ABOUT THE OFFENSES PROVIDED IN THE LAW NUMBER 95/2006 ON HEALTH REFORM

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ABSTRACT*: The importance of the medical profession, as well as that of the other categories of personnel in the health system, is undeniable, especially in the context in which we recently faced a pandemic. The people who exercise these professions benefit from the perspective of criminal law also by the protection offered by the provisions of art. 652 of Law no. 95/2006. On the one hand, related to the provisions of the Criminal Code in force, we consider it necessary to intervene in the sense that the legislator has to make changes regarding the content of the article mentioned above. On the other hand, I have not found in the legislation in force criminalization rules that confer increased protection from the perspective of the criminal law for people who exercise professions other than those in the health system, with the exception of the provisions criminalizing acts of outrage, respectively judicial outrage, but the reason for the existence of these criminalization rules resides in protecting mainly the authority of the state, as well as the administration of justice. In this context, it is interesting to analyse what would be the solution from the criminal law point of view to grant protection to all professional categories.*

KEYWORDS*: criminal law; crime; health field; reform; legislative mismatch.*
JEL Code*: K14, K42.*

1. GENERAL PRESENTATION

According to art. 173 of the Criminal Code[1], by "criminal law" we understand "any provision of a criminal nature contained in organic laws, emergency ordinances or other normative acts that at the time of their adoption had the force of law".

Within the Law[2] no. 95/2006 regarding the health reform, certain crimes are described in the XV[th] Title, a title that contains only one article, namely article 652, which has the following content: „(1) Threat committed directly or through means of direct

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[1] It is about Law no. 286/2009 regarding the Criminal Code, published in the Official Gazette of Romania no. 510 of July 24, 2009, with subsequent amendments and additions. Available at: https://legislatie.just.ro/Public/DetaliiDocument/109855, (accessed: September 27, 2022).
[2] Republished in the Official Gazette of Romania no. 652 of August 28, 2015, with subsequent amendments and additions.

communication against a doctor, nurse, ambulance driver, paramedic or any other type of personnel in the health system, in the exercise of their duties or for acts performed in the exercise of their duties, is punishable by imprisonment from 6 months to 2 years or a fine. (2) Hitting or any acts of violence committed against the persons referred to in para. (1), in the exercise of the function or for acts performed in the exercise of the function, shall be punished with imprisonment from 6 months to 3 years. (3) Bodily injury committed against the persons referred to in para. (1), in the exercise of the function or for acts performed in the exercise of the function, shall be punished with imprisonment from 6 months to 6 years. (4) Serious bodily injury committed against the persons referred to in para. (1), in the exercise of the function or for acts performed in the exercise of the function, shall be punished with imprisonment from 3 to 12 years"[3]. We note that this article has not been modified in its content after the entry into force of Law no. 286/2009 regarding the Criminal Code, but remained unchanged in the form it had when Law[4] no. 15/1968 regarding the adoption of the Criminal Code of Romania was in force.

2. CONSIDERATIONS REGARDING THE MATERIAL ELEMENT OF THE OFFENSES DESCRIBED IN ARTICLE 652 OF THE LAW NUMBER 95/2006

Each of the four paragraphs of article 652 of Law no. 95/2006 contains the description of a distinct crime, as follows: in para. (1) the act of threat is criminalized, in para. (2) the act of hitting or other violence is criminalized, in para. (3) the act of bodily injury is criminalized and in para. (4) the act of serious bodily injury is criminalized, with the particularities that the passive subject is qualified, and any of the acts must be committed in a temporary interval, "in the exercise of the function", or be committed for acts performed by the passive subject in the exercise of the function. At the time this article was drafted and, subsequently, at the time it entered into force, each of these facts described in the paragraphs of art. 652 of Law no. 95/2006, with the particularities specified above, was based on the general provisions of the Criminal Code in force at that time[5].

[3] Available at: : https://legislatie.just.ro/Public/DetaliiDocument/71139 , (accessed: September 27, 2022).

