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Statutory Sentencing Reform in Israel: Exploring the Sentencing Law of 2012

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In 2012 the Knesset approved a new sentencing law. Israel thus became the latest jurisdiction to introduce statutory directions for courts to follow in sentencing. The approach of the United States to structuring judicial discretion often entails the use of a sentencing grid with presumptive sentencing ranges. In contrast, the Sentencing Act of Israel reflects a less prescriptive method: it provides guidance by words rather than numbers. Retributivism is clearly identified as the penal philosophy underpinning the new law, which takes a novel approach to promoting more proportionate sentencing. Courts are directed to construct an individualised proportionate sentencing range appropriate to the case in hand. Once this is established, the court then follows additional directions regarding factors and principles related to sentencing. Although other jurisdictions have placed the purposes and principles of sentencing on a statutory footing, this is the first such legislative declaration in Israel. The statute also contains a methodology to implement a proportional approach to sentencing as well as detailed guidance on sentencing factors. This article describes and explores the new Sentencing Act, making limited comparisons to sentencing reforms in other jurisdictions – principally England and Wales, New Zealand and the United States. In concluding, we speculate on the likely consequences of the law: will it achieve the goals of promoting more consistent and principled sentencing?

Keywords: sentencing, sentencing reform, judicial decision-making

1. Introduction

Over the past 30 years, a wide variety of sentencing reform initiatives have been introduced or proposed, all attempting to structure judicial discretion without unduly constraining the ability of a court to impose a just sanction.[1] Some guidelines – such as those found in many jurisdictions across the United States (US) – are relatively prescriptive. Sentence length ranges are contained within a two-dimensional sentencing grid, the dimensions being seriousness of the crime and criminal history. These ranges reflect the relative seriousness of the offence and the extent of the offender's culpability. Courts in these jurisdictions are required to impose a sentence within these specified sentence ranges or find 'substantial and compelling reasons' why a sentence outside the guideline ranges is appropriate.[2]

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[1] For a collection of essays exploring recent developments in sentencing reform, See Oren Gazal-Ayal (ed), 'A Global Perspective on Sentencing Reforms' (2013) 76 *Law and Contemporary Problems* 1.

[2] Minnesota is the archetypal US jurisdiction. Guidelines have been in place for almost 40 years now in that state: see Richard S Frase, 'Sentencing Guidelines in Minnesota, 1978–2003' in Michael Tonry (ed), *Crime and Justice: A Review of Research*, Vol 32 (University of Chicago Press 2005) 131.

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In contrast, sentencing schemes such as those found in Sweden and other Scandinavian countries provide general guidance for sentencers without specifying numerical sentence ranges – guidance by words rather than by numbers.[3] The guidelines proposed in New Zealand[4] and those implemented in England and Wales offer a middle ground between the relatively restrictive US models and looser European systems of guidance. For example, the English scheme consists of offence-specific guidelines which provide considerable discretion for courts within the guideline as well as the latitude to depart therefrom.[5] The crucial choice confronting a legislature that seeks to structure judicial discretion in sentencing, therefore, is whether to adopt a numerical guideline scheme which prescribes specific ranges for length of sentence (and, in the English case, 'starting point' sentences) for particular offences, or whether to provide a detailed guiding statute containing purposes and principles without a numerical scheme of guidelines.

To date, the academic literature[6] on structuring judicial discretion has focused on Western jurisdictions, particularly the common law countries where most sentencing reforms have been implemented. In 2012 the Israel legislature approved an innovative approach to structuring judicial discretion, one which attempts to achieve more proportionate and consistent outcomes by means of a guiding statute alone. The Sentencing Act in Israel is closer to the Scandinavian model, but provides more detailed guidance for sentencers. The new sentencing law caps a period of debate and discussion about sentencing reform in this jurisdiction.

This article explores the 2012 reform legislation[7] which is contained in the Appendix to the article. After summarising events leading up to the passage of the Sentencing Act, we review its principal features, discussing these within a limited comparative context of guideline schemes in other countries. We speculate as to the likely impact of the legislation, and draw some lessons for other jurisdictions which might consider emulating the Israeli approach to structuring judicial discretion, namely limiting the discretion of sentencing authorities without implementing a more restrictive, numerical scheme of guidelines.

[3] See Andrew von Hirsch and Nils Jareborg, 'The Swedish Sentencing Law' in Andrew Ashworth, Andrew von Hirsch and Julian V Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (3rd edn, Hart 2009) 258.

[4] Although fully developed, the New Zealand guidelines have yet to be proclaimed as law: see Warren Young and Claire Browning, 'New Zealand's Sentencing Council' (2008) 4 *Criminal Law Review* 287–98.

[5] The English regime also includes a number of generic guidelines which are applicable across different categories of offence – for example, one such guideline relates to sentencing in cases of multiple convictions. For further information, see Julian V Roberts and Anne Rafferty, 'Sentencing Guidelines in England and Wales: Exploring the New Format' (2011) 9 *Criminal Law Review* 681–89; Julian V Roberts, 'Structured Sentencing: Exploring Recent Developments in England and Wales' (2012) 14(3) *Punishment and Society: The International Journal of Penology* 267–88 and, more generally, Andrew Ashworth and Julian V Roberts (eds), *Sentencing Guidelines: Exploring the English Model* (Oxford University Press 2013).

[6] See, eg, Michael Tonry and Richard Frase, *Sentencing and Sanctions in Western Countries* (Oxford University Press 2001); Christopher M V Clarkson and Rodney Morgan (eds), *The Politics of Sentencing Reform* (Clarendon Press 1995).

[7] Penal Law (Amendment No 113), 2012, 2337 LSI 170.

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2. ORIGINS AND OVERVIEW OF THE ACT

In 1997 a committee chaired by Supreme Court Justice Eliezer Goldberg recommended reforms to Israeli sentencing law.[8] The committee failed to generate a unanimous set of proposals. While the minority proposed a scheme incorporating minimum and maximum sentences for most offences, the bill ultimately endorsed by the majority of the committee included a less stringent limitation on judicial discretion in sentencing.[9] The majority envisaged the creation of a 'starting point' sentencing regime, and the establishment of a Sentencing Committee to develop this scheme.[10] Such a system would have prescribed sentences for most common offences to serve as a point of departure for courts. This element of the proposal did not pass the legislative process, although the bill as passed into law in January 2012 did incorporate the principles proposed in another section of the majority report. The new Sentencing Act articulates a retributive guiding philosophy for sentencing and contains a series of provisions relating to various aspects of sentencing. Although other jurisdictions, such as Canada and New Zealand, have placed the purposes of sentencing on a statutory footing, this is the first such legislative declaration in Israel. The statute also contains a methodology to implement a proportional approach to sentencing as well as detailed guidance on sentencing factors.

2.1 PROMOTING PROPORTIONAL SENTENCING

The Act begins by identifying its purpose, after which it affirms the philosophical orientation of sentencing. Section 40b stipulates that '[t]he guiding principle in sentencing is proportionality between the seriousness of the offence committed by the offender and the degree of his culpability, and the type and severity of his punishment'.[11] By denoting proportionality as the 'guiding' principle, this provision aligns the statute with sentencing laws in other jurisdictions such as New Zealand and Canada.[12] The rest of the Act fleshes out a scheme of proportional sentencing. Yet how is proportionality to be achieved or even promoted?

[8] 'Report of the Committee for the Examination of Means to Structure Judicial Discretion in Sentencing', Jerusalem, October 1997 (Goldberg Committee Report). For a thoughtful analysis of the report, see Daniel Ohana, 'Sentencing Reform in Israel: The Goldberg Committee Report' (1998) 32 *Israel Law Review* 591.

[9] For discussion of legislative proposals prior to the Sentencing Act, see Miriam Gur-Arye and others, 'Position Paper on the Proposal for Penal Law (Amendment 92 – Structuring Judicial Discretion in Sentencing), 5756-2006 Working Paper No 14, Jerusalem Criminal Justice Study Group, Faculty of Law, Hebrew University of Jerusalem, 2006.

[10] See Ruth Kannai, 'Sentencing in Israel' (2010) 22 *Federal Sentencing Reporter* 223–32; Oren Gazal-Ayal and Ruth Kannai, 'Determination of Starting Sentences in Israel – System and Application' (2010) 22 *Federal Sentencing Reporter* 232–42.

[11] Empirical research in Israel has long demonstrated the influence of proportionality on sentencing practices: see, eg, Shlomo Shoham, 'Sentencing Policy of Criminal Courts in Israel' (1959) 50 *Journal of Criminal Law and Criminology* 327–37.

