



CONCEPT AND TYPES OF THE OLD AGE PENSION SECURITY PROCEDURAL LEGAL RELATIONS

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Summary

The article is dedicated to analyzing of the legal nature of the old age pension security procedural legal relations. The author characterizes the main features of the old age pension security procedural legal relations. It argues that the old age pension security procedural legal relations are not the derivative subsidiary relations. The classification of these relations is given here. An article focuses on describing the concept of the legal procedure as the core of the old age pension security procedural legal relations.

Key words: pension security, the right to an old-age pension security, legal procedure, the old age pension security procedural legal relations.

Аннотация

Статья посвящена анализу правовой природы процедурных правоотношений пенсионного обеспечения по возрасту. Автор характеризует основные черты процедурных правоотношений пенсионного обеспечения по возрасту. Утверждается, что процедурные правоотношения пенсионного обеспечения по возрасту не являются производными вспомогательными отношениями. Классификация этих отношений приведена здесь. Статья посвящена описанию понятия правовой процедуры как ядра процедурных правоотношений пенсионного обеспечения по возрасту.

Ключевые слова: пенсионное обеспечение, право на пенсию по возрасту, юридическая процедура, процедурные правоотношения пенсионного обеспечения по возрасту.

Problem statement. Ukraine declared itself as a social state, the essence of which is disclosed in the social rights under Part II of the Constitution of Ukraine [1]. Among all of them we can select the most popular – the constitutional right to an old-age pension security.

The old-age pension security is an essential part of the social security system, the guarantee of the stable development of society, because it covers both the interests of working and disabled population.

Therefore, one of the urgent needs is the existence of an effective mechanism for the realization of the right to receive the old-age pension provision. But a person, who has reached the statutory retirement age, can exercise the right to an old-age pension security only in the relevant relations. These are the old-age pension security legal relations.

The old-age pension security legal relations can be identified as regulated by the law of social security permanent and volitional social relationships that occur between those involved in the implementation of their rights and responsibilities in the area of the old age pension security, and consist in providing personalized substantive security by the redistribution of the Pension Fund or the state budget. These legal relations are quite different. The traditional legal classification on the point of the purpose (or on the point of the result of what legal norm those relations are) seems to be appropriate. Thus, the old age pension security legal relations are

divided on the substantive and procedural legal relations. The old age pension security substantive legal relations are the relations of the assignment of the pension benefits. The old age pension security procedural legal relations include the relations about the establishment on the legal facts; the right to an old age pension security; the relations about the hearing of the appeals on issues relating to social security out of the court.

Research condition. The procedural legal relations in the sphere of the social security were comprehensively examined by V.K. Subotenko [2] back in the 80s of the twentieth century and therefore to some extent lost its relevance. The examined legal relations also were analysed by such domestic scientists and lawyers as N.B. Bolotina, P.D. Pylypenko, S.M. Sinchuk, N.M. Stakhovska, B.I. Stashkiv and others. In general, scientists are exploring the legal aspects of substantive relations in the sphere of the social security. However, there is the lack of the researching of the procedural legal relations, particularly in the field of the pension security.

Taking into the consideration the above-mentioned fact that the right to receive the pension provision is the Constitutional right, which can be realize through the old age pension security procedural legal relations, we find it necessary to emphasize them on the scientific level. This defines **the aim and task of the proposed article.**

Main part of the article. The core of the old age pension security procedural legal relations is the legal notion of the

«procedure». It should be noted that in the literature the definition of the «procedure» is not unambiguous. In particular, some scholars consider the procedure as a kind of the process, while others use the terms «procedure» and «process» as synonymous [3, c. 448]. There is also an approach to a broad understanding of the legal procedures, thus isolating the regulative procedure as a series of actions, aimed at regulating public relations by providing their participants the rights and responsibilities (the official activity) as well as a protective procedure, that provides the defense of the rights of their participants in case of their challenge or infringement and the application of measures of the legal liability (the jurisdictional activity or the judicial process) [4, c. 57].

Likely, V.M. Protasov identifies substantive and processual procedures. The core substantive procedure makes the substantive relationships, in which the positive behavior of the participants is conducted. For the processual procedure the main elements are the defensive legal relations, in which the coercive measures are implementing [5, c. 7].

