



## Binding precedents and three-dimensional theory of right: An analysis of fundamental rights how legal values

### *Los precedentes vinculantes y la teoría tridimensional del derecho: un análisis de los derechos fundamentales como valores jurídicos*

*Bruna Érica Dantas Pereira Diógenes<sup>1</sup>, Livia Oliveira Almeida<sup>2</sup>, Maria Fernanda Dantas Pereira<sup>3</sup>, Paulo Henriques da Fonseca<sup>4</sup> & Pedro Lucas Formiga de Almeida<sup>5</sup>*

**Abstract:** The STF binding precedents (SV's), instituted by Constitutional Amendment 45/2004, impact in application of the Constitution and innovate the institutional position of the STF in Brazil. From the question of how the legal value of fundamental rights appears in the set of binding precedents of the STF, the main objective of this research is to analyze and interpret the collection of 57 SV's. The basis will be the three-dimensional theory of Right, which presents the legal phenomenon as fact, value and rule, and among the values some fundamental principles will be chosen as a filter for the SV's analysis. Using the analytical and hermeneutic method focused on the text of the precedentes, tables will be drawn up to visualize the records and relations between their contents and the facts, values and rules explicitly quantifiable and implicitly perceptible in a qualitative-quantitative research exercise. As a result, is expected a clearer understanding of how the SV's express and translate to the legal system the fundamental rights as legal values, which are at the axiological core of the Constitution, fundamental to the understanding of the presence of values like equality, freedom, legal security, and human dignity in the STF's SVs. So, it is concluded that, despite the important explicit presence of the valorative element in the SV's, there was the predominance of implicit aspect, resulting in the necessity of interpretation by the judiciary and, thus, making more complex the effective assurance of fundamental rights.

**Keywords:** *Binding precedentes; Three-dimensional theory; Fundamental rights; Values.*

**Resumen:** Los precedentes vinculantes (SV's), establecidos por la Enmienda Constitucional n° 45/2004, impactan en la aplicación de la Constitución e innovan la posición institucional del Supremo Tribunal Federal (STF) en Brasil. A partir de la cuestión de cómo el valor jurídico de los derechos fundamentales aparece en el conjunto de precedentes vinculantes del STF, el objetivo principal de esta investigación es analizar e interpretar la colección de 57 SV's. La base será la teoría tridimensional del derecho que presenta el fenómeno jurídico como hecho, valor y norma y entre los valores se escogerán algunos principios fundamentales como filtro para el análisis de los SV. Utilizando el método analítico y hermenéutico centrado en el texto de los precedentes, se elaborarán tablas para visualizar los registros y relaciones entre su contenido y los hechos, valores y normas explícitamente cuantificables e implícitamente perceptibles en un ejercicio de investigación de tipo cualitativo. Como resultado, se obtuvo una comprensión más clara de cómo los SV expresan y traducen en el ordenamiento jurídico los derechos fundamentales como valores jurídicos, que están en el núcleo axiológico de la Constitución, fundamental para entender la presencia de valores como la igualdad, la libertad, la seguridad jurídica y la dignidad de la persona humana en los SV del STF. Por lo tanto, se concluyó que, a pesar de la importante

\*Author for correspondence

Received on 2022/11/25; approved on 2023/05/30

<sup>1</sup>Raw degree student, UFCG, bruna.eric@estudante.ufcg.edu.br; ORCID: <https://orcid.org/0000-0002-7058-684X>;

<sup>2</sup>Raw degree student, UFCG, livia.almeida@estudante.ufcg.edu.br; ORCID: <https://orcid.org/0000-0002-3140-3844>;

<sup>3</sup>Graduate student of Law, UFCG, maria.f.dantas@estudante.ufcg.edu.br; ORCID: <https://orcid.org/0000-0002-5146-8258>;

<sup>4</sup>Doctoral degree in Law, assistant professor, Centro de Ciências Jurídicas e Sociais - CCJS, UFCG, profpepaulo@gmail.com; ORCID: <https://orcid.org/0000-0001-6993-2269>;

<sup>5</sup>Graduate student in Law, UFCG, pedro.formiga@estudante.ufcg.edu.br; ORCID: <https://orcid.org/0000-0002-2015-7676>.

presencia explícita del elemento valor en los SV's, hubo un predominio del aspecto implícito, resultando en la necesidad de interpretación por parte del poder judicial y, por lo tanto, haciendo más compleja la garantía efectiva de los derechos fundamentales.

**Palabras clave:** *Precedentes Vinculantes; Teoría Tridimensional; Derechos Fundamentales; Valores.*

## **INTRODUCTION**

Neo-constitutionalism has led to innovations in the Brazilian legal system, specifically in the field of principles and the processes of constitutional mutations, which allowed the advent of binding precedents, as well as the re-entry of values, taking into consideration the axiological dimension of the Constitution in its material sense. From a hermeneutic point of view, binding precedents are interpretations pacified by the STF in constitutional matters that acquire mandatory incidence. In this sense, we sought to relate the conduction of binding precedents with the three elements of the three-dimensional theory of Law, highlighting the contribution of jurist Miguel Reale (1994).

