The creation of the National Anti-Corruption Commission: Is it an administrative reform to fight corruption efficiently?

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Introduction

The goal of this essay is to reflect on the administrative anti-corruption reform which was born from the Constitutional Reform project to create the National Anti-Corruption Commission (Spanish: Comisión Nacional Anticorrupción CNA) which was presented on November 15th 2012 to the Senate by the Institutional Revolutionary Party (Spanish: Partido Revolucionario Institucional, PRI) and the Ecological Green Party of Mexico (Spanish: Partido Verde Ecologista de México, PVEM).

Mexico is experiencing an important moment of political change which will determine the main parameters for responsible exercise of public power in public administration. In this sense, it is important to mention that the aforementioned proposal has been refuted by the National Action Party (Spanish: Partido Acción Nacional, PAN) and the Party of the Democratic Revolution (Spanish: Partido de la Revolución Democrática, PRD) who have made proposals on this topic. The legal-administrative implications derived from the institutionalization of an anti-corruption body in Mexico continue to be analyzed in the Republic's Senate.¹

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¹ Three and a half months after it was formally presented as an initiative, the matter remains the same: said initiative to create the National Anti-Corruption Commission (Spanish: Comisión Nacional Anticorrupción CNA) is being consulted by the Republic’s Senate and it will not be probably approved in the first regular period of sessions of the current legislature. PAN Senators have strongly opposed and criticized the disappearance of SPF and the creation of CNA.
The proposal made by the new government is based on the Pact for Mexico (Spanish: Pacto por México), document which contains in section 4.3 the creation of the National Anti-Corruption System thanks to a constitutional reform that allows the establishment of a National Commission, state commissions in charge of preventing, investigating, sanctioning administratively and denouncing to proper authorities corrupt acts in public administration.\(^2\)

This essay mentions some observations regarding the creation of an anticorruption body and strengths and weaknesses regarding the construction of a public body to fight corruption effectively. The bases of public administration reform in Mexico are summarized as well as the main characteristics of the anti-corruption administrative reform.

The main arguments that support the creation of an anti-corruption body are mentioned, taking into account opinions and studies which have already been developed, and that will surely be developed in the future to establish the viability of the reform; lastly, the minimum elements public policies require to fight corruption effectively are analyzed in an administrative structure like the one proposed by Enrique Peña Nieto’s government.

1. Reforming public administration.

Reforming public administration is a complex practice; it includes changing institutional structures and organizational procedures to obtain better government result, taking into account the importance of the human factor, for it would be impossible to implement the suggested procedural changes.

In Mexico, public administration’s institutional and procedural structures have gone through various reform processes. It is worth noting that during the 20th century, during Luis Echeverría Álvarez’s (1970-1976) government, “eleven administrative reform programs were created and implemented in each Ministry, Administrative Departments, Internal Commissions Administration (Spanish: Comisiones Internas de Administración, CIDA), with the help of Units of Organization and Methods (Spanish: Unidades de Organización y Métodos, UOM) and with the assistance of programming units”\(^3\)

During José López Portillo’s (1976-1982) government, administrative reform established “the National Planning System, which was regulated by the new Federal Public Administration Organic Law (Spanish: Ley Orgánica

\(^2\) Pact for Mexico, retrieved on January 30th: www.presidencia.gob.mx/wp-content/uploads/2012/12/Pacto-Por-M%C3%A9xico-TODOS-los-acuerdos.pdf

de la Administración Pública Federal), the promulgation of the Budget, Accounting and Public Spending Law (Spanish: Ley de Presupuesto, Contabilidad y Gasto Público) and the Public Debt Law (Spanish: Ley de Deuda Pública) (...) and the Ministry of Programming and Budget (Spanish: Secretaría de Programación y Presupuesto, SPP) which is one of the last historical links in the administrative development of topics such as programming and planning in our country.”


