Human Dignity in Luxembourg

Jörg Gerkrath and Maria Pichou

Abstract

Luxembourg's current Constitution does not refer to Human Dignity but several Acts of Parliament do so, without providing any comprehensive definition. This *lacuna* is partially filled with Luxembourg's strong commitment to European and International law. Two of the main characteristics of Luxembourg's legal order: its attachment to monism and pragmatism show up in this regard. The Grand Duchy is not only a contracting party to numerous international treaties that guarantee the respect for Human Dignity; its Representatives have always strongly advocated the need to protect Human Dignity worldwide. Domestic authorities, when applying EU law, need to grant the protection of Human Dignity as it is enshrined in the EU Charter of Fundamental Rights. It is up to the national judges to determine the content of Human Dignity on a case by case basis.

Keywords

Human dignity in Luxembourg • Luxembourg at the ECtHR • Protecting human dignity in Luxembourg • Luxembourg's guarantees on human dignity

Contents

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1 Introduction

The Grand Duchy of Luxembourg has not yet developed its own 'home-grown' idea of Human Dignity, '*dignité humaine*' or '*Menschenwürde*'. The current Constitution, which dates to 1868 and partly even to 1848, does not even explicitly refer to Human Dignity either as a value, a principle, or as a specific fundamental right. Article 11 (1) merely mentions that 'the state guarantees the natural rights of the human being and the family[1].' Predictably the Constitutional Court had some trouble with decoding this rather enigmatic provision.

Still, as it will be developed, many acts of Parliament retain the notion of Human Dignity in various contexts and grant specific rights to human beings in diverse circumstances without ever defining precisely the notion's legal meaning. The resulting concept of Human Dignity, as retained for instance in the field of social assistance or regarding over indebtedness, is thus more an ethical or a moral notion than a clear cut legal term allowing to infer direct legal implications. The latter is only the case in the fields of palliative medicine, euthanasia and biomedicine where the link to the very nature of human beings, their corporeality, corporal dignity, life and death is particularly close. But even in these fields the legislator did not really define the concept of Human Dignity leaving it to the judges to determine its final shape on a case by case basis.

As a matter of fact, all the domestic political and legal actors seem to rely on the meaning given to Human Dignity under international law. Thus, the concept is mostly used in a sense based on its recognition under the 1950 European Convention on Human Rights (ECHR) or the 1948 Universal Declaration of Human Rights (UDHR). Surprisingly, while Luxembourg's lawyers did not seem to spend much effort on developing and understanding the meaning of Human Dignity in the domestic context; the State's Representatives abroad, however, participated very actively in European and international efforts to promote this notion and strengthen its legal protection. We will expand the current setting in Luxembourg more in detail by showing how the concept has been progressively incorporated into the domestic system (2), whereas it still lacks a coherent definition (3), and by assessing how it could be ensured more efficiently (4).

[1]"L'Etat garantit les droits naturels de la personne humaine et de la famille." In Luxembourg the official legal language is French. All translations of legal sources or secondary literature from French to English have been realized by the authors.

2 Incorporating Human Dignity in the Domestic Legal Order

Luxembourg's legal order displays some specificities that need to be mentioned. It can indeed be easily described as, first, being resolutely monist and, second, showing a profound pragmatism in receiving for instance legal transplants inspired by neighbouring countries or solutions enshrined by international treaties. Regarding the notion of Human Dignity both, monism and pragmatism, have played their role. Although Human Dignity is not constitutionally guaranteed for the moment, the Grand Duchy has made many efforts to introduce this concept into its legal order notably under the influence of international law.

A first explicit mention of the concept of Human Dignity, bearing legal consequences, appeared in an Act of Parliament in 1979 regarding discipline within the armed forces. This Act introduced Human Dignity as a valid motive for soldiers to disobey orders contrary to it. More recent Acts of Parliament build on the Human Dignity concept in order, e.g., to protect categories of vulnerable human beings against violations of their dignity. These legal references have to be appreciated in a larger context which is characterized by the absence of a Human Dignity reference in the current Constitution, a strong impact of international and European law sources and a lesser contribution made by case law.

To provide a useful overview on the current situation, the following synopsis contains a brief presentation of the occurrence of the Human Dignity concept throughout statutory law (2.1) as well as the relevant case law (2.2).

2.1 Statutory Law

As the current Constitution does not contain an explicit reference to Human Dignity, this lacuna is to be altered by a pending constitutional amendment and already largely compensated by a number of international treaties which Luxembourg is part to, as well as several Acts of Parliament and some administrative acts.

2.1.1 The Constitution

The Constitution currently in force in the Grand Duchy dates to October 1868. Some provisions, notably under the human rights chapter, have been transferred from the liberal Constitution of 1848, which in turn had been strongly inspired by the model Constitution of the Kingdom of Belgium of 1831.

Compared to the present constitutional systems of its neighbouring countries, France, Germany and Belgium, which have repeatedly served as sources of inspiration for constitutional amendments in the past, the situation in Luxembourg is now unique. It remains one of the rare EU member states that does not explicitly guarantee Human Dignity as a constitutional value or as a fundamental right.

Its condition is, however, shared by the Netherlands and consequently it is predominant amongst the Benelux member states. The Netherlands' approach to Human Rights relies indeed strongly on international law and protection. Akin to Luxembourg, there is no explicit mention of Human Dignity in the Constitution.

According to the Dutch Constitution, the government has the duty to promote the development of the international legal order (article 90), which it notably fulfils by acceding to human rights conventions. The implementation of international obligations is regulated by articles 93 and 94. On this basis 'self-executing' provisions of human rights treaties form part of Dutch law and can be invoked by citizens before the courts.

The Constitution of the Kingdom of Belgium, which was the model for Luxembourg in the past, and still is an incontournable reference, was finally amended to conclude a humble reference to Human Dignity in 1994. An event that passed quite unnoticed in Luxembourg. It is true that article 23 of the Belgian Constitution stating in vague terms that 'everyone has the right to lead a life in conformity with Human Dignity', refers in the following exclusively to social and economic rights requiring an intervention of the legislator. (Merckx-Van Goey and Verrijdt 2014).

Within Luxembourg's constitutional system the notion of Human Dignity ultimately materialized through the case law of the Constitutional Court that has been established in 1997. This Constitutional Court is exclusively competent to decide on preliminary questions submitted by ordinary judges on the consistency of legal provisions with a specified article of the Constitution (Gerkrath 2008). In 1989 and 2004, the Constitutional Court was called upon to respond to two such questions regarding article 11 (3) of the Constitution. This article requires the state to guarantee 'the natural rights of the human person and the family'.

Regarding the meaning of this ambiguous provision, the Court finally took a position fully in line with the duty of judicial self-restraint. Admittedly, the Court indicated in its first judgment 2/98 of 13 November 1998 that 'natural law is stemming from human nature and exists even without legislation' and thus, it seemed to recognize the existence of supra-constitutional rights beyond the explicitly enumerated fundamental rights (Arrêt 2/98 du 13 novembre 1998, Mémorial A n° 102, 8 décembre 1998, p. 2499). Regarding the content of this category of natural rights, the Court mentioned *in concreto* 'the right to procreation and the Community of Life'. In its decision 20/04 of 28 May 2004, the Court clarified, however, that 'natural law is restricted to the existential questions of the human being, to the respect for its dignity and freedom' (Arrêt 20/04 du 28 mai 2004, Mémorial A n° 94, 18 juin 2004, p. 1561).

The Constitutional Court obviously did not wish to contribute to the creation of a new category of fundamental rights with an indeterminate content left to the discretion of the judge. It clearly construed, however, this constitutional provision as including the duty to respect Human Dignity.

A further, explicit, allusion to Human Dignity is likely to be included into the Constitution via a currently pending amendment procedure initiated in April 2009 (Gerkrath 2013). The Constitution of 1868 is indeed to be replaced by a new document which shall be adopted by referendum in early 2018. The current draft of the new Constitution, as of 30 June 2015, contains an article 12 stating that 'Human Dignity is inviolable'.

The parliamentary committee, which authored the proposal of amendment, considered inviolability of Human Dignity as 'the very foundation of human rights'. Drawing from the EU Charter of fundamental rights and the UDHR, the committee quoted in particular four human rights that appear as a direct application of the principle of Human Dignity and accordingly form the core of human rights: the right to life, the prohibitions of torture and slavery and the non-retroactivity of criminal law (Ergec 2009, p. 182).

According to the Opinion of the *Conseil d'Etat* on the amendment proposal (Avis du Conseil d'Etat, 6 June 2012 sur la proposition de revision de la constitution, p. 21):

> Human Dignity is inalienable and cannot be limited, even in wartime. It cannot suffer any exclusion. It is therefore wise to include this declaratory concept as an inaugural principle in the enumeration of fundamental rights and public freedoms.

In the reading that the *Conseil d'Etat* gives to the notion of Human Dignity, it includes the right to free development of personality. The Conseil stresses also that the very notion of Human Dignity is difficult to pin down in legal terms. In a legal system embodying the principle of constitutional review, it can thus be expected that many actions will be based on this constitutional provision. In the eyes of the *Conseil*, Human Dignity is, however, 'hardly enforceable in itself, independently to other rights and freedoms guaranteed by the Constitution' (Spielmann 2010).

The proposal to include Human Dignity in article 12 of the new Constitution is certainly commendable even though it is a concept that allows virtually unlimited interpretations. Human Dignity can indeed be regarded as a kind of meta-right, a right that is the foundation of all other human rights. Its constitutionalisation will help to give full effect to a notion that is, for the time being, essentially enshrined in international treaties and Acts of Parliament.

