**THE NATIONAL UNIVERSITY OF ADVANCED LEGAL STUDIES, KOCHI**

**DISSERTATION**

*Submitted in partial fulfilment of the requirement for the award of the degree of*

**MASTER OF LAWS (LL.M)**

(2023-2024)

**ON THE TOPIC**

# LEGAL IMPLICATIONS OF THE CRIMINAL PROCEDURE (IDENTIFICATION) ACT, 2022

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# CERTIFICATE ON PLAGIARISM CHECK

This is to certify that the dissertation submitted by Ms. S. Akhila (Roll No: LM0123011) titled "LEGAL IMPLICATIONS OF THE CRIMINAL PROCEDURE (IDENTIFICATION) ACT, 2022" in partial fulfilment of the requirement for the award of Degree of Master of Laws in Constitutional and Administrative Law has been checked for plagiarism in Grammarly on 18-06-2024 and is found to be less than 10%.

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# DECLARATION

I declare that this dissertation titled 'LEGAL IMPLICATIONS OF THE CRIMINAL PROCEDURE (IDENTIFICATION) ACT, 2022' is researched and submitted by me to The National University of Advanced Legal Studies, Kochi in partial fulfilment of the requirement for the award of Degree of Master of Laws (LL.M) in Constitutional and Administrative Law, under the guidance and supervision of Dr. Sandeep M.N., Assistant Professor. It is an original, bonafide and legitimate work pursued for an academic interest. This work or any type thereof has not been submitted by me or anyone else for the award of another degree of either this University or any other University.

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# ACKNOWLEDGEMENT

This dissertation in its entirety would not have been completed without the guidance of many a people who had provided their unwavering support to me. I take this opportunity to express my heartfelt thanks to each and everyone of them.

Firstly, I express my sincerest gratitude to my guide and supervisor, Dr. Sandeep M.N., who has been exceptionally considerate, empathetic and patient towards me in the fulfilment of this work. I thank him wholeheartedly for giving me meaningful suggestions and for always making me widen my thoughts and improving my work. I am deeply indebted to you, Sir, for the kindness, support and advice you have given me throughout the completion of this work.

I express my sincere thanks to Prof. (Dr.) Mini S, the Director of Centre for Post Graduate Legal Studies for her continuous support and encouragement extended during this course.

I sincerely express my thanks to all the library staff members and the technical staff for their timely assistance in completing this work.

Words fall short of expressing love, appreciation and gratitude to my family and friends for their constant encouragement.

Lastly, thank you, God, in providing me with good health, both physical and mental as well as the determination and time in completing this work.

S. AKHILA

# ABBREVIATIONS

1. & - And
2. AIR- All India Report
3. Anr. – Another
4. Co. - Company
5. CPIA – The Criminal Procedure(Identification) Act, 2022
6. DNA - Deoxyribonucleic acid
7. DPDP – The Digital Personal Data Protection Act, 2023
8. Dr. – Doctor
9. ECHR - European Court of Human Rights
10. ed. – Edition
11. e.g. - Example
12. etc. - Et cetera
13. EU – European Union
14. HC – High Court
15. IPA – The Identification of Prisoners Act, 1920.
16. Ltd. – Limited
17. NCRB – National Crimes Record Bureau
18. NDIS - National DNA Index System
19. No. – Number
20. NPC – National Police Commission
21. NY – New York
22. Ors - Others
23. PACE – The Police and Criminal Evidence Act
24. PIL – Public Interest Litigation
25. Retd. - Retired

26. SC – Supreme Court
27. SCC- Supreme Court Cases
28. SCR – Supreme Court Report
29. SLP – Special Leave Petition
30. Supp – Supplement
31. v. – versus
32. W.P. – Writ Petition
33. W.P. (C) – Writ Petition (Civil)
34. W.P.(Crl.) – Writ Petition(Criminal)

**LIST OF CASES**

1. Balkishan A. Devidayal etc. v. State of Maharashtra, 1981 SCR (1) 175.
2. Bharat Co-Operative Bank (Mumbai) Ltd. v. Co-Operative Bank Employees Union, (2007) 4 SCC 685.
3. Charles Sobraj v. The Superintendent, Tihar Central Jail, New Delhi, 1979 SCR (1) 512.
4. Commercial Taxation Officer, Udaipur v. M/s Rajasthan Taxchem Ltd, 2007 (3) SCC 124.
5. Harshit Goel v. Union of India through Home Secretary & Anr., W.P.(Crl.) 869/2022.
6. Her Majesty the Queen v. Brandon Roy Dyment, (1988), 89 N.R. 249 (SCC).
7. Internet Freedom Foundation and Ors v. Union of India and Ors, W.P. (Crl.) No. 000080/2024.
8. Justice K S Puttaswamy (Retd.) and Anr. v. Union of India and Ors, 2019 (1) SCC 1.
9. Julian J Robinson v. The Attorney General of Jamaica, [2019] JMFC Full 04.
10. NG v. Director of the 'National Police' Directorate-General at the Bulgarian Ministry of the Interior, Case No: C-118/22.
11. P. Kasilingam and Ors v. P.S.G. College of Technology and Ors, 1995 Supp (2) SCC 348.

12. Prem Shankar Shukla v. Delhi Administration, 1980 SCR (3) 855.
13. Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and Ors, 1987 (1) SCC 424.
14. S and Marper v. The United Kingdom, ECHR 1581; Application Nos. 30562/04 and 30566/04.
15. Satish Chander Ahuja v. Sneha Ahuja, AIRONLINE 2020 SC 784.
16. Selvi v. State of Karnataka, AIR 2010 SC 1974.
17. State of Uttar Pradesh v. Ram Babu Misra, 1980 SCR (2) 1067.
18. V. Adarsh v. Union of India, W.P. No. 25205 of 2022.

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# CHAPTER 1 – INTRODUCTION

*"Sans the punitive rule of law, democracy becomes a rope of sand. India is not a soft State, a sick society, a pathologically submissive polity. In this darkling national milieu, the penal law and its merciless enforcement need strong emphasis.*

- Late Justice V. R. Krishna Iyer[1]

## 1.1 INTRODUCTION

A strict definition of biometrics is that it has been defined as the science which involves the statistical analysis of biological characteristics. A slightly more pragmatic definition is, the application of computational methods to biological features, especially with regards to the study of unique biological characteristics of humans.[2] The development of biometric identification began with a classification system for fingerprints in the mid-nineteenth century and was quickly applied to legal contexts, such as criminal investigation[3]. They play an important part in law enforcement, as an investigation tool for narrowing the long list of criminals and as scientific evidence in courts[4]. Biometric systems are designed to recognize individuals by using their biological and physiological characteristics such as fingerprints, hand vein patterns, iris, face, DNA and others. Each of these represents a biometric modality. The choice of the best biometric modality or modalities is dependent on the context of the application use case.[5]

Identification by biometrics asks the wider question of 'Who am I?' - it works by comparing a scanned biometric against a library of stored biometric data. The obvious distinction being that a biometric is a reference to part of the individual themselves,

[1] Dr. JUSTICE V.S. MALIMATH, COMMITTEE ON REFORMS OF CRIMINAL JUSTICE SYSTEM, 21 (2003) (hereinafter 'Malimath Committee').
[2] RICHARD HOPKINS, *An Introduction to Biometrics and Large Scale Civilian Identification*, 13 INT'L REVIEW OF LAW COMPUTERS & TECHNOLOGY, 337, 337- 338(1999).
[3] MARCUS SMITH AND SEUMAS MILLER, BIOMETRIC IDENTIFICATION, LAW AND ETHICS, 17 (Springer 2021).
[4] Anil K. Jain and Arun Ross, *Bridging the gap: from biometrics to forensics*, 370 PHILOSOPHICAL TRANSACTIONS OF THE ROYAL SOCIETY OF LONDON. SERIES B, BIOLOGICAL SCIENCES, 1.
[5] BIOMETRICS AND SURVEILLANCE CAMERA COMM'R, Annual Report 2021 to 2022, (2023), https://www.gov.uk/government/publications/biometrics-and-surveillance-camera-commissioner-report-2021-to-2022.

rather than an object carried on the person, or password held in their mind. Biometric identification has been described as: rather than being something that an individual knows or has, it is something that they are.[6]

However, the modern meaning of forensics, which entered the English vocabulary in 1659, is now confined to the aspects of legal and police investigation. In a broad sense, the term "forensics science" is closely associated with those civil and criminal proceedings where evidence is scientifically evaluated and analysed to solve the cases. Forensic science refers to those principles and the scientific interpretation of the technical methods used in the investigation of crime with the purpose to prove the committing of a crime, to expose the identity of the offender(s) and their modus operandi.[7] Therefore, there is a very close connection between the two – forensic science and criminal investigation processes.

Without a doubt, biometric technology is already creating a significant impact in the society. Today, the field of biometrics has been evolving at a fast pace and it has been revolutionised with its application in law enforcement. Crime has been considered to be one of the oldest problems that has confronted mankind. Therefore, every attempt in combating it has been ensured in order to maintain the sanctity of society and in securing the interests of the people.

With the advancements in information and communication technologies in the twentieth century alongside other developments such as the rise of the welfare state, the existing notions of effectively defying criminal activities has led to renegotiations of the boundaries between the private and public spheres[8]. With reference to the present study, the private sphere shall be pertaining to the individuals from whom the measurements would be taken from. The state and its law enforcement machinery shall be the public sphere.

Besides, the development, adaptation, and use of innovative technologies that enabled and increased the collection and use of personal information later in the twentieth

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[6] Smith and Miller, *supra* note 3, at 2.

[7] Sachil Kumar and Geethika Saxena, *Biometric forensic tools for criminal investigation*, CYBER CRIME AND FORENSIC COMPUTING MODERN PRINCIPLES, PRACTICES, AND ALGORITHMS (October 2021).

[8] Urs Gasser, *Recoding Privacy Law: Reflections on the Future Relationship Among Law, Technology and Privacy*, 130, HARVARD LAW REVIEW FORUM, 61, 62 (December 2016).

century were also among the key drivers that led to the birth of modern information privacy law in the early 1970s.

During the pre-independence period in India, there existed only the practice of merely taking measurements of convicts that included fingerprints and photographs of convicts, but without any legal authority or legal sanction for the same. In order to authorise the taking of such measurements and the necessity to legalise and regularise the procedure, the Identification of Prisoners Bill was introduced by Sir William Vincent in the then Legislative Council on 27th August, 1920. Thereafter, the Act entrusted the authorities the authorisation to take photographs, to collect footprints, palm prints and finger prints of convicted people and also in certain cases, non-convicted people and store them. The Identification of Prisoners Act, 1920, consisted of just 9 sections and therefore authorised the taking of measurements and photographs of convicts and others.

By citing scientific developments and strengthening of law enforcement agencies as the rationale, the Indian Parliament had enacted the Criminal Procedure (Identification) Act of 2022. In other words, the archaic Identification of Prisoners Act 1920 is repealed by the new Criminal Procedure (Identification) Act, 2022. The new Act which had come into force on 4th August, 2022 provides legal sanction to law enforcement agencies for "taking measurements of convicts and other persons for the purposes of identification and investigation of criminal matters". The term 'measurements' is now wider and includes 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.

## 1.2 STATEMENT OF RESEARCH PROBLEM

The Act presents concerns of excessive delegation of powers with no specifications on the uniform standard to be maintained for obtaining the measurements and the subsequent application of such measurements. Therefore, there arises a possibility that it will move towards the domain of mass surveillance in its assumption of improving the effectiveness and efficiency of criminal investigations.

## 1.3 SCOPE OF STUDY

In India, prior to the enactment of the new Act, there existed the Identification of Prisoners Act, 1920 which had authorised the taking of measurements and photographs of convicts and others consisting of merely 9 sections. Due to the inadequacies in the Act, there was a call for reform from several quarters of law. From the judgment in Ram Babu Misra[9], the Tandon Committee Report[10] to the second NPC Report[11], from the very detailed report of the Law Commission of India[12] who had looked into the minutest of details of the old Act to the Malimath Committee Report[13], a unanimous call had been reasonated to amend the colonial statute and bring into existence a new one that aligned with the changing scenarios of technology, to upgrade and update India's criminal justice system to effectively deter crime.

This study, therefore makes an attempt in tracing out the history behind the culmination of the 1920 legislation and the various recommendations in that domain. The study has underlined the importance of how the new statute, the Criminal Procedure (Identification) Act, 2022 is in contravention of certain essential principles and rights that need to have been in strict compliance of and a critical evaluation has also been undertaken by analysing the various provisions of the new Act.

Further, in giving a wider perspective, an attempt has been made to understand how other countries internationally have enacted such legislations in their jurisdictions.

## 1.4 OBJECTIVES OF THE STUDY

1. To examine whether the recommendations of the 87th Law Commission Report and the Expert Committee on Reforms of the Criminal Justice System of 2003 have been incorporated into the Act.
2. To study the changes brought out by the Act of 2022 in comparison with the Identification of Prisoners Act, 1920.

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[9] State of Uttar Pradesh v. Ram Babu Misra, 1980 SCR (2) 1067.
[10] S. TANDON COMMITTEE (July 1979).
[11] THE NATIONAL COMMISSION OF INDIA, REPORT NO: 2 (August 1979).
[12] LAW COMMISSION OF INDIA, REPORT NO. 87: THE IDENTIFICATION OF PRISONERS ACT, 1920 (August 1980).
[13] Malimath Committee, *supra* note 1.

3. To examine the effect of the provisions of Criminal Procedure (Identification) Act, 2022 in prevention, detection, investigation and prosecution of any offence.
4. To comparatively analyze the legislative frameworks that govern prisoner identification in an international perspective.

## 1.5 RESEARCH QUESTIONS

1. How does the Act balance the needs of law enforcement with that of individual rights?
2. Whether the Act confers excessive delegation of powers and unguided discretion to the executive contrary to Article 14 of the Indian Constitution?
3. Whether the enactment has a disproportionate impact on the aspect of privacy and data protection principles at the very cost of improving investigation, detection and prevention of crimes?

## 1.6 HYPOTHESIS

The Criminal Procedure (Identification) Act, 2022 lacks comprehensive regulatory measures in preserving database of the wide range of measurements taken under the Act, confers unbridled delegation powers to the administrative authorities, encourages biased policing practices as an extension of predictive policing and mass surveillance and further is in violation of data protection principles.

## 1.7 RESEARCH METHODOLOGY

The doctrinal method of research has been adhered to. The study would be based on the collection of data from primary and secondary sources. The primary sources of data would include statutes, bills, case laws, and secondary sources would include books, journals, committee reports, newspaper articles, online resources, etc. which are available relating to the concerned study.

1.8 CHAPTERIZATION

- CHAPTER 1 - INTRODUCTION

The first chapter contains a brief introduction to the topic under study, the statement of problem, scope of study of the topic, research questions, objectives of the study, of hypothesis and the methodology adopted for the study.

- CHAPTER 2 – THE IDENTIFICATION OF PRISONERS ACT, 1920 AND THE CRIMINAL PROCEDURE (IDENTIFICATION) ACT, 2022 – CHANGES BROUGHT OUT

This chapter begins with a critical evaluation of the role of forensic science in criminal investigation. It dwelves deeper into the 1920 legislation and examines its various provisions. This chapter also looks into the various recommendations received over the years and traces out the transition to the current legislation. A comparative analysis of the two Acts have also been covered.

- CHAPTER 3 - CRITICAL ANALYSIS OF THE CRIMINAL PROCEDURE (IDENTIFICATION) ACT, 2022 WITH SPECIFIC REFERENCE TO DATA COLLECTION, USE AND RETENTION.

This chapter analyses the provisions of the 2022 Act in its conformity with data protection principles, on the aspect of privacy, proportionality amongst others.

- CHAPTER 4 - AN INTERNATIONAL OVERVIEW OF BIOMETRIC DATA OF PRISONERS

The penultimate chapter provides an international perspective of certain selected jurisdictions where biometric samples has been employed for investigating crimes. The study incorporates the legislative frameworks from the Unites States of America, from the United Kingdom as well as South Africa.

- CHAPTER 5 – CONCLUSIONS AND RECOMMENDATIONS

The final chapter summarises the findings of the study, the implications and how the Act would be inefficient in its non-conformity with certain essential principles. Besides, it shall contain certain recommendations which shall be a humble attempt for the proper implementation in the larger interests of justice.

## 1.9 LITERATURE REVIEW

1. Scrutinising the Criminal Procedure (Identification) Act of 2022 and its conformity with privacy principles - Aaryan Mithal and Abhinav Gupta published in NUJS Law Review, Volume 15 Issue 1 (2022).

In their article, the authors have analysed the inconsistencies of the 2022 legislation by shedding light on the implications that the Act has on some of the key principles of data protection. They compare the Act against the purpose limitation principle, the storage limitation principle, accountability principle and concludes that the Act is broad, fails to provide a specific, legitimate and explicit purpose, the limits in the Act are highly excessive as they do not provide any delineation with a blanket applicability for all data. They have also highlighted the fact that there exists no substantial accountability mechanisms on the authorities who process this data and therefore this Act would be difficult to implement without abiding by the principles.

2. An Introduction to Biometrics and Large Scale Civilian Identification - Richard Hopkins published in the International Review of Law, Computers & Technology (1999).

The author has given a layman understanding of what biometrics entails and the various terms used in biometric industry. The article also provides a brief explanation of how modern biometric technology is used for identification and verification of individuals and reflects how biometric technologies has been augmented to cope up with the challenging situations.

3. Biometric Identification, Law and Ethics – Marcus Smith and Seuman Miller, a Springer open access book (2021).

This book has been very extensive in its approach and has dwelled deep on the various kinds of biometric identification- fingerprint identification, facial recognition and DNA identification. The book examines the use of these measurements including their reliability as a form of evidence, the ethical risks and benefits associated with these techniques, relevant ethical principles, including privacy, autonomy, security and public safety, and the implications for law and regulation in relation to these identification techniques. Further, the authors have explained as to how the use of biometrics, data

and algorithms could be used by governments to regulate social and economic interactions and how such related technological developments may change governance in and how liberal democracies might respond to these new technologies in a manner that preserves their benefits without compromising established liberal democratic institutions, principles and values.

