Human Dignity in Denmark

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Contents

Abstract

This chapter deals with the process of constitutionalization of human dignity in Denmark, which is a non-written constitutional principle introduced in Danish domestic system, in its modern form, by international norms and the communitarian acquis. It follows exanimating Danish case law related with the clusters of rights enshrined in the EU charter that normatively define the concept of human dignity. The chapter focuses on the repercussions of the amendment of the Danish Aliens Act to asylum seekers, migrants and refugees, and Danish Supreme ruling on two extradition cases of Romanian convicted citizens. The final section is a conclusion that links the case analyzed with the candidacy of Denmark presented by the Ministry of Foreign Affairs for a seat at the United Nations Human Rights Council in 2019–2021 that emphasizes human dignity as one of the main goals to be promoted.

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P. Becchi, K. Mathis (eds.), *Handbook of Human Dignity in Europe*,
https://doi.org/10.1007/978-3-319-28082-0_10

Keywords
Constitutional value · Aliens act · Noncitizens · Asylum seekers · Confiscation of valuables · Liberty depravation · Extradition

1 Introduction

Human dignity is a constitutional value in Denmark even though there is not an explicit mention of the concept in the Danish Constitution (*Grundloven*). The lack of an express constitutional provision on human dignity at the constitutional level is partially due to the main elements of the Constitutional Act of 1953, which reproduced the first constitution of the Kingdom of Denmark of 1849, one of the oldest constitutions in the world. Neither there is a specific provision in the Constitution related to acts of international organizations nor any doubts of the validity and effectiveness of international human rights and principles on Danish soil. The lack of an express mention in the constitutional text, as stated, does not imply that it is a principle of Danish constitutionalism.

Danish constitutional law can be defined as a mixed continental-based system but with elements of common law. In this sense, the lack of an express constitutional accommodation is solved systematically and effectively. A different debate is whether it would be pertinent to include an express mention in the constitutional text for symbolic and programmatic reasons or to update the constitution to the legal developments and needs.

In the Danish case, human dignity has become a constitutional value through international law, communitarian acquis, and later Danish jurisprudence and case law. Even though international law has never been considered part of the national legal system, Denmark is, as the other Nordic countries, traditionally dualistic. The assumption has always been, instead, that Danish laws should be interpreted as being compatible with the requirements of international law (Nergelius 2016a).

Denmark ratified in 1953 the European Convention for the Protection of Human Rights and Fundamental Freedoms. As in other constitutional systems, prior to the ratification of an international Treaty, the Government will review the compatibility of Danish law with the provisions of the Treaties (Harhoff 1996). The European Convention was transplanted by law no. 285 of 29 April 1992 being the only Human Rights treaty incorporated in Danish law to date (Björgvinsson 2018). The Convention is influenced by the Universal Declaration of Human Rights. Nevertheless, it contains no express reference to human dignity; the accepted view is that human dignity is an underlying value of the convention (Barak 2015). It serves as the basis for all of the rights determined by it (Barak 2015).

Another source of national accommodation of the human dignity value at the Danish constitutional domestic level has been the communitarian acquis, and especially the European Treaties (including the Treaty of Lisbon and the Charter of Fundamental Rights of the European Union) that recognize human dignity. Article 2 of the Lisbon defines human dignity as one of the founding values of the Union,

common to all Member States. As a founding value and absolute right, it has the special protection established by article 7 of the Treaty.

Article 7 Treaty of the European Union (TEU) aims at ensuring that all European Union countries respect the common values of the EU, including the rule of law. The preventive mechanism of Article 7(1) TEU can be activated only in case of a "clear risk of a serious breach" and the sanctioning mechanism of Article 7(2) TEU only in case of a "serious and persistent breach by a Member State" of the values set out in Article 2 (Barak 2015).

The TEU, a European Union constitutional norm, is complemented by the clearer and broader normative definition of the Charter of Fundamental Rights of the European Union. The EU Charter provides in relation with the duty to protect and respect dignity (Article 1), the right to life (Article 2), the right of physical and material integrity (Article 3), the prohibition of torture, inhuman, or degrading treatment (Article 4), and the prohibition of slavery, forced labor and human trafficking (Article 5) (http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l33500&from=GA).

This cluster of rights that form the normative definition of human dignity are complemented in the Charter by two specific references to human dignity: one in Article 25 that protects the "right of the elderly to lead a life of dignity and independence and to participate in social and cultural life" and the other in Article 31 acknowledging that "every worker has the right to working conditions which respect his or her health, safety and dignity" (Dupré 2013).

Human Rights as it happens with constitutionally proclaimed individual rights are still taken for granted, but at the same time not as having a particularly strong status. When needed, the democratic legislature can legitimately establish the limits of such rights, usually through simple majority decisions. Denmark has so far not gone through major constitutional amendments, although Norway has introduced certain amendments in the details that have contributed to a growing importance of constitutionally guaranteed fundamental rights (Dupré 2013). Danish Supreme Court Decision, such as Ajos (Nergelius 2016b), is not cause of optimism that a constitutional amendment will be produced in that sense.

