HUMAN RIGHTS AND THE CRIMINAL PROCEDURE (IDENTIFICATION) ACT, 2022: A CRITICAL ANALYSIS

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ABSTRACT

Repealing the Identification of Prisoners Act, 1920, the parliament has enacted the Criminal Procedure Identification Act, 2022, to replace it. The objective of the Act is to make the criminal investigation effective and efficient by allowing the easy identification of the persons concerned through their measurements recorded and stored in the repository of the National Crime Records Bureau (NCRB). The Act allows the police officer or head warder of the prison to take measurements of the person convicted or arrested. Such measurements are to be stored in the repository of the NCRB for 75 years from the date of collection. Resisting or refusing to give measurements is penalised under Section 186 of the Indian Penal Code. The Act defines 'measurements' as a very broad term that not only includes iris and retina scans but also encompasses personal data including behavioural attributes and biological samples that also allows the taking of biological samples for DNA extraction. Using an inclusive definition of 'measurements' without defining the critical terms such as biological samples and behavioural attributes permit the investigating agencies to misuse the law and infringe upon human rights. The Act has also been criticised as being arbitrary and disproportionate, infringing on the fundamental rights enshrined in the Constitution. The absence of laws such as the Data Protection Law and the pending DNA Technology (Use and Application) Regulation Bill, 2019 further makes the situation complex by allowing the government to act whimsically. Therefore, the researcher decides to undertake the present research to critically examine the Criminal Procedure Identification Act, 2022, on the touchstone of human rights and to address the legal lacunae of the Act.

Keywords: DNA, Human Rights, fundamental Rights, privacy, constitution, measurements.

INTRODUCTION

The Identification of Prisoners Act, 1920 (hereinafter referred to as the "Act of 1920") provides for the collection of measurements and photographs for the purpose of identifying convicts and other persons. These measurements include footprints and fingerprints[i]. The Act of 1920 was hastily enacted to meet the contingencies of that time since, before 1920; the taking of measurements was not backed by legal sanction, accompanied by the refusal of the convicts to give measurements, demanding arduous efforts to serve justice[ii]. However, with time, the Act of 1920 becomes obsolete and requires modification to keep pace with the changing world of modern science. Therefore, in 1980, the law commission, after acknowledging the advancements in forensics in its 87th report, recommended the modification of the Act of 1920 to expand the term "measurements" to include palm impressions and specimens of writing, signatures, and voice[iii]. However, the recommendations of the law commission were not given any heed at that time. Thereafter, in 2003, the Expert Committee on Reforms of the Criminal Justice System recommended the revision of the Act of 1920 to bring it in line with the modern trends of forensic science by authorising the magistrate to direct the accused to give his bodily sample for DNA extraction. Again, the government did not consider the recommendations, and as a result, the Act of 1920 became a stifling force for criminal investigations, impeding the administration of justice. Later on in 2022, the government, after acknowledging the complications involved in the old and outmoded Act, repeals the Act of 1920 and enacts the legislation on the Criminal Procedure (identification) Act, 2022 (hereinafter referred to as the "Act of 2022") to broaden the domain of its predecessor Act. Since the Act of 2022 is an improved version of the Act of 1920, it not only broadens the term 'measurements' but also expands the power of certain agencies to collect, analyse, store, and disseminate such measurements with other agencies to aid criminal investigation. These expanded powers have raised concerns related to human rights.

IMPORTANT FEATURES OF THE ACT

Expands the term "measurements"

The Act of 2022 provides for an inclusive definition of the term "measurements," which, unlike the Act of 1920, which covers only footprints, fingerprints, and photographs, broadens the scope to also include iris and retina scans, physical samples, biological samples, behavioural attributes, and examinations conducted under Section 53 or 53A of the Code of Criminal Procedure[iv]. The Act, however, has not defined the terms physical sample, biological sample, or behavioural attributes, which has given rise to concerns regarding human rights.

Persons whose measurements can be collected

The repealed Act of 1920 puts a rider on the investigative authority to collect the data only of those persons who have been convicted or arrested for an offence punishable with rigorous imprisonment of one year or upwards, whereas the Act of 2022 authorises the investigative authority to take measurements of every person convicted or arrested of 'any' offence. Also, the person who is required to give security under Section 107, Section 108, Section 109, or Section 110 of the Code of Criminal Procedure or who is detained under any preventive detention law can be compelled to furnish their measurements[v]. Resisting or refusing to give measurements is considered an offence for obstructing a public servant in the discharge of his public function under Section 186 of the Indian Penal Code[vi]. However, in cases where the arrested person is not punishable for an offence against a woman or a child or punishable for less than seven years, the Act requires the taking of biological samples only with his consent.

