Human Dignity and the Recognition of Foreign Judgements in Colombia*_**

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Abstract. Human dignity is usually associated with public law. However, its role in private law is increasingly being recognized. In this context, attention is drawn to the connections between human dignity and private international law. Examining how this unfolds in the Colombian legal system leads to two main ideas. First, the relationship between human dignity and the notion of recognition in private international law is twofold, since beyond its significance in the recognition of foreign laws and judgments, it also provides a voice to marginalized groups. Second, the role of human dignity in private international law challenges the traditional divide between public and private international law. Underlying

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both ideas is the fact that the meaning and function of human dignity are shaped by the specific context in which they operate.

KEYWORDS: Private international law, public international law, human dignity, human rights, public policy, Colombia, recognition, foreign judgments.

Dignidad humana y reconocimiento de sentencias extranjeras en Colombia

RESUMEN. La dignidad humana suele ser circunscrita al derecho público. Sin embargo, hay un creciente reconocimiento del papel que desempeña en el derecho privado. En este contexto, son relevantes las conexiones entre dignidad humana y derecho internacional privado. Analizar este fenómeno en el sistema legal colombiano nos permite desarrollar dos ideas centrales. La primera es que la relación entre dignidad humana y la noción de reconocimiento en el derecho internacional privado es doble, pues, más allá de la relevancia que esta relación tiene en el reconocimiento de leyes y sentencias extranjeras, también permite dar voz a grupos que tradicionalmente han sido excluidos. La segunda idea es que el papel que la dignidad humana desempeña en el derecho internacional privado desafía la clásica división entre derecho internacional público y derecho internacional privado. Tras ambas ideas subyace el hecho de que el significado y la funcionalidad de la dignidad humana vienen determinados por el contexto.

PALABRAS CLAVE: derecho internacional privado, derecho internacional público, dignidad humana, derechos humanos, orden público, reconocimiento, sentencias extranjeras

Introduction

The internationalization of a legal phenomenon within a national legal system can occur in many ways. These ways can fall into one of two different legal fields. One of them—and probably the one that comes to mind most easily—is public international law. This field comes into play when each State party to an international treaty incorporates its rules to domestically serve the obligations previously acquired in its relations with other States or international organizations. Here, the

internationalization of the national law occurs *from outside to inside* the State. Each State can decide how to do this incorporation, according to its law. Internationalization can also take place the other way around, i.e., *from inside to outside* the State. This process involves the application, which is a kind of extension, of legal institutions established internally, in the national legal system to subjects, facts, or goods originating abroad. The legal field in which this latter process of internationalization occurs is private international law. In this paper, we argue that human dignity, being intrinsically linked to human rights, is subject to both processes of internationalization.

The paper aims to address some manifestations of a problem that underlies the above processes in Colombia, observing the embodiment of human dignity in the national legal system and its consideration in private international law cases regarding the recognition of foreign judgments. In particular, the problem that the paper seeks to address is the lack of clarity around two consequences that derive from such internationalization processes. First, human dignity is related to recognition, which is fundamental in how private international law deals with foreign laws and foreign judgments[1]. It follows from the existence of this relationship that this field is called upon to consider collective and individual dignity by giving voice to *the different* in the domestic as well as in the global community[2]. Second, the internationalization of human dignity invites us to revisit the traditional public international law-private international law divide which reflects not only the divide between *law* and *politics* but also between the *private* and *public* spheres[3].

Methodologically, this research has been based on the compilation and review of decisions of the Constitutional Court and the Supreme Court of Justice of Colombia that are relevant to address the problem outlined above. From there, the research has proceeded to apply analytical as well as synthetic approaches to, first, observe how each of these decision-making bodies addresses human dignity and, second, how these approaches converge.

The first section of the paper explains that the notion of human dignity can be identified as a context-bound concept, as it does not have one single meaning, and the context in which it is intended to be applied is essential. The second section outlines how the relationship between human dignity and private law has been developing in Colombia, which has occurred mainly through the constitutionalizing process of private law. Further, the third section examines how the Colombian Constitutional Court has unfolded the polysemy that underlies the meaning of human dignity. The fourth section explains that human dignity has been used by

1 Muir-Watt, H., "Fundamental Rights and Recognition for Private International Law", *European Journal of Human Rights,* n.º 3, 2013, 411-434.

2 See *ibid*.

3 Muir-Watt, H., "Private International Law Beyond the Schism", *Transnational Legal Theory*, vol. 2, n.º 3, 2011, 347-428; see also García, C., "Introduction", in Koskenniemi, M., *La política del derecho internacional*, Madrid, Trotta, 2020, 13-14.

the Colombian Supreme Court of Justice when dealing with the recognition of foreign judgments and, at the same time, with the recognition of excluded groups. Cases concerning people with disabilities illustrate this. Finally, the fifth section looks critically at the classical divide between public and private international law. To this end, attention is paid to how human dignity is considered in cases where the recognition of foreign judgments is claimed.

I. Human dignity: a context-bound concept

Human dignity refers to a quality of each human being that must be protected and promoted. For some, it is inherent and inalienable[4]; for others, it is socially granted, and consequently, human beings can be deprived of it[5]. Despite this dichotomy, this elusive and difficult-to-grasp concept enjoys wide acceptance in law, being used in legislative and decision-making processes. The elusiveness of the notion of human dignity relates to the lack of a conclusive agreement on what it means, and it is thus an indeterminate legal concept[6].

Thus, the preamble of the Universal Declaration of Human Rights states that dignity is "inherent"[7] without providing any additional element for its conceptualization. The preambles of both the International Covenant on Economic, Social

4 See Pogge, T., "Dignity and Global Justice", in Düwell, M.; Braavig, J., Brownsword, R., and Mieth, D. (eds.), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives*, Cambridge, Cambridge University Press, 2014, 477; Tasioulas, J., "On the Foundations of Human Rights", in Rowan, C.; Liao, M., and Renzo, M. (eds.), *The Philosophical Foundations of Human Rights*, Oxford, Oxford University Press, 2015, 49; Gilabert, P., *Human Dignity and Human Rights*, Oxford, Oxford University Press, 2018, 6.

