

resumen

El sistema de mérito es un elemento esencial en el manejo del Estado moderno que se ha tratado de adoptar en la Administración Pública colombiana. El artículo pretende establecer las razones por las cuales el sistema de mérito ha encontrado dificultades en su aplicación a lo largo de los diferentes periodos de la carrera administrativa. La metodología empleada es cualitativa, recurriendo a fuentes primarias y secundarias, aplicando la técnica de revisión y análisis documental. Las conclusiones señalan que la inoperancia del mencionado sistema se debe a razones de cultura política antes que un problema técnico o de desarrollo legal.

Palabras clave: carrera administrativa, sistema de mérito, función pública, reforma administrativa.

abstract

Development of a Merit-Based System and the Administrative Career in Colombia: Context, Application and Limitations

An attempt has been made to adopt the merit system, which is an essential element in the management of a modern state, in public administration in Colombia. This article seeks to establish the reasons for which the merit system has encountered difficulties in its application throughout the different stages of the administrative career. The methodology applied is qualitative, consulting primary and secondary sources, applying the technique of documentary review and analysis. The conclusions indicate that the ineffectiveness of the system in mention is due more to questions of political culture than to a technical problem or to a matter of legal development.

Key words: administrative career, merit system, public function, administration reform.

resumo

Desenvolvimento do sistema de mérito e a carreira administrativa na Colômbia: contexto, aplicação e limitantes

O sistema de mérito é um elemento essencial no manejo do Estado moderno, que se tem tentado adotar na administração pública colombiana. O artigo pretende estabelecer as razões pelas quais o sistema de mérito encontra dificuldades em sua aplicação, ao longo dos diferentes períodos da carreira administrativa. A metodologia empregada é qualitativa e recorre a fontes primárias e secundárias, aplicando a técnica de revisão e análise documental. As conclusões indicam que a inoperância do mencionado sistema deve-se, primeiramente, a razões de cultura política que um problema técnico ou de desenvolvimento legal.

Palavras chave: carreira administrativa, sistema de mérito, função pública, reforma administrativa.

Development of the merit system and the administrative career in Colombia: context, application and limitations¹

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1. Introduction

Because the merit system is considered a fundamental and essential element for the development of public administration and for the proper functioning of government, it is important to address this topic that has been a subject of increasing interest for research projects in the ESAP in recent years. The preliminary results of these studies show that the implementation of said system, despite the efforts made, has not yet achieved the goals desired, and even the more general topic of the reform of public and civil service has been a complicated one for Latin American countries.² Institutionalization of the merit system and development of the administrative career in Colombian government has followed a tortuous path full of different types of events, of advances and reversals, frustrations, long periods of inactivity and political confrontations. In this sense, the research problem to be solved is the following: Why has the merit system not functioned satisfactorily in Colombia? Other questions that arise from the previous one are the following: What obstacles have impeded its full development? Are they insurmountable? As a working hypothesis, one might suggest that the merit system has not worked in Colombia due to four different types of factors: (1) those of a cultural nature, (2)

¹ The article is the product of a research project entitled: "La Historia del Sistema de Mérito y la Aplicación de la Carrera Administrativa en Colombia", aimed to develop a research line of the "Política, derecho y gestión pública" group classified in category A of Colciencias.

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those of a political nature, (3) those of a constitutional and legal nature, and (4) those of a technical nature.

This article aims to explain the reasons why this system, which is so important for public administration in Colombia, has not functioned adequately. For this purpose, it presents an account of the different periods in the evolution of the administrative career. In analyzing the merit system in Colombia, at least five outstanding moments can be identified in the development of the rules governing it and their practical application.

The first period dates back to the birth of the system in 1938 with the enactment of Law 165, and lasted until 1957.

The second period started with the plebiscitary reform of 1957 and its subsequent development in Law 19 of 1958, which was constituted in a statute that created the Civil Service as an institution in charge of implanting and developing the Administrative Career and the Consultation Room and Civil Service of the Council of State, as the entity for reviewing legislative bills and decrees regarding civil service matters.

The third moment begins with the administrative reform of 1968, a period in which the new legal system contained in the so-called "reform of '68" was instituted, which created the Civil Service Administrative Department. During this period, the following basic set of rules relating to the Administrative Career was established: Decrees 2400 and 3074 of 1968, issued on the basis of Law 165 of 1967; Reglementary Decree 1950 of 1973; Decree 583 of 1984; Law 161 of 1987 and its reglementary Decree 573 of 1988.

The fourth period extends from the promulgation of the Constitution of 1991 and the enactment of Laws 27 of 1992 and 443 of 1998. It should be noted in this historic account that based on Decision C-372 of 1999, which declared the creation of the National Civil Service Commission and the territorial commissions unconstitutional, the administrative career system became paralyzed and its actions were not renewed until five years later, in 2004.

The fifth period begins with the enactment of Law 909 of 2004 and includes the diverse legislative attempts in recent years to invalidate the merit system through questionable mechanisms, as in the case of extraordinary or privileged entry of

individuals into government posts as provisional or acting functionaries.

2. First period of the administrative career: 1938-1957

To understand the origin of the merit system in Colombia, it is necessary to study the context in which the initiative arose as well as the ideological turmoil the country experienced in the period between 1934 and 1938, an era in which the Congress of the Republic approved the first legislation regarding the Administrative Career, Law 165 of 1938.

