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ARTIGO ORIGINAL

The principle of efficiency, beyond rhetoric

O princípio da eficiência, para além da retórica

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Abstract: This scientific text deals with the reality of the principle of efficiency in Brazilian Administrative Law, since its insertion in the Brazilian Constitution (article 37, *caput*). In this sense, the article that is summarized here is a denunciation of the fact that administrative efficiency, as a constitutional promise, has not yet been materialized in the public administration of the country, at any of its levels, and it will hardly be effective due to the dense cloud of doubts that it has provoked in both the Executive and the Judiciary, and this has nothing - or very little - to do with corruption. Undoubtedly, in up-to-date Public Administration, the role of agents should adapt to the complexity of the interests of the community, which are multifaceted and changing. The work published here aims to point out the problems and solutions in what concerns the administrative efficiency of today so that a real system is framed in which the efficiency of tomorrow is renewed in perception. Therefore, the research was carried out through a deductive approach and bibliographical and documental review.

Keywords: Constitutional principles of Public Administration. Administrative Efficiency. Judicial control. Brazil.

Resumo: Versa este texto científico sobre a realidade do princípio da eficiência no Direito Administrativo brasileiro, desde a sua inserção na Carta da República em vigor (artigo 37, caput). Neste sentido, o artigo que aqui se resume é denunciativo do fato de que a eficiência administrativa, como promessa constitucional, não se concretizou na Administração Pública do país, em nenhum dos seus níveis, e dificilmente se efetivará por conta da densa nuvem de dúvidas que tem provocado tanto no Poder Executivo quanto no Judiciário, e isso nada – ou muito pouco – tem a ver com corrupção. É indubitável que, na Administração Pública da atualidade,

a atuação dos agentes deveria se adaptar à complexidade dos interesses da coletividade, que são multifacetados e mutantes. Objetiva o trabalho aqui publicado apontar os problemas e as soluções naquilo que se refere à eficiência administrativa do hoje para que se emoldure um real sistema em que seja de renovada percepção a eficiência do amanhã. Para tanto, a pesquisa foi levada a cabo mediante abordagem dedutiva e revisão bibliográfica e documental.

Palavras-Chave: Princípios constitucionais da Administração Pública. Eficiência Administrativa. Controle judicial. Brasil.

1 INTRODUCTION

The title chosen for this article is provocative. At first sight, with this call, it is believed that the principle of efficiency should not be accepted and, mainly, applied on the assumption that just invoking it, or by expressing appreciation, by itself, allows transforming the Brazilian reality, even less "from water to wine". This is not true.

Its existence dates back to 1988, but the rant that preceded and succeeded its insertion in art. 37, *caput*, of the Constitution of the Republic – alongside the principles of legality, impersonality, morality and publicity –, and as a general principle of Public Administration, brought more problems than advantages. It confused vision, confused minds, provoked passions. And wrath. The problem is that this still happens today, even more than thirty years after its enactment.

Therefore, what is in it is not intended for any commemoration. On the contrary, dealing with efficiency as an administrative duty of public managers or as a general principle of Public Administration does not change the point of arrival. Many of the constitutional promises have not yet materialized, including due to human failures – which have little or nothing to do with corruption.

Collective interests become increasingly complex, multifaceted, and continue to vary in time and space. Administrative action should conform to all of this, but there are not always conditions for this, for several reasons. Nevertheless, this is the "reason for being" of the

principle of efficiency as a general principle of the Brazilian Public Administration, which is to allow "the destination" to be maintained, with the necessary course corrections and eventual adaptations of route, without this implying inattention to the laws and the Law. In other words, in the best possible way.

In this scenario, the first problem is to know how to do this based on a systematic and principled constitutional hermeneutics of the order. The second is to recognize that every manifestation of the exercise of the administrative function involves judicial control, even without authorizing the State-Judge to override the State-Administration, purely and simply.

The aim of this article is, therefore, to contribute to such reflections, in addition to paying homage to the country and its citizens, opening wide the conviction that the day will still come when the Brazilian State – as once promised – will become a reality. The (renewed) role of the principle of efficiency is to collaborate in accelerating the process. Just understand it and give it faithful compliance.

2 EFFICIENCY IN THE CONTEXT AND IN THE TEXT OF THE 1988 CONSTITUTIONAL PROJECT

Promulgated on October 5, the Constitution of the Federative Republic of Brazil boasted, preambularly, its commitment to "ensure the exercise of social and individual rights, freedom, security, well-being, development, equality and justice as supreme values of a fraternal, pluralist and prejudice-free society" (Brasil, 1988).

That is, from this promise a new state is constituted (Miranda, 2009), the Brazilian State, which proclaimed itself as also founded on the dignity of the human person and on the social values of work and free initiative (art. 1), and whose main objectives are to (i) build a free, fair and solidary society, (ii) guarantee national development, (iii) eradicate poverty and marginalization and

reduce social and regional inequalities and (iv) promote the good of all, without prejudice of origin, race, sex, color, age and any other forms of discrimination (article 3) (Brasil, 1988).

In this sense, it cannot be forgotten that each of the three "powers" of the Union – Executive, Legislative and Judiciary – competes, since then, in what and in the way that fits them, to pay attention to such values, pursue such ends and give concreteness to the constitutionally recognized rights, with strict observance of laws and current law.

However, the difficulties are manifest, starting with the fact that there is no prior indication of how to do it. However, this does not even cause surprise, given that it is not within the purview of a constitutional charter to define behaviors, but only and solely to organize the exercise of political power - through constitutional norms of organization, which include those of attribution of competences –, establish the fundamental rights of individuals – which is based on constitutional norms that define the law – and establish principles and outline public purposes to be achieved by the State – through programmatic constitutional norms (Barroso, 2004, p. 254) .

Moreover, the current Constitution stands before the legal system as a "source, compass and magnet" (Britto, 2003, p. 125), leaving to subordinate strata, normatively inferior, the desideratum of disciplining the conduct of people in general, and even those close to public functions, based on deontic modalities (permitted, prohibited and obligatory) to which terms are often imprecise, or, even worse, plurivocal.

