

# **Promoting Indicators: The case of Colombian health system**

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## **Abstract**

This research is aimed to evaluate the role of indicators in the monitoring process carried out by the Colombian Constitutional Court to government's health policies and the interaction between the national and international sphere. For this purpose interviews were made with the auxiliary magistrate of the Constitutional Court, Aquiles Arrieta; the former auxiliary magistrate in charge of Specialized Chamber of Review (Sala Especial de Seguimiento a la Sentencia T-760 de 2008) for health of the Constitutional Court, Everaldo Lamprea; and the Associated Professor of Law School - Universidad de los Andes, Julieta Lemaitre. The paper is divided in five sections: First, an explanation about the use of health indicators in the international context, in order to establish the international influence over the Colombian Constitutional Court in the discussion about the creation of health indicators; second, a description of the current context of the health care system that introduces: i) the current problems of the Colombian health system, ii) the roll of the Constitutional Court, which exerts control over the executive actions, intends to achieve improvements in the national health system, and iii) the discussions about the creation of national health indicators; the third section explores the limits of indicators, concretely why the Constitutional Court has developed just general guidelines, but not indicators; the fourth section shows the impact of

the Courts work and the use of indicators by the government. Finally, v) the fifth section concludes.

## Introduction.

The use of indicators as a technique of global governance is increasing rapidly. Nowadays, this practice has been extended to the field of Human Rights, especially in Economic, Social and Cultural Rights (ESCR) to identify human rights violations, assess compliance with treaty obligations and measure human rights progress over time. The increase in their use is based on the idea that they simplify information and allow the evaluation and comparison between different actors who are being assessed.

Even though the use of this tool is common, the concept has different connotations; in studies about indicators as a technology of global governance they are defined as

*“a named collection of rank-ordered data that purports to represent the past or projected performance of different units. The data are generated through a process that simplifies raw data about a complex social phenomenon. The data, in this simplified and processed form, are capable of being used to compare particular units of analysis (such as countries or institutions or corporations), synchronically or over time, and to evaluate their performance by reference to one or more standards.”<sup>1</sup>*

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<sup>1</sup> DAVIS, KINSGBURY & ENGLE. Indicators as a Technology of Global Governance. Institute for

That definition is linked to the idea of quantitative methods, and delimits indicators as representations of numerical information that evaluate performance with reference to a standard; but in human rights field indicators the definition is broader. Human rights indicator:

*“is specific information on the state or condition of an object, event, activity or outcome that can be related to human rights norms and standards; that addresses and reflects human rights principles and concerns; and that can be used to assess and monitor the promotion and implementation of human rights”<sup>2</sup>*

Thus, human rights indicator can be quantitative or qualitative; therefore it is important to understand the difference between each of them, taking into account that one implies tighter methodological restrictions. Despite the differences between the methods, the general idea of both definition is evaluated whether an actor's performance or the promotion and implementation of rights, according to some standards and use the information as a base to regulate or promote policies.

Moreover, power dynamics behind the indicators depends on who creates the indicators, who uses them and how or why they are used. This research will study a specific case: the role of

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International Law and Justice New York University School of Law. Oxford University press. First edition, 2012.

<sup>2</sup> UNITED NATIONS, OFFICE OF HIGH COMMISSIONER. Human Rights Indicators: A Guide to Measurement and Implementation. New York And Geneva, 2012. Online: [http://www.ohchr.org/Documents/Publications/Human\\_rights\\_indicators\\_en.pdf](http://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf)

indicators in the evaluation of the national health care regime accordance with the constitutional right to health. Due to hundreds of petitions from citizens, claiming for the provision of essential medical treatments, in 2008 the Constitutional Court of Colombia decided that was necessary to reshape the system to comply with the constitutional rights, primarily with the right to health and life. The Court created a Specialized Chamber of Review, and later an expert committee, which identified parameters intended to created health indicators. However, years later, there are no indicators developed by the Court.

This paper aims to show how different actors -national and international- that are involved in the health field interact among the design process of indicators; and how the Constitutional Court promote the use of this tool to assess the government. The Court highlight the criteria to fulfill the right to health, and which variables must be include to has a complete understanding about the compliance of the right; but taking into account how indicators can show just part of the reality, now the Court should supervise that government's indicators include all the criteria.

## 1. The global concern for the right to health and the use of indicators.

The global concern about health has focused on two points: first, in initiatives to promote structural changes in health systems, in order to improve the quality and guarantee of the access; and second, the battle against specific diseases, like Malaria or AIDS. On an effort to respond to these concerns, indicators have been one of the main tools used to show the global

scenario: making the problems visible, maintaining the interest about the topic and giving the impression of being precise and neutral since they come from scientific methods.

The concern about health systems was discussed in the International Conference on Primary Health Care. As a result of the global concern about “*the need for urgent action by all governments, all health and development workers, and the world community to protect and promote the health of all the people of the world*”<sup>3</sup>, the Declaration of Alma -Alta in 1978 and his slogan “*health for all by 2000*” were made. At that moment, the world started to promote certain principles that should direct health systems, such as *solidarity, efficiency and universality* in the access to health services, etc. The challenges in the materialization of these principles were especially difficult to Latin American countries, considering that their health systems were inequitable and inefficient, and State initiatives to incorporate substantial changes were stopped in the 80’s<sup>4</sup>.

