Since the exceptions in Section 61 have largely swallowed the rule, if the section is to be retained at all, it should be rewritten to specify the officers who *may* be compensated by fees, rather than listing those who may not.

Sec. 62. STATE AND COUNTY RETIREMENT, DISABILITY AND DEATH COMPENSATION FUNDS. (a) The Legislature shall have the authority to levy taxes to provide a State Retirement, Disability and Death Compensation Fund for the officers and employees of the state, and may make such reasonable inclusions, exclusions, or classifications of officers and employees of this state as it deems advisable. The Legislature may also include officers and employees of judicial districts of the state who are or have been compensated in whole or in part directly or indirectly by the state, and may make such other reasonable inclusions, exclusions, or classification of officers and employees of judicial districts of this state as it deems advisable. Persons participating in a retirement system created pursuant to Section 1-a of Article V of this Constitution shall not be eligible to participate in the Fund authorized in this subsection; and persons participating in a retirement system created pursuant to Section 48-a of Article III of this Constitution shall not be eligible to participate in the Fund authorized in this subsection except as permitted by Section 63 of Article XVI of this Constitution. Provided, however, any officer or employee of a county as provided for in Article XVI, Section 62, Subsection (b) of this Constitution, shall not be eligible to participate in the Fund authorized in this subsection, except as otherwise provided herein. The amount contributed by the state to such Fund shall equal the amount paid for the same purpose from the income of each such person, and shall not exceed at any time six per centum (6%) of the compensation paid to each such person by the state.

There is hereby created as an agency of the State of Texas the Employees Retirement System of Texas, the rights of membership in which, the retirement privileges and benefits thereunder, and the management and operations of which shall be governed by the provisions herein contained and by present or hereafter enacted Acts of the Legislature not inconsistent herewith. The general administration and responsibility for the proper operation of said system are hereby vested in a State Board of Trustees, to be known as the State Board of Trustees of the Employees Retirement System of Texas, which Board shall be constituted and shall serve as may now or hereafter be provided by the Legislature. Said Board shall exercise such powers as are herein provided together with such other powers and duties not inconsistent herewith as may be prescribed by the Legislature. All moneys from whatever source coming into the Fund and all other securities, moneys, and assets of the Employees Retirement System of Texas shall be administered by said Board and said Board shall be the trustees thereof. The Treasurer of the State of Texas shall be custodian of said moneys and securities. Said Board is hereby authorized and empowered to acquire, hold, manage, purchase, sell, assign, trade, transfer, and dispose of any securities, evidences of debt, and other investments in which said securities, moneys, and assets have been or may hereafter be invested by said Board. Said Board is hereby authorized and empowered to invest and reinvest any of said moneys, securities, and assets, as well as the proceeds of any of such investments, in bonds, notes, or other evidences of indebtedness issued, or assumed or guaranteed in whole or in part, by the United States or any agency of the United States, or by the State of Texas, or by any county, city, school district, municipal corporation, or other political subdivision of the State of Texas, both general and special obligations; or in home office facilities to be used in administering the Employees Retirement System including land, equipment, and office building; or in such corporation bonds, notes, other evidences of indebtedness, and corporation stocks, including common and preferred stocks, of any corporation created or existing under the laws of the United States or of any of the states of the United States, as said Board may deem to be proper investments; provided that in making each and all of such investments said Board shall exercise the judgment and care under the circumstances then prevailing which men of ordinary prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income therefrom as well as probable safety of their capital; and further provided, that a sufficient sum shall be kept on hand to meet payments as they become

due each year under such retirement plan, as may now or hereafter be provided by law. Unless investments authorized herein are hereafter further restricted by an Act of the Legislature, no more than one per cent (1%) of the book value of the total assets of the Employees Retirement System shall be invested in the stock of any one (1) corporation, nor shall more than five per cent (5%) of the voting stock of any one (1) corporation be owned; and provided further, that stocks eligible for purchase shall be restricted to stocks of companies incorporated within the United States which have paid cash dividends for ten (10) consecutive years or longer immediately prior to the date of purchase and which, except for bank stocks and insurance stocks, are listed upon an exchange registered with the Securities and Exchange Commission or its successor; and provided further, that not less than twenty-five per cent (25%) at any one time of the book value of investments of said Fund shall be invested in Government and Municipal Securities as enumerated above. This Amendment shall be self-enacting and shall become effective immediately upon its adoption without any enabling legislation.

(b) Each county shall have the right to provide for and administer a Retirement, Disability and Death Compensation Fund for the appointive officers and employees of the county; provided same is authorized by a majority vote of the qualified voters of such county and after such election has been advertised by being published in at least one newspaper of general circulation in said county once each week for four consecutive weeks; provided that the amount contributed by the county to such Fund shall equal the amount paid for the same purpose from the income of each such person, and shall not exceed at any time five per centum (5%) of the compensation paid to each such person by the county, and shall in no one year exceed the sum of One Hundred and Eighty Dollars ($180) for any such person.

All funds provided from the compensation of each such person, or by the county for such Retirement, Disability and Death Compensation Fund, as are received by the county, shall be invested in bonds of the United States, the State of Texas, or counties or cities of this State, or in bonds issued by any agency of the United States Government, the payment of the principal of and interest on which is guaranteed by the United States, provided that a sufficient amount of said funds will be kept on hand to meet the immediate payment of the amount likely to become due each year out of said Fund, such amount of funds to be kept on hand to be determined by the agency which may be provided by law to administer said Fund; and provided that the recipients of benefits from said Fund shall not be eligible for any other pension retirement funds or direct aid from the State of Texas, unless the Fund, the creation of which is provided for herein, contributed by the county, is released to the State of Texas as a condition to receiving such other pension.

(c) The Texas Legislature is authorized to enact appropriate laws to provide for a System of Retirement, Disability and Death Benefits for all the officers and employees of a county or other political subdivision of the state, or a political subdivision of a county; providing that when the Texas Legislature has passed the necessary enabling legislation pursuant to the Constitutional authorization, then the governing body of the county, or other political subdivision of the state, or political subdivision of the county shall make the determination as to whether a particular county or other political subdivision of the state, or subdivision of the county participates in this System; provided further that such System shall be operated at the expense of the county or other political subdivision of the state of political subdivision of the county electing to participate therein and the officers and employees covered by the System; and providing that the Legislature of the State of Texas shall never make an appropriation to pay the costs of this Retirement, Disability and Death Compensation System.

