

The Attributes of the Waiver of the Right: An Overview from the Point of View of Russian Criminal Proceeding Doctrine

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ABSTRACT

The participants of modern Russian criminal proceedings exercise a wide range of rights. Using them they are able not only to promote their interests but to influence the proceeding and the outcome of the case. The possibility to exercise or to waive the right has no less important than the realization of the right itself. The choice is based on the will of the right holder, who can exercise as well as waive the right. However, the right might not be realized according to the conditions independent of the right holder's will (due to the lack of information about legal rights, absence or prohibition of using this right, etc.) This case cannot be regarded as a waiver of the right as an individual is deprived of the benefits provided by legal provisions. This can negatively influence not only the legal status of an individual, but the whole society and the State, which proclaims itself as law-based. This work is created to justify that the waiver of the right must have the following features: voluntariness, freedom of choice and awareness.

Keywords: *criminal procedure law, to exercise the right, a refusal to exercise a right, a waiver of the right in criminal case.*

1. INTRODUCTION

The participants of modern Russian criminal court proceedings exercise a wide range of rights to promote their interests. The general purpose of the criminal case proceeding is to protect the rights and legal interests of an individual, both the complainant and the prosecuted one (article 6 of the Criminal Procedural Code of the Russian Federation). Legal regulatory mechanism can be effective only in case, if it can take into a full account both public and personal needs, potential abilities of individuals in the society. Legal rights and responsibilities in criminal case proceedings help its participants not only to promote their personal interests, but to disclose basic assumptions of the relationships between the State and an individual [1, p. 38-40]. To realize the right - is to put it into effect, to translate the legal standards in an actual code of behaviour for an individual [2, p. 221]. If the right is not realized then the aims of lawmakers are not fulfilled as well as the whole institution might lose its sense [3, p. 159].

At the same time, as the main social regulator, the right itself must not only control the limits of acceptable behaviour for every individual without exceptions but provide a possibility for the individual to decide the necessity and practicability of the right depending on personal interests. So, the right of choice is impossible without a chance to waive it.

Legal rights of the participants of a criminal proceeding are stated in the code of penal procedure. This means that

their realization as a way of legal instruction implementation depends on the individual's declaration of will. Using his legal rights an individual can promote his personal interest in order to gain some benefit. Subjective law of criminal procedure might not be realized if an individual is unwilling to use it. For instance, a suspected person, an accused person, or a victim have the right to offer evidence or to make an application, but, at the same time, they may have no desire to do that, promoting their personal interests, having their own view on the practicability of the right. This is the difference between a legal right and an obligation, which does not depend on the person's desires and wishes and must be guaranteed by the compulsory force of public individuals and organizations. The overall theory of the rights and criminal law doctrine has formulated a presupposition "if there is no liberty of choice [to realize a subjective right or not – from the author], there is no legal right at all, and its place is taken by obligation" [4, p. 310].

Consequently, having a choice whether to use a legal right or not, has no less value as an opportunity of its implementation. The basis for this right is the will of the holder, the decision whether to realize it or not.

The waiver of the right must be a clear, final and single-entendre act, that has a particular purpose – to reject this right [5, p. 99]. But the right might not be implemented due to the conditions, independent of the right holder's will (a lack of information about the right, a lack of opportunity or a prohibition to use it and etc.). These cases are not considered a waiver of the right as an individual

has no option to use the benefits provided by the legal code.

How can we describe the waiver of the right? To do this we must identify some certain attributes.

2. METHODOLOGY

General academic methods of analysis and synthesis were used to define the standards of a waiver of the legal right in the criminal code, their contents as well as the necessary connections between them.

The conclusions were made implementing induction and deduction methods. In order to write this article the authors used partial-scientific methods: technical (to study the requirements for the waiver of the subjective right) and comparative law research (to explore the attitude of the European Human Rights Court and the Supreme Court of the Russian Federation on the occurrence and content of the waiver of the right).

3. RESULTS AND DISCUSSION

The doctrine of the waiver of the right and its main features was formulated by the judicial practice. According to the American law doctrine waive (vb.): “[To abandon, renounce, or surrender (a claim, privilege, right, etc.); to give up (a right or claim) voluntarily. This means to relinquish or to give up a right, benefit or privilege and implies that the person knows what he is doing” [6]. The enforcements for the waiver have been stated by the European Human Rights Court related to the ability of an individual not to use the rights of fair trial stated by European Convention on Human Rights. As the legal decision of the European Human Rights Court are mandative in the Russian Federation, it is important and necessary to take into consideration the position of the European Human Rights Court to formulate the requirements of the waiver of the right. According to the European Human Rights Court the waiver, firstly, must be expressed clearly and unequivocally, must be stated unconditionally, secondly, must be voluntary, thirdly, must be fully explained and comprehended, fourthly, must be accompanied by minimal procedural guarantees that correspond to the importance of the case, fifthly, it must not be conflicting with any public interest [7, p. 3-7].