2.1.2 International Treaties

The protection of Human Dignity under international law is diffuse, ranging from references in preambles in international treaties to safeguarding Human Dignity as a right or principle. (Dupré 2014, p. 10) In Luxembourg's Constitution, there is no express reference to the legal status of international treaties under domestic law. However, the *Conseil d'État,* acting at that time as the highest administrative court, firmly confirmed that in case of conflict between a rule of domestic law and a rule of international law, which has a direct effect in the domestic legal order, the rule of the international treaty shall prevail (Gerkrath 2016). According to national case law, an international treaty has a higher legal status, because its source is higher than the will of the common legislator. Therefore, in case of a conflict between the provisions of an international treaty and of a posterior national law, international law norms shall prevail.

Luxembourg is a founding member of the United Nations. The preamble of the Charter of the United Nations (Charter), which was signed by Luxembourg in 1945, reaffirms the faith in fundamental human rights and in the dignity and worth of the

human person. In addition to these references in the Charter, the Universal Declaration of Human Rights, adopted in 1948, contains well-known dignity provisions in its Preamble, article 1, article 22 and article 23 (3). Not only was Luxembourg one of the first signatory states of the Universal Declaration of Human Rights, but as early as in 1960, the Luxembourgish Representative referred to Human Dignity in the context of welcoming new member states at the Plenary Meeting of the UN General Assembly (Schaus 1960).

Furthermore, Luxembourg is member to the International Covenant on Civil and Political Rights and to the International Covenant on Economic, Social and Cultural Rights, which formulate dignity as an individual right. Luxembourg ratified both instruments in 1983. In 2009, Luxembourg signed the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, which establishes a mechanism to follow up on complaints concerning the violation of the Covenant by a signatory state. Luxembourg is also member to the UNESCO, which adopted in 1997 the Universal Declaration on the Human Genome and Human Rights, guaranteeing to everyone the right to respect for dignity regardless of their genetic characteristics. In 2014, the 'Commission nationale du Luxembourg pour la coopération avec l'UNESCO' was established with the mandate to promote the implementation of programs and projects relevant to UNESCO in Luxembourg. Moreover, Luxembourg ratified all fundamental conventions of the International Labour Organisation, which constitutes, since 1946, the first specialized UN agency with the mandate to advance decent working conditions in freedom, equity, security and Human Dignity for men and women. Luxembourg also ratified the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery in 1967. The latter reiterates in its preamble the faith in the dignity and worth of the human person as prescribed in the UN Charter (United Nations, Treaty Series, vol. 266, p. 3).

Apart from these UN and UN Agencies' driven instruments promoting the protection of Human Dignity, Luxembourg is party to several international treaties, which guarantee Human Dignity. Regarding international humanitarian and international criminal law, Luxembourg is party to the four Geneva Conventions since 1953 and to the two Additional Protocols since 1989. The preambles of the four Geneva Conventions recognize that the respect for the personality and dignity of human beings constitutes a universal principle, which is binding even in the absence of any contractual obligations. This postulation elevates the respect for Human Dignity to the sphere of international customary law. Human Dignity underpins the protection of civilian populations during armed conflicts. The two Additional Protocols prohibit 'outrages upon personal dignity'. Similarly, article 8 of the Statute of the International Criminal Court (ICC) prohibits 'outrages upon personal dignity', in particular humiliating and degrading treatment. Luxembourg is a founding member state to the ICC Statute.

Human Dignity is also invoked in international instruments, which protect vulnerable people. The Convention on the Rights of children, which Luxembourg ratified in 1994, formulates Human Dignity as a benchmark in multiple articles for the protection guaranteed to children (articles 23, 37, 39, 40). Additionally, in 2011,

Luxembourg ratified the Convention on the Rights of Persons with Disabilities and its Optional Protocol. Respect for inherent dignity and individual autonomy is recognized as a general principle in this Convention as well. Since 2009, Luxembourg is party to the Convention on Action against Trafficking in Human Beings, which establishes in its preamble that trafficking in human beings constitutes an offence to the dignity and the integrity of the human being. Moreover, Luxembourg ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1987 and the Optional Protocol to this Convention in 2010. The preamble of this convention recognizes that human rights derive from the inherent dignity of the human person.

References to dignity are also found in international treaties prohibiting discrimination. The International Convention on the Elimination of All Forms of Racial Discrimination, which Luxembourg ratified in 1978, states in article 1 that discrimination between human beings on the ground of race, colour or ethnic origin constitutes an offence to Human Dignity. In 1996, Luxembourg filed a declaration on this Convention, recognizing the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by Luxembourg of any of the rights set forth in the Convention. Indeed, in May 1996, the 'Commission Spéciale Permanente contre la Discrimination' was created, with the competence to receive and consider petitions from individuals and groups of individuals within the jurisdiction of Luxembourg who claim to be victims of a violation of any of the rights set forth in the Convention. However, the mandate of this Commission was not renewed and was replaced with a commission on integration and equal opportunities. The Centre for Equal Treatment (CET) was created by the Act of 28 November 2006, without though being vested with the right to be party to legal proceedings. According to the 2014 Concluding Observations of the UN Committee on the Elimination of Racial Discrimination for Luxembourg, the definition of racial discrimination, provided in article 1 of the National Act of 28 November 2006 on equal treatment, does not include the criteria of national origin, colour or descent, and therefore it is 'not quite consistent with article 1 of the Convention'. Luxembourg is also member to the Convention on the Elimination of all forms of Discrimination against women, which perceives Human Dignity as a principle. The Convention reiterates that any discrimination against women violates the principles of equality of rights and the respect for Human Dignity. Luxembourg ratified the Optional Protocol to this Convention in 2003.

Luxembourg never became party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which guarantees in article 70 that states parties shall ensure that working and living conditions of migrant workers are compatible with the principle of Human Dignity (United Nations, Treaty Series, vol. 2220, p. 3; Doc. A/RES/45/158). This omission was criticized in 2014 by the UN Committee on the Elimination of Racial Discrimination. Neither did Luxembourg ratify the International Convention for the Protection of all Persons from Enforced Disappearance (United Nations, Treaty Series, vol. 2716, p. 3 Doc. A/61/448). The latter guarantees that the collection, processing, use

and storage of personal information, including medical and genetic data, shall not infringe or have the effect of infringing the human rights, fundamental freedoms or Human Dignity of an individual. Furthermore, Luxembourg never ratified the Convention on Human Rights and Biomedicine. As the Council of Europe emphasizes, this convention is the first legally binding international text designed to preserve Human Dignity, rights and freedoms, through a series of principles and prohibitions against the misuse of biological and medical advances. Despite the Opinion 1/1999 of the Luxembourg's 'Commission Consultative Nationale d'Ethique pour les Sciences de la Vie et de la Santé', which recommends the Government of Luxembourg to ratify this Convention, Luxembourg has not ratified it thus far (Harpes and Wagner 1999). Human Dignity is also included in another Council of Europe's convention, the European Social Charter. While Luxembourg is member state to the European Social Charter, it has not yet ratified the Revised European Social Charter, which in article 16 provides that all workers have the right to dignity at work.

Regarding bilateral agreements, the Agreement between Luxembourg, as a Benelux country, and Bosnia and Herzegovina, concerning the readmission of persons who have entered and/or reside without authorization, provides that any relevant procedure of readmission must guarantee Human Dignity (Readmission Agreement: Benelux – Bosnia and Herzegovina, Mémorial A n° 62 of 20 April 2007). Similarly, the corresponding agreement with Kosovo (Readmission Agreement: Benelux–Kosovo, Mémorial A n° 104 of 24 May 2012) provides in its preamble that any procedure of return of irregular migrants should guarantee their Human Dignity. Interestingly, the relevant agreements with F.Y.R.O.M. (Readmission Agreement: Benelux–F.Y.R.O.M. Government, Mémorial A n° 61 of 20 April 2007) and Armenia (Readmission Agreement: Benelux–Republic of Armenia, Mémorial A n° 258 of 28 December 2009) do not make such reference.

On EU level, the Charter of Fundamental Rights (CFR) enshrines Human Dignity as the foundational value of the European Union. The level of public support for the EU in Luxembourg has always been one of the highest throughout the Union and is shared by all political parties in the Chamber. European integration has never been conceptualized in Luxembourg as a threat to constitutional rules, principles or values, and Luxembourg's constitutional culture may be said to be 'somewhat deferent to international and European law' (Gerkrath 2016).

2.1.3 Acts of Parliament

Luxembourg's Parliament, the '*Chambre des députés*' (hereinafter 'the Chamber'), consists of a single chamber composed of 60 MPs. The '*Conseil d'Etat'*, an advisory body of the government, delivers Opinions ('avis') on every draft bill and every draft grand-ducal regulation. It closely interacts with the Chamber, which in the clear majority of cases follows the Opinions of the *Conseil*. In practice the *Conseil d'Etat* exercises the function of a second moderating chamber. The Chamber is, however, not bound by the Opinions of the *Conseil*. In case of disagreement, taking the form of a 'formal opposition', the Chamber has simply to proceed to a second vote.

