THE BRAWL IN THE NEW ROMANIAN CRIMINAL CODE

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Abstract: In the current present paper we have proceeded in examining the brawl offense provided by the Romanian criminal law, by reference to the provisions mentioned in the previous law. We also considered some views promoted in the doctrine, starting from the interwar period to the present day, as well as the judicial practice adopted by some Romanian courts. The novelties refer both to the examination of the offense in the light of the new regulations promoted with the adoption of the new Criminal Code, with direct reference to the previous law, as well as to the opinions formulated in connection with the application of more favorable criminal law. Also, as a novelty, we emphasize the references to the doctrine of the activity of the Carol II Criminal Code. As it is written, this paper may be useful to both law students and master students of law schools in the country, as well as practitioners in the field of law enforcement.

Keywords: *Offense, constitutive content, the more favorable criminal law*

JEL Classification: *K14*

1. Introduction

As part of Title I with the marginal name "Offenses against the Person" and Chapter II of the mentioned title entitled "Offenses against Tolerance or Health", the offense of brawl is mentioned in the provisions of art. 192 of the Criminal Code, and it consists of the act of an individual to participate in a brawl between several persons.

Taking into account the consequences produced, the incrimination presents a simple normative way and three aggravated ways, which can consist in the participation in a brawl between several people, the bodily injury of several people, the death of one or more persons.

Considering the special circumstances in which such acts are committed, the legislator also provided for two cases of non-punishment that may be incident when a person was caught in a brawl against his will or when he tried to separate other persons already involved in a brawl.

In the doctrine of the second half of the last century, it was argued that "the brawl between several people, also called *rix* (from the Latin word rixa), is the violent and spontaneous clash between several twisted people, a tangle of actions, so that it is difficult to

determine the contribution of each of the people caught in the fight. The characteristic of rix is precisely this intertwining of acts of violence, pushing, strikes and hits between those engaged in struggle, all accompanied by screams and clamor. As a rule, it is not possible to determine what each of the participants did in the fight. However, what appears to be certain is the fact of the fight, that is, the fact that the respective persons are involved in the rix, without this participation being impossible to speak of a brawl. As an act of conduct, the brawl therefore appears as an act to which each of the participating persons is responsible, and therefore conceptually, by brawl it is meant one's deed to participate in the fight between several persons." [1]

Other authors point out that "Brawl or rix is defined in the criminal doctrine as the physical fight between at least two adverse groups or camps composed of at least two persons each. It is characterized by a complex of mutual violence acts, applied in clutter and by chance, regardless of the manner or means by which they were executed, in such a way as to make it difficult to establish and individualize the contribution of each participant conducting the fight" [2].

At the same time, "*Through the manifestations of violence that it involves, through the screaming and larking that accompanies it, the brawl creates a state of agitation, anxiety, social insecurity. At the same time, scramble poses a danger to people around them that could be caught without their will in the fight or could fall victim to violent manifestations during the fight. Ultimately, the social danger of brawl lies in the possibility of committing serious crimes against the person during the fight. This possibility is created on the one hand by the mental state specific to the participants in the brawl (excitement, the loss of self-control, etc.), and on the other hand the confusion of the manifestations inherent to the fight, where it is difficult, if not impossible, to determine who committed a personal injury or killing one of the people in the fight, or someone outside of it, a situation where offenders can take advantage of committing such crimes."* [1]

2. The Criminal Code in force in Relation to the Previous Law

The offense to be examined was also laid down in the Criminal Code of 1969, in Title IX, with the marginal title "Offenses Affecting Relationships in Social Cohabitation", Chapter IV, entitled "Other Offenses Affecting Relationships in Social Cohabitation" in art. 322 with the same marginal name.

The comparative examination of the two crimes allows the following elements of differentiation to be highlighted:

- in the new regulation, the offense is included in the category of offenses against the person, as to the provision of other crimes that affect social life relations (in the previous regulation);

- the new law sanctions all participants when the author of the bodily injury is not known, as in the previous law, but has removed the hypothesis known to the author of the challenge of bodily injury or the death of one or more persons;

- In the new law two cases of non-punishment have been eliminated, namely the rejection of an attack and the intervention in the fight for the defense of another person,;

- the penalty limits differ as follows: imprisonment from 3 months to one year or fine in the new law, to one month to 6 months imprisonment or fine, in the case of par. (1); the imprisonment from one to five years and from 6 to 12 years or the increase of the special limits by a third in the new law, from the imprisonment from 6 months to 5 years and from 6 to 12 years, in the case of aggravated ways provided by the law old.

