



# The Proportionality of House Arrest with Electronic Monitoring and Individual Freedom of the Accused: A Comparative Study between French and Iranian Law

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**Abstract:** The paper is dedicated to the relevant topic of applying electronic monitoring measures to individuals who have been placed under house arrest, using the experiences of two countries — France and Iran — as case-studies. The key issue explored in the study is the proportionality criteria of this measure in relation to the suspect's or accused person's right to privacy and freedom of movement. The authors conclude that French legislation establishes the principle of proportionality between the aforementioned measure and the accused's freedom of movement, as well as defines clear criteria for proportionality. In contrast, Iranian legislation does not establish the proportionality of this measure with the accused's freedom of movement, nor does it address the scope and duration of this measure at the legislative level. The authors also point out that French law requires the accused's consent to wear electronic bracelets in order to respect their dignity and ensure privacy. Iranian law does not clarify the status of the accused's consent or the consequences of failing to comply with this procedure.

**Keywords:** Alternative to pre-trial detention; freedom of movement; privacy; proportionality; accused's consent

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## I. Introduction

In the early sixties of the twentieth century, Scientists from Harvard University Ralph Schwitzgebel and his twin brother Robert, in collaboration with a group of researchers at this university, invented a type of electronic monitoring technology (Gable and Gable, 2016, p. 13). It was designed for bidirectional data transfer between a central station and a volunteer, considered a juvenile delinquent who benefited from parole. It also transmitted guidance and advice messages to these volunteers to help them reform and rehabilitate while undergoing parole (Gable, 2014, p. 4). The solidity and success of this innovation in

criminal law were due to the efforts of the American judge Jack Love (Tadayon, 2008, p. 59). He liked this monitoring method after watching the Spider-Man animated movie. In 1983, in New Mexico, He ordered the installation of an electronic device on the ankles of criminals who were sentenced to house arrest to monitor their movements (Phillips, 2013, pp. 97–98). Afterward, the use of this method spread to other states, including Washington, Virginia, Florida, Michigan, California, and Alabama. In 1986, this method reached 26 states (Lehzil, 2018, p. 309). The rising success of electronic monitoring influenced European legislators, whether as a modern method of enforcing punitive actions and (freedom-restricting or depriving) penalties and leniency institutions or as an alternative for pre-trial detention. In France, the feasibility of predicting electronic monitoring was the subject of comprehensive analysis and discussions by its opponents and proponents.

In 1993, a legal movement emerged in French law to alternative electronic monitoring for pre-trial detention. Senator Cabanel, when drafting the bill on pre-trial detention, presented electronic monitoring as an ideal solution, from among twenty proposed methods, for reducing prison populations and an effective means of preventing recidivism among high-ranking officials. However, when examining the bill in 1996, the National Assembly dismissed this proposal on the grounds that it jeopardized the prestige and authority of criminal justice (Cabanel, 1996). Due to the pressure from proponents of house arrest with electronic monitoring, the French legislator was later forced to accept this establishment as an alternative for pre-trial detention under the “Law on Strengthening the Protection of the Presumption of Innocence and the Rights of Victims” known as the *Guigou Law* in the year 2000. Nevertheless, the regulation related to this institution was not practically implemented and was suspended (Masrouq, 2019, pp. 11–13). Soon after, by ratification of the Guidance and Planning of Justice Law (2002), the obligation to be present at the place of residence with electronic monitoring as an alternative to pre-trial detention became one of the requirements and obligations of judicial supervision. Pursuant to the 24 November 2009 law,<sup>1</sup> this measure acquired a proper status and

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<sup>1</sup> Loi n° 2009-1436 du 24 novembre 2009 pénitentiaire JORF n° 0273 du 25 novembre 2009.

was recognized as an intermediate measure between judicial supervision<sup>2</sup> and pre-trial detention<sup>3</sup> (Plonquet, 2021, pp. 9–10).

In the French Code of Criminal Procedure, Art. 137, the legislator emphasizes the principle of innocence and the freedom of the person under investigation<sup>4</sup> (the accused) and stipulates that due to the necessities of the investigation or as a precautionary measure, the accused can be obligated to comply with one or more of the requirements of judicial supervision, and if these requirements are insufficient, a house arrest with electronic monitoring<sup>5</sup> will be issued. Finally, suppose the requirements of judicial supervision or house arrest with electronic monitoring do not suffice to achieve these goals (the necessities of the investigation or precautionary measures). In that case, the accused can be detained temporarily.

Conversely, Iranian legislators have been influenced by the formation and development of electronic monitoring in the United States and European countries, especially France. Article 62 of the Islamic Penal Code (2013) provided for placing convicts under electronic monitoring with their consent. In order to reduce discretionary prison sentences (Ta'zir) and provision of proper monitoring of the behavior of convicts according to Art. 27 of the executive bylaw of Electronic Monitoring, the Guidelines for Determining the Monitoring Range of Convicts Under Electronic Monitoring Systems was ratified by the Head of the Judiciary in 2022. Moreover, Para. (g) Art. 217 of the Code of Criminal Procedure stipulated that electronic monitoring as one of the preventive measures for accused individuals under the title "*House or designated place of residence arrest order with the consent of the accused by determining the amount of the bail through monitoring with electronic equipment or without monitoring with such equipment*" (Khaleghi, 2024, p. 250).

Given that the principle of proportionality has been highlighted in French criminal law and electronic monitoring has been considerably successful in European countries, examining Iran's approach in

<sup>2</sup> Contrôle judiciaire (CJ).

<sup>3</sup> Détention provisoire (DP).

<sup>4</sup> Personne mise en examen.

