PhD Thesis Summary

Preventing and combating the discrimination in the rules of the criminal law

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First of all, we dare to point out the special advantage given by the privilege to accomplish this work, namely to analyze the concept of real importance and topical both in the national criminal law and also other subjects of public and private law. Equally, the research has crossed the borders of the national law by treating the concept of equality in general sphere of the European Union law or the European Convention on Human Rights, being noted also several relevant aspects of comparative law.

As a corollary of those who shall be exposed onto the subsequent lines we keep in mind that the main objective of this work was the analysis of the internal aspects of criminal law relating to discrimination in relation to the case law of the Strasbourg Court and, naturally, under the European Convention of the Human Rights .

Such an analysis could be performed, in our opinion, only in the context of careful assessing both elements which represent the terms of comparison, with discussing the institution both the Criminal Code in force and in the new project of the Criminal Code. The work could not ignore the extra criminal issue of discrimination, being emphasized the *lato sensu* civil consequences of the phenomenon, the current internal law, and being analyzed the domestic institutions with tasks in this field.

There were considered, for the rigor of exposure, also other relevant international documents in this field, and their influence upon the institution in the internal law. We consider that the analysis of the theme was required to be made starting from the reflection of the Romanian criminal law in the case law of the European Court of the Human Rights, generally, and later it will be emphasized both the importance of the Convention and its scope on the Romanian law in general and on the criminal law, in particular.

The structure of the paper can be discerned in two keys: the discrimination in the criminal law, namely in the extra criminal one, or in the internal and the “external” one. In other words, based on a review of the national criminal law matter, we continued with the

presentation of the problem of discrimination in the non -criminal internal law. Then, starting from a brief analysis of the European Convention and of some relevant elements of the case law of the Strasbourg Court and anchoring these elements in the Romanian law, we continued to analyze the phenomenon in terms of international law elements.

Essentially, we placed the issue in relation to the relevant national legislation, with a careful observation of its reverberations in the civil and in the criminal law. On the other hand, it was made a presentation of the case law of the Strasbourg and Luxembourg Courts regarding the discrimination and also for some foreign systems of law on this matter.

Under a second plan, we considered the criminal elements related to the problem of discrimination, in the wider context of its analysis in the light of the civil law, reviewing inclusively some elements of the Romanian public law and of the international acts which are part of the legal national heritage.

Without aiming an exhaustive analysis of the problems exposed, we tried to provide not only the legal frame, viewed broadly, of the concepts described, but also doctrinal significant views and, not least, case law appreciations not only by the juridical force given by the law but also the one of the arguments put forward by the aforesaid courts of law. In this sense, there were given the right place to the arguments and to the dispositions of the European jurisdictional courts, mentioned above, and, in particular, of the national court of constitutional jurisdiction of the High Court of Cassation and Justice.

Given these premises for working with, we identified the relevant law institutions as we proceeded to their description, as well as to an implementation of the adjacent legal reasoning.

The Part I was dedicated to the study the discrimination problem in the light of the current criminal law.

As this chapter represents the main part of the paper, we indicated that the criminal valences of the phenomenon called generically "discrimination" can be seen as much as possible in the context of establishing the internal legislative frame in this field, for underlining the usual consequences of the phenomenon in the current state of the legislation. Starting from reminding some general issues in this matter, approach that was meant to identify the place of the concept of discrimination within the criminal law, we conducted a

succinct statement of the concept and importance of the criminal law, regarded as a law branch of *sui generis*, and subsequently to provide some doctrinaire elements related to the concept of legal liability, useful in our opinion for this part of beginning the thesis but also for the subsequent parts, in particular the one regarding the effects of the discrimination in the civil law.

The approach itself for the analysis of the concept in the criminal law started with a brief statement of the phenomenon in the previous criminal codifications in our country, stopping at the Criminal Code from 1865 but also at the Criminal Code from 1937. Thus, we emphasized the existing constitutional frame at the activity eras of these two legislations and also some texts of these two legislations which were "touching" the concept of equality, by finding the existence of some sensitive similarities between the current and previous Criminal Codes.

As a subsequent step, we performed a brief analysis of the concept in the light of the Criminal Code in force, making references to the level of the doctrine and of the laws which sanctioned the existence of the equality principle in the sphere of criminal law and including a synthetic exposure of some "moments " or some relevant criminal texts: art.75 paragraph 1 letter c [1] of the Criminal Code, the future art.77 letter h in the New Criminal Code, the former art. 200 of the Criminal Code, the Decision no. 463/1997 of the Constitutional Court to declare as unconstitutional the provisions of art. 81 paragraph 4 in the Criminal Code and the contents of the Law no.108/1992 abrogating the Decree no. 24/1970.

