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THE CRIMINAL PROCEDURE (IDENTIFICATION) BILL, 2022: DOES IT THREATEN THE CONSTITUTIONAL RIGHTS?

*"...rights, fundamentally, imply that the State must justify each incursion even at the cost of efficiency."
---Carol Steiker¹*

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1. Introduction

Criminal investigations include practices of identifying the criminal, collecting, recording, and preserving evidence. Personal characteristics used for the identification of criminals are blood group, colour of the hair, voice, general appearances, shape and size and arrangement of the teeth and bones, footprints and fingerprints.² A broad range of scientific techniques³ are used by the law enforcement agencies in order to identify suspects and establish the connection between a suspect and a crime beyond doubt. The Fundamental Right to privacy under Article 21 of the Constitution and the prohibition against self-incrimination under Article 20 (3) require specific legal authority to collect evidence of physical nature from the person (body) of the suspect or the prisoner. Articles 53,⁴ 53-A⁵ and 54⁶ and 54-A⁷ of the Criminal

¹ Carol Steiker, 'Second Thoughts About First Principles', Harvard Law Review, 107 (1994) 820, 820

² H.J. Watts Forensic Medicine, (1968), p. 106 Law Commission Report No. 87, Identification of Prisoners Act, 1920, Advocate Khoj,

<https://www.advocatekhoj.com/library/lawreports/identificationofprisoners/23.php?Title=Identification%20of%20Prisoners%20Act,%201920&STitle=Physical%20evidence%20and%20personal%20characteristics>

³ Modern writers on criminology now use the word "criminalistics" to denote the use of scientific techniques in the investigation of crime: Grassberger University Teaching of Social Sciences, (UNESCO), (1957), p. 62. See also Sutherland and Cressey Criminology, (1968), pp. 348, 349 referring also to Ohara and O'sterling Introduction to Criminalistics.

⁴ Article 53 of the Criminal Procedure Code, 1973: Examination of accused by medical practitioner at the request of police officer

⁵ Article 53A of the Criminal Procedure Code, 1973: Examination of person accused of rape by medical practitioner. Inserted by Section 9, Act 25 of 2005 (w.e.f. 23-6-2006).

⁶ Article 54 of the Criminal Procedure Code, 1973: Examination of arrested person by medical officer, Substituted by Act 5 of 2009, Section 8, for section 54 (w.e.f. 31-12-2009)

⁷ Article 54 A of the Criminal Procedure Code, 1973: Identification of person arrested Inserted by Act 25 of 2005, s. 11 (w.e.f. 23-6-2006)

Procedure Code, 1973 and the Identification of Prisoners Act, 1920 authorise collection of physical evidence from the arrested and convicted persons.

The Identification of Prisoners Act, 1920, in particular, permitted the collection of fingerprints, foot-print impressions, and photographs of persons including convicts and arrested persons. However, this 102 year old law has many limitations relating to the use of the modern scientific measures of collecting evidence. In order to address the difficulties, the Act of 1920 has been repealed by the Criminal Procedure (Identification) Bill, 2022. The Bill was passed in Lok Sabha on 4 April 2022, replacing the Identification of Prisoners Act, 1920.

The Bill, while expanding, firstly, the type of data that may be collected, secondly, persons from whom such data may be collected, and finally, the authorities that may require/direct such collection, invited much criticism of being a threat to the constitutional rights of persons concerned.⁸ In this back drop this paper endeavours to trace the background of the new Bill to understand the insufficiencies of the Act, and discuss the importance of the coercive measures employed to collect criminal evidence, as well as the implications of the new measures allowed by the Bill on the Constitutional rights of persons. This paper's objective is to highlight the provisions of the Bill and argue for the reconsideration of the provisions that pose potential threat to the human rights concerns of people.

2. Background of the Criminal Procedure (Identification) Bill, 2022

The Identification of Prisoners Act of 1920 was enacted amid certain difficulties that had been experienced with criminal investigations around that time. It so happens that many laws come into existence in order to meet the exigencies of the situations giving no room for a comprehensive examination of the area to which the law that is being drafted is supposed to apply. The same thing happened with the Act of 1920 which became evident by the many local amendments that were made in the Act from time to time by several States.⁹ However, revision of the Act on an All India basis has been delayed though such a review has been felt necessary on account of many reasons.

