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Tort liability for unsafe sidewalk conditions: a comparative study between Colombia and New York city[1]

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Abstract

The present paper aims to compare two different perspectives

[1]The present paper is part of the results of the research project entitled "Contemporary Challenges for the protection of human rights in post-conflict scenarios from interdisciplinary approaches", which is part of the line of research rationale and implementation of Human Rights, of the research group of the person, institutions and demands for justice, recognized and categorized as Type A1 by COLCIENCIAS and registered with the code COL0120899, linked to the Socio Legal Research Center (CISJUC), and funded by the Faculty of Law of the Universidad Católica de Colombia.

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of tort liability in the cases of sidewalk accidents which occur in main cities of two different states, given state negligence. A revision of the evolution pursued in both of the legal frameworks is made. i) On the one hand, the approach made in the legal context of the State of New York (United States of America) where after 2003 responsibility was shifted to private owners ii) and on the other the one implemented in Colombia where State is responsible for such a situation. iii) Discussion is centered on revising if any of the two State has overreached its duties, or if instead the new proceeding is serving well their responsibility of citizen protection.

Key Words: Liability, Negligence, Sidewalk Accidents, State Reponsibility, New York, Colombia.

Responsabilidad extracontractual por condiciones de acera inseguras: un estudio comparativo entre Colombia y Nueva York

Resumen

El presente artículo hace un repaso por las perspectivas sobre responsabilidad por causa de negligencia en el mantenimiento del espacio público (andenes, en este caso), que se encuentran vigentes en la legislación de dos Estados diferentes. Por un lado i) se aborda el marco legal vigente en el Estado de Nueva York (Estados Unidos de América), en donde después del año 2003 la responsabilidad fue trasladada a propietarios privados. Por el otro ii), se revisa la legislación colombiana en donde la responsabilidad recae en el Estado mismo. La discusión propuesta iii) se centra en determinar si alguno de los dos Estados se ha extralimitado en sus funciones, o si por el contrario las acciones emprendidas corresponden con el deber estatal de protección.

Palabras Clave: Responsabilidad, Negligencia Accidentes en Andenes, Responsabilidad del Estado, New York, Colombia.

1. INTRODUCTION

As a person walks through the streets of Bogotá, past its uneven streets filled with potholes, the question begs asking: Who is responsible for maintaining the sidewalks in Colombia, and who is liable in the case of a slip, trip or fall accident? We examine the case of New York City, where the implementation of a new sidewalk law in 2003 changed tort liability for unsafe sidewalk conditions by shifting liability for failure to repair and maintain them from the city to property owners and examine the potential effects such a shift would have in the Colombian legal landscape. That new law is really important, because the State delegates his responsibility of keeping the public space in safe conditions to particular owners, creating a new kind of obligation for these people.

This article is the base that clearly evidences and explains the obligation and responsibility that the State has when it doesn't comply its obligations related to the public space, and when because of it a person or a group of persons suffer damages.

Notions of illegal damage, and who is responsible when the duty of the state to protect its citizens from harm, is overlooked, not through overt acts but through mere negligence because of having a believe that they are hiper-citizens (Carreño-Dueñas & Sánchez, 2018). In Colombia, as in most systems, civil liability is an essential institution of the law of damages, and it covers the areas of contractual and extra contractual responsibility. Nevertheless it must not be

overlooked the country´s conflict (Scocozza, 2015) and the important role of civil society (Martínez Lazcano & Cubides Cárdenas, 2016; Martínez Lazcano et al, 2017; Pérez-Salazar, 2018; Navas-Camargo & Pérez Cagua, 2019; Ávila Hernández, Woolcott Oayague & Navas-Camargo, 2018). The State is responsible for illegal harm occurring to citizens from its wrongdoing, by either action or negligence, as per article 90 of the Constitution (Navas-Camargo & Cubides-Cárdenas, 2019). In Europe, other sorts of situations have an impact given their parliamentary system (Ruiz-Rico & Silva García, 2018; Blanco Alvarado, 2019).

