Interdisciplinary Studies in Society, Law, and Politics 2026; 5(5): 1-13

ISSLP

Original Research

# Retrial Based on an Error of Law Under the Principle of Legality in Criminal Procedure

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**Received:** 2026-02-10 **Revised:** 2026-07-04 **Accepted:** 2026-07-13 **Published:** 2026-09-01

The principle of legality in criminal procedure requires that, at the post-trial stage, the procedures governing extraordinary challenges to final judgments must themselves be established and regulated by law. Accordingly, the legal framework for addressing errors of law through retrial must be interpreted and implemented in a manner consistent with this fundamental principle, which is itself grounded in a number of subsidiary legal principles and rules. In this regard, Paragraph (c) of Article 474 of the Iranian Code of Criminal Procedure identifies a legal issue—namely, the non-criminal nature of the act—as a basis for judicial error resulting in a final conviction. However, this provision has created uncertainty regarding the application of the principle of legality to final judgments issued by certain judicial authorities, particularly the Supreme Court. This article therefore examines, through an analytical approach and by drawing upon the prevailing judicial practice of the chambers of the Supreme Court, the legal foundations for reopening criminal proceedings on the basis of such errors of law.

***Keywords:*** *Error of law, judicial truth, judicial error, retrial, principle of legality in criminal procedure*

**How to cite this article:**

Asgari, A. A. (2026). Retrial Based on an Error of Law Under the Principle of Legality in Criminal Procedure. *Interdisciplinary Studies in Society, Law, and Politics, 5*(5), 1-13. https://doi.org/10.61838/kman.isslp.519

## 1. Introduction

In Iranian criminal procedure law, as in most legal systems, challenges to court judgments have historically been permitted through procedures classified by the legislature into ordinary and extraordinary remedies. The most important characteristic of ordinary methods of challenging court judgments is that no specific precondition must be satisfied before such an application may be filed, and the remedy remains available until the statutory time limit for filing the challenge has expired. By contrast, extraordinary remedies may be invoked only in the circumstances expressly prescribed by law. A second point is that an extraordinary remedy cannot be pursued as long as an ordinary method of challenge remains available. Furthermore, an ordinary challenge generally stays the enforcement of the judgment, unless provisional enforcement is authorized by law and ordered by the court. Notwithstanding disagreements concerning the precise classification of ordinary and extraordinary methods of challenging court judgments, legal scholars generally agree that the reopening of criminal proceedings (*la réouverture du procès pénal*) following the issuance of a final judgment, through a procedure initially known as the reopening of trial and later designated as retrial or revision (*révision*), constitutes an extraordinary method of challenging court judgments (Sepahvand, 2002). It is therefore governed by all the legal effects applicable to extraordinary remedies. Retrial was first introduced into

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Iranian criminal procedure legislation in 1911 through seven provisions of the Temporary Law on the Principles of Criminal Trials, which subsequently became known as the Criminal Procedure Code. In quantitative terms, although seven grounds for retrial had been recognized under the Civil Procedure Code, the 1911 Criminal Procedure Code, following the French Criminal Procedure Code and with the objective of preventing instability in judicial judgments, limited such grounds to four, which predominantly concerned factual matters. As regards matters of law, only the disproportionality of the sentence to the criminal culpability of the offender was identified as a ground for retrial. Under Article 466 of that Code, the grounds for reopening criminal proceedings, regardless of whether the judgment had been enforced, were as follows:

1. Where several persons had been convicted of committing an offense that, by its nature, could have been committed by only one perpetrator.
2. Where a person had been convicted of murdering another person who was subsequently found or proven to be alive.
3. Where evidence was presented that could establish the innocence of the accused, or where the sentence imposed was disproportionate to the offender's culpability because of an error committed by the judicial authorities.
4. Where forged documents or false testimony on which the judgment had been based were discovered and proven to be fraudulent.

Under the 1999 Criminal Procedure Code for Public and Revolutionary Courts, the grounds contained in the 1911 legislation were retained, while the number of grounds for retrial was increased to seven. The additional grounds, corresponding to Clauses 3, 6, and 7, were as follows:

1. Where a person had been convicted of an offense and another person had also been convicted of the same offense by a judgment issued by another judicial authority, in such a manner that the contradiction between the two judgments established the innocence of one of the convicted persons.
2. Where, because of a judicial error, the sentence imposed was disproportionate or the conduct did not constitute a criminal offense.
3. Where a subsequent law mitigated the punishment provided under the previous law, in which case the new punishment imposed following retrial could not be more severe than the previous punishment.

Although the number of grounds for retrial remained quantitatively unchanged under the 2013 Criminal Procedure Code, the issuance of different judgments against the same person for the same accusation, as provided in Article 474(d), replaced the content of Clause 7 of Article 272 of the previous Code. Moreover, the absence of criminality of the conduct was stated more explicitly in Article 474(g) as a ground for retrial. By contrast, most foreign legislation, including the French Criminal Procedure Code, gives priority to the principle of res judicata and, with the objective of preserving the authority of judicial judgments, recognizes retrial only in limited circumstances that predominantly concern factual matters (Stefani et al., 1998). For example, under Article 596 of the new French Criminal Procedure Code, the grounds for retrial are as follows:

1. Where, following a conviction for murder, evidence is presented providing sufficient indications that the alleged victim remains alive (*la victime est encore en vie*).
2. Where, following a final conviction, a new judgment convicts another accused person or other accused persons of committing the same act and, because the two convictions are incompatible, the contradiction between them establishes the innocence of one of the convicted persons.
3. Where one of the witnesses heard in the proceedings is, following the conviction, prosecuted and convicted for giving false testimony against the convicted person (*faux témoignage*).

