



## ARTICLES

### TOWARDS EUROPEAN CRIMINAL PROCEDURAL LAW – FIRST PART

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## TOWARDS A EUROPEAN RIGHT TO CLAIM INNOCENCE?

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ABSTRACT: Although there is a European right to fair trial, a presumption of innocence, and a right to appeal, there is no European human rights norm that obligates Member States to allow former suspects to contest their convictions. In a time of growing harmonisation and comparison of criminal procedure approaches between European countries, and in a time in which new scientific options to gather and analyse evidence were developed, the question rises whether there should also be an EU right to claim innocence. And if so, what should it entail? A common European (Union) right to claim innocence could further strengthen the faith Member States have in each other's legal system and therefore have a positive influence on mutual cooperation in criminal matters. This *Article* explores the justification for an EU directive on this topic. It is concluded that an EU procedural right to overturn wrongful convictions could be justified (by the EU legislator), but further research on the various differences and (in)adequacy in practice of the existing mechanisms across the Member States is needed to substantiate the necessity of such an EU instrument.

KEYWORDS: revision – claim of innocence – miscarriages of justice – mutual recognition – mutual trust – minimum rights.

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## I. EU LAW AND REVISION

A main goal of the EU is to constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States. From the end of the last century on, the criminal (procedural) law agenda of the EU has, for that part, been focused on mutual recognition of judgments and other decisions of judicial authorities of Member States. This would enhance judicial cooperation in criminal matters across borders. Mutual recognition is based on mutual trust of Member States in each other's (criminal) legal order.<sup>1</sup> Therefore, it is needed that all Member States respect a certain minimum of fundamental rights of citizens. The EU has the legislative power to set minimum rules, for instance on rights of suspects in the criminal procedure, taking into account the differences between the legal traditions and systems of the Member States. If these minimum rules are upheld EU-wide, there is no reason not to cooperate in criminal matters across borders, even though the executing state may have dealt with a certain case differently. On the basis of mutual trust, the executing State can only rarely refuse to recognise and execute a decision of the issuing State.<sup>2</sup> It is up to the issuing State to ensure that it conducts the administration of justice properly in theory and in practice, on which other Member States need to be able to rely.<sup>3</sup> This is not automatically the case.<sup>4</sup>

When formulating human rights, preventing miscarriages of justice is explicitly mentioned within the European legal framework. Two good examples where this topic is present in the case law of the European Court of Human Rights are the right to access to a lawyer in criminal proceedings<sup>5</sup> and the right to remain silent as part of the right to

<sup>1</sup> Council Resolution of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. See, for instance, the various contributions to E. BOUWER, D. GERARD (eds), *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law*, in *EUI Working Papers*, no. 13, 2016.

<sup>2</sup> See for a recent example of those principles: Court of Justice, judgment of 5 December 2019, case C-671/18, *Centraal Justitiele Incassobureau (and exécution des sanctions pécuniaires)*.

<sup>3</sup> See Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

<sup>4</sup> As Satzger has stated for that matter, mutual trust is not something that can just be created or ordered to exist. Trust has to be deserved and permanently watched, for it is also not a static given. The legal and factual situation in Member States should be observed continuously and if necessary, trust and cooperation should be revoked if there is a certain lack of respecting fundamental rights in a Member State. H. SATZGER, *Is Mutual Recognition a Viable General Path for Cooperation?*, in *New Journal of European Criminal Law*, 2019, p. 44 *et seq.*

<sup>5</sup> European Court of Human Rights, judgment of 26 April 2007, no. 36391/02, *Salduz v. Turkey* [GC], para. 53.

a fair trial and the presumption of innocence.<sup>6</sup> These fundamental rights are, among many others of course, also acknowledged by the EU legislator.<sup>7</sup> However, even when all minimum rules, human rights and (procedural) regulations are followed fairly and to the letter, a final criminal conviction of the person concerned can turn out to be wrong. Judges, laymen and juries can simply appreciate the evidence in such a way that the verdict does not reflect reality. With new (forensic) investigative techniques and other experiences from the past (such as the improper interrogation of suspects), judicial errors have come to light more regularly and the need to address wrongful convictions is felt globally.<sup>8</sup> Without prejudice to the interests of legal certainty and finality, all Member States have, we safely assume, some form of remedy to redress a final conviction that turns out to be wrong.<sup>9</sup> They may, however, vary to quite an extent.

The EU has formulated ambitions on guaranteeing and developing human rights repeatedly and quite unequivocally this century.<sup>10</sup> Contemplating minimum standards for post-conviction redress to correct a wrongful conviction would be appropriate for a community that wants to constitute an area of freedom, justice and security, as it can be seen as a right of individuals in criminal procedure, also after they have ended.<sup>11</sup>

In this *Article* we will examine if we should move towards a European right to claim innocence. We ask ourselves if a right to claim innocence would be feasible in the EU as a minimum rule that could further enhance mutual trust between Member States, leading to (even) better mutual recognition and cooperation in criminal matters. In section II we explore the concept of revision (what is its nature and why is there a need for revision in general?) and the grounds for it in various (Western European) Member States. In section III we discuss the legal possibilities and justification to harmonise revision in

<sup>6</sup> European Court of Human Rights, judgment of 8 February 1996, no. 18731/91, *John Murray v. the United Kingdom*, para. 45. See Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings and Art. 48 of the Charter of Fundamental Rights of the European Union.