5 See Waldron, J., *Dignity, Rank, and Rights*, New York, Oxford University Press, 2012, 61; Bird, C., "Dignity as a Moral Concept", *Social Philosophy and Policy*, vol. 30, n.º 1-2, 2013, 172-176; Kilmister, S., "Dignity: Personal, Social, Human", *Philosophical Studies*, vol. 174, 2017, 2070-2080; Kilmister, S., *Contours of Human Dignity*, New York, Oxford University Press, 2020, 129-140.

6 See Henry, L., "The Jurisprudence of Dignity", *University of Pennsylvania Law Review*, vol. 160, n.º 1, 2011, 172. In the philosophical literature on the subject, the conceptual indeterminacy of human dignity is also manifest and is treated in different ways: as a value, see Barroso, L., *La dignidad de la persona humana en el derecho constitucional contemporáneo*, Bogotá, Universidad Externado de Colombia, 2014, 137-146; Pogge, T., "Dignity and Global Justice", cit., 480; as a normative status according to which all human beings are equally important, see Waldron, J., *Dignity, Rank, and Rights*, cit., 18; Bielefeldt, H., *Auslaufmodell Menschenwürde?*, Freiburg, Herder, 2011, 55; Tasioulas, J., "On the Foundations of Human Rights", cit., 54; Gilabert, P., *Human Dignity and Human Rights*, cit., 113; as a right, see Kirste, S., "A Legal Concept of Human Dignity as a Foundation of Law", in Brugger, W., and Kirste, S. (eds.), *Human Dignity as a Foundation of Law*, Stuttgart, Franz Steiner Verlag–Nomos, 2013, 78-81; Jakl, B., "Human Dignity as a Fundamental Right to Freedom in Law", in Brugger, W., and Kirste, S. (eds.), *Human Dignity as a Foundation of Law*, Stuttgart, Franz Steiner Verlag–Nomos, 2013, 102; as an existential attitude (*Haltung*), see Weber-Guskar, E., *Würde als Haltung*, Münster, Mentis, 2016, 89-94.

7 Universal Declaration of Human Rights, Res 217A (III), 10 December 1948.

and Cultural Rights and the International Covenant on Civil and Political Rights[8] go further than the Universal Declaration of Human Rights. They affirm that the human rights they contain "derive from the inherent dignity of the human person", thus considering human dignity as the source of human rights[9]. National constitutions similarly entail a high degree of indeterminacy. For the Constitution of Bolivia[10] human dignity is a constitutive principle of the State, Germany includes it in the chapter on Fundamental Rights of its Basic Law[11] and Israel considers it a value[12]. Other constitutions, such as those of Finland[13], Ireland[14], Switzerland[15] and Venezuela[16] only guarantee the protection of human dignity, without giving any relevant clue as to its conceptualization. Now, in practice it not only guides law-making, as can be deduced from the above-mentioned norms. It has also been used to resolve specific cases, such as the well-known *Omega Spielhallen- und Automatenaufstellungs-GmbH*[17] and *Manuel Wackenheim v. France*[18], in which the protection of human dignity was crucial. In both cases, the authorities banned games (*Lasersports* in the first case and *dwarf tossing* in the second) because they violated human dignity.

From this, it follows that the notion of human dignity has practical utility, despite its indeterminacy. Indeed, the way it works is always contextual. This implies that, from a legal pragmatic perspective, what human dignity means is established by the use that is given to it in practice[19]. Put in other terms, human dignity involves a context-bound concept[20]: its meaning and functionality is given by those who take part in the discourse on human dignity in a specific context.

8 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171, Preamble; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976), 993 UNTS 3, Preamble.

9 See Griffin, J., *On Human Rights*, Oxford, Oxford University Press, 2009, 200.

10 See the Preamble of the Bolivian Constitution (2009).

11 See Germany. Basic Law for the Federal Republic of Germany (1949 rev. 2014), Article 1.

12 See Israel. Basic Law: Human Dignity and Liberty (1992 rev. 1994), Articles 1, 2 and 4.

13 See Finland. Constitution (1999 rev. 2011), Article 1.

14 See Ireland. Constitution (1937 rev. 2019). Preamble.

15 See Swiss Confederation. Federal Constitution (1999 rev. 2014), Article 7.

16 See Bolivarian Republic of Venezuela. Constitution (1999 rev. 2009), Article 46.2.

17 See European Union. Court of Justice, Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, EU:C:2004:614.

18 United Nations Human Rights Council (26 July 2002) CCPR/C/75/D/854/1999.

19 Luban, D., "Human Rights Pragmatism and Human Dignity", in Rowan, C.; Liao, M., and Renzo, M. (eds.), *The Philosophical Foundations of Human Rights*, Oxford, Oxford University Press, 2015, 274-275.

20 See Henry, L., "The Jurisprudence of Dignity", cit., 177, 186-189. In a similar way, and referring to Wittgenstein, Neal maintains that human dignity is a *language-game* or *Sprachspiel* since its meaning is tied to the sense that people assign to it in specific contexts. See Neal, M., "Dignity, Law and Language-Games", *International Journal for the Semiotics of Law*, vol. 25, n.º 1, 2012,

Consequently, human dignity necessarily has more than one single meaning in law. This allows us to observe the practical functionality it has in the context of decision-making, and how a certain meaning is assigned to it in a specific legal, political, historical, or social context[21]. In other words, the meaning of human dignity is linked to concrete socio-political dynamics and people's expectations: "Temporal, cultural, political, and technological changes can create new dignity issues and even erase old ones. Dignity, therefore, cannot be defined in a permanent way, but must instead remain open to revision"[22].

Although it is context-bound, there is a core framework of reference that prevents it from being used arbitrarily and losing its symbolic value and functionality[23]. Three elements appear, in one way or another, in all different norms and decisions with regard to human dignity: a) its inherent value—the question remains open as to what is the source of such inherence: God, reason, society, etc.—, b) the respect for this value by others and c) the limitation of State power[24]. As a context-bound concept, human dignity is shaped by these three elements.

II. Human dignity and the private dimension of law

Human dignity has reached its greatest normative development in public law. Its special importance was recognized by public international law developed after World War II[25], which gave rise to the internationalization reflected in the documents mentioned above. The Universal Declaration of Human Rights has five

110-113; Wittgenstein, L., *Philosophical Investigations*, Oxford, Basil Blackwell, 1958, para. 7 and para. 23.

