

Discussion Note | Webinar on ‘Unpacking the Criminal Procedure (Identification) Act, 2022’

Background

The Criminal Procedure (Identification) Act, 2022 (the 2022 Act) received the President’s assent in April 2022. The Act does away with the Identification of Prisoners Act, 1920 (the 1920 Act) and allows for collection, processing and retention of ‘measurements’ by law enforcement agencies for identification and investigation in criminal matters. The Act has been a topic of contention due to the ambiguity around the definition of certain terms, its scope and uncertainty around its purpose and use. We hosted a webinar to unpack critical aspects of the Act, with **Mr. Nandkumar Saravade** (former Indian Police Service officer and Founding CEO, ReBIT), **Ms. N. S. Nappinai** (Supreme Court Advocate and Founder, Cyber Saathi) and **Ms. Shreya Rastogi** (Founding Member, Project 39A) as the panellists. This summary highlights key insights from the discussion, beginning with the concerns expressed, benefits of the 2022 Act and practical implications.

Concerns expressed

1. **Updation of legislation and lack of consultative process:** The 1920 Act is a colonial inheritance, and the need for an updated legislation was brought up in 2018. The foundation of the 1920 Act was to allow for collection of information that can be used for investigation, conviction or to maintain records of offenders. While the 87th Law Commission Report (1980) recommended that the 1920 Act be amended to include a wider spectrum of measurements, it was accompanied by limitations on what kind of data could be collected. As part of this evaluation, the 1920 Act underwent a rigorous scrutiny, which included an assessment of the tools for measurement and analysis available at that time. The passing of the 2022 Act, however, was rushed in both Houses, without public consultations and reference to scientific research.
2. **Establishing legitimate grounds for expansion of scope:** The reliance on a single metric, i.e. the ease of access to technology for improved collection and analysis of vast amounts of information, cannot be sufficient grounds for legitimising the need for the 2022 Act. A legitimate State aim must be established to justify such a wide expansion in its scope. In comparison to the 1920 Act, the 2022 Act expands the scope across five fronts.
 - a. **Persons who can collect ‘measurements’:** Any person above the rank of a head constable or a prison officer above the rank of a head warden is now authorised to collect measurements.
 - b. **Scope of ‘measurements’ that can be collected:** It now allows for collection of biological samples and behavioural attributes, the latter of which may also be interpreted to include psychological information based on definitional subjectivity.
 - c. **Use of the measurements:** Measurements by themselves need not be evidence. However, the 2022 Act does not explicitly clarify if measurements collected can be used to arrive at further evidence. For instance, could the 2022 Act empower law enforcement agencies to unlock physical and digital spaces that require biometric passwords? Such instances, and others, need to be explored further.
 - d. **Persons from whom ‘measurements’ can be collected:** While the 1920 Act restricted collection of measurements from persons arrested and/or convicted for offences with a punishable term of one year or more, and from persons who have been previously arrested in connection to the offence under investigation, there are no such limitations provided in the 2022 Act.
 - e. **Purpose for which law enforcement agencies can collect measurements:** While section 53A of the Code of Criminal Procedure, 1973 (CrPC) requires justification on reasonable grounds for

collection of such measurements as evidence for an offence, the purposes for which these measurements can be collected is not clarified in the 2022 Act. The Puttaswamy judgement also heeds caution to the potential for abuse of biometric information. The extent to which safety measures, checks and balances will be implemented, and what the role of rules in enforcing them will be, are questions that remain unanswered.

