

# The Reasons for the Waiver of the Right: An Overview from the Point of View of Russian Criminal Proceeding Doctrine

Irina N. Chebotareva<sup>1,\*</sup>, Olesya S. Pashutina<sup>1</sup> and Irina V. Revina<sup>1</sup>

<sup>1</sup> Southwest State University, Kursk, 305040, Russia

\*Corresponding author. Email: [cheb\\_irina@mail.ru](mailto:cheb_irina@mail.ru)

## ABSTRACT

The realization of rights protection and legal interests of individuals and legal units, suffering from criminal actions, as well as those under penal action can be regarded as the primary task of Russian criminal procedure law. The participants of a criminal procedure have a wide range of rights, realizing which they can promote their interests, influence the dynamic of criminal procedure relations, the process and the outcome of a criminal proceeding. Procedural rights (including subjective), unlike procedural duties, are combinations of possible legal actions stated and guaranteed by criminal procedural standards for the possible code of behaviour for the participants of a criminal proceeding as well as an opportunity to call for certain law enforcement. The participants can realize the rights or waive them, without any negative legal consequences, to promote their interests. The analysis of law enforcement practice, doctrinal interpretations and the data from official social studies, presented in this article, provide a possibility to classify the reasons for the waiver of the rights by the participants of criminal proceedings.

**Keywords:** *criminal proceeding, individual rights in criminal proceedings, subjective rights, waiver of the rights.*

## 1. INTRODUCTION

The participants of the modern criminal proceeding possess a wide range of rights, realizing which they are able to promote their own interests, influence the criminal proceeding as well as its outcome. This article features the participants of criminal proceedings, promoting their own interests. Public individuals and agencies, carrying out criminal proceedings, have powers which have a different nature in comparison with subjective rights. Thus, in public and semi-public hearing the complainant takes the decision on criminal prosecution initiation (parts 2, 3 article 20 of the Criminal Procedural Code of the Russian Federation), the accused is legally provided with the right to choose the legal proceedings standards (a court with the participation of jurors, in special order of the judicial proceedings, in general order). The participants of the criminal proceedings have the rights to be informed of proceedings in criminal cases (for instance, the right of the complainant to be aware of the accusation presented (p.1, part 2, article 42 of the Criminal Procedural Code of the Russian Federation), and the accused can be well aware of the incrimination (p.1, part 4, article 47 of the Criminal Procedural Code of the Russian Federation), the right to be informed about criminal complaints and petitions (p.20, part 2, article 42, p.19, part 4, article 47 of the Criminal Procedural Code of the Russian Federation), the right to obtain the copies of procedural decisions (p.13, part 2,

article 42, p.2, part 4, article 47 of the Criminal Procedural Code of the Russian Federation)). They can benefit from the rights to promote their position for public individuals, carrying out criminal proceedings (for instance the right to give evidence (p.2, part 2, article 42, p.3, part 4, article 47 of the Criminal Procedural Code of the Russian Federation), the right to present a petition (p.5 part 2 article 42, p.5 part 4 article 47 of the Criminal Procedural Code of the Russian Federation)), which help them to deal with the offence of the law (the right to appeal against court decisions, for example, p.18, part 2, article 42, p.14 part 4 article 47 of the Criminal Procedural Code of the Russian Federation). Using these legal rights an individual can actively influence the criminal proceeding, that fully corresponds to the purpose of the legal proceeding (article 6 of the Criminal Procedural Code of the Russian Federation), intended to protect the rights and legal interests of an individual as a criminal offence victim or as charged with a criminal offence.

To realize the right - is to put it into effect, to translate the legal standards in actual behaviour of an individual [1, p. 221]. If the right is not realized than the purposes of lawmakers are not fulfilled as well as the whole institution might lose its sense [2, p. 159]. At the same time the subjective right of the participant in criminal proceeding is a stated and guaranteed code of possible behaviour for a right holder that presupposes his choice of appropriate behaviour: an individual can take advantage of the opportunity as well as miss it, waiving his right in this way.

A person cannot be forced to exercise his right. That is the conceptual difference between a right and an obligation. The waiver of a legal right is an individual's expression of will, including his decision on the appropriateness or inappropriateness of the exercise of the right to accomplish an objective and promote his own interests as well as its external realization (active measures for the denial of the right as well as passive behaviour). A waiver of the right is an example of legal behaviour.

It is difficult to evaluate the social importance of the waiver of the right, as it expresses the conflict of the autonomy of an individual on the one hand, and the social requirement for the right usage on the other hand, as this exercise of the right is meaningful not only for the right holder, but for the society in general [3].

This article can be regarded as an attempt to answer the question: why do the participants of the criminal proceeding waive their rights. Three main reasons were discovered: (1) personal interest; (2) legal consciousness deformation; (3) waiver stimulation by the State.

