



**Suprema Corte**  
de Justicia de la Nación



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**SUBSTANTIVE EQUALITY IN ACCESS TO RETIREMENT  
(IGUALDAD SUSTANTIVA EN EL ACCESO A LA JUBILACIÓN)**

**CASE:** *Amparo en Revisión* 405/2019

**REPORTING JUDGE:** Javier Laynez Potisek

**DECISION ISSUED BY:** Second Chamber of Mexico's Supreme Court of Justice

**DATE OF THE DECISION:** October 23, 2019

**KEY WORDS:** right to equality and non-discrimination, right to a retirement pension, formal equality, substantive equality, affirmative action, special legislative measures, differentiated conditions between women and men for access to a retirement pension, social security, domestic work and care work.

**CITATION OF THE DECISION:** Supreme Court of Justice of the Nation, *Amparo en Revisión* 405/2019, Second Chamber, Javier Laynez Potisek, J., decision of October 23, 2019, Mexico.

The full text of the decision can be consulted at the following link:

<https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2021-10/AR%20405-2019.pdf>

**CITATION SUGGESTED FOR THIS DOCUMENT:** Human Rights Office of Mexico's Supreme Court of Justice, *Extract of the Amparo en Revisión* 405/2019, Mexico.

## SUMMARY OF THE *AMPARO EN REVISIÓN* 405/2019

**BACKGROUND:** LMG requested from the Social Security Institute of State Workers [Instituto de Seguridad y Servicios Sociales de los Trabajadores del Estado] (ISSSTE) a retirement pension, arguing that at his age and years of contribution, if he were a woman, it would be granted to him. His request was denied based on the Tenth Transitory article, section II, subsection a), of the ISSSTE Law, which establishes the requirement that men have contributed for 30 years or more and women 28 years or more. On January 5, 2018, he filed a *juicio de amparo indirecto*, in which he challenged the constitutionality of that rule, considering it discriminatory. A district judge of Jalisco denied him the *amparo*, and therefore the worker filed a *recurso de revisión* on August 28, 2018. To determine the constitutionality of the provision, the collegiate court of Jalisco decided to send the appeal to Mexico's Supreme Court of Justice (this Court).

**ISSUE PRESENTED TO THE COURT:** Whether the legal provision that establishes a lower minimum age and years of contribution for women compared with those required for men to have access to a retirement pension constitutes a discriminatory measure in view of the fact that the legislator's reasons for making that distinction are no longer applicable in today's reality.

**HOLDING:** The decision was confirmed for essentially the following reasons. The intention of the legislator upon implementing the special measure established in article 60 of the ISSSTE Law of 1983 was to recognize women who work for the State, given that they carry out a double role in society, both working for remuneration generally inferior to that of men and usually working in the home as mothers and/or primary caregivers. For this reason, by requiring women to comply with age and work times inferior to those required for men to access the right to retirement, the legislator did not affect the values protected by the Federal Constitution, since in addition to being conferred full configurative liberty to determine such requirements, the legislator is bound to observe the principle of equality and non-discrimination, understood through the concept of substantive equality, which implies establishing differentiated measures

intended to level out the possibility of women exercising a right to a retirement pension. Thus, it was determined that, as a special legislative measure, it is objectively justified in a social reality still in existence; it was also determined that it was not a measure that promotes gender stereotypes. Therefore, the decision was upheld and the *amparo* was denied to LMG.

**VOTE:** The Second Chamber decided this matter by a unanimous vote of four judges Yasmín Esquivel Mossa, Alberto Pérez Dayán, José Fernando Franco González Salas (issued his vote against the arguments) and Javier Laynez Potisek.

The votes may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=256085>

## EXTRACT OF THE *AMPARO EN REVISIÓN* 405/2019

- p. 1 Mexico City. The Second Chamber of Mexico's Supreme Court of Justice (this Court), in session of October 23, 2019, issues the following decision.

### BACKGROUND

LMG requested the Social Security Institute of State Workers [Instituto de Seguridad y Servicios Sociales de los Trabajadores del Estado] (ISSSTE) to grant him a retirement pension arguing that with his age and years of contribution, if he were a woman, he would be granted the pension.

- p. 2 The ISSSTE denied the pension to LMG, based on its determination that the requirements established in the Tenth Transitory article, section II, subsection a), of the ISSSTE Law were not met. On January 5, 2018, LMG filed an *amparo indirecto* lawsuit against this decision, indicating various acts and authorities responsible in his brief.
- p. 2-3 On August 8, 2018, a district judge in Jalisco issued a decision denying the *amparo* for the acts attributed to the Congress of the Union, the President of the Republic and the Head of the Department of Work Health and Safety, Jalisco Delegation of the ISSSTE, considering, in essence, that it is constitutional to establish a different regime.
- p. 4 On August 28, 2018, LMG filed a *recurso de revisión* in which he disputed the denial of the *amparo*.
- p. 8 On May 8, 2019, a collegiate court in Jalisco decided to send the court record to this Court, so it could decide the constitutionality issue. The President of this Court admitted the appeal and turned it over to Judge Javier Laynez Potisek for the preparation of the corresponding draft.

