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ADVERSARIAL PRINCIPLE, THE EQUALITY OF ARMS AND CONFRONTATIONAL RIGHT – EUROPEAN COURT OF HUMAN RIGHTS RECENT JURISPRUDENCE

ABSTRACT

This paper deals with differences and similarities regarding three elements of the main criminal procedure principle, the right to a fair trial. In the jurisprudence of the European Court of Human Rights (ECHR) these three elements, the adversarial principle, the principle of equality of arms and confrontational right are often considered together. Recent ECHR jurisprudence changes the Court's approach slightly, but significantly. This paper will therefore show the Court's practice before and after its landmark decision in Schatschaschwili v. Germany, followed by Pačić v. Croatia and Seton v. United Kingdom. Confrontational standards developed by the Court are very important to national laws and jurisprudence. The following presentation will show how Croatian criminal procedure and court practice changed based on the ECHR interpretation of the European Convention on Human Rights and Fundamental Freedoms. Since there is almost always room for improvement in the implementation of the right to a fair trial, this paper will draw attention to the main areas and directions of possible improvement of judicial practice.

Keywords: *adversarial principle, equality of arms, confrontational right*

1. INTRODUCTION

As a central principle of criminal procedure the right to a fair trial is defined in Article 6 § 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, November 4, 1950, ETS 5 (further in text: Convention). In Article 6 § 3 the Convention defines so called “minimum rights” of defense.¹ One of these minimal rights is the confrontational right enshrined in Article 6 § 3(d) of the Convention.²

¹ Trechsel, S., *Human Rights in Criminal Proceedings*, Oxford University Press, 2006, p. 292.

² „Everyone charged with a criminal offence has the following minimum rights: ... (d) to examine or

The right to a fair trial is not “closed” because its content is open to judicial interpretation and the addition of certain other rights not enumerated in Article 6 of the Convention.³ These other rights are also essential for a fair trial and are developed through the jurisprudence of the European Court of Human Rights (further in text: ECHR). Other components of the right to a fair trial, which at first sight are not visible in article 6 § 3(d) of the Convention, are: the right of access to the court, the right to the presence of the defendant at the hearing in the criminal proceedings (principle of immediacy), the privilege of self-incrimination, the right to adversarial proceedings and the right to a reasoned decision.⁴

The principle of equality of arms is the first right that the ECHR developed while interpreting the central principle of criminal proceedings i.e. the right to a fair trial.⁵ The adversarial principle, confrontational right and equality of arms partially overlap and often in practice are considered together.⁶ Sometimes one might not see the difference between them. Therefore, it is necessary to identify them and delineate.

2. EQUALITY OF ARMS

The term “equality of arms” corresponds to the German legal term “Waffengleichheit” that was first used in the proceedings before the European Commission of Human Rights. In its Report from November 23, 1962, the Commission referred to “Waffengleichheit” first as to “the principle of treatment on an ‘equal footing’”.⁷ Later in the Report, the Commission expressed an opinion “that what is generally called ‘equality of arms’, that is the procedural equality of the accused with the public prosecutor, is an inherent element of a ‘fair trial’”.⁸ The notion

have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”

³ Harris, D., O’Boyle, M. & Warbick, C., *Law of the European Convention of Human Rights*, Oxford University Press, New York, 2009, p. 306.

⁴ Mole, N., and Harby, C., *The Right to a fair Trial, A guide to the implementation of Article 6 of the European Convention on Human Rights, Human rights handbooks, No. 3*,
URL=<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007#49>, Accessed 9 February 2017.

⁵ *Ibid.* p. 46, Harris *et. al.*, *op. cit.* note 3., p. 246.

⁶ See for instance Fedorova, M.I., *The Principle of Equality of Arms in International Criminal Proceedings*, URL=<https://dspace.library.uu.nl/bitstream/handle/1874/257535/Fedorova.pdf?sequence=1>. Accessed 9 February 2017, p. 45.

