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CONFRONTATION AND THE CRIMINAL DEFENDANT IN A HYBRID LEGAL SYSTEM: THE REPUBLIC OF NORTH MACEDONIA

David M. Siegel
Professor of Law, New England Law | Boston,
154 Stuart Street, Boston, MA 02116 USA
dsiegel@nesl.edu

ABSTRACT

This note analyzes the treatment of out-of-court statements in the Republic of North Macedonia's (NMK) hybrid criminal procedure system, which blends adversarial and neo-inquisitorial elements. Anchored in the principle of orality, NMK's Criminal Procedure Law (CPL) generally prohibits the use of out-of-court statements against criminal defendants with four narrow exceptions. The article compares each exception with the approaches taken under U.S. constitutional and evidentiary law and the European Court of Human Rights jurisprudence. While three exceptions—preserved testimony, impeachment of testifying witnesses, and statements from threatened witnesses—are consistent with U.S. and European standards, the admission of statements given to prosecutors by unavailable witnesses is clearly impermissible under U.S. law and problematic under the European Convention on Human Rights. The analysis illustrates the tension between adversarial safeguards and continental evidentiary flexibility, raising concerns about fairness and the right of confrontation in evolving legal systems.

Key words: Confrontation, hearsay, evidence, hybrid, adversarial

INTRODUCTION

The Republic of North Macedonia (NMK) is developing a hybrid legal system of criminal procedure. Drawing on the Italian model, since 2010 it has incorporated adversarial components into what was a 'neo-inquisitorial' structure (G. Lažetic, et al, 2020, pp. 133-134). The adversarial centerpiece of the reformed criminal process is the trial (main hearing') at which all facts requiring personal knowledge must be presented through witnesses examined using cross examination. The judge may admit out of court statements in four circumstances. All but one of these exceptions have comparable US and ECtHR analogues. The outlier exception permits a court to admit statements by unavailable witnesses that were given to prosecutors on which the defense may never have had an opportunity to examine the witness. This interpretation would be inconsistent with the US approach and likely inconsistent with ECtHR jurisprudence.

This note has four parts. Part I is a brief overview of the NMK's revised criminal procedure structure. Part II sets forth its two key concepts applicable to the treatment of out-of-court statements: a general requirement that all facts based on observation be established through live testimony at trial subject to cross examination, and a principle that all evidence be subject to free assessment by the fact finder. Part III outlines the US and ECtHR approaches to admission of out-of-court statements against criminal defendants. Part IV compares each of the NMK's four exceptions to the requirement of live testimony to corresponding US law and ECtHR jurisprudence. A brief conclusion follows.

OVERVIEW OF THE REPUBLIC OF NORTH MACEDONIA'S HYBRID CRIMINAL PROCEDURE STRUCTURE

The Republic of North Macedonia's Criminal Procedure Law ('CPL') creates a comprehensive procedural scheme for the criminal process from the earliest investigation through conviction (Criminal Procedure Law, 2010).[1] Its investigative structure is a process led by the prosecutor rather than as had previously been the case an investigating judge (G. Kalajdžiev, G. Lažetić Bužarovska, 2013). The aims of the investigative process are to collect and preserve evidence rather than present it, and to enable the prosecutor to determine whether to bring an indictment. Id. Unlike the process in more purely adversarial systems, all parties can be involved in much of the investigation. Once the process reaches trial, the structure is fully adversarial, with the hallmark adversarial tool of cross examination.

Pre-Investigation and Investigation

The CPL provides for two phases of investigation: a pre-investigative phase and a more formal investigative phase. The pre-investigative phase starts with someone filing a police report, filing a formal charge with the prosecutor, or through the police or prosecutor, otherwise learning of a crime they are obligated to prosecute. (CPL, Arts. 272-274). When the police learn of a serious crime (punishable by over four years' incarceration), they must immediately notify the prosecutor. (CPL, Art. 282(2)). The pre-investigation phase requires only that there may be grounds for suspicion (i.e., reasonable suspicion) of a crime or that a specific person committed one, and information collected during this phase is kept secret (CPL, Arts. 288-289). The police conduct the basic investigation under prosecutorial supervision. They collect evidence from the scene or related vehicles, persons, or buildings, take witness accounts, collect identifying information from persons such as photos, fingerprints, and DNA samples, and conduct eyewitness identification procedures. (CPL, Arts. 276-279). The police may summon persons whom they believe have general information about the crime or the perpetrator in order to take their statements, but they may not summon someone as a defendant, a witness, or expert, and if they learn that a person they have summoned may be a suspect they must immediately notify the prosecutor. (CPL, Arts. 212, 279). The police submit the results of their investigation to the prosecutor, who then has three months to decide whether to open a formal investigation.