A solid step towards the amendment of this law was taken when the Supreme Court of India pointed out the practical difficulties with this law, in its judgment in the case of *State of Uttar Pradesh v. Ram Babu Misra*.¹⁰ Consequently, in view of the importance in the field of criminal investigation the Law Commission of India brought forth its 87th Report in the year 1980 thoroughly explaining the need for the amendment of the Identification of Prisoners Act of 1920. Later, in the wake of the advances in technology that allow other

⁸ 'Criminal Identification Bill: Dal Khalsa calls for protests, says Centre will use law to snoop on citizens', *The Indian Express*, 5 April, 2022. <https://indianexpress.com/article/cities/jalandhar/criminal-identification-bill-dal-khalsa-calls-for-protests-says-centre-will-use-law-to-snoop-on-citizens-7852813/>

⁹ The Law Commission of India Report No. 87 Identification of Prisoners Act, 1920, (1980) p1. lawcommissionofindia.nic.in/51-100/report87.pdf

¹⁰ *State of Uttar Pradesh vs. Ram Babu Misra*, (1980) 2 SCC (Part 3) 345 (346), para. 8 (issued dated May 1980).

measurements to be used for criminal investigations, the Expert Committee on Reforms of the Criminal Justice System, (2003)¹¹ recommended amendment of the Act of 1920 to empower the Magistrate to authorise the collection of data such as blood samples for DNA profiling, hair, saliva, semen, etc. However, after these many years of the Report of the Law Commission as well as Recommendations of the Expert Committee in this regard, the Criminal Procedure (Identification) Bill, 2022 has been brought about.¹²

3. Meaning and Purpose of Evidence in Criminal Investigation

In a broad sense, criminal evidence is ‘any crime-related information basing on which an investigator makes a decision or a determination relating to the crime under investigation or the suspected perpetrator of the crime. It includes, supposed facts and knowledge relating to a particular crime or a perpetrator.¹³ According to Section 3 of the Indian Evidence Act, 1872, evidence can be of three kinds namely, *oral evidence* that refers to statements made by the witnesses, *documentary* which means any matter expressed or described upon any substance and *material* that includes objects like blood stained clothing, knife, gun etc.¹⁴

Material evidence is also known as *real evidence*.¹⁵ It is tangible evidence that the court can examine for itself. A wide range of things fall under the category of material/real evidence including material objects like a knife, a gun, and other physical objects, photographs, video recordings, foot impressions, fingerprints, blood samples, DNA profiling, and all other forensic evidence. *Forensic evidence* is material or traces of material that have been analysed by a forensic science laboratory.¹⁶ Forensic science laboratories closely examine materials such as paint, glass, soil, hair, fibres, firearm residues, fire accelerants and footprint samples. These samples may have been taken from the scene of the crime or may have been found on the victim or the suspect. The court requires the production of such material things for its inspection.¹⁷ Material evidence is not derived from a document or witness.

Crime investigating officers perform different activities to discover and collect evidence. Such evidence is used to establish two important things, that *a crime was committed* and that the said *crime was committed by*

¹¹ The Committee on Reforms of the Criminal Justice System was constituted by the Government of India, Ministry of Home Affairs by its order dated 24 November 2000, to consider measures for revamping the Criminal Justice System. The Committee, chaired by Dr. Justice V. S. Malimath, submitted its report in March 2003.

¹² The Criminal Procedure (Identification) Bill, 2022, Policy Research Studies (PRS) India, https://prsindia.org/billtrack/the-criminal-procedure-identification-bill-2022#_edn5

¹³ ‘The Role of Evidence in Criminal Investigations’, Chapter 3, *Criminal Investigation*, (2017, SAGE Publications, Inc.) p 39.

¹⁴ Nageswara Rao, V., *The Indian Evidence Act-A Critical Commentary*, (2012, Lexis Nexis-Butterworths Wadhwa, Nagpur) p. 25; Batuk Lal, *The Law of Evidence*, (2020, 23rd Edition, Central Law Agency) p. 11.

¹⁵ Proviso to Section 60 of the Indian Evidence Act, 1872

¹⁶ Real evidence, Citizen Information, https://www.citizensinformation.ie/en/justice/evidence/real_evidence.html

¹⁷ Vepa P. Sarathi’s, *Law of Evidence*, (2021, Eighth Edition, Eastern Book Company, India) p. 15

a particular person.¹⁸ Therefore, establishing the crime and identifying the criminal are the primary purposes of the criminal evidence.

3.1 Importance of the advanced Scientific Measures in Criminal Investigation

Due to the diversities of criminal activities accurate and efficient identification have become a vital requirement for forensic application.¹⁹ Forensic science employs advanced scientific measures first, for the effective identification, documentation,²⁰ second, for adequate collection of evidence related to the crime and criminal, and third, for efficient preservation of physical²¹ and biological evidence,²² at the crime scene. The evidence so gathered is then subjected to scientific analysis in the forensic laboratory and the results of the examinations yield forensic evidence for consideration by court.²³ Ultimately, the evidence will be presented as proof that a crime was committed and will prove the identification of the criminal.