⁷ Applications lodged by Herbert Ofner (No. 524/59) and Alois Hopfinger (No. 617/59) against Austria. The German term “Waffengleichheit” was used by lawyer who represented applicants, Mr. Hans Gürtler, Barrister-at-Law from Vienna. URL=[http://hudoc.echr.coe.int/eng#{"sort":\["kdateAscending"\],"languageisocode":\["ENG"\],"respondent":\["AUT"\],"kphthesaurus":\["119"\]}](http://hudoc.echr.coe.int/eng#{)

⁸ *Ibid.* p. 78.

of “equality of arms” appeared later in other Commission’s reports.⁹ Finally, the ECHR accepts the term in *Neumeister v Austria*.¹⁰ It is therefore considered that the equality of arms is a “concept that has been created by the European Court of Human Rights in the context of the right to a fair trial (Article 6)”.¹¹ The ECHR uses the notion of equality of arms more or less consistently when they evaluate that segment of the fair trial.¹²

Equality of arms requires that each party in the proceedings be given a reasonable opportunity to present their views under conditions that will not put one party in a significantly inferior position to the opponent.¹³ The principle exists also in proceedings before the International Criminal Tribunal for the former Yugoslavia and Rwanda where it is required that “the defendant must have the same position without the benefits that belongs to the prosecutor”.¹⁴

Although this principle, as well as the adversarial principle, applies equally to both parties in the process, usually equality of arms means that “the defendant must not be deprived in their fundamental procedural rights in relation to the prosecutor”.¹⁵ This is even more important when we are considering systems where investigation is conducted by the prosecutor. It is without doubts that in that case there is no real equality between prosecutor and defendant. One may even argue that allowing full equality in that stage of criminal procedure would jeopardize effective investigation notably gathering of evidence and thus even preventing the possibility that the perpetrator is found guilty.¹⁶ In that respect, the principle of equality of

⁹ *X v Austria* (1963) App. n° 1418/61, *NM v Austria* (1964) App. n° 1936/63.

¹⁰ „The Court is inclined to take the view that such a procedure is contrary to the principle of “equality of arms” which the Commission, in several decisions and opinions, has rightly stated to be included in the notion of fair trial (procèséquitable) mentioned in Article 6 (1) (art. 6-1).“(1968) Application n° 1936/63.

¹¹ Oxford Dictionary of Law, seventh edition, Oxford University press, New York, 2009 p. 202.

¹² See for instance *Zhuk v. Ukraine*, (2010) App. n° 45783/05, par. 25: “The Court reiterates that the principle of equality of arms – one of the elements of the broader concept of a fair trial – requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.”

¹³ *Ibid.*, p. 46, Harris *et. al.*, *op. cit.* note 3., p. 251. See also *Bulut v. Austria* (1996) App. No. 17358/90, *Foucher v. Francei* (1997) App. No. 22209/93, *Bobek v. Polandi* (2007) App. No. 68761/01.

¹⁴ Calvo-Goller, K., *The Trial Proceedings of the International Criminal Court*, Martinus Nijhof Publisher, Leiden/Boston, 2006, p. 46.

¹⁵ Ivičević-Karas, E., *Okrivljenikovo pravo da ispituje svjedoke optužbe u stadiju istrage kao važan aspect načela jednakosti oružja stranaka u kaznenom postupku*, Hrvatski ljetopis za kazneno pravo i praksu, vol. 14, No. 2, 2007, p. 1000. From the same author see also, *Načelo jednakosti oružja kao konstitutivni element prava na pravični postupak iz članka 6. Europske konvencije za zaštitu ljudskih prava I temeljnih sloboda*, Zbornik Pravnog fakulteta u Zagrebu, vol. 57, No. 4-5, 2007., pp. 761-788.

¹⁶ For instance, if we would allow full equality during the investigation, then we would not be able to gather evidence through special investigative measures (ie. different types of secret surveillance). That

arms represents the “functional principle that participants in criminal proceedings must have equal opportunities to influence its course and outcome”, and superiority of the prosecutor must be offset by “effective defense capabilities”.¹⁷ Therefore we are seeking fair balance between parties considering criminal procedure as whole and not only one part of it.

3. ADVERSARIAL PRINCIPLE

In continental law the adversarial principle is often called the principle of contradiction. Contradiction is important, if not the most important feature of accusatorial procedure. Adversarial principle consists of the fact that all “procedural actions ... as far as the nature of the case permits, are performed in the presence of both parties who have the right and the possibility that during of the performance of these actions represent their interests and express their position”.¹⁸ In other words, each party should have an opportunity to contradict the opponent’s allegations (evidence).¹⁹ A known Latin maxim is often used to express this principle; *auditure altera parts*.

