

Suspended Sentence Activating Policy – An Empirical Study

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Abstract

The aim of this study is to examine the suspended sentence activating policy in Israel and to examine the extent to which the courts activate the suspended sentence according to the legislature's intent.

For the purpose of this examination, two research questions have been proposed: The first question aims to examine whether the existence of an activated suspended sentence affects the imposed sentence for a further offense (breach offense). This question focuses on the implementation of clause 56 on Hok HaOnshin (Penal Law), which regulates the authority of the courts to extend the suspension term instead of activating it under the conditions prescribed by the law. This authority was first granted in 1963, with the purpose of finding a solution for the many cases in which a minor offense lead to activating a long and disproportionate suspended sentence. In order to ensure that this authority would be carried out sparingly and only on rare cases, the legislature determined restrictive and cumulative conditions that only when those specific conditions were present were courts authorized to prolong the suspension period after a breach. One of the conditions being that the court does not impose a prison sentence for the breach offense. This requirement is intended to ensure that this use of power by the courts would only be used if the breach offense is minor in its gravity and does not justify a prison sentence. Previous studies that dealt with the limitation of the judicial discretion in punishment by introducing mandatory minimum penalties have shown that courts have reservations about laws that limit their discretion in determining punishment, especially when implementing the provisions of those laws will culminate in an unjust outcome and a distortion of justice. A major consequence of this is an attempt to circumvent these laws. Based on these studies, the hypothesis set was that judges will not only use this authority on a high percentage of cases but will especially refrain from imposing imprisonment for a breach offense, even when the punishment is the appropriate penalty for that offense. This is in order to circumvent the obligation of activating the suspended sentence. This implies that a defendant with a criminal record, but without an activated suspended sentence, has a higher probability of being sentenced to imprisonment than defendants with an activated suspended sentence, *ceteris paribus*. To test this hypothesis a comparison was made between groups of Israeli adult defendants with and without an activated suspended sentence (where the court has the authority to extend the suspended

sentence) that were convicted in the magistrates' courts with their sentences being given between 2014-2016. In order to minimize the bias in the results due to the variance between the two groups, the PSM (Propensity Score Matching) method was utilized. Couples of subjects from both groups were matched when the difference on the propensity score between them fell within the predetermined 'bandwidth' (caliper). The findings illustrate that when all the offenses were included together in the analysis, the probability of imposed imprisonment on defendants with an activated suspended sentence was 1.2 times higher than the probability of the same penalty being imposed on defendants without an activated suspended sentence. This finding is consistent with the view that the existence of a suspended sentence increases the likelihood of imprisonment when the defendant breaches the condition by committing a further offense. However, after adding the principle offense severity variable (Offense Severity) and the interaction variable between offense severity variable and an activated suspended sentence to the regression, it was found that in severe offenses ($OS \geq .66$) where imprisonment sentence is the common sentence, the probability of imposed imprisonment is 1.5 times *lower* than if the defendant was subjected to an activated suspended sentence. In contrast, when the committed offense is minor, i.e. an offense that does not typically result in incarceration, the defendants without an activated suspended sentence have a greater chance of avoiding a prison sentence. In this regard the research hypothesis has been confirmed for severe offenses.

The main consequence of this result elucidates that suspended sentences have failed to achieve proportionality between the severity of both the offense and the punishment. While it was expected that the higher severity of the offense the more likely a severe sentence be imposed, results indicated that suspended sentences mitigate and weaken this impact. Additionally, while suspended sentences are supposed to be a sword that is hanged over the head of defendants, this study demonstrates that suspended sentences do not necessarily increase specific deterrence. On the contrary, it might destabilize and undermine it. This is supported by the fact that a defendant with an activated suspended sentence convicted of a severe offense is less likely to be incarcerated than a similarly situated defendant without an activated suspended sentence.

Another key outcome is that the likelihood of judges imposing a sentence resulting in imprisonment may decline when defendants face a minimum sentence (in the current study- the existence of a suspended sentence). At least in those cases in which the judges can avoid imposing a sentence leading to imprisonment.

The second research question aims to examine the effect of the length of the suspended sentence on the activating policy. Studies have found that the longer the period of a defendant's mandatory minimum sentence, the greater the leniency in their imprisonment duration. The hypothesis being as follows: the longer the suspended sentence, the higher the tendency of the court in extending the period of suspension and thus avoiding imposing a sentence resulting in incarceration. It was also supposed that in a case resulting in the court activating the suspended sentence, the manner of activation will be an exception to the rule, i.e. the longer the suspended sentence the greater the courts' tendency to activate the suspended sentence concurrently in full or in part. The findings of multiple logistic regression and multinomial regression analysis have confirmed both hypotheses, as it was found that the longer the term of suspended sentence, the lower the probability of an imposed imprisonment as well as a lower probability of cumulatively activating the suspended sentence. This tendency was observed at various levels of the offense severity variable.

The main conclusion from the results of this question is that the legislature's attempt to harshen punishment by constantly increasing the severity of the minimum penalties (in cases where an activated suspended sentence is considered a form of minimum punishment) may have an adverse response and result in a more lenient sentence rather than a more severe one. The justification for this is a judge's preference to refrain from issuing a prison sentence which they consider to be disproportionate and unjust in the circumstances of the case.

Descriptive statistics analysis of the sample also revealed that the courts' policy of activating a suspended sentence was not in accordance with the norm but rather according an exception of the rule when it was found that the less common alternative was the cumulative operation of the condition. The cumulative activation rate was about 13% while the most common alternative was the extension of the condition, with the extension rate in the sample being around 37%.

The conclusion that must be drawn from analyzing the findings of the two research questions is that the activating policy of a suspended sentence in Israel is contrary to the legislature's intention. In many cases, it was found that instead of activating the suspended sentence after violating the condition of suspension, at the very least the defendant carries the conditional term of imprisonment behind bars, the activated suspended sentence is therefore favorable to the defendant and is considered a reward instead of punishment.

This policy has a negative consequence on sentencing in Israel especially as it creates a divergence in the penalty policy. This polarity is violating the adequacy principle, which requires proportionality between the severity of the offense and the severity of the imposed punishment. It also undermines the fairness of the sentencing process as it causes discrimination between types of defendants in the probability to be sentenced to imprisonment, the only difference being the existence or absence of an activated suspended sentence.

Contrary to other judicial systems which are either in favor of phasing out a suspended sentence (probation?) as a sentencing option or have already rescinded it completely, the main recommendation in this study is, the possibility of diminishing the negative consequences in the activating of a suspended sentence policy by changing the judges' thinking patterns towards imposing suspended sentences in Israel. The measures for which are described in detail in the last chapter of this work.