The efficiency principle at the Supreme Court's case law*

O princípio da eficiência na jurisprudência do Brazilian Federal Supreme Court

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ABSTRACT

The Constitutional Amendment No. 19/1998 inserted efficiency as one of the basic principles of the direct and indirect public administration, along legality, impersonality, morality and publicity. This article investigates the legal content of the efficiency principle as interpreted and applied by the Brazilian Federal Supreme Court, the official interpreter of the Constitution. The quantitative analysis covered all cases from 1950 to 4/30/2017 and identified 186 cases where efficiency was mentioned by

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the Court, but only in seven cases it was actually used as reasoning for the ruling. The qualitative analysis of these seven cases indicates that the efficiency principle: (i) is different than the other public administration principles; (ii) constitutes law and can be applied directly; (iii) can be used to control discretionary power of public officials; and (iv) the legal concept of efficiency coincides with the economic definition of productive efficiency, even though some conceptual imprecision may be identified.

KEYWORDS

Efficiency principle — Federal Constitution — public administration — case law — Brazilian Federal Supreme Court

RESUMO

A Emenda Constitucional nº 19/1998 introduziu a eficiência como um dos princípios basilares da administração pública direta e indireta, além da legalidade, impessoalidade, moralidade e publicidade. Este artigo investiga o conteúdo normativo desse princípio tal qual interpretado e aplicado pelo Supremo Tribunal Federal (STF), o intérprete oficial da Constituição. A análise quantitativa da jurisprudência de 1950 até 30/4/2017 identificou 186 casos em que o termo eficiência foi utilizado pela Corte, e em apenas sete casos (3,76%) o princípio da eficiência foi utilizado como fundamento. A análise qualitativa desses sete casos mostra que o princípio da eficiência: (i) não se confunde com os demais princípios da administração pública; (ii) possui valor normativo próprio e autônomo; (iii) pode ser usado para controlar a discricionariedade administrativa; e (iv) o conceito jurídico de eficiência coincide com a definição econômica de eficiência produtiva na prática, ainda que haja algumas imprecisões conceituais na casuística.

PALAVRAS-CHAVE

Princípio da eficiência — Constituição Federal — administração pública — jurisprudência — STF

1. Introduction

On June 4, 1998, when Brazil's new Constitution had been in effect for almost 10 years, Congress exercised its competence as a derived constituent

entity to amend Article 37 by adding "efficiency" as one of the general principles applicable to the federal public administration, in addition to legality, impersonality, morality and publicity.

Although often used by lawyers in a non-technical sense,[1] we believe the legal content of the concept of efficiency is no different from that of the economic concept, which is the same as in other sciences.[2] Although "efficiency" may have more than one meaning from a technical point of view, the concept of "productive efficiency" will be used for this article.

Productive efficiency relates to optimum use of resources, or to producing more *(output*) from the same resources *(input*) or to produce the same from fewer resources. This is being efficient from the productive point of view. The idea is always related to providing the maximum product with the resources and technology available, and therefore refers to the elimination of waste (produce more from the same amount of resources or produce the same using fewer resources).

The Federal Constitution (FC) requires the public administration to act efficiently and recognizes that any waste of public resources is socially undesirable. Although the efficiency principle only became positive with Constitutional Amendment 19/1998 (EC 19/1998), the Constitution has since its inception explicitly required the Legislative, Executive and Judiciary branches to perform their duties efficiently and has distinguished efficiency from effectiveness for constitutional and control purposes.[3] For the same reason, part of legal doctrine has recognized efficiency as an implicit principle even before it was positivized,[4]

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1 Jurists have repeatedly confounded the concepts of efficiency, efficacy and effectiveness. This problem is found in books such as Bercovici's, in which efficiency is associated with obtaining results. BERCOVICI, G. *Constituição econômica e desenvolvimento:* uma leitura a partir da Constituição de 1988. São Paulo: Malheiros, 2005. pg. 83.

2 In this respect, Silva clearly states his understanding of efficiency as an economic rather than legal category. SILVA, J. A. D. *Curso de direito constitucional positivo.* 16th ed. São Paulo: Malheiros, 1999. pg. 651. Bobbio corroborates this idea by stating that efficiency is a technical rather than moral judgment. BOBBIO, N. *Teoria geral da política:* a filosofia política e as lições do clássicos. Rio de Janeiro: Campus, 2000. pg. 201.

3 Art. 74. The Legislative, Executive and Judiciary Powers shall maintain an integrated internal control system **for the purpose of:**

[...]

II — showing legality and **evaluating results as to the effectiveness and efficiency of the budgetary,** financial and property or asset management by the entities of the federal administration, as well as of the use of public funds by private-law entities.

4 Tácito stated that control over the public administration should obey both the aspect of lawfulness and efficiency, which, he said, would "aim to improve administrative institutions and make them more productive." TÁCITO, C. O controle da administração e a nova Constituição do Brasil. *Revista de Direito Administrativo,* Rio de Janeiro, v. 90, Jan. 1967. pg. 24. Available at: <http://

which is perfectly in line with Brazil's normative tradition as per Decree-law No. 200/1967.[5]

If administrative efficiency was already set forth by the Constitution and was a principle from the historical point of view, why then did the derived constituent body endeavor to make it even more explicit? There is a simple answer: the Brazilian State's need for administrative reform. EC 19/1998 was one of the instruments drafted for the Administrative Reform undertaken by the first Fernando Henrique Cardoso administration and detailed in the master plan for State apparatus reform approved in November 1995.

The master plan stated that "State reform should be understood in the context of redefining the role of the State"[6] and would entail, among other changes, fiscal adjustment, social security and pension reform, more "managerial" public administration "on modern rational bases," "based on current concepts of administration and efficiency, focused on controlling results and decentralized to reach citizens."[7]

The *master plan* showed a clear concern to augment governance and the State's capacity to implement public policies, focusing on quality and low-cost public services. The citizen was to be seen as a "privileged client of services provided by the State,"[8] reinforcing the idea of managerial culture in the context of the administration.

The efficiency concept, which permeates the entire Master Plan, was used in the sense of "the need to reduce costs and raise quality of services for the citizen as beneficiary."[9] In other words, efficiency would be related to the "pursuit of an optimal ratio between quality and costs of services available to the public."[10] Therefore, the efficiency principle was positively stated by EC

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bibliotecadigital.fgv.br/ojs/index. php/rda/article/view/30641>. Accessed on: Nov. 19, 2016.

5 Article 26. In relation to the Indirect Administration, ministerial oversight shall basically aim to ensure: [...]

III — Administrative efficiency.

[...]

Art. 116. The Civil Personnel Administrative Department (DASP) shall:

I — Manage matters concerning the civilian personnel of the Federative Republic and take measures to further their abilities and efficiency.

6 BRAZIL. Presidency of the Republic. Chamber of State Reform. *Plano diretor da reforma do aparelho do Estado*. Brasília, 1995. pg. 17. Available at: <www.biblioteca.presidencia.gov.br>. Accessed on: Jan. 25, 2017.

7 Ibid., pg. 10.

8 Ibid.

9 Ibid., pg. 21.

10 Ibid., pg. 54.

No. 19/1998 in order to make clear that the Brazilian State should be more efficient and produce more and better public services at lower costs (productive efficiency). These were the motivations and the theoretical framework used by *the Master Plan for Reform of the State Apparatus* and the grounds for the proposed constitutional amendment that the Executive Branch submitted to Congress in Message No. 886 of August 23, 1995, subsequently enacted as EC No. 19/1998.

The Interministerial Statement of Reasons No. 49 of August 18, 1995 posited higher levels of efficiency for the State as essential to get over the fiscal crisis and reinvigorate its ability to manage, formulate and implement public policies. Adding the efficiency principle to the constitution was expressly justified by the need for the State apparatus "to show that it is capable of generating more benefits in the form of services for society from the available resources, thus showing respect for taxpaying citizens." By voting to add the efficiency principle to the constitution, the constituent assembly sought to provide more public services for citizens and enhance their quality in the context of scarce resources and unlimited social needs.

However, although the constituent assembly explicitly started from the productive efficiency concept to inscribe the efficiency principle in the Constitution, there is no guarantee that the Judiciary is applying it in this way to decide cases, since as noted above "once it has been enacted, the law takes on a life of its own."[11] The judiciary enjoys freedom in its approach to positive law and even more so when it comes to principles, a juridical category of indeterminate content that depends on jurisprudential construal to have any practical significance.[12,13] The question to be answered here, then, is: how is the Brazilian Federal Supreme Court articulating the efficiency principle and applying it?

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[11] POLETTI, R. *Introdução ao direito.* 3rd ed. São Paulo: Saraiva, 1996. pg. 288. Mello corroborates this assertion in relation to historical interpretation by highlighting the fact that the Supreme Court attaches greater relevance to a supposed spirit of the law (*mens legis)* than the legislator's intention *(mens legislatoris).* Even though the idea of law having a "spirit" other than the original aim of a legislator is highly questionable. MELLO, P. P. C. *Nos bastidores do Brazilian Federal Supreme Court.* Rio de Janeiro: Forense, 2015. pg. 30.

[12] Mello argues that "legalistic interpretive resources are insufficient to solve a significant part of the problems faced by interpreters of the Constitution, such as the fulfillment of indeterminate legal concepts." P. P. C. Mello, *Nos bastidores do Brazilian Federal Supreme Court,* op. cit., pg. 2. On the same lines, Gico Jr. argues that in the presence of legal indetermination, to avoid *non liquet,* the interpreter has a legal obligation (Article 140/CPC) to attribute meaning to the norm, thus creating law ("[the] judge shall not exempt from deciding under the allegation of a lacuna or obscure meaning in the legal system"). GICO JUNIOR, I. T. Hermenêutica das escolhas e a função legislativa do Judiciário. *Mimeo,* 2017. pg. 2.

[13] In this respect, referring to the indeterminate legal concepts of good faith and negligence, Gico Junior states that their "meanings must be constructed by the judge in the concrete case,"

Our response is structured as follows. In addition to this introduction, section 2 will detail the methodology used to analyze the Brazilian Federal Supreme Court's precedents. Section 3 will present the initial results from a quantitative point of view, which will enable us to identify the most significant group of cases for qualitative analysis in section 4. Our conclusions are then submitted in section 5.