The present comparison is necessary because each one has different elements, that evidences the drastic change and development that laws can have in a society, all related to the evolution and constant advances that citizens have every day; specially in the case of New York that evidences the real change from one law to another. Among those changes intercultural perspectives of the situations can help to provide thorough understanding of the peculiarities approached by each legal frame (Navas-Camargo, F. & Montoya Ruíz, S., 2018b). It is a way of incorporating the diverse cosmovisions and pluralisms of cultures (Llano-Franco, 2016; Guadarrama González, 2019; Monje Mayorca, 2015), what supposes a holistic perspective and represents a challenge in times of transition (Cubides – Cárdenas et al. 2018a; 2018b), but which also represents a way of incorporating citizen participation (Woolcott – Oyague & Flórez Acero,2014; Woolcott - Oyague, 2015; Ávila Hernández & Córdova Jaimes, 2017; Santos

Olivo & Ávila Hernández, 2018; Ávila Hernández et al, 2019; Ávila Hernández & Santos Olivo, 2019).

2. NEW YORK CITY

a. New York City sidewalk law before 2003 (Old law)

Tort liability for sidewalk defects has not always been a clear issue. In 1979, New York City, in an attempt to reduce the number of tort claims brought in for sidewalk defects (Terry, 1981), enacted Local Law Number 821[1]. Under this statute, written notice was paramount in establishing a claim against the municipality for their failure in properly maintain and upkeep the sidewalks, without these written notices of defects, citizens' sustained injuries could not be held liable (Supreme Court of the State of New York, 1987). Prior written notice[2] is then, a condition precedent to the plaintiff´s cause of action,

[1] (…) 2. No civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe, dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice, or where there was previous injury to person or property as a result of the existence of the defective, unsafe, dangerous or obstructed condition, and written notice thereof was given to a city agency, or there was written acknowledgement from the city of the defective, unsafe, dangerous or obstructed condition, and there was a failure or neglect within fifteen days after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or the place otherwise made reasonably safe. (Admin Code, New York Code, June 4 1980)

[2] The New York City Administrative Code in § 394a-1.0, subd d, par 3 describe the procedure: 3. The commissioner of transportation shall keep an indexed record in a separate book of all written notices which the city receives and acknowledgement of which the city gives of the existence of such defective, unsafe, dangerous or obstructed conditions, which

which he is required to plead and prove (Supreme Court of the State of New York, 1983). Fifteen days before the accident the Commissioner of Transportation included maps to constitute "written notice".[3]

Prior to 2003, the liability in all slip and fall cases on a public sidewalk belonged to the city, as it was the municipality´s duty to keep the sidewalks in a reasonably safe condition, a zero tolerance policy forthered by the former major of New York, Ruldoph Giuliani, was applied (Ariza López, 2018). A failure to repair a defective condition, of which it had notice, will cast the municipality in liability for damages to a person who had suffered injuries (Court of Appeals of the State of New York, 1982). This general rule cast all public space, even that abutting private property, as the city´s responsibility.

In common law, a city that performs proprietary functions such as supplying public utilities or, in the present case, maintaining sidewalks, is liable for negligent acts related to this function just like a private corporation. In the same manner, if there was adequate notice the city was held responsible for injuries resulting from a defect in the sidewalk (Court of Appeals of the State of New York, 1982).

record shall state the date of receipt of each such notice, the nature and location of the condition stated to exist and the name and address of the person from whom the notice is received. This record shall be a public record. The record of each notice shall be maintained in the department of transportation for a period of three years after the date on which it is received and shall be preserved in the municipal archives for a period of not less than ten years.

[3] See: Supreme Court of the State of New York (July 17 1981). Matter of the Big Apple Pothole and Sidewalk Protection Committee, Inc., Petitiones, v Anthony Ameruso, as Commissioner of Transportation of the City of New York, Respondent, Special Term, 110 Misc.2d 688.

The question of Landowner Tort liability for injuries sustained because of a defective condition on an abutting public sidewalk was, prior to 2003, narrowed by Surowiec v. City of New York, 139 A.D.2d 727, 728, 527 N.Y.S.2d 478 (1988):

> [A]n abutting landowner will not be liable to a pedestrian passing by on a public sidewalk, unless the landowner created the defective condition or caused the defect to occur because of some special use, or unless a statute or ordinance placed the obligation to maintain the sidewalk upon him.

