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Ius Novum

2025, vol. 19, no. 3, pp. 54–61

FACTORS SHAPING THE MODEL OF PREPARATORY PROCEEDINGS

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DOI 10.2478/in-2025-0024

Abstract

The Commission for the Codification of Criminal Law is currently working on amendments to the Code of Criminal Procedure. Its aim is to define a new model of pre-trial proceedings that enhances their effectiveness. The shape of the pre-trial model is not accidental; it results from the consideration of numerous factors, both extra-normative (such as national crime levels in the country and criminalisation trends) and normative (such as the role of the prosecutor in pre-trial proceedings). This article critically examines the key factors influencing the optimal model of pre-trial proceedings, thereby outlining a clear direction for future regulations.

Key words: criminal trial, pre-trial model

INTRODUCTION

The work of the Criminal Law Codification Commission has been accompanied by an ongoing debate concerning the structure of preparatory proceedings in the modernised criminal process and the role of the prosecutor therein. From the outset – specifically since the adoption of the Code of Criminal Procedure (CCP) in 1928 – it appears that Polish legislators have lacked a clear vision regarding the design of preparatory proceedings and the appropriate procedural model. The Codification Commission responsible for drafting this Code highlighted the existence of two competing needs within the justice system: on one hand, the need to expedite the adjudication process; on the other, the necessity of properly preparing evidence. According to the Commission, these two objectives are in constant tension, making

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it extremely difficult to devise an effective model for preparatory proceedings.[1] This problem remains unresolved to this day. One need only consider the amendments to Article 297 § 5 CCP – which defines the scope of evidence in preparatory proceedings and has been amended four times to date – to illustrate the point.[2]

There is no doubt that the structure of preparatory proceedings, as with the criminal process as a whole, depends on a variety of factors that must be taken into account for the process to function effectively and to fulfil its intended purpose. The aim of this study is to identify the factors that influence the model of preparatory proceedings and must be considered by the legislator when drafting the relevant provisions, so that the proceedings are as effective as possible and contribute to achieving the goals of the criminal process. The study does not aim to describe the model of preparatory proceedings as such.

THE CONCEPT OF A PROCEEDINGS MODEL

As S. Waltoś has observed, a model consists of elements within a system that distinguish it from other systems. While a system refers to the entirety of criminal procedural rules in force at a given time in a particular jurisdiction, characterised by coherence, order and completeness, a model identifies only those elements that are essential to the system apart from others.[3]

When we refer to a 'model' *in abstracto*, we mean either a target framework that describes an ideal system (i.e. the one we wish to achieve) or a pattern derived from analysis of an existing system. As noted by I. Dąmbska, 'a model is at times a starting point for homothetic operations aimed at constructing a new explanatory theory, and at other times a tool for logically controlling specific new formal structures.' Based on this understanding, Dąmbska distinguishes between model--patterns and model-mappings.[4] For the purposes of this discussion, a model-pattern may be equated with a *de lege ferenda* model, whereas a model-mapping corresponds to a *de lege lata* model. A model-pattern is thus an ideal construct – a theoretical assumption not yet incorporated into the existing legal order, but intended to be so following its approval by the legislator.

The *de lege lata* model of preparatory proceedings has been the subject of extensive academic analysis, beginning with the foundational 1968 monograph by S. Waltoś 'Model postępowania przygotowawczego na tle prawnoporównawczym (The Model of Preparatory Proceedings in a comparative law perspective), followed

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1 *Uzasadnienie projektu ustawy postępowania karnego przyjętego przez Komisję Kodyfikacyjną dnia 28.IV.1926 r.*, Warszawa–Lwów, 1926–1927, p. 326.

2 Amendments to Article 297 § 5 of the Code of Civil Procedure were introduced by the acts of: 1 July 2003 (Journal of Laws of 2003, No. 17, item 155; Article 1); 12 July 2007 (Journal of Laws of 2007, No. 64, item 432; Article 2); 1 July 2015 (Journal of Laws of 2013, item 1247; Article 1); and 15 Aprile 2016 (Journal of Laws of 2016, item 437; Article 1).