The Legislature may provide for a voluntary merger into the System herein authorized by this Constitutional Amendment of any System of Retirement, Disability and Death Compensation Benefits which may now exist or that may hereafter be established under subsection (b) of Section 62 of Article XVI of the Texas Constitution; providing further that the Texas Legislature in the enabling statute will make the determination as to the amount of money that will be contributed by the county or other political subdivision of the state or political subdivision of the county to the State-wide System of Retirement, Disability and Death Benefits, and the Legislature shall further provide that the amount of money contributed by the county or other political

subdivision of the state or subdivision of the county shall equal the amount paid for the same purpose from the income of each officer and employee covered by this State-wide System.

It is the further intention of the Legislature, in submitting this Constitutional Amendment, that the officers and employees of the county or other political subdivision of the state or political subdivision of a county may be included in these systems regardless of whether the county or other political subdivision of the state or political subdivision of the county participates in the Retirement, Disability and Death Benefit System authorized by this Constitutional Amendment, or whether they participate in a System under the provisions of subsection (b) of Section 62 of Article XVI of the Texas Constitution as the same is herein amended.

History

The original Section 62 as adopted in 1946 consisted of the present Subsection (b) and a Subsection (a) that tracked the language of the original Section 48a of Article III. (See *History* of that section.) In 1949 the voters turned down a proposed Section 63 which would have supplemented Subsection (b) with an authorization for a statewide system comparable to the municipal system authorized by Section 51-f of Article III. Two years later the legislature tried again, but again the voters turned it down. This time the legislature included a clause that had been omitted in 1949—a prohibition against appropriating state moneys to pay county pensions.

Subsection (a) was amended in 1957. The first paragraph read as it does today except for the maximum allowable contribution, which remained at 5 per cent. The second paragraph was amended more or less to track the wording of the 1956 amendment of Section 48a of Article III. (See *History* of that amendment.)

In 1958 the voters again turned down an amendment of Subsection (b). This amendment would have removed the first semicolon in the first paragraph and inserted the words "or precinct or for the appointive and elective officers and for the employees of the county or precinct." The amendment would have changed the maximum allowable contribution from 5 per cent to 7½ per cent and removed the $180 maximum. In 1962, there was still another effort to include elected county officials. To make the idea palatable, it was proposed that an elected official would have to serve at least 12 years to be eligible for benefits. (This is probably what was intended, but the drafting was ambiguous.) The proposal reverted to the 5 per cent maximum but removed the $180 maximum. This proposal went beyond "county or precinct" by covering "each county and any other political subdivision of this State." The voters rejected the amendment.

In 1963, the legislature tried something new—a "local" amendment. This proposal applied only to appointed officials and employees of the political subdivisions within Jefferson County. In one respect this proposal represented ridiculous drafting; it literally provided that *each* subdivision would have the right to provide for a pension fund for *all* appointed officers and employees of *all* political subdivisions within the county. The voters of the entire state turned down this local amendment in November 1964.

Finally, in 1966 the voters accepted Subsection (c). It is ironic that in most respects Subsection (c) is broader than the various amendments rejected between 1949 and 1964. In 1968 the present wording of Subsection (a) was adopted. The first paragraph was changed only by substituting 6 per cent for 5 per cent in the last sentence. Except as discussed later, the second paragraph tracks the 1966 Teachers' Retirement System Fund set out in Section 48b of Article III.

In 1975 Section 62 was repealed. (See the *History* of Section 67.)

Explanation

In discussing other pension sections it has been pointed out again and again that there is no need for a constitutional grant of power to provide pensions for government employees. This observation creates a bit of a problem in the case of Subsection (b), what with all those unsuccessful attempts to broaden county coverage. Whatever the legislature's power, once an amendment is proposed and defeated, one could hardly expect the legislature to act without a new mandate. Indeed, this history of Section 62 may lend support to the observation of Justice Critz quoted in the *Author's Comment* on this section.

Subsection (a). The first paragraph of this subsection is a strange combination of grants of flexibility to the legislature and limitations on that flexibility. On the one hand, words in the second sentence like "who are or have been compensated in whole or in part directly or indirectly by the state" avoid problems of interpreting the meaning of "officers and employees" of the state. On the other hand, the third and fourth sentences are designed to prevent the legislature from permitting someone to collect a double pension for the same service. Although this is an understandable bit of caution, such limitations create problems. In 1970 the attorney general was asked for an opinion on the pension consequences of converting domestic relations and juvenile courts into district courts. Judges of the former participate in the Subsection (c) plan whereas if they became judges of state district courts they would come under the judicial plan of Section 1-a, Article V. The attorney general ruled that the limitation of Subsection (a) precluded any preservation of county pension rights if the judges became district judges. (Tex. Att'y Gen. Op. No. M-830 (1971).) There is reason to question the soundness of the opinion. Subsection (a) has nothing to do with Subsection (c). Moreover, the opinion quoted from the *Farrar* case (see Sec. 63 of this article), which dealt with different provisions with different wording. This is a tail-wagging-the-dog situation. A proposed judicial reform fails because of an inability to adjust two government pension systems.

The second paragraph with one major exception is substantially the same as Section 48b of Article III. The major change was to remove what has been described previously as a "weird" restriction. (See the *Explanation* of that section.) In Subsection (a), the restriction on diversification of investments is a straightforward requirement that 25 per cent be in government obligations. For reasons set out earlier, this is not necessarily a good rule for a tax-exempt fund.

Subsection (b). This subsection is probably obsolete. Under Subsection (c) and the implementing statute (Tex. Rev. Civ. Stat. Ann. art. 6228g, secs. 10 and 11), county and district pension plans can be folded into the statewide system. In any event, an old plan could live on if Subsection (b) were repealed. It is inconceivable that anyone would want to create a Subsection (b) plan in preference to joining the Subsection (c) system.