4. CONFRONTATIONAL CLAUSE

The Confrontational right is one of defendant’s minimum rights and is provided through the confrontational clause in Article 6 3(d) of the Convention.²⁰ Although the clause refers to “witnesses” which would suggest that confrontational rights applies only to witnesses as a personal evidence, that is not the case. Namely, the ECHR developed autonomous interpretation of the term “witness”. According to the consistent Court’s practice, all evidence that is used as a basis for conviction is considered as “witness” regardless of the terminology that is used in national laws.²¹ In that sense, any document, victim or expert witness testimony should be

would prevent investigation and adjudication of serious criminal offences. Therefore, one might say that “inequality” is allowed during investigation or to be more accurate that we are tolerate it for the sake of effectiveness of criminal procedure.

¹⁷ Krapac, D: *Kazneno procesno pravo, Prva knjiga: Institucije*, Narodne novine, V. izmijenjeno I dopunjeno izdanje, Zagreb, 2012, p. 108.

¹⁸ *Ibid.*

¹⁹ Zlatarić, B. –Damaška, M., *Rječnik krivičnog prava I postupka*, Informator, Zagreb, 1966, p. 136.

²⁰ “Everyone charged with a criminal offence has the following minimum rights...to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.” Almost the same wording is in Article 29 of Croatian Constitution. Similarly, the VI Amendment of United states of America Constitution provide that “in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him.”

²¹ *Isgrov. Italy* (1991) App. No 11339/85, *Vidalv. Belgium* (1992) App. No.12351/86, *Luca v. Italy* (2001) App. No. 33354/96., *Mathisen v. Norway* (2006), App. No. 18885/04 and 21166/04. For more de-

tested by the defense at least once during procedure, ideally during the trial since a trial is best place for confrontation.²² It should be emphasized that a co-accused statement is also to be considered as “witness” and therefore included under the confrontation clause protection as long that statement is used for conviction.²³

Therefore, we can conclude that the confrontational clause means the right of the defendant to effectively examine the witnesses against him/her at least once in the process. Ideally, this option should be at the trial because that is the best place and time for the confrontation. Nevertheless, it is possible that the confrontational right may be exercised at a time other than the trial. The ECHR is requires fulfillments of certain criteria which will be elaborated here further.

5. DIFFERENCES AND SIMILARITIES

Having in mind elaboration in previous chapters we might perceive differences and similarities between contradictory (adversarial) principle, equality of arms and confrontational right.

The contradiction refers “to certain actions in the procedure (filing the indictment, presentation of evidence, prosecution’s argumentation)” and to those actions the defendant must have the opportunity to contradict them.²⁴ Equality of arms is the “right of a party that in any action or proceeding in any procedural stage may put forward its position and the evidence under conditions that do not place him/her at a substantial disadvantage compared to the counterparty” which means that equality of arms has a wider scope of contradictions but narrower content.²⁵

Regardless of that slight distinction, both principles refer ”to the way arguments, documents, elements and evidence are presented before the court and to the characteristics of the procedures before the court.”²⁶

tails see, Mrčela, M., *Svjedoci u kaznenom postupku, Ispitivanje svjedoka kao dokazna radnja*, Narodne novine, Zagreb, 2012, p. 143 et al.

²² *Ibid.*

²³ *Ibid.* To establish whether evidence was used for conviction, the ECHR established so called “sole or decisive” rule. According to that rule, an evidence was used for conviction if it was the only evidence for a conviction (“sole”) or if it was so relevant that conviction without that evidence would not be possible (“decisive”).

²⁴ Krapac, *op. cit.* note 17., p. 108.

²⁵ *Ibid.*, see also Mrčela, M., *Načelo kontradiktornosti u dokaznom postupku kao novo temeljno načelo brvatskog kaznenog postupka*, Modernizacija prava, Knjiga 22, HAZU, Zagreb, 2014.

²⁶ Silveira, J.T., *Equality of Arms as a Standard of Fair Trials*, URL=http://www.joaoitiagosilveira.org/mediaRep/jts/files/Equality_of_Arms_Fair_Trial_Lithuania__15052015.pdf, Accessed 13 February 2017.

Adversarial principle and equality of arms are principles. Generally, both principles apply on to both parties in criminal procedure. On the other hand, confrontation is only the right of the defendant, not the prosecutor. Still, the confrontational right is part of the adversarial principle.

