

THE RIGHT TO RETIREMENT IN THE "REVOLUTIONARY" VISION OF THE ROMANIAN CONSTITUTIONAL COURT

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Abstract

The study analyzes the general legal regime of pension rights, in the view of the Constitution and the current legislation, referring to the recent decision of the Constitutional Court no. 387/2018, which allowed an exception of unconstitutionality and it was found that the provisions of art. 53 par. (1) letter c) of the Labor Code are constitutional insofar as the phrase "standard age conditions" does not exclude the possibility for women to request the continuation of the individual labor contract under identical conditions with the man until the age of 65 years. Such a solution leads to the conclusion that the woman can, without being obliged to continue her activity until the age of 65, thus eliminating a rule which has long been in the legislation, considered by some specialists to be discriminatory, also embraced by the Constitutional Court by that decision.

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JEL Classification: K31, K38

1. The right to retirement: general legal regime

The Romanian Constitution², revised³ and republished⁴, regulates in art. 47 *the living standard*. Through its content, which has undergone some additions through the Revision Law no. 429/2003, he establishes what constitutes, according to the specialized doctrine, *the right to a decent standard of living*, which includes the citizen's right to reasonable living conditions, capable of ensuring a decent, civilized level.⁵

Paragraph (1) of art. 47 also establishes **an obligation on the part of the State** to take *measures for economic development and social protection*, but also to impose an implicitly expressed **right** by means of a formula capable of providing citizens with *a decent standard of living*. We find that although the text does not expressly refer to **the right**, such a qualification is understood to mean the fulfillment of any obligation having the purpose of satisfying a right, namely *the right to a decent standard of living*.

The second paragraph enshrines those rights whose guarantee is an obligation for the state and whose realization ensures a decent standard of living for the citizen. The first of these is **the right to retirement**, followed by *the right to paid maternity leave, the right to health care in state healthcare establishments, the right to unemployment benefit and other forms of public or private social insurance provided by law, to social assistance measures, according to the law*.

Thus, as we have already stated, the first in the list is **the right to retirement**, which is due, to a great extent, to the employee, the public servant, the dignitary and other categories of staff (with some peculiarities to the soldiers, members of the liberated professions, etc.).

The development of the legal regime of the right to retirement is found in the Labor Code, approved by Law no. 53/2003⁶ and in Law no. 293/2010 on the unitary pension system⁷. We note that, at the time of writing this study, it is notorious that the Government in office is in the process of finalizing new legislation in the field.

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² Published in the Official Gazette no. 233 of November 21, 1991.

³ Through the Law on revision no. 429/2003, published in the Official Gazette no. 758 of October 29, 2003.

⁴ The republication was made in the Official Gazette no. 767 of 31 10 2003.

⁵ M. Constantinescu, A. Iorgovan, I. Muraru, E.S. Tănăsescu, *Constituția României revizuită-comentarii și explicații*, All Beck Publishing House, Bucharest, 2004, pp.97-99.

⁶ Republished in the Official Gazette no. 345 of 18 May 2011.

⁷ Published in the Official Gazette no. 852 of 20 December 2010.

The discussion should be started from the provisions of art. 56 of the Labor Code, *which regulates the cases of legal termination of the individual labor contract*. Among these, the letter d) shall be present **at the time of cumulative fulfillment of the standard age and minimum retirement contribution at the date of the notification of the pension decision in the case of Grade III disability pension, partial early retirement pension, early retirement pension, old-age pension with the reduction of the standard retirement age; at the date of communicating the medical decision on work capacity in the case of grade I or II invalidity. Interest in our study and the issues it develops is the first of those listed in the letter c), namely **the cumulative fulfillment of the standard age conditions and the minimum retirement contribution**.**

The regulation of **the standard retirement age** can be found in art. 53 par. (1) of the Law no. 263/2010 on the unitary pension system, according to which it is **65 years for men and 63 years for women**. From the interpretation of the legal norm, we find that the legislator differentiates between the two sexes, setting an age two years lower for women, compared to the man.

