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Chapter

Addressing Wrongful Convictions in Croatia through Revision of the Novum Criterion: Identifying Best Practices and Standards

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Abstract

The topic of miscarriages of justice in Croatia is new. It had begun to be the center of academic discussion in 2015 and culminated with the establishment of the experimental Innocence Project in Croatia in 2020. For the first time, experts started to analyze the domestic legal framework and judicial practice concerning the protection of the rights of wrongfully convicted persons, with a special emphasis on carrying out a post-conviction revision of criminal proceedings to prove eventual miscarriages of justice. This chapter examines wrongful convictions as miscarriages of justice through the scope of the novum criterion in different European countries, and the standards of the ECtHR and CJEU. The novum criterion is a legal principle that allows for the reopening of a case if new evidence emerges that could change the outcome of the trial. The purpose is through comparative and case study methods to address the revision of criminal proceedings in Croatia by examining the requirements for establishing a novum in the legislation of different European countries and examine the jurisprudence of the European Court of Human Rights (ECtHR) and Court of Justice of the E.U. (CJEU) and establish best practices.

Keywords: revision of procedure, novum, innocence projects, wrongful convictions, miscarriages of justice

1. Introduction

The topic of miscarriages of justice in Croatia is relatively new. It had begun to be the center of academic discussion in 2015, after for the first time was presented at the ISABS Conference in Dubrovnik and culminated with the establishment of the experimental Innocence Project in Croatia in 2020. For the first time, experts started to analyze the domestic legal framework and judicial practice concerning the protection of the rights of wrongfully convicted persons, with a special emphasis on carrying out a post-conviction revision of criminal proceedings to prove eventual miscarriages of justice. They are analyzing judicial practice de lege lata on the use of the novum criterion in the reopening of criminal cases for serious crimes. So far serious criminal
cases, where renewal of the proceedings was requested, have been reviewed. Also, the potential discrepancy in the evaluation of the novum criterion in theory and practice is analyzed to determine what constitutes a novum in the eyes of the courts. However, preliminary results of several cases indicate that establishing a novum criterion in Croatia is far from an easy ordeal. It is a costly and time-consuming effort with a high threshold. On average the pre-trial investigation procedure in Croatia lasts 1–2 years, including the time to review the new evidence or conduct new forensic investigations. The absence of income and deprivation of liberty of the convicted persons, to finance this endeavor to establish a novum criterion is very problematic.

This chapter examines wrongful convictions as miscarriages of justice through the scope of the novum criterion in different European countries, and the standards of the ECtHR and CJEU. The novum criterion is a legal principle that allows for the reopening of a case if new evidence emerges that could change the outcome of the trial. The purpose is through comparative and case study methods to address the revision of criminal proceedings in Croatia by examining the requirements for establishing a novum in the legislation of different European countries and examine the jurisprudence of the European Court of Human Rights (ECtHR) and Court of Justice of the E.U. (CJEU) and establish best practices. In doing so, the first part of this chapter will explain the importance of the novum in correcting miscarriages of justice. The second part will identify positive legislative best examples from Italy, Germany, and the Netherlands, as countries with similar legal traditions. The third part shall examine the principles and standards from the jurisprudence of the ECtHR and the Court of Justice of the European Union. The fourth part will present the revision of the criminal procedure from the Croatian procedural legislation and a few cases of the Croatian Innocence Project in identifying the main problems in establishing the novum criterion in practice. The conclusive part highlights which positive practices should be adopted in Croatia, as well as why the promulgation of the special law of lowering the threshold of the novum criterion is needed in Croatia in order to protect the rights of the wrongfully convicted persons as a special vulnerable group. Ultimately, this chapter will provide valuable insights into the use of the novum criterion as a tool for correcting wrongful convictions and will inform the development of best practices for its implementation in the Croatian criminal legal system. This chapter will also contribute to the ongoing debate on wrongful convictions in Europe and the role of new evidence in correcting them.