The epoch corresponds to the first government of Alfonso López Pumarejo, which was popularly known as "*La Revolución en Marcha*." There is a general feeling among Colombian historians (Tirado Mejía, 1981) that López Pumarejo's first administration (1934-1938) was a positive period in which significant changes in social structures occurred, the country modernized its public administration, there were significant advances in the social security system that adjusted government mechanisms to the new times, and the country lived a progressive context. A new orientation of the country towards social aspects was evident. An agrarian reform was promoted during this period, which obliged the large landowners to put their lands into production or have them expropriated by the government after ten years of not being used. Furthermore, an educational reform took place, which limited the intervention of the Catholic church in the teaching profession. The "*Ciudad Universitaria*" of the Universidad Nacional was designed and an effort was made to limit the privileges of the most privileged classes in tax matters, by means of a tax reform.

Alfonso López Pumarejo was the first leader in the 20th century to provide any effective orientation with social significance for the Colombian government. Despite being a member of the aristocracy, López recognized the problems of the poorest Colombians and adopted measures that were revolutionary for his time to favor the most unprotected classes, for which he was considered a traitor to his own class. The following text reflects the thinking of the time.

Public Administration should be much more independent and autonomous when politics becomes intense, dynamic and highly varied, i.e., when it better expresses the character

of democracy and the tone and sense of the contemporary epoch. The Administrative Career project responds fully and justly to this clear purpose. On the other hand, It has been believed and is believed, among us, that the authority to freely remove the administrative personnel of the Republic is a very great power and a privilege of the party and political group that reaches public power. And for this reason, despite the fact that this privilege is much more harmful than useful, it hurts more than it benefits whoever holds it³.

Law 165 of 1938 sought to apply the administrative career for employees at the national, departmental and municipal level, introducing new rights such as irremovability (stability), promotion based on merit and competence, social benefits, and training. The Administration and Disciplinary Council was created to manage the system composed of five members elected by the government, and replicas of the council were created at the territorial level. The law did not define exactly what the administrative career was, and it only managed to cover 3,000 public functionaries. The application of both the merit system and the administrative career was a failure during this period for the following reasons:

In the first place, the custom of selecting government employees did not change and continued to be done based on "*palanca*" (leverage), political recommendation, "*amiguismo*" (personal favoritism), nepotism, clientelism and other vices of Colombian political culture. For the above-mentioned reasons, the new system collided with the inveterate clientelist and patrimonialist practices, seasoned with the political "spoils" system that had been established due to the sectarian confrontation between liberals and conservatives.

In the second place, intensification of the partisan confrontation between liberals and conservatives during the first half of the 20th century would generate a more accentuated sectarianism in the wielding of government power. This would eventually degenerate into the physical elimination of political adversaries (as in the best Schmitterian style of politics) and give way to the tragic period

known as *la violencia* in Colombia, which continued until 1953.

In the third place, technical problems that contributed included (a) the right to job stability, which conditioned the employee in a negative sense, (b) lack of autonomy of the entity managing the career, (c) scarcity of budgetary resources and personnel, (d) part-time advisors (Arana de Ramírez, 1972).

3. Second period of the administrative career: 1957-1968

It is necessary to go back to the period of *la violencia* (1948-1954) to understand this period, a lapse in the history of the country that was characterized by the murder of thousands of citizens for political reasons, a fierce struggle between liberals and conservatives, murders, terrorism and destruction of property (Álvarez, 2009). The era of *la violencia* began after the assassination of liberal leader Jorge Eliecer Gaitán on April 9th, 1948 which triggered the riots known as "El Bogotazo". The violence precipitated by his assassination later extended throughout most regions of the country, especially in rural zones and small municipalities. Although the bitter struggle for power (the political spoils of government posts) between the two traditional parties is considered the main cause of *la violencia*, the latter was also due to the economic hardship suffered by the lower classes, the exaggerated concentration of wealth and the rigid discriminatory political system. It is estimated that more than two hundred and fifty thousand people were killed during this period, most of them innocent *campesinos*.

The growing levels of violence in the countryside, the displacement of *campesinos* to the cities and the confrontation between the political forces of the era precipitated the coup d'état perpetrated by General Gustavo Rojas Pinilla in 1953 (with the approval of important political sectors). The violence decreased during his years in power, but public freedoms were infringed and his legitimacy was always questioned.

During the dictatorship, the government received the advice of UN technicians, and the Commission for the Reform of Public Administration was created in 1954 for the purpose of formulating rules for the establishment and functioning of the Civil Service and modernization of the government. Said report

³ Excerpt from the exposition of motives of the *Ley de Carrera* (Career Law) that was approved by the Senate on April 15th, 1938 and went into effect on January 1st, 1939.

concluded with the need to create an Administrative Technical Department in the area of planning and other Civil Service matters, as well as a School of Public Administration. Decrees 2355 and 2356 of 1956 were issued based on recommendations of the experts. The former sought to organize the Civil Service and the Administrative Career, as well as to manage government service personnel, while the latter aimed to create the Superior School of Public Administration (ESAP). These decrees were not developed further because, among other reasons, given the threat of Rojas perpetuating himself in power, the traditional parties reacted between 1956 and 1957 and decided to forget their grudges and differences to create a *Frente Nacional* that would permit the return of legality to the country. On May 10th, 1957 they organized a national strike that ended with the dictator's resignation, thus leaving the government in the hands of a provisional military junta. The definitive creation of the ESAP would have to wait until 1958.