3. The Preexisting Elements

3.1. The Legal Object

The special legal object is represented by the social relations relating to the person, namely those related to life, body integrity, the health of the person, as well as those related to social cohabitation.

In the recent doctrine it has been argued that the Special Legal Object is constituted by the "social relations on the human person, namely those related to the life, bodily integrity and the health of the person" [3].

In addition to these values and social relationships "which always constitutes its specific legal object, fighting may sometimes have as a secondary or adjacent legal object the social relations regarding the maintenance of public order and tranquility, the climate of social security needed for peaceful and harmonious cohabitation between citizens" [4].

3.2. The Material Object

The material object consists of the body of the person or the goods on which the action of the participants in the brawl has occurred.

3.3. The Subjects of the Offense

a) The active subject can be any physical person participating in a brawl.

Criminal participation is possible only in the form of incitement and complicity.

b) The passive subject is the person or persons who suffered as a result of the brawl.

As a specific element, we note that in the case of this offesnse, the participants can be both active and passive subjects [5].

4. Structure and Legal Content of the Offense

4.1. Premise Situation

Since we do not have a premise situation, the legal content is confused with the constitutive content of the offense.

4.2. The Constitutive Content

4.2.1. The Objective Side

The material element of the objective side is accomplished by the action of participating in a brawl between several persons grouped in two or more camps by acts of violence that can be exercised by several physical actions, such as: strikes, pushes, stabbing, shooting, etc.

From the interpretation of the provisions of the law, it results that the participant will also be considered the participant after the fight started, or the one who withdraws from the fight before ending.

Also, there will be this offense only when more people divided into side groups hit each other, all are active subjects, and all or part of them may have the status of passive subjects, their actions being difficult or sometimes impossible to establish. If this requirement is not met, the act will not constitute the offense of brawl, but possibly another offense [1].

There will be no such offense when a group of people exerts acts of violence on one person only.

In this respect, it was decided in the judicial practice that, if there was a brawl between several persons and the victim was killed by one of them (concretely established), the deed does not meet the constitutive elements of the brawl, as the text criticizes the hypothesis in which it is unknown which of the participants caused the death of a person by his action; it was established that the victim died as a result of the defendant applying a knife strike, the committed offense meet the constituent elements of the murder offense [6].

In another case, the Supreme Court ruled that the brawl offense involves a plurality of active subjects, formed by at least two groups, to fight each other, to strike each other. As such, when there is only the group of defendants, the victim to which it was caused death was alone, the deed falls under the provisions of the murder offense [7].

Also, it was also decided in the legal practice that if one of the participants in the brawl attempts to kill another, the act constitutes an attempt to commit the crime of murder and not the offense of brawl, in contest with the first one [8].

Also, the offense will not survive if there is only a group (of the defendants) and the victims of the violence act do not constitute a grouping, not aware of the defendants' intentions and reacting only to defend themselves. [9]

The *immediate consequence* is a state of danger for the good conduct of social cohabitation, as well as hitting or other violence, injuring the bodily integrity, the health of a person, or the death of a person or the death of two or more persons.

In the case of brawl only resulted in the offense of hitting or other violence, it will be absorbed in the content of the brawl offense.

In all circumstances, for the existence of the offense, it is necessary to establish the *causal connection* between the action by which the material element is achieved of the objective side and the immediate consequence; we must point out that the causal connection must be determined only if the result consisted of a prejudice to the life, the bodily integrity or the health of a person or persons involved in the struggle or the death of a person or two or more persons; if the above mentioned result has not occurred, the causal connection must not be established because it results from the material nature of the committed offense (art. 198 par. (1) of the Criminal Code].

