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Contents

- 1 Between Legal Certainty and Doubt. The Developments in the Procedure to Overturn Wrongful Convictions in the Netherlands
Nina Holvast, Joost Nan & Sjarai Lestrade
- 13 Chosen Blindness or a Revelation of the Truth? A New Procedure for Revision in Belgium
Katrien Verhesschen & Cyrille Fijnaut
- 22 Correcting Wrongful Convictions in France. Has the Act of 2014 Opened the Door to Revision?
Katrien Verhesschen & Cyrille Fijnaut
- 33 The Challenges for England's Post-Conviction Review Body. Deference to Juries, the Principle of Finality and the Court of Appeal
Carolyn Hoyle
- 44 The Right to Claim Innocence in Poland
Wojciech Jasiński & Karolina Kremens
- 55 Overturning Wrongful Convictions by Way of the Extraordinary Review. The Spanish Experience
Lorena Bachmaier Winter & Antonio Martínez Santos
- 63 Post-Conviction Remedies in the Italian Criminal Justice System
Luca Lupária Donati & Marco Pittiruti
- 73 Mechanisms for Correcting Judicial Errors in Germany
Michael Lindemann & Fabienne Lienau
- 87 Exoneration in Sweden. Is It Not about Time to Reform the Swedish Model?
Dennis Martinsson
- 102 A European Approach to Revision in Criminal Matters?
Joost Nan, Nina Holvast & Sjarai Lestrade

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 **Nederlandse
uitgeversverbond**
**Groep uitgevers voor
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Between Legal Certainty and Doubt

The Developments in the Procedure to Overturn Wrongful Convictions in the Netherlands

Nina Holvast, Joost Nan & Sjarai Lestrade*

Abstract

The Dutch legislature has recently (2012) altered the legislation for post-conviction revision of criminal cases. The legislature aimed to improve the balance between the competing interests of individual justice and the finality of verdicts, by making post-conviction revision more accessible. In this article we describe the current legal framework for revising cases. We also study how the revision procedure functions in practice, by looking at the types and numbers of (successful) requests for further investigations and applications for revision. We observe three challenges in finding the right balance in the revision process in the Netherlands. These challenges concern: 1) the scope of the novum criterion (which is strict), 2) the appropriate role of an advisory committee (the ACAS) in revision cases (functioning too much as a pre-filter for the Supreme Court) and, 3) the difficulties that arise due to requiring a defence council when requesting a revision (e.g., financial burdens).

Keywords: revision law, post-conviction review, wrongful convictions, miscarriages of justice, criminal law, empirical research

1 Introduction

While all legal systems aim to exclude the possibility of wrongful convictions, the reality is that wrongful convictions cannot completely be ruled out. This is also true for the Netherlands. Nevertheless, the legislation in the Netherlands to reopen closed cases for revision traditionally has been restrictive.¹ In the legislative process, the importance of the principle of finality of legal procedures was of primary importance.² The prevailing idea has been that revision of unjust cases should be possible. However, having a revision procedure should not feed the idea that the normal procedures are inadequate

to provide adequate legal protection.³ The legal system requires there to be no subsequent debate on the outcome, unless there are strong and fresh leads indicating that there is something fundamentally wrong with the conviction.

This understanding of post-conviction revision law was jeopardised when various controversial ‘wrongful conviction’ cases emerged at the beginning of this century (details of these cases are provided in Section 2). After an extensive discussion in parliament, new legislation was passed by means of the *Reform of Revision in Favour of Former Suspects Act* in 2012. Since 1 October 2013, revising cases to the detriment of former suspects has also been made possible,⁴ but that will not be discussed in this article (only one such case has been submitted to the Supreme Court, as of the writing of this article).⁵ The new legislation (described in detail in Section 3) aimed to create a better balance between legal protection against wrongful convictions and the notion of legal certainty by having a legal process that has an end. Improving this balance was expected to be beneficial to the overall trust in the justice system.⁶ In this article we will investigate how the Netherlands currently stands with regard to this balance. Does the new legislation indeed provide a better balance between these principles? And what challenges are still faced in achieving the right balance?

To answer these questions, we use the data from an evaluation study we performed five years after the legislation was passed, which was commissioned by the Ministry of Justice and Safety.⁷ We analysed all the submitted requests for revision and all applications for further investigation (a new opportunity created by the legislation), made in the period October 2012 to December 2017. We also interviewed twenty-eight professionals involved in the revision process and held a meeting with seven experts to discuss our findings. For this article, we also include new developments that have occurred over the years 2018 and 2019. We analysed all deci-

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1. Several terms are used to describe the remedy of overturning a final criminal conviction (or, more broadly, criminal verdict), such as (extraordinary) review or revision. In this article, we will use the term revision.
2. See for the legal history J.S. Nan, ‘Herziening ten voordele van de gewezen verdachte als buitengewoon rechtsmiddel’, 1 *Nederlands Tijdschrift voor Strafrecht* 11 (2020).

3. See the introduction of legislation in 1899 *Kamerstukken I 1898/1899*, 78, no. 78; See the recent changes in legislation *Kamerstukken II* 2008/09, 32045, no. 3, at 5.

4. See Art. 482a et seq CCP.

5. Dutch Supreme Court, 8 November 2016, ECLI:NL:HR:2016:2520, NJ 2017, 69, m.nt. T. Kooijmans (*Vivaldi*). The Supreme Court rejected the petition.

6. *Kamerstukken II* 2008/09, 32045, no. 3, at 5.

7. J.S. Nan, N.L. Holvast, S.M.A. Lestrade, P.A.M. Mevis & P. Mascini, *Victa vincit veritas? Evaluatie Wet hervorming herziening ten voordele* WODC (2018).

sions on applications to conduct further investigations in 2018 and 2019, as well as several significant requests for revision.

In Section 2, we start by providing background information on the developments that resulted in the changes in the revision legislation. In Section 3, we describe the new legislation (i.e., the current legal framework in the Netherlands) for post-conviction revision. Section 4 provides an overview of how different parts of the revision legislation (the applications for further investigation and the requests for revision) function in practice. In Section 5, we discuss three challenges for the execution of revision law. In the final section, we conclude that the new legislation results in a marginally better balance and that there remain important attention points regarding post-conviction revision.

2 Developments that Resulted in Changing the Legislation

The extraordinary remedy of revision in favour of former suspects (*herziening ten voordele van een gewezen verdachte*) originated in 1899, after a highly controversial case in which three brothers were convicted unjustly. The three brothers Hoogerhuis were deemed troublesome by the authorities and were wrongfully accused of a robbery, committed in early December 1895. The victims altered their earlier statements, possibly because the District Attorney's office put pressure on them. Only after a famous Member of Parliament, the socialist Troelstra, advocated on their behalf, the conviction of the brothers Hoogerhuis was revised. In the new legislation several rudimentary grounds for revision (such as the fact that the victim of manslaughter turned out to be alive), were reformulated to two grounds: conflicting convictions or a novum.⁸ When the new Criminal Procedural Code (CCP) was enacted in 1926, the remedy took its current place in the legal framework in Article 457 et seq. In 2003, a third ground was added. Revision was also possible if a judgement by the European Court of Human Rights (ECtHR), in which a violation of the Convention was established, made redress necessary.⁹

Events at the beginning of this century pointed to various shortcomings in the revision process and eventually led to another significant change in the legislation in 2012. These events started with a wrongful conviction in the infamous *Schiedam Park Murder*, a case concerning the rape and murder of a young girl in 2000 in a park in the city of Schiedam. This case illustrates a clear example of a wrongful conviction. A passer-by, who was a known paedophile, was convicted for the murder, primarily on a (later retracted) confession and some circumstantial evidence. In 2004, a year after the final conviction by the Supreme Court, another person confessed

to committing the crime, and new convincing evidence indicated that this man was in fact the real murderer.¹⁰ As a response to this wrongful conviction, an evaluation committee was established (the *Committee Posthumus*). This committee wrote a report commissioned by the Procurator General, which resulted in various recommendations to improve the investigation and prosecution of criminal cases.

However, at the turn of the century, more miscarriages of justice emerged, and these cases showed that making improvements to the investigation and prosecution alone was not enough. One of these cases was the *Putten Murder Case*, committed in 1994. In 1995, two men were convicted for raping and murdering a young woman, even though both of their DNA did not match the DNA of a drop of semen found at the crime scene. They had at one point during police investigations, admitted they committed the crimes, but later retracted this. In 2001 this conviction was finally revised. In this case, an expert report regarding a theory of dragging out semen from earlier sexual intercourse played an important role in the conviction. This theory was needed to explain how semen from a third person was found on the leg of the victim, but the two other men subsequently committed the rape and murder. The expert later retracted his report and the statements he made in court.¹¹ The expert was now of the opinion that earlier sexual intercourse could be ruled out.¹² Another case concerned the murder of an 89-year old woman. Ina Post, the caregiver, was convicted for theft and murder of the woman in 1987. The conviction in this case was also based on confessions of the accused that were later retracted. In the revision that finally occurred in 2010, it was concluded that the police investigations had from the start focused on proving the guilt of Post, instead of trying to establish the facts. A fourth wrongful conviction case concerns Lucia de Berk. In 2003, a hospital nurse, Lucia de Berk, who worked with sick children, was convicted of multiple murders after she was present during a number of unnatural deaths that were statistically highly unlikely to be coincidental. Expert opinions about the deaths being unnatural were important in convicting De Berk, who always claimed her innocence. She was eventually acquitted in 2010.

Several of these cases concerned acquittals that had occurred ten (*Putten Murder Case*) or twenty (*the case of Ina Post*) years after the conviction. Evaluations of these

8. What a novum entails is described in Section 3.1.

9. See Art. 457(1 b), Dutch Code of Criminal Procedure.

10. This man's DNA matched various crucial samples found at the crime scene, and he possessed knowledge that only someone who was highly involved could know. For an English analysis of this case, see P.J. van Koppen, 'Miscarriages of Justice in Inquisitorial and Accusatorial Legal Systems', 7 *Journal of the Institute of Justice and International Studies* (2007).

11. This was presumably because he was not aware of the fact that the semen was found on more places on the body of the victim. He now also stated that semen could only be found outside the body within half an hour after intercourse.

12. It was also concluded that undue pressure was used in the police interrogations, which resulted in false confessions by the men accused of the murder. Later, the third person identified, whose semen was found, was convicted for the crime.

wrongful conviction cases pointed to various additional defects in the regular investigation, prosecution and adjudication of criminal cases.¹³ The cases also uncovered the difficulties in reopening legal procedures to re-examine these cases. All cases displayed early signs that the convictions were wrongful. Nonetheless, the process of getting the cases revised was, without exception, lengthy, and in all cases, earlier requests to reopen the cases were rejected. The cases also revealed how difficult it was for the convicted persons to collect new and convincing evidence to prove their innocence. This resulted in the awareness that existing revision procedures did not provide adequate protection to overcome wrongful convictions. As a result, several measures were taken to improve the existing possibilities to request revision. These measures had two primary aims: 1) improving the possibility of collecting evidence to successfully request a revision, and 2) extending the legal grounds for revisions.

The first measure was taken in 2006 on an ad hoc basis. By means of an experiment, a temporary commission, the Commission Evaluation Closed Cases (*Commissie Evaluatie Afgesloten Strafzaken*, CEAS) was formed.¹⁴ This committee consisted of legal academics, attorneys, police officers and prosecutors. Scientists, or whistle-blowers from the prosecution office or police, could submit applications to this committee to conduct research to find defects in the investigation of cases. The core purpose of the commission's work was evaluative, yet in practice, the reports exposed essential information that was used to substantiate requests for revision at the Supreme Court.

The CAES was however a temporary solution. Furthermore, the CAES's goal to evaluate the investigation process made it unsuitable to provide all relevant material that was legally required for the revision of cases. Establishing the CAES also did not solve the problem that certain new evidence simply did not fit into the legal requirements for revision, even though many legal experts agreed that such evidence should provide a reason to consider revision. In particular, new expert evidence did not fit the legal requirements for revision. These shortcomings resulted in two key alterations to the existing legal framework: the creation of a new procedure that (in serious cases, prior to an application for revision) provides former suspects the opportunity to request that the Procurator General initiates further investigations into the existence of new evidence, and the amendment of the novum criterion to encompass more situations. The new opportunity to request further investigations also resulted in the establishment of a new advisory committee to examine these cases, called the ACAS (*Advies Commissie Afgesloten Strafzaken*, or the Advisory Committee for Concluded Criminal Cases).

13. See CEAS-reports on the Enschedese ontuchtzaak, Lucia de B. and Ina Post.

14. See more about this committee in J. de Ridder, C.M. Klein Haarhuis & W.M. de Jongste, *De CEAS aan het werk. Bevindingen over het functioneren van de Commissie Evaluatie Afgesloten Strafzaken* WODC (2006-2008).

3 Legal Framework for Revision

In this section, we describe the grounds for revision, the legal framework to request further investigations and the legal requirements of the procedure to apply for revision.

3.1 Grounds for Revision

3.1.1 Conflicting Convictions

There are three grounds for revision. The first ground for revision under Article 457, paragraph 1 CCP (sub a) is the circumstance of conflicting convictions. This circumstance rarely occurs. The conflict needs to consist of factual findings concerning the perpetration of the crime or crimes. At least one final conviction and another conviction in which the proved charges in both cases are incompatible with each other are required. Both judgements have to have been given by a Dutch criminal court. Two types of conflicts are possible. First, the conflict can involve the same convicted person. For instance, someone may be convicted of theft at a given time and place but, according to another verdict, was at the other side of the country at that specific time, committing another crime. Second, a conflict can also occur if different persons are involved and there are judgements stating that they both committed the same crime (not in any sort of collaboration). In both situations, the convictions are contradictory, and at least one of them is wrong.

3.1.2 A Judgement by the ECtHR

The second ground for revision is a judgement of the ECtHR in which a breach of the Convention or any of the protocols of the ECHR is established and revision is necessary to redress the breach (as mentioned in Art. 41 ECHR sub b).¹⁵ This ground was established in 2003¹⁶ and is limited to judgements of the ECtHR only; verdicts of other international tribunals such as the United Nations Human Rights Committee in Geneva or the EU Court in Luxembourg are not included. A unilateral

15. See P.H.P.H.M.C. van Kempen, *Heropening van procedures na veroordelingen van het EHRM. Over redres van schendingen van het EVRM in afgesloten strafzaken alsook afgesloten civiele en bestuurszaken* (diss. Tilburg) (2003). According to the ECtHR, the reopening of proceedings or a retrial could be an appropriate way to redress a violation, but this is not always mandatory, *Moreira Ferreira v. Portugal* no. 2, ECHR (2017) App. No. 19867/12, 47-51, NJ 2019, 280, m.nt. P.A.M. Mevis.

16. The attempt of Van Mechelen to have his case revised after a successful complaint in Strasbourg on Art. 6 ECHR (the right to interrogate anonymous witnesses (police officers)), failed in 1999. The ECtHR judgement was not considered a novum, and the law did not offer revision on another ground. The Supreme Court did not see it as its role to overcome this legal gap. Therefore, the legislature acted. See *Van Mechelen and Others v. The Netherlands*, ECHR (1997) App. No(s). 21363/93, 21364/93, 21427/93 and 22056/93; Dutch Supreme Court 6 July 1999, ECLI:NL:HR:1999:ZD1603, NJ 1999, 800, m.nt. J. de Hullu (*Herziening na Straatsburg*). The same goes for a ruling by the EU court in Luxembourg, Dutch Supreme Court 9 April 2019, ECLI:NL:HR:2019:546, NJ 2019, 439, m.nt. P.A.M. Mevis.

declaration of the Dutch government that the ECHR or a protocol has been breached does not appear to be sufficient.¹⁷ There have been only a few examples of successful pleas for revision on this ground, such as the *Vidgen* case and the *Hokkeling* case.¹⁸

3.1.3 *Novum*

The third, and most commonly used, ground for revision is a *novum* (sub c). Under the current legislation, a *novum* requires that there is ‘a data point’ (*een gegeven*).¹⁹ This data point should have been unknown to the court during the court hearing. Furthermore, it should either on its own or in relation to the previously submitted evidence seem incompatible with the judgement, to such an extent that a serious suspicion arises that, should this data point have been known, the investigation into the case would have resulted in the former suspect being acquitted or discharged from prosecution, in the prosecution being barred or in the application of a less penal provision. Before the new legislation was enacted in 2012, instead of a ‘data point’, the legislation referred to ‘a circumstance’. This circumstance had to be new and important and it had to be of a factual nature. Because in some cases this concept was considered too narrow, the Supreme Court on occasions made an exception to the requirement that the new evidence was of a factual nature and broadened its scope. New forensic expertise was, in special circumstances, also framed as a *novum*.²⁰ A good example is the aforementioned *Putten Murder Case*, in which the expert was of a different opinion at a later stage, based on facts which were new to him. In the case of *Lucia de B.* the conviction was also revised due to a new expert opinion. This opinion was based on more medical data than the previous expert had available, now indicating a natural death of one of the children. The change in the legislation was specifically aimed to avoid the necessity of such figurative constructions of the Supreme Court.²¹ One could argue that the stipulation itself was significantly changed (extended) but that the actual impact was limit-

ed since it mainly encompassed a codification of the exceptions the Supreme Court already made. There is an ongoing (parliamentary) debate on whether the ‘serious suspicion’ requirement should be lowered to further extend this ground, and whether, for instance ‘reasonable doubt’ would suffice to have a case retried (see also Section 5).²²

In the interpretation of what constitutes a data point, expert evidence was particularly central to the discussion. On the basis of parliamentary history, there are four new situations in which new expert evidence could provide a data point.²³ In an important ruling, the Supreme Court set out some principles on this topic.²⁴ Hereby, an explicit reference was made to the legislative history for cases in which an expert opinion can provide new evidence.²⁵ The Supreme Court imposed specific requirements on experts²⁶ and their opinions. Any expert opinion/insight which is presented as new and/or revised must be of sufficient quality and weight to lead to a revision of the judgement, and the revision application must provide sufficient clarity such that the content and novelty of this opinion can be deemed of value. The mere fact that an expert has a different view on the evidence does not give rise to the mandatory ‘serious suspicion’. Changes in law, in case law or in the public view on the criminality of the proved conduct are not a data point, nor is a verdict from the EU Court in Luxembourg.²⁷

3.2 A Further Investigation

Under the new provisions enacted through the *Reform of Revision in Favour of Former Suspects Act*, former suspects may turn to the Procurator General and request that a further investigation is initiated ‘in preparation of a revision application’ (Art. 461, paragraph 1 CCP). This relates to a situation in which reasonable doubt exists about the correctness of a judgement, but without further investigation there is insufficient information to

17. See, for example, the *Keskin* case, *Keskin v. The Netherlands*, ECHR (2015) App. No. 2205/16 (communicated case).

18. *Vidgen v. The Netherlands*, ECHR (2012) App. No. 29353/06; Dutch Supreme Court 4 June 2013, ECLI:NL:HR:2013:CA1782, NJ 2013, 333; Dutch Supreme Court 6 June 2017, ECLI:NL:HR:2017:1017, NJ 2017, 378, m.nt. J.M. Reijntjes (*Post-Vidgen*); *Vidgen v. The Netherlands*, ECHR (2019) App. No. 68328/17. *Hokkeling v. The Netherlands*, ECHR (2017) App. No. 30749/12; Dutch Supreme Court 19 September 2017, ECLI:NL:HR:2017:2412, NJ 2019, 281, m.nt. P.A.M. Mevis. Since 2012, co-conspirators of the applicant can also benefit from a judgement by the ECtHR, depending on the nature of the breach.

19. A data point could be a new piece of ‘hard’ evidence such as a statement by a witness, a fingerprint or DNA trace, but also a (revised) opinion of an expert.

20. See Dutch Supreme Court 26 June 2001, ECLI:NL:HR:2001:AA9800, NJ 2001, 564, m.nt. T.M. Schalken (*Putten Murder Case*) and Dutch Supreme Court 7 October 2008, ECLI:NL:HR:2008:BG1941, NJ 2009, 44, m.nt. P.A.M. Mevis (*Lucia de B. Murder Case*). For an analysis (in Dutch) of the qualification as *nova* in the *Ina Post* and the *Deventer Murder case* see H.F.M. Crombag, H. Israëls, P.J. van Koppen & W.A. Wagenaar, ‘Twee nova: Ina Post en de Deventer moord-zaak’, 8 *Nederlands Juristenblad* 378, at 475–478 (2010).

21. For the parliamentary history, see *Kamerstukken II* 2008/09, 32045, no. 3, at 9–11 and 27.

22. See Nan, above n. 2.

23. These are, first, the situation in which the relevant question, which is directly related to proven charges, has not yet been submitted to an expert. Second, there is the situation that a new expert, from another field of expertise or on the grounds of other investigative methods, arrives at new conclusions. Third, there is the case that, on the grounds of the same facts, a new expert reaches another opinion because the previous expert opinion was based on incorrect factual assumptions or because there are new developments in the relevant field of expertise. Fourth, there is the situation that the expert backtracks from his or her original opinion because this opinion was based on an incorrect premise due to the lack of correct initial information.

24. Dutch Supreme Court 17 April 2018, ECLI:NL:HR:2018:605, NJ 2018, 272. See also Dutch Supreme Court 26 April 2016, ECLI:NL:HR:2016:736, NJ 2016, 305, m.nt. J.M. Reijntjes.

25. The ruling did not specifically refer to the fourth situation (the expert backtracks from his or her original opinion because this opinion was based on an incorrect premise due to the lack of correct initial information).

26. One factor is whether the expert is officially registered as an expert (in the *Nederlands Register Gerechtigdijk Deskundigen*).

27. Dutch Supreme Court 12 March 2013, ECLI:NL:HR:2013:BZ3627, NJ 2013, 438, m.nt. N. Keijzer (*Tongzooen II*); Dutch Supreme Court 25 June 2013, ECLI:NL:HR:2013:73, NJ 2013, 548, m.nt. T.M. Schalken and Dutch Supreme Court 9 April 2019, ECLI:NL:HR:2019:546, NJ 2019, 439, m.nt. P.A.M. Mevis.

build a revision application. The legislature is aimed at creating a new opportunity to mitigate a former suspect's weak position in providing evidence of a wrongful conviction.

Investigations can only be requested when they are expected to result in a novum. The request to have further investigation into new evidence cannot be submitted for every conviction, only for more serious offences. A request should concern a criminal offence that is subject to a prison sentence of a minimum of twelve years. Cumulatively, it is also required that the criminal offence in question has 'seriously shocked' the legal order. The Procurator General may only reject the request if there are insufficient indications of potential new evidence or if the requested investigation is unnecessary.²⁸

On the grounds of Article 462, paragraph 1 CCP, the Procurator General may, on his or her own initiative, or at the request of the former suspect, decide in advance to submit a request to 'a committee charged with advising on the desirability of a further investigation'. As mentioned before, this independent and impartial committee is called the ACAS.²⁹ Just like its predecessor (the CEAS), members of the ACAS are not necessarily lawyers. The ACAS consists of academics, attorneys, (former) police officers and prosecutors. In cases in which a prison sentence of six or more years has been imposed (which is true for most cases), it is compulsory for the Procurator General to obtain advice from the ACAS. It is not compulsory for the Procurator General to obtain advice when he or she decides that the request could be upheld, or declares the request inadmissible or manifestly ill-founded. The ACAS has the task 'of advising the Procurator General on the desirability of a further investigation' as referred to in Article 461, paragraph 1 CCP.³⁰ During its assessment, the ACAS can conduct some modest investigation itself, such as interviewing experts and persons involved in the original investigation. The Procurator General initiates these further investigations, if he or she upholds the request.³¹ Further investigation is not unlimited. The Procurator General can designate a specific investigation to a court's investigating judge, who was not previously involved in the case. In addition, the Procurator General may be assisted by an investigation team. During further investigation, if needed, digital and physical evidence can be seized, DNA can be tested and witnesses and experts can be interviewed.

3.3 Procedure

Only a verdict of a Dutch criminal court that is final can be subject to revision.³² The former suspect can request the revision but needs formal representation (the requirement of formal representation was introduced in 2012). The request needs to state the grounds on which it is based, the relevant documents that can sustain the request and a copy of the verdict holding the conviction that needs to be reviewed. After the death of a former suspect, certain family members are eligible to submit a request for revision. The Procurator General can also file a petition for revision and has done so on some occasions.³³ The Supreme Court handles the request, which has to be in writing. There is no time limit after the final verdict for submitting a request and no limit to the number of requests that one can submit.³⁴ The fact that the Procurator General, next to (the family of) the former suspect, has the independent authority to request revision, indicates that revising criminal convictions is not only in the interest of a former suspect (and his legacy), but also in public interest. If the request for revision does not meet the formal requirements, the Supreme Court declares it inadmissible. If it is manifestly ill-founded, it is rejected.³⁵

If the submission is well-founded, the revision process goes into a second phase.³⁶ The Procurator General then gives his or her advisory opinion on the case. In preparation for giving this opinion, the Procurator General can conduct a further investigation or seek advice from the ACAS. The advice of the ACAS is usually given in thorough and detailed reports. In practice, these reports are an authoritative source of information for the Procurator General, as well as the Supreme Court. Legal counsel is offered the option to respond to the advisory opinion of the Procurator General within two weeks. The Supreme Court can order a further investigation by the Procurator General or order the Procurator General to request advice from the ACAS. The Supreme Court can also order one of its own judges, or a fresh investigating judge, to conduct a further investigation. This is highly unusual, but it has occurred (e.g., in the *Putten Murder Case*, a member of the Supreme Court interrogated the expert). When the Supreme Court possesses of all the information it requires, it passes judgement regarding the revision.

When the Supreme Court rules that there is no ground for a revision, it rejects the request (Art. 470 CCP). If

28. In cases that do not meet these requirements, a further investigation is possible after a petition to revise the case is filed; see Arts. 465, 468 and 469 CCP.

29. Established by the Advisory Committee for Concluded Criminal Cases Decree.

30. Art. 462, para. 1 CCP, and Art. 2 of the Advisory Committee for Concluded Criminal Cases Decree and Art. 2.1 of the Internal Rules of the Advisory Committee for concluded criminal cases. The ACAS should deal with the task in an impartial and independent way, whereby it can decide its own way of working (as well as its internal rules).

31. See Arts. 463-4 CCP. The Procurator General can also start a further investigation without a request by the former suspect, even though this is not written down in the law itself.

32. Art. 457, paras. 1 and 2 CCP. In general, courts have limited leeway to address small and obvious errors in their verdicts. If illegal proceeds of crime are taken, and it turns out the sum of the proceeds is actually lower than calculated, a ruling can be given to lower the amount (Art. 6:6:26 CCP).

33. Dutch Supreme Court 19 December 2017, ECLI:NL:HR:2017:3189, NJ 2018, 251, m.nt. J.M. Reijntjes (*Zes van Breda*).

34. Expect for cases in which a breach of the ECHR or any of the protocols is established, revision is necessary for redress, as mentioned in Art. 41 ECHR. Then, a petition needs to be submitted within three months after it can be established that the former suspect knew about the judgement (Art. 465, para. 2 CCP).

35. Art. 465 CCP. If needed, a further investigation can take place or advice from the ACAS can be asked for.

36. Art. 466 et seq.

Table 1 Requests for further investigations

	2012 (from Oct.)	2013	2014	2015	2016	2017	2018	2019	Total
Applications for further investigation to Procurator General	2	10	10	8*	9	3	2	0	44
Of those, applications submitted to the ACAS	2	9	10	6	7	2	2	0	38

* Two of these applications concerned suspects in a case in which an application was already submitted in 2014.

there is a ground for revising the conviction, the outcome depends on the legal ground. If a conflict of convictions occurs, both verdicts are annulled, and an appellate court that was not involved in the earlier convictions will handle both cases (see Art. 471 CCP).³⁷ This is because at least one of the verdicts cannot be correct. The reopening of the case because of a verdict by the ECtHR needs to be the appropriate form of redress as mentioned in Article 41 ECHR. This will most likely happen when Article 6 ECHR has been breached according to the ECtHR.³⁸ In case of a novum, the conviction is redirected to an appellate court that was not involved in the earlier conviction. This court can either uphold the conviction (and the original sentence if one was given) or annul it. If the original conviction is annulled, the appellate court can a) bar the district attorney from prosecuting, b) acquit the suspect, c) discharge the suspect from prosecution or d) convict the suspect with the application of a less penal provision or a lower sentence (Art. 472, paragraph 2 CCP). The CCP contains further stipulations on, among other things, the detainment of the former suspect or the suspect's release, the verdict of the Supreme Court (which has to be reasoned), the procedure of the retrial,³⁹ the settlement by the State of the Netherlands of any compensation and costs previously paid by the former suspect to the disadvantaged party and information to victims and their surviving dependants who require such information.⁴⁰

4 Revision in Practice

This section provides insight into the way that the current revision system works in practice. We start by describing the data regarding the process of requesting further investigations to prepare for applying for revision and we continue by providing data with respect to the actual revision procedure.

4.1 Further Investigations

4.1.1 Number of Submitted Requests

Despite concerns of the legislature about a potential growth in requests for further investigation, the numbers of cases in which suspects made use of this opportunity remained modest. Between 2012 and 2019, a total of 44 requests to conduct further investigations were submitted to the Procurator General. The number of requests was, in fact, on average, lower than what was submitted to the impermanent commission, the CEAS, that existed prior to the change in legislation. This is unexpected, as with the establishment of the new legislation the legislature intended to extend the possibilities to apply for further investigations. However, while on the one hand applying is easier as a former suspect (as the application does not have to be motivated by a scientist or whistle-blower), the need for formal representation may have made applying more difficult; see also Section 5 sub c.

Table 1 shows the number of applications to the Procurator General, as well as the number of applications that were subsequently submitted to the ACAS. Most of the applications were submitted in the first years (2013–2016) after the legislation took effect. Since 2017, only five new applications were submitted in three years. The table shows that most applications were also submitted to the ACAS. This is partly due to the fact that most applications fall under the six-year imprisonment criterion (see Section 3.2). However, also in cases that did not meet this criterion, the Procurator General usually involved the ACAS.

The majority of requests concern homicide cases; a minority are related to assaults, arson and drug traffick-

37. A higher sentence than the original is not allowed.

38. But if, for instance, Art. 8 ECHR was not respected, this does not mean that the applicant did not have a fair trial ex Art. 6 ECHR. Financial compensation could suffice, and a retrial does not have to take place. The Supreme Court can address this matter in its verdict on the revision procedure (Art. 472, para. 1 CCP). See, for example, Dutch Supreme Court 27 September 2005, ECLI:NL:HR:2005:AS8858, NJ 2007, 453.

39. The retrial will be conducted mainly according to the rules applying to appeal, with 'fresh' judges (Art. 476 CCP). In no way may the original sentence be exceeded during the retrial; see Art. 478 para. 1 CCP.

40. Art. 473 et seq CCP.

Table 2 Decisions and advice to conduct further investigations

	2012 (from Oct.)	2013	2014	2015	2016	2017	2018	2019	Total
ACAS									
ACAS reports	–	5	12	5	4	6	5	1	38
ACAS advises to conduct further investigation	–	–	3	–	–	–	4	1	8
Procurator General (PG)									
Final decisions by PG*	–	1	10	12	2	6	5	3	39 (+ 1 pending)
Decisions by PG to conduct further investigation	–	1	2	1	–	–	4	1	9

* Four requests were not admissible (three in 2015 and one in 2017).

ing. These are all among the most serious crimes, which is due to rules for admissibility (crimes subject to a prison sentence of twelve years and that have seriously shocked the legal order). This limitation is in line with the intention of the legislature to only open this possibility for a limited number of serious crimes, although some have argued for a lower threshold (see Section 5).⁴¹

4.1.2 Requests that are Granted and Further Investigations Conducted

While the number of submitted applications is modest, the number of requests that are granted is even more limited. When the new legislation was evaluated in 2018, the ACAS had advised to grant only three of the 28 requests that were submitted to it. The Procurator General has, since the enactment of the new legislation, followed the advice of the ACAS (on main points) in all of the decisions (33 cases decided up to and including 2017). Thus, the Procurator General also granted the submission in all three requests. In one additional request, which was not submitted to the ACAS, the Procurator General also granted the permission to conduct further investigations. These numbers can be found in Table 2 (the numbers do not add up to the number of applications because some cases are still pending).

When we conducted our evaluation study in 2018, several attorneys involved in submitting requests for further investigation mentioned being disillusioned by the number of requests that were denied. They believe that the ACAS and the Procurator General are too strict in granting requests, making it nearly impossible for sus-

pects to have further investigations conducted on their cases.⁴² Together with the fact that the process of handling the requests is time-consuming (we found the total duration from application to decision from the Procurator General to be on average one year and three months), this could result in suspects and their attorneys deciding not to bother submitting requests for further investigation. This would be problematic as the purpose of the new legislation – to offer suspects extra support in substantiating their requests for revision – would be in danger (see also Section 5.3).

Since the publication of our evaluation study (in 2018 and 2019), the Procurator General published eight new decisions. When these decisions are considered, a somewhat different picture of the success rate emerges. In the first five years and three months (October 2012 to 2017), four of 31 requests for further investigations resulted in a (partly) positive decision by the Procurator General (13%). In the last two years (2018 and 2019) five of the eight new decisions taken (of which three concern different suspects in the same court case) granted (part of) the request to conduct further investigation (63%). This brings the success rate over the total duration of seven years and three months to 23%.

As cited in Section 3.2, the ACAS has the possibility to single-handedly conduct some modest investigations needed to support their advice. The ACAS made use of this in approximately 40% of its cases.⁴³ This means that some form of investigation is taking place more regularly, even when these eventually result in denying a request.

42. *Ibid.*, at 68-69; see also G.G.J.A. Knoops, 'Herziening in strafzaken anno 2018: ten voordele of ten nadele?', *Nederlands Juristenblad* 2018/1646, afl. 31, 2322-2328 (2018).

43. ACAS jaarverslag 2017, at 11.

41. See Nan et al., above n. 7, at 77.

Table 3 *Applications for revision handled by the Dutch Supreme Court 2012-2019*

	Revision applications handled by the Supreme Court	Percentage of total
Well-founded	55	24
Ill-founded	131	57
Inadmissible	41	18
Partly ill-founded/ partly inadmissible	4	2
Total	231	100

Table 4 *Applications for revision handled by the Dutch Supreme Court per year*

	2012	2013	2014	2015	2016	2017	2018	2019	Total
Revision applications	27	39	31	33	37	27	18	19	231
Well-founded	8	7	5	11	13	6	4	1	55
Ill-founded	13	27	20	15	19	16	9	12	131
Inadmissible	6	3	6	6	5	5	5	5	41
Partly ill-founded/ inadmissible	0	2	0	1	0	0	0	1	4

Thus, in recent years, more decisions in favour of conducting further investigations were taken by the Procurator General. The ACAS has also advised positively more frequently. This could indicate a drift towards a more suspect-friendly interpretation of the legal framework for conducting further investigation (see also Section 5.2). However, considering the small numbers, it would be misleading to indicate this as a general trend, as all cases consider unique circumstances. Moreover, the process of deciding on the cases, especially in the more complex cases, has taken several years.

4.2 Applications for Revision

In the period from October 2012 to the end of December 2019, 231 revision applications were handled by the Supreme Court.⁴⁴ Those applications related to convictions for ‘minor’ offences such as light traffic offences and motor insurance problems because of mistaken identity, but also serious offences such as theft, fraud, abuse, human trafficking and murder. Also, a substantial number of the cases (106 in total) are a result of errors in odour tests using sniffer dogs to detect drugs (in which it turned out that the handler of the sniffer dog knew beforehand which one of the vials contained the odour of the suspect, which was not allowed according to the procedural rules).

From October 2012 through December 2017, only seven applications were based on Article 457, paragraph 1

CCP sub a (conflicting convictions in the Netherlands) and sub b (in breach of the ECHR Convention). The other applications were founded on the third ground for revision (Art. 457, paragraph 1 CCP sub c), a supposed novum. In 11% of those applications, the applicant made use of the new possibilities offered by the broadened concept of the novum (established in the 2012 legislation). The ‘nova’ that have been brought forward concern, for example, alleged personality changes, new or changed statements from the witnesses or the suspects, new DNA material or other new scientific evidence.

Of the 231 applications dealt with in the period from October 2012 to December 2019, 55 were declared well-founded, 131 were ill-founded, 41 were declared inadmissible and 4 were declared partly unfounded and partly inadmissible (Table 3).

Compared to the years 2006 to 2011 (before the new legislation), the percentage of applications declared well-founded has decreased. In the period 2006-2011, 27% of all applications for revision were declared well-founded, 50% ill-founded and 23% inadmissible. However, these figures are somewhat distorted by applications that were a result of errors in odour testing (97 in total), that occurred mainly between 2006 and 2011.⁴⁵ Table 4 shows the number of applications per year since 2012.

44. The majority of revision cases are published on www.rechtspraak.nl. A small number that has not been published was requested from the archivist of the Dutch Supreme Court and subsequently analysed by the researchers.

45. Most of these (84 judgements) occurred in 2008, 2009 and 2010.

From October 2012 until the end of December 2019, an average of 32 applications for revision per year were handled by the Supreme Court. This is considerably less than the six years before the legislative amendment. During that period, the number of applications for revision that were processed was more than double, an average of 72 cases per year. Even when the cases concerning errors in odour tests are subtracted, the average number of applications for revision processed per year is still considerably lower than in the six years prior to the amendment of the law.⁴⁶

For our evaluation study, we interviewed different key actors involved in the revision process. They provided various possible explanations for this decrease. Various respondents (from the prosecution office, the police, the judiciary and the ACAS) suggested that the police and the judiciary have learned from previous mistakes that came to light in the wrongful conviction cases that were mentioned in Section 2, and that currently it is less likely for investigative errors to be made. Various measures were introduced after the *Schiedam Park Murder* to prevent miscarriages of justice. The manner in which interrogations and forensic investigation teams worked in the 1990s differs from how they operate today and police officers are better at reporting their investigative actions. Furthermore, the introduction of peer opposition, reflection and peer supervision should result in more attention for alternative scenarios. Additionally, at times, forensic experts are involved during interrogation and, moreover, attorneys are currently present during the police interrogations. It has also been observed that after the *Schiedam Park Murder*, relatively more criminal cases ended in acquittals, also for serious cases.⁴⁷ This could be a sign that fewer suspects were wrongfully convicted. However, some interviewed forensic experts were more critical about the supposed progression that was made within the investigative authorities.⁴⁸ These respondents emphasised that wrongful convictions appear at all times. They believe that the number of cases that would qualify for revision is actually much higher, for instance, because former suspects are not able to afford legal counsel. And even if they do, the suspects are often not taken seriously by the legal system, including their defence lawyer.

5 Challenges in the Revision Process

The *Reform of Revision in Favour of Former Suspects Act* therefore provides some new prospects for addressing potential wrongful convictions and substantiating applications for revision with evidence. Nonetheless, the new provisions do not appear to have severely altered the already existing practices of revision. The legislative changes were intended to provide more possibilities to bring forward potential wrongful convictions, but, in fact, fewer applications for revision were submitted along with fewer requests for further investigation. Although it is possible that the applications have simply dropped because improved investigations have resulted in less wrongful convictions, it remains important to guarantee that the revision process is accessible and functioning well. In this context, we observe three key challenges in the current functioning of the Dutch revision law, which relate to: 1) the novum criterion, 2) the role of the ACAS in the revision process and 3) the access to the revision procedure.

5.1 The Novum Criterion

Although the legislation concerning the revision procedure in 2012 was amended substantially to extend the possibilities of a successful request for revision, critics pointed out that this primarily concerns a codification of the exceptions to the old criterion that the Supreme Court was already willing to make.⁴⁹ Also, some critics believe the new criterion is still too strict.⁵⁰ Thus, the current legislation did not end the discussion regarding the criterion. On the contrary, an ongoing discussion is taking place on the legal criterion to decide whether something qualifies as a novum. Several defence lawyers, scholars and politicians advocate an extension of the criterion to ‘an unsafe conviction’ or ‘serious or even reasonable doubt on the righteousness of the conviction’.⁵¹ This was partly based on new cases that were brought forward, in particular the *Arnhem Villa Murder case*. In this case, the initial conviction of nine men appeared to be wrongful, but it proved difficult to start a revision procedure under the new novum criterion. After the final conviction in this case, the manner in which the police interrogations took place (resulting in incriminating statements of two convicted that were the key evidence in the case), were criticised. The retraction of the statements by one of the convicted was brought forward as a novum. However, the Procurator General has recently advised the Supreme Court to declare the

46. In the years 2006 to 2011, a total of 97 revision cases were dealt with as a result of these (alleged) mistakes. In the years 2012 to 2019, this number was nine. Excluding the odour test cases, the number of judgments in revision cases from 2012 to 2019 amounts to 222 (an average of 31 cases per year) and for 2006 to 2011, this concerns 333 cases (an average of 56 cases per year).

47. Raad voor de Rechtspraak in Rechtstreeks 2007-3, *Strafrechter en strafketen: de gang van de zaken 1995-2006* (www.rechtspraak.nl/SiteCollectionDocuments/Rechtstreeks-2007-3.pdf) at 34.

48. By forensic experts, we mean legal psychologists, criminologists, forensic trace investigators and legal philosophers.

49. Knoops, above n. 42.

50. See, for example, P.J. Van Koppen and R. Horselenberg, ‘Waarom er in België en Nederland geen rechterlijke dwalingen zijn’, *Expertise & Recht* 278 (2018); A.P.A. Broeders, ‘Misleidend bewijs’, *Expertise & Recht*, afl. 1, 1-3 (2018).

51. See, for this discussion, Nan, above n. 2. See also Knoops, above n. 42. Crombag et al., above n. 20, afl. 8, 475-478. R. Van der Hulle and R. Van der Hulle, ‘Herziening en gratie op basis van een nieuwe rechtsopvatting van de rechter: een vergelijking met de Verenigde Staten’, *RM THEMIS* 12-17 (2017/1).

applications inadmissible, because the Appellate Court had already addressed the credibility of these retracted statements in depth.⁵² An extended criterion would make it easier to overturn this and other potentially wrongful convictions, considering that currently too many cases fall by the wayside. In our evaluation study, certain scientists and attorneys stated that they are in favour of an extended novum criterion.⁵³ These respondents pointed to the limited successful revision cases so far and the fact that in all the (eventually successful) revision cases, the convicted faced great difficulties in bringing their cases to the Supreme Court. Most of the interviewees, however, were wary of such an extension. They were worried that this would open the floodgates to requests for revision. These respondents were also concerned about the principle of finality, as they figured that in a considerable number of cases, there will always remain room for discussion. In their view, a further extension would create problems for the authority of court judgements and for the capacity of the organisations involved and could cause unnecessary unrest (also for victims and their surviving dependants).⁵⁴ There is opposition on extending the criterion for a novum by the legislature too. According to the Secretary of State, extending the criterion would endanger the character of revision as an extraordinary remedy, diminish the faith in the judiciary system if verdicts could be called into question too regularly, stir up the cases with victims, the bereaved and society as a whole and attract too many (of the wrong) cases.⁵⁵ Nonetheless, it is clear that the introduction of a new novum criterion has not ended the discussion regarding the right range of the criterion.

5.2 The Role of the ACAS

With the introduction of the possibility to request further investigations and with the establishment of the ACAS, the assembly of persons involved in detecting and overturning wrongful conviction has grown from judges and prosecutors to various other legal experts and researchers. The ACAS has gained a prominent position in the revision process.⁵⁶ In theory, a suspect can directly apply for a revision of his or her case to the Supreme Court. In reality, in the majority of serious cases, the defence lawyer of the suspect first submits a request for further investigation. The reason is that further investigation is usually necessary to substantiate a request for revision in these – often highly complex – cases. The increased reliance on expert opinion/insights

in light of the new novum criterion increases the desirability of having a committee, partly composed of scientific experts, to provide advice on the substantiation of claims in that regard.⁵⁷ A defence lawyer we interviewed, who is responsible for a large portion of all applications for revision, also stated that in his or her view, submitting a request for further investigation is simply a step one is supposed to take within the revision process.⁵⁸ The fact that the ACAS is comprised of a varied group of (legal) experts – and thus engages in a more multifaceted analysis of a case – can be a reason for convicted persons and their defence lawyers to include this commission.

In the years since its establishment, the profound and comprehensive reports from the ACAS (including input from various non-lawyers) have been vital sources of information for the Procurator General to make decisions regarding further investigations. While the ACAS reports are often lengthy, the decisions by the Procurator General are commonly short, referring to the data and arguments mentioned by the ACAS.

However, there has been some debate about how to interpret the position of the ACAS in relation to the Supreme Court. The outstanding question is to what extent the ACAS is functioning – and should function – as a pre-filter for the Supreme Court, taking the novum criterion as a starting point in advising about requests for further research, or whether the ACAS has a separate responsibility in investigating the reasons for requesting further research and in generating criteria for certain cases that require further investigations.⁵⁹ On the one hand, the ACAS is an independent and impartial committee that is consulted precisely for its broad, and not exclusively legal, expertise. On the other hand, it is pointless to allow further research to be conducted on evidence that will not result in a novum, which is required for revision by the Supreme Court. As clarified in Section 4.1, in the first few years that the ACAS was operating, most of its reports advised negatively regarding the requests for further investigations, and the committee was criticised for acting too much as a pre-filter for the Supreme Court.⁶⁰ Such an image could also negatively affect the willingness of wrongfully accused and their defence lawyers to submit requests for further

52. See ECLI:NL:PHR:66, ECLI:NL:PHR:67, ECLI:NL:PHR:70, ECLI:NL:PHR:71, ECLI:NL:PHR:72, ECLI:NL:PHR:73, ECLI:NL:PHR:74 and ECLI:NL:PHR:75.

53. One scientist was of the opinion that the question of revision was an empirical question on the guilt of the former suspect and not a legal question.

54. Nan et al., above n. 7, at Sections 4.3.5 and 6.4.2.

55. Letter Dekker 6 April 2020, *Kamerstukken II* 2019/20, 29279, no. 582.

56. C. Fijnaut and K. Verhesschen, 'Minder juristen, meer andere deskundigen bij de herziening van de herziening in Nederland en België? Een rechtsvergelijkende beschouwing', 6 *Expertise en Recht* 268-275 (2018).

57. *Ibid.*, at 272.

58. Nan et al., above n. 7, at 68. Though, as mentioned, defence lawyers interviewed for the evaluation of the legislation also mentioned being disillusioned by the, in their eyes, strict manner of advising in cases.

59. This dilemma has been mentioned and discussed in various publications; see Den Doelder, 'De ACAS in de Nederlandse herzieningsprocedure', *Nederlands Juristenblad* (2016/1231); Knoops, above n. 42; C.P.M. Cleiren, 'De ACAS als speler in een gelaagde procedure', *Expertise & Recht* (2018), nr. 6, 249, N.L. Holvast, S.M.A. Lestrade & J.S. Nan, 'De Adviescommissie afgesloten strafzaken; twijfelcommissie of poortwachter van de Hoge Raad?', 6 *Expertise en Recht* 283-290 (2018). It also continues to be discussed in parliament; see Rondetafelgesprek vaste commissie voor Justitie en Veiligheid 22 mei 2019 over de evaluatie Wet hervorming herziening ten voordele; *Kamerstukken II* 2019/20, 29279, 543.

60. Nan et al., above n. 7, at 68-69; see also Knoops, above n. 42; Van Koppen and Horselenberg, above n. 50.

investigations.⁶¹ More recently, the ACAS has published several reports on cases in which its analysis does not match the characterisation of the ACAS as a pre-filter. In these reports, the ACAS qualifies the convictions as ‘potentially unsafe convictions’. This qualification refers to convictions which are ‘by current standards incomprehensible decisions by judges regarding the valuation of the facts and the weighing of evidence’.⁶² This description does not fit within the legal description of a novum, because it does not entail a data point unknown to the court. Up to now, the ACAS has qualified five cases (of which three regard three different suspects of the *Arnhem Villa Murder case*) as ‘potentially unsafe convictions’ and advised further investigations for that reason.⁶³ In none of these cases can a novum, in the sense in which it was meant by the legislature, be easily recognised. Nonetheless, the ACAS advised to conduct further investigations. The Procurator General has followed the advice given by the ACAS for further investigations in all of these cases. None of these cases have thus far been decided by the Supreme Court, as investigations are still pending or have only recently finished. Hence, it continues to be unknown how the Supreme Court will decide in these cases.

5.3 Effective Access to the Revision Procedure via Legal Representation

A third significant aspect of the reform of the *Revision Act* is the introduction of compulsory legal representation. A former suspect can only initiate the revision procedure via a defence counsel. The idea is that a defence counsel is better equipped to put a case forward than a former suspect who is left to use the available legal arrangements on his or her own. At the same time, the belief is that, given compulsory legal representation, the counsel will be able to select cases (early and adequately) and, in doing so, help ensure that the people and resources of the organisations charged with the revision are used efficiently.⁶⁴ However, this compulsory legal representation is also a challenge with regard to effective access to the revision procedure.

Several attorneys indicated that they were hesitant to take on any legal aid revision cases because the remuneration for these cases does not cover their working hours. As a result, compulsory legal representation appears to form a financial threshold for any former suspect with limited means, which was explicitly not the intention of the legislature. If (experienced) attorneys are no longer prepared to take on cases of former suspects with limited means, this jeopardises the access of these convicted persons to the reformed revision provisions. To solve this problem, better compensation could be offered to legal aid lawyers. That way the convicted persons will

have access to the revision procedure and to a lawyer to help them adequately present their case.

6 Conclusion

The Dutch legislature has recently tried to improve the balance between the competing interests of individual justice and the finality of verdicts, by making the revision procedure more accessible with a reform of the revision legislation (enacted in 2012). In our evaluation study of the reformed legislation (2018), we concluded that, all things considered, a better balance was found.⁶⁵ However, the debate on the adequacy of the possibility of reopening cases post-conviction has not quieted down. There are still several challenges to maintaining and improving the balance. In this regard it is a notable observation that, after a short increase, the new legislation has not resulted in a lot of applications for further investigation or in more requests for revision in recent years. This poses the question of whether the new legislation has changed much in the way that revision cases are dealt with in practice.

We observed three major challenges of the current system. First, the legal criterion to reopen a case on the ground of a novum might still be too strict to overturn verdicts that are simply wrong. The threshold of a new data point that would most likely significantly change the outcome of the case is still too high according to some. The *Arnhem Villa Murder case* is an example of a case that is difficult to get admitted to the revision procedure, due to the current scope of the novum criterion. Second, while the possibility of re-examining a case before a request for revision is submitted to the Supreme Court is regarded as a welcome instrument to find these much-needed new developments, the outcomes seem somewhat meagre. The ACAS, which provides important advice on the necessity for further investigations, has been criticised of acting too much as a pre-filter for the Supreme Court and thereby being too strict in the advice it gives. The ACAS should, according to some, at this early stage only investigate whether the conviction is safe, without worrying about the legal criterion. In several recent cases, the ACAS has actually done just that and given advice to investigate further (advice that the Procurator General followed). Third, the mandatory legal representation, combined with the limited compensation that attorneys receive for legal aid work, might prove another obstacle for former suspects to have their cases revised, particularly for those with limited means.

It remains to be seen how the Supreme Court will decide in the cases that the ACAS has qualified as ‘potentially unsafe convictions’ and thus what the criteria for opening closed cases will be in practice. It is furthermore almost inevitable that new cases will present new elements that might stir up debate about new (and

61. As was also mentioned by two of the defence lawyers interviewed in our evaluation study; see Nan et al., above n. 7, at 68-59.

62. ACAS jaarverslag 2018, at 13.

63. To wit, ACAS cases no. 22, 26, 28 (*Arnhem Villa Murder case*), 32 (*Rosmalen Flat Murder case*) and 37 (*Petten Campsite Murder case*). See ACAS jaarverslag, 2019, at 10.

64. *Kamerstukken II* 2008/09, 32045, 3, at 33.

65. Nan et al., above n. 7, at Ch. 6.

unforeseen) elements in the revision procedure that may need adjustment, whether just once or on a more permanent basis. For that reason, it is all the more important that convicted persons have effective access to the revision procedure.

Chosen Blindness or a Revelation of the Truth?

A New Procedure for Revision in Belgium

Katrien Verhesschen & Cyrille Fijnaut*

Abstract

The Belgian Code of criminal procedure provides the possibility to revise final criminal convictions. This procedure had remained more or less untouched for 124 years, but was finally reformed by the Act of 2018, after criticism was voiced in legal doctrine concerning its narrow scope and possible appearances of partiality and prejudice. The Act of 2018 therefore broadened the third ground for revision, the so-called *novum*, and defined it as an element that was unknown to the judge during the initial proceedings and impossible for the convicted person to demonstrate at that time and that, alone or combined with evidence that was gathered earlier, seems incompatible with the conviction, thus creating a strong suspicion that, if it had been known, it would have led to a more favourable outcome. Thereby, this ground for revision is no longer limited to factual circumstances, but also includes changed appreciations by experts. To counter appearances of partiality and prejudice, the Act of 2018 created the Commission for revision in criminal matters, a multidisciplinary body that has to give non-binding advice to the Court of Cassation on the presence of a *novum*. However, the legislature also introduced new hurdles on the path to revision, such as the requirement for the applicant to add pieces that demonstrate the ground for revision in order for his or her request to be admissible. For that reason, the application in practice will have to demonstrate whether the Act of 2018 made the revision procedure more accessible in reality.

Keywords: final criminal conviction, revision procedure, grounds for revision, Court of Cassation, Commission for revision in criminal matters

1 Introduction

The Belgian ‘Wetboek van strafvordering’, ‘Code d’instruction criminelle’ (Code of criminal procedure; hereinafter: CCP) provides the possibility to revise final criminal convictions in Article 443 *et seq.* In contrast to its surrounding states, Belgium has not been confronted

yet with notorious, highly publicised wrongful convictions that led to a thorough evaluation of this procedure. Although there have been cases in which convicted persons insisted on their innocence and were supported in their claim by journalists,¹ this never resulted in a broad public debate about widening the possibility to re-examine final criminal convictions. It would be naïve, however, to think this means that there are no wrongful convictions in Belgium. Although hard to measure, it is more likely a symptom of the procedure being very strict.²

Despite the lack of public pressure, the revision procedure was criticised in legal doctrine for its narrow scope.³ The impression was that the procedure strongly preferred legal certainty and the authority of *res iudicata*, giving truth and justice barely a chance to surface. Because the procedure was so cumbersome, it was hard to get a wrongful conviction recognised as such.⁴ Although legal doctrine had to shout hard and long, its criticism was picked up by the legislature. With the Act of 2018,⁵ it finally reformed the procedure for revision, which had remained more or less untouched for 124

13

1. See, for example, D. De Coninck, *14 jaar onschuldig in een Belgische gevangenis – De Gebroeders Gottschalk* (2014); F. Meert and W. Van Den Eynde, *De bloedkamer* (2011). The former book criticises the revision procedure for the narrow scope of the grounds for revision and the possibly long duration of the procedure. The latter book does not elaborate on the revision procedure but only mentions that a request for revision was filed. Yet critics of the (former) revision procedure often invoke the case of Mr Meert. One of the reasons is that, in this case, the request for revision was referred by the Court of Cassation for advice to (the civil chamber of) the court of appeal of Antwerp, while the original conviction had been rendered by the court of appeal of Antwerp as well (albeit by its criminal chamber) (see *infra* footnote 59). This created an appearance of prejudice and partiality.
2. D. Leestmans, ‘Dwalingen rechtzetten schept vertrouwen in ons rechtssysteem’, 292 *Juristenkrant* 10 (2014), at 10 (hereinafter: Leestmans); Ph. Traest and J. Roelandt, ‘Herziening van de herziening anno 2019’, 6 *Nullum Crimen* 481, at 481 (2019) (hereinafter: Traest a.o. (2019)).
3. See, among others, M. Colette, ‘Filip Meert en de herziening in strafzaken: het moet anders’, 258 *Juristenkrant* 13 (2012) (hereinafter: Colette); Ph. Traest, ‘Is de herziening in strafzaken aan herziening toe?’, in F. Deruyck, E. Goethals, L. Huybrechts, J.-F. Leclercq, J. Rozie, M. Rozie, Ph. Traest & R. Verstraeten (eds.), *Amicus Curiae. Liber amicorum Marc De Swaef* (2013) 383 (hereinafter: Traest (2013)).
4. Traest (2013), above n. 3, 383-4.
5. Wet 11 juli 2018 houdende diverse bepalingen in strafzaken – loi 11 juillet 2018 portant des diverses dispositions en matière pénale, *Belgisch Staatsblad – Moniteur belge* 18 July 2018, 57582.

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years.⁶ The Act aims to widen one of the grounds for revision and introduces a Commission for revision in criminal matters, which includes non-judges and will be involved in the examination of requests for revision. The new revision procedure entered into force on 1 March 2019.⁷ However, it took more than an additional year to fully implement all aspects of the new procedure.⁸

In this article, we first provide an overview of the legal framework of the revision procedure. In order to give a proper understanding of the current procedure, we discuss some aspects of the former procedure as well and of the criticism voiced against it in legal doctrine. We then look at the revision procedure in practice. However, since the new revision procedure entered into force very recently, there is not much practice to turn to yet, making it hard at this stage to assess the practical impact of the reform. Instead, we look at the practice of the former revision procedure and highlight the challenges the new procedure will have to overcome. We conclude with an overview of our findings to answer the question whether the new revision procedure tackles the issues with which its predecessor struggled and which aspects of the new procedure that are currently still unclear are decisive for this.

2 Legal Framework of the Revision Procedure

2.1 The Start of the Revision Procedure

2.1.1 Possible Applicants

Like France, Belgium distinguishes between three categories of criminal offences. The first category comprises the most serious offences, called ‘misdaad’, ‘crime’ (felony, crime). The second comprises what are called ‘wanbedrijf’, ‘délit’ (ordinary offence, misdemeanour). The third category comprises the least serious offences, called ‘overtreding’, ‘contravention’ (contravention) (Art. 1 Strafwetboek, Code pénal). Only criminal decisions in cases concerning the two most serious categories of offences (‘misdaad’, ‘crime’ and ‘wanbedrijf’, ‘délit’) are eligible for revision (Art. 443 CCP).⁹ Convic-

tions imposing a so-called police penalty¹⁰ are thus excluded.¹¹

The criminal decision has to contain a finding of guilt. In Belgium there is no revision *in defavorem*,¹² so final acquittals cannot be revised.¹³ Yet the actual imposition of a penalty is no longer required. The ‘Hof van Cassatie’, ‘Cour de cassation’ (Supreme Court, hereinafter: Court of Cassation) changed its case law and decided that criminal decisions in which there was a simple finding of guilt are also eligible for revision.¹⁴ Moreover, the decision has to be final. No other remedies may be available, either because they have been exhausted or because the term in which to do so has expired.¹⁵

As mentioned previously, convictions imposing a police penalty are excluded from the scope of the revision procedure. The legislature thought these penalties were of little importance, because of their short duration or limited amount.¹⁶ It stated that it would therefore not be of any inconvenience to exclude these convictions from the scope of the revision procedure.¹⁷ Some legal scholars, however, question this exclusion, especially now that a simple finding of guilt is eligible for revision.¹⁸ As a consequence, for example, a person found guilty of a ‘wanbedrijf’, ‘délit’ who did not receive a penalty, can file a request for revision, while a person sentenced to imprisonment for seven days cannot. Yet even these ‘minor’ convictions can have a serious impact on the convicted person’s private and professional life.^{19, 20} Moreover, some scholars argue that it should be a point of honour for the judiciary to correct all its mistakes.²¹ However, for now, the more practical considerations for excluding these ‘minor’ convictions seem to have maintained the upper hand, since the reform of 2018 did not

6. Although there have been minor adjustments in the meantime, the last major reform of the revision procedure dates back to an Act of 1894 (wet 18 juni 1894 inhoudende de IXde titel van het IIIe boek van het Wetboek van rechtspleging in strafzaken – loi 18 juin 1894 contenant le titre IX du livre III du Code de procédure pénale, *Belgisch Staatsblad* – *Moniteur belge* 24 June 1894, 1959).