[4] Published in Official Bulletin no. 79-79 bis of June 21, 1968, currently repealed. Available at: https://legislatie.just.ro/Public/DetaliiDocument/144628, (accessed: September 27, 2022).

[5] Thus, in art. 193 of Law no. 15/1968, the act of threatening was described as follows:" The act of threatening a person with the commission of a crime or a damaging act directed against him, his spouse or a close relative, if it is of a nature to alarm him, is punished with imprisonment from one month to 1 year or with a fine, without the penalty applied exceeding the penalty provided by law for the crime that was the object of the threat. (…)". In art. 180 of Law no. 15/1968, the act of hitting or other violence was described as follows: "Hitting or any acts of violence causing physical suffering are punishable by imprisonment from one month to 3 months or a fine. Hitting or acts of violence that caused an injury that required medical care for no more than 20 days for healing are punishable by imprisonment from 3 months to 2 years or a fine. (…)". In art. 181 of Law no. 15/1968, the act of bodily injury was described as follows: "The act by which the bodily integrity or health was affected by an injury that required medical care for a maximum of 60 days for healing is punishable by imprisonment from 6 months to 3 years. (…)". In art. 182 of Law no. 15/1968, the act of serious bodily injury was described as follows: "The act by which am injury was caused to bodily integrity or health that required more than 60 days of medical care for healing, or that produced any of the following consequences: loss of a sense or organ, the cessation of their functioning, a permanent physical or mental infirmity, aesthetic damage, abortion, or endangering the person's life, is punishable by imprisonment from 2 to 7 years. When the act was committed in order to produce the

The provisions of art. 652 of Law no. 95/2006 have, by reference to the Criminal Code, the value of a special norm, having priority in application, in a concrete case, for example, when a doctor in the exercise of his duties is hit by another person, patient, according to the *specialia generalibus derogant* principle. Understanding the criminalization rules contained in art. 652 of Law no. 95/2006 can only be done by referring to the corresponding general rule from the Criminal Code because the legislator does not define the notions of "threat", "hitting or any acts of violence", "bodily injury" or "serious bodily injury" " in any article of Law no. 95/2006, and according to art. 172 of the Criminal Code: "Whenever the criminal law uses a term or an expression from those shown in this title, its meaning is that provided in the following articles, except when the criminal law provides otherwise".

We consider that the *rationale* of the legislator in establishing rules derogating from the general criminal rules contained in the Criminal Code was that of offering increased protection from the point of view of criminal law, judging by the special limits of the punishment provided by law for each individual crime, among those described in art. 652 of Law no. 95/2006, related to the provisions of art. 193, 180, 181 and 182 of Law no. 15/1968.

In the following, we deem it necessary to make a few clarifications accompanied by a few proposals *de lege ferenda*, by reference to the Criminal Code in force, without the order in which they are presented leading to a ranking of them according to their importance.

A first clarification is related to the provision in art. 652 para. (4) from Law no. 95/2006. The act of serious bodily injury is no longer criminalized in the Criminal Code in force. In these conditions and the phrase "serious bodily injury" not being expressly defined in the contents of Law no. 95/2006 for the understanding of the norm and its application to concrete cases, we propose *de lege ferenda* the repeal of this paragraph from the content of art. 652, the respective incrimination norm lacking in clarity and predictability.

A second clarification is related to the incrimination provision in para. (3) of art. 652 of Law no. 95/2006, in the sense that the special limits of the punishment are lower compared to the corresponding provision in the Criminal Code in force. Under these conditions, we propose *de lege ferenda*, either the increase of the special limits of the punishment for the offense provided in art. 652 para. (3) of Law no. 95/2006 over those of the crime of bodily injury in the Criminal Code, i.e. over imprisonment between 2 and 7 years, or the repeal of this rule from Law no. 95/2006 because at this moment the increased protection of the qualified passive subjects, expressly provided in the norm of art. 652 of Law no. 95/2006 is ensured by the norm of art. 194 of the Criminal Code regarding the bodily injury.

