International Annals of Criminology (2022), **60**, 251–268
doi:10.1017/cri.2022.17

ARTICLE

Analysis of India's Criminal Procedure (Identification) Act, 2022: Determining Potential Misuse and Possible Violations of Fundamental Rights

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(Submitted 17 June 2022; revised 28 July 2022; accepted 19 August 2022; first published online 22 September 2022)

Abstract
India's parliament has passed the Criminal Procedure (Identification) Act of 2022 following a lengthy debate. Legislation is being introduced to rescind the 1920 Identification of Prisoners Act, which permitted the use of identification and investigative methods on detainees. The 2022 Act's expanded definition of measurements includes iris and retina scans, behavioural traits like handwriting, fingerprint imprints and palm impressions (and their analysis), and physical and biological samples. When reporting measurements, the phrase "and their analysis" implies that profiles can be generated from a variety of sources of information. The Act stipulates that measurements are to be preserved in digital or electronic form for 75 years. This article intends to assess the Act's potential misuse and possible violation of fundamental rights such as the right to equality and privacy of those covered by the Act. Additionally, the author wishes to provide a concise explanation of the Act and numerous other related issues.

Keywords Indian criminal law, Criminal Procedure (Identification) Act, 2022, Indian Constitution, fundamental rights, Identification of Prisoners Act, 1920

INTRODUCTION

The Criminal Procedure (Identification) Act, 2022 was approved by voice vote in the Lok Sabha (House of the People, lower house of parliament) on Monday, 4 April 2022, and obtained the assent of the President on 18 April 2022. The Act permits actions against prisoners and others to aid identification and investigation in criminal situations and preserve records. During the Act's debate, opposition members highlighted concerns about data protection, the possibility of misuse of the proposed legislation, and the invasion of citizens' right to privacy and other fundamental rights, among other things. When asked about the Act during a discussion, Union Home Minister Amit Shah stated that the primary motivation

for bringing it up was to increase the conviction rates in the country while simultaneously lowering crime rates. Shah asserted that the Criminal Procedure (Identification) Act would serve as a human rights defender for millions of law-abiding residents across the country.

This article examines the Act's potential exploitation and likely infringement of fundamental rights such as the right to equality and privacy of those affected by it. Moreover, the author seeks to bring a summary of the Act along with various other allied aspects.

KEY FEATURES OF THE ACT

Key features are:

(1) This Act allows for collecting and recording precise body measurements using contemporary technology.
(2) It extends the National Crime Records Bureau's (NCRB's) authority to include new areas of responsibility for gathering, maintaining and sharing measurements, and the deletion and other disposition of such records.
(3) For perhaps the first time, a magistrate has the authority to direct anyone to take action; additionally, in the particular instance of a unique subset of convicted and non-convicted persons, a magistrate can instruct police officials to collect "fingerprints, palm print imprints, footprint impressions, photographs, iris and retina scans, physical, biological samples and their analysis, behavioural characteristics such as signatures, handwriting, or any other examination".[1]
(4) Any individual who refuses to comply or resists should remain liable to have police or jail officials take action against them.
(5) Moreover, the Act authorizes law enforcement officials to maintain records of signatures, handwriting and other behavioural characteristics described in Section 53 or 53-A of the 1973 Code of Criminal Procedure to conduct an inquiry.
(6) Under the oversight of a magistrate, fingerprint and footprint impressions, as well as a restricted classification of pictures of convicted and non-convicted individuals, is authorized.
(7) According to a preventative detention statute, individuals convicted, imprisoned or detained shall be compelled to produce "measurements" to a law enforcement officer or prison officer in line with the Act's criteria.

PROBABLE VIOLATION OF THE RIGHT TO EQUALITY AND RIGHT TO PRIVACY

The Act permits gathering specific, personally identifiable data about persons to conduct criminal investigations. The right to privacy guaranteed by the Constitution protects individuals' personal information, including the data included

[1]Section 2(b), The Criminal Procedure (Identification) Act, 2022.

https://doi.org/10.1017/cri.2022.17 Published online by Cambridge University Press

in the Act. The right to privacy has been deemed a fundamental right by the Supreme Court (2017). Any legislation restricting this right's exercise should be guided by the standards the Court established. These include the fact that this is the least invasive way to accomplish the goal, a legitimate connection between the law and the goal, and a public purpose. In other words, the invasion of privacy must be necessary for and appropriate for achieving the purpose. The Act may fail this criterion due to several factors. Additionally, it might contravene the requirements of equality before the law and fair and reasonable legislation outlined in Article 14 of the Constitution.

It is a problem because: (a) information can be obtained from anyone who can provide information to support an investigation, including those who have been convicted of a crime, those who have been detained for any reason, and anyone else; (b) the information obtained need not be connected in any way to the evidence required for the case; (c) the data is stored in a central database that is open to all users, not just those with access to the case file; and (d) the information is kept for 75 years (effectually, for life). Below, we will go over these concerns in more detail and use a few real-world examples to illustrate some of the effects they have.

INDIVIDUALS WHOSE INFORMATION MAY BE GATHERED

In addition to those convicted or arrested for any crime, the Act broadens the pool of individuals from whom data can be acquired. This would apply to someone arrested for speeding and careless driving, which carries a sentence of up to six months in jail. It also broadens the authority of a magistrate to order the collecting of evidence from any individual (rather than only those who have been arrested) to help in the inquiry. This is in contrast to the Law Commission's (1980) claim that the 1920 Identification of Prisoners Act ("1920 Act") is based on the idea that the authority to impose harsh punishment on the offender is limited the more serious the offence. It is important to note that the DNA Technology (Use and Application) Regulation Bill, 2019 ("DNA Bill") waives the permission requirement that should be taken from convicts for DNA collection, specifically those persons incarcerated for capital crimes or imprisoned for more than seven years in certain circumstances.

