The concept of general norm of bidding and public procurement*

O conceito de norma geral de licitação e contratação pública

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ABSTRACT

The article, elaborated by the hypothetical-deductive method, studies the concept of a general bidding and contracting rule based on current legislation, doctrine, and jurisprudence. The need for the research stems from the fact that Law no. 14,133, of April 1st, 2021, mainly due to its more detailed nature, re-emerges the debate on the limits of the Constitutional Competence of the Union to legislate on the subject. Initially, it is based on the traditional doctrine, according to which the general character of the

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norm would result from its content isolatedly, that is, it's pure and absolute objective aspect. Given the insoluble problems of this interpretative path, it elaborates an alternative hypothesis, called subjective-objective, which, in summary, admits the generality as the need for the norm to be uniform for all its recipients, without prejudice to the local competence for particularities not treated by the general norm, provided that the limits of the general norm are respected. The subjective-objective hypothesis was better in the hermeneutic test for the solution of practical cases.

KEYWORDS

constitutional law — administrative law — legislative competence — definition of general norms — bids and public procurement

RESUMO

O artigo, elaborado pelo método hipotético-dedutivo, estuda o conceito de norma geral de licitação e contratação a partir da legislação vigente, da doutrina e da jurisprudência. A necessidade da pesquisa decorre do fato de a Lei nº 14.133, de 1º de abril de 2021, principalmente por seu caráter mais pormenorizado, fazer ressurgir o debate sobre os limites da competência constitucional da União para legislar sobre o tema. Inicialmente, parte-se da doutrina tradicional segundo a qual o caráter geral da norma decorreria de seu conteúdo isoladamente considerado, ou seja, seu aspecto objetivo puro e absoluto. Dados os problemas insolúveis desse caminho interpretativo, elabora hipótese alternativa, denominada subjetiva-objetiva, que, em síntese, admite a generalidade como a necessidade de a norma ser uniforme para todos os seus destinatários, sem prejuízo da competência local para particularidades não tratadas pela norma geral, desde que respeitados os limites desta. A hipótese subjetiva-objetiva se mostrou melhor no teste hermenêutico para a solução de casos práticos.

PALAVRAS-CHAVE

direito constitucional — direito administrativo — competência legislativa — definição de normas gerais — licitações e contratações públicas

1. Introduction

State action is important not only in terms of fulfilling its ultimate purposes, the provision of public services, but also how it performs the necessary activities. Among such activities, public procurement has the potential to serve as an effective public policy regulator, insofar as it is capable of influencing the behavior of officials, as seen, for example, in the adoption of sustainability.[1]

A historic controversy lies in the definition of the constitutional limits and competence of the Union to legislate on general standards of bidding and contracts, pursuant to art. 22, XXVII, of the Constitution.[2]

This controversy intensified with the advent of Law no. 14,133, April 1, 2021, due to its more detailed character, compared to the previous legislation. For example, the new law dealt with the procedural aspect of planning, price research and inspection of compliance with labor obligations.

Would this greater detail challenge the concept of a general rule provided for in the Constitution? Would the competence of other federal entities be disturbed by those of the Union? To what extent are these entities obliged to follow Law no. 14,133, 2021, and to what extent do they have competence to legislate on the subject?

The importance of resolving these issues is the stimulus for this article. The prevailing current conceptualizes a general norm as a generic principle or guideline, so that the details should complemented by local legislative competence. This chain of understanding, of an absolute pure objective character, will also be called, in the present study, a traditional current.

Although in theory this conception satisfies some authors, it does not survive a practical empirical test, as will be seen throughout the text.

Given this conclusion, the article seeks to formulate an alternative proposal to remedy the problems raised in dealing with the issue. This alternative is referred to in this article as subjective-objective.

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1 SARAI, Leandro. *Contratações públicas sustentáveis*: crítica da norma pura e caminho da transformação. Londrina, PR: Thoth, 2021.

2 "Art. 22. The Union is exclusively responsible for legislating on: […] XXVII — general rules of bidding and contracting, in all modalities, for direct public administrations, autarchic and foundational bodies of the Union, States, Federal District and Municipalities, obeying the provided in art. 37, XXI, and for public companies and government-controlled companies, in the terms of art. 173, §1, III." In the original wording, item XXVII provided: "XXVII — norms general terms of bidding and contracting, in all modalities, for the public administration, direct and indirect, including foundations established and maintained by the Government, in various spheres of government, and companies under its control;". This device was changed by Constitutional Amendment no. 19, of June 4, 1998.

The methodology used will be hypothetical-deductive,[3] based on reference to the current legal system and the specialized literature, in addition to jurisprudence.

The alternative hypothesis of this article is that it is possible to consider the subjective aspect of the concept of a general norm, that is, the generality of the rule would be essentially in its applicability to different entities or in its subjective scope, and not, as traditional doctrine holds, simply in the general nature of its content. This alternative is improved by an additional criterion to assist in the application of the standard, to justify its nomenclature as "subjective-objective".

The methodology chosen is also reflected in the way the article is organized, which, to support the thesis, includes the introduction and the following sections.

In the second section, the conception of the traditional current will be clarified, which represents the prevailing understanding of the constitutional definition of the general rule of bidding and public contracting. Within this, a subsection demonstrates, still from a theoretical point of view, the problems of the traditional definition, which justify its refutation.

The third part presents the alternative hypothesis, called subjective-objective, which maintains that the meaning of a general rule would be to standardize a norm to be adopted by all federative entities. A subsection brings further refinement to this hypothesis.

The fourth section focuses on empirical, practical tests to test both hypotheses. As the issue involves interpretation of the Constitution, the article considered only judgments of the Federal Supreme Court (STF) dealing with the limits of the competence of the Union to edit general rules, mainly in the interpretation of art. 22, XXVII.

2. The traditional current

Although recognized as "objective" in character, this term may not be altogether perfect. The idea is that it refers to the content of the norm, while there is no denying that the targets of the norm, in a way, are also covered

[3] MEZZAROBA, Orides; MONTEIRO, Claudia Servilha. *Manual de metodologia da pesquisa no direito*. 5. ed. São Paulo: Saraiva, 2009. p. 68-70.

by its content. Indeed, in general, a norm contains an instruction intended for a subject. On the other hand, the distinction between subject and object is adopted propositionally. It is based on the distinction that, when assigning the description "objective" to the path identified, we try to make it clear that it is not addressed to the recipient of the norm, to subjects.

