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ELECTRONIC MONITORING IN PUBLIC CRIMINAL MANAGEMENT

Carlos Henrique Brites Rodrigues

carloshenriquebrites@gmail.com

Graduated in Law

Postgraduate in Public Management and Human Resources

Deise Dugatto

deise_dugatto@yahoo.com.br

Graduated in Pedagogy

Postgraduate in Public Security Management

SUMMARY

This article aims to address the legal aspects of electronic monitoring of individuals as a form of public management in the penal area, defining and detailing its operation and the advantages and disadvantages of using this electronic mechanism, which serves to locate individuals in real time through a monitoring center, assisting the State in monitoring compliance with court orders and, at the same time, “relieving pressure” on prisons; a measure that has been widely adopted and discussed recently. This is the focus of this article, which aims to contextualize the issue of electronic monitoring of individuals in the country, in all its pragmatic aspects. To this end, it is necessary to briefly explain the public penal management and the national prison system. Brazil has one of the largest prison populations in the world and due to the lack of investment, the Brazilian penitentiary system is bankrupt. Public servants in the system, such as police officers and prison guards, suffer from the lack of infrastructure. Given this serious situation, there has recently been an increase in court decisions that determine that an individual's sentence be served through electronic monitoring, rather than incarceration, which makes this indirect surveillance system a reality. Only time will tell whether it will bring more benefits than harm to criminal treatment.

KEYWORDS: Public management. Electronic monitoring. Ankle bracelet. Penal system.

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1. INTRODUCTION

Public management refers to the functions of public management in government affairs. It is an administrative activity linked to law and policy, which is carried out under a public mandate for those who perform it, aiming to improve the interests of the community. The public manager has the duty to act under the legal precepts and administrative ethics, which guide his/her actions. While an individual can do anything that the law does not prohibit, in public administration it is only permitted to do what the law authorizes.

Criminal law is a branch of public law that exists for the community. It is a formalized tool for social control that keeps violence within acceptable parameters. Whenever a legal asset is put at risk, criminal law acts with all its principles. In Brazil, until a few years ago, no other form of punishment was considered other than the incarceration of an individual who committed a crime punishable by deprivation of his or her liberty.

Over the years, this accumulation of prisoners "deposited" in the country's penitentiaries, combined with the government's neglect of the prison system, has exceeded the tolerable limit for ensuring the mission of resocializing people deprived of their liberty and guaranteeing the right to human dignity of individuals inserted in the penitentiary system. In this context, public administrators are eager to find a viable alternative to solve this problem in the penal area.

Currently, due to technological advances; the influence of first world countries with their way of conducting penal management; and mainly the search for alternatives that allow the reduction of the Brazilian prison population, the electronic monitoring system for prisoners has been implemented. This system consists of the use of electronic devices installed on the ankles of individuals, enabling their tracking twenty-four hours a day. It is an alternative tool for removing the prisoner from society, because instead of being in a penitentiary, the prisoner continues to live in a social environment, with his family; often working, that is, being part of society. The electronic monitoring system can also be considered an alternative to the confinement of the prisoner in a penitentiary. The following topics will present a series of information, data and procedures for the design of a public policy for electronic monitoring of prisoners.

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people. This is the focus of this work, which will introduce issues relevant to the penal system, focusing on the electronic monitoring of prisoners and addressing its nuances, from its operation to its advantages and disadvantages, from the doctrinal point of view and professional experience of the author.

2.1 PUBLIC MANAGEMENT

Public management is understood as planning that aims at the public interest, that is, it is the form of management that is applied in public and governmental institutions. Public policy is a guideline developed in response to a public problem. It involves actions and plans that governments draw up to achieve a public purpose. Public administrators act based on principles that support all their actions, representing what is believed to be correct and legal. The fundamental principles of public administration present the central ideas of the administrative legal system. They give meaning to the legal system and will serve as a guideline for the production and interpretation of the rules that guide public administration. The principles expressed in art. 37 of the CF/88 are legality, impartiality, morality, publicity and efficiency. In public administration there can be no personal will, which is subjective, but rather the will of the law, which is objective. Therefore, the actions of public administration are regulated by law, that is, public agents can only do what the law determines or authorizes.

