
THE DIMINUTION OF SOCIAL JUSTICE LANDSCAPE UNDER CRIMINAL IDENTIFICATION ACT, 2022: AN ANALYSIS IN THE LIGHT OF ACCUSED PERSON'S PANORAMA

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*No man is infallible; misdeeds can happen at any time, glorification of the
same for the endurance is a palm off to the State, it is the white knight not
the punctilious parent...*

ABSTRACT

The Act aims to bring about robustness in the investigation process by using new world technologies to help the courts in deciding the guilt of the accused and thereby increase the conviction rate. The law seeks to expand the scope of "measurements" that law enforcement agencies can make for the purpose of speedy and effective investigations. However, this legislation is marked by controversy as it has met with vehement opposition across the board. Critics have argued that in the absence of a comprehensive data protection mechanism in India, the Act is a threat to citizens' privacy and a violation of Article 21 of the Constitution. The law lacks proper safeguards to protect citizens' sensitive data and is therefore susceptible to abuse by law enforcement authorities, raising concerns on the creation of a surveillance state. This law is an example of the expansion of powers to give a heavy hand to law enforcement agencies in the detection and prosecution of criminal activity. In a democracy, however, the expansion of power must be accompanied by the strengthening of guarantees for the protection of citizens' rights. There is no one-size-fits-all answer to this question, what is the definition of social justice, because the definition of social justice will vary from person to person. In general, however, social justice refers to the idea that all people should have equal rights and opportunities, regardless of their social class, race, or gender. Social justice has been a hot topic in recent years and people from all walks of life are voicing their opinion on the matter. From politicians to social media influencers, it seems everyone has an opinion on what constitutes social justice. In an adversarial system of criminal justice, the judge is to see that the evidence of an honest witness is

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not damaged by intimidation or blackmail. Courts otherwise become a mockery. In the adversarial system, the accused must be presumed innocent until proven guilty. The judge must evaluate the evidence. But today the judge too often becomes a mere bystander. The conviction rate is very low because the investigations carried out do not meet the requirements. The high rate of acquittals is very demoralizing to the general public as perpetrators get away scot-free. If this Act has been awarded in a fully it will certainly amounts to negation of fair treatment towards the accused person, it is somewhat a type of incriminating nature. As well there is constitutional protection for the same, but this became an exception that go beyond the tip of one's hand. The limitless powers in the hands of authorities can certainly be misused and the fairness component will vanish from the procedure of criminal investigation, as fair treatment and equality doctrines are part and parcel of social justice landscape. The more understanding of the Act will give more insights to the loopholes and incriminating features of the same.

Keywords: Identification, self-incrimination, investigation, social justice, fairness.

PRELUDE PASSAGE

The coercive extraction of personal data from an individual who is an arrested person, detained one or ejusdem generis, it is an umbrella usage which affects the free and fair procedure of criminal investigation. Here the concept of 'social justice'² has been negated to this particular group of individuals by the implementation of Criminal Procedure (Identification) Act, 2022 (*hereinafter* referred as CPI Act). This Act allows the collection of 'identifiable information' from individuals for investigation of crime. This identifiable information is the core apple of this Act, it is an ambiguous term which includes each and every personal matters related to the individual that is of having very core value, which again includes another vague term as 'biological samples'. The previous Act of 1920 the Identification of Prisoners Act allows the taking of pictures and measurements of prisoners and other people.³In 2018, an opinion request has been forwarded to include Aadhaar information and biometric information like iris scans, signatures and voice samples.

When a person being accused of an offence he will be treated as like the useless part of a fruit, in the very nature of the concept of social justice, it is an implied principle that fairness to be executed in every part of administration of justice, whether it is criminal justice system also.

² The fair division of resources and privileges.

³ The refusal of the same will be an offence under Section 186 of Indian Penal Code, 1860.

Hence the key factor in this legislation is that whether the accused persons or the categories of persons mentioned under the Act are getting the 'fairness' treatment which is the part and parcel of social justice landscape.