21 Luban, D., "Human Rights Pragmatism", cit., 276; Barak, A., *Human Dignity. The Constitutional Value and the Constitutional Right*, Cambridge, Cambridge University Press, 2015, 6.

22 Henry, L., "The Jurisprudence of Dignity", cit., 189. See also Réume, D., "Discrimination and Dignity", *Louisiana Law Review*, vol. 63, n.º 3, 2003, 40, 51; Paust, J., "Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content", *Howard Law Journal*, vol. 27, n.º 1, 1984, 147; Tamayo, F., and Sotomayor, J., "¿Penas sin humillaciones? Límites al derecho penal derivados del respeto a la dignidad humana", *Opinión Jurídica*, vol. 17, n.º 33, 2018, 25; Basedow, J., "Human Rights and Private International Law", Institute of International Law-Commission, n.º 4, 2018, 8.

23 See Neal, M., "Dignity, Law and Language-Games", cit., 113.

24 See McCrudden, C., "Human Dignity and Judicial Interpretation of Human Rights", *The European Journal of International Law*, vol. 19, n.º 4, 2008, 679-680. Jeremy Waldron thinks something similar, and argues that, although at first glance there are conceptions of human dignity that seem to rival each other, most of them are compatible, since they express "a reflection of the rich and complementary aspects of the meaning of this multifaceted term". Waldron, J., *Dignity, Rank, and Rights*, cit., 16.

25 See, for instance, Barroso, L., *La dignidad de la persona humana*, cit., 28; Riley, S., *Human Dignity and Law: Legal and Philosophical Investigations*, London – New York, Routledge 2018, 103; Feng, W., "Menschenwürde, Persönlichkeit und die verfassungsmäßige Kontrolle. Oder: Starke Normativität ohne Metaphysik?", *Archiv für Rechts- und Sozialphilosophie*, vol. 165, 2021, 24. In the view of these authors, the dominant notion of human dignity is rooted in international law.

direct references to human dignity[26], as do the Preambles of the International Covenant on Economic, Social and Cultural Rights[27] and the International Covenant on Civil and Political Rights[28]. Even before World War II, there were already linkages between human dignity and constitutionalism: it was included in the constitutions of the Weimar Republic (1919)[29], Finland (1919)[30], Ireland (1937)[31] and Cuba (1940)[32]. In 2012 there were already 141 constitutions that explicitly mentioned human dignity[33].

The significant role that human dignity plays concerning private dimensions of law has been receiving increasing consideration as well. A few examples may be mentioned in civil law. Article 16 of the French Civil Code[34] includes it among the civil rights[35]: "The law ensures the primacy of the person, prohibits any attack on his dignity, and guarantees respect for the human being from the beginning of his life". This regulation is directly linked to the civil protection of the human body of Chapter II (Of the Respect of the body) of Book I (Of Civil Rights). The Argentine Civil and Commercial Code, when referring to the most personal rights and acts, states in Article 54 that the "human person is inviolable and in any circumstance has the right to the recognition and respect of his dignity" and in Article 55 that the "human person injured in his personal or family intimacy, honor or reputation, image or identity, or who in any way is harmed in his personal dignity, may claim the prevention and reparation of the damages suffered"[36], thus making it clear that the damages caused to the human dignity of other persons are subject to civil liability. This Code also excludes as an object of contract anything contrary "to the dignity of the human person" (Article 1004). So, because human dignity alludes to a substantial aspect of every human being,

26 See Universal Declaration of Human Rights, Res 217A (III), 10 December 1948, Preamble and Articles 1, 22 and 23.

27 See International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976), 993 UNTS 3, Preamble.

28 See International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171, Preamble.

29 See German Reich. Constitution (1871), Article 15.1.

30 See Finland. Constitution from 1919, Section 1.1.

31 See Ireland. Constitution (1937, rev. 2019), Preamble.

32 See Cuba. Constitution from 1940, Article 20.

33 See Shulztiner, D., and Carmi, G., "Human Dignity in National Constitutions: Functions, Promises, and Dangers", *The American Journal of Comparative Law*, vol. 62, n.º 2, 2014, 480.

34 See France. Civil Code (adopted 8 March 1803, entered into force 21 March 1804), Article 16.

35 France. Law n.º 94-653 of July 29, 1994.

36 Argentina. Civil and Commercial Code (adopted 1 October 2014, entered into force 1 August 2015), Articles 54 and 55.

it can act as an insurmountable limit to the principle of free will which is central to contract law[37].

In Chilean law, human dignity can have a direct impact on property rights, including contract law and civil liability[38]. Article 15 of the Law on the Protection of the Rights of Consumers provides that the "security and surveillance systems that, under the laws that regulate them, are maintained by commercial establishments are especially obliged to respect the dignity and rights of persons"[39]. The same law considers human dignity as one of the criteria to establish the amount of compensation in case of moral damages[40]. These rules are based on the Chilean Constitution, according to which "persons are born free and equal in dignity and rights"[41].

Another example is the Romanian Civil Code, which includes the respect for human dignity as a personal right: "Everyone has the right to respect for his dignity"[42]. This is an implementation of the Romanian Constitution, which states that Romania "is a democratic and social State under the rule of law, in which human dignity, the rights and freedoms of citizens, the free development of the human personality, justice and political pluralism represent supreme values and must be guaranteed"[43].

The above-mentioned examples reflect, to some extent, how human dignity has been involved in the process of constitutionalization of the private dimension of law[44]. Such examples also show how human dignity acquires specific contents and meanings[45] depending on the legal context.

III. The polysemy of human dignity in Colombian law

The Colombian Political Constitution gives human dignity an outstanding role: "Colombia is a social State of law, organized in the form of a unitary Republic

37 Von Bar, C., "Derecho contractual y dignidad humana", *Anuario de Derecho Civil*, vol. 76, n.º 1, 2023, 217.

38 See Gamonal, S., and Pino, A., "La dignidad humana en el derecho privado. Una lectura desde el concepto de dignidad como estatus", *Revista de Derecho Privado*, Universidad Externado de Colombia, n.º 43, 2022, 53.