2. Wrongful convictions and the importance of the Novum

Merriam-Webster’s dictionary [1] defines miscarriage of justice as a “Grossly unfair outcome in a judicial proceeding, as when a defendant is convicted despite a lack of evidence on an essential element of the crime”. This means that Innocent people lose their liberty and do “end up in jail”. Regardless of the legal system, this virus can be found in either the Continental or the Common law system. The wrongful convictions came to light with the birth of the innocence movement in the U.S. in the 80s and the 90s through which academics and law practitioners started to take seriously this problem by analyzing cases and having them overturned to shed light on the causes of such mistakes. This was by no mistake. These were the formative years of the DNA sciences as well. Science reached the ability to match with sufficient precision DNA profiles. Luparia [2] argues that the DNA testing technology, which is
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frequently used to convict a suspect dead to rights, is also used in the post-conviction procedure to repeat the procedure and overturn the initial judgment based on the re-examination of the biological samples which were either inconsistently tested or contained inconclusive results. In the U.S. alone post-conviction DNA examination is used to exonerate persons wrongfully convicted of rape and murder charges. However, the grounds for exoneration are numerous and do not apply only to DNA evidence. They can also be: witnesses or victims’ recantations of testimonies, police or prosecutorial misconduct, illegally obtained evidence, and depositions given under duress. For any of these reasons, a revision of the criminal procedure can be requested. Peters [3] further explains that the adversarial (accusatorial) systems, particularly in the American version, may be more vulnerable to factual errors than their European counterparts. Furthermore, Kilias [4] argues that another factor may be that factual errors in Europe have a higher chance of remaining undiscovered because of the statutes of limitation for the retention of evidentiary materials. Also, this pertains to physical evidence, such as blood samples, skin, sperm, and hair are usually destroyed once the case has been disposed of through the judicial hierarchy. Another reason is that in the U.S. the rulings are never “final” as in Europe, given the many possibilities to appeal or petition the redress under the form of “habeas corpus” petitions. Also, the storage of physical evidence tends to be conserved over long periods of time. In the European (Continental legal system), the availability of legal remedies for revision of the criminal procedure is very narrow, and it is usually an extraordinary legal remedy.

With the transcendence of the “innocence” revolution in the U.S. in Europe, past judicial decisions and legislation were reviewed aimed at overturning wrongful convictions. The results uncovered those judicial errors existed in Europe as well. European judges were obliged to face what Luparia and Pitturi call a long-standing taboo that European judges do make mistakes and yes, there are wrongfully convicted persons in Europe as well [5]. Unlike in the U.S., in Europe, there is no single style of criminal procedure. Some European countries switched from an inquisitorial to an adversarial style of criminal procedure, some retained the inquisitorial style, and others made a mixed style of procedure. According to Kilias [6] several prominent causes for wrongful convictions were identified through cross-national studies in Europe: simplified and accelerated procedures with negotiated outcomes in the form of plea bargains and mostly penal orders. Gilleron [7] explains that these are the major factors for wrongful convictions because facts are assessed summarily and beyond the controls of the courts. Other sources for wrongful convictions are the unreliability of witnesses and incompetent or corrupt forensic reports [8]. However, both authors agree that the predominant problem for wrongful convictions in Europe is preconceived police and prosecutorial investigations. By law, they should investigate exculpatory evidence as well. Judges are obligated to critically assess what the parties present in court. However, this works in theory only, as certain researches from Luparia and Geert indicate that confirmation bias is very present in European court practice. Confirmation bias pertains to the tendency to uncritically confirm what the law enforcement authorities have found in the investigatory procedure or in the first instance procedure (should an appeal is lodged against a judgment) and to eliminate any other alternative hypotheses. As Geert puts it, such biases occur particularly under systems and in countries with a strong preference for consensual thinking [9].

The system of extraordinary legal remedies in Europe was mostly left untouched by the reform process. For overturning wrongful convictions and ascertaining judicial
errors, only the “Revision of the criminal procedure” remedy can be considered as a main tool. Revisions are tools that benefit convicted persons, as it is the only way to ascertain judicial error and reverse the final decision. It allows the overturning of the final judgment due to the existence of new cognitive elements that reveal the court’s faulty evaluation of the factual state. However, there is a mutual dependency between revision and judicial error. Luparia calls this a ‘system security mechanism’ where the error is a prerequisite for the request of revision, while on the other side, the judicial error gains legal significance after its assessment through the revision judgment [10]. This makes the system more efficient in guaranteeing the individual’s personal freedom. Revision is perceived as a remedy operating only in favor of the convicted person. The most common type is a revision to the advantage of the accused who is convicted. All jurisdictions offer this remedy. Another type of revision is the ad malam partem revision or to the detriment of the convicted person. This type of revision is found in some jurisdictions in Europe, Croatia included.

The revision is often guided by the principle of the novum criterion. This criterion helps to ensure that any revision to the criminal procedure is not arbitrary but is based on solid reasons and evidence. Furthermore, this ensures that the revision is guided by objective criteria and promotes the goal of justice and fairness in the criminal justice process. Revision can be requested for all final judgments and decisions made by the court, only for factual issues error facti. Revision is allowed to be proposed at any time by the convicted person or his or her next of kin or person’s guardian; if the convicted person is deceased, by his heir or a next of kin. However, revision is also permissible to be lodged by the public prosecutor or the procurator general. All judgments can be subject to revision. The only precondition is the finality of the judgment. Revision must not be understood as a fourth degree of judgment. Only the error that emerges from new facts can justify the overcoming of a final judgment.