2. Methodology

Although this study is juridical and eminently empirical, the appropriate way to begin is by explicitly stating its epistemological focus and the reasons thereof. We have restricted our universe of investigation to the Brazilian Federal Supreme Court's precedents since the Federal Constitution's Article 102 states that the Supreme Court must enforce the constitution and have the last word in relation to its construal. In addition, as per paragraph 2 of this article, the court's definitive merit decisions on direct actions for declaration of unconstitutionality and declaratory actions for constitutionality have *erga omnes* efficacy and binding effect for the rest of the judiciary and the direct and indirect public administration at federal, state and municipal level.[14]

As a result of these constitutional provisions and other norms stipulated in infra-constitutional procedural legislation,[15] the existence of an Brazilian Federal Supreme Court decision on the matter clearly not only has the power to establish the semantic extension of the efficiency principle, but also to conform the application of this principle by other state bodies, including federal courts and audit courts. In

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adding "these legal provisions do not constitute rules of behavior, but standards of judgment to be construed by the Judiciary."

Due to its semantic indeterminacy, the same reasoning also applies to the efficiency principle. GICO JUNIOR, I. T. O capital jurídico e o ciclo da litigância. *Revista Direito GV,* v.9, pg. 446, Jul./Dec. 2013.

[14] As per Article 2 of Law 11.417/2006, the Brazilian Federal Supreme Court's precedents have binding effect in relation to other entities of the Judiciary and the direct and indirect public administration at federal, state and municipal levels.

[15] Under Article 927 of the New CPC (Law 13.105/2015), not only decisions rendered through concentrated control, but also theses signed with general repercussions began to produce binding effects only for the Judiciary. Note that Article 988, with the wording given by Law no. 13.256/2016, establishes that a claim may be filed to ensure compliance with: i) the Brazilian Federal Supreme Court's binding precedents; ii) Brazilian Federal Supreme Court decisions through concentrated control; and iii) decisions rendered in judgment of an instance of resolution of repetitive demands.

this context, the proposed sample is adequate given the Brazilian Federal Supreme Court's competence and the relevance and impact of its decisions.

Having decided on the entity to be investigated (Brazilian Federal Supreme Court), we used the search engine available on the Court's own website (www.stf.jus.br) to list instances of the term "efficiency" in its judgments. As a temporary sample, we took decisions rendered by the Court from July 6, 1950 through April 30, 2017.[16] The 1950 baseline year was used because it is the earliest covered by the search engine on the Brazilian Federal Supreme Court's website. Moreover, since the efficiency principle was not positively stated until the 1998 Constitution did so, this period of time is more than enough to show any historical evolution of its current use and practice.

Stage 1: establishing universe. Assuming that there could be some previous discussion of the concept of efficiency even before its positivization as a principle of public administration, we decided to use a Boolean[17] search expression using the term "efficiency" rather than "efficiency principle" and found 199 instances of judgments through end-date April 30, 2017. The totality of the universe was then tabulated with the following information: type of case, case number, state of origin, parties, reporting justice, plenum/panel judging, decision (granted, rejected or partly granted), type of decision (unanimous or majority), date of decision and date of publication.

Stage 2: classifying and refining samples. Once the entire universe of cases had been tabulated, we proceeded to perform a preliminary refining of the data for classifying samples, by reading case summaries and searching for the word "efficiency" or expression "efficiency principle" in reports and votes.[18] The samples were then classified using the following criteria: (i) mentioned in summary; (ii) mentioned in votes; (iii) discussed in votes; (iv) differing interpretations; and (v) other concepts related to the notion of "efficiency".

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[16] An important point to emphasize is that, given the Brazilian Federal Supreme Court's practice of not publishing its judgments immediately, there may be more instances later, as happened while writing this article itself. After the data collection staged ended on July 8, 2012, three new instances were detected; although judged during the period analyzed, they were only published afterwards, sometimes almost a year later.

[17] "Boolean" originates from George Boole (1845-64), the self-taught mathematician who first developed an algebraic logic system. Using boolean search operators, such as *"and", "or"* and "no", helps to search databases by filtering results. CRATO, N. *Passeio aleatório pela ciência do dia a dia.* São Paulo: Livraria da Física, 2009. pg. 73-74.

[18] In some cases, older scanned data could not be searched electronically, so judgments were read in full.

After reviewing the universe of 199 cases, 13 false positives were detected in which the word "efficiency" was not found in a judgment. In three of them, the word "deficiency"[19] was found while in one judgment the word "efficiency" appears only as part of the title of a quoted reference,[20] whereas the other nine[21] were probably indexing errors. The universe was then reduced to 186 instances. In this universe, the word "efficiency" appeared in only 20.97% of case summaries, i.e. 39 cases, but the term was used in the main body of a judgment at least once in all cases in the universe.

Having excluded false positives, the samples were analyzed by a preliminary classification of each instance in relation to actual use of the concept of efficiency in the reasons adduced for each case, using the following criteria:

Table 1
Classification of samples by relevance

Category	Criterion
1	At least one vote discusses at least one aspect of the content of the concept of efficiency or efficiency principle.
2	At least one vote uses the concept of efficiency or the efficiency principle as part of reasoning, but no vote discusses its content.
3	The "efficiency principle" is listed along with other principles from the FC's Article 37 but not articulated.
4	At least one vote mentions efficiency or the efficiency principle in a specific instance that is not relevant to the reasoning.

Stage 3: qualitative analysis of the relevant judgments. The third stage consisted of full reading of the judgments classified as relevance 1 and 2 for a more comprehensive and detailed understanding of how the Brazilian Federal Supreme Court would have articulated and employed the concept of efficiency and the efficiency principle in its decisions. The detailed review in this stage allowed for refinement of the classification of cases according to

[19] HC 85691/PE, AGR AI 247810/RS and RHC 53771/PR.
[20] RE 602347/MG
[21] AGR AI 69756/SP, AI 16100/DF, RE 18041/MG, HC 61584/MG, RHC 61703/SC, HC 63250/SP, AGR AI 152282/S, RHC 83990/MG and AGR AI 525336/SP.

their relevance, and cases of relevance were those on which the qualitative analyzes in section 4 below were made.

The results from the stages described above are presented in the following sections.

3. Quantitative analysis of results

A simple Brazilian Federal Supreme Court database search for the term "principle" until April 30, 2017, the cut-off for the study of precedents, showed that there were at least 19,789 judgments mentioning principles. Of these, less than 0.1% (0.094%) contained 186 instances. Even so, almost 20 years after the promulgation of EC 19/1998, the content and boundaries of the efficiency principle have been shown and/or discussed in at least one case.

Based on the data tabulated in stages 2 and 3, we have the following aggregated summary of cases:[22]

Table 2

Overall Summary of Results

Search terms: "efficiency" and/or "efficiency principle"	Yes	No
Terms mentioned in case summary	39	147
Terms mentioned in one or more votes	176	10
There is discussion of the meaning of the terms in votes	0	186
There are differences over the meaning of the terms	0	186

As shown, the word efficiency appears in only 39 case summaries (about 20% of our universe). The small number of instances may be interpreted as a low level of relevance of the concept, in general, for the Brazilian Federal Supreme Court's precedents.

Even more significant, however, is the fact that we did not find one single case in which justices have actually discussed the content of the efficiency principle or held different positions as to its meaning. Our initial expectation was that the principle would have been discussed in at least a few cases, but

[22] For full data, see Annex I.

the data found refuted this expectation. The fact is that although the Brazilian Federal Supreme Court intuitively applied the efficiency principle in its reasoning for some cases (see section 4 below), its legal articulation is still quite non-technical and in some cases contradictory.

The absence of a more technical articulation of the content of the efficiency principle in the Brazilian Federal Supreme Court's cases is reflected in the quantitative data for categories by relevance, as Table 3 shows[23]

Table 3
Results by category

Category	Number of Instances
1	7
2	30
3	19
4	130

It is noteworthy that although the word "efficiency" is found in 100% of the universe of 186 cases examined, the notion of efficiency or the efficiency principle was part of the grounds for the judgment in only about 20% of them: there are only 37 instances classified by relevance as categories 1 or 2.[24] In these 37 instances, efficiency is part of the grounds, but in 30 cases the efficiency principle is only mentioned without any discussion or articulation of its content (category 2). It is, therefore, only a purely rhetorical argument of no practical relevance. On the other hand, the content of the principle was minimally explained in only 3.7% of the cases found, i.e. in only seven judgments. Given the importance of these cases, they will all be analyzed in detail in section 4.

Another point of interest is that all 38 instances before 1998, i.e. before EC 19/1998, were classified in category 4 as not having any conceptual relevance. In these cases, "efficiency" appears occasionally related to the efficiency of the armed forces, the judiciary, or public authorities for example. Note that in 20 of these judgments the indexer was associated with efficiency of defense, and 17 of those decisions were rendered in *habeas corpus* cases or appeals. The 37 judgments rated as categories 1 and 2, i.e. most relevant, are all subsequent

[23] For full data, see Annex II.
[24] For full data, see Annex II.

to 2002 and the 19 judgments classified as category 3 are subsequent to 2000. This shows that the Brazilian Federal Supreme Court did not use the efficiency principle as grounds for its decisions *before 1998*.

In the universe of 186 cases, there were at least 20[25] in which other ideas were associated with the concept of efficiency, which leads us to ask whether the Brazilian Federal Supreme Court justices have a clear notion of what is efficient or if, in practice, they use the term in a non-technical sense associated with other concepts such as economicity (five instances),[26] right to a speedy trial (four instances),[27] simplification,[28] rationalization,[29] flexibility[30] and productivity[31] (two instances each). Despite the use of these accessory notions associated with the word efficiency, in no case has the Brazilian Federal Supreme Court effectively said that the terms are synonymous or defined any relation between them.

Finally, based on quantitative analysis alone, the results allow us to state that although the efficiency principle was recognized by legal doctrine as an implicit principle before EC 19/1998, it was only invoked by the Brazilian Federal Supreme Court after the amendment. Pre-1998 judgments mentioning the term 'efficiency' do so in on occasion without articulating the concept in order to justify their decisions (Category 4).

Moreover, there has to date been no discussion or disagreement between justices in judgments that used the efficiency principle as part of the grounds for their decision. Perhaps for this reason, on the few occasions on which efficiency was used in the reasoning for votes, there is a non-technical or layperson's use of the term in association with several other notions. However, an intuitive view of efficiency as a matter of productive efficiency may be detected from the logic of those decisions, even when articulation is contradictory. These conclusions will be further clarified after a detailed qualitative analysis of the judgments classified as Category 1, which will show that the Brazilian Federal Supreme Court has been striving to apply and articulate the efficiency principle, but as yet is lacking adequate theoretical sophistication.

