

THE CONSTITUTIONAL COURT SHIFTS ITS POSITION ON THE ACCUSED'S RIGHT TO THE LAST WORD

In this information briefing, we analyse the recent judgment of the Constitutional Court, in plenary session, [*Tribunal Constitucional*] ("TC") which was issued on 18 February 2021. In this judgment, the TC amends the criteria established in Judgment 258/2007, of 18 December, concerning an accused's right to the last word and the guarantees that should accompany its use.

1. Background

In the case that is the subject of the judgment of 18 February, after the closing arguments, the Magistrate-Judge proceeded to deliver her judgment *in voce*. During this judgment, the accused attempted to make a statement but was reprimanded by the judge, who ordered him to remain silent and continued with the summary of her decision, bringing the trial to a close at the end of her remarks.

At no time was the accused given the opportunity to express to the Court any issues that he considered relevant in accordance with the right granted to him by Article 739 of LECrim (La Ley de Enjuiciamiento Criminal) [*The Criminal Procedure Act*]. These issues were, in the opinion of the applicant for constitutional protection [*demandante de amparo*], the only means of challenging the allegations made by the complainant and her acquaintances at the trial, after the statement of the accused.

2. The judgment of the Constitutional Court, in plenary session, 18 February 2021

The applicant sought a declaration that there had been a breach of the fundamental right to effective judicial protection, the right to a defence and the right to a fair trial recognised in Articles 24.1 and 24.2 of the Spanish Constitution [*Constitución Española*] ("CE") in circumstances where the accused was neither asked nor allowed to submit his views to the Court.

A. The right to the last word and the right to a defence, legal assistance and a fair trial

In its judgment, the TC states that the guiding criterion has always been to consider the right to the last word an essential guarantee to ensure the accused's right to a defence in criminal proceedings:

- (i) The right to the last word is an expression of the right to self-defence

A distinction can be made between the right to self-defence, the specific expressions and scope of which are determined by the law in each case, and the right to heterodefence [*heterodefensa*], which entitles the accused to have procedural representation and legal advice at every stage and step of the proceedings. In this case, our criminal procedure offers the accused the "right to the last word" in Article 739 of the LECrim.

- (ii) It differs from the right to be heard in evidence

Although the cross-examination allows the accused to make the statements he deems relevant to the defence of his interests, at that moment he is unaware of the nature of the rest of the evidence to be heard during the trial. The same applies to the content of the prosecution's evidence. As a result, the position that he maintained during his statement at the beginning of the trial may be reaffirmed or, on the contrary, may need to be revised and clarified.

For this reason, the TC considers that the accused should have the opportunity to challenge all of the evidence presented in the trial, arguing whatever he considers appropriate for his defence. Thus, he should have the opportunity to be the last to speak in the proceedings.

- (iii) The right to the last word is a guarantee of a fair trial

From the perspective of the right to due process, it must be stated that breaches of procedural rules or standards only constitute a breach of the right to due process if they result in the significant impairment of the ability to defend oneself. In this regard, the TC concludes that the right to the last word constitutes a "guarantee of a fair trial".

B. Definition of the right to the last word

The TC considers that the purpose of the right to the last word is that the last thing the judicial body hears, after the trial and before passing sentence, is the speech of the accused; its very nature prevents these statements from being disputed by the parties.

The TC adds that it is precisely the words used at the end of the trial that best express and guarantee the right to self-defence, insofar as the accused knows better than anyone else all of the issues that may influence the assessment of the proven facts in the trial and which form the basis of the accusation.

C. Conditions for the exercise of the right to the last word

Regarding the conditions required for the valid exercise of this right, the TC considers that there are two relevant issues:

(i) No requirement for a request before the delivery of the last word

Firstly, there is no need for a prior request by the accused, or by his counsel, in order to exercise the right to the last word. In this regard, the judgment states that the court must offer and ensure the exercise of the right to the last word in its capacity as the guarantor of a fair trial.

(ii) No requirement to prove actual harm

Secondly, until Judgment 258/2007, the accused was not required to prove the actual impact that the denial of the right to speak could have had on the sentence issued. It was sufficient to prove the fact that he was not allowed to have the last word before the court.

However, the TC acknowledges that Judgment 258/2007 placed the burden on the appellant to demonstrate how the failure of the court to take into account the information that the accused would have provided if he had been given the last word could have had an impact on the outcome of the (conviction) sentence. In this regard, the judgment dealt with the issue by equating the breach of the right to the last word with the right to be protected from a material lack of defence.

The TC also notes that since Judgment 258/2007, it had not had the opportunity to rule on the changes introduced by the 2007 Judgment. This is why the TC recognises the existence of special constitutional significance of the appeal for constitutional protection insofar as this appeal provides an opportunity for it to clarify and revise its position which was established in Judgment 258/2007.

In this respect, the TC concludes that the doctrine of Judgment 258/2007 should be revised in circumstances where the right to a defence under Article 24.2 of the EC should be considered breached whenever the accused is deprived of the right to the last word (provided that he has not waived this right), without the accused having to prove, in an appeal against the conviction, the positive influence of what he had said to the court on the judgment. Furthermore, the TC states that it is irrelevant whether or not the substance of the accused's remarks would have been decisive in relation to his acquittal or a more favourable verdict.

Therefore, the TC has decided to clarify and revise its position as set out in Judgment 258/2007. It considers that the requirement of having to convince the court of the consequences of what the accused could or could not have said in the trial in order to

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obtain a more favourable sentence must be qualified. Thus, the judgment holds that the right to a defence under Article 24.2 of the EC must be considered to have been breached in all cases in which the accused has been deprived of the right to the last word, without having to prove the possible consequences or relevance of its contents on the judgment of the trial court, even if he has not expressly waived his right to exercise it. The accused's right to the last word is not the right to express to the court the relevant facts in order to ensure his best position in the judgment, but the right to communicate to the court that which, in his opinion, the latter must know in order to reach a just decision, whether or not it is relevant in relation to his acquittal or a lesser sentence.

This Information Briefing was prepared by Jorge Walser, Associate of the White Collar Crime and Investigations practice area.

The information contained in this Briefing is of a general nature and does not constitute legal advice. This Briefing was prepared on 3 March 2021 and Pérez-Llorca does not undertake any commitment whatsoever to update or review its content.

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