PERSONS WHO HAVE THE AUTHORITY TO ORDER THE COLLECTION OF DATA

A magistrate has the power to order the collecting of data to assist in the investigation of a crime committed under the 1920 Act.[2]

According to the Law Commission (1980), the 1920 Act does not need for a magistrate to justify his order.[3] The statute's reach ("any individual" detained in connection with "any inquiry") was extensive, and disobeying the directive might lead to criminal prosecution. The Supreme Court suggested that the clause be changed so that the magistrate is required to record the reasons for issuing the order before it becomes effective. Such a precaution is not included in the legislation.

[2]Section 5, The Identification of Prisoners Act, 1920.

[3]Chapter 5, Eighty Seventh Report of the Law Commission of India.

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Instead, it reduces the level of the law enforcement officer authorized to make the measurement (from sub-inspector to head constable) and also permits the head warden of the jail to do so.

WHAT KIND OF INFORMATION MAY BE GATHERED

According to the Act, data-gathering processes include biometrics (fingerprints, handprints, footprints, eye and retina scans), physical and biological samples (which are not defined but may include blood, sperm, saliva and other body fluids), and behavioural features (signature, handwriting, and could include voice samples). It still does not restrict the actions to those that are absolutely necessary for carrying out a particular investigation. For example, the Act allows collecting a person's handwriting samples if they are arrested for reckless and irresponsible driving. Furthermore, it does not explicitly prohibit the collection of DNA samples (which might have information other than verifying identity). It should be noted that Section 53 of the 1973 Code of Criminal Procedure only allows the collecting and examination of biological samples where "there are reasonable grounds to think that such analysis may reveal evidence of the commission of a crime". Thus, there is potential for a clash between the Act and the Code since both have varying language for the permission to be sought for collecting biological samples.

SAMPLES OF BIOLOGICAL MATERIAL

The Act grants a waiver in the case of biological material. A person can refuse to provide these samples until they are arrested for an offence that targets women or children or carries a mandatory minimum sentence of seven years in prison. In this case, the first exception is broad. For example, theft committed against a woman would fall under this category. This regulation would also violate the principle of legal equality between those who take an object from a man and those who steal an item from a woman.

Keeping Track of Information

The Act established a 75-year preservation duration for the data, which would be removed only if a person arrested for an offence was acquitted or discharged from the court system. Maintaining data in a central database and potentially using it for future criminal investigations may also be deemed unnecessary and disproportionate under the principles of necessity and proportionality.

EXISTING FRAMEWORK FOR FORENSIC EVIDENCE COLLECTION

Currently, the 1973 Code of Criminal Procedure and the 1920 Act permit the collection of a variety of biological and physical samples. Although these regulations permit the use of coercive techniques to obtain non-communicative evidence, they strike a balance between the protection of an individual's right to privacy and the necessity of gathering evidence required for an inquiry. The 1920 Act enables "measurements" with a more limited scope than the Act. It is limited to acquiring

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such materials to conduct an inquiry under the Code of Criminal Procedure, 1898, and has certain procedural protections to prevent process abuse.[4]

The DNA Bill[5] was introduced in the Lok Sabha (The Wire Staff 2019) in February 2019 and referred to the Rajya Sabha (Council of States, upper house of parliament) in October 2019 by the Rajya Sabha to the Parliamentary Standing Committee on Science and Technology (PRS Legislative Research 2021). Later, the Parliamentary Standing Committee's report was tabled in February 2021. The DNA Bill presents significant constitutional and procedural problems, and the Standing Committee has suggested various revisions. While this law has not yet been passed, it is significant for this debate since it works in a comparable area to the Criminal Procedure (Identification) Act, 2022 and should be considered while evaluating its contents.

What Kind of Materials is Permissible Under the Existing Legal Framework?

Code of Criminal Procedure, 1973

Sections 53, 53A and 54 of the Criminal Procedure Code authorize the examination of blood, blood stains, semen, swabs for sexual offences, sputum and sweat, hair samples and fingernail clippings using modern and scientific techniques, including DNA profiling and other tests as ascertained needful in a specific case by a registered medical practitioner. Courts have applied an expansive interpretation to these rules. Additionally, Section 311A authorizes gathering specimen signatures and handwriting samples.

Identification of Prisoners Act, 1920

The 1920 Act defines "measurements" narrowly, including finger and foot imprints. Additionally, it enables the photography of persons covered by the 1920 Act.

The DNA Technology (Use and Application) Regulation Bill, 2019

The DNA Bill establishes the source and manner of DNA sample collection. Sources include human fluids, crime scenes, clothes and other artefacts. Blood, sperm, tissue, fluid, urine, pubic hair, or a swab from a person's orifice, skin or tissue are all examples of "intimate body material". Another sort of evidence is "non-intimate body substances", which include a person's handprint, fingerprint, footprint, a specimen of hair other than pubic hair, nail or under-nail sample, lip swab, saliva, or skin impression.

[4]Law Commission of India, 87th Report on Identification of Prisoners Act, 1920 (1980).

