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Theoretical Perspectives on Electronic Monitoring and Police Supervision Order as Crime Prevention Modalities in Malaysia

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Abstract

The attachment of an electronic monitoring device (EMD) to offenders in the form of an anklet has enhanced the method of supervision of offenders in Malaysia. Under various legislations, the court is empowered to place the offender under police supervision, who must comply with the terms and conditions and agree to be attached to an electronic monitoring device accessible through the Global Positioning System (GPS). Furthermore, the Police will be immediately alerted if there is any breach of the monitoring terms and conditions. However, there is lack of academic research into electronic tagging and its relationship with police supervision order in Malaysia. Hence, this paper aims to discuss the effect of attachment of EMD to an offender in the prevention of crime.

This paper adopts a doctrinal approach, whereby an analysis of the primary and secondary sources comprising relevant statutes, textbooks and journal articles on the application of electronic monitoring devices. This paper contends that although electronic monitoring devices have contributed to the prevention of crimes, it would be more effective if some elements of the human intervention were included as part of the offender's supervision.

Keywords: Electronic Monitoring, Police Supervision, Surveillance, Crime Prevention, Criminological Theories

Introduction

The electronic monitoring of offenders requires the offender to wear a uniquely coded electronic transmitter device (in the form of an anklet or bracelet) which sends a signal to the monitoring authority via satellite or radiofrequency. An EMD consists of a strap, a smart tag, and a beacon, assembled and strapped together at the offender's right or left leg. The fitting of an EMD enables the authority to track the whereabouts of a person fitted with the instrument. In Malaysia, several Acts permit the courts to order the convict to be fitted with an EMD, namely, the Prevention of Crimes Act 1959 (POCA), Prevention of Terrorism Act 2015 (POTA), Dangerous Drugs (Special Measures) Act 2012 (DDA (SPM)), Criminal Procedure Code (CPC) and Security Offences (Special Measures) Act 1985 (SOSMA). The implementation of EMD under these legislations can be divided into two stages; pre-inquiry/trial and post-inquiry/trial. An inquiry is a process for a person charged under the preventive laws namely

POCA, POTA and DDA (SPM). It involves an inquiry conducted by an inquiry officer in addition to the police investigation. The inquiry officer will submit a report to the Board (POCA & POTA) and the final decision is made by the Board and not by the court of law in a trial. For DDA (SPM) the inquiry officer will submit its report to the Minister of Home Affairs for final decision. In the pre-inquiry or pre-trial stage, the use of the EMD is imposed on the offender, as in a bail situation.

Meanwhile, the post inquiry or post-trial stage is where the use of the EMD is ordered after the disposal of the case. Using an EMD in Malaysia is not treated as a type of punishment in itself. It is used instead as part of the surveillance mode for police supervision. EMD is essential in the criminal justice system to prevent crime though it may not hinder the commission of certain crimes. According to DeMichele (2014), electronic supervision is expensive. It requires a lot of officer time, and he believes that jurisdictions that cannot dedicate ample resources in time and money should avoid incorporating these technologies; they are not a silver bullet or panacea. Despite these, it is contended that the EMD plays a significant role in preventing crime in Malaysia.

The paper will first briefly elaborate on the methodology adopted by this paper. This is followed by an in-depth discussion on the literature on electronic monitoring ranging from the concept as well as the legal framework governing electronic monitoring in Malaysia. The discussion then directed towards the analysis on several criminological theory, informing the reality of electronic monitoring in Malaysia on the extend of its effectiveness. Lastly, the paper elaborated on the discussion and observation of adopting electronic monitoring and how such framework fit with the existing criminological theory.

