

## THE ABSENCE OF BODY IN CYBERSPACE CRIMINAL JUSTICE IMPACT

by

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*The "computer ontology" has an impact on constructing the offenders' and victims' identities and it also shapes the image of a judge. The present paper focuses on body as one of the central ideas in criminal law. In cyberspace, the body extends outward into data: digitized identity cards, sentencing information systems, risk assessment instruments, etc. Some authors talk about the disappearance of body-in-law (Redhead), others about the expansion of data/body (Brown). The impact of the so-called "computer ontology" can be observed in police investigation, prosecution, judging and sentencing. In criminal investigation, "evidence" is rendered into a data-human form. The nature of victimization, as seen from the victim's perspective, is challenged: which type of victimization should be perceived as the "real" one? On the other hand, the notion of a criminal offender is conceived through the optic of pre-defined "risk factors" and other pre-defined attributes recognized by the criminal legal system. In systems with sentencing information instruments, a judge has to take into consideration only the factors that have been previously anticipated, estimated as relevant and adequately pondered. Franko Aas believes that "a delinquent with a soul" has already ceased to exist and instead suggests denoting a subject as a "data-vidual". A subject – an offender is thus no longer perceived as a contextualized multi-dimensional entity, but as a de-contextualized two-dimensional abstract object. From cybercrime perspective, the paper tackles one of the central presumptions of criminal law and criminology, i.e. the presumption of a generic offender.*

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## **Introduction [1]**

The information-communication technology (ICT) “ontology” or computer “logic” has an impact on constructing the offenders’ and victims’ identities and, in addition, it also shapes the image of a judge. In cyberspace, the body extends outward into data through the use of digitized identity cards, sentencing information instruments, risk assessment instruments, etc. Some authors talk about the disappearance of body-in-law (Redhead 1995), while others identify the expansion of data/body and claim that a “body-in-law” is no longer a stable point of reference (Brown 2006). Computer “logic” is thus changing our existing notion of a subject as a unique, biologically, sociologically and psychologically determined human being.

In contemporary crime policy and criminal justice system, the offender is no longer perceived as a contextualized multi-dimensional human being. One is no longer regarded as a totality of “body and soul”. As is the case in cyberspace, the body ceases to be important. The subject is taken to pieces and perceived as a componential, decontextualized two-dimensional abstract object which is later on reconstructed according to the parameters of a particular agency of criminal justice system.

To support the above mentioned thesis, the paper presents the following arguments:

1. the relativity of the *concept of “crime” and “offender”*,
2. the wider *cultural implications of the “ICT ontology”* that reconfigure the relative concept of offender, and the *ICT “ontology” impact on criminal justice system* in: police investigation, prosecution, judging and sentencing procedure.

## **The Nature of the Concept of “Crime” and “Offender” [2]**

Discussing the different or changing “notions of an offender” presupposes that the notions of crime and offender are relative. The argument that is pursued should therefore not be understood in legalistic terms by which a crime is defined as a violation of criminal substantial law and an offender is defined as a person found guilty in a criminal procedure according to the beforehand set of criminal substantial rules.

### **What is crime? [2.1]**

In the 20<sup>th</sup> century, the critical discourses (abolitionism, labelling theory, symbolical interventionism, feminist perspectives and Foucauldian analyses of penalty) showed that crime is a relative concept. Crime is defined as something that a particular society in a particular historical moment defines as an offence. It is not an objective phenomenon ontologically present in nature or something that is waiting to be revealed. It is a social construction, a label for particular acts.

### **“What in fact is a criminal?” [2.2]**

According to Garland (1985: 122), this question forms the basis of criminology. The quest for “criminality”, an element that would distinguish the criminal from the non-criminal, was the central question of early “criminology”. But, have we managed to find the firm, solid ground where “criminality” is rooted?

The following three arguments disclose the notion of a criminal, and show its contingent nature and relativity:

1. the Nietzschean argument, whereby the ideas inherent in Nietzsche’s philosophy were precursor to the so called “post-modern” theory,
2. the argument deriving from Foucault’s concept of criminology and
3. the argument deriving from the changed social control in “risk society” (Beck).

### **The Nietzschean Concept of an Offender [2.2.1]**

When denoting someone as a criminal (i.e. the subject as a responsible agent), we are, according to Nietzsche, committing four false inferences:

*“At first we call particular acts good or evil without any consideration of their motives, but simply on the basis of their beneficial or harmful consequences. Soon, however, we forget the origin of these terms and imagine that the quality ‘good’ or ‘evil’ is inherent in the actions themselves, without consideration of the consequences; [...] – that is, we take the effect to be the cause. Then we assign the goodness or evil to the motives, and regard the acts themselves as morally ambiguous. We even go further and cease to give the particular motive the predicate good or evil, but give it rather to the whole nature of the man.”<sup>1</sup>*

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<sup>1</sup> Nietzsche (2002: Aphorism 39).