### STUDY OF THE MERITS

- p- 9-10 To resolve this matter, this Court will start with the following question: Does the legal provision that establishes a lower minimum age and years of contribution for women compared with those required for men to access a retirement pension constitute a

discriminatory measure because the legislators' reasons for making that distinction are no longer applicable in today's reality?

p. 11 The Tenth Transitory article, section II, subsection a), of the ISSSTE Law, establishes the requirements that workers who contribute to the pension system must satisfy in order to access the retirement benefit. In the case of men, the requirement is having contributed 30 years or more and for women, 28 years or more. The justification of that measure can be found in the reform of article 60 of the repealed law.

p. 19 The basic intention of the 1983 reform of article 60 of the ISSSTE Law was to recognize that women carry out a double role in society, as workers and as mothers who work in the home, and therefore they require a differentiated treatment. Its purpose was also to break down the inequality that prevails between men and women, with the purpose of recognizing for women the special rights they deserve for their participation in the productive area of the country. The decrease to twenty-eight years for retirement for women constituted a positive vindication.

There are 2 conclusions from the above: that before the mentioned reform, the law granted equal treatment to men and women; and that the fundamental essence of the reform was to recognize the de facto differences that women live with respect to men, which result from multiple factors.

p. 20 The grievances that LMG states question the constitutionality of the challenged provision based on two premises. The first consists of the fact that the legal norm in question constitutes an affirmative action implemented in order to compensate the double role of women in society. The second is intended to demonstrate that the social conditions that the legislator took into account to implement such action are no longer applicable in today's reality.

p. 20-21 To analyze whether the challenged norm implements the operativity of an affirmative action, it is necessary to define the origin and purpose of these types of measures. For this it is necessary to distinguish and define the concepts of formal equality and substantive equality.

## I. Formal equality

p. 25 The principle of equality has certain essential roots that are summarized below:

Not all inequality of treatment in the law presumes an infraction of the guarantee of equality; this is only produced by the inequality that introduces a difference between situations that can be considered equal and that lack an objective and reasonable justification.

Such justification must be based on objective and sufficiently reasonable criteria, according to generally accepted criteria or value judgments that can be appreciated in the statement of purpose or found in the norm itself.

Finally, for the differentiation that is constitutionally valid, it is not enough for the end it pursues to be valid; rather it is also essential that the legal consequences resulting from that provision are adequate to such end, so that the relationship between the measure adopted, the result that is produced and the end sought by the legislator are proportional.

The above developed parameters allow for the construction of the notion of the concept of the human right to formal equality based on two principles: equality before the law and equality in the law.

p. 26 The first principle requires, on one hand, that the legal norms be applied uniformly to all persons that are in the same situation and, in turn, that the materially judicial bodies cannot arbitrarily modify their decision in cases that share the same dispute, unless they consider that they should not follow precedents, at which point they must offer reasonable and sufficient grounds in law and fact. The second principle operates before the materially legislative authority and has the purpose of controlling the content of the legal norm in order to avoid legislative differentiations without constitutional justification or in violation of the principle of proportionality broadly speaking.

This acceptance of formal equality is defined as a “prohibition on discriminatory treatment”, which refers to the fact that human rights are common to all persons, men and women.

This implies that the law cannot be applied differently to persons in similar situations and that it cannot be applied identically to persons in different situations.

- p. 26-27 The notion of formal equality requires that when the law makes any distinction based on a suspect category (like race, sex, or political or religious ideas, etc.), it must be subjected to a strict test of proportionality that determines whether the differentiation is justified.

## **II. Substantive equality**

- p. 27 It is not possible to consider that the right to equality and non-discrimination is exhausted with the concept of formal equality (equality in the law and before the law), since that principle is often insufficient to address the cases of laws neutral in appearance that have a disproportionate impact on particular groups.

- p. 28 Substantive or de facto equality exists as a facet or dimension of the human right to legal equality the purpose of which is to remove or diminish the social, political or cultural, economic or any other kind of obstacles that prevent certain persons or social groups from actually and effectively enjoying or exercising their human rights in conditions of parity with another group of persons or social group.