7. Art. 81 of the Act of 2018.

8. Notably, the appointment of the members of the newly introduced Commission for revision in criminal matters (see *infra*).

9. M. Mahieu and J. van Meerbeeck, ‘Procédure de révision en matière pénale’, 24 *DPPP* 51, at 58 (2010) (hereinafter: Mahieu a.o.); Traest (2013), above n. 3, at 384.

10. Each of the three categories of offences is linked to a different category of penalties. The least serious category of offences (‘overtreding’, ‘contravention’) is punished by so-called police penalties (‘politiestraf’, ‘peine de police’) (Art. 1 Strafwetboek, Code pénal).

11. Mahieu a.o., above n. 9, at 68-9; Traest (2013), above n. 3, at 384; Traest a.o. (2019), above n. 2, at 482-3.

12. During the parliamentary debate in the preparation of the Act of 2018, a member of the Bar Association for the French- and German-speaking lawyers in Belgium (Ordre des Barreaux Francophones et Germanophones de Belgique) suggested the introduction of the possibility to revise final acquittals. This suggestion was not adopted. (Verslag van de eerste lezing van het wetsontwerp houdende diverse bepalingen in strafzaken – Rapport de la première lecture du projet de loi portant des dispositions diverses en matière pénale, *Parl.St. Kamer – Doc.Parl. Chambre* 2017-18, n. 54 2969/003, at 54 (hereinafter: Report first reading).)

13. Traest (2013), above n. 3, at 384; Traest a.o. (2019), above n. 2, at 483.

14. Court of Cassation 29 April 2009, P.08.1648.F; Mahieu a.o., above n. 9, at 59-61; Traest (2013), above n. 3, at 384-5; Traest a.o. (2019), above n. 2, at 483.

15. Mahieu a.o., above n. 9, at 67-8.

16. Currently, police penalties can amount to an imprisonment of no more than seven days and to a fine of a maximum of twenty-five euros, multiplied by the legal surcharges (Art. 28 and 38 Strafwetboek, Code pénal).

17. Exposé des motifs du projet de loi portant la troisième livre du Code de procédure pénale, *Parl.St. Kamer – Doc.Parl. Chambre* 1878-79, n. 15 238, at 70.

18. Traest (2013), above n. 3, at 385.

19. Mahieu a.o., above n. 9, at 68.

20. It is interesting to note that convictions imposing a police penalty are, in principle, automatically erased from the convicted person’s criminal record after three years (Art. 619 CCP), thus potentially limiting in time the impact on his or her reputation and professional life.

21. Mahieu a.o., above n. 9, at 68.

add convictions imposing a police penalty to the scope of the revision procedure.²²

The convicted person can file a request for revision. If he is deceased or declared incapable or missing, a request can be filed by his spouse, descendants, ancestors, brothers and sisters. Both types of applicants cannot do so on their own. They are obliged to consult a lawyer who has to be registered at the Bar of Lawyers at the Court of Cassation. That lawyer has to sign the request, and if he does not, the request is inadmissible (Art. 444 CCP). This obligation is intended to discourage requests that have no prospect of success.²³

Revision serves not only private interests, but the public interest as well. Admitting and correcting mistakes restores people's confidence in the justice system. Moreover, it allows the search for the real culprit to continue. Revision is thus in the interest of society too.²⁴ Therefore, it can also be requested by the attorney general at the Court of Cassation and the attorneys general at the courts of appeal (Art. 444 CCP). Before the Act of 2018, the Minister for Justice was competent to request this, just as in France. However, because the Belgian legislature wanted to ensure the separation of powers and guarantee the independence of the judiciary,²⁵ the Act of 2018 removed this competence and, following the suggestion²⁶ of the High Council of Justice,²⁷ reassigned it to the aforementioned attorneys general.

2.1.2 The Grounds for Revision

There are three possible grounds for revision.²⁸ The Act of 2018 has modified the third ground, in an attempt to broaden it.²⁹ The three grounds are the following (Art. 443 CCP):

1. two (or more) distinct convictions that find different defendants guilty of the same fact and that are irrec-

oncible, so that one of the convicted persons has to be innocent;

2. after a conviction, a witness that was heard is convicted for false testimony concerning the defendant;
3. an element that was unknown to the judge during the initial proceedings and impossible for the convicted person to demonstrate at that time and that, either alone or combined with the evidence that was gathered before, seems incompatible with the conviction, thus creating a strong suspicion that, if the element had been known, it would have led to an acquittal, a discontinuance of the proceedings or the application of a less strict criminal provision.³⁰ This element is also referred to as a *novum*.

The grounds for revision in Belgium are very similar to the former grounds for revision in France. Yet while the French legislature, in the Act of 2014, decided to maintain only the last ground, arguing that the other grounds for revision are included in that ground,³¹ the Belgian legislature decided to maintain the three separate grounds.³² Depending on the ground a request for revision invokes, the procedure for examining the request is different (Art. 445 CCP). For example, in regard to the first or second ground for revision, no advice will be given by the Commission for revision in criminal matters (see *infra*). Moreover, a request based on the second ground, a false testimony, has to be filed within five years since the final conviction for false testimony, while for the other grounds for revision there is no time limit (Art. 443 CCP).

The grounds for revision are similar not only to the former French grounds, but also to some of the current Dutch grounds for revision. Especially the third ground for revision, the *novum*, shows a strong resemblance since its modification in 2018. Before 2018, the third ground for revision in Belgium spoke of a new fact or a circumstance that the convicted person could not possibly demonstrate at the time of the initial proceedings and that seemed to demonstrate the convicted person's innocence or the application of a more strict criminal

22. In the explanatory memorandum, the inclusion or exclusion from convictions imposing a police penalty is not even discussed. (Memorie van toelichting bij het wetsontwerp houdende diverse bepalingen in strafzaken – Exposé des motifs du projet de loi portant des dispositions diverses en matière pénale, *Parl.St. Kamer – Doc.Parl. Chambre* 2017-18, n. 54 2969/001, hereinafter: Explanatory memorandum.)

23. Mahieu a.o., above n. 9, at 103.

24. Hoge Raad voor de Justitie – Conseil supérieur de la Justice, 'Advies over de ontwerp tekst van wet inzake de hervorming van de herziening in strafzaken' – 'Avis sur le projet de texte de loi relatif à la réforme de la révision en matière pénale', *Working Paper* 2017, at 6 (High Council of Justice (2017)); Report first reading, above n. 12, at 3 and 53; Leestmans, above n. 2, at 10-11; Traest (2013), above n. 3, at 403; Traest a.o. (2019), above n. 2, at 487.

25. Explanatory memorandum, above n. 22, at 12-13.

26. High Council of Justice (2017), above n. 24, at 6; Traest a.o. (2019), above n. 2, at 487.

27. The 'Hoge Raad voor de Justitie', 'Conseil supérieur de la Justice' (High Council of Justice) is an authority that intends the Belgian justice system to operate better. It is involved in the selection and appointment of judges and handles investigations and complaints relating to the functioning of the justice system. It also makes recommendations and gives opinions (Art. 151 Belgian Constitution). See www.csj.be/en.

28. The Belgian CCP also provides the possibility to reopen a criminal case after a conviction by the European Court of Human Rights for a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms or its additional protocols. This procedure is described in Art. 442bis *et seq.* Since this procedure is distinct from the procedure for revision, it will not be discussed in this article.

29. Explanatory memorandum, above n. 22, at 10.

30. Art. 443, 3° CCP: 'Wanneer er sprake is van een gegeven dat bij het onderzoek op de terechtzitting aan de rechter niet bekend was en waarvan de veroordeelde het bestaan niet heeft kunnen aantonen ten tijde van het geding en dat, op zichzelf of in verband met de vroeger geleverde bewijzen, met de uitspraak niet bestaanbaar schijnt, zodanig dat het ernstige vermoeden ontstaat dat indien dit gegeven bekend zou zijn geweest, het onderzoek van de zaak zou hebben geleid, hetzij tot een vrijspraak van de veroordeelde, hetzij tot het verval van de strafvordering, hetzij tot het ontslag van rechtsvervolg, hetzij tot de toepassing van een minder strenge strafwet.' – 'Si un élément qui n'était pas connu du juge au moment de l'instruction faite à l'audience et que le condamné n'a pas été à même d'établir lors du procès et que cet élément, en lui-même ou conjugué aux preuves qui avaient été fournies, paraît incompatible avec le jugement, de manière à faire naître une présomption grave que si cet élément avait été connu, l'instruction de l'affaire aurait donné lieu soit à un acquittement du condamné, soit à l'extinction de l'action publique, soit à l'absolution, soit à l'application d'une loi pénale moins sévère.'

31. Rapport n° 467 enregistré le 16 avril 2014 sur la proposition de loi, adoptée par l'Assemblée nationale, relative à la réforme des procédures de révision et de réexamen d'une condamnation pénale définitive par M. Nicolas Alfonsi, *Sénat* 2013-14, at 5, 21 and 40.

32. Explanatory memorandum, above n. 22, at 11-2.

provision than the one he had violated in reality (former Art. 443 CCP). This ground thus concerned new or unknown factual elements. Examples are newly discovered files,³³ a confession by the actual perpetrator³⁴ and a new testimony of a witness or accomplice on the condition that it seems genuine.³⁵ By contrast, new discussions or appreciations of facts that were already known were not considered a new fact or an unknown circumstance that the convicted person could not possibly demonstrate.³⁶ This entailed that a new conclusion of an expert was considered a possible ground for revision only if the conclusion was based on new scientific techniques.³⁷ If the different conclusion was not based on a new scientific technique, it was no new fact, but a new appreciation of facts that were already known and could therefore not be successfully invoked in a request for revision.³⁸ The third ground for revision was severely criticised for this narrow scope.³⁹

The legislature in 2018 took note of this criticism and wanted to include in the third ground new appreciations by or conclusions of experts who did not make use of new scientific techniques.⁴⁰ It therefore replaced the third ground for revision by the Act of 2018 and introduced the concept of ‘an element’. This wording was strongly inspired by the Dutch legislation, as was recommended by the High Council of Justice in 2016.⁴¹ However, it is not yet clear how much this ground for revision has actually broadened. In the parliamentary debate, it became clear that the legislature did not want to limit it to factual circumstances, but favoured the inclusion of changed appreciations by experts.⁴² It remains unclear, however, whether the expansion is limited to those appreciations by experts or goes further, to include other types of new insights on known facts as well,⁴³ a question for the Court of Cassation to resolve.

2.2 Examination of the Request

2.2.1 Admissibility and More: Court of Cassation

The applicant has to file the request for revision at the Court of Cassation. In order to be admissible, some con-

ditions have to be met. First, if the request is filed by the convicted person or one of his aforementioned relatives, the request has to be signed by a lawyer (Art. 444 CCP) (see *supra*). Moreover, the request has to be accompanied by the favourable opinion of three other lawyers, who are either registered at the Bar of Lawyers at the Court of Cassation or have been registered at the ‘ordinary’ bar for at least ten years (Art. 443 CCP). Both requirements are intended to exclude requests that clearly have no prospect of success.⁴⁴ In addition, the request has to contain an elaborate account of the facts and state the ground for revision on which it is based. It also has to add pieces that demonstrate the ground for revision (Art. 444 CCP). If, in the initial proceedings, a civil party was involved, the applicant has to notify the civil party of his request for revision; otherwise, his request will also be inadmissible.⁴⁵

The requirement to add pieces that demonstrate the ground for revision is one of the novelties of the Act of 2018. The legislature wanted to ensure that the Court of Cassation can easily filter out requests that are manifestly unfounded.⁴⁶ When the request is based on one of the first two grounds for revision (incompatible convictions or a conviction for false testimony), this requirement will not present such a high hurdle.⁴⁷ As concerns the first ground, it will probably be sufficient to add the conflicting conviction. If the Court of Cassation then finds that the convictions are indeed incompatible so that one of the convicted persons has to be innocent, it nullifies both convictions. As concerns the second ground for revision, adding the conviction of the witness for false testimony will probably be sufficient. If the Court of Cassation then finds that that conviction indeed concerns a witness that was heard in the initial proceedings, it nullifies the original conviction. In both cases, the Court of Cassation then refers the matter to a court of appeal or assize court⁴⁸ other than the one that had rendered the original conviction(s), regardless of the possible prescription of the criminal proceedings⁴⁹ or the death of the defendant (Art. 445 CCP). That court of appeal or assize court will then render a new decision on the merits. It can acquit the applicant, impose a more lenient penalty or confirm the original conviction. It cannot, by contrast, impose a more severe penalty (Art. 447 CCP).⁵⁰

Yet for applicants who base their request on the third ground, the *novum*, the requirement to add pieces that demonstrate the ground for revision might present a

33. Court of Cassation 5 June 1996, P.96.0310.F.

34. Court of Cassation 14 September 1982, 7280.

35. Court of Cassation 12 November 1986, 5251; Court of Cassation 1 March 1995, P.94.1025.F; Court of Cassation 22 September 1999, P.99.1089.F; Court of Cassation 18 October 2000, P.00.0880.F.

36. M. Meysman and A. Bailleux, ‘Nota wetsontwerp houdende diverse bepalingen in strafzaken’, *Orde van Vlaamse Balies Working Paper* 2018, at 1-2 (hereinafter: OVB Working Paper).

37. Court of Cassation 25 April 1996, P.95.1490.N.

38. Explanatory memorandum, above n. 22, at 11; OVB Working Paper, above n. 36, at 1-2.

39. Traest (2013), above n. 3, at 404.

40. Explanatory memorandum, above n. 22, at 11.

41. Hoge Raad voor de Justitie – Conseil supérieur de la Justice, ‘Advies herziening in strafzaken’ – ‘Avis révision en matière pénale’, *Working Paper* 2016, at 7 (hereinafter: High Council of Justice (2016)); Explanatory memorandum, above n. 22, at 11.

42. Explanatory memorandum, above n. 22, at 11; Traest a.o. (2019), above n. 2, at 486.

43. OVB Working Paper, above n. 36, at 3; K. Verhesschen and F. Verbruggen, ‘Niets dan de waarheid? Grenzen aan de waarheidsvinding in het strafrecht’, in F. Fleerackers and R. Van Ransbeeck (eds.), *Recht en Waarheid* (2020) 93, at 112 (hereinafter: Verhesschen a.o.).

44. Mahieu a.o., above n. 9, at 101-2; Traest (2013), above n. 3, at 388-9.

45. Court of Cassation 23 February 2016, P.15.1586.N; Mahieu a.o., above n. 9, at 104; Traest (2013), above n. 3, at 389; Traest a.o. (2019), above n. 2, at 489.

46. Explanatory memorandum, above n. 22, at 13.

47. Traest a.o. (2019), above n. 2, at 489.

48. A ‘hof van assisen’, ‘cour d’assises’ (assize court) is a court that judges the most serious crimes, such as murder and manslaughter, and is characterised by the involvement of a lay jury and the oral character of its proceedings (Art. 280 and 287 CCP).

49. Mahieu a.o., above n. 9, at 118.

50. Traest a.o. (2019), above n. 2, at 490.

much higher hurdle.⁵¹ Those pieces have to create a ‘strong suspicion’ that the element they demonstrate would have led to a different outcome if it had been known at the initial proceedings. It is unclear what type of pieces and how many would then be sufficient. It is important to note that, contrary to the procedure in, for example, France⁵² and the Netherlands⁵³, the applicant under Belgian legislation has no formal possibility to ask investigative measures before filing his request for revision. Yet he is expected to put forward the right pieces when filing this request, or else it will be filtered out immediately. Depending on how strictly the Court of Cassation will interpret this requirement, the hurdle might thus be very or even too high for many applicants.⁵⁴

If the request for revision is based on the third ground, the *novum*, and is not inadmissible, the Court of Cassation proceeds to examine whether there are sufficient indications that there might be a ground for revision.⁵⁵ If there are none, it dismisses the request as manifestly unfounded. But if such indications are indeed present, it refers the request for advice to the ‘Commissie voor herziening in strafzaken’, ‘Commission de révision en matière pénale’ (Commission for revision in criminal matters; hereinafter also: Commission) (Art. 445 CCP). That Commission will examine whether a *novum* is indeed present (see *infra*).⁵⁶

2.2.2 Presence of a Novum: Commission for Revision in Criminal Matters

a) Composition of the Commission

The creation of the Commission for revision in criminal matters is another important novelty of the Act of 2018. Earlier, the Court of Cassation referred the request for advice to a court of appeal, which then had to examine whether the facts and circumstances invoked in the request ‘seemed sufficiently decisive’ to revise the matter (former Art. 445 CCP). If legitimately given, its

advice was binding for the Court of Cassation.⁵⁷ This part of the procedure was severely criticised for two reasons. First, only judges were involved in the examination of a request for revision.⁵⁸ Second, the court of appeal to which the Court of Cassation referred the request for advice could be the same court as the one that had rendered the original conviction.⁵⁹ Although the conviction was rendered by the criminal chamber, while the advice on the request for revision was delivered by the civil chamber, this created an appearance of prejudice.⁶⁰

The legislature was strongly aware of these negative appearances and created the Commission for revision in criminal matters to counter them. This Commission is a permanent, independent body⁶¹ and is composed of a judge, a member of the public prosecutor’s office, two lawyers and a member that is appointed on the basis of his expertise or experience related to the tasks delegated to the Commission (Art. 445 CCP). All members are appointed for five years, and their appointment is renewable.⁶² This multidisciplinary composition ensures that a request for revision is not examined by judges alone. Moreover, once appointed, the Commission has to draft its internal rules, containing a procedure on the exemption of a member whose independence or impartiality might be dubious.⁶³ This way, the legislature wanted to eradicate all appearances of partiality and prejudice.⁶⁴ One can question, however, whether the Commission is truly independent, since it interferes in the revision procedure only after the Court of Cassation has filtered out the inadmissible and manifestly unfounded requests (see *supra*).⁶⁵ Yet the Commission is called an independent body because it is intended to be independent in its task of advising on the presence of a *novum*, as is demonstrated by its composition (see *supra*) and the requirement to publish its advice (see *infra*).

Since Belgium is a multilingual state, there will, in fact, be two Commissions for revision in criminal matters, one that is Dutch speaking and the other French speak-

51. Traest a.o. (2019), above n. 2, at 489 and 495; Verhesschen a.o., above n. 43, at 113.

52. In France, according to Art. 626 of the ‘Code de procédure pénale’, when preparing a request for revision, the applicant has the possibility to ask the public prosecutor to carry out the investigative measures that seem necessary to bring to light a new fact or an element that was unknown at the time of the initial proceedings. For more information, see K. Verhesschen and C. Fijnaut, ‘Correcting Wrongful Convictions in France: Has the Act of 2014 Opened the Door to Revision?’, also in this issue of *Erasmus Law Review*.

53. In the Netherlands, Art. 461 *et seq.* of the ‘Wetboek van Strafvordering’ provide the possibility for a person convicted for an offence for which the Criminal Code lays down a penalty of 12 years’ imprisonment or more and that severely shocked the legal order to request the attorney general via his lawyer to investigate whether a ground for revision is present. Apart from the formal procedure provided in the ‘Wetboek van Strafvordering’, there are also private initiatives to investigate the possibility of a wrongful conviction, such as the project ‘Gerede Twijfel’ at the Vrije Universiteit Amsterdam and the project ‘Dubieuze zaken’ at Maastricht University.

54. Report first reading, above n. 12, at 17; OVB Working Paper, above n. 36, at 2; Verhesschen a.o., above n. 43, at 113.

55. Explanatory memorandum, above n. 22, at 13-14.

56. Explanatory memorandum, above n. 22, at 10 and 14; Traest a.o. (2019), above n. 2, at 495.

57. Mahieu a.o., above n. 9, at 113-14; Traest (2013), above n. 3, at 391-3.

58. High Council of Justice (2016), above n. 41, at 9; Explanatory memorandum, above n. 22, at 6-7; Traest a.o. (2019), above n. 2, at 496.

59. As happened in the case of Mr Meert (see *supra* footnote 1).

60. High Council of Justice (2016), above n. 41, at 9; Explanatory memorandum, above n. 22, at 6-7; Colette, above n. 3, at 13; Traest (2013), above n. 3, at 391; Traest a.o. (2019), above n. 2, at 496.

61. Explanatory memorandum, above n. 22, at 7; Report first reading, above n. 12, at 25 and 55.

62. Art. 2 Koninklijk Besluit 19 december 2018 tot vaststelling van de regels inzake de aanstelling van de leden van de Commissie voor de herziening in strafzaken, in uitvoering van artikel 445 van het Wetboek van Strafvordering – Arrêté royal 19 décembre 2018 fixant les règles relatives à la désignation des membres de la Commission de révision en matière pénale, en exécution de l’article 445 du Code d’instruction criminelle, *Belgisch Staatsblad – Moniteur belge* 24 December 2018, 102202 (hereinafter: Royal decree 19 December 2018).

63. Art. 3 Royal decree 19 December 2018, above n. 62.

64. Explanatory memorandum, above n. 22, at 7 and 14.

65. As was questioned by Mr Dennis Martinsson, who provided us with valuable feedback on our article, for which we are very grateful.

ing.⁶⁶ Both Commissions are separate and will draft their own internal rules,⁶⁷ so it remains to be seen whether they will have a similar or different approach concerning their task and competences.

The creation of the Commission was inspired by the Dutch procedure for revision, which involves the 'Adviescommissie Afgesloten Strafzaken'.⁶⁸ However, the actual implementation of this idea in the Belgian procedure resulted in some differences, for example in its composition and the stage of the procedure at which it interferes.⁶⁹

b) Advice on the presence of a *novum*

The Commission has to advise on the presence of a *novum*, so whether the invoked element, alone or combined with the evidence that was gathered before, seems incompatible with the original conviction, thus creating a strong suspicion that it would have led to a different outcome if it had been known at the initial proceedings.⁷⁰ To fulfil its task, the Commission has been given some investigating powers (Art. 445 CCP).⁷¹ First, it can hear persons who were involved in the initial investigation as well as experts. These include the convicted person, civil party, investigating judge, public prosecutor, members of the police, experts that were involved in the initial proceedings and also other experts.⁷² Yet it does not seem to oblige the Commission to hear the applicant, it only facilitates it.⁷³ Moreover, some authors⁷⁴ question whether this competence, in view of its wording, also includes the possibility for the Commission to hear witnesses that were heard in the initial proceedings.⁷⁵ The application of this provision in prac-

tice will have to clarify this,⁷⁶ but hearing the witnesses from the initial proceedings seems an indispensable competence for the Commission in order to properly examine the presence of a *novum*. However, if the Commission would be unable to hear those witnesses on its own initiative, it might make use of its competence to request investigative measures at the Court of Cassation (see *infra*) to get (transcripts of) a hearing of those witnesses.

Second, in addition to the expert that is a permanent member of the Commission, the Commission can appoint an expert in light of the scientific or technical expertise needed to examine the request at hand.⁷⁷

Third, the Commission can request investigative measures at the Court of Cassation. It has to indicate what measures are required and why.⁷⁸ The Court of Cassation will then decide whether they are indeed necessary and thus have to be performed. If it decides that they are, the investigative measures are carried out by a public prosecutor's office that was not involved in the initial investigation.⁷⁹ Otherwise, the Court of Cassation will have to motivate its decision not to comply with the request of the Commission. The Court of Cassation can also decide on its own account that investigative measures are required.⁸⁰

Some authors raise the question of whether the Commission can ask for all types of investigative measures.⁸¹ In Belgium, depending on how far-reaching an investigative measure is, a prior authorisation of an investigating judge is needed.⁸² Yet the provisions on the revision procedure remain silent on how this prior judicial control has to be applied in the context of this procedure, so it is not clear whether such measures can be asked for.⁸³ This is another question for practice to resolve. However, for the restoration of people's confidence in the justice system, the credibility of the Commission is crucial, and that credibility is, in its turn, linked to the

66. Because of this multilingual character, in Belgium, judges are assigned to a Dutch or a French linguistic register. Moreover, there are two bar associations, one for the Flemish (Dutch speaking) lawyers (Orde van Vlaamse Balies) and one for the French- and German-speaking lawyers (Ordre des Barreaux Francophones et Germanophone de Belgique). For those reasons, there will be a Dutch-speaking and a French-speaking Commission for revision in criminal matters. The Dutch-speaking Commission has been formed only recently, the ministerial order appointing the final member was published in the Official State's Gazette (Belgisch Staatsblad, Moniteur belge) on 4 May 2020. By contrast, on the French-speaking Commission, no information had been published at the time of writing this article (finalised in August 2020). However, in the period between the submission and the publication of this article, the ministerial order appointing the judge, the member of the public prosecutor's office and the two lawyers for the French-speaking Commission was published in the Official State's Gazette on 8 January 2021. The expert member has not been appointed yet.

67. Art. 3 Royal decree 19 December 2018, above n. 62.

68. High Council of Justice (2016), above n. 41, at 9-10.

69. For a comparison, see C. Fijnaut and K. Verhesschen, 'Minder juristen, meer andere deskundigen bij de herziening van de herziening in Nederland en België?', 6 *Expertise en Recht* 269 (2018) (hereinafter: Fijnaut a.o.).

70. Traest a.o. (2019), above n. 2, at 498.

71. Explanatory memorandum, above n. 22, at 15.

72. Traest a.o. (2019), above n. 2, at 499.

73. Report first reading, above n. 12, at 56.

74. Traest a.o. (2019), above n. 2, at 499.

75. The Dutch version states 'personen die bij het onderzoek in de zaak betrokken waren', the French version 'l'audition de personnes impliquées dans l'instruction', so it is open for discussion whether those witnesses are covered by this provision. Its wording does not necessarily seem to exclude them.

76. Or the internal rules of the Commission, which have to contain provisions on the possibility to hear persons involved in the initial investigation and experts (Art. 3 Royal decree 19 December 2018, above n. 62).

77. Explanatory memorandum, above n. 22, at 9.

78. Explanatory memorandum, above n. 22, at 15; Traest a.o. (2019), above n. 2, at 501.

79. Explanatory memorandum, above n. 22, at 15.

80. Explanatory memorandum, above n. 22, at 15; Traest a.o. (2019), above n. 2, at 505.

81. Traest a.o. (2019), above n. 2, at 502-5.

82. For example when a house search, DNA test without the permission of the person involved, telephone bug or arrest warrant is needed. In Belgium, there is a distinction between the 'opsporingsonderzoek', 'information' (preliminary investigation), which is directed by a public prosecutor and the 'gerechtelijk onderzoek', 'instruction' (judicial investigation), which is directed by an investigating judge. In principle, the more invasive investigative measures are possible only in a judicial investigation. Yet the list of exceptions to this principle is constantly growing, making the distinction between the two types of investigations more and more contested. In the blueprints for a new criminal procedure, the distinction is therefore abolished: each investigation is directed by a public prosecutor, and the investigating judge will intervene in the investigation for specific authorisations (R. Verstraeten and A. Bailleux, 'Het voorstel van een nieuw Wetboek van Strafvordering: algemene beginselen en fase van het onderzoek', 110 *Themis Straf- en strafproceesrecht* 143, at 146 (2019)).

83. Traest a.o. (2019), above n. 2, at 502-5.

means the Commission has to thoroughly examine requests for revision. Therefore, a thorough debate and clearer legal provisions on the investigative measures that can be requested by the Commission and ordered by the Court of Cassation in the context of the revision procedure would have been welcome.

The Commission thus has to assess whether the invoked element, either alone or combined with the evidence that was gathered before, seems incompatible with the original conviction. The Commission may involve all information from the criminal file that had been subject to the (possibility of) contradiction by the parties.⁸⁴ This requires that evidence is still available at the time of the request for revision. Unfortunately, there is no clear, global regulation⁸⁵ on the storage of evidence in Belgium.⁸⁶

After its examination, the Commission advises the Court of Cassation on the presence of a *novum*. Its advice will be made public after the Court of Cassation rendered the final decision on the request for revision (Art. 445 CCP). This is another guarantee for the Commission's independence.⁸⁷ Moreover, it enhances the transparency of the procedure, which might contribute to the public's confidence in the justice system.⁸⁸ To avoid an illegal interference in the independence of the judiciary, the advice of the Commission does not bind the Court of Cassation.⁸⁹

2.2.3 Referral or Not: Court of Cassation

Once the Commission for revision in criminal matters has rendered its advice, the request for revision returns to the Court of Cassation (Art. 445 CCP). As mentioned previously, the Court is not bound by the advice. However, if it decides not to comply with it, it will have to motivate that decision.⁹⁰

The Court of Cassation decides in a public hearing, at which the parties can be present.⁹¹ However, it is not clear yet whether they will be able to take note of the Commission's advice before the hearing of the Court of Cassation is held. The Act of 2018 does not specify whether they will be notified of the advice and given time to prepare their remarks, nor does the Royal Decree of 19 December 2018.⁹² To ensure a contradictory debate, the advice will have to be added to the criminal file before the hearing of the Court of Cassation, but it is regrettable that the Act does not explicitly

stipulate this, nor the time given to the applicant after the notification of the advice to prepare his remarks.⁹³

The Court of Cassation renders a final decision on the presence of a *novum* and thus on whether or not to allow a revision. If it finds that the conditions for the third ground for revision are not fulfilled, it dismisses the request. If it finds that they are, it nullifies the original conviction and refers the case to a court of appeal or assize court other than the one that had rendered the original conviction for a new decision on the merits of the case (Art. 445 CCP) (see *supra*).

3 Practice and Challenges Concerning the Revision Procedure

There are no official annual statistics available on the application of the former revision procedure. Only in responses to parliamentary questions, the number of applications in a specific year or time frame can be found. For example, between 2000 and 14 July 2015, decisions were taken on fifty requests for revision, and in ten of these cases the original conviction was nullified.⁹⁴ The lack of annual data on the application of the revision procedure will make it harder to assess the impact of the recent reform on the accessibility of the procedure.

However, currently, it is not only the lack of data on the former procedure that makes it difficult to assess the actual impact of the reform. As previously clarified, the legal framework of the new revision procedure leaves a lot of questions unanswered. The application in practice will have to clarify the scope of the third ground for revision (the *novum*), the magnitude of the various hurdles to the actual revision, the investigating powers of the Commission for revision in criminal matters, the possibility of a contradictory debate about the advice of the Commission, *etc.* Unfortunately, there is little practice to turn to yet, since the final member of the Dutch-speaking Commission for revision in criminal matters was appointed as recently as 17 April 2020, published in the Official State's Gazette on 4 May 2020, and so far, no information has been published on the French-speaking Commission (see *supra*).⁹⁵ It thus took over a year after its entry into force⁹⁶ to implement all aspects of the Act of 2018.

84. Traest a.o. (2019), above n. 2, at 495-6.

85. There are separate rules on, for example, the confiscation of seized assets and the management of such assets, and on the storage of DNA samples.

86. S. Royer, *Strafrechtelijk beslag: digiproof en (multi)functioneel* (2020), at 56.

87. Explanatory memorandum, above n. 22, at 14.

88. Verhesschen a.o., above n. 43, at 115.

89. Explanatory memorandum, above n. 22, at 14.

90. Explanatory memorandum, above n. 22, at 14.

91. Traest a.o. (2019), above n. 2, at 507.

92. Report first reading, above n. 12, at 56; Verhesschen a.o., above n. 43, at 115.

93. Traest a.o. (2019), above n. 2, at 507; Verhesschen a.o., above n. 43, at 115.

94. *Vragen en antwoorden Kamer* (Commissie voor de Justitie), n. 16761, 22 februari 2017 – *Questions et réponses Chambre* (Commission de la Justice), n. 16761, 22 février 2017.

95. No information had been published yet at the time of writing this article, which was finalised in August 2020. However, in the period between the submission and the publication of this article, on 8 January 2021, the ministerial order appointing four members of the French-speaking Commission was published in the Official State's Gazette (see *supra* footnote 66).

96. Which was on 1 March 2019 (above n. 7).

It is striking how long it took to form the Commission for revision in criminal matters. The first call for candidates was published in the Official State's Gazette as early as on 10 January 2019. However, as it was difficult to find a judge (for the French-speaking Commission) and a member of the public prosecutor's office (for both Commissions), a new call for these members was published, on 26 April 2019.⁹⁷ This might be an indication of the sensitivity of this procedure and the possible distrust towards the newly established Commission.

The Commission for revision in criminal matters thus has the difficult task to, on the one hand, dispel the distrust of the judiciary and, on the other hand, restore people's confidence in the justice system. For those reasons, it is crucial that the Commission can thoroughly examine a request for revision and gives a motivated advice, and that it is made public. It is therefore very welcome that Article 445 CCP explicitly states that the advice of the Commission will be made public after the Court of Cassation has rendered the final decision on the request for revision.⁹⁸ Only by this means can the procedure stand up to scrutiny and gain or restore the confidence of both the judiciary and society.⁹⁹ Unfortunately, the Act of 2018 does not contain an explicit obligation for the Commission to motivate its advice. However, to properly advise the Court of Cassation, it will have to state the main reasons.¹⁰⁰

It is remarkable that although its task is to examine the presence of a *novum*, the composition of the Commission allows¹⁰¹ for only one member to have a non-legal background.¹⁰² The Commission thus has little access to in-house scientific or technical expertise. However, to counter this, if more expertise is needed, it can appoint an expert in light of the request at hand.

Not only the Commission for revision in criminal matters, but also the Court of Cassation has an important role to play in restoring people's confidence in the justice system. It is the Court of Cassation that decides on the admissibility of a request and that examines whether there are sufficient indications that a ground for revision might exist, before sending the request to the Commission (see *supra*). It thus serves as a first filter. Although it seemed like the legislature wanted to widen the possibility to obtain a revision by broadening the definition of a *novum*, it also introduced the requirement for the applicant to add pieces that demonstrate the ground for revision. As explained earlier, if the request for revision is based on a *novum*, adding those pieces might be a dif-

ficult requirement for most applicants.¹⁰³ Depending on how strictly the Court of Cassation will perform its task as a first filter, it might thus make the procedure less accessible again.¹⁰⁴

Moreover, the Court of Cassation renders the final decision on the request for revision. It decides whether or not to refer the case to a court of appeal or an assize court for a new decision on the merits (Art. 445 CCP) (see *supra*). As the preparatory works make clear, the Court will have to motivate its decision if it decides not to comply with the advice of the Commission.¹⁰⁵ This as well might enhance the transparency of the decision-making and thus contribute to the restoration of people's confidence in the justice system.

4 Conclusion

The Act of 2018 responded to several of the criticisms voiced by legal doctrine, but not to all. Convictions imposing a police penalty are still excluded from the scope of the revision procedure (Art. 443 CCP). However, such convictions are becoming increasingly rare.¹⁰⁶ It did respond to the criticism that the scope of the third ground for revision, the *novum*, was too narrow. It broadened its wording to include changed appreciations by or conclusions of experts who did not make use of new scientific techniques. However, it is unclear whether the newly formulated *novum* also includes other types of new insights on known facts as well.

The former procedure for revision was also severely criticised because it involved only judges in the examination of a request for revision. Moreover, when the Court of Cassation had to send the request to a court of appeal for advice on the invoked facts and circumstances, it could send it to (the civil chamber of) the court of appeal that had rendered the original conviction. This created appearances of partiality and prejudice. The Act of 2018 responded to this criticism by creating the Commission for revision in criminal matters, a multidisciplinary and independent body that provides non-binding advice to the Court of Cassation on the presence of a *novum*. Thereby, the Act of 2018 ensures that the request for revision is not examined by judges alone and also guards the independence of the judiciary by stating that the advice of the Commission is non-binding.

97. According to Art. 81 of the Act of 2018, by then, the new revision procedure had already entered into force.

98. Note that neither the Act of 2018 nor the Royal decree of 19 December 2018 clarifies how the advice will be made public. All possible means are allowed, so they will probably be published on a webpage (Traest a.o. (2019), above n. 2, at 507).

99. Fijnaut a.o., above n. 69, at 274; Verhesschen a.o., above n. 43, at 115.

100. Traest a.o. (2019), above n. 2, at 506.

101. It allows it, but does not oblige it. It is thus not required that the member of the Commission who is appointed based on his expertise or experience has a non-legal background. For example, academics practising legal research are also eligible.

102. Fijnaut a.o., above n. 69, at 274.

103. Report first reading, above n. 12, at 17; OVB Working Paper, above n. 36, at 2; Verhesschen a.o., above n. 43, at 113.

104. Fijnaut a.o., above n. 69, at 275.

105. Explanatory memorandum, above n. 22, at 14.

106. Moreover, in the proposal for a new 'Strafwetboek', 'Code pénal', the category of 'overtredingen', 'contraventions' is abolished, so there would no longer be convictions imposing police penalties (J. Rozie, D. Vandermeersch, J. De Herdt, M. Debauche & M. Taeymans, *Commissie voor de Hervorming van het Strafrecht. Voorstel van voorontwerp van Boek I van het Strafwetboek* (2017), at 39).

In general, the Act of 2018 was warmly welcomed and positively received.¹⁰⁷ Compared with the previous procedure, it is a huge step forward.

However, the proof of the pudding is in the eating. An improved legal framework in itself is insufficient to restore people's confidence in the justice system. Moreover, the Act of 2018 leaves many questions unanswered. Its application in practice will have to clarify how strictly the Court of Cassation will interpret the requirement to add pieces to a request for revision and how it will play its role as a first filter. It will then become clear whether in reality the Act of 2018 made the revision procedure more accessible or not. Moreover, time will tell whether the Commission for revision in criminal matters has the means to thoroughly examine requests for revision and will elaborately motivate its advice. Whether the reform of 2018 will help restore people's confidence in the justice system thus hinges on the way in which the different actors involved apply those legal provisions.

Nevertheless, to ensure people have confidence in the justice system, a well-functioning revision procedure is not enough. Also of considerable importance is that wrongful convictions be prevented as much as possible. At each stage of the criminal procedure, sufficient safeguards should be in place, and all actors should be aware of the possibility of mistakes and of the various pitfalls and possible abuses and try to counter them.

107. Report first reading, above n. 12; Traest a.o. (2019), above n. 2, at 508.

Correcting Wrongful Convictions in France

Has the Act of 2014 Opened the Door to Revision?

Katrien Verhesschen & Cyrille Fijnaut*

Abstract

The French 'Code de procédure pénale' provides the possibility to revise final criminal convictions. The Act of 2014 reformed the procedure for revision and introduced some important novelties. The first is that it reduced the different possible grounds for revision to one ground, which it intended to broaden. The remaining ground for revision is the existence of a new fact or an element unknown to the court at the time of the initial proceedings, of such a nature as to establish the convicted person's innocence or to give rise to doubt about his guilt. The legislature intended judges to no longer require 'serious doubt'. However, experts question whether judges will comply with this intention of the legislature. The second is the introduction of the possibility for the applicant to ask the public prosecutor to carry out the investigative measures that seem necessary to bring to light a new fact or an unknown element before filing a request for revision. The third is that the Act of 2014 created the 'Cour de révision et de réexamen', which is composed of eighteen judges of the different chambers of the 'Cour de cassation'. This 'Cour de révision et de réexamen' is divided into a 'commission d'instruction', which acts as a filter and examines the admissibility of the requests for revision, and a 'formation de jugement', which decides on the substance of the requests. Practice will have to show whether these novelties indeed improved the accessibility of the revision procedure.

Keywords: Final criminal conviction, revision procedure, grounds for revision, preparatory investigative measures, Cour de révision et de réexamen

1 Introduction

Like many states, France has been confronted with notorious cases in which the wrong person was convicted. The best known example is probably the case of Alfred Dreyfus, an officer who was wrongly convicted for treason and banned to Devil's Island. This conviction incited Émile Zola to publish his famous letter 'J'accuse' in the newspaper *L'Aurore* in 1898. In this letter, he accused many high-ranking officials of manipu-

lating the investigation and of trying to cover it up. Eventually, a new investigation was conducted and exposed the malpractices. After many years, Dreyfus was exonerated.

This and other cases demonstrate the importance of providing a possibility to re-examine final criminal convictions if there are strong indications that the conviction is erroneous. The French 'Code de procédure pénale' (Code of Criminal Procedure, hereinafter: CPP) provides for such a possibility in Article 622 *et seq.*¹ The procedure was fundamentally reformed in 2014, after the finding that the previous reform of 1989 had not achieved all its objectives, because few requests for revision were successful and had led to a new decision on the merits.² Both in the 'Assemblée nationale' and in the 'Sénat', there was broad support for the reform in 2014, resulting in the unanimous adoption of the (amended) legislative proposal.³ Among other things, Act no 2014-640 of 20 June 2014⁴ changed the grounds on which a request for revision could be based and defined more clearly the tasks of the different bodies considering the request (see *infra*).

At the same time, a proposal to provide the possibility to revise a final acquittal was on the table,⁵ after new DNA evidence had turned up in a highly publicised murder case, creating a strong suspicion among the public that

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1. There is a separate revision procedure for convictions for offending public decency by means of a book (Loi n° 46-2064 du 25 septembre 1946 ouvrant un recours en révision contre les condamnations prononcées pour outrages aux bonnes mœurs commis par la voie du livre). This specific revision procedure will not be discussed in this article.
2. Rapport d'information n° 1598 enregistré le 4 décembre 2013 sur la révision des condamnations pénales par MM. Alain Tourret et Georges Fenech, *Assemblée nationale* 2013-14, XI^e législature, at 15 (hereinafter: Rapport d'information n° 1598); Compte rendu intégral de la première séance du 27 février 2014, *Assemblée nationale* 2013-14, XI^e législature, www.assemblee-nationale.fr/14/cr/2013-2014/20140184.asp#P208536 (hereinafter: *Assemblée nationale* 27 février 2014); F. Fournié, 'Réviser la révision', 27 *La Semaine Juridique* 1326, at 1326 (2014) (hereinafter: Fournié); C. Ribeyre, 'La réforme des procédures de révision et de réexamen ou comment mieux corriger l'erreur judiciaire', 10 *Droit pénal étude* 17, at n. 1 (2014) (hereinafter: Ribeyre).
3. *Assemblée nationale* 27 février 2014, above n. 2; Compte rendu intégral de la deuxième séance du 11 juin 2014, *Assemblée nationale* 2013-14, XI^e législature, www.assemblee-nationale.fr/14/cr/2013-2014/20140231.asp#P248399; Ribeyre, above n. 2, at n. 1.
4. Loi n° 2014-640 du 20 juin 2014 relative à la réforme des procédures de révision et de réexamen d'une condamnation pénale définitive.
5. In the form of an amendment to the legislative proposal that served as basis for the Act of 2014. Amendement n° 5 de 24 février 2014, *Assemblée nationale* 2013-14, XI^e législature, www.assemblee-nationale.fr/14/amendements/1807/AN/5.asp (hereinafter: Amendement n° 5).

the final acquittal of the main suspect was erroneous.⁶ However, this proposal for a revision *in defavorem*⁷ was not accepted.⁸

The aim of this article is twofold. First, it wishes to describe the revision procedure as it is in the books. Second, it intends to look at some aspects of the revision procedure in action. We will therefore first provide an overview of the legal framework of the revision procedure, highlighting some of the novelties introduced by the Act of 2014. We will then look at the revision procedure in practice, to answer the question whether, according to the initial findings, the reform of 2014 lives up to the expectations raised by the legislature.

2 Legal Framework of the Revision Procedure

2.1 The Start of the Revision Procedure

2.1.1 Possible Applicants

In France, there are three categories of criminal offences. The first category, consisting of the most serious offences, is called ‘crime’ (felony, crime). The second is called ‘délit’ (ordinary offence, misdemeanour), and the third, comprising the least serious offences, is called ‘contravention’ (contravention) (Art. 111-1 Code pénal). Not all criminal decisions are eligible for revision. Only decisions in which someone is found guilty of one (or both) of the two more serious categories of offences (‘crime’ or ‘délit’) can be revised (Art. 622 CPP).⁹ A simple finding of guilt is sufficient, so the imposition of a penalty is not required.¹⁰ Moreover, the

revision procedure concerns only criminal decisions that are final.¹¹ No other remedies may be available to challenge the criminal decision. Either the ordinary remedies have been exhausted or the term in which they can be exercised has expired.¹²

The convicted person can file a request for revision. In the event of incapacity, his legal representative can file the request for him. When the convicted person is deceased or declared missing, a request for revision can be filed by his spouse, partner in a civil union, cohabitee, parents, children, grand- or great-grandchildren, his universal legatee or part universal legatee (Art. 622-2 CPP).

The possibility for revision does not only serve the private interests of the convicted person. Correcting wrongful convictions is also in the public interest, as it restores people’s confidence in the justice system.¹³ Therefore, revision can also be requested by the Minister for Justice, the attorney general at the ‘Cour de cassation’ (Supreme Court) and the attorneys general at the courts of appeal (Art. 622-2 CPP).

2.1.2 The Grounds for Revision

2.1.2.1 New Fact or Unknown Element Establishing Innocence or Giving Rise to Doubt

Since the Act of 2014, there is only one ground for revision left, unlike before, when there were four grounds (former Art. 622 CPP):

1. after a conviction for homicide, sufficient indications are presented that the alleged victim is still alive;
2. after a conviction, there is a new conviction finding another defendant guilty of the same fact, both convictions being irreconcilable, so that one of the convicted persons has to be innocent;
3. after a conviction, a witness that was heard is convicted for false testimony concerning the defendant;
4. after a conviction, a new fact or an element unknown to the court at the time of the proceedings comes to the surface and is of such a nature as to cast doubt on the convicted person’s guilt.

When preparing the Act of 2014, the legislature decided that the first three grounds were already included in the fourth ground, and that there was therefore no need to maintain the first three.¹⁴ Since the Act of 2014, the

6. Amendement n° 5, above n. 5; Assemblée nationale 27 février 2014, above n. 2 (intervention of Mr Georges Fenech); L. Colcombet, ‘Meurtre de Nelly Haderer: le dernier espoir de connaître la vérité’, *Le Parisien* (6 December 2017), www.leparisien.fr/faits-divers/meurtre-de-nelly-haderer-le-dernier-espoir-de-connaître-la-verite-06-12-2017-7437354.php; M. Gay, ‘Affaire Haderer: La vérité judiciaire à l’épreuve de la science’, *Info du Jour* (13 October 2017) infodujour.fr/societe/justice/10193-affaire-haderer-la-verite-judiciaire-a-lepreuve-de-la-science.

7. However, Art. 6 para. 2 CPP already allows in an exceptional circumstance criminal proceedings to resume after they were discontinued owing to, for example, the death of the defendant, prescription or amnesty: when the falsity of that decision on the discontinuance of the proceedings has been established. An example given in this context is that of a defendant pretending to be deceased to escape criminal prosecution (D. Caron, ‘Art. 6 – Fasc. 10: Action publique – Extinction – Décès, amnistie et autres causes’, in X., *JurisClasseur Procédure pénale* (2020) loose-leaf, at n. 72).

8. E. Daures, ‘Révision’, in M. Aydalot (ed.), *Répertoire de droit pénal et de procédure pénale* (2015) loose-leaf, at n. 11 (hereinafter: Daures); S. Guinchard and J. Buisson, *Procédure pénale* (2018), at 1352 (hereinafter: Guinchard and Buisson).

9. Rapport d’information n° 1598, above n. 2, at 20-21; F. Desportes and L. Lazerges-Cousquer, *Traité de Procédure Pénale* (2016), at 2308-2309 (hereinafter: Desportes a.o.); Fournié, above n. 2, at 1327; Guinchard and Buisson, above n. 8, at 1353-1354; Ribeyre, above n. 2, at n. 2; F. Saint-Pierre, *Pratique de défense pénale. Droit, histoire, stratégie* (2018), at 660 (hereinafter: Saint-Pierre).

10. Rapport d’information n° 1598, above n. 2, at 20-21; C. Ambroise-Castérot, J.-F. Renucci, J.-P. Céré & M. Léna, *Code de Procédure Pénale Annoté* (2018), at 983 (hereinafter: Ambroise-Castérot a.o.); Daures,

above n. 8, at n. 11 and 15; Ribeyre, above n. 2, at n. 2; Saint-Pierre, above n. 9, at 660.

11. Daures, above n. 8, at n. 19-22; Desportes a.o., above n. 9, at 2308; Fournié, above n. 2, at 1327; Guinchard and Buisson, above n. 8, at 1353; Saint-Pierre, above n. 9, at 660.

12. Rapport d’information n° 1598, above n. 2, at 20; Daures, above n. 8, at n. 20.

Example of a case in which the term for exercising the ordinary remedies had not expired because it had not started yet: CRR 18 June 2015, ECLI:FR:CCASS:2015:C1E1043.

13. Assemblée nationale 27 février 2014, above n. 2; Fournié, above n. 2, at 1328.

14. Rapport n° 467 enregistré le 16 avril 2014 sur la proposition de loi, adoptée par l’Assemblée nationale, relative à la réforme des procédures de révision et de réexamen d’une condamnation pénale définitive par M. Nicolas Alfonsi, *Sénat* 2013-14, at 5, 21 and 40 (hereinafter: Rapport n° 467); Compte rendu intégral des débats de la séance du 29 avril

only ground¹⁵ for revision is therefore the existence of a new fact or an element unknown to the court at the time of the initial proceedings, of such a nature as to establish the convicted person's innocence or to give rise to doubt about his guilt (Art. 622 CPP).¹⁶ The newly presented element may not have been known by the court at the time of the initial proceedings. By contrast, it is no obstacle to revision if the convicted person already knew about the element.¹⁷

Not only did the legislature want to simplify the grounds for revision, but it also wanted to make the revision procedure more accessible on a substantive level. It therefore intended the scope of the remaining ground for revision to be broader. The 'Assemblée nationale' found that judges tended to interpret the former fourth ground for revision strictly. Although it was not stated as such in former Article 622 CPP, they gave a very narrow interpretation to the wording 'doubt', reading it as if 'serious doubt'¹⁸ was required.¹⁹

The case law requiring serious doubt dates back to before the reform of 1989, when the legal provision spoke of facts or unknown pieces of such a nature as to establish the convicted person's innocence. It did not contain a reference to doubt. By stating that 'serious doubt' was sufficient, judges, in fact, mitigated the strict wording of the provision from before 1989.²⁰ However, in 1989, the legislature introduced in Article 622 CPP

the concept of doubt and deliberately did not qualify it. According to the 'Assemblée nationale', the legislature thus wanted to ensure that, in principle, the slightest doubt²¹ could be sufficient to obtain a new examination of the merits of the case.²² By still requiring serious doubt, judges did not comply with this intention of the legislature. Moreover, according to several experts, in some cases the requirement of serious doubt in fact required the applicant to establish his innocence by pointing out the real culprit or to establish that it was practically or legally impossible for him to commit the crime.²³ 'Simple' doubt, on the contrary, was not deemed sufficient to allow revision.²⁴

The 'Assemblée nationale' criticised this case law for being too strict. It considered that, as is the case in the original procedure for the accused, doubt should benefit the convicted person and lead to a new examination of the merits of the case.²⁵ It thus wanted to urge judges to alter their case law by rephrasing the ground for revision. In order to make clear that, in principle, doubt in itself is sufficient for a request to be successful, it proposed to use the wording 'le moindre doute' (the slightest doubt) in the Act of 2014.

The 'Sénat', however, disagreed with this proposal for several reasons. First, the introduction of the concept 'serious doubt' was actually intended to allow judges to be more flexible at a time (before the reform in 1989) when the legal provision allowed revision only when the judge was convinced of the convicted person's innocence.²⁶ Second, judges' interpretation of the question of doubt varied according to whether or not it was possible to organise adversarial hearings, being more flexible when such hearings were still possible and more strict when the 'Cour de révision' decided in the last instance and could not refer the case.²⁷ Third, it was raised that it is artificial to qualify doubt; either there is doubt, or there is no doubt, but there are no levels in between. Adding the word 'moindre' (slightest) had no legal meaning and thus no added value.²⁸ Not qualifying the level of doubt leaves it to the judges to appreciate whether or not the new fact or unknown element calls into question the reasoning adopted in the original conviction and thus raises doubt.²⁹

In order not to delay the adoption of the legislative proposal for the Act of 2014, the 'Assemblée nationale'

2014, *Sénat* 2013-14, www.senat.fr/seances/s201404/s20140429/s20140429_mono.html#Niv1_SOM7 (intervention of Mr Nicolas Alfonsi) (hereinafter: *Sénat* 29 avril 2014); Daures, above n. 8, at n. 24; Desportes a.o., above n. 9, at 2310; Fournié, above n. 2, at 1327.

15. The rapport d'information n° 4302 of 2016 that evaluates the Act of 2014 proposes to add another ground for revision: the existence of a fundamental procedural irregularity affecting the reliability of evidence, for example confessions obtained by torture (Rapport d'information n° 4302 enregistré le 14 décembre 2016 sur l'évaluation de la loi n° 2014-640 du 20 juin 2014 relative à la réforme des procédures de révision et de réexamen d'une condamnation pénale définitive par MM. Georges Fenech et Alain Tourret, *Assemblée nationale* 2016, XI^e législature, at 18 and 33 (hereinafter: Rapport d'information n° 4302)). That proposal has not been implemented in the CPP thus far. A case that demonstrated the possible need for this ground for revision is CRR (Commission d'instruction) 16 March 2015, 13REV037.

16. Art. 622 CPP: 'La révision d'une décision pénale définitive peut être demandée au bénéfice de toute personne reconnue coupable d'un crime ou d'un délit lorsque, après une condamnation, vient à se produire un fait nouveau ou à se révéler un élément inconnu de la juridiction au jour du procès de nature à établir l'innocence du condamné ou à faire naître un doute sur sa culpabilité.'

17. Rapport d'information n° 1598, above n. 2, at 26; H. Angevin and M. Lafourcade, 'Art. 622 à 626-1 – Fasc. 20: Demandes en révision', in LexisNexis (ed.), *JurisClasser Procédure pénale* (2018) loose-leaf, at n. 56 (hereinafter: Angevin a.o.).

18. In some cases the wording 'reasonable doubt' is used. However, the rapporteurs appointed by the 'Assemblée nationale' find that this 'reasonable doubt' in fact amounts to 'serious doubt' (Rapport d'information n° 1598, above n. 2, at 27-28).

19. Rapport d'information n° 1598, above n. 2, at 25-34; Proposition de loi n° 1700 relative à la réforme des procédures de révision et de réexamen d'une condamnation pénale définitive, *Assemblée nationale* 2013-14, XI^e législature, at 5 (hereinafter: Proposition de loi n° 1700); *Assemblée nationale* 27 février 2014, above n. 2; D. Goetz, 'La révision en matière pénale', Doctoral thesis at the Université de Strasbourg (2015), www.theses.fr/2015STRAA036, at 101-102 and 234 (hereinafter: Goetz).

20. Rapport d'information n° 1598, above n. 2, at 24; Goetz, above n. 19, at 95.

21. Others argue that 'doubt' in the sense of former Art. 622 CPP requires a certain intensity and does not include all types of doubt. According to them, it concerns 'insurmountable and rational doubt', which corresponds with doubt that benefits the accused in the original procedure (*in dubio pro reo*). What counts is whether in a specific case doubt is rational, regardless of whether it is phrased as 'simple' or 'serious' doubt (Goetz, above n. 19, at 99-100).

22. Rapport d'information n° 1598, above n. 2, at 24 and 98.

23. *Ibid.*, at 28-30 and 98-99; Goetz, above n. 19, at 101-2.

24. Rapport d'information n° 1598, above n. 2, at 30-3 and 99.

25. *Ibid.*, at 34; Goetz, above n. 19, at 97-8.

26. Rapport n° 467, above n. 14, at 21 and 40.

27. *Ibid.*, at 21 and 41.

28. *Ibid.*; *Sénat* 29 avril 2014, above n. 14; Fournié, above n. 2, at 1327; Ribeyre, above n. 2, at n. 3.

29. Rapport n° 467, above n. 14, at 21; *Sénat* 29 avril 2014, above n. 14 (intervention of Mr Nicolas Alfonsi).

agreed to leave out the word ‘moindre’ in the text that was finally adopted. However, both in the parliamentary report and during the parliamentary debate, the ‘Assemblée nationale’ stressed its intention to urge judges to relax their interpretation and to no longer require ‘serious doubt’.³⁰ It expressed its confidence in the members of the newly composed ‘Cour de révision et de réexamen’ not to interpret the provision contrary to the intention of the legislature.³¹

Whether a fact or an element can be successfully invoked in a request for revision thus depends a lot on the facts of the case. A confession of the actual perpetrator, a new declaration of the victim or a witness, new DNA evidence ... can be considered a new fact or an unknown element³² but will lead to a revision only if they cast doubt on the applicant’s guilt.³³ Sometimes that is quite clear, for example elements proving the hospitalisation of the convicted person at the time of the offence in a hospital that was far removed from the crime scene, or elements proving that the convicted person was completely paralysed at the time of the offence.³⁴ Sometimes, however, the question of doubt is less clear. For example, new testimonies of accomplices clearing the applicant can be considered a new fact, but if they are contradictory and implausible, they might not cast doubt on the applicant’s guilt and therefore not lead to a revision.³⁵

2.1.2.2 Conviction by the European Court of Human Rights

In order to further simplify the procedure, the legislature decided to join together before the same court the revision procedure and the procedure of reopening a criminal conviction after the finding of a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms by the European Court of Human Rights (Art. 622-1 CPP). Both procedures are alike in the sense that they can both lead to a new assessment of a case after a criminal conviction had already become final.³⁶ Yet, as the French legislature also acknowledges, they are also different: the revision

procedure concerns factual errors and the reopening procedure legal, procedural errors.³⁷ For this reason, the possibility to reopen a case after a conviction by the European Court of Human Rights will not be dealt with in this article.

2.1.3 The Possibility to Seek Investigative Measures

Before filing a request for revision, the applicant³⁸ has the possibility to ask the public prosecutor to carry out the investigative measures that seem necessary to bring to light a new fact or an element that was unknown at the time of the initial proceedings (Art. 626 CPP).³⁹ To this end, he has to file a written and motivated request, in which he clearly indicates the investigative measures he wishes to see performed and, in case of a hearing, clarifies the identity of the person he wishes to be heard. The public prosecutor has to render a motivated decision on the request within two months from its reception. If he rejects the request, the applicant can appeal to the attorney general, who has to decide within a month.

This provision, introducing the possibility for the applicant to seek investigative measures before filing a request for revision, aims to make the revision procedure more accessible on a procedural level.⁴⁰ Convicted persons with inadequate resources to take on a lawyer and to carry out a private investigation or convicted persons who are not supported by the media do not need to wait for a new fact or an unknown element to pop up but can instigate an investigation into the existence of such a fact or element.⁴¹ This should also prevent allegations of manipulation of evidence by the applicant or his lawyer.⁴² An example given in this context is that of a lawyer meeting with a possible new witness, after which the testimony of the witness can be discredited by allegations of corruption.⁴³ Moreover, by establishing before a request for revision is filed that there is little indication for the existence of a new fact or an unknown element, this provision also aims to discourage requests for revision that have no prospect of success.⁴⁴

2.2 Examination of the Request

2.2.1 Cour de révision et de réexamen

The applicant has to file a request for revision at the ‘Cour de révision et de réexamen’ (Court for revision and reopening, hereinafter: CRR) (Art. 623 CPP). This

30. Rapport n° 1957 enregistré le 21 mai 2014 sur la proposition de loi (n° 1900), modifiée par le Sénat, relative à la réforme des procédures de révision et de réexamen d’une condamnation pénale définitive par M. Alain Tourret, *Assemblée nationale* 2013-14, XIV^e législature, at 19-20 and 27-8 (hereinafter: Rapport n° 1957); Fournié, above n. 2, at 1327; Goetz, above n. 19, at 234.

