

September 2013

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Recommended Citation

Adam Górski and Maria Ejchart, *Wrongful Convictions in Poland*, 80 U. Cin. L. Rev. (2013)
Available at: <https://scholarship.law.uc.edu/uclr/vol80/iss4/7>

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WRONGFUL CONVICTIONS IN POLAND

Adam Górski & Maria Ejchart**†*

I. RE-OPENING AND CASSATION AND THEIR POSSIBLE ROLE IN THE EXONERATION PROCESS

Poland's criminal justice system embodies both ordinary and extraordinary means of appeal. Ordinary appeals can be used against invalid judgments on both a violation of law (be this substantive or procedural, *error iuris*) and facts (*error factum*). Violation of facts—that is, failure to prove them properly—should be indicated directly in an appeal, in order to be considered by a court of appeal.

As far as extraordinary means of appeal are concerned, parties to a criminal process have two avenues for questioning a valid judgment: a cassation appeal against the law and petition for overturning the criminal process. The cassation system in Poland is not designed as an extraordinary remedy for those that were actually, factually innocent. On the contrary, facts are explicitly excluded from cassation grounds. Thus, it is only possible to correct a wrongful conviction if a violation of facts is a result of a violation of particular procedural provisions concerning the law of evidence and not only the general rules of evidence, such as free assessment of the evidence or the immediacy principle. Thus, merely observing that a free assessment of the evidence or the immediacy principle has been violated without arguing for violation of specific provisions will not be successful. This violation must be flagrant and have a strong potential influence on convictions (though a causal link need not be proven). The result of filing a cassation appeal might thus be an acquittal by the ad quo court that convicted a person if evidence provisions have been clearly violated and if, in correcting these violations, a court reaches another conclusion, quashing conviction.

To re-establish facts in a criminal process, however, parties must file a petition for overturning the criminal process. Filing a petition for overturning a criminal process is possible for a number of reasons, of

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† This article is being published as part of a symposium that took place in April 2011 in Cincinnati, Ohio, hosted by the Ohio Innocence Project, entitled The 2011 Innocence Network Conference: An International Exploration of Wrongful Conviction. Funding for the symposium was provided by The Murray and Agnes Seasongood Good Government Foundation. The articles appearing in this symposium range from formal law review style articles to transcripts of speeches that were given by the author at the symposium. Therefore, the articles published in this symposium may not comply with all standards set forth in Texas Law Review and the Bluebook.

which “new facts or evidence” are naturally designed for overturning wrongful convictions. New facts or evidence, as grounds for overturning a criminal process in Poland, cannot lead to the conviction of someone adjudicated as guilty. New facts or evidence should indicate that the convicted party has not committed the crime because of the lack of act or because the act was not a criminal offense or punishable by statute. It is worth mentioning that new facts or evidence are subject to often diverse interpretation made both in legal doctrine and by Poland’s Supreme Court. New facts and evidence should not be unknown to parties to a criminal process. In line with a convincing interpretation new facts and evidence can be subject to the attention of parties to a criminal process when they were not initially considered. The latter opens the way to exoneration quite broadly.

Another ground for overturning a criminal process that leads to the exoneration of the innocent is that of *propter criminis*. Criminal proceedings must be overturned if a crime committed in liaison with a criminal process gives justified reason to assume that the process may have had an influence on a verdict (not just a conviction).¹ The causal link between the committed crime and the outcome of the proceedings need not, therefore, be proven. However, the liaison between a committed crime and criminal process must be clear, though the law does not specify the nature of a perpetrator, nor does the law offer a list of offending crimes. Obviously, though, crimes against the system of justice are at stake. False testimony constitutes the vast majority of all crimes against the justice system. However, false accusations can also give rise to exoneration pursuant to the reopening of a criminal process. Rather importantly, however, and in line with the presumption of innocence, such a crime is to be stated in a valid conviction unless another form of a court’s verdict is required by law or the respective criminal proceedings are suspended.

II. EMPOWERMENTS AND MAJOR ACTIVITY OF INNOCENCE CLINIC

The Helsinki Foundation for Human Rights (HFHR), the largest and most experienced non-governmental organization (NGO) in Poland, confirmed the importance and significance of the problem when the HFHR established a program called the Innocence Clinic, which focuses on cases of individuals who have been wrongfully accused or convicted in criminal proceedings.