Explication of the so-called traditional current may best be conveyed through presenting the position of each author who adopts it, but this would become repetitive. Therefore, we have chosen to give a set of arguments that align with this current for a more synthetic position, to construct a single theoretical framework. In this way, the consulted authors will be cited only where they present some peculiarity or a more complete exposition of the characteristic analyzed.[4]

In a synthetic way, this current, when interpreting art. 22, XXVII, of the Constitution, starts from the idea that the norms, conceptually, are already be general and abstract precepts. Thus, when the provision uses the word "general", it is necessary to utilize it, so that there is no redundancy. This idea stems from the hermeneutic maxim that "the law does not contain useless words".[5]

The traditional current, then, rejects the idea that "general" refers to the addressees of the norm, that is, the subjective aspect. It may be considered purely objective. As the current seems to identify the "general" nature of the norm in terms of its own content, without considering the context and, mainly, without comparing it with other norms, this current suggests an absolute character.

This much clarified, it is necessary to present other aspects, for a fuller understanding. This current also maintains that, as the Constitution is geared towards the people, its text must be interpreted with common, not technical, sense.[6]

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[4] The authors used here to synthesize the traditional current are Eduardo Marcial Ferreira Jardim, Celso Antônio Bandeira de Mello, Diogo de Figueiredo Moreira Neto, Rafael Valim, Marçal Justen Filho, Alice Gonzalez Borges and Lúcia Valle Figueiredo, it is worth mentioning that such authors also refer to others who have studied the subject. The consulted works are throughout the text and in the bibliographic references.

[5] MAXIMILIANO, Carlos. *Hermenêutica e aplicação do direito*. 20. ed. Rio de Janeiro: Forense, 2011. p. 204.

[6] JARDIM, Eduardo Marcial Ferreira. Normas gerais de direito financeiro. In: CAMPILONGO, Celso Fernandes; GONZAGA, Alvaro de Azevedo; FREIRE, André Luiz (Coord.). *Enciclopédia jurídica da PUC-SP*. Tomo: Direito tributário. Coordenação de Paulo de Barros Carvalho, Maria Leonor Leite Vieira e Robson Maia Lins. São Paulo: Pontifícia Universidade Católica de São Paulo, 2017. Available at: https://enciclopediajuridica.pucsp.br/verbete/307/edicao-1/normas-gerais-de-direito-financeiro. Accessed on: 27 July 2021.

The common meaning of the word "general", in this current, is generic or without detail. Thus, the intent of the constituent would be to delimit the competence of the Union to establish only generic norms, principles or guidelines, that is, without going into details.[7]

It is also argued that, in addition to the generic character, the general norms also represent a "defensive floor" or "minimum defense standards of the public interest".[8]

Still, there is a more sophisticated construction which, based on the federative and constitutional distribution of competences, demonstrates the distinction between the exclusive legislative competence of art. 22 and the concurrent competence of art. 24 of the Constitution. According to this construction, finalistic or external competences are distributed or shared between federal entities. Internal or instrumental competences that all entities possess may suffer conditioning or exceptional limitation. This limitation on the faculty of self-organization would be allowed when constitutionally authorized, as would occur in items IX (transport), XXI (operation of the military service), XXIV (education) and XXVII (public contracts) of art. 22 of the Constitution. As the competence to self-organize would be inherent in each entity, the interpretation of what would be a general rule should be restricted, since the limitation of the competence of the local entities would be exceptional, and exceptional norms should be interpreted in a restricted way.[9]

Based on the text of the Constitution, where the provision of norms is present only in item XXI (operation of the military service) and item XXVII (public contracts) of art. 22, some contend this is one more argument, in the sense that the constituent would effectively have the intention of limiting the exclusive competence of the Union to deal with public contracts, that it is not incumbent upon it to invade the competence of other entities.[10]

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7 Ibid.; BANDEIRA DE MELLO, Celso Antônio. *Curso de direito administrativo*. 35. ed. São Paulo: Malheiros; JusPodivm, 2021. p. 437.

8 Id. O conceito de normas gerais no direito constitucional brasileiro. *Interesse Público — IP*, Belo Horizonte, ano 13, n. 66, mar./abr. 2011. Available at: https://www.editoraforum.com.br/wp-content/uploads/2014/07/artigo-bandeira-mello.pdf. Accessed on: 16 July 2021; Id, *Curso de direito administrativo*, op. cit., p. 437.

9 MOREIRA NETO, Diogo de Figueiredo. Licitações e contratos administrativos — observações para hoje e para amanhã. *Revista de Direito Administrativo*, Rio de Janeiro, v. 189, p. 39-57, 1. jul. 1992; VALIM, Rafael. Normas gerais — sentido e alcance — ouvidorias. *Revista Trimestral de Direito Público — RTDP*, ano 8, n. 57, p. 202-209, abr./jun. 2014. Available at: https://www.forumconhecimento.com.br/periodico/156/20928/34640. Accessed on: 29 July 2021.

10 JUSTEN FILHO, Marçal. *Comentários à Lei de Licitações e Contratos Administrativos*. São Paulo: RT, 2019. Available at: https://proview.thomsonreuters.com/launchapp/title/rt/codigos/98527100/v18/page/RL-1.2p. RL-1.2.

Based on the distinction between general and special norm, some authors may conduct an analysis of Law no. 8,666, of June 21, 1993, to define whether each would or would not be general.[11] These are the main aspects of the traditional current. To justify the need for an alternative, it is necessary to demonstrate the limitations of each of these arguments.

2.1 The limitations of the traditional current

The argument that "the law does not contain useless words" has no solid basis. It may act as a guide to the interpreter in the face of a standard, insofar as, if the author used a certain word, in principle there is a reason for it. But this premise, which on the theoretical level makes perfect sense, does not find rigor in practice. First, on an empirical level one cannot prevent the use of redundant words. Second, language naturally has a margin of flexibility that allows the elaboration of a text in different ways to fulfill one and the same intention. Third, the judgment as to what is useful or useless does not offer a secure a priori criterion. Texts, for example, may use a word just for emphasis.