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25 For full data, see Annex III.
26 ADI 1851/AL, RE 593849/MG, RCL (Cump. Sent) 1728/DF, ADI 1842/RJ and RE 837311/PI.
27 RE 193503/SP, RE 293246/RS, RE 210029/RS, AC ED-ED-ED-AgR 3923/RS.
28 RE 193503/SP and ADI 4333/DF.
29 RE 631240/MG and ADI 3943/DF.
30 RE 789874/DF and ADI 1923/DF.
31 HC 44074/DF (2nd judgment) and Ext. AI 272.

4. Qualitative analysis

This section looks at cases in which the Brazilian Federal Supreme Court's reasoning referred to the efficiency principle with at least some discussion of its content. We shall proceed to a critical analysis of the decisions and attempt to thus derive a legal rule for the efficiency principle that would be applicable in practice. These decisions will be listed in chronological order by date of judgment rather than the date on which an action or appeal was filed.

4.1 ADC No. 12-MC/DF (2006)

On February 2, 2006, the Brazilian Judges Association (AMB), represented by then-attorney Luís Roberto Barroso, filed a Declaratory Action for Constitutionality (ADC) with the Brazilian Federal Supreme Court to declare the constitutionality of Resolution 7/2005 of the National Justice Council (CNJ), which "governs the exercise of positions, jobs and duties by relatives, spouses and partners of judges and civil servants in management and advisory positions in the Judiciary's entities." ADC No. 12 was assigned to the reporting justice Carlos Ayres Britto and its grounds were, in short: (i) the CNJ's jurisdiction to ensure compliance with the FC's Article 37; (ii) the prohibition of nepotism supposedly derived from the principles of impersonality and administrative morality; (iii) the subordination of the public power to the FC; and (iv) non-violation of the principle of separation of powers.

In the context of establishing the extension of the CNJ's regulatory jurisdiction in relation to audit courts (the FC's Article 103-B, § 4, sub. II), the reporting justice stated that the jurisdiction of the former did not exclude that of the latter to ensure "application of the law for oversight of accounting, financial, budgetary and operational matters, and property or assets", in addition to those solidifying the principles of "economicity", *"effectiveness and efficiency"* of their respective managements "(our emphasis, Brazilian Federal Supreme Court, ADC judgment No. 12-MC, page 30). In the context of oversight, therefore, the justice treated efficiency and effectiveness as economic principles, but did not define their proper content.

The reporting justice subsequently endeavors to distinguish the contents of the principles of impersonality, efficiency and equality in cases of nepotism

(Brazilian Federal Supreme Court, ADC judgment No. 12-MC, pg. 33-36) to conclude that — from the point of view of efficiency — it is more difficult to require public servants to show commitment to their work if their employment relations were "practiced... in a context of domestic relations projected on the State's premises or offices", especially lack of objectivity when assessing the work of a relative and the difficulty of punishing one in cases of fault or absence, due to *"parochial* fusion of the domestic or home environment with public space" (Brazilian Federal Supreme Court, Judgment ADC No. 12-MC, page 36). On the other hand, although the principle of morality was different, its violation would follow from a breach of one of the abovementioned three principles (Brazilian Federal Supreme Court, ADC judgment No. 12-MC, pg. 37).

The reporting justice's vote poses a preliminary, almost intuitive notion of the meaning of efficiency from a legal point of view, but it is still a non-technical or layperson's version. If public servants were hired on the basis of nepotism, they might not adequately provide the services for which they were hired, and control and management mechanisms would be weakened by personal relations, therefore hiring would be inefficient and violate the efficiency principle (therefore the prohibition stated in Resolution 7/2005 would be constitutional).

Justice Cezar Peluso admitted that: (i) nepotism "impedes selection of the most competent [applicants]"; (ii) the matter would be "directly related to the efficiency of the public administration"; and (iii) could be "discussed in light of various constitutional principles" (Brazilian Federal Supreme Court, ADC Judgment No. 12, pg. 58) However he decided to analyze the issue from the point of view of the principle of impersonality. But, in doing so, he recognizes his difficulty in articulating the various principles, including the principle of impersonality itself, and surprisingly contradicts the constitutional wording by stating that the efficiency principle is not a principle (Brazilian Federal Supreme Court, ADC Judgment No. 12 MC, pg. 59 and 60), in these words:

> There are theoretical difficulties in conceptualizing and identifying this principle, particularly because of its close ties to, and intimate affinities with, other equally relevant constitutional principles such as legality, morality, equality, impartiality and even **that which the Constitution's Amendment No. 19 calls the efficiency principle — which is not even a principle in my opinion.**

> [However,] the principle of impersonality is related to the notion of efficiency an indispensable condition or requirement for the operational efficiency of the public administration.

Indeed, although discussing the principle of impersonality, Justice Peluso's entire argument expressly uses the idea of efficiency, since public efficiency would require hiring the most competent applicants, those most apt to be more productive for the salary paid, thus delivering better public services. In this respect, our interpretation of Justice Peluso's refusal to recognize the principle-related nature of the efficiency principle (despite the constitution) has more to do with lack of theoretical ignorance of what it could mean than an evaluative question as such.

In any case, the injunction was granted by a majority of the court (excepting only Justice Marco Aurélio) but no other justice alluded to the efficiency principle as grounds for their votes.

Back on August 20, 2008, when the merits of ADC No. 12 were judged by the Brazilian Federal Supreme Court's plenum, the efficiency principle was explicitly stated as grounds for the decision (Brazilian Federal Supreme Court, ADC Judgment No. 12, Summary, 1-2). It was also mentioned by Justice Ricardo Lewandowski (Brazilian Federal Supreme Court, ADC Judgment No. 12, pg. 24), along with the principles of morality and impersonality, at which time the justice referred to the vote he would proffer in RE No. 579.951 in the same session, the content of which is discussed below in section 4.2.

Although ADC No. 12-MC clearly states that the issue of nepotism is directly related to that of the public administration's efficiency, the judgment did not add to the concept of efficiency. At first, the Court seems to distinguish the concepts of economy, efficiency and effectiveness, as well as the efficiency principle from the principles of legality, morality, impersonality and equality, but to what extent and to what extent is not known. The notion of efficiency is still being used in a non-technical layperson's sense, as more of an intuition than a concept as such.

Nevertheless, it could to argued that, at least intuitively, the principle is closely related to the notion of *productivity (productive efficiency)* in the exact same sense as that which prompted the constituent assembly or entity to add the efficiency principle through EC No. 19 1998, although a legal rule cannot be derived from the articulation of the principle as used by the Court in this case.

4.2 RE No. 579.951-4/RN (2008)

On March 3, 2008, the Public Prosecutor of the state of Rio Grande do Norte filed Extraordinary Appeal No. 579.951-4/RN as part of Public Civil Action 108.07.001018-4, Rio Grande do Norte brought against the municipality of Água Nova et al. to annul the administrative act of appointment and investiture of Elias Raimundo de Souza and Francisco Souza Nascimento, for violation of the principles of impersonality, efficiency, equality, morality and supremacy of the public interest due to nepotism. Note that while ADC 12 related to a CNJ ruling in the sphere of the Judiciary (see section 4.1 above), RE No. 579.951-4/RN explicitly invoked these principles as direct constitutional prohibitions of nepotism in the Executive and Legislative branches, without the need for a specific law.

On 19 April 2008, the plenum acknowledged the general repercussion of the constitutional question raised and on 20 August 2008, it judged the merits of the RE in 579.951-4/RN at the same session as ADC No. 12.

As did Justice Ayres Britto for ADC 12-MC, here too reporting justice Ricardo Lewandowski sought to construct appropriate content for the efficiency principle. He begins by stating that hiring unskilled relatives not trained for the job or their duties would violate the efficiency principle, which would be a misappropriation of purposes and clearly confound both legal categories (Brazilian Federal Supreme Court, Judgment RE No. 579.951-4/RN, pg. 1893).

To support his position against nepotism, the reporting justice oddly referred to Justice Celso de Mello's ruling in ADI No. 1.521/RS, and quoted a section thereof showing a similar rejection of nepotism based only on the principles of impersonality and morality[32] rather than efficiency (Brazilian Federal Supreme Court, Judgment RE No. 579.951-4/RN, pg. 1893), thus showing that the reporting justice again theoretically confounded these principles on very similar lines to Justice Cezar Peluso's vote when judging ADC No. 12-MC (see section 4.1 above).

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[32] The following passage was quoted: "[...] who holds State power and force has no right to exercise, for their own benefit, the authority conferred upon them by the laws of the Republic. Nepotism, in addition to reflecting an illegitimate gesture of patrimonial domination of the State, disrespects the republican postulates of equality, impersonality and administrative morality "(Brazilian Federal Supreme Court, Judgment RE No. 579.951-4/RN, pg. 1893).

Precisely because of this conceptual imprecision, the reporting justice rejected the argument used by the judgment in RE No. 579.951-4/RN, in which, absent evidence that relatives employed through nepotism were not performing their duties properly, there could be no question of breaching the efficiency principle. He argued that the issue was not how those involved were doing the work (efficiency), but rather how each was selected (impersonality), which would lead to "presumption of harm for society as a whole" (Brazilian Federal Supreme Court, RE 579.951-4/RN, pg. 1898). As we have shown, there is perceptible conceptual confusion between something being effective *versus* being impersonal or even immoral.

The impression given is that the reporting justice does not have a clear definition of efficiency, which is reaffirmed by his use of the Odete Medauar doctrine, which does not tell us what efficiency is but merely states what it is not, by contrast with "slowness, neglect, negligence, and omission, as customary characteristics of Brazil's Public Administration." (Brazilian Federal Supreme Court, Judgment RE No. 579.951-4/RN, pg. 1899). This definition from the contrary is rather vague and insufficient to make the efficiency principle an operable legal category, although a concern for agile service and proper management of public resources may be inferred from it.[33]

As the definition and/or extension of the efficiency principle did not appear in the discussions that followed for the resolution of the case, RE 579.951-4/RN was also not enough to help us to draw a rule of conduct from the principle that would be used for guidance in future cases, i.e. we do not yet know the legal content of the efficiency principle. However, both here and in ADC 12-MC, the notion of efficiency is loosely related to the notion of productivity, and more importantly it has been recognized that constitutional principles are self-enforcing because they include "normativity apt to produce legal effect (Brazilian Federal Supreme Court, Judgment RE No. 579.951-4/RN, pg. 1894), a characteristic which also extends to the efficiency principle and underlines the importance of construing its legal content.

