

UUMILC 2017
9TH UUM INTERNATIONAL LEGAL CONFERENCE

**ELECTRONIC TAGGING OF OFFENDERS AND HUMAN
RIGHTS: A CLASH OF PRIMARY INTERESTS**

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Abstract

The advancement of technology contributes towards the efficacy of the criminal justice system in dealing with crimes and enforcement of sentences. In Malaysia, the legal frameworks on electronic monitoring (tagging) is developed by way of amending the existing legislations and enacting new laws such as Prevention of Crime Act 1959 (POCA), Security Offences (Special Measures) Act 2012 (SOSMA), Prevention of Terrorism Act 2015 (POTA), Dangerous Drugs (Special Preventive Measures) (Amendment) Act 2015 (DDA) and the Criminal Procedure Code (CPC). The introduction of electronic tagging enables the authorities to devise a mechanism to control crimes. This is achievable when the movement and whereabouts of an offender is monitored through such a device. Electronic tagging refers to a device fitted on the body of an offender in the form of anklet or bracelet. Electronic tagging when fitted to a body of a person, may raise issues of fundamental liberties such as right to live, freedom of movement, liberty of person and privacy. This paper attempts to determine, whether tagging will still preserve the person's liberty under Part 11 of Federal Constitution and the Human Rights Commission of Malaysia Act 1999. The underpinning interest to be protected through tagging is to maintain security but on the other hand an offender must be accorded his fundamental rights even though at the minimum level. The writers will examine the clash and establish justifications based on human rights approach to argue that an offender should be able to enjoy a minimum level of his fundamental rights.

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Keywords: Criminal justice, electronic monitoring, tagging, liberty, human right, security.



1. Introduction

The introduction of electronic monitoring device in criminal justice systems marked a new development in our criminal justice. Electronic monitoring technology in the form of tagging fitted to a body of a suspect or an offender is one form of methods utilized in enabling the authority especially the investigative body to control and monitor his activities. In exercising electronic monitoring through a device tagged to a body may infringe fundamental rights of the person fitted with the device. This paper will focus on infringement of fundamental liberty by the State in exercising their power under various preventive laws and how to balance between the power of the state to monitor and the right of the person monitored.

1.1. Definition of Electronic Monitoring

In this type of electronic monitoring, also known as ‘tagging’, an offender wears a uniquely, coded electronic transmitter devices (in the form of an anklet or bracelet) that sends a signal to a home monitoring device located in offender’s home which links with a central computer via a telephone line. In the article written by Rondinelli (1997) electronic monitoring equipment comes in two general forms; continuously signalling (active systems) and programmed contact (passive systems). In active systems, the electronic monitoring device fitted to the body of the person in the form of an anklet or bracelet, continuously emits a signal to a receiver unit connected to his or her land-line telephone. The receiver unit sends the signal to a computer at the monitoring unit, where any interruptions with the offender’s schedule, or any attempts to tamper with the equipment, can be detected and alerted to the appropriate authorities. In its early introduction, electronic monitoring relied on radio frequency technology. Radio frequency has some limitations, therefore, a more advanced Global Positioning Satellite (GPS) technology is applied to enhance the supervision of offenders. Gopalan and Bagaric (2016), mentioned in relation to GPS, the subject is monitored 24/7 by satellites receiving transmitted information which is then triangulated to provide data on location and movement.

1.2. Legal Framework on Electronic Monitoring in Malaysia

In Malaysia, the introduction of electronic monitoring device entails two types of laws; preventive laws and ordinary law. The use of electronic monitoring device is largely dominated in the preventive laws namely the Prevention of Crime Act 1959, Security Offences (Special Measures) Act 2012, Prevention of Terrorism Act 2015 and Dangerous Drugs (Special Preventive Measures) (Amendment) Act 2015. Electronic monitoring is imposed as part of police supervision order under the various preventive laws. The public security and order is the main justification for the introduction of these laws. Meanwhile the only ordinary law which provides for the application of electronic monitoring device is the Criminal Procedure Code in which electronic monitoring is imposed, in cases whereby the accused could not afford to provide bail.