Persons authorized to take/order measurements

The Act of 2022 also expands the range of persons who are authorised to collect the measurements as compared to its predecessor Act. While lowering the degree of the police officer from sub-inspector to head constable, it also authorises the prison authority of the rank of a head warder or above to take measurements of the persons convicted or arrested[vii]. Further, the judicial magistrate, or in some cases, the executive magistrate (in cases where the person is required to give security for good behaviour or for maintaining peace), can also direct the taking of measurements of 'any' person (not just arrested persons) to aid criminal investigation[viii] .

Storing and disseminating measurements

The Act of 2022 not only allows the taking of measurements for the identification of convicts and some persons but also empowers government agencies to store, preserve, and disseminate such information. For this purpose, the National Crime Records Bureau (hereinafter referred to as "NCRB") is the central agency named in the Act that will act as a repository of information and is authorised to collect, store, preserve, process, share, disseminate, and destroy the records of the persons concerned[ix]. Further, the Act also authorises the state governments to notify such agencies that can collect, manage, and store such sensitive information in their jurisdiction[x]. The records so collected are to be retained digitally in the repository for seventy-five years from the date of collection. Such records shall be expunged in cases where the arrested person, after exhausting all legal remedies (with no previous conviction), ends up acquitted or is released by the court[xi].

HUMAN RIGHTS CONCERNS WITH THE ACT OF 2022

Infringement of Article 14

The Act of 2022 deals with the collection and storage of sensitive information about individuals. Therefore, any law that deals with such sensitive personal data must be constitutionally valid. However, it is argued that it violates Article 14, which protects the fundamental right to equality for every citizen. Hence, it is necessary to analyse the Act of 2022 on the touchstone of the right to equality. The Supreme Court in the case of Shri Ram Krishna Dalmia v. Justice S. R. Tendolkar[xii] observed that the legislative classification must be reasonable to preserve equality. A classification is reasonable if it fulfils the twin test, i.e., first, the classification must be founded on intelligible differentia distinguishing one class from another, and second, the differentia must have a rational nexus to the object sought to be achieved by the Act[xiii].

The proviso to Section 3 of the Act of 2022 made a classification concerning the person who can be compelled to give a 'biological sample'. It states that any person who has been arrested for an offence against a woman or a child or committed an offence punishable with imprisonment of seven years or more is required to compulsory furnish their "biological

sample". In the case of other arrested persons, they are compulsorily required to give measurements other than biological samples.

The proviso classifies the taking of biological samples based on the age and gender of the victim. The aim of taking such measurements is to aid the investigative process. However, the Act fails to establish how particularly the "biological sample" of the arrested person will be more useful to aid the investigation in the case of crimes against a woman or a child or for any offence punishable with seven years or more, and not in the investigation of other crimes generally. Rather, carving out the proviso specifically for the biological sample does not make any sense, as the biological sample is considered to be on par with other measurements when it comes to aiding the investigation. Therefore, the Act fails to present any reasonable nexus between classifications based on the age or gender of the victim for the biological sample to aid the investigation.

Further discretionary powers have been given under Section 3 to the police and prison authority to collect measurements. The usage of the phrase "if so required" in the absence of any legal standards or criteria for assessing such "requirement" clearly indicates that it will depend on such officials to whom they wish to compel them to provide measurements, which can be misused as *carte blanche* without any provision of grievance redressal. Also, a similar discretionary power has been granted to the judicial magistrate under Section 5 of the Act. The use of the word "any person" shows that the magistrate has the power to order any person (whether arrested or not) to give his measurements based on his expediency, thereby expanding the scope of the Act. Further, not stating the authority to which the order of collection relates may allow the magistrate to include a third party for the collection of measurements in addition to the police or prison staff.

Infringement of Article 20 (3)

Considering the constitutionality of neuro-scientific tests such as narco-analysis or brain mapping for criminal investigation, the Supreme Court in Selvi v. State of Karnataka[xiv] observed that subjecting the accused to such a test without his consent infringes on his mental privacy, and the revelations made by the accused during the test would tantamount to a testimonial compulsion, which is unconstitutional under Article 20(3) that protects the accused from self-incrimination. However, using an inclusive definition of

"measurements" under Section 3 of the Act without defining the word "behavioural attributes" would subject the term to numerous interpretations, which may even lead to harsh consequences. As the Act talks about the compulsory taking of measurements, behavioural attributes may lead to the taking of measurements by compulsive psychiatric tests, which, on expansive interpretation, may include compulsive narco-analysis or brain mapping tests, thereby violating the fundamental right against self-incrimination protected under Article 20(3).

