IS CRIMINAL PROCEDURE IDENTIFICATION ACT 2022 AN ATTACK ON THE RIGHT TO PRIVACY?

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INTRODUCTION

The concepts of justice, fairness, equality, and reasonableness has been embraced by legal systems around the world as the pillars of their countries. They were written as a sacred oath in the illustrious Constitution by our predecessors. They serve as the foundation for all laws made in the nation and are the golden thread that runs through it. In the historic decision of Maneka Gandhi v. Union of India,[1] the Hon'ble Supreme Court reaffirmed this, stating that the course of action should be equitable, fair, and reasonable. Since J.S. Mill asserts that "restriction over a person in a civilised society is just only if prevents harm against others".1 we have adopted his philosophy. One side cannot sacrifice justice in order to serve the interests of another.

Criminal procedure (Identification) Act of 2022 to "take measures of convicts and other persons for the sake of identification and Law enforcement organizations are given legal authority under the Criminal Procedure investigation of criminal offences." The Ministry of Home Affairs announced that even though the law was passed earlier this year, it will not take effect until August 4, 2022. Additionally, it nullifies the 1920 Identification of Prisoners Act.

The goal of this act is to obtain a person's fingerprints, footprints, dimensions, pictures, and other identifying information. If the person is fired or dismissed, their name will be removed from the list. The task of maintaining records has been delegated to the National Crime Records Bureau (NCRB). It must provide the information to law enforcement authorities. The states and union territories will provide notification of the collection, preservation, and retention of data under their control. It has amended the Code of Criminal Procedure's Sections 53 and 53A to include provisions relating to the gathering of "biological samples," "behavioural features," blood, semen, hair, swabs, and DNA profiling (CrPC).[2] The right to privacy is now recognized as a basic right under the purview of Article 21 following the decision in Justice K.S.

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[1] Maneka Gandhi vs Union Of India on 25 January, 1978, https://indiankanoon.org/doc/1766147/ (last visited Sep 22, 2022).

[2] THE CODE OF CRIMINAL PROCEDURE, 1973, 226.

Puttaswamy and Anr. vs. Union of India (UOI) and Ors.[3] The Puttaswamy case was decided by the court, where the court noted that informational privacy is a crucial component of the right to privacy. Information privacy is defined as "an individual's claim to control the terms under which personal information, or information identifiable to the individual, is acquired, disclosed, and utilised" by the IITF Principle of the United States.

A person's personal space may be invaded by the collection, preservation, and retention of their data. This act looks to be a step backward in a modern culture where the globe is moving toward the protection of personal data since it blatantly violates the fundamental right to privacy. Despite the fact that Sir James Stephen's well-written Evidence law was rarely changed, it was considered that we needed to keep up with other countries' highly developed legal systems. The Law Commission recommended in its 94th report states that the courts should have the authority to reject evidence if it has been obtained: in violation of social norms and human dignity; if the gravity of the crime, the significance of the evidence, or the urgency of the circumstance are ignored; and whether the collection is justified or not.[4]

MAIN ISSUES

The Act has drawn harsh criticism for being open-ended, having wide provisions without adequate controls, and violating people's privacy. In essence, the new act has broadened the categories of information that can be gathered during a criminal inquiry as well as the individuals who can authorise the gathering of such information. The Act also specifies the agency that may keep the data as well as the maximum amount of time that it may be kept by that agency. The opposition contends that the Act obviously violates human rights, particularly the rights to privacy and equality, while the government is certain that the Law would allow crime detectives to be two steps ahead of the criminals. This is especially true given the possibility of data misuse in the absence of adequate data protection measures in the proposed law.

Furthermore, the phrase "physical and biological samples" is not defined in the act, which could cause confusion. The phrase is just listed among the items in Section 2 (1) (b) of the act's definition of measurements.[5] In accordance with the new Act, 2022, a Magistrate may now

[3] Justice K.S. Puttaswamy (Retd) vs Union of India on 26 September, 2018, https://indiankanoon.org/doc/127517806/ (last visited Sep 22, 2022).
[4] https://lawcommissionofindia.nic.in/51-100/Report94.pdf (last visited Sep 22, 2022).
[5] https://egazette.nic.in/WriteReadData/2022/235184.pdf (last visited Sep 22, 2022)

order the gathering of evidence from anyone (and not only an arrested person) to aid an investigation. Previously, a Magistrate could order the measurement of any arrested person in certain circumstances to aid a criminal investigation.