3 S. Waltoś, *Model postępowania przygotowawczego na tle prawnoporównawczym*, Warszawa, 1968, pp. 9 and 13.

4 I. Dąmbska, 'Pojęcie modelu i jego rola w naukach', *Filozofia Nauki*, Year XXIII, 2015, No. 2(90), pp. 143–144.

by numerous articles and culminating in the 'System Prawa Karnego Procesowego' (System of Criminal Procedure Law).[5] These publications outline the existing model, highlighting its shortcomings to varying degrees. There is now a pressing need to formulate an ideal model that could serve as the basis for substantial reform, as recent amendments to the Code of Criminal Procedure have failed to achieve the intended goal to accelerate proceedings.

NON-NORMATIVE DETERMINANTS SHAPING THE MODEL OF PREPARATORY PROCEEDINGS

The factors that determine the structure of preparatory proceedings are diverse. Both normative and non-normative elements shape not only preparatory proceedings but criminal proceedings in general. These elements are interdependent and interact with one another. In designing a model for preparatory proceedings, non-normative factors must be considered first, since the law is not an end in itself but a tool for regulating social relations, which are primary in relation to legal norms.

The level of crime in a given country is undoubtedly one of the non-normative factors that must be taken into account when defining the model of criminal proceedings and preparatory proceedings as such. Unlike civil law, substantive criminal law does not enforce itself but is operationalised exclusively through procedural provisions. When drafting the Code of Criminal Procedure, the legislator must ensure that all crimes reported within a given year can be prosecuted within that same timeframe. For example, if procedural law allows for the adjudication of only 500,000 crimes out of one million reported offences, judicial and law enforcement authorities will be unable to address them in a timely manner. This inevitably results in a backlog of unresolved cases in prosecutors' offices and courts, leading to excessive delays that contravene Article 6(1) of the European Convention on Human Rights.

The assessment of crime levels as a determinant of the preparatory proceedings model is further influenced by prevailing trends in criminalisation – that is, the classification of particular conduct as criminal. This includes both the introduction of new offences and the continued enforcement of existing ones.[6] If the legislator relies excessively on criminal law as a tool for addressing social problems, neglecting its role as a last resort and failing to consider whether such problems could be resolved through administrative, civil or labour law, this will lead to an increase in the number of crimes, as new types will add to the existing ones. This, in turn, will lead to a rise in crime levels in general.

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[5] Collective work edited by R.A. Stefański, *System Prawa Karnego Procesowego. Tom X. Postępowanie przygotowawcze*, Warszawa, 2016.

[6] See L. Gardocki, *Zagadnienia teorii kryminalizacji*, Warszawa, 1990, p. 7.

Another relevant factor is the state's criminal policy, which reflects the strategic, tactical and operational approach to preventing and combating crime.[7] It is important to stress that a rational criminal policy must be free from *ad hoc* policies aimed at consolidating power, which give rise to penal populism. Depending on the chosen policy, the legislator may adopt varying approaches, for instance, insisting that all crimes, irrespective of their gravity and social harmfulness, be prosecuted (the principle of legality), or allowing the authorities to focus on serious crimes while disregarding minor ones (the principle of opportunism).