2 Case Law

This section exposes some examples of Danish case law related to the concept of human dignity. More specifically, the cases are related to the clusters of rights enshrined in the EU charter that define normatively the concept of human dignity previously exposed. These examples might well evidence some difficulties that Danish doctrine faces to enforce the meta-concept of human dignity in its domestic system. The cases under scope have had a large international and national dimension and repercussion, to a point, that the Danish solid reputation in the respect and promotion of human rights and human dignity has been called into question.

The selected legislative doctrine encompasses Danish domestic legislation, two reports of the United Nation Refugee Agency on the proposed amendments to the

Danish Aliens Legislation (*udlændingeloven*), on 6 January 2016 and 9 October 2017 (Nergelius 2016c), and a report of the Council of Europe. It also includes jurisprudence of the European Court of Human Rights, the Court of Justice of the European Union and the Danish Supreme Court. These legal instruments show shortcomings in terms of application and understanding of human dignity in Denmark.

The amendment of the Aliens Act in Denmark has highlighted several examples that might breach the principle of human dignity of noncitizens. As in the ancient Athens with the Foreigners or in ancient Rome with the pilgrims and the *latini veteres*, *latini coloniarii*, and the *latini iuniani*, the migrants are subject to a dissimilar treatment in constitutional democracies; discriminatory policies that in some occasions might breach their most basic human rights and their human dignity (UNHCR Observations on the proposed amendments to the Danish Aliens legislation, L 87. http://www.refworld.org/docid/5694ed3a4.html and UNHCR Observations on the proposed amendments to the Danish Aliens legislation: *Lov om ændring af udlændingeloven (Ny kvoteordning*), http://www.refworld.org/docid/59dcde544.html).

In the case of asylum seekers and refugees, this discriminatory treatment is especially onerous because the people suffering these discriminations are in a situation of greater risk and vulnerability. Asylum seekers and refugees need a greater real protection of their human rights and a reinforced respect for their human dignity. The implementation of an affirmative action to remark these human values and principles is mandatory in host societies, in mature constitutional democracies. On the contrary, not only the dignities of human beings are at stake but also the essence and nature of our democracies.

The cases under scope in this chapter also encompass legislative acts and police and administrative actions. The universe range is the Danish Aliens Act and the effects that this constantly amended bill has caused in asylum seekers, confiscation of valuables of migrants, cases of depravation of liberty, and the confine of undocumented immigrants with ordinary prisoners. The second example also affects migrants, European Union citizens, who if convicted, can face a breach of their human dignity if they are extradited to prisons in their countries of origin. This situation has called into consideration the viability of the European Warrant Arrest.

2.1 Amendment to the Aliens Act (Bill no 87): A Legal Coverage of Human Dignity Breaches

Legislation on migrants, asylum seekers, and refugees are normally a source of potential conflict in constitutional democracies. The topics under scope in this kind of legislation are in constant evolution and modelled according to concrete political needs or proclamations. Lately, in Europe, we are facing a special renewal of political interest in migration policies. This primary focus of attention in migration policies does not attend to real needs or economic reasons but to private political private agenda and interests.

In this sense, the amendment of the Danish Alien Act seems to respond to a concrete European political position on migration and immigrants, aggravated by the humanitarian crisis that Europe was facing as a consequence of the Syrian war, more than to a real political or economic need.

The Danish Aliens Act is a very complete and exhaustive norm, having as main parts, the Alien's entry into and stay in Denmark, on work, lapse and revocation of residence permits and work permits; causes of expulsion; refusal of entry; rules on residence permits; expulsion and refusal of entry; control of entry; stay and departure of aliens; competence, appeals, and penalty provisions; and commencement and transitional provisions.

This code on migration is supplemented by the Executive Order No. 376 of 20 March 2015 containing a number of more detailed rules, including specific provisions regarding the visa requirement and visa exemption, lodging of visa applications, conditions for issuing visas, basic considerations in the processing of visa applications, and the division of cases between the authorities concerned (As we will see later in this chapter, among the objectives of the Danish candidacy for a seat at the United Nations Human Rights Council in 2019–2021 there is no a particular mention to migrants, asylum seekers or refugees, even that these collectives need an special protection).

In November 2015, the Danish Government announced an amendment of the Aliens Act to make Denmark "less attractive to migrants and asylum seekers" (Ministry of Immigration and Integration, Guidelines from the Ministry of Immigration and Integration No. 9201/2017 of 27 February 2017 on the Processing of Applications for Visas for Denmark. In English https://www.nyidanmark.dk/NR/rdonlyres/06DCA764-FBB0-48B2-967C-C7C4F50BC0DE/0/GuidelinesontheProcessingofApplicationsforVisasforDenmark_FEBR2017.pdf). Only a week later, on 26 January 2016, 13 amendments passed with only 23 h for public comments and the Danish Parliament passed the controversial amendment to the Aliens Act (Bill no. 87). The amendment bestows new powers upon the police concerning the seizing of assets of asylum seekers (http://refugees.dk/en/news/2016/januar/the-asylum-restrictions-in-brief-summary/).