In this context, it is interesting to examine the initial obstacle to understanding the demands made, in 1988, in relation to the powers of the Union, in the sense of maintaining an internal control system with the objective of " proving the legality and evaluating the results, regarding the effectiveness and **efficiency** , of the budgetary, financial and asset management in the bodies and entities of the federal administration, as well as the application of public resources by

entities governed by private law" and, also, of what is required of the legislator in the sense of guaranteeing the "efficiency" of the activities of bodies responsible for public safety (Brasil, 1988, *emphasis added*).

For Hely Lopes Meirelles, "efficiency", as provided in the Constitution, without amendments, and only in the two passages mentioned, already presented itself with a principled feature[1], but surely affected by those in charge of public management as a duty ("of Good Administration"), serving as a benchmark for its regular exercise and control, including *a posteriori* – based on the examination of "results".

It so happens that the first scenario of the constitutional text brought to light another very important issue, namely "economicity", referred to as a parameter of external control – of the use, collection, safekeeping, management or administration of money, goods and public values, alongside of legality and legitimacy – to be exercised by the National Congress and by the internal control system of each power (art. 70 and sole paragraph of the Constitution).

Thus, even without any concern to distinguish, from the outset, efficiency and economy, it seems completely unreasonable to think that both would be referring to an "identical" constitutional requirement in the context of public management. Adding to this the circumstance that the two words are presented as indeterminate legal concepts, and that based on both of them only a judgment of interpretation is authorized (and not of valuation or even of choice)[2], we have that the

[1] The duty of efficiency is what is imposed on every public agent to carry out his duties with promptness, perfection and functional performance. It is the most modern principle of the administrative function, which is no longer satisfied with being performed only legally, it has experienced positive results for public service and meeting the needs of the community and its members" (MEIRELLES, 1991, p. 86). Continuing, the said jurist concluded the profile of this duty by recognizing that it would not be up to the Public Administration to decide based on lay criteria to the detriment of existing technicians to solve the specific case, and that, in the event of a possible plurality, the option should fall on an alternative that the (s) housed (MEIRELLES, 1991, p. 87).

[2] Indeterminate legal (or normative) concepts are those that contain a high degree of "indetermination". For António Francisco de Sousa (1994, p. 26-29) these concepts can

former would be point "in the direction" of the administrative action required in each concrete case, but without defining "the course", in order to, in perspective, satisfy the interest of the community; this, in turn, would only aim at compliance with the cost-benefit ratio (of the "chosen" solution) in order to "optimally" satisfy the public interest[3] in its secondary aspect. [4]After all, "***verba cum effectu sunt accipienda*: Useless words are not presumed in the law.** Expressions in Law are interpreted so that they do not result in sentences without real

be of the type that entails "interpretation" – pure and simple (like "marriage"), valuation – normative concept "of value" (*eg* "immoral") or "free discretion" – assumed as present only when the law and the Law authorize the administrative authority to decide, in the concrete case, based on a "personal conception", characterizing the "free appreciation" or the "autonomy of personal valuation". This conception, which allows recognizing in indeterminate legal concepts space for "free discretion", although followed by many, seems mistaken. We welcome, for the reasons themselves, the understanding of Luis Manuel Fonseca Pires, for whom – after examining and criticizing the writings of the most distinguished scholars on the subject in Portugal, Italy, Austria and Germany, France, Argentina, in Spain and Brazil – "any and all legal concepts – determined or indeterminate, and, in the latter case, of experience or value – are, ultimately, a matter of mere legal interpretation" (PIRES, 2017, p. 108), which excludes any consideration of valuation or even subjectivism in the recognition of its content for the purpose of applying the norm, the same occurring in relation to the control of the norm as applied. Therefore, the two *sub-examen concepts* allow broad jurisdictional control from the setting of their content through interpretation and, from that, their concrete application.

[3] In this sense, Juarez Freitas (1997, p. 85), recognized the existence of the principle of economy or optimization of state action as extractable solely from art. 70 of the CR, and, from it, highlight that "the public administrator is obliged to act with the optimal parameter. In other words, it has the indeclinable commitment to find the most economically appropriate solution in the management of public affairs".

[4] Borrowing the lessons of Celso Antônio Bandeira de Mello (2016), we have that the primary public interest (or collective, of the collectivity) is equivalent to the interest that each individual has as a member of the social body, while the secondary public interest presents itself as that of the state entity involved in its patrimonial aspect. In this wake, the principle of economy, with the proposed features, proves to be much more inclined to meet the demands of the secondary public interest, in which the focus of action-investigation-control falls (much more) on the amount of spending and not with its quality itself. On the contrary, based on the duty of efficiency, public managers find themselves involved with more complex, multifaceted issues, in which not only can there be – in principle – more than one adequate technical solution, but several public interests to be satisfied concomitantly.

meaning, superfluous, idle, useless words" (MAXIMILIANO, 1933, p. 270, emphasis in the original)[5].

Consequently, both the principle of efficiency and the principle of economy, as they are legal norms and, therefore, aimed at changing the phenomenal world, would serve to help control the validity of administrative action, however, with different concerns, not being able to mix them, even *ab ovo*.

In the same sense, the "effectiveness" – also referred to in item II of art. 74 – will have a different meaning from the previous ones. Its helpfulness is to remind the public manager, or whoever acts as him, of his duty to (seek) to achieve, in an optimal way, the effects of the intended intervention, with a view to maximizing results, in terms of quality and quantity[6].

However, all these forecasts – relating to the efficiency, economy and effectiveness of the public machine – apparently would not have allowed, to the satisfaction, the implementation of the constitutional project by any of the presidents that followed it (José Sarney, Fernando Collor and Itamar Franco), what would have led Fernando Henrique Cardoso – after being elected in the first round, with a great advantage

[5] Furthermore, "a word can have more than one meaning and the adaptable to the species can be ascertained, by examining the context or by another process; but the truth is that each one must always be given its reason for being, its role, its meaning, its contribution to specifying the scope of the positive rule(...). Value is given to all words and, above all, to all sentences, in order to find the true meaning of a text; because this must be understood in such a way that all its provisions are effective, no part is inoperative or superfluous, null or without any significance. (MAXIMILIANO, 1933, p. 270 -271).