A third clarification is related to the fact that, in relation to the rules of art. 193 and 206 of the Criminal Code, criminalizing the acts of hitting or other violence and threat, the provisions of art. 652 para. (1) and (2) of Law no. 95/2006 ensure increased protection to the persons expressly named in the aforementioned law, the special limits of the punishment being higher than those of the Criminal Code in force.

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consequences provided in the previous paragraph, the penalty is imprisonment from 3 to 8 years. The attempted act provided in para. (2) is punished."

A fourth clarification, relative to para. (1) of art. 652 of Law no. 95/2006, takes into account the fact that not every threat committed by a person to one of the professional categories expressly provided in the norm will fall within the provisions of art. 652 para. (1) of Law no. 95/2006, but only that carried out "directly or by means of direct communication" and in compliance with the other conditions provided in the norm. If, in a specific case, an act of threat is committed against one of the persons provided in art. 652 para. (1) of Law no. 95/2006, but indirectly and with the fulfilment of the other conditions provided in art. 206 of the Criminal Code, these latter legal provisions will apply.

A fifth and last clarification is the one relative to art. 652 para. (2) from Law no. 95/2006, in the sense in which the phrase "hitting or any acts of violence" should be replaced *de lege ferenda* with that of "hitting or other violence", committed against the persons provided in paragraph (1), found in the exercise of the function or for acts performed in the exercise of the function", for reasons of legislative correlation. If in the other paragraphs of art. 652 of Law no. 95/2006 the legislator refers to the name of the corresponding crime described in the Criminal Code in force, respectively in the previous Criminal Code, in this situation the reference is made to the material element of the crime of hitting or other violence. For the understanding of the crime described in art. 652 para. (2) from Law no. 95/2006 we will consider both variants of the crime of hitting or other violence from the Criminal Code, as a corresponding crime, under the aspect of the immediate result, i.e. both the causing of physical suffering and the causing of "traumatic injuries or of affecting health of a person, whose severity is evaluated by no more than 90 days of medical care".

3. CONSIDERATIONS REGARDING THE PASSIVE SUBJECT OF THE OFFENSES DESCRIBED IN ARTICLE 652 OF LAW NUMBER 95/2006

The passive subject of any of the 4 crimes described in art. 652 of Law no. 95/2006 is expressly qualified by the legislator, in the sense that it can be a doctor, a nurse, an ambulance driver, an ambulance personnel or any other type of personnel in the health system. As in the case of the qualification of the author of a crime, the qualification specified in the law must exist at the time of the commission of the act[6]. But it is important to specify that in addition to fulfilling the condition related to the quality of the passive subject, for the existence of any of the four crimes another condition must also be met, namely that according to which the passive subject must be in the exercise of the function at the time of committing any of the acts or the one regarding their commission in relation to facts performed in the exercise of the function.

If in terms of understanding the scope of the notions of "doctor", "nurse", "ambulance driver", respectively "ambulance personnel" there are no problems because they are terms known in the current language, we consider that the same thing does not apply in the case of the scope of the phrase "any other type of personnel in the health system". In the sense of the rules of incrimination contained in art. 652 of Law no. 95/2006, we consider the profession of "doctor", respectively that of "nurse", regardless of the specialty in which the

[6] In the same sense, see Barbu I.A. (2022) *Criminal law. The General part*, 2nd edition, Universul Juridic Publishing House, Bucharest, p. 92; Ionaș A., Măgureanu A.F., Dinu C. (2015) *Criminal Law. The Special Part*, Publishing House Universul Juridic, Bucharest, p. 289.

profession is exercised and regardless of whether the profession is exercised in the public or private health system. For the notion of "ambulance personnel" there is a legal definition in art. 92 para. (2) let. g) from Law no. 95/2006, in the sense in which it is the "personnel without medical training who graduated from ambulance courses, authorized by the Ministry of Health, to work in the ambulance services".

