JURISPRUDENȚĂ COMENTATĂ ȘI PROBLEME DE PRACTICĂ JUDICIARĂ

CONFRONTATION CLAUSE

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SUMMARY

The Sixth Amendment to the United States Constitution enumerates a cluster of rights granted to criminal defendants and is designed to make criminal prosecutions more accurate, fair, and legitimate. The Confrontation Clause, which states that „In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witness against him" should not be underestimated. This article seeks to analyse the evolution of the Confrontation Clause and the extent of a defendant's right to face-to-face confrontation. The article analyse the case Crawford v. Washington, which was a key shift in the Supreme Court's Confrontation Clause jurisprudence.

Key-words: *confrontation clause, common law legal system, cross examination, testimonial statement.*

The Sixth Amendment enumerates a cluster of rights granted to criminal defendants and is designed to make criminal prosecutions more accurate, fair, and legitimate. One of its clauses that has been the subject of much recent judicial activity is the Confrontation Clause, which states that „In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witness against him" [1]. The importance of this physical confrontation should not be underestimated. But the institutions of American criminal justice have changed markedly over the past several centuries, forcing courts to consider how old rights apply to new institutions and procedures. This article seeks to analyse the extent of a defendant's right to face-to-face confrontation and how much weight that right should be given when it comes into conflict with other interests.

CLAUZA CONFRUNTĂRII

SUMAR

Amendamentul nr. 7 al Constituției SUA enumeră un grup de drepturi garantate inculpaților și are menirea de a transforma procesul de urmărire penală în unul mai corect, echitabil și legitim. Clauza confruntării, care prevede că „în toate procesele de urmărire penală inculpatul trebuie să beneficieze de dreptul de a se confrunta cu martorul său", nu trebuie subestimată. Articolul urmărește să analizeze evoluția prezentei clauze și limitele dreptului inculpatului la o confruntare directă cu martorul său. Articolul examinează cazul Crawford împotriva Washingtonului, care a constituit o schimbare importantă în jurisprudența Curții Supreme privind confruntarea inculpatului cu martorul său.

Cuvinte-cheie*: clauza confruntării, sistem juridic de drept comun, examinare încrucișată, declarație/mărturie.*

The evolution of the Confrontation Clause

The right to confront one's accusers far predates the Bill of Rights, and its origins can be traced to Roman times [2], as well as to the Bible, Shakespeare and British common law [3, p. 140-41]. The Framers of the Sixth Amendment sought to strengthen the adversarial process. Continental Europe had long used an inquisitorial system, in which magistrates investigated crimes and judges took leading roles in framing the issues, digging up evidence, and questioning witnesses. The Anglo-American system that the Sixth Amendment codified, by contrast, leaves it to each side to conduct its own investigation, present its own evidence, and argue one side of the story in open court. When drafting the confrontation clause, the Framers were doubtless influenced by the English jurist William Blackstone, whose Commentaries on the Laws of England, first published in 1765-1769, had noted that "open examination of witness viva voce, in the presence of all mankind, is much more conductive to the clearing up of truth, than the private and secret examination taken down in

writing before an officer, or his clerk" [4]. English common law has long differed from the continental civil law in regard to the manner in which witnesses give testimony in criminal trials. The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officer.

The most notorious instances of civil-law examination occurred in the great political trials of the 16th and 17th centuries. One such was the 1603 trial of Sir Walter Raleigh for treason. Lord Cobham, Raleigh's alleged accomplice had implicated him in an examination before the Privy Council and in a letter. At Raleigh's trial, these were read to the jury. Raleigh argued that Cobham had lied to save himself: „Cobham is absolutely in the King's mercy; to excuse me cannot avail him; by accusing me he may hope for favor" [4]. Suspecting that Cobham would recant, Raleigh demanded that the judges call him to appear, arguing that „the Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face….". The judges refused and, despite Raleigh's protestations that he was being tried „by the Spanish Inquisition", the jury convicted, and Raleigh was sentenced to death. [4]

One of Raleigh's trial judges later lamented that "the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh" [4]. Through a series of statutory and judicial reforms, English law developed a right of confrontation that limited these abuses. For example, treason statutes required witnesses to confront the accused "face to face" at his arraignment. Courts, meanwhile, developed relatively strict rules of unavailability, admitting examinations only if the witness was demonstrably unable to testify in person [5, p. 770-771]. Several authorities also stated that a suspect's confession could be admitted only against himself, and not against others he implicated.

Over the years, the Supreme Court has interpreted the confrontation clause with an eye to Raleigh's plight. At its most basic, the clause has been read to give defendants the right to actually see and confront the witnesses, the prosecution has called to give testimony under the oath. The importance of this physical confrontation should not be underestimated. Seeing a witness testify will make a defendant better able to assist in his own defense, and seeing a defendant before her may help impress a witness with the importance of truthful testimony. There are not to be secret witness, and no trial witnesses identified but excused from giving live testimony.

