

Privacy in the Age of Technology: Implication of Criminal Procedure (Identification) Act, 2022 and Unravelling Concerns to Criminal Justice- A Explorative Study.

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“The Criminal Procedure (Identification) Act, 2022 leaves too much to the imagination of authorities, and appears to legalize the violation of constitutional rights by the State and its enforcement agencies, including the rights to privacy, life, and liberty and the Act arbitrarily intrudes upon the right to privacy. What needs to be examined is whether the same satisfies the threefold test laid down in Puttaswamy.” -Advt.Krishna Shah -in Leaflet - Constitution First.

Abstract

This article explores the impact of the Criminal Procedure (Identification) Act of 2022 on the Right to Privacy. The Criminal Procedure (Identification) Act aims to authorise the collection of data from a wider range of individuals under a broader set of situations for the purpose of criminal profiling in investigations. The Act seeks to achieve an increased conviction rate by creating a centralised database, to be operated by the National Crime Records Bureau, which will store the record of “measurements” for 75 years. The article will highlight the various provisions of the Criminal Procedure (Identification) Act that would potentially infringe upon the Right to Privacy of an individual, while simultaneously analysing the impact of this Act on the principles of fair trial within the criminal justice system.

Keywords: Right to Privacy, data, measurements, criminal, conviction.

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I. Introduction.

Law enforcement institutions have always struggled to preserve accused and criminal data but the age of technology has paved the way for storing data for ages together. In many situations, the prosecution is halted due to a lack of evidence, which can impede conviction. With the emergence of new technology, it has become critical to modify the procedures of investigation and identification of criminals mandated in the legislation, especially due to the evolving nature of crimes. The Criminal Procedure (Identification) Act of 2022 is a boon to law enforcement. The Act intends to strengthen the robustness of the investigation procedure by utilising digital tools in maintaining a centralised database that will assist courts in determining the guilt of the accused and thereby increase the conviction rate. The Act aims to increase the range of "measurements" that law enforcement authorities can use to conduct quick and efficient investigations. The Criminal Procedure (Identification) Act 2022 (Henceforth referred to as the Act of 2022) was enacted on 18th April 2022 for authorisation of the collection of measurements, i.e. data from convicts and other persons, to aid identification and investigation of criminal matters and to store such data in a digitised format with a central database, i.e. the National Crime Records Bureau. The Act of 2022 replaced the Identification of Prisoners Act 1920. While the Identification of Prisoners Act 1920 authorised the collection of finger impressions, foot-print impressions and photographs from convicts and non-convicts by a Magistrate of the First Class, the Act of 2022 authorises the collection of “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.”

The Act of 2022 comes when India lacks data protection legislation. In the Digital Personal Data Protection Bill of 2022, state instrumentalities are exempted from the application of the provisions regulating the processing of personal data under Section 18 on the grounds of sovereignty and integrity of India, security of the State, friendly relations with a foreign state, maintenance of public order or prevention of incitement to

any related cognizable offence. If the Digital Personal Data Protection Bill is enacted, it will pave the way for implementing The Act of 2022 while absolving state authorities who misuse personal data during such implementation. The Right to Privacy was upheld as a Fundamental Right under Articles 14, 19, and 21 of the Constitution in the judgment of Justice K.S. Puttaswamy v. Union of India. The judgment laid down the following tests to determine compliance with the Right to Privacy: legitimate aim, suitable means to achieve a legitimate aim, and necessity and proportionality of the data processing to the aim. Based on the researcher's field data analysis, the Act of 2022 does not pass any of these tests. The Ministry of Home Affairs has stated that the Criminal Procedure (Identification) Act aims to improve the conviction rate. However, there is no government data or literature to support that the lack of criminal data is the primary reason for low conviction rates. Elements such as inadequate investigation, delayed and poor quality of prosecution, and lengthy trials are reasons for low conviction rates in India. According to the government, the disposal of cases depends on the classification of cases, how complex the facts are, and the kind of evidence and engagement of the parties involved.