The pact of Sigtes (Spain) concluded on July 20th, 1957 between the leaders of the two traditional political parties -Alberto Lleras Camargo and Laureano Gómez- would germinate into the reform of 1957 with the following central points: 1) the need to legitimize the institutions by resorting to the will of the people through a plebiscite; 2) parity-based composition of the parliament by the two parties, on a transitory basis, to return later to democratic electoral confrontation, but "never" abandoning the criterion of totalitarian hegemony; 3) restrictions on the power of the president and high officials to fire employees of the administration at will (Molina, 1886). This last point is of special interest and is expressed as follows:

A first limit has to be the very urgent creation of a Civil Service career that supresses the concept that the political victor has the right to the spoils of the vanquished and to alter public administration from top to bottom, substituting all posts with new favorites (...) To give constitutional guarantee to the administrative worker, to make these functionaries neutral citizens in the political struggle and to create, at last, a serious and respectable career of specialists in the management of public resources..." (Arana de Ramírez, 1972: 55).

The plebiscite of December 1st, 1957 would be held with these elements in mind, which contained

the political and administrative reform with the following central characteristics⁴:

- a) There would be parity in the composition of the Congress, Assemblies and Municipal Councils, initially for 12 years and later prolonged to 16.
- b) The president would name cabinet ministers in the same proportion as found in the composition of the congress, i.e., maintaining parity between the two parties. The same rule governed appointments to all posts that were did not belong to the administrative career.
- c) There would be alternation in the presidency. Although not initially included in the plebiscite, the 1st legislative act of 1959 established the rule of rotation between the two parties in the Presidency of the Republic until August 7th, 1974.
- d) The parity system was also established in the judicial branch.
- e) The administrative career was established at the constitutional level.

The reform of 1957 established the administrative career through Law 19 of 1958 and Decree 1732 of 1960. Law 19 indicates the sphere of application in which employees are covered by the duties and rights of the Civil Service and which of them belong to the administrative career, the classification of posts and their respective requirements. It also orders the formation of administrative cadres and the determination of the powers of the President of the Republic in relation to the Civil Service. It created the Administrative Department of the Civil Service, the Superior School of Public Administration (ESAP), the Administrative Department of National Planning (DNP), the National Civil Service Commission and the Consultation Room and Civil Service of the Council of State. It also granted extraordinary powers to the president to establish the rules regarding different aspects of the career.

As can be seen, the idea of adopting a modern and technical civil service, united to the development of an administrative career, was considered a strategy, not only for modernizing public administration but above all as a means for achieving peace and national reconciliation.

⁴ Some consider that this was not a plebiscite in strict technical legal terms, but rather a constitutional referendum, since it simply ratified or amended a text of reform.

On the other hand, in exercise of the extraordinary powers that said law granted to the president, Decree 1732 of 1960 was issued, by means of which the Administrative Career Statute was adopted and other rules regarding the Civil Service were adopted. It established that the Civil Service is composed of all the civil posts within the executive branch, some of which are part of the Administrative Career while others are outside the system. It also established the obligation to request the National Civil Service Commission to provide the name of a candidate in order to fill an Administrative Career post. The functions of the commission included that of establishing the lists of persons qualified for the different types of public posts, based on the results of the competitive examinations that the Administrative Civil Service Department should hold periodically, according to the rules dictated by said commission. Furthermore, it specified the conditions and guarantees of public functionaries, the disciplinary regime, the system for classifying services, and the sphere of application of the administrative career.

Despite all the good intentions and the constitutional, legal and reglementary reforms adopted, application of the merit system and the administrative career was partial at the national level and merely marginal at the territorial level. The efforts of president Alberto Lleras Camargo, the first president of the *Frente Nacional* period and great promoter of both the merit system and the administrative career during his mandate from 1958 to 1962, did not produce the desired results. This was seen in the results obtained regarding the number of entries into the Administrative Career system, which only came to a total of 1,340 (Alvarez, 2009). The second *Frente Nacional* government was that of Guillermo León Valencia, who did little to promote the merit system. Instead, President Valencia showed an enthusiastic willingness to cover public posts "by the millimeter", a fact for which he became famous as he called upon conservatives and liberals to fill them. This attitude produced gratitude among some and bewilderment among others. The causes of the failure of the reform can be synthesized in the following way:

In the first place, the parity system established by the *Frente Nacional*, substituted the previous political-spoils system with another that was similar, but reserved for militants of the two parties (millimetric parity assignment between the two bands). Thus, while the administrative career posts were not

filled through competitive examinations, they were susceptible to being shared out equally between the two parties and this severely hindered implantation of the administrative career during the period analyzed.

In second place, we find the dissimilar and scarce political support for the reform. While the first *Frente Nacional* government (liberal President Alberto Restrepo, 1958-1962) was committed to it, the second (President Guillermo León Valencia, 1962-1966) condemned it to oblivion: "It was an epoch of struggles to structure the system and implant it, to overcome the multiple threats of the Parliament and the natural resistance of the traditional political mentality" (Arana de Ramírez, 1972: 60). The third *mandate* (President Carlos Lleras Restrepo, 1966-1970) decided to introduce its own constitutional and administrative reform.

