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

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

5.1 The political structure in Poland after the Second World War

5.1.1 Basic historical developments in politics and constitutions

5.1.1.1 Basic historical developments in politics

After the Second World War, under the powerful influence of the Soviet Union, the Communist Party seized power in Poland. The country progressively adopted the Communist legal system and replaced the pre-1939 governmental apparatus destroyed by the...
foreign occupation. Gradually, the Polish Communist Party, under the name Polish Workers’ Party, pursued active politics and gained power in the country in the first parliamentary election in 1947. After several purges, in 1948 the Polish Workers’ Party merged with other Polish workers’ and labourers’ parties to form the Polish United Workers Party. By 1950, Poland was a full member of the Soviet Bloc under one-party rule. The Soviet Union’s dominance was mostly a feature of the Stalinist era (1944–1955). With the rise to power of Gomulka in 1956, Poland entered an era marked by the rejection of the Stalinist model. The emergence of the Solidarność (Solidarity) workers movement in August 1980 marked the start of the transition towards democracy and the end of Soviet-style Communism. General Jaruzelski, the leader of the Communist government at the time, imposed martial law and tried to defeat the movement. This saw a return to state-sponsored terror for two years. Many strikes and demonstrations eventually led to the repeal of martial law in 1983. In 1989, for the first time since the end of the war, the existence of a political organisation independent of the Communist Party was legally recognised. Lech Wałęsa, leader of Solidarność was elected President in December 1989.

5.1.1.2 Basic historical developments in constitutions

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

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

300 ‘In their struggle to establish the people’s legality, courts and government attorneys shall take their directives from the guiding principle of the Party’ in Gsovski & Grzybowski 1959, p. 732.
period, several retrograde legislative changes were introduced, but reforms towards democratisation and the Rule of Law eventually prevailed by the end of the 1980s.\textsuperscript{301}

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

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

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

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

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

\textsuperscript{302} Article 50 of the Constitution made the office of judges elective and provided that further electoral rules be established by law. However, no legislation was issued and this provision remained unimplemented, with the Council of State given the
State also recalled judges in cases of permanent incapacity or in ‘the interest of the administration of justice’

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

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

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

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

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

303 Bredin 1960.


5.1.3 The People’s Councils

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

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

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

5.2.1.1 Socialist Legality

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

A lawyer capable of applying the law but he must also cooperate with the government and must understand and know how to realise the policy of the Party in every case.\(^{306}\)

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

\(^{306}\) Gsovski & Grzybowski 1959, p. 735.
organisations. Law and justice, in the Marxist-Leninist system, are considered tools for the organisation of the economy and the transformation of the people’s behaviour towards the fulfilment of the ideal Communist society. In this system, the law has to be strictly observed because every single violation of the law is not only prejudicial to the potential victim but also to the State in general.

The law, including criminal law, is not supposed to express any abstract idea of justice, but must be seen instrumentally.\textsuperscript{307}

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

Substantial basis for the activities of the people’s state which depends on the strict and absolute observance of the law of the Polish People’s Republic by all agencies of the government administration and by individual citizens and which expresses the interests and the will of the working people.\textsuperscript{308}

In fact, Socialist Legality could take the form of general and individual binding acts published or otherwise, and take diverse forms (speeches, directives, laws, decrees, economic plans).\textsuperscript{309} In the hierarchy of legislative acts, Socialist Legality was superior and had to be enforced with priority. An administrative order could be superior to an old legislative act contrary to Communist interests.

This proliferation of legislation led to great confusion in the application of laws because every act of every institution – not to mention every official action of every citizen – had to comply with the Party resolutions. Any violation of these directives could be considered by the courts as a violation of the law. Another important source of laws were the directives of the Supreme Court issued when questions were posed by the Minister of Justice or the general prosecutor during reviews of lower tribunal cases.\textsuperscript{310} In this sense, crimes could be defined in regulations found elsewhere than in the

\textsuperscript{307} Frankowski 1982.
\textsuperscript{308} Gsovski & Grzybowski 1959, p. 729.
\textsuperscript{309} This legislation included the new legislation concerning agrarian ‘reform’ by confiscation and nationalisation. Directives and speeches were delivered by the leaders of the Party and treated as directives for the courts in the administration of justice; see Gsovski & Grzybowski 1959, p. 732.
\textsuperscript{310} Rozmaryn & Warkallo 1967, p. 365; Gsovski & Grzybowski 1959, p. 736.
CC. Until 1970, the old, pre-war legislation was still in force and the Supreme Court continued to find pre-war provisions contrary to the Socialist Legality by issuing binding directives. From 1970, Supreme Court directives forced the lower courts to apply harsh penalties.\textsuperscript{311}

5.2.1.2 Code of Criminal Procedure and Criminal Code

Initially, the old Polish 1928 CPC remained in force.\textsuperscript{312} Several important amendments between 1949 and 1950 reformed the 1928 CPC enhancing the powers of the people’s militia (police) in preliminary proceedings during the Stalinist era.\textsuperscript{313} In 1969, a new CPC was issued and entered into force 1 January 1970.\textsuperscript{314} In criminal proceedings, the powers of the militia were reduced and the powers of prosecutors enhanced. The Court’s control over decisions taken by the Prokuratura was strengthened.

The 1932 CC also remained in force until 1969 when a new code was issued. Until 1969, it remained almost unmodified but many special statutes were adopted in order to deal with specific matters.\textsuperscript{315} It is important to note the existence of a Military Criminal Code that covered acts considered both purely military acts committed by military personnel, and also acts against the State considered to be military although committed by civilians. Until 1955, military courts and civilian courts could apply the Military Criminal Code against a civilian who had committed a crime against the State.\textsuperscript{316} As in other Communist systems, Poland adopted the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{311} Cole, Frankowski & Gertz 1987, p. 223.
\item \textsuperscript{312} Murzynowski 1993.
\item \textsuperscript{313} The people’s militia or civic militia was the equivalent of the police force and was part of the Ministry of Internal Affairs.
\item \textsuperscript{314} The present research is based mainly on the 1969 Code, which remained in force until 1997, however, important changes between the two Codes and the main legal amendments of the latter is taken into consideration. Specific legislation adopted during the Martial era in 1981 and later is not taken into account. For an English version of the Code see Waltoś 1979.
\item \textsuperscript{315} For instance, ‘the Decree on Offenses Particularly Dangerous in the Period of Rebuilding the State’ was passed. The Decree, generally referred to later as the Small CC, carried the death penalty for such acts as: manufacturing, storing, or merely possessing arms and explosives; disclosing a State secret; creating or directing an organisation aimed at the commission of a felony; and conspiring to counterfeit money, in Frankowski 1982.
\item \textsuperscript{316} There was also a Military Code of Criminal Procedure enacted in 1944. This code applied to military staff but also to civilians charged with political offences (see 5.2.2.6).
\end{itemize}
\end{footnotesize}
A criminal court had jurisdiction to judge an act that met two requirements – to constitute an offence the act must be prohibited by the law in force and also be considered to have been socially dangerous. If the social danger of a prohibited act was insignificant or non-existent, proceedings were to be dropped (see also 5.5.1.3). If the matter did not constitute a criminal offence, it could be transferred to another organ such as a social tribunal (see 5.2.2.6).

The 1969 CC provided in Article 1 that a criminal offence is a socially dangerous act that is prohibited and under penalty of the law in force at the time of its commission. With the new codification, several special criminal statutes were rescinded. Nevertheless, the offences provided in these statutes were included in the 1969 CC. The new Code also increased the minimum and maximum terms of imprisonment and adopted very stringent measures against recidivists.