If the prosecutor moves forward with a formal investigation, the prosecutor must have grounded suspicion (probable cause) that a specific person committed a specific offense (CPL, Art. 291). The prosecutor issues an order to conduct an investigation procedure to determine whether to bring an indictment, and now the investigation process is open and can involve all parties. The prosecutor may interview the suspect before issuing this order (CPL, Art. 292(3)), and must do so before completing their investigation (CPL, Art. 302(2)). The prosecutor now

[1] This analysis relies on the English translation of the 2010 Criminal Procedure Law provided by OSCE, and available at https://legislationline.org/sites/default/files/documents/d3/FYROM_CPC_am2010_en.pdf, which became applicable in November 2913.

has access to the full complement of investigative tools (searches, seizures, formal examinations of the suspect and witnesses, obtaining expert analyses, reconstructions, and special investigative measures) (CPL, Art. 295). Because the process is now open, the defense and injured parties may also participate in this process and the prosecutor must notify them of investigative actions at which they may be present (CPL, Art. 296) and they may move for additional investigative steps by the prosecutor or to protect their rights (CPL, Art. 293).

During the investigation procedure, the defense is guaranteed the right to collect evidence and interview witnesses and can seek the assistance of the preliminary procedure judge to obtain items and information (CPL, Arts. 305-311). The defense can seek the assistance of the judge to obtain documents from public and private entities that refuse requests for them, as well as to enter private property (CPL, Arts. 310, 311). If a person will not speak to the defense, the defense can even ask that the prosecutor summon the person for questioning, at which the defense may ask questions first (CPL, Art. 307(8)). The victim or injured party is authorized to observe the investigation and later to participate in the trial, including through examining all witnesses (including the accused) and submitting evidence (CPL, Arts. 57, 64).

Of significance for the admission of out-of-court statements, either party can request an evidentiary hearing during the investigation (CPL, Arts. 312, 313). This hearing is an evidence preservation mechanism rather than an investigative tool (Art. 312(2)). However, statements given at the evidentiary hearing are fully admissible at the trial (CPL, Art. 388(3)).

The process retains several traditional inquisitorial features. The prosecutor has an obligation of mandatory prosecution if the investigation reveals evidence of a crime (CPL, Art. 18), and an obligation to equally investigate and collect exculpatory and inculpatory evidence (CPL, Arts. 15, 291(4)). All the incriminating and exculpatory information developed in the investigation is submitted into a case file that accompanies the proposed indictment (CPL, Art. 321(2)). The defense can submit material supporting its case as well (CPL, Art. 310).

Trial (Main hearing')

The trial, or 'main hearing,' under the CPL has a fundamentally adversarial orientation: cross examination is permissible, and leading questions are not permitted on direct examination (CPL, Arts. 383(3), 384(2)). This mode of examination closely follows the adversarial model in the US, where leading questions are not permitted on direct examination but are freely permitted on cross examination (Federal Rules of Evidence, 2024, Rule 611(c)). As in the majority of US jurisdictions, the scope of cross examination is restricted to the subject matter of the direct examination or matters of credibility (CPL, Art. 384(1)); (Federal Rules of Evidence, 2024, Rule 611(b)). This contrasts with the "wide-open" scope of cross examination in the UK and a minority of US jurisdictions.

THE CPL'S APPROACH TO OUT-OF-COURT STATEMENTS OFFERED AGAINST THE CRIMINAL DEFENDANT.

The CPL uses adversarial rules to develop oral evidence offered against a criminal defendant and continental principles to evaluate it. From the adversarial tradition, the CPL requires live testimony at the trial by a witness with personal knowledge who is examined by the accused. From an inquisitorial tradition, it embraces the free evaluation approach to weighing this evidence.