<sup>5</sup> L'assignation à résidence avec surveillance électronique (ARSE).

this area seems valuable. This paper, by using a descriptive-analytical method and library resources, identifies the nature of the house (or designated place of residence) arrest order and seeks to determine the components of the ideal model of proportionality of house arrest with electronic monitoring with the accused's individual freedom. To this end, the second section of this article will study the nature, implementation and enforcement of house arrest with electronic monitoring and its position in relation to other criminal preventive orders. The third section examines the proportionality of this order with the accused's freedom of movement. The fourth section will analyze the status of the accused's consent and agreement and how this order is proportionate to their privacy. Finally, the fifth section elaborates on the possibility of deducting the duration of house arrest with electronic monitoring from the final verdict and compensating for the inflicted damages.

## **II. Definition of House Arrest with Electronic Monitoring**

In this section, we will discuss the nature of House Arrest with Electronic Monitoring and how it is applied and implemented in French and Iranian law.

### **II.1. The Nature of House Arrest Order with Electronic Monitoring**

French legislator enacted house arrests through electronic monitoring, but did not define it since legislators usually pay attention to explicating the conditions and how to enforce them (Kasāsiba, 2010, p. 295). Various definitions of this order have been presented in the legal doctrine of countries. Still, as the details of the legal system governing house arrest with electronic monitoring vary in each country, these definitions change from one country to another (Masrouq, 2019, pp. 28–31). Defining the nature of such order cannot be achieved by merely providing a single definition, as being under electronic monitoring, at least under French law, can be fixed or mobile, full-time or part-time. Moreover, in French law, house arrest as an intermediate order is

only executed using electronic monitoring without awarding any bail to the accused.<sup>6</sup> However, under Iranian law, in the term of house arrest or the designated residence, the accused's continuous presence in that place is monitored by electronic devices or other equipment. Moreover, the commitment of the accused to appear before the judicial authority and not to leave their house or another place determined in agreement with the investigating judge, a bail is determined, which will be confiscated in case of any violation of these terms (Khaleghi, 2024, p. 250). The Iranian legislator has defined Electronic Monitoring in general as: "A method that allows the presence and absence of the accused and the suspect to be monitored remotely in locations specified by the judicial authority and within specific periods, using electronic means designated for this purpose."<sup>7</sup>

The question in determining the nature of the Institution of presence at the place of residence with electronic monitoring is whether this institution is considered a measure restricting freedom or deprivation of liberty. Some jurists have considered it a measure restricting freedom, given the nature of this surveillance method. In contrast, the intensity of presence at the place of residence has led some jurists to liken it to a kind of imprisonment (Robert, 2020, p. 577).

### **II.1.1. Freedom-Restricting Measure**

Some researchers consider house arrest with electronic monitoring a restrictive measure of freedom (Anane, 2015). They refer to the French Court of Cassation Jurisprudence. In 2015, while raising the issue of harmonizing house arrest with electronic monitoring with pre-trial detention in the enforcement of Art. 175 and 142-12 of the French Code of Criminal Procedure, the latter Court stated, "In French law,

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<sup>6</sup> In Para. 2 Art. 138 of the French Code of Criminal Procedure, obligations such as refraining from leaving the territorial limit determined by the investigating judge or the judge of freedoms and detention, refraining from leaving home or residence, except for cases specified by these judges, and the prohibition of traveling to certain places or mandatory travel in neighborhoods determined by these judges.

<sup>7</sup> Article 26 of the Executive Regulations for method of implementing judicial supervision and preventive orders of 2016 and Para. B Art. 1 of the Executive Regulations for Electronic Supervision of 2018.

house arrest with electronic monitoring does not inherently entail ‘deprivation of liberty’ in the strict sense of the term. Therefore, house arrest with electronic monitoring is considered an alternative to pre-trial detention; while providing information for presenting defenses and statements, these two institutions cannot be considered identical, and the same regulations cannot be applied to them.”<sup>8</sup>

Some judges, including the Paris Court of Appeal prosecutor, believe that house arrest with electronic monitoring has a specific regime, and the legislator should explicitly enact the rules governing this order. They claim that the enforcement of this measure outside France differs from French jurisdiction. They argue that although “*bail with electronically monitored curfew*,” as implemented in England, is equivalent to house arrest with electronic monitoring in French law, it is not the same as or similar to pre-trial detention so that it can be attributed to the full duration of the custodial sentence. It is due to the fact that Art. 716-4 of the French Code of Criminal Procedure only refers to the deduction of the pre-trial detention period from the custodial sentence, and there is no mention of deducting the duration of house arrest with electronic monitoring, which is executed abroad, from the custodial sentence (Baudel, 2020, p. 25). Although this opinion is based on Art. 716-4 of the aforementioned law, it lacks validity, and the French Court of Cassation disagrees with this interpretation (Lavric, 2021).

In Iranian law, researchers have not commonly described and defined the nature of the order for house/or place of residence arrest order. Some jurists have explained Para. (g) Art. 217 of the Code of Criminal Procedure, namely: “The obligation of the accused to appear before the judicial authority when necessary, while restricting their freedom of movement at other times, in such a way that another obligation to refrain from leaving the house or designated place of residence, instead of pre-trial detention [...], is also imposed on them” (Khaleghi, 2023, p. 300). They have also stated, “The purpose of this new establishment (obligation not to leave the house or place of residence) is reducing the cases of arrest of the accused due to the failure to introduce a guaran-

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<sup>8</sup> Cour de cassation, criminelle, Chambre criminelle, 17 mars 2015, 14-88.310, Publié au bulletin, 2015.

tor or bail, or issuance of the pre-trial detention order so that while avoiding the deprivation of their liberty, their entry into the prison is also prevented” (Khaleghi, 2024, p. 250). These statements indicate that a house arrest is considered a restrictive measure of freedom in Iranian legal doctrine. This can be because the latter jurists have considered the geographical limits of enforcing this order. They have also distinguished between this order and an pre-trial detention order and considered the house/place of residence arrest order as an alternative to pre-trial detention. Therefore, they have described it as a restriction of freedom. This approach is aligned with the approach of proponents of the principles of necessity and proportionality since this perspective underlines the use of alternative and less intrusive measures. As long as a house arrest is considered an alternative to pre-trial detention and less intrusive, this order should not inherently be considered a deprivation of liberty like pre-trial detention (Chetard, 2019, pp. 370–372).

