

# Novelties in the Legal Regulation of Operational and Investigative Activities

Andrey V. Nikulenko<sup>1</sup> <sup>a</sup>

<sup>1</sup>The Herzen State Pedagogical University of Russia, Saint Petersburg, Russia

**Keywords:** Operational-search activity; criminal legislation; circumstances precluding criminality of the act; lawful infliction of harm.


**Abstract:** The article is devoted to the circumstances that exclude of the criminality act in the criminal legislation of the Russian Federation and their role in determining the legality actions of law enforcement officers (operatives) during operational search activities. Objective: to identify the advantages and disadvantages of the legal regulation of operational-search activities from the point of view of the current operational-search legislation and criminal legislation of Russia. Tasks: to analyze situations of legitimate harm in the implementation of operational investigative activities and develop proposals for improving the current legislation. Methods: research of the relevant norms using the system method, general scientific methods (structural and functional analysis, comparison, logical method, content analysis of the courts practice and mass media). Main results: the study revealed the advantages and disadvantages of the regulatory framework for conducting operational search activities, as well as significant qualification errors in forensic investigative practice. Conclusions and justification of the work novelty: the paper substantiates the insufficient effectiveness of the existing approach to the problems of legal regulation of operational search activities and suggests ways to solve these problems, including by modernizing the existing norms and introducing new ones in Chapter 8 of the Criminal Code of the Russian Federation. In view of the ambiguous and often inconsistent practice of applying the norms of criminal law on the circumstances precluding the criminality of an act, it is proposed to use a casuistic approach in the further reconstruction of the relevant norms to present the legislative wording of these norms that allow causing legitimate harm to public relations protected by criminal law. At the same time, the wording of the norms is created as clear as possible for the operative employee and the authorities controlling his activities, as well as for citizens, which allows them to unambiguously assess the legality of their implementation (operational search measures related to causing harm).

## 1 INTRODUCTION

Turning to the topic of circumstances that exclude the criminality of an act in the criminal legislation of Russia, it is not difficult to notice their obvious legislative imperfection, incompleteness, which gives rise not only to numerous disputes in the doctrine of criminal law (Савинский А.В., 2018) within the framework of which a single view on the legal nature of these circumstances has not yet been developed, but also significant contradictions in investigative and judicial practice, generating errors that seal the fate of socially active people who sought to carry out socially useful behavior. Against the background of a reduction in the number of employees, primarily

police officers, who are directly obliged to counteract socially dangerous manifestations, the importance of the institution of circumstances that exclude the criminality of the act is significantly increasing (Organized Crime, Trafficking, Drugs, 2004). Citizen is often in a situation when, in the case of criminal threats, he must rely on their own strength and ability, and which are significantly limited by the framework of the current legislation, as usual, falling short of the realities of modern criminal situation (Milyukov S. F. and Nikulenko A.V., 2020).

However, often show a complete helplessness and representatives of law enforcement agencies, which, in our opinion, are deprived of even minimal legal and regulatory framework, giving effective

<sup>a</sup> <https://orcid.org/0000-0003-1332-4621>

opportunities to counter criminal expansion (Anderson E., 1999; Пархоменко С.В., 2018; T.R. Oliveira, J. Jackson, K. Murphy, B. Bredford, 2018; Milyukov S., 2021).

## 2 MATERIALS AND METHODS

The methodological basis of the study was primarily the following two methods. First, the dialectical method of cognition of social and legal phenomena, according to which the circumstances that exclude the criminality of an act are considered in the unity of their social content and legal form. Secondly, the method of systematic analysis of actual situations of legitimate harm in the implementation of operational investigative activities and reflecting their norms.

The work uses private scientific methods: logical-semantic, system-structural, grammatical, document analysis, and others.

## 3 RESULTS AND DISCUSSION

If we admit that the improvement of the Federal Law "On Police" is still being demonstrated, then the operational-search legislation froze at the level of 2006 (at that time, the adoption of the Law "On Operational-search Activities" itself looked progressive), when the presence of declaratory norms was recognized as sufficient.

It is no longer possible to deny the close relationship between the criminal legislation and the legislation regulating operational and investigative activities (Shkabin G.N., 2020). Moreover, the latter cannot be legally implemented without taking into account the provisions of the General Part of the Criminal Code of Russia, not to mention the Special Part. We are talking, first of all, about the norms enshrined in Chapter 8 of the Criminal Code of the Russian Federation (circumstances that exclude the criminality of an act), without which it is impossible to determine the legality of almost any operational search activity.