[6] On the other hand, but still in the same context, it is assumed that there has always been an imposition of obligations with the "effectiveness" of administrative action. That is, it has never been constitutionally "unimportant" or "uninteresting" the non-achievement of concrete results from a given action by the public power authorized-determined by law. After all, "those who exercise an administrative function are bound to satisfy public interests, that is, the interests of others: the community. Therefore, the use of the Administration's prerogatives is legitimate if, when and to the extent necessary to meet the public interests; that is to say, of the people". (BANDEIRA DE MELLO, 2016, p. 72).

over the runner-up (Luís Inácio Lula da Silva) – to decide and, in fact, manage to promote changes in the Brazilian legal system, which was taken carried out through Constitutional Amendments nº 19/98 (which modified the regime and provided for principles and norms of Public Administration, civil servants and political agents) and nº 20/98 (which altered the social security system), whose spirit is also spread through laws[7].

3 EFFICIENCY AFTER CONSTITUTIONAL AMENDMENT Nº 19/98: SIMPLE RANT OR (INVIGORATED AND EXPRESSED) PRINCIPLE OF PUBLIC ADMINISTRATION?

To answer this question, with minimal security, it is necessary to verify – first – what happened, under the auspices of the Presidency of the Republic, [8]from 1995 onwards, in the sense of promoting a paradigm shift in the structure and mode of operation of the Brazilian State. To put it simply, it was at that time that the movement, apparently ideological, was installed, which resulted in the self-titled "Reform of the State Apparatus", whose project (Brasil, 1995) was mented by the then Minister of Federal Administration and State

[7] By way of illustration: Law nº 9.637/98 (relating to social organizations – of 05/15/98); Law nº 9.784/99 (which regulates the administrative process within the scope of the Federal Public Administration – of 01/29/99); Law nº 9.790/99 (which deals with Civil Society Organizations of Public Interest – of 03/23/99).

[8] " I was convinced, when I arrived at the federal government, that the Brazilian Public Administration needed a broad reform, and I was willing to take responsibility for the initiative. In the first meeting I had with the president, a few days before the start of the new government, I told him that I planned to carry out this reform, which should contain a constitutional amendment defining the stability of servers more flexibly because I understood the absolute stability that exists in Brazil incompatible with a modern administration. Fernando Henrique noted that this reform was not on the agenda, that it had not been part of his campaign commitments. It did not prevent me, however, from taking the first steps towards it, only making it clear that the decision to present a constitutional amendment should wait the necessary time to know if there would be enough political support for it or not" (BRESSER-PEREIRA, 2008, p. 180)

Reform, Luiz Bresser-Pereira and also chancelled by the Chamber of Reform[9].

The Master Plan for the Reform of the State Apparatus (PDRAE) was presented to the community through a true "manifesto"[10]– therefore, with the usual qualities and defects – including that of "seducing" to convince, because through it allegedly diagnoses problems and solutions were announced, which can be seen in several passages of the presentation,[11] signed by Fernando Henrique Cardoso in his

[9] Said body was made up of the following authorities: Chief Minister of the Civil House, Clóvis Carvalho – President; Minister of Federal Administration and State Reform – Luiz Carlos Bresser Pereira; Minister of Labour, Paulo Paiva; Minister of Finance, Pedro Malan; Minister of Planning and Budget – José Serra; and Chief Minister of the General Staff of the Armed Forces, Benedito Onofre Bezerra Leonel.

[10] Just like the Communist Manifesto (by Marx and Engles), *mutatis mutandis*.

[11] "The Brazilian crisis of the last decade was also a state crisis. Due to the development model that previous Governments adopted, the State deviated from its basic functions to expand its presence in the productive sector, which resulted, in addition to the gradual deterioration of public services, to which, in particular, the lesser segment resorts. favored by the population, the worsening of the fiscal crisis and, consequently, of inflation. In this sense, State reform has become an indispensable instrument for consolidating stabilization and ensuring sustained economic growth. Only then will it be possible to promote the correction of social and regional inequalities. (...) The great historical challenge that the country is willing to face is that of articulating a new development model that can bring the perspective of a better future to Brazilian society as a whole. One of the central aspects of this effort is strengthening the State so that its regulatory action is effective, within the framework of a market economy, as well as the basic services it provides and the social policies it needs to implement. create conditions for the reconstruction of public administration on modern and rational bases. (...) It is now necessary to take a leap forward, towards a public administration that I would call 'managerial', based on current concepts of administration and efficiency, focused on the control of results and decentralized in order to be able to reach the citizen , who, in a democratic society, are the ones who give legitimacy to institutions and who, therefore, become a 'privileged customer' of the services provided by the State. in the true professionalization of the server (...). I urge everyone who holds public office in the Federal Government to carefully read this 'Director Plan for the Reform of the State Apparatus'. Because the success of the transformation of the Brazilian State will depend on the good fulfillment of its directives. The 'Plan', which is already being put into practice in several of its dimensions, is the result of extensive discussion within the State Reform Chamber. The challenge of fully implementing this reform, however, is immense and will require everyone's dedication and enthusiasm. It is our duty to give

first year of government, therefore when he still had broad support from the Brazilian population.

In this context, in which the constitutional alteration was propitiated and "legitimized" based on repeated rhetorical speeches[12] of a liberal nature, what followed were reactions of two orders: many accepted the insertion of efficiency as a principle of Public Administration practically without any reflection (or critical); others, because they shared a diametrically opposed thought, made exhaustive criticisms,[13] without taking care to examine the legal effects that could be extracted from the alteration of the constitutional text (and context). None of these situations favors Brazil or Brazilians.

