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## CROSS-SYSTEM ANALYSIS: SHAPING THE APPROPRIATE MODEL OF CROATIAN INNOCENCE PROJECT IN THE LANDSCAPE OF WRONGFUL CONVICTIONS

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### Abstract

*This paper performs a comparative analysis of wrongful convictions within adversarial and continental legal systems, spotlighting the United States, Italy, the Netherlands, and Croatia. Focused on countries with operational Innocence Projects, it aims to dissect the effectiveness of these models in rectifying judicial errors, particularly eyeing the newly established Croatian Innocence Project. Through normative, comparative, and theoretical methodologies, alongside a detailed case study approach, this study scrutinizes the mechanisms of Innocence Projects across diverse legal landscapes. It delves into the frequency and nature of wrongful convictions, underscoring the pivotal role of post-conviction DNA testing in unveiling judicial inaccuracies, especially in serious criminal offenses requesting retrials. The exploration reveals a critical examination of domestic and international legal frameworks governing the rights of the wrongfully convicted, emphasizing the transformative impact of U.S. Innocence Project models on their European counterparts. This analysis is supported by the exploration of the specific challenges encountered in post-conviction DNA testing, including the logistical and ethical dilemmas inherent in the management and retention of DNA profiles. The paper posits that the Croatian Innocence Project stands at a crossroads, necessitating a strategic choice in its model adoption to effectively safeguard wrongfully convicted individuals' rights. Drawing from the experiences of established Innocence Projects in the U.S. and Europe, and considering the unique legal and systemic challenges in Croatia, the paper advocates for a University non-DNA approach. This recommendation is grounded in the recognition that Croatia's high evidentiary thresholds and the intricate legal and ethical issues surrounding DNA evidence demand a broader, more inclusive strategy. Such an approach would enable the Croatian Innocence Project to leverage a wider array of investigative and legal tactics to address the multifaceted causes of wrongful convictions, transcending the limitations of DNA evidence alone. By advocating for substantial legal reforms and heightened public consciousness, the proposed model aims to realign Croatia's justice system with the European Court of Human Rights standards, fostering a more adaptable and just legal environment. This non-DNA-centric strategy not only accommodates cases*

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*where DNA evidence is lacking or inconclusive but also champions a more equitable legal process that rigorously defends against wrongful convictions.*

*As the Croatian Innocence Project evolves, adopting a model that extends beyond the conventional DNA evidence framework could significantly enhance its effectiveness in combating miscarriages of justice in Croatia. This approach promises not only to rectify past injustices but also to lay a robust foundation for a fairer, more transparent judicial system in Croatia, ensuring the protection and administration of justice for all.*

## **Introduction**

This paper explores the common causes of wrongful convictions within two major legal frameworks: the adversarial and continental law systems. It uses the United States as a representative example of the adversarial system, and Italy, the Netherlands in Croatia, as representatives from the continental law system. The paper focuses on countries that have already established innocence projects, specifically Italy, the Netherlands, and the newly established innocence project in Croatia<sup>1</sup>, as the main beneficiary country of this paper. These countries are considered case studies to evaluate the effectiveness of innocence project models in correcting judicial errors. Its primary objective is to assess the various innocence project models to identify the most suitable approach for the newly developed Croatian Innocence Project, currently in its experimental phase. The hypothesis suggests that choosing the university-based model for the Innocence Project will substantially enhance the protection of rights for individuals wrongfully convicted in Croatia. To achieve this, the paper employs several research methodologies, including normative, comparative, and theoretical analyses, to explore the operations of innocence projects across different legal systems. The paper aims to provide a normative and empirical examination of the domestic and regional legal frameworks concerning the rights of wrongfully convicted individuals, emphasizing the importance of post-conviction DNA testing to uncover potential judicial errors. This paper will include an overview of serious criminal offenses where a retrial has been requested in the Netherlands and Italy to demonstrate the effectiveness of the European innocence projects. Furthermore, the paper seeks to highlight the challenges associated with conducting post-conviction DNA testing, the impact of the U.S. Innocence Project's experiences on European counterparts, and the specific experiences of the Croatian Innocence Project to recommend the most suitable model of innocence project for Croatia.

This paper is organized into distinct sections, each addressing a critical aspect of wrongful convictions and the role of innocence projects. The first section delves into the causes and explanations behind wrongful convictions, setting the stage for a deeper exploration of this issue. Following this, the second section compares and contrasts the approaches of innocence projects in the United States with those in European countries, highlighting differences in their models and methodologies. The third section narrows the focus to the operations of innocence projects in Italy and the Netherlands, specifically their integration into the continental criminal justice system and their impact on addressing wrongful convictions through revision of the criminal procedure and treatment of DNA evidence. This section also briefly touches upon the jurisprudence of the European Court of Human Rights regarding the *novum* and reopening of proceedings in both cases. This analysis provides insight into how these projects adapt to different legal environments. The fourth section introduces Croatia's recently established innocence project, presenting an in-depth look at its legal framework, jurisprudence, and the potential it holds for correcting wrongful convictions. The conclusion of the paper highlights the indispensable role of innocence projects in rectifying miscarriages of justice. It advocates

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<sup>1</sup> More about the activities of the Innocence Project Croatia can be found at [www.croinop.unizg.hr](http://www.croinop.unizg.hr).

for Croatia to select the most suitable model for an innocence project, suggesting that reforming its legal system in line with proven practices is essential for preventing future wrongful convictions.

## I. What are Wrongful Convictions?

Merriam-Webster's dictionary defines a miscarriage of justice as a situation where a judicial proceeding results in an unjust outcome, such as a conviction without sufficient evidence for a crucial element of the crime.<sup>2</sup> This definition underscores the reality that innocent persons can be imprisoned, raising questions about the causes of these errors and the methods to prevent them in the future. Killias describes wrongful convictions as a phenomenon that occurs when individuals are found guilty and punished for crimes they did not commit.<sup>3</sup> These judicial errors can result from various factors, including mistaken eyewitness identification, false confessions, forensic science mistakes, prosecutorial misconduct, inadequate legal defense, and the misuse or withholding of evidence. In contrast Gillieron further argues that the consequences for the wrongfully convicted are profound, leading to unjust imprisonment, loss of reputation, and significant personal and familial distress.<sup>4</sup> Beyond the individual impact, wrongful convictions erode public trust in the justice system, highlighting the need for reforms and mechanisms like Innocence Projects to prevent such errors and ensure justice is accurately served. Well, the response to these concerns traces back to the 1980s and 1990s with the emergence of the Innocence Movement.<sup>5</sup> This period marked the beginning of a concerted effort by academics and legal professionals to address wrongful convictions, leading to the overturning of previous cases and highlighting the reasons for such errors through the establishment of "Innocence Projects." According to Vuille and Champod, the first organization of this kind, Centurion Ministries, aimed at exonerating innocent individuals by advocating for legal and policy changes to reduce wrongful convictions. This movement has since expanded, with numerous Innocence Projects emerging across various locations including Ohio, Chicago, and San Diego.<sup>6</sup> Recently, the California Innocence Project in San Diego has been coordinating efforts to enhance lawyers' trial skills.

### 1.1. Causes of wrongful convictions in the U.S. and Europe

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<sup>2</sup> Dictionary MW. Merriam-Webster. On-line at <http://www.mw.com/home.htm>.2002:8:2

<sup>3</sup> Killias M. Wrongful Convictions as a Result of Political Pressure [Internet]. Luparia L, editor. San Giuliano (MI): Wolters Kluwer Italia; 2015. pp. 61-63. Available from: ">[www.alexandria.unisg.ch](http://www.alexandria.unisg.ch)

<sup>4</sup> Gilliéron G. The risks of summary proceedings, plea bargains, and penal orders in producing wrongful convictions in the US and Europe. In: Wrongful Convictions and Miscarriages of Justice: Causes and Remedies in North American and European Criminal Justice Systems. London: Routledge; 2019. pp. 245-266

<sup>5</sup> The Innocence Movement is a global campaign aimed at identifying and overturning wrongful convictions and reforming the justice system to prevent future injustices. Central to this movement are organizations like the Innocence Project, which utilize DNA evidence and other forms of new proof to exonerate individuals who have been falsely convicted. Beyond securing the freedom of wrongfully convicted people, the movement advocates for policy changes to address systemic flaws that contribute to wrongful convictions, such as unreliable eyewitness testimony, forensic science errors, false confessions, and prosecutorial misconduct. Through public awareness, legal challenges, and legislative advocacy, the Innocence Movement seeks to enhance the accuracy, fairness, and integrity of the criminal justice system.

<sup>6</sup> Vuille, J., & Champod, C. (2017). "Forensic science and wrongful convictions. In *The Routledge International Handbook of Forensic Intelligence and Criminology* " The Routledge International Handbook of Forensic Intelligence and Criminology (pp. 125-135). Routledge.