In addition to criminal proceedings applying the CPC and the CC, the existence of a Penal Administrative Justice Code should be noted. Until the adoption of a Code of Violations in 1971, a special Order of the President of the Republic from 1928 regulated proceedings against offences that were not criminal offences. These violations were very similar to crimes because they were sanctioned by penalties such as deprivation of liberty and fines, and they were based on similar principles of responsibility as the penal law. Two criteria distinguished criminal offences from administrative violations:

- the penalties for criminal offences were penalties exceeding three months deprivation or limitation of liberty, and a fine of PLN 50,000. For violations, the penalties did not exceed these limits
- a crime was not an act causing insignificant or non-existent social danger

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317 As we will see this conception is still in force in the current Polish system (6.4.3.2).
318 A person over 17 at the time of the commission of a criminal offence is criminally liable and criminal proceedings must be instituted if he commits a criminal offence with a criminal mental state (mens rea).
The agencies with jurisdiction over violations were social tribunals, the militia and some administrative agencies such as the public security agency and the forest protection service. 320

5.2.2 Organs and institutions of the judicial system of Communist Poland

5.2.2.1 Investigative institutions involved in the preliminary phase of the criminal process

The Act of 27 April 1949 suppressed the investigating judge, whose functions were first transferred to public prosecutors, who had the principal position in the preliminary phase of a criminal process. Until 1955, investigations were officially conducted almost exclusively by prosecutors. Acts were carried out by the militia or the public security agencies under supervision of a prosecutor. Legally the militia was the principal body tasked with maintaining public order and security. It could carry out actions in criminal preliminary proceedings as provided for by law and under the supervision of the competent public prosecutor. Prosecutors could therefore issue instructions which were, in principle, binding on the militia. However in practice, people lived under police terror and the real power to investigate lay in the hands of the militia under supervision of military prosecutors. 321 This position changed after the end of the Stalinist era and particularly with the promulgation of the new CPC in 1969. In 1969, preliminary investigations were split into

- investigations conducted by prosecutors in matters concerning serious crimes. A prosecutor could delegate the execution of acts to the police. Indictment and decision to dismiss proceedings belonged to prosecutors only
- inquiries conducted by the police under the supervision of a prosecutor in other matters. Only the prosecutor could issue an indictment and the dismissal of proceedings could be decided by the police upon approval of the prosecutor
- simplified inquiries for petty offences were conducted by the police. The competent prosecutor only endorsed a decision by the police to indict or to dismiss

320 Although very similar to criminal procedures, this work does not cover procedures concerning violations.
321 For instance, civilian prosecutors had to obtain a pass to enter a police office just like ordinary citizens, see Gsovski & Grzybowski 1959, p. 765.
5.2.2.2 The suppression of the three-instances system

After the Second World War and the German occupation, the jurisdiction of the common courts followed the new administrative division of the country. The laws issued on 27 April 1949 suppressed the previous three-instance court system and replaced it with a two-instance system. Under the old system, judgements from the first instance courts (the city and district courts) could be challenged by way of appeal (apelacja) before the court of appeal (voivode). The judgement of the voivode court could be challenged by way of cassation (kasacja) in a ‘third instance’.322 Only the Supreme Court in Warsaw could examine a cassation appeal and solely in order to redress infringements of the law. The Supreme Court could grant an appeal and refer the case to the court of appeal or reject the cassation.

Under the two-instances system, a single form of review, the appeal, replaced appeal and cassation (see 5.6.2).323 The appellate court made a second decision on the criminal liability of the accused. The appellate court checked the evidence, facts and, as in a cassation review, also controlled the pure legality of the decision on the basis of the act of appeal. Courts were composed of non-professional and professional judges (see below 5.2.2.4). Both had the same rights although not the same legal training. Despite the principle of elected judges provided for by the Constitution, the Council of State on the motion of the Minister of Justice appointed the professional judges (see 5.1.2). Common courts were organised so that

- at the first instance and for less important crimes (występki), city and district courts were competent. In 1975, both courts were amalgamated as regional courts. Their judgements could be reviewed by the competent voivode courts
- major crimes (zbrodnie) were judged by voivode courts at the first instance. The Supreme Court reviewed these judgements

An appellate court could dismiss an appeal, annul the challenged decision or refer it to the first instance court for a rehearing. This organisation was meant to accelerate criminal trials. However, there were times when the same legal issue in different matters was

322 Actually, the terminology of third instance is incorrect. While the first and appellate instances cover, in principle, the questions of facts and of law in a case, a cassation instance only covers questions affecting points of law. Nevertheless, the literature on the subject does not make this distinction.
323 According to the type of the decision attacked, the name of the review was appeal or reclamation (see 5.6.2).
settled differently at the last resort by a voivode court on the one hand and by the Supreme Court on the other. The system favoured gaps between the interpretations of the law and the control of legality, since decisions made by a second instance court were, in principle, definitive.\footnote{324}

5.2.2.3 Institution of the extraordinary appeal and the supervisory function of the Supreme Court

Extraordinary appeal was created to solve possible divergences of legal interpretation occurring in the two-instance system. The extraordinary appeal respects the tradition according to which Supreme Courts perform, in general, judicial supervision over lower courts, and where conformity to the law of all judicial decisions thus takes precedence over \textit{res judicata}.\footnote{325} Against a decision that has the force of \textit{res judicata}, ordinary forms of review are unavailable because they have already been used or because the time limit for lodging them has elapsed.

As an exception, an extraordinary appeal (see 5.6.3.2) could affect the redress of

- any definitive and valid judgement deciding on the criminal culpability of an accused
- any valid decision concluding judicial proceedings

The Code did not provide specific grounds for filing such an appeal. Any kind of irregularity, particularly on grounds that would have previously justified an ordinary appeal, were admissible for review.\footnote{326}

Only the Supreme Court was competent to review the challenged decision. This typically Soviet form of review has been criticised as being an instrument that allows the government to obtain reversals of final verdicts in criminal cases.\footnote{327} It has been considered as one of the main institutions differentiating Communist country procedure from that of capitalist countries.

First, the monopolistic highest officials in whose hands this powerful weapon is held are using it often to correct illegalities and excesses committed by lower courts at the expense of the rights of the accused or of private citizens (preservation of ‘Socialist’ or simple legality). Secondly, the device is deliberately and repeatedly used to overrule

\footnotesize{\begin{itemize}
  \item Kalinowski 1971.
  \item Rozmaryn & Warkałło 1967, p. 364.
  \item Andrejew 1982, p. 199.
  \item Frankowski & Wasez 1993.
\end{itemize}}
correct and strictly legal decisions of the courts (including the Supreme Court) when they contravene a current political line of the government and the Party.\textsuperscript{328}

5.2.2.4 Participation of lay assessors in the criminal trial

Another important modification of the criminal judicial system introduced after the war was the participation of the lay assessors in criminal trials. This was seen as a fundamental feature of the Soviet criminal system.\textsuperscript{329} The 1952 Constitution stipulated that judicial cases had to be investigated and adjudicated with the participation of lay assessors (Article 59-1). Courts of first instance were, in principle, composed of one professional judge and two lay assessors unless the case involved an offence for which the death penalty could be imposed. In such matters two judges and three lay assessors were required (Article 19 CPC). Second instance courts were only composed of professional judges.

The People’s Councils elected lay assessors from candidates proposed by political organisations. They were considered to be professional judges in criminal trials, thus they could decide on criminal liability and the punishment of an accused. However, they could not chair the court or carry out judicial functions outside the trial. Since the People’s Councils were elected by universal suffrage, it is possible to say that lay assessors were to a certain extent representatives of the people. In fact, the participation of lay assessors in the justice system posed several problems as there were not enough of them and the appointed lay assessors were insufficiently trained and qualified. Because of these two problems, many cases were judged by a court composed of a single judge – such as when the penalty could not exceed two years’ imprisonment.\textsuperscript{330}

5.2.2.5 The Supreme Court\textsuperscript{331}

Modification in the organisation and jurisdiction of the Supreme Court was made with the transplantation of the Soviet system after the war. Article 51 of the 1952 Constitution provided

1) The Supreme Court is the highest judicial organ and supervises the activity of all other courts concerning the pronouncement of judgment.

