the facts of a case, a prosecutor shall remain within the limits set by his objective study of the investigative findings. The prosecutor shall objectively take into consideration all the circumstances of a case affecting the accused, irrespective of whether they are to the latter's advantage or disadvantage. With regard to the interpretation of the law and the assessment of a case provided within a superior's instruction, the affected prosecutor shall continue to observe the instruction. However, if new circumstances disclosed during a hearing change the evidentiary state of a case, the participating prosecutor may have to adopt a position other than that required by the instruction. If the superior had known of the new circumstances, his instruction might have been different. The prosecutor participating in the hearing may have to change his opinion in the case but he must continue to obey his superior. This situation may entail divergence of opinion because it may not always be possible for a lower prosecutor to request a change of instruction from his superior. In this case the deputy prosecutor will have to imagine what the change would be. The outlines of the prosecutor's answer to a Minister's instruction will remain vague and may be difficult to establish in certain cases.[262]

4.3.5 Other rights and duties of Dutch prosecutors

The appointment of the prosecutor commences with the oath that every judicial official has to take, which is as follows

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[260] The 1827 Act establishes the right for the Board and the heads of national, regional and district offices to issue general and specific instructions, and does not specify any formal requirements for the validity of these instructions (respectively Articles 130 § 4, 137 § 2, 138 § 2 and 136 § 3).
[261] See, *Kamerstukken II* 1996/97, 25 392, nr. 3, p. 25 (MvT).
[262] Hermans 2002.

> I promise to be faithful to the Crown, to obey and uphold the Constitution and other acts of law.
>
> I declare that I did not, neither directly nor indirectly, under any name or pretext, promise anything or give anything to somebody in order to obtain an appointment.
>
> I declare that I will never accept nor receive any gifts or presents from any person whom I suspect or know has or will have a lawsuit falling with the performance of my duties.
>
> I promise that I will exercise my duties with honesty, precision and neutrality (*onzijdigheid*), without distinction as to persons, and that I, in this exercise, will act as befits the position of a judicial civil servant.
>
> So help me God Almighty! I swear and promise![263]

Moreover, prosecutors are bound to keep secret any data they obtain during the exercise of their duties which they know or presume to be of a confidential nature, unless the law prescribes it. In 2000 the Board issued a Code of Ethics (*Gedragscode*) concerning public prosecutors and other institution staff. The Code in fact represents a consolidation of usages already in force within the prosecution service and implementations of Supreme Court decisions and the advice of the National Ombudsman. This Code is not an independent source of disciplinary law and is not published in the official journal.[264] Nevertheless, it is a very important text because it refers explicitly to the prosecutors' oath. The Manual establishes

- general rules according to which members of the prosecution shall carry out their functions
  - conscientiously and energetically
  - within the limits established by the law
  - with special attention to fundamental human rights
  - with respect for persons and without discrimination
  - honestly, impartially, objectively and fearlessly
  - in such a way as to be verifiable
- rules concerning mutual cooperation, such as that
  - members of the prosecution shall have a mutual respect for their functions and competences and shall not request from

[263] Article 1g, lid 1, van de Wet op de rechtspositie rechterlijke ambtenaren van 29 november 1996, Stb. 590 (authors' translation).
[264] On the prosecutors' ethics and the Code of Ethics, see Myjer 2002; 't Hart 2001, p. 44.

each other services that would be an abuse of these functions and competences
  - a member of the prosecution is accountable to the superior who directs him as to his work (*leidinggevende*); therefore, he shall keep him relevantly informed
  - the managing member (the one issuing directives) shall carry out his managerial functions fairly and shall inform his deputy of what constitutes the proper exercise of the tasks
  - there shall be free result-oriented communication between prosecution offices
- specific rules concerning relations with the professional environment, such as that
  - members of the prosecution are accountable to the court for the submitted case
  - in contacts with a judge, a public prosecutor's conduct shall not affect the impartiality of this judge
  - the members of the prosecution shall respect the instructions of the Minister of Justice. Especially during a hearing, the public prosecutor shall loyally support the Minister of Justice's instructions. Nonetheless, he is free to pay special attention to considerations of the law that the judge will apply in the case owing to objective reasons
  - in their actions (and decisions not to act), the members of the prosecution shall consider the consequences for the Minister of Justice's political responsibility
  - the public prosecutor ensures he is kept informed of the police investigation's findings and that he can answer to the judge on these findings

4.3.6 Criminal and disciplinary responsibility of prosecutors

4.3.6.1 Penal responsibility of members of the prosecution service

Members of the prosecution service do not benefit from any criminal immunity and are entirely responsible before the criminal courts for the commission of acts that constitute a criminal offence, whether in office or not.

4.3.6.2 Disciplinary responsibility of the prosecution service members

Sanctions and disciplinary proceedings are dependent on the organ that appointed the perpetrator. In practice, the Minister of Justice along with the perpetrator's superior decides whether to institute

disciplinary proceedings. The Minister of Justice cannot withdraw the legal functions in whole or in part from a member of the prosecution service unless there are reasons for suspension or dismissal. Disciplinary sanctions vary from reprimand to suspension and dismissal.

A prosecution suspension may occur

- after assessment by the competent authority, if the 'interest of duty' (*het belang van de dienst*) so demands
- or once criminal proceedings have been instituted

Dismissal may occur on several occasions provided by law, such as when[265]

- the affected person has resigned his functions
- after the delivery of a final and valid court judgement carrying a prison sentence for the commission of a misdemeanour
- the affected person has breached the duties accompanying the function of prosecutor
- the affected person no longer meets the requirements attached to the function
- the affected person cannot perform his work due to ill health
- the affected person has reached the age of retirement
- or for 'other reasons' determined by the competent authority

In theory, the Minister of Justice or a direct superior may threaten a prosecution service member with a disciplinary sanction if he does not implement his orders or instructions. These organs can decide what is 'in the interests of duty' and therefore argue that the instruction given was fundamental. However, if the affected member does not agree with the instruction received, he may file a complaint with the administrative court which will balance the instruction against the duty of subordination. A member of the prosecution service punished by way of disciplinary sanction can file a complaint with the *Centrale Raad van Beroep*.[266]

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[265] Article 36 of the Decree on the Judicial Position of Judicial Civil Servants (Besluit rechtspositie rechterlijke ambtenaren, *Stb.* 1994, p. 212), and Articles 91, 98 and 99 of the General Regulation on State Civil Servants (Algemeen Rijksambtenarenreglement, *Stb.* 1931, p. 248).

[266] This procedure is provided for in Article 47 of the Wet op de rechtspositie rechterlijke ambtenaren van 29 november 1996, *Stb.* 590. The *Centrale Raad van*

4.4 The functions of the Dutch PPS in the preliminary phase of the criminal process

4.4.1 Functions outside the preliminary phase of the criminal process

According to Article 124 of the 1827 Act, the prosecution service is responsible for the criminal enforcement of the legal order (*de rechtsorde*) and for other tasks provided by law. In addition to its main task of enforcing criminal law, the Dutch prosecution service is empowered with specific tasks in civil, commercial and administrative law. For example, the prosecution service has jurisdiction in cases concerning minors, marriage (Article 53 § 1 of book 1 of the Civil Code), guardianship (Article 379 of book 1 of the Civil Code) and bankruptcy (Article 4 § 1 of the Code of Bankruptcy), and it upholds the legal order in the interest of the State.

After a criminal process is brought to a close by a final judgement, the prosecution service is also responsible for the enforcement of this judgement.[267]

4.4.2 General principles concerning the preliminary proceedings of the criminal process

*4.4.2.1 The opportunity principle (*het opportuniteitsbeginsel*)*

The 'opportunity principle' may be defined as the freedom for the prosecution service to select from all criminal cases those suitable for prosecution or for other settlements (e.g. dismissal or transaction).[268] In principle, during the investigative phase, the CPC does not provide this opportunity. An official with investigatory power (for the definition of such an official see 4.4.3.1) records the criminal facts and submits the report to the competent public prosecutor for a decision on the charge. The law does not provide any option at this stage of the proceedings. However, a limited right to dismiss a matter has been recognised, in practice, for the police. The investigating officer may decide not to record a report, and

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Beroep is the highest administrative court that tries, among others, cases concerning civil servants.

[267] During the criminal process, the prosecution service is also responsible for the enforcement of certain judicial decisions. For example, the court can summon the suspect at the hearing. The prosecution service is charged with enforcing this summon (Article 278 § 2 of the CPC).

[268] Corstens 2005, p. 57.

consequently, not to officially inform the prosecutor (*politie sepot*).[269] The police can take this decision because it is not always wise to investigate or because the priorities of the criminal policy are different. This power of the police to dismiss a matter is carried out under the supervision and responsibility of the prosecution authority. It seems that the reasons behind the police dismissing a case are in fact guided by the opportunity policy followed by the prosecution authority.[270] In practice, this right to select cases for 'further' investigation is effective for all types of criminal investigative authorities.

Once an investigation has been carried out, Articles 167 and 242 CPC establish that the prosecution service decides on the charge, whether criminal proceedings should be instituted or not, and summons the suspect before the court. Government criminal policy plays a role in this. The decision on the charge is taken in accordance with the criminal policy of the Minister of Justice, who also sets the priorities. This is why public prosecutors make decisions on the charge taking into account the Minister's political responsibility.[271] This is also the reason why only public prosecutors can decide on the charge because they are dependent on the Minister of Justice.[272] The prosecution service has a monopoly in this respect. Indeed, as will be shown, the opportunity principle is a combination of political decision-making and legal criteria, and therefore only a judicial public institution dependent on the political decision-maker meets the necessary requirements (organisational dependence and functional autonomy) to supervise the decision to prosecute. To provide other organs (particularly private individuals) with the right to prosecute would thwart the opportunity policy. Certain authors maintain that authorising private prosecutions would undermine the opportunity principle and the policy of the prosecution service.[273]

The prosecutor can dismiss a matter entirely or partly according to

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[269] This right was established by the Supreme Court in 1950, see e.g., HR 31 januari 1950, *NJ* 1950, 668.
[270] De Jong & Knigge 2005, p. 138.
[271] De Jong & Knigge 2005, p. 14.
[272] However, Article 126 of the 1827 Act provides that within the limits set by the law, public prosecutors can entrust other prosecution office officers with their competence. In practice, the offices' legal secretaries (*parketsecretaris*) carry out many of the prosecutors' actions.
[273] Corstens 2005, p. 57.

- technical grounds provided by law (see grounds for dismissal 4.4.3.2.3)
- grounds provided by the general interest (*algemene belang*)

In other words, a public prosecutor may prosecute a criminal offence only if the law provides for a criminal definition of the act and if it is in the general interest to prosecute. The CPC does not provide for a list of grounds for opportunity dismissal (*beleidssepot*), and it does not establish what the general interest comprises. Here prosecutors and the police apply the instructions provided by the Board (*de vervolgingsrichtlijnen*), while the Board itself receives the Minister of Justice's instructions. In reality, these instructions define the general interest. The notion of general interest that may justify dismissal is vague, but this does not mean that opportunity is arbitrary.[274] The prosecution policy is more a question of what should be prosecuted in the general interest of Dutch society. Examples may be taken from several circumstances, such as where[275]

- another type of procedure other than criminal prevails (e.g. administrative or tort law)
- there is insufficient national interest because, for example, the suspect will be extradited
- the impact of the criminal act on the legal order is minimal
- the criminal act itself is minor
- although the time limit to prosecute has not elapsed, the facts are old
- there are circumstances particular to the accused such as advanced age or poor health

In addition, the instructions of the hierarchy affect the opportunity to prosecute with regard to the sentence a prosecutor may recommend in specific proceedings. These *richtlijnen* are published and are extremely precise. Accordingly, a prosecutor knows exactly what kind of sentence should be recommended against the commission of a specific crime and in specific circumstances. Since April 1999, the PPS uses computer software (BOS) to provide automatic

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[274] See, on the notion of arbitrariness and inadmissibility of the prosecutor's indictment, footnote 274.

[275] Examples of grounds are listed in the guidelines of the Board, such as Aanwijzing gebruik sepotgronden van het College van procureurs-generaal 6 augustus 2007 available on the internet at <www.om.nl>.

guidelines.[276] This software indicates to prosecutors which sentence demands they should request for almost eighty percent of the common criminality. One of its advantages is to unify the sentence policy across the country.

4.4.2.2 Control over the decisions affecting the prosecution

General control over the Minister of Justice's criminal policy is exercised by parliament. Moreover, the Dutch criminal procedure provides several regulations affecting the opportunity to prosecute and the decision on the charge.

Superior prosecutors exercise control over decisions made by public prosecutors in specific cases. This control consists of regular meetings taking place at their offices. In addition, local representatives of the prosecution service take care to ensure that the police carry out their functions in harmony with the prosecution criminal policy as provided by the Board's instructions.[277]

According to Article 12 CPC, persons with a direct interest in a case, usually the victim, can challenge the prosecutors' decision not to prosecute or not to charge certain facts (*beklag over het niet vervolgen van strafbare feiten*). As we will see (4.4.3.2), the control exercised over the prosecution decision may lead to the overruling of this decision.

Article 36 CPC also provides that the accused can request the court to dismiss a case if the prosecutor does not carry out a prosecution while the suspect had knowledge or expectation of a possible prosecution.

Articles 250 and 262 CPC provide the accused with the right to challenge an initiated or continued prosecution by way of a complaint procedure before a court (see 4.4.3.2.1).

4.4.2.3 The phases of the preliminary proceedings

The first phase is the discovery and investigation of criminal acts by the police and/or other investigators. This phase usually starts with the victim's report or the suspect's arrest in *flagrante delicto*. Thereupon, the police officers usually investigate the act (*opsporing*) and in principle keep the prosecutor informed of the investigation. If the police do not drop the case, they send a record to the prosecutor

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[276] These guidelines, the so-called *Polaris richtlijnen*, are public and available on the internet at <www.om.nl>. However, they only apply to the most common crimes for which rapid handling is necessary.

[277] De Jong & Knigge 2005, p. 138.

who decides on the next phase (see for the police dismissal decision 4.4.2.1).

The first phase ends in principle with the prosecution's decision (*beslissingen omtrent vervolging*). The prosecution phase (*de vervolgingsfase*) follows. At the conclusion of the investigative phase the public prosecutor may decide to settle the case by transaction, institute further proceedings, dismiss the proceedings or refer the case to the investigating judge (*de rechter-commissaris*). The preparatory investigations may thus stop with one of the following decisions by the prosecutor

- a decision on the charges against the defendant (*de tenlastelegging*) followed by an indictment (*de dagvaarding*)[278]
- the dismissal of the case
- a transaction between the accused and the public prosecutor (*de transactie*)
- a conditional dismissal (*het voorwaardelijk sepot*)

Depending on the type of prosecution decision brought by the prosecutor, the prosecution phase may end with a final decision (i.e. a definitive and valid judgement) concerning the accused and the commencement of the execution of this decision (*aanvang van de tenuitvoerlegging*). The prosecution phase includes the judicial investigation by an investigating judge, the hearing in the first instance court, the appellate proceedings and the cassation proceedings.[279]

4.4.3 The role of the Dutch prosecution service in the pre-trial stage

*4.4.3.1 First phase: the investigation (*de opsporingsfase*)*

Unless discovered in *flagrante delicto*, a victim or a witness brings criminal acts to the attention of the police or sometimes the prosecutor himself. In practice, the prosecutor's information about

[278] The public prosecutor may decide to request a judicial investigation (*gerechtelijk vooronderzoek*) by an investigating judge before issuing the indictment or make another decision such as to dismiss the case.

[279] In this thesis only those decisions made by the public prosecutor after the investigative phase will be addressed (*beslissingen omtrent vervolging*), as well as the major prosecution roles during the hearing and with regard to the different forms of review. It is not the purpose of this thesis to describe this phase in complete detail.

the commission of a crime mainly comes from the police or other investigators. In practice, police officers have the power to dismiss certain matters without bringing them to the attention of the prosecutor (*het politiesepot*). The officers having the power to investigate every crime (Articles 141 CPC) are

- the public prosecutor
- the members of the police force
- officers of the military police
- officers of the special investigation services

In addition, there are also special investigation officers whose investigative functions are limited to certain types of crime (Article 142 CPC)

- civil servants specially appointed by the Minister of Justice on motion of the Board for the exercise of certain investigations
- investigators mentioned by specific acts

The police investigate in most common matters. They carry out their duties under the supervision of the public prosecutor (Article 148 CPC). In principle, police officers have the right to deploy some means of coercion with the approval of the competent prosecutor (e.g. police custody extension beyond three days). In exceptional cases, a senior police officer (*de hulpofficier van justitie*) may take a decision over the deprivation of liberty pursuant to an investigation (police arrest or police custody).[280] Only in case of *flagrante delicto* do the police have the right to take the suspect into custody. However, the public prosecutor or a senior police officer shall be informed of the matter as soon as possible thereafter. At the end of the investigation, the police send a report to the prosecutor, who decides on further proceedings.

[280] Police officers with the rank of *hulpofficier* act in the capacity of auxiliaries to the public prosecutor and may carry out most of the prosecutor's tasks during the investigation.

*4.4.3.2 Second phase: the prosecution decisions and the beginning of the prosecution phase (*de vervolgingsfase*)*

4.4.3.2.1 Decisions alternative to prosecution, the decision to prosecute and the judicial investigation

According to the facts disclosed during the investigation, the PPS takes a decision on the charge and whether further prosecution should be commenced as soon as possible. Instead of prosecuting a petty offence or a crime carrying a custodial sentence of up to six years, the public prosecutor may propose a deal to the accused (e.g. the payment of a fine). In the same vein, the PPS may decide to conditionally dismiss the proceedings (*voorwaardelijk seponeren*).[281] The main distinction between this and the deal consists in the prosecutor's right to propose more extensive conditions (e.g. a long probation period, compensation for the victim's losses or payment to a victims' compensation fund, and the prosecutor may also order the accused to attend a special care facility).[282] If the conditions of the deal or of the conditional dismissal imposed during the probation period are respected, there will be no prosecution before a court. At the time of writing, an amendment to the CPC on the prosecution service's settlement power has been adopted and will gradually enter into force from February 2008 (*Wet OM-afdoening*). According to this act, the public prosecution in charge of a case will enjoy the right to make a decision and sentence the accused with a criminal order (*strafbeschikking*) that may carry a penalty such as a fine or community service of up to 180 hours. The right to settle a case by way of deal will progressively be replaced by this new criminal order. The right to settle without trial will apply to crimes and misdemeanours for which a jail sentence of up to six years is available. The accused will have the right to challenge the criminal order by way of opposition (*verzet*) within, in principle, fourteen days from the day he has knowledge of the decision. If the opposition is accepted, the proceedings continue as if the suspect had received a classic indictment. In addition, other directly affected parties such as

[281] Corstens 2005, p. 504.

[282] In practice, the PPS tries to promote out-of-court settlement and compensation for victim. Although the law does not require the consent of the victim of a crime, one of the PPS guidelines provides that a prosecutor may settle a case if the accused has repaired the victim's damage, see Aanwijzing slachtofferzorg van 13 april 2004, *Stcrt*. 2004, p. 80.

the victim will have the right to challenge a decision of the prosecutor to settle.[283]

The prosecutor may notify the suspect of his intention to press charges and prosecute him for all or only a part of the facts (*de kennisgeving van verdere vervolging*), or directly issue an indictment. If the public prosecutor decides to prosecute the accused, he may take him to court by immediately issuing the indictment.[284] However, certain acts may require a judicial investigation (*het gerechtelijk vooronderzoek*). Instead of taking the accused to court immediately, the prosecutor may request such an investigation if he finds it necessary (Article 181 § 1 CPC).[285] The prosecutor's motion establishes explicitly the facts requiring investigation. Only in very limited circumstances does a case need a preliminary judicial investigation. For example, a public prosecutor cannot decide to hear a witness outside a judicial investigation. The impartiality and independence of the investigating judge may be necessary to carry out witness interviews. The investigating judge can refuse to commence an investigation (Article 184 CPC) and reject the prosecutor's request. If the judge agrees to open the investigation and to carry out the necessary actions, the public prosecutor retains his authority over the opportunity to prosecute. For example, he can request an extension of the investigation to new facts (Article 182 CPC) or the abandonment of the investigation (Article 238 CPC). In the end, the judge reports the results of his investigation to the prosecutor who decides upon further action.

A prosecutor cannot decide *ex officio* to place an accused in preliminary custody (*de voorlopige hechtenis*). Preliminary custody is ordered by a judge. The first fourteen days may be ordered by an investigative judge (the institution of a judicial investigation is not necessary) whereas only the council section of a court (*raadkamer*) may extend the custody for ninety days more.

4.4.3.2.2 The control over the decision not to prosecute and to notify the charge

The decision not to issue an indictment can affect all the crimes disclosed by the investigation, or only certain facts. Article 12 CPC provides that the person directly affected by this decision can

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[283] Stamhuis & Van der Leij 2005.

[284] The immediate summons of the suspect is now the most frequent kind of action taken on charges brought, see De Jong & Knigge 2005, p. 26.

[285] During the first instance hearing, the court can also request the intervention of the investigating judge in order to clarify relevant questions.

challenge it before the court of appeal (*Beklag over niet vervolging door rechtstreeks belanghebbende*). The complainant can challenge the prosecutor's failure to prosecute the case, to prosecute only certain facts or infractions, or to prosecute certain facts using a one legal qualification rather than another.[286] The court judges whether the prosecutor decided correctly. If it decides that the complaint is well founded, it can order the prosecutor to prosecute or continue prosecution. The court fully evaluates the entire criminal file.

The suspect can challenge a notification of further prosecution before the competent court of first instance (Article 250 CPC). If the prosecutor issued an indictment directly without notification of further prosecution, the suspect may challenge the indictment before the hearing's commencement by way of a pre-trial complaint (Article 262 CPC). The court can annul the prosecutor's notification or indictment and dismiss the case or a part of it (*buiten vervolging stellen*). This might occur when certain requirements are not met (e.g., the suspect is not criminally liable or a certain standard of proof is not met). The court can also decide to ask an investigating judge to carry out new investigations. Alternatively, the court will reject the accused's complaint (whether against a notification or an indictment) when it is inadmissible or unfounded. The proceedings can also continue after the public prosecutor has implemented in the indictment the changes underlined by the court. The PPS has the right to challenge a court decision taken on the complaint.

4.4.3.2.3 Grounds for dismissal of prosecutions

Once an indictment is served and the court becomes competent to hear the case, it will check the admissibility of the prosecution (*ontvankelijkheid van de officier van jusititie*). In other words, to avoid annulment, the public prosecutor should carefully verify before service that the prosecution meets all the legal requirements. The Supreme Court has extended the conditions that can lead to a prosecution's inadmissibility to general principles of proper procedure (*beginselen van een goede procesorde*), such as the so-called legitimate expectation (*vertrouwensbeginsel*).[287] The Supreme Court has developed case law according to which promises made by the prosecution service not to prosecute are binding. Opportunity is not equivalent to arbitrary action. Therefore, a prosecutor cannot

[286] The decision made by the court of appeal in application of Article 12 of the Code to indict the suspect cannot in turn be challenged by application of Article 250 of the CPC procedure.
[287] See HR 29 mei 1978, *NJ* 1978, 358.

prosecute a matter if it is contrary to a published instruction or a previous promise made by the Minister of Justice or an organ of the prosecution service.[288] If the suspect is prosecuted despite having the legitimate expectation that he would not be, the court may declare the prosecution inadmissible and dismiss the case.

At this stage, criminal proceedings may also be dismissed if there are good reasons to think that prosecution would probably not lead to a conviction. In the following examples, the case will be dismissed (Article 348 CPC) where

- the prosecutor brings the case before an incompetent court
- a legal requirement has not been met rendering the indictment invalid
- an essential condition for a valid prosecution cannot be met, such as when the prosecution is out of time or the accused is dead

4.4.4 The role of the Dutch prosecution service in the supervision of the preliminary proceedings

4.4.4.1 Exclusive competence of the prosecution service in the supervision of proceedings

Actors in preliminary proceedings include not only the public prosecutors but also the police, the investigating judge and several other investigators (see 4.4.3.1). However, Article 132a CPC establishes that a public prosecutor supervises the investigative phase. Article 148 § 2 provides that public prosecutors can give orders to all the officers involved in an investigation.[289] Of course, public prosecutors do not have the particular skills of the other officers empowered in the investigation, but they should ensure that

- the investigation focuses on matters important to the assessment of the criminal offence only
- the investigation policy is geared to the prosecution policy and in particular to the opportunity directives
- the investigation remains within the law and the general principles of law

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[288] See e.g. HR 29 mei 1978, *NJ* 1978, 358 and HR 19 juni 1990, *NJ* 1991, 119.

[289] Articles 3 and 4 of the Special Investigation Services Act provides for supervision of the PPS over the relevant services' investigators in criminal matters; Wet van 29 mei 2006, *Stb*. 285.

For these reasons, public prosecutors have an exclusive competence to supervise investigations. They are also responsible for what may occur during this phase. It also follows the hierarchical organisation of the prosecution service in that

- the Board of General Prosecutors supervises preliminary proceedings by way of instructions to the head of offices
- Article 19 of the Police Act provides that the Board of General Prosecutors has a general supervisory function over the police when they uphold the criminal legal order and execute their functions in the service of justice[290]
- the head of office supervises preliminary proceedings by way of instructions delivered to public prosecutors (see also 4.3.3.3)
- Article 13 of the Police Act stipulates that the police are under the authority (*het gezag*) of the public prosecutor when they act for the enforcement of criminal law and in the service of justice

Supervisory instructions will direct the investigators, for example, to pursue certain types of offences over others. In practice, prosecutors give instructions to the police to comply with the criminal policy of the prosecution service and to execute acts necessary for the investigation of the case.

The police provide the supervising public prosecutor with criminal reports (*process-verbaal*) and may await further instructions. The police are also under the authority of the mayor of their municipality when they enforce local policy. In order to coordinate matters, the chief of the local police, the mayor and the heads of offices meet regularly to discuss these activities.

4.4.4.2 Appeal of orders

During a preliminary proceeding, unless otherwise provided by law, the competent prosecutor can challenge interlocutory and final orders taken by a judge, court or the investigating judge (Article 446 CPC) if the order rejected a prosecutor's request (such as a request to take the accused into preliminary custody). In principle, the court of first instance or the court of appeal has jurisdiction to hear the appeal. The Supreme Court is competent to hear an appeal against orders taken during the appeal proceedings. The appeal shall be filed within fourteen days of the day the decision is made.

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[290] Wet van 9 december 1993, *Stb.* 724.

4.5 The role of the Dutch PPS after the preliminary phase of the criminal process

4.5.1 Preliminary verifications

According to Article 283 CPC, the court, at the accused's preliminary request or by its own motion, can decide at the start of the trial hearing by way of judgement on the

- nullity of the indictment
- the inadmissibility of the prosecution
- its own lack of competence to hear the case

In these cases, the public prosecutor may offer to modify the indictment in order to save the case.

4.5.2 First instance hearing and participation of the prosecutor therein

According to Article 258 § 1 CPC, the trial stage commences with a summons to appear before the court. The precise commencement is when the indictment is served on the accused by the public prosecutor. This moment is actually when the indictment is sent to the accused, not when the accused receives it. The trial stage then commences and the case is listed for hearing before the court. When the case is called, the public hearing formally commences. From that moment the prosecutor loses an important aspect of his *dominus litis* position. He is no longer entitled to withdraw the indictment. Therefore, the case will be conducted only by a decision of the trial court. The court hears the case in its normal composition unless otherwise prescribed by law. Before any type of court, the public counsel for the prosecution is in principle a public prosecutor. The public prosecutor enjoys a certain freedom to adapt the indictment according to the circumstances of the case subject to the court's approval (see 4.3.3.2 and 4.3.4.3).

4.5.3 Position of the public prosecutor in the ordinary forms of review

*4.5.3.1 Appeal (*hoger beroep*)*

The appeal is the ordinary form of review against valid final judgements (*einduitspraak*) or interlocutory judgements made during the court's proceedings (*in de loop van het onderzoek ter terechtzitting*). Parties may lodge an appeal against the entire

judgement, or only challenge those parts considered unfavourable (*verbod van partieel appel*). However, where the defendant is found guilty of several crimes in the same judgement, he may lodge an appeal against the entire judgement or only against one or more convictions (Article 407 § 2 CCP). The time period for making an application for appeal is, in principle, fourteen days from the day of the public reading of the final judgement. The public prosecutor of the court that gave the decision and the defendant in the first instance proceedings both have the right to lodge an appeal. The challenges raised against the decision must be disclosed in writing to the office of the first instance court where the appeal is lodged. The competent public prosecutor can challenge a judgement to the benefit or detriment of the defendant. Only the prosecution service can lodge an appeal against an acquittal. If the prosecutor is the only appellant, he must inform the defendant of the appeal.

Once the appeal is filed, the competent member of the prosecution service becomes the advocate-general. He serves the indictment (*appeldagvaarding*) on the defendant. In this indictment, the advocate-general will specifically indicate the date of the hearing and the charges against the suspect. Until the moment that the case is called, the appellant has the right to withdraw the appeal. When the case is heard, the appeal court will first verify three formal requirements

- it will decide whether or not the appeal is admissible (*ontvankelijkheid van het hoger beroep*). The appeal is inadmissible when
  - its plea does not comply with Article 407 CPC
  - the time limit to lodge an appeal has expired
- whether the indictment on the appeal is valid (*geldigheid van de appeldagvaarding*)
- whether the court of appeal has jurisdiction to hear the case (*bevoegdheid van de appelrechter*)

If the appeal clears these checks, the court completely re-examines the case using the investigations made during the first instance hearing and any new investigations.

Until a recent amendment of the CPC, the appeal procedure consisted of a full rehearing of the case. However, according to this amendment, parties shall indicate to the court of appeal the issues

on which the appellate judges need to focus, in order to avoid unnecessary duplication.[291]

The court of appeal may

- sustain the first instance decision and reject the appeal
- quash the first instance decision and, as the case may be, acquit the accused or convict him and impose a higher or lower sentence

*4.5.3.2 Opposing appeal (*verzet*)*

This form of review has been repealed by a recent amendment of the CPC.[292]

*4.5.3.3 Cassation appeal (*beroep in cassatie*)*

When a cassation appeal is lodged, the Supreme Court shall verify that the lower court correctly applied the law. According to Article 78 § 1 of the 1827 Act, the Supreme Court has jurisdiction to hear the cassation appeal against all decisions of common first instance courts and appellate courts. The cassation appeal is not admissible when another ordinary remedy is still available to the parties, or has been available but remained unused.

Both the defendant and the prosecutor may file the cassation appeal within fourteen days of the date of the final judgement.[293] Until the moment the case is called, the appellant has the right to withdraw his appeal. If the prosecution service alone challenges the decision, the defendant has the right to lodge an incidental cassation appeal (*incidenteel*) within fourteen days of the filing of the notification of the appeal. This right provides the defendant with extra time to decide whether or not to file a cassation appeal. The prosecution service does not need to act with the assistance of counsel in cassation, whereas the defendant can *only* file his or her cassation appeal through professional counsel.

One of the distinctions between the appeal and the cassation appeal is that the Supreme Court does not rehear the entire case, and especially, does not assess facts.[294] It can only hear arguments

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[291] Wet van 5 oktober 2006, *Stb.* 470.
[292] Idem.
[293] Depending on the circumstances, this time limit may start from the moment the judgement is known to the defendant.
[294] There are rare exceptions, such as a change in the law in favour of the accused since the last instance court made a decision, or if a long time elapsed between the

against the application of the law in the specific case. In addition, as opposed to the appeal, a cassation appeal is admissible only on the grounds specified by law, i.e.

- the omission of a procedural requirement, of which the failure to respect is specifically sanctioned by law with nullity or where such nullity clearly results from the nature of the requirement
- a violation of the law

Before examining the case, the Supreme Court reviews the admissibility of the appeal. The *procureur-generaal*'s office at the Supreme Court has a special position in the cassation trial because the *procureur-generaal* or the *advocaat-generaal* who advises the Supreme Court is neither a member of the prosecution service (see 4.3.1.2.3) nor of the Supreme Court. The *procureur-generaal* receives the opinion of the prosecution service and/or the opinion of the defendant, but independently advises the Supreme Court. His opinion (*conclusie*) is based on close study of the law and only points of law are discussed therein, so as to serve as legal and impartial advice to the court.

The Supreme Court may reject the appeal and sustain the challenged decision or quash it entirely or partly. The Supreme Court usually does not annul a judgement to the prejudice of the defendant unless the appeal originated from the prosecution service.[295] The Supreme Court can decide to quash the judgement and refer the case to the originating court or to a different court. In certain cases the Supreme Court establishes a violation of the law and delivers a final decision itself rather than referring the case back to a lower court. This is done in order to prevent needless delay and work when the lower court's options are limited to only one possible decision. The Supreme Court is entitled to take this course of action only when an assessment of the facts is not required to finalise the case.

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moment the cassation appeal was filed and the moment it is handled by the Supreme Court; see Groenhuijsen & De Hullu 1994, p. 29.

[295] Corstens 2005, p. 751.

4.5.4 Position of the public prosecutor in the extraordinary forms of review

*4.5.4.1 Cassation appeal in the interest of the law (*cassatie in het belang der wet*)*[296]

When an ordinary remedy is no longer available, the *procureur-generaal* at the Supreme Court has the right to appeal any decision made by a court. The Supreme Court decides on the challenged point of law in the interest of the law. The purpose of this form of review is for the Supreme Court to exercise its role of supervising the implementation and interpretation of the law by judges. The decision taken by the Supreme Court upon such an appeal does not interfere with the rights obtained by the parties in the original decision. Even if the Supreme Court decides that a judgement of acquittal is void, the acquittal remains in force.

The prosecution service has no right to lodge such an appeal. It has, however, occurred that the PPS lodged an ordinary cassation appeal within fourteen days against a judgement for reasons that surpassed the mere interests of the case. Such a 'disguised appeal in the interest of the law' (*verkapte beroep in het belang der wet*) has been the object of criticism.

Although they do not have the right to lodge such an appeal, it can happen that the PPS or the Ministry of Justice make an informal request to the *procureur-generaal* to lodge an appeal in the interest of the law against a judgement.

*4.5.4.2 Revision (*herziening*)*

The extraordinary remedy of revision is opened against valid and irrevocable decisions that become unsustainable. The review is only possible against a decision of conviction or a discharge from all further prosecution. In particular, a revision cannot be lodged to the prejudice of an aquitted defendant.[297] The *procureur-generaal* at the Supreme Court or the convicted person may file a request for revision. The prosecution service is thus barred from making this request. The grounds for the revision are

- conflict between two contradictory decisions, for example, when someone is convicted by two courts of having committed a criminal offence at the same time, but in two different places

[296] See for more Den Hartog Jager 1994.
[297] At the time of writing, the Dutch Minister of Justice has announced a plan to propose a bill that includes acquittal in the revision.

- the discovery of a circumstance that was not disclosed during the investigation at the hearing and that is so important that an acquittal, a prosecution inadmissibility or the dismissal of proceedings would have been instituted by the court
- the finding of a violation of the European Convention for Human Rights or one of its protocols by the European Court of Human Rights

When there is conflict between two decisions, the Supreme Court cancels both of them and refers the cases to a regional court for retrial. In the two other situations (new factual circumstances and violation of the ECHR), the Supreme Court refers the decision to a court of appeal, which may maintain or annul it and give a new decision. Thereupon the remanded court may decide that the prosecution is not admissible, acquit the accused or sentence the accused for a more minor criminal offence.

*4.5.4.3 Pardon (*gratie*)*

The Crown may grant the convicted person clemency upon his request. Clemency only applies to the sentence's execution. The public ministry submits its opinion to the Crown, and the court that made the last resort decision provides its advice. The Crown may change the decision to a sentence diminution or sentence modification (the Crown may reduce imprisonment to a fine).

Chapter 5
Poland (1947–1989) – the Communist organisation and functions of the *Prokuratura* in the criminal process

During the first years following the end of the Second World War, communists progressively seized power in Poland and transplanted the Soviet political system, based on the supremacy of the Communist Party (5.1). The reception of the Socialist legal system implied the replacement of the Rule of Law with the concept of Socialist Legality, which establishes the supremacy of the law as a tool to achieve Communism. Major changes in criminal law and criminal procedure followed. In particular, the replacement of the institution of the investigative judge by prosecutors, the participation of lay judges in criminal justice, the suppression of the cassation review and the creation of an extraordinary appeal will be considered here (5.2).

5.1 The political structure in Poland after the Second World War[298]

5.1.1 Basic historical developments in politics and constitutions

5.1.1.1 Basic historical developments in politics

After the Second World War, under the powerful influence of the Soviet Union, the Communist Party seized power in Poland. The country progressively adopted the Communist legal system and replaced the pre-1939 governmental apparatus destroyed by the

[298] See Wagner 1970.

foreign occupation. Gradually, the Polish Communist Party, under the name Polish Workers' Party, pursued active politics and gained power in the country in the first parliamentary election in 1947. After several purges, in 1948 the Polish Workers' Party merged with other Polish workers' and labourers' parties to form the Polish United Workers Party. By 1950, Poland was a full member of the Soviet Bloc under one-party rule. The Soviet Union's dominance was mostly a feature of the Stalinist era (1944–1955). With the rise to power of Gomulka in 1956, Poland entered an era marked by the rejection of the Stalinist model. The emergence of the Solidarność (Solidarity) workers movement in August 1980 marked the start of the transition towards democracy and the end of Soviet-style Communism. General Jaruzelski, the leader of the Communist government at the time, imposed martial law and tried to defeat the movement. This saw a return to state-sponsored terror for two years. Many strikes and demonstrations eventually led to the repeal of martial law in 1983. In 1989, for the first time since the end of the war, the existence of a political organisation independent of the Communist Party was legally recognised. Lech Wałęsa, leader of Solidarność was elected President in December 1989.

5.1.1.2 Basic historical developments in constitutions

In 1952, a new Constitution, modelled on the Russian Constitution of 1936 was adopted and the previous 1935 Constitution was declared illegal.[299] Poland became the Polish People's Republic. Two main organisations represented the core of Party authority – the Central Committee and the Political Bureau or Politburo (nine members). The Politburo carried out Party activity when the Central Committee was not in session. Party Directives were treated as the guiding principles for court activities and for all agencies involved in the administration of justice.[300] Until 1955, criminal legislation was strongly influenced by the Stalinist terror and used as a tool for purging the emerging Communist society of its enemies. After 1955, while the nature of the system remained unchanged under a strong Party monopoly, the political climate was more relaxed and the life of citizens more tolerable. The pressure of political trials eased until the renewed martial law period from late 1981 to 1983. During this

[299] While differences can be found between the Polish and Russian constitutions, these do not concern the main features of the judicial system, see Izdebski 1984.

[300] 'In their struggle to establish the people's legality, courts and government attorneys shall take their directives from the guiding principle of the Party' in Gsovski & Grzybowski 1959, p. 732.

period, several retrograde legislative changes were introduced, but reforms towards democratisation and the Rule of Law eventually prevailed by the end of the 1980s.[301]

5.1.2 The shape of the governing bodies – the Sejm, the Council of State and the Council of Ministers

The Polish Committee of National Liberation and the National Home Council were created in 1944 under covert Soviet protection. While the Committee was given provisional executive powers, the National Home Council became the provisional parliament until the new legislative body (Sejm) was 'elected' and held its first session in 1947. The Sejm was a unicameral body elected by the working people (Article 2, 1952 Constitution). Although the Constitution declared the Sejm to be the highest body of State power, its functions were minimal. The offices of the President of the Republic and the Senate were abolished. A new body called the Council of State was created with fifteen members elected by the Sejm. The Council of Ministers and local People's Councils were also created as government bodies. The Sejm met twice a year and only approved decrees promulgated between sessions by the Council of State and enacted legislative bills presented by the Council of Ministers.

The Council of State was composed of a President, four vice-presidents, a secretary and nine members, chosen by the Sejm. The Council, and behind it the Communist leaders who were present at every stage of the administration, had the power to

- order elections for the Sejm
- lay down universally binding rules for the interpretation of laws
- issue decrees with the force of law
- ratify governmental decrees
- initiate legislation
- make judicial appointments (professional judges only) to lower courts on the motion of the Minister of Justice.[302] The Council of

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[301] For example, two Acts in May 1985 amended the CC and CPC in order to increase the harshness of the criminal law and to simplify criminal procedure. This thesis will not take these temporary amendments into account. See Cole, Frankowski & Gertz 1987, p. 223.

[302] Article 50 of the Constitution made the office of judges elective and provided that further electoral rules be established by law. However, no legislation was issued and this provision remained unimplemented, with the Council of State given the

State also recalled judges in cases of permanent incapacity or in 'the interest of the administration of justice'[303]

- appoint the first President and the other judges of the Supreme Court

Most importantly, in the intervals between sessions of the Sejm, the Council issued decrees with the force of law, which would only be submitted for approval to the Sejm at its next session. Specifically, the Council had the power to initiate legislation, pass decrees with the force of law, appoint magistrates and issue binding directives to the judiciary for the interpretation of laws. In it were concentrated the legislative, executive and judicial powers in accordance with the Marxist-Leninist rejection of the theory of the separation of powers.[304]

In the judicial sphere the Council interpreted law as the supreme organ of State authority. Its interpretations were binding on the courts. Article 4-2 of the *Prokuratura* Act of 20 July 1950 noted that interpretations and principles concerning the implementation of law, passed by the Council of State, were generally binding and published in official reports.[305]

The official executive and administrative organ of State power was the Council of Ministers. However, it was subordinate to the Council of State and accountable to it when the Sejm was not in session. Ministers were appointed by the Sejm but the Council of State could modify the composition of the government (Article 29, 1952 Constitution). Although ministers could issue regulations, adopt decisions, supervise their execution and enforce laws (Article 32, 1952 Constitution), they were merely experts in their own fields and did not play creative roles in the shaping of political lines. The presidium of the Council of Ministers was composed of members of the Politburo and the Party, and was the chief executive of the government. It could always withdraw an order or a regulation issued by a minister (Article 33, 1952 Constitution). Each member of the presidium was in charge of one branch of the administration.

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function of appointing judges as a successor to the President of the Republic, see Rozmaryn & Warkałło 1967, p. 352.

[303] Bredin 1960.

[304] Gönenç 2002, p. 83.

[305] Translation of the Ustawa z dnia 20 lipca 1950 o Prokuraturze Rzeczypospolitej Polskiej (Dz.U. Nr 50, poz. 346) in Législation Polonaise 1952, p. 208.

5.1.3 The People's Councils

At the local level – in large cities, districts, counties and provinces – and under the supervision of the Council of State, State power was decentralised to the People's Councils. Their members were elected by the working people. People's Councils served as instruments for the transmission of the regime's plans and policies and as a means of enforcement of government programmes. Here too the active powers of the Councils were delegated to their presidiums. In their judicial capacities, the People's Councils appointed non-professional judges.

5.2 The criminal judicial organisation of the Polish People's Republic

5.2.1 Socialist Legality and changes in the Criminal Procedure Code and the Criminal Code

5.2.1.1 Socialist Legality

Statutes, i.e. laws passed by parliament, were the main source of legislation in the pre-Communist Polish period. As a civil law jurisdiction, Polish court decisions were the result of the interpretation and application of statutes to facts in specific matters. In the early days of the 'socialisation' process, many statutes and codes remained in force. However, as the Party line became the main driver of legislation, Party resolutions began to amount to orders requiring enforcement by all governmental bodies. From being a state under the Rule of Law, the country moved towards one party rule. As far as justice was concerned, the judge was not only supposed to be

> A lawyer capable of applying the law but he must also cooperate with the government and must understand and know how to realise the policy of the Party in every case.[306]

As the country became governed by a Communist regime, it also transplanted the Communist conception of law and justice. In non-Communist countries based on capitalist economy, law and justice are used as tools to monitor society justly, predicated on principles mainly directed towards the protection of private interests and a certain notion of justice and morality. Law and justice thus provide citizens with a satisfactory degree of protection in their relationships with each other, and between them and public or private

[306] Gsovski & Grzybowski 1959, p. 735.

organisations. Law and justice, in the Marxist-Leninist system, are considered tools for the organisation of the economy and the transformation of the people's behaviour towards the fulfilment of the ideal Communist society. In this system, the law has to be strictly observed because every single violation of the law is not only prejudicial to the potential victim but also to the State in general.

> The law, including criminal law, is not supposed to express any abstract idea of justice, but must be seen instrumentally.[307]

Indeed, if the law is not strictly observed by the whole of society, the construction of Communist society could be impeded. Therefore, the term 'Socialist Legality' was created and widely used as the Socialist equivalent of the Western Rule of Law. It has been defined by the Polish Academy of Science as a

> Substantial basis for the activities of the people's state which depends on the strict and absolute observance of the law of the Polish People's Republic by all agencies of the government administration and by individual citizens and which expresses the interests and the will of the working people.[308]

In fact, Socialist Legality could take the form of general and individual binding acts published or otherwise, and take diverse forms (speeches, directives, laws, decrees, economic plans).[309] In the hierarchy of legislative acts, Socialist Legality was superior and had to be enforced with priority. An administrative order could be superior to an old legislative act contrary to Communist interests.

This proliferation of legislation led to great confusion in the application of laws because every act of every institution – not to mention every official action of every citizen – had to comply with the Party resolutions. Any violation of these directives could be considered by the courts as a violation of the law. Another important source of laws were the directives of the Supreme Court issued when questions were posed by the Minister of Justice or the general prosecutor during reviews of lower tribunal cases.[310] In this sense, crimes could be defined in regulations found elsewhere than in the

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[307] Frankowski 1982.
[308] Gsovski & Grzybowski 1959, p. 729.
[309] This legislation included the new legislation concerning agrarian 'reform' by confiscation and nationalisation. Directives and speeches were delivered by the leaders of the Party and treated as directives for the courts in the administration of justice; see Gsovski & Grzybowski 1959, p. 732.
[310] Rozmaryn & Warkałło 1967, p. 365; Gsovski & Grzybowski 1959, p. 736.

CC. Until 1970, the old, pre-war legislation was still in force and the Supreme Court continued to find pre-war provisions contrary to the Socialist Legality by issuing binding directives. From 1970, Supreme Court directives forced the lower courts to apply harsh penalties.[311]

5.2.1.2 Code of Criminal Procedure and Criminal Code

Initially, the old Polish 1928 CPC remained in force.[312] Several important amendments between 1949 and 1950 reformed the 1928 CPC enhancing the powers of the people's militia (police) in preliminary proceedings during the Stalinist era.[313] In 1969, a new CPC was issued and entered into force 1 January 1970.[314] In criminal proceedings, the powers of the militia were reduced and the powers of prosecutors enhanced. The Court's control over decisions taken by the *Prokuratura* was strengthened.

The 1932 CC also remained in force until 1969 when a new code was issued. Until 1969, it remained almost unmodified but many special statutes were adopted in order to deal with specific matters.[315] It is important to note the existence of a Military Criminal Code that covered acts considered both purely military acts committed by military personnel, and also acts against the State considered to be military although committed by civilians. Until 1955, military courts and civilian courts could apply the Military Criminal Code against a civilian who had committed a crime against the State.[316] As in other Communist systems, Poland adopted the

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[311] Cole, Frankowski & Gertz 1987, p. 223.
[312] Murzynowski 1993.
[313] The people's militia or civic militia was the equivalent of the police force and was part of the Ministry of Internal Affairs.
[314] The present research is based mainly on the 1969 Code, which remained in force until 1997, however, important changes between the two Codes and the main legal amendments of the latter is taken into consideration. Specific legislation adopted during the Martial era in 1981 and later is not taken into account. For an English version of the Code see Waltoś 1979.
[315] For instance, 'the Decree on Offenses Particularly Dangerous in the Period of Rebuilding the State' was passed. The Decree, generally referred to later as the Small CC, carried the death penalty for such acts as: manufacturing, storing, or merely possessing arms and explosives; disclosing a State secret; creating or directing an organisation aimed at the commission of a felony; and conspiring to counterfeit money, in Frankowski 1982.
[316] There was also a Military Code of Criminal Procedure enacted in 1944. This code applied to military staff but also to civilians charged with political offences (see 5.2.2.6).

concept of defining a crime by the social danger posed by the act.[317] A criminal court had jurisdiction to judge an act that met two requirements – to constitute an offence the act must be prohibited by the law in force and also be considered to have been socially dangerous. If the social danger of a prohibited act was insignificant or non-existent, proceedings were to be dropped (see also 5.5.1.3). If the matter did not constitute a criminal offence, it could be transferred to another organ such as a social tribunal (see 5.2.2.6). The 1969 CC provided in Article 1 that a criminal offence is a socially dangerous act that is prohibited and under penalty of the law in force at the time of its commission.[318] With the new codification, several special criminal statutes were rescinded. Nevertheless, the offences provided in these statutes were included in the 1969 CC. The new Code also increased the minimum and maximum terms of imprisonment and adopted very stringent measures against recidivists.

In addition to criminal proceedings applying the CPC and the CC, the existence of a Penal Administrative Justice Code should be noted. Until the adoption of a Code of Violations in 1971, a special Order of the President of the Republic from 1928 regulated proceedings against offences that were not criminal offences. These violations were very similar to crimes because they were sanctioned by penalties such as deprivation of liberty and fines, and they were based on similar principles of responsibility as the penal law. Two criteria distinguished criminal offences from administrative violations[319]

- the penalties for criminal offences were penalties exceeding three months deprivation or limitation of liberty, and a fine of PLN 50,000. For violations, the penalties did not exceed these limits
- a crime was not an act causing insignificant or non-existent social danger

[317] As we will see this conception is still in force in the current Polish system (6.4.3.2).
[318] A person over 17 at the time of the commission of a criminal offence is criminally liable and criminal proceedings must be instituted if he commits a criminal offence with a criminal mental state (*mens rea*).
[319] Marek 1988.

