

THE ISSUE OF THE COURT'S COMPETENCE TO RELEASE FROM CRIMINAL LIABILITY ON THE BASIS OF ACTIVE REPENTANCE

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Abstract. In this article, the author, taking into account the various approaches developed in legal practice, raises the issue of whether the court can be regarded as an authorized body entitled to exempt a person from criminal liability on the basis of active repentance.

On this matter, the author conducts a corresponding analysis and presents their own approaches.

As a result, the author, also relying on the idea that discretionary criminal prosecution refers to the prosecutor's ability, based on legal criteria and reasoned expediency, not to initiate or to terminate already initiated criminal proceedings, concludes that the existing practical approaches—according to which the court, by virtue of its function of administering justice, is already vested with the right to apply the institution of active repentance—are legally questionable. This includes concerns regarding the proper enforcement of the constitutional chain of “function – body – authority”.

Keywords - *active repentance, prosecutor, discretionary criminal prosecution, court, to release from criminal liability..*

Active repentance is one of the traditional types of exemption from criminal liability provided by criminal legislation. It is aimed at economizing criminal-legal coercion in cases where a person who has committed a crime proves, through post-crime positive behavior, that subjecting them to criminal liability is pointless.

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As noted in theory, through the institution of active repentance, the state enters into a so-called “legal bargain” with the offender—prioritizing not so much the punishment of the offender as the protection of legally safeguarded interests and the prevention of potential future crimes¹. This institution is, in essence, an alternative reaction by the state to the unlawful conduct of the person who committed the crime².

A study of legal practice shows that, due to various approaches formed in reality—among other issues—questions especially arise concerning which subjects are authorized to apply this institution. In particular, whether it is to be applied by the prosecutor only, or also by the court³. Regarding this fundamental issue, it is important to note the following:

Article 6, Part 1 of the Constitution states: “State and local self-government bodies and officials are authorized to perform only those actions for which they are empowered by the Constitution or the law.”

According to Article 12 of the Criminal Procedure Code (CPC): “1. Criminal prosecution must not be initiated, and initiated criminal prosecution shall be terminated if: (...) 12) the person is subject to exemption from criminal liability under the provisions of the General or Special Part of the Criminal Code of the Republic of Armenia. (...)”

According to Part 2 of Article 33 of the same Code: “The court shall exercise other powers in cases provided by this Code.”

Article 35, Part 2 of the CPC states: “The prosecutor is responsible for the legality of initiating, not initiating, and terminating criminal prosecution, the legality of pre-trial proceedings, the legality of applying coercive measures by participants in the process, for identifying circumstances necessary to file a claim in court for protecting public interests, and for the legality of appealing or not appealing a judicial act.”

¹ Tadevosyan, L.Z. The Social Purpose of the Criminal Law Institution of Active Repentance. Vector of Science of TGU, No. 3(3), 2010. Тадевосян Л.З. Социальное назначение уголовно-правового института деятельного раскаяния. Вектор науки ТГУ. № 3 (3). 2010.

² Sargsyan, A.A. Features of Regulating the Institution of Active Repentance in the Criminal Legislation of Certain Foreign Countries. Vector of Science of TGU, No. 1(40), 2020. Саргсян А.А. Особенности регламентации института деятельного раскаяния в уголовном законодательстве некоторых зарубежных стран. Вектор науки ТГУ. № 1 (40). 2020:

³ **The decisions in the following criminal cases:** the decision of the First Instance Court of General Jurisdiction of Lori Province dated October 15, 2024, case no. **ԼԳ-0276/01/23**; the decision of the First Instance Court of General Jurisdiction of Armavir Province dated May 21, 2025, case no. **ԱԳԴ-0129/01/25**; and the decision of the Criminal Court of Appeal dated October 18, 2024, case no. **ԵԳԴ-1/2227/01/23**.