Although the confiscation of asylum seekers' assets probably violates several human rights, so far the implementation of "similar laws" in other countries does not have led to complaints before the European Court of Human Rights (http://refugees.dk/en/news/2016/januar/the-asylum-restrictions-in-brief-summary/). Therefore, the Danish government is not discouraged to limit migration, even though measures of dubious legality and potentially breaching human rights and human dignity of migrants, refugees, and asylum seekers.

(a) Asylum seekers

In January 2016, Denmark became the last Nordic country to tighten entry access, reintroducing controls on its border with Germany in the form of random checks – and twice extending these controls. While evidence suggests that Denmark's lower social benefits for newcomers – the "Start Help" – have

slightly increased employment rates, the measure has also led to a decrease in their income levels (Hartmann and Feith 2017).

The "Asylum Package" passed in January 2016 resulted in a cut in the monthly benefits that refugees receive (an amount that depended on the family composition of the individual refugee). The amendment also restricted the right to family reunification. Individuals granted subsidiary protection status had to wait for 3 years before being eligible to apply for family reunification (Hartmann and Feith 2017). The reduced social benefit was applied to everyone – including Danish citizens – not meeting the residency requirements. However, the overall aim was to deter immigration and encourage refugees to find employment quickly.

The restrictions to asylum and migration laws suspended an agreement with UNHCR (UN refugee agency), to accept refugees for resettlement. The new procedural rules created delays for transgender people seeking legal gender recognition, a particularly vulnerable sector of the population placed in a special risk situation. In this sense, the UNHCR observed that (Bill no.87) tightened the requirements for aliens to obtain permanent residence in Denmark (Rosholm and Vejlin 2010).

Bill no. 87 had other effects on the Danish policies on asylum seekers, such as the new executive power to suspend judicial oversight over the detention of migrants and asylum seekers when the government considered there was a large influx of people to the country.

Later, the government introduced further restrictions to its "tolerated stay" regime, which applied to individuals, but it excluded from protection those who have committed a felony in Denmark or were believed to have committed war crimes elsewhere but who could not be deported to their country of origin as they faced a real risk of human rights violations (Rosholm and Vejlin 2010). The new restrictions included a compulsory overnight stay at *Kærshovedgård* centre, about 300 km outside Copenhagen, to separate individuals from their families. Those who breached their "tolerated stay" obligations faced potential custodial sentences in regular prisons (Amnesty International, Report 2016/2017, The state of the world's Human Rights).

Other restrictions target the right on family reunification. In order to get your partner to Denmark, you must provide a valid marriage certificate, which in the cases of Syrians and Eritreans they must evidence both the civil and the religious version. Many asylum seekers do not have these proofs and as an alternative, they need to demonstrate that they have lived together as a couple for 18–24 months to be deemed as cohabiting. This can also be difficult to prove and generally, there is little else to go on than the asylum interview.

The handling of these cases is neither quick nor easy. The screening period prior to the actual handling of the case is far too long. If some details have been overlooked, the applicant should not have to wait 7–14 months before being informed. Likewise, during handling, it is completely impossible to get in

contact with *Udlændingestyrelsen*, the Danish Immigration Service (https://www.ejiltalk.org/the-danish-law-on-seizing-asylum-seekers-assets/).

(b) Confiscation of properties

The so-called Danish "jewellery law" has been the most polemic effect of Bill no. 87. This "vindictive" (Human Rights Watch) legislation bestows the police with new powers to search and confiscate the property of asylum seekers to contribute to the expenses associated with their stay in Denmark. Before the amendment, the Aliens Act already stated that asylum seekers could be required to contribute to expenses associated with their stay but after the last amendment, police officers have the competence to enforce these confiscation competences.

In the enforcement of these new powers, police officers need to apply body search procedures, full and personal searches, and interrogation of asylum seekers. Police techniques intended to be used in criminal investigations and interrogations of suspects may result in degrading treatment of the human dignity of asylum seekers.

After a strong criticism, comparisons that the new Bill had with some of the measures that Jews suffered by Nazi Germany during the Holocaust, some limitations to the first legislative proposal were included. Danish authorities then exempted sentimental items like wedding rings from the seizable assets of refugees and asylum seekers. According to the Danish Integration Ministry, the new rules only apply to assets of "considerable value." Initially, this term was defined as cash and tangible assets worth more than 3000 Dkk (€402). The threshold was subsequently increased to 10,000 Dkk (€1340) (https://www.ejiltalk.org/the-danish-law-on-seizing-asylum-seekers-assets/).

The rationale of the amendment to the Danish Aliens Act is to ensure that asylum seekers "pay their fair share," but unlike Swiss law, Danish law makes no provisions for returning asylum seekers' confiscated assets, if they decide to leave Denmark (https://www.ejiltalk.org/the-danish-law-on-seizing-asylum-seekers-assets/). However, this justification needs to be contextualized with a more general framework on the last Danish public policies on migration and reinforcement of national sovereignty. The Danish Supreme Court Decision in the Ajos case (Amnesty International, Report 2016/2017) and the Danish government's deference to implement the agreement with UNHCR to receive 500 refugees annually for resettlement from refugee camps around the world are some symptoms and evidence of this new policymaking.

