ARTICLES

REOPENING CRIMINAL PROCEEDINGS AND *NE BIS IN IDEM*: TOWARDS A WEAKER *RES IUDICATA* IN EUROPE?

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ABSTRACT: The principle of *ne bis in idem*, intrinsically linked to the concept of *res iudicata*, constitutes a fundamental cornerstone of criminal justice, ensuring protection against multiple prosecutions or punishments for the same offense. Nevertheless, the ever-evolving legal landscape has engendered extensive discussions concerning the potential reopening of criminal cases, particularly in light of novel evidentiary findings or fundamental procedural irregularities in the criminal proceedings at stake. This *Article* embarks upon a comprehensive and exhaustive inquiry into the intricate interplay between the re-examination of criminal proceedings and the *ne bis in idem* principle in Europe. By concentrating on key legal instruments, including the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights (ECHR), and the Convention Implementing the Schengen Agreement (CISA), this study aims at exploring the theoretical, legal, and human rights implications associated with such a course of action. At the heart of this analysis lies a meticulous examination of art. 4 of Protocol 7 to the ECHR, which serves as a pivotal benchmark governing the permissibility and justifiability of reopening criminal proceedings. Within this context, it will be demonstrated that, unfortunately, the interpretation of the latter provision by the Strasbourg Court – which provides for the minimum standards of protection of *ne bis in idem* in EU law – has not been consistent, creating potential issues concerning legal certainty and clarity that could undermine the essence of the said principle. Against this composite background, the primary objective of this *Article* is to illuminate the extent to which the principle of *ne bis in idem* may be rendered less stringent, in exceptional circumstances, to accommodate legitimate grounds warranting the reopening of criminal proceedings within the European legal framework.

KEYWORDS: Art. 4 of Protocol 7 ECHR – *ne bis in idem* – reopening of case – legal certainty – art. 50 of the Charter – art. 54 CISA.

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I. Setting the scene: introductory remarks

An individual is acquitted of a murder charge due to the testimonies of two witnesses who asserted that he was present with them elsewhere during the time of the homicide. That verdict became final. However, those witnesses are later found guilty of perjury since their statements were proven to be false.[1]

In another instance, X received a final conviction for the offenses of kidnapping, sexual assault, and homicide involving a young child. Nevertheless, subsequent to that conviction, a serial rapist Y made a confession, acknowledging his guilt for the same crime.[2] Similarly, a 14-year-old African American boy is brutally murdered and the two white men accused of the crime are acquitted by an all-white jury. After the acquittal, both men confessed to the murder.[3]

In a different scenario, Z faces charges of terrorism and is ultimately acquitted with a definitive verdict due to insufficient evidence linking him to a terrorist attack resulting in the death of several individuals. However, after several years, advancements in technical analysis allowed for the extraction of Z's DNA from a biological trace discovered at the crime scene. An inverse scenario involves a man who is convicted of murder with a final judgment; the subsequent emergence of DNA evidence proving his innocence put that verdict into question.[4]

The common element in all the presented cases is the existence of *final* judgments, whether they resulted in an acquittal or a conviction. Yet, those verdicts depict several argumentative and/or factual shortcomings. Apparently, such circumstances raise an essential question regarding the possibility and appropriateness of challenging final judgments and potentially reopening these cases. While the principle of *res iudicata* and legal certainty traditionally provides stability to the justice system as a whole,[5] it becomes crucial to address situations where "finality"[6] might inadvertently lead to unjust outcomes. To put it differently, the central issue at hand pertains to the extent to which final criminal judgments can genuinely be considered as conclusively final and immune from any possibility of being revisited through a brand-new retrial of the same facts. Indeed, should final criminal judgments be potentially flawed, illogical, incoherent, or arbitrary, there may arise a pressing concern about miscarriages of justice, that is to say, cases that appear formally final may still possess significant substantive deficiencies that demand further scrutiny and review.

[1] D Wolf, 'I Cannot Tell a Lie: The Standard for New Trial in False Testimony Cases' (1985) MichLRev 1925.

[2] AJ Flick, 'Rapist's "Confessions" could Reopen a Case' (19 April 2005) Tucson Citizen tucsoncitizen.com.

[3] E Pilkington, 'Will Justice Finally be Done for Emmett Till? Family Hope a 65-year Wait May soon be Over' (25 April 2020) The Guardian www.theguardian.com.

[4] SE Garcia, 'DNA Evidence Exonerates a Man of Murder After 20 Years in Prison' (16 October 2018) The New York Times www.nytimes.com.

[5] For a comprehensive analysis, see A Turmo, *Res Iudicata in European Union Law* (EU Law Live Press 2022).

[6] K Malleson, 'Appeals against Conviction and the Principle of Finality' (1994) Journal of Law and Society 151, 158.

As widely acknowledged, the principle of *res iudicata* and legal certainty plays a pivotal role in criminal justice systems, fostering a public interest in ensuring the stability and the integrity of judgments. Notably, it ensures that once a case has been definitively adjudicated, the parties involved can rely on the decision and move forward without fear of revisiting the same matter repeatedly.[7] Against this background, the CJEU has repeatedly highlighted:

> "[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".[8]

Still, the cases presented above underscore the complex nature of criminal proceedings, where even seemingly conclusive judgments may, and arguably should, be challenged upon the discovery of new evidence or revelations which hinder their authority.

This would lead to touch upon a cornerstone of (but not limited to) criminal procedure,[9] inextricably linked with the concept of *res iudicata* – the *ne bis in idem* principle, commonly referred to as double jeopardy, that serves the vital purpose of safeguarding individuals from facing multiple criminal prosecutions for the same criminal offense. While the respect for the *res iudicata* is intertwined with the public interest in enhancing legal certainty throughout the whole criminal justice system,[10] the right not to be tried or punished twice in criminal proceedings for the same criminal offence – being an "expression of legal certainty"[11] – is customarily contemplated as a fundamental right of individuals.[12] This prerogative, deeply rooted in the European legal history,[13] offers protection against potential abuse of power by the prosecution, serving as a crucial safeguard to

[7] G Illuminati, 'Cassazione o Terza Istanza' in Associazione tra gli Studiosi del Processo Penale (ed.), *Le impugnazioni penali. Evoluzione o involuzione? Controlli di merito e controlli di legittimità. Atti del Convegno (Palermo, 1-2 dicembre 2006)* (Giuffré 2008) 352.

[8] Case C-234/17 *XC and Others* ECLI:EU:C:2018:853 para. 52.

[9] This *Article* will solely refer to the concept of *ne bis in idem* within the criminal law sphere. For a broad analysis of the principle in the EU law, see *inter alia* JAE Vervaele, 'Ne Bis in Idem: Towards a Transnational Constitutional Principle in the EU?' (2013) Utrecht Law Review 211; B van Bockel, 'The Ne Bis in Idem Principle in the European Union Legal Order: Between Scope and Substance' (2012) ERA Forum 325, and B van Bockel, *The Ne Bis in Idem Principle in EU Law* (Kluwer Law International 2010).

[10] JAE Vervaele, 'The Transnational Ne Bis in Idem Principle in the EU Mutual Recognition and Equivalent Protection of Human Rights' (2005) Utrecht Law Review 100.

[11] D Sarmiento, 'Ne Bis in Idem in the Case Law of the European Court of Justice' in B van Bockel (ed.), *Ne Bis in Idem in Eu Law* (Cambridge University Press 2016) 120.

[12] M Luchtman, 'The ECJ's Recent Caselaw on Ne Bis in Idem: Implications for Law Enforcement in a Shared Legal Order' (2018) CMLRev 1717, 1721.

[13] G Coffey, 'A History of the Common Law Double Jeopardy Principle: From Classical Antiquity to Modern Era' (2022) Athens Journal of Law 253.

ensure that individuals are not subjected to harassment, intimidation, or oppressive and endless legal proceedings by the State.[14]

In this light, the opportunity to challenge a final judgement represents an exception to *ne bis in idem* (and, in turn, to the integrity of *res iudicata*). The possibility to reopen a case constitutes *per se* a duplication of proceedings (*bis*) in relation to the facts which already formed the object of the final judgment (*idem*) against the same accused. However, instances may arise in which individuals, for example, are definitively acquitted based on false testimonies, leading to a realisation that rigidly adhering to the principle of *ne bis in idem* can potentially result in miscarriages of justice. The same applies if convicted individuals are not released, after a retrial, when new evidence subsequently emerges, proving their innocence – in light of advancements in technology, particularly in DNA analysis, crucial evidence that was previously unavailable may be discovered. The reopening of a case, therefore, could respond to the need to prevent the danger that, in strict adherence to formalities, the demands of truth and material justice may be sacrificed. Consequently, the formal application of *ne bis in idem* might hinder the criminal justice system from achieving an accurate outcome in certain circumstances. This could have adverse consequences for the society as a whole, as individuals should rely on the belief that the criminal justice system will consistently render the most just decisions in each case, appropriately punishing the guilty and acquitting the innocent accused ones.