### **II.1.2. Custodial Measure**

Advocates of this approach believe that, given its daily implementation, the French law has not provided distinct regulations for house arrest with electronic monitoring. The French legislator has not recognized any distinction between enforcing this order full-time or part-time. It is noteworthy that, pursuant to Para. 2 Art. 142-5 of the French Code of Criminal Procedure, an individual subject to house arrest can leave the designated place at times determined by the judge. Of course, the geographically prohibited area where an individual subject to house arrest is not permitted from visiting or imposed places related to the main place of residence can be regulated (Bitton, 2021).

The European Union and French laws make a clear distinction between restrictive measures of freedom and custodial measures. The Court of Justice of the European Union (CJEU), in its judgment of 28 July 2016, in Para. 1 Art. 26 of Order No. 2002/584, stated, “[...] Although, given the nature of the house arrest and possible ancillary obligations, including monitoring of the person in question using

an electronic bracelet,<sup>9</sup> the obligation to report to the police authorities at specified times on a daily basis or several times a week, and the prohibition of applying for travel documents; the coercive nature of this measure is undeniable. But, in principle, such an order cannot be compared to detention as defined in Para. 1 Art. 26 of Order No. 2002/584. However, the sum of these obligations, depending on their type, duration, effects, and enforcement methods, are coercive so that the same negative effects on liberty as the effects of detention. Consequently, they can be considered as ‘detention’.”<sup>10</sup>

Considering the aforementioned judgment, the French Court of Cassation stated, “The concept of ‘detention’ essentially refers to a deprivation of liberty, but does not necessarily take the form of imprisonment. Therefore, it seems important to verify the measure in question to determine whether it, given its type, duration, effects, and implementation methods, is so severe that it naturally leads to depriving the person in question of their liberty to the same degree as imprisonment. Thus, the French Court of Cassation has equated house arrest with electronic monitoring to pre-trial detention for the purpose of attributing its full duration to a custodial sentence, even if it is carried out part-time” (Cour de cassation, criminelle, Chambre criminelle, 17 mars 2021, 20-84.365, Publié au bulletin, 2021).

Accordingly, we cannot deduce that the legal system governing house arrest with electronic monitoring is subject to the regulations of pre-trial detention. One can take the competent authority for extending the order for house arrest with electronic monitoring as an example. The French legislator has promulgated, “House arrest with electronic monitoring order is issued with justified reasons by the investigating judge or the judge of freedoms and detention [...]” The French Court of Cassation has interpreted, the authority to issue or extend the house<sup>11</sup> arrest with electronic monitoring lies with both the investigating judge (JI) and the judge of freedoms and detention (JLD). The broad jurisdiction of these two judicial bodies suggests that after one of them decides

<sup>9</sup> Bracelet électronique.

<sup>10</sup> CJUE, 28 Juillet 2016, Aff. C-294/16 PPU, JZ Contre Prokuratura Rejonowa Łódź – Śródmieście, 2016.

<sup>11</sup> Alinéa 2 de l’article 142-5 du C.P.P.

to take a measure, it is always possible for the other authority to issue an order to extend it, and there is no “hierarchy”<sup>12</sup> between these two judges or “parallel jurisdiction”<sup>13</sup> between the initial decision and its extension. However, house arrest with electronic monitoring is presented both as a measure similar to and an alternative to pre-trial detention. Nevertheless, the rules of jurisdiction in each case are very different. In this regard, no exclusive jurisdiction has been provided for the judge of freedoms and detention to extend the house arrest with electronic monitoring.<sup>14</sup>

Despite the substantive and inherent differences between the two legal institutions, these regulations indicate that house arrest with electronic monitoring is equivalent to pre-trial detention. However, house arrest with electronic monitoring is not equated with general or unconditional pre-trial detention; it is rather limited to specific cases. This equation is more based on the effects and consequences of house arrest with electronic monitoring than on its nature (Recotillet, 2022). Consequently, regardless of the degree and extent of the deprivation of liberty that is inherent in house arrest with electronic monitoring, its severity, effects, and consequences require the application of some of the regulations, where appropriate, of the pre-trial detention regime to this measure. In essence, house arrest with electronic monitoring, whether it leads to a slight or severe deprivation of liberty, should guarantee the rights of the accused, as it seems that house arrest with electronic monitoring is a complex measure that might entail effects and characteristics of pre-trial detention.

## **II.2. Implementation and Enforcement of the Electronic Monitoring Measure**

The question of the technology used to implement the electronic monitoring measure always arises. In France and Iran, similar electronic technologies are used to monitor the movements of the accused and

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<sup>12</sup> Hiérarchie.

<sup>13</sup> Parallélisme de compétence.