These grounds correspond to Clauses (a), (b), (c), and (e) of Article 474 of the Iranian Criminal Procedure Code. Nevertheless, as noted above, Iranian law has added three further grounds. This approach may reflect the Iranian legislature's realistic assessment of the judicial system, particularly the relatively high probability of error resulting from the extraordinary accumulation of cases before judicial authorities, which is itself largely influenced by various social and economic structures

and circumstances contributing to the initiation of judicial proceedings. Certain legal scholars, consistent with the approach adopted by the Iranian legislature, have also advocated an expansion of the grounds for retrial and have proposed additional grounds, including the following: (a) where, after a final judgment has been issued, the corruption or lack of impartiality of the judge or a witness, or the lack of impartiality of the jury, is established; (b) where it is established that a witness's failure to appear and testify resulted from external factors beyond the witness's control and that such obstacles have subsequently been removed; and (c) where the judgment is incomplete in restoring the complainant's rights—for example, where, in a case involving the unlawful transfer of another person's property, the court orders payment of the transaction price instead of restitution of the property (Mahdavi Rad et al., 2023).

Nevertheless, although the legislature's recognition of an error of law under the heading "the act does not constitute a criminal offense" as a ground for retrial has been welcomed by some legal scholars as demonstrating that the discovery of truth takes priority in Iranian criminal procedure law (Mirkamali & Kazemi, 2017), it has been criticized by other legal scholars because of the ambiguity surrounding its scope and examples (Zeraat, 2007). Judicial practice has likewise failed to develop a uniform analysis or consistent approach toward this category of judicial error. Accordingly, this article explains the legal concept of an error of law and distinguishes it from an error of fact. It then examines the characteristics of an error of law that necessitates retrial, the mechanisms for correcting such an error through legal institutions, and the interpretive and structural approaches adopted by legal doctrine and judicial practice toward the error of law recognized in Article 474(g), namely, that the act does not constitute a criminal offense. Finally, it presents a proposed analysis and interpretation consistent with the principle of legality in criminal proceedings.

## 2. The Concept of an Error of Law

Judicial truth (*vérité judiciaire*) resulting from criminal proceedings is produced through the interaction between law and fact in the analysis of the three constituent elements of a criminal offense: the material, legal, and mental elements. This truth is ultimately expressed by the criminal justice system through a final judgment based on deliberations and discussions of an entirely judicial nature and on the conscious, informed, and responsible activity of the judicial authority. However, because this entire process depends on the mental operations of a human actor—the judicial authority—it may not correspond to reality. Through the occurrence of an "error," the human mind may perceive what is incorrect as correct, and this process may result in a judicial error (*contrariété du jugement*) and the issuance of a conviction inconsistent with reality (Claire, 2012). Where the error results from a failure to consider a tangible matter capable of affecting the outcome of the proceedings or, in the terminology employed by legal scholars, relates to material facts (*un fait matériel*), it constitutes an "error of fact" (*erreur de fait*) (Zeraat, 2007). By contrast, where the error concerns the incorrect application of a legal rule in issuing a conviction, it constitutes an "error of law" (*erreur de droit*).

## 3. Characteristics of an Error of Law Requiring Retrial

Article 474(g) establishes a ground for retrial under which a new hearing may be conducted where the act committed does not constitute a criminal offense or where the punishment imposed exceeds the statutory limit. As may be observed, the first ground—the absence of criminality of the act—was introduced for the first time among the grounds for retrial in Iranian criminal procedure law and has no legislative precedent in French law. It refers to a situation in which the availability of retrial must be assessed independently of the defenses, preferences, and legal interpretations of the persons involved in the case and according to standards capable of being applied consistently to different individuals. A failure to analyze this ground may divert the proceedings from the legislature's ideal objective of facilitating the primacy of actual truth over a legal presumption of truth and, in conventional terminology, the primacy of discovering reality over merely terminating the dispute. Therefore, to analyze the issue accurately, it is necessary to examine the characteristics of this ground for retrial both in terms of the nature of the relevant error and the manner in which it affects the decision of the judicial authority that issued the final judgment.

*3.1. The Objective Nature of the Error*

The proposition that the act does not constitute a criminal offense concerns the absence of the legal element of the offense and therefore constitutes a matter of law. In terms of its potential occurrence during judicial proceedings, it differs from the other grounds for retrial, which generally seek to correct errors concerning factual matters. It is difficult to imagine a professional criminal justice system conducting judicial proceedings without taking account of the principle of legality of crimes and punishments. Consequently, certain examples may be mentioned only because even an unlikely hypothetical situation is not logically impossible. One such example is where a court imposes punishment for conduct that has not been defined as a criminal offense under any substantive criminal law and for which no punishment has been prescribed, but the court nevertheless characterizes the conduct as criminal and imposes a sentence. For instance, a court may, without any statutory basis, impose a criminal punishment in relation to conduct that is exclusively civil in nature. Similarly, a court may try a person accused of carrying or possessing a newly developed narcotic drug, psychotropic substance, or precursor for which no punishment has been prescribed by law and, by invoking legislation governing existing narcotic drugs and psychotropic substances, convict the accused.

