

СЕКЦІЯ 22

КРИМІНАЛЬНО-ПРОЦЕСУАЛЬНІ АСПЕКТИ КРИМІНАЛЬНОГО ПРОВАДЖЕННЯ ТА КРИМІНОЛОГІЧНІ ОСОБЛИВОСТІ ПРОТИДІЇ ЗЛОЧИННОСТІ В УМОВАХ ВОЄННОГО СТАНУ

Керівник секції: завідувач кафедри кримінального процесу,
детективної та оперативно-розшукової діяльності, доктор юридичних наук,
професор Л. І. Аркуша

Секретар секції: професор кафедри кримінального процесу,
детективної та оперативно-розшукової діяльності, доктор юридичних наук,
доцент О. О. Торбас

Підсекція 1

Проблеми кримінального процесу в умовах воєнного стану

ARKUSHA LARYSA

*National University "Odesa Law Academy",
Head of the Department of Criminal Procedure, Detective and Operational Activities,
Doctor of Law, Professor*

CHIPKO NATALIYA

*National University "Odesa Law Academy",
Associate Professor of the Department of Criminalistics, PhD*

ZAHORODNII IHOR

*National University "Odesa Law Academy",
Associate Professor of the Department of Criminalistics, PhD*

OPERATIONAL INVESTIGATIVE AND CRIMINAL PROCEDURAL LEGAL RELATIONS: CONCEPTS AND DIFFERENCES

Obtaining materials of operational and investigative activities and their use in criminal proceedings takes the form of legal relations that arise both within the subjects of operational investigative activities and between the

subjects of criminal proceedings, and between subjects of operational investigative activities and criminal proceedings.

One of the main reasons for the inefficiency of the use of materials of operational investigative activities in criminal proceedings is the lack of scientific and theoretical development of legal relations in operational investigative activities and their relationship with criminal procedural relations and imperfection of their legal regulation.

Criminal-procedural relations can be defined as those that arise, develop and terminate in the field of criminal procedure, regulated by criminal-procedural norms [1] and through which the powers of state bodies conducting criminal proceedings, as well as procedural rights and responsibilities of individuals, which fall into its scope, and protect their substantive, procedural and other legitimate interests.

In the modern theory of operational investigative activities, the problem of legal relations is the least studied, which negatively affects the determination of the legal status of operational investigative activities, their interaction both with each other and in relations with criminal subjects during the implementation of operational units commands from investigator, prosecutor, when using materials of operational investigative activities in criminal proceedings as reasons and grounds for opening criminal proceedings or conducting investigative (search) actions, making other procedural decisions, obtaining factual data that may be used as an evidence in criminal proceedings.

Despite the lack of detailed legislative regulation of operational investigative activities, the problems of legal relations in this area, at the same time, were the subject of research, which was mainly conducted on the basis of analysis of legal regulations. The efforts of specialists in the field of operational investigative activities were aimed mainly at proving the very existence of the main prerequisite for the existence of legal relations in operational investigative activities, which forced to seek arguments to justify the legal nature of norms governing relations between its subjects.

In the theory of operational investigative activities, the opinion was expressed that there are no grounds to attribute operational investigative legal relations to special administrative ones, and the following arguments were presented: the principles of administrative law differ from the principles of norms governing relations arising in operational investigative activities. These principles are directly or indirectly enshrined in bylaws governing operational investigative activities [2; 3; 4], so there can be no administrative-legal (even «special») relations governed by law that do not comply with the principles of administrative law.

Prior to the legislative settlement of operational investigative activities in theory there was no unity of opinion on the legal nature of its norms and legal relations, which were formed on their basis in this area, which greatly complicated the development of problems of operational investigative activities in criminal proceedings.

Analysis of the relations arising in the operational investigative activities shows that many of them have the main features of legal relations: they are

a specific part of public relations; arise on the basis of legal norms; carried out through the subjective rights and legal obligations of their participants, which have a specific nature; express a certain will of these subjects; arise, change and cease in the presence of legal facts; in some cases, they may give rise to criminal procedural legal relations, and in others – arise from them; promote specific means and methods of criminal procedure relations, the establishment of criminal law relations; they are under the protection of the state, which ensures their implementation; regardless of their specificity, based on their content and object, they are inherent in the public law nature. Operational investigative legal relations are protective legal relations.

These features give grounds to define operational investigative legal relations as those regulated by the legislation on operational and investigative activities, and arise, develop and terminate in the field of operational investigative activities, through which the powers of operational investigative activities and their officials persons, rights and responsibilities of persons who fell into its sphere.

Operational investigative legal relations differ from criminal-procedural relations in following features: the nature of the norms that regulate them; special objects; grounds of origin and end; the nature of the implementation; the range of entities and their legal status.

Operational investigative, as well as criminal-procedural legal relations, actually function in two aspects: first, in their system as a set of interdependent relations; secondly, as the individual relations that make up the system.

Legal relations that function in the process of operational investigative activities and criminal proceedings have a complex structure. They include: object, content and subject. Proper clarification of the structure of legal relations in general and each of their elements separately makes it possible to clearly determine the status of the subjects of these legal relations, to create optimal conditions for their relationship within these activities and their subjects, which will effectively solve operational problems activities and criminal proceedings.