[33] Although not quoted in the vote, Medauar states that "the efficiency principle determines that the Administration must act quickly and precisely to produce results that meet the population's needs." MEDAUAR, O. *O direito administrativo moderno.* 18th ed. São Paulo: Revista dos Tribunais, 2014. pg. 148.

4.3 ADI No. 3.386/DF (2011)

On January 10, 2005, the Federal Attorney General filed a Direct Action for Declaration of Unconstitutionality (ADI) asking the Brazilian Federal Supreme Court to declare the unconstitutionality of the expression "and other statistical surveys conducted by the Brazilian Statistical Geography Foundation Institute (local acronym IBGE), under Article 2-III of Law No. 8.745/1993, authorizing survey staff to be hired on temporary contracts for a fixed period of time in order to meet temporary needs for the census and other statistical surveys. The Federal Attorney General (PGR) argued this would violate the Constitution's Article 37-IX.

On April 14, 2011, the Brazilian Federal Supreme Court's plenum dismissed ADI No. 3.386/DF. At the time, Justice Carmen Lúcia invoked the efficiency principle to explain why the public administration should not hire civil servants for seasonal surveys to then let them go when they were no longer needed. In her vote, in an attempt to provide its content, she referred to the Portuguese *Aurélio* dictionary`s definition of efficiency as "action, force, capable of producing an effect; effectiveness" (Brazilian Federal Supreme Court, judgment of ADI No. 3.386/Brazilian Federal Supreme Court's, pg. 21-22). In doing so, like her predecessors, the reporting justice confounds the concept of efficiency with that of efficiency, which, although closely related, is not to be confounded.

To corroborate her position, the reporting justice also quoted Custódio Filho, for whom the efficiency principle related to three ideas: usefulness (a service's utility for citizens), readiness (speed of delivering public service) and economicity (satisfying citizens needs at least cost for the Treasury). Custódio Filho argued that the efficiency principle encompassed both aspects involving procedures (readiness, economicity), and results (usefulness).[34] However, the justice did not use any of these elements to construct her argument, having only quoted the above words to underline his point.

In any case, Custódio Filho himself admits that "efficiency" has different meanings: a lay sense, which would be synonymous with efficiency, and a scientific sense formulated by the economy and the administration. Thus,

[34] COSTÓDIO FILHO, U. A Emenda Constitucional 19/98 e o princípio da eficiência na administração pública. *Revista dos Tribunais — Cadernos de Direito Constitucional e Ciência Política,* yr. 7, n. 27, pg. 210, Apr./Jun. 1999.

he concludes that the use this term "is to be given in the context of legal language." must be investigated.[35]

The first definition of 'efficacious' given by the *Aurélio* dictionary is that *"which produces the desired effect; which gets a good result."*[36] Therefore, an efficacious public policy will be one that has the effects intended by a legislator or public administrator. On the other hand, as stated above (see section 1), the meaning of efficient used by the original constituent assembly to is making optimal use of the resources available for production, that is, something is said to be efficient if it produces more with the same resources, or the same with less resources (productive efficiency). Thus, a public policy will be efficient if it not only achieves the ends it proposes (efficacious) but also and necessarily if it does so in order to maximize its effects, given the available resources (efficiency). In this sense, *efficacy will always be a necessary but not sufficient condition for efficiency,* so any and all efficient measures will necessarily be efficacious but not every efficacious measure will necessarily be efficient.

This definition of efficiency is fully consonant with the definition of productive efficiency used in economics[37] and administration, in which the concepts of efficacy and efficiency are clearly distinguished. Chiavenato states that "efficacy is a normative measure of achievement of results," whereas "efficiency is a normative measure of resources utilized for this process."[38] Clearly, therefore, the sense of efficiency used by the original constituent assembly in EC 19/1998 is the scientific concept of efficiency as used in economics, administration or even physics. *Efficacy is about achieving objectives (ends), while efficiency is concerned with the mechanisms used to achieve those goals (means).*

An example may clarify the conceptual difference. Suppose there is a public policy that determines the elimination of child illiteracy in a certain municipality. The local population of the municipality has been stable for years and 60 children have to be enrolled each year for everybody to be literate. If the mayor built two schools with room for 50 pupils each, this

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35 Ibid., pg. 211-212.

36 FERREIRA, A. B. D. H. *Novo dicionário Aurélio da língua portuguesa.* Rio de Janeiro: Nova Fronteira, 1975 [1965]. pg. 500.

37 MANKIW, N. G. *Introdução à economia:* princípios de micro e macroeconomia. 2nd ed. Rio de Janeiro: Campus, 2001. pg. 5; HOVENKAMP, H. *Federal antitrust policy:* the law of competition and its practice. 4th ed. St. Paul. MN: West, 2011. pg. 83.

38 CHIAVENATO, I. *Recursos humanos na empresa:* pessoas, organizações e sistemas. 3rd ed. São Paulo: Atlas, 1994. pg. 70.

policy would surely be efficacious, since all 60 children would duly attain literacy every year. Therefore, this policy is efficacious. On the other hand, the mayor could build one single school for 60 students, thus spending less funds from the municipal budget, rather than build two schools holding 50 pupils each. In this case, the same 60 children would attain literacy annually, so this policy would be equally efficacious. However, much more public spending is needed to build two schools rather than one single school; therefore, building one single school is more efficient than building two. Although both public choices are equally efficacious, the latter achieves the same result as the first, but involves less spending. *Ergo*, it is more efficient.

Relating the distinction between these concepts to the case discussed in ADI 3.386/DF, it may be argued that, despite conceptual confusion, the Brazilian Federal Supreme Court's use of the efficiency principle was correct and compatible with the technical definition of efficiency rather than efficacy. Note that if the IBGE were to hire all its survey staff through a public competitive selection procedure and they were to become [tenured] public servants, as Federal Attorney General suggested, the IBGE would still be able to conduct statistical surveys within the periods required, so this public policy would be efficacious.[39] However — and this was the rationale used by the reporting justice — the IBGE could conduct the same statistical surveys while spending less if its seasonal survey staff were not civil servants and could be laid off once the temporary demand had ended. In other words, hiring temporary staff would be as efficacious as hiring through a public competitive selection procedure, but the costs incurred for temporary workers would be much lower, so this would be the most efficient option; therefore, the challenged legal provision was constitutional because it was compatible with the efficiency principle, as the Brazilian Federal Supreme Court ruled.

So, although the Brazilian Federal Supreme Court has articulated the terms efficacy and efficiency as synonyms, its use (*rationale*) was necessary in recognizing that scarce public funds should not be wasted on hiring tenured public servants as survey staff when temporary and seasonal researchers would do just as well while costing less. The court recognized that hiring

[39] Based on the assumption that the IBGE would have sufficient budget available to hire all data collectors as public servants or temporary employees. If this assumption were false, then recruiting survey staff through a competitive selection procedure would also be inefficacious, since it would not enable the IBGE to accomplish its main mission of conducting statistical surveys to inform public policies.

temporary survey data gatherers without a competitive procedure is more efficient, therefore ADI No. 3.386/DF was unanimously rejected.

4.4 RE No. 631.240/MG (2014)

On October 11, 2010, the National Social Security Institute (INSS) filed Extraordinary Appeal No. 631.240/MG in the context of the Civil Ordinary Action No. 2008.01.99.058977-3, Minas Gerais, for Marlene Araújo dos Santos against the 1st Region TRF's judgment, which had determined that "administrative non-postulation of [pension benefit] does not impede filing the action" (Brazilian Federal Supreme Court, Judgment RE No 631.240, pg. 4).

The original action was to have rural old-age pension granted to the insured person, who claimed to be a day-laborer and who had not previously submitted an administrative application. The Court of Law of the Judicial District of Teófilo Otoni (MG) rendered a decision that dismissed the action without prejudice, because it believed that the absence of a contested claim would remove the element of 'interest in the suit'. This ruling was annulled by the appellate decision on the grounds that requiring a previous administrative application [for pension] would violate the "constitutional precept of freedom of access to the Judiciary" (Brazilian Federal Supreme Court, Judgment RE No. 631.240, pg. 5).

On December 10, 2010, the Brazilian Federal Supreme Court's plenum recognized the general repercussion of the issue and on September 3, 2014, the Brazilian Federal Supreme Court majority followed the vote of the reporting justice's position that a pension benefit cannot be applied for directly in court. The benefit must be postulated administratively and only then — if not granted or there is no response in the proper time— the claim could go to court.

The content of the efficiency principle was not discussed by the court in this case, but was used once when the reporting justice discussed the procedural concept of 'interest in acting' (Brazilian Federal Supreme Court, RE No. 631.240, Reporting justice vote, pg. 4):

> Clearly 'interest in the suit' is a condition essentially related to the principles of *economicity* and *efficiency*. Based on the premise that public funds are scarce, which translates into limitations for the Judiciary's structure and staff, *demand must be rationalized* to prevent the prosecution of cases that are *useless, inadequate* or *unnecessary*, [our italics]

This passage raises two important points. Firstly, as stated in ADC No. 12 — MC (see section 4.1), the difference between the principles of economicity and efficiency was recognized. Secondly, the Brazilian Federal Supreme Court expressly admitted that given the scarcity of public resources, including the Judiciary's, law must be rationalized, meaning that rules applied must be efficient in terms of the reach of public policies (productive efficiency) and allocating scarce resources (allocative efficiency) to avoid waste of funds. Therefore, the Brazilian Federal Supreme Court has clearly been attempting to construct a meaning for the efficiency principle, but the lack of clear technical concepts seems to have been a hindrance to date, since an almost intuitive use of the principle has prevailed in the court's reasoning.

4.5 ADI No. 1.923/DF(2015)

On December 1, 1998, two political parties (*Partido dos Trabalhadores* [Workers' Party, or PT] and *Partido Democrático Trabalhista* [Democratic Labor Party, or PDT]) filed ADI No. 1.923/DF to have the court declare the unconstitutionality of Law 9.637/1998 and Article 24 — XXIV of Law 8.666/1993, which stipulate and regulate the formal recognition of private-law entities as "social organizations" (local acronym OS). These laws were alleged to be unconstitutional by having activities developed by public-law parastatal entities and foundations transferred to publicly funded private-law entities.

