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

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

137 Molins 2004; Verrest 2000; Rassat 1967; Rolland 1955.
any decision made by a judge or a court by means of ordinary and extraordinary forms of review.

3.1 Historical developments

3.1.1 Provisions concerning judicial power in the 1958 Constitution

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of 5 October 1958 and several major laws adopted the same year provided the final features of the current system and repealed important provisions of the 20 April 1810 Act on the organisation of the judicial system (for more on this Act, see 2.5).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

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

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

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139 The most important modifications of the judiciary, above all, concerned the administrative side of the law, with a progressive establishment of the administrative judicial system.
140 An official English translation of the 1958 Constitution can be found at http://www.assemblee-nationale.fr/english/8ab.asp.
twelve members – six magistrates (appointed by their peers) and six other persons – such as the President of the Republic, the president of the Senate and the president of the National Assembly.\footnote{The six magistrates from the two sections are different, while the six other members are the same for both sections.} Although the council has no binding powers, it plays an important role in the status of magistrates (see 3.3.2.1 and 3.3.5.2). An order adopted in 1958 (the 1958 Order) determined the status, functions and organisation of the \textit{magistrature}.\footnote{Ordonnance n. 58-1270 du 22 décembre 1958, portant loi organique relative au statut de la magistrature, JO du 23 décembre 1958, 11551. The present paper is based on this 1958 Order as amended by the 2004 Act, see loi n. 2004-192 du 17 février 2004, JO du 2 mars 2004.} A new Criminal Procedure Code (\textit{Nouveau Code de Procédure Pénale}) was adopted in 1957, while the new Criminal Code was adopted in 1992 and came into force only in 1994.

\subsection*{3.1.2 The structural and functional position of the prosecution service in the State organisation}

During the Old Regime, prosecutors carried out their functions in the name of the king, who was the sole sovereign, combining executive, legislative and judicial functions. Article 3 of the 1789 Human Rights Declaration provided that the principle of all sovereignty resides in the nation. The public ministry’s magistrates were established as the nation’s representatives and not exclusively as the agents of the executive before the courts. It was advocated that in a democratic country, the nation expresses itself in two ways – by the law enacted by its parliament on the one hand, and by the decisions of its government on the other. In order to represent the nation, the public ministry must necessarily act on behalf of the government and uphold the law. Both prosecutors and judges are considered magistrates belonging to the judiciary (\textit{autorité judiciaire}) in the French system, but they do not possess the same status or the same functions. While on the one hand prosecutors belong to the judiciary (\textit{principe de l’unité du corps judiciaire}), they do not enjoy the constitutional independence of judges because they are subordinate to their superiors (\textit{principe de la subordination hiérarchique}).\footnote{Favoreu 1994.} The Constitutional Court has decided that public prosecutors are magistrates and hence watch over individual liberty as judges do; however this task does not exempt them from being subordinate to the Minister of Justice.\footnote{CC 93-323, 5 août 1993, RJC, I.535 and CC 93-326, 11 août 1993, RJC, I.551.} In this context, the
Constitution states that there is one corps of magistrates and that within this corps, there are two functional classes, judges and prosecutors. This distinction explains how the rules for appointment and discipline may be different for the two categories: two separate sections of the High Council of the Judiciary are therefore necessary.

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

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

> The public prosecutor exercises the public action and formally requests the law to be enforced.\(^{145}\)

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

\(^{145}\) Translations of French laws and codes are provided at <www.legifrance.org>. Although Article 1 CPC translates ‘action publique’ as ‘public prosecution’ (see 3.3.2.2), the translator sometimes uses ‘public action’ instead.
the prosecution services. Without providing the Minister of Justice with new powers over prosecutors, the amendment introduced a new provision into the CPC (Article 30) according to which the Minister of Justice implements the criminal prosecution policy (politique d’action publique) and therefore gives general instructions affecting prosecution to the prosecution services (see 3.3.2.2).