In the month of April the two wings of Parliament passed the Criminal Procedure (Identification) Bill, 2022. When the President gave his assent to the bill on 18 April, the government duly notified him, bringing the law into force. The aim of the law is to enable the collection, analysis and retention of biometric and personal data of every person arrested by the executive authorities, including convicts. This is an amendment to the Prisoner Identification Act of 1920⁴. The law expands the powers of the state and its law enforcement agencies in criminal investigations to collect biometric and other biological data from any person arrested by the police, including those detained under pre-trial detention laws. Although the term "any person" does not specify exactly who is to be covered by this law, it broadens the scope of its application and leaves it to the whims and fancies of the state and its law enforcement agencies. Dangerous is the criminalization of an individual's refusal to provide such data, making it a criminal offense under the law. Such criminalization is not only against individual autonomy but directly interferes with the individual's right to fair trial under Article 21 of the Constitution of India.

THE SHAKING TOOLS OF FAIR PROCEDURE

Through this 2022 law, the scope of measurements that can be performed has been redefined and expanded. In the past, the 1920 Act only allows fingerprints and footprints and photographs to be taken. The 2022 Act now defines measurements as fingerprints, palm prints, footprints, photographs, iris and retinal scans, physical, biological samples and their analysis, behavioral characteristics including signatures, handwriting or any other examination referred to in Section 53[3] and 53-A[4] of the Code of Criminal Procedure 1973.⁵ The 2022 Act further allows for the measurement of all convicted persons, arrested persons and persons detained under any remand law regardless of the sentence imposed.⁶ Although the 2022 Act focuses on

⁴ Which is repealed by Section 10(1) of the 2022 Act.

⁵ The definition of "measurements" specifies behavioural attributes that include signatures, handwriting or any other examination referred to in sections 53 or 53A of the CrPC; however, the scope of the term "behavioural attributes" has not been explained anywhere in the 2022 Act. In the absence of a properly crafted explanation, the result may be that such "measurements" may create evidence against the accused which can lead to self-incrimination in violation of Article 20(3) of the Constitution.

⁶ This provision is the most wide umbrella implementation of this Act, which widens the scope of persons come under the purview of this legislation.

technological advancements in crime investigation, it suffers from tetra-fold major fundamental concerns that are compelling reasons to question its validity.

The first and foremost one is , the 2022 law does not define the process and definitive framework for how the measurements taken would be used for analysis and further use in criminal investigations. The word "analysis" used in the context of measurement is vague and undefined, which is a problem because there is no certainty to what extent these collected measurements can be analyzed, and further, what all data can be obtained by analyzing such measurements. Even though the technical advancement is in a long fully occupied in our nation, but the data privacy issues are still a great concern. The scope of the 2022 Act is limited to the collection of measurements for identification and investigative purposes, and therefore the analysis of these measurements is a black hole that exceeds the permissible scope of the Act.

The second issue concerns the structural capacity to collect and store measurement records, making it a question of feasibility. The 2022 Act states that the National Crime Records Bureau (hereinafter referred as NCRB)⁷ will be responsible for the collection and management of metering records in accordance with the State Government or Union Territory Administration or other law enforcement agencies. It is understood that the NCRB was set up as a repository of information on crime and criminals and has no wing to collect measurements including biological samples. Central and State Forensic Science Laboratories, whose numbers are very limited, would have to play a significant role in collecting such records. Additionally, due to the expanded scope of the 2022 Act, there are operational difficulties in collecting such measurements followed by analysis and retention of records for 75 years in the form of data where we have no legal framework for India's data protection.

In the case of *Jitendra v. State of Maharashtra*⁸ the Bombay High Court observed that it is essential for laboratories to ensure proper quality control and quality assurance when dealing with the collection and analysis of biological samples and the same should be as high as possible. So the question arises as to who would actually be responsible for collecting such measurements which are sensitive in nature, deal with body fluids and are at a higher risk of denting the quality due to lack of care and caution.

⁷ See for more details <https://www.scconline.com/blog/post/2022/05/31/questioning-the-feasibility-of-the-criminal-procedure-identification-act-2022/> (accessed on March 21, 2023)

⁸ 2017 SCC OnLine Bom 8600.

The third part of great concern is the nature of these measurements being made, which can complicate investigation and identification. In the well known case of having nick name as 'privacy case', *K.S. Puttaswamy v. Union of India*⁹ it was found that biometric technology does not guarantee 100% accuracy and is only 99.76%. The Court held that even though the percentage of errors is very less, but when we look at such a failure rate from the point of view of the total body, this failure rate would be a phenomenal number in itself. Additionally, the court noted the changing nature of biological patterns, such as the failure of an iris test due to a person's blindness or the change in fingerprint formation due to an individual's aging. However, if these measurements, including biological samples, are kept for such a long time after analysis, there is a possibility that the measurements may change in some cases and cause unnecessary victimization of an innocent person.¹⁰ Therefore, the way these measurements are collected can lead to disadvantages for criminal investigations.