A legal academic professor Samantha Besson, analysing the decisional law of the European Human Rights Court, stated legal conditions for admissibility and effectualness of the waiver of the right. The waiver must not be conflicting with any public interest (must be admissible), must be translated unequivocally (expressly or by implication), must be “be fully explained” without any limitations in implementation, to put it differently – it must be free (that characterizes its validity) [8, p. 23-25].

The purpose of this work is to define the attributes which help to define if the waiver of the right can fulfil the main

principals of legal code, as we can state that categorized by its “validity”.

The conditions for the validity of the waiver can be defined by its outer configuration (it must obvious, unequivocal) and inner configurations (it must be voluntary and conscious).

The Supreme Court of the Russian Federation emphasizes such attributes of the waiver as its form (it must be clearly stated), voluntariness and admissibility (it must not contradict the current law of the Russian Federation, generally recognized norm of international law and international Russian Federation treaties) (the Plenum of Supreme Court decree “ administration of the Convention for the Protection of Human Rights and Fundamental Freedoms for courts of general jurisdiction in the Russian Federation, on the 4th of November 1950 and all amendments” on the 27th of June 2013, №21 p.10). Another decree of Plenum in the specific context also states the necessity to establish the principles of freedom of will and voluntariness (the Plenum of Supreme Court decree “the application of court legislation practice for commitment, house imprisonment and bail” on the 19th of December 2013 №41, p.16). The Supreme Court of the Russian Federation, unlike the European Human Rights Court, does not promote the awareness as an essential principle for the waiver of the right for an individual. However in case of criminal case termination and/or termination of prosecution on the basis of article 25 of Russian Federation Code of criminal procedure, the Supreme Court of the Russian Federation commands to verify not only voluntariness, but the awareness of accommodation of interests for the victim represented by a physical body (the Plenum of Russian Federation Supreme Court decree on the 27th June 2013 №19 “ the court legislation application for the basis and order of relief from criminal responsibility” p. 22).

This inhomogeneity of principles can characterize the waiver of the right in the sense of their structure as well as in the aspect of terminology. This can be generally explained by the absence of the Russian doctrine of “the waiver of the right”. Therefore, it is obvious, that the waiver of the right must be voluntary and conscious.

3.1. *Voluntariness as an attribute of the waiver*

Indisputably, the waiver of the right as an expression of will must be characterized by its voluntariness. That means it should occur only on individual’s own accord, based on his own assumption of appropriateness of the right to promote his personal interests and achieve his own goals. In this way voluntariness guarantees the waiver of the right in case of a practical realization.

Subjective and objective criteria of voluntariness might be explored. The Subjective criterion is the free will of an individual intended to waive the right. The objective criterion is the freedom of choice with an opportunity to exercise your right. Rights can signify our freedom in two ways: as an ability consciously and independently behave in a certain situation (internal freedom) or an ability to act

and to promote one's own goal externally (external freedom) [9, p. 7]. The voluntary attribute means that the waiver of the right is based on the personal wishes and desires of an individual. The intellectual attribute means the awareness of the act of rejection itself as well as the consequences of such behaviour.

The waiver is voluntary if an individual of his own volition, without any enforcement or pressure is unwilling not to use his right [10, p. 85].

Public individuals and agencies during proceedings in criminal cases might cause enforcement or pressure (both physical and psychological) on the participants of the criminal procedure [11, 19-25]. Without doubt, acts of outrage, investigative tortures, endangerments and blackmailing offenses are prohibited.

However, any forced choice under the endangerment of negative consequences as well as any persuasion of an individual in the necessity of a special behaviour in the certain situation can be regarded as psychological enforcement.

The European Human Rights Court considers that not any enforcement influences voluntariness. It is important to evaluate the effect of this influence and the ability of an individual to resist it [12, p. 85] with this object in mind the Court might take into account the conditions of the individual at the moment of waiver.

3.2. The freedom of choice as an attribute of the waiver

To evaluate the voluntariness of the waiver of the right it is necessary to prove that an individual does it at his own initiative. The reason for the waiver plays an important role, as this expression of will can be influenced by inability to exercise his right or some abuse of law enforcement power. Any conditions forcing an individual to deny his personal rights could indicate the lack of the freedom of choice.