Since 1979 and until April 2016, a total number of sixteen Acts ('lois') referring to Human Dignity have been adopted by the Chamber and published in the *Mémorial*, the official journal of the Grand Duchy. For the needs of a more systematic scrutiny they are analysed hereinafter following their nine principal subject matters:

1. The very first occurrence of the notion of Human Dignity in Luxembourg is linked to the matter of discipline within the military. An Act of 16 April 1979 on discipline in the armed forces establishes Human Dignity as a valid motive for soldiers to disobey an order being incompatible with it (article 7, Loi du 16 avril 1979 ayant pour objet la discipline dans la Force Publique, Mémorial A n° 33 of 26.04.1979). A second Act of 31 December 1982 similarly revises the military criminal code (Loi du 31 décembre 1982 concernant la refonte du code pénal militaire. Mémorial A n° 114 of 1982, p. 2604), which states in its article 31 that 'a refusal to execute an order that violates Human Dignity does not constitute an offense' under this code. None of these acts, however, define what is meant by Human Dignity. Soldiers refusing to obey an order which they consider erroneously to be incompatible with Human Dignity may therefore still be sanctioned.
2. Media, press and TV advertising is the second domain where Human Dignity was introduced by Acts of Parliament as a value to be respected in all circumstances. Specifically, an Act of 27 July 1991 regarding electronic media, which has been modified twice in 2001 and 2010, pursues the aim of organizing the function of electronic media 'in the respect of the human being and its dignity' (article 1). According to articles 25, 27bis and 28 of this Act, TV advertising, teleshopping and any other audio-visual commercial communications must not adversely affect Human Dignity. In addition, the Deontology Code of the press states in article 5 that 'the press is committed to respecting and defending the Human Dignity of each individual'.
3. A third area was identified when an Act of Parliament of 8 December 2000, subsequently modified in 2013, established a collective debt settlement procedure. This procedure intends to prevent over-indebtedness and addresses the financial situation of the individual debtor by allowing him to pay his debts and 'ensuring for himself and his domestic community, that they can lead a life of Human Dignity' (article 1).
4. The fourth domain, where the legislator introduced an obligation to respect Human Dignity, is the treatment of asylum seekers. Article 8 of the Act of 5 May 2006 provides indeed that 'the judicial police service shall conduct any checks necessary for establishing the identity and the applicant's travel itinerary. It shall hold a hearing of the applicant. It may proceed if necessary to a body search of the applicant and a search of his belongings, provided that such a search will be done with respect for Human Dignity' (Loi du 5 mai 2006 relative au droit d'asile et à des formes complémentaires de protection, Mémorial A n° 78 de 2006, p. 1404). In addition, the conditions of confinement of irregular migrants or unsuccessful asylum seekers, who are subject to a measure of removal towards their countries of origin, were determined by an Act of 28 May 2009 (Loi du 28 mai 2009 portant création et organisation du Centre de rétention, Mémorial

A n° 119 de 2009, p. 1708). Article 3 indicates that the individuals placed in the so-called Retention Centre, referred to as 'the retained', 'deserve respect and protection of their dignity, their physical and mental integrity and their religious and philosophical convictions'. Furthermore, before being placed at the appropriate unit of the Retention Centre, 'the retained' is subject to a body search conducted with respect for Human Dignity by two agents of the same sex as him (article 8). During their stay at the Centre, 'the retained' may be subject to periodic security searches. Their belongings and rooms can also be inspected. Such body searches and inspections 'must be made with respect for the Human Dignity of the retained' (article 17).

5. The fifth domain where Human Dignity was introduced by law as a safeguard is certainly the most controversial. In a somewhat troublesome period from 2007 to March 2009, the Chamber deliberated on a parliamentary proposal as well as on a governmental bill concerning what the media named the 'Right to Die with Dignity'. After heated debates in the Chamber, the threat of the Grand Duke not to sign and promulgate this Act leads to a constitutional amendment withdrawing this competency from the Grand Duke. The resultant Act 'on palliative care, the anticipated directive and the accompaniment at end of life' was finally adopted and published on 16 March 2009 (Loi du 16 mars 2009 relative aux soins palliatifs, à la directive anticipée et à l'accompagnement en fin de vie, Mémorial A n° 46 de 2009). This Act covers both euthanasia and physician-assisted suicides. It establishes a National Commission of Control and Evaluation to assess the implementation of the Law. A physician who performs euthanasia must, within 4 days, remit an official declaration to the Commission. Finally, the law provides that no physician is obliged to perform euthanasia or assist in a suicide. The physician is required to inform the patient of his state of health and life expectancy and to discuss all other therapeutic possibilities still available and their consequences, including palliative care. Article 1 defines palliative care as 'acute, continuous and coordinated care, performed by a multidisciplinary team with respect for the dignity of the person being cared'.
6. In the social field, where a small welfare state such as Luxembourg can still afford generous measures, an Act of 18 December 2009 provides a right to social assistance to enable all citizens to lead a life 'worthy of Human Dignity', while preserving their autonomy (article 1, Loi du 18 décembre 2009 organisant l'aide sociale, Mémorial A n° 260 de 2009, p. 5474). Social assistance, referred to in the text as 'aid', provides people in need and their families with access to goods and services adapted to their particular situation, to help them to acquire or preserve their autonomy. This assistance is meant to be provided as a subsidiary measure, and it can supplement the social measures and the financial benefits provided by other laws and regulations, which the beneficiary is, however, required to exhaust before applying for it.
7. From 2009 onwards, the Chamber started to introduce the notion of Human Dignity in criminal law, namely, in the 'Penal Code' and the 'Code of Criminal Investigation'. The latter has indeed been amended by an Act of 6 October 2009 to strengthen the rights of victims of criminal offences (Loi du 6 octobre 2009

renforçant le droit des victimes d'infractions pénales, Mémorial A n° 206 du 19 octobre 2009, p. 3538). According to article 8 (3) of the Code, the General Prosecutor, or his substitute, may publish information on the progress of proceedings, respecting notably 'the presumption of innocence, the rights of the defense, the right to protection of privacy and the dignity of persons'. The Penal Code has been modified in 2009 and 2011 introducing two new criminal offences whose definitions build inter alia on the concept of Human Dignity. These are, first, human trafficking and, second, exploitation and sexual abuse touching children. According to an Act of 13 March 2009, which has been reinforced by an Act of 9 April 2014, the offense of human trafficking consists in recruit, transporting, transferring, hosting, receiving a person, passing or transferring control over it, with the purpose of: (1) the commission against that person of offenses of procuring, assault, or sexual abuse; (2) the exploitation of labour or services of that person in the form of forced labour or mandatory services, servitude, slavery or practices similar and generally in conditions contrary to Human Dignity (Loi du 13 mars 2009 relative à la traite des êtres humains, A-2009-051-0002 p. 672. Loi du 9 avril 2014 renforçant le droit des victimes de la traite des êtres humains, Mémorial A n° 63 du 14.04.2014, p. 656). The protection of children against any kind of sexual exploitation and sexual abuse has been strengthened via a provision that has been introduced in a chapter of the Penal Code dedicated to 'public indecent behaviour and specific provisions to protect young people'. An Act of 16 July 2011 modified article 383 of the Penal Code, which now punishes the manufacturing, transporting, distributing by any means whatsoever and regardless of the medium, a message of a violent or pornographic character or 'likely to cause serious harm to Human Dignity', or to trade such a message, 'when this message is likely to be seen or noticed by a minor' (Loi du 16 juillet 2011, Mémorial A n° 152 de 2011, p. 2234).

8. In the field of illegal employment of third-country nationals residing without permit, the Chamber adopted an Act of 21 December 2012 amending the Labour Code (Mémorial A n° 296 du 31.12.2012, p. 4698). Article L.572–5 of this Code sanctions accordingly, any employer who employs an illegally residing third-country national if this infringement is accompanied by 'particularly abusive working conditions'. Article L. 572–2 further defines such particularly abusive working conditions as 'working conditions, including those resulting from discrimination based on gender or other factors, where there is a striking disproportion compared with the working conditions of employees who are legally employed, having in particular an impact on the health and safety of Persons, and that undermines Human Dignity'.
9. Finally, regarding the treatment of prisoners in the national Penitentiary, a bill was introduced on 14 February 2012 to reform the penitentiary administration. As it stands in the current parliamentary proceedings, the future Act will ensure very broadly the respect of Human Dignity of the detainees by the penitentiary administration and the prison officials.

Common to all the cited Acts is that they refer to Human Dignity without further defining the concept and without relating it to any higher ranking legal basis either under domestic constitutional law or under international law. The notion is applied as if its normative substance was self-evident and did not demand any further explanation. Accordingly, the legislator must have considered that these references to Human Dignity are either inconsequential or, more likely, that any imaginable violation of Human Dignity must be obvious to a point that any judge could easily detect it.

Moreover, in the clear majority of the quoted Acts, the notion of Human Dignity was seemingly introduced by the legislator in order to ensure the protection of those who are vulnerable or are placed in a situation of dependence or inferiority. But this method went only half way introducing Human Dignity dispersedly without establishing a general legal framework.

2.1.4 Administrative Acts

According to the division of powers organized by the Constitution of 1868, all acts of Parliament mentioned in the previous section were concretized and implemented through grand-ducal regulations. None of these has, however, elaborated further the meaning or legal implications of the Human Dignity concept referred to by the law. Consequently, there is not a single grand-ducal regulation employing the terms 'Human Dignity' or 'dignity' in relation to human beings. Nonetheless, there are a few other administrative acts, mostly ministerial decrees that procure some added value to the normative background of Human Dignity in Luxembourg.

The first decree dates to 28 April 1955 and surprisingly relates to the Grand Duchy's participation to the '*Exposition Universelle et Internationale de Bruxelles 1958'* (Arrêté du 28 avril 1955 portant institution du Commissariat Général du Gouvernement grand-ducal auprès de Í Exposition Universelle et Internationale de Bruxelles 1958). The short text, signed by the 'Commissaire Général du Gouvernement, Guill Konsbruck', addresses Luxembourgish attendees to this World Fair in the following words:

> It is true that, in many areas, the Grand Duchy will have to stand aside competitions that will engage the major powers. But this is only one more reason that, given the very large audience to which we will go, our participation becomes a shining example of what can reach a small country with love of freedom, respect for Human Dignity, the taste of the effort and faith in peace.

It appears to be an additional proof of Luxembourg's past strategy to plead in favour of Human Dignity abroad rather than to legislate on the matter at home.

In addition to the legislative acts quoted in the previous section, there are, however, three important administrative acts that contain some valuable indications regarding the respect for Human Dignity by physicians, agents of the probation service and prison officials.