[5]The DNA Technology (Use and Application) Regulation Bill, 2019, retrieved 5 September 2022 (https://prsindia.org/files/bills_acts/bills_parliament/2019/The%20DNA%20Technology%20(Use%20and%20Application)%20Regulation%20Bill,%202019%20Bill%20Text.pdf).

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Whom May the Proof be Gathered from? Who Has the Authority to Gather Evidence, and for What Purpose?

Code of Criminal Procedure, 1973

Under Sections 53, 53A, 54 and 311A of the Criminal Procedure Code, samples may only be taken from those previously arrested. Only police officials with sub-inspector rank or above may submit a request under Sections 53, 53A and 54. This material can be utilized throughout the inquiry and may be used against them at trial as evidence. A request can be submitted only when there are solid reasons to suspect that an inspection will turn up proof of a crime. A certified medical professional is required to examine Sections 53 and 53A, and a government medical officer is required to perform it under Section 54. The examination mandated by Section 54 is carried out immediately after the arrest to ensure that the suspect did not suffer any physical harm while being held. The collection of handwriting samples from anyone, even an accused individual, is permitted by Section 311A. Only if a magistrate decides it is required for the investigation or procedure, as the case may be, may these samples be taken.

Identification of Prisoners Act, 1920

According to this Act, "measurements" are obtained to gather information and make it easier to recognize and look into specific offences as outlined by the Code of Criminal Procedure, 1898. The 1920 Act affects three separate categories of people. A police officer with the level of sub-inspector or above may take measurements and photographs under the prescribed scenarios:

(1) Individuals convicted of a crime punishable by a sentence of harsh incarceration of up to one year or more;
(2) Persons ordered to give security for their good behaviour; and
(3) People who have never been convicted of a crime that carries a maximum one-year sentence of hard incarceration.

A magistrate has the authority to order that any individual submits measurements and photographs to conduct an inquiry or proceed under the Code of Criminal Procedure. This individual must have been arrested in connection with the same at some point.

The DNA Technology (Use and Application) Regulation Bill, 2019

The DNA Bill makes identifying specific categories of people easier through DNA analysis and the establishment of DNA databanks. These individuals include victims, criminals, suspects, pre-trial detainees, missing persons and unidentified deceased individuals.

Clause 21 permits the collection of samples from arrested individuals as well, with their agreement if necessary. If they refuse, the person conducting the investigation may apply to the magistrate, who shall ascertain "just cause" and, if necessary, order to take substances.

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Clause 22 of the Bill provides for the voluntary submission of body fluids by anyone present at the crime's site during its commission, is being questioned in connection with the investigation, or seeks to identify a missing or lost relative by written consent. In the circumstances involving minors, when parental or guardian consent is unavailable, the person conducting the investigation may apply to the magistrate, who may order the collection of samples if convinced there is probable cause.

Clause 23 of the Bill authorizes the collection of bodily fluids from a victim or a person reasonably suspected of being a victim who is still alive or a relation of a missing person, with their written consent. Additionally, it permits such collecting from a juvenile or disabled person with their parents' or guardians' written agreement.

The DNA Bill authorizes medical practitioners to gather intimate biological fluids from live or deceased individuals. The DNA Bill authorizes technical personnel to collect non-intimate bodily material under the supervision of a physician or a scientist with experience in molecular biology.

Is Consent Necessary for Sample Collection? Is it Possible to Discard or Remove the Samples?

Code of Criminal Procedure, 1973

Sample collection does not require consent. Sections 53, 53A, 54 and 311A prohibit investigating agencies from storing or incorporating collected samples beyond the duration of the investigation. In practice, criminal courts issue orders ordering the destruction of collected samples following the conclusion of the trial and delivery of the verdict.

Identification of Prisoners Act, 1920

The collecting of samples does not require consent. Except for those who have been found guilty of a crime carrying a sentence of a year or more in jail, the 1920 Act enables the eradication of measurements and photographs of those who have been freed without being put on trial, discharged or found not guilty. There is no provision in the current system for maintaining a measurement database. It is worth noting that the Central and State Fingerprint Bureaus both keep databases of fingerprints for comparison and analysis. Separate regulatory systems regulate these datasets.

The DNA Technology (Use and Application) Regulation Bill, 2019

Except for those detained in connection with crimes punishable by death or imprisonment lasting more than seven years, Clause 21 of the DNA Bill needs agreement from those arrested. If consent is rejected, the investigating authorities may petition the magistrate, who may compel collection if the magistrate judges that there are "reasonable grounds" to suppose the bodily material may reveal or refute involvement in the crime.

Clause 22 of the Bill allows for voluntary written consent for collecting body fluids for DNA testing. This provision applies to anybody present at the time of the crime, is being interrogated in connection with the investigation, or is attempting to locate a missing or lost family member. If the subject of the inquiry is a minor and

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parental or guardian consent cannot be obtained, the investigator may apply to the magistrate, who will issue an order based on "just cause".

Even if the victim does not consent, the proviso to Clause 23(2)(b) of the DNA Bill allows a magistrate to order the collection of bodily samples from victims provided that he is persuaded that there is reasonable cause. This violates Section 164A(7) of the Criminal Procedure Code, which prohibits medical examinations or sample collection from rape victims without their agreement.