4. PACE(The Police and Criminal Evidence Act) 1984: Past, Present and Future – Michael Zander published in the National Law School of India Review, Volume 23 No.1 (2011).

The author discussed the many amendments and reviews of the Police and Criminal Evidence (PACE) Act, 1984 of the United Kingdom which has been very useful for enriching the content in the penultimate chapter of this work.

5. Exploring the Intersection of Privacy and Other Fundamental Rights with the Criminal Procedure (Identification) Act 2022 – Anurag Krishna Tiwari published in Jus Corpus Law Journal (2023)

The author in their article has contended that the Act in its vision of creating an effective framework for reducing crime has violated certain fundamental rights and has termed the Act of being draconian in the light of its unchecked autonomy and disregard for constitutional principles.

## 1.10 LIMITATIONS OF THE STUDY

The Criminal Procedure Identification Act, 2022, which is the very crux of this study had come into force only on the 4th of August, 2022. As a result, the scope for conducting empirical research, though pondered upon, could not be materialised and therefore has been limited by the recency of its implementation. As a result, the study is doctrinal in its approach. Besides, the comparative analysis of the global perspective is also restricted to certain selected countries.

# CHAPTER 2 - THE IDENTIFICATION OF PRISONERS ACT, 1920 AND THE CRIMINAL PROCEDURE (IDENTIFICATION) ACT, 2022 – CHANGES BROUGHT OUT

## 2.1 THE INTERLINK BETWEEN FORENSIC SCIENCE, CRIMINAL INVESTIGATION AND PREVENTION OF CRIME

Crime exists in every society. It is a legal concept and can be termed as an act that involves the breach of a law. The occurrence of a crime is not the result of any single factor, but rather the synthesis of many a complex element. The extent and the various kinds of criminal activities that take place raises the question of the efficiency in which the criminal investigation would have to be conducted.

Investigation technically involves the collective effort of enforcement agencies in collecting information to facilitate the identification and furnishing of evidence to establish the guilt of an offender. Criminal investigation consists largely of assembling the necessary pieces of information required to establish the identity of a suspect, according to the standards and procedural guidelines established by the courts[14]. It becomes effective only when the investigation officer knows - the nature of physical evidence to be collected, where it is found, how it is collected, preserved, packed and dispatched, what standard samples for comparison purposes are necessary, how much sample is required, how the sampling is done, how the laboratory results will link the crime with the criminal and to what extent his labours will be rewarded[15].

Identification of individuals is therefore one of the most significant steps in criminal investigation. The word ‘identification’ relates to the individuality of a person. The investigation officer is vested with the task of establishing the identity of the concerned person, but the aspect of forensic science comes into the picture since it is the medical/forensic officer who will have to determine various identification data points like fingerprints, footprints, handwriting, hair, etc. To facilitate the identification of

[14] Peter W. Greenwood, Jan M. Chaiken, Joan R. Petersilia, Linda L. Prusoff, R. P. Castro, Konrad Kellen, Sorrel Wildhorn, *The Criminal Investigation Process Volume III: Observations and Analysis* (1975).
[15] B.R. SHARMA, FORENSIC SCIENCE IN CRIMINAL INVESTIGATION AND TRIALS, 10 (LexisNexis 2019).

individuals and subsequently for investigating crimes, the application of forensic science occupies an important role.

Forensic science involves the application of scientific methods for investigating and solving crimes. It is a multi-disciplinary field and involves the application of science and technology to assist in the administration of criminal justice systems. A founding concept in forensic science is the 'Exchange Principle' propounded by Dr. Edmund Locard. Known as the Sherlock Holmes of France, he was a French criminologist who stated that, "whenever objects come in contact with each other, there is an exchange of traces mutually." In other words, every contact leaves a trace. Thus, in the event of committing a crime, the criminal is bound to leave some of his traces at the scene of crime and also, he will carry with him certain traces from the scene of crime.

Forensic Science, therefore proves beneficial for finding answers to a variety of questions – how was the crime committed, in determining whether a crime had indeed occurred, who had carried out the act, when had it occurred and lastly in identifying the victim and the means used for the act. Therefore, it becomes imperative to understand the role played by forensic science in the realm of crime.

The science of establishing the identity of an individual based on the physical, chemical or behavioural attributes of the person is known as biometrics. On the aspects of preventing crime, storing biometric data serves as a tool for enhancing safety and promoting law enforcement measures. In its widest sense, biometric capability could revolutionise the investigation and prevention of crime and the prosecution of offenders[16]. At the same time, the way in which technology is used could jeopardise the model of policing by consent on which we rely. Its future regulation and oversight ought to reflect both its potential and its risk.[17]

A look at history would reveal that most biometrics, especially fingerprint recognition were created and developed for law enforcement purposes[18]. The relevance of biometrics in modern society has been reinforced by the need for large-scale identity

[16] *supra* note 5.
[17] *Ibid.*
[18] Smith and Miller, *supra* note 3 at 1.

management systems whose functionality relies on the accurate determination of an individual's identity in the context of several different applications. [19]

2.2 THE IDENTIFICATION OF PRISONERS ACT, 1920

In the pre-independence era, there existed a practice of taking measurements of convicts that included fingerprints and photographs of convicts, but without any legal authority or legal sanction for the same. In 1915, the Government of Bengal had drawn attention to the case of 2 'dangerous conspirators' who were convicted in the Raja Bazar Bomb Case and who were most persistent in their refusal to be photographed. The same government further reported that such instances were becoming frequent wherein prisoners had been refusing to allow their fingerprints or photographs to be taken. In this background, the Government of Bengal had proposed amendments to the Police Act and the Prisoners Act in order to allow police officers and jail superintendents to collect fingerprints, measurements from persons who were under arrest, under-trial prisoners and convicts.

The Government of India, after an examination of the whole question, concluded that - "No further time should be lost in placing on a regular footing a practice which is the normal incident of police practice in India." [20] Therefore, for authorising the taking of such measurements and the necessity to legalise and regularise the procedure, the Identification of Prisoners Bill was introduced by Sir William Vincent in the then Legislative Council on 27th August, 1920.

The reasons for the enactment of the 1920 Act are given in the Statement of Objects:

"The object of this Bill is to provide legal authority for the taking of measurements, finger impressions, foot-prints and photographs of persons convicted of, or arrested in connection with, certain offences. The value of the scientific use of finger impressions and photographs as agents in the detection of crime and the identification of criminals is well known, and modern developments in England and other European countries render it unnecessary to enlarge upon the need for the proposed legislation."

The Act authorised authorities to take photographs, to collect footprints, to collect palm prints, finger prints of convicted people and also in certain cases, non-convicted people

[19] ANIL K. JAIN, PATRICK FLYNN AND ARUN A. ROSS, HANDBOOK OF BIOMETRICS 1 (Springer New York, NY 2007).
[20] *supra* note 12 at 18.

and store them. The Identification of Prisoners Act, 1920, therefore authorised the taking of measurements and photographs of convicts and others. It has a total of 9 Sections.

Provisions of the 1920 Act

The term 'measurements' is defined in Section 2(a) to include finger impressions and foot-print impressions. Also, Section 3 authorises a police officer to also take photograph in the prescribed manner.

The 1920 Act authorises the taking of measurements from the following categories of people:

1. Those convicted of any offence punishable with rigorous imprisonment for a term of one year or upwards.[21]
2. Those convicted of any offence which would render him liable to enhanced punishment on a subsequent conviction.[22]
3. Those who have been ordered to give security for his good behaviour under Section 118 of the Code of Criminal Procedure, 1898.[23]
4. Those who have been arrested in connection with an offence punishable with rigorous imprisonment for a term of one year or upwards.[24]

Section 5 of the Act states as follows:

Power of Magistrate to order a person to be measured or photographed.—*If a Magistrate is satisfied that, for the purposes of any investigation of proceeding under the Code of Criminal Procedure, 1898 (5 of 1898), it is expedient to direct any person to allow his measurements or photograph to be taken, he may make an order to that effect, and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in the order and shall allow his measurements or photograph to be taken, as the case may be, by a police officer:*

*Provided that no order shall be made directing any person to be photographed except by a magistrate of the first class:*

[21] Identification of Prisoners Act, 1920, § 3(a), No. 33, Act of Legislative Council, 1920 (India) (hereinafter 'IPA 1920').
[22] *Ibid.*
[23] *Id.* §3(b).
[24] *Id.* §4.

*Provided further, that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding.*

Section 5 provides for the taking of measurements of a man who has at some time been under arrest on suspicion of his being implicated in certain offences but is not under arrest at the time it is proposed to take these measurements. For instance, a man may he arrested in a theft ease and subsequently released; further investigation may indicate that it is necessary to take his finger impressions to ascertain whether he was implicated in the crime or not but for any action under this clause, ie., against a man not actually under arrest at the time the order of a Magistrate will be necessary.[25]

Therefore, a combined reading of Section 4 and 5 respectively shows that the Act of 1920 was limited, in the sense that it allowed for taking finger-impressions and foot prints of the above-mentioned categories of persons and photographs upon a Magistrate's order.

Additionally, any person who refuses or resists the taking of his measurements or photograph shall be said to commit the offence of voluntarily obstructing a public servant in the discharge of his duties under Section 186 of the Indian Penal Code, 1860[26]. The Act also deems it lawful to employ any means necessary to secure the taking of the same.

Section 7 of the Act of 1920 reads as follows:

*Destruction of photographs and records of measurements, etc., on acquittal.—Where any person who, not having been previously convicted of an offence punishable with rigorous imprisonment for a term of one year or upwards, has had his measurements taken or has been photographed in accordance with the provisions of this Act is released without trial or discharged or acquitted by any court, all measurements and all photographs (both negatives and copies) so taken shall, unless the court or (in a case where such person is released without trial) the Districts Magistrate or Sub-Divisional Officer for reasons to be recorded in writing otherwise directs, be destroyed or made over to him.*

[25] THE INDIAN LEGISLATIVE COUNCIL, Proceedings of The Indian Legislative Council Assembled for the purpose of making Laws and Regulations [Vol. LIX] (1921).
[26] IPA 1920, *supra* note 21, §6(2).

Section 8 of the Act is a rule-making power and grants power to the State Government to frame rules to put into effect the provisions of the Act.

Lastly, no suits or other proceeding shall be initiated against any person done by him in good faith under the Act or any rule made thereunder[27].

2.3 RECOMMENDATIONS TO AMEND THE ACT OF 1920 – A TIMELINE

Since the Identification of Prisoners Act of 1920 was enacted to achieve a specific goal, which was to authorise the taking of measurements of convicts and other classes of persons mentioned under the Act, the Act had borne the brunt of several shortcomings. To rectify these defects within the Act, various recommendations had been proposed from several quarters of law.

a) February 19th, 1980 - recommendation by the Supreme Court of India in State of Uttar Pradesh v. Ram Babu Misra[28]

Though this case did not directly adjudicate on any provision of IPA, the Court had to decide a question with respect to Section 73 of the Indian Evidence Act, 1972 which closely corresponds to Section 5 of the IPA.

Section 73 of the Indian Evidence Act, 1972 reads as follows:-

*Comparison of signature, writing or seal with others admitted or proved - In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.*

*The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.*

*This section applies also, with any necessary modifications to finger-impressions.*

In this case, an officer while investigating certain offences charged against the respondent, Ram Babu Misra had moved the Chief Judicial Magistrate, Lucknow to

[27] IPA 1920, *supra* note 21, §9.
[28] *supra* note 9.

direct the accused to give his specimen writing and signature for comparison with certain disputed writings. Subsequently, the High Court of Allahabad had upheld the view of the Magistrate who had denied permission stating that he had no power to do so while the matter was under investigation.

The State who preferred an appeal had contended that Section 73 granted the Magistrate sufficient authority to direct the accused to give his specimen writing even when the investigation was ongoing. Besides, it was only in the administration of justice for the Magistrate to direct the accused to give his specimen writing when the case was still under investigation, since that would enable the investigating agency not to place the accused before the Magistrate for trial or enquiry, if the disputed writing, as a result of comparison with the specimen writing, was found not to have been made by the accused.

The second paragraph of section 73 enables the Court to direct any person present in Court to give specimen writings "for the purpose of enabling the Court to compare" such writings with writings alleged to have been written by such person. The clear implication of the words "for the purpose of enabling the Court to compare" is that there is some proceeding before the Court in which or as a consequence of which it might be necessary for the Court to compare such writings. The direction is to be given for the purpose of 'enabling the Court to compare' and not for the purpose of enabling the investigating or other agency 'to compare'. If the case is still under investigation there is no present proceeding before the Court in which or as a consequence of which it might be necessary to compare the writings. The language of section 73 does not permit a Court to give a direction to the accused to give specimen writings for anticipated necessity for comparison in a proceeding which may later be instituted in the Court. [29]

Section 5 of the IPA does not include within its ambit signatures and specimen writing and as such they are explicitly excluded. But, in both the Acts, finger impressions are included. The Court took the view that since Section 73 wouldn't encompass the investigative stage, Section 5 of the Identification of Prisoners Act was specifically introduced to address that stage.

[29] 2 B M PRASAD and MANISH MOHAN, LAW OF EVIDENCE, (19th ed).

In its conclusion, the Court remarked that a suitable legislative framework be made on the analogy of Section 5 of the Identification of Prisoners Act, to vest with the Magistrates the power to issue directions to any person, including an accused person, to give specimen signatures and writings.

b) Tandon Committee, July 1979

Under the chairmanship of S. Tandon, the then Director, Bureau of Police Research and Development had been set up by the Ministry of Home Affairs to look into certain aspects of police reforms. In its observations, the Committee had formulated a draft enactment known as the 'Crime and Offender Records Act' to replace the then existing IPA, 1920 so as to facilitate the collection of wide range of data and information regarding crimes and criminals. In the draft enactment, the following provisions were recommended to be included:

1. To bring all materials that could aid in the prevention and detection of crime within the ambit of the term 'Crime and Offender Data' which is covered by a wide definition.

2. To authorise the taking of crime prevention data in respect of an arrested person by police, medical, court, jail, probation or other officers to be declared as 'authorised officers' under the Act.

3. To require such officers to submit such data for retention in Crime Record Bureaus to be set up both at the national and state levels.

4. To enable the Crime Records Bureaus to issue certificates in respect of data in its records to help the court in examining witnesses to prove whatever is certified.

c) Second Report of the National Police Commission, August 1979

In its report, the Committee had fully endorsed the recommendations voiced by the Tandon Committee for the enactment of a new comprehensive Act in replacement of the existing Identification of Prisoners Act, 1920. However, in its Report, the Committee also proposed the following:

1. The recommendation given by the Tandon Committee on the definition of 'Crime and Offender Data' should be more precise.

2. The circumstances in which the proposed data should be collected should be explained in a more specific manner to avoid any scope for misuse.

3. Under the Act, rules should be framed from time to time to be laid before the Parliament or State Legislature for a prescribed period.

4. The new Act proposed by the Tandon Committee titled 'The Crime and Offender Records Act' must be enacted as a central Act with rule-making powers available to both governments, at the centre and state.

d) August 29th, 1980 - 87th Report of the Law Commission of India on 'Identification of Prisoners Act'

Chaired by Justice P V Dixit, the Law Commission of India in its 87th Report had recommended certain suggestions to revise the IPA in order to enable the Act to keep up with the modern trend in criminal investigation.

The Law Commission had also outlined the principle enshrined in the Act which proceeds on the fact that the less serious the offence, power would be more restricted to make coercive measures and vice versa.

Following are a summary of its recommendations:

1. To amend the short title of the Act to 'Criminal Procedure (Physiological Evidence) Act or 'Criminal Investigation (Physiological Evidence) Act.

2. To include palm impressions within the ambit of measurements.

3. To amend Section 4 to empower a police officer to take photographs of the person to whom the section applies.

4. To amend Section 5 to include – specimen signature or writing and specimen of voice.

5. Reasons must be specified when an order is being given by a Magistrate under Section 5.

6. To remove the difficulty with respect to Section 73 of the Evidence Act and Section 5 of the Identification of Prisoners Act.

e) March 28th, 2003 - Malimath Committee on Reforms of Criminal Justice System

Constituted by the Government of India, Ministry of Home Affairs by its order dated 24 November 2000, the Committee on Reforms of the Criminal Justice System undertook the task of recommending substantial reforms for revamping India's

Criminal Justice System. Chaired by Dr. Justice V.S. Malimath, former Chief Justice of Karnataka and Kerala High Courts, Chairman, Central Administrative Tribunal and Member of the Human Rights Commission, the Committee also consisted of several other members thereby making the Committee a combination of expertise of the Judiciary, the Bar, the Police, the legal academic and administrator.

The Committee had also recommended specific reforms to the Act of 1920, which are enumerated below:

1. To enact a legislation in order to direct the accused to give his specimen writings or blood samples for DNA finger printing.
2. Similarly, under the existing law, an accused cannot be compelled to give the samples of his hair, saliva or semen etc. Sections 45 and 73 of the Evidence Act, are not comprehensive enough to admit of such samples being taken on Court orders. Due to be above lacunae, it is difficult to build up a strong case, based on forensic evidence, against the accused.[30]
3. To incorporate a separate provision in the Code of Criminal Procedure and the Indian Evidence Act to vest with the Magistrate the power to order an accused to give samples of hand writing, fingerprints, footprints, photographs, blood, saliva, semen, hair, voice etc, for the purposes of scientific examination.

### 2.4 THE CRIMINAL PROCEDURE (IDENTIFICATION) ACT, 2022

India in 1920 cannot be, in any way, compared to the India that is now in existence. Pre-independent India contained a lot of statutes that were enacted by the British colonialists. Some of the statutes that were enacted back then continue to remain in force. However, technology has achieved far-reaching dimensions and there has been an increase in scientific developments. And with the ever-changing social problems that exist in the society, it becomes necessary that laws be continually renewed to keep up with the changing scenarios.