[12] For example, s 718 of the Canadian Criminal Code designates proportionality as 'the fundamental purpose of sentencing', thus elevating this principle above others, such as restraint with respect to the use of custody as a sanction: see Julian V Roberts and Andrew von Hirsch, 'Conditional Sentences of Imprisonment and the

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2.2 External versus Internal Proportionality Constraints

The US grid-based guideline schemes promote proportionality by arranging offences on a scale of seriousness, and then prescribing sanctions of commensurate severity for each offence. For example, the US sentencing guidelines assign all federal crimes to one of 43 rows in the two-dimensional sentencing grid, with each row representing a separate level of crime seriousness and each column a level of criminal history. Each cell of the grid contains a range of sentence lengths within which courts must remain when determining the sentence.[13] In this way proportional sentencing is promoted by imposing an external structure upon the exercise of judicial discretion. Similarly, in England and Wales the offence-specific guidelines provide separate ranges of sentence for different (usually three) levels of crime seriousness. Proportionality is established by ensuring that the more serious cases of any offence attract a sentence within a more severe sentencing range.[14]

In contrast to this approach, the Sentencing Act imposes an 'internal' proportionality constraint upon sentencing authorities. Section 40c(a) directs that a sentencing court 'shall determine a "proportionate sentencing range"' (PSR) in accordance with the guiding principle articulated in section 40b. The provision further notes that in reaching this determination the court shall consider the societal values infringed by the offence, the level of harm caused by the offence, existing sentencing practices, and circumstances related to the commission of the offence, as identified in a later provision of the Act. These considerations determine the upper and lower limits of the proportionate sentence range, which is itself constrained by the statutory maximum sentence. The reference to existing sentencing practices reflects the importance of parity in sentencing – a sub-requirement of a proportional sanction.[15] In order that offenders of comparable culpability who are convicted of crimes of equal seriousness are sentenced with parity, a court needs information about current sentencing practices. The extent to which criminal conduct affronts social values constitutes a framework which guides the severity of sanctions.

3. Sentencing Methodology: Establishing a Proportionate Sentencing Range

The first step for a sentencing court under the new law is therefore to establish a PSR – a concept which echoes the sentence ranges found in guideline schemes across the US and also in England and Wales.[16] In determining the limits of the PSR, a court must consider only factors *related to*

Fundamental Principle of Proportionality in Sentencing' (1998) 10 *Criminal Reports* 222–31. Similarly, s 8(a) of the New Zealand Sentencing Act 2002 affirms the importance of proportionality in sentencing.

[13] US Sentencing Commission, '2011Federal Sentencing Guidelines Manual', 1 November 2011, http://www.ussc.gov/Guidelines/2011_Guidelines/Manual_HTML/index.cfm.

[14] All the English guidelines can be found at http://sentencingcouncil.judiciary.gov.uk/guidelines/guidelines-to-download.htm.

[15] Andrew von Hirsch, *Censure and Sanctions* (Clarendon Press 1993).

[16] As noted, under the English guidelines each offence carries a proportionate sentence range which is narrower than the total statutory range for the offence: for example, for assault occasioning actual bodily harm (Offences

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the commission of the offence (discussed below). This requirement ensures that the sentencing court's attention is focused on the offence rather than the offender. Offence-related factors are thus established as being elemental in the determination of the sanction – consistent with the statute's emphasis on proportionality. Once a PSR has been determined, the court must decide whether to select an appropriate sentence within the proportionate range it has created, or to depart from the range in pursuit of utilitarian sentencing objectives.[17] Offence-related factors therefore determine the limits of the PSR. Sentencers may deviate from these limits only for rehabilitation or incapacitation purposes. However, other factors which are unrelated to the offence are also eligible for consideration, but they play a lesser role. These other factors merely shape the sentence *within* the range, rather than determine the upper and lower limits of the range.

The Israeli Sentencing Act therefore creates a multi-step methodology for courts to follow when determining sentence. This may be summarised as follows:

1. Determine a proportionate sentence range, drawing upon a list of statutory factors related to the offence.
2. Decide whether to depart from the PSR in order to promote rehabilitation or the protection of the public.
3. If the court remains within its PSR, it should then locate a sentence within that range, drawing upon additional sentencing factors unrelated to the offence.

The existence of a sequential sentencing methodology is therefore reminiscent of the guidelines in England and Wales and New Zealand. In England, the offence-specific guidelines require courts in the first instance (designated 'Step One') to select one of three ranges of sentence to reflect the overall level of seriousness. In reaching this decision, the court considers the 'principal factual elements of the offence' – which may be seen as analogous to the 'offence-related circumstances' under the Israeli scheme. Once the appropriate sentence range has been selected, the English guidelines direct courts to consider other factors, which might be relevant to seriousness and culpability, in shaping a sentence within the range selected in Step One.[18] Similarly, the scheme proposed but not yet adopted in New Zealand identifies two levels of factors, the most important of which determines the limits of the proportionate range, the less important of which may then be applied to shape the sentence within that range.[19]

The important difference between the Israeli and English schemes is that in England, the seriousness of the crime and culpability play a role at both stages: at the first stage in setting the category, and at the second in fine-tuning the sentence. In Israel, these concepts are engaged

against the Person Act 1861, s 47), the statutory maximum is five years' imprisonment while the guideline sentence range runs from a fine to three years in prison. A court may sentence anywhere within this range and remain compliant with the guideline: see, eg, the definitive guideline for the assault offences, http://sentencingcouncil.judiciary.gov.uk.

[17] We discuss the grounds for departing from the PSR later in this article.

[18] Roberts and Rafferty (n 5).

[19] Young and Browning (n 4).

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only at the first stage – in determining the sentence range. Of course, since this range is not limited by any guidelines, a court may fine-tune it to the specific levels of seriousness and culpability, but it is only the range that is affected by seriousness and culpability. Within the proportionate range, the sentence is based on other factors – that is, circumstances unrelated to the commission of the offence (see section 40c(b)). The unique nature of the Israeli sentencing scheme is that the proportionate sentence range is determined by the individual judge and not by an external body, and hence the range itself can be individualised to the level of culpability in the specific case. This feature of the law may permit a more accurate calibration of seriousness. The disadvantage, of course, is that without a common starting point courts may be less consistent in their sentences.

3.1 Establishing the PSR by Considering Factors Related to the Offence

Section 40i identifies 11 factors relating to the offence which should determine the upper and lower limits of the proportionate sentence range. The list is preceded by a salutary reminder to courts that these factors should relate to the seriousness of the offence and the offender's level of culpability (section 40(i)(a)). As will be seen, the enumerated factors include circumstances which increase or decrease seriousness or culpability. First, however, it is important to note a divergence from the methodology prescribed by the English guidelines, in which the list of factors provided by the guidelines for consideration by a sentencing court at Step One is exhaustive: circumstances other than those explicitly identified by the guidelines may not be taken into account at this stage of the English guideline methodology.

In contrast, the list of circumstances considered by courts when determining the PSR under section 40(i) of the Israeli statute is non-exhaustive. This list simply assists the court in determining the seriousness of the offence and the culpability of the offender rather than supplying a comprehensive list of relevant factors. As a result, the court may disregard factors in the list and take into account factors not present in the list as long as they are related to the seriousness of the crime and the offender's level of culpability. This additional discretion to reflect a wider range of circumstances may undermine the ability of the law to promote greater consistency, as it allows individual judges to import additional factors, the nature and significance of which may vary widely across courts.

No attempt will be made here to discuss each of the 11 offence-related factors listed in section 40(i) of the Sentencing Act (see the Appendix to this article), although some general comments are worth making. First, almost all[20] of these factors relate to the level of culpability (rather than the seriousness of the crime), and include:

(1) the degree of preparation that preceded the offence;
(2) the role of offenders in the offence and the extent to which they may have been influenced by others;

[20] The one offence-related factor which reflects the crime rather than the offender's level of culpability for the crime is factor (4), which relates to the harm that was caused as a result of the commission of the offence.

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(5) offenders' level of culpability as reflected in their reasons for committing the offence;
(6) the ability of offenders to understand their conduct, including the consequences of their age for their level of understanding;
(7) the ability of offenders to abstain from committing the act and their degree of control over their actions, considering any provocation;
(8) offenders' level of psychological distress as a result of abuse at the hands of the victim;
(9) the proximity of the case to legal defences to criminal responsibility;
(11) the extent to which the offender exploited a relationship with the victim.