Against this background, the present *Article* will highlight the importance of striking a balance between *ne bis in idem* and the pursuit of truth and justice, emphasising that while the right not to be prosecuted or punished twice for the same criminal offence is of paramount importance in modern criminal justice systems and shall be undeniably preserved in its kernel, it should not be considered as an impenetrable barrier preventing the rectification of final judgements, that is, the reopening of cases when new circumstances, in the context of exceptional scenarios, come subsequently to light.

To this end, this *Article* will firstly provide an overview of the key theoretical questions surrounding the legitimacy of allowing criminal justice systems to reopen final cases and its potential impact on the principle of *ne bis in idem* (section II). Subsequently, a concise examination of the main European sources relevant to this principle will be presented (section III), with particular emphasis on the ECHR legal framework, where explicit exceptions to *ne bis in idem* are outlined concerning the reopening of final cases, their scope and meaning being regrettably interpreted by the Strasbourg Court following a blurred and fragmented approach (section IV). Finally, I will attempt to provide potential solutions

[14] X Groussot and A Ericsson, 'Ne Bis in Idem in the EU and ECHR Legal Orders: A Matter for Uniform Interpretation?' in B van Bockel (ed.), *Ne Bis in Idem In Eu Law* cit. 55. As pointed out by M Fletcher, 'The Problem of Multiple Criminal Prosecutions: Building an Effective EU Response' (2007) Yearbook of European Law 33, 39, multiple prosecutions result *per se* in adverse consequences for the individual, *e.g.*, duplicated expenditures on legal representation, coercive actions against personal and property rights, and psychological strains stemming from prolonged proceedings and the absence of conclusive outcomes.

that, in my understanding, may amend the ECtHR's approach towards *ne bis in idem*, without hindering the very nature of the principle in itself (section V).

II. The possibility to reopen a case and *ne bis in idem*: main theoretical issues

The opposing demands of the State's punitive authority (*ius puniendi*) and the protection of fundamental rights for individuals have led to intriguing debates surrounding the interpretation of *ne bis in idem*, which is often perceived as a principle "simple in theory" but "complicated in practice".[15] At first glance, the concept that an individual cannot be subjected to prosecution, trial, or conviction twice for the same criminal offense may seem straightforward – once X has been convicted or acquitted with a *final judgment*, she cannot be *again* subject to criminal proceedings (and eventually convicted or acquitted) regarding *the same facts*. One might assume that a simple solution would be to prohibit any judicial criminal law-related action concerning the same set of facts against that individual. Nevertheless, the practical application of the *ne bis in idem* principle is far more complex than it appears.[16]

Despite not being the purpose of this *Article*, various legal, procedural, and substantive aspects come into play in this field. One such question pertains to the basis for defining what constitutes the "same facts" (the *idem*) – is it derived from the legal definition or classification of offenses (*in abstracto*), or is it based on the specific set of facts (*in concreto*)?[17] The definition of what constitutes a *final* judgment also remains ambiguous.[18] Further questions arise as to whether respect for this principle necessitates an absolute bar on further prosecution or punishment, or if the authority imposing the second punishment can take into account the first punishment.[19] Finally, the frequent scenario

[15] S Coutts, *Citizenship, Crime and Community in the European Union* (Hart 2019) 157. In the same vein, P Oliver and T Bombois, '"Ne bis in idem" en droit européen: un principe à plusieurs variantes' (2012) Journal de Droit Européen 266.

[16] In this section, I will deal with the theoretical issues surrounding the *vertical* application of *ne bis in idem*, that is, the classical prohibition of double prosecution and punishment against the same individual for the same facts *within a single domestic system*. As will be explored in section III, there is also a *horizontal* application of *ne bis in idem*, that is, when the principle is applied *between different legal orders* (*e.g.*, within the EU legal framework).

[17] For an updated overview of the relevant European case-law, see P Rossi-Maccanico, 'A Reasoned Approach to Prohibiting the Bis in Idem' (2021) eucrim 266, 268-270. See also case C-117/20 *bpost* ECLI:EU:C:2022:202 and case C-151/20 *Nordzucker and Others* ECLI:EU:C:2022:203.

[18] In this regard see S Montaldo, 'A New Crack in the Wall of Mutual Recognition and Mutual Trust: Ne Bis in Idem and the Notion of Final Decision Determining the Merits of the Case' (2016) European Papers www.europeanpapers.eu 1183.

[19] N Neagu, 'The Ne Bis in Idem Principle in the Interpretation of European Courts: Towards Uniform Interpretation' (2012) LJIL 955.

where both administrative and criminal penalties are imposed for the same illicit behaviour, as observed in some countries with regard to tax evasion, public safety and environmental law,[20] raises doubts about the legitimacy of dual-track enforcement systems in relation to the principle of *ne bis in idem*.[21]

Against this background, and despite its blurred boundaries, the right not to be tried or punished twice undoubtedly serves crucial purposes for both definitively convicted and finally acquitted individuals. For the former, it ensures that they serve their penalty without the constant fear of being repeatedly retried for the same offense, and, arguably, being distributed with a harsher penalty (over-punishment). Likewise, for the latter, the principle provides protection against endless criminal proceedings that could intrude upon their private sphere.

In both cases, the pivotal factor is the achievement of a *definitive* result through the criminal proceedings, signified by the final judgment. *Ne bis in idem* thus prevents the authorities from reopening criminal proceedings indiscriminately, thereby avoiding potential abuses of the *ius puniendi* by the State. At the same time, this principle contributes to the enhancement of legal certainty and the stability of the *res iudicata*, ensuring that both the State and the individual involved can be content with the outcome attained through the criminal proceedings.[22] Broadly speaking, the hybrid nature of *ne bis in idem*, encompassing both its status as a fundamental right and its practical utility for State-related objectives, can indeed be considered the defining hallmark of this principle.[23]

That being said, there is a prevailing consensus in doctrinal circles that *ne bis in idem* constitutes an essential principle of criminal law,[24] part of the constitutional traditions common to Western European democracies.[25] However, it remains subject to dispute whether a similar consensus exists across the European countries regarding the signifi-

[20] Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2012:340, opinion of AG Cruz Villalón, para. 70.

[21] See ECtHR *A and B v Norway* App n. 24130/11 and 29758/11 [15 November 2016], dissenting opinion of judge Pinto de Albuquerque.

[22] In this regard, see J Lelieur, '"Transnationalising" Ne Bis In Idem: How the Rule of Ne Bis In Idem Reveals the Principle of Personal Legal Certainty' (2013) Utrecht Law Review 198, 199 ff and, similarly, S Mirandola and G Lasagni, 'The European ne bis in idem at the Crossroads of Administrative and Criminal Law' (2019) eucrim 126 and further references cited therein.

[23] In this regard, M Luchtman, 'The ECJ's Recent Caselaw on Ne Bis in Idem' cit. 1721 argued that "the importance one attaches to the specific rationales of the principle inevitably has consequences for its design and effects in a specific legal order".

[24] In this vein, case C-486/14 *Kossowski* ECLI:EU:C:2015:812, opinion of AG Bot, para. 37.

[25] See *inter alia* D Sarmiento 'Ne Bis in Idem in the Case Law of the European Court of Justice' cit. 109. In the same vein, see C Burchard and D Brodowski, 'The Post-Lisbon Principle of Transnational *Ne Bis in Idem*: On the Relationship between Article 50 Charter of Fundamental Rights and Article 54 Convention Implementing the Schengen Agreement' (2010) NJECL 310 (fn 4). See, very recently, case C-435/22 PPU *HF* ECLI:EU:C:2022:775, opinion of AG Collins, para. 41.

cance of that principle in terms of its scope of application, underlying purposes, and potential derogations.[26] In relation to the latter, one may contemplate whether the principle of *ne bis in idem* should always remain inviolable, considering its vital role in upholding legal certainty. Moreover, this reflection raises the question of whether it is socially acceptable that final judgments are entirely immune from any form of further scrutiny, even in cases where new evidence or circumstances emerge, casting doubt on their integrity, either in favour or at the detriment of the individual involved.

The ongoing debate surrounding the reopening of final criminal cases stems from the acknowledgment that a conclusive judgment should not be regarded as an infallible truth. This is because potential miscarriages of justice can regrettably always happen, resulting in the *wrongful conviction* of innocent individuals,[27] with harsh detrimental effects against their mental health,[28] their reputation and, more broadly, the trustworthiness of the whole criminal justice system. Thus, the possibility that *wrongful convictions* may occur undoubtedly serves as a powerful theoretical argument for those advocating the need to allow for retrials in favour of convicted individuals, according to the time-honoured stance that "[b]etter that ten guilty persons escape, than that one innocent suffer".[29] If a final verdict results in the conviction of an innocent individual, its stability and reliability should be compromised, despite the principle of legal certainty.[30] In this regard, it has been argued that: "[i]f 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".[31]

Hence, it appears conceivable to consider setting aside the principle of *ne bis in idem* in instances of wrongful convictions. The convicted individual should consequently be subject to a new trial, wherein they would revert to the status of "accused". This new trial would allow them to present fresh evidence and introduce new grounds, which could serve as the basis for their acquittal. Given the exceptional nature of this procedure, it is not uncommon for a domestic legal system to incorporate a preliminary procedural phase wherein a dedicated *ad hoc* court would meticulously examine the grounds on

[26] See JAE Vervaele, 'The Transnational Ne Bis in Idem Principle in the EU Mutual Recognition and Equivalent Protection of Human Rights' cit. 110 and, by analogy, X Groussot and A Ericsson, 'Ne Bis in Idem in the EU and ECHR Legal Orders' cit. 56. In the same line, see *Åkerberg Fransson*, opinion of AG Cruz Villalón, cit. paras 81-87.

