

Maria Kaiafa-Gbandi

Aristotle University of Thessaloniki, Faculty of Law, University Campus, GR-54124 Thessaloniki
kaiafabg@law.auth.gr

**Human Dignity:
Protected, but also Jeopardised by Criminal Law?**

Abstract

The paper explores the notion of human dignity in law in general and in criminal law in particular, it examines whether human dignity is a legal interest protected by criminal law (e.g., in cases of criminalisation of reproductive cloning and acts of racism), and it reflects upon how criminal law may jeopardise the human dignity of perpetrators, particularly in cases of penalisation of drug use and police entrapment.

Key words

human dignity, criminal law, criminal repression, abuse of biomedicine, drug use, law and morals, reproductive cloning, racism, police entrapment

I. Introductory remarks

When addressing an audience who are not exclusively jurists on the way in which law, particularly criminal provisions, may protect or possibly offend human dignity, one must first offer a set of basic explanations.

First and foremost, it is important to note that law is an instrument for organising modern societies. It is rational and regulated violence within society that certainly serves to enforce the will of the people in power, the so-called “establishment”, but, in democratically structured societies, it also attends to their citizens that it arose to serve.¹ In other words, law is, or rather, should be, *anthropocentric*.

Law and its statutes are not simply abstract idealism. The “appropriate” ratio behind a legal provision (e.g., the protection of human life through penalisation of homicide) emerges through a certain social reality from which we draw the motive for the enactment of legal regulations. It helps us to understand when life begins and when it ends, given that scientific developments and the progress of medicine continually adjust the relevant data which law-makers keep in mind when drafting rules. Therefore, law and legal doctrine in general *must be working in a conciliative spirit with sociology*.

On the other hand, in trying to define the relationship of law to morality/ethics, one should be schematically aware that morality and ethics refer to human behaviour in a society, which instigates general approval or disapproval of

1

Ioannis Manoledakis, *Εισαγωγή στην επιστήμη [Introduction to Science]*, 2nd edition, Thessaloniki 1979, pp. 151ff.

the same. Legally speaking, any behaviour is relevant to the legal rules which govern it: if it complies with them, it is legally valid and produces the desired effects; if not, it is legally invalid and does not produce the desired, but rather negative outcomes, including, amongst other things, even sanctions against perpetrators.

Therefore, any behaviour can be either legally valid and moral, or only moral but legally indifferent, or only legally valid but morally indifferent, or even morally rejected.² Thus, the artificial termination of pregnancy at an early stage (up to 3 months into pregnancy) with the consent of the expecting woman and in a medically safe environment is legally valid under Greek law (Art. 304 § 4 GPC³). For some social groups, however, it is far from being morally indifferent or morally acceptable, while some others would morally reject it at a glance. *In order for law to facilitate its enforcement, it is only natural that it tries to align it with morality as much as possible.*

This brings us to the last fundamental clarification of *criminal law* in particular. Criminal law is admittedly *the harshest mechanism that states employ to achieve social control*. Given that the identity of criminal law is such, it should not be viewed merely as an instrument for the preservation of legally protected interests, but also as a mechanism which curbs or even infringes on the fundamental liberties of those who contravene it.⁴ This is why any criminal justice system necessarily presupposes a set of principles and restraints to keep the counter crime activities of the state in check. In this sense, *criminal law is closely linked to the protection of fundamental rights and the rule of law.*

II. The notion of human dignity in law in general and in criminal law in particular

As a concept and a functional element of law, ‘human dignity’ was first recognised in (the former West) Germany after the overthrow of the Nazi regime and the establishment of the post-war, new German Republic.⁵ In Greece, it emerged after the fall of the military junta and the founding of the new Greek Republic. Article 1 § 1 of the Basic Law for the Federal Republic of Germany (1949) and Article 2 § 1 of the Greek Constitution from 1975 constitutionally typify ‘human dignity’ as a legal concept that represents a moral value and request explicitly that it should be respected.

Scholars more or less agree that human dignity means acknowledging human beings with their legitimate value as subjects of history and forbidding their mere objectification under any expediency. By accepting this definition, one must agree to some reasonable assumptions resulting therefrom. Specifically: a) human dignity is recognition or acknowledgement of a merit/value in all humans, b) all humans are subjects of history (and law), and therefore differ from all other beings, c) no expediency may deprive them of this transcendent value, and transform them into objects, not even “briefly”. Thus, it is ruled that, e.g., accepting objective criminal liability (strict liability) is violating human dignity, since the subject’s volition is ignored when the subject is being punished for an offence for the sake of (criminal) expediency.

According to a certain view, human dignity is a conceptual construction of law and not a human trait, such as the legally protected interests of physical integrity, life, or honour. It directly expresses an attitude of the legal order that proposes the individual and not an evaluation of an existing physical or social attribute.⁶

However, if one examines today's empirical reality of victims of modern slavery or of human trafficking for organ harvesting or even victims of torture, then the existence of a distinct quality – which is but the socially recognised and empirically apparent human status of all human beings, which forbids their utilisation for any expediency purpose – appears self-evident.