The Innocence Clinic has been operating since 1999 and is currently

1. See art. 540 of the Polish Code of Criminal Procedure of 06 June 1997, Journal of Laws 89, position 555.

the only institution in Poland dealing with the problem of wrongful convictions and miscarriages of justice. The program was created as a law clinic and was included in the didactic program of Warsaw University, with students of legal faculties as its participants.

Individuals, whether or not they are accused, challenging the indictment or convicted in criminal proceedings, who challenge the accusations or trial verdict, can have their cases directed to the clinic. Within the clinic's scope of interest are cases involving wrongful conviction and, under a wider interpretation, cases involving a miscarriage of justice.

The Innocence Clinic thoroughly analyzes each case by researching the court files, interviewing the accused or convicted, and cooperating with their defense team. From among the cases examined, participants choose those in which they determine that the evidence gathered is insufficient to deliver a guilty verdict, or in which the court's consideration of evidence is questionable pointing terms of respecting the proceeding's principles (e.g., a presumption of innocence and the *in dubio pro reo* principle) or the right to a fair trial. In only such cases as these does the clinic take action. Therefore, the program takes an interest in the cases of individuals who are actually innocent, having not committed the crime of which she was accused or convicted, and cases of persons who are legally innocent, where the evidence gathered is insufficient for a conviction and the court is obliged to acquit the accused under the principle of *in dubio pro reo*. The clinic deals with cases at every stage of criminal proceedings, though the clinic's activities differ depending on the stage of the proceedings and on available opportunities to gain knowledge about the case and the possibility of litigation. At the stage of preparatory proceedings, NGOs are extremely limited in their capacity to take action, as the law does not provide any formal possibility to participate. The Helsinki Foundation for Human Rights has, however, developed a series of such procedures that it uses in practice. These include monitoring of court sessions in preparatory proceedings, particularly those relating to pre-trial detention. The procedures also include presenting an amicus curiae brief to the court, analyzing the merits of detention, and preparation of or support for a complaint concerning the length of a court proceeding, if warranted. However, an NGO would obviously have no opportunity to provide any evidence, so its actions at this stage are extremely limited.

At each stage of the proceedings, but especially in the preparatory proceedings, it is particularly important to establish close cooperation with the defense attorneys of suspects and accused individuals, as they constitute the main source of knowledge on the case.

Opportunities to influence the judicial stage of the proceeding are much broader. An NGO can obtain the court's permission for access to the court files for the case, a widely used practice. Further, Article 90 of the Code of Criminal Procedure provides the opportunity for organizations to participate as social representatives in criminal proceedings if there is a need to protect the public interest or an important individual interest, particularly concerning the protection of human rights and freedoms. The law provides that a social representative may attend public hearings, take the floor and present statements in writing.

Based on these broad legal rights, the HFHR developed the practice of submitting an *amicus curiae* legal opinion to the court. The submission of such an opinion in a wrongful conviction case is undoubtedly the strongest, most serious, and most complete presentation of the program's position of the case and a possible interpretation of the evidence. The goal of these opinions is to gather and present to the court the Supreme Court's jurisdiction concerning the essential issue. In some briefs, part of the clinic's opinion is considered like that of an expert.

The court is not obliged to take an NGO's opinion into account, but the program's practice confirms the efficacy of this measure. NGOs have an impact on the final shaping of the court's decision, which speaks to the professionalism and high social confidence placed in the NGO, whose primary goal is to care for the rule of law and its appropriate use. These actions also serve to increase confidence in the courts and judiciary by encouraging the belief that courts properly assess cases. In its opinions, the program, therefore, does not explicitly refer to assessing the guilt of the accused but instead represents only the public interest in ensuring a fair trial.

The power of social organizations in criminal proceedings extends to inclusion of the submission of statements at the final stage for the defense, before the court delivers its judgment.

During appeal proceedings, social organizations have similar opportunities, subject only to the rules and restrictions of this stage of the proceedings.

Some recent controversy of the status of *amicus curiae* opinion concerns the program's participation in the cassation stage of a case before the Supreme Court (the only cassation court in Poland). During a recently completed case covered by the Innocence Clinic, the Supreme Court expressed doubt as to whether the opinion *amicus curiae* submitted—containing an evaluation of the judiciary proceedings as well as the violations that occurred during preparatory proceedings—is an excessive interference in the sphere of adjudication, which is

reserved for the court. The Supreme Court expressed the opinion that the NGO's position in the case should be formulated similar to a cassation. In the program's opinion, however, presenting a quasi-cassation distorted the purpose of the *amicus curiae* institution, which aimed to assist a court in deciding a particular case.

