

Pre-trial electronic monitoring in Portugal

Nuno Caiado explores 24-hour confinement

The introduction of electronic monitoring (EM) in Portugal was a response to particular penal problems in the 1990s. Like many other European countries, we struggled with the growth of our prison population. Incarceration rates reached almost 150 prisoners per 100,000 inhabitants, and the overcrowding reached 20 per cent; almost 50 per cent of the prison population were in 'preventive detention' (our term for 'pre-trial detention'). In addition, the length of time in such detention was increasing, with some cases lasting for three years or more. This was a serious problem for our judicial system, and indeed for democratic conceptions of liberty.

In the later part of the decade, the government proposed reforms to relieve pressure on the prison system, which included the use of EM (piloted between 2002 and 2004). This measure aimed to ensure appropriate control over the existing bail curfews, which – based as they were on defendant's mere obligation to comply – were permitted by law but mostly considered unverifiable and unenforceable. It was hoped EM would make home confinement a viable alternative to preventive detention in significant numbers of cases. Anticipating unfavourable reactions to this innovation by the courts, the EM programme was specifically designed to enlist the judicial community's full support, placing emphasis on two key ideas, 'security' and 'flexibility'.

Security and flexibility

'Security' meant ensuring that EM technology, and its associated procedures and protocols, provided a sufficiently credible measure to convince judges that they could safely allow defendants to leave overcrowded prisons (or avoid

entering them). It was deemed to require periods of confinement lasting for a full 24 hour day, an equivalent to the time they might spend in prison regime but with the singular advantage of being in their own environment.

'Flexibility' entailed making it possible for courts to allow defendants to leave the house on appropriate and necessary occasions. A specialist EM unit in the Portuguese Probation Service (then a separate entity, now merged with its prison service) was given the responsibility of monitoring the programme and maintaining social contact with defendants to help them comply with home confinement. This approach satisfied all Portuguese stakeholders in EM, especially the judges.

We knew the majority opinion in Europe believes that EM should not be imposed for 24 hours per day, and prefers shorter, more partial periods of daily confinement, for example overnight curfew regimes. No-one in Portugal, however, would have considered partial home confinement during the pre-trial period as an adequate equivalent of preventive detention in prison. Partial confinement went against the security and control we were aiming to create: we needed something that the courts could believe and trust in as a means of preventing defendants (as far as possible) from absconding, intimidating witnesses or re-offending. Our approach was the only way of convincing courts that there is a viable, 'intermediate', option, between the unrestricted freedom of conventional bail and prison.

Pre-trial defendants are, of course, technically innocent, which does warrant special caution and moderation in the interventions to which they can be subjected. It is

equally true that they are invariably accused of crimes (mostly crimes against property and drug trafficking) that carry a sentence of five or more years in prison, one of the criteria for preventive detention in the first place – and now for using EM. The legal parameters are the same in both cases, which leaves the judge with a choice of equivalents.

Authorised absences

Our programme is not a 'lockdown model'. Social work support is offered to defendants and 'authorised absences' from home are allowed. Obviously, because the defendants are unconvicted, the social work cannot be focused on rehabilitation. Contact with offenders is framed by the following protocol: one phone call 24 hours after the beginning of EM, one home visit within three working days, and at least one phone call and one home visit per month. In addition, defendants have a free toll telephone line to discuss problems (including family issues), to ask for advice or to seek authorised absences. Other contacts occur between defendants and EM services around issues such as courts appearances and police contacts. We also try to establish links between defendants and educational and welfare services operating in the area, and participation in these can be arranged.

Only a minority of defendants are in fact permanently confined during periods of pre-trial EM and absence from home can be granted in three situations:

- To enable work, study, or the receipt of prolonged health care can be judicially authorised
- To attend the police and courts, to meet health service appointments or other issues
- Medical emergencies

We recognise that defendants need and benefit from these periods of what we call 'decompression'. Inevitably, some abuse this, attempting to do more while absent from home than was officially agreed (e.g. meeting friends and associates). We have learned to anticipate and forestall devious requests for

absence, and sometimes we monitor their outings. Also inevitably, further crimes are committed while on pre-trial EM, as with any community based-measure, but to date none have seriously antagonised public opinion, or jeopardised the programme in the eyes of the courts.