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an urgent and effective response to the population, who, by electing me President of the Republic, believed in this Government's ability to change Brazil, creating a model of social justice, in which the right to a life with dignity is guaranteed." (BRASIL, 1995, p. 9-12)

[12] "Rhetoric, concerned with the art of producing persuasive speeches, establishes itself in the world of contingent truths and makes use of the exploration of reason and affectivity as means to obtain success. Indispensable for changing moods, rhetoric sediments or alters moods, moves moods, modifies temperaments." (CARMELINO, 2012, p. 40-41)

[13] This portion is not judging anyone who may have criticized Constitutional Amendment No. 19/98. The intention is only to draw attention to the fact that some reactions were so great as to overshadow any hermeneutic attempt to bring said amendment (or part of it) back to the contours of the state founded in 1988. Here is a note that speaks for itself: "With the manifest objective of co-opting national legislators, the neoliberalists, under the umbrella of an administrative reform of the State that outlined messianic pretensions of solving national problems, operated a true (and little perceived by the majority) *epistemological change* (Coutinho), placing in the constitutional text, through Amendment nº 19/98, efficiency as a goal-principle of public administration. Efficient action was, therefore, duly 'renamed' by the juridical, and now, many legalists (the unwary ones) started to defend an *efficient State*, thinking they were defending an *effective State* (some do it intentionally, it must be said!). The institutional coup (Bonavides) took place with subtle refinements of cruelty: with the astute strategy of attacking *from within* the state structure (through the Constitution of the Republic itself), the neoliberals skillfully used the mythification-perfection (Ost) and the principled abstraction of the law to naturalize efficiency as a new and legitimate parameter for state action. Such a paradigm, as seen, brings with it the Yankee theoretical *framework* of the *Economic Analysis of Law* which, as is known, aims to place Law at the service of the economy and the efficient allocation of resources in society" (MARCELLINO JÚNIOR, 2009. p. 241).

Indeed, while it is possible to state that what happened was the result of a neoliberal movement, the result of "political will to ease the so-called 'bureaucratic constraints' (...). The positivization of efficiency was basically related to the dismantling of the public sector and the displacement of economic conflicts to the sphere of the market (...)", it can also be recognized that "the positivization of the principle of efficiency reduces the margin of convenient and opportune options" and that, based on its application, "public policies that were previously subject to non-legal sciences are now considered unconstitutional when they expressly violate the minimum parameters of efficient action" (Nohara, 2013, p. 93- 94).

That is, the referred political motto is of no use whatsoever to interfere with the recognition of the meaning, content and scope of the principle of efficiency as constitutionally enshrined, even less in its usefulness for controlling Public Administration. The reason is Franciscan: the *mens legislatoris* is of minor importance, since it is from the *mens legis that the ratio legis* can and must be extracted, which requires a "systematic and principled constitutional hermeneutics of the order" (Gabardo; Hachem, 2010, p. 245). Therefore, "efficiency as a mere symbol or ideological value cannot be confused with its legal-normative manifestation" (Gabardo, 2033, p. 185).

Thus, efficiency – in the normative composure of Public Administration principle – has an instrumental vocation [14]and "does not have an absolute character, but radiates effects in four dimensions: it fulfills an ordering function, a hermeneutic function, a limiting function and a directive function", as observed by Paulo Modesto (2000, p. 112). And, although the understanding of that jurist, about these four functions, has not been expressed in the sequence, it is assumed that they are referring to what follows.

[14] That is, it does not have a self-sufficient value, requiring integration with the other principles (MODESTO, Paulo, 2000, p. 112).

Through the ordering function, the principle of efficiency contributes to the standardization and harmonization of the constitutional system insofar as it allows articulating different parts of this system "sometimes, apparently contradictory – around common values and purposes" (Barroso, 2017, p. 246). The hermeneutic function, in turn, gives the principle of efficiency a vocation to serve as a criterion for the interpretation of other norms. That is, it works, along with the other principles, "like a lighthouse that illuminates the paths to be followed. In fact, it is the principles that give the legal system ideological and ethical identity, pointing out objectives and paths" (Barroso, 2017, p. 246). On the other hand, the principle of efficiency, in its limiting function, restricts the performance of the public manager, imposing certain parameters even when it is characterized, in the abstract, by a certain amount of discretion. Finally, the directive function imposes a certain destination for the exercise of any administrative activity, even if, again, it does not define the path – and not even the course, sometimes – to be followed in each concrete situation.[15]

Consequently, the full normativity of the principle of efficiency remains evident, in the sense of imposing obligations (although without precisely establishing prohibited, permitted or obligatory behaviors), guiding the process of interpretation (and even creation) of other norms and, more than that, to serve – in short – as

> (...) the core commandment of a system, its true foundation, a fundamental provision that radiates over different norms, composing their spirit and serving as a criterion for their exact understanding and intelligence precisely because it defines the logic and rationality of the normative system, in what gives it

[15] "(...) when using principles to formulate political options, goals to be achieved and values to be preserved and promoted, the Constitution does not always choose the means that must be used to preserve or achieve these legal assets. Even because, and this is an important point, often different means can be adopted to achieve the same objective." (BARROSO, 2017, p. 247).

> its tonic and gives it a harmonic sense. (Bandeira de Mello, 2016, p. 990-991, translation mine).

Despite their relevance, all the considerations made still do not meet the demands of a safe orientation in the sense of complying with the principle of efficiency in its most varied features or dimensions. So, you still need to break it down.

4 COROLLARIES OF THE GENERAL PRINCIPLE OF EFFICIENCY: A CONCEPTUAL PROPOSAL BY ACCESSION AND THE RECOGNITION OF ITS MAXIMUM IMPORTANCE IN THE EXERCISE OF DISCRETIONARY COMPETENCE

Now that (literally and constitutionally) erected to the condition of a "general" principle of Public Administration (*rectius* , as a "general" principle for the exercise of the public function), the principle of efficiency ends up "superimposing" the principle of economy, whose scope is much smaller and is limited to public management itself [16].

By way of example – in itself enlightening –, the duty-principle of efficiency, alone, guides any and all administrative activity, including normative production (infraconstitutional and infralegal), which, it is argued here, is not proposed in relation to the principle of economy[17]. The former operates effects *in abstracto* and *in concreto*; this only requires "that the Administration adopt the most convenient and efficient

[16] There are, however, those who think otherwise. For all, Professor Diogo de Figueiredo Moreira Neto (MOREIRA NETO, 2006, p. 311-312) is pointed out, for whom, "although referred to the purpose of carrying out accounting, financial and budgetary inspection, it should be received as a principle of Administrative Law, due to its breadth in the performance of the internal public administration".

[17] In any case, this understanding is reinforced by the fact that the principle of economy is not even mentioned in several – and consecrated – complete works on Administrative Law, such as, for example, those by Celso Antônio Bandeira de Mello, Irene Patrícia Nohara and Maria Sylvia Zanella Di Pietro.

solution from the point of view of managing public resources. The principle of economy is the specialized, pecuniary expression of the principle of efficiency" (Aragão, 2009). Thus, without discrediting its importance, the principle of economy is understood as the first corollary [18]of the principle of efficiency.

