THE LEGAL REGIME OF THE RETIREMENT OF THE EMPLOYED WOMAN AND OF THE PUBLIC SERVANT WOMAN IN THE ROMANIAN LAW SYSTEM

Associate professor **Teodor Narcis GODEANU**[1]

Abstract

The present study aims to analyze, as it also results from its title, the specificity of the legal regime of the right to retirement, from two perspectives. First, in comparison, the regime of the woman's pension right in relation to the man, and secondly, from the same comparative perspective, the pension scheme of the woman employed in relation to the woman civil servant. The conclusion that emerges from its content is that the legislative policy in Romania has sought to mitigate the differences of legal regime between the above mentioned categories. The Constitutional Court also had a special role, which promoted, through its jurisprudence, the solution of eliminating discrimination, both on the grounds of sex and on the criteria of professional category, women employees and women civil servants.

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1. Constitutional foundations regarding the right to retirement

Two major stages can be distinguished in the evolution of a person's professional existence. The first of these is the one in which an activity is performed, in the sense that a work, service or public dignity report is carried out, a liberal profession or other atypical form of employment report is exercised. During this period, the person performing the respective activity benefits from a consideration which is called, as a rule, *salary* or *remuneration*, or, as the case may be, an allowance, a balance or a fee.

The second stage is the one that follows after the cessation of the first one, an active one, when the person continues to benefit from an advantage bearing the name of pension and which from the point of view of the legal regime, can be governed by a **general pension regime**, currently regulated by Law no. 127/2019 regarding the public pension system, not yet in force, preserving the effects of Law no. 263/2010, with the subsequent modifications and completions, regarding the unitary system of public pensions, or of an atypical regime, the so-called **special pensions**, which are recognized both to categories of civil servants, as well as contract staff or, as the case may be, dignitaries.

Regarding *the special pensions granted to certain categories of former employees in the public sector,* the Constitutional Court, by Decision no. 847/2011,[2] ruled that *they do not belong to the pension right provided by art. 47 of the Constitution, to the extent that the source of financing is in the state budget, not in the social insurance budget.*[3] Moreover, it was considered by Decision no. 765/2011,[4] that *although they are not a privilege, their amount can be modified or even annihilated, if the resources required for their payment no longer exist.*

The constitution contains regulations regarding both salary and pension, specifying that they are enshrined in two different constitutional texts, but both are placed in the title on fundamental rights, freedoms and duties.

As regards the right of receiving a monthly salary, it is established in Article 41, which regulates **labor and social protection**, and mentions it in two paragraphs, expressing two hypotheses, and implicitly, two dimensions of the legal regime of the wage.

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[1] Teodor Narcis Godeanu - Faculty of Legal and Administrative Sciences, "Spiru Haret" University, Bucharest, Romania, narcis@godeanu.eu.

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[3] Popescu, A., Tănăsescu, E.- S., in Muraru, I., Tănăsescu, E.- S. (coord.), *Constitution of Romania, Commentary on articles*, 2nd ed., C.H. Beck Publishing House, Bucharest, 2019, p. 32.

[4] Published in the Official Gazette no. 476/July 6, 2011.

The first of these is regulated in paragraph (2) of art. 41, which recognizes *the right of employees to social protection measures,* and in this context one of the means by which this right is guaranteed is *"the establishment of a gross minimum wage on the economy".*

The second regulation contained in art 41 is that of paragraph (4), according to which *"in equal work, women have equal salary with men"*. This principle represented *a real milestone for the legislator*[5] and can be found and even developed in art. 6 paragraph (3) of the Labor Code, as it was supplemented by G.E.O. no. 55/2006[6] which states that *"For equal work or of equal value, any discrimination based on sex criterion is prohibited on all the elements and conditions of remuneration"*. This regulation, which was taken from the norms of the European Union, was criticized in the specialized doctrine,[7] considering, in our opinion, rightly, that it adds to art. 41 paragraph (4) of the Constitution, which refers to *equal work.* However, the cited author considered that, although he adds to *the letter of the Constitution,* it is in accordance with *its spirit,* but in order to eliminate any criticism in the future, it would be necessary to reformulate, in the perspective of the constitutional revision, of art. 41 paragraph (1) of the Constitution, in the sense that he refers to *work of equal value.*

Regarding **the right to retirement,** we find it regulated in art. 47 dedicated to the *"standard of living",* which, according to paragraph (1), obliges the Romanian state to take measures of economic development and social protection, through which to ensure to the citizens a decent standard of living.