<sup>14</sup> Cour de cassation, criminelle, Chambre criminelle, 3 octobre 2012, 12-84.863, Publié au bulletin, 2012.

suspect, and they do not contain any cameras or audio recorders. In the event of a House Arrest with Electronic Monitoring, the device consists of a box installed in the home and a grey, hypoallergenic bracelet that attaches to the person's ankle. The box is connected to a power outlet, which allows the bracelet to be monitored at home, and is equipped with a handset, which will enable it to be contacted by the central monitoring unit.<sup>15</sup> In addition, it also has a touch screen that allows the person under surveillance to view the restrictions imposed on them in terms of place and time. If this measure is imposed in specific locations outside the home, in addition to wearing the bracelet and placing the box at his residence, the person under electronic monitoring must carry with him every time he leaves the house a device called a "mobile unit,"<sup>16</sup> a phonea dedicated to this purpose and allows the person's location to be permanently geolocated (Plonquet, 2021, pp. 12, 50; Poostchi and Darabi, 2024, pp. 116–119).

Regarding the mechanism for implementing this measure, in France, the decision to place a person under Electronic Monitoring is taken at the pre-trial stage by the investigating judge or the judge of liberties and detention. Before final approval of the decision, the judge must ensure the technical feasibility of this measure.<sup>17</sup> And to this end, the judge seeks the assistance of the Penitentiary Integration and Probation Service.<sup>18</sup> Then the electronic monitoring agent<sup>19</sup> installs the electronic devices in preparation for the implementation of the measure, and the proper implementation of this measure is monitored by employees and consultants working at the Penitentiary Integration and Probation Service. According to the Methodological Guide for Electronic Monitoring, "When the obligations imposed on the person under Electronic Monitoring are violated, warnings are issued for behavioral violations,<sup>20</sup> which mainly include failure to adhere to the established travel schedules (late entry, early exit), intentional damage

<sup>15</sup> Pôle de centralisation (PC).

<sup>16</sup> Unité mobile (UM).

<sup>17</sup> Alinéa 3 de l'article 142-6 et Alinéa 3 de l'article 142-6-1 du C.P.P.

<sup>18</sup> Service pénitentiaire d'insertion et de probation (SPIP).

<sup>19</sup> Agent de surveillance électronique (ASE).

<sup>20</sup> Alarmes comportementales.

to the equipment (transmitter and receiver), or interference with their technical operation.”<sup>21</sup> The rule given to the person under Electronic Monitoring on the day the electronic device is installed is that every warning must be justified. The electronic monitoring agent prepares notes on behavioral warnings via a special software application known as the “Probation and Integration Program” and sends them to both the responsible Counsellor at the Penitentiary Integration and Probation Service<sup>22</sup> and the judge responsible for implementing the measure, so that the latter can examine the justifications of the person placed under electronic monitoring (Plonquet, 2021, p. 22). If he accepts the justifications, the Electronic Monitoring measure will continue, and if he rejects it, the accused or suspect will be brought in, and a pre-trial detention order may be issued against him.<sup>23</sup>

In Iran, the decision to place a person under Electronic Monitoring is made by the investigating judge or, in some cases, the public prosecutor.<sup>24</sup> When the competent judge intends to take this measure, he obtains the accused’s approval and sends a request to the Electronic Monitoring Center to ensure that this measure can be implemented in the locations he has designated. The accused is then sent to this center to have the electronic device installed by the electronic monitoring agent, and the supervisor monitors the implementation of this measure at all times. In cases where a person under Electronic Monitoring is forced to breach the obligations and duties imposed on him, he must obtain prior approval from the competent judicial authorities if he can do so. If this is not possible, he must prove the state of necessity to the competent judicial authorities. Undoubtedly, establishing the state of necessity exempts the person under Electronic Monitoring from liability.<sup>25</sup> In addition, according to Iranian law, any sabotage or disruption of electronic devices by a person under electronic surveillance, whether intentional

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<sup>21</sup> Circulaire interministérielle Du 28 Juin 2013 Relative Au Guide Méthodologique Sur Le Placement Sous Surveillance Électronique — Légifrance, 2013, pp. 38, 47.

<sup>22</sup> Conseil pénitentiaire d’insertion et de probation (CPIP).

<sup>23</sup> Alinéa 3 de l’article 142-8 et alinéa 3 de l’article D32-11 du C.P.P.

<sup>24</sup> Art. 217 C.C.P.

<sup>25</sup> Art. 3, 24 and 25 of the Executive Regulations for Electronic Supervision of 2018.

or negligent, obligates that person to pay compensation for the damage caused to these devices. In such cases, supervisors and those responsible for implementing this measure must inform the judicial authorities that issued it to take the necessary action.<sup>26</sup>

The bottom line is that the techniques used in France and Iran are very similar, as are the mechanisms for implementing and maintaining the measure and the cases in which a person under electronic monitoring is forced to breach their obligations and duties. However, it should be noted that the Iranian legislator did not specify the alternative measure that should be taken if the person under Electronic Monitoring breaches his obligations and duties, and did not explicitly stipulate the adoption of a decision for pre-trial detention in such cases. This is because the legislator did not specify the position of electronic monitoring measures among the various preventive measures.

### **III. Proportionality of House Arrest with Electronic Monitoring and the Individual's Freedom of Movement**

House arrest with electronic monitoring, full-time or part-time, is a coercive measure restricting the accused's right to freedom of movement. The legitimate objectives, such as protecting society and victims' rights and ensuring the efficiency of investigations and criminal proceedings, generally justify this coercive measure. They are considered equal to the accused's freedom of movement regarding importance and dignity. Therefore, using house arrest with electronic monitoring may lead to a conflict between the rights and interests of the parties to a criminal case. European jurists, especially Germans, have utilized the principle of proportionality to resolve this issue (Sauvé, 2018).

The German model of proportionality employs multiple criteria in a hierarchical order to examine proportionality. The Federal Constitutional Court first used it in the "Pharmacy Case"<sup>27</sup> in an order issued

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<sup>26</sup> Art. 27 and 28 of the Executive Regulations for method of implementing judicial supervision and preventive orders of 2016 and Art. 12 of the Executive Regulations for Electronic Supervision of 2018.