3.2 The present French criminal courts system

3.2.1 First instance

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

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

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

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147 At the time of writing, draft legislation modifying in depth the French judicial system to a considerable extent is under discussion. This draft may lead to a complete reorganisation of judiciaries, entailing the suppression of existing courts and the creation of new ones.
148 According to the gravity of the acts, the Criminal Code establishes three types of criminal offences – petty offences (contraventions), misdemeanours (délits) and felonies (crimes). The petty offences are classed into five different categories (contraventions de 1ère, 2ème, 3ème, 4ème et 5ème classe).
149 The lay judge has the jurisdiction to judge petty offences of the four first classes. The purpose of the 9 September 2002 Act establishing this new judge was to relieve the pressure of an increasingly heavy workload on the courts and to expedite the justice process. However, the territorial jurisdiction of the lay judges is the same as the police court with which they also share the same infrastructure (clerks, offices, etc.).
• one of the 493 police courts (tribunaux de police) with jurisdiction to hear certain minor offences that do not carry a sentence of imprisonment\textsuperscript{150}

• the criminal section (Tribunal correctionnel) of one of the 186 district courts (Tribunal de grande instance) with jurisdiction to hear important cases that may carry a sentence of imprisonment\textsuperscript{151}

• a Cour d’assises, composed of three professional judges (one president and two assessors) and nine jurors. In principle, there is one Cour d’assises in each district (département). The Cour d’assises judges the most severe crimes, carrying sentences up to life imprisonment\textsuperscript{152}

• a youth judge (juge pour enfants), a youth tribunal (Tribunal pour enfants) and youth Cour d’assises (Cour d’assises des mineurs), according to the gravity of the offence\textsuperscript{153}

• the High Court of Justice (Haute cour de justice), with jurisdiction to judge the President of the Republic in cases of high treason (Article 68, 1958 Constitution)

• the Court of Justice of the Republic (Cour de justice de la République), with jurisdiction to judge members of the government accused of committing a criminal offence while in office (Articles 68-1 and 68-2, 1958 Constitution)\textsuperscript{154}

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

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

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

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

\textsuperscript{154} Only misdemeanours and felonies may be tried before this court.
Since 2004, the jurisdiction of certain district courts (*juridictions interrégionales*) has been extended to cover multiple districts, where proceedings concern organised crime.\(^{155}\)

### 3.2.2 Appeal level

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

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

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

\(^{156}\) Stéfani, Levasseur & Bouloc 2001, p. 882.

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

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

3.2.4 Types of judicial decisions

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

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

3.3 Organisation of the French PPS

3.3.1 Structure of the public ministry

3.3.1.1 The structure of the public ministry

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

\textsuperscript{158} The term \textit{relaxe} is used for a judgement made by the Tribunal correctionnel, Tribunal de police and the juge de proximité whereas the term \textit{acquittement} is used for a judgement made by the Cour d’assises. Technically there is no difference between the two terms.
the general prosecutor’s office (Parquet général près la Cour de cassation) within the jurisdiction of the Supreme Court. This office exercises no authority over other offices

appellate offices (Parquets généraux près la Cour d’appel) established within each appellate court and having authority over prosecutors acting before all second instance courts and Cours d’assises with resort to the court of appeal and the chief district prosecutor

district offices (Parquets du Procureur de la République près le Tribunal de grande instance) established within each district court and having authority over prosecutors carrying out their functions before all first instance courts below a district court (juge de proximité, Tribunal de police, juge and Tribunal des enfants)

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

This includes

• a general prosecutor at its head (Procureur général près la Cour de cassation)

• several advocate generals (Avocats général près la Cour de cassation)

