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THE EXPERIENCES, DEVELOPMENTS, AND CHALLENGES OF THE PUBLIC ETHICS COMMITTEE

1. INTRODUCTION

The concern over public ethics has reemerged with great emphasis in the political and administrative agendas of western developed democracies. In fact, the past two decades of the 20th century have made it clear that corruption, the most visible breach in ethical standards of public conduct, has ceased being seen as a mere “moral” problem, and is now seen as a threat to economic order, administrative organization, and even to the State of Right. If this is true for countries with a long tradition of democracy, what of countries in which the development of political institutions is more recent and less stable?

Nowadays it is of general opinion that corruption is not what distinguishes nations or governments. Today, what differentiates them is the way they organize themselves to confront corruption. In the effort to promote ethics in the public sector, two basic challenges may be highlighted. First, the capacity to create results linked to public interest must be ensured to Federal organisms. Second, an effective standard of conduct that contemplates the expectations of society must be established. Society, on the other hand, does not satisfy itself with only a set of generic rules. It demands concrete solutions and objective and clear rules of conduct.

The capacity to produce results was the main concern of the programs of institutional strengthening and modernization of organization that spread from the beginning of the 80s on. The establishment of an effective ethical standard has been a more recent concern. It is a result of the acknowledgment of the need to change the increasingly high levels of mistrust coming from society regarding the conduct of its public agents.

It is amazing how processes of modernization in organizations have there reality limited when they do not have actions directed specifically towards the establishment of an effective model of ethical management. To reach this comprehension most of them went through at least four different phases. The main concern during the first phase was to *gain efficiency*: do the same things better and more rapidly. In the second phase the emphasis moved towards *efficacy*, which is understood as the results desired by clients. The third phase observed the fact that generating the results desired by clients is impossible without *transparency*. During the fourth and final phase the conclusion that was reached was that results with transparency are impossible to reach without an *ethical standard*.

To ensure an adequate ethical standard in the public sector, a political interest by the Federal Powers is vital. It is only this way that deep-rooted administrative actions can be fought off, authoritarian, sedimented cultures can be changed, and, in many cases, a certain degree of hypocrisy can be overcome. This is a hypocrisy that, at least in Brazil, has kept a new standard of relationship between the private and public sectors from being identified.

Certainly changes of this kind, with such a large scope of comprehension, cannot be reached instantly. To conceive a set of rules of conduct that reveal themselves to be simple, sufficient, comfortable to carry out, and consistent, is, as paradoxical as it may seem, harder than to find a consensus within abstract rules. Besides that, an adequate *management structure* must correspond to the normative mark in which functions and responsibilities are well defined.

2. SCENERY

Brazil has an institutional management of ethics that is relatively old and characterized by a large amount of rules. The Constitution establishes principles that guide the actions of the Public Administration in the three areas of Government that are part of the federation:

- the principles of legality, impersonality, morality, publicity, and efficiency;
- public tender, as a rule for acquisitions of properties and services;
- administrative probity, that, in the case of actions against it, is punished by the suspension of political rights, the loss of public office, retention of properties, and compensation to the funds.

The constitutional principles are almost always automatically applicable. In other words, they do not depend on laws and regulations for them to be observed. Nevertheless, the judicial penal ordainment, as well as the administrative has several principles of a legal and infra-legal nature that openly reaffirm the constitutional principles or make them clearer. The principles are:

- law 8112/90, that established a single judicial regime for civil servants;
- law 9429/92, that typified cases of improbity;
- law 9784/99, of the administrative process;
- law 8666/93, of public tender; and
- ethical codes of the civil servant and of members of the highest level of the Executive branch.

The main subject areas regulated by these principles are:

- improper use of public office;
- illegal enrichment during office;

- private interest sponsorship in the presence of public administration (trade of influences);
- violation of secrecy;
- use of privileged information;
- rendering advice to a private entity;
- professional activity parallel to public office;
- hypothesis of conflict of interest;
- limitations for professional activities after office (quarantine);
- receiving gifts;
- use of public resources and servants for private activities;
- appropriation of public funds or properties.

