

## POWER OF SURVEILLANCE – IMPLICATIONS OF TECHNOLOGICAL AND INFORMATION STEP FORWARD IN THE 21ST CENTURY ON CRIMINAL POLICY AND CRIMINAL LAW

*The century that has begun denotes the birth of a new world regime at the same time. That „novus ordo seclorum“ or „novus ordo mundi“ is characterized with the amazing step forward in technological and information sense, having serious consequences on all spheres of human actions. Insofar the modern criminal law, gradually but constantly, experiences transformation from the classic repressive instrument of discipline towards the new (preventive) concept of unobtrusive but omnipresent global surveillance resulting in gradual replacement of classic state power with global corporative power in the future. In other words, discipline ends to be the matter of criminal law (exclusively), just as the punishment will loose the status of the main criminal sanction one day. Such transformation will promote different and new policy of repression of criminal acts, which will be based on the surveillance and information as its supstrates, with certain risks for the protection of affirmed fundamental freedoms and human rights.*

**Key words:** *surveillance, criminal policy, criminal law.*

### 1. TECHNOLOGICAL AND INFORMATION POWER WITH ITS INFLUENCE ON TRANSFORMATION OF MODERN SOCIETY AND PERTAINING CRIMINAL LAW

*„Magnus ab integro saeculorum nascitur ordo“* – this has been written prophetically by Virgil in his famous Eclogues.<sup>1</sup> Today we bear witness to the birth of the new world order with symbolism characterized, among the rest, with the opening of the metaphysical All-Seeing Eye as an ancient symbol of God's omnipresence.<sup>2</sup> In the framework of this-world sphere the symbolism of this kind could be identified with the technological and information „eye of global surveillance“ - *annuit coeptis* – as blessed venture of modern time. Beforementioned

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<sup>1</sup> *Ultima Cumaevi venit iam carminis aetas; magnus ab integro saeculorum nascitur ordo, iam redit et Virgo, redeunt Saturnia regna...*“ (IV).

<sup>2</sup> Symbolism attaches the eye with the attribute of the Sun apropos of the light disclosing the darkness (in ancient Egypt's tradition known as *udjat* or Eye of Horusos), the attribute of the truth and deep insight (in islamic tradition known as *'ayn al-jauhin*), but the sign of clairvoyance as well. Additionally in masonry tradition the eye symbolises the Word, Logos, Principle of Creation within transcendental or astral sphere, while within the spiritual or divine sphere it symbolises the Great Creator.

technological and information step forward from the turn of the century, has contributed repeatedly in special way to the optimism of criminal policy, what is so typical for any *fin de siècle*.<sup>3</sup> However, optimism of criminal-law theoreticians has never been shared by humanists, let alone philosophers. Although until recently “the brave new world” of Aldous Huxley has appeared sufficiently epiphenomenal and unreal in order to be intimidating, the world insinuated through his essays is sufficiently real and manifested, so every even a little bit serious *Gedankenexperiment* (according to Einstein “thought experiment”) results in reasonable concern. In the future Rojcs<sup>4</sup> “the law of state protection” will imply hierarchical (vertically but not horizontally differentiated), constant and strictly functional surveillance in the form of the essence of future criminal policy and correspondent criminal law. This transformation or trend in criminal policy has been grounded on general premise elaborated and verified through the scientific research (according literally to the words of one report) pointing out that people act more honest when someone observes their behaviour (as well as listen to what they say).<sup>5</sup> But this is only the one of several simplest forms of modern conceptions of surveillance. Namely there are various, complex and less explicit forms of surveillance, which go beyond the function of „preventive influence“, and so called “normalizing sanctions”. It is a question of active techniques of „supervision“, which transcend regular (state repressive) „physics of power“, through the „acts upon the body” (according to the words of Foucault<sup>6</sup>) which do not take place according to the standard laws of optics and mechanics (physics). The power of such surveillance is less, or is not at all „physical“. Finally, the peak of this pyramid has been represented through the virtual technologies and techniques of so called sublimate surveillance<sup>7</sup> and incalculations<sup>8</sup>. In this context, the best results can appear when the object is not aware of the surveillance activity, as well as that object’s autonomous behaviour has been conditioned or directed (by the video and audio techniques, or by corresponding psychological medical techniques). Prevention requires primarily managing, and afterwards punishable function. This makes possible new “Copernican revolution” – without placing the punishment and perpetrator in the foreground, but placing functional strength and manager on such position. Retributive element of the punishment (except on pure symbolic level) has been placed in the background, so the

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<sup>3</sup> See for example BAČIĆ, F.: „La fin de siècle: krivično pravo i njegovo društvo“ (author’s translation: “La fin de siècle: Criminal Law and its society”), *Zakonitost*, 45/1991.(1):32-47 (p. 32: „Svjedoci smo da se svijet mijenja, da se mijenja sve oko nas. Mijenja se i krivično pravo...“), (author’s translation: We witness the changes in the world, the changes all around us...“); or for example ROJC, M.: “Rapsodične misli o budućnosti kaznenoga prava” (author’s translation: rhapsodic thoughts on the future of Criminal Law, *Mjesečnik*, 19/1895:161,193,241 („Na mjesto sa vidika odstupajućega kaznenoga prava u dalekoj budućnosti podići će se pravo državne zaštite...“!)), (author’s translation: „On the horizon of the derogated Criminal would appear the law of the state protection...!“).

<sup>4</sup> Rojc, ib. (see the footnote no. 3) (Famous Croatian criminal-law theoretician from the beginning of the 20. century.).

<sup>5</sup> For example, interesting experiment implemented by the team of scientist from the University in Newcastle, has shown that people put around three times higher amount of money in the boxes collecting charities while buying something to drink, when being observed by someone from the poster. There are some thoughts on the strategy being able to contribute to the fight against antisocial behaviour. The beliefs exist that the strategy could help in combating antisocial behaviour. Investigators think that people subconsciously put greater amounts of money in the “honesty box” because of natural reaction of the brain to the pictures of faces and eyes. Furthermore, they share the opinion that people act differently if they think that they are being observed, because they care about what other people think of them. (*Vjesnik*, 30. June 2006).

<sup>6</sup> In his famous work: *Surveiller et punir: Naissance de la prison* (author’s translation: „Surveillance and punishment: the birth of prison“), Bibliothèque des histoires, Éditions Gallimard, Paris, 1975. (translation into Croatian language: Informator and Faculty of Political Sciences /Biblioteka politička misao/, Zagreb 1994., 322 pages).