<sup>7</sup> See respectively Directive 2013/48 and Directive 2016/343 and Art. 48 of the Charter.

<sup>8</sup> See, for instance, B.L. GARRETT, P.J. NEUFELD, *Invalid Forensic Science Testimony and Wrongful Convictions*, in *Virginia Law Review*, 2009, p. 1 *et seq.*; G.J.A. KNOOPS, *Redressing Miscarriages of Justice, Practice and Procedure in (International) Criminal Cases*, Leiden: Nijhoff, 2013; D. HAMER, *Wrongful Convictions, Appeals, and the Finality Principle: The Need for a Criminal Cases Review Commission*, in *University of New South Wales Law Journal*, 2014, p. 270 *et seq.*; B.L. GARRETT, *Towards an International Right to Claim Innocence*, in *California Law Review*, 2017, p. 1173 *et seq.*

<sup>9</sup> See for an indication of the universal existence of remedies and their development, B.L. GARRETT, *Towards an International Right*, *cit.*

<sup>10</sup> See as an example Directive 2013/48, Preamble no 6: "Strengthening mutual trust requires detailed rules on the protection of the procedural rights and guarantees arising from the Charter, the ECHR and the ICCPR. It also requires, by means of this Directive and by means of other measures, further development within the Union of the minimum standards set out in the Charter and in the ECHR".

<sup>11</sup> It has been on the EU legislative agenda at least once before, albeit informal at a luncheon of the secretaries of justice on 9 July 2014, in Brussels.

criminal procedural law. In section IV, we come to a conclusion on the justification of overturning wrongful convictions as a potential EU procedural right.

## II. THE NATURE OF REVISION AND (WESTERN) EUROPEAN GROUNDS

### II.1. THE NATURE OF REVISION: STRIKING A BALANCE BETWEEN LEGAL CERTAINTY AND JUSTICE

The extraordinary remedy of claiming innocence (revision) concerns a post-conviction right to start a procedure where a conviction has already become final, is wrong and must be overturned. When it comes to revision, two competing interests are at stake: legal certainty, finality and *res judicata* (the case has been decided) on the one hand, and justice for the individual in specific and exceptional cases on the other. This *Article* is meant to gain some familiarisation with the extraordinary remedy that is usually called revision and focusses on the character of the remedy and the various grounds in several (Western European) Member States. While we think that all Member States have some form of revision in their criminal law system with certain similarities, major differences exist, even if we only compare the systems of especially the Western European Member States on grounds for revision.<sup>12</sup> We will not discuss in depth the origins of judicial errors, nor how to prevent them. We accept miscarriages of justice, or to put it more mildly, judicial mistakes, as a given in any legal system, just as the need to correct them. We want to focus on the possibility of revision in connection with improving mutual trust and therefore mutual recognition and cooperation in criminal matters between the Member States. We limit this to a review on behalf of the convicted person and leave the revision *ad malam partem* (a re-opening of proceedings to the disadvantage of the accused) outside the scope of this *Article* (although that review mechanism could also influence mutual trust in each other's criminal judicial systems).

When designing a revision procedure, the above-mentioned interests must be taken into account: the importance of finality and the importance of justice. With regard to the first interest, it is widely accepted that finality in criminal law is relevant because otherwise, there would be no certainty to the meaning of the law, or the outcome of any legal process. A case has to end sometime (*litis finiri oportet*). Therefore, revision is an extraordinary remedy in probably all jurisdictions. The grounds for reopening a criminal case are usually narrowly defined and restricted in practice, because of the principles of legal certainty, finality and *res judicata*.<sup>13</sup> It is truly an exceptional procedure.<sup>14</sup>

<sup>12</sup> B.L. GARRETT, *Towards an International Right*, cit., p. 1196, who denotes that there is a real or remarkable variation among civil law and common law countries in their approach towards claims of innocence.

<sup>13</sup> See on the importance of the principle of finality and practice in England, K. MALLESON, *Appeals Against Conviction and the Principle of Finality*, in *Journal of Law and Society*, 1994, p. 151 *et seq.* More authors are sceptical about the room the law leaves and the judicial attitude to only reluctantly overturning a conviction. See for

The aforementioned principles are often also connected to the principle of double jeopardy (*ne bis in idem*).<sup>15</sup> When it comes to reopening (criminal) cases it is, simply put, a matter of choice between the interests of *res judicata* and legal certainty to uphold the criminal justice system all together and the interest of justice in the case at hand. Only in exceptional cases, the latter interest wins.<sup>16</sup> If we keep doubting verdicts, proceedings never come to an end and no authority can be derived from them to enforce them. However, always holding on to apparently unjust convictions just because they are final harms the legitimacy of legal systems too, of course.

Finality of legal proceedings that have come to an end and the authority they have, are principles that have been recognised in the case law of the Court of Justice and the European Court of Human Rights. In 2018, the Court of Justice firmly reiterated this in the case of *XC and Others*.<sup>17</sup> In addition, the European Court of Human Rights has stated repeatedly that one of the fundamental aspects of the rule of law is the principle of legal certainty, which requires – among other things – that where the courts have finally determined an issue, their ruling should not be called into question. Reopening (criminal) proceedings after they are concluded “are justified only when made necessary by circumstances of a substantial and compelling character”, according to the European

Germany K. MARXEN, F. TIEMANN, *Die Wiederaufnahme in Strafsachen*, Heidelberg: Müller, 2006, p. 1 and M. HEGHMANN, U. SCHEFFLER, *Handbuch zum Strafverfahren*, München: Beck, 2008, p. 1087.

