Chapter 6

Poland – the current organisation and functions of the prosecution service in the criminal process

The rise of political opposition during the 1980s finally meant the collapse of the communist regime in Poland. The most important reforms took place from 1989 on. Although the Act on the PPS adopted in 1985 remained in force, fundamental amendments repealed the Soviet features of the Prokuratura in order to make the PPS an institution mainly empowered with the prosecution of crimes (6.1). Though the powers of the general prosecutor have been reduced (the general supervision function has been repealed) and the independence of prosecutors increased, we will see that the Polish current PPS remains centralised and subordinate to the Minister of Justice who fulfils the general prosecutor’s functions (6.3). The Soviet features affecting the criminal justice system, such as the two-instance system, have been repealed (6.2). The rights of the security police in criminal proceedings have been reduced to allow Public prosecutors to gain further powers. The Polish criminal procedure has been extensively modified in order for Poland to meet Western standards, in particular the European acquis (6.4). The role of prosecutors after the pre-trial phase of criminal proceedings has been changed accordingly. With regard to modifications affecting the forms of review we highlight the repeal of the extraordinary appeal (6.5).

6.1 Major changes affecting the Polish PPS in the Constitution of Poland and in the Prokuratura Act

The 1989 Round Table Agreement took place at the government’s initiative in order to defuse social unrest. Discussions took place
between the Communist Solidarność and other opposition groups. Although General Jaruzelski had hoped that the discussion would not yield major reforms, the opposite occurred. The 1952 Constitution was amended the same year. This amendment repealed the Soviet Prokuratura and launched the transformation of the institution into a French style prosecution service. The subordination of the prosecution services to the Minister of Justice replaced its subordination to the Council of State. A new version of Article 64 of the 1952 Constitution stipulated

1 – The Office of Public Prosecution shall safeguard observance of the law and the prosecution of offences.

2 – The Office of Public Prosecution is subordinate to the Minister of Justice who holds the office of the General Prosecutor.

3 – The method of appointment and recall of prosecutors as well as the principles of organisation and procedure of the Office of Public Prosecution shall be defined by law.

Between 1992 and 1997, the Small Constitution replaced and repealed the 1952 Constitution. In 1997, Poland adopted a new Constitution, repealing all provisions concerning the Soviet Prokuratura. Today, only Articles 103 and 108 of the 1997 Constitution affect the prosecution services and prevent prosecutors from cumulating their functions with a mandate of deputy or senator.

The Prokuratura Act adopted on 20 June 1985 repealing the 1950 Act became the fundamental legal instrument regulating the PPS. This text has undergone important amendments in order to transform the institution into a body compatible with the democratic principles of law. In line with the above-mentioned Article 64, the Act of 22 March 1990 appropriately amended the provisions concerning

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373 Ustawa z dnia 29 grudnia 1989 roku o zmianie Konstytucji Polskiej Rzeczpospolitej Ludowej (Dz.U. Nr 75, poz.444).
374 Tyman & Grzegorczyk 2003, p. 247.
375 Old versions of the 1952 Constitution as amended may be found at http://www.oefre.unibe.ch/law/icl/pl_index.html.
377 Ustawa z dnia 20 czerwca 1985 roku o Prokuraturze Polskiej Rzeczpospolitej Ludowej (Dz.U. Nr 31, poz.138). This act has been amended several times. At the time of writing this thesis, the latest consolidated version was published in 2002. It will be used in this work and can be found at <http://www.Prokuratura.walbrzych.pl/prokurat.pdf>.
the appointment, organisation, functions and dismissal of procurators.\[378] Article 1 § 2 of the 1985 Act now stipulates

The general prosecutor supervises the services of the prosecutor’s office. The Minister of Justice performs the functions of the general prosecutor.\[379]

In 1996, a new amendment to the 1985 Act created a uniform national prosecutor’s office (Prokuratury Krajowej).\[380] Article 6 of the 1985 Act now stipulates

1 - The prosecutors of the general units of the organisational prosecutor’s offices (powszechnych jednostek organizacyjnych prokuratury) are the national (local) prosecutor’s office (Prokuratury Krajowej), the appellate prosecutor’s offices (prokuratur apelacyjnych), the provincial and district offices (okręgowych i rejonowych).

2 - The prosecutors of the units of the organisational national prosecutor’s military offices (wojskowych jednostek organizacyjnych prokuratury), are the prosecutors of the Chief Military Prosecutor’s office (Naczelnej Prokuratury Wojskowej), the military prosecutors of the provincial and garrison prosecutor’s military offices (okręgowych i garnizonowych).

Since Poland became a liberal democracy founded on the Rule of Law respecting freedom, justice, the inherent dignity of the person and his or her right to freedom, criminal policies have changed.\[381] The new task of the prosecutor’s office is safeguarding the law and prosecuting crimes (Article 2, 1985 Act), rather than safeguarding law and order (in practice, to generally supervise and implement Socialist Legality), as was the case in the Polish People’s Republic. As a public authority, public prosecutors shall respect and protect

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\[379] All quotes from the 1985 Act as amended are the author’s unofficial translations. The terms in parenthesis are always added by the author.

\[380] The 1996 amendment also modified prescriptions concerning the general regulation of the independence, rights, duties and disciplinary responsibility of prosecutors, trainee and assistant prosecutors, and the organization and functions of the prosecutors’ office and military prosecutors; see Ustawa z dnia 10 maja 1996 roku o zmianie ustaw o prokuraturze, o Sądzie Najwyższym, o Trybunale Konstytucyjnym oraz ustawy – Prawo o ustroju sądów powszechnych i ustawy – Prawo o adwokaturze (Dz.U. Nr 77, poz. 367).

\[381] References to the Rule of Law are made in particular in the Preamble and Article 2 of the Constitution.

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the inherent and inalienable dignity of the person as established by the Constitution.\textsuperscript{382} The PPS ensures that public organs and other organisations enforce the laws passed by parliament.\textsuperscript{383} Article 3 stipulates

1. As mentioned in Article 2, the general prosecutor and the public prosecutors subordinated to him:
   1) Conduct prosecutions, supervise the penal preparatory procedures and act as the public accuser before the courts;
   2) Initiate proceedings (submit claims) in criminal and civil cases and give opinions in civil cases and participate in judicial proceedings, civil as well as labour and social insurance, if required for the protection of legality (praworządność), the social interest (interesu społecznego) and the rights of citizens or property rights;
   3) Take measures provided by the law for the correct and homogenous application of the law with regard to offences (rule breaking, not only criminal) in judicial and administrative procedures and in other procedures;
   4) Supervise the enforcement of decisions concerning preliminary detention and other decisions of deprivation of liberty;
   5) Conduct research in the field of criminality problems and take measures to prevent and fight them;
   6) Challenge before the court administrative decisions incompatible with the law and participate in judicial procedure regarding the conformity of such decisions with the law;
   7) Coordinate activities led by other state organs prosecuting crime;
   8) Cooperate with the state organs, state organisational units and social organisations in the prevention of delinquency and other infringements of rights;
   8a) Cooperate with the national and local chiefs of criminal information centres (Szefem Krajowego Centrum

\textsuperscript{382} Article 30 of the Constitution provides: ‘The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities.’ In the articles following this one, the Constitution sets out a list of freedoms and rights of persons and citizens.

\textsuperscript{383} Waltoś 2002.
Informacji Kryminalnych) in the realisation of their regulatory tasks;

9) Give opinions with regard to regulation projects (aktów normatywnych);

10) Take any other measures (czynność) when so defined by the law.

2. Military prosecutors perform the same functions as provided in part 1.

The Decree issued by the Minister of Justice in 1992 organised the internal functioning of the Polish prosecution service as prescribed by Article 18 § 1 of the 1985 Act. Recently, the Act of 10 January 2003 amended the Criminal Procedure Code and introduced a formal distinction between the functions of prosecutors and those of the Minister of Justice/general prosecutor (see 6.3.2.2).

6.2 The current Polish criminal justice system

6.2.1 The first instance

Article 24 § 1 CPC provides that the district courts (sąd rejonowy) have jurisdiction to adjudicate in the first instance in all cases except those referred by law to the jurisdiction of another court (e.g., felonies). A district court may request the appellate court to refer a particular case to a provincial court because it is particularly important or complex. There are three hundred forty-eighth district courts and forty-four provincial courts in Poland. Article 25 § 1 CPC provides that provincial or circuit courts (sąd okręgowy) have jurisdiction to adjudicate the following cases in the first instance

- felonies enumerated in the CC and other special statutes
- misdemeanours enumerated in the CC and other special statutes


385 Ustawa z dnia 10 stycznia 2003 roku o zmianie ustawy – Kodeks postępowania karnego, ustawy – Przepisy wprowadzające Kodeks postępowania karnego, ustawy o świadku koronnym oraz ustawy o ochronie informacji niejawnych (Dz. U. Nr 17, poz. 155).

386 The English language court designation in this paper does not necessarily accord with designations in papers written in English or translations of official Polish documents. In an ascending scale I use the term regional, district (or circuit), appellate and Supreme whereas many other papers use the following scale: district, regional (or circuit), appellate and Supreme.

387 For statistics concerning the number of offices, see Tak 2004-2005, p. 597.
A defendant is brought before the court with territorial jurisdiction over the area where the criminal act was committed. If the act was committed in several areas, the court where the preparatory steps were first taken will be competent (Article 31 CPC). If the place where the act took place remained undiscovered, the area of jurisdiction is the area where

- the offence was discovered
- the accused was apprehended
- the accused was domiciled or temporarily resided prior to the commission of the offence

The Polish system has no investigating judge. Initially, the police conduct investigations and these are subsequently pursued by the public prosecutors. In the first instance, according to the circumstances of the case and the gravity of the offence committed, proceedings are as follows

- normal proceedings comprising of a pre-trial procedure, usually in the form of an investigation followed by a decision to prosecute further, and a trial before a provincial or a district court

- summary proceedings comprising of a pre-trial procedure, in principle, in the form of an inquiry, a decision to further prosecute and a trial before a single judge. This type of proceeding applies to offences for which the law imposes a maximum term of five years imprisonment and the value of the crime or the damages do not exceed PLN 50,000

- proceedings before a single judge (or decree proceeding), applying to offences considered as minor misdemeanours for which the criminal law only imposes a custodial sentence not exceeding 100 days or a fine not exceeding PLN 200,000 (Articles 500 to 507 CPC). Provisions concerning summary proceedings apply to this type of proceeding unless the law provides otherwise. The judge may issue a decree judgement (wyrok nakazowy) without the participation of the parties, when in light of the evidence gathered the circumstances of the act and the guilt of the accused do not raise any doubts

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388 In general, normal proceedings are discussed in this paper.
389 The accused and the public prosecutor have a right to file objections with the court that issued the decree judgement. The objection should be filed within seven days of the date of service. Once an objection has been raised, the decree
proceedings following private denunciation (see 6.4.2.3.2)

Categories of crimes committed by soldiers in active service and crimes against the military are proceedings carried out before courts-martial. In cases subject to military criminal justice, courts-martial apply specific parts of the CPC that, in general, are not related to the basic provisions of the Code.