This interpretation of the nature of an error of law may also be observed in judicial practice. Certain chambers of the Supreme Court, when interpreting the expression "the act does not constitute a criminal offense" in Article 474(g), permit retrial only where the accusation attributed to the defendant does not constitute an offense under the applicable law. In the draft bill amending the Criminal Procedure Code, the expression "the act does not constitute a criminal offense" in Article 474(g) was clarified as follows: "The meaning of the act not constituting a criminal offense is that the matter is civil in nature or that the conditions required for the realization of the offense have not been properly established." For example, in Judgment No. 9209987712600545, dated August 29, 2016, a chamber of the Supreme Court stated:

"Although the applicant for retrial has asserted that the matter falls within Article 474(g) of the Criminal Procedure Code, the members of this Chamber find no basis for examining the substantive defenses and objections. The expression 'the act committed does not constitute a criminal offense' in Article 474(g) applies where the subject of the accusation attributed to the accused does not constitute an offense under the law, rather than where the applicant for retrial claims not to have committed an act that is legally defined as an offense. Accordingly, because the application for retrial does not correspond to any of the grounds enumerated in Article 474 of the Criminal Procedure Code, it is rejected" (Mirkamali & Kazemi, 2017).

*3.2. Creating Doubt as to the Validity of the Final Judgment (doute sur la décision finale)*

An ancient principle of Roman law, expressed in Latin, provides that "a judgment must be regarded as truth" (*res judicata pro veritate habetur*). This principle reinforces res judicata as one of the fundamental principles of transnational adjudication and has received particular attention in legal doctrine and in the legislation of different countries, especially the French Criminal Procedure Code. Nevertheless, judicial judgments are products of human action and therefore cannot be entirely free from error or ignorance. Moreover, because of the difficulties involved in collecting, completing, and evaluating factual and legal matters composed of elements or data specific to a judicial case and directly affecting the outcome of the proceedings, a judge can never possess absolute certainty regarding the correctness of a decision.

Does this mean that, contrary to the principle stated above, judicial decisions should be presumed erroneous unless proven otherwise? It may be answered that if the conclusion of the hearing is regarded as equivalent to the completion of the process of collecting the factual and legal matters relevant to the case, a stage known as the "closure of proceedings" is reached on the basis of the totality of the factual and legal matters governing the case. At this stage, before the judgment has become final, every element constituting the judgment may be challenged through ordinary methods of appeal (Claire, 2012). The trial court, when hearing an objection to a default judgment, and the appellate court, when considering an appeal and examining the evidence for and against the parties, separately assess all factual and legal matters relevant to the case.

Once this stage has passed and the judgment has acquired finality, however, the legal system encounters an entity possessing a character independent of the factual and legal matters constituting it. By analogy, this situation may be compared with the natural persons who constitute a legal person. The factual and legal matters are comparable to the natural persons, while the final judgment resembles the independent legal person formed by them. At this stage, a new judicial truth known as the "court judgment" emerges through a process of reasoning and argumentation (*raisonnement, argumentation*), the presentation and evaluation of evidence and documentation (*documentation*) contained in the case file, judicial inference and reasoning based on the mental, material, and legal elements of the offense, the application of procedural rules to the facts of the case, the explanation of judicial principles and foundations, and the interpretation of statutory provisions. This process is further influenced by qualitative considerations relating to the judge's intellectual command, scientific knowledge, and distinctive judicial experience (Katebi, 1974). The judgment thereby acquires a legal existence independent of the factual and legal matters on which it was originally based.

Accordingly, because retrial is directed not merely against an individual factual or legal matter but against an independent judicial truth embodied in the court's final judgment, the ground relied upon in the application must be capable of creating doubt regarding the validity of that final judgment. An examination of legal opinions and the practice of certain chambers of the Supreme Court indicates that this requirement is regarded as an essential condition for admitting a retrial application.

For example, in explaining an error of law arising from the proposition that the act does not constitute a criminal offense, the Legal Department of the Judiciary relied on a combination of objective and subjective criteria that ultimately created doubt regarding the validity of the court judgment. It stated:

"Under Articles 136 and 169 of the Constitution and Articles 2, 10, 12, 13, and 18 of the 2013 Islamic Penal Code, any conduct for which punishment has been prescribed by law constitutes a criminal offense. In other words, for conduct to constitute an offense, first, the legislature must have recognized that conduct as criminal—the legal element; second, the criminal conduct must have materialized—the material element; and third, the conduct must have been accompanied by the intention to commit the offense or by criminal negligence—the mental element. Accordingly, and having regard to Article 161 of the Constitution concerning the duty of the Supreme Court to supervise the proper implementation of laws by the courts, the legislature's intended meaning of the expression 'the act committed does not constitute a criminal offense' in Article 474(g) and the first part of Article 469(b) of the 2013 Criminal Procedure Code is the absence of any one of the three aforementioned elements" (Mirkamali & Kazemi, 2017).

Similarly, in Judgment No. 940997925101298, dated October 19, 2015, Chamber 36 of the Supreme Court adopted this approach and treated the final judgment forming the subject of the retrial application as an independent judicial truth in relation to the objective and subjective criteria governing the case. It stated:

"The application for retrial cannot be accepted. Although a registered title deed is valid under Articles 22 and 73 of the Registration Act, proceedings concerning unlawful dispossession require an examination of the complainant's prior possession and the defendant's subsequent interference or possession. In the present case, the expert opinion, the testimony of witnesses and informed persons, which was also confirmed by the local Islamic Council, the statements of the parties' elder brother, and the police investigation establish the complainant's prior use of the disputed passage. Furthermore, the public water channel located along the western boundary of the convicted person's property may, according to custom, also constitute a passageway. Accordingly, the convicted person's application does not correspond to any of the grounds enumerated in Article 474 of the Criminal Procedure Code" (Mirkamali & Kazemi, 2017).