The principle of orality

Consistent with an adversarial perspective, the CPL adopts a general requirement that all facts based on one's observation must be established through examination of witnesses at trial (CPL, Art. 388(1)). This is effectively a rule against oral hearsay statements and a requirement that the defendant be able to confront the witnesses. Lest there be any doubt, it specifies that live examination of such witnesses 'may not be replaced either by reading out loud a record of a statement that the person provided earlier, or a written statement.' Id. Electronically recorded audio or video, or photographs, are not treated as out of court statements (CPL, Art. 250).

The principle that evidence offered against a criminal defendant must be established by examining witnesses at trial is an essential element of a fair trial under both European and US standards (ECHR, Art. 6, § 3 (d)); (US Constitution, 6th Amendment). Under European standards there is a presumption against the use of out-of-court statements. 'Article 6 §§ 1 and 3 (d) of the Convention contains a presumption against the use of hearsay evidence against a defendant in criminal proceedings.' (Thomas v. the United Kingdom, 2005). This presumption extends to at least some documentary evidence as 'witnesses' in this context can include documents offered against a defendant (Butkevich v. Russia, 2018, ¶ 90(c)). Essentially, 'these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him or her either when that witness is making a statement or at a later stage of the proceedings' (Mirilashvili v. Russia, 2008, ¶ 163).

The US Constitution's 6th Amendment right of confrontation bars use of 'testimonial hearsay.' These are testimony-like out of court statements, formalized through question-and-answer format or oath, whose primary purpose is establishing past events for later prosecution, when used in court to prove what they assert (Smith v. Arizona, 2023, pp. 784-785). The US has a separate non-constitutional rule restricting use of non-testimonial hearsay (Federal Rules of Evidence, 2024, Rules 803, 804).

The free evaluation of evidence

Continental European legal systems rely on a 'free evaluation' of evidence that does not strictly cabin how judges can assess evidence through rules of evidence (Satlanis, 2022, pp. 345-346). Instead, judges evaluate evidence objectively using logic, common sense, and reliable methods to avoid reaching arbitrary and unfair decisions. Id., 347-348. The CPL adopts the principle of free evaluation of evidence but also requires that judicial officers clearly elaborate and state the reasons for their decisions (CPL, Art. 16(1)).

Even within the 'free assessment' of evidence, there are special rules concerning the degree to which certain types of evidence – even if they satisfy the assessment criteria – can meet burdens of proof in certain circumstances. For example, a criminal verdict may not rely solely on a statement from a witness whose identity or appearance is shielded for their protection (CPL, Arts. 231(2), 288, 400(1)). Similarly, it may not rely solely on witnesses' statements obtained by either side that were given during the investigation procedure (CPL, Art. 388(2)), or transcripts of statements given in the evidentiary hearing. (CPL, Arts. 388(3), 400(2)).

THE US AND ECTHR APPROACHES TO OUT-OF-COURT STATEMENTS OFFERED AGAINST THE CRIMINAL DEFENDANT.

US law governing admission of out-of-court statements at trial against the criminal defendant.

The US approach involves two independent regulatory schemes, both of which may be applicable to any out-of-court statement. First, the US constitution guarantees criminal defendants a right to confront their accusers (US Constitution, 6th Amendment). This bars the admission of testimonial (i.e., testimony-like) out of court statements against a criminal defendant unless 1) the witness is unavailable and 2) the defendant had a prior opportunity to examine the witness under oath (Crawford v. Washington, 2004).

The US Supreme has developed an increasingly complex set of rules for determining whether frequently recurring out of court statements are 'testimonial.' For example, calls by victims or witnesses for emergency assistance, or statements to the police made at crime scenes, are generally not testimonial if they are made to address an ongoing emergency, however to the extent they address past facts that would be relevant to a future prosecution they are testimonial (Davis v. Washington, 2006); (Hammon v. Indiana, 2006). Similarly, reports by forensic laboratory analysts are testimonial (Melendez-Diaz v. Massachusetts, 2009) and their substance cannot be provided through testimony by a surrogate analyst who did not perform the testing (Bullcoming v. New Mexico, 2011), but whether a forensic laboratory analyst's statements concerning what they did and how they did it are testimonial requires a judge to determine whether the primary purpose in making the statements was for criminal prosecution, taking into account all relevant circumstances (Smith v. Arizona, 2023).