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

Indeed, prosecutors at the Supreme Court do not institute criminal proceedings, they participate in cassation proceedings before the Supreme Court as joined parties (partie jointe). In other words, in cassation proceedings an advocate general ensures the correct application of criminal law. This implies that an advocate general
does not represent the public ministry as a defendant or plaintiff but gives independent legal advice on legal issues. There is one exception to this principle as regards criminal proceedings instituted against government ministers or the President of the Republic before the Court of Justice of the Republic or before the High Court of Justice. Within the jurisdictions of the High Court of Justice and the Court of Justice of the Republic, the general prosecutor of the Cour de cassation represents the prosecution service. The only circumstances under which the general prosecutor may institute proceedings in common cases is an extraordinary appeal in the interests of the law (pourvoi en cassation dans l'intérêt de la loi). In this way he can challenge every decision, ex officio or on instruction of the Minister of Justice (see 3.5.4.1).

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

There are 35 appellate prosecutors’ offices, each of which includes
- a general prosecutor (procureur général)
- several deputies (avocats généraux and substituts généraux)

As the office head and the superior of public prosecutors acting within the territory of the appellate court, the general prosecutor has the following administrative functions. He
- administers the appellate office
- supervises the application of the criminal law within the jurisdiction of and with resort to the court of appeal, and supervises security in all courts
- ensures the smooth functioning of all the prosecution offices with access to the court of appeal
- coordinates the work of the chief district prosecutors
- coordinates the implementation of the criminal prosecution policy by the lower offices
- supervises the police officers and police agents of the jurisdiction of the court of appeal

159 The general prosecutor’s office does therefore not play an important part in the present thesis which is especially focused on the functions of the prosecution service in the common criminal process.
160 The criminal proceedings before these two courts have a specific character and for this reason fall outside the scope of the present research.
161 Loi du 20 avril 1810, article 45, Sirey, Duvergier & De Villeneuve 1821, p. 78.
While the general prosecutor has authority over public prosecutors acting in all offices within the territorial jurisdiction of the court of appeal (Article 37 CPC), he has no disciplinary power over them. This power lies with the Minister of Justice, and the general prosecutor is also accountable.

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

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

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

### 3.3.1.4 The district offices

There are 181 district offices, each of them including

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

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

- the district court
- all courts of first instance with resort to the district court (tribunaux de police and juges de proximité)\(^{162}\)
- the Cour d’assises, if it has its seat within the district court
- the investigating judge

### 3.3.1.5 Ranking and the general principle of substitution

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

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

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

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

\(^{163}\) Within each rank there are also levels depending on the seniority of the magistrate.

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

3.3.2 Subordination

3.3.2.1 Appointment of the organs of the public ministry

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

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

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

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

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

3.3.2.2 Authority of the Minister of Justice over the public ministry

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

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

The Minister of Justice carries out the prosecution policies determined by the government. He ensures the coherence of their application throughout the national territory.

To these ends, he sends general instructions about prosecutions to the prosecutors attached to the public prosecutor's office.

He may denounce violations of the criminal law of which he has knowledge to the prosecutor general, and charge him, by means of written instructions attached to the case file, to initiate prosecutions or to cause them to be initiated, or to seize the competent court of such written orders that the Minister considers to be appropriate.\(^{168}\)

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

\(^{166}\) Sections 4 and 5 of the 1958 Order.

\(^{167}\) According to Article 8 of the 1958 Constitution, the Minister of Justice is appointed by the President of the Republic based on a motion of the Prime Minister. The President also decides on his dismissal at the Prime Minister’s motion.

\(^{168}\) Translations of French laws and codes are provided at <www.legifrance.org>.
establishing more accurately the connection between the Minister of Justice and the public prosecution.\textsuperscript{169}

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

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

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

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

\textsuperscript{170} The action publique is established by Article 1 of the CPC as the public prosecution for the imposition of penalties (see 3.4.2.1).

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

\textsuperscript{172} Malibert 1994, p. 8.
• the dismissal of the case
• the penalty

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

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

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

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

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

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

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

Without prejudice to any specific reports drafted at the request of the general prosecutor, the chief district prosecutor sends the general prosecutor an annual report on the activities and management of his office, as well as on the application of the law (Article 35 § 3 CPC).
With this information, the general prosecutor decides whether information should be forwarded to the Ministry of Justice.