[27] PC Roberts, 'The Causes of Wrongful Conviction' (2003) The Independent Review 567.

[28] AT Grounds, 'Understanding the Effects of Wrongful Imprisonment' (2005) Crime and Justice 1.

[29] This is the well-known "Blackstone Ratio", on which, for further reference and analysis, see A Voloch, 'n Guilty Men' (1997) UPaLRev 173.

[30] R Vanni, 'La Revisione in Pejus del Giudicato Penale: Frana il Tradizionale Divieto?' (1993) La Legislazione Penale 605.

[31] J Nan and S Lestrade, 'Towards a European Right to Claim Innocence?' (2020) European Papers www.europeanpapers.eu 1329.

which the request to reopen a case is presented. This admissibility review ensures that only cases with compelling and valid justifications for reconsideration proceed to the retrial stage, maintaining the balance between preserving the finality of judgments and addressing potential miscarriages of justice.[32]

Things might be more complicated when it comes to assess the admissibility of allowing the reopening of cases in which an individual has been previously acquitted. As evocatively highlighted, in judicial praxis:

> "[a]cquittals are largely invisible. Although criminal trials are public, the vast majority of cases receive no public notice and are particularly invisible when an acquittal occurs. Acquittals are in general immune from appeal, because rules against double jeopardy prevent the state from trying the defendant again. Transcripts of acquittals are difficult to obtain, because court reporters are not required to turn their notes into a transcript unless there is an appeal".[33]

While the possibility of exceptionally setting aside the principle of *ne bis in idem* to address a wrongful conviction may seem straightforward, there exist several stances – enhancing the significance of *res iudicata* – opposing the prospect of reopening a case to the detriment of the individual concerned, that is, where an individual, previously acquitted, might be subjected to a new trial with the aim of securing his or her conviction.

Firstly, allowing for the reopening *in melius* of final judgments[34] does not necessitate admitting *vice versa* a revision *in peius* of those verdicts,[35] as the former legal tool is driven by the need to safeguard a fundamental right (the liberty of the innocent), while the latter lacks any comparable merit.[36] Secondly, it is claimed that the aftermaths of an unjust conviction are far more severe than those of an unjust acquittal.[37] Thirdly, only the inviolability of the final judgment enhanced by the principle *ne bis in idem* enables individuals acquitted with an irrevocable sentence to enjoy peace and security in social life, as citi-

[32] For a critical examination of the admissibility phase in the Italian legal framework, see L Bernardini, 'Una nozione imprecisa, un iter disorganico: quale futuro per la "manifesta infondatezza" del ricorso di revisione?' (2023) Diritto Penale e Processo 575.

[33] TD Lyon, SN Stolzenberg and K McWilliams, 'Wrongful Acquittals of Sexual Abuse' (2017) Journal of Interpersonal Violence 805, 806.

[34] That is, in favor of the convicted individual.

[35] Namely, at the detriment of the acquitted person.

[36] F Carrara, *Opuscoli di Diritto Criminale* (Tipografia Giusti 1886) 296.

[37] This assumption relies on the scientific literature on the phenomenon of wrongful convictions. See *inter alia* M Naughton, 'Criminologizing Wrongful Convictions' (2014) The British Journal of Criminology 1148, and, more recently, G Johnson and DW Engstrom, 'Judge Learned Hand's Haunting: The Psychological Consequences of Wrongful Conviction' (2020) Social Justice 195. For a medical perspective, see also SK Brooks and N Greenberg, 'Psychological Impact of Being Wrongfully Accused of Criminal Offences: A Systematic Literature Review' (2021) Medicine, Science and the Law 44.

zens cannot constantly be subjected to suspicion and the danger of continuous accusations.[38] Fourthly, if every acquitted person were always subjected to new accusations for the same facts, they would be perpetually burdened with seeking evidence to prove their innocence, leading to an evident imbalance compared to the powers and resources of the prosecution.[39] Fifthly, imposing a sentence on an individual who was previously acquitted and then convicted after new accusations for the same facts, possibly after many years, would render the punishment perceived as unjust, thereby undermining the notion that the penalty would *inter alia* assist the individual's rehabilitation or, more specifically, their reintegration into society.[40]

While these arguments seem acceptable, they nonetheless have been contested on several basis.[41] First and foremost, it may be considered that if a conviction can be tainted by a judicial error – thus leading to the need for reconsideration –, the same degree of merit for revision applies to an acquittal verdict, as judicial errors can occur in both instances. It is apparent that, even in cases where a guilty person is acquitted, this situation can be regarded as a miscarriage of justice.[42] In the same vein, it may be maintained that although the individual harm and social costs caused by a judicial error are more significant in the conviction of an innocent person than in the acquittal of a guilty one,[43] the lesser harm should not be disregarded *solely* for that reason.

Moreover, the standpoint that the absolute prohibition of punishing a guilty person definitively acquitted raises concerns about the authority of the criminal justice system

[38] As emphasized, very recently, in case C-147/22 *Központi Nyomozó Főügyészség* ECLI:EU:C:2023:549, opinion of AG Emiliou, para. 57.

[39] According to S Coutts, *Citizenship, Crime and Community in the European Union* cit. 156, the possibility to reopen a case "would give [the State] multiple changes to amend and improve its case, an opportunity that is unavailable to the accused", thus hindering the "equality of arms" principle.

[40] In this regard, see S Montaldo, 'Offenders' Rehabilitation: Towards a New Paradigm for EU Criminal Law?' (2018) European Criminal Law Review 223 and L Foresberg and T Douglas, 'What Is Criminal Rehabilitation?' (2022) Criminal Law and Philosophy 103. On time and punishment intertwined issues, see, among others, JV Roberts, 'The Time of Punishment: Proportionality and the Sentencing of Historical Crimes' in M Tonry (ed.), *Of One-eyed and Toothless Miscreants: Making the Punishment Fit the Crime?* (Oxford University Press 2019) 149.

[41] This is evidenced by the different approaches taken by European countries. For instance, the Italian legal framework distinctly bars the prospect of reopening cases with the intent of convicting an individual who has been definitively acquitted (see art. 630 of the Italian Code of Criminal Procedure). Conversely, in the German legal system, provisions exist that permit the reconsideration of cases under exceptional circumstances, potentially leading to adverse outcomes for those previously acquitted (see para. 362(5) of the German Code of Criminal Procedure).

[42] In this regard, see M Tonry, 'Wrongful Acquittals and "Unduly Lenient" Sentences—Misconceived Problems that Provoke Unjust Solutions' in L Zedner and J V Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press 2012) 307. For a US perspective, see PG Cassell, 'Tradeoffs Between Wrongful Convictions and Wrongful Acquittals: Understanding and Avoiding the Risks' (2018) Seton Hall Law Review 1435.

[43] N Garoupa and M Rizzoli, 'Wrongful Convictions Do Lower Deterrence' (2012) Journal of Institutional and Theoretical Economics 224, 230.

vis-à-vis the society as a whole – in that individuals may not fully grasp the rationale behind such a strict formal prohibition – appears to hold some merit. In simpler terms, if an individual has been wrongfully acquitted, it is reasonable to expect the justice system to correct such a mistake.[44]

Besides, while it is true that those who have been definitively acquitted deserve tranquillity and social peace, it is equally valid that ordinary citizens also deserve to enjoy these values, which could be compromised in a society where wrongdoers – albeit definitively acquitted – are left unpunished, despite the existence of new evidence or circumstances against them.[45] Ultimately, it is noteworthy that reopening cases to the detriment of an individual definitively acquitted can serve commendable purposes, as it cannot be completely ruled out that the acquittal of a guilty person might result in the conviction of an innocent one.

Against this background, it seems fair to maintain that legal frameworks should remain mildly flexible to strike a right balance between preserving the principle of *ne bis in idem* and ensuring the integrity of the criminal justice system. While this undoubtedly represents a challenging task, it should not be underestimated that the potential for wrongful convictions or unjust acquittals ought to be addressed with a nuanced approach, that acknowledges the need to put efforts in addressing cases that present compelling reasons for their reopening without undermining the value of final judgments in general. Evidently, there (rightly) appears to be a widespread consensus regarding the merit of reopening cases in favour of wrongfully convicted individuals, thereby justifying a departure from the *ne bis in idem* principle for the purpose of safeguarding the equally fundamental right to personal liberty of the individuals concerned. Conversely, the same unanimous consensus does not extend to situations where the exception to *ne bis in idem* is invoked to reopen a case against an individual who has been wrongfully acquitted. In the latter scenario, as previously suggested, a range of concerns may arise regarding the acceptability of encroaching upon the principle of *res iudicata*. Nonetheless, if such reconsideration is circumscribed to extraordinarily scenarios and thoroughly justified circumstances, such option might not appear unreasonable *per se*.[46] Ostensibly, this is the

[44] PG Cassell, 'Tradeoffs Between Wrongful Convictions and Wrongful Acquittals' cit.

