

## The Concepts of Merit and Equal Opportunities in Law No. 30057, Civil Service Law

### [Los Conceptos de Mérito e Igualdad de Oportunidades en la Ley N° 30057, Ley del Servicio Civil]

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#### Resumen

La gestión de recursos humanos de la administración pública tiene mucha importancia correspondiente a los fines asignados al Estado por mandato constitucional. De allí la necesidad que se desarrolle una política de recursos humanos acorde a la atención de las necesidades sociales. No puede concebirse un Estado que mantenga en su seno una heterogeneidad de regímenes laborales con derechos y obligaciones diferentes y, sobre todo sin un régimen de carrera único. Uno de los más importantes factores que plantea la Ley N° 30057 lo constituye el mérito como condición para la incorporación de nuevos servidores públicos. Sin embargo, la referida norma no hace un desarrollo adecuado de dicho factor, lo que implica la posibilidad de una interpretación discrecional de su contenido y, en consecuencia, una selección de aspirantes que pudiera no atender adecuadamente las necesidades de recursos humanos idóneos. La presente investigación tiene como finalidad indagar desde el punto de vista teórico y fáctico el concepto de mérito, a fin de arribar a una definición tentativa que nos permita aportar elementos objetivos para su evaluación.

Palabras clave: Servicio civil, mérito, igualdad de oportunidades.

#### Abstract

The human resources management of the public administration is of great importance corresponding to the purposes assigned to the State by constitutional mandate. Hence the need to develop a human resources policy in accordance with the attention to social needs. A State cannot be conceived that maintains within it a heterogeneity of labor regimes with different rights and obligations and, above all, without a single race regime. One of the most important factors raised by Law No. 30057 is merit as a condition for the incorporation of new public servants. However, the aforementioned norm does not adequately develop said factor, which implies the possibility of a discretionary interpretation of its content and, consequently, a selection of applicants who may not adequately meet the needs of suitable human resources. The purpose of this research is to investigate from a theoretical and factual point of view the concept of merit, in order to arrive at a tentative definition that allows us to provide objective elements for its evaluation.

**Keywords:** Civil service, merit, opportunities equality.

## 1. Introduction

The coexistence of labor regimes in the public sector worries and derives attention from the needs of the Peruvian population. The establishment of a public career must be based, among other factors of equal importance, on the merit that candidates for public office must demonstrate. However, said ideal is not duly arranged in Law No. 30057, the Civil Service Law, a situation that is aggravated by the delay in its implementation, which has currently been provided as indefinite. The State cannot ignore the relevance of the existence of a solid and efficient body of public servants, demonstrating that the exercise of the public function is intimately related to the implementation of public policies, institutionality, governance, and social and economic development. of the Nation.

Governance in Peru suffers from a great weakness due to the fact that there is legislation that houses various labor regimes, at the same time that it incorporates into the public service people whose relationship with the State is governed by the Civil Code, but performs its own tasks of public servants. This way of incorporating personnel into the service of state entities seriously jeopardizes the possibilities of carrying out state action effectively to solve the problems that afflict society, especially vulnerable groups.

Due to the signing of the United States Free Trade Agreement, the Peruvian government was forced to eliminate the so-called "non-personal services" of workers without a labor regime and to issue Legislative Decree No. 1057, which establishes the Special Regime of Administrative Contracting of Services, better known in Spanish language as RECAS or CAS, whose purpose is to regulate "... the special regime of administrative contracting of services, and is intended to guarantee the principles of merits and capacity, equal opportunities and professionalism of the public administration", thereby complying with the provisions of the Ibero-American Charter of Public Function (2003) and the Ibero-American Charter of Quality in Public Management (2003).

In this regard, Beltrán (2013), points out that "... with the use of the CAS, the constitutionally recognized right to equality of workers was violated, since the State did not give fair treatment to all its personnel, despite the fact that people hired through CAS, they carried out permanent tasks, were subject to subordination and received payment for the work rendered; characteristics of an employment contract, but because they were hired through CAS and not according to the procedure established by Legislative Decree No. 276, they had curtailed rights".

The National Civil Service Authority (2013) when taking stock of the civil service, indicates that:

- The civil service grows without planning, nor based on State priorities.
- Two out of five servers have temporary contracts.
- The continuity of public policies is affected.
- There are disparities in compensation.
- Different remuneration is given for similar functions.
- Remuneration, pensions and CTS are low.