\textsuperscript{328} Boim, Morgan & Rudzinski 1966.
\textsuperscript{329} Grajewski & Murzynowski 1989.
\textsuperscript{330} Bredin 1960.
\textsuperscript{331} Rozmeryn & Warkało 1967, p. 331.
2) The procedure for the exercise of supervision by the Supreme Court is established by law.

3) The Supreme Court is elected by the Council of State for a term of five years.

Despite the two-instance system, the Supreme Court remained at the top of the judicial organisation supervising judicial activity of all civilian courts and military tribunals. On the one hand, the Court was in charge of the strict control of legality over the lower and appellate courts’ decisions. On the other hand, it acted as an appellate court when controlling the facts and legality of regional court decisions. Because of this dual capacity, the Supreme Court could review its own cases with a different panel of judges. The jurisdiction of the Supreme Court over pending proceedings and definitive or non-definitive judgements was performed by four sections – civil, criminal, labour/social insurance and military. The organisation of the Court was modified during the Communist period, but the main features of the supervisory functions remained as provided, particularly in their procedural codes and in the criminal field, especially the CPC. The Supreme Court was closely subordinated to the Council of State not only because its members were appointed by it, but also because the First President of the Court had to report regularly to the Council. This report could affect the current activity of the judiciary and the orientations that the judiciary had to and should follow in its future activity.

Supervision was performed by means of appellate measures, but also by means of binding directives concerning court practices and the interpretation of laws. These directives answered legal problems posed by the Minister of Justice, the general prosecutor or the First President of the Supreme Court. The directive issued was published in the official journal and carried the force of law. On the occasion of pending proceedings, it was also possible for a lower court to direct a question to the Supreme Court. The answer to this question was then binding on the lower court. If the issue was important, the Supreme Court could decide to answer in the form of a general binding directive. The Supreme Court did not, however, supervise the administration and the organisation of lower courts, which was the task of the Minister of Justice, or the Defence Minister for the military courts.

5.2.2.6 Military and social justice

To complete this brief description of the Polish criminal judicial system it is important to note the existence of the military criminal
system composed of military tribunals and prosecutors.\textsuperscript{332} During the Stalinist era military courts were competent to hear criminal cases against citizens. The 1944 Military Criminal Code provided that many crimes against persons were considered as anti-State and therefore had to be prosecuted by military prosecutors and settled by military courts.\textsuperscript{333} In 1955, jurisdiction of the military system over civilians was rescinded and transferred to the civilian system.\textsuperscript{334}

As in other Communist systems, certain acts, the so-called violations (see 5.2.1.2) prohibited by specific statutes and excluded from the CC could be settled by independent agencies, such as social tribunals. The militia and other special agencies also had jurisdiction over several violations. Social tribunals, also called boards or commissions, were composed of lay judges elected by People’s Councils at the district level and by voivode People’s Councils at the appellate level. These tribunals were established in public undertakings and economic agencies. If the elements of the act were prohibited by the CC and by the Code of Violations (see 5.2.2.6), the prosecutor could transferred it to the jurisdiction of a social tribunal only if it caused an insignificant or non-existent social danger. In these proceedings, a public prosecutor bore the burden of proof. In addition to a custodial sentence and a fine, social tribunals could impose disciplinary measures such as compensation for the victims’ damages, a reprimand or a payment of a sum to a social organisation.\textsuperscript{335}

5.3 Organisation of the Polish \textit{Prokuratura}

5.3.1 The laws of the \textit{Prokuratura}

This new national organisation and transplant of Marxist-Leninist ideas needed a strong institution charged with the task and right to enforce Socialist Legality. Before the War, the Polish prosecution service was modelled on the French public ministry with the main purpose of prosecuting crimes and representing the State in criminal proceedings and trials.\textsuperscript{336} The public ministry was directly subordinate to the government, the Minister of Justice also being the general prosecutor. The \textit{Prokuratura} Act 20 July 1950 established a Communist-style prosecution service in an institution separate from

\textsuperscript{332} In general, this study will only take the civilian system into account.
\textsuperscript{333} Frankowski & Wasez 1993.
\textsuperscript{334} Rozmaryn & Warkałło 1967, p. 334.
\textsuperscript{335} Rozmaryn & Warkałło 1967, p. 341.
\textsuperscript{336} Waltoś 1992; Frankowski 1987; Siewierski 1963.
the government and hierarchically organised under the supervision of the general prosecutor and empowered with a strong and general supervisory function.\textsuperscript{337} In the 1952 Constitution the Prokuratura is noted as one of the fundamental institutions of Communist Poland.\textsuperscript{338} The new public ministry was indeed patterned after the Soviet Procuracy.\textsuperscript{339} Its role was to consolidate the People’s Rule of Law, to protect the social assets and to prosecute crimes. Therefore, prosecutors were rendered independent from all governmental agencies. They had the power and right to supervise the legality of acts undertaken by all State agencies – except the heads of the central State organs – enterprises, and citizens. The Prokuratura was considered to be the eyes and ears of the Council of State and the ‘Guardian of Law and Order’.\textsuperscript{340} The 1950 Act was modified in 1964 when the military prosecution service was clearly separated from the civilian prosecution service.\textsuperscript{341} In this new act the supervisory function of prosecutors became ‘control of observance of the law’ (prokuratorską kontrolą przestrzegania prawa). This Act remained in force until 1985 when the current Act on the Polish prosecution service was adopted.\textsuperscript{342}

5.3.2 The structure of the Polish Communist Prokuratura

The institution was composed of three hierarchical levels

- the local Prokuratura in cities and district courts (both courts later being gathered under the generic regional courts)
- the voivode Prokuratura at the voivode level
- the prosecutor general’s office at the central level

The Prokuratura was centralised and organised according to the principle of hierarchical subordination. All prosecutors were, in principle, directly subordinate to their immediate superior and to the head of the institution, i.e. the general prosecutor. However, each office was subordinate only to the general prosecutor.

\textsuperscript{337} Translation of the Ustawa z dnia 20 lipca 1950 o Prokuraturze Rzeczypospolitej Polskiej (Dz.U. Nr 50, poz. 346) in Législation Polonaise 1952, p. 208.
\textsuperscript{338} Chapter 6 of the Constitution is ‘The courts and the public prosecutors office’, see Burda 1964.
\textsuperscript{339} Gsovski & Grzybowski 1959, p. 762.
\textsuperscript{340} Gajewska-Kraczkowska & Palmer 1991, p. 73; Gsovski & Grzybowski 1959, p. 763.
\textsuperscript{341} Ustawa z dnia 14 kwietnia 1964 roku o Prokuraturze Polskiej Rzeczypospolitej Ludowej (Dz.U. Nr 31, poz. 138).
\textsuperscript{342} The present historical research is mainly based on the 1950 Act.
5.3.3 Subordination

5.3.3.1 Appointment and education

The Council of State, on motion of the Party, directly appointed and recalled the general prosecutor (Article 5-1, 1950 Act). The President of the Council of State

- directly appointed and dismissed deputies of the general prosecutor and military prosecutors (Article 5, 1950 Act)
- appointed and dismissed chief prosecutors of the voivode and of the general prosecutor’s office on motion of the general prosecutor (Article 8-1, 1950 Act)

At the local level, the general prosecutor appointed and dismissed prosecutors and deputies in the cities and districts and the deputies in the voivode (Article 8-2). Applicants without a university degree and under the age of twenty-six – only a few months of lectures were enough to comply with the educational requirements – could be appointed as prosecutors. The newly appointed trainee would start without any experience in court, and no traineeship was required. The most important requirements were to be of ‘good social origin’ and be devoted to the Communist Party. Of course, in practice, membership of the Party was a necessary condition to be appointed or awarded a higher position. During the Stalin era, judges, attorneys and prosecutors were required to attend political seminars in ‘Marxism-Leninism-Stalinism’ to become aware of the latest evolutions of Socialist Legality.