In such a context, the next natural step was to analyze the few legal texts aimed at the discrimination phenomenon in the special part of the Criminal Code or in other special normative acts. In this regard we opted for a “classical” analysis of the misdemeanors, similar to that of the most famous theorists in this field, identifying both the elements of consensus found in the literature and ones upon which the authors of the criminal law did not reach at least until this date full consensus . Also, we had to emphasize that, despite our verification and research, we found that in these matters the case law has been more than reluctant to make a contribution, but it has left the main and sole place to the doctrine. Specifically, our analysis focused first onto the abuse of office offense by limiting certain rights - art. 247 of the Criminal Code, legal rule pursuant to which "Restraining, by the public official, the use or the exercise of the rights of a person or creating for this one an

inferiority situation based on race, nationality, ethnicity, language, religion, gender, sexual orientation, opinions, political affiliation, belief, wealth, social origins, age, disability, non contagious chronic disease or HIV / AIDS, is punished with imprisonment from 6 months to 5 years."

There were presented the main issues identified in the literature but it was brought also the vision of the New Criminal Code regarding this offense.

Secondly, we stopped at the misdemeanor of incitement to discrimination - art. 317 in the Criminal Code, pursuant to which "incitement to hatred on grounds of race, nationality, ethnicity, language, religion, gender, sexual orientation, opinion, political affiliation, belief, wealth, social origin, age, disability, non –contagious chronic illness or HIV / AIDS is punishable by imprisonment from 6 months to 3 years or a fine". The analysis provided in this section was similar, structurally speaking, to the one of the first misdemeanor, also being accompanied by a subtle look upon the new regulation.

Third, we performed an analysis of the genocide misdemeanor - art. 357 of the Criminal Code, pursuant to which "Committing, in order to destroy all or part of a local or a national, ethnical, racial or religious group, of any of the following acts: a. murdering the group or collectivity members; b. severely damaging the physical or mental integrity of the group or collectivity members, c. subjecting the community or the group to conditions of life or treatment likely to result in physical destruction, d. tending to measures for preventing births within the group or collectivity; e. forcibly transferring children belonging to a community or to a group to another community or group is punishable by life imprisonment or imprisonment for 15 up to 25 years and the prohibition of certain rights. (2) If the offense is committed in time of war, the penalty is life imprisonment. (3) The conspiracy to commit the misdemeanor of genocide is punishable by imprisonment from 5 to 20 years and the prohibition of certain rights."

I realized in this regard an analysis of the misdemeanor including in the light of the case law elements provided by the International criminal Courts of Law, pointing especially the major doctrinal views. In the plan of the misdemeanors provided for under special laws, we began by presenting some introductory issues related to the contents of the Government Emergency Ordinance no. 31/2002 on banning organizations and symbols with fascist, racist

or xenophobic nature, and worship of persons guilty of crimes against peace and humanity, followed by a brief historical considerations relative to the term "holocaust".

Following our approach, we conducted a brief analysis of the actual misdemeanors, mainly the misdemeanor of establishing an organization of fascist, racist or xenophobic nature, the misdemeanor of joining an organization of fascist, racist or xenophobic nature, and also supporting an organization of such nature, the offense of broadcasting or selling or making such fascist, racist or xenophobic symbols, the offense of using in public such fascist, racist or xenophobic symbols, the offense of promoting the cult of persons guilty of crimes against peace and humanity or promoting fascist, racist or xenophobic ideology by propaganda as well as the misdemeanor denial, appeal, approval or justification of the Holocaust, the genocide or the crimes against humanity or their effects. The analysis was accompanied by making a comparison between the first of the above mentioned offenses and the offense of association for committing a crime and then continued with a brief analysis of the crime of nationalist – chauvinist propaganda, presently abrogated.

It was also made a parallel between the offense of nationalist- chauvinist propaganda, the offense of promoting fascist, racist or xenophobic ideology, by propaganda, and the former art. 19 of the GO no.137/2000 and, as a present legislative overview, an analysis of the differences between the offenses of incitement to discrimination, promoting fascist, racist or xenophobic ideology by propaganda and the currently contravention pursuant to art.15 of the GO no.137/2000 .

The end of the first part was dedicated to several procedural issues, emphasizing the principle of formality and its limitation within this group of offenses, the principle of legality, the provisions of art.209 of the Criminal Procedure Code but also the ones inscribed in the art.8 of the future criminal procedural coding, the latter ones relative to the principle of equality in the matter.

The Part II, entitled "The right not to be discriminated in the Romanian legal system" was meant to supplement the information gathered and analyzed in the first part as well as to emphasize the meaning indicated above.

First, we aimed the emphasizing of the equality concept by comparing it to the non-discrimination and also by reference to some philosophical thesis issued in several acknowledged works.

Subsequently, we have realized an exposure of the concept in the light of the remote past of these lands, namely the Program of the 1821Revolution program in the Romanian country that included the phrase "abolition of the aristocratic privileges, justice and freedom", the Draft Constitution drawn up in Moldova in 1822 - "The Constitution of the coal diggers" - which also included the egalitarian principle, the Proclamation of Iasi in 1848 provided in the art. 2 or 14, for example, some references to the idea of equality, including civil and political equality of the citizens, the Proclamation of Islaz in 1848 enunciated also the equality of the political rights in section 2 or the genders equality for instruction in paragraph 21.

Then, there were reviewed the previous fundamental laws, with observing the legal texts relevant to this area and highlighting the concept development stage. Specifically, there were mentioned the Constitutions of 1866, 1923, 1938, 1948, 1952, 1965 and also the one of 1991.

