

The Right to Claim Innocence in Poland

Wojciech Jasiński & Karolina Kremens*

Abstract

Wrongful convictions and miscarriages of justice, their reasons and effects, only rarely become the subject of academic debate in Poland. This article aims at filling this gap and providing a discussion on the current challenges of mechanisms available in Polish law focused on the verification of final judgments based on innocence claims. While there are two procedures designed to move such judgment: cassation and the reopening of criminal proceedings, only the latter aims at the verification of new facts and evidence, and this work remains focused exactly on that issue. The article begins with a case study of the famous Komenda case, which resulted in a successful innocence claim, serving as a good, though rare, example of reopening a case and acquitting the convict immediately and allows for discussing the reasons that commonly stand behind wrongful convictions in Poland. Furthermore, the article examines the innocence claim grounds as regulated in the Polish criminal procedure and their interpretation under the current case law. It also presents the procedure concerning the revision of the case. The work additionally provides the analysis of the use of innocence claim in practice, feeding on the statistical data and explaining tendencies in application for revision of a case. It also presents the efforts of the Polish Ombudsman and NGOs to raise public awareness in that field. The final conclusions address the main challenges that the Polish system faces concerning innocence claims and indicates the direction in which the system should go.

Keywords: wrongful convictions, right to claim innocence, reopening of criminal proceedings, miscarriage of justice, revision of final judgment

1 Introduction

Wrongful convictions, miscarriages of justice and the right of the convict to claim innocence are not necessarily topics that claim the attention of Polish scholars. The legal literature, engaged in the discussion on a variety of appellate measures available during criminal proceedings, devotes surprisingly little attention to the measures allowing for reopening cases closed with a final judgment,

leaving it on the fringes of interest for Polish academics. Only occasionally do miscarriages of justice, their reasons and effects, attract academic debate.¹ The issue of the compensation for wrongful conviction attracts more attention.² However, the studies rarely involve analysis of quantitative and qualitative data concerning wrongful convictions and their reasons.³ Altogether, the research relating to this issue is not even comparable to that carried out on that topic, especially in the US, but also in Europe.⁴ This seems intriguing. Miscarriages of justice affect their victims in various ways. They range from physical and psychological to social and financial harm of the persons directly or indirectly affected by wrongful conviction.⁵ But they also impact the whole society since convicting the innocent means that criminal justice system failed to protect the victims of crime. Erring in doing justice undermines the public trust in the criminal justice system and in the rule of law.⁶ The miscarriages of justice may also gener-

1. Ł. Chojniak, *Niesłuszne skazania – przyczyny i skutki* (2016); Ł. Chojniak and Ł. Wiśniewski, *Przyczyny niesłusznych skazań w Polsce* (2012); A. Sowa, 'Przyczyny pomyłek sądowych', 1-2 *Palestra* 138 (2002). See also in English A. Górski and M. Ejchart, 'Wrongful Convictions in Poland', 80 *University of Cincinnati Law Review* 1079 (2012).
2. See e.g. P. Cioch, *Odpowiedzialność Skarbu Państwa z tytułu niesłusznego skazania* (2007); Ł. Chojniak, *Odszkodowanie za niesłuszne skazanie, tymczasowe aresztowanie oraz niesłuszne oskarżenie* (2013); K. Dudka and B. Dobosiewicz, *Odszkodowanie za niesłuszne skazanie, tymczasowe aresztowanie lub zatrzymanie w praktyce orzeczniczej sądów powszechnych* (2012); W. Jasiński, 'Odszkodowanie i zadośćuczynienie za niesłuszne skazanie, wykonanie środka zabezpieczającego oraz niezasadne stosowanie środków przymusu po nowelizacji kodeksu postępowania karnego', 9 *Prokuratura i Prawo* 49 (2015). See also in English: K. Wiśniewska, 'Liability of State Treasury for Judicial Errors – Polish Experiences and Legal Solutions', 7 *Czasopismo Prawa Karnego i Nauk Penalnych* 1 (2019), www.czpki.pl/artykuly/liability-of-state-treasury-for-judicial-errors-polish-experiences-and-legal-solutions (last visited 1 August 2020).
3. Chojniak and Wiśniewski, above n. 1; J. Widacki and A. Dudzińska, 'Pomyłki sądowe. Skazania osób niewinnych w Polsce', 11-12 *Palestra* 64 (2007); Sowa, above n. 2; O. Mazur, 'Niesłuszne skazania w Polsce w opinii prokuratorów i policjantów', 3-4 *Palestra* 23 (2002).
4. See e.g. C. Hoyle and M. Sato, *Reasons to Doubt. Wrongful Convictions and the Criminal Cases Review Commission* (2019); B. Forst, *Errors of Justice: Nature, Sources and Remedies* (2004); C.R. Huff and M. Killias (eds.), *Wrongful Convictions and Miscarriages of Justice: Causes and Remedies in North American and European Criminal Justice Systems* (2013); C.R. Huff and M. Killias (eds.), *Wrongful Conviction: International Perspectives on Miscarriages of Justice* (2010); M. Naughton, *The Innocent and the Criminal Justice System: A Sociological Analysis of Miscarriages of Justice* (2013); M. Naughton, *Rethinking Miscarriages of Justice: Beyond the Tip of the Iceberg* (2007); R. Nobles and D. Schiff, *Understanding Miscarriages of Justice* (2002); R. Nobles, D. Schiff & G. Teubner, *Understanding Miscarriages of Justice: Law, the Media and the Inevitability of a Crisis* (2000).
5. Naughton (2013), above n. 4, at 165-78.
6. S. Poyser, A. Nurse & R. Milne, *Miscarriages of Justice. Causes, Consequences and Remedies* (2018), at 128.

* Wojciech Jasiński is Assistant Professor in the Department of Criminal Procedure of the University of Wrocław, Poland. orcid.org/0000-0002-7427-1474 Karolina Kremens is Assistant Professor in the Department of Criminal Procedure of the University of Wrocław, Poland. orcid.org/0000-0002-2132-2645 This publication has been developed as part of the project Compensation for Wrongful Deprivation of Liberty. Theory and Practice (Registration No. 2017/26/E/H55/00382) financed by the National Science Centre, Poland.

ate substantial financial costs that should not be easily bypassed.⁷

It is hard to judge what reasons lie behind that relative lack of interest of Polish scholars in wrongful convictions. It is definitely not because the criminal justice system is perceived as not producing such cases. There are a host of studies showing how shortcomings in investigation, bias, false testimonies other factors produce false convictions.⁸ The belief that the public trial is able to counterbalance those risks or that criminal justice system is immune to them has been widely contested. The criticism concerning the shortcomings of the criminal justice system that may result in wrongful convictions is continuously expressed by practitioners and academia. Yet it may be that the scale of that phenomenon is not perceived as large enough to launch an academic discussion on a wide scale. Another reason might be that Poland had long been waiting for a case that would trigger a nationwide public debate and engage the media. This happened with the widely covered *Komen-da* case, which shocked the public and opened a discussion on the reasons for wrongful convictions, the ways in which the wrongfully convicted should be reimbursed for their time in isolation, and the legal measures available to re-verify the final cases.