In paragraph (2) of art 47 the social protection measures that contribute to ensuring a decent standard of living are listed. The first of these being **the recognition for citizens, the right to a pension,** followed by *paid maternity leave, medical assistance in state health units, unemployment assistance and other forms of public or private social insurance provided by law.*

Acestor măsuri, considerate *de protecție socială,* se adaugă altele, *de asistență socială,* potrivit legii.

To these measures, considered as *social protection*, others like those of *social assistance*, according to the law are added.

We find that the right to retirement is enshrined in the Constitution as a **component of the standard of living**, a solution that, in our opinion, can generate certain discussions, including of a critical nature. We say this because the pension represents a second component that derives from the performance of a work, service or other contract, for which the holder pays the contributions provided by law, which will be constituted, in time, in the amount of the pension he will receive at end of activity. It represents, in the last resort, a form of state compensation, which consists in the establishment and management of the pension funds, so that the resources necessary for the effective payment of the pensions due at the date of birth of the pension, regarding the retirement age limit and the minimum contribution period.

In this respect, we consider that it is a constitutional projection that also influences the perception regarding the general regime of the right to the pension and we refer, in particular, to the public pension system and which, in perspective, should change. Including the existing discussions at the level of the public debates regarding the existence or not, in the future, of the funds necessary for the payment of these pensions, there are a proof of the veracity of our support. The modalities of managing the public pension fund, of the contributions provided for its constitution, will be identified and rigorously regulated, so as to eliminate, in the future, this true public psychosis.

2. Entitlement to a pension female - male, female employee - female civil servant

By Law no. 127/July 8, 2019, the public pension system was regulated, but it enters into force on September 1, 2021, except for some articles, and until then the Law no. 263/2010 remains in force. According to the latter law, art 1, "the right to social insurance is guaranteed by the state

[5] Popescu, A., Dima, L., in Muraru, I., Tănăsescu, E.- S. (coord.), *op. cit*., 2019, p. 341.
[6] Published in the Official Gazette no. 788/September 18, 2006.
[7] Ștefănescu, I. T., *Labor Law Treaty,* Wolters Kluwer Publishing House, Bucharest, 2007, p. 577.

and is exercised, under the conditions of this law, through the public pension system and other social insurance rights, hereinafter referred to as the public pension system."

According to art. 56 paragraph (1) letter c), the first thesis of the Labor Code, regulates, between **the cases of law termination of the individual employment contract**, *"the date of cumulative fulfillment of the standard age conditions and the minimum contribution period for retirement, or, with an exceptional character, for the employee who opts in writing for the continuation of the individual employment contract, within 30 calendar days prior to fulfilling the standard age conditions and the minimum contribution period for retirement, at the age of 65;*". We find that the text refers to the *female employee*, recognizing the possibility of opting to continue the activity up to 65 years old.

A second relevant text in the matter is art. 53 of Law no. 263/2010 regarding the unitary system of public pensions, through which, in paragraph (1) it is provided that *"The standard retirement age is 65 for men and 63 for women. The attainment of this age is achieved by increasing the standard retirement ages, according to the staggering provided in annex no. 5."*

The notion of **standard retirement age** is defined by art. 3, letter v) of Law 263/2010, meaning that, *the age established by the present law for men and women, at which they can obtain the pension for age limits, according to the law, as well as the age from which the reductions provided for by the law operate.* By "contribution period", according to the letter p) of the same law article, as it was modified by GEO no 18/2018[8], is meant *"the time period for which social insurance contributions were due to the public system of pensions, as well as the one for which the insured with social insurance contract owed and paid social insurance contributions to the public pension system".*