The action approach of this office has been transformed; it started as coercive and became preventive in terms of fighting corruption. Main reforms led to the 2000 institutional transformation which focused on transparency and access to information; control and monitoring of public resources; public employees’ responsibilities and public administration's professionalization. Thus, in terms of institutional development, Mexico has taken important steps to implement transparency in public institutions as counterweight to discreetional exercise of power and public resources.

In 2000, the Supreme Audit Law (Spanish: Ley de Fiscalización Superior) and the Superior Auditing Office of the Federation (Spanish: Auditoría Superior de la Federación), body with technical and managerial autonomy, monitoring powers of the three powers of the Union and the one which substituted Tax Treasury Accounting (Spanish: Contaduría Mayor de Hacienda).

Currently, Mexican democracy is undergoing political alternation and the return of the Institutional Revolutionary Party (PRI) as ruling party. Ergo, the government is supposed to consolidate itself as one with efficient, effective, transparent, well-administered, citizen-oriented, corruption-free institutional structures. This is the only way citizens’ negative perception on government and bureaucracy can be improved.

Similarly, we can mention the issuance of norms such as: Law on Administrative Responsibility of Public Employees (2002) (Spanish: Ley de Responsabilidades Administrativas de los Servidores Públicos),

6 Ibidem, p. 25.
Professional Career Service Law (2003) (Spanish: Ley del Servicio Profesional de Carrera) and the Federal Anticorruption Law on Public Procurement (2012) (Spanish: Ley Federal Anticorrupción en Contrataciones Públicas). The latter establishes the legal bases of an important subject that needs to be addressed, that is still part of the public agenda and whose actions need to be continuously addressed to institutionally strengthen the Mexican government to configure effective anti-corruption public policies.

The new government’s challenge is to find the ability to mold pre-existing institutional structures, guiding them to effective policies on transparency, professionalization, accountability and fight against corruption.

The thematic central concepts that guide the Pact for Mexico give birth to three reforms:

a) Improve the financial accountability system and approved mechanisms to ensure citizens’ access to information on public spending (Commitment 82).

b) Promote constitutional reform to transform the Federal Institute for Access to Public Information (Spanish: Instituto Federal de Acceso a la Información y Protección de Datos, IFAI) into an autonomous constitutional body with powers over all federal public institutions. (Commitment 83).

c) creation of the National Anti-Corruption System thanks to a constitutional reform that allows the establishment of a National Commission, state commissions in charge of preventing, investigating, sanctioning administratively and denouncing to proper authorities corrupt acts (Commitment 85)\(^7\).

The last reform is the object of study of this essay; nonetheless, it is curious that commitments established to fight corruption do not include actions to avoid corrupt acts in public procurement. On the other hand, our new government gave the first steps to achieve administrative reform by reforming the Federal Public Administration Organic Law.

1. 1 Federal Public Administration Organic Law Reform.

On January 2\(^{nd}\) 2013 the Official Journal of the Federation published “Decree to reform, supplement and repeal several dispositions of the Federal Public Administration Organic Law”, with which disappears the Ministry of Public Function (SFP); however, it is important to mention that until the anti-corruption body is created, the Ministry must give continuity to implemented actions and policies.

\(^7\) Pact for Mexico (op cit).
Reforms made to the Federal Public Administration Organic Law are transcendental because they will define the governmental body’s public affair management model which will concentrate power, resources and powers for three ministries: Tax and Public Credit, Interior and Social Development. The Ministry of Agrarian, Territorial and Urban Reform was also restructured.8

The reform does not take into account the management of the Professional Career Service; however, the Senate’s Interior Commission approved on November 2012 the elimination of the following job positions: General Directors and Deputy General Directors which are now included on the trust-and-management section of public administration. Thus, 3 thousand 937 managerial-level positions of the federal public administration have been allotted by using the professional service; only 472 public employees were certified and will have the opportunity to keep their jobs.9

The creation of an anti-corruption body is not an isolated situation; on the contrary, the institutional framework must be reformed to build anti-corruption policies in Mexico. This goes hand-in-hand with the disappearance of the Ministry of Public Function which forces us to reconsider federal transparency, access to information, protection of personal data, accountability and professional career service policies.