This part of the work was inclusively meant to provide a definition of the common terms for this field. Thus, we defined the discrimination as representing the differentiation or the different treatment given to two or more persons or to situations where there is no relevant distinction between these or the identical treatment of two or more events that are, in fact, different, and by reference to the provisions of the Government Ordinance no.137/2000 on preventing and sanctioning all forms of discrimination, we have defined the relevant terms in this matter.

Specifically, we found that the direct discrimination refers to the situation where, in the absence of the objective criteria, the individuals are treated differently in relation to race, sex, age, being imperative to identify a comparable situation, in which the discrimination is allowed only in exceptional circumstances.

On the other hand, the indirect discrimination occurs when a provision, criterion, practice, apparently neutral, would put in disadvantage persons belonging to a protected group as compared to the other.

The harassment is any conduct based on race, nationality, ethnicity, language, religion, social status, beliefs, gender, sexual orientation, membership in a disadvantaged category, age, disability, refugee or asylum status or any other criteria that leads to creating an intimidating, hostile, degrading or offensive frame, and the victimization is any adverse

treatment, in response to a complaint or legal action regarding the violation of the principle of equal treatment and non-discrimination.

For each, separately, we tried to give practical examples from the National Council for Combating Discrimination, the concepts being subsequently recalled in the chapters dedicated to Community law or to the law of other states.

Next, we placed the issue of discrimination within the Romanian Constitution. After a brief enunciation and analysis of the constitutional key texts - for instance, the art.4, 16 or 17 of the Basic Law – we have provided a jurisprudential examination of the Romanian Constitutional Court in regarding the right to equality.

The presentation of the internal legislative framework continued by inclusively indicating some non-criminal normative acts dealing with the issue of equality even if only fragmentary, then being performed an analysis upon the issue of the discrimination based on sex. In this last issue, starting by the Law no. 202/2002 on equal opportunities and treatment between men and women we have provided definitions for the of direct discrimination, indirect discrimination, harassment, sexual harassment, affirmative action, work of equal value, discrimination based on sex, multiple discrimination.
At the end of this sub chapter, we noted some procedural aspects provided by the law and its sanctioning dimension.

At the end of the second part of the thesis, we made brief references to the National Council for Combating Discrimination, in particular issues of organization, functions and procedures which take place before this institution.

The Part III of the paper was dedicated to the effects of discrimination in the civil law, and, additionally, to the employment law, with an appropriate treatment of the main application – the tort liability.

This part is equally designed to fully outline the concept of discrimination in the field of the internal law, being thus established both the internal legal texts related to the concept and the concrete means of action for persons aggrieved by any eventual discriminatory action.

Recalling that the tort liability requires a legal relationship of obligations arising from an unlawful act causing injury, report in which the offender or other person who was summoned has the obligation to repair the damage, we underlined that the tort liability, in

any of its forms, appears as a civil sanction targeting the property of the responsible person, and in case of death, the estate of the heirs in the conditions specific to passing over the patrimony *mortis causa*.

The analysis was structured to reveal the aspects of substantial law and the procedural ones.

Specifically, starting from establishing a correlation between the torts liability and discrimination, we identified the siege of the matter in the Civil Code of 1864 noting that the tort liability is set to be out of a conventional report, the compensation being meant to cover both the actual loss suffered (*damnum emergens*) and the unrealized gain of the injured person (*lucrum cessans*). Also, we reminded that the torts liability involves the combination of several cumulative requirements: the injury - consisting of the negative consequence suffered by the persons as a result of the illegal act - which must be certain and irreparable; the unlawful act - representing any act or omission by which, in violation of the rules of the objective right, there are caused damages to the subjective right, the causal link between the unlawful act and damage, the guilt - defined as that element of responsibility aiming the subjective side of the offense, i.e. the author's subjective attitude towards his action or towards its consequences at the moment of its committing.

The analysis in this chapter focused in particular on the requirement of existing an injury, the ascertaining of its certain nature when committing a discriminatory act, the determination and the quantification of the moral damages. In this regard, there were made both doctrinal and jurisprudential references, but throwing a look over the adjacent law in this matter and over the European legislation.

Among the procedural aspect, we examined the issue of the stamp duty for the actions aimed at tort liability commitment based on acts of discrimination, the nature of such an action, aspects related to the extinctive prescription, or the law legitimateness or the effect of a court decision made in this field. Also, there were reviewed some issues related to the probation system specific to this matter leading to the conclusion that, in this area, there is operating a genuine sharing of the burden of proof.

In the second sub chapter, we have covered some of the defining elements in the New Civil Code of Romania, enunciating and submitting to a summary analysis some general texts relating to discrimination in the new civil legislation, the institution of the tort liability in the

New Civil Code and also the institution for defending the personal non patrimonial rights. Such an approach has emerged as evident from the entry into force of this code at the end of 2011 and the rigor of the work required the reporting including to the new civil law.

Further, being necessary to be analyzed the discrimination issued in the employment laws, we have reviewed the provisions of the Labor Code in force but also the details of the institution in the present status of the legislation.

