THE INCOMPATIBILITY OF THE JUDGE AS PROVIDED BY THE NEW ROMANIAN CRIMINAL PROCEDURE CODE

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Abstract

Subsequent to the coming into force of the new Criminal Procedure Code of Romania, the lawmaker brought significant modifications as regards the incompatibility of the judge. In this respect, the main observation that one can make is that the hypotheses regarding incompatibility are more numerous and, thus, there are more cases in which the judge's lack of impartiality can be invoked. In the present study we are going to analyse the situations in which a judge is considered incompatible and we are going to make suggestions as regards the improvement of the present legislative framework.

Keywords: *judge's incompatibility, lack of impartiality, criminal trial, the fairness of the criminal procedure, the new Criminal Procedure Code of Romania.*

1. Introduction

Incompatibility is the situation in which one of the official procedure subjects is in a state of inadequacy in relation to a criminal case; this situation represents an impediment as to the subject's participation in solving that criminal case1.

Moreover, incompatibility may be considered an institution whereby a certain person who belongs to a judicial body is impeded to participate in the procedure activity that a certain criminal case involves with a view to removing suspicions as to the objectivity and impartiality of the manner in which a case is solved by this subject2.

Incompatibility should not be considered as a lack that is identified in a person's professional training, but rather as a special situation in which an official subject finds oneself in a certain criminal case. Thus, it would be possible for some of the best judges of a court of law not to be able to participate in solving a criminal case due to his/her potential incompatibility according to the law.

Similarly, incompatibility strictly refers to the provisions of the Criminal Procedure Code. The potential procedure errors that might be committed by magistrates (e.g., non-admitting certain concluding and useful evidence in court, violations of the right to defence, etc.) cannot be settled outside the means of appeal and not through recusation because they do not refer to the cases of incompatibility provided by the law[3].

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[1] Traian Pop, *Drept procesual penal,* vol. II, Cluj: Tipografia Națională Publishing House, 1946, p. 271.

[2] Grigore Theodoru, Lucia Moldovan, *Drept procesual penal*, Bucharest: Didactică și Pedagogică Publishing House, 1979, p. 56.

[3] The Court of Appeal Bucharest, Section I, The Criminal Section, Decision no. 1917/2003, in Ion Neagu, *Tratat de procedură penală,. Partea generală,* Bucharest: Universul Juridic Publishing House, 2013, p. 396.

2. The cases of incompatibility of judges

2.1. The judge is incompatible if he was a representative or a lawyer of one of the parties or of the main procedure subjects in a case, no matter if this occurred in a different case [Article 64 paragraph (1 letter a) of the Criminal Procedure Code, entered into force on 1st February 2014, hereinafter named CPP]. This first instance of a judge's incompatibility corresponds to Article 48 paragraph (1) letter b) of the former Criminal Procedure Code, which extends the application of the legal text for the hypothetical situation in which a party or the main procedure subject was represented or benefited from counsel services in another case, too. Similarly, the representation or counsel services offered to a suspect fall under the provisions of this case of incompatibility; the former regulation did not specifically refer to the person alleged to be guilty.

This case of incompatibility may be explained if we consider the irreconcilable positions of a former representative / counsel for any of the parties / for the main procedure subject and the position occupied later by this person as a judge; under such a circumstance, the suspicion regarding the impartiality is justified[4]. This case of incompatibility also exists if the counsel for the defence did not exercise any of the defence activities involved by the criminal trial[5].

2.2. The judge is incompatible if he/she is a relative or an in-law up to the 4th degree including to one of the parties, to one of the main procedure subjects, to the lawyer or to the representative thereof or is in another situation that is different from the provisions stipulated by Article 177 of the Criminal Code [Article 64 paragraph (1 letter b) CPP]. This case of incompatibility has been influenced by the provisions of Article 48 paragraph (1) letter f) of the previous Criminal Procedure Code, according to which incompatibility existed if the judge was the husband, a relative or an in-law up to the 4th degree including to one of the parties or to the lawyer or to the attorney-in-fact.

The regulation provided by this case extends incompatibility for other legal hypotheses. In this respect, a judge is incompatible if he/she is a family member to one of the parties, a main procedure subject, the lawyer or the representative thereof. According to Article 177 paragraph (1), The Criminal Code, a family member is: a) extended family and descendants, brothers and sisters, their children, as well as persons that subsequent to an adoption process became, according to the law, such relatives; b) the husband and c) the persons that have established husband-wife, respectively parents-children relationships on condition that they live together.