Carlos Maximiliano, a renowned figure in the field of hermeneutics, observes that this precept implies a relative presumption.[12]

The doctrine, verifies in practice the common occurrence of useless words, resulting from our human limitations, especially in the complex process of legislative elaboration.[13]

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[11] BORGES, Alice Gonzalez. Normas gerais nas licitações e contratos administrativos: contribuição para a elaboração de uma lei nacional. *Revista de Direito Público — RDP*, São Paulo, n. 96, p. 81-93, out./dez.1990; Diogo de Figueiredo Moreira Neto, *Licitações e contratos administrativos*, op. cit., p. 39-57, FIGUEIREDO, Lúcia Valle. Competências administrativas dos estados e municípios. *Revista de Direito Administrativo*, Rio de Janeiro, v. 207, p. 1-19, jan./mar. 1997. Available at: https://doi.org/10.12660/rda.v207.1997.46934. Accessed on: 27 July 2021.

[12] "308 — However, the precept is not absolute. If an appreciable sense is not collected from a passage for the case, or there is evidence that the words were inadvertently inserted or deceit, the judge does not cling to the dead letter, leans towards what results from the employment of other resources able to give the true reach of the norm. Well Warned Americans formulate the rule of Hermeneutics in these terms: 'One must assign, when necessary, possible, some effect to every word, clause, or sentence. It is not assumed that there are superfluous expressions; as a rule, it is assumed that laws and contracts were drafted with care and neatness; so that they translate the objective of their authors. However, it is possible, and not very rare, the opposite happens; and in the doubt between the letter and the spirit, the latter prevails."

[13] "The fact is that laws have useless words, imperfections, inconsistencies. And that's not something unexpected: it is the result of the democratic process. It's like 210 million Brazilians work together. An approved law is the result of concessions and agreements made by representatives of the people in the House and Senate. The more complex the topic, the more complex the agreements will be and the more difficult it will be to understand the meaning of the approved text. The process that resulted in the new Procurement Law is no exception. After more than seven years of debate, the result is a complex product whose details can be difficult to understanding for those who have not followed its gradual production."

Here, an argument is used in the traditional current that reinforces the possibility of redundant words, at least in relation to the Constitution. This is the argument that the words of the Constitution, representing the will of the people, are intended for the people, and must be read and understood in their common and ordinary sense.[14]

This argument in favor of accessible language is, in a certain way, in principle, contradictory to the argument that the "law does not have useless words". Thus, to say the law does not have useless words, one must start from the premise that the legislator is technical and uses formal rigor when establishing norms.

Admitting, however, that we may reconcile the two arguments, that the words of the Constitution should indeed be interpreted with ordinary and common sense, does not solve the problem raised. This is because, contrary to what the current affirms, the common sense of word "general" does not simply point to what is "generic" or "not specific". To demonstrate this, we refer to the dictionary definition of the concept "general", which, in addition to those senses, entails what is "common to most people or things: […] comprehensive in its totality",[15] "which applies to a set of cases or individuals […] that encompasses all or most of a set of things or people".[16] The fact that these meanings, of a subjective scope, appear before "generic" and "without detailing" seems to indicate, moreover, that they are precisely the most ordinary and common.

Even if it is admitted that the order in which the meaning appears in the dictionary is not enough to determine which should be used, we cannot deny that the idea "common to most people" or "common to a group of people" confers utility to the term "general" used in the constitutional text and thus satisfies those who defend the non-existence of useless words. This utility will be better explored in the topic related to the subjective-objective path.

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[14] "In the present case, the expression is used in its colloquial sense, according to Thomas Cooley, who asserts that, in interpreting the Constitution, it must be presumed that the words are used in their natural and ordinary meaning. A renowned Professor at the University of Michigan in the 1880s he emphasized his understanding, reproducing the authoritative words of the magistrate John Marshall: '[the] framer of the Constitution and the people who adopted it must understand words in their natural meaning and have heeded what they say." (Eduardo Marcial Ferreira Jardim, *Normas gerais de direito financeiro*, op. cit.).

[15] MICHAELIS. *Michaelis dicionário brasileiro da língua portuguesa*. São Paulo: Melhoramentos, 2021. Available at: https://michaelis.uol.com.br/moderno-portugues/. Accessed on: 27 July 2021.

[16] HOUAISS, Antônio. *Houaiss dicionário da língua portuguesa*. Dicionário eletrônico Houaiss. V. 1.0. Editora Objetiva, 2004.

Continuing the analysis of the traditional current, we arrive at an effectively insurmountable point: when defending the term "general" means "generic" or "without detail", two alternatives follow: if it is not possible to define generic, then this current is, in a way, useless, as it will not serve to assist in the application of the constitutional norm; on the other hand, if it is possible to define the scope of the "general", then the traditional current is ineffective, as it does not present a clear and precise criterion that allows application to concrete cases. The attempt to define "general norm" as a "principled norm" or as a "guideline" does not solve the issue, as it tries to tackle the vagueness and abstraction of the first expression using other loose expressions, without legal certainty, undermining practical application.

The problem is that the concept of "general" refers to a judgment of a relationship between objects, not a single object — "general" vs. "specific" — so that the distinction is only possible if a general object is opposed to a particular object. In other words, a norm can only be considered general if it is compared with a standard of a specific character. But the peculiarity is that the generality or specificity is the result of the comparison, i.e., that characteristic only appears after the comparison and not before it. There is no abstract hypothetical set that contains admissible generic terms once the elements of the general norm have been collected, just as there is no set of elements that would be specific. Generality and specificity are dynamic and not static.

Tércio Sampaio Ferraz Júnior captures this in his analysis of the general norms of article 24 of the Constitution, attesting that as it is a logically, correlative term, general is only defined in respect of its opposite and vice versa.[17]

This notion of a comparison or confrontation between two elements reflects the Aristotelian method of definition in which an object is taken, framed in a category or genre, then detailed in terms of its specific characteristic or identity, separating it from the other species in the same genus.[18] Aristotle,

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[17] FERRAZ JÚNIOR, Tércio Sampaio. Normas gerais e competência concorrente. Uma exegese do art. 24 da Constituição Federal. *Revista da Faculdade de Direito, Universidade de São Paulo*, São Paulo, v. 90, p. 245, 1995. Available at: https://www.revistas.usp.br/rfdusp/article/view/67296. Accessed on: 13 Aug. 2021.