[45] See, referring to the "general interest of society in effectively pursuing offenders", *Központi Nyomozó Főügyészség*, opinion of AG Emiliou, cit. paras 60-61.

[46] In situations where a wrongful acquittal results from a substantial or procedural error committed by the prosecuting authorities or the presiding judge, a retrial should not be granted. It is the responsibility of the legal system to protect individuals who have been wrongfully acquitted from bearing the consequences of errors attributable to the state. In any event, this reopening should not serve as a pretext for state authorities to intimidate or harass the acquitted individuals. Conversely, in cases where such a retrial is sought based on specific, and newly arisen circumstances, and the motivation for reopening the case is *unrelated to state negligence*, there might be grounds for considering such a reopening. Consider an individual who has been acquitted on the grounds of *fraudulent or fabricated evidence*. In such an instance, the verdict has plainly been com-

attitude that has been broadly embraced by both the ECHR legal framework and EU law, although certain divergences exist between the two.

III. Retrial and *ne bis in idem* in Europe through the lens of the Charter, the ECHR and the CISA

When referring to *ne bis in idem* in the European legal framework, a conventional triad of norms is commonly cited – art. 50 of the Charter of Fundamental Rights, art. 4 of Protocol 7 to the ECHR (hereinafter "art. 4 of Protocol 7"),[47] and art. 54 of the so-called Schengen Convention (CISA).[48] These provisions have become closely interconnected in their application by the States bound by them, although there are significant divergences in their scope, both *ratione personae* and *ratione materiae*. Moreover, the rationales underlying them also differ significantly.[49]

Without delving into details, it suffices to note that art. 54 CISA was conceptualized with a purpose extending beyond the customary justifications of *ne bis in idem*. Indeed, art. 54 CISA was specifically crafted to guarantee the *free movement of individuals* within the realm now known as the Area of Freedom, Security and Justice (AFSJ).[50] Against this background, an individual whose case has been definitively concluded in a Member State should be able to move freely without the spectre of facing a second prosecution in another Member State for the same facts – this is the kernel of that provision.[51]

promised by a material and relevant flaw, the revelation of which ought to culminate in the potential reopening of the case. This possibility, which I assume to be arguably the only one which can – and ought to – justify a revision of a final case at the detriment of the acquitted one, should be strictly limited and entertained only if genuinely exceptional circumstances, such as when the newly presented evidence has the potential to significantly affect the case's outcome, potentially leading to a conviction.

[47] Council of Europe, Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 22 November 1984, ETS 117 [1984].

[48] Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000].

[49] See *amplius* K Ligeti, 'Fundamental Rights Protection between Strasbourg and Luxembourg: Extending Transnational *ne bis in idem* Across Administrative and Criminal Procedures' in K Ligeti and G Robinson (eds), *Preventing and Resolving Conflicts of Jurisdiction in Eu Criminal Law: A European Law Institute Instrument* (Oxford University Press 2018) 160 ff.

[50] G Coffey, 'An Interpretative Analysis of the European Ne Bis in Idem Principle Through the Lens of the ECHR, CFR and CISA Provisions: Are Three Streams Flowing in the Same Channel?' (2023) NJECL 362 ff. Importantly, the principle of *ne bis in idem* is also "the result of the rationale of mutual recognition and mutual trust among legal orders" (D Sarmiento, 'Ne Bis in Idem in the Case Law of the European Court of Justice' cit. 120). More precisely, it "became part of the scheme of mutual trust in the EU [AFSJ]" (JAE Vervaele, 'Ne Bis in Idem' cit. 221).

[51] B van Bockel, 'The Ne Bis in Idem Principle in the European Union Legal Order' cit. 329, and M Luchtman, "The ECJ's Recent Caselaw on Ne Bis in Idem' cit. 1724. For a broad analysis of the purpose of art. 54 CISA, see S Coutts, *Citizenship, Crime and Community in the European Union* cit. 160, and C Burchard and D Brodowski, 'The Post-Lisbon Principle of Transnational *Ne Bis in Idem*' cit.

While the CISA does include several exceptions to this principle,[52] none of them explicitly allude to the possibility of reopening a case. This absence is not surprising, as the decision to re-examine a criminal case can be construed as a matter falling under the "vertical" application of the *ne bis in idem* guarantee (*i.e.*, within the same legal order). Indeed, should a final case be reopened, the focal points of concern would be restricted to *that* specific case within *that* domestic legal framework.

For instance, consider a scenario where X has been definitively convicted (or acquitted) in Luxembourg for a criminal offense and has received a final verdict. The exceptional reopening of such a case would evidently pertain to Luxembourgish domestic law. It is apparent that *only the State that issued the final decision possesses the capacity to re-examine that judgment* – no other authority is endowed with this capability. This implies that such a circumstance could be viewed as a strictly *domestic* exception to the *ne bis in idem* principle.

Certainly, in the event that a reopening is granted, and the individual is subsequently acquitted (or, respectively, convicted), the *ne bis in idem* principle, in light of art. 54 CISA, is reinstated in its *horizontal* effects (*i.e.*, among different legal frameworks). Consequently, X can freely move across the EU due to their brand-new final verdict. From this perspective, the revision of a case can be regarded as an exclusively *internal* exemption to the *ne bis in idem* principle. Hence, art. 54 CISA holds no direct relevance for the present analysis.

Conversely, art. 50 of the Charter and art. 4 of Protocol 7 prove to be extremely influential in this matter. The former reads as follows: "[n]o one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law".

Evidently, the EU's interpretation of the *ne bis in idem* principle appears to possess a transnational nature – its application spreads "within the Union" – akin to the provision in art. 54 CISA. Given its wording, it undoubtedly safeguards a *horizontal* utilization of this prerogative (*i.e.*, across diverse legal frameworks), thereby promoting the unrestricted movement of individuals within the EU and bolstering the mutual trust among its Member States.[53] Yet, art. 50 of the Charter also extends its applicability within the boundaries of a single Member State, safeguarding a *vertical* implementation of the *ne bis in idem* principle, as helpfully clarified in the Explanation relating to the Charter.[54] In this regard, it encompasses a broader scope than art. 54 CISA, since art. 50 of the Charter provides

[52] See, among others, art. 55 CISA. In this regard, see A Weyembergh, 'Le Principe Ne Bis in Idem: Pierre d'Achoppement de l'Espace Pénale Européen?' (2004) Cahiers de Droit Européen 337, 354 ff.

[53] T Lock, 'Art. 50 CFR' in M Kellerbauer, M Klamert and J Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 2235. See also J Tomkin, 'Article 50' in S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights. A Commentary* (CH Beck/Hart/Nomos 2014) 1374-1377 and C Amalfitano and R D'Ambrosio, 'Articolo 50' in R Mastroianni, O Pollicino, S Allegrezza and others (eds), *Carta dei Diritti Fondamentali dell'Unione europea* (Giuffrè 2017) 1015.

[54] Explanations relating to the Charter of Fundamental Rights [2007] ("the Explanations").

protection against double jeopardy *not only* across distinct legal frameworks, *but also* within a *single* domestic legal order.[55]

Interestingly, from its wording, one cannot discern any provision for *exceptions* to this principle. In other words, the Charter appears to establish the absolute characterization of the *ne bis in idem* principle, devoid of any potential exceptions. However, whether this prerogative is truly absolute finds its answer in another provision of the Charter. Namely, although art. 50's wording is clear and offers no avenue for derogations, art. 52(1) of the Charter introduces mechanisms for restricting the rights enshrined therein.[56] Consequently, the *ne bis in idem* principle does not stand as an absolute and inviolable tenet within the EU legal framework. Instead, it may be limited under certain extraordinary circumstances.[57]

The query now revolves around whether the possibility of reopening a case, in light of art. 52(1) of the Charter, could be deemed a valid exception to the provisions of art. 50 thereof. Arguably, the affirmative answer can be supported glancing at art. 52(3) of the Charter, referred to as the "homogeneity clause",[58] which establishes that if the rights guaranteed by the Charter align with those guaranteed by the ECHR, both rights shall possess equivalent scope and meaning. As previously mentioned, the ECHR includes a provision addressing the *ne bis in idem* principle – art. 4 of Protocol 7. The latter is applicable solely within the same state (*vertical* application), and expressly incorporates a specific exception to this principle, namely, the potential for case reopening, as set in art. 4(2) thereof. In this light, the Explanations clarified that: "[a]s regards the situations referred to by Article 4 of Protocol No 7, namely the application of the principle [of *ne bis in idem*] within the same Member State, the guaranteed right has the same meaning and the same scope as the corresponding right in the ECHR".[59]

In *Menci*, the CJEU underscored the imperative nature of considering art. 4 of Protocol 7 as an essential factor for the purpose of interpreting art. 50 of the Charter.[60] This entails that, limited to domestic situations, art. 50 of the Charter shall respect the ECtHR's case-law on art. 4 of Protocol 7.[61]

[55] K Ligeti, 'Fundamental Rights Protection between Strasbourg and Luxembourg' cit. 162. This is without prejudice to art. 51(1) of the Charter, which stipulates that, in cases involving proceedings conducted exclusively within a single Member State, art. 50 of the Charter is applicable solely if the situation at hand falls within "the scope of application of Union law".