Subsection (c). The thrust of this subsection has already been set forth. (See the *Explanations* of Secs. 51-e and 51-f of Art. III.) It was noted that Subsection (c) includes political subdivisions of the state and that this literally includes cities and towns. The implementing statute excludes them. (Tex. Rev. Civ. Stat. Ann. art. 6228g, sec. 2, subs. 3.)

There are two drafting ambiguities in the second paragraph of the subsection. The paragraph opens with a reference to merging Subsection (b) plans with the Subsection (c) system. Under ordinary usage the balance of the paragraph, particularly since it consists of "providing that" and "further provide that," should

concern only the elements of the merging process. It is clear, however, that the balance of the paragraph relates back to the first paragraph.

The second drafting ambiguity concerns the two provisos. The first states that the legislature "will make the determination as to the amount of money that will be contributed by the county"; the second states that the legislature "shall further provide that the amount of money contributed by the county . . . shall equal the amount paid for the same purpose from the income of each officer and employee . . . ." (One wonders why the use of "will" in the first proviso and "shall" in the second.) These two provisos seem mutually exclusive. What was probably in somebody's mind was that current contributions for current service had to be on the usual 50-50 basis, but that the legislature should set up rules for determination of prior service credit for work performed before the pension plan came into existence. In any event, the implementing statutes provide for prior service credit and for its financing by the government alone. (Tex. Rev. Civ. Stat. Ann. art. 6228g, sec. 4, subs. 2(d).)

The final paragraph of Subsection (c) may be unique. It is not normal for a constitutional provision adopted by the voters to state: "It is the further intention of the Legislature, in submitting this Constitutional Amendment, that . . . ." (The word "further" is particularly mystifying.) What the paragraph means is not at all clear. One way to read the paragraph is that the first and second paragraphs of the subsection mean what they say. Another reading is that Subsection (c) does not repeal Subsection (b), which is obvious. Still another possibility is that it does not mean anything except that the legislature hoped that the people would adopt the amendment.

Comparative Analysis

See *Comparative Analysis* of Section 67 of this article.

Author's Comment

In *Friedman v. American Surety Co.*, Justice Critz, speaking for the supreme court, observed:

> It is argued that because the Legislature saw fit to submit to the people for adoption Sections 48 [sic], 51a, 51b, 51c, and 51d, and the Confederate aid provisions of Section 51, all of Article III of our State Constitution, it is indicated that the Legislature was of the opinion that such amendments were necessary . . . . We are not called upon, and never will be called upon, to pass on the necessity for the above amendments, ... We will say, however, that the history of the submission of constitutional amendments in this State will prove that not all of them have been submitted in order to create a legislative power. Some few have undoubtedly been submitted to ascertain the will of the people, and to enable them to express such will regarding a governmental policy. (137 Tex. 149, 166, 151 S.W.2d 570, 580 (1941). Section "48" should read "48a." In 1941, Sections 51a, 51b, 51c, and 51d all dealt with welfare. See *History* of Sec. 51-a.)

Justice Critz was answering an argument put forth by Chief Justice Alexander in dissent. It is possible that Justice Critz was overstating the case in order to answer the dissent. But, assuming that he was not overstating it, using the constitution as a vehicle for a popular referendum simply adds to the muddle, to say nothing of abusing the amending process and burdening the constitution. Moreover, did Justice Critz mean that if an unnecessary amendment was voted down, the legislature lost the existing power to legislate?

In any event, it is clear that there have been unnecessary amendments. Section 48a of Article III is one example. It follows that all subsequent amendments

concerning pensions—except Section 66, Article XVI—were equally unnecessary. (Sec. 63 is a little different; it was necessary to "overrule" a court decision construing an unnecessary constitutional provision.)

All of the many pension provisions could be repealed safely. Under the rule of the *Byrd* case (see *Explanation* of Sec. 48a), anything can be done in the pension area except to increase the pensions of those already retired. (See the *Author's Comment* on Sec. 44 of Art. III. But see the *Explanation* of Sec. 67 of this article.) Even that should be permissible. There have been instances where public employee pension systems have gotten out of hand but only by profligate increases in pensions to be paid in the future. (This is a device for granting a "pay increase" without having to raise taxes now.) Giving some relief to those who retired on inadequate pensions is not likely to be abused.

There are, of course, practical problems in abandoning all pension provisions. In any event, this has not happened. Section 67 has taken over the subject.

Sec. 63. TEACHERS AND EMPLOYEES RETIREMENT SYSTEMS, SERVICE CREDIT. Qualified members of the Teacher Retirement System, in addition to the benefits allowed them under the Teacher Retirement System shall be entitled to credit in the Teacher Retirement System for all services, including prior service and membership service, earned or rendered by them as an appointive officer or employee of the State. Likewise, qualified members of the Employees Retirement System of Texas, in addition to the benefits allowed them under the Employees Retirement System of Texas shall be entitled to credit in the Employees Retirement System of Texas for all services, including prior service and membership service, earned or rendered by them as a teacher or person employed in the public schools, colleges, and universities supported wholly or partly by the State.

History

This section was added in 1954 and repealed in 1975 when Section 67 of this article was adopted.

Explanation

In 1951 the supreme court invalidated a statute authorizing the transfer of service credits between the teachers' pension plan and the state employees' pension plan. (*Farrar v. Board of Trustees,* 150 Tex. 572, 243 S.W.2d 688 (1951).) This section "overrules" the *Farrar* case. (Apparently, the case is not dead; the attorney general made use of it recently. See Tex. Att'y Gen. Op. No. M-830 (1971) discussed in the *Explanation* of Sec. 62.)

Comparative Analysis

No other state has a comparable provision. Obviously, many states have many provisions designed to "overrule" a specific judicial interpretation of the state constitution.

Author's Comment

The irony of this section is that an eminently sensible policy had to be adopted by constitutional amendment because of the details in two constitutional provisons that were unnecessary anyway.