The remaining factors relate to the harm intended or created by the offender and include the level of cruelty or violence.

In contrast with other sentencing schemes which merely note the relevance of any given sentencing factor, section 40(i)(b) also clarifies the specific way in which these factors should be considered. Thus, the first five each constitute a continuum, with low levels of the factor representing lower culpability and high levels increasing culpability – for example, factor (3), the harm that the offender anticipated causing. Four of the factors serve only to mitigate culpability, and include circumstances such as factor (8), the offender's psychological state of mind as a result of abuse inflicted by the victim. The final factors aggravate the sentence within the PSR: cruelty, violence or abuse of the victim, and the abuse of trust by the offender when committing the offence. The list of offence-related factors omits some important circumstances found in other guideline schemes. For example, racially aggravated offences or crimes motivated by hatred or hostility towards categories of victims are frequently cited in other schemes, including the English guidelines[21] and sentencing statutes more generally. However, an additional provision of the law, discussed later in this article, creates discretion for courts to consider other such factors.

Having established a proportionate sentencing range, and before it shapes the sentence to be imposed within that range, the court must consider whether a departure from the range is justified. In order to maintain consistency in the way in which courts depart from the PSR, the Sentencing Act specifies the conditions under which a court may depart from the PSR it has created, and it is to these conditions we now turn.

3.2 Departing from the PSR: Rehabilitation, Incapacitation and Deterrence

3.2.1 Rehabilitation

Under the Sentencing Act, the principal ground for departing from the PSR is to promote the rehabilitation of the offender. Before discussing the way in which this operates, a note about departure sentences is necessary. No guideline scheme prohibits any deviation from its ranges.

[21] An offence motivated by, or demonstrating, hostility towards the victim based on his or her sexual orientation (or presumed orientation), disability (or presumed disability), or the victim's age, sex, gender identity (or presumed gender identity) are all aggravating circumstances found at Step One of the offence-specific guidelines.

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Guideline schemes always permit derogation from a prescribed, proportionate range of sentences, and the Israeli Sentencing Act is no exception. Under the US and English guidelines, sentences outside the guideline range may be imposed in response to exceptional characteristics of a case.[22] When such characteristics are present, a court may depart from the guideline but must provide reasons why a departure is necessary. The number of departures will naturally reflect the width of the guideline ranges: across the US, departure rates vary considerably but hover around the one-third mark; in England, departures are very rare because the guideline sentence ranges are much wider.[23] According to the new law, a court wishing to promote the rehabilitation of the offender may impose a sentence outside its own PSR.

If the court determines that there is a 'real likelihood' that the offender will be, or has already been, rehabilitated it may depart 'downwards' from the proportionate range and impose a less severe sentence that is intended to promote the offender's rehabilitation. This may involve ordering the offender to follow some rehabilitative course of action. However, this provision does not create a blank cheque for courts to overrule proportionality in pursuit of the offender's rehabilitation: a proportionality-derived restriction applies to the more serious cases. If the crime is 'very serious', or if the offender's level of culpability is 'very high', the court may activate this ground for departing from the PSR only when unusual and extraordinary circumstances exist. In other words, deviation from the PSR is still possible in these more serious cases, but the threshold for deviating is raised. This important restriction on judicial discretion to depart from the proportionate range helps to ensure that rehabilitation does not readily (or easily) undermine the proportional considerations which gave rise to the PSR in the first place; this feature is further evidence of the proportionality-orientated approach adopted by the Sentencing Act. Finally, in the event that a court sentences *outside* the PSR in pursuit of the rehabilitation of the offender, it must provide justification for this decision.

[22] According to s 125(1)(b) of the Coroners and Justice Act 2009 (UK), courts must follow any relevant sentencing guideline unless 'the court is satisfied that it would be contrary to the interests of justice to do so': see discussion in Julian V Roberts, 'Sentencing Guidelines and Judicial Discretion: Evolution of the Duty of Courts to Comply in England and Wales' (2011) 51 *British Journal of Criminology* 997–1013. As noted, US jurisdictions use a more stringent test for departure, namely that the court should find 'substantial and compelling' reasons to impose a sentence outside the guidelines range.

[23] Statistics from Minnesota reveal that in 2009, 25% of all felony offenders received a sentence different from that prescribed by the guidelines, while a further 14% of all custodial sentences were outside the limits of the range of sentence lengths in the guidelines: Minnesota Sentencing Guidelines Commission, *MSGC Report to the Legislature*, January 2010, 26, http://www.msgc.state.mn.us/data_reports/jan_leg_report/leg_report_jan2010.pdf. The total departure rate for 2009 was therefore 39%. In England and Wales the limited departure data issued to date reveals that only approximately 2–3% of sentences fall outside the guideline ranges. Courts in England and Wales are not restricted to the sentence range associated with any specific category of seriousness, but are allowed to sentence within the much wider total guideline range for the offence: see Ashworth and Roberts (n 5); Sentencing Council, 'Crown Court Sentencing Survey: Annual 2012 Results', http://sentencingcouncil.judiciary.gov.uk/facts/crown-survey-results-2012.htm.

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3.2.2 THE ROLE OF OTHER UTILITARIAN CONSIDERATIONS: PROTECTION OF SOCIETY AND DETERRENCE

Protection of society

Departures from the proportionate sentence range are also permitted to protect society from further offending by the offender. Section 40e allows a court to take the protection of society into account in determining sentence. If the court determines that there is a 'serious likelihood' of further offending[24] and that it is 'necessary' to separate the offender from society in the interests of public protection, the court may impose a sentence above the PSR – departing upwards, in other words. However, the court must not deviate 'significantly' from the PSR for the sake of protecting society from such further offending. The word 'significantly' qualifies the extent of the departure and suggests that incapacitation-based departures will be more modest than those in pursuit of rehabilitation, for which no such qualification exists (see above). In addition, the decision to depart 'upwards' must be supported by a substantial criminal record or a professional report. It is likely that in most cases when the court contemplates such deviation it will request a pre-sentence report from the probation officer, and use it as a professional report. The court's mere belief on the basis of the current offence alone that the offender is likely to re-offend is insufficient to justify a departure on this ground.

Deterrence

The other principal utilitarian objectives of general and special deterrence may not be invoked to justify a departure from the PSR, but they may influence the sentence imposed *within* the PSR (to be discussed below). In this sense, deterrence is relevant, but only to the extent that it affects the sentence *within* the PSR. In addition, in respect of both individual and general deterrence, the statute requires there to be a 'serious likelihood' that the increase in severity will actually deter the actual offender or potential offenders, depending on the form of deterrence. This contrasts with other jurisdictions: in England and Wales, when deterrent sentences are imposed there is no requirement that the increased, non-retributive punishment is likely to produce that result. It may be unrealistic to expect a busy court of any level to engage in a review of social science evidence relating to a specific utilitarian sentencing objective such as deterrence or incapacitation. This underlines the need for a sentencing guidelines authority of some kind with the capacity to conduct, commission or evaluate relevant research. Otherwise courts are likely to continue to pursue unobtainable objectives, at the expense of principled sentencing and the interests of offenders.

[24] The law does not specify whether the seriousness of the offending should determine whether this reason for departing from the PSR is justified. This seems to be an oversight: courts should be prevented from departing from the PSR unless there is a probable risk to society of serious harm – otherwise departures could be imposed for highly recidivist offenders convicted of minor property offences.

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In light of the fact that 'downward' or mitigated departures beneath the proportionate sentence range are permitted (to promote rehabilitation), it was open to the architects of the Sentencing Act to provide for permitted 'upward' deviations from the PSR for deterrence. For example, the Act could have allowed a court to deviate from the PSR when there was a pressing need to achieve general deterrence. This scenario has been played out in other jurisdictions. Thus, in 2011, the Court of Appeal in England and Wales upheld very significant departure sentences from guideline ranges for offending that occurred during the summer riots. The court made it clear that these exceptional sentences were justified by the need to deter other potential offenders.[25] In other words, deterrence was used to justify the imposition of sentences well above the guideline recommended ranges in existence at the time. In contrast, the Sentencing Act in Israel prevents this approach. In our view this is the preferable route: several reviews of the research into the effectiveness of general deterrence have now been conducted, and the general conclusion is that severity of outcome offers little in terms of crime prevention through deterrence.[26]

3.3 Summary of Departure Provisions

To summarise, the pursuit of utilitarian sentencing objectives such as rehabilitation may justify a departure from the proportionate sentence range in the following ways:

1. Rehabilitation may justify a sentence outside the PSR, although such departures will be less likely when the offence is very serious or the offender is particularly culpable.
2. Incapacitation may also justify imposition of a sentence outside the PSR as long as the court believes there is a serious likelihood of re-offending and it is necessary to isolate the offender from society. However, this departure must not deviate 'significantly' from the PSR, which suggests that incapacitation-based departures will be more modest than those justified in the name of rehabilitation.
3. General and individual deterrence may both be considered when determining sentence, as long as there is a serious likelihood that any increase in severity will be effective, but the sentence must not deviate from the PSR.