6.2.2 The appeal and the Supreme Court level

District courts hear appeals in cases defined by law. Provincial courts hear appeals against decisions and rulings issued in the first instance by district courts as well as other matters delegated to them by law. Appellate courts (Sądy apelacyjne) hear appeals from matters delegated to them by law and decisions and rulings issued in the first instance by the provincial courts. There are eleven appellate courts in Poland. There are four to seven provincial courts within each appellate resort. There are several district courts within each provincial resort.

The criminal law section of the Supreme Court in Warsaw reviews cases of all other courts in cassation, and other appeals if provided by the law, in order to safeguard their compliance with the law and to ensure uniformity. It also resolves other legal issues.

6.2.3 Types of decisions

The various authorities acting from the inception to the closing of proceedings take different types of judicial decisions. The following classification is useful in determining if a decision can be challenged and if so, by which means

• instructions (zarządzenia) made when the law does not require a judgement or an order: during the preparatory proceedings, such a decision may be made by a public prosecutor and, on the occasions specified by law, by the court or the police (or one of the organs mentioned in Article 312 CPC, see 6.4.3.1.3). During the court proceedings, this type of decision is made by a judge (the president of the court or a judge of the panel). In principle, instructions concern organisational and regulatory matters

• judicial decisions (orzeczenia) designate the category of procedural decisions that decide on legal matters during the course of proceedings. There are two types of judicial decisions

judgment ceases to be valid and the matter is subject to examination according to general rules.
orders (*postanowienia*), which are made when the law does not require a judgement. The law specifies whether such a decision is to be taken by the police, a public prosecutor, a court or another body.

- judgements (*wyroki*), which are required by law in specific cases (Article 93 § 1 CPC). They are delivered by a court or tribunal in the first instance or by a superior court to terminate a case. Judgements include resolutions (*rozstrzygnięcie*) and findings (*ustalania*). A resolution confirms the legal prescription applied to the case (e.g. recognising the accused as guilty of the indictable act, dismissing the proceedings, demanding the removal of defects). Findings establish the facts that are proven and accepted.

A judgement made by an appellate court becomes valid and final as soon as the court delivers it. From that moment a judgement can be executed unless the Supreme Court decides otherwise.  

### 6.3 The organisation of the current Polish PPS

#### 6.3.1 The designation of the prosecution in the Soviet statute, in the 1985 Act and in the Criminal Procedure Code

The first chapter of the old Soviet statute on the *Prokuratura* designated the prosecution service as the ‘office of the general prosecutor’ (*Urząd Generalnego Prokuratora Rzeczypospolitej*). The Act only defined the office of the general prosecutor and his deputies as the state institution for prosecution. In the 1985 Act, the Polish prosecution service included:

- the general prosecutor and his deputies within his office
- other prosecutors subordinate to the general prosecutor
- prosecutors from the military units of the prosecution service
- the prosecutors of the Institute of National Remembrance – the Commission for the Prosecution of Crimes against the Polish Nation (Article 1 § 1, 1985 Act, see 6.3.3.5)

The term ‘public prosecutor’ is used rather than the term ‘general prosecutor’, which is only used to distinguish a provision conveying specific rights or obligations linked to the activities of the general prosecutor.

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In the Criminal Procedure Code, the term \textit{prokurator} designates the state prosecutor and different terms designate other parties involved in the prosecution. Because Polish criminal procedure covers different types of criminal prosecution instituted and executed by different organs, the generic term ‘accuser’ is often used. The Code distinguishes between the public accuser (\textit{oskarżyciel publiczny}), who is the state prosecutor (\textit{prokurator}), and other prosecutors – such as the private prosecutor. In addition to the state prosecutor, the following legal persons may act as accusers appropriately empowered by the law (Article 45 CPC)

- the units of forest guards, who are entitled to conduct preparatory proceedings and to support charges
- the victim (\textit{pokrzywdzony})
- the subsidiary accuser or subsidiary prosecutor (\textit{oskarżyciel posiłkowy})
- the private accuser, also called the private prosecutor (\textit{oskarżyciel prywatny})

\textbf{6.3.2 The Minister of Justice/general prosecutor and the administration of the public prosecutors' offices}

\textit{6.3.2.1 The general prosecutor}

The Minister of Justice/general prosecutor heads the prosecution service, which is one of the departments of the Ministry. The Minister of Justice/general prosecutor is also empowered to supervise the prison administration and the activities of lawyers at court, public notaries and court enforcement officers. As a superior to all public prosecutors, the general prosecutor has or his deputies have the right to

- supervise the activity of the prosecution authorities, issue instructions (\textit{zarządzenia}), guidelines (\textit{wytyczne}) and commands (\textit{polecenia}). These supervisory acts cannot, however, affect the content of acts of procedure made by a lower prosecutor (Article 10, 1985 Act)
- issue guidelines concerning preparatory proceedings binding on all the organs entitled to conduct these proceedings (Article 29 § 1, 1985 Act)

With regard to the administration of the public prosecutors' offices, the general prosecutor has the right to

- appoint (Article 11, 1985 Act) and discharge prosecutors
Unity and Diversity of the Public Prosecution Services in Europe

• create and dissolve prosecutors’ offices by way of resolution (rozstrzygnięcie Article 17, 1985 Act)
• determine the internal regulation (regulamin) of the international activities of prosecutor’s offices (Article 18 § 1, 1985 Act)
• define the internal organisation of the general units of the prosecution service and the range of operations of the secretariat and all the other sections of the administration (Article 18 § 2, 1985 Act)

Within the general prosecutor’s office, the council of public prosecutors (Rada Prokuratorów przy Prokuratorze Generalnym) is composed of prosecutors and tasked with delivering opinions on issues such as drafts of guidelines and instructions of the general prosecutor (Article 24, 1985 Act).

The general prosecutor or his deputy must participate in trials presided over by the entire Supreme Court bench or by the bench of one section. A public prosecutor from the national prosecutor’s office may also participate in other Supreme Court benches.

6.3.2.2 The plurality of functions

During the discussions leading to the 1989 Round Table Agreement, the question of the constitutionalisation of the public ministry arose with respect to the question of the plurality of the functions of the Minister of Justice and the general prosecutor. After 50 years of one-party rule and of a powerful prosecution instrument in the hands of the Communist Party, it was felt that the new PPS should be, on the one hand, depoliticised and controlled by parliament to a certain extent but, on the other hand, carefully monitored during the transition period. Politicians thought that appointing the Minister of Justice as the prosecutor with the highest rank as the head of the PPS would safeguard against the abuses and mistakes that could occur during the transition towards democracy. Indeed, ministers are democratically responsible and have to answer questions raised during a session of the Sejm (Article 115, 1997 Constitution).

Ministers are individually and collectively responsible to the Sejm (Article 157, 1997 Constitution). The Minister of Justice, as the head of the prosecution service, would therefore be directly liable for actions undertaken by his service. The Sejm can pass a vote of no confidence in an individual minister. If the Sejm passes this vote, the President of Poland will discharge the minister from his functions (Article 159, 1997 Constitution). Ministers are also accountable to the Tribunal of State for infringements of the Constitution or statutes
and for the commission of criminal acts connected with the discharge of the duties of their office (Article 156, 1997 Constitution). In this latter case, the minister is also relieved of his office.

However, this plurality of functions poses several problems, including the risk of political pressure on the public prosecution when exercising criminal competences. The European Commission criticised this position during Poland’s accession process.391 This position is also criticised within Poland. The right of the Minister of Justice/general prosecutor to intervene directly or indirectly by way of instructions to his deputies in the course of penal proceedings, arouses suspicion that his position in certain cases is politically motivated, where his only proper concerns are upholding the law adopted by the legislative body.392

The risk of a conflict of interests between law and politics is also present in the constitutional judicial debate. The general prosecutor is party to constitutional proceedings and issues opinions in cases heard by the Constitutional Court.393 If a case is politically sensitive, it is hard to imagine that the general prosecutor – the Minister of Justice – will not sustain the government’s position to the detriment of legality. A duality in responsibilities and a difference in concerns can place the Minister of Justice in a difficult position that could undermine his or her status as legal adviser to the Court. For example, if the Minister prepares draft legislation subject to verification by the Constitutional Court, can the general prosecutor have sufficient independence to give an opinion purely motivated by legal arguments? In addition to his political accountability to parliament, the Minister of Justice is also responsible to the Council of Ministers to which he reports directly. These conditions make it extremely difficult for the Minister of Justice, who is primarily a politician, to hold his position independently as a prosecutor and to focus only on safeguarding legality.

The plurality of functions may also be a sensitive issue because the Minister of Justice/general prosecutor’s function is directly

391 ‘There is no clear separation of functions of the Minister of Justice and the attorney-general. Draft legislation addressing this issue is being discussed within the government. It is aimed at separating the two functions, but the provisions as currently formulated will not result in the attorney-general becoming more independent.’ In European Commission, Regular Reports from the Commission on Progress towards Accession of 13 October 1999 by Poland pp. 50–54, 72–74.
392 Waltoś 2002.
393 Art. 27 of Ustawy z dnia 1 sierpnia 1997 roku o Trybunale Konstytucyjnym (Dz. U. Nr 102, poz. 643).
dependent on the stability of the government in place. During the President of Poland’s five-year mandate, ministers can be discharged for the reasons already mentioned but also at the request of the Prime Minister (Article 161, 1997 Constitution). There is no need for disciplinary proceedings to discharge the general prosecutor from his office. Although this replacement may only rarely occur it could, however, be a source of pressure and instability for the PPS. Guidelines and directives concerning the work of prosecutors could also change with the Minister of Justice. The frequent changes in the guidelines concerning prosecutors' jurisdiction, internal regulation, the appointment of superior prosecutors or simply changes in criminal policy do not favour a coherent and unified fight against crime.  

