

I. ESTUDIOS
SOBRE DERECHOS
FUNDAMENTALES
Y UNIÓN EUROPEA

GUARANTEES OF DUE PROCESS IN CRIMINAL APPEAL PROCEDURE

MANUEL DÍAZ MARTÍNEZ

SUMMARY

I. PRIOR CONSIDERATIONS. II. THE RIGHT TO DUE PROCESS. 1. The scope of the application. 2. The failure of audiovisual recordings to satisfy the guarantee of due process. III. THE RIGHT OF THE ACCUSED TO ADDRESS THE COURT. 1. The doctrine of the European Court of Human Rights. 2. The subjective element of a crime as an express fact of the trial. 3. Sentences imposed by the Spanish State. IV. THE CURRENT STATE OF THE QUESTION: THE APPEAL COURT CAN ONLY MODIFY THE JUDGMENT WITH REGARD TO SPECIFIC QUESTIONS OF LAW. V. A BRIEF REFERENCE TO THE NEW DRAFT CRIMINAL PROCEDURE CODE OF 2013. VI. CONCLUSIONS.

GUARANTEES OF DUE PROCESS IN CRIMINAL APPEAL PROCEDURE

MANUEL DÍAZ MARTÍNEZ

Catedrático (acreditado) de Derecho Procesal
UNED

I. PRIOR CONSIDERATIONS

Article 14.5 of the *International Covenant on Civil and Political Rights* (ICCPR) guarantees the right of any person convicted of an offense to have the conviction and sentence imposed subject to review by a higher court, as prescribed by law.

This guarantee has been incorporated into our domestic law pursuant to Article 10.2 of the Spanish Constitution (referred to as SC hereafter) and requires consideration that among the guarantees of criminal procedure to which the Constitution refers generally in Article 24.2 is included the right of appeal to a higher court, except in the case of summary offences or where an individual has been convicted by the highest court or has had his conviction reaffirmed following an appeal against acquittal.

Our Constitutional Court has stated that:

«in view of the wording of that Article 14.5 ICCPR, and in accordance with the jurisprudence of the European Court of Human Rights (ECHR) in relation to the Article 6.1 of the *European Convention on Human Rights* (ECHR) and Protocol 2 no. 7 of the said Convention, that this provision should be interpreted, not as the right of appeal to a full trial of the action, but rather as a right to have a superior Court review the original trial decision in the first instance, so as to insure that the conviction and sentence imposed in the particular case were fully in accordance with the law¹.»

¹ STC 70/2002, of April 3 (FJ 7).

In contrast, while there is no specific enumerated right under the Constitution to appeal against a final decision, rather the legislature is given the freedom to establish and regulate this guarantee. Nevertheless, once the legislation is in place allowing recourse against certain judgments, that guarantee becomes part of the fundamental right to an effective remedy (Article 24.1 SC), and is incorporated within it, which is fully consistent with the character of this fundamental right to due legal process.

It is interesting to note that in our appeal court hierarchy, courts of law are empowered not only to overturn the ruling of a lower court but have jurisdiction to impose another sentence in its place.

When this occurs, two factors become relevant from the perspective of constitutional right to a fair trial with all the guarantees this entails: namely, that the Court of Appeal will be in effect the court that convicts the defendant for the first time—assuming that the acquittal in the court of first instance is overturned—and that any conviction so imposed must rest on a direct assessment of the evidence presented by the prosecution.

As a preliminary matter, it should be noted that the *Charter of Fundamental Rights of the European Union* (CFREU) in Article 47 essentially reproduces the contents of Article 6 of the Convention (ECHR), given that its meaning and scope are equivalent to those conferred by the Convention (Article 52 CFREU), which is why this article will focus on the requirements provided under Article 6 (ECHR).

II. THE RIGHT TO DUE PROCESS

Respect for the principles of openness, due process, fair procedures and the right to challenge the evidence are essential ingredients in the right to a fair trial, these require that any conviction be based on a presentation of the evidence that the court has examined directly and personally and on an open right to challenge whatever evidence is adduced.

