

**FaR 2021**

**International Forum “Freedom and responsibility in pivotal times”**

**THE ENFORCEMENT OF PROCEDURAL RIGHTS OF  
COGNITIVELY VULNERABLE PARTICIPANTS OF CRIMINAL  
PROCEEDINGS**

Svetlana M. Kurbatova (a)\*, Alexey G. Rusakov (a), Maria M. Fedotova (a)

\*Corresponding author

(a) Krasnoyarsk State Agrarian University, 660049, 90 Mira Str., Krasnoyarsk, Russia, ui-nauka-krasgau@yandex.ru

**Abstract**

The paper deals with the application of the current Russian criminal procedure legislation to criminal processes involving persons with limited cognitive abilities as a form of realizing the social responsibility of the modern state of law to its citizens. The paper studies the mechanism for ensuring the rights and legitimate interests of participants in criminal proceedings with limited cognitive capabilities. It also formulates practical proposals to improve this mechanism taking into account the provisions of the international law and the concept of modern legal understanding of the essence of the social state. The authors base their position on a compensatory approach, which allows ensuring the most equal opportunities for the participation of persons with limited cognitive abilities in criminal proceedings, without diminishing the rights of other participants. This approach may be applied not only to the category of persons in question: it is generally aimed at ensuring the enforcement of the rights of participants in criminal proceedings who have limited abilities. However, due to the limited scope, this paper only considers one category of such participants, which is the largest in terms of quantitative indicators, since it includes minors, persons of older age groups, persons with mental disorders, mental illnesses, persons being in physiological conditions that affect the level of their cognitive functions, etc.

2357-1330 © 2022 Published by European Publisher.

*Keywords:* Criminal proceedings, cognitively vulnerable persons, legal status, implementation mechanism



This is an Open Access article distributed under the terms of the Creative Commons Attribution-NonCommercial 4.0 Unported License, permitting all non-commercial use, distribution, and reproduction in any medium, provided the original work is properly cited.

## **1. Introduction**

Russian science and legislation reflects some problems related to the legal status of some participants in criminal proceedings. First of all, this concerns the categories of citizens who, according to medical or social criteria, can be classified as “cognitively vulnerable” due to the fact that the level of cognitive functions of brain activity is insufficient (Chalfonte & Johnson, 1996), as a result of which their cognitive abilities are more limited compared to persons whose cognitive functions are implemented independently in full (Merkulov, 2005). Besides, persons of this category regularly participate in criminal proceedings as suspects, accused, witnesses and victims. This makes it necessary to consider this situation through the prism of the legal and social state, to which, according to Article 1 of the Constitution of the Russian Federation, Russia also belongs, as well as the resulting social responsibility of the state for its population, especially when it comes to vulnerable categories of citizens.

At present, the current Russian criminal procedure legislation does not identify this group of participants in criminal proceedings as a special category of persons. It lacks the institution of criminal procedure (Tkachenko et al., 2014). The concept of limited legal capacity is also not enshrined by the law, and as a result the legislator does not provide cognitively vulnerable persons with additional procedural guarantees aimed at equalizing their procedural status compared to other participants. In view of the fact that Russia is in the process of building a legal social state, this situation is intolerable, since the constitutional rights and freedoms of all participants in criminal proceedings must be exercised equally and fully.

## **2. Problem Statement**

Social practices indicate that a certain number of people around the world (including Russia) have different degrees of expression of cognitive disorders. This is caused by various reasons (age, medical, psychological, physiological, social status, etc.). At the same time, such persons are regularly involved in criminal proceedings as suspects, accused, victims, and witnesses. This raises the question of how to provide them with the opportunity to participate in criminal proceedings on an equal basis with full-fledged participants, to defend their interests, to gain equal access to justice, to protect them, to realize the right to acquittal in case of innocence, the right to a fair sentence for crime, etc.

## **3. Research Questions**

The subject of the study includes the following:

- 3.1. relations established by the norms of the Russian criminal procedure legislation in the field of criminal proceedings involving persons with limited cognitive abilities;
- 3.2. mechanism for the exercise of the procedural rights of persons with cognitive disabilities to lawful and fair investigation and judicial resolution of criminal cases where they participate as suspects, accused persons, victims and witnesses.