<sup>7</sup> Lat. *sub limine*, under the barrier (in this case of conscious perception).

<sup>8</sup> Forced implantation of information (*incalculations*).

criminal law sanction can become more human and forbearing, unobstrusive and almost invisible. Besides, without being irrelevant, it becomes more economic. It is clear that the surveillance organized in this way, is not and will not be exclusively criminal-law category, while it will be legal category only in the extent demanded by formal regulation of its application towards its adresates. Being less „legal“ (heteronomous) this tehnnique becomes more natural (autonomus), so the adresats do not experience offered model as imposed one, but more as their own free choice. This is how one „new world“ is created with new forms of power, where discipline power (power of disciplinning) becomes „integrated“ system with „governance functioning like a device, leaving no space in shadow, and mostly functioning in secrecy“.<sup>9</sup> According to this new concept, in foreground is placed (again?) the jeopardy and its repression<sup>10</sup>, but now in essentially different way, than in traditional concept of positivism. New system of criminal policy has been conceived in a way of reflecting prominent trend of globalization surveillance based mostly on globalisation of the system of values. Technological and information substrate of pervasive surveillance, as the condition of information society, requires also so called neuro-linguistic programming which can be realized through the combination of state and corporate interventions. The spreading of technology as well as the idea of surveillance has been ensured through constant psychological preparations of adresats by awareness framed in media terms, especially by the implementation of relevant rules of values and the system of desirable (expected) behaviour<sup>11</sup>. In other words, it is necessary to persuade people that the surveillance serves to the realization of their freedom, safety and finally existence. Having in mind the words of the „master of corporative propaganda“<sup>12</sup> that „constant repeating next to sufficient knowledge on the psychology of persons involved would not make impossible to proof that the square is actually the circle. These are just words, and the words can be shaped until they become the disguise for ideas“. The precondition requires discrete and uninvasive activity while doing this. It is necessary to point out that it is acceptable to give up the part of own freedom in order to enjoy the fullness of its content – the principle of state of law have been relativized by the infighting of the principle of social state through the concept of simple trade – freedom in exchange for safety. In order to do this it is necessary to refer whole the time to the “happy individuals”, considering the words of previously mentioned Nazi ideologist, that „ the happy people are actually the strongest opponents to the freedom“. According to the widely spreaded “conspiracy theories” it is considered that such postulate defined in utilitarian manner can be easily accomplished by consistent and persistent affirmation of primarily economic, materialistic consumer system of values (however with necessary negative consequences), which is traditionaly and conceptually most pragmatikal and most flexible system of heteronomous control. The globalism<sup>13</sup>, although at the first sight being presented as a form of

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<sup>9</sup> V. bilj. 6., str. 182.

<sup>10</sup> V. PAWLIK, M.: „Strafe oder Gefahrenbekämpfung? Die Prinzipien des deutschen Internationalen Strafrechts vor dem Forum der Straftheorie“, *Zeitschrift für Internationale Strafrechtsdogmatik*, 1/2006.(7): 274-292.

<sup>11</sup> V. MILARDOVIĆ, A.: „Nove su tehnologije utjecale i na promjenu vrijednosti i na rastakanje tradicionalnih oblika zajednica pridonijevši tako produbljanju modernizacijskih procesa. One su omogućile globalizaciju ili integraciju svijeta kao niti jedne prethodne.“ (author’s translation: „New technologies have influenced the change of values within the decanting of traditional community forms, while contributing to the deepening of modernization flows. They have made possible globalization or integration of the world, like no other did.“. (*Vjesnik*, 24 April 2008 „Globalizacija ili trijadizacija?“ (author’s translation: “Globalization or triadization”).

<sup>12</sup> Joseph Goebbels (DESERANO, D.B.: “Jesmo li uistinu slobodni?” (author’s translation: Are we free indeed?), (2004), *Svjetlost – magazin za duhovnost*, no. 34 (May/June).

<sup>13</sup> „In favour of globalisation thesis as the sequence of modernization can be incorporated the attitudes of A. Giddens (1990), U. Beck (1992), Scholte (2000) and Daw H. Curria (2003). This is how the theory of globalization appears as sequence of theories of modernization. Some theoreticians see it as the type of “neomodernism”. Being placed within the context of modernization sequence, the globalization, according to Scholte, relies on rationalism, capital system or capitalism, technology innovations and regulation. As integral

reduction of state power, is not something else than the new form of collectivism, actually corporativism<sup>14</sup>, with unavoidable populist content and to certain extent changed power holders.<sup>15</sup> These are not the state authority bodies, but public authority bodies in a larger sense.<sup>16</sup> Such framework guidelines will imbue the whole policy of repression of punishable behaviour, including criminal law as its greatest repressive segment. Great contribution in this sense will come from technological and information globalisation as well as globalization of values, creating conditions for such changes.

## 2. INFORMATION AND TECHNOLOGICAL FACTORS OF MONITORING IN THE SYSTEMS OF CRIMINAL POLICY

*Traditional performance monitoring - TPM*<sup>17</sup> in general, as well as in the segments of criminal policy and criminal law, was not able to ensure the quantity which would present new qualitative form. It could not be mass or continued and could not penetrate all spheres and areas of human life. In other words it was fragmented, discontinued and partial. That was monitoring over objects, respectively subjects. However new monitoring (known as *electronic performance monitoring - EPM*<sup>18</sup>) is monitoring over information, and not anymore over „bodies of convicts“, as it was scenically said by Foucault. Having in mind before said, technological and informational requirements have been accomplished to move forward from the repressive to especially preventive contents of criminal policy. Something what was impossible, too expensive and unacceptable in technical and economic sense until recently, today becomes available instruments of social engineering. This social engineering has been basically characterised as global instrument of prevention, but as opposed to all previous forms, it is characterised with significant progress within the meaning of criminal policy – from strictly criminal law segment to the segment of administrative law (with „interactive use of services of electronic administration through all available communication channels“<sup>19</sup>).