1.2.1. Prevention of Crime Act 1959 (POCA)

This Act aims to control criminals, members of secret societies and other undesirable persons, and for matters incidental thereto. This Act allows electronic monitoring under police supervision to be

imposed at preinquiry and post inquiry stage. At preinquiry, the decision to order police supervision is under the power of the court upon application by PP and the police for a maximum period of 59 days. Meanwhile the decision to attach electronic monitoring device at post inquiry for a maximum period of five years or less, lies on the decision of Prevention of Crime Board appointed by the Yang DiPertuan Agong after considering a report submitted by the Inquiry officer.

1.2.2. Prevention of Terrorism Act 2015 (POTA)

The objective of this Act is to provide for the prevention of the commission or support of terrorist acts involving listed terrorist organizations in a foreign country or any part of a foreign country, and for the control of persons engaged in such acts. The attachment of electronic monitoring device in POTA is similar to the procedures in POCA. The Board appointed by the Yang Dipertuan Agong for deliberating on this case is the Prevention of Terrorism Board.

1.2.3. Dangerous Drugs (Special Preventive Measures) (Amendment) Act 2015 (DDA)

An Act providing for the preventive measures of persons associated with any activity involving the trafficking in dangerous drugs. In DDA the detention period for remand is only for 14 days which is lesser compared to POCA and POTA (59 days). During remand, the police and the Inquiry Officer will conduct their investigation and submit a report to the Minister. The Minister upon considering the report may make a detention or restriction order (in which electronic monitoring device could be imposed) for a period not exceeding 2 years. In conclusion, the attachment of electronic monitoring device in DDA cases is only allowed after the inquiry is submitted by the Inquiry Officer (without involving Board) to the Minister as the final authority.

1.2.4. Security Offences (Special Measures) Act 2012 (SOSMA)

An Act to provide for special measures in relation to security offences with the aim to maintain public order. According to the Act, any action by a substantial body of persons both inside and outside Malaysia which threaten to cause a substantial fear or organized violence against persons or property or to excite disaffection against Yang Dipertuan Agong, the parliament, if considered necessary may stop such action. Unlike POCA, POTA and DDA, the SOSMA does not involve the appointment of Board and Inquiry Officer. The power is mainly granted to the police in investigation and the Public Prosecutor in considering whether to charge a person under security offences. The Minister has no role in SOSMA unlike DDA cases. Electronic monitoring device is applied only at pre-trial for a period not exceeding 28 days.

1.2.5. Criminal Procedure Code (CPC)

Electronic monitoring is applied as alternative for bail in bail pending trial and bail pending appeal. The accused who has been granted bail but could not afford to provide security, may be ordered to wear electronic monitoring device to secure his attendance in court. Unlike electronic monitoring device in preventive laws which function to assist the police in supervising the accused, electronic monitoring device in CPC however meant to secure his attendance in court for trial or appeal.

2. Problem Statement

The exercise of electronic monitoring device in supervising an offender may infringe his fundamental liberties even though the state has the power to infringe under various preventive laws by virtue of Article 149 of Federal Constitution in protecting public security.

3. Research Questions

This research has two main questions. Firstly, what is the effect of electronic monitoring device on fundamental liberties and secondly how to balance between the power of the state under Article 149 of Federal Constitution and the protection of fundamental liberties of a person subject to electronic monitoring device.

4. Purpose of the Study

This paper aims to examine the problem of infringement of fundamental liberties in electronic monitoring device and how to balance between the infringement and the fundamental liberties of the person in the Malaysian perspective. This research suggests that human dignity and privacy is part of the fundamental liberties in Article 5(1) of the Federal Constitution. Thus, to protect both, the authors recommend some new regulations to safeguard the information privacy and dignity of the suspect, despite the state power in depriving a person of his fundamental liberty under Article 149 of Federal Constitution.

5. Research Methods

This article employs a doctrinal analysis and secondary data from all the relevant literature on the preventive laws and electronic tagging via the library-based search. The primary sources including the POCA, POTAs, DDAs and SOSMAs, and the secondary sources involve Hansards, law reports, academic journal articles, books and online databases were reviewed.