[18] ARISTOTLE. *Metaphysics*. Tradução de W. D. Ross. Available at: http://www.documentacatholicaomnia.eu/03d/-384_-322,_Aristoteles,_13_Metaphysics,_EN.pdf. Accessed on: 27 Jul. 2021. Livro Z, cap. 12; id. *The metaphysics of Aristotle translated from the Greek*. Por Thomas Taylor. Londres, 1801. Available at: https://warburg.sas.ac.uk/pdf/akh237b32590817.pdf. Accessed on: 27 July 2021 (In the edition Livro Z appears as Livro VII, but the chapter is the same).

indeed, faced the same issue, that "the genus absolutely does not exist without the species that compose it".[19]

Applying these ideas to issue of the present study, it can be argued that without the simultaneous existence of a general norm and a respective specific rule, it cannot be said that the first is general and the second specific — not, at least, in the sense of a "generic norm" that the traditional current attributes to it. Note, for example, that the hypothetical norm "it is forbidden to acquire assets" is general in relation to the norm "It is forbidden to acquire movable property". But the norm "it is forbidden to acquire assets", considered in isolation, cannot indicate anything about its generality or specificity. In addition, the specific rule here, "it is forbidden to acquire movable property", can be considered general if compared with "it is forbidden to acquire movable property belonging to foreigners". Even the general rule, "it is forbidden to acquire assets", may be considered specific if there is another overarching idea.

This shows that the generality and specificity necessarily result from a judgment that requires confrontation between at least two norms. Furthermore, as a standard has varying degrees of generality or specificity, it is not possible to determine where it ceases to be specific and becomes general.

In the realm of law there is something similar in the distinction between rules and principles.[20] Making an analogy with mathematics, the application of rules is to discrete reasoning what the application of principles is to continuous reasoning. These are applied in the binary mode of being and not being. The latter are employed in a gradual mode.[21]

It should not be overlooked that, even when comparing two standards, it is possible that one of them is specific in relation to some aspect and general with respect to another. If we take the standards "it is prohibited to do business involving movable property" and "it is prohibited to acquire assets", it is evident that the first norm is more general than the second as to the legal business involved, but the second is more general than the first in relation to

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[19] Aristotle, *Metaphysics*, op. cit., Book Z, chap. 12. For more details on the Aristotelian method, cf. ZINGANO, Marco. Unidade do gênero e outras unidades em Aristóteles: significação focal, relação de consecução, semelhança, analogia. *Analytica*, Rio de Janeiro, v. 17, n. 2, p. 395-432, 2013.

[20] DWORKIN, Ronald. *Levando os princípios a sério*. Tradução de Nelson Boeira. São Paulo: Martins Fontes, 2002; ÁVILA, Humberto. *Teoria dos princípios*. 4. ed. São Paulo: Malheiros, 2005. p. 26-86; SILVA, Virgílio Afonso da. Princípios e regras: mitos e equívocos acerca de uma distinção. *Revista Latino-Americana de Estudos Constitucionais*, Belo Horizonte, n. 1, p. 607-630, jan./jun. 2003. Available at: https://constituicao.direito.usp.br/wp-content/uploads/2003-RLAEC01-Principios_e_regras.pdf. Accessed on: 29 July 2021.

[21] Leandro Sarai, *Contratações públicas sustentáveis*, op. cit., p. 65-66.

the object. This point is raised to show that the general character of a norm can be in its entirety or only in part of it. The traditional current has no way of answering if the norm must be general in its entirety or only in part.

Of course, it was never possible for the legislator to foresee all hypothetical situations.[22] The insistence on apprehending all reality can lead the legislator to establish norms of a more open or generic nature. But this open character can be present both in a general as well as a specific rule.

The idea that the general norm represents a "defensive base" or "minimum standards for the defense of public interest" seems to posit the effect as the cause. In other words, it is clear that the general norms of public contracts have this property, characteristic or effect. But they have this effect precisely because they are general rules, and not the other way around. And the question of whether a norm is general or not remains unresolved.

The search for a solution in the analysis of the federative organization of the Brazilian State does not suggest that the Union's exclusive legislative competence would be restricted or that it should be interpreted restrictively. In fact, the competence must have the scope that the constituent so determined. As Law becomes practice, perhaps only an analysis of concrete cases would allow a definition of these limits, so that one could not determine them without such cases, that is, a priori. Furthermore, the claim that the interpretation must be restrictive leads to the problem of defining what is restrictive and what is not.

A final problem with the traditional theory is the thesis that art. 22, XXVII, of the Constitution, by providing that the Union would have competence to establish a "general rule", would not allow the establishment of a specific rule. The problem here is evidenced by a reductio ad absurdum. Adopting the greater premise that art. 22, XXVII, of the Constitution does not allow the Union to establish a specific rule and the lesser premise that the Union appears in that same device as the addressee of the norms established, we reach the conclusion that the Union could not establish a specific standard, which would be absurd. The conclusion being absurd, another path must be taken, employing different reasoning.

Finally, the argument that exceptions should be interpreted restrictively does not help, as the competence of the Union to legislate on general terms of bidding and public contracting is an express and constitutional rule, not an exception.

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[22] Aristotle observed that "every law is universal, but it is not possible to make a universal statement that is correct with respect to certain particular cases" (ARISTÓTELES. *Ética a Nicômaco*. Tradução de Pietro Nassetti. São Paulo: Martin Claret, 2003. p. 125).

The problems raised here may be solved by opting for the subjective-objective path, as will be seen below.

3. The subjective-objective path

The subjective-objective path is taken as the "general norm" of art. 22, XXVII, of the Constitution, in the sense that the general character would concern, in the first place, its subjective scope, that is, in relation to the subjects or addressees of the norm. The general norm would be that which covers all the addressees indicated therein, "the direct, autarchic and foundational public administration of the Union, States, Federal District and Municipalities", pursuant to the cited constitutional instrument.

Using "general" in this sense serves, first of all, as well as the traditional path, and perhaps even more so, the recommendation of hermeneutics is the constitutional right to adopt the ordinary and common meaning of the words.

Secondly, it confers utility to that term, namely: the word "general" is not only the possibility, capacity or competence to legislate for all entities indicated in the constitutional provision. "General" means that the norm established for these entities must be the same, uniform, homogeneous, i.e., it must be common.

As, naturally, what is common to all tends to be rarer than that which may be specific or peculiar, the subjective-objective still offers as an advantage over the traditional way an automatic limitation of the competence of the Union.

It may seem counterintuitive to say that what is common tends to be rarer than that which is specific, since that which is common, contrary to what is specific, is present in all elements of the set. But this plurality here concerns the number of times the common feature appears and is limited only to the number of elements of the set that share this characteristic. On the other hand, if you take a number of common features, it will be less than the number specific characteristics. This must be so because the branches, by definition, outnumber the trunks. And the more elements of a set are taken, the fewer the characteristics that will be common to all of them.