From this analysis, it is shown what appears and, mainly, what does not appear in the binding precedents taking into consideration Reale's theory (1994), in which it is noticeable the need for a norm, since the reference to the Constitution will be explicit or not, with the help of infra-constitutional rules. Moreover, the fact will also have a high incidence, considering that precedents deal with issues that are considerably relevant to the Brazilian legal system, which will reflect what happens in society.

The research seeks to bring the students closer to the new guidelines for legal courses, present in Resolution CES/CNE no. 5/2018, which provide for the inclusion of more concrete and practical elements in the educational and training process of the student belonging to the legal area. To this end, this work is related to the thematic axis of human rights and equality. From the interpretation of the binding precedents and how much the evaluative element of the three-dimensional theory appears in them, one can infer, beforehand, how the fundamental rights, such as equality, are included in this collection of precedents.

In this scenario, the present work has as its main objective to analyze the aspects of foundation in the formulations of binding precedents by the supreme court, considering the use of the factors listed in the three-dimensional theory evidencing the lack or the predominance of them and their impacts on the effectiveness of the guarantee of fundamental rights. These are listed especially in Article 5 of the 1988 Federal Constitution - which deals with individual and collective rights and duties.

## **THEORETICAL FOUNDATION**

### **The Binding Precedents: Concept, Origin and Purpose**

A priori, it is worth mentioning the meaning of precedents to arrive at the concept of binding precedents. According to Fonseca (2010, p. 1456-1457), a precedent is a "proposition that enunciates a jurisprudence that is consolidated by repeated judicial decisions on the same theme or dispute brought before the Judiciary". The binding precedents also have the same principle, but they are binding on the bodies of the Judiciary Branch and on the direct and indirect public administration.

Binding Precedents are foreseen in the Federal Constitution of 1988, having arisen through the approval of Constitutional Amendment 45/2004, which, among other changes, added article 103-A, which in its heading states

Art. 103-A. The Supreme Federal Court may, ex officio or at its own request, upon decision of two thirds of its members, after repeated decisions on constitutional matters, approve precedents which, as from their publication in the official press, will have a binding effect on the other bodies of the Judicial Power and on the direct and indirect public administration, in the federal, state and municipal spheres, as well as revise or cancel them, as established by law.

From the analysis of this constitutional provision, one can perceive some essential points for the understanding of binding precedents. First, only the Federal Supreme Court (STF) can approve a binding precedent, which will have binding effect, causing the judiciary to act as a negative legislator, in its atypical function. In addition, the binding precedent will deal with constitutional matters, in which case this matter will have considerable repercussions in the courts of the country, especially if there are controversial interpretations. From these points, one can find the central objective of binding precedents, which is the pacification and unification of the interpretation on a given constitutional issue, striving for equality in the judiciary, for the agility of its exercise and for legal certainty in the Brazilian legal system.

### **Miguel Reale's Three-Dimensional Theory of Law**

The Three-Dimensional Theory of Law correlates three factors for the analysis of the legal phenomenon, overcoming normativism for a broader understanding. It is influenced by Legal Culturalism, which is divided into two branches, the abstract and the specific. The three-dimensional theory under the abstract viewpoint corresponds to the analysis of the elements separately, encompassing three theories: Sociologism (focus on the social fact), Normativism (focus on the rule) and Legal Moralism (focus on values). The perspective proposed by jurist Miguel Reale (1994) has the specific focus and addresses the three elements: fact, value and norm in an interdependent manner. All are related to the cultural aspect of society. Regardless of the place, time or context, Law will rely on the fact as a

condition of existence, on the value as intuition, and on the rule as a concretizing character. Therefore, with these three elements, the unity of the legal phenomenon is sought.

### **Overcoming Positivism and Jusnaturalism: The Influence of Legal Culturalism**

The essence of Miguel Reale's three-dimensional theory of Law is supported by the German Culturalism explored by Friedrich Carl von Savigny, under Kantian roots (1976). Legal Culturalism, much debated at the Recife School due to the works of Tobias Barreto and Sylvio Romero, is a theory that seeks to analyze the legal phenomenon in its entirety and offers a unique concept to Brazil. It was presented as another path in relation to the existing ones, such as the positivist current, which valued the rule, and the jusnaturalista, which focused on values not tied to the facts. Both were idealistic and responsible for creating conflicts in the Brazilian legal scenario with the creation of legislation full of bottlenecks when submitted to practice and, consequently, the cumulativeness of incoherent sentences.

Legal culturalism, then, takes a critical stance and breaks away from the merely normativist aspect of Law, while also opposing jusnaturalism. Reale innovates by proposing an onto-axio-gnosiological theory of Law. He considers the rule and its application to reality as inseparable elements, since the rule guarantees the systematization and reality allows for the valuation resulting from the interpretation. As we can verify in Souza's (2010, p. 145) exposition: "the legal models are not disconnected from the concrete situation of man".