The last and final stumbling block is that, the 2022 Act made it possible to violate a person's physical autonomy by making it a criminal offense to refuse or resist taking a measurement. There are appropriate declarations of non-interference with the physical autonomy of a person over his own body, to which India is also a signatory. Although the 1920 Act also criminalizes resistance or refusal, the current 2022 law exacerbates the problem by covering all types of prisoners. The same is further in direct conflict with the decision of the Supreme Court in *Selvi v. State of Karnataka*¹¹ where the Supreme Court held that Article 20(3)¹² of the Constitution is intended to prevent the forcible "transfer of personal knowledge which is relevant for a given fact". Through this Act of 2022, a suspect who has been arrested for the crime of petty theft or pick-pocketing can be compelled to take any measurements he may be directed to take. Thus, such interference is inconsistent with physical autonomy and further violates the individual's right to privacy, which is a fundamental right under Article 21 as laid down in *K.S. Puttaswamy*

⁹ (2018) 1 SCC 809.

¹⁰ It is in this point the fairness has been primarily negated.

¹¹ (2010) 7 SCC 263, The Supreme Court, in *Common Cause versus Union of India* (2018), ultimately upheld the right of an individual against forceful intrusion into one's body, keeping intact bodily integrity and autonomy of the individual. In fact, in *Selvi*, it had held that compulsory neuroscientific tests amount to testimonial compulsion and violates the rule of self-incrimination as a result, and that such tests would have to meet the standard of 'substantive due process' for placing restraints on personal liberty. It further held that the main purpose of the right against self-incrimination is to ensure reliable testimony, since involuntary statements mostly turn out to be inaccurate, besides violating a person's dignity and integrity. It even clarified that this right protects persons who have been formally accused, those who are examined as suspects in criminal cases, witnesses who apprehend that their answers could expose them to criminal charges in an ongoing investigation, or in cases other than the one being investigated.

¹² Rule against self incrimination

case. The intent of the 2022 Act is itself consistent with the modernization of criminal investigation.

It even violates the three-pronged test upheld by the Supreme Court in the recent times in *Jacob Puliyeel v. Union of India*¹³, after analyzing *K.S. Puttaswamy*. While the first proviso states that there must be a valid law to intrude on anyone's privacy, the second proviso states that the nature and content of such a law should fall within the sphere of reasonableness laid down in Article 14. It states that the means adopted by the legislature must be proportionate to the ends and must be pursued. In this case, even if it can be argued that the collection of such data is consistent with the protection of individual privacy, it does not change the fact that the collection and analysis of such data borders on executive discretion where the will of the individual not to share such data is expressly criminalized. In fact, there is no reasonable justification for retaining such data, so it is disproportionate to the wider context of justice.

Preventive detention laws work according to the whims and caprices of the executive in India. Without going into the rigors of criminal procedure, it empowers the police to detain anyone on mere suspicion of committing any act prejudicial to the state. Those arrested do not enjoy the fundamental rights guaranteed by Article 22(1) and (2) of the Constitution. These articles protect a person from arrest and detention in general. When society distinguishes between different classes of offenders and deprives them of basic rights generally available to others, it perpetuates systemic indifference to their right to life and liberty, allowing basic rights to be violated under the guise of protection. So when such a person is already alienated from a free and fair trial under the law on preventive detention, such conduct, which further interferes with the person's right against self-incrimination, makes him even more vulnerable under the current process.

A strong case supported by solid evidence is necessary to secure a criminal conviction. But the evidence is to be taken in a fair manner by avoiding 'forcible extraction of information'. Here if the same matters have been refused, the same will become an offence¹⁴, so the classification of 'voluntary and in-voluntary' is a total gaffe.