6. Findings

6.1. Literature Review on Electronic Monitoring

The concept of electronic monitoring device in Malaysia lies in the application of preventive laws itself. Prevention is the main theme of the introduction of electronic monitoring device. Electronic monitoring is imposed as part of the terms and conditions of police supervision order, against a person arrested under the said Acts. In other jurisdictions such as United States and European countries, electronic monitoring device is applied as one mode of punishments or sentences, which can be imposed on an offender. In United States (which is the origin of place for electronic monitoring) for instance, electronic monitoring applies to juvenile offenders and parolees. In United Kingdom, electronic monitoring is used as part of provisions of curfew orders for juvenile as well as adult offenders. The application of electronic monitoring by way of tagging raised issues of fundamental liberties. There are a number of writers who had raised their concern on the effects of electronic monitoring against the fundamental liberties of a person. Technology thus can be useful in detention, restriction and surveillance. However constant surveillance of people particularly by the use of devices fixed to their body, or even

implanted beneath the skin, raises serious civil liberty and ethical concerns. They further emphasized, there are still many legal, ethical and practical issues to resolve despite its use since two decades ago. Although the latest technologies are more efficient than in the past, their surveillance potential creates concerns of over-regulation and infringement of human rights. Black and Smith (2003) and Timothy (1991) in their articles described electronic monitoring as an 'electronic jail' although it is a useful alternative to detention. Payne and Gainey (2004) reported that those undergoing sanction of electronic monitoring has similar pains of imprisonment similar to those considered by Sykes (1958) : e.g., deprivation of liberty, deprivation of autonomy, etc. The preamble to Recommendation 2014(4) of Council of Europe Recommendation on Electronic Monitoring also favours the effort to reduce the size of population in prison...however there is also a recognition that offenders may actually be harmed by criminal justice authorities and need protection from them.

Plachta (2016) stated that, alternatives to detention can also infringe the right to liberty and human rights impacts of their extended use must also be considered, especially with regard to electronic monitoring and house arrest. In addition, Gopalan and Bagaric (2016) viewed that the problem of an infringement of privacy is among objections raised for the deployment of electronic monitoring (especially when accompanied by CCTV monitoring) as a sanction in lieu of jail.

In the Malaysian Parliament report, a few of the representatives raised their concern on the introduction of the preventive laws under Article 149 of Federal Constitution. For example, Mohamed Hanipa (*Hansard*, 8 April 2015 vol 19) in the debate relating to SOSMA, described the law as draconian when limiting the power of judicial review on the power of police in SOSMA cases. This is supported by Dr Michael Jayakumar Devaraj (*Hansard*, 8 April 2015 vol 19) in the same debate, when he mentioned a few provisions in SOSMA which are draconian including section 4, the enabling provision for the attachment of electronic monitoring device. Although the writers speak about infringement of fundamental liberties, they however, did not deliberate in detail on how the electronic monitoring device infringe fundamental liberties. This paper will address this problem of infringement of fundamental liberties in electronic monitoring device and examine how to balance between the infringement and power of the government in the prevention of crime in Malaysia. In filling in the gaps, the author will make recommendations on how to balance between the power of the state to regulate in preventing crimes under Article 149 of the Federal Constitutions and the right of the affected person subject to electronic monitoring device.

There are few issues related to electronic monitoring by way of tagging. Firstly, in relation to right to life, it attracts Article 5(1) which provides no person shall be deprived of his life or personal liberty save in accordance with law. The discussion on the application of this provision is better understood by looking into the Indian Constitution of Article 21 which is in *pari materia* with Article 5(1) Malaysian Constitution. In interpreting the meaning of right to life, the Indian Supreme Court in Maneka Gandhi's case (1978), viewed that the words 'life' and 'liberty' be given extended meaning and inclusive of the right to human dignity and the right to privacy. The decision of Supreme Court of India in Maneka Gandhi's (1978) case and cases subsequent to it have asserted two important principles. Firstly, the Supreme Court has asserted that in order to treat as a fundamental right, it is not necessary that it should be expressly stated in the constitution as a fundamental right. Changes in politic, social and economy of

the country entail the recognition of new rights. The law in its eternal youth grows to meet the demands of the society. Secondly, Article 21 was given the extended view and proven to be multidimensional. This multidimensional of Article 21 has been made possible by courts giving an extended meaning to the word 'life' and 'liberty' in Article 21. These two words are not to be read narrowly. These are organic terms which are to be construed meaningfully (Jain, 2010).