It requires State authorities to take certain steps to obtain that correspondence of opportunities between the different social groups and their members and the rest of the population. Therefore, this requirement is met through a series of administrative or legislative measures that have the ultimate purpose of preventing the unjustified differentiation or systematic discrimination from continuing or reverse the effects of the historical and/or structural marginalization of the relevant social group.

- p. 29 This notion of equality has its origin in the realization that in society certain groups exist that have been systematically excluded from the enjoyment and exercise of their rights and that it is the duty of the State to prevent this situation from worsening, and to reverse the effects of that historic marginalization.

- p. 30 In those cases in which the principle of formal equality is insufficient to guarantee the non-discrimination of the disfavored social groups, the State should protect and promote substantive equality through the implementation of different measures of a special nature.
- p. 31 In addition, it requires that the State not only abstain from engaging in actions that deepen the marginalization of these groups, but also review that those norms that appear neutral, do not have a discriminatory impact on the groups in a situation of exclusion, as well as adopt positive measures to favor their integration into society and their access to social assets. Therefore, this notion of equality is closely related to so-called affirmative action.
- p. 32-33 Affirmative action constitutes temporary measures implemented in order to accelerate the participation of a disfavored social group, in conditions of equality. In the words of the First Chamber of this Court, in the *Amparo Directo en Revisión* 1464/2013, affirmative action includes measures that have the “purpose of preventing the continuation of an unjustified differentiation or systematic discrimination or reversing the effects of the historic and/or structural marginalization of a relevant social group”. In other words, affirmative or positive action must have the purpose of equalizing the circumstances of a group that suffers de facto inequality.
- p. 31 It should be mentioned that affirmative action is not the only measure that the legislator can implement to favor the social groups considered vulnerable. There are other legislative measures that, once a situation of inequality is recognized, are intended to achieve substantive equality through the recognition of a right in favor of a vulnerable social group, or through the reduction of the requirements to access it.
- p. 33-34 The legislative measures of leveling or compensation constitute actions that are intended to expand the recognition of a right or reduce the requirements to access it. From the recognition of the special conditions of the group in a situation of vulnerability, the focus is on reducing the negative impact that such conditions of inequality could have on the exercise of a right; in other words, they are not directed toward reducing or eliminating the situation of inequality, but rather achieving substantive equality in the effective access or exercise of a civil, political, economic, social or cultural right.



### III. Analysis of this case

p. 34 In this case, the intention of the legislator was to recognize the fact that women carry out a double role in society, working both outside the home and inside the home as mothers and/or primary caregivers, and therefore the reduction in the years of work to access the benefit of retirement represents an act of recognition of the women who work for the State.

p. 35 The legislative measure established in the challenged norm cannot be classified as affirmative action, because its purpose is not to equalize the roles men and women perform in society. This is because it does not have the effect of accelerating the equality of women in their work in the home and as caregivers of children, nor is it intended to eliminate the conditions that originate discrimination in the workplace.

Establishing differentiated requisites to obtain the benefit of retirement does not lead to incorporating more women into the workforce nor generates a situation of greater de facto equality between the roles that men and women occupy in society.

p. 35-36 The challenged norm recognizes the inequality between men and women on the understanding that the physical and mental wear and tear on women regarding work and the home are disproportionate. It is a special measure of a legislative nature that, from the assumption that the majority of women workers still carry out a double role in society, working in the home and working outside of the home, seeks to level the conditions of access to a retirement pension, thus seeking substantive equality.

p. 36-37 This Court is aware that LMG challenged the mentioned norm based on the premise that it was implemented by the legislator as affirmative action. However, the norm is not affirmative action given that, as stated, its effect is not to equalize the roles that men and women perform in society.

p. 37 The criteria of this Court note that for an examination of equality where there is a distinction based on a suspect category, a strict scrutiny or reinforced analysis must be done. In theory, this would be such a case because the legislative distinction challenged is based on the sex of the worker. However, in this case the one who makes use of the

constitutional appeal is not a member of the group that the legislator considered disfavored, since LMG, being a man, is a member of the dominant group.

Given that strict or reinforced scrutiny implies examining as strictly as possible, making it difficult for a measure to overcome such scrutiny, it would be illogical for this test to be applied to cases in which the legislator makes a distinction that presumably affects a socially favored group. This would result in nullifying the possibility of the legislator adopting measures leading to substantive equality of the vulnerable groups or within the suspect categories. In that regard, when a measure that seeks to protect a disfavored group is analyzed, even when it is made under the suspect categories of article 1 of the Constitution, a reasonability analysis should be applied and not strict scrutiny.

p. 38 In other words, a measure that seeks to equalize a vulnerable group will be unconstitutional if the distinction is not reasonable because the circumstances of fact regulated by both legal regimes are equivalent or similar, such that this equivalency would show that the distinction is unjustified.