39 Chile. Law on the Protection of the Rights of Consumers (Law 19496/1997), Article 15.

40 See *ibid*., Article 51.2, para. 2.

41 Chile. Constitution (1980 rev. 2021), Article 1.

42 Romania. Civil Code (adopted 17 July 2009, entered into force 1 October 2011), Article 72.1.

43 Romania. Constitution (1991 rev. 2003), Article 1.3.

44 See Gamonal, S. and Pino, A., "La dignidad humana en el derecho privado", cit., 46.

45 See Tapia, M., "Dignidad humana en el derecho civil", in Hernández, G. (ed.), *Derecho civil y Constitución*, Valencia, Tirant lo Blanch, 2021, 36.

[…], founded on respect for human dignity" (Article 1)[46]. Thus becomes one of the basic political-normative elements of Colombian society. Before the approval and entry into force of the current Political Constitution (1991)—which included human dignity for the first time as a fundamental normative category of the State—the country had already signed and ratified several international agreements, declarations, and treaties on human rights that mention human dignity as a cornerstone of their provisions[47]. Thus, the inclusion of human dignity in the Constitution is not only an expression of sovereignty. It also reflects the internationalization of the national legal system, i.e., such inclusion derives from a process that takes place beyond its borders.

The relevance that the Constitution assigns to human dignity is reflected throughout the national legal system. The Colombian Criminal Code is clear in this respect: "Criminal law shall be based on respect for human dignity"[48]. The Consumer Statute includes human dignity among its general principles: "The objectives of this law are to protect, promote and guarantee the effectiveness and free exercise of consumers' rights, as well as to protect respect for their dignity and economic interests"[49]. The Law for the Integral Protection of the Family includes human dignity as a right[50]. The Code of Childhood and Adolescence, when stating its purpose, establishes that "the recognition of equality and human dignity" shall always prevail[51]. One can easily see that in these latter legislations, human dignity is embraced as a basic normative category concerning some private dimensions of Colombian law.

If, as we argue, human dignity can be seen as a context-bound concept, then its content and meaning respond to the specific Colombian social, political, legal, or economic context. If we also consider its embodiment in the country's legal system, then the question arises as to what human dignity means in the Colombian legal system. The Colombian Constitutional Court has been progressively dealing with

46 Colombia. Political Constitution (1991 rev. 2015), Article 1. The term also appears in Articles 53 and 70. Articles 25, 42, 51, 68, and 95 of the Colombian Constitution expressly mention the words *dignified* and *dignification*, without specifically referring to human dignity. Whether these latter Articles refer directly to human dignity or not is left open in this writing.

47 By way of example, in 1966 Colombia signed the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which were ratified in 1969, and in 1988 it ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987), 1465 UNTS 85. All three documents allude to human dignity in their Preamble. In 1978, Colombia also ratified the American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978), OAS Treaty Series n.º 36, 1144 UNTS 123, whose Articles 5, 6, and 11 emphasize the importance of human dignity.

48 Colombia. Criminal Code (Law 599 of 2000), Article 1.

49 Colombia. Consumer Statute (Law 1480 of 2011), Article 1.

50 See Colombia. Law for the Integral Protection of the Family (Law 1361 of 2009), Article 4.7.

51 Colombia. Code of Childhood and Adolescence (Law 1098 of 2006), Article 1.

this question since 1992. After Decision T-401 of 1992[52], more than 300 decisions have been adopted. The issues raised were far from uncontested and diverse positions were maintained until Decision T-881 of 2002, which systematized the Court's relevant conceptual and normative criteria.

The Constitutional Court implicitly admits that human dignity is a polysemic term. It embraces a range of meanings[53] that "can be presented in two ways": 1) considering the object of protection and 2) considering its normative functionality. Both categories are further subdivided[54]. Firstly, human dignity *as the object* refers to what must be protected in the application of norms. It is the material content of human dignity as a normative concept. According to the Court, there are three basic and differentiable ways in which human dignity is manifested based on the object: a) *Autonomy or as the possibility of designing a life plan and determining oneself according to its characteristics* (*living as one wishes*): the guiding character would be the protection and exercise of individual freedom against the possible rule of general or collective interests[55]. b) *Certain concrete material conditions of existence* (*living well*): human dignity is associated with allowing access to certain minimum material conditions to be able to live well, in addition to "ensuring that such a result is achieved"[56]. c) *Intangibility of non-property assets, physical integrity, and moral integrity* (*living without humiliation*): degrading treatment of human beings in general, whether physical or not, is disrespectful of their human dignity[57].

The second category, considering human dignity *from its normative functionality*, unveils the role played by human dignity as an element that cohesively links the conceptual and practical structure of the Colombian political and legal system. To the Court, the normative function of human dignity is shown as follows: a) *As a founding value of the Colombian legal system and State* (*value*): human dignity is a value on which the State is based. What is most interesting here is to highlight the normative nature of this value, so that the legal system and the State are constituted respecting the "must be"[58] contained in human dignity. In this sense, following the criterion of Decision T-406 of 1992 on what a legal value is, human dignity would be an essential end or objective towards which the actions of the State must aim, and which is directed "in general to lawmakers

52 Colombia. Constitutional Court, Decision T-401 of 1992.

53 Carvajal, B., *La dignidad humana como norma de derecho fundamental*, Bogotá, Universidad Externado de Colombia, 2020, 110.

54 Colombia. Constitutional Court, Decision T-881 of 2002.

55 *Ibid*.

56 *Ibid*.

57 *Ibid*.

58 *Ibid*.

and especially to the legislator"[59]. It does not establish a specific duty, but it does serve as a guideline[60]. b) *Human dignity as a principle* (*principle*): also in the application of Decision T-406 of 1992 and, especially, of Alexy's criterion on constitutional principles, where human dignity is understood as a norm that establishes "a specific duty to be"[61] and that must be "optimized"[62] or concretized to the greatest extent possible[63]. The State must, to the extent of its legal and material possibilities, carry out all due conduct to achieve the conditions that allow the effective development of the spheres of protection of human dignity: individual autonomy, material conditions of existence, and physical and moral integrity. c) *Fundamental right to human dignity* (*right*): human dignity is an "autonomous fundamental right; it entails the elements of any right: a clearly identified holder (natural persons), a relatively delimited object of protection (autonomy, living conditions, physical and moral integrity) and a judicial mechanism for its protection (tutela action)"[64]. In other words, human dignity refers to the power of individuals to judicially demand that their autonomy and physical and moral integrity be respected and that the minimum social, economic, and political conditions for an adequate life be promoted.