The novum criterion or the new evidence criterion plays an important part in the revision hypothesis. The new evidence in the classical legal theory is divided into noviter repertae, noviter productae, and noviter cognitae evidence. The repertae evidence pertains to newly discovered evidence and refers to evidence that was not available at the time of the trial but has been discovered after the finality of the judgment. This type of evidence can include physical evidence, witness testimony, or other forms of evidence that could change the outcome of the trial if it had been presented during the original trial. The productae evidence refers to evidence that was not available at the time of the trial because it was not in existence. An example of this type of evidence could be a new scientific method that is used to re-test DNA evidence, which was not available at the time of the original trial. The cognitae evidence refers to evidence that was known to exist at the time of the trial but was not presented in the original trial. This type of evidence can include, for example, evidence that was withheld by the prosecution or defense, or evidence that was not considered relevant at the time but is now considered relevant considering new information.

However, there is a lack of consensus regarding the novum criterion in judicial practice. In Croatian jurisprudence, the applicability of the novum differentiates in theory and in practice. In theory, the court should be obliged to take into consideration all three types of novum. However, the inspection of several cases by the Innocence Project in Croatia, identified that the application of the novum by the courts is restricted mostly to the noviter productae and repertae evidence, and not so much to the cognitae.
3. Novum in the revision proceedings in Europe: Practices and experiences

Here we will identify several legislative examples from Italy, Germany, and the Netherlands, because of their diverse and special laws for lowering the threshold of establishing a novum in the revision of the procedure. The interpretation and application of the novum ground vary between jurisdictions. The question of whether a different expert opinion or a change of law can be considered a novum is still a topic of debate among legal scholars. The criteria for what is considered new enough and how the new evidence is evaluated also differ between countries. Some countries require new evidence to prove the person’s innocence, while others only require substantial doubt on the person’s culpability. The standard for what is considered enough for revision is still under development. In European jurisdictions, there are two types of revision. The first type is the revision to the advantage of the convicted person, and the second type is a revision to the detriment of the convicted person, even though the proceedings resulted in his acquittal. The second type of revision exists only in some jurisdictions and is considered problematic regarding the non bis in idem principle. The jurisdictions of France, Belgium, and Spain do not accept revision ad malam partem. In France, there was a proposal to add this option in 2014 but it was ultimately rejected due to conflict with the Constitutional provisions of non bis in idem [11]. Meanwhile, Germany, Croatia, the Netherlands, Poland, Sweden, and England allow for revision to the detriment of the accused under specific circumstances. The novum being the most common ground for granting revisions, its interpretation depends on judicial determination in each country specifically. For instance, in Germany, facts can still be considered new even if they were discussed in the main proceedings, as long as the court did not take them into account deliberately. Furthermore, a change of law can also be a cause for revision in some jurisdictions but not in others. England and Croatia, for instance, allow for new arguments of law to be raised in the revision procedure, while Germany and the Netherlands reject a change of law as a ground for revision. The aim here is to detect the diverse practices and experiences these countries have and how can they be transferred into the Croatian criminal procedural legislation.

