
THE CRIMINAL PROCEDURE (IDENTIFICATION) ACT 2022: TESTING THE SHORES OF CONSTITUTIONAL VALIDITY

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ABSTRACT

The Criminal Procedure (Identification) Act, 2022 endeavours to advance techniques for prisoner identification to make the entire process of investigation efficient. Whilst the intent of the legislature merits credit, the said Act fails to meet the test of constitutionality on various counts of being disproportionate; violating one's right to privacy; and violating the well enshrined principle of 'presumption of innocence', amongst others. The article sheds light on the extent to which the provisions of the Act have departed from striking a balance between upholding the rights of privacy of individuals vis-à-vis empowering the state authorities with excessive power in conducting investigation in criminal matters.

INTRODUCTION

The Criminal Procedure (Identification) Act, 2022 (*hereinafter referred to as the “Act”*) received the President’s assent on April 18, 2022.¹ It was introduced by the Parliament with a two-pronged objective i.e. (i) to take measurements of convicts and ‘other persons’ for identifying and investigating in criminal matters; and (ii) preserve records of such ‘measurements’ recorded during criminal investigation.

The ‘need’ to introduce the Act

Before evaluating the provisions of this Act with a critical lens, it is imperative that we appreciate and understand the factors that accelerated/necessitated the introduction of the Act.

Firstly, the Identification of Prisoners Act, 1920 (*hereinafter referred to as “IPA 1920”*) was the only other statute that dealt with the term ‘measurements’ prior to the introduction of the Act (with regards to criminal investigations). Section 2(a) of the IPA defined “measurements” to ensure inclusion of “*finger impressions and foot-print impressions*”.² Furthermore, section 3 of the IPA 1920 permitted taking photographs and measurements of ‘convicted persons’ by the concerned police officer in a manner as prescribed therein. However, the present Act has widened the scope of the term “measurements” and intensified its scope of application. Section 2(1)(b) of the Act states as follows:

“2. (1) *In this Act, unless the context otherwise requires, - ...*

(b) “measurements” includes finger-impressions, palm-print impressions, foot-print impressions, photographs, iris and retina scan, physical, biological samples and their analysis, behavioural attributes including signatures, handwriting or any other examination referred to in section 53 or section 53A of the Code of Criminal Procedure, 1973; ...”

Evidently, the law enforcement agencies found the mere collection of finger and footprint impressions (as per the IPA 1920) inadequate in criminal investigations. To put things in perspective, a total of 66,01,285 cognizable crimes were registered in 2020 in India (comprising 23,46,929 crimes under Special and Local Laws coupled with 42,54,356 crimes

¹ The Criminal Procedure (Identification) Act, 2022, No. 11, Acts of Parliament, 2022 (India)

²The Identification of Prisoners Act, 1920, No. 33, Acts of Parliament, 2022 (India)

under the Indian Penal Code, 1860).³ In order to accurately accelerate criminal investigations, the Act significantly broadened the definition of ‘measurements’ to also include iris and retina scan, physical, biological samples and their analysis, behavioural attributes including signatures and handwriting amongst others.

Secondly, the IPA 1920 restricted collection of such *measurements* to convicts and non-convicts as particularized in sections 3 and 4 therein. They are reproduced as hereunder:

“3. Taking of measurements, etc., of convicted persons.—*Every person who has been—*

(a) convicted of any offence punishable with rigorous imprisonment for a term of one year or upwards, or of any offence which would render him liable to enhanced punishment on a subsequent conviction; or

(b) ordered to give security for his good behaviour under section 118 of the Code of Criminal Procedure, 1898 (5 of 1898),

shall, if so required, allow his measurements and photograph to be taken by a police officer the prescribed manner.