<sup>27</sup> L'affaire des pharmacies.

on 11 June 1958.<sup>28</sup> The first criterion is that the measure infringing on rights and freedoms should serve a legitimate purpose. A legitimate purpose is considered a prerequisite and an external pre-condition for establishing proportionality. The next step is to determine whether the measure is suitable to achieve the intended objective and capable of realizing it, and whether it is necessary in that it imposes the least possible impairment on rights and freedoms. Ultimately, even measures that are suitable and necessary must also satisfy proportionality in the strict sense (Van Drooghenbroeck, 2019, pp. 35–40).

Per the preliminary article of the French Code of Criminal Procedure, “coercive measures<sup>29</sup> that a suspect or a person subject to prosecution may face [...] shall be strictly subject to procedural rules and proportionate to the seriousness of the alleged crime and must not infringe the human dignity.” Although the principle of proportionality is not enacted as a guiding principle in Iranian law, the legislator has underlined the necessity of observing proportionality in judicial supervision and criminal orders, including house arrest, proportionate to the nature and gravity of the crime, the severity of the punishment, and other circumstances.<sup>30</sup>

### III.1. Adequacy

Adequacy<sup>31</sup> refers to the aptitude for restrictive rights and freedoms measures to achieve their goals. Thus, if the decision-maker is confident that a house arrest with electronic monitoring truly seeks a legitimate objective, they should also examine the existence of a minimal causality<sup>32</sup> between the house arrest and the intended objective, ensuring that this means providing the aptitude to achieve the intended goal. Therefore, examining the criterion of adequacy is not limited to

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<sup>28</sup> German Case. Foreign Law Translations. Texas Law. (n.d.). Retrieved 12 April 2025. Available at: <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=657>.

<sup>29</sup> Les mesures de contraintes.

<sup>30</sup> Art. 218, 219, 247, 250, and 254 of the Iranian Code of Criminal Procedure.

<sup>31</sup> Adéquation.

<sup>32</sup> Lien de causalité minimal.

the mere existence of a causal relationship between the means and the end. Still, the quality of this relationship also matters. Namely, house arrests with electronic monitoring should be able to fully or partially achieve the desired goals because a certain error margin is expected when examining the adequacy of measures that infringe on rights and freedoms. Hence, the decision-maker accepts adequacy if the measure's effectiveness is generally and probably proven, even if its adequacy is not proven definitively. In contrast, inadequacy may stem from a partial deficiency in the nature of such measure, and conversely, it may have a minor and marginal effect (Chetard, 2019, p. 364).

The French Code of Criminal Procedure emphasizes the adequacy of criminal preventive measures and the promulgation of their legal and factual considerations,<sup>33</sup> which is also emphasized by the judicial precedent (Pradel, 2019, p. 1131). An order issued by the French Court of Cassation prescribed: "Factors such as the defendant's dangerous history, violating the previous judicial supervision, and insufficiency of guarantees for their presence are not sufficient to justify not using house arrest with electronic monitoring; rather, judges shall explicitly elaborate on the legal and factual considerations regarding the inherent inadequacy of house arrest with electronic monitoring."<sup>34</sup> The Iranian Code of Criminal Procedure, Art. 250, highlights the justification and adequacy of preventive order and judicial supervision, indicating the requirement to determine the actual adequacy of the house/place of residence arrest order for achieving the desired objectives of such order.

### III.2. Necessity

However, some researchers acknowledge that necessity, as one of the criteria of the principle of proportionality, is identical to what is discussed in substantive criminal law (Harithi, 2021, p. 8). In fact, necessity, as one of the criteria of the principle of proportionality, entails a different nature and application in issuing preventive measures. Therefore, it is determined by choosing measures with minimal in-

<sup>33</sup> Alinéa 1 de l'article 137-3 du C.P.P.

<sup>34</sup> Cour de cassation, criminelle, Chambre criminelle, 19 avril 2023, 23-80.873, Publié au bulletin, 2023.

interference with individual rights. According to the above definition, a method should be selected with the least interference with individual rights and the most adequate to achieve such goals (Hajimolla and Mohammadi, 2021, pp. 34–35). Thus, some jurists have called it “internal necessity”<sup>35</sup> to distinguish the necessity of the principle of proportionality from other types of necessity (Ghazwani, 2022, p. 23).

The wording of Art. 137 of the French Code of Criminal Procedure stipulates the need to consider the necessity of house arrest with electronic monitoring. As a result, house arrest with electronic monitoring can only be issued on the grounds of investigative necessities or as a preventive measure only in cases of insufficient judicial supervision measures.

In Iranian law, the principle of the necessity of establishing preventive measures is well grounded. According to para. 1 of the Single Article Act on Respect for Legitimate Freedoms and Protection of Citizen Rights, enacted in 2004, law enforcement officers are obligated to [...] avoid additional and unnecessary arrests (Ashoori and Saffari, 2023, pp. 9–10). Therefore, if the requirements and commitments of judicial supervision stipulated in Art. 247 of the Code of Criminal Procedure or other minor measures specified in Art. 217 of the latter can achieve the conflicting goals, utilizing house arrest is deemed unnecessary, intrusive, and violates the principle of proportionality.

### **III.3. Proportionality in the Strictest Sense**

In addition to the need for establishing the adequacy and necessity of a restrictive measure on rights and freedoms, it should also be proportionate in its strictest sense.<sup>36</sup> These criteria require assessing the effects and consequences of imposing such a restriction to ensure that it is not excessive compared to the surrounding circumstances of a certain case. In addition, the importance of the goal and the expected benefits of such restriction of rights are evaluated properly for optimal exercise of competing rights (Alexy, 2012, pp. 467–469; 2014, pp. 55–58).

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<sup>35</sup> Nécessité interne.