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parts of rationalism have been mentioned scientific figure of the world, global secularity, belief into science. Capital system, or capitalism imply on information capitalism, as described by Manuel Castels. The term of technology innovations imply on innovations in the sphere of computer technology, telecommunications, transport, while regulation considers standardization of the rules in the international community, regulation and deregulation, as well as human rights. Globalization results with fundamental changes within traditional concept of the community, society, state, borders, territories, sovereignty and democracy as „supranational democracy“. Theses on globalisation as the sequence of modernization rely on the western concept of globalisation, meaning globalisation as westernization, meaning furthermore that it has been controlled by the West“ (MILARDOVIĆ, Ib, see the footnote no.11).

<sup>14</sup> As being pointed out by Mussolini (political promoter of corporativism) the ideal or at least more appropriate name for corporativism is Fascism, considering „it presents the fusion of state and corporative powers“. V. HILLARY, E., „Običajni zakon protiv globalističkih planova“ (author’s translation: Custom law against global plans), *Nexus*, No. 2 (August – September, 2004), p. 17-22.

<sup>15</sup> Insofar, actual system of powers „prepares modern slavery for humanity, through the food controls, energy controls, credits and finances, personal freedoms, all in order to accomplish finally ancient idea on new world order“. (Stella, 167, December/January 2007/08, 40).

<sup>16</sup> As an example can be used the „List of public authority bodies in the Republic of Croatia“ for relevant year, established according to the Law on the Right to Access Information (Official Gazette No. 172/03), containing next to traditional subjects of state power, also the specialized agencies, bureaus, public institutions, economic operators etc. All of them have certain power within the spheres of supervision and sanctioning. Majority of these bodies directly or indirectly create or participate in accomplishment of state policies on combat punishable behaviour. For the year 2009 see the Official Gazette No. 15/09.

<sup>17</sup> V. STANTON, J. M.: „Traditional and Electronic Monitoring from an Organizational Justice Perspective“, *Journal of Business and Psychology*, 15/2000.(1):129-147.

<sup>18</sup> Ib.

<sup>19</sup> LUČIĆ, I., State Secretary in Central State Administrative Office for e-Croatia, see the article: „E-Uprava će iz temelja promijeniti administraciju“ (author’s translation: „E-Administration will introduce fundamental

Main category of such concept of prevention is information, while all others categories present only derivations. Endogenously this means the creation of complex and interconnected databases in functional sense and so called electronic administration (e-administration<sup>20</sup>), while egzogenously it appears as manifestation of the systems of global control – creation of different centralized, digitalized technical systems, which are symbolised and encompassed within a microchip, surveillance camera and other registration means. Having in mind exclusively the politics of suppress of punishable acts, information and technological factors (actually factors of information and communication technology) present modern systems of criminal policy through the three segments or three levels: first segment encompasses mentioned primarily preventive actions having the centre of gravity at the regulations of administrative law, or the level of general prevention in the largest sense; second segment encompasses criminal-law level in a narrower sense – the system of regulating and pronouncing sanctions for criminal offences or misdemeanours; and third segment present the level of their enforcement. The establishment of relevant databases within the aspects of criminal policy include implicitly the collection, elaboration and analyzing of information according to set areas, and modulated, functional unities with regularly limited (as well as authenticated) access. It is the matter of general registers of the bodies specialized to combat crime (police, state attorneys, courts, department for enforcement of criminal and legal sanctions etc.). During the last few years various special registers have appeared, as for example the register of perpetrators of specific criminal offences. Predominant function of information databases has been performed through linking with the registration function. Insofar monitoring becomes the most significant premise of the new concept of criminal policy, while being realized through the application of various technological forms (including the biomedicine). The biomedical databases on their exponents, separately perpetrators of criminal offences, being lately in the main focus of the interests of scientific and expert spheres, but also of the organizations for promotion and protection of human rights and fundamental freedoms, open various ethics and legal questions (questions dealing with determination of data and circumstances of their collection or use; as well as questions dealing with determination of persons of perpetrators of criminal offences whose data can be collected or used; who can access and use information from such database, or how long data can be preserved specially if the institution of rehabilitation is taken into consideration? These are just some of possible questions). Standard general questions of establishment and use of different databases have been placed between the postulate of protection of personality and successful suppression of serious forms of criminal offences, organised crime, terrorism etc. Insofar it is possible to expect operationalization of ideas on creation of the series of special and specialized databases which will, next to traditional ones (especially police databases, dactiloscopic, modus-operandi bases), create fundamental information *corpus*. Here have to be included DNA databases<sup>21</sup>, which are lately in the centre

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changes into administration”), *Vjesnik*, 16. February 2009 „Dokumenti u elektroničkom zapisu, njihovo slanje internetom i uporaba elektroničkog poslovanja bit će sve češći i sve će više zamjenjivati klasične oblike uredskog poslovanja“ (author’s translation: Documents in electronic form, their sending through the Internet and the use of electronic business will be more often and will reduce more and more classic forms of making business from office), see the article: “Elektronička uprava smanjuje birokratske barijere” (author’s translation: “Electronic administration reduces red tape”), *Vjesnik*, 20. January 2009.

<sup>20</sup> See the article: “Elektronička uprava smanjuje birokratske barijere” (author’s translation: “Electronic administration reduces red tape”), *Vjesnik*, 20. January 2009.

<sup>21</sup> See for example LAZER, D.: *DNA and the Criminal Justice System (The Technology of Justice)*, [http://books.google.hr/books?id=8FXS\\_0tg2p8C&dq=dna+criminal&printsec](http://books.google.hr/books?id=8FXS_0tg2p8C&dq=dna+criminal&printsec) or <http://www.koshland-science-museum.org/exhibitdna/crim01.jsp>.

of attention.<sup>22</sup> One of technologies which have bloomed during the last ten years is the application of RFID (*Radio Frequency Identification*) chips. RFID technology has enabled application of simple method of automatic identification, by using pertaining „transmitters“, respectively „receivers“. It is necessary to save certain data on RFID chip, and afterwards implement this chip into some object, person or animal in order to make this technology applicable.<sup>23</sup> The main aim is identification (authorization, authentication) and control. It is the matter of technologies which use radio waves in order to identify object automatically. Radio frequency communication has been grounded on creation of electromagnetic waves within transmitters and their detection on distanced receiver. There exist few methods of object identification, but the most common one is the storage of identification serial number or some other information on microchip, which combined with antenna forms RFID transponder. In other words RFID is a combination of identification microchip and radio antenna.<sup>24</sup> RFID is an integral part of the concept of so called biometric identification documents (passports, identity cards etc.)<sup>25</sup>. The fact that RFID can operate also as a physical implant<sup>26</sup>, opens serious ethical and legal questions: it has to be noted that „microchip inside