<sup>14</sup> B.L. GARRETT, *Towards an International Right*, cit., p. 1218: “all systems include some form of finality that attaches to a conviction after the appeal is complete”. See for an earlier comparison on France, Germany and England J. HATCHARD, B. HUBER, R. VOGLER (eds), *Comparative Criminal Procedure*, London: British Institute of International and Comparative Law, 1996, pp. 57, 82-83, 134-135, 205 and 218.

<sup>15</sup> See J.A.E. VERVAELE, *European Criminal Law and General Principles of Union Law*, in *Research Papers in Law*, 2005, p. 131 *et seq.* See on this principle W.B. VAN BOCKEL, *The ne bis in idem Principle in EU Law*, doctoral thesis, University of Leiden, 2009, available at [openaccess.leidenuniv.nl](http://openaccess.leidenuniv.nl).

<sup>16</sup> We don't think this meets any opposition. See for instance A. GRÜNEWALD, *Die Wiederaufnahme des Strafverfahrens zuungunsten des Angeklagten*, in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 2008, p. 545 *et seq.*; M. HEGHMANN, U. SCHEFFLER, *Handbuch zum Strafverfahren*, cit., p. 1087. See also J. LEROY, *Procédure Pénale*, Paris: Librairie générale de droit et de jurisprudence, 2009, p. 543; V. CONWAY, J. SCHWEPPE, *What Is a Miscarriage of Justice? The Irish Answer to an International Problem*, in *Dublin University Law Journal*, 2012, pp. 1 and 4; Z. VARGA, *Retrial in the Member States on the Ground of Violation of EU Law*, in *ELTE Law Journal*, 2017, p. 57 *et seq.*; S. BAYER, *Die strafrechtliche Wiederaufnahme im deutschen, französischen und englischen Recht*, Baden-Baden: Nomos, 2019, p. 24 *et seq.*

<sup>17</sup> “Furthermore, attention should be drawn to the importance, both in the legal order of the European Union and in national legal systems, of the principle of *res judicata*. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time limits provided for in that connection can no longer be called into question”. Court of Justice: judgment of 24 October 2018, case C-234/17, *XC and Others* [GC], para. 52, with reference to judgment of 16 March 2006, case C-234/04, *Kapferer*, para. 20; judgment of 29 June 2010, case C-526/08, *Commission v. Luxembourg* [GC], para. 26; judgment of 29 March 2011, case C-352/09 P, *ThyssenKrupp Nirosta v. Commission* [GC], para. 123; judgment of 10 July 2014, case C-213/13, *Impresa Pizzarotti*, para. 58. See also Z. VARGA, *Retrial in the Member States on the Ground of Violation of EU Law*, cit., p. 55 *et seq.*

Court of Human Rights. If courts have finally determined an issue, their ruling should not be called into question and only correcting fundamental defects can justify going back on binding and enforceable judicial decisions: "That power must be exercised so as to strike, to the maximum extent possible, a fair balance between the interests of an individual and the need to ensure the effectiveness of the system of justice".<sup>18</sup>

As for the second interest, the interests of justice, we consider mistakes during criminal proceedings – that is, including regular appeal and cassation – which have become final, are a given. They can result from an honest mistake to fraud, made by investigators (such as interrogators), witnesses, experts or the court itself in assessing the evidence it has in front of it; new techniques such as DNA testing make those judicial faults especially visible. The existence in all the Member States (we assume) of some sort of revision mechanism to address them, both acknowledges that mistakes are made and proves the need for it besides a regular appeal.<sup>19</sup> Especially where a conviction is not based on the truth or a fair trial, there can be no justice. One might say that for any system to be righteous, a procedure to revise an incorrect criminal conviction, which has already become final, *must* exist notwithstanding the principles of legal certainty, finality and *res judicata*.<sup>20</sup>

That there is such a need for any justice system to have a revision clause can also be derived from the case law of the European Court of Human Rights. Although legal certainty and finality are important principles, there should be an instrument to correct miscarriages of justice.<sup>21</sup> Although the European Court of Human Rights underlines the

<sup>18</sup> There can be no revision merely for the purpose of a rehearing and a fresh decision on the case. The mere possibility of there being two views on the subject is not a ground for re-examination, according to the European Court of Human Rights. The principle of legal certainty is, however, not absolute and reopening closed criminal proceedings to someone's detriment is not *prima facie* incompatible with the Convention (notably not with Art. 6). While the Convention does not guarantee a right to have a terminated case reopened, it is clear that it does not prevent it either to correct judicial errors or a miscarriage of justice. Art. 6 is applicable in criminal proceedings if the national court is called upon to determine the charge. See, among many other judgments, European Court of Human Rights, judgment of 29 January 2009, no. 28730/03, *Lenskaya v. Russia*, para. 30, and further and more recently judgment of 11 July 2017, no. 19867/12, *Moreira Ferreira v. Portugal (No. 2)* [GC], both with further references.