In third place and as a consequence of the above, the short time which the rules were in force impeded its consolidation, knowledge, and general application of the reform, which is why the number of functionaries who entered the administrative career in application of Decree 1732 of 1960 was very low.

4. Third period of the administrative career: 1968-1991

The third period of the Administrative Career began in 1968 during the government of Carlos Lleras Restrepo (August 1966 to August 1970). His administration, denominated "the national transformation," was characterized by economic stabilization and growth and by the Constitutional Reform of 1968 that, among other aspects, decentralized a large part of government management into specialized entities - the decentralized institutes. Based on Laws 62 and 65 of 1967, which granted extraordinary powers to the President of the Republic, the government issued the following rules:

a) Decree-Law 1050 of 1968, which established the organization and functioning of the National Administration, indicating that it was composed of the Presidency of the Republic, the ministries and the administrative departments as "*organismos principales*" (main institutions); the superintendencies and other public establishments, as "*organismos adscritos*" (attached institutions); and state-owned industrial and commercial enterprises, as "*organismos*

vinculados” (associated institutions). The possibility of organizing “special administrative units” was also considered.

b) Decree-Law 3130 of 1968, which established the organic statute of decentralized entities, identifying them as public establishments, state-owned industrial and commercial enterprises, and mixed-economy companies.

c) Decree-Law 3135 of 1968, which regulated the integration of the social security system in the public sector and established the benefits system for public employees and official workers. This Decree-Law was regulated by, among other things, Decree 1848 of 1969, which defined the concepts of official employee, public employee and official worker: Public employee, when a natural person is employed in a legal and reglementary relationship that is translated into an administrative act of appointment with labor relations governed by the rules of public law; official worker, when the relationship involves a labor contract governed by the rules of the general labor code applicable to all labor contracts, and is normally applied to those working in construction, maintenance or public works (Rodríguez, 2004; Suárez Castañeda, 2004).

d) Decree-Laws 2400 and 3074 of 1968 develop the different aspects of the administrative career and civil service.

The above-mentioned rules determined the conditions of ordinary employment, in provisional and trial period, while the concepts of the career system are maintained but with modifications in their application. In addition to the administrative career within the executive branch of government, there are others such as those in the judicial branch, the electoral institution, the Office of the Comptroller General of the Republic and the Office of the Attorney General of the Nation. Furthermore, there are other special careers within the executive branch and, while it is true that one has its own particular characteristics, they are all inspired by the same fundamental principles. Such is the case of functionaries in the teaching career, the social security system, Telecom, and the National Health System, etc.

The general administrative career applies only within the executive branch, since the statute “regulates the administration of civil personnel who lend their services in posts within the Executive Branch of Public Power.” Only those who classified as public employees can belong to the administrative career,

and among them, only those who hold posts that are naturally of a career type. The jobs that make up the former category have been pointed out restrictively in different laws and regulations as the exception to the generality of government posts, which are of the career type (Suárez Castañeda, 2004). The applicability and achievements of the reforms established were limited and partial, and were not even in force much of the time.

In effect, a state of siege was declared in 1976 (Decree 2132) for reasons of public order, and application of the administrative career rules was suspended. It was necessary to await the issuance of Decree 583 of 1984 for legal-political normality to be restored and for the administrative career to be authorized anew. However, the new rules “cleaned up” the situation of the functionaries who occupied career posts without having gone through competitive examinations to obtain them, thus repeating the extraordinary entry phenomenon discussed previously.

Law 61 of 1987 reestablished entry into the administrative career through the merit system. However, as has already been mentioned, it also permitted automatic inscription for employees with seniority and was limited to the national level.

Among other provisions, it should be pointed out that it established the act of assuming a different career post without having been selected through competitive examinations was established as just cause for loss of career rights. It also prohibited career employees from being appointed provisionally. These measures aimed to end *de facto* “promotions” or “advancements”, i.e., without having gone through the corresponding competitions. Law 61 also imposed sanctions on functionaries who held posts of free appointment and removal with the loss of career rights, unless they had previously been given a commission to that effect (Suárez Castañeda, 2004). Finally, it dealt with aspects relating to retirement, dismissal, old age pensions, disability.

This period represented a retrogression in general terms and in relation to the administrative career in particular. We can offer the following reasons to explain said failure:

In the first place, as in the case of previous periods, the administrative culture for filling government posts did not change and appointments continued to be done in the traditional way. It should be recalled that the Colombian political system functions with

a logic in which, due to the presidential regime and the weakness of the political parties, congressional support for the executive is obtained by "delivering" different government entities to members of congress. Once the payroll has been filled, the following step is to legalize it by enacting the respective law.

In the second place, application of the administrative career rules is restricted to the national level. The field of application remains restricted to said level and in this sense the objectives of the decentralizing reform of 1968 were not developed; even less so were those of the decentralizing reform of 1986 and subsequent years which emphasized territorial levels of government, especially the municipal level.