To put it more clearly, we lay blame on the man:

1. for the effects of his actions,
2. for his actions,
3. for his motives, and
4. finally, for his nature.

### **Foucault's Concept of Criminology [2.2.2]**

Similarly, Foucault's account of criminology discloses the same relativistic understanding of the criminal offender.<sup>2</sup> The science of criminology, in his opinion, emerged and persisted because it had institutional coverage in the form of prison which enabled "individualisation". By individualisation he means the way in which the main architectural features of prison with its primary units in the form of separate cells containing the individual prisoner and the prison organisation itself "affected the way in which offender was viewed" (Garland 1985: 115). The criminological inquiry was made possible, because its object was already "there", it was eligible for observation and available for analysis. The prison organization itself in this way influences our perception of how we see the criminal. The individual is thus not simply "here".

### **Changed Social Control in "Risk Society" (Beck) [2.2.3]**

In today's post-modern society, social control is no longer performed through interpersonal interaction, but has rather been entrusted to an automated basis. One just has to think of the wide-spread emergence of "Automated Socio-Technical Environments" (Lianos and Douglas 2000), like online banking systems, automated car parks, the collection a reserved plane or train ticket delivered by a lounge machine, the withdrawal of money from a cash dispenser (ATM), etc. In all of the above mentioned cases, the user can not negotiate with the system. There is no need for polished social skills, no need to demonstrate ethical probity.

Who is, therefore, regarded as an offender in these types of environment? Lianos and Douglas (2000: 265) claim that in such environments "the law-abiding citizen" is replaced with the "efficient user". And who are the

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<sup>2</sup> Foucault (1975, 1988), Ostrander (1988).

deviants? They are not the moral incorrigibles, nor are they the morally condemned. They are simply “dangerous” and “risky”. Their actually committing an offence is a matter of secondary importance to the parts of society that define what deviance is. What is important is their perceived probability of being dangerous, their riskiness.

Departing from the fact that the notions of crime and offender are relative, we can now identify the building bricks which ICT is providing for those concepts, i. e. the way ICT is re-configuring the concept of an offender.

### **The Cultural Implications of ICT “Ontology” and its Impact on the Criminal Justice System [3]**

The main impact of ICT on the criminal justice system is in the new ways of producing knowledge. ICT offers new parameters for describing the social landscape, including the crime control mechanisms and criminal justice system. It is fundamentally changing the way we perceive ourselves through the changes in the parameters that make us unique human beings. For instance, we are able to enter a particular virtual area only if we possess our “digital double” – ID card or password; the identification in online services (e.g. electronic banking system) is performed with the use of a digital certificate; our bodies are digitalized and changed into information patterns in biometrical technologies, etc. The research into the cultural impacts of ICT confirms that databases have indeed become the privileged way of constructing knowledge.<sup>3</sup> “We have succeeded too well in shutting out the narrative – from theories, our research and our courts.”<sup>4</sup> On the other hand, some scholars see the narrative as crucial to the development of law. “It is really a matter of whose story carries the day” (Miller 2001: 156). And whose story carries the day nowadays? Not surprisingly, the narrative is, after all, not expelled from the courts entirely: it continues to survive in courts among upper and upper-middle class defendants and other institutionally “sympathetic” defendants (e. g. police). The new forms of knowledge are thus exercised only over the population that has no social power.

This transformation of knowledge from a narrative into a database

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<sup>3</sup> Manovich (2001), Poster (1990, 1996), Franko Aas (2004).

<sup>4</sup> Miller (2001: 156).

principally means that a database as a collection of the most diverse information about an individual has become the privileged way of constructing knowledge about the criminal as well. The agencies of criminal justice (the police, courts, prisons, etc.) are no longer interested in people as unique, biologically, sociologically and psychologically determined human beings, as the totality of "body and soul" in the existent narrative form, but are now focused only on the pre-determined computer-based parameters relevant to their decision. Thus, the »delinquent with a soul« ceased to exist (Franko Aas 2005: 107). What is left in the contemporary criminal justice system's discourse is better denoted by the notion of a »data-vidual«, *dividuum* (Deleuze 1995), »categorical individuum« (Calhoun 1995) or "fading subject". One is no longer relevant as a person, as one's life story ceases to be important.

The "information revolution" has thus transformed all social systems, including the criminal justice system. Where can these changes be seen?

### **Agencies of Criminal Justice System [3.2]**

Our comprehension of the performance of the agencies of criminal justice system is defined by the means we use to observe and analyse them. A computer-mediated analysis contains the parameters complying with the computer "logic". The parameters that do not fit into this "logic" are left out and are gradually disregarded.