## 4. Methods of Correcting an Error of Law

As noted above, an error of law constitutes one category of judicial error. To clarify the concept of an error of law, it is therefore necessary to determine its scope and position among other types of judicial error. Some scholars classify judicial errors into two categories. The first category consists of grounds attributable to a judge's mistake. The general characteristic of these grounds is that they do not arise after the issuance of the

judgment; rather, the parties may become aware of them immediately upon service of the judgment. The second category consists of grounds that arise after the judgment has become final and are, in a certain sense, attributable to the convicted person (Hayati, 2008). Other scholars divide judicial errors into grounds relating to evidence and grounds relating to judicial mistakes (Mirkamali & Kazemi, 2017).

As may be observed, under both classifications an error of law falls within the category of judicial mistakes. The correction of this category of judicial error is therefore not confined to the institution of retrial and may be pursued through ordinary and extraordinary procedures at every stage following the issuance of the judgment. However, in characterizing a method of challenging a judgment as ordinary or extraordinary, its relationship with the principle of res judicata must be considered. Ordinary remedies, when invoked by an interested person, prevent a judgment from acquiring the authority of res judicata. Consequently, ordinary remedies cannot be exercised against judgments already possessing res judicata effect; such judgments may be challenged only through extraordinary remedies.

This criterion is also emphasized in Article 593 of the new French Civil Procedure Code. In defining retrial in civil proceedings, that provision characterizes retrial as the setting aside of a judgment possessing the authority of res judicata so that a new judgment may be issued on both fact and law. Under this structural classification, an objection to a default judgment, an appeal, and a cassation appeal fall within ordinary remedies, while retrial and an application for the implementation of Article 477 of the Criminal Procedure Code constitute extraordinary remedies. Nevertheless, because of the distinctive function of cassation review in correcting errors of law and its potential overlap with the retrial mechanism in this respect, cassation review is briefly examined below.

### *4.1. Correcting an Error of Law through Cassation Review*

Unlike ordinary methods of challenging judgments, which broadly permit a new hearing based on alleged errors of fact or law either before the same court through an objection to a default judgment or before a higher court through an appeal, the scope of cassation review is confined to the circumstances expressly prescribed by law. In other words, cassation review of court judgments is unavailable except on the grounds and in the circumstances expressly recognized by statute.

In French law, with the objective of preserving the institutional authority of the Court of Cassation, cassation review is regarded as an extraordinary remedy and is available only upon the application of the Minister of Justice under Article 620, the Prosecutor General under Article 621, or in relation to judgments issued following retrial under Article 622 (Stefani et al., 1998).

In Iranian law, although the enactment of the 1994 Law on the Establishment of Public and Revolutionary Courts reduced the function of cassation review to a form of appellate consideration, the current method of review conducted by the Supreme Court, even where its examination of factual matters resembles that of an appellate court—as in the offenses referred to in Article 428 of the 2013 Criminal Procedure Code—does not authorize the Supreme Court to issue a substantive judgment on its own initiative. After quashing a judgment, the Court must refer the matter for a new hearing to a court of equal jurisdiction. Even where the Supreme Court identifies an error of law because the act does not constitute a criminal offense or the accused cannot legally be prosecuted, it quashes the judgment without remand. Such a decision does not constitute the issuance of a substantive judgment; it merely signifies that, following the quashing of the judgment, no matter remains for substantive determination. This may occur, for example, where the alleged conduct does not constitute a criminal offense, where the prosecution is barred by a limitation period, or where a general amnesty has removed the criminal character of the conduct.

In French law, which influenced the formulation of many provisions of the Iranian Criminal Procedure Code of 2013, cassation review may be conducted only to examine an error of law arising from a violation of the law. French legal doctrine consistently maintains that the Court of Cassation is not a third level of trial. According to criminal procedure scholars:

"The Court of Cassation does not evaluate the acts, determine guilt or punishment, or decide the case itself. It does not adjudicate the proceedings as such; rather, it adjudicates exclusively on the legal validity of the judgments issued. If the Court of Cassation concludes that the law has been correctly applied, it dismisses the cassation application" (Stefani et al., 1998).

This definition explains why, under French criminal procedure law, the Court of Cassation is required, after reviewing and quashing a judgment, to refer the matter to a court of equal jurisdiction. Issuing a judgment requires a substantive examination through the evaluation of evidence for and against the parties. Because the Court of Cassation is not legally authorized to conduct a substantive examination, it cannot issue a substantive judgment.

Under Article 464(c) of the Iranian Criminal Procedure Code, the inconsistency of the evidence or documents contained in the case file is recognized as a ground for cassation review. Authorizing the Supreme Court to examine this ground does not amount to authorizing it to conduct a substantive hearing. In discharging this statutory duty, the Court merely determines whether the court issuing the judgment complied with the applicable legal standards when evaluating the evidence and documentation. Accordingly, even where this factual ground is examined and the judgment is quashed because the Court finds that the ground exists, the Supreme Court chamber cannot issue a new judgment and must remit the case to a court of equal jurisdiction.