102 years later, the Criminal Procedure (Identification) Bill, 2022 was tabled in Lok Sabha as Item No. 21 by Union Home Minister Amit Shah on 04-04-2022. The bill was then passed by the Rajya Sabha, two days later, on 06-04-2022.

[30] Malimath Committee, *supra* note 1 at 123.

A total of 6 objectives can be seen in the Statement of Objects and Reasons attached to the Bill of 2022 which has been produced verbatim below[31]:

1. The Identification of Prisoners Act, 1920 was enacted to authorise the taking of measurements and photographs of convicts and other persons. The term "measurements" used in the said Act is limited to allow for taking of finger impressions and foot-print impressions of limited category of convicted and non-convicted persons and photographs on the order of a Magistrate.
2. New "measurement'' techniques being used in advanced countries are giving credible and reliable results and are recognised world over. The Act does not provide for taking these body measurements as many of the techniques and technologies had not been developed at that point of time. It is, therefore, essential to make provisions for modern techniques to capture and record appropriate body measurements in place of existing limited measurements.
3. The said Act, in its present form, provides access to limited category of persons whose body measurements can be taken. It is considered necessary to expand the ''ambit of persons'' whose measurements can be taken as this will help the investigating agencies to gather sufficient legally admissible evidence and establish the crime of the accused person.
4. Therefore, there is a need for expanding the scope and ambit of the ''measurements'' which can be taken under the provisions of law as it will help in unique identification of a person involved in any crime and will assist the investigating agencies in solving the criminal case.
5. The Criminal Procedure (Identification) Bill, 2022 provides for legal sanction for taking appropriate body measurements of persons who are required to give such measurements and will make the investigation of crime more efficient and expeditious and will also help in increasing the conviction rate.
6. The said Bill, inter alia, seeks:

(i) to define ''measurements'' to include finger-impressions, palm-print and foot-print impressions, photographs, iris and retina scan, physical, biological samples and their analysis, etc.

[31] The Criminal Procedure (Identification) Bill, 2022, No. 93 of 2022 (India).

(ii) to empower the National Crime Records Bureau of India to collect, store and preserve the record of measurements and for sharing, dissemination, destruction and disposal of records;

(iii) to empower a Magistrate to direct any person to give measurements; (iv) to empower police or prison officer to take measurements of any person who resists or refuses to give measurements.

The Act consists of a total of 10 sections and has come into force on the 4th day of August, 2022.

On September 19th, 2022 the Union Ministry of Home Affairs notified the Criminal Procedure (Identification) Rules, 2022 which specifies the details with respect to the manner of taking certain data from individuals as well as the manner of collecting, storing, sharing such records, and the disposal of such records.

The provisions of the new Act and the Rules as well as the changes brought about will be discussed, together, below.

## 2.4 EVOLVING LAWS FOR EVOLVING CRIMES: A LOOK INTO THE NEW ACT

After 102 years, a new legislation has been enacted bringing with it a sea change sought to achieve one amongst its main objectives - prevention and detection of crime. Needless to say, there has been a lot of backlash and controversies surrounding the new Act. At the time when the Act was being deliberated, India had not even enacted a legislative framework for data protection in order to safeguard the measurements taken under the Act. On the other hand, the law-makers has defended the Act to be technologically advanced in the promotion of nation's fight against crime.

As pointed out repeatedly, the rationale for enacting the new legislation is due to the culmination of many a several factors - advancement of technology, changes in time, the type of proof that would be now required before a court of law in order to prove the guilt of a person and also for enhancing the strength of law enforcement agencies by providing them with evidence through the various 'measurements' stored under the Act.

The new changes brought about by the new Act will be discussed in detail in this chapter. Further, the implications and the discrepancies behind the introduction of these

changes as well as the critical analysis of the Act shall be dealt with in the succeeding chapter.

On the aspects of how the new Act differs from the 1920 legislation, the following questions have been framed and the changes can be understood by finding out the answers to the respective questions.

a. What purpose does the new legislation serve in comparison to the old Act?

In pre-independence India, there already existed a system for taking measurements, but without any authorization. While introducing the Bill of 1920 in the then Legislative Council on August 27, 1920, Sir William Vincent had said, *"If Hon'ble Members will refer to the Statement of Objects and Reasons attached to the Bill, they will, I think, at once realise the necessity for this legislation. It has long been the practice in India to take such measurements including finger prints and photographs when required, but there is no legal authority for this and we now think it necessary to legalise and regularise that procedure. Indeed, we should have undertaken this legislation earlier had any practical difficulties arisen of a serious character and had it not been for our preoccupations during the war."*[32]

Hence, from the above statement it is clear that the1920 Act had merely provided a legislative backing for collecting the measurements.

Speaking on the floor of Lok Sabha when the Criminal Procedure (Identification) Bill of 2022 was tabled, Mahua Moitra, a former Member of Parliament from Krishnanagar, West Bengal had also remarked that the original Act of 1920 was passed by the British colonisers for the purpose of establishing control over nationalist forces and to increase surveillance.

Besides, on an analysis of the Act, there has been no mention as to why the measurements have been taken from the categories of individuals mentioned in the Act. The Act solely gave permission to take pictures and measurements of prisoners and other people and outlined the legal principles controlling the police and prisoners.

[32] *supra* note 25 at 59.

But take the CPIA, the Preamble to it clearly states the following – "*An Act to authorise for taking measurements of convicts and other persons for the purposes of identification and investigation in criminal matters and to preserve records.*"

Comparing both the Acts, it can now be understood that the new Act authorises the taking of measurements for not just identification purposes but additionally for using the same for investigation purposes. A nodal agency has also been authorised for the "collection, storing, preservation of measurements and storing, sharing, dissemination, destruction and disposal of records."

b. Measurements –what is its scope under the new legislation?

Firstly, with respect to the measurements, since the very Act is considered to a biometric retention legislative framework, one would have to look into whether or not the data to be collected as seen in the old Act has been widened or narrowed down in the newer legislation. If yes, what sort of additional biometric data has been introduced?

The old Act of 1920 defines "measurements" to just include 2 categories of forensic science - finger impressions and foot-print impressions[33]. In addition to this, taking of photographs are also authorised.

In the new Act, an enhanced scope has been given to the term 'measurements' and the very objective behind it is keeping in view the changes that had developed in technology. It is an expansive interpretation. As a result, it was necessitated to update the law to take into account various techniques of identification and measurements that had subsequently been evolved.

Under the new Act of 2022, Section 2(1)(b) states:

*"measurements" includes 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;*

In addition to finger impressions and foot-print impressions, the Act now covers a wide range of other measurements – palm-print impressions, iris and retina scans, physical,

[33] IPA 1920, *supra* note 21, §2.

biological samples and their analysis, behavioral attributes including signatures, handwriting or any type of examination mentioned in Section 53 or Section 53A of the Code of Criminal Procedure, 1973.

c. From whom can the measurements be taken from? or What offences warrant the measurements to be taken?

The question, here is whether, in the new Act, there has been an approach which has broadened the category of individuals or subjects from whom the specified 'measurements' mentioned in the Act can be obtained.

Whether the Act has imposed any exceptions from whom the measurements cannot be taken from?

Additionally, what offences deem taking of such measurements from the individuals?

Section 3 of the new Act authorises the taking of measurements from the following categories of persons:

*Taking of measurement - Any person, who has been,-*

*(a) convicted of an offence punishable under any law for the time being in force; or*

*(b) ordered to give security for his good behaviour or maintaining peace under section 117 of the Code of Criminal Procedure, 1973 for a proceeding under section 107 or section 108 or section 109 or section 110 of the said Code; or*

*(c) arrested in connection with an offence punishable under any law for the time being in force or detained under any preventive detention law,*

*shall, if so required, allow his measurement to be taken by a police officer or a prison officer in such manner as may be prescribed by the Central Government or the State Government:*

*Provided that any person arrested for an offence committed under any law for the time being in force (except for an offence committed against a woman or a child or for any offence punishable with imprisonment for a period not less than seven years) may not be obliged to allow taking of his biological samples under the provisions of this section.*

The new Act has expanded the range of individuals who would be required to undergo measurements. Under the Act, all convicts, arrested persons, detainees under the

preventive detention laws as well as persons ordered to give security for good behaviour may be required to give their measurements.

The only exemption under the Act is that a person may not be obliged to allow his biological samples to be taken who has committed an offence except one against a woman or a child or for an offence punishable with imprisonment for a period not less than 7 years. However, under the Rules of 2022, the exemption of measurements has been extended to two more categories of persons by virtue of Proviso 2 and 3 of Rule 3.

a) The measurements of a person who has been charged for violating a prohibitory order that has been issued under Section 144 or Section 145 or has been arrested under Section 151 of the Code of Criminal Procedure, 1973 (2 of 1974) shall not be taken unless such person is charged or arrested in connection with any other offence punishable under any other law for the time being in force.
b) The measurements of a person shall not be taken on the initiation of proceeding under Section 107 or Section 108 or Section 109 or Section 110 of the Code unless such person has been ordered to give security for his good behaviour or maintaining peace under Section 117 of the said Code for a proceeding under the said sections.

Additionally, the measurements of a person who has committed an offence mentioned under Chapter IX A or X of the Indian Penal Code, 1860 shall be taken only upon obtaining prior written approval from a Police officer of no less than the rank of Superintendent of Police.

e. Authorities entrusted to take measurements

1. Who are the authorities entrusted to collect data under the new Act and whether there has been any modification?
2. Whether the new Act has entrusted any authority for collecting the record of measurements and in storing it?

The measurements are to be taken by a police officer or a prison officer in the manner that would be prescribed by the Union Government or the State Government. The term

police officer includes within its ambit the officer-in-charge of a police station or an officer not below the rank of a Head Constable[34].

For the purpose of any investigation or any proceeding under the Code of Criminal Procedure, Magistrate[35] is also empowered to make an order directing any person to allow the measurements to be taken in conformity with such directions[36].

However, the Rules have changed the scope of the Act by giving a wide interpretation to the list of persons authorised to take the measurements. Under sub-rule 1 of Rule 3, in addition to a police officer or a prisoner officer of the Central Government or State Government or Union Territory Administration, that is authorised by the Bureau (referred to as authorised user under the Rules) the power to take measurements has been additionally entrusted to the following categories of persons[37]:

a. Person who is skilled in taking the measurements or
b. A registered medical practitioner or
c. Any other person authorised in that behalf.

Under the new Act, the National Crimes Records Bureau has been appointed as the nodal agency who is entrusted with the task of collecting, storing, preserving the measurements and storing, sharing, dissemination, destruction and disposal of such records of measurements.

f. Other miscellaneous changes

a) Whether the Act prescribes any period within which the measurements could be stored?

The 1920 Act did not prescribe any duration with respect to the measurements mainly because there existed no provision for the purpose of storing the three types of measurements to be taken under the Act.

[34] The Criminal Procedure (Identification) Act, 2022 § 2(c), No. 11, Acts of Parliament, 2022 (India).
[35] *Id.* §2(a).
[36] *Id.* § 5.
[37] The Criminal Procedure (Identification) Rules, 2022, Rule 3(1), G.S.R. 708(E) (India).

The change in the new legislation is that there exists a prescribed time-period of 75 years from the date of collection of measurements which shall be retained in digital or electronic form.[38]

b) What is the procedure for taking the measurements?

Though the Act is silent on the procedure to be adopted for taking the measurements, the Rules empower the NCRB to issue the Standard Operating Procedure for taking the measurements and includes the following[39]:

i. specifications of the equipments or devices to be used for taking measurements;
ii. specifications and the format, including digital or physical, of the measurements to be taken;
iii. method of handling and storage of measurements in the database at the level of State Government or Union territory Administration in a format compatible with the database of the Bureau;
iv. information technology system to be used for taking of measurements.

The State Government/Union Territory Administration shall also use its own information technology system to provide a compatible application programming interfaces for sharing the measurements or record of measurements with the Bureau.

The record of measurements shall be stored and preserved in a secure and encrypted format as specified by the NCRB in its Standard Operating Procedure.

Sub-rule 2 of Rule 5 prescribes as follows:

*In case any measurement is collected in physical form or in a non-standard digital format, it shall be converted into standard digital format and thereafter uploaded in the database as per the Standard Operating Procedures, which may include the following, namely:-*

*(a) process to be followed by an authorised user for uploading the measurements in the database using the registered device;*

*(b) standard digital format in which each type of measurements shall be converted before uploading into the database;*

[38] *supra* note 34, § 4(2).
[39] *supra* note 37, Rule 3(2).

*(c) encryption method to be followed;*

*(d) manner of registering the device*

c) What would be the procedure of deletion of the 'measurements' and by whom should it be done?

Proviso to sub-section 2 of Section 4 of the Act states that the records will be destroyed in case of those persons whose measurements have been taken under the Act who:

(i) have not been previously convicted, and

(ii) are discharged or acquitted after all appeals, or

(iii) released without trial

unless it has been directed by the Court or Magistrate with sufficient reasons to recorded in writing.

Any request for destruction of record of measurements shall be made to the Nodal Officer to be nominated by the respective State Government or Union territory Administration or Central Government, as the case may be, concerned with the criminal case in which the measurements were taken[40]. The request for destruction of the record of measurements shall be recommended by the Nodal Officer to the Bureau after verifying that such record of measurements is not linked with any other criminal cases[41].

Here, while the Act by itself provides for destruction of the records, the Rules places the responsibility upon the individual whose measurements have been taken the Act.

d) Whether any coercive measures will be taken against an individual on their refusal to take measurements?

Section 6 of the old Act is synonymous to Section 6 of the 2022 legislation. Refusal or resistance to the process of taking measurements under the Act will be considered as an offence according to Section 186 of the Indian Penal Code[42].

[40] *supra* note 37, Rule 5(5)(i).
[41] *supra* note 37, Rule 5(5)(ii).
[42] *supra* note 34, § 6(2).

As under the Rules, the power is conferred on the authorised user (police officer or prison officer) who shall take the measurements in accordance with the provisions of Sections 53 and 53A of the Code of Criminal Procedure, 1973.

As in every democratic civilized society, criminal justice systems are expected to provide the maximum sense of security to the people at large by dealing with crimes and criminals effectively, quickly and legally[43]. The enactment of the Act of 2022 adopts this approach and signifies a pivotal shift in modernizing and speeding up India's efforts in preventing and detecting crime by adopting a wide array of measurements to be taken from the classes of persons mentioned under the Act. The Act further encourages the use of contemporary technologies with the sole objective of identification and investigation in criminal matters. On the face of it, the CPIA appears to be more broader and a more modern version of its colonial predecessor, the IPA of 1920.

[43] Malimath Committee, *supra* note 1 at 21.

# CHAPTER 3 – CRITICAL ANALYSIS OF THE CRIMINAL PROCEDURE (IDENTIFICATION) ACT, 2022 WITH SPECIFIC REFERENCE TO DATA COLLECTION, USE AND RETENTION.

*That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.*

- John Stuart Mill, 'On Liberty' (1859)

## 3.1 INTRODUCTION

Criminal justice system is a complex one. It is administered at all levels of government and influenced by many actors. The various strategies that have been predominantly adopted to combat crime and in preventing it often interlinks a web of complex and interconnected questions of moral considerations. Questions in the like of safeguarding privacy rights of those individuals whose biometric measurements has been obtained as well as in preserving their individual autonomy have often been raised. The fact that an individual shall have full protection in person and in property is a principle as old as the common law, but it has been found necessary from time to time to define anew the exact nature and extent of such protection[44].

The larger picture therefore is to trace out the extent to which the state can be permitted to extend the collective responsibility of individuals to put up with the idea of relinquishing their individual rights for the greater good. The greater good here can be what has been envisioned by the makers of legislations and in this context, the Criminal Procedure (Identification) Act of 2022. Therefore, to fully capitalize on the benefits biometric technology reaps, it is of utmost importance that an approach which focuses on integrity of both technology and in actual practice be charted out by setting clear standards and with no compromise. The fact that there are many possible methods and technical variations when using biometric technologies is relevant for law only when it proves that some of these methods intrude on fundamental rights, such as the right of

[44] Louis D. Brandeis & Samuel D. Warren Jr., *The Right to Privacy*, 4 HARVARD LAW REVIEW, 193, 193 (1890).

physical integrity and the right of privacy[45]. Significant technological advancements have greatly expanded the capacity to anticipate, address, and recover from crises surpassing the capabilities that could have been feasibly envisioned in the past times. This forms the core argument behind the enactment of the Act of 2022.

In the preceding chapter, the vital differences brought about by the new legislation have been enumerated. This chapter will focus on how the different provisions of the Act infringe and violate the principles and provisions of privacy and proportionality amidst other concerns.

## 3.2 SCRUTINIZING THE CRIMINAL PROCEDURE (IDENTIFICATION) ACT, 2022 – AN EFFORT PLAGUED WITH FALSE STARTS

The following areas have been demarcated for critically analysing the various issues with the legislation:

### 3.2.1 ISSUES PERTAINING TO 'MEASUREMENTS'

1. ON DATA COLLECTION

i. Inconsistencies in the manner in which data would be collected.

As described in the previous chapter, Section 3 of the Act talks of the instances which warrants the taking of the measurements:

*Any person, who has been, -*

*(a) convicted of an offence punishable under any law for the time being in force; or*

*(b) ordered to give security for his good behaviour or maintaining peace under section 117 of the Code of Criminal Procedure, 1973 for a proceeding under section 107 or section 108 or section 109 or section 110 of the said Code; or*

*(c) arrested in connection with an offence punishable under any law for the time being in force or detained under any preventive detention law,*

*shall, if so required, allow his measurement to be taken by a police officer or a prison officer in such manner as may be prescribed by the Central Government or the State Government:*

[45] Paul de Hert, *Biometrics: Legal Issues and Implications*, 4, 7 (2005).

