

RGPS AND RPPS – PARITY BETWEEN REGIMES: An analysis of the similitude between the institutes of unretirement and reversion

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Abstract

The goal of this article is to analyze if there is parity between the Pension Regimes for Government Workers and the General Regime of Social Security (RPPS and RGPS), and to identify the similitudes between the institutes of reversion and unretirement, using the deductive method, from the interpretation of the constitutional text and from its application in relation to what is provided and allowed by infra-constitutional Law, and to verify if it is possible to guarantee to the insured that keeps on paying the social security after jubilation the recalculation of his retirement pension, and if this command finds sustenance in the constitutional text from the parity between the RPPS and the RGPS.

Keywords:

Parity. Unretirement. Reversion. RGPS. RPPS.

1 INTRODUCTION

The recalculation of the retirement benefit of those who continue to work or go back to doing paid work after jubilation, with the compulsory contribution to social security and filiation

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to the general regime of social security, based on the subsidiary application of the institute of reversion, by force of article 40, paragraph 12, of the Federal Constitution, is the problematic discussed in this work.

Using the deductive method, we seek to analyze if there is parity between the Pension Regimes for Government Workers and the General Regimes of Social Security (RPPS and RGPS, respectively), and the application of reversion in a subsidiary manner to the general regime, in order to guarantee the right of the retired individual who either continues to work or goes back to doing paid work, the recalculation of his benefit, due to the so-called institute of unretirement.

The paper aims to identify the legitimacy of unretirement in the Brazilian legal system, from the interpretation of the constitutional text and its application in relation to what enables the existence of infra-constitutional law, to present the concept and the effects of reversion in the Pension Regimes for Government Workers, and to verify if it is possible to guarantee to the citizen who continues to pour contributions to social security after its jubilation the recalculation of his or her retirement, due to the subsidiary application of reversion.

From the words of paragraph 12 of article 40 of the Federal Constitution, which guarantees the subsidiary application, where applicable, of the RGPS to the RPPS due to omission of the law, one can state that the lawmaker established the hypothesis of the proportional inverse application, like in a bijective function⁴, in the cases where the general regime is either missing or incomplete.

Reversion, as will be seen in more detail in this paper, allows a retired public servant to return to public work, either by request or in the interest of the Public Administration. This allows a public servant retired with proportional pay to return to paid work and, thus, gives him or her the possibility of retiring with either integral pay or a more beneficial proportional pay.

It will also be established that unretirement finds no objection in the legal system and, therefore, due to the protection dispensed by the guiding principles of Social Security, the right mentioned would extend to the jubilated individual who either continued or went back to paid work, aiming to establish the protection to his or her social well-being.

Furthermore, even if one should speak about legal omission, we seek to demonstrate that the reversion of a public servant is similar to the recalculation of retirement through unretirement and, in this interim, its application would come from the need to guarantee maximum protection to the individual stemming from the beneficial interpretation of the law to the insured.

⁴ Bjective functions possess equal codomains and images and, besides, distinct elements of the domain relate to distinct elements of the image. Concept available at: <https://mundoeducacao.bol.uol.com.br/matematica/funcao-bijetora.htm>. Last accessed on May 6, 2019.

2 UNRETIREMENT AND ITS APPLICATION IN THE LEGAL SYSTEM FROM THE ANALYSIS OF CONSTITUTIONAL PRINCIPLES.

From a perfunctory analysis of the constitutional text, one can realize that to the male insured that completes 35 (thirty-five) years of contribution, and the female who completes 30 (thirty) years of contribution, with a reduction of 5 (five) years for teachers from basic education, is guaranteed the benefit of retirement by time of contribution, with pensions calculated as expressed on article 29, I, from Law 8.213, 1991, with redactions from Law 9.876, 1999.

The Federal Constitution also disposes that the general regime of social security is organized by its contributive character with mandatory filiation, as long as the financial and actuarial balances are maintained. From article 201 from the constitutional text, it is possible to realize that the exercise of paid work, without any reservations, determines the compulsory filiation of workers to the general regime of social security and demands, as a consequence, the payment of quotas defined by law, which have the aim of maintaining the balance of the social security fund in order for it to be possible to guarantee to the insured and their dependents the benefits sculpted by law.

Thus, regardless of the insured being retired or not, the exercise of paid work demands that he pays the social security contributions and, because of that, they should, in theory, have the right to a counterpart, even if its simply the recalculation of the received benefit which, for years, has been called unretirement.