Regarding the principle of efficiency, JUNIOR LEITE mentions:

> "Society has major interests linked to the activities developed by the government, which, in turn, has as its basic principle to provide services that meet collective needs efficiently. In other words, public managers must take this principle into account when managing the public sector. The importance of efficiency in public management has as its aspect the social development that directly affects society as a whole, contributing to the improvement of public services provided to society. Therefore, efficiency is considered fundamental to any public or private organization." (LEITE, 2017).

In the criminal sphere, given the chaos of the Brazilian penal system, governments have adopted emergency, compensatory public policies as a form of management, with rapid implementation and immediate results. Even in the face of continuous investments by the government, the conditions of

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management of the prison system are increasingly aggravated and precarious, requiring more innovative measures and public policies aimed at operationalizing mechanisms for criminal accountability as an alternative to deprivation of liberty. An example of an action in this sense is the use of the electronic monitoring system for prisoners, as an alternative to incarceration, aiming at the immediate reduction of overcrowding in prisons, but which does not solve the problem in the long term. The huge contingent of prisoners is a worrying reality that contributes to the state of unconstitutionality experienced by the Brazilian prison system. This management model addresses theoretical and conceptual foundations and legislation that deal with electronic monitoring.

2.2 THE PUNITIVE POWER OF THE STATE

The State is the institution that organizes and governs a people in a given territory, with sovereignty. It preserves public interests and is organized politically, socially and legally. Generally, at the apex of the state system, there is the Constitution, defined as the set of regulatory norms of an institution or as the supreme law of a nation. It is an instrument used to maintain harmony and limit human conduct. In the criminal sphere, its violation constitutes a criminal act, punishable by a criminal sanction. To guide the law enforcer to impose a certain sanction respecting the humanitarian nature of the penalty, some indirect sources of Criminal Law arise, one of which is the General Principles of Law (BITENCOURT, 2009, p.42). These principles limit the punitive power of the State and are known as: principle of legality or loyal reserve; principle of broad defense and adversarial proceedings; principle of guilt; principle of non-retroactivity of criminal law; principle of minimum intervention; principle of social adequacy; principle of trifle or insignificance; principle of individualization of punishment; principle of proportionality; principle of harmfulness; principle of humanity of punishments (BITENCOURT, 2009, p 54).

The principle of legality is provided for in the Federal Constitution, in its art. 5, item XXXIX, as in the Penal Code, in its art. 1. According to it: "there is no crime without a prior law that defines it, nor punishment without prior legal imposition" (BRAZIL, 1988), that is, the law must be prior, written and clearly address the fact described as a crime and its respective criminal sanction. The principle of adversarial proceedings and full defense is contained in art. 5 of the Magna Carta, inc. LV: "the litigants, in judicial or administrative proceedings, and the accused in general are entitled to

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ensured the adversarial system and full defense, with the means and resources inherent thereto" (BRAZIL, 1988). The principle of culpability refers to the expression "nulla poena sine culpa", that is, without guilt, the penalty is null. Here, reference is made to the judgment of reprehensibility of the agent's illicit conduct. As for the non-retroactivity of the criminal law, provided for in art. 5, item XL of the Federal Constitution, the criminal law will not be retroactive, unless it is to benefit the defendant (BRAZIL, 1988), that is, a later, more severe criminal law will not affect the defendant, however, if the later law is more lenient, it will cover the perpetrator of the crime.

Cézar Bitencourt (2009) clarifies that according to the principle of minimum intervention, criminal law is not the only instrument for protecting social values, and is therefore only used as a last resort, when other means are insufficient to protect a given legal asset. According to the principle of social adequacy, conduct is not considered typical if it is socially appropriate or recognized. The principle of trifle consists of declaring conduct that minimally affects a legal asset as atypical. The individualization of punishment is contained in art. 5, item XLVI of the Constitution, which states that the punishment is proportional to the harm caused to society and takes into account the history of the agent, since each individual has a personal history, and each person should receive only the punishment that is due to him or her. The principle of proportionality seeks to balance the sanction imposed and the harm caused to the legal asset affected. In the principle of harmfulness, it is found that only conduct that harms or endangers a legal asset protected by law is punishable by the State. Finally, it is observed that in the principle of humanity, there is a mention regarding punishments, especially those involving deprivation of liberty, with the submission of individuals to cruel, inhuman and degrading punishments being prohibited.