Despite the statements made by SERVIR, said entity has not proposed clear alternatives to solve the problem. In this sense, it is inconceivable that there is a noticeable increase in the number of people at the service of the State, without a labor regime, such as those who find services and the services of third parties.

In the National Policy for Modernization of Public Management to 2021 (2013), the "... inadequate determination of the job profiles and the optimal number of professionals required by each profile - under a focus of workload and relevance for the achievement of results-, which is exacerbated by inadequate processes of planning, selection, hiring, performance evaluation, incentives,

capacity development and disincorporation of people. These problems are exacerbated by the absence of training policies and the development of capacities and competences, either because the authorities do not value personnel management or because the entity does not have the resources to do so”.

Article II of Law No. 30057, the Civil Service Law, states the merit as a principle, specifying: “The Civil Service regime, including access, permanence, progression, improvement in compensation and mobility, is based on the aptitude, attitude, performance, capacity and permanent evaluation for the post of the applicants and civil servants.” From what has been pointed out, it is necessary to separate the evaluation from the other concepts, because the evaluation depends on the employing entity and consists in measuring the aptitude, attitude, performance and capacity, attributes that the server must exhibit, so that the merit does not it can encompass all those notions. Likewise, it expresses the principle of equal opportunities: “The rules of the Civil Service are general, impersonal, objective, public and previously determined, without any discrimination on the grounds of origin, race, sex, language, religion, opinion, economic condition or any other nature”, in spite of which, both the Law and its Regulations establish a structure of positions and a classification of civil servants that contradicts said statement.

Despite the requirement of merit, this concept is not defined in the Civil Service Law or its regulations, nor are the criteria for its determination established. So that, at the time of its evaluation, the subjectivity of the evaluators decreases significantly. Neither the Law nor its regulations offer a clear definition of equal opportunities. On the other hand, Supreme Decree No. 005-90-PCM, Regulation of Legislative Decree No. 276, defines merit as “[...] the formal recognition of the responsibility and will with which the server puts its qualifications into action in the performance of the service public and is measured by the degree of efficiency and responsibility with which the assigned functions are carried out”, thus offering objective elements for its evaluation, unlike Law No. 30057 and its regulations. In the same sense, for the promotion contest, values individual merits, as one of the factors, defining them as “[...] the actions that positively transcend the competence functions of each server, as well as obtaining higher qualifications to the requirements at their respective career level”, which constitute information contained in the server record.

In the opinion of Cordero (2010) “Merit can be defined as an administration philosophy framed in the capacities of people who enter, or aspire to enter the public service, whose application seeks to discourage the use of criteria not related to the professional performance of public employees or job applicants [...]”.

On the other hand, Legislative Decree No. 276 establishes as one of the principles of the administrative career, that of Equal opportunities, in accordance with Law No. 26772 of April 14, 1997, which provides that job offers and access to Educational training means may not contain requirements that constitute discrimination, cancellation or alteration of equal opportunities or treatment. Article 5 of Supreme Decree No. 005-90-PCM, states that “The administrative career provides equal opportunities for all the servants, setting beforehand possibilities and conditions of a general and impersonal nature, which guarantee their development and progression, without the size of the entity being a limiting factor”. The study of public administration constitutes a permanent necessity, due to the constant changes that take place in the world and that affect the totality of human relations and, consequently, the state activities oriented to the search for general well-being.

A strong State requires two fundamental elements: an effective administrative procedure system and institutionally identified and duly qualified human resources for the performance of its functions, both technically and ethically. For an adequate management of human resources, the

State must design policies aimed at achieving the personal and technical development of its servers, observing for this purpose unrestricted respect for their rights.

The publication of a norm that contravenes international instruments signed by Peru generates a situation of legal insecurity that must be corrected. In this framework of reflections, this research deepens the analysis of Law No. 30057, the Civil Service Law and its regulations regarding the development of the concepts of merit and equal opportunities that have been placed by the company itself as the cornerstone of its purpose. Therefore, the Civil Service Law and its regulations have deficiencies in the development of the concepts of merit and equal opportunities, so that they do not guarantee compliance with the priority objectives outlined in the National Policy on Competitiveness and Productivity and, for therefore, in the effectiveness of the public function.