The author, therefore, sought to overcome the erroneous correlation between norm and value, the norm distant from reality and the excessive conceptual formalism, Kelsenian idea of the pure application of the codified norm. This culturalist vision provides transformations in the legal experience that becomes linked to the cultural aspect and acquires multiple functions.

### **Fact, Value and Norm as the Essence of the Legal Phenomenon**

Law is not only a norm, as Kelsen wants, Law is not only a fact, as Marxists or economists of Law pray, because Law is not an economy. Law is not economic production, but involves economic production and interferes in it; Law is not mainly value, as the adherents of the Thomistic Natural Law think, for example, because Law is at the same time a norm, a fact and a value. (REALE, 1994, p.118)

Fact, Value and Rule, when interconnected, explain the essence of the legal phenomenon. The author's understanding takes place in the concrete aspect to the extent that its foundation is found in

experience. Therefore, he considers that the application of the rule only occurs when it is related to reality, thus the value emerges, which comes from interpretation.

As explained in the work "Ethics and Philosophy of Law:"

The three-dimensional understanding of Law suggests that a norm acquires objective validity by integrating the facts into the values accepted by a certain community in a specific period of its history. When interpreting a norm, it is necessary to understand it according to the facts that condition it and the values that guide it (CARVALHO, 2011, p. 186).

Besides being interconnected, Reale considers the possibility of arrangements among the three elements, allowing to start from the fact and value to reach the norm, as well as to go from the fact to the norm, reaching the value and finally, from the norm to the value, culminating in the fact. Specifying each of these elements, fact comes from the Latin factum and defines the context that surrounds individuals, which may generate repercussions. According to Johnston (2004), it refers, therefore, to events or happenings that have actually happened, not being linked to ideals, but to the ontological character.

Values are based on the conceptualization of the definition established by human beings, which varies according to space, date, and culture. Although values are ideal elements because of the difficulty of attesting their existence, they establish coercive criteria by their presence in the sphere of human beings' consciousness. Thus, values are in the moment they exist. Reale also admits the "continuous 'value intentions' about a fact, allowing several interpretations and adaptations of the norm, also depending on the choice of the authority in question, which will decide which way will be admitted. Thus, Reale (1994, p. 125.) states:

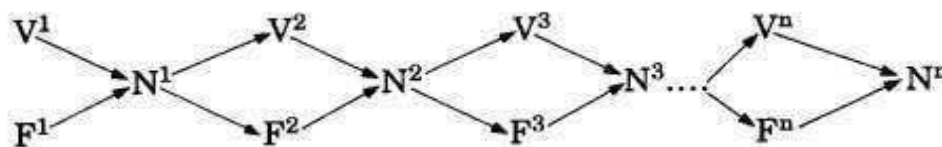
But it happens that the legal norm is immersed in the world of life, that is, in our daily experience, in our ordinary way of seeing and appreciating things. Now, the world of life changes. Then something very important and surprising happens: a legal norm, without undergoing any graphic change, a norm from the Civil Code or the Commercial Code, without having a comma alteration, starts to mean something else.

Reale (2002, p. 204) lists the Historical-Cultural Theory of Values to explain its historical relation: "(...) it is characterized by the impossibility of understanding the questions about value outside the scope of history, which is the realization of values, the projection of the spirit over nature, since the universality of the ethical ideal must be sought on the basis of historical experience and not abstracted from it". The dignity of the human person, for example, is included in Article 1, item III of the Federal Constitution and

is one of the foundations of the Democratic State of Law of the Federative Republic of Brazil. This is just an ideal, but it gives rise to a culture that values it and makes possible the emergence of other values that will be linked to it, allowing them to be socially respected due to the awareness of the existence of these values by individuals who are integrated in this system.

To determine the last element, the norm, it is valid to note that Law is born from the human observation of facts that, after being verified, will suffer axiological attribution belonging to a given culture. The process of constitutional mutation, an instrument that will enable the implementation of the precedents, stems from the dynamic character that fact and value acquire over time, thus requiring the issue of new norms, in this case from the interpretative variable. This is because fact and value together make up and ground the norm. As can be seen in the following image:

**FIGURE 01:** Norm formation through the linking of fact and value.



**SOURCE:** Taken from Reale (1994).

### **The influence of the three-dimensional theory in the formulation of Binding Precedents**

The complex three-dimensional tension of factual, evaluative and normative, causes the legal text to suffer semantic changes according to changes in the plane of facts and values, in the same way that the emergence of a norm depends on the assumption of a position in front of social facts, bearing in mind the realization of certain values.(JUNIOR, 2018, p. 272)

The changes that occur in society reflect in the interpretation of legal norms, including the Constitution, which, since its enactment, has been subject to several changes, both in its express text and in the way the text is understood, in which divergence is likely with what the constituent legislator intended to establish. The Three-Dimensional Theory of Law supports such changes through the instrument of constitutional mutations, which allow gaps of possible variations in the meaning of legal norms, which allows their repercussion in the jurisprudence of the Supreme Courts, as in the case of the Binding Precedents. As Cappelletti (1993, p. 22) admits, the interpreter is "called upon to give new life to a text that is itself dead, a mere symbol of someone else's life act".