The State is the exclusive holder of the right to punish, however, it is noted that it cannot go around punishing randomly and applying any type of penalty to anyone, as the legislator was concerned with this state punitive power. The Penal Code establishes in its art. 34 that the types of punishment are: deprivation of liberty, restriction of rights and pecuniary penalty (BRAZIL, 1984). Deprivation of liberty penalties are divided into three types: imprisonment, detention and simple imprisonment. The latter for criminal misdemeanors. Restrictive penalties of rights are alternative penalties, which avoid restricting the individual's freedom. The measures provided for in restrictive penalties of rights aim to rehabilitate the agent who committed the crime by restricting some rights. The pecuniary penalty consists of the payment of a certain amount of money to the penitentiary fund.

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The main purpose of punishment is to prevent the defendant from committing new crimes, harming other people, and also to inhibit others from committing the same crimes (BONESANA, 2014, p. 63). The power to foresee and punish crime, conferred on the State, is called *Punishment Law* or punitive power. It is a prerogative protected by positive law itself that legitimates the political action of applying punishment against those who have transgressed collective precepts considered to provide order and stable social coexistence (PEREIRA, 2014). Punishability arises for the state on two fronts, in two rights. The first is the State's right to punish in an abstract way (creation of the norm) that brings with it a state power-duty, where no one can fail to comply with what is in the norm. The second right is the right to punish in concrete terms, which is effective after failure to comply with a norm sanctioned by the State.

The Brazilian punitive system has as its fundamental hypothetical norm the dignity of the human person – a value that is above all others, which serves as the basis for the entire legal system, including the Federal Constitution. Thus, it should be used as a vector for the creation, interpretation and application of Criminal Law. This, in turn, has an intimidating, educational and repressive effect, to the extent that it represents the maximum degree of protection of assets, and therefore should be used only to defend the most relevant social values and when other means of protection are insufficient.

2.3 BRAZILIAN PENITENTIARY SYSTEM AND THE PENAL EXECUTION LAW

The law on the execution of criminal sentences, established in 1984, aims to rehabilitate convicted individuals so that when they return to society, they do not reoffend. To this end, it addresses all aspects of criminal treatment, from the rights and duties of the person deprived of liberty, such as social, educational, material, legal, health and work assistance. It also states in its article 88:

> Art. 88. The convicted person shall be housed in an individual cell that shall contain a dormitory, sanitary equipment and a washbasin. Sole paragraph. The basic requirements of the cellular unit are: a) healthiness of the environment through the concurrence of the factors of aeration, sunlight and thermal conditioning adequate for human existence; b) minimum area of 6.00m2
> (BRAZIL, 1984).

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Comparing this article from the LEP with the reality of the Brazilian prison system, it can be seen that there is a total incompatibility between the law and the reality of the prison system, since in practice there are dozens of prisoners crammed into small cells without the minimum structure to guarantee what is provided for by law. In addition to the prisoners, the affliction and anguish of their families are added, multiplying the pain imposed on them. The main prisons in the country were built with the aim of housing the largest possible number of prisoners. Even today, large prison complexes allow interaction between individuals who have committed theft and murder. In short, they reveal the miscellany between pre-trial detainees and convicted prisoners who have nothing more to do than interact with each other, exchanging experiences and cooperating (MARIATH, 2010).

The system poses a health risk to all involved, both prisoners and government employees, due to the high incidence of tuberculosis, HIV, and other diseases. Under the current conditions, there is no chance whatsoever of respecting human dignity, one of the basic principles provided for in the Federal Constitution. Practically all prisons are unsanitary and have serious structural problems. The Brazilian prison system has not evolved over the decades. It is flawed and represents a total disregard for the system by the government. Overcrowding, riots, and gang warfare are the reality for those who live in a penitentiary.