3.2 Coercive Measures Adopted in Criminal Investigation and the Law

In modern times various highly efficient identification techniques came to be used in criminal identification including DNA finger printing, dactyloscopy²⁴ anthropometry,²⁵ cheiloscopy,²⁶ sex determination, age estimation, blood grouping etc., Most of these techniques involve invasive methods of collecting samples. If the criminal does not consent to giving of such measurements/samples, the investigating officers will be constrained to proceed to collect the samples against his consent. One of the general principles of criminal procedure states that, such 'coercive measures should only be used when other less invasive alternatives are not available.'²⁷ However, in general even after 1920, the legality of coercive measures to secure evidence for identification of criminals has not been directly in discussion before the courts. In the landmark case of *Kathi Kale*,²⁸ that was decided after the commencement of the Constitution, the issue was relating to self-incrimination under Article 20(3) of the Constitution. In this case the question was relating to certain specimen signatures taken from the accused on a set of documents. Nevertheless, the legality of the practice as such was not challenged.

¹⁸ R.V. Kelkar's *Lectures on Criminal Procedure*, (2017, Sixth Edition by K.N. Chandrasekharan Pillai, Eastern Book Company, India) p. 62.

¹⁹ Monika Saini and Anup Kumar Kapoor, 'Biometrics in Forensic Identification: Applications and Challenges', *Journal of Forensic Medicine*, 2016, 1:2, <https://www.hilarispublisher.com/open-access/biometrics-in-forensic-identification-applications-and-challenges-2472-1026-1000108.pdf>

²⁰ Collection of notes, photographs, sketching and videos of crime scene

²¹ Covers items of non-living origin such as fingerprints, footprints, fibers, paint, tire or shoe impression and weapons

²² Originates from a living source and includes DNA, other bodily fluids, hair, skin and bone material

²³ Fish JT, Miller LS, Braswell MC, *Crime Scene Investigation*, (2013, Routledge)

²⁴ Finger printing

²⁵ The scientific study of the measurements and proportions of the human body

²⁶ Sandeep S Kadu, Gayatri N Toshniwal, 'Cheiloscopy: A Deterministic and Non Invasive Tool for Personal Identification', *Indian J Forensic Med Pathol*. 2020;13(2):303–307. Greek, cheilosis lips and e skopien is to see, is the study of lip prints by analyzing the sulci and grooves present on the labial mucosa of the lips.

²⁷ Rod Rastan, 'Investigation, Coercive Measures, Arrest, and Surrender', Oxford Public International Law, Chapter in Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev, Salvatore Zappalà (eds.) *International Criminal Procedure: Principles and Rules* (2013) <https://www.researchgate.net/publication/330912429>

²⁸ Kathi Kale, AIR 1961 SC 1808 (1816), para. 21.

The judicial interpretation of Article 21 of the Constitution in case of *Maneka Gandhi vs. Union of India*²⁹ has changed the whole scenario. It is now very clear that the different ways in which police gather information relevant to the investigation process must fit into the concept of "procedure established by law." Therefore, in a country governed by rule of law the various types of coercion that may have to be applied for collecting scientific evidence, must have specific legal authority.³⁰ Hence it is necessary that the legal provisions must clearly demarcate what coercive measures can be legally adopted in criminal investigation.³¹ The Criminal Procedure (Identification) Bill, 2022, endeavours to deal with these matters by specifically stating the measures that can be adopted to collect evidence in the process of criminal investigations.

4. Main Changes Proposed by the New Bill, 2022 and the Relevant Concerns

The Bill has been vehemently criticised as being open ended, with broad provisions without proper safeguards thereby infringing the privacy of individuals.³² Basically the new Bill has expanded the type of data that may be collected in the criminal investigation process, category of persons from whom such data may be collected, and the persons that may authorise such collection. Further the Bill prescribes the agency that can retain the data and the maximum period for which the data could be saved with the said agency.

While the government is confident that the Bill would enable the crime investigators to be two steps ahead of the criminals,³³ the opposition on the other hand argues that the Bill is clearly violative of human rights concerns, primarily, the rights to privacy and equality. This is so, specially, because of the possible misuse of data in the absence of proper safeguards in the proposed law to protect the data.