<sup>36</sup> Proportionnée au sens strict.

In our opinion, in addition to the obligation of considering the principle of proportionality, the legislator must also provide the means of compliance with this principle for law enforcement officials. To this end, competent authorities should be given many powers since house arrest with electronic monitoring is a temporary measure that should be continuously reviewed and reassessed. In other words, proportionality in the strictest sense should also be observed in decision-making and during implementation.

Article 142-5 of the French Code of Criminal Procedure stipulates: “House arrest with electronic monitoring may be issued, without a request or at the request of the person concerned, if the accused faces a misdemeanor punishable by imprisonment of fewer than two years or a more severe penalty.” Suppose the accused is suspected of committing a crime punishable by more than seven years of imprisonment, for which social-judicial prosecution is considered. In that case, this obligation may be carried out in accordance with the regime of placement under mobile electronic monitoring.<sup>37</sup> In all these cases, according to Art. 142-7 of the Code of Criminal Procedure, house arrest is ordered for a period that cannot exceed six months. During the investigation, it can be renewed for the same period several times, provided that the total duration of placement under electronic monitoring does not exceed two years.

In the Iranian legal system, the legislator has not observed the determination of the extent and duration of house arrest at the legislative level (Rajab, 2017, pp. 75–77). It seems that the offenses subject to this measure and its maximum term are left to the broad discretion of the competent judges. This issue may lead to abuse of this measure and violation of the principle of judicial security for citizens. In Iran, despite the issuance of the Executive Regulations for method of implementing judicial supervision and preventive orders in 2016, the competent authorities have not worked seriously and noticeably to provide the necessary infrastructure and equipment to implement this measure. Electronic Monitoring measures are generally limited to some vital regions, such as the capital. The appropriate environment and necessary

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<sup>37</sup> Alinéa 3 de l'article 142-5 C.P.P.

equipment have not yet been provided in remote areas to implement this decision. Therefore, Electronic Monitoring in Iran has not been widely welcomed by judges due to its limited implementation in some geographical regions. In light of current legal texts, the determination and extension of the period is left to the judge. Accordingly, there is nothing to prevent a judge from taking this measure for a period exceeding the periods specified for pre-trial detention, which contradicts the philosophy and essence of Electronic Monitoring as an alternative measure to pre-trial detention, which must be characterized by a short duration. In our opinion, the term of house/place of residence arrest order should not exceed the duration of interim detention.

#### **IV. Proportionality of House Arrest Order with Electronic Monitoring and the Accused's Privacy**

Dissenters of house arrest with electronic monitoring exaggerate in claiming that house arrest with electronic monitoring poses greater harm to the accused and violates several of their fundamental rights. It is due to infringing on the accused's freedom and undermining their home, physical, and psychological privacy; thus, it can be considered a more severe measure than pre-trial detention. Hence, many European laws have set the condition of "consent"<sup>38</sup> for enforcing this order. This section addresses the position of the accused's consent and agreement. It examines the opponents' view on infringing the accused's privacy rights in house arrest with electronic monitoring, as the principle of proportionality aims to protect competing rights and freedoms.

##### **IV.1. The Role of Accused's Consent**

Legislators have introduced the condition of "consent" under the influence of said criticisms to establish proportionality between this measure and the accused's privacy. For example, the French legislator, in Para. 2 Art. 723-8, the Code of Criminal Procedure, has emphasized respecting human dignity, integrity, and the privacy of the individual during the implementation of this measure as well as obtaining the ac-

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<sup>38</sup> Consentement.

cused's consent to install electronic tagging, and also imposed an obligation of notifying the accused that the device will not be installed without their permission. However, refusing this installation will be considered a violation of their obligations. It will result in the cancellation of house arrest with electronic monitoring and putting the accused in pre-trial detention.<sup>39</sup> Furthermore, according to Art. 142-12 of the Code of Criminal Procedure, this provision applies if the accused is placed in pre-trial detention and the competent authority decides to impose house arrest with electronic monitoring as an alternative for pre-trial detention.

Although the Iranian legislator enacted the "consent of the accused," it has not sufficiently elaborated on the status of this consent and the consequences of the accused's disagreement. A number of Iranian jurists believe that "Para. 1 Art. 217 of the Code of Criminal Procedure on the sanctions for non-compliance with the order mentioned in Para. (g), which implementation was subject to the approval of the relevant bylaw, is not enforceable. Evidently, the phrase 'consent of the accused' in Para. (g) refers to the 'designated place of residence.' Seemingly, since 'commitment' is a legal act and requires free will and without any coercion and compulsion, in case of the order mentioned in Para. (g), a bail should be issued instead [...]" (Khaleghi, 2023, p. 301).

Under Iranian law, to further explain the status of the accused's consent, one can ask: in French law, why is the accused's consent limited to the installation of the electronic device? And does it imply their consent to house arrest with electronic monitoring itself? In French law, it looks like the accused's consent to the installation of the electronic device should not be construed as consent to the implementation of house arrest with electronic monitoring itself. Although the accused's refusal of electronic monitoring may result in the nonissuance of such an order, these two forms of consent should not be regarded as the same. The accused's consent to the order itself may lead to assuming that, subsequently, the accused will be barred from requesting release or appealing against this order since they initially consented to it. Furthermore, consent to the order puts it out of the scope of coer-

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<sup>39</sup> Alinéa 4 de l'article 142-5 du C.P.P.

cive measures, and the principle of necessity and proportionality can no longer apply. Conversely, the French legislator has required the accused's consent to the installation of the electronic device so that the installation of the electronic bracelet or anklet would not be considered as a physical sanction. In contrast, in cases of domestic violence where the punishment is less than five years of imprisonment, the legislator has enabled the accused to use the regime of placing under mobile electronic monitoring.<sup>40</sup> Concurrently, it has provided for the installation of a remote protection device to protect the victim,<sup>41</sup> but it has made obtaining their explicit consent a condition.<sup>42</sup> Even though the victim is not obligated to be under house arrest with electronic monitoring, their consent for installing the remote protection device must be obtained to respect their dignity and privacy. Thus, in French law, the accused's consent for installing the electronic monitoring device is provided to respect their dignity, integrity, and privacy.