3. **Open-ended nature of provisions in the Act:** The open-ended nature of the provisions in the 2022 Act gives vast powers to law enforcement agencies. The 2022 Act does not define ‘measurements’, ‘biological samples’ and ‘... and their analysis’. It also doesn’t define ‘behavioural attributes’ which may leave room to interpret the term as comprising not just physical manifestations, such as signatures, handwritings, etc., but possibly psychological information as well. These are an addition to the measurements mentioned in the 1920 Act. By not defining what is permissible, and what is not, the 2022 Act allows for a vast interpretation of what can be collected and most importantly, why it can be collected. Leaving such foundational provisions to be defined later in the Rules, is not only excessive delegated legislation but enables the State to belatedly interpret what information is allowed to be collected, which may be beyond the scope of the 2022 Act.
4. **Establishing necessity and proportionality in line with the Puttaswamy judgement:** The Puttaswamy judgement lays down the broad contours of what is required of an Act to ensure constitutionality. Section 5 of the 2022 Act, however, gives discretionary powers to the Magistrate where it is no longer required to demonstrate a connection between an individual and the offence that was being investigated in order to collect measurements from the said individual. This follows from the removal of a critical provision in the 1920 Act where any person can be directed to provide their measurements provided the person was previously arrested for that offence. Without the establishment of legitimate state aim, and questionable efficacy of measurements and their analysis, it raises concerns whether the 2022 Act demonstrates proportionality and necessity to the requirements of law enforcement agencies. However, a counterpoint to this was that given crime investigation is an intrusive process and requires curtailment of certain individual rights, the same expectations of privacy will not apply in the first place.
5. **Implementation in the absence of a Data Protection Law:** Given the absence of a law around data protection, there are no redressal options available to citizens. Further, questions about how these records will be stored, managed and accessed are all matters of concern. The 2022 Act prescribes that measurements will be stored in databases for 75 years, which is unprecedented in other jurisdictions and the effects of which are not yet assessed. While the 2022 Act also has provisions on deletion of data, there is lack of clarity on whether this means deletion of data residing with the National Crime Records Bureau (NCRB) or every source where the data was collected, shared and stored. The 2022 Act also omits mentioning who is responsible for deleting the data.
6. **Right against self-incrimination:** There have been cases where exceptions were made towards the constitutional right against self-incrimination for purposes of crime investigation. It is unclear whether the 2022 Act takes into consideration the various judgments that have evolved in interpreting Article 20(3) towards defining what amounts to self-incrimination and when it is permissible to exercise the right against self-incrimination. As per the CrPC, providing samples of handwriting and blood does not amount to self-incrimination. However, with the expansion in scope of measurements, whether or not the additional measurements such as ‘biological samples’ and ‘behavioral attributes’ also continue to account for self-incrimination remains to be seen.

7. **Scientific validity around unique identification based on these measurements:** The premise of the Act is based on the assumption that measurements, as stated in the Act, are critical to the process of justice delivery and maintenance of peace and order. The value of forensic evidence, however, is very context-specific. Understanding how and when the evidence was collected is influential in determining the value of the evidence and the outcomes from analysis of such evidence. Other concerns raised include:
- There is currently no scientific backing to the claim that fingerprints, iris and retinal scans are unique to individuals. While biometric measurements such as palm vein patterns, shape of ears, voice samples are considered to be unique, without scientific validity, standardisation and a stored sample to compare them to, mere collection of samples is not sufficient to identify prisoners.
 - Each individual has a unique DNA sequence, however, DNA profiling techniques don't examine entire DNA strands. Rather, specific sections of the strand are considered for the analysis, which may share similarities among individuals.
 - There is also evidence that techniques used to analyse such measurements have false positives (PCAST [report](#)). For instance, a 2017 FBI study reported that 1 in 306 cases of fingerprint analysis of latent prints was a false positive.
 - The Supreme Court has also directed that due to the uncertainty in accuracy of narco analysis and polygraph tests, these evaluations cannot be carried out without the consent of the subject.
- Given the uncertain nature of these analyses used for investigation, such measurements should not be the sole basis for conviction, but be used rather as corroborative evidence.
8. **Need for Indian standards and guidelines of foundational validity and science:** Most of these scientific techniques are imported and not developed indigenously. Adopting these methods without a sound understanding of their limitations can raise issues. To overcome issues of scientific validity of these tests, the United States Department of Justice developed the Uniform Language for Testimony and Reports (ULTR) on reporting fingerprints analysis. The ULTR considers scientific uncertainty and reflects it in the results of analysis. In India, however, forensic and biometric practices are not conducted using the same standards and guidelines of foundational validity and science. For instance, fingerprint examinations in the United States of America report the outcomes of the tests as identified, excluded, insufficient or inconclusive.

