SOME THEORETICAL AND PRACTICAL ASPECTS
CONCERNING CONTRAVENTIONS AFFECTING THE NORMS
OF LIVING TOGETHER, SOCIAL ORDER AND PUBLIC
PEACE

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Abstract: The article is a study about justice and practical situations related to some contraventions
covered by the law no.61/1991.
The paper makes a critical assessment of the problems encountered in implementing legislation.
In conclusion some proposals for amendments to this law are formulated in this paper.

Keywords: legislation, contravention, jurisprudence, social order, public peace

I. General aspects regarding the regulation of the penalizing of contraventions which affect the
norms of living together, social order and public peace

1. General considerations
In the field of internal legislation legal provisions concerning contraventions are to be
encountered within a large number of governmental laws issued by the Parliament as well as by the
central and local government department authorities.
In the contraventional field legislation is not encompassed in a unitary way in a code as is the
case with the penal law\(^1\). If contraventional common law is comprised in a single governmental law

\(^1\)In Romania, in the field of contraventions there have existed several general regulations. For example, in 1865
the contravention was considered as criminal offence, its definition being achieved by means of penalty, by the
formulation “the criminal offence which the law punishes by police prison or fine”.
Subsequently, the explanation of contravention by means of punishment was dropped, as there were situations
in which some penal punishments were lighter than the contraventional ones.
By the Romanian Penal code from 1936 the principle of criminal liability was adjusted to the principle
of legalizing incrimination in the sense that the acts which represented a contravention had to be explicitly
provided by the law, by regulation, or by an ordination of the administrative authority.
By Decree nr.184/1954, contraventions were placed outside the penal law field and considered illicit acts which
triggered an administrative liability.
There followed, in 1968, Law nr.38, regarding the establishing and the penalizing of contraventions, followed
by different governmental laws with a special status which comprise the description of some illicit acts which
represent contraventions.
In 2001, the Romanian Government passed Ordinance nr.2, regarding the judicial system of contraventions,
published in the Official Journal nr.410 from 25.07.2001, which became the framework norm in the
contraventional law field. The new governmental law structured in 6 chapters and 51 articles also included in its
content provisions regarding its enforcement as well as the enforcement of special contraventional norms.
The administrative governmental laws by which contraventions are established and penalized come into force
within 30 days from the publishing date or, depending on the situation, from the date of their public notification
according to the law, excepting the case in which a longer term is stipulated in their content.
(the Government Ordinance nr.2/2001\(^2\) concerning the judicial system of contraventions), the special part of this field does not enjoy a unitary regulation, a variety of governmental laws which penalize contraventions in different fields being present.

The governmental laws with a special status from the Government Ordinance nr.2/2001 can include derogatory procedures regarding the acknowledgement of contraventions, the application and enforcement of civil sanctions which will be applied in a prioritary and exclusive way for the contraventions stipulated in these law standards.

In specialized literature a distinction is made between the contraventions committed in different fields of activity\(^3\). A distinction is made between contraventions concerning: traffic on public roads, official secret defence, population record, land record, tax evasion, environment protection, forest protection, water careful management and utilization, labour protection, railway transport, the norms of living together, social order and public peace.

Some of the most frequently committed contraventions are stipulated in Law nr.61/1991\(^4\) regarding the penalizing of the acts of breaking some norms of living together, social order and public peace. The governmental law was issued for the ensuring of the climate of social order and public peace necessary for the normal carrying on of economic and socio-cultural activities for the promotion of civilized relationships in daily life.

It can be appreciated that this governmental law stipulates and penalizes contraventions which break the norms of public order having a social character, the committing of social acts not depending, as a rule, on the existence of some special qualities of the delinquent, or on the performance of a function or profession. Sometimes, the active subject of the contravention performs activities of a commercial type. But, these contraventions generally encountered can be grouped depending on the social and moral values which are affected by the committing of the antisocial act. We can distinguish between contraventions which: affect people’s honour and dignity as well as the prestige of public institutions; affect public order, good morals and manners; trigger danger related circumstances; prevent the good unfolding of activities of public and socio-economic interest; break norms which protect some categories of persons; break the legal framework of the selling, marketing and consumption of some categories of goods; regard acts of violence, destruction and degradation.

Among the contraventions stipulated in Law nr.61/1991, the highest frequency is to be noticed, according to the activity reports of the community police and gendarmerie, with the contraventions stipulated in:

- art.2 p.(1) from the law – the performance in public of obscene acts and gestures, the uttering of insulting words, of offensive or vulgar phrases;
- art.2 p.(3) – the repeated appealing to the people’s mercy by a person who is able to work;
- art. 2 p.(6) – the luring of persons with a view to have sexual intercourse with them in order to gain material benefits;
- art.2 p.(25) – the consumption of alcoholic drinks in public places;
- art.2 p.(26) – the causing of scandal;
- art.2 p.(28) – the disturbing, without having the right to, of the inhabitants’ peace;

In urgent cases the coming into force in a shorter term can be stipulated, but not sooner than 10 days from the publishing date. The orders from the local or district government department stipulated in art.1 from G.O. nr.2/2001, by which contraventions are established and penalized, can be notified to the public by posting or by any other form of publicity stipulated by the law only on the basis of the legality notice issued by the prefect.


The acts stipulated in article 2 of Law nr.61/1991 are contraventionally penalized, unless they are performed under the conditions in which, according to the penal law, they are considered criminal offences, thus being found, depending on the situation, within the provisions of articles 204, 222, 223, 255, 364-371, 373 from the Penal code or of article 1 from the same administrative act of Parliament.

As this governmental law does not define the notion of contravention, the provisions of the act of Parliament will be completed by the provisions of article 1 of the Government Ordinance nr.2/2001 concerning the judicial policy of contraventions which defines the contravention as “the act committed with guilt, established and penalized as such by the law, by Government decision or by a decision of the local council of the commune, town or municipal town or district of the municipal town of Bucharest, of the district council or of the General Council of the municipal town of Bucharest”.