The entities with responsibilities in management of ethics in the Executive may be divided in three groups: those that have the ethical question in public service as their primary objective; those that have the ethical question among their objectives although it is not the only one, or, that in an indirect form, reflex and subsidiary also work in this direction having control, supervision, and applying sanctions; and those in charge of qualifying and training servants to show off an ethical standard of conduct according to the desirable. They are the following:

- ethic committees, foreseen in the Decree 1171/94;
- Union General Office;
- specific offices determined by organs and entities;
- Human Resources and Administrative bureaus;
- entities in charge of qualifying and training, such as governmental schools like ENAP (National School of Public Administration) and ESAF (School of Fiscal Administration);
- Federal Control Bureau;
- Union Audit Office;
- Federal Public Ministry;
- thematic commissions from each of the houses of National Congress;
- parliamentary commissions for inquiry;
- Federal Police;
- Judiciary Power; and finally
- the citizen himself, who has the constitutional right to propose to Justice a popular suit to annul injurious acts against public patrimony.

The law has established institutional rules of relationship and especially obligations of mutual communication. It has done so to make it possible for organs that exert control over ethical behaviors, as well as for those that have responsibility in management of ethics, including the merely educational aspect, to reach a larger effectiveness in action.

The main means of control that are available to these entities and organs are:

- audits, inspections and surveillance, that are made by control organs both internal and external, and must provide reports containing elements that allow the administration to check aspects of legality, legitimacy, and fund management;
- disciplinary administrative process, brought about by syndication and inquiry committees, to investigate personal conduct misfeasance;
- public civil inquiry, promoted by the Federal Public Ministry;
- ordinary suits for damage compensation, promoted by the Union, its companies and foundations;
- public civil suits for damage compensation, promoted by the Federal Public Ministry;
- police inquiries, made by the Federal Police;
- public penal suit, promoted by the Federal Public Ministry;
- administrative improbity suits, promoted by the Federal Public Ministry, Attorney General or by judicial organs linked to it;
- popular suits, originating from any citizen, to annul injurious acts against public patrimony or against administrative morality;
- financial disclosure, mandatory for those holding public office, used as an inhibiting element in illicit enrichment.

Although there is a large amount of regulation, the general perception is of low effectiveness in the rules of conduct that exist. Among the reasons for this are:

- the disclosure of rules of conduct, mainly those from edited codes and orientations coming from competent organs, has not reached the objective of transforming these rules into common knowledge: if they are not known, how can they be carried out?
- there is no culture or structure to stimulate consultation, or to give the civil servant in doubt orientation as to the correct application of rules in practical cases;
- the qualifying and training programs, as well as basic education, have only very recently begun incorporating ethics as a specific or transversal subject matter;
- the investigation of misfeasance has only shown itself to be effective in entities that have an adequate structure to do such an investigation;
- the application of sanctions is directly related to the capacity of investigation;
- non-selective system of presenting declarations has not allowed its use to be effective in identifying evidence of misfeasance.

It is in this context that the Public Ethics Committee emerges.

3. SOURCE AND ATTRIBUTIONS

The Public Ethics Committee- PEC- was created by Presidential Decree on May 26, 1999, as consequence of a specific proposal by the State Counsel of Reform.

This counsel has six members appointed by representatives of civil society. They have notorious knowledge and respectability, and none are linked to the government.

The actions taken by PEC can be understood from three different movements:

- 1) from its creation, on May 26, 1999, until August 21, 2000, its performance was restricted to the request of consultation by the President regarding ethical questions;
- 2) from August 21, 2000, until May 18, 2001, with the approval of the Federal Code of Conduct of High Administration, it also had executive functions and was responsible for its implementation;
- 3) from March 18, 2001 on, besides its consulting and executive functions of the Code of Conduct of the High Administration, it also had the job of leadership and coordination in the promotion of decentralized suits with the objective of ensuring adequacy and effectiveness in the ethical standards of 193 entities and organs that are part of the Federal Executive branch.