The agencies with jurisdiction over violations were social tribunals, the militia and some administrative agencies such as the public security agency and the forest protection service.[320]

5.2.2 Organs and institutions of the judicial system of Communist Poland

5.2.2.1 Investigative institutions involved in the preliminary phase of the criminal process

The Act of 27 April 1949 suppressed the investigating judge, whose functions were first transferred to public prosecutors, who had the principal position in the preliminary phase of a criminal process. Until 1955, investigations were officially conducted almost exclusively by prosecutors. Acts were carried out by the militia or the public security agencies under supervision of a prosecutor. Legally the militia was the principal body tasked with maintaining public order and security. It could carry out actions in criminal preliminary proceedings as provided for by law and under the supervision of the competent public prosecutor. Prosecutors could therefore issue instructions which were, in principle, binding on the militia. However in practice, people lived under police terror and the real power to investigate lay in the hands of the militia under supervision of military prosecutors.[321] This position changed after the end of the Stalinist era and particularly with the promulgation of the new CPC in 1969. In 1969, preliminary investigations were split into

- investigations conducted by prosecutors in matters concerning serious crimes. A prosecutor could delegate the execution of acts to the police. Indictment and decision to dismiss proceedings belonged to prosecutors only
- inquiries conducted by the police under the supervision of a prosecutor in other matters. Only the prosecutor could issue an indictment and the dismissal of proceedings could be decided by the police upon approval of the prosecutor
- simplified inquiries for petty offences were conducted by the police. The competent prosecutor only endorsed a decision by the police to indict or to dismiss

[320] Although very similar to criminal procedures, this work does not cover procedures concerning violations.
[321] For instance, civilian prosecutors had to obtain a pass to enter a police office just like ordinary citizens, see Gsovski & Grzybowski 1959, p. 765.

5.2.2.2 The suppression of the three-instances system

After the Second World War and the German occupation, the jurisdiction of the common courts followed the new administrative division of the country. The laws issued on 27 April 1949 suppressed the previous three-instance court system and replaced it with a two-instance system. Under the old system, judgements from the first instance courts (the city and district courts) could be challenged by way of appeal (*apelacja*) before the court of appeal (*voivode*). The judgement of the *voivode* court could be challenged by way of cassation (*kasacja*) in a 'third instance'.[322] Only the Supreme Court in Warsaw could examine a cassation appeal and solely in order to redress infringements of the law. The Supreme Court could grant an appeal and refer the case to the court of appeal or reject the cassation.

Under the two-instances system, a single form of review, the appeal, replaced appeal and cassation (see 5.6.2).[323] The appellate court made a second decision on the criminal liability of the accused. The appellate court checked the evidence, facts and, as in a cassation review, also controlled the pure legality of the decision on the basis of the act of appeal. Courts were composed of non-professional and professional judges (see below 5.2.2.4). Both had the same rights although not the same legal training. Despite the principle of elected judges provided for by the Constitution, the Council of State on the motion of the Minister of Justice appointed the professional judges (see 5.1.2). Common courts were organised so that

- at the first instance and for less important crimes (*występki*), city and district courts were competent. In 1975, both courts were amalgamated as regional courts. Their judgements could be reviewed by the competent *voivode* courts
- major crimes (*zbrodnie*) were judged by *voivode* courts at the first instance. The Supreme Court reviewed these judgements

An appellate court could dismiss an appeal, annul the challenged decision or refer it to the first instance court for a rehearing. This organisation was meant to accelerate criminal trials. However, there were times when the same legal issue in different matters was

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[322] Actually, the terminology of third instance is incorrect. While the first and appellate instances cover, in principle, the questions of facts and of law in a case, a cassation instance only covers questions affecting points of law. Nevertheless, the literature on the subject does not make this distinction.

[323] According to the type of the decision attacked, the name of the review was appeal or reclamation (see 5.6.2).

settled differently at the last resort by a *voivode* court on the one hand and by the Supreme Court on the other. The system favoured gaps between the interpretations of the law and the control of legality, since decisions made by a second instance court were, in principle, definitive.[324]

5.2.2.3 Institution of the extraordinary appeal and the supervisory function of the Supreme Court

Extraordinary appeal was created to solve possible divergences of legal interpretation occurring in the two-instance system. The extraordinary appeal respects the tradition according to which Supreme Courts perform, in general, judicial supervision over lower courts, and where conformity to the law of all judicial decisions thus takes precedence over *res judicata*.[325] Against a decision that has the force of *res judicata,* ordinary forms of review are unavailable because they have already been used or because the time limit for lodging them has elapsed.

As an exception, an extraordinary appeal (see 5.6.3.2) could affect the redress of

- any definitive and valid judgement deciding on the criminal culpability of an accused
- any valid decision concluding judicial proceedings

The Code did not provide specific grounds for filing such an appeal. Any kind of irregularity, particularly on grounds that would have previously justified an ordinary appeal, were admissible for review.[326] Only the Supreme Court was competent to review the challenged decision. This typically Soviet form of review has been criticised as being an instrument that allows the government to obtain reversals of final verdicts in criminal cases.[327] It has been considered as one of the main institutions differentiating Communist country procedure from that of capitalist countries

> First, the monopolistic highest officials in whose hands this powerful weapon is held are using it often to correct illegalities and excesses committed by lower courts at the expense of the rights of the accused or of private citizens (preservation of 'Socialist' or simple legality). Secondly, the device is deliberately and repeatedly used to overrule

[324] Kalinowski 1971.
[325] Rozmaryn & Warkałło 1967, p. 364.
[326] Andrejew 1982, p. 199.
[327] Frankowski & Wasez 1993.

> correct and strictly legal decisions of the courts (including the Supreme Court) when they contravene a current political line of the government and the Party.[328]

5.2.2.4 Participation of lay assessors in the criminal trial

Another important modification of the criminal judicial system introduced after the war was the participation of the lay assessors in criminal trials. This was seen as a fundamental feature of the Soviet criminal system.[329] The 1952 Constitution stipulated that judicial cases had to be investigated and adjudicated with the participation of lay assessors (Article 59-1). Courts of first instance were, in principle, composed of one professional judge and two lay assessors unless the case involved an offence for which the death penalty could be imposed. In such matters two judges and three lay assessors were required (Article 19 CPC). Second instance courts were only composed of professional judges.

The People's Councils elected lay assessors from candidates proposed by political organisations. They were considered to be professional judges in criminal trials, thus they could decide on criminal liability and the punishment of an accused. However, they could not chair the court or carry out judicial functions outside the trial. Since the People's Councils were elected by universal suffrage, it is possible to say that lay assessors were to a certain extent representatives of the people. In fact, the participation of lay assessors in the justice system posed several problems as there were not enough of them and the appointed lay assessors were insufficiently trained and qualified. Because of these two problems, many cases were judged by a court composed of a single judge – such as when the penalty could not exceed two years' imprisonment.[330]

5.2.2.5 The Supreme Court[331]

Modification in the organisation and jurisdiction of the Supreme Court was made with the transplantation of the Soviet system after the war. Article 51 of the 1952 Constitution provided

> 1) The Supreme Court is the highest judicial organ and supervises the activity of all other courts concerning the pronouncement of judgment.

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[328] Boim, Morgan & Rudzinski 1966.
[329] Grajewski & Murzynowski 1989.
[330] Bredin 1960.
[331] Rozmaryn & Warkałło 1967, p. 331.

2) The procedure for the exercise of supervision by the Supreme Court is established by law.

3) The Supreme Court is elected by the Council of State for a term of five years.

Despite the two-instance system, the Supreme Court remained at the top of the judicial organisation supervising judicial activity of all civilian courts and military tribunals. On the one hand, the Court was in charge of the strict control of legality over the lower and appellate courts' decisions. On the other hand, it acted as an appellate court when controlling the facts and legality of regional court decisions. Because of this dual capacity, the Supreme Court could review its own cases with a different panel of judges. The jurisdiction of the Supreme Court over pending proceedings and definitive or non-definitive judgements was performed by four sections – civil, criminal, labour/social insurance and military. The organisation of the Court was modified during the Communist period, but the main features of the supervisory functions remained as provided, particularly in their procedural codes and in the criminal field, especially the CPC. The Supreme Court was closely subordinated to the Council of State not only because its members were appointed by it, but also because the First President of the Court had to report regularly to the Council. This report could affect the current activity of the judiciary and the orientations that the judiciary had to and should follow in its future activity.

Supervision was performed by means of appellate measures, but also by means of binding directives concerning court practices and the interpretation of laws. These directives answered legal problems posed by the Minister of Justice, the general prosecutor or the First President of the Supreme Court. The directive issued was published in the official journal and carried the force of law. On the occasion of pending proceedings, it was also possible for a lower court to direct a question to the Supreme Court. The answer to this question was then binding on the lower court. If the issue was important, the Supreme Court could decide to answer in the form of a general binding directive. The Supreme Court did not, however, supervise the administration and the organisation of lower courts, which was the task of the Minister of Justice, or the Defence Minister for the military courts.

5.2.2.6 Military and social justice

To complete this brief description of the Polish criminal judicial system it is important to note the existence of the military criminal

system composed of military tribunals and prosecutors.[332] During the Stalinist era military courts were competent to hear criminal cases against citizens. The 1944 Military Criminal Code provided that many crimes against persons were considered as anti-State and therefore had to be prosecuted by military prosecutors and settled by military courts.[333] In 1955, jurisdiction of the military system over civilians was rescinded and transferred to the civilian system.[334]

As in other Communist systems, certain acts, the so-called violations (see 5.2.1.2) prohibited by specific statutes and excluded from the CC could be settled by independent agencies, such as social tribunals. The militia and other special agencies also had jurisdiction over several violations. Social tribunals, also called boards or commissions, were composed of lay judges elected by People's Councils at the district level and by *voivode* People's Councils at the appellate level. These tribunals were established in public undertakings and economic agencies. If the elements of the act were prohibited by the CC and by the Code of Violations (see 5.2.2.6), the prosecutor could transferred it to the jurisdiction of a social tribunal only if it caused an insignificant or non-existent social danger. In these proceedings, a public prosecutor bore the burden of proof. In addition to a custodial sentence and a fine, social tribunals could impose disciplinary measures such as compensation for the victims' damages, a reprimand or a payment of a sum to a social organisation.[335]

5.3 Organisation of the Polish *Prokuratura*

5.3.1 The laws of the *Prokuratura*

This new national organisation and transplant of Marxist-Leninist ideas needed a strong institution charged with the task and right to enforce Socialist Legality. Before the War, the Polish prosecution service was modelled on the French public ministry with the main purpose of prosecuting crimes and representing the State in criminal proceedings and trials.[336] The public ministry was directly subordinate to the government, the Minister of Justice also being the general prosecutor. The *Prokuratura* Act 20 July 1950 established a Communist-style prosecution service in an institution separate from

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[332] In general, this study will only take the civilian system into account.
[333] Frankowski & Wasez 1993.
[334] Rozmaryn & Warkałło 1967, p. 334.
[335] Rozmaryn & Warkałło 1967, p. 341.
[336] Waltoś 1992; Frankowski 1987; Siewierski 1963.

the government and hierarchically organised under the supervision of the general prosecutor and empowered with a strong and general supervisory function.[337] In the 1952 Constitution the *Prokuratura* is noted as one of the fundamental institutions of Communist Poland.[338] The new public ministry was indeed patterned after the Soviet Procuracy.[339] Its role was to consolidate the People's Rule of Law, to protect the social assets and to prosecute crimes. Therefore, prosecutors were rendered independent from all governmental agencies. They had the power and right to supervise the legality of acts undertaken by all State agencies – except the heads of the central State organs – enterprises, and citizens. The *Prokuratura* was considered to be the eyes and ears of the Council of State and the 'Guardian of Law and Order'.[340] The 1950 Act was modified in 1964 when the military prosecution service was clearly separated from the civilian prosecution service.[341] In this new act the supervisory function of prosecutors became 'control of observance of the law' (*prokuratorską kontrolą przestrzegania prawa*). This Act remained in force until 1985 when the current Act on the Polish prosecution service was adopted.[342]

5.3.2 The structure of the Polish Communist *Prokuratura*

The institution was composed of three hierarchical levels

- the local *Prokuratura* in cities and district courts (both courts later being gathered under the generic regional courts)
- the *voivode Prokuratura* at the *voivode* level
- the prosecutor general's office at the central level

The *Prokuratura* was centralised and organised according to the principle of hierarchical subordination. All prosecutors were, in principle, directly subordinate to their immediate superior and to the head of the institution, i.e. the general prosecutor. However, each office was subordinate only to the general prosecutor.

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[337] Translation of the Ustawa z dnia 20 lipca 1950 o Prokuraturze Rzeczypospolitej Polskiej (Dz.U. Nr 50, poz. 346) in Législation Polonaise 1952, p. 208.
[338] Chapter 6 of the Constitution is 'The courts and the public prosecutors office', see Burda 1964.
[339] Gsovski & Grzybowski 1959, p. 762.
[340] Gajewska-Kraczkowska & Palmer 1991, p. 73; Gsovski & Grzybowski 1959, p. 763.
[341] Ustawa z dnia 14 kwietnia 1964 roku o Prokuraturze Polskiej Rzeczypospolitej Ludowej (Dz.U. Nr 31, poz. 138).
[342] The present historical research is mainly based on the 1950 Act.

5.3.3 Subordination

5.3.3.1 Appointment and education

The Council of State, on motion of the Party, directly appointed and recalled the general prosecutor (Article 5-1, 1950 Act).[343] The President of the Council of State

- directly appointed and dismissed deputies of the general prosecutor and military prosecutors (Article 5, 1950 Act)
- appointed and dismissed chief prosecutors of the *voivode* and of the general prosecutor's office on motion of the general prosecutor (Article 8-1, 1950 Act)

At the local level, the general prosecutor appointed and dismissed prosecutors and deputies in the cities and districts and the deputies in the *voivode* (Article 8-2). Applicants without a university degree and under the age of twenty-six – only a few months of lectures were enough to comply with the educational requirements – could be appointed as prosecutors. The newly appointed trainee would start without any experience in court, and no traineeship was required. The most important requirements were to be of 'good social origin' and be devoted to the Communist Party. Of course, in practice, membership of the Party was a necessary condition to be appointed or awarded a higher position.[344] During the Stalin era, judges, attorneys and prosecutors were required to attend political seminars in 'Marxism-Leninism-Stalinism' to become aware of the latest evolutions of Socialist Legality.[345]

Public prosecutors were held responsible for their breaches of duty in disciplinary proceedings, instituted by an order issued by the Council of State on motion of the general prosecutor.

5.3.3.2 Dependence and independence of the Prokuratura

The general prosecutor was directly subordinate to the Council of State and bound by its directives (Article 6-1, 1950 Act). The Council of State issued regulations concerning the status – hierarchy, salary and discipline – of prosecutors and civil servants working in the institution.[346] Since the Council of State was appointed and dissolved by the Sejm, the *Prokuratura* was also indirectly

[343] Gsovski & Grzybowski 1959, p. 346.
[344] Waltoś 1992.
[345] Frankowski 1987.
[346] Rozmaryn & Warkałło 1967, p. 372.

subordinate to it. The general prosecutor could personally carry out all the functions of his deputies or directly order specific tasks (Article 9, 1950 Act). General and specific directives of the general prosecutor were compulsory for his deputies. He controlled the activities of prosecutors and other staff, and periodically reported to the Council of State.[347] He was the head of the civilian and military *Prokuratura*.

Lower prosecutors were directly subordinate to the general prosecutor (Article 7, 1950 Act). They were also subordinate to the head of the office to which they were appointed. The superior prosecutor reviewed the decisions and orders of his deputies. The head of a prosecution office had the right to order his deputies to act in his place and in his name. The head also had the right to take over the functions of his deputies and to act in their place.

Acts carried out by a prosecutor in the exercise of his functions were undertaken in the name of the *Prokuratura*. They bound the institution as a whole. In principle, independently of his affiliation to a particular office, a prosecutor could perform any act concerning criminal proceedings unless that act belonged to the exclusive jurisdiction of a prosecutor with a specific rank. Nevertheless, not every prosecutor possessed the right to carry out his functions in all pending proceedings. He needed to be appropriately empowered. A prosecutor could be thus empowered by the general prosecutor, or by the jurisdiction of his appointed office (*rationae materiae* and *rationae loci*).

The *Prokuratura* was only subordinate to the Council of State. It was a separate and independent branch of State power. While carrying out its functions it was independent from any other organ. All other administrative or economic organisations were obliged to assist it in any way possible (Article 12, 1950 Act). This independence was necessary for prosecutors to carry out their so-called general legal supervision over all authorities and agencies in the country. We will see that prosecutors were entitled to screen the activity of any public or economic body and request the redress of any breach of the law (see 5.4.2). Without independence, this supervision would have been undermined. The structural independence of the *Prokuratura* could not be imprecise. When performing his functions in judicial proceedings, a prosecutor had, in principle, to apply procedural law

[347] Grajewski & Murzynowski 1989.

impartially.[348] However, the institution was strictly dependent on the Council of State and did not enjoy much political independence when carrying out its functions. Although the primacy of the Party was not stipulated in the Constitution as in the Soviet Constitution, the *Prokuratura* was the guardian of legality *for* the central authorities, thus the Party, and not the watchdog of legality *against* the central authorities.[349] In the context of Socialist Legality, it could be held that the first motive of the members of the *Prokuratura* was to respect the Party directives that could lead above all to political prosecution, especially during the Stalinist era. This, however, does not mean that prosecutors who were also lawyers did not perform their functions as such.

5.4 Supervisory functions of the Polish *Prokuratura*

5.4.1 Provisions common to general and judicial supervision

The 1952 Constitution stated in Article 54 that the task of the general prosecutor is

> To guard the people's rule of law…and to safeguard the respect of the rights of citizens.

Article 3 of the 1950 Act provided that the general prosecutor was to

> 1) supervise that the laws are strictly executed by all authorities and agencies at the *voivode*, district and city levels as well as by the units of nationalised economy, social institutions and individual citizens,
>
> 2) supervise conformity of the regulations issued by all the bodies mentioned under 1) with the law,
>
> 3) protect the rights of citizens,
>
> 4) supervise the correct and uniform application of the law by the courts as provided in the procedural Acts,
>
> 5) initiate the criminal procedure, watch over the preparatory proceedings and sustain the public prosecution at trial,

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[348] The *Prokuratura* had to safeguard the law and respect the principle of objective truth (see 5.5.1.1), therefore prosecutors in charge of criminal proceedings had to act for and against the defendant's interests, see Gajewska-Kraczkowska & Palmer 1991, p. 76.

[349] Article 126 of the 1936 Soviet Constitution notes that the Communist Party of the Soviet Union is: 'the vanguard of the working people in their struggle to build a Communist society and is the leading core of all organisations of the working people, both social and State.'

6) order the execution of criminal judgments and supervise their implementation in detention centres,

7) take any measures necessary for the protection of social property and the prevention of crimes.

According to these texts, the functions of the *Prokuratura* were extremely broad and were not only centred on criminal activities. Prosecutors could exercise wide control over the activities of authorities and agencies at the *voivode*, district and city levels, as well as through the units of the nationalised economy, social institutions and individual citizens. Only the national organs escaped this supervision. The institution was actually instrumentalised by the totalitarian regime in order to act as the guardian of Socialist Legality.[350] Prosecutors were one of the cornerstones of the Communist State. They were recipients of complaints made by people against administrative decisions of bodies active in society. Because of the very strong constitutional and legal position of the prosecution, any information requested from an authority by a prosecutor had to be provided. On the one hand, prosecutors could take part in the decision-making process of governmental bodies and corporate organs. They could act preventively before an individual or general decision was made. They could participate in pending proceedings or institute proceedings in all matters. On the other hand, once a decision was made, prosecutors had a general right to request illegal decisions to be anulled or modified. Supervision was divided into general supervision and judicial supervision.

5.4.2 General supervision

The function of general supervision is certainly the most striking difference between the Western and Soviet-style prosecution services, because this function has nothing to do with the prosecution of crimes. It was mainly aimed at supervising the enforcement of Socialist Legality by all the administrative agencies and redressing grievances relating to administrative organs.[351] General supervision could affect the strict control of the respect of Socialist Legality by all social bodies and the activity of these bodies in all aspects, be that internal regulation or decisions binding upon citizens without distinction to the type of decision or the quality of the decision-maker. Specific laws and regulations dealt with general

[350] Frankowski 1982.

[351] For more details on the general supervision function of the Soviet Procuracy, see Hełczyłński 1962; Smith 1978.

supervision – such as the 1960 Administrative Procedure Code. This function had little to do with judicial activity and with criminal law, because a grievance against an administrative organ was, in principle, not a criminal offence. Of course, it could exceptionally also constitute a crime and be prosecuted.[352]

Firstly, prosecutors were empowered with the right to request any information or document. The recipient of a request could be anyone or any body, with the exception of the supreme State body. The 1950 Act lists State administrative bodies, local government agencies, all civic, professional, cooperative, self-governing bodies and citizens. The government and its ministers were gathered within the State administration and were therefore bound to comply with prosecutors' orders and requests. The recipient of a request was obligated to respond (Article 12, 1950 Act). The purpose of the request was first to screen whether the Communist Rule of Law was strictly respected and secondly whether the people's rights were respected. Prosecutors could take part in the meetings of these bodies and require the head of the body to control the activities of his deputies and intervene in the course of proceedings.

Secondly, the *Prokuratura* could supervise the acts or any functions of all bodies active in society (Article 10 § 1, 1950 Act). If a prosecutor found a decision illegal, he had the right to object to this decision and demand redress of the grievance. The 1950 Act states that illegal acts are those contrary to law or directives or to instructions issued by superior authorities. He could submit this protest to the immediate superior of the organ addressed. The organ affected had thirty days to deal with the objection. If it deemed the protest well founded, it either ordered the reopening of the proceedings, or rescinded or modified the decision. Where a decision considered illegal by a prosecutor was issued by a supreme administrative organ, the prosecutor could only explain his objections. Ultimately, the decision rested with the administrative organ.

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[352] During proceedings, prosecutors were interchangeable in their application of the principle of the 'uniformity of the office of the prosecutor' see Gajewska-Kraczkowska & Palmer 1991, p. 73. In the Soviet Union, prosecutors used to be specialised by field of activity within each district. The prosecutor in charge of general supervision was usually not the one in charge of public prosecution; see Collignon 1977, pp. 371–375.

5.4.3 Judicial supervision

The *Prokuratura* supervised the strict observance of Socialist Legality by organs participating in preliminary and judicial proceedings and in detention centres. Prosecutors carried out this function through the application of procedural laws (Article 10 § 2, 1950 Act). The scope of the judicial supervision covered every field of law since prosecutors were present in every court and could intervene at any stage of the proceedings. Prosecutors could institute proceedings or intervene in pending proceedings in all fields of law. Prosecutors thus supervised the correct application of civil, labour, military and criminal law. This supervision took place on occasion of judicial proceedings, but also outside the scope of proceedings when a prosecutor deemed a modification in the application of the law necessary. In order to ensure the uniformity of the interpretation of Socialist Legality, the *Prokuratura* could propose interpretative principles of law to the Council of State if it discovered that the courts did not apply the law in accordance with Socialist Legality.[353]

If a violation in the application of law or a contradiction between the existing law and Socialist Legality were discovered outside pending proceedings, prosecutors would intermediate between the decision-maker and the organ violating the law. Ultimately, redress for the violation or contradiction was the task of the Supreme Court or the Council of State. Article 4 of the 1950 Act provided

> 1) The general prosecutor can propose to the Council of State concerning the interpretation of the laws in force and their implementation,
>
> 2) Interpretation and principles concerning the application of law issued by the Council of State have a general binding force and are published in an official journal that will be indicated by the Council of State.

The *Prokuratura* also had the duty to take any measure necessary to prevent crime. The Council of State remained the body to decide on propositions but the general prosecutor was the empowered institution cognisant of the day-to-day state of court and district affairs. It could therefore trace and report problems directly to the top.

As will be shown in more detail below, prosecutors also carried out classical functions in criminal proceedings. In this area, prosecutors were in a very strong position and watched over the correct

[353] Rozmaryn & Warkałło 1967, p. 376; Gsovski & Grzybowski 1959, p. 736.

application of substantive and procedural criminal law by bodies involved in preparatory proceedings and courts. Court independence was purely a façade. Every interpretation made by a court could be reversed at the general prosecutor's motion at trial by way of appeal, even after the decision became definitive and effective. However, the interpretations of the courts on judicial issues could also be the object of questions posed by the prosecutor to the Supreme Court or the Council of State, and the answer would be binding on the lower courts.

5.5 The role of the Polish *Prokuratura* in the preliminary phase of the criminal process

5.5.1 The role of the Polish *Prokuratura* in preparatory proceedings

5.5.1.1 Institutions initiating prosecutions, the principle of legality, compulsory prosecutions and the principle of objective truth

Public prosecutors or the militia were competent to commence preparatory proceedings if there were good reasons to suspect the commission of an offence. Before Stalin's death in 1953, the powers of the militia were extremely important, but they diminished after 1953 to the benefit of the *Prokuratura*.[354] In certain cases, other institutions could receive the notification of a crime and conduct preliminary proceedings in the form of an inquiry. These institutions had the same procedural rights as the militia.[355]

The principles of legality, non-retroactivity, compulsory prosecution and objective truth had to be respected

- firstly, there could be no crime and no punishment without such being provided for by the law in force at the time of the commission of the act in question (Article 1, 1932 and 1969 CC)
- secondly, the competent authority (the *Prokuratura* and the militia) had the duty to initiate criminal proceedings and to issue

[354] According to several authors, the militia was the institution endowed with the real power in all criminal proceedings. Immediately after the war, it was vested with the authority of the investigating judge as provided for in the old Procedural Code; see for example Frankowski & Wasez 1993; Gsovski & Grzybowski 1959, p. 764.

[355] These institutions were agencies of the Minister of Finance in cases concerning offences committed to the prejudice of the State, and units of the frontier protection forces in cases concerning offences against the inviolability and security of the State border.

an indictment as soon as it had recorded the commission of a criminal act (Article 5-1 CPC)

- thirdly, all decisions in criminal cases were to be based solely on well-established facts and not on legal fictions. It was the duty of institutions involved in criminal proceedings to do everything in their power to establish the relevant facts. This duty was also binding upon prosecutors even if the facts spoke in favour of the accused

In several cases, the injured party acting as a private prosecutor (Article 49 CPC) could also commence proceedings, charge a person with a criminal offence and file an indictment for the punishment of the perpetrator.[356] Private prosecution was only admissible against offences with a direct effect on the injured person's rights or property – such as interfering with the post, defamation or violation of bodily integrity, etc. In principle, a victim acting as a private prosecutor had the same rights as a public prosecutor. However, the principle of compulsory prosecution did not apply, and if the victim withdrew his charges, the court would stop the proceedings. It was said that the private prosecutor 'rents' a judge for his case.[357] Nevertheless, if the public interest so required, a public prosecutor could intervene in the case and take over the proceedings. In addition to the right to act as private prosecutor, an injured person could also ask the court to join a public prosecution as a subsidiary prosecutor (Article 44-1 CPC).

5.5.1.2 Decision affecting prosecutions, investigation and inquiry

Before the institution of preliminary proceedings, the CPC provided that if the notification of the acts did not specify sufficient grounds for instituting preliminary proceedings, they should be refused by way of order on approval of the prosecutor.

The police could carry out a screening of the acts notified within a maximum of thirty days. After completion of the screening or upon receipt of sufficient information, preliminary proceedings could be instituted. A prosecutor or the militia would issue an order instituting

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[356] Article 40-2 CPC stipulated that: 'A public or social institution may also be treated as the injured person even though it has no separate legal entity.' The injured party, wrote Murzynowski, is defined: 'as the person whose legal welfare (life, health, property, dignity, personal inviolability etc.) has been directly violated or threatened by the committed offense.' In Kurowski 1984, p. 329. The notion of injured party was very broad and would certainly be a powerful tool of control of the mandatory prosecution principle.

[357] Gajewska-Kraczkowska & Palmer 1991, p. 33.

prosecution and describing the object of the proceedings, the acts and their legal characteristics.

In order to collect evidence and testimonies, and eventually capture the perpetrator, an inquiry or an investigation could take place before the issuance of an indictment. According to the gravity of the facts, prosecutors could start an investigation while the militia could institute an inquiry. Investigations were compulsory in certain cases or for important or complex crimes (Article 262 CCP). A proceeding that started as an inquiry could be continued in the form of an investigation.

The period of completion was three months from the day of the institution of the investigation and one month in the case of inquiries. In principle, prosecutors were empowered to conduct and supervise preparatory proceedings. Nevertheless, a prosecutor could delegate activities and actions to the militia. The militia could conduct an inquiry, either on its own authority or pursuant to a prosecutor's order. In some cases, other bodies conducted inquiries, such as the Minister of Finance if financial offences were involved.

Police custody was limited to forty hours. Only prosecutors had the right to decide or approve coercive measures – such as preliminary detention – to extend the period for completion of the investigation, to dismiss a case or to decide other ways for the proceedings to end. The public prosecutor had the right to issue a preliminary detention order if reasons for such detention were found. Such detention could last for up to three months. The superior prosecutor (*voivode*) could order an extension of six months, but only a *voivode* court could extend the detention beyond six months.[358]

During the preliminary proceedings, if no sufficient grounds to justify the preparation of an indictment were found, the militia or other bodies could issue an order for dismissal. However, such an order had to be ratified by the public prosecutor. The prosecutor could also decide to suspend proceedings for a certain period or to order a supplementary investigation.

Alternatively, if there were sufficient grounds to justify the preparation of an indictment, the files and evidence were handed over to the prosecutor. The end of proceedings could take the form

[358] During preliminary proceedings, prosecutors could order or approve detention. Once the indictment was issued, the right to detain the suspect belonged to the court. Upon the suspect's appeal, the court supervised orders on pre-trial detention and the extension of the pre-trial detention period. Only the Supreme Court could extend the period of detention beyond nine months.

of a formal order or none could be issued. Within fourteen days of the conclusion of preliminary proceedings, the prosecutor was obliged to file an indictment with the court, dismiss the case, conditionally dismiss the case, or suspend or supplement the proceedings (see below).

5.5.1.3 Exception to mandatory prosecutions

The principle of mandatory prosecution did and does not mean that every single criminal act had to be prosecuted. Public institutions had neither the time nor the means to do so. The decision to refuse to start proceedings, or to dismiss proceedings already instituted, had to comply with the law. There were a few strict legal exceptions to the principle of mandatory prosecution, e.g. juvenile crime.[359] Article 11 CCP stipulated

> Criminal proceedings shall not be instituted, or, if previously instituted, shall be dismissed, when a circumstance precluding such proceedings occurs, and in particular when:
>
> 1. the act has not been committed, or does not possess the qualities of a prohibited act, or when it is acknowledged by law that the perpetrator has not committed an offence,
>
> 2. it has been established by law that the act is not an offence because it constitutes only an insignificant social danger, or that the perpetrator is not subject to penal sanctions,
>
> 3. the perpetrator is not subject to the jurisdiction of the criminal courts,
>
> 4. no indictment has been made by a duly authorised prosecutor, permission to prosecute has not been granted, or no complaint has been filed by the person lawfully entitled thereto,
>
> 5. the accused is deceased,
>
> 6. the prescribed limitation period has lapsed
>
> 7. or criminal proceedings concerning the same act committed by the same person have been validly concluded or, if previously instituted, are still pending.

The notion of social danger and the permission to prosecute need further development. If the social consequences of an act were not overridden, the act was not a criminal offence (see 5.2.1.2). An act

[359] The prosecutor had to consider whether it was reasonable or not to institute criminal proceedings, see Gajewska-Kraczkowska & Palmer 1991, p. 77.

was socially dangerous when it affected the interests of the Popular State – its regime, its independence or its security – or when it affected common property – such as social estate or assets – or if remouit affected private property protected by law. Acts affecting other private property – in practice, almost all private properties – were not considered criminal offences for which public prosecution was obligatory. Private prosecution was nevertheless available to the victim. In principle, the law would provide definitions of acts causing no social danger. However, by exception, if the act caused a real social danger, e.g. hooliganism, the prosecution authority would always have the right to prosecute. As a further exception, the prosecution of an act defined by law as a social danger could be dropped where this social danger ceased to exist.[360] This could occur when the perpetrator had repaired the damage caused or when the object of the act ceased to be dangerous.

The permission to prosecute (developed in Article 5-2, 1969 CPC) meant that permission was required for the prosecutor or the militia to prosecute certain persons when this was established by a specific statutory provision. This provision affected the so-called immunity of certain important members of the State administration such as judges, deputies or prosecutors. For instance, if a prosecutor had committed a criminal offence, prosecution was only possible after his superior revoked this immunity. In some particular cases – such as rape or theft committed to the detriment of a next of kin – public prosecution depended on the initiative of the injured person (Article 5-3 CPC).

Once proceedings were instituted, the prosecutor in charge of the case – or another body on a prosecutor's approval – could also decide the conditional dismissal of the proceedings for one or two years. The prosecutor could oblige the accused to fulfil certain obligations such as the compensation of damage done to the victim for a certain period. The case could be dismissed on completion of the obligations. Conditional dismissal could take place when

- the degree of social danger of the act was not substantial
- the defendant was a first-time offender and there was reason to believe that no further offences would be committed

The dismissal of a case was no guarantee that the accused would not be prosecuted further. Reopening was possible against another suspect at any time but the direct superior of the prosecutor who

[360] Siewierski 1963.

dismissed the previous proceedings could reopen proceedings against the same suspect only in the event of the discovery of circumstances of vital significance, unknown to the previous proceedings (Article 293 CPC).

5.5.2 The role of the Polish *Prokuratura* in the supervision of the preparatory proceedings

5.5.2.1 Supervision by the direct superior

In certain circumstances provided by law, a prosecutor had to disqualify himself from participating in the proceedings (Articles 38 and 39 CPC).[361] His direct superior could order this disqualification if necessary.

Acts carried out by prosecutors and other organs were formal and had to contain certain provisions – such as the name of the suspect, the act imputed to him and the legal qualification of the act. Reasons for every order concerning measures taken during the preliminary proceedings were required in writing. Prosecutors in their supervisory functions screened these acts and reasons. The purpose of the supervision of preparatory proceedings was to ensure that proceedings were conducted correctly and efficiently. The prosecutor in charge of the supervision of proceedings would (Article 292-3 CPC)

> 1. Inform himself of the intentions of the person conducting the preparatory proceedings, indicate the directions for the proceedings, and issue rulings in the matter,
>
> 2. Request that materials collected in the course of preparatory proceedings be presented to him,
>
> 3. Participate in actions carried out by the person conducting the investigation or inquiry, carry them out in person, or personally assume the conduct of the case,
>
> 4. Issue orders and rulings, and amend and reverse orders and rulings issued by the person conducting the preparatory proceedings.

Firstly, there is the supervision between prosecutors in the course of preparatory proceedings, orders issued by the prosecutor in charge of a case could be challenged by the parties by way of reclamation, in principle, before his direct superior. A superior prosecutor could also interfere *ex officio* with decisions made by a deputy.

[361] For example, if he was directly connected with the case, or the spouse of another party or of the judge, or an eyewitness, etc.

Supervision provided the right to request information from a deputy as well as the right to reverse or annul acts carried out by a deputy when these acts were considered inefficient or incorrect.

Secondly, prosecutors supervised other institutions, such as the militia, in the execution of acts in preparatory proceedings. Orders made by the militia could also be appealed by way of interlocutory appeal before the superior prosecutor (Article 413 CPC).

The supervision of a superior prosecutor over his deputy and over the militia or other inquiring body was performed *a priori* and *a posteriori*. Certain acts had to be forwarded to the superior prosecutor for approval. This was particularly the case with decisions to refuse to institute preparatory proceedings and to dismiss or suspend proceedings. Only a prosecutor could decide on the extension of the duration of proceedings and on pre-trial detention (see also 5.5.1.2).

5.5.2.2 Supervision by the general prosecutor and the court

The general prosecutor had the right of control *ex officio* over preparatory proceedings. For instance, he had the right to reverse an order to dismiss valid proceedings. This right could affect orders to dismiss preparatory proceedings with respect to a person examined as a suspect, unless the order had been issued by a court. If the general prosecutor found this order groundless, he had six months to reverse it from the day the order became valid. After this six-month period elapsed, the general prosecutor could only reverse or amend the statement of reasons in favour of the suspect.[362]

[362] An order was validly issued when all requirements provided by law were met (i.e. the prosecutor's ratification in writing and issuance within fourteen days of the conclusion of the investigation). An order to dismiss a case could be challenged by the victim by way of interlocutory appeal within seven days of the date of notification of the order. An accused party could challenge an order of conditional dismissal by way of protest within seven days of the date of notification of the order.

5.6 The role of the Polish *Prokuratura* after the preliminary phase of the criminal process

5.6.1 The position of public prosecutors in the first instance

5.6.1.1 The pre-trial conference

Once an indictment was issued (within fourteen days of the conclusion of preliminary proceedings), the competent court was not bound by any attempt of the public prosecutor to dismiss the charges. The possible withdrawal of the public prosecutor from the case did not prevent the court from continuing proceedings. The prosecutor ceased to be the principal actor in the criminal process, though the main hearing had not yet commenced.

Indeed, the president of the competent court could decide, *ex officio*, or upon the request of a party, to refer the case to a pre-trial conference composed of trial judges (Article 299 CPC).[363] This pre-trial conference was not public, the prosecutor was not obliged to attend the conference and the defendant and his counsel could attend only if the president permitted it. The president of the court checked *ex officio* that

- the indictment formally met legal requirements. In case of errors, the case would be referred to the prosecutor for correction (Article 298 CPC)
- there was no reason to dismiss the case in application of Article 11 CPC (see 5.5.1.3)[364]
- no other court had jurisdiction, unless it concerned a case referred by another court with jurisdiction
- there was no reason to suspend proceedings (Article 15 CPC provides for this in cases where the accused could not be arrested or could not participate in the proceedings because of mental illness, etc.)

The pre-trial conference has been criticised because it violated the public character of the criminal trial and the right to a defence.[365]

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[363] The fact that after a hearing a court had only three days to render a judgment could explain the importance of the pre-trial conference (see 5.6.1.2).

[364] It seemed here that the court could perform an important control notably because it could decide that the level of social danger of the act committed was not significant enough to continue the case.

[365] Gajewska-Kraczkowska & Palmer 1991, p. 138.

5.6.1.2 The first instance hearing

After verification of the indictment, the court would notify the accused of this indictment, choose the judges who would try the case and set the date and place of the hearing. During the hearing, a prosecutor had to be present (Article 37 CPC) except in summary proceedings applicable only to crimes causing minor damage or for which no custodial sentence could be imposed (Article 424 CPC). During the hearing, the prosecutor

- read the charges
- participated in the judicial examination (examining evidence, witnesses, victims, experts and the accused)
- delivered his speech[366]

Before deliberation, if new circumstances occurred during the judicial examination and further investigations were necessary, the court could remand the matter to the investigating prosecutor.

After the hearing, the court would retire for deliberation and deliver a judgement within three days. If the time limit was not respected, the trial had to be restarted. The judgement was recorded in writing and met certain legal requirements, for example concerning the description and legal classification of the act and the names of the judge and prosecutor (Article 360 CPC). Every judgement decided the criminal liability of the accused. Judgements of guilt included a detailed description of the act committed by the accused and the sentence imposed on him. A statement of reasons was provided if a party requested it, which had to include a legal basis for and description of the facts found, proven or unproven, and a description of the evidence used to support the outcome of the decision.

5.6.2 The position of public prosecutors in ordinary forms of review[367]

5.6.2.1 General provisions concerning the appeal and the reclamation

Part nine of the 1969 CPC established the appellate proceedings (*postępowania odwoławcze*). The general provisions (*przepisy*

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[366] The prosecutor case at a hearing in the Soviet Union would include a political appraisal of the offence, a summary of the case, an analysis of the evidence, an analysis of the character of the accused, a legal qualification of the offence and potentially an opinion as regards the sentence, see Collignon 1977, p. 371.

[367] Andrejew 1982; Kalinowski 1971; Boim, Morgan & Rudzinski 1966.

ogólne) detailed the main requirements for both appeal and reclamation, including

- the parties entitled to appeal
- the formal requirements of the act of appeal
- the grounds and limits for review
- the rights of the appellate organ with regard to the decision challenged

In two separate chapters, the Code established requirements respectively for appeal (*apelacja*) and reclamation (*zażalenie*).

The writ of review had to state the demands and objections raised against the decision issued regarding facts and law, and to include several formal requirements (such as the identity of the person lodging the appeal or the contents of the appeal and its supporting reasons, see Article 104 CPC).

The appellants, the parties to the proceedings, could challenge a decision in part or in whole only if it was prejudicial to their rights, and if their appeal was lodged within the prescribed time limit. The injured party acting as a subsidiary prosecutor could only challenge the part of a decision concerning the conviction and not the sentence. The prosecutor could challenge a decision without reservation (Article 374 CPC). He could also challenge a judgement prejudicial or beneficial to the accused.

The president of the appellate court performed an initial check to ensure that the writ of review met formal requirements. He could declare it inadmissible and send it back to the appellant for corrections or simply not grant the review.

The appellate court, or the competent prosecutor in case of reclamation, examined the appealed decision only within the ambit of the grounds mentioned in the writ of review. However, if the review was to the detriment of the accused, it could lead to a decision in his favour, while a challenge made for the benefit of the accused could not, in principle, lead to the aggravation of his situation. Irrespective of the limits of the review, the court checked

- the so-called 'absolute grounds for revision' (see 5.6.3.1)
- if the decision challenged was 'manifestly unjust'. The law did not specify what a 'manifestly unjust' decision was and left this issue to the court's judgement[368]

[368] It seems that a decision was manifestly unjust when it violated the interest of the Popular State.

An error in the evaluation of evidence, in the application of the law or in the measure of punishment could justify a review of the judgement.[369] Article 387 CPC stipulated that the review would be implemented in cases of

- a violation of the provisions of substantive law
- a violation of the provisions of procedural law, if this could have affected the contents of the decision issued
- an error in the determination of the factual situation accepted as a basis for making the decision, if this could have affected the contents of this decision
- the penalty imposed being strikingly disproportionate to the offence; or where the application or failure to apply a preventive measure, or any other measure, was unfounded

Until the court of appeal retired for deliberation, an appellant could withdraw the appeal unless it was in favour of the accused, in which case the consent of the accused was necessary. However, if 'absolute grounds for revision' were found by the court in the appealed decision, the withdrawal of the act of appeal had no effect and the appellate court reversed the challenged decision. Once the appellate court had examined the decision, it could

- maintain the challenged decision
- modify the decision by aggravating or attenuating the sentence, sentence an acquitted person or acquit a convicted accused. However, the Supreme Court could not convict someone acquitted in the first instance or someone against whom proceedings in the first instance had been dismissed

The court could also

- set aside the decision in whole or in part and reverse the decision and dismiss the proceedings
- set aside the decision in whole or in part and refer the case with a binding opinion and within the limit of the writ of review to
  - the first instance court for re-examination
  - the prosecutor, if essential deficiencies occurred during the preparatory proceeding or if additional evidence was required. The referral of a case to a prosecutor could also be necessary to extend the prosecution to acts closely related to

[369] Waltoś 1979, p. 11.

the pending case committed by persons as yet not prosecuted

5.6.2.2 Some divergences between appeal and reclamation

Parties were entitled to challenge a judgement delivered by a court of first instance by way of appeal. The time limit for filing an appeal was fourteen days from the service of judgement. A subsidiary prosecutor could attack the part of a judgement concerning conviction. An appeal could raise objections which had not or could not constitute the object of a reclamation.

Alternatively, reclamation could be brought against

- the orders of a court, which preclude the rendering of a judgement – i.e. orders taken after completion of the pre-trial conference
- the orders deciding a preventive measure
- other orders if provided for by law

The time limit for filing a reclamation was seven days from the date of service of the order. The provisions on appeal against decisions of a court applied accordingly to reclamations against decisions of public prosecutors or other organs conducting the preliminary proceedings. A decision made by

- a public prosecutor was challenged by way of reclamation filed with his superior, and when provided for by law, with a court
- an organ conducting the preliminary proceedings was challenged by way of reclamation by the prosecutor supervising these proceedings

If the review was filed with a prosecutor, general provisions common to appeal and reclamation applied accordingly.

5.6.3 The position of public prosecutors in extraordinary forms of review

5.6.3.1 The reopening of proceedings

If an appeal or reclamation was no longer available, a valid decision concluding court proceedings could be reviewed in certain legally specified situations, for instance where new facts or evidence were found, previously unknown to the court, indicating that the accused was innocent. The review would then be filed with the *voivode* court or the Supreme Court. Before 1969, the law distinguished the reopening of proceedings prejudicial to the accused from reopening

to his benefit. Only a prosecutor could request the reopening of proceedings prejudicial to the accused. In the 1969 CPC, a general classification of the circumstances that could result in review replaced this distinction. Court proceedings concluded by a valid decision were reopened if (Article 474 CPC)

- an offence had been committed in connection with the proceedings and there was good reason to believe that this might have affected the contents of the decision
- after the decision had been issued, new facts or evidence previously unknown to the court came to light, which indicated that
  - the convicted person was innocent or had been sentenced for another offence carrying a severer penalty than that for the current offence committed
  - the court erroneously dismissed the proceedings, relying without good reason on one of the grounds provided for in Article 11 subsections (3) to (7) CPC (see 5.5.1.3)
- any of the 'absolute grounds for revision' had come to light (Article 388 CPC)
  - a person unauthorised to decide on the matter, or subject to disqualification had participated in the decision
  - the panel was improperly constituted or one of its members was not present throughout the trial
  - a penalty or preventive measure not prescribed by law had been imposed
  - one of the circumstances provided for in Article 11 had occurred
  - the decision was not signed by all the members of the panel
  - the accused had no defence counsel
  - a civilian court had decided upon a case falling under the jurisdiction of a special court or a special court had decided on a case falling under the jurisdiction of a civilian court
  - a lower court had decided on a case falling under the jurisdiction of a higher court
  - the case had been heard in the absence of an accused whose presence was mandatory

Proceedings could be reopened by the court at the request of parties, and *ex officio* in case of 'absolute grounds for revision'. Reopening was even possible by a family member if the accused was deceased. If the decision had already been examined by way of extraordinary appeal, proceedings could not be reopened.

The request for reopening was made before the court of last resort (the *voivode* court or the Supreme Court) sitting as a panel of three judges. Refusal of a court to reopen proceedings could be challenged by way of reclamation before the Supreme Court unless the dismissal came from the Supreme Court itself.

If the request was granted, the court could

- set aside the decision and remand it to a competent court for re-examination. The decision to reopen and remand the case to the competent court could not be challenged
- reverse the appealed decision and acquit the accused in a new judgement

5.6.3.2 The extraordinary appeal

Any valid judicial decision concluding the proceedings – e.g. an order to dismiss a case – and any valid judgement incapable of challenge at appeal or reclamation could also be challenged by way of extraordinary appeal. Only the Supreme Court had jurisdiction to review decisions by way of extraordinary appeal. The Supreme Court as a panel of seven judges had jurisdiction to review its own decisions.[370]

The right to file an extraordinary appeal was only granted to the Minister of Justice, the general prosecutor and the first president of the Supreme Court. It was not a third-instance form of review because the parties to a case were not granted this right.[371] However, the appeal could be filed at the motion of the injured party, the person convicted or the persons authorised to take appellate measures. Though all three institutions could be petitioned to file an appeal, only one appeal would be granted.

A decision could be challenged without restriction as soon as an error vitiated the judgement or the proceedings. The Supreme Court was not bound by the grounds produced in the writ of review. Any kind of error could serve as grounds for extraordinary appeal, such as

- violation of substantive law

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[370] Article 51 of the 1952 Constitution notes, however, that the Supreme Court supervised the activity of all *other* courts. In application of this provision, the Supreme Court could not supervise its own decisions. Nevertheless, the Supreme Court's review over its own cases was never judged to be unconstitutional.

[371] The issue of considering the extraordinary appeal as a third-instance form of review has however been debated by scholars; see in particular, Boim, Morgan & Rudzinski 1966.

- violation of procedural law if it affected the judgement
- incorrect appraisal of facts on which the judgement was based
- discrepancy between the sentence imposed and the offence committed

Extraordinary appeal could be filed for the benefit and to the prejudice of the accused. For instance, appeal was admissible for the accused even in cases where the sentence had been served, clemency had been granted, the prescribed limitation period had expired or the accused had died. It did not matter whether the sentence had been served or not. If it had not, the Supreme Court could stay the execution of this decision. There was no time limit to file the appeal. Before 1969, a decision prejudicial to the accused could be challenged after six months from the date the judgement became valid. A decision modified upon appeal filed after six months could not modify the accused's circumstances but only serve the uniformity of case law. The resulting decisions taken by the Supreme Court would take the form of an opinion binding on lower courts. According to the 1969 Code, appeals filed after six months were not granted if prejudicial to the accused. Concretely, the accused had to wait for an extra six months in order to be sure that the judgement was irrevocable. It meant that an acquitted accused could be arrested again if the appeal had been filed before the six-month time limit had expired. An extraordinary appeal concerning the same accused and the same decision and based on the same charges could be brought only once (Article 467 § 2 CPC). If *new* charges were brought against the same judgement and the same accused, another extraordinary appeal could be filed. This could happen at any time. A new final judgement delivered by a lower court on the same matter, but after the previous one had been annulled by the Supreme Court, could be challenged again by the same person against the same accused if new charges, evidence or factual circumstances were found. In such cases, the accused risked double jeopardy.

Only the Supreme Court had the jurisdiction to hear extraordinary appeal. It could annul a decision that violated the law or set it aside and remand the case back to a lower court. Its opinions on questions of law and on questions of facts were binding on the remanded court. However, the latter remained free to appraise new and old evidence according to its understanding, to establish factual circumstances accordingly and to decide on the penalty in a manner

possibly inconsistent with the implied or assumed stance taken by the Supreme Court.[372]

5.6.3.3 The reinstatement of proceedings conditionally dismissed by the court

At the motion of a public prosecutor, or *ex officio*, the court of first instance could decide to reinstate proceedings conditionally dismissed by the court if this dismissal was no longer justified. The motion or the decision to reinstate had to be settled by a decision of the court of first instance with jurisdiction over the case.

5.6.3.4 Compensation for unjustifiable sentencing or detention

In certain cases, an accused was entitled to request compensation for damage incurred by him because of a wrong judicial decision – *e.g.* if he was acquitted or re-sentenced under a more lenient provision because of a reopening of proceedings or a cassation appeal or if he suffered manifestly unjustifiable preventive detention. The *voivode* court in whose jurisdiction the judicial decision was taken was competent to judge the compensation claim. The right to seek compensation could not be exercised beyond one year from the date on which the judicial decision became valid and final.

