



Book Reviews



Helena Morão and Ricardo Tavares da Silva (eds), *Fairness in Criminal Appeal: A Critical and Interdisciplinary Analysis of the ECtHR Case-Law*. New York (United States of America): Springer, 2023. 213 pages, ISBN: 978-3031130007

The subject matter of this book is the principle of immediacy in criminal procedure, with a special focus on appellate courts. The complexity of the subject is overcome by a clear and simple language that makes the reader easily understand the arguments put forward by the authors.

The case law and doctrinal references are precise and up to date, including cases from the European Court of Human Rights (ECtHR or Court) and several national apex courts, such as the Spanish, Italian, and Portuguese Constitutional Courts.

The structure of the book is appealing, with four well-structured parts. Part I consists of an introduction to the case law on immediacy in criminal appeal, critically discussing the most significant cases that the ECtHR has dealt with in this area.¹ Since the book reflects the present stage of an ongoing research, I would invite the authors to go further down the road of their analysis of the shortcomings of the Court's argumentation, through the lens of the rhetorical fallacies of its judgments. Rhetorical fallacies such as the *argumentum ad hominem*, the *argumentum ad terrorem*, the *argumentum ab auctoritate* or the *argumentum ad ignorantiam*,² are very common in legal argumentation and the

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- 1 H Morão, 'The ECtHR Case-Law on Immediacy in Criminal Appeal' in the reviewed volume 3. For an extensive review of the relevant case law, corroborating the findings of the book, see also *Murtazaliyeva v Russia* [GC] 36658/05 (ECtHR, 18 December 2018) Dissenting Opinion of Judge Pinto de Albuquerque, on the right to obtain the attendance and examination of witnesses on behalf of the defendant under the same conditions as witnesses against him or her and the principle of immediacy in criminal procedure.
 - 2 For a striking example, see the analysis of Court's use of the *argumentum ad ignorantiam fallacy* in *Akeliénė v Lithuania* 54917/13 (ECtHR, 16 October 2018) Dissenting Opinion of Judge Pinto de Albuquerque.

ECtHR is no exception. The deconstruction of the Court's legal argumentation would serve the purpose of a better understanding of its output and hopefully of a departure of the Court's overall fairness test which is, step by step, nullifying the minimum rights of Article 6.³

Part II adopts a comparative law perspective, presenting the Spanish, Italian, and Portuguese criminal appeal models and debating the problems that they are confronted with in light of the principle of immediacy.⁴ The apparent role model of the Italian criminal appeal system⁵ is contrasted with the Spanish⁶ and Portuguese⁷ less generous but more efficient models. Other than assessing the most pressing problems of the criminal justice system at the level of appellate courts, such as the control of the first instance court's decision on the facts and the renewal of the evidence before the appellate courts, this part interestingly distinguishes and contrasts the victims' and the defendants' perspectives.⁸

Part III adds the interesting input of cognitive sciences. Case law and scholarly work alike have often ignored this input, which makes this part of the book particularly important and novel. The authors have convincingly demonstrated that cognitive sciences like neuroscience of memory and philosophy of knowledge can shed a new light on the working methods of courts and the limits of their jurisprudence,⁹ namely when recording and assessing first instance evidence. The crucial issue of guaranteeing and preserving the factual perception and memory of witnesses is addressed conclusively, showing that appeals conceived as critical re-evaluation of the lower court's

3 Most recently, making the exact same argument, R Goss, 'The Disappearing 'Minimum Rights' of Article 6 ECHR: The Unfortunate Legacy of Ibrahim and Beuze' (2023) *Human Rights Law Review* 1, 23. The author confirms in many regards what I and Judge Serghides wrote in *Farrugia v Malta* 63041/13 (ECtHR, 4 June 2019) Joint Dissenting Opinion of Judge Pinto de Albuquerque and Judge Serghides.

4 Along the same lines, in the Italian context, ML Bitonto and P Pinto de Albuquerque, '«In difesa del dibattimento penale»' (2020) 8 *Diritto penale e processo* 1116, and in the Spanish context, CP Domenech and P Pinto de Albuquerque, *Hablemos de Derechos Humanos, La doctrina del TEDH y su aplicación en España desde los votos particulares del Juez Paulo Pinto de Albuquerque* (Tirant lo Blanch 2019) 401–506.