An agenda that fits with the European Union immigration policy limited to adopt reactive measures concerned with security affairs that the European Court of Human Rights (ECtHR) might assess as discriminatory or disproportionate. Compliance with the ECHR, however, is unlikely to have been a priority for Danish law-makers voting on Bill No. 87. Some have persuasively suggested the value of the bill is largely symbolic and a way to send a signal to prospective asylum seekers (http://www.independent.co.uk/news/world/europe/denmark-refugee-bill-politicians-to-vote-on-law-allowing-police-to-seize-asylum-seekers-cash-and-a6834276.html).

It has been argued by several Human Right international organizations, human rights agents, and stakeholders that the "jewellery law" could amount to an infringement of multiple human rights and the human dignity of the persons concerned. Among this organization, the EU Council Commissioner for Human Rights strongly criticized the proposal to seize assets of asylum seekers arriving in Denmark, in order to cover their subsistence needs (https://www.ejiltalk.org/the-danish-law-on-seizing-asylum-seekers-assets/).

The confiscatory schemes targeted only at asylum seekers are likely to breach the prohibition of discrimination enshrined in Article 14 of the European Charter of Human Rights (ECHR). One may argue that asylum seekers are not in a "comparable" situation to nationals, as they do not enjoy the same rights. Under the ECHR, asylum seekers have no right of access to the territory of State Parties. Nonetheless, most rights under the ECHR do not allow any discrimination. Instead, the rights of everyone within the jurisdiction of a State Party, regardless of status must be secured (Article 1 ECHR).

The UN Human Rights Committee also criticized the amendments and raised concern about a further amendment to the Aliens Act. The ECtHR has held that article 1 of protocol 1 contains three rules (https://www.ejiltalk.org/the-danish-law-on-seizing-asylum-seekers-assets/). The first one establishes the protection of property; the second rule concerns the deprivation of property which sets out the requirement and general principles for expropriations; and the third rule deals with the control of the use of property which clarifies that obligations, such as tax duties, which may be tied to property in the interest of the public.

The ECtHR has reiterated, at the same time, that these three rules should not be viewed as isolated but rather as forming one concept of property protection: The enjoyment of possessions is guaranteed, but this guarantee is not without limits. On the other hand, when it comes to restricting the right to property, it needs to be borne in mind that property is in principle protected under article 1 of protocol 1 and rule 2 and 3 have to be construed in light of this principle (Danish Supreme Court, Case 15/2014 - delivered Thursday 6 December 2016 (UfR 2017.824.H)).

Whether the aims of the Danish Government in relation to seizing the assets of asylum seekers can be qualified as "social justice" seems doubtful. Asylum seekers and refugees are generally considered a particularly underprivileged and vulnerable group in need of special protection, as the ECtHR has stressed (https://www.ejiltalk.org/the-danish-law-on-seizing-asylum-seekers-assets/). Marcus Knuth, a Government spokesman declared in an interview, "*We're simply applying the same rules we apply to Danish citizens who wish to take money from the Danish government"* but Danish welfare claimants have to give up their savings before they receive benefits but not their valuables, unlike refugees (http://www.coe.int/en/web/commissioner/−/denmark-amendments-to-the-aliens-act-risk-violating-international-legal-standards?desktop=true). They will also not suit be searched, except in rare circumstances (http://echr-online.info/right-to-property-article-1-of-protocol-1-to-the-echr/introduction/).

Stripping people in search of international protection of their assets to pay for the costs of their reception does not seem to strike a fair balance between community and individual interests. This is especially so when one considers that the amount of money collected by seizing the assets of asylum seekers is likely to be modest.

The interference with the right to property has to pursue a legitimate aim: According to the second sentence of article 1 of protocol 1, deprivations of property are only allowed if they are in the public interest and the second paragraph provides that the control of use of property has to be in accordance with the general interest. The Court reads these provisions together as establishing one principle that interferences with the right to property have to serve a legitimate aim (http://echr-online.info/right-to-property-article-1-of-protocol-1-to-the-echr/introduction/).

The provisions also inferred the principle of a legitimate aim from article 18 ECHR, which provides that limitations on rights foreseen in the Convention may only be used to the ends for which they are prescribed. This article made its way to the Convention in recognition of the fact that states may abuse their power and use restrictions of rights to pursue illegitimate purposes and hidden agendas. The wording of the Article clearly prohibits such bad faith use of power by states (MSS v. Belgium and Greece, [GC] no. 30696/09. The Court attaches considerable importance to the applicant's status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection (see, *mutatis mutandis*, *Oršuš and Others v. Croatia* [GC], no.15766/03, § 147, ECHR 2010). It notes the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the Reception Directive). Yet Article 18 has been a dormant provision for much of the history of Strasbourg case law. The case law of the Convention operating under a structural good faith presumption downplayed the possibility of bad faith violations (https://www.theguardian.com/world/2016/jan/12/denmark-to-force-refugees-to-give-up-valuables-under-proposed-asylum-law).