The current rapid development of public relations requires new approaches to the current legislative formulations of the norms on circumstances that exclude the criminality of an act in criminal legislation (Parkhomenko S. V. Milyukov S. F., Nikulenko A.V., 2019) and a significant modernization of operational and investigative legislation, as well as the practice of their application,

which cause well-founded criticisms (Козлова Н., 2020; Жарких И.А. 2021).

Almost any operational search activity, in one way or another, encroaches on the rights of citizens, and the protection of which is proclaimed by the Constitution of the Russian Federation. For example, such "harmless" things as questioning citizens, making inquiries without remorse invade the privacy of a person whose inviolability is enshrined in the basic law of the country. Obtaining information about people, events, and facts, especially those of operational interest, is always associated with a certain invasion of a person's personal life. And only the official position of persons who have the right to carry out operational search activities requires that this information be kept secret.

It is noteworthy that a citizen has the right to receive information about the ORM carried out against him. But how can he know that they were conducted against him?

Coming to the main point, we note that the conditions for the legality of any operational search activity are not defined in legal regulatory legal acts. Departmental instructions are hidden not only from the public, but also from practicing lawyers-interrogators, investigators, prosecutors and judges, in fact, determining the question of the legality or illegality of the actions of operational workers.

Such a situation leads to negative consequences, both for the citizen (Humphrey J., 2006; Finn J., 2004) in respect of whom operational measures were carried out illegally or in violation of the conditions of legality, and for the operative employee himself, since his actions can be recognized as criminal a priori.

The author critically assesses the current state of affairs and believes that the possibilities of the relationship between criminal law and operational-search legislation have not even begun to work. Only article 39 of the Criminal Code of the Russian Federation (extreme necessity) to some extent can serve as a basis for determining the legality of the implementation of a particular operational search activity.

We believe that the modernization of the current Chapter 8 of the Criminal Code of the Russian Federation is long overdue in terms of the need to consolidate fundamentally new norms regulating the specifics of conducting operational-search events.

The first step could be a norm that establishes the conditions for the legality of an operational experiment and a test (control) purchase – the most difficult operational search measures to implement, affecting the constitutional rights and freedoms of

citizens and entailing (if successfully implemented) criminal liability for the person against whom they were conducted, and in this regard, causing a great public outcry.

Subsequently, perhaps each operational-search event can get its own legislative consolidation in the criminal legislation, or certain conditions for the legality of its conduct will be "embedded" in the Law of the Russian Federation "On operational-search activities".

## 4 CONCLUSIONS

In our opinion, it is necessary to construct the norms of the articles of Chapter 8 of the Criminal Code of Russia as clear as possible for the law enforcement officer (Nikulenko A.V., 2019), that is, an ordinary citizen performing his civil duty related to the implementation of socially useful behavior by harming public relations protected by criminal law, as well as for law enforcement officers performing their official duty to combat crime. Moreover, it is much easier to achieve compliance and enforcement of standards that are clear to everyone (the operative worker, supervisory and judicial authorities, lawyers).

We present our proposed norm on the operational experiment:

"Article ... operational experiment.

1. It is not a crime to cause harm to interests protected by criminal law as a result of an operational experiment to expose a person guilty of committing a crime and prevent the possibility of committing new socially dangerous acts, if it was not possible to expose such a person (persons) in this situation by other means and at the same time there was no excess of the necessary measures, that is, deliberate actions that clearly do not correspond to the nature and degree of public danger of the act committed by him and the identity of the guilty person.

2. When assessing the legality of causing harm to interests protected by criminal law, along with the nature and degree of public danger of the committed act, the person, methods of evading responsibility, the reasonable need for causing harm to achieve the goals of provocation and other circumstances related to the fact of the operational experiment are taken into account.

3. Exceeding the limits of an operational experiment is recognized as causing harm that is clearly inconsistent with the nature and degree of the threatened danger of the act committed (committed) by the person in respect of whom the experiment is

being conducted. Such excess entails criminal liability only in cases of intentional infliction of harm.

4. The provisions of Part 1-3 of this Article shall fully apply to persons who have the right to conduct an operational experiment in connection with their professional or other special activities or official (official) position. If the content of the norms of other legislative or subordinate normative legal acts contradicts, the provisions of this article shall apply."

In our opinion, the author's position on the problem of law enforcement of the rules on the circumstances that exclude the criminality of an act, in our opinion, will increase the effectiveness of the mechanism for countering socially dangerous manifestations by applying the required and sufficient criminal legal means. The use of offensive measures to counteract socially dangerous behavior is justified (Milyukov S.F., 2016, 2018, 2021). The proposal of the author's version of the norm of the Criminal Code of Russia on operational experiment will allow to apply it more actively in the framework of such operational search activities as operational experiment and verification (control) procurement, designed to assist in countering such socially dangerous manifestations as bribery and trade in narcotic and other dangerous drugs and substances, as well as weapons.