During the economic crisis of 1980 World Economic Forum required States to cut costs on the social sectors. In the middle of this state of affairs, the World Bank strengthened its loan program for the health sector and became the international agency that lent more funds for developing countries. In addition, the World Bank promoted some guidelines to achieve the reforms, such as the privatization and decentralization of services and the universalization of

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<sup>3</sup> Declaration of Alma-Ata. International Conference on Primary Health Care, Alma-Ata, USSR, 6-12 September 1978.

<sup>4</sup> HOMEDES & UGALDE. “Las reformas de salud neoliberales en América Latina : una visión crítica a través de dos estudios de caso”, in Pan Am. J. Public Health, vol 17, 2005.

the access to a set of minimum services<sup>5</sup>.

In the 90's, the influence of international actors led the developing countries, especially from Latin America, to a series of health reforms, some closer or more distant to the principles promoted by the World Bank. The interest of the region to achieve equitable access to health services was reaffirmed at the Summit of the Americas in 1994, because it is a central factor in the fight against poverty<sup>6</sup>.

The generalized reforms on Latin America made that organizations, like the Pan American Health Organization (PAHO) and the United States Agency for International Development (USAID), paid special attention to the situation and tried to make profiles of the reforms, to classify them according to their characteristics and evaluate them comparatively. But this exercise was impossible because before the reforms the quality controls were generally done separately by hospitals, there was no concept of "quality", nor standards or indicators<sup>7</sup>.

In 1997, was created the Regional Initiative of Reforms for the health sector, a project designed to develop methodologies that allowed tracing and evaluation of the reforms based on five objectives: (1) equality (coverage and access); (2) effectiveness and quality (technical

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<sup>5</sup> *Ibíd.*

<sup>6</sup> ROSS, ZEBALLOS & INFANTE. La calidad y Reforma del sector Salud. In Pan Am. J. Public Health, Vol 8. 2003-2004.

<sup>7</sup> ALLEYNE, George. Advancing the People's Health Annual Report of the Director – 2000. Pan American Health Organization.

and perceived); (3) efficiency (in the assignment and administration of resources); (4) sustainability and (5) participation and social control. Subsequently, in 1998, the Division Of Health Systems And Services Development of PAHO wrote and spread the “Methodological guidelines, health system profiles, monitoring and analyzing health systems change” of the countries of the region. The guidelines described, in different sections, the basic components of the profile of the systems and health services: i) political, economic and social context; ii) general organization, resources and functions, and iii) tracing and evaluation of the reforms.

Even though this document was done with a general view of the Latin American countries, the report gives a warning about the methodological limitations. The paper warned that in some countries the available information turned out to be insufficient and unreliable and was not compiled with the required level of disaggregation; also that health services systems had complex and dynamic realities and it was not possible to establish a cause-and-effect relationship between health system functions, sectorial reform processes and the impact on the variables used to evaluate their results<sup>8</sup>.

These inconveniences, not allowed comparisons between regions. Although, there has been methodological changes, in 2000 the World Health Organization (WHO) made a general report, including Latin American countries, where a list of indicators were used, including: i) general level of each country's health and equality in their distribution within the population; ii) the level and distribution of responsiveness of the system to the population

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<sup>8</sup> Rivas-Loría, Priscilla. Methodological guidelines, health system profiles, monitoring and analyzing health systems change. Special Edition N. 18 Washington, D.C: PAHO, 2006.

expectations, iii) justice and impartiality of the financial burden and financial risk protection. Based on those indicators, which were combined in a composite index, the countries were ranked in terms of performance in health level and in their general health system<sup>9</sup>.

These indicators were helpful for the study of the health systems in the world, but the methodological problems do not allowed a quantitative and comparative global analysis. To make a more precise report, experts from the WHO and PAHO suggested the development of a census on indicators to examine the methodology. So with the help of national governments and experts a transparent system was designed, in order to normalize data compilation and included indicators such as: access, equality, sustainability, competence, efficiency and adaptability by the citizens. They were classified according to four dimensions, the intermediate and final goals.

In 2006, PAHO developed a document with some improvements, and organized the structure of methodological guidelines in three sections: i) context of the health system, ii) functions of the health system and iii) monitoring change/reform in health systems. This structure claimed to facilitate the recollection, preparation and periodic updating of the Profile based on the three sections. But the Country Profiles that are currently available were made in 2007.

Besides the health systems monitoring, in 2000 the eight Millennium Development Goals

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<sup>9</sup> Mesa-Lago, Carmelo. Las reformas de salud en América Latina y el Caribe: su impacto en los principios de la seguridad social. LC/ W 63. Santiago de Chile, ECLAC, 2005.