3.1 Italy

The Italian legal system, after the 1988 reform can be considered a hybrid system with both inquisitorial and adversarial traits. The Italian experiences of the revision proceedings and the establishment of novum are quite interesting and very close to the Croatian examples. The cases for renewal are stipulated in the Italian Code of Criminal Procedure [12], under which a revision can occur if: (a) the facts in the judgment or criminal decree of conviction are incompatible with those established in another final criminal judgment; (b) the decision was based on a judgment that was later revoked if new evidence that proves the accused person’s acquittal is found, or (c) the judgment of conviction was delivered on the basis of false documents or statements. However, the new evidence must be exculpatory and prove the accused person’s innocence. Another basis for revision of the procedure, allowed by the Constitutional Court of Italy, and not envisaged in the law is the revision based on compliance with an EChHR judgment. To some extent, this is not seen as a direct remedy for judicial errors, and it is considered as an indirect remedy because it does not produce any new evidence [13].
Luparia and Pittiruti [5] explain the legal treatment of the revision proceedings stemming from the 1988 Code of Criminal Procedure where the assessment of admissibility and the revision trial are handled by the Court of Appeal. According to Article 634, paragraph. 2 of the 1988 CCP the Court of Appeal must preliminarily assess the admissibility of the request and exclude groundlessness while being careful not to evaluate the merit of the request. If the request is deemed inadmissible, the applicant can appeal to the Court of Cassation. If the request is deemed admissible, the revision trial can take place and the enforcement of the sentence can be suspended by the Court of Appeal. If the request is deemed admissible, the revision trial can take place and the enforcement of the sentence can be suspended by the Court of Appeal. If the request is deemed inadmissible, the applicant can appeal to the Court of Cassation. If the request is deemed admissible, the revision trial can take place and the enforcement of the sentence can be suspended by the Court of Appeal. If the request is deemed admissible, the revision trial can take place and the enforcement of the sentence can be suspended by the Court of Appeal. If the request is deemed inadmissible, the applicant can appeal to the Court of Cassation. If the request is deemed admissible, the revision trial can take place and the enforcement of the sentence can be suspended by the Court of Appeal. If the request is deemed inadmissible, the applicant can appeal to the Court of Cassation. If the request is deemed admissible, the revision trial can take place and the enforcement of the sentence can be suspended by the Court of Appeal. If the request is deemed inadmissible, the applicant can appeal to the Court of Cassation. If the request is deemed admissible, the revision trial can take place and the enforcement of the sentence can be suspended by the Court of Appeal. If the request is deemed inadmissible, the applicant can appeal to the Court of Cassation.

Concerning the clarity of the revision provisions in the law, Luparia notes that revision in article 630, paragraph 1, letter c of the Code of Criminal Procedure has been the subject of numerous legal interpretations, due to the lack of clarity in the law regarding the definition of “new evidence” pertaining to the noviter cognitae type of evidence [2]. Initially, he argues that the judicial praxis’s interpretation was extensive and encompassed all three types of new evidence. Recently, this position was reversed to allow for admission in the revision of any evidence that was not considered by the court. Furthermore, Gialuz [14] identifies the challenge of balancing the limitations of a criminal trial with the continuous advancements in science and technology.

Italian case law generally allows revision requests based on new scientific evidence, but there are difficulties in regard to reassessments of previously acquired evidence. However, with the inclusion of new evidence in the legal definition, the Court of Cassation reversed its stance and has started to allow revisions based on new scientific methods applied to previous evidence. The principle of favor innocentiae supports this adaptation of the trial to the advancements in science. Another extraordinary legal remedy in the Italian procedural system is the Rescission of the final judgment stipulated in art. 629-bis CCP [12]. This remedy allows a convicted person who was absent during the entire proceedings to obtain a revocation of the final judgment if they can prove that their absence was due to an inculpable unawareness of the proceedings. However, the requirements for this remedy, according to the practice of the Court of Cassation are very strict. Such example the absence must be ruled out if the accused had stated an address for service during the investigation phase. The request must be submitted within thirty days to the Court of Appeal in whose district the decision was taken and if accepted, the judgment will be rescinded and the case file forwarded to the first instance court. This remedy is a restorative post iudicatum remedy and is meant to protect the convicted if it is proven that the presumed knowledge of the trial was not accurate. The rescission of final judgment does not result in acquittal but rather a new trial where the accused can fully exercise their right of defense. The new judgment might end with the acquittal of the accused, making the rescission of final judgment a “mediated” remedy for miscarriages of justice.

Summarizing the Italian experiences, it is obvious that the extensive judicial policy of the Court of Cassation is crucial in the admissibility of new scientific evidence. It is important in jurisprudence not to limit the novum criteria to only evidence which were not known previously to the court—the productae. It is imperative to include scientific evidence from supplementary expertise (such as in DNA cases) as a point to establish a novum. Furthermore, as argued by Luparia and other Italian eminent experts, the accessibility to data is of crucial importance. In this perspective along the
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lines of the American experience, it would be advisable to create an Italian equivalent of the U.S. National Registry of Exonerations, providing detailed information on all the cases where final convictions were reversed in a revision trial. This tool would be extremely helpful for scholars to easily obtain the information and data they need to build their own theory on the causes of wrongful convictions, advance reform proposals, and share awareness.