Even though the adversarial principle and equality of arms generally refers to both parties, it is obvious that more attention is given to ensuring both principles regarding the defendant, and not to prosecutor. That is self-evident having in mind the advantage that prosecutors enjoy over the defense particularly during the investigation.²⁷

6. ECHR CONFRONTATIONAL STANDARDS BEFORE *SCHATSCHASCHWILI V. GERMANY*²⁸

It was already mentioned that ECHR often considers both the principles and confrontational right together. Since some of their elements overlaps, ECHR sometimes finds a breach of all three elements of minimal rights or only two of them (equality of arms and confrontational right). In some cases there is only a violation of confrontational right.

In any case, ECHR developed the confrontational standards that ought to be amplified in cases dealing with Article 6 3(d) of the Convention. They might be presented throughout these nine points.²⁹

1. The term witness has autonomous meaning. Classification under national law is not relevant.³⁰ It includes all persons whose statements the national court used as evidence for conviction (victims, witnesses, expert witnesses) but also documents. The Prosecution witness is also a codefendant if his/hers statement was taken into account while establishing guilt.³¹
2. “Sole or decisive rule”. Confrontational right has been violated if a conviction is based only on non-confronted (untested) evidence or if that evidence has

²⁷ Mrčela, M. – Bilušić, I., *Konfrontacijska mjerila*, Hrvatski ljetopis za kazneno pravo i praksu, Vol. 23, No. 2, 2016, p. 379.

²⁸ *Schatschaschwili v. Germany* (2015) App. No. 9154/10.

²⁹ Mrčela, *op. cit.* note 21, pp. 175 and 176.

³⁰ *Sibgatulin v. Russia* (2012) App. No. 1413/05, *S.N. v. Sweden* (2002) App. No. 34209/96.

³¹ *Vidgen v. the Netherlands* (2012) App. No. 29353/06, *Isgrov. Italy* (1991) App. No. 11339/85, *Luca v. Italy* (2001) App. No. 33354/96, *Doorson v. the Netherlands* (1996) App. No. 20524/92, *Trofimov v. Russia* (2009) App. No. 1111/02, *Romanov v. Russia* (2009) App. No. 41461/02).

significant influence in a way that conviction could not be possible without it. The rule is finally formulated in *Al-Khawaja and Tahery v. United Kingdom*.³²

3. All the evidence against the defendant must normally be produced in his presence at a public hearing for the purpose of adversarial argument. Since that is not always possible, the confrontational right could be achieved earlier in the proceedings, especially if there is any indication that the witness will later be unavailable or that it would not be possible to question him/her at the trial. In any case, the defendant must have an adequate opportunity to examine witnesses against him/her during the proceedings.
4. The use of anonymous witnesses should be avoided. However, if that is not possible, their vulnerability or the vulnerability of their families should be objectively determined before a status of anonymity is granted. In addition, it is not enough to read their statements given in the pre-trial proceedings. The defense should be able to examine them without the presence of the public or with the use of technical means for transferring image and sound (not just audio). The use of police investigators as anonymous witnesses should be kept to a minimum and conviction should not be based solely or almost solely on their statements.
5. Regarding particularly vulnerable witnesses, victims of sexual offences, especially children, the need for their protection is higher, but not at the expense of the defendant's rights. The defendant should have the opportunity to examine these witnesses. The use of technical aids (audio-video recording) of that procedure is recommended. The fact that conviction is based only on the testimony of particularly vulnerable witnesses does not mean immediately that it is a violation of the right to a fair trial - what is important is that the defense had the opportunity to ask questions to the witness.
6. The trial court should be able to observe the behavior and expression of a witness in order to facilitate evaluation of their credibility. It is also important that the judge or competent person who examined the anonymous witness or leads his interrogation knows the identity of the witness. The record of that examination should contain the reasoning for the conclusion about the necessity of testifying as an anonymous witness and assessment of the credibility of his testimony. When evaluating this testimony the trial court should use excessive and elaborate caution.
7. Reading the statements of the previous examination of witnesses is not in itself a violation of the right to a fair trial. However, the national court must

³² *Al-Khawaja and Tahery v. United Kingdom* (2011), App. No. 26766/05 and 22228/06.

take reasonable measures to ensure the presence of witnesses. Any Legal system which cannot secure the examination of witnesses which exclusively or predominantly was the grounds for conviction cannot be an alibi for violating the rights of the fairness of the proceedings.³³

8. A conviction in which the defendant was not given the opportunity of questioning a witness against him, must include the reasons for the failure to provide that possibilities. Otherwise, it is violation of the rights of the defense.
9. Confrontational right is the right of the accused, not his duty. Waiver of right to ask questions to the witness of the prosecution and waiver of the right to propose evidence is possible. If so, there is no violation of confrontational clause and therefore neither violation of the right to a fair trial.