Methodology

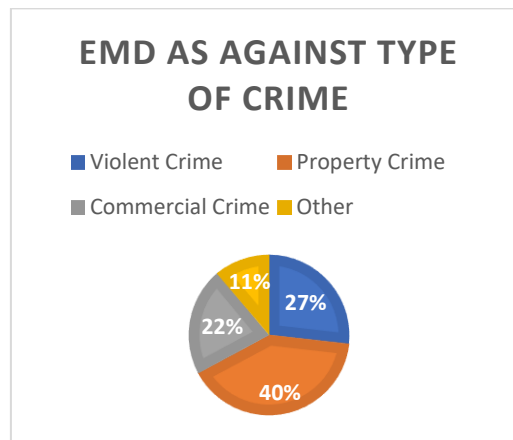
This study utilized a qualitative method to gain a profound understanding of the reason for applying EMD in general and specifically in the Malaysian criminal justice system. It encompasses a doctrinal analysis in which a qualitative data collection method will be conducted by collecting information from the relevant statutes, codes and regulations as the primary sources of the secondary data. In addition, the literature on electronic monitoring and the criminological theories on crime prevention were also conducted as part of the secondary data collection.

What is Electronic Monitoring?

The definition of electronic monitoring varies depending on its use and purpose. It could be defined as a type of punishment or sentence when electronic monitoring is considered a mode of serving imprisonment sentence either as a front or back-door policy. It is also considered a tool for police monitoring when attached to the conditions of police supervision. In some jurisdictions, electronic monitoring is used as a corrective program for certain offenders, such as juveniles or parolees. In a nutshell, the definition of EMD could be best understood, as stated by Nellis (2021), that electronic monitoring is a form of coercive connectivity, a generic term for a range of corrective technologies which utilise networked communication systems and body-worn sensors (tags - usually on ankles, sometimes wrist) to pinpoint and track the locations and movements of offenders. They are used by judicial and penal authorities to monitor real-time compliance with supervisory regimes of varying

restrictiveness and duration at the criminal justice process's pre-trial, sentencing and post-release stages (Nellis, 2021).

Table 1



Sources

The data suggest that the attachment of EMD on the accused and convicted person varies depending on the crime they committed. Table 1 above shows that most of the accused person, who was attached to the EMD, are involved in property crime. It was reported that 40 per cent (208 offenders) of those attached to EMD has committed crimes ranging from housebreaking to motorcycle, car, and animal theft. While the second type of crime which holds 27 per cent (138 offenders), has committed violent types of crime such as robbery as a public servant, cargo robbery, armed robbery, snatching robbery, shop and petrol pump robbery, and murder. 22 per cent (112 offenders) of those attached with EMD has committed a commercial crime such as cheating, money laundering, and profit from the narcotic type of crime. And lastly, about 11 per cent (34 offenders) had EMD attached to them for other types of crime ranging from gangsterism, gambling, drug, and prostitution.

Electronic Monitoring Operation

In Malaysia, electronic monitoring involves the Police and the company supplying the EMD and its equipment. A local company controls the monitoring system's procurement, installation and operation (as of today, the monitoring equipment has been acquired by a local company from a foreign manufacturer). The company then rents the equipment to the Royal Malaysian Police. Police officers at the Bukit Aman have been assigned to liaise with the company on any matters concerning the monitoring system.

Meanwhile, monitoring the person tagged is the responsibility of the Police, usually headed by the District Chief Police Officer of that person's residence. A follow-up is conducted by the Police supervising the said person. A review of the development of the person tagged will be conducted after six months. The Officer in Charge at the police station (OCS) is fully responsible for reforming the offenders. There is no limit on the number of persons supervised by the OCS, and it also depends on the order of the Board for cases under the POCA and POTA and by the Minister of Home Affairs under the DDA (SPM). The involvement of the Royal Malaysian Police in the implementation of electronic monitoring is very significant since EMD is currently implemented as part of police supervision. The Police utilize the EMD as a tool for supervising and monitoring an offender subject to police

supervision.¹The prison authority is not involved in the implementation of EMD. However, in the future, when EMD is imposed as a mode of executing an imprisonment sentence, it may involve the role of the prison authority, such as parole officers.

Despite advances in GPS technology, there are still several limitations surrounding the use of GPS. Problems with technology, particularly the equipment, may include technical faults, poor monitoring coverage and equipment failure. This wireless tracking may not be effective at certain 'dead spots' areas commonly experienced by mobile phones. It may lose satellite signals when entering large structures or when moving in specific areas; thus, there is a possibility of compromising the ability to know an offender's location. The strap used can also break easily, hence compromising its durability.