The principle of special use is an exception to the general rule that imposes an obligation on the abutting landowner, where he puts part of a public way to a special use for his own benefit and the part used is subject to his control, to maintain the part so used in a reasonably safe condition to avoid injury to others (Supreme Court of the State of New York, 1988).

It is not enough, however, to show that the defendant made a special use of some part of the sidewalk (Supreme Court of the State of New York, 1989). There must be evidence that the exclusive use actually caused the condition complained of (Supreme Court of the State of New York, 1995), or that the special use itself was not kept in a reasonably safe condition, thereby causing injury (Supreme Court of the State of New York, 1988). An abutting owner has no duty to keep the sidewalk area adjacent to an exclusive use free of obstacles (Court of Appels of the State of New York, 1996)

In *Santorelli v. City of New York 77 A.D.2d 825 (1st Dep't 1980)* the court ruled that although under normal circumstances the owner of property abutting a sidewalk is under no obligation to keep it in a proper state of repair, where a sidewalk is constructed for the special use of the adjoining landowner, that special use imposes upon him the obligation to maintain the area of special use so as not to raise the spectre of peril to the traveling public (Supreme Court of the State of New York, 1980). This creates an obligation to repair the sidewalk, but only in cases where the sidewalk has been built with the purpose of benefitting the property owner through exclusive use.

Similarly, in *Sheehan v. Rubenstein* 154*4 A.D.2d 663546 N.Y.S.2d 66 (2nd Dep´t 1989)*, the court ruled that an abutting landowner will not be liable to a pedestrian passing by on a public sidewalk, unless the landowner created the defective condition or caused the defect to occur because of some exclusive use, or unless a statute or ordinance placed the obligation to maintain the sidewalk upon him. Again, we see the obligation derived from the exclusive use of the sidewalk generating an obligation (Supreme Court of the State of New York, 1989).

Liability arising from falls on snow and ice deserves a special mention, since prior to 2003 there was no obligation to the property owner to clear the accumulation of snow and ice. In fact, before the Administrative Code was changed in 2003, it was settled law that if a defendant undertakes to clear snow and ice from an abutting City owned public sidewalk, the failure to clear all the snow and ice does

not constitute negligence (Supreme Court of the State of New York, 1963). Barring statutorily imposed tort liability, an abutting property owner or occupier may only be found liable if, in undertaking to remove snow or ice, the defendant's acts "created a condition on the sidewalk more dangerous or hazardous than the existing condition already created by the natural accumulation of snow and ice" (Supreme Court of the State of New York, 1973).

The previous law made clear that liability does not attach from the removal of snow cover resulting in the exposure of ice on an abutting public sidewalk (Supreme Court of the State of New York, 1954), not from the act of salting, which may cause ice to melt but then refreeze (Court of Appeals of the State of New York, 1944). The only way in which liability can attach to an abutting property owner or lessee is if, in undertaking to remove the natural accumulation, the defendant's acts created or increased the hazard inherent in ice and snow on sidewalks (Supreme Court of the State of New York, 1963, Supreme Court of the State of New York, 1954).

In *Glick v. City of New York, 139 A.D.2d 402, 403,* the plaintiff sued for injuries he suffered when he fell on an icy patch of sidewalk. The defendant alleged that his employee had removed all snow and ice from the sidewalk after the last snowfall, about ten days before the accident. The court ruled that the defendant was required to exercise a reasonable amount of care in the removal of the snow and ice, so that a more dangerous condition would not be created, putting the plaintiff at harm (Supreme Court of the State of New York, 1988). It is only in

cases where the plaintiff´s actions create a more dangerous condition that liability to the property owner can arise.

b. New York City sidewalk law after 2003 (New law)

In 2003, Mayor Michael Bloomberg, in a dramatic move that reformed tort liability in the City of New York, signed the law that added three new sections to the administrative code. Section 7-210 of the Administrative Code of the City of New York, which became effective on September 14, 2003, shifted liability for accidents occurring on New York City sidewalks to the owners of the property abutting the sidewalk.[4]

[4] a. It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition. b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. This subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes. c. Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes) in a reasonably safe condition. This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section. d. Nothing in this section shall in any way affect the provisions of this chapter or of any other law or rule governing the manner in which an action or proceeding against the city is commenced, including any provisions requiring prior notice to the city of defective conditions. (New York City Administrative Code Sidewalk Rules (NYC DOT), September 16 2003, § 7-210)

In relevant part, Section 7-210 requires the owners of property abutting any sidewalk to maintain said sidewalk in a reasonably safe condition.