The 2022 statute stipulates that the information will be kept in a single database, the National Crime Records Bureau (NCRB). It may divulge the information to law enforcement authorities. Additionally, states and UTs have the right to request that agencies gather, store, and distribute data in their respective regions. The gathered information will be stored digitally or electronically for 75 years. The Supreme Court outlined the principles of data minimization and storage limitation in the case of Justice K.S. Puttuswamy vs. Union of India, and such a provision for keeping the data for so long as 75 years goes against those principles. If a person is released without a trial or is found not guilty after exhausting all appeals, the database's records will be deleted.8 However, in some circumstances, a Court or Magistrate may order that the details be kept after stating their justifications in writing. In that event, the database will continue to hold the data of persons who are cleared of all accusations, of violating their human rights.

Sec. 4(3) gives State and UT governments the authority to alert the proper agency to collect, store, and share sensitive personal data about residents. It cannot be ruled out that the responsibility for gathering, conserving, and disseminating measurements may be given to a private agency in the absence of any limitations on the notification's scope under section 4(3). The State's responsibility to administer justice would be affected if this amounted to the delegation of the sovereign role of conducting criminal investigations and gathering evidence for such investigations. It is illegal to provide such unguided authority to a private organisation that is not subject to regulations.

ISSUE - IN THE LIGHT OF CONSTITUTIONAL FRAMEWORK

Art 14 – and how this act grants excessive delegation of power which is violative of art. 14.

According to this act, measurements must be taken by law enforcement and correctional personnel, and records of those measurements must be collected, stored, destroyed, processed, and disseminated by the NCRB in the interest of "prevention, detection, investigation, and prosecution" of criminal offences. The Act grants the executive branch undue power in many places. It does this in two ways: first, by giving the executive broad rule-making authority with little oversight and transferring legislative duties to the executive; and second, by giving

functionaries under the act (police/prison officers and Magistrates) an excessive amount of discretion over who they may compel to provide measurements, under what conditions, and for what purposes. On the grounds that it exceeded the permitted boundaries when granting powers, a statute may be declared to be ultra vires the Constitution.

Police or jail officers will collect measurements, either voluntarily under sec 3 or at the magistrate's request under sec 5. Rules created by the Central or State governments must specify the procedure for taking these measurements. Sec 3 and 5 offer very little advice regarding the procedure and conditions in which police or prison officers and Magistrates are to use their discretion to order the taking of measurements. In sec 3, measurements must be taken by law enforcement or prison officials 'if required.

According to the ruling in In re Delhi Laws Act, the legislature cannot abandon its legislative duties and must take care to prevent the executive from acting as a parallel legislature when it delegated its authority. An important legislative role is selecting and deciding the legislative policy that will underpin a piece of legislation, as well as legally adopting that policy into law. As long as the general policy is determined and standards are established, allowing the executive to act within set parameters, it is possible to delegate the working out of specifics to the executive. Given the absence of statutory direction regarding how this "requirement" is to be decided and the lack of any guidance regarding what the Rules should give in terms of the method of taking measures, the stated officers have entire and unfettered discretion.

This Act allows the police and the magistrate excessive and overbroad discretion under sections 3 and 5 to make administrative judgments and pass orders, respectively. By delegating unguided legislative power to set rules under sections 4 and 8, it abdicates its legislative duties. Legislation restricting fundamental rights must be sufficiently clear and precise regarding the degree, type, and scope of the interference permitted, as well as have enough protections to prevent governmental abuse of authority. This means that while executive discretion has the potential to limit rights and freedoms, the legislation must not provide it an undue amount of leeway. As long as there are rules limiting how discretionary powers are used, the mere grant of discretion is not causing alarm. However, "total and unchecked discretion degenerates into arbitrariness."

In the case of Shayara Bano v. UOI For the purpose of invalidating legislative law, Article 14 established the separate ground of manifest arbitrariness. A statute is plainly arbitrary,

according to Justice Nariman's observation in that case, if it is "done by the legislature capriciously, arbitrarily, and/or without adequate governing principle... [the law is] excessive and disproportionate." The majority opinion in the Aadhar 5-J decision recognised this approach as a basis for rejecting the law. We believe that the Act is obviously arbitrary because it repeatedly fails to provide any justification or guiding concept.