Electronic Monitoring as a Form of Punishment

Although EMD imposed after disposal of a case is not expressly stated as a type of punishment, this does not deny the claim that EMD fitted to an offender's ankle may also be considered a punishment and not merely as a mode to enhance surveillance. Arguably, regardless of the stage, the attachment of EMD is a punishment to the person fitted with the anklet. According to Bentham (1830), punishment is defined as:

An evil resulting to an individual from the direct intention of another, on account of some act that appears to have been done or omitted. It is an evil, a physical evil, either a pain or a loss of pleasure.

In contending that EMD is considered punishment under the police supervision order, especially when imposed post-inquiry for POCA, POTA and DDA (SPM), several justifications for this contention are based on the impact of an EMD on a fitted person. Firstly, the order to be fitted with an EMD is mandatory, and failure on the part of the person ordered to comply will result in a criminal sanction. The offender fitted with an EMD is prohibited from removing the EMD within the period he is subjected to police supervision. An attempt to remove the EMD is an offence and is punishable with imprisonment if convicted. For example, under section 7A (7) of POCA, any person who tampers with or destroys the EMD shall be guilty of an offence and liable to imprisonment for a term not exceeding three years. Secondly, the EMD attached to the person's body fulfils the definition of punishment, as stated earlier. It is a form of physical evil or suffering. A person has to endure fitting with an EMD weighing about 200 grams at his ankle for 24 hours for a prescribed period. Apart from the physical discomfort, if not suffering, it is also a humiliation he has to bear when EMD is visible to the public.

The Purposes of Electronic Monitoring

The literature indicates that EMD is used for several purposes. The EMD serves three purposes in the criminal justice system: detention, restriction and surveillance, depending on its application. Electronic monitoring is used as an alternative to detention. It can be summarised in three ways; firstly, it is used as a total replacement for a sentence of imprisonment, for instance, in cases involving minor offences. Instead of being locked in jail, these offenders can be released without detention but subjected to electronic monitoring. Electronic monitoring

¹ See section 15 of POCA, 13(3) of POTA 2015 and section 6(3) DDA (SPM) 1985

and order of house curfew will also be suitable for detention as both can be used to ensure that the individual remains in a designated place or home at certain hours.

In Malaysia, its use as an alternative to bail under the Criminal Procedure Code² and SOSMA³ suits the purpose of an alternative to detention. Secondly, electronic monitoring is used as a front-door⁴ policy in sentences in the form of imprisonment. Some offenders can escape imprisonment sentences as it is used as a front-door policy. For example, under the Australia Northern Territory's Sentencing Act 1995, a court that sentences an offender to a term of imprisonment may make an order suspending the sentence and instead place the offender under a home detention order. Offenders on home detention orders may be required to wear a monitoring device. Failure of the offenders to comply with the rules and terms of monitoring will result in detention in prison. The court will first sentence an offender to imprisonment, and then, if the offender consents and is assessed as suitable, the term may be served through monitored home detention.

Another method used in replacing incarceration is the exit-door policy. Offenders who have served a certain period of imprisonment may be allowed to be released early (subject to the offender wearing EMD). This exit-door policy is similar to those who are released on parole. In New Zealand, the Sentencing Act 2002 and Parole Act 2002 provide for electronic monitoring of offenders in various situations. Both Acts allow home detention (with electronic monitoring) as a sentence in its own right rather than just as a custodial option. It is noted, however, that using EMD in monitoring parolees is not applicable in Malaysia, and EMD is not applied as part of the punishment in place of imprisonment.

Electronic monitoring seeks to achieve the objective of ensuring compliance with restrictions in movement. Individuals may be prohibited from entering prescribed areas or approaching people such as complainants, potential victims, witnesses or co-offenders. Restrictive purpose also applies to home curfew cases; for instance, offenders under the POCA must remain indoors during the night to reduce the risk of reoffending. According to Albrecht (2003), electronic monitoring is not house arrest but is a restriction of freedom through enforcing precisely defined or structured time schedules through technology'. In Ireland, surveillance at the post-trial stage targets high-risk sex offenders who are released from prison. They are required to be tagged under the Sex Offenders Act 2001. Under the Act, registered sex offenders are prohibited from approaching certain areas related to the victim or female residence.