<sup>19</sup> See G.J.A. KNOOPS, *Redressing Miscarriages of Justice*, cit., and B.L. GARRETT, *Towards an International Right*, cit. See, for recent studies also S. BAYER, *Die strafrechtliche Wiederaufnahme im deutschen, französischen und englischen Recht*, cit.; C. HOYLE, M. SATO, *Reasons to Doubt: Wrongful Convictions and the Criminal Cases Review Commission*, Oxford: Oxford University Press, 2019, pp. 6-7: "In all Western democracies, appeals processes may fail to identify wrongful convictions: appeals solicitors do not have adequate resources to investigate cases; judges fail to recognise when the system has erred; or at the time of direct appeal forensic science was insufficiently developed to be of probative value. Thus, elsewhere procedures have been established to review cases which have failed to find relief at the appeal court".

<sup>20</sup> As do V. CONWAY, J. SCHWEPPE, *What is a Miscarriage of Justice?*, cit., p. 1.

<sup>21</sup> "Considerations such as the emergence of new facts, the discovery of a fundamental defect in the previous proceedings that could affect the outcome of the case, or the need to afford redress, particularly in the context of the execution of the Court's judgements, all militate in favour of the reopening of pro-

importance of a revision possibility, an international or European extraordinary right to a remedy after an accused or suspected person has been irrevocably convicted of a crime does not exist currently. Only the right to a review by a higher tribunal and a claim for compensation after a wrongful conviction are internationally acknowledged so far.<sup>22</sup> Assuming that all Member States have some form of review in their criminal justice system, and given the case law of the European Court of Human Rights, it is interesting to see no right to review has been erected in the European context.

With respect to violations of the European Court of Human Rights, there is a recommendation of the Committee of Ministers that it seems best to put the injured party "as far as possible, in the same situation as he or she enjoyed prior to the violation of the Convention (*restitutio in integrum*)". The committee deems it appropriate that national legal systems have adequate opportunities of re-examination of the case, including reopening of proceedings.<sup>23</sup> However, this is not mandatory and the European Court of Human Rights has acknowledged this in *Moreira Ferreira v. Portugal No. 2*, although it does favour reopening proceeding in certain cases as the best redress.<sup>24</sup> It should be noted here, that the Court of Justice does not require Member States to extend this option to violations of EU law.<sup>25</sup> This case law may change, of course, if the frequency and scope of violations of EU law makes it too hard to stick to this line of reasoning (which has the uneasy effect that possibly unjust convictions are upheld).

The European Court of Human Rights thus on the one hand emphasises the relevance of finality, but on the other hand underlines the importance of justice. There must be some way to redress a wrongful conviction for the prevention of a breach of the right to a fair trial, or to end it. Reviewing criminal cases that have resulted in a conviction cannot, however, take place too easily.

## II.2. DIFFERENT APPROACHES ON THE GROUNDS FOR REVISION IN (WESTERN) EUROPE

The different jurisdictions in Europe show a wide variation of grounds for revision, such as conflicting convictions (*i.e.* two persons convicted of the same crime), the fact that

ceedings [...] a conviction ignoring key evidence constitutes a miscarriage of criminal justice, and that leaving such errors uncorrected may seriously affect the fairness, integrity and public reputation of judicial proceedings [...]. Similarly, the Court has found that the upholding, after review proceedings, of a conviction which breached the right to a fair trial amounted to an error of assessment which perpetuated that breach". *Moreira Ferreira v. Portugal (No. 2)*, cit., paras 62-63, with further references.

<sup>22</sup> See Arts 2-3 of Protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as Art. 14, paras 5-6, of the International Covenant on Civil and Political Rights.

<sup>23</sup> Committee of Ministers of the Council of Europe, Recommendation R(2000)2 of 19 October 2000 on the re-examination or reopening of certain cases at domestic level following judgements of the European Court of Human Rights.

<sup>24</sup> *Moreira Ferreira v. Portugal (No. 2)*, cit.

<sup>25</sup> *XC and Others [GC]*, cit.

the alleged victim of a murder turned out to be still alive, the fact that a witness committed perjury, a judge was bribed, the provision of criminal law was declared unconstitutional, new information came to light that would possibly (significantly) change the outcome of the case (*novum*), etc. More recently, a judgment of an international authority such as the European Court of Human Rights has also been seen as a ground for revision in all Member States whose revision mechanism we address in this *Article*. There could, thus, be several reasons to have a final verdict reviewed. A substantial divergence in the grounds for revision could support the need for harmonisation, setting a minimum standard for this important right and therefore facilitate judicial cooperation.

For example, Portugal has no less than seven grounds for a review (*Fundamentos e admissibilidade da revisão*): invalid evidence on which the final judgment was based, one of the judges or jurors who took part in the proceedings that led to the final judgment has been convicted with final effect of an offence linked to the performance of his or her duties, the facts of another judgment are incompatible with the conviction (where such discrepancy casts serious doubt on the validity of the conviction), a *novum* (the discovery of fresh evidence that casts serious doubt on the validity of the conviction), the conviction was based on unlawfully obtained evidence, the Constitutional Court has declared unconstitutional one of the provisions on which the conviction was based or a judgment by an international authority (with which the conviction is irreconcilable, or such a judgment casts serious doubt on the validity of the conviction in question, see Art. 449, para. 1, of the Portuguese Code of Criminal Procedure).