Brazil has the fourth largest prison population in the world and the recidivism rate among prisoners is around 70% (IPEA, 2015). Due to these considerations, viable alternatives to reduce prison overcrowding have been considered. Among these alternatives, one that is currently being widely discussed and used is electronic monitoring through a device attached to the prisoner's ankle, which allows him/her to be tracked twenty-four hours a day. Electronic monitoring is even provided for in the law on the execution of criminal sentences:

> Art.146-B. The judge may determine supervision by means of electronic monitoring when: II - authorizing temporary release in semi-open regime; IV - ordering house arrest. Art.146-C. The convicted person shall be instructed on the care that he/she must take with the electronic equipment and the following duties: I - receive visits from the server responsible for electronic monitoring, respond to his/her contacts and comply with his/ her instructions; II - refrain from removing, violating, modifying, damaging in any way the electronic monitoring device or allowing anyone else to do so; Sole paragraph. Proven violation of the duties provided for in this article may

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> result, at the discretion of the enforcement judge, after hearing the Public Prosecutor's Office and the defense: I - regression of the regime; II - revocation of the temporary exit authorization; VI - revocation of house arrest; VII - written warning for all cases in which the enforcement judge decides not to apply any of the measures provided for in items I to VI of this paragraph. Art. 146-D. Electronic monitoring may be revoked: I - when it becomes unnecessary or inadequate; II - if the accused or convicted person violates the duties to which he is subject during its validity or commits a serious offense (BRAZIL, 2010).

It is clear that since the enactment of Law 12,258/10, the legislator has included in the law on the execution of criminal sentences the electronic monitoring of inmates in cases of temporary release in semi-open regime and house arrest. The implementation of the electronic monitoring system aimed to provide greater security and control when the inmate leaves the prison system. Analyzing section VI of the law on the execution of criminal sentences, it is observed that article 146-C establishes the care that the convicted person must adopt with the electronic device, under penalty of suffering some sanctions such as regression of the regime; temporary release; or even revocation of house arrest, if the highlighted measures are not complied with.

2.4 ELECTRONIC MONITORING OF PRISONERS

Historically, electronic monitoring can be used to achieve the following purposes: detention (the most common form currently), where the monitored individual is restricted to a predetermined location, usually their home; restriction, so that they do not access certain places or approach certain people (often used in the Maria da Penha cases); continuous surveillance, without restriction of movement.

The electronic monitoring system for prisoners has been provided for in Brazilian legislation since 2010, as provided for in law 12,258/10, which "amends Decree-Law number 2,848, of December 7, 1940 (Penal Code), and law number 7,210, of July 11, 1984 (Penal Execution Law), to provide for the possibility of using indirect surveillance equipment by the convicted person in the cases specified" (BRASIL, 2010).

The electronic ankle bracelet has been used as an alternative to incarceration of the individual, aiming to reduce overcrowding in prisons. It serves to locate people in real time through a monitoring center, assisting the State in monitoring

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regarding compliance with court orders. Brazil has one of the largest prison populations in the world and, due to lack of investment, the penitentiary system is bankrupt. Public servants in the system, such as police officers and prison guards, suffer from the lack of infrastructure. Given this serious situation, there has recently been an increase in court decisions that determine that an individual's sentence be served under electronic monitoring, instead of incarceration. It is not uncommon for judges to order the progression of the prisoner's regime due to a lack of vacancies in the Brazilian prison system so that he or she can be included in the electronic monitoring system. This also occurs with prisoners in open and semi-open regimes, who are waiting for a vacancy in halfway houses or penal colonies. It is therefore clear that electronic monitoring has not only been used as a precautionary measure other than preventive detention, but also by people who are serving sentences, whether in open or semi-open regimes.

In general terms, electronic monitoring is nothing more than a device technological monitoring device attached full-time to the individual and connected to an information receiving center, so that its host will be monitored twenty-four hours a day. The monitored person, upon entering the system, is warned about the care that he/she must take in relation to the electronic equipment and the following duties: respect the defined geographic limits, respond to contacts from prison officers and follow their instructions; removing, violating or attempting to circumvent the electronic ankle bracelet is prohibited. This is a modern version of the custodial sentence that, today, is served in a closed space, but with technological advances and its incorporation into society, it will be served outside the prison, preserving full surveillance as if he/she were incarcerated; given the due differences.