Infringement of Article 21 - Right to Privacy

The Act stipulates the collection and recording of measurements, which include fingerprints, footprints, iris and retina scans, and physical and biological samples. These measurements constitute the personal information of an individual and, therefore, are covered under informational privacy as observed by the Supreme Court in the Aadhar verdict[xv]. Further, the Supreme Court in the Puttaswamy-I judgement elevates the right to privacy to a fundamental right under Article 21 of the Constitution[xvi]. Therefore, the measurement covered under the Act amounts to an encroachment on the citizen's fundamental right to privacy. However, the Supreme Court also observed that the right to privacy is not an absolute right and is subjected to reasonable restrictions. The Supreme Court, therefore, establishes the fourfold test against which every law encroaching on the right to privacy must be evaluated. The tests include[xvii]:

1. **Legitimate aim:** it implies that the goal that the state wishes to pursue must be significant enough to justify the violation of the right to privacy**.**
2. **Suitable means:** it indicates that appropriate means should have been employed to achieve the end.
3. **Necessity:** selection of a preferable alternative that achieves the goal in a real and meaningful way while compromising less on the right of the subject as compared to the state's measure.
4. **Proportionality:** ensures a rational nexus between the objects and the means adopted to achieve them.

The objective of the Act of 2022 is to collect and record measurements for the identification and effective investigation of criminal cases. The Act has a legitimate aim as appeared from the objective; however, the same fails to satisfy the other three prongs.

Wide discretionary power bestowed on executive

Under Section 3 of the Act of 2022, wide discretionary power has been granted to police and prison officers to take measurements if they "so require" without specifying any guidelines as to the nature or severity of the offence. This includes the compulsory taking of measurements, even in those minor offences regarding which no investigation is ever needed, but in such cases, if the prison or police officer feels "requirement", it can take the measurements of the person and record them in the database for an unreasonable long time, which no doubt fails to establish a rational nexus with the stated aim of effective investigation, thereby infringing the privacy of the individuals.

Infinite retention of data

The Act stipulates that the personal data collected shall be retained digitally in the repository of the NCRB for seventy-five years from the date of collection. The compulsory taking of measurements completely ignored the doctrine of parity and puts the accused of felony and misdemeanour on the same footing. This results in the storage of personal data for 75 years, even though the person is accused of committing a petty offence. Therefore, the period of retention is manifestly disproportionate to the nature and gravity of the offence committed.

Further, the Act fails to specify any time frame within which the records are to be deleted. Though the Act requires the digital retention of measurement records for 75 years, it does not explicitly mention the destruction of data after 75 years, which may result in the data being held in perpetuity in the database. Also, the Act makes provision for the deletion of data only in the cases of accused persons who are released, discharged, or acquitted after exhausting all legal remedies. In the case of other persons, for example, under Section 5 of the Act of 2022, the magistrate has the power to order "any person" (for example, a person of interest, including juveniles) to give measurements. In such a case, though his measurements are compulsorily recorded, since there is no provision for deletion of data, his measurements will be kept in the database for perpetuity without any legitimate purpose.

Also, Section 6(2) of the Act provides for punishment in cases of refusal or resistance to giving measurements. It creates a legal lacuna, as if the accused refuses to furnish measurements, he will be penalised under Section 186 of the Indian Penal Code, 1860. However, if the same person is subsequently acquitted after exhausting all legal remedies in the original case, would

his details remain in the database since he was convicted under Section 186 of the IPC? This question has remained unanswered.

Lack of Purpose for the retention and sharing of measurements

The purpose of retention of such data and sharing with law enforcement agencies is not clear. Records of measurements can be used as evidence in a court of law or to access other evidence. In the latter case, the measurements allow the recording of biometric data such as fingerprints, iris scans, or retina scans. Such biometric information can be used to access other personal devices like laptops, cellular phones, etc. to gain private information about the individual. Such a case would be considered to be the gravest intrusion into the private life of the individual, severely violating the right to privacy.

