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Human Dignity as a Supreme and Absolute Constitutional Value  
in German Law – In Israel Too?  
Mordechai Kremnitzer, Michal Kramer

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- (1) Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt. 1
- (2) Das Deutsche Volk bekennt sich darum zu unverletzlichen und unveräußerlichen Menschenrechten als Grundlage jeder menschlichen Gemeinschaft, des Friedens und der Gerechtigkeit in der Welt.
- (3) Die nachfolgenden Grundrechte binden Gesetzgebung, vollziehende Gewalt und Rechtsprechung als unmittelbar geltendes Recht.

Grundgesetz für die Bundesrepublik Deutschland, Bundesgesetzblatt III, Gliederungsnummer 100-1.

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 .162 ' ,)DREIER, GG KOMMENTAR : ((2. Auflage, 2004)  
 "Everyone has inherent dignity and the right to have their dignity 5  
 respected and protected"  
 .154 ' ,4 " ,DREIER, GG KOMMENTAR 6  
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 "Der Staat ist um des Menschen willen da,["  
 nicht der Mensch um des Staates willen; Die Würde der menschlichen  
 Persönlichkeit ist unantastbar. Die öffentliche Gewalt ist in allen ihren  
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“Eine Änderung dieses Grundgesetzes, durch welche die Gliederung 8  
 des Bundes in Länder, die grundsätzliche Mitwirkung der Länder bei  
 der Gesetzgebung oder die in den Artikeln 1 und 20 niedergelegten  
 ( Grundsätze berührt werden, ist unzulässig”

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<sup>28</sup>.respect- honor, dignity, glory

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Izhak Englard, *Human Dignity: From Antiquity to Modern Israel's Constitutional Framework*, 21 CARDOZO L. REV. 1903, 1904 (2000)

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“Ein solcher Umgang mit[ " Menschen ist herabwürdigend und trägt nicht zuletzt das beachtliche Risiko des Abbaus von Hemmschwelle im Umgang mit anderen .Menschen in sich”



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"Das Recht des Sozialgesetzbuchs soll [  
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 Sozialleistungen einschließlich sozialer und erzieherischer Hilfen  
 gestalten. Es soll dazu beitragen, ein menschenwürdiges Dasein zu  
 .]sichern"  
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"Wer nicht in der Lage ist, aus eigenen Kräften seinen Lebensunterhalt]  
 zu bestreiten oder in besonderen Lebenslagen sich selbst zu helfen, und  
 auch von anderer Seite keine ausreichende Hilfe erhält, hat ein Recht auf  
 persönliche und wirtschaftliche Hilfe, die seinem besonderen Bedarf  
 entspricht, ihn zur Selbsthilfe befähigt, die Teilnahme am Leben in der  
 Gemeinschaft ermöglicht und die Führung eines menschenwürdigen  
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)allgemeine Persönlichkeitsrecht(

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## 1

- (1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
- (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
- (3) The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law.

## 2

- (3) Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

## 3

[...] der Mensch kann von keinem Menschen [...] bloß als Mittel, sondern muss jederzeit zugleich als Zweck gebraucht werden, und darin besteht eben seine Würde (die Persönlichkeit), dadurch er sich über alle andere Weltwesen, die nicht Menschen sind, und doch gebraucht werden können, mithin über alle Sachen erhebt.

## 4

- (1) Das Briefgeheimnis sowie das Post- und Fernmeldegeheimnis sind unverletzlich.
- (2) Beschränkungen dürfen nur auf Grund eines Gesetzes angeordnet werden. Dient die Beschränkung dem Schutze der freiheitlichen demokratischen Grundordnung oder des Bestandes oder der Sicherung des Bundes oder eines Landes, so kann das Gesetz bestimmen, daß sie dem Betroffenen nicht mitgeteilt wird und daß an die Stelle des Rechtsweges die Nachprüfung durch von der Volksvertretung bestellte Organe und Hilfsorgane tritt.
- (1) The privacy of correspondence, posts and telecommunications shall be inviolable.
- (2) Restrictions may be ordered only pursuant to a law. If the restriction serves to protect the free democratic basic order or the existence or security of the Federation or of a Land, the law may provide that the person affected shall not be informed of the restriction and that recourse to the courts shall be replaced by a review of the case by agencies and auxiliary agencies appointed by the legislature.)

