

THE IMPORTANCE OF PRE-TRIAL CHAMBER IN CRIMINAL PROCEEDINGS. PROCEDURE AND CONTROVERSIAL ISSUES

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Abstract

Following a legislative proposal to eliminate the pre-trial chamber phase from the criminal proceedings, I decided to study its properties and express my opinion on its importance.

Analyzing the pre-trial chamber and the trial procedure, I found that its delimitation from the trial phase by clear differences imposed by the code of criminal procedure is of particular importance.

Its nature is to carry out a complex legal control over the criminal investigation phase in order to give effectiveness to the fundamental principles of the criminal proceedings and to guarantee compliance with the legal provisions in force.

Through my study, I aim to delimit some notions that have a practical, but also theoretical importance, in order to identify and distinguish the procedures regulated in the new code of criminal procedure regarding the institution of the pre-trial chamber.

I intend to set out the procedure, but also the issues discussed in contradiction in the specialized practice, as well as in doctrine, in a technical manner in order to outline its essential features and to delimit the usual procedure from other derived procedures in which the legislator used the phrase "pre-trial chamber judge", although this is not found in the pre-trial chamber phase.

Also, the delimitation of these proceedings leads to a practical understanding of the functionality of the pre-trial chamber and to the elimination of the confusions of judicial proceedings conducted in a particular procedure.

Keywords: *pre-trial chamber, theoretical problems, procedure, remedies.*

1. Definition of pre-trial chamber, as provided in the New code of criminal procedure in relation to its subject matter

The pre-trial chamber is a phase of the criminal trial, in my opinion, and not a stage of the trial phase. Starting from the simplest reasoning, as positioned in the Code of Criminal Procedure, it is after "Chapter VII. Complaint against criminal prosecution measures and acts", but before the „ Title III. Judgment", which shows us that it is an independent phase, and not a stage embedded in the judgment phase.

The legislator also understood to regulate from the first part of the code of criminal procedure, namely in art. 3 para. (1) letter c) – the function of verifying the legality of sending or not sending to court, and in the same article letter d) – the judicial function, which denotes the fact that it understood to separate the judicial functions by positioning them in a natural order, this being found even in the chapters and titles of this code.

Indeed, the judge of the pre-trial chamber after disinvestment becomes a court, but this cannot lead us to the idea that this phase of the criminal trial is an integral part of the trial phase, but the judicial function it exercises is to control the legality of the execution of

criminal prosecution acts (in a narrow sense), not that of judgment.

In my opinion, the legislator did not want this, basing my opinion on the old codes of criminal procedure, in the sense that in the code of criminal procedure of 1968 the pre-trial chamber did not exist, but its functions were, by absorption, taken over by institutions present in the trial phase.

As he could choose to integrate the institution of the pre-trial chamber in the trial phase, by extending the functional competence of the trial judge, we can see that it is completely delimited by its object which is distinct from that of judgment, and analyzing the provisions of art. 342-347 of the New Code of Criminal Procedure, we can see that the procedure, the solutions and the decisions it has do not lead to a conclusion of diminishing its properties, but to the consolidation of the idea of differentiation.

As object, the pre-trial chamber represents a complex control over the criminal investigation phase in terms of its legality as well as the verification of the jurisdiction of the court of which this pre-trial chamber judge is a part.

We can see that from the first article (art. 342 of the New Code of Criminal Procedure) which defines the object of the pre-trial chamber we find an atypical feature, namely the lack of analysis of the merits of the accusation brought against the defendant, which leads

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us to the conclusion that it is based exclusively on the legality of the prosecution.

In article 342 of the New Code of Criminal Procedure we find the object of the pre-trial chamber: „The object of the pre-trial chamber procedure is the verification, after the trial, of the competence and legality of the referral to the court, as well as the verification of the legality of the administration of evidence and the execution of acts by the criminal investigation bodies”.

From this text we can notice the tendency of the legislator to subject the criminal investigation to a perfect analysis because this represents the first phase and the one without which there can be no legal criminal trial, a complex filter that offers the possibility for the representatives of the Public Ministry to discover by criminalizing as crimes the dangerous deeds directed against the society in order to endanger the values protected by the criminal law.

The criminal prosecution, among other things, concerns the discovery of criminal actions, their analysis and the possibility of prosecuting the perpetrators of crimes.