We understand as unretirement the institute through which the insured, after his or her jubilation, remains mandatorily connected to the general regime of social security and, due to new quotas, seeks the recalculation of his or her benefit, considering the entirety of the contributing period, which, as a rule, leads to a raise in the nominal value.

According to Fábio Zambitte Ibrahim⁵, the goal of unretirement, both in the RGPS and in the RPPS, is to allow the insured to obtain a more financially advantageous benefit in view of these new contributions, paid after retirement.

According to the author⁶, even though unretirement has no legal provision, from the interpretation of the constitutional principles that rule Social Security, as well as in attention to the general rules that rule the benefits and quotas, it is possible to conclude that the claim for recalculation of benefit is legitimate, especially because it does not find express prohibition in the

⁵ IBRAHIM, Fábio Zambitte. Curso de Direito Previdenciário. 22º Ed. Impetus.. RJ, 2016, p. 724

⁶ IBRAHIM, Fábio Zambitte. Desaposentação – O caminho para uma melhor aposentadoria. Impetus. RJ, 2005, p. 109.

Brazilian legal system, due to the application of the principle of the most favorable condition to the insured.

The problematic about unretirement arises, especially, from three points. The first consists in the possibility of the insured renouncing or not to the benefit of retirement and if doing so would result in the obligation or not to give back the values received to the social security fund. The second corresponds to financial and actuarial imbalance, due to the elevation of the benefits with total funding unable to support the payment. And the third, the non-existence of legal provisions that, by consequence, would cause objection to the concession of the readjusted benefit, which could violate the principle of solidarity expressed on article 194 from the Federal Constitution.

Very well. The Supreme Court (STF), in the trial of the Extraordinary Appeal number 661256, defined as a general repercussion thesis that “in the General Regime of Social Security (RGPS), only the law can create social security laws and advantages, there not being, for now, legal provision for the right of unretirement.” With it, the constitutionality of article 18, paragraph 2, from Law 8.213/91, which establishes that the retired who returns to paid work will only be granted working family payment and the service of professional rehabilitation.

For the Court, the inexistence of legal provision would be an objection to the recalculation of the benefit, and a contrary understanding would allow the Judicial Power an activism that would cause grave losses to the social security fund, especially stemming from the application of solidarity and the distributive nature of Social Security.

In reality, one of the crucial points of unretirement would be the theoretical absence of a legal ground. In this paper we will discuss if, faced with that, it would not be possible to apply the institute of reversion which is applicable to public servants in a subsidiary manner in the general regime of social security, due to the parity provided on article 40, paragraph 12, of the Federal Constitution.

However, Wladimir Novaes Martinez⁷ states that:

It is not the goal of the Magna Carta to petrify the perfect juridical act, as much as the acquired right and the *res judicata*; it must walk towards the owner of the faculty and not against him. The protection offered (with no loss of being harmoniously magnified by the doctrine) is *contra legem*, or a decision that goes against the legitimate and consolidated interests of the individual. Since the administration can revise its own acts, it does not enjoy the favor of this postulate; it dismisses it. It can sustain it, if actioned, as a proof of correct procedure. Never against the volition, if legitimate, of the administered. Nothing prevents, and neither could it object in a Major Law of a Democratic State, the affectation on the part of the owner, as long as it represents the exercise of liberty.

(...)

Really, when the public norm intends to impede determined fact – for consisting such

⁷ MARTINEZ, Wladimir Novaes. Curso de Direito Previdenciário. 7ª Ed. LTr. São Paulo, 2017, pp. 715-717.

measure in a restriction to liberty —, it must behold it clearly and expressly; at first, if it is not prohibiting it, as long as it is convenient to the holder of the right, it is because it so wishes to happen.

Social security law has the nature of a fundamental social right of effective protection to the worker and, under such a prism, the demands in this sense must be evaluated under the exegetic orientation that seeks the effectuation of these rights, even when stemming from an eventual juridical activism, since it is dealing with the protection of human rights. However, the mere inexistence of prohibition to the recalculation of the benefit would already be reason enough for the jurisprudential interpretation were in the direction of benefitting the insured due to the compulsory quotas after voluntary jubilation in the general regime of social security, due to the principle of solidarity and protection to the insured to effectuate to him or her the state of social well-being.

Immediately thereafter, it must be highlighted that unretirement does not aim to obtain a new benefit which, technically, would find objection on article 18, paragraph 2, of Law 8.213/91. Its goal is, most importantly, the obtention of a new pension, in a more advantageous condition to the value previously perceived, all due to a new contributive period stemming from the compulsory filiation to the general regime after voluntary jubilation.