The right to 'life' has been liberally interpreted so as to mean something beyond mere survival and mere existence or animal existence. Hence it includes all facets of life to make a person's life meaningful, complete and worth living. In the case of Francis Coralie (1981), a grand step was taken by the court when it argued 'life' in Article 21 does not mean merely 'animal existence' but living with 'human dignity'. The court has given very extensive parameters to Article 21:

"But the question which arises is whether the right to life is limited only to protection of limb or faculty or does it go further and embrace something more. We think that the right to life includes right to live with human dignity and all that goes along with it, viz., the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and mingling with fellow human beings. Of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare expression of the human self."

Another broad formulation of the theme of life with dignity is to be found in the case of Bandhua Mukti Morcha (1997). Characterizing Article 21 as the heart of fundamental rights, the court gave it an expanded interpretation:

"...to live with human dignity, free from exploitation. It includes protection of health and strength of workers, men and women, and of the tender age of the children against abuse, opportunities and facilities for children to develop in a healthy manner and conditions of freedom and dignity; educational facilities, just and human conditions of work and maternity relief. These are the minimum conditions which must exist in order to enable the person to live with human dignity. No government can take any action to deprive a person of the enjoyment of these basic rights."

In *Chameli Singh v. State of Uttar Pradesh* (1996), the Supreme Court while dealing with Article 21 has held that the need for a decent and civilized life includes the right to food, water and decent environment.

This extended and broad approach of the word life to include the right to livelihood was adopted in the Malaysian case of *Tan Tek Seng v Suruhanjaya Perkhidmatan & Anor* (1996). Gopal Sri Ram JCA cited:

...the expression 'life' does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the rights to seek and be engaged in lawful and gainful employment...

Balasingam and Bhatti (2017) commented that the Malaysian Constitution is an evolving document, it would be silly to suggest that the rights enshrined in it are set in stone; unable to adopt to modern-day requirements. In concluding the evolution of Malaysian Constitution, the authors quoted the statement by Raja Azlan Shah LP (as his Royal Highness then was) opined on behalf of the Federal court

in the case of Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus (1981) that the constitution should be interpreted broadly. Sri Ram (2017) has also summed up;

“The dynamics of constitutional interpretation changes as we acquire more knowledge about how we must approach our Constitution. We have moved away from looking at the Supreme Law as a last will and testament to an organic instrument that is constantly developing to meet new challenges to the Rule of Law and constitutional disobedience. In relation to Part 11 courts have moved away from the literal approach to the generous to the prismatic.”

Lord Suffian LP, on the other hand, in *Government of Malaysia & Ors v Loh Wai Kong* (1979) stated that Article 5 speaks of personal liberty and not of liberty simpliciter. This article only relates to the person or body of the individual. Personal liberty was held not to include certain rights, like right of travel, or right to passport. The respondent had argued that the refusal or delay in granting him a passport violated his right of personal liberty under Article 5. This decision was followed in the case of *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishman* (2002).

Despite the difference in Malaysian judge’s opinion on the extended meaning of ‘life’, it is submitted that in having to wear a device attached to the body of a person (ankle or forearm) for 24 hours within a stipulated period, for the purpose of surveillance may infringe the person’s right to life and liberty in upholding human dignity if the size of the electronic monitoring device is not compatible with humane, since electronic monitoring device comes in different type and sizes. It is hoped that the electronic monitoring device size suits human being to avoid visibility to public and feeling of humiliation by the person wearer. This view is in line with the extended meaning of the word life in Article 5 of our Federal Constitution to also consider the aspect of human dignity.

Although electronic monitoring is a cost-effective, it is also a more restrictive, more invasive of privacy, a greater affront to dignity than any of the other alternatives to detention (Maes & Mine, 2013). The GPS must be charged for several hours a day, which means that participants in the program, have to plug themselves into the wall, constraining their movement for hours at a time. This can be degrading and dehumanizing experience (Marouf, 2017).

A question also arises as to whether Article 21 *in pari materia* with Article 5 provides for the right to privacy. The Supreme Court has observed in *People’s Union for Civil Liberties v. Union of India* (1991):

“We have, therefore no hesitation in holding that right to privacy is a part of the right to “life” and “personal liberty” enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy, Article 21 is attracted. That said right cannot be curtailed ‘except according to procedure established by law’.”

