INTRODUCTION

In the debate on human rights, the concept of human dignity has attained primary importance. This is somewhat surprising given that the exact implications of the general idea that human beings possess dignity remain far from clear. Doubts abound as to the source of human dignity, its contents, the necessity to "protect" it, and, most evidently, the practical conclusions to be drawn from the recognition of human dignity as an important value.

The articles presented in this issue of the *Israel Law Review* cannot resolve these very fundamental questions. Their goals are more modest and therefore, perhaps, easier to attain. The authors focus on the role that human dignity can play in the discourse on criminal justice. Obviously, the commission of serious crimes, as well as their adjudication, can have a significant impact on the human dignity of the persons involved—both victims and offenders. Even the definitions of certain crimes and the rules for convicting a person of a crime are related to issues of human dignity in various ways.

It is these and similar questions that the authors of this issue have tackled. Their work has been organized in a unique way. At the outset, a group of scholars from Israel and Germany produced individual papers that shed light on selected topics related to human dignity from the viewpoint of German and Israeli law, including constitutional law, criminal law, and criminal procedure. Then, pairs of scholars from each country worked together to produce comparative pieces. Finally, the drafts of these comparative analyses were presented, in the context of an international symposium held at the Hebrew University in Jerusalem, to a group of renowned experts from other legal systems, who gave their input in the form of critical comments (some of which appear in this issue). Finally, the authors reviewed their drafts in light of the critical assessment and discussion at the symposium and produced the articles reprinted here.

The authors wish to express their deep gratitude to the German-Israeli Foundation for Scientific Research and Development, which through generous funding has made possible an intense academic and intellectual exchange between Israeli and German legal researchers. Both sides have profited immensely from the debates and the common effort to produce comparative articles. It was not always easy to bring together the different approaches and styles of legal research, and both sides had to learn from each other about their partners' preconceptions and methodological approaches. For example, in German law, the inviolability of human dignity is the

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supreme constitutional value, and human dignity cannot be infringed even when other very important legal interests are at stake. In Israel, by contrast, the constitutional status of human dignity is the same as that of other basic rights, such as liberty, and is subject to weighing against other normative interests. However, as the comparative research proceeded, it became apparent that when actual legal problems were considered the differences in the application of the concept of human dignity were much smaller than expected and indeed that the Israeli "relativistic" approach sometimes led to stronger protection of human dignity than Germany's insistence on the "absolute" inviolability of human dignity.

This issue begins with an account of theological and philosophical concepts of human dignity provided by *Meir Dan-Cohen*. He highlights the common ground between the religious idea of *imago Dei* (in the original Hebrew: *b'tzelem Elohim*), the belief that human beings were created in the image of God, and the Kantian view of human autonomy. Dan-Cohen notes certain errors that can result from confounding theological and normative concepts of human dignity.

Various aspects of the constitutional protection of human dignity in Germany and Israel are presented by *Ariel Bendor and Michael Sachs*. Their comparative analysis reveals that human dignity is similarly protected in both countries although its constitutional status differs. The German Constitution affords human dignity the highest status among all rights of the individual. Because of the "absolute" protection of human dignity, this concept has been given a narrow interpretation, leaving room for an array of other more specific basic rights, many of which are related to human dignity. The Israeli Basic Laws, on the other hand, do not provide for an absolute right to human dignity but grant it the same constitutional status as other basic rights. Against this background, the right to human dignity—as well as other rights protected through the Basic Laws—is interpreted broadly and includes rights not stated explicitly in the Basic Laws, such as freedom of expression and the right to equality.

The constitutional review of criminal laws limiting liberty or human dignity is discussed by *Miriam Gur-Arye and Thomas Weigend*. This article shows that, although the outcome in specific cases may differ, the general approach toward constitutional review of criminal prohibitions follows similar principles in Israel and Germany. In both systems, criminal laws are seen as restrictions on liberty, and they can be justified only when such restrictions are reasonable and proportionate. Human dignity, on the other hand, plays a different role in the constitutional review of criminal laws: whereas in Germany the "absoluteness" of human dignity has led to the possible reduction of the concept of dignity to an imprecisely defined "core," in Israel the protection of human dignity as a right separate from liberty has not yet received sufficient attention. Gur-Arye and Weigend suggest that under both systems criminal laws that interfere with human dignity should be subject to strict con-

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stitutional scrutiny; such laws are constitutional only if they are needed to protect the human dignity of victims.

In his comment on the article of Gur-Arye and Weigend, *Kent Roach* examines the Canadian experience with regard to the constitutional control of criminal laws focusing on the liberty of the accused. He suggests that, due to the dual character of human dignity as protecting the dignity of both offenders and victims, human dignity as such is not a particularly helpful tool for courts in assessing the constitutionality of criminal laws. Roach concludes that the liberty of the accused and the proportionality of the limits the state sets to his liberty provide the best basis for constitutional control of criminal laws.