Reaction to the programme

So far, after initial reservations, the practice of the EM services has been very well accepted by Portuguese judges and prosecutors, defendants and their families, public opinion and university researchers. A probation request to the courts for some indication of satisfaction in 2011 revealed a 'positive' evaluation in 50 per cent cases ('very positive' in 46 per cent), figures which were sustained the following year. Defence lawyers have unsurprisingly been vigorous supporters, seeing EM as a very useful way of sparing their clients prison at the pre-trial stage.

For defendants and their families, knowing that the alternative would be imprisonment, their response remains largely positive. Testimonies on the advantages of spending time on EM have been shared on television and newspapers, and these have probably helped to win moderate support for the programme among the public, which is generally severe in its attitudes towards crime. Some tabloids newspapers offer dissenting voices in particular cases but these have not jeopardised the general credibility of the programme, nor undermined its public acceptance.

Legitimacy

The Probation Service currently deals with an average of 500 EM cases on a daily basis, equivalent to 15 to 20 per cent of preventive detention cases. By June 2013 we had cumulatively managed more than 5,000 cases, and closed more than 4,500, with a success rate of 95 per cent in 2012. No Portuguese voices have claimed that our use of EM is authoritarian, or raised ethical issues regarding the periods of confinement or procedures.

We believe this perception of our programme's legitimacy results from a combination of the following factors:

- The use of EM is framed by the humanistic culture of probation; an obviously better solution for defendants compared to being in prison.
- EM operates within transparent, mandatory, exhaustive national protocols with clear legal specification of the circumstances in which it can be used.
- An EM order's duration is not excessive: about 75% of cases are dealt with in less than a year, with an average period of time spent on EM of about six months.
- Judges request information on the appropriateness of using EM from the probation services. The decision to use it is made solely by the judge, after seeking the informed consent of the defendant and cohabitants.
- Judges review the ongoing use of EM in every case every trimester.
- EM is delivered by a respected public service; the private sector supplies and operates the technology but has no responsibility for monitoring, responding to alarms, or even installing/uninstalling equipment.

GPS and domestic violence

Since 2001 Portugal has adopted GPS tracking technology to enforce the use of restraining orders in domestic violence cases. These have mostly been used at the pre-trial stage to enable courts to better manage medium or medium-high risk offenders, who would otherwise always have been remanded in custody. The technology permits the pinpointing of defendants' movements, but also, with their consent, the movements of the victim, which enables the probation service to monitor their proximity to each other, and to keep them apart. The new programme is popular with the courts. As of June 2013, the programme hosted more than 150 cases on a daily basis (more than 350 new cases, with 200 closed). The

success rate has been surprisingly high, with 96 per cent cases getting to court without incident.

Electronic monitoring creates a new middle ground in penal practice that conceptually breaks the classic dichotomy of 'prison vs. freedom'. The defendant (or offender in sentence-based measures) is neither imprisoned, in the conventional sense, nor in total freedom. He (or more rarely she) is subject to restrictions to his (or her) freedom, but not incapacitated. Crucially, this requires defendants to exercise or develop a sense of responsibility that is not really required of them in prison; on EM, at home, they have to make an active choice to comply with the regime that has been imposed on them, and to resist temptations they would not experience in prison. In prison, on preventive detention, they are all too often passive, merely an 'observed' and monitored object. Thus does not really help them become good citizens.

We do not believe in Portugal that the use of EM at the pre-trial stage for a legally permitted period of 24 hours daily confinement is misconceived. It is the only way we could have won the support of judges and actually reduced the use of preventive detention. Because it includes support from the Probation Service and permits authorised absences we believe we have implemented pre-trial EM without violating core social values, or human rights. We know this is at odds with Anglo-Saxon views of how to use EM, and we suggest a certain ethnocentrism may be in operation when our approach is described (unfairly) as a 'lockdown model'. In defence of this statement I reiterate that in almost 12 years of operation there haven't been any critical objections to this approach, and this in a once authoritarian country that prides itself on having established a strong democracy. We are sure we are using EM in the right way, for us, at this time. ■

Nuno Caiado is Director of EM, Prison and Probation Service, Portugal
Translation by Ana Stilwell