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

3.3.3 Limits to subordination

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

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

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

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

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


\textsuperscript{174} Rassat 1967, p. 100.
However, once a criminal prosecution is instigated, the Minister or the competent general prosecutor may order the prosecutor in charge of a case to deliver a written opinion before the court leading to the dismissal of the case. Specifically, the general prosecutor who is the direct superior of the chief district prosecutor may directly challenge the judgement of a lower court by way of appeal (Article 497 CPC).

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

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

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

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

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

### 3.3.4 Other rights and duties of French prosecutors

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

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

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

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

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

3.3.5 Criminal and disciplinary responsibility of prosecutors

3.3.5.1 Penal responsibility of members of the public ministry

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

3.3.5.2 Disciplinary responsibility of members of the public ministry

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

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

176 E.g. the High Council of the Judiciary decided that a prosecutor committed a breach of his professional duty and of délicatesse because he published an article about another prosecutor in a professional review that could harm victims of anti-Semitism. See <http://www.conseil-superieur-magistrature.fr/rapports-annueles/rapport1999/rapport1999-partie5.htm>.
Judiciary with jurisdiction for public prosecutors has heard the prosecutor and issued an opinion related to the sanction. The Minister of Justice is not bound by the opinion. He may impose a stricter sanction, which would, however, require a fresh opinion from the Council (Article 66, 1958 Order).

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

- a reprimand noted in the magistrate’s file
- transfer to a different location
- discharge from certain functions
- demotion in the hierarchy\(^{177}\)
- compulsory retirement
- discharge from his or her functions with or without the right to a pension

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

#### 3.4.1 Functions in fields other than the criminal process

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

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\(^{177}\) Such demotion may consist of demotion in rank from one level to another or from the first rank to the second, or temporary suspension for a maximum of one year with total or partial withholding of salary.

\(^{178}\) Article 6 of the Civil Code stipulates that statutes relating to public safety and morals may not be derogated from by private agreements.
3.4.2 General principles concerning the preliminary proceedings of the criminal process

3.4.2.1 Distinction between action publique and action civile

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

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

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

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

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

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

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

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

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

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

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

180 In very exceptional circumstances, the decision to prosecute depends on a formal notice, or a complaint from a victim or an authority, such as cases concerning criminal offences committed by a French national outside the territory of the French Republic (Article 113-8 CC) or concerning criminal tax offences. For more, see Stéfani, Levasseur & Bouloc 2001, p. 535. Also, in exceptional instances, an organ other than the chief district prosecutor may make the decision to prosecute (e.g. the tax authorities, the water and forest authority, the roads and mines authority or the customs authority).
with the Minister’s directives for the most part, but in practice there are disparities.\textsuperscript{181}

3.4.2.3 Control over opportunity

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

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

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

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

\textsuperscript{181} E.g. disparities in staff resources, the scale of certain crimes and disparities in populations explain disparities in local criminal policies, see Hodgson 2005, p. 228.
3.4.2.4 The phases of the preliminary proceedings

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

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

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

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

- a public prosecutor
- the judicial police (police judiciaire)\textsuperscript{185}

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

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

\textsuperscript{184} Buisson 2002.

\textsuperscript{185} The judicial police consists of officers of different ranks (officiers de police judiciaire, agents de police judiciaire, fonctionnaires et agents chargés de fonctions de police judiciaire) empowered with different prerogatives during the preliminary proceedings. Officers belonging to various corps, including certain
The victim of a criminal offence may also complain directly to

- an investigating judge\textsuperscript{186}
- a criminal court\textsuperscript{187}

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

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

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

\textsuperscript{187} If the victim directly summons the suspect before a criminal court, there are no preliminary proceedings and investigations will only take place at the hearing. The victim shall provide the court and the public prosecutor participating in the hearing with sufficient elements concerning the existence of a criminal offence. The public prosecutor participating in the hearing is competent to carry out the prosecution and may request the imposition of a penalty based on these elements.
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is immediately notified, can visit the scene of the offence personally and take charge of investigations (Article 68 CPC).