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<sup>22</sup> The bases of this type contain DNA-profile of perpetrators, what has a great value in criminal investigation. The countries in Europe having this kind of base are: Great Britain, France, Austria, Germany, and Slovenia. Today cross border exchange of DNA samples becomes standard in the world, but the length of keeping data in the base differs from state to state. French base storages DNA of criminals for 40 years, after the sentence was served, while this time limit is 20 years in the Netherland if the person has been convicted to minor sentence (till the 6 years), and 30 years if the sentence exceeds 6 years. Germany has specific legislation, in a way that data from the base have been checked 10 years after for adults, and after 5 years for minors, while only in the case of murder or sexual delicts the unlimited keeping is allowed. In Croatia for the introduction of DNA bases will be crucial amendments of relevant legal framework. The fact is that Croatia already has the trained experts with all necessary technology (see *Vjesnik*, 20. October 2008, „Svi kriminalci uskoro u bazi DNK“(author’s translation: “All criminals will be in DNA base soon“).

<sup>23</sup> Although early versions of RFID chips have been presented and used since 1993 in British aviation for identification of flying machines, their wide application has begun in the last century, in the 90tees. Many American and European chain stores use this technology for a while, and one of the world intercessors of its application is American Ministry of Defence, which plans to mark members of their formations and battle materials in this way. Also on inland area the RFID chips have been applied at, for example, charging of tolls on motorways.

<sup>24</sup> Mentioned microchips can be in a form and size of the head of the match, incorporated at hidden place, or stick as plaster. It is possible to implant it under the skin (although first experiments on animals imply on high percentage of skin cancer what makes it not recommendable for application on humans). The microchip can contain all identification data on person and the antenna which is thin as a hair, makes the chip works. The energy can be supplied from the body heat. It is sufficient to have completely irrelevant electromagnetic incentive, in order for microchip to transmit requested data. The production cost has become closer to the economic price of five cents of US Dollars. It has been widespread in economic activity, industry for example in car industry, production, construction fields, shopping and entertainment centres, educational institutions etc. „RFID u svemu (i svakome)“! (author’s translation: “RFID in everything (and everybody)”) (see *Večernji list*, 24. January 2006); „RFID će uništiti barkod“(author’s translation: “RFID will destroy barcode”).

<sup>25</sup> Biometry – automatic method of identification of person using physiological or behavioural characteristics, what makes biometric authentication the safest method. For example biometric passports (and for the first time identity cards) which have been introduced in the Great Britain in 2006, contain biological data of their holders: they have electronic chip which marks face dimensions of the document holder, specially the measures between eyes, nose, mouth and ears, calculated according to the identification photo. Passport data will include fingerprints as well. The trend of introduction of biometric photos have been used in more than 50 states. More information available at the U.S. National Institute of Justice,

[http://209.85.129.132/translate\\_c?hl=hr&sl=en&u=http://www.biometriccatalog.org/Introduction/default.aspx](http://209.85.129.132/translate_c?hl=hr&sl=en&u=http://www.biometriccatalog.org/Introduction/default.aspx)  
or <http://biometrics.gov/>.

<sup>26</sup> American company *Digital Angel* has demonstrated a prototype of this chip on American market in 2000. It is the matter of chip implanted under the skin, which transmits data not only on the place where the holder is situated, but on heart beat, temperature and other bio-medical indicators as well. Two models have been offered (they are originally intended to be implanted under the collar bone (clavicle): *Constant Companion TM* for

the body presents microchip in relation to computer based system“ in technical sense; in ethical or legal senses „the concept has been directed on the control of body on physical, emotional or mental plan“. <sup>27</sup> Also, there exist no technical obstacles in order to apply chip in combined manner within the technology of satellite positioning. <sup>28</sup> This kind of microchips can be used without limit in locating the objects or monitored persons, whether in active or passive mode. <sup>29</sup> The system of monitoring of movements of people (*tagging*) by using satellite positioning gradually replaces older systems of monitoring from the Earth. <sup>30</sup> The system appears to be ideal for the surveillance function in order to realize various protective, safety or other measures, respectively special commitments related to the surveillance and probation, as well as other so called alternative sanctions. Definitely the most prevailing technique of monitoring encompasses so called CCTV cameras, usually combined with a computer. It can be said that there is no bigger European town <sup>31</sup> without appropriate, more or less complex system of video surveillance. Gradually such surveillance is introduced, or is planned to be introduced in many Croatian towns <sup>32</sup>. Video surveillance can be combined with the technique of administrated audio-control. <sup>33</sup> As standard, programming, criminal policy goals of introduction of video surveillance have been specified, among the rest, the reduction of the number of punishable conducts – criminal offences and misdemeanours (separately acts of violence, or misdemeanours, or separately acts of violence or misdemeanour offences against public order and decency, as well as punishable conduct in traffic), with general enhancing of the feeling of personal security of citizens by knowing that they are situated on monitored area. From the police point of view such monitoring simplifies detection of unknown perpetrators, more efficient surveillance of public assembling, identification of initiator of disturbance of the peace, as well as enables direct monitoring of traffic etc. Among

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monitoring on distance of old and powerless persons, and *BabySitter TM* for children, while *BodyGuard TM*, *MicroManager TM* are in the preparation phase.

<sup>27</sup> ICKE, D., “O mikročipiranju i kontroli uma”, (author’s translation: “About microshipping and mind control”) *Nexus*, 29. November 2008, p. 25-28.

<sup>28</sup> American company *Applied Digital Solutions* has presented the prototype of the chip for monitoring of human movements over the satellite Global Positioning System.

<sup>29</sup> It is well-known that such system (five or six years ago) has been used in the car industry, with a purpose of protection of valuable cars from larceny and resells. In the 2006, for example, has been arrested foreign citizen in stolen car in Croatia. After being located by a satellite, foreign citizen has been stopped on the road near Ivanić Grad through the remote cutting of the gas supply (the example of active surveillance mode). The year before the other perpetrator has been arrested on the border Vinjani, whose car has been stolen in Italy, and has been located by satellite and stopped before crossing the border (the example of passive surveillance mode). ([www.t-portal.hr](http://www.t-portal.hr), 23 January 2006).