Meanwhile, the division of law into fact, value, and norm, as elements that coexist and complement each other, will reverberate in the production of binding precedents, because the Law approaches a value-based ideal, that of justice. This value element, in the dynamics between time and space that form the fact, becomes concrete with the rule, and is not expressly mentioned in the discussions among the precedents' formulators, but the presence of these elements is noticeable because, in view of the need to be materially constitutional and the idea that the Constitution is a reflection of society and its desires, the rule and the fact will be intrinsically linked to the contents of the precedents.

The values, which are scattered throughout the constitutional text, are also part of the interpretative change present in the precedents, in which, even if it is not explicit in the text, the value aspect will be implicitly linked to the theme addressed in the STF's binding precedents. Thus, the SV is born linked to values, a factor related to fundamental rights.

### **Fundamental Rights: conceptualization and contextualization**

Fundamental Rights are the set of rights that are integrated - expressly or implicitly - into the constitutional text and bring together the guarantees that are the tools to make them effective and accessible. They are universal, indivisible, inalienable, full of historicity, and limited.

Their formation is not recent; the birth of philosophy and the existence of Hammurabi's code in 1690 B.C. already regulated rights common to all men, such as life, property, and dignity. Still in this scenario, the Middle Ages, with the strong influence of Christianity, which offered an important contribution in the foundation of certain rights, such as the equality of all before one God, in addition to the Magna Carta of 1205, which represents the first limitation of the sovereign power of the time. The philosophical theories of Hobbes, Locke, and Rousseau were crucial to the creation of the foundation behind fundamental rights. This is evident in the categorization by Hobbes (2003) of the existence of natural rights, to all individuals, in their natural state, by Locke (1973) in the defense of individual rights represented by the right to life, liberty, and property, and by Rousseau in the work *Social Contract* (1997) with the idea of freedom.

In modern times, the declarations of the United States of America and France represent a historical landmark for the birth of human rights. The North American Independence and the French Revolution appear in this historical context as a gift of extreme changes, intending to announce their liberal ideals. However, the fundamental rights listed today are based on the establishment of a democratic state of law that delimited different prerogatives for the inclusion of certain rights to be considered. The evolution of constitutionalism has brought about a concept of fundamental rights that, despite being positively stated

in the constitutions, did not represent the same weight in the different legal orders, being necessary to consider their dual nature and the classification in dimensions.

### **Dimensions of Fundamental Rights**

Fundamental rights are classified in dimensions, since their formation is closely related to the historical period, that is, to the specific demands of each society in its time. For this reason, five dimensions of fundamental rights are presented.

The first dimension originated in the supremacy of the State, with freedom as its main value. The State then played the role of a negative provider to society, in order not to acquire a welfare role. These rights are political and civil. In the first decade of the 20th century, the main point of the rights of the second dimension emerged, which would be to consecrate social rights with the protection of human dignity. In this case, equality becomes the fundamental value and, therefore, the State starts to act positively towards society. These are the economic, social and cultural rights. In the 20th century the third dimension arises, which is based on the values of fraternity and solidarity, not belonging in an isolated way to individuals, receiving the nomenclature of transindividuals, which can be classified as: collective, diffuse, and homogeneous individual rights.

In the fourth dimension, we enter into the aspects of political globalization in the sphere of legal normativity, configuring the last phases of institutionalization of the social state. It is worth mentioning democracy, information and pluralism in a universalized manner. Moving on to the fifth and last dimension, we must understand that it is complementary to the fourth, and is linked to the question of peace as an axiom of participatory democracy.

### **Axiological relationship and presence in the 1988 Federal Constitution**

The fundamental rights are closely related to the Democratic State of Law, which is supported by the emergence of the constitutions. The State is born, therefore, from the separation between its elements, such as politics, morality, and religion, and thus, the need for inclusion arises from the emergence of the differentiation of society with liberalism. Thus, essential values of a given society will be listed and included in the legal system by means of principles, establishing the Constitution at the center of the legal system, no longer allowing only an advisory character, but recognizing its normative force (Hesse, 1991), which seeks to promote social justice through the principle of human dignity, which is the basic element of the Brazilian legal system.

This Normative Force of the Constitution will allow it to become the propagator of changes in the very values that were hitherto dominant in a society, in order to adapt them to the values that were



enshrined as principles in the Constitutional text. As Dworkin (1999) states, legal rules, in addition to their positivization, have value, and this allows principles to have constitutional normative force. Thus, the principles when integrated into the constitution are endowed with normative force and give effectiveness to fundamental rights, which are not susceptible to changes resulting from amendments, because they belong to the constitutional provision of the stony clauses.

For Bonavides (2011), constitutionalism establishes constitutional unity by valuing its double dimension, which encompasses the formal and axiological aspects. However, constitutionalism is full of positivist predispositions and prevents the constitution from exercising its role as coupler of differentiations of modern society. Therefore, Luhmann (2010) attributes that fundamental rights should be seen as institutions, which will be established as behavior expectations, from the translation of normative and dogmatic complexities full of social function, based on communicative relations, in the search for a social consensus.