The Act of 2022 provides for the forcible extraction of data from any person – whether arrested, convicted, detained, or even someone who has not been arrested, at the order of a Magistrate. The Act of 2022 further identifies refusal to give data as an offence under Section 186 of the Indian Penal Code, 1860. Under the Act of 2022, the Government avoids all accountability, bestowed with the power to make rules related to data collection and processing as well as the power to remove difficulties that may arise during the implementation of the Act of 2022. Hence, there is a need to analyse the provisions of the Act of 2022 vis-a-vis the Right to Privacy and data protection principles.

The research methodology used for this study is qualitative, employing qualitative data tools such as structured and semi-structured interview schedules and a multiple-choice questionnaire to form the primary research. Literature review and systematic review methodology of national and international literature on privacy, data protection, and state-surveillance mechanisms across select jurisdictions – India, the United Kingdom, the USA, and the European Union form part of the secondary research. The researcher undertakes an exploratory, descriptive and qualitative study. The research method is descriptive and analytical.

The objectives of the research are: To study the Criminal Procedure (Identification) Act in the context of the Fundamental Right to Privacy. To explore the intentions and colonial roots behind the enactment of the Criminal Procedure (Identification) Act. To analyse the need for a criminal database and whether the Criminal Procedure (Identification) Act fulfils that need. To assess the levels of data protection maintained by the Criminal Procedure (Identification) Act. To investigate the link between pervasive collection/storage of data and delivery of justice.

For the field data analysis, primary data was collected from the key informants, stakeholders, and the target population. Academicians, legal counsels, and public policy practitioners were identified as key informants. The Government was identified as a significant stakeholder, hence a Head Constable (embodying the powers of data collection), a senior officer of the Indian Police Services, and a metropolitan magistrate were interviewed. The purposive sampling technique was used to interview the key informants and stakeholders, constituting eight interviewees. For the target population, fifty-eight individuals were selected through snowballing sampling technique as respondents for a questionnaire to determine public opinion about the Act of 2022. Their opinion was determined within the hypothetical context of preventive detention for a student protest.

Secondary data was collected from books, articles, reports, and data, collected from-a) Government sources, such as National Crime Records Bureau, Law Commission Reports, and Parliamentary Committee Reports. b) Stakeholders outside the Government, such as databases maintained by the Internet Freedom Foundation (like Panoptic Tracker), Project 39A of National Law University Delhi, Criminal Justice and Police Accountability Project, Software Freedom Law Centre, and Centre for Internet and Society. c) International Stakeholder Organizations of Privacy and Human Rights, such as Fair Trials (London), Information Society Project (Yale Law), Oxford Internet Institute, Information Labs (Brussels), Access Now (NY), European Digital Rights (Brussels), Centre for Internet and Human Rights (Germany) and Privacy International (London).

1. Data Inferences from Key Informants and Stakeholders.

Data from Key Informants: Certain key information was inferred from the observations of the key informants interviewed for field data analysis. It was observed by Participant No. 1 that Informational Privacy was not reflected in the Criminal Procedure (Identification) Act, of 2022. Participant No. 2 held the view that the nomination of a nodal officer for the destruction of records under Rule 5 of the Criminal Procedure (Identification) Rules, 2022 was a mere procedural formality completed by the government and did not actually reflect the right to erasure, since the entire procedure to delete the records is vague and discretionary. In comparison, it was observed by Participant No. 3 that the application of data protection principles must be held

to a different standard in matters of criminal investigations than in the purchase of service matters due to the angle of state security involved. Participant No. 4 brought a fresh perspective with the observation that the Act of 2022 contradicted the principles of Privacy, Confidentiality, and Fresh Start under the Juvenile Justice Act, 2015. It was observed by Participant No. 5 that storage limitation principles were not reflected in The Act of 2022.

Data from Stakeholders in the Government: It was observed by Participant No. 6 that the data collected under The Act of 2022 was not relevant to the crime committed and could lead to stigmatization of the person whose data is collected. It was observed by Participant No. 7 that the existing criminal databases are not foolproof, with no mechanism to correct wrong data entry. It was observed by Participant No. 8 that there was no facility for the digitization of data at the district level.