Article 197 of the Criminal Procedure Code of the Republic of Armenia provides: “1. The supervising prosecutor is authorized not to initiate or to terminate criminal prosecution if all the conditions provided in Article 81(1) of the Criminal Code of the Republic of Armenia are present.

2. In the case provided in part 1 of this article, the decision not to initiate or to terminate criminal prosecution is made by the supervising prosecutor on their own initiative, based on the materials of the proceedings or upon the motion of the investigator.”

Article 81 of the Criminal Code states: “1. If a person has committed a crime for the first time, they may be exempted from criminal liability if the act they committed is a minor or medium-gravity crime, they cooperate with the criminal prosecution authorities, do not dispute the act attributed to them, and, in case of caused damage, they have compensated or otherwise settled the damage caused by the crime.”

Based on a **systematic analysis** of the above provisions, we believe that the legislator **has not granted the court** the authority to apply the material legal norm provided by **Article 81** of the Criminal Code, which concerns exemption from criminal liability on the basis of active repentance. This is justified, among other things, by the following reasons:

1. Why can't point 12 of part 1 of Article 12 of the RA Criminal Procedure Code be considered as a procedural (trial-related) mechanism for the implementation by the court of the criminal-legal norm stipulated by Article 81 of the RA Criminal Code regarding release from criminal liability on the grounds of active repentance?

In order to answer the mentioned question, it is first necessary to refer to the relationship between the norms enshrined in point 12 of part 1 of Article 12 and Article 197 of the RA Criminal Procedure Code, both with each other and with the regulations stipulating the norms for release from criminal liability enshrined in Articles 80–83 of the RA Criminal Code.

Thus, from the combined analysis of the legal norms enshrined in part 1 of Article 12 of the RA Criminal Procedure Code and Chapter 12 titled “Release from Criminal Liability” of the RA Criminal Code, it follows that both the grounds provided in part 1 of Article 12 of the RA Criminal Procedure Code for not initiating or terminating initiated criminal prosecution—including point 12 of that same part (the person is subject to release from criminal liability by virtue of the provisions of the general or special part of the RA Criminal Code)—and the legal norms provided in Articles 80, 82, and 83 of Chapter 12 of the General Part of the RA Criminal Code stipulating grounds for release from criminal liability (release

due to voluntary renunciation of the crime, reconciliation between the victim and the perpetrator, expiration of the statute of limitations), **unlike** the legal norm stipulated by Article 81 of the RA Criminal Code regarding release on the basis of active repentance, **are imperative**—meaning, they oblige the competent authority not to initiate criminal prosecution or to terminate it, if already initiated, in the presence of the relevant conditions. In other words, **only** the legal norm on release from criminal liability on the basis of active repentance, stipulated in Article 81 of the RA Criminal Code, is discretionary. Furthermore, among the legal norms of Chapter 12 of the General Part of the RA Criminal Code that define the grounds for release from criminal liability, **only** the legal norm defined in Article 81 of the RA Criminal Code (based on active repentance) has a specific norm in the RA Criminal Procedure Code regulating its application—**Article 197**, titled “Discretionary Criminal Prosecution.”

On this basis, we believe that point 12 of part 1 of Article 12 of the RA Criminal Procedure Code can be considered as a procedural basis for applying the criminal-legal norms stipulated in Articles 80, 82, and 83 of the RA Criminal Code, but **not** for the application of the basis of release due to active repentance. In other words, when any of the grounds defined in part 1 of Article 12 of the RA Criminal Procedure Code excluding criminal prosecution are present, the relevant authorities are **obliged** to make a decision not to initiate or to terminate criminal prosecution. However, **only the prosecutor** has the exclusive discretionary authority not to initiate or to terminate criminal prosecution on the grounds of active repentance.

These conclusions are supported not only by the rules defined in Article 40 of the RA Law “On Normative Legal Acts” regarding the relationship between general and special norms but also by the interpretation of the aforementioned substantive and procedural norms according to Article 41 of the same law.