The program also deals with completed cases in which the only possibility for altering the verdict is to overturn the original criminal proceedings. The basis for overturning proceedings is, as described above, the disclosure of new facts or evidence that were unknown to the court and to the parties at the previous stage of proceedings. The Innocence Clinic does not have the ability to search for new evidence, but if such evidence comes to light (e.g., the emergence of a new essential witness), the clinic formulates a petition to overturn the proceedings on behalf of the convicted person.

The program can also have an impact on completed proceedings by requesting so-called extraordinary cassation, which according to the law, can be lodged by the Attorney General or the Ombudsman (Human Rights Defender). In such situations, the basis of an NGO's possible action is a request to these institutions containing an analysis of the case.

During the twelve years of the Innocence Clinic's operation, several hundred cases have passed through the clinic's doors. The clinic took the actions described above in several dozen of these cases as a result of serious doubts concerning the correctness of the conviction.

III. DEFINITION AND THE CURRENT SITUATION IN POLAND

By discussing wrongful convictions in Poland we must depart from narrow and rather exact definition of wrongful convictions, as primarily convictions changed into exonerations by reopening of criminal proceedings. There is still no research performed in this field in Poland, and even if such research existed, it would not reveal the whole phenomenology of the problem. At present there are also no official statistics covering issue of wrongful convictions. There is also no government agency monitoring the issue for the purpose of a law amendment. The only comparable statistics that exist concern compensation cases which by no means reveal the scale of the problem.

Instead, it would be much better to canvass practitioners with a questionnaire, which is still being developed. Researchers are currently using techniques to interview practitioners and—the most fruitful element—to examine cases in legal clinics. In their experience, bringing a case to reopen a trial is not a common occurrence. To give an example, in 2010 the practice of the Innocence Clinic run by the Helsinki Foundation of Human Rights found that out of the sixty cases

examined, only ten cases involved legal steps being taken. Of these, there were only a couple of reopenings, and in only one case was a person acquitted. All this encourages one to examine wrongful convictions not from the context of reopening, but rather as a phenomenon to be observed in legal clinics. This is what the authors consider to be their major task.

As to the current state of the legal studies in this field, the apparent interest in the subject of wrongful convictions has not resulted in empirical examination of the issue. Out of a mere two articles covering this subject in the Polish legal journals,² only one of them includes empirical analysis by interviewing twenty defense lawyers. Some articles deal with the somewhat special problem of politically motivated wrongful conviction in the Communist Era and also address the specific way of dealing with them after political change in Poland.³

Although wrongful conviction is the subject of interest of professionals in the field of criminalistics and criminal lawyers alike, no one has effectively promoted this topic to date.

IV. WRONGFUL CONVICTIONS AND FEATURES OF OUR CRIMINAL JUSTICE SYSTEM: WHERE ERRORS ARE LIKELY TO OCCUR AND WHY?

Before examining the subject, it must be stressed that both practical problems and systemic problems will be examined. Indeed it is often hard to separate the two. The assumptions made are based on interviews with practitioners and the already mentioned examination of cases in legal clinics. Some of the conclusions are drawn from the first Helsinki Foundation conference of that subject held in 2010 at Warsaw University.⁴

Poland's criminal justice system is by and large divided into two main stages: preparatory proceedings and the judicial phase.⁵

2. Anna Sowa, *Przyczyny pomyłek sądowych* [*Causes of Judicial Mistakes*], *PALESTRA* 1–2 (2002); J. Widacki & A. Dudzińska, *Pomyłki sądowe. Skazania osób niewinnych przez sądy w Polsce* [*Miscarriage of Justice. Conviction of Innocent Persons by the Courts in Poland*], *PALESTRA* 11–12 (2007).

3. See W. Pływaczewski, Adam Górski, & Andrej Sakowicz, *Wrongful Convictions in Poland: From the Communist Era to the Rechtsstaat Experience*, in *WRONGFUL CONVICTION. INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE* 273 (C. Ronald Huff & Martin Killias, eds., 2008).

4. The conference can be seen at *Konferencja pt. "Pomyłki sądowe w postępowaniu karnym" – 24 czerwca, 2010 r.*, WYDZIAŁ PRAWA I ADMINISTRACJI http://www2.wpia.uw.edu.pl/text8683_Konferencja_pt__Pomyłki_sadowe_w_postepowaniu_karnym_-_24_czerwca_2010_r_.html (last visited 08.10.2012).