5 M Ceresa-Gastaldo, 'The Evidence Renewal Model in Italy' in the reviewed volume 15.

6 AL Lopez, 'The Retrial Model in Spain' in the reviewed volume 43.

7 R do Rosário, 'The Recordings Model in Portugal: The Appeal Court's Perspective' in the reviewed volume 71.

8 T Geraldo and N Matos, 'The Recordings Model in Portugal: The Defendant's and the Victim's Perspectives' in the reviewed volume 97.

9 This had already been the purpose of a previous paper of H Morão, '«Neuroethics and Criminal Responsibility – A Criminal Law Comment on Neil Levy's *Consciousness and Moral Responsibility*»' (2016) 3 *Anatomia do Crime* 183.

rulings do a better job than second trials in attaining those objectives. This interdisciplinary approach enriches the book with new critical insights to the efficacy of the criminal justice system and makes it more attractive to a greater audience.¹⁰

Finally, Part IV presents some concluding thoughts on the legitimacy of the ECtHR case law, proposing a flexible appeal system like the one adopted by Article 83 (2) of the Rome Statute of the International Criminal Court.¹¹ The main thesis of the book is that, save for exceptional cases, evidence renewal is not necessarily the best possible solution to attain fairness and equality of arms in criminal appeals, since most countries have satisfactorily implemented a system of re-examination of the lower court's factual version by the court of appeal based on the first instance trial recorded evidence, thus avoiding the well-known downsides of double trials.¹² Nonetheless, as a fundamental fair trial requirement, the defendant must have the possibility of introducing new exculpatory evidence before the court of appeal.¹³ As a professional having dedicated 35 years of my professional life to criminal law and procedure and human rights, both at the national and international level, I see no argument that could deconstruct these conclusions. As a matter of fact, the book brilliantly confirms my teaching as a law professor and my experience as a national and international judge regarding the urgent need for a more consistent and coherent Article 6 case law, particularly in the field of criminal procedure¹⁴ and regulatory offences procedure.¹⁵ Most importantly, the book directly engages with the two most recent cases of the ECtHR on this

10 For a similar approach, P Pinto de Albuquerque and K Wojtyczek (eds), *Judicial Power in a Globalized World – Liber Amicorum Vincent De Gaetano* (Springer 2019); I Motoc, P Pinto de Albuquerque, and K Wojtyczek (eds), *New Developments in Constitutional Law, Essays in Honour of Andras Sajó* (Eleven 2018).

11 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

12 As rightly concluded by H Morão, 'On the Legitimacy of the ECtHR's Criminal Appeal Immediacy Requirement' in the reviewed volume 197, 208.

13 That was exactly the reason why the Court found a violation in *Pereira Cruz and Others v Portugal* 56396/12 and others (ECtHR, 26 June 2018).

14 On this point, see the preface by LA Sicilianos, 'Foreword', in *Judge Pinto de Albuquerque and the Progressive Development of International Human Rights Law*, T Mariniello (ed), (Brill 2021) ix, the comments of L Milano, Y Kerbrat, and Y Lecuyer, *Droits de l'Homme: Les opinions séparées vues par la doctrine* (Lexis Nexis 2020), and the comments of A Balsamo and others, *Diritti Umani in una Prospettiva Europea, Opinioni concorrenti e dissenzienti (2016–2020)* (Editoriale Scientifica 2021).

15 On this point, see the comments of G Raimondi, 'Le Autorità Amministrative Indipendenti e la Corte Europea dei Diritti dell'Uomo', in *Europa Umana, Scritti in Onore di Paulo Pinto de Albuquerque*, D Galliani and E Santoro (eds), (Pacini Giuridica 2020) 637.

matter, *Pereira Cruz and Others v Portugal*¹⁶ and *Paixão Moreira Sá Fernandes v Portugal*,¹⁷ in which the Court has brought the fair trial requirements in criminal appeals to a higher level. As a matter of fact, that was exactly the purpose of the Portuguese division, which I led at the time, when it brought these cases to the Chamber. It is telling that both cases are now considered as leading authorities on fairness in criminal appeal within the context of the Strasbourg case law.¹⁸

Instead of a unique table of cases and a single table of references or authors, the editors have chosen to close each Chapter with a useful table of cases and a complete table of references. This choice makes perfect sense in view of the diversity and richness of the sources used in each individual Chapter.

Summing up, this book is a must for academics who study criminal procedure and professionals who practice in criminal courts. On top of that, this book will be thoroughly enjoyed by anyone interested in European human rights law.

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16 *Pereira Cruz and Others* (n 13).

17 *Paixão Moreira Sá Fernandes v Portugal* 78108/14 (ECtHR, 25 February 2020).

18 *Morão* (n 12) 200 and 201.