Even if the existing regulation of the judicial policy of contraventions does not mention in the defining of the contravention the fact that it implies a social danger less serious than the criminal offence, this fact obviously remains valid.

Law nr.61/1991 decrees as representing contraventions directed against the norms of living together, social order and public peace a range of antisocial acts among which some will be dealt with in this study.

2. The national authorities qualified to enforce contraventional penalties on the basis of Law nr.61/1991 for the penalizing of the acts of breaking some norms of living together, social order and public peace

The above mentioned governmental law does not establish special competences for the enforcement of the law.

In this situation the common norm is enforced, the provisions of art.15 item (3) from the Government Ordinance nr.2/2001 concerning the judicial policy of contraventions being incidental. It stipulates that “the officers and non-commissioned officers from the Ministry of Internal Affairs assess contraventions regarding: the protection of social order; the traffic on public roads; the general rules of trading; the selling, circulation and transportation of food and non-food products, cigarettes and alcoholic drinks; other fields of activity established by law or by Government decision”.

Art.26 item(1) from Law nr.218 from 23 April 2002 regarding the organizing and functioning of the Romanian Police stipulates among the attributions of this structure:

- the enforcement of measures regarding the preserving of the social order and public peace as well as of the citizen’s safety;

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5 I aim to consider the contraventions penalized by Law nr.61/1991 under two aspects: as a social phenomenon and as a judicial phenomenon.

Regarded upon as a social phenomenon the notion of contravention evolves in the same way as the notion of morality, the declaring of a social act as contravention depending on the appreciation the majority of the members of society give to a certain act.

As a judicial phenomenon the contravention is characterized by its incrimination, by the qualifying of a certain socially dangerous action or inaction as contravention, but also by the establishing by the legislative power or by a certain administrative authority of a penalty for its commitment.

6 Unlike Law nr.32/1968, the new act of Parliament does not stipulate in the defining of the contravention the fact that it implies a social danger less serious than the criminal offence, but under a theoretical aspect this thing remains valid.

The social danger of a contravention results from the prejudice that this act has caused or may in an objective way cause to a social value protected by the administrative law norm.

It is necessary for the social danger of a contravention to meet a fundamental condition: to be generated by the committing of the contravention. Thus it is the contravention which carries along social danger, not the delinquent.

The estimation of the abstract social danger of the act and of its committing conditions trigger the legislator’s choice between enforcing the penal law or the administrative law policy.

When having to choose the form of liability and the establishing of the degree of social danger of the act the following aspects will be taken into consideration: the manner and the means of its committing; the purpose targeted by the perpetrator; the circumstances in which the act was committed; the consequence which was triggered or may have been triggered; the person and the behaviour of the perpetrator.

7 Law nr. 218 from 23/2002 regarding the organizing and functioning of the Romanian Police was published in the Official Journal nr.305 from 9 May 2002.
- the assessment of the contraventions and the enforcement of contraventional penalties.

According to art.21 let. 1) and o) from the Emergency Ordinance nr.104 from 27 June 2001, concerning the organizing and functioning of the Romanian Frontier Police, this structure also has the following attributions:

- the assessment of the contraventions and the enforcement of contraventional penalties;
- the ensuring of the preserving of social order and public peace in crossing the state border places, and at the request of other state authorities it takes part in such actions in the localities in the frontier area.

In its turn, the Romanian Gendarmerie has, on the basis of art. 19 from Law nr.550/2004 attributions regarding:

- the ensuring and reestablishing of public order;
- the assessment of contraventions and the enforcement of contraventional penalties.

Community Police also has, according to art.7 from Law nr.371 from 20 September 2004 regarding the establishing, organizing and functioning of the Community Police, attributions concerning:

- the ensuring of social order and public peace in the areas and places established by means of the guard and social order plan;
- the prevention and fighting of the breaking of legal norms regarding the cleanliness of localities and street trading, as well as of other acts established by decisions of the local council;
- the assessment of contraventions and the enforcement of contraventional penalties for the breaking of the legal provisions regarding the disturbing of social order and public peace, the cleanliness of localities, street trading, the protection of the environment, as well as for the acts which affect the social climate, established by the law, decisions of the local council or the mayor’s provisions;
- the participation in ensuring the order measures on the occasion of public assemblies, meetings, cultural-artistic and sports demonstrations organized at a local level;
- the intervention, together with the authorized bodies, at the citizens’ request, for the settling of conflicting situations, the catching of some perpetrators, the solving of some social cases, the establishing of some notified situations and their solving.

Analysing the attributions of the four public order structures an overlapping of competences in the field of public order contraventions can be noticed.

These authorities often function in the same territorial competence area, thus in the same place policemen, gendarmes and community policemen can operate. Gendarmes and community policemen feel forced to escort the detained person to the police stations in the case in which the assessed antisocial act exceeds the level of mere contraventions.

This situation is to be debated under the aspect of the efficiency of the control upon contraventions, often in the cases of competence concurrence the premise of the non-intervention of any authority being present.

On the other hand, the competence concurrence aims at increasing the public control upon antisocial phenomena.

II. Contraventions which affect the persons’ honour and dignity as well as the prestige of public institutions

1. General aspects

Art.2 p. (1) from Law nr.61 from 1991 penalizes the performing in public of obscene deeds, acts or gestures, the uttering of insulting words, offensive or vulgar phrases, threats with violent acts against persons or their goods, in a way to disturb social order and public peace or to trigger the

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8 The Emergency Ordinance nr.104 from 27 June 2001, regarding the organizing and functioning of the Romanian Frontier Police was published in the Official Journal Part I, nr.351/2001.
9 http://www.jandarmeriaromana.ro
10 Law nr.550/2004 regarding the organizing and functioning of the Romanian Gendarmerie was published in the Official Journal nr.1175/2004.
11 Law nr.371/2004 regarding the establishing, organizing and functioning of the Community Police was published in the Official Journal nr.878 from 27 September 2004.
citizens’ indignation or to harm their dignity and honour or that of public institutions. The act is penalized by fine from 200-1000 lei.

If the acts are performed on the premises of an educational institution, medical institution or one intended for the special protection of some categories of deprived persons, the applicable penalties are the fines from 1.000 lei to 3.000 lei.