Second, even if a statement is admissible under the Constitution, it may nevertheless be excluded as 'hearsay' (Federal Rules of Evidence, 2024, Rule 802). The rule against hearsay bars using out of court statements as substantive evidence (i.e., for their truth), but permits their use for other purposes such as impeachment.

The US Supreme Court has noted that the constitutional guarantee of confrontation and the evidentiary rule against hearsay 'stem from the same roots' (Giles v. California, 2008) they provide substantively different protections. Most significantly, an out-of-court statement may be excluded under *either* constitutional *or* evidentiary bases but may not be admitted unless it satisfies *both* the constitutional and evidentiary requirements.

European (ECtHR) jurisprudence concerning admission of out-of-court statements at trial offered against the criminal defendant.

The European Convention on Human Rights and Fundamental Freedoms guarantees a criminal defendant the right to 'examine or have examined witnesses against him' (ECHR, Art. 6(3)), but in applying this provision to the 46 criminal procedure systems of states that have signed the ECHR the European Court of Human Rights (ECtHR) follows a less rigid approach than does the US Sup Ct. The ECtHR assesses whether the inability to confront live testimony deprived the defendant of a fair hearing under Art. 6(1) of the ECHR. The accused's right to examine witnesses whose statements the prosecution relies on, is presumed; there is no need for the accused to show why or how he wishes to examine them (Keskin v. The Netherlands, 2021, ¶¶ 60-61). The ECtHR has developed a three-step test for applying this fair hearing standard, which itself relies on the subsidiary application of three other standards (Al-Khawaja and Tahery v. United Kingdom, 2011, ¶¶ 119-147).

In assessing whether the use of an out-of-court statement from a witness the defendant could not examine rendered the hearing as a whole unfair, the ECtHR considers:

(1) Whether there was a 'good reason' for using evidence from a non-testifying witness.

A party seeking to use an out-of-court statement must make reasonable efforts to secure their appearance. Circumstances that have been held 'good reasons' for use of an absent witness's out of court statement include the witness's death or fear of retaliation from the defendant. Other legitimate reasons may also be good reasons (Schatschaschwili v. Germany, 2015, ¶¶ 133-140).

(2) Whether the evidence from the non-testifying witness was the 'sole or decisive' evidence implicating the defendant.

An out of court statement is the 'sole' evidence against the accused if there is no other incriminating evidence, and it is 'decisive' if it is so significant or important as likely to be determinative of the outcome (Schatschaschwili v. Germany, 2015, ¶ 123). Even if there is other corroborating evidence, the evidence from the non-testifying witness will be sole or decisive if the corroborating evidence is itself hearsay or circumstantial technical evidence.

(3) Whether there were sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps the defendant faced from the absent witness.

Strong counterbalancing factors include whether other evidence corroborated the out-of-court statements, whether the trial court approached the evidence with caution, and whether the defendant had had any procedural mechanisms such as an opportunity to put questions in writing to the witness or observe the witness's statement through video (Paić v. Croatia, 2016,

¶¶ 42-47). The counterbalancing measures must allow for meaningful examination of the witness, so a confrontation with a witness during the investigative phase – before the defendant had access to the full case file – could (but is not necessarily) inadequate counterbalancing measure (Chernika v. Ukraine, 2020, ¶¶ 70-72).

> The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case. (Butkevich v. Russia, 2018, ¶ 90(a))

Caselaw establishes that inadequacy on either of the first two inquiries will not render a trial unfair. Neither the absence of a good reason to call the witness nor that the evidence was ‘decisive’ for the conviction necessarily renders a trial unfair. (Schatschaschwili v. Germany, 2015, ¶¶ 111-113); (Al-Khawaja and Tahery v. United Kingdom, 2011, ¶¶ 146-147). Notwithstanding these flexible understandings, the ECtHR has noted that hearsay evidence, even if offered as corroboration, has less weight than live testimony by a witness with personal knowledge (Pichugin v. Russia, 2012, ¶ 199). More recently, the ECtHR has strictly enforced the need for counterbalancing factors, and found a violation when witness statements were taken by police without participation by the defense and it could be easily anticipated that the witnesses would not be present for trial, because they were migrants passing through the country without legal authorization (Al Alo v. Slovakia, 2022).