[56] As per art. 52(1) of the Charter, any prerogative laid down therein may be subject to limitations, yet these exceptions must comply with five conditions: legality, respect for the kernel of the right at stake, necessity, proportionality and that derogation shall "genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".

[57] Case C-524/15 *Menci* ECLI:EU:C:2018:197 para. 40.

[58] Case C-481/19 *DB* ECLI:EU:C:2020:861, opinion of AG Pikamäe, para. 50.

[59] Explanations cit.

[60] *Menci* cit. para. 60.

[61] X Groussot and A Ericsson, 'Ne Bis in Idem in the EU and ECHR Legal Orders' cit. 60.

More specifically, art. 4(2) of Protocol 7 should be considered under the "general limitation provision" of art. 52(1) of the Charter in conjunction with art. 52(3) thereof.[62] Accordingly, it becomes essential to thoroughly examine the possibility to reopen final cases as construed and interpreted by the ECtHR – this constitutes, on the one hand, the "basic line" of art. 50 of the Charter[63] and, on the other hand, the minimum standard applicable in both the EU and ECHR legal frameworks.[64]

IV. A focus on the ECHR: art. 4 of Protocol 7 as a benchmark for cases reopening in Europe

It is indisputable that the drafters of the ECHR did not give specific consideration to the *ne bis in idem* principle – none of its provisions address this particular prerogative. While the European Commission of Human Rights initially carved out the legal basis of the prerogative from the right to a fair trial as per art. 6 ECHR, this reading was later overturned.[65] Accordingly, the formulation of Protocol 7 in 1984 marked the first explicit recognition of this issue by the State Parties within the ECHR legal framework.[66]

As previously mentioned, art. 4(1) of this Protocol is crafted with the objective of preventing the duplication of criminal proceedings that have culminated in a final judgment against the same individual.[67] Against this background, it has been notably emphasised that the "repetitive aspect of trial or punishment is central to the legal problem addressed by Article 4 of Protocol No. 7".[68] In its assessment of the facts, as recently found in *Prigală*, the ECtHR "has to determine whether the two sets of proceedings were criminal in nature, whether they concerned the same facts and offence (*in idem*), and whether there was duplication of the proceedings (*bis*)".[69] As for its scope of application, *ne bis in idem* as guaranteed by art. 4 of Protocol 7 applies only at the national level ("under the jurisdiction

[62] T Lock, 'Art. 50 CFR' cit. 2240.

[63] JAE Vervaele, 'Ne Bis In Idem' cit. 227.

[64] As noted by H Satzger, 'Application Problems Relating to "Ne Bis in Idem" as Guaranteed Under Art. 50 CFR/Art. 54 CISA and Art. 4 Prot. No. 7 ECHR' (2020) eucrim 213, the ECHR serves not only as an instrument for interpreting the EU *ne bis in idem* (as per art. 53 of the Charter) but also establishes a baseline level of protection that cannot be limited under the Charter (as per art. 54 of the Charter).

[65] As reported by G Coffey, 'An Interpretative Analysis of the European Ne Bis in Idem Principle Through the Lens of the ECHR, CFR and CISA Provisions' cit. 346-347 with additional reference to the relevant case-law. By contrast, Luchtman has rightly pointed out that it cannot be denied that the mere potential for multiple prosecutions concerning the same set of events against the same individuals will unavoidably impact defence strategies and procedural safeguards, such as the right to silence, employed in both proceedings (see M Luchtman, 'The ECJ's Recent Caselaw on Ne Bis in Idem' cit. 1722, for further observations).

[66] See S Allegrezza, 'Art. 4 Prot. n. 7 CEDU' in S Bartole, P De Sena and V Zagrebelsky (eds), *Commentario breve alla Convenzione Europea dei Diritti dell'Uomo* (Cedam 2012) 894.

[67] ECtHR *Gradinger v Austria* App n. 15963/90 [23 October 1995] para. 53.

[68] ECtHR *Matevosyan v Armenia* App n. 20409/11 [13 April 2021] para. 47 and the case-law cited therein.

[69] ECtHR *Prigală v the Republic of Moldova* App n. 14426/12 [13 December 2022] para. 8.

of the same State"). Thus, that prerogative is safeguarded should it be applied *vertically*, that is, within the same legal framework.[70]

Unlike art. 50 of the Charter, art. 4(2) of Protocol 7 explicitly outlines a distinct exception to the *ne bis in idem* principle. This stands as the *sole* exception provided,[71] as in all other instances, the principle remains inviolable, even in those situations sanctioned under art. 15 of the ECHR during times of war or other public emergencies (art. 4(3) of Protocol 7). While this feature underscores the "prominent place"[72] that *ne bis in idem* occupies within the framework of fundamental rights protection under the ECHR, it is noteworthy that the resumption of a trial is an exception to *ne bis in idem* that is widely acknowledged and accepted in the ECHR legal system.

In accordance with art. 4(2) of Protocol 7, the reopening of a case is contingent upon the fulfilment of two grounds, as foreseen in the domestic law of the State concerned. The first element entails the emergence of new or newly discovered facts subsequent to the issuance of the final judgment (sub-section IV.1) or, alternatively, the revelation of a fundamental defect in the proceedings (sub-section IV.2). Secondly, it shall be assessed that these identified circumstances have the potential to influence the outcome of the case, either to the advantage or detriment of the individual involved (sub-section IV.3).

These scenarios are evidently exceptional,[73] constituting derogations from a fundamental right, and, as such, deserve thorough evaluation by national judges. At first glance, such circumstances present valid grounds to set aside *res judicata* and reopen a final case. Yet, while it is reasonable to foresee specific instances of retrial, the more or less flexible assessment of these grounds risks yielding problematic consequences. Indeed, an overly *stringent* application of the aforementioned requirements would reinforce the principle of *ne bis in idem* and the authority of judgments, even in cases where a reopening of the proceedings is likely necessary; conversely, an overly *expansive* application of the grounds for reopening a case would weaken the principle of *ne bis in idem* and, consequently, the authority of *res iudicata*.

Therefore, it appears that the main challenges raised by art. 4(2) of Protocol 7 does not solely lie in providing exceptions to the principle under analysis, but rather in the establishment of retrial scenarios which, although listed exhaustively, are formulated rather broadly. In particular, as will be argued in the forthcoming sub-sections, it seems that the ECtHR has attempted to define these exceptions by adopting an approach that is not consistently applied, being often blurred, and thus prone to legal uncertainty.

[70] ECtHR *Krombach v France* App n. 67521/14 [20 February 2018] para. 40. See K Ligeti, 'Fundamental Rights Protection between Strasbourg and Luxembourg' cit. 162.

[71] P Oliver and T Bombois, '"Ne Bis in Idem" en Droit Européen' cit. 269 and 272.

[72] ECtHR *Mihalache v Romania* App n. 54012/10 [8 July 2019] para. 47.

[73] ECtHR *W.A. v Switzerland* App n. 38958/16 [2 November 2021] paras 65-66 – they constitute "exceptional circumstances" triggered by "strict conditions". For further reference in the ECtHR's case-law, see JI Escobar Veas, *Ne bis in idem and Multiple Sanctioning Systems* (Springer 2023) 112-114.

IV.1. New or newly discovered facts: is the ECtHR drawing (too) blurred lines?

Intuitively, a judicial case is determined based on the available evidence at a specific historical moment. Due to the passage of time and evolving circumstances, however, it is possible that new evidence or facts (*novum*) may emerge that challenge the original verdict. Scientific advancements, in particular, could provide access to evidentiary elements that were previously unavailable (*e.g.*, traces of DNA on the crime scene). Additionally, it is also possible that "traditional" pieces of evidence – such as a testimony or paper documents – which existed before a case has been finalised, are nonetheless discovered and collected after a final judgement.

In the ECHR legal framework, as emphasised by AG Sharpston, "it is clear that *ne bis in idem* is no bar to reopening proceedings if new facts and/or evidence emerge".[74] Accordingly, the first exception mentioned in art. 4(2) of Protocol 7 precisely involves the possibility of reopening a final case when "new or newly discovered facts" come to light. As for the meaning of this expression, the text indicates that there may be a distinction between "new facts" and "newly discovered facts". Whereas the precise delineation of these concepts cannot be expressly carved out from the provision itself, this might not hold significant relevance, as both categories of facts may potentially and equally result in the reopening of the case.