2. Delimitation of pre-trial chamber procedures and other institutions of the New Code of Criminal Procedure targeting the intervention of the pre-trial chamber judge

In certain cases, the code of criminal procedure imposes a certain control over certain institutions of criminal prosecution (*e.g.* confirmation of waiver of criminal prosecution; complaint against non-prosecution solutions) by a pre-trial chamber judge.

Given that the legislator did not emphasize the distinction between the pre-trial chamber and this control of a pre-trial chamber judge, confusion may arise in certain situations.

Starting from the fact that its object, as I have shown above, does not provide for the analysis of the validity of the solutions, we cannot say that we are in the presence of the pre-trial chamber regulated by 342-348, but in a pseudo pre-trial chamber with special procedures regarding the various regulations in which the phrase "pre-trial chamber judge" appears”.

The subject of special proceedings concerning the intervention of the court through the judge of the pre-trial chamber are such as to control the solutions ordered by the prosecutor (in this case - confirmation of the waiver of the criminal investigation) in a new way that was introduced by the new code of criminal procedure after the amendment, because it is an act of disposition of the prosecutor in order to waive the application of the coercive force of the state in case of committing a crime with a low degree of danger within

the parameters imposed by law. Although the ordinance to waive the criminal investigation is subject to confirmation by the hierarchically superior prosecutor of the one who ordered this solution, judicial control is required over it in order to avoid problems that could jeopardize the integrity of the justice.

In other words, the legislator artificially created a procedure to verify the solution ordered by the prosecutor during the criminal investigation (that of waiving the criminal investigation) by double "jurisdiction", which means that, in accordance with art. 318 – the hierarchically superior prosecutor of the one who ordered the solution expresses his point of view on the fulfillment of the conditions provided in order to be able to order this solution (legality and soundness), following that the last verification belongs to the judge of the pre-trial chamber in a special procedure provided by art. 318 para. (11)-(16).

We can notice another legislative difference in the fact that the solution ordered by the judge of the pre-trial chamber in this procedure is final, while any solution provided in art. 346 is subject to appeal.

I believe that this deprivation of appeal is appropriate because, as a specified earlier, the solution of the waiver is subject both to the verification by the hierarchically superior prosecutor of the one who ordered the solution, as well as to the judge of the pre-trial chamber.

The Romanian legislator decided to separate the verification of the legality of the criminal investigation actions from the trial phase (as regulated in the old code of criminal procedure) by introducing a new distinct institution which it raises to the rank of a separate phase of the criminal trial in order to have a complex analysis of the criminal prosecution in line with compliance with the European Convention on Human Rights and by aligning national legislation with European standards.

Inspired by both the German and Italian criminal procedure codes, the legislature has devised a special way of verifying the criminal investigation phase by externalizing the idea of security of justice and materializing the struggle of states against corruption of civil servants by regulating this procedure, as well as by the solutions that the judge of the pre-trial chamber has in the usual procedure of sanctioning the actions performed in violation of the law by the criminal prosecution bodies in a drastic way.

Through the special procedures in which we find the pre-trial chamber judge outside it, the legislator established in the task of the prosecutor a competence to rule on the criminal action through the solution of waiving the criminal prosecution under the law, which offers the opportunity for the prosecutor to end the criminal trial through a solution that does not aim at the

intervention of the court, but only at its confirmation by a judge.

As a first distinction between the pre-trial chamber procedure and a special procedure, we can notice that the solutions that the judge has in the two variants are diametrically opposed.

As opposed to the procedure set out in art. 342-348 of the New Code of Criminal Procedure, in the special complaint procedure against the closure order (the situation in which such an appeal may be exercised is clearly provided for in the code of criminal procedure and namely – the complaint may be referred to the judge of the pre-trial chamber of the court competent to adjudicate the case at first instance in the event that, previously, a complaint was filed with the hierarchically superior prosecutor than the one who ordered the solution, and he/she did not respond within 20 days or it was rejected) the judge of the pre-trial chamber may order the commencement of the trial in a single case, which entails certain consequences.

Art. 341 (7) (2) (c) of the New Code of Criminal Procedure states that, in the context in which the judge of the pre-trial chamber is called upon to rule on the solution ordered by the prosecutor, the criminal action has been initiated beforehand, and the legally administered evidence is sufficient, he/she may order the commencement of the trial.