5. On phases of criminal procedure in Poland, see STANISŁAW WALTOŚ, *PROCES KARNY. ZARYS SYSTEMU* [CRIMINAL TRIAL. OUTLINE OF THE SYSTEM] 479–584 (2009). On structure of criminal proceedings in Poland, see WOJCIECH DAJCZAK, ANDRZEJ J. SZWARC, & PAWEŁ WILIŃSKI, *HANDBOOK OF POLISH LAW* (2011).

Preparatory proceedings are by definition inquisitorial, while the judicial phase is adversarial (which as we will soon learn, does not exclude exceptional evidence initiative by the court). Both phases are governed by the same rules of evidence. These rules include the truth principle, the free assessment of evidence, and the immediacy principle.

A. Preparatory Proceedings

Poland's system of preparatory proceedings differs markedly from the common law model. Collecting evidence is almost entirely the role of the state, and the role of other actors is extremely limited. This means that the quality of evidence largely depends on how prosecutors and the police act in their roles, as well as to the quality of investigations, especially the quality of experts. At this largely inquisitorial stage, no private collection of evidence exists, so the defense questions only the findings of the state. Therefore, the expert opinion commissioned and presented by state cannot be challenged by private expert opinion. Given the example of medical malpractice, an expert opinion presented by the prosecutor cannot be questioned by a private expert opinion presented by the defense throughout the whole criminal process. The private expert opinion can serve only as "information on evidence."

At this stage of the proceedings, a prosecutor is not obliged to reveal all her evidence to the defense, which may practically exclude an effective defense and discourage defense lawyers from active participation at that stage.⁶ One may say that despite all the guaranties given in legal texts, the suspect and then the accused are poorly served with information by the criminal justice system at preparatory stages in a manner comparable to a kind of blind date situation.⁷

6. It was recently discussed whether or how far this obligation exists with regard to access to files justifying provisional arrest. On that discussion see Piotr Kardas, *Z Problematyki Dostępu do akt Sprawy w Postępowaniu w Przedmiocie Zastosowania Tymczasowego Aresztowania* [*With Issues of Access to the File in the Proceedings in the Application for Provisional Arrest*], CZASOPISMO PRAWA KARNEGO I NAUK PENALNYCH 2 [J. OF CRIM. L. AND PENAL SCI. 2] (2008); Piotr Kardas & Paweł Wiliński, *O Niekonstytucyjności Odmowy Dostępu do akt Sprawy w Postępowaniu w Przedmiocie Tymczasowego Aresztowania* [*The Unconstitutionality of the Refusal of Access to the File in Respect of Provisional Arrest*], PALESTRA 7–8, 23–36 (2008). Recently, the Constitutional Tribunal declared that the access to files with this regard is required by the Constitution itself and contrary statutory provision is void. In its verdict of 3.06.2008 (K 42/07) the Constitutional Tribunal of Poland declared that arbitrary disclosure of materials justifying provisional arrest is unconstitutional. Subsequently, the statute law was changed, but it is still doubtful if it meets constitutional standards with this regard, allowing for some discretion in disclosing provisional arrest files to the parties.

7. On defense rights in preparatory proceedings in general see TOMASZ GRZEGORCZYK, OBROŃCA W POSTĘPOWANIU PRZYGOTOWAWCZYM [DEFENDER IN THE PREPARATORY PROCEEDINGS] (1988); P. Kardas, *Problematyka prawa do obrony w postępowaniu przygotowawczym*, in TRESTNE CINY SUVISIACE S CINNOSTOU OZBROJENYCH SIL A OZBROJENYCH ZBOROM (J. Madliak, J. Mihailov eds. 2009); CEZARY KULESZA, EFEKTYWNOŚĆ UDZIAŁU OBROŃCY W POSTĘPOWANIU KARNYM W

The latter systemic problem is especially apparent in medical malpractice cases and, most of all, in child abuse cases. It is noticeable that the opinion of a psychologist at the preparatory stage, combined with the statements of abused children and their mothers, very often determines the case. In such cases, the course of the proceedings leading to conviction largely depends on our understanding of free assessment of evidence and to some degree our understanding and scale of the immediacy principle.