At the end of this part of the thesis, we made some short considerations on discrimination and on the inconsistent practice of the courts of law.

In this last issue, we indicated the fact that the civil procedural law doctrine accepted the principle of equality before justice as constituting a basic principle of the civil procedure, but also that it is significant the lack of including in the European Convention on the Human Rights the principle of equality before the law, the reason being that manifestation of the will of the Parties States not to confer to the Convention institutions an additional role, namely to be able to check the possible mistakes made in their jurisdictions on the uneven application of the law by the judge.

Even in these conditions, we determined the fact that the European forum did not hesitate, when he had the opportunity, to criticize in a very sharp manner the inconsistency of the judiciary institutions in enforcing the law, and this in particular for similar or even identical situations.

Specifically, we have referred to the cases Tudor Tudor and Maria Atanasiu vs. Romania, but also the firm indication of the Court including in the cause John Radu and other 30 vs. Romania, case in which it was stated that, in order to establish if ruling different solutions in similar cases represents or not a violation of the right to a fair judgment under the aspect of breaching the principle of the juridical reports safety, the European court analyzes, first of all, whether there was or not an internal difference "*deep and persistent*", if the internal law provides a mechanism for unifying these practices and, lastly, if this mechanism effectively functioned in this case.

At the end of this part we have provided solid examples of similar cases solved differently by the domestic courts, concluding that for the hypothesis of the identical or similar factual situations, falling within the same legal texts and which were given distinct solutions, without any reasonable justification or other suitable procedural incidents, only in

some cases there can undoubtedly acknowledged a discrimination between the process elements.

In ***the Part IV*** of the paper, noting that it was adopted by the Council of Europe, a regional organization for promoting joint activities in the economic, social, cultural, scientific, legal and administrative field, we have underlined the importance of the European Convention on the Human Rights and its occurrence on the background of the consistent increase of the need to protect the individual and his rights against the arbitrary, the acknowledgement of the fundamental rights of the human being becoming an important concern of the national and international bodies.
We also reminded that the adoption of the Convention, although it represented a significant breakthrough of the ideas, at least, would have had no real efficiency in the absence of some institutions meant to make applicable the principles inscribed herein and in the absence of a consistent number of signatory states. For this purpose, initially, the Convention has provided a mechanism for controlling the way in which Contracting States fulfilled the assigned obligations consisting of the sum of three bodies: the European Commission of the Human Rights, the European Court of the Human Rights and the Committee of Ministers of the Council of Europe, and by the Protocol no.11 and later no. 14, there was made a radical change in the functional skills, the jurisdictional attributions pertaining exclusively to the Court.

After a brief historical examination of the importance of the instrument, we set the concrete applicability of the Convention in the domestic law, indicating the ratification of the European Convention on the Human Rights by Romania through the Law no. 30/1994 and the fact that this is an international act, part of the domestic law, pursuant to the art.11 paragraph 2 in the Romanian Constitution. Furthermore, pursuant to the art.20 paragraph 2 of the Constitution, if there are discrepancies between the international instruments to which Romania is part of and the internal laws, the international regulations shall prevail. Therefore, not only the Convention, but also the jurisprudence of the European Court, regardless of the state which was a party in that case, are imposed to the Romanian judge, who has the duty to make its direct and top priority application to the national law during handling the cases, in the event of discrepancies.

We have reviewed some aspects of criminal law treated by the Convention, noting that both the Convention and the Additional Protocols aim the protection of the two main categories of rights, subsumed in the light of the art. 6 in the notions of "appeal on civil rights and obligations" and "criminal charge", notions by an autonomous nature which can't be interpreted by the simple reference to the domestic law of the States Parties to the Convention.

After a brief analysis and definition of the terms building up the phrase "rationality of a criminal charge" we went to a summary analysis of the relevant articles of the Convention for this matter, by reviewing the main elements of novelty and distinction brought by the Convention and by the jurisprudence of the Court on criminal matters. The presentation was made for some of the basic articles of the Convention, considered separately, and it was meant to highlight the effect of the Convention on the domestic law and on the practice of law.

On the same occasion, we have extended the approach to an analysis of the criminal field as considered by the Court jurisprudence, emphasizing that the European forum did not hesitate to include in this area including matters related to the classical criminal law, such as the contravention, the purpose in light of the art. 6 being to give to the matters assimilated to the criminal field satisfactory procedural safeguards. The discussion showed interest mainly in the light of the procedure rules to be applied, with the subsequent procedural safeguards amount, being debatable whether the offender in the contravention field has the right to remain silent, if the penalty (for minor offenses) must be applied exclusively by a court meeting the requirements of independence and impartiality required by the art. 6 or it can be left to the officers' discretion but also the way to understand and apply the concept "presumption of innocence".

This part of the work was completed with the presentation of several procedural aspects required by the Convention point of view, noting that the procedural safeguards required by the art. 6 of the Convention are based on the principle of the proceedings equity or, as the Court pointed out in this respect, the right of access to a court to be an effective one, but not also absolute, with the possibility for the state to instate a system of free legal aid, creating the obligation for the State to ensure the right of the party to contact and communicate in

private with a lawyer, to have access to all the pieces of evidence gathered by the prosecutor. Not least, there were mentioned the exceptions to this rule and its limitations.