¹³ Writ Petition (Civil) Number 607 of 2021, here the court accepted the concept of 'right to refusal';

¹⁴ Section 6(1) of the Act, which states that, "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 maybe prescribed", especially when Section 6(2)

- *Against Sunil Batra Precedent*

In the classic case of *Sunil Batra v. Delhi Administration*¹⁵, the apex court expressly stated that while a prisoner is in prison, the prison authorities have no right to punish, torture or discriminate against them in any way without the express permission or orders of the court, and that a convicted prisoner still has the right to life imprisonment and liberty under Article 21 of the Constitution, even if you are in prison. But when the provision gives a warden the power to take samples from convicts in a prison under their charge, without adequately specifying how they can do it, it gives them free rein to do anything. Such free passage makes the provision against the very essence of the jurisprudence of the right to life and liberty espoused by *Sunil Batra*. The right to live with dignity has been interpreted to include "life or personal liberty". Consequently, it would also include the prohibition of torture and other forms of physical abuse by the state or its officials. Except in the course of law by imposing such reasonable restrictions as are permissible, convicts, under-trials, detainees and other prisoners shall not be denied the invaluable right protected by Article 21 of the Constitution of India." The ICCPR is reflected in Article 21 of the Constitution of India, which is the right, which cannot be revoked. Before the 44th Amendment to the Constitution in 1978, Article 21 was an exceptional right. It includes the prohibition of torture and violence by government officials or other individuals. Prisoners remand prisoners, people awaiting trial and foreign nationals have access to this privilege.

By law, all those convicted, arrested and detained under any pre-trial detention law may be required to take measurements. The rules state that certain people are not tested unless they have been charged or arrested in connection with any other offence. These persons include persons who violate prohibitions under Section 144 or 145 of the Criminal Code of 1973 (CPC) or are arrested in pre-trial detention under Section 151 of the Criminal Code. The law states that the measurement will be carried out by a police officer or a prison worker. The rules provide that such measurements may be made by an authorized user or any person qualified to make measurements or a registered medical practitioner or any person authorized in that behalf. An authorized user is a police officer or prison officer who has been authorized by the NCRB to access the database. Along with the officer in charge of the police station or someone of the rank of chief constable or above, the chief warden of the prison can also order such data

makes it an offence under Section 186 of the Indian Penal Code, while Section 7 absolves the authorities of any trial or proceeding for doing anything under the Act.

¹⁵ (1978) 4 SCC 409.

collection, placing them directly in the investigative process and increasing their powers over the trials and condemned prisoners in the prison under their charge.¹⁶ This can vehemently leads to the torture by the prison officers towards prisoners, therefore here also the concept of fairness is lacking.

- *Against the principles of natural justice.*

Administrative procedure requires that the authorities cannot do anything without sufficient justification. It is one of the basic rules of natural justice. However, under this Act, a magistrate has the power to order the collection of personal information from any non-arrested person to assist an overriding investigation, with the discretion of the magistrate not to state any reason for doing so.¹⁷ This provision is in direct conflict with Article 14 of the Constitution, which gives a person the right against arbitrary and unreasonable state action. This disproportionate action further violates an individual's right to a fair trial regardless of whether he is the main accused or not.

Section 5 Bizarre....

Section 5 of the Act only empowers a Magistrate of the First Class to order any person to allow his measurement or photograph. The second proviso to this section ensures that no such direction shall be issued unless the person has at some time been arrested in connection with such investigation or proceeding, thus acting as a built-in safeguard against the discretion of the Magistrate. Section 5 of the Act intends to confer similar powers on a Magistrate, who in this case may also be an Executive Magistrate, in matters of "public peace" and "good behaviour". While Section 5 of the Act limits its application to investigations and proceedings under the Code, the Act extends the application of Section 5 to investigations and proceedings under all laws in India. More importantly, the necessary safeguard in the form of the second proviso to Section 5 is glaringly missing from the Act. This omission gives unbridled discretion to the Magistrate to compel any person to take a "measurement", even in the case of a trivial offence, or where such person's involvement in the said offense has not even been prima facie

¹⁶ The 2022 Act increases the number of persons who are eligible or authorized to collect data and provides discretion to prison officers, the police, and the magistrate's officers, in this regard.

¹⁷ To aid in an investigation or proceeding under the CrPC, the 2022 Act seeks to empower a magistrate to direct any person to give his/her measurements and data as prescribed., See also Dr. Kapil Chaurpagar, *Constitutional Impediments in Criminal Procedure Identification Act, 2022*, SOUTH ASIAN LAW REVIEW JOURNAL, 2022

established. There is no provision in the Act to assist the Magistrate's Court in determining the indicators for an individual to be considered a relevant person for the purposes of the investigation.¹⁸

- ***Stratospheric Consignment***

While filtering the provisions of the Act raise legitimate concerns about the violation of the fundamental right to privacy. The collection and dissemination of civil records is permitted by law, but there is no legislative policy to ensure proper use of these records. The National Crimes Records Bureau (NCRB) is to collect, store and share records, while states and union territories can appoint agencies in their respective jurisdictions for the purpose. Since no framework for implementation was created, the executive branch was given the power to make rules about how records are collected, stored and shared. In the absence of a data protection law and where the fundamental right to privacy is at stake, it was the duty of parliament to create a basic framework within which the executive would determine the scope of legislation and the limits of its authority. Even if there is a requirement of ratification of the rules by the legislature concerned, it only aids accountability and does not cure the vice of over-delegation. Implementation without proper policy and oversight can lead to disastrous consequences as seen in several Aadhaar data breaches.