31. Rapport n° 1957, above n. 30, at 19-20 and 27-8.

32. Rapport d’information n° 1598, above n. 2, at 25; Ambroise-Castérot a.o., above n. 10, at 985-87; Daures, above n. 8, at n. 28, 33, 37, 42, 46 and 49-51; Desportes a.o., above n. 9, at 2311-2312.

33. For example CRR 25 October 2018, ECLI:FR:CCASS:2018:C1E1087, in which the new testimonies cast doubt on the convicted person’s guilt. An example of a case in which the revocation by the victim of its initial allegations was not sufficient to cast doubt on the convicted person’s guilt is CRR 18 June 2015, ECLI:FR:CCASS:2015:C1EV144.

34. Rapport d’information n° 1598, above n. 2, at 25; Ambroise-Castérot a.o., above n. 10, at 985; Daures, above n. 8, at n. 27 and 29; Desportes a.o., above n. 9, at 2312.

35. Ambroise-Castérot a.o., above n. 10, at 987; Daures, above n. 8, at n. 52.

36. Proposition de loi n° 1700, above n. 19, at 4; Desportes a.o., above n. 9, at 2322; Fournié, above n. 2, at 1326.

37. Assemblée nationale 27 février 2014, above n. 2; Rapport n° 467, above n. 14, at 20; Desportes a.o., above n. 9, at 2322; Fournié, above n. 2, at 1326; Ribeyre, above n. 2, at n. 6.

38. The convicted person or, in case of incapacity, his legal representative. If the convicted person is deceased or declared missing, his spouse, partner in a civil union, cohabitee, parents, children, grand- or great-grandchildren, his universal legatee or part universal legatee can request investigative measures before filing a request for revision (Art. 626 CPP).

39. Daures, above n. 8, at n. 74-75; Fournié, above n. 2, at 1329; Guinchard and Buisson, above n. 8, at 1354; Ribeyre, above n. 2, at n. 4.

40. Assemblée nationale 27 février 2014, above n. 2.

41. Rapport d’information n° 1598, above n. 2, at 86.

42. *Ibid.*, at 87; Saint-Pierre, above n. 9, at 666.

43. Rapport d’information n° 1598, above n. 2, at 87.

44. *Ibid.*

court is composed of eighteen judges of the ‘Cour de cassation’, including the president of the criminal chamber, who presides over the CRR. The other members are representatives of the different chambers of the ‘Cour de cassation’⁴⁵ and are appointed by its general assembly for three years, one time renewable.⁴⁶ Eighteen supplementary members are also appointed. Before the CRR, the attorney general’s office at the ‘Cour de cassation’ acts as prosecution service (Art. 623-1 CPP).⁴⁷ To ensure the impartiality of the CRR, judges and attorneys general that had been involved in the initial investigation or the initial decision(s) on the merits of the case that is now brought before the CRR have to abstain from the examination of the request for revision.⁴⁸ They may sit on neither division of the CRR nor act as member of the attorney general’s office in this case (Art. 623-1 CPP).

The CRR is divided in a ‘commission d’instruction’ (investigating commission) and a ‘formation de jugement’ (adjudicating formation) (Art. 623-1 CPP). The former is composed of five members of the CRR and serves as a filter, by examining the admissibility of the requests (see *infra*). The latter consists of the remaining thirteen members and decides on the substance of the requests for revision (see *infra*).

The composition of the CRR is one of the novelties of the Act of 2014. Before this Act, requests were filtered by a ‘commission de révision’, which was composed of five judges of the ‘Cour de cassation’ and was not part of the ‘Cour de révision’.⁴⁹ The latter, the ‘Cour de révision’, consisted solely of members of the criminal chamber of the ‘Cour de cassation’, and the number of judges examining requests was undetermined and varied from case to case.⁵⁰ Also, the division of tasks between the two bodies and their different roles were not very clearly defined.⁵¹ This created an appearance of arbitrariness and prejudice.⁵² To avoid these negative appearances, the legislature in the Act of 2014 laid down the composition of the new CRR and made sure all chambers of the ‘Cour de cassation’ are represented herein, to ensure more diverse perspectives on and a more neutral appreciation of the requests for revision.⁵³ It also delineated

more clearly the tasks of the ‘commission d’instruction’ and the ‘formation de jugement’.⁵⁴

By involving only members of the judicial branch in the examination of (the admissibility of) a request for revision, the French legislature made a choice different from that of some of its surrounding states, such as Belgium and the Netherlands. Those states deemed it necessary to involve non-judges in the revision procedure (in an advisory role at the least) to avoid an appearance of prejudice (judges deciding on alleged errors of other judges) and to ensure that other, more scientific and technical expertise is available when assessing the existence of a new or unknown element. The French legislature, in contrast, decided to counter an appearance of prejudice by including judges working in different fields of law, not merely penalists, but did not include non-legal experts. The revision of a final criminal conviction harms legal certainty and the authority of *res iudicata* and should therefore be exceptional. For that reason, the French legislature deemed members of the most supreme court, the ‘Cour de cassation’, best placed to decide on requests for revision.⁵⁵ However, both the ‘commission d’instruction’ and the ‘formation de jugement’ have investigative powers, so they can appoint an expert when technical or scientific expertise is needed (see *infra*).

2.2.2 Commission d’instruction

Five members of the CRR are appointed for three years (one time renewable) to form the ‘commission d’instruction’, an investigating commission that filters the requests for revision by dismissing the ones that are inadmissible (Arts. 623-1 and 624 CPP). The president of the commission can dismiss requests that are manifestly inadmissible without further ado in a motivated decision.⁵⁶ If the request does not appear inadmissible at first sight, the commission proceeds with the examination of the request and can carry out investigative measures. After having received the (written or oral) comments of the applicant and his lawyer, the attorney general and, if he intervened, the civil party or his lawyer and after having given the applicant and his lawyer the last word, the commission decides on the admissibility in a motivated decision. If it deems the request admissible, it refers the case to the ‘formation de jugement’. There is no appeal possible against the decisions of the commission and its president on the request for revision (Art. 624 CPP).

When the applicant invokes a new fact or an unknown element, the commission has to verify whether it indeed exists and is new or was previously unknown to the court.⁵⁷ According to the ‘Sénat’ and the commission

45. The criminal chamber; the first, second and third civil chambers; the commercial, financial and economic chamber and the social chamber (Rapport n° 467, above n. 14, at 31).

46. Daures, above n. 8, at n. 77; Desportes a.o., above n. 9, at 2313; Fournié, above n. 2, at 1328; Guinchard and Buisson, above n. 8, at 129; Ribeyre, above n. 2, at n. 9.

47. Daures, above n. 8, at n. 80; Fournié, above n. 2, at 1328; Guinchard and Buisson, above n. 8, at 182.

48. Daures, above n. 8, at n. 81; Desportes a.o., above n. 9, at 2314; Fournié, above n. 2, at 1328; Ribeyre, above n. 2, at n. 9.

49. Rapport d’information n° 1598, above n. 2, at 35; Rapport n° 467, above n. 14, at 29.

50. Rapport d’information n° 1598, above n. 2, at 40; Rapport n° 467, above n. 14, at 30.

51. Rapport d’information n° 1598, above n. 2, at 38-9; Rapport n° 467, above n. 14, at 32.

52. Rapport d’information n° 1598, above n. 2, at 40; Rapport n° 467, above n. 14, at 30.

53. Rapport d’information n° 1598, above n. 2, at 62-6; Rapport n° 467, above n. 14, at 20 and 30-1; Rapport d’information n° 4302, above n. 15, at 9; Fournié, above n. 2, at 1328.

54. Rapport d’information n° 1598, above n. 2, at 67-70; Rapport n° 467, above n. 14, at 32-6; Fournié, above n. 2, at 1328-1329.

55. Rapport d’information n° 1598, above n. 2, at 62.

56. Daures, above n. 8, at n. 86; Desportes a.o., above n. 9, at 2314; Fournié, above n. 2, at 1329; Guinchard and Buisson, above n. 8, at 1355; Ribeyre, above n. 2, at n. 9; Saint-Pierre, above n. 9, at 664.

57. Rapport d’information n° 1598, above n. 2, at 68-9; Rapport n° 467, above n. 14, at 15; Daures, above n. 8, at n. 90; Fournié, above n. 2, at 1329.

itself, this also requires it to assess whether the fact or element is linked to the case at hand and to the question of guilt.⁵⁸ The commission may not, however, assess the impact of the invoked fact or element on the convicted person's guilt, since that would go beyond its task as a filter.⁵⁹ The latter assessment is for the 'formation de jugement' to carry out. When performing its task as a filter, the commission may also involve in the assessment facts and elements that were invoked in previous requests for revision.⁶⁰

To fulfil its task, the commission has the same investigative powers as an investigating judge.⁶¹ It can, for example, hear witnesses, appoint an expert, organise a reconstruction and seize assets.⁶² It cannot, however, when there are strong indications that a third person is the actual perpetrator, hear this person and take him into custody (Art. 624 CPP).⁶³ If such suspicions towards a third person exist, the commission has to inform the public prosecutor's office, which will conduct the necessary investigations (Art. 624-2 CPP). The applicant⁶⁴ can ask the commission to carry out investigative measures by a written and motivated request (Art. 624-5 CPP).⁶⁵ The commission has to decide on this request within three months from its reception. There is no appeal possible against this decision of the commission.

Not only for the examination of the admissibility of the request, but also to enable revision in general, it is necessary that evidence is stored long enough.⁶⁶ In France, evidence can, in general,⁶⁷ be destroyed six months after the conviction (Art. 41-4 CPP).⁶⁸ This proved to be an impediment to the revision of criminal convictions. For that reason, the Act of 2014 introduces the obligation for the public prosecutor and the attorney general who intend to destroy confiscated goods or to transfer them

to the agency responsible for the administration of seized and confiscated assets to first give notice to the convicted person (Art. 41-6 CPP).⁶⁹ The convicted person then has two months to oppose this decision. If the public prosecutor or attorney general still wants to proceed with the destruction or transfer, the matter can be brought before the 'chambre d'instruction' (indictments chamber),⁷⁰ who decides within a month. Every five years, the public prosecutor or attorney general can reassess the need for a transfer or destruction. If he thinks them advisable, he will again have to notify the convicted person, in accordance with Article 41-6 CPP.⁷¹ To limit the extra costs of the storage, this provision only applies to evidence in criminal cases, in which there is a final conviction rendered by a 'cour d'assises'.^{72, 73}

2.2.3 Formation de jugement

The thirteen remaining members of the CRR form the 'formation de jugement', which is presided over by the president of the criminal chamber of the 'Cour de cassation' (Art. 623-1 CPP). The formation examines the substance of the request and decides whether or not to allow a revision. To ensure impartiality, the legislature wanted to maintain a strict separation between the function of investigating a request and that of judging one. It therefore assigned the latter function to the 'formation de jugement' and stipulated that members of the 'commission d'instruction' may not be part of the formation.⁷⁴

The formation examines the substance of the request and holds a public hearing during which it receives the (written or oral) comments of the applicant and his lawyer, the attorney general and, if he intervened, the civil party or his lawyer (Art. 624-3 CPP). The president of the formation can also decide to hear every person that can contribute to the examination of the request. The applicant or his lawyer is the last to speak before closing the hearing.⁷⁵

If the formation, however, finds that the case is not ready to be heard yet, it can, before organising the hearing, order an additional investigation.⁷⁶ That investigation is to be executed by one or more of its members, either directly or by rogatory commission. The formation has the same investigative powers as the 'commission d'instruction' (Art. 624-3 CPP) (see *supra*).

58. Rapport n° 467, above n. 14, at 33-4; Rapport d'information n° 4302, above n. 15, at 10.

59. Rapport n° 467, above n. 14, at 33; Rapport d'information n° 4302, above n. 15, at 10; Daures, above n. 8, at n. 90.

60. Angevin a.o., above n. 17, at 148 and 151.

61. Rapport n° 467, above n. 14, at 16.

62. *Ibid.*, at 22 and 34. As it did, for example, in CRR 25 October 2018, ECLI:FR:CCASS:2018:C1E1087.

63. Rapport n° 467, above n. 14, at 22 and 34-5; Daures, above n. 8, at n. 90; Desportes a.o., above n. 9, at 2314-2315; Fournié, above n. 2, at 1329.

64. Art. 624-4 CPP states that during the procedure, the applicant is represented by a lawyer. According to the CRR, this implies that the request for investigative measures on the basis of Art. 624-5 CPP has to be filed by the applicant's lawyer. If not, it is inadmissible. CRR 24 November 2014, ECLI:FR:CCASS:2014:C1EV155.

65. Rapport n° 467, above n. 14, at 16; Daures, above n. 8, at n. 90; Desportes a.o., above n. 9, at 2314; Fournié, above n. 2, at 1329; Guinchard and Buisson, above n. 8, at 1356; Ribeyre, above n. 2, at n. 9.

66. Rapport d'information n° 1598, above n. 2, at 81-6; S. Cormier, 'Le procès en révision avec la loi du 20 juin 2014', 9 *Cahiers Droit, Sciences & Technologies* 65, at n. 29 (2019) (hereinafter: Cormier); J. Danet, 'De la rumeur à la révision ou les leçons de l'erreur', *RSC* 601 (2013).

67. There are exceptions, for example five years for the recordings of a hearing of a minor that was the victim of one of the listed offences (Art. 706-52 CPP) and forty years for evidence on which an unknown DNA profile was found (Art. R.53-20 *jo.* Art. R.53-10 CPP). (Rapport d'information n° 1598, above n. 2, at 84.)

68. Rapport d'information n° 1598, above n. 2, at 83-5; Rapport n° 467, above n. 14, at 18 and 25-7.

69. Rapport d'information n° 1598, above n. 2, at 85-6; Daures, above n. 8, at n. 68; Fournié, above n. 2, at 1328; Ribeyre, above n. 2, at n. 8.

70. Or, since 2019, before its president (Art. 41-6 CPP).

71. Rapport d'information n° 1598, above n. 2, at 86; Fournié, above n. 2, at 1328.

72. A court that judges the most serious offences and is characterised by the involvement of a lay jury and the oral character of its proceedings (Art. 240 CPP).

73. Rapport d'information n° 1598, above n. 2, at 85-6.

74. *Ibid.*, at 67; Rapport n° 467, above n. 14, at 31; Daures, above n. 8, at n. 78; Fournié, above n. 2, at 1328; Ribeyre, above n. 2, at n. 9.

75. Desportes a.o., above n. 9, at 2316; Guinchard and Buisson, above n. 8, at 1357.

76. Daures, above n. 8, at n. 92; Desportes a.o., above n. 9, at 2316; Fournié, above n. 2, at 1329; Guinchard and Buisson, above n. 8, at 1357.

After the hearing, the formation renders a motivated⁷⁷ decision on the request for revision.⁷⁸ There is no appeal possible against this decision (Art. 624-3 CPP). The formation can decide that the request is unfounded and dismiss it. If it decides that the request is founded, it nullifies the original conviction (Art. 624-7 CPP). If it is still possible to organise adversarial hearings, the formation transfers the case to a court of the same order and degree as the one that rendered the nullified conviction but that is not that particular court (Art. 624-7 CPP). The assigned court will deliver a new decision on the merits of the case but cannot impose a more severe penalty than the initial one.⁷⁹ If, however, after the nullification it is clear that there is nothing left that can be classified as an offence, the formation does not transfer the case (Art. 624-7 CPP).⁸⁰

Sometimes it is no longer possible to hold adversarial hearings, owing, for instance, to the death of the convicted person or the prescription of the criminal proceedings.⁸¹ Then the formation does not transfer the case to another court either and delivers a new decision on the merits of the case itself (Art. 624-7 CPP).⁸²

3 Practice and Challenges Concerning the Revision Procedure

3.1 First Evaluations of the Act of 2014

The Act of 2014 aimed to make the revision procedure more accessible, both on a substantive and on a procedural level: on a substantive level by changing the wording of the ground for revision in an attempt to broaden its scope and on a procedural level by expanding the list of possible applicants, by giving applicants the possibility to ask for investigative measures before filing a request for revision, by delineating more clearly the task

of the ‘commission d’instruction’, *etc.* In general, the Act of 2014 could count on the approval of many experts.⁸³ However, they also identified several aspects that were still unclear or possibly problematic.

In 2015 a doctoral thesis was finished that included an analysis of the revision procedure of 2014.⁸⁴ It identifies several improvements, such as the enlargement of the list of possible applicants, the possibility to seek investigative measures before filing a request for revision and the clarification of the investigative powers of the ‘commission d’instruction’ and the ‘formation de jugement’.⁸⁵ However, although it indicates that it was too early to draw conclusions, it fears that the Act of 2014 cannot live up to the expectations the legislature raised.⁸⁶

The author regrets that the new provision on the destruction or transfer of evidence, which requires the public prosecutor and the attorney general to first notify the convicted person, who can then oppose that decision (see *supra*), applies only to criminal cases.⁸⁷ Most requests for revision concern ‘délits’,⁸⁸ while to those cases, this provision does not apply, so the possible difficulties for revision caused by the destruction of evidence remain.⁸⁹ Moreover, a prolongation of the term in which evidence is stored is only useful and will only enhance people’s confidence in the justice system if the storage is done in the right circumstances (for example moisture-proof and secured), which requires the authorities to invest in the courthouses or other places used for storage.⁹⁰

With the Act of 2014, the legislature wanted to clearly define the tasks of and differ between the ‘commission d’instruction’ and the ‘formation de jugement’. It wanted to ensure that the commission would only examine the admissibility of the request and would not assess the impact of the invoked fact or element on the question of guilt (see *supra*). The commission thus has to examine whether the fact is indeed new and the element was indeed unknown by the court at the time of the initial proceedings.⁹¹ However, it also has to examine its solidity and relevance.⁹² The boundary between examining the solidity and relevance, on the one hand, and assessing the impact on the convicted person’s guilt is not that clear-cut and might tempt the commission to have a look at the implications of the invoked fact or element already, as was the case under the former revision procedure.⁹³

77. In the rapport d’information n° 4302, it is raised that, although in practice all decisions of the CRR rendered since the Act of 2014 were motivated, Art. 624-7 CPP does not contain a formal obligation for the CRR to motivate its decisions, whether it finds the request founded or unfounded. Since adding a motivation serves the rights of the applicant, the report thus proposes to introduce a provision in Art. 624-7 CPP containing a clear obligation for the CRR to motivate its decisions (Rapport d’information n° 4302, above n. 15, at 12). Yet Art. 624-3 CPP states the following: ‘(...) Lorsque l’affaire est en état, la formation de jugement de la cour l’examine au fond et statue, *par un arrêt motivé* non susceptible de recours, à l’issue d’une audience publique (...)’ (emphasis added). The CPP thus already contains an obligation for the CRR to motivate its decisions.

78. Angevin a.o., above n. 17, at 166; Daures, above n. 8, at n. 93; Desportes a.o., above n. 9, at 2316; Fournié, above n. 2, at 1329; Guinchard and Buisson, above n. 8, at 1357; Ribeyre, above n. 2, at n. 10.

79. Daures, above n. 8, at n. 103; Guinchard and Buisson, above n. 8, at 1357.

80. Daures, above n. 8, at n. 111-112; Desportes a.o., above n. 9, at 2316-2317.

81. Daures, above n. 8, at n. 105; Desportes a.o., above n. 9, at 2316-2317; Fournié, above n. 2, at 1329; Guinchard and Buisson, above n. 8, at 1357.

82. As was the case, for example, in CRR 25 October 2018, ECLI:FR:CCASS:2018:C1E1087.

83. Rapport d’information n° 4302, above n. 15, at 8; Goetz, above n. 19, at 251.

84. Goetz, above n. 19.

85. *Ibid.*, at 226 and 251.

86. *Ibid.*, at 251 and 317.

87. *Ibid.*, at 278-84.

88. See, for example, Rapport annuel Cour de cassation 2016, at 397 and Rapport annuel Cour de cassation 2017, at 347.

89. Goetz, above n. 19, at 278-84.

90. *Ibid.*, at 284-5.

91. *Ibid.*, at 254.

92. *Ibid.*, at 255.

93. *Ibid.*, at 255-6.

The legislature wanted to broaden the scope of the remaining ground for revision, by urging judges to no longer require ‘serious doubt’ (see *supra*). This aspect of the reform is decisive for the actual improvement of the accessibility of the revision procedure, since it determines its scope.⁹⁴ However, although the wording of the ground for revision was changed, it still mentions ‘doubt’, as did the former provision.⁹⁵ In 1989, when the former provision was introduced, the legislature already intended for doubt in itself to be sufficient. However, despite that clear intention of the legislature, judges in their case law interpreted it as requiring ‘serious doubt’. The author thus questions whether, after the Act of 2014, judges will adjust their case law.⁹⁶ Since requests for revision concern final decisions and due to the authority of *res iudicata*, judges might still be reluctant to find that there is doubt.⁹⁷ For those and for other reasons,⁹⁸ the author fears that the Act of 2014 is not as large a reform as it claims to be.⁹⁹

The ‘Assemblée nationale’ requested an evaluation of the Act of 2014. Several parties involved in the revision procedure were heard, and the report was presented to the ‘Assemblée nationale’ in December 2016.¹⁰⁰ In general, the reform has been positively received.¹⁰¹ The members of the CRR find that its composition, which now includes members of the different chambers of the ‘Cour de cassation’, is an enrichment for its deliberations.¹⁰² The Act of 2014 also more clearly embeds the rights of the parties involved, such as the possibility for a contradictory debate, access to the case file, legal assistance and the possibility to seek investigative measures before filing a request,¹⁰³ and enlarges the list of possible applicants. Both developments are also warmly welcomed.¹⁰⁴

However, the report also identifies some shortcomings and makes suggestions for possible amendments, although it immediately stresses that it is still too early to draw clear conclusions. A first suggestion is that in

order to fully reinforce the rights of the parties, the revision procedure should contain a clear obligation for the CRR to motivate¹⁰⁵ its decisions.¹⁰⁶ Another suggestion is to amend the provision on the possibility to seek investigative measures before filing a request so that the term in which the public prosecutor has to respond (two months) is one time renewable, the investigative measures have to be performed within a reasonable term and the applicant is informed of the performed measures by the public prosecutor in writing. In case the public prosecutor is inactive, the applicant would then be able to appeal to the attorney general.¹⁰⁷ The report also contains an amendment on the public prosecutor’s office that performs the requested investigative measures, and it suggests that the convicted person’s lawyer be notified of the public prosecutor’s or attorney general’s intention to destroy or transfer evidence.¹⁰⁸ Finally, the report also suggests the addition of a new ground for revision: the existence of a fundamental procedural irregularity affecting the reliability of evidence (see *supra*).¹⁰⁹ An example is confessions obtained by torture.

One of the parties that was heard in the evaluation signals that the CRR still seems to require ‘serious doubt’ before finding a request for revision founded.¹¹⁰ However, the report immediately adds the reservation that it is too early and that there is not enough data available to assess whether the case law has evolved or not.¹¹¹

3.2 Current State of Affairs¹¹²

The doctoral thesis expects the ‘commission d’instruction’ to still involve the implications of the invoked fact or element for the question of guilt when examining the admissibility of a request for revision.¹¹³ Unfortunately, there is little case law to turn to in order to verify this expectation, since up to now only a few decisions of the CRR have been published. However, the decision of the commission of 14 December 2015¹¹⁴ seems to indicate that the author of the doctoral thesis might be right. Although it states that

Attendu qu’il résulte des articles 622, 624 et 624-2 du code de procédure pénale que, s’il n’appartient qu’à la formation de jugement de la Cour de révision et de réexamen de déterminer si le fait nouveau ou l’élément inconnu de la juridiction au jour du jugement est de nature à établir l’innocence du condamné ou à faire naître un doute sur sa culpabilité, il incombe à la

94. *Ibid.*, at 232.

95. *Ibid.*, at 290.

96. *Ibid.*, at 235. As question Angevin a.o., above n. 17, at n. 57-58.

97. Goetz, above n. 19, at 235 and 292-5.

98. In this article, we discussed only some of the criticisms voiced in the doctoral thesis. The author also suggests amendments on, among other aspects, the inclusion in the ground for revision of elements that were already present in the case file but not discussed in the initial proceedings, the composition of the ‘commission d’instruction’, which currently does not necessarily include (former) investigating judges, and the position of the victim in the procedure for revision and in the procedure to suspend the execution of the conviction while the request for revision is being examined (Goetz, above n. 19, at 240-3, 275-7 and 311-14).

99. Goetz, above n. 19, at 317.

100. Rapport d’information n° 4302, above n. 15.

101. *Ibid.*, at 8.

102. *Ibid.*, at 9.

103. Although this novelty from the Act of 2014 was welcomed as a guarantee that convicted persons with a sincere claim but insufficient resources would have access to the revision procedure too, and thus as an improvement of the rights of the applicant, the first findings are that applicants make little use of this possibility. However, experts believe that it is only a matter of time until convicted persons learn of this possibility and will use it. (Rapport d’information n° 4302, above n. 15, at 20-1; Cormier, above n. 66, at n. 27.)

104. Rapport d’information n° 4302, above n. 15, at 11-12, 15 and 20-1.

105. The CPP already seems to contain this obligation in Art. 624-3 (see *supra* footnote 64).

106. Rapport d’information n° 4302, above n. 15, at 12.

107. *Ibid.*, at 20-2.

108. *Ibid.*, at 22 and 24.

109. *Ibid.*, at 17-18.

110. *Ibid.*, at 15-16.

111. *Ibid.*, at 16.

112. Unfortunately, we have been unable to obtain sufficient decisions of the ‘commission d’instruction’ and the ‘formation de jugement’ to make clear statements on the interpretation of the provisions on the revision procedure by the CRR. The conclusions in this paragraph are therefore cautious.

113. Goetz, above n. 19, at 255-6. As do Angevin a.o., above n. 17, at 149.

114. CRR (Commission d’instruction) 14 December 2015, 15REV040.

commission d'instruction de se prononcer sur la recevabilité de la demande de révision en appréciant, notamment, la réalité du fait nouveau ou de l'élément inconnu allégué par le demandeur, et son rapport avec la question de la culpabilité; (...) ¹¹⁵

it also contains the following considerations:

Attendu qu'aucune des pièces produites à l'appui de la demande n'est de nature à remettre en cause les témoignages ou le contenu des rapports figurant au dossier de la procédure, lesquels font ressortir l'existence d'une rébellion commise contre la force armée par au moins huit militaires armés; (...) ¹¹⁶

and

Attendu que la participation personnelle d'Antoine X ... à ces actes de rébellion, ses refus d'obéissance et ses outrages ont été retenus à partir des témoignages de l'aspirant Y ..., du capitaine K ..., du lieutenant Jules Z ... et de l'adjudant L ..., recueillis par l'officier de police judiciaire chargé de l'information, les trois premiers témoins ayant, en outre, été entendus par le tribunal militaire permanent; que la commission d'instruction, qui n'a pas à se prononcer sur la suffisance de ces témoignages, ne peut que constater qu'aucune des pièces produites à l'appui de la demande en révision n'est de nature à les remettre en cause; (...) ¹¹⁷

30

In these considerations, the commission seems to go beyond its task of examining whether the invoked facts or elements exist, are indeed new or unknown and are linked to the question of guilt. It already seems to make an assessment of their impact on the convicted person's guilt, of whether they can raise doubt, by verifying whether the facts or elements call into question the wit-

115. Own translation: 'Whereas it follows from Arts. 622, 624 and 624-2 CPP that it is only for the 'formation de jugement' of the CRR to determine whether the new fact or element unknown to the court at the time of the initial proceedings is of such a nature as to establish the convicted person's innocence or to give rise to doubt about his guilt, it is for the 'commission d'instruction' to rule on the admissibility of the request for revision by assessing the existence of the new fact or unknown element that is put forward by the applicant, and its relation with the question of guilt.' CRR (Commission d'instruction) 14 December 2015, 15REV040.

116. Own translation: 'Given that none of the pieces brought forward to support the request are of such a nature as to call into question the testimonies or the content of the reports in the file of the proceedings, which bring to light the existence of a rebellion against the armed force by at least eight armed soldiers; (...) ' CRR (Commission d'instruction) 14 December 2015, 15REV040.

117. Own translation: 'Given that the personal involvement of Antoine X ... in the acts of rebellion, his refusal to obey and his insults are deduced from the testimonies of aspirant Y ..., of captain K ..., of lieutenant Jules Z ... and of adjudant L ..., collected by the judicial police officer charged with the investigation, the first three witnesses, in addition, having been heard by the permanent military tribunal; that the 'commission d'instruction', who is not to decide on the conclusiveness of these testimonies, can only come to the conclusion that none of the pieces brought forward to support the request are of such a nature as to call them into question; (...) ' CRR (Commission d'instruction) 14 December 2015, 15REV040.

ness statements that were gathered in the initial proceedings. However, one decision is insufficient to draw conclusions from.

Both the author of the doctoral thesis and an expert heard by the 'Assemblée nationale' fear that judges will still require 'serious doubt' and that, because of this, the accessibility of the revision procedure will not really improve, by lack of accessibility on a substantive level. ¹¹⁸ There is, unfortunately, currently too little case law publicly accessible to make statements in this article on how the judges of the CRR interpret the question of doubt. By contrast, it is possible to draw some – albeit cautious – conclusions on the accessibility of the revision procedure, based on the initial findings in the report of the 'Assemblée nationale' ¹¹⁹ and on the figures in the annual reports of the 'Cour de cassation', available on its website ¹²⁰.

The report of the 'Assemblée nationale' finds that in 2015 the number of requests for revision had increased. Moreover, the number of requests referred by the commission to the formation had also grown. ¹²¹ This is confirmed in the annual report of the 'Cour de cassation' of 2015. ¹²² The commission deemed 145 requests for revision inadmissible (including the decisions by the president of the commission) and referred eight requests to the formation. In that same year, the formation decided on seven requests and nullified one conviction. ¹²³

The annual reports of the 'Cour de cassation' contain information up to the year 2019 (see *infra* Figure 1 'Decisions of inadmissibility' and Figure 2 'Number of referrals and nullifications'). In 2016, there was again an increase in the number of requests. One hundred and thirty were considered inadmissible by the commission or its president, and two were referred to the formation. The formation decided on thirteen requests for revision and nullified the original conviction in two cases. ¹²⁴ In 2017, the commission or its president found 139 requests inadmissible and referred seven requests to the formation. In that same year, the formation rendered no decision. ¹²⁵ The next year, in 2018, there was again an increase in the number of requests. 118 requests were found inadmissible, either by the commission or by its president. Five requests were referred to the formation, which decided on eight requests for revision that year and nullified four convictions. ¹²⁶ The most recent figures of 2019 show again an increase in the number of requests. One hundred and thirty-eight requests were deemed inadmissible by the commission or its president, and four requests were referred to the formation. The

118. Rapport d'information n° 4302, above n. 15, at 15-16; Goetz, above n. 19, at 235.

119. Rapport d'information n° 4302, above n. 15, at 13.

120. Which is www.courdecassation.fr/publications_26/rapport_annuel_36/.

121. Rapport d'information n° 4302, above n. 15, at 13.

122. Rapport annuel Cour de cassation 2015, at 328-30.

123. *Ibid.*

124. Rapport annuel Cour de cassation 2016, at 397-8.

125. Rapport annuel Cour de cassation 2017, at 347-8.

126. Rapport annuel Cour de cassation 2018, at 301-2.

Figure 1 Decisions of inadmissibility

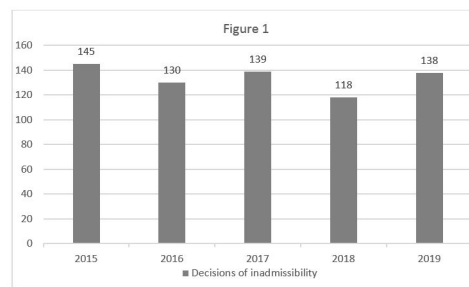
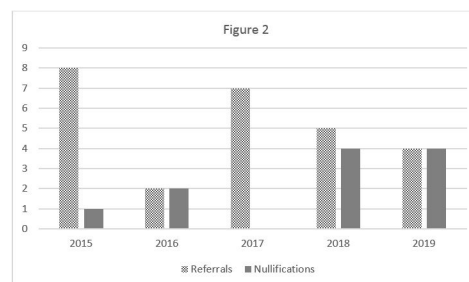


Figure 2 Number of referrals and nullifications



formation decided on seven requests for revision and nullified four convictions.¹²⁷

interpret the question of doubt, as still requiring ‘serious doubt’ or not.

The figures on the period before the Act of 2014, from 1989 until 2013, show that, in this period, 3,358 requests were sent to the ‘commission de révision’, which took 3,171 decisions and referred eighty-four requests to the ‘Cour de révision’. In that same period the ‘Cour de révision’ decided on eighty-four requests and nullified fifty-one decisions.¹²⁸ Compared with the aforesaid more recent figures from the annual reports, there seems to be a slight augmentation in the number of cases referred by the commission to the formation. Nevertheless, the commission still finds the majority of requests inadmissible, mainly because of the absence of a new fact or unknown element:

Ces irrecevabilités sont le plus souvent motivées par l’absence de fait nouveau ou d’élément inconnu de la juridiction de jugement au jour du procès.¹²⁹

The overall success rate of requests for revision, however, has not improved significantly, although there seems to be a slight improvement in the last two years. Unfortunately, not enough case law has been published yet to thoroughly examine whether those findings are linked to the way in which the commission and the formation perceive the division of tasks between them and

4 Conclusion

The Act of 2014 reformed the revision procedure. Many aspects of the procedure were changed for the better, such as the enlargement of the list of possible applicants, the possibility to seek investigative measures before filing a request for revision, the new provision on the storage of evidence and the reinforcement of the rights of the applicant.

For other changes, however, it is still unclear whether they are successful. The legislature intended to clearly define the different tasks of the ‘commission d’instruction’, on the one hand, and the ‘formation de jugement’, on the other. The commission would have to examine only the admissibility of the requests for revision, while the formation would decide on the substance of the requests. It would thus be the task of the formation only to assess the impact of the invoked fact or element on the convicted person’s guilt. Some experts, however, question whether it is possible for the commission to merely examine the existence, the new or unknown character and the solidity and relevance of the invoked fact or element without involving the implications of that fact or element for the question of guilt.

Moreover, the legislature wanted to broaden the single remaining ground for revision. It intended the slightest doubt to be sufficient to obtain a new examination of the merits of the case, but, after finding that it was artificial to qualify doubt, decided to maintain the wording ‘doute’ and not replace it by ‘moindre doute’. However, the legislature expressed its confidence in the judiciary not to interpret the provision contrary to the intention of the legislature and thus to no longer require ‘serious

127. Rapport annuel Cour de cassation 2019, at 270-1.

128. Rapport d’information n° 1598, above n. 2, at 15.

129. Own translation: ‘These inadmissibilities are mostly motivated by the absence of a new fact or element that was unknown to the court at the time of the initial proceedings.’ Rapport annuel Cour de cassation 2016, at 397. Also see Rapport annuel Cour de cassation 2015, at 329; Rapport annuel Cour de cassation 2017, at 347; Rapport annuel Cour de cassation 2018, at 301; Rapport annuel Cour de cassation 2019, at 270.

doubt'. Yet experts question whether stating that intention explicitly in the parliamentary debate is sufficient to urge judges to change their interpretation. History has shown that, owing to a strong commitment to the authority of *res iudicata*, they are rather reluctant to find that there is doubt, despite the clear intention of the legislature not to require 'serious doubt'.

In the introduction we posed the question whether the Act of 2014 lives up to the expectations raised by the legislature. The proclaimed aim of this reform was to improve the accessibility of the revision procedure both on a procedural and on a substantive level. Practice will have to show whether it succeeded. On the basis of the first findings, however, there seems to be no significant augmentation in the success rate of requests for revision in the period from 2015 until 2019, although the commission seems to refer more cases to the formation. Unfortunately, there is currently still too little case law published to verify whether these findings are linked to the way in which the commission and the formation perceive their different tasks and to the interpretation of the ground for revision. Not enough case law is publicly available to assess whether the ground has indeed broadened.

The Challenges for England's Post-Conviction Review Body

Deference to Juries, the Principle of Finality and the Court of Appeal

Carolyn Hoyle*

Abstract

Since 1997, the Criminal Cases Review Commission of England, Wales and Northern Ireland has served as a state-funded post-conviction body to consider claims of wrongful conviction for those who have exhausted their rights to appeal. A meticulous organisation that has over its lifetime referred over 700 cases back to the Court of Appeal, resulting in over 60% of those applicants having their convictions quashed, it is nonetheless restricted in its response to cases by its own legislation. This shapes its decision-making in reviewing cases, causing it to be somewhat deferential to the original jury, to the principle of finality and, most importantly, to the Court of Appeal, the only institution that can overturn a wrongful conviction. In mandating such deference, the legislation causes the Commission to have one eye on the Court's evolving jurisprudence but leaves room for institutional and individual discretion, evidenced in some variability in responses across the Commission. While considerable variability would be difficult to defend, some inconsistency raises the prospects for a shift towards a less deferential referral culture. This article draws on original research by the author to consider the impact of institutional deference on the work of the Criminal Cases Review Commission and argues for a slightly bolder approach in its work

Keywords: wrongful conviction, criminal justice, Criminal Cases Review Commission, Court of Appeal, discretion

1 Introduction

The vast majority of those who believe themselves to be wrongfully convicted do not find relief from a direct appeal. While in some countries a failed direct appeal would mark the end of the road, in England, Wales and Northern Ireland there is further opportunity for post-conviction review: the Criminal Cases Review Commission of England and Wales ('the Commission'; Scotland has its own Criminal Cases Review Commission). Over two decades since its establishment, this article focuses on that review body, considering its close relationship with the Court of Appeal.

Following a recommendation of the 1993 Royal Commission on Criminal Justice (known as the 'Runciman Commission'),¹ the Commission was established in 1997, by Article 8 of the Criminal Appeal Act 1995, to review a sentence or conviction following the exhaustion of first instance appeals. The first system of regular appeals against criminal conviction had been introduced in England and Wales by the Criminal Appeal Act 1907, which created the Court of Criminal Appeal – the forerunner of today's Court of Appeal established in 1966. Since 1908, the only further recourse for people convicted of criminal offences, who had been refused leave to appeal or whose appeals had been dismissed, had been to apply to the Home Secretary for executive intervention.² The Criminal Case Unit of the C3 (Criminal Policy) Division of the Home Office reviewed hundreds of petitions a year, few with legal representation, and asked the Home Secretary to refer meritorious cases where there was fresh evidence back to the Court. The quality of investigations was poor,³ and subsequent appeals by referral were rare; just a handful each year.⁴

At the time, the English criminal justice system clearly valued the notion of finality.⁵ Indeed, at the start of the twentieth century, opposition to the establishment of an appeal court centred on the risks posed to the finality of convictions, with critics focusing particularly on the inappropriateness of judges revising a jury's verdict without hearing the actual witnesses themselves.⁶ The Criminal Appeal Act 1968 was understood to embrace the principle of finality of litigation and interpreted as requiring that only a single appeal against conviction

33

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1. Royal Commission on Criminal Justice. 1993. Report (Cm 2263). London.
2. The only other option was to ask the Home Secretary to recommend that the Queen exercise the Royal Prerogative of Mercy; however, this provided little solace to those who believed themselves to be innocent as it started from the premise that the person was guilty.
3. Home Affairs Committee. *Miscarriages of Justice: Sixth Report from the Home Affairs Committee*, Session 1981-1982, Together with the Proceedings of the Committee, the Minutes of Evidence and Appendix HC421. London (1982).
4. C3 contributed to an annual average of five cases being quashed by the Court between 1980 and 1992, and before the 1980s references were even fewer (R. Pattenden, *English Criminal Appeals 1844-1994* (1996), at 363).
5. K. Malleon, 'Appeals against Conviction and the Principle of Finality', 21(1) *Journal of Law and Society* 151-64, at 151 (1994).
6. R. Nobles and D. Schiff, 'Miscarriages of Justice: A Systems Approach', 58(3) *The Modern Law Review* 299-320, at 311 (1995).

was permitted, even when fresh evidence came to light after an appeal had been dismissed, as was confirmed in *R v. Pinfold*.⁷

Although C3 could refer cases back to the Court – indeed it was the only option for those who had already appealed – over the years that it operated, successive Home Secretaries demonstrated extreme reluctance to disturb jury verdicts, and the Court certainly expressed no inclination to hear more cases. Hence, the Runciman Commission was keen to establish an independent institution to review cases where the Court had not provided relief and the consensus, among even the Commission's harshest critics, is that whatever its faults, the Commission has undoubtedly outperformed C3. That said, the challenge for any post-conviction review process must be to balance the principle of finality and deference to the jury's decision with opportunities for rigorous post-conviction review.

This article describes the legislative framework of the Commission, discusses its work in practice and considers if it has got this balance right. In particular, it addresses the key criticism of the Commission, namely that as a gatekeeper or a filter to the Court, it is in an essentially dependent, even subordinate position, leaving it in the realm of having to anticipate how the Court may assess those cases that the Commission believes to be unsafe and making its referral decisions in light of this second-guessing.⁸ It builds on rigorous empirical research conducted by the author over the past decade, with much of the empirical data gathered between 2013 and 2016, research that is analysed in greater detail elsewhere.⁹ This focused on analysis of 146 cases: including examination of Court judgments; interviews with and surveys of caseworkers, commissioners and others working on these cases; quantitative analysis of working practices; and detailed review of Commission policy and internal guidelines, not publicly available. It considers these data through a theoretical lens that borrows from sociolegal scholarship on discretion, in particular, adopting Keith Hawkins' concepts of decision-making 'frames' that draw on 'decision fields' within social, political and legal 'surrounds'.¹⁰

2 Legal Framework for Post-Conviction Review

Those who believe themselves to be wrongfully convicted must apply to the Court of Appeal (Criminal Division) for leave to appeal,¹¹ and only if leave is granted

will their appeal be heard.¹² Appeals may be based on fresh evidence or a change of law, but in the former case, the appellant will need to have a good reason for not adducing this evidence at trial. Where a judge refuses leave to appeal, the appellant can renew his or her application, but if it is again unsuccessful, there is no further recourse for *direct* appeal. Similarly, there is no further remedy for those whose appeal is heard but conviction upheld by the Court of Appeal.

Leave to appeal is granted in only about 10% of approximately 700–800 applications for appeals against conviction each year.¹³ However, about two-thirds of conviction appeals heard by the Court each year will be allowed (with those convictions being deemed to be 'unsafe' by the Court and therefore quashed). While the numbers differ each year, over the past five years, only about 7% of all applications received have been successful.¹⁴ Given that forensic science may evolve to provide new evidence or expose the weak probative value of old science and that new witnesses may come forward or old ones may be discredited, a rigorous post-conviction review process, one that is not bound by strict time limits, is crucial. The Commission provides appellants who are unsuccessful at direct appeal with an opportunity to have their conviction reviewed by a rigorous independent body, the only authority with the power to take their case back to the Court.

However, while the Commission is expected to be independent of the executive and the courts,¹⁵ there are limits to its independence. It is unable to quash convictions itself, having the power only to refer cases back to the Court for their consideration (though once referred, the Court is then obliged to hear the appeal). In giving the Commission power to refer cases to the Court,¹⁶ Parliament set the parameters of the legislative test that was to be applied, the 'real possibility test' (Criminal Appeal Act 1995, section 13(1)(a)). Under this test, the Commission must be satisfied there is a real possibility that the Court will quash the trial verdict.¹⁷ As the

defence solicitors will usually advise their client on whether there are reasonable grounds for appeal (and draft those grounds) immediately after the trial has concluded.

7. [1988] B.B. 462.

8. A. James, 'The Criminal Cases Review Commission: Economy, Effectiveness and Justice', *Criminal Law Review* 140-53 (2000).

9. C. Hoyle and M. Sato, *Reasons to Doubt: Wrongful Convictions and the Criminal Cases Review Commission* (2019), at ch. 2.

10. K. Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (2002).

11. There are time limits for lodging an appeal (28 days from conviction or sentence, although applications for extensions can be made), so

12. While *permission* to appeal is usually given by a single judge, appeals against conviction and sentence are generally heard by three experienced judges. The Court hears appeals from the Crown Courts of England and Wales, while the Crown Courts typically hear appeals from the Magistrates' Courts.

13. The majority of the approximately 4,000 applications or appeals each year concern sentences.

14. Court of Appeal (Criminal Division) Annual Report 2018-19, <https://www.judiciary.uk/wp-content/uploads/2020/02/LCJ-18-to-19-FINAL-PDF-1-1.pdf>.

15. Home Office. 1994. *Criminal Appeals and the Establishment of a Criminal Cases Review Authority: A Discussion Paper*. London.

16. The jurisdiction of the Commission extends to the magistrates' court, for which a referral would be to the Crown Court, although most of its applications relate to convictions from the Crown Court, which are referred back to the Court.

17. Sections 9-12 of the Criminal Appeal Act 1995 give the Commission the power to refer if the case satisfies the section 13 real possibility test but do not impose a *duty* to do so. There are circumstances under which the Commission will choose not to refer a case back to the Court even if it meets the real possibility test. For example, it might be influenced by the age of the case or the fact that the applicant is deceased.

Commission is required to consider how the Court will respond to a referral, its decision-making is inextricably linked to the test subsequently applied by the Court. Set out in section 2 of the Criminal Appeal Act 1968, this test is simply whether or not the conviction is ‘unsafe’; the Court does not need to be satisfied that the applicant is innocent. These principles were stated most explicitly in the case of *Hickey* in 1997, the year the Commission was established:

This court is not concerned with guilt or innocence of the appellants, but only with the safety of their convictions. This may, at first sight, appear an unsatisfactory state of affairs, until it is remembered that the integrity of the criminal process is the most important consideration for the courts which have to hear appeals against conviction. Both the innocent and the guilty are entitled to fair trials. (per Roch U, *R v. Hickey*)¹⁸

In deciding which cases fit the criteria for a referral back to the Court, the Commission must work within both the 1968 (section 23) and the 1995 (section 13) Criminal Appeal Acts. Section 13 of the 1995 Act sets out the conditions for making a reference: most notably, that there is ‘new’ evidence or argument – for example, on a point of law – not previously raised at trial or appeal, that raises a *real possibility* that the Court will quash the conviction (though the Commission can refer a case without new evidence under ‘exceptional circumstances’) (section 13(1)(b)(i)). In other words, the case must pass a threshold; there must be something ‘fresh’ as well as persuasive. Similarly, if the application relates to a sentence there must be ‘an argument on a point of law, or information’ that has not been raised previously (section 13(1)(b)(ii).5). In all cases, an appeal should have been determined, or leave to appeal against it refused, before the convicted person applies to the Commission (section 13(1)(c)), although the Commission can consider an application that does not meet this criterion in ‘exceptional circumstances’.

The Court must consider that it is ‘necessary or expedient in the interests of justice’ to receive the new evidence within the criteria set out in section 23 of the 1968 Act: the evidence must be capable of belief, capable of forming a ground for allowing the appeal, and there must be a reasonable explanation for the failure to adduce the evidence at trial if the evidence had been available to the defence at the time (section 2d). By way of illustration, in the oft-cited case of *Steven Jones*, the Court clarified the application of section 23, warning against the presentation of better expert witnesses at appeal whose evidence could have been given at trial: [The appellant] is not entitled to hold evidence in reserve and then seek to introduce it on appeal following conviction. While failure to give a reasonable explanation for failure to adduce the evidence before a jury is

not a bar to reception of the evidence on appeal, it is a matter which the Court is obliged to consider in deciding whether to receive the evidence or not ... Expert witnesses, although inevitably varying in standing and experience, are interchangeable in a way in which factual witnesses are not. It would clearly subvert the trial process if a defendant, convicted at trial, were to be generally free to mount on appeal an expert case which, if sound, could and should have been advanced before the jury. (*Steven Jones*)¹⁹

Given that section 2(1) of the 1968 Act provides that the Court shall allow an appeal against conviction only if it thinks that the conviction is unsafe, meeting the real possibility test requires the Commission to assess whether the Court is likely to find the conviction to be unsafe when presented with new argument or new evidence. Hence, in deciding whether there is new evidence and whether that evidence gives rise to a real possibility that the Court will find the conviction to be unsafe, the Commission must consider not only the legislation, but also subsequent guidance from the Court – on cases referred by the Commission, as well as on direct appeal judgments – as well as decisions made by the Administrative Court in judicial reviews of the Commission’s decisions *not* to refer. This guidance – provided by judgments and occasional reprimands from the Court²⁰ – is regularly reviewed by the Commission and reproduced with analysis in Casework Guidance Notes; in internal memos on Court judgments; in the ‘Statements of Reasons’ either to refer or not to refer a case, prepared for applicants and the Court; and in informal communication between Commission staff. As Keith Hawkins might put it, these are the routine ways in which decision makers create ‘decision fields’ to make sense of evolving interpretations of the law.²¹

The first challenge to the Commission’s decision not to refer a conviction to the Court (in the case of *Pearson*)²² led to an important judgment by Lord Bingham that elucidated the Commission’s role in deciding whether any particular case meets the real possibility test, having a lasting impact on the Commission’s decision-making: The real possibility test ... is imprecise but plainly denotes a contingency which, in the Commission’s judgement, is more than an outside chance or a bare possibility but which may be less than a probability or a likelihood or a racing certainty ... The Commission is

18. [1997] EWCA Crim. 2028.

19. [1997] 1 Cr App R 86. The Court has since demonstrated *some* flexibility on this matter. In *R v. Solomon* the fact that the evidence had been available and could have been raised at trial did not prove fatal to the appeal as the evidence was particularly strong ([2007] EWCA Crim 2633).

20. For example, the Court has sought to place limitations on the Commission in relation to referrals on ‘lurking doubt’, where there is no new evidence, and very old cases. Furthermore, it has reprimanded the Commission for certain referrals based on a change of law or on assertions of legal incompetence.

21. K. Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (2002), at 50-1.

22. *R v. Criminal Cases Review Commission ex p Pearson* [1999] 3 All ER 498.

entrusted with the power and the duty to judge which cases cross the threshold and which do not ... In a conviction case depending on the reception of fresh evidence, the Commission must ask itself a double question: do we consider that if the reference is made there is a real possibility that the Court of Appeal will receive the fresh evidence? If so, do we consider that there is a real possibility that the Court of Appeal will not uphold the conviction? The Commission would not in such a case refer unless it gave an affirmative answer to both questions.

Returning to the case in hand, *Pearson*, Lord Bingham continued:

The Commission had, bearing in mind the statutory threshold, to try to predict the response of the Court of Appeal if the case were referred and application to adduce the evidence were made. It could only make that prediction by paying attention to what the Court of Appeal had said and done in similar cases on earlier occasions. It could not rationally predict the response of the Court of Appeal without making its own assessment, with specific reference to the material in this case, of the considerations to which the Court of Appeal would be obliged to have regard and of how it would be likely to exercise its discretion. (Lord Bingham, *R v. Criminal Cases Review Commission ex p Pearson*²³)

36 Hence, the Administrative Court refused the application from *Pearson*, reluctant to usurp the function that Parliament had deliberately accorded to the judgment of the Commission.

With *Pearson* in mind, the Commission's internal guidance on the real possibility test makes clear that commissioners should give each case proper scrutiny before deciding whether the test is met. It reproduces Lord Bingham's words, noting that there must be more than an outside chance of success but that there does not have to be a probability; that referrals must be more than threadbare but that success need not be assured. It also makes clear that the Commission, in second-guessing the Court, must be cognisant of the Court's decisions in previous cases. Hence, the Commission regularly conducts careful analysis of the Court's reactions to its referrals to better predict its responses to future cases. In other words, it draws on its 'surround' to construct its own 'decision field'.²⁴

Both the Court in its judgments and the Commission in its Statements of Reasons draw heavily on the House of Lords'²⁵ judgment in *Pendleton*.²⁶ Following a referral by the Commission, *Pendleton*'s conviction was upheld, with the Court asserting that the criminal justice system

requires trial by jury and not a second trial by judges in the Court. Notwithstanding deference to the jury, the Lords subsequently quashed the conviction. Drawing on prior case law, they argued that in making a judgment on whether a conviction is unsafe, the Court should test its provisional view by asking whether the evidence if given at trial might reasonably have affected the decision of the jury to convict. If it might, the conviction must be thought to be unsafe. While the House of Lords in *Pendleton* did not change the law, it reminded the Court that in difficult cases it should consider what doubts the jury might have had.

Since *Pendleton* the Commission, in deciding its cases, has asked itself whether the new evidence takes the case into the realms of 'difficulty', as discussed by Lord Bingham, and has not assumed that the prosecution at trial had made out an incontrovertible case. In other words, the Commission is guided by anticipation of how the judges might consider what a jury would have made of any new evidence, what the jury might have thought is sufficient to quash a conviction or order a retrial.

Post-*Pendleton* jurisprudence appears to set the bar somewhat higher for the Commission and, more recently, the Commission has found itself on the receiving end of sharp rebukes by the Court for its weaker referrals. Consequently, some have argued that the Commission has become somewhat 'timid' in deciding which cases meet the test for a referral 'without it adopting an explicit policy to that effect or even necessarily appreciating that its approach has been changing'.²⁷

The legal framework of statute and evolving case law leave some room for discretion, for different approaches to cases, and for bolder or more cautious decisions on referring cases back to the Court. In considering post-conviction review in practice, the following section considers how the Commission's analysis of case law structures responses to applications from receipt through to the decision of whether or not to refer an applicant's case back to the Court and how different commissioners and caseworkers interpret and respond to cases in the gaps left for their discretion.

3 Understanding Post-Conviction Review in Practice

Since the Commission started work in 1997, when it inherited over 200 cases from C3, it has received 26,221 applications from people, often prisoners, who believe themselves to be wrongfully convicted and/or sentenced.²⁸ While applications to the Commission were typically fewer than 1,000 a year, since the launch of a

23. [1999] 3 All ER 498.

24. Hawkins, above n. 21.

25. In October 2009, the House of Lords was replaced by the Supreme Court as the final court of appeal in the UK for civil cases and for criminal cases from England, Wales and Northern Ireland.

26. *R v. Pendleton* [2001] UKHL 66 [2002] 1 WLR 72 (HL).

27. L. Elks, *Righting Miscarriages of Justice? Ten Years of the Criminal Cases Review Commission* (2008), at 71.

28. This figure refers to applications received between April 1997 and March 2010 (retrieved from the Commission's website on 31 May 2020).

simplified application form in 2012 and a concurrent increase in prison ‘outreach’ visits by the Commission, that figure has risen to approximately 1,400 to 1,500 a year. The Commission has so far referred approximately 3% of cases (692 cases) back to the appeal courts; 670 cases have been heard by the appeal courts, and of these, appeals were allowed in 450 cases.²⁹ Given that most referrals are for serious offences,³⁰ the release from a conviction, and often a prison sentence for hundreds of people over the lifetime of the Commission, is to be commended. However, with a typical 3%–4% referral rate – which has in the past years dropped to a remarkably low referral rate of 0.8% in 2016–2017 and 0.9% in 2018–2019, almost all of those who apply to the Commission do not find relief.

Making difficult decisions about which cases, and when, to refer back to the Court requires the Commission to make sense of the Court’s likely approach to new cases by examining its response to past referrals. But it also necessitates the Commission being mindful of how it could, in turn, try to shape the Court’s evolving jurisprudence. This section considers how the Commission responds to its many applications. In so doing, it is attentive to ‘the space ... between legal rules where legal actors must exercise choice’³¹ and draws on the work of sociolegal scholars who consider the interdependent roles of sociological and legal influences on discretionary decision-making within criminal justice institutions.³² Analysis is cognisant of how legal frameworks structure decision-making but mindful too of the sociological factors that shape discretion, not least the values and beliefs of those who work in justice organisations. As Lacey makes clear, we must consider the ‘operational ideologies’, ‘frames of reference’ or ‘assumptive worlds’ that help decision makers to make sense of and to impose explanations on their cases.³³

This approach does not necessarily mirror the perceptions of Commission staff who have somewhat positivist assumptions about their decision-making, believing it to be guided and restricted *only* by the relevant legislation, not least the real possibility test, and the evolving Court jurisprudence. As one Commissioner explained, ‘We have to look at each case distinguished on its own facts, and obviously, we need to read what’s coming out of the Court of Appeal so we understand their thinking [if] there’s a real possibility.’³⁴ Staff also recognise that they are influenced in their decision-making by policies imposed by the Commission in the form of Casework Guidance Notes and Formal Memoranda and in other institutional directives aimed at helping them to

recognise and review appropriately those cases that may meet the real possibility test. Although many do not recognise the role of culture or individual predispositions in decision-making, their assumptions are that decisions about whether to refer a case back to the Court are made simply on the merits of a case, and therefore that two different members of the Commission would likely come to the same conclusion if presented with the same evidence. As one interviewee told us, ‘when you refer a case ... You try and decide it on its merits’.³⁵ Except as David Nelken reminds us, ‘legal actors often have little grasp of the factors which shape “inputs” and “outcomes” of their decisions’.³⁶

More helpful is a naturalist approach to understanding decision-making, one that recognises that decisions are not self-evident; that what is ‘merited’ is context sensitive and open to interpretation in each case.³⁷ In this regard, there will sometimes be different approaches and outcomes in apparently similar cases. Indeed, Hawkins questions what it might mean to consider a case ‘on its merits’. What merits self-evidently determine outcomes, and how are they determined?³⁸ Naturalistic approaches acknowledge the context and social world in which discretion is exercised.³⁹ In *Law as Last Resort*, Hawkins suggests that to understand the nature of discretionary decision-making, a connection ought to be made between a range of factors in the decision-making environment and the decision-making processes in which individuals engage.⁴⁰ His typology of ‘surround’, ‘decision fields’ and decision ‘frames’ allows this connection to be made:

Decisions about legal standards and their enforcement, like other legal decisions, are made, then, in a much broader setting (their “surround”) and within a context, or “field”, defined by the legal and organizational mandate. Decision “frames”, the interpretive and classificatory devices operating in particular instances, are influenced by both surround and field.⁴¹

Emerson and Paley similarly note that organisational horizons condition decision-making, as agents are expected to have a working knowledge of how other cases of the same nature would be approached, as well as the implications of allowing the case to proceed to the next stage of the criminal process.⁴² In this regard, anal-

29. These figures were retrieved from the Commission’s website on 31 May 2020.

30. Approximately 22% for homicide; 18% for sexual offences; 12% for robberies and other serious, mostly indictable-only offences.

31. K. Hawkins, ‘The Use of Legal Discretion: Perspectives from Law and Social Science’, in K. Hawkins (ed.), *The Uses of Discretion* (1992) 11, at 11.

32. N. Lacey, ‘The Jurisprudence of Discretion: Escaping the Legal Paradigm’, in K. Hawkins (ed.), *The Uses of Discretion* (1992) 361.

33. *Ibid.*, at 364.

34. Interview (74) with Commissioner.

35. Interview (40) with Commissioner.

36. D. Nelken, ‘Blind Insights? The Limits of a Reflexive Sociology of Law’, 25(3) *Journal of Law and Society* 407–26, at 407–8 (1998).

37. For a discussion of positivism and naturalism, and the key differences between them, see R. Keat, ‘Positivism, Naturalism, and Anti-Naturalism in the Social Sciences’, 1(1) *Journal for the Theory of Social Behaviour* 3–17 (1971).

38. K. Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (2002), at 31.

39. K. Hawkins, ‘On Legal Decision-Making’, 43(4) *Lee Law Review* 1161–1242 (1986).

40. Hawkins, above n. 38.

41. *Ibid.*, at 47–8.