As part of its criminal policy, the legislator also determines the primacy of certain penalties and punitive measures for specific categories of crimes. For example, Article 58 § 1 of the Penal Code prioritises non-custodial over custodial penalties where a choice is available and the offence is punishable by imprisonment for no more than five years. In such cases, imprisonment may be imposed only if no other sanction can fulfil the objectives of punishment. This approach serves to reduce excessive punitiveness and to rationalise criminal policy.[8]

The structure and organisation of law enforcement agencies is also a significant factor. The more specialised an authority is, if its remit is limited to conducting preliminary investigations and prosecuting crimes, the more effective its operations are likely to be. By contrast, the tasks assigned to the Police under Article 14(1) and (2) of the Police Act are broad and varied.[9] They include operational, reconnaissance, investigative, administrative and regulatory duties aimed at detecting and preventing crimes, fiscal offences and misdemeanours; locating individuals sought by law enforcement or judicial authorities; and finding persons whose whereabouts are unknown due to circumstances necessitating the protection of life, health or freedom. The Police also carry out tasks at the request of a court, prosecutor, state administration bodies, or local government bodies, as specified in separate legislation.[10] This extensive scope of responsibilities – compounded by staffing issues – means that the Police often struggle to fulfil their duties effectively. It must therefore be acknowledged that any changes to the Code of Criminal Procedure affecting the model of preparatory proceedings must be accompanied by a comprehensive reform and specialisation of the Police. Such reform requires significant time and financial investment, but it is essential.

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[7] J. Zagrodnik, 'Zasadnicze tendencje we współczesnej polityce kryminalnej w zakresie zwalczania drobnej przestępczości', *Państwo i Prawo*, 2016, No. 6, pp. 60–78.

[8] Cf. I. Zgoliński, in: Konarska-Wrzosek V. (ed.), *Kodeks karny. Komentarz*, 4th edn, Warszawa, LEX/el., 2023, Article 58; https://sip.lex.pl/#/commentary/587715680/740498/konarska-wrzosek-violetta-red-kodeks-karny-komentarz-wyd-iv?keyword=polityka%20kryminalna&unitId=passage_1552 [accessed on 1 April 2025]; judgment of the Administrative Court in Kraków of 20 November 2003, II AKa 306/03, KZS 2004/1, item 29.

[9] Act of 6 April 1990 on the Police (Journal of Laws of 2024, item 145, consolidated text).

[10] For example, pursuant to Article 15zzzn(1) of the Act of 2 March 2020 on Special Measures Related to the Prevention, Counteraction and Combating of COVID-19, Other Infectious Diseases and Crisis Situations Caused by Them (Journal of Laws of 2024, item 340, consolidated text), the Police ascertain violations of the isolation obligation.

NORMATIVE FACTORS SHAPING THE MODEL OF PREPARATORY PROCEEDINGS

Although criminal proceedings may conclude at the preparatory stage if they are discontinued, this stage is only one part of the broader process. Except in cases of private prosecution, preparatory proceedings are a mandatory preliminary phase.[11] Preliminary proceedings encompass activities intended to prepare the jurisdictional phase and, under current law, are extrajudicial in nature, although some actions remain within the court's remit.[12] This observation, while obvious, is necessary to indicate that the model of preparatory proceedings cannot be shaped in isolation from the overall model of criminal justice. The legislator must determine the structure of the criminal process and identify which stage should be given priority. In particular, it is necessary to clarify the relationship between the trial before the court of first instance and the preparatory proceedings. If the main trial is recognised as the principal forum for examining the case and presenting evidence upon which the court will base its judgment, this would allow for a streamlined preparatory phase, reducing the scope of gathering and securing evidence in the case. For instance, in such an ideal model, where the court is required to hear the witness as a source of evidence during the trial in full accordance with formal requirements, it would be sufficient during the preparatory stage to question the witness and record the interview informally in an official note or memorandum. Duplication of witness testimony at both stages would thus be avoided, shortening the duration of both the preparatory and the overall proceedings. Conversely, if law enforcement authorities are required to conduct a full and formal evidentiary process during the preparatory stage, the role of the court would be marginalised, reduced to merely repeating that process or, in extreme cases, issuing judgments based solely on the case file without direct engagement with the sources of evidence. While the legislator may adopt either an adversarial or inquisitorial model, it is constrained by the need to uphold human rights and to provide stronger procedural safeguards for the accused.

