

THE (IN)VALIDITY OF BINDING PRECEDENT N° 4 OF THE STF: ANALYSIS OF THE VIOLATION OF FUNDAMENTAL RIGHTS AND THE REQUIREMENT FOR CANCELLATION

A (IN)VALIDIDADE DA SÚMULA VINCULANTE N° 4 DO STF: ANÁLISE DA VIOLAÇÃO AOS DIREITOS FUNDAMENTAIS E A EXIGÊNCIA DE CANCELAMENTO

LA (IN)NULIDAD DEL PRECEDENTE VINCULANTE N° 4 DE LA CORTE SUPREMA DE BRASIL: ANÁLISIS DE LA VIOLACIÓN DE DERECHOS FUNDAMENTALES Y LA EXIGENCIA DE CANCELACIÓN

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ABSTRACT

This article aims to analyze and demonstrate that Binding Precedent No. 4, of the Federal Supreme Court, does not meet the minimum requirements for existence, did not follow all formal procedures for creation and did not observe some of the fundamental principles and rights established in the 1988 Constitution, and should, for these reasons, be canceled from the legal system and replaced by another formally adequate statement. The methodology used will be qualitative, bibliographical and documentary.

Keywords: Binding Precedent No. 4. Minimum Wage. Fundamental Principles. Fundamental Social Principles and Rights.

RESUMO

Este artigo se propõe a analisar e a demonstrar que a Súmula Vinculante n° 4, do Supremo Tribunal Federal, não reúne os requisitos mínimos de existência, não seguiu todos os procedimentos formais de criação e não observou alguns dos princípios e direitos fundamentais estabelecidos na Constituição de 1988, devendo, por tais motivos, ser cancelada do ordenamento jurídico e substituída por outro enunciado formalmente adequado. A metodologia empregada será qualitativa, bibliográfica e documental.

Palavras-chave: Súmula Vinculante n° 4. Salário-mínimo. Princípios Fundamentais. Direitos Fundamentais Sociais.

RESUMEN

Este artículo tiene como objetivo analizar y demostrar que el Precedente Vinculante n.º 4 del Supremo Tribunal Federal no cumple con los requisitos mínimos para su existencia, no siguió todos los procedimientos formales para su creación y no respetó algunos de los principios y

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derechos fundamentales establecidos en la Constitución de 1988. Por lo tanto, debería ser cancelado del ordenamiento jurídico y reemplazado por otro que sea formalmente adecuado. La metodología empleada será cualitativa, bibliográfica y documental.

Palabras clave: Precedente Vinculante n.º 4. Salario Mínimo. Principios Fundamentales. Derechos Sociales Fundamentales.

1 INTRODUCTION

The binding precedent was introduced into the Constitution (BRASIL, 1998) by Constitutional Amendment No. 45 of 2004 (BRASIL, 2004), which became known as the "Reform of the Judiciary". It served to bring the Brazilian legal system (*civil law*³) closer to the *common law*⁴, by conferring normative force to certain judgments handed down by the Federal Supreme Court. It also changed the Constitutional arrangement of the separation of powers, to the extent that the Legislative Branch accepted to share its function of creating general and abstract norms with the Judiciary, based on the repeated creation of individual and concrete norms.

However, in order to avoid abuses and violations of the fundamental constitutional principles of the Democratic Rule of Law and, notably, of the separation of powers, it is essential that the Federal Supreme Court, when creating binding precedents, strictly remain within the formal and material limits that were established by the Constitution and by Law No. 11,417⁵ (BRASIL, 2006), which serve as a guarantee that the independence and harmony between the Powers will not be shaken, considering that binding precedents can only be approved when there is a current controversy, on certain norms, causing serious legal uncertainty and a relevant multiplication of lawsuits on the same issue.

According to article 103-A, *caput*, §§ 1 to 3, of the Constitution, inserted by Constitutional Amendment No. 45, the Federal Supreme Court may, *ex officio* or by provocation, by decision of two-thirds of its members, after repeated decisions on constitutional matters, approve a precedent that, as of its publication in the official press, will have binding effect in relation to the other organs of the Judiciary and the direct and indirect public administration. at the federal, state and municipal levels, as well as to review or cancel it. The precedent will aim at the validity, interpretation and effectiveness of certain rules, about which there is a current controversy between judicial bodies or between them and the public administration that causes serious legal uncertainty and a relevant multiplication of lawsuits on the same issue. A complaint will be filed with the Federal Supreme Court against the

³ The Brazilian legal system has traditionally been part of the *civil law* family (Roman-Germanic law), where the main source of law is written law (codes and statutes), and judicial decisions (jurisprudence) have a secondary and non-binding role for other cases.

⁴ *Common law* (Anglo-Saxon law) is characterized by the prevalence of judicial precedents (jurisprudence), following the rule of *stare decisis* (decision taken must be maintained). In this system, the decision of a higher court in a specific case is mandatory for lower courts to comply with in similar cases.

⁵ Regulates article 103-A of the Federal Constitution and amends Law No. 9,784, of January 29, 1999, regulating the edition, revision and cancellation of the statement of binding precedents by the Federal Supreme Court, and provides for other provisions.

administrative act or judicial decision that contradicts the applicable precedent or that improperly applies it.

Binding Precedent No. 4 (Brasil, STF, 2008, n.p.), unanimously approved by the Federal Supreme Court, based on the judgment of Extraordinary Appeal No. 565,714 (Brasil, STF, 2008, p. 1260.), establishes that, "Except in the cases provided for in the Constitution, the minimum wage cannot be used as an index of the basis for calculating the advantage of a public servant or employee, nor be replaced by a judicial decision".

This research is based on the following legal problem: can Binding Precedent No. 4 be considered existing, formally valid and materially compatible with the fundamental principles and rights established in the 1988 Constitution?