With respect to deontology obligations of physicians, a ministerial decree of 7 July 2005 approves the Deontology Code adopted by their College (Arrêté ministériel du 7 juillet 2005 approuvant le code de déontologie des professions de médecin et de médecin-dentiste édicté par le Collège Médical. Mémorial A n° 160 de 2005, p. 2755. Arrêté ministériel du 1er mars 2013 approuvant le (nouveau) Code de déontologie des professions de médecin et de médecin-dentiste édicté par le Collège medical). This Code refers several times to the duty of the doctor to respect Human Dignity. Article 3 declares notably that 'respect for Human Dignity, which is at all times the paramount duty of the doctor is required even after death'. Concerning in particular persons deprived of their freedom, article 12 adds: 'A doctor, asked or required to examine a person deprived of freedom or to give him/her care, may not encourage or support, directly or indirectly, even by his presence alone, a violation of the corporal or mental integrity of that person's dignity. If the doctor finds that this person has been mistreated, he must inform the judicial authority'. Similarly, regarding cases of patients close to the end of their life, 'the doctor must reject any treatment or any act which would prove inadequate to the extent it would provide no relief but would have the only aim to prolong life in conditions that could be considered contrary to Human Dignity (therapeutic obstinacy)' (article 41). Finally, article 70 of the Code provides that medical ethics prohibits any experiment that could damage the physical and/or mental integrity, moral conscience, or endangering the dignity of the subject.

Regarding the duties of the agents of the probation service, there are just some 'guidelines' that mention their duty to preserve Human Dignity of any offender executing his punishment or probationary measure.

When it comes to prisoners, no domestic rule protects their Human Dignity in general. Only a simple 'service note' about body searches edited by the penitentiary centre in Luxembourg recalls the applicable national and European standards (Note de service DIS01, Centre pénitentiaire de Luxembourg, intitulée 'Fouilles corporelles'). A grand-ducal regulation from 24 March 1989 on 'administration and internal regime of penitentiaries' allows body searches of prisoners under some conditions but does not refer to Human Dignity of prisoners in this context (Règlement grand-ducal du 24 mars 1989 concernant l'administration et le régime interne des établissements pénitentiaires). Thus the 'service note' has to refer to the 'European Prison Rules' adopted by the Committee of Ministers of the Council of Europe (CoE) in 1973 and restated in 2006. Based on the United Nations Standard Minimum Rules for the Treatment of Prisoners, these rules are not legally binding for the CoE member states but provide recognized standards on good principles and practices in the treatment of detainees and the management of detention facilities. They insist in many respects on the obligation to respect Human Dignity of prisoners, specifically apropos body searches (article 54.3).

In absence of a fully-fledged set of written norms on Human Dignity, we will turn now to the contribution of case law, which, at least in some respects, fills in the prevailing gaps of statutory law.

2.2 Case Law

As Dupré points out, 'Human Dignity has largely been a judge-made concept, constructed on a rather ad hoc basis' (Dupré 2014, p. 13). Besides decisions 2/98 and 20/04 of the Constitutional Court, already mentioned, the relevant case law on Human Dignity in Luxembourg was delivered to some extent by the internal ordinary courts but also by the European Court of Human Rights (ECtHR). Given the impact of international and European law in the Grand Duchy's legal order this is not a surprise.

2.2.1 ECtHR Judgments on Human Dignity in Luxembourg

Luxembourg is one of the ten founding states of the Council of Europe and a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR or Convention) since its ratification in 1953. Although there is no reference to Human Dignity in the ECHR, the European Court of Human Rights (ECtHR or Court) asserted that the Convention requires respect for Human Dignity. According to the Court, respect for Human Dignity and human freedom constitutes the very essence of the Convention (*S.W. v U.K.*, App. no. 20166/92, 22 Nov. 1995, para 44). Explicit reference to dignity is found in the preamble of the Additional Protocol 13, concerning the abolition of the death penalty in all circumstances. Luxembourg also ratified this Protocol in 2006.

Thus far, three cases were brought against Luxembourg before the Court where references to the Human Dignity of the applicants are found, while a fourth, earlier case was brought before the European Commission of Human Rights. In the latter case, the applicant claimed that a national act violated her professional dignity, but the Commission did not touch upon the issue and dismissed the case as inadmissible (*X. c Luxembourg*, Req. no. 4519/70, 5 Feb. 1971).

In the case S.J. c. Luxembourg, the Court delivered a judgment on alleged violations of articles 3 and 6 of the Convention (*S.J.c Luxembourg*, Req. no. 47229/12, 31 Oct. 2013, para. 50). The case concerned a Luxembourgish national who claimed to have been a victim of a body search that allegedly reached the threshold of inhuman and degrading treatment. The Court reiterated its previous case law that custodial measures are inevitably accompanied by suffering and humiliation. Even though a detention measure is not *ipso facto* a violation of article 3, the latter imposes on the State the obligation to ensure that every prisoner is detained in conditions which respect his Human Dignity. This requirement dictates that the detention conditions do not subject the prisoner to a degree of distress or hardship that exceeds the unavoidable level inherent in such action and suffering. Moreover, measures taken in the context of the detention must be necessary to achieve the legitimate aim pursued, while the prisoner's health and well-being must be adequately guaranteed. In the specific case, the Court, having engaged in an overall assessment of the progress of the contested body search, based on the evidence before it, considered that the applicant has not undergone a treatment reaching the threshold of a violation of the right guaranteed in article 3 of the Convention (*S.J.c Luxembourg*, para. 62) (Hirsch 2015, p.26).

Similarly, in the case Jacques Pecheur c Luxembourg, in its Decision on Admissibility, the Court reiterated that article 3 requires the State to ensure that a person is detained in conditions which are compatible with respect for Human Dignity, that the measure in question does not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention, and that his health and well-being are adequately insured, including the requisite medical care (*Jacques Pecheur c. Luxembourg*, Req. no. 16308/02, 3 May 2005, p. 18). Therefore, the lack of adequate medical care and the detention of an ill person in inadequate conditions may in principle amount to treatment contrary to article 3. When deciding on the merits of the case, the Court did not elaborate any further on the protection of the applicant's Human Dignity.

Finally, in the case G.S. c Luxembourg, the applicant alleged that the Luxembourgish authorities failed to investigate his claims that his children were maltreated and thus the state did not comply with its positive and procedural obligations under articles 3, 8 and 13 of the Convention (G.S. c Luxembourg, Req. no. 5235/13, 9 Apr 2015). The Court declared the application inadmissible, but it did have the opportunity to highlight the obligation of states to respect Human Dignity when adopting national measures to protect children. Given their vulnerability, the measures that states take in order to prevent violence against children must be effective and should aim at ensuring respect for Human Dignity and for the best interests of the child (*G.S. c Luxembourg*, para. 46).

Overall, Luxembourg has never been condemned by the ECtHR for violations of the Convention that would amount to an offence to the applicants' Human Dignity. Two out of the four cases were declared inadmissible, while in the other two, the relevant claim on Human Dignity was rejected. In two cases, the argument on Human Dignity was raised in the context of an alleged violation of article 3 of the Convention: in one case the Court underlined the states' obligation to respect the Human Dignity of children and in the earliest case an argument on the applicant's professional dignity was raised, without being addressed by the Commission.

2.2.2 Ordinary Domestic Courts' Case Law

The contribution of domestic case law to the understanding of Human Dignity and to the definition of its legal implications is rather deceiving and, in some cases, puzzling. The judiciary being divided into two branches, the judicial courts and the administrative courts, both have issued judgements that contain the wording 'Human Dignity', altogether about 180 decisions. But the number of judgements must not mislead us. There is not a single judgment that adds a substantial content to the various statutory foundations of Human Dignity in Luxembourg.

Regarding the case law of the *judicial courts*, comprising the local '*Justice de paix*' and '*Tribunaux d'arrondissement*' in the towns of Diekirch and Luxembourg and the centralized '*Cour d'Appel*' and '*Cour de cassation*', 42 judgments issued between 1988 and 2014 contain either the expression 'Human Dignity' (8) or at least the word 'dignity' (34) in a sense close to the 'Human Dignity' concept.

A very first judgment was rendered by the 'Justice de Paix' in Diekirch in the field of corrective measures, including corporal punishments that may be applied by

school teachers to pupils. Appreciating the disciplinary powers of teachers, the judges esteemed that (Justice de Paix Diekirch, 11 October1988, n° 160/88):

> The extent of the 'right of correction' also depends on the age of the pupil. It must indeed avoid to injure the feeling of dignity of pupils, which develops throughout the years.

Three additional judgments deal with satirical publications and possible injuries to Human Dignity resulting from them (Court of Appeals (Cour d'appel) 2 July 1996, Tribunal d'arrondissement de Luxembourg 10 June 2004 and 23 December 2005). None of these defines, however, the concept but simply refer to a quotation from a French Lawyer published in a commentary on a judgment of the French 'Cour de Cassation' and saying that 'the humorous modus does not justify undermining Human Dignity', which is self-evident. In all three cases it was decided that the satiric publications did not trespass the existing legal limits.

Another group of judicial decisions comprises judgments applying Acts of the Chamber containing the notion of Human Dignity, notably the Act of 2009 on human trafficking, the Act of 2000 concerning over-indebtedness and the Act of 2009 on social aid (for the first Act: Cour d'appel, 22 October 2013, n° 497/13; for the second Act: Tribunal d'arrondissement, Luxembourg, 24 April 2009, n° 117/2009 and 6 February 2004, no. 79723; for the third Act: Cour de Cassation, 6 November 2014, n° 68/14, no. 3381 du registre). None of these judgments delivers however any interpretation of the concept. In the last case, the Cour de cassation considers, however, interestingly that (Cour de Cassation, 68/14, p. 4):

> Whereas the principle of territoriality is the basis for social assistance schemes, the State cannot be accused of violating Human Dignity by making the grant of this aid subject to certain conditions.

One further judgment refers to 'Human Dignity' while citing a judgment of the French Cour de cassation regarding the duties of physicians (Tribunal d'arrondissement, Luxembourg, judgment n° 218/2008 of 11 July 2008). According to this judgment:

> No physician can be relieved of his duty of information vis-à-vis his patient, which is founded on the requirement of the principle of safeguarding the dignity of the human person, by the mere fact that a serious risk materializes only exceptionally.