Public prosecutors were held responsible for their breaches of duty in disciplinary proceedings, instituted by an order issued by the Council of State on motion of the general prosecutor.

5.3.3.2 Dependence and independence of the Prokuratura

The general prosecutor was directly subordinate to the Council of State and bound by its directives (Article 6-1, 1950 Act). The Council of State issued regulations concerning the status – hierarchy, salary and discipline – of prosecutors and civil servants working in the institution. Since the Council of State was appointed and dissolved by the Sejm, the Prokuratura was also indirectly

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343 Gsovski & Grzybowski 1959, p. 346.
345 Frankowski 1987.
subordinate to it. The general prosecutor could personally carry out all the functions of his deputies or directly order specific tasks (Article 9, 1950 Act). General and specific directives of the general prosecutor were compulsory for his deputies. He controlled the activities of prosecutors and other staff, and periodically reported to the Council of State.\(^{347}\) He was the head of the civilian and military Prokuratura.

Lower prosecutors were directly subordinate to the general prosecutor (Article 7, 1950 Act). They were also subordinate to the head of the office to which they were appointed. The superior prosecutor reviewed the decisions and orders of his deputies. The head of a prosecution office had the right to order his deputies to act in his place and in his name. The head also had the right to take over the functions of his deputies and to act in their place.

Acts carried out by a prosecutor in the exercise of his functions were undertaken in the name of the Prokuratura. They bound the institution as a whole. In principle, independently of his affiliation to a particular office, a prosecutor could perform any act concerning criminal proceedings unless that act belonged to the exclusive jurisdiction of a prosecutor with a specific rank. Nevertheless, not every prosecutor possessed the right to carry out his functions in all pending proceedings. He needed to be appropriately empowered. A prosecutor could be thus empowered by the general prosecutor, or by the jurisdiction of his appointed office (rationae materiae and rationae loci).

The Prokuratura was only subordinate to the Council of State. It was a separate and independent branch of State power. While carrying out its functions it was independent from any other organ. All other administrative or economic organisations were obliged to assist it in any way possible (Article 12, 1950 Act). This independence was necessary for prosecutors to carry out their so-called general legal supervision over all authorities and agencies in the country. We will see that prosecutors were entitled to screen the activity of any public or economic body and request the redress of any breach of the law (see 5.4.2). Without independence, this supervision would have been undermined. The structural independence of the Prokuratura could not be imprecise. When performing his functions in judicial proceedings, a prosecutor had, in principle, to apply procedural law

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\(^{347}\) Grzegorz W. Grajewski & M. Murzynowski 1989.
However, the institution was strictly dependent on the Council of State and did not enjoy much political independence when carrying out its functions. Although the primacy of the Party was not stipulated in the Constitution as in the Soviet Constitution, the *Prokuratura* was the guardian of legality *for* the central authorities, thus the Party, and not the watchdog of legality *against* the central authorities. In the context of Socialist Legality, it could be held that the first motive of the members of the *Prokuratura* was to respect the Party directives that could lead above all to political prosecution, especially during the Stalinist era. This, however, does not mean that prosecutors who were also lawyers did not perform their functions as such.

5.4 Supervisory functions of the Polish *Prokuratura*

5.4.1 Provisions common to general and judicial supervision

The 1952 Constitution stated in Article 54 that the task of the general prosecutor is

> To guard the people’s rule of law...and to safeguard the respect of the rights of citizens.

Article 3 of the 1950 Act provided that the general prosecutor was to

1) supervise that the laws are strictly executed by all authorities and agencies at the *voivode*, district and city levels as well as by the units of nationalised economy, social institutions and individual citizens,
2) supervise conformity of the regulations issued by all the bodies mentioned under 1) with the law,
3) protect the rights of citizens,
4) supervise the correct and uniform application of the law by the courts as provided in the procedural Acts,
5) initiate the criminal procedure, watch over the preparatory proceedings and sustain the public prosecution at trial,

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348 The *Prokuratura* had to safeguard the law and respect the principle of objective truth (see 5.5.1.1), therefore prosecutors in charge of criminal proceedings had to act for and against the defendant’s interests, see Gajewska-Kraczkowska & Palmer 1991, p. 76.

349 Article 126 of the 1936 Soviet Constitution notes that the Communist Party of the Soviet Union is: ‘the vanguard of the working people in their struggle to build a Communist society and is the leading core of all organisations of the working people, both social and State.’
6) order the execution of criminal judgments and supervise their implementation in detention centres,
7) take any measures necessary for the protection of social property and the prevention of crimes.

According to these texts, the functions of the Prokuratura were extremely broad and were not only centred on criminal activities. Prosecutors could exercise wide control over the activities of authorities and agencies at the voivode, district and city levels, as well as through the units of the nationalised economy, social institutions and individual citizens. Only the national organs escaped this supervision. The institution was actually instrumentalised by the totalitarian regime in order to act as the guardian of Socialist Legality. Prosecutors were one of the cornerstones of the Communist State. They were recipients of complaints made by people against administrative decisions of bodies active in society. Because of the very strong constitutional and legal position of the prosecution, any information requested from an authority by a prosecutor had to be provided. On the one hand, prosecutors could take part in the decision-making process of governmental bodies and corporate organs. They could act preventively before an individual or general decision was made. They could participate in pending proceedings or institute proceedings in all matters. On the other hand, once a decision was made, prosecutors had a general right to request illegal decisions to be annulled or modified. Supervision was divided into general supervision and judicial supervision.

5.4.2 General supervision

The function of general supervision is certainly the most striking difference between the Western and Soviet-style prosecution services, because this function has nothing to do with the prosecution of crimes. It was mainly aimed at supervising the enforcement of Socialist Legality by all the administrative agencies and redressing grievances relating to administrative organs. General supervision could affect the strict control of the respect of Socialist Legality by all social bodies and the activity of these bodies in all aspects, be that internal regulation or decisions binding upon citizens without distinction to the type of decision or the quality of the decision-maker. Specific laws and regulations dealt with general

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350 Frankowski 1982.
351 For more details on the general supervision function of the Soviet Procuracy, see Helczyński 1962; Smith 1978.
supervision – such as the 1960 Administrative Procedure Code. This function had little to do with judicial activity and with criminal law, because a grievance against an administrative organ was, in principle, not a criminal offence. Of course, it could exceptionally also constitute a crime and be prosecuted.\textsuperscript{352}

Firstly, prosecutors were empowered with the right to request any information or document. The recipient of a request could be anyone or any body, with the exception of the supreme State body. The 1950 Act lists State administrative bodies, local government agencies, all civic, professional, cooperative, self-governing bodies and citizens. The government and its ministers were gathered within the State administration and were therefore bound to comply with prosecutors’ orders and requests. The recipient of a request was obligated to respond (Article 12, 1950 Act). The purpose of the request was first to screen whether the Communist Rule of Law was strictly respected and secondly whether the people’s rights were respected. Prosecutors could take part in the meetings of these bodies and require the head of the body to control the activities of his deputies and intervene in the course of proceedings.