The Polish Code of Criminal Procedure⁹ provides for many options to question the final judgment. A long-standing Polish tradition is a two-fold system of procedures designed to verify final court judgments: the cassation and the reopening of criminal proceedings. The former mechanism is designed to correct judicial decisions tainted by legal defects that occurred in the course of the proceedings (violations of either substantive or procedural law provisions). The cassation in its contemporary shape¹⁰ empowers the Supreme Court to quash a final judgment if it has been proven that it was tainted by serious violations of law that occurred in the course of criminal proceedings. The power to lodge the cassation is vested with the parties, as well as with the Prosecutor General, the Ombudsman and the Child's Ombudsman.

The second procedure allowing the reversal of the final judgment has a slightly different character. The reopening of judicial proceedings happens primarily when new facts or evidence has been discovered after the final judgment has been passed that indicate that the convicted person was innocent or convicted on the basis of a provision carrying an inadequately severe penalty (*prop-*

ter nova grounds).¹¹ Proceedings may also be reopened if an offence has been committed in connection with the closed proceedings and there are reasonable grounds to believe that this might have affected the ruling in question (*propter falsa* grounds).¹² These two grounds are seamlessly present in Polish criminal procedure since the enforcement of the first procedural regulations after Poland regained independence in 1918.¹³

But during the twentieth century, additional grounds for reopening of the proceedings were added. Currently, the reopening is possible as a result of the judgment of the Constitutional Court¹⁴ or international tribunal¹⁵ establishing a violation of the Constitution or international treaty that occurred in the course of the relevant proceedings.¹⁶ It is also possible in cases where conviction has been passed *in absentia* without notification of the defendant about the date of hearing,¹⁷ when a convicted defendant, whose penalty was extraordinarily mitigated in return for his or her cooperation with law enforcement authorities, did not confirm the disclosed information in investigation during the trial,¹⁸ and as a result of establishment of serious procedural errors that took place in the course of proceedings.¹⁹

Most recently, upon the adoption of the new law on the Supreme Court at the end of 2017,²⁰ the third extraordinary measure has been introduced to the Polish legal system. In the course of efforts to subordinate the judiciary to the executive, undertaken by the Law and Justice party (*Prawo i Sprawiedliwość*), the so-called extraordinary complaint (*skarga nadzwyczajna*) was introduced. The new procedure provides that if it is necessary to ensure compliance with the principle of a democratic state implementing the rules of social justice, an extraordinary complaint may be lodged against a final judgment of a common court or a military court, provided that the judgment violates the principles or freedoms and human and citizen rights set out in the Constitution, or the judgment grossly violates the law owing to its incorrect interpretation or application, or there is

7. Naughton (2013), above n. 4, at 173-8.

8. See i.a. publications mentioned in n. 5.

9. Code of Criminal Procedure (*Kodeks postępowania karnego*) of 6 June 1997, Dz.U. 1997, Nr 89, poz. 555 with amendments [hereinafter CCP].

10. Note that during the communist period and a few years after democratic transition (1950-1995) the Polish criminal procedure in place of cassation provided for a distinct model of extraordinary revision of judgments, depriving the parties of the right to question the judgment and entrusting that right only to the Prosecutor General, the Minister of Justice, the First President of the Supreme Court and the Ombudsman (after its creation in 1988).

11. Art. 540 § 1 (2) CCP.

12. Art. 540 § 1 (1) CCP.

13. See more on the history of Polish criminal procedure in W. Jasiński and K. Kremens, *Criminal Law in Poland* (2019), at 42-9.

14. After the establishment of the Polish Constitutional Court in 1985.

15. This, in particular, concerns the European Court of Human Rights judgments since, in 1993, Poland became a party to the European Convention on Human Rights.

16. Arts. 540 § 2 and 3 CCP.

17. Art. 540b § 1 CCP.

18. Art. 540a CCP.

19. Art. 542 § 3 CCP. This mode for reopening of criminal proceedings is possible ex officio. It replaced previously existing procedure to nullify the judgment which was removed from the Polish CCP in 2003.

20. Act of 8 December 2017 on Supreme Court (Dz.U. 2018, poz. 5 with amendments). It is the same act that lowered the age of judges' retirement and interrupted the term of office of the First President of the Supreme Court, which were qualified as a violation of Art. 19(1) TEU by the CJEU (judgment of 24 June 2019, ECLI:EU:C:2019:531). See more: 'Attack on Judiciary in Poland Was Planned and Successful. Stefan Batory Foundation Legal Expert Group Reports', <https://archiwum.siatynskiego.pl/wpis-w-debacie-en/attack-judiciary-in-poland-planned-and-successful-stefan-batory-foundation-legal-expert-group-reports/> (last visited 1 August 2020).

an obvious contradiction between the court's fact finding and the evidence gathered in the case, and the judgment may not be set aside or amended by other exceptional measures of appeal.²¹ The extraordinary appeal can be lodged exclusively by the Prosecutor General, the Ombudsman and few other public authorities such as the Child's Ombudsman and the President of the Office of Competition and Consumer Protection. The aim of the measure is to correct the defects of the final judgments that cannot be modified by cassation or reopening of proceedings. However, quashing a contested judgment is possible only if a gross violation of law or obvious contradiction between the court's fact finding and the evidence gathered in the case has occurred. Therefore, the extraordinary complaint resembles cassation having two distinguishable features. First, it offers limited opportunity to question errors of law that occurred during the proceedings. And, secondly, it can be used to question the establishment of facts in the case, which is not allowed in cassation proceedings.

Certainly, not all discussed measures might be used in cases of convicted persons claiming their innocence. Some of the grounds allowing the lodging of a cassation or a motion for reopening of procedure, because of their nature, exclude such a possibility. If the right to claim innocence is understood very broadly, as alleging any type of error affecting final conviction, it is obvious that both cassation and reopening of proceedings, as well as extraordinary appeal may be used as such. If, however, that right is understood as an ability to put into question the facts of the case established in the ruling, then the possibilities are more limited. Apart from cassation that allows alleging the incorrect evaluation of evidence and the extraordinary complaint that can be lodged in cases where an obvious contradiction between the court's fact finding and the evidence gathered in the case occurred, the convict may refer only to *propter nova* and *propter falsa* grounds for reopening of the proceedings.²² These measures allow the case to be reopened because of newly discovered circumstances after conviction that indicate that it was wrongful.