In the third place, a massive incorporation of functionaries was ordered which required only seniority and qualification of services. This practice would establish a perverse precedent, which would go against the postulates of merit-based access and permanence, thus limiting applicability of the administrative career principles by replicating the practice of extraordinary entry initiated in 1968. This practice undoubtedly encouraged political maneuvering (the patrimonialist and political-spoils system) regarding the designation and appointment of public functionaries, since politically recommended individuals were appointed in all government entities, and their situation was regularized from time to time (1968, 1973, 1984, 1987, 1992) by automatically incorporating them into the administrative career:

Decree 2400/68 created what I have called, and continue to call, the "ventana siniestra" (legal loophole) for having instituted **extraordinary entry** into the administrative career, which is exactly the opposite of the merit system. This figure was repeated on various occasions, even after the Constitution of 1991, thus: through Decree 573 of 1985 (sic), in Law 61 of 1987, and in Law 27 of 1992, this last one after the constitution that is in effect today (Puentes, 2004: 52-53).

In the fourth place, its applicability was conditioned to the issuance of regulations, and in this way the authorities that had the power to provide jobs directly (without competitive examinations) continued to do so until the president issued Decree 1950 of 1973, 5 years later!⁵

⁵ This decree is still in force in relation to the administrative situations of functionaries.

Finally, from the legal viewpoint, the administrative career was suspended most of the time. From 1968 to 1973 competitions could not be held for lack of clearly established regulations. It was subsequently impracticable from 1976 to 1984 with the declaration of the state of siege.

5. Fourth period of the administrative career: 1991-2004

In response to the acute institutional, political and social crisis of the late 1980s, a Constitutional Assembly was called in 1991 which produced the new Constitution that would expressly establish the principles of a Social State of Law as its dogma, a participatory democracy, a unitary but decentralized republic, recognition of a multiethnic and multicultural nation with ample civil and political, economic, social and collective rights, but especially the introduction of mechanisms for the effectiveness of fundamental rights such as the *acción de tutela* (judicial tutelage action), popular and class actions, *acción de cumplimiento* (enforcement action), etc.

The classic division of the three branches of government would be maintained in the organic part of the constitution, but other entities would appear in charge of developing the public service role of the government. One of them would be the National Civil Service Commission. The creation of the constitutional jurisdiction in the hands of the Constitutional Court deserves special mention as a true bastion for the development of constitutional principles and a zealous guardian of the Constitution. The changes produced by the constitution in administrative ordering are more a mutation than a simple reform (Jiménez, 2006). In the case of the civil service and the administrative career, it generated important modifications such as those pointed out below:

a) The concept of "Public Function". There is an entire chapter entitled "Of the Public Function" (Articles 122 to 131), which covers everything related to the administration of government personnel. The Public Function refers to all government posts with functions detailed in law or official regulations, and those of a remunerated nature should be included in the respective staff payroll and their emoluments provided for in the respective budget. This concept, of French origin, complements the more traditional concept of "Civil Service," of English origin, which

refers only to functionaries of the executive branch. In this sense, the Constitution preserves the second meaning when it refers to the National Civil Service Commission⁶.

b) Entry into public employment is through the career system, the rest are the exception (Art. 125). All public service posts will be filled through competitive examinations to establish merits, except for offices of free appointment and removal, official workers, and others determined by law. Entry through competitive examination is the rule, and in this way, all functionaries whose system of appointment has not been established will be selected through competitive examinations. As will be seen further on, this constitutional principle has been invoked by the Colombian Constitutional Court on various occasions to prevent the **extraordinary entry** of provisional functionaries.

c) At least two different administrative career systems are established: a general one for the executive branch (covering the national level, governors' offices and mayors' offices with their respective central sector and decentralized sector by services), and special systems for the other branches of government and autonomous government agencies (Comptroller's Office, Attorney General's Office, autonomous university entities, diplomatic and consular career, General Prosecutor's Office).

d) The concept of public servant groups together all those who fulfill public functions, including individuals who perform them temporarily. Public servants are the members of public corporations, public employees and official workers.

e) With respect to retirement, it is emphasized that political affiliation may in no case determine appointment, promotion or removal from a career post. Furthermore, retirement from the administrative career shall be done for (1) unsatisfactory grading of performance, (2) violation of the disciplinary rules, (3) the other reasons established by law. The last type has been used by Law 909/04 in introducing

a polemical dismissal for reasons of "good service," which we will consider below.

f) Other aspects dealt with in the text relate to impediments to working as a public servant for reasons of crimes against public patrimony (the only article of the 2004 referendum that was approved); incompatibilities, the obligatory nature of the oath taken upon being sworn into office and for declaring property and income, etc.

g) The National Civil Service Commission is the entity responsible for administration and oversight of the careers of public servants not governed by special systems.

Law 27 of 1992 applied the constitutional precepts, although its enactment was somewhat precipitated by the peremptory terms that the constitutional assembly had established. Among its achievements are the creation of the National Civil Service Commission, regulation of the career for entities at both the national and the territorial level, classification of government posts, authorization of the entities competent to develop the selection processes, development of the right to reincorporation and compensation for dismissal, establishment of guarantees for physical limitations and maternity, and the creation of a system of extraordinary entry for employees at the territorial level.

The administrative career was reactivated at the national level and began to be applied at the territorial level. Nevertheless, the results were insufficient for the following reasons:

1. The automatic or extraordinary entry mechanism was applied once again, contradicting the Constitution itself, this time for functionaries at the territorial level as long as they fulfilled two conditions: 1) that they held administrative career posts, and 2) that they accredited the requirements for occupying the post. "In application of the law at the territorial level, 100,054 employees registered during the 1993-1998 period, of whom approximately 80% did so based on **extraordinary inscription** and the rest, through selection processes" (Grillo Rubiano, 2004: 106, emphasis added).