Finally, electronic monitoring may be used as a form of surveillance on the wearer. Electronic monitoring enables the authority to continuously track a person without restricting his movements. Therefore, the surveillance of the wearer is crucial to track his movements and location. Under the POCA of Malaysia, surveillance is conducted on persons subject to police supervision. Therefore, electronic monitoring may be attached as part of the conditions under an order of police supervision. Hence, it would mean the Police use electronic monitoring to supervise offenders' whereabouts.

² See section 388A CPC

³ See section 13 SOSMA

⁴ Also known as 'front-end' or 'back end' for back door policy

Apparently, in Malaysia, the attachment of EMD has two primary purposes. Firstly, it is an alternative to bail for cases under CPC and SOSMA. Secondly, it is a tool used to monitor and supervise the whereabouts of the person ordered to be tagged with an EMD under POCA, POTA and DDA (SPM). It is utilized by the Police to enhance the method of monitoring criminals. Electronic monitoring is not a type of punishment but a condition that could be imposed as part of release during remand or supervision order.

Electronic Monitoring and Police Supervision Order

In general, the sentence of police supervision is provided under sections 295(1) and (1A) of the Criminal Procedure Code (CPC):

(1) When a person previously convicted of an offence punishable with imprisonment for a term of two years or upwards is convicted of any other offence is also punishable with imprisonment for a term of two years or above.

(1A) When a person is convicted for sexual offences under sections 376,377C, 377CA or 377E of the Penal Code.

Police supervision is affected on an offender by the Police under section 295 CPC through random police visit to the offender's home when necessary and requiring him to report to the nearest police station on the prescribed schedule.

The method for surveillance by the Police was enhanced when an EMD was introduced. However, the introduction of police supervision through an electronic device fitted to the body (anklet) of the offender is only applicable under the preventive laws, namely, Prevention of Crime Act 1959 (POCA),⁵ Prevention of Terrorism Act 2015 (POTA)⁶ and Dangerous Drugs Act (Special Preventive Measures) (Amendment) Act 2016⁷.

As far as the theory of supervision by the supervising or monitoring officer is concerned, several theories are relevant for discussion. In his seminal paper, *A Theory of Probation Supervision* (1972), Klockars built a theory upon his ethnographic study of an extensive urban probation and parole office. First, the type of officers who follow the surveillance approach to supervision is the law enforcer and the time server. The law enforcer embraces values of firmness, authority and rule abidance, whereas the time server just methodically upholds the rules to meet minimum job requirements until retirement. The therapeutic agent, however, follows a treatment approach to supervision. This agent often has advanced training and provides supportive psychotherapy and casework to encourage behaviour change and improve the prisoner's life. The synthetic officer follows a hybrid supervision approach, combining helping and therapeutic problem-solving and controlling or surveillance roles. Klockar (1972) posits the synthetic officer will balance the rehabilitative and surveillance goals to achieve adequate supervision. Skeem & Manchak (2008) posit that in their hybrid role, supervision officers achieve a broad base of power for helping prisoners change and maximising the likelihood that they will complete their terms and avoid recidivism.

The exercising of police supervision in Malaysia appears to have adopted more of the surveillance approach than the hybrid approach. Such an approach is in line with their duty

⁵ Section 15 POCA

⁶ Section 13(3) POTA

⁷ Section 6(3) of DDA (SPM) (police supervision is one of the conditions of restriction order)

as provided in section 3(3) of the Police Act, that is, for the maintenance of law and order, the preservation of peace and security of Malaysia, the prevention and detection of crime, the apprehension and prosecution of offenders and the collection of security intelligence. Even when the person subject to police supervision reports to the police station, no procedure is prescribed as to what should happen during the reporting. The Police may voluntarily inculcate motivation and encouragement towards the person reporting. However, this is not a requirement.

The reliance on EMD as a preventive measure is not always practical, as highlighted by DeMichele (2014), who cited the California case of Phillip Garrido and his wife, who kidnapped and held a young girl captive for nearly 18 years. During this time, Mr Garrido was on parole supervision with GPS tracking, but when it went undetected, he had a kidnapped girl in his tent in the backyard. His GPS revealed that he was exactly where he was supposed to be (at home) and in his backyard. However, parole officers failed to conduct a regular in-depth search of the home or even walk through the backyard. In his article, 'Electronic Monitoring is a tool, not a silver bullet', DeMichele (2014) discouraged the application of EMD as a tool only and not as part of the programme.