III. Protecting human dignity as a legal interest by criminal law

According to Article 2 § 1 of the Greek Constitution, the state's primary obligation is to respect and protect the value of the human being. Therefore, and principally in respect of the wording "obligation to protect", it prompts an active and dynamic logic.⁷ This spurs any researcher of the protection of human dignity via criminal law to deduce that a special and possibly systematic nexus of penal regulations is envisaged.

However, even a short overview of the GPC is sufficient to make evident that such a special orientation towards the protection of human dignity from certain violations has never gone beyond typifying specific abuses committed by state authorities when trying to get a confession, or when disciplining offenders, etc. (Articles 137A et seq. and especially 137A § 3 GPC).⁸ Furthermore, these acts have been categorised as assaults against the state,⁹ and therefore it is questionable whether they provide actual proof of human dignity being protected as a legal interest by criminal law. Of course, more offences exist that may generally also inflict upon human dignity, amongst other legal interests. Here, one could name the following as typical examples: countering illegal immigration in the contemporary world,¹⁰ where it goes hand in hand with trading in humans – nothing short of modern slavery, or even racism.

²
Ibid., p. 166.

³
Greek Penal Code.

⁴
See Ioannis Manoledakis, *Ποινικό Δίκαιο. Επιτομή Γενικού Μέρους [Criminal Law. Compendium of General Part]*, 3rd edition, Thessaloniki 1992, p. 22.

⁵
Ioannis Manoledakis, "Ανθρώπινη αξιοπρέπεια: Έννομο αγαθό ή απόλυτο όριο στην άσκηση εξουσίας;" ["Human Dignity: Legal Interest or Absolute Limit on the Exercise of Power?"], in: I. Manoledakis, C. Prittwitz (eds.), *Η ποινική προστασία της ανθρώπινης αξιοπρέπειας [The Penal Protection of Human Dignity]*, Thessaloniki 1997, p. 13.

⁶
Ioannis Manoledakis, *Το έννομο αγαθό ως βασική έννοια του Ποινικού Δικαίου [Legal Interest as a Basic Notion of Criminal Law]*, Athens 1998, pp. 245ff.

⁷
See mainly Prodromos Dagtoglou, *Συνταγματικό δίκαιο, Ατομικά δικαιώματα [Constitutional Law, Civil Rights]*, Vol. b, Athens

1991, p. 1138; see also Antonis Manidakis, *Κράτος δικαίου και δικαστικός έλεγχος της συνταγματικότητας [Rule of Law and Judicial Review of Legislation]*, Vol. I, Thessaloniki 1994, p. 408.

⁸
See the Explanatory Report of Law 1500/1984, p. 1.

⁹
For a critical approach to this categorisation, see Konstantinos Konstantinidis, *Ποινικό δίκαιο και ανθρώπινη αξιοπρέπεια [Criminal Law and Human Dignity]*, Athens 1987, pp. 107ff; Dimitris Spirakos, *Folter als Problem des Strafrechts*, Frankfurt/M. 1990, pp. 148ff.

¹⁰
See Dimitrios Spirakos, "Η ποινική διάσταση της λαθρομετανάστευσης;" ["The Criminal Dimension of Illegal Immigration"], in: A. Chlepas, D. Spirakos, *Ο ν 1975/1991 περί αλλοδαπών και το Σύνταγμα [Law 1975/1991 on Immigration and the Constitution]*, Athens 1992, pp. 52–53, and note 25.

At this point, let us focus on some criminal offences that have been connected with the violation of human dignity, so as to see whether this is rightly done, and try to understand, on the one hand, human dignity itself as a legal value and, on the other, the way that criminal law could or should protect it.

In 2002, Greece developed a modern legal framework which recognised medically assisted reproduction and regulated its consequences in the area of civil law.¹¹ Three years later, several provisions were added by Law 3305/2005 concerning not merely when it is permissible for medically assisted reproduction to take place, but also what is prohibited in relation to it and has such demerits that begets *criminal* sanctions, presumably as the state's last resort.

Law 3305/2005 establishes, for the first time, the criminal protection of a legal interest which is *prima facie* related to human genetic material and the overall reproductive procedure. Article 26 of the said Law, which categorises various relevant crimes in 14 paragraphs, indicates that, according to the legislator's assessment, these crimes bear an increased demerit, since the relevant sentences range normally from three months of imprisonment to (five) fifteen years of incarceration (e.g., for reproductive cloning or for creation of chimeras and hybrids). The first rational question is what exactly the aforementioned penalisations try to protect.

In this case, detection of the protected legal interest is hindered by the fact that the specific provisions of Article 26 criminalise extremely varied behaviours. However, their systematisation attempt produces a result which can essentially be helpful.