Another paradigm that cannot be sustained, from the analysis of this argument, would also be that of the loss to the actuarial and financial balance, once that in the existence of the quotas arising from the exercise of paid work after retirement, respecting, inclusively, the premises of the triple source of funding, diversity and equity, the valued of the benefit would be linked to the social security funds, by force of what expresses article 167, XI, from the Federal Constitution, since these revenues aim to guarantee, efficiently, the payment of benefits, including those arising from eventual majoration.

It must be highlighted that, for the effectuation of collective protection, in reason of solidarity, it is indubitable the obligation of individually protecting the insured, because it falls to the Public Administration to make it accessible to the citizen his well-being through measures of social protection. Inclusively, when the collective interest must be protected in a more objective manner, the Public Administration will act in such a way to instrumentalize the conditions that limit the right of the individual, such as decadence, prescription, and the exhaustive indication of the insured's dependents, a fact that does not happen with the recalculation of the benefit of the insured in activity.

As previously mentioned, if the intention of the lawmaker is to limit the right to liberty, he must do it expressly when the argument is the protection of collective rights. On the other hand, when there is no express prohibition, and the titular of the right meets all the criteria that create

said right, it must be guaranteed. In the case of unretirement, the corresponding source of funding and the principle of protection to guarantee the fundamental right to a fair benefit, are the most important conditions for the insured to obtain the social right to well-being.

Social security hermeneutics, incidentally, allows the benefit of retirement to be waived since there is no legal prohibition, as long as it happens with the intention of recalculation. Thus, the counting of time – both anterior and posterior to the jubilation – should be admitted to the calculation of the value owed to the insured, and not even mentioning some restitution of values received due to retirement, since there is no cumulation of benefits.

When the original benefit was received, the insured held the right to receive it and, therefore, the payment is alimentary in nature. Since the return or continuation of labor is a condition not prohibited by law and, in these cases, there will be compulsory payment of the social security contributions, there arises, after retirement, the right to recalculate the benefit, considering the time anterior and posterior to the jubilation, without having, at that moment, cumulation and, therefore, there is no legal hypothesis demanding the refunding of those values.

Aligned with the three hypothesis of discussion on the prohibition to unretirement, it is possible to notice that the negative does not hold, especially for offending, directly, the principles of the protection to the most advantageous condition, and solidarity, once there are quotas after jubilation and with no legal provisions prohibiting the recalculation of the benefit, it must be guaranteed.

However, once understood the concept and legitimacy of unretirement, it must be highlighted that this hypothesis could also be guaranteed from the subsidiary application of articles 25 to 27 from Law 8.212/91, by force of what is expressed on paragraph 12 from article 40 of the Federal Constitution, since there would be parity with a hypothesis of reversion, as will be discussed on the next topics.

3 THE INSTITUTE OF REVERSION – CONCEPT AND REQUIREMENTS;

Initially, it is important to highlight that the analysis of the institute of reversion will be done based on what is established in the Unique Juridical Regime of Federal Public Servants, Law number 8.112/1990.

The institute being analyzed finds legal provision on article 25 of Law 8.112/1990, which establishes, in its *caput*, the concept of reversion, which can be translated as a retired public servant's return to activity⁸.

⁸ Art. 25. Reversion a retired public servant's return to activity:

This return to activity can happen in two cases: a) when the reasons that led to the retirement of the public servant due to disability are declared unsubstantiated; b) in the interest of the Administration.

Reversion in the interest of the Administration must observe the content of lines “a” through “e” from article 25, subsection II, from Law 8.112/1990. Let us see the article in question:

Art. 25. Reversion is a retired public servant's return to activity:
(...)
II – in the Administration's interest, as long as:
a) reversion has been requested;
b) retirement was voluntary;
c) tenured when in activity;
d) the retirement occurred in the five years leading to the request;
e) there is a vacant post;

Analyzing the content of the article in question, one can see, at once, that the requisites from lines “a” through “e” must be met by the servant in a cumulative manner – it is not enough that only part of the requisites be met.

Therefore, for him to effectively return to activity in the interest of the Administration, the servant must meet the five requisites from subsection II.

From the content of line “a” it can be seen that the lawmaker made a mistake by not expressing clearly who must be the responsible for requesting the reversion – the servant or the Public Administration. However, since the Public Administration cannot act on its own in this hypothesis, it therefore depends on being provoked by the interested party, so it seems clear to us that the request of reversion must be filed by the servant⁹.