In addition, insofar as the norm implies cost, responsibility and effort, the Union will encounter an inhibiting element in the exercise of its competence, since, as a rule, any general rule imposed on other entities should also be imposed on itself. So, for example, when predicting the exceptional chances of exemption from bidding, these hypotheses will be applied not only to states and

municipalities, but also itself. This does not, however, prevent the possibility of the Union establishing distinct norms, more flexible or more restrictive for the other entities. An example of more flexible norm is in art. 176 of Law no. 14,133, of 2021, which grants longer period for small municipalities to adopt some of the requirements of law. An example of a more restrictive rule is in §3 of art. 86 of Law no. 14,133, of 2021, which does not allow municipalities to adhere to price registration habits in other municipalities.

The idea here is that different entities should be treated differently with respect to their distinctions or limitations, bearing onuses and bonuses compatible with their peculiarities, i.e., the application of the principle of isonomy to federal entities. In the previous examples of municipalities, if, on the one hand, a smaller size may ease some requirements in relation to them, on the other hand, precisely because tenders in municipalities have less scope and participation, use of registration of municipal prices by other entities was prevented.

In the subjective-objective path, as can be seen, there is no difficulty of distinction between what is general and what is specific. General is the feature of the norm that is common to more than one entity. Note, certain norms can be general and specific at the same time, depending on the perspective used in the approach. To clarify — imagine a rule applicable only to municipalities and states. This same norm will be general in relation to both municipalities and states, in the sense that it will be common, the same norm for both, and it will be specific in the sense that it will not be applicable to the Union.

The proposal formulated here, taken as a hypothesis later, requires further refinement, to justify calling it not only subjective, but subjective-objective.

3.1 A further enhancement

Establishing that the Union can legislate on tenders and contracts and that the other entities must be subject to such legislation begs a further question — how to reconcile the competence of the Union to legislate on general rules for public procurement with the legislative powers of other political entities, notably the self-administration inherent to the federative form of the State.

It is important to emphasize that this challenge is not exclusive to the subjective-objective path. It is also present in the traditional current. Thus, it does not represent a disadvantage in this regard.

The solution to this challenge involves understanding the political-administrative organization of the Brazilian State. For this, as observed by the then minister Eros Roberto Grau, it should be remembered that "the law is

not interpreted in strips, in pieces, so that the normative text invoked must be interpreted in conjunction with the other constitutional precepts".[23]

The obstacle to the exclusive competence of the Union to legislate on general rules for bidding and public contracting would be the competence of local entities, on account of the federal balance. To be more precise, the question is the definition of the scope of competence of the Union. This is because, in the Federation, in principle, there is no hierarchy between the federated entities. But this absence of hierarchy occurs only in relation to the constitutional text. On the one hand, when the Constitution provides for a common competence among the entities of the Federation without specifying the role of each entity, the absence of hierarchy may be confirmed.[24] On the other hand, when the Constitution provides that a given entity has exclusive competence, subjection to the exercise of that is implied, as in the case of art. 22, XXVII.

In this last situation, the effect of the general norm for bidding and public procurement is to represent a defensive base or minimum standard to be observed. Thus, for example, when art. 75, II, of Law no. 14,133, 2021, provides that procurement bids may be waived for objects of a value up to BRL 50,000.00, this implies the impossibility of local federation entities establishing their own laws to manage bids worth more than R$ 50,000.00, but nothing prevents the same entities from further restricting this limit — for example, deciding the Exemption can only be applied to objects of up to R$ 30,000.00.

The question arises as to whether a state or municipality would effectively be prevented from expanding the limits by local regulation. On the one hand, it can be argued that establishing exemption hypotheses is within the scope of competence of the Union to legislate on tenders and contracts. But the situation gets complicated when the norm established by the Union in some way restricts the management of public assets of federative entities by their holders. This situation led to the Direct Action of Unconstitutionality no. 927/DF vis-à-vis Law no. 8,666, 1993, notably art. 17, which establishes some restrictions applicable to the disposal of public assets. In terms of the precautionary measure, the Court conferred interpretation according to "art. 17, I, 'b' (donation of immovable property) and art. 17, II, 'b' (exchange of movable property), to clarify that the instrument is applicable within the

[23] BRASIL. Supremo Tribunal Federal. Pet 3089. Rel. min. Eros Roberto Grau. j. 28 out. 2004.
[24] BRASIL, Supremo Tribunal Federal, Segunda Turma. Rcl 45319 MC-AgR, relator min. Ricardo Lewandowski, j. 15 mar. 2021.

scope of the Federal Union only". The same "understanding in relation to art. 17, I, 'c' and par. 1. of art. 17 can be seen". [25]

Apparently, however, both the position adopted by the author of the ADI 927 and the STF seem to have ignored a more satisfactory explanation. It was understood that the law would have determined that the donations and exchanges of public assets could only be made in relation to other public entities. Based on this premise, the STF concluded this limitation could only be applicable to the Union, precluding other federal entities managing their own assets.

However, as the instruments are questioned in the list of hypotheses for exemption from bidding, Law no. 8,666, 1993, also allows the interpretation that the intention of the legislation was only to establish that the bidding waiver would only occur in the aforementioned cases, that is, when the recipient of assets was another public entity. The law would not have prohibited the donation or exchange of private entities. Thus, if the recipient was not a public entity, there would be a need to bid.[26]

If Law no. 8,666, of 1993, had effectively prohibited states and municipalities making donations of public assets to individuals, this prohibition would, in principle, go beyond, the area of bidding and public contracting. Indeed, it is

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[25] The original wording of these provisions was: "Art. 17. Disposal of Public Administration assets, subject to the existence of justified public interest, shall be preceded by assessment and will comply with the following rules: I — when immovable, it will depend on authorization by legislation for bodies of direct administration, self-regulating entities and foundations, and, all, including parastatal entities, will depend on prior evaluation and tenders, waived in the following cases: […] b) donation, allowed exclusively for another body or entity of the Public Administration, of any sphere of government; c) exchange, for another property that meets the requirements contained in item X of art. 24 of this Law; […] II — when movable, it will depend on prior evaluation and bidding, waived in the following cases: […] b) exchange, allowed exclusively between organs and entities of public administration; […] §1 The properties donated based on item 'b', once the reasons that justified its donation no longer apply, will revert to the equity of the donating legal entity, its alienation by the beneficiary being prohibited".