In addition to this phrase, Law no. 263/2010 defines in art 3, letter l) and that of **"full contribution period",** which means *"the period of time provided by the present law in which insured persons have completed the contribution period for being able to receive an age limit, early retirement or partial early retirement pension".*

In relation to the two categories of internships, we find again defined by law the one of the **minimum contribution period**, which means *"the minimum period of time provided by law by which insured persons have completed the contribution period in order to be able to receive a pension when they reach the retirement age".*

We find that the legislator differentiates, regarding the age limit set by the law, for men and women, being of about 65 years old for men and 63 years old for women. The difference between the two ages is determined by the need to establish a lower limit for women, considering the role they play in society and, especially, in the family, in raising children, thus representing a benefit that the state grants to women.

The provisions of art. 53 paragraph (1) of Law no. 263/2010 regarding the unitary system of public pensions were subject to the exception of unconstitutionality, solved by the **Constitutional Court by Decision no. 387/June 5, 2018[9]**. We mention that the title of this decision was *"Decision no. 387/June 5, 2018, regarding the exception of unconstitutionality of the provisions of art. 53 paragraph (1) first thesis of Law no. 263/2010 regarding the unitary system of public pensions and of art. 56 paragraph (1) lit. c) the first thesis of Law no. 53/2003-Labor Code".*

By the aforementioned decision, the Constitutional Court ruled the following: *"It admits the exception of unconstitutionality of the provisions of art. 56 paragraph (1) lit. c) the first thesis of Law no. 53/2003-Labor Code, exception raised in File no. 42072/3/2015 of the Bucharest Court - VIII labor conflicts and social insurance section and finds that* ***they are constitutional insofar as the phrase "standard age conditions" does not exclude the possibility of the woman to request the continuation of the individual employment contract, under conditions identical to man, respectively until she reaches the age of 65 years old".***

From the content of Decision no. 387/2018, it can be seen that this refers to ***"the possibility of the woman to request the continuation of the individual employment contract".*** It concernes, as

[8] Published in the Official Gazette no. 260/ March 23, 2018.
[9] Published in the Official Gazette no. 642/ July 24, 2018.

requested and by the exception invoked and the Constitutional Court has ruled by the aforementioned decision, **the female employee**, respectively the woman employed on the basis of an individual employment contract, establishing a benefit for it.

From the interpretation of this decision, we understand that by a simple request, the female employee notifies the employer of the intention to continue her activity, who takes note of this option of the female employee. It is not necessary, as is sometimes interpreted in practice, in the activity of public authorities or institutions, for the employer to approve the request, but only to take note of the option of the employed woman to continue her activity until she reaches the age of 65. After reaching this age, both the employed woman and the employed man can choose to continue the activity for another three years, in which case it is necessary to approve the employer, respectively, in the case of public authorities and institutions, their manager's approval.

Of interest for the present study, is the recognition for the female employee of being able to continue her activity until she reaches the age of 65, without the need for the approval of the employer, but only informing him.

Certain interpretations and applications that we consider to be wrong have appeared in the practice of public authorities and institutions regarding **the regime of the public servant's pension rights**[10]. Provisions regarding this problem were previously found in the former Law no. 188/1999 [11] regarding the Statute of civil servants, meanwhile repealed by art. 517, paragraph (2) lit. b) of the Administrative Code adopted by GEO no. 57/2019[12]. Currently, the provisions of art. 517, letter d) of the Administrative Code, which lists, among the situations in which the lawful termination of the service report takes place, **on the date of cumulative fulfillment of the standard age conditions and the minimum contribution period for retirement, if the person who has the power of appointment in the civil service does not have the application of the provisions of paragraph (2).**

We mention that paragraph (2) of art. 517 provides that *"exceptionally, based on a request made two months before the cumulative fulfillment of the standard age conditions and the minimum contribution period for retirement and with the approval of the head of the public authority or institution, the public official may be kept in the public position held for maximum three years above the standard retirement age, with the possibility of annual extension of the service report. During the period in which it is arranged to keep in activity, the provisions of art. 378".* We make the mention that by art. 378 of the Administrative Code recognizes **the possibility that a civil service can also be occupied on the basis of a part-time service report** and the regime of this possibility is regulated.