Data Inferences from Target Population: It was inferred from the responses of the target group that 79.3% of the target group would not be comfortable sharing data if ordered by a Magistrate to give measurements for an ongoing criminal investigation. 67.2% of the persons in the target group were not happy with data being stored electronically for 75 years under the Act of 2022.

Thematic Areas of Analysis: The following themes have been adhered to for a critical analysis of The Act of 2022. Below is a tabular representation of the key inferences drawn from primary and secondary data, pertaining to each theme:

Theme	Primary Data	Secondary Data
Right to Privacy	Criminal Procedure (Identification) Act, 2022 violates the Right to Privacy; promotes Stigmatization	Biometric mass surveillance violates Fundamental Rights
Fair Trial	Criminal Procedure (Identification) Act, 2022 does not uphold information privacy, fair information principles	Criminalizes before proof of guilt; criminal profiling (India-Denotified tribes); racial profiling through AI
Necessity and Proportionality	Criminal Procedure (Identification) Act, 2022 does not pass the tests of necessity and proportionality	Fundamental in assessing the lawfulness of processing personal data
Purpose Limitation	Criminal Procedure (Identification) Act, 2022 has no purpose limitation or storage limitation principles	Surveillance will facilitate control; Purpose limitation –a pillar of data protection
State Security	No justification behind how more data will reduce crime; existing databases are not functional	State Security not defined, could harm Fundamental Rights
Data Protection	NCRB lacks the infrastructure and framework to protect data	Act of 2022 Vulnerable to misuse by Police

2. **Right to Privacy.**

The Act of 2022 has overreaching provisions that strike at the core of the constitutional right to privacy. The Act authorizes the collection and preservation of measurements of convicts and other persons for identification and investigation in criminal matters. The Act defines the term “measurements” as “finger-impresions, palm-print impresions, foot-print impresions, 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”. However, the Act does not further define the terms “biological samples” or “behavioural attributes”. Biological samples could be understood to mean blood, semen, swab, hair, and DNA profiling. Behavioural attributes could be inclusive of psychometric evaluation such as brain mapping, NARCO analysis, and lie detector test, in the absence of a clearly worded definition. The Criminal Procedure (Identification) Act, of 2022 authorizes the forcible collection of measurements and penalizes resistance to sharing measurements. Such provisions deem the consent of the data subject irrelevant, which contradicts the decision given in *Selvi v. State of Karnataka* - that, neuroscientific investigative techniques could not be administered without the valid consent of the accused. The penalising provision also contradicts the essence of the judgment in *Selvi v. State of Karnataka*, that the right against self-incrimination protected under Art.20(3) of the Constitution has to be read in consideration with the

Right to life and personal liberty, which encompasses fair trial and substantive due process, protected under Art. 21 of the Constitution.

3. Conceptualizing Privacy in Criminal Reforms.

In India, the Right to Privacy is a Fundamental Right under Art. 21 (Right to Life and Personal Liberty) of the Constitution. The constitutionality of the Right to privacy as a Fundamental Right was upheld in Justice K.S. Puttuswamy v. Union of India. The Right to Privacy, being a Fundamental Right, is not absolute. The Right to Privacy is subject to reasonable restrictions that may be implemented through procedures established by law. It is especially so in matters of criminal investigations, which are in desperate need of reforms due to the evolving nature of crimes, leading to new forms of evidence. The present infrastructure of investigations in India is equipped to handle mostly physical evidence when evidence is no longer limited to being found or stored in a physical form. Hence, progressive reform was needed concerning collecting and storing criminal data. The colonial era Identification of Prisoners Act of 1920 has become outdated, as highlighted in the 87th Report of the Law Commission of India. The need to revamp the Identification of Prisoners Act of 1920 arose in the light of the decision given in State of Uttar Pradesh v. Ram Babu Mishra (1980) which held that the Magistrate had no authority to direct the accused to give his writing samples and signatures in the absence of any specific provision of law, and that suitable legislation was required to enable Magistrates to direct the accused to give specimen signatures and writing samples at par with the provision under Section 5 of the Identification of Prisoners Act.