Although treated in a drowning way, effectiveness in public management presupposes that all administrative actions, of a legal or concrete nature, present a vocation, at least, to optimally bring about, in the phenomenal world, the desired effects when formulating the rule of competence that authorizes-demands the practice. With this bias, effectiveness assumes the position of the second corollary.

However, the simple ability of the administrative action to bring about the results intended in the norm is not enough in itself to meet the demands of the Constitutional, Social and Democratic State of Law installed in 1988. Even if due attention (and importance) is given to it for the values and pursuit of the purposes as set out in the Constitution of the Republic, concrete satisfaction of the constitutionally recognized rights is also demanded. And here resides effectiveness as the third corollary of the principle of efficiency.

Finally, it is possible to allude to a last development of this same primacy. This is the duty of speed (or optimization of time), as included in the Constitution through Constitutional Amendment No. 45/2004, which inserted the following item (LXXVIII) in art. 5th: "everyone, in the judicial and administrative scope, is ensured the reasonable duration of the process and the means that guarantee the celerity of its processing" (Brasil, 1988). "The new commandment, whose features are that of a fundamental right, has as its content the principle of efficiency with regard to access to justice and stamps an undeniable reaction against society's dissatisfaction with the excessive

[18] "two. (...) Proposition that derives, in a deductive chain, from a previous assertion, producing an increase of knowledge through the explanation of aspects that, in the previous statement, remained latent or obscure." (HOUAISS; VILLAR, 2001, p. 841)

delay of processes [...]" (Carvalho Filho, 2016, p. 32). In this sense, the principle of efficiency reveals an aspect linked to the temporal lapse understood as a limit and whose disregard in administrative action can result in total or partial uselessness of the materialization of the end.

Juxtaposing the aforementioned corollaries, it is possible to conceptualize the principle of efficiency as follows: it is that (i) general principle (ii) that imposes on those who are in the exercise of an administrative function (iii) the duty to pursue collective interests, as an end – prioritizing one (or some) over the others, as the case may be, (iv) to promote the choice and implementation of less burdensome legal or material action for the parties involved – as a means, (v) by optimizing public resources – while criteria for choosing and accepting behaviors and (probable) results, whenever possible, and (vi) with a retrospective review of the results actually obtained[19].

All this, without neglecting the other general principles of Public Administration - in particular, legality, morality, impersonality and

[19] This mention refers to the fact that the eventual non-achievement of the purposes sought in the norm for granting competence does not matter, per se, in cause for disapproval of the administrative action, as a sufficient condition for its fulmination by the control bodies or for accountability who elected him. There is an example that speaks for itself, in the sense of clarifying the conclusion-argument: the margins of preference provided for in the bidding area, through which it is possible to hire a bidder who does not present – from the outset – the least expensive proposal and allows contracting another with a price increased by up to 25% can lead to the mistaken conclusion that it is a real affront to the principle of economy. However, it is a public policy authorized by law and implemented by the will of the government, with a view to promoting the acquisition of " manufactured products and for national services that meet Brazilian technical standards" and the contracting of "goods and services produced or rendered by companies that prove compliance with the reservation of positions provided for by law for people with disabilities or for rehabilitated Social Security and that meet the accessibility rules provided for in the legislation", according to items I and II, of paragraph 5, of art. 3 of the General Bidding Law (LGL) - Law No. 8.666/93 (BRASIL, 1993). It turns out that there is no guarantee that this will result in the achievement of the intended purposes (in items I to III, of paragraph 6, of the same provision of law). Intelligently, therefore, the law provided that the studies that legitimize the promotion be reviewed every five years, with "retrospective analysis of the results", according to the content of item V of §6 of art. 3 of the LGL (BRASIL, 1993). That is, if the results are not "satisfactory" – and within rational and objective parameters –, the public policy should be suspended.

publicity –, with them and also from them providing the choice and implementation (legal and/or material) administrative of the "best possible solution" [20]by those legitimized by the law, for that purpose, and within the narrow limits of its provisions, except in relation to the fulfillment (negative or positive) of fundamental and social rights, for which – in the absence of them (limits) – compliance with constitutional principles and rules, explicit and implicit, at least, is demanded.

From this follows an obvious fact: it is in the (regular) exercise of discretionary competence [21]that the principle of efficiency assumes an insurmountable role in the materialization of the values, foundations and objectives of the Republic, adjusting the administrative action in each case, time and place, without prejudice to its observance even when the administrative action is linked. In this case, the principle of efficiency can be measured in your service, taking into account, for example, the speed with which a certificate is issued.

5 POSSIBILITIES AND LIMITS TO JUDICIAL CONTROL OF THE VARIOUS ADMINISTRATIVE ACTIVITIES BASED ON THE GENERAL PRINCIPLE OF EFFICIENCY

There are no doubts as to the appropriateness of the control of public management by the Courts of Accounts, based on the requirements

[20] Here sustained as excellent "enough", without this constituting a true paradox. Therefore, as a result of a process of choice that complies with the Law, which weighed ends and means, costs and results, predictability and probabilities, considering the time limit for the expiry of the desired interest/right to satisfy, to which weights were attributed, even than "subjective", but impersonal, to guide the final decision.

[21] The following concept of administrative discretion is adopted, for all the reasons pointed out by its creator: "it is the competence provided for by law for the exercise of the administrative function that grants the public agent a plurality of legitimate decisions, and that therefore does not confuses with the legal interpretation of indeterminate concepts, and likewise cannot be granted within the scope of the Sanctioning Administration, and the choice must be exercised, in the face of the concrete case, for the best possible option for the realization of the public interest" (PIRES, 2017, p. 227-229).

that can be drawn from the general principle of efficiency and the principle of economy. However, this subject does not fit in this study due to its own limitations.

Likewise, no one forgets the fundamental right, of a constitutional nature, of access to Justice in the event of injury or threat of injury to the right (art. 5, item XXXV), which includes the review of any administrative act, even that endowed with a certain amount of discretion, for example, with regard to the control of its expedition from an authority considered to be incompetent. After all, this element of the act is always binding.