### *4.2. Correcting an Error of Law through Retrial*

An examination of the historical grounds for retrial in Iranian legislation and in French criminal procedure law, from which Iran's first modern criminal procedure legislation was derived, indicates that retrial and the postponement of enforcement of a final judgment are authorized because the legislature recognizes the possibility that the judgment may have been issued contrary to reality. Instead of defining the concept of a judgment contrary to reality, however, the legislature has enumerated the circumstances that it regards as corresponding to this concept in Clauses (a) to (g) of Article 474 of the Criminal Procedure Code.

Although the grounds stated in Clauses (a) to (f) may be grouped together because they concern factual matters governing the case, Article 474(g), by referring to the legal matter that the act does not constitute a criminal offense, raises the question of how an error may occur in relation to a matter of law that was fully available to the judicial authority throughout every stage of the proceedings. This ground has therefore been criticized by some legal scholars. In their view, the apparent meaning of this ground is that the judge has erred in applying the law to the facts. However, such a ground is inconsistent with the purpose of retrial and expands the operation of an exceptional institution. Retrial operates in opposition to the principle of res judicata and is intended to correct errors relating to factual matters; this explains why an error of this kind is rarely recognized as a ground for retrial in foreign legislation (Zeraat, 2007). These scholars have consequently proposed that the provision should be confined to judicial mistakes concerning material facts (*un fait matériel*), although the wording of the statute does not support such an interpretation.

## 5. The Interpretive Approach of Judicial Practice toward Retrial Based on an Error of Law

An examination of the practice of the chambers of the Supreme Court demonstrates that, as the exclusive authorities responsible for determining whether retrial is warranted under Iranian criminal procedure law, they have not adopted a uniform approach toward the scope of retrial based on the error of law referred to in Article 474(g). They have sometimes expressed conflicting approaches even in cases involving similar subject matter.

For example, in one retrial application, a chamber of the Supreme Court examined the contents of the case file and the objective and subjective circumstances governing the case. Having established that the underlying transaction had been rescinded, the Chamber concluded that the offense of unlawfully transferring another person's property could not have been committed and, pursuant to Article 474(g), permitted retrial on the ground that the conduct did not constitute a criminal offense (Mirkamali & Kazemi, 2017). In contrast, in Judgment No. 14006920000159276O, dated January 29, 2022, another chamber considered a similar claim but dismissed the application. It reasoned that the matters raised in the retrial application predominantly constituted substantive defenses for which there was no basis for examination at the retrial-admission stage and that the application did not correspond to any of the grounds specified in Article 474 (Mirkamali & Kazemi, 2017).

Accordingly, the interpretive approaches adopted in judicial practice regarding the nature of an error of law based on the absence of criminality of the act under Article 474(g) may be classified into two categories.

*5.1. The Objective Approach Based on Restrictive Interpretation*

According to this approach, Article 474(g) applies where the court has made an objective error in applying the conduct to the legal element of an offense. In such a case, the court has treated an act or omission for which no punishment has been prescribed by law as criminal by applying a legal provision unrelated to that act or omission and has sentenced the accused to punishment.

For example, in one case the trial court treated a form of complicity in intentional homicide as corresponding to the jurisprudential concept of *mumsik*—a person who restrains the victim to facilitate the killing—and imposed life imprisonment. The convicted person applied for retrial under Article 474(g), alleging both innocence and the absence of the material element of the alleged offense. The applicant argued that the conduct attributed to him lacked a legal basis under the Islamic Penal Code. The relevant chamber of the Supreme Court refrained from substantively examining the case and, applying a restrictive interpretation to the convicted person's claim, addressed only the legal element of the offense in objective terms. In Judgment No. 930322, dated December 14, 2014, it stated:

"The principal argument presented by the convicted person in the application for retrial is that the accusation of instigation in murder lacks an express statutory basis and that the imposition of punishment therefore has no legal foundation. However, instigation in murder constitutes a form of complicity in intentional homicide for which life imprisonment is prescribed under Islamic jurisprudence. Article 127 of the Islamic Penal Code also gives priority to reference to Islamic law over statutory provisions concerning complicity in an offense. Where Islamic law prescribes a specific punishment for a particular form of complicity, the court must initially refer to Islamic law and determine the punishment according to Islamic and jurisprudential principles. This procedure was followed in the present case. The other matters raised in the retrial application generally constitute substantive defenses and assertions of the convicted person's innocence, for the examination of which there is no basis at the retrial stage. Accordingly, because the retrial application does not correspond to any of the grounds specified in Article 474 of the Criminal Procedure Code, it is rejected" (Mirkamali & Kazemi, 2017).

*5.2. The Approach Based on Broad Interpretation*

A criticism that may be directed against the objective approach based on a restrictive interpretation is that determining whether an act does not constitute a criminal offense—a matter of law—is possible only through an examination of the factual matters governing the case and the changes affecting those matters over time. Because Article 474(g) cannot be examined abstractly and in a factual vacuum, the assessment of this error of law necessarily requires consideration of the evidence and the factual circumstances that have arisen in the case.

Under this approach, a judicial error concerning the matter of law referred to in Article 474(g) can justify retrial where it affects the specific factual circumstances of the particular case. Such circumstances arise from the distinctive legal relationships governing the identified persons involved in the proceedings and all the individualized elements of that particular judicial case. Through the proceedings, those matters ultimately result in a final judgment, and the outcome of each case is therefore distinct from that of every other case.