The article focuses exclusively on the latter issue and has been divided into five chapters. We begin with the case study of Komenda's successful innocence claim, which serves as a good example of reopening a case and acquitting the convict immediately. It also reveals some of the reasons that commonly lie behind wrongful convictions. The next chapter discusses how the innocence claim grounds are regulated in the Polish criminal procedure and how they are understood in judicial practice. It also brings the presentation of the judicial proceedings concerning the revision of the case. The fourth chapter focuses on the use of the innocence claim in practice. Despite the limited access to information, we attempt to explain the scattered statistical data and show the tendencies in application for revision of a case. It also presents the efforts of the Polish Ombudsman and

NGOs to raise public awareness in that field. The final conclusions address the main challenges that the Polish system faces concerning innocence claims and indicates the direction in which the system should go.

2 The Komenda Case²³

On the morning of New Year's Day 1997 in the backyard of a house in a small village, Miłoszyce, in the southwestern part of Poland, the body of a 15-year-old girl Małgosia Kwiatkowska was found. The girl had died of cold and loss of blood resulting from a brutal rape committed just before she was left to die. The investigation established that she had been celebrating New Year's Eve in the town's disco with her friends and had left the club, appearing heavily drunk, with three unknown men. At the crime scene the evidence, which was carefully gathered, included bite marks on the victim's body and hair and DNA samples of the offenders, and although many witnesses were questioned, the perpetrators were not found, and the case was soon closed as unsolved.

It was not until four years later that the police unexpectedly arrested Tomasz Komenda, a young man with a clear criminal record, identified as the alleged perpetrator on the basis of facial recognition from a police sketch shown in a TV program. During the trial Tomasz Komenda denied his guilt and provided an alibi from his twelve friends with whom he claimed to spend that New Year's Eve in the city remaining 24 kilometres away from the crime scene. The main evidence invoked against Komenda was the expert's opinion on bite mark evidence and DNA, the testimony of the witness who recognised him from a sketch and his own confession made just after his arrest during police questioning. He was found guilty by the District Court in Wrocław in 2003, a judgment that was subsequently sustained by the Wrocław Court of Appeal, and was sentenced to 25 years of imprisonment. The cassation in his case was rejected by the Supreme Court in 2005 as obviously unjustified, and the case remained closed for many years.

Since the first informal interrogation on the night of his arrest, later described by Komenda as brutally enforced on him through threats and violence, he never admitted that he raped and killed the victim. Neither did he do so during subsequent interrogations by the prosecutor nor

21. Art. 89 (1) of the Act of 8 December 2017 on Supreme Court.

22. Art. 540 § 1 (1-2) CCP.

23. The description of the case is based on available court decisions and articles from the newspapers by K. Nowakowska, 'Zbrodnia miłoszycka wciąż czeka na wyjaśnienie. Śledczy popełniają te same błędy, które doprowadziły do niesłusznego skazania Tomasza Komendy', *Gazeta Prawna*, 11 August 2019, <https://prawo.gazetaprawna.pl/artykuly/1425686,zbrodnia-miloszycka-tomasz-komenda-kto-zabil-malgorzatek.html> (last visited 1 August 2020) and the interview with Komenda's lawyer – Zbigniew Cwiakalski in *Rzeczpospolita* newspaper on 29 July 2019, www.rp.pl/WW-sadzie-i-urzedzie/190729360-Zbigniew-Cwiakalski-o-procesie-o-odszkodowanie-i-zadoscuczynienie-dla-Tomasza-Komendy---wywiad.html (last visited 1 August 2020). See also non-fiction book by G. Głuszak, *25 lat niewinności. Historia Tomasza Komendy* (2018).

when testifying at the trial. Even during the eighteen long years that he had spent in prison, severely maltreated and humiliated as a child rapist and murderer, he always claimed that he was not guilty, which even cost him a chance to be released on parole.

Throughout these long years in isolation Komenda was receiving continuous support from his family, seeking help from various institutions to exonerate him. But his situation would probably not have changed if it had not been for the curiosity of one police officer that got him interested in the old town's case. Digging through the case file and asking questions, the officer became convinced that an innocent was serving a sentence for the crime. In 2017 he identified Ireneusz M., a convicted rapist, as the potential perpetrator. The new suspect had not only been present on the tragic night in the disco in Miłoszyce but had also parked his bicycle in the same backyard where the rape took place. Moreover, when questioned back in 1997 as a witness he admitted that he had known the victim and described in detail the red socks that she was wearing that no one else could know except one of the rapists because the socks were well hidden under her black stockings. The prosecution decided to reopen the closed investigation into the two unknown perpetrators of the old crime. The new DNA tests confirmed that the semen found on the victim's clothes belonged to Ireneusz M. He was immediately arrested and charged.

At that point the motion to reopen the criminal proceedings in favour of Tomasz Komenda was lodged with the Supreme Court by the prosecutor, on the basis of new facts and evidence showing that he did not commit the offence of which he was found guilty. The prosecution submitted a long list of evidence in support of the motion. A new, very complex, expert opinion using advanced techniques was filed, confirming that the blood samples and, in particular, the bite marks found on the victim's body did not belong to Tomasz Komenda. Moreover, it was argued that some key witnesses became unreliable in the light of new interrogations and identification of Ireneusz M. as a new suspect. The prosecution not only sought the reopening of the case but also demanded the immediate acquittal of Tomasz Komenda.

The Supreme Court of Poland held the hearing on the 16 May 2018 and issued the judgment.²⁴ The Court has focused in its ruling on new opinions that definitely excluded Tomasz Komenda as a perpetrator. The decision was made in accordance with the prosecutor's request, and Komenda was immediately acquitted. He left the courtroom as a free man surrounded by family and friends.

Currently, Ireneusz M., together with a second suspect, Norbert B., both arrested in 2018, are standing trial under charges of rape and murder of Małgosia. They both pleaded not guilty and claim that they will share

Komenda's fate of wrongful convict. The Regional Prosecution Office in Łódź conducts an independent investigation for possible abuse of power and negligence of those engaged in the original investigation leading to Komenda's accusation. There are rumours that the need to identify the perpetrator at all costs and personal revenge might have contributed to many mistakes in that case. Tomasz Komenda currently lives in Wrocław with his family and is awaiting a decision on the compensation for the wrongful conviction. His lawyer filed the motion seeking compensation of 19 million PLN (about 4 million EUR) – one million PLN for every year of Komenda's detention.

3 Procedure for Reopening Criminal Proceedings Based on the Innocence Claims

The exoneration of Tomasz Komenda was sought for on the basis of new facts and evidence found after his case became final. But, as mentioned earlier, there are two grounds in the Polish system that can be used to reopen the case on the basis of the so-called innocence claim. Both are understood in the literature²⁵ and case law²⁶ as extraordinary measures that should be employed only exceptionally so as not to become a threat to the stability of the court's rulings. They will now be described in turn.