Germany also has six separate grounds for revision (*Wiederaufnahme*). Art. 359 of the German Code of Criminal Procedure (StPO) stipulates that a final judgment in a criminal case can be reviewed if in the main proceedings false documents have been used to the detriment of the convicted person, in case of perjury by a witness in detriment of the convicted person, in case of misfeasance by a judge or layman, when a civil judgment on which the conviction was based is annulled, in case of a *novum* or a judgment by the European Court of Human Rights.<sup>26</sup>

In Poland, a case can be reopened for four reasons.<sup>27</sup> If in connection with the proceedings an offence has been committed, and there is good reason to believe that this might have affected the contents of such a decision, and/or in case of a *novum* the case can be reviewed (see Art. 540, para. 1, of the Polish Code of Criminal Conduct). However, reopening is also possible if the relevant provision is, in short, declared unconstitutional or if that it is needed because of a judgment by an international authority.<sup>28</sup> Bel-

<sup>26</sup> See S. BAYER, *Die strafrechtliche Wiederaufnahme im deutschen, französischen und englischen Recht*, cit., pp. 123-190.

<sup>27</sup> Many thanks to Dr. Karolina Kremens, University of Wrocław.

<sup>28</sup> See Art. 540, paras 2-3. See on the Polish law of reopening proceedings W. JASINSKI, K. KREMENS, *Criminal Law in Poland*, Alphen aan den Rijn: Wolters Kluwer, 2019, p. 276.



gium also has four grounds for revision: conflicting convictions, a conviction for perjury by a witness, a *novum* and a judgment by the European Court of Human Rights.<sup>29</sup>

There are also Member States with an even more compact system, such as the Netherlands, who simplified its legislation on revision (*herziening*) in 1899 from several fragmentary grounds to just two grounds (conflicting convictions or a *novum*). In 2003 a third reason was added, through a judgment by the European Court of Human Rights.<sup>30</sup> France used to have four of the aforementioned “classical” grounds for review (*révision*): the murder victim turned out to be alive, conflicting verdicts, false witness statements and new evidence. France simplified these grounds to just one, a *novum*, in 2014 and has added a judgment by the European Court of Human Rights as the second basis for revision.<sup>31</sup> In Ireland there is just one basis to apply for revision (which could also be grounds for a pardon): a miscarriage of justice.<sup>32</sup> This broad term has not been defined exclusively, but does encompass not only a *novum*, but also certain other procedural defects.<sup>33</sup>

This brief and incomplete overview already shows that a conviction can be deemed wrong or unjust; not only because there is new evidence casting doubts on the culpability of the convicted person, but also because the proceedings leading up to the conviction were in one way or the other unfair or because the relevant provision of criminal law was invalid or unconstitutional. Even if it might be clear that the person involved committed the crime under review, there are still several reasons not to uphold the final verdict because it is unjust. So, what entails the right to claim innocence? When should there be grounds to overturn a final conviction? In other words, when is the conviction “wrong” or a “miscarriage of justice”?

<sup>29</sup> See Art. 443, Belgian Code of Criminal Procedure (although the reopening of proceedings in case of a judgment by the European Court of Human Rights has been separately codified in Art. 442 *bis* and further).

<sup>30</sup> See Art. 457, para. 1, Dutch Code of Criminal Procedure.

<sup>31</sup> Art. 622 of the French Code of Criminal Procedure reads: “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”. See Art. 622-1 for a ruling of the European Court of Human Rights as a ground for review. See further S. BAYER, *Die strafrechtliche Wiederaufnahme im deutschen, französischen und englischen Recht*, cit., pp. 191-253.

<sup>32</sup> Art. 2, para. 1, of the Criminal Procedure Act 1993 reads: “A person – (a) who has been convicted of an offence either – (i) on indictment, or (ii) after signing a plea of guilty and being sent forward for sentence under section 13 (2) (b) of the Criminal Procedure Act, 1967, and who, after appeal to the Court including an application for leave to appeal, and any subsequent re-trial, stands convicted of an offence to which this paragraph applies, and (b) who alleges that a new or newly-discovered fact shows that there has been a miscarriage of justice in relation to the conviction or that the sentence imposed is excessive, may, if no further proceedings are pending in relation to the appeal, apply to the Court for an order quashing the conviction or reviewing the sentence”.

<sup>33</sup> See D. LANGWALLNER, *Miscarriages of Justice in Ireland*, in *The Bar Review*, 2011, pp. 50-55 and V. CONWAY, J. SCHWEPPE, *What is a Miscarriage of Justice?*, cit.

One of the common denominators is, despite the different approaches, that all of the above-discussed jurisdictions have a *novum* as grounds for review, as well as a judgment by the European Court of Human Rights and other procedural defects. This shows that revision is usually not only possible in case it turns out the convicted person is actually innocent, but also if there is (serious) doubt about his culpability or if the proceedings were not conducted fairly. This would call for a broad approach to revision. For an error *de iure* this similarity is not the case. For instance, in the Netherlands the legislator and the Supreme Court unequivocally deny any legal argument as grounds for revision, even if a substantive law provision is later declared invalid or interpreted differently. It would be up for discussion how broadly the grounds for revision should be formulated.

It will, we think, therefore not be easy to agree upon the grounds for review that every Member State should have to enhance mutual trust. Member States have quite different portals to revision and in general, the grounds for revision also differ in the severity of the applicable criterion. This shows that in some countries getting a conviction reviewed could be much easier than in other countries, even though similarities also exist. Aligning all Member States to set minimum standards on all aspects of revision might be appropriate but could take a while.