For Alexy (2012), principles and values have differentiations. Principles are deontological and values are axiological. However, constitutional principles are based on the predominant values, the 'real factors of power' as defined by Lassalle (1988). The main one in the Federal Constitution of 1988 is the dignity of the human person, with a strong axiological basis and used as an interpretation parameter in the constitutional and infra-constitutional sphere. For Sarlet (2002, p. 89) "[...] the Brazilian Constitutional Charter brings not only a declaration of ethical and moral content, but a legal norm - positive with constitutional status, transforming human dignity into a fundamental legal value of the community".

Thus, fundamental rights are components of the constituent decision and are represented in the preamble of the Carta Maior, in the dignity of the human person as a foundation, in the construction of a free, fair and solidary society as a principle, and also contemplates three dimensions. The text continues to refer to fundamental rights in article 5 with individual and collective rights, in articles 6 to 11 with social rights, in articles 12 and 13 with nationality rights, and in articles 14 to 17 with political rights. Despite the importance of the principle of dignity, the Constitution has elaborated a system of explicit and implicit rights that are to a lesser or greater extent linked to human dignity.

The State has the duty to guarantee the realization of these rights, which are based on two perspectives: the objective one, which has as its bias the reach of society, and the subjective one, which focuses on the subject of law. This scenario demonstrates the need to protect fundamental rights in the public sphere, based on vertical effectiveness, but also among private individuals, encompassing horizontal effectiveness. The relevance of this instrument can also be seen in its immediate applicability, allowing its effects to be independent of a regulatory infra-constitutional rule. The legislator should also

not formulate or edit rules that are not in accordance with this principle, in order to generate inequalities or extend them, under the possibility of being attributed unconstitutionality.

## **METHODOLOGY**

The analytical and hermeneutic methodology will be the axis of this work, with the collection of the 57 Binding Precedents (CVs) of the Federal Supreme Court (STF) as the primary source for verification at the explicit textual level, explicit-interpretative of the occurrences of the records of facts, norms and values in the text of the CVs. The research will use the bibliographical technique, through articles and books, and documentary research. The basic theory will be Miguel Reale's Three-Dimensional Theory of Law (1994) and the fundamental rights, investigated in the deeper structures of the precedents.

The research is qualitative in nature, which is relevant, because for Gatti (2004, p. 4) these are complementary perspectives, insofar as the combination of the two methods enriches the understanding about the approaches to the factors analyzed. From a qualitative standpoint, it was possible to analyze the emergence and the foundations of the theory with the three elements (fact, value and norm). In this context, by the technique of observation at exploratory levels, the quantitative character was analyzed from the delimitation in the cutout of the 57 (fifty-seven) binding precedents of the STF and the predominance of the elements as a whole or of one over its provisions.

Proceeding with the analysis and interpretation of the content of the Precedents and approximate quantification and registration of the occurrence of terms that express facts, values, and norms, tables will be drawn up for better data management. The criterion of three markings in the SV's was adopted: one in italics corresponding to the mention of value, the second in bold referring to the fact, and finally underlined referring to the rule. The mention was analyzed starting from the verification of the presence or absence of the elements, delimiting explicitly, being textual, or non-textual and without occurrence before the total of the binding precedents.

The interpretation will be applied on two levels, the first being the registration of textual and explicit occurrences of facts, events, and entities of real existence in the field of Law, as well as explicit non-textual ones, which denote, in an interpretative exercise, the implied occurrence of Reale's triad in the Binding Precedents of the STF. The second will take as an analysis the occurrence of legal values that have been added to the Constitution, also by observing the explicit textual and non-textual aspect and its impact on the concrete execution of Fundamental Rights.

## RESULTS AND DISCUSSIONS

Based on the definition and contextualization of binding precedents, analysis will be conducted on all binding precedents, establishing as a criterion the mention of elements that are related to fact, value and norm, these referring to the three-dimensional theory of law.

### Specific analysis on the first table

**TABLE 01:** Occurrence of mentions to Reale's triad in Binding Precedents - Quantities (s/57).

	<b>Explicit/ Textual</b>	<b>Explicit/Non-textual</b>	<b>No occurrence</b>
<b>Suit</b>	55	0	2
<b>Norma l</b>	29	18	10
<b>Value</b>	16	17	24
<b>Total</b>	100	35	36

**SOURCE:** Survey data (2022).

Among the analyses carried out in the 57 (fifty-seven) SV's, we will look more specifically at those that have the elements in a more intense way or with peculiar aspects.

### Fact

When addressing the factual aspect, the precedent number 13 was observed, which states: "The appointment of a spouse, companion or relative in a direct or collateral line or by affinity, up to the third degree, inclusive, of the appointing authority or of a servant of the same legal entity invested in a directive, leadership or advisory position, for the exercise of a commissioned or trust position or, further, of a gratified function in the direct and indirect public administration in any of the Powers of the Union, the States, the Federal District and the Municipalities, including the adjustment through reciprocal designations, violates the Federal Constitution. "This precedent has an express legislative reference in Article 37, caput of the Federal Constitution. This precedent has a strong presence of the fact when, as can be seen in the reference to spouses, companions or relatives, besides having an explicit textual norm with direct citation to the federal constitution and an explicit value derived from the interpretation, in the equality issue, when establishing equivalence of access to public positions.