Five categories of acts are practically punishable according to the Greek legislator. Three of them concern acts pertaining to human genetic material, which take place *beyond* the framework of MAR, i.e., they refer to illegal methods or other very serious deviations from the process of human reproduction. The other two categories concern acts that violate the legally regulated *procedure* of MAR. The first three categories, which pertain to human genetic material and refer to acts beyond the MAR framework, are the most serious offences. The Greek legislator punishes the repeated purchase, sale, offer for sale or mediation for the sale of genetic material with a sentence of 5 to 10 years of incarceration, and especially interventions in genetic material or its use in respect of its reproductive attribute. The last category includes serious punishable behaviours, which are grouped into acts prohibited by law, reproductive methods or technologies, or generally acts which constitute serious deviations from the human reproductive procedure (e.g., reproductive cloning, creation of chimeras and hybrids, punishable with a sentence of 5 to 15 years), acts of illegal research on genetic material and use of its results (punishable with a sentence of 5 to 10 years) and, lastly, other acts which generally lead to the use of genetic material in a way which differs from what is prescribed by law (punishable with a sentence of 2 to 5 years of imprisonment).

I shall focus here on the legal interest of the provisions which punish acts beyond the MAR framework in general, and on the provision which punishes reproductive cloning in particular.

Starting from Article 26 § 1 of Law 3305/2005 (as amended by Article 20 of Law 4272/2014), one concludes that the acts it enumerates basically concern either interventions in genetic material itself or its use in respect of human reproduction, and that they constitute acts that normally not only deviate from the procedure of human reproduction, but also present dangers in the aftermath of this procedure according to current scientific standards. Consequently, reproductive cloning and the creation of chimeras, transfers of human fertilised

ova outside the human body after a full fourteen day period from fertilisation are connected with dangers for the product of the reproductive procedure.¹²

However, a strongly supported argument in favour of the criminalisation of cloning claims that such acts are violations of human dignity.¹³ Thus, the first question raised in respect of this view is whose dignity is actually violated.¹⁴

One could initially presume that the said violation concerns the value of genetic material created by such acts. Besides, the fertilised ovum is considered by some scientists to be a carrier of human rights by itself, as a ‘living being’ that has its own autonomous function and destination, its evolution to a human being. However, the fertilised ovum does not exist when such an act takes place for it to be violable by the act, given that the fertilised ovum is, in fact, created through such an act.

On the other hand, human dignity is enshrined in all international and constitutional texts in an absolute way: it cannot be weighed against any other principle or value. Thus, if there was indeed ‘human value’ in a fertilised ovum or embryo in general, then it could neither be destroyed nor donated, the way that it currently does happen.

Unequivocally, the extent to which fertilised ova consist of human genetic material and incorporate the value of their genitors’ personality is the extent to which they should be treated differently from the rest of things. To name but one example, they cannot be sold. However, *fertilised ova cannot be recognised as personified subjects of law and carriers of human dignity*.

This fact would justify one in expressing the view – regardless of any criticism concerning the specific criminalisation chosen by Law 3305/2005 – that, in Article 26 § 1 of Law 3305/2005, the legislator aimed at the protection of *human genetic material as an object*¹⁵ which has the unique attribute to lead

11

On the innovations and general characteristics of the legal framework, see Efi Kounougeri-Manoledaki, *Τεχνητή γονιμοποίηση και Οικογενειακό Δίκαιο. Η ειδική ελληνική νομοθεσία: Νόμοι 3089/2002 και 3305/2005 [In Vitro Fertilization and Family Law. Special Greek Legislation: Laws 3089/2002 and 3305/2005]*, 2nd edition, Athens 2005, pp. 1–6.

12

On the dangers of reproductive cloning, see Donald M. Bruce, “Βλαστικά κύτταρα, έμβρυα και κλωνοποίηση. Ξετυλίγοντας τα νήματα της ηθικής σε μια περίπλοκη διαμάχη” [“Germ Cells, Embryos and Cloning. Unrolling the Fiber of Ethics in a Complicated Dispute”], in: European Laboratory of Molecular Biology, *Το μέλλον των Βιοεπιστημών [The Future of Biological Science]*, Heraklion 2006, pp. 169–170; Françoise Shenfield, “Cloning: Reproductive (Crime?), Therapeutic (Panacea?), Where to Now?”, in: M. Kaiafa-Gbandi, E. Kounougeri-Manoledaki, E. Symeonidou-Kastanidou (eds.), *Biotechnology Issues – Cloning*, Athens – Thessaloniki 2006, pp. 115ff.

13

Georgios-Alexandros Magkakis, “Η κλωνοποίηση ως επιστημονικό κατόρθωμα και

ιστορική πρόκληση” [“Cloning as a Scientific Achievement and Historical Challenge”], in: *Honorary Volume for D. Spinellis*, Athens 2001, p. 671.

14

For a relevant analysis, see Elisavet Symeonidou-Kastanidou, “Γενετική τεχνολογία και ποινικό δίκαιο” [“Genetic Technology and Criminal Law”], *Poiniki Dikaiosyni*, 2002, pp. 1061ff, where further bibliographic references are found.

