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Active Repentance as an Incentivizing Tool of Criminal Law: Ukrainian Model

1. Introduction

For years one of the most fundamental questions of criminal law remains at the center of debate. What is the primary aim of criminal law, or, to put it simply, why do we need criminal law at all? Deterrence theorists claim that the primary justification of criminal legislation is to prevent and reduce crime.² At the same time, retributivists advance the view that the primary aim of criminal legislation is to punish the offender, to give the wrongdoer the suffering she deserves.³ This discussion in legal scholarship is frequently intertwined with the debate about the justification of punishment. In his famous *Prolegomenon*, H.L.A. Hart attempted

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² Bonesana-Beccaria, C. (2017). *An Essay on Crimes and Punishments, Translated From the Italian: With a Commentary, Attributed to Mons. De Voltaire, Translated From the French (Classic Reprint)*. Forgotten Books. 8; Ball, J.C. (1955). The Deterrence Concept in Criminology and Law. *The Journal of Criminal Law, Criminology, and Police Science*, 46(3), 347–354. <https://doi.org/10.2307/1139417>.

³ Gerard V. Bradley, "Retribution: The Central Aim of Punishment", 27 *Harv. J.L. & Pub. Pol'y* 19 (2003–2004). Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/495; Bronsteen, John (2009) "Retribution's Role", *Indiana Law Journal*: Vol. 84 : Iss. 4 , Article 3. Available at: <https://www.repository.law.indiana.edu/ilj/vol84/iss4/3>; Richard Burgh, "Do the Guilty Deserve Punishment?" *The Journal of Philosophy*, 79 (1982), pp. 197–198.

to separate the two questions and concluded that the expressivist and deterrence theories should dominate when we justify the existence of criminal legislation. When we determine that something is a crime, we do two things: (1) Tag some types of action as not-to-be-done and (2) minimize the frequency of which acts of this sort are done. In Hart's view, the justification for inflicting limitations and restraints on a wrongdoer is retributive. The criminal justice system inflicts punishment not to deter a crime but to give a wrongdoer what she deserves.⁴

Hart's claims have been much debated since then, especially regarding the justification of punishment, but it gives us the necessary theoretical foundation for the next question. Suppose the primary aim of criminal legislation is to mark certain types of people's behavior as criminal and minimize crime. Does it mean that we always need to inflict punishment on a wrongdoer? Might it be the case that even without sentencing an offender we might achieve the primary goal of reducing the designated crime? Moreover, is it possible that punishment is not the most effective way to protect our communities from what we label as crime and reduce the harm it brings to our societies?

State of study. Throughout the last thirty years, the concept of restorative justice has expanded its influence.⁵ It has been implemented in law, policies, and practices. The expansion of restorative justice brought scholars and policy-makers from around the globe to reconsider the means of criminal law in light of its primary goal of reducing crime. The restorative justice approach aims to bring the victim to the center

⁴ Hart, H.L.A. (2009), *PROLEGOMENON TO THE PRINCIPLES OF PUNISHMENT*. Oxford Scholarship Online. <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199534777.001.0001/acprof-9780199534777-chapter-1>.

⁵ European best practices of restorative justice in criminal procedure (2010). <http://restorativejustice.org/rj-library/european-best-practices-of-restorative-justice-in-criminal-procedure/10121/#sthash.FsKX9yJD.dpbs>; Restorative Justice – A New Paradigm in Criminal Law? (Vol. 6, Issue 2). (1998). Brill. <https://doi.org/10.1163/157181798x00148>; Von Hirsch, A., Roberts, J., Bottoms, A.E., Roach, K., & Schiff, M. (2003), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* Oxford and Portland, ON: Hart Publishing.; Sitarz Olga, Jaworska-Wieloch Anna, Bek Dominika. (2019). Can criminal law instruments implement the concept of restorative justice?, *International Journal of Forensic Sciences*. Vol. 4, Iss. 2 (2019), No 166. DOI 10.23880/ijfsc-16000166.

of criminal justice, not only the offender. The core idea is that it is not enough, or not even always necessary, to punish the offender; in order to reach a just outcome it is more important to prevent, minimize or redress the harm inflicted on a victim as the result of crime. In light of these particular developments in law, the legal concept of active repentance in criminal law now appears to be a valuable notion regarding how to bridge the divide between the perpetrator and victim of a crime.

