

“The DNA Technology (Use and Application) Regulation Bill, 2019: A Critical Appraisal”

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ABSTRACT

The House of People introduced the DNA Technology (Use and Application) Regulation Bill, 2019 on 8th July, 2019. The purpose of this legislation is to establish a DNA Regulatory Board with the authority to set up DNA Data Banks and certified DNA Profiling Laboratories. This bill will help to establish a National DNA Database for storing of data of criminals' identities in order to deliver the speedy justice to the public. The Bill emphasizes on the use and application of DNA technology, that is to identify the identity of persons missing, victims of offences, criminals and accused, under-trial prisoners and unknown people who are deceased. The Bill includes a wide range of index of criminal offences but it is virtually silent on civil matters, raising concerns about where and how the DNA profiles would be stored. Clause 21 of the Bill is one of the highly debated provisions of the bill related to consent of accused persons for their DNA samples/bodily substances for the profiling purposes. As it states that for offences punishable with imprisonment of more than seven years or death, the consent of accused is not required to be taken by the investigating agencies. In all other cases, written consent from the individual whose sample is to be taken is required. This paper highlights the concerns over the several fronts and breach of the fundamental right to privacy.

Keywords: DNA Profiling, Right to Privacy, Criminal Proceedings, Arbitrariness, Investigation agencies

INTRODUCTION

The simple and obvious meaning of right to privacy is to protect our personal information. This right became an intrinsic part of life, democratization and independence of thought in India. It is the personal choice of an individual with whom he wants to share his personal information. Democracy is one of the basic constitutional ideals mentioned in the Preamble of Constitution of India. This is the most essential aspect of human existence. The latest advancements in information technology have jeopardised privacy and reduced control over personal data, posing a threat to people's freedom. The one of such advancement is the newly introduced *DNA Technology (Use and Application), 2019*.

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DNA is self-replicating material present in nearly all living organisms. The molecule inside cells that contains the genetic information responsible for the development and function of an organism. It is essentially a human hereditary material that no two persons share.¹ The introduction of DNA evidence in criminal investigations has changed the face of forensic science. It has shown to be a very reliable and accurate source of evidence, as well as an extremely successful tool in the area of investigation all over the world.

Countries throughout the world have been improving their investigative systems to incorporate the use of DNA profiling since 1980s. Some have been quite successful in developing permanent and robust legislation for it, while keeping all of its merits and demerits in mind. DNA evidence has long been employed in criminal investigations in India, and its importance has grown in the last decade or so. However, due to number of obstacles, India has yet to achieve full potential in this regard, the one of the most significant of which is a lack of specialized laws.

Currently, in India, courts have authorized the collection and use of DNA evidence in trials by relying on provisions in several statutes that allows for the acquisition of such evidence indirectly. Extensive interpretation of Sections 53(3) and 54(6) of CrPC, 1973, permits for DNA tests as the accused assessed by a practicing medical expert and perform medical examination on the request of the arrested person, respectively. A new provision, Section 53-A, was inserted to the CrPC in 2005 by an amendment that requires a medical practitioner to examine the individual accused of rape.² The examination of the rape accused includes blood, bloodstains, semen, swabs, hair samples and DNA analysis. The court has the authority to instruct the police to collect blood samples and perform DNA tests for the purposes of further inquiry.³

In addition to this, while not expressly, *The Indian Evidence Act, 1872* permits the admission of DNA evidence. Section 45 of the Act deals with the expert opinion under which DNA scientific evidence has been accepted in certain criminal prosecutions.⁴ As a result, there is still no current legal provisions in India which allows the DNA samples to directly use in the investigation. The Courts held on many occasions that before making decision on DNA evidences, public interest and constitutional mandate must be kept in mind. The balance between public interest and privacy should be maintained.

In addition to the aforementioned problems, there are other issues about infrastructure (both technical and scientific), scientific understanding among investigative authorities, and most crucially, the right to privacy. Keeping all of the aforementioned difficulties in mind, the

¹ “What is DNA? MedlinePlus Genetics,” available at: <https://medlineplus.gov/genetics/understndng/basics/dna/>

² R.V. Kelkar, *Criminal Procedure* 75 (Eastern Book Company, Lucknow, 5th edn., 2008)

³ *Krishna Kumar Malik v. State of Haryana*, (2011) 7 SCC 130

⁴ Dr. Avtar Singh, *Principles of The Law of Evidence* 258 (Central Law Publications, Prayagraj, 24th edn., 2020).

Government of India attempted to create dedicated laws that may legitimize the usage and implementation of DNA technology in India.