The need to integrate the model of preparatory proceedings with the criminal process as a whole also relates to the objectives of criminal proceedings outlined in Article 2 § 1 CCP. As K. Woźniewski rightly observes, 'the principle of material truth applies at all stages of criminal proceedings (pre-trial, jurisdictional and enforcement), covering all investigative activities (including operational and reconnaissance activities), binding on all courts and court clerks, and binding on all pre-trial authorities.'[13] The duty to fulfil the aims of criminal proceedings extends beyond the objective of securing accurate criminal responses; it encompasses all the

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[11] Even in expedited proceedings conducted under Chapter 54a CCP, the investigation remains rudimentary in nature. Cf. Article 517c CCP.

[12] A. Gerecka-Żołyńska, 'Konstrukcja procesu karnego', in: Gerecka-Żołyńska A., *Internacjonalizacja współczesnego procesu karnego w Polsce*, Warszawa, 2009; https://sip.lex.pl/#/monograph/369206478/230313 [accessed on 23 April 2025].

[13] K. Woźniewski, 'Zasada trafnej reakcji karnej – art. 2 § 1 pkt 1 k.p.k. po nowelizacji z dnia 27 września 2013 roku', *Gdańskie Studia Prawnicze*, 2015, No. 1, pp. 425–434. See also judgment of the Supreme Court of 17 January 2019, IV KK 33/18, LEX No. 2613548.

aims set out by law. Accordingly, the tasks of preparatory proceedings defined in Article 297 CCP must be aligned with these overarching aims.

Another essential consideration is the division of functions within preparatory proceedings. Criminal procedure doctrine traditionally distinguishes three main functions: prosecution, indictment and control.[14] In an ideal model, these functions should be allocated to separate authorities to enhance their effectiveness. However, an analysis of the current Code of Criminal Procedure reveals that these functions are often exercised concurrently by different bodies, with overlapping responsibilities.

Regarding the function of prosecution, Article 298 § 1 CCP provides that preparatory proceedings are conducted or supervised by the public prosecutor and, to the extent provided by law, by the Police. In specific cases, these powers are granted to other authorities.[15] Thus, a number of entities are involved in preparatory proceedings. Furthermore, under Article 298 § 2 CCP, courts also carry out certain activities during the preparatory phase. These include not only supervisory actions, but also actions clearly falling within the scope of prosecution – such as examining minor witnesses under Articles 185a and 185b CCP, imposing pre-trial detention, issuing safe conduct orders, and examining a witness *in articulo mortis* under Article 316 § 3 CCP.[16]

The prosecutorial function is primarily fulfilled by the public prosecutor, who initiates and supports indictments and motions under Articles 324, 335 § 1 and Article 336 CCP. However, this function is also exercised, within their respective competences, by other authorities operating under specific laws or under the Regulation of the Minister of Justice of 22 September 2015 on the authorities authorised, alongside the Police, to conduct investigations and to bring and support charges before the court of first instance in cases in which investigations have been conducted, as well as the scope of cases assigned to these authorities.[17]

The function of control within preparatory proceedings has likewise been delegated to various entities. The courts perform this role, for instance, by adjudicating complaints against decisions to discontinue proceedings or against preventive measures. The public prosecutor also exercises a supervisory role, though the scope of this function varies. Article 326 § 1 CCP authorises the public prosecutor to supervise preparatory proceedings that he does not personally conduct. In addition, the public prosecutor may also oversee the preliminary verification proceedings under Article 307 CCP. The second type of prosecutorial supervision

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[14] K. Dudka, H. Paluszkiewicz, *Polski proces karny*, Warszawa, 2024.