Assuming that the court elects to remain within the PSR – and not to depart from it in order to promote rehabilitation or protect society from further offending – it must now shape the sentence within the PSR. At this point the court should consider factors unrelated to the offence, but which are relevant in some other respect to the sentencing decision.

[25] *R v Blackshaw and Others* [2011] EWCA Crim 2312.

[26] See Andrew von Hirsch and others, *Criminal Deterrence and Sentence Severity* (Hart 1999); Cheryl Webster and Anthony N Doob, 'Searching for Sasquatch: Deterrence of Crime through Sentence Severity' in Joan Petersilia and Kevin R Reitz (eds), *The Oxford Handbook of Sentencing and Corrections* (Oxford University Press 2011) 173–91; Daniel Nagin, 'Deterrence in the Twenty-First Century' in Michael Tonry (ed), *Crime and Justice: A Review of Research,* Vol 39 (University of Chicago Press 2013).

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4. DETERMINING THE SENTENCE WITHIN THE PSR: ROLE OF FACTORS UNRELATED TO THE OFFENCE

One of the most challenging tasks for any guidelines authority or legislative body consists of clarifying which factors unrelated to the offence are nevertheless legitimate sentencing considerations. These circumstances are usually justified by considerations external to a proportionality model. Two preliminary comments are in order with respect to the list of factors that are *not* related to the commission of the offence found in section 40(k). First, the Act places an important limit upon the extent to which these 'secondary' factors may influence the sentence. The enumerated factors eligible for consideration are preceded by a constraining direction that they should influence the position of the sentence *within* the proportionate range – but not take the sentence out of the PSR. Thus these factors individually (and collectively) may not result in a breach of the proportionate range; a case with several powerful mitigating factors might be placed at the lower limit of proportionate severity (the floor of the PSR), but not beneath this limen. This restriction reflects, presumably, their subordinate status within a proportionality-based model of sentencing.

A restriction of this kind could result in undesirable consequences in some cases. Where the lower limit of the PSR involves a prison sentence, an offender who, for example, suffers from an illness and might as a result suffer disproportionately from being imprisoned, or who has been severely damaged by the offence (such as a parent who has negligently killed his or her own child and is injured in an offence involving culpable driving) must still be sentenced to imprisonment. The harm suffered by the offender and the harmful impact of the punishment on the offender and the offender's family are circumstances unrelated to the commission of the offence.

Lower courts in Israel have already struggled with this restriction. Some have decided that, in order to maintain the desired level of flexibility, the PSR should be wide. With a wider PSR the courts can give more weight to circumstances unrelated to the offence.[27] Other courts have held that the rehabilitation exception should be interpreted broadly to allow deviation from the PSR in those rare cases where such deviation is needed.[28] These attempts to circumvent the restrictions imposed by the amendment show the need either for more flexibility in weighing the circumstances unrelated to the offence or for a general exception rule which allows the court to deviate from the PSR when it is satisfied that it would be contrary to the interests of justice to sentence within the range.[29]

Second, there is an asymmetry in the factors unrelated to the offence. The list includes several factors which reduce the severity of sentence, but only one factor which might enhance its severity. This is in contrast with other statutory sentencing schemes which usually contain a

[27] For example, CrimC (Magistrate Court, Tel Aviv) 57968-01-13 *The State of Israel v Oyes* 2013, 6: 'The sentencing ranges should be wide enough to allow a variety of defendants with different characteristics and different personal circumstances to find a place under its roof.'
[28] See CrimC (Magistrate Court, Haifa) 23887-02-13 *The State of Israel v Gidan* 2013.
[29] For such an exception in England and Wales, see Coroners and Justice Act 2009, s 125.

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predominance of aggravating factors.[30] In short, the list serves primarily to mitigate, rather than to aggravate, the sentence. This, of course, further limits the influence of these factors upon the sentence ultimately imposed. If the court has determined a proportionate sentence range of, say, 12 to 24 months' custody and enters the range at a midpoint of 18 months, all of these factors (save one – see below) have the potential to move the case down from 18 to 12 months but not to raise the sentence above the 18-month ceiling.[31]

It is unclear why the list of unrelated sentencing factors contains no circumstances to reflect higher culpability. What kinds of circumstances unrelated to the crime nevertheless justify the imposition of a more severe sentence? Many factors found in guideline schemes from other countries could have been included. For example, committing the offence while on bail or parole is unrelated to the gravity of the crime, but offending under these conditions is generally taken as evidence of enhanced culpability on the part of the offender: he or she may be deemed to be more culpable for having offended while still under a court order for earlier criminal conduct.[32] In addition, committing an offence within a short period after a previous conviction is usually taken to reflect a higher risk of further offending. This factor is identified as an aggravating factor under almost all guideline schemes. Other factors cited by guideline schemes as indicative of enhanced culpability (but in ways unrelated to the seriousness of the offence) include being intoxicated at the time of the offence;[33] attempts to conceal evidence or impede any police investigation; ignoring warnings or concerns expressed by others about the offender's behaviour, and a history of non-compliance with court orders, even if the offender is not currently under such an order.[34] It is worth noting, however, that all of these factors might still be taken into account since the list of circumstances in the law is not exhaustive.

[30] For example, the Canadian sentencing statute contains a range of aggravating factors, but none relating to mitigation. Statutory sentencing factors in other jurisdictions are also more likely to be aggravating than mitigating, possibly because there is greater consensus around the circumstances which make an offence worse, or an offender more culpable. There is generally a wider range of aggravating factors, reflecting the reality that there are many ways of committing a crime with greater harm but fewer ways of mitigating this harm: for discussion, see Julian V Roberts, 'Aggravating and Mitigating Factors at Sentencing: Towards Greater Consistency of Application' [2008] *Criminal Law Review* 264–76.

[31] The scant empirical data seems to indicate that courts, in fact, tend to impose sentences in the lower part of the PSR: see Oren Gazal-Ayal, 'Disproportional Sentencing Ranges – on the Proportionality Principle in Setting Sentencing Ranges' (forthcoming) 6 *Mishpatim Al Atar* (*The Hebrew University Law Journal – Online Edition*).

[32] For example, in Minnesota, committing the offence while on probation, parole or while serving a sentence results in the assignment of an additional custody status point, which justifies a harsher sentence: see Minnesota Sentencing Guidelines Commission, *Minnesota Sentencing Guidelines and Commentary*, August 2012, 22, http://www.msgc.state.mn.us/guidelines/2012%20MN%20Sentencing%20Guidelines%20and%20Commentary.pdf. Similarly, under the English guidelines, committing an offence while on licence is an aggravating factor to be considered by the court at Step Two of the guidelines methodology.

[33] Under the English guidelines intoxication is an aggravating factor, but it may also mitigate sentence – as in the case of a defendant who is unused to drinking and commits an out-of-character offence as a result of a rare episode of drunkenness: see Nicola Padfield, 'Intoxication as a Sentencing Factor: Mitigation or Aggravation?' in Julian V Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press 2011) 81.

[34] For example, all these circumstances are listed in the definitive guideline for assault issued by the Sentencing Council of England and Wales, *Assault: Definitive Guideline*, 2011, http://sentencingcouncil.judiciary.gov.uk/docs/Assault_definitive_guideline_-_Crown_Court.pdf.