3.2 Germany

The German style of criminal procedure is a classic inquisitorial type of procedure. The German CCP stipulates the grounds for retrying a case in sections 359 and 362 and there are two types of retrial: (a) in favor of the convicted and (b) in disadvantage of the convicted [15]. The grounds for retrial in favor of the convicted are: (a) if separate final verdicts have been reached which are in difference with each other; (b) If a procedural violation has been established by the European Court of Human Rights that has led to a conviction or a conviction of the same act, and a retrial is necessary in line with the principle of redress enshrined in article 41 of the ECHR; (c) If there is a new finding which was not known to the trial judge and, such if the judge would have been aware thereof, it must have most likely resulted in a different verdict. Concerning the applicability of the novum, retrial is possible should new facts or evidence is discovered, or falsified documents have emerged [16]. Furthermore, the law takes into perspective any false confessions from witnesses or experts given under oath or a judge or juror involved in the ruling being guilty of a criminal violation of their public duties. Concerning the praxis of allowing a retrial, they argue that the conditions for reaching a novum are stringent and have been criticized by experts for several reasons. One of the main criticisms is the high threshold of the requirement of proof, and the other is the possible conflict with the constitutional principle of non bis in idem. The provisions for a retrial to the disadvantage of the defendant under Section 362 nos. 1 to 3 of the Code of Criminal Procedure are largely similar to the provisions for a retrial in favor of the convicted persons in Italy. However, there are some differences between the two provisions that are worth noting. Section 362 no. 3 of the CCP, does not envisage the fact that the defendant caused a criminal violation of public duty, unlike in Section 359 no. 3 of the CCP. Furthermore, Section 362 does not contain any grounds for a retrial that correspond to those contained in Section 359 no. 4, which concerns the annulment of a civil court decision. On the other hand, Section 362 no. 4 includes grounds for a retrial that are not found in Section 359 such as the giving of a credible confession by the acquitted party to the crime in question. As this is a new ground that is not found in the Italian, Dutch, or Croatian legislation, A. Engländler and T. Zimmermann point out that this pertains to convicts who are boasting about the crime without punishment. They put this into perspective, as the convicts are factually guilty, but were exonerated on procedural grounds, or lack of evidence [17]. Furthermore, grounds for credible confession can be established when the confession comes directly from the acquitted person, meaning that the facts admitted must be logically possible and in line with reality. Furthermore, the confession must be given personally, and testimonial confessions from alleged accomplices are not sufficient. Permissibility and merit of the petition for retrial are reviewed using the addition method or Additionsverfahren envisaged in Section 366 et seq. The petition must specify the statutory ground for reopening proceedings and the evidence [16]. Furthermore, the petition must be signed by the defense counsel or other legal representative. If the defendant or a close family member wishes to seek a
retrial, they may do so in writing or orally, recorded by the court registry. The petition for retrial is decided by another court with the same jurisdiction to avoid unconscious bias or conflict of interests. The court reviews the formal requirements and evidence indicated in the petition.

Concluding the German experiences there is a need for up-to-date empirical knowledge and potentially establishing a national registry for exonerations to aid research. The lack of retrial statistics is also a problem. In Germany no official statistics are kept for successful retrial processes, making it difficult to determine the actual number of judicial errors. However, in Germany, certain Innocence Projects and academic studies are analyzing successful retrial processes and are publishing the results which would further aid the promulgation of updated legal solutions. Alongside the German Innocence Project which is monitoring the field situation, Lindemann and Lineau refer to the study by the Kriminologische Zentralstelle in Wiesbaden [18]. The preliminary results of these studies have shown that the majority of the wrongfully convicted persons had been convicted of sexual or violent offenses and the reasons for the errors were mainly false accusations and incorrect evidence from expert witnesses. Regional differences in handling retrial processes and the threshold for novum criteria were also noted. Also, several political initiatives in Germany campaigned to allow for the retrial of a defendant in criminal cases if new facts or evidence come to light. The idea was primarily driven by advancements in DNA analysis but was limited to murder and other crimes potentially subject to life imprisonment. However, these initiatives faced constitutional objections and the most recent proposal faced significant opposition in Parliament. Some of the concerns were that losing the current restriction on presenting new evidence would potentially undermine the principle of non bis in idem.