*Provided that any person arrested for an offence committed under any law for the time being in force (except for an offence committed against a woman or a child or for any offence punishable with imprisonment for a period not less than seven years) may not be obliged to allow taking of his biological samples under the provisions of this section.*

If one were to adhere to a textual interpretation, the test that has been applied in order to identify whether a statutory provision is a mandatory or a directory one is with reference to the words 'SHALL' or 'MAY'. If the word 'SHALL' has been used, it is a mandatory requirement and therefore, a strict observance should be maintained. It is merely a directory requirement if the word 'MAY' has been used and a significant compliance would suffice. The use of word 'shall' raises a presumption that the particular provision is imperative[46]. A strict compliance of the test would render the meaning that the authority empowered to take the measurements would have to mandatorily comply with the taking of measurements owing to the usage of the word 'shall'. Going back to the provision, the police officer or the prison officer is at a wide discretion to take measurements from the class of persons mentioned under the Section. Additionally, the words 'if so required' puts an additional power upon the prison officer, the police officer as well as the other authorities added under the Rules to use their subjective satisfaction to either take the measurements or not.

Moving to the proviso, which states "Provided that any person arrested for an offence committed under any law for the time being in force (except for an offence committed against a woman or a child or for any offence punishable with imprisonment for a period not less than seven years) *may not be obliged* to allow taking of his biological samples under the provisions of this section. The phrase 'may not be obliged' itself throws open to many interpretations[47]. The proviso makes it vague to the extent that it does not specify to whom the obligation is directed at[48]. Is it at the prison officer/police

[46] JUSTICE G P SINGH, PRINCIPLES OF STATUTORY INTERPRETATION 317 (15th ed. 2022).

[47] During the discussion of the Bill in Lok Sabha, Bhartruhari Mahtab, the Lok Sabha MP from Cuttack had described the problem associated with 'may not be obliged' as: "On surface, it offers a choice to a person to refuse. However, the words 'may not be obliged' may also be read to offer discretion to a police officer to confer such a choice. This choice may not be truly voluntary when there is absence of accountability in our police practices."

[48] Another MP, Manish Tiwari from Anandpur Sahib had also remarked that if the legislature wanted to put in a positive stopper, it should have been made clear. Instead of inserting the words 'may not be obliged', the phrase could have been worded as "shall not be obliged to give samples" or "you shall not give samples".

officer/the additional authorities who are not under an obligation to take the biological samples or is it with reference to the persons who can outrightly refuse the taking of such sample which would then result in a resistance under clause 2 of Section 6 of the Act thereby attracting criminal liability under Section 186 of the Indian Penal Code, 1860.

Besides, there exists an inconsistency on a reading of the proviso to Section 3 and Section 5 of the Act. The proviso to Section 3 clearly states that a person who has been arrested for an offense may not be obliged in taking of their biological samples except in the following circumstances:

1. Where the offence has been committed against a woman or a child, or
2. Where the offence is punishable with imprisonment for a period of not less than seven years.

However, Section 5 grants power to the Magistrate to make an order directing any person to allow the measurements to be taken in conformity with such directions. The implication is that the Magistrate can order any person to provide their measurements regardless of whether or not they fall under the exceptions in the proviso to Section 3.

Another implication would be that such an order from the Magistrate would be directed at a person who has not been even arrested in connection with the concerned investigation or proceeding. It shall be noted that such a safeguard was provided in the Act of 1920 by virtue of the second proviso to Section 5 which states that – '*Provided further that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding'*. In the new legislation, this safeguard has been removed. The discretion thus granted to the Magistrate is very wide since the person to whom the order of measurements is directed at in order to be taken need not even be arrested for the same. A combined reading of Section 3 and its proviso along with Section 5 would further imply that every individual would be required to allow taking of their measurements irrespective of that person falling under the categories mentioned in clause a, b and c of Section 3 and the exceptions under the proviso. Therefore, with respect to the obligation to provide measurements for individuals under certain circumstances is concerned, there arises an inconsistency in the application of the legislation.

b. <u>ADDRESSING VAGUENESS IN THE TERM 'MEASUREMENTS</u>'

In addition to finger-impressions, foot-print impressions and photographs as authorised under the old Act, the new Act empowers the collection of palm-print impressions, 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. Under Section 53 of the Code of Criminal Procedure, 1973, the term 'examination' includes the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case. The section authorises an examination of an arrested person by a registered medical practitioner at the request of a police officer, if from the nature of the alleged offence or from the circumstances under which it was alleged to have been committed, there is reasonable ground for believing that such an examination will afford evidence[49].

The term 'measurements' has been broadened to encompass almost every type of biometric data to bring under its purview. The terms that are used under the definition of 'measurements' such as 'analysis of biological samples' and 'behavioral attributes' do not have a defined boundary. The aspect of whether it would include voice samples has also not been specified, either under the Act or in the Rules. Similarly, narco-analysis, polygraph testing and brain mapping are all examples of procedures that may be included in a broad reading of the term 'behavioural attributes'. The justification for this argument can be attributed to ***Selvi v. State of Karnataka***[50] wherein it was categorically stated that no individual should be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise and by doing so, it would amount to an unwarranted intrusion into personal liberty[51]. While the Act stipulates that an arrested individual has the right to refuse the collection of biological samples, not all arrested persons may be aware of their right to not oblige in giving samples. Due to the broad sweeping powers given to the

[49] 1 S C SARKAR, LAW OF CRIMINAL PROCEDURE (9th ed. 2010).
[50] Selvi v. State of Karnataka, AIR 2010 SC 1974.
[51] It shall be noted that the Apex Court had also held that the voluntary administration of the impugned techniques in the context of criminal justice can take place provided that certain safeguards are in place. Even when the subject has given consent to undergo any of these tests, the test results by themselves cannot be admitted as evidence because the subject does not exercise conscious control over the responses during the administration of the test.

investigating officers, they can ignore such a request and take such samples. Again, the vagueness of the terms throws open to interpretation of the inclusion of such identification techniques that may be of a testimonial nature taken by way of a compelled psychiatric evaluation. Such evaluation, when it leads to any incriminating admission, would constitute a 'testimonial compulsion'. This coercive provision therefore transgresses the right against self-incrimination mandated under Article 20(3) of the Constitution.

The implication thus leaves it open to a wide variety of identification techniques that may be adopted due to the inclusive definition under the Section. As such, it can be criticised and termed as a loosely defined set of individual data points. So, the concern stems from the fact as to what has been excluded since the inclusion itself is so broad that it cannot be ascertained as to what has been left behind.

The word that is used to denote the biometric measurements in Section 3 of the Act is 'includes'. The Legislature often defines a particular expression by using the word 'means' or 'includes'[52]. And at times, both words, 'means and includes' are used. It has been held that the word 'includes' would result in giving a wider meaning to the words or phrases in the Statute and such a word is usually used in the interpretation clause in order to enlarge the meaning of the words in the statute[53]. Therefore, when "includes" is used, it should be understood to encompass not only such things as they signify according to their nature and impact but also those things which the interpretation clause declares they shall include[54]. Putting this test into the legislation in hand, by deliberately using the word 'includes', an expansion of the meaning of the 'measurements' may be implied so as to encompass other additional techniques of

[52] P. Kasilingam and Ors v. P.S.G. College of Technology and Ors, 1995 Supp (2) SCC 348.

[53] Commercial Taxation Officer, Udaipur v. M/s Rajasthan Taxchem Ltd, 2007 (3) SCC 124.

[54] In *Bharat Co-Operative Bank (Mumbai) Ltd. vs. Co-Operative Bank Employees Union* (2007) 4 SCC 685, it was stated that when the word "includes" is used in the definition, the intention of the legislature is not to restrict the definition, but instead to make the definition enumerative but not exhaustive. In other words, the Court meant that such a term defined would retain its ordinary meaning but its scope would be extended to bring within it matters, which in its ordinary meaning may or may not comprise. Again, in *Satish Chander Ahuja Vs. Sneha Ahuja* AIRONLINE 2020 SC 784, it was termed that by resorting to the word "includes", the intention of the legislature is that it wants to give an extensive and enlarged meaning to the expression. Further, in *Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and Ors.* 1987 (1) SCC 424, the Apex Court remarked that legislatures resort to inclusive definitions for the following purposes - to include meanings about which there might be some dispute, or to bring under one nomenclature all transactions possessing certain similar features but going under different names.

identification that may be employed which could have normally not been able to be included under the clause. The terms such as 'behavioural attributes', 'biological samples and their analysis' have nowhere been defined, either in the Act or in the Rules. For example, 'behavioural attributes' as measurements may be coercively taken from a person by making use of a compelled psychiatric evaluation. Such evaluation, when it leads to any incriminating admission, would constitute a 'testimonial compulsion'. An expansive interpretation of 'behavioural attributes' could even potentially be understood to include narco-analysis, polygraph tests, or brain mapping, which were prohibited expressly by the Supreme Court's ruling in ***Selvi v. State of Karnataka***.[55] By failing to concisely define what 'analysis' means, the Act opens up a pandora's box and opens up a lot of possibilities.

With respect to the measurements that can be taken, there is no distinction that has been made between the categories of accused persons based on the nature of offences committed by them. A person who is accused of a petty offence is treated at the same level with that of a person accused of a grave one. As such, there exists no distinction between persons who commit petty offences with those who have committed a more heinous one. The executive branch needs to apply the Doctrine of Parity to differentiate between the minor and grave offences, as in its present form there is no distinction in the way of collecting samples from different classes of offenders[56]. Otherwise, the law would be subject to the whims and fancies of investigating officers[57].

2. <u>ON DATA USAGE</u>

Presently, society has become increasingly reliant on data and has become a data-driven one. The extensive biometric data that has been dubbed as 'measurements' under the Act will be collected, stored, preserved, shared, disseminated, destructed and disposed of by and under the authority of the National Crime Records Bureau. In order to check whether the biometric measurements collected under the Act conforms to data protection policies, the 2022 legislation will be compared with the principles

[55] *An Analysis of the Criminal Procedure Act, 2022*, Project 39A National Law University, Delhi (2022).
[56] Ayush Raj*, India's Criminal Identification Act: A Human Rights Critique,* OXFORD POLITICAL REVIEW, Sept. 30, 2022, https://oxfordpoliticalreview.com/2022/09/30/indias-criminal-identification-act-a-human-rights-critique/ , (last visited on June 12, 2024).
[57] *Ibid.*

enumerated under the General Data Protection Regulation (GDPR) and under India's own data protection legislation – The Digital Personal Data Protection Act, 2023.

The Digital Personal Data Protection Act, 2023

On August 11, 2023, India had enacted its first ever comprehensive data protection legislation titled the Digital Personal Data Protection Act, 2023[58]. The DPDP Act follows broadly similar principles as those set out in the GDPR and specifies rules for data fiduciaries (equivalent to 'controllers' under the GDPR) and data processors, and rights for data principals (equivalent to 'data subjects' under the GDPR)[59].

The term "data" means a representation of information, facts, concepts, opinions or instructions in a manner suitable for communication, interpretation or processing by human beings or by automated means[60]. The Act defines 'personal data' to mean any data about an individual who is identifiable by or in relation to such data[61].

Article 5 of GDPR is synonymous with Section 4 of the DPDP Act which lays down the following grounds for processing of personal data:

1. For a lawful purpose
2. For which the Data Principal has given her consent.
3. For certain legitimate uses

The Criminal Procedure (Identification) Act, 2022 shall be tested as to whether it complies with the principles enshrined under the DPDP Act with respect to the wide collection of data taken under it. Besides, the Act will also be tested upon two principles of the GDPR – purpose limitation and storage limitation (which shall be dealt with under data retention). The relevance and reliance on GDPR for examining an Indian

[58] Hereinafter referred to as the DPDP Act.
[59] Gail Crawford, Fiona Maclean, Danielle van der Merwe, Kate Burrell, Bianca H. Lee, Alex Park, Irina Vasile, and Amy S Myth, *India's Digital Personal Data Protection Act 2023 vs. the GDPR: A Comparison,* Dec. 13, 2023 https://www.globalprivacyblog.com/2023/12/indias-digital-personal-data-protection-act-2023-vs-the-gdpr-a-comparison/ (last visited on May 18, 2024)
[60] The Digital Personal Data Protection Act, 2023 §2(h), No. 22, Acts of Parliament, 2023 (India).
[61] *Id.* §2(t).

legislation can be drawn on the basis of the judgement in ***K.S. Puttaswamy v. Union of India***[62].[63]

a. Incompatible with the concept of Purpose Limitation/Lawful Purpose

The term 'lawful purpose' under the DPDP Act is synonymous with the purpose limitation test laid down under the GDPR. In the DPDP Act, the term 'lawful purpose' has been defined in the DPDP Act to mean any purpose which is not expressly forbidden by law. Additionally, the concept of Purpose Limitation under the GDPR serves a two-fold purpose – it safeguards the rights of the data subjects by placing certain restrictions on how data controllers can utilize their data and by simultaneously offering a degree of flexibility to the data controllers. The concept of purpose limitation has two main building blocks:

i. Personal data must be collected for 'specified, explicit and legitimate' purposes, termed as purpose specification.
ii. Such personal data collected must not be 'further processed in a way incompatible' with those purposes. It should be that of a compatible use.

In India, the Digital Personal Data Protection Act explicitly mentions the above-referred building blocks in its long title - An Act to provide for the processing of digital personal data in a manner that recognises both the right of individuals to protect their personal data and the need to process such personal data for lawful purposes and for matters connected therewith or incidental thereto.

By applying the principles into the Act, it shall be noted that for processing the personal data of an individual, the purpose enshrined under the CPIA is stated in the Preamble of the Act - for the purposes of identification and investigation in criminal matters. Howsoever, this may be a legitimate purpose, it loses its explicitness when such purpose gets broadened under Section 4 of the Act. Under Section 4, data collected shall be for 'prevention, detection, investigation and prosecution'. For example, if a law enforcement agency is investigating a suspected criminal activity, then by virtue of Section 4 of the Act, they can argue that it is permissible for them to invade physical and digital spaces. For example, if they need to access an individual's smartphone

[62] K.S. Puttaswamy v. Union of India, 2019 (1) SCC 1. (hereinafter 'Puttaswamy').
[63] Aaryan Mithal & Abhinav Gupta, *Scrutinising the Criminal Procedure (Identification) Act, 2022 and Its Conformity with Privacy Principles*, 15 NUJS L. REV. [i] (2022).

which may be protected by a fingerprint or by an iris or a retina scan, the agency could potentially override these protections to gather evidence. This raises questions about the individual's right to privacy and whether such access is justified without a clear legal framework.[64]

3. ON DATA RETENTION

i. Inadequacy of the Act in adhering to the principle of Storage Limitation.

Section 4 of the Act provides that the National Crimes Record Bureau shall collect the record of such measurements from State Government or Union Territory. They can also store, preserve and destroy such records as well as process, share and disseminate with any law enforcement agency. Under the Act, the record of measurements shall be retained in digital or electronic form for a period of seventy-five years from the date of collection of such measurement[65].

A key point for consideration would be whether retention of personal data in police becomes a cause for concern or is there rather cause to be grateful for those police records when investigators of unsolved old cases, now more commonly known as 'cold cases', are able to solve them to the huge relief of victims' families? In the European Union, this question was answered by the Grand Chamber of the Court of Justice of the European Union on 30th January, 2024 in the case C-118/2022 - *NG v Direktor na Glavna direktsia 'Natsionalna politsia' pri Ministerstvo na vatreshnite raboti – Sofia(Director of the 'National Police' Directorate-General at the Bulgarian Ministry of the Interior)*. The case concerned the latter's refusal of NG's request based on his legal rehabilitation after having been convicted by final judgment to be removed from the national records in which the Bulgarian police authorities register persons prosecuted for an intentional criminal offence subject to public prosecution('the police records') [66]. In other words, it was to be decided whether it was a matter of concern that personal data that are retained in police records which would label the individual with the status of permanently dangerous social deviant for their entire lifetime?

[64] *Id.* at 6.
[65] *supra* note 34, §4(2).
[66] InfoCuria Case-law, https://curia.europa.eu/juris/document/document.jsf;jsessionid=DEC3D1757D86F30F7B24F85E4AF74FF9?text=&docid=274651&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=21748532.

In the course of a criminal investigation for failing to tell the truth as a witness, which is a criminal offence under Article 290(1) of the Criminal Code, an entry in the police records was made in respect of NG, in accordance with Article 68 of the Law on the Ministry of the Interior. Following that investigation, NG was charged with a criminal offence and he was found guilty of that offence and given a one year suspended sentence. After serving that sentence, NG was legally rehabilitated under Article 82(1) and Article 88a of the Criminal Code. On the basis of the legal rehabilitation, NG applied to the relevant district authority of the Ministry of the Interior for the erasure of the entry concerning him in the police records. However, his application was refused by DGPN on the ground that a final criminal conviction, even in the event of legal rehabilitation, is not one of the grounds for erasure of an entry in the police records, which are exhaustively listed in Article 68(6) of the Law on the Ministry of the Interior. By a decision of February 2nd 2021, the Administrativen sad Sofia grad (Administrative Court of the City of Sofia, Bulgaria) dismissed the action brought by NG against that decision of the DGPN on grounds similar to those given by the DGPN. NG preferred an appeal before the referring court, the Varhoven administrativen sad (Supreme Administrative Court of Bulgaria). The main ground of NG's appeal alleged a breach of the principles that could be inferred from Articles 5, 13 and 14 of Directive 2016/680 and that the processing of personal data resulting from their storage cannot be carried on indefinitely. According to NG, the main issue was that there is no provision for removing personal data from police records even after legal rehabilitation. As a result, individuals cannot have their personal data erased even after they have served their sentence and been legally rehabilitated for the criminal offense they were convicted of.

The Supreme Administrative Court of Bulgaria decided the following:

1. An entry in police records would constitute the processing of personal data with respect to the purposes set out in Article 1(1) of Directive 2016/680 and therefore falls within the scope of that directive.
2. Legal rehabilitation cannot be considered as one of the grounds for removal from the police records that has been listed exhaustively in Article 68(6) of the Law on the Ministry of the Interior. Therefore, the result is that it is impossible for the data subject to have his entry erased from those police records in such a case.