Theorising Electronic Monitoring

Surveillance of Offenders and Bentham's Theory

The attachment of EMD enables the authority to track the location and movement of a person tagged. The objective is to ensure greater deterrence as the person knows he is under constant surveillance. The power of surveillance as a deterrence on a person tagged could be traced to the theory grounded by Jeremy Bentham, who proposed the panopticon theory in the 18th century as a circular building with an observation tower in the middle of an open space surrounded by an outer wall. The design could increase security by putting more effective surveillance.

In 1985, Foucault further developed Bentham's conceptualisation when he elaborated upon the function of disciplinary mechanisms in such a prison and illustrated the function of discipline as an apparatus of power. He referred to Jeremy Bentham's Panopticon, a type of surveillance and disciplinary punishment made possible by the physical structure of the circular panopticon prison. Bentham reasoned that in the Panopticon, even the most ignorant prisoner would be able to calculate the likelihood that he is being watched and that the greater the likelihood, the greater the feeling that he is indeed under such conditions. In such circumstances, the prisoners, through their uncertainty, would thus discipline themselves. In other words, the traditional theory suggests that mere surveillance could help maintain the discipline of a person being watched.

In Malaysia, under the preventive laws in which EMD is imposed, the person arrested and inquired under POCA, POTA, and DDA (SPM) will face either two consequences: detention or restriction order. In serving an order of restrictions, many conditions could be imposed on him, including fitting EMD. For instance, section 13(3) of POTA provides the following restrictions or conditions: a) He shall be required to reside within the limits of any state, district, mukim, town, or village b) He shall not be permitted to transfer his residence to any other state, district, town or village, as the case may be, without the written authority of the

Chief Police Officer of any state concerned...l) He shall be attached to an electronic monitoring device.

Condition (l) of section 13(3) of POTA requires the offender to be attached with an EMD. The attachment of EMD to an offender's ankle means the offender fitted with the EMD knows that he is being monitored and watched for 24 hours for a prescribed period. Under such circumstances, the said person who is under monitoring would thus discipline himself. All conditions are imposed to control the person's activities to reduce the risk of reoffending. Such a condition includes the attachment of EMD as prescribed under condition (l) to ensure the person serving a restriction order will comply with all the conditions. The EMD facilitates the Police to monitor his whereabouts. In reality, EMD may not prevent the commission of a crime by the person fitted with EMD. However, it will minimise or reduce the number of crimes committed as the Police can track his location, thus making the person fitted with the EMD more apprehensive.

Social Control Theory

According to the social control theory, criminal behaviour occurs when an individual's affiliation with society is weak. Gottfredson and Hirschi (1990) viewed lack of social theory control due to an absence of connection with normative society leaves one devoid of interest in maintaining conformity, hence one's tendency to criminality. Shoham et al (2015) viewed that EM enables a normative lifestyle otherwise absent in a criminal's life, thus establishing social connections with the family and promoting life skills development. They suggested the authority to ensure that the rehabilitation program will integrate the released prisoner within society in as many ways as possible, most of all through familial and occupational connections, so that he would have much more to lose if he breaks the law (Payne & Gainey, 2004). Using EMD as a punishment helps ensure the offender's employability and family bonding.

Rational Choice Theory

The rational choice theory is about decision-making and behavioural motivations. People decide to commit crimes after careful consideration of the costs and benefits. This consideration may include personal as well as situational factors. For example, personal factors could be a need for money, revenge or entertainment, whereas situational factors may include the victim's vulnerability and the presence of witnesses and Police (Siegal et al., 2006). According to this theory, an individual chooses to commit a crime because it can be rewarding.

Similarly, a rational person's behaviour can be controlled or modified by a fear of punishment. In this method, a person can resist offending by intensifying their fear of punishment, made possible through surveillance by an EMD. Under this theory, it could be said that any breach of the conditions of police supervision or commission of an offence is easier to be detected through an EMD fitted to his body. Therefore, the fear of punishment for persons under electronic monitoring increases with the high possibility of detection, arrest and conviction. Consequently, fitting EMD will more likely prevent him from committing a further offence.