The code makes an exception for owners of one, two, or three-family residential real property that are, in whole or part, owner occupied, and used exclusively for residential purposes. Liability imposed by Section 7-210 does not apply to the owners of one, two and three family residential homes. Accordingly, to establish liability to owners of single-family, owner-occupied, residential homes, plaintiff must establish that the defendant affirmatively created the condition through negligent repair or exclusive use (Court of Appeals of the State of New York, 1996).

In *Terilli v. Peluso 2014 N.Y. Slip Op. 01120114 A.D.3d 523980 N.Y.S.2d 443 (1st Dep´t 2014)*, the plaintiff got her foot caught in a hole in front of a single family, owner occupied residence. The court dismissed the complaint under Section 7-210 since the owner of a single-family home has no duty to repair or maintain the sidewalk, and plaintiff was unable to show evidence of exclusive use (Supreme Court of the State of New York, 2014).

Conversely, in *Howard v. City of New York 2012 N.Y. Slip Op. 0413495 A.D.3d 1276944 N.Y.S.2d 88*, the court ruled that the defendant was liable pursuant to Administrative Code § 7–210(b) because, even though she submitted evidence that the property is a two-family dwelling, she failed to make a case as to whether the

premises were owner occupied (Supreme Court of the State of New York, 2012).

In sum, for the exception to Administrative Code § 7–210 to apply, defendant must show:

1. That the premises are destined to be of one, two, or three-family dwellings

2. That the premises be, in whole or part, owner occupied,

3. That the premises are used exclusively for residential purposes.

The principle of exclusive use, a narrow exception to the general rule, imposes an obligation on the abutting landowner, where he puts part of a public way to an exclusive use for his own benefit and the part used is subject to his control, to maintain the part so used in a reasonably safe condition to avoid injury to others (Supreme Court of the State of New York, 1988).

But there must be evidence that the special use actually caused the condition complained of (Court of Appeals of the State of New York, 2013), or that the special use itself was not kept in a reasonably safe condition, thereby causing injury (Supreme Court of the State of New York, 1988) which in this case there was no evidence that the oil cap in the sidewalk, which constituted a special use, caused the

sidewalk defect and there was no obligation to maintain the sidewalk beyond the confines of the special use or oil cap.

In *Katz v. City of New York 18A.D.3d 818796 N.Y.S.2d 62 (1st Dep´t 2005)* the court ruled that a driveway constitutes an exclusive use of the sidewalk, therefore the defendant, a residential property owner, was liable for the plaintiff´s injuries arising from an accident. Moreover, the court ruled in *Katz* that the duty to repair an exclusive use runs with the land, and liability for a defect arising from an exclusive use is not dependent upon a finding that the defect arose while the appellants owned the property (Supreme Court of the State of New York, 2005).

An abutting owner has no duty to keep the sidewalk area adjacent to an exclusive use free of obstacles. In this regard, pre-2003 standards remain unchanged. In *MacLeod*, plaintiff suffered injuries when she fell outside the defendant´s outdoor café. The question of whether the exclusive use of the sidewalk represented by the outdoor cafe extended beyond the guardrail to include the public sidewalk area in which plaintiff fell was resolved by the court when they decided that neither the existence of the crowd nor the fact that one of defendant's employees was seen on the sidewalk outside the rail creates a triable issue of fact in this respect. The use of web based communications and technology has led to a wider knowledge of the peculiarities of the situation (Becerra, 2015; Pitre Redondo et al, 2017; Velandia Montes, 2018; Woolcott-Oyague & Cabrera Peña, 2018, Sánchez Acevedo, 2018).