### III. HARMONISATION OF CRIMINAL REVISION PROCEDURE LAW

#### III.1. COMPETENCE FOR HARMONISATION IN GENERAL

Having determined the nature of a revision procedure, the question rises whether an EU right could be justified. According to Art. 82, para. 2, TFEU, the EU is competent to harmonise criminal procedural law only for the purpose of facilitating mutual recognition of judgments and judicial decisions, and police and judicial cooperation in criminal matters having a cross-border dimension. The harmonisation of criminal procedural law is thus not a goal in itself (as opposed to the harmonisation competence of the EU in the field of substantive criminal law, Art. 83 TFEU), but has to support mutual recognition within the Union. Harmonisation rules concern the mutual admissibility of evidence between Member States, the rights of individuals in criminal procedure, the rights of victims of crime and any other specific aspects of criminal procedure which the Council has identified in advance by a decision (for the adoption of such a decision, the Council has to act unanimously after obtaining the consent of the European Parliament).

The term mutual recognition is already listed in the beginning of Title V, Chapter 1, TFEU, regarding the area of freedom, security and justice. Art. 67, para. 3, TFEU states that: "The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws".

However, it goes even beyond application in the context of cooperation in criminal matters alone. Art. 70 TFEU implies that the EU shall strive for “full application of mutual recognition”.<sup>34</sup> Even before the TFEU came into force in 2009, mutual recognition was already formulated by the Tampere Council of 1999 as a cornerstone principle for cooperation in civil and criminal matters.<sup>35</sup> Although the principle of mutual recognition has reached the status of the cornerstone for the area of freedom, security and justice, the concept has never been defined.<sup>36</sup> In a communication report to the European Parliament, the Commission described the principle as follows:

“Mutual recognition is a principle that is widely understood as being based on the thought that while another state may not deal with a certain matter in the same or even a similar way as one’s own state, the results will be such that they are accepted as equivalent to decisions by one’s own state. Mutual trust is an important element, not only trust in the adequacy of one’s partners rules, but also trust that these rules are correctly applied”.

Based on this idea of equivalence and the trust it is based on the results the other State has reached are allowed to take effect in one’s own sphere of legal influence. On this basis, a decision taken by an authority in one State could be accepted as such in another State, even though a comparable authority may not even exist in that State, or could not take such decisions, or would have taken an entirely different decision in a comparable case.<sup>37</sup>

Recognising a foreign decision in criminal matters could be understood as giving it effect outside the State in which it has been rendered, be it by according it the legal effects foreseen for it by the foreign criminal law, or be it by taking it into account in order to make it have the effects foreseen by the criminal law of the recognising State. “Not always, but often, the concept of mutual recognition goes hand in hand with a certain degree of standardization of the way states do things. Such standardization indeed often makes it easier to accept results reached in another state. On the other hand, mutual recognition can to some degree make standardization unnecessary”.<sup>38</sup>

With regard to the question whether the EU is competent to harmonise criminal review law, the following question must be answered: would the harmonisation of criminal review law within the EU Member States facilitate mutual recognition of judgments

<sup>34</sup> See also A. KLIP, *European Criminal Law*, Cambridge: Intersentia, 2016, p. 394.

<sup>35</sup> European Council, conclusions of the Presidency of 15-16 October 1999, SN 200/99, paras 33 *et seq.*

<sup>36</sup> See also A. KLIP, *European Criminal Law*, cit., p. 400.

<sup>37</sup> Court of Justice, judgment of 11 February 2003, case C-187/01, *Gözütok and Brügge*.

<sup>38</sup> Communication COM (2000) 495 final of 26 July 2000 from the Commission on mutual recognition of Final Decisions in criminal matters. See also I. ARMANDA, A. WEYEMBERGH, *The Mutual Recognition Principle and EU Criminal Law*, in M. FLETCHER, E. HERLIN-KARNELL, C. MATERA (eds), *The European Union as an Area of Freedom, Security and Justice*, New York: Routledge, 2017, p. 115.

and judicial decisions, and police and judicial cooperation in criminal matters having a cross-border dimension?

However, EU legislation is also bound by the principle of subsidiarity; see correspondingly Art. 5 TEU and more specifically with regard to legislative initiatives in the field of criminal matters, Art. 69 TFEU. Respect for the principle of subsidiarity can be seen as a safeguard for respecting national legal diversity, which is one of the aims of evolution of the EU as an area of freedom, security and justice, such as mentioned in Art. 67 TFEU.<sup>39</sup>

Taking these considerations into account, this leaves several questions open. First, what is a criminal matter having a cross-border dimension? Second, when does an EU instrument improve mutual recognition of judgments and judicial decisions, and police and judicial cooperation? Third, how should the principle of subsidiarity be taken into account in this perspective?