Continuing the analysis of the requirements for reversion in the interest of the Administration, it can be noted that (line “b”) the servant that intends to revert back to the activity must have been retired voluntarily, that is, the servants that have been compulsorily retired cannot benefit from the institute in analysis.

The rule in question seems quite coherent to us, since the compulsorily retired servant, as per the legislation that rules this kind of retirement, could not remain in activity after having reached the maximum age allowed in the public service, therefore, obviously, this servant could not return to activity anymore due to age restrictions.

The third requirement refers to tenure, which according to article 41 from the Federal Constitution from 1988¹⁰ is attained with three years of actual service. It is interesting to note that

⁹ RIGOLIN, Ivan Barbosa. **Comentários ao Regime jurídico Único dos Servidores públicos civis**, 6ª Edição, São Paulo, Saraiva, 2010, p.93.

¹⁰ Article 41. Servants who, by virtue of public entrance examinations, are appointed to effective posts, acquire tenure after three years of actual service.

the requirement in question confirms the understanding according to which tenure is no presupposition for concession of retirement in favor of the public servant¹¹.

The fourth requirement demands the retirement of the servant to have occurred in the five years leading to his request. It seems to us that the intention of the lawmaker was to avoid the return of servants already in long periods of inactivity. In this context, he aimed to avoid that a servant already disaccustomed/outdated with the exercise of his or her tasks return to active duty, thus honoring the principle of efficiency (article 37, *caput*, CF88¹²).

The fifth and last requirement concerns the need for existence of a vacant post for the servant to occupy, so line “e” must be interpreted in conjunction with the first paragraph of article 25 from Law number 8.112/1990¹³, that is, the vacant post that must exist, must be the one previously occupied by the servant, or, yet, the result of its transformation. Regarding the transformation, Ivan Barbosa Rigolin clarifies:

In effect, it does not make much sense, in the statutory system, the reversion to a post different from the one of the retirement or, as provided on paragraph 1, **in the one resulting from its transformation, which ends up being almost the same, since transformation of public offices, in general, are merely formal denominations, by the most debatable reasons of convenience, and not material in attribution**¹⁴.

The need for reversion in the same post also seems to be adequate when faced with the understanding consolidated by the Supreme Court on binding decision (Súmula Vinculante) number 43¹⁵, which prohibits the transposition of public posts, that is, a public servant being invested, without previous approval in civil service examinations, into a post that is not part of the career in which he was previously invested.

3.1 Practical effects of reversion;

Two practical effects that can be visualized when the servant reverts back to his activity are: the performance in the tasks completed in the post he previously occupied, even when in the condition of surplus servant¹⁶, as well as the replacement of the servant’s pensions by the

¹¹ Op. Cit, p. 94.

¹² Art. 37. The governmental entities and entities owned by the Government in any of the powers of the Union, the States, the Federal District and the Municipalities shall obey the principles of lawfulness, impersonality, morality, publicity, and efficiency, and also the following:

¹³ Art. 25 (...) paragraph 1: Reversion will happen in the same post or in a post resulting from its transformation.

¹⁴ Ibidem, p. 94.

¹⁵ Binding Decision 43 All modalities of provision that allow servants to be invested, without prior approval in public entrance examinations destined to its provision, in a post that is not part of a career in which previously invested, are unconstitutional.

¹⁶ Art. 25 (...)

remuneration of the post he went back to occupying, including all the personal advantages he received before his retirement¹⁷.

The possibility of the servant being reverted to work as a surplus, in our opinion, must be seen with reservations. This because if the post the servant previously occupied is already filled, the Public Administration must prove the real and effective need to adopt this measure, or risk spending taxpayer money unnecessarily, with two servants working identical jobs for no reason.

Once reverted, the servant will not receive retirement pensions anymore, which seems rather obvious to us since, from then on, he will be in active duty again, and, as such, must be remunerated, including all personal extras and bonuses received before retirement.

Another practical effect arising from reversion, and also arising from receiving his servant's remuneration, is the return of the payment of the social security contribution, an effect which is connected to the benefits in the social security regime specific to public servants, which we will now analyze.

3.2 Effects of reversion on the benefits of the Pension Regimes for Government Workers.

As previously stated, the servant who returns to activity stops receiving his or her pension, and so goes back to receiving the remuneration from the effective post he starts to occupy. Consequently, the servant once again starts to pay for social security, just like a regular active servant¹⁸.