Similarly, while the previous provision made reference to the attorney-in-fact (conventional representative), at present, under the provision regarding incompatibility, one has to include to larger procedure category of representation with all its characteristics (legal and conventional representation).

2.3. The judge is incompatible if he/she was an expert or a witness in the case [Article 64 paragraph (1 letter c) CPP]. While preserving the same form in the content as Article 48 paragraph (1) letter c) of the previous Criminal Procedure Code, for this instance, incompatibility is established, on the one hand, considering that the expert expressed his/her opinion on certain aspects of the criminal case and, on the other hand, considering that the person who produced a piece of evidence in a criminal case should not be able to evaluate that evidence later.

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[4] Vintilă Dongoroz, Siegfried Kahane, Costică Bulai, George Antoniu, Rodica Stănoiu, Nicoleta Iliescu, *Explicații teoretice ale Codului de procedură penală. Partea generală*, Bucharest: Academiei Publishing House, 1975, p. 153.
[5] The Supreme Court, The Criminal Section, Decision no. 2153/1973, in *Revista Română de Drept* no. 1/1974, p. 142.

2.4. The judge is incompatible if he/she is the trustee or curator of a party or of one of the main procedure subjects [Article 64 paragraph (1 letter d) CPP]. This case of incompatibility is similar with the one provided by Article 48 paragraph (1) letter g) of the previous Criminal Procedure Code and it is justified given the protection of the juvenile natural person through the trust or of the mature natural person who has a curator under the conditions of the Criminal Code.

2.5. The judge is incompatible if he/she completed criminal investigations in the present case or if he participated as a prosecutor in the accomplishment of any procedure before a judge or a court of law [Article 64 paragraph (1 letter e) CPP]. The comparative analysis with the previous regulation brings into evidence, once again, the significant extension of the sphere of application for the institution of the judge's incompatibility.

Thus, this case of incompatibility has a correspondent in Article 48 paragraph (1) letter a), thesis I, of the previous Criminal Procedure Code, according to which a judge was incompatible, if, as a prosecutor, he/she initiated the criminal action, decided for the case to be brought before the court of law or issued conclusions in the court of law.

The present regulation extends the judge's incompatibility to all criminal investigation acts which he/she, as a prosecutor or criminal investigation body, accomplished in that case. Similarly, incompatibility also refers to the hypothetical situations in which, in the same case, the judge participated as a prosecutor in the proceedings accomplished both during the criminal investigation stage before the judge of rights and liberties, and also during the trial stage, i.e. before the judge of the preliminary chamber or the court of law.

The lawmaker consistently extended the instance of incompatibility for this case in order to eliminate the potential suspicions related to the judge's impartiality, which are justified by the previous quality of a criminal investigation body in that case.

2.6. The judge is incompatible if there is reasonable suspicion that his/her impartiality is affected [Article 64 paragraph (1) letter f) CPP]. *This case of incompatibility is the most complex for its content can, actually, include any situation that might generate a reasonable suspicion that the magistrate's impartiality is affected.*

The generic manner of presenting this incompatibility case makes room for a lot of interpretation as to the reasonable suspicion that the judge's impartiality is doubtful.

Considering the previous regulation, we appreciate that this case is applicable, e.g., when the judge expressed his/her opinion before, in an occasional manner, outside the criminal trial or even within the criminal trial [(this hypothesis was regulated in a different way by Article 47 paragraph (2) of the previous Criminal Procedure Code].

We have to enumerate the different regulations provided for certain cases of incompatibility as regards the expression of an opinion by a judge before a case is solved (i.e. the situation when the judge expresses opinion in advance), within a criminal trial, according to Article 64 paragraph (3)-(6) CPP.