The Explanatory Report of the Protocol only suggests that the expression in question encompasses "new means of proof relating to previously existing facts", without further indications.[75] Still, the absence of precision in this regard raises concerns. Given that the presence of a *novum* could potentially undermine the (fundamental) *ne bis in idem* principle, the Convention should have offered a more precise delineation of this ground for reopening final cases. Conversely, the chosen wording, being nuanced, might have enhanced legal uncertainty within this realm, thereby granting a considerable degree of discretion to the ECtHR in assessing whether a piece of evidence may be considered a "new fact" or a "newly discovered fact".

Against this background, the ECtHR's case-law has provided some guidance, albeit not all doubts have been solved. In *Bulgakova*, a definition of "new or newly discovered circumstances" has been provided for the first time by the Strasbourg Court: "[c]ircumstances which concern the case, exist during the trial, remain hidden from the judge, and

[74] Case C-398/12 *M* ECLI:EU:C:2014:65, opinion of AG Sharpston, para. 59.

[75] Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms [1984] para. 31. Significantly, the Explanatory Report does not draw a distinction between "new" facts and "newly discovered" facts, treating "new or newly discovered facts" as a single category of evidence.

become known only after the trial, are 'newly discovered'. Circumstances which concern the case but arise only after the trial are 'new'".[76]

While the case concerned a breach of art. 6 ECHR, such definition has been taken as a point of reference for the meaning of the definition of "new or newly discovered *facts*" according to art. 4(2) of Protocol 7 in the landmark *Mihalache* judgement.[77] In light of this clarification, it seems that "new" evidence is a means of proof that *did not exist* before the final judgment and was discovered only after the latter became final. This is the interpretation to be attributed to the phrase "arise only after the trial", which could also encompass scenarios where evidence, previously inadmissible during the trial, becomes admissible after the final judgement due to a legislative change.[78]

Indeed, whereas the first limb of art. 4(2) specifies that "newly discovered" evidence should "exist during the trial", this specification is absent in the second limb. This omission upholds the stance that "new" evidence is a means of proof which either did not materially exist – *i.e.*, did not exist *de facto* –, or was not admissible – *i.e.*, did not exist *de iure* – during the original trial. A classic example pertains to the situation where scientific evidence is uncovered after the judgment became final, primarily because of new scientific techniques.[79]

By contrast, the interpretation of what constitutes a "newly discovered fact" is not entirely straightforward,[80] especially in two common practical scenarios.

It would be challenging to clearly assess, for instance, whether evidence previously admitted in a trial but *not evaluated by the judge* can be deemed "newly discovered" and thus serve as grounds for requesting the reopening of the case. This situation can arise with a testimony that the judge completely ignored in the reasoning of the judgment – to put it differently, the judge omitted any reference to that witness without offering any justification for doing so. It might be challenging to categorise such testimony as "hidden from the judge" and to argue that it "become[s] known only after the trial". Therefore, it might not qualify as a valid basis for seeking the reopening of a final case.

Similarly, it is unclear whether evidence that existed prior to the final judgment but was *not accepted by the judge* or was *not presented by the parties* at all (*e.g.*, due to their

[76] ECtHR *Bulgakova v Russia* App n. 69524/01 [18 January 2007] para. 39.

[77] *Mihalache* cit. para. 131.

[78] A Ashworth, B Emerson and A Macdonald (eds), *Human Rights and Criminal Justice* (Sweet & Maxwell 2012) 555.

[79] This would preclude the possibility of considering evidence that was available to the parties but was not *deliberately* presented by them before the judge as "new". In this case, that evidence did not "arise" after the trial, but *already existed* during the latter.

[80] Although there is no florid case-law in this regard, reference may be made to *Kadusic* – in that judgement, the Strasbourg Court accepted that the new establishment of the applicant's mental condition – *i.e.*, the severe mental illness of the applicant that was *already present* but *not detected* at the time of the initial judgment – was a "newly discovered fact" (ECtHR *Kadusic v Switzerland* App n. 43977/13 [9 January 2018] paras 82–86).

negligence or as a part of a wider defence strategy) can be subsequently considered a "newly discovered fact" in the context of a retrial request.[81] That piece of evidence is excluded from the trial proceedings, and the reasoning provided in the final judgment does not take this evidence into account. It may be hard to maintain that non-accepted evidence was "hidden from the judge", and that, by analogy, non-presented evidence "become known only after the trial".

In the latter two scenarios, the literal interpretation of the "hidden from the judge" and "become known after the trial" clauses could potentially create an obstacle for a convicted individual to seek the reopening of the case using means of proof that were presented to the judge in some capacity – *e.g.*, *i)* when evidence has been *admitted to trial* but ignored by the judge; *ii)* when a party *requested the admission of evidence* that was not eventually been granted or, finally, *iii)* when a party negligently *failed to present* that evidence before the court –. Analogously, the same type of evidence cannot be employed to the disadvantage of an acquitted individual.

In essence, evidence that predates the trial must remain *concealed* from the judge in order to potentially serve as a foundation for a request for retrial. For a piece of evidence to qualify as "newly discovered", it signifies, firstly, that this evidence should not have been considered by that specific court under any circumstances ("hidden from the judge" ground). Secondly, both the parties and the judge should not have possessed any awareness of the existence of that means of proof before the final judgment was delivered ("become known only after the trial" ground).

With the limited body of case-law in this domain and the uncertainties highlighted earlier, it becomes apparent that case-by-case interpretations of the concepts under examination risks amplifying ambiguity within this realm. This vagueness stands in stark contrast to the pivotal objective of attaining a legal certainty that should envelop exceptions to the fundamental principle of ne bis in idem.

IV.2. Looking at "fundamental defects in the previous proceedings": a twin-track system built on a "catch-all" provision

The presence of "new or newly discovered facts" is *not* the *sole* condition that can invoke the potential for a retrial, thereby deviating from the *ne bis in idem* principle. In fact, as an alternative condition,[82] art. 4(2) of Protocol 7 permits State Parties to re-examine a final case if a "fundamental defect" is determined to have occurred "in the previous proceedings". A precise definition of this concept is absent from the Protocol's text as well as

[81] According to A Ashworth, B Emerson and A Macdonald (eds), *Human Rights and Criminal Justice* cit. 559, the art. 4(2) definition of evidence of "new or newly discovered facts" does not seem to "include evidence which existed pre-trial but was not adduced".

[82] *Mihalache* cit. para. 130.

its Explanatory Report.[83] By contrast, it is evident that this ground for reopening final cases is designed to serve as an effective mechanism for rectifying judicial errors.[84] Prominent illustrations of the latter may involve witness or jury intimidation, as well as scenarios where the trial court lacked the legal authority to adjudicate the matter.[85]

The "broad and general"[86] language of art. 4(2) of Protocol 7 indicates – at least – that not all deficiencies in prior proceedings hold relevance for its purpose. Specifically, it necessitates that defects must be of a "fundamental" nature, suggesting that only *significant* breaches of procedural rules that substantially compromise the integrity of the earlier proceedings can serve as grounds for reopening the case. According to the scant wording of art. 4(2) of Protocol 7, such ground would be applicable to situations benefiting either the convicted individual or to the potential detriment of the acquitted person.

While discerning a *fundamental* defect from minor procedural irregularities might present challenges (due to procedural differences among domestic criminal justice systems), the inclusion of this specification is indeed commendable, as it serves to underscore the importance of *ne bis in idem* which fundamentally ought not be compromised by *any procedural shortcomings* in national proceedings. In this regard, the ECtHR has recently upheld this viewpoint in *Stăvilă*, in a passage whose implications transcend the specific features of the case and thus merit quoting at some length:

> "The mere consideration that the investigation in the applicant's case led to an erroneous discontinuation of the proceedings cannot in itself, in the absence of *jurisdictional errors* or *serious breaches* of court procedure, *abuses of power*, *manifest errors* in the application of substantive law or any other *weighty reasons stemming from the interests of justice*, indicate the presence of a fundamental defect in the previous proceedings. *Otherwise, the burden of the consequences of the investigative authorities' lack of diligence during the pre-trial investigation would be shifted entirely onto the applicant* and, more importantly, the mere allegation of a shortcoming or failure in the investigation, however minor and insignificant it might be, would create an unrestrained possibility for the prosecution to abuse process by requesting the reopening of finalised proceedings".[87]

Significantly, it follows from this line of reasoning that, on the one hand, "deficiencies" must meet a certain threshold of severity and, on the other hand, a mere "lack of diligence" on the part of the investigative authorities cannot (and shall not), under any circumstances, serve as a valid justification for reopening final cases in breach of *ne bis in idem*.

[83] Explanatory Report cit. para. 31.

[84] JL De la Cuesta, 'Concurrent national and international criminal jurisdiction and the principle "ne bis in idem"' (2002) Revue Internationale de Droit Pénal 714

[85] G Coffey, 'Resolving Conflicts of Jurisdiction in Criminal Proceedings: Interpreting Ne Bis in Idem in Conjunction with the Principle of Complementarity' (2013) NJECL 71.

[86] WA Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 1155.

[87] ECtHR *Stăvilă v Romania* App n. 23126/16 [1 March 2022] para. 98, emphasis added.