Sec. 64. TERMS OF OFFICE, CERTAIN OFFICES. The office of Inspector of Hides and Animals, the elective district, county and precinct offices which have heretofore had terms of two years, shall hereafter have terms of four years; and the holders of such offices shall serve until their successors are qualified.

Art. XVI, § 64

History

This section was added to the constitution in 1954. Terms of district, county, and precinct officials could not be lengthened without a constitutional amendment because Section 30 of Article XVI limits to two years the duration of all offices not fixed by the constitution. Section 64 extended the terms of nonconstitutional officers; other constitutional provisions were also amended at the same time to extend the terms of various constitutional offices from two to four years. (See, *e.g.*, Art. V, Secs. 9 (district clerk), 15 (county judge), 18 (justice of the peace and constable), 20 (county clerk), 23 (sheriff), and 21 (county and district attorney).)

In all constitutions prior to 1876, terms of offices not fixed by the constitution were limited to four years. Section 30 of Article XVI of the 1876 Constitution reduced the term to two years.

Explanation

This section is straightforward and apparently has generated little litigation.

One question has arisen because the section speaks of district, county, and precinct offices generally, while Section 65, which is the transitional provision for this section, lists specific offices. The attorney general ruled that Section 64 was not intended to cover any office not specifically named in Section 65 and therefore does not apply to the office of county school trustee because the latter is not named in Section 65. (Tex. Att'y Gen. Op. No. WW-1110A (1962).) As an exercise in constitutional construction, this may be an example of allowing the "tail to wag the dog", but it is at least an illustration of the need for consistency in draftsmanship.

It is not clear why the office of "Inspector of Hides and Animals" is mentioned specifically in Section 64. Article 6972 of the civil statutes, which creates the office, provides that each county shall constitute an inspection district and shall elect an "Inspector of Hides and Animals." The office therefore would seem to be either a county or district office (or both) and thus covered by the general language of Section 64 without need for specific identification.

Comparative Analysis

About 11 states have constitutional provisions stating that terms of office not established by the constitution shall be provided for by law. Hawaii has a similar provision concerning specific offices. (Hawaii Const. art. IV, sec. 6.) About five states provide that the legislature may not create offices with terms exceeding four years. At least two state constitutions provide that certain officers shall hold office during the term of (and/or at the pleasure of) the governor. Four other state constitutions contain general provisions that, like this section, limit terms of office to a specific number of years. The *Model State Constitution* provides in separate sections for the terms of specific state offices but does not fix terms for precinct, county, or district offices.

Author's Comment

It has been suggested that some of the elective offices covered by this section should be made appointive instead, thus eliminating the "long ballot" which confronts Texas voters. (Cofer, "Suffrage and Elections—Constitutional Revision," 35 *Texas L. Rev.* 1040, 1044-45 (1957).) Even if the offices continue to be elective, however, many of the terms of office now provided for by the constitution, especially for lower-echelon positions, could be fixed by statute. Terms of most of the offices covered by Section 64 are also provided for in other sections dealing specifically with those offices. At the very least, consideration should be given to

combining Sections 30, 30a, 30b, 64 and 65 of Article XVI.

Sec. 65. TRANSITION FROM TWO-YEAR TO FOUR-YEAR TERMS OF OFFICE. Staggering Terms of Office—The following officers elected at the General Election in November, 1954, and thereafter, shall serve for the full terms provided in this Constitution:

(a) District Clerks; (b) County Clerks; (c) County Judges; (d) Judges of County Courts at Law, County Criminal Courts, County Probate Courts and County Domestic Relations Courts; (e) County Treasurers; (f) Criminal District Attorneys; (g) County Surveyors; (h) Inspectors of Hides and Animals; (i) County Commissioners for Precincts Two and Four; (j) Justices of the Peace.

Notwithstanding other provisions of this Constitution, the following officers elected at the General Election in November, 1954, shall serve only for terms of two (2) years: (a) Sheriffs; (b) Assessors and Collectors of Taxes; (c) District Attorneys; (d) County Attorneys; (e) Public Weighers; (f) County Commissioners for Precincts One and Three; (g) Constables. At subsequent elections, such officers shall be elected for the full terms provided in this Constitution.

In any district, county or precinct where any of the aforementioned offices is of such nature that two (2) or more persons hold such office, with the result that candidates file for "Place No. 1," "Place No. 2," etc., the officers elected at the General Election in November, 1954, shall serve for a term of two (2) years if the designation of their office is an uneven number, and for a term of four (4) years if the designation of their office is an even number. Thereafter, all such officers shall be elected for the terms provided in this Constitution.

Provided, however, if any of the officers named herein shall announce their candidacy, or shall in fact become a candidate, in any General, Special or Primary Election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one (1) year, such announcement or such candidacy shall constitute an automatic resignation of the office then held, and the vacancy thereby created shall be filled pursuant to law in the same manner as other vacancies for such office are filled.

History

This section, with the exception of the proviso, was added to the constitution by amendment in 1954 along with Section 64 extending the terms of certain offices from two to four years. Its function was to stagger the effect of this extension so that some county, district, and precinct offices would be filled each two years. The proviso was added in 1958.

Explanation

Except for the proviso, this section appears to be a transitional provision applying only to the 1954 general election. The supreme court, however, has ruled that Section 65 also controls the sequence of terms for offices created after 1954. (See *Fashing v. El Paso County Democratic Executive Committee,* 534 S.W.2d 886 (Tex. 1976).) Thus, terms for a domestic relations court created in 1971 run in four-year intervals dating back to 1954, rather than four-year intervals beginning when the court was created. A judge elected in 1972 therefore is up for re-election in 1974 (the fifth four-year interval after 1954), rather than 1976.

The federal constitutionality of Section 65 was upheld, both on its face and as applied, in a case brought by voters who would have been entitled to vote for county commissioners at the next election but who, because of redistricting, were transferred to districts in which they would not be entitled to vote for these officers until the subsequent election. (*Pate v. El Paso County,* 337 F. Supp. 95 (W.D. Tex.), *aff'd without opinion,* 400 U.S. 806 (1970).) However, in a case involving a similar situation, it was held that where less than 50 percent of the residents had

had a chance to vote, equities favored reordering the election. (*Dollinger v. Jefferson County Commissioners Court,* 335 F. Supp. 340 (E.D. Tex. 1971).)