Current criticism to the anti-corruption strategy proposed by Enrique Peña Nieto’s government is that it requires holistic vision; that is transversal one which makes it possible to clearly identify responsibilities, periodic evaluations and continuity. Initiatives which fragment the fight against corruption only address its effects and not the underlying causes.10

In this sense, governments must understand that reducing corruption takes years of implementing policies and having credible institutions. This does not imply that the creation of a new anti-corruption body is not important. “Good institutional design can increase the possibility of achieving planned goals. Faulty constructions will only generate new problems which will cost more and contribute to institutional fragmentation and citizens’ lack of trust”.11

These powers should be used to inhibit and sanction corrupt practices; promote a culture of legality; establish accountability mechanisms; monitor public management; improve regulatory processes and professional service and make good use of federal real estate. Once the creation of the anti-corruption body is approved, the powers of this body will have to be restructured administratively; the Ministry of Tax and Public Credit, the Superior Auditing Office of the Federation, the Federal Institute for Access to Public Information and the Attorney General’s Office will participate so that the current institutional structure does not have double functions and establishes a realistic anti-corruption policy.

The programs it had will or will not be carried out by the 2012-2018 public administration. The accountability approach mentioned by section 4.1 of the Pact for Mexico:

“the approved reform will be implemented to improve accountability in the three levels of government and establish common rules and approved mechanisms to ensure citizens the right to access information on public spending.”12

It is worthy to mention there are several meanings for accountability. One of the most accepted ones says that it does not only entail the communication of information, but democratic governments also see transparency, access to information, accountability as means, elements used by states governed by the rule of law to be able to communicate efficiently and effectively with their citizens.13

In turn, accountability implies “a pro-active process through which public employees inform, explain and justify their plans, performance, goals [to their citizens] and accept the appropriate [administrative and penal] sanctions”.14

Mexico has made normative and institutional advances in transparency topic; however, social efforts have not been articulated to achieve effective accountability which includes citizens’ participation as an active element in the monitoring of public resources in public administration.

In this sense, work done by the Superior Auditing Office of the Federation on monitoring public accounts has to be recognized; in other words, work done to review management, custody and spending of public resources

12 Pact for Mexico (op cit)
14 Ibidem, p. 16.
–income, expenses, grants, transfers and donations—. It also reviews financial, patrimonial, budgetary and programmatic information of bodies that are monitored.\textsuperscript{15}

The goal of monitoring Public Accounts is to evaluate the results monitored bodies yield on the topic of financial management; ascertaining the Budget, Income Law and other legal dispositions have been enforced. On the other hand, audits allow the fulfillment of federal programs’ goals in accordance with norms and posterity, annuity, legality, definitiveness, impartiality and reliability principles.\textsuperscript{16}

In the future, the fight against corruption must consider the strengthening of existing institutions which are the bases of anti-corruption public policy development. In this sense, the impending reform to article 79, the anti-corruption body will be linked to the Superior Auditing Office of the Federation thanks to an anti-corruption General Law. This proposal has not been made public and has not been analyzed, discussed and ruled by the Legislative power.

2. Corruption and citizens’ perception in Mexico.

Corruption is a topic which is part of our daily social environment. It is not correct to think that it is practiced by public employees who use their public office to obtain personal benefits and “work” more quickly. Citizens can also commit corrupt acts by offering money in exchange for not being ticketed or to be “recommended” for job positions.

The line dividing honesty and corruption is a very fine one. Sometime we do not understand the consequences of some tiny acts we commit to gain personal benefits; however, citizens, public employees, business owners and social, public or private organizations do not take into account said consequences and disrespect norms and promote the undermining of society’s and public institutions’ coexistence and development.

National and international indexes reflect country’s progresses and setbacks on corruption topics. Transparency International’s 2012 Corruption Perceptions Index analyzed 176 countries using surveys and evaluations carried out by recognized institutions. The Corruption Perceptions Index scores countries on a scale from 0 (highly corrupt) to 100 (very clean). Mexico’s score was 34 awarding it the 205\textsuperscript{th} place.\textsuperscript{17} 66\% of countries in the American Continent had a score below 50 points; Canada was the less corrupt country (84 points) and Haiti and Venezuela are tagged as “highly

\textsuperscript{15} Federal Law of Audit and Accountability (2010, June 18\textsuperscript{th}). Article 1. DOF.