The causes of wrongful conviction elaborated in this paper are derived from the work of the Innocence Project in New York<sup>7</sup> and the California Innocence Project.<sup>8</sup> In comparison to the United States, Europe has seen a notable deficiency in research concerning the origins of wrongful convictions. The Innocence Project New York has identified key factors<sup>9</sup> such as false confessions, eyewitness misidentification, and errors in DNA analysis as primary reasons for these miscarriages of justice. However, wrongful convictions can also stem from misconduct by law enforcement and prosecutors, and inadequate legal representation, among other issues. Both in the U.S. and across Europe, it's evident that incorrect forensic analysis and coerced confessions play significant roles in unjust convictions. For instance, the Netherlands has revisited and overturned six wrongful conviction cases since the 2000s, prompted by new evidence or 'novum.' Notably, in two instances, individuals confessed to crimes they didn't commit, where DNA evidence later contradicted their confessions. Despite the presence of evidence absolving them, these individuals were still convicted. Similarly, in Croatia, challenges arise due to legal inconsistencies in the handling, storing, and applying of DNA evidence in criminal cases, including the duration for which DNA data can be stored. This chapter will present the most common causes of wrongful convictions based on the data received from the National Registry of Exonerations and the work of the Innocence Projects.

### 1.1.1. False Confessions

In the United States, it is not uncommon for police investigations to cease following the acquisition of a confession, disregarding any inconsistencies within the case. This trend is particularly pronounced within the Common Law system, where a jury's exposure to a confession significantly diminishes the likelihood of altering their perception. In contrast, the Continental law system, prevalent in European nations, approaches false confessions with greater diligence. Courts within this system are committed to uncovering the factual truth, scrutinizing the conditions under which confessions are made, including the potential for coercion or duress. Luparia notes that, unlike jury-based Common Law trials, Continental law trials are presided over by professional judges.<sup>10</sup> This arrangement minimizes the emotional sway that confessions might otherwise have on the outcome. However, Killias points out that, despite these precautions, confessions frequently exert a decisive influence over judicial proceedings, even shaping the course of pre-trial investigations.<sup>11</sup> An illustrative example is provided by Knoops in the Dutch "Dimo murder" cases<sup>12</sup>, where the convictions were initially based on false confessions, unsupported by DNA evidence. Although these convictions were eventually overturned, their initial reliance on confessions highlights a systemic issue; even with mechanisms for scrutiny in place, confessions often carry disproportionate weight,

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<sup>7</sup> The official web site of the innocence project New York can be accessed here: <https://innocenceproject.org/>

<sup>8</sup> The official web site of the California Innocence Project can be accessed here: [https://www.cwsl.edu/experiential\\_learning/clinics/california\\_innocence\\_project.html](https://www.cwsl.edu/experiential_learning/clinics/california_innocence_project.html)

<sup>9</sup> Full list can be accessed here: <https://innocenceproject.org/the-issues/>

<sup>10</sup> Lupária L, Gialuz M. The Italian criminal procedure thirty years after the great reform. *Roma Tre Law Review*. 2019;2019(1):24-71

<sup>11</sup> Killias M. *Wrongful Convictions in Switzerland: The Experience of a Continental Law Country*. Huff CR, Killias M, editors. Philadelphia, PA, USA: Temple University Press; 2008. pp. 61-76

<sup>12</sup> Dimo murders are Dutch cases where the court has convicted 17 individuals in a significant case involving a gang responsible for planning several murders, highlighting the dangerous depths of the Netherlands' drug-related criminal underworld. The trial has captivated and alarmed the nation, especially after the related killings of a key witness's brother, the witness's lawyer, and a journalist. These additional murders underscored the trial's severity. The court found the testimony of a key witness who also faced charges, credible, contributing to the convictions. Other defendants received various sentences, and the court's decision can be appealed.

potentially serving as the primary basis for conviction absent additional supportive evidence.<sup>13</sup> Research highlights that false confessions can result from coercive interrogation tactics and certain personality traits like suggestibility, compliance, low IQ, young age, and the context of detention. It's noted that courts may misinterpret denials, assuming suspects have a motive to lie, thereby viewing confessions as more credible. This bias overlooks the possibility that innocent individuals might also deny involvement truthfully. In cases like Brian Banks<sup>14</sup>, where a victim recanted their accusation in court, the judicial system sometimes remains unconvinced without additional proof, leading to a reaffirmation of the original sentence. Similarly, requests for retrials based on new evidence, such as recanted witness statements, are often denied unless there's a formal conviction for obstructing justice, demonstrating a high threshold for reconsidering cases. In Europe, judicial authorities follow the legal obligations to assert that they rigorously verify the voluntariness of confessions and the credibility of material evidence, regardless of a defendant's plea. False confessions, particularly in misdemeanor cases or cases of plea bargains, are identified as significant contributors to wrongful convictions. The expedited process in misdemeanors aims for efficiency but may compromise justice, as defendants are encouraged to confess in exchange for leniency, risking harsher penalties and costs if they choose to contest the charges.

When it come to cases such as pre-trial proceedings, Luparia acknowledges that false confessions during plea bargaining can occur when defendants, faced with aggressive negotiation tactics, feel pressured to plead guilty to lesser charges for a reduced sentence.<sup>15</sup> This pressure is compounded by the fear of facing harsher penalties if convicted at trial, the desire to avoid the uncertainty and stress of a trial, and potential misunderstandings or misrepresentations of the evidence against them. Further, Cole and Thomson reiterate that vulnerable defendants, such as those with limited understanding of the legal system, mental health issues, or those who are falsely convinced of their guilt due to manipulative interrogation techniques, are particularly at risk.<sup>16</sup> The combination of these factors can lead defendants to falsely confess to crimes they did not commit as part of a plea bargain, believing it to be in their best interest under the circumstances. Refuting this, Brants demonstrates that false confessions can result from coercive interrogation tactics and certain personality traits such as suggestibility, compliance, low IQ, youth, and the conditions of detention.<sup>17</sup> Schiffer and colleagues have identified four possible stances a defendant might take in criminal cases:

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<sup>13</sup> Knoops GJ. Miscarriages of justice originating from false or unreliable confessions and plea agreements. In: Redressing Miscarriages of Justice: Practice and Procedure in (International) Criminal Cases. Brill Nijhoff; 2006;2013:41-59. Available from: [brill.com](http://brill.com)

<sup>14</sup> The Brian Banks case is a notable example of a wrongful conviction in the United States. Brian Banks was a high school football star at Long Beach Polytechnic High School in California, with a promising future and scholarship offers. In 2002, at the age of 16, Banks was accused of kidnapping and raping a fellow student, Wanetta Gibson. Despite maintaining his innocence, Banks faced up to 41 years in prison if convicted at trial. On the advice of his lawyer, who warned him about the likelihood of receiving a harsher sentence if convicted by a jury due to his race and the charges against him, Banks accepted a plea deal. He pleaded no contest to the charges, which resulted in a six-year prison sentence, five years of probation, and registration as a sex offender. Years later, in 2011, Gibson contacted Banks on Facebook and later admitted in a private meeting, which was recorded, that she had fabricated the allegations. With the help of the California Innocence Project, Banks filed a petition for the exoneration of his conviction. In 2012, his conviction was overturned by the Los Angeles County Superior Court, freeing him from the burden of his wrongful conviction.

<sup>15</sup> Lupária L, Gialuz M. The Italian criminal procedure thirty years after the great reform. *Roma Tre Law Review*. 2019;2019(1):24-71

<sup>16</sup> Cole, S. A., & Thompson, W. C. (2013). *Wrongful Convictions and Miscarriages of Justice: Causes and Remedies* in North American and European Criminal Justice Systems.

<sup>17</sup> Brants, C. (2013). "Tunnel Vision, Belief Perseverance and Bias Confirmation: Only Human?" In *Wrongful Convictions and Miscarriages of Justice* (pp. 161-192). Routledge.

- Correct denial of involvement in a crime<sup>18</sup>
- Incorrect denial of involvement<sup>19</sup>
- False confession to a crime<sup>20</sup>
- True confession to a crime<sup>21</sup>

The issue is that courts often misinterpret denials, assuming suspects have a motive to lie, especially since many guilty defendants deny their crimes.<sup>22</sup> As a result, defendants who confess are frequently seen as more credible, under the assumption that they would have no reason to confess if not guilty. Knoop<sup>23</sup> further argues that this skepticism towards suspects — assuming they're likely to lie — unfairly affects those genuinely innocent who deny their involvement. This bias can lead to the misinterpretation of denials as merely a defense strategy, rather than a truthful assertion of innocence. The research<sup>24</sup> conducted within the Innocence Project Croatia, suggests that Croatian judges consistently verify that a defendant's guilty plea is made voluntarily, not under coercion, and this scrutiny extends to all evidence against the defendant, regardless of a guilty plea. They emphasized their legal obligation to thoroughly examine the evidence. Some of the participants emphasized that in some instances, an usually during the police procedure, confessions are generally seen as more credible than denials. In Croatia, false confessions occur more frequently in misdemeanor cases. The current Law on Misdemeanors, especially in the “Speedy procedure” (Žurni postupak) prioritizes efficiency, leading to a process where only the defendant is called for a deposition. Here, a judge may offer a lenient fine for a guilty plea, contrasting with potentially stricter penalties, including higher fines or prison time, for those who deny charges and are then found guilty.