Another precedent that has this element in evidence is number 31, which states that: "It is unconstitutional the incidence of the Tax on Services of Any Nature - ISS on lease operations of movable property." This has as its legislative reference the National Tax Code of 1966, in addition to Decree-Law No. 406/1968 and Complementary Law No. 56/1987. It was verified in its content the exclusive existence of fact, so as not to present norm and value, which remained underlying and hidden.

### **Standard**

With regard to the precedents with ample emphasis on the normative element, we highlight number 08, which states: "The sole paragraph of article 5 of Decree-Law 1,569/1977 and articles 45 and 46 of Law 8,212/1991, which deal with prescription and limitation of tax credit, are unconstitutional. One can observe the strictly technical character present in its matter due to the forecast of the use of constitutional provisions, in this case unconstitutionality, in the question of the validity of certain infra-constitutional rules. Such aspects are based on article 146 of the Federal Constitution of 1988, Decree-Law 1.569/1977, and Law 8.212/1991, the last two presented in explicit textual form in the summary definition. Despite the normative predominance, the presence of fact was attested in the mention of the statute of limitations and limitation period of the tax credit. As a result of the technical nature, the evaluative element was not found, both in the explicit textual and explicit non-textual formats.

Still alluding to the norms under the explicit non-textual character, Binding Precedent No. 49 was observed: "A municipal law that prevents the installation of commercial establishments of the same branch in a given area offends the principle of free competition." It has as legislative reference articles 170 and 173 of the Federal Constitution of 1988. The scenario present in this precedent evidences the norm in an explicit non-textual way, being therefore related only to the mention of municipal law, without expressly defining the number of the law or the article, enabling the existence of legislative gaps that will be supplied by the interpretative act. Moreover, fact and value were identified, despite the fact that the value exposed in the foundation of the principle also acquires a normative character.

### **Value**

In relation to the value element, the Binding Precedent no. 11 expresses that: "It is only lawful to use handcuffs in cases of resistance and well-founded fear of escape or danger to one's own or another's physical integrity, on the part of the prisoner or a third party, justifying the exceptionality in writing, under penalty of disciplinary, civil and criminal liability of the agent or authority and nullity of the arrest or the procedural act to which it refers, without prejudice to the civil liability of the State." Its legislative reference is Article 5 of the Federal Constitution. From this, it is possible to identify the value in explicit

textual format, and it is possible to list more than one value, for example, the mention of physical integrity, which

integrity, which is supported by the principle of human dignity, besides suggesting aspects related to freedom and safety. Besides the value, fact and rule, the latter in an explicit and non-textual way.

Still on the value, the binding precedent number 25 states: "The civil imprisonment of an unfaithful depositary is unlawful, whatever the type of deposit." It has as its legislative reference the Federal Constitution of 1988 in its article 5, the American Convention on Human Rights (Pact of S. José da Costa Rica) and the International Covenant on Civil and Political Rights. In this case, the value is found in an explicit, non-textual form, without direct mention of principles or any suggestion of axiological aspects. Thus, there is a need to resort to interpretative methods that will enable the qualification of the value of freedom with regard to the unlawfulness of the civil imprisonment of an unfaithful trustee. It should also be noted that the fact is present in the specification of civil imprisonment, besides having been verified the absence of rules.

#### **Analyses referring to the second table**

In Table 2, we will verify specific values, highlighting those of dignity, equality, liberty, and security, before the general data. The occurrences may be cumulative, and it is possible to quantify more than one occurrence per SV, as is the case of Precedent 11. However, we chose to define only one value that was present in a dominant way, in order to give shape and solidity to the STF's jurisprudential rule.

**TABLE 02:** Occurrence of legal values in the Binding Precedents of the STF.

	<b>Explicit/ Textual</b>	<b>Explicit/Non-textual</b>	<b>Subtotals</b>
<b>Dignity of the human being</b>	3	0	3
<b>Equality</b>	6	11	17
<b>Freedom</b>	1	2	3
<b>Safety</b>	5	3	8
<b>Other</b>	1	1	2
<b>TOTAL (IS)</b>	16	17	33

**SOURCE:** Survey data (2022).

Within the second table, it was possible to verify the predominance of certain evaluative elements, such as human dignity, isonomy, equality and legal security in detriment of others that remain in the background, such as freedom and free enterprise. Based on the textual analysis, it was found that, except for Binding Precedent No. 25, which announces a content of international human rights, more specifically on the illegality of civil imprisonment of an unfaithful trustee, the others present interpretations that lead to the identification of a behavior of restriction of access to fundamental rights. This is because in most of the precedents analyzed, which present value, this element appears with the aim of placing limits on such guarantees, as was identified in the binding precedents no. 04, 05 and 06, which have isonomy as their value, respectively, in the idea that the minimum wage cannot be used as a base indexer for calculating benefits for public servants or employees, the non-offense to the constitution by the lack of technical defense of the lawyer in the administrative disciplinary process and the remuneration lower than the minimum wage for military personnel, which also does not violate the Constitution.