COMPARISON OF THE ADMISSIBILITY OF OUT-OF-COURT STATEMENTS AT TRIAL AGAINST THE CRIMINAL DEFENDANT UNDER THE CPL, US, AND EUROPEAN APPROACHES.

The CPL provides four exceptions to the requirement for live testimony at trial (CPL, Art. 388). Each addresses a specific type of evidentiary problem and sets out evidentiary limits for the use that may be made of these types of evidence. The CPL also provides a mechanism for preserving testimony from witnesses who are anticipated to be unavailable at trial: the evidentiary hearing. This mechanism is significant because it provides one of the bases to admit out of court statements.

Evidence preservation through the evidentiary hearing [Arts. 312-318]

When a prospective witness’s testimony will not be available for the trial it can be preserved at an evidentiary hearing (CPL, Art. 312(2)). Either the prosecutor or the defense may request an evidentiary hearing. A judge may permit the hearing in three situations: 1) if the witness will not likely be available at trial, 2) if the witness has been subjected to threats against testifying or promised benefits to testify falsely, or 3) if the testimony is an expert’s report and the subject or substance of the report will become changed or unavailable. Id.

The party seeking an evidentiary hearing must show *why* testimony cannot be presented at the trial. (CPL, Art. 313). This provision strongly suggests that testimony from an evidentiary hearing should only be admissible at the trial *if* the witness is unavailable, although the provision permitting admission of testimony from the evidentiary hearing does not explicitly require unavailability.

The evidentiary hearing operates under the same rules of evidence as does the main hearing (CPL, Art. 315(4)). Because this evidentiary hearing is the defendant’s opportunity to elicit evidence from a witness that can be presented at the main hearing, the defendant must have counsel at the evidentiary hearing. If counsel is not present another must be assigned (CPL, Art. 315(3)). The evidence at the hearing may not extend to facts concerning a suspect who does not have counsel at the hearing (CPL, Art. 315(5)). Evidence developed at the evidentiary hearing may only be used against defendants who had counsel present at the hearing (CPL, Art. 318).

The US federal criminal procedure similarly provides for preservation of testimony through the deposition of a witness who will not be available at trial (Federal Rules of Criminal Procedure, 2024, Rule 15). It too requires the permission of the court, but the provision is only meant to apply in 'exceptional circumstances and in the interest of justice.' Id., Rule 15(a)(1). If the witness is unavailable at the time of trial, testimony preserved this way will be admissible and fully usable as substantive evidence (Federal Rules of Evidence, 2024, Rule 804(b)(1)). So long as the defendant participated in the deposition to preserve the testimony, its admission will also satisfy the right of confrontation (Crawford v. Washington, 2004, p. 68).

Admission of a testifying witness's prior out-of-court statements concerning credibility [Art. 388(2)]

The CPL permits admission of prior out-of-court statements obtained by the prosecutor (or the defense) during the investigative phase for what they may show about the credibility of a witness who testifies at the trial (CPL, Art. 388(2)). These statements may be used on cross examinations to reduce a witness's credibility or on redirect examinations to rehabilitate a witness's credibility. Id. Under the free evaluation approach to evidence, there is no distinction between the use of these statements to assess the witness's credibility and their use as substantive evidence. There is a critical limitation on the use of these statements: they may not be the sole basis of a verdict (CPL, Art. 400(2)).

While the defense will have these prior witness statements and should have had an opportunity to observe them being given, the defense will not likely have had a chance to examine the witness beforehand. As part of the prosecutor's investigation, the prosecutor can examine witnesses (CPL, Art. 295(1)), and the prosecutor must notify the defense of investigative actions such as witness examinations (CPL, Art. 296(1)). While observing these actions, people can suggest direct questions they think might clarify the issues, but the prosecutor must approve them (CPL, Art. 296(3)). Although the prosecutor has an obligation to equally seek exculpatory as well as inculpatory information, the prosecutor may not approve such questions.