Significantly, neither this section nor any comparable provision has ever been applied to district judges. As a result, there is no systematic staggering of terms of district judges in areas where there is more than one district judge. Unless the dates of creation of new courts happened to occur in such a way that the judges' four-year terms overlap, it is possible that no district judge may be up for election in a county for four years.

The effect of the proviso is to forfeit automatically the office of a precinct, county, or district official who seeks other office when more than one year remains in his term. This is true even when the two offices in question would not violate the dual-officeholding provisions of Section 40 of Article XVI. (*Ramirez v. Flores,* 505 S.W.2d 406 (Tex. Civ. App.–San Antonio 1973, *writ ref'd n.r.e.*).)

Comparative Analysis

Although several states have provisions limiting terms of office, no other state has a provision comparable to Section 65, nor does the *Model State Constitution.*

Author's Comment

Section 65, excluding the proviso, served its purpose 20 years ago and is now meaningless. The Texas Legislative Council has suggested that Sections 30, 30-a, 30-b, 64 and 65 of this article should be combined in one general provision governing terms of office. (3 *Constitutional Revision* (Austin: Texas Legislative Council, 1959), p. 278) If that is done, all of Section 65 except the proviso should be deleted because it is superfluous.

The proviso discriminates, with no apparent legitimate reason, against elected precinct, county, and district officials. (See also Art. XI, Sec. 11, which contains an identical proviso applicable to municipal officials.) If it is thought generally that officeholders should forfeit their positions when they announce for other office, the provision should apply to members of the legislature and statewide elected officials as well as to those named in this section.

If the officeholder waits until the last year of his term to announce for the new office, his old office is not forfeited. This one-year period might be unrealistic if applied to statewide and federal offices, in view of the trend in recent years toward longer campaigns for those offices.

Sec. 66. TEXAS RANGERS; RETIREMENT AND DISABILITY PENSION SYSTEM FOR RANGERS INELIGIBLE FOR MEMBERSHIP IN EMPLOYEES RETIREMENT SYSTEM. The Legislature shall have authority to provide for a system of retirement and disability pensions for retiring Texas Rangers who have not been eligible at any time for membership in the Employees Retirement System of Texas as that retirement system was established by Chapter 352, Acts of the Fiftieth Legislature, Regular Session, 1947, and who have had as much as two (2) years service as a Texas Ranger, and to their widows; providing that no pension shall exceed Eighty Dollars ($80) per month to any such Texas Ranger or his widow, provided that such widow was legally married prior to January 1, 1957, to a Texas Ranger qualifying for such pension.

These pensions may be paid only from the special fund created by Section 17, Article VII for a payment of pensions for services in the Confederate army and navy, frontier organizations, and the militia of the State of Texas, and for widows of such soldiers serving in said armies, navies, organizations or militia.

History

This section was added in 1958.

Explanation

Of all the many pension and related sections in the constitution, this is the only clearly necessary one. Any pension, insurance, medical assistance, workmen's compensation, or death benefit plan for government employees operating prospectively should be recognized as compensation. There is no constitutional prohibition against compensating employees. But if a pension is initially awarded after employment has ended, a prohibition against grants to people as in Section 51 of Article III or against extra compensation as in Section 44 of that article may be applicable. A prohibition against appropriating money for a private purpose as in Section 6 of Article XVI is not applicable, however, for a pension for faithful service can be viewed as a form of welfare or as a recognition of the unfairness of ignoring retired employees when instituting a pension plan for present employees.

Section 66 is not self-executing. The legislature promptly implemented the section by providing the maximum pension permitted by the section. In addition to the other limitations contained in the section, the legislature ruled out rangers who had been dismissed for cause and set the starting age for a pension at 60 years old. (Tex. Rev. Civ. Stat. Ann. art. 6228e.) There does not appear to have been any litigation concerning the section. There are two attorney general opinions, one that permits a widow who remarries to continue to receive her pension and one that ruled against a pension for a former ranger who later worked for the state, contributed to the Employees Retirement System but withdrew his contributions when he left. (Tex. Att'y Gen. Op. Nos. WW-686 (1959) and M-1181 (1972), respectively.)

Comparative Analysis

No other state has a comparable provision. (But see the *Comparative Analysis* of Sec. 67.)

Author's Comment

It is worthy of note that the joint resolution submitting the new pension section (Section 67 of this article) repealed all pension sections except Section 66. This is understandable, for Section 66 is a "transition" section covering a limited and "frozen" number of people which will eventually reach zero. It is also worthy of note that, paradoxically, Section 66 is both the only pension section not repealed and the only pension section, as noted earlier, that was constitutionally necessary in the first place. It may be that more sections like this one will be required if the legislature some day wants to do something for retired personnel. (For further discussion of this point, see the *Author's Comment* on Sec. 67.)

Sec. 67. STATE AND LOCAL RETIREMENT SYSTEMS. (a) General Provisions (1) The Legislature may enact general laws establishing systems and programs of retirement and related disability and death benefits for public employees and officers. Financing of benefits must be based on sound actuarial principles. The assets of a system are held in trust for the benefit of members and may not be diverted.

(2) A person may not receive benefits from more than one system for the same service, but the Legislature may provide by law that a person with service covered by more than one system or program is entitled to a fractional benefit from each system or program based on service rendered under each system or program calculated as to amount upon the benefit formula used in that system or program. Transfer of service credit between the Employees Retirement System of Texas and the Teacher Retirement System of Texas also may be authorized by law.

(3) Each statewide benefit system must have a board of trustees to administer the system and to invest the funds of the system in such securities as the board may consider prudent investments. In making investments, a board shall exercise the judgment and

care under the circumstances then prevailing that persons of ordinary prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income therefrom as well as the probable safety of their capital. The Legislature by law may further restrict the investment discretion of a board.

(4) General laws establishing retirement systems and optional retirement programs for public employees and officers in effect at the time of the adoption of this section remain in effect, subject to the general powers of the Legislature established in this subsection.