The issue on privacy was earlier discussed in the case of *Kharak Singh v State of Uttar Pradesh* (1963), a question was raised whether the right to privacy could be implied from the existing fundamental rights, such as Article 19(1)(d), 19(1)(e) and 21. Majority of the judges viewed that “Our constitution does not in terms confer any like constitutional guarantee”. On the other hand, the minority opinion (Subba Rao J.) was in favour of inferring the right to privacy from the expression ‘personal liberty’ in Article 21. In the words of Subba Rao J.

“Further, the right to personal liberty takes in not only a right to be free from restrictions placed on his movements; but also free from encroachments on his private life. It is true our constitution does not expressly declare a right to privacy as a Fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life...”

It was decided in this case that police surveillance of a person by domiciliary visits was void. The Supreme Court in the case of *R. Rajagopal v. State of Tamil Nadu* (1994), has averred that in recent times the right to privacy has received constitutional status; it is “implicit to the right to life and liberty guaranteed to the citizen”. It is a “right to be left alone”. A citizen has a right “to safeguard the privacy of his own, family, marriage, procreation, motherhood, child bearing and education among other matters.”

The right to privacy protects a person’s right to control the dissemination about himself. Research on privacy indicates there to be a several dimensions on type of privacy in existence. Physical privacy (also known as solitude) is the type of privacy whereby person is free from intrusion or observation that are unwanted. Informational privacy (also known as anonymity) is the ability to control over the conditions under which personal data is released. Psychological privacy is defined as the control over released or retention of personal information to guard one’s cognitions and impacts. Interactional privacy (or intimacy) is relevant to relationship in society as it ensures meaningful communication between persons and among members of the group (Ahmad, 2008).

A person who is subject to electronic monitoring by way of tagging may raise the issue of privacy from the aspect of information. The data collected through the monitoring by way of police supervision may have been use not only to gain information related to the crime but other unnecessary purpose. Furthermore, the personal data obtained by the government is not governed by the Personal Data Protection Act 2010. Prior to the introduction of electronic monitoring, the monitoring of offender was conducted by a random visit made to the offender’s home or by requiring him to report to the nearest police station at the prescribed arrangement.

Another fundamental right which is also, a concern, is the right to equal protection before the law enshrined under Article 8 of the Federal Constitution. Notably, among the salient feature of preventive laws is the limitation of judicial review only on matters of procedural and technicalities. The court has no jurisdiction to determine the exercise of discretionary power of the Board or Minister. This matter was raised by the Working Group of Human Rights in its mission to Malaysia. In addition, Article 5(3) was not provided expressly in these preventive laws. The sub clause 3 guarantees the right to legal counsel and to communicate with family upon arrest. This protection was not present in all the preventive laws.

Finally, in regard to freedom of movement, the use of electronic tagging does not attract the issue on freedom of movement mainly because electronic tagging per se does not detain a person from going to any place he wishes. Electronic tagging is merely a device used to monitor the movement of a person and the freedom of movement will not be an issue unless a condition of house curfew or designated place of movement is imposed on the user. As mentioned earlier, the fundamental rights is not absolute enjoyment of an individual. This is due to two reasons: firstly, the wording in Article 5(1) ‘no person shall be deprived of his life and liberty *save in accordance with the law*’ i.e. the right to life and liberty may be deprived through legal procedures. Secondly, under Article 149 of Federal Constitution, the Parliament is empowered to limit the freedom guaranteed under Article 5, 9, 10 or 13 under the several circumstances

inclusive of an act which is prejudicial to public order or the security of the Federation or any part thereof. The power of the government to deprive a person his fundamental rights on security reasons is highlighted by one of the speaker in Malaysia Parliament debate, Dato' Sri Wan Junaidi Tuanku Jaafar (*Hansard*, 23 April 2015 vol 9) comparing with the position in England since 19th century, that when it comes to security, it is not the right of the court to determine, but the government. He cited the case of *R v Secretary of State Ex Parte of Hosenball (1977)*. In *Hosenball*, a case relating to deportation order made against the appellant, an American national working as a journalist in United Kingdom. He appealed against the order for failure to disclose the relevant grounds for his deportation which is said to be prejudicial to the national interest and Lord Denning MR in dismissing his appeal stated:

“There is a conflict here between the interests of national security on the one hand and the freedom of the individual on the other. The balance between these two is not for a court of law. It is for the Home Secretary. He is the person entrusted by parliament with the task. Those who are responsible for the national security must be the sole judge for what the national security requires. It would be obvious undesirable that such matter should be made the subject of evidence in a court of law or otherwise discussed in public.”