3. The referring court notes that recital 26 of Directive 2016/680 refers to safeguards so that the data collected are not excessive or stored for longer than is necessary for the purposes for which they are processed and states that the data controller must set time limits for erasure or periodic review. In addition, it infers from recital 34 of that directive that processing for the purposes set out in Article 1(1) thereof should involve the restriction, erasure or destruction of those data. In its view, those principles are reflected in Article 5 and Article 13(2) and (3) of that directive.

However, the referring court was doubtful as to whether the objectives would include within it national legislation to be a 'virtually unlimited right' to data processing for the purposes set out in Article 1(1) of Directive 2016/680 and, for the data subject, to the loss of his or her right to the restriction of processing or erasure of his or her data.

For the above reason, the referring Court decided to stay the proceedings and referred the following question to the Court of Justice - *Does the interpretation of Article 5 in conjunction with Article 13(2)(b) and (3) of [Directive 2016/680], permit national legislative measures which lead to a virtually unrestricted right of competent authorities to process personal data for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and/or to the elimination of the data subject's right to have the processing of his or her data restricted or to have them erased or destroyed?*

The Court of Justice of the European Union held that the interpretation of Article 4(1)(c) and 4(1)(e) of Directive (EU) 2016/680 of the European Parliament should be in a manner so as to preclude national legislation that provides for the storage, by police authorities, for the purposes of prevention, investigation, detection, or prosecution of criminal offenses or the execution of criminal penalties, of personal data, including biometric and genetic data, concerning persons who have been convicted of a criminal offense, until the death of the data subject. Additionally, factors like the nature and seriousness of the offence committed would not necessarily provide a rational basis for justifying the storage of the data relating to such a person in police records under their death.

Another case that has been adjudged on the permissible extent of DNA Databases is ***S and Marper v. The United Kingdom***[67]. Before the ECHR, applications were filed by two British Nationals, Mr. S and Mr. Michael Harper against the United Kingdom of Great Britain and Northern Ireland under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The first applicant, who was arrested on January 19th, 2001 on charges of attempted robbery had his fingerprints and DNA samples taken but was later acquitted on June 14th, 2001. The second applicant was arrested on March 13th, 2001 on charges of harassing his partner. Even his fingerprints and DNA samples were taken. Both the parties reconciled when a pre-trial review had taken place and the charges were not pressed and the case was formally discontinued. Thereafter, both the applicants had asked for their fingerprints and DNA Samples to be destroyed. However, in both the cases, the police had refused. Following a judicial review of the police decisions, an Administrative Court of Lord Justice Rose and Justice Leveson rejected the application. Upholding the decision of the Administrative Court by a majority of 2:1, Lord Justice Waller remarked on the necessity of retaining DNA samples.

Coming back to the Act, the record of measurements shall be retained in digital or electronic form for a period of seventy-five years from the date of collection of such measurement. However, if the person has not been previously convicted of an offence or punishable under any law with imprisonment for any term or is released without trial, discharged or acquitted by the court, after exhausting all legal remedies then all such records of measurements be destroyed from records unless the court or Magistrate directs written reasons for retention. Destruction is only mentioned in the proviso to Section 4(2) indicating that the records of measurements must be retained for at least 75 years but the Act is silent on whether to destroy or retain the samples after the 75 year period. Further, the Act does not provide at all for destruction of samples taken from any persons under the Act, including from those who were arrested and subsequently acquitted. There is no provision for deletion of samples as well as records based on current personality of the person, likelihood of future criminality, severity of the offence, nature of the offence, time elapsed since the offence, etc[68].

[67] S and Marper v. The United Kingdom, [2008] ECHR 30562/04.
[68] Project 39A, *supra* note 55 at 32.

The General Data Protection Regulation

The GDPR[69], officially known as Regulation 2016/679 of the European Parliament and of the Council replaced several national laws in Europe with one unified regulation that defines basic rights in a digital society. It has become applicable since May 25, 2018 and has repealed the earlier Directive 95/46/EC[70] which contained no reference to the right of data protection. Since its enactment in 2016, GDPR has become a normative frame of reference for data protection, serving as an optimal tool to preserve the fundamental rights and freedoms of natural persons[71].

Article 4(1) defines the term 'personal data' to mean any information which is relating to an identified or an identifiable natural person who is termed as the data subject. Such a person is one who can be identified either directly or indirectly in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person. The term 'genetic data' means personal data relating to the inherited or acquired genetic characteristics of a natural person which give unique information about the physiology or the health of that natural person and which result, in particular, from an analysis of a biological sample from the natural person in question[72]. Biometric data means personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data[73].

Article 5 of the Regulation specifies certain principles to be complied with respect to the processing of personal data:

*(a) processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency')*

[69] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regards to the processing of personal data and on the free movement of such data. (hereinafter 'GDPR').
[70] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.
[71] Taner Kurua & Iñigo de Miguel Beriainb, *Your genetic data is my genetic data: Unveiling another enforcement issue of the GDPR*, 47 COMPUTER LAW & SECURITY REVIEW, 1, 2 (2022).
[72] GDPR *supra* note 69, Art 4(13).
[73] *Id.* Art. 4(14).

*(b) collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes ('purpose limitation');*

*(c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ('data minimisation');*

*(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay ('accuracy');*

*(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed; personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) subject to implementation of the appropriate technical and organisational measures required by this Regulation in order to safeguard the rights and freedoms of the data subject ('storage limitation');*

*(f) processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures ('integrity and confidentiality').*

In other words, the GDPR outlines six key principles relating to the processing of personal data in Article 5 - lawfulness, fairness and transparency, the purpose limitation test, data minimisation, accuracy, storage limitation and in maintaining integrity and confidentiality.

For the benefit of this research work, three principles of the GDPR - the purpose limitation test, storage limitation and accountability principle shall be applied since they highlight the concerns with respect to data protection and privacy. The purpose limitation principles and the storage limitation has been dealt with before. Moving on to the accountability principle, Article 5(2) of the GDPR states that the data controller is to be responsible for demonstrating compliance with the obligations of data

protection and the various principles of the same[74]. The Act conspicuously lacks a cogent framework governing the utilization, analysis, and safeguarding of this data[75]. Furthermore, the potential for the misappropriation or undue exploitation of such data engenders legitimate concerns pertaining to individuals' privacy and the prospective vulnerability to erroneous victimization[76]. In other words, the lack of any substantive provisions for protection hence itself provides that there will be minimal scope of incorporating any form of accountability[77]. Again, though the Act provides that the State Government and Union Territory Administration may notify an appropriate agency to collect, preserve and share the measurements in their respective jurisdictions, no guidelines of accountability and collection of data have been provided with respect to these bodies as well[78]. Their manner of functioning ought to be regulated or prescribed so as to ensure that these bodies similar to the NCRB uphold the right to privacy and data protection[79].

3.2.2 OTHER CONCERNS

a. THE STATUTE IS VIOLATIVE OF INFORMATIONAL PRIVACY READ INTO THE FUNDAMENTAL RIGHT TO PRIVACY GUARANTEED UNDER ARTICLE 21 OF THE CONSTITUTION OF INDIA.

Privacy signifies the right to control the dissemination of personal information. Laws related to privacy have always had to seek a balance between competing interests – individual interest and legitimate concerns of the state on the other side. Informational privacy is a facet of the right to privacy[80].

Any infringement on the right to privacy may be tested on the tests formulated by the Supreme Court of India in ***Justice K S Puttaswamy (Retd.) and Anr. v. Union Of India and Ors***[81]. In the context of Article 21, an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable[82]. An

[74] GDPR *supra* note 69, Art. 5(2).
[75] NATIONAL HUMAN RIGHTS COMMISSION INDIA, FORENSIC SCIENCE AND HUMAN RIGHTS, 13 (Shri Bharat Lal, Secretary General on behalf of the National Human Rights Commission, 2023) (hereinafter 'NHRC').
[76] *Id.* at 14.
[77] Mithal and Gupta, *supra* note 62 at 12.
[78] *Ibid.*
[79] *Ibid.*
[80] Puttaswamy, *supra* note 62 at 264.
[81] *Ibid.*
[82] *Ibid.*

invasion of life or personal liberty must meet the three-fold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them[83]. The Act satisfies the first two ingredients- legality, since the Criminal Procedure Identification Act, 2022 is a validly enacted statute passed by the Parliament and object sought to be achieved by the statute which is the prevention and investigation of crime and protection of the revenue are among the legitimate aims of the state. Therefore, one has to dwell further on whether the Act satisfies the test of proportionality.

The practice of collecting and utilizing personal data is not a recent phenomenon. The question for deciding therefore, is whether the statute under the guise of protecting public interests, which here is "identification and investigation in criminal matters and to preserve records and for matters connected therewith and incidental thereto" satisfy the principles of proportionality. Across the world, the principle of proportionality has been resorted to in adjudicating matters in relation to limitations of fundamental rights. It is the legal doctrine of constitutional adjudication that states that all laws enacted by the legislature and all actions taken by any arm of the state, which impact a constitutional right, ought to go no further than is necessary to achieve the objective in view[84]. The question examined in the first stage is whether a statute infringes upon one of the rights protected by the Constitution. The examination performed in the second stage determines the compliance of the statute with four sub-components that comprise proportionality:

Limitation of a constitutional right will be constitutionally permissible if it is designed for a proper purpose, if the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose, if such measures are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation and the existence of a proper relation ('proportionality stricto sensu' or 'balancing') between achieving the proper purpose and the social importance of preventing the limitation on the constitutional right. [85]

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[83] *Ibid.*
[84] Julian J Robinson v. The Attorney General of Jamaica [2019] JMFC Full 04.
[85] Ariel L. Bendor, Tal Sela, How proportional is proportionality, International Journal of Constitutional Law, Volume 13, Issue 2, April 2015, Pages 530–544.

These four components render the notion of proportionality into a more concrete and and usable concept transforming what would have otherwise been seen as an abstract one. In order to pass constitutional muster, the limiting statute, which here is the CPIA, should uphold these four components.

However, restrictions of the right to privacy may also be justifiable in the following circumstances subject to the principle of proportionality - other fundamental rights[86], legitimate national security interest, public interest including scientific or historical research purposes or statistical purposes, criminal offences, i.e., the need of the competent authorities for prevention investigation, prosecution of criminal offences including safeguards against threat to public security. The fourth circumstance is what the CPIA envisages. Therefore, the right to privacy, a limitation or a restriction should also be proportional to the goal sought to be fulfilled by the concerned Act.

According to the mosaic theory, thousands of bits and pieces of apparently innocuous information which when properly assembled create a picture. The Mosaic Theory allows for the collection of small pieces of information that, on their own, may seem harmless but when combined can provide a complete picture of an individual's activities and personal life. The Act allows for the collection of a wide range of biometric data including fingerprints, palm prints, retina or iris scans, facial recognition data, etc. Though each type of biometric measurement when taken on its own might not be overly intrusive, when combined, it is possible that they would create a comprehensive and highly detailed biometric profile of an individual potentially violating the right to privacy. To put this into a scenario, we can take three statutes – the 2022 legislation, the the DNA Technology Bill, 2019[87] and the Passenger Name Record Information Regulations, 2022[88]. The 2022 Act has already been dealt with in detail earlier. The DNA Technology (Use and Application) Regulation Bill, 2019 facilitates the use of DNA profiling technology for collection and storage of DNA samples, which can be used to create detailed genetic profiles. The Passenger Regulations of 2022 deals with

[86] The right to privacy must be considered in relation to its function in society and be balanced against other fundamental rights.
[87] Though it has been withdrawn by the government stating that the provisions have been incorporated under the Criminal Procedure (Identification) Act, 2022, the option of the Parliament enacting a new Act cannot be left closed.
[88] The Passenger Name Record Information Regulations, 2022 provides for the collection of passenger information from airlines for risk analysis for the purpose of prevention, detection, investigation and prosecution of offences under the Act and the rules and regulations made there under.

the collection of passenger information from airlines for risk analysis for the purpose of prevention, detection, investigation and prosecution of offences under the Act and the rules and regulations made there under[89]. When you combine all of these statutes, it is enabling the collection of extensive biometric and personal data from various sources - physical and behavioral attributes during arrests through the 2022 Act, the DNA Technology Bill adds detailed genetic information, and the Passenger Regulations track travel patterns and personal data. Such a detailed composite can lead to significant privacy violations, as it provides the state with the ability to monitor and analyze individuals' lives in an unprecedented manner. This extensive data collection without stringent safeguards and clear boundaries represents a gross violation of the right to privacy guaranteed under the Constitution.

b. THE STATUTE IS IN INFRINGEMENT OF ARTICLE 14 OF THE CONSTITUTION

The manner of taking measurements under Section 3 and Section 5 shall be prescribed by Rules framed by the Central or State governments. The procedure and circumstances under which police or prison officers, as well as magistrates, may exercise their discretion to require the taking of measurements have not defined in Section 3 and 5. Measurements to be taken by police or prison officers have been used by the term 'if required'. This itself imposes a wide discretion since it is left to them to decide what 'requirement' may mean at different situations. Besides, the Rules are also silent of the manner of taking measurements thereby vesting the discretion with the said officers to be absolutely complete.

c. THE STATUTE IS VIOLATIVE OF THE RIGHT AGAINST SELF-INCRIMINATION UNDER ARTICLE 20(3) OF THE CONSTITUTION.

The right against self-incrimination is designed to prevent the use of law or the legal process to force from the lips of the accused the evidence necessary to convict him[90]. The doctrinal origins of the right against self-incrimination can be traced back to the Latin maxim `Nemo tenetur seipsum prodere' which translates to 'no one is bound to

[89] *The Passenger Name Record Information Regulations, 2022,* LEGALITY SIMPLIFIED, (Aug. 09, 2022), https://www.legalitysimplified.com/the-passenger-name-record-information-regulations-2022/#:~:text=The%20Central%20Board%20of%20Indirect,of%20offences%20under%20the%20Act (last visited on June 12, 2024).

[90] A S Dalal and Arunava Mukherjee. "CONSTITUTIONAL AND EVIDENTIARY VALIDITY OF NEW SCIENTIFIC TESTS." *Journal of the Indian Law Institute* 49, no. 4 (2007): 529–42.

accuse himself'[91]. The maxim finds its statutory place in Clause (3) of Article 20 of the Constitution of India which states that "no person accused of any offence shall be compelled to be a witness against himself." An analysis of this clause shows three things - firstly, its protection is available only to a "person accused of any offence". Secondly, the protection is against compulsion "to be a witness" and thirdly, this protection avails "against himself".[92]

As mentioned, the CPIA authorises the taking of measurements from convicts, arrested persons, detainees under the preventive detention laws as well as persons ordered to give security for good behaviour may be required to give their measurements.

For example, the term behavioural attributes is not defined under the Act. Suppose, an arrested person is being asked to provide his voice sample which may come under the purview of 'behavioural attributes' under the umbrella of 'measurements'. It is possible for a person to alter his voice at will.

Since the term 'biological samples and analysis' has also not been defined under the Act, tit raises the question of whether it would include DNA profiling within its purview. One of the most significant advancements in criminal investigation since the advent of fingerprint identification is the use of DNA technology in helping convicting criminals or eliminate persons as suspects[93]. By doing DNA analysis on saliva, skin tissue, blood, hair and semen can now be used to link criminals to convict for crimes[94]. Such use of a person's body without his consent to obtain information about him invades an area of privacy essential to the maintenance of his human dignity[95].

Under the aegis of the 2022 Act, the purview of permissible measurements now encompasses a wide array, spanning from finger and palm print impressions to footprint impressions, photographs, iris and retina scans, physical and biological specimens, and behavioral attributes, including signatures and handwriting[96]. While this broadened scope aligns harmoniously with the modernization of criminal investigation techniques,

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[91] Levy, Leonard W. "The Right Against Self-Incrimination: History and Judicial History." *Political Science Quarterly* 84, no. 1 (1969): 1–29.

[92] Balkishan A. Devidayal etc. v. State of Maharashtra, 1981 SCR (1) 175.
[93] Subhash Chandra Singh, *DNA PROFILING AND THE FORENSIC USE OF DNA EVIDENCE IN CRIMINAL PROCEEDINGS*, Vol. 53 No. 2, Journal of the Indian Law Institute, pp. 195–226(2011).
[94] *Ibid.*
[95] Her Majesty the Queen v. Brandon Roy Dyment, (1988), 89 N.R. 249 (SCC).
[96] NHRC, *supra* note 75 at 9.

it simultaneously engenders formidable challenges in the realm of data stewardship and security[97]. By concluding this chapter, one could understand the grave concerns surrounding the Act especially with respect to individual autonomy, on the aspect of privacy and the safe keeping of the records of such measurements. Such grave concerns must be looked up at the most strictest level of compliance by ensuring that there exists sufficient mechanisms for the same. The effective execution of this legislative development rests upon the establishment of centralized repositories, exacting data governance protocols, and exhaustive safeguards for data protection[98]. Policymakers are tasked with the intricate navigation of these hurdles, obligating them to exercise prescience in crafting a data management and sharing framework that seamlessly synchronizes with India's ever-evolving forensic knowledge landscape[99].

[97] *Ibid.*
[98] *Id.* at 10.
[99] *Ibid.*

# CHAPTER 4 - AN INTERNATIONAL OVERVIEW OF BIOMETRIC DATA OF PRISONERS

*Science gave us forensics. Law gave us crime.*

- Mokokoma Mokhonoana[100]

## 4.1 INTRODUCTION

In an increasingly globalized world, there arises a need to understand how other countries have adopted in their respective legislations, issues that strike a discourse between individual autonomy and state interests. One way of seeking to establish greater jurisprudential and doctrinal clarity would be to consider how other liberal democracies seek to balance the interest of individual citizens in being autonomous and self-defining with respect to matters of fundamental significance against the imperatives of the modern industrial state, including security, bureaucratic efficiency, and even other constitutional values like equality[101].

Carrying out a comparative legal analysis of other countries would in effect bring out in finding a common ground on issues of compelling interests, which in this case would be the use, retention, sharing and destruction of biometric data collected from prisoners/convicts and other categories of people. Quite simply, a nation who is concerned about its international reputation within the wider global sphere would enact its laws in conformity with data protection policies and upholding the autonomy of its citizens.