5.6.3.5 Clemency

A convicted person or a person authorised to file an appellate measure could file a clemency petition; however, the general prosecutor could also institute it *ex officio*. The court that delivered judgement in the first instance had jurisdiction to decide on the petition. If it expressed a favourable opinion, the file was transmitted to the general prosecutor who presented it to the Council of State. The Council could decide whether to grant clemency or not. The general prosecutor could also be ordered by the Council of State to institute clemency proceedings *ex officio*.

[372] Boim, Morgan & Rudzinski 1966.

Chapter 6
Poland – the current organisation and functions of the prosecution service in the criminal process

The rise of political opposition during the 1980s finally meant the collapse of the communist regime in Poland. The most important reforms took place from 1989 on. Although the Act on the PPS adopted in 1985 remained in force, fundamental amendments repealed the Soviet features of the *Prokuratura* in order to make the PPS an institution mainly empowered with the prosecution of crimes (6.1). Though the powers of the general prosecutor have been reduced (the general supervision function has been repealed) and the independence of prosecutors increased, we will see that the Polish current PPS remains centralised and subordinate to the Minister of Justice who fulfils the general prosecutor's functions (6.3). The Soviet features affecting the criminal justice system, such as the two-instance system, have been repealed (6.2). The rights of the security police in criminal proceedings have been reduced to allow Public prosecutors to gain further powers. The Polish criminal procedure has been extensively modified in order for Poland to meet Western standards, in particular the European *acquis* (6.4). The role of prosecutors after the pre-trial phase of criminal proceedings has been changed accordingly. With regard to modifications affecting the forms of review we highlight the repeal of the extraordinary appeal (6.5).

6.1 Major changes affecting the Polish PPS in the Constitution of Poland and in the *Prokuratura* Act

The 1989 Round Table Agreement took place at the government's initiative in order to defuse social unrest. Discussions took place

between the Communist Solidarność and other opposition groups. Although General Jaruzelski had hoped that the discussion would not yield major reforms, the opposite occurred. The 1952 Constitution was amended the same year.[373] This amendment repealed the Soviet *Prokuratura* and launched the transformation of the institution into a French style prosecution service.[374] The subordination of the prosecution services to the Minister of Justice replaced its subordination to the Council of State. A new version of Article 64 of the 1952 Constitution stipulated

> 1 – The Office of Public Prosecution shall safeguard observance of the law and the prosecution of offences.
>
> 2 – The Office of Public Prosecution is subordinate to the Minister of Justice who holds the office of the General Prosecutor.
>
> 3 – The method of appointment and recall of prosecutors as well as the principles of organisation and procedure of the Office of Public Prosecution shall be defined by law.[375]

Between 1992 and 1997, the Small Constitution replaced and repealed the 1952 Constitution. In 1997, Poland adopted a new Constitution, repealing all provisions concerning the Soviet *Prokuratura*.[376] Today, only Articles 103 and 108 of the 1997 Constitution affect the prosecution services and prevent prosecutors from cumulating their functions with a mandate of deputy or senator.

The *Prokuratura* Act adopted on 20 June 1985 repealing the 1950 Act became the fundamental legal instrument regulating the PPS.[377] This text has undergone important amendments in order to transform the institution into a body compatible with the democratic principles of law. In line with the above-mentioned Article 64, the Act of 22 March 1990 appropriately amended the provisions concerning

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[373] Ustawa z dnia 29 grudnia 1989 roku o zmianie Konstytucji Polskiej Rzeczpospolitej Ludowej (Dz.U. Nr 75, poz.444).

[374] Tylman & Grzegorczyk 2003, p. 247.

[375] Old versions of the 1952 Constitution as amended may be found at http://www.oefre.unibe.ch/law/icl/pl__indx.html.

[376] An official translation of the 1997 Constitution is available at <http://www.trybunal.gov.pl/index2.htm>.

[377] Ustawa z dnia 20 czerwca 1985 roku o Prokuraturze Polskiej Rzeczpospolitej Ludowej (Dz.U. Nr 31, poz.138). This act has been amended several times. At the time of writing this thesis, the latest consolidated version was published in 2002. It will be used in this work and can be found at <http://www.Prokuratura.walbrzych.pl/prokurat.pdf>.

the appointment, organisation, functions and dismissal of procurators.[378] Article 1 § 2 of the 1985 Act now stipulates

> The general prosecutor supervises the services of the prosecutor's office. The Minister of Justice performs the functions of the general prosecutor.[379]

In 1996, a new amendment to the 1985 Act created a uniform national prosecutor's office (*Prokuratury Krajowej*).[380] Article 6 of the 1985 Act now stipulates

> 1 - The prosecutors of the general units of the organisational prosecutor's offices (*powszechnych jednostek organizacyjnych prokuratury*) are the national (local) prosecutor's office (*Prokuratury Krajowej*), the appellate prosecutor's offices (*prokuratur apelacyjnych*), the provincial and district offices (*okręgowych i rejonowych*).
>
> 2 - The prosecutors of the units of the organisational national prosecutor's military offices (*wojskowych jednostek organizacyjnych prokuratury*), are the prosecutors of the Chief Military Prosecutor's office (*Naczelnej Prokuratury Wojskowej*), the military prosecutors of the provincial and garrison prosecutor's military offices (*okręgowych i garnizonowych*).

Since Poland became a liberal democracy founded on the Rule of Law respecting freedom, justice, the inherent dignity of the person and his or her right to freedom, criminal policies have changed.[381] The new task of the prosecutor's office is safeguarding the law and prosecuting crimes (Article 2, 1985 Act), rather than safeguarding law and order (in practice, to generally supervise and implement Socialist Legality), as was the case in the Polish People's Republic. As a public authority, public prosecutors shall respect and protect

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[378] Ustawa z dnia 22 marca 1990 roku o zmianie ustawy o Prokuraturze Polskiej Rzeczypospolitej Ludowej, Kodeksu postępowania w sprawach o wykroczenia oraz ustawy o Sądzie Najwyższym (Dz.U. Nr 20, poz. 121).

[379] All quotes from the 1985 Act as amended are the author's unofficial translations. The terms in parenthesis are always added by the author.

[380] The 1996 amendment also modified prescriptions concerning the general regulation of the independence, rights, duties and disciplinary responsibility of prosecutors, trainee and assistant prosecutors, and the organization and functions of the prosecutors' office and military prosecutors; see Ustawa z dnia 10 maja 1996 roku o zmianie ustaw o prokuraturze, o Sądzie Najwyższym, o Trybunale Konstytucyjnym oraz ustawy – Prawo o ustroju sądów powszechnych i ustawy – Prawo o adwokaturze (Dz.U. Nr 77, poz. 367).

[381] References to the Rule of Law are made in particular in the Preamble and Article 2 of the Constitution.

the inherent and inalienable dignity of the person as established by the Constitution.[382] The PPS ensures that public organs and other organisations enforce the laws passed by parliament.[383] Article 3 stipulates

> 1. As mentioned in Article 2, the general prosecutor and the public prosecutors subordinated to him:
>
> 1) Conduct prosecutions, supervise the penal preparatory procedures and act as the public accuser before the courts;
>
> 2) Initiate proceedings (submit claims) in criminal and civil cases and give opinions in civil cases and participate in judicial proceedings, civil as well as labour and social insurance, if required for the protection of legality (*praworządności*), the social interest (*interesu społecznego*) and the rights of citizens or property rights;
>
> 3) Take measures provided by the law for the correct and homogenous application of the law with regard to offences (rule breaking, not only criminal) in judicial and administrative procedures and in other procedures;
>
> 4) Supervise the enforcement of decisions concerning preliminary detention and other decisions of deprivation of liberty;
>
> 5) Conduct research in the field of criminality problems and take measures to prevent and fight them;
>
> 6) Challenge before the court administrative decisions incompatible with the law and participate in judicial procedure regarding the conformity of such decisions with the law;
>
> 7) Coordinate activities led by other state organs prosecuting crime;
>
> 8) Cooperate with the state organs, state organisational units and social organisations in the prevention of delinquency and other infringements of rights;
>
> 8a) Cooperate with the national and local chiefs of criminal information centres (*Szefem Krajowego Centrum*

[382] Article 30 of the Constitution provides: 'The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities.' In the articles following this one, the Constitution sets out a list of freedoms and rights of persons and citizens.

[383] Waltoś 2002.

> *Informacji Kryminalnych*) in the realisation of their regulatory tasks;
>
> 9) Give opinions with regard to regulation projects (*aktów normatywnych*);
>
> 10) Take any other measures (*czynności*) when so defined by the law.
>
> 2. Military prosecutors perform the same functions as provided in part 1.

The Decree issued by the Minister of Justice in 1992 organised the internal functioning of the Polish prosecution service as prescribed by Article 18 § 1 of the 1985 Act.[384] Recently, the Act of 10 January 2003 amended the Criminal Procedure Code and introduced a formal distinction between the functions of prosecutors and those of the Minister of Justice/general prosecutor (see 6.3.2.2).[385]

6.2 The current Polish criminal justice system

6.2.1 The first instance[386]

Article 24 § 1 CPC provides that the district courts (*sąd rejonowy*) have jurisdiction to adjudicate in the first instance in all cases except those referred by law to the jurisdiction of another court (e.g., felonies). A district court may request the appellate court to refer a particular case to a provincial court because it is particularly important or complex. There are three hundred forty-eigth district courts and forty-four provincial courts in Poland.[387] Article 25 § 1 CPC provides that provincial or circuit courts (*sąd okręgowy*) have jurisdiction to adjudicate the following cases in the first instance

- felonies enumerated in the CC and other special statutes
- misdemeanours enumerated in the CC and other special statutes

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[384] Rozporządzenie Ministra Sprawiedliwości z dnia 11 kwietnia 1992 roku - regulamin wewnętrznego urzędowania powszechnych jednostek organisacyjnych prokuratury (Dz. U. Nr 38, poz. 163).

[385] Ustawa z dnia 10 stycznia 2003 roku o zmianie ustawy – Kodeks postępowania karnego, ustawy – Przepisy wprowadzające Kodeks postępowania karnego, ustawy o świadku koronnym oraz ustawy o ochronie informacji niejawnych (Dz. U. Nr 17, poz. 155).

[386] The English language court designation in this paper does not necessarily accord with designations in papers written in English or translations of official Polish documents. In an ascending scale I use the term regional, district (or circuit), appellate and Supreme whereas many other papers use the following scale: district, regional (or circuit), appellate and Supreme.

[387] For statistics concerning the number of offices, see Tak 2004-2005, p. 597.

A defendant is brought before the court with territorial jurisdiction over the area where the criminal act was committed. If the act was committed in several areas, the court where the preparatory steps were first taken will be competent (Article 31 CPC). If the place where the act took place remained undiscovered, the area of jurisdiction is the area where

- the offence was discovered
- the accused was apprehended
- the accused was domiciled or temporarily resided prior to the commission of the offence

The Polish system has no investigating judge. Initially, the police conduct investigations and these are subsequently pursued by the public prosecutors. In the first instance, according to the circumstances of the case and the gravity of the offence committed, proceedings are as follows

- normal proceedings comprising of a pre-trial procedure, usually in the form of an investigation followed by a decision to prosecute further , and a trial before a provincial or a district court[388]
- summary proceedings comprising of a pre-trial procedure, in principle, in the form of an inquiry, a decision to further prosecute and a trial before a single judge. This type of proceeding applies to offences for which the law imposes a maximum term of five years imprisonment and the value of the crime or the damages do not exceed PLN 50,000
- proceedings before a single judge (or decree proceeding), applying to offences considered as minor misdemeanours for which the criminal law only imposes a custodial sentence not exceeding 100 days or a fine not exceeding PLN 200,000 (Articles 500 to 507 CPC). Provisions concerning summary proceedings apply to this type of proceeding unless the law provides otherwise. The judge may issue a decree judgement (*wyrok nakazowy*) without the participation of the parties, when in light of the evidence gathered the circumstances of the act and the guilt of the accused do not raise any doubts[389]

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[388] In general, normal proceedings are discussed in this paper.

[389] The accused and the public prosecutor have a right to file objections with the court that issued the decree judgment. The objection should be filed within seven days of the date of service. Once an objection has been raised, the decree

- proceedings following private denunciation (see 6.4.2.3.2)

Categories of crimes committed by soldiers in active service and crimes against the military are proceedings carried out before courts-martial. In cases subject to military criminal justice, courts-martial apply specific parts of the CPC that, in general, are not related to the basic provisions of the Code.

6.2.2 The appeal and the Supreme Court level

District courts hear appeals in cases defined by law. Provincial courts hear appeals against decisions and rulings issued in the first instance by district courts as well as other matters delegated to them by law. Appellate courts (*Sądy apelacyjne*) hear appeals from matters delegated to them by law and decisions and rulings issued in the first instance by the provincial courts. There are eleven appellate courts in Poland. There are four to seven provincial courts within each appellate resort. There are several district courts within each provincial resort.

The criminal law section of the Supreme Court in Warsaw reviews cases of all other courts in cassation, and other appeals if provided by the law, in order to safeguard their compliance with the law and to ensure uniformity. It also resolves other legal issues.

6.2.3 Types of decisions

The various authorities acting from the inception to the closing of proceedings take different types of judicial decisions. The following classification is useful in determining if a decision can be challenged and if so, by which means

- instructions (*zarządzenia*) made when the law does not require a judgement or an order: during the preparatory proceedings, such a decision may be made by a public prosecutor and, on the occasions specified by law, by the court or the police (or one of the organs mentioned in Article 312 CPC, see 6.4.3.1.3). During the court proceedings, this type of decision is made by a judge (the president of the court or a judge of the panel). In principle, instructions concern organisational and regulatory matters
- judicial decisions (*orzeczenia*) designate the category of procedural decisions that decide on legal matters during the course of proceedings. There are two types of judicial decisions

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judgment ceases to be valid and the matter is subject to examination according to general rules.

- orders (*postanowienia*), which are made when the law does not require a judgement. The law specifies whether such a decision is to be taken by the police, a public prosecutor, a court or another body
- judgements (*wyroki*), which are required by law in specific cases (Article 93 § 1 CPC). They are delivered by a court or tribunal in the first instance or by a superior court to terminate a case. Judgements include resolutions (*rozstrzygnięcie*) and findings (*ustalania*). A resolution confirms the legal prescription applied to the case (e.g. recognising the accused as guilty of the indictable act, dismissing the proceedings, demanding the removal of defects). Findings establish the facts that are proven and accepted

A judgement made by an appellate court becomes valid and final as soon as the court delivers it. From that moment a judgement can be executed unless the Supreme Court decides otherwise.[390]

6.3 The organisation of the current Polish PPS

6.3.1 The designation of the prosecution in the Soviet statute, in the 1985 Act and in the Criminal Procedure Code

The first chapter of the old Soviet statute on the *Prokuratura* designated the prosecution service as the 'office of the general prosecutor' (*Urząd Generalnego Prokuratora Rzeczypospolitej*). The Act only defined the office of the general prosecutor and his deputies as the state institution for prosecution. In the 1985 Act, the Polish prosecution service included

- the general prosecutor and his deputies within his office
- other prosecutors subordinate to the general prosecutor
- prosecutors from the military units of the prosecution service
- the prosecutors of the Institute of National Remembrance – the Commission for the Prosecution of Crimes against the Polish Nation (Article 1 § 1, 1985 Act, see 6.3.3.5)

The term 'public prosecutor' is used rather than the term 'general prosecutor', which is only used to distinguish a provision conveying specific rights or obligations linked to the activities of the general prosecutor.

[390] Murzynowski 1998.

In the Criminal Procedure Code, the term *prokurator* designates the state prosecutor and different terms designate other parties involved in the prosecution. Because Polish criminal procedure covers different types of criminal prosecution instituted and executed by different organs, the generic term 'accuser' is often used. The Code distinguishes between the public accuser (*oskarżyciel publiczny*), who is the state prosecutor (*prokurator*), and other prosecutors – such as the private prosecutor. In addition to the state prosecutor, the following legal persons may act as accusers appropriately empowered by the law (Article 45 CPC)

- the units of forest guards, who are entitled to conduct preparatory proceedings and to support charges
- the victim (*pokrzywdzony*)
- the subsidiary accuser or subsidiary prosecutor (*oskarżyciel posiłkowy*)
- the private accuser, also called the private prosecutor (*oskarżyciel prywatny*)

6.3.2 The Minister of Justice/general prosecutor and the administration of the public prosecutors' offices

6.3.2.1 The general prosecutor

The Minister of Justice/general prosecutor heads the prosecution service, which is one of the departments of the Ministry. The Minister of Justice/general prosecutor is also empowered to supervise the prison administration and the activities of lawyers at court, public notaries and court enforcement officers. As a superior to all public prosecutors, the general prosecutor has or his deputies have the right to

- supervise the activity of the prosecution authorities, issue instructions (*zarządzenia*), guidelines (*wytyczne*) and commands (*polecenia*). These supervisory acts cannot, however, affect the content of acts of procedure made by a lower prosecutor (Article 10, 1985 Act)
- issue guidelines concerning preparatory proceedings binding on all the organs entitled to conduct these proceedings (Article 29 § 1, 1985 Act)

With regard to the administration of the public prosecutors' offices, the general prosecutor has the right to

- appoint (Article 11, 1985 Act) and discharge prosecutors

- create and dissolve prosecutors' offices by way of resolution (*rozstrzygnięcie* Article 17, 1985 Act)
- determine the internal regulation (*regulamin*) of the international activities of prosecutor's offices (Article 18 § 1, 1985 Act)
- define the internal organisation of the general units of the prosecution service and the range of operations of the secretariat and all the other sections of the administration (Article 18 § 2, 1985 Act)

Within the general prosecutor's office, the council of public prosecutors (*Rada Prokuratorów przy Prokuratorze Generalnym*) is composed of prosecutors and tasked with delivering opinions on issues such as drafts of guidelines and instructions of the general prosecutor (Article 24, 1985 Act).

The general prosecutor or his deputy must participate in trials presided over by the entire Supreme Court bench or by the bench of one section. A public prosecutor from the national prosecutor's office may also participate in other Supreme Court benches.

6.3.2.2 The plurality of functions

During the discussions leading to the 1989 Round Table Agreement, the question of the *constitutionalisation* of the public ministry arose with respect to the question of the plurality of the functions of the Minister of Justice and the general prosecutor. After 50 years of one-party rule and of a powerful prosecution instrument in the hands of the Communist Party, it was felt that the new PPS should be, on the one hand, depoliticised and controlled by parliament to a certain extent but, on the other hand, carefully monitored during the transition period. Politicians thought that appointing the Minister of Justice as the prosecutor with the highest rank as the head of the PPS would safeguard against the abuses and mistakes that could occur during the transition towards democracy. Indeed, ministers are democratically responsible and have to answer questions raised during a session of the Sejm (Article 115, 1997 Constitution). Ministers are individually and collectively responsible to the Sejm (Article 157, 1997 Constitution). The Minister of Justice, as the head of the prosecution service, would therefore be directly liable for actions undertaken by his service. The Sejm can pass a vote of no confidence in an individual minister. If the Sejm passes this vote, the President of Poland will discharge the minister from his functions (Article 159, 1997 Constitution). Ministers are also accountable to the Tribunal of State for infringements of the Constitution or statutes

and for the commission of criminal acts connected with the discharge of the duties of their office (Article 156, 1997 Constitution). In this latter case, the minister is also relieved of his office.

However, this plurality of functions poses several problems, including the risk of political pressure on the public prosecution when exercising criminal competences. The European Commission criticised this position during Poland's accession process.[391] This position is also criticised within Poland. The right of the Minister of Justice/general prosecutor to intervene directly or indirectly by way of instructions to his deputies in the course of penal proceedings, arouses suspicion that his position in certain cases is politically motivated, where his only proper concerns are upholding the law adopted by the legislative body.[392]

The risk of a conflict of interests between law and politics is also present in the constitutional judicial debate. The general prosecutor is party to constitutional proceedings and issues opinions in cases heard by the Constitutional Court.[393] If a case is politically sensitive, it is hard to imagine that the general prosecutor – the Minister of Justice – will not sustain the government's position to the detriment of legality. A duality in responsibilities and a difference in concerns can place the Minister of Justice in a difficult position that could undermine his or her status as legal adviser to the Court. For example, if the Minister prepares draft legislation subject to verification by the Constitutional Court, can the general prosecutor have sufficient independence to give an opinion purely motivated by legal arguments? In addition to his political accountability to parliament, the Minister of Justice is also responsible to the Council of Ministers to which he reports directly. These conditions make it extremely difficult for the Minister of Justice, who is primarily a politician, to hold his position independently as a prosecutor and to focus only on safeguarding legality.

The plurality of functions may also be a sensitive issue because the Minister of Justice/general prosecutor's function is directly

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[391] 'There is no clear separation of functions of the Minister of Justice and the attorney-general. Draft legislation addressing this issue is being discussed within the government. It is aimed at separating the two functions, but the provisions as currently formulated will not result in the attorney-general becoming more independent.' In European Commission, Regular Reports from the Commission on Progress towards Accession of 13 October 1999 by Poland pp. 50–54, 72–74.

[392] Waltoś 2002.

[393] Art. 27 of Ustawy z dnia 1 sierpnia 1997 roku o Trybunale Konstytucyjnym (Dz. U. Nr 102, poz. 643).

dependent on the stability of the government in place. During the President of Poland's five-year mandate, ministers can be discharged for the reasons already mentioned but also at the request of the Prime Minister (Article 161, 1997 Constitution). There is no need for disciplinary proceedings to discharge the general prosecutor from his office. Although this replacement may only rarely occur it could, however, be a source of pressure and instability for the PPS. Guidelines and directives concerning the work of prosecutors could also change with the Minister of Justice. The frequent changes in the guidelines concerning prosecutors' jurisdiction, internal regulation, the appointment of superior prosecutors or simply changes in criminal policy do not favour a coherent and unified fight against crime.[394]

Finally, it seems problematic to expect from prosecutors that they do not become members of political parties or participate in political activity (Article 44 § 3, 1985 Act), when their highest superior and colleague is a politician. In the meantime, the general prosecutor is empowered with the same rights and functions as any prosecutor because of the indivisibility and unity principles (see 6.3.5.1). Prosecutors enjoy relative immunity against removal from office. A disciplinary or penal sanction is, in principle, necessary to discharge a prosecutor (Article 16, 1985 Act see 6.3.7.2). Nevertheless, this immunity does not seem to apply to the Minister of Justice for the following two reasons

- the President of the Polish Republic may discharge the Minister of Justice from his ministerial office, thus from his general prosecutor's office (if such a discharge occurs he will take up another prosecution position such as national prosecutor)
- the general prosecutor has no superior capable of instituting the disciplinary proceedings provided for in Article 77 § 1 of the 1985 Act [395]

Criticism of this plurality of functions is ongoing among Polish scholars and legal practitioners, especially when it comes to possible political intervention in pending criminal proceedings.

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[394] Poland is, however, a country where the principle of mandatory prosecution or legality is in force. Prosecution must be instituted if a criminal fact is suspected (see 6.4.2.2). Because of this principle, there is less need for a criminal policy regulating the prosecution.

[395] Resolution of the Supreme Court of 26 September 2002, I KZP 24/02, OSNKW 2002/11-12/100. This resolution of the Supreme Court has, however, been criticised by several authors who claim that the general prosecutor enjoys the same immunity and rights as any other prosecutors, see Kaczmarska 2005; Bojańczyk 2003.

Several attempts to solve the problem have been unsuccessful. One of these was the transfer of the general prosecutor's jurisdiction over judicial proceedings to the national prosecutor's office, which was established in 1996.[396]

The Polish Parliament also passed a law in 2003 modifying the CPC and distinguishing the functions of the Minister of Justice from those of the general prosecutor.[397] In fact, this legislation only replaced the words 'Minister of Justice/general prosecutor' with 'general prosecutor' in certain provisions of the CPC. As the European Commission had already assumed when the 2003 Act was still a project, further modifications were needed in order to guarantee the independence of public prosecution from political pressures but these modifications did not happen.[398] The only advantage of the change is that it clarifies responsibilities but it does not provide any clear separation between the Minister of Justice and the general prosecutor.

6.3.3 The structure of the Polish prosecution service

6.3.3.1 The new structure of the public ministry since 1990 and the hierarchy between offices

The PPS structure consists of the following civilian units

- the national prosecutor's offices (*Prokuratura Krajowa*)
- the appellate prosecutor's offices (*Prokuratury Apelacyjne*)
- the provincial offices (*Prokuratury Okręgowe*)
- the district offices (*Prokuratury Rejonowe*)
- the Institute of National Remembrance – Commission Prosecuting Crimes Against the Polish Nation (*Instytut Pamięci Narodowej - Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu*), which is also part of the general office of the prosecution service but as we shall see, has a very specific function

Article 17 of the 1985 Act defined the hierarchical relationship between offices and between prosecutors within the offices. It is

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[396] Waltoś 2002.
[397] Ustawą z dnia 10 stycznia 2003 roku o zmianie ustawy – Kodeks postępowania karnego, ustawy – Przepisy wprowadzające Kodeks postępowania karnego, ustawy o świadku koronnym oraz ustawy o ochronie informacji niejawnych (Dz. U. Nr 17, poz. 155); See Tylman & Grzegorczyk 2003, p. 247.
[398] See footnote 391.

necessary to distinguish between a superior and direct superior in the hierarchy because certain rights in criminal proceedings are only granted to direct superiors (see 6.3.4.2). The structure is as follows

- the general prosecutor is
  - directly superior to national prosecutors
  - superior (*przełożonym*) to all public prosecutors of the civilian prosecution service
  - superior to military offices
  - superior to prosecutors of the Institute of National Remembrance
- the national prosecutor administers (*kieruje*) the national prosecutor's office within the scope defined by the general prosecutor. The national prosecutor is the direct superior of the prosecutors from the national prosecutor's office
- an appellate prosecutor administers an appellate prosecutor's office and is
  - directly superior to prosecutors within the appellate office
  - superior to public prosecutors from a provincial prosecutor's office and to prosecutors from district offices within the area of activity (*działania*) of the appellate office (the territorial area)
- a provincial prosecutor administers a provincial prosecutor's office and is
  - directly superior to prosecutors within the provincial office
  - superior to public prosecutors from district prosecutor's offices within the area of activity of the provincial office (the territorial area)
- a district prosecutor administersa district prosecutor's office and is the direct superior of prosecutors within the district office

In addition to the civilian institution, a military prosecution office (*wojskowe jednostki organizacyjne prokuratury*) consists of the chief military prosecutor's office, the provincial offices and the garrison offices.

The Minister of Justice and the Minister of National Defence for the military offices establish the general territorial competence of the prosecution service by way of regulations. The civilian regulation in force was issued on 1 June 2001.[399]

[399] Rozporządzenie Ministra Sprawiedliwości z dnia 1 czerwca 2001 (Dz. U. Nr 64, poz. 656).

Prosecutors are not only organised according to their rank in the organisation but also according to the territorial judicial areas within which they perform their functions. In principle, prosecutors' offices are separate from the courts. If, in practice, prosecutors perform their functions in the same jurisdiction as a district, provincial or appellate court, however, they can act before another court. Appellate prosecutors' offices are established in the eleven appellate resorts. There are several provincial prosecutors' offices within each appellate resort. Only important provincial resorts have a district prosecutor's office. There are also several outlying prosecutors' offices belonging to the territorial area of important provinces, the highest-ranking staff member working in these distant offices is the head of the provincial office. The inquiry department of the provincial office of Warsaw is always competent in crimes concerning public trading in securities, regardless of the place where the crime was committed. A regulation issued on 11 April 1992 establishes the internal organisation of all the offices.[400]

6.3.3.2 The national prosecutor's office

At the national level, the general prosecutor determines the powers and responsibilities of the national prosecutors who head the national prosecutor's offices. Of the 60 national prosecutors, certain individuals are direct deputies of the general prosecutor. The national office is part of the Ministry of Justice.

This office has a generally high rank in the PPS's hierarchy and national prosecutors adopt positions in national or central-level affairs and in matters with an extraterritorial element, such as

- criminal proceedings in international relations (Article 227 et seq., 1992 Regulation)
- cases of extradition (Article 234 et seq., 1992 Regulation)
- or European arrest warrants, when the whereabouts of the person whose arrest has been sanctioned is unknown (Article 238, 1992 Regulation)

The national office also partly supervises the appellate prosecutors (Article 14 and 15, 1992 Regulation) and gives, in particular, instructions in specific cases as provided in Article 8 § 2, 1985 Act.

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[400] Rozporządzenie Ministra Sprawiedliwości z dnia 11 kwietnia 1992 roku - regulamin wewnętrznego urzędowania powszechnych jednostek organisacyjnych prokuratury (Dz. U. Nr 38, poz. 163).

6.3.3.3 The appellate, provincial and district prosecutors' offices

Since the territorial division of the jurisdiction of the judiciary, the civilian system includes three hundred district prosecutor's offices, forty-two provincial prosecutor's offices and ten appellate prosecutor's offices. The military system includes sixteen garrison offices and three provincial offices.[401] Each office is organised into services with different tasks and positions in the hierarchy.

6.3.3.4 Assemblies of public prosecutors

Assemblies and colleges of prosecutors help lead prosecutors in their decision-making. These meetings present an opportunity to discuss important issues related to the offices. They deliver opinions on a candidate's appointment as a trainee and a prosecutor's removal or disciplinary responsibility.

These assemblies and colleges are organised on the same model as prosecution offices at the national, appellate, provincial and district levels.

6.3.3.5 The Institute of National Remembrance and the Commission for the Prosecution of Crimes against the Polish Nation

The 18 December 1998 Act established the Institute of National Remembrance.[402] In the Institute, the Commission for the Prosecution of Crimes against the Polish Nation investigates and prosecutes

> a) Crimes perpetrated against persons of Polish nationality and Polish citizens of other nationalities in the period between 1 September 1939 and 31 December 1989 – Nazi crimes, Communist crimes, other criminal offences constituting crimes against peace, crimes against humanity or war crimes
>
> b) Other politically motivated repressive measures committed by functionaries of Polish prosecution bodies or the judiciary or persons acting upon their orders, and disclosed in the content of the rulings given pursuant to the Act of 23 February 1991 on the Acknowledgement as Null and Void Decisions Delivered on Persons Repressed for Activities for the Benefit of the Independent Polish State (Journal of Laws of 1993 No. 34, item 149, of 1995 No. 36,

[401] Tylman & Grzegorczyk 2003, p. 248.
[402] Ustawa z dnia 18 grudnia 1998 roku o Instytucie Pamięci Narodowej - Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu (Dz. U. Nr 155, poz. 1016).

item 159, No. 28, item 143, and of 1998 No. 97, item 604)[403]

The Institute is situated in Warsaw and branch offices are usually created in locations which are seats of appellate courts. It is hierarchically organised in the same frame as other prosecution offices in national, appellate, provincial and district offices. All these bodies are composed of public prosecutors and apply the CPC. The Institute may order an investigation into cases involving crimes against humanity even though prosecution is inadmissible. In these cases, the investigation only provides a comprehensive clarification of the circumstances of the case and identifies the aggrieved parties (Article 45 § 3 and § 4, 1998 Act).

6.3.4 The appointment and subordination of public prosecutors

6.3.4.1 The appointment of the organs of the Polish public ministry

A Polish citizen must have an advanced law degree and have passed a special examination in order to become prosecutor. The traineeship lasts for three years. Exceptions may be made for members of other legal professions or judges. The Prime Minister appoints and may recall national prosecutors and other general prosecutor's deputies, on the motion of the general prosecutor from among the public prosecutors of the national offices (Article 12, 1985 Act). The general prosecutor appoints and may recall other civilian prosecutors. He also appoints military prosecutors on the Defence Minister's motion. Prior to a definitive appointment, the general prosecutor may grant trainee prosecutors a short period, not exceeding three years, where they enjoy all the prosecutor's functions with the exception of the right to participate in procedures before appellate and provincial courts, and the right to take steps in procedures before the Supreme Court (Article 99 § 1, 1985 Act). Prosecutors and judges are not members of the same professional group and have a different status. It is possible to move from one service to another in the course of a career.

Representatives of the council of public prosecutors are elected by the assembly of the prosecutors of the national prosecutor's office, the Institute of the National Remembrance, the appellate office and the general prosecutor, who heads the office and appoints three

[403] The history of the Commission can be traced back to 1945 when the Chief Commission for the Examination of German Crimes in Poland was created.

representatives. Prosecutors of subordinate assemblies elect the members of assemblies.

The general prosecutor may

- transfer prosecutors from one post to another but only with the consent of the prosecutor in question unless the transfer is the result of a disciplinary measure or the suppression of the current occupied post (Article 16a, 1985 Act)
- delegate one prosecutor to a different prosecution service unit without his consent but only for six months (Article 50, 1985 Act)

6.3.4.2 The subordination of lower prosecutors to their superiors

The hierarchy of subordination between prosecutors depends on their position in the hierarchical structure (see 6.3.3.1). Article 8 of the 1985 Act provides that

- a prosecutor is obliged to carry out his superior's instructions (*zarządzenia*), guidelines (*wytyczne*) and orders (*polecenia*)
- if the order affects a particular case or procedural function (*czynności procesowej*), the superior must deliver the order by means of a written notice, stating reasons, if the prosecutor so requires. A copy of the written order is kept on file
- only the direct superior may order the dismissal of a pending preparatory proceeding or proceeding before the court
- a non-direct superior prosecutor may order a lower prosecutor, however, such an order cannot refer to the way preparatory proceedings are concluded or to proceedings before the court
- a prosecutor may refuse to carry out an order and ask for its modification or for his removal from the case. The prosecutor must explain his reasons for this refusal and his direct superior must take a decision concerning further action

Prosecutors are obliged (Article 40, 1992 Decree)

- to carry out actions outside the established scope of their duties in important cases for the service, particularly in matters that cannot suffer delays, on being ordered by a superior
- to immediately inform their superior of any obstacle rendering the fulfilment of the task impossible

According to the principle of devolution (*dewoluciji*), a superior prosecutor has the power to devolve the execution of his functions to a deputy if the activity in question lies within his competence. According to the principle of substitution (*substytucji*), a superior has

the power to take over the functions of his deputy (Article 10 § 3, 1985 Act) unless otherwise stipulated by law.

Superior prosecutors and superior services supervise the actions of lower prosecutors (Article 42, 1992 Regulation). The national prosecutor's office coordinates the supervision exercised by the different services of the provincial and appellate offices. In particular, this office attends to the form of the supervision and its effectiveness. At the recommendation of the general prosecutor or of the national prosecutor and, in exceptional circumstances, at the request of the head of the affected office, the national office directly exercises supervision. In principle, every senior prosecutor is empowered with the following rights

- to examine the interlocutory appeals to an order issued by a prosecutor, unless otherwise provided for by law (Article 465 § 2 CPC)
- to extend the period of investigation from three months to a longer period (Article 310 CPC)
- to order the reinstatement of a preparatory procedure that was dismissed, unless such a procedure is conducted against a person under examination as a suspect in a previous procedure (Article 327 § 2). The general prosecutor has, however, the right to issue such an order if he finds that the dismissal of the previous procedure was groundless (Article 328 § 1 CPC)

Within the same unit in the prosecutor's office, lower prosecutors must inform their superior when a case is especially complex (Article 44, 1992 Regulation); however, supervision is always carried out with respect for independence of the prosecutors (Article 45 § 1, 1992 Regulation). The direct superior (Article 43, 1992 Regulation) has the following rights

- to monitor the efficiency of his deputies' work
- to demand in individual cases a report of actions taken and, where necessary, to make recommendations as to the direction the proceedings should take and even the content of those actions
- to be informed of all actions taken during the proceedings
- to check the preparation of the prosecutor's intervention before the court
- to check the case once it has been settled
- to analyse the execution of the services' tasks

An invalid decision taken by lower prosecutors regarding the dismissal of a specific case can be repealed or modified by way of supervision.[404] Certain written decisions taken by lower prosecutors can also be approved or rejected upon supervision. However, this approval or rejection is without legal force in the proceedings and is only significant in the internal hierarchical structure of the office as regards disciplinary responsibility. In fact, if a deputy took important steps without having informed his superior, the superior in charge of discipline must be informed (Article 45 § 3, 1992 Regulation). Under such circumstances, the actions of the lower prosecutor may be considered as a breach of duty unless it was impossible, or very difficult, to obtain approval before acting due to the circumstances of the case. In such an event, the prosecutor has the right to decide independently (Article 50, 1992 Regulation).

6.3.5 Limits to subordination

6.3.5.1 Principles of unity, indivisibility and undifferentiation

Before every type of court, the public prosecutor is the state prosecutor (Article 45 § 1 CPC). He is entitled to prosecute and take criminal cases to court. Other state organs also have this right (Article 45 § 2 see also 6.4.3.1.1). There is no hierarchical relationship between prosecutors and these organs. Nevertheless, a public prosecutor always supervises steps taken by these organs in criminal proceedings. In addition, a prosecutor has a general prosecution function and can take over the other organs' right to prosecute.[405]

According to the principles of unity and indivisibility (*jednolitości i niepodzielności*) every prosecutor, irrespective of his grade, performs the same function in criminal proceedings. The PPS is a homogeneous institution of the state, representing the state. The personality of a prosecutor is irrelevant to the performance of his duties (the principle of undifferentiation or *zasada indyferencji*). In practice, it is very common that a prosecutor conducts the preliminary proceedings of a specific case and that another prosecutor participates in the hearing. Any prosecutor can replace one another in the exercise of public prosecution functions, unless otherwise stipulated. Prosecutors can replace each other in the same court because they perform their functions in the name of the

[404] Tylman & Grzegorczyk 2003, p. 674.
[405] Tylman & Grzegorczyk 2003, p. 686.

PPS. The eyes of the law do not distinguish which prosecutor completed a given action so long as the change of prosecutor in the course of proceedings does not affect their validity or efficiency. However, the principle of undifferentiation does not apply to the internal organisation of competences in the service. A low ranking prosecutor is not competent to act as a higher ranking prosecutor unless otherwise provided for. The organisation of the service is a matter of internal regulation and not related to criminal proceedings.

A public prosecutor may be temporarily transferred to another office. This transfer can be for a period longer than six months with the prosecutor's consent. An appellate or district chief prosecutor may decide on temporary transfer for a period of less than two months. In other cases, the general prosecutor has jurisdiction to decide.

6.3.5.2 Independence of the prosecutors

In principle, the independence of the prosecutors is limited by

- the legality principle (see 6.4.2.2)
- the general and specific binding instructions given by their immediate supervising prosecutor or other superiors (Article 8 § 5, 1985 Act)

Article 8 § 1 clearly stipulates that public prosecutors shall be independent in the discharge of their duties. This means that a prosecutor does not need any previous agreement or support from his superior to carry out his functions. A prosecutor decides alone whether to prosecute or not. The 1996 amendment to the 1985 Act transplanted the French principle *La plume est serve, mais la parole est libre*.[406] During hearings, prosecutors recover a certain independence from their superiors.[407] During a court session, if new circumstances become public, the prosecutors can take an independent decision concerning further proceedings (Article 8 § 6). However, a prosecutor must always be loyal to his superior and, if possible, conscientiously keep him informed during the proceedings. Such information is necessary for the superiors to carry out supervision and perhaps modify a given instruction. Depending on the circumstances, a lack of information can lead to disciplinary measures.

The general prosecutor cannot intervene directly in a pending case; however, he has general power of supervision and has the right to

[406] Refer to 2.3.3.3 for an explanation of this expression.
[407] Waltoś 2002.

intervene indirectly by means of instructions to the direct superior of the prosecutor in charge of a specific case. The superior passes the instruction on to the latter.

6.3.6 Other rights and duties of Polish prosecutors

From the time of his appointment, the trainee prosecutor is bound by his official status and takes the following oath before the general prosecutor (Article 45, 1985 Act)

> 'I solemnly swear to faithfully serve the Polish state as a public prosecutor, to stand as a guardian of the law (*prawa*), to safeguard the legality (*praworządności*), and to fulfil the duties of my function conscientiously, to keep the secrets of the state and of my duty, and to lead procedures with dignity and honesty'; the following may be added at the end of the oath: 'So help me God!'

In addition to the oath, prosecutors must respect the dignity and the impartiality (*beztronność*) required to perform their functions. This obligation is binding upon prosecutors whether or not they are in office. The law also prevents them from being members of political parties and from participating in political activity. They may not accept a mandate of deputy or senator nor may they accept any other employment unless it is performed during their free time and does not interfere with their duties (Article 49, 1985 Act). A prosecutor is also required to maintain the secrecy of the circumstances of the cases he deals with, unless a court relieves him of this obligation. Measures taken by prosecutors must respect the principles of impartiality and equal treatment of all citizens (Article 7, 1985 Act). Prosecutors are also regularly required to provide their superior with a statement of their family assets, including their matrimonial assets. In addition, a public prosecutor may not participate in a proceeding (Article 47 CPC), if

- the case affects him or his spouse
- he is related to any party to the case by blood or marriage
- he has participated in the issuance of the decision subject to appellate measure
- or there are other circumstances that could cast reasonable doubt on his impartiality in a given case

In contrast, public prosecutors enjoy important rights provided by criminal procedure and local governmental bodies; other public or private organs must provide the PPS with any necessary assistance in the realisation of their tasks.

6.3.7 The discipline and criminal responsibility of prosecutors

6.3.7.1 The penal responsibility of Polish prosecutors

Article 54 of the 1985 Act establishes the criminal responsibility of prosecutors. Members of the public prosecution enjoy immunity against criminal proceedings when they have committed a criminal act in the form of a petty offence or contravention (*wykroczenie*). However, in these cases a disciplinary procedure may be instituted. Prosecutors enjoy relative immunity against prosecution for other types of offence because the start of a public prosecution has to be decided by a disciplinary court (*sądu dyscyplinarnego*) where a disciplinary prosecutor will represent the PPS's interests against his colleague. A prosecutor cannot be remanded in custody unless his superior authorises it or the crime has been committed in *flagrante delicto*, *i.e.* when the suspect is caught in the act of committing a crime or immediately afterwards. The superior's authorisation for custody is only possible if there is sufficient suspicion that the suspect has committed a criminal act. The various parties to the proceedings and the disciplinary prosecutor can challenge a decision to authorise or to refuse prosecution. Only a public prosecutor can conduct criminal proceedings against another prosecutor.

6.3.7.2 The disciplinary responsibility of Polish prosecutors

Members of the PPS are liable for breaches of duty (Article 66, 1985 Act). Once appointed, a prosecutor cannot be removed or transferred to a different unit except under certain circumstances provided for by law. Article 16 of the 1985 Act stipulates that the general prosecutor can remove a prosecutor from his position as the result of his resignation or a disciplinary measure. The following conditions are necessary for disciplinary removal

- dereliction of duty
- this dereliction is a manifest violation of a legal provision or an offence to the dignity of the public prosecutor's office
- the general prosecutor has heard the prosecutor beforehand
- a disciplinary proceeding has resulted in sanction or a judgement

The following forms of misconduct are considered breaches of duty (*przewinienia służbowe*)

- an obvious and flagrant breach of the law
- an offence to the dignity of the prosecutor's office

- the abuse of the freedom of speech during the execution of the functions of a public accuser and constituting an insult to a party, his lawyer, a curator, a representative, a witness, an expert or a translator[408]

If a superior prosecutor discovers that a deputy has committed a manifest breach of law (*oczywistej obrazy*) in the conduct of a case, he can demand an explanation and launch disciplinary proceedings (Article 8 § 7, 1985 Act) or apply a minor punishment (Article 72, 1985 Act). If the breach is manifest and serious (Article 8 § 8, 1985 Act), the superior must launch disciplinary proceedings.[409] If the affected prosecutor was handling a case, this should not influence its continuation. The statute of limitations for instituting disciplinary proceedings is three years from the date of the act. If the act constitutes a crime (*przestępstwo*), the provisions of the CC apply.[410]

A disciplinary court of first instance consists of three independent prosecutors, only subject to law and appointed by the general prosecutor (Article 70, 1985 Act). Appeals to these first instance court judgements lie in a disciplinary appellate court composed of five prosecutors. A disciplinary prosecutor is appointed by the general prosecutor and follows his instructions. A cassation appeal is available to the parties. A disciplinary measure may be in the form of (Article 67, 1985 Act)

- a warning
- a reprimand
- discharge from office
- transfer to a different place
- discharge from the prosecution service

[408] This misconduct is also an offence prosecuted by way of private prosecution (see 6.4.2.3.2).

[409] There is no statute defining a manifest and serious breach – it is a matter of discretion.

[410] According to Article 101 § 1 CC – the statute of limitation is thirty years if the act constitutes a homicide (*zbrodnię zabójstwa*), twenty years for other crimes, ten years for misdemeanours subject to a custodial sentence exceeding three years, five years if the act is subject to a custodial sentence not exceeding three years, and three years if the act is subject to a custodial sentence or a fine.

6.4 Functions of the Polish prosecution service in the preliminary phase of the criminal process

6.4.1 Functions in fields other than the criminal process

In addition to criminal procedure and the supervision of detention facilities and custody, the PPS is active in other procedures, particularly those affecting civil, labour, administrative, social insurance and property rights. It would be wrong to say that the current scope of the prosecutor's jurisdiction has survived the era of the Soviet *Prokuratura*.[411] PPS interventions in non-criminal procedures exist in all systems (for example, Article 29-3 of the French *Code Civil* entitles public prosecutors to bring an action for the determination of the status of anyone who may hold French citizenship). However, the jurisdiction of the Polish PPS is general. In the interest of safeguarding legality (*praworządność*), the rights of citizens or the social interest (Article 7 of the Polish Civil Procedure Code), a prosecutor may

- institute proceedings or take part in pending proceedings. This prescription allows the PPS's intervention at any moment in any trial, even between two private parties litigating over the legality of a private contract. Exceptionally, in the field of family law, prosecutors can only intervene where provided for by law[412]
- independently give his opinion as to the subject of the dispute. A court may inform the PPS about a case where attention should be paid (Article 59 of the Civil Procedure Code)
- appeal civil judgements
- deliver an opinion on administrative regulation bills
- request the communication of acts, documents and written explanations from bodies empowered to conduct proceedings of any type
- question witnesses, take expert opinions and carry out investigations to explain a case (Articles 42 and 43, 1985 Act)

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[411] Waltoś 2002.

[412] The state prosecutor is not entitled to bring an action for divorce, legal separation or adoption on behalf of someone else. However, the state prosecutor may bring almost any other action to the civil court (such as an action for the nullification of a marriage, the nullification of fatherhood, or the denial of motherhood or paternity) on behalf of someone else.

Statutes other than the CPC, such as the Code of Administrative Procedure or the Civil Procedure Code, provide for other specific functions.

6.4.2 General principles concerning preliminary proceedings in the criminal process

6.4.2.1 The legality principle and the principle of ex officio prosecution of offences

Poland is a country where the principle of legality or compulsory prosecution (*zasada legalizmu*) is in force. The public organ empowered with the right to prosecute criminal offences is obliged to institute and carry out preliminary proceedings (Article 10 § 1 CPC) as soon as there is a good reason to suspect that an offence has been committed (Article 303 CPC).[413] However, modifications in criminal procedure have enhanced public prosecutors' discretionary powers. Reducing the risk of inequality between citizens and the risk of external pressure on the PPS have both been put forward as reasons to justify choosing legality over opportunity of prosecution.[414]

The principle of legality is combined with the principle of proceedings *ex officio* (*zasada ścigania z urzędu*). According to the latter, the public accuser must institute and carry out preliminary proceedings with or without the agreement of the other parties, such as the victim, in the majority of cases. In specific cases, however, a motion from a particular person, institution, agency or the permission of an authority is necessary to conduct a proceeding or undertake certain actions (Article 9 § 1).[415]

6.4.2.2 The principle of compulsory complaint

The principle of compulsory complaint or accusatorial procedure (*zasada skargowości*) contrasts with the two previous principles. Organs with the right to institute proceedings involved in preparatory proceedings can institute and conduct these proceedings only upon the request of an authorised body.[416] Article 14 § 1 CPC stipulates

> The court proceedings shall be instituted upon the motion of the duly authorised accuser (*oskarżyciel*) or authorised entity.

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[413] Gaberle 2004, p. 365.
[414] Tylman & Grzegorczyk 2003, p. 126.
[415] Gaberle 2004, p. 368.
[416] Gaberle 2004, p. 375.

If the principle applies, a state prosecutor cannot institute and carry out criminal proceedings *ex officio*. The public or private organ empowered with the right to complain must first make a formal request. However, the state prosecutor is obliged to act *ex officio* without waiting for a formal complaint if he deems that the public interest so requires.

6.4.2.3 The role of the public prosecutor in relation to the prosecuted offence

In order to determine the place and the role of the public prosecutor in the preparatory stages of a criminal process, it is necessary to distinguish between several types of offences. Although accusers other than a public prosecutor can institute criminal proceedings, the public prosecutor remains empowered with the strongest position.

6.4.2.3.1 Offences prosecuted on motion (*przestępstwa ścigane na wniosek*)

In several cases provided by substantive criminal law, such as offences against liberty or offences against sexual liberty and decency, criminal proceedings may only be instituted if a complaint has been filed by an authorised person (Article 12 § 1 CPC) or if a certain person authorised a prosecution (Article 13 CPC).[417] Otherwise, criminal proceedings cannot be instituted (Article 17 § 1 point 10 CPC). This is an application of the principle of compulsory complaint. The injured person is most likely the person entitled to bring the motion.

A public prosecutor institutes proceedings after the motion is filed. One of the purposes of this type of prosecution is to prevent fresh psychological pain for the victim resulting from a criminal proceeding.[418] Once proceedings are instituted, they are carried out *ex officio* by the public prosecutor according to the legality principle. The plaintiff cannot withdraw his complaint without the consent of the public prosecutor (Article 12 § 3 CPC).

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[417] For instance, the offence of threat (Article 190 CC) or medical operation without the consent of the patient (Article 192 CC) and offences of forced or illegal sexual intercourse (Article 197 CC) or abuse of a vulnerable person in order to subject him or her to sexual intercourse (Article 198 CC).

