

PLEA BARGAINS IN APPELLATE COURTS WHICH NULLIFY THE NORMATIVE RULINGS OF TRIAL COURTS: STOP THE TIDAL POTENTIAL

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Recently, we can trace several examples of normative plea bargains in the appellate courts. Thus, in cases where the defendant was acquitted in the trial court and an appeal was filed by the prosecution, the parties reach a plea bargain which states as follows: the acquittal will remain intact, but the *normative* holdings of the trial court, which trouble the prosecution, shall be nullified. The appellate court, satisfied by the parties' agreement, validates the plea bargain. According to the article, this is a dangerous development, and one should stop the tidal potential. It is an unworthy development when considering positive law and normative law alike.

These agreements deviate from positive law, which regards substantial criminal law to be cogent; in addition, in this kind of plea bargain the parties' consent is attributed greater weight than in ordinary plea bargains as far as facts, criminal responsibility and punishment. In the latter type of agreement, the parties' consent does not suffice for validation and an independent court's inquiry of the agreement is demanded. The recent development is not welcome from the normative perspective either. Although the border line in criminal law between substantial and procedural law is blurred, it still needs must still be preserved, due to its cogent aspects, which reflect delicate constitutional balances, the determination of which should not be entrusted to the accused and to the prosecution. Entrusting the development of substantial criminal law to the parties will result in distorted evolution due to the fundamental difference between the prosecution (which is a "repeat player") and the accused (who is a "one shotter"). The defendant, by definition, will not object to the nullification of the normative holdings of the trial court as long as the acquittal still stands, while the prosecution considers not only the results to be important but also the legal rules, and thus it will be interested in nullifying the normative rulings that could make future litigation more difficult. So, if normative plea bargains of the kind mentioned above will be respected, the result would be a gross over nullification of normative rulings,

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which limits criminal liability and this distortion will adversely affect the development of substantive criminal law.

The legislator should address this issue in prospective discussions of the pending plea bargains bill. Those discussions should include the topic of plea bargains at the appellate stage, and set the border lines of the issues that cannot be agreed upon in plea bargains.

II

A PLEA BARGAIN IS A PLEA BARGAIN: PAST, PRESENT AND FUTURE

MICHAL TAMIR & YONI LIVNI

In the Israeli legal system, plea bargains currently serve as a central tool in law enforcement, both in terms of numbers and of substance. Nevertheless, the law has yet to determine what the normative status of the plea bargain is, nor has it decided under which category of law it should be classified. A number of rulings have explored the extent to which the plea bargain conforms to one of the existing legal structures: the “contract model”, “governmental model” or “authority-contractual model”, in an attempt to find it a proper “home”. However, these efforts have become an obstacle because forcing a uniquely distinct institution to resemble an existing one ignores its unique nature and may even lead to undesirable consequences resulting from such categorization

The authors will argue that a plea bargain is a plea bargain. It is a unique legal structure, to which three legal norms apply: criminal law, public law and private law. Consequently, the attempts to categorize it are unnecessary. In the view of the authors, it is both desirable and proper to reopen the issue and establish a coherent and orderly structure for its regulation. This means that it is necessary to determine standards from which the rules for this unique institution may be derived

The authors will address the problem of the discrepancies between the growing dimension of this legal institution, the growing criticism against it and the lack of comprehensive legal treatment. They claim that the 2010 bill – which seeks to enshrine the institution of the plea bargain in law – could be an opportunity to contend with this problem. However, the bill as proposed misses the mark, since it does not define the goals of the plea bargain and the hierarchies among them and lacks clear guidelines to govern the actions of the relevant parties in concrete situations. At the end of the paper, the authors illustrate this by suggesting the goals that should guide plea bargains and accordingly, the rules that should guide the prosecution and the courts.

PLEA BARGAINING AND PAROLE DECISION MAKING PROCESS

NETANEL DAGAN

The article analyzes the status of the decision making process surrounding plea bargains in Israel's Parole Board. While considering the nature of plea bargains as one of its considerations, the Parole Board reflects retributive (just punishment) or preventive aims. The article points out difficulties in the current positive legal policy in terms of due process, minimizing plea bargain utilities and the proper matching between decision makers and decision-making regarding the willingness of parole boards to "second guess" the court's just punishment or fact-finding determinations. Furthermore, the article suggests possible amendments regarding the proposed Criminal Procedure Bill (Amendment No. 65) (plea bargain) 5770-2010.

DISCLAIMER OF AN INHERITANCE BY AN INSOLVENT DEBT-RIDDEN HEIR

SHMUEL SHILO

May an heir who has no assets be permitted to disclaim an inheritance when he is in debt to others, thus preventing his creditors from collecting their debts? According to section 6 of the Succession Law – 1965, which deals with disclaimer of an inheritance, it appears that even in such a situation a disclaimer is valid. This was the accepted view, which was also based on the Supreme Court decision in *Shlacter v. Harash*. In 1995, the tables turned and in *Sittin v. Sittin* the Supreme Court ruled that in such a situation the heir-debtor would not be allowed to disclaim. This decision has been followed in later court decisions, including other Supreme Court decisions.

This article casts doubt on the *Sittin* decision. It discusses the reasons that led the court to come to its conclusions and even adds some further arguments in support of the decision. The author then presents and analyzes arguments against the reasoning in *Sittin*. He admits that there are good arguments both in favor and against what was decided in *Sittin* but concludes that despite some good reasons to agree with *Sittin*, the decision is wrong. Among the reasons given by the author for his conclusion is that the *Sittin* court's use of American law regarding disclaimers is flawed. The law in the United States usually allows a debtor-heir to disclaim. The *Sittin* court erred in its understanding of the law in the United States. The article discusses questions of interpretation of the law and legal policy.

ADVANCE NOTICE OF TERMINATION OF DISTRIBUTION
AGREEMENT: AMBIGUITY IN PRESENT LAW AND THE NEED
FOR LEGISLATION

URI BENOLIEL

In this article I will argue that as the present law stands, and given the lack of legislation, courts' decisions regarding the notice requirement in legal disputes are largely ambiguous. The ambiguity is apparent in four central issues: the legal purpose of the notice requirement, the identity of the facts that are considered while fixing the length of the notice requirement, the methods applied by courts while calculating the damages in circumstances when adequate notice was not given, and the status of the enforcement remedy when adequate notice was not given. This article therefore calls for clear legislation of the advance notice requirement that governs the current law of distribution agreement termination.

EITHER MINE OR DEAD – FEMICIDE IN ISRAEL AND A
LEGISLATIVE PROPOSAL TO AMEND SECTION 301 OF THE
ISRAELI PENAL CODE

HAVA DAYAN

A diagnostic view of the phenomenon of the murder of women reveals that unique yet common motives for murder are sexual jealousy and/or the female partner's desire to end the intimate relationship. This article deals with the socio-legal problems stemming from the application of the doctrine of provocation, as it is statutorily entrenched in section 301 of the Israeli Penal Code, which consequently affords a criminal defence. Although writers have already criticized the mitigation of criminal liability based on the doctrine of provocation, this article offers a real contribution to the cause of dealing with intimate partner homicides both because it focuses on this issue specifically and because it presents a concrete proposal for the legislative amendment of the Israeli Penal Code in this regard. The proposed amendment focuses on Section 301 of the Israeli Penal Code and offers a discrete socio-legal perspective of the unique criminological characteristics of intimate partner homicides (relating to the circumstances, motives and characteristics of the murderers). The legislative proposal offered in this article contains unique and innovative features, as well as a formula that provides a socio-legal response which is targeted and tailored to issues that have not yet been adequately addressed by legislative proposals in this context to date.