The case law developed prior to the present code, which is still applied, correctly provided that the fair labelling of a criminal act by the judge is not similar with the previous expression by the judge of an opinion that would make him/her incompatible to judge that case. In this respect, the application by the judge of a procedure provided by the law does not lead to his/her incompatibility to participate in the on-going judging of that case[6]. Contrarily, other courts of law appreciated that the modification of the fair labelling of a case for the act

[6] The Supreme Court of Justice, The Criminal Section, Decision no. 442/1992, in *Revista Dreptul* no. 12/1992, p. 92.

which led to the notification of the court, through a conclusion pronounced before solving the case in first instance, leads to the incompatibility of the judge who was a member of the panel. The invoked reasons refer to analysing the decision to modify the labelling of the act, which is seen as a manner of quickly solving the case, with the result that the judge who pronounced the decision became incompatible to take part in solving the case.

The Supreme Court, finding that the criminal procedure law was not unitarily applied, ruled, when solving an appellate review in the interest of the law, that the modification of the labelling of the criminal act upon which the legal action was grounded, due to a conclusion pronounced prior to solving the case, does not reflect the incompatibility of the judge who was a member of the panel[7]. The decision adopted by the Supreme Court was grounded on the fact that the lawmaker found the modification of the labelling of the criminal act as a procedure matter, which did not affect the solution given to the case.

Similarly, the court found that the judge who completed and grounded the notification for revoking the suspension of the probation release (considering that the convict did not observe the obligations set forth by the judgement and left the country) expressed, in this way, the opinion as regards the solution that was to be given in the case, and, thus, became incompatible with judging the case[8].

For the same case of incompatibility, we are going to include the hypothesis provided by Article 48 paragraph (1) letter d) of the previous Criminal Procedure Code, according to which a judge becomes incompatible if, due to certain circumstances, it is proved that he/she/the husband/any close relative/member of the family has an interest of any nature under the provisions of Article 177 of the Criminal Code. From this point of view, any time the judge manifests an interest in the solution given to the criminal case, the suspicion as regards his impartiality may be invoked on reasonable grounds.

Thus, as regards the circumstances that could confirm the interest of the judge (and, consequently, the reasonable suspicion as to the lack of impartiality), there have been exemplified the situations in which the judge, the husband or a close relative of the judge is financially dependent on one of the parties, as debtor or creditor of that party; the judge is trying a similar case in a different court of law; the judge is involved in a dispute or was involved in a litigation with one of the parties. As to the interests that the judge might have, they could be material or moral.

2.7. Judges who are husband and wife, relatives or affine, up to the 4th degree including, or who find themselves in a situation similar to the ones provided under Article 177 of the Criminal Code [Article 64 paragraph (2) CPP].

The lawmaker provided this incompatibility case in order to remove any suspicion that might be invoked as to the mutual influence of those who are members of the same panel and would be husband and wife, close relatives or affine or family members, as provided by the criminal law.

The incompatibility case complies with the provisions of Article 46 of the previous Criminal Procedure Code, which are enlarged by including the hypothesis of "family members".

2.8. The judge who took part in the judgement of a case can no longer take part in the judgement of the same case if an appeal is lodged against it or if that case is retried subsequent to the annulment or cassation of the judgement [Article 64 paragraph (3) CPP].

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[7] The High Court of Cassation and Justice, the Joint Sections, Decision no. 1/2006, published in the Official Gazetter of Romania, no. 291 on 31st March 2006.

[8] The Court of Appeal Iaşi, The Criminal Section, Decision no. 296/2005, in Ion Neagu, op. cit., p 402.

The previous regulation provided by Article 47 paragraph (1), according to which "The judge who solved a case cannot take part in the resolution of the same case in a higher court when a means of appeal is exercised or the case is retried after the annulment of the judgment subsequent to an appeal lodged against it or after its cassation subsequent to lodging a second appeal against it.", illustrates a case of incompatibility that is justified by the previous judgement delivered by the judge who, in this way, can no longer take part in the re-judgement of the same case no matter if a means of appeal is lawfully lodged against it or if the judgement is retried subsequent to the annulment or cassation of the appealed judgement.

Thus, the judge who was a member of the panel that solved the case in the court of first instance cannot participate in the judgement of the same case when an appeal is lodged against it or when the case is retried subsequent to lodging an extraordinary means of appeal no matter what court of law has the competence to judge these means of appeal. The same judge is not entitled to take part in the re-judgment of the case subsequent to the annulment or cassation of the judgement.