On August 5, 1999, the Brazilian Federal Supreme Court started to try the application for provisional remedy. As shown by the vote of Justice Ilmar Galvão when judging the provisional remedy, the President of the National Congress justified the abovementioned law based on the belief that (Brazilian Federal Supreme Court, ADI Judgment No. 1.923 — MC, pg. 105):

> [...] social organizations are one of the most innovative and relevant initiatives introduced *to improve the functioning of the State by making its activity is efficient and free of defects,* adding the initiative to the master plan for reform of the State apparatus, which stipulates that these non-profit private entities may absorb non-exclusive social public services *to eliminate the causes of deficiencies caused by the administrative machinery, such as notorious misuse of public money, faulty management,*

> *huge proportions of mid-level activities to the detriment of basic-level or core activities, unnecessarily creating jobs*, excessive bureaucratization, and tenured civil servants being accommodated to the *detriment of initiative and efficiency in the production of goods;* in relation to healthcare and education, these activities may be provided by private individuals as per the Constitution's articles 197/9 and 213. There is nothing in the Constitution to prevent the latter being applied to environmental conservation, cultural preservation and access to science as fields in which so-called non-governmental organizations, as is well known, have sometimes been more effective than the State itself. [our emphasis]

Brazil's National Congress expressly used the technical definition of efficiency to defend the constitutionality of the contested law, since the legislature declared that its intention (*mens legislatoris*) was to boost productive efficiency in order to deliver more public goods and services through OSs while using the same or smaller amounts of public resources. This justification reinforces our argument that productive efficiency is a matter of means rather than just efficacy and that it is the correct concept to be used when addressing the efficiency principle.

Justice Ilmar Galvão's vote also confirmed that the State is not obliged to provide any and all public services directly; it may do so indirectly, including through OSs, as long as the legal and constitutional precepts are followed to ensure more efficient performance (Brazilian Federal Supreme Court, ADI judgment No. 1.923 — MC, pg. 117 to 119, 144), followed by Justices Sepúlveda Pertence, Néri da Silveira and José Carlos Moreira Alves (Brazilian Federal Supreme Court, ADI Judgment No. 1.923 — MC, pg. 120-122).

During the same session, Justice Nelson Jobim requested to examine the case and kept it under advisement for almost seven years until March 29, 2006. When he finally voted, the justice not only agreed with the others but also emphasized that the law itself was created in the context of the Administrative Reform of 1998 and that "[the] idea was to modernize the public administration, creating instruments capable of attending to the purposes of the State and the interests of society "(Brazilian Federal Supreme Court, ADI Judgment No. 1.923 — MC, pp 139 and 142).[40]

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[40] At the March 29, 2006 session, Justice Eros Grau requested [indefinite postponement for] further examination and then together with justices Joaquim Barbosa and Ricardo Lewandowski, voted to grant a provisional remedy (Brazilian Federal Supreme Court, ADI 1923 MC, pg. 162) on February 2, 2007, when Justice Gilmar Mendes requested [indefinite postponement for]

On August 1, 2007, Justice Gilmar Mendes declared his opinion together with a sweeping retrospective of the Administrative Reform of 1998 in the context of the Madrid Declaration of October 14, 1998 issued by the Latin American Administration for Development Center (local acronym Clad), and stated that the Brazilian State Reform was part of a more general phenomenon of reform of Latin America's States (Brazilian Federal Supreme Court, ADI Judgment No. 1.923 — MC, pg. 167 and 168). Like the National Congress, Justice Gilmar Mendes used the technical concept of efficiency, compatible with EC 19/1998, and expressly distinguished it from efficacy, stating that the Brazilian State had become both inefficient and inefficacious (Brazilian Federal Supreme Court, ADI Judgment No. 1.923 — MC, pg. 169):

> In Brazil, given the State's *inability to absorb and efficiently manage the immense weight of demands addressed to it, especially in the social sphere, redefining the role of the State and its reconstruction are of decisive importance.* Given the exhaustion of the interventionist state model, *with patently inefficacious and inefficient* bureaucratic public administration based on an outdated Weberian model, and its fiscal crisis, all seen on a large scale in the late 1980s, Brazil has to reconstruct the State on the aforementioned lines of a managerial state, capable of regaining its financial autonomy and its ability to implement public policies. [our emphasis]
>
> The issue is therefore redefining the role of the State to focus on its task of fostering and regulating economic and social development while no longer intervening or directly producing goods and services. [...]
>
> Thus, according to the master plan, "aim of the Social Organizations bill is to allow decentralization of activities in the non-exclusive services sector, in which there is no exercise of State power, *based on the assumption that these services will be more delivered efficiently if they are delivered by the non-state public sector* while retaining State funding." [our emphasis]

The fact of the distinction between the concepts of efficiency and efficacy being recognized in this 2007 vote might suggest that the Brazilian Federal Supreme Court had gradually been refining its articulation of the concept over time (see section 4.1). But the same level of theoretical sophistication was

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further examination. The concept of efficiency was not discussed.

missing from its subsequent decisions discussed in sections 4.2 to 4.4, which continued to show some conceptual confusion or linguistic imprecision. In any case, it was precisely the supposed efficiency resulting from the new public-private partnership organizational model that led to the action being denied (Brazilian Federal Supreme Court, ADI Judgment No. 1.923 —MC, pg. 187):

> Law 9.637/98 introduced a program designed to 'publicize' activities and services not restricted exclusively to the purview of the State — such as education, scientific research, technological development, environmental protection and preservation, culture and healthcare. These services were to be *transferred to non-bureaucratized management by private entities that would run them more flexibly, dynamically and efficiently*. This new model — managerial administration by public but not state-controlled entities — is more about reaching targets than strictly following procedures. *The pursuit of efficiency in results through more flexible of procedures calls for special arrangements* governed by rules that respond to the rationalities of public law and private law. [our emphasis]

On April 16, 2015, almost 20 years after the action was filed, the Brazilian Federal Supreme Court finally partly accepted ADI No. 1.923/DF, but only to provide its interpretation according to the Constitution (Brazilian Federal Supreme Court, ADI Judgment No. 1.923, pg. 146). Since the word 'efficiency' was mentioned more than 30 times in this substantive decision, one might expect it to expressly articulate the concept, but it did not.

An interesting point to note in the case summary is that the Brazilian Federal Supreme Court again stated that the efficiency principle has normative force and must be obeyed when interpreting laws: "The discretionary competence provided for in Article 2, II, of Law No. 9.637/98 in relation to qualifying condition must be interpreted under the influence of constitutional principles, especially the principles of *impersonality, morality, publicity and efficiency* (the FC's Article 37, main section)" (Brazilian Federal Supreme Court, ADI judgment No. 1.923, pg. 5). In addition, and crucially, it recognized that given the scarcity of public goods and resources, if there were several entities wishing to use them, these resources should be allocated to those selected by competition, while also obeying the efficiency principle (Brazilian Federal Supreme Court, Judgment ADI 1.923, pg. 5 and 6). However, unlike the cases

discussed in the previous sections, in this one, none of the judges actually attempted to construct or discuss the content of the efficiency principle and/or how it should be articulated.

Reporting justice Ayres Britto voted for partial acceptance of the action (Brazilian Federal Supreme Court, ADI Judgment No. 1.923, pg. 46) but argued that the law gave administrators sole discretion to decide whether a certain organization would be awarded official status as a "social organization" which, through a management contract, would be given public funds without having to submit to a bidding procedure (Brazilian Federal Supreme Court, ADI Judgment No. 1.923, pg. 37). Nevertheless, the justice did not at any point articulate or explain what was meant by efficiency or the content of the efficiency principle; he merely repeated mantra fashion that the law granted discretionary power to grant OS status, which would violate "the principles of legality, impersonality, morality, publicity, efficiency, economics and isonomy..." (Brazilian Federal Supreme Court, Judgment ADI 1.923, pg. 43).

Justice Luiz Fux's opinion emphasized that the administrative discretion granted by the law challenged could not be exercised by the administrator in violation of the principles of public administration stipulated in the FC's Article 37, including efficiency, which has its own normative efficacy (Brazilian Federal Supreme Court, ADI judgment No. 1.923, pg. 68-70). He again stated that administrative acts must be duly reasoned and must not follow from misappropriation of purpose, but he did not explicit define the meaning and scope of this principle.

Justice Fux also stated that OSs could pay extra amounts to civil servants assigned to them provided that the payments came from the OS's own funds and were not part of their salaries as public servants, since "otherwise this would amount to rendering social organizations the equivalent status of autonomous government entities, which would be an affront to the need for efficiency and flexibility that had led to the OS model being created" (Brazilian Federal Supreme Court, ADI Judgment No. 1.923, pg. 81 and 82). All of this shows that the justice seems to believe that the autonomous government entity model is inefficient and therefore changing it would be efficient, but he does not explain why or how he reached this conclusion.

Finally, the Court decided by a majority vote to partly approve the claim for relief to be interpreted as per the Constitution, Law 9.637/1998 and Article 24 —XXIV of Law 8.666/1993, included by Law no. 9.648/1998, to ensure that these provisions were applied in compliance with the principles of Article 37.

A striking fact here is that the discussion on the efficiency of the new administrative model was much clearer and forceful when judging the plea for provisional remedy than when judging on the merits. In one way or another, the efficiency principle was clearly part of the grounds for the merit decision, even though its content had not been directly addressed. Two conclusions may be drawn: (i) the efficiency principle has its own normative force and (ii) the concept of efficiency as introduced by EC No. 19/1998 differs from the concept of efficacy and is related to the need to lower costs and raise quality of services for the benefit of citizens, although there is some confusion in the reasoning.

4.6. RE No. 837.311/PI (2015)

RE 837.311/PI was filed by the state of Piauí in the context of Writ of Mandamus 2008.0001.000683-9, Piauí, for Eugênia Nogueira do Rego Monteiro Villa et al., against a decision of the Court of Appeals of Piauí ordering hiring of applicants that passed a public competitive procedure, but had been kept in reserve, due to the fact that the state had held a new procedure for the same positions still during the period of validity of the previous one (Brazilian Federal Supreme Court, Judgment RE 837.311, page 7). On September 15, 2014, Extraordinary Appeal no. 837.311/PI was assigned to reporting justice Luiz Fux and the general repercussion of the matter was recognized on November 21, 2014. On October 14, 2015, by a majority vote and one terms of the vote of the rapporteur, the Court dismissed RE No. 837.311/PI, against the minority votes of justices Roberto Barroso, Teori Zavascki and Gilmar Mendes.