4.1 Data Allowed to be Collected

In addition to the data that could be collected under the Act of 1920 namely, fingerprints, foot-print impressions, photographs the new Bill allows the collection of "measurements" including biometrics namely, palm-print impressions, iris and retina scan, physical and biological samples and their analysis, behavioural attributes including signatures, handwriting or any other examinations referred to under sections 53 and 53A of Criminal Procedure Code which include blood, semen, hair samples, and swabs, and analyses such as

²⁹ Leading cases on Article 21 of The Constitution- 'Procedure Established By Law' : *Maneka Gandhi v. Union of India*, AIR 1978 SC 597; *In the Special Courts Bill, 1978*, AIR 1979 SC 478 (516); *Sita Ram v. State of Uttar Pradesh*, AIR 1979 SC 745 (753); *Hussainara Khatoon (I) v. Home Secretary*, AIR 1979 SC 1360 (1361); *Hussainara Khatoon (IV) v. Home Secretary*, AIR 1979 SC 1369; *Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565 (586); *P.S.R. Sadhanantham v. Artinachaiam*, AIR 1980 SC 856 (858-859); *Anand Vardhan Chandel v. University of Delhi*, AIR 1978 Del 308 (314); *Inder Parkash v. Dy. Commissioner, Delhi*, AIR 1980 Del 87 (92).

³⁰ The Commission of India Report No. 87, *Id.*, *supra* note 8 at Chapter 1.5

³¹ *Id.*,

³² 'Explainer: All you need to know about the Criminal Procedure (Identification) Bill, 2022, The Times of India, 5 April, 2022
<https://timesofindia.indiatimes.com/india/explainer-all-you-need-to-know-about-the-criminal-procedure-identification-bill-2022/articleshow/90659950.cms>

³³ *Id.*,

DNA profiling.³⁴ Unfortunately, the Bill does not define the expression ‘physical and biological samples’ which could lead to ambiguities. The phrase is just included in the list of things enumerated in the definition of measurements under Section 2 (1) (b) of the Bill.

The important point here to be noted is that the collection of measurements, under this law, need not be confined to those required for a specific investigation. Such wide powers can be detrimental to the human rights and civil liberties of persons protected under Articles 14, 19 and 21 of the Constitution.

4.2 Persons from whom Data May be Collected

Regarding the persons from whom the criminal evidence could be collected, firstly, while the repealed law of 1920 included persons convicted or arrested for *offences punishable with rigorous imprisonment of one year or more*, the new Bill of 2022 says persons convicted or arrested for **any offence** could be subjected to the procedures for collection of evidence.³⁵ This means that the vital information of every offender even if the offence committed is punishable with a fine of 1,000 Rupees, or 6 months imprisonment, the person’s vital information can be collected and kept in the database for a period of 75 years, unless a magistrate allows the data to be removed upon a written request. Secondly, under the 1920 data could be collected from the persons ordered to give security for good behaviour or maintaining peace, whereas under the new Bill of 2022, persons detained under **any preventive detention law** have been added.³⁶ Finally, under the old law a Magistrate might order in other cases collection of measurements from any **arrested person** to aid criminal investigation, but by virtue of the new Bill, 2022, a Magistrate may order collection of evidence from **any person** (not just an arrested person) to aid investigation.³⁷ Such a provision contradicts the observations of the Law Commission which is based on the principle that the less serious the offence, the more restricted should be the power to take coercive measures.³⁸ The expression *any person* could jeopardise the private information of any other person in the society, it could even be an innocent onlooker at the crime scene.

Further, while Proviso to Section 3 of the new law allows **biological samples** may be taken forcibly only from persons arrested for offences against a woman or a child, or if the offence carries a minimum of seven years imprisonment, Section 6 (1) of the Bill authorises the police officer or the prison officer to take **measurements**, of the person irrespective of his/her resistance or refusal for such measurements to be taken. Does this power of police officer/prison officer under Section 6 (1) relate to the above mentioned proviso to Section 3 alone or does the officer have such power in relation to any offence? In this context, it is pertinent to note that the DNA Technology (Use and Application) Regulation Bill, 2019 limits the waiver of the permission required to collect DNA from those who are arrested for particular crimes which are punishable

³⁴ Section 2 (1) (b) of the Criminal Procedure (Identification) Bill, 2022, https://www.livelaw.in/pdf_upload/the-criminal-procedure-identification-bill-2022-413274.pdf

³⁵ Section 3 (a) of the Criminal Procedure (Identification) Bill, 2022.

³⁶ *Id.*, Section 3 (a)

³⁷ Section 5 of the Criminal Procedure (Identification) Bill, 2022.