(b) State Retirement Systems. (1) The Legislature shall establish by law a Teacher Retirement System of Texas to provide benefits for persons employed in the public schools, colleges, and universities supported wholly or partly by the state. Other employees may be included under the system by law.

(2) The Legislature shall establish by law an Employees Retirement System of Texas to provide benefits for officers and employees of the state and such state-compensated officers and employees of appellate courts and judicial districts as may be included under the system by law.

(3) The amount contributed by a person participating in the Employees Retirement System of Texas or the Teacher Retirement System of Texas shall be established by the Legislature but may not be less than six percent of current compensation. The amount contributed by the state may not be less than six percent nor more than 10 percent of the aggregate compensation paid to individuals participating in the system. In an emergency, as determined by the governor, the Legislature may appropriate such additional sums as are actuarially determined to be required to fund benefits authorized by law.

(c) Local Retirement Systems. (1) The Legislature shall provide by law for:

(A) the creation by any city or county of a system of benefits for its officers and employees;

(B) a statewide system of benefits for the officers and employees of counties or other political subdivisions of the state in which counties or other political subdivisions may voluntarily participate; and

(C) a statewide system of benefits for officers and employees of cities in which cities may voluntarily participate.

(2) Benefits under these systems must be reasonably related to participant tenure and contributions.

(d) Judicial Retirement System. (1) Notwithstanding any other provision of this section, the system of retirement, disability, and survivors' benefits heretofore established in the constitution or by law for justices, judges, and commissioners of the appellate courts and judges of the district and criminal district courts is continued in effect. Contributions required and benefits payable are to be as provided by law.

(2) General administration of the Judicial Retirement System of Texas is by the Board of Trustees of the Employees Retirement System of Texas under such regulations as may be provided by law.

(e) Anticipatory Legislation. Legislation enacted in anticipation of this amendment is not void because it is anticipatory.

History

Section 67 was adopted by a vote of 399,163 to 142,790 at a special election held on April 22, 1975. (Sec. 24 of Art. III was amended at the same election. See the *History* of that section.) Almost as important as the adoption of the new section was the repeal of Sections 48a, 48b, 51e, and 51f of Article III and Sections 62 and 63 of Article XVI. Actually, Section 67 is substantially the same pension revision drafted by the 1974 Convention and later submitted to the voters in November 1975 as part of a general revision of the constituion. Since the November vote was unfavorable, Section 67 is now the only product of the long revision effort that made it into the constitution.

Why Section 67 and the 1974 Convention proposal are not exactly the same rather than just substantially the same is not clear. The differences are not earthshaking. Section 67 provides in Subsection (b)(3) that the state may not contribute to a pension fund more than 10 percent of current compensation whereas the convention's proposal contained no maximum. The same subsection permits the legislature to appropriate additional necessary sums but only in "an emergency as determined by the governor" whereas the convention's proposal did not require an "emergency" and did not mention the governor. This all seems a little strange, for both versions are, in effect, limitations on the power of the legislature to appropriate more than is "actuarially determined to be required to fund benefits authorized by law." The inclusion of the governor's power to determine that there is an emergency seems to do nothing except give him the power to prevent the legislature from appropiating what is actuarially needed. This seems to translate into a power of the governor to refuse to act and thereby really create an emergency. In the event of a real emergency that the governor would not recognize, the legislature might have to reduce future benefits in order to preserve actuarial soundness. All in all, this particular gubernatorial power gives the governor an absolute veto over legislative policymaking, something that the traditional veto power does not include.

It should be noted that Section 1-a(1) of Article V, providing for a compensation plan for retired judges, was not included among the sections repealed when Section 67 was adopted. (See the *Explanation* of Sec. 1-a and the *Explanation* of this section.)

Explanation

In view of the short period of time since Section 67 was adopted, it is not surprising that there is little in the way of judicial or other gloss on the section. The big question is whether Section 67 has simplified the previously existing mishmash enough to obviate the necessity for judicial and other gloss. To put it another way, is Section 67 simple enough to leave the legislature with the necessary flexibility to solve all pension problems by legislation, including legislation that "overrules" a judicial decision? (See the *Explanation* of Sec. 63 of this article for an example of a constitutional amendment that was required to "overrule" a decision.) The analysis that follows is devoted principally to this question.

In the discussions of the several pension sections that were repealed at the time Section 67 was adopted, three fundamental propositions were stressed. First, no constitutional amendment was ever necessary in order to create a pension system. Second, none of the constitutional provisions prevented the legislature from discontinuing a pension system. Third, the legislature could discontinue a system, but whatever existed at the time of discontinuance was frozen so that employees in the system at the time of discontinuance had a "vested" right to whatever had been funded up to that time. (If the legislature had ever taken such a politically suicidal step, a litigating donnybrook would have ensued, principally devoted to what, if anything, the legislature had to continue to do to preserve the financial integrity of the existing system in order to meet the "vested" rights at the time of discontinuance.)

The drafters of Section 67 obviously intended to create some judicially enforceable obligation on the government to continue to provide for pensions for government employees. The section clearly does not go so far as the pension section in the New York Constitution discussed in the *Author's Comment* on this section. But how far does Section 67 go?

Subsection (a), General Provisions. Subdivision (1) of the subsection contains an

unnecessary and redundant grant of legislative power and two limitations on the legislature's power, one of which is of dubious significance and the other of which is of great significance. The grant of power to establish pension systems is unnecessary for the reasons mentioned earlier; the grant is redundant because the legislature has long since exercised the power. Indeed, Subdivision (4) of this subsection recognizes this. The dubious limitation requires financing based on sound actuarial principles. The limitation is of dubious significance because it is doubtful that a court would mandamus the legislature to appropriate more money if the court found that the financing was inadequate. Moreover, notwithstanding the wording of this limitation, the legislature could uphold actuarial principles by cutting back future benefits instead of increasing appropriations to the various pension funds. (This is probably not what potential pensioners think is the significance of the limitation.) The enforceable and important limitation is the last sentence of the subdivision. It tells the legislature to keep its "cotton-picking hands" off the pension funds. (As a minor practical matter, this sentence protects a member of a pension system from an attempt by others, usually creditors of one kind or another, to get at the pension money. See, for example, *Prewitt v. Smith,* 528 S.W.2d 893 (Tex. Civ. App.–Austin 1975, *no writ*).)