7. ECHR NEW APPROACH AFTER *SCHATSCHASCHWILI V. GERMANY*

The ECHR practice regarding confrontational right changed with *Schatschaschwili v. Germany*. In a 9 to 8 majority the ECHR introduced a change of assessing violation of confrontational right that was not tremendous but it was significant. Although the dissenters and even four of the concurring judges were not particularly thrilled with the majority decisions,³⁴ the new approach of assessing violation of confrontational right was followed by *Paić v. Croatia*³⁵ and *Seton v. United Kingdom*.³⁶

In *Schatschaschwili* the ECHR did not depart from the previous practice which was reinforced in *Al-Khawaja and Tahery v. United Kingdom* (performing three-part test, so called “Al-Khawaya test”). The first part of the test should assess whether there was a good reason for non-attendance of the witness whose untested testimony was introduced at trial. The second part is related to the assessment of “sole or decisive rule”. The third part is evaluation, “whether there were sufficient

³³ *Mild and Virtanen v. Finland* (2004) App. No. 39481/98; 40227/98.

³⁴ Judge Kjølbros wrote that “the judgment is another example of the Court’s focus on the importance of the investigation stage for the preparation of the criminal proceedings (and) an example of a rather formalistic approach to the importance of procedural guarantees”. Other six dissenters were milder and regretted that they were “unable to agree with the view of the majority that the applicant’s rights under Article 6 §§ 1 and 3 (d) of the Convention were violated”. It is interesting to note that four judges who concur with the Court’s decisions “have a reasonable fear that the clarification provided by the Court in this case ... can be summarised in one single question: were the proceedings fair as a whole? This overall test is not, in our view, a step in the direction of strengthening the rights guaranteed by Article 6 (3) (d) of the Convention.”

³⁵ *Paić v. Croatia* (2016) App. No. 47082/12.

³⁶ *Seton v. United Kingdom* (2016) App. No. 55287/10.

counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps faced by the defence as a result of the admission of the untested evidence and to ensure that the trial, judged as a whole, was fair”.³⁷

The order of examination should not always be the same. Since “all three steps of the test are interrelated and, taken together, serve to establish whether or not the criminal proceedings at issue have, as a whole, been fair, it may be appropriate, in a given case, to examine the steps in a different order, in particular if one of the steps proves to be particularly conclusive as to either the fairness or unfairness of the proceedings”.³⁸

In *Schatschaschwili* the Grand Chamber confirmed that the absence of a good reason for non-attendance of the witness by itself does not necessarily lead to the violation of the right to a fair trial. Equally, it is not enough to assess only (non) existence of counterbalancing factors if the evidence of the absent witness was the sole or the decisive basis for conviction. The overall assessment must be also if untested evidence carried significant weight and its admission might have handicapped the defense.³⁹ In other words, complete “Al-Khawaya test” should be performed always even in cases where there is no good reason for nonattendance of non-confronted evidence.

It is, therefore, possible to have a breach of confrontational right that would not inevitably lead to a violation of the fairness of the process in a whole. In that case, a conviction could be based on untested evidence (“sole or decisive rule”) even if there was no good reason for its non-attendance at trial but only if there were enough counterbalancing factors (“strong procedural safeguards”) that would clearly show that defense handicap was not of significant weight. Hence, it would appear that counterbalancing factor test has crucial impact when assessing fairness of the whole proceedings.

7.1 Counterbalancing factors

Since they appear to become of particular importance in assessing fairness of procedure in whole, it is necessary to point out to the ECHR practice. Of course, particularity of each case and factual situation dictates the extent and scope of the

³⁷ *Paić v. Croatia* *op. cit.* note 35, § 29.