Subsequently, the 87th Report of the Law Commission of India came up with recommendations to align the law with modern trends in the criminal investigation. The Report highlights the conflict between the two competing interests: the interest of the citizen in protection from the invasion of his physical privacy and the State's interest in securing evidence relevant to the crime. In the report, privacy is defined as "indicating those values which a civilized society would like to cherish for protecting the human desire for secrecy and anonymity as also for freedom from physical interference." In alignment with the definition, the report stresses the need to follow the procedure established by law as guaranteed by Art. 21 of the Constitution. The report recommends the expansion of the classification of offences for which evidence may be ordered to be furnished (post-arrest) and specific shreds of evidence in view of scientific developments. Under the recommendations, the revised definition of "measurements" would be applicable only to those convicted or arrested for specific offences with some minimum imprisonment, or as security for good behaviour. However, the Act of 2022 presents sweeping provisions for collecting measurements from individuals convicted or arrested under any offence, for security for good behaviours, and also for being detained under preventive detention laws.

4. Provision infringes on Privacy.

Section 3 of The Act of 2022 requires any person convicted or arrested for any offence or even detained under preventive detention laws or ordered to give security for good behaviour, to share his measurements with the government. The only exception made is with respect to the biological sample, which a person may not be obliged to share unless he has committed an offence against women/children punishable with a minimum of seven years of imprisonment. There is no classification of offences on the basis of severity of punishment to bring an offender within the ambit of this provision, meaning that someone arrested for a minor misdemeanour would be treated at par with someone arrested for murder under this Act. Section 5 enables the Magistrate to direct any person to share his measurements, for the purpose of any investigation or proceeding under the Code of Criminal Procedure of 1973 or any other law in force. This section removes the requirement for a person to be even arrested or convicted or detained for the purpose of sharing measurements.

An innocent person could be asked to share his measurements with the authorities which would then be used for criminal profiling. The Act thus enables the creation of a centralized database containing criminal profiles of persons whose guilt might not even be proved. Further, resistance to allowing the taking of measurements would lead to being penalised under Section 186 of the Indian Penal Code of 1861, and the police official or prison official may still collect the measurements as prescribed under Section 6 of the Act. These measurements will be stored in a digital/electronic form with the National Crime Records Bureau for 75 years from the date of collection, which exceeds the life expectancy of an average Indian. In Venkateshappa and Others v. State of Karnataka and Others, the High Court of Karnataka, upholding the principle of bodily integrity, held that the right to privacy of an individual is violated if the State orders a DNA test without the individual's consent.

5. Fair Trial.

The Right to a Fair Trial stems from the Rule of Law in a State. Fair Trial means that any proceeding before the law would be just and fair, without any bias or arbitrary actions exercised by the government. In Zahira Habibulla Sheikh v. State of Gujarat and Others, the Supreme Court observed that "each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as

it is to the victim and to society. A fair trial obviously would mean a trial before an impartial judge, a fair prosecutor, and an atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witness or the cause which is being tried, is eliminated.” A criminal trial must begin with the presumption of innocence of the accused, as dictated by the Latin maxim, “*ei incumbit probatio qui dicit, non qui negat*”, meaning the burden of proof rests with one who asserts, not with one who denies. In the adversarial system followed in criminal trials in India, it is the responsibility of the prosecution to produce evidence and prove the guilt of the accused. However, Section 5 of the Act of 2022 prescribes that the Magistrate may order any individual to mandatorily share measurements for any proceeding or investigation, which leads to the assumption of guilt of an individual even before the trial begins. In *Shashimani Mishra v. State of Madhya Pradesh*, the High Court of Madhya Pradesh (Jabalpur Bench) held that the State has no right to infringe upon a person’s right to privacy if his act does not constitute an offence or illegality.