It was also identified that certain precedents present fact, value and rule simultaneously, as in SV 11 and 25. These elements are found in explicit textual and explicit non-textual formats, demonstrating the relevant incidence of the three-dimensional theory in the binding precedents of the STF and that there is no single reference that is used as the basis for the text of the precedents, which can contribute to a lengthy analysis of the issues portrayed in the binding precedents.

### **Analysis of precedents and considerations about their impact on fundamental rights guarantees**

Precedents are a systemic and regulatory innovation, with evident prominence in legal security and the legal system, which have undeniable repercussions on fundamental rights, their interpretation and application. Here we will delimit some observations about peculiarities observed in the three elements according to the analysis of specific precedents and the aspects of the evaluative content found in their content. From this, the explicit textual classification was adopted for the norms when an article, a constitutional amendment, and/or a specific law is found in the summarized text. In the case of explicit and non-textual classification, it was highlighted those that refer only to legislation, such as the terms judicial agreement or law, in a way that is not specified in the text, therefore, not occurring direct mention, because for the effective understanding of the norm presented, it is necessary to resort to hermeneutics.

Regarding the facts, it can be observed that there are only two precedents without the explicit textual presence of this element, which demonstrates the importance that reality presents in the formulation of the precedents. However, the case regarding the two precedents becomes a relevant point of analysis, because the fact when placed in explicit textual form, enables the understanding more in line

with what is evident in the text, which allows the guarantee of fundamental rights to present ambiance without the express need for the interpretative method. The immediate identification of the fact, from the explicit textual content, collaborates with greater effectiveness to the guarantee of fundamental rights. However, this non-existent textual explicit mention does not occur only with the facts, we have identified that such case occurs in the norms and, mainly, with the values.

Analyzing the criteria set forth in the first table, we found that the value element is lacking, and is mostly found in an explicit non-textual form, being more related to the interpreter, in the hermeneutic function, with hardly any explicit textual mention. This factor ends up generating a direct impact on the guarantee of the fundamental rights foreseen in the Federal Constitution of 1988. This is because the value elements in the non-explicit textual aspect require a broad interpretative exercise, being, in this case, subject to the autonomy of the judiciary. Therefore, it becomes the role of the judge to expand or restrict the meaning of the normative content of the binding precedent, and to measure the value attached to it. However, this scenario requires the judge to hold views that are in harmony with the principles of a given community, which carries within itself its evaluative character.

Moreover, this criterion opens room for the use of political bias in judicial decisions, distancing them from guaranteeing fundamental rights to all, which can make it difficult for the most vulnerable to access them.

## **CONCLUSIONS**

Binding precedents are exclusive instruments of the STF, in which they constitute a systemic and factual fact in Brazil as well as consolidate a judicial understanding with effects throughout the legal system. Thus, it demonstrates that the legal decision is systemic, pragmatic and aims to recreate the system in terms of security and predictability, being possible the use of Miguel Reale's Three-Dimensional Theory of Law as an analysis of the effectiveness in ensuring such goals.

In this way, binding precedents can also be used for the protection of rights, in this case fundamental rights, which are established in the Constitution based on a consolidated and uniform interpretation. Such rights are inherent to the human person and, therefore, acquire relevance, especially in the context of the defense of human dignity.

However, in view of all the study on the subject it is clear that the contribution of binding precedents for the protection of fundamental rights does not come from the production of an enunciation that brings them in an explicit textual form, but from the crystallization of interpretations of concrete situations, which are subject to the autonomy of the judiciary and face difficulty in establishing a connection of meaning between fundamental rights and other constitutional provisions.

Knowing this, this article reaffirms the importance of the explicit textual character in the content of the precedents, especially when referring to the value element, which is intrinsically related to fundamental rights. This aspect would also allow for more objectivity, which would be of more value to the effectiveness of the guarantee of Fundamental Rights. The protection of the dignity of the human being would be easier to achieve with a clearer and more objective mention of the summary text. The complexity of the fundamental rights must be identified and legislation must be constructed that possesses the necessary detailing as to the judicial decisions, thus human rights would manage to overcome the position of simple operational instruments.

