
Who's Afraid of Structuring Judicial Discretion in Sentencing? The Court of Appeals and Amendment no. 113

Sigal Kogut, Efrat Hakak and Itamar Gelbfish

Amendment no. 113 to Israel's Penal Code – “Structuring Judicial Discretion in Sentencing” – which entered into force on July 10, 2012, was aimed at reducing disparities in sentencing, which stem from judges' differing viewpoints on the guiding principles of punishment and the balance between them. These can lead to arbitrariness and injustice in sentencing, and weaken the rule of law. Israel's legislature chose to contend with these disparities by constructing a multi-step, sequential methodology for courts to follow when determining sentences. The court is required to establish a “proportionate sentencing range” for the offense at hand and determine the sentence within that range, or, under specific conditions delineated in the law, in departure from it. This process ensures that the judge distinguishes between the culpability which arises from the commission of the offense and its circumstances, and other considerations related to sentencing, such as rehabilitation, deterrence, the protection of the public, and the offender's personal circumstances unrelated to the offense.

In this article, we trace the development of this innovative sentencing approach. We argue that the new sentencing scheme was supposed to strengthen the guiding role of the appellate court, whose role has always been more than simply providing a final ruling in a specific conflict. By requiring the trial judge to do the

for the defendant not to have this right at all. Particularly, the possibility of plea bargaining may incentivize the prosecutor to submit an indictment even in cases in which there is no reasonable probability of conviction; in such case the plea bargaining is in the shadow of an illegal threat, which makes it both coercion and extortion.