\textsuperscript{16} Ibidem.

corrupt” countries (19 points).\textsuperscript{18} Mexico’s score puts it at the same level that Algeria, Armenia, Bolivia, Gambia, Kosovo, Mali and Philippines.\textsuperscript{19}

Corruption has been in our country a recurring subject and it is getting more and more expensive for those who carry out these acts and those who suffer from a corrupt act. This can be confirmed by observing statistical data shed by different international organizations, the Corruption Perceptions Index carried out by Transparency International in 2011 states that 183 countries were scored from 0 (highly corrupt) to 10 (very clean) according to corruption perception levels of the public sector using 17 different surveys which analyze factors such as implementation of anti-corruption, access to information and conflict of interests laws; two-thirds of all of the countries cored less than 5 points.\textsuperscript{20} Mexico got 3 points, which makes it one of the countries with the lowest scores and placed it in the 100\textsuperscript{th} place (out of 183).

Corruption is a practice that affects all areas of society and is connected logically to a normative system. An act of corruption only happens when there is a person with authority or capacity to make decisions; thus, corruption presents itself when authorities or decision makers carry out actions that are against the rules they have to abide.\textsuperscript{21} The goal of corruption is to obtain additional benefits; things they cannot obtain thanks to honest exercise of public office or employment.

There are several types of corruption; bribery and extortion are the most common ones. Bribery means an authority or decision-maker obtains economic benefits thanks to the transgression of norms dictated by its job and extortion means reaping that same benefit in exchange for their tasks.\textsuperscript{22}

Corruption is not an isolated practice; corrupt people have learned how to make legal rules coexist with their interest to obtain additional benefits derived from corruption. This can be done when networks of complicity and benefit are created; allowing permanent and discreet profits from bribes and extortions and other crimes.

In politics and governments, public administration is ideal to develop corrupt acts; public employees (political and administrative) and citizens are key

\textsuperscript{18} Idem.
\textsuperscript{19} Idem.
\textsuperscript{22} Ibidem, p. 217.
factors and promote the existence of said situations. In 2010, the National Index of Corruption and Good Governance (Spanish: Índice Nacional de Corrupción y Buen Gobierno, INCBG) carried out by Transparency International in 15,326 households found that 200 million corrupt acts were done by using public services provided by federal, state and municipal authorities, as well as private service concessions.

In turn, the National Index of Corruption and Good Governance (INCBG) in 2010 stated that the average cost paid by each household for bribes was $165 pesos (32,000 million throughout the nation). Households living on minimum wage gave 33% of their income to corruption.

Some of the paperwork procedures and services included in this index were: Property tax payment; Apply for a scholarship; Process military ID / exempt military service; Get a registration number to attend an official school; Get a credit or cash loan for home, car or business; Speed up the process or get a passport from the Ministry of Foreign Affairs; Connection or reconnection of electricity at home; Speed up the process or get birth, death, marriage or divorce certificates from the Civil Registry; Start working for the government; Get a driver’s license; Request a permit to set up or open an establishment or business; Pass vehicular inspection; Work or sell on the street; Ask the municipal or delegational garbage truck to take away the trash, etc.

Corruption cannot only be found during provision of services; however, citizens perceive acutely progresses and setbacks in these areas. Corruption needs at least two individuals to take place: that which exercises corruption and the corrupted one. INCBG’s data from 2010 are a direct reflection of what citizen and authorities are used to: the promotion of a corrupt system (management of goods and services) which has severe consequences for the poorest families’ incomes.

The proposal to create a national and several state anti-corruption bodies will promote the organic reform of public administration structure; norms will be needed to regulate said institutional changes. The main elements to establish this anti-corruption body will be explained in the next section.