As regards the situation of civil servants, the right to retirement is recognized by art. 39 of the Law no. 188/1999 on the Civil Servants' Statute⁸, still in force, given that the future Administrative Code of Romania has not yet been promulgated, he is in the preliminary control stage of his constitutionality. We say "*still in force*", given that, after this moment, the provisions of Law no. 188/1999 shall be repealed, on the grounds of art. 604 of the Code, as a result of their taking over, amending and completing them by the provisions of Part Six of the Administrative Code. The text stipulates that *the civil servants benefit from pensions, as well as other state social security rights, according to the law*. The right to retirement is qualified in doctrine in the category of *the rights to cease activity*, respectively, for civil servants, upon termination of their service relationship⁹.

2. The case law of the Constitutional Court on the standard retirement age. A revolutionary vision

In applying the legal provisions on the standard retirement age for women and men, called L.-C.C. he appealed to the Bucharest Tribunal, challenging their interpretation, on the basis of which his decision to retire at the age of 63 was issued, and before the court raised the objection of unconstitutionality of Articles 53 (1) of the Law no. 263/2010, referring to art. 56 para. (1) letter c) of the Labor Code.

In justifying the exception, which was the subject of the Romanian Constitutional Court (CCR) Case no. 2.2270/D/2016, the author of the exception has shown that they violate the provisions of art. 1 par. (3), art. 4 par. (2), art. 16 par. (1) and art. 41 par. (1) of the Constitution *in so far as it is interpreted that the fulfillment of the retirement age of a younger woman than that of the man is a compulsory reason for termination of the individual labor contract, according to art. 56 para. (1) letter c) of the Labor Code*.

As regards the infringement of European case-law and European rules, the applicant invoked the judgment of the European Court of Justice of 26 February 1986 in the case of *MH Marshall v Southampton and the South-West Hampshire Area Heath Authority (Teaching)*, paragraph 26, that "*neither the defendant's employment policy nor the statutory social security scheme obliges a person to retire at the minimum age at which he is entitled to retire. On the contrary, the provisions of national law envisage a possible continuation of professional activity beyond the normal retirement age. in such circumstances, it would be difficult to justify the dismissal of a woman on grounds of gender and age*".

By the same judgment, the Luxembourg Court further points out that "*Article 5 (1) of the Directive 76/207 must be interpreted as meaning that a general dismissal policy involving the*

⁸ Republished in the Official Gazette no. 365 of May 29, 2007.

⁹ Verginia Vedinaș, *Statutul funcționarilor publici (Legea nr. 188/1999) Comentarii, legislație, doctrină, jurisprudență*, 2nd edition revised and added, Universul Juridic Publishing House, Bucharest, 2017, p. 131.

dismissal of a woman on the sole ground that she has reached or has passed the age at which she is entitled to a State pension and which is different for men and women under national law, constitutes discrimination on grounds of sex which is prohibited by that directive". It should be noted that Council Directive 76/207 of 9 March 1976¹⁰ prohibits, by art. 5 par. (1) any discrimination on grounds of sex with regard to working conditions, including the conditions of dismissal, which has led the European Court of Justice to state that the text of the directive "can be invoked against a State authority acting as an employer, to avoid the application of any national provisions not in accordance with art. 5 par. (1)".

Examining the exception, the Court took into account the fact that the legal provisions criticized were also subject to exceptions of unconstitutionality, which it has already stated in its previous case-law, which it invokes in the substantiation of Decision no. 387/2018. Thus, by Decision no. 1237/6 October 2010¹¹, the Court held that the criticism of the parties was made "not only from the point of view of men, who considered themselves discriminated against by the obligation to work until an older age than women, as stated in Decision no. 888 of November 30, 2006¹², but also from the perspective of women, dissatisfied with the fact that at the age of the law, which is lower than that of men, the woman can be retired, which represents discrimination, a violation of the right to work and an injury the right to a decent living standard"¹³. In this regard, the Court also ruled in its Decision no. 107/1 November 1995¹⁴.