DNA profiles collected according to the Bill are maintained in five indices: crime scene, suspects or those under trial, offenders, missing individuals, and unknown deceased in national and regional DNA databanks. Clause 31 of the Bill allows for removing a suspect's information once the police report has been filed and the Court has ordered an under-trial. An individual who is not an offender, suspect or defendant may also write to the National DNA Data Bank requesting that their information be deleted. A parent or guardian may do so on behalf of minors or disabled individuals.

CRITICAL ANALYSIS

By expanding the scope of the 1920 Identification of Prisoners Legislation and repealing it, the Act, while in regulation, expanded the number of legal jargon utilized. Section 2(1)(b) defines measurements as fingerprints, palm prints, footprints, images, iris and retina scans, physical samples and their assessment, personality traits such as signatures and handwriting, and any other evaluation specified in Section 53 or 53-A of the 1973 Code of Criminal Procedure.

The State's primary aim to make the term "measurement" exclusive by including broad terms such as biological samples could result in narco-analysis and brain mapping through the implicit use of force during collection, directly breaching Article 20(3), the right against self-incrimination, and Article 21, the right to life, of the Indian Constitution.

Under Article 20(3) of the Indian Constitution, it is unlawful to compel a person charged with a crime to testify against themself (S.J.S.F. 1959). As a result, people are becoming increasingly concerned about their right to privacy, which is now under threat.

Additionally, it should be mentioned that the Act violates the Human Rights provisions of the United Nations Charter (United Nations 1948). In the United States, "privacy" refers to the right to be free from intrusions on one's personal space, body, information and choice.

Apart from that, Clause 4(2) of the Act mandates the retention of data measured for 75 years, an apparent infringement of the right to be forgotten, as recognized by the Supreme Court of India in *Puttaswamy v. Union of India*.[6]

Additionally, it violates a fundamental concept of criminal law, which holds that no one is guilty until proven otherwise and until their guilt is established in a court of law (Legal Information Institute 2020).

[6]Supreme Court of India, *Justice K. S. Puttaswamy (II) v. Union of India (UOI) and Ors.*, (2019) 1 SCC 1 [106].

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According to the Court's decision in the case of *Narayan Dutt Tiwari v. Rohit Shekhar*, no one should be compelled to engage in any of the contested practices under any conditions, even if it is part of an investigation into a criminal matter.[7] Such action would be deemed an egregious violation of a person's right to privacy.

After a protracted argument, the Supreme Court determined in *Kharak Singh v. State of Uttar Pradesh* that the term "life" encompasses something beyond animal subsistence.[8] When it is taken away from us, we become resistant to ever losing it, allowing us to appreciate our lives more fully. It could be argued that non-human species also have the right to life, in addition to humans (Global Freedom of Expression 2021). In this context, physical well-being is not the only consideration.

The Supreme Court expanded upon Article 21 when it heard the arguments in *Maneka Gandhi v. Union of India*, noting that the "right to life or to exist" includes not just the right to exist bodily but also the right to exist in dignity.[9] An individual's life is paused, and he will constantly be under government surveillance, which is a significant infringement of privacy under this Act. Any person who is put under the government's surveillance would have their liberty and privacy violated, thereby being denied of these constitutional rights.

The Supreme Court declared in *A.P. v. Challa Ramakrishna Reddy*[10] that one of the fundamental human rights assured to everyone is the right to life. It cannot be violated by anyone, not even the government, since it is so crucial to our existence except in the rare cases where the heinous or grave nature of the crime means that the death penalty is awarded. The human condition remains intact, even while someone is imprisoned. In this state, he preserves his human status and is therefore eligible for any basic rights, including the right to life.

CONSTITUTIONAL PROVISIONS ANALYSIS

Article 14

The Act's current text contains much significant abuse of the right to equality, protected by Article 14 of the Constitution of India. Unreasonable categorization, arbitrariness and undue delegation are the constitutional vices that characterize the Act. According to the Constitution, the Act delegated undue legislative authority to the executive and granted excessive discretionary powers to functionaries. It was arbitrary and failed the practical categorization test, all of which are violations of the Constitution.[11]

The Act raises severe concerns about the excessive delegation of powers, which violates Article 14 (Shukla 1959:360). This Act authorizes the taking of measurements by police and prison officers, the collection, preservation and sharing of those

[7]Supreme Court of India, *Narayan Dutt Tiwari v. Rohit Shekhar*, (2012) 12 SCC 554, retrieved 5 September 2022 (https://privacylibrary.ccgnlud.org/case/narayan-dutt-tiwari-vs-rohit-shekhar).

[8]Supreme Court of India, *Kharak Singh v. The State of U. P. & Others*, 18 December 1962, 1964 SCR (1) 332.

[9]Supreme Court of India, *Maneka Gandhi v. Union of India*, 25 January 1978, 1978 SCR (2) 621.

[10]Supreme Court of India, *State of Andhra Pradesh v. Challa Ramkrishna Reddy & Ors*, 26 April 2000, (2000) 5 SCC 712.

[11]*Ibid.*, p. 18.

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measurements by state-notified agencies, as well as the collection, storage, destruction, processing and dissemination of the records of such measurements by the NCRB in the interest of "prevention, detection, investigation, and prosecution" of criminal offences. The Act delegated disproportionate powers to the government in many scenarios. It does so by delegating legislative functions to the executive by providing the broad rule-making authority with little guidance;[12] and for another, it does so by granting functionaries under the Act (police officers, prison officers and magistrates) excessive discretion in deciding whom they can compel to provide measurements, under what scenarios they can do so, and for what purposes they can do so.