2. As a result of the above, as the selection processes were carried out provisional appointments became the usual form of access

⁶ This new idea about Public Function is not without its problems since, in the tradition of constitutional and administrative law, the same term is used to refer to the general attributes or functions of government, such as the legislative function, the executive function, the judicial function, etc. The constitution itself uses this concept when it refers to the Administration of Justice (Art. 228), or fiscal control (Art. 267) as "public function."

to career posts, ignoring the obligation to apply the merit principle, a situation which continued until 1997 when a decision of the Court declared said extraordinary inscription unconstitutional.

3. Certain entities, such as the Administrative Department of the Presidency of the Republic and the Directorate of Customs and National Taxes, were excluded from the administrative career. The Constitutional Court ruled against this as well.
4. The composition of the National Civil Service Commission was also questioned because its plural and ineffective composition prevented it from properly fulfilling its obligations and, furthermore, it did not have any real power to impose sanctions on the nominators who committed the abuses (González Salas, 2004).

Diverse decisions of the Constitutional Court, and inconsistencies contained in the law itself made it urgent to replace them with a new statute, which would appear in 1998 with the enactment of Law 443 regarding the administrative career. The characteristics of the new legislation included the following: 1) It reformed the composition of the Civil Service Commission and created departmental and district commissions; it was also authorized to impose sanctions; 2) The already famous extraordinary inscriptions were prohibited; 3) The classification of posts of free appointment and removal was adjusted to the pronouncements of the Constitutional Court; 4) A single nomenclature was created for posts at the territorial level, thus terminating the dispersion of nomenclatures and requirements; 5) It established that modifications to payroll staff would have to be backed up by a technical study and reasons of service; 6) The preferential right to reincorporation due to suppression of a career post could be made effective in any entity and not just in the one in which the person had worked.

Unfortunately, this law had only one year of life and did not survive the constitutional control of the Court, which declared the creation of the National Civil Service Commission and the territorial commissions unconstitutional in decision C-372 of 1999. Without this agency for administration and supervision, it was not possible to carry out the competitive examinations to determine merits, which meant the administrative career would be

paralyzed from then on until the call for candidates in December of 2007. The factors that contributed to the failure of the administrative career in this effort include the following:

In the first place, the temporary status of the administrative career since the middle of 1999, given that no selection process was carried out through competition until the end of 2007. This has been taken advantage of to obtain a proliferation of provisional appointments and to delay establishment of the new regulations as long as possible. "By May 31, 2003, out of a total of 91,174 posts in the general administrative career, only 60,264 were found registered in the career roster, while 34%, i.e., 30,880, were filled by provisional employees" (González Salas, 2004:18). It is estimated that this situation was even more dramatic at the territorial level.

In the second place, the Presidency of the Republic and its entities assigned to the administrative career system continued to be exempted.

In the third place, the interpretation of the Constitution regarding the nature and structure of the Civil Service Commission was inadequate.

Finally, all of the above permitted posts to be filled even more openly on this occasion on the basis of political recommendation and the clientelist practices used in Colombia.

6. Fifth period of the administrative career: 2004-to date

Law 909 of 2004 regarding public employment, the administrative career and public management forms part of the transversal reforms initiated during the government of Álvaro Uribe. It is not limited to filling the legal vacuum by adjusting the requirements of the administrative career to the decisions of the Constitutional Court, but rather introduces new elements regarding public employment in general and the topic of "public management" posts in particular, the latter being a clear development of the principles behind the administrative reform. The regulations can be analyzed in three main parts: a) the first is addressed to development of the administrative career and corrects the failures of previous regulations; b) the second part covers matters relating to public employment; c) and finally, the third part takes charge of establishing the guidelines of so-called "Public Management". The law also

grants the president powers to issue decrees with the force of law, which will make it possible to apply the precepts of the law. The most relevant aspects of Law 909/04 are pointed out below, with special mention of the topics relating to the administrative career and public management.

In general, the law develops the principles of the administrative career indicated in the Constitution, which revolve around the merit system and access to public posts through an administrative career system as the general rule, not the exception. There are approximately 1,200,000 government jobs in Colombia, but there are no reliable figures regarding how many of them belong to the administrative career⁷, and of those that do, the most approximate figures indicate that 35% have provisional status. Regarding Law 909, it is important to point out the following in relation to the merit system:

- *The National Civil Service Commission.* The Commission is created as an agency for the administration and supervision of the specific administrative careers, of a permanent nature at the national level, independent of the branches of government and institutions of governmental power, with legal personality, administrative autonomy and their own patrimony.
- *Institutions for the direction and management of the system.* In the first place, the Administrative Department of the Public Function (DAFP) is responsible for formulating policy, as well as planning and coordinating human resources at both the national and territorial level.
- *The peremptory call for open competitions.* Once the Commission has been formed, it should issue the call for public competitions to fill the career posts.
- *The general administrative career system, specific and special systems.* Three types of systems are established: 1) the general system, which applies to most entities of the executive branch, including departments and municipalities; 2) specific systems, or those that correspond to the singularity and specialty of the functions fulfilled by entities such as the Administrative Department of Security

⁷ The executive branch in Colombia is composed of the national government with its centralized sectors by services and, at the territorial level, 32 departments and close to 1100 municipalities with their respective central and decentralized sectors, all of which may represent a potential total of close to 350,000 administrative career posts.