Although restorative justice is a fairly recent approach to the reform of criminal justice systems, rules that require or allow the use of active repentance of a perpetrator as a mitigating circumstance in sentencing have been known to criminal law for quite a while. Criminal legislation in many European countries is structured in a way that incentivizes the offender to show remorse and compensate the harm done to the victim. These elements enable the judiciary to mitigate the punishment, release a repentant perpetrator from serving a sentence, or even exculpate the perpetrator entirely. However, the application of active repentance as a mitigating factor in Western European countries is mostly limited to specific crimes or otherwise minimally affects criminal liability.

Statement of purpose of the article. In light of the abovementioned, the Ukrainian model of active repentance in criminal law might present interesting lessons to criminal justice reformers, on the broad application of this legal institution.

2. Ukrainian approach to active repentance

2.1. Preliminary notes

The Ukrainian approach to active repentance presents an interesting study. Before jumping to its peculiarities, it should be noted that Ukrainian criminal legislation retains many features of the post-soviet approach to law-making and legal application. The Criminal Code is seen as a set of clear-cut conditions and rules, and its application presents a set of algorithmic operations. Put simply, the law requires certain conditions to be met, and the role of a judge is to establish whether these conditions are present. Once the judge finds that a factual pattern of behavior matches a description in law, there is not much room for further

judicial discretion. The judge either must or may make certain decisions regarding the application of law, but the scope of these decisions is very limited in comparison to common law systems.

The noteworthy peculiarity of active repentance under Ukrainian criminal legislation is that the law incentivizes offenders to show remorse at every stage after committing a crime: during pre-trial investigation, during trial, while serving a punishment and even after the punishment while the person is still subjected to certain limitations connected with criminal record. Therefore, the incentive for an offender to be penitent and “undo the harm” remains present all times of interaction with the criminal justice system. It should also be noted that active repentance under Ukrainian law is associated only with completed, but unsuccessful attempts to commit a crime, and with post-perpetration behavior of an offender. Similar kinds of behavior that happen before the commission of a crime, at the stages of perpetration and attempt, are mostly covered by the doctrine of voluntary abandonment. Active repentance may also take place if the crime was not committed, but only for reasons that are totally unrelated to offender’s voluntary decision to withdraw from the crime (e.g., a perpetrator was detained by law enforcement during the preparation or attempt to commit a crime). Remorse in such cases is assessed by the same rules as post-perpetration repentance.

The Criminal Code of Ukraine does not provide a definition of active repentance but instead identifies elements through which it manifests itself. These elements are (a) sincere remorse of the offender, (b) full confession (self-report), (c) active facilitation of the detection of the offense, (d) voluntary compensation of the losses or repairing the damages inflicted, (e) providing medical or other aid to the injured person after committing the offense. These elements, or types of behavior, however, can show up in different stages of the criminal proceeding and, thus, play a different role in the kind and degree of leniency that the state gives to a perpetrator.

2.2. Pre-conviction active repentance

The “classic” form of active repentance takes place after commission of a crime, but before a criminal trial. Art. 45 of the CCU provides that

a person who has committed a criminal misdemeanor or minor negligent or reckless crime for the first time shall be exempt from criminal liability if, upon committing that offense, he/she sincerely repented, actively facilitated the detection of the crime, and fully compensated for the losses or repaired the inflicted damage.⁶ This is the strongest incentive to undo harm that Ukrainian criminal legislation provides. To understand how active repentance operates under Art. 45 of the CCU, it is necessary to take a closer look at its prerequisites and elements.

1) Preconditions. Notably, the law broadly defines which crimes are eligible for exemption from criminal liability via repentance after commission of the crime. This exemption is available after commission of all criminal misdemeanors (offenses, punishable by penalties less severe than imprisonment, e.g., a fine, community service, arrest for up to 6 months, restraint of freedom, etc.) and for minor *negligent* or *reckless* crimes (punishable by imprisonment up to five years or fines up to 10,000 tax-free allowances)⁷. As a result, this exemption is widely applicable to offenders that commit the majority of common crimes, such as theft, petty fraud, minor injuries, etc. However, corruption crimes, even those that are being defined by law as misdemeanors, are not subject to the exemption of criminal liability found in Art. 45 of the CCU, mainly due to Ukraine's ongoing struggle with corruption and efforts of the government to reduce vastly pervasive corruption in society.