15

See Eutychia Kounougeri-Manoledaki, “Σπέρμα, ωάριο και γονιμοποιημένο ωάριο που βρίσκονται έξω από το ανθρώπινο σώμα – Η νομική τους φύση και μεταχείριση κατά το αστικό δίκαιο” [“Sperm, Ovum and Fertilized Ovum Outside the Human Body – Their Legal Entity and Treatment According to Civil Law”], *Armenopoulos*, 1999, pp. 469, 474ff; Takis K. Vidalis, *Ζωή χωρίς πρόσωπο. Το σύνταγμα και η χρήση του ανθρώπινου γενετικού υλικού [Life with no Face. The Constitution and the Use of Human Genetic Material]*, Athens 1999, pp. 45ff. For an objection to treating the fertilised ovum as an object incorporating the value of human life, see Lampros Karabelas, “Έξασωματική γονιμοποίηση – Ηθικά και νομικά προβλήματα” [“In Vitro



to human reproduction after its unification with relevant components or under specific conditions, and at the preservation of the above attribute in a way that no problems are created for the aftermath of the reproductive process. The carrier of this legal interest is the donor of genetic material which simultaneously constitutes an element of his/her personality,¹⁶ but also its recipient when genetic material is used in the MAR context for impregnation.

If this is the case, and if here we exclude the protection of other legal interests,¹⁷ such as human dignity, which cannot tenably exist for an unborn life, or public morals since, according to the best-founded view, public morals cannot be an object of protection by criminal law, then one should take into account that the protection of the specific object called genetic material must be viewed in connection to its subsequent evolution stages, i.e., the embryo growing in the woman's body. In other words, the sentence of incarceration of up to 15 years for, e.g., modifying the genes of human gametes is disproportionate to the sentence envisaged for abortion, even if it could be proven that in this specific intervention in genetic material there lurks a danger for the human reproductive process.

In this context, it becomes obvious that the legislator exaggerated and wished to demonstrate through the enactment of Law 3305/2005 that any abuses in biomedicine in the field of human reproduction will be severely punished, with the aim of transmitting a sense or feeling of security to the people in respect of the new methods used. It is questionable whether this practice ameliorated the distrust of those who view this issue from the standpoint of ideological prepossessions. However, it is certain that the legislator utilised criminal law excessively as a tool of political administration in order to propagate a symbolic message, and has thus, unfortunately, confirmed a non-learned stance on the challenges posed by the new methods of biomedicine.

Similar is the problem of the view that tries to justify the irrational penalties of the said Law by referring to the protection of human dignity, at least as far as some of its provisions are concerned, such as, for example, the provisions relating to reproductive cloning.

The above example shows not only a bad example of criminal law, but also the need to be very careful when arguing that criminal provisions protect human dignity, because, in such cases, one tends normally to readily accept high sanctions, which may not even comply with the principle of proportionality.

However, there are other examples which testify to a reverse situation of sorts, i.e., situations where human dignity, although violated, is not used as a basis for offering criminal protection. The criminal suppression of racism could be one such example. Even though acts of racism may also affect other legal interests, such as the physical integrity, life or honour of victims, or even public order, it is clear that such acts carry added contempt. This demerit is directly related to the violation of human dignity, because through acts of racism perpetrators deny acknowledging that the victim possesses the value bestowed upon every individual on the basis of his/her simple biological identity as a human being, regardless of race or gender, and that he/she claims to think and act autonomously, and thus enjoys freedom of religion, ideology and sexual orientation. The regulation of such acts by the Greek criminal legislator is substandard. Law 4285/2014 fails to capture actual disapproval of the same, because its provisions make the *public* undertaking of the crimes it typifies necessary and does not refer to human dignity itself.

IV. Human dignity jeopardised by criminal law?

In what follows, it is useful to extend our focus to another very important aspect which can provide a holistic view on the real extent of the protection of human dignity by the means of criminal law. This cannot be achieved by merely documenting the respective extent of criminalisation of relevant infractions. Even if one acknowledges human dignity as a protected legal interest,¹⁸ such an approach to the issue would only be one-sided and disorienting.

Criminal law, as has already been mentioned, is not only an instrument for the protection of legal interests, but is also a yardstick of civil liberty.¹⁹ From this point of view and in connection with the operation of criminal law as a warranty and defence mechanism – even for perpetrators – the discussion about the way in which criminal law may jeopardise the human dignity of perpetrators is even more *substantial*. This issue reveals the structural principles of our criminal system associated with the protection of human dignity *as a limit to criminal repression*, such as restrictions on penalisation of inflictions upon others or the principle of guilt.²⁰ Moreover, these historically fought principles reveal that, in the association between criminal law and human dignity, it is potential violations of criminal law (as an instrument of regulated retaliation) against the human dignity of offenders that reasonably receive more focused attention.