There is incompatibility only if the judge was a member of the panel that delivered the judgement in the first instance on the same case, i.e. the judge settled the matter regarding the commission of the crime and the offender's guilt. In other words, the incompatibility provided for this situation exists if the judge was involved in solving the same case in another court of law or during a different stage of the criminal trial[9].

As to the above mentioned situation, there is no incompatibility if the judge took part in the judgement of a case in a court of first instance and was involved in three deadlines during which evidence was admitted and administered without a solution to be passed for this case in any of the established deadlines; under this circumstance, the judge may take part in the judgement of the same case in a court of appeal[10].

Similarly, appellate judges who did not deliver judgement in the first instance, while appreciating that the sentence was unlawful solely due to the composition of the panel and ruled the annulment of the judgement and, thus, its re-judgement, are not incompatible to judge the appeal lodged against the passed sentence for the re-judgement of the case[11].

The judge - who took part in solving the case in a court of appeal even if the panel had diverging opinions - is incompatible in participating in the judgement of the same case in a court of appeal subsequent to the annulment of the judgement and its submission for re-judgement in the court of first instance[12].

2.9. The judge of rights and liberties cannot participate in the judgement of the same case at the preliminary chamber proceedings, at the first instance judgement or in case means of appeal are lodged [Article 64 paragraph (4) CPP]. This case of incompatibility of the judge reiterates some of the previous regulations and, at the same time, it includes supplementary hypotheses, which were not provided by the previous Criminal Procedure Code.

In this respect, Article 48 paragraph (1) letter a) of the previous Criminal Procedure Code provided that a judge is incompatible if he/she solved, during the criminal investigation stage, the proposal of preventive detention or of prolongation of the preventive detention.

In the studies published before the present regulations[13], we appreciate that – by regulating the incompatibility of the judge who settled, during the criminal investigation, the proposal to arrest a person preventively or to prolong the preventive detention – other

[9] The Court of Appeal Suceava, The Criminal Section, Decision no. 461/1999, in *Revista de Drept Penal* no. 2/2000, p. 155.
[10] The High Court of Cassation and Justicee, The Criminal Section, Decision no. 5269/2007, according to the web page of the supreme court.
[11] The Court of Appeal Cluj, The Criminal Section, Decision no. 208/1998, in Ion Neagu, *op. cit.*, p. 399.
[12] The High Court of Cassation and Justicee, The Criminal Section, Decision no. 5229/2006, in Ion Neagu, *op. cit.*, p. 398.
[13] Ion Neagu, *op. cit.* p. 403.

circumstances were excluded, e.g. the situations in which the judge was asked to express opinion on other aspects regarding the individual freedom of the supposedly guilty person or the culprit. In this respect, we referred to the judge who, during the criminal investigation, expressed opinion on the other measures of preventive detention (replacement, interruption or revocation of the preventive detention measure) or who settled applications as to the provisory release or who decided that freedom depriving preventive measures should be adopted against the person alleged to be guilty or against the culprit, i.e. the obligation not to leave the locality and the obligation not to leave the country. Considering the above mentioned hypotheses, the incompatibility case provided by Article 48 paragraph (1) letter a) was not contested. Under these circumstances, we appreciate that, *de lege ferenda,* a unitarily applicable regime should be implemented as regards the judge who, during the criminal investigation, settled applications regarding the individual freedom of the allegedly guilty person or of the culprit.

One can notice that the present regulation, justified by the principle of the separation of the judicial offices, provided by Article 3 CPP[14], can be applied in a significantly larger number of situations if we consider all the hypotheses in which the judge of rights and freedoms intervenes during the criminal investigation stage, not only as regards the suspect's/culprit's individual freedom, but also as regards the decisional acts related to other fundamental rights (inviolability of the domicile, right to private life, inviolability of correspondence etc.).

Thus, the judge who, during the criminal investigation stage, exercises the judicial office of adopting decisions as to the fundamental rights and freedoms of the persons is not entitled to participate in the procedure run in the preliminary chamber or in the first instance judgment, no matter the jurisdiction level. Thus, in the panel of a criminal case, there will be no judge who, during the criminal investigation, settled proposals, complaints, contestations or any other notifications as regards the procedure measures, upon request or ex officio, while agreeing upon searches or the use of special surveillance methods and techniques etc.