3. COLOMBIA

Legal frame of State Responsibility has ranged from the theories of indirect responsibility, going through direct responsibility, the guilt theory, the failure of the public service to finally determine what is known as illegal damage. Colombia is constantly making an evolution in its norms (Flórez Acero et al., 2017). In this way permitting society to have an opportunity to adequate it in virtue of its needs (Becerra et al., 2015) where security is not to be seen as a paradigm opponent to the tensions of human rights (Carvajal Martínez, 2018). Such security it must also be understood under the frame of health connotation within human rights (Woolcott Oyague, Vivas Barrera, & Garzón Landínez, 2017; Woolcott Oyague & Monje Mayorca, 2018; Woolcott Oyague & Fonseca, 2018). The latter incorporation in the Constitution of the given denomination, reflects the understanding of the State of recognizing as a fundamental right (Navas-Camargo, Cubides-Cárdenas, & Caldera Ynfante, 2018c) their duty of protection, and a means of modernizing the State and incorporate citizen participation (Ávila Hernández & Córdova Jaimes, 2017; Ávila Hernández et al, 2019; Ávila Hernández & Santos Olivo, 2019). Democracy for all, understood as a fundamental right (Picarella, 2017; Picarella, 2018; Caldera Ynfante, 2018) and an integral right (De Los Santos et al., 2018; De Los Santos & Ávila Hernández, 2019).

The political Constitution of Colombia has a variable geometry (Vivas Barrera, 2018) but establishes the essential purposes of the State and its obligations, for example, article 82, declares:

> It is the duty of the State to ensure the protection of the integrity of public space and its destination for common use, which prevails over the particular interest. Public entities will participate in the surplus value generated by their urban development and will regulate the use of land and urban air space in defense of the common interest.[5]

From this perspective, within the public space can be included the sidewalks through which people pass, therefore, it is the State's obligation to maintain them in safe conditions. Otherwise, the State would be involved in a non-contractual liability, which, depending on the case, will be determined as a type of liability (Ostau de Lafont & Niño Chavarro, 2016; Ostau de Lafont & Niño Chavarro, 2017). Now, it is necessary to evaluate how the patrimonial responsibility of the State in Colombia has evolved, as well as to understand that a relationship within states when both internal rules as well as their rules given the relationship among them and other states, are clear (Acosta & Molina, 2018).

According to Colombian doctrine, there are three historical moments that determine the evolution of the patrimonial responsibility of the State, as follows:

[5] Translated by the author.

- From the creation of the Council of State until 1964, there was a residual competence of the Council of State.

- From 1964 to 1991, there was total competition from the State Council.

- From 1991 to the present, constitutionality of the responsibility of the State is set in the Social State of Law (Giraldo, 2014, p. 29).

Further revision will be made in the following paragraphs.

a. Before 1991

Patrimonial responsibility of the state was first stated in the Political Constitution of 1991 when it was positivized in a specific norm, maybe in a quest for global and cognitive justice (Barreto, 2014; Velandia Montes & Gómez Jaramillo, 2018) or as a practical humanism of the institutions (Guadarrama González, 2018), but not overseeing that real access to justice is to be achieved by combining formal and non-formal procedures (Castillo Dussan & Bautista Avellaneda, 2018; Navas-Camargo, 2019). Previously in the Political Constitution of 1886 there was no clause that explicitly determined the patrimonial responsibility of the State, but what has always been clear is that a use of force methods by the States is a wrongdoing of their real means (Chacón Triana et al., 2018; Chacón Triana, Pinilla

Malagón & Hoyos Rojas, 2018; Torres Vásquez, Tirado Acero & Trujillo Florian, 2018).

Accordingly, at this stage, the competent jurisdiction to hear cases involving the patrimonial responsibility of the State was the ordinary one, that is, of which its highest organ is the Supreme Court of Justice in the Civil Cassation Chamber, and in a residual way, the contentious administrative jurisdiction, of which its highest organ is the Council of State. When there is a regulatory void in relation to the patrimonial responsibility of the State, the Supreme Court of Justice makes an analogy between the extracontractual liability preserved in the Civil Code applicable to individuals to fill in the gaps of the State's patrimonial responsibility, justifying the indemnification obligation of the State in indirect responsibility (Armenta, 2008). A lack of specific regulation presents the necessity of reaching out to the existing private law, generating the indirect responsibility presumed by the existence of guilt against the moral person. This presumption could be ended through the proof of the absence of guilt and therefore the patrimonial responsibility of the State was directly related to the breach of an obligation and lack of fulfillment of its duties (Irisarri, 2000).