Finally, it seems problematic to expect from prosecutors that they do not become members of political parties or participate in political activity (Article 44 § 3, 1985 Act), when their highest superior and colleague is a politician. In the meantime, the general prosecutor is empowered with the same rights and functions as any prosecutor because of the indivisibility and unity principles (see 6.3.5.1). Prosecutors enjoy relative immunity against removal from office. A disciplinary or penal sanction is, in principle, necessary to discharge a prosecutor (Article 16, 1985 Act see 6.3.7.2). Nevertheless, this immunity does not seem to apply to the Minister of Justice for the following two reasons:

- the President of the Polish Republic may discharge the Minister of Justice from his ministerial office, thus from his general prosecutor’s office (if such a discharge occurs he will take up another prosecution position such as national prosecutor)
- the general prosecutor has no superior capable of instituting the disciplinary proceedings provided for in Article 77 § 1 of the 1985 Act

Criticism of this plurality of functions is ongoing among Polish scholars and legal practitioners, especially when it comes to possible political intervention in pending criminal proceedings.

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394 Poland is, however, a country where the principle of mandatory prosecution or legality is in force. Prosecution must be instituted if a criminal fact is suspected (see 6.4.2.2). Because of this principle, there is less need for a criminal policy regulating the prosecution.

395 Resolution of the Supreme Court of 26 September 2002, I KZP 24/02, OSNKW 2002/11-12/100. This resolution of the Supreme Court has, however, been criticised by several authors who claim that the general prosecutor enjoys the same immunity and rights as any other prosecutors, see Kaczmarska 2005; Bojańczyk 2003.
Several attempts to solve the problem have been unsuccessful. One of these was the transfer of the general prosecutor’s jurisdiction over judicial proceedings to the national prosecutor’s office, which was established in 1996.\textsuperscript{396} The Polish Parliament also passed a law in 2003 modifying the CPC and distinguishing the functions of the Minister of Justice from those of the general prosecutor.\textsuperscript{397} In fact, this legislation only replaced the words ‘Minister of Justice/general prosecutor’ with ‘general prosecutor’ in certain provisions of the CPC. As the European Commission had already assumed when the 2003 Act was still a project, further modifications were needed in order to guarantee the independence of public prosecution from political pressures but these modifications did not happen.\textsuperscript{398} The only advantage of the change is that it clarifies responsibilities but it does not provide any clear separation between the Minister of Justice and the general prosecutor.

6.3.3 The structure of the Polish prosecution service

6.3.3.1 The new structure of the public ministry since 1990 and the hierarchy between offices

The PPS structure consists of the following civilian units

- the national prosecutor’s offices (Prokuratura Krajowa)
- the appellate prosecutor’s offices (Prokuratury Apelacyjne)
- the provincial offices (Prokuratury Okręgowe)
- the district offices (Prokuratury Rejonowe)
- the Institute of National Remembrance – Commission Prosecuting Crimes Against the Polish Nation (Instytut Pamięci Narodowej - Komisji Ścigania Zbrodni Przeciwko Narodowi Polskiemu), which is also part of the general office of the prosecution service but as we shall see, has a very specific function

Article 17 of the 1985 Act defined the hierarchical relationship between offices and between prosecutors within the offices. It is

\textsuperscript{396} Waltoś 2002.  
\textsuperscript{397} Ustawą z dnia 10 stycznia 2003 roku o zmianie ustawy – Kodeks postępowania karnego, ustawy – Przepisy wprowadzające Kodeks postępowania karnego, ustawy o świadczeniu korzennym oraz ustawy o ochronie informacji niejawnych (Dz. U. Nr 17, poz. 155); See Tylman & Grzegorczyk 2003, p. 247.  
\textsuperscript{398} See footnote 391.
necessary to distinguish between a superior and direct superior in the hierarchy because certain rights in criminal proceedings are only granted to direct superiors (see 6.3.4.2). The structure is as follows:

- the general prosecutor is
  - directly superior to national prosecutors
  - superior (przelożonym) to all public prosecutors of the civilian prosecution service
  - superior to military offices
  - superior to prosecutors of the Institute of National Remembrance
- the national prosecutor administers (kieruje) the national prosecutor’s office within the scope defined by the general prosecutor. The national prosecutor is the direct superior of the prosecutors from the national prosecutor’s office
- an appellate prosecutor administers an appellate prosecutor’s office and is
  - directly superior to prosecutors within the appellate office
  - superior to public prosecutors from a provincial prosecutor’s office and to prosecutors from district offices within the area of activity (dzialania) of the appellate office (the territorial area)
- a provincial prosecutor administers a provincial prosecutor’s office and is
  - directly superior to prosecutors within the provincial office
  - superior to public prosecutors from district prosecutor’s offices within the area of activity of the provincial office (the territorial area)
- a district prosecutor administersa district prosecutor’s office and is the direct superior of prosecutors within the district office

In addition to the civilian institution, a military prosecution office (wojskowe jednostki organizacyjne prokuratury) consists of the chief military prosecutor’s office, the provincial offices and the garrison offices.

The Minister of Justice and the Minister of National Defence for the military offices establish the general territorial competence of the prosecution service by way of regulations. The civilian regulation in force was issued on 1 June 2001.\(^\text{399}\)

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\(^{399}\) Rozporządzenie Ministra Sprawiedliwości z dnia 1 czerwca 2001 (Dz. U. Nr 64, poz. 656).
Prosecutors are not only organised according to their rank in the organisation but also according to the territorial judicial areas within which they perform their functions. In principle, prosecutors' offices are separate from the courts. If, in practice, prosecutors perform their functions in the same jurisdiction as a district, provincial or appellate court, however, they can act before another court. Appellate prosecutors' offices are established in the eleven appellate resorts. There are several provincial prosecutors' offices within each appellate resort. Only important provincial resorts have a district prosecutor's office. There are also several outlying prosecutors' offices belonging to the territorial area of important provinces, the highest-ranking staff member working in these distant offices is the head of the provincial office. The inquiry department of the provincial office of Warsaw is always competent in crimes concerning public trading in securities, regardless of the place where the crime was committed. A regulation issued on 11 April 1992 establishes the internal organisation of all the offices.

6.3.3.2 The national prosecutor's office

At the national level, the general prosecutor determines the powers and responsibilities of the national prosecutors who head the national prosecutor's offices. Of the 60 national prosecutors, certain individuals are direct deputies of the general prosecutor. The national office is part of the Ministry of Justice.

This office has a generally high rank in the PPS’s hierarchy and national prosecutors adopt positions in national or central-level affairs and in matters with an extraterritorial element, such as

- criminal proceedings in international relations (Article 227 et seq., 1992 Regulation)
- cases of extradition (Article 234 et seq., 1992 Regulation)
- or European arrest warrants, when the whereabouts of the person whose arrest has been sanctioned is unknown (Article 238, 1992 Regulation)

The national office also partly supervises the appellate prosecutors (Article 14 and 15, 1992 Regulation) and gives, in particular, instructions in specific cases as provided in Article 8 § 2, 1985 Act.

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400 Rozporządzenie Ministra Sprawiedliwości z dnia 11 kwietnia 1992 roku - regulamin wewnętrznego urzędowania powszechnych jednostek organizacyjnych prokuratury (Dz. U. Nr 38, poz. 163).
6.3.3.3  **The appellate, provincial and district prosecutors’ offices**

Since the territorial division of the jurisdiction of the judiciary, the civilian system includes three hundred district prosecutor’s offices, forty-two provincial prosecutor’s offices and ten appellate prosecutor’s offices. The military system includes sixteen garrison offices and three provincial offices. Each office is organised into services with different tasks and positions in the hierarchy.

6.3.3.4  **Assemblies of public prosecutors**

Assemblies and colleges of prosecutors help lead prosecutors in their decision-making. These meetings present an opportunity to discuss important issues related to the offices. They deliver opinions on a candidate’s appointment as a trainee and a prosecutor’s removal or disciplinary responsibility. These assemblies and colleges are organised on the same model as prosecution offices at the national, appellate, provincial and district levels.

6.3.3.5  **The Institute of National Remembrance and the Commission for the Prosecution of Crimes against the Polish Nation**

The 18 December 1998 Act established the Institute of National Remembrance. In the Institute, the Commission for the Prosecution of Crimes against the Polish Nation investigates and prosecutes

   a) Crimes perpetrated against persons of Polish nationality and Polish citizens of other nationalities in the period between 1 September 1939 and 31 December 1989 – Nazi crimes, Communist crimes, other criminal offences constituting crimes against peace, crimes against humanity or war crimes

   b) Other politically motivated repressive measures committed by functionaries of Polish prosecution bodies or the judiciary or persons acting upon their orders, and disclosed in the content of the rulings given pursuant to the Act of 23 February 1991 on the Acknowledgement as Null and Void Decisions Delivered on Persons Repressed for Activities for the Benefit of the Independent Polish State (Journal of Laws of 1993 No. 34, item 149, of 1995 No. 36,

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401 Tylman & Grzegorczyk 2003, p. 248.
The Institute is situated in Warsaw and branch offices are usually created in locations which are seats of appellate courts. It is hierarchically organised in the same frame as other prosecution offices in national, appellate, provincial and district offices. All these bodies are composed of public prosecutors and apply the CPC. The Institute may order an investigation into cases involving crimes against humanity even though prosecution is inadmissible. In these cases, the investigation only provides a comprehensive clarification of the circumstances of the case and identifies the aggrieved parties (Article 45 § 3 and § 4, 1998 Act).

6.3.4 The appointment and subordination of public prosecutors

6.3.4.1 The appointment of the organs of the Polish public ministry

A Polish citizen must have an advanced law degree and have passed a special examination in order to become prosecutor. The traineeship lasts for three years. Exceptions may be made for members of other legal professions or judges. The Prime Minister appoints and may recall national prosecutors and other general prosecutor’s deputies, on the motion of the general prosecutor from among the public prosecutors of the national offices (Article 12, 1985 Act). The general prosecutor appoints and may recall other civilian prosecutors. He also appoints military prosecutors on the Defence Minister’s motion. Prior to a definitive appointment, the general prosecutor may grant trainee prosecutors a short period, not exceeding three years, where they enjoy all the prosecutor’s functions with the exception of the right to participate in procedures before appellate and provincial courts, and the right to take steps in procedures before the Supreme Court (Article 99 § 1, 1985 Act).

Prosecutors and judges are not members of the same professional group and have a different status. It is possible to move from one service to another in the course of a career.