In line with Brazilian Federal Supreme Court practices, the case summary poses the efficiency principle as one of the grounds for the decision, but it is not explicitly elaborated together with the principles of good faith, morality, impersonality and the protection of trust (Brazilian Federal Supreme Court, Judgment RE No. 837.311, pg. 2). However, some important conclusions in relation to the principle may be drawn from an examination of some of the judges' votes.

Reporting justice Luiz Fux stated that public competitive procedures should be conducted in such a way as to concretize the various principles of public administration, including the efficiency principle (Brazilian Federal Supreme Court, judgment RE No. 837.311, pg. 19). In this respect, the list of reserves would be an "administrative planning instrument that favors

efficient management — enabling efficient and speedy use of pre-approved applicants without needing to start a new competitive procedure;" in these cases, the public administration must act within the scope of its discretionary powers to "**rationally and efficiently assess the convenience and timeliness of calling on more applicants [from among those listed as "reserves"] during the competitive procedure's period of validity.**" (Brazilian Federal Supreme Court, Judgment RE No. 837.311, pg. 21 and 22). On this basis, administrative discretionary power would be limited and could therefore be controlled in the light of the efficiency principle and other tenets (Brazilian Federal Supreme Court, judgment No. 837.311, pg. 25).

The reporting justice concluded that persons approved in a competitive procedure who are supernumerary to vacancies stipulated in the notice, have no subjective right to be appointed, even if an invitation to bid for a new procedure is issued during the previous procedure's period of validity" (Brazilian Federal Supreme Court, Judgment RE No. 837.311, pg. 31), but that in the present case, because the public administration showed "the need to fill positions during the validity of the first competitive selection procedure", the appellees (around 20 applicants) should be appointed; appeal RE No. 837.311/PI (Brazilian Federal Supreme Court, RE judgment No. 837.311, pg. 38 and 39) was therefore denied.

In casting this vote, in line with the evolution of previous Brazilian Federal Supreme Court precedents, Justice Luiz Fux made a distinction between speed and efficiency, although not making an in-depth study of the meaning of either of them, and used the word "efficiency" in the sense of obtaining higher gains more from the lowest possible quantity of funds or resources. As discussed in ADI No. 3.386/DF (see previous section), this case clearly shows that both the appointing of those approved on the reserve list and the holding of a new competitive selection procedure would be equally *efficacious* means of selecting applicants able to act as public defenders, because in both cases they would all have been approved in a competitive selection procedure.[41] However, if the public administration used the list of reserves, this could be more *efficient* in the sense of achieving the same result at lower costs. According to the reporting justice, therefore unless there is a

[41] Obviously, the assumption here is that the current selection through a public competitive examination is sufficient to adequately assess the quality of successful candidates and their ability to perform the duties in question. We do not agree with this assumption. We believe current public competitive selection procedures are extremely flawed in their ability to find good candidates for public sector positions, but this is a matter best left for another occasion.

valid reason for not using the list of reserves, the latter is the most efficient mechanism that should prevail.

Delivering public services efficiently was considered so important that Justice Edson Fachin, although following the reporting justice's vote, made a point of declaring his own vote on the matter (Brazilian Federal Supreme Court, Judgment RE No. 837.311, pg. 41) in which he states that, "from the perspective of ensuring the functional status of administrative activity, in addition to obeying the principle of lawfulness, there must be efficiency as required by the Constitution's Article 37." (Brazilian Federal Supreme Court, Judgment RE No. 837.311, pg. 47). Justice Edson Fachin then clearly states that "proper utilization of public servants' positions [...] is a requirement of administrative efficiency and proper management of public resources," which is a right of "all [...] administered parties or persons to see that human resources assigned by the legislator to fulfill a public purpose are being employed efficiently" (Brazilian Federal Supreme Court, Judgment RE No. 837.311, pg. 49) and not a subjective right of applicants approved in a competitive selection procedure to be places on a list of reserves [for upcoming vacancies].

This shows that Justice Fachin not only emphasizes the distinction between the principles of legality and efficiency and that both must be equally applied by the public administration, but also clearly uses the word "efficiency" in the technical sense of productive efficiency, i.e. producing more using of fewer resources. To dispel any doubt over the technical concept of efficiency employed by the justice, it is worth recalling that he quotes Carvalho Filho, for whom the core of the efficiency principle "is the pursuit of productivity and economicity, and most importantly, the requirement to avoid wasting public money, which means services must be carried out promptly and perfectly and show functional performance... " (Brazilian Federal Supreme Court, Judgment RE 837.311, pg. 47). Obviously, higher productivity (more results or *output*) together with economicity (lower costs or inputs) is a slightly imprecise way of using the technical definition of productive efficiency, which is producing more from the same resources, or producing the same using fewer resources, thus eliminating waste.

In addition to the Brazilian Federal Supreme Court's gradually but perceptibly becoming more sophisticated in its use of the technical concept of efficiency, from the judgment of RE No. 837.311/PI, there are two conclusions that may be added to those drawn from the cases discussed above: (i) there is the express recognition of the distinction between the

principle of efficiency and that of lawfulness, which may be invoked by the judiciary to control administrative discretionary power; and (ii) the concept of efficiency involved in the principle is the scientific concept of productive efficiency which led to EC 19/1998 and which means that in managing scarce public resources, the public administration should seek to eliminate waste using as few resources as possible to achieve the maximum effectiveness of public policies, in other word, to be efficient.

4.7 ADPF No. 190 (2016)

On September 8, 2009, the governor of the Federal District filed an action against the violation of a fundamental precept in 190/SP (ADPF no. 190/SP) against arts. 190 paragraph 2, and 191 paragraphs 6 and 7 of Law No. 2.614/1997, of the municipality of Poá, a mineral spa resort, in the wording given by Laws 3.269/2007 and 3.276/2007, which exclude amounts from the calculation base for municipal tax on services (local acronym ISSQN) other than cases provided for by federal supplementary law.

ADPF no. 190/SP was originally assigned to Justice Joaquim Barbosa, who retired a few years later without appreciating the governor's action for provisional remedy. On June 16, 2015, almost six years after it had been filed, the ADPF was reassigned to Justice Edson Fachin, who partly granted the remedy required on December 15 of the same year (Brazilian Federal Supreme Court, ADPF No. 190 MC/SP). Shortly afterwards, on December 18, the reporting justice sought to have the abovementioned provisional remedy placed on the agenda of the Court's plenum. Since the judgment was scheduled for the September 29, 2016 session, almost a year after the preliminary ruling and seven years after the ADPF had been filed, the reporting justice decided — "for the sake of procedural efficiency" (Brazilian Federal Supreme Court, ADPF judgment No. 190, pg. 1), to convert the judgment on a permanent basis, following the precedent established by ADPF No. 378, for which the judgment was drafted by Justice Luís Roberto Barroso *(DJe* 8/Mar/2016).

A study of ADPF No. 190/SP is of interest to our purposes for two reasons. Firstly, for using the principle of efficiency from its procedural angle (article 8/CPC). Secondly, because of the clear distinction between the concepts of efficiency and efficacy identified in the discussion of the ADPF. Although these questions do not result directly from application of the Federal Constitution's

Article 37, they show how the Brazilian Federal Supreme Court has articulated the concepts of efficiency and efficacy.

On declaring his vote in the preliminary orders stage, the reporting justice initially states that the concept of efficiency in the Code of Civil Procedure's Article 8 refers to productive efficiency, as does the Principle of Efficiency: "*Article 8 of CPC/15 requires the application of the principle of procedural efficiency in the sphere of the Judiciary, which translates into case management powers to ensure that the procedural result obtaining is the most beneficial for the least public expense*" (Brazilian Federal Supreme Court, ADPF judgment No. 190, page 12, our emphasis). Once again efficiency is articulated in Brazil's legal system as the pursuit of the most useful procedural result (produce more) for the lowest possible cost (spend less), which means productive efficiency.

In this respect, due to the procedural aspect of the efficiency principle, we may state that the judge, as public manager of the Judiciary's scarce resources, must manage the case as efficiently as the public administrator must manage public assets. In addition, both CPC's Article 8[42] and the Federal Constitution's Article 37[43] clearly state that from a legal point of view the efficiency principle must not be confounded with the principle of lawfulness. These are distinct legal concepts with their own varying contents, legal implications and specific normative force.

On the other hand, on the issue of granting the ADPF, Justice Marco Aurelio discussed the ADPF's feasibility in light of the so-called 'subsidiarity principle' (Brazilian Federal Supreme Court, ADPF judgment No. 190, pg. 28), under the terms of Article 4 of Law 9.882/1999, which states:

> Article 4. The claim shall be dismissed as a preliminary matter by the reporting justice, unless there is an action against the violation of a fundamental precept, or if any of the requirements prescribed herein is absent or defective.
>
> Paragraph 1 — An action against the violation of a fundamental precept will not be heard *if there is any other efficacious means of remedying its harmfulness.*

---

[42] "Art. 8 When applying legal precepts, the judge shall bear in mind the purpose of society and the requirements of the common good, safeguarding and promoting the dignity of the human person and observing proportionality, reasonableness, legality, publicity and *efficiency* " (our emphasis).

[43] "Art. 37. The direct and indirect public administration of any of the powers of the federative republic, states, federal district and municipalities shall obey the principles of lawfulness, impersonality, morality, publicity and efficiency and [...]"(our emphasis)

Returning to section 4.3's discussion of the difference between efficacy and efficiency, note that the law clearly states here that what has conventionally been called the principle of subsidiarity is not a principle but a rule under which only one ADPF may be managed if no other procedural means is efficacious in protecting against injury. If there is any other way of resolving the issue, even if it is less efficient, then an ADPF is not appropriate, as Justice Marco Aurélio argued. Hence the feasibility of an ADPF being a matter of efficacy rather than efficiency. This position was strengthened by the vote of Justice Roberto Barroso, who, while recognizing the feasibility of ADPF No. 190/SP, stated that an ADPF would be feasible only if "there were no other judicial measure available to the applicant in order to remedy harm attributed to the norm *to the same extent and with the same efficacy* [...]." (Brazilian Federal Supreme Court, ADPF judgment No. 190, pg. 49 and 50, our emphasis).