(MDG) were established. Three of the eight goals concern to health: reduce mortality in children under the age of 5, improve maternal health and combat HIV/AIDS, malaria and other diseases. The reach of each goal is calculated on a basis of 16 indicators, as mortality-rate, prevalence deaths associated with some diseases and the access of essentials medicines goods (drinking water, essential drugs, contraceptives, etc.).

The Millennium Development Goals required the accomplishment of many changes in health systems, even though the changes were not a goal itself. The United Nations Economic Commission for Latin America and the Caribbean (ECLAC) has pointed out that the Human Development Index in Latin America has been a major progress in improving average social indicators<sup>10</sup>. Nonetheless, the index does not reflex the region's high levels of inequality and exclusion<sup>11</sup>. Consequently, the rank does not take into account whether there are improvements in the general access of basic goods and services by the population, a condition in order to achieve the Goals.

As a result, the MDG needed an improvement of system response capacity, equity and extend social protection and investment expended on health, etc. Those structural measures depended on the willingness and capacity of national governments, but there are not indicators that calculate if the measures that governments have been applying until now are efficient.

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<sup>10</sup> Human Development Report Office as of 15 May 2011. Available in: <http://hdrstats.undp.org/en/indicators/103106.html>

<sup>11</sup> The millennium development goals: a latin american and caribbean perspective. LC/W. 121. ECLAC. March 2007.

With new initiative as MDG, accountability is essential and, monitoring methods must be accessible, transparent and effective. For this reason, Paul Hunt (the Special Rapporteur of Human Rights Council) emphasized the importance of proper collection of medical data whereas without reliable indicators it would be impossible for the States to monitor the progressive realization of the right to health<sup>12</sup>. Even though, there are general recommendations for create indicators on human rights, in the regional sphere the American Commission on Human Rights have proposed guidelines for the monitoring of the right to health<sup>13</sup>. The principal guidelines are: the reception of the right, State capacity, financial context, equality and non-discrimination, access to information and participation and access to justice. Besides that, to each one have been assigned: principal structural indicators, of process and outcome, which included signs of qualitative and quantitative progress to determine the level of protection, and suggested to use the available data that was obtain in the development of the MDG.

The American Commission on Human Rights recognizes that the right to health has a large number of measuring instruments, especially quantitative, like statistics in infant mortality, maternal mortality and HIV / AIDS. In consequence, the Commission promoted the use of these tools, especially the MDG indicators, to create a general report for health field<sup>14</sup>.

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<sup>12</sup> Paul Hunt. Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 17 January 2007. A/HRC/4/28.

<sup>13</sup> ABRAMOVICH, Víctor. Lineamientos para la Elaboración de Indicadores de Progreso en Materia de Derechos Económicos, Sociales Y Culturales. 19 July 2008. OEA/Ser.L/V/II.132

<sup>14</sup> American Commission on Human Rights. OEA/Ser.L/V/II.132. 19 July 2008. Par. 91

Hence, in the context of the right to health indicators and guidelines, there have been some developments, in order to enable accountability to international and regional organizations, about the progress in protecting the right to health. However, at the regional level, the limitations in data collection have not allowed to consolidate macro statistics to compare the progress and effects of health reforms.

After study the international context, it will be introduce the case of the Colombian Health System, its problems and the intervention of Colombian Constitutional Court.

## 2. The health care regime in Colombia: the control exert by de Constitutional Court over the executive

Joining the Latin American trend suggested by the World Bank, the Law 100 of 1993 changed the Colombian health care regime and created a market regulated by the State. This new system was based on the affiliation of all the citizens through two regimes: the contributive and the subsidized regime. The first, covered employees of the formals sectors, self-employed that have the economic capacity to contribute to the system and retired people, all of them have to contribute 12% of their earns to the Solidarity and Guaranty Found (FOSYGA), with the purpose of financing the access of citizens that did not receive sufficient income to pay their own affiliation to the system and belonged to the subsidized regime<sup>15</sup>.

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<sup>15</sup>Pan American Health Organización. “Perfil Sistema de salud en Colombia”. Washington, D.C.: OPS, 2010

The management of the health services is in charge of the Organizations that Promote Health Services (EPS) and the managers of the subsidized regime. These corporations hire the suppliers required to provide the package of health services described by the “mandatory services of health” (POS) of each regime. Both regimes were designed with different POS, as a transitory measure based on the financial projections of the health care system, which predicted the increase in the incomes that would allow the unification of both POS<sup>16</sup>.

Unfortunately, it didn't work out as planned because: 1) the portion of the population that pays to the contributive regime is less than the people covered by the subsidized regime, producing a negative balance. 2) The inequality among Colombian citizens has created a barrier to break the negative balance between people that contributes and people that is subsidized. 3) The negative balance is helpless in unifying the POS between both regimes. 4) Some institutions have dysfunctions that have created disputes related to the cost of drugs, the settlement of the request of patients and the update of the POS<sup>17</sup>.

The users were affected when the EPSs started to deny important medicines and treatments, and the *tutela*<sup>18</sup> action started to be the main mechanism to pursue the access to some health services. The Colombian Constitutional Court tried to solve the situation with a case by case

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<sup>16</sup>Op.cit. HOMEDES& UGALDE.