### 1.1.2. Forensic errors

The work of Innocence Projects in the U.S. and Europe over the past twenty years has revealed significant flaws in forensic science. As previously stated in this paper, DNA evidence can either ensure a conviction when handled correctly or lead to wrongful convictions if mishandled. Vuille notes that defendants are more likely to confess when faced with compelling evidence, such as DNA. However, judicial practices indicate that if a defendant has falsely confessed, any exonerating forensic evidence is often overlooked.<sup>25</sup> Forensic science, particularly DNA profiling developed in the mid-1980s, initially appeared as a powerful tool against wrongful convictions. Its first notable application prevented the likely wrongful

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<sup>18</sup> Correct denial of involvement in a crime: This occurs when a defendant truthfully asserts they did not commit the crime they are accused of. It represents an accurate assertion of innocence despite allegations or suspicions.

<sup>19</sup> Incorrect denial of involvement: In this scenario, a defendant denies their involvement in a crime even though they are actually guilty. The denial is a deceptive attempt to avoid responsibility or punishment for their actions.

<sup>20</sup> False confession to a crime: This happens when a defendant admits to a crime they did not commit, often due to coercion, misunderstanding, or psychological pressure. Such confessions can lead to wrongful convictions if not thoroughly investigated.

<sup>21</sup> True confession to a crime: A true confession occurs when a defendant genuinely admits to committing the crime they are charged with. This admission is often used as key evidence in securing a conviction and can sometimes lead to a more lenient sentence.

<sup>22</sup> Schiffer B. *The Relationship between Forensic Science and Judicial Error: A Study Covering Error Sources, Bias, and Remedies*. Lausanne: Université de Lausanne, Faculté de droit et des sciences criminelles; 2009

<sup>23</sup> See *supra* note 13.

<sup>24</sup> The results of the research are based on the jurisprudence of the county courts in Split, Osijek, Rijeka and Split. They were presented by Prof. Primorac, Prof. Sokanovic, and Mr. Bozhinovski mag.iur at the ISABS conference in 2022 in Split. Currently, the results are in the process of publishing. The overall results indicate the high threshold of presenting new evidence and reopening of criminal cases in Croatia

<sup>25</sup> Vuille, J., & Champod, C. (2017). "Forensic science and wrongful convictions. In *The Routledge International Handbook of Forensic Intelligence and Criminology* " The Routledge International Handbook of Forensic Intelligence and Criminology (pp. 125-135). Routledge.



conviction of a mentally challenged individual who had falsely confessed to a crime, showcasing forensic DNA's potential to correct miscarriages of justice. This potential was quickly recognized by attorneys Peter Neufeld and Barry Scheck, who founded the Innocence Project and later the Innocence Network to leverage DNA evidence in exposing wrongful convictions. By the 1990s, forensic science, especially post-conviction DNA testing, had become a key method for revealing wrongful convictions, accounting for 37% of such cases in the US between 1989 and 2012.<sup>26</sup>

What made these DNA-based exonerations particularly impactful was their undeniable proof of innocence, which helped build consensus around the existence of wrongful convictions—a concept once met with skepticism. This phenomenon also lent credibility to other non-DNA exonerations, making it harder for skeptics to deny the occurrence of wrongful convictions achieved through different methods. This shift in perspective helped establish the recognition of wrongful convictions as a significant issue, largely attributed to the advent of forensic DNA testing. However, the narrative of forensic science as solely a rectifier of wrongful convictions is complicated by its role in contributing to them. **Giannelli** argues against engagement with forensic DNA profiling began while defending a client against suspect forensic evidence. Their experience highlighted not just the potential of forensic science to uncover wrongful convictions but also its ability to contribute to them.<sup>27</sup> This duality was further evidenced by the role of forensic science in several high-profile wrongful convictions in the UK, as well as analyses revealing that forensic errors, including those in DNA evidence, ranked among the leading causes of wrongful convictions. Studying how forensic science contributes to wrongful convictions presents challenges. The data on exposed wrongful convictions is constantly under development, given unknown biases in exposure mechanisms and debates over what constitutes a wrongful conviction. Research in this area has primarily focused on wrongful convictions identified through post-conviction DNA testing, which, while offering clear evidence of wrongful convictions, may overemphasize cases amenable to DNA evidence and underrepresent other types of cases.<sup>28</sup>

Early studies ranked forensic science as a significant factor in wrongful convictions, second only to eyewitness misidentification. **Giannelli's** comprehensive analysis found that forensic evidence played a role in the prosecution of 74% of examined cases, with a significant portion of the forensic testimony at trial being invalid. These findings underscore the complex role of forensic science in the criminal justice system—not only as a tool for exposing wrongful convictions but also as a significant factor contributing to them.<sup>29</sup> In a comprehensive analysis, "False or misleading forensic evidence" by **Costello** touch upon wrongful convictions in cases where no crime was actually committed, highlighting arson and cases involving the misinterpretation of medical evidence related to infant deaths, often associated with "shaken baby syndrome."<sup>30</sup> This particular syndrome is increasingly scrutinized for its role in wrongful

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<sup>26</sup> Nan J, Holvast N, Lestrade S. A European approach to revision in criminal matters? *Erasmus Law Review*. 2020;13:102

<sup>27</sup> Giannelli, P. C. (2007). " *Wrongful convictions and forensic science: The need to regulate crime labs* " *NCL Rev.*, Volume 1

<sup>28</sup> Criminal Cases Review Commission, Wakefield and Warren, the No Appeal Project. Accessible here: <https://s3-eu-west-2.amazonaws.com/cloud-platform-e218f50a4812967ba1215eaccede923f/uploads/sites/5/2023/01/Final-Report-No-Recommendations-v2-1.pdf>

<sup>29</sup> See *Supra* 27

<sup>30</sup> Shaken Baby Syndrome (SBS) is a controversial diagnosis linked to wrongful convictions, as evolving science challenges its traditional indicators—previously deemed as proof of child abuse. Recent findings show these symptoms can result from non-abusive causes. This shift has led to questioning past abuse convictions, emphasizing the need for updated legal and medical standards. An example includes cases where individuals were convicted based on the SBS diagnosis, only to have their convictions questioned or overturned when alternative explanations for the injuries were recognized.

convictions, with some scholars suggesting it could be a focal point for future innocence projects due to the overturning of convictions based on what later was considered weak or discredited scientific evidence.<sup>31</sup>

Criticisms by forensic science proponents who argue that forensic errors are relatively minor risks to the criminal justice system. These proponents suggest a lower contribution rate of forensic science to wrongful convictions than some researchers have estimated. They emphasize the complexity of attributing wrongful convictions to specific causes, noting the methodological challenges in quantifying the influence of forensic evidence on the legal process. However, identified by the National Registry of Exoneration in the U.S.,<sup>32</sup> the most common forensic errors are: **Incompetence or corruption of the forensic reports**, where Some wrongful convictions have been linked to forensic analysts who were either unskilled, fraudulent, or both, engaging in practices like fabricating test results or failing to conduct tests altogether. B) *Overclaiming*, which occurs when analysts sometimes overstate the significance of forensic evidence, making it seem more conclusive than scientifically justified. This overconfidence was particularly noted in disciplines without solid scientific backing for their claims. C) *Biased Interpretations*, which indicate that the analysis of forensic evidence was sometimes swayed by the analyst's knowledge of the case, leading to interpretations that favored the prosecution without considering alternative explanations. D) *Lack of Validation Research*, where many forensic techniques were utilized without robust validation studies to confirm their accuracy, contributing to wrongful convictions due to reliance on unproven methods.<sup>33</sup>

Derencinovic reiterates that the uncovering of wrongful convictions through forensic errors offers a unique opportunity to identify and address specific issues within the criminal justice system. it is possible to prevent future miscarriages of justice, even if the underlying reasons remain broadly the same. This perspective is particularly relevant in discussions about the role of forensic evidence in wrongful convictions.<sup>34</sup> Viewing exposed wrongful convictions as a chance to gain insights into systemic flaws, rather than merely pinpointing immediate causes, is crucial. The era of post-conviction DNA exonerations has provided a particularly valuable, albeit temporary, glimpse into these issues, allowing for a period of significant learning and reform.