[26] The possibility of donations cannot be posited a priori. It will depend on the analysis of a concrete case, two examples of which will make clear. Imagine a situation, for instance, in which a municipality donates public land to some citizens whose homes and land were destroyed by a natural tragedy or the collapse of a dam. Or take a situation where the municipality donates public land to the mayor's son to set up a business. The first case probably would have public support. The second case would be, to say the least, suspect. Both involve the application of principles, which are notably republican. In addition, a law entailing, as foreseen, that another law is necessary for the donation is somewhat irregular. On the one hand, it is useless, since, serving the public good, it is essential that the will of the holder is clear in terms of the disposal of the asset, which can only be done by law. On the other hand, it is also useless because the law that will be enacted to authorize the disposal will prevail over the previous law, so that no conditions will exist.

clear that hiring usually involves some asset. But that cannot mean that the competence of the Union can reach the point of annulling the competence of local entities to manage their assets, an indispensable component of fulfilling constitutional purposes.[27]

Thus, the case indicates that the criterion for defining whether a standard is or is not within the scope of competence of the Union lies in the definition of what would be "public tenders and contracting" and not in the definition of "general rules". That criterion can help both the traditional and the subjective-objective current.

There may, however, be cases where an additional difficulty arises. These could be divided, in principle, into two groups: a) there are doubt as to whether or not the norm is framed as a norm in bidding and public contracting; and b) although the norm is framed as a rule in public procurement, there is doubt as to sufficient justification for departure from the general norm.

In case of the first group, in principle, when in doubt, a decision is made in favor of competence of the Union, since the norms exist precisely to resolve conflicts. This orientation is reinforced by the fact that the sole paragraph of art. 22 of the Constitution provides that "a supplementary law may authorize the States to legislate on specific issues relating to the matters listed in this article". This reinforcement occurs because, in the absence of authorization, not even specific matters may be dealt with by the states, according to the intention of the original constituent.

In the case of the second group, one must question a separate standardization by the local entity to remove the general rule. Put another way, as a rule, the regulations issued by the Union on bidding and contracting must be respected by local entities, except for hypotheses that justify different and specific treatment. Take the example of art. 7 of Law no. 14,133, of 2021, as to designation for the performance of functions essential to the execution of the law, preferably public office holders. In this case, clearly, the local norm prevails, where it envisages, for example, the possibility for the local entity establishing a specific law, such as, instead of providing that the nominee is preferably occupying an effective position, that they necessarily be the holder of such a (stable) position. It can be said, therefore, that peculiarities that allow adoption of specific solutions to the detriment of the norm must be analyzed in view of a final context. The interpreter needs to analyze the

[27] SARAI, Leandro. Notas gerais e críticas sobre o regime dos bens públicos. *BDA*, São Paulo, v. 6, p. 664-682, 2012.

content in this context. From a teleological perspective, the distinction can relate, for example, to the prevailing interest in the federative organization.[28]

There will be cases, however, in which the general rule will not have applicability in the particular situation, where the legislator has not covered a hypothesis. Take, for example, the provisions of item III of art. 7 of Law no. 14,133, 2021.[29] which prohibits the indication of relatives of bidders or contractors acting in the hiring procedure. Imagine a scenario where a small municipality does not have anyone on its staff who can be nominated. It cannot be accepted that the entity ceases to contract according to the presumption that such a nomination would be inappropriate.[30] In cases like this there will be justification for a differentiated treatment that may characterize a hypothesis of non-incidence. As the case may be, depending on the degree of legal uncertainty, the local entity may enact a specific law to deal with the peculiarity that separates it from the general norm. It should be noted that this situation is so particular that the sole paragraph of art. 22 does not address the possibility of authorization. Incidentally, considering that municipalities also bid and contract, the silence of the text is eloquent in this regard. This is because the hypothesis of authorization is due to regional peculiarities, justifying different treatment, not just of a single state or municipality, but different regions, so that the norms established by the local entities would continue to be general, while aimed at specific entities.

Finally, it is possible that federal law contains national and specific rules for the Union. See, for example, §5 of art. 1 of Law no. 14,133, 2021, which deals with the management of the country's international reserves, a matter of exclusive competence of the Union.

Unlike what sustains the traditional current, and here is a subtle difference, the generality is not in the content of the text, but stems from constitutional competence. If the norm is established by the Union and provides for bidding and public contracting, it is assumed that this is a general rule, whose terms will need to be observed by local entities. Considering it is a general rule, only

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[28] Tércio Sampaio Ferraz Júnior, *Normas gerais e competência concorrente*, op. cit., p.249.

[29] "Art. 7º It is the responsibility of the maximum authority of the body or entity, on whom the administrative, organizational norms rest, to promote management by competence and designate public officials for the performance of essential functions for the execution of this Law, fulfilling the following requirements: […] III — it may not be a spouse or partner administrative contractors nor have a kinship bond, up to three levels removed, or share connections of a technical, commercial, economic, financial, labor or civil nature."

[30] SARAI, Leandro. Comentários ao art. 7º. In: SARAI, Leandro. *Tratado da nova lei de licitações e contratos administrativos:* Lei nº 14.133/2021 comentada por advogados públicos. Salvador: JusPodivm, 2021. p. 263.

then will there be a parameter for controlling the validity of the local specific standards. But this control will necessarily demand a comparison between norms, something inherent to the proposal formulated here.

There will remain, it is true, a field of interpretative divergence, but that is proper and natural to any norm, and the solution occurs through the standardization instruments of jurisprudence. Here is another interesting aspect of the proposal formulated in this article: the general character of the national norm lies both in its subjective scope, that is, in representing a norm common to all entities, but also in its objective effectiveness, since the content of the norm will bind the other entities, as a defensive limit vis-a-vis public interest, but without harming, as seen, the peculiar situations that justify the non-applicability of the general rule.

With this criterion in mind and the two paths analyzed, we now consider an empirical practical test.

4. Empirical practical test

The norm is not the written text,[31] but the interpretation that is made of it.[32] An empirical test means how the elements of physical reality were considered in the application of a standard. The practical in terms of analyzing how real cases were dealt with by the Judiciary, specifically the STF.

The law has the practical purpose of organizing society. This requires criteria for solving conflicts that may arise, from the coexistence of the different interests of the members of society.