The act of Parliament penalizes the committing of a wide range of acts and deeds which disturb social order and public peace.

On the other hand, the New Penal Code stipulated in art.184 that “the act is considered as committed in public when it was performed: in a place which by its nature or destination is always accessible to the public, even if no person is present; in any other place accessible to the public, if two or more persons are present; in a place inaccessible to the public, but with the purpose of the deed being heard or seen and if this result has occurred in the presence of two or more persons, in a meeting or reunion of several persons, excepting the reunions that can be considered as having a family character, due to the kind of relationships existing between the participating persons”.

When the antisocial act is committed in public by using violence or by seriously affecting the persons’ dignity, and the concrete social danger of the act is higher, the administrative penalizing policy will be replaced by the penal one, the provisions of article 371 regarding the Disturbance of social order and public peace from the New Penal Code being incidental.

If the threat aims at the committing of a criminal offence or the omitting of an injury which has the capacity to alarm and there is the beforehand complaint of the injured person the provisions of article 193 regarding threat from the Penal code will be enforced. If the threat is directed against a clerk who is in a position which involves the exercise of the state authority and who carries out job duties, the act will represent the criminal offence of insulting behaviour.

13 The committing of a contravention in a personal space is also penalized, but on a freely accessible internet site (ht 5 for example) or from a personal vehicle having the window open.
14 Article 371 from the New Penal Code has the following content: “The act of the person who, in public, by violence inflicted upon persons or goods or by threats or serious harm to the persons’ dignity, disturbs the social order and public peace, is punished by prison from 3 months to 2 years or by fine”.
16 Article 206 from the New Penal Code has the following content: “(1) The act of threatening a person with the committing of a criminal offence or of a deed causing damage directed against the person herself or against another person, is punished by prison from 3 months to one year or by fine, without the possibility of the enforced punishment to exceed the penalty stipulated by the law for the threat that constituted the object of threat. (2) The criminal proceedings are set to work on the making of the beforehand complaint of the injured person”.
17 In my opinion the notion of clerk must be estimated from the point of view of the provisions of the penal law, the provisions of article 175 from the New Penal Code being applicable in the situation in question, provisions which stipulate that the term “clerk” designates “the person who carries on, permanently or temporarily, attributions which allow him to take decisions, to participate in decision taking or to influence their taking within a judicial person who carries on an activity which cannot represent the object of the private field”.
We can also consider as clerk in the sense of the penal law the person who carries on an activity for which she was invested by a public authority and who is subjected to it. Together with these provisions of the penal law there are the provisions of the administrative law regarding the legal defining of the notion of public servant stated in art.2 item (2) of Law nr. 188/1999 regarding the status of public servants (governmental law published in the Official Journal, Part I, nr 600/8.12.1999). The administrative law defines the public servant as “the person appointed in the terms of Law nr. 188/1999 in a public position”. We can notice the legislator’s express will to exclude from the notional sphere of public servants the state employees who carry on public service, but who are not placed within the provisions of Law nr.188/1999 (a fact which distinguishes the provisions of the administrative law from the penal law).
It is also to be noticed that unlike the definitions given to the notion by specialized judicial literature, which are quite ample, the legal definition of the institution of the public servant is much more concise. Relating the legal definition of the institution of the public servant to that of public position, it results that the public servant is the person who in the terms of the Status of public servants, carries on the attributions and the responsibilities established on the grounds of the law, with the purpose of carrying out the prerogatives of the public power by the central and local public administration. By the notion of public servant we understand those categories of public employees, remunerated from the public money, who, by carrying on their activity within the public bodies, institutions and services with the purpose of meeting the general and legitimate interests of the members
2. The Jurisprudence of the European Court of Human Rights in the subject matter of art.2 item (1) from Law nr. 61 from 1991

Decision nr.28183/2003 of the European Court of Human Rights, case Anghel against Romania.

By Decision nr.28183/2003, Case Anghel against Romania\(^\text{19}\) passed on 4 October 2007, the European Court of Human Rights noticed that some provisions of the contraventional law encouraged a jurisprudence contrary to the presumption of innocence.

Alleging art.6 from the Convention\(^\text{20}\), the plaintiff complains about his right to a rightful trial being infringed regarding the carrying out and the result of the procedure related to the challenging of the contraventional minutes from 8 July 2002. He considers that he was placed in an unfavourable position during the procedure compared to the adverse party, to the police from Râmnicu-Valea respectively, and reproaches especially to the notified jurisdictions that they wrongly handled the proofs and they had preconceived ideas regarding his innocence.

Alleging, in essence, art.3 from the Convention, the plaintiff complains about the ill treatments inflicted upon him by a policeman from Râmnicu-Valea on 3 July 2002 as well as about the impossibility of demonstrating the criminal liability of the author of the presumed ill treatments.

Actually, the plaintiff had a verbal argument with a policeman, being subsequently accused of having insulted him, and therefore having been contraventionally penalized on the grounds of Law nr.61/1991 for the disturbance of public peace. Within a few days after the incident the plaintiff was notified about a contraventional minutes by which a contraventional fine of 200 lei was settled.

The contestation he formulated against the contraventional minutes was rejected, chiefly because the plaintiff did not demonstrate that he had not insulted the civil servant in question.

\(^{18}\) The notion of function which involves the exercise of state authority is broader than that of public function. The public function is defined in art.2 item (1) of Law nr.188/1999 with the subsequent changes as representing “the totality of the attributions and responsibilities, established on the grounds of the law, with the purpose of carrying on the public power prerogatives by the local and central public administration. The sphere of the categories of persons who carry on state authority is broader also including high officials, the military, the magistrates etc.

\(^{19}\) The official site of the European Court of Human Rights.