As to the decision of taking preventive measures, the judge of rights and liberties becomes incompatible to take part in the procedure of the preliminary chamber or to settle the case in first instance, first of all in compliance with the provisions of Article 202 paragraph (1) CPP, according to which preventive measures may be set forth if there are serious grounds and pieces of evidence which justify the reasonable suspicion that a person committed a crime and, similarly, if these measures are necessary in order to ensure the good pursuance of the criminal trial or to prevent the suspect's or the culprit's attempt to avoid criminal investigation, respectively the trial or, finally, to prevent the commission of another crime.

Under these conditions, the judge of rights and liberties who may adopt preventive measures is obliged to establish whether there are clues or pieces of evidence which justify the reasonable suspicions that the person who is criminally investigated is also the person who committed the crime. Considering these aspects, this case of incompatibility refers to a supposed lack of objectivity of the judge who expressed opinion as to the adoption of preventive measures.

In previous works[15], we appreciated that the procedure for adopting preventive measures (and we refer to preventive detention), although of a contentious nature, is not apparently a judgement activity, but, due to its procedure implications and to a set of aspects closely related to the merits of the case, at least from a probatory point of view, it creates a state of incompatibility for the judge who was assigned to solve this criminal case. Our pleading became consistent in the present form of Article 64 paragraph (4) CPP.

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[14] According to Art. 3 paragraph (3) of the CPP, the exercise of a judicial office is incompatible – during the same criminal trial – with the exercise of another judicial office, except for the situation when the held office refers to checking the legality of subjecting or non subjecting a person to trial, situation in which the two offices are compatible.

[15] Ion Neagu, *op. cit.*, p. 404.

We appreciate that it was justified to include into the incompatibilities category the hypothesis referring to the judge of rights and liberties who directed the technical surveillance. In this respect, the judge who decided that communication of any type should be tapped or that access to an informatics system should be ensured, or that a person should be subjected to video and audio surveillance, photographed etc., appreciates that there are reasonable grounds to suppose that the person under surveillance plans or intends to commit a crime. These value judgements, which result from the content of Article 139 paragraph (1) CPP, justify the incompatibility of the judge of rights and liberties, who is not able to take part, in the same case, in the preliminary chamber procedure or in the first instance judgement or in the appellate judgement.

In this respect, the judge who appreciates that there is a reasonable suspicion as to the commission of a crime by a person or as to the possession by this person of objects and documents that are connected to the commission of a crime is incompatible to participate in the preliminary chamber procedure or in the first instance judgement or in the appellate judgements; in consequence, the judge must decide for the domicile to be searched according to Article 157 paragraph (1) CPP.

As to the incompatibility of the judge of rights and liberties who, during the criminal investigation, decided for provisory medical measures to be taken, the legal arguments are not very convincing and the incompatibility of the judge is not fully justified.

Thus, according to Article 245 paragraph (1) CPP, the judge of rights and freedoms, during the criminal investigation stage, may decide for a provisory subjection of the suspect or the culprit to medical treatment if the latter, due to a certain illness, including to an illness caused by a chronic consumption of alcohol or of other psychoactive substances, poses a social threat. It is essential to mention that the medical procedure is accomplished by the judge of rights and liberties on the basis of a medical and legal expertise which confirms the necessity to apply a compulsory measure for medical treatment. In other words, the judge of rights and liberties, when taking this measure, cannot decide on probatory elements that could be relevant for the existence of the crime and that could make the judge incompatible to try the case in first instance. In this case, the judge of rights and liberties, on the basis of a medical and legal act, appreciates that the person subjected to a medical evaluation represents a threat to society.

Similarly, under Article 247 paragraph (1) CPP, the judge of rights and liberties, during the criminal investigation, may decide for the suspect/culprit to be temporarily treated in a hospital if the latter is mentally alienated or a chronicle consumer of alcohol or a consumer of psychoactive substances and if this measure is necessary to prevent an actual and concrete social peril.

Although the incompatibility of the judge of rights and liberties who rules that such medical measures should be taken is not obvious as to his/her participation in the preliminary chamber procedure or in the judgement of the case in first instance or in other appellate procedings, we appreciate that the present incompatibility regulation is justified given the specific nature of these measures, i.e. the suspect's/culprit's limitation of freedom or deprivation of freedom.