Subdivision (2) is of minimal significance. With one exception the subdivision simply preserves legislative freedom that should have existed in the old days except for the earlier unnecessary detail that produced a court decision that had to be "overruled" by constitutional amendment. (See the *Explanation* of Sec. 63 of this article.) The exception is the prohibition against permitting double benefits for the same service. It seems doubtful that the legislature would do this on purpose, but pension laws can get so complicated that a double benefit can show up by accident. The prohibition should serve as an item on a checklist for bill drafters working on pension legislation. (Interestingly enough, the subdivision does not prevent all double benefits. If, as is frequently the case, state or local pension credits are given for military service and the ex-military personnel eventually qualify for a military pension and a state or local pension, they receive money from both pension systems for "the same service.")

Subdivision (3) is an improvement over Section 48b of Article III and the comparable portion of Section 62 of this article. At least a great deal of detail has been omitted. Even so, the subdivision is relatively insignificant and in one respect is internally inconsistent. The first sentence, calling for a board of trustees, is hardly necessary. Since the first subdivision states that the funds are held in trust, it follows that there has to be one or more trustees. The second sentence simply restates the common-law rule of prudent investment. This would automatically follow from the existence of a trust. The final sentence is a little inconsistent. If the board is required to follow the universally accepted standard for maintaining a trust fund, there seems no point in permitting the legislature to require the board to be even more prudent than is required of the prudent man. (For a speculation about how this legislative power might be construed to cover a peripheral investment issue, see Tex. Att'y Gen. Op. No. H-681 (1975).)

Subdivision (4) was probably meant to guarantee that the state will continue to provide pensions for its employees and for teachers. Actually, the subsection taken as a whole does not guarantee this, but if Subdivision (4) is read with Subsection (b), the guarantee is there. Subsection (b) commands the legislature to provide pensions. This might not be of much value if there were no existing pension systems since courts do not ordinarily order a legislature to act. But there are pension systems and Subdivision (4) preserves them. It is a matter of simple logic to conclude that the command in Subsection (b) combined with the constitutional continuation

of existing law in Subdivision (4) prevents the legislature from abolishing pensions. (A different question is presented if the existing legislation that is continued by Subdivision (4) contains within itself a provision that permits discontinuation of the plan. See, for example, Tex. Att'y Gen. Op. No. H-903 (1976) (citing a provision that permits a county participating in the statewide county and district retirement system to discontinue enrollment of new members).)

Subsection (b), State Retirement Systems. As just noted, Subdivisions (1) and (2) of this subsection are redundant in the sense that the systems already exist but are of value in prohibiting the legislature from abandoning state pension systems. Subdivision (3) is a strange provision. One of the strange aspects was discussed in the *History* of this section. A second strange aspect is that the subdivision assumes the existence of the two systems that the preceding subdivisions command the legislature to create.

Subdivision (3) does have some important teeth in it, however. The subdivision clearly prohibits a noncontributory pension system. The subdivision also strongly implies that the employees and the state are to contribute roughly equivalent amounts to the pension fund. This implication flows from the 6 per cent minimum contribution required of both the employee and the state and from the 10 per cent maximum for the state. (As the *History* notes, the 1974 Convention's provision had no maximum.) Behind all this probably lie two thoughts. One is that a pension plan ought to include the concept that an employee should save something for his old age. Otherwise, though an employee would bridle at the suggestion, a noncontributory pension plan, particularly one financed by taxpayers, becomes a welfare program. The second thought is that, to the extent that it was not hemmed in by restrictions, the legislature might be tempted to sweeten the employees' fringe-benefit pot in a manner that avoided an increase in taxes. A pay increase requires more money right now; an unfunded increase in pension benefits does not. Some future legislature has to reap that whirlwind. Even though the fundamental concept is that equality of contribution is required, some leeway is necessary; a host of changes—actuarial errors, inflation, investment errors, past service requirements, to name but a few—may require adjustments to protect the promises made to employees. For this reason, the legislature has to be permitted to increase its contributions. It is arguable, of course, that none of this belongs in a constitution. But if something is to go into the constitution, the combination of powers and limitations contained in this subdivision makes good sense.

Subsection (c), Local Retirement Systems. This is another strange subsection. It commands the legislature to do what in fact has already been done. The subsection also sets up an illogical command, but the command is nothing more than the permission previously unnecessarily granted by Sections 51e and 51f of Article III and Section 62 of this article. What is illogical is that cities and counties may create their own pension systems or may join a statewide system whereas other political subdivisions may only join a statewide system. (A nice theoretical constitutional question would be whether a newly formed school district could opt to join a "local" statewide system rather than the state teachers' system.) Of course, this illogical command serves the same purpose as Subsection (b). When put together with Subdivision (4) of Subsection (a), the legislature is stuck with continuing all existing pension systems involving local governments. This is quite a confused mess. There are a great many local pension systems created by local laws that have been upheld as "general" laws under the population-bracket device. (See the *Explanation* of Sec. 56 of Art. III. For a particularly interesting "local" pension law, see *Board of Managers of the Harris County Hospital District v. Pension Board of the Pension*

System for the City of Houston, 449 S.W.2d 33 (Tex. Civ. App.–Austin 1975, *no writ*).) One may speculate whether, in the light of the wording of Subsection (c), the legislature has the power to bring order out of what could become a chaotic mess of underfunded and mismanaged local pension systems. To conclude that the legislature cannot may be only to conclude that Section 67 preserves the previous constitutional situation that could also have made it impossible to bring order out of chaos; but then again, perhaps Subsection (c) creates a barrier that did not exist before. The earlier sections were unnecessary grants of permissive power; perhaps the courts would have permitted the legislature to withdraw its permission and to replace all local pensions by a statewide system. It is doubtful that Subsection (c) would permit this.