As has already been mentioned, for law in general and for criminal law in particular, human dignity is linked to the individual as a biological being, without any other qualities being required. As far as law is concerned, this means that any human being must perpetually be a subject of law and never be degraded to an object of law, i.e., a means to any possible end. The right to self-determination, amongst other things, directly derives from human dignity and so does the liberty to develop one's personality.

In this context, one can focus on discovering occurrences where the criminal legislator *directly* bends the relevant protective milieu *via regulatory provisions* or, at any rate, *tolerates the possibility of inflicting* the value of a human being in view of a paramount interest in accord with the legislator's rationale.

Law 4139/2013 on narcotic drugs emerges as a typical legal framework for the detection of such patterns. Article 29 of the said Law introduces the fa-

Fertilisation: Moral and Legal Problems”], *Poinika Chronika*, 1988, p. 943, but also the apt confutation of E. Symeonidou-Kastanidou, “Genetic Technology and Criminal Law”, p. 1054.

16

See E. Kounougeri-Manodelaki, “Sperm, Ovum and Fertilized Ovum Outside the Human Body”, pp. 469, 474ff.

17

See E. Symeonidou-Kastanidou, “Genetic Technology and Criminal Law”, pp. 1061ff, where further bibliographic references are found.

18

See Nikolaos Paraskevoopoulos, “Η προστασία της ανθρώπινης αξιοπρέπειας: σημεία εξασ-

θήνησης” [“The Protection of Human Dignity: Points of Decline”], in: I. Manoledakis, C. Prittwitz (eds.), *The Penal Protection of Human Dignity*, pp. 76–77, but also Ioannis Manoledakis, “Βιβλιοκρισία” [“Book Review”], *Poinika Chronika*, 1980, p. 492; D. Spirakos, *Folter als Problem des Strafrechts*, pp. 149ff and especially 151–152.

19

See I. Manoledakis, *Criminal Law*, p. 22.

20

See Nikolaos Paraskevoopoulos, “Η συνταγματική διάσταση του αδικού και της ενοχής” [“The Constitutional Dimension of Wrongfulness and Guilt”], *Yperaspisi*, 1993, pp. 1251ff.

miliar – yet exceptional for Greek legislative standards – penalisation of self-harm,²¹ particularly in the case of drug use. Its diachronically enduring content has been criticised by Greek penal theoreticians for offending the right to self-determination, which emanates from the principle of protection of and respect for the value of the human being (Art. 2 § 1 GrCon²²), as well as the associated right to freely develop one’s personality (Art. 5 § 1 GrCon).²³ As is widely acknowledged, the liberal spirit of the Greek criminal legislation system has abstained from penalising *immiscible* acts of self-harm, thus leaving room for personal self-determination and free development of one’s personality; criminal repression claims no part therein.²⁴ This is what we could call a choice for a non-paternalistic model of criminal law.

One could say that such a legislative choice is but imperative, particularly as regards drug use. To begin with, when the rights to self-determination and free development of one’s personality are exercised in a way which may, at the most, challenge mainstream morality, yet which does not trample on the rights of third parties or the Constitution itself, criminalisation is not an option. Mainstream morality is not a legally protected interest, nor may criminal law consider it to be one.²⁵ In fact, an attempt at criminalisation that lacks a basis other than the mere preservation of mainstream morality (i.e., current directives of social ethics)²⁶ by citizens reveals, through its disproportional features,²⁷ that the norms of criminal law are employed by the state as a means to an end.²⁸

Even a utilitarian perception of civil rights that prioritises in favour of the social state and supports the expansion of restrictions²⁹ could not substantiate criminalisation in this case; such imposed constraints should, at the very least, openly verify their social aspect. The latter cannot even be established through the functionality of penalty in such cases. With regard to the same, one ought to consider that: a) retribution is irrational by default in cases of self-infliction,³⁰ b) special prevention is not only highly ineffective, but also feeds the vicious circle of drug use through the imposition of incarceration,³¹ and thus fails to be convincing as regards its social facet, c) general prevention as the sole underpinning of the imposition of penalty is, even when efficient, directly at odds with the protection of human dignity, and the reprimand on drug users appears exclusively as a means to an end.³²

A theoretical approach to Article 29 of Law 4139/2013, on the other hand, sheds light on its problematic aspects as regards human dignity. What needs to be comprehended in this instance are the real features of this predicament. In particular, precisely because penalisation of drug use as an act of self-harm is an alien element in Greek criminal law, it automatically cancels all criminal defences, such as necessity and self-defence. Offenders are at the same time: the person in defence, the person acting out of urgent necessity *and* the respectively harmed individual. Therefore, criminalisation of drug use carries an exponentially punitive quality, considering the notional cancellation of all criminal defences that could lead to impunity. Hence, it seems as if the individual is used as a means of serving the hypothetical needs of a general criminal policy (general prevention) in the field of narcotics, because the penalty cannot really address the “offence” committed.