According to R.S. Alimov, for the understanding of the legal procedures it is necessary to enclose its content, namely the system of the relations. The scientist believes that «the result of a legal nature, on which all legal relations that are included in the legal procedure are aimed to achieve, may consist not only of the realization of the certain relationships». Scientist identifies the following types



(groups) of the legal procedures: the rule-making procedures, the procedures for the adoption of the individual acts of government; the auxiliary procedures, which are not accepted the management decisions, but the operation of these procedures can be the basis for a decision as normative or individual plan [6, c. 22].

O.O. Sereda proposes a criterion for the classification of the legal procedures as a form of consolidation (fixation) of legal procedures that allows distinguishing the oral and written legal procedures, that have either documentary or oral form [7, c. 119].

B.I. Stashkiv highlights the legal procedure for the establishment of legal facts, the legal procedure regarding the realization of the right for the particular type of social security, the legal procedure with respect to consideration of the cases about the providing of the certain types of social security out of the court. The scientist believes that the meaning of the words «process» and «procedure» is synonymous, and they are introduced into scientific circulation to define that the jurisdiction is served in the form of the legal process, and rules of the legal procedure are applied in the out of court procedure [8, c. 98].

It should be noted that the difference of the concepts of the legal terms «procedure» and «process» may also vary because of the type of law system in each country. Thus, in common law countries Procedural law comprises the set of rules that govern the proceedings of the court in criminal lawsuits as well as civil and administrative proceedings (by contrast, in the countries with a Roman law system those rules are written in the procedural legal norms). As an exception, the United States procedural law defines rules for the judicial process as well as for the administrative procedure. Dispute resolution through the procedure is typical for the administrative law. The subject of the procedural relations, that resolves the dispute, is known as the so-called federal administrative agencies¹. These agencies are considering the case on an informal or formal procedures. For example, the Social Security Administration reviews hundreds of applications for benefits annually, holding hearings or answering challenges to their decisions in only a small number of cases. The formal procedure consists of: 1) the rule-making that apply to solve other

similar applications in the future, and 2) the decision. The formal procedure involves hearing, which is very similar to the trial. In this procedure the administrative agencies apply the Administrative Procedure Act [9]. This act determines the possibility of judicial review of a decision reached by the administrative agencies. However, the scope of the review is limited. The court will not consider the dispute, but only for reasons of reviewing whether the agency went outside the authority granted to it or procedures in reaching its decision; and whether the decision is so clearly wrong that it must be set aside.

Without analyzing of the legal nature of the concepts of «procedure» and «process» we should emphasize two main differences between legal procedures and processes, such as follows: first, the subjective part (when the dispute is solving by court, then occurs the process and, therefore, there are the processual relations rather than procedural), and secondly, the process is characterized by well defined sequence of phased actions, strict adherence to them from the beginning to the end reaching the appropriate result. The procedure is the a certain order, a method of the dispute resolution.

So, getting back to the characteristics of the old age pension security procedural legal relations, we should highlight the following features:

1. These legal relations are the distinct kind of relationships in the sphere of the pension security. We do not support the idea about the service role and the derivative subordinate character of those procedural legal relations with respect to the substantive one. The explanation for this is that in case of the regret in the decision about the pension provision due to the lack of the reasons for getting a particular kind of old-age pension security, the old age pension security substantive legal relations, in spite of the procedural one, are not occur. Thus, the old age pension security procedural legal relations may precede the occurrence of the relevant substantive legal relations or even prevent their occurrence.

2. The studied relations arise because of the legal fact (an action) as a result of the voluntary will (in the form of a statement) of a person, who applies for an old-age pension security upon the general or preferential conditions. The applicant must

have a subjective right to receive an old-age pension security. Therefore, according to the legislation a person obliges to present with the application required documents confirming this right. Because of such appealing, the old age pension security procedural legal relations of the establishing of legal facts (the social risk), which cause the right to an old-age pension provision, are occurring. These are governed by the Act of the Procedure for the submission and processing of documents for the pension benefits assigning (or the recalculation) under the Law of Ukraine «On Mandatory State Pension Security» [10] defining issue about applications for the working and non-working people (although it doesn't matter whether the person is working or not at the application time, except the seniority pension). An application for the pension provision can be made at any time after the occurrence of the right for it, but not earlier than one month before the achieving of the retirement age.