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4.1 THE IMPACT OF THE SENTENCE ON THE OFFENDER AND THE OFFENDER'S FAMILY

The list of factors *unrelated* to the offence is more innovative than the list of circumstances determining the limits of the proportionate range, and is therefore worthy of further discussion. The list is also progressive in that it identifies important considerations that are now recognised as relevant to sentencing, even if they have historically been excluded from guideline schemes around the world. In this sense the new sentencing law builds on existing sentencing provisions in other jurisdictions, such as those in the Swedish Criminal Code.[35]

First, there is clear statutory recognition that some sentences may impact disproportionately upon either the offender or third parties, such as members of the offender's family. Section 40k(1) allows a court to consider 'the harmful impact of the punishment on the offender, including as a consequence of his age'. This provision reflects a growing international consensus that sentencing courts should ensure that a custodial sentence does not create disproportionate hardship for the offender, or create additional suffering for his or her dependants. Section 40k(2) notes that the court may also consider 'the harmful effect of the punishment upon the offender's family'. A court may use this provision to consider the interests of the offender's children or relatives in the event that the seriousness of the case requires the offender to be committed to custody. There is growing recognition in the appellate courts of other jurisdictions of the need to protect such individuals from suffering from the consequences of maternal or paternal offending.[36] This provision formally recognises the importance of preventing the sentencing process from harming parties other than the offender.

Promoting a sense of responsibility among offenders and encouraging them to make amends have become increasingly salient elements of sentencing in Western nations. Indeed, such incentives lie at the heart of efforts to promote the interests of crime victims and, more generally, the concept of restorative justice. Section 40k(4) identifies 'whether the offender took responsibility for his actions and the degree to which he has become or is making an effort to be, normative [that is, law-abiding]' as a factor, and section 40k(5) recognises the 'effort that the offender made to "fix" the consequences of his offence, and to compensate the victim for the harm caused'. If taken up by alert counsel and conveyed to the offender, this element of the sentencing law may well promote the likelihood and incidence of reparative efforts. Finally, section 40(k)(3) notes the relevance of the impact of the crime itself on the offender – immanent punishment, as it were, arising from the commission of the offence. Many examples of such harm may be cited, such as dangerous driving causing death which often involves the death of a close relative or friend of the offender. This provision provides courts with a justification for imposing a less severe sentence in these cases, as long as the sentence remains within the PSR.

[35] For example, the Swedish Criminal Code (1962), ch 29, para 5, notes a number of factors which should influence sentencing and which may now be found in the sentencing law of Israel. One of these is whether the offender himself suffered serious bodily harm as a result of his own criminal behaviour.

[36] Andrew Ashworth, *Sentencing and Criminal Justice* (5th edn, Cambridge University Press 2010) 156.

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4.2 Evidence of Good Character

Empirical research in other jurisdictions has demonstrated the importance of what may be termed 'personal mitigation' – characteristics or conduct of the offender not related to the offence or his level of culpability for the offence, but which in practice often serve to mitigate the severity of sentence.[37] These factors are often adduced as evidence of 'good character', and form the basis of appeals for leniency. A retributive sentencing model excludes such considerations as they are unrelated to either crime seriousness or offender culpability. Despite this lack of relevance for retributive sentencing, personal mitigation is a frequent source of leniency in sentencing.[38] In addition, some – but by no means all – guideline schemes explicitly recognise such factors. Previous exemplary conduct, good works, a positive work record and acts of bravery or heroism are some of the factors which might fall within this category of mitigation.

Sentencing scholars sometimes object to the invocation of these factors, as they bear such a tenuous link to the principles of sentencing and because they introduce an adventitious element into the sentencing equation. This may explain why the English Sentencing Council placed this consideration at Step Two of its guidelines, where it has less effect on sentencing outcomes. Thus, under the English guidelines, 'good character, and/or exemplary conduct' are explicitly cited as factors which may reduce the severity of the sentence, under the category of 'personal mitigation'. Section 40k(7) of the new law places sentencing in Israel on this same slippery slope by including 'the offender's good behaviour and his contribution to society'. This formulation raises concerns about the role of chance and class; the opportunities to contribute to society are far from evenly distributed across the general population.[39]

4.3 The Role of Previous Convictions

The single potentially aggravating factor on the list of factors unrelated to the offence is the offender's criminal record. The relevance of previous convictions to retributive sentencing is a highly contested issue among contemporary penal theorists.[40] Some retributive scholars argue that prior criminality should play no role in the current sentencing proceedings as it is unrelated to the current offence or the offender's level of culpability for the current crime.[41] According to this view, a sentencing court should sentence offenders convicted of the same crime under the same

[37] See, eg, Jessica Jacobson and Mike Hough, 'Personal Mitigation: An Empirical Analysis in England and Wales', in Roberts (n 33) 146.
[38] ibid 152. These authors found that personal mitigation was a factor in approximately half the cases included in their study.
[39] Several prominent ex-politicians in Israel – including a former President – have recently been convicted of serious offences. Should public service at the highest levels be deemed a singular 'contribution to society'?
[40] See Claudio Tamburrini and Jesper Ryberg (eds), *Recidivist Punishments: The Philosopher's View* (Lexington Books 2012); Julian V Roberts and Andrew von Hirsch (eds), *Previous Convictions at Sentencing: Theoretical and Applied Perspectives*, *Studies in Penal Theory and Penal Ethics* (Hart 2010).
[41] For example, J Angelo Corlett, 'Retributivism and Recidivism' in Tamburrini and Ryberg, ibid; George P Fletcher, *Rethinking Criminal Law* (Little, Brown and Company 1978) 339.

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conditions in a similar fashion – irrespective of whether one offender is a multiple recidivist and the other a first offender.

Other retributivists have argued for a limited 'recidivist premium' on the grounds that repeat offenders can reasonably be considered to be more culpable than first offenders, or a limited discount for first offenders.[42] It has been argued, for example, that repeat offenders are reasonably deemed to be more culpable because they have failed to take steps to correct the causes of their own offending.[43] Finally, a third group of scholars argue that the absence of previous convictions should entitle a first offender to some mitigation, but once this mitigation is exhausted additional convictions should not result in additional punishment. This is referred to as the principle of the 'progressive loss of mitigation'.[44]

Empirically, previous convictions carry great weight in sentencing; analyses of sentencing statistics show that prior convictions result in a considerable increase in the severity of sentences, particularly under the US guidelines.[45] In most jurisdictions, prior related convictions affect sentence in a manner consistent with the so-called 'cumulative' sentencing model, whereby the severity of sentence rises progressively to reflect additional criminal convictions.

The relevance of previous convictions to the severity of the current sentence is clear enough under the Israeli Sentencing Act. Section 40k(11) identifies 'the offender's criminal past or lack thereof' as a factor relevant to the sentence within the PSR. The phrase suggests a symmetrical application: the presence of prior convictions should aggravate sentence severity while their absence should mitigate sentence. In addition, the law makes it clear that prior convictions alone cannot justify the imposition of a sentence outside the PSR; this may constrain the effect of previous convictions on sentence severity.[46] However, the statute fails to provide any guidance as to the specific way in which earlier crimes should be considered; it could have given more guidance to courts with respect to the weight that should be accorded previous convictions in the sentencing process.[47]

[42] Julian V Roberts, 'Explaining the Enduring Appeal of the Recidivist Sentencing Premium: The Role of Blameworthiness' in Ashworth, von Hirsch and Roberts (n 3).

[43] See Youngjae Lee, 'Repeat Offenders and the Question of Desert' in Roberts and von Hirsch (n 40); Thomas Mahon, 'Justifying the Use of Previous Convictions as an Aggravating Factor at Sentencing' [2012] *Cork Online Law Review* 85–97.

[44] See Andrew von Hirsch, 'Proportionality and the Progressive Loss of Mitigation: Some Further Reflections' in Roberts and von Hirsch (n 40). For critiques of this perspective, see Jesper Ryberg, 'Recidivism, Retributivism, and the Lapse Theory of Previous Convictions' in Roberts and von Hirsch (n 40).

[45] Julian V Roberts, *Punishing Persistent Offenders: Exploring Community and Offender Perspectives* (Oxford University Press 2008).

[46] It is consistent with the English scheme whereby previous convictions are considered only at Step Two of the guidelines methodology, where they have less influence than the primary 'Step One' factors. Step One factors determine which of three sentence ranges is appropriate for the case under consideration; Step Two factors influence the sentence only when the range has been determined and this accordingly limits their influence on the level of punishment.

[47] Previous convictions may have another effect on the sentence as they may be invoked to justify modest upward departures from the PSR for the protection of society (see the earlier sections of this article on departing from ranges).

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In contrast, the sentencing guidelines in the US provide detailed scoring rules for previous convictions;[48] in England and Wales, section 143(2) of the Criminal Justice Act 2003 provides statutory direction with respect to the dimensions of a criminal record.[49] It is disappointing that the architects of the Israeli law did not provide a similar degree of guidance to promote more consistent consideration of previous convictions in sentencing.