Therefore, it is evident that the constitutionally established principle of non-violation of the value of the human being on behalf of the state (Article 2 § 1, GrCon)³³ is not upheld in the criminal regulation of drug use.

Likewise, Article 28 § 1 of Law 4139/2013 decriminalises the activities of police officers as agents provocateurs, even when they commit flagrant violations, such as drug trafficking (Articles 20, 22 & 23 of Law 4139/2013) and

instigating the trade or trafficking of narcotics. The Greek legislator has activated this provision to justify quite a controversial set of police activities that absurdly instigate delinquency in an effort to investigate criminal behaviour by getting those who have already broken the law to get engaged in further criminal activity.³⁴

21

On this problem, see Nikolaos Paraskevopoulos, “Ποινική ευθύνη από αυτοκαταστροφικές πράξεις” [“Criminal Liability from Self-Destructive Acts”], *Elliniki Epitheorisi Egklimatologias*, Vol. 3–4 (1991), pp. 58ff; N. Paraskevopoulos, “The Constitutional Dimension of Wrongfulness and Guilt”, pp. 1258–1259, where further bibliographic references are found; but also Lampros Margaritis, *Σωματικές βλάβες [Personal Injuries]*, 2nd edition, Athens–Thessaloniki 2000, pp. 79ff; Elisavet Symeonidou-Kastanidou, *Εγκλήματα κατά της ζωής [Crimes against Life]*, 2nd edition, Athens – Thessaloniki 2001, pp. 153ff.

22

Greek Constitution.

23

See N. Paraskevopoulos, “Criminal Liability from Self-Destructive Acts”, pp. 65–67; Nikos Paraskevopoulos, *Η καταστολή της διάδοσης των ναρκωτικών στην Ελλάδα. Μετά το Ν. 4139/2014 [Repression of Narcotic Drug Trafficking in Greece. After Law 4139/2014]*, 4th edition, Athens 2014, p. 163, according to whom criminalisation of this act also offends Art. 7 § 1 of GrCon, because the act does not affect “another person”. For a violation of the right to self-determination by the penalisation of drug use, see also Lorenz Böllinger, “Strafrecht, Drogenpolitik und Verfassung”, *Kritische Justiz*, Vol. 24 (1991), No. 4, pp. 393ff.

24

See footnote 21, but also Ioannis Manoleidakis, “Υπάρχει δικαίωμα στο θάνατο;” [“Does the Right to Death Exist?”], *Υπερασπισί*, 1994, p. 526, who, in rejecting this right, nonetheless thinks that liberal law recognises the liberty of humans to form the content of their lives (lifestyles), and thus argues that acts of pure self-harm are allowed. See also Cornelius Nestler, “Rechtsgüterschutz und Strafbarkeit des Besitzes von Schusswaffen und Betäubungsmitteln”, in: Institut für Kriminalwissenschaften Frankfurt/M. (ed.), *Vom unmöglichen Zustand des Strafrechts*, Frankfurt/M. 1995, pp. 74–75.

25

See also E. Symeonidou-Kastanidou, *Crimes against Life*, p. 163.

26

See Aristovoulos Manesis, *Συνταγματικά Δικαιώματα [Constitutional Rights]*, Vol. a, 4th edition, Athens 1982, p. 62.

27

For restrictions of the restrictions of constitutional rights and particularly the principle of proportionality, see Dimitrios Tsatsos, *Συνταγματικό δίκαιο [Constitutional Law]*, vol. c, Athens 1988, p. 245.

28

For a criticism of using criminal law as a means of defending social ethics, see I. Manoledakis, *Criminal Law*, p. 17.

29

D. Tsatsos, *Constitutional Law*, p. 241.

30

N. Paraskevopoulos, *Repression of Narcotic Drug Trafficking in Greece*, p. 168.

31

For the failure to address the problem of drug use via the imposition of incarceration, see international experience, which has been recorded since 1982 and compiled in the conclusions of the Conference of the Council of Europe, “Drugs and Prison”, *Rassegna penitenziaria e criminologica*, N. Speciale, 1982, pp. 531–533; N. Paraskevopoulos, *Repression of Narcotic Drug Trafficking in Greece*, p. 168. See also Dimitri Spirakou, “Η ποινική καταστολή των ναρκωτικών: Η λύση ή το πρόβλημα;” [“The Criminal Repression of Drugs: Solution or Problem?”], *Υπερασπισί*, 1993, p. 1038, where further bibliographic references are found, but also Winfried Hassemer, “Aktuelle Perspektiven der Kriminalpolitik”, *Strafverteidiger*, 14 (1994), p. 337.

32

See also N. Paraskevopoulos, *Repression of Narcotic Drug Trafficking in Greece*, pp. 175ff.

33

See, in particular, A. Manitakis, *Rule of Law and Judicial Review of Legislation*, p. 408.