- ***No concern over Individual welfare***

The Act not at all satisfies the Bentham's utility aspect, it is not for the good of all, and it will create a segregation wall between people as 'good mangoes' and 'bad mangoes', also rise the communal profiling. The previous Act was brought into force by a colonial government for which social control, and not individual welfare, was the primary objective. Our Constitution, however, is based on the ethos of personal liberty. It is a pity then that the Act furthers a normative arrangement which is more draconian than its colonial counterpart. More so, the Act paves the way for a dangerous end-product, a breed which is typical of invariably all totalitarian

¹⁸ The 87th report of the Law Commission of India notes that the scope of the said Section 5 of the Act is 'fairly wide' and acknowledges the 'width of its coverage'. Since the coercive direction passed under Section 5 interferes with bodily integrity, the said report recommended a revised Section 5 under which the magistrate, when issuing an order, would be required to record their reasons for such an order. The Bill does not take this recommendation into account. On the contrary, this new Section 5 is a regression from the current protection. While it does not provide the comfort of a reasoned order, it also takes away the embedded safeguard in the form of the existing second proviso. Notably, this unrestrained discretion shall not only be enjoyed by a judicial magistrate, but also by an executive magistrate.

regimes: a 'good' citizen who is obedient, who does not indulge in activities which the State labels and treats as criminal and who does not dissent. One of the stated objectives behind data collection and dissemination under the Act is 'prevention' of offences of all kinds. However, such data collection will only aid profiling, mass surveillance and suppression of dissent. Armed with such a law, the State can create a seamless repository of 'political prisoners' and people who are arrested for protesting the policies of the government. Citizens can easily be segregated on the basis of their disposition towards the government; the good saints would be identified, monitored closely and kept in check. Fearful of this constant persecution, more and more citizens can be coaxed into being what can be called as 'restricted goodness', like the State is parenting its citizens for being good. Record maintenance of this kind can also further communal profiling. Members of certain communities can be accused of having inherent criminal inclination which may create an overall bias against such communities in the criminal justice system. A new set of condemned citizens will emerge - ones who are 'more likely to be criminal'.

BOTTOM LINE

While the 2022 Act will bring modern prisoner identification techniques, it has several drawbacks, namely the possibility of abuse of power by the authorities, the possibility of self-incrimination by the accused, data privacy, overlapping or conflicting legislation between the states and the central government. etc. In addition, some provisions of the 2022 Act need to be clarified, and if they do not exist, law-abiding citizens and their fundamental rights are at risk. The aim of the law is to introduce the robustness of the investigation procedure with the help of new global technologies, which will help the courts in deciding the guilt of the accused and thereby increase the conviction rate. The law seeks to expand the scope of "measurements" that law enforcement agencies can make for the purpose of speedy and effective investigations. However, this legislation is marked by controversy as it has met with vehement opposition across the board. Critics have argued that in the absence of a comprehensive data protection mechanism in India, the Act threatens the privacy of citizens and violates Article 21 of the Constitution. The law lacks proper guarantees for the protection of sensitive data of citizens and is therefore susceptible to abuse by law enforcement authorities, which raises the fear of the creation of a surveillance state. From the above analysis, we can conclude that the concern about privacy and data security is undoubtedly significant. Indian laws still do not comply with strict data protection laws in this regard, citizens' personal data details could be misused and

there is no criminal provision yet. But on the other hand, it is necessary to use modern scientific techniques to help law enforcement agencies to reduce crime and criminals. This will ultimately prove to be beneficial for the entire company. Due to the ambiguous provision of the current law, a certain constitutional obstacle has appeared in this regard, which could be challenged in court for violation of constitutional guarantees. Similarly, there is an eminent threat to politically accused or non-criminals that their biological samples could be misused by the authorities. In this context, appropriate changes in this law should therefore bring the necessary clarification so that citizens are protected from states of arbitrary action.