In the same vein, the Cour de Cassation referred once to 'Human Dignity' analysing a case of judicial proceedings that lasted for more than 14 years in the light of articles 5.3 and 6.1. of the ECHR, the 'respect for the rights of the defense and administration of evidence, and the respect for Human Dignity and the utility of the penalty' (Cour de cassation, Arrêt n° 46/11 du 09.06.2011).

About a dozen further cases are about 'moral harassment' or 'sexual harassment' in the field of employment relations. Most of them have been decided in application of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Article 2 (3) defines

indeed as being 'a form of discrimination (. . .) when unwanted conduct (. . .) takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment'.

In one of the most striking judgments in this field, the Appelate Court made application of an Act of 26 May 2000 concerning the protection against sexual harassment in working relations (Loi du 26 mai 2000 concernant la protection contre le harcèlement sexuel à l'occasion des re-lations de travail et portant modification de différentes autres lois. Mémorial A n° 50 du 30.06.2000, meanwhile abrogated by the Code du travail). In a case of contractual liability in the field of labour law, the 'Cour d'appel' considered indeed that, 'given the gravity and frequency of the acts of sexual harassment, the amount requested by the respondent in compensation for moral damage suffered by her as a result of the attack on her 'female dignity' is appropriate' (Arrêt de la Cour d'Appel 30.1.2003. Numéro 26,327 du role).

A few other judgments refer to the dignity of the spouse in divorce cases where the infidelity of one of the spouses has been considered as constituting an attack to his or her partner's dignity (See e.g., Cour d'appel, 28 March 2001, n° 23,649. Tribunal d'arrondissement, Luxembourg, 20 November 1997, n° 56,840).

Synthesizing this case law is not an easy task. Some of the quoted judgments only refer to the notion of 'Human Dignity' as it is used by the applicable Act of the Chamber. Others employ the expression by referring to the ECHR, an EU directive or French case law and legal writing, which is very influential in civil law. Altogether this case law does not make any substantial contribution to the interpretation of the notion of Human Dignity. There are, however, some conclusions to be drawn.

First, the judicial courts clearly admit the direct effect of 'Human Dignity' in horizontal legal relations between private persons. More puzzling: without employing the full expression of 'Human Dignity' several judgments refer to the 'dignity' of human beings bearing specific characteristics: the pupil, the spouse, the worker. Does that mean that the judges consider the existence of different degrees of Human Dignity according to the position a human being occupies? This would be a dangerous path. As these judicial decisions do only refer to 'dignity' and not to the notion of 'Human Dignity' one should probably not overrate them.

Regarding the case law of the *administrative courts,* consisting of the 'Tribunal administratif' (TA) and the 'Cour administrative d'appel' (CAA), the picture is somewhat different but not less deceiving. The research on the available database produced a list of 159 judgments containing the exact wording 'Human Dignity'. The vast majority of this case-law is about immigration and notably asylum seekers that contest the refusal of the administration to grant them a status of international protection under the Geneva Conventions and EU law. The Constitution does not foresee indeed the right of asylum. In their judgments, both courts currently refer to international treaties notably the ECHR or the 1951 Geneva Convention and the EU Charter of Fundamental Rights (CFR). The case law starts precisely in 2006 after the adoption of an Act on the right of asylum and complementary forms of protection (Loi du 5 mai 2006 relative au droit d'asile et à des formes complémentaires de protection, Mé-morial A n° 78 of 9 May 2006, texte coordonné: Mémorial A n° 151 du 25.07.2011). Again a thorough analysis of all the relevant judgments showed

that not even one adds something to the definition of Human Dignity under international law, the ECHR or the CFR.

3 The Substance of 'Human Dignity' Still Lacks a Coherent and Comprehensive Definition

This part focuses on outlining Human Dignity as a legal concept in view of Luxembourg's practice. It first reviews the philosophical approaches on the notion of Human Dignity that have been developed in the Grand Duchy (3.1), it then proceeds with the attempts to identify and draft a legal definition in Luxembourg (3.2). In this respect, the impact of European integration is considered because of Luxembourg's strong commitment to the EU integration process. Although it may not be easy to do justice to the different conceptions of Human Dignity and define comprehensively this term, the concept of Human Dignity may be shaped based on certain instruments, especially in Europe. (Dupré 2014, p. 18) This part concludes by presenting the building blocks of Human Dignity as a legal concept (3.3). Following McCrudden's syllogism that there is a *concept* of Human Dignity with a minimum core and there are several different *conceptions* of Human Dignity, a similar distinction threads the analysis. (McCrudden 2008, p. 679).

3.1 Philosophical Approaches

As a universal concept, Human Dignity has its roots in philosophy and religion. Regarding its normative value, various historical events are cited as the emerging point of a legal concept of Human Dignity. Often mentioned are the French Revolution, the abolition of the death penalty in the German Constitution of March 1849, the Weimar Constitution of 1919 with the introduction of social rights, and legal instruments of the 1940s when UN instruments and European Constitutions enshrined Human Dignity. These origins of protecting juridically Human Dignity indicate the concept of Human Dignity in Europe, being connected to liberal democracy and human rights.

Indeed, it was after the Second World War that Human Dignity was established as a legal concept and was formulated in international law instruments and national constitutions, as a response to the mass crimes previously committed. This conception of Human Dignity became explicitly connected to human rights. As the two UN International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights proclaim, human rights derive from the inherent dignity of the human person. According to Habermas, this connection signifies Human Dignity as the 'moral source' of the meaning of all fundamental rights. Because of this, Human Dignity constitutes the bridge between morality and law (Habermas 2010, p. 466). However, Human Dignity's role in interpreting human rights and its scope in adjudication remain yet unclear (Botha 2009, p. 171). Sometimes dignity is

formulated as an individual right, sometimes as a principle, and often it is connected to other fundamental values such as liberty and equality (Baer 2009, p. 417).

With regard to 'luxembourgish' efforts to define Human Dignity from a non-legal point of view, three sources have been identified. There are, first, a number of statements made by external representatives on the international scene; second, an interesting Opinion of the *Conseil d'Etat*; and, third, a number of valuable contributions made by what is often called the 'civil society'.

3.1.1 Luxembourg's Representatives Promoting Human Dignity on the International Scene

Research was conducted in the United Nations database, focusing on Luxembourg's statements during general debates before the United Nations General Assembly to identify references to the need of protecting Human Dignity therein. The first time when Human Dignity appeared as a term in Luxembourg's official address before the General Assembly's general debate was in 1960. Specifically, Mr. Schaus invoked Human Dignity as one of the core principles, along with democracy, justice and social progress, based on which newly admitted states to the UN need to establish their governments (Schaus 1960). This speech paved the way for a series of references to the need of protecting Human Dignity by the representatives of Luxembourg before the UN General Assembly.

In 1968, Luxembourg's address focused on social justice among all nations and on the struggle against poverty. According to Luxembourg, ensuring that the living conditions of people around the world do not degrade their Human Dignity is a prerequisite for safeguarding international peace (Gregoire 1968). In 1974, the Prime Minister of Luxembourg reiterated that the Universal Declaration of Human Rights is the 'fundamental charter for safeguarding Human Dignity' and that all people aspire to dignity (Thorn 1974). Three years later, he used stronger language to condemn the daily violation of these rights around the world and called on the United Nations to take action. Amid the Cold War and before an ideologically divided General Assembly, the Luxembourgish Representative stated: (Thorn 1977)

> (. . .) respect for human rights is not anyone's special preserve; it is part of the common and inalienable heritage of mankind. It must go far beyond ideologies and group solidarity, for what is at stake here is what is or should be the ultimate aim of all political action, that is to say, man himself and his dignity and freedom, and these, I repeat, are inalienable whether for men living in the East, in Uganda, in Viet Nam, in Chile or in our midst.

An equitable distribution of the wealth of the world, as a condition for existence in dignity of all nations and of all their citizens, figured prominently in the subsequent speech of the Luxembourg Prime Minister in 1979 (Thorn 1979). Human Dignity was also invoked by Luxembourg in the discussion on racial discrimination, when apartheid was condemned as an 'ignorable attack on the dignity of human person' in 1982 (Flesch 1982). In 1984, during the plenary meeting of the UN General Assembly, the State Representative identified racial discrimination, arbitrary arrests, improper detentions, torture and limitations on free movement of people as

offences to Human Dignity (Poos 1984). Two years later, the General Assembly adopted a Resolution with which it set international standards in the field of human rights and recognized that international human rights instruments derive from the inherent dignity and worth of human person (Poos 1984).

As years passed by and international terrorism became an increasing concern for the United Nations, Luxembourg invoked Human Dignity when calling the United Nations to fight terrorism through not only military means. In 2004, Luxembourg's Minister of Foreign Affairs highlighted that at the core of any multilateral system lies the right of every human being to live in peace and dignity (Asselborn 2004). Similarly, in 2010, he identified as a primary task of the United Nations the provision of constructive solutions, which would respect the 'dignity, safety, security and well-being of all' (Asselborn 2010). Dignity appears again in Luxembourg's address before the General Assembly in 2011, where the duty of the United Nations is defined as responding to crises, which threaten peoples' dignity and existence (Asselborn 2010). Finally, in 2015, Luxembourg's Minister of Foreign Affairs highlighted the new challenge for the UN posed by the mass exodus of people fleeing armed conflict in search of safety and dignity.

Based on the analysis of the speeches delivered by Luxembourg's Representatives before the UN General Assembly throughout the years, one can safely assume that for Luxembourg, respect for dignity of all people is a clear goal and purpose of the United Nations in the pursuit of their mission. During the 1960s and 1970s, Luxembourg connected Human Dignity with the struggle against poverty and the promotion of social justice, while in the speeches delivered in the 1980s before the UN General Assembly, Luxembourg associated Human Dignity with the prohibition of racial discrimination. More recently, the Luxembourgish Representatives invoked Human Dignity in the context of international terrorism and of the refugee and migration crisis. According to Luxembourg, any response to the major challenges and crises that the United Nations faced should haven taken into account the safeguarding of Human Dignity. This conception of Human Dignity refers both to individuals and to nations. As put eloquently in 2015 by Luxembourg's Minister of Foreign Affairs, the dream of the drafters of the UN Charter is the dream of a world of peace and dignity for all (Asselborn 2015).