Further, sharing such personal information with other agencies without the informed consent of the person concerned also infringes on his right to privacy. Moreover, no safeguard or guidelines have been provided in the Act for sharing such personal data. There is a possibility that the NCRB may link such data with other already existing databases, like the Indian version of the Automated Fingerprint Identification System[xviii] ("AFIS") known as FACTS and Crime and Criminal Tracking Network & Systems[xix] ("CCTNS"). Also, the prospect of private parties having access to such records cannot be refuted, as NCRB outsources its projects on a regular basis to private contractors.

Absence of laws on DNA Data and Data protection law

The purpose of the impending DNA technology (use and application) Regulation Bill, 2019[xx] is to facilitate the identification of the person concerned as per the schedule appended to the bill. It deals with the establishment of national and regional DNA data banks and a DNA regulatory board that will supervise DNA laboratories and DNA data banks. It also provides for punishment in cases of misusing DNA data and DNA samples. The Act of 2022, however, broadens the term "measurements," which include an undefined "biological sample," which may cover within its ambit the taking of bodily samples for the extraction of DNA and the storage of DNA data in the NCRB Database. Implementing the Act of 2022 without a DNA Data Protection Law will result in grave injustice to the citizens, violating their privacy, as there is no safeguard provided for the quality maintenance of DNA samples in laboratories,

which may result in contamination of the sample. Further, the lack of provisions for safeguarding confidentiality and the absence of punitive provisions in the event of data misuse led to a lack of responsibility and accountability, making the data even more prone to misuse.

Also, the lack of Data Protection legislation[xxi] exacerbates the situation by leaving individuals with no rights to informed consent concerning their personal data, data erasure or correction, or punishment and grievance redressal mechanisms in the case of misuse of their personal data.

CONCLUSION

The purpose of the Act of 2022 is to make criminal investigation efficient by making use of modern technologies to collect and store the measurements. However, using the term measurements in its widest possible sense, allowing the collection and storage of the same in the database coupled with bestowing an unbridled power on the executive creates an Orwellian state with fewer safeguards where the government will have the power of surveillance over its people through the maintenance of a huge database. Further, the implementation of this Act in the absence of crucial laws like data protection and the impending DNA technologies bill affects the constitutional values of the citizens, engendering derogatory practices of misusing personal data and infringement of the right to privacy. Therefore, the Act of 2022 needs an amendment to safeguard the interests of individuals in protecting their freedoms while also ensuring the security of the nation by using modern techniques to aid criminal investigations.

ENDNOTES

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[i] The Identification of Prisoners Act, 1920, No. 33, Acts of Parliament, S. 2(a)
[ii] LAW COMMISSION OF INDIA, "87th Report on Identification of Prisoners Act, 1920 (1980), https://lawcommissionofindia.nic.in/report_ninth/ (last visited on September 10, 2023).
[iii] ibid
[iv] The Criminal Procedure (Identification) Act, 2022, No. 11, Acts of Parliament, S. 2(1)(b)
[v] *Ibid.*, S. 3
[vi] *Ibid.*, S. 6(2)
[vii] *Ibid.*, S. 3
[viii]*Ibid.*, S. 2(1)(a)
[ix] The Criminal Procedure (Identification) Act, 2022., No. 11, Acts of Parliament, S. 4(1)
[x] *Ibid.* S. 4(3)
[xi] *Ibid.*, S.4(2)
[xii] AIR 1958 SC 538
[xiii] *Ibid.*
[xiv] AIR 2010 SC 1974, (2010) 7 SCC 263
[xv] KS Puttaswamy v.Union of India, (2019) 1 SCC 1
[xvi] (2017) 10 SCC 1
[xvii] *Id.*
[xviii] Saima Parveen, *National Automated Fingerprint Identification System (NAFIS): Meaning, History, Working Process, Benefits*, MAPS OF INDIA (September 17, 2023, 3:02 PM), https://www.mapsofindia.com/my-india/india/national-automated-fingerprint-identification-system-nafis-meaning-history-working-process-benefits.
[xix] CCTNS (September 17, 2023, 4:12 PM), https://cctnspolice.org.in/ .
[xx] The DNA Technology (Use and Application) Regulation Bill, 2019, No. 128, Bills of Parliament, 2019.

[xxi] Akanksha Prakash, *What is the purpose of Data Protection law in India?* BUSINESS TODAY (October 2, 2023, 1:18 PM), https://www.businesstoday.in/opinion/columns/story/what-is-the-purpose-of-data-protection-law-in-india-300925-2021-07-09.