In India, technological development in crime scene investigation has long been required and agencies keep upgrading their know-how, but it does not appear to be adequate in comparison to the current advancements being made all over the world. In order to strengthen the nation's justice delivery system, this measure seeks to use of DNA Technology for determining a person's identification. This DNA Bill is the latest in a series that originated as the "*DNA Profiling Bill*" in 2007. Since then, the proposed law has gone through multiple iterations with each version raising privacy concerns, such as the lack of adequate standards for consent, notice, retention and security of data. Chief amongst these privacy concerns is the fact that each of these iterations seems to grant near-sweeping powers to the state for the collection of DNA samples, with very few safeguards to protect citizens. The legislation's objective is to establish a national DNA database for the purpose of identifying individuals and assisting the nation in delivering justice to the public.

According to Clause 21 of the *DNA Technology Bill, 2019*, the offender's consent is not necessary to be acquired by the investigating agencies for committing a felony punishable by more than seven years imprisonment or death. In other cases, the written permission is required to be obtained from the offender whose sample to be taken. In the absence of voluntary consent, magisterial order may be issued. It is the clear-cut breach of fundamental right to privacy which was well established by Hon'ble Supreme Court in a landmark case.⁵ The Supreme Court ruled that the privacy allows individual to retain his bodily, mental autonomy and the right to govern the acquisition, use, storage and distribution of the personal information is an essential component of that right.

Many people might argue that outcome of the DNA profiling would be useful in terms of the investigation agencies providing them possible leads but individual's privacy also compromises.⁶ If legislation like this empowers the executive, it is critical that it outlines the limitations of that power so that basic rights are not violated.

POSSIBLE MISUSE OF A DATABASE⁷

On the outset of debate, one can argue over the immediate result of DNA profiling. It will be helpful for the State by giving credible leads to the investigation agencies but same counter-balance privacy concerns of the public. But breach of privacy is not only caused not by the

⁵ *K.S. Puttaswamy (Retd.) v. Union of India and others*, (2017) 10 SCC 1.

⁶ "DNA Bill, 2019: Privacy issues must be addressed," 2021 available at: <https://www.thehindubusinessline.com>

⁷ "DNA Profiling Bill 2007: Parliament of Republic of India, New Delhi," 5 *Journal of International Biotechnology Law* (2008).

imminent processing of samples for DNA profiling, but also by the fear of coercion by investigation agencies. This type of data can be misused by investigation agencies against the habitual offender by planting evidence against him. The data misuse can be in the form of sharing it by the private companies like pharmaceuticals, insurance companies, telecom industry etc. While DNA profiling is peculiar but indisputable genetic coincidence will jeopardize the privacy of those family members whose identities are in the Central Database.

The Crimes like riot, in which thousands of people involves where everybody is suspected without any reason. On the basis of mere suspicion large number of people might be subjected to DNA Profiling. Such pervasive authority has the potential to exploit innocent individuals, notwithstanding the lack of evidence. Another key issue to address is to delete the records. This is essential to understand how long this data would be stored since it is helpful in arresting and prosecuting the habitual offenders by comparing the stored data with the sample collected from the crime spot.

One of the biggest issues regarding the database is expanding the usage of the data collected. Clause 34 of the *DNA Technology Bill, 2019* describes that the samples collected will be used for various purposes like enabling judicial adjudication and conviction, to recognition of civil matters. Subsequently, the people who provides DNA sample for civil matter can also be vulnerable to criminal matters also. Centralized repository blurs the line between innocence and guilt. Someone who provides their DNA sample for civil purposes looks less innocent than the person whose data is not in the Centralized repository because the supposition of innocence has been severed. This may potentially shift the burden of proof on the people whose DNA matches in the forthcoming criminal prosecution, requiring them to prove their innocence.

ABSENCE OF A DATA PROTECTION LAW

The Draft of Personal Data Protection Bill was tabled in parliament with the goal of regulating the use of citizens' personal data by the government and commercial enterprises. It featured the use of sensitive information such as fingerprints, financial information, and even religious convictions with consent. The bill appeared to be a move towards more limited and consent-based usage of personal information by government machinery.

The Draft of Personal Data Protection Bill, 2019 (the "*PDP Bill, 2019*") is not designed to safeguard citizens from the major privacy violations that the *DNA Technology Bill, 2019* threatens. Section 43 of the *PDP Bill, 2019* makes an exception for the investigation and prosecution of crimes, exempting them from severe criteria. As a result, any infringement of accused individuals' and their family members' privacy under the DNA Technology law might be justified under such an exemption. While a full-fledged Privacy Act may appear to be a fanciful dream, the historic Puttaswamy judgement can be used as a yardstick to assess the

legality of the DNA Technology Bill. In this regard, we contend that this Bill would fail the three-prong test of legality, necessity and proportionality as laid down in Puttaswamy judgement.⁸