Thus an established doctrine of the Constitutional Court (CC hereafter) guarantees the right to a criminal appeal, as established in case STC 167/2002, of 18 September, and followed in numerous subsequent decisions² considers an appeal hearing wanting in terms of guarantees of fairness, where a judicial body on hearing an appeal against an acquittal proceeds to impose a conviction based on a reappraisal of proven facts whose correct and proper appreciation was for

² SSTC 170/2002, 197/2002, 198/2002, 230/2002, 41/2003, 68/2003, 118/2003, 189/2003, 50/2004, 75/2004, 192/2004, 200/2004, 14/2005, 43/2005, 78/2005, 105/2005, 181/2005, 199/2005, 202/2005, 203/2005, 229/2005, 90/2006, 309/2006, 360/2006, 15/2007, 64/2008, 115/2008, 177/2008, 3/2009, 21/2009, 118/2009, 120/2009, 184/2009, 2/2010, 127/2010, 45/2011 y 46/2011, *inter alia*.

the court of first instance that adjudicated over the full trial of the action (the guarantee of due process/fair procedures)³.

1. *The scope of the application*

The determination of an alleged infringement of the right to a fair trial with all the guarantees and, in particular, the guarantee to due process, is mainly circumstantial, and may not lend itself to rigid or stereotyped solutions.

In any case, the guarantee of due process/fair procedures should be based on the evaluation of determined admissible evidence of a personal character:

a) When the appeal decision was based on a new and different evaluation of documentary evidence⁴, always provided that the acquittal in the first instance was based, on an assessment of essentially the same documentary evidence.

b) When the essence of the discrepancy between the judgment of the court of first instance and the appellate court is based on evidence admitted by the first court seized of the matter and that remains unchanged on appeal⁵.

c) In relation to expert evidence, it will depend on the nature of evidence itself and on the offense prosecuted.

Thus, when the appellate court only assesses the written transcript of the expert witnesses and there is no need for a fresh oral hearing or cross examination, always provided that the grounds for the conclusion are clearly stated in these reports⁶.

In contrast, when the experts have in the first instance further explained, clarified or expanded on their report, then such evidence acquires a personal character and should be fully reproduced on appeal⁷.

³ See, MAGRO SERVET, V., «Pueden las Audiencias Provinciales revocar las sentencias absolutorias de los Juzgados de lo Penal sin oír al acusado? Las sentencias del Tribunal Constitucional 167/2002 y 170/2002», in *Diario La Ley*, Núm. 5677, 2002; ANDRÉS IBÁÑEZ, P., «Sobre el valor de la intermediación (Una aproximación crítica)», in *Jueces para la democracia*, Núm. 46, 2003; IGARTUA SALAVERRIA, J., «El nombre de la intermediación en vano», in *Diario La Ley*, Núm. 5768, 2003; GÓMEZ RECIO, F., «La Sentencia 167/2002 del Tribunal Constitucional, o de cómo abrir la caja de Pandora en el recurso de apelación penal», in *Diario La Ley*, Núm. 5871, 2003.

⁴ SSTC 40/2004, of March 22 (FJ 5), 230/2002, of December 9 (FJ 8), 198/2002, of October 26 (FJ 5).

⁵ SSTC 120/2009, of May 18 (FJ 4), 34/2009, of February 9 (FJ 4), 124/2008, of October 20 (FJ 2), 256/2007, of December 17 (FJ2), 328/2006, of November 20 (FJ 4), 170/2002, of September 30 (FJ 5).

⁶ SSTC 75/2006, of March 13, FJ. 8.º; 143/2005, of June 6, FJ. 6.º

⁷ SSTC 21/2009, of January 26, FJ. 2.º; 360/2006, of December 18, FJ. 4.º, 10/2004, of February 9, FJ. 7.º

d) Finally, when the court of appeal is limited to rectifying the inference made by the court of first instance, commencing with the factual basis established in the lower court that initially tried the matter, except where such evidence arises unequivocally from an assessment of personal evidence⁸.

It is all too evident, that the doctrine of the CC, with regard to the guarantees of fairness on appeal focuses all its attention on due process as a criterion for the correct assessment of personal evidence; the CC has thus taken the view that it is only when the response to the prosecution's challenge on appeal depends on a ruling as to the initial credibility of the testimony submitted in the first instance will it be necessary to hold a full oral hearing before the appeal court to hear and test once more such personal evidence.

2. *The failure of audiovisual recordings to satisfy the guarantee of due process*

As noted above, and in order to reconcile our restricted appeal procedure with the requirements arising from the principle of due process, the doctrine⁹ has in part embraced the use of audiovisual recordings¹⁰, as a means of reproducing what occurred in the course of the oral hearing, as thereby satisfying the constitutional guarantee to fair procedures.

At this point, the crucial question is whether the Court of Appeal can effectively assess the evidence of a personal character as given in the first instance by viewing a visual recording of the trial, and go on to judge that there was an error in assessing such evidence in the lower court and then legitimately proceed to give a fresh ruling on the evidence thereby convicting a defendant who was initially acquitted or in the alternative imposing a more severe penalty on the accused.