A statute may violate the Constitution because it goes beyond the allowable limitations in delegating powers, which violates the First Amendment. Earlier this year, the Supreme Court ruled in *In Re The Delhi Laws Act* that the legislature could not abandon its legislative obligations and that, while delegating its powers, the legislature must guarantee that the administration does not become a parallel legislature.

In breach of Article 14, police and prison officers have been given excessive discretionary authority to compel the collection of measures on their initiative.

There is no guidance on how measures should be taken, and no basis is published for determining which measurements are "needed" to be obtained and from which the Act covers individuals.

There is an unreasonable classification of people detained for breaking Article 14 based on the victim's gender or age, the severity of the punishment for their alleged crime, and the Act's goals for gathering biological samples.

Due to a lack of differentiation/gradation between convicts, those arrested or detained, as well as a lack of differentiation following the nature of the offence and the need for investigation in a particular case, the right to privacy has been disproportionately violated.

Legislation restricting basic rights must be sufficiently unambiguous regarding the extent, scope and form of the interference permitted, and contain adequate protections against authority abuse.[13] This means that the legislation must refrain from granting excessive executive discretion that has the consequence of curtailing fundamental rights and freedoms (European Court of Human Rights 2021). The grant of discretion, in and of itself, is irrelevant as long as guidelines regulate the exercise of discretionary powers. However, "total and unfettered discretion degenerates into arbitrariness".[14] If it is regulated most strictly, then there will not be much room for any executive discretion as the regulations would not allow it.

Clause 3 authorizes jail and police officials to collect measurements of those covered by Clause 3(1) "when necessary". Additionally, Clause 5 specifies that the magistrate may order "any individual" to enable his or her measurements to

[12]Supreme Court of India, *In Re The Delhi Laws Act, 1912, The ... v. The Part C States (Laws) Act, 1950*, 23 May 1951, 1951 AIR 332 [93].

[13]Supreme Court of India, *Shreya Singhal v. Union of India*, 24 March 2015, (2015) 5 SCC 1 [17, 18, 26]; *Puttaswamy v. Union of India*, above note 6 [319, 1288].

[14]Supreme Court of India, *State of Punjab and Anr v. Khan Chand*, 17 December 1973, 1974 SCR (2) 768 [8].

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be taken for "any" investigation or process under the Code of Criminal Procedure or "any other legislation" in force if he or she finds it "expedient". There is no indication in the Act of any legislative policy governing the determination by police and jail officers, as well as the magistrate, of whether taking measures is required or expedient. As a result, we argue that the Act does not refer to the purposes or conditions under which this finding of "necessity" or "expediency" may be made.

A police officer must be convinced that there are "reasonable grounds for believing that an examination of his person will yield evidence as to the commission of an offence", taking into account the nature of the offence and the circumstances surrounding its commission, in order for a healthcare professional to examine a suspect at the request of a police officer under Section 53 of the Criminal Procedure Code.[15] Even this minimal level of satisfaction is not required for police personnel to take measurements of persons covered by Clause 3. Thus, determining when officers are "required" to take "measurements" under Clause 3 is an unguided discretionary power that amounts to *carte blanche* to discriminate. This is especially concerning given that the current Act's scope includes "finger impressions, palm impressions, foot impressions, photographs, iris and retina scan, physical, biological samples and their analysis, behavioural characteristics including signatures, handwriting, or any other examination referred to in section 53 or 53A of the Act", in contrast to the 1920 Act, which limited measurements to finger impressions, foot impressions and photographs.[16] Any or all of these may be processed, stored in databases, and disseminated for an unidentified and varied purpose by police or prison personnel using unguided discretion.

Article 20(3)

Article 20(3) of the Indian Constitution – Right Against Self-Incrimination may be violated. "Measurements" are defined in Section 2(1)(b) of the Act as "fingerprint impressions, palm-print impressions, footprint impressions, photographs, iris and retina scan, physical samples and their analysis, behavioural attributes including signatures and handwriting", or any other examination referred to in Section 53 or Section 53A of the Code of Criminal Procedure, 1973. "Measurements" are defined as "fingerprint impressions, palm-print impressions, footprint impressions, photographs". It is worth noting that "behavioural characteristics" is not a term of art in the field of forensic science, which raises issues regarding the phrase's overbroad and ambiguous application. In particular, it is up to the judge whether or not measures of a testimonial character should be included. In some instances, coercively obtained "behavioural characteristics" as measures may be obtained from a person through a mandatory psychiatric assessment. If such an examination results in any damning admission, it would be considered a "testimonial compulsion". Narcoanalysis, polygraph testing and brain mapping are all examples of procedures that

[15]Karnataka High Court, *Shreemad Jagadguru Shankaracharya v. State of Karnataka*, 3 December 2014, 2014 SCC OnLine Kar 5639.

[16]Section 2(a), Identification of Prisoners Act, 1920.

https://doi.org/10.1017/cri.2022.17 Published online by Cambridge University Press

may be included in a broad reading of the term "behavioural qualities", which were explicitly barred by the Apex Court in the *Selvi v. the State of Karnataka*[17] case.

In a series of decisions, the Supreme Court has concluded that inclusive definitions are intended to broaden and add to the ordinary meaning of terms, particularly when the enlarged statutory meaning may not fit within the ordinary or natural meaning. In this way, "behavioural traits" can be defined as what its usual meaning would indicate and the handwriting, signatures and other measures specified in Sections 53 and 53A of the Criminal Procedure Code.