#### **IV.2. Home Privacy**

Since house arrest with electronic monitoring leads to the transformation of the accused's home into a detention center, the opponents of this method have questioned the place of enforcing this measure. Since the house is the symbol of the individual's privacy, while the detention center is a more public and populated place. How can a home be transformed into a detention center?! If the person dealing with pain and suffering in their home during the implementation of this order ever forget these feelings afterward?! (Otani, 2009, p. 157). They also criticize the accused's consent claiming that their consent cannot be real and effective because unwillingness inevitably leads to a more severe preventive measure. Thus, such consent is considered defective and tainted. Real and effective consent is achieved based on awareness and free will, not on coercion and compulsion caused by the possibility of a more severe preventive measure (Ben Zarqa, 2020, p. 37).

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<sup>40</sup> Art. 142-12-1 du C.P.P.

<sup>41</sup> Dispositif de téléprotection.

<sup>42</sup> Article D32-30 du C.P.P.

Although this perspective is somewhat logical, it can still be moderated. Many restrictive measures on rights and freedoms have side effects and are not limited to violating the right or freedom in question. A potential measure, in addition to restricting a right or freedom, indirectly and incidentally undermines other rights and freedoms as well. Of course, it is good to distinguish the application of home electronic monitoring from monitoring in the place of residence since applying this order within a specific geographical area, such as a place of residence, is not subject to this criticism. Hence, it does not invade home privacy. In these cases, using the principle of necessity and proportionality and providing appropriate guarantees prevent indirect violation of rights and freedoms. Notably, in 2019, the French legislature enacted the principle of necessity and proportionality of restrictive privacy measures as a guiding principle. Moreover, if the accused violates their obligations, strict and detailed regulations should be provided for entering their home, and the manner of home inspection and search by officials should also be organized. Despite the possibly defective consent of the accused, freedom of will is not completely eliminated. Seemingly, these opponents have not sought to protect the sanctity of the accused's home but rather intend to protect the prestige of criminal justice and repressive measures such as pre-trial detention.

It should be noted that the suspect or accused's consent to wear the electronic anklet is not sufficient in itself, because French law also requires the consent of some persons, such as the property owner and the joint tenant (Devresse, 2013, p. 376). In other words, if the suspect or accused is not the sole owner or tenant of the property, French law requires the host person to also consent to the installation of electronic devices on the property. Article R57-14 of the French Code of Criminal Procedure states, "Written consent must be obtained from the owner or leaseholder(s) of the premises where the receiver is to be installed." However, under French law, the consent of family members, especially children, or other co-residents other than tenants or owners, is not required (Plonquet, 2021, p. 47). In Iranian legislation, the legislator was content to mention a provision stipulating that Electronic Monitoring should not be carried out in a manner that conflicts with the privacy

of individuals,<sup>43</sup> but did not provide details regarding obtaining the consent of the property owner, joint tenant, or family members. This often leads judges to neglect the consent of the property owner or joint tenant and family members because this condition is not mentioned in the legal texts.

### **IV.3. Physical and Mental Privacy**

Following the increased use of electronic monitoring technology in the United States and European countries, empirical research and medical experiments on the harmful physical and psychological effects of house arrest with electronic monitoring on accused individuals, especially in cases where the accused has a physical or mental illness or is elderly, have received attention (Tully et al., 2014, p. 6). Physicians and psychiatrists believe that being under electronic monitoring has detrimental and irreparable effects on the bodily integrity and mental state of the accused. A group of psychiatrists even stated that the harmful effects of this measure are more severe than those of pre-trial detention are and have recommended that the duration of being under electronic monitoring be limited to a short period (Ghanim and Rakaizi, 2017, pp. 35–36).

This criticism is also unfounded and cannot prevent the enactment and implementation of this order. The reason is that legislators usually assume the necessity of conducting medical tests to preserve the accused's physical integrity and mental state (Mazmoumi, 2020, pp. 885–886). Article (D32-6) of the French Code of Criminal Procedure stipulates “When examining to issue such an order, the investigating judge or the judge of freedoms and detention informs the accused of the possibility of conducting a continuous medical examination to ensure that the implementation of this order does not harm their integrity and health.”<sup>44</sup> Although Iranian law has not provided for a medical examination of the accused for being under electronic monitoring prior to issuing this order or during its implementation, nevertheless,

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<sup>43</sup> Art. 14 of the Executive Regulations for Electronic Supervision of 2018.

<sup>44</sup> Article D32-6 du C.P.P.

in Art. 250 of the Code of Criminal Procedure, the legislator has emphasized the need for the proportionality of preventive measure with the mental and physical conditions and age [...]. Looking at the indicators of mental and physical condition from the accused's perspective, it can be inferred that the decision-making authority must consult a medical specialist due to incompetence in assessing the mental and physical conditions of the accused. In our opinion, it would have been better if the legislator had explicitly provided for a medical examination before issuing the house arrest and during implementation if required.

## **V. Mitigating the Adverse Effects of House Arrest Order**

A comparative analysis of the legal systems in various countries indicates that if the duration of house arrest with electronic monitoring is not subtracted from the sanctioned award, it is unlikely that this order will be effective or that accused persons will be motivated to accept it. Furthermore, since this measure is continuous and as the state-centric approach in criminal proceedings diminishes, legislators increasingly focus on addressing the harms associated with house arrest with electronic monitoring (De la Bâtie, 2013, pp. 13–27).