In the Implementation Plan of the National Civil Service Policy, the National Civil Service Authority states: "SERVIR, as the governing body of the Human Resources Management System of the Peruvian state, must develop and implement a set of subsystems of: planning of human resources policies, organization of work and its distribution, employment management, performance management, compensation management, development and training management, human relations management and dispute resolution.

None of those subsystems exist today. Thus, all the functions provided for in Legislative Decree 1023 require an initial stage of development, testing and adjustment, to be fully implemented and then move on to the administration phase of the function".

Until this year, not all public entities have a SERVIR resolution for having adapted to Law No. 30057. In our opinion, such adaptation involves a bureaucratic and excessively ceremonial procedure, when what could have been done is a homologation process, as happened when Legislative Decree No. 276 was passed, through which all public workers went from the previous regime to the new administrative career regime.

Carrillo (2003), maintains that "The principles of merit and capacity are the only parameters that provide content to the principle of equality in access to public service [...]. "

For his part, Fernández, specifies that "[...] the constitutional principles of equality, merit and capacity, are recognized and developed in current legislation, but we understand that, insufficiently, since there are no specific and legally detailed mechanisms and guarantees that prevent, on a preventive basis, the commission of infractions [...]."

Legislative Decree No. 276 defines the administrative career as "[...] the set of principles, norms and processes that regulate the entry, rights and duties that correspond to public servants who provide services of a permanent nature in the Administration on a stable basis. Public" stating as objectives: "[...] allow the incorporation of suitable personnel, guarantee their permanence, ensure their development and promote their personal fulfillment in the performance of public service", proposing its expression "[...] in a structure that allows the location of the servers public according to qualifications and merits", which expresses an approach very similar to the objective of Law No. 30057.

Recognizing the importance and necessity of the principles of merit and equal opportunities, it is worth noting that the vision of the new public management, according to Senge, cited by Friedmann (2003), must include five disciplines:

- "Personal mastery or continuous learning of the individual is the discipline of" personal mastery. "
- Mental models are deeply ingrained assumptions and images that influence how we understand the world and act.
- The construction of a shared vision. It is vital for smart organization because it provides concentration and energy for learning.

- Team learning: thinking together and producing better results than members would achieve separately.
- Systems thinking refers to the ability to think systemically. See the relationships between all the components of the organization. "

## 2. Materials and Methods

The present investigation is non-experimental and descriptive. The design is Ex post facto. The unit of analysis of this investigation is: Law No. 30057, Civil Service Law and its regulations, Supreme Decree No. 040-2014-PCM

For its realization, national and international official documents, legal regulations on the subject under investigation and other related ones have been consulted. Likewise, it is considered the need to verify the way in which public entities, in compliance with the directives issued by the National Civil Service Authority (in Spanish language SERVIR), are carrying out the incorporation of civil servants. For this, a sample of twenty-six (26) calls for tenders for Administrative Procurement of Services (in Spanish language CAS) published on the website of the Ministry of Labor and Employment Promotion during the year 2019 has been selected.

For the purposes of the investigation, the general problem was raised: What is the degree of influence of the concepts of merit and equal opportunities developed in Law No. 30057, the Civil Service Law and its regulations, Supreme Decree No. 040-2014-PCM in the effectiveness of the public function?. Also as specific problems: (a) Does Law No. 30057, the Civil Service Law and its regulations, Supreme Decree No. 040-2014-PCM develop the concept of merit through objective criteria so as to guarantee the incorporation of suitable civil servants, as well as for the evaluation of its performance?, and Does Law No. 30057, Civil Service Law and its regulations, Supreme Decree No. 040-2014-PCM adequately develop the principle of equal opportunities in favor of civil servants so that acts of discrimination do not occur?

The General Objective was established to determine the degree of influence of the concepts of merit and equal opportunities developed in Law No. 30057, Civil Service Law and its regulations, Supreme Decree No. 040-2014-PCM in the effectiveness of the function. public. Also as specific objectives: (a) Demonstrate that Law No. 30057, Civil Service Law and its regulations, Supreme Decree No. 040-2014-PCM, do not develop the concept of merit through objective criteria so as to guarantee the incorporation of suitable civil servants, as well as evaluating their performance; and (b) Demonstrate that Law No. 30057, the Civil Service Law and its regulations, Supreme Decree No. 040-2014-PCM, do not adequately develop the principle of equal opportunities in favor of civil servants so that acts of discrimination