1. Case of K.S.: The Expert's Prejudgment Opinion About Guilt

One example of a case where a psychologist's opinion, presented by the prosecutor during the preparatory proceedings, determined the guilt of the accused is that of K.S., who was accused of the sexual abuse of his two daughters, aged five and three. The accusation was based on the testimony of his ex-wife, given during a pending divorce proceeding. The girls were interviewed in the presence of a psychologist who concluded, on the basis of his observations, that the girls had been sexually abused. The psychologist went beyond the acceptable range of opinion, stating, "[M]ost likely, the children had been sexually abused by their father." The other evidence in this case was the testimony of the girls' mother and grandparents.

During the first proceeding, the court acquitted the accused by recognizing that there was insufficient evidence that the father had committed the abuse. On appeal, however, the court referred the case for retrial due to insufficient consideration of all evidence. In reconsidering the case, the first-instance court dismissed the defense's motion to appoint a team of experts from a scientific institute to question the opinion presented by the prosecutor; the court found that the gathered evidence, including the psychologist's written opinion, was sufficient to convict K.S., who was sentenced to six years' imprisonment.

The court of appeals upheld the verdict. In cassation proceedings, however, the Supreme Court held that the lower courts violated the principle of immediacy by basing its judgments on the psychologist's opinion without hearing it directly. After five years of proceedings, three of which K.S. had spent in prison, the process started again.

B. "Special Witness" and False Allegations

Under the rules of evidence, free assessment of evidence is an

PERSPEKTYWIE PRAWNORÓWNAWCZEJ [EFFICIENCY OF DEFENDER PARTICIPATION IN CRIMINAL PROCEEDINGS IN COMPARATIVE LEGAL PERSPECTIVE] (2005).

unlimited principle in the Polish legal system. Theoretically, finding the truth requires no corroboration of evidence at all. However, in one of its judgments, the Supreme Court has introduced several obligations regarding the corroboration of evidence.⁸ It is still a contentious issue as to whether this judgment is contrary to free assessment of evidence or not. Those duties refer to above all to the following pieces of evidence: (1) anonymous witnesses; (2) crown witnesses (procedurally and substantively);⁹ and (3) self-accusations, as well as allegations, which should be examined with special scrutiny.

The gravity of this jurisprudence is self-explanatory and has huge importance because false allegations and testimony are a more common occurrence in types of cases involving special witnesses. In spite of that, in the practice of certain legal clinics, there are cases where the confessions of crown witnesses are not at all corroborated.

In one such case, a conviction was secured on the basis of the false allegation of a crown witness and the testimony of another witness who stated that he saw the suspect in town on the given day.

1. Case of A.S. and U.L.: False Witness Allegation

By far, the Innocence Clinic's most common cases are those in which the sole or primary evidence is a false witness allegation. These cases involve imputing the commission of a crime on the factually innocent person. The examples below are of cases in which an anonymous witness chose to give testimony and cooperate because of personal gain.

One such case is a multi-threaded criminal proceeding called "the Octopus," described in the Polish media in 2006–2007 as a success for the public prosecutor's office. In this case, many were accused, mostly of bribery, entirely on the basis of a witness testimony that was later determined to be false. The witness was a woman who had been repeatedly sentenced for fraud. In exchange for her cooperation with the prosecutor's office and in return for giving false testimonies, she was granted multiple postponements on the execution of custodial sentences.

The prosecutor proposed to repeal a judge's immunity on the basis of

8. See, for example, judgments cited in KATARZYNA BORATYŃSKA, ADAM GÓRSKI, ANDRZEJ SAKOWICZ & ANDRZEJ WAŻNY, *KODEKS POSTĘPOWANIA KARNEGO. KOMENTARZ* [CODE OF CRIMINAL PROCEDURE. COMMENT] 417 (2007).

9. Polish criminal justice system includes two kinds of crown witnesses. A "procedural" crown witness is regulated in a respective statute. His testimonies are rewarded with impunity, whereas snitches of a "substantive" crown witness have an impact on the imposed penalty. See regulation of "substantive" crown witness in art. 60.3-4 in the Polish Substantive Criminal Code, *Dziennik Ustaw* [Journal Of Laws] 88, position 553, with subsequent changes. As to regulation of procedural crown witness, it is envisaged in a special "Crown Witness Statute" *Dziennik Ustaw* [Journal of Laws] 114, position 738.

this witness's testimony, which resulted in the start of criminal proceedings against the judge. The witness had testified that in 2000, the judge accepted a bribe in return for issuing a favorable sentence against an offender. The disciplinary court evaluating the evidence set aside the judge's immunity, finding that the witness's testimony showed a high degree of probability that the judge had committed a crime. In 2007, the Supreme Court examined the case on appeal and stated that the decision to set aside the judge's immunity should be well-reconsidered and proceeded through a thorough assessment of the evidence. The court stressed that the witness's testimony was inconsistent and that, because of her background and personality, she could not be considered reliable. The Supreme Court disagreed with her accusations regarding the judge.