[15] Under Article 312 CCP, the authorities authorised to conduct investigations include the Border Guard, the National Revenue Administration, the Internal Security Agency, the Central Anti-Corruption Bureau, and the Military Police, as well as bodies authorised to conduct investigations under specific provisions (e.g. the Act of 13 October 1995 – Hunting Law, consolidated text: Journal of Laws 2023, item 1082), or under the Regulation of the Minister of Justice of 22 September 2015 on authorities authorised, alongside the Police, to conduct investigations and on authorities authorised to bring and support prosecution before the court of first instance in cases where an investigation has been conducted, as well as the scope of cases assigned to those authorities (Journal of Laws of 2018, item 522, consolidated text).

[16] See also: A. Baj, 'Udział stron w niepowtarzalnych czynnościach dowodowych postępowania przygotowawczego', *Prokuratura i Prawo*, 2018, No. 10, pp. 165–191.

[17] K. Dudka, H. Paluszkiewicz, *Polski proces*…, op. cit.

concerns proceedings that have been definitively discontinued: these may be resumed (Article 327 § 1 CCP), reopened (Article 327 § 2 CCP), or exceptionally reopened by the Prosecutor General (Article 328 CCP). Furthermore, prosecutors supervise discontinued preparatory proceedings by granting access to completed proceedings, as provided by Article 156 § 5b CCP. This provision, introduced by the Act of 20 April 2021, amending the Penal Code and Certain Other Acts, is widely criticised for disproportionately strengthening the prosecutor's authority.[18] Previously, access to closed files was governed by the Act on Access to Public Information.[19] The government in power at the time, which had instrumentalised the Public Prosecutor's Office in an authoritarian manner to fight the democratic opposition, sought at all costs to prevent journalists and opposition figures from accessing proceedings against 'representatives of the authorities' that had been discontinued or refused initiation, as such access would have affected the image of the ruling party in the media. Transferring to the Prosecutor's Office the unjustified right to grant access to closed preliminary investigation files was intended to block the disclosure of files 'above the heads' of the Public Prosecutor's Office through the Act on Access to Public Information. This is exactly what happened. As the Provincial Administrative Court in Szczecin pointed out in its judgment of 12 March 2025 (I SA/Sz 777/24), the provisions of the Act on Access to Public Information do not apply when they are incompatible with the provisions of specific acts that regulate the rules and procedure for access to public information in a different manner. Such specific provisions include Article 156 §§ 1, 5, and 5b CCP. These norms apply to all individuals, not just parties to criminal proceedings, and pertain to documents which constitute public information and are contained in the files of pending or completed preparatory proceedings. As such, they qualify as special provisions within the meaning of Article 1(2) of the Public Information Act, which therefore does not apply to them.[20]

As this analysis demonstrates, the prosecutor performs all three functions – prosecution, indictment, and control – within preparatory proceedings. While this may enhance effectiveness, it also significantly influences legislative design. This is reflected, for example, in Article 46 § 2 CCP, which provides that where preparatory proceedings take the form of an investigation, the absence of the public prosecutor does not preclude the commencement of the trial. In practice, it is now rare to see a prosecutor in court for such cases. Given that a defendant's participation in the trial is a right rather than an obligation (except in cases where the court requires it), criminal trial begins to resemble an inquisitorial model, in which the court assumes all three procedural functions – prosecution, defence, and adjudication (decision-making).

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18 Journal of Laws of 2021, item 1023.
19 Journal of Laws of 2022, item 902, consolidated text.
20 LEX No. 3850870.

CONCLUSION

It appears that the time for superficial amendments to the Code of Criminal Procedure concerning preparatory proceedings has passed. What is now required is a comprehensive reform, one that establishes a consistent procedural model aimed at enhancing prosecutorial effectiveness while preserving the procedural rights of suspects. Such a model is achievable, provided it is constructed with due regard to the normative and non-normative factors outlined above – and perhaps others that may yet be identified.

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Cite as:

Dudka K. (2025), *Factors shaping the Model of Preparatory Proceedings*, Ius Novum (Vol. 19) 3, 54–61. DOI 10.2478/in-2025-0024