4) STRATEGY OF ACTION

For the Public Ethics Committee, to *practice* ethical management is to:

- ensure that the rules of conduct include the expectations of society in regards to that which should be the standard of conduct of the public agent;
- make the rules known and understood, which implicates publicity, education, orientation for a solution of ethical dilemmas;
- monitor and examine the practice of the rules;
- apply an effective system of consequence aiming towards a continuous perfection of the rules and administration, as well as the application of sanctions; and finally
- mobilize entities of civil society.

The strategy used to ensure effectiveness to the model of administration of ethics in the Federal Executive branch was to develop these competencies in relation to a rather emblematic group with a high degree of public exposure and visibility, both in and out of the public sector: heads of state departments, national secretaries, presidents and directors of state companies, foundations, public companies, partnerships of mixed economies, civil associations, and class entities.

This is how the Federal Code of Conduct of High Administration-FCCHA- was approved. The President gave PEC the responsibility of its implementation.

The FCCHA establishes the duty to give information about patrimony, income, and situations that might bring about a conflict of interests. Those who have this duty are heads of state departments, national secretaries, presidents and directors of state companies, foundations, public companies, regulating agencies, and partnerships of

mixed economies (the number of which is up to 700). Besides that, it also establishes a limit for the exercising of professional activities during and after (quarantine and interdiction) holding public office. Limits are also extended to acts of management of patrimony, and it is forbidden to receive favors of any nature from interested parts.

High level employees linked to FCCHA cannot invest in business of which they might have privileged knowledge of revenue, nor can they accept transportation, lodging, and other favors that might bring about conflicts.

5. EXAMINATION OF THE IMPLEMENTATION OF THE CODE OF CONDUCT OF HIGH ADMINISTRATION- FCCHA

Employees linked to the FCCHA must declare explicit adherence to the rules at the moment of taking office. Up to ten days later they must present to the Public Ethics Committee- PEC- the “Confidential Declaration of Information- CDI” with data about income, estates, and private interests that might bring about conflicts with office.

In the course of office each person must inform any changes that might occur in the information that was given as well as sending other information do PEC such as: job proposals, participation in companies that negotiate with public power, etc.

To help carry out its mission, PEC counts on an Executive Bureau that has six members, the support of 135 representatives of sectors in entities and organs that are part of the Federal Executive, a computerized system that helps with monitoring activities, and direct mail.

With time, new and easy instruments are being implemented to contact PEC and employees: a website in the internet (<http://www.presidencia.gov.br/etica>), where useful information about the application of FCCHA can be accessed, the use of electronic mail, and the possibility of presenting the CDI electronically.

Up to June 2001, PEC issued an average of 500 orientations and 50 notifications per month. By the end of September the average number of orientation was maintained, while there was a slight decrease in the number of notifications to about 40 per month. About 5% of authorities linked to FCCHA still show difficulty in keeping with the basic rule of FCCHA: handing in their CDI in up to 10 days after taking office. Most of the notifications are for these people. Even though the notifications have been solving the problem without the necessity of applying sanctions, the percentage of 5% has maintained itself stable in the in and out flow of managers. This is a clear demonstration of the fact that the routines that inform people about this obligation still needs improvement.

Most of the rules that FCCHA establishes are in fact prohibitions. However, it plays an important part in the defense of the group of employees that are linked to it. It gives them the tranquillity and safety necessary for the full exercise of their

functions without the risk of accusations about their private ethical conduct. Some emblematic examples show that this second part FCCHA is playing, not less important than the first, is being progressively understood. At least three authorities from the top level of employees and several others have appealed to PEC for it to state its position about specific conducts that were being questioned. In all cases, after PEC took its position, the questioning about ethical conduct diminished.