³⁸ *Ibid.* § 31 which refers to

³⁹ *Schatschaschwili. Germany, op. cit.* note 28, § 118. Same: *Seton v. UK*, *Op. cit.* note 36 § 59: “The extent of the counterbalancing factors necessary in order for a trial to be considered fair would depend on the weight of the evidence of the absent witness. The more important that evidence, the more weight the counterbalancing factors would have to carry in order for the proceedings as a whole to be considered fair.”

assessment. In essence and according to *Schatschaschwili v. Germany* and more precise *Paić v. Croatia*, counterbalancing factors should be evaluated in relation to following elements.

First element is trial court's approach to the untested evidence. Trial court should pay specific caution and attention in evaluating credibility of absent and untested evidence. Reasoning should be "detailed".⁴⁰

Second element is availability and strength of further incriminating evidence. The assessment goes not only if there was corroborating evidence and what is there strength, but also did "national authorities make any serious attempt to collect further evidence".⁴¹

Third element is procedural measures aimed at compensating for the lack of opportunity to directly cross-examine the witness at the trial. Those measures could include but not limited to: existence of opportunity for defendant to give his version of events and whether he was afforded with possibility to dispute credibility of an absent witness whose identity was known to him.⁴²

8. RECEPTION OF ECHR CONFRONTATIONAL STANDARDS IN CROATIA

The Republic of Croatia ratified Convention in 1997. The Convention has primacy over domestic law.⁴³ Since decision of the Constitutional Court of the Republic of Croatia may be subject to assessment before the ECHR, one might say that Convention by its legal force is even above the Croatian Constitution. However, that would not be completely accurate because Croatian Constitution is drafted

⁴⁰ *Paić v. Croatia*, *op. cit.* note 35 § 43. In national case credibility of absent and untested witness testimony was reasoned only as "credible and truthful". ECHR find that explanation not sufficient. It should be noted that according to Croatian Criminal procedure act the reasoning of the judgment should contain "...reasons why the disputed facts found proven or unproven, producing the assessment of the credibility of contradictory evidence..." (Article 459 para. 5). Obviously, assessment that contains only two words is not enough. The reasoning should contain explanation why a testimony is "credible and truthful".

⁴¹ *Paić v. Croatia*, *op. cit.* note 35 § 44. The use of term "national authorities" indicates that ECHR is aware of the fact that evidence collection initiative in some jurisdiction is practically only in prosecutors hands and in others court have power to introduce evidence *ex meromotu*.

⁴² *Paić v. Croatia*, *op. cit.* note 35, § 45.

⁴³ Article 141 of Croatian Constitution stipulates: "International treaties which have been concluded and ratified in accordance with the Constitution, published and which have entered into force shall be a component of the domestic legal order of the Republic of Croatia and shall have primacy over domestic law. Their provisions may be altered or repealed only under the conditions and in the manner specified therein or in accordance with the general rules of international law." www.sabor.hr/fgs.ax?id=17074, Accessed 23 February 2017.

and is in conformity with the Convention. Besides, wording of Article 141 of the Croatian constitution suggests that Convention and Constitution have same legal force. Therefore, one might say that Convention is not above the Constitution; in effect both legal acts have same legal significance and should be applied together when evaluating fairness of procedure in the particular case.⁴⁴ Nevertheless, any discrepancy of a national law with the Convention at the same time is discrepancy with the rule of law that is stipulated in Article 3 of the Croatian Constitution.⁴⁵

Having that in mind, it might sound strange that allocation of confrontational standards of the ECHR started only in 2006, nine years after Convention ratification, first with Constitutional Court decisions.⁴⁶ The Supreme Court of Croatia made first assessment of confrontational clause in 2009.⁴⁷ It found violation of Article 6 (3) (d) of the Convention because “the investigating judge failed to inform defendants of questioning of the victim, although he did in relation to the prosecutor, and then the trial court refused the defense’s proposal for direct, additional examination of the victim at the trial, and precisely on her testimony [the trial court] based the finding of relevant facts on which the existence of a criminal responsibility of the accused has been established”.⁴⁸ Interestingly, in almost completely same situation in another case the Supreme Court did not find violation

⁴⁴ In former Yugoslavia judges were not able to apply Constitution directly in particular case. Instead, they were obliged to initiate the process before the competent Constitutional Court to assess the constitutionality of a law and if they did so, they were obliged to stop the proceedings until the completion of proceedings before the Constitutional Court (Article 24 Law on Courts, “Narodnevine”, Official Gazette 5/77, [www.digured.hr/\(active\)/tab261](http://www.digured.hr/(active)/tab261) Accessed 23 February 2017.