Through the lens of comparative law, this chapter will dwell deeper on the following jurisdictions – the United States of America, the United Kingdom and South Africa. The United States has a varied legal landscape with proactive data privacy laws and significant legal precedents and by conducting a comparative analysis with India's statute, the significant contrasts can be brought about. The UK's adoption of the GDPR into its data protection laws provides an example of a well-developed regulatory regime, which is something India can look up to in the evolution of its data protection

[100] *The Window of Forensic Science in Criminal Justice System,* LEGAL AID DNLU, Oct. 28, 2021, https://legalaiddnlu.wordpress.com/2021/10/28/3054/ [last visited, June 06, 2024).
[101] RONALD J. KROTOSZYNSKI Jr., PRIVACY REVISITED: A GLOBAL PERSPECTIVE ON THE RIGHT TO BE LEFT ALONE, xi, Oxford (2016).

and privacy laws. Both India and South Africa have been tainted with histories of colonialism which have profoundly shaped their freedom struggle and commitments to human rights and dignity. The country shall provide a relevant comparison for India, particularly in balancing modern technological advancements with privacy protections.

This chapter will provide an insight into the provisions of the above-mentioned jurisdictions simultaneously followed by a comparative study of these provisions with the Indian statute.

## 4.2 UNDERSTANDING IDENTIFICATION LEGISLATIONS ACROSS THE UNITED STATES, THE UNITED KINGDOM AND SOUTH AFRICA – AN INTERNATIONAL OVERVIEW

### 4.2.1 UNITED STATES OF AMERICA

The United States Code is the official codification by subject matter, of the general and permanent laws of the United States[102]. As mentioned numerous times in this research work, DNA testing has been increasingly becoming a powerful tool in the hands in law enforcement agencies in conducting criminal investigations. To that end, Title 18 U.S. Code - Sections 3600 and 3600A outlines the specific conditions under which the U.S. government must preserve and protect the biological evidence it gathers during a criminal investigation[103]. Where Section 3600 lays down the provisions relating to DNA testing, 3600A enumerates the provisions relating to the preservation of biological evidence.

Under the US Code, Section 3600 aims at ensuring fairness in criminal proceedings by devising a meticulate mechanism for defendants by enabling them to utilize DNA technology to either prove their innocence or to reduce their sentences after conviction. The specific section outlines certain grounds under which DNA testing may be requested, the procedure that should be followed, the process for such testing, outlines standards for the testing process to ensure reliability and accuracy. Besides, post-testing

[102] United States Code, GovInfo, https://www.govinfo.gov/app/collection/uscode/2022/, [last visited, June 09, 2024).
[103] Dmitry Gorin, *Rules for Preservation of Biological Evidence - Title 18 U.S. Code § 3600A,* (Sept. 04, 2023), https://www.thefederalcriminalattorneys.com/preserve-biological-evidence (last visited, June 09, 2024).

procedures are also and provides certain circumstances where DNA testing may not be required.

The following sub-headings deals in detail the provisions under the Section:

CONDITIONS FOR DNA TESTING

DNA testing of specific evidence shall be ordered by a court upon the written motion by an individual who has been sentenced to imprisonment or death upon being convicted for a federal offense upon certain conditions[104]:

The applicant asserts that he is actually innocent under penalty of perjury with respect to the federal offense for which they are sent to imprisonment or death[105].

Additionally, the applicant can claim his innocence of another federal or state offense if evidence of such an offense was admitted during a federal sentencing hearing and proving innocence of this offense would lead to a reduced sentence or a new sentencing hearing[106].

In the case of a state offense, the applicant must demonstrate that there is no adequate remedy under state law to permit DNA testing of the specified evidence related to the state offense. Furthermore, the applicant must have exhausted all remedies available under state law for requesting DNA testing of the specified evidence related to the state offense[107].

The specific evidence to be tested was not previously subjected to DNA testing, and the applicant did not knowingly fail to request DNA testing of that evidence in a prior motion for postconviction DNA testing[108].

If the evidence was previously subjected to DNA testing, the applicant is requesting DNA testing using a new method or technology that is substantially more probative than the prior DNA testing[109].

[104] 18 U.S.C. § 3600 (a) (2022).
[105] *Id.* §3600 (a) (1) (A).
[106] *Id.* §3600 (a) (1) (B) (i).
[107] *Id.* §3600 (a) (1) (A) (ii).
[108] *Id.* §3600 (a) (3) (A).
[109] *Id.*§3600 (a) (3) (B).

The specific evidence to be tested is in the possession of the government and has been maintained under a chain of custody[110]. It must have been retained under conditions sufficient to ensure that the evidence has not been substituted, contaminated, tampered with, replaced, or altered in any way that is material to the proposed DNA testing[111].

The proposed DNA testing is reasonable in scope, uses scientifically sound methods, and is consistent with accepted forensic practices[112].

The court shall order DNA testing if the applicant identifies a theory of defense which is not inconsistent with an affirmative defense presented at trial. Additionally, this theory would establish the actual innocence of the applicant for the federal or state offense[113].

If the applicant was convicted following a trial, the identity of the perpetrator was at issue in the trial[114].

The proposed DNA testing of the specific evidence may produce new material evidence that would support the theory of defense referenced earlier and raise a reasonable probability that the applicant did not commit the offense[115].

Where such a motion has been filed, the court shall issue a notice to the government and allow them to respond to such a motion and further direct to prepare an inventory and issue a copy of such inventory to the court, the applicant and the Government[116]. Further, the Court shall also issue a 'preservation order' to direct the Government to preserve the specific evidence. Where the applicant is an indigent, the court may also appoint a counsel on their behalf[117].

Therefore, upon the satisfaction of the above-mentioned conditions, DNA testing may be complied with.

PROCEDURE FOR DNA TESTING[118]

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[110] *Id.* §3600 (a) (4).
[111] *Id.* §3600 (a) (4).
[112] *Id.* §3600 (a) (5).
[113] *Id.* §3600 (a) (6).
[114] *Id.* §3600 (a) (7).
[115] *Id.* §3600 (a) (8).
[116] *Id.* §3600 (b) (1).
[117] *Id.* §3600 (b) (2).
[118] *Id.* §3600 (c).

Procedural guidelines have also been stated as to when DNA testing may be directed including the requirements for the motion and the evidence needed to support it.

The court shall direct that such DNA testing ordered shall be carried out by the FBI. However, the court may order DNA testing by another qualified laboratory if it ensures the integrity of the specific evidence and the reliability of the testing process and results. The costs of such DNA Testing shall be paid either by the applicant or in case of an indigent applicant, it shall be paid by the government. The costs of any DNA testing ordered under this section shall be paid by the applicant. If the applicant is indigent, the costs shall be covered by the government.

TIME PERIOD FOR DNA TESTING[119]

Where the applicant is sentenced to death, any DNA testing ordered shall be completed not later than 60 days after the date on which the Government responds to the motion and not later than 120 days after the date on which the DNA testing ordered is completed, the court shall order any post-testing procedures.

RESULTS OF DNA TESTING[120]

Generally, the DNA testing results shall be disclosed simultaneously, to the court, the applicant and to the Government. However, if the DNA profile obtained through testing that excludes the applicant as the source and meets the Federal Bureau of Investigation's criteria for uploading crime scene profiles to NDIS, the court shall direct the law enforcement entity, which has access to NDIS, to submit the DNA profile derived from relevant biological evidence from the crime scene. This submission is to ascertain whether the DNA profile matches a known individual's profile or a profile from an unsolved crime. Such results shall be simultaneously disclosed to the court, the applicant and to the Government.

RETENTION OF DNA SAMPLES[121]

[119] *Id.* §3600 (d).
[120] *Id.* §3600 (e) (1).
[121] *Id.* §3600 (e) (3).

The government is required to submit any test results concerning the applicant's DNA to NDIS.

If the DNA test results obtained under this section are inconclusive or indicate that the applicant was the source of the DNA evidence, the applicant's DNA sample may be entered into NDIS.

If the DNA test results obtained under this section exclude the applicant as the source of the DNA evidence, and a comparison of the applicant's DNA sample matches with DNA evidence from another offense, the Attorney General must notify the appropriate agency and preserve the applicant's DNA sample.

If the DNA test results obtained under this section exclude the applicant as the source of the DNA evidence, and a comparison of the applicant's DNA sample does not match DNA evidence from another offense, the Attorney General shall destroy the applicant's DNA sample. This action must ensure that such information is not retained in NDIS unless there is other legal authority to retain it.

POST-TESTING PROCEDURES[122]

a. RESULTS - INCONCLUSIVE AND INCULPATORY.

Where the DNA test results obtained are inconclusive, the court may either order further testing or may deny the applicant relief. If the results prove that the applicant was the source of the DNA evidence, the court shall deny the applicant relief. Subsequently, where the government has preferred a motion, the court shall determine as to whether the applicant's assertion of actual innocence was false and if proved, the applicant may be held guilty of contempt of court. The court may also require the applicant to pay for the expenses associated with the DNA testing conducted.

The court shall also forward the finding to the Director of the Bureau of Prisons who may be permitted to do the necessary. If the DNA test results relate to a State offense, it shall be forwarded to any appropriate State official.

b. RESULTS PROVIDING MOTION FOR NEW TRIAL OR RESENTENCING[123]

[122] *Id.* §3600 (f) (1).
[123] *Id.* §3600 (f) (2).

Where the results of the DNA testing prove that the applicant is not the source of the DNA evidence, the applicant may file a motion for a new trial or for resentencing. The court shall establish a reasonable schedule for the applicant to file such a motion and for the Government to respond to the motion.

PRESERVATION OF BIOLOGICAL EVIDENCE[124]

Section 3600A outlines the specific rules under which the U.S. government must preserve and protect the biological evidence it gathers during a criminal investigation[125].

The term biological evidence has been defined to mean the following:

i. A sexual assault forensic examination kit,
ii. Semen, blood, saliva, hair, skin tissue, or other identified biological material.

The primary purpose is to ensure that biological evidence — such as blood, hair, skin cells, or other bodily materials — is preserved accurately and effectively[126].

The general rule is that the government is required to preserve biological evidence that has been secured gathered during the investigation or prosecution of a federal offense committed by a defendant who is undergoing imprisonment. In other words, the federal government is legally obligated to preserve biological evidence collected in the investigation or prosecution of a crime if the defendant has been sentenced to prison[127].

However, there exists specific conditions under which the government is permitted to destroy or get rid of biological evidence. These include the following:

a) After the defendant has exhausted *"all opportunities for direct review of the conviction."* In such cases, the defendant must be given advance notice and have 180 days to file a motion to prevent the destruction of the evidence[128].
b) If the evidence must be returned to its rightful owner or cannot practically be preserved due to its *"size, bulk, or physical character."* In such cases, the

[124] 18 U.S.C. § 3600A: Preservation of biological evidence (2022).
[125] *supra* note 103.
[126] *Ibid.*
[127] *Ibid.*
[128] *supra* note 124, §3600A (c) (1).

government must take reasonable measures to preserve some of the biological evidence for future testing[129]. (Section 3600A(c)(2)(A)).

c) If the biological evidence in question has already been tested according to legal regulations and clearly defines the defendant as a source of the evidence (Section 3600A(c)(3)).

CRIMINAL LIABILITY

If a person has knowingly and intentionally destroyed, altered or tampered with biological evidence with the intention of preventing such evidence from being subjected to DNA testing or in preventing its production or use in an official proceeding, they shall be liable to pay fine or face an imprisonment of not more than 5 years or both.

For example, if the evidence would exonerate you as a defendant and a prosecution team member deliberately corrupt the evidence, they could be charged with a crime. Likewise, if you tamper with your biological evidence to keep DNA testing from identifying you, you could be charged with a crime. [130]

4.2.2 A COMPARISON WITH INDIAN LAW

After an extensive research into the provisions governing DNA testing and the preservation of biological evidence in the USA, one can understand that there is in place a mechanism even for those individuals who are convicted to seek DNA testing, thereby ensuring justice is served even post-conviction. A comparative analysis of US federal legislation with India's position with respect to DNA testing leads to the 'DNA Technology (Use and Application) Regulation Bill, 2019'. The Bill was intended for expanding the application of DNA based forensic technologies to support and strengthen the justice delivery system of the country. It had originally consisted of nine chapters which had provided for DNA Regulatory Board, Accreditation of DNA Laboratories, Obligations of DNA Laboratory, DNA Data Bank, etc. The Bill also included one Schedule which contained a list of matters for DNA testing.

First, it sought to set up a DNA profiling board as the regulatory body, one of the functions of which would be to provide accreditation to laboratories authorised to carry out DNA sample tests. The Bill also provided for the creation of databases — DNA

[129] *supra* note 124, § 3600A (c)(2)(A).
[130] *supra* note 125.

Data Banks — for storing of DNA information collected from convicts and accused. This database could be indexed and searched for matching samples from crime scenes. And third, it sought to facilitate collection of DNA samples from the convicts and accused.[131]

The Bill was initially introduced in the Lok Sabha in July 2019 and was referred to the Department-related Parliamentary Standing Committee on Science and Technology. In February 2021, the committee had submitted its report recommending several changes in the draft. But instead of introducing a fresh Bill with changes, the government decided to withdraw it altogether thereby ending a 20-year effort to build a new regulatory framework for the use of DNA fingerprinting technology in the criminal justice system. A possible reason that has been cited is that the main provisions of the Bill have already been enacted as part of the Criminal Procedure (Identification) Act, 2022.

However, one fails to understand as to how DNA testing has been made explicit in the new Act since there exists no explicit mention of DNA in the 2022 legislation. The closest resemblance is that of 'biological samples and their analysis'. Additionally, due to the vagueness as to what the term 'analysis' is directed at, it throws open to the interpretation as to whether it would include DNA testing, the reason cited by the Government for withdrawing the earlier DNA Bill.

4.2.3 UNITED KINGDOM

The United Kingdom consists of Great Britain (England, Scotland and Wales) and Northern Ireland. Certain provisions of state specific enacted legislations have their territorial application to specific constituent countries. This chapter tries an attempt at an inclusion of all such legislations pertaining to biometric retention of convicts and other categories of people.

1. England and Wales

a. The Police and Criminal Evidence Act, 1984[132]

[131] Amitabh Sinha, *DNA technology Bill: features, debate, and why it was withdrawn,* THE INDIAN EXPRESS, https://indianexpress.com/article/explained/what-is-the-dna-bill-8857810/, (last visited on June 08, 2024).

[132] Hereinafter referred to as the PACE Act.

The PACE Act mainly extends to England and Wales[133] with certain provisions applicable to other countries in the United Kingdom (Scotland and Northern Ireland). The Act was the result of the Report in 1981 of the Royal Commission on Criminal Procedure chaired by Sir Cyril Philips[134]. The Act makes further provision in relation to the powers and duties of the police, persons in police detention, criminal evidence, police discipline and complaints against the police; to provide for arrangements for obtaining the views of the community on policing and for a rank of deputy chief constable; to amend the law relating to the Police Federations and Police Forces and Police Cadets in Scotland and for connected purposes[135].

Part V of the PACE Act titled 'Questioning and Treatment of Persons by Police' containing Sections 53-65B envisages certain biometric measurements such as fingerprints, impressions of footwear, photographs, intimate and non-intimate samples, X-rays and ultrasound scans that may be taken, either with or without appropriate consent and under various other circumstances.

A. Fingerprinting[136]

The general rule is that fingerprints of a person shall not be taken without appropriate consent[137]. Under the Act, fingerprints can be taken under the grounds laid down below and upon the fulfilment of conditions of consent:

a. Fingerprints of persons who are detained at a police station shall be taken without the appropriate consent if:
    i. They are detained in consequence of their arrest for a recordable offence and fingerprints have not been taken in the course of the investigation of the offence by the police[138].
    ii. They have been charged with a recordable offence or informed that they will be reported for such an offence and the fingerprints have not been taken in the course of the investigation of the offence by the police[139].

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[133] PACE, §120.
[134] PACE (The Police And Criminal Evidence) Act 1984: Past, Present And Future, *National Law School of India Review* 23, No. 1, 47–62.(2011).

[135] Introductory text to the PACE Act.
[136] *supra* note 133, § 61.
[137] *supra* note 133, § 61 (1).
[138] *supra* note 133, § 61 (3) (a).
[139] *supra* note 133, § 61 (1) (b).

However, such fingerprints taken shall be disregarded if they do not constitute a complete set of the person's fingerprints or if some or all of the fingerprints taken on the previous occasion are not of sufficient quality to allow satisfactory analysis, comparison or matching. [140]

b. Fingerprints of a person who has answered to bail at a court or police station

Such prints can be taken without the appropriate consent either at court or at the station provided it is authorised by the court or by an officer of at least the rank of an inspector. Where the consent is given by an officer orally, it shall be confirmed in writing by him as soon as is practicable[141]. The authorization shall be given by the court or by an officer if:

*(a) the person who has answered to bail has answered to it for a person whose fingerprints were taken on a previous occasion and there are reasonable grounds for believing that he is not the same person; or*

*(b) the person who has answered to bail claims to be a different person from a person whose fingerprints were taken on a previous occasion.*

A comparison with the Indian legislation

Impressions of footwear[142]

The Act of 1984 authorises the power to take an impression of the footwear of a person who is detained at a police station without the appropriate consent to be exercised by any constable[143]. It prohibits the taking of impression of a person's footwear without the appropriate consent, except under the following circumstances[144]:

Before the impression of a person's footwear has been taken, the person shall be told of the reason behind taking it and such reason should also be recorded in his custody record as soon as practicable after the impression is taken[145].

[140] *supra* note 133, § 61 (3 A).
[141] *supra* note 133, § 61 (4B) (5).
[142] *supra* note 133, § 61A.
[143] *supra* note 133, § 61A (7).
[144] *supra* note 133, § 61A (3)
[145] *supra* note 133, § 61A (6) (a) and (b).

i. If he is detained in consequence of his arrest for a recordable offence, or has been charged with a recordable offence, or informed that he will be reported for a recordable offence[146].

ii. If the impression of his footwear has not been taken in the course of the investigation of the offence by the police[147].

