

ELECTRONIC MONITORING IN A DEVELOPING COUNTRY

The background

1. South Africa is a multi-cultural and multi-lingual country with a developing economy.
2. Having emerged fifteen years ago from a repressive and racist system as a democracy based upon and guided by one of the most progressive constitutions, it faces unique challenges.
3. Its 45 million inhabitants include between three and five million foreign nationals, many of whom have crossed the borders without proper entry documents.
4. Poverty is wide-spread. About 25 to 30 percent of the labour force is unemployed, a figure that is rising on a virtually daily basis as the international economic downturn has dramatically reduced the demand for luxury commodities like gold and diamonds, South Africa's major export goods apart from agricultural products. Tourism, the only market sector that exhibited growth in the last year, is in decline.
5. Millions of South Africa's inhabitants do not have a proper home yet, in spite of the Government's concerted efforts to alleviate the housing backlog. Squatter camps are evident on the periphery of every town and even in many metropolises.
6. The country still suffers from the after-effects of a discriminatory education system bent on ensuring that the majority of the population would receive second-class qualifications. Many school leavers are underqualified and unable to find employment.
7. The ravages of the AIDS pandemic are still prevalent because of the fact that president Mbeki always remained an AIDS denialist at heart. Huge numbers of young persons and children have lost one or both parents. Many households are headed by children. The health system and service delivery in other sectors are under huge pressure.

8. One of the worst problems is the ever-increasing problem of drug abuse and trafficking. There is hardly a school in South Africa that has not had learners falling prey to unscrupulous traffickers, who also recruit vulnerable young persons who are affected by the ravages of poverty and deprivation.

The legal system

9. Although South Africa has a very progressive Constitution, all is not well in its legal system.
10. Crime is endemic, both in its organized and multi-national form and offences perpetrated by individuals. Of particular concern is the excessively high number of sexual assaults on women and girl children.
11. Some two million offences are reported to the police every year, but it is estimated that half the crimes that are in fact committed never lead to a charge being laid, as the victims distrust the police, the prosecutors and the courts.
12. The police are widely seen as incompetent, disinterested, dispirited and corrupt. More than a fifth of all police officers are functionally illiterate. Because of the fact that South Africa has eleven official languages, English is used in most instances as *lingua franca*, with Afrikaans as the language used most often in other instances. Most police officers' home language is not English, with the result that investigations are often derailed because statements are taken down incorrectly.
13. Prosecutors are perceived to be less than competent and subject to political and other pressures, while the courts are experienced as slow, archaic and out of touch with reality. Virtually all court rolls are grossly overcrowded and trials take years to be concluded. Public confidence

in the system has shrunk from 69% at the beginning of the year to about 58% at present.

14. Only about 200 000 of the two million offences reported to the police are prosecuted, with a success rate of more than 90%.

The problem

15. In spite of the low number of successful prosecutions, South Africa's correctional institutions are overcrowded. Built to house 114 000 inmates, they average a 43% overcrowding rate, with some prisons experiencing more than 200% occupation. The excess number of detainees at the end of 2008, the latest available statistic, was 50 175. Of the total number of 164 957 incarcerated persons in the country's correctional institutions, 48 300 were awaiting trial, of whom 801 were children under the age of 18. Of these awaiting trial detainees, 10 049 were granted bail, but remained behind bars because they were too poor to pay bail that in most instances did not exceed R 1 000,00 (about E 85). Over the past few years, many awaiting trial detainees were locked up for more than a year or two without their trial ever proceeding because witnesses disappeared, cases were withdrawn by the complainants or the courts refused to grant the prosecution further postponements. One can imagine the view that a person in that position would have of the legal system after two years were wasted needlessly in detention without the detainee ever being afforded an opportunity to prove his or her innocence.
16. The SA Constitution records in Chapter 1, clause 1 thereof the foundational values upon which the country's society should be developed. The first value is expressed as follows: "*Human dignity, the achievement of equality and the advancement of human rights and freedoms.*"

17. It is clear that the conditions described are in conflict with these foundational ideals.
18. The South African authorities were less than speedy in addressing the problems, in spite of a considerable number of NGO's, individuals and lawyers pressing for change. Over the past ten years restorative justice has gradually gained support, several courts at all levels have given recognition to the need to rethink the approach to, in particular, criminal justice and family courts have been created in several centers. Of these latter, the most prominent is the Hatfield Community Court that deals on a daily basis with children in conflict with the law and other instances in which community involvement in the legal process and community sentencing are given priority. During the latter half of 2008, the Department of Justice and Constitutional Development embarked upon a large-scale revision of the entire legal system to address the grave shortcomings. Since the beginning of this year large numbers of detainees who were granted bail by the courts but were unable to pay the same have been released, but there are still far too many who should not be behind bars pending trial.