42. R.M. Emerson and B. Paley, ‘Organizational Horizons and Complaint-Filing’, in K. Hawkins (ed.), *The Uses of Discretion* (1992) 231–48.

ysis must look beyond the explicit rationales for referring cases back to the Court and be cognisant of how commissioners and caseworkers make sense of their knowledge about past cases in order to infer from those cases how the Court will respond to a referral in a particular case. They have first to work out what was ‘really going on’ in similar cases and what the implications are of that analysis for future cases.⁴³ Hence, while case law from the Court might be considered in terms of Hawkins’ ‘surround’, once the Commission reacts to evolving Court jurisprudence, by discussing such cases in its informal and formal guidance to Commission staff, those cases become an integral part of the decision field. By way of example, we turn to consider the Commission’s initial response to applications, what we might refer to as its ‘screening’ process before moving on to consider its decision-making in investigating applications concerning procedural irregularities. We see in both analyses that the field structures decision-making but leaves discretionary gaps for caseworkers to interpret and respond differently.

3.1 Application Screening: Variability in Decision Frames

The Commission’s case screening produces a high rate of attrition. It subjects just over half of its 1,400–1,500 applications a year to full and thorough investigation, rejecting the others with minimal review. This process causes some anxiety within the Commission, given that among those screened out there may be innocent people. Owing to limited resources, the Commission cannot conduct in-depth reviews of *all* applications and so relies on minimal information provided, or gathered, to make difficult judgments.

Many commissioners identified the real possibility test as the legal ‘field’ shaping their screening decisions: ‘We’re all independent commissioners from different backgrounds but there’s one job to do: to see, on the evidence and facts, if there’s anything new to give rise to a real possibility.’⁴⁴ Nonetheless, some acknowledged the influence of individual characteristics on how they framed the information received from applicants: ‘[Commissioners] bring a lot of their own previous experience with them, so ... you’re going to get different approaches, and that’s a good thing, in many respects ... But on the flip side of that, [it] can then lead to, obviously, different approaches and inconsistencies.’⁴⁵ Indeed, our interviews across the Commission identified a variety of decision-making styles, which ranged from ‘inflexible conservative’ to ‘very liberal’, from ‘exploratory’ to ‘decisive’, ‘slow’ to ‘fast’ and from ‘rigorous’ to ‘less careful’. Interviews with staff revealed concerns about inconsistency in approaches: ‘I get alarmed sometimes. All our commissioners are very individual people and they all have quite strong person-

alities, but that does lead to a measure of inconsistency of approach.’⁴⁶

Although the legal framework is clear that the Commission is a last resort for those who have not found relief at direct appeal, applications from persons who have not already appealed are not uncommon, making up about 40% of applications each year. Section 13(2) of the Criminal Appeal Act 1995 allows the Commission to review such cases and to make a reference ‘if it appears to the Commission that there are exceptional circumstances which justify making it’. All otherwise eligible cases where there has been no direct appeal will be considered by commissioners and caseworkers responsible for screening, as the decision about whether there are ‘exceptional circumstances’ is complex. The Formal Memorandum states: ‘It is vital that the Commission does not, other than for compelling reasons, usurp the conventional appeals process,’ in recognition of the impact that will have on those who have already satisfied the previous appeal criterion and will be waiting in the queue. Hence, it claims, ‘[A] decision by the Commission to review or to refer any “no-appeal” case will be unusual.’

Commissioners involved in screening during the first years of my fieldwork appeared to interpret the guidelines liberally.⁴⁷ Furthermore, I found some variability among those responsible for screening, in that some cautious commissioners ‘screened in’ half of the cases, while others rejected most. For example, between 2010 and 2013, one commissioner, ‘Commissioner 1’, screened twenty-eight cases and found one case with potential exceptional circumstances, while another, ‘Commissioner fifteen’, screened twenty-eight cases and found fourteen cases with potential exceptional circumstances. No significant differences were found in the profile of cases these two commissioners were responsible for screening in terms of applicants’ gender, custody status, type of offence or when the applications were received. While wider analysis of screening decisions suggested that commissioners could be influenced by guilty pleas and by good legal representation at application, albeit to different degrees, the variability in practice, overall, was difficult to account for. Clearly, notwithstanding a coherent decision field, decision makers were influenced by individual decision frames – ways of making sense of the information – reflecting their particular personalities.

3.2 Investigating Cases: Variability in Decision Frames

The Commission commits considerable resources to searching for fresh arguments or evidence in those cases where the relatively superficial screening of an application suggests that there are reasons to doubt the safety of the conviction. Decisions about reviewing cases are not made in a vacuum; the Commission influences decision-making by creating and providing knowledge to

43. R.M. Emerson, ‘Case Processing and Interorganizational Knowledge: Detecting the “Real Reasons” for Referrals’, 38(2) *Social Problems* 198–212 (1991).

44. Interview (74) with Commissioner.

45. Interview (70) with Commissioner.

46. Interview (17) with Commissioner.

47. More recently, the Commission has become more restrictive in its interpretation of exceptional circumstances.

draw on, as set out, and regularly revised, in its internal guidelines for staff. Notwithstanding this clear decision field, my research found a wide range of investigative patterns and behaviours across the Commission, by way of different decision frames, that could not be accounted for by the types of cases or by the experience of the investigative staff.

Most applicants, even those with legal representation, do not have access to all the records from the trial, and so the first stage of any review is to collate and analyse relevant material for the investigation from public bodies, such as the health service, the police and the Courts, and – since 2016 – from private bodies and individuals.⁴⁸ Beyond these vital ‘desktop reviews’, in some cases it is considered to be advantageous to conduct empirical investigations: to interview the applicant, a witness or an expert and perhaps conduct other investigatory work, including commissioning forensic analysis.

Making sense of applications and deciding what investigations to carry out is a complex process, guided by more than the law; other structural and cultural variables, such as resources and even the personalities of the caseworkers, inform the process and introduce inevitable variability across cases. Analysis of investigatory behaviour over a particular year revealed that one caseworker conducted no empirical investigations, while another did fourteen separate empirical investigations in the same time, with a range of approaches between these two. Case analysis also revealed considerable differences in the speed of reviews at each stage of the process, variability that could only in part be accounted for by the nature or complexity of the case or by the responsiveness of persons external to the Commission. Those we interviewed felt that some of the variation could be accounted for by the intelligence and expertise of caseworkers and commissioners but also by their personalities, confidence and dynamism.

While guidelines cover all aspects of the commission’s work, of particular interest to us here is guidance on decision-making throughout reviews, principally on the question of whether the case satisfies the real possibility test. Discretion may be exercised by individual decision makers slightly differently for each case in the context of past judgments handed down by the Court as well as by the Commission’s interpretation of the factors that influenced those judgments and a set of ever-shifting understandings of the persuasiveness of certain evidence in a particular context at a particular time. By way of a case study of decision-making, we now turn to consider the Commission’s response to applications that raise concerns about police and prosecution procedural irregularities to show how this works in practice.

3.3 Decision-Making in Cases Raising Due Process Concerns

The three main issues raised in applications to the Commission are concerns about the credibility of the witness

or complainant, incompetent representation and claims of police or prosecutorial misconduct.⁴⁹ The criminal justice process is operated by fallible and sometimes prejudiced individuals, and criminal trials provide ‘imperfect procedural justice’.⁵⁰ Wrongful convictions are therefore inevitable. Indeed, to a greater or lesser extent, all applications to the Commission raise concerns about the reliability of the evidence presented to the trial court or about flaws in criminal procedure.

As the Commission must be mindful of the Court’s evolving jurisprudence in deciding how to investigate its cases and when a case is sufficiently strong for a referral back to the Court, it relies on Casework Guidance Notes to steer commissioners in their reviews: documents not publicly available but that I have analysed. As regards applications claiming procedural impropriety, the Commission is aware that the Court is becoming increasingly disinclined to quash convictions based solely on procedural irregularities. Evolving jurisprudence suggests a sea change in the Commission’s ‘surround’, to use Hawkins’ term, to a position whereby the Court seeks to establish whether procedural failures ‘caused any prejudice to any of the parties, such as to make it unjust to proceed further’.⁵¹ In other words, the Commission knows that the approach of the Court is not to presume that breaches of due process are determinative in themselves and that it ‘routinely applies the safety test in the light of its overall sense of justice and not on the basis of technicalities’.⁵² This inclination in the Commission’s surround inevitably influences its ‘decision field’, as the Commission tries to predict which cases may be accepted by the Court and which are likely to fail the test.

Drawing on the recent trends in the Court’s judgments, Casework Guidance Notes advise Commission staff on responding to cases of police misconduct or material non-disclosure (of potentially exculpatory evidence) that might undermine the credibility of a case to such an extent that it amounts to an abuse of process. They make clear that the primary concern of the Court is how evidence of misconduct might have affected the jury’s decision to convict the applicant, or the judge’s decision on a legal ruling. In other words, evidence of police misconduct ‘should not be viewed as determinative’ in itself but should rather be considered in light of the overriding question of how it impacts on the safety of the conviction; that had police investigated thoroughly and behaved with probity, the jury may not have convicted the applicant. In making those crucial decisions about whether evidence of improper policing is determinative – whether it is sufficiently strong to impact on the safety of the conviction – the Commission must inter-

48. Section 17 of the Criminal Appeal Act 1995; section 18A of the Criminal Cases Review Commission (Information) Act 2016.

49. S. Heaton, ‘A Critical Evaluation of the Utility of Using Innocence as a Criterion in the Post-Conviction Process’ (PhD Thesis, University of East Anglia), at 32 (2013).

50. J. Rawls, *A Theory of Justice* (1971), at 85.

51. *Clark and McDaid* Court judgment [2006] EWCA Crim 1196, cited in Criminal Cases Review Commission. 2006b. ‘Quashing Convictions’: The Responses of the Criminal Cases Review Commission (11 December 2006), para. 19.

52. *Ibid.*, para. 25.

pret each case, with its unique set of factors, in light of the evolving Court jurisprudence.

A few of the cases I examined involved breaches of due process of significant severity and import to justify a referral back to the Court. One applicant had been convicted of an attempted rape and of a burglary with intent to rape solely on his false confession, although there was no positive identification from either of the victims and no forensic evidence linking him to either the scene of crime or the victims. Moreover, there was an alternative suspect. Following an application to the Commission in 2000, an experienced forensic psychologist was commissioned to examine the applicant and could demonstrate that he was ‘highly suggestible’, casting doubt on the veracity of the confession. The Commission referred the case back to the Court with this fresh expert evidence – which afforded the information about the alternative suspect higher evidential status – and on the further ground that the police had acted without integrity. The Commission’s Statement of Reasons for a referral pointed out that the police had done very little investigation into the offences – indeed had failed to do the basics – and that the jury had been provided with an abridged version of the interview transcripts, which would have been misleading. Furthermore, the applicant had not been provided with a lawyer. The Court quashed the conviction on the basis of the expert witness’ ‘serious reservations about the reliability of the self-incriminating admissions [the applicant] made to the police’, despite the initial guilty plea. This was a reasonably straightforward case, and it is likely that any commissioner would have made the same decision about referral.

In many of those cases where the Commission refused to refer the case to the Court although applicants had raised concerns about police misconduct, evidence of misconduct or non-disclosure was not fresh, the defence had failed to adduce it at trial or the evidence was not determinative, the legal parameters that the Commission must operate within. The thrust of the advice in the Casework Guidance Note on non-disclosure is that the Commission should consider whether the undisclosed evidence may have been material to the issues in the case and seek to understand its significance in the context of the case as a whole. Hence, again, commissioners would be likely to respond fairly consistently to such cases. As one commissioner explained, ‘It’s not non-disclosure per se that makes something meritorious. It’s always the sort of back-story as to why it wasn’t used before. So, I can see where the Court of Appeal are coming from because it always is based on the significance of the material rather than the mechanics of how or why it didn’t come about.’⁵³

In most cases, police misconduct identified by the Commission was not thought to meet the threshold whereby it could be said to impact on the safety of the conviction within a legal decision frame. As explicated by one Statement of Reasons not to refer, an application cannot

be referred simply on the basis that the investigation fell short of the standards, but the Commission ‘would have to be satisfied that if there was any inadequacy and/or misconduct in the investigation its effect impacted upon the safety of the conviction’. Similarly, in another case, the applicant’s claims of police incompetence were deemed to be insufficient: ‘Investigative failures would not be sufficient in themselves to cause the Court of Appeal to quash the conviction ... there would need to be specific matters arising from such failures that affected the trial process to a degree that rendered it unsafe. (Statement of Reasons)’ Case analysis in most such cases similarly made clear that to refer a case back to the Court, breaches of disclosure rules – like breaches of the police codes of practice – must be sufficiently egregious, or the Commission must be able to demonstrate that had the material been disclosed to the defence, it would have made a difference to the outcome of the case.

Within the wider decision field, Commission staff adopted different decision frames in order to make sense of cases and to arrive at difficult decisions about referrals. While a legal decision frame was dominant, they also adopted, in some cases, instrumental or moral decision frames. Although they referred back to the Court those cases demonstrating flagrant breaches of due process, there were a few examples of Commission decision-making that demonstrated variable levels of deference to police and prosecutors. Such cases suggested either a moral decision to trust in the integrity of the pre-trial process or moral values concerned with due process being trumped by common-sense understandings of the inevitable shortcomings inherent in an overburdened criminal justice system. Hence, one commissioner described the failings of a senior investigating police officer in one of his cases in terms of a heavy case-load: ‘I think it’s easy to sit back in our sort of ivory tower here and be hyper-critical. ... But I think [the senior investigating police officer] himself, you know, I do have a lot of sympathy for him because it was a difficult case.’

Other interviewees dismissed inadequate investigations by the police as merely ‘mistakes’, or ‘shortcomings in the investigation with no evidence of the police acting in bad faith’, with one Statement of Reasons suggesting ‘police officers might have *unknowingly* implanted incorrect information in the witnesses’ minds’ (emphasis added), and a commissioner in another case explaining:

There’s no sense that there’s been deliberate, you know, impropriety either on behalf of the police or the prosecution. In my experience, it’s just been a cock up, you know, that things have been missed and particularly that police ... have just not recognized the significance of a piece of information or material, generally to the case ... I think it’s just ... error, mistake ... incompetence ... negligence, whatever you want to call it.⁵⁴

Few wanted to call it misconduct and were perhaps, therefore, less likely to see mischief when reviewing

53. Interview (1) with Commissioner.

54. Interview (29) with Commissioner.

police investigations. It is arguable that the Commission has been a little too complacent here, in assuming that institutionalised corruption and misconduct by police is rare.

In considering the Commission's response to these cases, we can see the relevance of Hawkins' work and that of other sociolegal scholars who have looked beyond the law in trying to understand the exercise of discretion at all stages of the criminal process. The Commission's decision-making demonstrates that the surround is not static. It shifts according to wider social and political changes beyond the institution, and when it does, the Commission will typically need to move with it. Case analysis demonstrated that developments in the surround require consequent paradigm shifts in the 'field' – in the policies and guidelines of the Commission developed to reflect both the dictates of and the latitude within the law – and, as we see above, in the 'frame', how commission staff make sense of information; how they interpret, classify and respond to evidence in their cases, with a few inclined to be rather forgiving of police and prosecution incompetence.⁵⁵

My research in these cases, as in others, demonstrated that the Court's prior response to Commission referrals and to direct appeals clearly impacts on the Commission's decision-making. Hence, despite some room for different interpretations, and therefore for some variability in responses across the Commission, this inevitably locks the Commission into a close, deferential relationship with the Court. It requires the Commission, as an institution, to accurately interpret the Court's decisions in order to guide decision makers, and then Commission staff must correctly interpret the guidance and apply it appropriately. Notwithstanding this room for discretion, there is a close relationship between the Commission and the Court, and this creates certain challenges, to which we now turn.

4 Challenges: Jury Deference and Deference to the Court

While the Commission remains determined to examine each application thoroughly for post-conviction review, it does so with inadequate resources⁵⁶ and within a legislative framework that restricts its independence and a culture that I have observed to be somewhat risk averse. I explore the culture of the Commission elsewhere⁵⁷ but here return to the legislation that shapes the Commission's response to applications and creates an intractable challenge.

The real possibility test inevitably restricts the Commission's ability to refer a possible wrongful conviction back to the Court and obliges the Commission to decide whether the Court will likely find the conviction to be unsafe. Hence, indirectly, decisions within the Commission are influenced by the Court of Appeal and the Administrative Court, by way of evolving case law. For that reason, many criticisms of the Commission stem from the nexus created by section 13 of the Criminal Appeal Act 1995 because it creates the conditions whereby if the Court is wrong in its analysis or judgment, the Commission is required to sustain erroneous jurisprudence. Given that there is some evidence that the Court is becoming more reluctant to overturn juries' decisions, this must be of concern to critics who consider the Commission to be insufficiently bold in its referral decisions.

4.1 Court Deference to the Jury?

The Court has long harboured a deeply felt reluctance to overturn convictions,⁵⁸ in part because of its commitment to the supremacy of the jury.⁵⁹ This deference led the human rights organisation JUSTICE to criticise the Court's failure to overturn jury verdicts in its 1964 report, stressing 'the fallibility and inexperience of juries whose verdicts do not warrant such reverential treatment by appeal court judges'.⁶⁰ Thirty years later, Malleon reviewed the first 300 appeals against conviction of 1990 and found that in only very limited circumstances was fresh evidence admitted by the Court and that when admitted only rarely did it form the basis for a successful appeal.⁶¹ The Court is reluctant to disturb a jury's verdict in part because it has not heard the evidence they heard nor seen the witnesses. Showing deference to the jury allows the Court to resist appeals based solely on the grounds that the jury could have reached a different verdict.⁶²

New research suggests that the Court today may be more deferential to the jury than ever. Roberts – using the same research method as Malleon (analysing the first 300 available appeals considered in 2016) – found almost double the number of appeals based on fresh evidence, which may hint at a more liberal approach by the Court today.⁶³ However, in only 19% of her cases did the Court admit the fresh evidence, significantly lower than the 61% in 1990.⁶⁴ This suggests the Court is now more restrictive. Her research also found that the most common reason for rejecting fresh evidence under section 23 of the Criminal Appeal Act 1968 was that the

55. K. Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (2002), at 49.

56. House of Commons Justice Committee. *Justice—12th Report: Criminal Cases Review Commission HC850* (2015), <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/850/85002.htm>.

57. Hoyle and Sato, above n. 9.

58. A. Zuckerman, 'Miscarriage of Justice and Judicial Responsibility', *Criminal Law Review* 492-500 (1991).

59. Nobles and Schiff, above n. 6, at 310.

60. JUSTICE cited in Nobles and Schiff, above n. 6, at 310.

61. K. Malleon, *Review of the Appeal Process*, RCCJ Research Study No 17 (1993).

62. R. Nobles and D. Schiff, 'The Right to Appeal and Workable Systems of Justice', 65(5) *Modern Law Review* 676-701, at 676 (2002).

63. S. Roberts, 'Fresh Evidence and Factual Innocence in the Criminal Division of the Court of Appeal', 81(4) *The Journal of Criminal Law* 303-27 (2017).

64. *Ibid.*

evidence had been available at trial and there was no reasonable explanation as to why it was not adduced then (a challenge I saw the Commission grapple with in some cases). If the Court is deferential to the jury, this necessarily influences the Commission's decisions about fresh evidence.

4.2 Commission Deference to the Court?

As the statutory grounds for referral 'provide strong *prima facie* evidence of an essentially dependent position',⁶⁵ concerns about deference are frequently expressed. Critics argue that the centrality of the real possibility test to the Commission's work compromises its claim to independence.⁶⁶ Some have argued that the Commission is circumscribed not only by the law, but also by a concern to please the Court.⁶⁷ On these points, some critics are more forceful than others. While some view the Commission as a filter to the Court,⁶⁸ others point out that 'accusations that the [Commission] is ... subordinate to the [Court] are truisms. That is the way that the system has been designed by Parliament'.⁶⁹ Nobles and Schiff see it as inevitable that the Commission would have developed this relationship even in the absence of a statutory restriction on its powers.⁷⁰ Given that the Commission has no independent power to quash convictions – but can only refer cases to the Court – it is deterred from making referrals that, in view of the Court's practices, would only fail.⁷¹ It is always in the realm of second-guessing how the Court may assess a case following a referral and anticipating how readily the Court will accept its new arguments.⁷²

Regardless of the legislative inevitability of the close predictive nexus between the Commission and the Court, friends and critics have worried about it being overly submissive:

[I]t has been suggested that the Commission has been somewhat intimidated in some cases by the Court's approach ... And has wrongly concluded that the Court would refuse to receive improved expert evidence on the basis of 'finality of trial' considerations. If

the Commission has, indeed, adopted that approach – rejecting exposed evidence that significantly improves upon the expert case at trial – that would be a serious criticism.⁷³

Of course, a difficulty with Elks' point is with the notion of 'evidence that significantly improves upon the expert case at trial'. The Commission can struggle with that subjective judgement. Commissioners not only follow casework guidance but sometimes also await pending Court judgments in similar cases, or cases that raise analogous issues, before deciding whether new evidence is likely to be seen by the Court to significantly improve on the expert case at trial. In light of those cases, they decide whether to refer and, if so, on what grounds. This is unavoidable deference, but it could also be regarded as a pragmatic use of limited resources; learning from past judgments to identify evidence that is likely to be accepted by the Court and to play down factors that have not proven to be persuasive in the past. In other words, it is not always clear what is deference and what is pragmatism, nor is it always clear what is constrained by the real possibility test and what is shaped by a culture of caution or individual predispositions, as described previously. Of course, if the Court gets it right, the Commission does too; however, if the Court gets it wrong, this approach affords no opportunities for the Commission to correct that. While commissioners have told me that recent castigations by the Court for its referrals show that the relationship is not too cosy, its historically high success rate might demonstrate an insufficiently bold approach to referrals.

The question of an appropriate success rate has troubled the Commission for some time. When I began my research, I put it to commissioners that an almost 70% success rate was perhaps a little too high and that it suggested the Commission was somewhat risk averse in its referrals. Recent data – showing a declining referral rate but also a declining success rate – is therefore confounding. If the current reduced referral rate were to suggest increasing risk aversion, with the Commission not wishing to be rebuked for audacious referrals based on a more liberal interpretation of the real possibility test, we might expect to see a higher rate of referred cases quashed, regardless of the raw numbers. Instead, the reduced referral rate has coincided with a reduced success rate. In light of this, is it sensible to urge the Commission to be bolder in its referrals?

5 Conclusion: Should the Commission Be Bolder?

The inevitable 'second-guessing' built into the legislation causes the Commission to be somewhat deferential to the Court. At the same time, the Court would appear

65. P. Duff, 'Straddling Two Worlds: Reflections of a Retired Criminal Cases Review Commissioner', 72(5) *The Modern Law Review* 693-722, at 701 (2009).

66. The boldness of this claim should not be underestimated, given that the *raison d'être* of the Commission is to be independent; see R. Nobles and D. Schiff, 'The Criminal Cases Review Commission: Reporting Success?' 64(2) *The Modern Law Review* 280-99 (2001).

67. M. Naughton, 'No Champion of Justice', in J. Robins (ed.), *Wrongly Accused: Who Is Responsible for Investigating Miscarriages of Justice? The Justice Gap and Solicitors Journal* 20-3, at 21 (2012).

68. A. James, 'The Criminal Cases Review Commission: Economy, Effectiveness and Justice', *Criminal Law Review* 140-53 (2000).

69. K. Kerrigan, 'Real Possibility or Fat Chance?' in M. Naughton (ed.), *The Criminal Cases Review Commission: Hope for the Innocent?* (2009) 166-77, at 174.

70. Nobles and Schiff, above n. 6.

71. R. Nobles and D. Schiff, 'The Criminal Cases Review Commission: Establishing a Workable Relationship with the Court of Appeal', *Criminal Law Review* 173-89 (2005).

72. R. Nobles, 'The CCRC in 2012: An Academic's View'. Queen Mary University of London, School of Law, *Legal Studies Research Series* No. 119/20 (2012).

73. Elks, above n. 27, at 77.

to be rather deferential to the jury, given its adherence to the principle of finality. The consistency of data demonstrating the Court's deference to the jury and the legislative interdependence of the Court and the Commission raises the question of what, if anything, the Commission can do to resist being too deferential to the Court. That may well be one of the key challenges of the coming decade.

On one level, it makes no sense to object to the Commission being somewhat subordinate to the Court; it is inevitable given its function as a review body, not a court of law. However, the Court's restrictions on admissibility of evidence (under its section 23 provisions) mean that some potentially unsafe convictions never get through its doors. Some of my cases were not referred because the Commission cannot submit evidence if it had been used at trial or at a prior appeal or had been available but not adduced at trial, and there is no adequate explanation for this failure. Although the principle of finality is important, this restriction causes some unease.

Although the Commission is institutionally deferential to the Court, it is not powerless to act in those difficult cases that cause disquiet. At the risk of a lower success rate, it can choose to be bolder in its referrals, making use of its powers to refer on 'lurking doubt' or bypassing the system and applying for a Royal Prerogative of Mercy, options that the Commission has expressed little appetite for in the past.⁷⁴ More significantly, the Commission could in certain cases push the boundaries of the real possibility test and make bolder, sometimes 'contrarian' referrals. It can do so because of the gaps in its decision framework that allow for discretion in interpretation and in response to evidence.

My research identified a few such difficult cases and an appetite for a less cautious approach to referral decisions among some commissioners.⁷⁵ While the Commission has expressed concern about the variability in its approach across cases, revealed by my research, and has made efforts to introduce measures to increase consistency, it must nonetheless embrace its limited discretion and encourage decision makers to take advantage of the gaps that can facilitate a more assertive approach to referrals. Although the Commission and the Court must maintain a reasonably harmonious relationship as the success of each requires the cooperation of the other, the relationship could be more challenging and occasionally combative without unduly compromising its symbiotic nature. It is not inevitable that the Commission must always follow the lead.

Currently, in England and Wales, there is considerable concern about the abilities of an overstretched and underfunded criminal justice system to protect defendants' due process rights. It is not unreasonable to assume that the coming years and decades will see a rise in the kinds of cases discussed previously, cases where ineptitude or insufficiency of resources by the police or

prosecution will introduce errors that can produce unsafe convictions. It may therefore be time for the Commission to test the boundaries of the Court's past jurisprudence by referring cases even when it cannot be demonstrated that the errors *were* determinative, so long as they are sufficiently disquieting to suggest they *may* be. The variation in approach we saw across the Commission suggests that at least some will have an appetite for this. As one commissioner told me, 'I think we could be bolder ... there are cut-and-dried cases, and there's a grey area. And I think in the grey area, we ought to lean more towards referring.' My research suggests that is a path worth taking.

74. Hoyle and Sato, above n. 9, at 334-5.

75. *Ibid.*, 335-7.

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.czp.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.

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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://archiwumosiadynskiego.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-malgorzate-k.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/WV-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%u015bwadczenie%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.

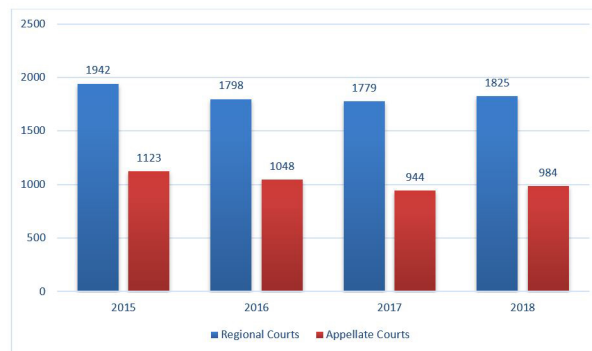
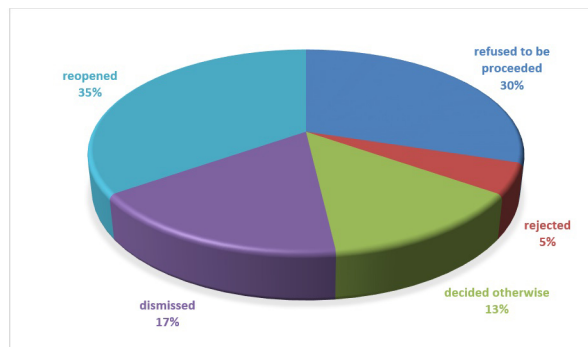


Figure 2 Type of decisions issued in 2015–2018 in Regional Court of Opole in response to motions to reopen proceedings.



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.

Overtuning Wrongful Convictions by Way of the Extraordinary Review

The Spanish Experience

Lorena Bachmaier Winter & Antonio Martínez Santos*

Abstract

According to the traditional view, the ultimate aim of the extraordinary review (*recurso de revisión*) provided in the Spanish justice system was to deal with wrongful criminal convictions and correct those serious miscarriages of justice which became apparent only after the judgment had become final. However, the 2015 reform called this traditional view into question by formally including two additional grounds for review that are not necessarily related to the correcting miscarriages or blatant mistakes in the assessment of the facts made by the sentencing court. This paper aims to give an overview of the extraordinary review in Spain. To that end it will first address the legal framework and its practical implementation, as well as present pitfalls and best practices. Finally, future trends and challenges will be identified in order to improve the protection of defendants who have suffered a wrongful conviction.

Keywords: extraordinary review, remedies, fair trial, wrongful convictions, criminal justice, innocence, procedural safeguards, justice

1 Introduction

The principle of *res iudicata* is a core element of any legal system that seeks to provide legal certainty.¹ The old principle of *res iudicata pro veritate habetur*² prevents that once the sentence is final, the case could be reopened, and the same facts could be subject to further judicial proceedings. Legal certainty, which underpins the credibility and efficiency of the judicial system, is to be seen as the primary goal of the finality of judgments. Only under exceptional circumstances a final sentence could later be set aside if there are pressing reasons that

justify sacrificing the legal certainty to protect higher interests. Correcting miscarriages of justice and revoking unjust decisions rendered against an innocent defendant, have traditionally been considered reasons enough to trump over the principle of *res iudicata*.

This paper aims at giving a broad overview on the extraordinary review (*recurso de revisión*) that is provided in the Spanish justice system to deal with wrongful criminal convictions. To that end, we will first address the legal framework of the extraordinary review, followed by its practical implementation, analysing current pitfalls and best practices, to assess if the existing mechanism is adequate and sufficient to provide protection for innocent defendants who have been convicted. Finally, we will point out future trends and challenges. However, it is worth noting that both, the sources of information consulted and the practitioners interviewed have confirmed that at present, in Spain, it is fairly rare for an innocent person to be victim of a wrongful final conviction.

This might be explained by the structure of the criminal procedure itself. Spain is one of the few European countries that has retained the figure of the Investigating Judge, who directs the pretrial inquiry with full independence, albeit under strict control by the public prosecutor. The system of double-checks (public prosecution controls the investigation carried out by the judge, and at the same time, the judge can control the prosecution filed by the public prosecutor) and the adherence to the principle of mandatory prosecution, have up to now, ensured a high level of safeguards in the criminal procedure. In addition, the very strict exclusionary rules of evidence and the strict respect of the presumption of innocence, together with an adequate system of plea agreements that up to now does not contemplate discretionary powers for the prosecution, and a broad appellate review, have proven effective in minimizing the risk of blatant miscarriages of justice.

The fact that the right to be assisted by a lawyer cannot be waived – except in the case of misdemeanours and petty road offences – making sure that the legal assistance by counsel is mandatory in all criminal cases (except minor road traffic offences), prevents many miscarriages or mistakes that may be found in countries where the defendant assumes his own defence. Nevertheless, despite these safeguards, there are still cases of

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1. See e.g. Spanish Constitutional Court judgments SSTC 2/2003, of 16 January; 159/200, of 12 June; or 262/2000, of 30 October.

2. See J. Lelieur, “‘Transnationalising’ *Ne Bis In Idem*: How the Rule of *Ne Bis In Idem* Reveals the Principle of Personal Legal Certainty”, 9-4 *Utrecht Law Review* 200 (2013).

wrongful convictions, and it is worth checking how strongly and efficiently the system may respond against them.

2 Legal Framework for the Extraordinary Review

Spanish Criminal Procedure Code (*Ley de Enjuiciamiento Criminal*, hereinafter LECRIM), exceptionally allows for the reopening of a finally adjudicated case by way of the ‘extraordinary review’ when there are substantial reasons of justice that should prevail over the legal certainty given by the *res iudicata* principle.³ Historically, in Spain, the extraordinary review has always been regarded as serving the purpose of rectifying grave miscarriages of justice, detected once a conviction has become final, particularly in cases where previously unavailable information has exposed a blatant mistake in the assessment of the facts made by the adjudicating court.

Only final convicting judgments, and no other types of judicial decisions, are subject to the extraordinary review (Art. 954. a) LECRIM). Despite the fact that Article 4 of Protocol No. 7 of the ECHR⁴ and Article 50 of the EU Charter⁵ allow for the *revisio contra reum*, the Spanish legal system only allows the extraordinary review of final convictions, not being available to review acquittal judgments.⁶

Article 954 LECRIM regulates the grounds for the extraordinary review. This rule was amended by Law 41/2015 of 5 October, mainly to take on board the criteria already set by the jurisprudence of the Supreme Court, as well as for adapting the text of 1882 to the present needs on confiscation and enforcement of the European Court of Human Rights’ judgments. In the context of the 2015 reform, it seems that what was unanimously considered to be the *raison d’être* of the extraordinary review has been blurred, at least to a cer-

tain extent. According to the traditional view, the ultimate aim of this remedy was none other than to correct those serious miscarriages of justice that become apparent only after a criminal conviction has become final. By formally including in Article 954 LECRIM two grounds for review that do not necessarily have to do with correcting judicial errors concerning the convict’s participation in the crime or blatant mistakes in the assessment of the facts made by the sentencing court, this extraordinary remedy currently serves wider purposes, which shall not be considered as something negative *per se*.

2.1 Grounds for Review

The grounds for review are listed under Article 954 LECRIM as follows:

False evidence (Art. 954.1 a) LECRIM

a) When a person has been convicted in a final criminal judgment that has assessed as evidence a document or testimony declared later to be false; the confession of the defendant obtained by using violence or coercion or any other punishable act carried out by a third party, provided that these facts are declared by final judgment in criminal proceedings followed to that effect. Such conviction judgment will not be required when the criminal proceedings initiated for this purpose are closed either for statute of limitation, absentia, death of the defendant or any other reasons that prevent the adjudication on the merits.

The fact the conviction was based upon evidence that later was declared as false is already seen as a ground for extraordinary review in the Spanish system, albeit for the civil procedure, in the *Siete Partidas* made under the King Alfonso X *el Sabio* in the 13th century.⁷ As a rule, only when the evidentiary falsehood has been established by a final criminal judgment – false document, false testimony, or confession obtained under torture or coercion – this ground for review will apply. The practice of the Supreme Court is quite strict in this regard, not being enough that a witness for the prosecution recognises later having given false testimony. Such conduct will not lead to granting the setting aside of the final conviction under review. The Supreme Court will require a judgment convicting such witness for false testimony, before considering the reopening of the case by way of review. Despite this very strict approach, since 2015, it is not always necessary for the evidence to have been proven false in a criminal judgment: for example, in those cases where the statute of limitations would halt the prosecution of such crime, once the forgery of the document or the false testimony has been sufficiently established, such a judicial decision would serve as a valid ground for the extraordinary review.

There are not many cases where the review has been granted upon the ground of ‘false document’, being more frequently invoked as grounds for review of the

3. See generally L. Bachmaier and A. Del Moral, *Criminal Law in Spain* (2020), at 356-358; STC 124/1984, 18 December; SSTs 19 September 2007, and 4 June 2008. See also T. Vicente Ballesteros, *El proceso de revisión penal* (2013), at 36 ff.; J. Banacloche Palao and J. Zarzalejos Nieto, *Aspectos fundamentales de Derecho procesal penal* (2018), at 368-371.

4. See Art. 4 of Protocol No. 7 of the ECHR.

5. See also Art. 50 of the Charter of Fundamental Rights of the European Union, which stipulates that ‘no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law’.

6. The *revisio contra reum* has been subject to lengthy discussions by legal scholars for the last two centuries in Europe. While France, Spain or Italy have traditionally opposed to such possibility, the reopening of an acquittal sentence is foreseen in the German Art. 362 StPO under very limited circumstances: only if the evidence that led to the acquittal or for appreciating mitigating circumstances, was proven to be false. The German approach was followed for example in Hungary, Poland, Russia, Switzerland and Austria, allowing the reopening of the proceedings *propter falsa*, but not *propter nova*. See e.g. H. Ziemba, *Die Wiederaufnahme des Verfahrens zu Ungunsten des Freigesprochenen oder Verurteilten* (1974), at 43.

7. See S. Barona Vilar, ‘La revisión penal’, 4 *Justicia*, at 852 ff. (1987).

‘false testimony’.⁸ The review based on false testimony will be admitted not only when the witness made false statements, but also in cases where the witness omitted to declare relevant information that might have determined the conviction sentence.⁹ It could be questioned whether the statement of the witness admitting that his testimony was false and providing elements that support a different version of the facts would be considered as the ground for reopening the case under this paragraph, taking into account that there has not been a criminal conviction for perjury. This question should not have significant relevance in practice, because such circumstance could be considered as a ‘new fact’ under 954.1.d) LECRIM, although this is not always the case.

2.2 Criminal liability of the judge for intentionally rendering an unjust judgment (Art. 954.1 b) LECRIM)

New Article 954.1.b) LECRIM regulates as the ground for review of the situation

when a final judgment has been delivered, convicting one of the magistrates or judges for the crime of intentionally rendering an unjust judicial decision in the proceedings in which the judgment whose review is sought was passed. For the aims of the extraordinary review, the unlawful judicial decision must have had an impact upon the conviction sentence, in the sense, that without it ‘the sentence would have been different’.

This ground for review is connected to the criminalisation in the Spanish Criminal Code of

the delivery by the judge of a knowingly unfair or knowingly unjustified judicial decision ... shall be punishable by imprisonment for a term up to four years and professional disqualification (Art. 447 Criminal Code).

This paragraph was introduced in 2015, although the ground for review could previously be derived from the general clause of ‘new or newly discovered facts’. In practice, this is not relevant, because as far as we know, the Supreme Court has never decided to reopen a final judgment upon this ground. It could be questioned if including this specific ground is necessary or not.

Ne bis in idem

c) When two different final sentences have been passed on the same facts and person. (Art. 954.1 c) LECRIM)

In connection with the principle of *res iudicata* or invariability and binding effect of the judgments, the principle of *ne bis in idem*, is a fundamental principle of law, which bars prosecution, trial and punishment repeatedly

for the same offence, identified by the facts. The review based upon *ne bis in idem* has been specifically provided for in Article 954 LECRIM by way of the amendment of 2015, although its first appearance in the case law of the Supreme Court dates back at least to 1966.¹⁰

It could be questioned whether the existence of two conviction sentences by different courts for the same acts would fall within the concept of ‘wrongful’ conviction. In fact, the defendant is not innocent, and his liability has even been confirmed by two different courts that adjudicated the case independently from each other. In this case, the review would not be aimed at protecting an innocent person, but at preventing the enforcement of two sentences: because the mechanisms to prevent the *ne bis in idem* have failed, the response of the criminal justice system is that the person sentenced twice for the same facts, sees one of the sentences annulled and only one executed.

In the theoretical case of infringement of the *ne bis in idem* principle, where the same defendant has been judged twice, one convicting and the other acquitting, the existence of two contradictory sentences would, of course, run against the coherence of the system and the principle of legal certainty. However, this situation might also be indicative of the defendant having been wrongfully convicted. Although interesting from a theoretical point of view, these cases are less relevant in practice, as they are almost non-existent in the Spanish practice.

New or newly discovered facts or evidence

d) When knowledge of facts or evidence emerges which, had it been available [at the time of sentencing], would have led to an acquittal or to a milder punishment. (Art. 954.1 d) LECRIM).

This ground for reopening a case was not included in the *Ley de Enjuiciamiento Criminal* of 1882 but was later added by Law of 24 June 1933 with the following wording: ‘When, after the sentence is passed, knowledge of new facts or new evidence arises of such a nature as to prove the innocence of the convicted person’.¹¹

In 1975, the Supreme Court had already established that in order to reopen a case because of new or newly discovered facts or evidence, it was not absolutely necessary to show the actual *innocence* of the convicted person, instead being sufficient to lead to a penalty reduction – either because a lighter penal provision is applicable or because the new circumstances might end up in a lower sentence. In the same vein, although new or newly discovered elements concerning the existence – or possible existence – of a mitigating circumstance (or the non-existence of an aggravating circumstance) were not con-

8. See, e.g. SSTs 232/2010, of 9 March; 229/2012, of 22 March; 640/2012, of 6 July; and, more recently, STS 400/2019, of 25 July.

9. See, e.g. STS 111/2003, of 23 July.

10. STS of 14 November 1966. More recently, see (among many others) SSTs 134/1998, of 3 February; 1698/1999, of 26 November; 824/2009 of 21 July; or 229/2009 of 21 March.

11. Section 1.6 of Art. 328 of the Spanish Military Procedure Code also contains a similar provision, according to which the overturning of a final sentence is to be granted ‘when, after a conviction has been handed down, there is knowledge of sufficient undoubted evidence as to prove the judgment to be erroneous due to ignorance of said evidence’.

sidered at first to be sufficient to grant the reopening of a criminal case, the Supreme Court soon declared that correcting a partially unjust sentence also falls within the aim of the extraordinary review, as long as the injustice stems from a factual error unveiled by the new facts or evidence.¹² In this context, extraordinary review has been granted because it was undoubtedly proved by way of new evidence that the defendant was a minor when he committed the crime, and thus a ground of excuse or a mitigating circumstance should have been applied in the judgment.¹³

This extensive interpretation was formally endorsed by the legislator in 2015. Thus, the current wording of Article 954 LECRIM does not refer to the actual innocence of the defendant, focusing instead exclusively on the potential consequences of the new findings in terms of the objective outcome of the proceedings.

As has already been mentioned, only new or newly discovered facts or evidence – which was not investigated or was not presented or produced at trial – and which would result in an acquittal or in a lesser sentence are currently admitted as a ground for the extraordinary review under section 1 d) of Article 954 LECRIM.

With regard to evidence, it is important to note that a re-evaluation of evidence already included in the case file is strictly forbidden. Furthermore, the case law has made repeatedly clear that the extraordinary review is not an appeal, and therefore cannot be used to challenge the assessment of facts or evidence already made by the adjudicating court. Ever since 2001, the Supreme Court has held that it is only possible to file an extraordinary review based on new evidence if it meets the following two requirements: (a) it is evidence that could not be presented at trial, either because it did not exist at that moment or because its existence was not known until after the judgment became final; and (b) the evidence in question is *unequivocally conclusive* as to the innocence of the convicted person; hence, uncovering a blatant miscarriage of justice¹⁴ (again, the term ‘innocence’ should be taken here in the broadest sense possible, also including excuses, justifications and mitigating circumstances; even the absence of aggravating circumstances erroneously found by the sentencing court).

This leads us to another controversial issue: how to assess whether the new or newly discovered facts or evidence ‘would have led to an acquittal or to a milder punishment’, i.e., what should the standard of proof be in these cases? There is agreement in this regard that the review is to be granted when the new or newly discovered facts or evidence clearly and unmistakably show that the convicted person is innocent. In all other cases, where the new elements could merely cast doubt upon

the guilt of the convicted person, scholars appear to be divided.¹⁵ However, most of them consider that absolute certainty about the innocence of the defendant is not necessary for overturning the conviction, and this appears to have been also the stance of the Constitutional Court.¹⁶

The Supreme Court, however, has been fairly consistent (with rare exceptions)¹⁷ in considering that the applicable standard must be a strict one.¹⁸ Even after the amendments of 2015 to the wording of section 1 d) of Article 954 LECRIM, which at first seemed to introduce more flexibility, the Supreme Court has adhered to the strict interpretation, so that the review will only succeed when the purported error in the conviction is made clearly and undoubtedly apparent from the newly presented evidence.¹⁹ It would seem that the ultimate reason behind this stringent criterion is the exceptional nature of the extraordinary review, which is consistent with the need to prevent the risk of continuous attempts to reopen closed cases on account of mere disagreements with judicial decisions on evidentiary issues.²⁰

Nevertheless, it seems obvious that setting the standard too high might be problematic from a perspective in favour of granting suitable protection to convicted innocents. The fact that most of the applications for extraordinary review are declared inadmissible might prove the existence of such risks in Spanish practice, although there are no specific data that such a strict filter has impeded correcting manifest miscarriages in practice.

It has also been discussed whether a change in the case law of the courts can be considered a ‘new fact’ for the purposes of reviewing a final judgment.²¹ The question has been controversial because the Supreme Court initially accepted these changes as grounds for review, but later held the contrary in the decision on unifying interpretative criteria (*acuerdo no jurisdiccional*) of 30 April 1999.²² However, at least in those situations where the change of the legal interpretation has led to the full decriminalisation of a certain conduct, the Con-

12. See, e.g., SSTs 407/2002, of 7 March; and 296/2004, of 10 March.

13. The mistake in the date of birth of the defendant has led to the extraordinary review in e.g. STS 1222/200, of 18 February 2000; or 2225/2008, of 25 April 2008.

14. See the decision (Auto) of the Supreme Court 9992/2001, of 5 February 2001. This decision was particularly important because it set the standards which the Supreme Court was to follow in the subsequent years.

15. Vicente Ballesteros, above n. 3, at 183.

16. STC 70/2007, of 16 April.

17. See STS 644/2007, of 22 June.

18. E.g., STS 949/2010, of 1 October. This was a case of sexual abuse in which the victim, a minor whose testimony had been the basis of the conviction, recanted all her allegations against the convict once the sentence had become final. The Supreme Court rejected the request for revision, precisely arguing that the new testimony was not ‘unequivocal’ enough to warrant a reopening of the case.

19. See, among others, SSTs 748/2016, of 11 October; and 85/2020, of 27 February.

20. See STS 85/2020 of 27 February. Practice shows that it is not uncommon that defence lawyers file an extraordinary review once all the ordinary remedies have been exhausted, trying to introduce new documents or new evidence, even if such evidentiary elements would not have any bearing upon the conviction sentence.

21. See J.A. Tomé García, ‘Chapter 24’, in A. De la Oliva *et al.* (eds.), *Derecho Procesal Penal* (2003) 607, at 613.

22. Art. 264 of the Organic Law on the Judiciary (*Ley Orgánica del Poder Judicial*, hereinafter LOPJ) provides that in case of diverse interpretative criteria in the different sections of the same Chamber of the Supreme Court, the judges shall meet and issue a decision setting unified criteria as well as for coordinating procedural practices. Although they are not legally binding, they are followed in practice to avoid inconsistencies within the same Chamber.

stitutional Court has accepted the possibility of reopening already closed cases based on this ground.²³

Later ruling on a preliminary issue that was previously decided by the criminal court

e) When, after the criminal court has decided on a preliminary non-criminal issue, a final judgment is given afterwards by the competent non-criminal court that contradicts the criminal judgment. (Art. 954.1 e) LECRIM).

Preliminary issues (*cuestiones prejudiciales*) arise when a criminal court has to decide on a specific subject matter, which falls within the competence of another jurisdictional branch (civil, administrative or labour), in order to make a decision on their own subject matter.²⁴ In Spain, criminal courts have been accorded jurisdiction to decide on non-criminal issues where it is necessary for the assessment of the criminal liability.²⁵ However, the ruling of a criminal court on non-criminal issues will never have *res judicata* effect.²⁶ If later an administrative, civil or labour court decides differently on such issue and this might have a bearing in the criminal conviction, the present ground for review would apply. This was the case of the judgment of 25 May 1999, regarding a criminal conviction for illegally exercising the profession of dentist, when later the administrative court held that the professional qualification of the convicted defendant was in fact valid, because the title had been validated.²⁷ This ground was not specifically set out in the law prior to 2015 but was admitted by the Supreme Court under the general ground of ‘new or newly discovered facts or evidence’. So far, we are not aware of any review filed recently upon this ground.

Non-criminal conviction-based confiscation (civil forfeiture), when the criminal judgment contradicts the facts upon which the confiscation was decided

2. A ground for reviewing the final judgment on confiscation proceedings will be the contradiction between the facts established as proven in it and those established as proven in the final criminal sentence that, eventually, is delivered (Art. 954.2 LECRIM).

Under this ground for review, the law intends to protect the defendant who has been subject to a civil confiscation when the subsequent criminal proceedings end up with an acquittal. The prior judgment on the civil forfeiture – which is decided by way of a civil procedure, Art. 803 *ter* g) of the LECRIM – should be set aside

when the subsequent criminal procedure contradicts the prior assessment of the facts. This ground for review seeks to protect the innocent, not from a criminal conviction, but from the civil forfeiture, which entails a kind of sanctioning system by way of the confiscation of assets (even if it is claimed to be preventive). As far as we know, no extraordinary review has ever been based on this ground.

Enforcement of a judgment of the European Court of Human Rights

3. Review of a final judicial decision may be lodged when the European Court of Human Rights has found it was given in violation of any of the rights recognized in the European Convention of Human Rights and its Protocols, provided that the violation, by its nature and seriousness, causes effects that persist and cannot cease in any other way than through the review. (Art. 954.3 LECRIM)

Upon a judgment of the European Court of Human Rights (ECHR), finding a violation of the ECHR in a final judgment, the way to set it aside and reopen the case to correct the violation of the fundamental right shall be through the extraordinary review. This ground was newly introduced in 2015 to make effective the execution of judgments of the ECtHR. Until then the judgments of the ECtHR were already enforced by way of the extraordinary review, considering the Strasbourg judgment as a new fact (under Art. 954.1 d) LECRIM). It is not worth recalling here all the debates on the adequateness of such extensive interpretation to overcome the legislative lacuna on this point, but we welcome the clarification over the fact that the extraordinary review is the adequate remedy to correct violations of the Convention caused in the criminal procedure. Most of these reviews are based on a violation of the fair trial rights, many of them not having a direct impact on the actual innocence or guilt of the defendant.

2.3 Procedure for Filing the Extraordinary Review

The extraordinary review will be filed with the Criminal Chamber of the Supreme Court (Art. 57.1.1 LOPJ).²⁸ It can be lodged by the public prosecutor and by the defendant.²⁹ The functions of the Spanish public prosecution as set out in Article 124.1 of the Constitution are to act in defence of the legality, the rights of the citizens and the public interest protected by the law, ex officio or at the request of the interested parties. In fact, removing wrongful convictions falls within its duties to promote justice and thus act in the general interest. However, the public prosecutor has no standing in the proceedings for enforcement of the ECtHR’s judgments.

23. See STC 150/1997, of 29 September.

24. See, L. Bachmaier (with C. Gómez-Jara and A. Ruda), ‘Blurred Borders in Spanish Tort and Crime’, cit., in M. Dyson, *Comparing Tort and Crime* (2015) 223, at 240-241.

25. On case law regarding preliminary questions and civil issues within the criminal procedure, see A. Del Moral Martín and A. Del Moral García, *Interferencias entre el proceso civil y el proceso penal* (2002), at 231-282.

26. A. De la Oliva, et al., *Derecho Procesal Penal* (2007), at 255.

27. STS 506/1999, of 25 May.

28. See Bachmaier and Del Moral, above n. 3, at 357.

29. Most of the requests come from the convicted parties. As an example, statistics of the Public Prosecution Office at the Supreme Court show that during 2018 there were 132 extraordinary reviews filed, and only 6 of them were filed by the Public Prosecution.

In those cases where the convicted defendant has died, certain relatives are accorded standing to request the reopening of the case (Arts. 955 and 956 LECRIM, these are the spouse or unmarried partner, ascendants and descendants). Allowing these close relatives to file a review not only has a goal of clearing the reputation of the defendant, but eventually will also revise the ruling on the civil damages. It must be recalled that one of the peculiarities of the Spanish criminal procedure is that the civil damages *ex delicto* will be decided necessarily – safe explicit objection by the claimant – within the criminal proceedings. Setting aside the criminal conviction by way of review will also have an impact upon the damages and thus give way to the reimbursement of the money amount imposed as civil compensation.³⁰

As a rule, there is no time limit to file the extraordinary review for wrongful convictions, and it is therefore even possible for the defendant to request the review once the sentence has been served, or, as already mentioned, that the relatives can seek to overturn the conviction to re-establish the reputation of the convicted defendant even after he or she passes away. For the review, based on the enforcement of a judgment of the ECtHR, the time limit is one year since it became final (Art. 954.3 LECRIM).

As to the proceedings, once the court checks that the admissibility requirements are met – the application for review is based on one of the legal grounds, the claimant has standing, and the allegations and elements presented show a *prima facie* wrongful conviction – the court will hear the allegations of the public prosecution. In practice, although there are no precise statistics, around 90% of the requests for review are rendered inadmissible.³¹

There is no specific regulation on how the new evidence for filing the extraordinary review will be gathered. It may result from other criminal investigations or proceedings, but also upon evidence collected by the convicted person and his defence lawyers. It is foreseen that the Supreme Court can *ex officio* carry out investigative actions to determine if the request for extraordinary review is grounded (Art. 957 LECRIM), but it is unclear to what extent these powers are used in practice.³²

If the court admits the case because it considers that the grounds to reopen the case and to re-examine the judg-

ment are sufficiently substantiated, the defendant or his relatives (or the public prosecutor) will have fifteen days to file the appeal for review in writing, following the same formal rules as the appeal in cassation. The proceedings are divided in three stages: admission, filing and decision. These proceedings have been criticised, for they require first a written claim for requesting the admission of the review and a second written claim with the petition for review itself, while both claims are usually the same.

Against a decision of not admitting the request for review, the law does not provide for any further remedy, except the constitutional complaint in case of violation of a constitutional right. If, once admitted, the reopening is rejected, the challenged judgment will remain unchanged and its validity will be confirmed. In practice, however, almost all petitions for review that pass the admissibility check are later granted. It is to be questioned if it is possible to file another extraordinary review to challenge the same judgment. In principle, if new facts or evidence appear after the first extraordinary review has been rejected, the possibility of filing a second review based on those new facts should not be excluded. In fact, this happens in a number of cases, where the defence lawyers of a convicted person keep on trying to set aside the final judgment by searching for new elements of evidence.³³

If the review is granted, the consequences will be different, depending on the grounds.³⁴ Despite the confusing wording of Article 958 LECRIM it can be concluded that: 1) when the Supreme Court finds that there has been a wrongful conviction due to false evidence, new or newly discovered facts or evidence or illicit wrongdoing of the court, the immediate effect is that the challenged judgment will be quashed (*iudicium rescindens*). Once the wrongful sentence is annulled, it is not clear in which circumstances the case will be remanded to the competent court in order to retry the case and give a new sentence (*iudicium rescissorium*); and in which cases will the Supreme Court just set aside the wrongful conviction and directly give an acquittal judgment instead. In some cases, the Supreme Court has issued a new acquittal sentence after granting the review,³⁵ while on other occasions it has remanded the case for retrial.

If the new judgment acquits the defendant, the law provides for the possibility to claim compensation of damages from the State (Art. 960 LECRIM).

30. On the civil claim *ex delicto* within criminal proceedings see Bachmaier (with C. Gómez-Jara and A. Ruda), above n. 24, at 241-254.

31. Practitioners interviewed explained that the high inadmissibility rate is greatly due to the fact that many lawyers just file the review seeking a re-assessment of the evidence done by the adjudicating courts, even aware that the review will not be admitted, but often to show their clients that they have defended them by all possible means.

32. There are no statistics on this and no empirical study on how often the Supreme Court requires the gathering of evidence for deciding on the admissibility of the review. However, practice shows that when there are doubts about the validity of an official document or even about the possibility that the conviction might have been based upon false testimony, the Supreme Court makes use of the powers given under Art. 957 LECRIM, to check the falsehood of such evidence. However, in no case will they order a repeat of the criminal investigation or to carry out a range of investigative acts.

33. There is a case where the person convicted for asset stripping has tried repeatedly to set aside the conviction sentence presenting new evidence, even if such new elements of proof do not question the validity of the conviction.

34. These consequences are set out in Art. 958 LECRIM, but this provision has not been amended to adapt to the changes introduced in 2015.

35. See e.g. STS 320/2016, of 18 April.

3 Extraordinary Review in Practice

According to available data, 4,982 requests for extraordinary review have been decided by the Supreme Court over the past twenty-five years (1995–2019).³⁶ This amounts to 4.5% of the total number of Supreme Court decisions in those two and a half decades. As to the evolution of cases, the statistics of the last five years do not reflect significant variations.³⁷

Although there is no official qualitative information available, a cursory analysis of the case law reveals that most petitions are dismissed *in limine* for lack of relevant grounds (as stated earlier, around 90%).

Requests for extraordinary review are most often based on allegedly new or newly discovered facts or evidence (Art. 954.1 d) LECRIM). The Supreme Court has long stressed the breadth of this ground for review. It is in fact so broad that it virtually overlaps with almost all the other grounds set forth in Article 954 LECRIM.³⁸

In this context, it is possible to identify some typical situations in which the Supreme Court has granted the extraordinary review on the basis of a miscarriage of justice, made clearly apparent by new facts or evidence. The most frequent one by far is without a doubt the annulment of a conviction for driving without a license when, after the sentence has become final, it is established either that the convicted person did in fact have a driving license (albeit issued by a foreign country), or that the administrative decision which deprived him of his driving license was subsequently revoked.³⁹

In these cases there is no reopening of the case as such: the immediate effect of the review is the overturning of the conviction and the cancellation of the acquitted person's criminal record.⁴⁰ It is important to note that it is not uncommon for these types of criminal convictions to have occurred as the result of a guilty plea rather than a full trial, as it is one of the exceptions where a lawyer is not mandatory. According to the case law of the Supreme Court, this circumstance in itself does not pre-

clude the granting of the review, as long as the rest of the pertinent criteria are rightly met by the applicant.⁴¹ The ground for review provided for in section 1d) of Article 954 LECRIM has also been used to overturn final convictions in cases of identity fraud or identity usurpation, where defendants had purposefully – and falsely – identified themselves as someone else from the very moment of their first detention, in order to transfer to that other person – nominally, at least – the legal consequences of their own actions.

Traditionally, identity parades and fingerprint evidence were the standard ways to prove the identity of the suspect, although DNA analysis is now carried out routinely.⁴² The provisions regarding identification of the suspect in the Spanish LECRIM are so broadly drafted that they allow a continuous adjustment to the present means for accurate identification.⁴³ However, this has not excluded possible miscarriages in the past. There is a case where a Moroccan man was recognised separately by several victims in an identity parade as the person who had attacked and raped them, but it turned out later that a man with very similar facial and physical features was the author of those sexual crimes.⁴⁴

On a similar note, the reopening has been granted as well in cases where, once the judgment has become final, another person confesses to the crime for which the defendant was found guilty. Of course, for the request to fully succeed and thus lead to an acquittal in these circumstances, the confession must not only be proven to be true, but also needs to exclude any participation of the convicted person in the crime.⁴⁵

Other types of evidence that have been considered in practice potentially suitable for the purposes of reopening criminal cases after the conviction has become final have been: (a) the coming forward of new and more reliable witnesses than those who testified at trial;⁴⁶ (b) the presentation of new expert or scientific evidence (e.g., DNA testing) that discredits without a shadow of a doubt the results of the evidence given at the trial;⁴⁷ (c) the production of new or newly discovered documents that prove with absolute certainty that it would have been impossible for the defendant to commit the crime he was convicted for, because he was either abroad or in prison when it took place;⁴⁸ and finally (d) conclusive

36. In order to better comprehend the magnitude of the problem, it is worth noting that the Spanish criminal courts passed a total of 570,322 judgments only in 2018 (which were 573,918 in 2017 and 644,693 in 2016, respectively). The relevant statistical data is available at the following website managed by the Spanish General Council of the Judiciary (*Consejo General del Poder Judicial*): www6.poderjudicial.es/PxWeb/pxweb/es/.