Specifically, this Part IV of the paper acted as a bridge between the first three parts, dedicated to the national laws on matter of discrimination, and the ongoing three parts of the thesis, which exposed the concept to the light of several international regulations or exclusively belonging to other states.

Also, the part IV established the necessary link between the domestic criminal sphere of discrimination and the "external" sphere, being in these conditions exhibited the premises of an analysis, including the international acts. Finally, the existence of this party was meant to outline the exhibited and analyzed terms in the first three parts and to give some clues as to how to deal with them in terms of international law or, where appropriate, internal law of other states.

The Part V, entitled "Protection against discrimination in the European Convention of the Human Rights" meant, first, an introduction to the field of dealing with the discrimination issue by the European Court of the Human Rights in the light of the relevant provisions of the European Convention on the Human Rights.

Filling this part of the thesis with numerous references to the relevant case law of the European Court or, where appropriate, of the Commission, but also with doctrinal references, we identified the two texts - subjects of analysis – respectively the art.14 of the Convention and the Additional Protocol no.12 to the European Convention signed by Romania on the 4th of November 2000.

The analysis started from a proper classification of these two texts within the sphere of several international legal text in matters relating to discrimination, and afterwards recalling the domestic legislation relevant for the same subject, aspect mean to create a bridge between the previous parts of the thesis and this first part dedicated to the international treaties. Also, by the same approach we have tried to emphasize the compliance of the Romanian legislation to the European Convention on the Human Rights on non-discrimination.

The sub chapter entitled "General considerations regarding the contents of the Convention relative to discrimination" aimed at treating and autonomous nature and the subsidiary feature of the right provided for in the art.14 of the Convention, the contents of the

Protocol no. 12 to the Convention and the analysis of the discrimination reasons and criteria in the light of the Court jurisprudence relative to the art.14 of the Convention.

Specifically, making frequent references to the case law in our field and trying to identify its evolution over time, we found the consensus on the of the autonomous and the subsidiary nature for the right to equality and the deep divergence discovered even in the decisions of the Strasbourg court on the obligation or, where appropriate, the faculty of the Court to analyze the alleged violation of the art.14 depending on some particular circumstances.

Also, keeping the line of analysis offered by the main theorists, we have made some considerations regarding the contents of the Protocol no.12 to the Convention, for then making an applied analysis of the reasons and criteria for discrimination in the light of the Court jurisprudence relative to the art.14 of the Convention, noting the indicative nature of the list. At the end of this sub chapter, in an effort to prepare the information provided in the sub chapters, we made short jurisprudential references, mainly to some of the common terms and concepts in this field, namely: the situations comparability thesis, the positive discrimination, the burden of proof.

The third sub chapter of this part was meant to deepen the aforesaid data by entering the depth of the discrimination issue based on criteria of race and ethnicity, namely sex and sexual orientation.

In the first matter, we started from a jurisprudential exam based on the known case Moldovan & others vs. Romania, followed by a statement and a summary analysis including other reasons given by the Court against our country. An especially sensitive detail was related to the author's analysis, approved by the Court in the probation plan, attempting a realistic exposure and a constructive criticism in this regard.
With respect to the discrimination based on sex and sexual orientation criteria, the work concerned primarily the location of the concept within the wide jurisprudence of the Strasbourg Court, recalling, for example, that in the Van Raalte vs. the Netherlands, the Court reaffirmed its acknowledged thesis, meaning that only very strong reasons might justify a difference in treatment based on sex and the sexual orientation is currently undoubtedly accepted as a criterion of discrimination.

Further, we noted that, as we had to consider whether a particular treatment or situation is consistent to the principle of equality, the Strasbourg Court established by a constant jurisprudence in reasoning that, in order to speak about discrimination, there are some requirements to be met: to be treated differently; to be in the presence of equal cases: the absence of an objective and reasonable justification; the lack of a proportionality between the means employed and the aim pursued.

We also conducted an analysis of concepts of analogous or comparable situations, test of the comparability, namely for the cases in which the Court has made a real elusion from analyzing this requirement. We pointed the valences of the term "margin of appreciation", by taking the doctrinal argument according to which the states have some margin of appreciation in applying the Convention to determine whether and to what extent the differences between analogous or comparable situations are likely to justify the applicable juridical treatment distinctions, the extent of this power being subject, nevertheless, to the supervision of the European court, as the European legal order, created by the Convention, has one meaning and one unitary interpretation which can't be changed according to the meaning assigned by each party to the contract.

We also reminded the argument that the assessment criteria used by the contracting states depend on the specific circumstances of each case, on the domain and on the context of each case, the European court showing that the existence of justification a different treatment for the same kind of situations is related to the purpose and to the means used on the action taken, in the light of the prevailing principle in a democratic society. Given these theoretical premises, we noted that the Strasbourg court adopted a constant position to indicate that the margin of appreciation of the states is lower in terms of discrimination based on sex, highlighting the numerous causes that gender equality should be a major objective of the contracting states and only very strong reasons justify such discrimination. The issue of positive discrimination in favor of women have retained the conclusion that preferential treatments not only do not appear to be prohibited but also these are required as where, without objective and reasonable justification, the states do not apply differential treatment of persons whose situations are not identical, thus the art.14 shall be deemed to be infringed. In addition, we pointed out that the preamble to the Protocol no.12 reaffirms that the non discrimination principle allows the states to take action for promoting full and

effective equality, provided that they meet an objective and reasonable justification, whilst observing the principle of proportionality.

