



The DNA technology (Use & application) regulation bill, 2019: A critical appraisal

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Abstract

DNA fingerprinting is a technology that has been proved to be a boon for the administration of the Criminal Justice System. To have a uniform procedure for the use of DNA Technology 'The DNA Technology (Use & Application) Regulation Bill, 2019' was placed in the Lok Sabha. The main purpose of the Bill is to apprehend repeat offenders for heinous crimes, to develop stringent standards, etc. The proposed legislation will empower the criminal justice delivery system by enabling the application of DNA evidence, which is considered the gold standard in crime investigations. However, there are many ethical and legal issues surrounding the Bill. This paper is an attempt to analyse the provisions of the bill and the gaps in the proposed Bill.

Keywords: DNA bill, DNA profile, DNA technology, criminal investigation, crime scene

Introduction

DNA (Deoxyribonucleic Acid) Forensic Technology has changed the face of evidence collection in the Criminal Justice System. It has saved many innocent individuals and had brought numerous criminals to justice. Doing the unthinkable, and solving the earlier thought unsolvable cases across the globe, DNA Forensic Science's Advancement has revamped the Criminal Justice System throughout the globe. Though 100% accuracy is not claimed it is substantially used due to its proven efficacy. For example, "the amendment of Cr. P. C. by the Cr. P. C. (amendment) Act, 2005 has brought two new sections which authorize the investigating officer to collect a DNA sample from the body of the accused and the victim with the help of medical practitioner. These sections allow examination of a person accused of rape by a medical practitioner and the medical examination of the rape victim respectively.

In India, there have been numerous instances when many 'mysterious' cases have been solved with the help of this modern technology. But taking into consideration the potential risks of the use of this technology, one must not overlook the gravity of privacy infiltration while putting into action this technology. While DNA testing, the State asks the concerned individual for his/her most private information. Rather, one can debate that they ask for the information that is interlinked with the concerned individual's very existence.

Yet, the pros of this technology clearly outweigh its cons. Still, we simply cannot overlook the potential threats, ergo rises the need for a law to regulate DNA Forensic Science. The DNA Technology Regulation Bill was placed in the Lok Sabha in July 2019. The Bill was then referred to Parliamentary Standing Committee on Science and Technology. The Parliamentary Standing Committee on Science and Technology recently issued a report, which points out the possibility of misuse of the provisions mentioned in the Bill. For example, the committee pointed that, the DNAs can be used for caste or community based profiling, or this can be a serious encroachment upon the right to privacy. There also has been considerable criticism, voicing for

the required changes. Some of the criticised sections of the Bill are: the data isn't being protected; and the potential misuse of this data is a threat to the right to privacy. Some Members feel that the "crime scene index" is unnecessary and is not a required feature to solve crimes. Thus there are many ethical and legal issues surrounding the Bill. Nonetheless, nobody will deny the need for legislation. The proposed legislation will empower the criminal justice delivery system by enabling the application of DNA evidence, which is considered the gold standard in crime investigations. Therefore, the paper will first analyse the provisions of the bill and the gaps in the proposed Bill. Secondly, it will discuss the possible impacts of this Bill on vulnerable communities. The paper will also analyse the suggestions forwarded by the Parliamentary Standing Committee recently on 1st February 2021.

Glimpses of DNA Technology (Use & Application) Regulation Bill, 2019

The purpose of DNA Bill is "to provide for the regulation of use and application of Deoxyribonucleic Acid (DNA) technology for the purposes of establishing the identity of certain categories of persons including the victims, offenders, suspects, under trials, missing persons and unknown deceased persons and for matters connected therewith or incidental thereto." The statement of objects and reason of the Bill contains that, "DNA technology has the potential of wide application in the justice delivery systems. In criminal cases, it helps in the investigation of crimes through biological evidence including semen evidence in rape cases, blood evidence in murder cases, saliva evidence in the identification of the source of anonymous threat letters, etc. In civil cases, it helps in investigations relating to identification of victims of disasters like cyclones, air crash, etc. Several crimes are committed by repeat offenders, whose apprehension and conviction will be aided by a comparison of biological evidence at the scene of crime with DNA profiles stored in a DNA Data Bank. At the same time, the DNA analysis offers substantial

information, which if misused or improperly used, can cause harm to individuals or society.”

