

EM Tracking, Ethics and the Recommendation CM/Rec(2014)4 of the Committee of Ministers to member States on electronic monitoring

Dominik Lehner (with assistance of Mike Nellis)

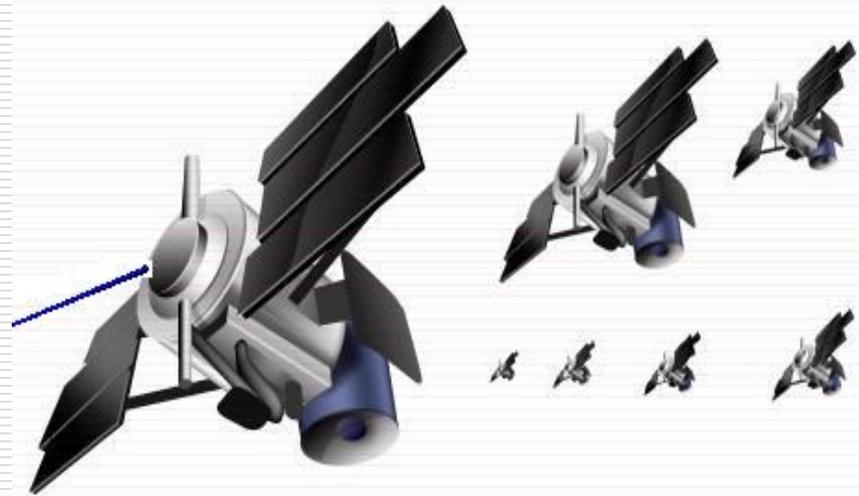
Departement of Justice and Security, Basel, Switzerland

President Risk Assessment of Dangerous Offenders Northwest and Central
Switzerland

Member of PCCP Working Group Council of Europe

Penally, EM is Not One Thing

- ❑ Radio frequency (RF) EM for curfews
 - ❑ GPS satellites for tracking and exclusion
 - ❑ Victim protection using GPS.
 - ❑ Biometric voice verification for tracking at several single locations
 - ❑ Kiosk-based reporting in probation offices
 - ❑ Alcohol Monitoring (two kinds)
 - ❑ Inmate monitoring within (open prisons]
-
- ❑ ARE THE EFFECTS THE SAME?
 - ❑ ARE THE ETHICAL AND LEGAL ISSUES THE SAME?



Penal Ethics and EM

- **Jurisprudence** – especially proportionality (intensity, duration and judicial accountability of EM regimes)
 - ❑ **Impersonal Surveillance** vs caring social work?
 - ❑ **EM is inadequate** as a high-tariff punishment.
 - ❑ The **visible stigma** of the ankle bracelet.
 - ❑ The effect on **third parties**
 - ❑ **(Un)removable straps** - health and safety issue
 - ❑ **Human rights:** privacy and freedom of movement, data protection.
 - ❑ **Council of Europe CM Rec 2014(4)**
-

EM - some observations

- EM has a **crime reduction effect** for the duration of the monitoring period (especially shorter ones), but not afterwards. No reason why it should.

 - EM is **always about control** but can serve both punitive and rehabilitative purposes depending on how judiciary or executive choose to combine it with other measures (or not), and to enforce it (flexibly?).

 - EM can be used to create **regimes of variable intensity and duration**, some more intrusive - and capable of replacing prison - than others.

 - Offenders and families can find some EM regimes legitimate and helpful - **onerous but preferable to prison**. But not always - EM can seem as bad as prison. (See James Kilgore, USA - “the voice of the monitored” website)

 - EM used in 40 countries and seems likely to expand because:
 - Penal acceptability - modest success at reduced reoffending/cost
 - Normalisation of digital technology in society. Digital connectedness for pleasure, convenience and necessity is ubiquitous - EM is “**coercive connectedness**” (court ordered).
-

GPS Tracking - what's different?