### 1.1.3. Plea Bargains

Plea bargains, agreements in which a defendant pleads guilty to a lesser charge in exchange for a lighter sentence, play a pivotal role in the resolution of the vast majority of criminal cases in the United States and several other legal systems worldwide. Plea bargaining is predicated on the mutual interests of the prosecution and defense. Peters argues that prosecutors aim to secure convictions efficiently, managing limited resources while upholding public safety. Defendants, on the other hand, often seek the certainty of a reduced sentence, avoiding the risks associated with trial verdicts. This negotiation process, while pragmatic,

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<sup>31</sup> Costello, Á. (2022). "Genetic Data and the Right to Privacy" *Human Rights Law Review*, Volume(22(1)),

<sup>32</sup> Annual Report for the National Registry of Exonerations in 2021-2022, <https://www.law.umich.edu/special/exoneration/Pages/about.aspx>

<sup>33</sup> See *Ibid.*

<sup>34</sup> Derencinović, D. (2021). *Preispitivanje prakse država glede zadržavanja DNK profila u svjetlu nedavnih presuda Europskog suda za ljudska prava protiv Ujedinjenog Kraljevstva i Sjeverne Makedonije*, In (Gordana Lažetić & Anita Kurtović Mišić, Recenzenti), *Ogledi o pravu i pravdi u dvije Europe* (p. 191). Narodne Novine Further reading in Ledić, A., Makar, A., & Obleščuk, I. (2023). "DNA Databases" In *Forensic DNA Applications* (p. 16). CRC Press.



raises profound questions about the trade-offs between efficiency and justice.<sup>35</sup> To this point, the relationship between plea bargains and wrongful convictions is multifaceted and troubling. First and foremost, the pressure to plead guilty can be overwhelming, particularly for the innocent who may face the daunting prospect of harsher penalties if convicted at trial. This coercive dynamic is exacerbated by disparities in power, information, and resources between the prosecution and defense, often leading to innocent individuals accepting plea deals as a rational choice under uncertain and intimidating circumstances. Moreover, the prevalence of plea bargains obscures the investigative and prosecutorial errors that contribute to wrongful convictions. By circumventing the trial process, there is less opportunity for the scrutiny of evidence, cross-examination of witnesses, and the public airing of discrepancies and mistakes. Consequently, the systemic issues that lead to wrongful charges and convictions remain unaddressed and hidden from public view.<sup>36</sup> The effectiveness of legal counsel is pivotal in the context of plea negotiations. Inadequate representation can result in uninformed or coerced plea decisions, particularly for defendants who are indigent and rely on overburdened public defenders. The ethical and practical challenges faced by defense attorneys in advising clients about plea offers, especially when evidence of innocence exists, underscore the complexities of legal strategy and the paramount importance of robust legal defense mechanisms in safeguarding against wrongful convictions. Addressing the challenges posed by plea bargains in the context of wrongful convictions necessitates comprehensive legal reforms. Donati and Piruti argue that enhancements in the transparency of the plea bargaining process, the establishment of safeguards against coercive plea practices, and the reinforcement of defendants' rights are critical steps toward mitigating the risks of wrongful convictions. Additionally, the promotion of open-file discovery, ensuring defendants and their counsel have full access to prosecutorial evidence, can contribute to more informed decision-making in plea negotiations.

#### **1.1.4. Police and Prosecutorial Misconduct**

The integrity of the criminal justice system is heavily reliant on the ethical conduct of its key players, notably police officers and prosecutors. Their roles, pivotal in shaping the outcomes of legal proceedings, are governed by a framework of legal and ethical standards designed to ensure justice and fairness. However, instances of unethical behavior by police and prosecutors have emerged as significant contributors to wrongful convictions, undermining public trust and the foundational principles of justice. Unethical behavior in the context of law enforcement and prosecution encompasses a range of actions, including the suppression of exculpatory evidence, coercion of witnesses, fabrication of evidence, and the use of unreliable or coerced confessions. Such misconduct not only violates the rights of the accused but also skews the judicial process, leading to convictions of the innocent. Similarly, police misconduct, including the manipulation of evidence or exploitation of vulnerable suspects during interrogations, creates an environment where wrongful convictions are more likely to occur.<sup>37</sup> The root causes of unethical behavior by police and prosecutors are multifaceted, often stemming from systemic pressures to secure convictions, institutional cultures that prioritize wins over justice, and a lack of adequate oversight and accountability mechanisms. The

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<sup>35</sup> Peters K. Fehlerquellen im Strafprozess: eine Untersuchung der Wiederaufnahmeverfahren in der Bundesrepublik Deutschland. 1970

<sup>36</sup> Donati LL, Pittiruti M. Post-conviction remedies in the Italian criminal justice system. *Erasmus Law Review*. 2020;13:63

<sup>37</sup> Gilliéron G. The risks of summary proceedings, plea bargains, and penal orders in producing wrongful convictions in the US and Europe. In: *Wrongful Convictions and Miscarriages of Justice: Causes and Remedies in North American and European Criminal Justice Systems*. London: Routledge; 2019. pp. 245-266

absence of serious repercussions for unethical actions further emboldens misconduct, allowing it to persist unchecked. Addressing these challenges requires a multifaceted approach, focusing on both preventive measures and accountability. Enhanced training on ethical standards, the implementation of body cameras and other transparency measures, and the establishment of independent oversight bodies can deter misconduct.<sup>38</sup> Moreover, fostering a culture within law enforcement and prosecutorial offices that values justice over conviction rates is essential. According to Luparia, the path to reform is intricate, necessitating legal, cultural, and procedural changes within police departments and prosecutorial offices. Strengthening whistleblower protections, promoting ethical leadership, and ensuring that wrongful convictions due to misconduct result in meaningful consequences are crucial steps. Additionally, the exoneration of wrongfully convicted individuals and the restoration of their rights underscores the need for a justice system that not only corrects its mistakes but also actively works to prevent them.<sup>39</sup>

## II. Innocence Projects and Different Models

To put it simply, Innocence Projects were invented in the United States. They are organizations dedicated to exonerating wrongfully convicted individuals and reforming the justice system to prevent future injustices. Utilizing forensic techniques like DNA testing and comprehensive legal review (depending on the model), these groups work to correct wrongful convictions and address the systemic flaws that allow them to occur. Innocence Projects operate by adopting the clinical method, merging theoretical knowledge with practical casework, often within law schools, to educate future lawyers. This model, compared by Justin Brook to medical education, emphasizes learning through hands-on experience. The movement has grown beyond the U.S. to include organizations like the Association in Defense of the Wrongly Convicted in Canada and the Rule of Law Movement in Latin America, indicating a broader international impact. Advancements in science, particularly DNA testing technology, have significantly improved the accuracy of matching DNA profiles, making it an essential tool in both convicting and exonerating individuals. Post-conviction DNA testing has led to the exoneration of those wrongfully convicted of serious crimes.<sup>40</sup> However, the work of innocence organizations is not limited to DNA evidence alone; they also examine cases involving recantations, misconduct by police or prosecutors, illegally obtained evidence, and coerced depositions. These efforts have heightened awareness of wrongful convictions in the U.S., demonstrating the criminal justice system's imperfections and fostering a greater openness to the idea of wrongful convictions. Depending on the work of the innocence projects, they are divided into different models.

When the U.S. innocence projects reached Europe, countries such as Germany, Italy, the Netherlands, Poland, and now Croatia established their own innocence projects to secure the exoneration of wrongfully convicted persons within their jurisdictions. Before the arrival of the Innocence Project revolution, the Continental courts perceived wrongful convictions as a matter that occurred only abroad and not in Europe. This conviction stems from the nature of the inquisitorial (Continental) procedure where the prosecutor is expected to conduct an objective investigation to establish the truth and with professional judges (not a jury) to determine the material truth in each case. Yet there is a difference between the common law system (the adversarial procedure) and the Continental law system (inquisitorial/mixed type of

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<sup>38</sup> *Ibid.*

<sup>39</sup> Lupària L. Rethinking the approach to wrongful convictions in Europe: Some preliminary remarks. *Giustizia Penale Europea*. 2015;3:1-2

<sup>40</sup> Brooks, Justin, and Zachary Brooks. "Wrongfully Convicted in California: Are There Connections Between Exonerations, Prosecutorial and Police Procedures, and Justice Reforms." *Hofstra L. Rev.* 45 (2016): 373.

procedure). Unlike the U.S. adversarial system, the judicial systems in Europe are inquisitorially based and are guided, as explained above, by the principle of determination of material truth. Yet most modern criminal justice systems in European countries are not just adversarial or inquisitorial based but borrow from each other's systems. Some adversarial "traits" have been introduced in the Croatian system as well, under the influence of the ECtHR jurisprudence, allowing for more contradiction in the criminal process. One of the criticisms of the adversarial system is the lack of equal resources for the defense council. Both parties (the prosecution and the defense) are expected to operate on an equal footing.<sup>41</sup> Therefore, these projects offer legal assistance to persons who cannot afford it, and at the same time draw the public's attention to the causes that lie behind wrongful convictions. Their work has produced some notable legislative changes and the introduction of new legislation in Europe, focused on the indemnification of wrongfully convicted persons and recognizing the problem of wrongful conviction.

As Luparia and Greco note, lawmakers throughout Europe are slowly improving remedies to overturn convictions, where some States have created *ad hoc* mechanisms appointed to verify the necessity to reopen final decisions. In addition to this, the exonerees' outburst has offered the opportunity for Continental jurists to reflect on the reliability of some traditional evidence, often overrated within courtrooms.<sup>42</sup> They further argue that the shift towards "safer" criminal justice systems is far from being completed, as cases of wrongful convictions are still quite frequent and national authorities are not always willing to admit their flaws. In the Continental legal system, the procedure works differently, where the Supreme Court determines whether or not a retrial should be granted and if so it will refer the case to the county court.