37. Data are for year/number of extraordinary reviews decided by the Supreme Court (without differentiating inadmissibility decisions from the rest. 2013: 229; 2014: 524; 2015: 346; 2016: 297; 2017: 287; 2018: 235. As can be seen there is an important deviation in 2014.

38. See P. Garcandía, 'Motivos de revisión penal: análisis de la nueva configuración del art. 954 de la Ley de Enjuiciamiento Criminal tras la reforma de 2015 y al amparo de la jurisprudencia del Tribunal Supremo', 39 *Revista General de Derecho Procesal* 10 (2016).

39. See Art. 384 of the Spanish Criminal Code.

40. See, without being exhaustive, SSTs 977/2010, of 8 November; 721/2012, of 2 October; 335/2016, of 21 April; 748/2016, of 11 October; 646/2017, of 2 October; 757/2017, of 27 November; 758/2017, of 27 November; 368/2019, of 19 July; 71/2020, of 25 February; or 85/2020, of 27 February.

41. See e.g., SSTs 335/2016, of 21 April; and 646/2017, of 2 October.

42. SSTs 1/2009, of 14 January; 453/2009, of 28 April; 349/2010, of 17 March; 556/2018, of 15 November; or 72/2020, of 25 February.

43. Art. 373 LECRIM reads: 'If there were any doubts about the identity of the defendant, efforts will be made to identify him by whatever means that would be adequate to that end.'

44. This case shows that despite all possible safeguards and precautions regarding the evidence, miscarriages do happen. The case was especially dramatic, because the innocent men spent around eight years in prison, until new DNA evidence proved that he had been wrongly convicted.

45. SSTs 975/1997, of 5 July and 1775/2002, of 28 October.

46. SSTs 1594/2003, of 28 November and 3644/2005 (ROJ), of 8 June.

47. See e.g., SSTs 792/2009 of 16 July; 1013/2012, of 12 December; and 75/2016, of 10 February.

48. SSTs 1460/2005, of 9 December; 95/2006, of 1 February; 245/2006, of 6 March; 450/2008, of 10 July; 538/2014, of 1 July; or 92/2015 of 16 February.

evidence of the fact that the convict was actually a minor at the time of committing the crime, such as foreign official records.⁴⁹

4 Concluding Remarks

As has already been mentioned, the rules on the extraordinary review were modified in 2015 to facilitate the enforcement of Strasbourg's judgments, and also to reformulate other grounds for review or add new ones to carry out 'technical improvements'. In fact, the new wording of Article 954 LECRIM clarified some controversial points, but also left other questions open. One of these issues relates to the effects of the extraordinary review once it has been granted. Unfortunately, the amendment of Article 954 LECRIM was not accompanied by a simultaneous amendment of Article 958, and therefore doubts might arise as to what should be the practical effects of the review in each case. These doubts will have to be gradually cleared up by the case law of the Supreme Court over the next few years.

One of the challenges that will need to be faced in the future, especially at the EU level, is how to deal with transnational *ne bis in idem*, and the question on whether the extraordinary review is the adequate remedy to grant protection for defendants whose right not to be prosecuted twice has been infringed. In this context, another issue to discuss is whether the extraordinary review should also be granted when the infringement of the *ne bis in idem* results from the accumulation of administrative punitive sanctions and criminal sanctions. As the case law of the ECtHR has extended the guarantees of criminal procedure to the administrative sanctioning system,⁵⁰ it is our understanding that this should also be somehow reflected in the rules and practice of the extraordinary review.

All in all, the extraordinary review in Spain has proven to be effective in setting aside wrongful convictions. As seen in the case law, at present, the situations where innocent persons are wrongfully convicted are very exceptional. Even very critical voices against the justice system do not mention this as a problem in the Spanish system. Furthermore, the grounds to grant an extraordinary review show an appropriate balance between the principle of justice and the principle of legal certainty.

While the extraordinary review does not play a significant role when viewed in quantitative terms, it definitely plays an important and necessary role, for correcting miscarriages of justice that would otherwise be left without remedy (or would have to be remedied, where possible, through a constitutional complaint before the Con-

stitutional Court). In general, practical application of the extraordinary review has not raised particular criticism and in general it seems to be functioning correctly. However, the Spanish extraordinary review is not without its pitfalls and shortcomings, as we have tried to show throughout this brief overview. The strict admissibility requirements prevent the use of this remedy in correcting the assessment of evidence done by the lower courts, but it is considered that the scope of the appellate review and even the appeal in cassation should be enough to prevent mistakes in the factual assessment. While this can be seen as adequate, the lack of precise statistical data on the grounds for the inadmissibility decisions, does not allow us to draw definitive conclusions.

Indeed, detailed statistical data that would be highly useful for a right assessment of its functioning, and thus for correcting shortcomings and improving the legislative framework if need be, is still missing. For the present study we have contacted practitioners in order to get more precise information and also a better understanding of the public perceptions. However, we are aware that a deeper analysis is necessary.

Finally, although the possibility of compensation for damages is justly provided in some cases where the extraordinary review is granted,⁵¹ the truth is that financial compensation does not give back the time spent by the wrongfully convicted person challenging his conviction, neither does it eliminate the psychological and moral suffering caused to him. As always, the best and most time-and-cost efficient remedy against wrongful convictions remains prevention. In this sense, the figures of wrongful convictions in Spain seem to remain quite low, and the media do not report serious miscarriages in this context, which might be seen as a positive indicator for the criminal justice system.

49. SSTs 334/2015, of 21 May; 166/2016, of 2 March; or 195/2016, of 9 March.

50. See *Engel and Others v. The Netherlands*, Application no. 5100/71, Judgment of 8 June 1976. See more recently also *Balsytė-Lideikiene v. Lithuania*, Application no. 72596/01, Judgment of 4 November 2008 and *Flisar v. Slovenia*, Application no. 3127/09, Judgment of 29 September 2011.

51. See Arts. 960 LECRIM and 293.2 LOPJ.

Post-Conviction Remedies in the Italian Criminal Justice System

Luca Lupária Donati & Marco Pittiruti*

Abstract

The Italian Constitution expressly contemplates the possibility of a wrongful conviction, by stating that the law shall determine the conditions and forms regulating damages in case of judicial error. Therefore, it should come as no surprise that many provisions of the Italian Code of Criminal Procedure (CCP) deal with the topic. The aim of this article is to provide an overview of the post-conviction remedies in the Italian legal system by considering the current provisions of the CCP, on the one hand, and by exploring their practical implementation, on the other.

Keywords: wrongful conviction, revision, extraordinary appeal, rescission of final judgment, *res judicata*

1 Introduction

In a recent television appearance, Italy's Ministry of Justice stated that 'innocent people don't end up in jail',¹ signifying that national authorities are not always willing to admit the flaws of their criminal justice system.

With all due respect to Italy's Ministry of Justice, however, it is fair to state that although the Italian criminal justice system has undergone a deep renovation process,² it is still far from being fully effective, especially

with regard to wrongful convictions.³ In fact, between 1991 and 2019, Italy had to face at least 191 cases of wrongful conviction,⁴ a number that falls short of being representative of the real proportion of wrongful convictions. Indeed, a reversal of a previous final judgment (this being, *strictu sensu*, a wrongful conviction) can occur only in exceptional circumstances. Furthermore, the Ministry of Justice does not provide official data concerning wrongful convictions.

In this article, we provide an overview of the post-conviction remedies in the Italian legal system, by considering the current provisions of the Italian Code of Criminal Procedure (from now on, CCP), on the one hand, and by exploring their practical implementation, on the other.

We start by examining the Italian Constitution, which specifically considers the occurrence of a deviation between historical truth and judicially ascertained truth⁵ (Art. 24, para. 4, of the Constitution). We then analyse the main remedy set forth by the criminal procedure rules to overcome a final judgment – i.e. the revision⁶ – and the compensatory measures that follow the acquittal of the defendant after the revision trial.⁷ Lastly, we take a closer look at the remedies set forth by the CCP for 'procedural' injustices that may have occurred during the trial, as indirect means to protect the wrongfully convicted.⁸

63

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1. www.today.it/politica/bonafede-innocenti.html (last visited 26 December 2020).

2. As it is known, the Italian Code of Criminal Procedure of 1988 is a hybrid system, showing both inquisitorial and adversarial traits. Indeed, the reform that led to the new CCP has transposed into the Italian system the adversarial principles of orality, immediacy and confrontation: the accused has the right to be judged on the evidence that is formed during the trial in front of the trial judge; the accused also has the right to confront his accusers and cross-examine witnesses. Still, the CCP provides with multiple elements that reveal Italy's inquisitorial background: judges have the power to order evidence to be acquired *ex officio*, and they can also question witnesses and indicate to the parties new issues that need to be addressed. Moreover, the Italian appellate system has been left mainly untouched by the reform and still provides the parties with two additional 'instances' of judgment. See L. Lupária and M. Gialuz, 'The Italian Criminal Procedure: Thirty Years after the Great Reform', 1 *Roma Tre Law Review* 26 (2019); L. Marafioti, 'Italian Criminal Procedure: A System Caught Between Two Traditions', in J.

Jackson, M. Langer & P. Tillers (eds.), *Crime, Procedure and Evidence in a Comparative and International Context* (2008) 81.

3. On the issue of wrongful conviction in Italy, see L. Lupária, 'Cultura della prova ed errore giudiziario: il processo penale in discussione', in L. Lupária, L. Marafioti & G. Paolozzi (eds.), *Errori giudiziari e background processuale* (2017) XI. See also L. Lupária and C. Greco, 'Unveiling Wrongful Convictions Between the US and Italy: Cross-Learning From Each Other's Mistakes', 1 *Wrongful Conviction Law Review* 101 (2020).

4. www.errorigiudiziari.com/errori-giudiziari-quantanti-sono/ (last visited 26 December 2020). It should be noted that these are not official figures provided by the Ministry of Justice but data collected and processed by the site's curators.

5. See *infra*, § 2.

6. See *infra*, § 3, 4 and 5.

7. See *infra*, § 6.

8. See *infra*, § 7.

2 Post-Conviction Remedies and the Italian Constitution

Article 24, paragraph 4, of the Constitution provides that ‘the law shall determine the conditions and forms regulating damages in case of judicial errors’.⁹ A corollary to this rule is that, strictly speaking, only an erroneous verdict concerning the existence of the criminal liability of the accused can be defined as a judicial error. Indeed, even though the acquittal of a culprit can broadly be considered an ‘error’, there is no damage to be regulated in this case, so much so that the CCP expressly prevents a new criminal proceeding to be held for the same criminal act.¹⁰

The reference made by Article 24, paragraph 4, of the Constitution to the ‘conditions and forms regulating damages’ could be interpreted as allowing the victim of the wrongful conviction only the right to receive monetary compensation for the injustice suffered. However, in order to recognise the right to monetary compensation, a system must be equipped with a special procedural tool aimed at identifying any errors crystallised in a judgment that has now become *res judicata*, and as such no longer subject to ordinary appeal.¹¹

At the same time, the provision of an extraordinary instrument of appeal represents in itself a ‘condition and way’ of redressing the judicial error.¹² With this in mind, Article 24, paragraph 4, of the Constitution integrates the protection offered by the three preceding paragraphs, aimed, respectively, at ensuring that ‘anyone may bring cases before a court of law in order to protect their rights’ (Art. 24, para 1), that ‘defense is an inviolable right at every stage and instance of legal proceedings’ (Art. 24, para. 2) and that ‘the poor are entitled by law to proper means for action or defense in all courts’ (Art. 24, para. 3). Therefore, Article 24, paragraph 4, of the Constitution grants the victim of judicial error two distinct rights: the right to act for the identification and removal of the error and the right to mone-

tary compensation for the unfair limitation of personal liberty deriving from the unjust conviction.¹³

The CCP implements the constitutional precept along the two aforementioned lines. On the one hand, Article 629 CCP sets forth the so-called revision, i.e. an extraordinary appeal aimed at the annulment of the unjust conviction, while on the other, Article 643 CCP provides for an economic compensation for the damages suffered as a result of the wrongful conviction.

Furthermore, in the last twenty years, the principle of intangibility of the *res judicata* has been challenged by new laws increasingly expanding the instruments in favour of the convicted after the final judgment. We are referring to the ‘Extraordinary appeal due to a factual error’ under Article 629-bis CCP, by which the not otherwise amendable perceptive error of the Court of Cassation can be corrected, and to the ‘Rescission of final judgment’, an extraordinary appeal aimed at removing the final judgment in case of a trial conducted entirely in the absence of the accused, who was unaware of the ongoing proceeding.

Each of these tools has its own *ratio* and discipline. It is therefore advisable to examine them separately.

3 The Basic Features of Revision

3.1 The Mutual Relationship between Revision and Judicial Error

Revision is the main tool at the disposal of a convicted person to ascertain a judicial error. Through this extraordinary appeal, it is possible to request that final (i.e., irrevocable) judgments of conviction be removed because of the existence of new cognitive elements that can reveal the judge’s faulty evaluation of the facts contained in the final decision, thus leading to its reversal. Therefore, the hypotheses of revision envisaged by the CCP are intended to remedy a ‘substantial’ injustice of the ruling, that is to say an error in the reconstruction of the historical event, leading to an unjust overcoming of the presumption of innocence.¹⁴

Between revision and judicial error, there is a relationship that goes in a ‘two-way direction’.¹⁵ On the one side, the alleged error is a prerequisite for the request of revision, while, on the other side, the judicial error acquires legal significance only following its assessment through the revision judgment. With this in mind, we can affirm that revision represents a ‘system security

9. This and the following quotes from the Italian Constitution in English are taken from *Constitution of the Italian Republic*, Senato della Repubblica, translation supervised by the Senate International Affairs Service, 2018, www.senato.it/application/xmanager/projects/leg18/file/repository/relazioni/libreria/novita/XVII/COST_INGLESE.pdf (last visited 26 December 2020).

10. Art. 649, para. 1, CCP: ‘the accused person who has been dismissed or convicted by a judgment or criminal decree that has become final shall not be prosecuted again for the same offence, even if his conduct is considered differently in terms of legal definition, stage of the offence or circumstances ...’. This and the following quotes from the Italian Code of Criminal Procedure in English are taken from M. Gialuz, L. Lupária & F. Scarpa (eds.), *The Italian Code of Criminal Procedure*, 2nd ed. (2017).

11. Art. 648 CCP: ‘judgments delivered at trial which are not subject to an appellate remedy other than revision are final. If an appellate remedy may be invoked, the judgment becomes final upon expiry of the time limit set to lodge the remedy or to appeal the order declaring his inadmissibility. In case of an appeal to the Court of Cassation, the judgment becomes final from the day of delivery of the order or judgment rejecting the appeal or declaring it inadmissible ...’.

12. See M. D’Aiuto, ‘La riparazione dell’errore giudiziario’, in L. Lupária (ed.), *L’errore giudiziario* (2020) 723.

13. See M. Gialuz, ‘Remedies for Miscarriage of Justice in Italy’, in L. Lupária (ed.), *Understanding Wrongful Conviction. The Protection of the Innocent Across Europe and America* (2015) 117.

14. Instead, the procedural injustice remains outside the operational sphere of the revision. See P. Troisi, *L’errore giudiziario tra garanzie costituzionali e sistema processuale* (2011), at 109.

15. See R. Del Coco, ‘Giudicato, progresso scientifico e prova nuova. Limiti e prospettive del giudizio di revisione’, in L. Lupária, L. Marafioti & G. Paolozzi (eds.), *Errori giudiziari e background processuale* (2017) 101.

mechanism',¹⁶ capable of guaranteeing the individual's personal freedom, in cases where an antinomy between the definitive statement of guilt pronounced and the historical truth is ascertained. In other words, the Italian legislature has sacrificed the certainty of the irrevocable judgments to 'meet the ineluctable requirements of truth and justice'.¹⁷

In the wake of a consolidated Italian legal tradition, the current CCP provides for revision as a remedy operating only in favour of the convicted person. The request can be proposed 'at any time' (Art. 629 CCP) 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; or, finally, by the Prosecutor General attached to the Court of Appeal in whose district the judgment of conviction was pronounced (Art. 632 CCP).

The judgments of conviction and the judgments of application of punishment upon request, as well as final criminal decrees of conviction, can be subject to revision (Art. 629 CCP) once they have become irrevocable, even if the sentence has already been executed or extinguished (Art. 629 CCP).

The conviction's erroneousness must be evaluated against the symptoms enunciated by the legislature to verify its possible substantial injustice. Indeed, only the error that emerges from new facts can justify the overcoming of a final judgment, thus avoiding that the review may turn into a fourth degree of judgment¹⁸ based on a mere re-evaluation of the same factual elements underlying the previous judgment (Art. 637, para. 3, CCP).

3.2 The Revision Cases

The revision cases are strictly established by Article 630 CCP: *a*) if the facts underlying the judgment or the criminal decree of conviction are incompatible with those established in another final criminal judgment issued by the ordinary court or by a special court; *b*) if the judgment or criminal decree of conviction has based its decision on a judgment issued by the civil or administrative court and subsequently revoked, if a decision has been taken on one of the preliminary issues provided for in Article 3 CCP¹⁹ or in one of the issues provided for in Article 479 CCP;^{20c}) if new evidence is found or discovered after conviction and, either inde-

pendently or together with already assessed evidence, proves that the convicted person must be acquitted;^{21d}) if it is proven that the judgment of conviction has been delivered on the basis of or as a consequence of false documents or statements provided during the trial or of any other criminal act deemed an offence by the law.²²

The aforementioned hypotheses must be integrated with another one created by the jurisprudence. With regard to Article 630 CCP, the Constitutional Court²³ has also allowed request for revision when the reopening of the proceeding is necessary to comply with a final judgment of the European Court of Human Rights. However, this hypothesis shares with those provided for by Article 630 CCP only its nature of extraordinary appeal, whereas it differs significantly from a functional point of view. In fact, filing a request for the 'European revision' does not imply giving the Court new evidence proving that the convicted person must be acquitted. Nonetheless, the 'European revision' can be considered an indirect remedy for judicial errors, since it is a tool that allows an atypical regression of the process to the merit phase.

Conversely, the 'lowest common denominator'²⁴ of the revision cases established by the CCP is the presentation of new elements that might prove, if ascertained, that the convicted person must be acquitted;²⁵ in short, new cognitive elements must emerge beyond those already examined.

At the same time, a consideration of all the acquittal formulas provided for by the CCP highlights that the revision is allowed not only if the new elements – alone or together with evidence already gathered in the previous judgment – prove the innocence of the convicted, but

16. See G. Dean, *La revisione* (1999), at 13 and F. Callari, *La revisione: la giustizia penale tra forma e sostanza* (2010), at 23.

17. Gialuz, above n. 13, at 121.

18. See A. Presutti, 'La revisione del giudicato penale tra impugnazione straordinaria e quarto grado di giudizio', 3 *Studium iuris* 245 (2009).

19. Pursuant to Art. 3 CCP, 'if the decision depends upon the resolution of a dispute on either family status or citizenship, if the issue is serious and a civil action is already in progress, the court may suspend the trial until the judgment settling the case becomes final'.

20. Pursuant to Art. 479 CCP, 'if the decision on the existence of the offence depends on the resolution of a particularly complex civil or administrative controversy, which is already being prosecuted before a competent court, the criminal court may order suspension of the trial. The trial may be suspended if the law imposes no limits on evidence demonstrating the controversial subjective stance in civil or administrative proceedings. The trial shall be suspended until the case is closed with a final judgment'.

21. Among the new evidence that can be brought to the attention of the Court of Appeal in a request for revision, an important role is played by the testimony. An exemplary case is offered by the judicial error concerning Giuseppe Gulotta. In 1976, Gulotta was arrested and later sentenced to life imprisonment on charges of participating in the killing of two *carabinieri*. Gulotta was subjected to different forms of torture while he was interrogated without the assistance of a lawyer and finally confessed to the double murder. In 2012, the Court of Appeal of Reggio Calabria eventually revoked Gulotta's conviction after his application for revision, following the testimony of a *carabiniere*, who had assisted at the tortures that led to the extorted confession. Testimony also helped to discover the wrongful conviction of Domenico Morrone for the murder of two minors. Even though Morrone had an alibi, the judges had convicted him because of witnesses reporting to have seen him committing the murder to the criminal police. The judges did not consider the fact that, during the trial, a few of those witnesses retracted the statements previously made, admitting that they were forced to indicate Morrone as the material author of the crime under threat of retaliation and physical violence by the criminal police. Finally, during the revision trial, two collaborators of justice indicated that Morrone was extraneous to the criminal facts and reported that they had gained such information from the real murderer, whose identity was revealed.

22. To file a request for revision based on the hypothesis referred to in Art. 630, let. d), CCP it is necessary that the false statement (e.g. false testimony) or the criminal act deemed an offence by law (e.g. slander) that led to the wrongful conviction have been ascertained by a final judgment; if a new testimony emerges instead, it will be possible to propose a request for revision pursuant to Art. 630, let. c), CCP.

23. See Constitutional Court., 7 April 2011, no. 113.

24. Gialuz, above n. 13, at 125.

25. The reasons and evidence justifying the revision must be specifically indicated in the request: Art. 633, para. 1, CCP.

also if they present a reasonable doubt about his guilt. From this it follows that it is not possible to file a request of partial revision, i.e., to obtain a conviction for a lesser offence (as was permitted under Art. 554 of the 1930 CCP), or to achieve the application of a mitigating circumstance.

3.3 The Revision Proceeding

The system envisaged by the 1988 CCP presents further innovative features compared with those outlined by the 1930 CCP, which contemplated a clear separation between *iudicium rescindens* and *iudicium rescissorium*. The former was mandatory and took place before the Court of Cassation, while the latter occurred only if the Court, having assessed that the request was not inadmissible or manifestly groundless, annulled the sentence, subordinate to the condition that the judge to whom the proceeding was referred would acquit the convicted person.

Conversely, in the 1988 CCP, both phases were entrusted to the Court of Appeal. In short, once the request for revision is submitted, the Court of Appeal – which in Italy is composed solely of professional judges – makes an *inaudita altera parte* preliminary examination of the admissibility of the application, to exclude manifest groundlessness and to test compliance with the requirements set by the CCP. In other words, the judges are required to make a prognostic evaluation of the suitability of the elements adduced to determine, if afterwards ascertained, the acquittal of the interested party. To this end, the *novum* must be weighed, also in terms of its reliability, persuasiveness and congruence against the evidence already assessed in the previous judgment.²⁶

In the delicate phase of preliminarily examining the admissibility of the application, the risk of trespassing into an evaluation of the merit of the request may be at hand.²⁷ This explains why the norm must be interpreted in the sense that the preliminary assessment of manifest groundlessness should concern only the relevance of the evidence.²⁸

If the Court of Appeal declares the inadmissibility of the request for revision, the applicant can appeal to the Court of Cassation. If the appeal is accepted, the Court of Cassation shall refer the revision trial to a different Court of Appeal (Art. 634, para. 2, CCP).

If the request for revision is deemed admissible, the revision judgment can take place, for which the same rules provided for the trial apply (Art. 636 CCP). During this phase, the enforcement of the sentence can be discretionarily suspended by the Court of Appeal if there is a positive prognosis regarding the acceptance of the application.

26. Court of Cassation, Sec. I, 5 March 2013, Scimone, in *C.E.D. Cass.*, no. 256157.

27. See Del Coco, above n. 15, at 106; Dean, above n. 16, at 93.

28. See G. Canzio, 'La revisione del processo: gli effetti del sopraggiungere di nuove prove rese possibili dal progresso scientifico', in A. Balsamo and R. Kostoris (eds.), *Giurisprudenza europea e processo penale italiano* (2008) 481.

If the request for revision is accepted, the Court revokes the judgment of conviction or the criminal decree of conviction and orders the acquittal, specifying its reason in the operative part of the judgment (Art. 637, para. 1, CCP). The ruling is accompanied by restorative measures, such as the order to refund the acquitted of the paid sums inherent in the criminal proceeding; the affixation of an extract of the judgment in the municipality where the sentence was pronounced, as well as where the acquitted last resided; the publication of an extract of the judgment in a newspaper indicated by the acquitted.

If, on the contrary, the application is rejected, the applicant can appeal to the Court of Cassation (Art. 640 CCP) or file another application based on different elements (Art. 641 CCP). The judgment of the Court of Appeal may be appealed to the Court of Cassation to challenge any *errores in procedendo* (Art. 606, let. c-d, CCP), *errores in iudicando* (Art. 606, let. b, CCP) or the fault of motivation (Art. 606, let. e, CCP).²⁹

4 The Notion of New Evidence

The most common revision hypothesis in the Italian practice is undoubtedly provided for by Article 630, paragraph 1, lett. c) CCP, concerning the occurrence of 'new evidence'.³⁰

Consequently, this aspect has been at the core of numerous jurisprudential reconstructions aimed at explaining its meaning, alternatively enlarging or reducing the application perimeter of the revision.

Such lack of hermeneutical consensus derives from the fact that Article 630 CPP does not clarify whether the notion of new evidence must also include, in addition to the classical hypothesis of the *noviter repertae* evidence (i.e. evidence that emerged only after the judgment had

29. According to Art. 606 CCP, an appeal to the Court of Cassation may be lodged if it is based on the following arguments: 'a) the court exercises a power that is granted by law to legislative or administrative bodies or not allowed to public authorities; b) failure to comply with or misapplication of criminal law or other legal rules which must be considered in the application of criminal law; c) failure to comply with the procedural rules established under penalty of nullity, exclusion of evidence, inadmissibility or expiry; d) decisive evidence is not gathered, when a party has requested its gathering also during the trial evidentiary hearing, exclusively in the cases provided for in Art. 495, para. 2; e) the grounds of the judgment are lacking, contradictory or manifestly illogical, when the defect results from the text of the appealed decision or from other documents of the proceedings specified in the arguments for the appeal to the Court of Cassation'.

30. Among the most recent new evidence that praxis deems suitable to establish a revision request, the following can be mentioned: health documentation suitable for integrating an alibi test (Court of Cassation, Sec. V, 21 June 2019, Nikolli, in *C.E.D. Cass.*, no. 277538); testimonial statements suitable to overturn the accusatory construct (Court of Cassation, Sec. II, 14 February 2019, Camassa, in *C.E.D. Cass.*, no. 276437); interrogation made by the convicted person before the judicial authority of another state (Court of Cassation, Sec. VI, 23 January 2018, Fraquelli, in *C.E.D. Cass.*, no. 272517); a psychiatric report on the convicted preceding the celebration of the trial that ended with the assertion of his responsibility (Court of Cassation, Sec. VI, 10 May 2017, Buzzerio, in *C.E.D. Cass.*, no. 270414).

become final), also the *noviter productae* evidence (i.e. evidentiary material that, although pre-existing, was not gathered in the trial), or even the *noviter cognitae* evidence (i.e. elements that were gathered during the trial but were not assessed by the judge).

Initially, jurisprudence endorsed the extensive interpretation that all the three aforementioned species should be considered as new evidence, on the basis that they had not been previously evaluated.³¹ But practice soon led to different conclusions, starting from the acknowledgment that revision is an extraordinary remedy. It followed that only evidence that had remained materially unrelated to the irrevocably defined process (i.e. *noviter repertae* and *noviter productae* evidence) could fall within the concept of *novum*.³² This was probably owing to the ‘traditional necessity of stability of the judicial decisions and of protection of the normative *status quo* related to criminal justice’.³³ As a result, the possibility to file a revision request was narrow.

However, this prospect soon underwent a new change, on the correct assumption that any evidence that was not ‘gnoseologically externalised in the grounds of the judgment’³⁴ is characterised by novelty, whereas the reason for the omitted acquisition is irrelevant. Hence, the most recent orientation that allows admission in the revision of any evidence that escaped the appreciation of the judges, therefore includes in the notion of ‘new’ evidence all the three types of evidence described, i.e. the *noviter repertae*, the *noviter productae* and the *noviter cognitae*.³⁵

5 The Boundaries of Revision Based on New Scientific Evidence

5.1 The Expansion of Revision Based on the Application of New Scientific Methods to Materials Already Acquired

The theme just outlined intersects with another one of great practical relevance, that is, the boundaries of revision requested on the basis of new scientific evidence.³⁶ As is well known, such evidence, which employs new,

highly specialised and possibly controversial scientific methods and technical tools, is the result of the continuous evolution of scientific and technological knowledge. This could potentially have a negative impact on the firmness of the *res judicata*.³⁷ In this regard, it is worth mentioning that Italian case law generally deems admissible a request for revision based on the occurrence of new evidence that requires technical investigation, whereas greater difficulties emerge in relation to new screenings of previously acquired material based on assessments that were not carried out during the trial.

Initially, the obstacle to a consideration of such elements of knowledge during the revision resided in the prohibition pursuant to Article 637, paragraph 3, CCP,³⁸ since the new assessments would have resulted in a critical evaluation of data already examined, at the risk of turning the extraordinary appeal into a new degree of judgment. However, behind this orientation, one can detect an outdated conception of science as an immutable and all-comprehensive type of knowledge, while the reverse is true: science and technology are characterised by ongoing progress. With this in mind, the antinomy between the spatio-temporal limitation of the criminal trial and the continuous scientific and technical advancements must necessarily be composed in the sense of an adaptation of the former to the latter, embracing the principle of *favor innocentiae*.³⁹

At the turn of the century, once the *noviter cognitae* evidence was included with full right in the notion of new evidence, the time was ripe for a corresponding expansion of revision based on the application of new scientific methods to materials already acquired.⁴⁰ Therefore, pronouncements began to be made by the Court of Cassation in which the novelty of the evidence was identified not only in the object of the assessment, but also in the use of a scientific method of analysis dif-

31. See Court of Cassation, Sec. II, 27 March 1992, Barisano in *Cass. pen.*, 1994, 1607.

32. Court of Cassation, Joint Chambers, 11 May 1993, Ligresti, in *C.E.D. Cass.*, no. 193421.

33. See L. Lupária, ‘Rethinking the Approach to Wrongful Convictions in Europe: Some Preliminary Remarks’, in *Id.* (ed.), *Understanding Wrongful Conviction. The Protection of the Innocent across Europe and America* (2015) 1, at 4.

34. Court of Cassation, Joint Chambers, 26 September 2001, Pisano, in *C.E.D. Cass.*, no. 220443.

35. However, the evidence initially admitted in the trial and subsequently excluded cannot be counted among ‘new evidence’ suitable for revision, on the grounds that the exclusion of previously admitted evidence does imply that such evidence is superfluous (Court of Cassation, Sec. III, 16 May 2019, A., in *C.E.D. Cass.*, no. 277174).

36. For an overview of the broad subject of scientific evidence, see G. Canzio and L. Lupária, *Prova scientifica e processo penale* (2017).

37. See F. Caprioli, ‘La scienza “cattiva maestra”: le insidie della prova scientifica nel processo penale’, in 9 *Cass. pen.* 3520 (2008).

38. *Ex multis* see Court of Cassation, Sec. I, 23 February 1998, Nappi, in *C.E.D. Cass.*, no. 210022.

39. See G. Paolozzi, ‘Relazione introduttiva’, in L. Lupária, L. Marafioti & G. Paolozzi (eds.), *Dimensione tecnologica e prova penale* (2019) 17.

40. See Court of Cassation, Sec. V, 14 May 1997, Cavazza, in *C.E.D. Cass.*, no. 208546. Paradigmatic is the case of the judicial error that struck Pietro Paolo Melis, whose innocence was recognised thanks to an expert witness in sound-biometric analysis. Melis was arrested and later convicted for kidnapping a woman because of the expert evidence gathered in the first instance trial. In particular, the experts attributed to Melis the voice of an unknown interlocutor wiretapped in a car belonging to another person who was involved in the same kidnapping. The expert evidence gathered in the revision trial, using new and more reliable techniques than those employed during the first instance trial, clarified that, because of a persistent noise in the tape background, the unknown interlocutor voice could not be attributed with certainty to Melis, who was finally acquitted after a revision request. The erroneous interpretation of the wiretapping results links the case of Melis to that of Angelo Massaro. A wiretapped conversation between Massaro and his wife led to his conviction to life imprisonment for the crimes of kidnapping, murder and concealment of the corpse. In fact, in such conversation, Massaro pronounced the word *muers* (i.e. something very bulky), which was misinterpreted by the judges as *muert*, that is, a dead man. In the end, he was acquitted thanks to the testimony of Massaro’s wife (who did not testify in the first instance trial) and mother, who helped clarify the real content of the wiretapped conversation.

ferent from the one employed in the trial, if this could produce new factual elements. Subsequently, the Court of Cassation even provided some guidelines to assess the admissibility of the request for revision based on new scientific evidence:

a) the appreciation of the novelty of the method introduced; b) the evaluation of its scientific value; c) the application of the new scientific method to the probative results already examined; d) the judgment of novelty of the results obtained through the new method; e) the assessment of those results in the context of evidence already collected in the trial, in order to establish whether they are suitable for determining a different sentencing.⁴¹

This represented a decisive step that paved the way for further developments concerning the institute of revision. Indeed, by anchoring the novelty to the new factual elements, a significant broadening of the horizon relating to the protection of the convicted was achieved. This is the case, for example, of a scientific method already existing at the time of the trial but not applied in those circumstances but suitable for an acquittal. If it is true that, viewed in these terms, revision runs the risk of transforming itself into a new degree of judgment, it is equally true that the convicted cannot be made to pay for the wrong choices eventually made by an expert or by a lawyer.

68 5.2 Learning from the Italian Lesson: Discretionary Jurisprudential Choices and Favor Innocentiae

We should be aware that there is still a long way to go before the shared notion of new evidence is reached. Extensive pronouncements, which expand the revision's field of application, stand side by side with judgments pursuing the opposite. Let us consider what happens in the field of digital evidence: here, jurisprudence denies the possibility of a revision based on a new analysis of the computer data already gathered in the trial, even if conducted through a different digital forensics technique.⁴² In fact,

a different and new technical-scientific evaluation of the data already known to the expert and the judge does not constitute new evidence ..., since it is in all respects a different assessment of elements already known and evaluated in the trial, as such inadmissible ...⁴³

41. Court of Cassation, Sec. I, 8 March 2011, Ghio, in *C.E.D. Cass.*, no. 249864.

42. For an exhaustive treatment of the use of digital forensics in the criminal trial, see G. Ziccardi, 'L'ingresso della computer forensics nel sistema processuale italiano: alcune considerazioni informatico-giuridiche', in L. Lupária (ed.), *Sistema penale e criminalità informatica. Profili sostanziali e processuali nella Legge attuativa della Convenzione di Budapest sul cybercrime* (L. 18 marzo 2008, n. 48) (2009) 166.

43. Court of Cassation, Sec. III, 17 March 2016, no. 18706, A., *Unpublished*.

Along the same lines, in the broader field of scientific evidence, it has been recently ascertained that new analyses of the same data do not fall under Article 630, paragraph 3, lett. c) CCP. The case in question concerned epidemiological studies on the possible causal link between exposure to asbestos and the onset of lung cancer. If such studies, despite reaching different assessments, do not deny the scientific validity of the knowledge implemented in the previous judgment, as stated by the Court of Cassation, the request for revision must be rejected, as it results in an alternative reading of the factual data.⁴⁴

In the light of the foregoing, the Italian experience proves that the concept of new evidence on which revision rests needs to be better defined by the legislature and that it should expressly include, in addition to the *noviter repertae* evidence, also the *noviter productae* and *noviter cognitae* evidence. Undeniably, a non-fixed notion of new evidence is likely to produce unjust disparities between convicted persons. At present, the admissibility of the revision request depends essentially on the discretionary choice of the judges in charge of the single case, who make an 'ideological' choice between the two poles represented, on one side, by the protection of the final judgment and, on the other, by the need to remedy the wrongful conviction. On the contrary, we support the view that if any type of evidence makes it possible to detect a wrongful conviction, the latter should not 'remain drowned in the sea of *res judicata*'.⁴⁵

6 The Compensation of the Judicial Error

Article 643 CCP entitles the victim of a miscarriage of justice to 'a compensation proportionately to the duration of the sentence or confinement that may have been served and to the personal and family consequences resulting from the conviction'.⁴⁶ The request can be proposed by the victim (or, in the event of his death, by one of the heirs) within two years of the time the judgment of revision has become final. The Court of Appeal decides on the request in chambers.⁴⁷

44. Court of Cassation, Sec. III, 21 May 2019, Lemetti, in *C.E.D. Cass.*, no. 276594.

45. G. Leone, 'Il mito del giudicato', in 1 *Rivista di diritto processuale penale* 167, at 197 (1956).

46. Lastly, on the subject, A. Gentile, 'La riparazione dell'errore giudiziario', in L. Lupária, L. Marafioti & G. Paolozzi (eds.), *Errori giudiziari e background processuale* (2017) 153. See also L. Scomparin, 'Errore giudiziario (riparazione dell')', XII *Digesto penale* (1997) 319; E. Turco, *L'equa riparazione tra errore giudiziario e ingiusta detenzione* (2007).

47. Art. 127 CCP: 'if it is necessary to proceed in chambers, the court ... shall set the date of the hearing and serve a notice on the parties and other persons concerned, as well as their lawyers. ... The Public Prosecutor, the other addressees of the notice and the lawyers shall be heard if they appear in court. ... The hearing shall take place without the presence of the public'.

The repairable damage, to be estimated with an equitable judgment,⁴⁸ includes all forms of material and non-material damages and can be liquidated by payment of a sum of money or by setting up a life annuity or, lastly, by admittance to an institution at the expense of the state.

The legal framework of reparation has long been disputed in doctrine and jurisprudence, with regard to its nature of restitution or indemnification.

In the aftermath of the entry into force of the Constitution, the request was believed to descend from the state's liability for an unlawful act;⁴⁹ however, this led to objections that the *res judicata* – regardless of its accordance with historical truth – is always lawful, unless it is the result of wilful misconduct or of gross negligence on the part of the magistrate.⁵⁰ And yet the equation between compensation and indemnification remained unsatisfactory. Indeed, indemnification derives from liability for a lawful act, that is to say, a damage to the subjective interest made in the name of a higher interest; but it is in the community's interest that the restrictions of personal freedom be anchored in the guilt of the accused.⁵¹

Hence, the institute under analysis should be granted an autonomous physiognomy, in which the *restitutio in integrum* responds to both a solidarity perspective – that is, compensating the prejudices suffered by the wrongfully convicted – and the necessity of safeguarding the inner balance of the legal system.⁵²

Compensation is assigned if certain positive and negative conditions exist. As for the former, the applicant must have been acquitted after a revision trial. The repair is due in case of either a full acquittal or insufficient, contradictory or lacking proof that the criminal act occurred (Art. 530 CCP) and judgment of non-prosecution (Art. 529 CCP).

The second requirement is that the miscarriage of justice must not have been a consequence of intentional misconduct or gross negligence by the convicted, according to the fundamental principle of self-responsibility,⁵³ implying that the victims of a miscarriage of justice are only those who have not contributed to determining it. As clarified by jurisprudence, intentional misconduct includes the case of a person who falsely blames himself for the crime or creates false evidence against himself, while gross negligence includes those conducts characterised by carelessness, neglect and

indifference for the consequences of one's own actions on the evolution of the trial.⁵⁴

As noted previously, a total of 191 compensation requests pursuant to Article 643 CCP were accepted in Italy between 1991 and 2019, resulting in an expenditure by the state of close to 66 million euros.⁵⁵ However, we do not know how many individuals acquitted following a revision did not submit a request for compensation or have seen their submission rejected.

The all in all limited number of accepted requests must also be ascribed, at least partly, to a certain reluctance by the Italian judges to acknowledge compensation. In fact, leveraging on the indeterminacy of the notion of intentional misconduct or gross negligence pursuant to Article 642 CCP, it was argued, for example, that compensation is not due to the person who, during the trial, kept silent about the defensive arguments that could have been suitable to determine his acquittal.⁵⁶ In addition, Courts of Appeal often deny compensation in the event of inefficiencies and errors by the technical defence, such as failure to present an appeal⁵⁷ or in case of a false alibi.⁵⁸

In short, in the Italian system, the institute of revision has experienced a progressive – albeit slow – expansion in practice; nonetheless, with regard to the economic reparation side of the miscarriage of justice, there is an inborn reluctance on the part of the judges to acknowledge it, in the name of an undue protection of state finances. We should, on the contrary, consider that economic compensation represents an inevitable corollary to the detected erroneousness of judicial ruling, as already foreseen by Article 24, paragraph 4, of the Constitution.

7 Procedural 'Injustice' and Wrongful Conviction

7.1 'Extraordinary Appeal Due to a Factual Error' as an Indirect Remedy for Miscarriage of Justice

It has been pointed out that revision aims at amending a 'substantial' miscarriage of justice, namely a judicial error that concerns the factual truth underlying the sentence.

Still, in order not to be invalidated by error, a decision must comply with the set of procedural guarantees, besides truthfully ascertaining the facts of the case.⁵⁹

48. See M.G. Coppetta, *La riparazione per ingiusta detenzione*, (1993), at 299.

49. V. Cavallari, 'La riparazione degli errori giudiziari secondo l'art. 24, ultimo comma, della Costituzione', in *I Giustizia penale* 276 (1954).

50. P. Troisi, 'La riparazione dell'errore giudiziario', in G. Dalia, P. Troisi & R. Troisi (eds.), *I rimedi al danno del processo* (2013) 5, at 18.

51. See G. Tranchina, 'Riparazione alle vittime degli errori giudiziari', *Novissimo digesto italiano* 1194 (1968).

52. R. Vanni, *Nuovi profili della riparazione dell'errore giudiziario* (1992), at 51. Lastly, in jurisprudence, on the presence of both a compensation and an indemnity component in the reparation for miscarriage of justice, Court of Cassation, Sec. IV, 4 April 2018, Montalto, in *C.E.D. Cass.*, no. 273403.

53. See Gialuz, above n. 13, at 133.

54. Court of Cassation, Sec. III, 17 May 2016, Attaguile, in *C.E.D. Cass.*, no. 268494.

55. www.errorigiudiziari.com/errori-giudiziari-quantitativo-sono/ (last visited 26 December 2020).

56. Court of Cassation, Sec. III, 12 February 2009, Ministero Economia e Finanze in proc. Grande, in *C.E.D. Cass.*, no. 243251.

57. See Court of Cassation, Sec. III, 10 March 2001, no. 13739, B., in *C.E.D. Cass.*, no. 249903.

58. See Court of Cassation, Sec. IV, 4 February 2010, Giuliana, in *C.E.D. Cass.*, no. 246803.

59. See L. Cricri, 'Errore giudiziario (riparazione dell)' (*Diritto processuale penale*), in *XIII Enciclopedia giuridica* 2 (2007).

Indeed, an unfailing corollary to the principle of procedural legality pursuant to Article 111 of the Constitution⁶⁰ is that a process can be deemed fair only to the extent that jurisdiction has been carried out in full compliance with the law.⁶¹

The link between ‘procedural’ injustice and wrongful conviction may be clearly perceived if we consider that the rules of the due process of law are functional to issuing a correct judgment in its cognitive outcome.⁶² Indeed, an unjust reconstructive method necessarily affects the formation of the judicial conviction and thus invalidates the outcome of the process.⁶³ Therefore, even if it does not directly represent a remedial tool for cases of wrongful conviction of the kind represented by revision, it nevertheless seems appropriate to discuss the ‘Extraordinary appeal by cassation due to a factual error’ (Art. 625-*bis* CCP).⁶⁴

This institute is the result of a recent evolution of the Italian procedural system, in which the traditional stability of the judicial decisions has become recessive with respect to the protection of the fundamental rights of the convicted.⁶⁵ In particular, the ‘Extraordinary appeal by cassation due to a factual error’ aims to remove the final judgment when, because of a perceptual error, the convicted’s right to a fair proceeding before the Court of Cassation has been infringed, causing a breach of a constitutionally guaranteed prerogative (the right to appeal to the Court of Cassation: Art. 111, para. 7, of the Constitution) and thus justifying the overcoming of the *res judicata*.⁶⁶

70

60. Art. 111 of the Constitution: ‘Jurisdiction shall be implemented through due process regulated by law. All court trials shall be conducted with adversary proceedings and parties shall be entitled to equal conditions before a third-party and impartial judge. ... In criminal law trials, the law shall establish that the accused be promptly and confidentially informed of the nature and reasons of the charges and be given adequate time and conditions to prepare a defence. A defendant shall have the right to cross-examine witnesses for the prosecution, or to have them cross-examined before a judge; examine witnesses for the defence in the same conditions as the prosecutor; and the right to produce any evidence for the defence. ... The formation of evidence in criminal law trials shall be based on an adversarial process. The guilt of the defendant may not be established on the basis of statements by persons who have willingly refused cross-examination by the defendant or the defendant’s counsel. The law shall regulate the cases in which the formation of evidence may not occur in an adversarial process, with the consent of the defendant or owing to verified objective impossibility or proven illicit conduct. ...’.

61. See A.A. Sammarco, ‘Il ricorso straordinario per errore materiale o di fatto e la rescissione del giudicato’, in G. Spangher (dir.), *Procedura penale. Teoria e pratica del processo* (2015) 385.

62. See G. Fiorelli, ‘Il ricorso straordinario per errore giudiziario “di fatto”. Portata, estensione e limiti’, in L. Lupária (ed.), *L’errore giudiziario* (2020) 525.

63. See G. Fiorelli, ‘L’errore giudiziario “di fatto”: portata applicativa e (dis)orientamenti giurisprudenziali’, in L. Lupária, L. Marafioti & G. Paozzoli (eds.), *Errori giudiziari e background processuale* (2017) 121, at 122.

64. Introduced by Law no. 128/2001 and later modified by Law no. 103/2017.

65. See Lupária and Gialuz, above n. 2, at 70.

66. See P. Troisi, ‘Flessibilità del giudicato penale e tutela dei diritti fondamentali’ (2 April 2005) in www.penalecontemporaneo.it/upload/1427127412TROISI_2015a.pdf (last visited 26 December 2020) at 6-7.

Pursuant to Article 625-*bis* CCP, ‘the convicted person is allowed to submit a request for rectification of a ... factual error contained in the decisions delivered by the Court of Cassation’.⁶⁷ Although the CCP does not specify the characteristics of the relevant factual error, both doctrine and jurisprudence have specified that it is a perceptive mistake that affects the essential content of the procedure;⁶⁸ i.e. a misleading perceptual representation of reality that interfered with the judge’s decision-making.⁶⁹

The correction of the error is taken in charge by the Court of Cassation itself, to which the request can be presented by the Prosecutor General or by the convicted person within one hundred and eighty days of the filing of the decision; however, the error can also be detected *ex officio* by the Court within ninety days of delivering the decision. The effects of the latter can be suspended by the Court of Cassation in exceptionally serious cases. After assessing the admissibility of the request, also with respect to its non-manifest groundlessness, the Court examines the request in chambers and takes the necessary measures to correct the error.

Lastly, it should be noted that the Court of Cassation has stated that this remedy can also be proposed against the sentences issued by the Court itself when dealing with a request for revision.⁷⁰ Therefore, one may request the correction of the factual error contained in the Court of Cassation’s sentence declaring inadmissible, or rejecting, the convicted person’s appeal against the negative decision of the Court of Appeal on the request for revision.

7.2 The ‘Rescission of Final Judgment’

The ‘Rescission of final judgment’ (Art. 629-*bis* CCP) is another tool that, albeit indirectly, can act as a remedy for wrongful convictions. In fact, through such a request, any convicted person who has been absent for the entire duration of the proceeding may obtain the rescission of the final judgment if he can prove that his absence was due to an inculpable unawareness of the proceeding. The Court of Cassation has been very strict

67. The rule also provides for the possibility of remedying a ‘clerical error’; the hypothesis, however, is outside the scope of this study. In doctrine, on the subject, see L. Marafioti, ‘Correzione di errori materiali’, VI *Digesto delle discipline penalistiche* 533 (1992).

68. See A. Capone, *Gli errori della Cassazione e il diritto al controllo di legittimità* (2005), at 141.

69. See, *ex multis*, Court of Cassation, Joint Chambers, 27 March 2002, Basile, in *C.E.D. Cass.*, no. 221280 and Court of Cassation, Joint Chambers, 27 March 2002, De Lorenzo, in *C.E.D. Cass.*, no. 221278. For example, a factual error occurs if the Court of Cassation does not examine an argument proposed by the appellant (Court of Cassation, Sec. II, 18 June 2019, Lampada in *C.E.D. Cass.*, no. 276925) or if the Court of Cassation errs in not declaring that the statute of limitations has expired (Court of Cassation, Sec. IV, 12 December 2014, Refatti, in *C.E.D. Cass.*, no. 262028).

70. Court of Cassation, Joint Chambers, 21 July 2016, Nunziata, in *C.E.D. Cass.*, no. 269788. In doctrine, see M. Gialuz, ‘Un altro tassello nell’evoluzione del ricorso straordinario per cassazione: da rimedio eccezionale a valvola di chiusura del sistema delle impugnazioni’, 5 *Diritto penale contemporaneo* 350 (2017).

in assessing this requirement:⁷¹ in fact, such inculpable unawareness must be ruled out if the accused, during the investigation phase, has stated or chosen an address for service. In fact, according to the Court, if the address for service is set in the lawyer's office, the accused must keep in contact with his own lawyer on the developments of the proceeding; on the other hand, if the address for service is set in his own home, the accused should inform the Court of possible changes.

The request must be submitted, either in person or through a lawyer holding a special power of attorney, to the Court of appeal in whose district the decision was taken, within thirty days of the acknowledgment of the proceeding by the accused. If the Court of Appeal, which decides in chambers, accepts the request, it rescinds (i.e. revokes) the judgment and orders the case file to be forwarded to the first instance court (Art. 629-bis, para. 2-3, CCP).

The institute represents a restorative *post iudicatum* remedy connected to the changes made by Law no. 67/2014 in the Italian procedural system. Indeed, this legislation states that judges can proceed in the absence of the accused person, on the presumption that the latter has knowledge of the trial.⁷² Therefore, it was thought necessary to protect the convicted when proved, after the final judgment, that the presumed knowledge did not reflect the truth.

Unlike what happens in the revision, the rescission of final judgment does not in itself involve acquittal, but rather the celebration of a new trial in which the accused can fully exercise his right of defence. Keeping this in mind, it is possible to include the rescission of final judgment among the tools offered by the system as a 'mediated' remedy for miscarriages of justice, since the new judgment might end with the acquittal of the accused.

8 Conclusion

While the new remedies against 'procedural' injustice have significantly widened the possibility to remove final judgments, the process towards ascertaining an effective protection against 'substantial' errors is far from being accomplished.

On the one side, the new 'European revision' provided by the Constitutional Court and the jurisprudential reconstructions interpreting the notion of new evidence in a broader sense have undoubtedly enlarged the scope of revision. On the other side, the Court of Cassation has weakened the potential for revision by stating that the new scientific evidence employed in the revision must deny the scientific validity of the knowledge implemented in the previous judgment.⁷³

In this regard, some authors have stressed the necessity of the Italian legislature to 'take responsibility for making choices, doing a much-needed check-up of the traditional revision and, even more urgently, a complete codification of the European one'.⁷⁴

However, it would be illusory to think that an effective system of post-conviction remedies would be enough to solve the problem of miscarriage of justice. In fact, we must keep in mind that 'wrongful convictions are not usually isolated cases but rather reflect systemic problems'.⁷⁵

In this perspective, along the lines of the American experience, it would be advisable to create an Italian equivalent of the U.S. National Registry of Exonerations,⁷⁶ 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, to advance reform proposals and to share awareness'.⁷⁷

Unfortunately, up to now, the Ministry of Justice is not required to provide official data concerning wrongful conviction cases, although the cooperation among national institutions would make the collection of data easier and, at the same time, would help to increase the awareness about the issue of miscarriages of justice.⁷⁸

At the same time, and once more learning from the overseas experience, a new consciousness of the constant recurring of wrongful convictions would help in creating Conviction Integrity Units (C.I.U.),⁷⁹ i.e. divisions of prosecutors' offices whose task is to prevent, identify and remedy wrongful convictions.

As has been pointed out, the Italian Prosecutors are already allowed by the CCP rules to ask for revision, yet this rarely happens in the practice. Hence, the need for a further 'cultural' step towards a better criminal system:

71. See Court of Cassation, Sec. IV, 3 March 2020, Ginevra, in C.E.D. Cass., no. 278648, and Court of Cassation, Sec. II, 27 March 2019, Pinton, in C.E.D. Cass., no. 276972.

72. Art. 420-bis CCP: 'if the accused, free or detained is not present at the hearing and, even if unable to appear, has expressly waived his right to be present, the Preliminary Hearing Judge shall proceed in his absence. ... The Preliminary Hearing Judge shall also proceed in the absence of the accused if the latter has already declared or chosen an address for service during the proceedings or has been arrested or placed under temporary detention or has been ordered a precautionary measure or has appointed a retained lawyer. The Judge shall also proceed when the accused is not present at the hearing but has been served the notice of the hearing personally or it is in any case certain that the accused is aware of the proceedings or has voluntarily avoided to be informed about either the proceedings or the documents thereof'.

73. See *supra*, § 5.2.

74. M. Gialuz, 'Il giudizio di revisione', in L. Lupária (ed.), *L'errore giudiziario* (2020) 567, at 638.

75. B. Garrett, *Convicting the Innocent, Worldwide*, in L. Lupária (ed.), *L'errore giudiziario* (2020) 1, at 15.

76. The Italian Innocence Project is currently working to have an equivalent of the National Registry of Exonerations established in Italy: see M. Pittiruti, 'Le cause e i rimedi dell'errore giudiziario tra Europa e Stati Uniti' (17 November 2017), in <https://archiviopdc.dirittopenaleuomo.org/d/5710-le-cause-e-i-rimedi-dell-errore-giudiziario-tra-europa-e-stati-uniti> (last visited 26 December 2020).

77. Lupária and Greco, above n. 3, at 17.

78. Lupária, above n. 33, at 4.

79. A list of Conviction Integrity Units currently active in the United States is provided for by www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx (last visited 26 December 2020).

keeping in mind that ‘the decrease in the number of wrongful convictions serves the purpose of justice, and not merely that of the defendant’,⁸⁰ prosecutors and lawyers should work side by side to provide an adequate implementation of Article 4, paragraph 4, of the Constitution, which can be obtained only through a prompt identification of causes and cases of wrongful convictions.

80. Lupária and Greco, above n. 3, at 18.

Mechanisms for Correcting Judicial Errors in Germany

Michael Lindemann & Fabienne Lienau*

Abstract

The article presents the status quo of the law of retrial in Germany and gives an overview of the law and practice of the latter in favour of the convicted and to the disadvantage of the defendant. Particularly, the formal and material prerequisites for a successful petition to retry the criminal case are subject to a detailed presentation and evaluation. Because no official statistics are kept regarding successful retrial processes in Germany, the actual number of judicial errors is primarily the subject of more or less well-founded estimates by legal practitioners and journalists. However, there are a few newer empirical studies devoted to different facets of the subject. These studies will be discussed in this article in order to outline the state of empirical research on the legal reality of the retrial procedure. Against this background, the article will ultimately highlight currently discussed reforms and subject these to a critical evaluation as well. The aim of the recent reform efforts is to add a ground for retrial to the disadvantage of the defendant for cases in which new facts or evidence indicate that the acquitted person was guilty. After detailed discussion, the proposal in question is rejected, inter alia for constitutional reasons.

Keywords: criminal proceedings, retrial in favour of the convicted, retrial to the disadvantage of the defendant, Germany, judicial errors

1 Introduction

The German Public Prosecutor's Office (*Staatsanwaltschaft*) likes to market itself (at least within its own ranks) as 'the most objective authority in the world';¹ pursuant to § 160(2) German Code of Criminal Procedure (StPO) it must 'ascertain both incriminating and exonerating circumstances', and pursuant to § 296(2) StPO it may 'make use of [the permitted legal recourse] in favour of the defendant' as well. If one adds to this the fact that in German criminal procedural law – unlike in procedural codes which are characterised by the

notion of the adversarial system – the court is intended to have a quite active role in examination of the truth (cf. § 244(2) StPO), then one could come to the conclusion that there exist sufficient safety precautions against judicial errors even in such cases where the defendant is defended only poorly or not at all. As a number of spectacular errors of justice² have shown in the recent past, wrongful convictions are nevertheless (one might be tempted to say: obviously) made in criminal cases even in German courtrooms. The following article therefore intends to focus on the question of what opportunities are available to suspects and the Public Prosecutor's Office in the event that they consider a legally effective criminal conviction to be incorrect. Based on a detailed investigation of the legal framework conditions and (somewhat scarce) knowledge of the legal reality, we will also pursue the issue of whether there is a need for legal reform regarding the mechanisms established in the German criminal process for correcting judicial errors.

It must be pointed out at this juncture that there exist only limited corresponding opportunities for correction, and that the German legal system traditionally³ assigns a great deal of value to the institute of legal force. A peculiarity of German law is the possibility of proceeding against a legally effective criminal conviction with a constitutional complaint (*Urteilsverfassungsbeschwerde*) before the German Federal Court (*Bundesverfassungsgericht*). To do so, the complainant must plead that his basic rights or rights equal to his basic rights – e.g. the right to a legally competent judge pursuant to § 101(1) (2) Basic Law for the Federal Republic of Germany (*Grundgesetz*; GG) or the right to a legal hearing pursuant to § 103(1) GG – have been violated, § 93(1) no. 4a GG, § 13 no. 8a German Act on the Federal Constitutional Court (*Bundesverfassungsgerichtsgesetz*; BVerfGG). An extensive examination of the peculiarities of the constitutional complaint process is beyond the scope of this article and would also detract too much from the actual focus; we must therefore satisfy ourselves with a few

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1. Under reference to a dictum of the Berlin Senior Public Prosecutor and later General Public Prosecutor Isenbiel; cf. J. Eisele and C. Trentmann, 'Die Staatsanwaltschaft – 'objektivste Behörde der Welt?'' [The German Public Prosecutor's Office – 'The Most Objective Authority in the World?'], 72 *Neue Juristische Wochenschrift* 2365, at 2366 (2019).

2. Examples can be found in R. Neuhaus, 'Fehlerquellen im Ermittlungsverfahren aus der Sicht der Verteidigung' [Sources of Errors in Investigations from the Perspective of the Defence], 35 *Strafverteidiger* 185 (2015); P. Velten, 'Fehlentscheidungen im Strafverfahren' [Wrong Decisions in Criminal Proceedings], 162 *Goltdammer's Archiv für Strafrecht* 387 (2015).

3. For an overview of the historical development of the law of retrials, cf. C. Arnemann, *Defizite der Wiederaufnahme in Strafsachen* [Shortcomings in Retrials in Criminal Cases] (2019), at 169 et seq.; S. Bayer, *Die strafrechtliche Wiederaufnahme im deutschen, französischen und englischen Recht* [The Retrial under Criminal Law in German, French and English Law] (2019), at 51 et seq.

general remarks and refer interested readers to the relevant specialist literature.⁴ Instead, the focus of this article will be the correction mechanism inherent in the criminal process: the retrial that is governed under § 359 et seq. StPO and which reverts the case back to the main proceedings if successful.