The concepts of merit and equal opportunities were not sufficiently developed in Law No. 30057, Civil Service Law and its regulations, Supreme Decree No. 040-2014-PCM, so as to guarantee an adequate assessment. thereof depending on the effectiveness of the public function. Also as specific hypotheses: (a) Law No. 30057, Civil Service Law and its regulations, Supreme Decree No. 040-2014-PCM do not develop the concept of merit through objective criteria so as to guarantee the incorporation of suitable civil servants, as well as for the evaluation of its performance; and (b) Law No. 30057, Civil Service Law and its regulations, Supreme Decree No. 040-2014-PCM, do not adequately develop the principle of equal opportunities in favor of civil servants so that acts of discrimination do not occur.

### 3. Results

The business model for the university incubator that we propose is a tool that describes the components on which a company creates and provides value.

The economic, technological and political changes that have taken place in the world in recent decades have produced a radical change of strategy in the economic model, prompting states to carry out profound constitutional, legal, structural and functional reforms.

In Peru, for more than ten years, changes have been promoted in the Constitution, one of which was related to the definitive closure of Decree Law No. 20530 that granted the right to an updated pension to the remuneration of those who were active, being known as "Cédula viva". Another important change is the enactment of a new Executive Power Law that establishes a new organization for the entities, accompanied by other measures aimed at improving the State. Unfortunately, not all measures point in the expected direction in order to achieve greater state effectiveness. Indeed, although in various fields such as those related to decentralization and deconcentration and administrative simplification in favor of the administrated and economic agents, among others, there have been notable advances, the same cannot be said of the formation of a strong public administration.

Since the publication of Legislative Decree No. 1023, through which the National Civil Service Authority (SERVIR) was created, no significant progress has been made in civil service reform. Although SERVIR has issued various regulations in the form of directives regarding the management of the State's human resources, the concretion of such measures in results in favor of a significant improvement has not been reflected in reality.

One of SERVIR's major deficiencies is related to its inability to formulate human resources policies, however, it has a General Directorate for this purpose. Hence, it is striking that the aforementioned entity has formulated the draft Civil Service Law without complying with the prerequisite of the design of the aforementioned policy, exhibiting in said device concepts that, due to lack of definition, make their practical application difficult. The slowness with which the process of adapting public entities to the new Civil Service Law has been perceived, which reaches a meager 18.34%, which is why this process has been extended indefinitely.

The postponement of such an important measure only seriously affects the civil service and, consequently, the timely and effective attention to social needs. It is incomprehensible that, having directed state action towards a reform of the civil service, it remains in a state of suspended animation without a horizon for its implementation.

The fact of focusing attention on the concepts of merit and equal opportunities does not mean a questioning of their need, but, on the contrary, the concern for their objective application, because what is involved here is not only the right of the Aspiring to access the civil service and career servers to the transparency of the processes of incorporation and maintenance in the civil service, but the right of all citizens to receive attention to their needs.

The new legislation on civil service is part of the State's modernization measures and, within this general framework, it is urgent to solve as soon as possible the problem of the absence of a single public labor regime with clear rules for the future of the country. On the other hand, it should not be forgotten that the public servants of the three current public labor regimes have been in the service of the State for many years. Therefore, their knowledge and experience cannot be underestimated. However, the allusions made by the official sectors about the quality of the public

service seem to want to attribute all the evils to public servants, intentionally ignoring that the serious deficiencies observed are the product of poor management by those who hold power. To understand it, it is enough to remember how successive governments have used the public administration as a shelter for their supporters, having no scruples to place them in the highest positions, generating in many cases serious cases of corruption, while the majority of public workers remain in a situation of economic and social delay. What has been described makes the implementation of the new regime more urgent, so that those who have access to public service effectively demonstrate the quality that the population needs to improve public service. Hence the concern about the lack of conceptual definition of those who are considered pillars of good public service. It is worrying that the treatment of merit is mixed with other concepts in an apparent effort to arrive at a definition, without achieving it.

The position of various authors regarding merit has already been exposed, finding in one of them some key questions regarding its conception, which adds to a greater uncertainty regarding what is meant by the word merit. Likewise, it has been possible to appreciate the link between merit and the right to equality and the way in which the former can negatively affect the latter. However, an adequate definition and the establishment of observable criteria could overcome this opposition, making possible a harmony between both concepts in favor of the public service. On the other hand, the concept of merit is not new, although it is intended to be presented as the great novelty of the new legislation. The only new thing is the insistence on its proper implementation as a factor of the civil service.