From this problem, three hypotheses were raised that will be addressed in the course of the work. First, Binding Precedent No. 4 does not meet the minimum requirements to exist in the legal world. Second, the approval of Binding Precedent No. 4 did not follow all the formal parameters established in the Constitution and in Law No. 11,417 of 2006. Third, Binding Precedent No. 4 ignored some of the fundamental principles and rights.

The dialectical and deductive methods will be used. The dialectic is based on the critical analysis of Binding Precedent No. 4 in relation to constitutional principles, aiming to identify conflicts and propose changes in the legal reality. The deductive will demonstrate that fundamental rights were violated by the Supreme Court's decision.

The research, with a qualitative approach, will analyze the contents, meanings and social impacts of Binding Precedent No. 4 through a bibliographic (doctrine) and documentary (legislation and jurisprudence) review.

2 THE ISSUE THAT GAVE RISE TO BINDING PRECEDENT NO. 4

The decision to approve Binding Precedent No. 4 (Brasil, STF, 2008, n.p.) occurred at the end of the judgment of Extraordinary Appeal No. 565.715 (Brasil, STF, 2008), which had been filed by military police officers against the State of São Paulo, against the Judgment that had dismissed the Appeal they handled against the judgment of dismissal, rendered in the Ordinary Action of Obligation to Do, which aimed to condemn the São Paulo Treasury to calculate the unhealthy bonus they received based on the remuneration or salaries of their positions, and not on the amount of two minimum wages, as stated in the governing legislation.

The police officers based the request on the merits of the preliminary ruling regarding the non-acceptance of article 3, paragraph 1, of Complementary Law No. 432, of 1985, of the State of São Paulo – which established that the basis for calculating the additional amount should be calculated on the amount of two minimum wages – by the rule of article 7, IV, final part, of the Constitution (BRASIL, 1988), which prohibits the indexation of the minimum wage for any purpose.

The claim was dismissed in the first instance, because the Single Judge understood that, even if the requested non-receipt was declared, it was not possible to increase salaries by means of a judicial decision, due to the principles of legality and separation of powers.

The military police officers filed an appeal with the Court of Appeals of São Paulo, which dismissed the appeal, by rejecting the preliminary question, based on a line of understanding, existing in the Federal Supreme Court, which considered that the adoption of the minimum wage as the basis for calculating the unhealthy bonus did not violate the constitutional prohibition of indexation of the minimum wage.

Dissatisfied with the decision rendered by the São Paulo Court, the military police filed the Extraordinary Appeal to the Federal Supreme Court, which was under the rapporteurship of Minister Cármen Lúcia, within the scope of the Full Body, which delivered the vote, which was accompanied by the Collegiate, obtaining a unanimous vote.

3 THE GROUNDS AND CONCLUSIONS OF EXTRAORDINARY APPEAL NO. 565,714

First, the Supreme Court recognized the General Repercussion in Extraordinary Appeal No. 565,714, generating Topic No. 25, with the title "Linking the unhealthy bonus to the minimum wage", and the following description: "Extraordinary appeal in which it discusses, in the light of article 7, IV, of the Federal Constitution (BRASIL, 1988), the revocation, or not, of article 3, sole paragraph, of São Paulo Complementary Law No. 432 (SÃO PAULO, 1985), which links the unhealthy bonus to the minimum wage, by the 1988 Constitution". (Brazil, STF, 2008, p. 1197)

Justice Cármen Lúcia began the vote by clarifying and demonstrating that, on the final part of item IV, of article 7, of the Constitution/88, numerous precedents could be presented, from the Supreme Court, in the sense of the unconstitutionality or non-reception of norms that use the minimum wage as a basis for calculating other earnings due to public and private workers.

The Magistrate cited, in this regard, several cases judged by the Court, between the years 1998 and 2008, dealing with the salary floor of professional categories, the inclusion of allowance or bonus, compensation for moral damages, the special pension, the administrative fine, the salary table of a state agency and the rates of social contributions. Upon reaching the central issue of the Appeal, referring to the calculation of the unhealthy allowance based on the minimum wage, the Rapporteur clarified that there were also numerous decisions within the scope of the Court, both for constitutionality and unconstitutionality.

From that moment on, she assumed the defense of the thesis of unconstitutionality (non-reception) of the questioned rule based on the basis extracted from Extraordinary Appeal No. 217,700 (Brasil, STF, 1999), which considered that the prohibition on indexation of the minimum wage was justified so as not to create obstacles to its increase, in view of the resulting chain of increases, which could pressure the occurrence of smaller adjustments to the minimum wage itself.

After rejecting the arguments alleged by the appellants, Justice Cármen Lúcia concluded her vote with the proposal to dismiss the Extraordinary Appeal, due to the declaration of non-reception of article 3, paragraph 1, of Complementary Law No. 432/1985, of the State of São Paulo, by the rule of article 7, IV, final part, of the Constitution/88.

This decision implied the suppression of the questioned rule (or at least in the calculation criterion) and the right of the appellants to receive the unhealthy bonus. However, the Rapporteur understood that the police officers could not lose this right and, therefore, restricted the meaning and scope of the declaratory decision to the criterion of the basis for calculating the additional payment, that is, the use of the minimum wage. As a result, the right to the unhealthy bonus would be without a basis for calculation. So, this situation forced the Court to act as a positive legislator, which would be denied through the wording of Binding Precedent No. 4. Thus, the ingenious solution that Minister Cármen Lúcia proposed, considered by her as "possible for the case", was to maintain the payment of the additional unhealthy pay in the amount of two salaries (in force at the time of the final and unappealable decision) and to link its future adjustments to the category.