4. Taking of measurements, etc., of non-convicted persons.—*Any person who has been arrested in connection with an offence punishable with rigorous imprisonment for a term of one year or upwards shall, if so required by a police officer, allow his measurements to be taken in the prescribed manner.”*

The present Act has not only gone wider in its application, but also steeper in its scope for taking measurements of also those individuals who are “*detained under any preventive detention law*”, as clearly stated in section 3(c) of the said Act. Additionally, it appears to contravene established international norms as provided for in the Article 17 of the International Covenant on Civil and Political Rights which affirms:

“no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and

³NATIONAL CRIME RECORDS BUREAU, *Crime in India, 2020 Statistics (Volume 1)*, xi, 2020, <https://ncrb.gov.in/sites/default/files/CII%202020%20Volume%201.pdf>

reputation”⁴

Therefore, it appears from a bare reading of the Act that the no stone is left unturned in arming the law enforcement agencies with every weapon in its arsenal to liberally investigate crimes in our country. Whilst the intent and effort must be lauded for wanting to address the increasing number of registered crime rates in our country, it must never be at cross-roads with facets of our constitution that seek to guard the sacred framework of our fundamental rights.

CHALLENGING THE CONSTITUTIONAL SAFEGUARDS

“Analysis” of Measurements

The Act permits *analysing* the aforementioned measurements of the convicts concerned. However, the Act remains silent on the method and mechanism to be deployed in using these *measurements* for the purpose of *analysis* in criminal investigations, as envisaged therein. Since the word ‘analysis’ is not defined in the Act, it breeds uncertainty with regards to ‘how much data/how are the measurements’ to be further used/ relied upon in criminal investigations. Bare perusal of the Act suggests that its scope is limited to ‘*collection of measurements for identification and investigation purposes*’. Therefore, *analysing* such data appears to travel beyond the permissible limits set by the provisions of the Act.⁵

Another issue related to maintaining and collecting record of measurements is its practical modus operandi. The Act entrusts the National Crime Records Bureau (NCRB) to administer and collect records of measurements (along with any union territory administration/State government/any other law enforcement agency)⁶. It is pertinent to note that the NCRB was primarily setup to operate as a repository of information on crime and criminals.⁷ It doesn’t seem to have any wing that can collect such measurements. It may have to lean on the support of central and state forensic science laboratories, which are already limited in number.⁸

“Ability” to protect and preserve data for 75 years

Whilst ‘collection of measurements’ forms the core component of the present Act, preservation

⁴ UNITED NATIONS, *International Covenant on Civil and Political Rights*, 1966, <https://www.ohchr.org/sites/default/files/ccpr.pdf>

⁵ G.S. Bajpai & Sahajveer Baweja, *Questioning the feasibility of the Criminal Procedure (Identification) Act*, 2022, 270, PL, 69, 69-70, 2022.

⁶ *Supra* Note 1, s.4

⁷ NATIONAL CRIME RECORDS BUREAU, <https://ncrb.gov.in/en> (last visited Aug 14,2022, 3:30 pm)

⁸ BAJPAI and BAWEJA, *Supra* Note 5, at 70

and protection of such ‘measurements’ is equally important and it does present challenges of its own. Section 4(2) of the Act states:

“The record of measurements shall be retained in digital or electronic form for a period of seventy-five years from the date of collection of such measurement: ...”

Protecting and preserving such ‘measurements’, especially in criminal matters, has to be of the highest standard in administering the ends of justice. The same was elucidated in the Supreme Court case of *Mukesh v. State (NCT of Delhi)*⁹ at paragraph 228:

*“228. From the aforesaid authorities, it is quite clear that DNA report deserves to be accepted unless it is absolutely dented and for non-acceptance of the same, it is to be established that there had been no quality control or quality assurance. If the sampling is proper and if there is no evidence as to tampering of samples, the DNA test report is to be accepted.”*¹⁰

This sentiment was further echoed by the Division Bench of the Hon’ble Bombay High Court in *Jitendra v. State of Maharashtra (2017)*¹¹ which stated as follows at paragraph 22:

*“22. Thus, the clinching nature of the evidence in the form of DNA analysis report is undeniable and it has to be accepted as a very strong proof of the involvement of the accused in the crime. But, as observed by the Hon'ble Supreme Court in the above mentioned judgment, if the DNA report is absolutely dented and it is established that there has been no quality control or quality assurance and if the sampling has been improper and that there is evidence to show tampering of the samples, the DNA test report would be unsafe to be made a basis for convicting the accused.”*¹²

Thus, when dealing with biological samples and analysis, the laboratories have to ensure quality assurance and control, which has to be of the highest standard and it cannot be compromised. With such reasonably stringent requirements in place, the question of which institution will ultimately bear responsibility for collection of such measurements begs to remain answered.