Violation of the Right to Privacy Under Article 21[18]

The right to privacy was declared a basic right protected by Article 21 of the Indian Constitution in *Puttaswamy-II*, a case decided by a nine-judge bench of the Indian Apex Court. The five-judge panel further underlined that informational privacy, including biometric and other personal data, is protected by the right to privacy under Article 21 of the Constitution while deciding on the constitutionality of the Aadhaar framework in *Puttaswamy-II*. For instance, when data containing private information is retained for an extended period, privacy rights are violated. Individuals' personal information is included in most of the measures covered by the Act; for example, "finger-impressions, palm-print impressions, footprint impressions, iris scans, retina scans, physical and biological samples, and their analysis". In addition, the systematic capturing of photographs and voice samples on databases to identify individuals through data processing has been recognized as interference with privacy by the European Court of Human Rights. This implies that because this Act contemplates extensive collection and using such personally identifiable information, it will directly impact the right to privacy in various ways.

According to Indian constitutional law, the test of proportionality was first incorporated into the country's constitutional law by a five-judge bench ruling in *Modern Dental College*,[19] in which Justice A. K. Sikri affirmed the proportionality notion proposed in *R. v. Oakes*.[20]

However, it was Justice Sikri himself who improved his concept of proportionality further in the *Puttaswamy-II* judgment, which was reached after taking into account the many critiques of the Canadian and German methods and the judgment in *Modern Dental College* in the five-judge bench decision.[21] We thus interpret the judgment in *Puttaswamy-II* as a clarification of the ruling in *Modern Dental College*, which we believe is correct. The criteria for passing the test were as follows:[22]

[17]Supreme Court of India, *Selvi v. State of Karnataka*, (2010) 7 SCC 263.

[18]The Constitution of India, Article 21.

[19]Supreme Court of India, *Modern Dental College Research Centre v. State of Madhya Pradesh & Ors*, (2016) 7 SCC 353.

[20]Supreme Court of Canada, *R. v. Oakes*, [1986] 1 SCR 103 [68].

[21]*Puttaswamy v. Union of India*, above note 6 [157–8].

[22]Supreme Court of India, *Justice K. S. Puttaswamy (Retd.) & Anr. v. Union of India and Ors.*, 24 August 2017, (2017) 10 SCC 1 [65].

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(1) A legitimate purpose is "of sufficient importance to warrant the suspension or abolition of a constitutionally protected privilege or freedom".
(2) Appropriate means, indicating a sensible relationship between means and outcomes as a result.
(3) The necessity of means is to be assessed in the following ways:

First, establish a variety of feasible alternatives to the State-sponsored measure; second, evaluate the efficacy of each of these options in achieving the stated goal in an accurate and meaningful way; and third, recommend a course of action. Examine the impact of each measure on the right that is being contested next.

Finally, consider if there is a preferred option that achieves the goal in a genuine and meaningful way while being less invasive on the right compared to the State's proposed measure.

To alleviate concerns about judges engaging in "*ad hoc* balancing", it is recommended that they use "bright line rules", which means that the "act of balancing" should be carried out in the form of an existing rule or through the development of a good rule.

The Act's goal of enhancing criminal investigation, detection and prevention is a worthy one, but it falls short of achieving the other three aspects of proportionality, as discussed below.

The Act is not an acceptable way of attaining the legitimate goal of crime prevention, detection and investigation, as it unjustly lowers the requisite rank of police officials for seeking measurements and should be repealed immediately (Javed 2022).

If the legitimate goal of crime prevention, detection and investigation is to be achieved, undue violation of the right to privacy is not required.

A disproportionate impact of the Act is seen by those who exercise their right to privacy.

The Act establishes an expansive class of individuals who may be compelled to supply measurements. It applies to all individuals convicted of any offence, including ex-convicts, regardless of the severity or type of the offence, as well as individuals detained under any preventive detention law and all arrestees (though a further subclass of arrestees are exempted from production of biological samples specifically). No classification is made based on the nature of the offence when determining whether the use of measures will facilitate the investigation. Thus, the Act's coverage is excessive in light of the reasonable objective it tries to accomplish. Additionally, Clause 5 of the Act empowers the magistrate to order the measurement of "any individual" to conduct not just investigations or processes under the Code of Criminal Procedure but also "any other law ... in effect". Clause 5 does not appear to require a suspicion that the subject of the measurements has committed an offence, and it just needs that the subject is under detention of the police authorities or is a convict. An extensive database does not automatically equate to improved crime prevention, investigation and prosecution.[23] Thus, the Act's broad scope is unnecessary to accomplish either one of two legitimate goals: tying a specific suspect to a specific crime or identifying future criminals.

[23]European Court of Human Rights, *Gaughran v. the United Kingdom*, Case No. 45245/15.

https://doi.org/10.1017/cri.2022.17 Published online by Cambridge University Press

The Act does not limit the length of storage of measurements or records of measurements. In *Gaughran v. UK*,[24] the European Court of Human Rights (2020) addressed a programme requiring the indefinite preservation of DNA and other personal information of individuals convicted of minor offences. The Court rejected the argument that increased data collection was proportionate to increased crime prevention and found the legislature to be in violation for failing to include a provision for data removal on an application[25] and held that this constituted a disproportionate interference with the applicant's right to respect for private life.[26] The Court also observed that several factors, i.e. the nature of the offence, the age of the person concerned, the length of time that had elapsed and the person's current personality[27] "should be taken into account by the authorities to assess whether conserving the forensic/biometric data appeared to be necessary". In *S. and Marper v. UK*,[28] the European Court of Human Rights invalidated a similar programme that maintained personal information about suspected and unconvicted individuals forever while expressing particular worry over keeping such information about juvenile offenders.