\(^{20}\) Art.6 from the Convention stipulates the following:”(1). Any person is entitled to fair judging (…) carried out by an independent and impartial court (…) which will decide (…) upon the firmness of each accusation in penal terms directed against her. (…). (2). Any person accused of a criminal offence is considered not guilty until her guilt is legally assessed. (3). Any accused person especially has the right: a. to be informed, in the shortest time, in a language she understands and in a detailed manner, upon the sort and cause of the accusation brought against her; b. to enjoy the time and the necessary facilities for the preparation of her defence; c. to defend herself or to be attended by a defender chosen by her (…); d. to ask about and to request for the hearing of the witnesses of the accusation and to obtain the calling and hearing of the witnesses of the defence under the same conditions as the witnesses of the accusation; (…)”
The European Court of Human Rights firstly noticed that, taking into consideration the sort of act the plaintiff was accused of as well as the fact that the penalty for that contravention could also have been, at that moment, a denying freedom one\textsuperscript{21}, the plaintiff was accused in penal terms, thus art.6 from the Convention being applicable.

Basically, the European Court of Human Rights considered that the Romanian procedural system in contraventional terms, having at its basis principles of civil procedure which compel the person who starts a judicial proceeding to demonstrate the truthfulness of her statements, is contrary to the presumption of innocence. The Court considered that the presumption of legality and truth of the contraventional minutes is a presumption lacking reasonableness, placing a penal law accused person in a too unfavourable situation.

Consequently, it was decided that art.6 from the Convention, regarding the presumption of innocence, was infringed.

3. The Jurisprudence of the Constitutional Court in the subject matter of art.2 item (1) from Law nr.61 from 1991

3.1 Decision nr.568/14/04/2009 of the Constitutional Court regarding the disallowance of the plea of the unconstitutionality of the provisions of art.2 p.1 from Law nr.61/1991 for the penalizing of the acts of breaking some norms of living together, social order and public peace, of art.1 and art.34 from the Government Ordinance nr.2/2001 regarding the judicial policy of contraventions.

By the Ruling from 14 November 2008, stated in Record nr.7.246/245/2008, Iasi Law Court – Civil Section notified the Constitutional Court with the plea of unconstitutionality of the provisions of art.2 p.1 from Law nr.61/1991, a plea raised by Corneliu Căileanu in the case which has as purpose the judging of a contraventional complaint formulated by the plea’s author.

In the reasoning of the unconstitutionality plea it is stated that art.2 p.1 from Law nr 61/1991 infringes the provisions of art21 from the Constitution by the vagueness of the acts of Parliament.

The unconstitutionality plea preeminently takes into account art. 21 (The free access to justice) item (3) from the fundamental law which stipulates that “the parties are entitled to a fair trial and to the solving of their cases within a reasonable term”.

The unconstitutionality plea’s author shows that the criticized legal provisions use terms which are not defined in the civil legislation which allow the persons’ abusing penalizing\textsuperscript{22}.

Examining the unconstitutionality plea regarding the provisions of art.2 p.1 from Law nr. 61/1991, the Court decides that it is unfounded, underlining, in essence, that the legal provisions apply to all the persons mentioned in the assumption of the norm and do not affect in any way the right to a fair trial, acknowledged by art.6 from the Convention for the defending of human rights and of the fundamental liberties as well as by art.10 from the Universal Declaration of Human Rights, as it does not settle a measure meant to infringe the right of any person to be listened to in a fair and public way by an independent and impartial trial court which will decide upon her rights.

\textsuperscript{21} By Law nr.82 from 18 May 1999 (governmental law published in the Official Journal nr. 228/21 May 1999) the denying freedom penalty of the contraventional prison is replaced, with the plaintiff’s consent, by the penalty of forcing him to perform some activities in the community service (See art.1 from Law nr.82 from 18 May 1999).

The provisions regarding the contraventional prison included in G.O. nr.2/2001 obviously became unconstitutional after the coming into operation of the constitutional changes from 2003. In item (13) of art.23 of the revised Constitution it is stipulated that ”the denying freedom penalty can only be of a penal kind”.

There results the unconstitutionality of the legal provisions which regulated the contraventional-administrative prison. The penalty of forcing the delinquent to perform an activity in the community service does not trigger a real denying of freedom upon the person.

From the constitutional text it results that the prison punishment will only be enforced for the committing of criminal offences and under no circumstances for the committing of a contravention or deviation from the military regulations. (See Giurgiu Liviu, Zaharie Christian Giuseppe, Administrative law, IX Edition, Prouniversitaria Publishing house, Bucharest, 2009, pages 557-558).

\textsuperscript{22} Decision number 568/14/04/2009 of the Constitutional Court regarding the rejection of the unconstitutionality plea of the provisions of art.2 p.1 from Law nr.61/1991 for the penalizing of the acts of breaking some norms of living together, social order and public peace of art.1 and art. 34 from the Government Ordinance nr.2/2001 regarding the judicial policy of contraventions, published in the Official Journal nr. 351 from 26/05/2009.
Moreover, art.9 from Law nr.61/1991 explicitly stipulates the right to set forth a complaint against the assessing contravention minutes at the trial court.

I personally consider the unconstitutionality plea as unfounded. Even if the civil law does not define certain terms, reference can be made to the provisions of the penal law. This fact does not infringe the person’s constitutional right to a fair trial.

3.2 Decision nr. 750/24 from June 2008 of the Constitutional Court regarding the rejection of the unconstitutionality plea of the provisions of art.16 item (1) and art. 19 item (1) from the Government Ordinance nr.2/2001 regarding the judicial policy of contraventions and art.2 p.1 from Law nr. 61/1991 for the penalizing of the acts of breaking some norms of living together, social order and public peace.

The Constitutional Court also passed a similar decision in the case of the unconstitutionality plea with the same purpose raised by Maria Iglescu in Record nr.1.052/300/2008 of District 2 Bucharest Law Court – the Civil section.

Given the facts, the acts stipulated in art.2 p.1 are not acts against the persons, but against the norms of living together, social order and public peace. In our law system, the acts mentioned in the criticized text represent contraventions if, being performed in public, have the ability to trigger any of the consequences stipulated by the law.