US law also permits admission of a testifying witness's prior statements for what they show about a witness's credibility. A 'basic rule of evidence provides that prior inconsistent statements may be used to impeach the credibility of a witness' (United States v. Hale, 1975, p. 176). The witness' prior inconsistent statements are freely admissible for impeachment but in this case they are not substantive evidence (i.e., they cannot be used to prove what they assert is true). However, US law *does* permit admission of a testifying witness's prior out of court statements as substantive evidence in two circumstances. First, the witness's prior inconsistent statements are admissible if they were made under oath at a proceeding or a deposition (Federal Rules of Evidence, 2024, Rule 801(d)(1)(A)). Second, the witness's prior consistent statements may then be admitted for rehabilitation, regardless of whether they were given under oath or at a proceeding (Federal Rules of Evidence, 2024, Rule 801(d)(1)(B)). These rules allow the statements to be used both as substantive evidence and for impeachment or rehabilitation.

Like the CPL, US law does not guarantee that the defense will have had a prior opportunity to examine the testifying witness on their prior inconsistent statements because these are admissible if they were made under oath in a 'proceeding.' A 'proceeding' includes a grand jury, which is an investigative forum in which the defendant does not participate. (Federal Rules of Evidence Advisory Committee, 1974 Enactment, Notes to Rule 801(d)(1)(A)) (The rule as adopted covers statements before a grand jury. Prior inconsistent statements may, of course, be used for impeaching the credibility of a witness.'). This means that, as in NMK, the defense can use a testifying witness's prior inconsistent statement given in the investigation process to impeach them, but it will be the first time the defendant has examined the witness on these statements.

ECtHR case law would likely present no impediment to admitting a testifying witness's prior out of court statements. While Article 6 §§ 1 and 3 (d) of the Convention 'contain a presumption against the use of hearsay evidence against a defendant in criminal proceedings' (Thomas v. the United Kingdom, 2005), this has been held to require an 'adequate and proper opportunity to challenge and question a witness against him or her either when that witness is making a statement *or at a later stage of the proceedings*' (Mirilashvili v. Russia, 2008, ¶ 163) (emphasis supplied). This presumption extends to at least some documentary evidence as 'witnesses' in this context can include documents offered against a defendant (Butkevich v. Russia, 2018, ¶ 90(c)).

Admission of a witness's prior testimony given at the evidentiary hearing [Art. 388(3)]

The CPL provides an exception to the requirement for live testimony in the main hearing for testimony that was taken in the evidentiary hearing (CPL, Art. 388(3)). Subject to the discretion of the court, transcripts of statements given in testimony in the evidentiary hearing may be presented in evidence by reading them or producing them. Id. There is no denial of the opportunity to examine the witness because the defendant had this opportunity in the evidentiary hearing. Moreover, the testimony in the evidentiary hearing was taken according to the same rules as that of the main hearing. As with the admission of a testifying witness' prior statements, these may not be the sole basis of a verdict (CPL, Art. 400(2)).

Because a party seeking an evidentiary hearing should specify the reason the evidence cannot be presented at the trial (CPL, Art. 313), it seems likely that testimony from an evidentiary hearing is only admissible at trial if the witness is unavailable. But the CPL does not make this explicit, and its provision permitting statements made to prosecutors by witnesses who are unavailable at trial does specify that the witnesses must be unavailable. (CPL, Art 388(5)). Presumably in exercising its discretion to permit testimony from the evidentiary hearing, the court would consider whether and why the witness is absent from the trial.

The rule is similar in the US. Former testimony that the defendant had participated in developing would be admissible if the witness were unavailable in the main hearing (Federal Rules of Evidence, 2024, Rule 804(b)(1)). This exception to the rule barring hearsay does not apply if the witness is available. The definition of 'unavailable' would require the type of circumstances that are a 'good reason' for a witness's absence under the European approach: exemption from testifying due to privilege, refusal to testify despite a court order, testifying to not remembering the subject matter, inability to be present due to death or infirmity, or absent and the prosecution could not obtain the witness's presence by process or other reasonable means (Federal Rules of Evidence, 2024, Rule 804(b)(1)). (There is no denial of the defendant's confrontation right because the defendant participated in developing the testimony in the evidentiary hearing.)