Benefits of the 2022 Act

1. **Reducing recidivism:** Another important reason for collecting measurements is to help with identification and elimination of suspects during criminal investigations. One of the key reasons for identification of prisoners is recidivism. As per NCRB [data](#), 4.8% of the persons arrested for offences under the Indian Penal Code are repeat offenders. People arrested often jump bail, disappear, violate parole, leave the country, etc. to escape prosecution and punishment. Currently, photographs are used to track fugitives and identify dead bodies. Biometric clues at the scene of crime can be instrumental in eliminating suspects.
2. **Introduction of a provision for deletion of records:** The 2022 Act includes provisions on deletion of records and restrictions on who this data can be collected from. Persons who have committed offences with terms of punishment less than seven years, and that are not crimes against women and children, are not obligated to provide their measurements.

Practical Implications

1. **Police capacity:** Police capacity to collect measurements provided in the 1920 Act itself is inadequate. Till date, only 1.2 million fingerprints have been recorded, which is a fraction of what should have been generated over the last few decades. The 2022 Act has been passed without considering the infrastructure, police capacity and culture necessary to use scientific evidence and conduct scientific investigations appropriately. Given the large number of people who are authorised to work with such measurements, the capacity of the State to conduct training, and provide adequate infrastructure becomes crucial.
2. **Clarity on efficacy of such measurements, given the quantum of investment required:** Data on success rates of such forensic techniques needs to be analysed and published for review. Transparency with regard to the data collected, such as information on the percentage of arrested who were actually photographed, fingerprinted or identified, is currently missing. The visibility and accountability on such performance metrics, budgeting and fund flows of police projects is limited to relevant bureaucrats and politicians. For instance, the NCRB has a national Automated Fingerprint Identification System (AFIS). However, there is no discussion in the public domain about coverage of this system, expenditure on infrastructure, trends in complaints against police brutality and illegal detention, etc. Publishing this information in the public discourse of police operations and outcomes could bring attention to cost-benefit analysis of criminal investigation initiatives.
3. **Accountability, enforcement and oversight:** Enforcement of the 2022 Act will require a strong oversight mechanism in place. The 2022 Act allows for unrestricted sharing and dissemination of such sensitive information among law enforcement agencies, without providing checks and balances and provisions for violations of these checks and balances. In the absence of these safeguards, the 2022 Act also doesn't specify how people will be exempted from the collection of such measurements, who decides whether someone is exempted or how one shall be informed of what data will be collected from them. The 2022 Act in its current form doesn't offer any protections against abuse of the various provisions.
4. **Role of NCRB:** NCRB is an administrative body under the Ministry of Home Affairs, and not a statutory body. Under the 2022 Act, NCRB's role to process, store and share data raises questions around creation of vast databases and profiling of individuals. However, there are certain benefits to law enforcement from centralisation of crime records with one agency, i.e. quick turnaround times for verifying or extracting records of an individual. Though the NCRB was not set up for the purpose of collecting, maintaining, storing and sharing information on such extensive databases, it is reasonable to expect expansion of its roles and responsibilities as it grows as an institution. The NCRB is expected to have highly skilled professionals who are responsible for managing crime records. It is important to empower these professionals so that their roles and responsibilities can be made more productive towards the benefit of society. Crime records are important and sensitive sources of information, and it is vital that they be maintained in a responsible manner with strong oversight. For instance, crime record checks during pre-employment verification is a standard practice in developed economies, especially for positions of trust.

Bio of speakers

Nandkumar Saravade is a senior advisor on governance, strategy, ethics and cyber security. He has had impactful stints in government and private sector spanning 36+ years, with expertise across diverse domains of law enforcement, banking, cyber security and technology management. Prior to joining the private sector, Mr. Saravade served in the Indian Police Service.

N. S. Nappinai, Supreme Court Advocate and founder of Cyber Saathi™, is a senior and renowned lawyer with over 30 years of experience focusing on litigation and policy work, apart from her social responsibility engagements for training judges, police, armed forces, students and industry. Ms. Nappinai appears as counsel in cases pertaining to Constitutional, Criminal, IPR & Cyber laws.

Shreya Rastogi heads Project 39A's death penalty litigation team and the work on forensics. She graduated in Law from the National Law University, Delhi in June 2013 as a double gold medalist. Before joining Project 39A in 2014, she worked for a year in the corporate and litigation teams at Khaitan & Co., Mumbai. Between 2016 to 2017, she completed her LL.M. from the New York University School of Law, and was awarded the Arthur Helton Global Human Rights Fellowship for the year 2017-18. Shreya returned to Project 39A after her LL.M. in 2017.