³⁸ The Commission of India Report No. 87, *Id.*, *supra* note 8

with death or imprisonment for a term exceeding seven years. The force impliedly permitted to be used in Section 6(1) to collect data violates the rights of prisoners laid down in a series of cases decided by Supreme Court starting from *A K Gopalan vs. State of Madras*,³⁹ *Kharak Singh vs. State of Utter Pradesh*,⁴⁰ *Charles Sobhraj vs. The Superintendent, Central Jail, Tihar*,⁴¹ *Sheela Barse vs. State of Maharashtra*,⁴² and *Pramod Kumar Saxena vs. Union of India*.⁴³

In addition, resistance or refusal will make the person liable for an offence under Section 186 of the Indian Penal Code giving limited right to refuse to the collection of information required by the authorities. Thus, extensive powers are given to the State allowing invasive biometric measurements of all arrested, not arrested, convicted and detained persons, irrespective of the gravity of the offence or specificity of investigation.

4.3 Persons Authorised to Require/Direct Collection of Data

Concerning the persons who may require/direct collection of data, while the Act of 1920 authorises investigating officers, officers in charge of a police stations, or officers of rank Sub-Inspector or above, and magistrates, the new Bill of 2022 allows additionally persons of rank Head Constable or above⁴⁴ and a Head Warder of a prison.⁴⁵ Further, under the expression Magistrates includes Metropolitan Magistrate or Judicial Magistrate of first class and in case of persons required to maintain good behaviour or peace, the Executive Magistrate may require collection of measurements of persons.⁴⁶ The provision doesn't require the magistrate to record the reasons for directing a person to give measurements widening the ambit of powers of the magistrates to the detriment of the right to privacy. The same thing was true with the Act of 1920 and was remarked by the Law Commission Report of 1980. The Law Commission recommended the amendment of this provision to safeguard the human rights of persons which has been ignored by the new Bill. Here it may be noted that under Section 53 of the Code of Criminal Procedure, 1973, collection of biological samples and their analysis may be done only if "*there are reasonable grounds for believing that such examination will afford evidence as to the commission of an offence*".⁴⁷ Both under the 1920 Act and the 2022 Bill,⁴⁸ resistance or refusal to give information is considered a violation of law that obstructs a public servant from doing his or her duty as detailed above.

³⁹ AIR 1950 SC 27.

⁴⁰ AIR 1963 SC 1295

⁴¹ 1978 AIR 1514

⁴² AIR 1983 SC 378

⁴³ Writ Petition (CRL.) NO.58 of 2007

⁴⁴ Section 2 (1) (c) the Criminal Procedure (Identification) Bill, 2022.

⁴⁵ *Id.*, Section 2 (1) (e)

⁴⁶ *Id.*, Section 2 (1) (a)

⁴⁷ Section 53 of the Code of Criminal Procedure, 1973

⁴⁸ *Id.*, Section 6 (2)

4.4 Maximum Period of Retention of Data

The 2022 Bill provides for the data to be stored in a central database, i.e., the National Crime Records Bureau (NCRB).⁴⁹ It can share the data with law enforcement agencies. Further, states/UTs may ask agencies to collect, save, and share data in their respective jurisdictions. The data collected will be retained in digital or electronic form for 75 years. Such a provision for retaining the data for such a long period as 75 years is contrary to the data minimization and storage limitation principles spelt out by the Supreme Court in the case of Justice K.S. Puttuswamy vs. Union of India.⁵⁰ Records with the database will be destroyed in case of persons who are acquitted after all appeals, or released without trial.⁵¹ Nevertheless, in such cases, a Court or Magistrate may order that the details be retained after recording reasons in writing.⁵² In which case, the information of those who are acquitted of all charges will remain with the database in abrogation of their human rights.

5. Conclusion

In conclusion the following points of great concern can be highlighted from the Criminal Procedure (Identification) Bill, 2022. According to the proposed law, data for criminal investigation purposes can be collected not only from convicted persons but also from individuals detained for any wrongdoing and from anyone who can help in the investigation. The data so collected, need not have any relationship with evidence required for the specific case under investigation. Further, the data is stored in a central database which can be accessed widely not just in the specific case file, for an inordinately long period of 75 years (effectively, for life). Finally, the Bill by proposing lower rank officials to be authorised to collect the data has minimized and diluted safeguards against misuse of the law. The likely misuse of the broad expressions like 'any offence', 'any person' cannot be overemphasized. Therefore, it is suggested that the proposed law which puts the human rights of persons at stake has to be thoroughly re-considered at any cost before it becomes a law.

⁴⁹ *Id.*, Section 4 (1)

⁵⁰ (2017) 10 SCC 1.

⁵¹ *Id.*, Section 4 (2)

⁵² *Id.*, Proviso to Section 4 (2)