Unity and diversity of the public prosecution services in Europe. A study of the Czech, Dutch, French and Polish systems
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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

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 délits (delicten) were tried in district courts and contraventions (overtredingen) in local courts and by justices of the peace (vrederechters). 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.

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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 criminel) 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. 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). 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. 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.
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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

\(^{208}\) 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. 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. 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. The report issued in 1994 proposed solutions that led to an important reform in 1999. 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.
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 *megazak* 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*).


\(^{221}\) 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
  - 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).

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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 (veroordeeling 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

\(^{225}\) 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.

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- 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

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)\(^\text{228}\)
- 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 (plaatsvervanger 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, 26982, nr. 3, p. 4 (MvT).
• public prosecutors (officieren van justitie) with different ranks\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{235} It is no longer part of the prosecution service and its members do not have \textit{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).\textsuperscript{236} However,

\textsuperscript{231} One of his deputies may replace the head in the case of absence (plaatsvervangend hoofdofficier van justitie).

\textsuperscript{232} At this level there are also simple session public prosecutors (officieren enkelvoudige zittingen).

\textsuperscript{233} The international team notably deals with Eurojust requests and questions.

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

\textsuperscript{235} Wet van 2 november 1994, Stb. 803.

\textsuperscript{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).

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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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. 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).

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. For example

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

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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\textsuperscript{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).\textsuperscript{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.\textsuperscript{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.\textsuperscript{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)

\textsuperscript{241} Corstens 2005, p. 302.

\textsuperscript{242} See on this issue Van Daele 2003, p. 180.

\textsuperscript{243} ’t Hart 2001, p. 62.

\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{247}

\textsuperscript{245} HR 9 oktober 2001, NJ 2001, 657.
\textsuperscript{246} Wet rechtspositie rechterlijke ambtenaren van 29 november 1996, Stb. 590.
\textsuperscript{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 temporarily 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 (requisoitir) 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. 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. 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. 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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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.
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.\(^{256}\)

\(^{254}\) 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, Stcr. 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. 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.

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

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. 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. 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.

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).
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!  

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. 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

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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.
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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:
- 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.\textsuperscript{266}

\textsuperscript{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 Rijksambtenarensreglement, Stb. 1931, p. 248).

\textsuperscript{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.

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). 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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*Corstens 2005, p. 57.*
consequently, not to officially inform the prosecutor (politie sepoet).\textsuperscript{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.\textsuperscript{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.\textsuperscript{271} This is also the reason why only public prosecutors can decide on the charge because they are dependent on the Minister of Justice.\textsuperscript{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.\textsuperscript{273}

The prosecutor can dismiss a matter entirely or partly according to

\textsuperscript{269} This right was established by the Supreme Court in 1950, see e.g., HR 31 januari 1950, NJ 1950, 668.
\textsuperscript{270} De Jong & Knigge 2005, p. 138.
\textsuperscript{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.
\textsuperscript{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 where275
• 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

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. 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.

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.

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.

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\(^{280}\) 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

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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, Stct. 2004, p. 80.
the victim will have the right to challenge a decision of the prosecutor to settle.\textsuperscript{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 (\textit{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.\textsuperscript{284} However, certain acts may require a judicial investigation (\textit{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).\textsuperscript{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 \textit{ex officio} to place an accused in preliminary custody (\textit{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 (\textit{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

\textsuperscript{283} Stamhuis & Van der Leij 2005.
\textsuperscript{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.
\textsuperscript{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 justitie*). 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

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\(^{286}\) 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.

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.\textsuperscript{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.\textsuperscript{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


\textsuperscript{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.

- 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.\textsuperscript{291}
The court of appeal may
\begin{itemize}
\item sustain the first instance decision and reject the appeal
\item quash the first instance decision and, as the case may be, acquit the accused or convict him and impose a higher or lower sentence
\end{itemize}

4.5.3.2 Opposing appeal (verzet)
This form of review has been repealed by a recent amendment of the CPC.\textsuperscript{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.\textsuperscript{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 re hear the entire case, and especially, does not assess facts.\textsuperscript{294} It can only hear arguments

\begin{itemize}
\item \textsuperscript{291} Wet van 5 oktober 2006, Stb. 470.
\item \textsuperscript{292} Idem.
\item \textsuperscript{293} Depending on the circumstances, this time limit may start from the moment the judgement is known to the defendant.
\item \textsuperscript{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. 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. 
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)\(^\text{296}\)

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 acquitted defendant.\(^\text{297}\) 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.
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• 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).