Nevertheless, legal scholars have rightly emphasised that the ECtHR – endowed with a significant margin of manoeuvre in interpreting the term "fundamental defect" – has adopted a broad reading of this notion.[88] Consequently, this has resulted in an extension of the avenues available to State Parties for initiating the re-examination of final cases. At least two examples may be presented to highlight the *transformation* of the "fundamental defect" ground into a versatile, dynamic and, ultimately, "catch-all" provision, supporting the resumption of final cases, rather than serving as a stringent mechanism intended to safeguard the principle of *ne bis in idem* and permitting retrials exclusively under extraordinary circumstances.

Firstly, in its interpretation of the term "fundamental defect", the Strasbourg Court has established a distinction between the reopening of cases in favour of a convicted person and the reopening of cases against an acquitted individual. This perspective is not manifestly evident from the wording of art. 4(2) of Protocol 7; nonetheless, it was introduced for the first time in the seminal *Mihalache* judgment.[89] This development represents a debatable departure by the Grand Chamber of the Strasbourg Court from the literal interpretation of the aforementioned provision. Essentially, the approach adopted by the ECtHR can be characterized as a twin-track framework, wherein the concept of a "fundamental defect" – contrary to the explicit meaning of art. 4(2) – has become dynamic and flexible and its scope is thus to be adapted *ratione personae*, that is, based on the person involved.

Therefore, in situations involving the reopening of a case *at the detriment of the acquitted individual*, it appears that the criterion for a "defect" to attain the status of being "fundamental" is particularly *strict*. The ECtHR sets forth that "only a serious violation of a procedural rule severely undermining the integrity of the previous proceedings can serve as the basis for reopening the latter to the detriment of the accused, where he or she has been acquitted of an offence or punished for an offence less serious than that provided for by the applicable law".[90] This stance aligns with the exceptional nature of the circumstances under which the re-examination of final cases is permitted under the aforementioned provision.

By contrast, should the reopening of a final case be granted *in favour of a convicted individual*, it appears that the criterion for a "defect" to attain the status of being "fundamental" is *relatively less demanding*. The Court's approach arguably stems from the Explanatory Report, according to which art. 4(2) of Protocol 7 "does not prevent a reopening of the proceedings in favour of the convicted person and any other changing of the judgment to the benefit of the convicted person".[91] As no further ground is mentioned therein, some

[88] See, among others, DJ Harris, M O'Boyle, EP Bates and M Buckley (eds), *Harris, O'Boyle & Warbrick Law of the European Convention on Human Rights* (Oxford University Press 2014) 973, and WA Schabas, *The European Convention on Human Rights* cit. 1154.

[89] *Mihalache* cit. para. 133.

[90] The ECtHR specified that "a mere reassessment of the evidence on file by the public prosecutor or the higher-level court would not fulfil that criterion", see *Mihalache* cit. para. 133.

[91] Explanatory Report cit. para. 31.

scholars have argued that reopening a case *in melius* is not bounded by the exceptions laid down in art. 4(2) of Protocol 7, *i.e.*, such reopening may be granted even in the lack of a fundamental defect in previous proceedings.[92] Yet, the ECtHR does not embrace such an extreme stance. It has affirmed that, in any case, the evaluation of the defect's nature should be undertaken by State Parties with the aim of determining if there has been a breach of defence rights and consequently an obstruction to the effective administration of justice.[93] Consequently, the examination of the presence of fundamental defects *is to be conducted*, albeit seemingly with *less stringency* when contrasted with the scrutiny demanded in cases involving the reopening against an acquitted person.

This dual-track interpretation in the application of the "fundamental defect" ground represents a divergence from the literal interpretation of art. 4(2) of Protocol 7, prompting inquiries into the extent of the Court's authority to extend its interpretation in a manner that may impact legal certainty and, as a result, the respect of the *ne bis in idem* principle.

Secondly, the ECtHR has somewhat weakened the extent of the *ne bis in idem* principle by allowing State Parties to authorise the reopening of concluded cases due to mere judicial errors related to points of law and procedure affecting the previous proceedings and that, notably, might not necessarily possess the "fundamental" nature required by art. 4(2) of Protocol 7. An example of this criticism occurred in *Nikitin*, where the ECtHR examined the scope of application of the so-called "supervisory review", an extraordinary legal remedy within the Russian legal framework that enables the revaluation of a final case under distinct circumstances.[94] Among these conditions, only the criterion of a "grave violation of procedural law" appears to align with the notion of a "fundamental defect in the previous proceedings" as shaped in *Mihalache*. Conversely, the criterion of a mere "prejudicial or incomplete investigation or pre-trial or court examination" as well as the existence of a "discrepancy between the sentence and the seriousness of the offence or the convicted person's personality" do not seem to fulfil the stringent criterion for these infringements to be classified as "fundamental" as per art. 4(2) of Protocol 7, given their literal vagueness and the lack of further clarifications. It goes without saying that permitting these latter grounds to serve as a legal foundation for reopening could substantially undermine the *ne bis in idem* principle.[95]

[92] See, in this vein, B van Bockel, 'The "European" Ne Bis in Idem Principle: Substance, Sources, and Scope' in B van Bockel (ed.), *Ne Bis in Idem in Eu Law* cit. 52 and, similarly, E Ravasi, *Human Rights Protection by the ECtHR and the ECJ: A Comparative Analysis in Light of the Equivalency Doctrine* (Brill 2017) 263.

[93] *Mihalache* cit. para. 133.

[94] ECtHR *Nikitin v Russia* App n. 50178/99 [20 July 2004] paras 22-29 with reference to art. 379 of the Russian Code of Criminal Procedure read in conjunction with art. 342 thereof. The ECtHR upheld this stance in other judgements, *e.g.*, ECtHR *Bratyakin v Russia* App n. 72776/01 [9 March 2006], admissibility decision, and ECtHR *Fadin v Russia* App n. 58079/00 [27 July 2006] paras 30-32.

[95] For the sake of completeness, it is noteworthy that the ECtHR has acknowledged the compatibility of reopening final cases owing to a *breach of the ECHR* with art. 4(2) of Protocol 7 (see ECtHR *Hakkar v France* App

IV.3. A gatekeeper requirement? The influence on "the outcome of the case"

Neither new evidence nor a fundamental procedural flaw can, as such, justify a reopening of the proceedings under art. 4(2) of Protocol 7. For this purpose, each of these grounds must exert an influence on the case's outcome. This criterion underscores the necessity for a "significant level of caution"[96] to be exercised by the authorities before initiating the reopening of a case, lest there be a violation of this provision. In essence, domestic authorities are burdened to assess whether new or newly discovered facts as well as fundamental defects in the previous proceedings possess the capability to *potentially* affect the outcome of the case.[97]

This would imply that the evidence (or, by analogy, the fundamental defect) at stake must possess the quality of *potentially altering the trial court's verdict*, inferring that if it had been introduced during the trial, the accused might not have been acquitted and *vice versa*. This entails not only the necessity for the evidence to be *credible* and *pertinent* but also mandates that it carries adequate *probative weight* to exert a substantial and meaningful influence on the case's outcome.[98] As is apparent, such an evaluation could pose challenges for the judge or court tasked with the responsibility of determining the admissibility and merits of a request for the reopening of a final case. For instance, to what extent is a domestic authority empowered to evaluate the potential influence of evidence or a defect on the case's outcome? How robust must the level of credibility be for a fact

n. 16164/02 [8 October 2002], admissibility decision). This standpoint is reasonable, as a contravention of fundamental rights laid down in the ECHR undoubtedly qualifies as a "fundamental defect". In a comparable scenario, a late appeal submitted by a prosecutor – based on *serious procedural shortcomings* – was deemed a valid instance of reopening a final case in accordance with art. 4(2) of Protocol 7, (ECtHR *Xheraj v Albania* App n. 37959/02 [29 July 2008] paras 69-74). Finally, in *Marguš*, the First Chamber dealt with the *final conviction* of the applicant on charges of war crimes, despite the fact that the latter was *previously subjected to criminal proceedings for the same facts* that terminated with an *amnesty*. The Court observed that the use of amnesties concerning international crimes is increasingly regarded as proscribed by international law, citing the growing trend for international, regional, and national courts to nullify general amnesty measures enacted by governments. Against this background, the ECtHR deemed the application of the amnesty to be a "fundamental defect in the [previous] proceedings" thus allowing the reopening of a final case as per art. 4(2) of Protocol 7 (ECtHR *Marguš v Croatia* App n. 4455/10 [13 November 2012] paras 64-76). Regrettably, the case was eventually referred to the Grand Chamber which considered art. 4 of Protocol 7 not applicable in the material circumstances (ECtHR *Marguš v Croatia* App n. 4455/10 [24 May 2014] paras 139-141). Nonetheless, the perspective advocated by the First Chamber retains a certain degree of significance. Indeed, all the aforementioned examples would demonstrate that, in certain cases, the ECtHR appeared to exhibit a greater inclination toward *confining the option to reopen cases exclusively to extraordinary circumstances*, thereby amplifying the significance of the *ne bis in idem* principle within the ECHR legal framework.