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

3.4.3.2 Second phase – the prosecution phase (poursuite)

3.4.3.2.1 Verification of the admissibility and the opportunity to prosecute

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

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

• the appropriate jurisdiction for the prosecution

• the opportunity for prosecution (see 3.4.2.2)

3.4.3.2.2 Further prosecution

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

• to refer the case to an investigating judge by warrant (réquisitoire à fin d'informer). Once a judicial investigation commences, the public prosecutor loses his dominus litis position and becomes a party to the proceedings. However, he retains certain important rights during the judicial investigation, such as to give his opinion on the acts carried out by the judge, to request an act by warrant and to challenge all the decisions of the investigating judge.

Once the investigation is complete, the investigating judge decides whether to summon the accused to court (ordonnance de renvoi) or not (ordonnance de non lieu)

• to issue an indictment and summon the accused before the court. There are various types of indictment

  ▪ summons procedure (citation directe) – for matters of lesser urgency; here, a bailiff serves the indictment on the defendant and summons him to the hearing
  ▪ the immediate appearance procedure (comparution immédiate), where the accused is heard on the day of completion of the police inquiry
  ▪ finally, the judicial ‘rendez-vous’ (convocation par procès-verbal) can be used for less serious cases, with the defendant ordered by writ to appear in court within a short period (between 10 days and 2 months)

3.4.3.2.3 Settlements alternative to prosecution or to a full hearing

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

\(^\text{188}\) This procedure applies only to minor offences such as occasional use of soft drugs.
• bringing to the attention of the offender the duties imposed by law
• referring the offender to a public health, social or professional organisation
• requiring the offender to regularise his situation under any law or regulation
• requiring the offender to make good the damage caused by the offence
• put in motion, with consent of the parties, a mediation between the offender and the victim

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

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

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

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

Eventually, the public prosecutor can propose to the accused charged with an offence carrying a penalty of a fine or imprisonment of up to five years, one or more of the main or additional penalties incurred, such as imprisonment (Article 495–7 and 495–8 CPC). This hearing, after prior admission of guilt (comparution sur reconnaissances préalable de culpabilité), is only possible if the accused acknowledges his guilt. Such a case is brought to court.
However, the hearing will be limited to the validation of the prosecutor’s proposal. Important distinctions from the previous proceedings are that the prosecutor may recommend a jail sentence and, particularly, that the approval order made by the court has the effect of a guilty verdict. It is, therefore, not an alternative to public prosecution.\textsuperscript{189}

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

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

3.4.4.1 Competence of the public ministry in the investigation

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

\textsuperscript{189} Pradel 2004.
\textsuperscript{190} Article 495 CPC provides: ‘The following may be dealt with by the simplified procedure set out in the present section: 1 misdemeanours provided for by the Traffic Code and related petty offences under this Code; 2 misdemeanours in relation to the regulations governing road transport; 3 misdemeanours in Title IV of Book IV of the Commercial Code which are not punishable by a sentence of imprisonment.’
\textsuperscript{191} On opposing appeal see below 3.5.3.2.
When a public prosecutor instructs the police, he fixes the time limit within which the inquiry must be completed. Where the inquiry is being carried out at the police’s own initiative, they supply the district prosecutor with a progress report once it has been running for more than six months (in case of preliminary inquiry only). The police carrying out a preliminary inquiry into a felony or misdemeanor must inform the district prosecutor as soon as a person has been identified against whom there is evidence of the commission or the attempted commission of an offence. The police may make decisions on the custody of suspects without the authorisation of the prosecutor. The prosecutor’s authorisation is only needed for extension of the custody period above twenty-four hours. Therefore, while the police may detain a suspect in custody, the public prosecutor controls the reasons motivating the decision and the possible extension or the ending of such custody.