The French legislator has adopted a more progressive stance in Art. 142-11 of the Code of Criminal Procedure by allowing the duration of house arrest with electronic monitoring to be deducted from the custodial sentence. This article stipulates: "House arrest with electronic monitoring, in terms of deducting its full duration from the custodial sentence, is similar to pre-trial detention, in accordance with Art. 716-4." Conversely, Iranian law has not incorporated insights from European practices; instead, it merely stipulates the obligation for the accused to remain at their home or place of residence without adequately addressing the implications or consequences of such measures or enacting detailed regulations for deducting the duration of this order from the custodial sentence. Iranian legal approach dissuades individuals from accepting house arrest, which ultimately exacerbates the criminal preventive measures and undermines their proportionality.

To mitigate the damages caused by house arrest with electronic monitoring, the French legislator has established provisions in Art. 142-

10 of the Code of Criminal Procedure: “In the event of a final decision of non-prosecution,<sup>45</sup> release,<sup>46</sup> or acquittal<sup>47</sup> of a person who was subject to house arrest with electronic monitoring, they are entitled to compensation for the damages suffered, under the conditions stipulated in Art. 149 to 150.” In contrast, while Art. 171 of the Iranian Constitution mandates compensation for material and moral damages resulting from judicial errors, misinterpretations, or application on a certain case, the ordinary legislator has failed to enact necessary regulations to compensate for the damages incurred due to house arrest.

## VI. Conclusion

House arrest with electronic monitoring is a compound measure that essentially constitutes a restriction of freedom. However, concerning its characteristics, effects, and consequences, it is better understood as a custodial measure akin to pre-trial detention. The proportionality of house arrest with electronic monitoring to the accused’s freedom of movement necessitates adherence to the criteria of adequacy, necessity, and proportionality in the strictest sense. The Iranian legislator has acknowledged the adequacy and necessity of this measure but has not addressed the criterion of proportionality in a strict sense. Furthermore, it has refrained from specifying the circumstances under which this measure may be applied and its maximum terms. Conversely, French law emphasizes the importance of respect for the accused’s dignity, integrity, and privacy by requiring their consent to install electronic tagging. Of course, refusal to install the device is deemed a violation of their obligations. It results in the cancellation of house arrest with electronic monitoring and placing the accused in pre-trial detention. Iranian law has not outlined the status of the accused’s consent and the implications of non-acceptance of the measure in Para. (g) Art. 217 and remains ambiguous. Additionally, while French law allows for deducting the duration of house arrest with electronic monitoring from the custodial sentence, the Iranian legislator has overlooked this pro-

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<sup>45</sup> Non-lieu.

<sup>46</sup> Relaxe.

<sup>47</sup> Acquittement.

vision. Moreover, the French legislator has established compensation for damages incurred due to house arrest with electronic monitoring and aligned it with the compensation provisions for pre-trial detention. Conversely, the Iranian legislator has failed to address such compensation for the damages resulting from the house/place of residence arrest order.

## **VII. Suggestions**

The principle of proportionality regarding restrictive measures on individual freedom warrants greater attention. By employing this principle, we can regulate the encroachment on personal privacy by the public authority in a manner that ensures proportionality serves as a strategy for protecting individual rights and freedoms. Legislators should adhere to the principle of proportionality at the legislative level and realize the importance of judicial security for citizens. Consequently, the scope of the house arrest with electronic monitoring and the maximum period of this measure should be explicitly articulated in detail. The wording of Para. (g) Art. 217 of the Iranian Code of Criminal Procedure is ambiguous and necessitates a review by the legislator drawing upon the experiences of European countries. Such revision can clarify the relationship between house arrest and other criminal preventive measures, as well as the status and role of the accused's consent and the sanctions for non-consent. To mitigate the adverse effects and consequences associated with house arrest with electronic monitoring, the Iranian legislature should provide for the deduction of the period of electronically monitored house arrest from any custodial sentence and for compensation for damages resulting from the imposition of this measure. Based on the foregoing, we recommend incorporating the following provisions into Iranian law.

The following text shall be added to the end of Art. 217 of the Code of Criminal Procedure: "The decision to place the person under Electronic Monitoring is issued for three months, which may be extended provided that the total periods in the pre-trial stage do not exceed half the period specified for pre-trial detention. If the Electronic Monitoring situation is applied after the implementation of pre-trial detention

for the same incidents, the total periods may not exceed the maximum periods stipulated for pre-trial detention. If pre-trial detention is imposed instead of Electronic Monitoring due to the accused or suspect's breach of their obligations or duties, the total period may not exceed the maximum period stipulated for pre-trial detention, plus half the period stipulated for managing the situation under electronic monitoring. If a person subject to electronic monitoring is placed under pre-trial detention due to a breach of his obligations or duties and has previously been subject to pre-trial detention, the total periods may not exceed the maximum periods stipulated for pre-trial detention and placement under electronic monitoring together."

The phrase "placement under electronic surveillance" shall be added to the end of Art. 255 of the Code of Criminal Procedure which relates to compensation for pre-trial detention, so the compensation provisions shall also apply to this measure.

The following text shall be added to the end of Article 515 of the Code of Criminal Procedure: "The measure of placing a person under Electronic Monitoring is considered similar to pre-trial detention in terms of deducting periods from the sentence issued."

The following text shall be added to the Executive Regulations for Electronic Supervision of 2018: "Written consent must be obtained from the accused or suspect, the property owner, the joint tenant, and adult family members residing with the accused or suspect and in case of domestic violence, the consent of the husband or wife must be obtained to install electronic monitoring devices in the home."

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