## REFERENCES

- [1] ALEXY, Robert. **Teoria dos Direitos Fundamentais**. Trad. Virgílio Afonso da Silva. 2<sup>a</sup> ed. São Paulo: Malheiros Editores, 2012.
- [2] BALLAN JUNIOR, Octahydes. Teoria tridimensional do direito de Miguel Reale nas decisões dos tribunais superiores. **Pensamento Jurídico**, v. 12, p. 262-280, 2018. Disponível em: <[http://www.mpsp.mp.br/portal/page/portal/documentacao\\_e\\_divulgacao/doc\\_biblioteca/bibli\\_servicos\\_produtos/bibli\\_boletim/bibli\\_bol\\_2006/Rev-Pensamento-Jur\\_v.12\\_n.2.11.pdf](http://www.mpsp.mp.br/portal/page/portal/documentacao_e_divulgacao/doc_biblioteca/bibli_servicos_produtos/bibli_boletim/bibli_bol_2006/Rev-Pensamento-Jur_v.12_n.2.11.pdf)> Acesso em: 10 set. 2022.
- [3] BONAVIDES, Paulo. **Curso de direito constitucional**. 27<sup>a</sup> ed. São Paulo: Malheiros, 2011.
- [4] BRASIL. [Constituição (1988)]. **Constituição da República Federativa do Brasil de 1988**. Brasília, DF: Presidência da República, [2022]. Disponível em: [http://www.planalto.gov.br/ccivil\\_03/constituicao/constituicao.htm](http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm). Acesso em: 22 set. 2022.
- [5] BRASIL. Supremo Tribunal Federal (STF). **Súmulas vinculantes: aplicação e interpretação pelo STF**. 2. ed. Brasília: STF, Secretaria de Documentação, 2017. Disponível em: [https://www.stf.jus.br/arquivo/cms/jurisprudenciaSumulaNaJurisprudencia/anexo/Livro\\_Sumulas\\_Vinculantes\\_2\\_edicao.pdf](https://www.stf.jus.br/arquivo/cms/jurisprudenciaSumulaNaJurisprudencia/anexo/Livro_Sumulas_Vinculantes_2_edicao.pdf). Acesso em: 28 out. 2022.
- [6] CAPPELLETTI, Mauro. **Juízes legisladores?**. Trad. Carlos Alberto Alvaro de Oliveira. Porto Alegre: Sérgio Antonio Fabris, 1993.
- [7] CARVALHO, José Maurício de. **Miguel Reale: ética e filosofia do direito**. Estudos quantitativos em educação. Educação e Pesquisa, São Paulo, v. 30, n.1. Porto Alegre: Edipucrs, 2011.



- [8] DWORKIN, Ronald. 1999. **O império do direito**. São Paulo: Martins Fontes.
- [9] FONSECA, P. H. Súmula vinculante, a regulação sistêmica e os direitos fundamentais. In: XIX Congresso Nacional do CONPEDI - Conselho Nacional de Pesquisa e Pós Graduação em Direito., 2010, Fortaleza. **Anais**. XIX CONPEDI. Florianópolis: Fundação Arthur Boiteaux, 2010. v. 1. Disponível em: <<http://www.publicadireito.com.br/conpedi/manaus/arquivos/anais/fortaleza/3858.pdf>> Acesso em: 11 set. 2022.
- [10] GATTI, B. A. Estudos quantitativos em educação. **Educação e Pesquisa**, São Paulo, SP, v. 30, n. 1, p. 11-30, jan, 2004. Disponível em: <<https://www.scielo.br/j/ep/a/XBpXkMkBSsbBCrCLWjzyWyB/?lang=pt&format=pdf>>. Acesso em: 10 set. 2022
- [11] HESSE, Konrad. **A Força Normativa da Constituição**. Trad. Gilmar Ferreira Mendes. Porto Alegre: Sergio Antonio Fabris, 1991.
- [12] HOBBS, Thomas. **Leviatã ou matéria, forma e poder de um Estado eclesiástico e civil**. Tradução por Eunice Ostrenskys. 2 ed. São Paulo: Martins Fontes, 2003.
- [13] JOHNSTON, D. K. (2004) **The natural history of fact**. Australasian Journal of Philosophy, vol. 822, pp. 275-291.
- [14] KANT, I. **Kritik der Sitten**. Berlin: Dietz Verlag, 1976, parág. 83. Tradução livre dos autores
- [15] LASSALLE, Ferdinand. **A Essência da Constituição**. 2ª ed. Rio de Janeiro: Liber Juris, 1988.
- [16] LOCKE, J. **Segundo tratado sobre o governo**. SP, Ed. Abril, 1973.
- [17] LUHMANN, Niklas. **Los derechos fundamentales como institución: aportación a la sociología política**. Ciudad de México: Universidad Iberoamericana, 2010.
- [18] REALE, Miguel. **Filosofia do direito**. 20. Ed. São Paulo: Editora Saraiva, 2002.
- [19] REALE, Miguel. **Lições preliminares de Direito**. 27. ed. São Paulo: Saraiva, 2002.
- [20] REALE, Miguel. **Teoria Tridimensional do Direito - situação atual**. 5º ed. São Paulo: Saraiva, 1994.

[21] ROUSSEAU, Jean-Jacques. **Do Contrato Social**. Tradução de Lourdes Santos Machado. São Paulo: Nova Cultural, 1997.

[22] SARLET, Ingo Wolfgang. **Dignidade da pessoa humana e direitos fundamentais**. 2ª ed. Porto Alegre: Livraria do Advogado, 2002.

[23] SOUZA, Ana Paula Loureiro de Souza. Modelos e fontes do Direito em Miguel Reale. In: Miguel Reale e o pensamento luso-brasileiro; **Atas do IX Colóquio Tobias Barreto**. Lisboa: Instituto de Filosofia Luso-Brasileiro, 2010.