Under the European approach, even if there were a good reason for using testimony from the evidentiary hearing (e.g., the witness's death), the ECtHR would have to find that it was not the sole or decisive evidence against the defendant, or if it were the sole or decisive evidence that there were sufficient counterbalancing factors to enable the defense to respond. The ECtHR held in Papadakis v. FYROM that the use of former testimony developed without the participation of the defense, which was the decisive evidence against the defendant, deprived the defendant of a fair trial (Papdakis v. FYROM, 2013, ¶¶ 92-95). In that case the witness was an undercover officer who testified about a critical meeting at which a drug deal had allegedly been arranged, but the agent testified only before the investigating judge and the prosecutor. Although the defense was later given a transcript of this examination and a short time in which to offer written questions, this was held inadequate to ensure the defendant's right to a fair trial.

Papadakis arose under the preceding Criminal Procedure Law, and the 2010 version of the CPL includes three provisions that might provide greater counterbalancing measures. First, as noted the CPL already provides that evidence admitted from the evidentiary hearing without testimony of a witness in the main hearing cannot be the sole basis for a conviction (CPL, Art. 400(2)). Second, the type of evidence relied on in Papadakis, testimony from a witness whose identity is shielded because they are protected, also cannot be the sole basis of a verdict (CPL, Arts. 231(2), 400(1)). Finally, in the case of examining a witness whose identity or appearance is shielded, the CPL specifies that 'special attention' shall be paid to the right of the defense to have an adequate and sufficient opportunity to challenge and verify the witnesses' statements (CPL, Art. 231(1)).

Admission of out-of-court statements given to a prosecutor by a witness who has been threatened or dissuaded from testifying truthfully [Art. 388(4)]

Under the CPL, once the trial has begun efforts to intimidate or threaten a witness that led to their not testifying or not testifying truthfully can be a basis for admitting their prior statements.[2] In these circumstances, the witness' statements given before the prosecutor in the preliminary procedure become admissible (CPL, Art. 388(4)). These statements will not necessarily have been under oath. This exception requires concrete evidence from which the judge can conclude that the witness was subjected to violence, threatened, or promised benefits in order to prevent their testifying or prevent them from testifying truthfully. It is not clear that these efforts need to come from or be acquiesced in by the defendant.

This is a broader exception than the analogous provision in the US for 'forfeiture by wrongdoing,' which permits the admission of out of court statements by an unavailable witness against the party that wrongfully caused the witness's unavailability (Federal Rules of Evidence, 2024, Rule 804(b)(6)). The party who has caused the witness to become unavailable (or acquiesces in another's wrongfully causing their unavailability) forfeits the protection of the prohibition on out of court statements, but the party must have acted with the intent to prevent the witness from testifying (Giles v. California, 2008).

Under the CPL, however, even if the witness is available and testifies but there is evidence from which it can be concluded that the threats or promises were made to cause the witness to testify falsely, it appears that the witness's prior statements in the preliminary procedure before the prosecutor are admissible. It is the effort to threaten, dissuade or change testimony that is sufficient, rather than the witness being unavailable. Moreover, as noted above, it is not clear that these efforts to threaten or dissuade the witness must come from the defendant.

Admission of out-of-court statements given to a prosecutor by a witness who is unavailable [Art. 388(5)]

Finally, when a witness has become unavailable (by death, mental illness, or inaccessibility despite all legal process to obtain them), the court may permit statements the witness made before the prosecutor in the pre-investigative or investigative phases to be admitted as evidence.

While these reasons for being unable to produce a witness would qualify the witness as unavailable under US law, admitting their statement would deprive the defendant of the ability to confront an accuser. A witness statement given to a prosecutor investigating a possible prosecution would almost clearly be testimonial, as it is historical information given in a formalized setting with an eye toward prosecution. There is no comparable provision in US law that would allow a judge to find an out of court testimonial statement so important that it could be admitted without any opportunity for confrontation.

Whether Art. 388(5) conflicts with European jurisprudence is less clear but there is a strong argument that it does. In a 2022 ECtHR case from Slovakia, the court examined the prosecution's use at trial of a witness statement taken by police without defense participation.