Secondly, the Prokuratura could supervise the acts or any functions of all bodies active in society (Article 10 § 1, 1950 Act). If a prosecutor found a decision illegal, he had the right to object to this decision and demand redress of the grievance. The 1950 Act states that illegal acts are those contrary to law or directives or to instructions issued by superior authorities. He could submit this protest to the immediate superior of the organ addressed. The organ affected had thirty days to deal with the objection. If it deemed the protest well founded, it either ordered the reopening of the proceedings, or rescinded or modified the decision. Where a decision considered illegal by a prosecutor was issued by a supreme administrative organ, the prosecutor could only explain his objections. Ultimately, the decision rested with the administrative organ.

\textsuperscript{352} During proceedings, prosecutors were interchangeable in their application of the principle of the ‘uniformity of the office of the prosecutor’ see Gajewska-Kraczkowska & Palmer 1991, p. 73. In the Soviet Union, prosecutors used to be specialised by field of activity within each district. The prosecutor in charge of general supervision was usually not the one in charge of public prosecution; see Collignon 1977, pp. 371–375.
5.4.3 Judicial supervision

The *Prokuratura* supervised the strict observance of Socialist Legality by organs participating in preliminary and judicial proceedings and in detention centres. Prosecutors carried out this function through the application of procedural laws (Article 10 § 2, 1950 Act). The scope of the judicial supervision covered every field of law since prosecutors were present in every court and could intervene at any stage of the proceedings. Prosecutors could institute proceedings or intervene in pending proceedings in all fields of law. Prosecutors thus supervised the correct application of civil, labour, military and criminal law. This supervision took place on occasion of judicial proceedings, but also outside the scope of proceedings when a prosecutor deemed a modification in the application of the law necessary. In order to ensure the uniformity of the interpretation of Socialist Legality, the *Prokuratura* could propose interpretative principles of law to the Council of State if it discovered that the courts did not apply the law in accordance with Socialist Legality.\(^{353}\)

If a violation in the application of law or a contradiction between the existing law and Socialist Legality were discovered outside pending proceedings, prosecutors would intermediate between the decision-maker and the organ violating the law. Ultimately, redress for the violation or contradiction was the task of the Supreme Court or the Council of State. Article 4 of the 1950 Act provided

1) The general prosecutor can propose to the Council of State concerning the interpretation of the laws in force and their implementation,

2) Interpretation and principles concerning the application of law issued by the Council of State have a general binding force and are published in an official journal that will be indicated by the Council of State.

The *Prokuratura* also had the duty to take any measure necessary to prevent crime. The Council of State remained the body to decide on propositions but the general prosecutor was the empowered institution cognisant of the day-to-day state of court and district affairs. It could therefore trace and report problems directly to the top.

As will be shown in more detail below, prosecutors also carried out classical functions in criminal proceedings. In this area, prosecutors were in a very strong position and watched over the correct

\(^{353}\) Rozmaryn & Warkałło 1967, p. 376; Gsovski & Grzybowski 1959, p. 736.
application of substantive and procedural criminal law by bodies involved in preparatory proceedings and courts. Court independence was purely a façade. Every interpretation made by a court could be reversed at the general prosecutor's motion at trial by way of appeal, even after the decision became definitive and effective. However, the interpretations of the courts on judicial issues could also be the object of questions posed by the prosecutor to the Supreme Court or the Council of State, and the answer would be binding on the lower courts.

5.5 The role of the Polish Prokuratura in the preliminary phase of the criminal process

5.5.1 The role of the Polish Prokuratura in preparatory proceedings

5.5.1.1 Institutions initiating prosecutions, the principle of legality, compulsory prosecutions and the principle of objective truth

Public prosecutors or the militia were competent to commence preparatory proceedings if there were good reasons to suspect the commission of an offence. Before Stalin's death in 1953, the powers of the militia were extremely important, but they diminished after 1953 to the benefit of the Prokuratura.\textsuperscript{354} In certain cases, other institutions could receive the notification of a crime and conduct preliminary proceedings in the form of an inquiry. These institutions had the same procedural rights as the militia.\textsuperscript{355}

The principles of legality, non-retroactivity, compulsory prosecution and objective truth had to be respected

- firstly, there could be no crime and no punishment without such being provided for by the law in force at the time of the commission of the act in question (Article 1, 1932 and 1969 CC)
- secondly, the competent authority (the Prokuratura and the militia) had the duty to initiate criminal proceedings and to issue

\textsuperscript{354} According to several authors, the militia was the institution endowed with the real power in all criminal proceedings. Immediately after the war, it was vested with the authority of the investigating judge as provided for in the old Procedural Code; see for example Frankowski & Wasez 1993; Gsovski & Grzybowski 1959, p. 764.

\textsuperscript{355} These institutions were agencies of the Minister of Finance in cases concerning offences committed to the prejudice of the State, and units of the frontier protection forces in cases concerning offences against the inviolability and security of the State border.
an indictment as soon as it had recorded the commission of a criminal act (Article 5-1 CPC)

- thirdly, all decisions in criminal cases were to be based solely on well-established facts and not on legal fictions. It was the duty of institutions involved in criminal proceedings to do everything in their power to establish the relevant facts. This duty was also binding upon prosecutors even if the facts spoke in favour of the accused

In several cases, the injured party acting as a private prosecutor (Article 49 CPC) could also commence proceedings, charge a person with a criminal offence and file an indictment for the punishment of the perpetrator. Private prosecution was only admissible against offences with a direct effect on the injured person’s rights or property – such as interfering with the post, defamation or violation of bodily integrity, etc. In principle, a victim acting as a private prosecutor had the same rights as a public prosecutor. However, the principle of compulsory prosecution did not apply, and if the victim withdrew his charges, the court would stop the proceedings. It was said that the private prosecutor ‘rents’ a judge for his case. Nevertheless, if the public interest so required, a public prosecutor could intervene in the case and take over the proceedings. In addition to the right to act as private prosecutor, an injured person could also ask the court to join a public prosecution as a subsidiary prosecutor (Article 44-1 CPC).

5.5.1.2 Decision affecting prosecutions, investigation and inquiry

Before the institution of preliminary proceedings, the CPC provided that if the notification of the acts did not specify sufficient grounds for instituting preliminary proceedings, they should be refused by way of order on approval of the prosecutor.

The police could carry out a screening of the acts notified within a maximum of thirty days. After completion of the screening or upon receipt of sufficient information, preliminary proceedings could be instituted. A prosecutor or the militia would issue an order instituting

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356 Article 40-2 CPC stipulated that: ‘A public or social institution may also be treated as the injured person even though it has no separate legal entity.’ The injured party, wrote Murzynowski, is defined: ‘as the person whose legal welfare (life, health, property, dignity, personal inviolability etc.) has been directly violated or threatened by the committed offense.’ In Kurowski 1984, p. 329. The notion of injured party was very broad and would certainly be a powerful tool of control of the mandatory prosecution principle.

prosecution and describing the object of the proceedings, the acts and their legal characteristics.

In order to collect evidence and testimonies, and eventually capture the perpetrator, an inquiry or an investigation could take place before the issuance of an indictment. According to the gravity of the facts, prosecutors could start an investigation while the militia could institute an inquiry. Investigations were compulsory in certain cases or for important or complex crimes (Article 262 CCP). A proceeding that started as an inquiry could be continued in the form of an investigation.

The period of completion was three months from the day of the institution of the investigation and one month in the case of inquiries. In principle, prosecutors were empowered to conduct and supervise preparatory proceedings. Nevertheless, a prosecutor could delegate activities and actions to the militia. The militia could conduct an inquiry, either on its own authority or pursuant to a prosecutor’s order. In some cases, other bodies conducted inquiries, such as the Minister of Finance if financial offences were involved.