There have arisen many difficulties in attempting to apply the Confrontation Clause to the circumstances of criminal trials, especially in relation to the testimony of young children. The focus, in recent years, on prosecuting child abuse cases, and the recognition of the lasting harm that the criminal justice system can inflict on the child witness, has put a special pressure on settled confrontation clause doctrine. The Court has been sharply divided on a consequential question: under what circumstances does the testimony of a young child, delivered outside of normal courtroom conditions, violate defendant's confrontation rights? [6]. The two Supreme Court cases, Coy v. Iowa and Maryland v. Craig largely resolved these issues. Coy involved whether the defendant's rights were violated by the use of a screen, allowed under Iowa state law, that prevented the 13-year-old accusers from seeing the defendant (accused of sexual assault) while they were testifying against him [7, p. 1012]. The Court ruled 6–2 in favor of the criminal defendant, holding that the Sixth Amendment requires the physical confrontation of a witness by a defendant. This ruling did not stand for long, however, as Maryland v. Craig became the holding precedent on issues involving the Confrontation Clause and the testimony of children. The Court's narrow 5–4 ruling in Craig held that the practice of a six-year-old alleged victim of sexual abuse testifying through the use of a one-way closed circuit television did not violate the defendant's Sixth Amendment rights [8, p. 836]. The Court explicitly overturned Coy in this case, agreeing with Justice O'Connor's concurrence in Coy that confrontation rights "are not absolute, but rather may give way in an appropriate case to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony [7, p. 1012]. A key shift in the Supreme Court's Confrontation Clause jurisprudence occurred in the 2004 case Crawford v. Washington.

Crawford v. Washington

Petitioner Michael Crawford stabbed a man who allegedly tried to rape his wife, Sylvia. At his trial, the State played for the jury Sylvia's tape-recorded statement to the police describing the stabbing, even though he had no opportunity for cross-examination. The Washington Supreme Court upheld petitioner's conviction after determining that Sylvia's statement was reliable. The question presented is whether this procedure complied with the Sixth Amendment's guarantee that, "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him."

In Crawford v. Washington, [2] the Supreme Court of the United States radically changed Confrontation Clause doctrine, creating a very firm rule of exclusion of "testimonial" statements, with apparently quite lim-

ited exceptions. Crawford has changed confrontation analysis enormously. Its concrete impact was immediate and substantial in both appellate and trial courts on the evidence rendered inadmissible. It has given real teeth to the Confrontation Clause in several frequently encountered and important situations. For instance, statements made during grand jury proceedings and plea allocutions and statements made by co-participants in crime to authorities during police interrogation can no longer be admitted against a criminal defendant unless confrontation is provided. [2]

Crawford involved statements made by one unavailable crime participant against another during police interrogation. Michael Crawford, accused of assault, claimed that the man he stabbed was armed and that he acted in self-defense. At the trial, the prosecution played a statement made by his wife that contradicted Crawford's story. Sylvia Crawford did not testify at trial because of a state marital privilege law, which prevented one spouse from testifying without the other's consent. Because he could not cross-examine the recorded statement, Crawford claimed on appeal that the state had violated his Sixth Amendment right to cross-examination. [2] The Washington Supreme Court upheld the conviction, relying on the Supreme Court precedent of Ohio v. Roberts. In that case, the Court upheld a conviction that relied on testimony given by a witness at a preliminary hearing, where she was cross-examined, although the witness failed to appear at the trial. Justice Blackmun wrote that the testimony was admissible because it possessed sufficient "indicia of reliability."[9, p. 56,66] Yet, in the unanimous decision in Crawford, the Roberts Court struck down Michael Crawford's conviction. In his opinion, Justice Scalia wrote that history, particularly British treason cases that led to the inclusion of the Sixth Amendment in the Bill of Rights, suggests the Sixth Amendment is chiefly concerned with testimonial hearsay, "and interrogations by law enforcement officers fall squarely within that class". [2]

Where testimonial statements are involved, the Court did not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

In addition, the Court argued that "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination" [2]. Scalia dismissed the reliability standard, writing, "Reliability is an amorphous, if not entirely subjective, concept." [2]

The Roberts test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one. In this respect, it is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability. For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability. [10, p. 158-159]

The Raleigh trial itself involved the very sorts of reliability determinations that Roberts authorizes. In the face of Raleigh's repeated demands for confrontation, the prosecution responded with many of the arguments a court applying Roberts might invoke today: that Cobham's statements were self-inculpatory, that they were not made in the heat of passion, and that they were not "extracted from [him] upon any hopes or promise of Pardon." It is not plausible that the Framers' only objection to the trial was that Raleigh's judges did not properly weigh these factors before sentencing him to death. Rather, the problem was that the judges refused to allow Raleigh to confront Cobham in court, where he could cross-examine him and try to expose his accusation as a lie.