The judgment was unanimous and gave rise to the following Summary of judgment for Extraordinary Appeal 565.714, which does not mention the heterodox solution that guaranteed the police officers the continuity of receiving the unhealthy bonus:

SUMMARY: CONSTITUTIONAL. ARTICLE 7, ITEM IV, OF THE CONSTITUTION OF THE REPUBLIC. NON-RECEPTION OF ARTICLE 3, § 1, OF SÃO PAULO COMPLEMENTARY LAW NO. 432/1985 BY THE 1988 CONSTITUTION. UNCONSTITUTIONALITY OF LINKING THE UNHEALTHY BONUS TO THE MINIMUM WAGE. PREVIOUS. IMPOSSIBILITY OF MODIFYING THE BASIS FOR CALCULATING THE BENEFIT BY JUDICIAL DECISION. EXTRAORDINARY APPEAL DISMISSED.

1. The meaning of the prohibition contained in the final part of item IV of article 7 of the Constitution prevents the minimum wage from being used as an indexation factor; this use would hinder a possible increase in the minimum wage by the chain of increases that would give rise to if this linkage were admitted (RE 217.700, Minister Moreira Alves). The constitutional rule aims to prevent an increase in the minimum wage from indirectly generating a greater weight than that directly related to the increase. This circumstance would pressure a lower adjustment of the minimum wage, which would mean hindering the implementation of the wage policy provided for in article 7, item IV, of the Constitution of the Republic. The use of the minimum wage to form the basis for calculating any remuneration portion or with any other pecuniary objective (indemnities, pensions, etc.) comes up against the binding prohibited by the Constitution of Brazil. History and comparative analysis of the jurisprudence of the Federal Supreme Court. Declaration of non-acceptance by the Constitution of the Republic of 1988 of Article 3, § 1, of Complementary Law No. 432/1985 of the State of São Paulo.

2. Absence of a constitutional rule authorizing the granting of unhealthy pay to public servants (art. 39, § 1, item III) or to military police officers (art. 42, § 1, c/c 142, § 3, item X).

3. Infeasibility of invoking article 7, item XXIII, of the Constitution of the Republic, because even if local legislation determines its incidence to public servants, the additional expression of remuneration contained in the constitutional rule must be interpreted as additional remuneration, namely, those who carry out painful, unhealthy or dangerous activities are entitled to additional remuneration, to compose their remuneration. If the Constitution had established workers' remuneration as the basis for calculation, it would have stated an additional amount on remuneration, which it did not do. 4. Extraordinary appeal dismissed. (Brasil, STF, 2008, p. 1189-1190).

In addition to generating Topic No. 25 of the General Repercussion and the Summary above, the judgment of Extraordinary Appeal No. 565,714 gave rise to Binding Precedent No. 4, with the following wording:

BINDING PRECEDENT No. 4: Except in the cases provided for in the Constitution, the minimum wage cannot be used as an index for calculating the advantage of a public servant or employee, nor be replaced by a judicial decision. (Brazil, STF, 2008).

Therefore, these are the grounds and conclusions adopted in the judgment of Extraordinary Appeal No. 565,714, which motivated the Federal Supreme Court to approve Binding Precedent No. 4.

4 BINDING PRECEDENT NO. 4 AND THE ABSENCE OF THE MINIMUM REQUIREMENTS FOR EXISTENCE

The term precedent, at least in the Brazilian legal context, refers to a summary of the dominant jurisprudence or the peaceful and reiterated understanding of a higher court (such as the Federal Supreme Court, or the Superior Court of Justice) on a given matter of law. Thus, when a Court repeatedly judges the same issue in the same way, it formalizes this understanding in a concise statement, which is the precedent.

For Mancuso (2013, p. 440), a precedent is the set of dominant jurisprudence of a court, covering the most varied branches of our Law, organized by numbered entries without commitment to the subject of the subject.

The jurist Lenio Luiz Streck (2010, p. 145) adopts the following concept of precedent:

In a more technical-legal sense, [precedent] means a statement that translates, concisely, the dominant jurisprudence of that court that issued it. [...] The precedent is, therefore, the production of explanatory definitions, which has prescriptive force in the daily practice of jurists.

This understanding is contained in article 103-A of the Constitution/88, which establishes that the Federal Supreme Court may approve a binding precedent "after repeated decisions" on constitutional matters, without prejudice to the other assumptions and requirements.

As seen, the issue that gave rise to Extraordinary Appeal No. 565,714, in addition to being unique, involving the control of the constitutionality of a given rule (article 3, paragraph 1, of Complementary Law No. 432, of 1985, of the State of São Paulo), was resolved by means of a singular and heterodox solution⁶, which could not and should not have been used to create a binding rule and, much less, to be extended to various issues, dealing with the basis for calculating all types of advantages received by all public servants and private workers, complemented by the prohibition of judicial action as a positive legislator, since the Supreme Court itself had acted in this way, to adapt the criterion of the calculation basis of the unhealthy bonus received by São Paulo police officers.

Thus, because there were no repeated decisions on the examination of the constitutionality of article 3, paragraph 1, of Complementary Law No. 432, of 1985, of the

⁶ There was a declaration of non-full acceptance of the rule and, even so, the appellants continued to receive the unhealthy bonus, in a judgment arrangement that was restricted to the vote rendered and was not even reproduced in the Summary of the Appeal.

State of São Paulo, the Federal Supreme Court did not have the minimum constitutional grounds necessary to produce a precedent, even more so with mandatory content, exorbitant of the singular issue, and resulting from a heterodox solution.

5 THE FORMAL ASPECTS THAT MAKE BINDING PRECEDENT NO. 4 INVALID

This section is intended to analyze and demonstrate that Binding Precedent No. 4 (Brasil, STF, 2008, n.p.) did not comply with some rules that regulate the creation of binding precedents, provided for in article 103-A of the Constitution (Brasil, 1988) and in Law No. 11,417 (Brasil, 2006), which regulates the issue.

5.1 EXTRAPOLATION OF THE OBJECTIVE LIMITS OF THE DETERMINED NORMS

Initially, it is verified that Binding Precedent No. 4 did not stick to its constitutional objective, consisting of the validity, interpretation and effectiveness of certain norms (art. 103-A, § 1, first part, of the Constitution/88), but advanced on the establishment of the meaning and scope of the effectiveness of the paradigm constitutional norm itself (art. 7, IV, final part, of the Constitution/88).