In an attempt to verify to what extent the concept of merit is being applied in the selection of new public servants, a sample of twenty-four (24) CAS call processes has been analyzed, since SERVIR has developed the regulations for incorporation to that regime, in which, although merit is not mentioned, terms used by SERVIR associated with merit are defined, such as:

- *"Competences: Personal characteristics that translate into observable behaviors for successful job performance, involves the integrated form of knowledge, skills and attitudes, which are the differentiating factor within the entity and given context "*
- *"Work experience: Understood as the time during which the person has performed general remunerated work under any contractual modality, be it labor, civil, educational or other. "*
- *"Experience in the position: Understood as the time during which the person has accumulated experience in the performance of the specific position that is convened or in another of the same level, hierarchy or responsibility. "*
- *"Specific experience: Understood as the time during which the person has accumulated experience in the performance of functions in a specific area required by the calling entity".*

The last two definitions incur a tautology because they try to explain that "experience" is "experience", that is, it defines itself, no matter how much it is intended to contextualize it.

Apart from this observation, it is understood that if the implementation of the Civil Service Law will be implemented when so decided by public entities, this does not prevent the CAS calls from considering merit, especially if it is closely related to the right to equal opportunities, because otherwise the spirit of the process would be emptied of content.

Having made these clarifications, the revisions have been found in the selected sample:

- The wrong consideration of "work under pressure" as a competition, when in reality what it is about is an overexertion that is required of the worker and that constitutes an injury to his rights, because he is subjected to a stressful situation consciously.

- The disparity in the demand for experience in both the public and private sectors for similar positions.
- The irrational requirement of cardinal competencies for all positions, without distinguishing their nature and level. Understand that the cardinality of a competency encompasses all members of an organization, but not all competencies can be cardinal, however much it may seem.
- Regarding knowledge of the position, in some cases a somewhat dispersed range of knowledge is required, as if the candidate could cover extensive knowledge corresponding to different disciplines. The same happens with courses and specialization studies. This requirement in our view reduces the quality of the evaluation because it results in a very high level of demand that can hardly be exceeded, so the declaration of a winner possessing such scrolls raises doubts.
- In several processes it is required to have two professional careers incurring an excess, as in calls 093-2019, 094-2019 and 104-2019.
- It is also demonstrated that there is a lack of criteria when demanding higher technical studies for the post of Administrative Assistant in call 052-2019, which, as shown, corresponds to the job of janitor, while, for a secretary, call 105- 2019, only completed secondary studies are required.

It is irrational that SERVIR has not planned to provide tools aimed at an effective improvement of the public service in CAS calls, considering that initially the six-year period for the adaptation of public entities to the Civil Service Law was a very long term and over all now that it is undefined.

In summary, the lack of definition of merit as a fundamental element of good public service and the delays in the implementation of the new regime affect the possibility of an efficient public service.

#### 4. Conclusions

- The conceptual lack of definition of the merit in Law No. 30057, Civil Service Law and its regulations constitutes a huge legal vacuum that puts at risk the possibility of strengthening the public service by leaving the appreciation of said factor to the discretion of the authorities, as is currently the case in CAS calls.
- The civil service cannot be understood in a restricted way only as a process of incorporation of new civil servants to the administrative career, but as an element that contributes to institutional strengthening and governance, for the effective implementation of public policies aimed at the solution of the most critical social problems.
- A public service strengthened through the proper selection of its members constitutes an important tool to contain corruption, because when it comes to merit, it not only refers to knowledge, experience or technical and professional skills, but also to related virtues. with public ethics. Hence the importance of merit, which, as we see, transcends the purely functional to become an integral element that significantly increases the potential of the public function.
- In accordance with the foregoing, we must not ignore that the civil service reform is part of a broad framework of state modernization reforms, without whose assistance development is endangered.
- It is unjustified that the adaptation of public entities to the new Civil Service Law has been postponed indefinitely, since it is not consistent with the other reforms. In this sense, the State must be understood as a system that can fall into entropy if a service such as the civil service is not urgently reformed.

- The National Civil Service Authority is not fully complying with its mission, which has been demonstrated by the meager 18.34% of entities in the process of adapting to the new Law, having to conclude, therefore, that the civil service reform has failed.

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