Thus, this end must be sought not only in the norm, but in its application. The test seeks to determine which of the paths — the traditional or the subjective-objective — offers the best solution for the real-world cases.

As this test will may provide the answer, each path is posited as a mere hypothesis, even though, even though theoretically, the traditional path is clearly refutable, as seen earlier.

We now turn to an analysis of some cases involving the concept of "general standards" in the STF.

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[31] "Therefore, the text constitutes the first unavoidable step of any hermeneutic understanding, the starting point for all communicational exchange. Without the text, the interpreter has no material on which to base his actions. However, the text itself, without practical interpretation, tells us nothing, as it is only a set of signs and syntactic constructions that lack realization." (CABRAL, Flávio Garcia. *O conteúdo jurídico da eficiência administrativa*. Belo Horizonte: Fórum, 2019. p. 56).

[32] Humberto Ávila, *Teoria dos princípios*, op. cit., p. 22.

4.1 ADI 4,658[33]

The summary of this judgment is:

> It is beyond the competence of the Union to legislate on general bidding norms, a rule that provides for the bidding procedure to be disposal for acquisition by a legal entity governed by domestic law, of goods or services provided by a body or entity that integrates the Public Administration, and that has been created specifically for this specific purpose, without the limitation period established by Law 8,666/1993 for this hypothesis of a bidding waiver.

In this case, Law no. 8,666, of 1993, provides in art. 24, VIII, that this bidding waiver hypothesis would only apply if the contract had been created before the enactment of the law.[34] The state norm, by removing the time limit, ended up expanding the hypotheses of application of this bidding waiver. As bidding tends to enable greater participation of those interested in contracting with management, it tends to be, in principle, the preferable method of hiring, as it better meets the republican principle.

The constitutional text itself, however, attentive to the hypotheses in that this principle would not be better served by the bidding procedure, authorized the legislator to exhaustively establish the exceptions.

By establishing such exceptions, the general norm of the Union works as a defensive base to be respected by the other entities, so they cannot extend the hypotheses provided for in the general law, although they may extend the established restriction, when justified.

But it should be noted that in the judgment the STF did not define what would be a general standard. Simply performed a comparison of the local with the federal norm, met with divergence, determining the prevalence of the norm federal.[35]

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[33] Rel. min. Edson Fachin, j. 25-10-2019, Plenário, *DJE* de 11-11-2019.

[34] This hypothesis was reproduced in art. 75, IX, of Law no. 14,133, 2021, but without a time limit.

[35] Curiously, there are cases, such as the present one, where in compares laws, the STF concludes that one is unconstitutional, and even states that its competence is restricted to analyzing the validity of a law in relation to the Constitution, so that the clash between laws would is an infra-constitutional conflict beyond its competence, as any unconstitutionality would be indirect or reflexive: "REPRESENTATION OF UNCONSTITUTIONALITY — MEMBER STATES — ADEQUACY. Constitutional authorization — article 125, §2º, of the Federal Constitution - is bound by state or municipal law to the Constitution, meaning the legal impossibility of a request in which the conflict of the norm with federal law is verified" (STF, Pleno, RE 251470, rapporteur. Marco Aurélio, j. 24 May 2000). As it is not the object of the article, this aspect will not be covered in depth here.

If the traditional criterion were adopted, in principle, there would be no comparison between norms, because, as seen, this current seems to maintain it is possible to find the characteristic of generality in the norm alone. However, if this were actually possible, it would be possible to check whether a norm is special without any comparison with other standards. Interestingly, in comparison between the two norms it was revealed that the state norm would be more generic that of the Union, as it allowed a greater number of waiver cases. This finding, as can be seen, is only possible by comparing the norms. As the state norm is more generic than the Union, the traditional current could, in theory, maintain that the state norm would be invalid as the competence to establish generic norms belongs to the latter. However, on the other hand, still from the perspective of the traditional current, it may also be said that the Union norm is invalid as it is specific in relation to the state norm and its competence should be restricted to general rules.

As can be seen, the STF solution adopted the subjective-objective criterion, that is, the same general rule of Law no. 8,666, 1993, must be respected by all entities and should work as a defensive base, so that distinctions present in the local regulations are only possible in this respect.

4.2 ADI 4,748[36]

The decision in this case was as follows:

> When determining the government acquires a minimum of 65% (sixty-eight five percent) of assets and services defined in a price registration system, State law invaded the exclusive competence of the Union […]. Paragraph 4 of art. 15 of Law 8,666/1993 provides that "the existence of registered prices does not oblige the Administration to sign the contracts that may arise from them […]"

Again, no general definition was mentioned in the sense the traditional current defends. And this case is peculiar, since the comparison between the norms does not allow a judgment of generality and specificity. The comparison results in an opposing judgment, as, while the national norm provides that the acquisition of items is not mandatory for the price registration minutes,

[36] Rel. min. Cármen Lúcia, j. 11-9-2019, Plenário, *DJE* de 27-9-2019.

the local norm provides for this obligation. According to this current there is no way to solve this case, because the norms, neither alone or comparatively, make it possible to determine which is general and which specific, taking into account the content of each.

In the subjective-objective model, on the other hand, the case is easily solved. Both local and national standards address public tenders, but the local must respect the national, as reasons for departing from the general rule are not justified in concrete cases.

4.3 ADI 1,746[37]

Summary:

> According to the provisions of art. 22, XXVII, of the CF, it is incumbent upon the Union to regulate general rules on public bidding and contracting, including termination of the administrative contract and the appropriate compensation.

In this case, the local entity issued a state norm providing for a deadline for payment of compensation to the individual in the event of termination of the public service concession contract. The STF again did not clarify why the national norm would be general, but used as an argument the fact that the established by the Union is general. According to the Court, this norm would comprise "the list of rules to set guidelines, honoring the principles of Public Administration […]".

But, if the Union norm is general, the local norm can be considered, in a certain way, special, insofar as it brings a condition to the form of indemnity payment that is not included in the national norm. But the local standard was not considered invalid because it is special, but because it differs from the national one and the difference was considered incompatible.

Although apparently the STF has used the traditional argument that the general norm is that which sets guidelines, it was, unequivocally, necessary to employ the subjective-objective model to effectively solve the issue, i.e., the general rule must be respected by the local entity when there is no justification for distinct treatment.

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[37] Rel. min. Marco Aurélio, j. 18-9-2014, Plenário, *DJE* de 13-11-2014.