3.1.2 Position of the *Conseil d'Etat*

The Conseil d'Etat, as the main advisory organ of the state, acting in practice like a second chamber, has had the occasion to issue Opinions on all the parliamentary proposals, governmental bills and draft grand ducal regulations. It delivered twenty-five Opinions containing a reference to the notion of Human Dignity. Only a single Opinion does, however, contain a deeper reflexion on the matter.

In its 2007 Opinion on the 'Projet de loi sur le droit de mourir en dignité' (the right to die in dignity), indeed seized the opportunity to elaborate a bit more on the notion of Human Dignity in the discussion of euthanasia, but it chose not to insist on the issue:

According to the *Conseil d'État,* Human Dignity has been abusively used to support both opposite views on euthanasia, without, however, the meaning of the

concept being actually questioned by the different sides of the argument. Adopting a critical stance towards this usage, the *Conseil d'Etat* decided not to engage – or 'to be bogged down in', as stated in the Opinion – in this discussion. It did state, however, that the concept of Human Dignity is a 'true Pandora's box'. For the *Conseil d'Etat,* Human Dignity is a general notion whose employment in positive law should be handled with caution and prudence. Irrespective of the definition of Human Dignity, the latter prohibits any determination of a moral equivalence between letting someone die and killing (Avis du 13 juillet 2007, Doc. Parl 4909/02, p. 13).

3.1.3 Civil Society Contributions

Many associations representing civil society have taken position regarding Human Dignity. The notion appears thus as somewhat inescapable. Many of these standpoints merely pay 'lip service' to the notion without further seeking to define it. This is the case notably with the political parties that include a reference to Human Dignity in their statutes or political programs such as in Luxembourg's Greens (Déi Gréng) and the socialists (LSAP). Other bodies attempted to go further.

The catholic church in Luxembourg, for instance, issued a sequence of propositions and reflexions that refer inter alia to Human Dignity (Réflexions à propos d'un renouveau societal. 11 propositions par le Conseil Diocésain des Catholiques et la Commission 'Justice et paix'). Quoting Immanuel Kant's words, 'The dignity of every human person is absolute and implies that society has a duty to protect the individual. Always treat others as an aim and never as a means only', it states that 'the human person cannot be exploited – this is the foundation of all social action'. Continuing to proclaim that:

> We cannot conceive life in society as anything but an unceasing struggle against discrimination, whether economic, political, racial or religious. Moreover, the protection of the person does not stop at our borders, but must also condition the relationship we have with all other peoples. The production of goods made in disregard of human life must be condemned unceremoniously and can not be legitimized by the sole reference to free trade. This makes it unacceptable to maintain trade and economic relations with partners who do not comply with foundations.

Another important contribution to the philosophical debate on Human Dignity has been written by Jean-Paul Harpes and Edmond Wagner on behalf of the Commission Consultative nationale d'éthique pour les sciences de la vie et de la santé' (CNE). The Committee's Opinion on the ratification of the Convention for the protection of Human Rights and Dignity of the Human Being regarding the Application of Biology and Medicine: Convention on Human Rights and Biomedicin (CETS No.164) contains indeed the following passage, which is certainly one of the most pugnacious contributions to the debate:

> The key concept, that of Human Dignity, refers to an area which is, in principle, non-negotiable in a normative perspective: By signing and ratifying the Convention, the Parties recognize that a number of normative requirements listed in their common moral horizon demarcate – in respect of the human being – a sphere of what we must not touch a sphere of

> what in principle commands respect. The most central part of this domain is clearly established by the physical and moral integrity of each individual. Respect for the moral integrity of the human being envelopes, as far as he some, full respect for its autonomy. Respect for Human Dignity comes, therefore, essentially, with respecting human integrity, both in its physical and moral expression. A negative formulation would be, perhaps, more suggestive: respecting Human Dignity amounts to spare the man from, in light of the standard requirements we share, being reduced to a state of shameful humiliation. (Harpes and Wagner 1999)

Last but not least, in 2012 the 'Commission consultative des droit de l'homme' adopted an Opinion on the proposal of a new Constitution and gave some thoughts on the introduction of the notion of Human Dignity in the new article 12 (Avis de la Commission consultative des droits de l'homme du Grand Duché du Luxembourg Doc. parl. 6030/10, 21.12.2012, p. 7). Quoting Jacques Fierens the relevant passage reads as follows:

> It is not sufficient that the debate exists, it is necessary that all take part, including and especially those whose dignity is most compromised: the humiliated, tortured, poor, foreigners, the socially excluded for any reason whatsoever. Dignity protects only those who have access to speech, including public speaking. In order to be able to discuss, one has to be a citizen in the sense we were told by Hannah Arendt, without which, indeed, the consecration of respect for Human Dignity as rule of law is useless. Having accessed the language does not only mean learning to speak, but also to have the opportunity to be heard. Aristotle had understood this twenty-four centuries ago, linking citizenship and logos, but he did not think that this language should be that of all human beings in full equal rights, that citizenship must be that of all. This principle – that axia, this "axiom," this dignity with equal rights – was acquired on a theoretical level at a much later period, with the Enlightenment philosophy and the American and French revolutions in law. The acquis is certainly not definitive. It took only a decade to make way for Nazism in a Europe that had two centuries of egalitarian tradition. It also remains to make effective the legal principle of respect for Human Dignity. This is ultimately the condition of validity of the concept of Human Dignity in law: that all may intervene in the public debate that defines its content. (Fierens 2002)

This vibrant plea to give a voice to those who are most vulnerable to violations of their dignity must be heard and followed by concrete consequences. The idea to institute a special Mediator for those, like prisoners, who have difficulties to be heard in the public debate circulates already in the Grand Duchy. It would be an important step forward.

3.2 An Attempt to Draft a Legal Definition

From a legal point of view, the concept of Human Dignity is undeniably one of the most difficult to define, be it on the level of international law or within the realm of a given domestic legal system. This is partly due to the tremendously rich input from philosophical, religious, moral, political, legal and ethical thinking that enhanced this notion over the past centuries.

The analysis of the available legal sources clearly shows that for the time being there is no comprehensive domestic definition of the Human Dignity concept and no general approach to systematize its scope or substance in Luxembourg. It has, however, to be borne in mind that there is a tremendous impact of international and European solutions on the comprehension and application of the domestic law, which somewhat compensates that shortage.

3.2.1 Lack of a Comprehensive Domestic Definition

The only attempt to develop a reflexion on the very meaning of Human Dignity as a legal concept was presented by the Minister of Family and Integration, Marie-Josée Jacobs, in its bill on 'social aid' on 22 January 2008, which became the Act of 18 December 2009 organising 'social aid'. The joint explanatory memorandum contains indeed some interesting thoughts about the 'right to social aid' enabling all citizens 'to lead a life worthy of Human Dignity' (article 1):

> If at first glance the term 'Human Dignity' may seem abstract, its presence in official documents should nonetheless be emphasized while recognizing its moral character linked to feelings. Difficult to appraise down to the smallest details, it is appropriate to consider the following at least as a definition of what in the name of that Human Dignity is not acceptable and what this Act precisely seeks to prevent.
>
> The idea of Human Dignity refers to a quality inseparably linked to the very being of man, which explains that it is the same for all and does not admit any degrees. The concept of dignity holds a prominent place in international human rights law. It may be noted its first appearance in the Universal Declaration of Human Rights in 1948. For Europeans it will become very visible in forming the first article of the European Charter of Fundamental Rights.
>
> The idea of Human Dignity was also discussed in Belgium in connection with the Act of 12 January 2007 on the reception of asylum seekers and certain other categories of foreigners, published in the Moniteur May 7, 2007. In a memorandum to the King it is stated: "The concept of Human Dignity is the subject of any definition. Everyone, however, agrees to consider that there is a threshold beneath which a person does not live in accordance with Human Dignity, which means that the person can feed, clothe, shelter, ensure hygiene and access to care health. This notion is at the same time relative – because it is determined by the degree of socio-economic development of the society within which it should be implemented – but also universal – because within a given society, the appreciation of a life consistent with Human Dignity is made in concreto, entirely individualized, which means each time a specific assessment".

These explanations will be beneficial to the application and the interpretation of the Act on 'social aid' and to a better understanding of the notion of Human Dignity regarding the minimal living subsistence. They are, however, strictly confined to the social domain and therefore without any help with regard to the general conception of Human Dignity. Regarding criminal law, the explanatory memorandum quotes, however, a criminal law handbook of Jean Pradel and J.-M. Danti-Juan entitled 'Droit Pénal Spécial' defining the offenses against Human Dignity as 'those who, outside the cases of attack on life, integrity or freedom, have primarily the effect of

treating the person as a thing, such as an animal, or in the best case, as a being which would be denied any right to honor and to its honorability'. But this criminal law aspect of Human Dignity was retained in the different criminal law bills quoted above. One has therefore to turn to European Law to learn more about the legal definition of Human Dignity.

3.2.2 Impact of European Integration on the Legal Definition of Human Dignity

In this section, the impact of European integration *lato* sensu on conceptualising Human Dignity is examined. Luxembourg is a founding member of the European Union (EU). Pursuant to article 49bis of Luxembourg's Constitution, the exercise of powers, reserved by the Constitution to the legislative, executive, and judiciary branches, may be temporarily vested, by treaty, in institutions of international law. This provision has always been construed very widely in national case law and did not hamper any ratification of the EC/EU founding, revision or enlargement treaties. (Gerkrath 2016).