## 2.1. Models of Innocence Projects

At first glance, the activities of innocence projects may appear identical to those of legal clinics. However, they are distinct in their operations and objectives. Greenwood outlines the different models based on the casework. The most recognized models are the a) *the University-Based Model*, b) *the Non-Profit Organization Model*, and c) *the Hybrid Model*. *The University-Based Model* speaks for itself. It is within academic settings, often in law schools, that this model integrates Innocence Projects into the educational curriculum.<sup>43</sup> Students work under the guidance of faculty and legal professionals on cases of individuals claiming wrongful convictions, gaining practical experience while advancing the cause of justice. This model focuses on research, legal education, and advocacy, utilizing academic resources to challenge wrongful convictions effectively. However, this model is limited when it comes to post-conviction DNA testing. *The Non-Profit Organization Model* is a model operating independently from educational institutions, this approach involves organizations committed exclusively to overturning wrongful convictions. These entities rely on funding from donations, grants, and occasionally government support, employing full-time legal experts, investigators, and forensic specialists to pursue their mission. *The Hybrid Model* merges the strengths of both the university-based and non-profit models. It often involves a non-profit organization that is closely linked to an academic institution, allowing students to engage in

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<sup>41</sup> Knoop GJ. Miscarriages of justice originating from false or unreliable confessions and plea agreements. In: Redressing Miscarriages of Justice: Practice and Procedure in (International) Criminal Cases. Brill Nijhoff; 2006;2013:41-59. Available from: brill.com

<sup>42</sup> See *Supra* 37.

<sup>43</sup> Greenwood, Holly. "Rethinking innocence projects in England and Wales: lessons for the future." *The Howard Journal of Crime and Justice* 60, no. 4 (2021): 459-492.

casework alongside professional guidance.<sup>44</sup> Despite its educational ties, the organization also pursues broader advocacy and reform efforts, making the hybrid model a flexible approach that supports education, legal representation, and systemic change. These models further are divided into sub-models based on whether they are conducting post-conviction DNA testing or not. For cases where biological evidence can speak volumes, the *DNA-based sub-model* comes into play, harnessing the power of modern DNA testing to provide irrefutable proof of innocence. This approach shines a light on the truth in situations where biological markers can make or break a case. Yet, not all wrongful convictions leave behind a trail of DNA. In these instances, the *non-DNA-based* sub-model steps forward, delving into the complexities of cases devoid of biological evidence. It challenges convictions built on shaky grounds—be it through re-examining eyewitness testimonies, uncovering prosecutorial misconduct, or bringing new evidence to light. This method acknowledges meticulous investigation and advocacy. Bridging the gap between these two is the *Hybrid model*. This approach melds the clarity of DNA evidence with the depth of investigative work into non-biological evidence, ensuring that no stone is left unturned. Whether a case calls for the precision of DNA analysis or the broad-reaching efforts to challenge flawed evidence, the hybrid model stands ready to tackle wrongful convictions with a dynamic and inclusive strategy.<sup>45</sup> Together, these methods weave a narrative of resilience and reform, illustrating the Innocence Projects' unwavering commitment to justice through a multifaceted and evidence-based approach.

However, in Europe, innocence projects operate with a broader focus beyond DNA evidence, addressing wrongful convictions through various non-DNA-based models. These models are adapted to the European legal landscape, which often involves mixed or inquisitorial legal systems, differing significantly from the adversarial system predominant in the United States where innocence projects originated. Non-DNA-based models in Europe focus on a variety of issues such as false confessions, misidentification by eyewitnesses, misconduct by police or prosecutors, and the use of unreliable forensic evidence other than DNA. The most important issues, the innocence projects in Europe are facing are the standard of presentation of new evidence or *novum* to court as a prerequisite for repetition of the criminal procedure. European innocence projects, therefore, have to navigate different legal frameworks to challenge wrongful convictions, often relying on new or overlooked evidence that does not necessarily include DNA.<sup>46</sup> These projects work within the European context by leveraging the continent's diverse legal mechanisms for post-conviction relief, including appeals, retrials, and petitions for clemency. They may also engage in legal advocacy, aiming to reform laws and practices related to criminal justice to prevent future wrongful convictions. Given the absence of a unified legal system across Europe, innocence projects must be highly adaptable, understanding the specific legal cultures, procedures, and evidentiary standards of the countries in which they operate. European innocence projects collaborate with legal professionals, academics, and students, often functioning within or alongside universities. This collaborative approach allows them to combine practical legal work with academic research, raising public awareness about the causes and consequences of wrongful convictions.

### **III. European Model of Innocence Projects – Finding the *Novum***

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<sup>44</sup> Roberts, Stephanie, and Lynne Weathered. "Assisting the factually innocent: The contradictions and compatibility of innocence projects and the criminal cases review commission." *Oxford Journal of Legal Studies* 29, no. 1 (2009): 43-70.

<sup>45</sup> *Ibid.*

<sup>46</sup> Findley, Keith A. "The pedagogy of innocence: Reflections on the role of innocence projects in clinical legal education." *Clinical L. Rev.* 13 (2006): 231.

The European Innocence Project models differ from the ones in the United States. This is because they are non-DNA-based models and are only active partially in the field of extraordinary legal remedies. The European system for extraordinary legal remedies has largely remained unchanged by reforms, focusing primarily on the "Revision of the criminal procedure" as the primary method for addressing wrongful convictions and identifying judicial mistakes. Revision serves as a critical mechanism for convicted individuals, offering the sole pathway to rectify judicial errors and overturn final verdicts by introducing new evidence that demonstrates the initial court's misjudgment of facts. This process is intricately linked to the presence of judicial errors; without such errors, the revision cannot proceed, and conversely, these errors only gain legal relevance through the revision process. This interdependence is described by **Luparia** as a 'system security mechanism,' ensuring the efficacy of the system in safeguarding personal freedom. Primarily, revisions favor the convicted, allowing for the correction of verdicts based on the *novum* criterion, which mandates that revisions be founded on new, substantive reasons and evidence.<sup>47</sup> This criterion upholds the principles of justice and fairness, permitting revisions for all definitive court decisions related to factual inaccuracies at any time by the convicted, their relatives, or legal guardians, and even posthumously through heirs. Additionally, the public prosecutor or procurator general can initiate revisions, applicable to all judgments provided they are final. However, it's crucial to understand that revision is not an additional level of appeal but a specialized recourse available when new facts emerge that challenge the finality of a judgment.

The concept of *novum*, or new evidence, is pivotal in the legal process of revising previous court decisions. This criterion is categorized into three types: *noviter repertae* (newly discovered evidence), *noviter productae* (newly produced evidence), and *noviter cognitae* (previously known but unutilized evidence). *Noviter repertae* refers to evidence that was unavailable during the initial trial but emerged afterward, potentially altering the trial's outcome. This could include new physical evidence or testimonies. *Noviter productae* encompasses evidence that didn't exist during the original trial, such as new scientific methods applied to re-examine DNA evidence. *Noviter cognitae* involves evidence known at the trial time but, for various reasons, was not present; this could be due to being overlooked or deliberately withheld.<sup>48</sup> Despite the theoretical framework, the application of the *novum* criterion in different European countries is inconsistent. The operational models of the Innocence Project in Italy and the Netherlands are particularly instructive when examined through the lens of the *novum* criterion, as it represents a critical factor in 90% of their cases, according to their reports. These projects have notably adapted their strategies to emphasize the identification, collection, and presentation of *novum* evidence in their efforts to overturn wrongful convictions.

### 3.1. Italy

After the 1988 reform, the Italian legal system evolved into a hybrid framework, incorporating both inquisitorial and adversarial characteristics. The procedures for revising wrongful convictions and integrating new evidence, *novum*, in Italy share similarities with those in Croatia, as delineated in the Italian Code of Criminal Procedure. A case for revision can be made if: (a) there's a conflict between the facts in the conviction and those in another final judgment; (b) the conviction is based on a later annulled judgment or newly found

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<sup>47</sup> Lupària L. Rethinking the approach to wrongful convictions in Europe: Some preliminary remarks. *Giustizia Penale Europea*. 2015;3:1-2

<sup>48</sup> Bozhinovski, Andrej. "Addressing Wrongful Convictions in Croatia through Revision of the *Novum* Criterion: Identifying Best Practices and Standards." (2023).

exculpatory evidence; or (c) the conviction rests on false documents or testimonies. The introduction of a new basis for revision by the Constitutional Court of Italy, aimed at aligning with European Court of Human Rights (ECtHR) judgments, represents an indirect approach to correcting judicial errors by emphasizing compliance rather than new factual evidence. Luparia and Pittiruti highlight the post-1988 procedural nuances where the Court of Appeal assesses the admissibility of a revision request without delving into its merits, as per Article 634, paragraph 2 of the Code.<sup>49</sup> Inadmissible requests can be escalated to the Court of Cassation, while admissible ones proceed to trial, potentially suspending sentence enforcement. Accepted requests lead to conviction revocation, whereas rejected ones can be further appealed.<sup>50</sup> The definition of "new evidence," particularly the *noviter cognitae* type, has been a point of contention and varied interpretation in Italian legal circles, as noted by Luparia.<sup>51</sup> The judiciary initially embraced a broad interpretation, encompassing all new evidence types. However, this stance evolved to include evidence previously unconsidered by the court. Nan<sup>52</sup> points out the challenge of integrating continual scientific and technological advancements within the constraints of criminal trials. Italian jurisprudence has gradually become more receptive to revision requests based on new scientific evidence, reflecting a shift towards favoring the principle of *favor in innocentiae*, which accommodates scientific progress within legal proceedings. An additional extraordinary legal recourse in Italy is the rescission of final judgments under specific conditions, such as the convicted person's justified unawareness of the trial, highlighting the procedural rigor and protective mechanisms embedded within the Italian legal system. The Italian approach underscores the significance of broad judicial policies by the Court of Cassation regarding the admissibility of new scientific evidence. It champions the inclusion of additional scientific insights as *novum* and emphasizes the importance of data accessibility. Drawing inspiration from the U.S. National Registry of Exonerations, the establishment of an Italian equivalent could serve as a valuable resource for legal scholars and reform advocates, enhancing transparency and understanding of wrongful convictions and their reversals.<sup>53</sup>