This procedure followed the doctrine of Justice Gilmar Mendes (2012, p. 1337), of the Federal Supreme Court, which gives the concept of "determined norms" an expansive meaning, in the following terms:

The constitutional rule explains that the precedent will aim to overcome the current controversy about the validity, interpretation and effectiveness of certain rules capable of generating legal uncertainty and a relevant multiplication of lawsuits. Therefore, current issues on the interpretation of constitutional norms or of these in the face of infra-constitutional norms are covered.

In view of the broad jurisdiction of the Federal Supreme Court, these [determined] norms may be federal, state or municipal. It is possible, however, that the issue involves only the interpretation of the Constitution and not its eventual contrast with other infra-constitutional norms. In these cases, generally submitted to the Court under the allegation of direct contravention of the Constitution (art. 103, III, a), the interpretation of the Constitution adopted by the courts is discussed.

However, the analysis made in this research diverges from this expansive understanding and adopts a declarative interpretation for the expression "determined norms", more compatible with the fundamental principles of the Democratic Rule of Law and the separation of powers, and with the dictate of the limitation of power.

By "determinate norms" we must understand those norms that are clear, specific, precise and identifiable in plan, and that contrast with indeterminate or undefined norms. They serve to keep the Supreme Court within the limits of its jurisdictional competence to say the law and not to produce generic, indeterminate and abstract binding precedents, which represent an invasion of the competence of the Legislative Branch.

The norms determined are not constitutional principles and rules (parameters), already considered valid, nor the principles and rules questioned (controlled), but the norm resulting from the judgment of the control of constitutionality exercised by the Supreme Court. In this case, the rule determined consisted of the following normative assertion: article 3, paragraph 1, of São Paulo Complementary Law No. 432/1985 was not accepted by article 7, IV, final part, of the Constitution/88. It was only this determined rule that, in theory, could give rise to a binding precedent, if the other constitutional assumptions and requirements were present.

However, Binding Precedent No. 4 exceeded the constitutional limits of the determined rule, resulting from the judgment of Extraordinary Appeal No. 565,714, and examined in the abstract the interpretation and effectiveness of the paradigm constitutional rule itself (article 7, IV, final part, of the FC/88), extending the meaning and scope of the prohibition contained therein to the basis for calculating any and all advantages perceived by public servants or employees, which involves an indeterminate number of infra-constitutional norms, foreign to the object of the Appeal judged, even though some have been cited in the reasoning, as a reason for deciding, but without being able to integrate the operative part.

This defect violates the so-called principle of congruence or astringency (also known as the Principle of Correlation or Conformity), which requires a strict correspondence between the claim, the cause of action and the judicial decision. The Code of Civil Procedure (Brasil, 2015) deals with the matter, mainly, in the following provisions:

Article 141: The judge shall decide on the merits within the limits proposed by the parties, and it shall be forbidden to hear issues not raised in respect of which the law requires the initiative of the party.

Article 492: It is forbidden for the judge to render a decision of a nature different from the one requested, as well as to condemn the party in a higher amount or in an object different from that which was demanded.

According to Dinamarco (2017, p. 320-321), "The extra *petita defect* occurs when the judge judges outside the limits of the demand, that is, 'if it is outside the limits [of the demand]', deciding a question not posed, granting a provision or a good of life not pleaded".

In the same sense is the understanding of Theodoro Júnior (2015, p. 814): "It is the defect that occurs when the sentence decides on an object different from what was proposed in the initial one, that is, "the judge grants a different performance from the one that was claimed from him".

Paulo and Alexandrino (2015, p. 898) reinforce the importance of the Judiciary remaining bound to the principle of the request, even in the exercise of abstract control of constitutionality, which is linked to the principle of the request, so that there is no offense to the principle of separation of powers:

The abstract control of constitutionality, in Brazil, is subject to the so-called principle of request. This means that the Judiciary can only exercise the review of the validity of laws in the abstract when provoked, not on its own initiative.

The principle of the request is typical of the judicial review of constitutionality and contributes to reducing the political character of the review of the validity of norms, as well as to preventing the Judiciary from assuming a role of supremacy in relation to the other branches.

This is not a mere formal irregularity, since the violated norms have the constitutional purpose of complying with and enforcing the fundamental principles of the separation of powers and the Democratic Rule of Law. By creating Binding Precedent No. 4, the Federal Supreme Court exceeded its jurisdictional competence to interpret legal norms and invaded the legislative competence of the National Congress, insofar as the mandatory Entry advanced on the validity, interpretation and effectiveness of indeterminate norms, incurring in the vice of absolute nullity.

5.2 THE ABSENCE OF DEMONSTRATION OF CURRENT CONTROVERSY

The approval of Binding Precedent No. 4 was also not preceded by the demonstration of the constitutional assumption regarding the current controversy between judicial bodies or between them and the public administration, which was causing serious legal uncertainty and a relevant multiplication of lawsuits on the same issue, as required by article 103-A, paragraph 1, second part, of the Constitution/88.

For Mendes and Branco (2015, p. 1337-1338), due to the need for the existence of repeated decisions, it is not possible to issue a binding precedent based on an isolated judicial decision:

Another requirement for the issuance of the binding precedent refers to the pre-existence of repeated decisions on constitutional matters.

It is required here that the matter to be addressed in the precedent has been the subject of debate and discussion in the Federal Supreme Court. It seeks to obtain the maturation of the controversial issue with the reiteration of decisions. Thus, the possibility of issuing a binding precedent based on an isolated judicial decision is prohibited. It is necessary that it reflects a jurisprudence of the Court, that is, repeated judgments in the same sense, that is, with the same interpretation.