Routine Activity Theory

Routine activities theory is a subsidiary of rational choice theory. According to Cohen and Felson (1979), routine activity theory requires three elements to be present for a crime to

occur; a motivated offender, the ability to act on his inclination, a suitable victim or target and the absence of capable guardians who can prevent the crime from happening. These three elements must converge for a crime to occur in time and space. According to them, the presence of capable guardians also helps to deter an individual from offending. Guardianship can be in the physical presence of a person who can act in a protective manner or the form of more passive mechanical devices such as video surveillance or security systems. Based on this theory, the presence of EMD serves as a guardian to deter an individual fitted with it from offending.

Situational Crime Prevention (SCP)

Crawford (1998) suggested three premises for SCP to operate, namely (a) reduce the opportunity of crime, (b) increase the risk of detection and (c) reduce the rewards of crime. The effect of the use of electronic monitoring by way of Close Circuit Television CCTV from the result of studies in the United Kingdom and North America was examined by Welsh and Farrington (2004). They concluded that:

CCTV had a significant desirable effect on crime, with an overall reduction in crime of 21 per cent in experimental compared to control areas....

Although the EMD is not precisely similar to CCTV, as the former cannot display the actual image and only trace the location and movement of the wearer, the use of EMD in reducing crime is essential to increase the risk of detection of the offender fitted with the device. Such a situation is because the EMD could monitor the real-time compliance with the restriction order conditions, thus facilitating detection and apprehension of failure to comply. Thus, it may reduce the offender's temptation to reoffend.

Discussion

Applying an EMD is undoubtedly improving the method of supervising offenders by the Police in controlling crime (Hassan, 2018). Hence, it is suggested that its use could be widened and recognised as a form of punishment in Malaysia. EMD may be considered a virtual prison and used as a punishment or a substitute for imprisonment. In addition, the EMD used with other programs for juvenile and adult offenders could contribute to the rehabilitative aspect of the person fitted with the EMD. In this way, EMD may avoid the negative impact of prison on the person tagged so as not to be surrounded by the convicts.

Furthermore, deploying this device may contribute to overcoming the problem of prison overcrowding in Malaysia when used as part of community service sentences (Hassan, 2021). Nellis (2021) described the EMD application as an ostensibly cheaper form of control than imprisonment and detention, albeit with specific restrictions and 'pains' of their own. However, using EM through a device is not fully effective if it is not imposed as part of a programme involving human intervention. Vitolisova and Borsekova (2021) found a fine line between EM as a blessing and disguise for community involvement. Setting proper measures to protect the community, targeted communication and support with attendance of professionals (for example, mediator and psychologist) for community members might help to avoid possible risks and support the benefits related to EM implementation, namely, social and economic inclusion of offenders, maintaining family and community rights, reducing recidivism or protection of sensitive sites.

Conclusion

The application of EMD in monitoring offenders is undoubtedly a step forward in the Malaysian criminal justice system. The EMD is applicable under the Prevention of Crime Act 1959 (POCA), Prevention of Terrorism Act 2015 (POTA), Dangerous Drugs (Special Measures) Act 2012 (DDA (SPM)) and Criminal Procedure Code (CPC). Literatures had shown that EMD is used for various purposes namely surveillance, restriction and to replace detention. Theories of surveillance and criminology support the use of the EMD as a tool for preventing crimes by the person fitted with the EMD. This is possible as EMD facilitates the tracking of the offender's whereabouts and if there is any breach of the restriction or condition relating to movement, imposed on the offender fitted with the anklet, it can be detected at the real time. Nevertheless, it is proposed for the authority to also consider the role of an officer in engaging with the person tagged to encourage positive behavior change effectively. Besides, it is highly recommended that the authority considers to extend the use of EMD as a mode of serving punishment in replacement of imprisonment and not just a tool in exercising police supervision. Hence, it will contribute to avoid prison criminogenic effect on the inmates and reduce the problem of prison overcrowding.

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