In this context, the time the servant spends in activity after reversion will be considered for the concession of a new retirement¹⁹, which seems rather just and coherent to us, since the servant will not stop contributing to the Pension Regime to which he is linked.

Therefore, it seems adequate, faced with the contributive/retributive character of the system, that the servant can add the time of contribution posterior to reversion to the time of contribution anterior to his first retirement in order to obtain a new benefit.

paragraph 3 In the case of subsection I, if occupying the post, the servant will work as a surplus, until a vacant post arises.

¹⁷ Art. 25 (...)

paragraph 4 The servant who returns to activity in the Administration's interest will receive, in replacement of the retirement pension, the remuneration of the post he will go back to filling, including the advantages of a personal nature that he received prior to the retirement.

¹⁸ Law number 10.887/2004: Article 4 The active public servant's social contribution from any of the Powers of the Union, here included associate government agencies and foundations, for the maintenance of the respective social security regime, will be 11% (eleven percent), charged over:

¹⁹ Art. 25 (...)

paragraph 2 The time the servant spends in activity will be considered for the granting of retirement pension.

Finally, article 25, paragraph 5, from Law number 8.112/1990²⁰, demands the servant to remain in activity for at least five years in order to have his pension calculated according to the current rules.

The text on the paragraph mentioned seems completely unnecessary to us, seeing that, as a rule, the servant who opts to revert back to active duty will not be interested in being retired by the current rules, since he already met the requirements for voluntary retirement in a previous opportunity, so that the history of pension reforms makes it clear that the requisites for concession and calculation are getting harder and harder, and detrimental to public servants.

Therefore, the paragraph mentioned will have no practical applicability. Moreover, Ivan Barbosa Rigolin's harsh criticism to the paragraph in analysis deserves to be highlighted, since that, in the theorist's opinion, an infra-constitutional norm cannot overlap the constitutional rules which, evidently, are more complex than the simple five-year requisite.

In this sense:

Less fortunate was paragraph 5, which must have intended to perpetuate on L. 8.112 the constitutional social security rules, above all those brought by EC n.20, from 12-15-1998, but which reveals itself to be of absolute ingenuity as the statutes of public servants, as long as our Constitution dictates from alpha to omega *all the rules of effective servants*, prescribes much more complex rules than that for the servant to retire integrally, and, within that possibility, still with the addition of determined advantages.

This legal provision is *solemnly ignored*, because when it comes to establishment the pension of a servant, *the laws have no power, no competence, no utility and no effect role*, no matter how high they are, like L. 8112. Here the lawmaker lost yet another opportunity of keeping the wisest of silences²¹.

We thus conclude the analysis of the institute of reversion within the Pension Regimes for Government Workers.

4 The parity between the RPPS and the RGPS: equivalence between unretirement and reversion.

According to Norberto Bobbio²², the juridical norm must be interpreted in a way that guarantees to the individual the directives not prohibited by law, especially so as to guarantee the application of the principles. See:

the function of the permissive norms is to make one imperative to stop existing in determined circumstances or with reference to determined people and, therefore, the

²⁰ Art. 25 (...) paragraph 5: the servant mentioned on subsection II will only have his pension calculated based on the current rules if he remains for at least five years in the post.

²¹ Ibidem, p. 96.

²² BOBBIO, Norberto. Teoria da Norma Jurídica. Tradução Ariani Bueno Sudatti. Edipro. São Paulo, 2014, p. 127.

permissive norms presuppose the imperative norms. If one would not go from the presupposition of imperativity, there would be no need, in determined circumstances and in relation to determined people, to make the imperative to cease existing, that is, to allow. When one does not presuppose an imperative normative system, the allowed actions are those that do not claim any norm to be recognized, as the postulate goes: “everything that is not prohibited or commanded is allowed”

Based on Bobbio’s teachings, we move on to the analysis of the normative command from article 40, paragraph 12, of the Federal Constitution from 1988, which reads as follows:

Art. 40. Employees holding effective posts in the Union, the States, the Federal District, and the Municipalities, therein included their associate government agencies and foundations, are ensured of a social security scheme on a contributory and solidary basis, with contributions from the respective public entity, from the current employees, retired personnel, and pensioners, with due regard for criteria that preserve financial and actuarial balance and for the provisions of this article. (...)

paragraph 12 – In addition to the provisions of this article, the social security scheme of government employees who hold effective posts shall comply, whenever appropriate, with the requirements and criteria stipulated for the general social security scheme.