When commenting on the assumption of the current controversy, Paulo and Alexandrino (2015, p. 833-834) clarify that it is necessary to have repeated current judgments, neither past nor future, on a relevant matter:

Therefore, for the issuance of a binding precedent by the Federal Supreme Court, the Federal Constitution requires, especially, the observance of four cumulative requirements, namely:

(...);

c) existence of current controversy between judicial bodies or between them and the

Public administration;

d) the controversy entails serious legal uncertainty and a significant multiplication of lawsuits on the same issue.

(...).

The second requirement - requirement that the constitutional matter has been the subject of repeated decisions by the Federal Supreme Court - is intended to avoid the hasty approval of a binding precedent, on a topic that is not yet consolidated in the jurisprudence of the Supreme Court. In other words, it is necessary that the binding precedent effectively reflects the jurisprudence of the Major Court, based on repeated judgments in the same sense.

Another point that should be emphasized is the requirement that the matter dealt with in the binding precedent be the subject of current constitutional controversy between judicial bodies or between them and the Public Administration. If, for example, it is a law that is already peacefully considered unconstitutional within the scope of the Judiciary and that is not being applied by the Public Administration, it will not be appropriate to issue a binding precedent. Nor is it allowed to issue a binding precedent on a matter that will presumably lead to future controversy, no matter how relevant it may be. The controversy must be current, neither future, nor already overcome.

Finally, even if the matter is the subject of current controversy between judicial bodies or between them and the public administration, it can only be dealt with in a binding precedent if this controversy is causing serious legal uncertainty and a relevant multiplication of lawsuits on the same issue. Thus, in the event that it is a controversial matter, but of reduced relevance, or concerning a few concrete cases, the issuance of a binding precedent will not be appropriate.

The constitutional issue discussed in Extraordinary Appeal No. 565,714, consisting of the examination of the constitutionality of article 3, paragraph 1, of São Paulo Complementary Law No. 432/1985, does not qualify as a current controversy, since it did not generate serious uncertainty (characterized by the existence of conflicting decisions between different judges and courts) nor the relevant multiplication of lawsuits, being restricted to a single judicial proceeding, it is certain that the cases cited as a reason for deciding also do not serve to characterize the current controversy, given that they were judged by the Federal Supreme Court from 1999 onwards.

The recognition of the General Repercussion in the judgment of Extraordinary Appeal No. 565,714, object of Topic 25⁷, also does not serve to demonstrate the existence of the current controversy, given that it constitutes one of the procedural assumptions for the admissibility of the extraordinary appeal itself (article 102, paragraph 3⁸, of the Constitution). They are different things. The general repercussion is one of the assumptions for the admissibility of the extraordinary appeal, while the current controversy, capable of causing serious legal uncertainty and the relevant multiplication of lawsuits on the same issue, is one of the specific constitutional procedural requirements for the approval of the binding precedent.

The constitutional assumption of the current controversy bears a certain similarity with the procedure for the judgment of repetitive appeals, however, its stages (selection and allocation of the representative precedent, in the suspension of the proceedings, in the judgment of the thesis and in the application of the precedent) were not followed by the Supreme Court in the judgment of the Representative Precedent, even because there were no other appeals in progress on the same issue.

Thus, Binding Precedent No. 4 should be canceled, as it does not meet the constitutional assumption of the current controversy.

5.3 THE ABSENCE OF A PRIOR STATEMENT BY THE ATTORNEY GENERAL OF THE REPUBLIC

The approval of Binding Precedent No. 4 also did not follow the obligation of prior manifestation by the Attorney General of the Republic in the proposals for editing, revising or

⁷ Title: Linking the unhealthy bonus to the minimum wage.

⁸ Paragraph 3 - In the extraordinary appeal, the appellant must demonstrate the general repercussion of the constitutional issues discussed in the case, under the terms of the law, so that the Court may examine the admission of the appeal, and may only refuse it by the manifestation of two-thirds of its members.

canceling the statement of binding precedent, provided for in article 2, paragraph 2, of Law No. 11,417, of 2006, which regulates the binding precedent.

Article 50 of the Rules of Procedure of the Federal Supreme Court establishes that the Attorney General shall have a period of fifteen (15) days to offer his procedural statements, when no other deadline has been set. (Brazil, STF, 2023).

Although the Attorney General has followed the judgment of Extraordinary Appeal No. 565,714 and the debates that led to the approval of Binding Precedent No. 4, this circumstance does not meet the fulfillment of the constitutional obligations of the Public Prosecutor's Office, as an institution essential to the jurisdictional function of the State, defender of the legal order, the democratic regime and social interests, since there was no period of reflection to issue an authoritative opinion on the issues debated.

Thus, Binding Precedent No. 4 should be canceled, for not having observed the obligation of prior manifestation of the Attorney General of the Republic in the proposal for its edition.

5.4 THE CONTRADICTION BETWEEN THE GROUNDS OF EXTRAORDINARY APPEAL NO. 565,714 AND THE TEXT OF BINDING PRECEDENT NO. 4

The Code of Civil Procedure (Brasil, 2015, art. 489, I, II and III) not only brought the essential elements of judicial decisions (report, grounds and disposition), but also established their conceptual parameters. The report will contain the names of the parties, the identification of the case, with the summary of the request and the response, and the record of the main occurrences that occurred in the course of the process. The grounds contain the judicial analysis of questions of fact and law. And the disposition is the part in which the judge will resolve the main issues that the parties submit to him.

These three parts of the judicial decision must maintain harmony and coherence, under penalty of the defect of contradiction giving rise to the motion for clarification, provided for in article 1,022, I, of the Code of Civil Procedure.

Fredie Didier Jr. and Cunha (2016, p. 251) teach that "the contradictory decision is one that has irreconcilable propositions, disharmonious statements, statements that clash, that point to opposite directions". For them, the main example is the contradiction between the reasoning (motivation) and the disposition (conclusion), as when the judge reasons that the plaintiff does not have the right claimed, but, in the operative part, upholds the request.