After a summary statement of the relevant causes in this matter, we mentioned, regarding the states margin of appreciation, that the Court emphasized that it will be different depending on the circumstances, on the purpose and on the context and although only very strong reasons may justify a difference in treatment based on sex, on the other hand when it comes to reasons of economic and social strategy it is recognized to the states a broader appreciation margin. It was indicated *expressis verbis* the fact that, because of the direct knowledge of the society and of its needs, the national authorities are more able than the international judge to appreciate what is in the public interest, socially and economically, and the Court shall respect their policy in these areas, provided that it is not manifestly unreasonable.

The section dedicated to the discrimination of sexual minorities began by stating that through the judgment in Schalk and Kopf vs. Austria, the Court noted that over time has examined, pursuant to art.8 or art.14 in conjunction with art.8 of the Convention many cases based on alleged discrimination on grounds of sexual orientation, based on: prohibiting by the criminal law the homosexual relations between adults (the Dudgeon case), the exclusion of homosexuals from the army (the Smith and Grady case), the prosecution of the homosexual relations depending on age (the L.and V. case), granting parental rights (the Salgueiro da Silva Mouta case), the permission to adopt a child (the E.B. case), the right to succeed to the deceased partner allowance (the Karner case). After an overview of some of the main causes in the matter of discrimination on grounds of sexual orientation, specifically homosexuality, we exposed some judgments ruled in causes triggered by transgender persons, alleged victims of discrimination acts.

The ***Part VI*** was reserved for individual protection against discrimination in other international documents, the information collected, summarized and analyzed aiming to complete the meaning of the concept of equality or discrimination, to emphasize its unique valences and to highlight the interplay between the national legal system meant for this matter and the European legal framework.

The essential component of this part was represented by analyzing the issue in the European Union law.

In this sense we located the meaning of EU law and described in concrete problem in the light of European legislation and jurisprudence of the Court in Luxemburg, with a special focus on discrimination based on sex.

In this sense we underlined the meaning of the European Union and we specifically described this problem in the light of European legislation and of the Luxembourg Court jurisprudence, with a special focus on the discrimination based on sex.

The first chapter of the party concerned a review of the European Union evolution history, but whilst emphasizing the place meant to the egalitarian principle. Specifically, we noted that the European Union laws and the legal systems of the non-community protect both forms of equality, the formal and substantial ones. In the European law, the principle of non-discrimination is a general principle of the European Union law. It is expressly mentioned in numerous provisions of the European Treaties. For instance, the European Union Charter of the Fundamental Rights, part of the Constitutional Treaty, solemnly proclaimed in December 2000. I reminded as first milestones the contents of the article 21 paragraph (1) in the Charter, which states:" Any discrimination based on grounds such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political opinions or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited" but also of the Article 13 ECT, which states:"Without disregarding the provisions of the other provisions of the Treaty and within the limits of the power conferred by this to the European Community, the Council, unanimously, acting on the proposal of the Commission and after consulting the European Parliament, may take the necessary decisions to fight discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation". We noticed that the principle of non-discrimination, as a general principle, is not mandatory only for the Member States at extended, but also for the community institutions, considered individually, as these can't grant juridical force in their policies or legislation to some criteria that would violate this principle.

Also, by a careful examination of the Luxembourg Court case law, we reminded that express indication of the principle of the direct effect of the Community law – the Van Gend & Loos case, of the community law supremacy principle – the Costa vs.Enel case, the rights and the obligations applied to the national courts in the application of the European Union

law. The analysis went beyond the general terms, being exposed various cases solved by the same forum in matter of discrimination, for ultimately emphasizing its different optical contrasts with the one consistently exposed by the Strasbourg Court for the issue of positive discrimination of women. In this last issue, we indicated that through the decision made in the Kalanke case, the Luxemburg Court held that "a national legislation which guarantees to women absolute and unconditional priority when for employment or promotion goes beyond the idea of promoting the equality of opportunities and exceeds the limits of the exception provided for in art.2 paragraph (4) of the Directive."

Following our approach, we also emphasized that the principle of non- discrimination was considered in an unequivocal manner by the European Community Treaty in its various texts, covering several subjects, of which we hereby mention: the non-discrimination in terms of citizenship or nationality - art. 12, art.39, art. 43 and art. 49 - 50 of the ECT; the non-discrimination between producers and consumers in agriculture - art.34 paragraph 2, art. 90 in the ECT; the non-discrimination as a purpose of the Community and solid grounds for the Community actions.