In this respect, the legislator stated that the establishment of differentiated conditions between women and men for access to the right to retirement has its origins in the factors that generate discrimination toward women in access to permanence in employment.

p. 38-43 From different determinations of the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination against Women (CEDAW Committee), it is seen that to achieve real equality of women with men it is insufficient that she be guaranteed identical treatment. It is necessary for women to have an adequate environment that permits them to have the same opportunities. The biological differences and the differences that society and culture have created also must be kept in mind. Under certain circumstances it will be necessary for there to be a treatment of women and men that is not identical in order to equalize the differences.

- p. 43-44 As measures to eliminate discrimination are removed, the needs may change or disappear or become needs for both women and men, and therefore it is essential to continually examine the laws, programs and practices intended to achieve substantive equality.
- p. 44-46 CEDAW's General Recommendation 27 on older women and the protection of their human rights, clarifies that substantive inequality in relation to access to pensions has its fundamental origin in the factors that generate gender discrimination in work, which women suffer during their entire lifetime and have a cumulative impact on old age, obligating them to live with income and pensions disproportionately low, or even non-existent in comparison with men. In addition, the role that older women perform in the caregiving of small children, spouses or partners, elderly parents or relatives under their care, constitutes unremunerated work whose cost is seldom recognized.
- p. 46 The recommendation does not suggest that the States legislatively establish a pension age in strict conditions of equality between women and men. However, it requires them to ensure that the age of retirement does not discriminate against women, such that all women that have participated in the active life have access to an adequate pension. In that regard, the State parties should adopt the necessary measures, including temporary ones, to guarantee the enjoyment of pensions in conditions of equality with men.
- p. 46-47 In the case of the Mexican State, while twelve years have passed since the issuance of the challenged norm, the situation of discrimination in employment, by reason of gender, and the double social role of women constitute a reality that persists to this day.
- p. 52 The results of studies prepared by the National Institute of Statistics and Geography and the National Commission of the Retirement Savings System indicate that inequality in salary and the double shift, which have been considered as factors of discrimination in employment and have motivated the implementation of measures intended to reduce the inequality in the right to access and enjoyment of pensions, while they have diminished some since 2005, are still part of the social, family and labor reality in the country.

They also make evidence that, contrary to what LMG argues, the reasons that generated the implementation of the special legislative measures that favor women in complying with the requirements for accessing the benefit of retirement are still valid.

- p. 52-53 In addition, the reasonability of the measure implemented by the legislator is fully justified by its statement, upon making use of the configurative liberty that the Constitution grants it to enforce the right to access to a pension, that women are in a situation of disadvantage compared to men, given that they face various conditions of discrimination in employment and engage in unremunerated work in the home which also generates a significant impact on the amount of the pensions.
- p. 53 As long as those conditions do not disappear, the State is obligated to implement other types of measures that favor women in relation to the effective exercise of the labor rights that correspond to them, including among others the right to the granting and amount of the pensions they receive.
- p. 53-54 In that regard, the establishment of special measures that favor women's access to the benefit of retirement, through the lowering of the age and the years of contribution in comparison with those of men, are objectively justified in the current social reality. In this way, it does not translate into a measure that promotes gender stereotypes, but rather a favorable measure that, by recognizing the social reality of discrimination in employment and social inequality, attempts to mitigate the cumulative impact such conditions generate in the amount of the pensions.
- p. 54 Thus, by requiring that women meet age and work time requirements lower than those required of men to have access to the right to retirement, the legislator does not affect the values protected by the Federal Constitution, since in addition to the fact that the constitution confers on the legislator full configurative liberty to determine those requirements, it also requires the legislator to observe the principle of equality between men and women, which implies that it is required not only to give them equal treatment before the law, but also to establish differentiated measures that are intended to equalize the possibility for women to effectively exercise a right established constitutionally.

- p. 54-55 In that regard, the reasonability of the legislative measure is justified not only by virtue of the fact that the Constitution conferred on the legislator a broad authority to regulate the conditions of access to and exercise of the right to retirement, but the fact that the Constitution requires it to observe the principles of equality and non-discrimination, understood from the concept of substantive equality.
- p. 55 This implies, contrary to which LMG asserts, that the legislative measure challenged is in accordance with the constitutional mandate of equality and non-discrimination protected in article 1 of the Federal Constitution, and thus this Court considers LMG's grievances to be unfounded.

### **DECISION**

- p. 56-57 Since the grievances are unfounded, the appealed decision is upheld, and therefore LMG is neither covered nor protected from the Tenth Transitory article, section II, subsection a), of the ISSSTE Law.