The first basis of the innocence claim, set in accordance with the structure of the Code, is the *propter falsa* that allows for reopening of the case if a crime has been committed in connection with those proceedings when there are reasonable grounds to believe that this might have affected the ruling.²⁷ The commitment of a criminal offence that could have impacted the ruling has to be, as a rule, confirmed in a separate judgment.²⁸ This forces the petitioner to report the crime and to obtain the relevant judgment first. If there is no conviction for the alleged offence, but there were no legal obstacles to initiate such proceedings, the motion to reopen the case will not be accepted even if, e.g., alongside the motion the written statement has been submitted in which the person admits providing false testimony in proceedings that are about to be reopened.²⁹ She must be first assumed as a perpetrator of perjury in separate criminal proceedings, and only thereafter can the motion to reopen the case successfully proceed.³⁰

24. Supreme Court Judgment of 16 May 2018, V KO 26/18, available in Polish at www.sn.pl/sites/orzecznictwo/orzeczenia3/v%20ko%2026-18-1.pdf (last visited 1 August 2020).

25. S. Zabłocki, in R.A. Stefański and S. Zabłocki (eds.), *Kodeks postępowania karnego. Komentarz*, vol. III (2004), at 649.

26. Resolution of the Supreme Court of 19.02.2014, III KO 104/14, LEX nr 1656221.

27. Art. 540 § 1 (1) CCP.

28. Art. 541 § 1 CCP.

29. Resolution of the Court of Appeals in Cracow of 6.10.2010, II AKO 116/10, LEX nr 783355.

30. Resolution of the Supreme Court of 30.10.2015, IV KO 81/14, LEX nr 2009511.

Despite the regulation that the pre-existing conviction is a necessary condition to reopen the case upon a *propter falsa* ground, it is also possible to seek the review even if the case did not reach the final decision of that kind but was dismissed for the reasons precluding the conviction carefully set forth by law.³¹ That means that non-conviction decisions might also be of relevance. However, the materials gathered in the terminated case have to confirm that a criminal offence has been committed or should at least mention circumstances that substantiate its commitment.³² This is regardless of whether the case has been dismissed by the prosecutor during investigation or later in the course of proceedings by the court. For instance, the proceedings can be reopened if the court discontinues the proceedings owing to the death of the defendant or because the prosecution became impossible because of the expiration of the statute limitations, if it was earlier established that the crime has been committed. If such a fact was not established in pre-existing ruling, it does not deprive the convicted person of a right to apply for reopening of proceedings. Although in some decisions the Supreme Court has taken the view that the court competent to reopen the proceedings was not empowered to hear the evidence and to establish the commission of an offence that might have affected the case in question,³³ recently the Criminal Chamber of the Supreme Court ruled that in cases where there is no possibility of obtaining a prior judicial decision confirming the fact that the offence has been committed, the applicant has to substantiate that fact in the motion for reopening of the proceedings, and the role of the court is to verify the circumstances of the case.³⁴

The role of the court in reopening proceedings, apart from possible fact finding concerning the commission of an offence, is to verify whether the offence impacted the decision that is sought to be quashed. It is hard to define how such an impact should be measured, especially since the law provides in very vague terms that it is enough that ‘an offence could have influenced the ruling’. Taking the example of perjury again, if the false testimony was not crucial in securing conviction, since the other available evidence in that case was considered sufficient to prove that the convict who now seeks the revision was guilty anyway, then the reopening of pro-

ceedings will not be granted.³⁵ But, on the other hand, it is not relevant who has been established as a perpetrator of the offence based on which the revision is sought for.³⁶ Therefore, it may be a witness who committed perjury or the judge who accepted a bribe in return for a certain ruling, as well as a third party that produced the fake evidence.³⁷ The only factor that will be taken under consideration by the court will be the impact that this offence could have had on the conviction of the petitioner who claims his innocence.

The *propter nova* ground, a second basis for the innocence claim available in Polish law, is understood as a situation where after the ruling has been issued, new facts or evidence have been uncovered.³⁸ This can be done only if new facts or evidence suggest that either

1. a convict has not committed an offence or the act that has been committed did not constitute an offence or was not subject to a penalty;
2. a defendant has been convicted for an offence carrying a more severe penalty, or when circumstances necessitating the application of the extraordinary mitigation of a penalty have not been taken into account, or when circumstances resulting in an extraordinary aggravation of a penalty have incorrectly been accepted;
3. a court discontinued or conditionally discontinued criminal proceedings, incorrectly assuming that the defendant has committed the imputed offence.

The new facts or evidence should be unknown both to the court and the party seeking reopening of proceedings,³⁹ and the novelty of the facts or sources has to be substantiated in a party’s motion. The applicant is obliged to indicate what new facts have been discovered since her conviction or has to adduce new evidence. As it is accepted that the presumption of innocence does not apply in proceedings concerning reopening of criminal cases, the burden of proof remains with the applicant.⁴⁰

The new evidence is understood as stemming from a totally new source such as an unknown witness, newly discovered real evidence, as well as from a source that was known but that reveals new information, e.g. new depositions of the witness who testified at the trial. However, new evaluation of evidence collected in a case or different interpretation of the substantive criminal law provisions relevant for the ruling cannot be consid-

31. Among the reasons that this provision refers to are the death of the defendant, the expiration of the statute of limitations or lack of jurisdiction of Polish courts (see Art. 17 § 1 (3)-(11) CCP). In such cases, the decision to dismiss criminal proceedings issued on these grounds by the competent authority is considered to be sufficient to allow reopening of criminal proceedings in lieu of the judgment convicting the perpetrator. The reopening of proceedings is also allowed if the proceedings regarding the commitment of the crime have been suspended (Art. 22 CCP). See more on the reasons to dismiss a case in the Polish criminal process Jasiński and Kremens, above n. 13, at 234-5.

32. Resolution of the Supreme Court of 5.12.2012, III KO 28/12, OSNKW 2013/1/10.

33. Resolution of the Supreme Court of 30.10.2015, IV KO 81/14, LEX nr 2009511.

34. Resolution of the Supreme Court of 26.05.2020, I KZP 12/19, OSNKW 2020/6/17.

35. Resolution of the Supreme Court of 10.12.2007 r., II KO 65/06, LEX nr 354299.

36. Resolution of the Court of Appeals in Cracow of 6.02.2018, II AKz 38/18, LEX nr 2610645.

37. D. Świecki, in D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz*, vol. II (2018), at 666.

38. Art. 540 § 1 (2) CCP.

39. Until 2013 r. the discussed provision provided that new facts or evidence should be unknown exclusively to the court. Amendment of that provision is understood as a move towards strengthening the obligation of the parties to reveal in a timely manner all relevant sources of information they possess – see Świecki, above n. 37, at 668.