<sup>30</sup> According to Boston’s *Christian Science Monitor*, U.S State of Florida has brought debatable law which has introduced lifelong satellite monitoring of convicts sentenced for most serious sexual offences against children: from 30.000 registered perpetrators of these criminal offences, for 1.800 of them has been predicted this type of monitoring! Investment of approximately 11 million dollars (monitoring bracelets functioning over satellite with a purpose of detection and surveillance information and communication equipment) has enabled surveillance all day long, so the place of their presence is going to be available on Internet very soon (!) – every day, actually for the whole of their life’s (see *Vjesnik*, 6 May 2005).

<sup>31</sup> Very complicated and developed systems can be found for example in London, Madrid, Stockholm, Vienna, Moscow etc.

<sup>32</sup> For example in Osijek, Pula, Varaždin, Zadar, soon in Zagreb etc.

<sup>33</sup> So called Middlesbrough *Project* (2007.) is one of the first projects of this kind in the Great Britain. On certain place of the town, next to the cameras have been installed loudspeakers used by administrators in order to refer to the citizens, whose behaviours are unacceptable, alluding to stop such activities immediately or simply warning them about the fact that their behaviour has been recorded. Interesting is that after the project has been concluded, citizens which were polled have supported this program. Generally the Great Britain has been considered as “the most spied community” in Europe. Average citizen has been daily recorded at least 300 times, while in the state has been installed more than 4,2 million cameras in 2007 (one on every 12 citizens). It is considered that the quarter of all surveillance cameras in the world have been installed in the Great Britain. (see *Jutarnji list*, 6 April 2007, *Večernji list* 9 March 2009).

strategic goals have been specified: reduction of material damage resulted from punishable conduct, deterrent of potential perpetrators from punishable conduct, more efficient arrangement of police and security resources, general increase of safety level (especially as economic and touristic factor), faster and more efficient assistance of public and communal services to the citizens etc.<sup>34</sup> Basically these systems enable connection of several cameras to the one computer, constant or alarmed recording with application of digital compression. The volume of filed information is reduced through the use of so called „external movement’s detector“. Serviceability of filing, classification and searching of the material makes possible easier identification of perpetrators of different punishable conduct, as well as appropriate evidences on the court.<sup>35</sup> There has been a lot of talk about unavoidable “Orwellization” or “BigBrotherization” of the society in the 21st century, in order to ensure one fundamental and unquestionable human right – right to safety. It is to be pointed out that „without safety there is no prosperity“<sup>36</sup>. However, it is necessary to point out that it is the matter of “risk society”, which repeatedly has to determine the level of acceptable risk.<sup>37</sup> According to the correct observation of one author, „globalization of risks present just a consequence or darker side of the world integration which is very hard to handle, especially today while coping the pendulum which oscillates between democratic and authoritarian solutions,<sup>38</sup> as on the beginning of the 20 century.<sup>39</sup> Therefore becomes completely clear which legal, criminal-law and political implications brings the introduction of information and communication technologies (ICT), respectively which information and technological factors can be attributed to the modern concept of monitoring in contemporary criminal policy systems. The opening of new options of general and special prevention of punishable conducts of different kinds and severity and increasing generally the level of safety in narrower and larger

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<sup>34</sup> See for example MRŠIĆ, B.: “Prijedlog projekta video-nadzora otvorenih prostora Grada Zadra” (author’s translation: The proposition of the project of the video monitoring of opened areas in Zadar) Ministry of Interior (MUP) of the Republic of Croatia – Police Department Zadar (PU Zadarska), Zadar, April 2006 (the concept presented in the framework of postgraduation study „Kriminalistička istraživanja“ of the Faculty of Law, University of Rijeka, 2007.

<sup>35</sup> For example, in Moscow the company *ISS – Principal System Video* has installed over 90.000 video cameras in residential quarters till 2006. The project of centralized digital video surveillance known as “Safe City” encompasses the system of continuous whole-day collection, transmission of data, together with intelligent analyses and recording of video data from great number of monitoring points, with simultaneous display of the situation in present and in past. According to the available data, the number of larcenies, especially burglaries into the housing, has been reduced for 12%, while the number of robberies in monitored quarters has been reduced for 15%. In general, violent behaviour and “vandalism” (resulting in damage or destruction of property) have been reduced for even 30%. ([http://www.sistemvideo.hr/info\\_moskva.shtm](http://www.sistemvideo.hr/info_moskva.shtm), 14 April 2006).

<sup>36</sup> Bandić, Milan (the Mayor of the Town of Zagreb on actual session of City Assembly has announced the building of five new police stations in Zagreb („even in the case of necessary giving up of building of several roads“) and introduction of monitoring cameras („which will contribute in solving certain problems: improper parking with a problem of urban guerrilla destroying the walls with graphite, while the safety aspect will bring the connecting of cameras with Community Policing (PUZ) and Ministry of Interior (MUP)“). (*Večernji list*, 30 October 2008). On the beginning of the year has been announced the setting up of 800 surveillance cameras (T-portal, [www.t-portal.hr](http://www.t-portal.hr) 23 February 2009), while 250 of them will be set up within the time of two months (*Vjesnik*, 24 February 2009).

<sup>37</sup> In the way described by the ŠEPAROVIĆ in his most famous books of 80tees: *Granice rizika – etičkopravni pristupi medicini* (“Borders of The risks – etical and iuristic approaches to medicine”, Faculty of Law, Čakovec 1985. and *Pojave i odgovornosti – članci i eseji* (author’s translation: „, Figures and responsibilities – Articles and Essays“) Faculty of Law in Zagreb, Samobor 1986 etc.

<sup>38</sup> The complex nature of this problem has been elaborated through the words of recent statement of Russian President Medvedev to the Spanish media, by claiming that in Russia „have not been respected some of fundamental rights“ using the examples of „protection of the citizens from the criminal“, but the „protection of privacy“ as well. This is classic conflict between two important principles – social and legal state (see *Vjesnik*, 2 March 2009).

<sup>39</sup> MILARDOVIĆ, A., Centar za politološka istraživanja, Zagreb (*Vjesnik*, 30 October 2008).

community, these technologies without relevant (in foreground legal) instruments of prevention of their misuse can become serious threat to democratic society. On other two levels: on the level of criminal law in a narrower terms and on the level of sanction enforcement, the situation appears to be initially favourable, having in mind existing legal framework and certain positive experiences two decades ago, since when has started more massive application of electronic monitoring in criminal law systems of many states<sup>40</sup>.

