

# INCOMPATIBILITIES OF JUDGES IN THE NEW CRIMINAL PROCEDURE CODE

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**ABSTRACT:** A DETERMINED ROLE IS HELD BY JUDGES OF RIGHTS AND FREEDOMS, JUDGES OF PRELIMINARY CHAMBER AND JUDGES RULING ON THE EXISTENCE OF THE OFFENSE AND THE CULPABILITY OF THE OFFENDER IN CRIMINAL PROCEEDINGS. JUDGES' ACTIVITY MUST BE CARRIED OUT WITH PROFESSIONALISM, OBJECTIVITY AND IMPARTIALITY IN APPLYING THE PRINCIPLE OF FINDING THE TRUTH. THEREFORE, IT IS IMPERATIVE THAT ON THEIR ACTIVITY MUST NOT HANG OVER ANY DOUBT AS TO HOW THEY RULE AND THERE MUST BE NO CIRCUMSTANCE THAT WOULD GENERATE SUSPICION OF PARTIALITY OR SUBJECTIVISM OR COULD LEAD TO A VITIATED SOLUTION AND THUS BRING PREJUDICE TO THE PARTIES' OR MAIN PROCEDURE SUBJECTS' PROCEDURAL RIGHTS.

THE NEW CRIMINAL PROCEDURE CODE, AS WELL AS THE PREVIOUS REGULATIONS, HAS PROVIDED A SERIES OF SITUATIONS OF JUDGES' INCOMPATIBILITY IN CRIMINAL TRIALS, CIRCUMSTANCES WHICH ARE CONSTITUTED IN INTERDICTS IMPOSED ON THEM TO PARTICIPATE AND TO RULE IN CERTAIN CASES. THE CIRCUMSTANCES GIVING RISE TO THE INCOMPATIBILITY OF JUDGES ARE CONTAINED IN ART. 64 OF THE CRIMINAL PROCEDURE CODE AND AIM ON THE ONE HAND, TO CERTAIN FAMILY, SOCIAL OR EMOTIONAL RELATIONSHIPS WITH THE PARTIES, MAIN PROCEDURAL SUBJECTS OR PARTICIPANTS IN THE CRIMINAL TRIAL, AND ON THE OTHER HAND, THE PROFESSIONAL ACTIVITY PREVIOUS TO THE SOLVING OF THE CRIMINAL CASE SUBMITTED BEFORE THE COURT BUT IN DIRECT RELATION WITH THAT CASE.

**KEY WORDS:** CRIMINAL TRIAL, JUDGE, INCOMPATIBILITY, ABSTENTION, CHALLENGE.

## I. INTRODUCTION

The decision-making in general, but especially the criminal trial must be carried on so that to inspire confidence with respect to professionalism, moral probity and impartiality of the court and judicial bodies both to parties and participants and to the public opinion.

The activity of the prosecutors and judges in a criminal trial must be performed with professionalism and objectivity, in compliance with the service obligation imposed by law and must involve a good theoretical and practical training.

The miscarriages of justice found in certain cases and some cases of corruption discovered in Romanian judicial system often induced a sense of mistrust and suspicion

among the public. However, such cases are isolated and do not affect the overall system, including well-trained and impartial personnel, with immaculate integrity.

Judges involved in solving criminal cases enjoy a presumption of impartiality and objectivity, but there are cases where, justified or not, these professional attributes are questioned by the beneficiaries of decision-making. In this context, the legislator created the legal framework under which a subject of criminal law to be able to report the existence of a situation which overturns the presumption of impartiality and objectivity of the judge in a criminal case or under which even the judge to declare that he cannot try a particular case, since it is in one of the situations expressly provided by law, considered as incompatible.

The Criminal Procedure Code contains procedural remedies for the situation where there is suspicion regarding the proper trial of the criminal case. Thus, the applicable institutions in such cases are: incompatible, abstention and challenge, which are the procedural means by which an official subject of the judicial bodies is removed or abstains from solving a criminal case.