Atypical form of criminal trial (art. 341 (7) (2) (c)) entails the incompatibility of the judge to exercise the function of judge because he enters into the analysis of the factual situation in order to find that it is not necessary to maintain a solution of non-trial or non-prosecution, but that of starting the trial. After the decision (sentence) to start the trial is pronounced, the text of the law expressly provides for the removal of the judge from the narrative thread of the criminal trial, the file reaching by random distribution to another judge of the respective court.

This procedure exceeds the scope of the pre-trial chamber, in that the judge examining the complaint against the closure solution also decides on the soundness of the accusation, considering that there is enough evidence in the case file (legally administered) to be able to pronounce a solution in the trial phase among those provided in art. 396 and art. 397 of the New Code of Criminal Procedure.

Given that the solution he/she pronounces is diametrically opposed to the original, and the judge used a procedure similar to the pre-trial chamber, the legislator makes available to the prosecutor, the petitioner and the respondents, within 3 days from the communication of the conclusion, the possibility to exercise the right of appeal, which is the only exception in which an appeal is accepted.

As a peculiarity, the unmotivated appeal against this solution is inadmissible according to art. 341 para. (9).

I admit that this remedy was naturally adopted in order to ensure dual jurisdiction, given the fact that the judge of the pre-trial chamber annuls the solution of non-trial or non-prosecution and orders the beginning of the trial.

3. Pre-trial Chamber Procedure

Starting from the object provided for in Article 342, we can notice as a first specificity the fact that the judge, after being sent to trial, analyzes the jurisdiction of the court in all aspects provided in the code of criminal procedure, as well as the legality of its referral.

By the analysis of the competence we understand the corroborated and unitary interpretation and application of the criminal procedural norms regarding the material, territorial competence and according to the quality of the person.

By the legality of the notification we have in view the act of notification of the court (the conditions imposed by law for the indictment provided in art. 327 and 328 of the New Code of Criminal Procedure) seen as a cumulative set of conditions in order to be effective.

The final thesis of art. 342 of the New Code of Criminal Procedure speaks about the object involving direct aspects to the reason of the legislator for which this procedural phase was instituted and without which it would be ineffective – „...the verification of the legality of the administration of evidence and the execution of acts by the criminal investigation bodies. – art. 342 of the New Code of Criminal Procedure final thesis.

In conjunction with the provisions of art. 343, where we find a procedural term for recommendation, the legislator's task was to increase the speed of difficult procedures, in order to limit the number of attempts by defendants to extend the reasonable length of criminal trial.

Established at the level of principle, the reasonable term of the criminal trial is an essential component for the good conduct of the trial. If a delicate situation is reached with a prolonged duration, the criminal trial is affected within the meaning that the discovery of the judicial truth and the restoration of the previous situation, as we find a definition of it in the specialized doctrine, are hindered or it may even reach to the situation where it would be impossible to obtain evidence.

The judge appointed for this procedure proceeds to verify the legality of the administration of evidence by examining whether all the conditions imposed by law for the evidentiary proceedings have been met

(example: compliance with the letter and spirit of the law in the event that the judge of rights and freedoms ordered a house search), as well as the steps in the proceedings performed during the criminal investigation by the criminal investigation bodies (the search warrant issued on the basis of the decision of the JDL, the minutes of the collection of documents based on the search, etc.).

Although the prosecutor is the first pawn in the structure of the criminal trial (being the master of the criminal investigation phase - the first phase of the criminal trial without which there can be no legal criminal trial), he shall ensure that the necessary evidence is gathered as to the existence of the offenses. In other words, the prosecutor is investigating the case on which the trial will be judged, which is an overwhelming responsibility.

The pre-meeting measures from the pre-trial chamber are set out in art. 344, citing in para. (1) another argument for those mentioned above, namely "After notifying the court through the indictment, the case is randomly distributed to the judge of the pre-trial chamber".

Regarding this phrase, although we are shown that "after notifying the court ...", we must understand the whole phase of the criminal trial of the pre-trial chamber, not the stage, because the indictment, although an act of referral to the court, did not enter directly into the trial procedure, the initial limit of the latter being the conclusion of the pre-trial chamber judge by which the commencement of the trial was ordered.