## **2. METHODOLOGY**

General academic methods of analysis and synthesis, induction and deduction, general-logic methods, as well as partial-scientific methods such as statistical study and observation, were used to define, classify and investigate the reasons for a waiver of the subjective right during the criminal proceeding in Russia by the right holder, to formulate objectives and scientific explanations and reliable conclusions. This combination helped to disclose the object of the study and reach the aims of the research.

## **3. RESULTS AND DISCUSSION**

### ***3.1. Personal interest as a reason for waiver***

Legal literature states the influence of internal (subjective) values, outer factors and law-enforcement actions as a reason for the waiver of the legal right by a participant of a criminal proceeding [4].

Waiving the legal rights, a participant of a criminal proceeding pursues his own objectives and promotes his personal interests. In this aspect a waiver of the right can be regarded as an active form of their rights promotion: an individual can choose which right might help to benefit the most.

There is a wide range of personal interests involved into the decision making. This can be illustrated by an example of the waiver of the right to testify part 4 (4) article 47 of the Criminal Procedural Code of the Russian Federation. According to the law-enforcement practice, during the direct examination accused individuals usually withhold evidence, explaining that they need extra time to work-out a position for the defence. Moreover, this withhold of evidence by a prosecuted individual can be explained by

the human nature. Self-preservative instinct as a form of inborn behaviour of living beings in case of real or potential danger, does not allow an individual to accuse himself of a socially-dangerous act in fear of appropriate sanctions [5]. The reasons for the waiver can be based on his conscious desire to obstruct the establishment of the truth in a criminal proceeding. In this context arises a reasonable question: is the "legality" of the nature of such waiver of any importance? No, it isn't. Taking into account the social importance of personal interests, the States provides a special legal protection even for the cases, when these interests conflict the public justice. In Russian criminal procedure such evidence withhold is protected by the law, particularly by the right to defence.

### ***3.2. Legal nihilism and legal infantilism as a reason for waiver***

Internal (subjective) reasons for the waiver of the legal right can be strongly connected with the legal conscience of its holder, as subjective will of an individual is a form of legal awareness.

The waiver of the right can be stipulated by legal consciousness deformation, such as legal nihilism and legal infantilism, which express a denial of legal values, the unwillingness to follow the law and disrespect of the law itself as well as its legal regulations [6].

The researchers describe the perception of legal instructions in case of legal consciousness deformation [7]: the attitude toward the law is negative or controversial; the apprehension of legal requirements, rights and obligations is inadequate as they seem nonmandatory, destructive (unnecessary) for people; the perception that most people demonstrate disrespectful behaviour towards the law and elude the requirements of legal instructions; the legal instructions in the society are regarded as unfair; understanding the laws as the defenders of State and authority, not of individuals and society.

It should be noted that these views are widely spread in modern Russian society. According to the survey of the analytic centre "NAFI" (National Agency for Financial Investigations) in 2019, a quarter of the participants stated that they do not take any actions to protect their personal interests in legal disputes, as they consider it to be useless (9% of the respondents) and believe that they cannot influence the respect of their rights (20% of the respondents) [8].

Legal infantilism is an absence or insufficient development of the right holder's legal knowledge, background assumptions and apprehension. Consequently, these citizens are indifferent to the law and suppose that is unnecessary to follow it. These individuals are not tended to receive the necessary information about rights, freedom and do not exercise them [9].

Legal passiveness is a form of legal infantilism. It can be demonstrated not only as an unenterprising behaviour of the right holder, but as indifference to law violation. This

indifferent behaviour of the right holder is considered socially negative, as it encourages lawlessness.

Legal literature poses an opinion that legal infantilism can be considered a phenomenon that characterizes common legal awareness, but not a form of its deformation, as there are no criteria for legal knowledge evaluation that is necessary, sufficient and normal for an average citizen [10]. However, during a criminal proceeding when the awareness of a participant about his potential rights and conditions for their realization are provided by public individuals and agencies, carrying out criminal proceedings, the reason for a passiveness of an individual characterized by a legal infantilism, is not primary the lack of legal awareness, but a typical system of values, leading to the legal indifference which is typical in this situation.

The researches specify that the most popular reason for the legal passiveness (legal infantilism) is an objection against positive law regulations, in case when the provided legal rights have no value for an individual. This right holder refuses to take actions that are useless or cost-consuming (physically or financially), exceeding the advantage of the benefit from their realization [11].

Legal nihilism is a devaluation of rights and rule of law and order, conscious neglecting of legal requirements and underestimation of their regulating social role, up to direct wilful violation of laws, by committing a crime or other administrative offence [12]. This type of legal consciousness deformation is the most widely spread in our country.