Notably, the European Court of Human Rights concluded in *Aycaguer v. France*[29] that a deletion procedure should be a feasible remedy available not just to suspects but also to convicted individuals. Additionally, it was noted in the same case that the length of data preservation should be proportional to the type and gravity of the offence. Indefinite retention or perpetual retention has been consistently ruled excessive in light of the legitimate goal of crime investigation and detection.

This Act has no method for applying for removal or deletion, except in the case of persons who have been acquitted, discharged or released from any criminal convictions (provision to Clause 4(2)). Even though such a method has been provided for the class mentioned above of persons, the Act lacks a defined procedure for the NCRB, which is responsible for destroying records of measures to acquire information on court decisions. As a result, how such a provision will be applied is unknown. Additionally, the Act appears to compel indefinite keeping of not only digital records of measures but also measurements themselves. In *Aycaguer v. France*, the Court viewed a term of 40 years as "indefinite storage, or at the very least as a rule rather than a maximum".[30] Additionally, whereas Clauses 4(1) and (2) require the NCRB to maintain records of measurements, which may or may not contain the samples themselves, Clause 4(3) requires State-notified agencies to collect, preserve and communicate the measurements themselves. Given that the definition of measures includes biological samples and no provision of the Act requires their disposal, it is reasonable to presume that samples can be maintained permanently.

Thus, the Act offers no provision for the erasure of records pertaining to actions taken against convicted people, prisoners, or those forced, according to Clause 5 (including juvenile offenders). Furthermore, the Act has no provisions for removing samples from anyone following the Act, even individuals imprisoned and afterward

[24] *Ibid.*
[25] *Ibid.*
[26] *Ibid.* [94].
[27] European Court of Human Rights, *S. and Marper v. The United Kingdom*, [2008] ECHR 1581.
[28] *Ibid.* [54, 124].
[29] European Court of Human Rights, *Aycaguer v. France*, Case No. 8806/12, [2017] ECHR 587.
[30] *Ibid.* [42].

https://doi.org/10.1017/cri.2022.17 Published online by Cambridge University Press

found not guilty. There is no provision for the deletion of samples or records based on an individual's present personality, the likelihood of future criminal behaviour, the seriousness of the offence, the kind of the offence or the amount of time since the offence, among other variables. As a result, keeping such data and measurements indefinitely is not necessary for the legitimate purpose of assisting future investigations.

There are no procedural safeguards in the Act to limit privacy intrusion, and the Act omits or delegates fundamental critical procedural safeguards to executive rule-making bodies. There is no indication of the purpose for which records may be utilized, exchanged or disseminated under Clause 4(1), and such policy judgment is left to the rule-making body's discretion. Removing one's measurements from the database is activated only when an accused individual is acquitted, released or discharged. All legal remedies against such outcomes have been exhausted and are even then subject to the magistrate's unguided discretion under Clause 4(2). There is no guidance on how measurements may be collected, the period for which records of such measurements, as well as the measurements themselves, may be retained, or how a person who refuses to supply their measurements may be compelled to do so.

CONCLUSION

Recent advancements in forensics led to the Act's enactment, which now permits the use of contemporary methods for measuring and registering permissible body dimensions. The goal is to authorize the measurement of prisoners and other people for identification and investigation in criminal situations while also maintaining the records. By allowing the broad State jurisdiction to maintain prisoner data and carry out physical and biological testing with the implied force of law, which is against the rule of law and has an arbitrary nature, the Act infringes on people's fundamental rights. People preserve their basic humanity even while incarcerated. There is a fair argument that an ex-convict may commit another crime in the future, and having their DNA on record would help solve the crime swiftly. However, we must consider that once the convict serves the awarded sentence, we must allow them to rehabilitate among society, not subject them to remain under a constant microscope. Furthermore, the statistics show that over 6.6 million First Information Reports were registered in India from 2018 to 2020 (National Crime Records Bureau 2020). Basing our argument on this benchmark, we can reasonably state that the financial burden alone for collecting, recording, compiling and storing evidence in these cases would be enormous.

It has been reiterated in several instances by the Apex Court and other Indian courts to guarantee that convicts do not become victims of human rights violations (Sharma 2018). As a result, since that time, the legislature has failed to meet the requirements for intangible differentiation and rational connection. Consequently, this act violates Sections 14, 19, 20(3) and 21 of the Indian Constitution, which outline the fundamental rights of citizens. Even though we agree that increasing the efficacy and efficiency of investigations is a worthwhile

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goal, we believe that the Act's premise that this can be accomplished through the gathering of a wide variety of metrics and the establishment of such enormous databases is unrealistic because increasing the size of the criminal database is not directly proportional to crime prevention. This mistake can result in several false convictions. While the entire process of collecting, preserving and storing the many sorts of measures may increase administrative costs, it is possible that the promised returns will not be delivered, rendering the development of such databases superfluous while also infringing on basic rights.

Acknowledgements. While the list of people who ought to be acknowledged is long, for conciseness, the author would like to acknowledge and appreciate his family members for their constant support and the Editors for reviewing multiple drafts and patient support throughout the entire process.