In the traditional reading, the legal force is interrupted in a retrial in the interest of a substantively correct decision. In one of the ‘classic’ textbooks on criminal procedural law, the basic idea of the retrial is summarised to the effect that, in exceptional cases, the legal force

must be withdrawn if facts which come to light after the decision cause the ruling to appear obviously incorrect in a manner that is unbearable for the sense of justice or ... if the sentence is not based on a minimum of procedural correctness.⁵

In the words of the German Federal Constitutional Court, the retrial instrument ‘is intended to resolve the conflict between the principles of material justice and legal certainty, both of which are derived with constitutional effect from the rule of law’.⁶

As Frister has shown in his commentary on § 359 et seq. StPO,⁷ this formulation is in fact too imprecise in several aspects: thus, he first voices his doubt that ‘even for the purpose of achieving substantive justice, a retrial is only sensible if an at least potentially more just decision can be expected from a new trial’. With increasing temporal distance to the act which is the subject of the proceedings, this could become questionable due to the usual clouding of sources of evidence over time.⁸ It must furthermore be taken into account that the faith of the general public in the rule of law, as is expressed in the topos of legal certainty, may also be damaged if new knowledge indicates that the legally effective ruling suffers from serious defects.⁹ A retrial on the basis of addi-

tional sources of knowledge could therefore be refused on the part of the public only on the grounds of the expenditure associated with a new trial, and the risk that evidence of an act that was actually committed may fail due to the passing of time; on the part of the defendant, the (individual) interest in not having to be subjected to a new criminal trial, protected by the principle of *ne bis in idem* (§ 103(3) GG), must be taken into account.¹⁰ In Frister’s opinion, what arises from this solidification of the range of interests is that the German legislator has correctly inserted the retrial *to the disadvantage of the defendant* and the retrial *in favour of the convicted*¹¹ under § 359 et seq. StPO into a differentiating regulation, and has particularly (only) permitted a retrial in the case of the former ‘if a potentially more just decision can be expected in a new trial on the grounds of additional sources of knowledge’ (§ 359 nos. 4, 5 StPO).¹² In the course of this article we will, inter alia, investigate whether the law and the practice of retrying criminal cases in Germany are in fact suited to establishing an appropriate balance between the complex groups of interests outlined above.¹³

Following a brief outline of the constitutional complaint against a ruling in criminal cases as discussed above (2), the third section will initially present the status quo of the law of retrial in Germany (3). Afterwards, we provide an overview of the state of empirical research into the legal reality of the retrial procedure (4). On this basis, we will then highlight current proposed reforms and subject these to a critical evaluation (5). We offer a brief conclusion at the end (6).

2 Constitutional Complaints in Criminal Cases

As already indicated, besides the petition to retry the criminal case, there exists a further extraordinary legal remedy¹⁴ in Germany which allows proceedings against a criminal conviction that has already become legally effective: the constitutional complaint governed under § 93(1) no. 4a GG and § 13 no. 8a, 90 et seq. BVerfGG. The Federal Constitutional Court is responsible for making a decision on the constitutional complaint but

4. For a more comprehensive examination, cf. M. Jahn, C. Krehl, M. Löfelmann & G. Güntge, *Die Verfassungsbeschwerde in Strafsachen* [The Constitutional Complaint in Criminal Cases] (2nd edn, 2017).

5. C. Roxin and B. Schünemann, *Strafverfahrensrecht* [Criminal Procedural Law] (29th edn, 2017), § 57.1 under reference to L. Greco, *Strafprozesstheorie und materielle Rechtskraft* [Criminal Procedure in Theory and Substantive Legal Force] (2015), at 883 et seq.

6. BVerfG [German Constitutional Court], Resolution of the 2nd Chamber of the Second Senate of 14 September 2006 – 2 BvR 123/06 inter alia, NJW 2007, 207. Agreement in W. Schmidt, in R. Hannich (ed.), *Karlsruher Kommentar zur StPO* [Karlsruhe Commentary on the StPO] (8th edn, 2019), § 359.3; B. Schmitt, in: L. Meyer-Goßner and B. Schmitt (eds.), *StPO mit GVG und Nebengesetzen* [StPO with GVG and Ancillary Acts] (63rd edn, 2020), § 359.1.

7. H. Frister, in: J. Wolter (ed.), *Systematischer Kommentar zur StPO* [Systematic Commentary on the StPO] (5th edn, 2016), § 359.1 et seq.; see also H. Frister and T. Müller, ‘Reform der Wiederaufnahme in Strafsachen’ [Retrial Reform in Criminal Cases], 52 *Zeitschrift für Rechtspolitik* 101, at 102 (2019).

8. Frister, above n. 7, § 359.1 under reference to G. Grünwald, ‘Die materielle Rechtskraft im Strafverfahren der Bundesrepublik Deutschland’ [Substantive Legal Force in Criminal Proceedings in the Federal Republic of Germany], 86 *Zeitschrift für die gesamte Strafrechtswissenschaft Beiheft* 94, at 103 et seq. (1974).

9. Cf. in this regard also R.J. Norris, J.N. Weintraub, J.R. Acker, A.D. Redlich & C.L. Bonventre, ‘The Criminal Costs of Wrongful Convictions: Can We Reduce Crime by Protecting the Innocent?’, 19 *Criminology & Public Policy* 367, at 376 (2020).

10. Frister, above n. 7, § 359.2.

11. Regarding the linguistic differentiation based on § 362 no. 4 StPO (Retrial to the disadvantage of the acquitted in case of a believable confession) which will also be taken as a basis in the following, cf. Frister, above n. 7, § 359.3 under reference to S. Brinkmann, *Zum Anwendungsbereich der §§ 359 ff. StPO. Möglichkeiten und Grenzen der Fehlerkorrektur über das strafrechtliche Wiederaufnahmeverfahren* [On the Scope of Application of §§ 359 et seq. StPO. Opportunities and Limits of Correcting Errors via the Criminal Law Procedure of the Retrial] (2017), at 39–40.

12. Frister, above n. 7, § 359.5.

13. Frister’s discussion of different approaches to reform in Frister, above n. 7, § 359.85 et seq.; § 362.3 et seq.

14. On classification, cf. H. Bethge, in T. Maunz, B. Schmidt-Bleibtreu, F. Klein & H. Bethge, *Bundesverfassungsgerichtsgesetz* [German Act on the Federal Constitutional Court], 58. EL Januar (2020), § 90.23.

emphasises in its settled case law that it is not an ‘instance of super-review’ (a review of a review):

It is not the court’s function to review, or even to standardise, the jurisprudence of the responsible specialised courts in their interpretation of the so-called ‘ordinary law’ (einfaches Recht) for the correctness of such. Rather, the court may only become involved if the decision of a court exhibits errors of interpretation which are based on an essentially incorrect view of the significance and scope of a basic right, or if the result of the interpretation is not congruent with the norms of basic law. (cf. Decision of the Federal Constitutional Court (BVerfGE) 18, 85 92 f.; settled case law (stRspr))¹⁵

Although the constitutional complaint can by law be lodged by ‘anyone’ without engaging a lawyer,¹⁶ there exist a number of admissibility requirements which – at least in the interpretation of such by the Federal Constitutional Court – are not always easy to grasp even for professional lawyers.¹⁷ Thus, the court adds to the rule on exhaustion of legal remedies, which is explicitly standardised under § 90(2)(1) BVerfGG,¹⁸ a (more comprehensive) principle of subsidiarity which demands that the complainant ‘exploit all procedural possibilities available to him in order to effect a correction to a contested constitutional violation’.¹⁹ The complainant may not be referred to the bringing of wholly hopeless or clearly impermissible legal remedies;²⁰ however, such remedies should also not be capable of impeding the course of the one-month period set for bringing the constitutional complaint as standardised under § 93(1) BVerfGG.²¹ As this brief insight into the case law of the Federal Constitutional Court shows, the court requires particularly complex prognostic considerations of the complainant in his efforts to satisfy the requirements for

subsidiarity.²² Similar difficulties can also be posed by a substantiation of the constitutional complaint which satisfies the requirements of the court: in the wording of the law, that the complainant must ‘specify the right which has allegedly been violated, as well as the act or omission of the organ or authority by which the complainant claims his or her rights have been violated’ (§ 92 BVerfGG). According to the Federal Constitutional Court, this results in an obligation to present or (comprehensively) reproduce the content of all affected decisions of the authorities or the courts and other documentation essential to the proceedings (written submissions, etc.), which in principle should allow the court to make a decision without referring to the case files.²³ This requirement too is not evident a priori from the law and appears liable to quickly overwhelm legal laypersons.

Regarding the justification of the constitutional complaint against a ruling in criminal cases, one can in principle look to the differentiation between violations of substantive law and violations of procedural law which is common in the review process (*dem Revisionsverfahren*).²⁴ However, in doing so, one must take into account the reservation of the court, stated at the beginning of this section, that it is not an ‘instance of super-review’: errors in the application of ‘ordinary law’ are not sufficient in and of themselves; instead, a ‘violation of a specific constitutional right’ must be demonstrated.²⁵ Whilst constitutional law is affected ‘if the regulation violated determines the manner, in which the judge is called to and comes to reach a verdict’,²⁶ substantive legal errors may refer either to the unconstitutionality of the substantive law principles underlying the ruling or the unconstitutionality of the application of norms by the specialist courts.²⁷ An example of a regulation declared void and incommensurate with the *Grundgesetz* for a constitutional complaint against a ruling due to a violation of the principle of definiteness (§ 103(2) GG) is § 43a German Criminal Code (*Strafgesetzbuch*; StGB) (old version) which stipulated the imposition of a forfei-

15. BVerfG, Resolution of the 2nd Chamber of the Second Senate of 24 October 1999 – 2 BvR 1821/99, BeckRS 1999, 23087 n. 7.

16. In principle, proceedings before the Federal Constitutional Court are free of charge; however, a fee may be charged in case of misuse (§ 34 BVerfGG).

17. Cf. G. Lübbe-Wolff & C. Geisler, ‘Neuere Rechtsprechung des BVerfG zum Vollzug von Straf- und Untersuchungshaft. Bericht mit Hinweisen zu einigen häufig übersehenen Erfolgsvoraussetzungen der Verfassungsbeschwerde’ [Recent Case Law of the German Federal Constitutional Court on Enforcement of Criminal Custody and Remand. Report with Notes on Certain Frequently Overlooked Requirements for the Success of Constitutional Complaints], 24 *Neue Zeitschrift für Strafrecht* 478, at 479 (2004); G. Lübbe-Wolff, ‘Die erfolgreiche Verfassungsbeschwerde. Wie man das Unwahrscheinliche wahrscheinlicher macht’ [The Successful Constitutional Complaint. How to Make the Unlikely More Likely], *Anwaltsblatt* 509, at 512 (2005). A comprehensive overview of the admissibility requirements for a constitutional complaint in criminal cases can be found in M. Jahn, in Jahn, Krehl, Löffelmann & Güntge, above n. 4, n. 63 et seq.

18. § 90(2)(1) BVerfGG states, ‘If legal recourse against the violation is permissible, then the constitutional complaint may only be brought after the legal recourse has been exhausted’.

19. BVerfGE 115, 81 (91 f.) under reference to BVerfGE 74, 102 (113); 104, 65 (70); for a more comprehensive examination, cf. Bethge, above n. 14, § 90.401 et seq.

20. Cf. BVerfGE 55, 154 (157); 70, 180 (186); 91, 93 (106); 102, 197 (198).

21. Cf. BVerfGE 5, 17 (19 f.); 19, 323 (330); 63, 80 (85); 91, 93 (106).

22. Cf. on this dilemma, with respect to a complaint regarding the right to be heard (*Anhörungsrechte*) governed under ordinary law in, inter alia, § 33a, § 356a StPO, M. Lindemann, ‘§ 3. Prozessgrundrechte und ihre Bedeutung für das Strafverfahren’ [Basic Procedural Rights and their Importance in Criminal Proceedings], in E. Hilgendorf, H. Kudlich & B. Valerius (eds.), *Handbuch des Strafrechts, Band 7, Grundlagen des Strafverfahrensrechts* [Criminal Law Handbook, Vol 7, Basics of Criminal Procedural Law] (2020), n. 36 et seq.

23. Cf. BVerfGE 88, 40 (45); 93, 266 (288); more comprehensive in Lübbe-Wolff and Geisler, above n. 17, at 479; Lübbe-Wolff, above n. 17, at 515-6.

24. Cf. C. Krehl and M. Löffelmann in Jahn, Krehl, Löffelmann & Güntge, n. 420.

25. *Ibid.*

26. M. Löffelmann, in Jahn, Krehl, Löffelmann & Güntge, above n. 4, n. 421 This may relate to the right to a fair trial, effective legal protection, or the right to be heard, for example. For a comprehensive overview of the importance of the substantive basic rights and basic procedural rights for criminal proceedings, cf. M. Lindemann, ‘§ 2 and § 3’, in E. Hilgendorf, H. Kudlich & B. Valerius (eds.), *Handbuch des Strafrechts, Band 7, Grundlagen des Strafverfahrensrechts* (2020).

27. Löffelmann, above n. 26, n. 553 et seq.

ture of assets.²⁸ If a criminal judgement is based on a legal provision that is void or incompatible with the Basic Law, proceedings may be resumed even after the judgement has become final, as is stated in § 79(1) BVerfGG.

From a quantitative point of view, constitutional complaints against criminal convictions play a not too insignificant role in the overall occurrence of constitutional complaints lodged with the Federal Constitutional Court;²⁹ however, it must also be taken into account that the proportion of successful constitutional complaints in recent years has consistently been below 2% (2019: 1.54%).³⁰

3 Legal Framework for the Retrial Procedure

Due to its inherent restriction to a genuinely constitutional control of the sentencing practice of the criminal courts, the constitutional complaint is of somewhat secondary importance for the context of correcting judicial errors discussed here. What is significantly more relevant from a thematic perspective is the retrying of a criminal trial, the legal framework conditions of which will therefore be considered in more detail below.

3.1 Grounds for a Retrial

The grounds for retrying a case can be found under § 359 and § 362 StPO; here, the former norm governs the retrial *in favour of the convicted* and the latter *to the disadvantage of the defendant*.

3.1.1 Systematics

To improve understanding, we should first provide a systematic overview of the legally standardised grounds for retrial: thus, a retrial is possible *both in favour of the convicted and to the disadvantage of the defendant* due to criminal acts committed in connection with the passing of the sentence (so-called *retrial propter falsa*, § 359 no. 1–3, 362 no. 1–3 StPO). These may consist in the falsification of a document that was crucial to the decision, a false statement made by a witness or expert and the criminal violation of public duty by a judge or juror involved in the reaching of a verdict – e.g. the acceptance of a benefit, corruption or perverting the course of justice. Moreover, a retrial *in favour of the convicted* can also be held in the following cases: annulment of a civil judgement which the criminal conviction is based on (§ 359 no. 4 StPO); the bringing of new, favourable facts or evidence (so-called *retrial propter nova*; § 359 no. 5 StPO); and in cases where the ruling is based on a violation of the European Convention on Human Rights

(ECHR) identified by the ECtHR (§ 359 no. 6 StPO). Pursuant to § 79(1) BVerfGG, a retrial *in favour of the convicted* shall ultimately be considered if the ruling is based on a norm or the interpretation of a norm which the Federal Constitutional Court has declared incommensurate with the *Grundgesetz*. A retrial *to the disadvantage of the defendant* is possible not only in the cases mentioned at the outset, but also in the event that the defendant gives a believable confession (§ 362 no. 4 StPO). On the other hand, a retrial *to the disadvantage of the defendant* in the event of new facts or evidence is excluded in principle. The law provides for an exception only in the event of closure of proceedings by means of a legally effective penalty order (which is only based on a summary examination of the facts³¹) if the new facts or evidence are suitable for justifying the sentencing of a crime³² (§ 373a(1) StPO).³³

3.1.2 Grounds for a Retrial in Favour of the Convicted

If one examines the opportunities for effecting a retrial *in favour of the convicted* in more detail, then it initially becomes clear that the grounds standardised under § 359 nos. 1 to 4 StPO are regularly only considered in the event that new facts or evidence comes to light. From a technical perspective, therefore, these are special cases of § 359 no. 5 StPO.³⁴ However, the demand to strike § 359 nos. 1 to 4, which is occasionally inferred from this assessment,³⁵ must be rejected. In doing so, we must first consider that § 359 no. 3 StPO, which is related to the criminal violation of public duty by a judge or juror involved in the ruling, is designed as absolute grounds for a retrial – unlike the other variations of § 359 StPO, here there is no demand for proof of the effect of the defect on the content of the ruling. The convicted person would thus be in a worse position if § 359 no. 3 StPO were stricken.³⁶ Arguing against a striking of § 359 nos. 1, 2 and 4 StPO, it is stated that here too the legal situation for the convicted would be effectively made worse in the light of the generally very restrictive han-

28. Cf. BVerfGE 105, 135.

29. Of the 5,158 constitutional complaints lodged in 2019, 1,322 were lodged against decisions of the criminal courts; cf. BVerfG, Annual Statistics 2019, accessible online www.bverfge.de.

30. For a comparison across several years, see BVerfG, Annual Statistics 2019, accessible online www.bverfge.de.

31. The penalty order proceedings governed under § 407 et seq. StPO are written proceedings, in which the Public Prosecutor's Office submits a written proposal for a decision to the court. Pursuant to § 408(3)(1) StPO, 'the judge shall comply with the application of the public prosecution office if he has no reservations about issuing the summary penalty order'. The defendant then has the opportunity to lodge an objection within two weeks of notification of the penalty order (§ 410(1)(1) StPO) and thus to force (largely) regular main proceedings. If no legally effective objection is made, then the penalty order is equal to a legally effective criminal conviction (§ 410(3) StPO).

32. Pursuant § 12(1) StGB, crimes are 'unlawful acts which are subject at least to a prison sentence of one year or more'.

33. For criticism of this regulation, cf. Frister, above n. 7, § 373a.5.

34. In the sense of A. Engländer and T. Zimmermann, in C. Knauer (ed.), *Münchener Kommentar zur StPO, Band 3/1* [Munich Commentary on the StPO, vol 3/1] (2019), § 359.2; see also Frister, above n. 7, § 359.4; Schmidt, above n. 6, § 359.3.

35. P. Deml, *Zur Reform der Wiederaufnahme des Strafverfahrens* [On Retrial Reform in Criminal Proceedings] (1979), at 103 et seq.; J. Meyer, *Wiederaufnahmereform: Eine rechtsvergleichende Untersuchung zur Reform des Rechts der Wiederaufnahme des Strafverfahrens* [Retrial Reform: A Legal Comparative Examination of the Reform of the Right to Retrial in Criminal Proceedings] (1977), at 93 et seq.

36. Cf. Engländer and Zimmermann, above n. 34, § 359.2.

dling of § 359 no. 5 StPO by the case law – as discussed in more detail later in this section.³⁷

According to § 359 no. 1 StPO, a retrial in favour of the convicted shall be considered ‘if a document presented in the main proceedings as genuine was not genuine or was falsified to his disadvantage’. In this respect, the term document under substantive law, in the sense of § 267 StGB (Falsification of documents), must be taken as a basis;³⁸ accordingly, a document is ‘any physical embodiment of thoughts which is suitable and intended for use as evidence in legal communication, and which states its author’.³⁹ Sometimes, an analogous application to technical recordings in the sense of § 268 StGB (e.g. a truck’s black box) is also considered.⁴⁰ The document is not genuine if the declaration contained therein does not originate from the person indicated as its author.⁴¹ The bringing of a document to the disadvantage of the convicted must be assumed if it cannot be excluded that the document influenced the ruling to the disadvantage of the convicted.⁴² It is contested whether § 364, clause 1 StPO, which, for petitions for retrial based on the claiming of a criminal act, requires the presence of a legally effective sentence on the grounds of this act or non-prosecution of such which is not supported by a lack of evidence, is applicable to § 359 no. 1 StPO. The prevailing opinion rejects such by referring to the wording of § 359 no. 1 StPO which deviates from § 359 nos. 2 and 3 StPO and specifically contains no reference to a requirement of criminal liability.⁴³

According to § 359 no. 2 StPO, a retrial in favour of the convicted shall furthermore be considered

if the witness or expert is guilty of wilfully or negligently violating their oath or of making an intentionally false statement under oath in a statement or

appraisal presented to the disadvantage of the convicted.

Since the assertion of these grounds for a retrial also claims the occurrence of a criminal act, the requirements of § 364, clause 1 StPO (legally effective judgement or non-prosecution which is not based on a lack of evidence) must be present.⁴⁴ Here too, an effect to the disadvantage of the convicted must be assumed if a negative influence of the witness statement or expert appraisal on the ruling cannot be excluded;⁴⁵ according to the prevailing opinion, however, it should not be necessary that the ruling is based on that part of the statement or appraisal which has been asserted as incorrect.⁴⁶ Thus, a retrial in favour of the convicted can also be considered pursuant to § 359 no. 3 stop

if a judge or lay judge who participated in reaching the judgment was guilty of a culpable breach of his official duties in relation to the case, unless the violation was caused by the convicted person himself.

The criminal act must have been committed ‘with respect to the case’, and may not simply have occurred ‘on the occasion’ of the activities of a judge – such as in the form of insulting the defendant.⁴⁷ The direct or indirect causing of the violation of public duty by the convicted (e.g. by bribing the judge who is acting contrary to his obligations) excludes the application of § 359 no. 3 StPO.⁴⁸ What is criticised is the very high hurdle for a retrial presented by the requirement for a criminal act – such as perverting the course of justice (§ 339 StGB), accepting benefits or corruption (§ 331, § 332 StGB), unlawful detention or coercion (§ 239, § 240 StGB); however, only the legislator would have the authority to reduce such to any form of conscious violation of public duty with respect to the case as has been proposed (and is certainly worth considering).⁴⁹ The restriction to persons directly involved in the reaching of a verdict is also rightly questioned since judicial errors – as shown not least of all by international research into this topic⁵⁰ – can also be traced back to the

37. Cf. Frister, above n. 7, § 359.85. However, § 359 no. 5 StPO is given a catch-all function in those cases where the petition for retrial is based on the claiming of a criminal act, but where no legally effective sentence has yet been rendered against this act (§ 364, clauses 1, 2 StPO); cf. here, Engländer and Zimmermann, above n. 34, § 359.2.

38. Prevailing opinion; cf. R. Eschelbach, in B. von Heintschel-Heinegg & J. Bockemühl (eds.), *KMR – Kommentar zur Strafprozessordnung* [Commentary on the German Code of Criminal Procedure], 97. EL May (2020), § 359.38; J. Kaspar, in H. Satzger, W. Schluckebier & G. Widmaier (eds.), *Strafprozessordnung* [German Code of Criminal Procedure] (4th edn, 2020), § 359.10; Schmitt, above n. 6, § 359.4; T. Singelstein, in J. Graf (ed.), *BeckOK-Strafprozessordnung* [Beck Online Commentary on German Code of Criminal Procedure] (36th edn, as at: 1 January 2020), § 359.8; conversely, in favour of establishing a procedural concept of a document (restriction to readable written documents signed by hand according to § 249), cf. K. Marxen and F. Tiemann, *Die Wiederaufnahme in Strafsachen* [Retrials in Criminal Cases] (3rd edn, 2014), n. 137.

39. Singelstein, above n. 38, § 359.8 with citations.

40. For example, Kaspar, above n. 38, § 359.10; Schmitt, above n. 6, § 359.6; Schmitt, above n. 6, § 359.5; conversely, Engländer and Zimmermann, above n. 34, § 359.18; Eschelbach, above n. 38, § 359.41.

41. Cf. Engländer and Zimmermann, above n. 34, § 359.19; Frister, above n. 7, § 359.19; each with citations.

42. Cf. Kaspar, above n. 38, § 359.10.

43. Cf. Eschelbach, above n. 38, § 359.57; J. Kaspar, above n. 38, § 359.11; each with citations; generally also BGH [German Federal Supreme Court], Resolution of 20 December 2002 – StB 15/02, NStZ 2003, 678 (679); alternative opinion, Frister, above n. 7, § 359.20; Schmitt, above n. 6, § 359.9.

44. Cf. Kaspar, above n. 38, § 359.13.

45. Cf. Engländer and Zimmermann, above n. 34, § 359.27; Frister, above n. 7, § 359.25; J. Kaspar, above n. 38, § 359.13.

46. Higher County Court Düsseldorf, Resolution of 6 December 1949 – Ws 250/49, NJW 1950, 616; Schmitt, above n. 6, § 359.12; alternative opinion Engländer and Zimmermann, above n. 34, § 359.26; Frister, above n. 7, § 359.25 (in case of lack of basis, consideration within framework of § 359 no. 5 StPO only).

47. Cf. Engländer and Zimmermann, above n. 34, § 359.30; Schmitt, above n. 6, § 359.13.

48. The mere knowledge that a third party has effected the violation of public duty without any personal involvement of the convicted person is harmless, however; cf. Engländer and Zimmermann, above n. 34, § 359.31; Schmitt, above n. 6, § 359.14.

49. Demanded by Greco, above n. 5, at 944 and 954; generally in agreement, Kaspar, above n. 38, § 359.16.

50. The significance of misconduct on the part of the police and the public prosecutor for the occurrence of judicial errors is particularly well documented for the US justice system (cf. R. Covey, ‘Police Misconduct as a Cause of Wrongful Convictions’, 90 *Washington University Law Review* 1133 (2013); J. Petro and N. Petro, ‘The Prosecutor and

misconduct of other persons involved in the proceedings (in the present context, in particular: the police or the public prosecutor's office).⁵¹

§ 359 no. 4 StPO also permits a retrial in favour of the convicted 'if a civil judgement, which the criminal conviction is based on, is annulled by another legally effective ruling'. In the prevailing opinion, the scope of application of these grounds for a retrial should cover not just the civil judgements explicitly mentioned in the norm, but also judgements under labour, social, administrative and financial law.⁵² If, on the other hand, another *criminal conviction* utilised in the reaching of a verdict is annulled, then the only possible path should be via § 359 no. 5 StPO.⁵³ However, if one assumes – as holders of the prevailing opinion do – that a criminal conviction is always 'founded' on the earlier decision in the sense of § 359 no. 4 StPO if this decision was used as documentary grounds, then it is not clear why this should not also apply for earlier criminal convictions which are introduced to the main proceedings by means of public reading and utilised in the ruling.⁵⁴ The same applies against the prevailing opinion⁵⁵ for the annulment of administrative documents utilised in the criminal conviction since the failure to obey state authority, which still remains even after the elimination of an unlawful administrative document, regularly does not constitute any wrongdoing worthy of punishment.⁵⁶ Notwithstanding the restrictive practical application already mentioned, the retrial in favour of the convicted on the grounds of the bringing of new facts or evidence (§ 359 no. 5 StPO) has the greatest practical significance.⁵⁷ According to the regulation, designed as a general clause,⁵⁸ a retrial in favour of the convicted shall be considered

if new facts or evidence were produced which, independently or in connection with the evidence previously taken, tend to support the defendant's acquittal or, upon application of a more lenient criminal provision, a lesser penalty or a fundamentally different decision on a measure of reform and prevention. (*Maßregel der Besserung und Sicherung*)

On the term (*new*) facts, the Federal Constitutional Court states:

Facts shall be understood as existing, identifiable occurrences or circumstances which belong to the past or the present. Whether a fact is new or not shall be judged solely according to whether or not the court has already utilised it. Therefore, in principle new is everything which the court has not taken as a basis for forming its opinion, even if it could have taken such as a basis.⁵⁹

Therefore, in order to assess the question of whether a fact is *new*, one must refer to the time of decision, meaning the conclusion of deliberation in case of convictions.⁶⁰ Evidence discussed in the main proceedings may also be new if the court (in violation of its obligation to assess the evidence exhaustively and completely as arises from § 261 StPO)⁶¹ has not taken such as the basis for its decision.⁶² It must be taken into account though that criminal courts are not obliged to address *every* taking of evidence made in the main proceedings within the context of its grounds for the ruling.⁶³ However, in the failure to mention a piece of evidence which is *substantial* with respect to the basis of facts for the decision, one may see an indication of a failure to take such into account.⁶⁴ Therefore, the sentence, facts are 'not new (only) because they have not been mentioned in the ruling', which one finds in one of the leading commentaries on the Criminal Procedural Code, does not apply in this generality.⁶⁵ So-called legal facts, such as the repealing of a law or amendment to the interpretation of such, are covered by § 359 no. 5 StPO just as little as simple procedural errors or errors of substantive law – the retrial is not a 'review without time limit'.⁶⁶

Wrongful Convictions: Misplaced Priorities, Misconduct, Immunity and Remedies', in C. R. Huff and M. Killias (eds.), *Wrongful Convictions & Miscarriages of Justice* (2013) 91; according to the National Registry of Exonerations, 'official misconduct' contributed to the sentencing in 1,425 of the 2,647 cases recorded therein; cf. www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx; accessed 23 June 2020, but may also constitute a not inconsiderable factor in other legal systems – including the German system (cf. M. Killias and R. Huff, 'Wrongful Convictions and Miscarriages of Justice: What Did We Learn?', in C. R. Huff & M. Killias (eds.), *Wrongful Convictions & Miscarriages of Justice* (2013) 373, at 380).

51. In the sense of Frister, above n. 7, § 359.26.

52. Schmidt, above n. 6, § 359.15; Singelstein, above n. 38, § 359.18; Schmitt, above n. 6, § 359.17; dissent in Eschelbach, above n. 38, § 359.29.

53. Cf. Engländer and Zimmermann, above n. 34, § 359.33; Schmidt, above n. 6, § 359.15; Schmitt, above n. 6, § 359.17.

54. For example, Frister, above n. 7, § 359.33; Kaspar, above n. 38, § 359.20.

55. Cf. BGHSt 23, 86 (94); Schmidt, above n. 6, § 359.15; Schmitt, above n. 6, § 359.17.

56. In the sense of Engländer and Zimmermann, above n. 34, § 359.33; Frister, above n. 7, § 359.34a; ultimately, also Kaspar, above n. 38, § 359.20; Singelstein, above n. 38, § 359.18.

57. In the sense of Engländer and Zimmermann, above n. 34, § 359.2; Eschelbach, above n. 38, § 359.4; G. Strate, 'Der Verteidiger in der Wiederaufnahme' [The Defence Counsel in Retrials], 19 *Strafverteidiger* 228, at 229 (1999).

58. Frister, above n. 7, § 359.35.

59. BVerfG, Resolution of the 2nd Chamber of the Second Senate of 19 July 2002 – 2 BvR 18/02, 2 BvR 76/02, StV 2003, 225.

60. Cf. Engländer and Zimmermann, above n. 34, § 359.45; Kaspar, above n. 38, § 359.25; Marxen and Tiemann, above n. 38, n. 178.

61. See here Y. Ott and R. Hannich (ed.), *Karlsruher Kommentar zur StPO* (8th edn, 2019), § 261.56 et seq.

62. In agreement, for example, Engländer and Zimmermann, above n. 34, § 359.44; Frister, above n. 7, § 359.46; Schmidt, above n. 6, § 359.24; alternative opinion, Schmitt, above n. 6, § 359.30.

63. Cf. Frister, above n. 7, § 359.47.

64. *Ibid.*, § 359.47; differentiating, also Engländer and Zimmermann, above n. 34, § 359.48; Eschelbach, above n. 38, § 359.161.

65. Schmitt, above n. 6, § 368.5; similarly, Singelstein, above n. 38, § 359.27.

66. Kaspar, above n. 38, § 359.24; see also Frister, above n. 7, § 359.38; Schmidt, above n. 6, § 359.19; Singelstein, above n. 38, § 359 Rn. 22; for inclusion of facts of the case related to the proceedings, Engländer and Zimmermann, above n. 34, § 359.41; for extension to obvious errors of law de lege ferenda, M.P. Waßmer, 'Die Wiederaufnahme in Strafsachen - Bestandsaufnahme und Reform' [The Retrial in Criminal

What is considered (*new*) *evidence* is the formal evidence of the StPO (witnesses, experts, documents and visual inspections), but not the defendant himself.⁶⁷ Personal evidence means the persons themselves and not their declarations; thus an amended statement is not new evidence, but rather, under certain circumstances, a new fact.⁶⁸

According to § 359 no. 6 StPO, a retrial in favour of the convicted shall ultimately be considered

if the European Court of Human Rights has asserted a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms or its protocols, and has based the ruling on this violation.

The regulation takes account of the fact that decisions adopted by the ECtHR do not have any direct cassatory effect, and thus acts of law adjudged to be in contravention of the convention still require annulment by the national courts.⁶⁹ A requirement for a retrial according to § 359 no. 6 StPO is that the criminal law sentence is based on a violation of the Convention on Human Rights or its protocols asserted by the ECtHR; however, here, just as in the case of a review (§ 337 StPO),⁷⁰ the possibility alone that the decision would have been different if the Convention had not been violated is sufficient.⁷¹ According to the wording of § 359 no. 6 StPO, which is relevant in this respect, a retrial shall only be considered if contravention of the Convention has been explicitly asserted by the ECtHR; the analogous application to contraventions of the Convention which are ‘clear’ but not (yet) asserted by the ECtHR, which is sometimes⁷² advocated for, must be rejected.⁷³ The same (in any case *de lege lata*) applies for the carrying over of the result contested by a convicted person before the ECtHR to other cases of the same type; pursuant to § 359 no. 6 StPO, only persons who *themselves* have contested a final decision before the ECtHR are permitted to make a petition.⁷⁴ It is an entirely different matter though

whether this restriction is still appropriate – in fact, there are good reasons to call for an extension of the grounds for retrial to sentences which are based on a legal norm or legal opinion declared *in another case* to be in contravention of the Convention is demanded *de lege ferenda*.⁷⁵

Thus, the legal situation with respect to decisions of the ECtHR would ultimately be adapted to the legal situation which applies for decisions of the Federal Constitutional Court pursuant to § 79(1) BVerfGG. According to this regulation, a retrial is permitted against *any* criminal conviction

based on a legal provision which was declared to be incompatible with the *Grundgesetz* or which was voided pursuant to § 78, or which was based on the interpretation of a legal provision which the Federal Constitutional Court declared to be incompatible with the *Grundgesetz*.

Insofar as the law also requires that a decision here be based on the unconstitutional norm or interpretation of the norm, again the standard developed for review according to § 337 StPO should be used.⁷⁶

3.1.3 Grounds for a Retrial to the Disadvantage of the Defendant

The grounds for a retrial *to the disadvantage of the defendant* standardised under § 362 nos. 1 to 3 StPO largely correspond in content to the grounds stipulated for a retrial in favour of the convicted under § 359 nos. 1 to 3 StPO. In principle, one can refer to the discussions on these in this regard. However, unlike § 359 no. 3 StPO, the fact that the defendant has caused the criminal violation of public duty is not given any significance in the context of § 362 no. 3 StPO.⁷⁷ And unlike § 359 StPO, an extension of the scope of application of the grounds for retrial by analogy is otherwise rejected on the grounds of the principle of *ne bis in idem* anchored constitutionally in § 103(3) GG.⁷⁸

§ 362 StPO does not contain any grounds for a retrial which correspond to those contained in § 359 no. 4 StPO (annulment of a civil law decision). Conversely, the grounds for retrial standardised in § 362 no. 4 StPO,

Cases – Survey and Reform], 24 *Juristische Ausbildung* 454, at 460 (2002).

67. Cf. Kaspar, above n. 38, § 359.27; Schmidt, above n. 6, § 359.23. In the opinion of Frister, above n. 7, § 359.36 this constitutes uniform grounds for a retrial; the differentiation between facts and evidence is obsolete.

68. Cf. Schmidt, above n. 6, § 359.23; Singelstein, above n. 38, § 359.22.

69. Cf. Kaspar, above n. 38, § 359.39.

70. On the requirement for a basis in the sense of § 337 StPO cf. only Schmitt, above n. 6, § 337.37 with citations.

71. Cf. Engländer and Zimmermann, above n. 34, § 359.68; Frister, above n. 7, § 359.74. The basis must be denied in particular if compensation for a violation of the Convention has already been made in specialist court proceedings.

72. For example, from County Court Ravensburg, Resolution of 4 September 2000 – 1 Qs 169/00, NSTZ-RR 2001, 115.

73. Cf. Kaspar, above n. 38, § 359.40; Schmidt, above n. 6, § 359.40.

74. Cf. Eschelbach, above n. 38, § 359.219; Frister, above n. 7, § 359.75; Schmidt, above n. 6, § 359.40; Schmitt, above n. 6, § 359.52; conversely, for extension of the applicable § 359 no. 6 StPO to parallel cases Engländer and Zimmermann, above n. 34, § 359.69; R. Esser, ‘Die Umsetzung der Urteile des Europäischen Gerichtshofs für Menschenrechte im nationalen Recht – ein Beispiel für die Dissonanz völkerrechtlicher Verpflichtungen und verfassungsrechtlicher Vorgaben?’ [Imple-

mentation of Rulings of the European Court of Human Rights in National Law – An Example of Dissonance between Public International Law Obligations and Constitutional Law Stipulations?], 25 *Strafverteidiger* 348, at 354-5 (2005); T. Weigend, ‘Die Europäische Menschenrechtskonvention als deutsches Recht – Kollisionen und ihre Lösung’ [The European Convention on Human Rights as German Law – Conflicts and How to Solve Them], 20 *Strafverteidiger* 384, at 388 (2000).

75. In the sense of Frister, above n. 7, § 359.75a; Kaspar, above n. 38, § 359.42; M. Marxen, ‘Ende gut, aber keineswegs alles gut – Defizite des strafrechtlichen Wiederaufnahmeverfahrens’ [Good in the End but Far from All Good – Shortcomings in the Retrial Procedure under Criminal Law], in P.-A. Albrecht, et al. (eds.), *Festschrift für Walter Kargl* [Festschrift for Walter Kargl] (2015) 323, at 331.

76. Cf. Engländer and Zimmermann, above n. 34, § 359.81.

77. Cf. Singelstein, above n. 38, § 362.4.

78. This applies, for example, for the analogous application of § 359 no. 1 StPO to technical recordings in the sense of § 268 StGB that is sometimes considered (cf. substantiation of the current debate in fn. 40). As a whole, see Kaspar, above n. 38, § 362.4.

namely the giving of a believable confession (obviously), have no counterpart in § 359 StPO. According to § 362 no. 4 StPO, a retrial to the disadvantage of the defendant shall be considered ‘if a credible confession to the criminal act is given by the acquitted party in or outside the court’. To establish these grounds for a retrial, it was crucial to assume that

the people’s legal consciousness (could) be misled if a criminal, after being acquitted due to a lack of evidence, may accuse himself or even boast of the crime without punishment.⁷⁹

Here too, the limited wording must be strictly observed; since it talks of the ‘acquitted’, application to confessed *convicts* with the aim of a harsher penalty cannot be considered.⁸⁰ Insofar as a measure of reform and prevention (which is not connected with an accusation of guilt) was imposed according to § 61 et seq. StGB alongside an acquittal, this does not prevent a retrial.⁸¹ According to the wording of the norm, the confession must furthermore come personally from the acquitted person named in the petition for retrial; testimonial confessions of purported accessories to the act are not sufficient.⁸² If one takes the requirement for a ‘confession to a criminal act’ seriously, then one must also demand that the presence of all prerequisites for criminal liability (including unlawfulness and guilt) arises a priori from the statement of the acquitted; the rationale of the norm also speaks in favour of this.⁸³ The prevailing opinion, however, considers it sufficient that the defendant ‘admits to the external facts of the case and his perpetration thereof’.⁸⁴ Ultimately, the confession must be ‘credible’ according to § 362 no. 4 StPO; this is interpreted to the effect that the facts admitted to are logically possible in law and must correspond to lived experience.⁸⁵

3.2 Procedure

The following section is devoted to a presentation of the retrial procedure. The procedure is broken down into a review of the permissibility and merit of the petition, and in the case of a merited petition ends in a repeating of the main proceedings.⁸⁶

3.2.1 Review of the Permissibility of the Petition for Retrial (*Additionsverfahren*)

The so-called *Additionsverfahren* (lit. additions process), in which the permissibility of a petition for a retrial is reviewed, is essentially governed under § 366 et seq. StPO. Many petitions for a retrial in favour of the convicted obviously fail at this stage in the procedure; the reason for this is (also) found in a generally restrictive handling of the relevant regulations by the courts who are not necessarily open to a critical review of their decisions.⁸⁷

Pursuant to § 366(1) StPO, ‘the statutory ground for reopening proceedings and the evidence’ must be specified in the petition – which is not subject to a time limit.⁸⁸ The petition for a retrial may only be based on the presence of one of the legally standardised grounds for retrial; it is impermissible if it is aimed exclusively at effecting a different sentencing on the grounds of the same law or a reduction in sentence due to significantly reduced criminal responsibility (§ 21 StGB; cf. § 363(1), (2) StPO).⁸⁹

If the defendant (or a close member of his family in case of his death, § 361(2) StPO) is seeking a retrial in his favour, then he may bring the ‘application only in the form of a written document signed by defence counsel or by a lawyer, or orally to be recorded by the court registry’ (§ 366(2) StPO).⁹⁰ Whilst the finding of a specialist lawyer who is in principle willing to take on the mandate of a retrial should not be an insurmountable obstacle, the financing of the mandate from the defendant’s own resources often poses significant and not infrequently insurmountable obstacles to an effectively convicted person.⁹¹ Under certain conditions, therefore, the appointing of counsel is stipulated for the retrial procedure or upon preparations for such (§ 364a,b StPO). The latter is then the case pursuant, inter alia, to § 364b(1)(1) no. 1 StPO if ‘there are sufficient factual indications that making certain inquiries will bring to light facts or evidence which may substantiate the admissibility of an application to reopen the proceedings’. Counsel is thus authorised to undertake investiga-

79. Draft 1873, Reasoning of § 278, clause 174; cited in Frister, above n. 7, § 362.1.

80. Cf. Engländer and Zimmermann, above n. 34, § 362.11; Frister, above n. 7, § 362.14; Schmidt, above n. 6, § 362.9.

81. Cf. Engländer and Zimmermann, above n. 34, § 362.12; Frister, above n. 7, § 362.15.

82. Cf. Engländer and Zimmermann, above n. 34, § 362.13.

83. See here *ibid.*; Frister, above n. 7, § 362.16; Kaspar, above n. 38, § 362.10.

84. Schmidt, above n. 6, § 362.11; also Schmitt, above n. 6, § 362.5; each with citations.

85. Cf. Engländer and Zimmermann, above n. 34, § 362.16; Schmidt, above n. 6, § 362.14; see also Frister, above n. 7, § 362.18, who moreover demands an overwhelming likelihood of sentencing in the sense of the suspicion of an offence otherwise duly sufficient for the lodging of an appeal and opening of the main proceedings (§ 170(1), § 203 StPO).

86. Cf. here also the overview in Bayer, above n. 3, at 168 et seq. A comprehensive illustration of the review of permissibility and merit can be found in Marxen and Tiemann, above n. 38, n. 11 et seq.

87. Cf. M. Bock et al., ‘Die erneute Wiederaufnahme des Strafverfahrens’ [The Retrying of Criminal Proceedings], 160 *Goltdammer’s Archiv für Strafrecht* 328 (2013); R. Eschelbach, A. Geipel, M. Hettinger, L. Meller & F. Wille, ‘Plädoyer gegen die Abschaffung der Wiederaufnahme des Strafverfahrens’ [Against the Elimination of the Retrying of Criminal Proceedings], 165 *Goltdammer’s Archiv für Strafrecht* 238 (2018); Frister and Müller, above n. 7, at 104; Marxen, above n. 75, at 323; Marxen and Tiemann, above n. 38, n. 2; Strate, above n. 57, at 228.

88. Cf. Engländer and Zimmermann, above n. 34, § 366.19; see also Marxen and Tiemann, above n. 38, n. 14, who rightly point out that a practical restriction arises from the fact that the bringing of new evidence gets harder and harder over time.

89. For the striking of § 363(2) StPO *de lege ferenda*, Frister, above n. 7, § 363.21-22; Frister and Müller, above n. 7, at 104; for criticism, also J. Kaspar and C. Arnemann, ‘Die Wiederaufnahme des Strafverfahrens zur Korrektur fehlerhafter Urteile’ [The Retrying of Criminal Proceedings to Correct Wrongful Rulings], 34 *Recht & Psychiatrie* 58, at 63 (2016).

90. Cf. here Roxin and Schünemann, above n. 5, § 57.13. Here, in the case of signing by a lawyer, it is required that said lawyer assumes full responsibility for the content, and has been involved in its creation; cf. Kaspar, above n. 38.

91. See here also Strate, above n. 57, at 228.

tions independently (such as questioning witnesses), but of course in doing so does not have the coercive powers which are available to the criminal investigation authorities.⁹² Pursuant to § 364b(1)(1) no. 3 StPO, counsel shall also be appointed if ‘the convicted person is unable to hire counsel at his own costs without impairing the support which he and his family require’. For the event of appointment according to § 364b(1)(1) StPO, § 45(4)(1) German Act on Remuneration of Lawyers (*Rechtsanwaltsvergütungsgesetz*; RVG) stipulates that the lawyer appointed shall have a claim against the state treasury even if he ultimately advises against the lodging of a petition for retrial; according to § 46(3)(1) RVG, this claim to remuneration also covers expenses which are incurred due to the investigations undertaken regarding preparation for the retrial procedure.⁹³ In quite general terms, the legislator, with § 364a,b StPO, takes account of the fact that many (in particular incarcerated) convicted persons are personally unable or able only to a very limited extent to exercise their rights competently in advance of the retrial procedure and during execution of such.⁹⁴

The authority of the court is governed by special provisions of the German Judicature Act (*Gerichtsverfassungsgesetz*; GVG; § 367(1)(1) StPO). Pursuant to § 140a(1) (1) GVG, the petition for retrial is decided on by ‘another court with the same substantive jurisdiction as the court against whose decision the application for the reopening of proceedings is directed’. Pursuant to § 368(1) StPO, this court shall review whether the formal requirements have been adhered to, whether legally stipulated grounds for retrial have been asserted and whether suitable evidence has been indicated. If any of these conditions of permissibility is lacking, then the petition is rejected by the court as impermissible.

The requirements that must be placed on the suitability of evidence required by § 368(1) StPO are contested at this stage in the procedure. This debate is significant above all for the assessment of a petition for retrial based on § 359 no. 5 StPO.⁹⁵ According to the appropriate interpretation, those criteria which are followed in the assessment of petitions to take evidence in contentious proceedings (cf. § 244(3)–(5) StPO) shall be taken as a basis here.⁹⁶ Accordingly, evidence shall also be considered unsuitable in the sense of § 368(1) StPO if the taking of evidence is not possible in a legally permissible

manner, if the evidence is unattainable for the court or if the evidence must be considered wholly unsuitable from the outset.⁹⁷ The latter is the case if it can be asserted, without any consideration for the previous result of the evidence, that the result promised with the evidence offered cannot be attained according to concrete lived experience.⁹⁸ Whilst some of the literature wishes to apply this restrictive standard exclusively,⁹⁹ the prevailing opinion permits a further evaluation of the probative force of the new evidence and – within certain limits – an anticipation of the consideration of the evidence in the additional process itself.¹⁰⁰ Critics see in this a key reason for the low rate of success of petitions for retrial based on § 359 no. 5 StPO.¹⁰¹ According to the prevailing opinion, the principle of *in dubio pro reo* should also not apply otherwise in this regard since the court does not have to be convinced by the new bringing of facts, but rather simply makes a predictive decision.¹⁰²

A permissible petition shall be presented to the complainant’s counterparty – meaning the Public Prosecutor’s Office in the case of a petition by a convicted person – ‘with a time limit being set for a response’ (§ 368(2) StPO). The preferred interpretation sees in this a rule for granting a legal hearing *before* the giving of a decision of permissibility (not legally governed in more detail);¹⁰³ the still prevailing opinion, on the other hand, assumes that § 368(2) StPO refers to the provision of the decision of permissibility to the counterparty, with the result that only the Public Prosecutor’s Office must be heard before the giving of the decision according to § 33(2) StPO.¹⁰⁴

3.2.2 Review of the Merit of the Petition for Retrial (*Probationsverfahren*)

With the decision to approve the petition, the *Additionsverfahren* moves on to the so-called *Probationsverfahren*

92. Cf. Engländer and Zimmermann, above n. 34, § 364b.6; Marxen and Tiemann, above n. 38, n. 462–463. An overview of ‘research material and tools of the defence counsel’ can be found in Strate, above n. 57, at 233–4. The author – himself a highly experienced defence lawyer, including in retrial procedures – points out that in the light of the lack of coercive powers, the defence is reliant on showing potential interlocutors the meaningfulness of the request for retrial. Moreover, he highlights opportunities for making use of specialist expertise.

93. More details on the effects of appointment under the law on fees, Engländer and Zimmermann, above n. 34.

94. Cf. Engländer and Zimmermann, above n. 34, § 364a.1.

95. A comprehensive overview of the current debate can be found in Arne-mann, above n. 3, at 397 et seq.

96. In the sense of Engländer and Zimmermann, above n. 34, § 368.14; Eschelbach, above n. 38, § 368.31; Frister, above n. 7, § 368.11; Kaspar, above n. 38, § 368.7; conversely Schmidt, above n. 6, § 368.10.

97. Engländer and Zimmermann, above n. 34, § 368.14; Frister, above n. 7, § 368.11.

98. Engländer and Zimmermann, above n. 34, § 368.14.

99. Eschelbach, above n. 38, § 368.31; Kaspar, above n. 38, § 368.7.

100. Cf. BGHSt 17, 303 (304); BGH, Resolution of 22 October 1999 – 3 StE 15/93-1 – StB 4/99, NStZ 2000, 218; Engländer and Zimmermann, above n. 34, § 368.31; Schmidt, above n. 6, § 368.10. However, according to the case law of the German Federal Constitutional Court, ‘the assertion of such facts which greatly support the verdict of guilty, in that they demarcate the adjudged act in its crucial characteristics, or the confirmation or presentation of which play a predominant role in the defence of the defendant, must in any case be reserved for the main proceedings’ (BVerfG, Resolution of the 2nd Chamber of the Second Senate of 7 September 1994 – 2 BvR 2093/93, NJW 1995, 2024, 2025).

101. According to Marxen and Tiemann, above n. 38, n. 199, the ‘characteristic of suitability [is] of the greatest practical importance. Lack of suitability is in practice the most frequently applied grounds for rejection’.

102. K. Volk and A. Engländer, *Grundkurs StPO* [A Basic Course in the StPO] (9th edn, 2018), § 38.19; see also BGHSt 39, 75 (85); Schmidt, above n. 6, § 368.13; criticism in B. Schünemann, ‘Das strafprozessuale Wiederaufnahmeverfahren propter nova und der Grundsatz ‘in dubio pro reo’ [The Criminal Law Procedure of the Retrial propter nova and the Principle of ‘in dubio pro reo’], 84 *Zeitschrift für die gesamte Strafrechtswissenschaft* 870, at 889 et seq. (1972).

103. Engländer and Zimmermann, above n. 34, § 368.54; Frister, above n. 7, § 368.12.

104. Kaspar, above n. 38, § 368.13; Schmitt, above n. 6, § 368.13.

(hearing of the petition), in which a decision is reached regarding the merit of the petition for retrial.

Pursuant to § 369(1) StPO, the taking of evidence shall be performed by a judge appointed by the retrial court. This formulation must not be understood in the technical sense; rather, as well as petitioning another judge in the sense of § 156 et seq. GVG, a taking of evidence by members or the whole of the panel of judges which has jurisdiction according to § 140a GVG shall also be considered.¹⁰⁵ Conversely, evidence obtained exclusively by the police or the Public Prosecutor's Office is unusable.¹⁰⁶ According to popular opinion, the principle of the inquisitorial system (*Amtsermittlung*; § 244(2) StPO) has to be applied accordingly in the *Probationsverfahren*; the collecting of evidence shall consequently be extended to all facts which are of significance for the retrial *ex officio*.¹⁰⁷ By some scholars, however, only a power, not an obligation, to extend the taking of evidence to additional evidence is assumed.¹⁰⁸ However, the wording of § 369(1) StPO, which speaks of the 'taking of the evidence *adduced*' (our emphasis), and the structure of the retrial process aimed at the principle of party disposition speak in favour of limiting the taking of evidence, in the preferable opposing opinion, to the evidence indicated by the complainant.¹⁰⁹ However, from the claim to a fair and due process of law, there follows an obligation of the court to exhaustively utilise the evidence indicated by the complainant, and to direct queries to an expert, for example.¹¹⁰ If witnesses or experts are questioned, or if the court undertakes a physical inspection, then the Public Prosecutor's Office, the defendant, and counsel have a right to be present (§ 369(3)(1)StPO).

After the taking of evidence is completed, the defendant and the Public Prosecutor's Office shall be given an opportunity to submit an opinion (§ 369(4) StPO). If the claims made in the petition have 'not [been] sufficiently substantiated', then the petition is rejected as unfounded without oral proceedings pursuant to § 370(1) StPO; the same applies according to this regulation if, in the case of a petition for retrial based on a document offence or the false statement of a witness or expert pursuant to § 359 nos. 1, 2 or § 362 nos. 1, 2 StPO, 'the assumption that the act specified in these provisions

influenced the decision can be ruled out given the circumstances which pertain'. The rejection of the petition as impermissible is subject to immediate appeal (§ 372, clause 1 StPO).

However, when a claim can be assumed to be 'sufficiently substantiated' in the sense of § 370(1) StPO has been contested in detail.¹¹¹ By some authors, the sufficient likelihood of a more favourable decision for the complainant in the new main proceedings is demanded in this context without further differentiation.¹¹² However, the correct approach is to differentiate between the grounds for retrial.¹¹³ Thus, for those grounds which are associated with criminal behaviour (§ 359, nos. 1-3, § 362, nos. 1-3 StPO), the full conviction of the court that there exists a criminal act is required, insofar as a retrial, by way of exception, is permissible without a legally effective sentence pursuant to § 364, clause 1 (2nd alternative).¹¹⁴ For a retrial on the grounds of a believable confession by the acquitted person (§ 362, no. 4 StPO), the level of suspicion necessary to initiate the main proceedings pursuant to § 203 StPO is crucial.¹¹⁵ With respect to a retrial in favour of the defendant on the grounds of new facts or evidence (§ 359, no. 5 StPO), the prevailing opinion demands sufficient likelihood of a retrial being brought,¹¹⁶ whilst in one minority opinion the mere possibility of correctness should suffice.¹¹⁷

If the petition is well-founded, then 'the court shall order the reopening of the proceedings and the recommencement of the main hearing' (§ 370(2) StPO). This resolution has far-reaching significance; it nullifies the substantive legal force and enforceability of the first ruling.¹¹⁸

3.2.3 Reopening the Main Proceedings

The new main proceedings to be held on the grounds of a successful petition for retrial are independent of the proceedings, in which the first ruling was made; in these proceedings, 'the set of evidence must be completely rebuilt from scratch'.¹¹⁹ The end result – just as in any other main criminal proceedings – may be a sentencing, an acquittal or a suspension of proceedings. However, a prohibition on *reformatio in peius* applies; i.e.

the original judgment, so far as it relates to the type and degree of the legal consequences of the offence,

105. Cf. Kaspar, above n. 38, § 369.3; Schmidt, above n. 6, § 369.6.

106. Kaspar, above n. 38, § 369.4; Marxen and Tiemann, above n. 38, n. 366.

107. Higher County Court Zweibrücken, Resolution of 1 February 1993 – 1 Ws 432/92, Goltzdammer's Archiv 1993, 463 (465); Higher County Court Hamburg, Resolution of 17 July 2000 – 1 Ws 53/00, Strafverteidiger 2003, 229; Kaspar, above n. 38, § 369.2; Roxin and Schünemann, above n. 5, § 57.15; Schmitt, above n. 6, § 369.5.

108. Cf. Schmidt, above n. 6, § 369.2.

109. Cf. Engländer and Zimmermann, above n. 34, § 369.9 et seq.; Eschelbach, above n. 38, § 369.2 et seq.; Frister, above n. 7, § 369.8 et seq.; Marxen and Tiemann, above n. 38, n. 370.

110. Frister, above n. 7, § 369.8 under reference to BVerfG, Resolution of the 2nd Chamber of the Second Senate of 23 December 2002 – 2 BvR 1439/02, Strafverteidiger 2003, 223 (224). As Frister (*ibid* n. 10) makes clear, the emphasis the prevailing opinion puts on the obligation to pursue the inquisitorial system may be derived from efforts 'to undertake significant parts of a taking of evidence reserved for the main proceedings during the *Probationsverfahren* itself, and where applicable to assert insufficient confirmation of the bringing of the retrial'.

111. For an overview of the current debate, cf. Engländer and Zimmermann, above n. 34, § 370.6 et seq.

112. Cf. Schmidt, above n. 6, § 370.4; Volk and Engländer, above n. 102, § 38.20.

113. Cf. Engländer and Zimmermann, above n. 34, § 370.6; Frister, above n. 7, § 370.4.

114. This relates to cases where 'criminal proceedings cannot be commenced or conducted for reasons other than lack of evidence'. Cf. Engländer and Zimmermann, above n. 34, § 370.8; Frister, above n. 7, § 370.4.

115. Cf. Frister, above n. 7, § 370.5; Schmidt, above n. 6, § 370.4.

116. Cf. Engländer and Zimmermann, above n. 34, § 370.10, 14; Schmitt, above n. 6, § 370.4.

117. Cf. Schünemann, above n. 102, at 898; in substance, also Frister, above n. 7, § 370.13.

118. Cf. Roxin and Schünemann, above n. 5, § 57.16; in detail, see Engländer and Zimmermann, above n. 34, § 370.19 et seq.

119. Roxin and Schünemann, above n. 5, § 57.17.

may not be amended to the convicted person's detriment if only the defendant or, on his behalf the public prosecution office, or his statutory representative applied to reopen the proceedings. (§ 373(2)(1) StPO)

However, orders to place the defendant in a psychiatric hospital or in an addiction treatment facility may be instructed for the first time (§ 373(2)(2) StPO).¹²⁰ An acquittal can also be made without reopening the main proceedings if the convicted person dies (§ 371(1) StPO), or if there exists sufficient evidence for an acquittal and the Public Prosecutor's Office consents (§ 371(2) StPO).

3.2.4 Damage Compensation for Wrongfully Prosecuted Persons

In the event of a successful retrial in favour of the convicted person, he shall in principle have a right to damage compensation for the disadvantages suffered as a result of the sentence according to the German Act on Damage Compensation for the Wrongfully Prosecuted (*Strafverfolgungsentschädigungsgesetz*; StrEG).¹²¹ According to § 7(3) StrEG, compensation for damages which are not pecuniary in nature is just 25 euros per started day of detention.¹²² According to a draft bill approved by the German Bundesrat (Federal Council) in December 2019, this amount should henceforth be set at 75 euros.¹²³ It should be noted that compensation pursuant to § 5(2)(1) StrEG is excluded 'if and insofar as the accused has caused the criminal prosecution by means of wilful intent or gross negligence'.¹²⁴

4 Legal Reality of the Retrial Process

No official statistics are kept regarding successful retrial processes in Germany; the actual number of judicial errors is therefore primarily the subject of more or less well-founded estimates by legal practitioners and jour-

nalists.¹²⁵ However, alongside the substantial work of K. Peters from the 1970s, there are also a few newer empirical studies devoted to the subject, which are discussed below.¹²⁶ A joint interdisciplinary project on the issue of 'Errors and retrials in the criminal process', funded by the German research funding organisation Deutsche Forschungsgemeinschaft, promises significant gains in knowledge, although it is not scheduled to be completed until March 2022.¹²⁷ According to data from the German Federal Office of Statistics (*Statistisches Bundesamt*), in 2018 a total of 325 proceedings held before district (*Amtsgericht*) and county courts (*Landgericht*) were initiated by a petition for a retrial to the disadvantage of the defendant, and a total of 1,000 by a petition for a retrial in favour of the convicted.¹²⁸ However, as already mentioned above, data on the success of these petitions for retrial cannot be obtained from these statistics.