Now, according to Decision T-881 of 2002, this list of six meanings of human dignity is not exhaustive, so the existence of other meanings "not mentioned in this decision"[65] is not excluded.

Based on the aforementioned criteria, the Court has decided on different legal areas, including some that belong to the private dimension of the law. It resorted to human dignity, for example, in Decision SU-214 of 2016 and protected the right of Luis and Edward—a same-sex couple—to get married when interpreting Article 42 of the Political Constitution, which regulates the legal conformation of the family[66]. Then, it sustained that same-sex marriage is included in the norm based on the protection of the right to human dignity, which is a principle from which "derives the full autonomy of the individual to choose the person with whom he/she wants to sustain a permanent and marital bond, whether natural or solemn,

59 Colombia. Constitutional Court, Decision T-406 of 1992.

60 See Velasco, Y., "La dignidad humana como valor, principio y derecho en la jurisprudencia constitucional colombiana", *Criterio*, vol. 6, n.º 2, 2013, 92.

61 Colombia. Constitutional Court, Decision T-881 of 2002.

62 *Ibid*.

63 Alexy, R., *Theorie der Grundrechte*, Frankfurt, Suhrkamp, 1985, 75.

64 Colombia. Constitutional Court, Decision T-881 of 2002.

65 *Ibid*. Henry holds that the Supreme Court of the United States has used the term dignity in different senses that respond to a variety of values that must be protected, although there is no ruling that systematizes them. There are five meanings: institutional status as dignity, equality as dignity, liberty as dignity, personal integrity as dignity, and collective virtue as dignity; see Henry, L., "The Jurisprudence of Dignity", cit., 190-229.

66 See Colombia. Political Constitution (1991 rev. 2015), Article 42.

whose purposes are to accompany, mutually assist each other and enjoy an intimate association, in the course of existence and to form a family"[67]. As a result, the civil legislation on marriage was profoundly modified, legally establishing a new paradigm based—to a large extent—on human dignity.

IV. Human dignity and the recognition of foreign judgements in Colombia

In the previous sections, it has been shown that, being nurtured by developments in human rights law at the international level, the concept of human dignity has undergone its path in Colombia thanks to its interpretation by the Constitutional Court. As we have seen, this has come to be considered in national cases concerning the private sphere of *the different* belonging to traditionally discriminated groups, for instance, through the recognition of a same-sex couple as a family. In addition, human dignity has been considered by the Supreme Court of Justice of Colombia in private international law cases regarding the recognition of foreign judgments, as will be presented in what follows.

In 2006, a Spanish court declared the *total incapacity* of Yesid, a 29-year-old Colombian residing in Madrid, due to his "mental retardation and cerebral palsy"[68] and appointed his mother Lucidia as his tutor[69]. In 2019, Lucidia filed a request for recognition of the Spanish judgment before the Colombian Supreme Court of Justice, which was inadmissible due to a procedural error[70]. The Court subsequently accepted this error and admitted the request for recognition. But in a dissenting opinion, one of the judges makes a substantive analysis based on the

67 Colombia. Constitutional Court, Decision SU-214 of 2016.

68 Colombia. Supreme Court of Justice, Civil Cassation Chamber, Decision SC714-2022 of 27 April 2022, reg. 11001-02-03-000-2021-04507-00.

69 Spain has been progressively modifying its legal system to adapt it to the Convention on the Rights of Persons with Disabilities. Thus, in 2021 it enacted Law 8/2021 (2 June 2021), according to the Preamble of which this "reform of civil and procedural law aims to take a decisive step in bringing our legal system into line with the International Convention on the Rights of Persons with Disabilities". This law eliminates the figure of incapacity and assumes the model of full legal capacity. According to the Preamble of the law, the "new regulation is inspired, as our Constitution in its Article 10 requires, by respect for the dignity of the person". In this line, on February 17, 2024, the reform of Article 49 of the Spanish Constitution came into force, which deletes the words *physically*, *sensorially*, or *mentally handicapped* and replaces it with the term *persons with disabilities*. One of the main reasons for this reform is that the "Spanish Constitution of 1978 enshrines the dignity of the person" (Law 8/2021 Preamble), so it would be contrary to this to allow constitutional articles that go against human dignity and consider disabled persons to be legally inferior.

70 In the proceedings in Spain, Yesid's father had not been notified within the time period established in the Colombian procedural norms. Behind this lies an obvious error, as the Colombian procedural rules should not have been taken into account by the Spanish courts. Colombia. Supreme Court of Justice, Civil Cassation Chamber, Decision AC547-2020 of 24 February 2020, reg. 11001-02-03-000-2019-02995-00.

possible transgression of the Colombian public policy, which is worth commenting upon. According to that opinion, since public policy consists of the "essential principles of the State' which are 'fundamental to the national legal system"[71], it includes the recent legal changes that seek to protect persons with disabilities[72]. These persons are now considered in Colombia to be active members of the society, and it is therefore necessary to "guarantee their fundamental rights, which include human dignity"[73]. Reference is made to the new national legal framework (Article 4 of Law 1996 of 2019)[74] and the United Nations Convention on the Rights of Persons with Disabilities, ratified by Colombia in 2009, one of the purposes of which is to promote respect for human dignity[75]. From this, the judge derived that the request for recognition should be rejected since in Colombia, "persons with disabilities cannot be deprived of their legal capacity even through the recognition of a foreign judgment"[76]. In favor of this reasoning speaks the fact that in Colombian private international law it is widely accepted that, when the recognition of a foreign judgment is requested, such request must be examined under the public policy existing at the time of the analysis.

In more recent cases, the Supreme Court of Justice has maintained the aforementioned approach. Thus, in a 2021 decision of the Supreme Court of California, the "absolute mental incapacity" of Nelson was declared, and Diana was appointed as his legal representative. In 2022, Diana requested the recognition of this judgment in Colombia, which was rejected by the Colombian Supreme Court. The central argument was that the judgment was contrary to Law 1996 of 2019 and the Colombian public policy, the latter including the principle of human dignity[77].