The precedent, consisting of a summary of the provisions of several judgments judged on a given legal matter, must also maintain the relationship of coherence with the grounds of all the decisions on which it is based, so that it does not fall into the vice of contradiction.

As Binding Precedent No. 4 (STF, 2008, n.p.) is the result of the judgment rendered in Extraordinary Appeal No. 565,714, its wording had to have been coherent, necessarily, with the reasons for deciding appeals, which did not occur in the case in question.

In fact, when analyzing whether the rule of article 192 of the Consolidation of Labor Laws (Brasil, CLT, 1943) could be applied to the appellant military police officers, Justice Cármen Lúcia identified its incompatibility with the constitutional rule that prohibits the indexation of the minimum wage (article 7, IV) and, then, stated that "[...] it will be up to the Labor Court to define the basis for calculating the unhealthy bonus due in relations governed by the CLT, taking into account labor legislation and collective bargaining agreements and conventions". (Brasil, STF, 2008, RE 565.714, p. 1217)

However, it was stated in the wording of Binding Precedent No. 4 that "the minimum wage cannot be used as an index of the basis for calculating the advantage of a public servant or employee, nor be replaced by a judicial decision" (Brasil, STF, 2008), removing from judges and labor courts the power that had been recognized in the grounds of the Extraordinary Appeal to "define the basis for calculating the unhealthy allowance due in relations governed by the CLT" (Brasil, STF, 2008, RE 565.714, 1217).

The contradiction was definitively proven when the Superior Labor Court decided to follow the guidance contained in the grounds of Extraordinary Appeal No. 565,714, and changed the wording of its Precedent No. 228 to state that "As of May 9, 2008, the date of publication of Binding Precedent No. 4 of the Federal Supreme Court, the unhealthy allowance will be calculated on the basic wage, unless a more advantageous criterion is established in a collective agreement" (Brasil, TST, 2008, n.p.). The attitude of the Labor Court was almost instantly disapproved through the granting of injunctions, which were confirmed in the judgment on the merits, issued by the Supreme Court in Complaints that were filed by agents linked to the economic market, who denounced the non-compliance with Binding Precedent No. 4.

Thus, since there is a contradiction between the reasoning used in the judgment of Extraordinary Appeal No. 565,714 and the text of Binding Precedent No. 4, the mandatory Entry should be canceled, as it does not have an autonomous existence and contradicts its own basis of existence and legal validity.

5.5 THE SELF-CONTRADICTION EXISTING IN BINDING PRECEDENT NO. 4

The normative text of Binding Precedent No. 4 is also self-contradictory, insofar as it ensures the validity and effectiveness of the fundamental constitutional right to prohibit the binding of the minimum wage for any purpose (article 7, IV, final part, of the FC/88) and, at the same time, allows this fundamental right to be violated. Here it is: "Except in the cases provided for in the Constitution, the minimum wage cannot be used as an index for the calculation basis of the advantage of a public servant or employee, nor can it be replaced by a judicial decision." (Brazil, STF, 2008).

First, the Entry prohibits "the minimum wage from being used as an index of the basis for calculating the advantage of a public servant or employee". Next, it prohibits judges and courts, who are faced with laws that provide for the minimum wage as an index of the basis for calculating the advantage of public servants or employees, from replacing the minimum wage with another index, which implies the permission of the conduct that had been prohibited in the first part of the Precedent.

In other simpler and summarized words, for Binding Precedent No. 4, the minimum wage cannot be used as an index; however, if it is being used as an indexer by any legal rule, it cannot be replaced by the Judiciary. In other words, indexation will continue to exist and produce legal effects, even though it is prohibited by Binding Precedent No. 4 itself and by the Constitution (Brasil, CRFB, 1988, art. 7, IV).

Thus, by prohibiting and, at the same time, allowing the prohibition of indexation of the minimum wage for any purpose, Binding Precedent No. 4 incurs in self-contradiction and, therefore, should be canceled.

6 THE MATERIAL ASPECTS THAT JUSTIFY THE CANCELLATION OF BINDING PRECEDENT NO. 4

In addition to not having observed all existential, formal (constitutional and legal) and logical aspects, Binding Precedent No. 4 also did not follow the legal regime that governs the judgment of the validity, interpretation and effectiveness of the issue that is the subject of Extraordinary Appeal No. 565,714, consisting of the indexation of the calculation basis of the unhealthy bonus received by São Paulo military police officers to the minimum wage.

The matters related to the issue (minimum wage and additional unhealthy wage) have the legal nature of fundamental constitutional social labor rights and are directly linked to the fundamental constitutional principles of the Democratic Rule of Law, the separation of

powers, human dignity, the social values of work and free enterprise, the construction of a free, fair and solidary society, and the prevalence of human rights, which were not observed or even cited at the time of the judgment of the Representative Precedent and the approval of the Binding Precedent.

6.1 JUDICIAL ACTIVISM

Judicial activism is a reflection of the prominent role that the Brazilian Judiciary, especially the Federal Supreme Court, assumed after the 1988 Constitution, in relation to guaranteeing the effectiveness of fundamental principles and rights.

For Barroso (2009), judicial activism is an attitude, the choice of a specific and proactive way of interpreting the Constitution, expanding its meaning and scope. It is usually installed in situations of retraction of the Legislative Branch, associated with a broader and more intense participation of the Judiciary in the realization of constitutional values and purposes, with greater interference in the space of action of the other two Branches. The activist stance is manifested through different conducts, which include: a) the direct application of the Constitution to situations not expressly contemplated in its text and regardless of the manifestation of the ordinary legislator; b) the declaration of unconstitutionality of normative acts emanating from the legislator, based on criteria less rigid than those of patent and ostensible violation of the Constitution; c) the imposition of conducts or abstentions on the Public Power, notably in matters of public policies.