- ❑ Monitoring movement/mobility in real-time or retrospectively + exclusion and inclusion zones + data analytic tools to identify patterns and anomalies (and pre-empt crime?)
 - ❑ Works in conjunction with mobile phone system
 - ❑ Notionally higher tariff than (RF) EM curfews - but is it or need it be?
 - ❑ Requires battery charging - and penal response to failure to do so (therefore add curfew?)
 - ❑ Can be combined with geo-sensing technologies like Google StreetView
-

Council of Europe

- **The Council of Europe is the continent's leading human rights organisation.** It counts 47 member states. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and **the rule of law.**



COUNCIL
OF EUROPE

CONSEIL
DE L'EUROPE

Recommendations on EM

COUNCIL OF EUROPE
COMMITTEE OF MINISTERS

**Recommendation Rec(2014)4
of the Committee of Ministers to member states
on the Electronic Monitoring**

*(Adopted by the Committee of Ministers on 19 February 2014
at the 1192nd meeting of the Ministers' Deputies)*

“Soft Law” - not legally binding - but ECHR could use it.
Done by the (standing) Committee on Penological Affairs (PCCP)
Nine countries, 2 experts - worked over two years
Some follow-up workshops for member & accessions countries

Scope of the Recommendation

"The aim of the recommendation is to define a set of basic principles related to ethical issues and professional standards enabling national authorities to provide just, proportionate and effective use of electronic monitoring **in full respect of the rights of the persons concerned.**

- A belated European response to EM
- Background anxieties about it



Apply general penitentiary principles

- use, types, duration and modalities shall be regulated by law
 - decisions shall be made by judiciary or allow judicial review
 - no discrimination on grounds of gender, race ...
 - terms of duration and intrusiveness shall be proportional to the offence
 - no restriction of rights and freedoms to a greater extent than provided by the decision imposing it
 - Staff shall be adequately and regularly trained (prevention of abuse of authority)
 - there shall be regular government inspection
 - Cost-efficiency is not sufficient grounds for penal decision-making
-

EM-specific issues to be dealt with by law

- ❑ Ideally use as alternative to custody, not low tariff
 - ❑ Equivalence of EM days and prison days
 - ❑ promising security for victims by restricting the offender
 - ❑ use of the gathered data (data protection)
 - ❑ Limit police access to GPS data for **investigation**
 - ❑ impact on family and third parties (intrusion into household)
 - ❑ exclusion zones (size and number of)
 - ❑ possibility of EM for life (always reviewable)
 - ❑ demand for the offender's consent (does this make EM ok?)
 - ❑ retain government responsibility (limit outsourcing)
 - ❑ offender contribution to costs (not desirable)
-

Recommendation CM / Rec(2014)3 concerning dangerous offenders

- Preventive Supervision may be applied as alternative to secure preventive detention (...) supervision may consist of:
 - 24 III prohibition from leaving the place of residence...
 - 24 IV prohibition from approaching the victim or
 - 24 V prohibition from visiting certain areas or places...
 - 24 VI prohibition from residing in certain places...
 - 24 VII prohibition from performing certain activities..
 - (...)

24 X. the use of electronic devices which enable continuous monitoring (electronic monitoring) in conjunction with one or some of the measures above

Radicalisation guidelines 2015/2016

- Guidelines for prison and probation services regarding radicalisation and violent extremism
 - 39. Electronic monitoring schemes and other control measures shall be combined with other professional interventions and supportive measures aimed at the social reintegration of radicalised offenders.
-

Monitoring Terrorists

Even in the context of recent activities against radicalisation and violent extremism Electronic Monitoring is apparently being considered to be a useful tool ... in blind hope of being able to observe the future terrorist while preparing the attack.

Christian Estrosi the mayor of Nice expressed support for a plan to track suspected terrorists



Some Very Broad Concluding Observations

- ❑ The moral and political argument for **keeping prison use to a minimum** requires attention to all possible alternatives, including EM. Society could benefit.
 - ❑ All forms of EM technology could, used modestly, **create imaginative and useful forms** of offender supervision and victim protection.
 - ❑ The commercial “**EM industry**” has views of its own about the future of EM - **cost-efficiency** can never be main criteria for any penal intervention
 - ❑ **EM could be used for terrible purposes** so it is best to envelop it in humanistic values and embed it institutions which will constrain its use. Human RIGHTS might not be enough.
 - ❑ Humanism - **an ethic of care and mutuality** - is vital to penal practice, and need not (but could) be impeded by digital technology.
 - ❑ EM will not be used **wisely and well** unless other forms of community supervision are not also used wisely and well (especially probation).
 - ❑ **Avoid problematising crime and penalty** in a way that lends itself to ever increasing technological solutions. Not easy!
 - ❑ As well as thinking in terms of an ethics of law and punishment, think also in terms of **an ethic of digital technology** - how far do we want it to go in our lives? How much can - and should - it be resisted?
 - ❑ **EM is not simply a neutral tool** to be used for good or ill - the decision to use a “machine” over “man” is itself an ethical decision - **and sometimes it is right to do so.**
-