## 5

## Section 136a. [Prohibited Methods of Examination]

- (1) The accused's freedom to make up his mind and to manifest his will shall not be impaired by ill-treatment, induced fatigue, physical interference, administration of drugs, torment, deception or hypnosis. Coercion may be used only as far as this is permitted by criminal procedure law. Threatening the accused with measures not permitted under its provisions or holding out the prospect of an advantage not envisaged by statute shall be prohibited.

- (2) Measures which impair the accused's memory or his ability to understand shall not be permitted.
- (3) The prohibition under subsections (1) and (2) shall apply irrespective of the accused's consent. Statements which were obtained in breach of this prohibition shall not be used, even if the accused agrees to their use.



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“Sticks and stones may break my bones, but[”

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Jonathan Yovel, *How Can a Crime Be against Humanity?* 64  
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"the principle that no one should be compelled to give )...(["  
 evidence against himself in a criminal proceeding can be characterized  
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David Luban, *Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, U. ILL. L. REV. 815, 833 (2005) ⊗

You do not make the inmate lock himself in his cell each night, just as you do not punish a naughty child by making her throw away her favorite toys — even if locking up the prisoner or taking away the child's toys are acceptable punishments when they are administered by an appropriate outside authority.

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first is international law, and the other is the sixty years of German case law founded upon this absoluteness.

The list of “candidates” for absolute, or almost absolute, protection presented in the final part of this paper is not complete, but arguably includes those aspects that constitute the core of the right to dignity. Inter alia, it includes such inviolable prohibitions of international law as the prohibition on slavery, torture and crimes against humanity; other principles of criminal law, such as the prohibition on imposing sanctions that are not based on personal responsibility and guilt, the death penalty (perhaps also the imposition of imprisonment with no possibility of parole), and the right against self-incrimination; and such fundamental principles of public law as the individual’s right to effectively present his case before the imposition of any administrative action that harms him, the “social” right pertaining to the guaranteeing of minimal living conditions (an affirmative duty on the state), and even the right not to suffer racially based humiliation deriving from state actions.

support the absolute protection of human dignity, there are also opposing considerations. Here, too, we can distinguish between general considerations that reject absolute determinations as such, and considerations that specifically reject the absoluteness of the right to dignity. The general considerations include, for example, the claim that an absolute rule can never suit all possible cases, and that its adoption necessitates a “waiver” of a just result in some cases. A second argument is that classification of a right as absolute may transform it into a “trump card.” On the one hand, this could result in attempts to classify any constitutional right as absolute, leading to its overall devaluation, and on the other hand, it could lead to a narrow and even excessively narrow construction of the right, in order to prevent absurd results. A third argument is that the establishment of a right as absolute becomes problematic in cases where the same right is argued by both parties and a decision must be made to prioritize one injury over the other.

An examination of the conflicting specific considerations points primarily to the fear that conferral of absolute protection to a right that is vague and broad, like the right to dignity, and the desire to prevent situations in which other rights are frequently in conflict with the right to dignity, such as the right to life or freedom of expression, leads to inadequate protection of the right (this concern was addressed in our comments above on the comparison of rights in the context of the supremacy of a particular right).

The problem of deciding between the opposing considerations calls for the identification of a middle path in the hope of avoiding such difficulties. The emerging solution is one that discerns certain aspects of human dignity as meriting absolute or nearly absolute protection, while avoiding the granting of absolute protection to a comprehensive right to dignity. We attempt to identify these specific, defined aspects of human dignity based on two principal sources: The

likely. Given that harm to the “other” does not prompt the response that restrains us from violating rights due to our fear of our own rights being violated, the harm inflicted is liable to be devoid of any restraint and inhibition. There is no shortage of cases reflecting this escalation. The classic cases are those in which “otherness” is combined with danger, or a sense of danger, exemplified by the draconic arrangements governing a “state of emergency,” and in many of the arrangements that balance security considerations against rights, such as the rights of the administrative detainee. These arguments provide justification for establishing deontological barriers in the form of absolute rights, and at least for establishing the absolute nature of certain aspects of these rights.