Subdivision (2) of Subsection (c) is a fascinating provision. One might speculate that Section 67 was drafted by people who were interested primarily in the two state systems. On the one hand, Subsection (b) says nothing about tenure but has considerable detail about contributions whereas Subdivision (2) simply says that benefits under local systems "must be reasonably related to participant tenure and contributions." Is this a viable requirement that is judicially enforceable? More important, does this subdivision permit the legislature to ride herd on local pension plans that may, in the long run, threaten local governments with bankruptcy? Again, it is important to keep one's eye on the constitutional ball. The only reason that one has to raise the question whether this subdivision permits the legislature to ride herd on mishandled local pension plans is the rigidity that the constitutional language of the rest of the subsection and subdivision (4) of Subsection (a) appear to create. At this early date in the life of Section 67, there are no answers to these questions. Indeed, no one knows whether they are questions that will ever arise.

Subsection (d), Judicial Retirement System. As noted in the *History* of this section, the comparable retirement provision in the constitution concerning judges was not repealed when Section 67 was adopted. The reason for this is that Section 67 was originally drafted for a new constitution and would have included within the section everything concerning pensions. When it came time to propose the section as part of the existing constitution, it was easy to repeal the various sections that dealt only with pensions but not so easy to excise the pension part of a lengthy section in Article V dealing with much more than retirement pay. Hence Subsection (d) in part duplicates Subsection (1) of Section 1-a of Article V. (See also the *Explanation* of Sec. 1-a.)

All of this makes Subsection (d) a little strange. For example, the subsection refers to the system "heretofore established by constitution or by law" and states that the system is continued in effect. This would mean something only if Section 1-a had been repealed and if someone thought that the statute carrying out the policy of Section 1-a could not stand without the underlying constitutional provision. (As stated so many times, there never was a need for a constitutional provision to permit the payment of pensions. There is, however, the problem whether an "unnecessary" provision once included in the constitution turns into a limitation. The words quoted earlier–"by constitution or by law"–in effect ratify anything in the pension act that was arguably broader than permitted by Sec. 1-a.)

Another strange element of the subsection are the opening words: "Notwithstanding any other provision of this section, ..." This should alert the reader that there is something about the subsection that is inconsistent with the rest of the section. The inconsistency is that the judicial retirement program is the only one that is not funded. There is no board of trustees, no pension fund, no regular contribution by the state. Judges are required to contribute to the system, but their contributions go into the general fund. The legislature simply appropriates enough

each budget period to pay pensions of retired judges. (See Tex. Rev. Civ. Stat. Ann. art. 6228b.) So long as the program operates this way, it must be excepted from the standards set forth in Subsection (a).

The question raised at the beginning of this *Explanation* was whether Section 67 is simple enough to avoid constitutional litigation. Although several fundamental questions have been raised, on balance it would appear that most litigation in the future will turn on statutory, not constitutional, provisions. With rare exceptions, the constitutional confusion pointed out would arise only if the legislature undertook some drastic revamping of the entire pension system. So long as the legislature works within the parameters of the present pension programs, the constitutional sailing should be smooth.

Comparative Analysis

Approximately nine other states have one or more provisions authorizing a retirement plan for public employees. In many instances the provisions are obviously an exception to a "gifts" prohibition like Section 51 of Article III or to an extra compensation prohibition like Section 44 of that article. It seems likely that all of the other instances were adopted to get around a comparable limitation. Several states have provisions like the one in the New York Constitution designed to prevent diminution in pension rights. (See the *Author's Comment* below.) A couple of states prohibit any use of pension funds for any other purposes. Interestingly enough, a handful of states have provisions prohibiting or limiting the payment of pensions. New Hampshire's 1784 provision is particularly endearing:

> Economy being a most essential virtue in all states, especially in a young one; no pension shall be granted, but in consideration of actual services; and such pensions ought to be granted with great caution, by the legislature, and never for more than one year at a time. (Art. 36, Part I.)

Neither the *Model State Constitution* nor the United States Constitution has a provision concerning retirement or pension plans.

Author's Comment

Public pension systems are a hot political problem these days. In many parts of the country state and local governments for years kept pay low but offset this by fringe benefits, one of which was a munificent pension plan. The trouble was that frequently the government neglected to fund the plan—that is, appropriate adequate sums for a trust fund to cover payments in the future. (Many private employers followed the same negligent practice.) This fiscal error could be compounded if employees began to demand noncontributory pensions. This would increase the government's future liability while decreasing whatever funding came from contributions.

One possible way to solve the problem of gross underfunding is to start reneging on the pension promises. In anticipation of this possiblity public employees develop an interest in securing permanent protection. This, in our system of government, can be guaranteed only through a constitutional provision protecting the promises. The model for this is a provision adopted by New York in 1938. It reads:

> After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired. (Art. V, Sec. 7.)

New York now finds that this provision has created difficulties. When people woke up to how munificent the pensions had become, they found that any reform of the pension system could apply only to employees hired after the effective date of a statutory revision. This is acceptable, perhaps, in the case of a fundamental change such as switching from a noncontributory to a contributory pension. But frequently there are minor elements in the program the effect of which is either unknown or unanticipated at the time of initiation. For example, if a person's pension is based on his last year's pay and if pay is defined to include overtime, it is easy to juggle work schedules so that employees within one year of retirement build up a large overtime record. Apparently, some people in New York have retired on an annual pension larger than their highest straight-time earnings. A constitutional provision that prevents correction of errors like this is obviously too broad.

Section 67 clearly leaves the legislature the flexibility needed to keep control over the several public employee pension plans in the state. For their part, public employees appear to have a guarantee that the state and its policial subdivisions must continue to provide pensions for their employees. All in all, Section 67 strikes a happy medium. It is fair to note, however, that the short form recommended by the Constitutional Revision Commission in 1973 struck the same happy medium at least as well as Section 67 does. That provision read:

> Any pension or retirement system of this State, or of any political subdivision thereof, or of any governmental agency of either, now in effect shall be continued. No funds held pursuant to any such system shall be used for any purposes inconsistent therewith.