So even in the case that the Danish Government presented a formal reason justifying the restriction of asylum seekers rights, these restrictions will continue to be a breach of article 18 ECHR if it were done for some ulterior purpose. In recent years, a number of applicants have raised Article 18 to claim that their arrest and detention violated Article 5, concerning deprivation of liberty, because it was politically motivated. (Because Article 18 is not a stand-alone article, the court always rules on it in conjunction with another article.) These applicants have argued that the unspoken purpose behind their being charged and detained was to prevent them from participating in politics – adding fuel to already controversial cases (http://www.bt.dk/politik/df-profil-i-nogle-tilfaelde-skal-vi-kunne-tage-flygtninges-vielsesringe The former Danish Minister of Justice, Søren Pind, in an interview declared that in some cases police must be able to take refugees weeding rings if they exceeded an undefinable value).

In terms of human dignity, all these potential breaches of human rights are intimately linked with the concept of human dignity prescript by the ECtHR and applicable to Denmark.

(c) Another aspect of the Aliens Act that has implications for human dignity is that *Undocumented Immigrants mixed with ordinary prisoners*.

Bill 87 also included a provision that gave the executive power to suspend judicial oversight over the detention of migrants and asylum seekers when the government considered there was a large influx of people to the country.

Detentions are mainly related either to the identification of the asylum seeker, i.e., at the beginning of the asylum procedure or to deportation or at the end of the asylum procedure. Detentions relating to the investigation of the identity of asylum seekers will generally last no longer than 4 weeks. The period of 4 weeks was not arbitrarily fixed; on the contrary, it coincides with the maximum legal length of detention in accordance with the provisions of the Administration of Justice Law, which means whereas detention prior to the deportation of an asylum seeker.

Article 36 of the Aliens Act provides a general ground justifying detention, according to which noncitizens may be detained if noncustodial measures are deemed insufficient to ensure enforcement of a refusal of entry, expulsion, transfer, or retransfer of noncitizen (https://rm.coe.int/ref/CommDH(2016)4). The same provision spells out several more precise grounds for detention: a person who has applied for residence permit can be detained if he refuses to stay at a place designated by the authorities or fails to appear for an interrogation at the police or the Immigration Service (Çalı 2017); asylum seekers can be detained if they do not assist the authorities in substantiating the asylum application, including by failing to appear at interrogations by the police or Immigration Service, concealing information about his identity, nationality, or travel route (Çalı 2017); noncitizens to be deported may be detained if they do not cooperate with the police in making arrangements for deportation (https://www.opensocietyfoundations.org/voices/case-watch-politics-justice-and-article-18).

The November 2015 amendment (L 62) to the Aliens Act added a new paragraph to article 36 according to which the police will also be entitled to detain an asylum seeker in the context of his arrival to Denmark, for the purpose of verifying his identity, conduct registration, and establish the basis for his/her application. UNHCR expressed concern about the risk of an arbitrary detention because of the amendment, highlighting that the purpose of detention is only to protect public order and not, for example, to facilitate administrative expediency.

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) have recommended several times to the Danish authorities put an end to the detention of children at *Ellebaek*, in the light of the above remarks (article 36(1)).

At the time of the 2014 visit of the CPT, Ellebæk was holding 87 asylum seekers of whom three were women and, in a separate section, 18 detainees (including one juvenile) awaiting deportation, for an official capacity of 136. The average stay in 2013 had been 29 days but one woman had been held in the

centre for a year at the time of the visit. At the outset, the CPT reiterate that asylum seekers should only be detained as a last resort, for the shortest possible duration, and after other less coercive measures have proven insufficient to ensure the presence of the persons concerned (article 36(2)).

The CPT also remarked that at the time of the visit, one juvenile was being held in the establishment and wishes to recall its position that every effort should be made to avoid resorting to the deprivation of liberty of an irregular migrant who is a minor. Following the principle of the "best interests of the child," as formulated in Article 3 of the United Nations Convention on the Rights of the Child, detention of children, including unaccompanied children, is rarely justified and, in the Committee's view, can certainly not be motivated solely by the absence of residence status.

When exceptionally a child is detained, the deprivation of liberty should be for the shortest possible period of time; every effort should be made to allow the immediate release of unaccompanied children from a detention facility and their placement in more appropriate care. Further, owing to the vulnerable nature of a child, additional safeguards should apply whenever a child is detained (article 36(4)).

This approach has been confirmed by the ECtHR, which, on several occasions, has held that the administrative detention of children in an adult detention centre with a view to their deportation amounted to inhuman treatment article 36(5–8).

The Deprivation of liberty is one of the most intensive interventions a human being can be exposed to. The right to personal liberty implies a prohibition against arbitrary deprivation of liberty and a fundamental principle that deprivation of liberty should only be used as a last resort. Personal liberty is primarily protected by human rights law defining acceptable reasons to deprive individuals of their liberty. Human rights law also imposes a range of procedural requirements to be comply with in connection with deprivation of liberty, e.g., judicial control, so that only takes place with satisfactory legal safeguards and on the basis of societal necessity. The Danish Constitution also protects the right to personal liberty.

Human rights law also states the essential and fundamental principle that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. As in the case of Asylum seekers, the CPT also stated that the material conditions in the establishment were generally adequate although somewhat basic and run down. Moreover, the environment was carceral, with barred gate partitions in the corridors separating one section from another, which is not appropriate for asylum seekers.