From this case we may conclude that: (i) the efficiency principle has its own content distinct from the principle of lawfulness, even in its procedural aspect; (ii) the legal concept of efficiency coincides with the economic concept of productive efficiency; and (iii) efficiency is not to be confounded with efficacy, despite its non-technical use found in some of the older judgments, and the Brazilian Federal Supreme Court has gradually been moving to this distinction.

5. Conclusions

As section 1 showed, by including the efficiency principle in the Federal Constitution's Article 37, the legislator's intention was to boost the public administration's efficiency in its technical sense of productive efficiency. The purpose of this study, almost 20 years after EC 19/1998, was to ask whether *mens legislatoris* is compatible with *mens legis* as applied by the Federal Supreme Court, in other words, to inquire as to the legal content the Brazilian Federal Supreme Court would have attributed to this principle.

The data collected in section 3 show that the number of trials in which the Brazilian Federal Supreme Court used the word "efficiency" corresponds to a universe of less than 0.1% of cases judged that contain the term "principle", which was only 186 instances. Of the 186 cases, only in 20% of them was the notion of efficiency or the efficiency principle part of the grounds for the judgment, that is, 37 cases (categories 1 and 2). Among these instances, the concept of efficiency was actually discussed or expressly used (category 1) in only 3.7% (seven) cases. Our quantitative analysis therefore shows that

adding the efficiency principle to the FC and the Court`s did not have any substantial impact.

Moreover, since that no cases were found in which efficiency as a principle was discussed prior to EC 19/1998, we may state that the data do not corroborate the assertion that the efficiency principle was recognized by the Brazilian Federal Supreme Court before EC No. 19/1998.

We may draw a few conclusions from our qualitative analysis of Category 1 cases (see section 4). *Firstly*, the efficiency principle should not be confounded with other public administration principles and has its own normative force (normative autonomy). *Secondly*, the efficiency principle may be used to control administrative discretionary powers. *Thirdly*, although there is some conceptual confusion in the argument, the concept of efficiency involved in the principle is the scientific concept of productive efficiency, which prompted EC 19/1998, which means that when managing scarce public resources, the public administration must endeavor to eliminate waste and using the minimum resources possible to achieve the maximum effectiveness of public policies.

From our quantitative and qualitative analysis, we may deduce that the Supreme Court has already recognized that in a world of scarce public resources, the public administration must be efficient in order to avoid waste, the judiciary must manage cases efficiently, and that the Supreme has been attempting to construct a juridical meaning for the efficiency principle, but as yet there is no clear technical articulation of the concept, although intuitive logic suggests that the legal concept is the same as the economic concept of productive efficiency.

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Annex I

Type		Case No.	State	Concept mentioned in summary?	Concept mentioned in votes?	Concept discussed in votes?	Different interpretations of the concept?
INQ	**ED-AgR**	**3075**	**SP**	Yes	Yes	No	No
RCL	**AgR**	**25028**	**MS**	Yes	Yes	No	No
MS		**25097**	**DF**	No	Yes	No	No
ADI		**5062**	**DF**	No	Yes	No	No
ADI		**2777**	**SP**	No	Yes	No	No
ARE	**AgR**	**929233**	**RJ**	No	Yes	No	No
RCL	**AgR**	**23131**	**SC**	Yes	Yes	No	No
RE		**593849**	**MG**	No	Yes	No	No
MS	**AgR**	**24883**	**DF**	Yes	Yes	No	No
ADPF		**190**	**SP**	Yes	Yes	No	No
AC	**ED-ED-ED-AgR**	**3923**	**RS**	No	Yes	No	No
ADI		**2144**	**DF**	No	Yes	No	No
HC		**132233**	**PR**	Yes	Yes	No	No
RE		**655265**	**DF**	No	Yes	No	No
RE		**723651**	**PR**	No	Yes	No	No
HC		**130636**	**PR**	Yes	Yes	No	No
RCL	**AgR**	**22286**	**SC**	Yes	Yes	No	No
HC		**123494**	**ES**	Yes	Yes	No	No
RE	**AgR**	**913568**	**RS**	No	Yes	No	No
RE		**837311**	**PI**	Yes	Yes	No	No
SL	**AgR**	**885**	**RJ**	No	Yes	No	No
RCL	**CumpSent**	**1728**	**DF**	Yes	Yes	No	No
ADI		**4333**	**DF**	No	Yes	No	No
RE		**611639**	**RJ**	No	Yes	No	No
ADI	**MC**	**5311**	**DF**	No	Yes	No	No
ADPF	**MC**	**347**	**DF**	No	Yes	No	No
HC		**127483**	**PR**	No	Yes	No	No
RE		**658570**	**MG**	No	Yes	No	No

Type		Case No.	State	Concept mentioned in summary?	Concept mentioned in votes?	Concept discussed in votes?	Different interpretations of the concept?
HC		**127823**	**PR**	Yes	No	No	No
ADPF	**MC-Ref**	**341**	**DF**	No	Yes	No	No
MS		**33340**	**DF**	Yes	Yes	No	No
ADI		**3943**	**DF**	No	Yes	No	No
HC		**127186**	**PR**	Yes	Yes	No	No
RE		**632853**	**CE**	No	Yes	No	No
ARE		**652777**	**SP**	No	Yes	No	No
ADI		**1923**	**DF**	No	Yes	No	No
ADI		**3059**	**RS**	No	Yes	No	No
MS	**AgR**	**25425**	**DF**	Yes	Yes	No	No
MS		**28178**	**DF**	No	Yes	No	No
HC		**122694**	**SP**	No	Yes	No	No
MS		**28485**	**SE**	Yes	Yes	No	No
RE		**789874**	**DF**	No	Yes	No	No
RE		**631240**	**MG**	No	Yes	No	No
RHC		**97926**	**GO**	No	Yes	No	No
RE	**AgR**	**692456**	**RS**	No	Yes	No	No
RE		**717424**	**AL**	No	Yes	No	No
AP	**QO**	**606**	**MG**	No	Yes	No	No
Inq.		**2616**	**SP**	No	Yes	No	No
RE		**658026**	**MG**	No	Yes	No	No
MS		**26860**	**DF**	No	Yes	No	No
RMS		**28208**	**DF**	No	Yes	No	No
ARE	**ED**	**763090**	**SP**	No	Yes	No	No
ARE	**AgR**	**678782**	**AM**	No	Yes	No	No
ARE	**AgR**	**728143**	**SP**	No	Yes	No	No
Ext		**1293**	**DF**	No	Yes	No	No
MS	**AgR**	**31371**	**DF**	No	Yes	No	No
ARE	**AgR**	**719067**	**RJ**	No	Yes	No	No
ADI		**3745**	**GO**	No	Yes	No	No

Type		Case No.	State	Concept mentioned in summary?	Concept mentioned in votes?	Concept discussed in votes?	Different interpretations of the concept?
RE		**630733**	**DF**	No	Yes	No	No
RE	**AgR**	**503436**	**PI**	No	Yes	No	No
ADI		**2588**	**DF**	No	Yes	No	No
RE		**611586**	**PR**	No	Yes	No	No
RE		**541090**	**SC**	No	Yes	No	No
MS		**25855**	**DF**	No	Yes	No	No
ADI		**4425**	**DF**	No	Yes	No	No
ADI		**4357**	**DF**	No	Yes	No	No
ADI		**2340**	**SC**	No	Yes	No	No
ADI		**1842**	**RJ**	No	Yes	No	No
AP		**470**	**MG**	No	Yes	No	No
MS		**30221**	**DF**	Yes	No	No	No
AI	**AgR**	**838141**	**GO**	Yes	Yes	No	No
MS		**30859**	**DF**	Yes	Yes	No	No
RE		**596478**	**RR**	No	Yes	No	No
Rcl	**ED-AgR**	**9970**	**SC**	No	Yes	No	No
MS		**27958**	**DF**	No	Yes	No	No
ADI		**4029**	**AM**	No	Yes	No	No
MS		**24020**	**DF**	No	Yes	No	No
ADC		**19**	**DF**	No	Yes	No	No
ADI		**4424**	**DF**	No	Yes	No	No
ADI	**MC-Ref**	**4638**	**DF**	No	Yes	No	No
MS		**27621**	**DF**	No	Yes	No	No
ACO	**AgR**	**1463**	**SP**	Yes	Yes	No	No
ARE	**AgR**	**646526**	**RN**	No	Yes	No	No
RMS		**23586**	**DF**	No	Yes	No	No
ADI	**MC**	**4543**	**DF**	No	Yes	No	No
AI	**AgR**	**761552**	**GO**	No	Yes	No	No
ARE	**AgR**	**649641**	**MG**	Yes	Yes	No	No
Inq.		**2482**	**MG**	No	Yes	No	No

Type		Case No.	State	Concept mentioned in summary?	Concept mentioned in votes?	Concept discussed in votes?	Different interpretations of the concept?
AI	**AgR**	**805322**	**CE**	No	Yes	No	No
MS		**25870**	**DF**	No	Yes	No	No
AI	**AgR**	**842925**	**SP**	No	Yes	No	No
HC		**107688**	**DF**	No	Yes	No	No
ADI		**4246**	**PA**	No	Yes	No	No
ADI		**3116**	**AP**	No	Yes	No	No
ADI		**3386**	**DF**	No	Yes	No	No
Rcl		**10793**	**SP**	No	Yes	No	No
HC		**107469**	**PR**	No	Yes	No	No
HC		**102819**	**DF**	Yes	No	No	No
RE		**581113**	**SC**	No	Yes	No	No
RE	**AgR**	**598240**	**BA**	No	Yes	No	No
HC		**96526**	**RS**	No	Yes	No	No
HC		**103684**	**DF**	No	Yes	No	No
ADI	**MC**	**4467**	**DF**	Yes	Yes	No	No
ADI		**3944**	**DF**	Yes	Yes	No	No
HC		**102729**	**CE**	No	Yes	No	No
Rcl		**3014**	**SP**	No	Yes	No	No
ADPF		**46**	**DF**	No	Yes	No	No
MS		**27339**	**DF**	No	Yes	No	No
RE		**579951**	**RN**	No	Yes	No	No
ADC		**12**	**DF**	No	Yes	No	No
Inq.		**2245**	**MG**	No	Yes	No	No
RE		**398041**	**PA**	No	Yes	No	No
MS		**24482**	**DF**	No	Yes	No	No
AI	**AgR**	**565223**	**SC**	Yes	No	No	No
AI	**AgR**	**580616**	**SC**	Yes	No	No	No
ADI		**3147**	**PI**	No	Yes	No	No
RE		**210029**	**RS**	No	Yes	No	No
RE		**193503**	**SP**	No	Yes	No	No