34

On this provision, see Maria Kaiafa-Gbandi, “Η πρόκληση για διακίνηση ναρκωτικών στην υπηρεσία της καταστολής της (άρθρ. 25β παρ. 1 ν. 1729/1987)” [“Provocation for Drug Trafficking in the Service of the Combat against It (Article 25B § 1 Law 1729/1987)”], in: *Μνήμη II – Ι. Δασκαλόπουλου, Κ. Σταμάτη, Χρ. Μπάκα*, Athens 1996, Vol. A, pp. 103ff.

Still, how is the goal of amplifying police efficiency compatible with respect for the value of the human being,³⁵ criminals included?³⁶ When police expediency becomes predominant, should we not be more preoccupied with the transformation of the individual into a wheel in the faceless and tangled mechanism of the policy of crime repression that lacks clear thresholds? Is it the ostensibly unconditional nature of the principle of the value of the human being³⁷ – which denies the application of proportionality to any legally protected interest – that should lead to a revision of the legislator’s reasoning as expressed in Article 28 § 1 of Law 4139/2013?

In order to resolve these issues, delving into the European Court of Human Rights (ECHR) precedent³⁸ on the so-called undercover police infiltration (alt. “police entrapment”) system – today, a rather widespread system which is not used only in cases of organised crime as initially envisaged – is of vital significance. It should be stressed, at this point, that the ECHR case law is binding for the Greek legal order; once it was ratified by the Greek state, the European Convention on Human Rights turned into domestic/national law. Moreover, in this particular “chain of command”, the Convention ranks above common national legislation.

According to the ECHR case law, one must certainly distinguish between endurable police endeavours and intolerable police instigation/entrapment. The Court focuses on the degree of the “essentially passive character” of police activities. It admits that this required passive nature is surpassed whenever officers or civilians, under police orders and for reasons of gathering evidence or ensuring prosecution, exert such influence on subjects that the latter engage in illegal behaviour that they would have otherwise avoided.

Even if one expresses reservations about the actual violation of human dignity by certain legal provisions, any hesitation must always be in favour of compliance with the principle. Reasonable doubt cannot operate against citizens which it attempts to protect, but rather against state authorities which it attempts to restrain. Any other development would undermine the absolute nature of the principle, which acknowledges that respect for and protection of human dignity is a *principal* obligation of the State.

Regrettably, the list of stipulations that bend this obligation could grow longer via accumulation of additional examples from anti-drug legislation and other fields of so-called “organised criminality”. For instance, the confiscation or seizure of items related to the perpetration, even though otherwise harmless for public safety, is articulated in the relevant provisions regarding smuggling (Article 160, Law 2960/2001 – Customs Code), and may be imposed on individuals who had not participated in any way whatsoever in the committal of the offence, thus fabricating a system of objective responsibility that directly opposes respect for human dignity.³⁹ The same comments could also apply to the recent stipulations on money laundering,⁴⁰ etc.

V. Conclusions

As far as the regulatory context is concerned, according to the above analysis, it would be legitimate to claim that the *contemporary* criminal legislator seems to take an inconsistent approach to human dignity as a protected legal interest. On the one hand, the legislator uses the protection of human dignity as a pretext for a symbolic criminal law aiming to calm society’s more general fears of new biotechnological or technological achievements, as we have seen in its improper invocation as a protected legal interest in the case of repro-

ductive cloning. On the other hand, the Greek legislator does not sufficiently protect human dignity when definitely and undeniably inflicted as is the case with acts of racism. Moreover – and perhaps more upsettingly – as for the protection of human dignity of those charged with criminal offences, the criminal legislator has eased its stance against retractions in the protection of human dignity, particularly in the field of both organised and mass criminality,⁴¹ as the latter specifically appears through the punishable acquisition of narcotics for one's own consumption. Certainly, in the case of mass criminality, challenging the value of the human being through legislative selection may not be irrelevant to the fact that the acquisition of narcotics for personal use is part of the drug trafficking circle.

None of its two pillars can justify this option. Increasing criminal repression – as an antidote to the escalation of certain sorts of criminality or as a countermeasure against organised (and, therefore, complex and intricate) crime – has never been and could never be an answer, particularly when paired with violations of fundamental constitutional principles, such as respect for human dignity. A balanced and composed reaction by criminal law may be a matter of legislative policy, even in cases of escalations of or resourceful criminality. However, the same does not apply to the issue of compatibility of regulations of criminal law with respect for human rights, and to constitutionally prescribed limitations on repression. Hence, the modern trend of the criminal legislator towards amplifying the *efficiency* of criminal repression by transgressing its thresholds – particularly those relating to the obligation to respect human dignity – is a pattern that must be broken. In a genuine state of the Rule of Law, such methods are simply intolerable. Thus, the criminal legislator must be more sensitive and watchful when it comes to evaluations of its regulations that fall under this spectrum.