For the phrase "any other type of personnel from the health system", we specify that in Law no. 95/2006 we do not find any legal definition. Moreover, the legislator mentions "regulated professions in the health system", in art. 89 let. a) from Law no. 95/2006, referring to the obligations of medical practitioners' offices and of its staff. But a phrase that is used by the legislator in the context of Law no. 95/2006 is that of "medical personnel", which has a legal definition in art. 653 para. (1) let. a) as follows: "medical personnel are doctors, dentists, pharmacists, nurses and midwives who provide medical services", when the civil liability of medical personnel is regulated by law. Another phrase used and which does not have a legal definition is that of "health personnel", which the legislator uses when referring to the categories of people who can apply medical treatment, according to the provisions of art. 236 para. (2) from Law no. 95/2006.

The health personnel includes: "health personnel with superior medical training, average health personnel, auxiliary health personnel"[7]. The category of "health personnel with superior medical training" includes: "doctors, dentists, pharmacists, physiotherapists, nurses with higher education, other health personnel with higher education"[8]. The "average health personnel" category includes: "medical assistants, pharmacy assistants, nurses, health technicians, medical clerks, midwives, laboratory technicians and other categories of health personnel with similar secondary education"[9]. The "auxiliary health personnel" category includes: "nurses, disinfection agents, stretcher bearers, bathing personnel, plasterers, mud cleaners, washerwomen, caregivers, ambulance personnel and other categories of health personnel assimilated to auxiliary health personnel"[10].

We also find the phrase "medical-health personnel", which does not benefit from a legal definition in the contents of Law no. 95/2006. This phrase designates: "all specialized medical personnel working in health care units and scientific research units in the medical field, both in the public and private sectors"[11].

The phrase "sanitary system" is not defined in the aforementioned law. From this perspective and taking into account the legislative technical norms in force[12], the meaning of this phrase is that of the current speech, namely: "the organization of people, institutions

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[7] Available at: https://insse.ro/cms/files/statistici/comunicate/com_anuale/activ_unit_sanitare/precizari_metodologice_16.pdf , (accessed: July 04, 2023).

[8] *Idem. In the category "other health personnel with higher education" we include: "biologists, chemists, medical physical culture teachers, speech therapists, psychologists, etc."* Available at: https://insse.ro/cms/files/statistici/comunicate/com_anuale/activ_unit_sanitare/precizari_metodologice19.pdf (accessed: July 04, 2023).

[9] *Idem.*

[10] *Idem.*

[11] *Idem.*

[12] We consider the provisions of Law no. 24/2000 regarding the rules of legislative technique for the elaboration of normative acts, republished in the Official Gazette of Romania no. 260 of April 21, 2010, with subsequent amendments and additions.

and resources that provide medical care services to cover the health needs of the target populations"[13], having as synonyms the phrases "health system", respectively "health care system"[14]. From the analysis of the phrases specified above, we consider, on the one hand, that the notion of "medical personnel" is included in that of "health personnel", and the latter is included in that of "medical-health personnel". On the other hand, in our opinion, the relationship between the notion of "medical-health personnel" and that of "health system personnel" is from part to whole, in the sense in which the phrase "medical-health personnel" is contained in the second.

Next, we want to address the issue related to the scope of the latter phrase, namely the phrase "personnel from the health system". Considering the provisions contained in Government Ordinance[15] no. 144/2010 on the organization and functioning of the Ministry of Health, relative to units with legal personality under the authority of or subordinated to the Ministry of Health, we consider that any person who works within one of these units, regardless of whether they are medical or administrative personnel, is included in the notion of "personnel from the health system". As a consequence, it benefits from criminal protection through the incrimination provisions contained in art. 652 of Law no. 95/2006, considering that the legislator refers to "any other type of personnel in the health system".