Representatives of the council of public prosecutors are elected by the assembly of the prosecutors of the national prosecutor’s office, the Institute of the National Remembrance, the appellate office and the general prosecutor, who heads the office and appoints three

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403 The history of the Commission can be traced back to 1945 when the Chief Commission for the Examination of German Crimes in Poland was created.
representatives. Prosecutors of subordinate assemblies elect the members of assemblies.

The general prosecutor may

- transfer prosecutors from one post to another but only with the consent of the prosecutor in question unless the transfer is the result of a disciplinary measure or the suppression of the current occupied post (Article 16a, 1985 Act)
- delegate one prosecutor to a different prosecution service unit without his consent but only for six months (Article 50, 1985 Act)

6.3.4.2 The subordination of lower prosecutors to their superiors

The hierarchy of subordination between prosecutors depends on their position in the hierarchical structure (see 6.3.3.1). Article 8 of the 1985 Act provides that

- a prosecutor is obliged to carry out his superior’s instructions (zarządzenia), guidelines (wytyczne) and orders (polecenia)
- if the order affects a particular case or procedural function (czynności procesowej), the superior must deliver the order by means of a written notice, stating reasons, if the prosecutor so requires. A copy of the written order is kept on file
- only the direct superior may order the dismissal of a pending preparatory proceeding or proceeding before the court
- a non-direct superior prosecutor may order a lower prosecutor, however, such an order cannot refer to the way preparatory proceedings are concluded or to proceedings before the court
- a prosecutor may refuse to carry out an order and ask for its modification or for his removal from the case. The prosecutor must explain his reasons for this refusal and his direct superior must take a decision concerning further action

Prosecutors are obliged (Article 40, 1992 Decree)

- to carry out actions outside the established scope of their duties in important cases for the service, particularly in matters that cannot suffer delays, on being ordered by a superior
- to immediately inform their superior of any obstacle rendering the fulfilment of the task impossible

According to the principle of devolution (dewolucji), a superior prosecutor has the power to devolve the execution of his functions to a deputy if the activity in question lies within his competence. According to the principle of substitution (substytucji), a superior has
the power to take over the functions of his deputy (Article 10 § 3, 1985 Act) unless otherwise stipulated by law.

Superior prosecutors and superior services supervise the actions of lower prosecutors (Article 42, 1992 Regulation). The national prosecutor’s office coordinates the supervision exercised by the different services of the provincial and appellate offices. In particular, this office attends to the form of the supervision and its effectiveness. At the recommendation of the general prosecutor or of the national prosecutor and, in exceptional circumstances, at the request of the head of the affected office, the national office directly exercises supervision. In principle, every senior prosecutor is empowered with the following rights

- to examine the interlocutory appeals to an order issued by a prosecutor, unless otherwise provided for by law (Article 465 § 2 CPC)
- to extend the period of investigation from three months to a longer period (Article 310 CPC)
- to order the reinstatement of a preparatory procedure that was dismissed, unless such a procedure is conducted against a person under examination as a suspect in a previous procedure (Article 327 § 2). The general prosecutor has, however, the right to issue such an order if he finds that the dismissal of the previous procedure was groundless (Article 328 § 1 CPC)

Within the same unit in the prosecutor’s office, lower prosecutors must inform their superior when a case is especially complex (Article 44, 1992 Regulation); however, supervision is always carried out with respect for independence of the prosecutors (Article 45 § 1, 1992 Regulation). The direct superior (Article 43, 1992 Regulation) has the following rights

- to monitor the efficiency of his deputies’ work
- to demand in individual cases a report of actions taken and, where necessary, to make recommendations as to the direction the proceedings should take and even the content of those actions
- to be informed of all actions taken during the proceedings
- to check the preparation of the prosecutor’s intervention before the court
- to check the case once it has been settled
- to analyse the execution of the services’ tasks
An invalid decision taken by lower prosecutors regarding the dismissal of a specific case can be repealed or modified by way of supervision.\textsuperscript{404} Certain written decisions taken by lower prosecutors can also be approved or rejected upon supervision. However, this approval or rejection is without legal force in the proceedings and is only significant in the internal hierarchical structure of the office as regards disciplinary responsibility. In fact, if a deputy took important steps without having informed his superior, the superior in charge of discipline must be informed (Article 45 § 3, 1992 Regulation). Under such circumstances, the actions of the lower prosecutor may be considered as a breach of duty unless it was impossible, or very difficult, to obtain approval before acting due to the circumstances of the case. In such an event, the prosecutor has the right to decide independently (Article 50, 1992 Regulation).

6.3.5 Limits to subordination

6.3.5.1 Principles of unity, indivisibility and undifferentiation

Before every type of court, the public prosecutor is the state prosecutor (Article 45 § 1 CPC). He is entitled to prosecute and take criminal cases to court. Other state organs also have this right (Article 45 § 2 see also 6.4.3.1.1). There is no hierarchical relationship between prosecutors and these organs. Nevertheless, a public prosecutor always supervises steps taken by these organs in criminal proceedings. In addition, a prosecutor has a general prosecution function and can take over the other organs’ right to prosecute.\textsuperscript{405}

According to the principles of unity and indivisibility (\textit{jednolitości i niepodzielności}) every prosecutor, irrespective of his grade, performs the same function in criminal proceedings. The PPS is a homogeneous institution of the state, representing the state. The personality of a prosecutor is irrelevant to the performance of his duties (the principle of undifferentiation or \textit{zasada indyferencji}). In practice, it is very common that a prosecutor conducts the preliminary proceedings of a specific case and that another prosecutor participates in the hearing. Any prosecutor can replace one another in the exercise of public prosecution functions, unless otherwise stipulated. Prosecutors can replace each other in the same court because they perform their functions in the name of the

\textsuperscript{404} Tyłman & Grzegorczyk 2003, p. 674.
\textsuperscript{405} Tyłman & Grzegorczyk 2003, p. 686.
PPS. The eyes of the law do not distinguish which prosecutor completed a given action so long as the change of prosecutor in the course of proceedings does not affect their validity or efficiency. However, the principle of undifferentiation does not apply to the internal organisation of competences in the service. A low ranking prosecutor is not competent to act as a higher ranking prosecutor unless otherwise provided for. The organisation of the service is a matter of internal regulation and not related to criminal proceedings.

A public prosecutor may be temporarily transferred to another office. This transfer can be for a period longer than six months with the prosecutor’s consent. An appellate or district chief prosecutor may decide on temporary transfer for a period of less than two months. In other cases, the general prosecutor has jurisdiction to decide.

6.3.5.2 Independence of the prosecutors

In principle, the independence of the prosecutors is limited by
- the legality principle (see 6.4.2.2)
- the general and specific binding instructions given by their immediate supervising prosecutor or other superiors (Article 8 § 5, 1985 Act)

Article 8 § 1 clearly stipulates that public prosecutors shall be independent in the discharge of their duties. This means that a prosecutor does not need any previous agreement or support from his superior to carry out his functions. A prosecutor decides alone whether to prosecute or not. The 1996 amendment to the 1985 Act transplanted the French principle La plume est serve, mais la parole est libre. During hearings, prosecutors recover a certain independence from their superiors. During a court session, if new circumstances become public, the prosecutors can take an independent decision concerning further proceedings (Article 8 § 6). However, a prosecutor must always be loyal to his superior and, if possible, conscientiously keep him informed during the proceedings. Such information is necessary for the superiors to carry out supervision and perhaps modify a given instruction. Depending on the circumstances, a lack of information can lead to disciplinary measures.

The general prosecutor cannot intervene directly in a pending case; however, he has general power of supervision and has the right to

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406 Refer to 2.3.3.3 for an explanation of this expression.
intervene indirectly by means of instructions to the direct superior of the prosecutor in charge of a specific case. The superior passes the instruction on to the latter.

6.3.6 Other rights and duties of Polish prosecutors

From the time of his appointment, the trainee prosecutor is bound by his official status and takes the following oath before the general prosecutor (Article 45, 1985 Act)

‘I solemnly swear to faithfully serve the Polish state as a public prosecutor, to stand as a guardian of the law (prawa), to safeguard the legality (praworządności), and to fulfil the duties of my function conscientiously, to keep the secrets of the state and of my duty, and to lead procedures with dignity and honesty’; the following may be added at the end of the oath: ‘So help me God!’

In addition to the oath, prosecutors must respect the dignity and the impartiality (beztronnaść) required to perform their functions. This obligation is binding upon prosecutors whether or not they are in office. The law also prevents them from being members of political parties and from participating in political activity. They may not accept a mandate of deputy or senator nor may they accept any other employment unless it is performed during their free time and does not interfere with their duties (Article 49, 1985 Act). A prosecutor is also required to maintain the secrecy of the circumstances of the cases he deals with, unless a court relieves him of this obligation. Measures taken by prosecutors must respect the principles of impartiality and equal treatment of all citizens (Article 7, 1985 Act). Prosecutors are also regularly required to provide their superior with a statement of their family assets, including their matrimonial assets. In addition, a public prosecutor may not participate in a proceeding (Article 47 CPC), if

- the case affects him or his spouse
- he is related to any party to the case by blood or marriage
- he has participated in the issuance of the decision subject to appellate measure
- or there are other circumstances that could cast reasonable doubt on his impartiality in a given case

In contrast, public prosecutors enjoy important rights provided by criminal procedure and local governmental bodies; other public or private organs must provide the PPS with any necessary assistance in the realisation of their tasks.
6.3.7 The discipline and criminal responsibility of prosecutors

6.3.7.1 The penal responsibility of Polish prosecutors

Article 54 of the 1985 Act establishes the criminal responsibility of prosecutors. Members of the public prosecution enjoy immunity against criminal proceedings when they have committed a criminal act in the form of a petty offence or contravention (wykroczenie). However, in these cases a disciplinary procedure may be instituted. Prosecutors enjoy relative immunity against prosecution for other types of offence because the start of a public prosecution has to be decided by a disciplinary court (sąd dyscyplinarnego) where a disciplinary prosecutor will represent the PPS’s interests against his colleague. A prosecutor cannot be remanded in custody unless his superior authorises it or the crime has been committed in flagrante delicto, i.e. when the suspect is caught in the act of committing a crime or immediately afterwards. The superior’s authorisation for custody is only possible if there is sufficient suspicion that the suspect has committed a criminal act. The various parties to the proceedings and the disciplinary prosecutor can challenge a decision to authorise or to refuse prosecution. Only a public prosecutor can conduct criminal proceedings against another prosecutor.