5. THE ROLE OF THE GUILTY PLEA AND PLEA BARGAINS

In other legal systems, entering a guilty plea is probably the most common (and powerful) factor that is not related to the seriousness of the crime or the offender. All common law jurisdictions award a significant discount to offenders who plead guilty.[50] This reduction reflects the benefits to the administration of justice and to victims and witnesses who are spared the trouble and potential anxiety of having to testify at trial.

The Israeli law does not explicitly authorise guilty plea discounts. In fact, the only reference to the plea is negative. Section 40k(a) – which lists the factors unrelated to the commission of the offence – includes 'the offender's cooperation with the enforcement agencies; however, the court shall not penalise the offender for pleading "not guilty" and going to trial'. This is the only place in the sentencing law where the court is explicitly instructed *not* to take account of a specific factor. It might be argued that the effect of this instruction is only to prohibit penalising offenders who plead not guilty and does not prevent courts from rewarding those who plead guilty with a reduction in sentence. More importantly, the law does not mention plea bargains at all. In Israel, as with other jurisdictions, the prosecution and the offender can negotiate a recommended sentence and then make a joint submission on sentencing. The court is required to follow the parties' joint recommendation unless it finds, taking into account the benefit to the offender, the plea bargain contrary to the public interest.[51] In some cases, when conducting a trial might be particularly harmful to the victim or the public interest, or when the evidence against the offender is relatively

[48] For example, the Minnesota guidelines incorporate a number of dimensions of a criminal record, including the recency of prior offences, their seriousness and their relation to the current offence: see Minnesota Sentencing Guidelines Commentary (n 32); Julian V Roberts, 'Paying for the Past: The Role of Criminal Record in the Sentencing Process' in Michael Tonry (ed), *Crime and Justice: A Review of Research*, *Vol 22* (University of Chicago Press 1997).

[49] The provision directs courts to consider the nature of the offence to which the previous conviction relates and its relevance to the current offence, as well as the time that has elapsed between the previous and current convictions: see Andrew von Hirsch and Julian V Roberts, 'Legislating Sentencing Principles: The Provisions of the Criminal Justice Act 2003 relating to Sentencing Purposes and the Role of Previous Convictions' [2004] *Criminal Law Review* 639–52.

[50] For example, in England and Wales, sentencing authorities follow a guideline which mandates a one-third sentence reduction for offenders who plead guilty at the first reasonable opportunity: see Sentencing Guidelines Council, *Reduction in Sentence for a Guilty Plea* (Revised Definitive Guideline 2007), http://sentencingcouncil.judiciary.gov.uk. For empirical trends in sentence reduction for a guilty plea, see Julian V Roberts, 'Sentencing Patterns in England and Wales: Findings from the Crown Court Sentencing Survey' in Ashworth and Roberts (n 5).

[51] See CrimA 1958/98 *X v The State of Israel* 57(1) PD 577 (2012).

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weak, the prosecution will offer the offender a sentence that is far below the PSR that it anticipates the court would impose in the case. The law takes no account of this practice.

The lower courts have already held that the rules governing plea bargains have not changed with the enactment of the new law. If, within the framework of a plea bargain, the parties recommend a sentence below the anticipated PSR, courts should still follow the recommendation as long as the recommended sentence correctly balances the benefit to the offender against the public interest.[52] Despite the absence of a plea bargains exception in the law, it is highly unlikely that higher courts would reach a different conclusion and limit sentence bargains to the PSR. This apparent judicial exception for plea bargains is of great practical importance since almost 80 per cent of convictions in Israel result from plea bargains, and over 60 per cent of the plea bargains include an agreed sentence recommendation.[53]

6. THE DUTY OF THE COURT TO EXPLAIN THE SENTENCE

Reflecting the current era of penal *glasnost*, all jurisdictions now require courts to provide reasons for a sentence. There are several functions of reasoning in this context. First, when courts are required to justify a sentence in this way they are more likely to adopt a reasoned approach. Second, reasons facilitate appellate review of decisions of the trial bench. Under presumptively binding guideline schemes, reasons are required to justify departure sentences. In jurisdictions such as Minnesota these 'departure' sentences are then subject to automatic appellate review. By reviewing the sentence in light of the reasons provided, appellate courts can more easily determine whether the sentence was inappropriate. Appellate review is of particular importance under the Israeli scheme because sentencing ranges are created by the trial courts and not by an external body. Officially, appellate review of sentences is limited to cases were the trial court made a substantial mistake or deviated significantly from the proper sentencing policy.[54] In practice, however, about one-quarter of the sentencing appeals are granted.[55]

Third (and more recently), there has been growing recognition that the offender and other parties with an interest in the sentence should be provided with the clearest possible understanding of the sentence imposed. The legitimacy of the sentencing process in the eyes of offenders and victims alike rests upon an acceptance that the sentence imposed is consistent with existing principles and standards. Simply put, victims and offenders need to understand the nature of the sentence imposed, and the giving of reasons contributes to this understanding.

[52] See CrimC (District Court, Beersheba) 5093-09-10 *The State of Israel v Giami* 2013.
[53] See Oren Gazal-Ayal, Keren Weinshall-Margel and Inbal Galon, 'Conviction and Acquittal Rates in Israel', *University of Haifa: Israeli Courts Research Division Publications*, May 2012, http://elyon1.court.gov.il/heb/Research%20Division/Research%20-%20Eng.htm.
[54] CrimA 2825/11 *X v The State of Israel* (unreported 2012).
[55] See Theodore Eisenberg, Talia Fisher and Issi Rosen-Zvi, 'Israel's Supreme Court Appellate Jurisdiction: An Empirical Study' (2011) 96 *Cornell Law Review* 693–725.

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Another benefit of clear and detailed reasons is that compliance with court orders is also more likely to be achieved if offenders understand the exact nature of the order, and have a clear grasp of the consequences of non-compliance with that order. It would be unwise to assume that this information will always be effectively communicated to the offender by his or her counsel or probation professionals. In recent years, legislatures and guideline authorities have moved to encourage or require courts to be as explicit as possible in providing reasons for the sentence and for describing the sentence in open court. Courts in Israel have been required for decades[56] to provide reasons for the sentence.

The United Kingdom Parliament has now gone further than other jurisdictions, creating more stringent requirements for courts in this regard. Amending an earlier statutory provision in the Criminal Justice Act 2003, section 64 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 creates a wide range of obligations upon courts in the sentencing process. For example, section 64(2) of this Act requires courts to explain to the offender 'in ordinary language and in general terms' the court's reasons for the sentence, as well as the effect of the sentence and the consequences of non-compliance with the order. Courts must also identify any definitive sentencing guideline relevant to the offender's case, explain how the guideline was followed and, in the event that a departure sentence was imposed, provide reasons for this departure. As noted, section 40n(3) of the Israeli Sentencing Act requires a court to give reasons for 'any deviation from the proportionate sentencing range for the purposes of rehabilitation or the protection of public safety, and the reasons for such deviation'.

Regrettably, the Sentencing Act does not go as far as the provisions in the 2012 English statute. The Israeli law imposes no specific duty on a court to explain to the offender the nature, purpose and consequences of the sentence. It does, however, require a court to (i) state its proportionate sentencing range and to articulate the circumstances related to the offence which were considered in determining the range; (ii) state and provide reasons for the decision resulting in the sentence within the PSR and also state and detail the reasons for any deviation from the proportionate range for the purposes of rehabilitation or public protection. These requirements will help to ensure that courts apply the new law consistently, but they fall short of promoting any greater understanding of the sentence from the perspective of the offender.

6.1 Sentencing Multiple Count Offenders

The law also requires courts to explain the method by which a sentence was determined when the offender has been convicted of multiple offences. This last requirement is particularly welcome. The totality principle,[57] which limits the overall severity of sentences imposed consecutively or concurrently in multiple conviction cases, often confuses criminal justice professionals, crime

[56] For example, CrimA 14/49 *Bishu-Bipton v The Attorney General* 2 PD 489, 491.

[57] See discussion in Martin Wasik, 'Concurrent and Consecutive Sentencing Revisited' in L. Zedner and Julian V Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Festchrift Essays in Honour of Andrew Ashworth* (Oxford University Press 2012).