The same reasoning prevailed concerning judgments that have declared not only total disability, as in the cases above, but also partial disability. For example, in the case of Germán, a Colombian of adult age whose mother Linney requested before the Supreme Court of Justice the recognition of a Spanish judgment that declared

71 *Ibid*.

72 The changes were introduced in Colombia by Law 1996 of 2019 (26 August 2019).

73 Colombia. Supreme Court of Justice, Civil Cassation Chamber, Decision AC547-2020 of 24 February 2020, reg. 11001-02-03-000-2019-02995-00.

74 Colombia. Law 1996 of 2019 (26 August 2019), whereby the regime for the exercise of the legal capacity of persons of legal age with disabilities is established, Article 4: "The following principles shall guide the application and interpretation of the present law, in accordance with the other principles set forth in the Convention on the Rights of Persons with Disabilities [...]: 1. Dignity. In all actions, respect for the inherent dignity of the person with disabilities as a human being shall be observed."

75 See Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008), 2515 UNTS 3, Article 1. See also Law 1346 of 2009 (31 July 2009).

76 Colombia. Supreme Court of Justice, Civil Cassation Chamber, Decision SC714-2022 of 27 April 2022, reg. 11001-02-03-000-2021-04507-00.

77 Colombia. Supreme Court of Justice, Civil Cassation Chamber, Decision AC4575-2022 of 10 October 2022, reg. 11001-02-03-000-2022-03107-00.

him partially disabled due to a "severe paranoid schizophrenia" that "partially limits his capacity for self-government […] and prevents him from managing his patrimony"[78]. In general, the Court has held that persons with disabilities "are entitled—like any other person—to express their will freely and autonomously, to the extent of their possibilities, and using, when necessary, some kind of support for the performance of legal acts, which can be established through the conclusion of an agreement"[79].

The Court refused the recognition of the foreign judgment based on Law 1996 of 2019 and considered that, in the development of the principle of dignity, it "recognizes full capacity to all persons of legal age, without distinction of any kind".[80]

The nationality of Yesid, Nelson, and Germán was not at the core of these cases, i.e., the fact that they were Colombians was not stressed in the Supreme Court's central argumentation. Instead, it relied entirely on the use of the public policy clause to guarantee their fundamental rights, which include human dignity.

By resorting to such an approach, the Supreme Court is introducing the consideration of human dignity in private international law cases, the need for which had already been stressed by the *Institut de Droit International* in its 2021 Resolution on human rights and private international law, according to which "human rights are a direct expression of the dignity of the human person"[81].

At the same time, these decisions put into effect the egalitarian approach contained in the principle of human dignity, which was mentioned by Basedow in his report commenting on the draft of the aforementioned Resolution. According to this principle, he said, States must protect the most vulnerable people in our societies, whether in internal or cross-border situations[82], which is evidence of the cosmopolitan character of private international law[83].

Although the Supreme Court does not explicitly refer to the doctrine of human dignity developed by the Constitutional Court, it recognizes human dignity as a fundamental right. Additionally, by observing it within the framework of public policy, it considers it a founding principle of the Colombian legal system. This approach additionally shows us that respect for human dignity implies a demand for recognition of *the* other, i.e., the different, or the discriminated.

Now, in the aforementioned decisions, the Supreme Court shows an approach to human dignity different from that of the Constitutional Court. The Supreme

78 Colombia. Supreme Court of Justice, Civil Cassation Chamber, Decision SC4377-2021 of 10 October 2021, reg. 11001-02-03-000-2020-03024-00.

79 *Ibid*.

80 *Ibid*.

81 Institut de Droit International, "Human Rights and Private International Law", 4 Res (4 September 2021), 1.

82 See Basedow, J., "Human Rights and Private International Law", cit., 51-52.

83 See Michaels, R., "The Right to Have Private Rights", *University of Toronto Law Journal*, vol. 74, n.º 1, 2024, 131.

Court pivots around the protection of public policy as part of the national order, which encompasses human dignity and fundamental rights. Whereas the approach of the Constitutional Court pivots around the protection of fundamental rights, with which human dignity is closely related. The paths followed by each of these approaches converge, though, as they come to protect human dignity.

An additional observation can be made from a private international law perspective. The kind of recognition required by human dignity is wider than the one required by the private international law methodology of recognition[84], which underlies the process of recognition of foreign judgments. Following this methodology, accepting the recognition of the foreign judgment should be the general rule, whereas to rejecting its recognition, based on the public policy clause, is meant to be exceptional. Human dignity assumes in turn that recognition of *the different* can occur in all situations since the dignity of every human being must always be respected. Thus, being considered as included in the public policy of the Colombian State, human dignity—and the recognition of *the different* it implies—acted as a basis for denying recognition to the foreign judgments in which the Spanish and American courts did not treat Yesid, Germán, and Nelson as active members of the society and, therefore, as persons with legal capacity. But human dignity—and the recognition of *the different* it implies—would also have acted as a basis for recognizing the judgments in the opposite case, i.e., if the Spanish and American courts had treated Yesid, Germán, and Nelson as active members of the society and, therefore, legally capable.

Nevertheless, the way in which public policy is being used by the Colombian Supreme Court makes clear that private international law can support the respect for human dignity and the wider kind of recognition to *the different* that underlies it. This illustrates the idea, defended by Michaels, that private international law makes it possible to protect human rights —including human dignity—across borders[85]. And it does so not only through the application of foreign law, as he argues. As we have seen, it can do so even when the recognition of judgments adopted in application of foreign law is rejected, based on mechanisms that private international law itself has developed.

V. Human dignity and public policy and the dichotomy between public and private international law

In private international law, it is widely accepted that public policy is based on fundamental national principles, i.e., those principles "on which the court's legal

84 See Muir-Watt, H., "Fundamental Rights and Recognition", cit.

85 See Michaels, R., "The Right to Have Private Rights", cit., 128-150.

system bases its individuality"[86]. In this regard, according to the Colombian Supreme Court of Justice, "where a foreign law or the judgment applying it is based on principles not only different from but contrary to the fundamental institutions of the country in which it is intended to be applied, the judges of that State may, exceptionally, refuse to apply the foreign law or judgment which contradicts those principles"[87].