⁴⁵ Therefore, the ECHR jurisprudence, although is formally not source of the law, is the most important form of interpretation of Convention, and thus all the regulations that are valid under it. This follows also from the decision of the Constitutional Court, which stated “...that that the entire Croatian law must be interpreted in accordance with the legal standards created in case-law of the European Court until Croatia is a member of the Council of Europe, which means as long as the part of its judicial jurisdiction Croatia conveyed with own sovereign decision to the European Court” (U-I-448/2009). Constitutional court decisions are available on its web site <https://www.usud.hr/hr/praksa-ustavnog-suda>. Still, ECHR might find violation of the Convention even if a case is decided fully in conformity with national law and constitution. That suggest strongly than in fact the Convention has supremacy over national constitution.

⁴⁶ First decision where Constitutional Court mentioned confrontational clause from the Convention and from Croatian Constitution (wording is almost completely the same) is case in which confrontational right was assessed through defendant’s right to introduce evidence on his behalf (U-III/444/2005 from 23 November 2006). There were two decisions following year (U-III/601/2006 from 27 September 2007 and U-III/2241/2006 from 18 October 2007); for further details see Mrčela *op. cit.* note 21, p 229 – 235. Constitutional court decisions are available on its web site <https://www.usud.hr/hr/praksa-ustavnog-suda>.

⁴⁷ VSRH I Kž 731/08 from 22 January 2009. All Supreme Court decisions are available on its web site <http://supranova/hpcl/component/main>.

⁴⁸ *Ibidem*.

because absent witness testimony “does not interfere nor compromise version of the defense, but it is in its conformity”.⁴⁹

Confrontational objections appear more often in Supreme Court cases. Therefore, the Court’s considerations together with ECHR decisions and Constitutional court practice led to changes in the Criminal Procedure Law. Among other changes, the “sole or decisive rule” was introduced.⁵⁰ Rules for reading at trial testimony obtained earlier during process were changed. According to the Article 431 (2) it is possible during the trial to read witness or expert witness testimony that were obtained earlier even if the defense was not notified about their questioning but a conviction cannot be based solely or decisively on such testimony. In other words, witness or expert witness testimony for which the defense did not have a real and objective opportunity to question at least once during the procedure may not be the basis for conviction. Following ECHR practice, the Supreme Court extends that rule to the codefendant statements. Consequently, even if the untested defendant’s statement is not explicitly stated in Article 431 (2) of Criminal Procedure Law as evidence that cannot be used for a conviction, the Court’s practice extends the application of the “sole or decisive rule” in cases where the codefendant’s statement serves as prosecution evidence.⁵¹

Since reading of the untested testimony at trial is legally allowed but basing conviction on such evidence is forbidden, one might wonder what the purpose of such trial exercise is. This is situation when a witness is present at the trial. If there is an absent witness and all legal conditions for reading such a statement during the trial are fulfilled (existence of good reason for non-attendance), sole or decisive rule will apply because in such case defense during the whole proceedings did not have a single opportunity to challenge evidence that could serve as basis for conviction. That means that conviction may not be based of previously obtained untested testimony that has been read at the trial.

But, if a witness is present at the trial, his previous statement should be read at the trial if he deviates from his previous untested testimony. The reason for such an exercise lays in one part of the adversarial principle (each party should have opportunity to contradict the opponent’s evidence). The prosecution should have an opportunity to challenge the trial deviation. The ability to contradict evidence is

⁴⁹ VSRH I KŽ 1078/08 from 3 June 2009. In this case a situation was assessed in relation to principle of equality of arms but there is no doubt that evaluation included confrontational clause elements. Further detailed elaboration of particularities of this case goes beyond purposes of this paper.

⁵⁰ Changes came into force on 15 December 2013 (“Narodnenovine”, Official Gazette 145/13).