(DAS), the National Penitentiary and Prison Institute (INPEC), the Administrative Department of the Presidency or the Superintendencies, and the Civil Service Commission which will oversee these different career systems; 3) special career systems are not covered by the law although they can apply its provisions on a subsidiary basis, as for example in the careers of the judicial branch, the Congress, the Office of the Prosecutor, the Office of the Comptroller, the Office of the Attorney General, etc. Some comments should be made on this point.

Among the limitations of the reform, the following stand out:

In the first place, there are problems of a technical order and of system management, which take concrete form in the delay and trauma involved in carrying out the competitive examinations to establish merits. The law was approved in 2004, but it was not until 2007 that the first tests began to administered and even in 2012, the lists of eligible candidates are still being drawn up and functionaries assuming their posts.

In this period the technical problems involved in initiating the operation of the administrative career and making it work became evident, and the capacity of the National Civil Service Commission and the whole system was put to the test to respond to the need to fill an important number of posts through competitive examinations to establish merits.

In the second place, there have been repeated attempts to obtain **extraordinary entry or privilege** for provisional posts since the enactment of Law 909 of 2004, which have led to diverse declarations of the Constitutional Court to preserve the merit principle, as will be seen below.

1) Law 909 of 2004, Art. 56, regarding background evaluation and validation of the experience of provisional employees in the competitions, was declared unconstitutional by the Constitutional Court in 2005 which considered that it violated the rights to equality and access to public posts. It was then noted that from the start of the new law regarding the administrative career, there were those who wished to give preferential treatment to the provisional employees, allowing them to obtain entry advantages over other candidates. Through Decision C-733 of 2005 (Presiding Justice, Clara Inés Vargas) these provisions were declared unconstitutional. In this regard, the Court pointed out that the law "...

ends up establishing an unjustified advantage in their favor with respect to the other candidates, and therefore violates the right to equality and the right to have access to public posts.”

2) Law 1033 of 2007, Art. 10, regarding the administrative career within the national police and the armed forces, creates a “*mico*” (loophole deliberately added to the law) to favor provisional functionaries and those who have already entered the administrative career without presenting the basic general test for preselection, and to assign greater value to experience instead. It also enabled those who had participated under previous parameters to enter the administrative career. The Constitutional Court, through Decision C-211 of 2007 (Presiding Justice, Álvaro Tafur Galvis) declared clauses 1, 2 and 3 of Art. 10 unconstitutional, arguing that “... exempting those candidates who are already working in administration, whether it be in a provisional status or within the career, effectively shows a clear ignorance of said principles.”

On the other hand, the final clause of Art. 10 was declared unconstitutional through Decision C-290 of 2007 (Presiding Justice, Marco Gerardo Monroy Cabra), which stated: “if they are eventually “enabled” in it, as permitted by the law being examined here, it will clearly incur in failure to recognize the right to equality to which Article 13 above refers...”

3) With a transitory paragraph, Legislative Act 01 of 2008 adds Art.125 of the Political Constitution to permit the extraordinary entry of provisional functionaries. The promoters of extraordinary entry intended to carry out a constitutional reform in order to incorporate into the very text of the Constitution itself rules that would permit extraordinary entry, because they thought that the Constitutional Court would not be able to declare the unconstitutionality of a rule elevated to constitutional rank. However, in the opinion of the court (Decision C-588 of 2009), in doing so the Congress had exceeded its functions of “reforming” the constitution and what it had done instead was to “substitute it”, by creating rules that were contrary to the merit principle established by the Constitutional Assembly in 1991⁸.

8 The legislative acts were initiated by members of Congress and promoted and approved by a great majority of representatives and senators from a wide variety of political parties and movements.

4) Legislative act 04 of 2011 established equivalences between the experience and education of provisional and acting employees and the entrance examination requirements. It applies to those who were participating in selection processes at the date on which said legislative act went into effect. The rule grants special treatment to provisional or acting officials, within the competitions, exactly as had occurred with Law 909 of 2004 Art. 56 and Law 1033 of 2007 Art. 10. What was new in this case is that the competition through examinations to establish merit is not omitted and it is done by means of a constitutional reform, but within the transitory rules, seeking to prevent the Constitutional Court from being able to argue “partial and transitory substitution”, as it had done with the ill-fated Legislative Act 01 of 2008. With eight files of lawsuits claiming unconstitutionality and appealing to the line of jurisprudence that it had established, the Constitutional Court, through Decision C-249 of 2012 (Presiding Justice, Juan Carlos Henao) declared Legislative Act 04 of 2011 unconstitutional, arguing the following:

... the transitory article introduced into the Political Charter through Legislative Act 4 of 2011, leads to a partial and temporary substitution of the Constitution and, for that reason, implies an excess on the part of the Congress of the Republic ... the permitted homologation of experience or additional studies as valid equivalents of the achievement test places the other candidates at an evident disadvantage.