Based on the testimony of the same witness, the prosecutor also accused two psychiatrists of accepting a financial benefit—the equivalent of \$150—in exchange for providing a favorable medical opinion six years earlier that had allowed the perpetrator of a car accident to avoid imprisonment. The court used the witness's testimony, being the only evidence, as the basis for its decision to hold both psychiatrists in pretrial detention for over twelve months.

After four years, the court discontinued the proceedings in the case because of the low social harm of the crime (the value of the gift accepted by the doctors was re-assessed to be \$10). The court also stressed that the testimony of just one witness, who was herself not very credible, raised some doubts about the guilt of the accused.

As the result of an appeal lodged by the prosecutor, the court of appeals referred the case for retrial. Proceedings began again in May 2011.

C. The Discussion on Preparatory Proceedings Continued: Who Does the Job and How It May Affect the Main Proceedings

In preparatory proceedings, the role of prosecutors may be purely formal. There is no special investigative police and some officers simply make irreversible mistakes at crime scenes in evidence gathering, or refuse to act at all. Many mistakes are made at accident scenes. The 2003 criminal procedure reform, which greatly increased the investigative powers of the police, can, for example, be regarded as a mistake. If we combine this with the fact that a large part of evidence material is simply reproduced (read out from protocols) at trial, the result requires no further explanation. This is where the immediacy principle comes into play.

The immediacy principle may be the most abused principle in

Poland's criminal process. The acceptable exceptions to this principle are already significant and should not be extended any further. Poland's system of appeal largely excludes a holistic revision of the case in the second instance. It is possible, therefore, that a case can return several times after an invalid judgment has been repeatedly appealed. This may last several years, as is evidenced by some cases examined in the legal clinics. The solution to the problem of duration of criminal process is paradoxically associated with breaking the immediacy principle in terms of basing assumptions on written protocols. This solution, paradoxically, would not result in a greater number of exonerations, which may be the first impression.

The latest draft amendments to the Code of Criminal Procedure give back prior investigative powers to the prosecutors. This is a good development, but it should go along with more emphasis given to the immediacy principle at the judicial stage of the proceedings.

Moreover, the execution of real investigative powers by the prosecutor should go hand in hand with making a single person responsible for the whole job of investigating, filing the accusation act, and supporting it in the court proceedings to the greatest possible degree. At present there is actually no evident personal responsibility for the indictment and it is pointless to explain how it affects wrongful convictions. Anonymous mistakes are easier to bear and collective guilt is easier to cope with than the alternative.

D. Judicial Phase: No Private Expert Opinion and Exceptional Evidence Initiative by the Court

Private documents are excluded if they are produced for the sake of criminal proceedings.¹⁰ That effectively excludes private experts. Despite what has already been mentioned, however, it is important to highlight one other factor that is likely to produce mistakes: the court's exceptional initiative in collecting and proving evidence at the judicial stage. As a rule, the parties request evidence. A court's initiative serves the truth principle where there is no sufficient initiative to reveal the truth. Of course, this initiative may eventually result in both a conviction and an acquittal (and so it was formulated), but this is a rather pure theory. In reality, the initiative is used mostly when the prosecutor is not active enough in supporting her accusation, and the judge has intimate conviction of a person's guilt. If an accusation is

10. Recent discussions on that exclusionary rule were analyzed in a book by ANTONI BOJAŃCZYK, *DOWÓD PRYWATNY W POSTĘPOWANIU KARNYM W PERSPEKTYWIE PRAWNOPORÓWNAWCZEJ* [PRIVATE EVIDENCE IN CRIMINAL PROCEEDINGS IN COMPARATIVE LEGAL PERSPECTIVE] (2011), referring broadly to the work of Innocence Projects.

based on experts' opinions, indication or allegation made in preparatory proceedings, the inability of the parties to produce its own private expert opinion at trial, combined with the court's inner conviction, may result in a failure of both the truth and not preserving the principle of equality of arms. In this regard, Poland's criminal justice system has much in common with certain other systems.¹¹