The discussion is centered, however, on the legitimacy – or not – of the Judiciary to examine and, from this, strike down or replace the final administrative decision (or those that preceded it) in which the definition of a public interest is verified. as preponderant, in relation to others (as an end), the choice between different measures (as a means, based on their impacts - positive and negative), the balance between costs and benefits (as a parameter of acceptability of the means based on the results expected), and the achievement, in whole or in part, of the desired repercussions.

It turns out that this can happen in different situations – in the exercise of police power, in the provision of public service, through regulation, when signing contractual partnerships, in development activities, etc. –, in which it will be necessary to investigate, with detention, the integrality of the process that defined the course and traced the path to be followed in order to reach the destination in time (the public interest achieved).

Just do two imaginary tests – among many others – to understand the richness of the problem-discussion-solution.

First: the pressing administrative need is to end outbreaks of *Aedes aegypti* in the municipal territory after the death of people from dengue, within a period of two months, although this was the first infestation with fatal victims. In order to resolve the situation, it is determined that – within a maximum period of ten days and in areas

mapped as at risk – municipal health agents must enter all properties, public and private, for commercial and residential use, without distinction, including through "break-in" – in the absence of people present to authorize entry –, aiming at the application of larvicide AXY, acquired, without bidding, upon adherence to the minutes of registration of Union prices, made, at the time, based on Decree no. 3,931/2001[22]. A month after the ordered measures were finalized, an additional twenty deaths were counted to the almost one hundred previously counted.

At this juncture, four "sensitive" points draw attention: possible violation of the home (through the use of a means that "fights" with the inviolability of the home), [23]alleged unnecessary expenditure (since, in theory, it would be enough to empty places/objects with accumulation of water), uselessness of the measure (since the deaths continued to happen) and delay in dealing with the situation. If provoked, the Judiciary would have to confirm the following, in order to finally decide: whether or not there had been compliance with: (i) the duty of efficiency (examining the ordinance made – in the sense of entering into properties, when powerful fumigators could have been used on public roads); (ii) the corollary of effectiveness (assessing whether the ordered measure was adequate, among the other possible and less burdensome measures – such as determining double or triple visitation, before forced entry); (iii) the speed demanded in the situation (considering that ten days were stipulated for completion, which could have been done in less time, if outsourced workers had been

[22] "Art. 8 The Minutes of Price Registration, during its term, may be used by any Administration body or entity that has not participated in the bidding process, upon prior consultation with the managing body, provided that the advantage is duly proven. (Revoked)" (BRASIL, 2001).

[23] In apparent violation of art. 5, item XI, of the CR: "the house is the individual's inviolable asylum, no one being able to enter it without the resident's consent, except in the case of flagrante delicto or disaster, or to provide help, or, during the day, by court order" (BRASIL, 1988).

hired, on an urgent basis); and (iv) the required effectiveness of the administrative action (revolving the fact that another twenty people would have occurred after the intervention was finalized).

For all of the above, it is understood, in the reported case, that: the measure was (i) efficient - considering that - *a contrario sensu* - the dispersion of poison, by means of fumigators, is always interfered with by winds and the existence of walls; (ii) effective – even though it conflicted with a fundamental individual guarantee, which legitimately "gave in" in the face of the interest of the community –, as the measure could put an end to dengue outbreaks; (iii) fast – since the simple emptying of tanks with water does not avoid filling them again, properly "treated" with larvicide, whose effect lasts for up to 20 months; (iv) economic – as it was achieved through adherence to the price registration minutes and having as its scope the acquisition of a product purchased by the Union itself (despite the fact that there are cheaper ones on the market); and (v) effective – after all, there was a change, with a significant reduction in the morbidity rate.

Second: the same municipality – concerned with discrimination against women in the labor market, and therefore with their resulting inability to provide for their own subsistence (with effects that threaten their dignity), which is aggravated by the large presence of families consisting only of mothers and their offspring –, based on objective data [24]and through regulation, decides to adopt the following public policy, taking into account that the percentage of women employed in the private sector is less than twenty percent: demand that, in the municipal bidding notices, a clause is stipulated in the contractual draft demanding that the contractor to provide services guarantees, at least, that thirty percent of vacancies are filled with women, committing to maintain this percentage throughout the execution of the contract

[24] The verified percentage of women in idle working age and conditions is more than sixty percent, equally expressive of more than sixty percent of all people in working conditions in the community.

and of any extension. Three years after the adoption of the public policy, the percentage of women employed in the private sector rises to twenty-three percent, based only on vacancies with contractual partners in the municipality. If provoked, the Judiciary would have to confirm the following, in order to finally pronounce: whether or not there was compliance with: (i) the duty of efficiency (examining the public policy itself); (ii) the corollary of effectiveness (whether the ordered measure was adequate, among other possible measures, taking into account that the reservation of vacancies would exceed – "in theory" – the usual purposes of the bidding process); and (iii) the principle of economy (in the sense that the public notice requirement has created a business burden with repercussions on the formulation of prices in public bids and contracts, with prejudice to the ordinary competition that would be expected); (iv) the lack of effectiveness of administrative action (considering that there would have been a meager increase of fifteen percent of women hired). Speed, in this case, would need no examination, as it would not be of greater importance taking into account the lack of urgency-emergency and the fact that discrimination is an imbroglio of centuries, which was not supposed or intended to be resolved in a few years.

Based on the report and the questions raised, it is argued, in the reported case, that: the measure was (i) efficient – considering that the promotion of sustainable national development is the third legal purpose of public tenders, [25]alongside the guarantee of isonomy (between bidders) and the selection of the most advantageous proposal (among those presented), [26]which encompasses economic,

[25] To deepen the examination of this public policy, see: FERREIRA, 2012.

[26] Law nº 8.666/93 : " Art. 3rd The bidding is intended to ensure compliance with the constitutional principle of isonomy, the selection of the most advantageous proposal for the administration and promotion of sustainable national development and will be processed and judged in strict accordance with the basic principles of legality, impersonality , morality, equality, publicity, administrative probity, binding to the summons instrument, objective judgment and those related to them" (BRASIL, 1993).

social and environmental concerns. To simplify: an environmentally balanced economic growth, in addition to being socially fair, benign and inclusive from a social point of view, which is also materialized, to a large extent, through the "margins of preference", which were discussed for illustrative purposes; (ii) effective – even though it may apparently come into conflict with the potential partner's autonomy of will, no one is obliged to participate in bids. Therefore, the encumbrance imposed is practically non-existent, and, on the contrary, the reported data prove the existence of many women able to work; [27](iii) economic – because it was carried out without any additional cost to be borne by the public purse, taking into account the constitutional prohibition of payment of wages differentiated by sex, as per item XXX, of art. 7th; (e) (iv) effective – after all, there has been significant progress in hiring women by the private sector.