#### **4. Purpose of the Study**

The purpose of this study is to analyze the current issues of applying the current Russian criminal procedure legislation to criminal legal relations involving persons with limited abilities in the field of ensuring the rights and legitimate interests of participants in criminal proceedings with limited cognitive abilities, to find ways to resolve them and to formulate practical proposals for improving the mechanism for their implementation taking into account the provisions of the international law. Besides, the authors initially deny the thesis that this category of persons from among the suspects accused in criminal cases receives preferential opportunities to avoid criminal liability or be released for the committed crimes. The authors believe that cognitive restrictions may only affect the mitigation of the imposed criminal punishment or the possibility of applying other measures of criminal law coercion in some cases provided for by the current Russian legislation. The authors base their position on a compensatory approach that ensures the maximum equal opportunity for the participation of this group of persons without diminishing the rights of other participants in criminal proceedings.

#### **5. Research Methods**

The study was conducted using general scientific and private methods. Theoretical methods include analysis, synthesis, deduction, induction, classification, etc. The authors applied the study of information sources, questionnaire, interviews and survey as empirical methods.

#### **6. Findings**

1. The procedural position of this group of persons (cognitively vulnerable) in the Russian criminal procedure legislation is not fully reflected, and is not fully studied in science (Potapov, 2019). At the same time, as evidenced by the law enforcement practice, there is a need for this. Thus, the authors conducted a survey of judges of a number of regions of the Siberian Federal District, which made it possible to present the following results (Table 1).

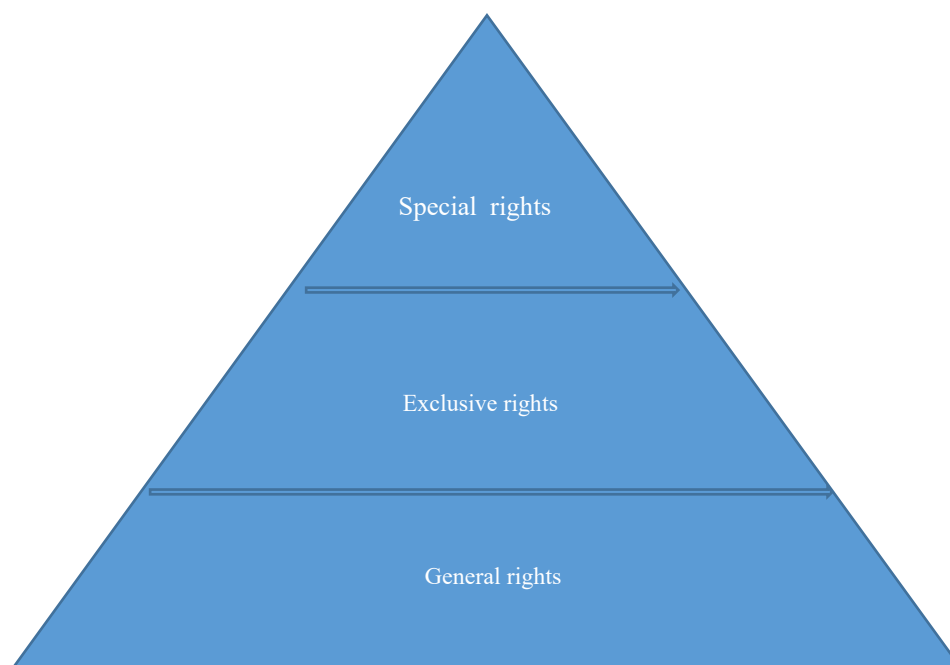
**Table 1.** Results of a survey of 30 judges of the Siberian Federal District on the procedural position of cognitively vulnerable persons as participants in criminal proceedings

Question	Yes (number of people)	No (number of people)
1. Were there cases of criminal proceedings in your practice where the defendant/victim/witness was a person with limited cognitive abilities, if yes, then:	23	7
* Have you experienced difficulties due to this situation?	12	11
* Had those persons encountered difficulties in exercising their rights?	17	6
2. Do you think it is possible (correct) to provide additional guarantees to enable such persons to participate fully in criminal proceedings?	24	6

The absence of legally enshrined guarantees that ensure the full enforcement of their rights and the equalization of the legal status of participants in criminal proceedings from among persons with limited

abilities leads to the violation of a number of rights and legal principles of the Russian legislation and at the international legal level (Kurbatova, 2019).