Despite the infringement of fundamental liberties relating to electronic monitoring device and the justifications for the infringement as provided under Article 149 of Federal Constitution, this does not mean that the accused may not be able to enjoy fundamental liberties absolutely or at a minimum accord. The emphasis on the balancing between the power of the state and the rights of the accused as stated in United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules) adopted in December 1990. One of the fundamental aims in The Tokyo Rules is when implementing the rules, member States shall ensure a proper balance between the rights of individual offenders, the rights of victims as well as the concern for public safety and crime control. The state should also provide safeguard on the dignity of the offender subject to non-custodial measures and it shall be protected at all times. In the application of non-custodial measures, the right to privacy of the offender shall be respected, similarly the right to privacy of the family. The personal records of the offender shall be kept strictly confidential and not opened to third parties. Only persons directly involved with the disposition of the offender's case or to other duly authorized persons shall have access to the records.

Meanwhile Council of Europe Recommendations CM/Rec (2014) 4 of the Committee of Ministers to member States on electronic monitoring also stresses on the information privacy. It recommends the data collected, in the course of the use of electronic monitoring shall be subject to specific regulations based on the relevant international standards regarding storage, use and sharing of data. Particular attention shall be paid to regulating strictly the use and sharing of such data in the framework of criminal investigations and proceedings. A system of effective sanctions shall be put in place of careless or intentional misuse or handling of such data. Private agencies providing electronic monitoring equipment or responsible for supervising persons under electronic monitoring shall be subjected to the same rules and regulations regarding handling of the data in their possession.

The government of Malaysia has acknowledged the importance of human rights via the Human Rights Commission of Malaysia Act 1999. The phrase 'human rights' is defined in section 2 of the Act by making reference to fundamental liberties as enshrined in Part 11 of Federal Constitution. The Act also

introduced into the domestic law the provisions of the Universal Declaration of Human Rights 1948 while redefining 'fundamental liberties' under Part 11 of the Federal Constitution as human rights. Under section 4(4) of the Human Rights Act 1999 provided that for the purpose of this Act, regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution'. Lobo (2007) in interpreting this provision suggested that section 4(4) of the Human Rights Act should be given primacy and should be read in harmony with the UDHR 1948 and not construed contrary to the purpose and objects of UDHR 1948. He supported his argument by using the case of *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* (1992) whereby Federal court judges held that the fundamental rights are inviolable. The Nordin's case adopted the Indian Supreme Court case *SM Maneka Gandhi* (1978). Gunn Chit Tuan SCY went on to approve the principles in *Maneka Gandhi's* case

...As regards the test or yard-stick to be applied for determining whether a statute infringes a particular fundamental right. I would agree with Bhagwati J in *Maneka Gandhi v the Union of India* at p 635 that the test (to be) applied was as to what is the direct and inevitable consequence or effect of the impugned state action on fundamental right...

Lobo (2007) was of the view since *SMT Maneka Gandhi* (cited in *Nordin's* case) the Indian Supreme court adopted the UDHR 1948, it means simply that if a right is not specifically mentioned in Part 11 of our Constitution it may still be regarded as a fundamental (human) right since it is integral to the named fundamental right. Since the right to privacy is specifically mentioned in Article 12 of UDHR, no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor attacks upon his honour and reputation, it is therefore implied that the right to privacy is protected under the Human Rights Act 1999.

7. Conclusion

The author contends that although infringement of fundamental liberties is justified under Article 149 of the Federal Constitution on all preventive laws but, an offender who is attached with an electronic tagging must be accorded his fundamental rights even though at the minimum level. The author is suggesting a few recommendations in according the person with a few of his fundamental rights or liberties. Firstly, the device attached to the body of the suspect or offender should be suitable in size and form to protect his dignity. Lack of consideration of this human form will cause irritation in having to wear for 24 hours, and humiliation, if seen to the public. Second, there should be proper regulation on the keeping and management of the data gathered out of monitoring. If the data leaks to a wrong person, it may be abused and this is an infringement of informational privacy.

Acknowledgments

This research is financially supported by the Ministry of Higher Education, Government of Malaysia under the Fundamental Research Grant Scheme (FRGS) 600-IRMI/FRGS 5/3 (58/2016).