In the judgment of July 29 1947, in the case of the newspaper El Siglo S.A. the Council of State determined:

> (…) applied for the first time the regime of strict liability based on the notion of special damage, that is to say, the one that invokes the principle of equality of citizens in public charges, according to which the citizen who, as a consequence of the

> action of the administration is forced to bear a burden more burdensome that the one that corresponds to support other citizens and as a result of that discriminatory treatment suffers a loss, he has the right to be compensated.[6] (Irisarri, 2000, p. 56).

Then, the Supreme Court of Justice in the process of Reinaldo Tinjacá and Aurelio Planells against the municipality of Bogotá[7], in judgement of June 30, 1962[8] (Corte Suprema de Justicia, 1962) made an extensive historical account of the responsibility of the legal persons, both private and public, and,

> (…) established that regarding the responsibility of legal persons under public law the thesis that must be applied is that of failure of the public service or fault of the administration, based on article 2341 of Civil Code and article 16 of the Political Constitution of 1886.[9] (Irisarri, 2000, p. 53).

However, the Council of State from 1964 began to be the competent organ to know in its entirety of the cases related to the patrimonial responsibility of the State, which sought to separate the patrimonial responsibility enshrined in the Civil Code of state responsibility (Armenta, 2008).

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[6] Translated by the author.

[7] (...) by which a direct state responsibility was given, displacing the state responsibility to the legal standard of article 2341 of the mentioned Code, in contrast to the indirect state responsibility imbued by articles 2347 and 2349 in deference to the guilt in choosing and in monitoring and obliterating the most recent thesis before the failure, the organicist thesis of state responsibility. (Yanten, 2010, p.10) Translated by the author.

[8] Although on this occasion the Court used a constitutional rule to refer to the responsibility of the Colombian State, it cannot be affirmed that this happened in all cases or as of this date, since in its great majority of judgments this corporation made reference to norms of civil law. (Rivera, 2003, p.18) Translate by the author.

[9] Translated by the author.

Likewise, the Council of State established in a judgment of March 30, 1990, that the notion of service failure is predicated both "by late operation, as well as by the malfunctioning or non-functioning of the service, that is to say that these services constitute modalities that the failure of the service can cover" (Irisarri, 2000, p. 58).

b. After 1991: Political Constitution of 1991

With the issuance of the Political Constitution of 1991, the patrimonial responsibility of the State became an issue of great importance, because it was already constitutionalized in article 90. This constitutionalizing was mainly due to the State's responsibility towards the damages that may be caused by the actions or omissions of the authorities to individuals (Corte Constitucional de Colombia, 2014), as well as by its globalization (Llano Franco & Silva García, 2018; Daza González, 2016).

The State Council established as requirements of the State's patrimonial responsibility "(i) the existence of unlawful damage, (ii) that the action or omission deployed attributable to public entities and (iii) that a causal material relationship is presented between the unlawful damage and the state organ" (Corte Constitucional de Colombia, 2011). Important is to understand the internal situation of Colombia in order to have a wider perspective of certain proceedings and to understand that it is given the reconstruction towards peace what has led to act differently (Navas-Camargo & Cubides-Cárdenas,

2018a; Cubides Cárdenas, Chacón Triana, & others, 2017; Guadarrama González, 2019; Martínez Lazcano et al, 2017; Pérez-Salazar, 2018; Navas-Camargo & Pérez Cagua, 2019).

Mainly, in the subject that is analyzed in the present text, the omission or absence of the service is given "when the administration, having the legal duty to provide the service, does not act, does not render it and the citizenry is left unprotected" (Consejo de Estado, 2011).

> In accordance with the provisions of article 90 of the Political Constitution, the State has the duty to respond in a patrimonial way for the unlawful damages that are attributable to it, caused by the action or omission of the public authorities (…) (Consejo de Estado, 2005).

However, in the face of the actions that individuals can exercise to request compensation from the State for damage caused, direct reparation is mainly found.

Direct reparation is an action with the purpose of compensating people when there is extracontractual liability of the State (Corte Constitucional de Colombia, 2011) this action is an administrative action and is enshrined in article 140 of the law 1437 of 2011.