The existence of an incrimination which is not allowed by the fundamental law could be retained only in the situation in which the legislator would not take into consideration the prohibited criteria, the way they are stipulated in art.53 from the Constitution. Or, on the contrary, in accordance with the constitutional provisions of art.57, according to which “Romanian citizens, foreign citizens and the stateless persons must exercise their constitutional rights and liberties in good faith, without infringing the other persons’ rights and liberties”, and in accordance with the provisions of art. 73 item (3) let.h) from the fundamental law, according to which the Parliament regulates, by organic law, aspects regarding criminal offences, punishments and the policy of their serving, the incrimination of some antisocial acts was initiated, acts which can affect public peace and can endanger citizens’ life.

3.3. Decision nr.74 from 7 March 2002 of the Constitutional Court regarding the unconstitutionality plea of the provisions of art.2 p.1) from Law nr.61/1991 for the penalizing of the acts of breaking some norms of living together, social order and public peace.

Another unconstitutionality plea was submitted to the debate of the Constitutional Court by the Ruling of 30 November 2001, pronounced in Record nr. 5.269/2001 by Brasov Trial Court. The plea was raised by Ion Cojocaru in the appeal declared by him against a civil sentence by which his complaint formulated against a contraventional minutes drawn up by the Police of the Municipal town of Brasov was rejected.

In the reasoning of the unconstitutionality plea the author claims that the criticized legal provisions infringe the provisions of art. 30 items (6) and (7) from the Constitution. The plea’s author considers that the syntagm “or the public institutions” included in the text of art.2 p.1) from Law nr.61/1991 is inconsistent with the constitutional provisions of art.30 item (6), which establish that “The freedom of speech cannot bring prejudice to the persons’ dignity, honour, private life or to the right to one’s own image”, and the provisions of art. 30 item (7), by which “the defamation of the country and the defamation of the nation are forbidden by the law”. Or, the plea’s author points out, honour and dignity are traits specific to private persons, and not to public institutions, and the including in the field of contraventions of acts regarding the harming of the dignity and honour of public institutions would be inconsistent with the provisions of the Constitution.

The Court retains that although the text contains some drafting imprecisions, when it refers to the possibility that the mentioned blameworthy manifestations might harm the dignity of the public institutions, it cannot be claimed that the provision of the law could be unconstitutional.

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23 Decision nr.750/24 June 2008 of the Constitutional Court regarding the rejection of the unconstitutionality plea of the provisions of art. 16 item (1) and art.19 item (1) from the Government Ordinance nr.2/2001 regarding the judicial policy of contraventions and art.2 p.1 from Law nr.61/1991 for the penalizing of the acts of breaking some norms of living together, social order and public peace published in the Official Journal nr.577/2008.
Therefore, although item (6) of art.30 from the Constitution takes into account the limits of the exercising of the freedom of speech – this being unable to bring prejudice, among other supreme values of the rule of law, to the person’s right to her own image –, the mentioned constitutional text has, corroborated with other constitutional provisions, the effect of consecrating a constitutional right with an independent identity and thus with applicability in a more extended field.

This constitutional text is in full accord with the provisions of art.10 p.2 from the Convention for the defending of the human rights and fundamental liberties, according to which “The exercising of these liberties which require obligations and responsibilities can be submitted to some formalities, conditions, restrictions or penalties stipulated by the law, which represent necessary measures, in a democratic society, for national security, territorial integrity or public safety, the protection of social order and the prevention of criminal offences, the protection of health or of morality, the protection of reputation or of somebody else’s rights, to prevent the divulging of confidential information or to guarantee the authority and impartiality of the judiciary power”.

Social order and public peace involve the decent and respectful attitude towards public institutions, and the arguments which the plea’s author was trying to impose by alleging the provisions of art.30 item (6) from the Constitution, namely that such antisocial manifestations could be permitted in connection to public institutions, cannot be accepted.

According to the provisions of art.54 from the Constitution “Romanian citizens, foreign citizens and the stateless persons must exercise their constitutional rights and liberties in good faith, without infringing the other persons’ rights and liberties”. Thus, social order and public peace must be observed by each and every person with the purpose of enabling the normal carrying on of the activities of public authorities and institutions namely in order for these to ensure the observance of the fundamental rights and liberties consecrated by the Constitution.

It is obvious that by committing the act stipulated in art.2, p.1) from Law nr.61/1991, republished, against a public institution, the proper working of this institution is disturbed, which can indirectly affect the other citizens’ constitutional rights and liberties.

In the same way in which the feeling of honour and dignity is characteristic of the private person, we can talk about the fame and good name of a public institution or authority, attributes which the law protects by contraventional penalizing of the acts stipulated in art.2 p.1) from Law nr.61/1991, republished. Although they are not mentioned among the values enumerated at art.30 from the Constitution, it does not mean that their infringement is allowed.

Consequently the syntagm “the dignity and honour of public institutions” does not come into contradiction with the constitutional provisions, as it subscribes itself to the applicability sphere of items (6) and (7) of art.30 from the Constitution which consecrates the limits of the freedom of speech.

I personally consider that the legal formulation “the dignity and honour of public institutions” is inappropriate, but this does not give the act of Parliament an unconstitutional character. The fact that public institutions have dignity or honour is doubtful, but this issue has no connection with the provisions of art.30 items (6) and (7) from the Constitution, regarding the private persons’ rights and liberties.

The provisions of art.30 items (6) and (7) from the Constitution cannot be interpreted in the same sense that they would allow the breaking of social order and the affecting of the working of a public institution by the abusive exercising of the right to the freedom of speech.

I consider that in a more appropriate formulation the phrase “the prestige of public institutions” could be used.

In conclusion, de lege ferenda, I suggest the alteration of article 2 item (1) from Law nr.61 from 1991 in the sense of penalizing the performing in public of obscene deeds, acts or gestures, the uttering of insulting words, offensive or vulgar phrases, threats with violent acts against the persons or their goods, of a nature to disturb social order and public peace or to trigger the citizens’ indignation or to harm their dignity or honour or the prestige of public institutions.