### 3.2. The Netherlands

The Dutch criminal justice system is inquisitorially based. What makes this system unique is the promulgation of the new law on lowering the threshold for establishing a *novum* in the retrial procedure. Before the promulgation of this law, wrongful convictions were perceived to be a problem that occurred abroad, and not in the Netherlands. The law was a product of the work of the Netherlands' Innocence Project and the several major cases that were revised based on the wrongful determination of the facts. As in Germany, the judge and the public prosecutor are expected to establish the truth. Knoops and Bell argue that this system in the Netherlands will be successful only when the investigation is truly objective and when

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<sup>49</sup> Donati LL, Pittiruti M. Post-conviction remedies in the Italian criminal justice system. *Erasmus Law Review*. 2020;13:63

<sup>50</sup> Code of Criminal Procedure of Italy. chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://canestrinilex.com/assets/Uploads/pdf/cf70b10e21/Italian-Code-of-Criminal-Procedure-canestriniLex.pdf [Accessed: February 7, 2024]

<sup>51</sup> Luparia L, Gialuz M. The Italian criminal procedure thirty years after the great reform. *Roma Tre Law Review*. 2019;2019(1):24-71

<sup>52</sup> Nan J, Holvast N, Lestrade S. A European approach to revision in criminal matters? *Erasmus Law Review*. 2020;13:102

<sup>53</sup> See *Ibid*



incriminatory and exculpatory evidence is fully disclosed to the defense.<sup>54</sup> Concerning the retrial procedure, in the Netherlands, the Supreme Court determines whether or not a retrial should be granted. If it is granted, the case is referred to the Court of Appeals to conduct a new trial. The major case which has contributed to the promulgation of the Law on Redressing Miscarriages of Justice was the *Schiedammer Park Murder case*<sup>55</sup> where a wrongful conviction was established. That case illustrated that the threshold for revision of the criminal procedure, was very narrow, and thus, a new Law was promulgated. The law on redressing the miscarriages of justice further expanded the review system of criminal cases to the advantage of the accused and lowered the threshold for establishing a novum. The promulgation of this law was not pro forma. The first new aspect of this law puts the focus on expert scientific findings to be subsumed under the novum criterion. Furthermore, this new law established the ACAS Commission for finding new facts and aiding convicted persons in identifying the novum. The Dutch legislator followed partially the German criminal justice system with respect to new expert evidence. However, there were never any issues in the Netherlands with the principle of non bis in idem as was the case with the German legal proposals. Under the legal provisions, expert evidence can be deemed admissible when (a) particular issues have not yet been examined; (b) after the expert research has been conducted, there is a new expert with new conclusions derived from using different research methods, or it is from a different profession, and (c) a new expert reaches different conclusions on the basis of the same facts of the case because the previous research was either based on incomplete or incorrect factual assumptions or as a result of new scientific development.<sup>56</sup> Not every fact or finding will be sufficient to novum threshold and provide an example of a verdict of the Supreme Court of the Netherlands rejecting a new witness statement for establishing a novum for a retrial, in which the witness recants a previously incriminating statement.<sup>57</sup> The second aspect of this law is the establishment of the ACAS system. The new law recognized that establishing a novum is very time-consuming and costly effort and therefore made it possible to request the attorney general of the Supreme Court to conduct a pre-investigation. This means that forensic investigations, should they be granted, could be conducted and paid for through this legal avenue. The ACAS system facilitates a defendant who claims that a novum exists, without having full proof of it. Summarizing the Dutch experiences there are major novelties worth considering. The establishment of a special Exoneration Register has been pointed out by Knoops and Bell as a main obstacle to conducting further research. However, the acknowledgment of the problems of wrongful convictions by society and the promulgation of the new laws for lowering the threshold of establishing a novum and having that indication to be researched by the state is a major breakthrough.<sup>58</sup>

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<sup>54</sup> Knoops GJ. Miscarriages of justice originating from false or unreliable confessions and plea agreements. In: Redressing Miscarriages of Justice: Practice and Procedure in (International) Criminal Cases. Brill Nijhoff; 2006;2013:41-59. Available from: [brill.com](http://brill.com)

<sup>55</sup> The Schiedammer Park Murder case involved the wrongful conviction of Cees B., a mentally disabled man, for the 2000 murder and sexual assault of 10-year-old Nienke Kleiss in Schiedam, Netherlands. Initially convicted in 2002 based on a retracted confession, Cees B. was later exonerated in 2004 when DNA evidence identified Wik H. as the real perpetrator. This case exposed serious flaws in the Dutch criminal justice system, including overreliance on confessions and inadequate handling of DNA evidence, leading to public outrage and calls for legal reforms to prevent future miscarriages of justice.

<sup>56</sup> Code of Criminal Procedure of the Kingdom of the Netherlands. Available from: <https://www.government.nl/topics/modernisation-code-of-criminalprocedure/contents-new-code-of-criminal-procedure> [Accessed: February 7, 2024]

<sup>57</sup> Knoops GJ. Miscarriages of justice originating from false or unreliable confessions and plea agreements. In: Redressing Miscarriages of Justice: Practice and Procedure in (International) Criminal Cases. Brill Nijhoff; 2006;2013:41-59. Available from: [brill.com](http://brill.com)

<sup>58</sup> Engländer A, Zimmermann T. Die Zulässigkeit eigenständiger Nachermittlungen durch die Staatsanwaltschaft. In: Ein menschengerechtes Strafrecht als Lebensaufgabe. CF Müller Verlag; 2015. pp. 699-708

## **Review of the Jurisprudence of the European Court of Human Rights Regarding the *novum* criterion**

It is evident that when it comes to new evidence in terms of *novum* criterion, the ECtHR applies a three-part test when assessing the reopening of criminal proceedings in light of new evidence: (1) the nature and reliability of the evidence, (2) the nature and extent of the proceedings, and (3) the interests of justice. Should the new evidence raise serious concerns not evaluated by a court, or a retrial was not allowed, the Court will generally find a violation of the right to a fair trial. As seen through the comparative overview of the other jurisdictions, the ECtHR judgments are considered a tool for allowing a revision in national jurisdictions. The ECtHR has applied the *noviter repertae, productae, and cognitae* evidence principle in various cases to determine if a violation of the ECHR in terms of revision of the criminal proceedings has occurred. In the case of **Kostovski v. the Netherlands**<sup>59</sup> the applicant claimed that his right to a fair trial had been violated because the prosecution had withheld evidence that was favorable to the defense and could potentially lead to his exoneration. The prosecution's failure to disclose the evidence had seriously undermined the fairness of the trial. As argued above, how in some jurisdictions there is a problem with presenting new scientific evidence, especially DNA evidence and supplementary testing, the case of **Ocalan v. Turkey**<sup>60</sup>, demonstrates why lowering the threshold for admissibility of such evidence is crucial. The applicant claimed that his right to a fair trial had been violated because new scientific methods that were not available at the time of the trial had been used to re-test DNA evidence that was crucial to the prosecution's case. The Court has determined that the applicant's right to a fair trial had been violated. Evident from these cases is the position of the ECtHR in recognition of the revision of the procedure based on any type of new evidence in determining whether the right to a fair trial had been violated. Furthermore, by applying the margin of appreciation in each case, the Court had demonstrated that not considering new evidence may infringe on the right to a fair trial. From the practice of the Court, it is evident that national jurisdictions should lower the threshold of presenting a *novum* for the revision of criminal proceedings.

Furthermore, the case of *Van Der Velden v. the Netherlands*<sup>61</sup> highlights the European Court of Human Rights' stance on the legality and necessity of collecting genetic material in a democratic society. The applicant, involved in five bank robberies and the theft of four cars, underwent psychological and psychiatric evaluations during his criminal investigation, which suggested a possible schizoid personality disorder. He challenged his extended confinement in a custodial clinic and the requirement under Dutch law to provide genetic material for a national police database DNA profile, arguing it was irrelevant to his crimes and violated his privacy and data protection rights under Article 8 of the European Convention of Human Rights (ECHR). The ECtHR acknowledged that retaining genetic material and derived data was intrusive but concluded it complied with national law and served legitimate aims like crime prevention and protecting others' rights and freedoms. Thus, the court found no violation of the applicant's rights. This decision underscored the court's view that DNA data collection is necessary for a democratic society and aids law enforcement significantly. However, the court's

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<sup>59</sup> Case of *Kostovski v. The Netherlands*, app. Number 11454/85. Available from: <https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-57615&filename=CASE%20OF%20KOSTOVSKI%20v.%20THE%20NETHERLANDS.docx&logEvent=False> [Accessed: February 7, 2024]

<sup>60</sup> Case of *Ocalan v. Turkey*, app. Number 46221/99. [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-69022%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-69022%22]}) [Accessed: February 7, 2024]