⁸ STC 127/2010, of November 29 (FJ 2), 24/2009, of January 26 (FJ 2).

⁹ See, CONDE-PUMPIDO TOURÓN, C., «El derecho a la doble instancia penal. Presente y futuro», in *Cuadernos de Derecho Judicial*, Número 15, 2003, pp. 25; GIMENO SENDRA, V., «La intermediación en la 2ª instancia y las sentencias arbitrarias de la primera», in *Diario La Ley*, Número 6876, 2008, pp. 2 & 3; GÓMEZ RECIO, F., La sentencia 167/2002 del Tribunal Constitucional, o de cómo abrir la caja de Pandora en el recurso de apelación penal, *op. cit.*, pp. 8 & 9; GARBERÍ LLOBREGAT, J., «El alcanzable mito de la segunda instancia penal», in *Diario La Ley*, Número 6507, 2006, p. 5 ff; LÓPEZ COIG, J.C., «La proyectada generalización de la doble instancia penal ¿cumple los requisitos exigidos por los Tratados Internacionales?», in *Diario La Ley*, Número 6567, 2006, pp. 5 ff.

¹⁰ Note that art. 743 LECrim., as amended by Law 13/2009, of 3 November, reformed procedural legislation with the establishment of a new Judicial Office, and provided that trial sessions could be visually and orally recorded.

The CC has already had occasion to decide on this issue with regard to certain issues in which the Provincial Court took the view, that after viewing the audiovisual recording of the initial trial held before a judge of the Criminal Court, it was thereby entitled to assess the direct personal evidence that had been submitted at the first trial; the CC were of the view that this amounted to a violation of the right of an accused person to a fair and public trial (see Article 24.2 SC), therefore the court in the second instance was not authorized to perform this assessment having not convened a public rehearing of the action in which the court could directly assess the evidence originally submitted at the first trial, nor preclude the legally necessary attendance of such people before the Court.

As can be seen, the essential reason that supports the negative decision of the CC is not so much the lack of fair procedures, such as respect for the enforceable guarantees that are equally applicable on appeal in accordance with the jurisprudence of Court of Human Rights in Strasbourg¹¹ —principally with regard to the defendant’s personal right of audience— who have explicitly stated that:

«direct personal examination by the court involves the temporal and spacial concurrency of whoever gives testimony and before whom, thus the constitutional guarantee implies that the one who judges has before him he who declares and equally that the declarer address directly he who will evaluate his declarations.»

So, with the express incorporation as a constitutional doctrine of the right of audience of the accused, an audio-visual recording of the hearing in the court of first instance ceases to be a viable alternative, since it does not satisfy, in accordance with the standards set by the ECHR and CC, the right of appeal with all guarantees, requiring, as a general rule, that the defendant be heard on an appeal that seeks to have his acquittal overturned.

III. THE RIGHT OF AN ACCUSED TO ADDRESS THE COURT

Together with respect for due process in the evaluation of personal testimony by the court seized of the matter, our CC has also acknowledged **the right of an accused to address the court** (Article 24.2 SC), the purpose of which is to allow a defendant who has been acquitted in the first instance, to present

¹¹ SSTEDH of the 10 of March 2009, case *Igual Coll c. España* (§37); 16 of December 2008, case *Bazo González c. España* (§31); 27 of November 2007, case *Popovici c. Moldavia* (§71).

to the Court before which that acquittal is being challenged, his own version of the allegations against him.

1. *The doctrine of the European Court of Human Rights*

The defendant's right to appear before a court rehearing his case is rooted in the doctrine of the ECHR, who since the *Ekbatani c. Sweden* case of May 26 1998 have reiterated that the guarantees of due process (Article 6 ECHR) are applicable to the court of second instance, because:

«criminal proceedings constitute a unity and the protection of Article 6 does not cease with the decision of the court of first instance.»

Now, as the ECHR has established the requirement that the accused has a right to be heard on an appeal hearing, which derives from the right to a fair trial within the meaning of Article 6.1 of the Convention, though this will depend on the overall characteristics of the case as a whole and the role of the appeal court in the legal system.

Thus, it can be affirmed, that a public trial in the first instance, and the absence of full hearing on appeal may find justification in the details of the procedure in question, taking into account the internal nature of the appeal system, the scope of the appeal court's powers, the manner in which the interests of the applicant have been represented and protected before it, and especially the nature of the issues that have to be resolved.