We understand that, beyond the multitude of controls, there is a random distribution that allows the defendant to form his own defenses based on the principles enacted in the field of criminal law, there are guarantees of fair proceedings.

In order to inform the participants of the procedure in the pre-trial chamber, the judge shall provide a certified copy of the indictment, as well as the rights and obligations they have.

Art. 344, para. (2), sentence 1 tells us about the one on whom the coercive force of the state is directed (the defendant), ensuring the defendant with the provision of the necessary information in order to build an effective defense (regarding the legal execution of measures and actions of criminal prosecution).

Emphasis is also placed on the fact that, regardless of its capacity in criminal trial, the court shall make known the subject-matter of the pre-trial ruling proceedings, the right to have a chosen defender, the right to formulate requests and exceptions, as well as the term in which they can fulfill, depending on the particularities of the case, the mentioned ones, the term not being allowed to be shorter than 20 days.

In this regard, the High Court of Cassation and Justice of Romania pronounced the decision no. 14/2018 by which it ruled: „The time limit within which the defendant, the injured party, and the other parties may make written requests and objections to the lawfulness of the referral to court, the legality of the administration of evidence and the execution of acts by the criminal investigation bodies is a term of recommendation". By this we understand that the violation of the term does not entail a sanction.

The compulsoriness of the legal aid is not mandatory at the pre-trial chamber stage, unless:

- The penalty provided for by law for the crime committed is more than 5 years or life imprisonment;
- If the judicial body considers that the defendant could not defend himself;
- When the defendant is a minor, hospitalized in a detention center or in an educational center, when he is detained or arrested, even in another case, when the security measure of medical hospitalization was ordered against him, even in another case;
- In other cases provided by law.

Another important aspect, if within the term of formulating the requests granted by the judge, the participants submit the requests to him, the deadline for settlement is set with the summoning of the parties, the injured party and the prosecutor for settlement.

As a sanctioning treatment for procedural passivity, art. 346 (1) provides us with the possibility for the judge to order the commencement of the trial, if no requests and exceptions have been made or if they have not been raised *ex officio*, on the one hand, and on the other hand, if the participants consider that the criminal investigation is legally carried out, the judge orders this solution.

As a novelty, the judge of the pre-trial chamber may invoke *ex officio* any nullity provided in art. 280-282 of the New Code of Criminal Procedure, which was not one of the legal provisions of the February 2014 code of criminal procedure, being modified art. 346 by art. I point 11 of the GEO no. 82/2014, article amended by Law no. 75/2016.

If requests and exceptions have been made, the judge, in the council chamber, resolves them and listens to the conclusions of the parties and the injured person (participation is not mandatory, they can be tried *in absentia*), as well as the prosecutor, based on the criminal investigation material.

In the specialized doctrine there were opinions that showed the unconstitutionality of paragraph 1 of art. 345 – only the phrase “any new documents presented” – because it limits the judge of the pre-trial chamber only to the administration of certain documents and does not allow him to administer other means of proof which, perhaps, may benefit from an

increased "weight" of evidence in proving the claims of the participants.

In this regard, the Constitutional Court being notified in order to resolve this issue, showed that the phrase is unconstitutional, a solution that substantiated the CCR Decision no. 802/2017, resulting, therefore, that any means of proof can be administered in this procedure.

Before proceeding to the actual solutions made available to the judge of the pre-trial chamber, I would like to discuss para. (3) of art. 345 together with the possibility for the judge to return the case to the prosecutor.

In the event of finding irregularities in the act of notification, following the sanctioning of criminal prosecution acts or if the evidence is excluded (one or more), the judge asks the prosecutor to remedy the indictment within 5 days from the communication of the decision, informing the judge if he maintains the order to sue or requests the restitution of the case.

This possibility for the prosecutor to request the restitution of the case is based on the fact that there is a probability that following the sanction with absolute or relative nullity of the evidence (one or more), the accusation brought against the defendant will be weakened. In his efforts not to tip the scales, the legislator offers the prosecutor this option to complete the criminal investigation and to reach a decision on whether or not to maintain the solution after it has been completed.

I admit that it is an advantage that the legislator has established in favor of the representative of the public ministry, an advantage that can have a hard outcome for the defendant and that can be likely to change his legal situation, but we must keep in mind that finding out the truth takes precedence.