Police custody was limited to forty hours. Only prosecutors had the right to decide or approve coercive measures – such as preliminary detention – to extend the period for completion of the investigation, to dismiss a case or to decide other ways for the proceedings to end. The public prosecutor had the right to issue a preliminary detention order if reasons for such detention were found. Such detention could last for up to three months. The superior prosecutor (voivode) could order an extension of six months, but only a voivode court could extend the detention beyond six months.358

During the preliminary proceedings, if no sufficient grounds to justify the preparation of an indictment were found, the militia or other bodies could issue an order for dismissal. However, such an order had to be ratified by the public prosecutor. The prosecutor could also decide to suspend proceedings for a certain period or to order a supplementary investigation.

Alternatively, if there were sufficient grounds to justify the preparation of an indictment, the files and evidence were handed over to the prosecutor. The end of proceedings could take the form

358 During preliminary proceedings, prosecutors could order or approve detention. Once the indictment was issued, the right to detain the suspect belonged to the court. Upon the suspect’s appeal, the court supervised orders on pre-trial detention and the extension of the pre-trial detention period. Only the Supreme Court could extend the period of detention beyond nine months.
of a formal order or none could be issued. Within fourteen days of the conclusion of preliminary proceedings, the prosecutor was obliged to file an indictment with the court, dismiss the case, conditionally dismiss the case, or suspend or supplement the proceedings (see below).

5.5.1.3 Exception to mandatory prosecutions

The principle of mandatory prosecution did and does not mean that every single criminal act had to be prosecuted. Public institutions had neither the time nor the means to do so. The decision to refuse to start proceedings, or to dismiss proceedings already instituted, had to comply with the law. There were a few strict legal exceptions to the principle of mandatory prosecution, e.g. juvenile crime.\textsuperscript{359} Article 11 CCP stipulated:

\begin{quote}
Criminal proceedings shall not be instituted, or, if previously instituted, shall be dismissed, when a circumstance precluding such proceedings occurs, and in particular when:

1. the act has not been committed, or does not possess the qualities of a prohibited act, or when it is acknowledged by law that the perpetrator has not committed an offence,
2. it has been established by law that the act is not an offence because it constitutes only an insignificant social danger, or that the perpetrator is not subject to penal sanctions,
3. the perpetrator is not subject to the jurisdiction of the criminal courts,
4. no indictment has been made by a duly authorised prosecutor, permission to prosecute has not been granted, or no complaint has been filed by the person lawfully entitled thereto,
5. the accused is deceased,
6. the prescribed limitation period has lapsed
7. or criminal proceedings concerning the same act committed by the same person have been validly concluded or, if previously instituted, are still pending.
\end{quote}

The notion of social danger and the permission to prosecute need further development. If the social consequences of an act were not overridden, the act was not a criminal offence (see 5.2.1.2). An act

\textsuperscript{359} The prosecutor had to consider whether it was reasonable or not to institute criminal proceedings, see Gajewska-Kraczkowska & Palmer 1991, p. 77.
was socially dangerous when it affected the interests of the Popular State – its regime, its independence or its security – or when it affected common property – such as social estate or assets – or if the act affected private property protected by law. Acts affecting other private property – in practice, almost all private properties – were not considered criminal offences for which public prosecution was obligatory. Private prosecution was nevertheless available to the victim. In principle, the law would provide definitions of acts causing no social danger. However, by exception, if the act caused a real social danger, e.g. hooliganism, the prosecution authority would always have the right to prosecute. As a further exception, the prosecution of an act defined by law as a social danger could be dropped where this social danger ceased to exist.

This could occur when the perpetrator had repaired the damage caused or when the object of the act ceased to be dangerous.

The permission to prosecute (developed in Article 5-2, 1969 CPC) meant that permission was required for the prosecutor or the militia to prosecute certain persons when this was established by a specific statutory provision. This provision affected the so-called immunity of certain important members of the State administration such as judges, deputies or prosecutors. For instance, if a prosecutor had committed a criminal offence, prosecution was only possible after his superior revoked this immunity. In some particular cases – such as rape or theft committed to the detriment of a next of kin – public prosecution depended on the initiative of the injured person (Article 5-3 CPC).

Once proceedings were instituted, the prosecutor in charge of the case – or another body on a prosecutor’s approval – could also decide the conditional dismissal of the proceedings for one or two years. The prosecutor could oblige the accused to fulfil certain obligations such as the compensation of damage done to the victim for a certain period. The case could be dismissed on completion of the obligations. Conditional dismissal could take place when

- the degree of social danger of the act was not substantial
- the defendant was a first-time offender and there was reason to believe that no further offences would be committed

The dismissal of a case was no guarantee that the accused would not be prosecuted further. Reopening was possible against another suspect at any time but the direct superior of the prosecutor who

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360 Siewierski 1963.
dismissed the previous proceedings could reopen proceedings against the same suspect only in the event of the discovery of circumstances of vital significance, unknown to the previous proceedings (Article 293 CPC).

5.5.2 The role of the Polish *Prokuratura* in the supervision of the preparatory proceedings

5.5.2.1 Supervision by the direct superior

In certain circumstances provided by law, a prosecutor had to disqualify himself from participating in the proceedings (Articles 38 and 39 CPC). His direct superior could order this disqualification if necessary.

Acts carried out by prosecutors and other organs were formal and had to contain certain provisions – such as the name of the suspect, the act imputed to him and the legal qualification of the act. Reasons for every order concerning measures taken during the preliminary proceedings were required in writing. Prosecutors in their supervisory functions screened these acts and reasons. The purpose of the supervision of preparatory proceedings was to ensure that proceedings were conducted correctly and efficiently. The prosecutor in charge of the supervision of proceedings would (Article 292-3 CPC)

1. Inform himself of the intentions of the person conducting the preparatory proceedings, indicate the directions for the proceedings, and issue rulings in the matter,
2. Request that materials collected in the course of preparatory proceedings be presented to him,
3. Participate in actions carried out by the person conducting the investigation or inquiry, carry them out in person, or personally assume the conduct of the case,
4. Issue orders and rulings, and amend and reverse orders and rulings issued by the person conducting the preparatory proceedings.

Firstly, there is the supervision between prosecutors in the course of preparatory proceedings, orders issued by the prosecutor in charge of a case could be challenged by the parties by way of reclamation, in principle, before his direct superior. A superior prosecutor could also interfere *ex officio* with decisions made by a deputy.

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361 For example, if he was directly connected with the case, or the spouse of another party or of the judge, or an eyewitness, etc.
Supervision provided the right to request information from a deputy as well as the right to reverse or annul acts carried out by a deputy when these acts were considered inefficient or incorrect.

Secondly, prosecutors supervised other institutions, such as the militia, in the execution of acts in preparatory proceedings. Orders made by the militia could also be appealed by way of interlocutory appeal before the superior prosecutor (Article 413 CPC).

The supervision of a superior prosecutor over his deputy and over the militia or other inquiring body was performed a priori and a posteriori. Certain acts had to be forwarded to the superior prosecutor for approval. This was particularly the case with decisions to refuse to institute preparatory proceedings and to dismiss or suspend proceedings. Only a prosecutor could decide on the extension of the duration of proceedings and on pre-trial detention (see also 5.5.1.2).