III. Contraventions regarding prostitution

24 Decision nr.74 from 7 March 2002 of the Constitutional Court regarding the unconstitutionality plea of the provisions of art.2 p.1) from Law nr 61/1991 for the penalizing of the acts of breaking some norms of living together, social order and public peace, published in the Official Journal nr.283 from 26/04/2002.
Law nr.61 from 1991 stipulates several contraventions regarding prostitution:

Art.2 p.6 from Law nr.61 from 1991 penalizes the luring of persons, under any form, performed in pubs, parks, on streets or in other public places with the purpose of having sexual intercourse with them in order to gain material benefits, as well as the urging and the determining of a person to commit such acts, with the same purpose.

The purpose of the act of Parliament is represented by the fighting of the acts of luring clients with a view to practice prostitution. The luring act cannot be performed by any person but only by the person who practices prostitution. In the incrimination of the administrative law it is not necessary for the sexual intercourse committed with the purpose of gaining material benefits to occur.

The person who urges or determines the luring of persons with a view to the performing of sexual intercourse with them in order to gain material benefits is contraventionally held responsible.

But, article 211 from the Penal code in item (1) penalizes the determining (…) to practice prostitution in a more severe way by prison punishment and the forbidding of exercising some rights.

By the practicing of prostitution we understand “the performing of sexual intercourse with different persons in order to gain patrimonial benefits for oneself or for somebody else”.

Prostitution represents a form of social parasitism, in which the contempt for work combines with an immoral lifestyle.

The penal law thus establishes that the determining for the practicing of prostitution represents a criminal offence.

From the analysis of the administrative legal text it results that the determining for the practicing of sexual intercourse in order to gain material benefits represents a contravention penalized by fine.

This fact represents a double regulation which may cause confusion.

The acts of determining, facilitating, urging and constraining with a view to gain patrimonial benefits must be strictly found within the provisions of the penal law because the perpetrator, as a rule, gains unfair material benefits as a result of the activity performed by the prostitute.

In conclusion, we suggest the elimination from the contents of art.2 p.6 from Law nr. 61 from 1991 of the methods of the determining of a person to perform acts of prostitution, because the enforcement of the contraventional penalty for this act would make the punishment be insufficient for the discouraging of their performing. We consider that the act must be punished in terms of a criminal offence.

On the other hand, the acceptance and tolerance of the method of luring (persons with a view to perform sexual intercourse with them in order to gain material benefits), as well as the acceptance or tolerance of urging or determining, (with the same purpose, of a person to perform such acts, in hotels, motels, campsites, bars, restaurants, clubs, pensions, discos or their annexes by the owners, administrators or the heads of the places in question) can still remain within the provisions of the administrative law because it involves the “in omitendo” guilt, that is a less serious form of guilt.

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25 At p.7 of the same article it is stipulated that the acceptance and tolerance of the act of luring persons with the purpose of having sexual intercourse with them in order to gain material benefits are also penalized, as well as the acceptance or tolerance of the urging or determining, with the same purpose, of a person to commit such acts, in hotels, motels, campsites, bars, restaurants, clubs, pensions, discos and their annexes by the owners or administrators or heads of the places in question.

26 Art.213 The Procurement from the New Penal Code stipulates in items (1) and (2) that “the determining or the facilitating of the performing of prostitution or of the gaining of patrimonial benefits as a result of the practicing of prostitution by one or more persons is punished by prison from 2 to 7 years and by forbidding the exercising of certain rights. In the case in which the determining of the initiation or the carrying on of the performing of prostitution was achieved by constraint, the punishment is prison from 3 to 10 years and the forbidding of the exercising of some rights.

27 Art.213 item (4) from the New Penal Code.


29 Ilie Badescu, The Sociology of Prostitution, on-line article.
Another problem was represented by the difficulty of the enforcement of the contraventional fine penalties in the case of the contraventions stipulated by Law nr.61 from 1991 in general and by art.2 p.6 of this governmental law in particular.

In this case, as the provisions of Law nr.61 from 1991 are very concise under the analysed aspect, we make reference to the supplementary norms included in art. 25-29 from the Government Ordinance nr.2 from 2001. Concisely rendered, the procedure is as follows:

If the delinquent was penalized with a fine, as well as if he was forced to pay some damages, at the same time with the minutes he will be informed about the payment notice. In the payment notice mention will be made regarding the compulsoriness of paying the fine and, depending on the situation, the damages, within 15 days from the notice\(^\text{30}\).

If the assessing inspector also enforces the penalty, and the delinquent is present at the concluding of the minutes, its copy and the payment notice will be handed to the delinquent, mention of this being made in the minutes. The delinquent will give his signature of acknowledgement. In the case in which the delinquent is not present or, although present, he refuses to sign the minutes, the informing about it as well as about the payment notice will be performed by the assessing agent within no more than a month from the concluding date.

The informing about the minutes and the payment notice is done by post, with receiving notice, or by posting at the dwelling place or headquarters of the delinquent. The delinquent can pay off on the spot or half of the fine stipulated in the governmental law within no more than 48 hours from the date of the concluding of the minutes, the assessing agent mentioning this possibility in the minutes. The payment of the fine is made at the Deposit Bank or at the public finances Exchequer, and a copy of the receipt is handed by the delinquent to the assessing agent or is sent by post to the body he belongs to\(^\text{31}\).

According to Law nr 293/2009\(^\text{32}\) for the modifying of the Government Ordinance nr.2/2009 regarding the judicial policy of contraventions, “in the case in which the delinquent does not pay off the fine (…), the court initiates the replacement of the fine with the penalty of enforcing the practicing of an activity in the community service”.

In the old regulation, G.O. nr.2/2001 stipulated that the court can replace the fine with the practicing of an activity in the community service, only with the delinquent’s consent. Thus, the court can force the delinquent to practice an activity in the community service for a maximum of 50 hours, and in the case of infants starting with the age of 16, for a maximum of 25 hours.