Apart from the general justifications, a number of arguments justify conferring absolute protection specifically to the right to human dignity. The right to dignity may also be understood as a non-intuitive right, such as, for example, freedom of expression, as opposed to the right to life. As a non-intuitive right, it calls for stronger protection because the legal system confronts greater threats of its violation. Such threats become of practical significance when the right to dignity conflicts with the concern for human life, which usually results in a non-proportionate infringement of the right to dignity. Furthermore, the natural reservations and negative social stigma attendant to an infringement of intuitive rights do not exist with respect to non-intuitive rights. Conceivably, these arguments dictate an adjusted understanding of “absolute.” The “absoluteness” does not connote the inherent, intuitive justification of the right, but is rather a tool for elevating the right to dignity above its conventional status, thus assisting it in its confrontation with the intuitive rights and thereby conferring upon it the degree of protection it deserves.

As opposed to the considerations mentioned above, which

afforded them in the various legal systems, which usually grant greater protection to the right to life. Indeed, the absolute protection of dignity in the German system, as opposed to the partial protection of the right to life, may be the result of a variety of factors that will be addressed in the article. However, it does not attest to its supremacy over the right to life, or for that matter, over all the other rights and interests. This being the case, there is no basis for adopting such an approach in Israel.

Regarding the *absoluteness of human dignity*, we find that German law departs from accepted constitutional discourse of balancing, favoring a decisive, absolute principle by which the right to dignity will prevail in every conflict. A number of justifications are offered for this absolute status – both “general” justifications that support the absolute nature of every right (and generally support establishing more stable foundations for constitutional discourse), and justifications specifically supporting the absolute nature of the right to dignity.

It would appear that the more general justifications all share a fear of the problems presented by a balancing discourse that grants (almost) absolute discretion to the constitutional interpreter. More specifically, and germane to our own concerns, it could be argued that the acceptance of a balancing approach, especially the balancing of values conducted in constitutional adjudication, may result in the court “surrendering” to oppressive dictates of heavy handed political power and infamed public opinion. Such surrender may culminate in granting judicial legitimacy to severe infringements of human rights. There is no lack of examples – in Israel and abroad – of the sorry consequences that result when this fear is realized.

The fear becomes even graver where it concerns the “other,” those without political representation, the foreigner, and primarily those depicted as “the enemy.” Harm inflicted upon the “other,” as opposed to harm inflicted upon “us,” may be far more aggressive and far more

consideration or majority can detract from its status. This study is concerned with the first two features, and especially the second – the absoluteness of the right. These features raise a number of questions concerning their justification per se, and specifically regarding the possibility of their adaptation and adoption in Israeli law. They also call for an examination of the considerations justifying the conferral of supreme, absolute status to the right to human dignity, as well as of the considerations that argue against such a status, through an examination of the right and the protection granted to it in other legal systems, especially in the German system. This study does not approach the subject from the perspective of rights protected under Israel's Basic Law: Human Dignity and Liberty in its current form, but rather from that of a constitution that comprises a complete charter of human rights.

Numerous doubts arise regarding the *supremacy of human dignity* over any other right or interest. The necessary comparison in this context pertains to the relationship between the right to dignity and the right to life (in the narrow sense, which does not include physical integrity). Many considerations lend support to the prevalent, intuitive conception that the right to life enjoys a status superior to that of the right to human dignity, and at least, is not inferior to it. For example, it could be argued that the right to life constitutes the foundation of all other rights because it protects the existence of the bearers of those rights. A distinction regarding the nature of the infringement yields a similar conclusion: An infringement of the right to life has an eliminating effect that culminates in the absolute loss of the right, as opposed to an infringement of human dignity, which diminishes the victim's dignity but does not totally negate it. In fact, an absolute negation of human dignity may be inconceivable. The relative importance of these rights can also be inferred from the protection