6.3.7.2 The disciplinary responsibility of Polish prosecutors

Members of the PPS are liable for breaches of duty (Article 66, 1985 Act). Once appointed, a prosecutor cannot be removed or transferred to a different unit except under certain circumstances provided for by law. Article 16 of the 1985 Act stipulates that the general prosecutor can remove a prosecutor from his position as the result of his resignation or a disciplinary measure. The following conditions are necessary for disciplinary removal

- dereliction of duty
- this dereliction is a manifest violation of a legal provision or an offence to the dignity of the public prosecutor’s office
- the general prosecutor has heard the prosecutor beforehand
- a disciplinary proceeding has resulted in sanction or a judgement

The following forms of misconduct are considered breaches of duty (przewinienia służbowe)

- an obvious and flagrant breach of the law
- an offence to the dignity of the public prosecutor’s office
the abuse of the freedom of speech during the execution of the functions of a public accuser and constituting an insult to a party, his lawyer, a curator, a representative, a witness, an expert or a translator.\footnote{This misconduct is also an offence prosecuted by way of private prosecution (see 6.4.2.3.2).}

If a superior prosecutor discovers that a deputy has committed a manifest breach of law (oczywistej obrazy) in the conduct of a case, he can demand an explanation and launch disciplinary proceedings (Article 8 § 7, 1985 Act) or apply a minor punishment (Article 72, 1985 Act). If the breach is manifest and serious (Article 8 § 8, 1985 Act), the superior must launch disciplinary proceedings.\footnote{There is no statute defining a manifest and serious breach – it is a matter of discretion.}

If the affected prosecutor was handling a case, this should not influence its continuation. The statute of limitations for instituting disciplinary proceedings is three years from the date of the act. If the act constitutes a crime (przestępstwo), the provisions of the CC apply.\footnote{According to Article 101 § 1 CC – the statute of limitation is thirty years if the act constitutes a homicide (zbrodnię zabójstwa), twenty years for other crimes, ten years for misdemeanours subject to a custodial sentence exceeding three years, five years if the act is subject to a custodial sentence not exceeding three years, and three years if the act is subject to a custodial sentence or a fine.}

A disciplinary court of first instance consists of three independent prosecutors, only subject to law and appointed by the general prosecutor (Article 70, 1985 Act). Appeals to these first instance court judgements lie in a disciplinary appellate court composed of five prosecutors. A disciplinary prosecutor is appointed by the general prosecutor and follows his instructions. A cassation appeal is available to the parties. A disciplinary measure may be in the form of (Article 67, 1985 Act)

- a warning
- a reprimand
- discharge from office
- transfer to a different place
- discharge from the prosecution service

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\end{itemize}
6.4 Functions of the Polish prosecution service in the preliminary phase of the criminal process

6.4.1 Functions in fields other than the criminal process

In addition to criminal procedure and the supervision of detention facilities and custody, the PPS is active in other procedures, particularly those affecting civil, labour, administrative, social insurance and property rights. It would be wrong to say that the current scope of the prosecutor’s jurisdiction has survived the era of the Soviet Prokuratura.\(^{411}\) PPS interventions in non-criminal procedures exist in all systems (for example, Article 29-3 of the French Code Civil entitles public prosecutors to bring an action for the determination of the status of anyone who may hold French citizenship). However, the jurisdiction of the Polish PPS is general. In the interest of safeguarding legality (praworzędność), the rights of citizens or the social interest (Article 7 of the Polish Civil Procedure Code), a prosecutor may

- institute proceedings or take part in pending proceedings. This prescription allows the PPS’s intervention at any moment in any trial, even between two private parties litigating over the legality of a private contract. Exceptionally, in the field of family law, prosecutors can only intervene where provided for by law\(^ {412}\);
- independently give his opinion as to the subject of the dispute. A court may inform the PPS about a case where attention should be paid (Article 59 of the Civil Procedure Code);
- appeal civil judgements;
- deliver an opinion on administrative regulation bills;
- request the communication of acts, documents and written explanations from bodies empowered to conduct proceedings of any type;
- question witnesses, take expert opinions and carry out investigations to explain a case (Articles 42 and 43, 1985 Act)

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\(^{411}\) Waltoś 2002.

\(^{412}\) The state prosecutor is not entitled to bring an action for divorce, legal separation or adoption on behalf of someone else. However, the state prosecutor may bring almost any other action to the civil court (such as an action for the nullification of a marriage, the nullification of fatherhood, or the denial of motherhood or paternity) on behalf of someone else.
Statutes other than the CPC, such as the Code of Administrative Procedure or the Civil Procedure Code, provide for other specific functions.

6.4.2 General principles concerning preliminary proceedings in the criminal process

6.4.2.1 The legality principle and the principle of ex officio prosecution of offences

Poland is a country where the principle of legality or compulsory prosecution (zasada legalizmu) is in force. The public organ empowered with the right to prosecute criminal offences is obliged to institute and carry out preliminary proceedings (Article 10 § 1 CPC) as soon as there is a good reason to suspect that an offence has been committed (Article 303 CPC).\(^{413}\) However, modifications in criminal procedure have enhanced public prosecutors’ discretionary powers. Reducing the risk of inequality between citizens and the risk of external pressure on the PPS have both been put forward as reasons to justify choosing legality over opportunity of prosecution.\(^{414}\)

The principle of legality is combined with the principle of proceedings ex officio (zasada ścigania z urzędu). According to the latter, the public accuser must institute and carry out preliminary proceedings with or without the agreement of the other parties, such as the victim, in the majority of cases. In specific cases, however, a motion from a particular person, institution, agency or the permission of an authority is necessary to conduct a proceeding or undertake certain actions (Article 9 § 1).\(^{415}\)

6.4.2.2 The principle of compulsory complaint

The principle of compulsory complaint or accusatorial procedure (zasada skargowości) contrasts with the two previous principles. Organs with the right to institute proceedings involved in preparatory proceedings can institute and conduct these proceedings only upon the request of an authorised body.\(^{416}\) Article 14 § 1 CPC stipulates

The court proceedings shall be instituted upon the motion of the duly authorised accuser (oskarżyciel) or authorised entity.

\(^{413}\) Gaberle 2004, p. 365.
\(^{414}\) Tylman & Grzegorczyk 2003, p. 126.
\(^{415}\) Gaberle 2004, p. 368.
\(^{416}\) Gaberle 2004, p. 375.
If the principle applies, a state prosecutor cannot institute and carry out criminal proceedings ex officio. The public or private organ empowered with the right to complain must first make a formal request. However, the state prosecutor is obliged to act ex officio without waiting for a formal complaint if he deems that the public interest so requires.

6.4.2.3 The role of the public prosecutor in relation to the prosecuted offence

In order to determine the place and the role of the public prosecutor in the preparatory stages of a criminal process, it is necessary to distinguish between several types of offences. Although accusers other than a public prosecutor can institute criminal proceedings, the public prosecutor remains empowered with the strongest position.

6.4.2.3.1 Offences prosecuted on motion (przestępstwa ścigane na wniosek)

In several cases provided by substantive criminal law, such as offences against liberty or offences against sexual liberty and decency, criminal proceedings may only be instituted if a complaint has been filed by an authorised person (Article 12 § 1 CPC) or if a certain person authorised a prosecution (Article 13 CPC). Otherwise, criminal proceedings cannot be instituted (Article 17 § 1 point 10 CPC). This is an application of the principle of compulsory complaint. The injured person is most likely the person entitled to bring the motion.

A public prosecutor institutes proceedings after the motion is filed. One of the purposes of this type of prosecution is to prevent fresh psychological pain for the victim resulting from a criminal proceeding. Once proceedings are instituted, they are carried out ex officio by the public prosecutor according to the legality principle. The plaintiff cannot withdraw his complaint without the consent of the public prosecutor (Article 12 § 3 CPC).

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417 For instance, the offence of threat (Article 190 CC) or medical operation without the consent of the patient (Article 192 CC) and offences of forced or illegal sexual intercourse (Article 197 CC) or abuse of a vulnerable person in order to subject him or her to sexual intercourse (Article 198 CC).

6.4.2.3.2 Offences prosecuted by way of private prosecutions

(przestępstwa ścigane z oskarżenia prywatnego)

The person authorised to institute proceedings is the injured person who becomes a private prosecutor. Unlike the case of prosecution on motion, the victim institutes proceedings and carries them privately. The proceedings start directly with the indictment served by the private prosecutor and not by a public prosecutor. There are no preparatory proceedings. The private prosecutor is not bound by the legality principle and is free to institute or refrain from instituting proceedings until the indictment has been read before the court. From this moment on, the case may only be dismissed with the consent of the accused. The public prosecutor’s opinion is, in principle, irrelevant.

Here too, substantive criminal law provides for offences prosecuted by way of private prosecution. Approximately 3% of cases are prosecuted privately. It affects cases involving less severe offences such as offences against honour (Article 216 CC) and bodily integrity (Article 217 CC).

If the public interest is at stake and the victim either does not institute proceedings or dismisses the proceedings, the prosecutor has the duty to institute or reinstitute proceedings (Article 60 § 1 of the Code). If proceedings have already been brought by private indictment, the public prosecutor can take over the proceedings if it appears that the public interest so requires. The victim then becomes a subsidiary prosecutor. His withdrawal will not, in principle, affect the proceedings. The public prosecutor then carries out proceedings as with cases of offences prosecuted ex officio.

6.4.2.3.3 Offences prosecuted ex officio (przestępstwa ścigane z oskarżenia publicznego)

Prosecution ex officio is the main type of prosecution. All crimes have to be prosecuted ex officio unless otherwise stipulated. A public accuser, usually a prosecutor, institutes and carries out proceedings. He makes the decision concerning further prosecution and indictment (Article 10 § 1 CPC).

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419 Murzynowski & Rogacka-Rzewnicka 2002.
420 Tylman & Grzegorczyk 2003, p. 114.
6.4.2.4 Phases of preliminary proceedings in case of offences prosecuted by a public accuser

The first phase, the discovery of facts that may constitute a criminal offence, takes place

- upon the victim’s report (notice of an offence)
- upon the report of another organ
- or upon a police (or another competent organ) report if the act is committed in flagrante delicto

The kind of offence committed must then be determined to decide whether the public accuser can institute criminal proceedings. The public accuser (public prosecutor, other organ or the police) issues an order instituting preliminary proceedings (postępowanie przygotowawcze). However, before such an order, a pre-investigation phase may be necessary in order to verify the facts or to secure evidence if the case is not subject to delay.