The use of electronic ankle bracelets as an alternative measure to imprisonment generates different opinions, mainly because it is confused with a means of impunity or undue benefit. This is often the opinion of people who are unaware of the serious structural problems of the national penitentiary system. It is known that electronic monitoring is a much more economical alternative for the State than keeping the prisoner in jail, since the cost per monitored individual can be up to 70% lower than if the individual were in a penitentiary, in a closed regime (IPEA, 2015). The use of electronic ankle bracelets is an extremely effective disciplinary control mechanism, allowing the necessary rigidity of the precautionary measure imposed, as long as it is correctly applied.

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The doctrine differs regarding the use of electronic monitoring on prisoners. There are those who defend and vehemently believe in the effectiveness of the method, in addition to the benefits it brings, which include the reduction of the prison population; the savings that the system generates for the State; the 24-hour surveillance of the prisoner; the realization of the principle of humanity, since the prisoner can live with his family away from the prison environment; the possibility of the inmate developing a work activity and thus reducing the chance of recidivism; and the adaptation to life in freedom. As disadvantages of this electronic monitoring system, criminal scientists and the doctrine mention the violation of human dignity, since the ankle bracelet is attached to the individual's ankle all day long, often causing him to spend a quarter of the day near an outlet, charging the device. There is also mention of the stigmatization that the prisoner suffers from society when seen with the device on his ankle and, mainly, the dubiousness of the effectiveness of this system, since its operation consists of analyzing GPS and GPRS data transmitted through chips from mobile phone operators, which in certain places, such as rural areas for example, end up failing and having no signal.

Currently, in the context of the failure of the country's prison system, especially due to the large increase in the prison population, there has been much talk about the electronic monitoring system for prisoners, as the State has realized the calamity in which the national prison system finds itself, with total disregard for the human dignity of prisoners and prison officers. Prisons are no longer fulfilling their purpose of restricting the freedom of individuals, aiming at their reintegration into society, and are becoming veritable schools of crime, where criminal factions entice people to join, who end up becoming yet another member of this criminal group and are ultimately used as a tool to achieve their illicit goals.

Thus, the defined punitive system must be reviewed in order to adapt to a temporality that is no longer immobilized and requires urgent changes. And, in this new scenario, by incarcerating the prisoner in a time that is neither his nor that of society, a disharmony is being generated between the time of being in the penitentiary and the time of being in the world (CAVALHEIRO; OLIVEIRA; HOFFMANN, 2013). Furthermore, according to the same authors, this situation does not represent the establishment of a Democratic State of Law, much less the consolidation of Fundamental Human Rights. To this end, some possibilities present themselves, and electronic monitoring is one of them.

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3. FINAL CONSIDERATIONS

Based on the information cited and the analysis of the reality of public management of the national prison system, it can be seen that there are several criticisms regarding the Brazilian prison situation. There is even talk of the failure of the prison system, and there are many discussions about its effectiveness. It is necessary to adopt short, medium and long-term measures to improve Brazilian prison policy. Prison overcrowding is perhaps the most chronic problem afflicting the Brazilian penal system. There is a need to reduce the prison population, since the overcrowding in these establishments makes it clear that it is difficult to fulfill the purposes of the sentence. There is a lack of mitigating measures on the part of the government, since the current public penal management focuses on compensatory measures. It is a mistake to act on the consequence and not on the cause, since the problems will continue to exist. In other words, the solution to overcrowding is not the construction of new prisons, but rather public policies aimed at education and the study of alternatives to prison sentences. In light of this situation, the alternative of electronic surveillance of prisoners has emerged in the country.

Electronic monitoring of prisoners is a global reality, adopted by many developed countries, such as the United States and Portugal; and in Brazil, only in 2010 was a federal law established on the subject. The inferences presented regarding the implementation of electronic monitoring reveal the degree of importance that such a technological solution has, whether due to the stigmatization to which the individual will be subject, or due to the possibility of preventing early imprisonment and its inevitable consequences.

Every innovation brings questions and concerns, and electronic monitoring is certainly not a definitive solution to the serious problems of the national prison system. However, it is an interesting alternative to criminal execution, as long as the State does not make greater investments in the prison system. Whether the electronic monitoring system brings more advantages than disadvantages will be discovered by analyzing the experiences lived during the period of its use. However, it seems reasonable to conclude that the electronic ankle bracelet will not harm the dignity of the human person any more than the confinement of the convicted person in a penitentiary already does.

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