Thus, when the procedures for leave to appeal are limited exclusively to issues of law and not of fact, the requirements of Article 6 are satisfied even if the Court of appeal or cassation does not grant the appellant the right to speak personally before them.

This was the case in the ECHR judgment of December 16, 2008, the *Bazo González c. España*, case; here the ECHR were of the view that even though the court that imposed the sentence on appeal did not hold a public hearing, the right to due process had not violated because the discrepancy between the decisions of the first and second instance were limited to questions of law.

However, the ECHR has also held that, when the Court of Appeal must take into consideration questions of both fact and law, and especially when it has to decide on the guilt or innocence of the accused, it cannot, for reasons of fairness, decide these issues without direct assessment of the defendant's testimony who argues that he has not committed the crime for which he has been

charged¹²; besides given that the second instance court on appeal has reversed the first instance acquittal, the conviction requires that the accused has been given the opportunity to testify in his defense before the relevant appeal court. This right is especially important given the fact that the court of second instance is the first to convict the defendant on a criminal charge.

In accordance with this doctrine of the ECHR, a full public hearing is a prerequisite where the Court of Appeal has not been limited to making a different interpretation in law to the judge of first instance based on the objective elements of the case, but has undertaken a fresh assessment of the facts established in the court of first instance that are now under reconsideration, and thus the hearing on appeal extends beyond strictly legal considerations¹³.

Equally the ECHR was anxious to stress that fair procedures on appeal should not be confused with the defendant's right to speak last or to have the last word, even though such rights may be of some importance, these must be distinguished from the right to be heard during the course of a hearing by the court¹⁴.

The ECHR were categorical that;

«the presence of accused individual before the appeal hearing, when some factual issues are discussed that affect the defendant's plea of guilt or innocence, is an acknowledgement of the right of the defendant who has been acquitted in the first instance to present before the Court hearing the appeal on the contested decision, to submit his own version of his participation in the acts alleged against him. It is precisely the very personal nature of this that imposes the requirement to be heard ...»¹⁵.

So if the deliberations in the second instance are focused exclusively on legal issues, whether as to the legal basis of the appeal, either as to the specific motives underlying the demand for a harsher sentence requested by the prosecution, or for the resolution of such issues, it is not necessary to hear the defendant personally in open court, as such a hearing may have no bearing

¹² ECHR 20 of March 2012, case *Serrano Contreras c. España*, §31; 13 of December 2011, case *Valbuena Redondo c. España*, §29; 22 of November 2011, case *Lacadena Calero c. España*, §38; 25 of October 2011, case *Almenara Álvarez c. España* § 39; 16 of November 2010, case *García Hernández c. España* §25; 21 of September 2010, caso *Marcos Barrios c. España* §32; 10 of March 2009, case *Igual Coll c. España* §27.

¹³ ECHR of March 10 2009, case *Igual Coll c. España*, (§ 36).

¹⁴ ECHR of June 27 2000, case *Constantinescu c. Rumania* (§ 58). STC 184/2009, of September 7 (FJ 3).

¹⁵ ECHR 153/2011, of October 17 (FJ 6).

whatsoever on the decision that may be taken, and that the appellate Court can properly make its decision based on the proceedings already submitted.

2. *The subjective element of a crime as factual aspect of the trial*

As we have seen, in all cases in which the appeal court has come to a contrary decision viz. the facts as proven and decided on in the court of first instance, with respect to the guarantees of fair procedure in the second criminal appeal court, and bearing in mind the right of the accused to defend his innocence by contesting the appeal; this imposes a requirement that the accused be heard, thus it is of the utmost importance to determine whether the subjective elements of the alleged offense are factual or legal in nature¹⁶.

In this regard, the Spanish Supreme Court in numerous decisions, has argued that the elements of a criminal offense relating to an accused individual's alleged subjective state or *mens rea*, can only be established by an inference from external events; the court was of the view that the rationality of such an inference was reviewable on appeal by reason of its infringement of Article 849.1° of the *Criminal Procedure Act*, in so far as this involves the consideration of legal issues pertaining to the *mens rea* of a criminal offence.

However, this doctrinal jurisprudence has been modified, given that the prosecution of the so-called *mens rea* ingredients of a criminal offence also comprises part of the factual aspect of the judgment on which the courts are entitled to adjudicate, and it must be distinguished relative to strict legal qualification allocated to the facts once these are established.