The *first aggravated way* is provided for in par. (2), and will be retained when a body injury to one or more persons has been caused in the course of the brawl and the participant has not been identified whom by his action he has caused this consequence, in which case all participants will be punished with the same penalty (imprisonment from one to five years). In order to retain this aggravated way, it is necessary to meet cumulatively the following conditions:

- not to identify the participant who, through the action, has caused the same result;

- two groups confronting;

- to cause bodily injury to one or more persons;

In the sense desired by the legislator, the term "bodily harm" means the offense referred to in art. 194 Criminal Code, and not a certain prejudice to the bodily integrity or the health of a person.

If following the brawl the consequence is the one stipulated in the content of art. 193 of the Criminal Code (physical injury or traumatic injuries or damage to the health of the victim, the severity of which is assessed by the days of medical care for a maximum of 90 days), it will be retained only the violation of art. 198, par. (1) Criminal Code, respectively the type of brawl offense.

In all situations, the victim will be responsible for the commission of the brawl offense in the manner prescribed by the provisions of art. 198, par. (1) of the Criminal Code.

If the person in the group who caused the consequences prescribed by law is identified, only he or she will be responsible for the offense of personal injury, and the other participants (including the victim or the victims) will be responsible for committing the offense in the type way.

The form of guilt with which the participants act in the brawl offense is the intention or overcome intention (praeterintentia).

The second aggravated way is provided in art. 198, par. (3) and consists in causing the death of a person, and the *third aggravated way* is to cause the death of two or more persons (provided in the same text).

4.2.2. The Subjective Side

As far as guilty is concerned, the offense is committed intentionally, which may be direct or indirect, and in the case of aggravated ways, it can also be committed with praterintention.

The mobile and the purpose are not important in terms of the existence of the offense, however, the finding of their existence is important in the process of individualization of the criminal law sanction to be applied by the court.

5. Forms, Modalities, Sanctions

5.1. Forms

In the case of the offense under examination, both preparatory and attempted acts are possible, but they are not punished.

Consumption of the offense takes place when several people who are part of two or more groups have started fighting.

The offense may also be committed in a continuing form, in which case it is exhausted at the time of the last strike.

5.2. Ways

The offense presents a type of normative way, and three aggravated normative ways.

The normative aggravated type is provided in the provisions of par. (1) and consists of participating in a brawl between several people.

The first aggravated normative way is provided in par. (2) and it will be retained in the event that one or more persons have been injured during the fight and it is not known which of the participants has produced the consequences.

The following aggravated ways are provided in the provisions of paragraph (3), and will be retained when the death of a person (sentence I) or the death of two or more persons (sentence II) has occurred.

5.3. Sanctions

The punishment prescribed by law for the type of offense is imprisonment from 3 to one year or fine, and for the first aggravated mode provided in paragraph (2) is imprisonment from 6 months to 5 years.

For the aggravated way provided in paragraph (3) sentence I, the sentence is imprisonment from 6 to 12 years (if a person's death has been caused) and for the last aggravated way the special limits of punishment increase by a third (when the death of two or more persons).

6. Special Causes of Non-Punishment

According to the provisions of art. 198, par. (4) of the Criminal Code, the participant at the brawl who is not punished is ther person who:

a) was caught in a fight against his will;

b) tried to separate others.

We note that in order to retain one of these causes of non-punishment, it is necessary to note that the inviting participant had no intention of participating in the brawl, except in the express terms specified in the text and mentioned above. Any other form of participation in other than those mentioned will also involve criminal liability for committing the offense under investigation.

According to the doctrine, "In all cases, the participant will not benefit from non-punishment causes, if later, let himself involved in the brawl, he acts with the intent to participate in the fight and integrates in the exchange of violence that takes place. Causes of non-punishment operate not only in the simple struggle, but also in the other assumptions provided in the text, except for those in which more serious crimes are committed, and the perpetrators are known" [3].

7. Complementary Explanations

7.1. The Connection to Other Offenses

The examined offense has links with other offenses included in this chapter, namely, hitting or other violence, bodily injury, and the crime of murder.

7.2. Some Procedural Aspects

The jurisdiction in the first instance belongs to the court in whose district the offense was committed, except in cases where competence is determined by the quality of the person.

The prosecution is carried out by the criminal investigation bodies of the judicial police under the supervision of the prosecutor.

The criminal action moves *ex officio*.

8. Legislative and Transitional Situations

8.1. Legislative Precedents

This act was not incriminated in the Criminal Code from 1865, and in the Carol II Criminal Code in the provisions of art. 490 was provided on in the situation in which, in the event of a strike, the body injury or the death of one of the participants was caused and it was not possible to know which of them committed the deed.