[418] Murzynowski & Rogacka-Rzewnicka 2002.

6.4.2.3.2 Offences prosecuted by way of private prosecutions (*przestępstwa ścigane z oskarżenia prywatnego)*

The person authorised to institute proceedings is the injured person who becomes a private prosecutor. Unlike the case of prosecution on motion, the victim institutes proceedings and carries them privately. The proceedings start directly with the indictment served by the private prosecutor and not by a public prosecutor. There are no preparatory proceedings. The private prosecutor is not bound by the legality principle and is free to institute or refrain from instituting proceedings until the indictment has been read before the court. From this moment on, the case may only be dismissed with the consent of the accused. The public prosecutor's opinion is, in principle, irrelevant.

Here too, substantive criminal law provides for offences prosecuted by way of private prosecution. Approximately 3% of cases are prosecuted privately.[419] It affects cases involving less severe offences such as offences against honour (Article 216 CC) and bodily integrity (Article 217 CC).

If the public interest is at stake and the victim either does not institute proceedings or dismisses the proceedings, the prosecutor has the duty to institute or reinstitute proceedings (Article 60 § 1 of the Code). If proceedings have already been brought by private indictment, the public prosecutor can take over the proceedings if it appears that the public interest so requires. The victim then becomes a subsidiary prosecutor. His withdrawal will not, in principle, affect the proceedings. The public prosecutor then carries out proceedings as with cases of offences prosecuted *ex officio.*

6.4.2.3.3 Offences prosecuted ex officio (*przestępstwa ścigane z oskarżenia publicznego*)

Prosecution *ex officio* is the main type of prosecution. All crimes have to be prosecuted *ex officio* unless otherwise stipulated.[420] A public accuser, usually a prosecutor, institutes and carries out proceedings. He makes the decision concerning further prosecution and indictment (Article 10 § 1 CPC).

[419] Murzynowski & Rogacka-Rzewnicka 2002.
[420] Tylman & Grzegorczyk 2003, p. 114.

6.4.2.4 Phases of preliminary proceedings in case of offences prosecuted by a public accuser

The first phase, the discovery of facts that may constitute a criminal offence, takes place

- upon the victim's report (notice of an offence)
- upon the report of another organ
- or upon a police (or another competent organ) report if the act is committed in *flagrante delicto*

The kind of offence committed must then be determined to decide whether the public accuser can institute criminal proceedings. The public accuser (public prosecutor, other organ or the police) issues an order instituting preliminary proceedings (*postępowanie przygotowawcze*). However, before such an order, a pre-investigation phase may be necessary in order to verify the facts or to secure evidence if the case is not subject to delay.

The second phase is the preliminary proceeding, which may take the form of an investigation or an inquiry (see 6.4.3.1.3). The proceedings are conducted by the police and supervised by a prosecutor.

The third phase involves the conclusion of the proceedings and the decision regarding further prosecution. The prosecutor takes the leading role and decides whether to dismiss the case, apply alternative measures, such as mediation, or take the accused to court.

6.4.3 The role of the Polish prosecution service in preparatory criminal proceedings

6.4.3.1 The first and second phase of criminal proceedings

6.4.3.1.1 Organs competent to institute preparatory proceedings

Three types of organ can institute preparatory proceedings in the Polish criminal system – a prosecutor, the police or other public organs. However, the position of the prosecutor in the proceedings remains stronger than the position of other organs. Prosecutors, in theory, conduct investigations and inquiries or charge other organs with their conduct when this jurisdiction does not result from the natural functions of these organs (Article 25, 1985 Act). An inquiry (*dochodzenie*) is carried out entirely by the police or the other

organs provided for in Article 325d and 312 CPC.[421] In practice, the police conduct investigations (*śledztwo*) unless the prosecutor decides otherwise (Article 311 CPC) or if the matter affects

- misdemeanours where the suspect is a judge, state prosecutor, police official or another official such as a border guard or military police
- a person who took the life of a human being (Article 148 CC)

A prosecutor can always delegate part of an investigation however. If the police conduct the investigation, the state prosecutor must perform the execution of certain actions, such as

- motion the court to take a suspect into preventive detention (Article 250 CPC)
- issue an order (the court may also make such a decision) to search for an accused for whom an order of preventive detention has been issued and who has gone into hiding, in the form of a wanted notice (Article 279 § 1 CPC)

According to the principle of legality, the competent organ for the prosecution of crimes is obliged to institute and carry out preparatory proceedings *ex officio* or upon notification of a criminal offence if there are good reasons to suspect that such an offence has been committed. Reports of crimes prosecuted *ex officio* may be made either to the police, a public prosecutor (Article 304 § 1 and 2) or other specific institutions (Article 325d). Article 312 § 2 and separate regulations determine which agencies have the right to institute proceedings or not and to support charges.[422] It mainly affects the simplified procedure before first instance courts. The following agencies are concerned

- the trade inspection organ
- the state sanitary inspection organ
- the treasury office and the inspectors of the treasury control
- the president of the office of telecommunications control and of the post office
- border guard officials
- officials of the national forests and parks
- officials of the national hunting reserve

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[421] Czajka & Światłowski 2005, p. 109.
[422] Rozporządzenie Ministra Sprawiedliwości z dnia 13 czerwca 2003 r. (Dz. U. Nr 108, poz. 1019).

These agencies do not have exclusive jurisdiction to institute and execute proceedings. A public prosecutor may intervene at any time and take over the case. The officials of the border guard, national forests and parks, and those of the national hunting reserve have the right to institute investigations and inquiries, whereas the other agencies only have the right to institute inquiries. If, however, the police have to immediately forward the order to institute proceedings to the competent prosecutor (Article 305 § 3), these agencies do not have this obligation.

In practice, it appears that the police conduct the majority of inquiries. Investigations are partly or wholly conducted by the police. This has been considered to present the risk of an excessive independence of the police in criminal proceedings. This issue was brought up when the new CPC was issued and the need to strengthen prosecutors' supervision of police activities was emphasised.[423]

6.4.3.1.2 The pre-investigation phase, the decision on the commencement of preparatory proceedings and the refusal to institute preparatory proceedings

Upon notice or *ex officio*, a state body competent to institute criminal proceedings may suspect the commission of a criminal offence. Nevertheless, it may be necessary to complete the notice and verify facts or, in urgent cases, to secure evidence. In such cases, certain steps can be taken, such as inspections, searches and the examination of the suspect's body for fingerprints or blood. The verification of facts and the securing of evidence should not take longer than necessary, usually thirty days maximum. If the suspicion affects facts for which the institution of an investigation seems necessary, such a case should be immediately referred to the prosecutor.

Already during this phase, the police may arrest a suspect, detain him in custody for forty-eight hours and apply to the prosecutor to obtain a preventive detention order from the court. The preventive detention cannot exceed a total period of two years. An appellate prosecutor may request an extraordinary extension before the appellate court.

If at the time of the notification of the facts – *ex officio* or during the verification and securing phase – the competent organ has good

[423] Tylman & Grzegorczyk 2003, p. 669.

reason to suspect that a criminal offence has been committed, this organ must issue an order to institute proceedings.

If the data available at the time of the institution of proceedings or collected during the course of these proceedings provide sufficient grounds for suspicion that an act has been committed by a specified person (offence prosecuted *ex officio*), the authorised institution issues an order on presentation of the charges (*postanowienie o przedstawieniu zarzutów*).[424] From the notification of this order, the suspect becomes the accused and is entitled to the rights of the accused. This decision must meet formal requirements (such as the identity of the suspect, detailed data on the act attributed to him and the legal classification of the act).

Alternatively, the police or a prosecutor, or one of the other bodies, issues an order on refusal to institute proceedings (*postanowienie o odmowie wszczęcia postępowania przygotowawczego*) if there is no reason to suspect the commission of a crime or if one of the conditions provided by Article 17 § 1 CPC is fulfilled (see below 6.4.3.2). If the police issue this kind of order, the public prosecutor's approval is required (Article 305 § 3 and 325e). This approval is not necessary for the other organs mentioned earlier. These orders may be challenged by way of interlocutory appeal before the superior prosecutor.

6.4.3.1.3 The investigation and inquiry

Depending on the complexity of the offence committed and the difficulty of the case, the competent organ chooses

- a simplified inquiry (*dochodzenie*) in cases within the jurisdiction of the district court (Article 325b § 1 CPC) that are
  - subject to a penalty not exceeding five years' custody and in cases of offences against property, only when the value of the object of the offence or damage inflicted or threatened does not exceed PLN 50,000 (exceptions are provided by law)
  - specified by law (i.e. in the CC)
- an investigation (*śledztwo*) in cases (Article 309 § 1 CPC) of
  - crimes

[424] In principle, this order is not required for an inquiry. The suspect is notified of the charges at the outset of his examination.

- misdemeanours where the suspect is a judge, state prosecutor, police official or another official such as border guards or military police
- misdemeanours for which inquiries are not conducted, misdemeanours for which inquiries are conducted, if the state prosecutor so decides by reason of the significance or complexity of the case

6.4.3.2 The third phase of criminal proceedings and decisions affecting further prosecution

In inquiries, on approval of the prosecutor, the police may issue an order for dismissal, prepare a bill of indictment or propose another solution. The prosecutor approves and files the indictment unless he decides otherwise. In investigations, the police may issue an order to dismiss the case on approval of the prosecutor. Otherwise, the police apply to the prosecutor to indict the accused. The prosecutor prepares and files the indictment or decides otherwise.

The completion of the preliminary proceedings may lead to mediation, the dismissal of the case (*umorzenie*) or the issuance of a bill of indictment or an act of accusation (*akt oskarżenia*).

The public prosecutor – or the court after the closing of preliminary proceedings – may decide, *ex officio* or upon the motion of or with consent from the injured party and the accused, to refer the case to a trusted institution or person for mediation (Article 23a CPC). If mediation is successful, the case is referred to a court for a decision on conditional dismissal (*warunkowe umorzenie*); alternatively, where mediation fails, an indictment follows.[425] Besides an indictment, the PPS can apply to the court for a conviction without hearing (*wniosek o skazanie bez rozprawy*, Article 335 CPC).

The conditional dismissal is available for petty offences carrying a penalty of up to five years and which present a low degree of social harm. The guilt of the accused must be without doubt and his character must be compatible with such a decision (i.e. he must be a first offender). The court will impose coercive measures other than imprisonment for a probation period. The conviction without hearing is admissible if the accused acknowledges his guilt for a crime carrying a penalty of up to ten years' imprisonment. The decision is made by the court through a judgement.

Alternatively, an order for dismissal can only be delivered

[425] In private prosecution, successful mediation leads to the definitive dismissal of the case.

- if the proceedings have failed to disclose sufficient grounds to justify the preparation of an indictment and the conditions specified in Article 324 are absent. Here the investigation is dismissed without the inspection of the case materials (Article 322 § 1 CPC)[426]
- in the case of a misdemeanour carrying a custodial penalty of up to five years if imposing the penalty would obviously be inexpedient in the light of a penalty validly decided for another offence, and as long as the interests of the injured party are not prejudiced (Article 11 § 1 CPC)
- Article 17 § 1 CPC provides that criminal proceedings shall be dismissed, if
  - the act has not been committed or there have not been sufficient grounds alleged to suspect that it has been committed
  - the act does not possess the qualities of a prohibited act or it is acknowledged by law that the perpetrator has not committed an offence
  - the act constitutes an insignificant social danger
  - it has been established by law that the perpetrator is not subject to a penalty
  - the accused is deceased
  - the prescribed limitation period has elapsed or criminal proceedings concerning the same act committed by the same person have been validly concluded or, if previously instituted, are still pending
  - the perpetrator is not subject to the jurisdiction of the Polish criminal courts
  - there is no complaint from an authorised prosecutor
  - permission is not required to prosecute the act or there is no motion to prosecute from a person so entitled, unless otherwise provided by law
  - other circumstances precluding such proceedings appear

[426] Article 324 § 1. If it is found that the suspect committed an act while incompetent and there are grounds to apply precautionary measures, the state prosecutor, having concluded the investigation, may apply to the court for the dismissal of proceedings and the application of precautionary measures. Article 321 applies accordingly.
§ 2. If the court finds no grounds for granting the motion referred to in § 1, it shall refer the case to the state prosecutor to be continued.
§ 3. The order of the court shall be subject to interlocutory appeal.

Articles 322 and Article 17 § 1, point 3, usually justify the dismissal of criminal proceedings. This is a clear approximation of the opportunity principle in prosecutions. In Article 322, the competent organ is free to appraise whether there are sufficient grounds to seek an indictment. If this organ is the police, approval from the state prosecutor is needed for dismissal (Article 305 § 3 CPC). In 2000, 17% of the cases were dismissed on this basis. In Article 17 § 1, point 3, an act constituting only insignificant social harm is not a criminal offence and there is thus no need to prosecute. Prosecutors use this system to drop cases despite the substantial elements of a crime having been assembled. In 2000, only 0.3% of cases were dismissed on this basis. However, there seems to be a difference with the Communist notion of social danger (see 5.5.1.3) because the words 'social harm' are used instead of 'social danger'. According to Polish authors, the new definition is interpreted less broadly than the old one

> …only those circumstances directly connected to the act may be taken into account in determining the act's 'social harm' in a concrete case.[427]

Finally, the wording of Article 11 provides for discretion in the decision to prosecute or not. The provision is justified on the basis that there is no point in carrying on complete criminal proceedings because the resulting conviction would be encompassed by a conviction for another offence.[428] This provision is rarely applied.

6.4.4 The role of the Polish prosecution service in the supervision of preliminary proceedings

6.4.4.1 The obligation to inform

All public institutions must assist the organs of criminal proceedings from within the scope of their activities.[429] In spite of this general obligation, the police have no legal obligation to inform the state prosecutor that a notice of an offence has been filed unless it concerns an offence for which it is compulsory for a state prosecutor

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[427] Frankowski 2005, p. 352.
[428] Murzynowski & Rogacka-Rzewnicka 2002.
[429] Article 15 § 1. The police and other agencies involved in criminal proceedings shall implement the instructions of the court and the state prosecutor and shall conduct their inquiry or investigation under the supervision of the state prosecutor within the scope prescribed by law.
§ 2. All state, local government and community institutions shall aid and assist, within the scope of their activities, the agencies conducting criminal proceedings.

to conduct an investigation. The other organs mentioned in Article 325d are under no legal obligation to inform a prosecutor (Article 304 § 3).

Until they inform the public prosecutor, the police and the other organs are empowered to dismiss the matter. In theory and in application of the legality principle, a dismissal can only occur if the act is not a criminal offence prosecuted *ex officio*. Only in matters where the prosecutor is fully informed can the prosecutor carry out his right to supervise proceedings fully. However, Article 306 § 3 provides for the right of the notifying person to bring an interlocutory appeal to the superior prosecutor if the person did not receive notification of an order to institute or to refuse to institute proceedings within six weeks.

6.4.4.2 The supervision of preparatory proceedings

The supervising prosecutor verifies the facts or information mentioned in the notice of an offence before issuing the order to institute or to refuse to institute proceedings (Article 307 CPC). Provisions concerning supervision apply to both investigation and inquiry unless otherwise stipulated by law. Once instituted, the competent prosecutor is responsible for the correct and efficient conduct of the proceedings. If a prosecutor does not directly conduct the proceedings, he supervises all actions with the exception of court actions (Article 326 CPC). Supervision is a prosecutor's compulsory duty and the law only provides exceptions. Prosecutors should ensure that proceedings are performed with respect for the law and the rights of the various parties. The purpose of supervision is to achieve, quickly and efficiently, the objectives of the preparatory proceedings such as (Article 297 CPC)

- establishing whether a prohibited act has been committed and whether it constitutes an offence
- detecting the perpetrator and, if necessary, effecting his capture
- collecting information
- elucidating the circumstances of the case, including the identification of the injured parties and the extent of the damage
- to collect, secure, preserve and record evidence for the court to the extent required

The provincial prosecutor or his deputies supervise proceedings conducted by other organs. Prosecutors have no influence over the discipline and position of police officers or other organs if they violate their duties during proceedings, but they do have the right to

inform the immediately superior organs of the violation.[430] A public prosecutor can only perform certain acts or agree on their execution by another organ – particularly, a prosecutor must ratify an order suspending an inquiry or investigation. The prosecutor may decide to carry out the execution of other acts. Supervision applies to almost all acts of organs leading the proceedings undertaken before or after the instructions of a supervising prosecutor.[431] Concretely, supervision implies that the supervising prosecutor may (Article 326 § 3 CPC)

- inform himself of the intentions of the person conducting the preparatory proceedings, indicate the direction of proceedings and issue instructions on this issue
- request that material collected in the course of preparatory proceedings be presented to him
- participate in actions carried out by the person conducting proceedings, carry them out in person or take over and proceed with the case
- issue commands, orders or instructions and amend and reverse orders and instructions issued by the person conducting preparatory proceedings. All the organs involved in criminal proceedings must implement the instructions of the prosecutor – and of the court if it is involved – and legal prescriptions
- at any time, order the reinstatement of dismissed proceedings unless such proceedings are conducted against a person examined as a suspect in the previous proceedings. However, the reinstatement of proceedings against such a suspect is possible if circumstances of vital significance unknown during the previous proceedings are discovered (Article 327 CPC). This especially concerns the discovery of new facts or evidence

[430] Article 20 § 2. In the event of a flagrant dereliction of procedural duty by a public prosecutor or a person conducting the preparatory proceedings, the court shall inform an immediate superior of the person who transgressed; such a right shall also be vested with the state prosecutor with regard to the police and other agencies involved in preparatory proceedings.

[431] Article 326 § 4. In the event that an agency other than the state prosecutor fails to obey an order, ruling or instruction issued by the state prosecutor supervising the proceedings, on the motion of the latter, a superior official shall institute proceedings whose results shall be communicated to the state prosecutor.

6.4.4.3 The position of the general prosecutor

The general prosecutor has the right to reverse validly issued orders that dismiss preparatory proceedings with respect to a person examined as a suspect if he finds that the dismissal of such proceedings was groundless. There are two restrictions to this right

- where it does not apply to a court order
- after six months from the date the order became valid and final, the decision of the general prosecutor can only be taken in favour of the suspect and only to amend or reverse an order or its statement of reasons

If an order is reversed, the proceedings start again. The law does not define a groundless order of dismissal. The reopening of proceedings can occur on the discovery of new facts or evidence, or if the general prosecutor considers that his deputy mistakenly decided that an investigated act lacked the elements of a crime in the face of sufficient facts and evidence to issue an indictment.[432]

*6.4.4.4 The appeal of orders (*zażalenie na postanowienie*)*

Prosecutors have the general power to examine interlocutory appeals (see 6.5.2.2) filed against orders issued by an organ – other than the state prosecutor – conducting preparatory proceedings (Article 465 § 3 and 302 CPC). The appeal may be filed by the parties, their lawyers and representatives. In addition to these persons, the institution or the person who submitted the notice of an offence may also file such an appeal (Article 306 CPC)

- against an order refusing to institute proceedings
- against an order for dismissal
- if the person or institution that submitted the notice of a crime has not been notified within six weeks about the institution or refusal to institute an investigation

The appeal is filed before the superior prosecutor or before a court if the superior prosecutor rejects the appeal. If the appellate organ grants the appeal, the case is remanded to the state prosecutor who may

- refuse to institute or dismiss proceedings
- or institute proceedings

[432] Tylman & Grzegorczyk 2003, p. 677.

In the case of a second refusal, another interlocutory appeal may be filed. If the appeal is granted the case is remanded to the prosecutor. If the prosecutor refuses to institute proceedings for a third time, the injured party can bring his own indictment (Article 330 § 2 CPC). This means that a party other than a public accuser may bring an indictment against an offence prosecuted *ex officio*, even though the public accuser does not take part in the proceedings.

6.5 The role of the Polish public prosecutor after the pre-trial phase of the criminal process

6.5.1 The position of the public prosecutor in the first instance

6.5.1.1 The preliminary verification of the indictment and the conference

First the indictment is subject to preliminary verification by the president of the court. If this indictment does not meet the formal requirements provided by law, the president can decide to remand the case back to the prosecutor for correction. The prosecutor can challenge this order by way of interlocutory appeal within seven days of the order being issued. This appeal is judged by a court with jurisdiction over the case.

If the indictment meets the formal requirements, the president assigns the case to a conference (*posiedzenie sądu*) rather than a public hearing when it is not too complex and if

- the state prosecutor has submitted a motion for a decision to apply precautionary measures
- there is a need to consider a conditional dismissal of the proceedings
- the prosecutor included a motion for conviction without hearing
- there is a possibility of mediation
- the proceedings are dismissed pursuant to Article 17 § 1 (see 6.4.3.2)
- an order is issued to the effect that the court lacks jurisdiction over the case
- the case is remanded to the state prosecutor in order to correct deficiencies of essential significance in the preparatory proceedings
- an order is issued on conditional suspension of the proceedings or on preventive detention or other coercive measures

The decision taken at the conference is an order subject to interlocutory appeal. However, if a conditional dismissal is decided at the conference, a judgement is issued. During the conference, the presence of the parties is not mandatory unless the president decides otherwise.

6.5.1.2 The first instance hearing

After completion of the indictment's formal requirements, the president of the court refers the case by instruction to a public hearing if he finds that because of the complexity of the case, or for other important reasons, this would contribute to more efficient proceedings and in particular the proper preparation and organisation of the first instance hearing (Article 349 CPC). During the hearing, the court may grant the accused his motion by agreeing to a certain penalty. This is only possible with the consent of the state prosecutor and the victim (Article 387 CPC). After the hearing, the court deliberates, votes and delivers a judgement. It may only base its judgement on the facts and evidence disclosed at the main trial. The court renders a judgement of conviction or a judgement of acquittal if it finds that the act does not constitute a significant social danger or does not possess the qualities of a prohibited act. When after judicial examination a fact or material circumstance is disclosed which precludes prosecution or requires a conditional dismissal of the proceedings, the court shall issue a judgement on such dismissal or conditional dismissal.[433] In this case, the court may refer the case to another agency if the act under examination is a disciplinary grievance. Such a decision is not available if the court renders a judgement of acquittal. A legally valid judgement of a court dismissing proceedings can only be attacked by way of extraordinary forms of review (see 6.4.3).

6.5.1.3 The participation of the state prosecutor at the hearing

Before any type of court, the public accuser is the state prosecutor. However, another public agency may perform this role if the law so provides (Article 45 § 2 CPC). For example, in summary

[433] During preparatory proceedings, if it is proven that the act has not been committed, that there are insufficient grounds to suspect its commission, that it does not possess the qualities of a prohibited act or if it is acknowledged by the law that the perpetrator has not committed the offence, the organ conducting the proceedings delivers an order dismissing proceedings, whereas if this happens after the judicial examination has started during the hearing, the court delivers a judgement of acquittal.

proceedings the agencies noted under Article 312 § 2 CPC may perform this function (see 6.4.3.1.1). During the hearing, the prosecutor not only defends the interests of the state but also the interests of justice. In so doing, the public prosecutor is supposed to adapt his indictment to new circumstances arising during the hearing. Therefore, if these circumstances reveal that the defendant is not involved in the offence, the prosecutor issues an opinion for acquittal and desists from supporting the charges.

6.5.2 The position of public prosecutor in ordinary forms of review

6.5.2.1 General provisions applying to ordinary forms of review

The CPC institutes two types of ordinary forms of review, i.e. the appeal (*apelacja*) and the interlocutory appeal (*zażalenie*). An appeal may be filed against a judgement of the first instance court, whereas an interlocutory appeal may be filed against other types of decisions made either by a court or by another organ involved in preliminary proceedings. General provisions apply both to appeal and interlocutory appeal unless the law states otherwise. Differences between appeal and interlocutory appeal will be explained below. An ordinary form of review may affect

- the whole decision
- only certain parts of it
- or only the statement of reasons

Whoever files an appellate measure has to indicate in writing the objections raised against the decision challenged. The decision is challenged before the organ that made it. A prosecutor can always challenge a resolution or finding for the benefit of the accused as well as against him through ordinary forms of review (Article 425 § 3 CPC). If a prosecutor supports the appellate measure filed by the accused to his benefit, the accused can no longer withdraw his appeal. The appellate body decides whether the decision challenged should be sustained, amended or quashed. The appellate court is bound to amend or quash the decision challenged if it finds

- a violation of substantive law
- a violation of procedural law if the content of the decision is affected
- an error occurred in the determination of the facts if the content of the decision is affected

- or that the penalty imposed is strikingly disproportionate to the offence

Nevertheless, it can amend or quash the decision and decide on dismissal of proceedings only if the assembled evidence warrants it (Article 437 § 2). If the evidence assembled during the first instance proceedings does not allow the appellate court to amend the decision, it will quash it and remand it to the first instance court. The appellate court can also only modify the challenged decision within the scope of the appeal and the objections raised therein, unless certain circumstances provided by law occur (e.g. the court of first instance was not competent to take the decision challenged or the accused had no defence counsel). In these cases the appellate court can modify the challenged decision *ex officio*. The appellate court can only aggravate the decision challenged if an appellate measure has been filed against the accused within the limits of this appeal (prohibition of the *reformationis in peius*); however, an appellate measure filed against the accused may also result in a decision for his benefit.[434]

6.5.2.2 The interlocutory appeal

This form of review is filed against certain orders and instructions, and not against judgements of the court. They are

- orders of a court that preclude the rendering of a judgement unless otherwise provided for by law
- orders with respect to preventive measures

The provisions on interlocutory appeals against orders of the court apply to interlocutory appeals against orders by the state prosecutor and other persons conducting proceedings. An interlocutory appeal from an order issued by a state prosecutor is examined by his superior and by the court in cases provided for by law. An interlocutory appeal from an order issued by a body conducting preparatory proceedings other than a state prosecutor is examined by the state prosecutor supervising the proceedings.

The time limit for filing an interlocutory appeal is seven days from the date the order was served or announced. In particular, the state prosecutor can challenge the following

[434] The prohibition of the *reformationis in peius* does not apply to the alternative means of settling a criminal case. The appellate court may aggravate a decision taken following the submission to conviction procedure even if the accused appealed against it.

- orders of the president of the court to remand the case back to the prosecutor if the indictment does not meet the relevant formal requirements
- orders issued at the conference (thus not a judgement conditionally dismissing the proceedings issued at the conference)
- instructions assigning the case to a public hearing
- orders precluding the rendering of a judgement (i.e. quashing proceedings)
- instructions of the appellate court refusing a cassation appeal to the Supreme Court

6.5.2.3 The appeal

Appeal is the ordinary form of review that applies to judgements made in the first instance by a court or at a conference. The time limit for filing an appeal is fourteen days from the date the judgement and the reasons therefor were served. The appellate court cannot convict a defendant acquitted in the first instance or with regard to whom the first instance proceedings have been dismissed or conditionally dismissed. If the appellate court finds that the first instance court's judgement should be modified and, for example, that a judgement of acquittal could be wrong, it can only decide to quash the judgement and return it to the first instance court.

6.5.3 The position of public prosecutors in extraordinary forms of review

6.5.3.1 The cassation appeal

6.5.3.1.1 Cassation appeal against a valid decision by an appellate court

The public prosecutor and other parties to a case may bring a cassation appeal against a valid decision of an appellate court concluding the court's proceedings. A Supreme Court judgement in a cassation hearing cannot be challenged by way of another cassation appeal.

Absolute grounds for appeal are (Article 439 CPC)

- a person unauthorised or incapable of adjudicating or subject to disqualification in cases provided for by law has participated in rendering the decision

- the panel was improperly constituted or one of its members was not present throughout the trial
- a common court rendered a decision in a case falling under the jurisdiction of a special court, or a special court rendered a decision in a case falling under the jurisdiction of a common court of law
- a lower court rendered a decision in a case falling under the jurisdiction of a higher court
- a penalty, penal measure or preventive measure unknown to law has been imposed
- a decision was rendered that infringes the principle of majority vote or was not signed by any one of the persons participating in it
- there is a contradiction in the contents of the decision, rendering its execution impossible
- a decision was taken despite the fact that another criminal proceeding for the same act by the same person was already validly and finally concluded
- one of the circumstances precluding the proceedings, as defined by law, exists
- the accused had no defence counsel in a case where the law provides that he must have counsel, or defence counsel did not participate in acts where his participation was mandatory
- or the case was heard in the absence of an accused whose presence was mandatory

Non-absolute grounds for appeal can be found in another flagrant breach of law with significant effect on the content of the judgement.

A cassation appeal based on non-absolute grounds may be filed if

- it is filed in favour of the accused only where he has been convicted and sentenced to a custodial sentence without conditional suspension of the execution (Article 523 § 2)
- it is filed against the accused only if the accused has been acquitted or the proceedings have been dismissed because
  - the prohibited act constituted an insignificant social danger
  - it was established by law that the accused is not subject to penalty
  - or the accused was non-accountable

The time limit for filing the cassation is thirty days from the date the judgement and the reasons therefor were served. The cassation is

brought to the Supreme Court via the appellate court. The president of the appellate court may refuse the cassation motion if he finds that certain formal requirements are not met, the time limit for filing the appeal has not been respected or the grounds for cassation are different from those provided for by law (Article 530 § 2 CPC). The Supreme Court may dismiss the cassation appeal or reverse the challenged judgement, in whole or in part, and remand the case to the relevant court. The Supreme Court may also find the conviction manifestly unjust and acquit the accused.

6.5.3.1.2 Rights of the general prosecutor and the Ombudsman (*Rzecznik Praw Obywatelskich*)

The general prosecutor and the Ombudsman have a very specific right.[435] They may bring a cassation appeal to *any* valid and final judgement and order concluding court proceedings at any time. The general prosecutor, in particular, is not bound by the grounds for cassation concerning a valid and final decision rendered by an appellate court in favour or against the accused. Moreover, they are not bound by the thirty-day time limit for filing a cassation appeal. They can also bring the cassation directly to the Supreme Court without verification by the appellate court upon the motion of cassation. Nevertheless, a cassation to the defendant's detriment may not be granted after six months from the date the decision became valid. The right of the general prosecutor, the Ombudsman and the Minister of Justice to file this cassation appeal with the Supreme Court is considered as being solely in the interest of the law.[436] The Supreme Court applies the same procedural rules as for an ordinary cassation appeal.

6.5.3.2 The reopening of proceedings

The public prosecutor or any other party can request the reopening of proceedings. The reopening of proceedings affects court proceedings concluded by a valid and final judgement or order on the merits (Articles 540 and 540a CPC) when

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[435] The Ombudsman guards the human and civic freedoms and rights specified in the Polish Constitution and other legal acts. Article 208 of the Polish Constitution stipulates that in accordance with the principles specified by statute, everyone shall have the right to apply to the Commissioner for the Protection of Civil Rights for assistance in protecting his or her freedoms or rights from infringement by the organs of public authority.

[436] Murzynowski 1998.

- an offence is committed and in connection with the judicial decision made after completion of these proceedings there is good reason to believe that this could have affected the content of such a decision
- and/or after the judicial decision has been issued, new facts or evidence previously unknown to the court come to light, which indicate that the accused is innocent or was not eligible for penalty, or the accused was improperly convicted for a crime subject to a more severe penalty than the penalty provided by law for the crime actually committed, or the court has dismissed or conditionally dismissed the proceedings after relying on incorrect assumptions about the accused
- or it is in the interests of the accused if the legal provision underpinning the convicting decision is declared no longer valid or has been amended as a result of a decision of the Constitutional Tribunal or of an international authority acting under the provisions of an international agreement that has been ratified by the Polish State

The court may also reopen proceedings *ex officio* only in the case of absolute grounds of appeal unless the reasons have already been subject to examination in a cassation procedure. No reopening *ex officio* to the prejudice of the accused is possible after six months from the date the decision became valid and final. The reopening of judicial proceedings is in principle decided by a provincial court, unless the judicial decision challenged was taken by a provincial court or an appellate court. Respectively, in these cases, only an appellate court or the Supreme Court are competent to decide upon the motion to reopen proceedings. The prosecutor can always file a reopening motion even against a decision irrespective of whether it is prejudicial to the rights of the accused.

If a court decides to reopen proceedings, it can reverse the decision and remand the case to the competent jurisdiction, which may acquit the defendant if it finds that the decision was manifestly unjust. The court may also dismiss the proceedings.

6.5.3.3 The reinstatement of proceedings conditionally dismissed by the court

On the motion of a public prosecutor, the injured person or the probation officer or *ex officio*, the court of first instance can decide to reinstate proceedings conditionally dismissed if this dismissal is no longer justified.

6.5.3.4 The compensation of unjustifiable sentencing or detention

In certain cases, an accused is entitled to request compensation for damages incurred by him because of a wrong judicial decision

- if he has been acquitted or re-sentenced under a more lenient provision resulting from a reopening of proceedings or a cassation appeal
- if he has been subject to manifestly unjustifiable preventive detention

The provincial court in whose jurisdiction the decision was taken, is in principle competent to judge the compensation action. The right to seek compensation cannot be exercised anymore after one year from the date on which the judicial decision in question became valid and final.

6.5.3.5 Clemency

A convicted person in general or a person authorised to file an appellate measure may file a clemency petition, but the general prosecutor may also institute it *ex officio* if the President of Poland so decides. The court that rendered the judgement in the first instance has jurisdiction to decide on the petition. If it delivers an opinion in favour, the file is transferred to the general prosecutor who presents it to the President of Poland, who may grant clemency.

Chapter 7
Czechoslovakia (1947–1990) – the Communist organisation of the *Prokuratura* and its functions in the criminal process

Before the transplantation of the prototype Soviet prosecution service, the French public ministry and several institutions of the CIC were in force in the Czechoslovakian criminal justice system. In this chapter, first the main political developments after the Second World War (7.1) and their implications for the areas of criminal justice will be examined (7.2). A special focus on the transplantation of the *Prokuratura* will then cover the legal basis, the structure and the organisation of the institution before and after the federalisation of the regime (7.3). As was the case in the Polish system, the Czechoslovakian *Prokuratura* maintained broad political supervision over the whole of society by way of general supervision, and of the justice system by way of judicial supervision. The purpose and mechanism of the two supervisory functions and the connections between them will be studied in turn (7.4). After an explanation of the institutional framework of the *Prokuratura*, attention will be turned to its role in the preliminary phase of the criminal process (7.5) and in the forms of remedies available against decisions taken by the judicial authorities (7.6).

7.1 The political structure in Czechoslovakia after the Second World War

7.1.1 Basic historical developments

The building of a free and independent Czechoslovakia began officially in October 1918 when the National Council seized power and left the Hapsburg Monarchy. T.G. Masaryk became the first president of the new democracy. V. Šrobár, representing the Slovak people, advocated for a common State.[437] The first constitution was adopted in 1920. The Czech legal system originated in the Austro-Hungarian Monarchy while the Slovakian regions were influenced by the Hungarian part of the Monarchy. Nevertheless, a unified legal system was established with important input from the Austrian and French legal systems. During the war, the country came under German control until Soviet forces, accompanied by a Czech coalition government headed by Beneš, and American troops, entered Czechoslovakia. From the summer of 1947, the Communists plotted to seize power, which eventually took place in the spring of 1948. Until 1 January 1993, when Slovakia and the Czech Republic became two independent countries, the history of the Slovakian and the Czech legal systems remained unified.

7.1.2 The governing apparatus from 1948 to 1960

Although the new Constitution adopted on 9 May 1948 did not declare the Czech Communist Party as the vanguard of society and was not modelled on a Soviet-style constitution, the State progressively took the Soviet-style – authoritarian and centralised. Power was concentrated in the hands of Gottwald, Chairman of the Communist Party, and the Party presidium (1945–1953) and President of the Republic (1948–1953).[438] Although the 1948 Constitution introduced the principle of an economy based on nationalised industrialisation, in practice it was often breached because it did not much differ from the old Constitution. Too many bourgeois institutions of the 1920 Constitution were maintained within it.[439]

In theory, legislative power was held by the unicameral National Assembly (368 members elected by members of the Communist

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[437] Polišenský 1991.
[438] Skilling 1962.
[439] The Constitution in particular provided for property rights, which was of course contrary to the Marxist-Leninist idea of nationalisation and collectivisation.

Party). The Assembly met very seldom and when it did not meet, the legislative power was wielded by the Presidium. The Presidium consisted of a committee of twenty-four members elected by the Assembly, among whom were the Chairman of the National Assembly, its Vice-Chairmen and other MPs. The National Assembly appointed the President of the State, i.e. the head of the government. The President appointed and dismissed government ministers. The government was accountable to the National Assembly and exercised in practice all legislative authority, as well as executive powers. The government was authorised to create ministries and other public agencies and to issue regulations for the purpose of implementing new laws. The electoral system ensured that MPs were always Communists. Although the Constitution was not a transplant of Stalin's 1936 Constitution, power was effectively in the hands of the Communists. The government published its decrees as joint resolutions of the Communist Party and the government.

In addition to the Czechoslovak national State bodies, the 1948 Constitution provided specific Slovak national organs. The legislative power in matters of a national or regional character was held by the Slovak National Council (104 members), provided that these matters required special regulation so as to ensure the full development of the material and spiritual forces of the Slovak nation and provided that these matters did not require national (i.e. Czechoslovak) regulation. A board of commissioners held governmental and executive powers. The Czechoslovak government appointed and dismissed members of the board. The board was directly accountable to the government. Concretely, the two nations were under the authority of the central power established in Prague. Laws or regulations of the Slovakian legislative body conflicting with or encroaching on Czechoslovak national laws were considered void. The jurisdiction of Slovakian agencies to enact specific legislation only applied to the extent that the full economic and cultural development of Slovakia required separate regulation. This slight decentralisation was, of course, a mere front, as the Communist Party in Prague was the true legislator and the Slovakian agencies were under the government's supervision in implementing the Marxist-Leninist theory of the unification of people.

7.1.3 The governing apparatus from 1960 to 1993

In 1960, the 1948 Constitution was repealed and replaced by a 1936 Stalinist Constitution.[440] This 'Constitution of the Czechoslovak Socialist Republic' stipulated that the Communist Party was the vanguard of the working class and the leading force in society and the State. It also created a Slovakian National Council and provided Slovakia with some more apparent autonomy, but the Czech branch of the governing apparatus remained the most powerful. In fact, the new Constitution did not bring many changes to the structure of the political institutions. An individual presidency was retained instead of the classic Soviet collective presidency (politburo). In fact, the President of the Republic was also the leader of the Communist Party. In practice, the law merely expressed the will of the Party.

In 1968, an important constitutional modification made Czechoslovakia a federation with two governments and two national councils. In fact, this federation was only a façade and Prague maintained power over these republican bodies. The National Assembly or Federal Assembly appointed the President and the government of the Federation. Each republic had its own unicameral legislative body as well as its own government, judiciary (including a supreme court in each republic) and prosecution service. However, all these institutions remained subordinate to the federal agencies in one way or another. For example, the federal government could invalidate republican government initiatives. A petition against a decision made by a republican Supreme Court could be filed before the federal Supreme Court.

7.1.4 The local level

In addition to federal and national agencies, there were national committees spread over the country and hierarchically organised into parishes (*obec*), districts (*okres*) and regions (*kraj*). These committees were in charge of local government but remained ultimately under the control of the federal government which issued resolutions binding on them. They performed a quasi-judicial function in cases of petty administrative offences (such as verbal insults).[441] Committees were composed of MPs elected for four years by the people (according to Article 3, 1960 Constitution, any citizen over 18 had the right to vote and any citizen over 21 had the right to be elected).

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[440] Kalvoda 1961.
[441] Gsovski & Grzybowski 1959, p. 1000; Bílek 1951.

7.2 The criminal justice system in Communist Czechoslovakia

7.2.1 The system until 1948

Before the war, the Czechoslovakian judicial system was in many respects similar to the Austrian and French systems. In general, Czechoslovakia possessed three final instance judicial courts (i.e. the Supreme Court, the Supreme Military Court and the Administrative Court). Differences existed, however, in the organisation of the judiciary in each nation.[442] The criminal system consisted of criminal courts (professional and lay judges), military criminal courts, assize courts, juvenile courts and a criminal section of the Supreme Court.[443] The prosecution service was dependent on the Minister of Justice. The general prosecutor was subordinate to the Minister and the lower prosecutors to their superiors, who were in turn subordinate to the general prosecutor.[444] An investigating judge was in charge of pre-trial investigations. His decisions could be challenged before an independent court. Prosecutors participated in the criminal process and had the task of bringing charges against a suspect in the public interest. Juries tried serious crimes and offences of a political nature. Jurors decided on the guilt of suspects and a bench of professional judges decided on the penalty. The system offered three judicial levels – first instance courts, courts of appeal and the Supreme Court, which carried out cassation reviews over decisions of lower courts. Between 1945 and 1948, the pre-war judicial system was re-established. Major changes started with the 1948 Constitution.

7.2.2 Important changes in the Constitution and in criminal procedure and criminal law

7.2.2.1 Constitutional reforms from 1948 to 1992

Part VII of the 1948 Constitution preserved several provisions in force from the previous Constitution, stating that the judiciary in all its instances should be separated from the administration (Article 138 § 1) or that proceedings before criminal courts should be based

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[442] E.g. in Slovakia, the appellate jurisdiction in criminal cases could be exercised by two consecutive appellate courts. In Czech regions, there was only one appellate jurisdiction available; see Gsovski & Grzybowski 1959, p. 915.

[443] Assize courts should here be understood as a jury in criminal matters similar to the French *cour d'assises*; see Štajgr 1953.

[444] Poláček 1953.

upon the principle of public prosecution (Article 144 § 4).[445] Only a few years later the Communists transplanted the Soviet legal and judicial system with several important legal reforms. The first important legal modifications took place in 1952. The Constitutional Act 64/1952 of 30 October 1952 modified the Constitution and introduced[446]

- the principle of the election of judges (implemented by Act 36/1957) according to which all judges were elected by legislative organs. The elections were decentralised and judges from local courts were elected by the corresponding local legislative organs. Supreme Court judges were elected by the national legislative organ
- a new judicial organisation under a two-instance system. This system repealed the cassation remedy previously available to parties. Only one form of review, before the immediately superior court, remained available to the parties in a case. Exceptionally, valid and definitive decisions could be challenged by way of extraordinary appeal before the Supreme Court. However, only the general prosecutor or the President of the Supreme Court could use this extraordinary appeal (see 7.2.3.3)
- the *Prokuratura* as a Soviet-style prosecution service (organised in Act 65/1952) with as its main task the supervision of the strict observance of Socialist Legality by society.[447] The old French-style prosecution service was abandoned[448]

In addition, the Administrative Court was abolished.[449] The Supreme Military Court was also abolished and its jurisdiction included in the Military Section of the Supreme Court.

Chapter VIII 'Courts and Public Ministry' of the 1960 Constitution clearly transplanted the 1952 Constitutional Act stating that the prosecution service would be charged with and empowered to

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[445] Article 144 § 4 of the 1948 Constitution provides that: 'Proceedings at criminal courts shall be based upon the principle of public prosecution. The accused shall be guaranteed the right to be defended by Counsel.'

[446] Ústavní Zákon č. 64/1952 Sb. ze dne 30. října 1952 o soudech a prokuratuře.

[447] For a definition of Socialist Legality see 5.2.1.1.

[448] Rais 1953.

[449] Persons affected by abuses of power and violations of law by government agencies could only apply for legal remedy at the public prosecution office. However, administrative offences were collected in an Administrative Criminal Code and tried before National Committees that applied the Administrative Penal Procedure Code.

supervise the strict application and implementation of Socialist Legality at all levels of society. Until the 1952 Constitutional Act, and later the 1960 Constitution, the public prosecution was only mentioned as the base of every proceeding in the criminal courts (Article 144 § 4). The 1960 Constitution confirmed the prosecution service's independence from the other bodies of the State. Their independence was justified by the fact that the institution was empowered with a supervisory function over other administrations of the State, national committees, courts, economic organisations and citizens. The general prosecutor headed the institution and was accountable to the National Assembly. With the Constitutional Act of Federation adopted on 27 October 1968 in force until 1992, Czechoslovakia became a federation. The prosecution service only became a federal institution but remained within the constitution as an independent institution of the State.

7.2.2.2 Criminal procedure and criminal law

One of the purposes of Communist penal law was to educate people in Socialist Legality as provided in the 1950 CC.

> The protection of the People's Democratic Republic, its construction of socialism, and the interest of the labourers…the law shall educate [everyone] to an observance of the rules of Socialist community life.[450]

Czechoslovak criminal law encompassed the Soviet concept of social danger and the principle of analogy.[451] An offence is criminal and tried by criminal courts only if it is deemed (i.e. by a prosecutor) dangerous to society and if its elements constitute a criminal offence. A material element (danger to society) and a legal element (elements defined by law) were necessary, and remain so, to define a criminal offence. It was believed that redress of criminal behaviour with a low impact on society could be achieved by means other than criminal prosecution before a court. The concept of Communist education underlined the situation. Therefore, elements of offences could be described in different statutes in addition to the CC, i.e. the Administrative Criminal Code or the statute concerning popular tribunals (Act 38/1961). An identical act could be tried before a criminal court applying criminal procedure if its seriousness required a stricter penalty, or before a national committee or a popular tribunal applying other procedural laws, only if a light penalty was

[450] Gsovski & Grzybowski 1959, p. 998.
[451] See for more on these two principles, the Polish situation 5.2.1.

required. This situation was considerably blurred, especially, because until 1961, the CPC did not specifically determine in which cases only criminal courts were competent. In 1961, reforms were undertaken. In criminal law, the legislator decriminalised facts considered less grave in order to enhance the educational rather than the prosecutive role of public institutions.[452] A new CC was adopted, which is still in force, although, of course, largely amended.

The previous Austrian criminal procedure was completely repealed. Criminal procedure codes were issued in 1950, 1956 and 1961.[453] The issuing of a new code in 1961 did not completely modify the criminal procedure but only simplified it and concentrated the use of criminal proceedings to the most serious offences. In particular, this Code clearly stipulated that criminal proceedings were to be instituted only for offences established by the Criminal Code. Criminal courts had no jurisdiction to try other offences provided by the Administrative Criminal Code or the statute concerning popular tribunals. Prosecutors were obliged to refer a case to a popular tribunal instead of issuing an indictment if they considered that the acts did not constitute a criminal offence (Article 174 § 1 CPC, see 7.5.1.3.3). The seriousness of the acts committed was one of the criteria distinguishing a criminal offence tried by a criminal court from another type of offence tried by a non-criminal court. In 1965 the 1961 Code was also amended by Act 57/1965 that split the preliminary proceedings into two forms of investigation. Investigations were carried out for serious crimes, whereas simplified inquiries were carried out for minor crimes (see 7.5.1.2).

7.2.3 The organs and institutions of the judicial system of Communist Czechoslovakia

7.2.3.1 Investigative institutions involved in the preliminary phase of the criminal process

In 1950, the system of investigating judges was repealed. From 1950 until 1956 only prosecutors carried out criminal investigations. In 1956, a special corps of security investigators was created.[454] These police investigators were subordinate to the Minister of Interior Affairs. In addition to them, public prosecutors had their own corps of investigators (*vyšetřovatelé prokuratury*), created by the

[452] Přichystal 1962.
[453] The current research is based on the 1961 CPC. The most important modifications made by the 1965 amendment are taken into consideration.
[454] Gsovski & Grzybowski 1959, p. 684.

1965 Act on the prosecution service (see below 7.3.1). Both types of investigators had a degree in law. When exercising their jurisdiction in criminal proceedings they were supervised by prosecutors.

7.2.3.2 The criminal court system

Criminal courts had jurisdiction to judge criminal offences. Criminal offences consisted of an act or a series of acts defined by law as causing significant social danger (see 7.2.2.2). An act defined in criminal law as a criminal offence could not be tried by a criminal court if it caused only insignificant social danger. The case was judged by one of the new State bodies transplanted from the Soviet system, e.g. a popular tribunal or a local committee.

Although the 1960 Constitution did not define national committees as courts, district national committees were competent in the first instance to hear cases of petty administrative breaches of law (provided for in the Administrative Criminal Code).[455] Decisions made by district national committees could be appealed before a regional national committee.[456] Committees applied administrative penal procedure and not criminal procedure. The 1960 Constitution (Article 98) defined popular tribunals as courts established in small cities and important factories. They were abolished in 1969.[457] These tribunals also had jurisdiction to try minor civil cases.[458] Popular tribunals applied their own specific statute and not the CPC or the CC. Neither a defence attorney nor a prosecutor attended sessions.

The jurisdiction of the courts matched the territorial administrative distribution of the country. In addition to extraordinary courts (military courts and courts of arbitration), common courts (i.e. with a general jurisdiction until 1969) were

- local popular tribunals
- district courts

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[455] Matters heard by committees could be, for example, insults or defamation.

[456] Bílek 1951. In of the performance of their general supervisory role, prosecutors also had the right to protest against decisions made by committees. In a case of protest, the challenged decision had to be modified by the committee that made it. If the committee refused to grant the modification, the prosecutor could refer the challenged decision to the central government, who took the decision in the last resort.

[457] Their jurisdiction was transferred to the district courts; see David & Jauffret-Spinosi 1992, p. 220.

[458] Knapp & Mlynář 1963, p. 162.

- regional courts
- the Supreme Court as supreme organ of control over all courts[459]

In principle, appeal against

- decisions made by local popular tribunals were filed with district courts
- decisions made by district courts were filed with regional courts
- decisions made in the first instance by regional courts were filed with the Supreme Court[460]

Local popular tribunals were composed of lay judges. Other courts were composed of professional and lay judges. The elections of judges were organised as follows

- local committees elected local tribunal judges
- citizens of the district elected district court judges on the basis of universal, direct and equal suffrage
- regional national committees elected regional court judges
- the National Assembly elected Supreme Court judges

Although the Constitution guaranteed the independence of judges, strong supervision from the prosecution service and an important increase in binding directives issued by the Supreme Court undermined judicial independence. Article 102 of the 1960 Constitution stated that judges were independent and should only act according to their Communist conscience and regularly report on their activities to the people who elected them.

The 1968 Constitutional Amendment created two republican Supreme Courts and two sets of people's courts and regional courts. Slovak and Czech national committees and councils respectively elected judges for Slovak and Czech regional courts and Supreme Courts. The federal Supreme Court was competent to hear reviews of military cases and extraordinary appeals against valid and definitive decisions of the republican Supreme Courts. The federal Supreme Court would actually be the institution that supervised the complete harmonisation of Socialist Legality by issuing binding guidelines (Article 99 § c, 1960 Constitution as amended by the 155/1969 Act).