2) Elements of repentance. In order to get an exemption from criminal liability a perpetrator should meet three conditions: she must (a) sincerely repent, (b) have actively facilitated the detection of the crime, and (c) have fully compensated for the losses or repaired the inflicted damage. Only having met all three conditions above grants the exemption. However, if a committed crime did not result in any losses or damage (as in the case of an unsuccessful attempt), then the lack of a compensation does not preclude the exemption.

⁶ St. 45 Kryminal'noho Kodeksu Ukrainy vid 5 kvitnia 2001 roku [Art. 45 of the Criminal Code of Ukraine, adopted on April 5, 2001], <https://zakon.rada.gov.ua/laws/show/2341-14#Text> [in Ukrainian]

⁷ A special unit measurement used by the government for the purposes of applying criminal law and welfare legislation; 1 tax-free allowance equals 17 Ukrainian hryvnia.

Sincere remorse is probably the element of active repentance that is most disputed by lawyers and legal scholars. The common understanding is that sincere remorse involves a real, genuine, and not merely pretended confession to a certain crime, candid regret about it and the condemnation of one's personal behavior.⁸ Recently the Supreme Court has held that sincere remorse shall be based on a person's proper critical appraisal of his wrongful conduct, self-condemnation, and desire to rectify the damage and to be held criminally responsible, and that these circumstances must be reflected in the materials of the criminal proceedings.⁹ It is doubtful that this definition has added anything but more confusion to the long-lasting debate on whether a judge is well fit to identify the depth and earnestness of the remorse expressed by an offender, and regarding the objective criteria that might be used for this judgement. Despite all the doubts raised in scholarship, it seems that the legislature has decided in favor of the capacity of judiciary to assess the degree of sincerity of offender's self-condemnation. In its further decisions the Supreme Court has explained that the expression of a negative assessment of the offense committed and of sympathy for the victim may be counted as evidence of sincere remorse, but did not address whether the presence of these factors alone is sufficient.¹⁰

Active facilitation of the detection of the crime has been consistently understood to be any actions that are intended to assist the pre-trial

⁸ Kryminal"nyj kodeks Ukrayiny. Naukovo-praktychnyj komentar [The Criminal Code of Ukraine: scientific and practical commentary] .za zah. red. V. Ya. Taciya, V. P. Pshonky, V. I. Borysova, V. I. Tyutyuhina. Kharkiv : Pravo, 2013. V. 1 : Zahal"na chastyna / Yu. V. Baulin, V. I. Borysov, V. I. Tyutyuhin. 2013. 376 p. at 178–180 [in Ukrainian]; Postanova Plenumu Verkhovnoho Sudu Ukrayiny Pro praktyku zastosuvannya sudamy Ukrayiny zakonodavstva pro zvil"nennya osoby vid kryminal"noyi vidpovidal"nosti [The holding of the Plenum of the Supreme Court of Ukraine On the practice of application by the courts of Ukraine of the legislation on release of a person from criminal liability] dated 23.12.2005 No 12 <https://zakon.rada.gov.ua/laws/show/v0012700-05?lang=en#Text> [in Ukrainian]

⁹ Postanova Verkhovnoho Sudu vid 30 zhovtnya 2018 roku u spravi No 559/1037/16-k [The holding of the Supreme Court dated 30.10.2018 case No 559/1037/16-k] <http://reyestr.court.gov.ua/Review/77654034> [in Ukrainian]

¹⁰ Postanova Verkhovnoho Sudu vid 10 lyutoho 2020 roku u spravi № 643/13256/17 [The holding of the Supreme Court dated 10.02.2020 case No 643/13256/17] <http://www.reyestr.court.gov.ua/Review/87640666> [in Ukrainian]

investigation authorities in identifying all the details necessary to solve a crime, as well as disclosing the identity of all known accomplices and accessories. The offender's refusal to facilitate the detection of the crime, to reveal co-conspirators or to collaborate with law enforcement disqualifies his exemption from criminal liability.