The provisions mentioned deal with the RGPS’ principle of subsidiarity, which must be understood as an idea of suppletion, holding, simultaneously, two meanings: complementarity and supplementarity²³, that is, the norms of the RGPS, in the case of absence of express disposition, complement or supplement the norms of the RPPS.

What happens is that, when exposed to Norberto Bobbio’s theory of the norm, it is possible to understand that the inverse can also happen. That is, in the case of absence of a specific norm in the RGPS, because there is no prohibition in the constitutional command, the application of RPPS norms are adequate, in a subsidiary manner.

This line of argumentation is strengthened by two specific points: a) the principle of maximum effectivity of the constitution; b) the commutativity between the social security regimes.

The principle of maximum effectivity is defined by Canotilho as follows:

This principle, also called **efficiency principle** or principle of effective interpretation, can be formulated in the following manner: a constitutional norm must be attributed the sense that gives it the greatest efficacy. It is an operative principle in relation to any and all constitutional norms, and even though its origin is linked to the thesis of actuality of programmatic norms (Thomas), it is today evoked, above all, when talking about fundamental rights (when in doubt, one must prefer the interpretation that recognizes the greatest efficacy to fundamental rights).²⁴

²³ BARACHO, José Alfredo de Oliveira. **O princípio da subsidiariedade**: conceito e evolução, io de Janeiro, Forense, 2000, p. 24.

²⁴ CANOTILHO, J.J. Gomes, **Direito Constitucional e teoria da constituição**. 7ª Edição, Coimbra, Portugal, Livraria Almedina, P.1224

Analyzing the content of article 40, paragraph 12, from the CF88, based on the principle of maximum effectivity, it can be verified that the greatest efficacy that can be attributed to it is derived from the interpretation that allows the application of the RPPS norms, in a complementary/supplementary manner, instead of the RGPS norms.

This interpretation is even more adequate because of the fundamental right it aims to guard: social right – social security – retirement (article 6, *caput*²⁵, and article 7, item XXIV²⁶, both from the CF88).

One should note that the fundamental right being guarded here, that is, retirement, must also be interpreted according to the principle of maximum effectivity, and must be understood as the best retirement (benefit) to which the insured is entitled to.

Taking these premises as a basis, that is, the possibility of application of the RPPS norms to RGPS in a supplementary manner in the case of omission, as well as the need to grant the insured the best benefit he is entitled to, allows us to understand the possibility, faced with the similitude of the institutes, of applying the rules of the institute of reversion (article 25 from Law number 8.112/1990) so that the individual insured by the RGPS can claim unretirement.

The similitude between the institutes is clear: in both hypotheses we are faced with retired workers who return to activity, consequently retaking their link with their respective social security regime, compulsorily and in a contributive character.

In this context, the servant that leaves his condition of retired, reverting back to active duty, goes back to receiving the remuneration of the post he previously occupied and, consequently, goes back to contributing to the RPPS just like a regular active servant (article 25, paragraph 4, Law number 8.112/1990), and, after that, he will be able to use these new contributions in the calculation of the new social security benefit. In the same way, the RGPS insured that retires and goes back to work becomes, due to the compulsory nature of the system, a mandatory insured, contributing to social security in relation to the new link and, therefore, he should be able to use these new contributions in the recalculation of the social security benefit, especially to meet the counterpart's yearnings, since there is the respective source of total funding, already mentioned in this paper.

However, the difference lies in the fact that within the RPPS there is express legal provision authorizing the counting of the time that the servant spends in activity for the granting

²⁵ Article 6. Education, health, food, work, housing, transportation, leisure, security, social welfare, protection of motherhood and childhood, and assistance to the destitute, are social rights, as set forth by this Constitution.

²⁶ Article 7. The following are rights of urban and rural workers, among others that aim to improve their social conditions:
XXIV – retirement pension;

of new retirement (article 25, paragraph 3, from Law number 8.112/1990), normative that, faced with omission within the RGPS, can be extended to the insured of the RGPS by application of article 40, paragraph 12, of the CF88, from which is extracted, in the hypothesis, maximum effectivity.

On the other hand, one can infer that the lawmaker's intention has been, for some years, to unify the RGPS and the RPPS, even in relation to the rules. Such condition is perceptible from Amendment number 20, from December 16, 1998, when paragraph 12 was added to article 40 of the Federal Constitution, already establishing the subsidiary application of the RGPS to the RPPS.