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[459] Štajgr 1953.
[460] Plundr 1957.

7.2.3.3 The extraordinary appeal

One of the typical features of the Communist legal system is the so-called extraordinary appeal. It was possible to review decisions without appeal made by courts and prosecutors for which no appeal had been filed but which were considered illegal.[461] The 1950 CPC created the extraordinary appeal, which remained in force in the 1956 and 1961 CPC.[462] It authorised the general prosecutor or the president of the Supreme Court to appeal any decision of any court, even when it was definitive and valid, if they considered that it violated the law. The general prosecutor could challenge any decision made by a lower prosecutor if contrary to the law. In principle, the republican Supreme Courts heard appeals against republican courts and the federal Supreme Court heard decisions of the republican Supreme Court (see below 7.6.3.1).

7.3 The organisation of the Czechoslovakian Communist *Prokuratura*

7.3.1 The laws on the *Prokuratura*

After the 1952 Acts (see 7.2.2.1), two important Acts affected the organisation of the prosecution service, its tasks and functions. The 65/1956 Act on the organisation and role of the *Prokuratura* transformed the prosecution service into a political institution independent from the State administration, or at least from low-level State administration.[463] The main purpose of the *Prokuratura* was to consolidate Socialist Legality and the Communist education of all citizens, as stipulated in Article 2 § 1

> The prosecution service guards, enforces and strengthens Socialist Legality regardless of local circumstances, secures the unity of legality in the entire territory of the republic and helps in the deepening of Socialist legal thinking and the strengthening of the Socialist relations in society (Author's translation).

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[461] A decision without appeal is a decision for which: an ordinary form of review was not possible; alternatively, if possible, the review was not lodged in time or the parties surrendered their right to appeal; alternatively, if lodged, the review was rejected (Articles 139 and 140, 1961 CPC). An illegal decision should be understood as a decision contrary to Socialist Legality, in terms other than the rulings of the Communist Party.
[462] Tolar 1950.
[463] Škoda 1957.

The 60/1965 Act repealed the 1956 Act and adapted the organisation of the prosecution service to the amendment of the CPC made in 1965, thus establishing two types of investigations. This act also suppressed the subordination relationship between the regional, district and local offices. From 1965 on, offices were subordinate only to the general prosecutor.

In 1969, the 60/1965 Act was amended to create a federal system with a Czech and a Slovak general prosecutor's office, and a federal general prosecutor's office. In spite of its transformation into a federal institution, the *Prokuratura* remained unified, fulfilling the same task under the supervision of the general prosecutor of Communist Federal Czechoslovakia and of the Czechoslovakian central power in Prague.

Although amended, the 60/1965 Act remained in force until the adoption of the current Czech statute on the State accuser (283/1993 Act). However, in 1990 it underwent a critical amendment (1968/1990 Act) that enhanced, not to say re-established, the prosecutors' political impartiality in their functions in criminal proceedings.[464] One of the main changes was the suppression of the general supervisory function.[465]

7.3.2 The structure of the Czechoslovakian Communist *Prokuratura* in the 60/1965 Act as amended in 1969

The prosecution service consisted of (Article 30, 60/1965 Act)[466]

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[464] I. Gasparovic: 'The role of the Prosecutor in Czechoslovak law' [1992] Revue Internationale de Droit Pénal, n.63, 657. The present historical study will be mainly based on the 60/1965 Act as amended in 1969, but before the 1990 amendment.

[465] From 1989 on, the State had to redistribute private properties that had been nationalised on a very large scale during the Communist regime. It begs the question whether the general supervisory function of the prosecution service would not have been an efficient institution against corruption and unlawful privatisation that took place at this time.

[466] The system had several peculiarities such as

• in Prague, the capital of the CSFR and of the CSR, the tasks of the regional prosecution office were fulfilled by a city prosecution office (*městská Prokuratura*), while those of the district prosecution office were fulfilled by the local prosecution offices (*obvodní prokuratury*)

• the tasks of the district prosecution office in the capital city of SSR, Bratislava, were fulfilled by the city prosecution office in Bratislava

• the tasks of the district prosecution office in the cities of Brno, Ostrava, Plzen and Košice were fulfilled by the city prosecution's office in these cities

- the general prosecutor of the Czech and Slovak Socialist Republic (CSFR), which included the main military prosecution office (*Hlavní vojenská Prokuratura*)
- the general prosecutor of the Czech Socialist Republic (CSR)
- the general prosecutor of the Slovak Socialist Republic (SSR)
- regional prosecution offices in the territory of the CSR and of the SSR (*krajské prokuratury*)
- higher military prosecution offices
- district prosecution offices in the territory of the CSR and of the SSR (*okresní prokuratury*)
- military local prosecution offices
- local prosecution offices (*obvodní prokuratury*) at the level of the local courts
- city prosecution offices (*městská Prokuratura*)

The CSR and SSR general prosecutor's offices consisted respectively of the general prosecutor of the CSR and of the SSR and their deputies. One of the deputies of the Slovakian general prosecutor supervised the Slovak Republic's State institutions (the National Council, its Presidium and commissions and others). Regional, district and local offices were headed by a regional, district and local prosecutor, respectively, to supervise deputies and investigators.

The seats of prosecution offices matched those of the courts. Prosecutors had jurisdiction to prosecute common crimes. Only a public prosecutor could issue an indictment and represent the State before courts. Nevertheless, common crimes committed by members of the police and investigation forces were prosecuted by the military prosecution service subordinate to the general prosecutor but dependent on the Ministry of Defence.[467]

[467] The military system of courts and prosecution was repealed in 2002.

7.3.3 Appointment and discipline of prosecutors, and relationships of subordination between them

7.3.3.1 Appointment and discipline of prosecutors

According to the 65/1956 Act, the President of the Republic had the power to appoint and dismiss the general prosecutor at the proposal of the government (*vláda).* The general prosecutor appointed and could dismiss other prosecutors and was officially only accountable to the government (Article 7, Constitutional Act 64/1952 and Article 2 § 1, 65/1956 Act).

In the 60/1965 Act, as amended, the President of the CSFR appointed and dismissed the general prosecutor of the CSFR on the motion of the Federal Assembly.

The cabinet of the National Council of each republic appointed and dismissed the general prosecutor of the respective republic. The federal general prosecutor could motion the appointment and the dismissal of either of the republics' general prosecutors (Article 6, 60/1965 Act). The Federal Assembly could propose the dismissal of the general prosecutor of the CSFR to the President of the CSFR and the general prosecutor of the CSFR could propose the dismissal of the general prosecutor of the republic to the cabinet of the National Council of each republic.

The competent general prosecutor appointed and dismissed lower prosecutors, but the first deputy of the general prosecutor had to be Slovakian if the general prosecutor was Czech and *vice versa*.

In order to be appointed prosecutors, candidates had to

- be Czechoslovakian nationals and at least twenty-four years old
- be graduates of law
- have successfully completed the required internship
- pass the final examination

Statutes and legal regulations, i.e. Socialist Legality, were binding on public prosecutors. Public prosecutors were held responsible for their breaches of duty and could face a disciplinary proceeding established by regulation issued by the general prosecutor. The general prosecutor held disciplinary jurisdiction over prosecutors and investigators. A disciplinary sanction could lead to dismissal.

7.3.3.2 Dependence and independence of the Prokuratura

7.3.3.2.1 Before the federal system (1952 to 1969)

One of the first modifications affecting the institution of the new prosecution service was the suppression of the subordination of the prosecution service to the Minister of Justice, i.e. the right to give binding general or specific instructions. In addition, the independence of lower prosecutors from their superiors, which characterised the pre-war system, was not adapted to the Marxist-Leninist model of a strong central power. The two Acts of 1952 established that all lower prosecutors were subordinate to the general prosecutor only. The general prosecutor had disciplinary power over lower prosecutors and could take over their functions and carry out any of their acts. This is why the law often referred to the general prosecutor as the central institution empowered with the implementation of Socialist Legality, its enforcement and supervision. The general prosecutor, or his deputies, executed the PPS's function (Article 2 § 2, 65/1956 Act). Article 106 of the 1960 Constitution provided that all the organs of the PPS were subordinate only to the general prosecutor and performed their functions independently of any other local authority.

Of course, this independence from the Minister of Justice did not mean that prosecutors were independent. In fact, the Minister of Justice lost his power of policy decision-making under the Communist system, but the general prosecutor was accountable to the political organ that appointed him. Moreover, the general and the specific directives of the general prosecutor were binding on lower prosecutors. The right to give instructions to the general prosecutor was not provided by law but neither was it prevented. The general prosecutor was completely free to carry out his functions so long as he remained in strict observance of Socialist Legality. Nevertheless, the general prosecutor – i.e. the whole prosecution office – was a State institution.[468] In fact, the general prosecutor received instructions directly from the President of the Republic or the leaders of the Communist Party who were members of the government, and later of the Federal Assembly. The general prosecutor forwarded these instructions to his deputies. A general prosecutor could be

[468] Article 34 of the 65/1956 Act stipulated that prosecutors, investigators and other employees of the prosecution service were employees of the State. Subordination to the State was at least assumed in the administration of the public ministry (Author's translation).

relieved of his functions following a simple political decision. The law did not prevent lower prosecutors from receiving direct instructions from the central State authority. Lower prosecutors were only independent from the local State authorities, which were, in any case, dependent on the central power.

7.3.3.2.2 During the federal system (1969 to 1993)

In 1968, an amendment to Article 106 stipulated that all organs of the federal general prosecutor's office were subordinate to the federal general prosecutor. The principle was that the PPS was one institution with jurisdiction over the whole country, headed by the federal general prosecutor. This unity remained a fundamental principle.[469] If the general prosecutors of the two republics were accountable to their respective National Council, in reality, the federal general prosecutor was the real head of the entire *Prokuratura.* Article 1 § 4 of the 60/1965 Act stipulates that

> The general prosecutor of the CSR and the SSR are subordinate to the general prosecutor of the CSFR when executing accurate supervision and obedience of acts and statutes and other legal regulations created by organs of the CSFR. Other organs of the prosecution service in CSR and SSR are subordinate to the general prosecutor of the CSFR when he or she deems it necessary to give them instruction to act in the compelling interest of the CSFR or because there is a danger of delay or the general prosecutor of the Republic is inactive (Author's translation).

Officially, the federal general prosecutor was accountable to the Federal Assembly and had to submit reports on his office's activities. There was no mention of the right of State organs to give instructions to the general prosecutor but this right was obvious since the regime was authoritarian and a decision to dismiss the general prosecutor could be made for purely political reasons.[470] The general prosecutors were obliged to attend the meetings of the assemblies where information and reports could be requested. Requests to inform political organs were binding on general prosecutors (Article 7). The general prosecutor would in fact receive

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[469] Interview accordée par le procureur général et le président du Tribunal Suprême 1971.

[470] Disciplinary proceedings provided in acts on the prosecution service were meant for lower prosecutors and other staff. The decision to sanction lower prosecutors was in the hands of general prosecutors.

instructions from the presidium of the Federal Assembly or from the President.

In order to supervise the *Prokuratura*, the general prosecutors issued orders and instructions binding on all deputy prosecutors and investigators. There was no limitation to this subordination. The system was organised as follows

- the general prosecutor in each republic was subordinate to the federal general prosecutor and received instructions from him with regard to the supervision of the exact application of the federal Socialist Legality (almost 90% of laws and regulations) [471]
- lower prosecutors in each republic were appointed and discharged by their respective general prosecutor. They were, in principle, only subordinate to this general prosecutor. However, the federal general prosecutor could give instructions to lower prosecutors if the matter was in the urgent interests of the Federation.[472] In fact, prosecutors had to enforce Party regulations when carrying out their functions in addition to criminal and procedural law, and to implement instructions in accordance with Socialist Legality

Nevertheless, the general prosecutors of each republic were relatively independent in the administration of their service (for example where the internal organisation and the appointment of staff was concerned).

7.4 The supervisory functions of the Czechoslovakian Communist *Prokuratura*

7.4.1 Provisions common to general and judicial supervision

7.4.1.1 Legal basis for the supervisory function

Article 104 of the 1960 Constitution referred to the supervisory function of the prosecution. According to the Act on the prosecution service (60/1965 Act), supervision is divided into general supervision and supervision of judicial activity. Judicial supervision mainly covered the following

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[471] Interview accordée par le procureur général et le président du Tribunal Suprême 1971.

[472] This could be the case if the general prosecutor of the competent republic did not give an appropriate instruction or when the situation was so urgent that a direct order was more efficient.

- criminal prosecution of persons and supervision of compliance with legality in preparatory proceedings by bodies empowered with the conduct of these proceedings (Chapter 2 subsection 2, 60/1965 Act)
- supervision of the courts and State notaries over the legality of proceedings and decision-making, and participation in proceedings before courts and State notaries (Chapter 2 subsection 3, 60/1965 Act)
- compliance with legality in detention and imprisonment centres (Chapter 2 subsection 4, 60/1965 Act)

7.4.1.2 The purpose and the scope of supervision

7.4.1.2.1 The purpose of supervision

The laws issued in 1952 transformed the position of general prosecutor into a sort of watchdog for Socialist Legality. The general prosecutor was required to investigate all matters reported by individuals or authorities and to supervise the correct and harmonised execution and observance of statutes and other legal regulations issued by the Communists. If a violation of legality was found, the PPS was bound to take the necessary steps to suppress the infringement. It could, therefore, launch a protest proceeding (see below) or if necessary, prosecute before a court. The supervision of all political and economic activity could be undertaken and redress imposed in the case of violations of Socialist Legality. The education of people in accordance with Marxist-Leninist theory and the eradication of capitalism was the first goal of the *Prokuratura*.[473] Therefore, the general prosecutor and his deputies enjoyed one of the highest positions in the State administration because they were entitled to supervise society, i.e. to trace acts and actions contrary to the Communist goals of the State.[474] The prosecution service protected (Article 2 § 2, 60/1965 Act)

> a) the Socialist State, its social order and relationship to the world socialist system;
>
> b) the political, personal, family, employment, social, real estate, property and other rights and interests of the citizens protected by law;

[473] Rais 1953.
[474] Czafik 1989.

> c) the rights and interests protected by law of State, of agricultural community, social and other organisations;
>
> d) the military readiness of military forces and armed organisations and discipline regulated therein (Author's translation).

7.4.1.2.2 The scope of supervision

Prosecutors carried out their supervision of the general activity of citizens and the entire administration, as well as the judicial activity and decision-making process of courts throughout the whole territory of the Federation. Therefore, they enjoyed complete independence from any kind of local influence (Article 1, 65/1956 Act, then 2, 60/1965 Act). Nevertheless, they were strongly politicised and entirely dependent on the organs of the Party. Supervision was a form of political control exercised *ex officio* or upon request or complaint. All citizens and organisations were expected actively to support *Prokuratura* activity (Article 2 § 5, 65/1956 Act, then 11, 60/1965 Act). Anyone had the right to challenge any procedure or decision that he deemed to be in breach of Socialist Legality before a prosecutor.

Prosecutors ensured that the State administration (ministries and national committees), courts, economic organisations and citizens secured the observance of Socialist Legality through the correct execution of their tasks and a review of any infringement they may have committed. Supervision could entail, first, the screening of the activity of the above-mentioned bodies, then

- review of the legality of generally binding regulations or acts
- review of the legality of processes and decisions made in individual cases

A prosecutor's request to an organ to screen and revise its own activity in order to discover any suspected infringement was binding. All prosecutors had the general right to demand files, decisions, regulations or evidence issued by any authority (Article 9, 65/1956 Act and 11, 60/1965 Act). Everyone was required to appear before a prosecutor upon simple request even if no criminal proceedings were instituted. Prosecutors could intervene in a pending decision-making procedure and also initiate proceedings in all areas of law, particularly civil and administrative areas.[475]

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[475] Administrative courts were suppressed in 1952 and the *Prokuratura* was given control of administrative activity.

7.4.2 General supervision

7.4.2.1 Mechanisms of supervision

If the *Prokuratura* found a breach of law in a pending decision-making procedure, it would issue this authority with a warning, requesting modification of the illegal provision. If the provision was already effective, the prosecutor could serve a challenge on the decision-maker, demanding that the provision be repealed or modified. There was no time limit to the right of supervision. Once the challenge was served, the infringement had to be redressed within thirty days of the day of service. If the authority did not comply with the challenge, the prosecutor would requisition intervention from the authority superior to the perpetrator to enforce the challenge. If the prosecutor challenged a decision of a minister, or of the staff of a ministry, the case was automatically submitted to the government.[476]

7.4.2.2 Consequences of supervision

A challenge made against a decision did not suspend the execution of this decision. The organ that made the decision could continue or suspend its execution. The *Prokuratura* only screened a decision and checked whether the law had been respected but did not repeal the decision or modify it. In accordance with the *Prokuratura*'s educational function in socialism, the perpetrator would have to acknowledge their error and repair it. Prosecutors only took care to ensure that the wrongful decision or action was redressed. If the violation also constituted a criminal offence, the prosecutor would institute criminal proceedings against the persons involved in the decision-making process.

Essentially, the general prosecutor and his deputies sought out and investigated violations of any law and requested its redress, and also prosecuted the decision-maker on these grounds if the action was criminal. All authorities and citizens had to cooperate and denounce suspected violations immediately. Ministers were not outside the scope of the general prosecutor's supervisory function. Protest against a minister was made before the government. The general prosecutor was therefore present and active during sessions of the government and other executive organs of the State.

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[476] Knapp & Mlynář 1963, p. 167.

7.4.3 Judicial supervision

Judicial supervision also covered the activity of the courts and the bodies conducting pre-trial proceedings.[477] During preliminary criminal proceedings, prosecutors supervised all the bodies involved that were obliged to request a prosecutor's decision or instruction before taking action. Prosecutors participated in criminal and civil procedures and court sessions. They supervised the legality of judicial decisions taken during the course of proceedings and hearings.

The general prosecutor had the right to review any court and, of course, any prosecutor's decision.[478] He could challenge any definitive and valid judicial decision contrary to law by way of extraordinary appeal (see 7.6.3.1). The general prosecutor could suggest to the general assembly of the Supreme Court that it issue directives binding on lower courts, whose purpose was the harmonisation of caselaw. The general prosecutor could participate in Supreme Court sessions, including sessions of its presidency.

7.5 The role of the Czechoslovakian Communist *Prokuratura* in the preliminary phase of the criminal process

7.5.1 The role of the Czechoslovakian Communist *Prokuratura* in preparatory criminal proceedings

7.5.1.1 Institutions initiating prosecutions, the principle of legality, mandatory prosecutions and the principle of objective truth

Prosecutors and other investigative organs (see 7.2.3.1) were obliged to prosecute any offence as soon as they learned of it (Article 2, 1956 and 1961 CPC). By offence, the 1956 Code meant any one of a very large number of factual situations sanctioned by the Administrative Criminal Code and the CC. The 1961 CPC allowed the use of criminal procedure only for facts considered to be criminal offences, provided by the CC (see 7.2.2.2).

In the 1956 CPC, only a prosecutor could decide not to institute or to dismiss a preliminary investigation. In the 1961 CPC and, especially after 1965, this power of decision was entrusted to other

[477] Although more attention will be paid to criminal justice, it should be underlined that prosecutors had equivalent rights of supervision as regards the activity of the courts in general.
[478] Poláček 1953.

investigative organs. As well as instituting a criminal investigation, prosecutors could transfer the case to a popular court or another organ with disciplinary jurisdiction. Once the investigation was instituted, the prosecutor could only decide to issue the indictment and file it with a court.

According to Article 103 of the 1961 Constitution, the courts had to conduct their proceedings in such a way as to uncover the true circumstances of the case, which would be used as a basis for decisions. Because of this principle of objective truth, organs involved in preliminary proceedings had to establish facts based on reality and not on legal fictions. Facts had to be investigated in a manner consistent with reality and the law.

7.5.1.2 Decisions affecting prosecutions, investigation and inquiry[479]

In the 1961 CPC, in a phase preceding the institution of criminal proceedings (up to one month), the investigative institution could screen the acts denounced or discovered. After the screening of these acts, if it appeared that no criminal offence was suspected, proceedings were not instituted. The decision not to institute the proceedings rested with the investigative organ or the prosecutor. However, it had, to be based on one of the grounds provided in Article 11 § 1 CPC (see 7.5.1.4). Instead of dropping the case, the organ could transfer the case to another jurisdiction, such as a popular tribunal, a local committee or any other disciplinary organ (Article 163 § 1 CPC). The investigative organ had no obligation to inform the prosecutor if it decided to drop the case.

If a criminal offence was suspected, the investigative organ or the prosecutor (if facts had been denounced to him directly), officially issued an order to institute proceedings. As soon as the investigative organ discovered facts which substantially indicated that a given person had committed a criminal offence, it issued an order to disclose the charge (Article 165 CPC), notified the suspect (now accused) and within forty-eight hours notified the prosecutor. The order contained a precise description of the acts and their legal qualification.

According to the 1965 amendment of the 1961 CPC, preliminary proceedings were split into[480]

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[479] In addition to the civilian system where investigators carried out preliminary proceedings, the Commander of the Army and his investigators carried out proceedings for military crimes.

- inquiries (lasting one month) carried out by investigators from the security corps[481]
- investigations (lasting two months) carried out by senior investigators from the security corps or investigators from the prosecution services[482]

In fact, apart from some specific cases, rules applying to investigations also applied to inquiries. A preliminary proceeding was conducted at the initiative of the investigative organs. Unless the law made a decision compulsory for the prosecutor, they took all decisions necessary for the investigation *ex officio*. The 1965 reform gave investigative institutions more autonomy from the prosecution authority once proceedings (especially inquiries) were instituted. Indeed, the investigative institutions made all the decisions concerning proceedings and, for example, could object to the prosecutor's instructions concerning the legal qualification of an act and the decision for further prosecution (Article 164 § 4 CPC).[483] Finally, the prosecution service always maintained the right to take over the proceedings.

After completion of the investigation or inquiry, the investigative organ communicated the file, along with an opinion on further

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[480] Husár 1966.

[481] The law established forty-six matters for which an inquiry could be instituted (Article 168 § 1 CPC). In principle, unless it was necessary to conduct an investigation (e.g. because the suspect was too young, a preliminary detention was necessary or the facts were complex), inquiries only concerned crimes carrying a maximum three-year custodial penalty.

[482] Investigators from the security corps, normally subordinated to the Minister of the Interior, were made independent from their superiors when exercising their competence in criminal proceedings. They had to strictly comply with criminal procedural laws.

[483] Article 164 § 4 CPC stipulated: 'Except for cases, which, under the present Act, call for the authorisation by a prosecutor, the investigator shall make in his own competence all the decisions concerning the process of investigation and investigation procedures, and shall take full responsibility for their lawful and timely execution. If the investigator does not agree with the prosecutor's instructions concerning the charges, the definition of the criminal offence and the scope of the charges or with instructions concerning the settlement of the case in pre-trial proceedings, he shall have the right to submit written objections to the latter; if the prosecutor turns down these objections, the investigator shall submit the case to the superior prosecutor who shall either void the instructions issued by a deputy prosecutor or assign the case to a different investigator. In all other cases, instructions issued by the prosecutor shall be binding on the investigator.' (Author's translation)

prosecution, forthwith to the prosecutor, who could issue an indictment and file it with the court.

7.5.1.3 The role of the Prokuratura *in measures taken during the preparatory proceedings (1961 CPC)*

7.5.1.3.1 Provisional custody

Investigative organs could take a suspect into custody on their own initiative without the previous consent of a prosecutor. This could only occur, in cases of emergency, if someone was suspected of a criminal offence and there were reasons justifying preventive detention. The investigative organ had to inform the prosecutor as soon as possible of the provisional custody. If the order for custody was not remanded to the prosecutor within forty-eight hours, the suspect had to be released.

7.5.1.3.2 Provisional detention

Only a judge could order preventive detention, unless it had to take place during the preliminary proceedings (Article 68 CPC). In this case, prosecutors had jurisdiction to order detention. The prosecutor had forty-eight hours to order preventive detention against the suspect remanded to him, otherwise, he was obliged to set him free. The period of detention was initially one or two months. Only a superior prosecutor could, in principle, grant an extension of one month, and the general prosecutor could do so for a longer period.

7.5.1.3.3 Other measures

In principle, the president of a court, a prosecutor or one of the other institutions in charge of preliminary investigations could order the main measures necessary to the investigation (e.g. a house search warrant, seizure of mail or confiscation of belongings). Nevertheless, the authorisation of a prosecutor was needed for measures taken during an investigation which could affect an underage suspect, or for the opening of mail.

7.5.1.4 Exceptions to mandatory prosecution

Until 1965, once proceedings were instituted, only a prosecutor could decide upon their dismissal, unless the trial session had already started. There were only exceptions provided by law that could lead to the dismissal of proceedings.

Proceedings were not instituted or if already instituted, were dismissed if (Article 11 § 1 CPC)

- the President of the Republic granted amnesty or pardon
- the prescribed statute of limitations had lapsed
- compulsory permission to prosecute had not been granted
- the suspect was too young to be criminally liable
- the suspect was deceased
- a previous proceeding had been instituted for the same facts and against the same person, and a court (or a local popular court) had terminated the case with a valid and definitive decision, or when a definitive and valid order to dismiss the case had been issued by a court or a prosecutor, if the decision had not been quashed as the result of a procedure prescribed by law
- or a proceeding had already been instituted against the same person on the same facts and had been terminated by a valid and definitive decision made by another institution empowered with the right to prosecute criminal offences, if the decision had not been quashed as the result of a procedure prescribed by law

In addition to the events provided for in Article 11, and after institution of prosecution, the public prosecutor had to dismiss the case if (Article 177 § 2 CPC)

- it was clear that the suspected events had not taken place
- these facts did not constitute a criminal offence and there were no grounds for remanding the case to a popular tribunal
- it had not been proven that the actions had been perpetrated by the suspect
- the penalty resulting from the proceedings was insignificant in comparison with another penalty that the suspect had already been convicted for in another case
- or the suspect had already been condemned by another national institution or a foreign institution and the prosecutor deemed that condemnation sufficient

If the acts committed by an accused did not cause a grave social danger and he acknowledged his guilt, the prosecutor could transfer the case to another institution (such as a popular court) instead of filing an indictment. This system was used as a moderator to the principle of mandatory prosecution and to reduce the workload of criminal courts. In addition, a prosecutor had to transfer the case to

a popular tribunal if the offence was only a petty offence and the popular tribunal had jurisdiction to try it (Article 177 § 1 CPC).

From 1965, organs other than the prosecutor – such as the investigators of the security corps (see 7.2.3.1) – could dismiss an inquiry, but notice of the decision to dismiss had to be given immediately to the prosecutor supervising the proceedings, who could modify it.

In principle, unless a new suspect or a new fact was discovered, a valid and definitive order of dismissal taken by a prosecutor could only be reversed and a proceeding reopened (see on reopening of proceedings 7.6.3.2).

7.5.2 The role of the Czechoslovakian Communist *Prokuratura* in the supervision of preparatory proceedings

Before 1965, only prosecutors had the right to supervise (Article 159 § 3 1961 CPC) and give compulsory instructions to other bodies involved in proceedings. The Code did not limit the right to give instructions. Prosecutors also had the right to request any file, document, piece of evidence or report concerning a case. They could take part in an investigation and carry out actions themselves or simply quash decisions taken by other investigative bodies and transfer a case to someone else. Investigative bodies had to notify the prosecutor of their decisions concerning the dismissal of a case or stay of proceedings. The prosecutor had fifteen days to check the legality of a decision. Prosecutors also had a monopoly over certain decisions, and in certain cases investigative institutions needed a preliminary authorisation from a prosecutor to carry out certain acts provided by law. However, during preliminary proceedings, investigative organs were only obliged to refer a matter to the supervising prosecutor every two months from the date of the order that instituted proceedings. The Code did not impose any obligation to communicate or inform a prosecutor between an order to institute proceedings and the end of the two-month period. A suspect or a victim also had the right to ask a supervising prosecutor at any time to screen the performance of an investigative institution and potentially to sanction its mistakes (Article 171 CPC).

After 1965, investigators from the public ministry and from the Minister of the Interior, as well as and officers of the army, were entitled to conduct preliminary proceedings. A prosecutor supervised these investigative organs and could reverse their decisions. The

reform modified the scope of the supervision exercised by prosecutors over the investigative institutions.[484] The latter were not obliged to comply any further with a prosecutor's instructions on the legal qualification of the acts, the scope of this qualification or the solution to the case. A prosecutor could exercise his right to supervise a matter – every two months for investigations and every month for inquiries. He could decide whether or not to grant an extension of one month (longer extensions had to be granted by the general prosecutor). An investigative organ that refused to comply with a prosecutor's instruction had to make the refusal in writing. If the prosecutor did not agree with the investigative institution, the case would be forwarded to a superior prosecutor for review. The superior prosecutor could quash the instruction of his deputy or remand the case to another investigative institution. In the case of inquiries, the investigative institutions were not allowed to object to the instructions of the prosecutor.

Supervision of the *Prokuratura* over preparatory proceedings could also entail superior prosecutors taking disciplinary measures against investigative organs.[485]

7.6 The role of the Czechoslovakian Communist *Prokuratura* after the preliminary phase of the criminal process

7.6.1 The position of the public prosecutor in the first instance

7.6.1.1 Preliminary judicial control over the indictment

A hearing could only start following a regular indictment issued by a public prosecutor (Article 180 CPC). During a pre-trial conference, the president of the court checked the indictment and the regularity of the preparatory proceedings. He could dismiss or stay the case for reasons provided in Article 177 CPC (see 7.5.1.4) without any hearing. If he found that a different law article was more in conformity with the case, he could remand it to the prosecutor or another institution for further investigation or for a different procedure. A public prosecutor always took part in the preliminary judicial investigation *in camera*. Until the president of the court

[484] Husár 1966.

[485] If the investigative organ was attached to the Ministry of the Interior, this Minister had jurisdiction to conduct disciplinary proceedings. However, a prosecutor always had the right to order a case to pass from an investigator from the Ministry of the Interior to an investigator of the prosecution service.

decided to remand the suspect before the court for hearing, the prosecutor could challenge any other decision. If the case was remanded to him, the prosecutor had one month to comply with the instructions of the court. This time limit could, however, be extended by a superior prosecutor. Until the moment the court validated the indictment, the prosecutor could withdraw this indictment and the preliminary proceedings would continue. After the court validated the indictment, the prosecutor could withdraw the indictment. However, the court still had the right to continue with proceedings.

7.6.1.2 The hearing

If the indictment was valid, the president of the court had to notify the charges 'in due time' to all interested parties in the case. After completion of this notification, the hearing of the court would start (Article 202 CPC). Once the preliminary checks of the indictment were performed, the president of the court decided upon the date of the session. The session was public and the public prosecutor needed to be present in order to explain and verbally support the indictment. The court could only decide upon facts as they were presented in the indictment and take into consideration facts as they were disclosed during the hearing. It was not bound by the legal qualification given by the prosecutor in the indictment. During the session, it was possible for the court to decide to remand the case to the prosecutor for further investigation if it transpired that the suspect had committed another offence.

7.6.2 The position of public prosecutor in the ordinary forms of review

7.6.2.1 The reclamation: review of decisions taken during the preliminary proceedings

A suspect could lodge a reclamation against every appealable decision taken by an investigative institution during the preliminary proceedings, e.g. the order notifying the charges. A decision could be appealed if made in the first instance by a court or a prosecutor and only if the law made reclamation available. Reclamation against decisions taken by the general prosecutor or the Supreme Court was not possible.

Reclamation was available for prosecutors against decisions made by a court in favour of the suspect or not, if the law provided for it, such as

- orders of a court to transfer or dismiss a case, or to suspend a proceeding after completion of the preliminary check of the indictment
- orders of a court to take a suspect into preliminary detention or not (Article 74, 1961 CPC)

A challenge of orders could follow

- an error in any of its statements
- or a breach of provisions governing the proceedings that preceded the adoption of an order, if such a breach could have resulted in an error in any verdict of the order

The period in which to lodge a reclamation was three days from the day of the communication of the order. The communication could take the form of an official written notification or a verbal notification at a hearing. The superior organ to the one which made the order – i.e. the prosecutor for an investigative organ's orders and the superior prosecutor for a prosecutor's orders – would judge the reclamation. Alternatively, the same organ could grant the reclamation if the change in the original order did not impinge on the rights of any other party.

If a reclamation was filed with an investigative organ and if, after the three-day period had expired for all authorised parties, the investigative organ did not make a decision upon it, the case was forwarded to the supervising prosecutor or to a superior prosecutor. The appellate court heard reclamations against decisions taken by lower courts.

7.6.2.2 The appeal: review of judgements

Parties to a trial could lodge an appeal against appealable judgements made by the court within eight days of the date of service. While a convicted person or a victim could only lodge an appeal against the parts of a judgement that concerned their rights, the prosecutor could appeal the judgement in any of its parts. An appeal filed by a prosecutor could be to the benefit or to the detriment of the defendant. An appeal application had to state the demands and objections against the judgement. If a prosecutor lodged an appeal, the superior prosecutor had the right to withdraw it. A court with jurisdiction to hear an appeal would check its admissibility before making a new decision. The court of appeal could modify the appealed decision, dismiss the proceedings or remand the case to a prosecutor or to a court of first instance. The

remanded court had to comply with the opinion of the court of appeal.

7.6.3 The position of public prosecutors in extraordinary forms of review

7.6.3.1 The extraordinary appeal

Only the general prosecutor or the president of the Supreme Court was allowed to file an extraordinary appeal with the Supreme Court.[486] The appeal could affect any valid decision (e.g. an order to dismiss a case) or definitive judgement without appeal. The illegality of a decision, or of a proceeding preceding a decision, could provide grounds for such an appeal. This illegality could be justified by a disproportionate penalty with respect to the offence committed by the accused. Indeed Article 266 § 2 CPC provided

> A complaint against a violation of law in the verdict of a sentence may be filed only if the sentence is in obvious disproportion to the level of danger of the act to the society or the conditions of the perpetrator or if the imposed kind of sentence is in obvious contradiction to the purpose of the sentence (Author's translation).

Only the general prosecutor could challenge valid decisions without appeal made by a prosecutor. If the Supreme Court found that a challenged decision violated the law, it would make a judgement stating the violation and the reasons for the violation. The Supreme Court could quash the decision, or remand it to a court or to a prosecutor, with the instruction to complete it or to issue a new one. The opinion of the Supreme Court was binding on the remanded institution.

If a verdict had been given to the detriment of the accused because the law had been violated (e.g. the accused was convicted instead of acquitted), the Supreme Court could cancel the verdict in whole or in part and, if necessary, remand the case to the appropriate body for a new decision.

If a verdict had been given in favour of the accused because the law had been violated (e.g. the accused was acquitted instead of convicted), the appeal had to be filed within six months of the

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[486] Since the Socialist judicial system was in the hands of the Communist Party, the general prosecutor and the President of the Supreme Court only acted as puppets in the hands of the Party. The right given to these two bodies to exercise extraordinary appeal was, of course, meaningless. It was intended only to give the system the appearence of independence.

decision. The Supreme Court would have to dispose of the appeal within six months. If a verdict was cancelled and a new decision necessary, then no change to the detriment of the accused could be taken in the new decision.

7.6.3.2 The reopening of proceedings

In the event that new facts or circumstances were discovered after the issuing of a valid and definitive judgement or a valid decision not to institute or to dismiss proceedings taken by a prosecutor or a court, the court could be requested to reopen proceedings. The reopening of proceedings could also be requested if it was discovered that the prosecutor in charge of the case, or the judge, violated the law and committed a criminal offence during the proceedings. Only the prosecutor had jurisdiction to ask for a reopening that would act against a suspect. A court or any other public organ that discovered new facts or new circumstances had to immediately notify a public prosecutor of the new information. A decision to reopen a case was always made by a court.

7.6.3.3 Pardon

The President of the Republic could grant pardon. Such a decision could affect the institution of preliminary proceedings and the decisions made during preliminary proceedings (e.g. an order for preliminary detention). It could also affect the enforcement of judgements on the merits, with or without appeal (e.g. suspend or postpone the execution of a sentence). The general prosecutor or the Minister of Justice had jurisdiction to carry out pardon proceedings under the supervision of the President.

Chapter 8
The Czech Republic – the current organisation and functions of the prosecution service in the criminal process

The collapse of Communism in Czechoslovakia in the late 1980s not only brought many changes to the organisation of State powers but also led to the separation of the Czech Republic from Slovakia. It was only after this split that critical modifications of the Czech PPS took place (8.1). As is the case in Poland, the Soviet features affecting the criminal justice system, such as the two-instance system, have now been repealed (8.2). Since 1993, and especially after a critical amendment in 2002, the PPS has progressively acquired its current organisational structure (8.3). The functions of public prosecutors now focus on criminal prosecution, and general supervision has been repealed. The principle of compulsory prosecution is in force in the Czech Republic, and public prosecutors play a fundamental role during the preliminary phase of the criminal process (8.4). With regard to forms of review, similar developments to those in Poland, such as the suppression of the extraordinary appeal, took place in the Czech Republic (8.5).

8.1 Major changes brought into the Constitution regarding the prosecution service of the Czech Republic and the new prosecution service Act

The new Constitution of the Czech Republic, adopted after the Velvet Revolution, came into force on 1 January 1993.[487] It stipulates (Article 80) that

> 1/ A public prosecutor's office represents the public prosecution in criminal proceedings; it also executes other tasks if the law so provides.
>
> 2/ The status and jurisdiction of the public prosecutor's office are defined by law.

Interestingly, it is the third chapter of the Constitution concerning the government that includes the prosecution body and not the fourth chapter, on judicial power. This constitutional position establishes the prosecution as a body of the executive. However, this does not mean it is subordinate to the Minister of Justice in areas of criminal policy and criminal proceedings. The judicial position of the prosecution service is in theory independent from that of the government. As far as it is necessary in a country where the principle of compulsory prosecution is in force, the prosecution itself determines the trends in criminal policies and does not officially receive instruction on their implementation (see 8.4.1.1 for more on the compulsory prosecution principle).

After the collapse of Communism but before the division of Czechoslovakia, the 60/1965 Prosecution Service Act remained in force. However, it was radically amended during this period of transition by an important Act in 1990.[488] The PPS remained the organ tasked with the general supervision of the execution and observance of statutes and other legal regulations by ministries, public administrative bodies, national committees and citizens. Nevertheless, Socialist Legality (Socialistická zákonnost), guarded, enforced and strengthened by prosecutors, became 'legality' (*zákonnost*). The amendment suppressed all previous links with the protection and strengthening of Communism. From the general supervision of the courts' decision-making processes the role of the prosecution is now limited to the execution of investigative rights during preliminary criminal proceedings and the attendance before courts of a prosecution representative. Subsequent, critical

[487] At the time of writing an official translation of the 1992 Constitution was available at <http://test.concourt.cz/angl_verze/constitution.html>.
[488] Zákon č. 168/1990 Sb., kterým se mění a doplňuje zákon o prokuratuře.

modifications of the criminal law and criminal procedure have taken place. In particular, criminal liability is now based on guilt, the principle of analogy is inadmissible, criminal law has acquired an additional role in protecting people and society, and the principle of legality has become well-defined.[489] The President of the Republic remained the organ appointing and dismissing general prosecutors, who were previously accountable to the Federal Assembly. The Presidium of the National Councils remained the organ appointing and dismissing the national general prosecutors, who were accountable to the National Councils.

In 1993, a new Act on the prosecution service was adopted and came into force on 1 January 1994. The PPS was established as a system of State offices, appointed to represent the State in cases stipulated by the Act (former Article 1 § 1, 1993 Act). Articles 12 and 13 stipulated that

- the Minister of Justice was officially superior to the general public prosecutors (the general prosecutor and his deputies)
- the general public prosecutor was officially superior to the higher public prosecutors
- higher public prosecutors were superior to regional public prosecutors
- regional public prosecutors were superior to district public prosecutors

Since 1993, several amendments have modified this Act. The most important amendment, adopted in 2002, completely changed the organisation of the prosecution.[490] It repealed the subordination of the prosecution to the Minister of Justice who since then has only administrated the prosecution service. Under the previous system,

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[489] The Constitutional Court decided on 21 December 1993 (PL. US. 19/93): 'According to Czech criminal legal theory, the criminal nature of an act is understood to encompass the possibility of being prosecuted for a criminal act, of being found guilty and of being punished. The basis for criminal responsibility is the criminal act, which is defined by means of a precise description of its characteristics and also by what is referred to as its objective characteristics, namely, the danger the act poses to society. It is the expression of the principle *nullum crimen sine lege* (no crime without law) or *sine culpa* (without fault).' (Author's translation)

[490] The present paper is based on the 1993 Act as amended by the 2002 Act, Zákon č. 14/2002 Sb., kterým se mění zákon č. 283/1993 Sb., o státním zastupitelství, ve znění pozdějších předpisů. All quotations from the 1993 Act as amended are the author's unofficial translation. Terms in parenthesis are always added by the author.

prosecutors, whatever their rank, were appointed on motion of the general prosecutor. However, the 2002 amendment decentralised the right to propose the appointment of lower prosecutors from the general prosecutor to the heads of the local offices. This amendment made the public ministry more independent from the executive power. The definition of the prosecution service within the Constitution as an institution of the executive power subsequently appears questionable. The new Act on the prosecution service is a compromise between the classical notion of a prosecution service as a body of the executive and the new ideas flowing in from other European countries advocating a public prosecution service independent from the executive power.

From 2002, the public ministry became a system of State authorities intended to represent the State by protecting the public interest (*veřejný zájm*) in matters vested in the public prosecution service (Article 1 § 1 as amended). Article 4 of the 1993 Act establishes the service's jurisdiction as follows

> 1/ The public prosecution service to the extent, under the conditions and in a way provided by law:
>
> a) Is the organ of the public prosecution in criminal proceedings and fulfils other tasks emanating from the Criminal Procedure Code;
>
> b) Exercises supervision over the compliance with the legal regulations in detention facilities, imprisonment, protective treatment and protective and institutional education, and in other places where personal freedom is constrained by legal permission;
>
> c) Acts in fields other than criminal proceedings;
>
> d) Exercises other tasks if a separate statute so provides.
>
> 2/ The public prosecution service takes part, in compliance with its competence set by law, in the prevention of criminality and provides support to victims of criminal acts.

Reference to the safeguard of legality disappeared. The Constitution stipulates that fundamental rights and freedoms are protected by the judiciary. It should be underlined that the PPS is not part of the judiciary, therefore, the task to protect fundamental rights and freedoms follows from Article 2 of the 1993 Act

> 1/ When exercising its competence, the public prosecutor's office is obliged to use means provided to it by law;
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> 2/ When exercising its competence, the public prosecutor's office ensures that every action it takes complies with statute, that it is rapid, professional and effective; that it

> exercises its competence impartially, and while doing so it respects human dignity and the equality of all before the law, while ensuring the protection of basic human rights and freedoms.

8.2 The current Czech criminal justice system

8.2.1 The first instance

Unless the law provides otherwise, ninety district courts (*Okresní soud*) have jurisdiction over minor crimes and cases concerning sums of less than CZK 50,000. Eight regional courts (*Krajský soud*) have jurisdiction over serious crimes for which a sentence of more than five years' imprisonment is possible and cases concerning sums of more than CZK 50,000. Regional courts are also competent to hear certain cases when stipulated by law. According to Article 18 CPC, criminal proceedings are instituted in the district of the court where the crime was committed. If this place is unknown or if the crime was committed abroad, the jurisdiction of the competent court may be determined by the place of domicile, work or residence of the accused. The Czech system has no investigating judge. The police conducts investigations, sometimes with the public prosecution. Depending on the circumstances of the case and the gravity of the offence committed, the CPC sets out

- normal proceedings with an investigation and a decision to prosecute further before a district or a regional court. The court terminates the proceedings with a judgement (*rozsudek*)
- shortened preliminary proceedings (two weeks) with a hearing before a single judge in a district court. These proceedings apply to offences for which the law imposes a maximum term of three years' custody if the suspect was caught in *flagrante delicto*, thus in the act of committing a felony or immediately afterwards. The judge terminates the proceedings with a judgement
- proceedings before a single judge that applies to offences for which the law imposes a maximum of five years' imprisonment. Without a hearing, the judge may issue a criminal order (*trestní příkaz*) and impose a limited punishment (such as a ban on activity for five years or a pecuniary penalty)

8.2.2 The appeal level and the Supreme Court

In principle, regional courts have jurisdiction to hear appeals filed against decisions taken by district courts in the first instance within

their jurisdiction. Two high courts (*Vrchní soud*) have jurisdiction to hear appeals filed against decisions taken by regional courts in the first instance within their respective jurisdictions. The high courts also have jurisdiction to hear special cases in disciplinary proceedings against judges and prosecutors commenced in the first instance by the competent court or prosecutor.

As the supreme judicial body, the Supreme Court in Brno, ensures the uniformity and legality of decision-making through extraordinary remedies in cases specified by the law on court proceedings.[491] The Supreme Court decides within the reasons stated in the appellate measure. It also gives advice about the interpretation of laws and other legal regulations, as well as international treaties. The Supreme Court also decides on appeals filed against appellate courts in disciplinary proceedings against judges and prosecutors.

8.2.3 Types of decisions

During the criminal process, there are different types of judicial decisions taken by the various authorities involved in the course of the process. Their classification is useful to determine if a decision can be challenged and if so, by which means.

- decisions (*rozhodnutí*) include different types of judicial decisions that can be issued by a court *ex officio* or on motion of a public prosecutor, such as a custody decision concerning a person against whom criminal prosecution has been initiated. The CPC further distinguishes
  - cases expressly provided by law, a court should decide by issuing a judgement (*rožsudek*). The normal form of review against judgements is the appeal (*odvolání*)[492]
  - cases where the law does not provide that a decision upon a legal matter during the process should be taken by way of judgement, it is taken by way of an order (*usnesení*). The normal form of review against an order is the complaint (*stížnost*). The courts may decide by way of resolution or order while the police bodies and the public prosecutors

[491] The Supreme Court (*Nejvyšší soud České republiky*) should not be confused with the Constitutional Court (*Ústavní soud*) in Brno that reviews the compatibility of legislative acts and treaties with the Czech Constitution.

[492] A judgement becomes valid and final (*pravomocný*) and thus enforceable (*vykonatelný*) unless the law provides otherwise if it cannot be reviewed according to the law or the law finds it reviewable but no appeal was lodged within the prescribed time limit, the entitled parties explicitly waived their right to appeal, withdrew their appeal or their appeal was denied.

always decide by way of resolution or order unless otherwise provided by law[493]

- verdicts or statements (*výrok*), constituting the findings or the statement of a court included in the judgement
- criminal orders (*trestní příkaz*), a special type of judicial decision against which protest is possible (*odpor* see 8.2.1 and 8.5.2.2)

8.3 The organisation of the current Czech PPS

8.3.1 The designation of the prosecution service in the 1993 Act and in the Criminal Procedure Code

The new Act designates the prosecution service as the State accusation service (*státní zastupitelství*). It is defined as the system of the State administration established to represent the State by protecting the public interest in matters vested in its competence. The reason for the adoption of German terminology for the public prosecutor (*der staatsanwalt*) was merely an ideological measure to break with forty years of Communism. Neither the term public prosecutor nor *prokurator* is used in the new statute or the CPC.

8.3.2 The Minister of Justice and the administration of the public prosecutors' offices

Article 11 § 1, 2/1969 Act on the establishment of ministries and other central administration authorities of the Czech Republic establishes the Ministry of Justice as the central agency of the State administration for courts and prosecution services.[494] The Ministry of Justice is the central body empowered with this administration. As head of the Ministry, the Minister of Justice supervises the effective fulfilment of the tasks vested in the prosecution service but only within the limits strictly set by Part 4 of the 1993 Act. The authority of the Minister affects the administration of the prosecution as an institution of the State. The wording does not introduce any connection with the conduct of criminal proceedings. Article 13a of the 1993 Act stipulates that the duty of the administration of the public ministry is to

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[493] An order becomes valid and final if it cannot be reviewed according to the law, if the law finds it reviewable but no complaint was lodged within the prescribed time limit, or if the entitled parties explicitly waived their right to appeal, withdrew their complaint or their complaint was denied.

[494] Zákon č. 2/1969 Sb., o zřízení ministerstev a jiných ústředních orgánů státní správy České republiky.

> Create conditions for the due performance of its powers, namely in respect of personnel, organisation, economy, finances and training, and to supervise the due performance of duties entrusted to the public prosecutor's office in a method and scope regulated below.

The Ministry of Justice administers the prosecution offices directly or through the heads of these offices. The head of each office is superior to the prosecutors and the other employees within that office. These heads can issue binding instructions to their deputies. The 1993 Act accurately determines the scope of competence for the heads of the office, who are ultimately responsible to the Minister of Justice. The administration of the offices covers

- securing the organisation of the office, with regard to the distribution of the workload amongst the available prosecutors and other employees of the office[495]
- securing the work of the prosecution office in the area of employment
- securing financial and material support for the offices
- setting the scope for the budget for regional and district offices
- directing and checking the administration of the prosecution offices through their respective head, and observing the work of the administration service within each prosecution office
- dealing with complaints against the actions of prosecutors according to the 1993 Act
- setting the methodology for choosing and accepting legal trainees, directing and organising legal traineeships, securing the final exams and organising the professional education of other employees

It will be shown below that the prosecution service is subordinate neither to the Minister of Justice nor to the government in the exercise of its judicial competence. In principle, the Minister of Justice cannot interfere with the work of the prosecution service in the exercise of its competence in criminal proceedings. However, it is impossible to believe that interference never occurs (see 8.3.4.2).