The questions that remain to be answered are the following: in the first case – the existence of an option (use a fumigator, instead of larvicide; just empty water receptacles, instead of using larvicide), the lack of objective parameters regarding predictability/probability of results, based on each option and the absence of parameters, regarding the minimum acceptability of results, would authorize the Judiciary to suspend the administrative decision (if still in progress) and, as a result, to hold the agent responsible responsible for an alleged illegitimacy? In the second case, they would be: the "unusual" character of the determined measure and fugitive from the ordinary standard of administrative action (consubstantiated in the reservation of vacancies to include women in the private labor market through contractual partnerships), the lack of objective parameters about the predictability/probability of results, based on this decision, the absence of parameters, about the minimum

[27] As for qualification for work, this is a parallel issue, but one that is not fundamental, since the Constitution of the Republic recognizes the social function of property (and, by reflex, also of legal persons) as a principle of the economic order, founded in valuing human work and free initiative (as provided for in item III, of art. 170).

acceptability of re results, would it allow the Judiciary to suspend the administrative decision (if still in progress), and, as a result, to hold the responsible agent responsible for alleged illegitimacy?

This research defend that this is not adequate! Intending to obtain a judicial declaration in the sense of what would have been the "optimal" solution in terms of choice of conduct, selection of means-effects, cost-benefit evaluation or even acceptance of desired-achieved (minimum) results is to provide a very serious violation of the principle of separation of powers. It is to remove from public management the technicality that is inherent to it. It means handing over to the interpreter of the law, par excellence, the decision-making power deliberately committed by law to the bureaucrat. It is, finally and beyond all that, defrauding the popular mandate. Therefore, without the slightest reason.

What is admitted and claimed, echoing Humberto Ávilla, is the judicial fulmination of administrative decisions through which, among other viable means, the "least intense", the "worst" and the "least safe" have been chosen and implemented" to achieve the purpose established by the rule (Ávila, 2005, p. 23). In the same sense, it is not tolerated – not even by hypothesis – the judicial maintenance of administrative decisions that violate the principle of efficiency and its corollaries due to indifference, fear or simple inattention, in particular when the constitutional protection of fundamental rights and guarantees is at stake. or the satisfaction of social rights.

In summary, the judicial provision, in the context, should be limited to fulminating the unsustainable, suspending the intolerable and holding the "irresponsible" responsible, leaving society with the burden of evaluating, qualifying and responding to any administrative behavior taken based on the "best possible" (which, as a rule, is equivalent to "satisfactory" in the context of reality, in the face of the ideal; not "optimal", repeat) compliance with the principle of efficiency – and with attention to efficacy, effectiveness, to the speed to the economy required in the concrete case – by means of the vote.

6 ARTIFICIAL INTELLIGENCE AS A MECHANISM AIMED AT ADMINISTRATIVE EFFICIENCY

In a context of administrative efficiency, the present text could not forget the contemporary incorporation, adoption and accentuated use of technologies arising from artificial intelligence in general, which did not take long until the systems were considered and effectively implemented by the administrative, controller and Brazilian courts.

Within the scope of Administration, there is talk of the use of AI in the field of public tenders and administrative contracts with the aim of introducing greater efficiency in their procedures (Motta, 2019) and making the fight against corruption in this field more elaborate (Valente, 2018). In addition, Brazilian Court of Accounts have used AI to assist in the auditing of state and municipal governments, which can lead to savings in contracts, whistleblowing and transparency in society. The Federal Court of Accounts (TCU) and the Federal Comptroller General (CGU) have been using the *Alice system* (Teixeira, 2022).

In *terrae brasilis*, the judiciary begins to sympathize with the use of AI, precisely because of the enhanced efficiency that technology provides in certain activities [28], such as the Sócrates project of the Superior Court of Justice (STJ) and the PIAA projects (Artificial Intelligence Project and Automation) and Larry (developed by the Court of Justice of the State of Paraná), and the other 70 existing projects in 50% of the courts in the country (Teixeira, 2022). The Court of Justice of the State of Minas Gerais has invested in innovations such as automatic procedural indexing in order to identify repetitive demands (Tribunal de Justiça de Minas Gerais, 2020).

In partnership with the University of Brasília, in 2018, the Federal Supreme Court started the "Victor" project, which in its initial

[28] Some studies cited in the scope of this work are inconclusive in this regard, but the generalization discourse of AI systems in the judiciary is that of efficiency.

phase allowed the reading of all the extraordinary appeals that come up to the STF and identify which are linked to certain topics of general repercussion (Supreme federal Court, 2020). In addition, the *Corpus 927* system exists in the field of the national superior courts, which was developed by the National School of Formation and Improvement of Magistrates (ENFAM) in partnership with the Superior Court of Justice (STJ), aiming to consolidate in a single place the binding decisions of the STF and the STJ, as well as the jurisprudence of the STJ.

Briefly unraveling the functionality of the aforementioned AI systems, it appears that the Victor Project sought to apply the concepts and techniques of Artificial Intelligence (AI) and Machine Learning (ML) to issues related to processing, classification of themes and parts within the scope of the General Repercussion in the STF. The Victor AI system works as follows: "initially, the STF makes its database of legal proceedings available for the team at the Machine Learning Group (GPAM) at the University of Brasília to process them. Currently, the Victor project database has about 952,000 documents from about 45,000 processes" (Inazawa, 2019).