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victims and particularly the general public; any attempt by the court to clarify the process for the benefit of all parties is to be welcomed.[58]

7. SENTENCING PROCEDURE: PROOF OF DISPUTED FACTS

Finally, another useful (and unusual) element of the Israeli sentencing law relates to the evidentiary rather than substantive aspects of sentencing. When a fact relevant to sentence is in dispute, the formal requirements of a trial are reasserted. However, most jurisdictions respect an important procedural asymmetry: factors cited in aggravation by the prosecution must be proved to a criminal standard, unless conceded by counsel for the offender.[59] Mitigating factors are generally accepted on the balance of probabilities, or possibly an even lower 'air of reality' threshold. Although this tradition has long existed, few sentencing guideline schemes and even fewer statutes acknowledge this procedural distinction between aggravating and mitigating factors.

Section 40j(c) of the new law places this arrangement on a clear statutory footing: 'The Court shall apply the reasonable doubt standard of proof for aggravating circumstances, and the civil [balance of probabilities] standard of proof for mitigating circumstances.' This element of the law will clearly benefit courts by focusing the attention of counsel on their respective evidentiary burdens with respect to sentencing factors. It is important to note, however, that the law prescribes such evidentiary rules only for circumstances related to the commission of the offence; with respect to other factors, such as those unrelated to the offence, the law leaves the evidentiary issue unresolved.

8. PROSPECTS FOR SUCCESS: PROMOTING PROPORTIONALITY AND CONSISTENCY

Is the Sentencing Act likely to have a significant impact on sentencing practices across Israel? Evaluating sentencing reforms is challenging for researchers, even when the reform consists of the introduction of presumptively binding guidelines which facilitate comparisons of sentencing practices before and after the introduction of the guideline. In the case of Israel, much will depend upon the degree to which courts engage with the requirement to create a proportionate sentencing range, and then fine-tune the sentence within that range. Focusing the court's attention on a proportionate range of sentence should enhance the principle of proportionality in sentencing.

[58] Other guideline schemes provide limited guidance for courts confronted with the complex task of sentencing offenders convicted of multiple counts; see the English Guideline: Sentencing Council of England and Wales, *Overarching Guidelines Professional Consultation: Allocation, Offences Taken Into Consideration and Totality*, 2011, http://sentencingcouncil.judiciary.gov.uk/docs/Consultation_-_Allocation_TICs_and_Totality_web.pdf.

[59] For England and Wales, see Archbold, *Criminal Pleading Evidence and Practice* (Sweet and Maxwell 2011); see also *R v Broderick* (1994) 15 Cr App R (S) 476 (CA).

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As noted earlier in this article, the Israeli law invites courts to create their own PSR, which then serves to anchor the sentence ultimately imposed within proportional limits based on seriousness and culpability. This approach contrasts with the US and English guidelines, both of which impose proportionate ranges on sentencing authorities – although the court retains some residual discretion to select one of three ranges under the English scheme. The consequence of this distinction is that proportionality is more likely to be enhanced *within* rather than *between* courts. To the extent that sentencers are influenced by now being required to create their own PSR, their sentences over time should become more proportional. Of course, the magnitude of the effect may well reflect the extent to which courts have already created an informal PSR when contemplating the sentence to be imposed, even without the specific direction of the statute. The requirement to remain within the PSR, even while attempting to pursue deterrence, should also enhance the principle of proportionality. If courts generally adhere closely to the statute when sentencing, consistency across courts will also improve. However, unlike numerical schemes such as those found across the US, departures will be less apparent.

In contrast to the sentencing ranges created by the Sentencing Council (in England and Wales) or Sentencing Commissions (in the US) the PSR in Israel is very much case-specific. Its limits are determined by the seriousness of the offence, taking into account the circumstances of its commission and the culpability of the offender. Thus, it cannot always be generalised from one case to another. A PSR is likely to have general application only in very simple offences where the circumstances related to the commission of the offence and the culpability are similar. In other, more complex offences, each offender will be subject to a different PSR, as determined by the court. Hence, PSRs are more likely to increase uniformity in, for example, relatively straightforward immigration offences than in more complex and diverse offences such as robbery.

Another important issue concerns the width of the proportionate sentence ranges adopted by courts. The Knesset gave no instruction as to how wide the PSR should be. Wider sentence ranges allow courts to give more weight to circumstances unrelated to the offence, while narrower ranges restrict this tendency and hence enhance consideration of seriousness and culpability factors. Some early decisions of the lower courts have already grappled with the question of how wide the proportionate sentence range should be. Few lower court decisions have held that the range should be wide; in particular, the lower band of the range should be sufficiently low to allow courts to give proper weight to exceptional mitigating circumstances.[60] Other courts have held that the range should reflect the more common cases and, when mitigation is required in exceptional cases, a broad interpretation of the rehabilitation exception can allow for such mitigation.[61] In our view, the absence of a general 'interest of justice' exception requires sufficiently wide ranges to allow the necessary flexibility in sentencing. It remains to be seen how the Supreme Court will decide on this and the many other unresolved issues arising from the new Act.

[60] See *The State of Israel v Oyes* (n 27).
[61] See *The State of Israel v Gidan* (n 28).

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9. CONCLUSIONS

What lessons might other jurisdictions contemplating sentencing reform draw from the recent experience in Israel? The impact of the new sentencing law will only become apparent after several years, and careful evaluative research. However, in its level of detail and, more particularly, its theoretical coherence the new law offers a clear alternative to the numerically based guideline schemes found across the US or in England and Wales. It is perhaps significant that although the US guidelines have been in existence for almost 40 years and the English guidelines for over a decade, neither scheme has been adopted by other common law jurisdictions. This may suggest that there is little international interest in more prescriptive or numerical schemes, in which case a detailed statutory scheme such as the Israeli sentencing law may prove more popular. As an example of the 'guidance by words' approach, the sentencing law in Israel represents a significant advance upon earlier reforms such as the Swedish sentencing statute. As we have attempted to document in this article, the new law provides a far more comprehensive and integrated structure for judicial discretion. It creates a coherent retribution-based sentencing framework which nevertheless allows room for utilitarian considerations such as the need to protect society from dangerous or high-risk offenders.

We cannot end the article without lamenting the absence – for the foreseeable future, at least – of two important elements of a rational and effective sentencing regime. First, the Sentencing Act, as noted, fails to include an element of the original reform proposal – namely, specific starting point sentences. Although the detailed proposals in the new law will promote a more consistent approach to sentencing, ultimately consistency in sentencing requires more than simply a set of statutory principles. Second, we recall and support one of Kannai's[62] critiques of the new law that it failed to incorporate a custodial threshold provision. Section 8(b) of the Goldberg Committee proposals stated that '[t]he court shall not pass a custodial sentence unless the seriousness of the act and the blameworthiness of the offender do not comport with the imposition of a less severe punishment'. Provisions of this nature are found in most common law jurisdictions and serve two purposes: they promote proportionality and enhance the related principle of restraint in the use of the most severe sanction. Any future legislative review of sentencing law should consider restoring both starting points and statutory restraint provisions; both are needed to promote more principled and consistent sentencing.

A further question that was heavily discussed during the legislative process was whether the law will lead to an overall reduction or increase in severity of sentence. The Goldberg Committee made it clear that the adoption of the new law should not lead to harsher sentences since proportionality often requires lower sentences.[63] The bill that was passed differs in several respects from the original proposal of the Goldberg Committee. On the one hand, the custodial threshold provision was removed from the law, which indicates that the legislator was less interested in

[62] See Kannai (n 10) 229.
[63] See the Goldberg Committee Report (n 8) 10.

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constraining the use of imprisonment. On the other hand, unlike the Committee's recommendation, the final version of the law does not allow significant deviation from the PSR on grounds of public safety, although it does permit, at least in exceptional cases, deviations to promote the offender's rehabilitation. While it is too early to know whether the combination of these conflicting trends will lead to an increase or decrease in the average sentences, a preliminary examination of the effect of the law on one common offence – illegal entry into the country – indicates that the proportionality principle has been used to justify an increase in the severity of sentences.[64] Whether this trend in immigration cases will reproduce itself across other offences remains to be seen.

APPENDIX A

PENAL LAW (AMENDMENT NO 113) 2012, 2337 LSI 170[65]

STRUCTURING JUDICIAL DISCRETION IN SENTENCING

40a Purpose

The purpose of this section is to set forth the principles and the considerations guiding sentencing, the weight that is to be accorded them, and the relationship between them, such that the Court will determine the sentence appropriate to the offender considering the circumstances of the offence.

40b The Guiding Principle: Proportionality

The guiding principle in sentencing is proportionality between the seriousness of the offence committed by the offender and the degree of his culpability, and the type and severity of his punishment.