its two aspects, which in German law represent the two interpretative approaches: protection of personal autonomous development on the one hand, and protection from the annulment of the individual's personal identity and being reduced to an object, on the other; in other words, protecting the individual against humiliation. Human dignity in the basic sense, i.e. the nucleus of the right, protects the individual against humiliation and as such should merit absolute protection. The absolute protection of the nucleus of human dignity should be defined in the Basic Law, and should include a "*numerus clausus*" of the matters included in the nucleus of the right and therefore warranting absolute protection. In addition to the interpretation of the nucleus of the right to human dignity, the protected scope of human dignity can also be given a broader interpretation. However, the protection of matters sheltered by the periphery of the right would not be absolute, but rather on the same level as the protection given to any other constitutional right – a protection that can be balanced against other competing interests and rights.

## Human Dignity – A Supreme and Absolute Right?

Mordechai Kremnitzer

The right to human dignity in German Law is comprised of three central features. *Firstly*, it is an absolute right in the hierarchy of rights and interests, that is: it is neither subservient to nor paralleled by any other right. *Secondly*, the right is absolute in the sense that it cannot be limited by balancing it against other rights or interests. An act that infringes human dignity is a priori unconstitutional, and hence prohibited, regardless of the interest or the right promoted by its infringement. *Thirdly*, the right is inalienable and, as such, no

right, this study concludes that the alternative interpretative approaches to human dignity in German law – protection based on the values of personal autonomy and free choice or protection from humiliation or from being reduced to an object – are not compatible. As indicated by the cases addressed in German case law, protection against humiliation and objectifying a person may also involve protection of a person against their own actions. It may dictate an “ideal image” of a person and in doing so infringe upon each person’s own autonomy and free will, which are of themselves values that derive from the value of human dignity.

The question of the appropriate interpretation of human dignity relates directly to the question of its appropriate constitutional standing. An approach similar to that adopted by German law, conferring it absolute, inviolate status, would encourage giving the concept a narrow substantive construction. A broad substantive construction, in which the scope of the protection offered by the concept of human dignity is not defined, would preclude conferring it an absolute status in which it cannot be balanced against any other interest or right. A weaker version of human dignity, which would accommodate a balance between human dignity and other interests and rights, would also allow a broader interpretation of its content as a constitutional concept.

In contrast to other constitutional values of central importance, human dignity is not self-evident. It therefore merits a solid constitutional standing. The undisputed importance of the protection it provides supports the conclusion that the preferred approach should be the one that confers it an absolute constitutional status. All the same, the conferral of absolute status should be accompanied by a clear interpretation of the content of human dignity.

The appropriate interpretation of the protection conferred by human dignity as a constitutional value or right should distinguish between

to prevent a violation of human dignity? Does its duty include the duty to ensure that every individual can live a life of dignity?

- **The German Basic Law Confers an Absolute Status to Human Dignity.** Under the wording of the Basic Law, human dignity is inviolate and may not be balanced against any other competing right or value. Any violation of human dignity is unconstitutional. The advantages of an interpretative approach that negates any violation of human dignity are clear. Unlike other central constitutional values, (such as the value of life), human dignity is not an intuitive, self-evident value. Understandably, the vagueness of the concept (in addition to its supreme importance) renders it particularly vulnerable and as such also justifies its increased protection. On the other hand, this approach is not free of difficulties, because alongside its absolute status, human dignity is also flexible in terms of its interpretation; not being a clearly defined value with a clear scope of protection, it is in a state of continual development. Its substantive meaning cannot be defined in advance, but only after the fact. This invites a central question, also discussed in this study: Is the interpretative approach conferring human dignity absolute status the appropriate method to adopt? This question is closely related to the question of the appropriate substantive interpretation of the protection conferred by human dignity.

This article concludes that human dignity as a constitutional value is intended to protect human life from the stage of a person's birth, alive. The question of the conduct of experiments in genetic and biotechnical realms is indeed an important one, but need not and cannot be resolved in light of the interpretation given to the value of human dignity and in light of the protection it grants.