These two cases may be completed with the situation in which the judge of rights and liberties decides for an IT search to be performed. Thus, under Article 168 paragraph (2) CPP, the premise of deciding for an IT search to be pursued is represented by the need to investigate an IT system / electronic storage support for informatics data in order to identify and collect evidence. Although this provision does not influence the merits of the case, the lawmaker regulated this case while paying attention to the fact that by searching an IT system the suspect's/culprit's private life could be violated.

Prior to the coming into force of the present Criminal Procedure Code, the High Court of Cassation and Justice ruled, when settling an appellate review in the interest of the law, that *the judge who, during the criminal investigation, settled the proposal for preventive detention shall not be incompatible to solve, in the same case, other applications which aim at prolonging the preventive arrest period*[16]. (My translation)

We appreciate that this decision may also be applied under the present Criminal Procedure Code, in the sense that the judge of rights and liberties who decided for a preventive detention to be enforced may settle, later on, applications for the prolongation of this measure.

2.10. The judge who participated in settling the complaint against decisions of non-initiating criminal investigation or as to not-bringing a person before a court of law cannot take part, in the same case, in the first court judgement or in the appellate proceedings [Article 64 paragraph (5) CPP]. This case of incompatibility was not explicitly provided in the previous regulation but it was partly invoked by Article 47 paragraph (2) of the previous Criminal Procedure Code, i.e. "the judge previously expressed his opinion as to the solution that could be given to that case".

In this respect, the judge's incompatibility was provided through a judgement of the High Court of Cassation and Justice, which was delivered to settle an appellate review in the interest of the law[17]. Thus, it was deemed as incompatible the judge who admitted the complaint, through a closing, revoked the resolution or ordinance appealed against and held that the case should be judged, while also appreciating that the existing evidence is enough to judge the case.

The manner in which Article 64 paragraph (5) CPP is drawn up extends the incompatibility situations for this judge. Thus, the present legal framework provides lack of impartiality for the judge of the preliminary chamber who took part in the procedure laid down under Article 340 CPP no matter the solution that was found, a fact which is different from the mandatory jurisprudence of the supreme court stipulated by the previous code and according to which the situation of incompatibility is set forth only for the judge who admitted the complaint and decided for the case to be judged.

This case of incompatibility refers to the preliminary chamber judge, who, when involved in settling the complaint against the non-initiation of the criminal investigation or non-initiation of the trial, according to Article 340 CPP, can no longer take part in the first instance judgement or in the means of appeal initiated for the same case.

We consider important to underline the fact that, even if the subject in this regulation is the preliminary chamber judge who settles complaints against non-initiation of the criminal investigation or non-initiation of a trial, incompatibility refers to the activity performed by this judge as provided for the complaint procedure set forth in Article 340 CPP and not to the jurisdiction activity he/she performs within the preliminary chamber. Thus, as a procedure stage, the complaint procedure initiated against the solutions of non-initiation of criminal investigation or non-initiation of the trial has a distinct nature, *sui generis*, which is not related to the criminal investigation stage.

Under these conditions, Article 3 paragraph (1) letter c) CPP, which sets up the power of checking whether it is legal or not to bring a person before the court, should be interpreted

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[16] The High Court of Cassation and Justicee, The Joint Sections, Decision no. 22/2008, published in the Official Gazette of Romania, no. 311 / 12th May 2009. The arguments on which the High Court relied when adopting its decision, according to which there was a situation of compatibility, are maintained as valid in the present regulations, as well; original text: *judecătorul care a soluţionat în cursul urmăririi penale propunerea de arestare preventivă nu devine incompatibil să soluţioneze ulterior, în aceeaşi cauză, cereri care au ca obiect prelungirea arestării preventive*.

[17] The High Court of Cassation and Justicee, The Joint Sections, Decision no.15/2006, published in the Official Gazette of Romania, no. 509 / 13th June 2006.

as follows: the power of checking whether it is legal or not to bring a person before the court can be exercised by the preliminary chamber judge in accordance with the preliminary chamber procedure, which we consider to be a first stage in the judgement process, whereas the power of not bringing a person before the court is exercised by the same preliminary chamber judge within the complaint procedure adopted against the non-initiation of criminal investigation or the non-initiation of the trial.

The incompatibility of the judge for the last situation is established in compliance with the law.