40. *Ibid.*, at 670-1. See also Resolution of the Supreme Court of 18.10.2017, II KO 61/17, LEX nr 2382417.

ered as a ground for reopening of the case.⁴¹ Even if the criminal law provisions were obviously misapplied, that should be corrected, if possible, by other measures.⁴² If the motion for reopening of proceedings is backed by a written witness statement, the role of the court is to establish whether the revealed information brings into question the correctness of the final judgment.⁴³

The Supreme Court case law on the admissibility of a private expert's opinion backing motion for reopening of the proceedings is inconsistent. The majority view is that this can be the case, but only in exceptional circumstances. If the private opinion was drafted on the basis of the same evidence as previously evaluated by the expert witness officially appointed by the prosecutor or court on the basis of Article 193 § 1 CCP, the opinion, even if containing different conclusions, cannot be perceived as new evidence. In such a case it is considered as a prohibited alternative interpretation of existing evidence.⁴⁴ However, if the opinion relies on facts that were not previously known or if a new scientific method was applied by the expert to prepare the expertise it might be qualified as a new fact allowing the proceedings to be reopened, if other conditions are met.⁴⁵

It is also required that new facts or evidence has to indicate with high probability or near certainty that the final ruling in a criminal case was erroneous and that after the reopening of the case the convicted person will be acquitted or proceedings discontinued.⁴⁶ For instance, the sole fact that the victim has testified in a different case that he is now not sure about the details of the offence was considered by the Supreme Court as new evidence that is insufficient to justify the reopening of proceedings.⁴⁷

Both in cases of *propter nova* and *propter falsa* grounds, the reopening of the proceedings is triggered only by the party's motion. Therefore, the motion can be lodged by the convict or by the public prosecutor.⁴⁸ There is also a limited right to seek reopening of proceedings by the aggrieved party (victim) acting as an auxiliary prosecutor,⁴⁹ which can be sought only on *propter falsa* grounds. Interestingly, revision of the case is permissible not only

in relation to living convicts alone. A motion can also be lodged by the next of kin of a deceased convict in order to clear her name. The proceedings can be reopened even after the penalty has been executed, the record of conviction has been erased or the person has been pardoned.

In all cases where the motion is submitted by participants other than the public prosecutor, it has to be drafted and signed by the counsel⁵⁰ that aims to bring the expected quality to this complicated document and to prevent hasty applications. The applicant has a right to legal aid on proving that she is unable to bear the costs of hiring the counsel to draft the motion.⁵¹ However, the appointed counsel is not obliged to submit a motion, but, if the careful analysis of the case leads to the conclusion that there are no relevant grounds to reopen the proceedings, the counsel must instead submit the legal opinion stating the reasons against filing such a motion.⁵² The motion for reopening of the proceedings can be withdrawn. However, if the public prosecutor lodged a motion in favour of the convict, the withdrawal has to be approved by that person.

The proceedings for reopening of a case are fully judicial. The court sits in a panel of three professional judges. The hearing is held either before the Regional Court, if the final judgment was issued by the District Court; before the Court of Appeals, if the final judgment was issued by the Regional Court; or before the Supreme Court, if the final judgment was issued by the Court of Appeals or the Supreme Court.⁵³ To reopen the case, it is not necessary to exhaust all appellate measures available in Polish law. As a result, even judgments that were not appealed are formally eligible for the reopening procedure.

After submitting the motion, the president of the court verifies it formally. If the formal requirements are not satisfied, the motion will be returned to the applicant, who will be asked to supplement it within 7 days. If the motion is not drafted and signed by the counsel, the applicant will be informed about the necessity to correct that error. Exceptionally, if at the same time the motion is clearly groundless, a single judge may simply refuse to proceed with the case, which will be usually done if the motion refers to circumstances that were already analysed in the reopening proceedings.⁵⁴ It is argued in the literature that this should also apply to cases in which the grounds for reopening of proceedings mentioned in the motion fall outside of the statutory catalogue, where the applicant relies on circumstances irrelevant from the point of view of legal grounds for reopening of a case, as well as in cases where the grounds for reopening of a case were not mentioned in the motion at all.⁵⁵ The

41. Świecki, above n. 37, at 668.

42. E.g. through the cassation lodged by the Ombudsman.

43. Resolution of the Supreme Court of 20.10.2016, V KO 60/16, LEX nr 2151453.

44. Resolution of the Supreme Court of 8.08.2018, II KO 27/18, LEX nr 2530704.

45. Świecki, above n. 37, at 669. See also: Resolution of the Supreme Court of 16.05.2018, V KP 26/18, LEX nr 2515771.

46. Resolution of the Supreme Court of 8.10.2019, V KO 20/19, OSNKW 2020/3/9.

47. Resolution of the Supreme Court of 20.05.2005, IV KO 38/04, LEX nr 223189.

48. In the case of the motion filed by the prosecutor the reopening of proceedings can also be done to the disadvantage of the convict. One of the interesting differences between the discussed grounds is that while in the case of *propter falsa* the proceedings can be reopened both in favour of and to the disadvantage of the defendant, the new facts and evidence can become a basis only for the reopening of proceedings to her advantage.

49. See more on the roles that the aggrieved party can play in the course of Polish criminal proceedings in Jasiński and Kremens, above n. 13, at 239-40.

50. Art. 545 § 2 CCP.

51. Art. 78 CCP.

52. Art. 84 § 3 CCP.

53. See on the system of Polish courts in D. de Vocht, 'Poland', in E. Cape, Z. Namoradz, R. Smith & T. Spronken (eds.), *Effective Criminal Defence in Europe* (2010), at 427.

54. Art. 545 § 3 CCP.

55. Świecki, above n. 37, at 706-7.

decision refusing to proceed with the motion is subject to interlocutory appeal.

If the motion is considered impermissible, as, for instance, based on grounds other than those allowing the reopening of proceedings, or submitted by a person not entitled to do so, it will be rejected.⁵⁶ Only those motions accepted as formally correct and permissible will be decided on their merits.

The hearing on reopening of proceedings is held in camera and without the presence of the parties, although this may be decided otherwise by the court that hears the case. The court is entitled to conduct investigation into the facts of the case (*czynności sprawdzające*).⁵⁷ It can be done by the court *en banc*, by one of the judges of the panel or even by another court on request. Conduct of investigation is an integral part of the reopening proceedings. Unlike in some other jurisdictions, e.g. France, the relevant legal provisions in Poland do not separate the investigative and adjudicative stages of this kind of proceedings. Conducting investigation is perceived as particularly useful in those cases where there is a need to verify new facts.⁵⁸ The right to investigate the facts of the case is understood as empowering the court either to take evidence on a regular basis according to the rules applicable at trial, e.g. taking testimony from witnesses or expert witnesses and inspecting documents or to verify available sources without the necessity to apply all strict evidentiary rules. The first option should be applied by courts where the case is to be reopened and should result in immediate acquittal (as in the *Komenda* case) or discontinuation of proceedings. The second option should be used if the court decides exclusively on reopening the case and leaves the decision on the merits to the competent criminal court. Regardless of the evidentiary rules adopted, the parties are entitled to participate in investigative actions undertaken by the court.