Analyzing its own jurisprudence, the Court acknowledged that it had *progressed gradually, from rejecting the exceptions invoked as unfounded, until it admitted, in principle, that social realities had changed, allowing gradual evolution towards uniform regulation, under the aspect of retirement conditions for women and men*¹⁵.

In order to rule on the exception which was the subject of the case which gave rise to Decision 387/2018, the Court held that, in the spirit of European case-law, "it is necessary to emphasize the distinction between **the question of retirement conditions** and that relating to **the termination of the contract individual work** (our emphasis)"¹⁶. In this spirit, the Luxembourg Court held that "the issue of the conditions for granting the old-age pension, on the one hand, and the conditions for terminating the employment relationship, on the other hand, are **distinct** (our emphasis)"¹⁷.

In European legislation, **it was allowed**, by Directive no. Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security¹⁸, the existence of national legislative solutions for determining the different retirement ages for men as compared with men. By another Directive, no. 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal treatment for men and women in matters of employment and occupation¹⁹, **is prohibited** any direct or indirect discrimination based on sex in the sectors whether public or private, including public bodies, in respect of "employment and working conditions, including dismissal conditions, and remuneration as provided for in art. 141 in the treaty".

Referring to all these European provisions, the Constitutional Court has held that its previous case-law on jurisprudence setting different retirement ages for women in relation to men is also not applicable with regard to the provisions of the law laying down the conditions for termination of the individual labor contract, this matter requiring a separate analysis. In making such an analysis, the Court notes that art. 53 of Law no. 263/2010 and art. 56 of the Labor Code

¹⁰ Published in J.O.U.E. series L no. 39 of 14 February 1976.

¹¹ Published in the Official Gazette no. 785 of November 24, 2010.

¹² Published in the Official Gazette no. 54 of 24 January 2007.

¹³ Decision no. 387/2018, paragraph 23.

¹⁴ Published in the Official Gazette no. 85 of 26 April 1996.

¹⁵ Decision of the Constitutional Court of Romania no. 387/2018, paragraph 24.

¹⁶ *Idem*, paragraph 30.

¹⁷ Court of Justice of the European Union, Judgment of 18 November 2010 in the case of *Pensionversicherungsanstalt against Christine Kleist*, paragraph 24, quoted in Decision of the Constitutional Court of Romania no. 387/2018, paragraph 30.

¹⁸ Published in JOUE series L no. 6 of 10 January 1979.

¹⁹ Published in JOUE series L no. 204 of 26 July 2006.

"does not establish an option for the employee to continue the work relationship in progress at the age of legal retirement. ... the only possibility for a person meeting the standard age and minimum retirement contribution to continue working under an individual employment contract is to conclude a new contract with the same employer if that is the case willing, or to another employer"²⁰.

In the same sense, he interpreted the doctrine of specialty, "*the cumulative fulfillment of the standard age conditions and of the minimum contribution stage determines the termination of the labor contract, regardless of whether or not the employee has applied for retirement. Thus, the individual labor contract ceases ope legis*"²¹.

At the same time, it was pointed out that for the cases of termination of the individual labor contract covered by letter c) of art. 56 the actual termination of the individual employment contract is different, depending on the type of pension to which the employee is entitled or who is required by the employee.

Under such conditions, there is no doubt that there is **discrimination between women and men**. This is because the man can continue to work freely, or the woman has to conclude a new employment contract, with the same employer, without the latter being obliged to conclude such a contract, or to another. For these reasons, the Court considers that **the termination of women's employment at a lower age than men can and must remain an option in the current social context**. To think otherwise, considers the Constitutional Court **to turn a legal benefit into a consensus on the termination of the individual labor contract ope legis, acquires unconstitutional valences, insofar as it ignores the woman's willingness to be treated equally with that of men**.

In the light of these considerations, the Court **accepted the objection of unconstitutionality of the provisions of art. 56 para. (1) letter c) the first sentence of Law no. 53/2003 - the Labor Code and found that they are constitutional insofar as the phrase "standard age conditions" does not exclude the possibility for women to request the continuation of the individual labor contract under identical conditions with the man until the age of 65 years**.