Mordechai Kremnitzer and Tatjana Hörnle analyze the relationship between human dignity and the principle of culpability and provide a comparative analysis of the various aspects of the principle of culpability. The authors propose that it violates human dignity to impose criminal responsibility upon an individual who is not culpable or to punish him more severely than he deserves according to the degree of his culpability. Human dignity also requires that the state, in assessing a person's criminal liability, takes his or her actual capacity to make moral decisions into account. A state that refrains from basing criminal liability on these principles uses the individual as a means for achieving an external purpose rather than regarding him as an end in itself.

The role of human dignity as an interest protected by the criminal law is discussed in a second article authored by *Tatjana Hörnle and Mordechai Kremnitzer.* This article starts from the assumption that human dignity prohibits humiliating treatment. The authors list several criminal laws protecting the individuals' interest in not being humiliated. Examples include humiliating acts, such as rape and sexual abuse, and humiliating speech, such as hate speech (but not every expression that violates the victim's honor). Moreover, criminal prohibitions of pornography showing rape, sexual acts with children, or sexual acts between humans and animals could be based on an objective understanding of humiliation.

In responding to Hörnle and Kremnitzer, *John Kleinig* expresses his preference for the term "non-degradation" over "non-humiliation." Whereas humiliation is primarily associated with self-respect, degradation is a dignitarian concept. A person who is degraded has her dignity as a human compromised—she is treated as less than a human. Kleinig also offers an account of human dignity as a foundational value in criminal law, entitling us to treatment that acknowledges our status as normatively determined beings.

A second set of articles deals with the role of human dignity in the criminal process. Opening this section, *Winfried Hassemer* discusses the tension between human dignity and the truth-finding function of the criminal process. According to Hassemer, truth-finding is a tool for protecting human dignity. Only a process geared

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toward truth-finding can guarantee that the defendant is adjudged on the basis of facts rather than the preconceived views of others. However, the search for the truth may violate human dignity by the use of intrusive tools. Hassemer concludes that the search for truth should not be the only goal of the criminal process but that the defendant's procedural rights should be paramount.

A comparative overview of human dignity in criminal procedure is provided by *Thomas Weigend and Khalid Ghanayim*. Their underlying assumption is that the criminal process is a testing ground for the degree to which a system respects individual autonomy and dignity by restricting the State's authority to investigate and adjudicate crimes. They conclude that it does not make much difference whether a system accords human dignity "absolute" protection (Germany) or whether it regards human dignity as one important value among others, subject to balancing against competing interests (Israel). Both systems are sensitive to the protection of privacy and other interests related to human dignity in the context of criminal investigations. Unexpectedly, Israeli law provides for stronger safeguards than German law in some areas, for example the secret monitoring of privileged conversations.

The infringement of human dignity by interrogative torture is discussed by *Miriam Gur-Arye and Florian Jessberger*. This article compares the rulings of the Israeli High Court of Justice and the Frankfurt Regional Court in Germany concerning the use of interrogative torture in order to save the lives of innocent persons. The comparative analysis reveals that, despite some fundamental differences, the Israeli and German rulings should both be seen as attempts to uphold the ban on torture and yet to grant fair treatment to an interrogator who uses, or threatens to use, force in order to save innocent lives. Based on the Israeli experience following the High Court ruling, Gur-Arye and Jessberger raise doubts as to whether it is possible to keep the ban on torture intact while either excusing the individual interrogator (Israel) or significantly mitigating his punishment (Germany). They further suggest that, in order to provide an effective protection against interrogative torture, evidence resulting from such interrogations should be inadmissible in any criminal proceedings.

The extent to which respect for the human dignity of victims has influenced the development of victims' rights in Germany and Israel is examined by *Anat Horovitz and Thomas Weigend*. Based on a detailed examination of the role and rights of victims within each jurisdiction, the authors conclude that despite the difference between the inquisitorial (Germany) and adversarial (Israel) systems, there exist great similarities in the way victims are treated in the Israeli and German criminal justice systems. In both countries, the active participation of victims in legal proceedings raises structural and practical difficulties, whereas the protection of victims against harm through their role as witnesses has made some progress over the last few decades. The concept of human dignity has played only a minor role in the context of victims' procedural rights.

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In responding to the argument of Horovitz and Weigend against enhancing the victim's role at the sentencing stage, *Leslie Sebba* argues that respect for the dignity of victims requires that they be permitted a role beyond merely informing them of the status of their case. Sebba cites research studies showing that victims wish their voice to be heard in the criminal process but that they do not want to bear the burden of decision-making. Sebba further points out that restorative justice would provide the victim with a forum *both* for active participation *and* for influencing the outcome—and without the risk of inflicting oppressive sanctions upon the offender.

Ultimately, this Israeli-German dialogue has not only enriched those who were actively engaged in it but has also—we hope—led to a better understanding of the functions and limitations of the concept of human dignity in the context of criminal justice.

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Guest Editors

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