Getting the necessary effective tools in the hands of an operational employee will allow you to use the offensive in the fight against crime and increase the importance of active counter-criminal actions of law enforcement officers. It is well known that without carrying out operational search measures, it is impossible to solve almost any pre-planned crime.

## ACKNOWLEDGEMENTS

The author is grateful to Gennady S. Shubin, Chief Researcher of the Federal Research Institute of the Federal Penitentiary Service of Russia, Doctor of Law, Associate Professor for the suggestions and materials that prompted the author to write this work.

## REFERENCES

- Parkhomenko, S.V., Milyukov, S.F., Nikulenko, A.V., 2019. Vectors of the criminal policy of legal regulation of circumstances that exclude the criminal character of an action. *In Russian Journal of Criminology*. 13(6). pp. 992–1001.
- International Crimes: Edited by Nicos Passas, 2003. Temple University. USA. p. 312.

- Organized Crime, Trafficking, Drugs, 2004. Helsinki. p. 90.
- Nikulenko, A.V., 2019. *Circumstances Excluding Criminality of Action: Conceptual Basics of Criminal Legal Regulation*: abstract of a Ph.D. thesis in Legal Science.
- Milyukov, S.F., Nikulenko, A.V., 2020. *Causing harm during the arrest of a person who has committed a socially dangerous act*. Petersburg: Jurid. Center. p. 768.
- Parkhomenko, S.V., 2018. Necessary defense in the context of the implementation of constitutional rights and freedoms of man and citizen. *In the Bulletin of the University of the Prosecutor's Office of the Russian Federation*. 6(68). pp. 67–70.
- Humphrey, J., 2006. *Deviant Behavior*. New York: Prentice Hall. p. 410.
- Finn, J., 2004. A survey of online harassment at a university campus. *In Journal of Interpersonal violence*. 19(4). pp. 468–483.
- Kozlova N., 2020. Elementary, Watson. Russian newspaper. July 29.
- Milyukov, S.F., Nikulenko, A.V., 2018. Defense provocation: from unconditional denial to a balanced assessment. *In the Scientific Bulletin of the Omsk Academy of the Ministry of Internal Affairs of Russia*. 1(68). pp. 8-14.
- Milyukov, S.F., Nikulenko, A.V., 2016. Provocation in the fight against corruption: dialectical contradiction and ways out of it. *In Actual problems of economics and law*. 10-4(40). pp. 45–53.
- Milyukov, S.F., Nikulenko, A.V., 2021. Non-obvious solutions to the problems of violent counteraction to crime. *In the All-Russian criminological journal*. 15(1). pp. 36–45.
- Criminal law of Russia. General and Special parts: textbook, 2015. Ed. THEM. Matskevich, N.G. Kadnikov. Moscow: Union of Criminalists and Criminologists. p. 990.
- Brantingham, P.J., Yuan, B., Herz, D. 2020. Is Gang Violent Crime More Contagious than Non-Gang Violent Crime?. *In Journal of Quantitative Criminology*.
- Anderson, E., 1999. *Code of the street: decency violence and the moral life of the inner city*. Norton and Company. p. 352.
- Braga, A.A., Weisburd, D., Turchan, B., 2018. Focused deterrence strategies and crime control. *In Criminal Public Policy*. 17(1). 3. 205–250.
- Savinsky, A.V., 2018. On the correlation of an operational experiment, provocation and circumstances that exclude the crime of the act. *In the Siberian Criminal Procedure and Criminalistic Readings*. 3. pp. 23–38.
- Smirnov, M.P., 2002. *Comments on the operational-search legislation of the Russian Federation and foreign countries*. Moscow: Exam. p. 543.
- Zharkikh, I.A., 2021. The concept and signs of crime provocation: a systematic approach. *Criminal law: development strategy in the XXI century: materials of the 18th International. scientific-practical conf.* Moscow. pp. 88–94.
- Oliveira, T.R., Jackson, J., Murphy, K., Bredford, B., 2020. Are Trustworthiness and Legitimacy «Hard to Win, Easy to Lose»? A Longitudinal Test of the Asymmetry Thesis of Police Citizen Contact. *In Journal of Quantitative Criminology*.
- Shkabin, G.S., 2020. Criminal and operative-search legislation: problems of intersectoral relations and prospects for improvement. *Review of the V Interdepartmental scientific and practical conference. State and Law*. 7. pp. 144–150.