<sup>61</sup> *Van Der Velden v. The Netherlands* (Application no. 21203/10): Judgment. Strasbourg. Retrieved from [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-112547%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-112547%22]})

more recent practices emphasize adherence to legality, proportionality, and necessity principles—or the Marper test, named after the case of *S. and Marper v. The United Kingdom*.<sup>62</sup> This includes ensuring a clear, accessible legal framework for DNA collection, emphasizing the importance of individuals' informed consent, and assessing the proportionality of DNA retention based on the crime's severity. Derencinovic, Primorac, and Becker argue that any privacy intrusion, such as DNA collection, must have a strong rationale and be strictly necessary for its purpose. The court advises authorities to balance DNA collection benefits against potential privacy infringements, requiring a clear justification for collecting and using DNA samples.<sup>63</sup>

Concluding the implementation of innocence projects in Europe that do not rely on DNA evidence, and considering the jurisprudence of the European Court of Human Rights, it becomes clear that there is a distinct difference from the U.S. model. In the United States, innocence projects are actively engaged at every stage of the criminal process. Conversely, in Europe, their involvement typically commences only after the final judgment has been issued, focusing on the collection of new evidence and the potential reopening of cases. One significant hurdle these projects encounter is the stringent criteria for what qualifies as new evidence (*novum*) and the reopening of criminal cases. While Italy faces ongoing challenges in this area, the Dutch experience has been notably positive. The model of the Advisory Committee on Closed Criminal Cases (ACAS) in the Netherlands presents a viable approach that could potentially be adapted into Croatian legislation.

#### **IV. Innocence Project Croatia – Practical Challenges and Detected Issues**

Over the past two decades, countries in South-Eastern Europe have reformed their criminal justice systems, transitioning from the frameworks established during the Socialist Federal Republic of Yugoslavia to developing systems that reflect the current political and social realities post-conflict. These reforms have included a shift from traditional continental or inquisitorial systems toward incorporating aspects of the Anglo-Saxon or adversarial models, aiming to enhance the efficiency of their legal processes. While these updates to criminal procedure codes were intended to modernize the justice system, they have also sparked concerns about the potential for wrongful convictions due to the emphasis on procedural efficiency.

The concept of Innocence Projects gained traction in Croatia around 2015, fueled by academic discussions and conferences focused on the plight of those wrongfully convicted and exploring the role of post-conviction DNA testing as a tool for justice. This interest led to the establishment of an experimental Innocence Project in 2020, spearheaded by the Faculty of Law at the University of Zagreb and supported by funding from the Croatian Science Foundation. The Croatian Innocence Project aims to enhance public awareness about the issues surrounding miscarriages of justice, advocate for legal reforms to make it easier for defendants to reopen their cases, and provide legal support to individuals believed to have been wrongfully convicted.

##### **4.1. The *novum* in the Croatian Legal Context**

The Institute for revision of the criminal procedure envisaged in the Croatian Code of Criminal Procedure has been subjected to the overall reform of the Code of Criminal Procedure. The revision of the criminal procedure institute is related to the *non bis in idem* institute,

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<sup>62</sup> Smith and Grady v. United Kingdom (*S. and Marper v. United Kingdom*).

<sup>63</sup> Becker, S. W., Derenčinović, D., & Primorac, D. (2023). "DNA as Evidence in the Courtroom" In D. Primorac & M. Schanfield (Eds.), *Forensic DNA Applications: An Interdisciplinary Perspective* (p. 433). CRC Press.

stipulated in Article 31, paragraphs 2 and 3 of the Croatian Constitution<sup>64</sup>, which provides that a revision of the criminal case can be permitted only if it is in line with the law and the Constitution. There are discrepancies on this issue between the CCP and the Constitution, where the Code in Article 12 paragraph 2 strictly prohibits revision of the criminal procedure for an exonerated person, whereas there is no such absolute prohibition in the Constitution. The revision of the criminal procedure is regulated in 12 articles from the CCP, where seven of them were subjected to an additional reform because of the Croatia EU accession process, and the influence of the jurisprudence of the European Court of Human Rights. The revision is done by the higher court and the Supreme Court of Croatia.<sup>65</sup> Furthermore, according to Lasan, although several reforms were made to the revision of the criminal procedure, the legislators failed to address the issue of which of the judicial decisions in this process are subject to the substantive validity of the judgment. This means that the CCP recognizes all three types of judgments (convicting, acquitting, and rejecting judgments) as a subject for revision, and the Constitution recognizes only convicting and acquitting judgments.<sup>66</sup> The CCP envisages seven types of revision: (a) improper revision—where only the sanction is evaluated; (b) Revision in cases where the indictment is rejected; (c) revision of the completed criminal procedure before the indictment; (d) Proper revision of the criminal procedure after the valid judgment; (e) Revision in *malam partem* on the detriment of the accused after acquittal; (f) Revision after the trial in *absentia*, and (g) Revision on the grounds of decisions of the Constitutional Court of Croatia and the European Court of Human Rights. Under the Croatian Code of Criminal Procedure (CCP), a criminal procedure can be revisited if it's established that the original judgment was based on fraudulent documents, recordings, or false testimonies from witnesses, experts, or interpreters. It also applies if a criminal act by a judicial officer or anyone involved in gathering evidence influenced the judgment. However, the Innocence Project Croatia has highlighted that meeting the criteria for introducing new evidence, known as *novum*, is exceptionally stringent, bordering on impractical.<sup>67</sup> In one notable instance, the County Court of Rijeka denied a revision request despite new evidence showing that a witness had provided false testimony. The witness had even recanted their previous statement in a notarized document. Yet, the court decided this was insufficient to meet the *novum* threshold, arguing that a case could only be revisited if the witness was formally convicted for obstructing justice. The court's stance suggests that any fact already known to the trial and appeals judges does not constitute *novum*.<sup>68</sup>

#### 4.2. Treatment of DNA evidence

DNA data is regulated in the Law on Criminal Procedure which regulates the treatment of biometric and DNA data in criminal proceedings in Croatia. While the law establishes very detailed and up-to-date conditions for collecting and processing personal data in criminal proceedings, there are several concerns concerning handling DNA data in terms of genetic privacy. Article 327-a stipulates that data obtained through DNA analysis

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<sup>64</sup> Constitution of the Republic of Croatia. Available from: <http://www.sabor.hr/en/constitution-republic-croatia-consolidated-text> [Accessed: February 7, 2024]

<sup>65</sup> Code of Criminal Procedure of the Republic of Croatia. Available from: <https://www.zakon.hr/z/174/Zakon-o-kaznenom-postupku> [Accessed: February 7, 2023]

<sup>66</sup> Lasan, Višnja Drenški. "Obnova kaznenog postupka de lege lata i analiza odluka Ustavnog suda Republike Hrvatske donesenih u povodu ustavnih tužbi nakon obnove kaznenih postupaka na osnovi konačne presude Europskog suda za ljudska prava." *Hrvatski ljetopis za kaznene znanosti i praksu* 25, no. 2 (2018): 169-196.

<sup>67</sup> Tomičić Z, Kovačev I. Obnova kaznenoga postupka na štetu oslobođene osobe u engleskoj. *Pravni Vjesnik: Časopis za pravne i društvene znanosti Pravnog fakulteta Sveučilišta JJ Strossmayera u Osijeku*. 30 Dec 2012;28(3-4):203-224

<sup>68</sup> County Court of Rijeka. Judgment of the Case Nm. KŽ-199/19. 2019. Available from: <https://www.iusinfo.hr/sudska-praksa/ZSRH2022VuKzB199A6?HighlightQuery=K%c5%bd-199%2f19>

from a legally convicted person are retained for 20 years after the final judgment.<sup>69</sup> In cases where the offense carries a prison sentence of ten years or more, or if it involves a criminal offense against sexual freedom with a prison sentence exceeding five years, the data can be retained for a maximum of 40 years. In the event of a final acquittal, suspension of criminal proceedings, or dismissal of charges, the data is kept for 10 years after the conclusion of the proceedings, after which the competent authority must delete it from the records. The intent of the legislator is clear in distinguishing criminal offenses by severity, so the length of retention of DNA profiles depends on whether the offense is punishable by imprisonment for up to ten years or more. Specifically severe are criminal offenses against sexual freedom for which the prescribed imprisonment is more than five years. However, Derencinovic argues that it does not seem entirely justified to treat less severe criminal offenses (e.g., punishable by imprisonment for up to one year, such as serious bodily harm due to negligence under Article 127, paragraph 1, of the Criminal Code) in the same category as more severe offenses (e.g., punishable by imprisonment for up to ten years, such as slavery under Article 105, paragraph 1, of the Criminal Code).<sup>70</sup>