Consequently, such subjective elements must receive the same treatment accorded in *actus reus* of a criminal offence; therefore, their establishment must meet the requirements that come within the constitutional guarantee accorded to the presumption of innocence¹⁷. Thus establishing *mens rea* requires a consideration of the valuation process, and of the evidence itself.

As stated in the STS 840/2012 decision of October 31:

«from the perspective of the presumption of innocence, establishing the lack of rationality of an inference which comprises the *mens rea* required for conviction, will inevitably lead to an acquittal on the basis of lack of evidence. By contrast, the lack of rationality of the inference that denies the occurrence of *mens rea* does not necessarily lead to its affirmation and a resulting conviction; this is be-

¹⁶ See ALCÁCER GUIRAO, R., «Garantías de la segunda instancia, revocación de sentencias absolutorias y recurso de casación», in *InDret*, Número 1, 2012, pp. 10-22.

¹⁷ SSTs 987/2012, of December 3 (FJ2), 274/2012, of April 4, 32/2012, of January 25.

cause in the second scenario this would entail an assessment of the evidence and the option of testing personal evidence is not available to the court on appeal.»

In any case, the question of the need to hear personal evidence, elements of which subsequently provide the basis for an inferential judgment as to the existence of *mens rea*, must be undertaken in full knowledge of the need to give the defendant a hearing before imposing a conviction *de novo* on appeal or when a harsher sentence is substituted.

In this manner, although the review of the reasonableness of the inferences on the basis of which the appeal court reaches its conclusion as to the absence of *mens rea*, or other subjective element, will not require the guarantee of due process if the prosecution in question was not based on the assessment of witness statements, which in all cases, should have been preceded by giving a hearing to the accused.

3. Sentences imposed by the Spanish State: the jurisprudence of the ECHR

The Decisions of the ECHR have been as follows, *inter alia* : the 27 of November 2012 —case *Vilanova Goterris y Llop García c. España*—, 13 of December 2011 —case *Valbuena Redondo c. España*—, 22 of November 2011 —case *Lacadena Calero c. España*—, 25 of October 2011 —case *Almenara Álvarez c. España*—, 16 of November 2010 —case *García Hernández c. España*—, 21 of September 2010 —case *Marcos Barrios c. España*—, 10 of March 2009 —case *Igual Coll c. España*—¹⁸.

Let us turn, to look in more detail, at some of the most recent rulings.

A) *Vilanova Goterris c. España*

In the case of *Vilanova Goterris y Llop c. España*, the SC based its decision against one of the parties on the following grounds, because of his role as mayor, he could not ignore the existing set of reports indicating that noise levels were above the authorized limits or requirements that had been imposed on Company R. by the technical service of the municipality or the Environment Agency, that consisted in an obligation to carry out insulation work on the local co-generator. Therefore, the SC concluded that by their actions and omis-

¹⁸ See GÓMEZ DE LIAÑO FONSECA-HERRERO, M., «La supuesta garantía de la intermediación en la segunda instancia penal española. Seis sentencias condenatorias del TEDH en menos de tres años», in *Revista General de Derecho Europeo*, número 27, Iustel, 2012.

sions the mayor had deliberately allowed the operation of a company when he knew was in breach of the rules, and had failed to take the appropriate action.

Based on the above, the ECHR, regarding what the defendant had said the court was of the view that:

«the SC had given its ruling based on subjective circumstances, in particular is knowledge of irregularities and complaints against the company R. and its conduct. It therefore considered that the issues considered by the SC required assessment of the direct evidence of the accused, including other witnesses» (§ 35).

In light of all the circumstances of the trial, the ECHR concluded that:

«the appellants had been deprived of their right to defend themselves in the context of an adversarial hearing. Consequently, there has been violation of the right to a fair trial as recognized by Article 6.1 of the Convention» (§ 37).

B) Valbuena Redondo c. España

In the case of *Valbuena Redondo c. España*, an acquittal for an offense against the Revenue Authorities imposed in the first instance was based on the absence of defendant's fraudulent intent, a conclusion that was later reversed on appeal, as it was considered proven that by creating a misleading framework the defendant/appellant had the objective of defrauding the public purse.

In its judgment, the ECHR stated that:

«... the Provincial Court had not simply limited itself to a fresh consideration of purely legal issues, but rather it had gone on to rule on a matter of fact, the existence of a fraudulent intention and actual harm to the Treasury, thus effectively modifying the facts established in by the Court of instance. In the mind of the Court, this test involves by its very nature, the assumption of certain facts that were crucial to the determination of the applicant's guilt» (§ 37).

