

Schriften zum Strafrechtsvergleich

Band 4

Human Dignity and Criminal Law

**Würzburg Conference on Human Dignity, Human Rights
and Criminal Law in Israel and Germany,
July 20–22, 2015**

Edited by

Eric Hilgendorf and Mordechai Kremnitzer



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Foreword

In 1952, four years after David Ben Gurion's proclamation of the State of Israel on 14 May 1948, the German Federal Parliament resolved to send the new state reparations payments. Many Israelis, led by subsequent Prime Minister Menachem Begin, much of whose family had been murdered in the Holocaust, protested against any cooperation whatsoever with Germany. They demanded that no money be accepted from a "country of murderers". Eventually, however, David Ben Gurion's pragmatic attitude prevailed and German compensation was accepted under the framework of the Luxembourg Agreement.

Only thirteen years later, on 12 May 1965, Germany and Israel first established diplomatic relations. Since that time, the German-Israeli relationship has continued to evolve on a stable, positive basis. In the decades since then, organizations such as the German-Israeli Society (DIG) or the German-Israeli Foundation for Scientific Research and Development (GIF) have been working to build bridges between the two countries. More than 100 Israeli towns and cities maintain partnership agreements with German municipalities. Germany is regarded today as Israel's most important friend in Europe and many Israelis, especially young Israelis, visit Germany every year, not in search of the past, but in order to get to know a country in the heart of the old continent which, despite its past, enjoys a high reputation around the world because of its wealth, its cosmopolitanism and its liberal democratic system of government. Currently, Germany has a population of about 100,000 Jews, and many Jewish communities are starting to reestablish normal Jewish life, as it was prior to the Holocaust.

Unfortunately, in the last few years, shadows have been raised over the strong relationship between the two countries – the reason for this being, among other things, different views on the nature and extent of Israeli settlement policy in lands captured in 1967. With this lack of consensus on an important political issue in mind, the *Jerusalem Report*, expressing its concern, asked in March 2014: "Best friends forever? Germany remains Israel's best friend in Europe, but could that be about to change?"¹ Similarly, in Germany itself the German-Israeli friendship has been subjected to strains again and again in recent years. On 4 April 2012 Günther Grass published a poem in the *Süddeutsche Zeitung* entitled: "*Was gesagt werden muss*" ("What has to be said"), which attracted much attention and subsequently was the subject of intense, and in part downright hysterical, debate. Grass declared that Israel was a major threat to world peace. Even though the tone and content of the text by the

¹ *The Jerusalem Report*, "Best friends forever?" March 24, 2014, p. 12.

Nobel Laureate came under considerable criticism, at the same time it expressed a widespread unease in Germany about certain aspects of Israel's foreign policy, particularly its settlement policy. The treatment of Palestinians in the occupied territories by the Israelis has repeatedly been sharply criticized by leading German politicians. The most prominent recent example of such criticism is the speech by the former President of the European Parliament, Mr. Martin Schulz, before the Knesset on 12 February 2014.

The two countries are united by a deeply felt commitment to "never again!". But behind the many disagreements, frictions and misunderstandings, the fact is simply that Germany and Israel learned different lessons from the murder of more than six million Jews during the Nazi dictatorship. "Never again perpetrators!". This phrase represents Germany's new approach, having made a complete break with its militaristic past, and stressing its understanding of itself as a democratic pluralist state, in which minority rights and tolerance are central values. This markedly peace-loving attitude has undoubtedly been facilitated by Germany's geographic location in one of the most pacified regions of the world.

The situation has been quite different for Israel. The founding of the new state, which from the beginning was surrounded by states calling for its destruction, has been accomplished under the motto: "Never again (passive) victims!". That is why Israeli politicians across the political spectrum all stress the need for their country to maintain its military strength, going at times to great lengths to defend their constitutional democracy, sometimes indeed going too far in the minds of their German friends and allies. The German government regularly emphasizes Israel's right to defend itself, at the same time also noting the need for Israel's response to remain proportional. How exactly should this proportionality be understood? Where does Israel's right of self-defense begin and where might it overstep accepted boundaries of human rights and human dignity?

There are, however, other aspects of Israel's special situation which apparently seem increasingly difficult to understand in Germany. One of these issues is Israel's dual character as a constitutional democracy while at the same time being a Jewish state, in which religion plays a much larger role than in Germany, although the percentage of Israel's population which is non-religious is very high. Thus to this day Israel has not yet concluded a final written constitution. This is because religiously fundamentalist Orthodox Jewish political parties have repeatedly prevented a consensus in the Knesset on any other "higher law" than Jewish religious law founded on the Torah. There are also idiosyncrasies in the current Jewish identity which can be traced back to religious traditions. In 2012, a decision of the District Court of Cologne (Landgericht Köln, Germany) created a sensation when it held that religiously motivated circumcision of a male child constituted the offense of bodily harm under the German Criminal Code. Without going into the details of the case here, it must be noted that at least in discussions among lawyers, one factor received very little attention: circumcision remains today a central aspect of Jewish identity;

it is hardly called into question anywhere in the Jewish community, not even among academics raised in the secular, pluralist tradition. If a criminally sanctioned prohibition of circumcision existed in Germany, most Jews would either be forced to illegally circumvent the ban or they would be forced to emigrate.

This illustrates the fact that a conflict-free, harmonious relationship between Germans and Israelis, or respectively, between German society and German Jews, who have once again become resident here, is not self-evident. Today, when the big political issues in the German-Israeli relationship, which dominated in the past, have become less important, the lines of conflict increasingly involve legal questions and problems. The aim of this book, the papers of which were originally presented during a conference in Würzburg, Germany, July 20.–22., 2015, is to aid in significantly expanding German-Israel cooperation in law, an area previously neglected, taking into account the various issues discussed above. The importance of human dignity and human rights in the two different legal systems is explored, and the impact of these principles on lawmaking within the respective legal systems is investigated. If a humane legal system is defined as a legal system which is always and in all its parts oriented toward respecting human dignity and human rights, then the project presented here could be subsumed in one central question: to what extent and under what conditions would a humane legal system be possible?

Israel's legal system is often characterized as a "mixed legal system" combining elements from the Common Law legal tradition, dating back to the mandate period in which Great Britain administered the then Palestine (1922–1948), together with elements from the Civil Law legal tradition, of which Germany is a member, which were brought there by immigrants from Central Europe in the period of Israel's initial founding. This mixing of systems can even be found in some sub-areas of law. For example in the area of criminal law, the law on the elements of specific offenses has been strongly influenced by English law, although the decisions of English courts have not been binding on Israeli courts since the early 1970s, whereas the general framework of the criminal law exhibits the increasing influence of German law.

In the area of criminal procedure, the crucial differences cannot be traced back to the geographic origins of particular sub-areas of the law, but rather in the intensity which internal and external threats to Israel's existence have compelled it to defend its constitutional democracy with means, the compatibility of which with the principle of the rule of law sometimes seems questionable. Thus Israel has, in the past, been repeatedly accused of torturing prisoners. In spite of Israel's ratification of the UN Convention against Torture in 1991, as well as the landmark decision of the Israel Supreme Court in 1999, which strictly prohibited the use of torture, the renewed use of massive physical pressure by the Israeli security services has been a more or less open (and openly acknowledged) secret since, at the very latest, the beginning of the second intifada in 2000. Different social conditions and acute foreign policy considerations are apparently crucial determining factors here for different understandings of the extent to which pragmatic measures are allowable by a