35

See Georgios-Alexandros Magkakakis, *Ποινικό δίκαιο: Διάγραμμα Γενικού Μέρους* [*Criminal Law: Diagram of General Part*], Athens 1984, p. 417. On these issues, see also Nikolaos Livos, “Το αξιόποινο του agent provocateur. Η σύγχρονη αντεγκληματική πολιτική μπροστά στο δίλημμα της δημοκρατίας και της αποτελεσματικότητας” [“Criminal Liability of *Agent Provocateur*. Modern Criminal Policy Faced with the Dilemma of Democracy and Efficiency”], *Poinika Chronika*, 1987, pp. 692ff, where further bibliographic references are found.

36

For the argument that even morally unworthy criminals should be treated by law in a way which is compatible with the principle of respect for the value of the human being, see Velissarios Karakostas, Eleni Georgopoulou-Athanasouli, *Το Σύνταγμα. Ερμηνευτικά Σχόλια, Νομολογία, άρθρα 5–10* [*The Constitution. Commentary, Jurisprudence, Articles 5–10*], Athens 1989, p. 66.

37

See P. Dagtoglou, *Constitutional Law, Civil Rights*, p. 1141; D. Tsatsos, *Constitutional Law*, pp. 261, 266.

38

Maria Kaiafa-Gbandi, “Η πρόσφατη νομολογία του ΕΔΔΑ για την αστυνομική διείσδυση και το δικαίωμα σε δίκαιη δίκη” [“The Recent Jurisprudence of ECHR for Entrapment and the Right to a Fair Trial”], *Poiniki Dikaosyni*, 2011, pp. 59ff.

39

See V. Karakostas, E. Georgopoulou-Athanasouli, *The Constitution*, p. 68; A. Manitakis, *Rule of Law*, p. 407; on the non-compatibility of the above provisions with the Constitution, see Stefanos Pavlou, *Η δήμευση στον ποινικό κώδικα και στους ειδικούς ποινικούς νόμους* [*Confiscation in the Criminal Code and Special Criminal Laws*], Athens 1994, pp. 170ff, 192ff.

40

See Art. 46 of Law 3691/2008.

41

On the difference between organised and mass criminality, see W. Hassemer, “Aktuelle Perspektiven der Kriminalpolitik”, p. 336.

Moreover, the analysis conducted in this article should attest to the following: even though recognition of the principle commanding respect for and protection of human dignity has been a conquest that restricts the criminal legislator, its practical implementation is still a long and winding path.

Maria Kaiafa-Gbandi

**Ljudsko dostojanstvo:
zaštićeno, ali i ugroženo kaznenim pravom?**

Sažetak

Rad istražuje pojam ljudskoga dostojanstva u pravu općenito i kaznenom pravu napose, odnosno ispituje je li ljudsko dostojanstvi pravni interes zaštićen kaznenim pravom (npr. u slučajevima kriminalizacije reproduktivnog kloniranja i rasističkih činova) te reflektira o tome kako kazneno pravo može ugroziti ljudsko dostojanstvo počinitelja, osobito u slučajevima kažnjavanja uporabe droga i policijskog uhićenja.

Ključne riječi

ljudsko dostojanstvo, kazneno pravo, kriminalna represija, zlouporaba medicine, uporaba droga, pravo i moral, reproduktivno kloniranje, rasizam, policijsko uhićenje

Maria Kaiafa-Gbandi

**Menschenwürde:
geschützt, aber auch gefährdet durch Strafrecht?**

Zusammenfassung

Die Arbeit erforscht den Begriff der Menschenwürde im Recht generell und vornehmlich im Strafrecht bzw. untersucht, ob die Menschenwürde ein durch das Strafrecht geschütztes rechtliches Interesse repräsentiert (beispielsweise in den Fällen der Kriminalisierung von reproduktivem Klonen und rassistischen Akten). Des Weiteren reflektiert die Arbeit darüber, wie das Strafrecht die Menschenwürde des Täters in Gefahr bringen kann, insbesondere in den Fällen der Bestrafung von Drogenkonsum und der polizeilichen Festnahme.

Schlüsselwörter

Menschenwürde, Strafrecht, kriminelle Repression, Missbrauch der Medizin, Drogenkonsum, Recht und Moral, reproduktives Klonen, Rassismus, polizeiliche Festnahme

Maria Kaiafa-Gbandi

**La dignité humaine:
protégée, mais aussi menacée par le droit pénal?**

Résumé

Ce travail examine le concept de dignité humaine dans le droit en général et dans le droit pénal en particulier, c'est-à-dire qu'il pose la question de savoir si la dignité humaine est un intérêt de droit protégée par le droit pénal (p. ex. dans les situations de criminalisation du clonage reproductif et dans les actes racistes) et réfléchit sur la manière dont le droit pénal peut menacer la dignité humaine du délinquant, particulièrement dans des situations où les peines sont liées à la prise de drogues et lors d'arrestations policières.

Mots-clés

dignité humaine, droit pénal, répression criminelle, abus de la médecine, prise de drogues, droit et morale, clonage reproductif, racisme, arrestation policière