Emphasizing both significant doctrinal views and some developments in terms of primary community legislation, we offered a presentation also for some of the usual concepts and principles in this matter. Specifically, we reminded that in the analysis offered by the Court of Justice of the European Union in matters of sex discrimination there were highlighted two factors: the need to prove the fact that sex represented the cause of discrimination; the imperative to prove the existence of a comparison element, meaning that the person of opposite sex, who is in a similar situation, has been or would have been treated better. We also appreciated that it was appreciated that the woman and the comparison element must be in "identical or comparable situations". Following a review of the relevant case law but also of the academic literature, we reminded also that it emerges quite clearly that the economic purpose pursued by the former art.141 in the Treaty obviously shows a secondary nature, currently alternative to the social objective pursued by this provision and undoubtedly constituting the expression of a fundamental human right, approach that meets moreover the spirit of the European Union.

Another landmark of this part was represented by the review of some of the most important European normative acts on the subject, recalling: the Directive 2006/54/EC and

the Directive 2002/73/EC amending the directive on equal treatment; the art.13 of the anti-discrimination Directives adopted in 2000, namely the Directive 2000/78/EC and the Directive 2000/43/EC; the Council Recommendation no 84/635/EEC of the 13th of December 1984 on promoting positive action for women; the Commission Recommendation no. 92/131/EEC concerning the protection of the labor dignity for women and men; the Resolution for controlling the pay gap between women and men (2008); the Directive no. 75/117/EEC on the harmonization of the Member States legislations relating to enforcing the principle of equal pay between men and women, which deepens the explanation of the equal pay principle, including equal pay for work of equal value; the Directive no. 79/7/EEC on the progressive implementation of the principle of equal treatment between men and women in matters of social security, which represented the extension of the principle of equal treatment in the field of social security; the Directive . 97/80/EC on bringing proof in sex discrimination cases; the Directive no. 2000/78/EC establishing a general framework for equal treatment in employment and occupation; the general framework that the Directive 2000/78/EC sets is designed to set minimum standards, which allows the member states to adopt or to maintain the more favorable provisions; the Council Directive no. 2000/43/EC implementing the principle of equal treatment between persons irrespectively of racial or ethnic origin, which is considering eliminating direct discrimination (when a person is treated less favorably than another one, has been or would be treated in such a way, in comparable situations, on the grounds of racial or ethnic origin) or indirect discrimination (when a provision, a criterion or a practice, apparently neutral, would put persons of a particular racial or ethnic origin at a disadvantage, compared to other persons); the Directive 2006/54/EC on implementing the principle of equal opportunities and equal treatment for men and women, in relation to employment and working conditions.

Furthermore, it was underlined the content of several community acts, important to this matter: the Directive 2000/43/EC of the 29.06.2000, the Directive 2000/78/EC of the 27.11.2000. and the Directive no. 2006/54/EC, their analysis including in the light of the Luxemburg Court case and of the specialized doctrine, highlighting the anchoring, as a principle, of our country to the standards set as above.

In essence, we exposed the scope of the Directive 2000/43/EC of the 06.29.2000 with reference to the implementation of the principle of equal treatment between persons,

irrespective of racial or ethnic origin, consisting of: employment, the conditions to access employment, independent or autonomous activities, social security, social protection, social advantages, education, access to and supply of goods and services, including housing. We also reminded that through the principle of equal treatment within the meaning of the Directive it is understood the absence of any direct or indirect discrimination based on racial or ethnic origin and the grounds of the Directive state that the specific actions of discrimination based on racial or ethnic origin should go beyond the access to activities carried on as employee or as independent contractor and cover areas such as education, social protection, including social security and healthcare, the social advantages and the access to goods and services, as well as providing these, the directive allowing, at the member states discretion, to assess the elements of which it can be inferred if there was a direct or an indirect discrimination, the national judicial authorities or other competent national authorities using the domestic law and the national practice. We noted the view of this directive to the classical concepts of direct, indirect discrimination, harassment, positive action or burden of proof.

On the other hand, we noted that the Directive 2000/78/EC of the 27.11.2000 sets a general framework for the manifestation of the principle of equal treatment in the employment and occupation matter and focuses on these issues, aiming to ensure the principle of equal treatment in the areas of access requirements to employment, to self-employment or to occupation, including the selection criteria and the recruitment conditions, the vocational training, the promotion at work, the remuneration, the dismissal, the membership of and the involvement in an organization of workers or employers. The objective of the Directive is to establish a general framework for fighting against discrimination on the grounds of religion or belief, disability, age or sexual orientation, regarding the employment and the occupation, for the implementation, in the member states, of the principle of equal treatment.

Following a similar analysis of this act, also, to the one provided for the Directive 2000/43/EC of the 29.06.2000, we pointed out the similarities and the differences between the two of them: their provisions apply both to the direct discrimination and to indirect one, thus covering the entire field of matter; both allow the implementation of several specific measures to compensate for the disadvantages faced by the victims of discrimination; the two

acts provide that the states must ensure that the judicial and administrative proceedings, including the conciliation proceedings, if necessary, regulating the compliance of the obligations arising from the Directive to be made available to all the persons who consider themselves offended by the failure to apply to them the principle of equal treatment, even after the end of the relationship in which the discrimination is alleged to have occurred; they introduce a significant development of the proof system in civil matters enabling the people to benefit from efficient means in their actions aimed at strengthening the principle of equal treatment.