An example of this interpretation may be found in a judgment of Chamber 36 of the Supreme Court dated March 5, 2016:

"The application filed by Ms. L.S. for retrial of the aforementioned judgments is well-founded and falls within Article 474(g). Apart from the complaints filed by the complainants, which are based solely on suspicion and conjecture, the case file contains no Islamic or statutory evidence establishing the offense of theft in relation to the property claimed by any of the complainants. Retrial is therefore permitted, and the matter is assigned to a court of equal jurisdiction for a new examination of the Islamic and statutory evidence capable of establishing theft in relation to the complaint filed by each complainant."

The same Chamber stated in another judgment dated December 27, 2015:

"Under Article 211 of the Islamic Penal Code, judicial knowledge means certainty derived from clear evidence relating to a matter presented before the judge. However, the indications relied upon by the court to establish the convicted person's guilt and impose the conviction were not, by their nature, capable of generating judicial certainty and were based on

inferential knowledge. Under the note to Article 211 of the Islamic Penal Code, mere inferential knowledge cannot serve as the basis for issuing a judgment. Accordingly, because the convicted person's application corresponds to Article 474(g) of the Criminal Procedure Code, the application for retrial is admitted, and a new hearing concerning the accusation is assigned to another chamber of the provincial appellate court" (Mirkamali & Kazemi, 2017).

## 6. The Structural Approach of Judicial Practice toward Retrial Based on an Error of Law

Irrespective of the interpretive approach adopted in determining whether an application corresponds to Article 474(g) of the Criminal Procedure Code, a prior question must be answered: which judgments are, in principle, capable of being reopened through retrial?

The chambers of the Supreme Court, as the authorities determining retrial applications, disagree on whether Article 474 applies structurally to the judgments of all judicial authorities, including both courts and the Supreme Court, or whether judgments of the Supreme Court are excluded from retrial because of the Court's specialized functions and its structural distinction from trial and appellate courts.

The first group adopts an approach based on the general structure of retrial, whereas the second group relies on the specialized structure of retrial. A third view distinguishes between judgments issued by the Supreme Court in cassation proceedings and judgments issued in the implementation of Article 477. Under this view, judgments issued in cassation proceedings cannot be reopened through retrial, while judgments issued under Article 477 may be subject to retrial because of the distinctive statutory conditions governing such proceedings and their similarity to court judgments in terms of substantive adjudication.

Alongside these three positions, a further approach may be proposed. Under this approach, regardless of whether the chambers of the Supreme Court have acted in cassation proceedings or under Articles 474 or 477 of the Criminal Procedure Code, a distinction should be drawn between errors of fact and errors of law giving rise to retrial. In relation to errors of fact, the general structural approach should be adopted and retrial should be permitted. In relation to an error of law already addressed by a chamber of the Supreme Court, however, retrial should be rejected and the specialized structural approach should be preferred.

### *6.1. The Approach Based on the Specialized Structure of Retrial*

According to some Supreme Court judges, judgments of the Supreme Court cannot be reopened through retrial, regardless of whether they were issued in cassation proceedings or through the implementation of Articles 474 or 477.

First, the provisions governing retrial are contained in Chapter Four of the Criminal Procedure Code, none of which refers to the possibility of retrial against judgments issued by the Supreme Court.

Second, Article 474 expressly provides that a retrial application concerns final judgments issued by "courts." A chamber of the Supreme Court does not constitute a court for this purpose, and an application under Article 474 cannot therefore be filed against a judgment issued by a Supreme Court chamber.

Third, Article 476 expressly provides that where the subject of a retrial application corresponds to one of the grounds stated in Article 474 and retrial is permitted, the case must be referred for a new hearing to a court of equal jurisdiction to the court that issued the final judgment. Consequently, where a chamber of the Supreme Court has issued a judgment in the performance of its statutory functions, Article 476 cannot be implemented.

Accordingly, judgments issued by chambers of the Supreme Court fall outside the scope of retrial under Article 474, and a case seeking such retrial cannot be considered by another chamber of the Supreme Court. An example of this position may be found in a judgment of Chamber 34 of the Supreme Court dated April 26, 2016, concerning an application for retrial under Article 474(g) (Mirkamali & Kazemi, 2017).

### *6.2. The Approach Based on the General Structure of Retrial*

According to this approach, which may be found in certain judgments of the Supreme Court, the philosophy underlying cassation provisions is confined to preventing the improper violation of statutory and Islamic legal rules. By contrast, the rationale underlying retrial provisions is the administration of justice and the

realization of the applicant's substantive rights (Mirkamali & Kazemi, 2017).

Accordingly, retrial involves an examination of different judicial dimensions, including both factual and legal matters, irrespective of whether the judgment was issued by a trial court, an appellate court, or the Supreme Court, and irrespective of whether the legal institution applied in issuing the judgment was cassation review, retrial, or Article 477 of the Criminal Procedure Code.

The reasoning supporting this approach is based on the illogical consequences of accepting the specialized structure of retrial. Such an approach could produce results whose unacceptability is manifest. For example, suppose that a death sentence by retribution in kind becomes final after cassation review or the application of Article 477 by a Supreme Court chamber, and immediately before execution the alleged murder victim is found alive, as contemplated by Article 474(a), or the falsity of the witnesses' testimony is established through a final court judgment, as contemplated by Article 474(e). If the specialized approach were accepted, the person sentenced to retribution could not apply to the Supreme Court for retrial merely because the Supreme Court is not technically classified as a court. Such a result would be entirely illogical and incompatible with the objectives of a fair trial.