Regarding the panorama of administrative decisions, the use of AI by the Federal Court of Accounts (TCU), the external control body of the Public Administration, is one of the bodies that has most used AI systems in order to increase its productivity. (Teixeira, 2022). The robot Alice (Analysis of Tenders and Notices), for example, together with the robots Sofia and Mônica, scan federal hiring with the aim of detecting irregularities (Desordi; Bona, 2020). Regarding the functionality of these intelligent systems, Danubia Desordi and Carla Bona (2020, p. 22) report:

> On air since February 2017, Alice reads public notices of bids and minutes of price records published by the federal administration, in addition to some state public bodies and state-owned companies, by collecting information in the Official Gazette and on Comprasnet. Based on this scan, Alice issues a report indicating signs of irregularities to the auditor, so that he can analyze the

> notice or minutes in more detail. With Alice's help, the auditors were able to suspend irregular hiring in states and even in Itamaraty public notices, demonstrating the contribution of the computational system to the optimization, agility and efficiency of the public service provided by the agency (mine translation).

As for the role of the robot Sofia, it is to point out errors in the auditors' texts, becoming an icon in the text editor that, when activated, operates in the sense of listing the information associated with the process numbers, CPF and CNPJ contained in the text (Desordi; Bona, 2020). In addition, the Mônica robot is a panel of all public purchases, including those ignored by the Alice robot system (direct hiring and unenforceability of bidding) (Desordi; Bona, 2020).

Recently, the Brazilian Artificial Intelligence Strategy – BIA was instituted, through Ordinance MCTI nº 4.617, which "assumes the role of guiding the actions of the Brazilian State in favor of the development of actions, in its various aspects, that stimulate research, innovation and development of solutions in Artificial Intelligence, as well as its conscious, ethical use in favor of a better future" (Government Federal, 2021). That is, the application of AI in Public Power was institutionalized, ceasing to be just a question in the face of technological innovations.

It is warned, however, that development, as such, has a twofold character, requiring sensitivity to the need to mitigate the risks of technological interference. According to Thiago Marrara (2011, p. 248), technologies are capable of increasing transparency, democratization, impersonality and efficiency, but their improper use is capable of violating the principles that govern Public Administration.

7 CONCLUSION

This study sought to lay bare the "duty of efficiency", as required of public managers from 1988 onwards, re-examining it – with

a magnifying glass – in the light of the current Constitution of the Republic, as amended by Constitutional Amendment no. 19/98, in order to purge possible deleterious effects of the rant linked to it.

This is how it was recognized as a general principle of Public Administration, of compulsory observance in the exercise of the administrative function in any of its expressions: police power, public service, regulation, promotion, etc.

Through this examination, it was also found that the general principle of efficiency has four corollaries – effectiveness, effectiveness, economy and speed –, which configure unfolding of its content. This time, the following concept was formulated: the principle of efficiency is that general principle that imposes on those who are in the exercise of an administrative function the duty to pursue collective interests, as an end - prioritizing one (or some) in relation to others , depending on the case, to promote the choice and implementation of less burdensome legal or material action for the parties involved – as a means, by optimizing public resources – as a criterion for choosing and accepting behaviors and (probable) results, always possible, and with a retrospective review of the results actually obtained.

In addition, it was found that it fulfills four functions: the hermeneutic function, the limiting function, the directive function and, also, the ordering function, through which it collaborates for the standardization and harmonization of the constitutional system insofar as it allows articulating different parts of this system, even when apparently contradictory, but around common values and purposes. Precisely for this reason, the principle of efficiency cannot antagonize the principle of legality. On the contrary – if and when necessary – both must harmonize according to the peculiarities of each case.

Attention to the commands resulting from the interpretation and application of norms based on the general principle of efficiency matters, as a condition of validity, both in terms of linked action and also discretionary, being more relevant in the latter, a situation in which it is important to consider the choice made by the legislator in

relation to whom is assigned the duty-power to choose the conduct to adopt – in the concrete case – to pursue the public purpose, elect the means potentially able to do so, with attention to the cost-benefit ratio, optimization of time and by weighing encumbrances-benefits, without prejudice to their revision, in similar situations, after retrospective examination of the results.

Hence, the importance of judicial control is also inferred, but it cannot override the administrative solution in choosing and implementing the means, among others equally eligible, except when this proves inadmissible, when measured as the "least intense", the "worst" and "least safe" to achieve the end established by the standard. Otherwise, the violation of the principle of separation of powers will be evident.

Finally, in view of the more than 30 years since the promulgation of our Republican Charter, it should be noted that the general principle of efficiency is not presented, only, as a necessary and cogent reference for the valid performance of those exercising administrative functions, but also as a **right of the administered to the best possible public administration** – in all its senses. [29]Turns out that wasn't the case. And, contrary to what one might assume, there was no failure or lack of interest in approaching the general principle of efficiency from this perspective. However, with this article the aim is to point out the light at the end of the tunnel; deliver a thread of hope.

In fact, there is no doubt that there is still much, much more to be done – by the State, by economic agents, by the third sector and by society – in the sense of pursuing the objectives of the Federative Republic of Brazil and giving effect to the constitutionally recognized rights, with strict observance of laws and current law. Then there is a problem. If that principle and its corollaries had been taken into account, then the countless "optimal" solutions would certainly have helped to alleviate the current situation. So, the question remains:

[29] Juarez Freitas (2014) and Jaime Rodríguez-Arana Muñoz (2012) carried out a similar investigation.

since 1988, or at least since 1998, has the general principle of efficiency been a real failure? The answer is, again, negative.

It is understood that from the result of applying the general principle of efficiency what can be extracted is the "best possible solution" (or even a "satisfactory solution" – as proposed by Humberto Ávilla), due to the fact that not always the ideal can be performed. Economic and budgetary reasons, per se, prove this every day, on account of the total dissatisfaction or the only incomplete satisfaction of fundamental social rights.

This is the reason why it will always be necessary to examine – and retrospectively – the results of each chosen solution, by whoever is in charge of exercising the administrative function to satisfy the public interest, in a particular situation and in a given context (legal, social, budgetary, economic, technology, etc.). What, today, is assumed – and legally validated – as "great result" or "best means", should not be repeated tomorrow. Incidentally, assuming that someone acted optimally and achieved optimal results is contributing to failure.

In short, the principle of efficiency calls for tomorrow's results to be better than today's; that the means are less and less invasive, causing progressively smaller encumbrances; that the advantages reach more and more people; and that the eventual increase in public expenditure, in the satisfaction of the interests of the community, is always overcome by the increase in collection (in the form of laws and the Law). Therefore, there is no other general principle of Public Administration that can surpass it, in importance, in the construction of an increasingly better Brazil to live in.

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