On the EU level, the Charter of Fundamental Rights (CFR) enshrines explicitly Human Dignity as the foundational value of the European Union. Much earlier than the Lisbon Treaty and the adoption of the CFR, the European Parliament adopted in 1989 the Declaration on Fundamental Rights and Freedoms. This Declaration states in article 1 that Human Dignity is inviolable. Although the European Parliament insisted on the Declaration be granted legal force, this never happened (Camporesi 2011). Even earlier, in 1948, the European Movement Convention, which is the precursor of the European Convention on Human Rights, enlists in article 1 eleven fundamental human rights, which may be considered as the core of the substance of Human Dignity. Among them are listed the security of life and limb, freedom from arbitrary arrest, freedom from slavery, equality of law and freedom from discrimination (Bates 2010).

In terms of secondary legislation, several EU Directives make explicit reference to the respect for Human Dignity. Indicatively, the Directive 98/44 on the legal protection of biotechnological inventions provides in its Recital 38 that 'processes, the use of which offend against Human Dignity', are excluded from patentability (Directive 98/44). The Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States in Recital 15 provides that measures should be taken to ensure family members, already residing within the territory of the host Member State, retain their right of residence exclusively on a personal basis, with due regard for family life and Human Dignity (Directive 2004/38/EC). Similarly, the Council Directive 2004/83/EC on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection seeks to ensure full respect for Human Dignity and the right to asylum of applicants for asylum and their accompanying family members (Council Directive 2004/83/EC). Moreover, the Schengen Borders Code proclaims that border checks should be carried out in such a way as to fully respect Human Dignity (Regulation (EU) 2016/399). Directive 2013/33/EU laying down standards for the reception of

applicants for international protection seeks to ensure full respect for Human Dignity, according to Recital 35 (Directive 2013/33/EU). The Directive 2008/115/EC in article 8 provides explicitly that where Member States use – as a last resort – coercive measures to carry out the removal of a third-country national who resists removal, such measures shall be implemented with due respect for the dignity and physical integrity of the third-country national concerned (Directive 2008/115/EC). Finally, the Directive 2006/123/EC on services in the internal market recognizes Human Dignity as an individual right when it excludes from its scope of application social services in the areas of housing, childcare and support to families and persons in need. According to Recital 27, these social services are essential in order to guarantee the fundamental right to Human Dignity and integrity and are a manifestation of the principles of social cohesion and solidarity (Case C-57/12 Fédération des maisons de repos privées de Belgique (Femarbel) ASBL v. Commission communautaire commune de Bruxelles-Capitale [2013] ECR 2013–00000, para. 43).

Regarding the external relations of the EU and Human Dignity, worth mentioning is the Lomé 'acquis'. In 1984, the European Communities insisted that the Convention would refer to the protection of human rights and respect for Human Dignity. Specifically, the Lomé Convention III refers to Human Dignity in its preamble, while article 4 provides that support will be provided to promote the ACP States' social and economic progress and the well-being of their population through the satisfaction of their basic needs, the recognition of the role of women and the enhancement of people's capacities, with respect for their dignity. The then President of the Commission of the European Communities, Mr. Gaston Thorn from Luxembourg, admitted in his public speech after the adoption of the Convention that, apart from the financial resources, the two subjects that made the greatest impact on the negotiations were respect for Human Dignity and fundamental human rights and cooperation through dialogue (Thorn 1985).

Finally, concerning the impact of European integration on the development of the juridical protection of Human Dignity, the interpretation of this concept through the case law of the Court of Justice of the European Union (CJEU) merits a review. Before the adoption of the CFR, the Court of Justice of the European Union employed Human Dignity in the context of non-discrimination cases, in legal protection of biotechnological inventions, in the area of freedom, security and justice and of asylum policy.[2]

Specifically, in 1996, the CJEU held that discrimination based on gender reassignment would amount to a failure to respect the dignity and freedom of the person concerned. The Court has the duty to protect such dignity and freedom (C-13/94 P. v. S. and Cornwall County Council [1996] ECR I – 2143, para. 22). In a case of non-discrimination on grounds of nationality, the Grand Chamber found in 2014 that the main function of the benefits at issue is to cover the minimum subsistence costs

[2]This analysis is based on research conducted in April 2016 on the database of the CJEU (curia.eu), using 'human dignity' as a criterion in the text and the Charter of Fundamental Rights as subject matter.

necessary to lead a life in keeping with Human Dignity. Thus, these measures cannot be characterized as benefits of a financial nature but must be regarded as 'social assistance' (C-67/14 Jobcenter Berlin Neukölln Jobcenter Berlin Neukölln v. Nazifa Alimanovic and others [2014] ECLI:EU:C:2015:597, paras 45–46).

In 2001, the CJEU emphasized that all biotechnological processes which offend Human Dignity are excluded from patentability (C-377/98 Kingdom of the Netherlands v. European Parliament and Council of the European Union [2001] ECR-I-7079, para. 76). Following the EU legislator (Directive 98/44), the Court found that any possibility of patentability where respect for Human Dignity could thereby be affected is excluded. Accordingly, the CJEU accepted a wide concept of 'human embryo' to grant this protection (C-364/13 International Stem Cell Corporation v. Comptroller General of Patents, Designs and Trade Marks [GC] [2013] ECLI:EU:C:2014:2451, para. 24).

In none of these cases, did the Court proceed to define the concept of Human Dignity. However, in the *Omega* case (2004) the Court proceeded to elaborate a concept of Human Dignity based on common constitutional traditions (C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I – 9609). In this case, the referring court asked, among other issues, whether the prohibition of an economic activity for reasons arising from the protection of fundamental values laid down by the national constitution – that was Human Dignity in this case – is compatible with Community law. The Advocate General argued in her Opinion that the Community legal order undeniably strives to ensure respect for Human Dignity as a general principle of law (C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] [Opinion] ECLI:EU:C:2004:162). The CJEU accepted that surely the objective of protecting Human Dignity is compatible with Community law, and it is irrelevant whether the principle of respect for Human Dignity has a particular status as an independent fundamental right in Germany (C-36/02 *Omega*, para. 34).

In the context of assessing the credibility of statements in respect of the declared sexual orientation made by applicants for asylum, the Court found in the joined cases C-148/13 and C-150/13 that the methods used by the competent authorities to assess the statements in support of those applications must be consistent with the right to respect for Human Dignity (Joined Cases C-148/13, C-149/13, C-150/13 *A, B and C* v. Staatssecretaris van Veiligheid en Justitie [2014] ECLI:EU:C:2014:2406, para. 35). Again in the context of asylum policy, the Court found that respect for Human Dignity under article 1 CFR preclude the asylum seeker from being deprived – even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible Member State – of the protection of the minimum standards laid down by the Directive 2003/9 on material reception conditions (C-79/13 Federaal agentschap voor de opvang van asielzoekers v. Selver Saciri and others [2014] ECR 2014–00000, para. 35). The Court has also underlined in the case C-23/12 that border guards performing their duties, within the meaning of article 6 of Regulation No 562/2006, are required, inter alia, to fully respect Human Dignity (C-23/12 Mohamad Zakaria [2013] ECLI:EU:C:2013:24, para. 40). In the

case C-648/11, the Court held that it is evident that Regulation 343/2003 seeks to guarantee 'full observance' of asylum seekers' Human Dignity and their right to asylum (C-648/11, The Queen, on the application of MA, BT, DA v. Secretary of State for the Home Department, [2013] ECLI:EU:C:2013:367, para. 5).

The Court was also called to rule on whether the protection conferred on a person by virtue of general principles of EU law and in particular concerning Human Dignity and the right to asylum is wider than the protection conferred by article 3 of the ECHR (C-411/10 and C-493/10, N. S. v. Secretary of State for the Home Department, [2011] ECLI:EU:C:2011:865, para. 109). The Court held that member states must respect the asylum seekers' Human Dignity whether their application is processed in that state or whether the persons concerned are returned to another member state (Dupré 2014, p. 16). According to the Opinion of Advocate General Trstenjak, under article 1 of the CFR, Human Dignity must not only be 'respected', but also 'protected'. Such a positive protective function is also inherent in article 4 of the Charter. When there is a serious risk that an asylum seeker would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment, then a Member State would be in violation of these obligations under the Charter, should it remove, expel or extradite him to a state where there is such risk (C-411/10 N. S. v. Secretary of State for the Home Department [2011] [Opinion] ECLI:EU:C:2011:610, para. 112). Advocate General Bot, also, interpreted the obligation of authorities when examining asylum applications in the light of Human Dignity (Joined Cases C-71/11 and C-99/11 Federal Republic of Germany v. Y and Z [2012] [Opinion] ECLI:EU:C:2012:224). According to the Advocate General, the Directive 2004/83/EC on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection does not indicate that authorities are allowed to ask the applicant to give up some of the rights and freedoms guaranteed to him (Joined Cases C-71/11 and C-99/11, para. 98). Requiring the asylum-seeker to conceal, amend or forego the public demonstration of his faith, is contrary to the respect due to Human Dignity enshrined in article 1 of the Charter (Joined Cases C-71/11 and C-99/11, para. 100).

Furthermore, Human Dignity was employed by Advocate General Cruz Villalón as a competing right to other rights, such as the right to freedom of expression. Accordingly, the Charter encompasses not only freedom of expression but also other rights that may occasionally compete with it: Human Dignity (article 1), first, together with another series of rights and freedoms, in particular the prohibition of discrimination on grounds of race or religion (article 21). It is clear for the Advocate General that the European public space is constructed, even if only in part, on the sum of national public spaces that are not completely interchangeable. (C-201/13, Johan Deckmyn and Vrijheidsfonds VZW v. Helena Vandersteen and others [Opinion] [2014] ECLI:EU:C:2014:458, para. 86).