5.1. Informational Privacy within Fair Trial.

The Right to Privacy must include the Right to Informational Privacy. Information Privacy has been defined as “an individual’s claim to control the terms under which personal information - information identifiable to the individual- is acquired, disclosed, and used.” The Act of 2022 does not uphold information privacy, since the collection and storage of measurements are not dependent on the consent of the data principal. According to Participant No. 1 of the field study conducted for this research, The Act of 2022 fails to uphold information privacy, despite it being an integral part of the right to privacy as observed in the *Puttuswamy* judgment. From the collection of measurements to storage and even inter-agency transfer, nowhere is the consent of the individual taken. It is also not clear whether the impact of this Act on other legislations can be limited, and whether it will override the objective of specific legislation. The case being made is of the Juvenile Justice Act of 2015, which embodies the principles of privacy, confidentiality, and a fresh start for minors. According to the data obtained from Participant No. 4, The Act of 2022 does not maintain any exceptions for the collection and storage of data from juveniles. For a child who might have committed an offence triggered by socio-economic factors beyond his control, storing his data for 75 years would contradict his right to a fresh start in life. Further, an individual whose data is stored does not have full control to get it deleted from the records under the Act. The Criminal Procedure (Identification) Rules, 2022 under Rule 5 prescribe that any request for the destruction of a record of measurements would have to be made to the nodal officer nominated by the Government, who would further recommend such request to the NCRB post-verification for the link to other criminal cases. Most people, especially juveniles, would be unaware and unable to benefit from such a bureaucratic and vague process to get their records deleted. This was substantiated by the observations made by Participant No. 2 of the field study, that the appointment of a nodal officer for the destruction of records of measurements under The Act of 2022 is a mere procedural formality used by the government to avoid accountability for violating the privacy of the marginalised. In *Anuj Kumar v. State of Uttar Pradesh and Others*, the High Court of Allahabad held that the Right to Privacy of a juvenile includes the right to deny information relating to criminal prosecution faced as a juvenile.

5.2. Risk of Labeling and Stigmatization.

It has been historical practice for the police to store measurements of individuals labelled as criminals by birth due to their belonging to criminalised communities under the Criminal Tribes Act of 1871 during the colonial era and the Habitual Offenders Act of 1952 post-independence. The criminalization of such communities, deeply rooted in casteism, means that police have internalized a prejudice towards such de-notified tribes and employ stricter policing methods while dealing with them which would include higher levels of surveillance. Due to a presumption of guilt, members of criminalised communities are rounded up by the police whenever there is a crime with no concrete evidence to pinpoint the criminal. While the de-notified tribes were made to give their measurements to the police which were stored at the local level, the Criminal Procedure (Identification) Act, of 2022 would lead to the creation of criminal profiles containing these measurements at the national level. This would result in a serious breach of privacy for such criminalised communities.

5.3. Necessity and Proportionality.

The Universal Declaration of Human Rights (UDHR), in Article 12, protects the right to privacy, inclusive of the honour and reputation of an individual against arbitrary interference. Despite the UDHR legitimising the Right to Privacy as free from arbitrary interference, governments across the world seek access to digital footprints left by individuals instead of limiting surveillance to people with reasonable suspicion of wrongdoing. Mass Surveillance by the government leads to indiscriminate collection and processing of data, without relevance to the actual need or purpose of such data collection. The Act of 2022 may lead to the indiscriminate collection of data from individuals, whether arrested/convicted or not, which might have no bearing on the actual purpose of this legislation - increasing conviction rates. This irrelevance of excessive data

collection to the objective of the legislation is substantiated by the government's response to a question in the Rajya Sabha on whether the delayed gathering of evidence resulted in pendency of cases - that "disposal of a case depends on several factors such as the category of the case (Civil or Criminal), the complexity of the facts involved, nature of evidence and co-operation of the stakeholder."

5.4. Test of Privacy in Indian Courts.

In the Puttuswamy Judgment, the Supreme Court held that the right to privacy was not absolute and could be overridden by the State, subject to three tests - of legality, the legitimate aim of the State, and proportionality. The third test of proportionality required a rational nexus between the objectives of the legislation and the means to achieve such objectives. In this aspect, by the government's own response to the question in the Rajya Sabha, there does not seem to be a rational nexus between indiscriminate data collection and increasing conviction rates. In furtherance of the test of proportionality, Justice Sikri relied on four sub-tests applied by him in *Modern Dental College and Research Centre v. State of Madhya Pradesh*. These sub-tests were the stages of legitimacy, suitability, necessity, and balancing. The test of necessity means that there should not be any less restrictive but equally effective alternative to the proposed law.