VIOLATIVE OF ARTICLE 20(3) OF CONSTITUTION OF INDIA

In a landmark case it was observed that any disturbance with individual autonomy violates the right to privacy, particularly when the individual faces criminal charges or sanctions. Hence any test which is not compatible with Human Rights is inadmissible. Therefore, a unified civil and criminal case database might result in defective searches and that jeopardise individual's right of privacy. It was also observed that assembling of DNA samples is not unconstitutional but DNA profiling for future usage could be the difficulty under Article 20(3) of Constitution of India.⁹

Because of its ability to replicate a wide range of psychological and behavioural features in humans, DNA is much more than a physical fact and usage of this in criminal prosecutions will not be less than self-incrimination, so it's a blatant breach of Article 20(3).¹⁰

The Apex Court held that privacy permits a citizen to enjoy the individual autonomy over body and mind and the freedom to gather, usage; storage and sharing personal information are the important part of this right. Five principles used to figure out whether a law affecting was valid.

- Legality- the Act must be legitimate.
- Statutory state's goal- The aim of the legislation must be parallel with the constitutional spirit
- Necessity- The violation must be restricted to a small extent with respect to right.
- Proportionality- There must be a contrast between the goal's importance and the level to which rights are infringed.
- Procedural Safeguards- To ensure procedural due process Citizens' DNA profiling by a DNA data bank may fall woefully short of these standards, jeopardizing persons' right to privacy unfairly.

LEAST RESTRICTIVE METHOD OF IDENTIFICATION

This Bill will probably fail the least restrictive method test because of the options available like destroying all DNA samples taken from victims and their family members when the trial is over, or restricting non-consensual DNA collection to some specific extreme circumstances. Moreover, data suggested that DNA profiling may not be the most effective method of distinguish people due to occurrences such as blood transfusion, bone marrow transplants, and other cases of different genomes in the human body. Jeopardizing the safety of persons on the

⁸ *Supra* note 5

⁹ *Selvi v. State of Karnataka*, (2010) 7 SCC 263

¹⁰ Manvi Rathore, *Prodding Privacy: Why India's DNA Regulation will be Curtains for Autonomy*, 2023 available at: <https://theleaflet.in/prodding-privacy-why-indias-dna-regulation-will-be-curtains-for-autonomy/>

list, an investigation system that heavily depends on the database to indict crimes, infringes the opinion of presumption of innocence, which is secured by the right of a fair trial.

FUNDAMENTAL RIGHT TO PRIVACY VERSUS LARGER PUBLIC INTEREST

Concerning proportionality, the state would attempt to support the Bill on the basis of a broader public interest in expedited justice delivery. The debate on balancing the interest of state with the rights of citizens might be made on basis of relevant judgments when there is probable contradiction between the individual's right to privacy and responsibility of the court to discover the truth, the court should act upon its discretion only after balancing the parties' interest and considering whether DNA is crucially needed for a reasonable conclusion in the issue.¹¹ However, even asserting a 'Compelling State Interest', as inferred in a relevant case¹², under the wider 'strict scrutiny test', in order to provide a gentle balance between the individual right and the societal interest might be protected. As a result, meeting the wider public interest exemption will be difficult for DNA profiling, which infringes fundamental right to privacy and the inherent rights of the accused, for meeting the larger public interest omission. Furthermore, contemporary concerns indicate that the issue in courts is not merely a matter of personal privacy vs. public interest, but rather the modern perspective of how "public interest in protecting personal private" is gaining relevance. As a result, any balancing of interests that the court may do in determining the legality of this statute must be done with the aforesaid criteria in mind.¹³

CONCLUSION

The aforesaid Bill might be an essential piece of regulation in the Indian legal system because, the government has declared that it will accelerate criminal prosecutions in which DNA evidence might be crucial, but the Bill lacks the procedural controls to restrict the escape or tampering of DNA samples and brings out no difference between prisoners or under-trial prisoners, accused or suspected. This Bill not only jeopardises the fundamental rights of convicted, under-trials, and suspects, but it also has the potential to significantly impact the lives of their family members. As Hon'ble Justice Chandrachud aforesaid, "Constitutional guarantees can't be subject to the Vicissitudes of technology". In this regard, we must determine how much trust we want to place in the trustworthiness of DNA samples, especially when the evidential value of DNA samples is still controversial. DNA Technology Regulation Bill, 2019 clearly avoids the security and privacy concerns of citizens, fails the constitutional tests as evolved in Puttaswamy Judgement. As a result, the Bill must be approved with careful consideration and discussion for its long-term relevance.

¹¹ *Bhabani Prasad Jean v. Convenor Secretary, Orissa State Commission for Women* (2010) 8 SCC 633.

¹² *Anuj Garg v. Hotel Association of India*, (2008) 3 SCC 1.

¹³ Editor 4, "Challenges and Concerns in Admission of DNA Evidence in India: With Special Reference to DNA Technology (Use and Application) Regulation Bill, 2019" SCC Blog, 2022 available at: <https://www.sconline.com>