Here, questions may arise as to what exactly these principles are and how we can know their scope and content. In this respect, one might consider that the Inter-American Convention on General Rules of Private International Law, ratified by Colombia in 1981[88], entails the public policy clause regarding the recognition and the subsequent application of foreign law. The Convention states in Article 5 as follows: "The law declared applicable by a convention on private international law may be refused the application in the territory of a State Party that considers it manifestly contrary to the principles of its public policy"[89]. This rule refers to foreign law, but not directly to the recognition of foreign judgments. Thus, in this regard, the Colombian Supreme Court of Justice must take into direct consideration the national regulation contained in Article 606 No. 2 of the General Procedure Code, according to which one of the requirements for a foreign judgment to be recognized and enforced in Colombian territory is that "it does not oppose laws or other Colombian public policy provisions, except those of procedure"[90].

The Supreme Court has interpreted this rule both in a narrow and a broad sense. In its narrow interpretation, the phrase *public policy provisions* refers to codified imperative rules (overriding mandatory provisions). In this vein, it has identified that there are "rules of public policy of direction" the content of which may be political, economic, or social and condense the fundamental principles of the institutions and the basic structure of the State or the community, and "rules of public policy of protection" that aim at protecting a certain sector or group and, therefore, do not represent the founding or essential values and principles of the State[91]. The rules of public policy of direction are the ones directly relevant to deciding on the recognition of foreign judgments[92]. Now, in this broader interpre-

86 Fresnedo de Aguirre, C., "Public Policy in Private International Law: Guardian or Barrier?", in Ruiz Abou-Nigm, V., and Noodt Taquela, M. (eds.), *Diversity and Integration in Private International Law*, Edinburgh, Edinburgh University Press 2019, 342.

87 Colombia. Supreme Court of Justice, Civil Cassation Chamber, Decision ref. file 11001-0203-000-2007-01956-00 of 27 July 2011.

88 Colombia. Law 21 of 22 January 1981.

89 Inter-American Convention on General Rules of Private International Law (adopted 5 August 1979, entered into force 6 October 1981), OAS Treaty Series 54, UN Reg 24637, Article 5.

90 Colombia. General Procedure Code (Law 1564 of 2012), Article 606, n.º 2.

91 Colombia. Supreme Court of Justice, Civil Cassation Chamber, Decision SC6493-2017 of 12 May 2017, reg. 11001-02-03-000-2015-01074-00.

92 *Ibid*.

tation, public policy implies "a problem of justice that makes it necessary to note the evolution of this concept in space and time, an examination that must therefore always be adapted to legal criteria currently in force"[93]. The scope and concrete content of these principles and, in consequence, of the public policy exception are thus determined by the use given to them in practice. In this sense, the content or meaning of public policy can be defined just in relation to the legal, political, and social context in the forum country at a given moment.

Although the above approach does not answer the question of the scope and content of public policy, it allows public policy to gain concreteness under the consideration of human rights norms developed in public international law. In such a manner, as the cases previously discussed illustrate, private international law has been able to consider human dignity in connection to public policy to adopt "a new focus on collective and individual dignity" and to give voice "to the Other – the different, the discriminated, or the minoritarian"[94].

In this sense, by resorting to human dignity, private international law is calling into question the traditional way in which public and private international law have been traditionally divided, which splits one from the other as if they were two strictly different legal spheres[95]. Based on the observation of Colombian law practice, one may argue that in reality, human dignity is subject to internationalization

93 Colombia. Supreme Court of Justice, Civil Cassation Chamber, Decision SC4377-2021 of 10 October 2021, reg. 11001-02-03-000-2020-03024-00.

94 Muir-Watt, H., "Fundamental Rights and Recognition", cit., 1. This effect of giving voice to "the Other, the different, the discriminated, or the minoritarian", as Muir-Watt puts it, does not exclude the important role played by human dignity in private international law cases involving people who belong to *the majoritarian*. An example is Decision SC6493-2017 of 12 May 2017, reg. 11001-02-03-000-2015-01074-00, through which the Civil Cassation Chamber of the Supreme Court Justice of Colombia recognized an Italian judgment declaring that Roberto, an Italian citizen, had no biological link to a child alleged to be his son with a Colombian woman. According to the court, the foreign judgment, which was based on DNA tests in both Italy and Colombia, was not contrary to the principles that form part of the Colombian international public order, as it did not violate the duty to protect the rights of the child, including the right to human dignity; see Colombia. Supreme Court of Justice, Civil Cassation Chamber, Decision AC4575-2022 of 10 October 2022, reg. 11001-02-03-000-2022-03107-00. On the significance of human dignity for the recognition of and respect for *the Other*, see also Réume, D., "Discrimination and Dignity", cit., 1-51; Shulztiner, D., and Carmi, G., "Human Dignity in National Constitutions", cit., 489. Recent research that gathered information through quantitative surveys of people with disabilities showed that—in addition to other aspects—recognition of their personality and decision-making capacity is fundamental to feeling dignified. About this topic, see Chapman, K.; Dixon, A.; Ehrlich, C., and Kendall, E. "Dignity and the Importance of Acknowledgement of Personhood for People with Disability", *Qualitative Health Research*, vol. 34, n.º 1-2, 2024, 146-148.

95 See Muir-Watt, H., "Private International Law Beyond the Schism", cit., 347-428. As Fernández Arroyo and Mbengue state, the "problem with this division, however, is that it has never truly reflected reality. The relationship between public and private international law is far more nuanced than the traditional distinctions would suggest"; Fernández Arroyo, D., and Mbengue, M. M., "Public and Private International Law in International Courts and Tribunals Evidence of an Inescapable Interaction", *Columbia Journal of Transnational Law*, vol. 56, n.º 4, 2018, 799.

in at least two ways that, although distinguishable, are intermingled. Once Colombia becomes a party to instruments of public international law (i.e., human rights conventions), it is indisputable that it is called upon to serve the obligations it has acquired vis-à-vis other States, which leads the country to absorb human dignity into the national legal system. Such absorption involves an internationalization *from outside to inside* the State. Of course, such obligations can emerge from sources other than international human rights conventions (e.g., international customs or court decisions) as well. The consideration of human rights' essential relationship with human dignity thus allows the national courts to resolve private law cases based on their interpretation and application. But human dignity is considered not just to deal with domestic cases but also with cross-border cases. When the latter occurs, internationalization of human dignity takes place *from inside to outside* the State. This means that human dignity—in the form in which it has been absorbed by national law—is applied or extended to reach facts originating abroad (to which judicial decisions refer). In this context, both public and private international law aim at the same end, i.e., protecting human dignity by giving voice to the different. One can thus see how private and public international law are intertwined and the boundaries between them blurred. Even though, as Michaels has noted, this does not mean that they are one and the same thing[96].