If the motion proves that the legal conditions for reopening of proceedings are met, the court issues a decision quashing the final judgment and remands the case for retrial. The decision is final and cannot be challenged.⁵⁹ If the motion was filed to the advantage of the convict, during the retrial her situation cannot be made worse. In exceptional cases the court may decide to reopen the proceedings and immediately acquit the convict if new facts or evidence indicates that the ruling is obviously unfair.⁶⁰ The court may also quash the final judgment and dismiss the proceedings if there are grounds for taking such a decision. The immediate acquittals and dismissals are reviewable unless the decision was issued by the Supreme Court. If, after the hearing, the motion is not considered justified, it is dis-

missed by the court, and this decision may be subjected to interlocutory appeal.⁶¹ The rulings issued in reopening proceedings are served on the parties (if delivered in camera) or delivered orally during the hearing accessible to the public. Selected anonymised decisions are also accessible through the websites of each court.

If the case has been reopened to the advantage of the convicted person, the court is obliged to verify whether it is necessary to also reopen proceedings to the advantage of other individuals convicted in the quashed judgment, since the revealed circumstances might also refer to them. In such a case the court also rules in favour of every convicted person, even if they did not apply for it.

4 Right to Claim Innocence in Practice

The scant Polish legal scholarship on the subject of wrongful convictions and, more generally, of reopening of criminal proceedings on various grounds, is reflected by the insignificant impact of these topics on public debate. For instance, when compared with the attention that the Innocence Project initiative⁶² receives worldwide, the recognition of its Polish branch is much weaker. The Innocence Clinic (*Klinika Niewinność*),⁶³ being a part of the European Innocence Network,⁶⁴ works under the auspices of the Helsinki Foundation of Human Rights in Poland as a part of the University of Warsaw curriculum of the Faculty of Law and Administration. It engages approximately ten to fifteen young law students yearly, who, under the supervision of the experienced academic and practitioner Maria Ejchart-Dubois, verify the case files of those who claim innocence. With limited funds, weak institutional support and no large-scale engagement of activists, it seems as barely covering the needs of the system.

The furthest-reaching efforts to promote the need to identify the reasons for wrongful convictions and to build an effective mechanism to address the issue have been undertaken in the Office of the Polish Ombudsman – Adam Bodnar. The idea of creating the ‘Innocence Commission’ has been proposed by the Ombudsman in his statement presented as a reaction to the *Komenda* case, even before the Supreme Court ruled on the issue.⁶⁵ The Commission, as proposed by the Ombudsman, could be based on similar mechanisms as known from the UK and US examples, upon the princi-

56. The rejection can be challenged in the court of a higher level, except when the rejection was decided in the proceedings before the Supreme Court; in such a case, the interlocutory appeal is heard by the other panel of the Supreme Court judges.

57. Art. 546 CCP.

58. Świecki, above n. 37, at 706-7.

59. Art. 547 § 2 CCP.

60. Art. 547 § 3 CCP.

61. Art. 547 § 1 CCP. However, the interlocutory appeal cannot be lodged against the dismissals issued by the court of appeal or Supreme Court, which are considered final.

62. www.innocenceproject.org (last visited 1 August 2020).

63. www.hfhr.pl/klinika-niewinnosc-nowa-edycja/ (last visited 1 August 2020).

64. <https://innocencenetwork.org> (last visited 1 August 2020).

65. ‘Statement of the Ombudsman Adam Bodnar’, 30 March 2018, www.rpo.gov.pl/sites/default/files/O%u015bwiadczenie%20RPO%20Adama%20Bodnara%20ws.%20Tomasza%20Komendy%2030.03.2018.pdf (last visited 1 August 2020).

ple of full independence from all state authorities and would be composed of judges, prosecutors, private lawyers, police officers and members of NGOs providing help for vulnerable victims. In the proposal, the Commission is designed to address only those cases where the convict is still alive, focusing only on cases concerning the most severe crimes, i.e. felonies, and should hear cases with the aim of only exonerating the convict and not changing or reducing the penalty. The decisions of the Commission should be only of an advisory character and should not replace the existing mechanisms of reopening the criminal proceedings, leaving the final decision to the court of law.

To promote his proposal, in 2019 and 2020 the Ombudsman organised four seminars with the aim of commencing a public debate on the creation of the national commission, gathering academics, practitioners and activists that supported the idea.⁶⁶ The public outrage that Tomasz Komenda's and some other cases described by the media have generated⁶⁷ has given hope for a change. Unfortunately, despite these efforts, no legislative initiative to modify the procedures allowing one to claim innocence after the final conviction has appeared so far.

The returning question concerns the number of successful requests to reopen criminal proceedings based, in particular, on new facts and evidence and the real scale of wrongful convictions in the Polish legal system. This could lead to identifying the reasons for that phenomenon and would allow the undertaking of action to eliminate mechanisms causing these traumatic consequences to its victims. As noted previously, no large-scale empirical studies aiming at estimating the efficiency of remedies available to those that believe had been wrongfully convicted have been conducted in Poland to date. In a few works the focus remained on the reasons of wrongful convictions, which allowed the

gathering of some scattered data.⁶⁸ The most comprehensive study in this regard has concerned the case-file analysis of 119 cases within the jurisdiction of the Court of Appeal in Poznań, in which the wrongful conviction had been confirmed through cassation and reopening of criminal proceedings.⁶⁹ This allowed the researchers to identify that in the majority of cases the wrongful convictions were not related to shortcomings in taking evidence but most frequently resulted from the incompetence of lawyers participating in the process that led to mistakes and miscarriages of justice.⁷⁰

The appraisal of the scale of the problem may be based on the number of compensation awards to persons identified as being wrongfully convicted. From 2010 to 2018 the courts awarded compensation to an average of sixteen former convicts yearly.⁷¹ However, it is not possible to draw far-reaching conclusions from this data. It only allows to determine the number of wrongful convictions officially identified as such in accordance with the legal definition.⁷² Therefore, on the one hand, the numbers include compensations that were awarded as a result of all available measures aimed at changing the final judgment and, moreover, they most likely also include cases in which the conviction was not questioned but the penalty was assessed as disproportionately harsh, which may also lead to awarding compensation. On the other hand, these statistics do not include cases that could be interpreted as wrongful convictions in which the convict after the final judgment did not decide to lodge any extraordinary measure to quash it or filed it but did not succeed in convincing the court that such a judgment should be changed, as well as situations where the convicted person after her exoneration did not claim compensation at all. As a result, this data should be read with caution regarding its accuracy as to the real scale of the issue.