In the administrative practice there is the interpretation that the provisions of the Labor Code and Law no. 263/2010 which recognize, based on the case-law of the Constitutional Court, the possibility of women to continue their activity until they reach the age of 65, which is the standard age for men, would not apply to women civil servants.

This practice is argued by the specificity of the legal status of the civil servant, which would not allow the extrapolation of the retirement rules valid for the employed woman. The doctrinal and jurisprudential opinions and solutions regarding **the legal nature of the service report, its identity in comparison with the employment report, the regime of the administrative act of appointment in a public position**, in the sense of representing *a typical administrative act*, in the acceptance of *unilateral manifestation of legal will, or assimilated administrative act, within the meaning of an administrative contract,* continues to be an object of scientific debate and of legislative and jurisprudence solutions.[13]

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[10] On the regime of the public servant's pension rights see Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H. Beck Publishing House, Bucharest, 2016, p. 386, 387.

[11] Republished in the Official Gazette no. 365/May 29, 2007.

[12] Published in the Official Gazette no. 555/July 5, 2019.

[13] See, to exemplify this debate: Șerban Beligrădeanu, *Theoretical and practical considerations - in relation to Law no. 188/1999 regarding the Statute of civil servants,* „Dreptul" no. 2/2000, p. 3-21; Șerban Beligrădeanu, *Considerations on the legal employment report of civil servants, as well as on the typology of the legal labor relations and a new monistic view on labor law,* „Dreptul" no. 8/2010, p. 87-112; Șerban Beligrădeanu, *Critical considerations - on an outdated administrative vision in relation to the legal nature*

In our opinion, the practice of denying for women as civil servants, the right to benefit from continuing the activity, up to the age of 65, reveals a **misinterpretation**, for several reasons.

In the constitutional plan, we invoke in support of our opinion the provisions of art. 1, paragraphs (1) and (5), art. 4, art. 16, paragraphs (1) and (2), which establishes a regime of equality of all before the law, and of the public authorities, the prohibition of any discrimination, on any criterion, as well as the supremacy of the Constitution and the obligation to respect this supremacy and the law.

Regarding the legal arguments, we invoke the provisions of art. 367 of the Administrative Code which bears the marginal name of *"provisions regarding the completion with other categories of norms"* and which provide that *"The provisions of this part* (this is part VI of the Administrative Code) *are supplemented by the provisions of labor law, as well as with the provisions of* ***labor law****. common law, civil, administrative or criminal regulations, as the case may be"*. We find that the **first** branch of law whose provisions are applicable in addition, in the case of civil servants is that of **labor law**. And the Labor Code approved by Law no. 53/2003[14] provides in art. 1, paragraph (2) that *"This Code also applies to the employment relationships regulated by special laws only insofar as they do not contain specific provisions derogating"*.

We understand from this text, the common law character of labor law for all employment or service relationships, as the case may be, with the exception of *"specific derogatory provisions".*

3. Conclusions

We consider that the rules regarding the retirement age for women civil servants do not fall within the category of **specific derogations** because the Administrative Code does not expressly set out separate age limits for civil servants, women or men. The constitution itself through art. 47, paragraph (2), speaks about *the right to retirement*, in general, without differentiating between women and men or between employees and civil servants.

For these reasons we must interpret that **the right to opt to continue the activity after reaching the age of 63 must be recognized for both employed women and women civil servants, up to the age of 65**, which is the standard age for men, without it is necessary to approve the person invested with the appointing power within the public authorities and institutions.

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[14] Republished in the Official Gazette no. 345/May 18, 2011.