Finally, Human Dignity is inherent to natural persons. According to the CJEU case law, the granting of legal aid is a measure of social assistance which is derived from the principle of the social State and is necessary for the safeguarding of Human Dignity, something which is not applicable in the case of legal persons. The latter are artificial creations vested with a legal form which is permitted by the legal system

of a State for reasons of practicality (C-279/09 DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland [2010] ECLI:EU:C:2010:811, para. 24).

The impact of European integration on protecting Human Dignity has a direct effect on Luxembourg's national legal order. International law has a full primacy in the Grand Duchy. The *Conseil d'État* implicitly accepted such a general primacy in an Opinion of 26 May 1992 on the draft Act Approving the EU Treaty. It considered indeed that 'it should be borne in mind that under the rule of the hierarchy of legal norms, international law takes precedence in national law and, in case of conflict, the courts dismiss domestic law in favour of the Treaty'. In case of conflict of an international or European engagement with the Constitution or legislative acts, national standards should be subject to a constitutional revision or amendment before the international commitment is approved by the competent national authorities. Once approved, the respective international norms enjoy, in the pure monistic tradition, full primacy on rules of domestic law even of constitutional value. This rule also applies to the secondary legislation of the European Union. All (civil and administrative) courts have accepted full supremacy and direct effect of EU law in the very terms of the CJEU case law, which they regularly refer to. (Gerkrath 2016).

3.3 'Building Blocks' of Human Dignity as a Legal Concept

From the findings above it can be assumed that the difficulty to develop a comprehensive definition of Human Dignity as a value, a principle or a fundamental right is far from being resolved in the context of the Luxembourgish legal system. Hence many approaches tend to circumvent this difficulty by defining Human Dignity as a compilation of different individual rights.

The position of Human Dignity in the structure of the EU Charter (Title I) constitutes a good example of this strategy. The Charter begins with guaranteeing Human Dignity in its first article and provides an indication of the concept's fundamental elements. The four articles that follow under Title I enshrine rights related to the protection of Human Dignity, namely, the right to life, right to the integrity of the person, prohibition of torture and prohibition of slavery and forced labour. Thus, the first five articles of the EU Charter provide a more precise meaning for dignity, although all Charter's rights are linked to the foundational value of Human Dignity. Furthermore, the Charter envisages special protection of the Human Dignity of elderly (article 25) and workers (article 31). Therefore, although Human Dignity has served as a principle that enlightens the interpretation of other rights, it is now formulated as an individual right on an EU level and consequently in Luxembourg, whenever Luxembourgish authorities apply EU Law.

Another element of Human Dignity is that it is inherent only to human beings, as encompassing an intrinsic value reserved only to them (Tasioulas 2013, p. 294) Human Dignity is also inviolable and must be protected and respected in Luxembourg pursuant to the EU Charter. The question that rises is whether this inviolability of Human Dignity means that it is an absolute right, falling out of the scope of article 52 of the EU Charter and is not subject to any limitations (Dupré 2014, p. 16).

Regardless of whether Human Dignity is considered a relative or absolute human right, it remains the first and most prominent fundamental right, at least on EU level.

In the end, Human Dignity should be understood as an 'open concept' (Dupré 2014). It is a patchwork or a mosaique consisting of numerous building blocks. These constituting elements cannot be enumerated exhaustively. They may evolve differently in each society at a given period. Rather than a singular Fundamental Right, Human Dignity seems thus to consist of several potential rights which become effective when required by a specific situation threatening the very nature of a human being.

As virtually all fundamental rights have their origin in the idea of Human Dignity and enrich in return the all-embracing principle of Human Dignity, the relationship between Human Dignity and Fundamental or Human Rights can be compared to the relation between the kelsenian hypothetical 'Grundnorm' and all the specific positive norms that rely on it. Seeking to deliver an all-encompassing definition of Human Dignity or to array a complete list of all specific rights that might be inferred from it is a vain exercise. It might even prove to be counterproductive as it would freeze the substantive scope of a notion that is virtually unlimited. This situation might appear uncomfortable to those who prefer to handle precisely defined legal notions. It must, however, not be seen as a threat but rather as an opportunity.

Nonetheless, defining the scope and substance of this concept is one thing; another, probably more decisive thing is to ensure its effectiveness and efficiency in every day's life. Typical for the Luxembourgish attitude preferring pragmatism to idealism and theoretical debates, the domestic judicial community is eager to establish practical solutions while it dislikes entering dogmatic discussions.

4 Conclusion: Human Dignity May be Ensured more Efficiently

The proverbial pragmatism of Luxembourgish law's architects resurfaces when it comes to ensure the respect for Human Dignity in practice. There is of course always room for improvement. Instead of critizising, the following lines confront the main strengths and achievements with the unevitable failures and weaknesses of the system.

In terms of achievements and strengths, one thinks primarily of some substantial progress like the different Acts of Parliament referring to Human Dignity or the abolition of the death penalty. In 1992 Luxembourg ratified indeed the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (United Nations, Treaty Series, vol. 1642, p. 414). Luxembourg also ratified in 2006 the Additional Protocol 13 to the ECHR, which imposes the abolition of the death penalty in all circumstances. The minister of Foreign Affairs, Jean Asselborn, also recently recalled that 'Luxembourg is firmly and absolutely opposed to the death penalty in all cases and under all circumstances. Luxembourg considers the death penalty as a gross violation of human rights and the abolition of this punishment as essential for the protection of Human Dignity'.

Other achievements result from legal formalities that contribute to strengthen the effective enforcement of Human Dignity like the full supremacy recognized to international treaties in the field of human rights protection or the way judicial review is ensured by the judiciary including the Constitutional Court. In the same vein, it has to be mentioned that there is an impressive number of independent administrative bodies in charge of the effective protection of human rights including of course the principle of Human Dignity. With regard for instance to the UN Convention on the Rights of Persons with Disabilities, Luxembourg has designated the 'Centre for equal treatment', the 'Consultative Commission on Human Rights' and the '*Médiateur*' (Ombudsman) as 'independent mecanisms to promote and monitor implementation' of the convention (article 33).

Likewise, in the field of media supervision, a 'Conseil national des programmes' (CNP) was created in 1991 by the Electronic Media Act. It is an independent institution, which advises the Luxembourg government on the surveillance of the audiovisual media, which have a Luxembourg license. Notably the CNP must ensure that the legal and regulatory principles set by Luxembourg legislation are respected by the broadcasting stations, e.g., respect for Human Dignity or protection of minors and of minorities. Its tasks have been transferred in 2013 to the 'Autorité luxembourgeoise indépendante de l'audiovisuel' (ALIA). Since its establishment, the ALIA took four decisions on complaints based on the non-respect of Human Dignity, none of them were successful.

Regarding working conditions and the struggle against sexual harassment, it is up to the 'Inspection du travail et des mines' (ITM) to monitor the respect of the Labour Code which defines sexual harassment at the work place as 'any sexually oriented behaviour or other conduct based on sex that the offender knows or should know that it affects the dignity of a person' (articles L 245–1 to L 245–8).

Regarding the rights of children, the 'Ombuds-Comité fir d'Rechter vum Kand' (ORK) has been established by an Act of the 25th July 2002. It notably must give its Opinion on draft laws and regulations concerning children's rights and suggest amendments, inform about the children's situation, ensure the application of the Convention on the Rights of the Child, examine the situations in which children's rights are not respected and to make recommendations on possible remediation, and to receive information and complaints regarding offences against children's rights.

Lastly, the Chamber, with the firm support of the *Conseil d'Etat,* pursues a strategy to punish violations of Human Dignity with criminal sanctions. As the Conseil stated in an Opinion of 1996 with regard to a legislative proposal regarding pornography 'only the means provided in criminal proceedings (judicial search and seizure, the police investigation means and the investigating judge) are likely to punish violations of Human Dignity' (Proposition de loi relative à la production, la propagation et l'utilisation de représentations pornographiques, Avis du Conseil d'Etat (12.11.1996), p. 4–5).

On the other side, in terms of failures and weaknesses, there are some points to be mentioned in addition to that which has already been said. A first failure is certainly the absence of any explicit mention of 'Human Dignity' in the current Constitution. But this will be hopefully remedied with the constitutional revision. The absence of

any reference to Human Dignity regarding the detention conditions of prisoners is also an important lacuna. The 'Ligue des Droits de l'Homme' (LDH) a French-Luxembourgish ONG has made a series of detailed proposals to improve legislation in this respect. It notably suggests the drafting of a new Code of execution of punishments and its translation into the main languages spoken by the detainees of the penitentiary centre of Luxembourg (CPL). It proposes the creation of a post of an independent mediator of the prisons or at least an extension of the powers of the current Ombudsman. Regarding penalties for inmates who committed offenses regarding internal regulations, LDH supports the idea of banning the so-called 'strict cellular' regime as a form of punishment. This lacuna is about to be filled by a bill, introduced in February 2012, that is currently debated in the Chamber. Aiming to reorganize the penitentiary administration, the bill contains several references to the duty to respect Human Dignity of the detainees.

Beyond the situation of prisoners, it must be pointed out that there is no general protection in favour of the most vulnerable persons under domestic law. Mentally ill interned in psychiatric hospital, persons under guardianship ('*tutelle*') or victims in criminal procedures need to receive specific protection regarding their Human Dignity. In addition to the protection offered by international treaties, this should be ascertained by a general rule, following an overarching approach of the legislator, not based on case by case measures, as is the practice in the present situation. The introduction of the principle of inviolability of Human Dignity in the new Constitution will certainly be an important step in this direction. It will, however, remain somewhat abstract as long as an individual direct access to the Constitutional Court is missing.

From the perspective of the Luxembourgish legal system and for the time being, Human Dignity appears to be a 'chameleon concept' its requirements changing according to each specific situation. Although its colour changes while adapting to the shape of the environment, the animal remains a chameleon. Following the Luxembourgish attitude towards pragmatism one might say: even if there is no general, theoretic definition of Human Dignity in Luxembourg, if you witness an abuse you will undoubtly be capable of identifying it.

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