### *6.3. The Approach Based on the Distinction between Substantive and Formal Review*

This approach was advanced by the representative of the Prosecutor General during the deliberations of the General Assembly of the Supreme Court concerning Uniform Judicial Precedent Decision No. 854, dated October 29, 2024, in opposition to the position ultimately adopted in that decision.

Under this view, the Supreme Court possesses two separate capacities or functions under Articles 474 and 475. Its first and inherent capacity is that of a Supreme Court chamber. Describing a decision issued by the Chamber in this capacity as a "conviction" involves a degree of imprecision, because a Supreme Court decision affirming a judgment or permitting retrial does not itself constitute a conviction. The conviction is the judgment issued by the Revolutionary Court or Criminal Court, which the Supreme Court examines through the relevant legal mechanism.

In other words, in such circumstances retrial is sought against the court judgment that has been affirmed by the Supreme Court's judicial decision, rather than against the Supreme Court judgment affirming the challenged decision. For this reason, Article 474 of the Criminal Procedure Code permits retrial only against final convictions issued by courts.

Because the Supreme Court does not conduct a substantive hearing when performing this statutory function, it does not constitute a trial court. It is instead a judicial authority charged with supervising, reviewing, and determining whether judgments issued by the courts conform to the law and to procedural principles and rules.

The Supreme Court's second capacity involves the performance of its functions under Article 477 of the Criminal Procedure Code. The nature of this function is based on an exceptional duty, similar to the duties of trial courts, delegated by the Head of the Judiciary in accordance with statutory rules. It is substantive in nature. Because this form of proceeding results in a final and non-appealable judgment, it must be governed by all the principles, rules, and incidents applicable to substantive adjudication, including third-party objection and retrial in civil and criminal matters.

Accordingly, under this approach, the availability of retrial depends not on the institutional structure of the Supreme Court chamber but on the nature of the judicial proceedings conducted by that chamber. It should be noted that this position failed to obtain the support of the majority of Supreme Court judges during the General Assembly's deliberations. Uniform Judicial Precedent Decision No. 854 was ultimately adopted, under which retrial pursuant to Article 474 is unavailable against judgments issued by Supreme Court chambers under Article 477, unless the judgment conflicts, on a ground different from the ground previously examined, with incontrovertible principles of Islamic jurisprudence and therefore itself falls within Article 477 (Shahsavandi et al., 2023).

### *6.4. The Proposed Approach: A Structure Consistent with the Nature of an Error of Law and Based on the Principle of Legality in Criminal Proceedings*

This approach is based on explaining the nature of an error of law by reference to the principle of legality in criminal proceedings (*le principe de légalité de la*

*procédure pénale*). One of the fundamental principles governing the different stages and levels of criminal proceedings is the principle of procedural legality, which is founded on the protection of individuals' fundamental rights in criminal proceedings and the prevention of the arbitrary exercise of power (Ashouri & Movahedi, 2016). Under this principle, which is expressly recognized in Article 2 of the 2013 Criminal Procedure Code, criminal proceedings must be based on law, guarantee the rights of the parties, and apply procedural rules uniformly to persons prosecuted under equivalent circumstances for committing similar offenses.

At the post-trial stage, the principle of legality requires that extraordinary challenges against final judgments through retrial also be governed by law. The structure governing the treatment of an error of law in retrial proceedings must therefore be interpreted and applied consistently with this fundamental principle and the subsidiary principles and rules derived from it.

One such rule is the "principle of separation of the functions of judicial authorities in criminal proceedings" (*la séparation des fonctions judiciaires dans le procès pénal*). With the objective of separating powers and preventing their concentration in a single authority, this principle assigns each stage of the proceedings to a distinct judicial authority. Its application requires criminal proceedings to pass through different stages and levels, so that not only the existence, order, and sequence of those stages and levels but also the conduct of each stage before the specifically designated authority possesses independent normative significance (Ashouri & Movahedi, 2016).

The stages of criminal proceedings—pretrial, trial, and post-trial—exist alongside one another, and the proceedings conducted at each stage differ from those conducted at another. By contrast, the levels of adjudication are based on a vertical separation arising from the judicial hierarchy and involve the reconsideration of the same subject addressed at the lower level. At the first and second levels, the review is both substantive and formal, initially before the trial court and subsequently before the appellate court. At the next level, review by the Supreme Court is exclusively legal and formal (Ashouri & Movahedi, 2016).

Until review at the higher levels has been completed, the proceedings and the judgment issued do not acquire finality. The existence of different levels of review produces two logical effects: the "suspensive effect" (*effet suspensif*) and the "devolutive effect" (*effet dévolutif*).

The suspensive effect means that the first-instance decision must not be enforced until the higher court has finally determined the matter or until the period for filing an appeal has expired. The devolutive effect, which is more directly relevant to the present discussion, means that challenging a judgment removes the matter from the jurisdiction of the trial court under the principle that the judge becomes functus officio and transfers the matter to another authority for reconsideration, whether substantive and formal or exclusively formal (Ashouri & Movahedi, 2016).

A logical requirement of the devolutive effect is that the higher authority reviewing the challenge must not be institutionally equal to the lower authority. Review of a challenge by a coequal authority lacks logical justification. The chambers of the Supreme Court are coequal when performing their inherent function of reviewing the legal matters governing a case and determining whether the courts have correctly implemented the law. Consequently, the devolutive effect of retrial cannot operate between them.