However, if such impression of the person's footwear has been taken previously, it shall be discarded if it is incomplete or isn't of sufficient quality to permit satisfactory analysis, comparison or matching[148].

Clause 5 of the Act mentions certain requirements to be fulfilled when an impression of a person's footwear has been taken at a police station, either with consent or without consent. The officer should inform the concerned person that it may be the subject of a speculative search and "the fact that the person has been informed of this possibility shall be recorded as soon as is practicable after the impression has been taken" and if the person has been detained at a police station, then the record should be made on his custody record.

C. Intimate Samples

Section 65(1) of the PACE Act defines the term intimate samples to mean a sample of blood, semen or any other tissue fluid, urine or pubic hair, a dental impression, or a swab taken from any part of a person's genitals (including pubic hair) or from a person's body orifice other than the mouth. Before taking an intimate sample from a person, an officer shall inform him of the reason behind taking such a sample, the fact that authorisation has been given and the provision of this section under which it has been given and if the sample was taken at a police station, the fact that the sample may be the subject of a speculative search[149].

An intimate sample may be taken from a person who is in police detention only upon the authorization given by a police officer of at least the rank of an inspector and if the appropriate consent is given[150]. However, if the person is not in police detention, an intimate sample may be taken if two or more non-intimate samples suitable for the same

[146] *supra* note 133, § 61A (3) (a).
[147] *supra* note 133, § 61A (3) (b).
[148] *supra* note 133, § 61A (4).
[149] *supra* note 133, § 61A (5).
[150] *supra* note 133, § 62 (1) (a) and (b).

means of analysis have been taken but have proved to be insufficient[151]. Such taking shall also be subject to the authorization of a police officer of at least the rank of inspector and if the appropriate consent is given[152]. For both the instances, the officer shall give authorization, only if he has reasonable grounds for suspecting the involvement of the person from whom the sample is to be taken in a recordable offence and for believing that the sample will tend to confirm or disprove his involvement[153]. The authorization given by the officer can be either orally or in writing. The Act also stipulates where the officer has authorized it orally, it shall be confirmed in writing as soon as is practicable[154]. The appropriate consent given shall however be in writing[155].

Where the intimate sample is a dental impression, the sample may be taken from a person only by a registered dentist[156]. In the cases of any other form of intimate sample, except in the case of a sample of urine, the sample may be taken from a person only by a registered medical practitioner or a registered health care professional[157].

D. DNA Samples

PACE provides for DNA samples to be taken, and the information derived, to be searched against records held by or on behalf of the police. This establishes the legal basis for the Database.

E. Other samples

Under the PACE Act, a non-intimate sample cannot be taken from a person without the appropriate consent given in writing except under the circumstances mentioned in the Section[158]. The term 'non-intimate sample' has been defined under the Act to mean the following:

(a) a sample of hair other than pubic hair
(b) a sample taken from a nail or from under a nail
(c) swab taken from any part of a person's body other than a part from which a swab taken would be an intimate sample

[151] *supra* note 133, § 62 (1A).
[152] *supra* note 133, § 62 (1A) (a) and (b).
[153] *supra* note 133, § 62 (2).
[154] *supra* note 133, § 62 (3).
[155] *supra* note 133, § 62 (4).
[156] *supra* note 133, § 62 (9).
[157] *supra* note 133, § 62 (9A) (a) and (b).
[158] *supra* note 133, § 63(1) and (2).

(d) saliva

(e) a skin impression

The Act authorises the taking of a non-intimate sample without the appropriate consent under the following circumstances:

a. If the person is in police detention in consequence of his arrest for a recordable offence[159]
b. If he has not had a non-intimate sample of the same type and from the same part of the body taken in the course of the investigation of the offence by the police[160], or he has had such a sample taken but it proved insufficient[161]
c. If he is being held in custody by the police on the authority of a court[162] and an officer of at least the rank of inspector authorises it to be taken without the appropriate consent[163]

Where the person has been arrested for a recordable offence and released, a non-intimate sample may be taken from a person without the appropriate person under the following[164]:

a. If he has not had a non-intimate sample of the same type and from the same part of the body taken from him in the course of the investigation of the offence by the police or
b. If the non-intimate sample taken from him in the course of that investigation was not suitable for the same means of analysis or it is proved insufficient.

D. Photographing of suspects[165]

The term 'photograph' has been defined in Clause 6A to mean 'a moving image'. Photographs shall be taken from the following categories of persons:

a. Who has been arrested by a constable for an offence
b. Who has been taken into custody by a constable after being arrested for an offence by a person other than a constable.

[159] *supra* note 133, § 63(2B).
[160] *supra* note 133, § 63(2C)(a).
[161] *supra* note 133, § 63(2C)(b).
[162] *supra* note 133, § 63(3)(a).
[163] *supra* note 133, § 63(3)(b)
[164] *supra* note 133, § 63(3A).
[165] *supra* note 133, § 64A.

c. Who has been made subject to a requirement to wait with a community support officer or a community support volunteer
d. Who has been given a direction by a constable under section 35 of the Anti-social Behaviour, Crime and Policing Act 2014
e. Who has been given certain penalty notices as mentioned in the Act.

A person who has been detained at a police station can be photographed either with appropriate consent or without it if such consent is withheld or not practicable in obtaining. Such photographs taken are said to be utilized for the following purposes:

1. It can be used by or disclosed to any person for any purpose in relation to the prevention or detection of crime, the investigation of an offence, the conduct of a prosecution or for the enforcement of a sentence.

2. After it has been used or disclosed, it may be retained but may not be used or disclosed except for a purpose so related.

E. X-rays and ultrasound scans[166]

An X-ray shall be taken or an ultrasound scan shall be carried out on the person by an officer of not less than the rank of inspector if he has reasonable grounds for believing that a person who has been arrested for an offence and who is in police detention may have swallowed a Class A drug and was in possession of it with appropriate criminal intent before being arrested.

Such X-rays or ultrasound scans shall not be carried out unless an appropriate consent has been given in writing. The appropriate officer should inform the person from whom scans would be taken to give authorization and the grounds behind such authorization[167].

An X-ray or an ultrasound scan shall be carried out by a suitably qualified person at a hospital, or at a registered medical practitioner's surgery or some other place that is used for medical purposes.

A COMPARISON WITH INDIAN LAW

[166] *supra* note 133, §55A.
[167] *supra* note 133, §55A (3).

An analysis of the UK provisions envisages the collection of measurements in the form of fingerprints, impressions of footwear, intimate and non-intimate samples, DNA samples, photographs, X-rays and ultra sound scans. Comparing with India's legislation, there is no mention of footwear impressions, X-rays and ultrasound scans. Besides, there exists no distinction with respect to intimate and non-intimate samples.

Further, the UK legislation gives utmost importance to the concept of individual rights through the principle of informed consent as is seen from a bare reading of all the provisions. Besides, the statute also delineates each and every measurement enumerated with respect to conditions of consent. This is absent in Indian legislation since all the 'inclusive' measurements are provided under one provision and no guidelines exists with respect to consent.

Also, the PACE Act clearly enumerates what is meant by intimate and non0intimate samples. The Criminal procedure (Identification) Act, 2022 gives a vague idea of the term 'measurement' and fails to concisely define what all are mentioned within its purview. Additionally, the UK Act explicitly mentions the taking of DNA samples as distinguished from the Indian law which fails to state whether the term 'biological samples and its analysis' would include DNA Profiling or not.

2. SCOTLAND

a. The Criminal Procedure (Scotland) Act of 1995[168]

The Criminal Procedure (Scotland) Act of 1995 which had come into force on 1 April 1996 is the primary legislation in Scotland which allows for the retention of fingerprints and DNA samples taken from a person who is arrested by the police in order to assess and verify their identity. In Scotland, when someone is arrested, the police are legally authorized to obtain the individual's fingerprints and collect a saliva swab or other biological sample to enable their DNA to be profiled. In the Act, the term photographs have however not been explicitly referenced.

Sections 18 to 19C stipulate the conditions under which samples may be taken by the police as well as rules for retention and specification on the purposes and use of

[168] Hereinafter called the Scotland Procedure Act.

samples[169]. While the Act does not specifically regulate the use or retention periods of facial images, it should be noted that the police have been photographing persons in police custody for more than one hundred years[170].

Under Section 18 of the Act, a constable is empowered to take or require such person who has been arrested and is in custody, the relevant physical data based on the circumstances of the suspected offence or the relevant offence and the person so required shall comply with such requirement. The term 'relevant physical data'[171] means any fingerprint, palm print, any other print or impression of an external part of the body and also includes the record of a person's skin on an external part of the body created by a device approved by the Secretary of State.

b. The Scottish Biometrics Commissioner Act of 2020

The Scottish Biometrics Commissioner Act was passed by the Scottish Parliament on March 10th 2020. It stablishes the office of Scottish Biometrics Commissioner and provides for its functions in relation to the acquisition, retention, use and destruction of biometric data for criminal justice and police purposes. The Act defines 'biometric data' to mean 'information about an individual's physical, biological, physiological or behavioural characteristics which is capable of being used on its own or in combination with other information (whether or not biometric data) to establish the identity of an individual'[172]. It may include also the physical data comprising or derived from a print or impression of or taken from an individual's body, a photograph or other recording of an individual's body or any part of an individual's body, samples of or taken from any part of an individual's body from which information can be derived and information derived from such samples.

The general function of the Commissioner is to support and promote the adoption of lawful, effective and ethical practices in relation to the acquisition, retention, use and destruction of biometric data for criminal justice and police purposes by:

(a)the Police Service of Scotland,

[169] Scottish Biometrics Commissioner and Scottish Police Authority, Joint Assurance Review of the acquisition of biometric data from children arrested in Scotland, available at https://www.biometricscommissioner.scot/media/fqkeklo5/final_children_jointassurancereport.pdf .
[170] *Ibid.*
[171] Scotland Procedure Act, §18 (7A).
[172] Scotland Procedure Act, §34.

(b)the Scottish Police Authority,

(c)the Police Investigations and Review Commissioner[173].

However, the Commissioner's general function do not include oversight of biometric data which falls under the jurisdiction of the Commissioner for the Retention and Use of Biometric Material, as specified in Section 20 of the Protection of Freedoms Act 2012[174]. Section 3 of the Act further prescribes that the Commissioner shall:

(a)To keep under review the law, policy and practice relating to the acquisition, retention, use and destruction of biometric data by or on behalf of the persons referred to in subsection (1) (Police Service of Scotland, the Scottish Police Authority, the Police Investigations and Review Commissioner).

(b)In promoting public awareness and understanding of the powers and duties of those persons in relation to the acquisition, retention, use and destruction of biometric data, how those powers and duties are exercised, and how the exercise of those powers and duties can be monitored or challenged,

(c) In promoting and monitoring the impact of the code of practice.

A COMPARISON WITH INDIAN LAW

Perhaps, one of the highlighted feature of the Scottish law is that the constituent country has in place a specific statute specifically entrusted for the establishment of a Biometrics Commissioner with respect to the acquisition, retention, use and destruction of biometric data for criminal justice and police purposes. Not only does the Indian statute fail to provide such a data protection authority, the Act is also silent on the safeguards with respect to such collection. Besides, the Criminal Procedure (Scotland) Act of 1995 stipulates the conditions under which samples may be taken by the police as well as rules for retention and specification on the purposes and use of samples. The Indian legislation only mentions that the records of measurements shall be stored in digital or electronic form for a period of seventy-five years from the date of collection of such measurement and fails to provide any detailed guidelines on the same.

[173] *Id.* § 2(1).
[174] *Id.* § 2(2).

### 4.2.4 **SOUTH AFRICA**

The Constitution of the Republic of South Africa is regarded to be one of the most progressive constitutions in the world and is of a comparatively recent origin. The Constitution elevates 3 constitutional values above all others – human dignity, equality and freedom.

A BRIEF TIMELINE OF THE LEGISLATIONS

a. The Criminal Procedure Act, 1955

The earliest indication of collecting finger-prints, palm prints and foot prints of arrested persons could be seen in the Criminal Procedure Act of 1955 that was passed to consolidate the laws related to procedure and evidence in criminal proceedings and other related matters. Under the Act, fingerprints, palm prints and foot prints of a person who is arrested upon a charge, can be taken or cause to be taken by the following categories of authorized persons for ascertaining whether the body of a person bears any mark, characteristic or any distinguishing feature or shows any condition or appearance:

a. The peace officer
b. The medical officer of a prison or a gaol
c. A district surgeon.
d. A magistrate holding any preparatory examination
e. A court trying any charge.

Additionally, the medical officer and the district surgeon is also authorized to conduct a blood test on those persons arrested.

The finger prints, palm prints or foot prints shall be destroyed of any person who is found not guilty of such charge.

Such measurements taken from the accused finds its applicability in Section 291(1) of the Act in order to ascertain whether the fingerprints, etc. of the accused corresponds to any other fingerprints, etc. In such cases, evidence of the accused's fingerprints, palmprints or foot prints including the result of any blood test shall have admissible value.

b. The Criminal Procedure Act of 1977[175]

The Act of 1977 intended to make provisions for procedures and related matters in criminal proceedings. This Act repealed the earlier Act of 1955. Section 37 of the Act contained in Chapter 3 lays down the provisions with respect to 'ascertainment of bodily features of accused'.

WHAT TYPES OF SAMPLES MAY BE TAKEN AND BY WHOM?

Any police official may take the fingerprints, palm-prints or footprints or may cause such prints to be taken from the following categories of persons:

i. Any person who is arrested upon any charge
ii. Any person who has been released on bail or on warning under Section 72
iii. Any person who has been arrested in respect of any matter referred to in Section 40(1)
iv. Any person upon whom a summons has been served in respect of any offence referred to in Schedule I or any offence with reference to which the suspension, cancellation or endorsement of any licence or permit or the disqualification in respect of any licence or permit is permissible or prescribed; or·
v. Any person who has been convicted by a court or deemed under section 57 (6) to have been convicted in respect of any offence which the Minister has by notice in the Gazette declared to be an offence.

The police official may also make a person who has been arrested upon any charge or released on bail or under a warning under Section 72 to be made available for identification in such condition, position or apparel which shall be determined by him[176]. In order to ascertain whether the body of such persons has any mark, characteristic or distinguishing feature or shows any condition or appearance, the police official may be required to take such steps as may be deemed necessary for it[177]. If requested by a police official, any medical officer of any prison or any district surgeon or any registered medical practitioner or registered nurse may take such steps which

[175] Hereinafter the Act of 1977.
[176] Act of 1977, § 37 (1) (b).
[177] *supra* note 176, §37(1)(c).

includes the taking of a blood sample in order to ascertain whether the body pf such persons has any mark, characteristic or distinguishing feature or shows any condition or appearance[178]. If any registered medical practitioner attached to any hospital is on reasonable grounds of the opinion that the contents of the blood of any person admitted to such hospital for medical attention or treatment may be relevant at any later criminal proceedings, such medical practitioner may take a blood sample of such person or cause such sample to be taken[179].

However, the police official is prohibited from taking any blood sample of the person concerned and in making any examination of the body of the person concerned where that person is a female and the police official concerned is not a female[180].

Under clause 3, a court before whom criminal proceedings are pending may also make an order with respect to the following[181]:

1. Where a police official is not empowered to take finger-prints, palm-prints or foot-prints or to take steps in order to ascertain whether the body of any person has any mark, characteristic or distinguishing feature or shows any condition or appearance, such prints can be taken from any accused, including the taking of a blood sample.

2. For the taking of a blood in order to ascertain the state of health of any accused at such proceedings.

Additionally, any court who has convicted any person of an offence or who has prepared a preparatory examination against any person on any charge or any magistrate may also order the finger-prints, palm-prints or foot-prints to be taken[182].

DESTRUCTION OF SAMPLES

Finger-prints, palm-prints or foot-prints as well as the record of steps that are taken shall be destroyed if the:

a. Person concerned is found not guilty at his trial, or
b. If his conviction is set aside by a superior court, or
c. If he is discharged at a preparatory examination, or

[178] *supra* note 176, §37 (2) (a).
[179] *supra* note 176, §37(2)(b).
[180] *supra* note 177.
[181] *supra* note 176, §37(3).
[182] *supra* note 176, §37(4).

d. If no criminal proceedings with reference to which such prints were taken or such record was made are instituted against the person concerned in any court, or
e. If the prosecution declines to prosecute such person.

c. The Criminal Law (Forensic Procedures) Amendment Act 37 of 2013

This Act of 2013 further amended the 1977 Act in order to provide the following:

a. For the taking of specified bodily samples from certain categories of persons for the purposes of forensic DNA analysis
b. For the protection of the rights of women and children in the taking of DNA samples
c. For further regulating proof of certain facts by affidavit or certificate,
d. To insert Schedule 8 to the Act of 1977 in respect of offences where DNA samples must be taken.

The Act amended the 1977 Act by including the following biometric samples:

1. Bodily samples means an intimate or buccal samples taken from a person

2. Buccal samples means a sample of cellular material taken from the inside of a person's mouth.

3. Intimate sample pertains to a sample of blood or a pubic hair or a sample taken from the genitals or anal orifice area of the body of a person excluding a buccal sample.

A COMPARISON WITH INDIAN LAW

Both the 1955 and 1977 Acts primarily focused on prints and blood tests. Through the expansion in the 2013 Amendment, DNA samples have been included and protection have been provided for vulnerable groups. In other words, South Africa have constantly upped the ante in their efforts in combating crime by amending their legislations. In India, it was only after a period of 102 years, that a new Act had come into place.

The South African legislation encompasses a huge variety of measurements - fingerprints, palm-prints, footprints, blood samples, DNA samples, bodily samples, buccal samples, intimate samples, etc. Besides, there is in place explicit provisions that provide for the retention as well as the destruction of the samples collected, a provision not enumerated in detailed in the Indian statute.