As for the recognition of foreign judgments, the above process is made possible by interpreting the public order clause to encompass the protection of human dignity. Because human dignity is an element of Colombian public policy, it was possible to refuse the recognition of the foreign judgments in order to preserve the human dignity of Yesid, Nelson, and Germán.

Now, although public policy in theory goes beyond national law[97] and even beyond the strictly legal, in practice, it operates when the State intervenes[98]. Thus, this notion becomes relevant in the discourse that takes place within the boundaries of—State—law and not beyond it. In this sense, even though it may be said with Neal that public policy is one of the "contested concepts",[99] it distances itself from the concept of human dignity, or other contested concepts that she mentions, such as property, person, or self-defense[100], since debates on these latter concepts may take place beyond the State legal discourse.

96 See Michaels, R., "The Right to Have Private Rights", cit., 145.

97 See Jayme, cited by Fresnedo de Aguirre, C., "Public Policy", cit., 354: "nowadays the emphasis is put on the fundamental rights of the individuals and the states as such does not play the main role regarding the scope of the public policy exception".

98 See *ibid*., 342-343.

99 Neal, M., "Dignity, Law and Language-Games", cit., 119.

100 See *ibid*., 119-120.

Furthermore, public policy is limited here to private international law. It forms part of what Mills calls the "outer limits of tolerance of difference"[101] in dealing with cross-border situations. But even though a certain degree of determination can exist about these outer limits, such determination does not embrace the content or meaning of public policy, since, according to the Colombian Supreme Court, this must necessarily be flexible. Thus, in addition to being the result of particular conditions that vary depending on the social, political, or legal context, public policy is an indeterminate legal concept[102]. The discretionary character that underlies this would be limited by the aforementioned exceptional character of the public policy clause[103]. Resorting to the public policy clause as a general rule would hinder access to justice in transnational contexts. This has been highlighted in the Principles on Transnational Access to Justice of the American Association of Private International Law (ASADIP), according to which access to justice must occur "without discrimination based on nationality or residence and in accordance with both international human rights law as well as the principles embodied in most modern constitutions"[104].

In any case, by being part of the content of public policy, human dignity favors the recognition of specific groups and their—collective—dignity[105]. It additionally breaks epistemological barriers that have given rise to the sharp separation between public and private international law. As part of the Colombian public order, human dignity thus fosters the creation of epistemological and practical links—rather than the erection of fences—between public and private international law. The practical dimension of the developments we have seen in the cases decided by the Colombian Supreme Court of Justice unveils cross-cutting conceptual bridges that bring these two legal fields closer together, instead of pushing them apart.

101 Mills, A., "The Dimensions of Public Policy in Private International Law", *The Journal of Private International Law*, vol. 4, n.º 2, 2008, 202.

102 This idea is not uncontested in legal literature; see, for instance, Belohlavek, A., "Public Policy and Public Interest in International Law and EU Law", *Czech Yearbook of International Law. Public Policy and Ordre Public*, Juris Publishing, vol. 3, 2012, 117-147.

103 See Mills, A., "The Dimensions of Public Policy", cit., 209.

104 ASADIP, "ASADIP Principles on Transnational Access to Justice" (adopted 12 November 2016), Articles 7.1 and 7.2.

105 In the three cases, the aim is to protect the human dignity of individuals for the specific reason that they belong to groups that have historically been socially excluded. Additionally, the idea of collective human dignity can also indicate the legal protection of a collective in itself, and not only its members. This is the intention that seems to be behind the Constitution of Ecuador (2008 rev. 2021) when it states in its Preamble that Ecuador "respects, in all its dimensions, the dignity of persons and collectivities". Undoubtedly, this statement requires further legal and judicial development by the Ecuadorian State. A similar approach is adopted in the Vienna Declaration and Program of Action (25 June 1993), UN Doc A/CONF. 157/23, para. 20, which "recognizes the inherent dignity […] of indigenous peoples", and the United Nations Declaration on the Rights of Indigenous Peoples A/RES/61/295 (13 September 2007), Article 43, for which the rights recognized in the Declaration "constitute the minimum standards for the survival, dignity, and well-being of the indigenous peoples of the world".

Conclusion

There is a dominant tendency to confine human dignity to the public sphere. However, having emerged linked to developments that have occurred in public international law in the realm of human rights, human dignity has progressively undergone its evolution domestically, permeating private dimensions of law. The same is true regarding private international law, as some cases decided by the Colombian Supreme Court of Justice, resorting to the use of public policy demonstrate. Thus, human dignity is not only used to deal with domestic cases but also across borders: the national legal system, which had already absorbed the notion of human dignity, ends up being applied to situations originating abroad. The two main effects of the consideration of human dignity in this context that have been pointed out—recognition or non-recognition of foreign judgments and recognition of the different, as well as the overcoming of the traditional divide between public and private international law—are expressions of the relevance of private international law for its realization.

This shows that private international law is an essential tool for fostering cosmopolitanism in terms of protecting the dignity of individuals in an indiscriminate manner. Though this is not the only or primary means of protecting human dignity, the fact that it is being internationalized through private international law cannot be ignored. It may be argued to the contrary that States can use private international law to undermine the human dignity of individuals, but legal practice demonstrates the opposite, i.e., that this area of law offers tools to protect human dignity. We should not, however, underestimate the risk of such violations. Courts have a special role to play in this regard since it is up to them to determine the meaning and content of human dignity as well as of public policy. In doing so, they reveal at the same time the essentially human nature of private international law.

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