### 3. ELECTRONIC MONITORING IN MODERN CRIMINAL LAW SYSTEMS

Electronic Monitoring (in further text: EM) means application of information and communication technologies in the system of material and procedural criminal law (legislation), as well as in the system of enforcement of criminal sanctions. The main reasons of its introduction in the system have been characterized by the nature of criminal policy, particularly meaning penal institutions being regularly overbooked (prisons and penitentiaries)<sup>41</sup>, inefficiency and high costs of traditional systems of enforcement of custody sanctions, mainly those with shorter length (to the six months), as well as doubtful efficiency.<sup>42</sup> First experiments with technologies of electronic monitoring can be found in the late 60ties. They were based on radio telemetric devices offering the possibilities of monitoring of the object (actually person) within 400m, and they were invented on the University of Harvard.<sup>43</sup> Nevertheless just 80ties have brought the development of the first systems of controlled monitoring, finding their place very soon in criminal law system. This technological and legal complex, known since then as „tagging“, has become the foundation of „community-based sanction (or sentences)“, which means sanctions with the main purpose of their enforcement in freedom, as community sanctions. This does not mean that the all (criminal-law) possibilities of the use of sophisticated ethnological achievements have been exhausted. Through the time, they have encompassed three main areas of electronic monitoring use within the system of criminal law: a. detention, b. limitation and c. surveillance or tracking (*tagging /tracking/* or surveillance in narrower terms). Certain contents on European area have been firstly introduced in the Great Britain, in formal variants

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<sup>40</sup> The application of electronic monitoring in the criminal law system can be found in the 80tees, firstly in Israel, than in Great Britain, USA, Canada and Australia.

<sup>41</sup> According to available data (SWIVEL – JENKIN: *World Prison Occupancy Rates by Country*, 14 July 2008) for 182 world states, more than 100 of them have overbooked prisons, some of them in the percentage of 300% or even more (for example Bangladesh 315.6%, Zambia 330%, Grenada 374.5%). Overbooked capacities of penal institutions are 107% in USA, 106% in Sweden, 118% in France, 140% in Spain etc. The Croatia has the percentage of 130,6%, which places it on the first place among the states of ex Yugoslavia. See <http://www.swivel.com/> (16 March 2009). The USA has the 5% of world population, but 25% of world prison population! With 2,3 million of prisoners, it is 751 persons on 100.000 of residents. The Russia has 627, England 151, Germany 88 – Croatia something more than 100 (LIPTAK, A., “U.S: prison population dwarfs that of other nations”, *International Herald Tribune*, 23 April 2008 (v. <http://www.iht.com/articles/2008/04/23/america>). According to some sources (AIZENMAN, N.C., “New High In U.S. Prison Numbers – Growth Attributed To More Stringent Sentencing Laws”, *Washington Post*, 29 February 2008 – [www.washingtonpost.com/wp-dyn/content/article/2008/02/29](http://www.washingtonpost.com/wp-dyn/content/article/2008/02/29) ) the number of prisoners has reached incredible number of 1000 on 100.000 residents in the USA!

<sup>42</sup> Within the meaning of all this it is necessary to mention illustrative report of the Directorate for Prison System of the Ministry of Justice from December, 2008 adopted on the session on 13 February 2009 (available on the official pages of Croatian Parliament: <http://www.sabor.hr/Default.aspx?sec=2830>).

<sup>43</sup> Within the *Science Committee on Psychological Experimentation*, under the leadership of Dr. Ralph Schwitzgebel, 1968 (see BLACK, M., RUSSELL, G. S. (2003), *Electornic Monitoring in the Criminal Justice System*, Australian Institute of Criminology).

of *Curfew orders (CO)* (1995) and *Home Detention Curfew (HDC)* (1999)<sup>44</sup>. Detention has been most common in the context of realization of wide spreaded alternative scheme of so called home-detention, one of the main characteristics of the model of Anglo-American system of probation. This does not necessarily mean that detention system could not be used with a purpose of realization of its more rigid forms, respectively various traditional models of penal servitude in prisons and penitentiaries. Limitation presents the form of surveillance in the system of enforcement of so called special obligations with suspended sentence (actually suspended sentence with surveillance) and sanctions which correspond to the security measures. Surveillance or tagging means the continuous and uninterrupted monitoring over the person, with complete or partial restrictions of his or her moving. It is not so well known that certain technologies of electronic monitoring enable transfer of special information on the state of monitored person (for example, whether or not a person is under the influence of alcohol or drugs as well as enable such monitoring simultaneously over more persons, who are connected in certain way with primary subject in greater area).<sup>45</sup> Technologies and techniques of electronic monitoring encompass various alternatives based on electromagnetic or optic systems of the information transmission, which means from radio technology to the technology of satellite global positioning. Anyway, in the focus of electronic monitoring is electronic monitoring device or so called correctional device. There exist active and passive systems, as well as systems of continuous positioning (the combination of various types is possible); there exist also unilateral, collateral, multilateral as well as situation analyses system, position analyses system; continued, discontinued, ad hoc systems; homogeneous and heterogeneous etc. depending on strategic or tactical criteria for such division. Complex technologies of monitoring enable reversible and active control of object, actually subject of monitoring. There exist also technologies of surveillance without using devices, as global surveillance which implicitly include different sublimed methods and methods of incalculatation, but which do not come in the criminal policy foreground – at least not in this moment. In criminal law system in a larger sense the electronic monitoring is applied, or can be applied in pre-trial stadium or trial stadium, which means the stadium of the criminal procedure before the judgement is given (separately, concerning the measures of providing the presence of suspect or defendant in investigation or in the trial), in primary sentencing stadium where electronic monitoring has been included or follow the criminal sanction, whether primary or secondary sanction, parapenal or alternative, non-custodial or security measures, and finally in prison<sup>46</sup> and post-prison or parole stadium which corresponds to the conditional release (parole) through its content. In criminal-law system in narrower terms the electronic monitoring is applied or can be applied as “transition form” from custody sanction to the “community sanction”, with a main purpose of elimination of social deprivation of convicts. The surveillance is to that extent “institutionalized sanction”. First projects of electronic monitoring in criminal law systems have begun in 80tees and 90tees of the last century, although first projects of its scientific evaluation have appeared later, with the beginning of this century. Despite the fact that „research did not keep pace with quick

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<sup>44</sup> ARDLEY, J.: “The Theory, Development and Application of Electronic Monitoring in Britain”, [www.internetjournalofcriminology.com](http://www.internetjournalofcriminology.com) (2005).