## **II. THE INCOMPATIBILITY OF THE JUDGE IN PENAL TRIAL**

As I mentioned above, the incompatibility is a procedural remedy by which a judge is unable to try a particular criminal case, the justification of this prohibition being given by the fact that there are certain personal circumstances such as to generate doubts regarding his objectivity in trying the criminal case. The incompatibility is not a denial of the personal jurisdiction of the judge to resolve that criminal case, but a procedural impediment in carrying out the procedural activity if he is in one of the situations provided by law.

In the new Criminal Procedure Code, the incompatibility, abstention, challenge, transfer and appointment to another court for the settlement of the case is included in the section *The criminal prosecution bodies and their competence*, which is questionable in terms of structuring the legal document, which should include a separate section for these institutions. In this regard, we mention that the incompatibility and transfer were contained in a separate chapter in the previous Criminal Procedure Code<sup>1</sup>.

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<sup>1</sup> ART. 46

Kinship between judges

The judges who are spouses, relatives or persons related between them, up to the fourth degree, cannot be part of the same panel.

ART. 47

Judge who ruled earlier

The judge who took part in the settlement of a case cannot participate in the same case in an appeal or trial after the dissolution of the judgment with reference on appeal or after the cassation with reference on appeal. Nor can participate in the trial the judge who had previously expressed views on the solution that could be given in that case.

ART. 48

Other cases of incompatibility

(1) The judge is also incompatible to try, whether in that case:

a) he initiated the criminal proceedings or disposed the arraignment or set conclusions as a prosecutor in the court, solved the proposal of preventive custody or of extension of the preventive custody during the prosecution;

b) was representative or defender of any of the parties;

It can be noted that the new rules of criminal procedure take a part of the old law, which they complement and change, both structurally and the coverage area.

A first case of incompatibility of the judge, provided for in Art. 64 par. (1), letter a) of the Criminal Procedure Code, is given as his representative or attorney of a party or of a main procedural subject, even in another case. The current Criminal Procedure Code, unlike the old code, exhibits in a more comprehensive manner the incompatibility in which the judge is, who was the representative or defender of a party and in regard with other previous cases, and in the situation in which he represented or assisted a main procedural subject in the same circumstances.

The incompatibility of the judge in the situation provided for in Art. 64 par. (1), letter a) is justified as representative or defender of a party or a main procedural subject that the judge previously held, generating a reasonable suspicion regarding his impartiality and objectivity in trying the criminal case. The reason for establishing this legal prohibition is supported by the fact that between attorney or representative and the party who has received the circumscribed benefits from this report of legal assistance or representation appear relationships of closeness, empathy.

We believe that although the intention of the legislator in the development of Art. 64 Criminal Procedure Code was to restrict the exercise of professional duties of a judge, who is in the situation described in par. (1) letter a) only if he was the lawyer or representative of one of the parties or of the main procedural subject in a previous criminal case, this prohibition also extends to where the legal relationship aimed a cause of other nature, especially since the legal text not expressly distinguishes in regard with this aspect.

According to Art. 64 par. (1) letter b) Criminal Procedure Code, the judge is incompatible if a relative or person related to him up to the 4<sup>th</sup> degree inclusive, or is in a different situation from those set out in Art. 177 Criminal Code with one party, with the main procedural subject, with their lawyer or representative. The old Criminal Procedure Code was bordered to the incompatibility stemming from kinship or affinity up to the fourth degree with any party, his attorney or representative.

In par. (1) letter b) of the new Criminal Procedure Code, there was dropped a direct presentation of the quality of husband that the judge has in relation to a party or a main procedural subject, his attorney or representative, adopting the solution of the reference to the Art. 177 Criminal Code, which regulates and defines the notion of family member.