For instance, the Supreme Court of the Russian Federation states that if the recall of defence attorney is connected with the economic circumstances of an individual, or the divergence of their views such waiver is considered as involuntary and enforced (the Plenum of Supreme Court decree "the application of court legislation practice for commitment, house imprisonment and bail" on the 19th of December 2013 №41, p.16). During the consideration of case in absentia the court can recognize the application for revocation as forced, if the accused person states the condition that objectifies his presence during the court proceedings (the Plenum of Supreme Court decree "the practical application of court legislation, providing the right of defence in criminal procedure" on the 30th of June 2015 № 29, p.7).

In such cases when an individual knows about his rights and the possible consequences of the waiver, wishes to exercise it but cannot because of the action preventing him - it cannot be regarded as the waiver of the right as the attribute of the freedom of will is not observed.

The freedom of choice for the holder of the right – is an impartial attribute of voluntariness, that presupposes an independent decision that is not influenced by any external conditions, interfering with the realization of his rights.

3.3. Awareness as an attribute of the waiver

The waiver is a conscious act, in other words it is a conscious expression of will, based on the knowledge of the rights and the possible consequences of the waiver.

This awareness of will expression means that an individual, refusing to use his right in each case realizes and understands the legal consequences of his actions (despite the fact that his waiving of legal rights cannot cause unfavourable legal consequences, in some spheres as a result of this action an individual might not file objections in the future [13, p. 30]), he controls his own behaviour, the expression of will realizes his own wishes and has no other goals, except the expressed [14, p. 77-80; 15, p. 90].

The waiver of the right presupposes binding awareness about the right, in other words, he deliberately refuses to use a certain right (the idea is a textbook definition of any waiving, formulated in 1938 by Supreme Court of the United States in case Johnson vs Zerbst in 1938 concerning the waiver of counsel) [16, p. 60].

The awareness is the result of the external influence, meaning the explanation of individual legal rights, their contents as well as internal understanding which expresses psychological attitude towards this right (that may be positive, neutral or negative), evaluation (an individual realizes his affordable behaviour in this situation) and motivation (the reason for a certain act) [11, p. 216]. This awareness stimulates individual's behaviour in a certain way.

Evidently, the knowledge of the right, evaluation of its appropriateness for the promotion of personal interests lead to an exercise as well as a waiver of the right. If an individual does not exercise his right due to unawareness, this cannot be considered as the waiver of the right.

Right declaration is informing an individual about his right in an accessible form. Moreover, if the person does not understand or unable to realize the subject, he must be provided with additional explanation.

An important attribute of the waiver of the right is an ability of an individual to understand and evaluate the legal potential of the right as well as the consequences of waiving.

The waiver is considered conscious if an individual, due to his psychological features, is able to realize the outcome of the action [10, p. 85]. For instance, regarding a waiver of the right the European Human Rights Court takes into consideration the age, the social status of the accused person [12, p. 96-97].

An individual must not only realize the benefits of the right, but also the consequences of waiving.

To sum up, a conscious waiving is an expression of the will, based on the awareness of the individual (by an attorney for the defence, for example) provided in a

comprehensible and understandable way (taking into account both the clarification as well as the reading of law) about the benefits of the right holding and the consequences of waiving as well as his ability to take action (due to his age, psychological and physical condition).

4. CONCLUSION

This study leads to the understanding that an opportunity to choose whether to exercise or waive a right has no less importance than its realization. The basis for such choice is the desire of the right holder to exercise the right or to waive it. The expression of will, leading to the denial of the legal right, can be considered as a form of waiving. Waiver can be differentiated from the refusal of conditions independent of individual's will (lack of information, or an opportunity for realization) by the attributes of waiving: voluntariness, freedom of choice and awareness.

The conditions of waiving can be connected with its external form (it must be clear and unequivocal) and typical internal attributes (voluntariness and consciousness). Voluntary abandonment is regarded as legal if it occurs on right holder's own accord, based on the appropriateness or inappropriateness of the exercise of the right to accomplish an objective and promote his own interests. Individual's free will expressing the denial of the right can be regarded as a subjective criterion for waiving. An objective criterion is realized through the freedom of choice: if an individual is aware of his rights and the consequences of voluntary abandonment and wishes to realize it, but is unable to do it due to some action bars, this is not waiving as the attribute of voluntariness is not represented. The waiver of the right is a conscious expression of will based on the knowledge of legal rights as well as the consequences of voluntary abandonment.

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