For this reason, the Court concluded that:

«as the issues were primarily factual in nature, ... the applicant's conviction on appeal to the Provincial Court was based on a modification of the evidence involving allegations of economic harm to the Treasury and or fraudulent intent by the applicant, who should in such circumstances have been afforded the opportunity to be heard in person and to challenge the evidence by way of an oral hearing. As this had not been the case the requirements of fair trial guaranteed by Article 6 of the Convention had not been met» (§ 39).

C) Lacadena Calero c. España

The Strasbourg Court demonstrated a similar attitude in the case of *Lacadena Calero c. España*. The facts here were that the SC had reversed an acquittal on charges of fraud, considering that the defendant - a notary - was aware of the documents, and had authorized and acted with intent to defraud, the ECHR stated that:

«the Supreme Court had reversed the judgment of the court of first instance basing its ruling on matters of fact and law that in their view determined the defendant's guilt. In this regard, this court was of the view that when the inference of a court was based on subjective elements (as in this case the existence of a possible fraud), it was not possible to proceed to the legal assessment of the defendant's actions without having previously proved the reality of this action, which necessarily involves verifying the defendant's intention in relation to the facts alleged against hi» (§ 47).

Certainly, the SC arrived at its assessment of the defendant/appellant's intention based on an inference from facts established by the lower court (the documents in the file). However, in reaching this conclusion the SC had failed to give the accused a hearing —as it does not exist in such appeal procedures— to explain the reasons why he denied having been aware that his conduct was illegal and as to his intention to defraud. In light of the foregoing, the ECHR were of the view that the issues considered by the Supreme Court required the direct evaluation of the testimony of the accused, or including that of other witnesses. (§ § 48 and 49).

D) Almenara Álvarez c. España

Similarly, the ECHR judgment of October 25, 2011, in *Almenara Álvarez c. España*, where the Superior Court had reversed the judgment of the criminal court judge convicted the defendant, on the grounds that the transfer of assets by the accused to members of her family were fictitious and intended to bring about insolvency, to the detriment of creditors, in these circumstances the ECHR considered that:

«... an examination of the case based solely on questions of law was problematic. All the more so as the very nature of the case involved taking sides on the facts crucial to the determination of the guilt of the accuse» (§ 48).

For this reason that court concluded that:

«the applicant's conviction on appeal by the Provincial Court based on an altered evaluation of elements involving intention and behavior, which were crucial to imposing a conviction, were reached without the applicant having had the opportunity to be heard in person nor being afforded the opportunity to challenge the evidence at a public hearing, failed to comply with the requirements of a fair trial as guaranteed by Article 6.1 of the Conventio» (§ 49).

The jurisprudence of the ECHR in relation to breaches of Article 6 clearly highlights the differentiation between facts and law as noted by ÁLCACER¹⁹: when an appeal court is obliged to evaluate issues of fact the presence of the accused and possibly other witnesses is a prerequisite. Conversely, only when the issues revolve concern questions of law (*iura novit curia*) may the court amend the acquittal without a hearing.

Finally, the ECHR case law with regard to the guarantees associated with due process on appeal does not revolve around ensuring basic fair procedures as a requirement for the assessment of personal evidence, as the Spanish SC has indicated, it is more focused on the right of the accused to defend his innocence by challenging and contradicting the evidence submitted in the second instance, including the right to be heard in person, where the fundamental reasons of such convictions is to be found.

IV. THE CURRENT STATE OF THE QUESTION: THE APPEAL COURT CAN ONLY MODIFY THE JUDGMENT WITH REGARD TO SPECIFIC QUESTIONS OF LAW

A review of the jurisprudence of the ECHR, and the most recent decisions of both the CC²⁰, and the SC²¹ confirm, as the culmination of all the above, that when the Tribunal has to consider questions both of fact and law, especially when they have to decide on the guilt or innocence of an accused, the appeal cannot be adjudicated fairly without a direct personal examination of the defendant who denies having committed the offense under consideration;

¹⁹ See ÁLCACER GUIRAO, R., *El derecho a una segunda instancia con todas las garantías*, at www.tirantonline.com, 2013, p. 12.

²⁰ SSTC 201/2012, of November 12; 126/2012, of June 18; 153/2011, of October 17; 142/2011, of September 26; 46/2011, of April 11.

²¹ SSTS 987/2012, of December 3; 840/2012, of October 31; 607/2012, of July 9; 1223/2001, of November 18; 1215/2011, of November 15; 1106/2011, of October 20; 1052/2011, of October 5; 998/2011, of September 29.

in like manner in cases involving the re-examination by the Tribunal of the defendant's conviction requires a new hearing in the presence of the accused and other parties concerned.