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[2] If these threats or efforts occurred earlier, during the investigative phase, the prosecutor could have sought an evidentiary hearing to preserve the testimony (CPL, Art. 312(2)(3)). In that case, the testimony in the evidentiary hearing would have been admissible in the main hearing under CPL, Art. 388(3).

A provision in Slovakia's Criminal Procedure Law (Section 213) authorized the defendant's attendance at witness interviews conducted by the police and his questioning of witnesses (Al Alo v. Slovakia, 2022). The provision even specified that such permission is to be granted 'especially if the charged person has no lawyer and there are grounds to believe that it would not be possible for such witnesses to be heard at trial.' Id., ¶ 6. However, this defendant never attended the interview.

The defendant was charged with smuggling migrants who entered the country unlawfully, and the witnesses interviewed were the two migrants he allegedly smuggled. The defendant was given a preprinted form about the interview, but was unrepresented and claimed difficulty understanding the language and legal concepts as the reason he did not attend the interviews. The migrants were then deported.

Al Alo claimed in defense that he was unaware the migrants were not lawfully present, and throughout the proceeding he sought their presence. The Slovakian analogue to CPL, Art. 388(5) provided that a prior statement of a witness who has become unavailable may be used at the main hearing. However, the law specified that if it were anticipated when they gave their statement that the witness would be unavailable for trial, the statement would only be admissible if the defendant or their lawyer had been properly notified that the witness' statement was to be taken (Code of Criminal Procedure of Slovakia, 2005, § 263(3)).

Applying the test of *Al-Khawaja and Tahery v. the United Kingdom*, the court found there was no good reason for the witnesses' non-attendance as the authorities had done little to obtain their presence, and that their out-of-court statements had been 'pivotal' in the conviction. As to any counterbalancing factors, the court rejected the government's argument that Al Alo had implicitly waived his right to participate in the interviews, especially when the police knew that the migrants intended to pass through Slovakia and made no effort to explain to the defendant the consequences of not participating in the interview. Even if this was a waiver, the Court held, it was not accompanied by the minimum safeguards commensurate with its importance, and so violated Article 6 § 3 (d) of the Convention (Al Alo v. Slovakia, 2022 ¶¶ 62-65).

This decision suggests that the admission at trial under Art. 388(5) of an absent witness's statement taken by the police without the defense participation and ability to ask questions would likely violate ECtHR jurisprudence. While CPL, Art. 296 provides for notification of the defense that witnesses will be examined during the investigation, notificaiton alone will not be sufficient if these witnesses will be the sole or decisive evidence against the defendant. Al Alo v. Slovakia suggests that the prosecutor would have to explain to an unrepresented defendant the consequences of not attending.

Beyond this, even if the defense attends the witness interview, Art. 296 still leaves control over any defense questions to the prosecutor, who may not approve them. The ability to attend the only chance to question a critical witness seems of little value if the prosecutor can control the defense ability to examine the witness. Even a judge freely evaluating all the evidence should recognize that regardless of its weight, or consistence with other evidence, the way the evidence is offered contradicts the basic principle of orality and the testing of live testimony through cross examination. Whether the admission of an absent witness' statements given to a prosecutor is permitted will demonstrate NMK's commitment to a more genuinely adversarial system.

CONCLUSION

NMK's basic principle of orality establishes a rule against the admission of oral hearsay statements and a requirement that criminal defendants be able to examine any witnesses on these statements at trial. Its CPL creates four exceptions to this rule, three of which are close to both US and European treatments of these situations. The admission of prior statements by a testifying witness to impeach or rehabilitate, the admission of preserved testimony from a pretrial evidentiary hearing, and the admission of out of court statements by a witness the defendant has threatened or tried to induce to testify falsely would all fit comfortably under US and European approaches. The admission of a statement given to a prosecutor by a witness who has become unavailable, however, would certainly be inadmissible under the US right of confrontation, and might very well also be invalid under Article 6 § 3(d) of the ECHR. The ECtHR's holistic approach makes it more difficult to predict, but if it were the sole or decisive evidence against the defendant, that would likely fail. The CPL's own limitations on the use of out of court statements of testifying witnesses or that were given at the evidentiary hearing from being the sole basis for a verdict suggests NMK's own courts might reach a similar conclusion.

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