Electronic monitoring

19. One of the major remedies that are being considered is the large-scale adoption of restorative justice practices such as diversion and community service, community based sentences and the creation of opportunities for children at risk of becoming involved in criminal activities. Given the lack of suitable institutions and Government services, it is clear that the legal system will have to endeavour to involve civil society at all levels if success is to be achieved in dragging the legal institutions out of the quagmire and dealing with the thousands of street children and other youngsters that are in danger.

20. In this context the use of electronic monitoring to allow awaiting trial detainees to be discharged but monitored, assist in the supervision of diverted potential accused and allow the release of parolees (thereby reducing prison overcrowding), and of convicted accused sentenced to community service becomes very attractive indeed. EM could obviously also be used in the prevention of family violence and for the tracking of the movement of known sexual offenders.
21. South Africa has tried before, some years ago, to introduce EM, but that attempt was unsuccessful. EM has been used to a limited extent in correctional institutions, but the exciting challenge of introducing it on the levels addressed in this speech will present much bigger problems than keeping track of detainees in an enclosed environment.
22. Some of the serious questions that would have to be answered are constituted by the fact that South Africa is a huge country, many times the size of the Netherlands. There are huge distances to be overcome and suitable technology must be developed therefore.
23. The monitoring system and apparatus must be constitutionally compliant if it is not to run foul of the courts that jealously guard the foundational values of the Constitution. The monitoring device must therefore be safe and may not be of such a size or nature that would hold the person monitored up to public ridicule or embarrassment. Electronic shocks, which might pass muster if applied in the context of dealing with violent and dangerous incarcerated individuals, would hardly be acceptable in an ordinary monitoring situation. As South Africa is not rich, the device and its operation would have to be comparatively cheap.
24. Given the fact that many people live in informal settlements without addresses, often without electricity, the device must be capable of tracking persons in squatter camps and locate them in tin shacks, where they may live.

25. In the multi-lingual and multi-cultural society in which it must operate, any apparatus has to be easy to apply and easy to keep track of, without presenting unfair challenges to operators who may not be well conversant with English.
26. In addition, the device must gain the confidence of the courts. Electronic monitoring is not specifically dealt with in legislation at this stage, (the physical restraint of arrestees, detainees and accused is authorized if the safety of third parties or the uninterrupted progress of a trial demand such action), but a specific statutory authorization of its use may be at least desirable, if not essential. It must be assumed that the Legislature would wish to set minimum standards for devices of this nature, while courts, that are notoriously conservative, would have to be introduced to its use together with a wide range of community based measures such as those debated above. It is likely that the introduction of these measures as standard criminal procedure may stimulate the legislature to determine the type of offence, the nature of the individual and the community based remedy that might be enhanced by the authorized use of electronic monitoring. Some might wish to argue that the courts should find the way in a trial and error fashion, but as the problems the justice system experiences at the moment are pressing and urgent, it may be both necessary and advantageous if the authorities adopt restorative justice as a new and desirable feature of the formal legal structures. If so, the application thereof could in all probability not be carried out effectively if some form of monitoring and supervision were not introduced by statute. In this process, questions such as the need to obtain the consent of the person to be monitored to carry the device will also have to be considered.
27. In this connection, the authorities will be aware of the need to take cognizance of the views of victims of crime, who might wish to see the alleged offender behind bars both while awaiting trial and thereafter.

Acceptance of the EM practice may be hampered by the same challenges that restorative justice faces in a society beset by crime – there is a great deal of resistance to any option on the justice process that is seen as “soft”. But if the absence of such measure will cause the system to eventually choke itself to death, every role player must be involved in persuading society to accept and participate in restorative justice measures.

28. Victims might in any event benefit from the monitoring of offenders who are not to come into contact with them.
29. If the large-scale introduction of restorative justice were to come about – and it must, as the climate in which the law has to operate at present will not improve by itself – electronic monitoring should form part thereof, always providing that such control must be applied in a fashion that does not do violence to the dignity and health of those affected thereby and does not require too much expenditure on the part of the authorities.
30. It will open an exciting new chapter in the practice of the law in South Africa if this road is taken – and all of us who are involved in it will be able to participate in real improvement of conditions that are not fit for beings that should be bearers of human dignity.