<sup>17</sup> LAMPREA, Everaldo. “Constitución de 1991 La Crisis de la Salud”. Ediciones Uniandes, Bogotá 2011. Pág. 77-80.

<sup>18</sup> The *tutela* is a judicial action presented before any judge for the immediate protection of a fundamental human right, and can be used by any person or group. Nowadays the *tutela* can provide not only the protection of civil and political rights, but also to some social and economic rights.

approach. The Court established the conditions to allow the justiciability of right to health; his protection proceed when the situation could lead the violation of right to life, or when it was necessary to preserve the petitioner dignity<sup>19</sup>. The number of *tutelas* regarding health issues increased rapidly, and by 2008 they represented the 41,52% of the 344.468 *tutelas* about all matters that were presented in that year<sup>20</sup>.

After years dealing with those cases, the Constitutional Court detected that all the judicial actions hid a structural problem of the health care system. Therefore, in July 31th of 2008 the award T-760 of 2008 was published. The award recognized the right to health as a fundamental right itself, taking into account that it is possible to identify his content as a subjective right according to the obligations in the POS, that basically involves the real access to health services<sup>21</sup>. The recognition of health as a fundamental right led the Court to order 15 specific aspects to the Government, among them stand out the following: update and unify of the POS, assurance of the access to the service and guarantee the necessary flow of the resources to achieve this goals. Correspondingly, the Court established a deadline to comply each of the 15 orders between December of 2008 and December of 2009.

It is noteworthy that in Colombia the Constitutional Court has wide powers to protect fundamental rights, and some times social, economic and cultural rights, and it was not the

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<sup>19</sup> See generally YOUNG & LEMAITRE. The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa. Harvard Human Rights Journal. Vol. 25 Issue 1. 2013. Online: <http://harvardhrj.com/wp-content/uploads/2013/05/V26-Young-Lemaitre.pdf>

<sup>20</sup> DEFENSORIA DEL PUEBLO. La tutela y el derecho a la salud: Periodo 2006-2008. Pág. 26. Online: [http://www.defensoria.org.co/red/anexos/publicaciones/salud\\_08.pdf](http://www.defensoria.org.co/red/anexos/publicaciones/salud_08.pdf)

<sup>21</sup> DEFENSORIA DEL PUEBLO. El Derecho a la Salud en la Constitución, la Jurisprudencia y los Instrumentos Internacionales. Bogotá D.C, 2003.

first time that the Court confronted a similar situation, where the magnitude of a problems that starts with singular cases evidence an structural problem. In 2004 an unconstitutional state of affairs<sup>22</sup> was declared, through the award T- 025, because the rights of internal displaced population were being systematically violated; the Court affirmed that the protection of the individual plaintiffs rights is a temporary solution but does not solve the massive violation of rights of the entire group, consequently it was necessary to take integral measures. In that occasion the Court gave orders to the Congress and the Government for the creation and implementation of public policies, and to follow up the decision developed two mechanisms: first, holding public hearings in which the Court gave new orders to institutions, according to the current situation; second was the issue of monitoring writs, a total of 84, by which guidelines and orders were given to institutions that didn't improve, and where the fulfillment of the violated rights of the displaced population was evaluated.

The T-025 monitoring writs were developed in three phases and three kinds of pronouncements. In the first stage since 2004, the Court documented and systematized the faults of public policies and implementation process related to the topic. In the second stage, starting in 2007, *"(T)he Court was focused on developing evaluation mechanisms in order to*

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<sup>22</sup> In the award T- 025/04, the Colombian Constitutional Court defined the requirements for establish an unconstitutional state of affairs. (i) The massive and widespread violations of various constitutional rights that affects a significant number of people; (ii) the continued failure of the authorities in fulfilling their obligations to ensure the rights; (iii) the adoption of unconstitutional practices, such as the use of judicial actions for protection, as part of the process to ensure the right violated; (iv) the failure to issue laws, administrative or budget measures necessities to prevent violation of rights; (v) the existence of a social problem whose solution compromises the intervention of several entities, requires the adoption of complex and coordinated actions, and need a level of resources that imply a significant additional budgetary effort; (vi) a situation where, if all the people affected by the same problem, use judicial action to claim protection of their rights, there would be a huge judicial congestion.

*measure progress, stagnation or decline in the programs and attention in charge of each entity” [...] “the result of the collaborative effort of the Court was a list of 20 topics that can be assessed through result indicators of three types: full enjoyment of rights, complementary and sectorial”*<sup>23</sup>. The third stage began in the mid-2008, *“has been marked by two features [...] “the increased demand for concrete results and the urgency of achieve them” [...] “The Court also made more specific diagnoses and orders through important writs about the situation of the most vulnerable displaced groups”*<sup>24</sup>.

Taking into account the internal displaced experience, and that the chair Magistrate, in charge of the award drafting was the same in both cases, it was expected a similar strategy to follow up the award compliance. At the beginning in health case the Constitutional Court created a Specialized Chamber of Review, and asked the Government to provide schedules, reports and specific results in the enforcement of changes. At the end of 2008, the Court received the first reports from the Ministry of Health and Social Protection and from National Agency of Health (Superintendencia de Salud). The reports were disordered and incomplete, as a result the Court, requested specific information again<sup>25</sup>.