The last element of active repentance requires a full compensation for sustained losses or inflicted damages to be done to the victim.¹¹ The offender, therefore, has to provide a full reimbursement of any physical, moral or property damage sustained by the victim. In the case of property damage, an offender either has to provide restitution or repairment of the goods, or a monetary replacement. The compensation must be done voluntarily. If compensation is done under certain conditions, e.g., a written statement of forgiveness made by the victim or a waiver of any future claims against that the perpetrator, then this condition is not met and an exemption may not be granted. However, the law does not require the perpetrator to make compensation personally: parents of a minor offender, relatives, friends are allowed to rectify on behalf of defendant. This emphasizes that redressing the wrong done to a victim is one of the core state interests in solving the conflict between the offender and the victim. Nonetheless, the offender must initiate the compensation, and others may provide compensation on her behalf only if he is unable to rectify the harm on his own (due to the lack of funds or being in custody).

3) Timeliness. A classic form of active repentance under Ukrainian law takes place after commission of a crime but before trial. This makes the Ukrainian model significantly distinct from the Austrian model (the oldest in Europe), in which repentance has to take place before "the authority was aware of the culpability."¹² The incentive to undo the harm

¹¹ Postanova Plenumu Verkhovnoho Sudu Ukrayiny Pro praktyku zastosuvannya sudamy Ukrayiny zakonodavstva pro zvil»nennya osoby vid kryminal»noyi vidpovidal»nosti (par. 3 sec. 5) [The holding of the Plenum of the Supreme Court of Ukraine On the practice of application by the courts of Ukraine of the legislation on release of a person from criminal liability] dated 23.12.2005, No 12 <https://zakon.rada.gov.ua/laws/show/v0012700-05?lang=en#Text> [in Ukrainian]

¹² Soyer Richard, Pollak Sergio (2017). Active Repentance. Basic questions regarding the timeliness and voluntary nature of damage compensation *SIAC-Journal – Journal for Police Science and Practice* (International Edition Vol. 7), pp. 32–43. at p. 35

and show regret for committing a crime remains present at all times during the pre-trial investigation, even after law enforcement has launched criminal proceedings and identified the probable perpetrator. Moreover, the law leaves it open for an offender to repent even during trial, but before the court hearing is closed and the judge goes to chambers to deliberate on the final judgement.

4) Legal consequences. When the preconditions are present, and all the elements (forms) of active repentance have timely taken place, it is the *obligation* of the judge to declare a defendant exempt from criminal liability. The judge acts like a factfinder, but once all the necessary facts are established there is no more room for discretion. The declaration, however, happens without delivering a verdict; therefore, from a legal perspective the defendant is neither found guilty of committing a crime, nor acquitted. Once the judge has applied Art. 45 of the CCU, all burdens of the criminal proceeding are void and the perpetrator is treated as if he has never committed the crime. Neither punishment nor any other collateral consequences of criminal conviction may be applied to the offender.

The Ukrainian criminal legislation also encourages direct reconciliation between the victim and the offender. Reconciliation grants another, separate ground for exemption from criminal liability and is a strong manifestation of restorative justice in criminal legislation. However, reconciliation between parties is not treated as active repentance under Ukrainian law, and therefore it is left outside of our present review.

However, there is another question that we have not yet answered: does pre-conviction active repentance has any meaningful significance in cases where the preconditions for the exemption of criminal liability are not met? Put simply, does active repentance matter if the crime committed by the offender is neither a misdemeanor nor a negligent or reckless minor crime, but instead a graver offense? The answer is affirmative.

The CCU treats all the abovementioned elements of active repentance as mitigating circumstances that the court has to account for during sentencing. The law does not explicitly provide how much the punishment should be mitigated in case of mitigating circumstances – this is left as a matter of judicial discretion. Yet if (a) sincere remorse, full confession and compensation of damages are present, and (b) there are

no aggravating circumstances, then the court *may not* impose a punishment that exceeds a period of two thirds of the maximum term of the most severe punishment provided for by law. At the same time, the active repentance of the offender gives the judge the opportunity to sentence the offender to a punishment that is even less severe than the range provided for by the law (Art. 69 of the CCU).