E. Fast-Track Court Proceedings

Another issue deserving of our attention are the Polish equivalents of plea-bargaining: sentencing without trial and fast-track trial.¹² In both cases, the truth principle fully applies and one cannot make a deal as to the fact or legal classification but only as to the punishment.¹³ Truth should be established beyond doubt in preparatory proceedings in line with all the procedural rules. A judge deciding without trial must base the conviction on evidence gathered at the preparatory stage. Where there is any doubt, the case should be subject to the usual judicial proceedings. Sentencing without trial can be applied in rather minor cases, which is possible when a crime is punishable with a custodial sentence of no more than ten years. The usual offenses that are sentenced that way include thefts, car accidents, driving under the influence of alcohol, and fraud. Economic fraud is also quite typical for a fast-track court proceeding. In such cases the suspects may have an interest in reducing their appearances in court (perhaps to keep their reputations intact). The difficulty in determining the scope of the problem in fast-track trials is of course, that after settlement, there is usually little interest in determining the truth. Needless to say, there are no such cases in legal clinics. With all the system of guaranties built into our model of fast-track sentencing and the academic accuracy of it, defense lawyers highlight this as the main source of wrongful convictions. There are several reasons for this. The first one is the already mentioned interest of the accused. Additionally, for overloaded criminal justice systems, with all the importance of producing proper

11. Similar arguments are presented by Chrisje Brants, *The Vulnerability of Dutch Criminal Procedure to Wrongful Conviction*, in *WRONGFUL CONVICTION, INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE* 172 (C. Ronald Huff & Martin Killias, eds., 2008).

12. The issue has recently been widely discussed in the European literature by Gwladys Gilliéron. See GWLADYS GILLIÉRON, STRAFBEFEHLSVERFAHREN UND PLEA BARGAINING ALS QUELLE VON FEHLURTEILEN [PENAL ORDERS AND PLEA BARGAINING AS A SOURCE OF WRONGFUL CONVICTIONS] 147–62 (2010).

13. For an overview of Polish regulation see SLAWOMIR STEINBORN, POROZUMIENIA W POLSKIM PROCESIE KARNYM. SKAZANIE BEZ ROZPRAWY I DOBROWOLNE PODDANIE SIĘ ODPOWIEDZIALNOŚCI KARNEJ [POLISH AGREEMENT IN A CRIMINAL TRIAL CONVICTION WITHOUT A HEARING AND VOLUNTARILY SUBMIT TO CRIMINAL LIABILITY] (2005).

statistics, fast-track sentencing is very tempting. There is no more evidence produced to the court and the judge is free to assess the truth based on the prosecutor's material, according to the judge's intimate conviction. Defense lawyers thus play a crucial role in encouraging a suspect to take what is offered. Needless to say, that is where most false confessions occur.

The typical error model contributed to fast-track trials lies in the fact that the accused may choose to plead guilty to a list of charges, including crimes that were never committed.

V. A NEW EMERGING EUROPEAN PROBLEM: WRONGFUL CONVICTIONS AND THE CROSS BORDER EUROPEAN CRIMINAL PROCESS

Over the past few years, the member states of the European Union have undergone a process of far-reaching legal integration, as far as criminal law and procedure is concerned. This process of European integration in criminal matters comprises many aspects of substantive and procedural criminal law. It has received unprecedented attention from legal scholars across Europe.¹⁴ Although there is no federal European criminal law, the EU forms a unique legal space of criminal justice with many consequences in the area of wrongful convictions. The simplified extradition, the European arrest warrant (EAW), makes it very easy for a member state to have a requested person surrendered. The EAW system does not sufficiently protect an individual against a jurisdiction that is likely to produce wrongful convictions in general or in a particular case. This situation may occur under the classical extradition regime, as the notion of flagrant denial of fair trial usually barred extradition. If that were the case, then we should presume that this likelihood of wrongful conviction in general is greater in some countries and that would mean an unacceptable assessment of the criminal justice system, which some would rightly call prejudicial. However, the EAW system is quicker than extradition and more frequently adopted. This is because it is the courts and not Ministers of Justice that cooperate and because many classical principles, such as non-extradition of nationals and dual criminality have been abolished. As a result of the EAW, an accused may be in a jurisdiction where she has less chance of a proper defense.