Also in 1998, Law 9.717/1998 was published, specifying that the Pension Regimes for Government Workers were prohibited to create social security benefits distinct from those established on the general regime, through Law 8.213/91. Then, from Constitutional Amendment number 41, from 2003, paragraphs 1 and 3 were changed, and paragraph 17 was added to article 40 of the Federal Constitution, so that the calculation of the social security benefit of the RPPS became comparable to that of the RGPS.

With Law 10.887 from June 18, 2004, the dispositions on the calculation of benefits already discussed were defined, as well as determined that the corrections from the RPPS pensions would follow the same indexes stipulated for the RGPS, besides stipulating other rules already aligning the RPPS to the RGPS.

It can be noted that the intention of the lawmaker, through the years, is to equate the RPPS to the RGPS and, through the principle of commutativity, in which there will be commutation between the regimes in a paradigmatic way, since, technically, we are dealing with a binary operation, that is, if the dispositions of the RGPS are applied to the RPPS, when the Law is lacking, the rule is identical when otherwise, especially because, as previously explained, there are no prohibition to this commutativity.

When there is no legal and express prohibition that the contributions of the insured from the general regime are validated for the recalculation of the benefit of retirement, and that there is a source of total funding and sufficient for the payment of the new calculated value, all by force of article 167, XI, from the Federal Constitution, the subsidiary application of what is expressed in the RPPS is possible in relation to the institute of reversion, in order to respect the maximum effectivity of the Constitution and the commutativity, hypothesis in which the worker will have guaranteed his dignity and the respect to the most beneficial condition also guaranteed by the constitution text.

Another point that brings the Regimes closer together is the 85/95 formula, that since

the Constitutional Amendment number 20/98 started existing implicitly in the RPPS²⁷, whose “summation” was lent to the RGPS. The 85/95 formula, created by Law number 13.183/2015, was the found parliamentary solution, in order to flog the federal government, so that the insured would be able to retired by time of contribution (a minimum of 35 years for men, and 30 for women), with the sum of the claimant’s age, without the application of the so-called social security factor.

With the validity of Provisional Measure number 664/14, the death pension instituted both in the RGPS and in the RPPS started having the application of a temporal limiter, since before that the benefit was lifelong, regardless of quantitative criteria for the insured’s contribution, and neither the period spent with the surviving spouse, there imposing, then, a limit to the time one could receive the pension.

Also, when there is no proof that the insured deceased had contributed for at least 18 months, and neither that the surviving spouse had lived with him for at least 24 months, the maximum time for receiving the benefit will be four months (the mini-pension). Neither the marital period, nor the contributive time, refer to a grace period, but only criteria of access to the table²⁸ that established limits to the payments.

If it were a grace period, there would be a possibility of receiving the benefit for four months, when there is no meeting of the criteria. And these new instruments for the concession of the death pension, since the Provisional Measure, and after its conversion on Law number 13.135/15, are directly applied to the RGPS and RPPS dependents.

Therefore, there are more commutative parallelisms between both Regimes. So, why not apply the normative idea of reversion, from the servant’s active service, as legal support and by analogy, to the RGPS, in unretirement, and, by reflex, to un-pensioning?

All in all, article 5 from Law number 9.717/98 shows the total consonance of both Regimes, pointing that:

Article 5 The Pension Regimes for Government Workers from the Union, the States, the Federal District, and the Municipalities, for military personnel from the States and the Federal District, cannot grant benefits distinct from those provided in the General regime of Social Security, expressed on Law number 8.213/1991, unless otherwise specified in the Federal Constitution.

²⁷ In the RPPS, with Constitutional Amendment number 20/98, the public servant started to have to meet two criteria to retire: 60 years of age and 35 years of contribution (95 implicit points), for men, and 55 years of age and 30 years of contribution (85 implicit points), for women.

Idade do dependente no momento do óbito	Duração do benefício
Menos de 21 anos	3 anos
Entre 21 e 26	6 anos
Entre 27 e 29 anos	10 anos
Entre 30 e 40 anos	15 anos
Entre 41 e 43 anos	20 anos
44 anos ou mais	Vitalícia

And by granted benefit, we can understand that unretirement and reversion are anomalous and inverse forms of concession of the benefit: the retroaction of concession. By the *modus tollens*²⁹ formula: *if p, then, q; if not p, then not q* (truth table), if the RGPS can grant one benefit, so can the RPPS; if the RGPS cannot retroact, then neither can the RPPS; if the RPPS can retroact to grant a benefit, then so can the RGPS. But that is not what is observed.