4. CONSIDERATIONS REGARDING THE LEGAL SOLUTION IN CASE WHEN A MEMBER OF THE PERSONNEL FROM THE HEALTH SYSTEM COMMITS ONE OF THE OFFENSES DESCRIBED IN ARTICLE 652 OF THE LAW NUMBER 95/2006

In the incrimination rules contained in art. 652 of Law no. 95/2006 the legislator does not qualify either expressly or implicitly the active subject of each individual crime. For this reason, we can state that any person who meets the general conditions of criminal liability can be an active subject. From a factual point of view, probably most frequently, a patient can be the active subject. But we cannot exclude the possibility that the one who commits any of the acts described in art. 652 of Law no. 95/2006 to be another member of the personnel from the health system. In this situation, on the one hand, we consider that, if the act committed by a member of the health system personnel is a threat or hitting or other violence against the passive subject expressly qualified in the incrimination norm of art. 652 para. (1) and (2) of Law no. 95/2006, the act will be classified as a crime of abusive behaviour[16], according to the provisions of art. 296 para. (2) of the Criminal Code, either on sentence I or on sentence II, which will contain either the act described in art. 652 para. (1), or the one described in art. 652 para. (2) from Law no. 95/2006, the perpetrator being a person in the exercise of official duties.

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[13] Available at: https://ro.wikipedia.org/wiki/Sistem_de_s%C4%83n%C4%83tate (accessed: July 04, 2023).
[14] *Idem.*
[15] Published in the Official Gazette of Romania no. 139 of March 2, 2010, with subsequent amendments and additions. We refer more precisely to annex no. 2 of this normative act.
[16] In art. 296 of the Criminal Code, the crime of abusive behaviour has the following content: (1) The use of offensive expressions towards a person by the person exercising his duties is punishable by imprisonment from one month to 6 months or a fine. (2) Threatening or hitting or other violence committed under the conditions of para. (1) shall be punished with the punishment provided by law for that crime, the special limits of which are increased by one third".

On the other hand, if the act committed by a member of the health system personnel is bodily harm to the passive subject expressly qualified in the criminalization norm of art. 652 para. (3) from Law no. 95/2006, it will be considered both[17] the crime of abusive behaviour (art. 296 of the Criminal Code) and the crime described in art. 652 para. (3) from Law no. 95/2006, considering the fact that the legislator did not include in the aggravated version of the crime of abusive behaviour the act of bodily harm.

5. THE NEED OF THE EXISTENCE OF THE OFFENSES DESCRIBED IN THE LAW NUMBER 95/2006 IN REGARDS TO OTHER CATEGORIES OF PROFESSIONALS

It is undeniable the importance of the services provided to society by the people who are members of the personnel of the health system, equally with those provided by other professional categories, who carry out their activity within the units whose object of activity is a service of public interest.

However, with the exception of the criminalization rules for acts of outrage[18] and judicial outrage[19] from the special part of the Criminal Code, through which the legislator wanted to protect mainly the authority of the state, respectively the administration of justice, granting protection accordingly to the professional categories that represent these social values, we did not find in the legislation in force some criminalization rules for acts that are described in the Criminal Code, in the title relative to crimes against the person, regarding an increased protection of a certain professional category, as found in art. 652 of Law no. 95/2006.

It is true that it is an option of the legislator, based on considerations of criminal policy, in the sense of establishing criminalization norms that have a special character, by referring to those in the special part of the Criminal Code, but we consider that their existence to

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[17] Ionaș A., Măgureanu A.F., Dinu C, *op.cit.,* p 415.

[18] The crime of outrage is described in art. 257 of the Criminal Code as follows: „ (1) The threat committed directly or by means of direct communication, hitting or other violence, bodily harm, hitting or injuries causing death or murder committed against a public official who performs a function involving the exercise of state authority, found in the exercise of official duties or in connection with the exercise of these duties, shall be punished with the penalty provided by law for that crime, the special limits of which are increased by one third. (2) Committing a crime against a public official who performs a function that involves the exercise of state authority or over its assets, for the purpose of intimidation or revenge, in connection with the exercise of official duties, is sanctioned with the punishment provided by law for that crime, the special limits of which are increased by one third. (3) With the same punishment it is sanctioned for the acts committed under the conditions of para. (2), if they concern a family member of the public official. (4) The facts provided in para. (1) -(3), committed against a policeman or gendarmerie personnel, as well as forestry personnel vested with the exercise of public authority, in the exercise of their official duties or in connection with the exercise of these duties, shall be punished with the punishment provided by law for that crime, whose limits are increased by half".

