ADI 5,644

Allocation of funds from the Public Defender's Office of the State of São Paulo for the payment of private lawyers (assigned counsel)

Rapporteur
Justice Edson Fachin

Voting
By Majority (8x3)

Majority Opinion
Justice Edson Fachin

Competent Court
Full Court

Decision Date
March 19, 2025

Format of the Session
In person

Facts

A constitutional action (Direct Action of Unconstitutionality) that addresses the validity of article 1 of Complementary Law 1,297/2017 of the State of São Paulo. The rule stipulates that 40% of the budget of the Fund for Free Legal Services—the main source of funding for the Public Defender's Office of the State of São Paulo—must be earmarked for the payment of assigned counsel, that is, private lawyers hired to assist people in need, in situations where no public defender is available.

The National Association of Public Defenders, which initiated the action, argues that article 1 of Complementary Law 1,297/2017 of the State of São Paulo is unconstitutional because (i) the State Governor could not have proposed a bill on the budget of the Public Defender's Office and (ii) tying a substantial portion of the institution's resources to the payment of assigned counsel would prevent the expansion of services provided to the population.

Legal Issues

1. Can the State Governor submit a bill that earmarks part of the funds that make up the Public Defender's Office budget?

2. Does allocating 40% of the Public Defender's Office budget to the payment of assigned counsel violate the constitutional requirement to expand and strengthen the institution?

Legal Reasoning

1. Public Defender's Offices are created to enforce the fundamental right to comprehensive and free legal services for people with insufficiency of funds (article 5, item LXXIV, and article 134, head provision, of the Constitution). In order to fulfill this mission, Public Defender's Offices have administrative and functional independence (article 134, paragraph 4).

2. The Constitution granted Public Defender's Offices the prerogative to prepare their own budget proposals (article 134, paragraph 4). Thus, it is the responsibility of the State Defender General—and not the Governor—to submit a bill to the State Legislature that puts constraints on the Public Defender's Office budget. For this reason, article 1 of Complementary Law 1,297/2017 of the State of São Paulo is unconstitutional.

3. The existence of public defenders everywhere where the Judiciary is present is a constitutional requirement (article 98, paragraph 1, of the Temporary Constitutional Provisions Act). However, practical limitations to the expansion of the Public Defender's Office mean that not all locations are served, which leads to the hiring of assigned counsel. In this context, by linking 40% of the budget of the Public Defender's Office of the State of São Paulo to the hiring of assigned counsel, Article 1 of Complementary Law 1,297/2017 of the State of São Paulo limited the resources available for the expansion of the institution to places not yet served, contrary to the constitutional requirement that the service be comprehensive.

Voting and Decision

Decision by Majority

Majority Opinion: **Justice Edson Fachin** (Rapporteur)

Dissenting Opinion(s): **Justice Alexandre de Moraes, Justice Ricardo Lewandowski, and Justice Gilmar Mendes.**

Decision of the Court

The Full Court, by majority vote, invalidated the São Paulo law that allocated 40% of the local Public Defender's Office's resources to the payment of private lawyers hired through agreements (assigned counsel).

The position established by the Supreme Court is that the law, by earmarking part of the institution's budget to a specific purpose, violated the budgetary and administrative autonomy the Federal Constitution guarantees to Public Defender's Offices.

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