According to Frederic Amado³⁰, what was mentioned above is “another device that aims to approximate (or equalize) the RPPS to the RGPS, ignoring that public relations have peculiarities that can, in some cases, generate different benefits”.

And notice that unretirement by waiving, in the Union’s RPPS, is grounded on Informative Note number 806/2012/CGNOR/DENOP/SEGEP/MP, from 10.04.2012 (binding for the SIPEC, pointing the following):

- Possibility of public servants waiving their retirement;
- Impossibility of concession and recalculation of personal advantages whose laws are no longer valid;
- Waiving without retroactive effects;

Well, if the General Coordination of Norms from the old Ministry of Social Security provided that public servants can waive their retirement by reversion, and that its nature is that of a waiving, then the person retired through the RGPS, in the name of parallelism and the “bridge” that still unites the Regimes through paragraph 12 of article 40 from the CF/88, commutatively, could, using both regimes for the solution of the gaps and the complementarity of the norm, unretire by application of the RPPS norm.

Sooner or later, either in a next Reform, in the 2020’s, or in the third millennium, the Regimes will be unified. No one doubts that.

Therefore, it is necessary to apply the nature and the law of reversion, by analogy, to the RGPS, through parallelism, like some Law the Supreme Court mentioned that was lacking for the effective application of the institute of unretirement.

5 CONCLUSION.

Unretirement, or simply the recalculation of the benefit of retirement due to compulsory

²⁹ **Modus tollens** (*Latin* for “mode that denies by denying”) or **denying the consequent**, is the formal name for **indirect proof**, also called apagogical mode. In: https://pt.wikipedia.org/wiki/Modus_tollens. Last accessed on 05/18/2019.

³⁰ AMADO, Frederico. Direito Previdenciário. 10ª edição. Coleção Sinopses. Juspodivm: Salvador, 2019, p. 493.

social security contributions after jubilation is still a matter that requires better evaluation, because there is no legal prohibition about its application, as well as there are permissive conditions in the constitutional text for the matter to be resolved in a more efficacious manner, guaranteeing the most beneficial condition to the retired worker.

Also, the paper aimed to show how the institute of reversion of the public servant works, and its effects within the Pension Regimes for Government Workers and, because of the principles of maximum effectivity of the Federal Constitution and the commutativity between the social security regimes, to allow the unretirement in view of the subsidiary application of the RPPS to the RGPS.

Such possibility arises, specially, through the inverse application of article 40, paragraph 12, of the Federal Constitution to the RGPS, arising from the lawmaker's own intention to unify the rules of the social security regimes, allied to the interpretation that, if there is no legal prohibition for the quotas paid after jubilation, then they should be used for the recalculation of the benefit, even risking to offend the principle of solidarity and the counterpart rule.

Reversion is equivalent to unretirement in the public service, because there is the replacement of the retirement pension and a return to activity and, in the RGPS, the retired can go back to work, after unretirement, or go back to work, after jubilation. The important part is that, in both cases, the work exists or goes back to existing.

Unretirement in the RGPS is equivalent to what is being called unretirement in the public service, because if it is reversible and waivable in the RPPS, it should be so in the RGPS.

In the RGPS, the insured becomes retired and, perhaps, continues to work in the same or in another activity and keeps on contributing to social security. In the public service, the retired servant is devoid of the effective post he occupied and can continue working in a commissioned post in another activity, while still contributing both as a retired worker through the RPPS and as a compulsory insured from the RGPS, as previously mentioned.

Unretirement in the public service would demand the inactive worker to be sent to a new post, and so it can be, but in commission. And this occurs all the time, but the filiation is to the RGPS.

Therefore, the publication of a Law to deal with unretirement is unnecessary, sincere there are already conditions, both in the federal legislation and in the constitutional text, to guarantee the recalculation of the benefit, which would differ, very much, from the decision made by the Supreme Court in the trial of the Extraordinary Appeal that put away the possibility with the application of article 18, paragraph 2, from Law number 8.213/91, because it only prohibits the granting of a new benefit to those who are already retired and continue to make compulsory contributions to the

RGPS.

We conclude, thus, that by similitude of the institutes of reversion and unretirement, and by the commutativity of regimes, it would be perfectly possible to recalculate the retirement of the RGPS to those retired that after jubilation go back pay compulsory quotas to the social security, all because of the maximum effectivity of the constitutional text when analyzing fundamental rights, as in this case.

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