The year 2009 was important to the Specialized Chamber of Review because received the

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<sup>23</sup> RODRÍGUEZ& RODRÍGUEZ, Diana. Cortes y Cambio Social Como la Corte Constitucional transformo el desplazamiento forzado en Colombia. Ed, Dejusticia. 2010.

<sup>24</sup> *Ibíd.*

<sup>25</sup>Colombian Constitutional Court, second chamber of review. Writ of December 18<sup>th</sup>, 2008.

reports requested and sent them to the stakeholder groups <sup>26</sup>. However, this phase of evaluation of the reports proved that the Government submitted vague information that was catalogued as chaotic<sup>27</sup>. In this year, only one of the orders was declared as unfulfilled<sup>28</sup>.

On the other hand, in the second semester of 2010 a new stage started. Considering that most of the reports sent to the Court in 2009 had plans and accomplishment strategies, the Court asked for advances and actions done until that moment, accordingly with the goals established by those institutions. In other words, there was a second phase, with concrete questions that would allow see the partial results of the plans implemented at the moment.

In September 28th of 2008, through the Writ No. 317<sup>29</sup> the Constitutional Court identified the critical areas to be studied and invited a group of national universities to support the review of the enforcement of the orders. With a new group of experts, the idea of use indicators was settled.

In a new tracing phase, the Constitutional Court summoned an accountability public hearing, in which public institutions and some tracing groups participated in a reflection about the obstacles that prevented the access to the health system and the implementation of new

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<sup>26</sup> These groups are composed by groups of research from different universities of the country and some private organizations dedicated to the research on health fields that formally request to the Colombian Constitutional Court the authorization to help in the following to the award.

<sup>27</sup>Constitutional Court. Specialized Chamber of review. Writ of July 13, 2009, Writ of July 13 of 2009- 3, Writ of July 13 of 2009-6.

<sup>28</sup>Constitutional Court. Specialized Chamber of review. Writ N°342 of December 15, 2009.

<sup>29</sup> “Writ” as the Spanish term “Auto”, which refers to a judicial decision that decides matters that are not of substantive importance for the conflict.

mechanisms, different from the emission of writs. The balance done by the public institutions was negative since there were no advances in the fulfilling of the orders. By that moment, the initial Magistrate in charge of the case was no longer in the Court, and a new magistrate was in charge of being the president of the Specialized Chamber of Review. Moreover, a new strategy for the fulfillment of the judgment appears: the conformation of a Group of Volunteer Constitutional Experts<sup>30</sup>.

In other words, the Court recognized the importance of the experts' opinion to have a better understanding of the situation. The group consisted on lawyers, epidemiologists and representatives of the leading medicine schools, people that could identify evaluating parameters. For that goal, the experts were divided in four groups, which corresponded to the principal axes of the judgment:

- Actualization of the Mandatory Services of Health (POS),
- Unification of the services offered to every type of affiliate in the system (universalization),
- Access to the service (obstacles in the access to the health right),
- Resources flow and financial stability of the system;

Also, in each group were two common subjects: indicators and measurement parameters.

Through the Writ No. 226 of 2011, the Court sets the parameters to create indicators. In this Writ, the Court recognized the indicators importance and its increasing use in the

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<sup>30</sup> Constitutional Court. Specialized Chamber of review. Writ N° 120 of June 8, 2011 and Writ N° 147 of July 19, 2011.

international context, mentioning indicators that use quantitative measures (as the Millennium Development Goals indicators or some indicators to measure the elimination of all forms of discrimination against women) and those who use qualitative measures (as the WJP Rule of Law Index). The Court highlight that Statistical Division of the United Nations claims that the indicators and parameters are indispensable part of public policy decisions, allowing monitoring of processes, policy evaluation and comparison between countries based on the collection of empirical evidence<sup>31</sup>, but also mention some papers that explain and evaluate cases of indicators as technology for global governance<sup>32</sup>.

In the realization of these guidelines there was a clear influence of the United Nation work and recommendations, the report of Paul Hunt and the parameters of the American Commission on Human Rights; those works suggest dividing indicators in structure parameters, process parameters and outcome parameters. The structure parameters assessed the existence of formal instruments for ensuring the right, as the existence of a concrete action plan, a schedule and performance indicators, process and outcome. The process parameters allowed the progress in the short and medium term, to assess progress against the action plan. Finally, the outcome parameters showed individual and collective achievements.

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<sup>31</sup> UN Expert Group Meeting Report, 8-10 October 2007, p. 4. In Colombian Constitutional Court. Writ No. 226 of 2011.

<sup>32</sup> The Court mention: Sally Engle Merry, "Measuring the World Indicators, Human Rights, and Global Governance" 52 *Current Anthropology*, Supplement 3 (2011) S83; Kevin Davis y Michael B. Kruse, "Taking the Measure of Law: The Case of the Doing Business Project." 32 *Law & Social Inquiry* (2007)1095; Ann Janette Rosga y Margaret L. Satterthwaite, "The Trust in Indicators: Measuring Human Rights" 27 *Berkeley Journal of International Law* (2009) 253.