⁵¹ See for instance the Supreme Court decisions: I Kž 407/13 from 9 October 2013, I Kž-455/13 from 13 February 2014, IKž 505/14 from 31 March 2015.

possible only if that evidence is produced during the trial. Therefore, it is permissible at the trial to read previously obtained but untested testimony of a witness who is present at the trial. It is important to realize that further use of such a testimony depends on witness statement after he is confronted with his previous statement. “Basically, if a witness at the trial repeats content of untested testimony which contains incriminating parts, that statement at the hearing then includes charging of the defendant and may be used for a conviction because the trial examination is carried out with respect to the defendant’s confrontational right. If at the trial witness “withdraws” his/her previously obtained untested statement or if at the hearing witness does not incriminate the defendant, then the earlier untested statement may not be used for conviction.”⁵²

The Supreme Court also developed multi part test that should always be applied when assessing alleged violation of defendant’s so called minimum rights stipulated in Article 6 (3) of Convention. It embraces ECHR jurisprudence concerning procedural fairness asking to evaluate the whole process and only after analysis of complete procedure draw conclusion about (no)violation of defendant’s minimum right stipulated in Article 6 (3) d of the Convention and Article 29 (2) of Croatian Constitution. If necessary, in any case such analysis should include consideration:

- Whether the accused had the opportunity to defend himself (and with a defense lawyer if necessary),
- Whether the defendant had the opportunity to challenge the credibility of prosecution evidence and oppose to their presentation, and what is a quality of the evidence on which the conviction is based including an assessment whether their acquisition or presentation cast doubt to their credibility,
- Whether the evidence has been presented in a way that ensures a fair trial, and in particular whether reasons for the rejection of the defense proposal to present evidence were given, particularly in relation to the significance of this evidence, and particularly in the case of rejection of the alibi witnesses.⁵³(*Khan v. UK*, *PG and JK v. UK*, *Vidal v. Belgium*).

⁵² VSRH I Kž 414/16 from 10 October 2016.

⁵³ See for instance the Supreme Court decisions: I Kž 174/14 from 8April 2014,I Kž 323/11from 23 September 2014,IKž 1005/11 from 23December 2014, I Kž 858/11, from 20 January 2015, I Kž 379/15 from 1. September 2015,Kzz 55/15 from 18 January 2016. In all those decisions the Croatian Supreme Court referred to ECHR jurisprudence in: *Asch v. Austria* (1991) App. No. 12398/86, *Sevinc v. Turkey* (2009) App. No. 26892/02, *Bykov v. Russia* (2009) App. No. 4378/02, *Lisica v. Croatia* (2010) App. No. 20100/06, *Barim v. Turkey* (2006) App. No. 47874/99, *Khan v. UK* (2000) App. No. 35394/97, *PG and JK v. UK*(2001) App. No. 44787/98, *Vidal v. Belgium*(1992) App. No. 12351/86.

9. CONCLUSIONS

The ECHR jurisprudence shows that three elements of the main principle of fairness (the adversarial principle, the principle of equality of arms and confrontational right) are often considered together. They are overlapping by the definition since defendant's confrontational right is part of adversarial principle and that equality of arms has a wider scope of contradictions but narrower content.⁵⁴

Blending of the three elements in ECHR decisions should not be problematic as long as the Court is firm and clear about confrontational standards. However, those standards are slightly but significantly changed with *Schatschaschwili v. Germany*. Now complete "Al-Khawaya test" should be performed always even in cases where there was no good reason for nonattendance of non-confronted evidence. Consequently, in each and every case related to Article 6 (3) d, often in conjunction with Article 6 (1) of the Convention, ECHR will assess all three elements of "Al-Khawaya test"; existence of good reason for nonattendance of untested witness, sole or decisive rule and counterbalancing factors.

After such an assessment, a situation could arise where a breach of confrontational right would exist but that would not inevitably lead to a violation of the fairness of the process as a whole. If so, a conviction could be based on untested evidence even if there was no good reason for its nonattendance at trial but only if there were enough counterbalancing factors ("strong procedural safeguards") that would clearly show that the defense handicap was not of significant weight. Hence, it would appear that the counterbalancing factor test would be a corner stone when assessing fairness of the whole proceedings.

In Croatia, however, there is a stronger confrontational standard based also on ECHR jurisprudence before *Schatschaschwili v. Germany*. The sole or decisive rule is crucial in assessing defendant's confrontational right. A conviction is not possible on the basis of untested evidence.⁵⁵ Such a crystal clear rule obviously represents higher confrontational standard than one of the ECHR. Having in mind the Croatian court's well established jurisprudence in that area and the fact that higher confrontational standard serves as a stronger guarantee of defendant's right, there should be no changes in Croatian laws and consequently in court practice.

⁵⁴ Krapac, *op. cit.* note 17., p. 108., see also Mrčela, *op. cit.* note 25.

⁵⁵ See note 50 and accompanied text.

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