[495] In the general prosecutor's office, the Minister of Justice needs the agreement of the general prosecutor

8.3.3 The structure of the Czech prosecution service

8.3.3.1 The new structure of the public ministry from 1993

The prosecution service consists of several units

- the general prosecutor's office in Brno (*Nejvyšší státní zastupitelství*)
- the higher prosecution offices of Prague and Olomouc (*vrchní státní zastupitelství*)
- eight regional prosecution offices (*krajská státní zastupitelství*). In Prague the competence of the regional prosecution service is exercised by the city prosecution office
- eighty-nine district prosecution offices (*okresní státní zastupitelství*). In Brno the competence of the district prosecution office is exercised by the city prosecution office
- during a military emergency, high and low field prosecution services (*vyšší a nižší polní státní zastupitelství*)
- a board for the protection of State secrets (repealed since 1 January 2006)

The 1993 Act establishes a pyramidal hierarchy between the units of the prosecution service as follows (Article 11a)

- the general prosecutor is superior to all higher public prosecutors
- the higher prosecutors are superior to regional prosecutors within their jurisdictions
- the regional prosecutors are superior to district prosecutors within their jurisdictions
- the head of each unit is superior to all prosecutors active in his unit

8.3.3.2 The distribution of competences within the prosecution service and concerning the prosecution functions

Prosecution functions are the monopoly of public prosecutors. No other institution can substitute for them. A superior public prosecutor's office is authorised by law to intervene in cases within the jurisdiction of an inferior public prosecutor, where the method and scope conform to the 1993 Act (Article 3 § 2, 1993 Act). The

23/1994 Order of the Minister of Justice establishes the internal organisation of the prosecutors' offices.[496] Prosecutors are organised according to their rank in the organisation and to the territorial judicial areas where they perform their functions. The seats and territorial jurisdictions of prosecutors' offices correspond to the seats and territorial jurisdictions of the courts. According to the principle of unity, the public prosecution service has a general competence to represent the State before the court within its jurisdiction, unless otherwise provided by law (Article 7, 1993 Act). In addition to the head of their office, only the superior prosecution office with territorial jurisdiction, as set out above, may supervise the lower prosecutors in lower offices. It is also the nearest superior office. The head of each office dispatches matters to prosecutors within his or her office according to specialisation, unless the matter concerns a specialisation provided by law to a specific office. For example, higher offices are competent for the prosecution of serious economic and financial crimes. The superior office supervises this distribution of competences on an annual basis. The nearest superior prosecutor's office decides on jurisdictional disputes between public prosecutors. The nearest superior public prosecutor's office may decide to withdraw and/or charge another lower prosecutor's office with a case if the head of the affected office is disqualified from hearing the case by the application of procedural rules. In general, only a superior prosecution office can intervene within the limits set by the 1993 Act in the handling of matters for which lower offices are competent.

8.3.3.3 The supreme prosecution office

The jurisdiction of the supreme office corresponds to that of the Supreme Court. It is headed by the official superior to the two higher offices. Eight departments (the secretariat, penal proceedings, extraordinary remedies, legislation and analysis, non-penal matters, international cooperation, administration, and serious economic and financial crimes) make up the supreme office in Brno. The general prosecutor heads the office with a number of deputies. Under the supervision of the general prosecutor, three deputies head

- the department dealing with international cooperation and matters of grave economic and financial crime, divided into

[496] Vyhláška Ministerstva spravedlnosti č. 23/1994 Sb., o jednacím řádu státního zastupitelství, zřízení poboček některých státních zastupitelství a podrobnostech o úkonech prováděných právními čekateli.

  - an international office, including a section for legal relations with foreign countries and a section for Eurojust and the European Union
  - an office to handle serious economic and financial crime
- the department for criminal matters and legislation, divided into
  - an analytical and legislative office with sections handling legislation and IT
  - a criminal office with a section for criminal proceedings and a section for review proceedings of internal complaints
- the department for non-criminal and administrative matters, divided into
  - a non-criminal office with a section tasked with the protection of children, the supervision of detention centres and bankruptcy cases
  - an administrative office with a section for financial and human resources and a section for day-to-day operations

The general prosecutor supervises the unity of the internal organisation of the public prosecutors' units and the unified exercise of the duties of the prosecution service. For this purpose, the office publishes instructions and guidelines concerning the type of sentence to request or suggest in different types of cases. These general instructions also permit adaptation to changing circumstances during proceedings.

The general prosecutor handles extraordinary appeals, the revision of cases and international judicial cooperation in criminal cases during preparatory proceedings. He is also empowered by law with specific tasks in fields of law other than criminal law. He administers the office and

- manages the office in personnel and organisational matters
- ensures the expertise of prosecutors working in his office
- deals with complaints as provided by the 1993 Act

8.3.3.4 The higher, regional and district offices

Higher prosecutors head the higher offices supported by two deputies. A higher prosecutor's jurisdiction corresponds to the jurisdiction of the higher courts in Prague and Olomouc. The higher office of Prague comprises six departments (the secretariat, penal proceedings, legislation and analysis, administration, and serious economic and financial crimes), whereas the office of Olomouc comprises five departments, lacking that of legislation and analysis.

Higher offices supervise the regional offices within their respective jurisdictions. Branches of the higher office of Olomouc have been set up in Brno and Ostrava to supervise preparatory proceedings in serious economic and financial crimes committed in the area of the regional public prosecutors' offices in Brno and Ostrava. The higher prosecutors also administer the higher prosecution office within their jurisdictions.

Regional and district public prosecutors respectively head regional and district offices. These offices represent the State in proceedings before the regional and the district courts respectively. A regional public prosecutor supervises all district prosecutors' offices within the regional jurisdiction. A specialised department tasked with the investigation and simplified preparatory proceedings against offences committed by members of the police and other intelligence officers has been established in one district office in each region. The regional prosecutors administer regional and district public prosecutors' offices within their jurisdictions. The administrative director of each regional office is also empowered with specific tasks, such as the economic, material and financial management of regional and district offices. Prosecutors in district offices administer their office in accordance with the superior regional office's directives. There is no structural assembly of prosecutors, nevertheless, meetings are organised between the different offices in order to discuss important issues.

8.3.4 Appointment and subordination of public prosecutors

8.3.4.1 Appointment of members of the public ministry

Depending on the prosecutor's rank, the government or the Minister of Justice appoints prosecutors for life. A citizen of Czech nationality may be appointed a public prosecutor if he or she is over twenty-five years old on the date of appointment, has achieved legal magisterial university education in the Czech Republic, has no criminal record and has successfully passed the final examination. The government appoints and dismisses the general prosecutor at the motion of the Minister of Justice. In contrast to lower ranking prosecutors, there are no express conditions grounding the dismissal of a general prosecutor. The Minister of Justice appoints and dismisses

- deputies of the general prosecutor at the general prosecutor's motion
- the higher public prosecutors at the general prosecutor's motion

- the chief regional public prosecutors at the motion of the general prosecutor or higher public prosecutor with jurisdiction over the region
- the chief district public prosecutors at the motion of the general prosecutor or of the regional prosecutor with jurisdiction over the district
- the deputies of the higher, regional and district prosecution offices at the motion of the superior prosecutor whose deputy is concerned

8.3.4.2 Some important rights of the Minister of Justice in the appointment of prosecutors

The Minister of Justice

- appoints public prosecutors to a particular prosecutor's office with his approval
- may transfer the prosecutor to another office of the same or higher instance upon approval or at his or her request
- may transfer the prosecutor to a lower office only upon his approval

There is no direct subordination between prosecutors and the Minister of Justice because the Minister of Justice does not give instructions concerning the exercise of the functions and jurisdiction of the public prosecution. The general prosecutor's office submits an Annual Report on the public prosecution's activities to the government through the Ministry of Justice (Article 18 § 7, 1993 Act). Nevertheless, it seems reasonable to believe that the Minister of Justice can exercise a certain influence through his power over appointments, budget or the organisation of offices. In particular, the Minister of Justice may dismiss prosecutors for serious breaches of duty as prosecutors or failures in the administration of their offices (Article 10 § 4, 1993 Act). A breach of duty as a prosecutor may only lead to dismissal at the motion of

- the general prosecutor for higher prosecutors
- the higher prosecutor for regional prosecutors
- the regional prosecutor for district prosecutors
- the competent superior for deputies of higher, regional and district prosecutors

If the breach of duty concerns the administration of the office, the Minister of Justice as the central organ of the administration of the prosecutors' offices can start *ex officio* disciplinary proceedings (Article 13i, 1993 Act).

Criminal policy is established by the PPS and the principle of compulsory prosecution (see 8.4.1.1) ensures that no instruction is required from the Minister of Justice to implement criminal policy. The Minister of Justice does not have a right to intervene in pending criminal proceedings. If he does so, he is acting outside the scope of his functions and this cannot be subject to democratic control. As with all other ministers, he is accountable only to the government which, in turn, is controlled by parliament. All members of parliament have the right to interpellate the head of the government or its ministers. [497]

8.3.4.3 The subordination of lower prosecutors to their superiors and the hierarchical supervision of public prosecutors

Prosecutors are subordinate to their direct superior in the exercise of their duties within the structure and hierarchy established by the Act (Article 11a). The general prosecutor is not the head of the entire institution and cannot intervene directly in specific cases. Nevertheless, the general prosecutor has a somewhat stronger position because he has the right to harmonise criminal policies by way of the following preventive and corrective measures (Article 12, 1993 Act)

- issuing instructions (*pokyny*) with general binding force on all public prosecutors in order to unify and streamline their actions
- expressing opinions (*stanoviska*) on the activities of public prosecutors' offices in order to unify the interpretation of statute and other legal regulations
- issuing orders (*nařízení*) to the general prosecutor's office or a public prosecutor's office authorised by the general prosecutor, to check finished cases over which the office had jurisdiction and to impose remedial measures in case of faults made by the service (internal supervisory remedies)

[497] Article 72 of the 1993 Constitution stipulates that the Chamber of Deputies shall discuss a proposal for a vote of no confidence in the government only if it is submitted in writing by no less than fifty deputies. Passing the proposal requires the consent of an absolute majority of all deputies.

- applying to the Supreme Court to express an opinion on the interpretation of a statute or other legal regulation if there appears to be disunity in the jurisprudence of the courts
- entrusting public prosecutors with the supervision of detention centres
- submitting annual reports on the activities of the public ministry to the Minister of Justice
- recommending that the Ombudsman exercises his power for the protection of the public interest

Of these rights, the right to impose remedial measures on finished cases should be stressed. This remedy affects cases that have been definitively dropped or dismissed (see 8.4.2.1.2) and where no regular remedy, such as an appeal, is available. It is unclear whether this right also affects cases once the indictment is filed with a court. The remedy may take the form of a binding order to continue proceedings, to carry out a specific action or to issue a decision. It is not a disciplinary remedy.

Supervision (*dohled*) is the exercise of authority provided by the 1993 Act in order to secure the management and control of relations between the different levels of public prosecutors' offices and within specific prosecutor's offices when carrying out the functions of the public prosecution office (Article 12c, 1993 Act). The nearest higher prosecution office is competent to exercise supervision over actions of the nearest lower prosecution offices within its jurisdiction when they handle matters within their competence. This supervision is performed by way of written general or specific instructions binding on the lower office. The nearest superior prosecutor's office is entitled to bring under a unified authority the actions of prosecutors concerning several matters of a particular type. It may remove a case from the lower office and dispose of it itself, including when the inferior office has been passive or permitted unjustifiable delay in the procedure. The head of an office supervises the actions of prosecutors working in that office when they are dealing with matters falling within the office's competence. Although in this case instructions do not have to be written, they are nevertheless binding on deputies. The general prosecutor's office has a particular right of supervision to harmonise criminal policies (Article 12g § 2 and 12h, 1993 Act). In the exercise of its competence, the general prosecutor's office is entitled to request from any prosecution office information on particular actions performed by prosecutors

exercising the jurisdiction of his office. The general prosecutor's office can also request to see files kept by lower offices. Unless the request affects the higher prosecution offices directly subordinated to the general prosecutor's office, this right can never lead to intervention in the way a lower office deals with a pending case. The general prosecutor's right to review cases only affects proceedings that are already closed.

8.3.5 Limits to subordination

8.3.5.1 Principles of unity, indivisibility, indifference and substitution

When a public prosecutor performs his functions, his acts are considered to be acts of the office and not of a specific person (Article 23, 1993 Act). The personality of the prosecutor is irrelevant as regards the validity of the act. A prosecutor should act within the competence allocated to him by his superior, but this allocation is not binding outside the scope of the office hierarchy. Therefore, a prosecutor acting in the name of the office binds his office even if he was not authorised by his superior.

A public prosecutor may be temporarily transferred to another office for a period of up to three years. Such transfers require the approval of the prosecutor and are only made possible to ensure the due performance of the duties of the prosecution service. The decision to temporarily appoint a prosecutor to another office is made by the chief prosecutor of the office, being the immediate superior of both affected offices. The general prosecutor decides on temporary transfers to the general office. In other cases, the Minister of Justice's decisions follow the consideration of the general prosecutor.

8.3.5.2 Instructions contrary to the law

If an instruction issued by a superior office is contrary to the law, the lower prosecution office is not obliged to follow it. In such cases, the lower office must immediately inform its superior office in writing of its reasons for refusal. If the superior office does not agree with the refusal and insists on the instruction, it may take over the case (external supervision provided in Article 12d § 2, 1993 Act).

A subordinated prosecutor is obliged to follow the instructions of the head of his office unless the instruction in a particular case is contrary to the law. If the superior gave such an instruction orally, he must confirm it in writing upon the request of the deputy. If the prosecutor refuses to follow the instruction, he must immediately

inform the prosecutor who issued the instruction in writing. If the superior sustains his instruction, he will present the case to the head of the prosecution office who may cancel the instruction. If the head does not cancel the instruction, he remands the case to the prosecutor who issued the instruction. If it was the head who issued the instruction, he takes over the case. During a court session, the competent prosecutor is bound by the instructions of the head of the office or those of the prosecutor designated by the head, unless new circumstances arise (internal supervision provided in Article 12e § 4, 1993 Act). The statute on the prosecution service clearly provides that the prosecutor is not bound by the instruction. However, this provision must not be overstated as a prosecutor must always remain loyal to his superior and, if possible, inform him of the new circumstances. Moreover, a prosecutor must always uphold the law and change the instruction upon a fair assessment of the new legal situation.

8.3.6 Other rights and duties and the independence of Czech prosecutors

The status of official prosecutor binds a trainee from the day he or she is appointed. The following oath is sworn before the Ministry of Justice (Article 18 § 3, 1993 Act)

> I swear on my honour and conscience to protect the public interest and to always act in accordance with the Constitution and the laws of the Czech Republic, as well as the international agreements the Czech Republic is bound by; to respect human rights, basic liberties and human dignity and to keep the confidentiality of facts I shall learn in connection with the execution of the public prosecutor's powers, even after termination of the execution of this office. In the execution of the public prosecutor's powers and in my personal life I shall protect the dignity of my profession.

Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms implies that prosecutors, when discharging their duties, are generally obliged to comply with every statute in a rapid, professional and effective manner.[498] They are also obliged to discharge their duties impartially, with respect for human dignity and the equality of all before the law, and to protect

[498] The Czech Republic signed the Convention on 21 February 1992 and ratified it on 18 March 1992. It entered into force on 1 January 1993 and became part of Czech law.

basic human rights and freedoms (Article 2 § 2, 1993 Act). This means that they must act in compliance with the principles provided by statutes governing the prosecution office, but also that they must carry out their tasks professionally, honestly, responsibly, impartially, equitably and without undue delay (Article 24 § 1, 1993 Act). Therefore, a public prosecutor must

- educate himself continuously and improve his knowledge for the proper performance of his functions
- demonstrate due respect towards other prosecutors and other persons practising the law, and withhold from inappropriately impugning the character of other legal professionals

Prosecutors are not banned from becoming members of political partie;, nevertheless, they must avoid anything that could undermine or cast reasonable doubt on their compliance with their professional obligations or that could endanger the dignity required of a public prosecutor. Therefore, they

- may not be influenced by the interests of political parties, public opinion or the media when exercising their functions
- must exercise their functions without economic, social, racial, ethnic, sexual, religious or other prejudice and must abstain from demonstrating any personal sympathies, affection or negative attitudes
- should improve their professional, legal and other knowledge necessary to execution of their duties
- must maintain due respect towards other public prosecutors and other legal professionals
- must maintain confidentiality in matters coming to their knowledge through the execution of their duties. This obligation remains in force even after their other duties have been discharged or terminated
- must not permit their functions to be misused for the enforcement of private interests
- must not act as arbitrators in legal dispute settlements, represent parties in judicial proceedings, or act as proxies of the injured

parties. They cannot be party to judicial or administrative proceedings unless in the cases provided for by the law[499]

Public prosecutors are obliged to comply with these obligations while in office and also within their private lives. Within the scope of his or her competence and for the purpose of his legal activities, a prosecutor may

- request any file or document from any ministry, other State authority, territorial self-governing authority or private authority. The authority requested must comply without delay
- request the same authority to provide any necessary explanation without delay
- ask courts to consult judicial files and provide copies. The court requested may refuse only if there are serious reasons to do so
- summon any person to appear at the public prosecutor's office and provide the necessary explanation. The person requested must obey

8.3.7 Discipline of prosecutors and penal responsibility

8.3.7.1 Penal responsibility of Czech prosecutors

Public prosecutors are not immune from penal responsibility and are liable for any criminal offences they may commit. If the nature of the crime committed impedes the continuation of the prosecutor's function, the prosecutor convicted upon a final judgement is disqualified (Article 26, 1993 Act). In addition, a superior may always institute a disciplinary proceeding against a prosecutor sentenced for a criminal offence upon a final judgement.

8.3.7.2 Disciplinary responsibility of Czech prosecutors

Disciplinary proceedings against judges and prosecutors are similar and regulated by a specific Act.[500] With regard to prosecutors, anyone has the right to lodge a complaint about delays in the performance of the duties of public prosecution or about misbehaviour on the part of prosecutors or other employees of the office (Article 16b, 1993 Act). The superior of the affected

[499] Such as legal representation, cases where this is allowed by special law, or cases where another party is represented in proceedings, to which the prosecutor is also a participant.
[500] Zákon č. 7/2002 Sb., o řízení ve věcech soudců a státních zástupců.

prosecutor, which is the Minister of Justice when the complaint is lodged against the supreme office, is in principle competent to settle the complaint and if necessary to institute and carry out disciplinary proceedings. The affected prosecutor may challenge the decision of his superior before the Supreme Court, which has exclusive jurisdiction over cases involving the discipline of judges and prosecutors. A disciplinary violation can be

- a deliberate violation of the public prosecutor's duties
- deliberate behaviour or conduct diminishing trust in the public prosecutor's office or damaging the reputation of and unbecoming to the dignity of the public prosecutor's position (Article 28, 1993 Act)

A prosecutor is liable for two years. If no disciplinary proceedings are instituted within the two years following the discovery of the offence, the prosecutor's responsibility expires (Article 29, 1993 Act). Removal from office or transfer to another office is possible as the result of disciplinary proceedings, but proceedings for disciplinary offences can also lead to

- reprimand
- reduction in salary
- dismissal

In addition to disciplinary proceedings, minor offences can be dealt with by a superior official merely setting out the offence committed in writing. The report of the offence is added to the professional file of the affected prosecutor.

8.4 Functions of the Czech PPS in the preliminary phase of the criminal process

8.4.1 General principles of the preliminary proceedings of the criminal process

8.4.1.1 The principle of compulsory prosecution

The principle of compulsory prosecution as provided by Article 2 § 3 CPC is binding on public prosecutors as follows

> Prosecutors shall have the duty to prosecute all criminal offences of which they are aware; an exception shall only be permitted by a law or under a promulgated international treaty.

Article 158 CPC applies the principle to police forces, obliging them to take all possible steps to discover facts indicating that a suspected criminal offence was indeed committed and to discover the offender. The obligation to prosecute is binding on the police from the moment they suspect a criminal offence was committed. Compulsory prosecution also implies that proceedings are held *ex officio*. Proceedings commenced by the competent body do not depend on any authorisation, unless otherwise provided by law (see 8.4.1.2). According to Article 2 § 4 CPC

> Unless the present Act provides otherwise, the bodies active in criminal proceedings shall act *ex officio*; they shall hear criminal cases without any undue delay…

There are several exclusively statutory exceptions to the principle. These exceptions can be relied upon to explain a refusal to initiate proceedings or the dismissal of proceedings. The police have a right to drop a matter before the commencement of proceedings and to dismiss them once in progress. A prosecutor may only dismiss proceedings once they have been investigated. Grounds for refusal to institute or dismiss proceedings are similar, to a certain extent. Article 11 of the Code stipulates that criminal prosecution is not admissible and cannot be instituted or if already instituted, cannot continue and must be dismissed if

- the President of the Czech Republic grants pardon or amnesty
- the statute of limitations applies and prevents prosecution
- the prosecution is pursued against a person enjoying privileges and immunities under domestic or international law
- the prosecution is pursued against a person who may only be lawfully prosecuted on the basis of authorisation which has not been obtained from the competent body
- the prosecution is pursued against a minor with no criminally liability
- the prosecution is conducted against a deceased defendant, or a person declared deceased
- the prosecution is pursued against a person whose previous prosecution for the same offence resulted in a final court judgement or had been lawfully dismissed, unless such a decision was nullified in the prescribed manner by a court sentence or another organ competent to prosecute criminal offences

- the prosecution is pursued against a person against whom previous prosecution for the same act had been closed by a final and valid judgement approving a transaction, unless such a decision was declared void in the ensuing proceedings
- the prosecution is pursued against a person against whom previous proceedings for the same act were closed by a final decision on assignment of a matter on the suspicion that the act is an administrative offence, other administrative delict or disciplinary offence, unless such a decision was overturned in the ensuing proceedings

8.4.1.2 The principle of compulsory consent of the injured party

In certain matters provided by the Criminal Code, the competent organ may only institute or continue prosecution already instituted upon the consent of the injured party (Article 163 CPC). Without this consent, the prosecution cannot be continued unless certain conditions are met, e.g. the victim is unable to give his consent or is under the age of fifteen (Article 163 a CPC).

8.4.1.3 Phases of the preliminary proceedings

The police, the public prosecutor or other established public organs (e.g. the Financial Analysis Department or the Customs Administration) may discover, or suspect the existence of, criminal facts. The first phase following this discovery or announcement of facts is the so-called 'verification and securing of facts' (*objasňování a prověřování skutečností*). During this pre-investigative phase, the charges and the suspect are unknown. The police take steps and inform the public prosecutor by means of a written report included in the criminal file. The first phase ends with a police report submitted to the prosecutor. The second phase starts with an official act disclosing charges and instituting criminal proceedings. This launches the criminal investigation (*vyšetřování*). The phase ends with a final police report submitted to the prosecutor requesting the continuance of the prosecution or some other decision. The prosecutor takes the next decision and may file an indictment, dismiss the case, decide to transfer it to another body or settle it. The public prosecutor is, in principle, the only organ competent to file the indictment and represent the public prosecution before a court (Article 180 § 1 CPC). For minor offences (carrying up to three years' imprisonment), the CPC organises simplified preliminary

proceedings.[501] There is no investigation and only a short ten-day investigative phase. This phase can result in a summons for the suspect to appear in court, with a judge sitting alone, unless the prosecutor opts for a dismissal or when an investigation becomes necessary.

8.4.2 The role of the Czech prosecution service in pre-investigations and preparatory criminal investigations

8.4.2.1 The first phase – pre-investigative proceedings, uncovering of the criminal acts and police investigation

8.4.2.1.1 The pre-investigative phase

The police corps or the PPS have jurisdiction to start pre-investigations. They are both obliged to accept a notice on the facts indicating that a crime might have been committed. Article 12 § 2 CPC provides that police bodies refer to the Czech police bodies. In addition to the main police corps, the military police can also bring proceedings against a member of the armed forces and the prison security police. However, if a police corps other than the Czech police – i.e. the Security Information Service or the Office of Foreign Relations – takes measures or performs an act, this body must inform the Czech police without delay. If there is a jurisdictional dispute between two police corps, the public prosecutor settles the conflict with a binding opinion (Article 158 § 10 CPC). The police are subordinate to the Minister of the Interior, who appoints and dismisses the chief of police. The chief of police appoints and dismisses the director of the various police services. The purpose of pre-investigation is to find out whether a criminal offence was committed and to try to identify the offender. The police are mainly involved in this phase and the public prosecutor is absent. First, there must be suspicion that a criminal offence has been committed. The police suspect an offence (Article 158 CPC)

- *ex officio* (i.e. if a suspect was caught in *flagrante delicto*, in the act of committing a felony or immediately afterwards)
- on report of an offence (*trestní oznámení*)
- on the motion of another body or person suspecting an offence (*podnět jiných*)

[501] This thesis will only study the proceedings available for more severe offences.

From the moment of this suspicion until the first report of the crime and possible charges, the police must undertake all necessary immediate acts. Police forces are entitled to demand explanation, conduct inspections and interrogations and seize any files or other documents necessary. In principle, it is not possible to hold someone in detention during this period. Only a court may order detention after the suspect is charged with an offence. However, if necessary, the police can take someone into custody. Custody cannot last more than forty-eight hours. The prosecutor has an additional twenty-four hours to file a motion with the district court disclosing the charge and requesting detention. The recent CPC modifications oblige the police body to inform the competent public prosecutor immediately or within forty-eight hours of notice of a crime. Once informed, the prosecutor is obliged to check that pre-investigation was undertaken within the legal time limit.[502] The public prosecutor instructs and supervises the police body during this phase. The prosecutor checks the report and instructs the police to modify its legal content, if necessary.

Based on this suspicion, Article 12 § 10 CPC establishes possible ways to officially commence preliminary proceedings

- the creation of a record of the steps to be taken (i.e. interrogation, search for explicatory evidence, detention of the suspect)
- the taking of such steps if they cannot be delayed or repeated, and if they precede the creation of such a record[503]

According to this Article, the date mentioned in a record will be the start of preliminary criminal proceedings. This date could be that of the urgent steps taken or that of the report itself. The police can take steps before they hand the final report over to the prosecutor. In principle, the police communicate official reports concerning these steps to the public prosecutor during this period. These reports cannot be used as evidence in judicial proceedings unless the law

[502] The workload of public prosecutors has risen significantly following the introduction of this obligation to report every single notice of a crime. According to the official statistics of the general prosecutor's office, in 2005 there were 18,387 reports of crimes in the 4th district of Prague while in South Bohemia (district of České Buděuovice) there were 6,719 reports.

[503] Article 160 § 4 stipulates that an act is undelayable (urgent) if, with regard to the danger it implies, or the destruction or loss of evidence affecting the criminal proceedings, it cannot be postponed until criminal proceedings have been instituted. The act is unrepeatable if it cannot be performed in court.

provides otherwise.[504] The pre-investigation phase should be completed within

- two months, if within the jurisdiction of a single judge without preparatory proceedings
- three months, if within the jurisdiction of the district court
- six months, if within the jurisdiction of the regional court

The public prosecutor can extend the time limit and decide to modify the steps the police need to take. The police must keep the competent prosecutor informed of the completion of their tasks within the time limit. The competent prosecutor is always entitled to supervise the police and issue instructions (see 8.4.3).

8.4.2.1.2 Refusal to start or continue preparatory proceedings

During the screening of the facts, the public prosecutor or the police can drop the matter and refuse to start preparatory proceedings (*usnesení o odložení věci*). The dropping of the matter might be definitive or temporary. If the reasons for dropping proceedings no longer exist, criminal prosecution must be instituted immediately. According to Article 159a CPC, the police and public prosecutors have the same right to decide to drop a case.

The competent body orders the dropping (*odložení*) of a matter by way of an informal decision if there is no suspicion of a 'criminal' offence. If more appropriate, the matter can also be[505]

- transferred to a competent body for hearing as an administrative offence or misdemeanour
- transferred to a different body for disciplinary (*kázeňské*) or other proceedings (*kárné*)

By formal order (*usneseni*) open to review, a definitive dismissal of a matter must be made if

- criminal prosecution is unacceptable according to Article 11 CPC (see 8.4.1.1)
- the public prosecutor or the police body failed to discover facts entitling them to institute prosecution (Article 160 CPC)

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[504] According to Article 158a CPC, an exception to this rule is available if an interrogation is urgent and cannot be repeated afterwards. In this case, a judge must be present during the interrogation if it is to be used as evidence in judicial proceedings.

[505] The decision to transfer the matter is informal and cannot be challenged.

The competent body may also order a definitive dismissal by way of a formal order if

- the sentence that may result from the prosecution is insignificant compared to the sentence for another act the accused has already been charged with
- the act committed by the accused had already been settled by another body in a disciplinary manner, or by a foreign court or agency, and this decision was considered satisfactory

The police refer the order communicating the refusal to start or to drop proceedings to the prosecutor within forty-eight hours, and notifies the victim, if known. The temporary dropping (*dočasné odložení*) of a matter may only occur with the agreement of a public prosecutor if it is necessary for clarification of criminal activities committed in the context of a criminal conspiracy or another deliberate criminal act or for ascertaining the identity of the perpetrators (Article 159b CPC). A case may be dropped temporarily for a period of two months unless the public prosecutor authorises an extension. In this case, the police will postpone the start of a criminal prosecution – they do not have to comply with time limits and inform the parties. This kind of process could be helpful for the police to avoid arousing the suspicions of suspects before sufficient evidence is collected to start a prosecution. In addition, interrogations do not need the authorisation of a judge during the screening phase, where time is often of the essence.

8.4.2.2 The second phase of proceedings

8.4.2.2.1 The decision on commencement of prosecution (*Výrok usnesení o zahájení trestního stíhání*) and investigation

Once facts uncovered and reasonably substantiated by a pre-investigation indicate that a criminal offence has been committed by a particular person, the police or the prosecutor must immediately commence investigation against that person unless prosecution is not admissible for reasons provided by law (Article 160 § 1 CPC). The decision on prosecution must contain

- the description of the act for which the person is prosecuted
- the legal definition of this act
- the exact personal details of the accused

The decision is in principle taken by the police and served on the different parties. The police must inform the public prosecutor within forty-eight hours. This decision starts the second phase of the preparatory criminal proceedings, the investigation and the prosecution. The suspect or the victim can challenge this decision by way of a complaint (*stížnost*). The date of this act stops time counting for the statute of limitations for prosecuting crime.

8.4.2.2.2 The investigation

Unless otherwise provided by law, the section of the Czech police concerned with criminal matters conducts the investigation, after which the indictment is filed and the case is transferred to another body, ordering definitive or conditional dismissal, or a settlement without trial (Article 161 CPC). If a body other than the police carries out the pre-investigation, the case must be handed on to the regular police. Otherwise the police will conduct the investigation on their own initiative. They have the same powers and rights as in the pre-investigation phase. The purpose of the investigation is to find the necessary evidence to clarify all the basic facts about the offence which are important for the assessment of the case, the identity of the perpetrator and the effects of the criminal offence. If acts are made in accordance with the law during the pre-investigation phase, they do not have to be repeated during the investigation period. Nevertheless, acts such as interrogations must be repeated because they need the decision of a judge in order to be used in judicial proceedings. The police are fully responsible for acts carried out during the investigation. With the exception of decisions that need the approval of a public prosecutor, the police take all decisions alone (Article 164 § 5). During and after the investigation, only a public prosecutor may take certain decisions such as

- ordering the dismissal, conditional dismissal or suspension of a criminal prosecution (see below 8.4.2.2.3), and the transfer of the matter to a different body if the findings of the investigation indicate that no criminal offence was committed
- filing an indictment with the court
- applying to the court for an extension of detention
- setting the accused free
- ordering the seizure of an accused's property or cancelling such an order

- securing the injured party's right to damages or cancelling this security
- ordering the exhumation of a corpse
- proposing the extradition of an accused from a foreign country
- performing preliminary investigations in proceedings on extradition to a foreign country

The police body closes the investigation when it is deemed complete. Thereafter they send the file to the public prosecutor with one of the following motions

- to file an indictment and a list of proposed evidence with the court
- to transfer the case to another body if there is no criminal offence but an administrative or disciplinary breach of the law
- to dismiss the prosecution
- to temporarily drop the prosecution
- to conditionally dismiss prosecution
- to settle the case without trial

If the investigation was directly performed by a public prosecutor, a superior public prosecutor of the immediately higher office supervises its legality. The lower prosecutor, however, maintains the right to file the indictment and does not need the approval of the superior prosecutor to take decisions such as

- the transfer of the case
- the dismissal of the case
- the suspension of the case
- the conditional dismissal of the case
- settlement without trial

If a matter involves a member of one of the police corps – the Czech police, the Security Information Service or the Office of Foreign Relations – only a public prosecutor is empowered to conduct the investigation. The same legal provisions apply as in a normal police investigation but decisions that normally needed the approval of a prosecutor no longer do so.

8.4.2.2.3 Decisions to end the prosecution

After the start of the investigation, the prosecutor has the right to dismiss a case (*zastavení trestního stíhání*) on the same legal basis as dropping it during the screening period (see 8.4.2.1).

The prosecutor may also suspend prosecution (Article 172 § 2 c)

> If, considering the importance of the protected interest infringed by the act, the manner of the commission of the act and its effects or the circumstances in which the act was committed, and considering the behaviour of the accused after the commission of the act, it is apparent that the goal of the criminal proceedings has been achieved.[506]

In the following cases, the public prosecutor must suspend the prosecution (Article 173 CPC)

- if the case cannot be duly clarified because of the absence of the accused
- if the accused is unable to understand the criminal prosecution because of mental illness, which manifested itself after the commission of the acts
- if the accused cannot appear before the court because of a severe illness
- if the accused is subject to extradition or expulsion to a foreign country or if an application has been lodged for expulsion or extradition

If the reason for suspension ceases to exist, prosecution must continue. The injured person has a right to challenge the order to dismiss prosecution issued by the competent authority by way of appeal before the superior prosecutor (Article 172 CPC).

The prosecutor may also decide to dismiss the case. Although the decision to dismiss is a plea of *res judicata*, the general prosecutor may *ex officio* or on demand of the injured or other person, cancel the decision within three months of the effective date of the decision and order the respective prosecutor to continue prosecution. From a

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[506] This provision is applied very rarely, often in cases of defamation. Prosecutors do not apply to decrease the workload and circumvent the principle of compulsory prosecution. In fact, this article is comparable to the definition of social danger as a material element of a criminal offence. An act is not a crime if the social danger is insignificant (Article 3 CC). Prosecutors tend to refer to the latter definition rather than to 172 § 2c. This new provision gives, however, more power to prosecutors to divert a case once charges have been disclosed and served on the accused.

practical point of view, this procedure also permits the unification of practices with respect to a claim from the accused (Article 174a CPC).

If the result of the investigation provides sufficient reason to prepare an indictment, the police hand over the case to the prosecutor who may file an indictment. The indictment can only be filed for acts described in the decision on commencement of prosecution. A prosecutor must always apply the law and follow his personal convictions based on consideration of all aspects of the case when he files an indictment and represents the State (Article 180 CPC).

In addition, the CPC (Articles 307 & 308) provides the right for the prosecuting authority to propose a conditional dismissal of the case for a period of six months to two years. This is possible when the offence committed carries a sentence of imprisonment of up to five years. The accused must acknowledge that he committed the offence and repair the damage caused by the act or conclude an agreement for the payment of compensation within the term of probation with the injured party, or take other measures necessary to repair the damage. Other restrictions may be imposed on the accused. If the accused complies with the conditions, the public prosecutor will decide that the dismissal is definitive.

If an offence of the same type has been committed, the public prosecutor may choose a settlement out of court if the victim and the accused agree on such a settlement (Article 309). The accused must acknowledge his guilt and repair the damage caused by the act. If the agreement comes into force, the prosecution is dismissed and the case ends.

Both proceedings – conditional dismissal and out-of-court settlement – are available to the court as possible conclusions of a hearing. The accused, the victim and, if the decision is made by a court, the public prosecutor, have the right to file complaint against such decisions.

8.4.3 The role of the Czech prosecution service in the supervision of preliminary proceedings

8.4.3.1 The obligation to provide information

The police must undertake all the necessary steps that prevent a criminal offence from taking place and lead to the clarification and verification of the facts reasonably indicating that a criminal offence was committed – such as interrogating the suspect. The police may undertake unrepeatable or urgent steps without informing the prosecutor. However, afterwards, the police must draft a record of

these steps without delay and send it to the prosecutor (Article 158 § 3 CPC). If the police decide to drop the matter by application of Article 159a or 159b CPC (see 8.4.2.1.2), they must inform the prosecutor within forty-eight hours of the relevant order. For steps that are *not* urgent or unrepeatable, the police must produce an official report, a copy of which must be sent to the public prosecutor within forty-eight hours of the start of the proceedings (Article 158 § 5 CPC). In addition to this police duty, there is a duty – that is binding on all public authorities – to inform the public prosecution or the police of facts indicating the commission of a criminal offence (Article 8 CPC). The same authorities must provide help if required by bodies active in criminal proceedings.

8.4.3.2 Supervision of preparatory proceedings

As a general provision, in the heading to the chapters concerning criminal proceedings, the CPC stipulates that (Article 157 § 2)

> A public prosecutor, in order to examine facts indicating that a criminal offence was committed, is entitled to:
>
> a) request from the police corps files, including files by which criminal proceedings were instituted, documents, materials and reports on actions undertaken when examining the notification of the offence;
>
> b) withdraw any matter from a police corps and take measures to transfer the matter to a different police corps;
>
> c) temporarily delay the institution of criminal prosecution.

From the beginning of proceedings, the competent public prosecutor has full powers over cases that come to the attention of the police. In preliminary proceedings, the competent prosecutor is *dominus litis*. If he is informed, he can – and *must*, if it comes to delays and the authorisation of the detention of suspects – exercise supervision over criminal proceedings from the beginning. Prosecutors check the legality of the police investigation, including the conformity of the procedure with the protection of human rights and fundamental freedoms. This duty is set down in provisions of the 1993 Act and in respective provisions of the CPC (Article 157, 174 et seq.). Article 157a CPC also stipulates that the suspect and the injured party have the right to ask the public prosecutor at any moment during preparatory proceedings to repair delays or errors in police actions. Article 174 CPC organises prosecutors' rights to supervise criminal pre-trial proceedings once charges have been served and the investigation started. Prosecutors are entitled to

- give binding instructions (*pokyny*) for the investigation of criminal offences
- request files, documents, materials and reports on criminal acts from the police body to review the early commencement of the criminal prosecution and the observance of due procedure
- participate in the performance of procedures by the police corps, personally conduct individual procedures or the entire investigation, and issue a decision in any case, while acting in the course of these actions pursuant to the provisions applicable to the police. A complaint against this decision is admissible as the prosecutor is acting in the capacity of a police corps
- return the case to the investigator with instructions for additional investigations
- cancel unlawful or unjustified decisions and measures taken by the police, which he may replace with his own decisions – within thirty days of the notification of an order to drop the matter
- order other persons active in the police body to perform the acts

8.4.3.3 The position of the general prosecutor in the supervision

Article 174a CPC authorises the general prosecutor to

- cancel an illegal order issued by a lower public prosecutor to dismiss a case or to transfer the matter, within three months of its taking effect
- request, by reason of the cancellation of illegal orders, files, documents, materials or reports and the performance of screening of them

If the general prosecutor cancels an order for dismissal, the public prosecutor who decided the case in the first instance, continues the proceedings. The legal opinion expressed by the general prosecutor is binding. The lower prosecutor is obliged to undertake the act and supplementary steps ordered.

*8.4.3.4 The complaint (*stížnost*) or appeal against orders*

Articles 141 to 150 CPC organise the procedure of complaint against orders made during preliminary proceedings (see for more 8.5.2.1). Orders issued by the police organs may always be challenged before the competent public prosecutor. Orders issued by public prosecutors or a court may only be challenged if the law permits,

before the superior prosecutor or the superior court respectively. Unless the law stipulates otherwise, a complaint does not halt the challenged order. The scope of a decision of the authority on a complaint is not limited by the grounds of the complaint. Nevertheless, reformation *in peius* is prohibited.

8.5 The role of the Czech PPS after the preliminary phase of the criminal process

8.5.1 The position of the public prosecutor in the first instance

8.5.1.1 The preliminary verification of the indictment and conference

The presiding judge of the competent court reviews the indictment before the main hearing starts and may order a preliminary hearing of the indictment if he considers that

- another court has jurisdiction over the matter
- the matter should be transferred because it is not a criminal offence but an act that could be evaluated by another body as an administrative offence or as a disciplinary offence
- there are circumstances justifying the dismissal of prosecution, that is, if
  - it is beyond any doubt that the act, on the grounds of which the criminal prosecution was instituted, did not occur
  - this act was not a criminal offence and there are no grounds to transfer the case
  - it is not proven that the act was committed by the accused
  - the criminal prosecution is inadmissible because one of the conditions provided for in Article 11 CPC is met (8.4.1.1)
  - the accused was of unsound mind while committing the act in question and thus not criminally liable
  - culpability for the act no longer existed
- there are circumstances justifying the suspension of prosecution if
  - the case cannot be duly clarified due to the absence of the accused
  - the accused cannot appear before the court because of a severe illness

  - the accused is unable to understand the meaning of the criminal prosecution due to mental illness manifesting itself after the commission of the act
  - the accused is subject to extradition to a foreign country or expulsion, or an application for transfer has been lodged, or the accused was extradited or expelled
- there are circumstances justifying the conditional dismissal of criminal prosecution
- the acts in the indictment should be judged pursuant to another provision of the CC than the one applied by the prosecution
- the pre-trial proceedings were not executed according to the law and, especially, when the regulations guaranteeing the right to defence were violated or the pre-trial proceedings were not executed according to the law, or procedural rules were infringed in a significant manner, in particular provisions securing the rights of the defence, and such violation of the procedural rules could not be remedied in the proceedings before the court
- basic factual circumstances in the matter were not clarified to the degree necessary to permit a decision on the matter

The presiding judge of a district court has three weeks to perform the verification and the presiding judge of a regional court has three months. The purpose of the preliminary verification is to examine whether (Article 181 CPC)

- the court has substantive and territorial jurisdiction to hear the matter
- there were any grave procedural infringements in the preliminary proceedings that cannot be rectified in the court hearing
- basic facts were clarified in the pre-trial proceedings sufficiently to permit the conduct of the main hearing and the taking of a decision

Within the time limit prescribed by law, the presiding judge decides to hear the indictment in conference or to directly order a trial. The preliminary hearing of the indictment takes place in closed session unless the presiding judge of the panel decides otherwise. After this hearing, the court may

- transfer the matter to the competent court
- transfer the matter to another body

- dismiss the criminal prosecution
- suspend the criminal prosecution
- remand the case back to the prosecutor for additional investigation to clarify facts or, if it is necessary, to correct serious procedural errors that cannot be remedied during the hearing
- decide on approval of a settlement without a complete hearing
- transfer the case to a single judge in circumstances provided by law
- serve the indictment on the parties and order the main hearing

The public prosecutor, the accused and, in certain circumstances, the victim may challenge the order of the court taken on preliminary hearing of the indictment by way of complaint (*stížnost*). If the court decides to remand the matter to the prosecutor, its decision indicates

- the proceedings that must be completed
- the facts that need clarification
- the steps that must be taken

Once the prosecutor has complied with the terms of the court's decision, he or she may issue a new indictment. A preliminary hearing of this new indictment may be held.

8.5.1.2 The first instance hearing and the participation of the State prosecutor at the hearing

The presiding judge of the panel orders the date and time of the main hearing. The hearing is public and starts with the president's announcement of the case. The hearing must always be held in the presence of the prosecutor who read the indictment. The examination of the defendant follows the reading of the indictment. Afterwards, the prosecutor and the other parties have the right to question the accused and summon witnesses. The public prosecutor then gives his closing address. The last word is always for the accused or his counsel. The court must always arrive at a decision based on the act identified in the indictment and the facts examined during the hearing. However, the indictment is not binding on the court with regard to the legal qualification of the act. After the hearing, the court may decide to

- remand the case back to the prosecutor for additional investigation if the results of the main hearing indicate that
  - there is a substantial change in the circumstances of the case occasioning the need for further investigations for clarification of the case
  - the defendant also committed another criminal act and the prosecutor was requested to return the case to the police for investigation
- transfer the case to another court or body
- dismiss the criminal prosecution
- conditionally dismiss the prosecution and approve a settlement without sentence
- suspend the criminal prosecution
- make a judgement finding the accused guilty or acquitting the accused

If the court remands the case back to the prosecutor, it must reason this step and order additional investigations to be carried out. The prosecutor is bound by this order. The court may decide to acquit the defendant, based on evidence presented during the hearing by the public prosecutor and supplemented by the court at the other party's request, if (Article 226 CPC)

- it was not proved that the act the defendant was prosecuted for occured
- this act is not a criminal offence
- it is not proved that this act was committed by the defendant
- the defendant bears no criminal liability for reasons of mental illness
- there is no longer any culpability for the act

Before the beginning of the main hearing, the prosecutor may withdraw the indictment until the court retires for deliberation. After the start of the hearing, he may only do so if the defendant does not insist on continuing the proceedings. If the indictment is withdrawn, the matter returns to the preliminary proceeding stage.[507]

[507] An exception exists if the indictment is filed with a motion to dispose of the case by penal order proceedings presided over by a single judge. In this case, withdrawal is possible until the penal order is served. Upon withdrawal, the penal order is

8.5.2 The position of the public prosecutor in ordinary forms of review

*8.5.2.1 The complaint (*stížnost*)*

The complaint is the ordinary form of review used against orders (*usnesení*) issued in the course of preliminary proceedings by a court, a public prosecutor or a police corps (Article 141 to 150 CPC). Where provided by law, a complaint is also available against other types of judicial decision, such as a custodial decision (*rozhodnutí o vazbě*). In principle, the complaint is filed with the superior of the body that issued the order. However, in certain cases

- orders issued by a police corps can always be challenged by way of complaint before a superior police officer unless the order requires the authorisation of the prosecutor. In this case, the superior officer may accept the complaint only with prior authorisation of the prosecutor
- orders made by a court or a public prosecutor can only be challenged when authorised by law and if the matter was decided in the first instance. A complaint against a court order is filed with the same court that initially made the order. A complaint against a prosecutor's order is filed with the same prosecutor
- orders issued by a public prosecutor from the general prosecutor's office can only be challenged when authorised by law and if the matter was decided in the first instance. Complaints may be filed with the general prosecutor
- orders of the general prosecutor may be challenged by way of complaint only when by law a court is competent to decide on a complaint. Complaints may be filed with the Supreme Court

Unless the law provides otherwise, only the person directly affected by an order may file a complaint. Such a complaint must be filed within three days of the date of receiving notification of the order. A public prosecutor may file a complaint against orders issued by the courts even if the complaint is in the defendant's favour. The superior prosecutor of the complainant prosecutor has the right to withdraw the complaint filed by his deputy.

Possible grounds for complaint are

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cancelled and the case returns to the preliminary proceedings (Article 314g § 4 CPC).

- an error in any statement of the orders
- a breach of provisions governing the proceedings that preceded the adoption of the order if such a breach could have resulted in an error in any statement of the order
- there are new facts and evidence that can be used to support the complaint

If the superior body does not dismiss the complaint, it may

- reverse the contested order, and if the matter calls for a new decision, it shall
  - decide on the matter in its own capacity
  - or instruct the body whose decision is contested by the complaint to re-examine the matter and take a new decision
- remand the case back to the prosecutor for additional investigation
- execute the order or instruct the subordinate body to do so

The deputy is bound by a legal opinion expressed by his superior

*8.5.2.2 The protest (*odpor*)*

Decisions taken by a single judge, when provided for by law (see 8.2.1), are called criminal orders (*trestní příkaz*). They have the force of a sentencing judgement. The accused, the persons authorised to file an appeal in his favour and the prosecutor can file a protest against a penal order within eight days of its service. A protest that is validly filed cancels the penal order and the case is then judged at a main hearing.

*8.5.2.3 The appeal (*odvolání*)*

The appeal is the ordinary remedy against definitive judgements made at the first instance. The following persons may challenge a judgement by way of appeal

- the prosecutor, on the grounds of the incorrectness of any verdict
- the defendant, on the grounds of the incorrectness of the verdict directly affecting him, his relatives in a direct line of descent, his brothers and sisters, adoptive parents, adoptive child or spouse
- a participant, on the grounds of the incorrectness of a verdict of seizure of property

- an injured party, claiming damage compensation for the incorrectness of the damage compensation verdict

An appeal is always possible for such categories of persons in the face of a breach of the provisions applicable to the proceedings that precede the judgement, and if this breach could have caused the verdict to be incorrect. Only the public prosecutor may file an appeal to the detriment of the defendant against a judgement. The appellate court may deny an unjustified appeal and sustain the judgement. Alternatively, it may

- suspend criminal prosecution
- cancel the judgement and re-examine the case in its entirety or in part
- cancel the judgement and remand it to another body if the first instance court should have done so
- dismiss the prosecution
- cancel the judgement and remand the case to the first instance court[508]
- if a verdict is incomplete, sustain the judgement and remand the case to the first instance court that must supply the missing verdict
- remand the case back to the prosecution service for additional investigation

8.5.3 The position of the public prosecutor in extraordinary forms of review

*8.5.3.1 The cassation appeal (*dovolání*)*

The following categories of persons can challenge a decision delivered by a court at the second instance

- the general prosecutor, at the motion of the regional or higher prosecutor, or *ex officio* for incorrectness of any verdict of a court decision (*výrok rozhodnutí soudu*) favourable or prejudicial to the defendant

[508] This can happen in particular if the factual findings fall so far short that it is necessary to repeat the main hearing or to obtain extensive and difficult supplements to the evidence.