Besides, the analysis included the criteria that any health indicator must have according to the UN Committee on Economic, Social and Cultural Rights<sup>33</sup>: 1) availability, 2) accessibility, 3) acceptability, and 4) quality. On the other hand, the guidelines mentions the Report on Indicators for Promoting and Monitoring the Implementation of Human Rights, where they are define attributes that capture reasonably the essence of the normative content of right to health: sexual and reproductive health, infant mortality and health care, the natural environment and work, prevention, treatment and control of disease and the accessibility of health facilities and essential medicines<sup>34</sup>.

The guidelines of the indicators were intended for each of the problematic areas mentioned during the sessions with experts<sup>35</sup> and gave a general guidance on what aspects were evaluated or the progress of the government to ensure the effective enjoyment of the right of the health in Colombia.

However, these measures were qualitative and not quantitative, and to establish the level of compliance of the government action, the Court decided to do an exercise of “weighting”, and classify the level of compliance with High, Medium, Low and non-compliance. For example, as a parameter of structure was sought "attendance to priorities of the population according to epidemiological and sociodemographic studies" and as outcome parameter

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<sup>33</sup> UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS. General Comment No. 14 (2000), The right to the highest attainable standard of health. E/C.12/2000/4. 11 August 2000.

<sup>34</sup> UN INTER-COMMITTEE MEETING OF THE HUMAN RIGHTS TREATY BODIES. Report on Indicators for Promoting and Monitoring the Implementation of Human Rights. HRI/MC/2008/3. 6 June 2008.

<sup>35</sup> Colombian Constitutional Court. Cumplimiento de la Sentencia T-760 de 2008. Online: <http://saludpublica.uniandes.edu.co/wp-content/uploads/Seguimiento+al+Cumplimiento+de+la+Sentencia+T-760+de+2008.pdf>

"ensure the effective enjoyment of the right to health by women, the elderly, ethnic minorities and population of the most vulnerable sectors", and government actions are qualified as "high compliance" if pondering structure parameters and process parameters, the Court considers that these actions lead to the materialization of the set results.

### 3. The “lack” of indicators.

While the guidelines for the development of indicators have been considered a vital aspect, the government has not provided health indicators yet. Without a measurement strategy and without determining who would develop these statistics, the guidelines for the "creation of indicators" were transformed into a list of criteria that was forwarded to public entities. The Constitutional Court already declared the compliance of four orders<sup>36</sup> but the rest of them have not been accomplished. In 2012, the strategy of the Court was to raise questionnaires to the group of experts so they could give their opinion based on a set of questions posed by the Court.

It is interesting that the Court didn't create indicators after a wide study of bibliography and resources to create indicators as a tool to evaluate the government compliance with the award, that it was the initial purpose of use indicators. Aquiles Arrieta Gomez -auxiliary magistrate of the Constitutional Court- indicated that there are no indicators because the government did not provide them and that the Court can lead the process giving parameters but it is not “the

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<sup>36</sup> Colombian Constitutional Court. Sala Especial de Seguimiento. Writ 261 november 16, 2012- Writ 262 november 16, 2012 – and Writ 263 noviembre 16, 2012.

government of the judges”, and that is the government responsibility to develop the indicators and the public policy. According to the Writs and the meetings with the experts, the indicators were aimed to assess the government, but now create them is a government responsibility.

On the other hand, according to Everaldo Lamprea Montealegre -former auxiliary Magistrate of the Specialized Chamber of Review for health- in the Constitutional Court there is no interest in the use of indicators for the monitoring process for several reasons: first, the current members of the Court do not have a judicial practice that includes the use of new mechanisms as indicators, their work is based on traditional legal issues. Second, health indicators require a technical knowledge that they do not have. Finally, the continual changes in the government and legislative policies make more difficult the reviewing and the Court parameters for indicators no longer apply in many aspects.

Even though the first and second reasons do not seem to be important, specially because is not the first time that the Court uses indicators, and that is an institution that can easily have support from experts or universities, etc. The health problem inside the country involves many national institutions; private actors (not only de EPS's but also pharmaceutical); users, and the Court can follow the process, but also needs to interact with the other actors. That's why the third reason show how the Court tries to evaluate and give guidelines, but at the same time the government takes some measures that changes the initial thoughts; for example, the guidelines have many recommendation about how to identify the medicines that must be included in the POS, but now the government is thinking about a negative list, and just specify which medicines are include.

Moreover, even if the Court started a structural approach, the case by case attention never stopped. The users still need the *tutela* to request some services and its use is promoted by the EPS, because when the judges protect the right of health and enforce the EPS to provide a medicine not covered by the POS, the EPS can ask to the FOSYGA for the reimbursement of the service cost, that ensures the service but promotes corruption. The Court is in the middle of a complex situation and adding the first two arguments that highlighted Everaldo Lamprea, at the end the Court changed his mind about developing indicators by itself.

