

**Case number:**

Up-171/14

ECLI:

ECLI:SI:USRS:2017:Up.171.14

Challenged act:**Operative provisions:****Abstract:**

Article 29 of the Constitution enumerates the minimum rights of defendants in criminal proceedings, the purpose of which is to ensure a fair trial before an independent and impartial court. According to the second indent of Article 29 of the Constitution, anyone charged with a criminal offence must be guaranteed, in addition to absolute equality, the right to be present at his or her trial and to conduct his or her own defence or to be defended by a legal representative.

The decision on the manner in which a defendant will defend him- or herself, i.e. alone, by means of a counsel, or by both him- or herself with the assistance of a counsel, must be left, as a general rule, to the defendant. The defendant may waive the mentioned right; however, the court cannot deprive him or her of such right by its conduct. If the defendant decides that he or she will defend him- or herself (either alone or with the assistance of a counsel), it is difficult to imagine how he or she could exercise this right without being present. From this perspective, the right to defend oneself is necessarily tied to the presence of the defendant.

The right determined by the second indent of Article 29 of the Constitution is not limited to merely the phase of adjudication before the court of first instance, but it applies to the entire criminal proceedings and thus also to proceedings before the appellate court.

The counsel cannot exercise the right of the defendant to be present at the appellate session, as the counsel merely assists the defendant in criminal proceedings, and acts together with the defendant and not instead of the defendant.

In cases where a violation of the law concurrently entails a violation of a constitutionally determined right, i.e. the right of the defendant to be present at his or her trial determined by the second indent of Article 29 of the Constitution, it is not necessary to demonstrate the influence of that violation on the legality of the final judgment in order to establish a violation of the mentioned human right. The opposing position of the Supreme Court violates the right determined by the second indent of Article 29 of the Constitution.

Thesaurus:**Legal basis:****Cases joined:****Full text:**

[Publisher's Note: The full text of this Decision/Order is available only in Slovene. The text published below is a summary prepared for the annual report.]

Right to be Present at Trial

In Case No. **Up-171/14** (Decision dated 9 February 2017), the Constitutional Court decided on the constitutional complaint of a complainant who was convicted of the criminal offence of abuse of position or rights under the first paragraph of Article 244 of the Criminal Code. The complaint alleged a violation of the right to a legal remedy determined by Article 25 of the Constitution as well as a violation of the procedural safeguards in criminal proceedings determined by Article 29 of the Constitution. He claimed that in the appeal he himself as well as his defence attorney requested that they be informed of the session of the appellate court, as they wanted to be present at the session. While the Maribor Higher Court informed the complainant of the session of the panel that was scheduled for 25 October 2012, the complainant only received this information on 30 October 2012, namely after the session had already been concluded.

Article 29 of the Constitution lists the rights that a defendant enjoys in criminal proceedings and which are intended to guarantee him or her a fair trial before an independent and impartial court. According to established constitutional case law, in order to ensure a fair trial it is essential that the person whose rights, obligations, or legal interests are the subject of judicial proceedings be provided appropriate and adequate possibilities to take a position regarding the factual as well as legal aspects of the case at issue and that he or she is not placed in a less favourable position with regard to the opposing party. From the mentioned constitutional provision there follows the defendant's right to be present at his or her trial as well as the defendant's right to conduct his or her own defence or to be defended by an attorney. The right to be present at trial entails a fundamental safeguard and its purpose is to enable the defendant to effectively defend him- or herself against the factual and legal aspects of the charges brought against him or her. As a general rule, the decision on whether the defendant will conduct his or her own defence, whether he or she will be defended by an attorney, or whether he or she will conduct his or her own defence as well as employ the assistance of an attorney must be left to the defendant. The defendant can waive this right, but a court may not deprive him or her of this right through its conduct. If a defendant decides to defend him- or herself (on his or her own or with the assistance of an attorney), it is difficult to imagine that he or she could exercise this right unless he or she personally attends the execution of procedural acts. In this regard, the defendant's right to conduct his or her defence is thus inevitably linked to his or her attendance. This right is not restricted to the stage of the trial before the court of first instance, but applies throughout the entire criminal proceedings and therefore also in proceedings before the appellate court.

In the case at issue, it was undisputed that in his appeal the complainant requested that he himself as well as his attorney be informed of the session of the appellate court, yet the appellate court informed only the complainant's attorney of the session in due time, but not the complainant. Consequently, the complainant could not attend the session regarding his appeal. Although it is true that his attorney attended the session, a defence attorney cannot exercise a defendant's right to be present at the session regarding his or her appeal. The defence attorney is namely merely the defendant's assistant in criminal proceedings and appears alongside the defendant, not in his or her stead. The defendant's presence at the appellate session is ultimately important from the perspective of the right to an effective legal remedy determined by Article 25 of the Constitution, as in such a manner he or she is ensured the possibility to appear and put forward arguments in person in order to convince the court that the appeal is substantiated, a decision that the court could otherwise only reach on the basis of written materials contained in the case file. As the Supreme Court did not remedy the violations that occurred before the Higher Court, but even adopted the position that the complainant

should have demonstrated that the established violation affected the legality of the judgment, it also violated the complainant's right determined by the second indent of Article 29 of the Constitution.

Type of procedure:

ustavna pritožba

Type of act:

posamični akt

Applicant:

Helmut Klemenčič, Maribor

Date of application:

5. 3. 2014

Date of Decision:

9. 2. 2017

Type of decision adopted:

odločba

Outcome of proceedings:

razveljavitev ali odprava

Published:

Document:

AN03819