2. With regard to the procedural status of participants in criminal proceedings from among persons with cognitive disabilities, let us highlight general, exclusive and special rights (Figure 1):



**Figure 1.** Levels of rights and status of cognitively vulnerable participants in criminal proceedings

According to the authors, the participants in criminal proceedings have general, exclusive and special rights. The participants of this category have general rights along with other participants. This is the right to testify, make petitions, bring complaints, use the help of an interpreter for free, etc. Exclusive rights belong only to persons recognized as partially incapacitated (i.e. unable to fully realize their rights on their own): the right to mandatory participation of a legal representative (including in the form of authorities). Special rights are granted to those subjects (including those belonging to the studied category) who need to use compensatory means to ensure the realization of their rights and interests by involving specialists (sign language interpreter, psychologist, gerontologist, etc.) or using special additional technical means (Kurbatova, 2020).

Special rights specify the peculiarities of the functions of their bodies that lead to a restriction of the criminal procedural capacity of these persons: for minors (right to participation of a teacher or a psychologist in a given field of psychology) (Bertovsky, 2017), for persons of older age groups (Giambra et al., 1995) (participation of a gerontologist or a psychologist in a given field of psychology or guardianship and guardianship authorities), for persons with mental illness (Becker & Salthouse, 1998), for persons with physical limitations (Petrova et al., 2017) (right to use videoconferencing, etc.).

3. Under the influence of global trends Russia introduced changes in the understanding of the legal regulation of relations with the participation of persons with disabilities. The Russian state has undertaken to guarantee the rights of socially vulnerable categories of persons in all spheres of life, including in

criminal procedure (Kurbatova & Bertovsky, 2020). The international law also focuses on the same aspects. For example, the United Nations Convention on the Rights of Persons with Disabilities of December 13, 2006, which established that the use of the term “person with disabilities” (and not “disabled”) is correct, and that the basis for attribution to this category of the population is not only medical, but also social, and philosophical criteria, which expands the grounds for assigning persons to this group, increasing the importance of their cognitive abilities (Solso, 2006).

4. The introduction of procedural guarantees to cognitively vulnerable participants in the criminal process should not lead to the deterioration in the legal situation of other cognitive-full-fledged, participants. In terms of the compensatory approach taken by the authors, through legislative recognition of these guarantees for persons with cognitive disabilities we “raise” them to the level of participants who are able to independently realize their rights.

In particular, the authors believe that it is necessary to expand the possibilities of procedural participation of specialists of various fields (psychologists, gerontologists, teachers, etc.). At the same time, these persons should have knowledge of establishing contact and interaction with certain categories of cognitively vulnerable persons. We propose to create the relevant bank (database) containing information about these specialists that agreed to their involvement in criminal proceedings. The payment for the services of these experts should be made at the expense of the federal budget and relate to court costs.

5. According to the authors, an additional guarantee for this category of participants in criminal proceedings should be the introduction of special training (and retraining) for the following subjects: investigators, interrogators, prosecutors, judges. We note that the status of cognitively vulnerable participants should correlate with the duties of persons exercising public-power functions in this area, which requires special additional knowledge in the latter.

6. This approach, according to the authors, should be extended to professional protection and judicial representation: the involvement of victims as defenders and representatives should also be considered from the point of view of the most favorable for their clients from among persons with disabilities.

7. The authors believe that questions related to the imposition of punishment on cognitively vulnerable persons who have committed a crime are also of practical interest: persons from this category have the right to rely to a greater extent than fully capable persons on the commutation of sentence or on the application of other criminal legal measures to them (educational, medical, restrictive, etc.) (Safronova, 2016). Besides, it is necessary to distinguish between the concepts of “insanity” and “cognitive vulnerability” (“limited cognitive abilities”) as entailing different consequences in terms of legal assessment of these conditions. However, this is a separate direction for relevant studies.