For the purpose of receiving the old age pension security a person must present an application, a certificate from the tax administration with an identification number (because of the religious convictions a person, who refuses to accept the identification number should present a copy of the passport page with the appropriate mark), evidence of the experience (mainly, the employment book with the relevant records of the working periods, and in case of its absence – the statement of earnings for a period of pensionable service before July 1, 2000 and from July 1, 2000 – the individual data, which can be provided by the Department of personalized registration), the residence proof, the documents certifying the status of a particular entity (the Combatant certification, the disability recognition certification due to injury, concussion, received in defending the homeland or performing other military duties, the certification as participant in liquidation of the Chernobyl NPP accident consequences, etc).

In our view, because of the current state of the widespread implementation of Internet technologies and electronic documents, it will be neat for improving the quality of services for persons who apply for a pension particularly and for the social system at all to expand the Web services in the obligatory state pension security² from only the informative aspect to an effective one, in particular by adding such options as the «retirement calculator»

¹The activity of administrative agencies is known since the early twentieth century. The Congress enacted the Administrative Procedure Act in 1946.



or filling the application form for the pension provision online and sending it to a particular pension fund and so on.

3. The old age pension security procedural legal relations are concerning to the realization of the person right to an old-age pension security. Guaranteed by the Constitution of Ukraine the right to an old-age pension security and the corresponding for it the obligation of the pension provision body to consider the relevant person's application and the attached documents to it and to make the decision, – determine the content of the old age pension security procedural legal relations. Additional elements of the content of these relations can be other mutual rights and obligations of the parties: the right to require from the obligated entities the assisting in establishing evidence which are lacking³, the right to demand the performance of the obligations by the other party in time, the right to choose one of the several types of social security, which exclude each other and so on.

4. The object of the studied legal relations is the result of a relevant pension provision, which is presented in the form of the decision to assign an old-age pension security or to refuse it.

5. These relations provide the law-enforcement activity. We should emphasize that the issue about belonging of the old age pension security procedural legal relations to the law enforcement sphere is controversial in the scientific literature. Particularly, it argues about the operational and organizational nature of the pension security bodies activities in the assigning pensions and establishing legal facts. The result of such activity confirms in the law-executive act. That's all characterized such activity as the execution of law, but not as its enforcement [11, c. 11]. In our view, the old age pension security procedural legal relations are providing the law enforcement, as related to the legal assessment of the legal significant facts, the individual enforcement act making and through imperative authority (powers) of the pension security body – the Pension Fund of Ukraine.

6. The rules apply out the court. This distinguishes the old age pension security

procedural legal relations from the processual one, as was discussed above. Also it should be noted that the Act of the Procedure for the submission and processing of documents for the pension benefits provides that in case of the regret in pension assignment a relevant message indicating the reason for it and the procedures for the appealing such decision must be sent to a person. Unconstitutionally will be the selection of the Pension Fund as a single mandatory appeal body, because of the constitutional principles of the rule of law (Article 8) and the unexhaustiveness of Human Rights (Article 22) as well as the guaranteed in the Article 55 of the Constitution of Ukraine everyone's right to a direct appeal to the court.

But if the applicant voluntarily appeals in the pretrial order to the Pension Fund, it will be procedural legal relations. Otherwise, in the case of judicial protection the relevant processual legal relations will occur.

For the wider characteristics of the old age pension security procedural legal relations we find it necessary to divide those using different criteria.

Among the old age pension security procedural legal relations can be identified relations which precede the substantive one (the relations related to the submission of a person who has become entitled to an old-age pension provision, the application and the required documents for a pension to the relevant local pension fund); the relations accompanying substantive relations (connected with the transferring and indexing the pensions), the relations that discontinue substantive relations (for example, because of the death of a pensioner or the expiring of the agreement on voluntary participation in pension security system, etc.).

Using the criterion of the validation of the old age pension security procedural legal relations we can divide them into the relations which are terminated with a one time performing of duties (for example, the providing of special status (the status of war veterans, veterans of labor, the status of the person affected by the Chernobyl disaster), the relations with completely fixed-term existence in time (procedural legal relations related to the consideration of an application

for an old-age pension provision and to it assignment), the procedural legal relations with respect to an indefinite existence in time (in particular, those relating to the payment of old-age pension).