### 5.5.2.2 Supervision by the general prosecutor and the court

The general prosecutor had the right of control ex officio over preparatory proceedings. For instance, he had the right to reverse an order to dismiss valid proceedings. This right could affect orders to dismiss preparatory proceedings with respect to a person examined as a suspect, unless the order had been issued by a court. If the general prosecutor found this order groundless, he had six months to reverse it from the day the order became valid. After this six-month period elapsed, the general prosecutor could only reverse or amend the statement of reasons in favour of the suspect.\(^\text{362}\)

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\(^{362}\) An order was validly issued when all requirements provided by law were met (i.e. the prosecutor's ratification in writing and issuance within fourteen days of the conclusion of the investigation). An order to dismiss a case could be challenged by the victim by way of interlocutory appeal within seven days of the date of notification of the order. An accused party could challenge an order of conditional dismissal by way of protest within seven days of the date of notification of the order.
5.6 The role of the Polish Prokuratura after the preliminary phase of the criminal process

5.6.1 The position of public prosecutors in the first instance

5.6.1.1 The pre-trial conference

Once an indictment was issued (within fourteen days of the conclusion of preliminary proceedings), the competent court was not bound by any attempt of the public prosecutor to dismiss the charges. The possible withdrawal of the public prosecutor from the case did not prevent the court from continuing proceedings. The prosecutor ceased to be the principal actor in the criminal process, though the main hearing had not yet commenced.

Indeed, the president of the competent court could decide, *ex officio*, or upon the request of a party, to refer the case to a pre-trial conference composed of trial judges (Article 299 CPC).\(^{363}\) This pre-trial conference was not public, the prosecutor was not obliged to attend the conference and the defendant and his counsel could attend only if the president permitted it. The president of the court checked *ex officio* that

- the indictment formally met legal requirements. In case of errors, the case would be referred to the prosecutor for correction (Article 298 CPC)
- there was no reason to dismiss the case in application of Article 11 CPC (see 5.5.1.3)\(^ {364}\)
- no other court had jurisdiction, unless it concerned a case referred by another court with jurisdiction
- there was no reason to suspend proceedings (Article 15 CPC provides for this in cases where the accused could not be arrested or could not participate in the proceedings because of mental illness, etc.)

The pre-trial conference has been criticised because it violated the public character of the criminal trial and the right to a defence.\(^ {365}\)

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\(^{363}\) The fact that after a hearing a court had only three days to render a judgment could explain the importance of the pre-trial conference (see 5.6.1.2).

\(^{364}\) It seemed here that the court could perform an important control notably because it could decide that the level of social danger of the act committed was not significant enough to continue the case.

5.6.1.2 The first instance hearing

After verification of the indictment, the court would notify the accused of this indictment, choose the judges who would try the case and set the date and place of the hearing. During the hearing, a prosecutor had to be present (Article 37 CPC) except in summary proceedings applicable only to crimes causing minor damage or for which no custodial sentence could be imposed (Article 424 CPC). During the hearing, the prosecutor
• read the charges
• participated in the judicial examination (examining evidence, witnesses, victims, experts and the accused)
• delivered his speech

Before deliberation, if new circumstances occurred during the judicial examination and further investigations were necessary, the court could remand the matter to the investigating prosecutor. After the hearing, the court would retire for deliberation and deliver a judgement within three days. If the time limit was not respected, the trial had to be restarted. The judgement was recorded in writing and met certain legal requirements, for example concerning the description and legal classification of the act and the names of the judge and prosecutor (Article 360 CPC). Every judgement decided the criminal liability of the accused. Judgements of guilt included a detailed description of the act committed by the accused and the sentence imposed on him. A statement of reasons was provided if a party requested it, which had to include a legal basis for and description of the facts found, proven or unproven, and a description of the evidence used to support the outcome of the decision.

5.6.2 The position of public prosecutors in ordinary forms of review

5.6.2.1 General provisions concerning the appeal and the reclamation

Part nine of the 1969 CPC established the appellate proceedings (postępowania odwoławcze). The general provisions (przepisy

366 The prosecutor case at a hearing in the Soviet Union would include a political appraisal of the offence, a summary of the case, an analysis of the evidence, an analysis of the character of the accused, a legal qualification of the offence and potentially an opinion as regards the sentence, see Collignon 1977, p. 371.

ogólne) detailed the main requirements for both appeal and reclamation, including

- the parties entitled to appeal
- the formal requirements of the act of appeal
- the grounds and limits for review
- the rights of the appellate organ with regard to the decision challenged

In two separate chapters, the Code established requirements respectively for appeal (apelacja) and reclamation (zażalenie). The writ of review had to state the demands and objections raised against the decision issued regarding facts and law, and to include several formal requirements (such as the identity of the person lodging the appeal or the contents of the appeal and its supporting reasons, see Article 104 CPC).

The appellants, the parties to the proceedings, could challenge a decision in part or in whole only if it was prejudicial to their rights, and if their appeal was lodged within the prescribed time limit. The injured party acting as a subsidiary prosecutor could only challenge the part of a decision concerning the conviction and not the sentence. The prosecutor could challenge a decision without reservation (Article 374 CPC). He could also challenge a judgement prejudicial or beneficial to the accused.

The president of the appellate court performed an initial check to ensure that the writ of review met formal requirements. He could declare it inadmissible and send it back to the appellant for corrections or simply not grant the review.

The appellate court, or the competent prosecutor in case of reclamation, examined the appealed decision only within the ambit of the grounds mentioned in the writ of review. However, if the review was to the detriment of the accused, it could lead to a decision in his favour, while a challenge made for the benefit of the accused could not, in principle, lead to the aggravation of his situation. Irrespective of the limits of the review, the court checked

- the so-called ‘absolute grounds for revision’ (see 5.6.3.1)
- if the decision challenged was ‘manifestly unjust’. The law did not specify what a ‘manifestly unjust’ decision was and left this issue to the court’s judgement

368 It seems that a decision was manifestly unjust when it violated the interest of the Popular State.
An error in the evaluation of evidence, in the application of the law or in the measure of punishment could justify a review of the judgement. Article 387 CPC stipulated that the review would be implemented in cases of

- a violation of the provisions of substantive law
- a violation of the provisions of procedural law, if this could have affected the contents of the decision issued
- an error in the determination of the factual situation accepted as a basis for making the decision, if this could have affected the contents of this decision
- the penalty imposed being strikingly disproportionate to the offence; or where the application or failure to apply a preventive measure, or any other measure, was unfounded

Until the court of appeal retired for deliberation, an appellant could withdraw the appeal unless it was in favour of the accused, in which case the consent of the accused was necessary. However, if ‘absolute grounds for revision’ were found by the court in the appealed decision, the withdrawal of the act of appeal had no effect and the appellate court reversed the challenged decision. Once the appellate court had examined the decision, it could

- maintain the challenged decision
- modify the decision by aggravating or attenuating the sentence, sentence an acquitted person or acquit a convicted accused. However, the Supreme Court could not convict someone acquitted in the first instance or someone against whom proceedings in the first instance had been dismissed

The court could also

- set aside the decision in whole or in part and reverse the decision and dismiss the proceedings
- set aside the decision in whole or in part and refer the case with a binding opinion and within the limit of the writ of review to
  - the first instance court for re-examination
  - the prosecutor, if essential deficiencies occurred during the preparatory proceeding or if additional evidence was required. The referral of a case to a prosecutor could also be necessary to extend the prosecution to acts closely related to

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369 Waltoś 1979, p. 11.
the pending case committed by persons as yet not prosecuted

5.6.2.2 Some divergences between appeal and reclamation

Parties were entitled to challenge a judgement delivered by a court of first instance by way of appeal. The time limit for filing an appeal was fourteen days from the service of judgement. A subsidiary prosecutor could attack the part of a judgement concerning conviction. An appeal could raise objections which had not or could not constitute the object of a reclamation. Alternatively, reclamation could be brought against

- the orders of a court, which preclude the rendering of a judgement – i.e. orders taken after completion of the pre-trial conference
- the orders deciding a preventive measure
- other orders if provided for by law

The time limit for filing a reclamation was seven days from the date of service of the order. The provisions on appeal against decisions of a court applied accordingly to reclamations against decisions of public prosecutors or other organs conducting the preliminary proceedings. A decision made by

- a public prosecutor was challenged by way of reclamation filed with his superior, and when provided for by law, with a court
- an organ conducting the preliminary proceedings was challenged by way of reclamation by the prosecutor supervising these proceedings

If the review was filed with a prosecutor, general provisions common to appeal and reclamation applied accordingly.