The direction (object) of the whole set of legal relations and each individual relationship coincides only in the end. Therefore, it seems quite justified to distinguish in the field of operational investigative activities and the criminal process of two objects of legal relations: general and special. The common object of operational investigative activities and the criminal process is what or in connection with which the whole set of relations in their spheres of activity functions and develops, respectively – operational investigative and criminal procedural legal relations in their objective (one that corresponds to reality) state, namely: public relations, which are placed under the protection of the criminal law of Ukraine.

The special object of operative-search activity and criminal process is the expected result of the behavior of the participants of each specific relationship, everything about what or why a certain legal relationship arises.

The question of the content of operational investigative legal relations is closely related to the question of their form and is one of the most

controversial in the legal literature. In legal relations, the legal form and material content are inseparable, and therefore the problems of legal relations must be solved taking into account this “fundamental fact”.

In operational investigative activities and criminal proceedings should distinguish between legal and factual content of legal relations. The legal content of the legal relationship is the possibility of certain actions of the authorized entity or the need to refrain from the prohibited actions of the obligor, and the actual – the very actions in which the rights and obligations are realized.

Based on the general theoretical principles, the content of operational-investigative and criminal-procedural legal relations can include subjective rights, responsibilities, as well as the activities of their subjects for their implementation. It should be noted that the activities of subjects in the actual exercise of their rights and responsibilities fills specific legal relationships with real meaning, allows you to see them in development, distinguish them from theoretical models, track and analyze the nature of their subjects.

The form of operative-investigative and criminal-procedural legal relations should be understood as the limits of possible and proper behavior of their subjects enshrined in the law. The analysis of the content and form of operative-investigative and criminal-procedural legal relations testifies to their interrelation and interdependence.

When considering operational investigative legal relations as one of the main categories of operational investigative activities, one of the main issues is their connection with material (criminal law) and criminal procedural relations.

The theory of legal relations has traditionally held the view that criminal law relations can be realized only through the activities of subjects of criminal procedure and that the criminal process is necessary and the only possible form of implementation of criminal law. However, in our opinion, the implementation of criminal law relations occurs much earlier than the beginning of the criminal procedure, that criminal law relations can be implemented through operational and investigative relations, which are one of the forms of establishing criminal law relations.

The analysis of criminal, criminal-procedural and operative-investigative legal relations shows that they, as a rule, arise and cease to exist at different times. It is important to find out the beginning of the emergence of operational and investigative relations and their relationship with criminal and criminal-procedural relations.

References:

1. Кримінальний процесуальний кодекс України : Закон України № 4651-VI від 13.04.2012 р. URL : <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2096> (дата звернення: 23.11.2021).
2. Про Державне бюро розслідувань : Закон України № 794-VIII від 12.11.2015 р. URL: <https://zakon.rada.gov.ua/laws/show/794-19#Text> (дата звернення: 10.11.2021).

3. Про Національне антикорупційне бюро України : Закон України № 1698-VII від 14.10.2014 р. URL: <https://zakon.rada.gov.ua/laws/show/1698-18#Text> (дата звернення: 05.11.2021).
4. Про Національну поліцію : Закон України № 580-VIII від 02.07.2015 р. URL: <https://zakon.rada.gov.ua/laws/show/580-19#Text> (дата звернення: 11.11.2021).
5. Про оперативно-розшукову діяльність : Закон України № 2135-XII від 18.02.1992 р. URL: <https://zakon.rada.gov.ua/laws/show/2135-12#Text> (дата звернення: 05.11.2021).

Ключові слова: оперативні підрозділи, правовідносини, оперативно-розшукова діяльність, кримінальний процес.

Key words: operational units, legal relations, operational investigative activities, criminal proceedings.

АЛЕНІН ЮРІЙ ПАВЛОВИЧ

*Національний університет «Одеська юридична академія»,
професор кафедри кримінального процесу, детективної
та оперативно-розшукової діяльності, доктор юридичних наук, професор,
член-кореспондент НАПрН України, Заслужений юрист України*

ЩОДО ВІДНОВЛЕННЯ ОЧНОЇ СТАВКИ В ЯКОСТІ САМОСТІЙНОЇ СЛІДЧОЇ ДІЇ

Відповідно до ч. 9 ст. 224 КПК слідчий, прокурор має право провести одночасний двох чи більше допитаних осіб для з'ясування причин розбіжностей у їхніх показаннях, тобто тут мова йде про очну ставку. Отже підкреслимо, що це слідча дія за КПК 2012р. втратила свою самостійність на відміну від КПК 1960р. та виведення з загальної системи перевірених слідчих дій. На наш погляд подібний підхід до використання очної ставки як ефективного засобу перевірки отримання нових доказів є не досить аргументованим і таку позицію слід визнати кроком назад у врегулюванні певних засобів збирання й перевірки фактичних даних.

З цього приводу зазначимо наступне. В сучасній літературі поки що не існує єдиної думки як щодо правової природи очної ставки, так і стосовно мети і предмету її провадження.

Що стосується першої обставини, то тут мається два головних підходи, які відображають сутність правової природи очної ставки.

Ряд авторів (наприклад, М.С. Строгович) дотримуються тої точки зору, що очна ставка не є самостійною слідчою дією, а є лише особливою формою допиту. Дійсно, в редакції всіх КПК вживається такий вираз, як «допит всіх раніше допитуваних осіб» та в декількох подібних варіантах. Їх використання й дало підставу стверджувати, що законодавець визнає очну ставку різновидом допиту, оскільки під час її про-