[19]The offense of judicial outrage is described in art. 279 of the Criminal Code as follows: „ (1) Threats, hitting or other violence, bodily harm, hitting or injuries causing death or murder, committed against a judge or prosecutor in the exercise of his duties, shall be punished with the penalty provided by law for that crime, whose special limits are increased by half. (2) The commission of a crime against a judge or prosecutor or against his assets, for the purpose of intimidation or revenge, in connection with the exercise of official duties, is sanctioned with the penalty provided by law for that crime, the special limits of which are increased by half. (3) The same penalty is imposed for the acts committed under the terms of para. (2), if they concern a family member of the judge or of the prosecutor. (4) The provisions of para. (1) -(3) shall also apply accordingly to acts committed against a lawyer in connection with the exercise of the profession.

ensure an increased protection, from the perspective of criminal law, of only a certain professional category, will lead to a hierarchy of professions, in terms of the protection that is provided to them from the perspective of criminal law, although these, as in the case of professions in the health system, do not presuppose the exercise of state authority or the administration of justice, as happens in the case of the criminalization of the act of outrage or of judicial outrage.

A solution in this case would be to repeal the provisions of art. 652 of Law no. 95/2006, especially since at this moment the special punishment limits provided for the crime of bodily injury in the Criminal Code are higher than those for the act described in art. 652 para. (4) from Law no. 95/2006, the provisions describing acts of threat (art. 206 of the Criminal Code), hitting or other violence (art. 193 of the Criminal Code), respectively bodily injury (art. 194 of the Criminal Code) being therefore applied in any situation where passive subjects of such acts would be persons engaged in the exercise of various professions or in relation to aspects related to the exercise of various professions.

Another solution would be to create new variants of criminalizing the act of abusive behaviour, described in art. 296 of the Criminal Code, as a service crime, which has as its passive subject "the one in the exercise of his duties", and as a material element has either "the use of offensive expressions" or "threat or hitting or other violence", without the active subject being qualified. Thus, the article in which the norm of criminalizing the act of abusive behaviour is found could have two new paragraphs, as follows: (1^1) The use of offensive expressions by a person towards the person in the exercise of his duties is punishable by imprisonment from 15 days to 3 months or with a fine, respectively (2^1) Threatening or hitting or other violence committed under the conditions of para. (1^1) shall be punished with the punishment provided by law for that crime, the special limits of which are increased by a fourth". This solution would not contravene the legislator's option regarding service crimes and is somehow similar to the model of criminalizing the act of violating the secrecy of correspondence, described in art. 302 of the Criminal Code, also in the chapter of service crimes, although only in the version of incrimination described in para. (3) of art. 302 of the Criminal Code the active subject is qualified. This would also ensure equal treatment from the perspective of criminal protection with regard to all professional categories, which would not be protected, secondarily, by the provisions criminalizing acts of outrage or judicial outrage. Moreover, the public official exercising a function involving the exercise of state authority to whom insulting expressions would be addressed by a person under the terms of paragraph (1^1) proposed by us, would benefit from criminal protection, because currently, such behaviour that would have him as a passive subject is not provided by the criminal law, when the deed is committed by a person who is not exercising his duties.

6. CONCLUSIONS

Therefore, we believe that the legislator should allow time to analyse the criminal provisions of the various normative acts in order to establish which are the changes that must be made so that there is a correspondence between the provisions of the general criminal law, represented by the Criminal Code, and the criminal provisions of other normative acts.

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