Depending on the purpose we offer to distinguish: 1) the old age pension security procedural legal relations related to establish the legal facts (the social risk), causing the appearance of the right to an old-age pension provision, such as the achievement of general or special retirement age and the insurance experience; 2) the old age pension security procedural legal relations about the providing of special status (the status of war veterans, veterans of labor, the status of the person affected by the Chernobyl disaster, etc.). For this category of people the legal fact of the existence of the appropriate special status is significant for the purpose of pension providing, and 3) the old age pension security procedural legal relations based on the procedure of the assignment of the old-age pension provision (the person is writing the application for an old-age pension, the appropriate regional body of the Pension fund is deciding to assign the certain old-age pension provision for the relevant person or to regret it), 3) the old age pension security procedural legal relations about the calculation and payment of old-age pensions (including indexing and recalculation of pensions due to the increase in average wages of workers employed in certain sectors of Ukraine's economy, the subsistence level and the length of service, the payment of pensions through the post-office or banks, etc.).

Conclusions. Therefore, knowing the characteristic features of the old age pension security procedural legal relations and their varieties, we can formulate the following definition: the old age pension security procedural legal relations are an independent type of the legal relations in the old age pension security, which preceded or accompanied by appropriate substantive relations, arising from the establishment of the legal facts by the decision of the relevant pension security body with the purpose of the realization of the constitutional right to an old age pension provision.

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МЕСТО ИНСТИТУТА ГОСУДАРСТВЕННО-ЧАСТНОГО ПАРТНЕРСТВА В СИСТЕМЕ ПРАВА УКРАИНЫ

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Summary

It is proved that a public-private partnership is a sub-sector institution of administrative law, and the factors of influence on the institution, such as the peculiarities of legal regulation (legal relations arising in this sphere as regulated using imperative and dispositive legal regulation method) specified relationship have a specific subject structure; relationships in the sphere of public-private partnerships are a special object; bases of relations in this sphere are the special legal facts (usually complex legal facts or actual compositions) within this institution made an impact on the economy of the state through the prism of interaction government bodies and local authorities, on the one hand, and private economic structures, on the other, and the result of this interaction is a significant impact on the performance of socially significant sectors of the economy, the application of public-private partnership is a realization of the public interest. The tasks of development institute of public-private partnership are defined in the legal community.

Key words: public-private partnerships, administrative law, administrative and commercial law, the legal system, the field of law, a legal institution.

Аннотация

В статье обосновано, что государственно-частное партнерство является институтом подотрасли административно-хозяйственного права, и определены факторы влияния на этот институт: особенности правового регулирования (правоотношения, возникающие в этой сфере, регулируются как с помощью императивного, так и диспозитивного метода правового регулирования); указанные правоотношения имеют специфический субъектный состав; правоотношения в сфере государственно-частного партнерства имеют специальный объект; основаниями возникновения правоотношений в этой сфере выступают специальные юридические факты; в пределах данного института осуществляется воздействие на экономику государства сквозь призму взаимодействия государственных органов и органов местного самоуправления, с одной стороны, и частных хозяйственных структур, с другой; результатом такого взаимодействия является существенное влияние на результаты деятельности общественно значимых отраслей хозяйства; при применении механизмов государственно-частного партнерства происходит реализация публичного интереса. Определяются задачи развития института государственно-частного партнерства в правовом обществе.

Ключевые слова: государственно-частное партнерство, административное право; административно-хозяйственное право, система права; отрасли права; правовой институт.

Постановка проблемы. Во времена независимости в Украине сформировался четко очерченный вектор научных исследований института государственно-частного партнерства, направленный на установление экономической целесообразности хозяйствования, экономических форм сотрудничества государства и частного сектора, признание критериев его эффективности и разработки моделей и механизмов его осуществления. Вместе с тем остаются не исследованными представителями юридической науки вопросы правового обеспечения нормативной регламентации указанного института.

Актуальность темы и состояние исследования. Анализ юридической литературы и действующего законодательства Украины даёт основания говорить о том, что «государственно-частное партнерство» практически не рассматривается на сегодняшний день и как самостоятельная правовая категория, и как отдельный правовой институт. Указанные отношения обозначились в рамках системы права Украины с принятием в 2010 году соответствующего закона Украины «О государственно-частном партнерстве» [1].

На данный момент категория «государственно-частное партнерство»