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

### 3.4.4.2 Appeal of orders

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

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

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192 Only a high-ranking police officer may decide on custody.
instance. However, the CPC does not specify how the general prosecutor is to be informed about the first instance investigation.\textsuperscript{193}

3.5 The role of the French PPS after the preliminary proceedings

3.5.1 Preliminary verifications

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

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

3.5.2 First instance hearing

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

\textsuperscript{193} Stéfani, Levasseur & Boulouc 2001, p. 722.
to recommend a particular sentence. Replies are always possible and the accused always has the last word.

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

3.5.3.1 Appeal (appel)

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

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

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

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

\(^{194}\) The law provides that in certain cases, the victim has the right to withdraw his appeal. Such a party may file an appeal before the public ministry. If the first appellant withdraws his appeal, the appeal of the public ministry is automatically withdrawn.
sentence or of the civil award. Therefore, it is usual that the public prosecutor files a concurrent appeal (appel incident). If the public prosecutor alone files an appeal, this will not affect the civil award. The court of appeal re-hears the case in full because it is a second level of jurisdiction.

If the appeal court considers that

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

3.5.3.2 **Opposing appeal (opposition)**

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

This remedy is also available to the PPS and the accused against a criminal order made by a judge in simplified proceedings (see 3.4.3.2.3). From the day the order is communicated, the public prosecutor has ten days and the defendant forty-five (or thirty in case of contravention) to appeal. If an opposing appeal is filed, the case is dealt with by the criminal court (Tribunal correctionnel, 195

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

\(^{196}\) The accused may choose to challenge the judgement by way of appeal instead of opposing appeal.
Tribunal de police or juge de proximité) in application of the common procedure.

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

3.5.4.1 Cassation appeal (pourvoi en cassation)

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

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

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

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

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

\(^{197}\) However, certain decisions can never be challenged by way of cassation, e.g. decisions of the High Court of Justice.
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- quash (casser) the challenged decision and in general remand the case to a court that has the same level as the one that made the decision. This court can hear the case only within the limits established by the Supreme Court but may freely judge within these limits. A second cassation appeal is available against the new decision.  
- quash the challenged decision and not remand the case. In these exceptional cases, the court pronounces a judgement and can consider questions on facts because they do not need any specific inquiry (e.g. if the criminal offence has been amnestied, the limitation period has expired, etc.). It may also decide that only a part of the decision challenged is valid and enforceable

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

This form of review may be used against valid decisions made without appeal that are irrevocable because the time limit to lodge a cassation appeal has elapsed or because such an appeal was not possible. The appeal may be filed against a decision made in favour of the accused or not. The general prosecutor at the Supreme Court reports to the criminal section any judicial acts, first instance or appeal judgements violating the law, in order to maintain the unity of case law and uphold the Rule of Law. The general prosecutors at appellate courts have the right to lodge appeals against acquittals made by a Cour d’assises. The purpose of the review is to seek the redress of a breach of the law and preserve the coherence of case law and the exact observance of the law. The general prosecutor has the right to appeal either on his own initiative or on a written order of the Minister of Justice. The Supreme Court can
- declare the appeal inadmissible
- reject the appeal
- quash the challenged decision. In this case, the execution of the decision continues and the situation of the parties is unaltered. The quashing of the judgement is purely theoretical and aimed only at reminding lower courts what the case law of the Supreme Court is with regard to the legal issue affected by the case

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

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

The Supreme Court may

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

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

3.5.4.4 Pardon (grâce)

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

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\(^{199}\) The grounds for revision can be that

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

\(^{200}\) The application for revision is made to a special committee that decides whether the appeal can be heard or not.
Anyone who has a moral or material interest may file a petition for pardon. No provision prevents the public ministry from filing such a petition in the public interest. The Minister of Justice collects all petitions, investigates the applications for pardon and decides which petitions might be of interest to the President.