Therefore, we believe that in order to enforce the criminal-legal norm defined by Article 81 of the RA Criminal Code, the RA Criminal Procedure Code provides **no other** procedural basis besides the regulation defined in Article 197 of the RA Criminal Procedure Code. As for Article 33 of the RA Criminal Procedure Code, which defines the powers of the court, it must be stated that those powers activate other norms, whereas the substantive legal institution in question **does not** have a procedural regulation in the RA Criminal Procedure Code allowing it to be enforced by the court⁴.

⁴ Virab Hambardzumyan. Authorities Empowered to Exempt from Criminal Liability on the Basis of Active Repentance. *Legality, Scientific-Practical Journal of the Prosecutor General’s Office of the Republic of Armenia*, No. 135, 2024. Վիրաբ Համբարձումյան, Գործուն զղջալու հիմքով քրեական պատասխանատվությունից ազատելու լիազորություն ունեցող մարմինները,

Moreover, the conclusion that the power to apply the institution of active repentance defined in Article 81 of the RA Criminal Code is granted **exclusively to the prosecutor** is also supported by a comparative analysis of the relevant legal regulations of the RA Criminal Procedure Code in force before July 1, 2022, and those in force after that date. Specifically, based on the study of the applicable legal norms of the aforementioned codes, it should be noted that the RA Criminal Procedure Code in force **before** July 1, 2022, explicitly granted the power to terminate prosecution based on active repentance **also to the court** (Article 37), whereas the **current** RA Criminal Procedure Code has granted such power **exclusively to the prosecutor** (Article 197). That is, it can be concluded that the will of the legislator has essentially changed in this regard.

Hence, taking the above into account, we **disagree** with the view formed in practice that in cases under judicial proceedings, where the ground defined in point 12 of part 1 of Article 12 of the RA Criminal Procedure Code is present, the court is empowered to apply that circumstance (active repentance) excluding criminal liability. We also do **not accept** the justification for such a view based on the argument that the presence of a special norm cannot be interpreted as a limitation on the application of the basis for release from liability by the court, or on the claim that no subject in criminal procedure can have broader powers than the court and that no basis for release from liability can exist without the court having the power to apply it.

2. The fact that the court does not have the authority to apply the criminal-legal norm stipulated in Article 81 of the RA Criminal Code is also substantiated by the following:

1) As already stated, release from criminal liability on the basis of active repentance is **discretionary** in nature, meaning the existence of the relevant grounds alone is **not sufficient** for the application of this criminal-legal institution. At the same time, taking into account the powers granted to the Prosecutor's Office by the Constitution, the legislator, as the procedural implementation mechanism for this substantive legal norm, has defined in the RA Criminal Procedure Code that it can be implemented **exclusively by the prosecutor**, through the legal regulations related to discretionary prosecution defined in Article 197. It must be stated that **discretionary prosecution** is the prosecutor's opportunity not to initiate or to terminate criminal prosecution on the basis of legal criteria and substantiated

expediency⁵. That is, in an **adversarial criminal trial**, only the **prosecutor** has both the duty to initiate criminal prosecution and the **discretion** to assess its expediency. The principle of expediency essentially provides broad opportunities for the prosecutor to **save resources** and to counteract crime using **alternative, more effective mechanisms**⁶⁷. In parallel, it is necessary to note that the principle of expediency assumes that when solving the question of initiating criminal prosecution, the following factors must be taken into account: the personality of the accused, the nature and circumstances of the act, the damage, the victim's position, and other conditions. That is, the existence of the conditions listed in part 1 of Article 81 of the RA Criminal Code **by itself** cannot indicate that release from criminal liability on that basis is **inevitable**, since the prosecutor, based on other considerations, **may refrain** from exercising this exclusive power. In other words, discretion is a **legal institution** that ensures a flexible and effective criminal prosecution process while respecting the principle of the rule of law. The prosecutor's discretion is more flexible because they assess public interest, the behavior of the accused, and both criminal-legal and social factors.