On the occasion of the judgment of Extraordinary Appeal No. 565,714 (Brasil, STF, 2008), the requirements for acting through judicial activism were present, as the Justices of the Supreme Court recognized the omission of the National Congress in the regulation of the fundamental right to the unhealthy bonus. However, the claim that the Supreme Court could not act as a positive legislator prevented the application of activism.

Thus, since judicial activism is a reality in Brazil, albeit in exceptional and relatively discretionary terms, it will be taken into account in the analysis of the material aspects of Binding Precedent No. 4 and, notably, of its Representative Precedent, in order to give effect to several fundamental principles and rights that are no longer observed.

6.2 THE FUNDAMENTAL CONSTITUTIONAL PRINCIPLES THAT SHOULD GUIDE THE CREATION OF THE CALCULATION BASIS FOR THE UNHEALTHY ALLOWANCE

The 1988 Constitution conferred the stature of a fundamental right to the unhealthy bonus, however, it attributed its regulation to the ordinary legislator:

More than 37 years have passed since the promulgation of the Constitution/88, but the National Congress, markedly liberal, has not yet regulated this fundamental right, opting to maintain the obsolete and unconstitutional regulation of article 192 of the Consolidation of Labor Laws (Brasil, 1943), which originated in Law No. 185, of 1936, despite not being materially compatible with the norms of fundamental rights and human rights.

The omission of the National Congress, associated with the need to regulate and give full effect to the fundamental constitutional right to the unhealthy bonus, justified the use of judicial activism by the Justices of the Federal Supreme Court, on the occasion of the judgment of Extraordinary Appeal No. 565,714 and the approval of Binding Precedent No. 4 (Brasil, STF, 2008, n.p.).

The obsolete and unconstitutional rule that had its interpretation, validity and effectiveness implicitly crystallized by Binding Precedent No. 4, as long as the National Congress remains inert, only favors the economic interests of employers, including the State, by leveling "downwards" (based on the minimum wage) the payment of a fundamental right that aims to directly protect health, the hygiene and safety of private workers and public servants who work in activities considered unhealthy (harmful to health).

It should be noted that the 1988 Constitution prioritized the establishment of some fundamental principles that should guide the Legislative and Judiciary in the creation of rules that regulate the parameters to be used in the calculation of advantages attributed to public servants and private workers.

In fact, initially, these parameters must be extracted from the fundamental principles adopted by the Federative Republic of Brazil, namely:

First. The adoption of the constitutional principle of the Democratic Rule of Law (article 1, *caput*) requires that the calculation of the advantages attributed (fundamental rights) to civil servants and workers reflect the will and social and economic interests of the majority of the Brazilian people, which is formed precisely by the working class, which produces the national wealth.

Second. It is necessary to contemplate with special emphasis the constitutional principle of human dignity (art. 1, III), in order not to tolerate the constitutionality and legality

of payments of fundamental normative advantages that do not allow workers to have access to the existential minimum.

Third. The basis for calculating the advantage (fundamental right) must be the result of the compatibility between the social values of work and the values of free enterprise (article 1, IV), so that there is no overlap of one over the other, as occurs in the situation dealt with in the final part of Binding Precedent No. 4.

Room. The fundamental constitutional objective of building a free, fair and solidary society (article 3, I) should also guide the creation of parameters for calculating advantages, which cannot result from unfair impositions and that do not take into account solidarity at the time of distribution of the product of wealth with those who effectively contributed to its existence.

Fifth. The fundamental constitutional principle of the prevalence of human rights (article 4, II) obliges the Brazilian State to honor the international commitment to promote decent work, which must be exercised in conditions of freedom, equity, security and human dignity, under the terms of the 2030 Agenda of the United Nations, signed by Brazil. Maintaining the payment of fundamental advantages such as the unhealthy bonus in the basic standard of a minimum wage reveals, in fact, indecent working conditions, since they are imposed by the Government, are not equitable, promote insecurity and harm health and human dignity.

Although these fundamental constitutional principles should have guided the judgment of Extraordinary Appeal No. 4 and the approval of the text in Binding Precedent No. 4, it appears that they were not even mentioned in these judicial decisions.

6.3 THE FUNDAMENTAL SOCIAL CONSTITUTIONAL RIGHTS THAT SHOULD GUIDE THE CREATION OF THE CALCULATION BASIS FOR THE UNHEALTHY BONUS:

In addition to observing the fundamental principles above, due to constitutional supremacy, the establishment of legislative and judicial criteria for the calculation of the advantages of civil servants and workers also has to be guided by the fundamental constitutional social labor rights, either because they brought the standards for calculating the fundamental advantages recognized by the Constitution, or because they broke with the system of a single wage base (minimum wage), that has always existed in Brazil, and they also began to provide for the minimum wage for the different professional categories.

The fundamental constitutional social labor norms establish various standards or models for calculating the advantages of civil servants and workers, always based on the value of the salary or even the remuneration, as shown in the following cases:

- 1) Unemployment insurance (article 7, II, of the Constitution), whose calculation, according to article 5, paragraph 1, of Law No. 7,998, of 1990, which regulates the Unemployment Insurance Program, is calculated by the average of the salaries of the last three (3) months prior to the dismissal.
- 2) Guarantee Fund for Length of Service (Article 7, III, of the Constitution), whose calculation, according to Article 15, *caput*, of Law No. 8,036, of 1990, which provides for the Guarantee Fund for Length of Service, falls on the percentage corresponding to 8% (eight percent) of the remuneration paid or due, in the previous month, to each worker.
- 3) Thirteenth salary, calculated on the basis of full remuneration (article 7, VII, of the Constitution), extended to public servants (article 39, paragraph 3, of the Constitution).
- 4) Remuneration for night work higher than that for daytime work (article 7, IX, of the Constitution), whose calculation, according to article 73, *caput*, of the Consolidation of Labor Laws, must be made with an increase of at least 20% (twenty percent) on the value of the daytime hour, which, in turn, is calculated on the value of the salary. This right is extended to public servants (art. 39, § 3, of the Constitution).
- 5) Remuneration for overtime service, calculated in the percentage of at least 50% (fifty percent) of the normal hourly rate (article 7, XV, of the Constitution) which, in turn, is calculated on the value of the salary. This right is extended to public servants (art. 39, § 3, of the Constitution).
- 6) Paid annual vacation with at least one third more than the normal salary (article 7, XVII, of the Constitution), extended to public servants (article 39, paragraph 3, of the Constitution).
- 7) Leave for pregnant women (article 7, XVIII, of the Constitution), whose calculation, according to article 72, *caput*, of Law No. 8,213, of 1991, which provides for Social Security Benefit Plans, is made on a monthly income equal to the employee's full remuneration. This right is extended to public servants (art. 39, § 3, of the Constitution).
- 8) Prior notice (article 7, XXI, of the Constitution), whose calculation, according to article 487, paragraph 1, of the Consolidation of Labor Laws, must be made on the employee's remuneration.