<sup>45</sup> V. LCA (*Leader in Community Alternatives, Inc.*) – *Private Criminal Justice/Social Service Agency*, San Francisco, Cal., USA – specialized Agency for electronic monitoring (*RF, Cellular, GPS, Group and Area Monitoring*) provides continuous 24 hour information on whether or not monitored person drinks alcohol (*Continuously Monitor Sobriety*) over SCRAM Transdermal Alcohol Monitoring Device (*Secure Continuous Remote Alcohol Monitor*), what is very similar also to the detection of the drugs. (<http://www.lcaservices.com/>, 18 March 2009).

<sup>46</sup> See SEYMOUR, S, BAKER, R., BESCO, M.: “Inmate Tracking With Biometric and Smart Card Technology”, *Corrections Today*, American Correctional Association, July 2001, ([http://www.ncjrs.gov/pdffiles1/nij/biometrics\\_smartcard.pdf](http://www.ncjrs.gov/pdffiles1/nij/biometrics_smartcard.pdf) , 20 March 2009).

implementation of this new and very promising penal strategy<sup>47</sup>, almost without exception first reports witnessed positive evaluation of the impacts of electronic monitoring. One German evaluation (2005)<sup>48</sup> based on the research implemented in the province of Hessen (2002-2004), has pointed out positive character of the application of electronic monitoring in the system of suspended sentence, or suspended sentence with surveillance, as well as in the system of conditional release. Then again, very good results in the reduction of prison population have been pointed out. In similar English report (2006)<sup>49</sup> have been stressed good results in application of the strategy of electronic monitoring in *Home Detention Curfew* system, next to extraordinary economic results (*cost-benefit impacts*), together with lists of recommendations for future application. The Swedish report (2007)<sup>50</sup>, although criticizing the restricted possibilities for wider use of EM strategy (considering the variables perpetrator-criminal act-punishment-victim), has pointed out that the best results as far as substitution of prison has been concerned, have been achieved in the cases of perpetrators sentenced with a punishment with duration between three and six months. Very good results have been achieved with the use of 'EM Release' or 'Parole'-strategy, in the system of conditional release. Particular attention has been devoted to the polling and interviewing of the victims of criminal acts (injured persons) in terms of their valorisation or strategy. Generally the strategy has been evaluated positively, although (having in mind mentioned variables), in certain cases the victims have expressed the uncertainty connected with the fact that they were previously informed on "including of perpetrator into the EM regime". This concerns particularly the case of perpetrators of criminal acts with the elements of violence, as well as criminal acts against people's health and freedoms. Many other studies, especially from USA<sup>51</sup>, Canada<sup>52</sup>, Australia<sup>53</sup> and Israel<sup>54</sup> have confirmed more or less the same. It is clear that electronic monitoring has its future in material (as well as in procedural *'Bail'- or Home Detention* system) criminal legislation<sup>55</sup>.

#### 4. INSTEAD OF CONCLUSION

This text offers general overview on the phenomena of monitoring in human society overall, its criminal policy and criminal law, specially having in mind respectable literature on this subject. The text aims on provoking some thoughts on possible negative consequences of modern technological and information (ICT) revolution and globalization. However the

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<sup>47</sup> See BALES, W., *Centre for Criminology and Public Research*, Tallahassee, Florida (SAD), <http://www.criminologycenter.fsu.edu/p/electronic-monitoring.php>, 10 March 2009.

<sup>48</sup> MAYER, M.: *Evaluation of a Pilot Project on Electronic Monitoring*, Max Planck Institute for Foreign and International Criminal Law, Freiburg 2004. (v. [www.mpg.de/forsch/krim/mayer\\_en.htm](http://www.mpg.de/forsch/krim/mayer_en.htm) - 23 November 2005).

<sup>49</sup> House of Commons – Committee of Public Accounts: *The electronic monitoring of adult offenders*, Sixty-second Report of Session 2005-06, London 2006.

<sup>50</sup> Extended use of electronic tagging in Sweden (The offenders' and victims' view), Report 2007:3 (An abridged version of the Swedish report 2007:1), The Swedish National Council for Crime Prevention, Stockholm 2007, [www.bra.se](http://www.bra.se).

<sup>51</sup> See PADGETT, K.G., BALES, W.D., BLOMBERG, T.G.: "Under Surveillance: An Empirical Test of the Effectiveness and Consequences of Electronic Monitoring" *Criminology & Public Police*, 5/2006 (1):61-92.

<sup>52</sup> See *Reporter* (John Howard Society of Alberta), vol. 18, 1, May 2001, Electronic Monitoring, [www.johnhoward.ab.ca](http://www.johnhoward.ab.ca); Electronics Monitoring, John Howard Society of Alberta 2000, <http://www.johnhoward.ab.ca/PUB/A3.htm> (2008/04/05).

<sup>53</sup> See BLACK, M., RUSSELL, G.S.: "Electronic Monitoring in the Criminal Jusitec System", *Australian Institute of Criminology Trends & Issues*, No. 254(2003), 6.

<sup>54</sup> See <http://www.mops.gov.il/BPEng/OnTheAgenda/ElectronicMonitor/>.

<sup>55</sup> See BARRY, K., "Electronic Monitoring: The Future of Crime Control?" (March 2009), see <http://www.scribd.com/doc/13198103/Electronic-Monitoring>, 15 March, 2009.

question is till what extent is one generation enabled to „manage its own time“, without repeating the historical mistakes of former generations. In criminal law these mistakes were traumatic and expensive. Maybe today the danger of the appearance of “police state“ is greater than ever, although so much effort has been invested into the protection of fundamental human rights and freedoms.<sup>56</sup> Insofar, many experts (not only advocates of conspiracy theories) in globalism and corporative refeudalisation of the world see the danger of establishment of new model of controlled society, which could be incomparable in negative sense with past familiar forms already seen before.<sup>57</sup> It was very common that big and generally acceptable ideas are accompanied with serious misuse, specially having in mind numerous examples from the history of criminal policy history as well as history of criminal law<sup>58</sup>. It has to be noted that „wrong perception of globalism“ can result with the worst model of colectivism in the future.<sup>59</sup> The whole thing becomes even more serious if the trend of strengthening of criminal-law repression (over last 10 and more years) has been taken into consideration. Insofar the criminal policy function of surveillance in a larger sense, especially in its segment of administrative law, will probably open the set of very complex questions, having in mind the fact that strict criminal-law aspects imply on at least declarative realization of satisfying legal protection of human rights and fundamental freedoms. The citizens do not mind cameras most of the time<sup>60</sup>, but it is necessary to pay attention that safety and right to safety is not and cannot permit interpretations (in social and legal sense) in Machiavellian manner. If nothing else „no one wants the world of global surveillance, managers-punishers and society of numerated people“.<sup>61</sup> However, it is evident that the monitoring element will prevail over the most significant functions of criminal policy, whether in preoffense or postoffense sense. It is not questionable that electronic monitoring (EM) has the perspective in prevention<sup>62</sup> and sanctioning of punishable conduct (even the most serious ones with high-