An increasing number of prison officers report being subjected to violence or threats from inmates. Preliminary figures for the first 9 months of 2016 show that 522 employees were subjected to violence or threats of violence (Council of Europe, CPT/Inf (2014) 25, Report to the Danish Government on the visit to Denmark carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 4 to

13 February 2014 https://menneskeret.dk/sites/menneskeret.dk/files/cpt_denmark_2014_visit.pdf), compared with the 538 for all of 2015. Financial investment in this policy appears all the less legitimate in that it does not necessarily lead to deportation despite the fact that this is supposedly the primary objective of detention. These facts also affect asylum detainment when asylum seekers are mixed with ordinary prisoners.

At the EU level, it can be observed that the number of people detained and effectively deported from EU territory is far below the stated goals. According to the statistics (Council of Europe, CPT/Inf 25 (2014)), half of those detained are never deported. In 2012, the European Commission (EC) recorded 484,000 orders to "return" and 178,000 migrants who effectively left EU territory (Council of Europe, CPT/Inf 25 (2014)).

Since the entry into force of the "Return" Directive, increases in the maximum length of detention in several countries have not improved this rate. Migrants are detained for longer periods, but there is no increase in the number of deportations. Thousands of people are deprived of their liberty without stated goals of migratory control being reached while the adverse consequences of detention on human dignity and fundamental rights are glaring.

In reference to the protection of human dignity, these measures contravene the jurisprudence of the ECtHR, *Yaralov Belousov v. Russia (Applications nos.*2653/13 *and* 60,980/14*)* the Court held in par.92: "*The State must ensure that a person is detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention, and that, given the practical demands of imprisonment, his health and well-being are adequately secured*" (European Court of Human Rights 2012).

2.2 Delivery to Inhuman or Degrading Treatment

On 31 May 2017, the Supreme Court ruled on the extradition cases of two Romanian citizens. The Danish Supreme Court found that prison conditions in Romania were so bad that extradition in the present case would be contrary to ECHR. The Convention contains in Article 3, an absolute ban on torture and against inhuman or degrading treatment or punishment.

The outcome of the two cases provoked harmful reactions from leading politicians, who found the legal position in grave contradictions with the desire in the widest sense possible scope to get rid of criminal foreigners (The Legal Affairs Committee 2015–16; REU final reply to question 943). During the High Court's hearing of the case, the Prosecution Service obtained an opinion from the Romanian authorities on Romanian prison conditions, based on a judgment delivered by the ECtHR in October 2016, in which the Court clarified its practice regarding the conditions of space in prisons (The Legal Affairs Committee 2015–16; REU final reply to question 943).

The Danish Supreme Court ruled on 24 February 2017 that a new opinion should be obtained from the Romanian authorities on the conditions under which T would be held in Romania (COM (2014) 199 final). The Romanian authorities stated that T would be guaranteed a personal space of at least 3 sq. m. in a multi-person cell when serving his prison sentence in a maximum-security prison. However, if the sentence was to be served in a medium-security prison, he would only be guaranteed a personal space of 2 sq. m (Decision ECtHR *Yaralov Belousov v. Russia (Applications nos. 2653/13 and 60980/14)*).

The Supreme Court considered that the information on the prison conditions under which T would be held if he was extradited to a maximum-security prison did not provide grounds for establishing that there was a real risk that he would be subjected to an inhuman or degrading treatment in contravention of Article 3 of the European Human Rights Convention (Vestergaard 2018).

The Supreme Court found that this implied a real risk of the expected reconciliation would lead to an infringement of Article 3 of the ECHR on as interpreted by the ECtHR and also to Danish law. The extradition act contains an express provision that the procedure may not take place if there is a danger of the person concerned after delivery will be exposed to inhuman or degrading treatment or punishment (Vestergaard 2018).

The case is based in a European arrest warrant that called into question whether the extradition of Romanian citizens to serve sentence in Romanian prisons did not leave up to the provision in the Human Rights Convention that no one must be subjected to inhuman or degrading treatment (http://www.supremecourt.dk/supremecourt7nyheder/Afgorelser/Pages/Extraditiondecisionsetaside.asp).

As Jørn Vestergaard argues, an extradition in such conditions categorically breaches several Human Rights and the human dignity of the citizens that were extradited to Romania (http://www.supremecourt.dk/supremecourt7nyheder/Afgorelser/Pages/Extraditiondecisionsetaside.asp). As a member of the Council of Europe and the EU, Romania has joined the European human rights, including the ban on exposing anyone inhumane or degrading treatment and punishment, as provided for in Article 3 of the ECHR also applies to prison prisoners. Romania has such miserable prison conditions that English, German, Swedish, and now also Danish courts have refused to hand over the sought-after looking for placement in crowded and unhuman cells.

The conditions of the Romanian prisons and its consequences for human rights and human dignity are a controversial aspect. The EU Commission has focused on prison conditions since the accession of Romania as a Member State in 2007, but there have not really been effective tools available for improvement (http://www.supremecourt.dk/supremecourt7nyheder/Afgorelser/Pages/Extraditiondecisionsetaside.asp). In addition, it is still a polemic question.