Law nr.294/2009\(^\text{33}\) also modifies the Government Ordinance nr. 55/2002 regarding the judicial policy of the penalty concerning the practicing of an activity in the community service in the

\(^{30}\) Art. 25 item (3) from the Government Ordinance nr.2 from 2001.  
\(^{31}\) Art. 28 from the same act of Parliament.  
\(^{32}\) Law nr.293/2009 for the modifying of the Government Ordinance nr.2/2009 regarding the judicial policy of contraventions was published in the Official Journal of Romania, Part I, Nr.645, from 1 October 2009.  
\(^{33}\) In the previous regulation of the Government Ordinance nr.21/2009 regarding the judicial policy of contraventions in the situation in which the female delinquent did not pay off the fine she followed the procedure of forced execution performed by the tax authority. As a rule, she did not have taxable incomes and did not own goods which could be sued for the recovering of the debits.

By way of example, we can mention the case of three female delinquents living in Drobeta-Turnu-Severin, who owe to the local budget, for the fines received from the bodies of public order, the sum of 225,910 lei. Only for one of the three, the Severin Direction of Local Duties and Taxes received 346 contraventional records of proceeding, with a total value of 179,000 lei. Despite the efforts made by the tax inspectors it was impossible to recover any money.

The representatives of the Direction of Local Duties and Taxes from Drobeta-Turnu-Severin claim that it is very difficult for these sums to be recovered, taking into account that the female delinquents do not own properties and do not have incomes which could be liable to executions.

In addition, the tax authorities spent money on correspondence, but each and every time the summons were returned from that particular address, as the prostitutes did not live at the address mentioned in the identity card. Moreover, the new Penal Code no longer penalizes prostitution acts.

Unlike its previous regulation, the contraventional law does not condition the enforcement of the penalty by the actual performing of sexual intercourse, but only by the existence of the intention.

\(^{34}\) Law nr.294/2009 for the modifying of the Government Ordinance nr.55/2002 regarding the judicial policy of the penalizing of the practicing of an activity in the community service was published in the Official Journal, Part I, nr.645 from 1 October 2009.
same direction, namely the elimination of the delinquent’s consent. Law nr.234/2009 repeals the provision according to which “the penalty of the exercising of an activity in the community service can be enforced only if the delinquent’s consent exists”.

The law also stipulates that the court will enforce “the penalty of the performing of an activity in the community service, if it considers that the enforcing of the contraventional fine is not enough or the delinquent does not have the financial and material means for its payment”.

In addition, the court will establish the kind of activities that will be performed in the community service, on the basis of the data communicated by the mayor of the locality which is the delinquent’s dwelling place or residence, taking into account his physical and mental abilities as well as the level of his professional preparation.

We consider as beneficial the legislative modifications enforced in order to avoid the accumulation of unpaid debts towards the inland revenue by the delinquents who are bad payers.

IV. The Conventions which break the legal setting of the selling, marketing and consumption of alcoholic drinks

Law nr.61 from 1991 penalizes several legal acts concerning the selling, marketing and consumption of alcoholic drinks. Among these,\(^{35}\) two are most frequently encountered:

1. The consumption of alcoholic drinks in the following public places: public roads, parks, stadiums and sportsgounds, cultural institutions, auditoriums, economic institutions or centers, all public means of transport, motor coach stations, railway stations as well as state and private airports, or other places stipulated by the law. On the premises of these public places alcoholic drinks can be consumed by the delimitation of some spaces especially arranged for the consumption of alcoholic drinks, upon the decision of the owners of those particular public places;

   The provisions of p.23 of article 2 from Law nr.61 from 1991 are related to those of p.25. This is one of the most frequently committed contravention in Romania.

2. The selling, marketing and consumption of alcoholic drinks at the yard entrance, on the premises, on the pavements and driveways of public places such as: hospitals and other medical centres, infant placement centres, centres and institutions of education and instruction, religious dwellings and religious institutions adherent to cults which forbid the consumption of alcoholic drinks in the practicing of their particular religion.

   An exception is represented by the touristic and public nutrition places, such as: restaurants, bars and discos. In the above mentioned public places the consumption of alcoholic drinks by persons who have not turned 18 is totally forbidden.

   The provisions included at p.23 and 25 of art. 2 from Law nr.61 from 1991 are part of a set of normative regulations\(^{36}\) which protect good social morals and manners as well as the raising and educating of infants in a public place protected against negative examples as well as possible. To this

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\(^{35}\) The other acts penalized by the law which break the legal setting of the selling, marketing and consumption of alcoholic drinks are:
- the consumer’s refusal to leave the public premises on which alcoholic drinks are consumed, after the closing time or at the justified request of an employee of the premises;
- the consumer’s serving with alcoholic drinks inside and outside the public premises, on days and at hours when, according to the legal provisions, they are closed or when the selling of alcoholic drinks is forbidden or after the closing time settled by the running permit;
- the serving, in the very proximity, of alcoholic drinks inside and outside public premises during the carrying on of public assemblies, strikes, sports manifestations or other such public meetings, as well as the consumption of alcoholic drinks under such circumstances by participants;
- the serving of alcoholic drinks, in public places, to the consumers who are in an obvious state of intoxication, as well as to infants.

\(^{36}\) In this setting we also include points 20-25 of article 2 of Law nr.61/1991 for the penalizing of the acts of breaking some norms of living together, social order and public peace. Another example is Decision nr.36/2003 of the National Board of the Audio-Visual regarding the forbidding of the broadcasting of any form of advertising for distilled alcoholic drinks between 6am-10pm.
we can add the fact that alcohol is an encouraging factor for the committing of antisocial acts including contraventions\(^{37}\) and criminal offences.

The Romanian legislator, by forbidding the consumption of alcoholic drinks in public places (unarranged and unauthorized), does not make the distinction between the types of drinks consumed.

Beer home producers have been trying for quite a while to convince the authorities that beer does not belong to the category of alcoholic drinks harmful to the body and, moreover, that in fact it is an aliment. Because of this, they consider that beer should be treated differently from distilled drinks.

At an international level the Nisa Commitment\(^{38}\), which Romania also adopted, is applied; it regulates the beer product in “Class 32” alongside with “soda and mineral water and other non-alcoholic drinks”.

According to the regulation of EEC 1576/89\(^{39}\), in Europe the used term is that of “spirits drink”, and not of alcoholic drink, and it is applied to “distilled drinks and drinks made of alcohol”, beer not being included in this group\(^{40}\).