To identify the number of criminal proceedings reopened on the grounds that concern the innocence claim, the courts hearing cases on requests to reopen criminal proceedings⁷³ were addressed to provide the relevant data. Almost all of them were reluctant to provide precise information, arguing that obtaining detailed data would be impossible in view of the limited resources.

66. See the coverage of the first conference held on 21 September 2019, www.rpo.gov.pl/pl/content/niesluszne-skazania-w-polsce-seminarium-w-biurze-rpo (last visited 1 August 2020).

67. The recent decision to reopen criminal proceedings against Arkadiusz Kraska (Supreme Court Judgment of 8 October 2019, V KO 20/19, OSNKW 2020/3/9) also received considerable attention. The convict was charged with two counts of murder and sentenced to life-imprisonment in 2001. This case was particularly interesting since the motion to reopen criminal proceedings was lodged with the Supreme Court by the Regional Prosecutor's Office in Szczecin and quickly withdrawn upon the order received from the National Prosecution Office, which gave a floor to discussion on the independence within the prosecution service. The convict, soon before being released on parole, did not accept the withdrawal, forcing the Supreme Court to eventually hear his case. As a result, the Supreme Court reopened the proceedings but, unlike what happened to Komenda, did not decide to immediately exonerate the accused but to order a new trial, which is currently being conducted before the Regional Court in Szczecin. The Supreme Court has argued that new facts have proved that the improper investigative measures were employed at an early stage of the criminal investigation, including forgery of the records of questioning of two police officers and the lack of use of recordings from surveillance cameras at the crime scene, which could exclude Kraska as the suspect. The Court has also raised doubts regarding the credibility of two anonymous witnesses accusing Kraska. The details of the case have been covered in a book authored by E. Ornacka, *Wrobiony w dożywocie. Sprawa Arkadiusza Kraski* (2019).

68. See Widacki and Dudzińska, above n. 3, at 64 (the study had limited coverage and was based on the questionnaire circulated among thirty lawyers from Warsaw Bar in Poland) and Mazur, above n. 3, at 9 (the study has also been conducted in the form of a questionnaire administered to 189 prosecutors and 450 police officers).

69. Chojniak and Wiśniewski, above n. 1.

70. *Ibid.*, at 73-7.

71. The estimation based on the data received from the Ministry of Justice on 4 September 2019 upon the access to public information request (DSF-II.082.249.2019); on file with authors. Note that the number of decisions in the given period was not equal each year and ranged from 5 to 33 decisions.

72. Art. 552 § 1 CCP provides that wrongful conviction should be understood as a conviction that was quashed in the course of one of the extraordinary procedures (cassation, reopening of criminal proceedings or extraordinary complaint), and, in consequence, the convicted person was acquitted or sentenced to a more lenient penalty than the one that had already been executed.

73. This means all forty-five Regional Courts and all eleven Appellate Courts as well as the Supreme Court.

Figure 1 Number of requests to reopen criminal proceedings lodged with Polish Courts between 2015 and 2018.

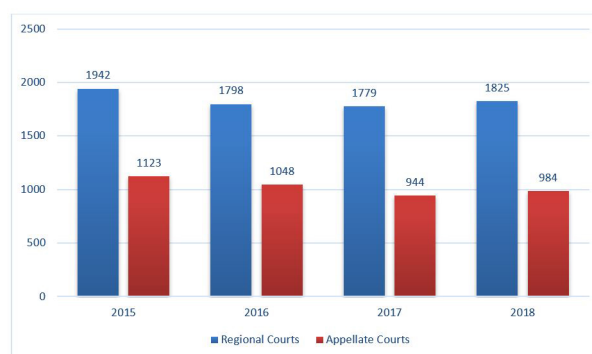
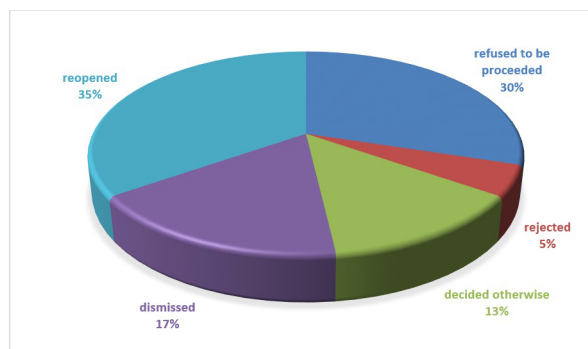


Figure 2 Type of decisions issued in 2015–2018 in Regional Court of Opole in response to motions to reopen proceedings.



Therefore, the acquired data should be considered as neither providing full data nor giving an exhaustive answer to all questions. Nevertheless, they allow some conclusions to be reached.

Figure 1 shows the number of requests filed with Polish courts⁷⁴ demanding reopening of criminal proceedings concerning all grounds and not only those based on the *propter nova* or *propter falsa* claims. In relation to that, in 2018 the Polish criminal courts decided in 318.168 cases, out of which the conviction was passed in 87% of cases (277.974 convictions),⁷⁵ these numbers can be considered very low. In just about 0.4% of cases the convicts were seeking the possibility to reopen criminal proceedings.

The data received from twenty-five Regional Courts and six Courts of Appeal⁷⁶ also allowed for estimation of the success rates of motions lodged with courts. In the

case of Regional Courts only 15% of all submitted motions resulted in reopening of criminal proceedings.⁷⁷ And in the case of Courts of Appeal it was just 10%. The very low acceptance of requests to reopen criminal proceedings can be partially justified by the fact that many of the motions are prepared by convicts in person and not by the lawyer, which prevents the motion being decided on its merits. More detailed insight into the nature of decisions that are reached by courts can be shown on the example of data provided by the Regional Court of Opole, although it must be remembered that the size of the court, regionalisms and local practices probably make this data unrepresentative for the whole country. In the period 2015 to 2018 the Regional Court of Opole has received 167 motions to reopen the criminal proceedings on various grounds (see Figure 2).