The incrimination from art. 490 expressly provided two hypotheses, respectively, when the crime or the offense was committed by *a crowd*, and when the same offense was committed *in the brawl*.

Referring to the second hypothesis, Professor Vintilă Dongoroz said that "a) brawl means a violent struggle between several men, most of the time being premeditated by a quarrel. As we cannot generally say in this struggle who provoked and who responded to the challenge, it is assumed that there was a mutual challenge and a more brilliant legal treatment. A simple altercation between two three people is not considered a brawl. b) Of course, any strike involves kicks, so each combatant is assumed by himself to be guilty of at least the whip and will be punished as such. If bodily harm occurred and if it is not known who committed it, then all participants in the fight - less of course the victim - shall be punished with the correctional prison of 1 month - 2 years and a fine of 1000-3000 lei if the injury is of those shown in art. 471, 472 and 473, and if death is punished for all participants, it will be the correctional prison of 1-3 years and the fine of 2000-5000 lei" [10].

8.2. The Transitional Situations. Applying the More Favorable Criminal Law

In transitory situations, the more favorable criminal law may be any of them.

Thus, in the case of the offense in the standard manner provided in paragraph (1), the punishment stipulated by the law is imprisonment from 3 months to one year or fine, and in the case of the type provided in art. 322 par. (1) of the Criminal Code of 1969, the penalty provided is imprisonment from one month to six months or a fine.

Taking into account the differences between the limits of punishment, both in the case when the court wishes to apply a punishment directed to the special minimum and to the special maximum, the more favorable criminal law will be the old law, which provides for lower limits.

As the author of injury or bodily harm is known, the more favorable criminal law will most often be the old law that allowed for a one year reduction in penalty limits.

Under the first aggravated normative way, provided for in paragraph (2) of art. 198 of the Criminal Code and in art. 322, par. (3) Thesis I, Criminal Code since 1969, when the court wishes to focus on the application of a punishment directed to the special minimum, the more favorable criminal law is the old law (the minimum limit is 6 months, unlike the law in force where the limit is one year) and when it wishes to apply a penalty aimed at the special maximum, the more favorable criminal law may be any of them (the same maximum is provided, i.e. 5 years).

In the case of the second aggravated way provided by the provisions of art. 198, par. (3) Thesis I, Criminal Code and art. 322, par. (3) second thesis Criminal Code in 1969, when the court wishes to apply a penalty aimed at the special minimum, the more favorable criminal law will be the old law (it provides for a special lower minimum and 3 years for 6 years in the new law), and when it wishes to apply a punishment directed to the special maximum, the more favorable criminal law will be the new law (which stipulates a special lower limit and 12 years instead of 15 years in the old law).

The more favorable criminal law will be the old law or the new law, in the case of the last aggravated normative way provided in art. 198, par. (3) Thesis II of the Criminal Code and art. 322, par. (3) from Criminal Code from 1969.

Also, if the contestant participated in the action rejects an attack or defends another, the more favorable criminal law would be the old law, as these are causes of non-punishment, which are no longer foreseen in the new law.

Conclusions

Although at present the crime of brawl does not record a high crime rate, its examination is of some importance, mainly due to some changes in the content of the offense by the legislator of the new Criminal Code.

These changes are of major importance in the case where it is necessary to identify and apply more favorable criminal law.

Among the changes that we consider to be of substance and on which we have insisted in this paper, because they are relevant in cases of more favorable identification and application of law, we highlight the cases of refutation of an attack and brawl intervention for the defense of another person, cases that are no longer foreseen to be unpredictable.

Undoubtedly, in case of identifying and retaining one of these, the more favorable criminal law will be the old law, because in the new law these two situations are no longer intended to be causes of non-punishment.

As a general conclusion, we appreciate that even if, due to the limits of punishment and the time elapsing since the adoption of the new law to date, in practice, the application of more favorable criminal law is of no particular interest, the institution as such remains valid from the perspective of subsequent modifications and additions.

On the other hand, the examination carried out is of importance, since the act in question continues to be topical, especially in the view of the brawl between groups of supporters of football clubs in the national division A.

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