In relation to the conditions of public space, and especially, the sidewalk in the ruling of filing 3590 of the State Council presents the case of a young man who dies due to the accident he has in a sewer hole in Cali. Through direct reparation, the family of the victim seeks

compensation from the State for the moral and material damages resulting from the death of the young person. The Council of State in this judgment condemns the department of Valle del Cauca to cancel the compensation sought by the victim's family (Consejo de Estado, 2014).

It also presents the case in which the plaintiff was traveling through a pedestrian bridge in the city of Cali, when it went down, resulting in fractures in the ankles, legs, shoulders and other injuries that had to be chirurgic intervention. In this case, there was clearly negligence in relation to the adequate maintenance required by the pedestrian bridge. In this case, the municipality of Cali was sentenced for physiological damage to the life of the relationship and for aesthetic damage (Consejo de Estado, 2016).

In the case previously presented, the responsibility that is predicated on the State lies mainly in the failure of the service, which

> (...) corresponds to the subjective liability regime, where the fault of the administration is due to overreaching of duties, delay in complying with obligations, late or defective obligations fulfilled, or due to non-compliance with obligations by the State. Are then actions or omissions that are preached by the administration and that in their operation, result in any of those irregularities that generate damages attributable to the State, a traditional regime in constant evolution, regardless of the objective liability positively recognized in a superior rule, consigned in Article 90 of the Political Constitution. (Ruiz, 2016, p.3).

4. CONCLUSIONS

Undoubtedly, it is the responsibility of the State to maintain public space in safe and appropriate conditions both for the transit of people and for the transit of automobiles, is to be understand as a means of reflecting what a democratic state is (Agudelo & Prieto, 2018), as well as a way of democratic participation (Becerra et al., 2018). It is one of the main duties of any State to apply the needed standard of care into every action of decision made so that the crisis in contemporary societies don´t turn into new ways of criminal organizations (Bernal Castro, 2018; Gómez Jaramillo, 2018; González Mongui, 2018; Moya Vargas, 2018) phenomenological sociology has also played a significant role in criminology (Silva García, Rinaldi & Pérez Salazar, 2018; Pérez Salazar, 2018; Silva García, Vizcaíno Solano & Ruiz- Rico, 2018; Restrepo Fontalvo, 2018; Silva García & Pérez Salazar, 2019). Therefore, when damages or accidents occur given unsafe conditions in public space, the State is the entity responsible for such damages and the victims thereof have the right to complain before the jurisdiction so that the latter compensates them for such damages. This critical analysis is important because of the idea of the State as a holder of political public power (Burgos Silva, 2018). The negative precedents are significant (Palencia Ramos et al., 2019)

In the case of New York, before 2003, it was the responsibility of the State to maintain safe and appropriate sidewalks as a general rule, however, there is an exception when a certain person or group of people gave special use to a part of the sidewalk. In such event the

person has the obligation to maintain said part in safe and appropriate conditions to avoid future damages to other persons. Nevertheless, this case applies only as an exceptional rule when the sidewalk has been built for the purpose of benefiting the owner through exclusive use.

However, as of 2003, the Administrative Code of New York in section 7-210 established that the owners who adhere to any sidewalk keep it in safe conditions, except in cases related to the number of people who live in the dwellings, occupation of exclusive residential property and uses.

In the Colombian case, the historical evolution of the patrimonial responsibility of the State clearly shows that the non-contractual liability of individuals cannot be the same for authorities and public entities, mainly because the cause that generates responsibility is not the same nature; while in extracontractual liability between individuals the cause is derived from a private conduct, in the extracontractual liability of the State the cause is derived either from an action or omission of the State from either a legal or constitutional duty. In the case of sidewalks, it is a constitutional obligation.

It is important to note that the non-contractual liability of the State in Colombia went through various stages to reach the present, where it is possible to preach the State's liability for damages caused by having an accident due to unsafe conditions on the sidewalk, through direct repair.

It is necessary to show that the cases of New York and Colombia are contrary, because in Colombia the State is solely responsible for maintaining the sidewalks in safe and appropriate conditions, since the only possibility the State would be to use the appeal mechanism in guarantee or repetition when it is possible for a given entity or official to be at fault for the damage. However, in Colombia, the possibility of damages due to unsafe conditions on the sidewalk is not addressed, the person can request compensation from an individual. In other cases, such as if you suffer an accident inside some private property changes the person responsible for the damages caused.

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