However, we point out the provisions of Article 3 paragraph (3) CPP, according to which, during the criminal trial, the exercise of a judicial office is incompatible with the exercise of another judicial office except for the entitlement to check whether a person should be or not brought before the court, which is compatible with the office of a judge. Consequently, the power to check whether a person should be or not brought before the court of law, which is exercised by the preliminary chamber judge, as provided by Article 340 CPP, is compatible with the judging position; thus, the judge is entitled to take part in the first instance judgement or in the appellate proceedings lodged for that case.

We appreciate that the compatibility provided by Article 3 paragraph (3) CPP is different, i.e. the lawmaker referred to the preliminary chamber judge who is entitled to take part in the first instance judgment, who checked the legal nature of the initiation of the trial. This aspect is reinforced by the provisions of Article 346 alin. (7) CPP, according to which the preliminary chamber judge, who decided for the criminal investigation to be initiated, exercises the judging power in the case.

Under these conditions, we agree with maintaining the incompatibility for the preliminary chamber judge's participation in the first instance judgement of the case, subsequent to his/her settling the complaint against the non-initiation of the criminal investigation or the non-initiation of the trial; however, at the same time, *de lege ferenda*, it is fundamental to modify Article 3 paragraph (3) CPP, a text which has the value of a principle, and which may be applied for the entire criminal proceedings; the modifications we suggest are as follows: (3) during the same criminal proceedings, the exercise of a judicial office shall be incompatible with the exercise of another judicial office, except for the power to check whether it is legal or not to bring a person before the court, which is compatible with the judging power.

2.11. The judge who delivered judgement as to a measure that is contested cannot participate in solving that contestation [Article 64 paragraph (6) CPP]. In a hypothesis that is similar with the one provided by Article 64 paragraph (3) CPP, this case is justified by the opinion previously expressed by a judge as to a contestation, a fact which makes him/her incompatible to participate in solving that case.

By applying this case, we point out for exemplification the following situations:

- according to Article 184 paragraphs (14) and (15) CPP, the judge of rights and liberties who decided, during the criminal investigation, to take measures against the unwilling hospitalization of the suspect or culprit, cannot participate in settling the contestation against that closing; in this case, the contestation is submitted with the judge of rights and liberties from the higher court within 24 hours after the decision is made and is settled within 3 days from the day it was filed;

- according to Article 204 CPP, the judge of rights and liberties who decided, during the criminal investigation stage, for certain preventive measures to be taken, cannot participate in settling the contestation against that settling; the contestation is submitted with the judge of rights and liberties from the higher court within 48 hours from its filing and it is settled within 5 days;

- according to Article 205 CPP, the judge of rights and liberties who decided, during the preliminary chamber proceedings, for certain preventive measures to be taken, cannot participate in settling the contestation against that closing; the contestation is submitted with the preliminary chamber judge from the higher court within 48 hours since it was filed and it must be settled within 5 days;

- according to Article 252^2 CPP, the judge of rights and liberties who decided, during the criminal investigation, through a closing, that the seized movable assets should be capitalized, cannot participate in judging the contestation against that closing; the contestation may be submitted within 10 days and it must be judged as soon as possible;

- according to Article 367 CPP, the judge who ruled the annulment of the judgment through a conclusion cannot take part in the judgment of the contestation, which is submitted to the higher court within 48 hours since its submission and which must be tried within 3 days since the file was received etc.

In fact, the last case of incompatibility mentioned in the present paper with reference to the judge is based on the same premise provided by Article 64 paragraph (3) CPP, especially that, according to Article 425^1 CPP, contestation is defined as a *means of appeal*.

3. Conclusions

At present, one can notice that the legal regime of a judge's incompatibility has been regulated in connection with the Criminal Procedure Code of 1968 and it came into force on 1st February 2014. The present lawmaker took over, to a large extent, provisions laid down by the previous laws, completing incompatibility cases with new hypotheses. Thus, a substantial increase has been recorded for the situations in which the judge is incompatible.

We can further conclude that many of the cases of incompatibility are grounded not only on the necessity to have the cases solved by impartial magistrates, but also on the specific regulation, which is a principle of the criminal trial, that it is the rule to separate judicial powers.

The present legislative criminal framework is superior to the previous Criminal Procedure Code. However, there are examples of norms that may be criticised and that must be, *de lege ferenda*, modified in the future.

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