Regarding the central question of the study, namely the substantive interpretation given to human dignity as a constitutional value and

The first article analyzes some of the issues pertaining to the interpretation of human dignity.

- **Who merits constitutional protection of human dignity?** The discussion initially focuses on the question of when the protection of human dignity begins – in other words, at which stage of development does a human life merit the protection of human dignity? For example, is an unborn fetus entitled to protection? What are the implications of protecting human dignity in relation to pre-natal life in terms of research in fields such as genetics and biotechnology? In addition to these questions the study examines whether the constitutional protection granted by human dignity is given (and limited) to the individual person, or whether it also applies to human collectives. In other words, does the protection of human dignity also mean protection of the dignity of mankind?
- **What is the content of the protection of human dignity? Can there be an exhaustive definition of human dignity?** The discussion of the content of human dignity focuses on two interpretative approaches in German case law and legal writing. The first is that the interpretative basis of human dignity lies in the prohibition of the degradation of a person and treating that person as an object devoid of any subjective identity. The other approach stresses the aspect of human autonomy and free choice as the basis of human dignity. The interpretation given to human dignity necessarily dictates the substance and scope of the governmental authority's duty to protect human dignity. As such the discussion of how to interpret human dignity influences the legal formulation of the state's duty to refrain from violating human dignity and to prevent a person's human dignity being violated by another. This subject invites discussion on two related questions: What means should the governmental authority adopt in discharging its duty

Human dignity as anchored in the Basic Law operates as a guiding right. It may be broadly construed in a manner that enables it to subsume constitutional rights that did not merit explicit mention in the Basic Laws. Alternatively, it may be narrowly construed. The question, which rights are derived from human dignity and thus fall within the scope of the essence of the right to dignity, is a question of interpretation. From this follows the tremendous importance of interpreting the value of human dignity in a manner that properly determines the scope of protection that it confers. The appropriate interpretative examination must proceed from the assumption that Israel will in the future have a complete bill of rights, which includes human dignity in addition to the other central human rights.

Notwithstanding the importance attaching to human dignity in other systems of law, none of them confer it the fundamental and central importance ascribed to it in the German legal system. Human dignity is anchored in the first section of the German Basic Law, and merits special standing, distinct from other basic rights or constitutional values. It is conceived of as a supreme value, and as a legal concept of the highest import. Its special status has spawned extensive interpretation – both in academic writing and in case law – regarding the question of the constitutional protection that it provides. Accordingly, as part of the analysis of the appropriate interpretation of the constitutional protection of human dignity in Israeli law this study examines its interpretation in German law.

The following study includes two articles: The first, written by Michal Kramer, deals mainly with human dignity in the German legal system. The second, written by Mordechai Kremnitzer, deals with the question of the appropriateness of adopting the German legal position in Israel, according to which human dignity is a supreme and absolute constitutional value.

## **Abstracts**

### **Human Dignity in German Law**

Michal Kramer, Supervised by Mordechai Kremnitzer

The Basic Law: Human Dignity and Liberty anchors human dignity as a constitutional value in Israel and regulates the protection of a number of constitutional rights, among them the right to personal freedom, to privacy, to a good name and the right to life and bodily integrity. In cooperation with Basic Law: Human Dignity and Liberty, the Basic Law: Freedom of Occupation regulates the constitutional protection conferred to freedom of occupation. Other basic rights in Israel, such as freedom of speech, freedom of religion and conscience or the principle of equality are not regulated by a basic law.

This partial and deficient regulation of basic rights augments the standing and importance of the constitutional protection of human dignity. Defining the contents of the constitutional value of human dignity and the extent of its protection under the Basic Law is a function of interpretation, and naturally does not permit a clear and unequivocal answer. Indeed, the constitutional reality in Israel – where the value of human dignity as anchored in the Basic Law supplements and bolsters the deficient protection of other human rights by way of legal interpretation – increases the importance and significance of the interpretation given to it.

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# **Human Dignity as a Supreme and Absolute Constitutional Value in German Law – In Israel Too?**

Mordechai Kremnitzer, Michal Kramer

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