5.5. History of Flawed Databases.

The Act of 2022 fails on the tests of necessity and proportionality. India has several digitized databases to collect, store and analyse criminal data. However, most of these databases are not implemented properly. For example, the Crime and Criminal Tracking Network and Systems (CCTNS), an integrated system that uses e-policing for effective governance, allows entry of data at the time of registration of the First Information Report (FIR) and subsequently at other stages of the trial, till the conclusion of the trial. From the field data analysis, substantiated by the data obtained from Participant No. 7 who is a government stakeholder, CCTNS has helped track perpetrators in a few Motor Vehicle Act crimes. However, CCTNS is not fully effective due to the lack of implementation of the database at the judiciary; meaning the information entered does not automatically migrate to the trial module of the database. It is imperative to note that had the CCTNS been implemented to its full capacity, the results achievable would be similar to the proposed objectives of The Act of 2022.

6. Purpose Limitation.

Art. 5(b) of the General Data Protection Regulation (GDPR) prescribes that personal data should be collected for specified, explicit and legitimate purposes, and should not be further processed in a manner incompatible with the initial purposes. This should be read alongside Art.5(c) which prescribes that the data collected should be adequate, relevant, and limited to the purpose for which it was collected. Clause (b) embodies the principle of purpose limitation, and clause (c) highlights the principle of data minimisation. The principle of purpose limitation is congruent to storage limitation - that data must be stored till the period relevant to its purpose and must be erased/destroyed after that, with the consent of the data principal. In this aspect, the Act of 2022 lacks provisions that comply with purpose limitation. Data is collected excessively without any classification of offences. According to the data obtained from Participant No. 5 during field data analysis, there is no categorisation as to what kinds of data may be collected from an individual under the Act of 2022, and all data prescribed under the Act could be collected for something as minor as smoking in public. The data collected under the Act may be stored for 75 years, which is beyond necessary and violates storage limitation principles.

7. Conclusion.

It may be summarised that data protection refers to a set of privacy laws, regulations, and processes designed to limit the invasion of one's privacy caused by the collecting, storage, and dissemination of personal data. Personal data is commonly defined as information or data relating to a person who can be identified from such information or data, regardless of whether it is gathered by the government, a private entity, or an agency. The object is to protect national and individual interests. However, the jurisprudence as it exists implies, or at least speculates on, the arbitrary violation of people's rights to life and liberty. Such broad and excessive powers in the hands of executive authorities with no accountability, and with no solid system to govern the storage, processing, and protection of data currently in existence, offer an inconceivable potential for abuse and jeopardise individual rights. The Act of 2022 strikes at the core of the Right to Privacy by delegating disproportionate data collection powers to local authorities for a misplaced objective. The objective of increasing conviction rates is not dependent on the mere availability of data, but rather on the condition of police infrastructure and forensic capabilities in India. Moreover, an increase in conviction rates does not automatically convert into the delivery of justice. Access to Justice for the individual and the society includes the process of a fair trial, wherein the accused should have the right against bias. The Act of 2022 promotes bias against the marginalised, including de-notified tribes in India, and hence is an unjustified attempt at infringing the right to privacy of an individual through criminal profiling. The Criminal Procedure (Identification) Act, of

2022 is an example of biometric mass surveillance, which fails to account for basic data protection principles like purpose limitation. Therefore, it may be concluded that the terrifying predicament of those who are not even accused/arrested for any crime but are bound to the requirements and implications of this Act is incomprehensible. As a result, the Act jeopardises a person's right to a fair trial. The Act, as it currently stands, makes no explicit provision for any steps to be taken to ensure information security, nor does it impose any security duties on NCRB or recommendations for data security/confidentiality, prohibitions on data sharing, or repercussions of data misuse.

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