A similar analysis, along with a scoring of the main jurisprudential elements, was also achieved with the Directive no. 2006/54/EC.

At the end of the Part VI, we identified the fight against discrimination in various international documents. We reminded: the content of the art.1, 2 and 7 in the Universal Declaration of Human Rights, the Convention no.100/1951 on remuneration, the ILO Convention No. 118 (1962) concerning equal treatment in the field of social security, the UN International Covenant on Civil and Political Rights, the Charter of the Organization of American States, the American Convention on Human Rights, the African Charter on Human and People Rights, the International Convention on the Elimination of All Forms of racial Discrimination in 1969, the Convention on the Elimination of All Forms of Discrimination against Women in 1979 or the Convention on the rights of the Child.

The Part VII, "Regulating the discrimination in the legislations of other countries" was a scoring of phenomenon in the law system of France, England, Germany, Spain, Bosnia - Herzegovina and the U.S.

We have proposed a statement of the legal framework, of the prominent institutions on this activity branch and of the case law of these countries. We also appreciated that highlighting the stage of these states' legislations in the matter of discrimination is intended to emphasize those indicated in the first part of the paper.

Specifically, we noted that in France, in addition to a "*lato sensu*" civil law relatively opulent in this matter and indicated accordingly, the Criminal Code sets out a number of criteria constituting the concept of discrimination, as the article 225-1 in the Criminal Code provides that any distinction made between individuals on the grounds of origin, sex, family status, pregnancy, physical appearance, employment, health status, disability, genetic

characteristics, habits, sexual orientation, age, political opinions, union activities, membership or not, true or suspected, to a certain ethnic group, nation, race or determined religion constitute discrimination, while the article 225-2 in the Criminal Code sets out the circumstances in which the discrimination made is punishable. The discrimination, as defined in the above article, committed in relation to a natural or legal person, is punishable by three years imprisonment and a 45,000 Euro fine if done in one of the following: the Refusal to provide a particular good or service; Preventing the regular activity of any company; the refusal to hire, sanction or dismiss a person; providing a good or a service subject to one of the elements indicated by the art.225-1; conditioning an employment, internship or training offer in society to a condition based on one of the elements of art. 225-1; the refusal to accept a person from one of the internship stages mentioned by the article two in the law 412-8, the Social Security Code. The penalty is five years imprisonment and a 75,000 euro fine if the discriminatory refusal referred to in paragraph 1 is committed in a public place or in order to prohibit access to it. However, article 225-3 provides a list of situations in which the use of a criterion set out in Article 225-1 is tolerated.

We also reminded that the French authority in the field of discrimination is currently represented by the Rights Defender, indicating the competence and procedural issues related to this institution. Finally, we pointed out some jurisprudential elements that referred to this matter.

Regarding the English legal system, we reminded the contents of the Race Relations Act in 1976, the Regulations of 2006 and the Equality Act in 2010. We also mentioned the institution called the Commission for Equality and Human Rights.
Regarding the German legal system, we have pointed the content including some constitutional provisions in this area, the general Act of equal treatment in 2006, emphasizing that in the light of section 46 in the German Criminal Code the perpetrator's motives and goals, the personal status reflected also by its deed and by the willingness to commit the offense may be taken into account in determining the penalty - similar situation to the legal aggravated circumstance in the Romanian Criminal Code. Finally, we made references to the German Anti-Discrimination Agency.

Regarding the Spanish legal system, we mentioned the current state of non-criminal law and also the content of art.313 in the Spanish Criminal Code under which it is considered a

criminal act the act of the employer who, having been administratively sanctioned for acts of discrimination in the public or private environment, on grounds of sex or sexual orientation, among others, does not take any steps to remedy the damages incurred and to restore the balance given by the principle of equality. We have also shown some cases ruled by the Spanish judiciary system.

Regarding the legal system in Bosnia and Herzegovina, we have made a detailed statement of the legal acts adopted by this State, indicating the legislative evolution state in fighting the discrimination phenomenon but also with the exposure of the Human Rights Ombudsman institution.

Regarding the legal system of the United States of America, we have highlighted the significance of the Federal Office for Good Practice in Contracts, we made a statement of several representative cases for considering the principle of equality in the last two centuries, subsequently presenting the institution called the United States Committee for Occupational Equal Opportunities.

Finally, we mentioned the major acts in matters of discrimination - the federal legislation, namely: the Title VII of the Civil Rights Acts of 1964; the Act against discrimination on grounds of pregnancy which amended the Title VII of the Civil Rights Act; the Act of Equal Pay of 1963; the Act against discrimination on grounds of age in the employment laws of 1967; the Act of the Americans with Disabilities of 1990; the Civil Rights Act of 1991 which amends the Title VII and the Act of the Americans with Disabilities of 1990; the Rehabilitation Act of 1973; the Act of non-discrimination on grounds of Genetic Information.

The Part VIII, entitled "Conclusions", was a brief overview of the main issues pointed out in this thesis, inclusively meant to emphasize the author’s opinion on the general concept in elaborating this thesis.