According to a study\(^{41}\) from 2003, financed by the Management of Beer Industry from Romania, “beer represents a mixture of the main nutritive elements (sugars, proteins, vitamins, minerals etc) having a low alcohol quantity and high nutritional value (14 kilocalories per 100 grams)”. The same study shows that beer contains, on average, 1,200 milligrams of mineral elements per litre and “it is an excellent source of vitamins, especially B vitamins (B1, B2, B6, B12) and folic acid”\(^{42}\).

But some normative acts such as Order nr.233 from 08.04.2004 of the Ministry of Agriculture, Forests and Rural Development for the approval of the norms regarding the specificity certificates for agricultural and food products\(^{43}\) classify beer as food product.

The community and internal regulation regard the commercial policy, but they can complete the provisions of Law nr.61 from 1991.

But the contraventional law does not focus only on the protection of the society members against the disapprobative behaviour of the consumers of alcoholic drinks, but also against the negative example offered by the consumption of alcoholic drinks in a public place.

The selling of alcoholic drinks should not be permitted – although at present it is authorized by the local councils – in the arranged places which allow the viewing of the consumers by passers-by either.

In this case, the society members are partially protected against the behaviour specific to customers, but the socially harmful effect upon infants generated by the viewing of the act of consumption does not disappear.

From the careful analysis and corroboration of the two points (23 and 25) of art.2 of Law nr.61 from 1991 there results the forbidding of the consumption of alcoholic drinks in public places,

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\(^{37}\) As an example, the public peace patrol of Baia Mare Gendarmerie, being on duty, on Friday 16 October 2009, Mara Park area, from Baia Mare, found several persons consuming alcoholic drinks on the premises of the park, the persons obviously not being in a place destined to this particular purpose. The patrol was informed about this by a citizen who was passing through the park. The delinquents were identified as being: V.Severian, age 36, L.Florin, age 37 and L.Lavinia, age 25, all of them jobless, having their dwelling place in Gârbou, Sălaj district and being penalized with a contraventional fine of 100 lei each of them for infringing p.25 of art.2 from Law nr.61 from 1991. The delinquents have also been penalized on the grounds of the same law for generating scandal.

\(^{38}\) The Nisa Commitment regarding the international classification of products and services with a view to brand registration from 15 June 1957, revised at Stockholm on 14 July 1967 and at Geneva on 13 May 1977 and modified on 2 October 1979, published on www.osim.ro/legis/marci/nisa.htm.

\(^{39}\) The Regulation of the EEC Board nr.1576/89 from 29 May 1989 regarding the setting of the general rules concerning the defining, nomination and presentation of spirits drinks published on eur-lex.europa.eu.

\(^{40}\) The situation is also similar in the case of the Board Directive 79/112/EEC from 18 December 1978 regarding the legislative bringing together of member states concerning the labelling and presentation of food products, as well as the advertising they receive, modified by Directive 86/197/EEC published on eur-lex.europa.eu.

\(^{41}\) Published in the National Courier from 22 May 2003.

\(^{42}\) See Alexe Gabriela, Tudorica Ionut, article “Beer, a food product”, in the National Courier from 22 May 2003.

\(^{43}\) Order nr.233 from 08.04.2004 of the Ministry of Agriculture, Forests and Rural Development for the approval of the norms regarding the specificity certificates for agricultural and food products is published on the ministry site www.madr.ro/pages/152/55. See p.1 of Annex nr.2 of the Order.
in parks, stadiums and sportsgrounds, cultural institutions, auditoriums, economic institutions or centres, all public means of transport, motor coach stations, railway stations as well as state and private airports, at the yard entrance, on the premises, on the pavements and driveways of: hospitals and other medical centres, infant placement centres, centres and institutions of education and instruction, religious dwellings and religious institutions adherent to cults which forbid the consumption of alcoholic drinks in the practicing of their particular religion or in other places stipulated by the law.

On the other hand, their selling and marketing are forbidden only at the yard entrance, on the premises, on the pavements and driveways of: hospitals and other medical centres, infant placement centres, centres and institutions of education and instruction, religious dwellings and religious institutions adherent to cults which forbid the consumption of alcoholic drinks in the practicing of their particular religion.

We ask ourselves the question, isn’t it normal to penalize the selling of alcoholic drinks as well in the places in which their consumption is penalized?

The term of selling involves an activity which is broader than that of marketing. The marketing only involves the selling of alcoholic drinks together with their packing material with a view to get profit. The selling also involves other actions such as: the opening of the bottle cap, the offering of glasses, the pouring of the alcoholic drinks into them.

The trader who performs the opening of alcoholic drinks in a public place in which the consumption of alcoholic drinks is forbidden is aware of the fact that their opening will be followed by their consumption.

That is why we recommend the forbidding and penalizing of the opening of alcoholic drinks in all the places in which their consumption is as well forbidden.

We do not share the same opinion regarding the penalizing of the marketing. The issue of only marketing the alcoholic drinks without also opening them involves several aspects. Generally speaking, the public place selling of alcoholic drinks meant for home consumption or for any other private place consumption cannot be forbidden. The freedom of commerce would be infringed, as well as the citizens’ rights and liberties. The trader could not possibly know - especially when it comes to can or pet bottled drinks – if the consumption will be performed in a place authorized or unauthorized by the law.

In conclusion we recommend the forbidding of alcoholic drinks in public places, in parks, stadiums and sportsgrounds, cultural institutions, auditoriums, economic institutions or centres, all public means of transport, motor coach stations, railway stations as well as state and private airports, at the yard entrance, on the premises, on the pavements and driveways of: hospitals and other medical centres, infant placement centres, centres and institutions of education and instruction, religious dwellings and religious institutions adherent to cults which forbid the consumption of alcoholic drinks in the practicing of their particular religion or in other places stipulated by the law.

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*** The Regulation of the EEC Board no.1576/89 from 29 May 1989 regarding the setting of the general rules concerning the defining, nomination and presentation of spirits drinks.

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