### III.2. CRIMINAL MATTERS HAVING A CROSS-BORDER DIMENSION

First of all, it is difficult to define a criminal matter having a cross-border dimension. Öberg distinguishes three explanations: the first one is a broad definition that includes any case which has any transnational element, however remote or indirect it is. The second one is a narrow definition and applies only to “pure” cross-border scenarios where either a victim or a suspect are involved in a trial in another State than the State in which they are citizens. The third one, which Öberg opts for, is a middle-way explanation which involves situations where the defendant or the victim is not from the Member State where the trial is held: situations where evidence must be mutually recognised for a trial in another Member State than where it is collected, and situations where the offence at issue was committed in another Member State than the one where the trial is held.<sup>40</sup> Using these definitions to justify the implemented EU instruments for strengthening the procedural rights of suspected persons in criminal proceedings, whatever definition is taken, a criminal procedural right can concern a criminal matter without any transnational element, but it could also very well relate to a “pure” cross-border crime. The same applies to a right on revision: the criminal case in which revision would be desirable can involve a cross-border element, but it can also be of (only) national nature. Since there are always cases with a pure transnational element, this criterion is not an obstacle for legislation. The European Commission also considers that Art. 82, para. 2, TFEU provides the legal basis for directives on procedural rights of suspects and accused persons; those rules are not only applicable to cross-border criminal proceedings (*i.e.* proceedings with a link to another Member State or a third country) but also to domestic cases as a precise, *ex ante*

<sup>39</sup> See also V. MITSILIGAS, *Criminal Law after Lisbon*, Oxford: Hart, 2016, p. 40.

<sup>40</sup> J. ÖBERG, *Subsidiarity and EU Procedural Criminal Law*, in *European Criminal Law Review*, 2015, pp. 25-27.

categorisation of criminal proceedings as cross-border or domestic is impossible in relation to a significant number of cases.<sup>41</sup>

### III.3. IMPROVING MUTUAL RECOGNITION

The second point of investigation relates to the question of whether the EU instrument improves mutual recognition of judgments and judicial decisions, and police and judicial cooperation. The EU instruments based on Art. 82, para 2, TFEU that have been developed related to fundamental rights were founded on the idea that the harmonisation of procedural rights (for both suspects and accused persons, as for victims) strengthens the mutual trust Member States have in each other's legal systems and this facilitates mutual recognition.<sup>42</sup> It is not exactly demonstrated *how* the instruments increase mutual recognition. However, in the analysis in 2008 of the future of mutual recognition in criminal matters in the EU, it was emphasised that the relationship between the level of harmonisation of procedural law and the level of mutual trust as a condition for successful mutual recognition is not in dispute.<sup>43</sup> With regard to the measures on the rights of the individual in criminal procedure, Mitsilegas also emphasises the legitimacy. In his opinion, EU legislation in this field will have a transformative effect for the protection of human rights in Europe's area of criminal justice. EU legislative intervention will ensure widening the scope and raising the level of protection of human rights in criminal procedures across the EU; it will ensure effective enforcement and monitoring of the implementation of these rights at national level and it will overcome obstacles to the protection of human rights arising from divergences in protection at national level.<sup>44</sup> This would imply that the threshold to introduce a right to claim innocence is low. The EU is able to formulate law as soon as it can argue that a directive on revision would facilitate mutual recognition of judgments and judicial decisions, and police and judicial coopera-

<sup>41</sup> Commission staff working document SWD(2013)478 final of 27 November 2013, *Impact assessment accompanying the document Proposal for measures on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings*, p. 29.

<sup>42</sup> See for example the Preamble no. 1-12 in Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings; the Preamble no. 1-14 in Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings; the Preamble no. 1-7 in Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA and the Preamble no. 1 and 2 in Directive 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings.

<sup>43</sup> G. VERNIMMEN-VAN TIGGELEN, L. SURANO, *Analysis of the Future of Mutual Recognition in Criminal Matters in the European Union (European Commission)*, in *European Criminal Law Academic Network*, 2008, available at [www.advokatsamfundet.se](http://www.advokatsamfundet.se), p. 10.

<sup>44</sup> V. MITSILEGAS, *Legislation for Human Rights after Lisbon, The Transformative Effect of EU Measures on the Rights of the Individual in Criminal Procedure*, in M. FLETCHER, E. HERLIN-KARNELL, C. MATERA (eds), *The European Union as an Area of Freedom, Security and Justice*, cit., p. 202.

tion in criminal matters having a cross-border dimension. Because the relationship between harmonisation of procedural law and the level of mutual trust is not called into question, the EU has the competence.

#### III.4. THE PRINCIPLE OF SUBSIDIARITY

Here we arrive at the third question we have to answer: is legislation in accordance with the principle of subsidiarity? Öberg stresses the importance of this principle – next to the conditions in Art. 82, para. 2, TFEU – in order to prevent EU regulation from being adopted too quickly. He introduces two criteria to test the compliance of EU law with the subsidiarity principle. First, there has to be adequate reasoning. Second, there has to be relevant evidence to justify legislation. With regard to the reasoning test, there has to be an explanation of why it is necessary to have a general right – in this context on revision law – to regulate purely internal situations, where the suspects are tried in their own Member State and where the judicial proceedings have taken place in that Member State alone. He adopted this test to the EU Victims Directive and argues that the harmonisation of *all* victim rights, also in cases where victimisation has no cross-border implication, cannot be based on the free movement and the mutual recognition argument and is thus not in conformity with the subsidiarity principle.<sup>45</sup> Furthermore, with regard to the second criterion, to justify EU legislation there must be concrete evidence to support that divergences in the protection of suspects' rights have already had negative consequences for the building of mutual trust among Member States' judicial authorities. The Commission would have to show that national diversities – in this case concerning a right to claim innocence – create such problems of mutual trust, that there would be a serious risk that Member States would refuse a mutual recognition instrument, such as the European Arrest Warrant. In the opinion of Öberg, the Victims Directive does not pass this test of "relevant evidence" and also infringes the subsidiarity principle on this ground.<sup>46</sup>