The proviso of section 3 of the act categorizes people who have been arrested based on the gender and age of the people who were the targets of their alleged crimes as well as the severity of the punishment assigned for that alleged crime. After classifying those arrested, the proviso allows those arrested for crimes carrying a seven-year or longer sentence, or those arrested for crimes against women or children, to be forced to provide their biological samples; all other arrested people, however, may only be forced to provide measurements other than biological samples. There is no logical connection between the investigation's goals and the victim's gender/age classification used to justify the need for biological samples. First, we argue that biological samples taken from the arrested individual are valuable for the inquiry in each given case regardless of the victim's gender or age. Second, it is illogical to assume that the victim's age or gender will have any bearing on whether taking such biological samples from an arrested person can help police investigators in general.

Right against self-incrimination Art 20(3)

Under Sec 2(1)(b) The word "behavioural attributes" does not have a specific definition in forensic science, which raises questions about its very broad, nebulous nature. It is up for interpretation whether or not to incorporate metrics of a testimonial nature. By using a coerced psychiatric evaluation, for instance, "behavioural characteristics" as measurements may be coercively taken from a person. Such an assessment would be considered a "testimonial compulsion" if it results in any incriminating admissions. In the light of the ruling given by SC in Selvi v state of Karnataka a broad reading of "behavioural attributes" would even be taken to forbid procedures like brain mapping, polygraph testing, and narco-analysis, all of which were specifically forbidden.

The fact that the clause is written as an inclusive definition only serves to support this interpretation. In a number of judgments, the Supreme Court has ruled that inclusive definitions are to be read as enlarging and enhancing the common meaning of words, particularly where the extended statutory meaning may not correspond to the ordinary or natural meaning. As a

result, the term "behavioural traits" may be construed to include both what its common meaning suggests and the measurements indicated in Sections 53 and 53A of the CrPC, as well as handwriting and signatures.

Right to privacy

The right to privacy is categorically declared as a fundamental right protected by Article 21 of the Indian Constitution by a nine-judge Supreme Court bench in Puttaswamy-I. When ruling on the constitutionality of the Aadhaar framework, the five-judge bench in Puttaswamy-II reaffirmed that informational privacy (including biometric and other personal data) is a part of the right to privacy under Article 21. Retaining data that contains private information constitutes an infringement on that right.

The majority of the biometrics covered by the act, including finger, palm, and footprints, iris and retina scans, physical and biological samples, and their analyses, constitute personal information because they are used to identify specific people. Additionally, the ECtHR has acknowledged that the systematic collection of voice samples and photos for the goal of identifying individuals through data processing violates their right to privacy. Due to the broad collection and use of such personal information as contemplated by the act, the right to privacy is directly impacted.

CONCLUSION

Although the Criminal Procedure (Identification) Act, 2022 has a clear intention, it leaves some decisions up to the discretion of the authorities, which makes it ambiguous and has a wider scope. Such broader implications run the risk of making it an administrative target of impunity, which would be disproportional and dangerous for the general populace. By undermining a person's right to life and liberty under Article 21 of the Constitution, this Act seeks to make it legal for the State and its enforcement authorities to violate their constitutional rights which is The majority of the biometrics covered by the act, including finger, palm, and footprints, iris, and retina scans, physical and biological samples, and their analyses, constitute personal information because they are used to identify specific people. Additionally, the ECtHR has acknowledged that the systematic collection of voice samples and photos for the goal of identifying individuals through data processing violates their right to privacy. Due to the broad collection and use of such personal information as contemplated by the act, the right to privacy is directly impacted. A convicted prisoner still has the right to life and liberty under Article 21

of the Constitution even while confined to jail and the jail authorities have no right to punish, torture, or treat them unfairly in any other way without their express permission or orders of the court Stated by SC in the case of Sunil Batra vs. Delhi administration (1979). 20 However, when a provision grants a warder the authority to collect samples from prisoners housed in the jail under their supervision without fully describing how they might do it, it essentially gives them carte blanche to do anything they want.