References

Ahmad, N. (2008). The Right to Privacy and Challenges: A Critical Review. *Malayan Law Journal Articles*, 5 *MLJ* cxxi.

- Balasingam, U., & Bhatti, S. (2017). Between Lex Lata and Lex Perenda: An Evaluation of the Extent of the Right to Privacy in Malaysia. *Malayan law Journal Articles*, 4 MLJ xxix
- Bandhua Mukti Morcha v. Union of India, AIR SC 2218 (Supreme Court 1997)
- Black, M., & Smith, R. G. (2003). *Electronic monitoring in the criminal justice system*. Australian Institute of Criminology,.
- Chameli Singh v. State of Uttar Pradesh, AIR SC 1051: (Supreme Court 1996)
- Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus, 1 MLJ 29 (Federal Court 1981)
- Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor, 1 MLJ 697 (Federal Court 1992)
- Francis Coralie v Administrator, Union Territory of Delhi, AIR SC 746 (Supreme Court 1981)
- Government of Malaysia & Ors v Loh Wai Kong, 2 MLJ 33 (Federal Court, 1979)
- Gopalan, S., & Bagaric, M. (2016). Progressive Alternatives to Imprisonment in an Increasingly Punitive (and Self-Defeating) Society, *Seattle University Law Review*, 40 Seattle U. L. Rev 57
- Jain, M.P. (2010). *Indian Constitutional Law* (6th Ed.). Butterworths Wadhwa Nagpur: Lexis Nexis
- Kharak Singh v. State of Uttar Pradesh AIR SC 207 (Supreme Court, 1963)
- Lobo, B. (2007). Does the Law of Human Rights Pervade All Malaysian Law in View of Part 11 of Federal Constitution? *Malayan Law Journal Articles*, 7 MLJ ixxxvi
- Maes, E. & Mine, B. (2013). Some reflections on the possible introduction of electronic monitoring as an alternative to pre-trial detention in Belgium. *The Howard Journal of Criminal Justice*. Doi:10.1111/hojo.12008
- Malaysia. House of Representatives. Parliamentary Debates. (2015 April 8) Vol 19 pg 80 (Mohamed Hanipa)
- Malaysia. House of Representatives. Parliamentary Debates. (2015 April 8) Vol 19 pg 85 (Dr Michael Jeyakumar Devaraj)
- Malaysia. House of Senates. Parliamentary Debates. (2015 April 23) Vol 9 pg 101 (Dr Haji Wan Junaidi bin Tuanku Jaafar)
- Maneka Gandhi v. Union of India AIR SC 597 (Supreme Court, 1978)
- Marouf, F.E. (2017). Alternatives to Immigration Detention, *Cordozo Law Review*, 38 Cordozo L. Rev.
- Payne, B. K., & Gainey, R. R. (2004). The Electronic Monitoring of offenders Released from Jail or Prison: Safety, Control, and Comparisons to the Incarceration Experience the *Prison Journal*, Vol. 84 No 4, December 2004 413-435.
- Plachta, M. (2016). European Union and Fair Trials Take-up a Problem of Pre-trial Detention, *International Enforcement Law Reporter*
- People's Union for Civil Liberties v. Union of India AIR SC 207 (Supreme Court, 1991)
- Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan 3 MLJ 72 (Federal Court, 2002)
- R v Secretary of State Ex Parte of Hosenball, 3 All.E.R 45 (Court of Appeal, 1977)
- R. Rajagopal v. State of Tamil Nadu AIR SC 264 (Supreme Court, 1994)
- Recommendation 2014(4) of Council of Europe Recommendation on Electronic Tagging
- Rondinelli, V. (1997). Tracking humans: the electronic bracelet in a modern world. *Criminal Lawyers' Association Newsletter* (August)
- Sri Ram, G. (2017). The Dynamics of Constitutional Interpretation. *Malayan Law Journal Articles*, 4 MLJ 1
- Sykes, G. M. (1958). *A Society of Captives* Princeton, NJ: Princeton University Press.
- Tan Tek Seng v Suruhanjaya Perkhidmatan & Anor 1 MLJ 261 (Court of Appeal, 1996)
- Timothy, C. P. (1991). Electronic monitoring in federal pretrial release. *Fed. Probation*, 55, 26.
- United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules) adopted in December 1990