It should be noted that, in the event of the conclusion of a plea agreement by the prosecutor and the defendant, the law excludes the pre-trial chamber phase of the criminal proceedings.

In other words, the special procedure of the plea agreement provided by art. 478-488 provides that the case, together with the agreement, is submitted to the court for admission or rejection.

Starting from the fact that finding out the truth is one of the most important desideratum of the criminal procedural law, and coercive force directed against the defendant must be such as to correct the consequences of the offense, the legal provisions governing this issue tend towards a good and fair administration of justice.

Also, given that the need to ensure equality of arms offers the defendant the opportunity to draw conclusions about this solution (rejecting the prosecutor's request by claiming that he did not remedy in time the irregularities of the act of referral), I find this a balanced method and claim that its rights are not

violated and do not offer a real advantage to one of the parties.

4. Pre-trial Chamber Judge's solutions

The legal basis for the solutions made available to the Pre-Trial Chamber Judge is contained in art. 346 of the New Code of Criminal Procedure. It provides the solutions, the arrangement, as well as the situations in which there are incidents.

As a first solution, the judge orders the start of the trial if no requests have been made (neither by the participants, nor ex officio) and no exceptions have been raised, after the expiration of the terms offered (as mentioned above), in the council chamber without summons.

We notice the attitude of the legislator in relation to the procedural passivity by the fact that he obliges the judge to order the beginning of the trial, not offering him the possibility to postpone the case. The speed of the procedure is the primary element in the reason for enacting these rules, and this can be deduced from the coding of the articles within the institution of the pre-trial chamber.

As a particular aspect, we note that art. 346 para. (1) the final sentence establishes a derogation from the mandatory participation of the prosecutor in that: "...The judge of the pre-trial chamber shall rule in the council chamber, without summoning the parties and the injured person and without the participation of the prosecutor, by conclusion, which shall be communicated to them immediately."

Nevertheless, in judicial practice, the Pre-Trial Chamber judge asks the participants if they have any requests or exceptions to be made within the time allowed for this purpose (being a procedural term of recommendation), these being able to take into account requests for recusal, etc., being within the legal term of formulation, the final provisions of art. 346 para. (1) being ineffective.

In this last assumption, the judge of the pre-trial chamber admits or rejects the requests made by the participants and orders one of the solutions provided in art. 346 of the New Code of Criminal Procedure.

The second solution provided by the code of criminal procedure is set out in the second paragraph, which is for the judge to order the commencement of the trial if he has rejected the requests and exceptions made under art. 344 (1) and (2).

Based on art. 346 (3), we find 3 reasons why the case should be returned to the prosecutor's office:

- The indictment is unlawfully drawn up and the irregularity has not been remedied by the prosecutor within the time-limit laid down in art. 345 (3) if the irregularity makes it impossible to establish the subject-matter and limits of the judgment;

- Excluded all evidence administered during the criminal investigation;

- The prosecutor requests that the case be returned, in accordance with art. 345 (3), or does not respond within the time limit set by the same provisions.

The text of the law brings into question certain particular situations and obliges the judge to dispose of them by strict methods.

„In all other cases in which it found irregularities in the act of referral, excluded one or more pieces of evidence administered or sanctioned in accordance with 280-282 the criminal prosecution acts carried out in violation of the law, the judge of the pre-trial chamber shall order the commencement of the trial "- art. 346 para. (4).

Following his disinvestment as a judge of the Pre-Trial Chamber, under art. 346 (7), he becomes a court and proceeds to examine the merits of the case.

Also, by being in the presence of the same judge who examined the legality of the prosecution and sanctioned the evidence (in the first instance), the legislator established in art. 346 (5) that “excluded evidence cannot be taken into account to the trial on the merits of the case”.

5. Remedies

The remedy against the conclusion of the pre-trial chamber judge is the appeal. Art. 347 of the New Code of Criminal Procedure expressly provides for the possibility of the prosecutor, the parties and the injured person to challenge the conclusions of the judge of the pre-trial chamber that he pronounced based on art. 346 para. (1)-(4²).

Also, the appeal provided in art. 347 of the New Code of Criminal Procedure is duly completed with the provisions of art. 425¹ of the New Code of Criminal Procedure, without altering the derogations from the general rule which the former establishes.

6. Procedure for appeal

After the communication of the decision ordering the solution (among those provided for in art. 346), within 3 days, the prosecutor, the parties and the injured party may exercise this appeal.