The second phase is the preliminary proceeding, which may take the form of an investigation or an inquiry (see 6.4.3.1.3). The proceedings are conducted by the police and supervised by a prosecutor.

The third phase involves the conclusion of the proceedings and the decision regarding further prosecution. The prosecutor takes the leading role and decides whether to dismiss the case, apply alternative measures, such as mediation, or take the accused to court.

6.4.3 The role of the Polish prosecution service in preparatory criminal proceedings

6.4.3.1 The first and second phase of criminal proceedings

6.4.3.1.1 Organs competent to institute preparatory proceedings

Three types of organ can institute preparatory proceedings in the Polish criminal system – a prosecutor, the police or other public organs. However, the position of the prosecutor in the proceedings remains stronger than the position of other organs. Prosecutors, in theory, conduct investigations and inquiries or charge other organs with their conduct when this jurisdiction does not result from the natural functions of these organs (Article 25, 1985 Act). An inquiry (dochodzenie) is carried out entirely by the police or the other
In practice, the police conduct investigations (śledztwo) unless the prosecutor decides otherwise (Article 311 CPC) or if the matter affects

- misdemeanours where the suspect is a judge, state prosecutor, police official or another official such as a border guard or military police
- a person who took the life of a human being (Article 148 CC)

A prosecutor can always delegate part of an investigation however. If the police conduct the investigation, the state prosecutor must perform the execution of certain actions, such as

- motion the court to take a suspect into preventive detention (Article 250 CPC)
- issue an order (the court may also make such a decision) to search for an accused for whom an order of preventive detention has been issued and who has gone into hiding, in the form of a wanted notice (Article 279 § 1 CPC)

According to the principle of legality, the competent organ for the prosecution of crimes is obliged to institute and carry out preparatory proceedings ex officio or upon notification of a criminal offence if there are good reasons to suspect that such an offence has been committed. Reports of crimes prosecuted ex officio may be made either to the police, a public prosecutor (Article 304 § 1 and 2) or other specific institutions (Article 325d). Article 312 § 2 and separate regulations determine which agencies have the right to institute proceedings or not and to support charges. It mainly affects the simplified procedure before first instance courts. The following agencies are concerned

- the trade inspection organ
- the state sanitary inspection organ
- the treasury office and the inspectors of the treasury control
- the president of the office of telecommunications control and of the post office
- border guard officials
- officials of the national forests and parks
- officials of the national hunting reserve

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422 Rozporządzenie Ministra Sprawiedliwości z dnia 13 czerwca 2003 r. (Dz. U. Nr 108, poz. 1019).
These agencies do not have exclusive jurisdiction to institute and execute proceedings. A public prosecutor may intervene at any time and take over the case. The officials of the border guard, national forests and parks, and those of the national hunting reserve have the right to institute investigations and inquiries, whereas the other agencies only have the right to institute inquiries. If, however, the police have to immediately forward the order to institute proceedings to the competent prosecutor (Article 305 § 3), these agencies do not have this obligation.

In practice, it appears that the police conduct the majority of inquiries. Investigations are partly or wholly conducted by the police. This has been considered to present the risk of an excessive independence of the police in criminal proceedings. This issue was brought up when the new CPC was issued and the need to strengthen prosecutors' supervision of police activities was emphasised.\footnote{Tylman & Grzegorczyk 2003, p. 669.}

6.4.3.1.2 The pre-investigation phase, the decision on the commencement of preparatory proceedings and the refusal to institute preparatory proceedings

Upon notice or \textit{ex officio}, a state body competent to institute criminal proceedings may suspect the commission of a criminal offence. Nevertheless, it may be necessary to complete the notice and verify facts or, in urgent cases, to secure evidence. In such cases, certain steps can be taken, such as inspections, searches and the examination of the suspect's body for fingerprints or blood. The verification of facts and the securing of evidence should not take longer than necessary, usually thirty days maximum. If the suspicion affects facts for which the institution of an investigation seems necessary, such a case should be immediately referred to the prosecutor.

Already during this phase, the police may arrest a suspect, detain him in custody for forty-eight hours and apply to the prosecutor to obtain a preventive detention order from the court. The preventive detention cannot exceed a total period of two years. An appellate prosecutor may request an extraordinary extension before the appellate court.

If at the time of the notification of the facts – \textit{ex officio} or during the verification and securing phase – the competent organ has good...
reason to suspect that a criminal offence has been committed, this
organ must issue an order to institute proceedings.
If the data available at the time of the institution of proceedings or
collected during the course of these proceedings provide sufficient
grounds for suspicion that an act has been committed by a specified
person (offence prosecuted ex officio), the authorised institution
issues an order on presentation of the charges (postanowienie o
przedstawieniu zarzutów). From the notification of this order, the
suspect becomes the accused and is entitled to the rights of the
accused. This decision must meet formal requirements (such as the
identity of the suspect, detailed data on the act attributed to him and
the legal classification of the act).
Alternatively, the police or a prosecutor, or one of the other bodies,
issues an order on refusal to institute proceedings (postanowienie o
odmowie wszczęcia postępowania przygotowawczego) if there is no
reason to suspect the commission of a crime or if one of the
conditions provided by Article 17 § 1 CPC is fulfilled (see below
6.4.3.2). If the police issue this kind of order, the public prosecutor’s
approval is required (Article 305 § 3 and 325e). This approval is not
necessary for the other organs mentioned earlier. These orders may
be challenged by way of interlocutory appeal before the superior
prosecutor.

6.4.3.1.3 The investigation and inquiry
Depending on the complexity of the offence committed and the
difficulty of the case, the competent organ chooses
- a simplified inquiry (dochodzenie) in cases within the jurisdiction
  of the district court (Article 325b § 1 CPC) that are
  - subject to a penalty not exceeding five years’ custody and in
cases of offences against property, only when the value of
the object of the offence or damage inflicted or threatened
does not exceed PLN 50,000 (exceptions are provided by
law)
  - specified by law (i.e. in the CC)
- an investigation (śledztwo) in cases (Article 309 § 1 CPC) of
  - crimes

424 In principle, this order is not required for an inquiry. The suspect is notified of the
charges at the outset of his examination.
misdemeanours where the suspect is a judge, state prosecutor, police official or another official such as border guards or military police

misdemeanours for which inquiries are not conducted, misdemeanours for which inquiries are conducted, if the state prosecutor so decides by reason of the significance or complexity of the case

6.4.3.2 The third phase of criminal proceedings and decisions affecting further prosecution

In inquiries, on approval of the prosecutor, the police may issue an order for dismissal, prepare a bill of indictment or propose another solution. The prosecutor approves and files the indictment unless he decides otherwise. In investigations, the police may issue an order to dismiss the case on approval of the prosecutor. Otherwise, the police apply to the prosecutor to indict the accused. The prosecutor prepares and files the indictment or decides otherwise.

The completion of the preliminary proceedings may lead to mediation, the dismissal of the case (umorzenie) or the issuance of a bill of indictment or an act of accusation (akt oskarżenia).

The public prosecutor – or the court after the closing of preliminary proceedings – may decide, ex officio or upon the motion of or with consent from the injured party and the accused, to refer the case to a trusted institution or person for mediation (Article 23a CPC). If mediation is successful, the case is referred to a court for a decision on conditional dismissal (warunkowe umorzenie); alternatively, where mediation fails, an indictment follows. Besides an indictment, the PPS can apply to the court for a conviction without hearing (wniosek o skazanie bez rozprawy, Article 335 CPC).

The conditional dismissal is available for petty offences carrying a penalty of up to five years and which present a low degree of social harm. The guilt of the accused must be without doubt and his character must be compatible with such a decision (i.e. he must be a first offender). The court will impose coercive measures other than imprisonment for a probation period. The conviction without hearing is admissible if the accused acknowledges his guilt for a crime carrying a penalty of up to ten years’ imprisonment. The decision is made by the court through a judgement.

Alternatively, an order for dismissal can only be delivered

[425] In private prosecution, successful mediation leads to the definitive dismissal of the case.
• if the proceedings have failed to disclose sufficient grounds to justify the preparation of an indictment and the conditions specified in Article 324 are absent. Here the investigation is dismissed without the inspection of the case materials (Article 322 § 1 CPC)\textsuperscript{426}

• in the case of a misdemeanour carrying a custodial penalty of up to five years if imposing the penalty would obviously be inexpedient in the light of a penalty validly decided for another offence, and as long as the interests of the injured party are not prejudiced (Article 11 § 1 CPC)

• Article 17 § 1 CPC provides that criminal proceedings shall be dismissed, if
  - the act has not been committed or there have not been sufficient grounds alleged to suspect that it has been committed
  - the act does not possess the qualities of a prohibited act or it is acknowledged by law that the perpetrator has not committed an offence
  - the act constitutes an insignificant social danger
  - it has been established by law that the perpetrator is not subject to a penalty
  - the accused is deceased
  - the prescribed limitation period has elapsed or criminal proceedings concerning the same act committed by the same person have been validly concluded or, if previously instituted, are still pending
  - the perpetrator is not subject to the jurisdiction of the Polish criminal courts
  - there is no complaint from an authorised prosecutor
  - permission is not required to prosecute the act or there is no motion to prosecute from a person so entitled, unless otherwise provided by law
  - other circumstances precluding such proceedings appear

\textsuperscript{426} Article 324 § 1. If it is found that the suspect committed an act while incompetent and there are grounds to apply precautionary measures, the state prosecutor, having concluded the investigation, may apply to the court for the dismissal of proceedings and the application of precautionary measures. Article 321 applies accordingly.

§ 2. If the court finds no grounds for granting the motion referred to in § 1, it shall refer the case to the state prosecutor to be continued.

§ 3. The order of the court shall be subject to interlocutory appeal.
Articles 322 and Article 17 § 1, point 3, usually justify the dismissal of criminal proceedings. This is a clear approximation of the opportunity principle in prosecutions. In Article 322, the competent organ is free to appraise whether there are sufficient grounds to seek an indictment. If this organ is the police, approval from the state prosecutor is needed for dismissal (Article 305 § 3 CPC). In 2000, 17% of the cases were dismissed on this basis. In Article 17 § 1, point 3, an act constituting only insignificant social harm is not a criminal offence and there is thus no need to prosecute. Prosecutors use this system to drop cases despite the substantial elements of a crime having been assembled. In 2000, only 0.3% of cases were dismissed on this basis. However, there seems to be a difference with the Communist notion of social danger (see 5.5.1.3) because the words ‘social harm’ are used instead of ‘social danger’. According to Polish authors, the new definition is interpreted less broadly than the old one...