3. On the creation of the National Anti-Corruption Commission.

On November 2012, Senators from the Institutional Revolutionary Party (PRI) and the Ecological Green Party of Mexico (PVEM) presented an administrative reform proposal. The latter included the disappearance of the Ministry of Public Function and the creation of the National Anti-Corruption Commission.
Commission which would be in charge of preventing, investigating and sanctioning corrupt administrative acts.

In turn, the National Action Party (PAN) and the Party of the Democratic Revolution (PRD) presented proposals that dealt with the creation of National Agency against Corruption and Money Laundering, and the National Agency to Fight Corruption.

On December 2012, Mexico Evaluates (Spanish: México Evalúa) presented its first diagnosis on the characteristics of corruption, tools to control it, powers to control these bodies and the effectiveness of this anti-corruption body.¹⁵⁵ Aid document analyzes the proposals given by the country’s three most powerful political parties and included the strengths and weaknesses of each one of them. PRI’s proposal included the creation of a National Council on Public Ethics and Anti-Corruption Law, as well as the inclusion of corruption as a crime. Penal codes from every state, the Federal District and the Federal Government do not explicitly consider corruption a crime.

The Senate’s proposal to create an anti-corruption body considers the following elements:²⁶

a) Provide it with management autonomy, legal persona and its own resources, but maintaining direct dependence to the Executive Power.

b) Internal Organization: constituted by 4 commissioners (7-year periods) and one President Commissioner (4-year period) which will be appointed by the Executive Power and ratified by the Senate.

c) Powers: full jurisdiction over federal, state and municipal acts of administrative corruption; power to implement programs to prevent corruption; power to investigate corruption cases and to circumvent banking, fiduciary or tax secrecy; power to administratively punish public employees or individuals for corrupt acts; power to execute sua sponte investigations or those derived from citizen complaints; power to inform the Attorney General’s Office of corrupt acts and closely collaborate it.

d) It will have no powers over political trial procedures; these will be overseen by the Congress of the Union.

e) Sanctions: those imposed may be appealed to the specialized Circuit Courts.


²⁶ Proposal to create the National Anti-Corruption Commission, retrieved from: http://www.redpolitica.mx/epn-transicion/documento-integro-propuesta-de-comision-nacional-anticorrupcion.
The aforementioned Anti-Corruption body poses important challenges; the most important one is the definition of a holistic policy to fight corruption. This means considering aspects such as administrative reform (already in process) and the creation of the national integrity system which will improve governments’ public management’s performance.

Transparency International developed the national integrity system, which is defined as an ideal mean to solve conflicts, effectively disperse public power and conflict of interests. Its tools are: accountability, transparency, prevention and punishment; all of this considering that the main problem is the adopted system and not individuals themselves.

In Mexico, the construction of a national integrity system needs reforms to strengthen all three powers of the Union and the implementation of actions to increase the cost of corruption and promote a co-responsible government-citizens-private sector relationship.

Enrique Peña Nieto’s proposal lacks articulated and coherent elements to create a national integrity system; even though it considers actions for transparency, accountability and the creation of an anti-corruption body, its weakness is it has not defined a holistic policy that can transform corruption into an unattractive economic practice.

On the other hand, the anti-corruption body must decide which priorities must be addressed to promote institutional strengthening and collaboration among Powers of the Union to fight corrupt practice in governments, businesses and citizens.

The powers established in the Senate’s proposal show that the anti-corruption body’s powers are not that different from the ones the Ministry of Public Function had; especially in investigation and penal sanction areas which are exercised by the Attorney General’s Office.

The idea of creating a Federal Anti-corruption Law to define procedures to implement administrative sanctions and issue recommendations to State Compresses to bar public employees from public office also creates an opportunity to create normative bodies which have greater perspectives as well as intergovernmental collaboration mechanisms to fight corruption.

Mexico has 33 Penal Codes and each one of them classifies public employees’ crimes in a different way; sanctions include fines, dismissal, disqualification, prison time and confiscation of property.27 It would be important to unify these penal codes and classify crimes committed by

27 Pact for Mexico’s commitments (78 and 79) include the creation of a Unified Penal Code and Unified Penal Procedures Codes; we only need to know the content of said proposals.
public employees and individuals in every state, the Federal District and the Federation.