The total capacity of the Romanian prison system is almost 20,000 places, but for a number of years, the occupancy rate has been almost one and a half times as big. The basic challenge is of practical and political nature and a solution requires a strong economic investment in prisons. The Danish Supreme Court's orders in the

two extradition cases have also been published on it the way in which it is completely closed for the expulsion of criminals to Romania.

In deciding on the two cases, the Supreme Court took the cutlery of the European Court of Justice pioneering judgment in the case of *Aranyosi- Caldararu*. In that case, the preliminary ruling stated that a Member State was able to refuse to execute a European Arrest Warrant on the grounds that the conditions of the detention of the person concerned in the Member State are contrary to art. 3 and 4 of the ECHR (Vestergaard 2018).

Previously, the European Court of Justice had categorically refused to allow Member States to decline extradition based on a European arrest warrant unless there was one of the cases in the specific case framework that grounded the refusal. Among these cases, unfair placement is not expressly stated. In general, the court has chosen to protect the European Union law principle of mutual trust between Member States and the principle of mutual recognition of judicial decisions in criminal matters (http://www.supremecourt.dk/supremecourt/nyheder/Afgorelser/Pages/Newopinionon prisonconditionstobeobtainedinextraditionprocedure2.aspx).

The European Arrest Warrant provides, for the purpose of promoting the judicial area, an accelerated recognition of requests for the surrender of persons. This procedure is an evolution of the extradition mechanism. The system is based on two principles: mutual trust, which is the basis of mutual recognition of decisions. Mutual trust is an unshakeable trust that member states are deemed to have developed among themselves within the European judicial area (Arrêt CJUE du 5 avril 2016, Aranyosi-Caldararu, C404/15 et C659/15 PPU, publié au Recueil numérique (Recueil général), ECLI:EU:C:2016:198).

The principles of mutual trust and recognition of mutual judgments are linked. An improvement in mutual trust automatically entails a reinforcement of recognition mutual judgments, indeed, a confidence between the Member States. Consequently, the latter do not tend to question the judgments of others. However, Member States must take care not to take advantage of these principles to no longer respect the guarantees of fundamental rights protection (Vestergaard 2017).

A test must be made of whether a person who is subject to a European arrest warrant, runs a real risk of inhumane or degrading treatment. Such an examination shall be carried out if there is objective, reliable, concrete and duly updated information that proves that it is known (Vestergaard 2018).

The test will analyze the conditions of the detention in the issuing Member State when systemic, general or degrading treatment affects certain groups of people or certain prisons units. In such cases, additional information must be obtained and the decision regarding extradition must be postponed until the State provides the necessary information, opening the possibility of rejection.

In light of the information provided by the Romanian authorities, the decision was unanimous by the Supreme Court that there was a real risk that the prison stay in Romania would be a part of the time would be in violation of Article 3 (Vestergaard 2018). In this sense, the Supreme Court finally paid homage to fundamental human right by deciding not to extradite the Romanian citizens (http://www.supremecourt.dk/supremecourt/nyheder/Afgorelser/Pages/Extraditiondecisionsetaside.aspx).

Despite the political debate opened in Denmark and in Romania, the case would not be polemic in relation to human dignity with a strict application of the European Charter of Human Rights. The two political rationales of the debate can be summarized on the one hand by the declarations of Lars Lokke Rasmussen (Danish Prime Minister) complaining that national courts should be able to expel foreign criminals more easily and the need to be s tougher on countries that do not fulfil their human rights obligations (Vestergaard 2018). On the other, the statement of Romanian Justice Minister Tudorel Toader offering written guarantees for detention under proper conditions and meeting the requirements of the ECHR.

As a consequence of lack of mutual trust between political institutions, Danish Justice Minister, Søren Pind, in order to speed up the deportation of around 200 sentenced prisoners, proposed that Denmark's justice system outsource its prison sentences to third-party countries such as Poland and Romania, through parliament (Nanchen 2017). This proposal has been received with strong scepticism by Denmark's Prison Authority (*Fængselsforbundet*) and by the National Association of Defense Lawyers (*Landsforeningen af Forsvarsadvokater*) among other political and legal stakeholders (Vestergaard 2018).

3 Conclusion

The Ministry of Foreign Affairs of Denmark presented the Danish candidature for a seat at the United Nations Human Rights Council in 2019–2021. As a member of the Human Rights Council, Denmark will work for dignity and human rights through dialogue and development (https://www.reuters.com/article/us-denmark-rights/make-expelling-foreign-criminals-easier-danish-pm-tells-euro-rights-body-idUSKBN1FD2F5). The three D's policy (Dignity, Dialogue, and Development) emphasizes the respect for and promotion of human rights at home and abroad.