The above confirms that the constitutional function of initiating criminal prosecution—as well as the component of responsibility enshrined in part 2 of Article 35 of the RA Criminal Procedure Code—includes the **exercise by the prosecutor** of the discretionary prosecution power: to not initiate or to terminate prosecution either on their own initiative based on the materials of the proceedings, or based on the investigator's motion⁸. This also stems from the analysis of the components necessary for the implementation of the criminal-legal institution in question. Specifically, among the conditions required for the application of this institution, the legislator has, among other things, stipulated the condition that the person “**cooperates with the criminal prosecution authorities**.” This condition, by its nature and content, is such that its evaluation, in our view, falls **outside the**

⁵ Problems of Simplification of Criminal Proceedings. Scientific-Practical Manual, Yerevan, 2011. Քրեական դատավարության պարզեցման հիմնախնդիրները, գիտագործական ձեռնարկ, Երևան, 2011, p. 93-105.

⁶ Golovko, L.V. Materials for the Construction of Comparative Criminal Procedure Law: Sources, Evidence, Preliminary Proceedings. // Proceedings of the Faculty of Law. Book – Moscow: Pravovedenie, 2009. Головки Л.В. Материалы к построению сравнительного уголовно-процессуального права: источники, доказательства, предварительное производство// Труды юридического факультета. Кн. – М.: Правоведение, 2009.

⁷ Jacqueline Hodgson & Laurène Soubise, School of Law, University of Warwick, UK, Prosecution in France, file:///C:/Users/user/Downloads/ssrn-2980309%20(1).pdf:

⁸ Similar regulations are also provided for, for example, in the legislation of France or the Netherlands (see the following links: https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000047244643, https://wetten.overheid.nl/BWBR0001903/2020-01-01/#BockTweede_Titeldeell_AfdelingVijfde_Artikel167):

scope of the court's functions, and in the opposite case, the constitutional chain of “function–body–authority” may be disturbed. We believe that even the **present-tense** formulation of the above condition (“cooperates”) should not be given merely formal significance, as it too characterizes the **exercise of the discretionary prosecution power** reserved to the prosecutor.

2) Regarding the issue of whether the prosecutor's decision to reject a motion for release from criminal liability on the basis of active repentance is subject to **judicial appeal** within the framework of procedural guarantees, it must first be noted that the **absence** of the court's authority to apply the criminal-legal norm in question **by itself** constitutes a proper justification for the condition defined in part 2 of Article 299 of the RA Criminal Procedure Code (pre-trial acts are also subject to judicial appeal if their review during the trial is impossible or will clearly deprive the appellant of a real opportunity to effectively protect their legitimate interests). As for the view formed in practice that, under such appeal procedures, a situation might arise where the court, within the framework of judicial guarantees of the legality of pre-trial acts, might review the legality of applying the active repentance institution, whereas during the trial stage the court's powers as the proceeding body would be artificially limited—then it must be stated that the relevant legal structures indicate that within the framework of **judicial guarantees**, the court must review **not the expediency**, but the **legality** of the prosecutor's exercise of authority. That is, at this stage of the proceedings, the court may assess whether the grounds and conditions for active repentance are present or not, or whether the prosecutor's discretion is properly reasoned or not. But **evaluating** whether the **application** of the prosecutor's discretion **is lawful or not**, beyond those criteria, in our view, is **not within the functions of the court**. In other words, by granting the court only the authority to evaluate the **legality** of the prosecutor's exercise of authority, the legal process's **balance** is ensured.

Thus, summarizing the above, we believe that the practical approaches formed—that the court, by virtue of its function to administer justice, is already empowered to apply the institution of active repentance—are problematic from a legal point of view, including in terms of **ensuring the constitutional chain of “function–body–authority.”**

Conflict of Interests

The author declares no ethical issues or conflicts of interest in this research.

Ethical Standards

The author affirms this research did not involve human subjects.

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