The Court then overturned Roberts. A new standard was established: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation"[2]. Unlike reliability of testimony, physical confrontation is straightforward, which means the new standard is significantly easier than the old one to apply. It also has the advantage of adhering more closely to the original intent of the Clause.

What Crawford also did at a conceptual level, which could be tremendously important, is to refocus the constitutional inquiry away from hearsay law and the trustworthiness and reliability of out-of-court statements toward the positive procedural goal of the con-

frontation right – encouraging and ensuring that evidence is presented in the courtroom in the presence of the accused and subject to adversarial testing. It was suggested that the path of the laws development will be improved if the clause is read as a positive command to afford the accused the right "to be confronted with the witnesses against him," [1] rather than principally as a negative restriction on the admission of certain out of court evidence, which has previously been its focus. [11, p. 511]

Although the central issue under Crawford was whether a statement was testimonial, the Court declined to adopt a comprehensive definition of the term. The Court acknowledged that its refusal to articulate a comprehensive definition would cause "interim certainty". [2] Yet the Court noted that this uncertainly "can hardly be…worse" than the unpredictable Roberts test. [2] At the least, Crawford has given us a model for treatment of the core of the Confrontation Clause – the exclusion of statements made out of court that are inquisitorial in nature, absent confrontation. [11, p. 511]

Crawford places a bold "stop sign" in the way of the admission of statements in this core area when confrontation is not provided. Given the damaging impact on prosecutions – a "stop sign" for the statement if it is testimonial–tremendous pressure was placed on courts to narrow the definition. [11, p. 511]

Analyzing the Crawford case we can identify exceptions that are limited in number, although some of them can be expanded in scope by interpretation or change in prosecutorial and judicial practices [11, p. 511]. First, if the statement is not within the core area of concern–that is, it is not testimonial in nature–then the "stop sign" does not apply. [2] Second, the confrontation right is satisfied during the current trial when the person who made the prior statement appears, testifies, and is subject to cross-examination as required by the confrontation right. [2] Third, the confrontation right is satisfied when the declarant has been previously confronted regarding the statement, but he or she cannot be confronted currently because of unavailability. [2] Fourth, the defendant is found to have forfeited his or her right to require confrontation if, through his or her own actions, the declarant becomes unavailable, rendering confrontation of the declarant impossible. [2] Fifth, the historic recognition of dying declarations as an exception to the confrontation right at the time of the Framing perhaps may mean that the Confrontation Clause is inapplicable to such statements, even if testimonial. [2] Sixth, the Confrontation Clause does not bar the use of statements, even if testimonial, if they are used for purposes other than establishing the truth of the matter asserted. [2]

The goal of enhancing the protection of the confrontation right is thus not at all the same as favoring maximum exclusion of the evidence under the command of the Confrontation Clause. Exclusion may be a necessary remedy to enforce compliance, but the goal should generally be more confrontation, not necessarily the admission of less evidence, even if such evidence qualifies as testimonial out-of-court statements. The right to confrontation should concentrate on guaranteeing confrontation, rather than excluding evidence. [11, p. 511]

Closing observations

After Crawford, the world of confrontation law has been radically altered. Given that the old system was incapable of policing problematic hearsay effectively, the new system that reliably excludes the most problematic statements is almost certainly an improvement. Crawford has certainly breathed new interest into the law of evidence and particularly confrontation and hearsay theory. The devil is in the details, and that is our immediate, important task. [11, p. 511] Solid work on the Confrontation Clause helps lay a firm foundation for broader evidence revision and potential broad scale procedural reform that both allows for the effective working of the criminal justice system and is true to the central concerns of the Constitution-evidence that is tested in the caldron of confrontation.

1. U.S. Const. amend. VI.
2. Crawford v. Washington, 541 U.S. 36 (2004).
3. Lilly v. Virginia, 527 U.S. 116 (1999) (Breyer, J., concurring).
4. Blackstone, William. Commentaries on the Law of England, vol. 3. (1768). Chicago: University of Chicago Press, 1979.
5. Lord Morley's Case, 6 How. St. Tr. 769 (H. L. 1666).
6. Sawyer, Jeremy. The evolution of the Supreme Court's Confrontation Clause Jurisprudence. (2013). The University of Chicago Undergraduate Law Review.
7. Coy v. Iowa, 487 U.S. 1012 (1988).
8. Maryland v. Craig, 497 U.S. 836 (1990).
9. Ohio v. Roberts, 448 U.S. 56 (1980).
10. Reynolds v. United States, 98 U.S. 145 (1879).
11. Robert P. Mosteller, Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witness, University of Richmond Law Review, Vol.39: 511 (2004).