At the same time, even if court deems the imposition of punishment necessary, it may immediately release the repentant convict from serving it on probation (Article 75 of the Criminal Code) or imposing coercive educational measures to a minor offender (Part 1 of Article 105 of the Criminal Code). Thus, the legislation provides for a variety of options by which the judge must or may account for the remorse expressed by the offender in a post-commission stage. The incentive for repentance and full compensation to the victim remains present all the time throughout criminal proceeding.

2.3. Post-conviction active repentance

Active repentance which occurs after the conviction also matters for the application of Ukrainian criminal legislation. The law motivates the offender to reconsider and condemn her criminal conduct in the course of reconciliation, and to reach out to the victim for forgiveness and provision of compensation while she serves the punishment. Almost every factor that is considered an element of active repentance – the active facilitation of the full detection of the crime, the disclosure and prosecution of other accomplices, assets recovery and voluntary compensation for property and non-pecuniary damages and other actions aimed at compensation for damage caused to the victim – is as likely to happen after conviction as before it. There are two main incentives to repent after conviction that are present in Ukrainian criminal law.

First, post-conviction repentance is one of the factors that might trigger a judicial decision to release the convict on parole (Article 81 of the CCU) or to replace the unserved part of the sentence with more lenient punishment (Article 82 of the CCU), or a decision by the President of Ukraine to pardon the convict (Article 87 of the CCU). In all cases, the decision to release is left to the judicial and Presidential discretion, but

post-conviction active repentance of the offender makes a strong case in favor of release.

Second, according to Ukrainian criminal law, in most cases even after serving a punishment the offender temporarily continues to bear some restrictions connected to his previous criminal conviction. These restrictions, known as collateral consequences of criminal conviction, limit eligibility for public office, limit access to pursuing certain professions and prescribe ongoing administrative oversight. Art. 91 of the CCU provides for the possibility of early expungement of collateral consequences of criminal conviction of a person who, after serving a sentence of restraint of freedom or imprisonment with exemplary conduct and conscientious attitude to work, has proved his correction. The conclusion of such correction, as in the above situations, may be based on the active repentance of the convict.

3. Conclusions

Ukrainian model of active repentance in criminal law is not an outstanding example of restorative justice mainly, because it does not advance the primary goal of reconciliation between the offender on one side, and the victim and wider community on the other. Nonetheless, it presents an important step to introducing a full-fledged restorative justice approach to national criminal law. The most important impact of active repentance is that it aims to align the interests of all parties involved and thus, opens the door for further reconciliation. The offender's interest in avoiding or mitigating punishment and collateral consequences is achieved through the set of incentives that are present all the time of interaction with the criminal justice system. The interest of victim in redress is satisfied through the full compensation of inflicted damages. Finally, the wider community interest in reducing and preventing crime (which is consistent with primary justification of criminal law) is satisfied through both the redress to the victim and the remorse of the offender, which theoretically makes it less likely for her to commit a crime again.

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Summary

The article analyses the Ukrainian model of active repentance in criminal justice through the lens of restorative justice. Restorative justice has incrementally attracted the increasing attention of scholars, legislators, and policymakers across the globe. Ukrainian criminal legislation, representing a combination of post-soviet and Western approaches to criminal justice, offers a remarkable experience.

Unlike many other Western European countries, the Criminal Code of Ukraine creates a strong incentive for an offender to show remorse at every stage of his interaction with the criminal justice system: during the pre-trial inquiry, throughout the trial, while serving punishment and even after the punishment while subjected to certain limitations (criminal record). At every stage,

active repentance of an offender triggers/might trigger the possibility of leniency. This leniency might result in a release from criminal liability, mitigation of the imposed punishment, release the convict on parole or early expungement of collateral consequences of a criminal conviction, etc.

The Criminal Code of Ukraine does not provide a clear demarcation of active repentance. Instead, the law defines it through the inexhaustive list of behavior patterns in which it manifests itself. This approach enables judicial discretion and reduces the formality in the assessment of the acts of an offender.

The main shortcoming of the Ukrainian approach to active repentance is that the reconciliation between the offender, the victim, and the wider community is being advanced poorly.

Keywords: active repentance, restorative justice, release from criminal liability, reconciliation of the perpetrator with the victim, active assistance in disclosure of a crime