The Israeli Retrial: An Institution at a Crossroads

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The Supreme Court's authority to quash convictions and order retrials has existed under the Israeli Courts Law since 1957. However, during the first forty years of the law's application the Court exercised its authority on only three occasions. Conversely, in the twenty years since the 1996 amendment of Article 31 of the Courts Law, which expanded the grounds for ordering a retrial, convictions have been quashed in twenty five cases.

This article, which constitutes the first comprehensive study conducted in Israel on the subject of retrials, examines the developments that have taken place in the retrial institution since its 1996 reform. This enquiry is held on both the substantive level – i.e., the Supreme Court's rulings on retrial petitions in the last twenty years – and the procedural level – i.e., the changes that took place during these years in the procedure of petitioning the court. My analysis focuses on the question which of two competing doctrines that traditionally play a central role in post-conviction procedures – the "due process" doctrine and the "actual innocence" doctrine – has become more dominant in shaping the Israeli retrial.

On the substantive level, I demonstrate that the institution is becoming more and more influenced by an "extreme" version of the "actual innocence" doctrine, one which allows only for unequivocal evidence of the petitioner's innocence to serve as grounds for quashing the conviction. As a result, the tendency to expand the use of the retrial institution following the amendment of Article 31 has, in actuality, remained extremely limited, and comes into play mainly in cases where the petitioners have been convicted of relatively light offences. Moreover, those petitions that are granted are usually based on evidence so clear-cut that re-conducting the trial de novo becomes unnecessary.

On the procedural level, developments that I refer to as "bureaucratization" and "adversarization" processes have caused the adaptation of the retrial from a once unique procedure, based on cooperation between usually opposing parties (the state and the defense), to the standard adversarial model of criminal law. These developments, I argue, hamper the ability to investigate claims of procedural misconduct on an all-systemic level, thus making the retrial institution unfit for applying the "due process" doctrine. However, no changes have been made on the procedural level to guarantee petitioners the ability to seek proof of their actual innocence, making the institution unsuited for the "actual innocence" doctrine as well.

The article offers a normative critique of the tendencies described above that draws on the insights of the institutional approach to post-conviction procedures, which challenge the dichotomy between due process and actual innocence. I argue that the institutional approach, which constitutes a middle way between the "due process" doctrine and the "actual innocence" doctrine, enables the retrial to fulfill its institutional purpose and leads to a more coherent interpretation of Article 31. I therefore suggest there is need for further reform – both in the Supreme Court's interpretation of Article 31 and on the procedural level – to make the retrial more compatible with the institutional approach. Otherwise, there is a chance that the retrial may become nearly redundant, as it was prior to the amendment of Article 31.