9) Hazard pay (article 7, XXIII, of the Constitution), whose calculation, according to article 193, paragraph 3, of the Consolidation of Labor Laws, falls on the employee's salary.

Thus, as the constitutional standard is to recognize the salary and even the remuneration itself as the basis for calculating the fundamental advantages established for public and private workers, this model must guide, in a binding manner, the legal norms, public policies and judicial decisions.

By not observing the directive model of the Constitution/88, Binding Precedent No. 4 cannot maintain the validity and effectiveness of legal norms that establish the minimum wage as the sole and mandatory basis for calculating the unhealthy bonus, under penalty of violation of the fundamental constitutional principle of non-discrimination (Brasil, CRFB, art. 3, IV) and the specific human right of non-discrimination in matters of employment and profession, provided for in article 1 of Convention No. 111 (ILO, 1958), ratified by Brazil through Legislative Decree No. 104, of 1964.

In addition to the constitutional standards that recognize the salary (and not the minimum wage) and even the remuneration itself as the basis for calculating the advantages established for public and private workers, the Constitution/88 broke the constitutional system, until then existing, of setting the minimum wage as the only basis for payment of wages in Brazil (art. 157, I, of the 1946 Constitution, art. 158, I, of the 1969 Constitution, and art. 165, I, of the 1969 Constitution). In addition to the minimum wage (Brasil, CRBF, 1988, art. 7, IV), the Constitution/88 also began to provide, as a minimum threshold for the payment of wages, the minimum wage proportional to the extent and complexity of the work (Brasil, CRBF, 1988, art. 7, V), which can be set by specific federal laws (for regulated professions), by state laws (regional floor for categories that do not have a floor defined in Federal Law or collective bargaining) or by collective bargaining (collective bargaining agreements).

Thus, both due to the omission of Congress and the need to enforce a fundamental right, it can be seen that the Supreme Court failed to employ judicial activism to recognize, in the specific case of the unhealthy bonus, that the calculation of this advantage could be based on the minimum wage (for those who earn this amount) or on the minimum wage of the category, because of the guidelines taken from the Constitution itself. With this, the legislative omission would be suppressed and full effectiveness would be given to the fundamental right that was constitutionally established more than 37 years ago, however, it continues to be

regulated through obsolete, unconstitutional and unjust rules, whose validity and effectiveness were maintained through Binding Precedent No. 4.

7 CONCLUSION

Binding Precedent No. 4 (Brasil, STF, 2008) was approved at the end of the judgment of Extraordinary Appeal No. 565,715 (Brasil, STF, 2008), in which the constitutional validity of a state rule, which established the minimum wage as the basis for calculating the unhealthy bonus for public agents, was discussed.

When analyzing Binding Precedent No. 4, it was found that it did not meet the minimum requirements for existence, did not follow all the formal procedures for creation and did not observe some of the fundamental principles and rights established in the 1988 Constitution, which would lead to its cancellation.

In this regard, it was found that there were no repeated decisions on the examination of the constitutionality of the questioned rule (article 3, paragraph 1, of Complementary Law No. 432, of 1985, of the State of São Paulo) and, therefore, the Federal Supreme Court did not have the minimum constitutional grounds necessary to produce a precedent.

In addition, Binding Precedent No. 4 did not stick to its constitutional objective, consisting of the validity, interpretation and effectiveness of certain norms (art. 103-A, § 1, first part, of the Constitution/88), but advanced on the establishment of the meaning and scope of the effectiveness of the paradigm constitutional norm itself (art. 7, IV, final part, of the Constitution/88).

It was also found that the approval of Binding Precedent No. 4 was not preceded by the demonstration of the constitutional assumption regarding the current controversy between judicial bodies or between them and the public administration, which was causing serious legal uncertainty and a relevant multiplication of lawsuits, on an identical issue, as required by article 103-A, paragraph 1, second part, of the Constitution/88.

Furthermore, the procedure for approving Binding Precedent No. 4 did not observe the obligation of prior manifestation by the Attorney General of the Republic in the proposals for editing, revision or cancellation of the statement of binding precedent, provided for in article 2, paragraph 2, of Law No. 11,417, of 2006, which regulates the binding precedent.

An even more worrying fact is the contradiction between the reasoning, used in the judgment of Extraordinary Appeal No. 565,714, and the text of Binding Precedent No. 4.

The mandatory Entry also focused on self-contradiction, by prohibiting and, at the same time, allowing the constitutional prohibition of indexation of the minimum wage for any purpose.

Finally, it was found that Binding Precedent No. 4 did not take into account several fundamental constitutional principles, such as human dignity, the construction of a just and solidary society, the prevalence of human rights, etc., and did not observe the constitutional parameters that recognize the salary, and even the remuneration itself, as the basis for calculating the fundamental advantages established for public and private workers.

For these reasons, it is concluded that Binding Precedent No. 4 should be canceled or, at least, revised, in order to adapt to the Constitution/88.

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