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- c) was an expert or witness;
- d) there are circumstances in which results that he is interested in any form, he, the spouse or any close relative;
- e) the spouse, relative or person related to him, up to the fourth degree inclusive, conducted criminal proceedings, supervised the prosecution, solved the proposal of preventive custody or of extension of the preventive custody, during prosecution;
- f) is the spouse, relative or person related to him, up to the fourth degree inclusive, with one of the party or with his attorney or agent;
- g) there is enmity between him, spouse or one of his relatives up to the fourth degree inclusive and one of the party, spouse or his relatives up to the third degree inclusive;
- h) is a guardian or trustee of a party;
- i) received freedoms from a party, attorney or agent thereof.

(2) The judge is incompatible to participate in the trial of a case in appeal when the husband, relative or the person related to him up to the fourth degree inclusive participated as a judge or prosecutor in the trial of the same case.

From the analysis of Art. 177 Criminal Code, it is clear that the judge's incompatibility also exists in regard with other categories of persons, which fall within the concept of family member. Thus, according to Art. 177 par. (1) the family members are: ascendants and descendants, brothers and sisters, their children, and people becoming by adoption, according to the law, such relatives, spouse and persons with whom established relationships similar to those between spouses or between parents and children, in case they live together.

From the above we find that the incompatibility of the judge can operate as a legal institution where the subjects of the report of criminal procedural law have the status of concubines or fiancés or have a behavior similar to the relations between parents and children, provided that they live together. Referring to the previous legal provision which aimed at reporting on the incompatibility of a judge who is a representative agent of a party, it should be mentioned that the representative agent is included in the concept provided in the current regulation.

A third situation of incompatibility is provided in Art. 64 par. (1) letter c) of the Criminal Procedure Code, according to which the judge is incompatible if he was expert or witness in the case. The legislator has maintained the text of the Art. 48 par. (1) par. c) of the old Criminal Procedure Code, adding the word "*in the case*" for a clearer focus on the criminal case brought before trial. With this addition, it is removed the ambiguity about the possibility of invoking the incompatibility if the judge was expert or witness in another criminal case prior to the trial.

According to Art. 64 par. (1) letter d), the judge is incompatible if he is guardian or trustee of a party or of a main procedural subject. This provision has as argument the relationship between the judge and one party or the main procedural subject who, in addition to legal report of civil law, involves a sentimental, approach relationship.

The incompatibility status exists, according to Art. 64 par. (1) letter e) of the Criminal Procedure Code, if the judge has performed in the case, criminal prosecution or participated as a prosecutor, in any proceedings carried out before a judge or a court.

Compared to the previous regulation which provided that it is in incompatibility status the judge who, previously, as a prosecutor, initiated the criminal proceedings, ordered the arraignment or set conclusions to the court, the current Criminal Procedure Code comprehensively disposes that the judge, who previously performed any criminal prosecution as a prosecutor or representative of the criminal investigation body, is incompatible to try the criminal trial. The extension of the regulation also aims to the activity performed by a judge as prosecutor previously held before a judge of rights and freedoms or in front of the judge of preliminary chamber.

The reason for this legal prohibition is that a person cannot perform research and prosecution activities in a criminal case, which involves taking samples and subsequently as a judge to rule on those samples.

There is the incompatibility status, according to Art. 64 par. (1) letter f), if there is reasonable suspicion that his impartiality is affected. With regard to this provision we find that the legislator has done an extremely broad wording, leaving the possibility of interpreting the situations that can lead to cataloging a judge's behavior as inappropriate or inconsistent and generating a reasonable suspicion. In the doctrine and judicial practice, there were outlined opinions according to which there is a reasonable suspicion if the judge

previously expressed his opinion on the criminal case, regardless of the circumstance, or if he or a family member has an interest in solving the case.

According to Art. 64 par. (2) there cannot be part of the same panel the judges who are spouses, relatives or related between them, up to the fourth degree inclusive, or are in a different situation from those set out in Art. 177 of the Criminal Code. The justification for this provision is that it must be removed any doubt on the possibility that judges who are part of the same panel and have the quality of close relatives, related persons or family members in the sense of Art. 177 of the Criminal Code, influence each other in ruling the solution.