Reopening of the proceedings took place in fifty-seven cases (35%). This predominantly concerned remanding the case for retrial (fifty-three cases), and only rarely after reopening was the convict immediately acquitted (1) or the case dismissed (3). In another twenty-eight cases (17%) the case was heard on its merits but dismissed. In forty-nine cases (30%) there was a refusal to proceed with the motion, and in eight cases the motion was rejected (5%). The remaining twenty-two cases (13%) were decided otherwise, which means that, e.g., the motion was filed with the wrong court and the case

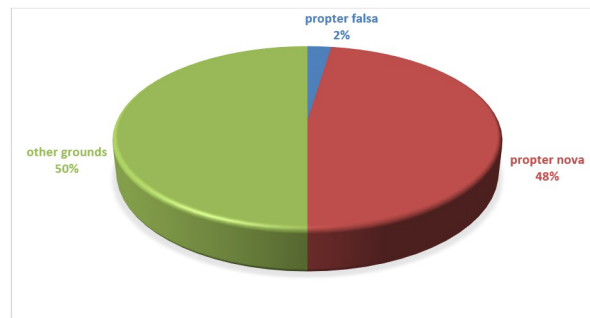
74. The number does not include data from the Supreme Court, which refused to provide the exact number of motions concerning reopening of criminal proceedings. It can be estimated on the basis of the available statistical data concerning all types of motions that are filed with the Supreme Court each year that approximately 200-300 motions of that kind may be lodged. See *Informacja o działalności Sądu Najwyższego w roku 2018* and *Informacja o działalności Izby Dyscyplinarnej Sądu Najwyższego w roku 2018*, Warszawa 2019, www.sn.pl/osadzienajwyzszym/Dzialalnosc_SN/Informacja%20o%20dzialalnosc%20SN%20i%20ID%20SN%202018.cleaned.pdf (last visited 1 August 2020), at 181.

75. Official statistics of National Prosecution Office for 2018, at 6, pk.gov.pl/wp-content/uploads/2019/04/PG_P1K.pdf https://pk.gov.pl/wp-content/uploads/2019/04/PG_P1K.pdf (last visited 1 August 2020).

76. The rest of the courts provide the residual data or did not provide them at all.

77. In some cases, the success rate is substantially lower than the average. For instance, in the Regional Court in Tarnobrzeg of all the eighty-three motions received between 2015 and 2018 only in one case did the court decide to reopen the proceedings. It is hard to judge this phenomenon.

Figure 3 Types of grounds on which the Regional Court of Olsztyn decided on merits in proceedings to reopen the case issued in 2015–2018.



had to be transferred to the one having jurisdiction over the case.

The courts were also asked to provide the grounds invoked by petitioners in their motions. Only one court agreed to provide such data, which shows how often the innocence claims become the basis of decisions for reopening criminal proceedings. The information that follows must be treated with a great deal of caution as to its accuracy and representativeness for the whole country since it is based on data received from only one court and only reveals the grounds for the decisions decided on merits. In the period from 2015 to 2018 the Regional Court of Olsztyn decided altogether on reopening criminal proceedings in 177 cases. In only forty-two cases was the motion decided on merits, and of those only in fifteen cases did the court decide to reopen the proceedings.

Figure 3 shows that of forty-two cases decided on merits, new facts or evidence formed almost half of the invoked grounds (twenty cases), while attempts to reopen the proceedings based on *propter falsa* grounds are almost non-existent (one case in 2016 – the reopening was rejected anyway). 50% of cases were sought to be reopened on other grounds.⁷⁸ This shows how difficult it is to seek the reopening under a *propter falsa* argument. It is most likely caused by the necessity to obtain the judgment establishing the commitment of a crime being a prerequisite to demand the reopening of the proceedings.

5 Conclusions

Finding a fair balance between legal certainty and the need to eliminate errors of justice is an extremely difficult task. Multiplication of verification procedures, especially those allowing overturning of the final conviction is not a proper solution. Nonetheless, various jurisdictions, of different origins and legal traditions, allow reopening of a case under the extraordinary circum-

stances. The main question is how and by whom it can be done.

For the applicant the main issue is whether the procedure is accessible and whether it gives a chance of eliminating most common errors of justice resulting in wrongful convictions. Polish law is partly deficient from that perspective. On the one hand, the case law emphasises the stability of judgments and the extraordinary character of the procedure to reopen criminal proceedings. That might be a side effect of the reopening procedure having exclusively judicial character, not allowing alternative non-judicial perspectives in the process of revising accuracy of the final judgment. However, it can be expected that the creation of the Innocence Commission may change this situation. The recent Ombudsman's proposal, in which the Commission is composed of people with various backgrounds, would allow the inclusion of extrajudicial perspective and make it possible to investigate cases that could hardly be successful in regular judicial proceedings. Yet the lack of power to reopen the proceedings by the Commission itself, might hold back the system from being as accessible as expected. The opinion of the Commission might not be enough to overcome the reluctance of the courts to reopen criminal cases.

The low number of cases in which convicts claim innocence seeking revision of judgments is also justified by the lack of possibility under Polish law to question the evaluation of evidence or the quality of expert witness's opinion in those proceedings. Even if there are reasonable grounds to assume that errors took place and the case should be reopened, the law does not provide for such grounds. Only the availability of new facts or evidence that had been previously unknown to the parties and the court justifies the reopening of proceedings. This significantly reduces the number of successful applications.

The chances of successfully seeking reopening of the case should also be considered limited owing to the requirement of the judicial predetermination of an offence as a necessary condition for successful *propter falsa* claims. That formal requirement allows the courts to dismiss the motions seeking revision of the conviction based on that ground, without even analysing the merits of the case.

78. See Chapter 1, explaining other grounds than *propter nova* and *propter falsa* as a basis for reopening proceedings that remain outside of the scope of what can be considered as 'innocence claim'.

The regulation of the procedure for reopening of the proceedings in Poland also seems to underestimate its significance in preventing wrongful convictions. Contrary to cassation and extraordinary complaint, the motions for reopening of proceedings are not registered in a separate category in the court registry. They are recorded jointly with various types of motions or complaints submitted to the court (e.g. motion to disqualify a judge from hearing a case, motion to appoint a different court to hear a case). This indirectly implies that motions for reopening of proceedings are perceived as less important when compared with other extraordinary measures questioning the finality of judgments.

Another reason for the low number of such cases might be the considerably weak position of the petitioner during the reopening proceedings. His or her role is highly dependent on the court's powers over the mode of proceedings, including the parties' participation and publicity of the hearing. Moreover, the crucial issue of whether and how the new facts and evidence attached to the motion for reopening of the case should be verified has been left to the discretion of the court acting in reopening proceedings. That may also result in arbitrary decisions, which are usually not subject to scrutiny, unless issued by the Regional Court. Essentially, the convict seeking revision of her case has no measures available to her that would allow addressing criminal justice authorities when the securing of evidence is needed. Whereas the *Komenda* case proves that if it had not been for the determination of one person involved in the process, who started collecting new materials and questioning witnesses, the convict would have never been released. Therefore, allowing convicts to address the Commission directly and giving the latter the right to order gathering of additional evidence outside of the existing criminal process seems to be a good solution. This would give some hope for the enhancement of accessibility of proceedings to those who are wrongfully convicted.