5.6.3 The position of public prosecutors in extraordinary forms of review

5.6.3.1 The reopening of proceedings

If an appeal or reclamation was no longer available, a valid decision concluding court proceedings could be reviewed in certain legally specified situations, for instance where new facts or evidence were found, previously unknown to the court, indicating that the accused was innocent. The review would then be filed with the voivode court or the Supreme Court. Before 1969, the law distinguished the reopening of proceedings prejudicial to the accused from reopening
to his benefit. Only a prosecutor could request the reopening of proceedings prejudicial to the accused. In the 1969 CPC, a general classification of the circumstances that could result in review replaced this distinction. Court proceedings concluded by a valid decision were reopened if (Article 474 CPC)

- an offence had been committed in connection with the proceedings and there was good reason to believe that this might have affected the contents of the decision
- after the decision had been issued, new facts or evidence previously unknown to the court came to light, which indicated that
  - the convicted person was innocent or had been sentenced for another offence carrying a severer penalty than that for the current offence committed
  - the court erroneously dismissed the proceedings, relying without good reason on one of the grounds provided for in Article 11 subsections (3) to (7) CPC (see 5.5.1.3)
- any of the ‘absolute grounds for revision’ had come to light (Article 388 CPC)
  - a person unauthorised to decide on the matter, or subject to disqualification had participated in the decision
  - the panel was improperly constituted or one of its members was not present throughout the trial
  - a penalty or preventive measure not prescribed by law had been imposed
  - one of the circumstances provided for in Article 11 had occurred
  - the decision was not signed by all the members of the panel
  - the accused had no defence counsel
  - a civilian court had decided upon a case falling under the jurisdiction of a special court or a special court had decided on a case falling under the jurisdiction of a civilian court
  - a lower court had decided on a case falling under the jurisdiction of a higher court
  - the case had been heard in the absence of an accused whose presence was mandatory

Proceedings could be reopened by the court at the request of parties, and *ex officio* in case of ‘absolute grounds for revision’. Reopening was even possible by a family member if the accused was deceased. If the decision had already been examined by way of extraordinary appeal, proceedings could not be reopened.
The request for reopening was made before the court of last resort (the voivode court or the Supreme Court) sitting as a panel of three judges. Refusal of a court to reopen proceedings could be challenged by way of reclamation before the Supreme Court unless the dismissal came from the Supreme Court itself.

If the request was granted, the court could

- set aside the decision and remand it to a competent court for re-examination. The decision to reopen and remand the case to the competent court could not be challenged
- reverse the appealed decision and acquit the accused in a new judgement

5.6.3.2 The extraordinary appeal

Any valid judicial decision concluding the proceedings – e.g. an order to dismiss a case – and any valid judgement incapable of challenge at appeal or reclamation could also be challenged by way of extraordinary appeal. Only the Supreme Court had jurisdiction to review decisions by way of extraordinary appeal. The Supreme Court as a panel of seven judges had jurisdiction to review its own decisions.\(^{370}\)

The right to file an extraordinary appeal was only granted to the Minister of Justice, the general prosecutor and the first president of the Supreme Court. It was not a third-instance form of review because the parties to a case were not granted this right.\(^{371}\) However, the appeal could be filed at the motion of the injured party, the person convicted or the persons authorised to take appellate measures. Though all three institutions could be petitioned to file an appeal, only one appeal would be granted.

A decision could be challenged without restriction as soon as an error vitiated the judgement or the proceedings. The Supreme Court was not bound by the grounds produced in the writ of review. Any kind of error could serve as grounds for extraordinary appeal, such as

- violation of substantive law

\(^{370}\) Article 51 of the 1952 Constitution notes, however, that the Supreme Court supervised the activity of all other courts. In application of this provision, the Supreme Court could not supervise its own decisions. Nevertheless, the Supreme Court's review over its own cases was never judged to be unconstitutional.

\(^{371}\) The issue of considering the extraordinary appeal as a third-instance form of review has however been debated by scholars; see in particular, Boim, Morgan & Rudzinski 1966.
• violation of procedural law if it affected the judgement
• incorrect appraisal of facts on which the judgement was based
• discrepancy between the sentence imposed and the offence committed

Extraordinary appeal could be filed for the benefit and to the prejudice of the accused. For instance, appeal was admissible for the accused even in cases where the sentence had been served, clemency had been granted, the prescribed limitation period had expired or the accused had died. It did not matter whether the sentence had been served or not. If it had not, the Supreme Court could stay the execution of this decision. There was no time limit to file the appeal. Before 1969, a decision prejudicial to the accused could be challenged after six months from the date the judgement became valid. A decision modified upon appeal filed after six months could not modify the accused’s circumstances but only serve the uniformity of case law. The resulting decisions taken by the Supreme Court would take the form of an opinion binding on lower courts. According to the 1969 Code, appeals filed after six months were not granted if prejudicial to the accused. Concretely, the accused had to wait for an extra six months in order to be sure that the judgement was irrevocable. It meant that an acquitted accused could be arrested again if the appeal had been filed before the six-month time limit had expired. An extraordinary appeal concerning the same accused and the same decision and based on the same charges could be brought only once (Article 467 § 2 CPC). If new charges were brought against the same judgement and the same accused, another extraordinary appeal could be filed. This could happen at any time. A new final judgement delivered by a lower court on the same matter, but after the previous one had been annulled by the Supreme Court, could be challenged again by the same person against the same accused if new charges, evidence or factual circumstances were found. In such cases, the accused risked double jeopardy.

Only the Supreme Court had the jurisdiction to hear extraordinary appeal. It could annul a decision that violated the law or set it aside and remand the case back to a lower court. Its opinions on questions of law and on questions of facts were binding on the remanded court. However, the latter remained free to appraise new and old evidence according to its understanding, to establish factual circumstances accordingly and to decide on the penalty in a manner
possibly inconsistent with the implied or assumed stance taken by the Supreme Court.\textsuperscript{372}

5.6.3.3 The reinstatement of proceedings conditionally dismissed by the court

At the motion of a public prosecutor, or \textit{ex officio}, the court of first instance could decide to reinstate proceedings conditionally dismissed by the court if this dismissal was no longer justified. The motion or the decision to reinstate had to be settled by a decision of the court of first instance with jurisdiction over the case.

5.6.3.4 Compensation for unjustifiable sentencing or detention

In certain cases, an accused was entitled to request compensation for damage incurred by him because of a wrong judicial decision – \textit{e.g.} if he was acquitted or re-sentenced under a more lenient provision because of a reopening of proceedings or a cassation appeal or if he suffered manifestly unjustifiable preventive detention. The \textit{voivode} court in whose jurisdiction the judicial decision was taken was competent to judge the compensation claim. The right to seek compensation could not be exercised beyond one year from the date on which the judicial decision became valid and final.

5.6.3.5 Clemency

A convicted person or a person authorised to file an appellate measure could file a clemency petition; however, the general prosecutor could also institute it \textit{ex officio}. The court that delivered judgement in the first instance had jurisdiction to decide on the petition. If it expressed a favourable opinion, the file was transmitted to the general prosecutor who presented it to the Council of State. The Council could decide whether to grant clemency or not. The general prosecutor could also be ordered by the Council of State to institute clemency proceedings \textit{ex officio}.

\textsuperscript{372} Boim, Morgan & Rudzinski 1966.