This refers as well to the procedure to be followed in the second instance hearing, viz. that it be conducted in public and that it allows for the evidence to be challenged, with direct and personal examination strictly in accordance with due process and fair procedures, of those individuals whose evidence will be subject to a fresh reassessment.

The reality, however, is that such a right to a public hearing simply does not exist at any level of the Spanish appeal court hierarchy, since, given the inconclusive wording of Art. 790.3 LECrim. (which has not been altered as a result of the reform of the LECrim. in accordance with Law 13/2009, of November 3); there is no interpretation of the regulation that allows evidence submitted in the first instance to be resubmitted in the second instance, given that the legislation is unequivocal with respect to inadmissibility of new evidence on appeal, only allowing for fresh evidence to be submitted to the appeal court in exceptional circumstances.

And in no case can evidence already submitted be resubmitted for the purpose of modifying the conviction imposed in the first instance²².

Only when, assuming that the facts in the first instance have been proved, the discrepancy between acquittal and conviction is a strictly a question of law, in these circumstances, the Court in the second instance is limited to making a different legal ruling to that of the Court of first instance on the overall objective elements of the case. In such a case it is not necessary to hear the accused or, if applicable, witnesses or experts, as the Court may deliver its decision based on the proceedings to date, without entailing any constitutional violation²³.

V. A BRIEF REFERENCE TO THE NEW DRAFT CRIMINAL PROCEDURE CODE OF 2013

As expressly stated in the Explanatory Memorandum, on appeals against sentence, the criminal reform has to address three major issues:

1. The overall appeal system involving courts of the first and second instance, because, as stated by the *Human Rights Committee* of the *United Nations*,

²² SSTS 32/2012, of January 25; 1423/2011, of December 29.

²³ See SÁNCHEZ MELGAR, J., «Las posibilidades revisoras de las sentencias absolutorias en el recurso de casación penal», in *Diario La Ley*, Número 7810, 2010.

Spanish appeal mechanisms do not adequately satisfy the right of accused individuals to have their conviction reviewed by a higher court;

2. The remodeling of the appeal system so that it can more effectively fulfill its overall purpose, which is not the case currently as the interpretation of a large number of criminal offenses remains in the hands of the provincial courts;

3. The reorganization of the review system for the assessment of evidence on appeal with regard to acquittals.

Given the need, on the one hand, to take an overall approach on first and second instance hearings and open up the appeal system to all matters, thereby ensuring uniformity of the law; and, on the other, to require that on appeal all the requirements of due process are complied with, it will be necessary to opt for one of two formulas:

1) To deny the possibility that acquittals based on the evaluation of evidence be open to further challenge on appeal based on further substantive grounds; this runs the disadvantage of turning the first court seized of the matter into an «absolute judge», with the risk of generating a sense of impossibility that the court's decisions viz. acquittals be the subject to control;

2) To admit the appeal against sentence, but to require that the evidence be reproduced on appeal, in effect, allowing for full hearings on appeal, with all the disadvantages this entails²⁴.

Faced with these two extremes the draft legislation opts for an intermediate position that maintains the possibility of an appeal against acquittals based on the evidence, but introduces corrective measures.

In this fashion, the defendant/appellant may invoke the appeal mechanisms without limitation concerning any dispute regarding the assessment of evidence and demand that review of the case give sufficient weight to the evidence, its validity and legality, its rational motivation and the existence of alternative hypotheses more favorable to the accused that were not reasonably refuted.

²⁴ a) Devaluation of the first instance; b) removing the guarantees of an increased assurance of success that should arise from the second level of appeal, especially given that the quality of the evidence deteriorates over time c) the inconvenience caused for those affected, victims, witnesses, experts, police, etc..., inevitably caused by a rehearing, in addition to the delay and expense to the litigants and to the criminal justice system itself and psychological costs to the victims involved., in this regard see: CONDE-PUMPIDO TOURÓN, C., El derecho a la doble instancia penal, *op. cit.*, pp. 22-24; BACIGALUPO ZAPATER, E., «Doble instancia y principio de inmediación (A propósito de la llamada doble instancia), in *Actualidad Penal*, Número 12, 2002, pp.292-295

By contrast, when the error in the evaluation of evidence is alleged by the prosecution when challenging an acquittal or in attempting to impose a more severe sentence, it is necessary to justify the failure or lack of rationality in the factual motivation, that clearly demonstrates a departure from the maxims of experience or omission in terms of reasoning as to the evidence that may be relevant or whose inadmissibility has been inappropriately stated (Article. 592 Draft Bill).