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https://doi.org/10.1017/cri.2022.17 Published online by Cambridge University Press

TRANSLATED ABSTRACTS

ABSTRACTO

El parlamento de India aprobó la Ley de Procedimiento Penal (Identificación) de 2022 luego de un largo debate. Se está introduciendo legislación para rescindir la Ley de Identificación de Prisioneros de 1920, que permitía el uso de métodos de identificación e investigación de los detenidos. La definición ampliada de medidas de la Ley de 2022 incluye escaneos de iris y retina, rasgos de comportamiento como escritura a mano, huellas dactilares e impresiones de la palma (y su análisis), y muestras físicas y biológicas. Al informar mediciones, la frase "y su análisis" implica que los perfiles se pueden generar a partir de una variedad de fuentes de información. La Ley estipula que las mediciones deben conservarse en forma digital o electrónica durante 75 años. Este artículo pretende evaluar el posible uso indebido de la Ley y la posible vulneración de derechos fundamentales como el derecho a la igualdad y a la intimidad de los amparados por la Ley. Además, el autor desea brindar una explicación concisa de la Ley y muchos otros temas relacionados.

Palabras clave Derecho penal de India, Ley de procedimiento penal (identificación) de 2022, Derecho constitucional de India, Derechos fundamentales, Ley de identificación de reclusos de 1920

ABSTRAIT

Le parlement indien a adopté la loi de 2022 sur la procédure pénale (identification) après un long débat. Une législation est en cours d'introduction pour abroger la loi de 1920 sur l'identification des prisonniers, qui autorisait l'utilisation de méthodes d'identification et d'enquête sur les détenus. La définition élargie des mesures de la loi de 2022 comprend les scans de l'iris et de la rétine, les traits comportementaux comme l'écriture manuscrite, les empreintes digitales et les empreintes de la paume (et leur analyse) et les échantillons physiques et biologiques. Lors du rapport des mesures, l'expression "et leur analyse" implique que les profils peuvent être générés à partir d'une variété de sources d'informations. La loi stipule que les mesures doivent être conservées sous forme numérique ou électronique pendant 75 ans. Cet article vise à évaluer l'utilisation abusive potentielle de la loi et la violation possible des droits fondamentaux tels que le droit à l'égalité et à la vie privée des personnes couvertes par la loi. En outre, l'auteur souhaite fournir une explication concise de la loi et de nombreuses autres questions connexes.

Mots-clés loi pénale indienne, loi de 2022 sur la procédure pénale (identification), droit constitutionnel indien, droits fondamentaux, loi de 1920 sur l'identification des prisonniers

https://doi.org/10.1017/cri.2022.17 Published online by Cambridge University Press

抽象的
经过长时间的辩论，印度议会通过了 2022 年的《刑事诉讼（身份证明）法》。正在立法废除 1920 年《囚犯身份识别法》，该法允许对被拘留者使用身份识别和调查方法。 2022 年法案对测量的扩展定义包括虹膜和视网膜扫描、笔迹、指纹印记和手掌印记（及其分析）等行为特征，以及物理和生物样本。在报告测量时，短语“及其分析”意味着可以从各种信息源生成配置文件。该法案规定，测量数据将以数字或电子形式保存 75 年。本文旨在评估该法案潜在的滥用和可能违反基本权利的情况，例如该法案涵盖的人的平等权和隐私权。此外，作者希望对该法案和许多其他相关问题进行简要解释。

关键词： 印度刑法，2022 年刑事诉讼（身份识别）法，印度宪法，基本权利，1920 年囚犯身份识别法

الملخص
أقر البرلمان الهندي قانون الإجراءات الجنائية (تحديد الهوية) لعام 2022 بعد مناقشة مطولة. يجري تقديم تشريع لإلغاء قانون تحديد هوية السجناء لعام 1920 ، الذي سمح باستخدام أساليب تحديد الهوية والتحقيق مع المحتجزين. يشمل التعريف الموسع للقانون 2022 للقياسات مسح قزحية العين وشبكية العين والسمات السلوكية مثل الكتابة اليدوية وبصمات الأصابع وانطباعات راحة اليد (وتحليلها) والعينات الفيزيائية والبيولوجية. عند الإبلاغ عن القياسات ، تشير عبارة "وتحليلها" إلى إمكانية إنشاء ملفات التعريف من مجموعة متنوعة من مصادر المعلومات. ينص القانون على الحفاظ على القياسات في شكل رقمي أو إلكتروني لمدة 75 عاما. تهدف هذه المقالة إلى تقييم إساءة استخدام القانون المحتملة والانتهاك المحتمل للحقوق الأساسية مثل الحق في المساواة والخصوصية لأولئك الذين يشملهم القانون. بالإضافة إلى ذلك ، يرغب المؤلف في تقديم شرح موجز للقانون والعديد من القضايا الأخرى ذات الصلة.

الكلمات المفتاحية: القانون الجنائي في الهند, قانون الإجراءات الجنائية (تحديد الهوية) لعام 2022, القانون الدستوري في الهند, الحقوق الأساسية, قانون تحديد السجناء لعام 1920

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Cite this article: Yadav, V. 2022. Analysis of India's Criminal Procedure (Identification) Act, 2022: Determining Potential Misuse and Possible Violations of Fundamental Rights. *International Annals of Criminology* **60**, 251–268. https://doi.org/10.1017/cri.2022.17