Further analysis into the provisions will provide that it would certainly be better and in line with the standards established in the practice of the ECtHR. Unlike biometric data, DNA remains in databases until the expiration of the prescribed periods without the possibility of periodic reassessment of the need for further retention. According to the ECtHR position this does not seem justified given the sensitive nature of the data and the genetic privacy implications involved. The legislator should revise this position and introduce control mechanisms for the DNA data, as well as mechanisms for differentiation between adult and/or minor perpetrators of criminal acts. The age of the perpetrator is crucial as evident in the case of *Marper* and the obligations of the laws regulating minor perpetrators of crime. In the context of genetic privacy is the inability to request deletion of the genetic data from the database after the rehabilitation period for the committed crime. The purpose of rehabilitation is reintegration into society for the offender, so the problem is the existence of DNA data long after the rehabilitation period of the offender. That is another issue the legislator might want to take a look. Lastly, the biggest problem that does not answer to the criteria of *pressing social need* is the retention of the DNA data, after the person was found innocent by the court. This criteria is not in line with the current practice of the court, because the national legislation does not have a mechanism to reexamine the criteria of *pressing social need* for further retention of such data, once the person was found innocent by the court. Derencinovic further clarifies that the retention of DNA profiles of victims is particularly contentious, occurring for the same duration as for individuals who have not been convicted – ten years (Article 327a, paragraph 3, of the Criminal Procedure Act). According to Article 327, paragraph 2, points 3 and 4, of the Criminal Procedure Act, biological material samples are taken from both victims and other individuals. Paragraph 6 specifies that the collection of biological material from these individuals is conducted with their written consent by the body conducting the investigation or proceedings, and the molecular-genetic analysis of these samples is mandated by the public prosecutor. If these individuals refuse consent, the court can order DNA analysis upon the prosecutor's proposal.<sup>71</sup> All the arguments highlighted concerning the retention of DNA profiles for non-convicted individuals are a fortiori applicable, especially concerning victims of criminal offenses, as it is challenging to establish constitutionally convincing reasons for such a significant intrusion into their privacy. A case

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<sup>69</sup> See *Supra note*. 66.

<sup>70</sup> Derencinović, D. (2021). *Preispitivanje prakse država glede zadržavanja DNK profila u svjetlu nedavnih presuda Europskog suda za ljudska prava protiv Ujedinjenog Kraljevstva i Sjeverne Makedonije*, In (Gordana Lažetić & Anita Kurtović Mišić, Recenzenti), *Ogledi o pravu i pravdi u dvije Europe* (p. 191). Narodne Novine

<sup>71</sup> *Ibid.*

that underscores the difficulty of meeting the novum threshold involved faulty DNA evidence. Here, a convicted individual was sentenced to 29 years for aggravated murder and rape, largely based on DNA evidence and witness testimonies. The defendant challenged the court's judgment, pointing out that DNA from an unidentified third party was found on his clothing. However, the Supreme Court dismissed this argument, stating that the presence of both the defendant's and the victim's DNA on the clothing was sufficient to uphold the conviction, despite the additional unidentified DNA. This scenario underscores the critical need for more comprehensive DNA analysis and the establishment of a more accessible mechanism for revisiting criminal cases based on new evidence.

The Croatian Innocence Project, currently in its experimental phase, is engaging in a comprehensive effort to address and reform issues related to wrongful convictions within Croatia's criminal justice system. This initiative is centered around two primary objectives: increasing public awareness of the challenges associated with miscarriages of justice and pushing for legislative changes to simplify the process for reopening cases for individuals who may have been wrongfully convicted. This reflects a broader ambition to align Croatia's legal practices with the European Court of Human Rights' standards and the constitutional provisions governing legal proceedings. A significant focus for the project is the stringent criteria for introducing new evidence, or novum, as stipulated by the Croatian Code of Criminal Procedure (CCP). Despite attempts to reform the legal system to ensure fairness, the threshold for presenting new evidence that could potentially overturn wrongful convictions remains excessively high. This challenge is illustrated by instances where courts have denied requests to revisit convictions, even when faced with recanted witness statements or fresh DNA evidence suggesting innocence. These cases underscore the urgent need for legal reforms to make the criteria for novum more attainable, thereby promoting a more just judicial process. Additionally, the project critically examines how DNA evidence is managed, particularly concerning the retention of DNA profiles and the implications for genetic privacy. The legal framework in Croatia provides detailed guidelines for the collection and processing of personal data in criminal cases. However, there are significant concerns about the retention policies for DNA data, especially regarding individuals who have been acquitted or are victims of crimes. The absence of a system for the periodic reevaluation of the necessity to retain such data, alongside issues related to the handling of DNA profiles of non-convicted individuals and victims, poses serious constitutional and ethical dilemmas. As the Croatian Innocence Project navigates through its experimental phase, its endeavors to identify and implement the most appropriate model for confronting these intricate challenges are vital. Through advocating for legal changes, enhancing societal awareness of wrongful convictions, and supporting those unjustly convicted, the project aims to foster a more equitable and just criminal justice system in Croatia. This period of exploration and advocacy is pivotal, setting the foundation for significant advancements in rights protection and justice administration.

## **Conclusion**

After reviewing the U.S. and European experiences with innocence project models, as well as the problems in different systemic backgrounds in which they are working, the authors should suggest a constructive approach to the selection of the model of the Croatian Innocence Project. The Croatian Innocence Project should consider adopting a University non-DNA approach to addressing cases of wrongful convictions for several compelling reasons. Firstly, the project's current focus on legislative reform and increasing public awareness aligns well with a broader strategy that goes beyond DNA evidence to challenge miscarriages of justice. Given the Croatian legal system's high threshold for introducing new evidence (novum), which has led to the denial of case revisions even with recanted testimonies or new DNA proof, it's



clear that relying solely on DNA evidence may not suffice in overturning wrongful convictions. This is further complicated by the legal and ethical concerns surrounding the management and retention of DNA profiles, especially for acquitted individuals or victims, pointing to a need for a more holistic approach to evidence and case review. Adopting a University non-DNA approach would allow the Croatian Innocence Project to expand its toolkit for challenging wrongful convictions, incorporating a wider range of investigative and legal strategies to address the complex array of issues that can lead to wrongful convictions, including but not limited to flawed eyewitness testimony, coerced confessions, and prosecutorial misconduct. This approach can also foster a more inclusive strategy for exoneration efforts, accommodating cases where DNA evidence is either unavailable or inconclusive. By focusing on comprehensive legal reforms and enhancing societal awareness, the project can advocate for a justice system that is not only more aligned with European Court of Human Rights standards but also more adaptive to the multifaceted nature of wrongful convictions. The University non-DNA approach exemplifies a commitment to justice that transcends the limitations of current evidentiary thresholds, advocating for a more equitable legal process that safeguards against the injustices of wrongful convictions. As the Croatian Innocence Project continues to evolve, embracing such an approach could be instrumental in achieving its goals of fostering a fairer judicial system and ensuring the protection of rights and administration of justice for all individuals.

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# ПОВЕЌЕ-СИСТЕМСКА АНАЛИЗА: ФОРМИРАЊЕ СООДВЕТЕН МОДЕЛ НА ХРВАТСКИОТ INNOCENCE ПРОЕКТ ВО КОНТЕКСТ НА ПОГРЕШНО ОСУДЕНИТЕ ЛИЦА

## Апстракт

*Овој труд претставува компаративна анализа на предметите на погрешно осудените лица во рамките на англо-саксонските и континенталните правни системи, со фокус на САД, Италија, Холандија и Хрватска. Концентрирајќи се на земји со функционални Инносепсе проекти, целта е да се анализира ефикасноста на овие модели во исправување на судските погрешки, со посебен акцент на новооснованиот Инносепсе проект во Хрватска. Преку нормативни, компаративни и теоретски методи, заедно со детален пристап на студии на случај, истражувањето ги анализира механизмите на овие проекти во различни правни системи. Трудот ја испитува фреквенцијата и природата на погрешните осудувања, истакнувајќи ја клучната улога на ДНК тестирањето по осудата во разоткривање на судските неправилности, особено кај сериозни кривични дела каде што се бара обнова на казнената постапка. Истражувањето прави критичка анализа на домашните и меѓународните правни рамки кои ги регулираат правата на погрешно осудените лица, нагласувајќи го трансформативното влијание на моделите на овие проекти од САД врз нивните европски еквиваленти. Дополнително, трудот ги разгледува специфичните предизвици во ДНК тестирањето по осудата, вклучувајќи ги логистичките и етичките дилеми поврзани со управувањето и чувањето на ДНК профилите. Црпејќи искуства од воспоставените проекти во САД и Европа, и земајќи ги предвид уникатните правни и системски предизвици во Хрватска, трудот препорачува модел насочен кон универзитетски пристап без исклучиво потпирање на ДНК докази. Оваа препорака се базира на сознанието дека високите доказни прагови и сложените правни и етички прашања поврзани со ДНК доказите бараат поширока, поинклузивна стратегија.*

*Таквиот пристап би овозможил користење на поширок спектар на истражувачки и правни тактики за адресирање на повеќеслојните причини за погрешни осудувања, надминувајќи ги ограничувањата на ДНК доказите. Преку залагање за значајни правни реформи и зголемена јавна свест, предложениот модел има за цел да го усогласи хрватскиот правосуден систем со стандардите на Европскиот суд за човекови права, создавајќи пофлексибилна и правична правна средина. Стратегијата што не е фокусирана само на ДНК докази не само што би се справила со случаи каде што ДНК доказите недостигаат или се неубедливи, туку и би поттикнала поправеден правен процес кој темелно се бори против погрешните осудувања. Овој пристап ветува не само корекција на минатите неправди, туку и поставување на цврсти основи за поправеден и потранспарентен судски систем во земјата, обезбедувајќи заштита и правда за сите.*