[96] M O'Boyle, EP Bates and M Buckley (eds), *Harris, O'Boyle & Warbrick Law of the European Convention on Human Rights* (Oxford University Press 2014) 973.

[97] E Ravasi, *Human Rights Protection by the ECtHR and the ECJ* cit. 263.

[98] A Ashworth, B Emerson and A Macdonald (eds), *Human Rights and Criminal Justice* cit. 555.

to be deemed relevant for the case's outcome? Conversely, should it be presupposed that every *fundamental* defect in the proceedings inherently affects the case's outcome?

Given the lack of jurisprudence on this matter and the absence of elucidations in the Explanatory Report, these and similar queries could hamper the endeavour to arrive at a *shared interpretation* of the notion expressed by the phrase "could affect the outcome of the case". Yet, considering the aforementioned challenges associated with the other two alternative grounds listed in art. 4(2) of Protocol 7, the "outcome of the case" requirement, albeit regrettably disregarded within the ECtHR case-law, could hold a significant role in restricting retrials solely to situations where the pursuit of substantial justice ought to overcome considerations of legal certainty.[99] To put it differently, if evidence or defects are wrongly and respectively deemed to be "new or newly" or "fundamental", the evaluation of their impact on the case's outcome can work as a gatekeeping mechanism. Hopefully, this would empower domestic authorities to deliver a case-by-case evaluation of the foundations upon which a reopening request is presented, even when such evidence or defects are incorrectly characterised. For example, in cases where evidence has been erroneously categorized as "new or newly discovered", the evaluation of its credibility, relevance, and evidentiary weight may curtail its potential to serve as a basis for reopening the case. Similarly, if a flaw in prior legal proceedings has been mistakenly labelled as "fundamental", the assessment of its influence on the case's final outcome can be instrumental in refuting such characterization.

V. Concluding remarks

Turning back to the question posited in the title of this contribution – may Europe witness a deterioration of *res iudicata* when the reopening of criminal cases is at stake? Delving into the ECHR legal framework, which sets forth *minimum* standards also in the realm of EU law, my answer could not but be in the affirmative. The ECtHR, in interpreting the scope and meaning of art. 4 of Protocol 7 ECHR, appears to falter in furnishing clear and explicit directives for circumscribing the reopening of criminal cases *solely to those circumstances capable of warranting a deviation from the ne bis in idem principle*, a fundamental right protected by both the Charter and the ECHR. This conspicuous, and quite evident, absence of legal certainty and clarity is arguably the most serious shortcoming in the approach taken by the ECtHR in this sphere. Not only this hampers the coherent definition of the principle's boundaries within the ECHR legal framework but also, by way of a *snowball effect*, obstructs the same demarcation within the EU legal framework.

Against this backdrop, I have emphasised that that this lack of consistency pertains to both of the scenarios under examination, namely, reopening proceedings in favour of or to the detriment of the individual concerned. While, in principle, said standpoint raises

[99] The expression originates from ECtHR *Velichko v Russia* App n. 19664/07 [15 January 2013] para. 69 with further reference.

significant criticism because it weakens the kernel of *ne bis in idem*, the lack of a clear legal framework is particularly perilous in the context of reopening cases *in peius*, that is, to the detriment of the acquitted individual. The main reason for this is that, while there is widespread consensus regarding the need for a second trial to safeguard the personal liberty of the *wrongfully convicted* (in order to prevent unlawful deprivations on their freedom), no such consensus exists when contemplating a reopening against an acquitted individual. In this regard, I have maintained that a reopening procedure, even in the latter case, is not arbitrary *per se* (*e.g.*, when the acquittal has been based on fraudulent or fabricated evidence, or should the reopening *in peius* be the basis for annulling a wrongful conviction), provided that it implies a "strict reading of the possibility of reopening the case *contra reum*".[100] Nevertheless, the ECtHR's patchy approach risks potentially permitting a revision of final cases to the detriment of the acquitted individual in situations where the principle should not be set aside.

Glancing at the overall situation, is there a way to navigate out from this *impasse*? And if so, what would it entail? I have put forward a potential solution, based on the belief that the Strasbourg Court holds the potential to formulate a comprehensive doctrine on *ne bis in idem* and its exceptions that adheres to the principles of legality and legal certainty. This is desirable *a fortiori* when considering that art. 50 of the Charter does not explicitly outline derogations (such as, the possibility to reopen final cases) to that principle. I have previously emphasised the prominent role of the ECtHR in delineating such boundaries, according to the equivalence clause enshrined in art. 52(3) of the Charter. What is more, in *Menci*, the CJEU has plainly acknowledged that art. 4 of Protocol 7 holds a significant influence in interpreting art. 50 of the Charter. In this vein, the Strasbourg Court ought to provide a clear and consistent definition of the exceptions to the *ne bis in idem* principle. To this end, first of all, it should exercise *increased scrutiny* when assessing the grounds provided for in art. 4(2) of Protocol 7 under which the *ne bis in idem* principle – and, in turn, *res iudicata* – may be set aside to permit the reopening of a final case.

As, however, the Court seems not to have provided a clear line of interpretation of the said grounds in its case-law, I have looked on the last circumstance provided in art. 4(2) of Protocol 7 as a gatekeeper requirement (*i.e.*, the influence on "the outcome of the case"). Its strict interpretation on the part of the Strasbourg Court might help in limiting reopening of cases to those circumstances really necessary, thereby re-affirming the importance of *ne bis in idem* and providing national authorities with clear principles to be applied in their domestic frameworks. The more rigorously national authorities scrutinise whether the elements put forth for reopening a final case are of a nature capable of *altering its prior outcome* – analysing their probative weight, pertinency and reliability –, the more effectively the principle of *ne bis in idem* may be safeguarded. After all, it should fall upon domestic authorities, aware of their accountability as guardians of the fundamental

[100] *Mihalache* cit. dissenting opinion of judge Pinto de Albuquerque paras 42-43.

rights enshrined in the ECHR, to accord due consideration to the fundamental right of *ne bis in idem* and its permitted and exhaustive derogations.[101]

Finally, there may exist an alternative avenue to fortify the *ne bis in idem* principle, constraining the reopening of final criminal proceedings to only exceptional cases. This approach involves the potential for art. 50 of the Charter to be *expansively interpreted by the CJEU*, in accordance with art. 52(3) of the Charter, which does not preclude EU law from offering broader protection of these rights than that already guaranteed by the ECHR. For instance, the CJEU could set *higher standards* for what constitutes "new" or "newly discovered" facts warranting the reopening of criminal proceedings, or it could more precisely delineate the definition of a "fundamental defect".

Such an "autonomist" approach to the reopening of final cases may be commendable as it would allow the CJEU to transcend the "minimalist" and fragmented case-by-case approach of the ECHR.[102] This would position the CJEU as a guarantor of more extensive protection for individuals already affected by a final decision (*i.e.*, acquittal or conviction).[103]

In carrying out this challenging task, and in order to strike a fair balance between *ne bis in idem* and allowed exceptions to the latter, both the CJEU, the ECtHR and national courts ought to follow, in any case, the enlightening and authoritative statement given by Madame de Staël some 150 years ago – "*rien n'est une excuse pour agir contre ses principes*".[104]

[101] See, among others, D Spielmann, 'Allowing the Right Margin: The European Court of Human Rights and The National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (2012) CYELS 381.

[102] I have previously advocated for the necessity of such an "autonomist" approach in relation to the ECHR, aiming to ensure *broader protection* of procedural safeguards through clear and straightforward rules. See, in this regard, L Bernardini, 'Turning Labels: A Sound Interpretation of the Right to Be Informed in Criminal Proceedings that Still Holds some Drawbacks: BK (Case C-175/22)' (29 November 2023) EU Law Live eulawlive.com. For an analysis of a recent instance of the CJEU's "emancipation" from the ECtHR's case-law in the field of criminal fair trial rights, see L Bernardini, 'On Encrypted Messages and Clear Verdicts – the EncroChat Case Before the Court of Justice (Case C-670/22, MN)' (21 May 2024) EU Law Live eulawlive.com.

[103] This was the case, for instance, of case C-348/21 *HYA and Others* ECLI:EU:C:2022:965 concerning the right to participation in criminal trials. For a commentary in this vein, see L Bernardini and G Ancona, '*HYA and Others*: Reshaping participation at criminal trials in Europe' (2023) Maastricht Journal of European and Comparative Law 312, 319-324 and S Allegrezza, 'Absent Prosecution Witnesses and Active Participation at Trial: The European Court of Justice Shapes European Fairness on Criminal Justice' 300 ff., forthcoming (to be included in the *Liber Amicorum* Judge Bay Larsen). For a slightly differing perspective, see A Cabiale, 'Absent Witnesses and EU Law: A Groundbreaking Ruling by the CJEU in Criminal Matters' (2023) European Papers www.europeanpapers.eu 66.

[104] Anne Louise Germaine de Staël-Holstein (Madame de Staël), *Considérations sur les principaux événemens de la Révolution française, ouvrage posthume de madame la baronne de Staël, publié par M. le duc de Broglie et M. le baron de Staël* (Delaunay, Bossange et Masson 1818, 2nd volume) 335.