### **Crime Prevention Strategies [3.2]**

In crime prevention strategies, the criminal is conceived through the optic of the pre-defined "risk factors" and other pre-defined attributes. The tools used by the various agents of the criminal legal system in crime prevention are a part of risk management ideology and form the so-called government-at-a-distance. According to Gottfredson and Tonry, the risk assessment instruments in particular present one of the most important reforms of the judicial system in the last 20 years. The purpose of these changes was to assure transparency, consistence, rationality, uniformity, and standardization of the system.

### **Crime Investigation [3.3]**

In crime investigation, the “evidence” is converted into a data-human form (for instance, DNA profiles and digitization of other traces). The narratives, i.e. the “life-records” of the individuals are no longer important. The only important factors nowadays are the new right-wing slogans, such as “zero tolerance” and “three strikes and you are out”.

### **Judging [3.4]**

The nature of judging has also transformed accordingly. The image of a judge as a person of authority looking into the eye of the defendants, listening to their explanation and reasons, and examining their history, is almost a caricature portraying the past. Instead, the judge is becoming just another state official, engaged in reducing the problems of case overload (a problem all European governments are facing according to the European Court of Human Rights judgements concerning the right to a speedy trial.) The criminal procedure is thus gradually becoming less dependent on the concrete decider and is transformed into binary computer language.

### **Sentencing Information Instruments [3.5]**

In legal systems with sentencing information instruments, the ICT impact is even more devastating: there, in a sentencing procedure a judge has to take into consideration only the factors that are anticipated and estimated as relevant by the computer software. The sentencing procedure thus depends less and less on the concrete decider; as a consequence, the judges are under pressure to externalize all their thoughts about the case, which is impossible. The externalization of judicial thinking eventually leads into a standardization of knowledge, thinking and ideas. The user negotiations with the system are excluded in the so-called “Automated Socio-Technical Environments” (Lianos and Douglas 2000). The “individual” punishment is thus giving way to “tariff” punishment, and, as these tariffs are passed by distant political actors (i.e. sentencing commissions), the theorists are denoting the process as »sentencing-at-a-distance«.<sup>5</sup>

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<sup>5</sup> Franko Aas (2005).

### **Instead of Conclusion [3.6]**

Our understanding of the world is assuming the computer “logic”. As mentioned above, ICT is constantly generating new notions about the world. The adoption of ICT in life sciences is one of the most concrete examples of the transformations pertaining to the notion of a human being. The descriptions of brain activity, the neurological structure or the human genome strongly resemble the ICT “ontology”: in all cases the information is transferred, stored, recalled, reactivated, etc. This fusion of ICT and life sciences, metaphorically termed as the “fusion of a computer and a gene”, is, according to many authors,<sup>6</sup> the new technological revolution leading from the industrial to the bio-technological age (as represented by the bio-informatics and molecular computers).

What does this have to do with the criminal justice system? The crime policy of the “risk society” (Beck) is facing the emergence of the concept of the individual “genetically at risk”,<sup>7</sup> also of offending. The notion of the individual »genetically at risk« of offending strongly resembles the notions of “pre-delinquent”, “near-criminal” and “presumptive criminal” that were already thought to be a matter of the past.

ICT logic neglects all knowledge statements unable to be digitalized and is therefore in this way reducing knowledge. In our technological world, the subject is taken to pieces, dismantled into an entity of arbitrary collected attributes, componential, standardized, decontextualized and constructed according to parameters of certain technology. In this type of circumstances, the new knowledge can be dangerous – it represents new power and is transforming crime control.

### **Conclusion [4]**

Computer “ontology” has penetrated penal culture. It has an impact on constructing the offenders’ and victims’ identities, and it presupposes a certain image of the judge. One can observe the impact of the ICT “ontology” in all agencies of the criminal justice system and all phases of criminal procedure: police investigation, prosecution, judging and sentencing procedure.

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<sup>6</sup> Rifkin (1998).

<sup>7</sup> Novas and Rose (2000: 502)



In analysing ICT impact on crime and control, the theory has mostly been concerned with identifying the changes emerging on three different levels:

1. crime scene (i.e. virtual space)
2. forms of crimes: old crimes in new forms (e.g. cyber stalking) and completely new crimes (e.g. hacking)
3. criminal system intervention (i.e. e-jurisdiction, e-punishment).

The technological progress is, in addition to the above mentioned areas, also changing the notion of subjectivity. In a technologically mediated world, a different notion of a subject is emerging, tackling two central ideas of criminal law: body and narrative. This is therefore the 4<sup>th</sup> level of changes in crime that have been provoked by the ICT. The contrast between cyberspace and biometry, the disappearing of body in the former and the idea that the body can be used as a passport in the latter shows that the body as such is no longer a stable point of reference. As Brown (2006: 234) asks: "Is the body human? Is human necessarily embodied?" At this point we can conclude by saying that, in this technosocial world, the notion of a human being is very fragile and more and more unclear.

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