However, as it was mentioned in the first part, there are many quantitative health indicators about Colombia, developed by international organizations, national organizations and institutions; as the National Survey on Demography, a survey developed every 3 years with financial aids of the USAID, that measure aspects as the affiliation to the Social Security System in Health, the perception of the health of population, the people with health problems and people hospitalized, the use of specific health services among others; or the Basic Health Indicators of the Ministry of Health and Social Protection that includes indicators for monitoring the Millennium Development Goals, mortality indicators, demographic indicators, socioeconomic indicators, indicators of health service offerings, rates of morbidity, among others. This information can be complemented with the information that is missing, and use as a resource to create public policy if they are reliable and representative.

On the other hand, it is also possible to adequate the American Commission on Human Rights Guidelines, using information like mortality rate, per capita expenditure on health, the legal

framework of the right to health, the coverage level of health care system, action plans of government, among others, and in this way combine qualitative and quantitative measures base on the legislation and health results <sup>37</sup>. This evaluation can't be forgotten, because even if the financial issues, the corruption, and the discussions about eliminate EPS's they must be solve, *“the only purpose of the health systems is to improve the society health, hence, the adequate way to judge them is for their impact in the population's health”*<sup>38</sup>.

The Court's decision is not misguided, because the Court can avoid several problems about how to design them, wish variables includes, among others, and just supervised the indicators that the government develop in order to guarantee the protection of the right to health. In next section it will be study how even if the Court did not develop indicators, promoted the use of this tool and introduced to the national sphere the recommendation of international organizations.

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<sup>37</sup> Of course, it should not be ignore the fact that there is disagreement with some of these data, like in the case on the level on coverage of the system, since it has been alleged that reflects the “inscription” of users to the system, but not the full enjoyment of services.

<sup>38</sup> ROBERTO ESGUERRA GUTIÉRREZ, Colombia debe reformar su sistema de salud: una visión desde la medicina. Revista de asuntos públicos,

#### 4. The dynamics of politic influence among the actors.

Some experts define Governance, specifying that “*comprises the means used to influence behavior, the production of resources, and the distribution of resources*”<sup>39</sup>, and is common to use a triangular to explain it:

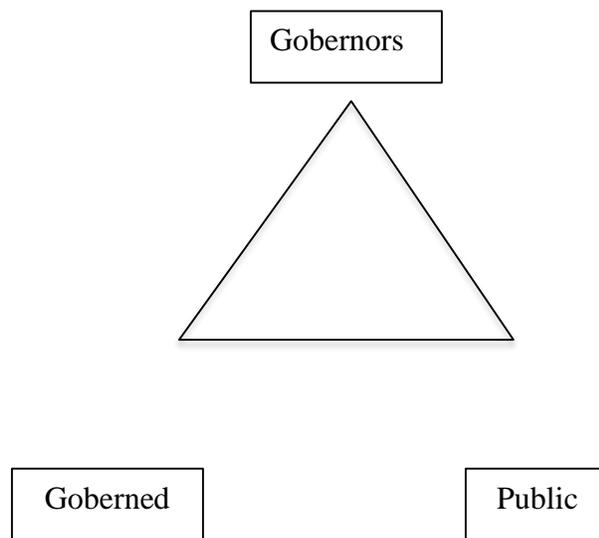


Fig. 1.1 A model of governance<sup>40</sup>.

*“Governance can be modeled using a standard triangular schematic which posits relations between the actors (the governors) who allocate resources among or exert influence over the behavior of other actors, the actors subject to governance (the governed), and other interested constituencies (the public)”<sup>41</sup>*

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<sup>39</sup> Op.cit. DAVIS, KINSGBURY & ENGLE. Pag. 11

<sup>40</sup> Op.cit. DAVIS, KINSGBURY & ENGLE. Pag. 12

<sup>41</sup> *Ibíd.* Pág. 11.

Despite the lack of indicators, the dynamics among stakeholders are important. The process to create an indicator involves a game of power.

The current law that is in course to reform the system take into account the Courts suggestions and establish:

*Article 7. Annual evaluation of indicators of enjoyment. The Ministry of Health and Social Protection will disclose the annual performance evaluations of the effective enjoyment of the fundamental right to health, depending on the essential elements of accessibility, availability, acceptability and quality. Based on the results of this assessment should be design and implement the public policies to improve the health conditions of the population.*

*The report on the evolution of the indicators of effective enjoyment of the fundamental right to health should be presented to all agents in the system<sup>42</sup>.*

This article proofs that the Government took into account the suggestions of the Constitutional Court, but also included the Committee on Economic, Social and Cultural Rights' General Comment No. 14. This interaction shows how an international organization can influence a national institution, and then regulate others.