Tumanov V.A. points out that legal nihilism can be expressed in different forms of attitude towards the law: “from the legal indifference through a sceptical attitude to its potential abilities to the complete disbelief and open criticism” [13]. The consequence of such attitude can be refusal of the legal rights. An individual refuses to use his rights in a situation which presupposes it: ignores legal violation, does not promote personal interests.

The reasons for legal nihilism include governmental abuse of human rights, as poor legal safety undermines the prestige of law, the trust to the ability of the State to provide order and peace in the society. Under such conditions an individual ceases to respect the law, as it is not observed as the protector of his interests [14]. As a result, the right holder refuses his legal abilities seeing them as ineffective.

The analysis of the appeals for human rights commissioner in the Russian Federation gives clear evidence that the problem of observance of human rights in criminal proceeding has been vital for many years. The report of human rights commissioner in the Russian Federation shows that in 2018 the amount of such appeals among all complaints and petitions for the commissioner was between 29-32% [15]. The situation remained the same for 2019.

According to the survey of the Public Opinion Foundation in 2018, 52 % of the respondents believed that civil rights are poorly observed in Russia [16]. The rights for equality before the law, fair trial are observed and realized in Russia insufficiently according to 37% of the respondents, sufficiently – 33%, well – 17%. 13% of the respondents

were unable to answer this question. Russian society does not show trust to the Court. When asked “How do you evaluate the work of courts and judges in general?” 40% evaluated as “negatively” and only 24% answered “positively” [17]. In 2019 the society poorly estimated the exercise of human rights in Russia: 54% of people under study pointed out the problems, while only 33% saw the observance of human rights as appropriate [18].

### **3.3. Waiver stimulation by the State**

Referring to the cases when the waiver of the rights leads to some benefits for an individual, for instance, the waiving of full legal proceedings in different forms (in the Criminal Procedural Code of the Russian Federation it is represented by a special procedure of judicial decision adoption with the consent of an individual with the accuse stated by the chapter 40 of the Criminal Procedural Code of the Russian Federation, a special order of judicial decision at pre-trial collaborating agreement stated by the chapter 40.1 of the Criminal Procedural Code of the Russian Federation) that leads to the reduction in sentence (both in type and length), adoption of alternative penalties or termination of prosecution at some aspects.

Depending on the motivation, there can be defined 4 main types of full legal proceedings waiving [19].

- (1) based upon a possibility of sentence reduction (both in type and length) for a committed crime.
- (2) based upon a possibility that some facts can be investigated or neglected in exchange of admission by the accused of other, less serious.
- (3) based upon reduction of accusations (for instance, manslaughter can be incriminated instead of murder) and/or closing the case.
- (4) co-operation with so-called privileged witnesses, which provide evidence against others in exchange of mitigation of punishment for themselves.

Besides full legal proceedings waiving the participant denies his other rights as well. In case of the pre-trial collaborating agreement an individual waiver the right of immunity of witness (article 317.1 of the Criminal Procedural Code of the Russian Federation, the decree constitutional court of the Russian Federation on 20.07.2016 N 17-P).

Such waiver of the right has obvious potential benefits for the State:

- (1) Saving the resources needed for full close investigation of all potential crimes and for conducting full judicial proceedings in open court. It is considered that some less serious but most frequent types of administrative offence might not justify the means needed for a normal full judicial proceeding;
- (2) Law-enforcement resources concentration on well-defined important types of criminal activities, for instance, fight against organized crime;
- (3) Ability of public prosecutor to offer “deals” to potentially “privileged” witnesses to promote the fight against organized crime;

(4) Permission for accused individuals, who admit their guilt, to avoid long-term pretrial investigation, which can limit their rights greatly.

However, possible abusive practices arise from strong critics [20].

#### 4. CONCLUSION

Every participant of the criminal proceeding sets his own goals. The aggrieved individual wishes to restore his violated civil rights - the right to life, the right of protection of his honour and dignity, the right of ownership and etc. The accused individual tries to defend against unjustified, illegal accusation. To fulfil these goals criminal-procedural law vests citizens with a huge range of different rights. Recognizing the rights of the participants, the lawmaker lets the right holder to decide on the appropriateness or inappropriateness of the realization of the right in order to accomplish an objective, providing the waiver of these rights without any negative legal consequences.

Three reasons forcing the participants to waive their right can be stated: personal interest, legal consciousness deformation and waiver stimulation by the State.

Any participant of the proceeding can waive provided rights depending on his personal interest, his beliefs, views, ideas about the desired and needed. In reality personal interests are the deepest reason for the waiver of the rights for the aggrieved and accused individuals. Possessing different nature, they have a certain material base (for instance, the waiver of the right of testifying can be promoted by the desire to avoid criminal responsibility) they reflect the consciousness of an individual and grow up into certain goal.