Another weakness of the anti-corruption proposal is the absence of definition for the term “corruption”; it would be essential to exhaustively analyze the crimes included in federal, state and Federal District codes to avoid discretionary interpretations on crimes which can be considered related to corruption.\(^{28}\)

If Mexico is determined to reform the administrative structure to fight corruption, it is essential to consider the creation of a national integrity system to promote legality, respect for institutions and effective interinstitutional coordination to punish public employees and individuals that commit corrupt acts.

To summarize, it is obvious studies and analyses will continue to be carried out to create a new anti-corruption body; nonetheless, the institutional structure created since the political alternation of the year 2000 has started to redefine the transparency, accountability and anti-corruption model that Mexico needs to improve its public management and restore citizens’ trust in institutions and public employees. Therefore, it would be a mistake to minimize the normative and institutional progresses achieved up until now and substitute them for a corruption-fighting strategy which has not shown institutional and intergovernmental coordination elements with bodies such as Superior Auditing Office of the Federation and the Federal Institute for Access to Public Information which are in charge of topics such as fighting corruption. Thus, we must think of the possibility of building a national integrity system as part of the strategic axes of national development planning for the 2012-2018 period.

Conclusions

Mexico is undergoing an administrative reform process that is in danger of becoming an isolated one, one that lacks incentives to establish a

\(^{28}\) Penal Codes include the following crimes as ones related to corruption: abuse of power; extortion; coalition of public employees; bribery; embezzlement; torture; wrongful exercise and abandonment of public service; wrongful custody of documents and revelation of secrets; illicit negotiations; intimidation; influence peddling; non-fulfillment of public duties; impersonation of public officials; wrongful exercise of powers; job abandonment; wrongful exercise of functions; illicit enrichment; public employees’ falseness; illegal exercise and abandonment of public powers; refusal to provide public service; usurpation of public powers; non-compliance; anticipation; prolongation and abandonment of public powers; abuse of power; intimidation and torture; public employees’ property crimes; abuse of power; wrongful exercise of legal duties and torture; irregular exercise of public powers; diversion and improper use of powers; crimes against good administration; negligent performance of powers; illegal exaction, among others.
legality culture and interinstitutional and intergovernmental collaboration to improve government processes and minimize the risk of corruption which affects society’s development.

The creation of the National Anti-corruption Commission must be analyzed carefully, avoiding the creation of an institutional body that allows setbacks, double functions and discretional exercise of public power to punish corrupt acts.

The current framework regarding transparency, accountability, administrative responsibilities and corruption lets us know the Mexican State has taken important steps in normative terms; transparency and accountability are still restricted, although the foundations have been built; current concerns include the generation of institutional and social conditions to limit the existence of corruption in public organizations and rulers’, public employees’ and citizens’ culture.

Mexico has not yet developed a national integrity system that allows government institutions to address and prevent corrupt crimes committed by public employees and individuals or promote solid public ethics which are truly committed to quality public service; this is why at the beginning of the 2012-2018 administration the development of actions to solve this problem have to be taken into account.

In sum, the definition of an anti-corruption body has to have an innovative design and institutionalization to develop the national integrity system with the following characteristics:

- Institutional efficiency based on a national integrity system that fights corruption and promotes public ethics.
- Normative institutional body that reduces the government’ institutional weaknesses to fight corruption and restores trust among public service and the government.
- Anti-corruption policies and programs based on a national integrity system.
- Identification of elements of the vicious circle of corruption and decrease them with a defined anti-corruption culture included in the national integrity system.
- Institutional strengthening of pre-existing bodies and creation of new bodies that help prevent double functions, discrentional decision-making processes, ensure impartiality in anti-corruption, transparency and accountability bodies.
- Implementation of process reengineering to strengthen the operation of the Professional Career Service in order to reduce the risk of corruption.
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REGULATIONS