As regards the exception of the unconstitutionality of art. 53 par. (1) the first sentence of Law no. 263/2010 on the unitary public pension system, for reasons which are apparent from the considerations that led to the admissibility of the first exception, it was rejected. Indeed, **it is not unconstitutional to set different ages for men and women to give women, for reasons related to their role in society and family, a legal benefit, but it is unconstitutional discrimination criteria, to force a woman to retire at a lower age than that of the man. Under these circumstances, the benefit turns to the contrary, it becomes a burden, a penalty, which is not only unconstitutional and illegal but also immoral**.

3. Legal and practical consequences of the Decision of the Constitutional Court of Romania no. 387/2018

The decisions of the Constitutional Court, according to art. 147 par. (1) of the Constitution **are mandatory and have power only for the future, from the date of their publication in the Official Gazette**. The effects of laws and ordinances that have been declared, in whole or in part, unconstitutional, **shall be suspended for a period of 45 days from the publication of the decision in the Official Gazette, part I**. During this time, the Parliament or, as the case may be, the Government, have the obligation to settle the law or, as the case may be, the order, with the Court's decision. If this does not happen, after the expiration of this period, the normative acts declared, in whole or in part, unconstitutional, cease to be lawful.

Referring to the Decision of the Constitutional Court of Romania no. 387/2018, it was published in the Official Gazette on 24 July 2018. The effects of article 56 par. (1) letter c) of the

²⁰ Decision of the Constitutional Court of Romania no. 387/2018, paragraph 33.

²¹ M. Gheorghe in Ion Traian Ștefănescu (coord.), *Codul muncii și Legea dialogului social. Comentarii și explicații. Include modificările aduse prin O.U.G. nr. 53/4 august 2017*, Universul Juridic Publishing House, Bucharest, 2017, p. 130.

Law no. 53/2003 - the Labor Code **remain suspended for 45 days and until 7 September 2018 inclusive, but not in their entirety, but as to the interpretation that they oblige the female employee to retire if she has reached the age of 53 years and has the minimum membership fee required by law.** During this time, Parliament has the obligation to agree art. 56 para. 1) letter c) of the Law no. 53/2003 - Labor Code with Decision of the Constitutional Court of Romania no. 387/2018. How can this be done? In our opinion, the solution of completing art. 56 of the Labor Code with a new paragraph, to be placed before the current paragraph (2), which reads as follows: "*For the situation referred to in para. (1), letter c) first sentence, women may choose to continue working until the standard age of the men is met*".

We have appreciated that this decision of the Constitutional Court is in fact revolutionary because it is capable of recognizing genuine equality for women, as it emerges both from the European institutions' rules and jurisprudence and from the principles enshrined in the Romanian Constitution, revised and republished. Article 4 (2) of the Constitution lists, in the spirit of all international regulations, **the gender** among the criteria prohibiting any discrimination between citizens²². And even if the sex criterion is placed sixth in the list, it should not be interpreted as meaning that the constituent legislator would operate a hierarchy between them. They are all important and their spirit has to be supplemented with the spirit of art. 16 par. (1) proclaiming *the equality of all before the law and public authorities without privileges and discrimination*. In the context in which, at the time of drafting this study, there is in the debate procedure a future regulation regarding the unitary pension system, which, in the future, is supposed to replace the current Law no. 263/2010, we consider that it would be of no interest that the case-law of the Constitutional Court that we have analyzed in this study should also be considered when adopting the future framework regulation in the field. It is at least one additional argument for the necessity of rethinking the public pension system in Romania, of its philosophy, which must be linked to that which comes out of European legislation and jurisprudence.

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7. Decision of the Constitutional Court of Romania no. 387/2018, published in the Official Gazette of Romania, Part I, no. 642 dated July 24, 2018.

²² The other criteria are race, nationality, ethnic origin, language, religion, opinion, political affiliation, wealth or social origin.