Amongst the studies presented in the recent past with a focus on the right to a retrial, mention must be made of a study carried out at the Kriminologische Zentralstelle (KrimZ) in Wiesbaden, which is based on an in-depth analysis of successful retrial processes.¹²⁹ The study supposedly involved all persons who were wrongfully (as evidenced by a successful retrial) given a prison sentence between 1990 and 2016. Ultimately, the files of 29 proceedings affecting 31 convicted persons were evaluated; the files for a further six proceedings were no

125. Evidence in S. Barton, M. Dubelaar, R. Kölbel & M. Lindemann (eds.), 'Vom hochgemuten, voreiligen Griff nach der Wahrheit...' *Fehlurteile im Strafprozess* ['On the Energetic, Rushed Search for the Truth...'] *Judicial Errors in the Criminal Process* (2018) 9, at 13-14. Estimates of the prevalence of judicial errors range from the low single figures to 10% or even 25%.

126. K. Peters, *Fehlerquellen im Strafprozeß*, Bände 1-3 [*Sources of Errors in the Criminal Process*, vols 1-3] (1970-1974). Regarding larger, mostly older empirical studies, cf. the overview in Arneemann, above n. 3, at 186 et seq. For an overview of the latest research, cf. also B. Dunkel and S. Kemme, 'Fehlurteile in Deutschland: eine Bilanz der empirischen Forschung seit fünf Jahrzehnten' [*Judicial Errors in Germany: A Review of Five Decades of Empirical Research*], 28 *Neue Kriminalpolitik* 138 (2016).

127. Involved in the project are Kriminologische Forschungsinstitut Niedersachsen e.V. (Criminological Research Institute of Lower Saxony) (Prof Thomas Bliesener), the Heinrich-Heine University Düsseldorf (Prof Karsten Altenhain) und die Psychologische Hochschule Berlin (Berlin Psychological University) (Prof Renate Volbert). More information can be found on the project homepage; cf. <https://kfn.de/forschungsprojekte/fehler-und-wiederaufnahme-im-strafverfahren/> (accessed on 26 July 2020).

128. Statistisches Bundesamt (eds.), *Rechtspflege Strafgerichte Fachserie 10 Reihe 2.3* [Administration of Justice in Criminal Courts Special Series 10 Vol 2.3] (2019); accessible online at <https://tinyurl.com/y54x5bda> (accessed on 26 July 2020). B. Dunkel conducts a time-series analysis on these data in *Fehlentscheidungen in der Justiz. Systematische Analyse von Wiederaufnahmeverfahren in Strafverfahren im Hinblick auf Häufigkeit und Risikofaktoren* [*Wrongful Decisions in the Justice System. A Systematic Analysis of Retrial Procedures in Criminal Proceedings with respect to Frequency and Risk Factors*] (2018), at 156 et seq.

129. Some of these results have also been published in English; cf. F. Leuschner, M. Rettenberger & A. Dessecker, 'Imprisoned But Innocent: Wrongful Convictions and Imprisonments in Germany, 1990-2016', 66 *Crime & Delinquency* 687 (2020). More details in A. Hoffmann and F. Leuschner, *Rehabilitation und Entschädigung nach Vollstreckung einer Freiheitsstrafe und erfolgreicher Wiederaufnahme* [*Rehabilitation and Damage Compensation after Imposition of a Prison Sentence and Successful Retrial*] (2017).

120. This possibility is the consequence of the duality of the German criminal sanctions system. For details, see M. Lindemann, 'Die Zweispurigkeit des deutschen Sanktionensystems – rechtliche Grundlagen und Konsequenzen für die Vollzugsgestaltung' [The Duality of the German Criminal Sanctions System – Legal Basics and Consequences for the Nature of Enforcement], 68 *Forum Strafvollzug* 99 (2019).

121. See here F. Leuschner and A. Hoffmann, 'Der Umgang des Staates mit Fehlern der Justiz' [The State's Handling of Errors of Justice], 28 *Neue Kriminalpolitik* 155 (2016).

122. Criticism, see Marxen, above n. 75, at 323.

123. Draft of an ... Act to Amend the Act on Damage Compensation for the Wrongfully Prosecuted (StrEG), BT-Drs. 19/17035. In its meeting of 1 July 2020, the Parliamentary Committee on Legal Affairs and Consumer Protection of the German Bundestag recommended the adoption of the proposal; see BT-Drs. 19/20659.

124. However, the claim to damage compensation is 'not excluded by the fact that the defendant has limited himself to a statement on the case only, or by the fact that he has omitted to lodge an appeal' (§ 5(2)(2) StrEG).

longer available.¹³⁰ The overwhelming majority of persons affected had been convicted of sexual offences (38.7%) or serious violent offences (35.5%).¹³¹ The reasons for these judicial errors were predominantly false accusations (N = 12) and incorrect evidence from expert witnesses (12); other frequent reasons were (a failure to recognise) lack of criminal liability (8), misidentification by eye witnesses (5) and false confessions (5).¹³² As part of the overall project, questions surrounding rehabilitation and damage compensation after a successful retrial were also investigated in detail; to do this, 17 interviews were carried out in addition to the file analysis with affected persons and professional actors in the criminal proceedings.¹³³ It was shown here that there is still a significant need for improvement in terms of the economic and social reintegration of persons who have previously been wrongfully incarcerated.¹³⁴

B. Dunkel presented an analysis of retrial files based on petitions for retrial submitted to the courts in the Hanseatic City of Hamburg between 2003 and 2015.¹³⁵ As a result, she was able to include 48 files in the investigation; of those, 44 were in favour of the convicted, and 4 to the disadvantage of the defendant.¹³⁶ 56% of the retrials related to penalty orders pursuant to § 407 et seq. StPO.¹³⁷ Since this study, unlike the KrimZ study, did not restrict itself to convicted persons who had been wrongfully given a detention sentence (the proportion of financial penalties was 66.7%), the deviation in distribution of types of offence is not surprising: here, theft and robbery (25.0%), fraud (20.8%) and highway offences (10.4%) dominated.¹³⁸ 60.5% of proceedings before the District Court were successful; before the County Court, this figure was only 22.2%.¹³⁹ The reasons for

the first ruling being wrongful were dominated by failure to observe a psychological condition (N = 12) and a lack of or wrongly collected evidence (8).¹⁴⁰

As part of her investigation into 'Shortcoming(s) in retrying criminal cases', C. Arnemann conducted guided interviews with 13 specialist criminal defence lawyers.¹⁴¹ The results of the work are largely impossible to summarise due to the qualitative approach underlying it;¹⁴² however, it is nevertheless significant that the prospect for success of retrials is considered by the criminal defence lawyers to be extremely small:

Retrial is not a functioning legal remedy, it's an illusory area of law. It's only successful in extremely exceptional cases. The whole of retrial law is just about blocking. Therefore, most clients have to be advised against a petition for retrial in the opinion of the experts questioned.¹⁴³

The work also contains statements on the regional differences in the frequency of petitions for retrial which are clear from the legal statistics:

Regional differences in how courts handle retrial processes were not reported. The fluctuating number of petitions for retrial between different German Bundesländer can be traced back to the engagement and specialisation of the defence lawyers. For example, more engaged criminal defence lawyers are located in large cities. The criminal defence lawyer located in a rural area lacks the experience, and the opportunity to discuss the case with colleagues, and also access to specialist libraries.¹⁴⁴

A key problem mentioned is that the courts de facto organised the review of permissibility as a review of merit, meaning that many petitions for retrial failed in the *Additionsverfahren* itself.¹⁴⁵

5 Current Developments in Legal Policy

In the past, it was above all the principled exclusion of a retrial to the disadvantage of the defendant in the case of the bringing of new facts or evidence (on the limited exception for penalty order proceedings, cf. § 373a(1) StPO) that was repeatedly the subject of political initiatives.¹⁴⁶ Examples of this include the draft of a bill on reforming the right to a retrial under criminal law introduced by the Bundesrat in 2008 at the initiative of the Bundesländer of Hamburg and Nordrhein-Westfalen.

130. A comprehensive description of the methodology can be found in Leuschner, Rettenberger & Dessecker, above n. 129, at 694 et seq.

131. Cf. Leuschner, Rettenberger & Dessecker, above n. 129, at 697.

132. *Ibid.*, at 701.

133. Cf. Hoffmann and Leuschner, above n. 129, at 34 et seq.

134. *Ibid.*, at 58 et seq.

135. Cf. Dunkel, above n. 128, at 169 et seq.

136. On methodology, cf. Dunkel, above n. 128, at 170 et seq.; on distribution of aims of retrial cf. *ibid.*, at 184.

137. Cf. Dunkel, above n. 128, at 180. On the particularities of the penalty order process, cf. above n. 31. It must be assumed that this process, held in writing, is not particularly well suited to identifying particularities lying in the person of the defendant (such as diminished responsibility in the sense of § 20 StGB), and that many defendants are overwhelmed by the formalities of the criminal process, such that a not insignificant number of penalty orders become legally effective without there having been any real opportunities for defence by means of an objection. For an in-depth analysis of the susceptibility of the penalty order process to error from the Swiss perspective, cf. G. Gilliéron, 'Fallstricke für die Wahrheitsfindung in summarischen Verfahren' [Pitfalls for Establishment of the Truth in Summary Proceedings], in S. Barton, M. Dubelaar, R. Kölbel & M. Lindemann (eds.), 'Vom hochgemuten, voreiligen Griff nach der Wahrheit...' *Fehlurteile im Strafprozess* (2018) 59, at 68 et seq.

138. Cf. Dunkel, above n. 128, at 181.

139. *Ibid.*, at 188. According to Dunkel, one explanation for this difference could be that in proceedings before the Country Court which regularly deal with more serious allegations, the preliminary investigation and the taking of evidence in the main hearing are conducted more carefully. Perhaps, however, the decisions of the Country Court are simply met with more trust.

140. Cf. Dunkel, above n. 128, at 191.

141. Cf. Arnemann, above n. 3, at 216 et seq.

142. On methodology, *ibid.*, at 217 et seq.

143. Cf. Arnemann, above n. 3, at 270-1.

144. *Ibid.*, at 271.

145. *Ibid.*, at 276. Cf. on this issue also Frister, above n. 7, § 369.10.

146. For an overview of previous legislative initiatives to be recorded, cf. Arnemann, above n. 3, at 172 et seq.

According to the plans of the draft's authors, a no. 5 was to be added to § 362 StPO, which would then have also allowed a retrial to the disadvantage of the defendant

if new facts or evidence, which alone or in connection with evidence previously collected are liable to convict the acquitted person, and which were not available at the time of making the ruling, in which the assertions underlying the ruling were last reviewed, are brought on the grounds of new scientifically recognised, technical investigation methods.¹⁴⁷

What was primarily meant in this regard was technical progress in the area of DNA analysis.¹⁴⁸ The new opportunity for retrial to be created as a result was to remain limited to acquittals regarding accusations of murder and only homicide crimes potentially subject to a sentence of life imprisonment according to the German Code of Crimes against International Law (*Völkerstrafgesetzbuch*; VStGB),¹⁴⁹ as well as incitement to such crimes which are punished with life imprisonment.¹⁵⁰ Following a hearing of experts before the German Parliamentary Committee of Legal Affairs (*Rechtsausschuss*), the proposal was abandoned on the grounds of constitutional reservations.¹⁵¹ A draft largely identical in content, which can be traced back to Nordrhein-Westfalen, from 2010¹⁵² was also unsuccessful.

This notwithstanding, the Coalition Agreement of the German Grand Coalition for the current legislative period contains the following declaration of intent: 'We shall expand the opportunities for retrial to the disadvantage of the acquitted defendant with respect to criminal acts with no statute of limitations'.¹⁵³ The considerable media attention which certain spectacular judicial errors have gained in the recent past¹⁵⁴ may have contributed to a broad majority of German citizens being not opposed to a corresponding expansion of

opportunities for retrial to the disadvantage of the defendant.¹⁵⁵ While the Federal Minister of Justice and Consumer Protection is showing a certain reluctance to implement the project,¹⁵⁶ the Ministers of Justice of the German states have asked her at their autumn conference on 26 November 2020 to present a draft bill to extend the provisions of the Code of Criminal Procedure regarding the retrial to the disadvantage of the defendant 'to include cases of the most serious crimes where new scientific investigation methods make it predominantly probable that the perpetrator is subsequently proven guilty'.¹⁵⁷

It is to be hoped that this initiative will ultimately remain unsuccessful, as the project is being met with fundamental constitutional concerns. In fact, the suggestion of creating a general opportunity for retrial to the disadvantage of the defendant on the grounds of new facts is rightly being contested: In contrast to the narrowly restricted grounds for retrial¹⁵⁸ already standardised in basic law under § 362 nos. 1-4 StPO, this would undermine the essence of the principle of *ne bis in idem* which is granted a constitutional rank in § 103(3) GG and which has been declared sacrosanct¹⁵⁹ by the Federal Constitutional Court.¹⁶⁰ The sword of Damocles, in the form of new facts or evidence which indicate perpetration by the defendant with a degree of likelihood satisfying the requirements of the grounds for retrial, would always hang over any acquittal. Insofar as a restriction to new knowledge from DNA analysis which was not yet available at the time of the acquittals has been suggested, it has been correctly pointed out that the proposed revision would not be capable of solving the problem due to the general principle of non-retroactivity.¹⁶¹ Moreover, the advance in criminal knowledge as such, evoked in the reasoning of the failed drafts

147. BT-Drs. 16/7957, at 5.

148. Cf. *Ibid.*, at 1: 'Countless examples from previous years show that even in the case of capital offences that have not yet been resolved, it is still possible to convict the perpetrator several years later. DNA analysis in particular delivers scientifically objective results which allow one to prove the act unambiguously'. Criticism here in K. Marxen and F. Tiekmann, 'Aus Wissenschaft und Praxis: Die geplante Reform der Wiederaufnahme zuungunsten des Angeklagten' [From Theory and Practice: The Planned Reform to the Retrial to the Disadvantage of the Defendant], *Zeitschrift für Internationale Strafrechtsdogmatik* 188, at 191 (4/2008).

149. According to this, one could consider genocide (§ 6 VStGB), and in certain cases crimes against humanity (§ 7 VStGB) and war crimes against persons (§ 8 VStGB).

150. *Ibid.*

151. Cf. here S. Pabst, 'Wider die Erweiterung der Wiederaufnahme zuungunsten des Angeklagten. Eine zu Recht unterbliebene Reform' [Against the Extension of the Retrial to the Disadvantage of the Defendant. A Rightfully Unfulfilled Reform], *Zeitschrift für Internationale Strafrechtsdogmatik* 126 (2/2010).

152. BR-Drs. 222/10.

153. Ein neuer Aufbruch für Europa. Eine neue Dynamik für Deutschland. Ein neuer Zusammenhalt für unser Land. Koalitionsvertrag zwischen CDU, CSU und SPD. [A New Start for Europe. A New Dynamic for Germany. A New Cohesion for Our Country. Coalition Agreement between CDU, CSU and SPD] 19th Legislative Period, n. 5853-5854 (accessible online at <https://tinyurl.com/y66cv3on> (accessed on 26 July 2020)).

154. Cf. here Velten, above n. 2, at 387.

155. Frister and Müller, above n. 7, at 101 citing a representative survey, according to which approximately 91% of German citizens would welcome the extension being discussed.

156. 'Mordprozesse trotz Freispruch wiederaufnehmen? Regierung prüft' [Reopening Murder Trials Despite Acquittal?], Report from the *Neue Osnabrücker Zeitung* of 9 July 2020; accessible online at <https://tinyurl.com/y434ow49> (accessed on 26 July 2020).

157. Decision of the Conference of Ministers of Justice on TOP II 1: Changes in procedural law for long-standing serious crimes; accessible online at <https://tinyurl.com/y53c78un> (accessed on 7 December 2020).

158. On the compatibility of this with the *Grundgesetz*, cf. Frister, above n. 7, § 362.3 with citations.

159. Cf. BVerfGE 56, 22 (34-35).

160. In agreement, for example, Frister and Müller, above n. 7, at 103; ultimately also A. Bohn, *Die Wiederaufnahme des Strafverfahrens zuungunsten des Angeklagten vor dem Hintergrund neuer Beweise* [The Retrying of Criminal Proceedings to the Disadvantage of the Defendant in light of New Evidence] (2016), at 237; Greco, above n. 5, at 978-9; generally also Engländer and Zimmermann, above n. 34, above § 359.43 ('extremely dubious proposal under constitutional law'); Wissenschaftliche Dienste des Bundestages, Report WD 7 – 3000 – 121/16, at 12 ('weighted arguments against an ... extension'). Conversely, for compatibility of a corresponding proposal with the *Grundgesetz* cf. Kaspar, above n. 38, § 362.14-15; C. Zehetgruber, 'Ist eine Erweiterung der Wiederaufnahmegründe zu Ungunsten des Angeklagten möglich?' [Is an Extension of the Grounds for Retrial to the Disadvantage of the Defendant Possible?], *Juristische Rundschau* 157, at 166 (2020).

161. Cf. Frister and Müller, above n. 7, at 103 under reference to Pabst, above n. 151, at 130.

of 2008 and 2010, is not in itself a new development; rather it has its roots back in the 19th century and has thus certainly been taken into account by the original legislator.¹⁶² Furthermore, it is rightly pointed out that even a positive DNA analysis result in and of itself is not evidence of the guilt of the defendant, but is rather evidence that he had contact with the trace carrier.¹⁶³ Ultimately, the restriction to certain, particularly serious offences stipulated in the failed drafts is also questionable since one may doubt that such a restriction would last long if, for example, serious suspicions would be raised regarding acquittals in grave cases of child abuse or series of violent robberies.¹⁶⁴ It should be remembered that the last undermining of the principle of *ne bis in idem* occurred during the time of National Socialism¹⁶⁵ and that § 103(3) was added to the *Grundgesetz* specifically in the light of these experiences.¹⁶⁶ It is hoped that the German government will reflect on these historical connections and distance itself from the proposal.

6 Conclusion

In conclusion, it is clear that one of the most urgent desiderata with respect to the law and practice of the retrial process in Germany is the attainment of up-to-date and meaningful empirical knowledge. However, there is cause for hope that the joint interdisciplinary project mentioned above (Section 4) will make a significant contribution to filling existing gaps in knowledge. Moreover, lesser reform issues have been formulated as part of the analysis of the existing legal framework, for example, the requirements to expand the scope of application of § 359 no. 3 StPO to any form of conscious violation of public duty¹⁶⁷ and to extend § 359 no. 6 StPO to sentences which are based on a legal norm or legal opinion declared to be in contravention of the Convention in another case.¹⁶⁸ However, the wish for the retrial in favour of the defendant to finally develop into the effective quality assurance mechanism which the historical legislator had in mind¹⁶⁹ and the functionality of which lies not least of all in the interest of the general

public can ultimately be fulfilled by the judiciary alone – through a more generous interpretation of § 359 et seq. StPO bound to the basic legal concept of the right to retrial.¹⁷⁰

162. Cf. Frister and Müller, above n. 7, at 103 under reference to the dactyloscopy first developed in the 19th century; also Marxen and Tiemann, above n. 148, at 191.

163. Cf. Frister and Müller, above n. 7, at 103.

164. On the questionability of the criterion of offence, cf. the Report of the Wissenschaftliche Dienste des Bundestages, above n. 160, at 14; and Marxen and Tiemann, above n. 148, at 193.

165. Details on this Bayer, above n. 3, at 113 et seq.

166. Cf. H. Schulze-Fielitz, in H. Dreier (ed.), *Grundgesetz-Kommentar* [Grundgesetz Commentary] (3rd edn, 2018), § 103(3) GG n. 5.

167. Above under fn. 49.

168. Above under fn. 75.

169. Cf. here Marxen, above n. 75, at 325-4, who points out that historically the fact that rulings of County Courts (*Landgerichte*), which are regularly based on serious accusations, other than rulings of District Courts (*Amtsgerichte*) are not subject to an appeal on points of fact and law (*Berufung*, § 312 et seq. StPO), was justified by the possibility of a retrial. See here also Eschelbach, Geipel, Hettinger, Meller & Wille, above n. 87, at 240-41.

170. In this sense also Frister and Müller, above n. 7, at 104.

Exoneration in Sweden

Is It Not about Time to Reform the Swedish Model?

Dennis Martinsson*

Abstract

This article reviews exoneration in Sweden, with a focus on the procedure of applying for exoneration. First, it highlights some core features of Swedish criminal procedural law, necessary to understand exoneration in the Swedish context. Secondly, it outlines the possibilities in Swedish law to apply for exoneration, both in favour of a convicted person and to the disadvantage of a previously acquitted defendant. Thirdly, it identifies some challenges with the current Swedish model of administering applications for exoneration. Fourthly, it argues that the current system should be reformed by introducing into Swedish law a review committee that administers applications for exoneration.

Keywords: wrongful convictions, extraordinary legal remedy, exoneration, exoneration in Sweden

1 Introduction

Sweden is renowned for a legal system that respects the rule of law.¹ This respect is visible in some of the core characteristics of the Swedish criminal justice system. As with all the other Scandinavian countries, Sweden does not allow plea bargaining, and the state provides a public defence counsel whose costs are covered by state funds.² The defence counsel is also appointed at a very early stage in the pre-trial investigation and successively

receives information concerning the case from the prosecutor. Other signs of the respect for the rule of law are that the prosecutor should indict a person only if there are sufficient reasons to believe that he or she committed the crime and if the assessment is that an indictment will result in a guilty verdict. Further, the prosecutor has the burden of proof and a conviction requires that the evidence prove beyond reasonable doubt that the defendant committed the crime. Another feature is that Swedish law offers rather extensive possibilities for a defendant who has been convicted by a district court to appeal against the judgment.³ Thus, Sweden's several legal safeguards ensure that criminal law cases are treated fairly and justly.

Yet in recent years several cases of wrongful conviction have been exposed in Sweden. A common denominator in these cases is that the wrongful convictions have been disclosed by journalists who have spent – at least regarding some cases – years researching and scrutinising these cases.⁴ Eventually, applications for exoneration

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1. Sweden, for example, often ranks well internationally in regard to the rule of law, see, e.g., The World Justice Project Rule of Law Index 2020, available at https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf (last visited 17 February 2021), which ranks Sweden among the top four countries in the world.
2. The strong main rule is that the state will cover the costs of the public defence counsel (*Swedish Code of Judicial Procedure*, Chapter 21 Section 10). Theoretically, if the defendant is convicted, he or she shall reimburse the state for the public defence counsel's litigation costs. The reimbursement is limited to litigation costs listed in the *Swedish Code of Judicial Procedure*, Chapter 31 Section 1. A convicted person might also reimburse the costs of the injured party's counsel (*målsägandebiträde*) and the special advocate for children (*särskild företrädare för barn*). However, in practice, the defendant is not required to pay more of the defence costs than he or she would have to pay as the legal aid charge, if legal aid had been granted according to the Legal Aid Act. The legal aid charge reimbursement will be decided according to the defendant's economic situation. If the defendant lacks economic resources, the public defence counsel's costs will be covered entirely by the state. The defendant can, of course, hire a private defence counsel, in which case the defendant covers the costs him- or herself.

3. Three instances in Sweden decide on criminal cases: the district court, the court of appeal and the Supreme Court. There are forty-eight district courts and six courts of appeal. From the *Swedish Code of Judicial Procedure*, Chapter 51, it follows that Swedish law offers rather extensive possibilities for the defendant to appeal against a pronounced judgment by a district court. As a main rule, a review permit is not needed here. However, in order to bring a case to the Supreme Court, a review permit is needed, which is approved only if the case is "of importance for the guidance of the application of law" or "if there are extraordinary reasons for such a determination, such as that grounds exist for relief for substantive defects or that a grave procedural error has occurred or that the result in the court of appeal is obviously due to gross oversight or to gross mistake" (*Swedish Code of Judicial Procedure*, Chapter 54 Section 10).
4. The most (in)famous case is Thomas Quick, who later changed his name to Sture Bergwall. During the 1990s he confessed to numerous murders in Sweden and Norway and was convicted of eight murders. But he was later found not guilty of any of the murders to which he had confessed. The journalist Hannes Råstam showed in three SVT documentaries, screened in 2008 and 2009, that the confessions were false and a product of maltreatment in the psychiatric ward where Quick was being held. The documentaries also showed that Quick had gained information from the prosecutor and the police, enabling him to provide details in his confessions. He received information directly from the people involved in the pre-trial investigation. Therefore, the evidence presented to the courts in each case was false. The Quick case prompted a general debate and discussion among jurists in Sweden. A government inquiry scrutinised each of the cases, see SOU 2015:52, with a summary in English at 23-8. Another wrongful conviction disclosed after investigation by a journalist is the case of Samir Sabri, who at the age of fifteen confessed to the murder of his stepmother. He was convicted of this crime. In an investigating podcast entitled #Fallet, broadcast in 2015, journalist Anders Johansson found that Samir could not possibly have committed the murder and that he had confessed so that his father would not serve time in prison. Samir Sabri's application for

were filed in these cases, all of which were approved. The result was a reopening, ending in acquittal of persons who had previously been convicted.

Swedish law recognises two other legal remedies besides exoneration⁵ for a post-conviction revision: restoration of expired time and grave procedural error. However, this article focuses solely on exoneration.⁶ This is because the legal grounds serve different purposes; exoneration serves to correct judgments that are materially incorrect, while the function of grave procedural error is to correct judgments that are procedurally incorrect. The purpose of restoration of expired time is to regain an applicant's lost right so that he or she can use an ordinary legal remedy, for example the possibility to appeal. Thus, these three extraordinary legal remedies have very little in common. Another reason for excluding restoration of expired time and grave procedural error is that they presuppose that an application has been filed within certain time frames, thereby limiting the possibility to invoke these legal remedies. Also, applications for exoneration are far more common in criminal law cases than are the other two extraordinary legal remedies.

Moreover, scholarly publications on exoneration in Sweden are rather scarce, and research on exoneration in Swedish criminal procedural law is in the nature of a blank spot.⁷ Until recently, the main scholarly work consisted of a PhD dissertation published in 1959.⁸ However, an ongoing PhD project in criminology⁹ and an ongoing PhD project in procedural law focus on exoneration.¹⁰ The subject was also recently analysed in a published PhD thesis in jurisprudence, which focused

mainly on the concept of confirmation bias.¹¹ Besides the two published scholarly theses, there is literature published by legal academics that provide an overview of the Swedish regulations on exoneration. In addition, the applicable Swedish provisions on exoneration have remained practically unchanged since 1940. The lack of legal research and the lack of legal reform provide yet another reason to focus on exoneration.

The main purpose of this article is twofold: to review the legal framework for exoneration in Sweden and to discuss whether there is a need for a reform of the current Swedish procedure for applications for exoneration. The review shows that an application for exoneration in Sweden can be based on several legal grounds and that it can be filed either in favour of a convicted person or to the disadvantage of a defendant who has previously been acquitted. In the latter case, a time frame limits the possibilities for filing an application. Further, some challenges regarding the current Swedish model of handling applications for exoneration are identified. Thus, the review suggests that Sweden should start offering official and annual statistics on the number of applications filed and that Sweden should consider implementing a different procedure for reviewing applications by introducing a review committee.

2 Legal Framework for Revision When Invoking Exoneration

2.1 Basic Features to Understand Exoneration in the Swedish Context

2.1.1 *Balancing the Principle of Firmness and the Principle of Truth*

In Swedish law exoneration is categorised as an extraordinary legal remedy,¹² meaning that it can be invoked only if a court has pronounced a legally binding judgment.¹³ Thus, exoneration is relevant only when the 'ordinary' legal remedies – i.e. the possibility to appeal – have been exhausted. Exoneration as a legal ground for post-conviction revision has existed in Swedish law since (at least) the seventeenth century.¹⁴ The current

exoneration was approved, resulting in a reopening of the case. He was eventually found not guilty.

5. Swedish law also contains a similar, but separate, provision for exoneration in civil law cases, see *Swedish Code of Judicial Procedure*, Chapter 58 Section 1. The present review focuses solely on the provision for exoneration in criminal law cases.
6. 'Exoneration' is the translation of the Swedish word *resning*, which is sometimes translated as 'new trial', 'review' or 'relief for a substantive defect'. The Swedish word *resningsansökan*, i.e. the application for exoneration, is sometimes also translated as 'petition for a new trial' or 'application for a substantive defect'. For the purposes of this article and for consistency, the terms 'exoneration' and 'application for exoneration' will be used. However, using 'exoneration' is not unproblematic. As will be seen later, Swedish law allows an application for exoneration to the benefit of a convicted person and to the disadvantage of a previously acquitted defendant. It is also possible that an application concerns only the sentence and not the question of whether the defendant is guilty of the crime(s) committed. Thus, the concept of exoneration in Sweden is wider than a petition for a new trial to the benefit of the defendant. Using a more complicated phrasing than 'exoneration', when referring to all aspects concerning the procedure of applying for exoneration, would indeed be rather ungainly.
7. P.O. Tråskman, 'Rätten till riktig resning – En fråga försummad av forskningen?', 92 *Nordisk Tidsskrift for Kriminalvidenskab* 249 (2005).
8. T. Cars, *Om resning i rättegångsmål* (1959).
9. Project conducted by Sara Hellqvist, Stockholm University. As a part, she has published an analysis of data on cases of exoneration collected during one year, see S. Hellqvist, 'The Narrow Road to Exoneration – the Incidence, Characteristics and Outcomes of Wrongful Conviction Claims in Sweden over a One-Year Period', 5 *Bergen Journal of Criminal Law and Criminal Justice* 131 (2017).
10. Project conducted by Christina Kjellson, Uppsala University.

11. Project conducted by Moa Lidén, Uppsala University, who defended her PhD thesis in 2018. As a part, she published a co-written article on confirmation bias, where the matter of exoneration was discussed to some extent; see M. Lidén, M. Gräns & P. Juslin, 'Self-Correction of Wrongful Convictions: Is There a "System-level" Confirmation Bias in the Swedish Legal System's Appeal Procedure for Criminal Cases? Part II', 17 *Law, Probability and Risk* 337 (2018).
12. This follows from the title of the *Swedish Code of Judicial Procedure*, Chapter 58: "Extraordinary remedies", in which the rules of exoneration are stated.
13. According to Swedish criminal procedural law, this simply means that the judgment can no longer be appealed against; see the *Swedish Code of Judicial Procedure*, Chapter 30 Section 9 para. 1.
14. For a thorough overview of the historical development of the extraordinary legal remedies (including exoneration) in Sweden, see Cars, above n. 8, at 48-93. Note, generally, that the judicial system in Sweden – like

provisions regulating exoneration entered into force in 1940. Despite minor changes, these provisions have remained largely unchanged since then.¹⁵

From a normative point of view, an application for exoneration is granted extremely rarely. The *rationale* behind this position is the principle of firmness,¹⁶ according to which a legally binding judgment by a court in a criminal law case should not be reconsidered. This also ensures that the legal system is reliable in the sense that a case will not be brought before a court again. One might claim that the principle of firmness is an expression of formal fairness. However, this contrasts with the principle of truth,¹⁷ which means that it is important that a judgment in a criminal law case is correct from the perspective of material fairness. According to this principle, the law must offer a possibility to quash wrongful convictions and a possibility for a review of wrongful convictions; otherwise, the public might lose their trust in the legal system. Therefore, the design of the regulation of exoneration needs to find the right balance between the principle of firmness and the principle of truth.¹⁸ In Swedish criminal procedural law, the rules on exoneration represent a compromise between these two principles since they ensure that a formally correct final verdict might (in rare cases) be reopened in order to secure material fairness.¹⁹

To understand the legal framework on exoneration in Swedish law, note that an application for exoneration is viewed as a petition for reopening a case. As a main rule, if an application is approved, a new trial should be held. At the succeeding trial, the question of whether the defendant is guilty is tried anew.

2.1.2 The Concept of the Binding Effect of a Judgment and Its Relation to Exoneration

In Swedish criminal procedural law, *res judicata* (the subject matter has already been adjudicated) and *ne bis in idem* (prohibition against trying someone twice for the same act) are viewed as two separate grounds for procedural hindrance. An important expression of this is the

concept of the binding effect of a judgment, meaning that an adjudicated case cannot be tried anew.²⁰ Thus, the binding effect of a judgment hinders a new trial. However, if a court approves an application for exoneration, it quashes the binding effect in the sense that the previous judgment no longer hinders a new trial. Note that an approval does not quash the original judgment. The concept of the binding effect of a judgment has been discussed mostly in the literature.²¹ The discussion has focused mainly on the following criteria: the course of events, the time and place of the act and against who or what the act was committed. It has been suggested that the criteria that constitute 'the (same) act' in the *Swedish Code of Judicial Procedure*, Chapter 30 Section 9 para. 1, needs to coincide with the provision on exonera-

20. See the *Swedish Code of Judicial Procedure*, Chapter 30 Section 9 para. 1: "Once the time for ordinary means of appeal has expired, the issue of the defendant's criminal liability for the act which was determined by the judgment may not be taken up again for adjudication." It should be noted that the concept of the binding effect of a judgment is wider than the indictment, since it, for example, includes elements of the crime that were not tried and includes cases where the prosecutor decides to circumscribe the indictment; see the *travaux préparatoires* SOU 1938:44, at 472; K. Olivecrona, *Rättegången i brottmål enligt RB* (1968), at 159-60; T. Bylund, 'Kioskinbrottet och rättskraftsspöket. En strip-tease i sex moment', in A. Agell, R. Boman & N. Jareborg (eds.), *Process och exekution. Vänbok till Robert Boman* (1990) 41, at 46-53. Further, the concept of the binding effect is also relevant in relation to the possibility for the prosecutor to, during the ordinary proceeding, file a prosecution adjustment (*justering av åtal*) respectively file an amendment of the indictment (*ändring av åtal*). To put it simply, Swedish criminal procedural law allows the prosecutor to rather easily file a successful prosecution adjustment (*Swedish Code of Judicial Procedure*, Chapter 45 Section 5 para. 3) but regulates the possibility for an amendment of the indictment restrictively (*Swedish Code of Judicial Procedure*, Chapter 45 Section 5 para. 1), since the main rule is that an amendment is not allowed after the prosecutor has indicted someone. This means that circumstances that could have been included in the (original) trial by filing an amendment of the indictment, will be covered by the binding effect of the (original) judgment. Thus, it hinders a second trial. See further on this matter, e.g., P.O. Ekelöf, H. Edeltam & M. Pauli, *Rättegång. Andra häftet* (2015), at 167-70. Note that the *Swedish Code of Judicial Procedure*, Chapter 30 Section 9 para. 1, needs to be interpreted in line with European norms (i.e. *res judicata* and *ne bis in idem*) that follow from, e.g., the practice of the EU Court of Justice and the European Court of Human Rights. However, considering that the concept of the binding effect of a judgment is comprehensive, it is difficult to imagine that the application of the Swedish provision in this regard would infringe the European norms. For an overview of the Swedish concept of binding effect in relation to European norms, see, e.g., P.O. Ekelöf, S. Andersson, H. Bellander, T. Bylund, H. Edeltam & M. Pauli, *Rättegång. Tredje häftet* (2018), at 203-4, 218-21. See also Supreme Court case NJA 2007 s. 557, where the Court referred to EU case law when it determined the binding effect in a case of drug offence.

21. The concept of the binding effect is rather complex, as it raises questions about the interpretation of several provisions in the *Swedish Code of Judicial Procedure* that uses the same phrasing. One cannot simply understand the meaning of the concept solely from one provision. The matter is discussed further in, e.g., Ekelöf *et al.* (2018), above n. 20, at 203-21; P. Fitger *et al.*, *Rättegångsbalken* (4 December 2019, Norstedts Juridik), commentary to the Swedish Criminal Code on Judicial Procedure, Chapter 30 Section 9; L. Welamson, *Om brottmålsdomens rättskraft* (1949); Olivecrona, above n. 20, at 145-74; T. Andersson, 'Brottmålsdomens rättskraft', in B. Lindell, H. Eklund, P. Asp & T. Andersson (eds.), *Straffprocessen* (2005) 267, at 267-75; T. Andersson, 'Straffprocessuell rättskraft, särskilt i narkotikamål: Rättskraftsspöket går igen!', in B. Lindell and T. Andersson (eds.), *Vänbok till Torleif Bylund* (2003) 9, at 9-51; Bylund, above n. 20, at 41-69.

that in many other European countries – was reformed in the seventeenth century to include more modern approaches to the judiciary. One example of the modernisation was the creation of a more distinct division of different court levels. This also created a need for provisions regulating the possibilities for a post-conviction revision. Previously, Swedish law offered other extraordinary legal remedies that were similar to the present-day provisions on exoneration.

15. See the *travaux préparatoires* SOU 1926:32, at 231-44; SOU 1926:33, at 135-41; SOU 1938:44, at 65-75, 572-82; prop. 1939:307; NJA II 1940 s. 147-86; NJA II 1943 s. 725-39. Some minor changes were made in 1975, see the *travaux préparatoires*: prop. 1975:78, JuU 1975:22; NJA II 1975 s. 671, and in 1985, see the *travaux préparatoires*: prop. 1987/88:23, JuU 1987/88:15; NJA II 1987 s. 676. See also, e.g., Supreme Court case NJA 2001 s. 687, at 689, where the Court stated that the provisions regarding exoneration have remained unchanged since 1940.

16. In Swedish: *orubblighetsprincipen*.

17. In Swedish: *sanningsprincipen*.

18. On the matter of balancing these two principles in both the legislature and the judiciary, see Cars, above n. 8, at 173-6.

19. Cf. Supreme Court case NJA 1998 s. 321, at 322. Note that the balance between these two principles differs, depending on whether an application for exoneration is filed in favour of a convicted person or to the disadvantage of a defendant who has previously been acquitted.

tion to the disadvantage of the defendant.²² Otherwise, the concept of the binding effect would collide with the *rationale* of the provision on exoneration to the disadvantage of the defendant.²³ Consequently, this reasoning suggests that the concept of the binding effect indirectly demands that the prosecutor have a solid case before indicting someone. If it were possible for the prosecutor to ‘save’ evidence to a later trial, it would create a risk that the pre-trial investigation is not conducted as thoroughly as possible.²⁴ The prosecutor should therefore include alternative or cumulative elements of the crime when indicting someone.²⁵

In conclusion, the effect of *res judicata* extends beyond the indictment in the original trial. Additionally, the concept of the binding effect of a judgment has direct implications for exoneration. Since this concept is comprehensive in Swedish criminal procedural law, it significantly narrows the possibility for a court to approve an application for exoneration – particularly if the application is filed to the disadvantage of a previously acquitted defendant. In that case, the concept of the binding effect could be viewed as a (strong) legal safeguard for the individual, protecting him or her from a new trial.²⁶

2.2 Grounds for Revision When Invoking Exoneration

Swedish law offers two provisions – applicable in two different situations – for a post-conviction revision in criminal law cases when the applicant invokes exoneration.²⁷ An application for exoneration can be filed either in favour of a convicted person (*Swedish Code of Judicial Procedure*, Chapter 58 Section 2) or to the disadvantage of a defendant who has previously been acquitted (*Swedish Code of Judicial Procedure*, Chapter 58 Section 3). These two main categories provide various sub-categories of legal grounds for reopening the case. Since the prerequisites for these two main categories differ to some extent, they are presented separately.

When an application for exoneration is filed to the benefit of a previously convicted person, Swedish law recognises five legal grounds. They are regulated in the *Swedish Code of Judicial Procedure*, Chapter 58 Section 2, which states:

After a judgment in a criminal case has entered into final force, relief for a substantive defect may be granted for the benefit of the defendant:

1. if any member of the court, an officer employed at the court, or the prosecutor, with respect to the case, is guilty of criminal conduct or neglect of official duty, or if an attorney, legal representative, or defence counsel is guilty of an offence with regard to the case, and the offence or neglect of duty can be assumed to have affected the outcome of the case,
2. if any legally qualified judge or the prosecutor has been disqualified and it is not plain that the disqualification has been without importance as to the outcome of the case,
3. if a written document presented as evidence was forged or a witness, expert, or interpreter gave false testimony and the document or statement can be assumed to have affected the outcome,
4. if a circumstance or item of evidence that was not presented previously is invoked and the its [sic!] presentation probably would have led to the defendant’s acquittal or that the offence would have been linked to a sanction provision milder than that applied, or if in view of the new matter and other circumstances, extraordinary reasons warrant a new trial on the issue whether the defendant committed the offence for which he was sentenced, or
5. if the application of law forming the basis of the judgment is manifestly inconsistent with a statutory provision.²⁸

The most interesting of these legal grounds is the one concerning new evidence or new circumstances, particularly since it is presumably the most commonly invoked legal ground when applying for exoneration.²⁹ Therefore, the present focus is on exoneration due to new evidence or new circumstances. This legal ground is usually divided into the main rule and the supplemental rule.

According to the main rule, an application for exoneration should be granted when the applicant presents a new circumstance or new evidence that was not invoked at the previous trial and that would probably have resulted in either an acquittal or a milder sentence. By new circumstance or new evidence is meant any fact

22. This idea of coinciding the meaning of ‘the (same) act’ in the *Swedish Code of Judicial Procedure*, Chapter 30 Section 9 para. 1, and the rule on exoneration to the disadvantage of a previously acquitted defendant was first presented by Lars Welamson; see Welamson, above n. 21, at 135-51. See also Ekelöf *et al.* (2018), above n. 20, at 206, 213-17; Andersson (2005), above n. 21, at 269-70. On the possibilities to file an application to the disadvantage of a previously acquitted defendant, see Section 2.2.

23. Welamson, above n. 21, at 139.

24. Welamson, above n. 21, at 54-55, 144-45, 262. See also Andersson (2005), above n. 21, at 270; Ekelöf *et al.* (2018), above n. 20, at 206.

25. See, e.g., K. Olivecrona, ‘Några rättsfall om ändring av åtal och res iudicata i brottmål’, 42 *Svensk juristtidning*, 1, at 6 (1957).

26. Beside the argument of providing a legal safeguard, economic reasons also motivate this position; see, e.g., the *travaux préparatoires*: SOU 1938:44, at 65.

27. The Swedish Constitution states that exoneration is a legal remedy that ensures a possibility for a post-conviction revision; see *Instrument of Government*, Chapter 11 Section 13.

28. This is the English translation offered by the Swedish Government, see Ds 1998:65, at 336, available at www.regeringen.se/49bb67/contentassets/5503f73d320b4de5bb521dd7ee07500a/the-swedish-code-of-judicial-procedure (last visited 17 February 2021).

29. This is often stated in Swedish criminal procedural literature; see, e.g., L. Welamson and J. Munck, *Processen i hovrätt och i Högsta domstolen. Rättegång VI* (2016), at 193; Fitger *et al.*, above n. 21, commentary to the Swedish Code on Judicial Procedure, Chapter 58 Section 2; H. Eklund, ‘Processen i hovrätt och i Högsta domstolen’, in B. Lindell, H. Eklund, P. Asp & T. Andersson (eds.), *Straffprocessen* (2005) 279, at 338; P.O. Ekelöf and H. Edlestam, *Rättsmedlen* (2008), at 192. See also the *travaux préparatoires*, prop. 1939:307, at 19; SOU 1938:44, at 74, which emphasises that the most common legal ground for exoneration is assumed to be new circumstances or new evidence.

that might affect a court's assessment of the presented evidence.³⁰ Thus, both dispositive fact and evidentiary fact can be invoked when filing an application.³¹ There might also be a peripheral circumstance that weakens the reliability of one fact in a chain of evidence.³²

The evidence presented must be completely new, in the sense that it was not presented before a court during the main hearing.³³ Consequently, it is, for example, still considered a new circumstance or new evidence if it was present in the pre-trial investigation but not invoked at the main hearing.³⁴ This is also the case if the new circumstance or new evidence has been invoked in an appeal to a higher court but the appeal was not granted;³⁵ or has been invoked in a previous application for exoneration, which was denied.³⁶

The requirement that the new circumstance or new evidence would probably have resulted in either an acquittal or a milder sentence evidently opens the way for hypothetical reasoning.³⁷ When deciding whether the new circumstance or new evidence would 'probably' have resulted in a more favourable outcome for the defendant, the court should *not* re-examine the evidence. Instead, the court that decides whether an application for exoneration should be granted needs to assess what the outcome of the previous trial would have been if the evidence had been presented then. Thus, the assessment should – theoretically – focus on how the original court would have reasoned if the new circumstance or evidence had been presented before that court. However, the new circumstance or evidence should not be viewed as isolated from what had previously been presented but must be considered in the light of the original evidence. The new evidence must be of such weight that it questions the previous verdict. The matter of what weight the new circumstance or evidence

should be given is difficult to answer, since this depends on the circumstances of the individual case. Given these difficulties, one has to rely on guidelines. Generally, the stronger and more reliable the original evidence was, the greater the strength of the new circumstance or evidence must be for the court to grant the application. Conversely, the less convincing the original evidence was, the less weight the new circumstance and evidence needs to have.³⁸ The latter is obviously questionable, because if the evidence in the original trial that resulted in a conviction was less convincing, the court should probably not have been able to find the defendant guilty. The general statement above was made in the *travaux préparatoires* and is not developed with examples. Potentially, this could occur if the original trial were held many decades ago, when the courts applied a different standard for assessing the evidence. Another possible example could be a conviction that was based only on circumstantial evidence. In these situations, it is understandable that, comparatively, the new circumstance or evidence underlying an application for exoneration can be of lesser weight.

An incorrect assessment in the original trial of the (original) evidence is no reason for granting an application for exoneration.³⁹ Additionally, it is not enough that mitigating circumstances are present or that the new circumstance or new evidence would result in a milder sanction within the same range of punishment as that previously applied by the original court.⁴⁰

The supplement rule enables the court to grant an application for exoneration in cases where the requirements of the main rule are not met, but where, considering what the applicant is invoking and other circumstances regarding the case, there are extraordinary reasons to reopen the case. The Swedish Supreme Court has repeatedly stated that the supplement rule should be applied restrictively.⁴¹ That opinion is also expressed in the literature.⁴² However, some authors emphasise that it is difficult to draw general conclusions from the Supreme Court cases regarding the supplement rule but that it is possible to conclude that it follows from the case law of the Supreme Court (before 1990) that the supplement rule is not always applied as strictly as was originally intended.⁴³

An application based on the supplement rule may be granted when the circumstances concerning the case are

30. See the *travaux préparatoires*: prop. 1939:307, at 10, 19, 28; SOU 1938:44, at 74.

31. See, e.g., Cars, above n. 8, at 152-69; Ekelöf and Edlestam, above n. 29, at 192; Welamson and Munck, above n. 29, at 199-200; B. Bengtsson, 'Resning i brottmål vid synnerliga skäl', in A. Agell, R. Boman & N. Jareborg (eds.), *Process och exekution. Vänbok till Robert Boman* (1990) 1, at 6-7.

32. See the *travaux préparatoires*: SOU 1938:44, at 74. See also Bengtsson, above n. 31, at 6.

33. See the *travaux préparatoires*: SOU 1938:44, at 573.

34. *Ibid.*, at 573, 575.

35. See, e.g., Supreme Court case NJA 1998 s. 148. Cf. Supreme Court, decision, 29 December 2016, reference number Ö 5257-15; Supreme Court, decision, 21 March 2018, reference number Ö 4066-17, where the Supreme Court in each case granted the application for exoneration. In these two cases, previous applications had been filed but not granted. The reason that the applicants were able to successfully file a new application was a combination of new circumstances/evidence and of what had been referred to in the previous applications. See further, in Section 3.2.

36. See, e.g., Cars, above n. 8, at 171. See, however, the Esa Teittinen case and the Kaj Linna case, presented in Section 3.2. In the Esa Teittinen case, evidence presented in the first application for exoneration was not considered new in the second (and successful) application, while in the Kaj Linna case it seems that the two previous unsuccessful applications for exoneration had some bearing when the Supreme Court granted his third application.

37. See, e.g., Welamson and Munck, above n. 29, at 205; Bengtsson, above n. 31, at 2.

38. These – perhaps obvious – starting points were stated in the *travaux préparatoires* when the current provision was introduced into Swedish law; see prop 1939:307, at 19, 28; SOU 1938:44, at 74.

39. See, e.g., Welamson and Munck, above n. 29, at 205.

40. See the *travaux préparatoires* prop. 1939:307, at 13; SOU 1938:44, at 575. See also Ekelöf and Edlestam, above n. 29, at 192; Fitger *et al.*, above n. 21, commentary to the *Swedish Code on Judicial Procedure*, Chapter 58 Section 2.

41. See, inter alia, the following Supreme Court cases: Supreme Court, decision, 27 December 2019, reference number Ö 5485-19, para. 12; NJA 2018 s. 163, para. 25; NJA 1992 s. 625, at 626.

42. See, e.g., Cars, above n. 8, at 224-6; Bengtsson, above n. 31, at 4. See also Welamson and Munck, above n. 29, at 207-8.

43. Bengtsson, above n. 31, at 16. Note that Bengtsson's article focused only on cases from the Swedish Supreme Court, which until 1988 was the only court that decided on applications for exoneration.

not enough to conclude that they would probably have led to a different assessment concerning whether the defendant was guilty but are still enough to cause doubt about the outcome of the previous judgment. That might be the case if considerable dissenting opinions existed between, for example, the district court and the court of appeal.⁴⁴ However, it is not enough to grant an application based on this rule if a case has received a great deal of media attention or scrutiny.⁴⁵

The requirement that the supplement rule should be applied when there are ‘extraordinary reasons’ to reopen the case means that the defendant must have been found guilty of a grave crime.⁴⁶ No guideline is available to clarify – in this context – what is meant by a grave crime. However, in extremely rare cases an application for exoneration might be granted even if the defendant had received a rather mild sentence.⁴⁷

If an application is filed to the disadvantage of a defendant who has previously been acquitted, the *Swedish Code of Judicial Procedure*, Chapter 58 Section 3, stipulates the following alternative requirements:

After a judgment in a criminal case has entered into final force, relief for a substantive defect may be granted to the detriment of the defendant:

1. if any such condition of the kind referred to in Section 2, clause 1 or 3, existed and this can be assumed to have contributed to the defendant’s acquittal or that the offence was linked to a sanction provision substantially milder than the one that should have been applied, or
2. if the offence is punishable by imprisonment for a term exceeding one year and some circumstance or item of evidence that was not presented previously is invoked and its presentation probably would have led to conviction of the defendant for the offence or that the offence would have been linked with a sanction provision substantially more severe than the one applied.

Relief for a substantive defect may not be granted on the basis stated in clause 2, unless the party shows probable cause that he was unable to invoke the circumstance or item of evidence in the court that pronounced the judgment or on appeal therefrom or he otherwise had a valid excuse for failing to do so.⁴⁸

44. See the *travaux préparatoires*: prop. 1939:307, at 28; SOU 1938:44, at 75, 575. However, it has been questioned whether it would be of any significance. It might, however, illustrate that the case raised difficult questions regarding the evidence, see Bengtsson, above n. 31, at 14.

45. See, e.g., Bengtsson, above n. 31, at 15–16. Note, however, the mention above in Section 1, that recent applications for exoneration have been granted in several cases following disclosure by journalists. Thus, Bengtsson’s 1990 claim may have less bearing than then. Nowadays, it seems that that the work of a journalist is often needed for enabling a previously convicted person to successfully apply for exoneration.

46. See the *travaux préparatoires*: prop. 1939:307, at 28; SOU 1938:44, at 575.

47. See, e.g., the Supreme Court case NJA 1980 s. 550.

48. This is the English translation offered by the Swedish government; see Ds 1998:65, at 336–7, available at www.regeringen.se/49bb67/contentassets/5503f73d320b4de5bb521dd7ee07500a/the-swedish-code-of-judicial-procedure (last visited 17 February 2021).

It is highly unusual for an application for exoneration to be based on this provision, and when an application is filed, the most common legal basis is new evidence or new circumstances.⁴⁹ Although this provision states a possibility to apply for exoneration to the disadvantage of an acquitted defendant, the criteria stated in the provision limit the possibility to do so. Generally, the requirements for granting an application based on the provision are stricter than those for applying to the benefit of the defendant.⁵⁰

In addition, an application that is based on this provision must be filed within one year after the situation underlying the application became known to the applicant (*Swedish Code of Judicial Procedure*, Chapter 58 Section 4 para. 2). The Supreme Court has stated that the time limit of one year should be counted in relation to every item of new evidence or new circumstance.⁵¹

Thus, the time frame and other requirements – for example, that a conviction should have resulted in a substantially more severe sanction and the limitation to rather severe crimes – imply that applications for exoneration to the disadvantage of a previously acquitted defendant are regulated rather strictly.

However, a proposal published in 2018 in the Ministry Publications Series suggests that the possibilities to apply for exoneration to the disadvantage of a previously indicted person should be extended. The proposal suggests the introduction of a new legal ground into Swedish law, enabling an application to the disadvantage if new evidence shows that the previously indicted person was older than what was claimed in the original trial, thus resulting in a reduced sentence owing to the age of the convicted. A corresponding new legal remedy is also proposed in relation to an application for exoneration in favour of a previously convicted person; if new evidence shows that the defendant was actually younger than assumed at the original trial.⁵² The proposal has been

49. See, e.g., Ekelöf and Edelstam, above n. 29, at 187–8.

50. See, e.g., the *travaux préparatoires* prop. 1939:307, at 13, 20; SOU 1938:44, at 74–5, 575; the following Supreme Court cases: NJA 1998 s. 321; NJA 2001 s. 687; NJA 2016 s. 851; NJA 2013 s. 931, at 932–3, paras. 14, 22; NJA 2020 s. 518, para. 23 and Supreme Court, decision, 17 December 2020, reference number Ö 936-20, para. 15. This position is also expressed in the Swedish criminal procedural literature; see, e.g., Cars, above n. 8, at 215–16.

51. See, e.g., Supreme Court case NJA 1998 s. 321. See, however, Supreme Court case NJA 2013 s. 931, where witness evidence known to the prosecutor more than a year before an application to the disadvantage of a previously acquitted defendant was filed. However, the Supreme Court stated that the witness evidence had come in another light, particularly since it brought new insights to the finding of the (new) main evidence, i.e. the body of the victim had been found. Since the prosecutor filed the application within one year from this discovery, the witness evidence was considered new. The Supreme Court has recently stated that, in a case concerning new DNA analysis, it is necessary to interpret the one-year limit somewhat differently. The Court stated that this time period begins when the prosecutor gets the result from the new DNA analysis; see Supreme Court, decision, 17 December 2020, reference number Ö 936-20, paras. 8–9.

52. See Ds 2018:19. Note that the age of criminal responsibility is fifteen in Sweden (*Swedish Penal Code*, Chapter 1 Section 6) and that Sweden applies a reduced sentence for juveniles, available for offenders who at the time of the crime were fifteen years old but under twenty-one years old (*Swedish Penal Code*, Chapter 29 Section 7 para. 1). No offender

criticised on the grounds that it is not necessary since it is already covered by the current provision.⁵³ Further, an application for exoneration to the disadvantage is designed for cases where someone in the original trial was acquitted; the proposed amendment is based only on adjusting the sentencing, which diverges from the *rationale* and the systematics of the provision.⁵⁴

2.3 Procedure for Revision in Cases of Exoneration

The procedure for an application for exoneration is the same regardless of whether the application was filed by a previously convicted defendant or by the prosecutor. Further, except for the aforementioned one-year limitation, the same procedural rules apply regardless of whether the application is to the benefit or to the disadvantage of the defendant.

Only a written application can be considered (*Swedish Code of Judicial Procedure*, Chapter 58 Section 4 para. 1), and it should be submitted to a court. If the judgment was pronounced by a district court, the application should be submitted to the (relevant) court of appeal, and if by a court of appeal, it should be submitted to the Supreme Court (*Swedish Code of Judicial Procedure*, Chapter 58 Section 4 para. 1).⁵⁵ The latter also applies if the judgment was pronounced by the Supreme Court. The court procedure is only written. However, if found necessary for the investigation, the court can decide that a party or a third party should be examined.⁵⁶ However, this rarely occurs.

As mentioned earlier, the application can be filed either by a previously convicted defendant or by the prosecutor. When the prosecutor files, any general prosecutor can apply to the court of appeal. However, if an application needs to be filed to the Supreme Court, the Prose-

cutor General must file the petition.⁵⁷ Note that Swedish law allows for the prosecutor and the Prosecutor General to file an application for exoneration in favour of a defendant who has previously been convicted.

When filing an application for exoneration, the applicant must specify the challenged judgment, the basis of and supporting reasons for the application, the evidence that the applicant desires to invoke and what he or she seeks to prove with each particular item of evidence (*Swedish Code of Judicial Procedure*, Chapter 58 Section 5 para. 1).

An application for exoneration cannot be granted unless it has been served upon the opposing party, who will be directed to file a written explanation in relation to the application. However, if the opposing party is the prosecutor, the application can be forwarded to the prosecutor without service (*Swedish Code of Judicial Procedure*, Chapter 58 Section 6 para. 1). The court can immediately reject an unfounded application and can dismiss an application without notifying the opposing party (*Swedish Code of Judicial Procedure*, Chapter 58 Section 6 para. 1).

Additionally, Swedish law requires that the prosecutor must, in certain situations, resume the pre-trial investigation. These rules were introduced into Swedish law in 2012.⁵⁸ First, this shall be done if an application for exoneration contains new evidence or new circumstances not previously presented and if it is probable that there exists a legal ground for exoneration (*Swedish Code of Judicial Procedure*, Chapter 58 Section 6A). A pre-trial investigation should not be resumed if there is no need for investigative measures. Secondly, the court that decides whether the application should be granted can order the prosecutor to take certain investigative actions. This requires that the mentioned prerequisites are fulfilled. The court can decide that an ongoing pre-trial investigation should also include an inquiry concerning the previous defendant's participation in the crime (*Swedish Code of Judicial Procedure*, Chapter 58 Section 6B). Alongside these provisions, the previous defendant should be provided with a defence counsel if a pre-trial investigation is resumed according to these provisions (*Swedish Code of Judicial Procedure*, Chapter 21 Section 3B).

If an application for exoneration is denied, the binding effect of the judgment will remain in force,⁵⁹ and, thus, the outcome of the final verdict will be upheld. However, Swedish law does not limit the number of times an application for exoneration can be filed.⁶⁰

under the age of twenty-one can be sentenced to life imprisonment (*Swedish Penal Code*, Chapter 29 Section 7 para. 2). However, a governmental inquiry has proposed that the reduced sentence for juveniles over the age of eighteen should be abolished; see SOU 2018:85. Currently (mid-February 2021), neither the proposal on amending the provisions on exoneration nor the proposal on abolishing the reduced sentence for juveniles has (yet) resulted in an amendment of the law.

53. See, e.g., Supreme Court case NJA 2020 s. 134, where the Court granted an application for exoneration in favour of the applicant, since the Court concluded that the applicant was probably younger than what was assumed at the original trial.

54. See the consultation response from the Faculty of Law, Stockholm University, 26 September 2018, available at www.regeringen.se/4a7b38/contentassets/3192961dcccc41bd9c812275643f1cc2/stockholms-universitet-juridiska-fakultetsnamnden.pdf (last visited 17 February 2021). See also the consultation response from the Swedish Bar Association, 26 September 2018, available at www.regeringen.se/4a7b38/contentassets/3192961dcccc41bd9c812275643f1cc2/sveriges-advokatsamfund.pdf (last visited 17 February 2021).

55. As a main rule, when the Supreme Court decides whether the application for exoneration should be granted, at least five justices of the Supreme Court must participate (the *Swedish Code of Judicial Procedure*, Chapter 3 Section 5 para. 1 point 5). The main rule for the court of appeal is that three legally trained judges must participate in the decision (the *Swedish Code of Judicial Procedure*, Chapter 2 Section 4 para. 1).

56. The *Swedish Code of Judicial Procedure*, Chapter 58 Section 6 para. 2, Chapter 56 Section 11 para. 1 and Chapter 52 Section 11 para. 1.