Compared with the old Criminal Code, the new Criminal Code also extends the prohibition area in forming the panel of judges on the people became relatives by adoption, and on the persons who established relationships similar to those between spouses or between parents and children, in case they live together.

Art. 64 par. (3) of the Criminal Procedure Code provides that the judge who participated in the trial of a case cannot participate in the same case in an appeal or retrial after the cancellation or cassation of the decision. The reason for this prohibition is given by the fact that the judge who ruled in a criminal case in the trial court cannot participate in solving the same cause in an appeal.

To exist the incompatibility case, there is necessary that the judge in the first instance to rule on the defendant's guilt. In the judicial practice of the High Court of Cassation and Justice (Dec. no. 5269/2007) has been established that there is an incompatibility case, if in ruling the criminal case in the first instance, the judge participated only in terms where evidence were allowed or provided, without participating in the settlement of the case and later was part of the panel that ruled the appeal.

According to Art. 64 par. (4), the judge of rights and freedoms cannot participate in the same case, in the preliminary chamber, in the judgment on the merits or remedies. Unlike Art. 48 par. (1) of the previous Criminal Procedure Code, which provided that it is in a incompatibility status the judge who settled the proposal of preventive arrest or prolongation of the preventive arrest during the prosecution, it is widened the area of the incompatibility status in the new criminal procedure code, being also included as grounds for incompatibility the issues related to ruling of the judge of rights and freedoms on fundamental rights of the suspect.

The judge who participated in solving the complaint against the solutions not to prosecute or not to put on trial cannot participate in the same case, in the judgment on the merits or remedies, under Art. 64 par. (5) of the Criminal Procedure Code. In the new regulation, the legislator extended the incompatibility status in the sense that, whatever solution gave in the settlement of the complaint against the solutions not to prosecute or not to put on trial, he is incompatible to judge the same case on the merits or remedies. Also, it is in state of incompatibility the judge who ruled on a measure subject to appeal and is designated to participate in solving the appeal in accordance with Art. 64 par. (6).

Getting out of the incompatibility status for the judges in a criminal trial is possible by two institutions as: abstention or challenge. If in case of abstention, the judge found in incompatibility asks not to participate in the proceedings, by the declaration of abstention, lodged as soon as he was aware of the circumstances referred to in Art. 64 Criminal Procedure Code, in case of challenge, the parties, main procedural subjects or the

prosecutor may submit application of challenge by asking that the incompatible judge to be replaced in the case.

### **III. Conclusions**

The text of Art. 64 of the new Criminal Procedure Code is much more comprehensive than the texts regulating the incompatibility of judges in the old regulation. The text of Art. 64 of the Criminal Procedure Code takes some of the provisions of Art. 46 and Art. 48 of the previous Procedure Code, which amends and supplements them. In this sense, we can find that the judge's incompatibility, arising as a consequence of his previous activity performed during the prosecution as a prosecutor, is extended in the new regulation in the sense that it is not only limited to the performance of certain procedural documents, but it also covers any participation of the prosecutor in the prosecution phase.

Regarding the incompatibility related to kinship, there is noticed an increase in the scope by introducing the family membership in the ban area, in the sense of Art. 177 of the Criminal Code. The incompatibility provided for in Art. 64 par. (1) letter f) of the new Criminal Procedure Code has a wider coverage in that it refers to any circumstance which is likely to generate a reasonable suspicion with respect to the impartiality and objectivity of the judge, compared to the old regulation that limits the spectrum of these circumstances.

In the new Criminal Procedure Code, there are provided for situations in which the judges of rights and freedoms or the judges of preliminary chamber are incompatible, i.e. when participating in solving the complaint against the solutions not to prosecute, not being relevant whether or not they solved the complaint. The judges' incompatibility also operates when they deliver in regard with a procedural measure and subsequently are appointed to settle the complaint in an appeal.

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