3.3 The Netherlands

The Dutch criminal justice system is inquisitorially based. What makes this system unique is the promulgation of the new law on lowering the threshold for establishing a novum in the retrial procedure. Before the promulgation of this law, wrongful convictions were perceived to be a problem that occurred abroad, and not in the Netherlands. The law was a product of the work of the Netherlands’ Innocence Project and the several major cases that were revised based on the wrongful determination of the facts. As in Germany, the judge and the public prosecutor are expected to establish the truth. Knoops and Bell [19] argue that this system in the Netherlands will be successful only when the investigation is truly objective and when incriminatory and exculpatory evidence is fully disclosed to the defense. Concerning the retrial procedure, in the Netherlands, the Supreme Court determines whether or not a retrial should be granted. If it is granted, the case is referred to the Court of Appeals to conduct a new trial. The major case which has contributed to the promulgation of the Law on Redressing Miscarriages of Justice was the Schiedammer Park Murder case where a wrongful conviction was established. That case illustrated that the threshold for revision of the criminal procedure, was very narrow, and thus, a new Law was promulgated. The law on redressing the miscarriages of justice further expanded the review system of criminal cases to the advantage of the accused and lowered the threshold for establishing a novum. The promulgation of this law was not pro forma. The first new aspect of this law puts the focus on expert scientific findings to be subsumed under the novum criterion. Furthermore, this new law established the ACAS Commission for finding new facts and aiding convicted persons in identifying
the novum. The Dutch legislator followed partially the German criminal justice system with respect to new expert evidence. However, there were never any issues in the Netherlands with the principle of non bis in idem as was the case with the German legal proposals. Under the legal provisions, expert evidence can be deemed admissible when (a) particular issues have not yet been examined; (b) after the expert research has been conducted, there is a new expert with new conclusions derived from using different research methods, or it is from a different profession, and (c) a new expert reaches different conclusions on the basis of the same facts of the case because the previous research was either based on incomplete or incorrect factual assumptions or as a result of new scientific development. Knoops and Bell argue that not every fact or finding will be sufficient to novum threshold and provide an example of a verdict of the Supreme Court of the Netherlands rejecting a new witness statement for establishing a novum for a retrial, in which the witness recants a previously incriminating statement [19]. The second aspect of this law is the establishment of the ACAS system. The new law recognized that establishing a novum is very time-consuming and costly effort and therefore made it possible to request the attorney general of the Supreme Court to conduct a pre-investigation [20]. This means that forensic investigations, should they be granted, could be conducted and paid for through this legal avenue. The ACAS system facilitates a defendant who claims that a novum exists, without having full proof of it. Summarizing the Dutch experiences there are major novelties worth considering. The establishment of a special Exoneration Register has been pointed out by Knoops and Bell as a main obstacle to conducting further research. However, the acknowledgment of the problems of wrongful convictions by society and the promulgation of the new laws for lowering the threshold of establishing a novum and having that indication to be researched by the state is a major breakthrough.


Concerning the issue of new evidence and revision of the criminal proceedings, the ECtHR and the ECJ, although have different mandates, have some similarities and differences. In cases involving new evidence and reopening of criminal proceedings, the ECtHR assesses whether the state has respected the right to a fair trial and other related rights, such as the prohibition of torture and inhuman or degrading treatment. On the other hand, the ECJ in cases involving new evidence and reopening of criminal proceedings focuses on the interpretation of EU law in relation to the rights of individuals in criminal proceedings, such as the principle of the sound administration of justice and the principle of the protection of the rights of the defense.

4.1 ECtHR jurisprudence

From the cases elaborated in this chapter, it is evident that when it comes to new evidence in terms of novum criterion, the ECtHR applies a three-part test when assessing the reopening of criminal proceedings in light of new evidence: (1) the nature and reliability of the evidence, (2) the nature and extent of the proceedings, and (3) the interests of justice. Should the new evidence raise serious were not evaluated by a court, or a retrial was not allowed, the Court will generally find a violation of the right to a fair trial. As seen through the comparative overview of the
other jurisdictions, the ECtHR judgments are considered a tool for allowing a revision in national jurisdictions. The ECtHR (ECtHR) has applied the *noviter repertae, productae, and cognitae* evidence principle in various cases to determine if a violation of the ECHR in terms of revision of the criminal proceedings has occurred. In the case of Kostovski v. the Netherlands the applicant claimed that his right to a fair trial had been violated because the prosecution had withheld evidence that was favorable to the defense and could potentially lead to his exoneration. The prosecution’s failure to disclose the evidence had seriously undermined the fairness of the trial [21]. As argued above, how in some jurisdictions there is a problem with presenting new scientific evidence, especially DNA evidence and supplementary testing, the case of Ocalan v. Turkey, demonstrates why lowering the threshold for admissibility of such evidence is crucial. The applicant claimed that his right to a fair trial had been violated because new scientific methods that were not available at the time of the trial had been used to re-test DNA evidence that was crucial to the prosecution’s case. The Court has determined that the applicant’s right to a fair trial had been violated. Evident from these cases is the position of the ECtHR in recognition of the revision of the procedure based on any type of new evidence in determining whether the right to a fair trial had been violated [22]. Furthermore, by applying the margin of appreciation in each case, the Court had demonstrated that not considering new evidence may infringe on the right to a fair trial. From the practice of the Court, it is evident that national jurisdictions should lower the threshold of presenting a *novum* for the revision of criminal proceedings.