6. WORKING WITH ENTITIES AND ORGANS THAT ARE A PART OF THE FEDERAL EXECUTIVE BRANCH

From May 18, 2001 on, in accordance with presidential decree, PEC established relations with entities and organs of the Federal Executive branch and not only with their directors. This was done to reach its highest objective which is the promotion of ethics in Public Administration.

After 160 entities and organs that are part of the Federal Executive branch were analyzed, a scene in which many specific suits about management of ethics have been developed appeared. However, there was no constant correlation between the entities that are more exposed to ethical misfeasance and those that presented more suits. Therefore, there is a wide terrain for short term developments. The results of research show the following:

- 31% of the entities and organs have specific rules to regulate the conduct of their staff;
- 26% develop educational activities for the rules of conduct that exist;
- 23% monitor how the rules of conduct are followed;
- 20% have applied sanctions for transgressions to the rules in the past 24 months prior to the research (which was carried out during the first semester of 2001)

In September, 2001, PEC organized a meeting with representatives of sectors from the entities and organs of the Federal Executive branch. During the meeting the best measures in management of ethics, both in an out of Brazil, were discussed. Strategic recommendations that must lead to promotion of ethics were proposed. From these recommendation they were able to define the strategic objectives for the promotion of ethics. The papers presented during this meeting as well as their conclusions are available for public access in the PEC website in the internet.

With sector representatives that have already been nominated in 135 entities and organs of the Federal Executive branch, a net of professionals has been formed. These professionals have the responsibility of making sure that actions for the promotion of ethics are taken, above all, those that have a preventive nature such as: publicizing and giving orientation about the rules of conduct that must be observed, educational activities, monitoring, and the proposal of corrective measures.

The work PEC has been developing has counted with the help of important partners, some even coming from international and non-governmental entities, that offer aid in specific actions at no cost. These partners are:

- the UN, OECD, and Interamerican Development Bank (BID); the partnership with BID is evolving towards financial support, besides the already given technical support. This will probably become fact after the formal approval of a specific project that also includes the Union's General Office;
- ETHOS Institute and Transparência Brasil (Brazil Transparency)
- about 20 voluntaries that systematically support PEC and help achieve the success of the jobs of diagnosis and analysis.

PEC's next steps will be directly associated to the strategic objectives defined by the meeting with its sector representatives. This meeting took place in September, 2001. They are recommendations given by the President himself, who determined they should be put in effect by all directors of the entities and organs of the Federal Executive branch.

- Improve the management system of ethics by perfecting rules and administrative structure, promoting education, stimulating cooperation, and creating protection mechanisms for the involved.
- Identify society's expectations in relation to management of public ethics, and implement a communication plan.
- Establish mechanisms for promoting transparency.
- Implement evaluation mechanisms and acknowledgment of management of ethics.

The II Meeting of Representatives of Sectors of PEC should take place on March 21 and 22, 2002. At this meeting there will be an evaluation of the progress made in the execution of the recommendations previously established.

7. LESSONS LEARNED FROM THE PEC EXPERIENCE

- ❖ Ruled will not magically alter habits and conducts if they do not have the support of social demand and an adequate administrative structure.
- ❖ Those who do not have an effective set of rules of conduct do not have an objective ethical reference. However, an ethical code must not be seen as useful only for the "unethical". The opposite is more likely to be true.
- ❖ The effectiveness of these rules is directly related to how well they are known and comprehended, and to political support and commitment of leaderships both formal and informal.

- ❖ To *practice* management of ethics is essentially to develop actions directed towards the comprehension of rules of conduct and to spread the knowledge of how to apply them to solve ethical dilemmas.
- ❖ A great challenge in management of ethics is to adequately balance preventive actions and repressive ones.

I am sure, and I have been saying this to our collaborators and civil servants in general, that the biggest challenge over the next year will be to lay down such a strong foundation that it would be impossible to discontinue what the current efforts have accomplished, as often happens with pioneer initiatives for state reform.