## **7. Conclusion**

Thus, the authors believe that:

1. The issues raised in this paper need further scientific study.
2. The Russian criminal process should include the institution of criminal procedural capacity, in which there should be a sub-institution of limited criminal procedural capacity, which we consider necessary to extend to persons with limited cognitive ability (cognitively vulnerable).

3. It is necessary to formalize the provision of additional procedural guarantees to cognitively vulnerable persons aimed at equalizing their procedural status compared to other participants in criminal proceedings.

4. Special training should be provided to law enforcement officers exercising public authority in criminal proceedings (as well as other persons involved in it on a professional basis, in particular lawyers, translators, etc.) in order to obtain the necessary knowledge for the initial identification of such persons among other participants, to determine the form, type and degree of limitation of their abilities so that they can be further specified by sending them to specialized medical and other institutions for examination. The first group of subjects (investigators, interrogators, prosecutors and judges) shall be subject to special retraining.

5. The Judicial Department of the Russian Federation and its divisions in the constituent entities of the federation should form databases of specialists who have skills in working with cognitively vulnerable subjects (sign language interpreters, teachers, psychologists, gerontologists, etc.), thus providing access to the parties in the criminal process.

6. There is a need to develop methodological recommendations on the organization and execution of individual procedural actions and, in general, criminal proceedings, where persons with limited cognitive abilities take part, including ensuring the realization of their procedural rights.

## References

- Becker, J. T., & Salthouse, T. A. (1998). Independent Effects of Alzheimer's Disease on Neuropsychological Functioning. *Neuropsychology*, 12(2), 242-252.
- Bertovsky, L. V. (2017). International standards for the implementation of criminal proceedings with the participation of minors and their implementation in modern Russian criminal procedure. *Issues of Russian and International Law*, 7(10A), 12–21.
- Chalfonte, B. L., & Johnson, M. K. (1996). Feature memory Craik, F. I. M. (1986). A functional account of age difference in memory. In F. Klix & H. Hagendorf (Eds.), *Human Memory and Cognitive Capabilities: Mechanisms and Performances* (pp. 409-422). Elsevier Science.
- Giambra, L. M., Arenberg, D., Zonderman, A. B., & Kawas, C. (1995). Adult life span changes in immediate visual memory and verbal intelligence. *Psychology and Aging*, 10, 123-139.
- Kurbatova, S. M. (2019). Formation of a cognitive approach to understanding a person with disabilities at the international legal level and its impact on national law (on the example of Russian criminal procedural legislation. *Issues of Russian and international law*, 9(8-1), 134–143.
- Kurbatova, S. M. (2020). On the problem of participation of persons with disabilities in criminal proceedings. *Modern Science*, 2, 305–309.
- Kurbatova, S. M., & Bertovsky, L. V. (2020). Protecting the rights of persons with disabilities as a constitutional value. *Advances in Social Science, Education and Humanities Research*, 175-179.
- Merkulov, I. P. (2005). *Cognitive Abilities*. IP RAS.
- Petrova, M. M., Prokopenko, S. V., Eremina, O. V., Mozheyko, E. Y., Kaskaeva, D. S., & Gankin, M. I. (2017). Cerebral circulation and cognition in patients with coronary heart disease underwent coronary bypass operation. *Russian Journal of Cardiology*, (3), 77-84.
- Potapov, I. V. (2019). Methodological approaches to solving the problem of determining the criminal procedural capacity of witnesses and victims. *Law and order: history, theory, practice*, 2(21), 43–50.
- Safronova, N. V. (2016). The role of modeling functions and levels of conscious and unconscious mental processes in cognitive reality. *Law and Practice*, 2, 251–256.
- Solso, R. (2006). *Cognitive Psychology*. Peter.
- Tkachenko, A. A., Morozova, M. V., & Savina, O. F. (2014). Psychological and psychiatric aspects of the assessment of criminal procedural capacity. *Russian Psychiatric Journal*, 2, 12–17.