### 4.2 CJEU jurisprudence

The jurisprudence of the CJEU in cases involving new evidence and reopening of criminal proceedings focuses on the interpretation of EU law in relation to the rights of individuals in criminal proceedings. Regarding the revision of criminal proceedings and presentation of new evidence, the CJEU applies the principle of the sound administration of justice and the principle of the protection of the rights of the defense. This is demonstrated through the case of the Q.M. v. Minister for Justice and Equality from Ireland and Aranyosi and Caldararu [23] where the applicant was convicted of a criminal offense. After the original trial, new evidence came to light that called into question the reliability of the evidence used previously. The applicant sought to have their conviction reviewed in light of this new evidence but was unable to do so because there was no provision in Irish law allowing for a review of a final conviction in such circumstances. He argued that the EU law, specifically the right to a fair trial under Article 47 of the Charter of Fundamental Rights of the European Union, required national courts to have the power to review convictions in the light of new evidence. The CJEU was asked to determine whether the EU law required national courts to have the power to review convictions in such circumstances. In the judgment, the CJEU held under the EU law national courts must allow the possibility to review convictions in the light of new evidence, even where there was no provision in national law allowing for such a review. The ECJ concluded that the right to a fair trial under Article 47 of the Charter of Fundamental Rights of the European Union required national courts to have the power to review convictions in the light of new evidence and that this right must be granted to all individuals, regardless of the type of proceedings they are involved in. Another interesting case of the CJEU where the conditions under which a revision of the criminal procedure based on new evidence are presented, is the case of X and Others v. Public Prosecutor’s Office [24]. The
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applicants of this case were previously acquitted in a criminal trial but the procedure was reopened to their detriment due to the emergence of new evidence. The CJEU upheld that EU law mandates national courts to consider all relevant and admissible evidence in the decision-making process of a retrial in a criminal procedure, including evidence that was previously unavailable or unknown to the parties involved. The court emphasized that a retrial must be granted in all relevant and admissible evidence, and the accused must be granted the opportunity to contest and present evidence in defense, in accordance with the principles of a fair trial and the right to an effective remedy. Although there are no direct cases against Croatia, a lesson should be learned about expanding the grounds for evaluating a *novum*, and lowering the threshold.