In the (final) impact assessment of the EU directive on the strengthening of certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings,<sup>47</sup> the EU considered that there is a need for EU action, respecting the subsidiarity principle. This is because: 1) the directive would enhance mutual trust between judicial authorities, and 2) it involves the movement of EU citizens because persons can be involved in criminal proceedings outside their own EU Member State, and the needs of those suspected and accused persons need to be tackled at EU level. In the EU, people are constantly travelling and moving across borders. Because of this continuing movement, it is important to ensure proper, effective action on the rights of those who become involved in criminal proceedings, in their own country or while travelling or liv-

<sup>45</sup> J. ÖBERG, *Subsidiarity and EU Procedural Criminal Law*, cit., pp. 39-40.

<sup>46</sup> *Ibid.*

<sup>47</sup> Directive 2016/343, cit.

ing abroad. Furthermore, the EU considers, that the European Court of Human Rights enforcement mechanisms are not sufficient to ensure that the European Court of Human Rights standards are applied in practice throughout the EU. They have not prevented EU Member States from repeatedly violating Art. 6, para. 2, of the European Court, in spite of the fact that they undertook to abide by the judgments of the European Court of Human Rights in any case to which they are parties.<sup>48</sup> This deliberation by the EU implies a less stringent test than Öberg argues for. If we apply these impact assessment arguments to an EU right on revision, we can say that such a right would also improve mutual trust. It involves moving EU citizens and, even more important, there is no right to claim innocence in the European Court or in other universal or European treatments yet (as we pointed out in section II), so an EU right would definitely be of added value in this regard.

We also see a number of disadvantages of a right to claim innocence, however. First, minimum rules with regard to a revision system risks reducing existing standards in Member States to the EU minimum.<sup>49</sup> Members which offer more opportunities for convicted suspects could use an EU instrument to revise their regulations to the detriment of convicted persons. Second, if the review procedure in another Member State is below the required level, it might create an extra obstacle to cooperation in other criminal cases (for instance, it might block the extradition of surrenders; because the review procedure is inadequate, this would hinder cooperation in general). Furthermore, a right to claim innocence might not be a prior concern of the EU. It could be argued that it is in general better to invest in EU cooperation in the phase of criminal investigation itself than in the post-trial phase (the review process). Compared to other EU instruments, a right to claim innocence would then not have priority. Finally, if an EU right is to be implemented, there has to be an opportunity to control the compliance with this rule, otherwise it would be an empty case.

#### IV. CONCLUSION

In this *Article* we examined the question of whether we should move towards a European right to claim innocence. The EU is only competent to harmonise criminal procedural law if it facilitates mutual recognition of judgments and judicial decisions, and police and judicial cooperation in criminal matters having a cross-border dimension and if it is in accordance with the principle of subsidiarity. It can be argued that a fundamental right to claim innocence meets those requirements. The EU instruments that have been developed related to fundamental rights so far, were all funded on the idea that the harmonisation of procedural rights (for suspects and accused persons as for victims) strengthens the mu-

<sup>48</sup> Commission staff working document SWD(2013)478 final, cit., pp. 29-30.

<sup>49</sup> G. VERNIMMEN-VAN TIGGELEN, L. SURANO, *Analysis of the Future of Mutual Recognition in Criminal Matters*, cit., p. 25.

tual trust Member States have in each other's legal systems and this facilitates mutual recognition. The same would go for a post-procedural right to claim innocence, especially since the grounds for revision vary in the Member States we discussed.

But enacting an EU right to claim innocence will come with inherent dangers. In general, it will have to serve two competing interests, namely that of legal certainty, finality and *res judicata* on the one hand, and justice in specific and exceptional cases on the other. If this mechanism is set up too narrowly, justice might not prevail. If it is set up too broadly though, the right would seriously endanger legal systems as a whole and the instrument might cave in under all the (unjust) applications. In both situations, mutual trust in a legal system can be affected negatively if a fair balance is not struck in the existing mechanisms, and this could hinder mutual recognition and cooperation. If convictions are overturned too regularly, the executing Member State might feel tempted or obligated to refuse recognition or cooperation. A high number of revisions would show that the requesting Member States may not have the required functioning criminal justice system. Trust diminishes if it could very well be that the person involved is, after all, innocent or there is at least (serious) doubt on his culpability, or fundamental human rights are not respected in the requesting Member State. If convictions cannot be reviewed or if they are rarely reviewed, even though that might seem appropriate in certain cases, the reluctance of the executing Member State to cooperate may also grow. If the requesting or issuing Member State does not have an adequate (functioning) mechanism to redress a wrongful conviction, the executing Member State may in that case set higher standards in order to cooperate. Doubts on revision are therefore a threat to the cornerstone of EU criminal procedural law.

Our conclusion is that an EU procedural right to overturn wrongful convictions could be justified by the EU legislator, in the same way as other minimum procedural rights have been justified, namely by arguing that harmonising criminal procedural law will enhance mutual trust. We think, however, that further research on the various differences and (in)adequacy in practice of the existing mechanisms across the member States is needed to substantiate the necessity more soundly. That would prevent critique on the condition of subsidiarity on this EU instrument.