In such cases, if the court in the second instance upheld the appeal and rules that the invalidity must extend to the original trial, then a retrial must be ordered to be held before a court with a different composition to that which delivered the initial judgment, except where there can be no reasonable doubt that their impartiality has been compromised (Articles 584.3^a and 585 Draft Bill).

On the other hand, on appeal only the accused is entitled to request that evidence be adduced and only on certain legal grounds, namely, that the evidence was not available to the court of first instance because the court was unaware of its existence; that its admissibility was improperly denied or not heard for other reasons not attributable to the accused. Nevertheless, once the appellant had adduced evidence, the respondent, may in contesting the appeal, submit such evidence that supports his position in the matter concerning which the appellant's evidence has already been admitted provided that the conditions expressed in the previous section are complied with (section 596 Draft),

VI. CONCLUSIONS

From all the reasons outlined above, one can say that the current appeal system in Spain has become a mere formal regulation, devoid of real content, in the light of the requirements arising from the right to due process, as interpreted by the ECHR; in reality these are simply unenforceable, as the Spanish appeal process makes no provision for the personal appearance of the accused, nor does it authorize the retesting of evidence that has already been examined for the purpose of modifying the conviction obtained in the first instance.

In consequence therefore, urgent legislative reform is essential, that will expressly provide the reasons for the appeal and regulate its processing in accordance with the terms as laid down by the ECHR, so as to resolve the current legal uncertainty that has been generated .

To this end, to definitively establish an effective appeal criminal appeal procedure, it is necessary to construct an appeal process in all criminal avenues that

can be effectively supervised both by the judicial application of the law, which will involve the possibility of revising the selection and interpretation of the applicable legal standards, as regards the evaluation of the different evidential procedures employed in the first instance.

It is the author's view, that only an appeal system that imposes without exception controls on the application of the law and on the assessment of evidence at the first instance level would really be in a position to establish itself as an instrument truly capable of establishing a genuine and effective second instance appeal mechanism.

Thus, compared to the option provided under the *Draft Criminal Procedure Act 2011*, pursuant to which the prosecution were not entitled in any case to seek the modification of proven facts, the provisions of the *Draft Criminal Procedure Code 2013* appear more appropriate; given that these provide that an alleged error in assessing the evidence can provide a ground of appeal, this avenue is open to both the defense and the prosecution, although in the case of the latter there must be grounds for justifying failure or lack of rationality with regard to the factual motivation.

Granting the possibility that the prosecution may invoke error in assessing the evidence, given the requirements arising from the ECHR this author believes that these are met by subjecting the first instance trial recording to challenge by the parties at the oral hearing held before the court of second instance, which will conduct a review, which will not be a repetition, of the evidential test applied by the first instance court, thus obviating the need for a new trial.

Título:

LAS GARANTÍAS DEL DEBIDO PROCESO EN LA SEGUNDA INSTANCIA PENAL

Sumario:

I. Consideraciones previas. II. La garantía de inmediación. 1. Ámbito de aplicación. 2. La grabación audiovisual no satisface la garantía de inmediación. III. La audiencia personal del acusado como garantía vinculada al derecho de defensa. 1. La doctrina del Tribunal Europeo de Derechos Humanos. 2. El elemento subjetivo del delito como vertiente fáctica del juicio. 3. Las condenas al Estado Español. IV. Estado actual de la cuestión: el tribunal que revisa únicamente puede modificar el fallo en cuestiones estrictamente jurisdiccionales. V. Breve referencia al borrador de nuevo Código Procesal Penal de 2013. VI. Conclusiones.

Abstract:

A study of appeal guarantees in the second instance of criminal proceedings, as interpreted by the case law of both the ECHR and the SC, demonstrate their incompatibility with the current legal regime, with the result that the regulation of the Spanish criminal appeal system is a mere formality, devoid of content, which is reason enough for urgent legislative reform.

Resumen:

Estudio de las garantías de la segunda instancia en el proceso penal, tal y como han sido interpretadas por la jurisprudencia del TEDH y del TC, poniendo de manifiesto su incompatibilidad con el actual régimen legal, lo que ha convertido a nuestro actual sistema de recursos en una regulación meramente formal, carente de contenido, razón por la cual urge una reforma legislativa.

Key words:

Criminal procedure. Appeals. Due Process. The defendant's right of audience.

Palabras clave:

Proceso penal. Recursos. Inmediación. Audiencia del acusado.