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<sup>56</sup> Indeed, never before the protection of constitutional rights, rule of law, legal state and generally the development of various forms of democracy have enjoyed such relevance. Nevertheless there exists significant discrepancy between application of information and technological arrangements with a purpose of promotion of democratic instruments in the society, and their application in the context elaborated in this paper. For example, as noticed by famous American writer Charles Bukowski that the democracy cannot be resumed only to the pure democracy of parliamentarism, or to elections arranged every four years for the choice between cold and warm...“, especially if having in mind existence of information and technological conditions which enable relevant step forward for the participation in decisions making.

<sup>57</sup> Therefore the question: „Fašizam pred vratima?“ (author’s translation: Fascism on front doors?“) – See, for example BAKOVIĆ, S.: „Bako, bako zašto imaš tako velike oči?“ (author’s translation: “Granny, granny why do you have so big eyes?“), *PC-chip*, December 2008.

<sup>58</sup> Unhidden, but justified optimism was imminent during the introduction of new sanctions like non-custodial measures and security measures into the system of criminal law sciences and legislation 100 years ago. Nevertheless, only few decades after, has been detected serious misuse damaging the protection of human rights and fundamental freedoms within the area of their application. All this has lasted until the late 50tees of the last century.

<sup>59</sup> This specially concerns the overcoming of all former historical systems and totalitarianistic experiences (Fascism, Communism etc.) in negative sense. One of the most significant symptoms of this process, which is very often in modern criminal policy, is populism.

<sup>60</sup> See Jutamji list, 13 February 2009 – „Zagreb: Život u centru od sada na filmu“ (author’s translation: Zagreb: Living in the center on the film from now on“). One citizen claims that honest people would not mind cameras, considering they can only be helpful to them, while the problem lays in the fact that police is not capable to use all the possibilities of surveillance. According to this citizen more serious crime has been dealt in a slow manner, while the records contain the victims more often than perpetrators of criminal offences.

<sup>61</sup> See SPECKBACHER, F.: *Menschen werden nummeriert – Kommt der Antichrist?*, Mediatrix Verlag, Andrä-Wörtern 1985., 66 pages (ISBN: 3854060629). The warning, which is old almost the quarter of the century, becomes very actual today.

<sup>62</sup> In spite certain sceptical statements, like the one given by the director of video surveillance in the Scotland Yard, claiming that „surveillance cameras have not contributed to the reduction of the criminal activity in Britain“ (Mike Neville: „A billion of pounds have been invested into the system having more than four millions

risk criminals<sup>63</sup>) in a larger sense,<sup>64</sup> not at any price of withdraw or limiting of fundamental components of political and generally civilization concept of human freedom. It is expectable that near future brings more or less certain substitution of punishment, so within this meaning monitoring finds its place as modality of repression substitute. According to before said, monitoring will not be only one of the components of punishment, but its substitute (first of all in the form of “alternative” sanction in the community), encompassing all traditional functions of punishment. Within the meaning of before said, the surveillance power will determine criminal policy of this century. This has to be taken into consideration while creating the new Croatian criminal law system.

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of surveillance cameras installed all over the Great Britain, although the project has failed completely /results have appeared as a „total fiasco“/. For example, in London only 3% of robbery cases have been solved by using cameras“). Actually he points out some specific issues linked to the monitoring enforcement, stating particularly that „police does not dispose with sufficient number of qualified persons, who are capable to operate with so many data collected by cameras“(see *Jutarnji list*, 8 May 2005 – „Nadzorne kamere u Britaniji nisu smanjile kriminal“(author’s translation: „Surveillance cameras have not reduced the criminal activity in Britain“).

<sup>63</sup> See RENZEMA, M., MAYO-WILSON, E.: “Can electronic monitoring reduce crime for moderate to high-risk offenders?” *Journal of Experimental Criminology*, 1/2005, str. 215-237.

<sup>64</sup> See BARRY, K.: “Electronic Monitoring - The Future of Crime Control?” (March 2009), <http://www.scribd.com/doc/13198103/Electronic-Monitoring>.

## Sažetak

### MOĆ NADZORA – IMPLIKACIJE TEHNOLOŠKOG I INFORMATIČKOG ISKORAKA U 21. STOLJEĆU NA POLITIKU SUZBIJANJA KAŽNJIVIH PONAŠANJA I KAZNENO PRAVO

*Stoljeće koje je započelo označava ujedno i rađanje novog svjetskog poretka. Taj „novus ordo seclorum“ ili „novus ordo mundi“ karakteriziran je fantastičnim tehnologijsko-informacijskim iskorakom s ozbiljnim konsekvencama na svim područjima ljudskog djelovanja. Utoliko i moderno kazneno pravo, postupno, ali kontinuirano, doživljava transformaciju od klasičnog represivnog instrumenta discipliniranja ka novom (preventivnom) konceptu nenametljivog no sveprisutnog, globalnog nadzora, pri čemu će u budućnosti klasičnu državnu moć postupno ali zasigurno zamijeniti globalna korporativna moć. Drugim riječima, discipliniranje prestaje biti (ekskluzivno) stvar kaznenoga prava, kao što će i sama kazna, jednoga dana, izgubiti primat glavne kaznenopravne sankcije. Takva transformacija promovirati će novu, drugačiju politiku suzbijanja kažnjivih ponašanja, temeljenu na nadzoru i informaciji kao njegovu supstratu, dakako ne bez izvjesnih rizika kad se radi o zaštiti afirmiranih temeljnih sloboda i prava čovjeka.*

**Ključne riječi:** *nadzor, politika suzbijanja kažnjivih ponašanja, kazneno pravo.*