Finally, we wish to add one last reason why the merit system has not functioned in Colombia. It has to do with the aging of the principles and objectives on the basis of which it has operated and the lack of renovation compatible with the functioning of modern organizations. We refer here to the principles of equality and to protection against the abuses of partisan politicians. These two principles are not sufficient:

Therefore, a redefinition of the concept will be necessary -or, in its defect, the incorporation of other principles of equal weight- in the administration of public service, so that the same will act as a counterweight to those of merit systems. The recent literature on public administration emphasizes four principles that stand out: transparency, high yield, results and ethics. It seems to us that a merit model that incorporates them has the potential of

contributing to the solution of one of the major problems that merit systems have faced (Cordero, 2010: 10).

The previous attempts clearly demonstrate the scarce acceptance that the merit system has among the members of the political class, since they see it as a scheme in which they lose control over the middle and lower levels of bureaucracy, which they would like to maintain under their own tutelage. While the extraordinary entries enable those appointed provisionally to achieve a certain degree of stability, these functionaries nonetheless continue "owing the favor" to the politicians who appointed or recommended them at the opportune time.

7. Conclusions

At the beginning of this article a hypothesis was pointed out that presented four factors considered unfavorable to the application of the merit principle, which could explain the failure in implementing the administrative career in Colombia. Of these, lack of constitutional and legal provisions should be discarded as a factor. In fact, important laws have been enacted since 1938, and in 1957 the administrative career was created constitutionally. Furthermore, during the third, fourth and fifth periods the process has been continued with profuse regulation at the constitutional, legal and reglementary level, and the last period has even witnessed intervention on the part of the Constitutional Court with jurisprudence that has closed the doors to the detestably unjust practice of extraordinary entry and privilege. Despite all this, implementation of the administrative career has been limited, postponed or left with residual effects time and again, due to reasons other than lack of legal regulation.

The only period of which it can be said that there was a lack of legal reglementation was the fourth one, specifically between 1999 and 2004, when a law was needed to make up for the deficiencies of previous Law 443 of 1998. Nevertheless, the delay in enacting the new law was due to the lack of will on the part of both Congress and the government to promote an initiative in this sense.

In contrast, the cultural factor is one that is directly responsible for the ineffectiveness of the merit system. The persistence of a patrimonialist and clientelist political culture generates resistance to the application of this mechanism, in a medium

accustomed to occupying public offices and posts by recommendation, privileged access, exchange of favors (votes for bureaucracy, jobs in exchange for support in campaigns, etc.), regionalism or localism *per se*. These cultural patterns also generate distrust of competitions, which is why it is not surprising that some who participate in them believe that whoever obtains a recommendation or "extra" support will eventually win and so they resort to looking for a "godfather" to ensure they win the contest.

Neither the enactment of a law nor its detailed technical regulation is sufficient to implement a rational Administrative Career system in government. It is a more complex process that involves changes in political and administrative customs that do not occur automatically and that require a long period of time for adaptation and adjustments. In this sense, the rules regarding the merit system should reflect the administrative customs of the organization so that its implementation will make its adoption and adaptation viable. Now it is not a question of validating detestable or ethically questionable practices by means of rules, but rather of adapting the rules to the cultural and social context of each people. The systems may have been transplanted without considering the social customs and practices that prevail over politics and public service in Colombia. In this sense, the implantation of merit systems must be accompanied by an educational strategy that will imply a change of values in both the medium and long term, such as the exploration of native or endogenous forms regarding entry into the administrative career. It is even possible that the standardized way of calling for candidates and carrying out competitions will end up being discriminatory for certain sectors, as has recently been suggested (Martínez, 2012).

The political factor has also been a determining one in the scarce development of the merit system, especially the relatively primitive practice of the political spoils system and distribution of government jobs based on political support and electoral results. This goes a long way in explaining why the administrative career (a) was postponed several times in the periods analyzed, sometimes under the protection of the State of Siege, (b) was applied in a limited or restricted way (in the executive branch at the national level), (c) was distorted by the practice of extraordinary entry and privilege, although efforts have in fact been made and are still being made to implement it, as

demonstrated in the last period analyzed. Entry into the administrative career since the late 1960s, during the decade of the 1980s, and well into the 1990s, was characterized more by extraordinary processes or labor amnesties than by a real merit system. Thus, a group of people who were not necessarily competent to perform their public functions was privileged, while thousands of people who may have had the necessary merits to fill a government post but lacked a political recommendation were excluded and ignored.

Finally, technical and administrative career management factors are also mentioned in some of the periods analyzed and seem to have contributed, although in a more discrete way, to the poor results of the merit system. These aspects relate to the organization and structure of the system, the specialized knowledge, the procedures, the competent personnel available to manage the administrative career, the salary and motivational structure, etc. Technical factors increase in importance during the last period analyzed, i.e., since 2004 because, as has been pointed out, both the implementation

and management of the competitions have been slow and traumatic and it would seem that the established constitutional and legal structure has been insufficient to respond to the demands of the competitions (call for candidates, selection, lists of those eligible, and appointments). In this sense, it seems necessary to draw up a balance on the matter, such as, for example, the functions of the National Civil Service Commission with its three commissioners, which must give national coverage.

On the other hand, some believe that the administrative career is unattractive to ambitious persons (in the good sense of the term), and that the job stability also leads to poor performance or low productivity, while the lack of promotion possibilities within the career and the low salaries paid produce demotivation in the employee. All of these are aspects that can be studied and improved, as pointed out in several proposals regarding the evaluation of performance, the development of job skills and the adoption of a system of variable salaries, among other things.



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