...only those circumstances directly connected to the act may be taken into account in determining the act’s ‘social harm’ in a concrete case.427

Finally, the wording of Article 11 provides for discretion in the decision to prosecute or not. The provision is justified on the basis that there is no point in carrying on complete criminal proceedings because the resulting conviction would be encompassed by a conviction for another offence.428 This provision is rarely applied.

6.4.4 The role of the Polish prosecution service in the supervision of preliminary proceedings

6.4.4.1 The obligation to inform

All public institutions must assist the organs of criminal proceedings from within the scope of their activities.429 In spite of this general obligation, the police have no legal obligation to inform the state prosecutor that a notice of an offence has been filed unless it concerns an offence for which it is compulsory for a state prosecutor...

429 Article 15 § 1. The police and other agencies involved in criminal proceedings shall implement the instructions of the court and the state prosecutor and shall conduct their inquiry or investigation under the supervision of the state prosecutor within the scope prescribed by law.

§ 2. All state, local government and community institutions shall aid and assist, within the scope of their activities, the agencies conducting criminal proceedings.
to conduct an investigation. The other organs mentioned in Article 325d are under no legal obligation to inform a prosecutor (Article 304 § 3).

Until they inform the public prosecutor, the police and the other organs are empowered to dismiss the matter. In theory and in application of the legality principle, a dismissal can only occur if the act is not a criminal offence prosecuted *ex officio*. Only in matters where the prosecutor is fully informed can the prosecutor carry out his right to supervise proceedings fully. However, Article 306 § 3 provides for the right of the notifying person to bring an interlocutory appeal to the superior prosecutor if the person did not receive notification of an order to institute or to refuse to institute proceedings within six weeks.

6.4.4.2 The supervision of preparatory proceedings

The supervising prosecutor verifies the facts or information mentioned in the notice of an offence before issuing the order to institute or to refuse to institute proceedings (Article 307 CPC). Provisions concerning supervision apply to both investigation and inquiry unless otherwise stipulated by law. Once instituted, the competent prosecutor is responsible for the correct and efficient conduct of the proceedings. If a prosecutor does not directly conduct the proceedings, he supervises all actions with the exception of court actions (Article 326 CPC). Supervision is a prosecutor's compulsory duty and the law only provides exceptions. Prosecutors should ensure that proceedings are performed with respect for the law and the rights of the various parties. The purpose of supervision is to achieve, quickly and efficiently, the objectives of the preparatory proceedings such as (Article 297 CPC)

- establishing whether a prohibited act has been committed and whether it constitutes an offence
- detecting the perpetrator and, if necessary, effecting his capture
- collecting information
- elucidating the circumstances of the case, including the identification of the injured parties and the extent of the damage
- to collect, secure, preserve and record evidence for the court to the extent required

The provincial prosecutor or his deputies supervise proceedings conducted by other organs. Prosecutors have no influence over the discipline and position of police officers or other organs if they violate their duties during proceedings, but they do have the right to
inform the immediately superior organs of the violation.\textsuperscript{430} A public prosecutor can only perform certain acts or agree on their execution by another organ – particularly, a prosecutor must ratify an order suspending an inquiry or investigation. The prosecutor may decide to carry out the execution of other acts. Supervision applies to almost all acts of organs leading the proceedings undertaken before or after the instructions of a supervising prosecutor.\textsuperscript{431} Concretely, supervision implies that the supervising prosecutor may (Article 326 § 3 CPC)

- inform himself of the intentions of the person conducting the preparatory proceedings, indicate the direction of proceedings and issue instructions on this issue
- request that material collected in the course of preparatory proceedings be presented to him
- participate in actions carried out by the person conducting proceedings, carry them out in person or take over and proceed with the case
- issue commands, orders or instructions and amend and reverse orders and instructions issued by the person conducting preparatory proceedings. All the organs involved in criminal proceedings must implement the instructions of the prosecutor – and of the court if it is involved – and legal prescriptions
- at any time, order the reinstatement of dismissed proceedings unless such proceedings are conducted against a person examined as a suspect in the previous proceedings. However, the reinstatement of proceedings against such a suspect is possible if circumstances of vital significance unknown during the previous proceedings are discovered (Article 327 CPC). This especially concerns the discovery of new facts or evidence

\textsuperscript{430} Article 20 § 2. In the event of a flagrant dereliction of procedural duty by a public prosecutor or a person conducting the preparatory proceedings, the court shall inform an immediate superior of the person who transgressed; such a right shall also be vested with the state prosecutor with regard to the police and other agencies involved in preparatory proceedings.

\textsuperscript{431} Article 326 § 4. In the event that an agency other than the state prosecutor fails to obey an order, ruling or instruction issued by the state prosecutor supervising the proceedings, on the motion of the latter, a superior official shall institute proceedings whose results shall be communicated to the state prosecutor.
6.4.4.3 The position of the general prosecutor

The general prosecutor has the right to reverse validly issued orders that dismiss preparatory proceedings with respect to a person examined as a suspect if he finds that the dismissal of such proceedings was groundless. There are two restrictions to this right:

- where it does not apply to a court order
- after six months from the date the order became valid and final, the decision of the general prosecutor can only be taken in favour of the suspect and only to amend or reverse an order or its statement of reasons.

If an order is reversed, the proceedings start again. The law does not define a groundless order of dismissal. The reopening of proceedings can occur on the discovery of new facts or evidence, or if the general prosecutor considers that his deputy mistakenly decided that an investigated act lacked the elements of a crime in the face of sufficient facts and evidence to issue an indictment.\(^{432}\)

6.4.4.4 The appeal of orders (zażalenie na postanowienie)

Prosecutors have the general power to examine interlocutory appeals (see 6.5.2.2) filed against orders issued by an organ – other than the state prosecutor – conducting preparatory proceedings (Article 465 § 3 and 302 CPC). The appeal may be filed by the parties, their lawyers and representatives. In addition to these persons, the institution or the person who submitted the notice of an offence may also file such an appeal (Article 306 CPC):

- against an order refusing to institute proceedings
- against an order for dismissal
- if the person or institution that submitted the notice of a crime has not been notified within six weeks about the institution or refusal to institute an investigation.

The appeal is filed before the superior prosecutor or before a court if the superior prosecutor rejects the appeal. If the appellate organ grants the appeal, the case is remanded to the state prosecutor who may:

- refuse to institute or dismiss proceedings
- or institute proceedings

\(^{432}\) Tylman & Grzegorczyk 2003, p. 677.
In the case of a second refusal, another interlocutory appeal may be filed. If the appeal is granted the case is remanded to the prosecutor. If the prosecutor refuses to institute proceedings for a third time, the injured party can bring his own indictment (Article 330 § 2 CPC). This means that a party other than a public accuser may bring an indictment against an offence prosecuted ex officio, even though the public accuser does not take part in the proceedings.

6.5 The role of the Polish public prosecutor after the pre-trial phase of the criminal process

6.5.1 The position of the public prosecutor in the first instance

6.5.1.1 The preliminary verification of the indictment and the conference

First the indictment is subject to preliminary verification by the president of the court. If this indictment does not meet the formal requirements provided by law, the president can decide to remand the case back to the prosecutor for correction. The prosecutor can challenge this order by way of interlocutory appeal within seven days of the order being issued. This appeal is judged by a court with jurisdiction over the case.

If the indictment meets the formal requirements, the president assigns the case to a conference (posiedzenie sądu) rather than a public hearing when it is not too complex and if

- the state prosecutor has submitted a motion for a decision to apply precautionary measures
- there is a need to consider a conditional dismissal of the proceedings
- the prosecutor included a motion for conviction without hearing
- there is a possibility of mediation
- the proceedings are dismissed pursuant to Article 17 § 1 (see 6.4.3.2)
- an order is issued to the effect that the court lacks jurisdiction over the case
- the case is remanded to the state prosecutor in order to correct deficiencies of essential significance in the preparatory proceedings
- an order is issued on conditional suspension of the proceedings or on preventive detention or other coercive measures
The decision taken at the conference is an order subject to interlocutory appeal. However, if a conditional dismissal is decided at the conference, a judgement is issued. During the conference, the presence of the parties is not mandatory unless the president decides otherwise.

6.5.1.2 The first instance hearing

After completion of the indictment's formal requirements, the president of the court refers the case by instruction to a public hearing if he finds that because of the complexity of the case, or for other important reasons, this would contribute to more efficient proceedings and in particular the proper preparation and organisation of the first instance hearing (Article 349 CPC). During the hearing, the court may grant the accused his motion by agreeing to a certain penalty. This is only possible with the consent of the state prosecutor and the victim (Article 387 CPC). After the hearing, the court deliberates, votes and delivers a judgement. It may only base its judgement on the facts and evidence disclosed at the main trial. The court renders a judgement of conviction or a judgement of acquittal if it finds that the act does not constitute a significant social danger or does not possess the qualities of a prohibited act. When after judicial examination a fact or material circumstance is disclosed which precludes prosecution or requires a conditional dismissal of the proceedings, the court shall issue a judgement on such dismissal or conditional dismissal.433 In this case, the court may refer the case to another agency if the act under examination is a disciplinary grievance. Such a decision is not available if the court renders a judgement of acquittal. A legally valid judgement of a court dismissing proceedings can only be attacked by way of extraordinary forms of review (see 6.4.3).

6.5.1.3 The participation of the state prosecutor at the hearing

Before any type of court, the public accuser is the state prosecutor. However, another public agency may perform this role if the law so provides (Article 45 § 2 CPC). For example, in summary

433 During preparatory proceedings, if it is proven that the act has not been committed, that there are insufficient grounds to suspect its commission, that it does not possess the qualities of a prohibited act or if it is acknowledged by the law that the perpetrator has not committed the offence, the organ conducting the proceedings delivers an order dismissing proceedings, whereas if this happens after the judicial examination has started during the hearing, the court delivers a judgement of acquittal.
proceedings the agencies noted under Article 312 § 2 CPC may perform this function (see 6.4.3.1.1). During the hearing, the prosecutor not only defends the interests of the state but also the interests of justice. In so doing, the public prosecutor is supposed to adapt his indictment to new circumstances arising during the hearing. Therefore, if these circumstances reveal that the defendant is not involved in the offence, the prosecutor issues an opinion for acquittal and desists from supporting the charges.