40c Determining the Proportionate Sentence Range/Determining the Sentence

(a) The Court shall determine a 'Proportionate Sentence Range' for the offence committed by the offender in accordance with the guiding principle; for that purpose, the Court will consider the societal 'values' harmed by the offence, the degree/level of that harm, customary sentencing practices [for that offence], and the circumstances related to the commission of the offence, as delineated in Article 40i.

(b) The Court shall decide the offender's sentence within the aforementioned Sentence Range, taking into consideration the circumstances unrelated to the commission of the offence, as delineated in Article 40k; however, the Court may deviate from the Proportionate Sentence Range for reasons of rehabilitation or the protection of public safety, as delineated in Articles 40d and 40e.

40d Rehabilitation

(a) If the Court determines the Proportionate Sentence Range in accordance with the guiding principle, and [then] determines that there is a 'serious likelihood' that the offender will be rehabilitated or has been rehabilitated, the Court may deviate from the Proportionate Sentence Range and decide the offender's sentence in accordance with his rehabilitative needs, and may instruct the offender to undertake rehabilitative action; for the purposes of this article, 'rehabilitative action' includes, inter alia, […].

[64] See Gazal-Ayal (n 31).

[65] This is an unofficial translation by the authors of this article based on an earlier version by Efrat Hakak, to whom the authors are grateful for permission to use this draft.

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(b) If the offence is exceptionally serious, or the offender's culpability is exceptionally high, the Court may not deviate from the Proportionate Sentence Range pursuant to subsection (a), even if there is a serious likelihood that the offender will be rehabilitated or if he has been rehabilitated, except in unusual and extraordinary circumstances, after the Court has been persuaded that these circumstances 'trump' the need to decide the offender's sentence according to the guiding principle; the Court shall enumerate its justifications in its ruling.

40e Protection of Public Safety

If the Court determines the Proportionate Sentence Range in accordance with the guiding principle, and [then] determines that there is a 'serious likelihood' that the offender will continue to commit crimes, and that it is necessary to separate him from the public and increase his punishment in order to protect the public, the Court may take this into account when deciding the offender's sentence, so long as the sentence does not deviate significantly from the Proportionate Sentence Range; the Court shall not do so unless the offender has a substantial criminal record or if a professional report has been presented to the Court.

40f Individual Deterrence

If the Court determines that it is necessary to deter the offender from committing another offence, and that there is a serious likelihood that the imposition of a specific sentence will deter him, the Court may take this consideration into account when deciding the offender's sentence, so long as the sentence does not deviate from the Proportionate Sentence Range.

40g General Deterrence

If the Court determines that it is necessary to deter the public from committing offences of the same type that the offender committed, and that there is a serious likelihood that an increase in his sentence will deter the public, the Court may take this into account when deciding the offender's sentence, so long as the sentence does not deviate from the Proportionate Sentence Range.

40h Fines

If the Court has determined that the appropriate sentence for the offender under the circumstances of the offence includes a monetary fine, the Court shall determine the Proportionate Sentence Range for that offence while taking into account, in addition to 40c(a), the offender's financial circumstances.

40i Circumstances related to the commission of the offence

(a) In determining the Proportionate Sentence Range, pursuant to Article 40c(a), the Court shall consider the circumstances related to the commission of the offence, as delineated below, [and the degree to which they are present], if the Court believes that they affect the seriousness of the offence and the offender's level of culpability:
  (1) the preparation that preceded the commission of the offence;
  (2) the offender's role in the commission of an offence committed by a number of perpetrators, and the degree to which another person influenced the offender in the commission of the offence;
  (3) the harm that was anticipated as a result of the commission of the offence;
  (4) the harm that was caused as a result of the commission of the offence;
  (5) the offender's culpability as manifested in the reasons that brought the offender to commit the offence;
  (6) the offender's ability to understand what he does, the illegitimate nature of his action, or the significance of his action, including as a consequence of his age;
  (7) the offender's ability to abstain from committing the act, and his control over his actions, including as a result of provocation;

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(8) the offender's psychological distress as a result of his abuse at the hands of the victim;
(9) the proximity to the legal defences to criminal responsibility as set out in Section B, Chapter 5–1;
(10) the cruelty, violence, or abuse of the victim, or the exploitation of the victim;
(11) the offender's abuse of his power or abuse of his status, or the exploitation of his relationship with the victim.

(b) The Court shall consider circumstances (a)(6)–(9) only if the Court believes that they mitigate the seriousness of the offence and the offender's culpability, and shall consider circumstances (a)(10) and (11) only if the Court believes that they aggravate the seriousness of the offence and the offender's culpability.

40j Proof

(a) The Court shall determine the existence of circumstances related to the commission of the offence based on evidence brought before the Court during the trial stage [i.e. not the sentencing stage];
(b) Subsection (a) notwithstanding –
(1) the offender may adduce evidence during the sentencing stage, so long as the evidence does not contradict his claims made during the trial stage; both parties may bring evidence during the sentencing stage if the law requires it;
(2) the Court may, at the request of one of the parties, allow the parties to adduce evidence during the sentencing stage, if it is convinced that it was not possible to adduce it during the trial stage, or if it will cause an obstruction of justice.
(c) The Court shall apply the reasonable doubt standard of proof for aggravating circumstances, and the civil [balance of probabilities] standard of proof for mitigating circumstances.
(d) Subsection (b)(2) notwithstanding – if the offender pleaded guilty to the facts set out in the indictment, whether before evidence was brought before the Court or after, the indictment shall include all the facts and circumstances related to the commission of the offence.

40k Circumstances unrelated to the commission of the offence

(a) In deciding the offender's sentence [within the Proportionate Sentence Range], pursuant to Article 40c(b), the Court may consider circumstances unrelated to the commission of the offence, as delineated below, and the degree to which they occur, if the Court believes that it is appropriate to take them into consideration, and so long as the sentence does not deviate from the Proportionate Sentence Range:
(1) the harmful impact of the punishment on the offender, including as a consequence of his age;
(2) the harmful impact of the punishment on the offender's family;
(3) the harms that occurred to the offender as a result of the commission of the offence and his conviction;
(4) whether the offender took responsibility for his actions, and the degree to which he has become, or is making an effort to become, law-abiding;
(5) the effort that the offender made to 'fix' the consequences of his offence, and to compensate for the harm he caused;
(6) the offender's cooperation with law enforcement agencies; however, the court shall not penalise the offender for pleading 'not guilty' and going to trial;
(7) the offender's good behaviour and his contribution to society;
(8) the offender's difficult life circumstances, which affected the commission of the offence;
(9) the behaviour of the enforcement agencies;
(10) the time that has elapsed since the commission of the offence;
(11) the offender's previous criminal convictions or lack thereof.

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40l Additional Circumstances

Notwithstanding the provisions of Articles 40i and 40k, the Court may consider additional circumstances related to the commission of the offence in order to determine the Proportionate Sentence Range and may consider additional circumstances unrelated to the commission of the offence in order to determine the offender's sentence.

40m Multiple Offences

(a) If the offender is convicted of a number of offences for actions that constitute one episode, the Court shall determine a single Proportionate Sentence Range for the entire episode, and will impose one sentence for all the offences in that episode.

(b) If the offender is convicted of a number of offences for actions that constitute numerous episodes, the Court shall determine one Proportionate Sentence Range for each episode separately, and may then impose one sentence for all the offences together, or may decide upon separate sentences for each episode; if the Court decides upon separate sentences for each episode, the Court shall determine whether the sentences shall be served concurrently or consecutively.

(c) When determining the sentence pursuant to this Article, the Court shall consider, inter alia, the number of offences, their frequency, and the relationship between them, and will maintain a proportional relationship between the seriousness of the offence committed by the offender and the degree of his culpability, and the type and severity of the punishment, including the length of imprisonment.

40n Duty of court to explain sentence

Any court passing sentence on an offender must state and detail its reasons for its determination, including, inter alia:

(1) the determination of the Proportionate Sentence Range pursuant to the guiding principle, and the circumstances related to the commission of the offence which it considered in determining the Proportionate Sentence Range;

(2) the decision of the appropriate sentence for the offender [within the Proportionate Sentence Range], and the circumstances unrelated to the commission of the offence which it considered in determining the appropriate sentence;

(3) any deviation from the Proportionate Sentence Range for purposes of rehabilitation or the protection of public safety, and the reasons for such deviation;

(4) the method by which it determined the offender's sentence for multiple offences.

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