This analysis explains why the legislature, in Chapter Four of the Criminal Procedure Code, has permitted retrial only against court judgments. The Supreme Court may be conceived as a higher authority in relation to trial and appellate courts within the vertical separation of levels of adjudication. However, no chamber of the Supreme Court can be regarded as hierarchically superior to another chamber when the chambers, as the country's highest judicial authority, determine legal matters in the exercise of their supervisory function of reviewing and assessing whether court judgments conform to statutory law and procedural principles and rules.

Because none of the chambers has authority over another, the devolutive effect of a challenge—which forms part of the rules governing levels of adjudication and is itself required by the principle of legality in criminal proceedings—cannot be realized. Accordingly, in applying the principle of legality, chambers of the Supreme Court generally cannot consider applications for retrial against the judgments of other Supreme Court chambers in relation to matters of law, including Article 474(g) of the Criminal Procedure Code.

This restriction does not apply to factual matters governing the case, even where the judgment has been affirmed and made final in cassation proceedings before a Supreme Court chamber or where the Supreme Court previously considered the case under Articles 474 or 477.

First, the Supreme Court does not, in principle, determine the factual matters governing a case. Therefore, review of those matters by another Supreme Court chamber is not prevented by the impossibility of realizing the devolutive effect of a challenge and does not conflict with the principle of legality in criminal proceedings.

Second, unlike the legal matters referred to in Article 474(g), time constitutes an essential element in revealing the judicial errors addressed by the factual grounds stated in Clauses (a) to (f) of Article 474. Those grounds are based on elements characterized by relativity and susceptibility to change over time. These features justify the devolutive effect of a challenge through retrial in relation to factual matters.

By contrast, a matter of law under Article 474(g) constitutes a judicial determination declared by a judicial authority at a particular point in time on the basis of the evidence presented to the court. Unlike the factual matters referred to in Clauses (a) to (f), it is stable and not susceptible to alteration merely through the passage of time. Time therefore has no conceivable role in revealing an error in such a legal determination.

Consequently, the principle of legality in criminal proceedings requires the rejection of an application for retrial under Article 474(g) of the Criminal Procedure Code where the application is directed against a judgment issued by a chamber of the Supreme Court.

## 7. Conclusion

If the principle of res judicata is regarded as a guarantee of judicial security and as safeguarding the efforts of the criminal court to reach judicial truth through identifying the points of connection and disconnection among the facts governing a case, an applicant for retrial seeks to reopen the case by proving that the court erred in its understanding of the judicial truth it declared. Therefore, only matters capable of being affected by error during the proceedings may properly constitute grounds for retrial.

Nevertheless, Article 474(g) of the Criminal Procedure Code, by recognizing the legal matter that "the act does not constitute a criminal offense" as the basis of a judicial error resulting in a final conviction, creates uncertainty concerning how the possibility of error under this ground can be justified. By referring to a particular form of error, this ground raises the question of how a mistake can occur in relation to a matter of law that was fully accessible to the judicial authority throughout all stages of the proceedings.

For this reason, the ground has been criticized by certain legal scholars. In their view, the apparent meaning of the provision is that the judge has erred in applying the law to the facts, rather than having fundamentally followed an erroneous path in determining whether the facts were legally capable of being characterized as criminal. The practical effect is to expand the use of an exceptional institution in a manner inconsistent with the purpose of retrial. Retrial operates in opposition to res judicata and is principally intended to correct errors relating to material facts, which explains why an error of law of this kind is rarely recognized as a ground for retrial in foreign legislation.

An examination of the judicial practice of the chambers of the Supreme Court demonstrates that, as the authorities possessing exclusive jurisdiction to determine whether retrial is warranted under Iranian criminal procedure law, they have failed to adopt a uniform approach toward the scope of retrial based on the error of law referred to in Article 474(g). They have sometimes expressed conflicting views even in cases involving similar subject matter.

To resolve this disagreement, it appears necessary to consider the structural nature of the Supreme Court as the country's highest judicial authority. Under this structure, chambers of the Supreme Court do not evaluate the conduct alleged, determine guilt or punishment, or decide the merits of the criminal accusation. In other words, they do not adjudicate the criminal proceedings themselves but judge exclusively whether the judgments issued comply with the law.

In performing this statutory function, no Supreme Court chamber possesses hierarchical superiority over another chamber. The devolutive effect of a challenge, which is among the effects of the rules governing the levels of adjudication and is required by the principle of legality

in criminal proceedings, cannot therefore operate between them.

Accordingly, regardless of whether Supreme Court chambers have previously addressed the legal matters of the case in cassation proceedings, in considering a retrial application under Article 474, or in proceedings under Article 477, the principle of legality in criminal proceedings generally prevents one chamber from considering an application for retrial against the judgment of another chamber in relation to a matter of law, including the ground stated in Article 474(g) of the Criminal Procedure Code.

This restriction does not apply to factual matters governing the case because the Supreme Court chambers have not, in principle, adjudicated those matters. Retrial based on factual grounds therefore remains available even where the judgment was affirmed and became final in cassation proceedings before the Supreme Court or where the Court previously considered the case through the implementation of Articles 474 or 477.

## Authors' Contributions

Authors contributed equally to this article.

## Declaration

In order to correct and improve the academic writing of our paper, we have used the language model ChatGPT.

## Transparency Statement

Data are available for research purposes upon reasonable request to the corresponding author.

## Acknowledgments

We would like to express our gratitude to all individuals helped us to do the project.

## Declaration of Interest

The authors report no conflict of interest.

## Funding

According to the authors, this article has no financial support.

## Ethical Considerations

In this research, ethical standards including obtaining informed consent, ensuring privacy and confidentiality were observed.

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