Legal nihilism and legal infantilism as the ways to legal consciousness deformation – is a negative social phenomenon. It is characterized by legal consciousness change that deforms social and personal legal reality and express negative attitude toward the existing system of justice, law and order in general. An individual suffering legal consciousness deformation can waive his rights not due to his interests choosing the most effective way to promote his position but because of an indifferent attitude toward the justice, disbelieve in law, denying its abilities and importance. It is obvious that these phenomena are social harmful, as they lead to lawlessness and arbitrary behaviour, abuse of rights and as a result deeper disbelieve in law in general.

Stimulation by the State presupposes that the waiver is influenced by possible benefits provided by the state such as the reduction of the sentence, adoption of alternative penalties or the termination of prosecution at some aspects. The importance of the ability to provide such a “deal” widely presented in Russian criminal proceeding for a special decision making procedure is obvious: on the one hand, it facilitates the proceeding in many criminal cases, on the other hand, an accused individual has a chance to grasp the importance of his crime, to effect restitution, to recoup for damages and voluntarily accept the penalty at the

same time promoting an opportunity to mitigate the punishment.

#### ACKNOWLEDGMENT

The reported study was funded by RFBR, project number 20-011-00858.

#### REFERENCES

- [1] S. S. Alekseev, Collected edition in 10 volumes. [+reference volume]. Vol.8: Manuals and study guides, Moscow, 2010.
- [2] N. I. Matuzov, A. V. Malko, The theory of State and law: Textbook, Moscow, 2004.
- [3] A. S. Gambaryan, Waiver of right and the criminal-procedural intrusion matter, Moscow, Urlitinform, 2019.
- [4] I. P. Gladisheva, Legal waiver (theory, practice, techniques). Autoabstract, dissertation of a candidate of legal sciences. Nizhni Novgorod, 2010.
- [5] N. G. Idrisova, Some aspect of the right not to testify against oneself and immediate relatives, *Business in law* 5 (2015) 159-161.
- [6] S. A. Kovalev, legal consciousness deformation as a factor of unlawful conduct, *History of slate and law* 13 (2009) 35-38.
- [7] V.G. Stukanov, Informational-pedagogical system of legal consciousness training: monograph. Minsk, Ministry of Internal Affairs Academy the Republic of Belarus, 2016.
- [8] Social studies «Law knowledge of the Russians on the way toward civil society– 2020» URL: <https://nafi.ru/projects/sotsialnoe-razvitie/pravovaya-gramotnost-rossiyan-na-puti-k-grazhdanskomu-obshchestvu-2020/>
- [9] N. N. Voplenko, Legal consciousness and legal culture, Volgograd, 2000.
- [10] E.S. Zaitseva, Legal infantilism: problematic issues, *Psycho pedagogics for law enforcement agencies*. 3 (62) (2015). 98-100.
- [11] V. M. Sirih, Materialistic theory of law: Selected. Vol. 4. Moscow, RAP, 2014.
- [12] N. I. Matuzov, Theory of State and law, Moscow, 1997, pp. 596-611.

[13] V. A. Tumanov Legal nihilism in Reform pulse. Legal practitioners and politologists meditate, Moscow, 1989, pp.135-146.

[14] I. N. Sorokotyagin Juristic psychology: textbook for Institution of Higher Education. 3-e edition., reworked and added, Moscow, Publishing house URAIT, 2014.

[15] The report of Human Rights Commissioner in the Russian Federation available online at [http://ombudsmanrf.org/upload/files/docs/lib/doclad\\_2018.pdf](http://ombudsmanrf.org/upload/files/docs/lib/doclad_2018.pdf)

[16] Civil law and freedom. observance of human rights condition, most significant rights and freedoms URL: <https://fom.ru/TSennosti/14053>

[17] The report of Public Opinion Fundation. The courts: their justice, independence, personal experience. What

does decision making in Russian court based on? And can we trust jury trial? URL: <https://fom.ru/Bezopasnost-i-pravo/14080>

[18] The report on the activities of the Commissioner for Human Rights in the Russian Federation in 2019 URL: <https://rg.ru/2020/04/14/rg-publikuet-doklad-o-deiatelnosti-upolnomochennogo-po-pravam-cheloveka-za-2019-god.html>

[19] The Disappearing Trial: A global study into the spread and growth in trial waiver systems URL: <https://www.fairtrials.org/publication/disappearing-trial-report>

[20] Deal making in criminal proceedings: the need for minimum standards for trial waiver systems) PASE Doc. № 14618 (2018) on 19.09.2018 URL: <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=25041&lang=EN>