- the defendant, for the incorrectness of a court decision directly affecting him

The following decisions delivered by a court in the second instance can be appealed by cassation

- a judgement where the accused was found guilty, and the sentence or protective measure imposed or the sentence waived (1)
- an acquittal (2)
- an order to dismiss the prosecution (3)
- an order to transfer the matter to another body (4)
- an order imposing a protective measure (5)
- an order conditionally dismissing the prosecution (6)
- an order approving a settlement (7)
- an order by which an ordinary appeal was denied or refused against a judgement or a resolution as provided for in cases 1 to 7 (8)

According to the cassation principle, an appeal is admissible only on strict grounds provided by law (Article 265b CPC). These are

- a sentence of life imprisonment
- a court incompetent in the subject matter or a court improperly composed, unless a panel or a higher court instance passed judgement rather than a single judge
- an excluded body decided on the matter; this reason does not apply if the person lodging the extraordinary appeal was aware of this in the original proceedings and failed to object before the second instance body
- the defendant did not have defence counsel appointed although one should have been appointed by law
- requirements for the presence of the defendant at the main hearing or in the public session failed to be observed
- the accused was criminally prosecuted where such prosecution was inadmissible by law
- a decision was made to transfer the matter to another body, to dismiss the criminal prosecution, to conditionally dismiss the

criminal prosecution or to approve a settlement, without having fulfilled the conditions for such a decision

- the decision is based on an erroneous legal classification of the act or other erroneous substantial legal classification
- the defendant was given a type of sentence inadmissible by law or a sentence was imposed that exceeded the sentence limits set in the CC for the specific criminal act for which he was convicted
- a decision was taken to suspend a sentence or suspend a sentence with supervision, without the conditions set by law for doing so having been met
- a decision was taken to impose a protective measure without the conditions set by law for doing so having been met
- a particular verdict is missing from a decision or a verdict is incomplete
- an ordinary form of review against a judgement or resolution in cases 1 to 7 above was refused, without the legal procedural conditions for such refusal having been met

The time limit for filing a cassation appeal is, in principle, two months from the date of delivery of the decision challenged. The cassation appeal is brought to the Supreme Court. If the general prosecutor files the appeal, he indicates whether he files in favour of the accused or otherwise. The presiding judge of the court verifies the content of the appeal and may request the removal of insufficiencies where necessary. The Supreme Court can deny the appeal if it is inadmissible or unsubstantiated. If the Supreme Court grants the appeal, it can abrogate a challenged decision and require a new decision. In principle, the Supreme Court only considers the application of the law in the particular case; it does not judge facts, which is the role of lower courts. Therefore, if necessary, the Supreme Court instructs the body that issued the challenged decision to issue a new decision. The Supreme Court's instruction is in principle not binding. In a review, the Supreme Court can consider factual points only if the legal conclusions of the lower instance court display extreme discrepancies with the factual points of the case. The Supreme Court may cancel the challenged decision or the preceding erroneous proceedings, in whole or in part. It may cancel only a part of the verdict and if a new decision is necessary, it may refer it to the court or the prosecutor that delivered the challenged

decision or conducted the erroneous proceedings. If the error lies only in an incomplete verdict, the Supreme Court may order the relevant court to complete the decision. The Supreme Court cannot cancel a decision and

- find the defendant guilty of an act for which he was acquitted or for which the proceedings were dismissed
- find the defendant guilty of a more serious criminal act than the one for which he was found guilty in the challenged decision
- sentence the accused to over fifteen years imprisonment if such a sentence was not imposed by the challenged decision or in connection with the judgement of the first instance court

No legal remedy against a Supreme Court cassation appeal decision is available except retrial proceedings (see 8.5.3.3).

*8.5.3.2 Complaint for breach of law (*stížnost pro porušení zákona*)*

The Minister of Justice can file a complaint for breach of law with the Supreme Court against a final decision of a court or public prosecutor which

- breached the law
- was based on incorrect proceedings

A complaint filed against a decision is only possible if the sentence is obviously disproportionate to the level of danger to society presented by the act or the personal circumstances of the convicted defendant, or if the type of sentence imposed is in obvious contradiction to the purpose of the sentence. The Minister of Justice is obliged to disclose whether the complaint is filed in favour of the defendant or otherwise. If the Supreme Court grants the complaint and finds that the law was violated, it declares by judgement that the law was violated by the challenged decision or a part of the proceedings that preceded it. The judgement does not affect the effectiveness of the challenged decision.

If a verdict prejudicial to the accused has been made through violation of the law – such as when the defendant was convicted rather than acquitted – the Supreme Court could cancel the verdict or part of it and if necessary remand the case to the appropriate body for a new decision.

If a new decision is necessary, the Supreme Court will order a rehearing of the case. Its opinion is binding. The Supreme Court cannot

- find the accused guilty of an act for which he was acquitted or for which the proceedings were dismissed
- find the accused guilty of a more serious criminal act than the one for which he was found guilty in the challenged decision
- impose a custodial sentence of over fifteen years or life imprisonment

*8.5.3.3 Reopening proceedings (*obnova řízení*)*

Criminal prosecution against a person may be reopened and continued on application of an authorised person if it ended in

- a final judgement
- a final criminal order
- a final order dismissing criminal prosecution
- a final order of conditional dismissal[509]
- a final order approving a settlement
- a final order transferring the matter to another body

The following persons are authorised to file the application

- the public prosecutor (the prosecutor is the only person authorised to apply to the detriment of the defendant)
- in addition to the defendant, any of the persons permitted to file an appeal in his favour (see 8.5.2.3)

If the decision ending criminal prosecution was made by a court, retrial may be allowed only if facts or evidence previously unknown to the court emerge, and

- it would justify another decision on guilt
- it would entitle the injured party to damage compensation
- if the original sentence imposed is obviously disproportionate to the level of danger to society presented by the criminal act
- the original sentence imposed is in obvious contradiction to the purpose of the sentence

[509] In addition to an application for the reopening of proceedings, proceedings conditionally dismissed may be reopened through the application of specific provisions of the CPC concerning conditional dismissal (Articles 307 and 308).

- it would justify a sentence
- it would result in finding that the reasons for dismissing the proceedings were absent and that it is appropriate to continue proceedings

If the decision ending criminal prosecution was taken by a final order of the public prosecutor for dismissal, settlement without trial, conditional dismissal or transfer of the matter to another body, retrial may be allowed if

- facts or evidence previously unknown to the public prosecutor emerge
- it would result in a finding that the reasons for the decision were absent
- it is appropriate to seek an indictment against the accused

A reopening of proceedings is possible against any of the preceding decisions if the final judgement finds that the police, the public prosecutor or the judge in the original proceedings breached their duties by acting in such a way as to constitute a criminal act. In principle, the court that would be competent to rule on the indictment is also competent to decide on the application to reopen proceedings ended by a prosecutor's decision. The court that ruled in the first instance is competent to decide on the application in other cases. It may deny reopening proceedings mainly if

- culpability for the act is no longer present
- the President of the Czech Republic orders the dismissal of the criminal prosecution[510]
- the accused has died
- an unauthorised person filed the application
- the decision applied for is not one of the decisions against which reopening proceedings is possible
- the necessary grounds for reopening do not exist
- If permission to reopen proceedings is granted, the preparatory proceedings continue if the proceedings ended with a final order of dismissal, settlement without trial, transfer or conditional

[510] See 8.4.1, the right of the President of the Republic to grant pardon (Article 11 § 1 a).

dismissal. Otherwise, the court continues the proceedings on the basis of the original indictment unless it was decided to remand the case to the public prosecutor for additional investigation.

8.5.3.4 Pardon

The provisions of the CPC did not change (see 7.6.3.3).

Chapter 9
Comparisons of the organisation of the prosecution services and their functions in the criminal process

In this chapter, I will compare the four systems – Czech, French, Dutch and Polish. I will look at the organisation of the PPSs and their functions in the criminal process, as I did when I dealt with each country individually.

Firstly, the place of the prosecution service within the State will be examined (9.1). Secondly, the structure of the four countries' PPSs will be detailed (9.2). Thirdly, the relationship within these services (9.3) will be put into perspective.[511] The focus will ultimately be on the functions of the PPS in preparatory proceedings and forms of review in the criminal process (9.4).[512] Special attention will be paid

[511] For individual details on each country, the reader should refer to the following sections – 4.1, 4.2 and 4.3 for the Netherlands; 3.1, 3.2 and 3.3 for France; 5.1, 5.2 and 5.3 for Poland under Communism; 6.1, 6.2 and 6.3 for Poland today; and 7.1, 7.2, 7.3 for the Czech Republic under Communism; and 8.1, 8.2 and 8.3 for the Czech Republic today.

[512] For separate details of each country's preparatory proceedings, the reader should refer to the following sections – 3.4.2, 3.4.3 and 3.4.4 for France; 4.4.2, 4.4.3 and 4.4.4 for the Netherlands; 5.5.1 and 5.5.2 for Poland under Communism; 6.4.2, 6.4.3, 6.4.3.1 and 6.4.4 for Poland today; 7.5.1.1, 7.5.1.3 and 7.5.2 for the Czech Republic under Communism; and 8.4.1, 8.4.2 and 8.4.3 for the Czech Republic today. For details on each country's forms of review, the reader should refer to the following sections – 3.5.3 and 3.5.4 for France; 4.5.3 and 4.5.4 for the Netherlands; 5.6.2 and 5.6.3 for Poland under Communism; 6.5.2 and 6.5.3 for Poland today; 7.6.2 and 7.6.3 for the Czech Republic under Communism; and 8.5.2 and 8.5.3 for the Czech Republic today.

to the major changes brought about during the democratisation process in the Czech Republic and Poland.[513]

9.1 The place of the prosecution service within the State

9.1.1 The position of the PPS in the repartition of State powers and the task of the prosecution service

A constitutional reference to the PPS is not a necessity. The Czech Constitution establishes it as an institution of the executive (Article 80 under heading 3 on executive power and subheading 2 on the government), whereas other countries constitutions' refer to public prosecutors or public prosecution only indirectly. Debate has flourished in all the countries on the issue of whether the PPS is an institution of the executive or the judiciary. As is also clearly the case in the Czech Republic, the Polish PPS belongs to the executive since the Polish Minister of Justice acts as a general prosecutor. In France and the Netherlands, public prosecutors are considered magistrates and thus members of the judiciary. However, we will see that they are subordinate to the executive.

In the Czech Republic and Poland, the prosecution service no longer consists of a political institution subordinate only to the general prosecutor. As its main purpose, the prosecution of crimes in the public interest replaced the upholding of Socialist Legality established by one party and the supervision of strict compliance thereof by society. From an offensive role in the politicisation of society by way of general and judicial supervision, the prosecution service transformed into a public institution carrying out public prosecution and upholding the laws passed by a democratically elected parliament. In addition, the transformation of the *Prokuratura* into an institution compatible with Western standards implied that public prosecutors integrated the protection of fundamental human rights into the discharge of their duties.

The first purpose of the PPS, established by law in all countries, is the prosecution of crimes. In addition, and to varying degrees, the public ministry also upholds the laws passed by parliament by means other than the prosecution of crimes and in fields other than

[513] In order to make a realistic comparison with the three countries that do not have a federal structure, this chapter and the following only compare the Czechoslovakian *Prokuratura* between 1961 and 1969, when it was not a federal institution.

criminal law.[514] In Poland, the law (Articles 2 and 3, 1985 Act) provides that the prosecution service protects legality (*praworządność*). In the other countries, a general reference to the protection of criminal legality is made in the law (Article 31 CPC in France and 124, 1827 Act in the Netherlands); however, there are no provisions tasking the PPS to uphold the law in general.[515] Specific legal provisions in fields of law other than criminal law task public prosecutors with upholding the law and specify the means to do so, for instance the civil or commercial codes.

A common function of all PPSs is to defend the public interest – *interes społeczny* (Poland), *veřejný zájem* (the Czech Republic), *intérêt général* (France), *algemene belang* (the Netherlands). The definition of the public or general interest differs between countries and covers different domains.[516] However, it is apparent that in all four countries, this concept is not limited to the prosecution of crimes or the upholding of the law, although it does remain related to these tasks. This concept has a broader scope than the laws passed by parliament or the guidelines and instructions of government policies. In Poland, besides upholding legality by initiating proceedings in criminal and civil cases, the protection of the public interest can justify the intervention of the PPS in judicial proceedings in civil, labour and social insurance cases (Article 3 § 1, 1985 Act). In the Czech Republic, the PPS represents the State by protecting the public interest in cases within its competence (Article 1 § 1, 1993 Act), thus public interest is central to its duties. In France, the PPS acts on behalf of society in order to uphold the law and prosecute crimes in the general interest. In the Netherlands, in cases provided for by law, public prosecutors uphold the law in civil, commercial and administrative law. In France and the Netherlands, the general interest can justify instituting or dismissing a public prosecution, whereas in Poland and the Czech Republic, the public interest primarily justifies the commencement of judicial proceedings or the intervention of the PPS in proceedings already in process. The general interest justification for the intervention of the PPS in judicial proceedings can be compared to the interest that a private person, a victim of a crime or a tort, has to institute proceedings. The

[514] PPSs also have the task of supervising detention centres.

[515] However, the oath sworn in the Netherlands by every judicial officer obliges public prosecutors to obey and uphold the Constitution and other acts of law (see 4.3.5).

[516] The notion of the 'public interest' is ill-defined and the purpose here is not to attempt a definition common to the countries studied. See e.g. Brownsword 1993.

assessment of the private interest does not only depend on the existence of an act qualified as a crime or tort, and the victim's legal capacity to institute proceedings, but may also depend on what the victim will gain from such proceedings. Similarly, a public prosecutor can question whether it is more valuable to the welfare of society to prosecute a certain type of crime, to dismiss a case or to choose an alternative method of settlement (see 9.4.2).

Finally, the PPS in all systems strives to ensure the protection of fundamental human rights established by domestic legislation and by international legal instruments implemented in domestic law. Specific legal provisions exist in different texts or case law relating to the PPS's obligation to protect fundamental rights. In Poland, the 1985 Act (Article 3) refers to the rights of citizens or property rights. In the Czech Republic, the 1993 Act (Article 2) refers to respect for human dignity, the equality of all before the law and the protection of basic human rights and freedoms. In France, the Constitution (Article 66) provides that the judiciary is the guardian of individual liberty within the scope of the law. In the Netherlands, the oath taken by public prosecutors and the Code of Ethics refer explicitly to the obligation on members of the PPS to discharge their duties with special attention to fundamental human rights. In particular, public prosecutors should carry out their functions with respect to general principles of law (*beginselen van een goede procesorde*). Some of these principles flow from the 1950 European Convention for the Protection of Human Rights signed and ratified by the Netherlands (see 4.4.3.2.3).[517]

9.1.2 Influence of the executive on the prosecution service

9.1.2.1 Authority exercised by the executive over the PPS

With the democratisation of the Czech Republic and Poland, authority over the PPS has been transferred from the representatives of the Communist party in the State organ, thus concentrating legislative, executive and judicial powers in the Minister of Justice. The Minister of Justice exercises authority over the PPS in all systems. Such authority does not necessarily mean that the public ministry is entirely subordinate to the executive. It implies the intervention of the Minister of Justice within the administration, and to varying extents within the functioning of the PPS in criminal proceedings. In all the systems, the Ministry of

[517] ETS No 005.

Justice ensures the administration of the service (see 9.2.2 on the appointment and the responsibilities of public prosecutors).

The most important difference between the four countries concerns the functional authority that the Minister of Justice exercises over the service. In the Czech Republic, until 2002 the prosecution was completely subordinate to the Minister of Justice but then the Minister became solely responsible for the administration of the service. The prosecution authority is technically independent from the Minister of Justice in the conduct of criminal proceedings. The Minister is responsible for the consistency of prosecution policy in the Netherlands (*het vervolgingsbeleid*) and France (*politique d'action publique*). In Poland, the Minister is legally entitled to act as a prosecutor in a case or replace a prosecutor by one of his direct deputies. As a general prosecutor, the Minister of Justice has direct deputies and is the direct superior of all national prosecutors and superior to all other prosecutors. He has the right to issue orders (*polecenia*) concerning the exercise of jurisdictions and functions in the prosecution service.

In order to prevent the Minister from exploiting his involvement in the functional activity of public prosecutors, democratic control of this process is imposed. In addition, as will be shown, the process differs depending on whether it falls under the principle of compulsory prosecution or the opportunity principle.

9.1.2.2 Democratic control of the executive authority over the PPS

The authority of the Minister of Justice over the PPS is limited in every country by different mechanisms of democratic control. Such control may be exercised, in particular, over the way criminal policy is enforced by the PPS, first by other members of the executive and second by MPs. Governmental accountability consists in particular of the right of the executive to appoint, sanction and recall justice ministers. In Poland, the Czech Republic and France, the President decides at the motion of the Prime Minister on the appointment and dismissal of the Minister of Justice. In the Netherlands, where there is no President, the Minister is appointed by an order co-signed by the head of the government (*de minister-president*) and the Queen.

In addition to their accountability to the government, justice ministers can be accountable to parliament. In Poland and the Netherlands, the Minister of Justice is individually – and collectively with the government – accountable to parliament and must answer questions raised by MPs in session. In the Czech Republic and France, every deputy has the right to interpellate the head of the government or

one of his ministers. However, a vote of no confidence passed by parliament affects the whole government. The direct democratic accountability of the Czech Minister of Justice with regard to the activity of public prosecutors, remains limited to the general instructions he may give (see 9.1.2.4.1) and to his power over the appointment and discipline of prosecutors, particularly his right to propose the appointment of the general prosecutor (see 9.2.2). This latter situation is explained by the Minister of Justice, in theory, having no influence on the conduct of criminal proceedings.

9.1.2.3 Executive authority and the distinction between compulsory prosecution and opportunity

With the exception of the Czech Republic, where intervention is, in theory, impossible, politicians with a function in the state executive may intervene in the functioning of the PPS in criminal proceedings through the Minister of Justice. Although they are in principle motivated by the upholding of the law and general interest, political interventions can be abusive and pursue interests contrary to the general interest. The ministerial democratic accountability already described lowers the risk of abuse in political interventions. In addition, the public prosecutors' discretion to prosecute should be noted. The more discretionary power a prosecutor has to start or stop a public prosecution, the greater the risk of political intervention. Two principles affect this discretion in different ways – the principle of compulsory prosecution and the opportunity principle. The principle of compulsory prosecution is in force in the Czech Republic and Poland, while the opportunity principle is in force in France and the Netherlands. According to the former, the organ competent to prosecute crimes is obliged to institute and to carry out preliminary proceedings as soon as there is a good reason to suspect that an offence has been committed.[518] As a result, if a case meets all the fundamental criteria provided by law for a valid prosecution (9.4.2.3), there is in principle no room for the prosecution's discretion to dismiss a case. This principle actually enhances the unity of the PPS in the execution of its functions in criminal proceedings because the dismissal of a case does not depend on a prosecutor's personal opinion of whether it is opportune to prosecute or not. Intervention from the Minister of Justice should therefore not be necessary.

[518] Besides the mere decision of whether to prosecute or not, the prosecution service's power of discretion also affects the decision to suggest a particular penalty rather than another. With regard to this aspect of the prosecutor's discretion, the fact that prosecutions are compulsory or opportune does not really matter.

According to the latter principle, the government or the prosecution's functional head establishes a criminal policy setting, in particular, priorities in prosecutions. Within the limits of this policy, a prosecutor is free to decide whether to institute a prosecution against a suspect or not, even where there is no doubt that the act in question constitutes a criminal offence. In such cases, the Minister of Justice's intervention is justified as ensuring that the personal opinions of lower prosecutors in pending cases do not abuse the system.

9.1.2.4 The role of the Minister of Justice's instructions and the discretionary power of the prosecution authority

9.1.2.4.1 General instructions of the Minister of Justice to the public ministry

In the Czech Republic the function of the Ministry of Justice is limited to issuing general instructions concerning the administration of the PPS. In principle there is no political intervention in the work of public prosecutors.[519] In Poland, France and the Netherlands, instructions and guidelines from the Minister of Justice, in addition to the administration of the PPS, are also intended to explain how to implement new laws and provide guidelines as to the severity or the type of sentence to impose according to the type of offence. Nevertheless, in Poland there are no sentencing guidelines for certain cases as yet. In Poland, France and the Netherlands the general guidelines of the Minister of Justice can be published or take the form of internal directives. They cannot concern specific cases, pending or not. They are binding on public prosecutors in Poland and the Netherlands if published, whereas they are in theory not binding in France. In the Netherlands some general instructions are issued by the Minister of Justice, but this occurs very rarely because they only affect situations where the Board of General Prosecutors does not agree with the Minister with regard to the prosecution of certain types of facts. In countries adopting the opportunity principle, general instructions also explain the conditions under which it is opportune to prosecute. They can guide prosecutors in the decision to prosecute certain types of crime rather than others and when to request greater severity in certain cases.

[519] Nevertheless, the influence of the Minister of Justice is visible because of his power to appoint and dismiss prosecutors. In addition, the Minister decides on the budgets of the prosecution offices.

9.1.2.4.2 Specific instructions of the Minister of Justice to the public ministry

With the exception of the Czech Republic, the Minister of Justice of the three other countries can issue specific instructions. The similarities and differences in the form of the instruction – i.e. positive, such as an order to start proceedings, or negative, such as an order to drop a case – and the procedure it follows will be considered in turn.

- Poland

By means of specific instructions, the Minister of Justice may order a prosecutor to institute proceedings against a particular person given a certain set of facts. In theory, he may also start proceedings himself.

However, only a direct superior can issue instructions affecting the content of procedural acts and the closing of preparatory proceedings or of the court procedure. Therefore, the Minister of Justice may only issue such an order in conjunction with a national prosecutor.

At the recipient's request, all specific instructions must be in writing and state reasons for the instruction. The recipient of a specific instruction has the right to ask for the instruction to be changed or for his or her exclusion from the case.

- France

By means of specific instructions, the Minister of Justice has the right to denounce to the competent general prosecutor a fact that in his view constitutes a criminal offence, or he can order the general prosecutor to institute proceedings or cause them to be initiated, but he is not able to institute proceedings himself. If proceedings are already in process, he has the right to request a general prosecutor to take the necessary steps for his opinion to be followed.

The Minister of Justice has no right to order a general prosecutor or any other prosecutor not to institute proceedings against someone in a specific case or with regard to a specific situation. Nevertheless, once proceedings have been initiated, the Minister of Justice can always request a general prosecutor to order a chief district prosecutor to submit a written opinion leading to the dismissal of the case.

Specific instructions must in any event be in writing and added to the file. If the final recipient of the order, i.e. a chief district prosecutor, refuses to carry out the instruction, the Minister of Justice is not able

to force him to do so or to replace him. The recipient remains free to carry out the order or not. Nevertheless, this does not mean he will be immune from disciplinary measures if he commits a breach of duty by not carrying out an instruction. Depending on the circumstances of the case, for example, the mere act of disregarding an instruction does not constitute a breach of duty. However, a general prosecutor can lodge an appeal against a judgement made by a first instance court in place of a chief district prosecutor if the latter refuses to bring this appeal himself.

- The Netherlands

Specific instructions during preparatory proceedings only occur in cases where the Board does not share the Minister's views. Such an instruction can affect a decision to investigate, charge or bring a person before the court. During the court proceedings, such an instruction could affect the filing of an indictment or the submission of a specific opinion. The Minister of Justice may also issue an instruction affecting appellate remedies against a decision taken by a judge or court, to apply for or withdraw a remedy.

The Minister can issue a negative instruction, i.e. to not prosecute a matter or to dismiss a case.

A strict procedure must be followed to validate specific instructions. Such instructions must be in writing and motivated to the Board of General Prosecutors, which then pronounces its opinion accordingly, with exceptional verbal instructions required in writing within a week. The instruction and the opinion of the Board are referred to the lower prosecutor concerned and added to the file. In addition to the latter procedure, negative instructions should be referred to both chambers of parliament with the Board's opinion.

9.2 The structure of the prosecution service

9.2.1 The structure and heads of the offices

9.2.1.1 Structure

During the Communist period, the prosecutors were subordinated in every lower office, local, district or regional, with deputies answering to their respective heads of office, and the lower offices to the general prosecutor. There was in principle no hierarchy between the lower offices. In addition to minor domestic readjustments, such as the reorganisation of the distribution of jurisdictions – for example, in the Czech Republic local levels were included in the districts – a

major modification in the organisation of the PPS in both ex-Communist countries came in the form of the re-establishment of the hierarchy between offices. Moreover, the creation of a prosecutors' office with an extra level of jurisdiction should be stressed. There is now a national office in Poland and there are now two higher offices with different territorial jurisdictions (in Prague and Olomouc) above the regional offices in the Czech Republic.[520]

In the PPS structures of the four countries studied, important differences characterise the office that upholds the law before the Supreme Court. The general prosecutor and his deputies have this jurisdiction in Poland and the Czech Republic. In the Netherlands the office of the *procureur-generaal* carries out this task, although it is no longer part of the PPS. In France, the *parquet général* is formally part of the PPS but has no supervisory function over it.

In general the other prosecution offices in all four countries have the same jurisdiction as their local courts. A prosecutor appointed to a particular office carries out his duties in the same territorial jurisdiction as the court where the office is located. However, several particularities should be underlined. In the Netherlands the Board of General Prosecutors, the head of the PPS and the national and functional offices – currently included within the national office (see 4.3.1.2.2) – have general jurisdiction in specific cases, while in Poland this role is performed by the national office. The national office in these two countries centralises relations with Eurojust. In the Czech Republic, this is the jurisdiction of the general prosecutor's office and in France of every appellate prosecutor or investigative judge. Prosecutors' offices in Poland are separate from the court, e.g. a deputy district prosecutor can act before a provincial court. In the Netherlands public prosecutors of a certain level (district or regional) can temporarily exercise their functions in courts of the same level without restriction, and a public prosecutor of a certain level may exceptionally substitute a prosecutor of a different level.

9.2.1.2 The heads of the prosecution offices

The head of the PPS structure in the four countries differs depending on administrative or functional duties. The administrative head is the Minister of Justice in all countries. The functional head, i.e. the public prosecutor with the highest rank with supervisory duties over lower prosecutors in criminal proceedings, varies from

[520] In addition to this structure, Poland possesses the Institute of National Remembrance under the direct supervision of the general prosecutor, see 6.3.3.5.

one system to another. In Poland, the Czech Republic and the Netherlands the supervision of the PPS remains integrated in one organ within the limits established by law (see 9.3.2). In Poland and the Czech Republic, one person, the general prosecutor, is superior to all prosecutors. In addition, the Polish general prosecutor is the direct superior to the national office and the Czech general prosecutor is the direct superior to the higher offices. In the Netherlands, a Board of General Prosecutors supervises the PPS. The French system remains structurally dispersed because the supervisory function is divided between thirty-five appellate general prosecutors.

In principle, the head of each office manages the office and is the direct superior of the prosecutors and staff within the office, but the relationship between offices is not uniform. In the Netherlands the hierarchy is only established between the Board and all other offices. There is for example no hierarchical difference between an appellate office and a district office. This hierarchical structure is in force in the other countries within the limits established by law. In France the chief appellate prosecutors are superior to the chief district prosecutors within the territorial jurisdiction of their respective courts of appeal. In Poland, the national prosecutor is superior to the appellate prosecutors who are superior to prosecutors of provincial and district offices within the jurisdiction of the appellate office. Provincial prosecutors are superior to prosecutors from district offices in the jurisdiction of the provincial office. In the Czech Republic higher prosecutors are superior to chief regional prosecutors who are in turn superior to chief district prosecutors within their respective jurisdictions.

9.2.1.3 The flow of instructions received by lower prosecutors

Concretely, a lower prosecutor receives instructions from the head of his or her office in all the countries studied. Within the limits established by law, a lower prosecutor can also receive instructions from the Minister of Justice (see 9.1.2.4) and from public prosecutors from other offices of a higher level. In the Czech Republic, the Netherlands and France instructions can only arrive from a direct superior – for example, from the Board to other prosecutors in the Netherlands, from a higher prosecutor to a regional prosecutor in the Czech Republic, or from an appellate prosecutor to a district prosecutor in France. Only in Poland, where appellate, provincial and district levels are found, can instructions originate from a superior who is not the immediate superior, such as

a district prosecutor receiving instruction from an appellate or national prosecutor.

9.2.2 Appointment and responsibility of public prosecutors

9.2.2.1 Appointment of public prosecutors

There are particularities to the appointment procedure for high-ranking prosecutors in all four countries. After the regime change in the Czech Republic and Poland, the power to appoint general prosecutors was transferred from the President of the Republic or the Council of State, respectively, to the government at the Minister of Justice's motion, in the Czech Republic and to the President in Poland.[521] In France also, the government appoints the general prosecutor at the Supreme Court and the appellate general prosecutors. Only in the Netherlands are most of the public prosecutors formally appointed by the Queen; though in reality, the Minister of Justice decides all appointments because he or she is accountable to the service.[522] The Minister of Justice in all four countries, and acting as a general prosecutor in Poland, currently appoints all other public prosecutors.

An additional state body can issue an opinion or request in support of a Minister of Justice's decision to appoint public prosecutors. In Poland, this body takes the form of assemblies of prosecutors established at the various levels of the PPS. In France it is the section of the High Council of the Judiciary with jurisdiction over public prosecutors. Finally, in the Netherlands it is the Board of General Prosecutors. In the Czech Republic, the chief prosecutor of the superior office nearest to the office where the prosecutor is to be appointed will apply to the Minister – for example, the chief regional prosecutor heading the office established in the same jurisdiction will request the Minister to appoint a chief district prosecutor. These opinions or requests are not binding on the Minister of Justice in any of the countries studied.

All countries have a procedure to permit the temporary relocation of a prosecutor from one office to another. If the period of relocation is less than two months, this procedure does not always require the

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[521] During the Communist period, the decision to appoint the general prosecutor's deputies and the chief *voivode* prosecutors was taken by a different body than that which took the decision to appoint other prosecutors; today, the general prosecutor requests the Prime Minister to appoint his deputies, including the national prosecutors.

[522] The Queen co-signs the order.

prosecutor's consent. In Poland the general prosecutor decides on this temporary relocation, in the Netherlands it is the Board, in France the Minister of Justice and in the Czech Republic the chief prosecutor of the office, being the immediate superior to both affected offices.

9.2.2.2 Responsibility of public prosecutors

In the two ex-Communist countries the depoliticisation of the PPS affected the professional obligations and political accountability of public prosecutors. The body charged with disciplinary sanctions followed the above-mentioned modifications concerning the power of appointment. The body taking the final decision to sanction a prosecutor depends on the latter's rank and the gravity of the breach of duty.

All countries hold public prosecutors responsible for breaches of duty. Disciplinary sanctions vary from reprimand to dismissal. The definition of a breach of duty that can lead to dismissal remains very vague and allows the disciplinary body leeway for interpretation.

The decision to remove a prosecutor from his post is always taken by a political body. In Poland the decision to sanction a prosecutor lies with the general prosecutor (the Minister of Justice), or the Prime Minister with regard to national prosecutors and other deputies of the general prosecutor. In the Czech Republic the final decision to remove a prosecutor from his functions is taken by the Minister of Justice. However, the Minister may take this decision only at the motion of the general prosecutor or of the chief prosecutor who recommended the appointment of the affected prosecutor. In the Netherlands, the organ that appointed and recommended the prosecutor has jurisdiction to launch disciplinary proceedings for a breach of duty and to decide on the sanctions. In France the Minister cannot take any decision on disciplinary sanctions against a prosecutor unless the section of the High Council of the Judiciary with jurisdiction over public prosecutors has issued a non-binding opinion. However, all countries permit the prosecutor affected by a disciplinary decision to apply for a review of this decision.

Finally, public prosecutors may be prosecuted and are liable if they commit a criminal offence. The case of Poland is an exception here. First, Polish public prosecutors enjoy immunity against criminal prosecution for petty offences (*wykroczenie*) and a relative immunity against criminal prosecution for other offences. In the latter case, prosecutions are admissible only with the authorisation of a

disciplinary court. This state of affairs may raise questions with regard to the general prosecutor's immunity because no prosecutor is superior to the general prosecutor – the Minister of Justice – and consequently possesses the right to institute disciplinary proceedings (6.3.2.1). The situation is similar in the Czech Republic where the general prosecutor may be dismissed for purely political reasons.

9.3 Relationships within the service

Under the first subheading (9.1.1), we looked at the place of the institution in the state separation of powers and the fundamental and common features of the modern PPS's task in criminal justice. The prosecution service is an institution of the State and a representative of the general interest before courts and tribunals. This may imply a certain degree of independence and impartiality in the public prosecutor's functions. Therefore, the relationship between the PPS and the political decision-makers of the State is a sensitive issue. By definition, the general interest is a concern common to all three powers in a democracy – the legislature, the executive and the judiciary. However, abuses of intervention by one power, such as the executive, into the sphere of another, the judiciary for instance, can happen. The PPS is therefore in a difficult position because it straddles these three powers. Under the second subheading (9.1.2) we considered the solutions found in the various countries to strike a balance between the prevention of abusive political interventions and the executive's intervention through instructions to the PPS to secure the general interest. Thereafter, the repartition of the prosecution's functions within the institution's structure (9.2.1) and the right to appoint and dismiss public prosecutors was addressed (9.2.2). Although differences exist between the above-mentioned issues, it will become apparent that every prosecution service functions according to general principles, such as the indivisibility and unity of the institution, and the hierarchical relationship between prosecutors implying subordination and substitution between prosecutors (9.3.1). A particular focus will be the obligation to execute orders and its limits (9.3.2).

9.3.1 Indivisibility, unity, hierarchy and substitution – the principles in the functioning of the PPS

9.3.1.1 Indivisibility and unity in the accountability of the institution

During the Communist era, all the members of the *Prokuratura* acted for the *Prokuratura* and the *Prokuratura* was responsible as one institution for any action carried out by any of its members – naturally, within the limits established by the prosecutors' personal disciplinary and criminal responsibilities. It remained so afterwards. The PPS in each of the four countries is a single indivisible institution, particularly because it always represents the same unique party – society.

It logically stems from this that as far as rights and obligations provided by criminal procedure and other specific statutes are concerned, all prosecutors are entrusted with the same functions in criminal proceedings. For a court, a judge, a victim or an accused, the person acting in the name of the PPS in criminal proceedings commits the institution as a whole. No one can challenge the fact that one prosecutor starts proceedings and another one continues them.

This indivisibility and unity in the accountability of the PPS implies the notion of neutrality – also called indifference in certain countries such as Poland or France – of public prosecutors in the criminal process. The other parties or bodies involved in a case cannot request a participating prosecutor's exclusion on the grounds, for instance, of insufficient qualification or specialisation. However, national legislation provides for several rare exceptions, such as a conflict of interest of a particular prosecutor in a case – e.g. prohibiting a prosecutor to participate in proceedings that affect him or his spouse (see in Poland 6.3.6).

The personality of the prosecutor or the nonconformity of his actions to instructions received from a superior does not affect the validity of these actions in the process. If a prosecutor prosecutes someone who is later acquitted by the court, the fact that he did not comply with the instructions of his superior cannot justify modification of the judgement. The superior can order an appeal and institute disciplinary proceedings against the prosecutor but the prosecution remains admissible and the judgement valid until it is quashed. Only the PPS as a whole is accountable for the decisions made by its members and this accountability is ultimately borne by the Minister of Justice as a member of the government, within the limits of his authority over the service (see 9.1.2.1). Nevertheless, the

accountability of the Czech Minister of Justice is limited because he does not intervene in PPS activity. He is responsible for the appointment of prosecutors and the choices made concerning the appointment of the general prosecutor. His accountability concerning the enforcement of the criminal policy by the PPS is indirect.

An interesting variation on this principle is found in the Dutch *vertrouwensbeginsel* or legitimate expectation (see 4.4.3.2.3), where a suspect enjoys the PPS's promise that he will not be prosecuted, this may lead to a subsequent prosecution, e.g. by a lower prosecutor, being inadmissible before the court. Nevertheless, the responsibility lies not with a particular prosecutor but with the whole institution, because the promise commits the whole institution.

9.3.1.2 Hierarchy and subordination

Of course, indivisibility and unity do not mean that there is no distinction between the different ranks of prosecutors and their respective rights and obligations in criminal proceedings. The PPS is a hierarchical institution consisting of public prosecutors with different ranks implying a hierarchical subordination of lower prosecutors to their superiors. In the Czech Republic and Poland after the democratisation process, the hierarchical subordination between offices of different levels, e.g. between local and district or district and appellate, was re-established. It no longer consists of the hierarchy between general prosecutor and other prosecutors, and between the head of an office and his deputies. It should be noted that in the Netherlands the exact opposite change in the hierarchical structure has recently been implemented – i.e. hierarchical links have been severed between offices at different levels, leaving only those between the Board and all other offices (see 9.2.1). The principle of hierarchy in all the countries consists of the right of superior prosecutors to instruct lower prosecutors. Lower prosecutors are in principle obliged to comply with these instructions.

The concept of hierarchy in the institution is closely related to the concept of unity in the exercise of the prosecution's functions. One of the tasks of the PPS is to uphold criminal law. In general, one law deals with one legal problem and is issued by one parliament. In order for public prosecutors to uphold this law and fight crime efficiently, unity in the interpretations of new or existing statutes is necessary. This aim is ensured by uniform instructions from the top to the bottom of the institution. This is one of the purposes of general instructions. Nevertheless, differences are found between the four

countries in the uniformity of these instructions. Such differences can be explained by the desire to favour local criminal policies, as in France, where a district prosecutor is not strictly bound by the general instructions of his general prosecutor.[523] In addition, such differences can also be explained by the purpose of general instructions, which differs between the countries where the opportunity principle is in force and where the principle of compulsory prosecution is in force (see 9.1.2.4.1).

9.3.1.3 Subordination and substitution

One important difference between the four current systems and the Czech and Polish Communist systems should be stressed. The Communist system implied a strict subordination of lower prosecutors to their head of office and ultimately to the general prosecutor. Each prosecutor was subordinated to his direct superior and had to obey his orders, however, the subordination to the general prosecutor was all-encompassing and took precedence in all cases. The general prosecutor could act in place of any prosecutor or could order any prosecutor to act in particular proceedings and in a particular jurisdiction. The general prosecutor could overturn an order from a direct prosecutor to a lower prosecutor, for example. If the hierarchy between prosecutors is still a common feature of all PPSs today, especially in the Czech Republic and Poland where the general prosecutor retains a specific position in the hierarchy, all systems provide limits to subordination (see 9.3.2).

In addition to instructions issued by superiors to deputies, the hierarchical relationships between the members of the institution are illustrated by the principle of substitution. Diversity in the ranks and rights of prosecutors exists within every PPS. A certain right – e.g. a right to appeal a particular decision – may be vested in a prosecutor of a particular rank. A lower rank prosecutor may have the right to exercise his superior's right by way of substitution and vice versa. The principle of substitution is a solution combining unity and this diversity, which is common to all systems. Substitution is a matter of internal organisation and can occur at any time during pending proceedings. It does not affect the continuation of the proceedings.

Within a single office, substitution between deputies takes place as of right. In all countries, a chief prosecutor has the right to take over

[523] This does not mean, of course, that local prosecutors cannot take local circumstances into account and adapt a national criminal policy or submit these circumstances to their superiors in order for the national policy to be adapted.

the functions of his deputies or to replace a deputy with another. In principle the affected prosecutor cannot oppose the exercise of this right by his superior. Lower prosecutors may substitute for each other in any case. Outside the jurisdiction of the same office, in practice substitution does not occur unless a prosecutor is temporarily appointed or definitively transferred. In France an appellate prosecutor has no right to substitute a district prosecutor unless the latter authorises this substitution. A variation exists in the Dutch system, where a prosecutor from any district may substitute for any other prosecutor from another district as of right, or an appellate prosecutor from an appellate office may substitute for another appellate prosecutor in another appellate office as of right. No official temporary appointment is therefore necessary. In fact this provision is in accordance with a recent governmental order establishing a system of jurisdictional substitution (see 4.2.1). During substitution, the substituting prosecutor remains competent in his office, while a temporary transfer implies that the affected prosecutor temporarily loses his competence to act in his office.

9.3.2 The obligation to carry out the instructions of superiors and the limits of subordination

9.3.2.1 Instructions issued by the highest-ranking prosecutors to other prosecutors

In principle the highest-ranking prosecutors straddle the prosecution service and the executive. Therefore, it is important to distinguish them from other superior prosecutors with regard to the right to issue instructions. Whilst in the Czech Republic, Poland and the Netherlands, the functions of the highest-ranking prosecutor are assigned to one general prosecutor or a single body consisting of several general prosecutors, France has several general prosecutors distributed across thirty-five appellate prosecution offices. By inference, in France the scope of the general instructions from the highest-ranking prosecutors is limited to district offices within the jurisdiction of the appellate court where the general prosecutor is appointed. As this affects specific instructions, this scope is limited to the chief district prosecutors of the jurisdiction. In other countries the scope is national. However, the right of the French Minister of Justice to issue instructions to all prosecutors (see 9.1.2.4.2) tempers this statement. Superior prosecutors in all four countries can issue general instructions that do not affect pending cases and specific instructions that do affect pending

prosecutions. However, the scope, the purpose and the binding force of these instructions vary according to the superior's rank.

- General instructions

One of the aims of the general instructions is to explain how to implement new or existing laws affecting criminal proceedings. The instructions may also comprise guidelines on the kinds of sentence to recommend according to the type and circumstances of the offence committed or on how to amend an opinion in a pending case if the circumstances alter the character of the case. In France and the Netherlands such instructions also affect the prosecutors' discretion and establish guidelines for the implementation of the opportunity policy. No country requires specific formalities for the validity of general instructions, however, they are often published. They are binding on all affected prosecutors in the Czech Republic, Poland and the Netherlands. In France the binding effect of general instructions is limited by the *pouvoir propre* of district prosecutors (see 3.3.3.1). If a district prosecutor decides to oppose an appellate prosecutor's instructions and takes a different position from his superiors, the latter have no means to overturn the decisions taken by the district prosecutor or replace him with another prosecutor, whereas in other countries the superior may substitute a deputy for the recalcitrant prosecutor. Nevertheless, the opposition of a district prosecutor can be considered a breach of duty and result in disciplinary measures.

- Specific instructions

By way of positive specific instruction, in all four countries the highest-ranking prosecutor can request information and files, order the decision to drop or dismiss a case be withdrawn and order that a prosecution be instituted or re-instituted. In principle, the highest-ranking prosecutor may also order a lower prosecutor to submit a specific opinion to a court once an indictment is filed. However, in the Czech Republic, there are doubts as to whether such an opinion can affect a decision to dismiss the case taken by a prosecutor at the hearing. Again, in France, the *pouvoir propre* of a chief district prosecutor tempers the superior's right.

By way of negative specific instruction, in the Netherlands and France the highest-ranking prosecutor can directly order lower prosecutors not to prosecute a case. In the Czech Republic and Poland the situation is ill-defined. Although in practice such an order is extremely rare, it can only be forwarded to the direct superior of the chief prosecutor of the office with jurisdiction in the case. In the

latter two countries the law does not really prevent or authorise the highest-ranking prosecutor to order the dropping of a case.

There is no standard between countries as to the form of specific instructions. The Dutch Board and the Czech general prosecutor may issue such instructions either in writing or verbally, whereas in France they must be written and added to the file, and in Poland they must also be written and reasoned at the request of the recipient prosecutor.

9.3.2.2 Instructions issued by other superior prosecutors

Prosecutors other than highest-ranking prosecutors, with a superior rank in the hierarchy, can issue instructions with a general scope concerning certain types of cases or delegate to lower prosecutors within the limits of the PPS hierarchy (see 9.2.1). Of course, their scope can only be general within the jurisdiction where the prosecutor in question has a superior rank. Depending on the purpose of the instruction, lower prosecutors may have discretion to comply or not. Alternatively, superior prosecutors may issue specific instructions concerning particular pending or closed cases. In this way, a superior can order a prosecution instituted or not, issue an instruction on how to proceed in a case, or reinstate a dismissed prosecution. In theory, specific instructions are always binding on lower prosecutors and may be issued verbally or in writing.

In Poland only a direct superior may order the dismissal of a case, instructions are always in writing and must be reasoned at the deputy's request. Moreover, a specific instruction must be added to the file. In the Czech Republic a specific instruction must be in writing if a superior other than the head of the recipient's office issues it or if the recipient so requests. In France the general prosecutor's instructions are in writing and added to the file. In the Netherlands instructions from the Board may be written or verbal.

9.3.2.3 Limits of subordination

The strong unilateral central authority of the general prosecutor in the Czech Republic and Poland during the Communist period left almost no room for the independence of prosecutors in the exercise of their duties. Their subordination to their superiors was almost unlimited. In the absence of instructions from a superior, and unless the case was extremely common, every prosecutor was required to ensure that his opinion was in accordance with the views of the hierarchy. This situation changed under the new regimes. All the countries permit public prosecutors to be independent in the

exercise of their duties in the absence of instructions from a superior. Unless the case is particularly complicated, a prosecutor is not required to request instruction.

During a hearing where verbal submissions are compulsory, the participating prosecutor can set his superior's instructions out in writing if the evidentiary status of the case has obviously changed. This right derives from the reception of the principle *la plume est serve, la parole est libre* (2.3.3.3). Under these circumstances, it should be clear that the instruction of his superior would have been different. However, the lower prosecutor must always remain loyal to his superior and must try to interpret how the change of circumstances would affect the instructions and adapt his actions accordingly. In the Czech Republic and the Netherlands an accurate set of general instructions is published. These deal with the appropriate measures a prosecutor should propose in specific circumstances. Outside the limits of subordination, prosecutors may enjoy independence, the extent of which varies slightly from one country to the other and according to the rank of the instruction's addressee.

In the Czech Republic and Poland, if a deputy refuses to enforce a superior's instructions, he must explain the reasons for his refusal. The refusal can bring about the replacement of the prosecutor. In France if a chief district prosecutor disregards a general prosecutor's instructions, the latter cannot substitute for him. If a lower prosecutor refuses the chief district prosecutor's instructions, the latter has the right to substitute for him and execute his own instructions. In the Netherlands a prosecutor technically has no right to disregard his superior's instruction. He may instead always request to be excluded from the case.

9.4 The role of the prosecution service in preparatory criminal proceedings and in forms of review

Until the decision is taken to bring a criminal case to court or to take another decision, the prosecution authority is entitled to carry out the actions necessary for the discovery of the truth and the preparation of the case, and to decide what will happen to the suspect. It could transpire that a public prosecutor is the first to learn of a crime. However, in general, the police are the first state organ to discover the facts or to receive a report from a victim or witness. Unless there is sufficient information in the discovery or the report, preliminary proceedings may be necessary to discover the truth and prepare the case for settlement. In certain circumstances, despite having

sufficient information about the occurrence of a crime, the PPS, and sometimes the police, can refuse to institute such proceedings. The PPS may also have the right to dismiss instituted proceedings. In principle a public prosecutor will supervise the execution of preliminary proceedings and decide how the case should be settled.

In this section a comparison of the four systems studied will underline, where significant, the modifications brought about by the democratisation process. Firstly (9.4.1), the decision to inform a prosecutor of criminal facts and the procedure to follow in doing so and the institution of proceedings will be compared. The standards and variations in the prosecutor's right to take coercive measures and to supervise preliminary proceedings will be explained. Attention will also be paid to the various mechanisms of control affecting the prosecutor's rights during this phase of the criminal process, available to the plaintiff, a judge or a court, for instance.

Secondly (9.4.2), the various decisions and the legal basis thereof available to the prosecution service in settling a case will also be compared. The emphasis is on the decision to dismiss an investigated case, the moment of filing the indictment with a single judge or a court, and the moment the public prosecutor becomes one of the parties to the process and entitled to support the prosecution in the public interest. From this moment, the right to decide on the case is transferred to a judge or court.

9.4.1 Uncovering the facts, starting and carrying out criminal preliminary proceedings – the prosecutor's role [524]

9.4.1.1 The start of proceedings

The democratisation process enhanced the role of the prosecution service to the detriment of the police and other state bodies. In the Czech Republic, for example, the police must report the commission of every crime to the PPS. The inquiry – carried out by investigators from the security corps – and investigation (see 7.5.1.2) have been replaced by an investigation conducted by the police under the supervision of the PPS. In Poland the distinction between the inquiry and the investigation is still in force, though the militia has lost its powerful function (see 5.5.1.1). Today, the law provides which body has jurisdiction to start an inquiry or an investigation according to the gravity of the facts. The PPS supervises inquiries and investigations.

[524] The grounds for refusal to commence proceedings will be dealt with under the next subheading (9.4.2.3).

In France an investigation can be conducted in the form of a preliminary inquiry – the main coercive measures require the consent of the suspect or the authorisation of a judge – or of a *flagrante delicto* inquiry where the police under direct supervision of a prosecutor have greater powers of coercion without the consent of the suspect.[525] In the Netherlands there is one type of investigative procedure providing the police with rights which are more or less coercive according to the circumstances of the case, e.g. *flagrante delicto* or otherwise. The police carry out investigations under the supervision of a public prosecutor, who must request the intervention of an investigative judge for certain coercive measures to be taken.

All systems allow either the police or a prosecutor to start proceedings *ex officio* on discovery of the facts or upon receipt of a victim's or witness's report. The purpose of these proceedings is to screen the facts and find evidence that a criminal offence has been committed and by whom. In addition to the police and the PPS, other State bodies have similar rights, but to a very limited extent, as provided by law.

The obligation on the police to inform a prosecutor of the report or the discovery of a fact at the outset of a case is not common to all systems. In certain systems, such as the Czech, the law provides that a prosecutor should always be informed as soon as possible or within forty-eight hours. In France only the police are under the obligation to immediately inform a prosecutor in *flagrante delicto* cases. In the Netherlands the police inform the prosecutor as soon as possible, while in Poland there is no general obligation to inform unless proceedings in the form of an investigation are necessary.

All systems permit the police and sometimes other State bodies to drop a case at its outset. In principle the PPS supervises police activity in criminal matters. However, the law provides different forms of control over the police in the exercise of their discretionary power to drop a case. Under the Czech system, the police do not need a prosecutor's approval to drop a case. However, since a prosecutor is

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[525] For the purpose of this research, *flagrante delicto* is when a suspect is caught in the commission of an offence or immediately afterwards. French criminal procedure also provides for a judicial investigation conducted by an investigative judge. However, this institution falls outside the scope of this research. The rights of a public prosecutor during the judicial investigation cannot really be compared with the rights of a public prosecutor during a police investigation in the other countries because he loses his status as *dominus litis* during the judicial investigation, see 8.4.2.2.3.

invariably rapidly informed of the report, he or she may reverse the police decision. In Poland a prosecutor does not have to be immediately informed in certain cases, but a prosecutor must always approve a police order to desist from commencing proceedings. In France it is also not always compulsory to inform the prosecutor immediately. However, in theory, the police cannot refuse to note a complaint or drop a case. Although the PPS exercises general control over the police, approval for dropping a case may be implicit in certain cases. In the Netherlands the police have the right to drop a case, but the grounds for dropping a case must comply with the prosecution policy and the guidelines issued by the PPS.