Type		Case No.	State	Concept mentioned in summary?	Concept mentioned in votes?	Concept discussed in votes?	Different interpretations of the concept?
RE	**AgR**	**455283**	**RR**	No	Yes	No	No
ADC	**MC**	**12**	**DF**	No	Yes	No	No
MS		**24484**	**DF**	Yes	No	No	No
MS		**25360**	**DF**	Yes	Yes	No	No
HC		**84367**	**RJ**	Yes	Yes	No	No
MS		**23872**	**DF**	No	Yes	No	No
MS		**22369**	**RJ**	No	Yes	No	No
MS		**24911**	**DF**	No	Yes	No	No
RE		**293246**	**RS**	No	Yes	No	No
AC	**QO**	**200**	**SP**	Yes	No	No	No
ADI		**2979**	**ES**	No	Yes	No	No
RE		**418876**	**MT**	No	Yes	No	No
RE	**QO**	**413478**	**PR**	No	Yes	No	No
MS		**24494**	**DF**	No	Yes	No	No
MS		**23981**	**DF**	No	Yes	No	No
MS		**24547**	**DF**	No	Yes	No	No
MS		**24113**	**DF**	No	Yes	No	No
RE	**Edv**	**210251**	**SP**	No	Yes	No	No
HC		**82490**	**RN**	Yes	No	No	No
MS		**24211**	**DF**	No	Yes	No	No
MS		**24304**	**DF**	No	Yes	No	No
MS		**23738**	**SP**	No	Yes	No	No
ADI		**1851**	**AL**	Yes	Yes	No	No
MS		**23759**	**GO**	No	Yes	No	No
ADI		**2306**	**DF**	No	Yes	No	No
MS		**23645**	**MS**	No	Yes	No	No
HC		**80717**	**SP**	No	Yes	No	No
ADPF	**QO**	**3**	**CE**	No	Yes	No	No
MS		**23563**	**GO**	No	Yes	No	No
MS		**23391**	**PR**	No	Yes	No	No

Type		Case No.	State	Concept mentioned in summary?	Concept mentioned in votes?	Concept discussed in votes?	Different interpretations of the concept?
HC		**74674**	**SP**	No	Yes	No	No
ADI	**MC**	**1511**	**DF**	No	Yes	No	No
MS		**22193**	**SP**	No	Yes	No	No
HC		**71452**	**PI**	No	Yes	No	No
HC		**71225**	**SP**	No	Yes	No	No
HC		**70685**	**RJ**	No	Yes	No	No
HC		**70526**	**SP**	No	Yes	No	No
HC		**68898**	**SP**	No	Yes	No	No
HC		**67971**	**SP**	No	Yes	No	No
HC		**67941**	**SP**	No	Yes	No	No
RHC		**65372**	**RS**	No	Yes	No	No
HC		**65487**	**SP**	No	Yes	No	No
RE		**105802**	**PR**	No	Yes	No	No
Rp		**1207**	**MG**	No	Yes	No	No
RHC		**62746**	**SP**	No	Yes	No	No
HC		**62438**	**DF**	No	Yes	No	No
HC		**60266**	**SP**	No	Yes	No	No
RHC		**60279**	**SP**	No	Yes	No	No
RHC		**58849**	**SC**	No	Yes	No	No
RHC		**53530**	**SP**	No	Yes	No	No
HC		**51572**	**SP**	No	Yes	No	No
RE		**68821**	**SP**	No	Yes	No	No
Ext		**272**		No	Yes	No	No
HC	**2nd judgment**	**44074**	**DF**	No	Yes	No	No
RE		**61124**	**PE**	No	Yes	No	No
RE		**49102**	**PB**	No	Yes	No	No
RHC		**37341**	**SP**	No	Yes	No	No
HC		**35899**	**SP**	No	Yes	No	No
HC		**35440**	**DF**	No	Yes	No	No
AI		**18628**	**DF**	No	Yes	No	No

Type		Case No.	State	Concept mentioned in summary?	Concept mentioned in votes?	Concept discussed in votes?	Different interpretations of the concept?
MS		**4057**	**DF**	No	Yes	No	No
RE		**33369**	**DF**	Yes	Yes	No	No
HC		**33627**	**DF**	Yes	No	No	No
RE		**27246**	**DF**	Yes	Yes	No	No
RE		**25976**	**DF**	Yes	Yes	No	No
RMS		**2201**	**DF**	Yes	No	No	No
RHC		**32678**	**DF**	Yes	Yes	No	No
MS		**1465**	**DF**	Yes	Yes	No	No

Source: Our compilation.

Annex II

Type	Case No.	Category
ADPF	190	1
RE	837311	1
ADI	1923	1
RE	631240	1
ADI	3386	1
RE	579951	1
ADC - MC	12	1
RCL - AgR	25028	2
ADI	5062	2
ADI	2777	2
RE	593849	2
RCL - Cump. Sent.	1728	2
ADI	4333	2
ADI - MC	5311	2
RE	658570	2
MS	33340	2
ADI	3943	2
ADI	3059	2
HC	122694	2
RE	789874	2
ADI	4425	2
ADI	4357	2
ADI	1842	2
MS	30859	2
ADI	4029	2
ADI - MC-Ref	4638	2
MS	27621	2
ACO - AgR	1463	2
ADI - MC	4543	2
ADI - MC	4467	2
ADI	3944	2
ADPF	46	2
ADC	12	2
RE	210029	2
RE	193503	2
ADI	2979	2
ADI	1851	2
ARE - AgR	929233	3
RCL - AgR	23131	3
RE	655265	3
RCL - AgR	22286	3
SL - AgR	885	3
ADPF - MC-Ref	341	3
MS	28485	3
RE	630733	3
ADI	2588	3
RMS	23586	3
ARE - AgR	649641	3
AI - AgR	565223	3
AI - AgR	580616	3
HC	84367	3
MS	22369	3
MS	23981	3
MS	24304	3
ADI	2306	3
ADPF - QO	3	3
INQ - ED-AgR	3075	4
MS	25097	4
MS - AgR	24883	4
AC - ED-ED-ED-AgR	3923	4
ADI	2144	4
HC	132233	4
RE	723651	4
HC	130636	4
HC	123494	4
RE - AgR	913568	4
RE	611639	4
ADPF - MC	347	4
HC	127483	4
HC	127823	4
HC	127186	4
RE	632853	4
ARE	652777	4
MS - AgR	25425	4
MS	28178	4
RHC	97926	4
RE - AgR	692456	4
RE	717424	4
AP - QO	606	4
Inq.	2616	4
RE	658026	4
MS	26860	4
RMS	28208	4
ARE - ED	763090	4
ARE - AgR	678782	4
ARE - AgR	728143	4
Ext	1293	4
MS - AgR	31371	4
ARE - AgR	719067	4
ADI	3745	4
RE - AgR (2º)	503436	4
RE	611586	4
RE	541090	4
MS	25855	4
ADI	2340	4
AP	470	4
MS	30221	4
AI - AgR	838141	4
RE	596478	4
Rcl - ED-AgR	9970	4
MS	27958	4
MS	24020	4
ADC	19	4
ADI	4424	4
ARE - AgR	646526	4
AI - AgR	761552	4
Inq.	2482	4
AI - AgR	805322	4
MS	25870	4
AI - AgR	842925	4
HC	107688	4
ADI	4246	4
ADI	3116	4
Rcl	10793	4
HC	107469	4
HC	102819	4
RE	581113	4
RE - AgR	598240	4
HC	96526	4
HC	103684	4
HC	102729	4
Rcl	3014	4
MS	27339	4
Inq.	2245	4
RE	398041	4
MS	24482	4
ADI	3147	4
RE - AgR	455283	4
MS	24484	4
MS	25360	4
MS	23872	4
MS	24911	4
RE	293246	4
AC - QO	200	4
RE	418876	4
RE - QO	413478	4
MS	24494	4
MS	24547	4
MS	24113	4
RE - Edv	210251	4
HC	82490	4
MS	24211	4
MS	23738	4
MS	23759	4
MS	23645	4
HC	80717	4
MS	23563	4
MS	23391	4
HC	74674	4
ADI - MC	1511	4
MS	22193	4
HC	71452	4
HC	71225	4
HC	70685	4
HC	70526	4
HC	68898	4
HC	67971	4
HC	67941	4
RHC	65372	4
HC	65487	4
RE	105802	4
Rp	1207	4
RHC	62746	4
HC	62438	4
HC	60266	4
RHC	60279	4
RHC	58849	4
RHC	53530	4
HC	51572	4
RE	68821	4
Ext	272	4
HC (2º julg.)	44074	4
RE	61124	4
RE	49102	4
RHC	37341	4
HC	35899	4
HC	35440	4
AI	18628	4
MS	4057	4
RE	33369	4
HC	33627	4
RE	27246	4
RE	25976	4
RMS	2201	4
RHC	32678	4
MS	1465	4

Source: Our compilation.

Annex III

Type	Case No.	State	Category	Related Concepts
RE	593849	MG	2	economicity, praticity, convenience,
AC ED-ED-ED-AgR	3923	RS	4	speedy trial procedure
RE	837311	PI	1	economicity, planning, promptness, functional yield
RCL — CumpSent	1728	DF	2	economicity,
ADI	4333	DF	2	simplification
ADI	3943	DF	2	racionalization, processual economy
ADI	1923	DF	1	flexibility, agility and de-beaurocratization
RE	789874	DF	2	flexibility
RE	631240	MG	1	rationalization
ADI	1842	RJ	2	economicity, quality, control
RE	210029	RS	2	speedy trial procedure
RE	193503	SP	2	simplification, processual rapidity
RE	293246	RS	4	speedy trial procedure
ADI	1851	AL	2	economicity, convenience, speed
Ext — AI	272		4	productivity
HC — 2nd judgment	44074	DF	4	productivity
HC	127483	PR	4	quality
RE	658570	MG	2	optimization
RE	655265	DF	3	waste
HC	123494	ES	4	precision

Source: Our compilation.