In the final thesis, art. 347 (1) states that the exercise of the right of appeal may also concern the manner in which claims and exceptions are to be settled.

The appeal is judged in full by 2 judges from the hierarchically superior court who proceeded according to art. 345-346 of the New Code of Criminal Procedure. When the notified court is the HCCJ, the appeal is

judged by the HCCJ in full by 2 judges of the criminal section.

The presence of the prosecutor is mandatory throughout the procedure, both in the pre-trial chamber procedure and in the appeal.

At the end of art. 347, the legislator regulates that no other exceptions or requests may be made (other than those already made in the pre-trial chamber procedure), except in cases of absolute nullity.

In the special procedure regulating the atypical form of criminal proceedings [art. 341 (7) (2) (c), art. 341 (9)] informs us that it is possible to file an appeal against the judge's decision to start the trial, a particular aspect, because in other cases the decision is final.

7. Preventive measures in the pre-trial chamber

Given the fact that we are before a judge, after the end of the criminal investigation and before the start of the trial, he/she has the possibility, as well as the obligation in certain cases, as is natural, to rule on preventive measures against the defendant.

Art. 348 states in the first article that the judge shall rule on request or ex officio on the taking, maintenance, replacement, revocation or termination of preventive measures. The provisions on preventive measures will be applied directly.

8. Appeals against preventive measures in the pre-trial chamber

A confusion that arose from the study of specialized papers is that, when attacking the solution to start the trial (for example), the judges of the hierarchically superior court are able to rule on preventive measures.

As the Constitutional Court itself noted, the provisions that provide for this are unconstitutional, for which reason the power to adjudicate belongs to the judge of the pre-trial chamber from the court which would have jurisdiction to adjudicate the case at first instance. Apart from the fact that they are unconstitutional, those provisions also circumvent the application of art. 207 of the New Code of Criminal Procedure.

A second confusion followed by a well-founded question is that the decision ordering the commencement of the trial may contain a provision on preventive measures (example: the commencement of the trial is ordered, and the measure of pre-trial detention is maintained by the same decision).

Although named the same way, the two remedies are procedurally different.

1. An appeal against the order for commencement of the proceedings shall be lodged within three days of service of the judgment.

2. An appeal against the decision ordering preventive measures shall be lodged within 48 hours of its pronouncement.

The appeal against the order for the commencement of the trial may not also be regarded as brought against the provision in the operative part of the order in which the judge hearing the appeal rules on (the taking, maintenance, replacement, revocation or termination by operation of law of preventive measures) a preventive measure.

Such a combination and interpretation of the rules of criminal procedural law referring to the two types of appeal leads to an erroneous legal approach designed to circumvent both institutions.

In my opinion, if we find ourselves in such a situation (the order for the commencement of proceedings also contains a provision on a preventive measure), although, unlikely, the final provision relating to the precautionary measure will be challenged within 48 hours of the contested decision, at which point the provisions of art. 205 of the New Code of Criminal Procedure will apply. This objection will not be deemed to have been made against the judgment in its entirety.

It is preferable, in the case shown above, to have a conclusion concerning the preventive measures at an earlier period, as well as a second subsequent conclusion concerning the solution of the pre-trial chamber.

Such an approach can also be observed in the case in which the court rules on preventive measures by sentence, a provision which, in a sense, can be directly challenged by appeal.

9. Conclusions

The procedure of the pre-trial chamber is likely to streamline the narrative thread of the criminal trial, to relieve the court, in the process of finding out the truth, to verify the legality of all criminal prosecution acts and to bring the Romanian legislation into European alignment.

Also, the legislator intended to build a filter procedure that would allow the court to verify the validity of an accusation based on evidence already presumed to be legally administered, given that it is subsequent to the pre-trial chamber.

I have repeatedly shown its importance in the elaboration of this paper, and in my opinion, the legislative proposal to eliminate this institution is not one of the most effective.

The Pre-trial Chamber, as a phase of the criminal proceedings, is likely to bring to the attention of the judiciary a thorough analysis of the legality of the proceedings, respect for human rights and the strengthening of the fairness of justice.

I consider that I have not touched on all the aspects that could be proposed during the research and examination of this institution by presenting my opinions, in general, the topics that present an obvious problem.

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