4.4 ADI 3,670[38]

Summary:

> Direct action of unconstitutionality: District Law 3,705, 21-11-2005, which creates restrictions on companies that discriminate in the hiring of labor: declared unconstitutional. An offense against the exclusive competence of the Union to legislate on general rules for bidding and administrative contracting, in all modalities, for direct public administrations, self-regulated and all entities of the Federation (CF, art. 22, XXVII) and to provide on labor law and labor inspection (CF, art. 21, XXIV, and art. 22, I).

In this case, the local norm prohibited the contracting of companies that practiced discrimination against job applicants registered with credit protection services.

Again, the STF stated that the national norm would have the character of a general norm. And, interestingly, it considered that the local norm would also be general and, for that reason, be invalid.

In fact, in a way, the local norm can be considered specific in relation to the general rule, as it inserts a restriction on contracting which does not exist in the national standard.

Indeed, what happened, again, was the assertion that the national norm prevails over the local and that there was no justification in the concrete case for differentiation from the local norm. So, apparently, the solution lay in the subjective-objective model.

4.5 RE 547,063[39]

Summary:

> […] The requirement by normative acts of the Court on the prior referral of the edict, without any request, invades the legislative competence bestowed by the CF, exercised by Federal Law 8,666/1993, which does not contain this requirement.

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[38] Rel. min. Sepúlveda Pertence, j. 2-4-2007, Plenário, *DJ* de 18-5-2007.
[39] Rel. min. Menezes Direito, j. 7-10-2008, 1ª T, *DJE* de 12-12-2008.

In this case, the local norm required prior submission of the public tender to the Court of Accounts, differently from the provisions of §2 of art. 113 of the Law no. 8,666, 1993, according to which the remittance would depend on a request from the Court of Accounts.[40]

The solution lay in the relationship between the local norm and the national law. But it should be noted that, in principle, in this comparison, considering as general the most comprehensive norm, the local one applies, as it allows application to more cases. Despite this, again, the STF simply determined the prevalence of the Union norm, not admitting the difference of the local norm.

The reasoning employed was from the subjective-objective, not the traditional, model.

4.6 RE 815,499 AgR[41]

Summary:

> This Court already established an understanding in the sense that the Union, when establishing Law 9,717/1998, extrapolated the limits of its competence to establish norms on social security matters, attributing to the Ministry of Social Security and Social Assistance administrative activities in the social security bodies of the states, Federal District and the Municipalities and establishing sanctions in the event of non-compliance with the rules contained in that law.[42]

Although the decision does not deal with a general norm for bidding and contracting, it is important because it deals with the concept of a general

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[40] "Art. 113. Control of expenses arising from contracts and other instruments governed by this Law will be performed by the competent Court of Accounts, in pertinent legislation, the interested bodies with the Administration responsible for demonstrating the legality and regularity of expenditure and execution, pursuant to the Constitution and without prejudice to the internal control system provided therein. […] §2º The Audit Courts and the member bodies of the internal control system may request for examination, until the business day immediately prior to the date of receipt of proposals, with the copy of the bidding notice already published, obliging the bodies or entities of the Administration concerned to adopt pertinent corrective measures that, as a result of this examination, are determined".

[41] Rel. min. Ricardo Lewandowski, j. 9-9-2014, 2ª T, *DJE* de 18-9-2014.

[42] Cf. também a ACO 830-PR, Pleno, rel. min. Marco Aurélio, Redator para acórdão min. Alexandre de Moraes, j. 17 fev. 2021; e a ACO 2.821-AgR, Pleno, rel. min. Ricardo Lewandowski, *DJe* de 22 mar. 2018.

norm. It would appear the most significant, because in all the others the norm established by Union prevailed, but here the local rule took priority.

It is also possible to notice in this judgment that it is limited to affirming that the national norm would not be a "general norm". It only adds "not limited to regulations of a general nature concerning the organization and functioning of the entities' own social security regimes" and that "imposing rules of specific duties were defined to be complied with by the entities responsible for the administration of the social security regimes". In fact, at no time did the STF clarify when a norm ceases to be general and becomes specific. Without the criterion, control is impossible. But it is not possible, in principle, to establish this delimitation.

Here too, only the subjective-objective model solves the question, as only it considers the subjective aspect and the objective aspect, in addition to establishing criteria for cases of conflict.

In this case, it would be enough to verify if the norm effectively deals with social security and, furthermore, whether there would be justification for the existence of a distinct local rule. The issue is controversial, so much so that in ACO 830-PR, which dealt with the same topic, the judgment was by majority. But the subjective-objective current continues to offer a solution.

5. Final considerations

If Law lends itself to organizing the functioning of society, the role needs to be thought through carefully, from establishing the standards to implementing them. Application of norms is an essential tool for the realization of the purposes of law.

This study, then, addressed the question of how to define what would be "general rules for bidding and contracting", an expression contained in item XXVII of art. 22 of the Constitution.

Using the hypothetical-deductive method, two hypotheses are considered: the first represented by the so-called traditional current, which considers that it is possible to verify whether a norm is general simply by analyzing its own terms, and that this generality consist in the fact that its content encompasses only "generic aspects", i.e., it would not cover specificities. This hypothesis, already theoretical, presented a series of limitations, such as the impossibility of judgment of an isolated norm to determine what would be general or not, besides the fact that the expressions

"generic aspects, principles or guidelines" do not lend themselves to the practical operation demanded by the norm.

The second hypothesis, called subjective-objective, considers the range of addressees of the norm and the fact that the expression "general" means uniformity of application among such recipients. This proposal is improved by the objective aspect, but under a differentiated approach. First, generality results from a judgment between norms and not an assessment of an isolated norm. Second, the previous establishment of the norm is necessary so that it becomes a parameter to be observed by other entities in terms of specific norms. Third, the priority is to define what would be "bidding and contracting" instead of defining "general". Fourth, recognizing that, in case of doubt, competence of the Union prevails, in order to give maximum effectiveness to the constitutional norm.

Fifth, establishing that local norms count in the hypotheses of inapplicability of the general rule, due to peculiarities that would justify non-incidence.

Practical empirical tests revealed that the second hypothesis was more adequate to the question posed.

The interpretation presented here therefore better resolves the arguments involving the concept of "general norm for bidding and contracting" than the traditional current, without pretence, however, to exclusivity and absoluteness.

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