⁹ *Mukesh v. State (NCT of Delhi)*, (2017) 6 SCC 1

¹⁰ *Id.* at paragraph 228

¹¹ *Jitendra v. State of Maharashtra (2017) SCC OnLine Bom 8600*

¹² *Id.* at paragraph 22

Measurements collected can change in dimensions over time

The National Institute of Standards and Technology (NIST) has published a study which suggests that fingerprinting has an accuracy of over 99%.¹³ Furthermore, a report by Ping Identity has shared that 92% of companies rank biometric authentication as either “effective” or “very effective” when it comes to securing data that is stored on premises and 86% of the people said that protecting data on a ‘public cloud’ was “effective”.

Therefore, this does leave room for inaccuracy as it’s not a 100% full proof system. Proponents of such technology may argue that the failure rate is minimal. However, when scrutinising this proposition from a relative lens of taking into account our population in question, it would be a substantial figure. The same was discussed in the case of *K.S. Puttaswamy (Aadhaar-5J.) v. Union of India*¹⁴ wherein it was argued that the although a 99.76% accuracy rate is high, it still leaves room for failure of 0.232%, which is a phenomenal statistic as it amounts to 27.60 lakh people when calculated and quantified against our population¹⁵. Additionally, formation of fingerprints may also undergo changes over time such in the case of a child growing up, an adult getting older, injury or damage to the finger, disability of any kind etc.¹⁶ Not just fingerprints, but even an iris test can fail on account of blindness.¹⁷ The aforementioned factors have the potential to result in unnecessary victimization.

Right to Self-Incrimination

Section 6 of the Act, which deals with the scope of resisting taking of ‘measurements’ states as follows:

“6.(1) If any person who is required to allow the measurements to be taken under this Act resists or refuses to allow taking of such measurements, it shall be lawful for the police officer or prison officer to take such measurements in such manner as may be prescribed.

(2) Resistance or refusal to allow the taking of measurements under this act shall be

¹³ *How reliable is biometric authentication?*, NEC (Aug 15, 2022, 8:45pm), <https://www.nec.co.nz/market-leadership/publications-media/how-reliable-is-biometric-authentication/>

¹⁴ *K.S. Puttaswamy (Aadhaar-5J.) v. Union of India* (2018) SCC OnLine SC 1642, at 400

¹⁵ *Id.* at 400

¹⁶ *Id.* at 402

¹⁷ *Id.* at 402

deemed to be an offence under section 186 of the Indian Penal Code”¹⁸

As exemplified by a bare reading of s. 6(2) of the Act, a refusal or not consenting to taking measurements under the Act can result in committing an offence u/s 186 of the Indian Penal Code. This section read with section 2(b) of the Act further raises concerns about the individuals ‘right to privacy’. The intention of the Legislature in including terms like ‘biological and physical samples’ (amongst others) in the definition of ‘measurements’ could potentially lead to other forceful methods such as brain mapping and narcoanalysis being exercised.¹⁹ The Supreme Court case of *Selvi v. State of Karnataka*²⁰ dealt with this issue at length whereby it opined that the “right against self-incrimination” stands violated if individuals concerned are compulsorily administered techniques of brain mapping, narcoanalysis and the like.²¹ The underlying rationale of the said “right against self-incrimination” is to make sure that the statements that are admitted in evidence are made voluntarily along with being reliable in nature. In fact, the Hon’ble Supreme Court goes a step further and upholds the protective scope of Article 20(3) of the Constitution of India by stating that:

“ ... Article 20(3) extends to the investigative stage in criminal cases and when read with Section 161(2) of the Code of Criminal Procedure, 1973 it protects accused persons, suspects as well as witnesses who are examined during an investigation. The test results cannot be admitted in evidence if they have been obtained through the use of compulsion.” (at paragraph 262)²²

Besides, the permitting usage of such intrusive techniques violates the standard of “substantive due process”. Although sections 53 and 53A of the Code of Criminal Procedure, 1973 enable application of medical examination techniques, the same cannot and should not be interpreted expansively to include methods of brain mapping, narcoanalysis and the like. In furtherance of the same, the Hon’ble Supreme Court²³ affirmed that:

¹⁸ *Supra* Note 1, s. 6

¹⁹ Sanjay Vashishtha, *The Criminal Procedure (Identification) Bill, 2022 and the Right to Privacy*, SCC ONLINE BLOG (Aug 24, 2022, 2:00 pm), <https://www.sconline.com/blog/post/2022/04/01/the-criminal-procedure-identification-bill-2022-and-the-right-to-privacy/>

²⁰ *Selvi v. State of Karnataka* (2010) SCC OnLine SC 564, at 382

²¹ *Id.* at 382

²² *Id.* at 382

²³ *Id.* at 382

“ ... compulsory administration of any of these techniques is an unjustified intrusion into the mental privacy of an individual. It would also amount to “cruel, inhuman or degrading treatment” with regard to the language of evolving international human rights norms.” (at paragraph 263)

Presumption of Innocence

Section 3(c) of the Act states that:

“Any Person, who has been, - ...

(c)Arrested in connection with an offence punishable under any law for the time being in force or detained under any preventive detention law.

shall if so required, allow his measurements to be taken by a police officer or a prison officer in such manner as maybe prescribed by the Central Government or the State Government ...”²⁴

The Act makes an explicit reference to “Any Person”, thus proposing to cover any and every person irrespective of whether they are convicted or acquitted. Conversely, the present section operates in stark contrast to the IPA 1920, which sought to apply to only those convicts/persons falling under the ambit of section 118 of the Code of Criminal Procedure 1898²⁵. It is imperative that in order to maintain law and order, a fine balance has to be struck by the judiciary in ensuring that whilst no guilty man should escape the claws of justice, an innocent man should not be punished. A principle of a balanced approach was enunciated in the case of *Dayal Singh v. State of Uttaranchal*²⁶:

“34. Where our criminal justice system provides safeguards of fair trial and innocent till proven guilty to an accused, there it also contemplates that a criminal trial is meant for doing justice to all, the accused, the society and a fair chance to prove to the prosecution. Then alone can law and order be maintained. The courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty

²⁴ *Supra* Note 1, s. 3(c)

²⁵ R. Amirthalakshmi & R. Parthasarathy, *Identity and Privacy – Criminal Procedure (Identification) Bill*, SCC ONLINE BLOG (Aug 25, 2022, 3:45 pm), <https://www.sconline.com/blog/post/2022/04/05/criminal-procedure-identification-bill/>

²⁶ *Dayal Singh v. State of Uttaranchal* (2012) SCC OnLine SC 580, at 282

man does not escape” (at paragraph 34)²⁷

Correspondingly, in *Ankita Kailash Khandelwal v. State of Maharashtra*²⁸ also held that a balance has to be struck between the right of investigation of the police and the individual’s right to personal freedom²⁹. Nonetheless, the Hon’ble Court further upheld the principle of ‘presumption of innocence’ by stating that:

“12. The law presumes an accused to be innocent till his guilt is proved. As a presumably innocent person, he is entitled to all the fundamental rights including the right to liberty guaranteed under Article 21 of the Constitution.”³⁰

Compatibly, even Article 11 of the Universal Declaration of Human Rights upholds the principle of ‘presumption of innocence’ by expressing that ‘anybody charged with a penal offence has a right to be presumed innocent until and unless, that person is proven guilty’.³¹

In view of the aforesaid findings by the Hon’ble Court, it appears that the present Act needs to undergo further modifications if it has to strike a ‘balanced approach’ in protecting and preserving the principle of ‘presumption of innocence’, which is so extensively documented in criminal law jurisprudence. Currently, it appears to be one-sided and aligning itself with providing wide powers to the police/prison officers in investigating individuals.

²⁷ *Id.* at 282

²⁸ *Ankita Kailash Khandelwal v. State of Maharashtra* (2020) SCC OnLine SC 816, at 688

²⁹ *Id.* at 688

³⁰ *Id.* at 688

³¹ UNITED NATIONS, <https://www.un.org/en/about-us/universal-declaration-of-human-rights>, (Aug 28, 2022, 4:28 pm)

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