Furthermore, the use of indicators is now involving also the users, considering that any

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<sup>42</sup> Texto conciliado al proyecto de Ley Estatutaria Número 209 de 2013 Senado 267 de 2013 Cámara.

mechanism that helps to create new health policies needs civil participation<sup>43</sup>. Despite that normally the indicators can exclude citizen and give the control to experts, and that there are many challenges to achieve participation due to the heterogeneity of the social group, but also in Julieta Lemaitre words, because “(U)sually health care policy at any stage requires specialized knowledge, often medical knowledge, but also specialized financial knowledge”<sup>44</sup>, the Ministry of Health and Social Protection developed the Survey of the Evaluation of the EPS’s Services<sup>45</sup>.

The Survey was designed as a way to accomplish one of the T-025 orders, which requires guaranteeing the right to complete and adequate information, allowing the citizens to choose the EPS that they prefer. The set of questions provide information about the general perception of each EPS, regarding the efficiency and the quality of his services, asking the time that it was necessary to receive medical attention, how users perceive the attention, if the EPS provided the medicines, among others<sup>46</sup>.

The survey was one of the three aspects that were taking into account to create a ranking of EPSs. The other aspect was the “respect of rights”, a category based on Constitutional Court’s

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<sup>43</sup> The citizens participation as a requirement for a constitutional health care policy was demanded by the Constitutional Court in the award T- 750/04.

<sup>44</sup> *Ibíd.*

<sup>45</sup> MINISTERIO DE SALUD Y PROTECCIÓN SOCIAL. Encuesta de evaluación de los servicios de las EPS. <http://www.minsalud.gov.co/Documentos%20y%20Publicaciones/Encuesta%20de%20Evaluaci%C3%B3n%20de%20los%20Servicios%20de%20las%20Entidades%20Promotoras%20de%20Salud.pdf>

<sup>46</sup> MINISTERIO DE SALUD Y PROTECCIÓN SOCIAL & DEFENSORÍA DEL PUEBLO. Ordenamiento (Ranking) de EPS 2013. <http://www.minsalud.gov.co/Documentos%20y%20Publicaciones/RANKING%20DESEMPE%C3%91O%202013.pdf>

criteria. The Ministry used the Constitutional Court Writs, the reports from EPSs, the survey, and the number of tutelas against each EPS, to create those indicators.

The last aspect is the “Process and the results in the attention”. This category is not explain with many details, but is take into account: 1) care quality, 2) transmittable diseases, 3) maternal and child health, 4) chronic diseases. Nonetheless, the method to establish the score, or the evaluation is not specified.

The raking is a public document that anyone can fine online, but has no advertising in the medias. However, each EPS is forced by law to bring a Performance Letter to every user, with his result in the survey, and his position in the ranking. The main problem is that citizen goes to the EPS when already chose it, or has no time to read about each EPS with anticipation when is hired for a new job.

Despite these problems, the EPSs with better rating already use the ranking as a way to promote it services. The ranking can stimulate the improvement of services in order to be more competitive, and it show if this strategy is more affective than judiciary or government pressure.

Hence, with the award and the following Writs the Court initiated some changes inside national institutions, and promoted a tool in order to achieve some of its goals, despite of the fact that the Court did not create indicators.

## 5. Conclusions.

As was evidenced, the international influence had a big impact in Colombia, leading the country to make major changes in its health care system. To set those changes and integrate initiatives such as the Millennium Development Goals, it was necessary to develop monitoring mechanisms where the indicators were the main tools. The consequence of this international influence was to provide many health indicators for Colombia and guidelines to develop national indicators, which helps to follow the fulfillment of right to health in the country.

Studying the monitoring process exerted by the Constitutional Court to the government's health policy is clear that, despite the large amount of quantitative information, the Court did not create indicators itself but created guidelines for the development of indicators, that helped to identify the features of a constitutional health system. Its decision are based on several reasons; first because it is a tool that does not fit into the traditional judicial culture; second, the use of health indicators requires technical knowledge, considering that a complete diagnosis of health care system needs different kinds of indicators; and third, the government continually changes some characteristic of the system.

But it is not necessary to create the indicators, the Court's strategy of establish guidelines influenced the government and promoted the use of this tool, highlighting the elements that most be take into account. This process also introduced into the national context the

recommendation and thoughts of international organization, as the UN committees, the American Commission on Human Rights, the USAID, and even the research of international academics.

It is clear that the Constitutional Court has not forced the government to create and use indicators, but there are two examples that show how government uses indicators. First, with the new law project, it is expected that Ministry of Health and Social Protection will evaluate the delivery of health services through a system of indicators of access, timeliness, relevance, continuity, comprehensiveness, resoluteness, quality and health outcomes, according to the case<sup>47</sup>.

Second, the Ministry of Health and Social Protection recently created a national survey and an EPS raking. The use of these indicators allowed the participation of users, promotes changes in the EPS services in order to be more competitive, and tried to achieve the compliance of one of the Constitutional Court orders.

Even though is too early to establish the final effects of use indicators, the Court promoted them. The guideline that ensure the fulfillment of right to health are important, but in order to guarantee its real implementation, the Court needs to evaluate the governments indicators ones they are ready (the recollection of the information, the variables, among others) because this indicators can be decisive for develop public policies.

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<sup>47</sup> Op.cit. Ley Estatutaria Número 209 de 2013.

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