6.5.2 The position of public prosecutor in ordinary forms of review

6.5.2.1 General provisions applying to ordinary forms of review

The CPC institutes two types of ordinary forms of review, i.e. the appeal (apelacja) and the interlocutory appeal (zażalenie). An appeal may be filed against a judgement of the first instance court, whereas an interlocutory appeal may be filed against other types of decisions made either by a court or by another organ involved in preliminary proceedings. General provisions apply both to appeal and interlocutory appeal unless the law states otherwise. Differences between appeal and interlocutory appeal will be explained below. An ordinary form of review may affect

- the whole decision
- only certain parts of it
- or only the statement of reasons

Whoever files an appellate measure has to indicate in writing the objections raised against the decision challenged. The decision is challenged before the organ that made it. A prosecutor can always challenge a resolution or finding for the benefit of the accused as well as against him through ordinary forms of review (Article 425 § 3 CPC). If a prosecutor supports the appellate measure filed by the accused to his benefit, the accused can no longer withdraw his appeal. The appellate body decides whether the decision challenged should be sustained, amended or quashed. The appellate court is bound to amend or quash the decision challenged if it finds

- a violation of substantive law
- a violation of procedural law if the content of the decision is affected
- an error occurred in the determination of the facts if the content of the decision is affected
or that the penalty imposed is strikingly disproportionate to the offence
Nevertheless, it can amend or quash the decision and decide on dismissal of proceedings only if the assembled evidence warrants it (Article 437 § 2). If the evidence assembled during the first instance proceedings does not allow the appellate court to amend the decision, it will quash it and remand it to the first instance court. The appellate court can also only modify the challenged decision within the scope of the appeal and the objections raised therein, unless certain circumstances provided by law occur (e.g. the court of first instance was not competent to take the decision challenged or the accused had no defence counsel). In these cases the appellate court can modify the challenged decision ex officio. The appellate court can only aggravate the decision challenged if an appellate measure has been filed against the accused within the limits of this appeal (prohibition of the reformationis in peius); however, an appellate measure filed against the accused may also result in a decision for his benefit.\footnote{The prohibition of the reformationis in peius does not apply to the alternative means of settling a criminal case. The appellate court may aggravate a decision taken following the submission to conviction procedure even if the accused appealed against it.}

6.5.2.2 The interlocutory appeal
This form of review is filed against certain orders and instructions, and not against judgements of the court. They are

- orders of a court that preclude the rendering of a judgement unless otherwise provided for by law
- orders with respect to preventive measures

The provisions on interlocutory appeals against orders of the court apply to interlocutory appeals against orders by the state prosecutor and other persons conducting proceedings. An interlocutory appeal from an order issued by a state prosecutor is examined by his superior and by the court in cases provided for by law. An interlocutory appeal from an order issued by a body conducting preparatory proceedings other than a state prosecutor is examined by the state prosecutor supervising the proceedings.

The time limit for filing an interlocutory appeal is seven days from the date the order was served or announced. In particular, the state prosecutor can challenge the following
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- orders of the president of the court to remand the case back to the prosecutor if the indictment does not meet the relevant formal requirements
- orders issued at the conference (thus not a judgement conditionally dismissing the proceedings issued at the conference)
- instructions assigning the case to a public hearing
- orders precluding the rendering of a judgement (i.e. quashing proceedings)
- instructions of the appellate court refusing a cassation appeal to the Supreme Court

6.5.2.3 The appeal

Appeal is the ordinary form of review that applies to judgements made in the first instance by a court or at a conference. The time limit for filing an appeal is fourteen days from the date the judgement and the reasons therefor were served. The appellate court cannot convict a defendant acquitted in the first instance or with regard to whom the first instance proceedings have been dismissed or conditionally dismissed. If the appellate court finds that the first instance court's judgement should be modified and, for example, a judgement of acquittal could be wrong, it can only decide to quash the judgement and return it to the first instance court.

6.5.3 The position of public prosecutors in extraordinary forms of review

6.5.3.1 The cassation appeal

6.5.3.1.1 Cassation appeal against a valid decision by an appellate court

The public prosecutor and other parties to a case may bring a cassation appeal against a valid decision of an appellate court concluding the court’s proceedings. A Supreme Court judgement in a cassation hearing cannot be challenged by way of another cassation appeal.

Absolute grounds for appeal are (Article 439 CPC)
- a person unauthorised or incapable of adjudicating or subject to disqualification in cases provided for by law has participated in rendering the decision
the panel was improperly constituted or one of its members was not present throughout the trial

- a common court rendered a decision in a case falling under the jurisdiction of a special court, or a special court rendered a decision in a case falling under the jurisdiction of a common court of law

- a lower court rendered a decision in a case falling under the jurisdiction of a higher court

- a penalty, penal measure or preventive measure unknown to law has been imposed

- a decision was rendered that infringes the principle of majority vote or was not signed by any one of the persons participating in it

- there is a contradiction in the contents of the decision, rendering its execution impossible

- a decision was taken despite the fact that another criminal proceeding for the same act by the same person was already validly and finally concluded

- one of the circumstances precluding the proceedings, as defined by law, exists

- the accused had no defence counsel in a case where the law provides that he must have counsel, or defence counsel did not participate in acts where his participation was mandatory

- or the case was heard in the absence of an accused whose presence was mandatory

Non-absolute grounds for appeal can be found in another flagrant breach of law with significant effect on the content of the judgement. A cassation appeal based on non-absolute grounds may be filed if

- it is filed in favour of the accused only where he has been convicted and sentenced to a custodial sentence without conditional suspension of the execution (Article 523 § 2)

- it is filed against the accused only if the accused has been acquitted or the proceedings have been dismissed because
  - the prohibited act constituted an insignificant social danger
  - it was established by law that the accused is not subject to penalty
  - or the accused was non-accountable

The time limit for filing the cassation is thirty days from the date the judgement and the reasons therefor were served. The cassation is
brought to the Supreme Court via the appellate court. The president of the appellate court may refuse the cassation motion if he finds that certain formal requirements are not met, the time limit for filing the appeal has not been respected or the grounds for cassation are different from those provided for by law (Article 530 § 2 CPC). The Supreme Court may dismiss the cassation appeal or reverse the challenged judgement, in whole or in part, and remand the case to the relevant court. The Supreme Court may also find the conviction manifestly unjust and acquit the accused.

6.5.3.1.2 Rights of the general prosecutor and the Ombudsman (Rzecznik Praw Obywatelskich)

The general prosecutor and the Ombudsman have a very specific right. They may bring a cassation appeal to any valid and final judgement and order concluding court proceedings at any time. The general prosecutor, in particular, is not bound by the grounds for cassation concerning a valid and final decision rendered by an appellate court in favour or against the accused. Moreover, they are not bound by the thirty-day time limit for filing a cassation appeal. They can also bring the cassation directly to the Supreme Court without verification by the appellate court upon the motion of cassation. Nevertheless, a cassation to the defendant’s detriment may not be granted after six months from the date the decision became valid. The right of the general prosecutor, the Ombudsman and the Minister of Justice to file this cassation appeal with the Supreme Court is considered as being solely in the interest of the law. The Supreme Court applies the same procedural rules as for an ordinary cassation appeal.

6.5.3.2 The reopening of proceedings

The public prosecutor or any other party can request the reopening of proceedings. The reopening of proceedings affects court proceedings concluded by a valid and final judgement or order on the merits (Articles 540 and 540a CPC) when

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435 The Ombudsman guards the human and civic freedoms and rights specified in the Polish Constitution and other legal acts. Article 208 of the Polish Constitution stipulates that in accordance with the principles specified by statute, everyone shall have the right to apply to the Commissioner for the Protection of Civil Rights for assistance in protecting his or her freedoms or rights from infringement by the organs of public authority.

• an offence is committed and in connection with the judicial decision made after completion of these proceedings there is good reason to believe that this could have affected the content of such a decision

• and/or after the judicial decision has been issued, new facts or evidence previously unknown to the court come to light, which indicate that the accused is innocent or was not eligible for penalty, or the accused was improperly convicted for a crime subject to a more severe penalty than the penalty provided by law for the crime actually committed, or the court has dismissed or conditionally dismissed the proceedings after relying on incorrect assumptions about the accused

• or it is in the interests of the accused if the legal provision underpinning the convicting decision is declared no longer valid or has been amended as a result of a decision of the Constitutional Tribunal or of an international authority acting under the provisions of an international agreement that has been ratified by the Polish State

The court may also reopen proceedings *ex officio* only in the case of absolute grounds of appeal unless the reasons have already been subject to examination in a cassation procedure. No reopening *ex officio* to the prejudice of the accused is possible after six months from the date the decision became valid and final. The reopening of judicial proceedings is in principle decided by a provincial court, unless the judicial decision challenged was taken by a provincial court or an appellate court. Respectively, in these cases, only an appellate court or the Supreme Court are competent to decide upon the motion to reopen proceedings. The prosecutor can always file a reopening motion even against a decision irrespective of whether it is prejudicial to the rights of the accused.

If a court decides to reopen proceedings, it can reverse the decision and remand the case to the competent jurisdiction, which may acquit the defendant if it finds that the decision was manifestly unjust. The court may also dismiss the proceedings.

6.5.3.3 *The reinstatement of proceedings conditionally dismissed by the court*

On the motion of a public prosecutor, the injured person or the probation officer *or ex officio*, the court of first instance can decide to reinstate proceedings conditionally dismissed if this dismissal is no longer justified.
6.5.3.4 The compensation of unjustifiable sentencing or detention

In certain cases, an accused is entitled to request compensation for damages incurred by him because of a wrong judicial decision

- if he has been acquitted or re-sentenced under a more lenient provision resulting from a reopening of proceedings or a cassation appeal
- if he has been subject to manifestly unjustifiable preventive detention

The provincial court in whose jurisdiction the decision was taken, is in principle competent to judge the compensation action. The right to seek compensation cannot be exercised anymore after one year from the date on which the judicial decision in question became valid and final.

6.5.3.5 Clemency

A convicted person in general or a person authorised to file an appellate measure may file a clemency petition, but the general prosecutor may also institute it *ex officio* if the President of Poland so decides. The court that rendered the judgement in the first instance has jurisdiction to decide on the petition. If it delivers an opinion in favour, the file is transferred to the general prosecutor who presents it to the President of Poland, who may grant clemency.