The EAW procedure is deemed to be primarily automatic, based on mutual recognition and mutual trust.¹⁵ It does not make an assessment

14. For further references on the issue of European criminal law see ADAM GÓRSKI, EUROPEJSKIE ŚCIGANIE KARNE. ZAGADNIENIA USTROJOWE [EUROPEAN CRIMINAL PROSECUTION. SYSTEMIC ISSUES] 447–91 (2010).

15. Mutual recognition of judicial decisions of EU member states has long been regarded as a

of which jurisdiction is better to prosecute. It will more often be the case that a short-term resident will be tried for a crime according to the principle of territoriality of the state of residence and not according to principle of nationality back in the resident's home country. This choice seems proper in terms of the truth principle, although it also includes the possibility of prejudice against a person tried in a foreign legal environment. Applying the nationality principle is usually advantageous for the defendant, mostly because almost all the evidence must be transferred from the place of residence, which makes the criminal process and establishing the truth much more complex.

The EAW however, only opens the discussion, and its major point is the European *ne bis in idem* principle.¹⁶ Over the past eight years the European Court of Justice has developed case law on when the European *ne bis in idem* principle applies.¹⁷ The European application of that principle is very broad and comprises even some prosecutorial pre-trial decisions and assumes a mutual recognition and trust that the trial has been fair. Thus, it automatically includes an export and recognition of a wrongful conviction (as well as wrongful exonerations). However, theoretically, it also makes it impossible to open a process to prove one's innocence in another country. So the result will be that the convicted has to insist on re-opening a process in the country of conviction, despite the fact that the accused may have little or nothing more to do with that country and may not be familiar with its legal system. This of course substantially reduces one's chances to prove herself innocent.

The latter problem would be reduced, provided that criminal information and legal aid in the EU were improved. However, information on convictions and instruments of legal aid in evidence gathering in the EU do not come up to a satisfactory standard. The lack of optimal instruments of transnational evidence gathering in the EU also has an impact on the actual inequality of arms and thus on the rights of defendants across the EU. The new, speedy instruments of transnational evidence gathering in the EU, such as the European

"cornerstone" of judicial cooperation in criminal matters in the EU. The principle has now been incorporated into the Lisbon Treaty and is likely to shape future legal arrangements in European criminal law. See point 3.3.1 of the Hague Programme, STRENGTHENING FREEDOM, SECURITY AND JUSTICE IN THE EUROPEAN UNION (2005/C 53/01). See also art. 67 of the Treaty of Lisbon, available at http://europa.eu/lisbon_treaty/full_text/index_en.htm (visited 17.08.2012).

16. Until recently, valid judgment based on the same fact in one Member State of the EU was no impediment to sentencing the same person twice in another Member State. Now, the protection against double jeopardy is introduced in the whole EU and may, with all differences, be compared to the protection now existing in the US.

17. On that issue widely, ANDRZEJ SAKOWICZ, ZASADA NE BIS IN IDEM W PRAWIE KARNYM 329-97 (2011).

evidence warrant, are designed for prosecutors and judicial authorities and have strengthened their investigative powers without giving the defense the equal right to obtain evidence from abroad. This is a systemic problem, which in effect, is likely to produce wrongful convictions in the recently changed legal circumstances.

In addition, one more future EU arrangement should have an impact on the subject discussed. EU member states will soon be obliged to take into account previous convictions in other EU member states, as they consider their own convictions with regard to recidivism or organized crime sentencing.¹⁸ It is not clear how valid exoneration abroad pursuant to the reopening of criminal proceedings, will influence a valid conviction, after taking into account a wrongful conviction in another country. It is doubtful if any systemic European remedy to deal with that problem will be revealed.

V. RECAPITULATION

The above sketch describes our criminal justice system and may be seen as a little gloomy, more so than the everyday practice appears to be. However, it was not our task to give an appraisal of criminal law and practice but rather to search for ways to improve the system.

In order to recapitulate, it should be noted that the issue of wrongful convictions in Poland can be solved only partly through legislative amendments. Allowing evidence from private expert opinion would be one desirable change. Nevertheless, the problem is in the mentality of some judges, who too often unconsciously adopt the role of a prosecutor.

Poland's membership in the EU, as much as the membership of any other country, forces us to ask further questions. We regard those transnational, unanswered European issues that may increase the danger of a wrongful conviction, or at least multiply the effects of wrongful convictions, as a discussion opener.

18. According to framework decision of 24 July 2008, 2008/675/WSiSW, OJ L.220/32 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:220:0032:0034:EN:PDF> (08.10.2012).