The Ministry defines the concept of dignity as: "*The inherent dignity and the equal and inalienable rights of all are at the heart of the Danish approach to human rights. A life in dignity is a life free from torture and ill-treatment, a life free from all kinds of discrimination, a life with freedom of opinion, expression and religion and with equal treatment and participation for all. The individual right to make one's own, free choices in life is a central element herein*." Denmark as a member of the Council will work for: (1) a world where women and men enjoy the same opportunities and rights; (2) a world without torture; (3) a world where indigenous peoples' voices are heard and all their rights are respected; and (4) a world in which human rights and the rule of law constitute the cornerstone of international and national structures of society (https://www.reuters.com/article/us-denmark-rights/make-expelling-foreign-criminals-easier-danish-pm-tells-euro-rights-body-idUSKBN1FD2F5).

The world report of Amnesty International on the state of Human Rights 2016/2017 remarks the lack of solidarity with refugees and fellow EU member states was typical of the migration policies of most EU countries, which united in their plans to restrict entry and expedite return. The report includes Denmark among the countries that restrict access to asylum and related benefits nationally. The trend was

particularly observable in previously generous Nordic countries: Finland, Sweden, Denmark, and Norway all introduced regressive amendments to their asylum legislation, Finland, Sweden, and Denmark, as well as Germany, all restricted or delayed access to family reunification for refugees (http://um.dk/en/foreign-policy/denmark-for-the-un-human-rights-council/).

Amnesty International notice that the Danish Government introduced serious restrictions to asylum and migration laws and suspended an agreement with UNHCR, the UN refugee agency, to accept refugees for resettlement. Procedural rules created delays for transgender people seeking legal gender recognition. A claim by Iraqis for torture against the Ministry of Defense was ruled admissible (Amnesty International, Report 2016/2017, The state of the world`s Human Rights).

Denmark has a very strong and well-deserved reputation in the promotion and defense of Human Rights and human dignity. Danish social-democrat system has been worldwide recognized as generous and beneficial not only for Danish citizens but also for minorities, asylum seekers, and migrants. Even so, this strong record and reputation may be negatively affected by the examples analyzed in this chapter. Denmark may need to reconsider some of its policies on migrants and asylum seekers to fulfil the goals on human dignity stated by the Danish candidacy at the United Nations Human Rights Council.

Finally, as Saussure, Foucault, Heidegger, and others have expressed language is power. The use of terms "tolerated stay," "less attractive to migrants and asylum seekers," "pay their fair share," and other expressions by representatives of the Danish Government may have partisan political benefits but also stigmatize foreigners and profile human beings according to their origin and economic power, a xeno-profiling that breaches human dignity. In short, Denmark might follow the path opened the Danish Supreme Court on 31st May 2017 setting aside the extradition for not meeting the conditions of the Extradition Act and not the one envisioned in Bill no. 87.

Acknowledgments I owe my thanks to Prof. Jørn Vestergaard, Sunne Klinge and Saulo Carballal for their help and comments.

References

Barak A (2015) Human dignity, the constitutional value and the constitutional right. Cambridge University Press, Cambridge

Björgvinsson DT (2018) The effect of the judgments of the ECtHR before the National Courts – a National Approach? In: Kjeldgaard-Pedersen A (ed) Nordic approaches to international law. Brill, Leiden

Çalı, Başak (2017) Merabishvili v. Georgia: has the mountain given birth to a mouse? *VerfBlog,* 2017/12/03 https://verfassungsblog.de/merabishvili-v-georgia-has-the-mountain-given-birth-to-a-mouse/, https://doi.org/10.17176/20171204-095317

Dupré C (2013) Human dignity in Europe: a foundational constitutional principle. European Public Law 19:319–340

European Court of Human Rights (2012) Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, judgment of 12 October 2006; Muskhadzhiyeva and others v. Belgium, judgment of 19 January 2010; and Popov v. France, judgment of 19 January 2012

Harhoff F (1996) National report on Denmark. In: Eisemann PM (ed) The integration of European and European community law into national legal order. Kluwer Law International, Alphen aan den Rijn

Hartmann J, Feith N (2017) The Danish law on seizing asylum seekers assets, Blog of the European Journal of International Law

Nanchen L (2017) Une accélération du rapprochement entre le CJEU et la CEDH par les biais de l'arrêt *Aranyosi-Cadararu* Quid. Fribourg Law Rev 20–23

Nergelius J (2016a) The Nordic states and the European convention on human rights. In: Arnold R (ed) The convergence of the fundamental rights protection in Europe. Springer, Heidelberg

Nergelius J (2016b) The Nordic states and the European convention on human rights. In: Arnold R (ed) The convergence of the fundamental rights protection in Europe. Springer, Dordrecht, p 87

Nergelius J (2016c) The Nordic states and the European convention on human rights. In: The convergence of the fundamental rights protection in Europe. Springer, Dordrecht, p 55

Rosholm M, Vejlin R (2010) Reducing income transfers to refugee immigrants: does start-help help you start? Labour Econ 17(1):258–275

Vestergaard J (2017) Forfejlet kritik af Menneskerettighedsdomstolen, 31. oktober 2017, Politiken, Sektion 2 (Kultur), Side 5

Vestergaard J (2018) Udlevering til umenneskelig eller nedværdigende behandling in Langsted, L.B. (eds) I forskningens og formidlingens tjeneste – Festskrift til professor, Ex Tuto, Copenhagen