5. Revision of the criminal procedure in Croatia

Jurisdictions in South-Eastern Europe have undergone criminal justice system reforms over the past two decades with the aim of moving away from the legal systems established during the Socialist Federal Republic of Yugoslavia and creating new systems reflective of the post-conflict political and societal reality. These jurisdictions have moved away from traditional continental/inquisitorial criminal justice systems and have introduced elements of Anglo-Saxon/adversarial criminal justice models in an effort to increase the efficiency of their criminal justice systems. These new criminal procedure codes were adopted with the goal of modernizing the system but have also raised concerns about the wrongful conviction efficiency of the procedure. The interest in Innocence Projects started in Croatia in 2015, mainly as a result of academic discussions and conferences about the fate of wrongfully convicted people and the possibilities of post-conviction DNA examination. It culminated in 2020 when for the first time the experimental Innocence Project was established, implemented by the Faculty of Law in Zagreb, and financed by the Croatian Science Foundation. The main purpose of the Croatian Innocence Project is to raise public awareness of miscarriages of justice, campaign for legal changes which ought to lower the threshold for defendants to have their cases re-opened, and to provide legal representation for those who are believed to have been wrongfully convicted [25]. The Institute for revision of the criminal procedure envisaged in the Croatian Code of Criminal Procedure has been subjected to the overall reform of the Code of Criminal Procedure. The revision of the criminal procedure institute is related to the *non bis in idem* institute, stipulated in Article 31, paragraphs 2 and 3 of the Croatian Constitution, which provides that a revision of the criminal case can be permitted only if it is in line with the law and the Constitution [26]. There are discrepancies on this issue between the CCP and the Constitution, where the Code in article 12 paragraph 2 strictly prohibits revision of the criminal procedure for an exonerated person, whereas there is no such absolute prohibition in the Constitution. The revision of the criminal procedure is regulated in 12 articles from the CCP, where seven of them were subjected to an additional reform because of the Croatia EU accession process, and the influence of the jurisprudence of the European Court of Human Rights. The revision is done by the higher court and the Supreme Court of Croatia. Furthermore, according to Tomicic [27], although several reforms were made to the revision of the criminal procedure, the legislators failed to address the issue of which of the judicial decisions in this process are subject of substantive validity of the judgment. This means that the CCP recognizes all three types of judgments (convicting, acquiting, and rejecting judgments) as
a subject for revision, and the Constitution recognizes only convicting and acquitting judgments. The CCP envisages seven types of revision: (a) improper revision—where only the sanction is evaluated; (b) Revision in cases where the indictment is rejected; (c) revision of the completed criminal procedure before the indictment; (d) Proper revision of the criminal procedure after the valid judgment; (e) Revision in *mala partem* on the detriment of the accused after acquittal; (f) Revision after the trial in absentia, and (g) Revision on the grounds of decisions of the Constitutional Court of Croatia and the European Court of Human Rights [28]. Concerning the proper revision of the criminal procedure the CCP allows the procedure to be revised if it is proven that the judgment is based on a false document, recording, or false testimony of a witness, expert, or interpreter. Also, if it is proven that the judgment was due to a criminal offense committed by a state attorney, judge, jury judge, investigator, or another person who performed evidentiary actions. Concerning the *novum*, the practice done within the Innocence Project Croatia indicates that the threshold is very high, and it is almost impossible to reach. In a specific case, the County Court of Rijeka rejected the request of the convicted person for revision of the criminal procedure even though new evidence was presented that one of the witnesses made a false statement in court. The faulty witness made a new notary confirmed statement, recanting his previous statement given in the trial, the County Court evaluated that this was not sufficient to fulfill the *novum* threshold. The Court argued that repetition would be allowed only when the witness has been formally convicted for obstruction of justice, and only then the new judgment would be considered a credible criterion for revision. No doubt that such an allegation warrants further investigation in the case, however, if any alleged fact was already known to the trial and appeal judges would not result in a *novum* [27]. Another case demonstrates how high the reaching the *novum* threshold where DNA expertise was conducted. Faulty DNA expertise is a valid ground for proper repetition of the criminal procedure [29]. In this case, the convicted was sentenced to 29 years in prison for aggravated murder and rape based on witness testimonies and DNA expertise. The defendant’s appeal to the Supreme Court stated wrongfully determined factual state and wrongfully evaluated DNA expertise by the court, stating that the test results of his trousers showed DNA material belonging to a third party, and that was clearly stipulated in the laboratory report. The additional findings and expert opinions cited in the judgments stated that apart from the DNA profiles of the victim and the perpetrator, there was an epithelium of a third person on his trousers that was impossible to isolate and determine the identity of the person due to insufficiency of the material. The Supreme Court argued that although there is another epithelium that belongs neither to the victim nor the defendant, that does not exclude the culpability of the defendant, since those trousers include his and the victim’s blood as well. This case demonstrates why supplementary DNA expertise is necessary, and why some form of mechanism must be established for lowering the *novum* [30].

The perception of legal practitioners is that the criterion is set very high, and further legal reform is needed, to lower the threshold for a *novum*. Furthermore, it is a positive novelty that the law does not stipulate any limitation on how many time a request can be made, regardless of whether there is an amnesty, pardon, or limitations of the crimes.

6. Conclusion

In contrast with other European countries, overturning wrongful convictions based on a revision of the procedure and proving the *novum* is still an under-researched topic.
in Croatia. The initially reviewed cases of the Innocence Project of Croatia have so far demonstrated that false confessions and improper forensic expertise are major contributing factors that need to be the further subject of discussion and potential reform [31]. The introduction of the Croatian Innocence Project has raised awareness of potential miscarriages of justice and has led to calls for legal changes. The revision of the criminal procedure institute has undergone reforms, but there are still discrepancies between the Code of Criminal Procedure and the Constitution on the issue of revision. The threshold for revision of a criminal procedure is considered very high, and there have been instances where new evidence was not enough to reach the threshold. The lack of research and a centralized database is not a problem only for Croatia, but for other European countries as well, as seen in this analysis. As seen from the German example, the possible conflict with the non bis in idem principle is not a problem at all when it comes to revision cases and establishing a novum. Establishing a National Exoneration Register alongside the U.S. model is highly advisable for the promulgation of future informed policy decisions. Furthermore, substantive legislation changes are needed in Croatia in terms of acknowledgment of the problem of proving a novum. It is a costly and time-consuming experience, as well as the convicted person, does not enjoy the liberty to collect the new evidence, as he is deprived of liberty. Therefore, the Dutch experiences should serve as an indicator, and establishing a similar body alongside the model of ACAS, where the notion of novum is investigated, as in the Netherlands is highly advisable.

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Conflict of interest

The author declares no conflict of interest.
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