The plaintiff has a right to challenge the refusal to start proceedings in all the systems. If the police take this step, the plaintiff can report it to the prosecutor directly. The victim has at all times the right to appeal the prosecutor's refusal to start proceedings before a superior prosecutor in all the systems. In the Netherlands this appeal can also be filed with the court. Ultimately, in Poland and France the victim of a crime for which the public prosecutor refused to start proceedings may file his own indictment with the court.

9.4.1.2 During the proceedings

After the collapse of Communism, modifications in criminal procedure have limited the right of the PPS to order coercive measures in particular. Today, in the Czech Republic and Poland only the courts have the right to order preliminary detention.

All systems have the public prosecution authority supervise preliminary proceedings and issue the orders and instructions necessary for the police to efficiently carry out proceedings. In addition to actions that the police undertake *ex officio*, there are also actions requiring a prosecutor's decision and sometimes a court decision. Decisions to take coercive measures, such as custody or preliminary detention, are often made with the authorisation of a prosecutor or court.

All systems permit the police to take a suspect into custody if it is necessary and urgent and in particular if he is caught in the act of committing a felony or immediately afterwards (*flagrante delicto*). In Poland or the Czech Republic the immediate notification of a prosecutor is not necessary, whereas in France the prosecutor must be informed immediately of the custody. In the Netherlands, in principle, only a prosecutor may take a decision on custody.

All systems limit custody to a short period only (between twenty-four and forty-eight hours).[526] Extensions are possible. If the circumstances of the case and/or the character of the suspect so require, preliminary detention for a longer period may be ordered, though only by a court or a judge. The prosecutor can only ask the court or the judge to order the detention. The detention period varies from one country to another, and judges or courts only decide on its extension.

9.4.2 Concluding preliminary proceedings[527]

9.4.2.1 Preparing the indictment

In all the countries once preparatory proceedings are completed, a prosecutor decides on further prosecution. However, the police may participate to varying extents in the preparation of this decision. If there is enough evidence to prove that a specific person has committed a criminal offence, a notification of the charges and an indictment can be issued. In Poland, the Czech Republic and the Netherlands the police or the prosecutor notify the accused of the charges. Thereafter, the prosecutor issues and files the indictment with the court. In Poland the police prepare the indictment and in the Czech Republic they apply to the prosecutor with the facts, evidence lists and a possible decision on further prosecution. In the Netherlands in minor cases a senior police officer may prepare a standardised indictment under the control and responsibility of the public prosecutor, who maintains full power of decision. On the contrary, in France the police merely hand the case on to a prosecutor without submitting an application or preparing an indictment.

Irrespective of who prepares the indictment, the public prosecutor checks the legal qualification of the facts. In principle a public prosecutor is the only body that has the right to file an indictment with the court and summon the accused. From that moment and until the hearing starts, only the prosecutor has the right to withdraw the indictment. This withdrawal affects the progress of the proceedings before the court in different ways. In France, in

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[526] Special statutes concerning acts of terrorism may provide for longer periods.

[527] For details for each country separately, the reader should refer to the following sections – 3.4.3.2 and 3.5.1 for France; 4.4.3.2 and 4.5.1 for the Netherlands; 5.5.1 and 5.6.1.1 for Poland under Communism; 6.4.2 , 6.4.3.2 and 6.5.1.1 for Poland today; 7.5.1.2, 7.5.1.4 and 7.6.1.1 for the Czech Republic under Communism; and 8.4.2.2.3, 8.5.1.1 and 8.4.2.1.2 for the Czech Republic today.

principle, once an indictment is issued by the court its withdrawal does not affect the progress of the trial. All other countries understand a withdrawal as a signal to halt proceedings until the start of the main hearing. In Poland and the Czech Republic once the hearing has started, withdrawal of proceedings is possible unless the defendant insists on their continuation.

9.4.2.2 Out-of-court settlement, settlement and conviction without hearing

All countries display a clear tendency towards providing simplified proceedings inspired by the common law guilty plea and to limit, not to say avoid, recourse to a complete court hearing. Such proceedings are available to the PPS when prosecuting a defendant charged with an offence carrying several years imprisonment and/or a fine as a maximum penalty. When such proceedings are pursued, the decision can vary from a conditional or definitive dismissal and victim's damage compensation to a conviction and sentence that is more lenient than imprisonment. The prosecutor takes part in this decision-making process to a different extent in each system and the conditions for the validity of the proceedings vary.

First, the PPSs are entitled to divert a case from public prosecution by means of various procedures if the accused acknowledges his guilt, the victim agrees and the accused repairs the damage caused by the act. In France, Poland and the Czech Republic the prosecutor can offer to mediate between a victim and an offender. In France for minor offences only, mediation can lead to the suspension of public prosecution as long as the limitation period permits. In Poland this only applies to offences constituting a low degree of social harm, with mediation being a step towards conditional dismissal by a court. In the Czech Republic, for offences punished by up to five years' imprisonment, a public prosecutor can dismiss a prosecution and settle the case without recourse to a court. In the Netherlands, according to the guidelines of the PPS, a public prosecutor may recommend the settlement of a case without its prosecution to the accused and the victim of a crime if the accused repairs the damage caused by his behaviour.

In addition, cases can be settled by the PPS without a hearing in all systems in cases where the accused is charged with an offence sentenced by imprisonment for up to five years (six in the Netherlands) or a fine, by means of a conditional dismissal – e.g. undertaking unpaid community work or victim's damage compensation – and, in the Netherlands, also through an agreement

(*transactie*) between the prosecutor and the accused, i.e. payment of a fine against dismissal of the case. One of the main differences between the various proceedings for conditional dismissal is in the autonomy of the prosecutor in the decision-making process. In Poland and France the court approves the conditional dismissal in a simplified hearing whereas in the Netherlands and the Czech Republic the court is in principle not involved. In all the systems, if the conditions are respected during the given probation period, no prosecution before a court will be purused and the right to prosecute expires.

Finally, in Poland and France the law provides for conviction without hearing. In the indictment, the PPS has the right to apply to the court to decide without a complete hearing. For example, the conviction without hearing is admissible if the accused acknowledges his guilt for a crime carrying a fine or a penalty of up to ten years' imprisonment in Poland and five in France. The court will decide to settle the case without a complete hearing on receiving an application included with the prosecutor's indictment. Conversely, in the Netherlands, the prosecutor can issue an order for conviction out of court and without the accused acknowledging his guilt for a criminal offence carrying a penalty of up to six years' imprisonment. However, the accused and the victim have the right to challenge such a criminal order by way of opposition (*verzet*) within fourteen days of the day the accused gained knowledge of the decision. If the opposition is grounded, the proceedings continue as though the defendant had received an ordinary indictment.[528] Another distinguishing feature of conviction without hearing is the right of the public prosecutor to propose a penalty that does not carry a custodial sentence.

9.4.2.3 Legal basis of the prosecutor's discretion

Of course, if the democratisation process has deeply modified criminal policies motivating the decision to prosecute – e.g. the abolition of the educational purpose of Socialist criminal law – the legal basis for such a decision remains technically similar to that in the previous system.

In applying the principle of compulsory prosecution, proceedings that do not meet one of the fundamental conditions provided by law are inadmissible and should be dismissed if already started. One of the

[528] This new institution, called *strafbeschikking*, replaces on many occasions the previous *transactie*, see 4.4.3.2.1.

most important of these conditions is a statute to proscribe the criminal behaviour and the related penalty for which a defendant is being prosecuted (*nullum crimen, nulla poena sine lege*). All four countries also prohibit the admission of criminal prosecution if the same accused has already been judged for the same facts (*ne bis in idem*), if a pardon or amnesty has been granted, if the limitation period has expired, if the perpetrator remains unknown or if the acts described in the indictment do not constitute a criminal offence. In addition to the specific national differences in the latter examples, the main difference between the different countries capable of affecting the PPS's discretion is in the definition of a crime. In Poland and the Czech Republic one of the constituent elements of a crime is the notion of the 'insignificant social danger of the act' or 'social harm' in Poland. The relationship between criminal behaviour as defined by law within the socialist notion of 'insignificant social danger' remains in force in the current Czech and Polish systems. Nevertheless, prosecutors do not use the concept to outlaw persons endangering society because of their social or political affiliations. Criminal law defines precisely what kind of behaviour constitutes a criminal offence; however, such behaviour must also pose a danger to society. In France and the Netherlands the notion of the social danger is not a general constituent element of a crime. When assessing the existence and gravity of this danger, the Czech and Polish public prosecutors have a discretionary power comparable to the Dutch or French prosecutors' appreciation of the general interest when applying the opportunity principle (see on this principle, 3.4.2.2 and 4.4.2.1).

Without prejudice to the solutions above (9.4.2.2), if a prosecution meets these admissibility prerequisites, the PPS has a duty to charge the accused and seek a conviction from a criminal court. Nevertheless, in certain cases a public prosecutor retains the right to dismiss a case despite all the prerequisite conditions being met – i.e. that the perpetrator is known and there is sufficient evidence that he has committed the offence prosecuted. In principle in Poland and the Czech Republic, once a case meets the conditions for an admissible prosecution, a prosecutor has no other option but to prosecute before the court. Nevertheless, since the collapse of Communism, sporadic legislation has enhanced the prosecutor's discretion at this stage and provides a legal basis for exceptions to compulsory prosecution. For example, prosecutors have the right to dismiss proceedings already instituted when the consequences of the act are insignificant (in the Czech Republic) or because imposing a

penalty would be inexpedient (in Poland).[529] In France and the Netherlands the prosecution can dismiss the case if it is not opportune to prosecute, though it is probably better to dismiss a case because it is in the general interest to do so. The general interest is difficult to define and often depends on the domestic legal culture, national criminal policy, local conditions, the circumstances of the case or the circumstances of the perpetrator and the victim. A common denominator in all four countries is the absence of real danger or the incidence of the criminal act on the social legal order, i.e. the criminal behaviour did not harm society. Behind the notion of the general interest there is, obviously, also the necessity for the justice administration to employ its limited human and financial resources to fight the most important and serious crimes.

It seems that all systems, whether implementing the principle of compulsory prosecution or not, converge on providing public prosecutors with the opportunity of deciding whether to prosecute. This trend is clearly illustrated by the integration of the socialist notion of insignificant social danger into the current criminal law, and in the sporadic legislation promoting exceptions to the obligation to prosecute cases that would otherwise be autmomatically prosecuted if the principle of compulsory prosecution was strictly respected.

9.5 The rights of the prosecution service in forms of review

In principle, on a valid indictment, the court or the judge has jurisdiction to settle the case and, following a hearing, will issue a decision, i.e. the judgement. An appeal before a superior court is available against this kind of decision when it is validly issued, in order to have the merits of the case or a part of them examined *de novo* (9.5.1.1).

If an appeal is not possible, the parties to a case may file a cassation appeal with the Supreme Court on specific, limited grounds provided by law and request the re-examination of questions of law. It is also possible that new facts or circumstances unknown to the first instance judges or, where applicable, to the

[529] Technically, the level of social danger established by the legal definition of a criminal offence should be distinguished from the degree of dangerous consequences caused by the act appraised by a prosecutor once proceedings are instituted. In the first case, proceedings cannot be instituted because they would be inadmissible, while in the second, proceedings instituted and admissible for prosecution before a court are dismissed because a prosecutor deems the harm caused by the offence insignificant, see 8.4.2.2.3.

appellate judges, are discovered after the decision on a case becomes definitive. Under such conditions, the reopening of proceedings may be possible (9.5.1.2).

9.5.1.1 The public prosecution's right to challenge decisions made at the first instance

Very few modifications have been made to the procedure in force under the socialist system as regards the rights granted to public prosecutors to appeal first instance judgements. A rehearing can be requested in all countries once the court or the judge has made a valid decision on the merits. This right is available to the prosecution service whether the decision was in favour of the accused or not. In principle the time limit for filing the appeal varies from eight days (the Czech Republic) to ten days (France) and fourteen days (Poland and the Netherlands). The time limit to file an appeal commences from the moment the appellant learns of the decision. This could be from the moment the decision is served. However, there is always a public prosecutor present at the hearing when a decision is announced. If the judgement is made and announced at the end of the hearing, the time limit for appeal starts from that day. In France the general prosecutor superior to the district prosecutor who was present at the first instance hearing has two months from the date of the judgement to file an appeal.

9.5.1.2 The public prosecution's right to challenge decisions without appeal

The repeal of the socialist legal system has brought a major modification to the forms of review available to parties against decisions without appeal. The cassation appeal as it is understood in France and the Netherlands was not available during the Communist era. Instead, an extraordinary appeal was the remedy available against a decision without appeal violating the law. However, only certain State bodies were entitled to file such an appeal. Since then, the extraordinary appeal has been repealed and a cassation appeal has been re-established in its place in the Czech Republic and Poland.

All systems provide parties with a cassation appeal against decisions without appeal to ensure the unification of case law and the correction of violations of the law. Such review is only possible on specific limited grounds provided for in the law. These grounds vary from one system to another. Various types of decision can be appealed. In Poland any decision concluding proceedings made by

appellate courts can be appealed. In the Czech Republic all acquittals, convictions and orders of dismissal or settlement can be appealed. In France all acquittals or convictions except judgements of acquittal made by a *Cour d'assises* can be appealed. In the Netherlands an appeal is possible against all judgements on their own merits except for misdemeanours (*overtredingen*), where the sentence does not impose a penalty or measure or if the sentence is minimal. All the systems provide cassation appeal to the prosecution service. The time limit to file an appeal varies from five days in France, to fourteen days in the Netherlands, thirty days in Poland and two months in the Czech Republic.

In addition, there is a system of review of definitive decisions in the interest of the law in Poland and the Czech Republic. A similar review is also available against illegal decisions that cannot otherwise be reviewed in France and the Netherlands. In every system this institution is available to a limited number of persons only. Each system either permits the Minister of Justice to file this motion where possible, as is the case in the Czech Republic and Poland, or to apply to the body entitled to file it, as is the case in France and the Netherlands. There is no time limit to file this application because the aim of the review is to ensure the unity and coherence of the case law of the Supreme Court. Therefore, a decision taken by the Supreme Court upon this kind of application should not, in principle, affect the status of the accused. A judgement of acquittal can never be turned into a conviction even if it breached the law. The Supreme Court takes a decision stating the nature of the violation of the law. Nevertheless, in the Czech Republic the Supreme Court can order a rehearing if the verdict was to the detriment of the accused. The rehearing cannot lead to an aggravation of the sentence.

Finally, if new facts or circumstances ignored during first instance or appellate proceedings are discovered after a judgement has become definitive, the proceedings can be reopened and the case judged anew under very strict conditions. This option for the reopening of proceedings is only available to the prosecution services in Poland and the Czech Republic.

Chapter 10
Concluding remarks

Are the public prosecution services in all Member States the same? To what extent do they differ? Are there European standards for PPSs? How far can the organisation of a PPS and its role in criminal prosecutions differ between Member States but at the same time comply with pre-accession criteria?

Even if the public prosecution services in the four continental law systems studied have the same root (see for the Netherlands 4.1.1, Poland 5.2.1.2 and 5.3.1, and for the Czech Republic 7.1.1 and 7.2.1), its transplantation into different legal cultures and the unique historical developments in each culture have led to different developments and specific characteristics. Comparison reveals multiple areas of similarity between the four prosecution authorities. However, these should not be viewed as European standards given the limited scope (four of twenty-seven countries) of this study. Although it is currently impossible to say what should be constant across all Member States, it is possible to say where systems converge and, within these points of convergence, where variations are possible. I will first look at where these points converge.

Secondly, the study demonstrates that the notion of diversity in the organisation and functioning of the public prosecution services in the European Union cannot be ignored. To facilitate the cooperation of the judicial authorities of the Member States, this diversity must remain within certain limits. These limits are naturally implicit in the phrase 'stable institutions guaranteeing democracy, the Rule of Law, human rights and respect for and protection of minorities'.[530] It seems that a stable PPS, guaranteeing democracy, the Rule of Law, human rights and respect for and protection of minorities should be organised and function according to four principles – independence from unfair or illegal intervention, democratic control, efficiency in the defence of the public interest and respect for human rights. Although

[530] See Chapter 1 on the Copenhagen criteria.

many other interpretations could be put forward, I will consider these standards as the barriers beyond which national diversity would be open to criticism. The methods employed in each constitutional tradition to secure the organisation of the PPS within these limits is not necessarily the same. A multitude of combinations is possible. As an example, I will apply this test to the four countries studied and underline the weaknesses of certain national characteristics.

10.1 Converging trends

1. In the four democratic societies based on the continental legal tradition studied here, one of the current fundamental goals of the PPS is to defend the so-called 'public' or 'general interest' by representing society in criminal justice.[531] This function is a priority for public prosecutors. The importance of this concept is obvious if the aim of the PPS in Communist Poland and Czechoslovakia is compared to the aim of the PPS in modern-day Poland, the Czech Republic, the Netherlands and France. During the Communist era, the Party interest – the achievement of Communism – was the priority and its defence took precedence over the public interest of society as a whole in the case of conflict. To the extent that an absolute monarchy is comparable with a totalitarian regime, this instrumentality of the prosecution authority is unsurprising, since the *Prokuratura* originated in the absolute monarchy of the French *Ancien Régime* where the defence of the interests of the king was the primary task of the public ministry (2.4). Although the task was not completely disregarded during the *Ancien Régime*, the defence of the public interest only really became a priority after the French Revolution (2.2.2.1, 2.6). Despite taking place two hundred years later, the collapse of Communism had a similar impact on the *Prokuratura*. The notion of the defence of the public interest is one of the first modifications made in the new regimes.[532]

2. The PPS represents society, which defines part of the public interest through a democratic process. It is concluded that the four countries' systems each refer to the public interest in the functioning of their respective PPS (9.1.1). Public prosecutors approach the defence of the public interest by upholding the law and representing

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[531] Society is understood here to be a particular community of people living in a country or region, and having shared customs, laws and organisations; see *Compact Oxford English Dictionary of Current English*, Third Edition.

[532] It should, however, be mentioned that modifications were simplified by the fact that before the Communist system was transplanted into Poland and Czechoslovakia, a post-French Revolution-like PPS was already in place.

only one client against crime in justice – society. Again, this act of representing and defending a 'client' flows from the French *Ancien Régime*, in the early days of which *avocats* and *procureurs du roi* were private lawyers defending the interests of the King (2.4.1). Today, society replaces the Crown, implying that society establishes what interests are to be protected and how to safeguard them. In the four countries studied, society expresses the public or general interest through legislative powers to pass laws and the executives that initiate the legislative process, and it explains by means of guidelines how to implement these laws. The PPS in all four countries, especially but not exclusively, upholds criminal law in the public interest. With these laws and guidelines, society defines crimes. Indeed, who could claim that it is not in the public interest, for example, to prevent citizens from killing each other or stealing each other's property? Such prohibition is necessary for the proper functioning of society and to protect it against chaos and barbarity. At first glance, the PPS defends a public interest that seems to have by definition a national scope. However, this begs the question of what the role of public prosecutors is if the scope of the public interest reaches a Community level. If necessary, should public prosecutors be able to refer directly to the public interest, as defined in Community legislation?[533]

3. An independent PPS is possible and advisable. The PPS does not have to depend entirely on the legislature, the executive or the judiciary. In the State organisation of the four countries studied, the PPS is positioned between the national and Community legislatures that issue laws expressing the public interest, an executive that gives guidelines to the PPS on how to enforce laws in the public interest, such as by means of a criminal policy, and a judiciary that interprets these laws in the public interest. The fundamental aim of the PPS is not exclusively the aim of any one of the three powers. In fact the defence of the public interest should motivate the executive, the legislature and the judiciary. Nevertheless, the 'checks and balances' inherent in the separation of powers necessarily also imply

[533] According to the principle of supremacy, all Member States have limited their sovereign rights; Case 6/64 *Flaminio Costa* v. *E.N.E.L.* [1964] ECR 585. In the Case 68/88 *Commission* v. *Greece* [1989] ECR 2685, the Court of Justice decided that the Member States have an obligation to ensure that 'infringements of Community law are penalized under conditions, both procedural and substantive, which, in any event, make the penalty effective, proportionate and dissuasive'. Later, (e.g. in the Case 333/99 *Commission* v. *France* [2001] ECR I-1025), the Court sanctioned Member States that fail to prosecute or take administrative action against individuals breaching EC law.

divergences in interpretation. It is therefore understandable that public prosecutors cannot be expected to be more dependent on one power than on another. Comparison of the organisation of the PPS in the four systems (9.1.1) revealed no uniformity in this respect. In exercising its functions in criminal justice, the PPS does not have to represent one power more than another. Accordingly, the independence of the PPS from the three powers can be perceived as necessary because the defence of the public interest is not the exclusive preserve of any one power. At the same time, it can also be regarded as one of the best ways to achieve a fair balance between the three.

4. If a Member State chooses a PPS dependent on the executive, the latter can limit its role to the mere administration of the service and/or also supervise the activity of prosecutors in criminal justice. The Minister of Justice can have both roles, administrative and supervisory, however, this is not a necessity. This is witnessed in the example of the Czech Republic, where neither the head of the PPS, i.e. the general prosecutor, nor the other prosecutors receive instructions from the Minister of Justice regarding criminal prosecutions. The administration of the PPS by the Ministry of Justice means that the executive handles issues concerning the appointment and discipline of public prosecutors, and sometimes the budget. The comparison of the systems revealed that the status of prosecutor is awarded for an unlimited period and may be revoked only after disciplinary proceedings establish a breach of duty. Public bodies other than the Minister of Justice can participate in the appointment and disciplinary proceedings. It seems that the more these public bodies become independent representatives of society, the more independent the public prosecutors are in the performance of their functions. Nevertheless, exceptions are possible with regard to the highest-ranking prosecutor, who may be dismissed on the basis of a purely political decision without disciplinary proceedings, as in Poland and the Czech Republic. Such an exception is open to criticism with regard to the independence from political pressure that public prosecutors should enjoy, unless the system provides for sufficient democratic control over instructions from superiors.

5. If the Minister of Justice or the highest-ranking prosecutor where he is politically accountable to the government, intervenes in the activities of public prosecutors, his intervention must be transparent and amenable to democratic control. In this case the Ministry of Justice should be responsible along with the PPS for the establishment and enforcement of criminal policy. As a

representative of society, the executive exercises influence over the way public prosecutors perform their duties in criminal proceedings. The Minister of Justice can supervise the way public prosecutors act in criminal proceedings by way of published general instructions (9.1.2.4.1) and can sometimes issue specific instructions in pending cases (9.1.2.4.2). Such specific instructions are preferred in writing. Moreover, the recipient should have the right to refuse an instruction or to ask for his exclusion from a case in order to preserve his or her independence. In principle, the Minister of Justice can only issue positive instructions, such as to order the prosecution of a case or to continue dismissed proceedings. Prosecutors enjoy discretion in determining whether or not society has been harmed by the commission of a crime. This boils down to a public prosecutor having the power to decide to drop a case despite the person involved in the case having acted contrary to a criminal statute (see 9.4.2.3). Ministers also have the right to order the dropping of a case, as illustrated by the Netherlands. Nevertheless, such an instruction should only be valid if the legislative and judiciary powers are properly and strictly informed (4.3.4.2.2).

6. When interventions by the Minister of Justice in the exercise of public prosecution are possible, a distinction can be drawn between countries where the principle of compulsory prosecution is in force (the Czech Republic and Poland) and those enforcing the opportunity principle (France and the Netherlands). Intervention concerning legal issues, such as the explanation of new legal concepts or the strict application of the law in a specific case, is possible in both systems. An intervention concerning certain categories of objectives, such as the prosecution of one type of crime rather than another or the dropping of a crime that a prosecutor considers harmless, should in theory only be possible in countries where the opportunity principle is in force. In other countries, public prosecutors have the duty to always prosecute a person suspected of having committed a crime. In either case, executive interventions in pending cases should be extremely rare and must only be motivated by the public interest and the necessity to monitor the correct application of the law.

7. The democratic control of the activities of the PPS in criminal justice is necessary. The idea that the PPS represents society by upholding the public interest against crime is justification for the work of prosecutors to be checked and supported by society, through parliament, for example. If a Member State chooses to create a PPS dependent on the executive, control can be exercised indirectly

through the political accountability of the Minister of Justice. In the countries studied, parliaments control the administrative and supervisory powers of the executive over the PPS by means of a vote of confidence in the government and through budgetary control. This vote can affect a government as a whole, or a Minister in particular. Firstly, such controls can lead to the issuing of new legislation, the amendment of existing criminal law and procedure or the modification of prosecution guidelines, e.g. modification of a criminal policy. Secondly, if the public interest was neglected, such controls can lead to disciplinary sanctions and ultimately the dismissal of prosecutors or even the dismissal of the Minister of Justice, as the highest-ranking prosecutor, where he or she is politically accountable to the government. Since there is no uniformity in PPS organisation between the systems, and since the PPS can fall under the authority of powers other than the executive, the direct accountability of the PPS to parliament is a possibility. Such accountability could be an efficient solution in systems where the PPS establishes in part or in whole the criminal policies, as in the Netherlands or the Czech Republic, and especially if the opportunity principle is in force, because public prosecutors can then justify decisions in criminal proceedings that conflict with political concerns. Nevertheless, such accountability should only apply exceptionally in very sensitive cases to ensure that the PPS is required to justify a decision on a prosecution or the refusal of an instruction. To avoid instability in criminal policy, parliament should not be able to instruct the PPS.

8. A hierarchy within the PPS is necessary to ensure the effective control of the organisation of the service and of prosecutors' activities, and to promote an efficient and fair criminal justice system. The structure of the hierarchy can take various forms. PPSs are organised into offices and there is always a hierarchy within each office in that there is subordination between the office head and his deputies. As in the Netherlands, there is no need for a hierarchical relationship between offices at different levels, such as between district and appellate offices. Nevertheless, there must be at least one level superior to the office conducting criminal prosecutions in a given jurisdiction, whether at the first instance or the appellate level. There is no requirement for the Minister of Justice to supervise the highest-ranking level because the PPS may or may not fall within his authority. The subordination of lower prosecutors to superior prosecutors exists for organisational – such as office management – and functional purposes. This is important for the efficient and fair defence of the public interest and to ensure the coherence of the

prosecutors' actions. For example, if a lower prosecutor refuses to commence criminal proceedings, a plaintiff always has the right to report this refusal to the prosecutor's superior (9.4.1.1). The superior may then take the necessary measures if such a refusal was not in the public interest.

9. A PPS is always a unified and indivisible institution. The representation of society through the defence of the public interest justifies the unity and indivisibility of the prosecution authority, and that in turn implies that prosecutors can substitute for one another (9.3.1). Public prosecutors defend one public interest and are accountable to one 'client' – society. If the unity in the organisation seems to impose a strict general standard implying a common status for all prosecutors and an impersonal accountability of the whole service for the activities of its members, the specific unity in the performance of the prosecutors' duties can vary. This is particularly the case in countries where the opportunity principle is in force and where, according to various factors, local chief prosecutors may interpret the law in their own way. Such interpretations are often justifiable in specific circumstances, but they may lead to differences in the protection of the rights of individuals. Differences culminate in the right of a chief prosecutor to decide, in very exceptional circumstances, to refuse to carry out a superior order – e.g. the case of France and the *pouvoir propre* of *procureurs de la République* (3.3.3.1). Of course, this power should not be abused and disciplinary proceedings should sanction possible abuses. However, it seems advisable that the unity of the PPS in the performance of the prosecutors' functions should be of the same nature as in the organisation of the service. Such unity could be enhanced, as it is in the case of the Netherlands, by a series of very detailed instructions listing the responses that can be adopted in similar exceptional circumstances by all prosecutors.

10. Public prosecutors enjoy a monopoly in the defence of the public interest in criminal justice. While organs other than public prosecutors can intervene in the upholding of the law and the public interest in non-criminal proceedings, prosecutions remain, in principle, within the exclusive jurisdiction of public prosecutors. Only a public prosecutor can decide to divert a case from prosecution (9.4.2.2) or to prosecute criminals before a court and thus file an indictment, summon the accused, withdraw an indictment or take another diversion decision (9.4.2.1). This monopoly does not mean that only a public prosecutor has the right to institute criminal proceedings. Other bodies, such as the police or a plaintiff, may also

have this right. If, for example, mainly private interests are affected by a crime, other bodies or persons, such as a plaintiff, can have the right to bring their own indictment, as in Poland (6.4.2.3) or France (3.4.2.1). However, if the public interest requires it (in Poland), or as soon as the indictment is served (in France), the PPS regains its monopoly fully and conducts the prosecution before a court. The monopoly over prosecution justifies a certain 'omnipresence' of the PPS in criminal justice. A public prosecutor always supervises preliminary proceedings carried out by the police and is responsible for the legal qualification of the charges brought against a suspect. A public prosecutor always takes part in criminal court hearings and always has a right to appeal a decision taken by a court, either during preliminary proceedings or after a hearing. Society is represented by a public prosecutor at all stages of the criminal process, thus before courts of first instance, the courts of appeal and the Supreme Court. On the matter of representation before the latter court (*Hoge Raad*), the Dutch case should be highlighted. This system no longer maintains a prosecution office, there but independent advisers receive opinions from all parties, thus also from the PPS (see 4.3.1.2.3 and 4.5.3.3).

11. Comparison shows a general trend towards enhancing efficiency in criminal justice. The PPS should be efficient and cope with the overloaded criminal justice system whether the principle of compulsory prosecution or the opportunity principle is in force. The establishment of simplified proceedings, out-of-court settlements or conviction without hearing allows public prosecutors to offer efficient judicial protection and rapidly settle petty or simple criminal cases (9.4.2.2). Efficiency and public interest do not always mean that a criminal case should end in a positive decision, i.e. prosecution or diversion. In the four countries studied, public prosecutors always have the right to drop a case even if it should technically be prosecuted. The fact that a system follows either the principle of compulsory prosecution or opportunity does not matter; public prosecutors in fact enjoy power of discretion (9.4.2.3). The PPSs also contribute to this efficiency trend by reducing the inertia caused by the hierarchy of prosecutors. All the systems grant public prosecutors independence in the exercise of their functions. In the absence of instructions from his superior, a public prosecutor must act independently and take decisions based on his personal judgement as to what is in the public interest. The best illustration of this independence is the reception of the principle that during a hearing *la plume est serve, la parole est libre* (9.3.2.3).

12. In all circumstances, public prosecutors should ensure the respect of human rights and fundamental freedoms. As we saw in the introduction, the implementation of the *acquis communautaire* includes the signature and ratification of international conventions on human rights and fundamental freedoms by all Member States. Although the signature and ratification of a convention such as the 1950 European Convention for the Protection of Human Rights is easy to trace, the tracing of its implementation and enforcement in day-to-day justice is much more difficult.[534] The obligation to respect the Convention has led to modifications in criminal procedure and the rights of public prosecutors in previously Communist countries, as well as in 'old' Member States. For example, the general prosecutor formerly had an indefinite right to challenge final judgements by way of extraordinary appeal, even though this was a concrete breach of legal certainty (see 5.6.3.2 for Poland and 7.2.3.3 for the Czech Republic). Through application of the case law of the European Court of Human Rights, this institution has been repealed.[535] In the countries studied, public prosecutors therefore play an essential role and are obliged to uphold fundamental human rights as defined by international conventions (see 9.1.1 *in fine*). They must always try to find the right balance between the protection of human rights and freedoms, and the public interest in fighting crime. This also militates in favour of more independence in the public prosecutors' activities.

10.2 A test for a democratically efficient prosecution service in the Member States of the European Union

As already mentioned, a public prosecution service should respect four main principles in its organisation and functioning – independence from unfair or illegal intervention, democratic control of prosecution activity, efficiency in the defence of the public interest against crime and respect for human rights. Those principles may cover very different notions at various stages in the organisation and functioning of a PPS. It is not my purpose to test all the systems

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[534] ETS No 005.

[535] See on the illegality of the extraordinary appeal, the Case ECt.HR *Brumarescu* v. *Romania* [1999] Appl. No. 28342/95: 'The right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which declares, among other things, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, *inter alia*, that where the courts have finally determined an issue, their ruling should not be called into question.' (61)

studied against all these notions. Nevertheless, as an example, I will look at the position of the PPS and its relationship to the Minister of Justice and test the limits offered by national diversity in the countries studied. If a country decides to establish its PPS within the scope of executive power, the Minister of Justice will have a supervisory power that is more or less influential on public prosecutions. Public prosecutors decide whether to prosecute suspects or not and therefore they should enjoy enough independence to resist unfair and illegal influences originating from a variety of sources, such as politics. In this respect, one of the ongoing issues with regard to the organisation of public prosecution services is their position in the separation of powers. There are various solutions to protect public prosecutors from abusive intervention. A heavy dependence on the executive is possible, as in the Netherlands or Poland, but extra guarantees or advantages must then be offered in terms of democratic control, efficiency in the defence of the public interest or respect for human rights.

In the Netherlands, the Minister of Justice may order the dismissal of a case (negative instruction). This position illustrates a strong dependence of prosecutors on politics. The Dutch system is the only one that establishes this right, albeit only in very exceptional situations which are justified on political grounds. Abuses of this right and unfair prosecutions, or withdrawals from prosecution, are also facilitated because the country applies the opportunity principle to public prosecutions (4.4.2.1), meaning that the dismissal of a case grounded on opportunity could easily be motivated by purely political reasons contrary to the public interest. However, the Dutch system only authorises this right after rigorous democratic control (4.3.4). By means of this control, I believe the risk of abusive interventions is reduced and the public interest is necessarily the main motivation for the intervention. Moreover, the system has a strong non-political counterbalance in the form of the Board of General Prosecutors, which exercises the main supervision over the PPS. It is conceivable that negative instructions from the Minister of Justice could be justified with limited risk of abuse if the principle of compulsory prosecution were in force, as is the case in Poland (6.4.2.1) or the Czech Republic (8.4.1.1), as a means to supervise the correct application of the law. Indeed, according to this principle, the dismissal of a case can only be ordered in cases provided by law and not for opportunity reasons, meaning that a dismissal ordered by the Minister of Justice would only be possible under circumstances provided for in law and not for political reasons. However, we saw that the principle of compulsory prosecution alone

is insufficient as a guarantee against political interventions and possible unfair prosecutions and withdrawals (9.4.2.3). Unless a system establishes democratic supervision and transparency in political influence of the right of a Minister of Justice to issue negative instructions, this right trespasses the limits beyond which a PPS would become incompatible with the democratic principles of law.

In Poland such negative instructions are not possible, but the dependence of public prosecutors on the Minister of Justice remains extremely strong since the Minister is also the head of the PPS (6.3.2.2). This plurality of functions may have been necessary during the transition period from Communism to democracy, but I have my doubts whether this is still the case now. Indeed, the Minister of Justice clearly lacks independence in the exercise of his functions as the highest-ranking prosecutor, and may favour interests contrary to the public interest. The Minister can exercise concrete supervision over prosecutors in almost all circumstances (6.3.4.2). This could affect the respect for human rights and fundamental freedoms in prosecution. The four guarantees offered by the system against this risk seem weak. Firstly, law provides for the independence of prosecutors. However, this does not prevent indirect interventions (6.3.5.2). Secondly, instructions must be in writing and added to the file submitted to the court. However, while prosecutors must still comply with their superiors' instructions or ask for their exclusion from a case, it may be difficult for a prosecutor to uphold the law if he believes that the instruction is contrary to the public interest. Thirdly, the principle of compulsory prosecution in force in Poland limits political intervention. However, as we saw above, it does not preclude all abuses and possible unfair prosecutions or withdrawals. Lastly, democratic control over the Minister of Justice is direct because he is individually accountable before parliament. This seems the most efficient guarantee to ensure that prosecutions are fair and non-abusive. Nevertheless, I doubt whether this guarantee would remain efficient if the intervention was indirect.

More independence from superiors could be provided to prosecutors, as is the case in France, where chief district prosecutors enjoy a *pouvoir propre* (3.3.3.1). According to this setup, no superior can force a chief district superior to act or not to act in any given case. This is favourable to the public prosecutors' independence. However, it may be detrimental to the efficacy of the defence of the public interest because unity in the execution of prosecutors' functions is more difficult to achieve. For example, the

treatment of a particular offence in a particular district can lead to a different solution than for the same offence in another district. I have to question whether this does not create inequality between citizens in the protection of the public interest. The lack of efficiency is amplified by the fact that in contrast to other countries, there is no central supervision of prosecutors by a general prosecutor or a Board of General Prosecutors, as in the Netherlands. The Minister of Justice, who is not a prosecutor but a political body, centralises this supervision, which could lack stability. It seems that the supervision of prosecutors by prosecutors at a national level could improve an efficient defence of the public interest. The suppression of the intermediate level of subordination (appellate offices 3.3.2.3) would probably not have the same positive effect as in the Netherlands (4.3.3.3), because the geographical scale of the two countries is different and also because guidelines and instructions might be less detailed and binding. Nevertheless, the Minister of Justice should remain accountable for the enforcement of criminal policy by the PPS. Such accountability is necessary for the exercise of democratic control.

Indeed, democratic control of the activities of prosecutors is a necessity. There are doubts whether such control is effective in the Czech system. The independence of public prosecutors from political interventions and possible unfair prosecutions could be ensured by the limitation of the right of sole supervision over the administration of the PPS, as in the Czech Republic, where the Minister has no right to issue instructions to public prosecutors concerning the discharge of their duties (8.3.2). Nevertheless, the system triggers the risk of non-transparent political influences in public prosecution, since the Minister is officially unaccountable for the enforcement of criminal policy, but is responsible for the appointment and dismissal of prosecutors (8.3.4.1). No democratic control can be implemented if this influence is exercised. Some form of control is indirectly exercised on the general prosecutor, the highest-ranking prosecutor of the PPS (8.3.3.3), who is politically accountable to the government (8.3.4.1). However, this is a minimal control because it is exercised by the government and the general prosecutor is not the head of the PPS but has rather important powers within it (8.3.4.3). It seems logical that the respect for human rights and the efficient defence of the public interest would be enhanced if clear accountability for PPS activity in criminal justice was established. This could be achieved if the general prosecutor became the head of the PPS and accountable to parliament rather than the government. Under these circumstances, the general

prosecutor and not the Minister of Justice should be able to recommend the appointment and dismissal of prosecutors.

From these remarks it follows that a PPS can be highly dependent on the executive if there is a transparent series of relationships between the two powers, and a counterbalancing power prevents the exercise of unfair influence. A more independent PPS can, however, result in less efficiency in the defence of the public interest, and in such cases the centralised supervision of prosecutors by other prosecutors is advisable. Considering the growing influence of European Union Law on domestic criminal systems, it is very likely that future public prosecutors will have to defend more than one national public interest and one national criminal policy. Can it be imagined that the development of a European public interest will encroach upon national public interests? Will the European Union develop a criminal policy with clear guidelines for public prosecutors? If this is to be the case, should democratic control of public prosecutors remain at the national level? Has the time not come to provide prosecutors with more independence – or even total independence? Indeed, has the time not come to open the door to a *Quatuor Politica* instead of a *Trias Politica*?

Résumé

Dans les pays de droit continental, le Ministère Public est une institution d'Etat chargée, notamment, d'assurer le respect de la loi et la défense de l'intérêt général en poursuivant les crimes et délits devant les tribunaux.[536] La présente thèse se concentre sur l'organisation et les fonctions du Ministère Public dans le procès pénal.

Bien que cette institution ait une origine unique, à savoir la France de l'Ancien Régime, nous la retrouvons implantée aujourd'hui sous diverses formes dans la plupart des pays Européens. Cette diversité a culminé durant plus de quarante années dans les régimes Communistes de l'Europe de l'Est où le Ministère Public, appelé *Prokuratura*, n'était qu'un instrument dans les mains du pouvoir politique. A la chute de l'Empire Soviétique, la plupart de ces pays ont souhaité adhérer à l'Union Européenne. Afin de rendre cela possible, de profondes modifications des lois et institutions nationales ont du être entreprises. Si nombre de ces modifications résultaient dans la transposition pure et simple d'un acquis communautaire, d'autres, touchant de près la souveraineté, nécessitaient des réformes plus subtiles. Il a été demandé à ces pays que leurs institutions, notamment le Ministère Public, satisfassent à des critères de stabilités garantissant « la démocratie, la primauté du droit, les droits de l'homme, le respect des minorités et leur protection».[537]

La tâche ne fut assurément pas aisée car, en dehors de ces vagues critères, aucune loi n'impose de conditions incontournables régissant l'organisation et les fonctions du Ministère Public. Comment dès lors procéder pour adapter cette institution et répondre aux exigences européennes ? Existe-t-il un modèle européen de Ministère Public que les pays candidats doivent transplanter afin de satisfaire les critères d'adhésion ? Dans quelles limites chaque pays peut-il conserver sa diversité nationale dans l'organisation et les fonctions pénales de son Ministère Public ?

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[536] Les pays de tradition continentale se distinguent des pays de tradition anglo-saxonne ou *Common Law*.

[537] Conclusions de la Présidence du Conseil Européen de Copenhague du 21 et 22 juin 1993 Chapitre 7.

Afin d'aborder ces questions, nous avons choisi de comparer l'organisation et les fonctions pénales du Ministère Public dans deux « anciens » Etats Membres de l'Union Européenne, les Pays-Bas et la France, avec celles de deux anciens « pays de l'Est », la Pologne et la Tchécoslovaquie (et après la partition, la République Tchèque).

Il nous a semblé, en premier lieu, incontournable de retracer les origines du Ministère Public dans la France d'Ancien Régime. Le Chapitre II (le Chapitre I étant consacré à l'introduction) retrace donc la naissance presque discrète au VII^{e} siècle d'un groupe « d'administrateurs », les saïons ou graffions, destiné à sauvegarder les intérêts de la Couronne. Jusqu'à la Révolution Française, ce groupe ne cessera d'évoluer tant au niveau de ses fonctions que de celui de son organisation pour devenir une véritable institution judiciaire. C'est durant l'Ancien Régime que vont apparaître certains traits fondamentaux du Ministère Public telle que la présence d'un représentant du Parquet devant chaque juridiction, la fonction d'accusateur public dans les affaires pénales puis celle de surveillance des décisions prises par les juges. C'est cette institution, avant tout politique, que le Tsar Pierre le Grand transplantera en Russie créant, sans le savoir, les bases de la future institution Soviétique, la *Prokuratura*. Après la Révolution et la mise en œuvre de la séparation des pouvoirs, Napoléon saura donner sa forme actuelle à l'institution grâce à diverses réformes. Le Ministère Public deviendra un véritable corps de magistrats parfaitement organisé aux fonctions centrées sur le maintien de l'ordre public et la poursuite des infractions à la loi pénale. C'est cette institution, ce « prototype » qui sera transposé dans de nombreux pays Européens tout au long du XVIII^{e} siècle. Nous le retrouverons notamment aux Pays-Bas, en Pologne et en Tchécoslovaquie.

Avec l'étude de la France et des Pays-Bas, où le Ministère Public évoluera paisiblement, nous rechercherons les bases d'un modèle Européen (Chapitre III et IV). En Pologne et en Tchécoslovaquie, l'évolution de l'institution sera bien moins paisible car, après la Seconde Guerre Mondiale, les soviétiques imposeront leur *Prokuratura*, instrument de contrôle politique des juges. Nous verrons comment le Ministère Public a fonctionné « sous influence » durant plus de quarante années avant de voir comment il se transformera à la fin des années 80. Ainsi nous étudierons le système Polonais durant la période communiste (Chapitre V) avant de détailler le système actuel transformé depuis la chute du communisme (Chapitre VI). Les mêmes recherches seront effectuées pour la République Tchèque (Chapitre VII et VIII). Ce

n'est qu'une fois chaque système national décortiqué, que nous pourrons envisager leur comparaison (Chapitre IX). Cette méthode permettra non seulement de mettre en avant les incompatibilités de la *Prokuratura* avec les systèmes modernes de Ministère Public, mais encore d'observer dans quelle mesure cette institution aura du s'adapter pour accéder à l'Union Européenne. La comparaison démontre l'existence d'un certain nombre de principes incontournables qui caractérisent le Ministère Public de chacun des pays étudiés. Si seule une étude complète de tous les Etats Membres de l'Union autoriserait à parler de « standards Européens », il nous est possible toutefois d'indiquer les points de convergence de l'institution. Au delà de cette « identité » Européenne, la diversité nationale est nécessaire mais doit rester cantonnée dans certaines limites. C'est cette identité Européenne du Ministère Public et ses limites que nous récapitulerons en guise de conclusion (Chapitre X).

Samenvatting

Het Openbaar Ministerie (OM) is in landen met een continentale rechtstraditie voornamelijk belast met rechtshandhaving en de bescherming van het algemene belang door de vervolging van strafbare feiten.[538] In dit proefschrift wordt de organisatie en de functies van dit staatsorgaan in het strafproces onderzocht.

Hoewel het OM zijn oorsprong vindt in het Franse ancien régime, bestaan er binnen Europa verschillende vormen van dit orgaan. Deze diversiteit is gedurende meer dan veertig jaar tot een climax gekomen in de Oost-Europese communistische regimes, waar het OM, genaamd *Prokuratura*, niet meer was dan een instrument van politieke macht.

Na de val van de Sovjet-Unie leefde bij veel van deze staten de wens om lid te worden van de Europese Unie. Om dat mogelijk te maken, waren er grondige wijzigingen van wetten en staatsorganen nodig. Veel van deze veranderingen resulteerden eenvoudigweg in de volledige transpositie van de acquis communautaire. Voor andere wijzigingen waren er subtielere herzieningen nodig, omdat ze zo gevoelig zijn voor de soevereiniteit. Van deze landen werd vereist dat hun instellingen, met name het OM, voldeden aan stabiliteitscriteria die “de democratie, de rechtsstaat, de mensenrechten en het respect voor en de bescherming van minderheden” garanderen.[539]

Dit was geen eenvoudige taak; er zijn namelijk buiten deze vage criteria geen algemene wettelijke bepalingen die exacte voorwaarden stellen aan de organisatie en de functies van het OM. Hoe zouden de kandidaat-landen nu verder moeten om het OM aan te passen en om aan de europese eisen te beantwoorden? Bestaat er een europees model voor het OM dat deze landen kunnen overnemen om aan de criteria van toetreding te voldoen? Binnen welke grenzen kan elk land zijn nationale diversiteit in de organisatie en de functies van zijn OM in het strafproces behouden?

Om deze vragen te beantwoorden, is er voor gekozen de organisatie en de functie van het OM in het strafproces van twee oude lidstaten

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[538] De landen met een continentale rechtstraditie onderscheiden zich van de landen met een Angelsaksische traditie of *Common Law*.

[539] Conclusies van het voorzitterschap Europese Raad in Kopenhagen 21-22 juni 1993 hoofdstuk 7.

van de Europese Unie, Nederland en Frankrijk, te vergelijken met die van twee voormalige Oostblok landen, Polen en Tsjecho-Slowakije (en na de splitsing, Tsjechië). Hiervoor is een beschrijving van de oorsprong van het OM in het Franse ancien regime onvermijdelijk. Na het inleidende hoofdstuk, beschrijft hoofdstuk II de 7de-eeuwse geboorte van een groep "beheerders", de saïons of graffions, met de taak de belangen van het koninkrijk te waarborgen. Deze groep bleef tot aan de Franse Revolutie zijn organisatie en functies ontwikkelen, tot op het niveau van een rechterlijk orgaan. Gedurende het ancien régime kwamen enkele fundamentele kenmerken van het OM tot stand, waaronder de aanwezigheid van het OM bij elke rechtbank, de functie van de publieke aanklager in strafzaken en toezicht op rechtspraak. Rond 1722 heeft Tsaar Peter de Grote dit met name politieke orgaan overgebracht naar Rusland, niet wetend dat hij hiermee de basis zou leggen van het toekomstige Sovjet-OM: de *Prokuratura*. Na de Franse revolutie en na de toepassing van de scheiding der machten kreeg door Napoleon via verschillende hervormingen het OM zijn huidige vorm. Het OM zal een volledig georganiseerde groep van magistraten worden, met als voornaamste functies de handhaving van de openbare orde en de vervolging van strafbare feiten. Dit orgaan of "prototype" is geïmplanteerd in meerdere Europese landen gedurende de 18de eeuw. Het is terug te vinden in Nederland, Polen en Tsjecho-Slowakije.

Na een uitgebreide studie van Frankrijk en Nederland (hoofdstuk III en IV), waar het OM zich vreedzaam ontwikkelde, heb ik naar de basis van een Europees model gekeken. Polen en Tsjecho-Slowakije kennen een minder vreedzame ontwikkeling van het OM. Na de Tweede Wereldoorlog gebruikte de Sovjet-Unie haar *Prokuratura* als een instrument van politiek toezicht op de rechters. Ik heb eerst nagegaan hoe het OM gedurende meer dan veertig jaar onder dergelijke invloed heeft gefunctioneerd. Vervolgens is de transformatie aan het einde van de jaren tachtig beschreven. Ik heb in de eerste plaats naar het Poolse communistische systeem gekeken (hoofdstuk V), waarna ik inga op het huidige systeem dat zich vanaf de val van het communisme heeft ontwikkeld (hoofdstuk VI). Op gelijke wijze is op de tweede plaats de Tsjechische Republiek besproken (hoofdstuk VII en VIII). Pas na een dergelijke analyse van de nationale systemen kunnen ze onderling vergeleken worden (hoofdstuk IX). Zo komen naast de verschillen tussen de *Prokuratura* en de moderne vormen van het OM ook de punten aan het licht waarop dit orgaan zich heeft moeten aanpassen om toe te kunnen treden aan de Europese Unie. De vergelijking laat een

aantal principes zien die het OM van de bestudeerde landen karakteriseren. Hoewel uitspraken over “Europese standaarden” alleen mogelijk zouden zijn na een volledige studie van alle lidstaten van de Europese Unie, kan ik na dit onderzoek wel enkele punten van overeenkomst in de verschillende vormen van OM aangeven. Dit gezichtspunt van een “Europese identiteit” vereist nationale diversiteit die binnen bepaalde grenzen gewaarborgd blijft. Deze Europese identiteit van het OM en de bijbehorende begrenzingen bespreek ik in de conclusie (hoofdstuk X).

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