# CHAPTER 5 – CONCLUSIONS AND RECOMMENDATIONS

*"When they arrested my neighbour, I did not protest. When they arrested the men and women in the opposite house, I did not protest. And when they finally came for me, there was nobody left to protest."*

- Late Justice V.R. Krishna Iyer in Prem Shankar Shukla v. Delhi Administration[183]

## 5.1 REFORMING THE INDIAN CRIMINAL JUSTICE SYSTEM

Law enforcement in a developing democratic society presents several complex problems which cannot be met adequately by a mere quantitative increase in police personnel. Increasing sophistication and finesse that attend crimes in a free society, extended operations of fast moving criminals and organized gangs with ramifications over large areas transcending the borders of districts, States and even the country increases expectations of the public regarding prompt and effective police response to any situation of violence of distress and the necessity to secure scientific evidence that will stand scrutiny in the legal system which would further require the police to harness science and technology to aid police performance.[184]

Introducing state-of-the-art mechanisms and techniques in identifying convicts is always a welcome step in bringing India at par with modern investigative techniques. This has both benefits and drawbacks. Not only will it help reduce the time in identification and location of convicts, thereby helping in reducing crime, it will leave open opportunities for abuse because of the wide extensive powers that police authorities hold.

Going back in history, the original Act of 1920 was passed by the British colonisers and the objective back then was to control nationalist forces and increase surveillance. Through the enactment of the Criminal Procedure (Identification) Act of 2022, India's policymakers sought to alienate its colonial roots by repealing the erstwhile Identification of Prisoners Act, 1920 enacted over a century back. But, by separating

[183] Prem Shankar Shukla v. Delhi Administration, 1980 SCR (3) 855.
[184] Third Report of the National Police Commission, 43 (1980).

itself from the colonial concept, it appears that they have merely added teeth to the source law to make it more fearful and repressive under the guise of enhanced measurements and increasingly arbitrary powers.

The very purpose behind the enhanced spectrum with respect to measurements shows the apparent vision of the legislature in levelling up India's efforts in improving its criminal justice system. The objective behind introducing such a legislation is that more samples collected from the categories of individuals using varied forensic techniques would lead towards a society where crime would be prevented, individuals would be reluctant in their efforts to commit offences and subsequently, the crime rate would be reduced significantly.

In other words, the reasoning behind the introduction of the Criminal Procedure (Identification) Act, 2022 was in aiding the prevention of crime. By using the term measurements in its widest possible sense, allowing the collection and storage of the same in the database coupled with bestowing an unbridled power on the executive creates an Orwellian state with fewer safeguards where the government will have the power of surveillance over its people through the maintenance of a huge database[185]. Through the employment of various scientific and forensic measurements like iris and retina scans, physical, biological samples and their analysis, behavioural attributes in addition to the already existing finger-prints, palm-prints and foot-print impressions, the rationale is that it would be easier to solve more crimes. This itself is an anomaly. By bringing in more data, the perceived notion of the legislative makers is that it would help in the reduction of crime. The conclusion in coming to this has not been clear either. Therefore, the blatant lack of checks and balances on how law enforcement uses surveillance tools makes such criminal identification systems breeding grounds for discrimination, targeted policing, and disenfranchisement of historically marginalised groups[186].

Even before the 2022 Act had come to force, there had been several attempts from various states to push for an Act along the same lines of the current legislation. These

[185] Dr. Shazia Parveen and Akshay Jain, *Human Rights and The Criminal Procedure (Identification) Act, 2022: A Critical Analysis*, 9, Journal of Legal Studies and Research, 169, 177(2023).
[186] Disha Verma, *Why a massive leak in Tamil Nadu Police's FRT database must herald the end of police use of surveillance technologies*, INTERNET FREEDOM FOUNDATION, (May 17, 2024) https://internetfreedom.in/leak-in-tamil-nadu-polices-frt-database/ , (last visited June 07, 2024).

States include West Bengal, Gujarat, Karnataka, Maharashtra, and Tamil Nadu[187]. In October 2010, Tamil Nadu had passed a State amendment to the Act of 1920 to include "blood samples" as a type of forensic evidence to develop and maintain a DNA database[188]. The latest was that of Karnataka in 2021, where the Karnataka government had tabled the Identification of Prisoners (Karnataka Amendment) Bill, 2021 for authorities to collect blood, DNA, voice, and retina samples in addition to the already existing fingerprints, footprints and photographs of those persons who have been imprisoned for over one month. The amendment had also granted authority to the superintendents of police and deputy commissioners of police to order the collection of samples, a power which was previously reserved solely with the Magistrates.

### 5.3 CONSTITUTIONALITY OF THE ACT UNDER JUDICIAL SCRUTINY

Due to the various concerns surrounding the provisions of the Act, several petitions had been filed before the respective High Courts and one before the Supreme Court of India to adjudge its validity.

Immediately a day after the Act had received Presidential assent, a public interest petition was moved before the High Court at Delhi challenging the vires of the statute[189]. As of now, no concrete arguments have been made and the case has been posted to a later date this year. A similar PIL[190] was also filed before the Madras High Court to declare Sections 2 (1) (a) (iii), 2 (1) (b), 3, 4, 5, 6, 7 and 8 of the Act as unconstitutional, illegal, void and ultra vires of the Constitution of India. However, this petition has been withdrawn by the concerned party.

A similar writ petition was also moved before the Supreme Court of India which was filed jointly by the Internet Freedom Foundation[191] and the Criminal Justice and Police Accountability Project, challenging the constitutionality of the Act and the Rules.

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[187] Discussion on the motion for consideration of the Criminal Procedure (Identification) Bill, 2022, LOK SABHA DEBATES, https://eparlib.nic.in/bitstream/123456789/876455/1/lsd_17_08_05-04-2022.pdf#search=criminal%20procedure(identification)%20act%2017 (last visited, June. 07, 2024).

[188] Government of Tamil Nadu (Oct. 6, 2010) available at https://www.stationeryprinting.tn.gov.in/extraordinary/2010/305-Ex-IV-2.pdf.

[189] Harshit Goel v. Union of India through Home Secretary & Anr., W.P.(CRL) 869/2022 & CRL.M.A.7363/2022,CRL.M.A. 7364/2022, CRL.M.A. 23429/2022

[190] V. Adarsh v. Union of India, W.P. No. 25205 of 2022.

[191] Internet Freedom Foundation and Ors v. Union of India and Ors, W.P. (Crl.) No. 000080/2024.

However, the Apex Court had refused to entertain the matter and directed the petitioner to approach the jurisdictional High Court first.

## 5.4 WAY FORWARD – SUGGESTIONS TO BETTER THE ACT

This research work had dwelved into the various legal implications that would be arising from the implementation of the Act. Undoubtedly, the Criminal Procedure (Identification) Act of 2022 has introduced substantial changes in the landscape of criminal procedure in India. However, the present act raises more questions than it answers. On the face of it, the Act appears to be more broader and a more modern version of its colonial predecessor, the Identification of Prisoners Act of 1920.

Besides, this Act has been peculiar in several aspects. Despite the security and privacy concerns, the Bill had not gone through the Parliamentary scrutiny of a committee, either a Select Committee or a Standing Committee, a procedure typically followed where there are allegations that the Bill might intrude on certain fundamental principles of law.

On that account, it becomes particularly crucial to achieve a fine balance in the instant case due to the sensitive data that is sought to be collected as per the Act. Due to such fundamental questions that the Act raises, the outcome of challenges that are made to the constitutionality of this Act before the courts would be crucial in the development of the fundamental rights of the citizens, especially with respect to right to privacy and data protection. No doubt that in combating crime, by using science and technology and through employing advanced forensic measurements, it will bring about an impact. And this impact cannot be curtailed by simply repealing the Act in its entirety. The alternative, therefore would be by bringing about amendments to the present Act resulting in India's efforts in making its criminal justice system more proactive and shall be to an extent, a successful law enforcement system.

The Act contains certain ambiguous terms, the definitions of which are necessary in the successful implementation of the Act. The following shall be a humble attempt in making effective changes to the Act. It is recommended that:

1. The term 'measurements' should be a restricted one so as to prevent the agencies concerned from misusing it and undertaking tests in violation of established principles laid down by the courts. It should clearly state what has been explicitly

excluded so as to avoid any sort of ambiguity. The definition should provide clarity in understanding whether it would entail the taking of DNA[192] samples, voice samples, brain-mapping, narco-analysis tests under its ambit in light of the judgment in ***Selvi vs. State of Karnataka***[193] .

2. The measurements termed under the Act for the purposes of the prevention, investigation, detection or prosecution of criminal offences should be facilitated while ensuring a high level of protection of such measurements which would require the building of a strong and more coherent framework for its protection. Examples can be taken from Scotland where they have a separate office of a Biometrics Commissioner[194] enumerating its functions in relation to the acquisition, retention, use and destruction of biometric data instead of the NCRB drafting the Standard Operating Procedure.
3. The proviso to Section 3 states that any person arrested for an offence committed under any law for the time being in force "may not be obliged" (except for an offence committed against a woman or a child or for any offence punishable with imprisonment for a period not less than seven years) to allow taking of his biological samples. The phrase shall be changed to "shall not be obliged
4. A distinction should be made between the offences with respect to its gravity. A person who is accused of a petty offence is treated at the same level with that of a person accused of a grave one. As such, there exists no distinction between persons who commit petty offences with those who have committed a more heinous one. Collection, storage and processing of data for such petty offences would not be adhering to the standards of proportionality and necessity.
5. Under the Act, an accused, victim, suspect, a witness or an undertrial is treated the same way as that of convicted criminals in the definition of persons who must give measurements. By being subjected to the same scrutiny and suspicion with those

[192] Though the Act and rules do not explicitly mention the collection of DNA samples and face matching procedure, in subsequent meetings with State police officials, the NCRB informed that the said measures will be rolled out in around 1,300 locations spread across police districts, commissionerate and Special Investigation Units at State headquarters. The Ministry of Home Affairs (MHA) has constituted a Domain Committee for the successful implementation of the Act with representatives from State police, Central law enforcement agencies and other key stakeholders. A technical sub-committee for preparing the SOPs for capturing DNA as a measurement has also been constituted – retrieved from Centre to roll out DNA, face matching systems at police stations across India available at https://www.thehindu.com/news/national/new-criminal-procedure-identification-act-to-also-capture-dna-face-matching-samples-of-the-accused/article67454507.ece

[193] Selvi, *supra* note 50.

[194] The Scottish Biometrics Commissioner Act, 2020.

who are convicted under law, the classification goes against the principle of presumption of innocence until guilty.

6. For destroying data, the onus has been placed on those individuals whose data has been collected. This would deter people from coming forward to apply for deletion. The provision should be read in terms of right to be forgotten and should not be at the mere discretion of the Nodal Officer. In some other laws, the onus of destroying personal information is on the authority maintaining the information or on the courts to direct the authority to delete such information when it is no longer required. For example, the Juvenile Justice (Care and Protection of Children) Act, 2015 provides that records of a child who has been convicted and has been dealt with under the law should be destroyed (except for heinous offences)[195]. In such cases, the Juvenile Justice Board directs the police or the court and its own registry to destroy the records. The Rules under the Act also specify that such records be destroyed (after expiry of the appeal period) by the person-in-charge, Board, or the Children's Court[196]. By putting the liability on people to request for such deletion, there exists a legal gap that needs to be addressed.
7. For retaining records, the terms "in digital or electronic form for a period of seventy-five years from the date of collection of such measurement[197]" can be substituted for "in original format during the pendency of investigation and prosecution[198]."
8. A deeper understanding of why the records would be retained for 75 years should also be made clear. In that scenario, if the records are being detained for a timeline of 75 years, the Act fails to answer as to whether they would be destroyed afterwards. If yes, by whom and what is the procedure that should be followed for such destruction?
9. Additionally, there should have been a distinction between the time-period for retaining records with respect to individuals who have committed heinous crimes and petty offenses. Bracketing them under the same time-period accounts to treating them unequally.

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[195] The Criminal Procedure (Identification) Rules, 2022, https://prsindia.org/billtrack/prs-products/rules-regulations-review-criminal-procedure-identification-rules-2022
[196] *Ibid.*
[197] Criminal Procedure (Identification) Act, 2022 § 4(2), No. 11, Acts of Parliament, 2022 (India).
[198] *Discussion on the motion for consideration of the Criminal Procedure (Identification) Bill, 2022*, LOK SABHA DEBATES, https://eparlib.nic.in/bitstream/123456789/876455/1/lsd_17_08_05-04-2022.pdf#search=criminal%20procedure(identification)%20act%2017 (last visited, June 07, 2024).

10. Arbitrary power will corrupt even the best of persons absolutely[199]. Therefore, there should exist mechanisms to make sure that Section 5 of the Act does not result in arbitrary actions by the Magistrates against any person. The Magistrate shall be mandated in provided reasons of the order issued for taking measurements. By including the word 'expedient', the Act fails to provide clarity in preventing arbitrary actions.
11. Clarify who can take the measurements as the Rules published under the Act expands it by including any person skilled in taking the measurements or a registered medical practitioner or any person authorised in this behalf to take measurements[200]. The Act or the Rules also do not define who is a person skilled in taking measurements[201].
12. The role of the NCRB shall be reevaluated in drafting the Standard Operating Procedure and such procedure shall be entrusted by a separate Data Protection Authority, which may be constituted and must be guided by the principles of privacy and other data protection principles. Such authority shall be independent and shall include details of when, where and with whom the data has been shared or accessed and the purpose or need for such request recorded in detail.
13. Because biometric data are sensitive personal data, there should be in place sufficient training programs so as to equip personnel with the necessary skills and knowledge in handling it.

Summing up, though the Act has failed to answer certain pertinent questions and has left certain gaps that are required to be filled for its effective implementation, it strives forward in an attempt to herald India's effectiveness in fighting crime. But, if today the freedom of one forsaken individual has been compromised by the police somewhere, tomorrow the freedom of many could be jeopardized elsewhere, with no one to protest unless there is in place an efficient machinery with established safeguards in protecting the rights of the individuals. In the words of Justice V. R. Krishna Iyer[202]: *When law*

[199] *Who will judge the judges,* The Hindu (Sept. 01, 2010), https://www.thehindu.com/opinion/op-ed/Who-will-judge-the-judges/article15898016.ece.
[200] *supra* note 195.
[201] *Ibid.*
[202] Charles Sobraj v. The Superintendent, Tihar Central Jail, New Delhi, 1979 SCR (1) 512.

*and tyranny begins: and history whispers, iron has never been the answer to the rights of men*[203].

[203] The meaning translates to – laws are enacted to uphold justice and protect people. When they become "instruments of tyranny", they are seen as an instrument of oppression. In India, which has a tainted history of oppression and discriminatory policies, use of force ("iron") will not be a solution for achieving justice. Instead, achieving justice would come from adherence to principles that uphold human dignity.

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# Chapter 1 - Introduction.

by Akhila

## General metrics

| 16,686 | 2,503 | 122 | 10 min 0 sec | 19 min 15 sec |
|---|---|---|---|---|
| characters | words | sentences | reading time | speaking time |

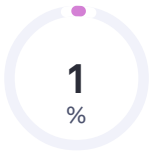
## Score


This text scores better than 90% of all texts checked by Grammarly

## Writing Issues

| 76 | 51 | 25 |
|---|---|---|
| Issues left | Critical | Advanced |

## Plagiarism




**2** sources

1% of your text matches 2 sources on the web or in archives of academic publications

# CHAPTER 2 - THE IDENTIFICATION OF PRISONERS ACT, 1920 AND THE CRIMINAL PROCEDURE (IDENTIFICATION) ACT, 2022 – CHANGES BROUGHT OUT

by Akhila

## General metrics

| 40,836 | 6,664 | 288 | 26 min 39 sec | 51 min 15 sec |
|---|---|---|---|---|
| characters | words | sentences | reading time | speaking time |

## Score


This text scores better than 94% of all texts checked by Grammarly

## Writing Issues

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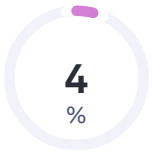
## Plagiarism




**13** sources

4% of your text matches 13 sources on the web or in archives of academic publications

# CHAPTER 3 – CRITICAL ANALYSIS OF THE CRIMINAL PROCEDURE (IDENTIFICATION) ACT, 2022 WITH SPECIFIC REFERENCE TO DATA COLLECTION, USE AND RETENTION.

by Akhila

## General metrics

| 51,443 | 8,152 | 374 | 32 min 36 sec | 1 hr 2 min |
|---|---|---|---|---|
| characters | words | sentences | reading time | speaking time |

## Score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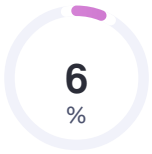
## Writing Issues

| 223 | 110 | 113 |
|---|---|---|
| Issues left | Critical | Advanced |

## Plagiarism




**24** sources

6% of your text matches 24 sources on the web or in archives of academic publications

# CHAPTER 4 - AN INTERNATIONAL OVERVIEW OF BIOMETRIC DATA OF PRISONERS

by Akhila

## General metrics

| 44,516 | 7,329 | 421 | 29 min 18 sec | 56 min 22 sec |
|---|---|---|---|---|
| characters | words | sentences | reading time | speaking time |

## Score


This text scores better than 92% of all texts checked by Grammarly

## Writing Issues

| 191 | 92 | 99 |
|---|---|---|
| Issues left | Critical | Advanced |

## Plagiarism


**40** sources

9% of your text matches 40 sources on the web or in archives of academic publications

# CHAPTER 5 – CONCLUSIONS AND RECOMMENDATIONS

by Akhila

## General metrics

| 18,256 | 2,784 | 136 | 11 min 8 sec | 21 min 24 sec |
|---|---|---|---|---|
| characters | words | sentences | reading time | speaking time |

## Score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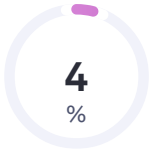
## Writing Issues

| 79 | 48 | 31 |
|---|---|---|
| Issues left | Critical | Advanced |

## Plagiarism




**6** sources

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