57. It follows from the *Swedish Code of Judicial Procedure*, Chapter 7 Section 4 para. 3, that the Prosecutor General is the public prosecutor at the Supreme Court.

58. See, further, the *travaux préparatoires*: prop. 2011/12:156.

59. On the matter of the binding effect of the judgment, see Section 2.1.2.

60. This is also possible if an application for exoneration is granted and a new trial is held but the outcome of the new trial confirms the original judgment. Although this is highly unusual, there are cases that illustrate this possibility. One example is that of Bertil Strömberg, who, in 1983, was convicted of gross espionage. He claimed that he was wrongfully convicted and applied several times for exoneration. The Swedish Supreme Court granted one application in 1988, but the new trial, in

If an application for exoneration is approved, the case is reopened, and the already decided case is brought before a court again. However, approval of an application for exoneration does not quash the original and final judgment. Instead, approval means that the binding effect of the original and final judgment no longer prevents the case from being reopened and being decided anew by a court.⁶¹ Therefore one might claim that since a decision to approve an application for exoneration results in a review of the case, it resembles an appeal.⁶²

An approved application should, as a main rule, result in a new trial. This should be held at the court that last adjudicated in the case (*Swedish Code of Judicial Procedure*, Chapter 58 Section 7 para. 1). Until a new judgment has been pronounced, the original judgment is still valid. Consequently, a person who has previously been convicted and sentenced to jail will continue to serve time in prison until a new judgment has been pronounced.⁶³

From the main rule it follows that the court trying the case again should hold a new main hearing. However, if the main hearing includes comprehensive verbal evidence, the case may be remanded to a lower court. Thus, a new trial intended for the court of appeal may be remanded to the district court. The main hearing will then take place at the district court, which will then pronounce a judgment, which can, of course, be appealed against according to the standard procedure.

When a case is reopened and a new trial is being held, the case is reviewed in full.⁶⁴ According to the standard procedure, all aspects (i.e. guilt, evaluation of evidence, sentence) of the previous judgment are reviewed. In the majority of granted applications for exoneration, the case as such is reviewed. Yet there are cases where an application for exoneration is granted partly, e.g. if the original judgment concerned several offences, but the (approved) application concerned only one of them. Additionally, when granting an application for exoneration, the court can limit the extent of what is being reviewed. It is therefore possible that a review covers only the sentence, not the question of whether the defendant was guilty.⁶⁵

However, as an exception, the court approving the application for exoneration may instead – where the application was filed for the benefit of the defendant – change the original judgment immediately. The prerequisite for changing the original judgment by, for

example, dismissing the action is that “the matter is found to be obvious” (*Swedish Code of Judicial Procedure*, Chapter 58 Section 7 para. 1). It is highly unusual for a court to find the matter ‘obvious’, and a majority of approved applications for exoneration will proceed according to the main rule.⁶⁶

3 Revision in Practice

3.1 Official Statistics on the Number of Applications for Exoneration Is Not Available

While some countries, for example Norway,⁶⁷ provide official statistics concerning the procedure of post-conviction review processes, there are no official statistics concerning how the Swedish criminal justice system operationalises, inter alia, applications for exoneration.⁶⁸ Although official statistics on this matter are not available or presented in a synthesised manner, there is a way to assess the number and characteristics of applications handled within the Swedish criminal justice system, namely by simply asking the courts to provide all the case files concerning application for exoneration. This is, of course, time-consuming since it requires collecting the applications and analysing them in detail.⁶⁹ For these reasons, empirical data on the number of applications that pass through the Swedish courts has not been gathered for the present review. However, a study published in 2017 presented empirical data from one year (2015).⁷⁰

That study found that 383 applications were decided by the Supreme Court and the courts of appeal. For

1989, at the court of appeal ended in a guilty verdict. In 2009, Ströberg again filed an application, but the Supreme Court turned this down in 2011.

61. This follows from the *Swedish Code of Judicial Procedure*, Chapter 58 Section 7 para. 1. See also the *travaux préparatoires*: SOU 1938:44, at 578.

62. See, e.g., Ekelöf and Edlestam, above n. 29, at 196.

63. However, according to the *Swedish Code of Judicial Procedure*, Chapter 58 Section 6 para. 3, the court may inhibit the enforcement of the judgment.

64. This follows from the wording of the *Swedish Code of Judicial Procedure*, Chapter 58 Section 7 para. 1.

65. See, e.g., Supreme Court case NJA 1976 s. 288, where the application for exoneration was granted part in the sense that the review only concerned the sentence.

66. See, e.g., the *travaux préparatoires*: SOU 2015:52, at 66.

67. See the Norwegian Criminal Cases Review Commission (*Kommisjonen for gjenopptakelse av straffesaker*), which annually presents empirical data on the post-conviction review process in Norway. In 2019 the Norwegian Commission received 153 applications to reopen cases and a total of 131 cases were concluded. The Commission reopened 11 cases, which represent an approval rate of 9%; see the Norwegian Commission's Annual Report 2019, available in English at www.gjenopptakelse.no/fileadmin/user_upload/Aarsrapport_2019_engelsk.pdf (last visited 17 February 2021), at 3. Note that the approval rate of reopened cases for all the years in which the Commission has existed is 15%.

68. Previously, it was easier to obtain official statistics. Until 1988 an application for exoneration had to be filed to the Swedish Supreme Court, regardless of which court had pronounced the judgment. This made it possible to gather statistics from the Supreme Court. A project initiated by the Office of the Chancellor of Justice showed that between 1950 and 1988, 40-60 applications for exoneration every ten years were approved. The most common legal ground for approving an application was new evidence or new circumstances; see *Felaktigt dömda. Rapport från JK:s rättssäkerhetsprojekt* (2006), at 96, 103-15. See also Cars, above n. 8, at 316-19, who provides statistics between 1935 and 1958 and who illustrates figures almost similar to the above. See also the *travaux préparatoires*: prop. 1939:307, Ann. D, at 55, showing that between 1936 and 1938 very few applications for exoneration were granted each year. Thus, during the period when the Supreme Court was the only court instance handling applications for exoneration, the approval rate seems to be rather consistent.

69. However, the problems in gathering the relevant case files are far more complicated; see, further, Hellqvist, above n. 9, at 149-50.

70. *Ibid.*, at 131-53.

reasons explained further in the study, some applications were excluded,⁷¹ leaving a detailed analysis of 216 applications. The result was that, of these, “209 applications were rejected and seven applications were approved. This represents a 3% approval rate”.⁷² The Supreme Court decided on a majority of the applications (79%)⁷³ and the most common invoked legal ground being new evidence or new circumstances.⁷⁴ The study also showed that the characteristics of the seven approved applications were rather disparate: two concerned road traffic offences, two concerned driving under the influence of narcotics or alcohol, one assault, one tax offences and false accounting offences, and one concerned involuntary manslaughter.⁷⁵

Although the study examined the number of applications and their characteristics during only one year, thus raising questions of representativeness, it provides some information on the number of applications that pass through the Swedish courts. Lacking other available data, it provides an important insight in regard to the number, the characteristics and the outcome of the review process in these cases.

3.2 Examples of Granted Applications for Exoneration from Swedish Case Law

From the previous sections, it is evident that Swedish law restrictively allows the court to grant an application for exoneration. Since there is a lack of official data and a narrow scope for granting an application, this section will highlight some examples of successful applications. Since very few applications are granted annually, it is difficult to find representative cases. In order to illustrate successful applications, this section reviews three cases. It should be noted that they have some common features. The three applicants were originally convicted of murder. Further, these cases could be viewed as high-profile cases, well known to both lawyers and the general public in Sweden. In two of the cases, the applicants had previously, unsuccessfully, applied for exoneration.

A case worth mentioning is the one concerning Samir Sabri, who at the age of fifteen confessed to the murder of his stepmother. He was convicted by a district court in 1986, and the guilty verdict was based on his confession.⁷⁶ He was sentenced to institutional psychiatric care. Although he withdrew his confession a few years later, an application for exoneration was filed in 2015 to the Svea Court of Appeal. At the same time, the pre-trial investigation was reopened. The invoked legal ground was new circumstances and evidence, which consisted of the withdrawal of the confession, some new witness testimony and evidence suggesting that the forensic evidence presented at the 1986 trial – for example, the pres-

ence and locations of bloodstains on his clothes – was not compatible with Samir’s confession. Additionally, he now stated that his father committed the murder and that his father told him to confess. Samir claimed that his father compelled him to confess so that the father would not be indicted and thereby risk a jail sentence.

In 2016, Svea Court of Appeal granted the application, although it stated that a modified statement from a previously convicted defendant should generally be assessed with some caution. The court emphasised that the withdrawal of the confession and the modified statement were supported by new forensic evidence and in line with witness testimonies.⁷⁷ Following the standard procedure, a new trial was held at the district court, which found Samir not guilty.⁷⁸

Another example of a successful application is the case of Esa Teittinen, who had allegedly killed his seventy-year-old friend by drowning him in a bathtub. Although no crime scene investigation was conducted and it was not possible to identify the cause of death, Esa was, in 2010, convicted of murder by an appeals court and was sentenced to fifteen years in prison.⁷⁹ He filed the first application for exoneration in 2014, but the Supreme Court did not grant this application.⁸⁰ A second application was filed in 2017.

The previous application consisted of statements from scientific experts, concluding that the original forensic medical examination was faulty and that the cause of death was still unclear. In the second application similar statements, providing the same conclusions, supported the new application. A new reconstruction, presenting an alternative course of events, was also attached to the application. The new reconstruction used figures of similar height and weight to the victim’s and Esa’s. A bathtub of the same size as in the victim’s flat was used. From this, it could not be excluded that the victim could have drowned without external force from another person. The new reconstruction was presented in both a film and in photographs shot from different angles. At the original trial, a reconstruction had also been presented. However, that reconstruction was only presented in two photographs (of bad quality), and the figure playing the victim was heavier than the victim. Thus, the original reconstruction was faulty in several regards.

In 2018, the Supreme Court approved the 2017 application. The court stated that the experts in the second application presented the same conclusions as in the first application. Since the conclusions did not differ from the first application, it could not be considered as new evidence.⁸¹ However, the Court concluded that the

71. *Ibid.*, at 139-40.

72. *Ibid.*, at 141.

73. *Ibid.*, at 141.

74. *Ibid.*, at 142. Note that in eighty-one of the applications no legal ground or an unclear ground was made.

75. *Ibid.*, at 143-4, 145-8.

76. Stockholm District Court, judgment, 1 October 1986, reference number B 322-86.

77. Svea Court of Appeal, decision, 7 April 2016, reference number Ö 7110-15.

78. Stockholm District Court, judgment, 13 December 2016, reference number B 4343-16.

79. Svea Court of Appeal, judgment, 21 October 2010, reference number B 6903-10.

80. Supreme Court, decision, 4 September 2014, reference number Ö 2666-14.

81. Supreme Court, decision, 21 March 2018, reference number Ö 4066-17, paras. 30-2.

new reconstruction was considered new evidence. The Court also emphasised that the new reconstruction raised questions about the conclusions drawn from the original reconstruction. The Court also stated that the case contained peculiar circumstances, and it raised concerns regarding the rule of law. It concluded that ‘extraordinary reasons’ warranted a new trial. Thus, the Court approved the application based on the supplement rule (see Section 2.2).⁸² Following standard procedure, a new trial was held at the appeals court, which found Esa not guilty.⁸³

The third successful case is the one of Kaj Linna. He was convicted, in 2005, of one case of murder, one case of gross robbery and one case of theft. The crime occurred at the home of two brothers. The appeals court sentenced him to life imprisonment.⁸⁴ The conviction depended largely on the testimony of one witness. The witness claimed that Kaj had said that he was planning a robbery of the two brothers’ home. He also claimed that Kaj and himself, the day before the crime, drove near the two brothers’ home intending to prevent Kaj from committing a crime. The evidence in the original trial further consisted of an analysis of the telephone traffic between, *inter alia*, Kaj and the witness.

Kaj had previously filed two unsuccessful applications for exoneration to the Supreme Court.⁸⁵ A third application was filed in 2015. To understand the third application, it is necessary to summarise the previous applications.

The first application emphasised that analysis of the witness’s telephone traffic showed no connection to a base station near the two brothers’ home on the date and at the time that the witness claimed that he and Kaj were driving there. The Supreme Court noted that this evidence supported the unlikelihood that the witness was where he claimed to be. The Supreme Court concluded that the court of appeal did not seem to have assessed this circumstance at the original trial. It was thus not a circumstance affecting the original outcome.⁸⁶ In the decision on the second application, the Supreme Court stated that the Court’s 2006 decision was that the matter of the telephone connections was insignificant in relation to the outcome of the original trial. Kaj also presented a reconstruction of the course of events. The Court concluded that both the previous and the new evidence gave no reason to approve the application. However, two of five justices of the Supreme Court dissented, concluding that there were indeed ‘extraordinary reasons’ to warrant a new trial. The main reason was

that the conviction relied heavily on the testimony of one witness, whose credibility could be questioned.⁸⁷

The third application presented new circumstances consisting of contradicting the testimony of the witness from the original trial. The witness had to journalists provided new information, which differed from what the witness stated at the original trial. The new information from the witness had been recorded. The new information gave a rather different explanation to what and when crucial events had occurred. Other new evidence that was used to support this application was a comparison with another case of robbery where the victim was killed.

The Supreme Court held that the new evidence concerning the witness raised questions of his credibility, but the Court stated that the statement from the witness now made to journalists was – both when assessed solely by itself and together with the previous applications – not enough to grant the application. Yet the Court stated that the “circumstances of the case is rather peculiar” and that the previous applications (also) contained evidence that could question the credibility of the witness. However, considering that a minority of the judges in the second application assessed that the application should be granted, a minor addition of new evidence could be sufficient to grant the application. Thus, the Supreme Court concluded that ‘extraordinary reasons’ warranted a new trial.⁸⁸ The Court approved the application based on the supplement rule (see Section 2.2). Following standard procedure, a new trial was held at the appeals court, which resulted in an acquittal.⁸⁹ Kaj Linna spent 13 years in prison. Until the present day, this is the longest time a person, who was later exonerated, has been imprisoned in Sweden.

One feature deserving some discussion is the multiple applications, and the Kaj Linna case is particularly interesting in this regard. An examination of the third application would show that it was supported mainly by successive (new) circumstances, most of which were already known in the two previous unsuccessful applications. Except from again, but with some new evidence, questioning the credibility of the witness, the third application did not really invoke any new evidence. A possible explanation for the Supreme Court’s approval could be that the Court considered that the questioning of the credibility of the witness – in the light of what had been invoked in the previous applications – was considered new. Therefore, what was now presented was the straw that broke the camel’s back. Yet when approving the third application, the Supreme Court emphasised that what the witness had stated to journalists was not enough to grant the application. Thus, it is rather peculiar that the Court rejected the only new evidence, and it seems that the previous applications

82. Supreme Court, decision, 21 March 2018, reference number Ö 4066-17, paras. 33-8.

83. Svea Court of Appeal, judgment, 7 September 2018, reference number B 2860-18.

84. Upper Norrland Court of Appeal, judgment, 1 March 2005, reference number B 49-05.

85. Supreme Court, decision, 5 December 2006, reference number Ö 2734-06; Supreme Court, decision, 21 October 2010, reference number Ö 1797-09.

86. Supreme Court, decision, 5 December 2006, reference number Ö 2734-06.

87. Supreme Court, decision, 21 October 2010, reference number Ö 1797-09.

88. Supreme Court, decision, 29 December 2016, reference number Ö 45257-15, paras. 17-24.

89. Upper Norrland Court of Appeal, judgment, 15 June 2017, reference number B 1138-16.

had a greater impact on the Court's approval rather than the new evidence invoked.

Moreover, a key factor in these three successful applications, eventually resulting in an acquittal, seems to be the involvement of (both) journalists and lawyers. The Samir Sabri case was scrutinised by both a journalist and a lawyer,⁹⁰ the Kaj Linna case had been scrutinised more than ten years prior to the new trial by a journalist who was later followed by other investigative journalists.⁹¹ And several lawyers were engaged in the different applications for exoneration. The Esa Teittinen case received some media attention; however, it was not scrutinised by journalists in the same way as the two other cases, and the successful application depended entirely on the work of lawyers.⁹² The three cases illustrate that a successful application seemingly depends on having access to proper resources – preferably a combination of investigative journalists and engaging lawyers.

4 Challenges in the Current Swedish Model of Administering Applications for Exoneration

A challenge concerning the post-conviction review process in Sweden is the lack of official statistics. It has been pointed out that this limits the understanding of how the Swedish justice system operates when administering applications for exoneration.⁹³ It should be noted that Sweden does maintain official data on other aspects of the Swedish criminal justice systems; for example, the Swedish National Council for Crime Prevention collects data and continuously publishes statistics on reported crimes. The Council also offers statistics on the number of indicted persons and data on different offences. Thus, it is rather peculiar that Sweden does not offer statistics on the post-conviction review process.⁹⁴

Providing statistics on this matter is important, since it is a way of removing the current 'blank spot'. Doing so would also be the beginning of more in-depth research, where the statistics on the post-conviction review process (including exoneration) could be scrutinised in detail. It would allow researchers to, inter alia, analyse variations in the number of granted cases and explain long-term variations in the administration of applications for exoneration. Another important aspect to analyse would be whether there is a correlation between the current criminal law policy and the characteristics of the granted applications for exoneration. Yet another reason to provide for official statistics is that it would enable comparative studies, in which variations between jurisdictions with different legal cultures and different core characteristics in their criminal justice system can be analysed further.⁹⁵

When reviewing the application procedure, one feature deserving critique is that an approved application will result in a reopening of the case and a new trial, which shall be held at the court that last adjudicated in the case. From the applicant's perspective, this might seem problematic, since this court originally convicted the applicant. Therefore, an applicant might perceive that the court in which the new trial is being held – to some extent – is biased. This could, of course, be solved by, for example, introducing a new rule stating that the reopened case should be referred to a different court than the one that last adjudicated the case.⁹⁶

A related issue is that the Supreme Court administers and decides on a majority of the applications for exoneration.⁹⁷ This means that an appeals court adjudicated the case. One can assume that the judgment is often appealed against. However, the Swedish Supreme Court is a court of precedent and adjudicates only if the Court has granted an application for a review permit.⁹⁸ Within the ordinary proceedings, the Court may grant a review permit if there exist grounds for exoneration (*Swedish Code of Judicial Procedure*, Chapter 54 Section 10 para. 1).⁹⁹ From the applicant's perspective, this might seem problematic, since it might be perceived as the

97

90. See above n. 4.

91. The first journalist to investigate the case more deeply (in 2006) was Stefan Lisinski at Dagens Nyheter; he kept examining the case during the entire process. In 2015, the journalists Anton Berg and Martin Johnson examined the case in detail in their podcast 'Spår' and found new evidence.

92. The journalist Katarina Lagerwall at Dagens Nyheter was contacted by Esa Teittinen in May 2017, and in July 2017 she wrote a longer article, examining the case, and the second application for exoneration was filed in August 2017. After the approval, she continued to write about the case.

93. Hellqvist, above n. 9, at 149-50. See also S. Hellqvist and M. Lidén, 'Det behövs mer kunskap om resning i brottmål', *Dagens Nyheter Debatt*, 14 January 2017.

94. Note that the problem is not that it is impossible to collect data from the courts. As Hellqvist points out, there are several practical problems for someone who wants to present official statistics. For example, the data must be collected at several courts, which categorise the applications differently. Another issue is that the courts differ in their archiving procedures. See Hellqvist, above n. 9, at 149.

95. See, e.g., M. Killias, 'Errors Occur Everywhere – But Not at the Same Frequency: The Role of Procedural Systems in Wrongful Convictions', in R.C. Huff and M. Killias (eds.), *Wrongful Convictions and Miscarriages of Justice. Causes and Remedies in North American and European Criminal Justice Systems* (2013) 61. Killias seems to suggest that the differences between the core characteristics of various criminal justice systems might offer one explanation of why the numbers of (granted) applications for exoneration vary. Thus, one cannot focus solely on extraordinary legal remedies when comparing different jurisdictions; one also needs to consider the legal culture and the core characteristics of various countries.

96. See, for example, the *Norwegian Criminal Procedure Act*, Section 400.

97. See Section 3.1.

98. Annually, the Court approves only approximately 2% of these applications. On the role and function of the Swedish Supreme Court, see, e.g., Welamson and Munck, above n. 29, at 129-67.

99. The Supreme Court rarely grants a review permit based on extraordinary reasons, such as exoneration. See, however, Supreme Court case NJA 2019 s. 438, where the Court (within an ordinary appeal) granted a review permit on the grounds that there existed reasons to approve an application for exoneration to the disadvantage of the defendant. New evidence and new circumstances had been discovered after the pro-

Court – in its decision not to grant a review permit – thereby also having decided on the issue of exoneration. Thus, if a previously convicted person later files an application for exoneration, the applicant might presume that the Court has already positioned itself in this regard. Note that no specific provision hinders, for example, a justice of the Supreme Court that participated in the decision not to grant a review permit from later participating in the decision on whether to grant the application for exoneration.¹⁰⁰ This could also – again from the applicant's perspective – be perceived as the Court not being objective when administering an application for exoneration. Although some applicants might perceive this procedure as somewhat biased, it is, of course, a positive feature that the Supreme Court within the ordinary procedure might grant a review permit owing to the existence of grounds for exoneration. Thereby, wrongful convictions could be corrected efficiently within the ordinary procedure. But this does not solve the situation where a justice of the Supreme Court has participated in the decision not to grant a review permit and later participates in the decision concerning exoneration. This issue could be addressed by introducing a main rule that hinders a justice of the Supreme Court from, later, also deciding whether to grant an application for exoneration.

Another challenge with the post-conviction review process in Sweden is that a convicted person applying for exoneration seemingly needs to have access to resources. From the cases mentioned in Section 3.2, one could claim that a successful application depends largely on the involvement of lawyers and journalists.¹⁰¹ Although it should be emphasised that the number of cases mentioned earlier, in Section 3.2, is low, it is evident that a key factor in each of these cases was the involvement of both lawyers and journalists. One could, of course, argue that the limited number of cases cannot be enough to draw general conclusions from them. Yet one has to remember that only a handful of applications for exon-

erations are granted annually. Thus, it is generally a problem to present a number of cases from which general conclusions can be drawn. Further, in all of the cases presented in Section 3.2 the indictment concerned murder. One could argue that the legal safeguards put in place are particularly crucial when the defendant is charged with a serious offence. Therefore, it is worth highlighting that when the indictment concerns a serious offence, a successful application seems to require access to resources.

From the cases reviewed in Section 3.2, it seems that a person claiming that he or she is wrongfully convicted, in order to file a successful application, (first) needs to engage a journalist who scrutinises the previous conviction in detail, which can later be used in the formal application for exoneration written by a lawyer. Generally, a lawyer does not necessarily have the means and time to fully investigate the previous case in detail. Thus, the lawyer does not have the means to review the case and create a story in the same way that a journalist can; meanwhile, a journalist does not have the legal skills to put together an application in a way that would adhere to the language of the court. The combination of the work of a journalist and a lawyer is – at least based on the reviewed cases – seemingly needed. Consequently, one could argue that it is almost impossible for an applicant who lacks the resources (i.e. access to a journalist and/or lawyer) to have a fair chance of successfully applying for exoneration. One cannot exclude the possibility that although there exist cases that meet the requirements for granting an application, the applicant has been unable to express him- or herself in the correct legal language.¹⁰²

Although the number of cases presented in Section 3.2 is limited, they concern grave crimes (murder) that – arguably – require greater respect for the existing legal safeguards, and in two of the cases several applications were required before the court granted the applications. The combination of these factors is interesting in that it indicates some deficiencies with the current Swedish model of administering applications for exoneration, raising the question whether this model, where an application for exoneration is administered within the court system, should be reformed by introducing a review committee.

Recently, some authors have suggested that Sweden should reform the current model by (at least considering) replacing it with a review committee.¹⁰³ Those in

ceedings at the court of appeal but before the binding effect of the judgment entered.

100. However, if it is a question of multiple applications for, inter alia, exoneration, the *Swedish Code of Judicial Procedure*, Chapter 3 Section 7, provides against the participation of a justice of the Supreme Court in a decision on whether to grant a renewed application for exoneration. Note that this applies if “a sufficient number of justices is nevertheless available in the Court”. This provision should be viewed as making it possible for a justice of the Supreme Court that decided on the matter of the review permit to participate in the decision on exoneration. However, it follows from general rules and principles that a judge should avoid handling a case that he or she has already dealt with. For related case law on the matter of multiple applications for exoneration, see, further, Supreme Court case NJA 1986 s. 666.

101. Note that the involvement of journalists does not necessarily result in an approval of an application for exoneration. In 2019 the case of Son Do was examined by the journalists Anton Berg and Martin Johnson in their podcast ‘Spår’. The defendant was convicted of murder in 2006 and was sentenced by an appeals court to life imprisonment. The journalists found new circumstances concerning, inter alia, the photo confrontation and the interrogation of a child who was the key witness in the case. In 2020, the Supreme Court rejected the application for exoneration, stating – without further reasoning – that no legal ground for exoneration existed in the case; see Supreme Court, decision, 9 December 2020, reference number Ö 5104-19.

102. See also Lidén *et al.*, above n. 11, at 353 (footnote 72), who, on scrutinising a number of applications for exoneration, found that 1,014 out of 1,330 (declined) applications were filed without any legal assistance. See also Hellqvist, above n. 9, at 151, concluding that the applicants included in her study showed that a majority of the applications were written by hand and without legal assistance. This illustrates the difficulties in putting together an application that will meet the legal requirements for granting an application for exoneration.

103. See Lidén *et al.*, above n. 11, at 354-6. Others have suggested that official statistics need to be provided first, and, depending on what the official data shows, it could be relevant to consider reforming the current Swedish model of administering applications for exoneration; see Hellqvist, above n. 9, at 153. The demand for an independent organ to

favour of introducing such a committee often refer to Norway, which established a review committee in 2001.¹⁰⁴ It should be noted that in the Nordic region,¹⁰⁵ a legal comparison between the neighbouring countries is rather common. A legal reform in a Nordic country (in any legal area) is commonly inspired or influenced by the regulation in place in another Nordic country. There are, of course, many reasons why comparisons are often made between these countries, but to mention a few, these countries have a similar (legal) culture, a similar law-making process, an emphasis on the written law and where *the travaux préparatoires* is viewed as an important legal source for the court when interpreting the written law and they are all considered welfare state regimes. Another aspect that promotes inter-Nordic comparisons is the language. The Swedish, Norwegian and Danish languages are similar, and thus legal sources are readable in their original language, thereby (also) making it easier to recognise and understand the terminology used as well as important legal concepts. Further, the Nordic countries cooperate closely in various matters, including criminal procedural law. Thus, for the purposes of the present review, it is worth referencing – albeit briefly – how applications for exoneration are administered in Norway, in particular the level of independence of the Norwegian Criminal Cases Review Commission.

Before turning to the role of the Norwegian Criminal Cases Review Commission, it should be noted that a few high-profile cases, concerning serious offences, prompted the reform that resulted in the creation of the Norwegian Commission. In particular, one (in)famous case – the Liland case – is often referred to as groundbreaking for the introduction of the Norwegian Cases Review Commission. In brief, in 1969 the defendant was convicted for two cases of murder and sentenced for life with 10 years supervision. After his release, he successfully applied for exoneration, and when the case was tried anew at the appeals court, in 1994, it ended in an acquittal.¹⁰⁶

administer applications for exoneration is not new. As early as in 1937, a member of the Swedish Parliament proposed that Sweden should introduce a system with an independent institution for operating the post-conviction review process. It was proposed that a preparatory committee administer applications for exoneration and forward to the Supreme Court those that it deemed met the criteria for reopening. It was suggested that the committee would apply to the Supreme Court to grant the petition to reopen the case. Further, the Supreme Court would be able to dismiss a petition only for extraordinary reasons. See motion by Vilhelm Lundstedt, Second Chamber of the Parliament, motion nr 98, 1937. The motion did not result in any changes in this regard; see further First Chamber of the Parliament, Opinion nr 9, 1937; SOU 1938:44, at 71-2.

104. For a background, see the Norwegian *travaux préparatoires*: Ot. prp. nr 70 (2000-2001). The amendment introducing the Norwegian Criminal Cases Review entered into force on 1 January 2004.

105. The Nordic countries consist of Sweden, Denmark, Finland, Norway, Iceland, Greenland, the Faroe Islands and the Åland Islands.

106. For a more thorough review of the Liland case in English, see, e.g., U. Stridbeck and S. Magnussen 'Prevention of Wrongful Convictions: Norwegian Legal Safeguards and the Criminal Cases Review Commission', 80 *University of Cincinnati Law Review* 1373 (2012), at 1386-1388. Note that the Liland case resulted in a government inquiry

The high-profile cases prompting the reform in Norway could also explain why the main reason for creating the Norwegian Criminal Cases Review Commission was to increase trust in the post-conviction review process.¹⁰⁷ This is also a valid argument in the Swedish context. A review committee could, for example, provide more transparent guidelines as to how the application should be outlined,¹⁰⁸ thereby increasing the number of potentially successful applications. Additionally, a review committee could – from the applicant's perspective – be perceived as more objective than a model in which applications for exoneration are administered within the court system. Further, a review committee could – like in Norway – provide official statistics, which would increase the transparency of the review process. Thus, there is a strong call for introducing a review committee in Sweden, in particular since it would significantly improve the transparency of how applications for exoneration are handled.

Although an introduction of a review committee would improve some features of the current Swedish model of administering applications for exoneration, it would not be unproblematic to establish a Swedish review committee. First, it would require an amendment of the Swedish constitution. According to the *Instrument of Government*, Chapter 11 Section 13, the Supreme Court or another court that is not an administrative court, shall administer an application for exoneration. The key word in this provision is 'court'; since a review committee would not be considered a court, an amendment would be necessary.¹⁰⁹ Secondly, it raises some principal questions concerning whether a 'system on the side' (a review committee) per se is preferable to one in which

that scrutinised the case, see NOU 1996:15, and several aspects of the case were discussed in the *travaux préparatoires* which established the Norwegian Criminal Cases Review Commission; see Ot. prp. nr 70 (2000-2001), at 85-97, where the Norwegian government mainly presented, inter alia, some amendments regarding provisions on criminal procedural law.

107. See, e.g., the Norwegian *travaux préparatoires*: Ot. prp. nr 70 (2000-2001), at 30-2. See also *Etterkontroll av kommisjonen for gjenopptakelse av straffesaker. Rapport fra arbeidsgruppe for etterkontroll av Gjenopptakelseskommisjonen*, Justis-og beredskapsdepartementet, 2012, at 114. Generally, the establishment of the Norwegian Criminal Cases Review Commission seems to have been successful; see, e.g., U. Stridbeck and S. Magnussen, 'Opening Potentially Wrongful Convictions – Look to Norway', 58 *Criminal Law Quarterly* 267 (2012); Stridbeck and Magnussen, above n. 106. For an overview of the regulation of the Norwegian Criminal Cases Review, see E. Keiserud, K.E. Soether, M. Holmboe, H-P. Jahre, M. Matningsdal & J.G. Smørdal, *Straffeprosessloven. Lov 22. Maj 1981 nr. 25 om rettergangsmåten i straffesaker. Lovkommentar. Bind II* (2020), at 1412-1449; J. Andenoes and T-G. Myhrer, *Norsk straffeprosess* (2009), at 572-86.

108. The Norwegian Criminal Cases Review Commission has a duty to provide guidance for applicants, and it will establish contact with the applicant. The Commission can, inter alia, appoint a defence counsel in supporting the applicant; see the *Norwegian Criminal Procedure Act*, Section 397.

109. An amendment of the Swedish Constitution requires two identical decisions by the Swedish Parliament. Before the second decision, an election needs to be arranged (*Instrument of Government*, Chapter 8 Section 14). Note that the election held between the parliamentary decisions need not to be a general election; an extraordinary election is sufficient. The stipulated minimum time frame between the first and second decisions is, nevertheless, nine months.

the court system reviews itself. This will be discussed in the following paragraphs.

One of the core questions when introducing a review committee in any jurisdiction is to determine its level of independence.¹¹⁰ Norway, for example, has established a fully independent review committee in the sense that the Norwegian Criminal Cases Review Commission has the mandate to deem the application admissible, to examine the case, to order the police and the prosecutor to undertake investigative measures and – more importantly – to decide whether the case should be reopened.¹¹¹ If the Norwegian Commission decides to reopen a case, a new trial should be held in a court. Other countries, for example Belgium, have established a review committee that could be categorised as semi-independent. The Belgian Commission de revision en matière pénale can review a case only if the Court of Cassation has determined, inter alia, the admissibility of the case. If deemed admissible, the case is forwarded to the Belgian Commission, which gives an advisory opinion on whether the Court of Cassation should approve the application for exoneration. The final decision is made by the Court.¹¹²

The examples of the Norwegian and the Belgian Commissions might be used as illustrations to further discuss that the level of independence is associated with some concerns. In the Swedish context, one of the problems with a fully independent review committee would be that its establishment could be perceived as introducing a higher instance than the Supreme Court.¹¹³ Evidently, this raises constitutional questions in regard to the division of power, since in Sweden a review committee would be considered an administrative authority, not a court. Although Sweden does not have the same tradition as, e.g., some European jurisdictions concerning a strong division of power, it might seem problematic for an administrative authority to review a court of law. However, since the Swedish Constitution is built on the principle of ‘people sovereignty’,¹¹⁴ the constitutional concerns might not necessarily be problematic. On the contrary, the principle of ‘people sovereignty’ might even help the case for establishing a review committee. Furthermore, the establishment of the Norwegian Com-

mission has not raised any major concerns in this regard.¹¹⁵

Yet a semi-independent review committee also has its disadvantages. Since a court decides whether an application is admissible and makes the final decision on whether to grant an application for exoneration, thereby maintaining control over the question of which cases should be reopened, one might question why it is necessary to establish an organ by the side, and a semi-independent review committee could therefore be perceived as pro forma. The counterargument would be that even though a system with a semi-independent review committee means that a court decides whether to grant the application, a semi-independent review committee would still improve the transparency of the review process. This is perhaps the strongest argument for a semi-independent review committee.

Another pertinent issue in this context is to design the system such that an adequate balance is struck between the principle of firmness and that of truth.¹¹⁶ This aspect is particularly interesting since one might assume that the establishment of a review committee would increase the number of applications for exoneration.¹¹⁷ First, the existence of a review committee would not necessarily affect the balance between these principles. As long as new legal grounds for exoneration are not adopted, the review committee would apply the existing legal grounds, meaning, inter alia, that prior precedents from the Supreme Court would remain an important legal basis for deciding whether to grant an application for exoneration. Second, even if a review committee were introduced, the principle of firmness would still be predominant. The reason would be mainly systematic: in order for the legal system to be reliable, the outset must be that a legally binding judgment should not be reconsidered (unless the requirements are met for, inter alia, exoneration). However, an independent organ might find the requirements for exoneration to be met in a larger number of applications than previously. That does not mean that the principle of truth has trumped the principle of firmness. Instead, a moderate assumption would be that since the applications would be examined more thoroughly than in the current Swedish model, a slight increase in the number of approved cases could be expected. Ideally, those cases would also have been approved within the current model, but they might not today be given the further examination needed in order to ascertain that they actually meet the criteria for exoneration.

Regardless of the level of independence, the importance of establishing a review committee lies in its mandate to scrutinise cases and applications, particularly in its pow-

110. For an overview of review committees in various jurisdictions, see, e.g., C. Hoyle and M. Sato, *Reasons to Doubt. Wrongful Convictions and the Criminal Cases Review Commission* (2019), at 6-11.

111. For example, the Scottish Criminal Cases Review Commission, the Criminal Cases Review Commission for England, Wales and Northern Ireland and the New Zealand Criminal Cases Review Commission could be considered independent in a similar way as the Norwegian Commission, since they can refer a granted application to the court. To the best of the present author's knowledge, the review committees in these jurisdictions decide whether to grant an application, and a successful application will result in a new hearing in a court.

112. See K. Verhesschen and C. Fijnaut, ‘Chosen Blindness or a Revelation of the Truth? A New Procedure for Revision in Belgium’, *Erasmus Law Review*, 4 (incomplete), (2020).

113. Cf. e.g. the *travaux préparatoires*: prop. 1939:307, at 26.

114. In Swedish: *folksuveränitet*, which is expressed in the *Instrument of Government*, Chapter 1 Section 1 para. 1, stipulating that “All public power in Sweden proceeds from the people.”

115. See, e.g., the Norwegian *travaux préparatoires*: Ot. prp. nr 70 (2000-2001), at 30, where it was concluded that the establishment of the Norwegian review committee, which is an administrative authority, was not infringing the Norwegian Constitution.

116. See Section 2.1.1.

117. The experience from Norway seems to indicate that the number of applications has been manageable since the Norwegian Commission was established.

er to mandate the police and the prosecutor to take investigative measures. The prime role and function of a review committee – whether independent or semi-independent – is to ensure that the case is thoroughly examined so that the later decision on whether to grant the application (regardless of the outcome) is based on adequately prepared documentation. Relating to the Swedish context, the main argument for introducing a review committee here is that it would improve the degree of scrutiny and transparency. This is particularly true for applicants who lack the resources that today seem to be necessary in order to adhere to the language of the court. It would also, as in Norway, presumably increase the trust in the Swedish post-conviction review process.

Hence, for the preceding reasons, there is a need to introduce a review committee into Swedish law. However, issues concerning *how* a review committee in the Swedish context should be designed and the details of its procedure and its level of independence are perhaps beyond the scope of this article. A reform of this kind requires, as always in the Swedish lawmaking process, that the government appoint a committee of inquiry to examine these matters and present a detailed proposal in regard to how the review committee could be modelled.

5 Conclusions

Sweden pays great respect to the rule of law and has put several legal safeguards in place, guaranteeing a high level of legal certainty and minimising the risk of wrongful convictions. Generally, the Swedish criminal justice system is robust and reliable. Swedish law further allows for a post-conviction revision in criminal law cases by, *inter alia*, regulating the possibility to apply for exoneration. Since Swedish law emphasises the importance of the binding effect of a judgment, applications for exoneration are granted only in extremely rare cases. It makes sense that applications are generally dismissed; otherwise, there would be a risk of undermining the reliability of pronounced judgments in criminal law cases. Thus, the present review shows no support for a need to, for example, extend the current legal grounds for invoking an application for exoneration.¹¹⁸

However, there are some factors that clearly limit the understanding of how the Swedish justice system actually works when administering applications for

exoneration. Therefore, the review suggests that two improvements are needed, concerning mainly the application procedure. First, Sweden should introduce a system that provides for official statistics on this matter. This would enable researchers to analyse the statistics of, for example, granted applications and their characteristics. It would also improve the transparency of the country's criminal justice system. Secondly, the provisions regulating the procedure for exoneration should be reformed, having remained unchanged for almost eighty years. According to the current Swedish model, applications for exoneration are administered within the court system. The time has come to introduce into Swedish law a model where applications for exoneration are administered by a review committee. Although this raises some constitutional concerns relating to, *inter alia*, the division of power and the committee's level of independence, Sweden has nothing to lose by introducing a model that would further enhance the legal certainty in – and the transparency of – its criminal justice system.

118. Another matter is that the courts interpret an application for exoneration according to the legal standards set out in the written law, while many applicants lack both legal education and legal assistance. Thus, it is assumed that many (almost all) convicted persons write their applications themselves. It is not unusual for an application to consist of handwritten notes, almost impossible to interpret. The lack of legal assistance clearly limits the actual use of the possibility to apply for exoneration. Without legal assistance, it is, of course, difficult to submit an application that the courts will even consider granting; see, further, Hellqvist, above n. 9, at 151; Lidén *et al.*, above n. 11, at 352-3. This question falls without the scope of the present review but merits more scholarly attention.

A European Approach to Revision in Criminal Matters?

Joost Nan, Nina Holvast & Sjarai Lestrade*

1 Introduction

This special issue includes contributions that address the extraordinary remedy of revision, designed to overturn a final criminal conviction that turns out to be wrong. The issue contains contributions on revision law in Belgium, France, Germany, Italy, the Netherlands, Poland, Spain, Sweden and England (including Wales and Northern Ireland). In this overarching contribution, we highlight several specific – and mostly common – themes and challenges that stand out after learning about the different approaches to revision in the aforementioned European countries.¹ We thereby aim to explore what different systems can learn from each other. We also explore whether a European approach to revision of criminal convictions is something to aim for. We will follow the general outline that is used in most contributions to this issue. We first provide a brief characterisation of the extraordinary remedy of revision and the interests involved (Section 2). This provides a common thread to discuss and reflect on the theoretical and practical issues in the following paragraphs. We will address the range of grounds for revision (Section 3), some important procedural aspects (Section 4) and the lack of empirical data on the functioning of the different mechanisms (Section 5). This will allow us to find some best practices for a properly functioning review mechanism in theory and practice – the need for which is not in question. Our approach will ultimately demonstrate that systems provide different solutions for certain problems and that no legal system is flawless. Nonetheless, to improve national revision procedures, it is valuable to learn from the experiences in other jurisdictions. We conclude that this special issue provides some important preliminary insights in this regard, but more research needs to be done to answer the question of whether a European approach to revision of criminal convictions would be desirable or not (Section 6).

2 Revision as an Extraordinary Remedy

All legal criminal justice systems aim to be diligent and their highest priority is to avoid making mistakes, both *de facto* and *de jure*. This explains the presence of regular procedures to review cases, such as appeal and (constitutional) cassation. Once proceedings have come to an end, the outcome has to be accepted, respected and enforced. The principles of legal certainty, finality and *res judicata* demand it (in short: *litis finiri oportet*). However, the reality is that making mistakes cannot be ruled out. Even after a criminal procedure has become final, it can turn out the verdict is wrong, either because of material circumstances which cast doubt on the culpability of the defendant or because of serious procedural defects. The interest of justice demands a post-proceedings review to redress these mistakes.

This interest of justice is more than just the interest of the convicted person and his or her legacy (after his or her death the next of kin can also submit the request). Revising criminal convictions is also in public interest. This particularly becomes apparent from the fact that all nine jurisdictions discussed in this special issue allow not only the convicted person and his or her legacy to file a request for revision, but also one or more public officials (such as a public prosecutor or a procurator general). The common absence of a time limit to submit such a request (in many but not all jurisdictions) also shows that revision transcends the individual's interests. With regard to revision, ultimately two interests are at stake. The principles of legal certainty, finality and *res judicata* on the one hand, and the principle of justice for the individual in specific and exceptional cases on the other hand. Only in special situations and under specific circumstances can the former principles be set aside to give way to the latter. It is plain to see that if the set-up of a revision mechanism is too strict, justice might not prevail. But if the set-up is too broad, the right would seriously endanger legal systems as a whole and the instrument might even collapse under all the (unjust) applications. The contributions to this special issue clearly demonstrate that the judiciary tends to exercise restraint when judging revision applications. Hence, for all the above-mentioned reasons, revision is truly an extraordinary remedy, in all jurisdictions. The most important challenge is finding the right balance between those competing interests. This challenge is the com-

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1. We refrain from giving an overview of all the similarities and differences between these legal systems. The number of contributions and topics is simply too high and our space here is too limited.

mon thread of this contribution when discussing the legal considerations and dilemmas regarding revision procedures. In the next section we will start by analysing the grounds for revision as mentioned in the different contributions to the special issue.

3 Grounds for Revision

In the jurisdictions discussed in this issue, two types of revision are possible. The most common, and undisputed, type is a revision to the advantage of the accused who is convicted. All jurisdictions offer this remedy. But there is also another type of revision, namely revision *ad malam partem*. This entails the reopening of proceedings to the disadvantage of the accused after criminal proceedings did not result in a conviction. This type of revision is regarded as problematic with regard to the *ne bis in idem* principle. It is only a feature in some of the jurisdictions' revision procedures and it usually requires more extraordinary circumstances than revision to the advantage of the convicted. Belgium, France, Italy and Spain do not accept revision *ad malam partem*. In France there was discussion (in 2014) to add this option, but it was ultimately rejected. Under specific, more restrictive circumstances, Germany, the Netherlands, Poland, Sweden and England allow for revision to the detriment of the accused. In the Netherlands it was enacted only in 2013 and in Germany an expansion is being seriously considered. This is an interesting development, but in this contribution, we will focus on the first type of revision.

Traditionally, jurisdictions have codified several grounds for revision in favour of the convicted. They include all sorts of *falsa* which have come to light after the conviction, such as a bribed judge, perjury of a witness or false documents. Other possible grounds are contradicting verdicts, or a situation wherein one of the provisions on which the conviction was based is declared unconstitutional or manifestly inconsistent with other provisions. All these grounds play only a modest role when it comes to actual revision cases. The so-called *novum* ground can be found in all jurisdictions and is most frequently invoked for revision (see *infra*). In addition to this, most countries also have a provision that makes revision possible in light of a judgement by the European Court of Human Rights. Spain introduced such a statutory provision in 2015; Italy and Sweden do not have such a possibility. In Italy, the Constitutional Court has created this opportunity in lieu of a provision.

A question that can be raised is whether some of the grounds for revision, especially the *falsa*, largely overlap with the *novum* ground (and perhaps even a judgement by the European Court of Human Rights could, with some creativity, be considered a *novum*). To streamline matters, some countries have narrowed down the grounds for revision to allow the reopening of a closed-off case to only a couple of grounds, such as Belgium

(four grounds) and the Netherlands (three grounds). France even went as far as to narrow down its original four grounds to only one: the *novum* ground. The French legislature had the opinion that the other three grounds (the murder victim turned out to be alive, conflicting verdicts or a false witness statement), were encompassed by the *novum* ground. However, since this does not include all procedural defects, in the French system a judgement by the European Court of Human Rights is a second ground for revision. The French modification shows that it is possible to simplify the grounds for revision and have them centred around the *novum* criterion (supplemented with the possibility of reopening proceedings in case of a violation of the European Convention of Human Rights).

The *novum* is the most important ground for revision. Yet, it is also the most problematic one. A *novum* – in short and in general – is made up of the following three elements: 1) a fact or circumstance, 2) which was unknown to the court in the regular proceedings and 3) that would, had it been known, likely have changed the outcome of the trial (usually to an acquittal, acceptance of a justification or excuse, or the application of a more lenient sanction provision). However, the range of the *novum* ground depends on how its elements are formulated in the relevant provision and on the way courts interpret the *novum* ground in practice. Regarding the latter, France is an example of a jurisdiction in which the expansion of the criterion did not appear to have changed the likelihood of the *Cour de révision et de réexamen* to overturn a final conviction (see further, Section 5).

Since a different evaluation of evidence that the court has already considered cannot constitute a ground for revision, the question arises as to under which circumstances a different expert opinion can count as a *novum*. This proves to be especially problematic when no new material was examined, but a new technique has become available to examine the same material. Several jurisdictions struggle with this issue, and it remains a question of practice. Another question is if a change of law can be cause for revision. Some jurisdictions offer a provision for the event that a criminal provision is later declared unconstitutional, or allow revision if the conduct was decriminalised (see Belgium and Spain). In England, new arguments on points of law can be raised in the revision procedure. In other jurisdictions, this is not considered a reason for revision. In Germany and the Netherlands, a change of law is rejected as a ground for revision.

Another point on which legal systems differ from one another relates to how 'new' the fact or circumstance must be and to whom. For instance, should there be a reasonable explanation for the failure to adduce the evidence at trial, given that it was available to the defence at the time? The latter is the case in England. Some countries explicitly want to prevent the accused from holding on to evidence for the revision phase. In Germany, however, facts can still be deemed 'new' even if they have been discussed in the main proceedings, as

long as the court did not take them into account unjustly.

A last discussion point concerns the question: in what situation is new evidence considered serious enough to assume it would have most likely or probably resulted in a different outcome of the legal procedure? In Poland, the new evidence has to demonstrate that the person involved is innocent. In the other countries, substantial doubt on the culpability of the convicted person is considered enough. Still, the courts are usually reluctant to accept that new evidence would have resulted in an acquittal or a different decision. In France, for instance, the standard was lowered by only demanding ‘doubt’ on the culpability of the convicted person. Any doubt would be enough, according to the French legislature. However, it is questionable whether this will make a difference in the assessment of revision requests by the *Cour de révision et de réexamen*. In the Netherlands there is an ongoing parliamentary debate on this topic, with several arguments made to lower the standard to ‘an unsafe conviction’ or ‘serious or even reasonable doubt on the righteousness of the conviction’. The Dutch legislature has, up until now, not given in.

4 Procedural Aspects

This brings us to the procedural aspects. Apart from the variation in the interpretation of a *novum* in the various jurisdictions, there are different procedures to be undertaken to request a revision. First, the possibilities for requesting assistance in proving the existence of a *novum* (prior an application for revision) vary. In England, France and the Netherlands, the applicant has a formal possibility to request investigative measures before filing a request for revision, in order to prepare and substantiate a revision application. Belgium, Sweden, Spain, Poland, Italy and Germany do not offer such a possibility. In the latter countries, the applicant is expected to bring forward the evidence necessary to reopen the case on their own. However, in Germany if there are ‘sufficient factual indications’ that certain inquiries will lead to facts or evidence which could provide grounds for the permissibility of a petition to retry the case, a counsel will be appointed to the convicted person. This counsel is authorised to undertake investigations independently (such as questioning witnesses), but he or she does not have coercive powers for investigation. In Belgium, if the applicant demonstrates ‘a strong suspicion’ that the *novum* would have resulted in a different outcome if it had been known at the initial proceedings, the case will be referred to the revision commission. This commission investigates the case and gives advice to the court. Such investigation opportunities can support convicted persons in their quest for justice, while maintaining the extraordinary character of revision.

In Belgium, Italy, the Netherlands, Poland and Spain a request for revision must be submitted by a lawyer. In

England, France and Sweden a legal representative is not obligated to submit a review application. However, in the latter countries, if the request meets the formal requirements, the convicted person has a right to legal aid during the substantive procedure in front of the competent court. The requirement of legal representation could both increase the quality of applications and prevent the filing of applications that do not stand a chance (assuming that legal representatives would refrain from filing such cases).² However, it could also turn out to be an obstacle if decent representation is (financially) unobtainable, as was described in our contribution on the Netherlands.

In Belgium, England and the Netherlands there are specific revision commissions that administer applications for revision. These commissions have a diverse composition and thereby ensure that a request for revision is not only examined by judges. In all three countries, the commissions have investigative powers and function as an advisory body to the courts. The commissions function independently from the courts. Furthermore, the advice of the commissions is not legally binding for the courts. In England, the commission also functions as a gatekeeper. Applicants cannot directly go to the court to have their case reviewed. A point of critique that is sometimes raised in relation to these commissions is that they assess requests too much in light of what the court would decide. In this regard, they do not act independently enough.³ At the same time, it is understandable that the committee considers the legal potential of a revision case.

In those countries without a specific revision commission, the main criticism is that the request for revision is judged within the court system itself, by judges. The room for additional perspectives is therefore limited and relevant insights from outsiders might be overlooked. It is also mentioned to be problematic that the convicted person must provide the evidence to prove there is a *novum*, while he or she might not have the financial resources to conduct research to substantiate his or her claim. In Sweden, Martinsson observes that a successful request depends heavily on the involvement of lawyers and journalists.⁴ However, lawyers do not have the means nor the time to investigate, while journalists do not have the legal skills. Martinsson therefore proposes the introduction of a Swedish review committee that administers applications for exonerations. However, even in the countries that offer possibilities to request investigative measures, the fact that the burden of proof lies too heavily on the convicted person is criticised.

If the critics are right, then the revision mechanisms are still ineffective in several ways. Certain procedural requirements, a revision procedure only involving judges and lack of sufficient legal and financial aid, could create insurmountable hurdles for convicted per-

2. These are the reasons for the Dutch legislature to enact such a provision.

3. See more in the contributions by Hoyle and Holvast, Nan and Lestrade.

4. See more in the contribution by Martinsson.

sons to have their convictions adequately reviewed. These are serious potential problems and empirical data can help to provide more insight into whether these elements hinder the effective working of revision procedures.

5 The Need for Empirical Data

In order to understand whether the revision procedures indeed provide an effective remedy to correct wrongful convictions, it is necessary to have insight into how the revision legislation functions in practice. Unfortunately, a great problem when it comes to studying revision procedures is that in many of the studied jurisdictions, data concerning the revision procedures at work are exceptionally scarce. In most countries, even formal data that disclose the total number of applications for revision or the number of successful applications are unavailable. Nonetheless, by finding available data regarding one particular year for instance, or by looking at the cases in which compensation for wrongful convictions is rewarded, we can at least get a glimpse of what is going on in the different legal systems. In England and the Netherlands the situation is somewhat different, as in those countries more extensive empirical research has been conducted to gain insight into the functioning of (parts of) the revision procedures in practice.⁵ These studies do not only provide important quantitative data, but also provide qualitative material on how the involved institutions review cases.⁶

The limited data available reveal that in all jurisdictions the number of applications for revision that are submitted is not trivial. The numbers vary from about 20-30 cases per year in the Netherlands to 1,400-1,500 cases a year in England.⁷ As expected with regard to the exceptional character of revision, in all jurisdictions most of the requests to review cases are rejected. Percentages of successful applications for review range from around 3% to about 10%.⁸ Of all cases that are ultimately reviewed, only some cases end up with the original conviction being nullified. It is however interesting to note

that all jurisdictions for which data are available have at least some nullified convictions each year.⁹

It is, however, difficult to draw conclusions from merely these numbers. To start with, it is relevant to gain insight into whether these cases primarily concern minor offences or whether they concern, for example, homicide cases. In Spain and the Netherlands, a substantial portion of all successful revision cases concern cases regarding driving without a licence (and in the Netherlands driving without motor insurance is also a major category). In Germany, an empirical study of revision cases reveals that theft and robbery, and fraud are the most common offences, followed by highway offences.¹⁰ However, almost all contributions to this special issue also describe revisions of notorious miscarriages of justice concerning very serious offences. In these instances, the miscarriage has usually also instigated public and academic discussion regarding the case. Considering that in many jurisdictions not all revision cases are published, it is difficult to gain insight into the precise composition of the supply of revision cases.

Furthermore, the revision procedures all have different set-ups and occupy a different position within the criminal justice systems of the different countries. For instance, jurisdictions have different possibilities for appeal within the regular system, which can affect the need for post-conviction review. In a system where possibilities for appeal are more limited, such as in England, it is not surprising that more people sought to use post-conviction review opportunities.¹¹

Finally, the total number of issued applications provides only little information about the actual number of wrongful convictions, given that – for a start – we do not know the percentage of wrongfully convicted persons who actually submit an application. As mentioned, different factors can inhibit the wrongfully convicted from bringing their case forward. Hence, the available empirical data do not allow us to draw any general conclusions about how the revision procedures function in the jurisdictions discussed in this special issue. We agree with many of the contributors to this special issue¹² that it is important that more data becomes available to learn whether the revision procedures do in

5. However, some empirical research has also been conducted in Germany; see Lindemann & Lienau's contribution, and also in Sweden, see Martinsson's contribution.

6. See more in the contributions from Hoyle and Holvast, Nan & Lestrade.

7. Other available data reveal that in France from 2014 to 2019 about 110-140 applications per year were submitted, in Germany 1,000 applications were submitted in the year 2018, in Spain 4,982 requests for review were resolved between 1995 and 2019 and in Sweden 383 applications were submitted in 2015. In Poland, Italy and Belgium no data are available on the total number of applications. Of course, one should be aware that these countries (and the number of court cases they handle) greatly differ in size.

8. In Spain about 90% of applications are dismissed. In Sweden an approval rate of 3% was found for the year 2015. In England and Wales, The Criminal Cases Review Commission has referred approximately 3% of cases to the appeal courts. In France over the years from 2015 to 2019, 4 to 9 cases were approved while in total 118 to 145 applications were submitted each year.

9. In Poland from 2010 to 2018, on average compensation was awarded to 16 wrongfully convicted persons; in Sweden 7 cases were approved in 2015. In Belgium between 2000 and 14 July 2015, decisions were taken on 50 requests for revision and in 10 of these cases, the original conviction was nullified. In Italy a total of 191 compensation requests pursuant to Art. 643 CCP were accepted in the period between 1991 and 2019. In France from 2012 to 2019, on average there were 2.2 nullifications per year. In the Netherlands from 2015 to 2019, there were on average 7 well-founded applications for revision. The empirical data on Germany also seem to suggest that there are at least some nullifications each year; see Lindemann & Lienau.

10. See Lienau and Lindemann on this study.

11. See also in this regard M. Killias, 'Errors Occur Everywhere – But not at the Same Frequency: The Role of Procedural Systems in Wrongful Convictions', in C.R. Huff and M. Killias (eds.), *Wrongful Convictions & Miscarriages of Justice: Causes and Remedies in North American and European Criminal Justice Systems* (2013).

12. See most noticeably Martinsson in this issue.

practice offer an effective remedy and what factors potentially impede its functioning.

6 Conclusion

From the contributions in this special issue, which cover nine different western European jurisdictions, it becomes clear that the importance of providing revision as a legal instrument to overturn wrongful criminal convictions, is undisputed. Revision in favour of the accused is, we conclude, generally seen as an indispensable and thus important remedy in any criminal justice system.¹³ At the same time, revision in case of an unjust conviction is an extraordinary measure, only applicable in exceptional circumstances, because justice will normally be done in the regular procedure. The provisions for revision are therefore usually formulated restrictively. We furthermore observe that there exists no unity on the grounds for revision and that not all jurisdictions allow for an application after a verdict by the ECtHR.

The available empirical data on revision in practice show that the grounds for revision are indeed restrictively applied by the courts. This makes it difficult for convicted persons to have their final conviction reviewed. In many instances this is amplified by the lack of funds for adequate legal representation (which is frequently mandatory to file a request) and the lack of facilities to investigate the existence of new facts or circumstances, which could constitute a *novum*. Some countries, such as France and the Netherlands, have broadened the *novum* ground for revision and enacted a procedure which allows (certain) convicted persons to ask the public prosecutor or procurator general for an investigation into a possible *novum*, prior to submitting a request for revision. Experiences in the Netherlands show some modest, positive results. But this pre-procedure is by no means a panacea for all situations, as most requests for a further investigation are inadmissible because no viable lead to a *novum* is presented. In both France and the Netherlands, even after legal possibilities were broadened, criticism on the procedure remained.

The various contributions to this special issue show both several similarities and differences between legal systems on the grounds for revision and the procedural aspects. There is not one single approach that stands out or proves to be superior to the others. A perfect revision mechanism, if it exists, will have to be the result of a patchwork of existing features, which fits within the specific legal system where it functions. However, the absence of reliable empirical data makes it particularly difficult to determine whether the revision mechanisms are functioning adequately and offer convicted persons sufficient access to this review remedy.

All jurisdictions have in common that they are aiming to find a balance between the principles of legal certainty, finality and *res judicata*, and the principle of justice. All jurisdictions also have in common that they seem to struggle to find the right balance between these principles. This special issue points to various ‘best practices’, as well as possible defects and challenges. The descriptions of the revision procedures in all these different jurisdictions, as well as their challenges, offer legislatures valuable material to reassess and improve their own systems. However, this special issue only marks the beginning of a more thorough comparative analysis of revision procedures. In order to make impactful research-based improvements, and perhaps even create mutual standards, more data are needed about the functioning of the systems in practice. Such further studies would allow national legislatures to learn more from international experiences. They can potentially also enable the European Commission and the Council of Europe to assess whether possible unwarranted differences in the national legal systems and malpractices in the functioning of these systems call for a European approach to redress wrongful criminal convictions.

13. However, not all countries accept revision to the detriment of the accused.

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