It had been claimed in the Bill that, sufficient efforts has been taken in balancing the use of DNA profiling in the administration of criminal and civil proceedings and the protection of the right to privacy. This is evident from the functions of the DNA Regulatory Board. Section 12 of the proposed Bill, talks about the functions of the Board. It states that the Board shall recommend methods and ensure optimum use of DNA Technology in the administration of Civil and Criminal Proceedings. It further requires that Board shall take into consideration all ethical, social and human rights issues regarding use of DNA. It further states that it shall be inconsistent with International guidelines provided by the UN and Its specialised agencies in respect of the protection of right to privacy, civil liberties by abiding by professional ethics in DNA testing while collecting and using DNA sample and DNA techniques. It also requires maintenance of confidentiality of DNA information and removal and destruction of obsolete or inaccurate DNA information from data Base.

Section 21 of the Bill proposes to obtain valid consent from the person who is arrested or whose bodily substances are required for criminal investigation, except for the offences for which punishment is death or imprisonment for a term exceeding seven years. It further says that, if the investigating officer wants the bodily substances of the person, who refuses to give, may apply to the Magistrate for obtaining bodily substances. And if the Magistrate feels it appropriate to prove or disprove the case may issue an order for taking of substances from such person. It means proper procedure has been laid down to prohibit any kind of abuse of process by the officers concerned.

Chapter V of the proposed Bill talks about the establishment of the National and Regional Data Bank. And further requires that all data stored in Regional Data Bank need to be shared with National Data Bank. It also categorically requires bifurcation of data in different indexes, like a crime scene index, under trials index, offender’s index, etc. so that there shall be a proper use of this data. Bill prescribes the procedure for sharing of DNA Profiles with even Foreign Government of International organisation, so that if required DNA profile may be matched with DNA profile received from International authority to facilitate criminal investigations at International Level. At the same time precautions are being taken by prescribing the due procedure for providing services to International bodies. It also prescribes the procedure for removal or detention of data from the Data Bank. Like if the criminal case is closed down or there is a written request from the person whose DNA data has been stored unnecessarily needs to be removed.

Chapter VI of the proposed Bill also talks about the security and confidentiality of the data received by data bank. The chapter further through section 34 of the Bill talks about the security of information relating to DNA profiles by specifying the purposes for which DNA profiles can be used. It states that the information can be utilised for facilitating the identification of persons in criminal cases by the law enforcement and investigating agencies, judicial proceedings, by following the rules of admissibility of evidence, facilitating prosecution and adjudication of criminal cases, taking defence by an accused, investigations relating to civil disputes or other civil matters, however in these matters information will be provided only after

the approval of the court, or the concerned authority to this effect. The bill also prohibits access to information in DNA data banks to protect the right to privacy and prohibit the misuse of data. Section 35 of the Bill states that information relating to DNA profiles, DNA samples and any other records thereof, in the custody of DNA Bank or the Regional DNA Bank or a DNA Laboratory need to be secured and kept confidential. Communication or access of information is restricted to the purposes specified under the Bill. This indicates that efforts are taken to regulate the use of data forwarded to and in the custody of Data Bank. Section 45 and 46 of the Bills provides a penalty for unauthorised disclosure or collection of DNA information from DNA Data Bank. The penalty has also been prescribed for destruction, alteration, and contamination or tampering with biological evidence. The Bill also listed down the list of matters for DNA testing through the Schedule attached to it. Matters relating to offences under the Indian Penal Code where DNA testing is useful for investigation of offences, offences under special laws, like, under the Immoral Traffic (Prevention), Act, 1956, The Medical Termination of Pregnancy Act, 1971, The PCPNDT Act, 1994, Domestic Violence Act, 2005, The protection of Civil Liberties Act, 1955, etc. and in respect of Civil matters like Parental disputes, Issues relating to ART, Human organ Transplantation, to establish individual identity etc. It also includes within its sphere the cases of medical negligence, unidentified human remains, identification of abandoned or disputed children.

Critical Analysis of the Bill

As stated earlier the present Bill has been criticised from various angles, let’s discuss few important criticisms of the Bill.

Need for efficient, trained Police officers and Forensic scientists

This Bill mainly focuses on the collection of DNA data and on DNA Profile creation, and its application in the field of Criminal Justice. It empowers the investigating agencies for the above mentioned functions. But the infrastructural revamp that is needed, such as but not limited to: proper training of police officers in this field and abundance of forensic experts. If such conditions aren’t met properly, this technology will prove ineffective, will be abused, and will then lead to injustice.

Use of Data from Different indexes for the purposes for which it has not been stored

Section 25 of the proposed Bill allows the creation of DNA banks at National and State levels. It further talks about the different kinds of indexes relating to the crime scene, offenders, suspects, including under trials, and missing and deceased people. However, the author would like to argue that there should be a separate database for criminal matters and missing persons. Or situations may occur where a missing person’s DNA is being used in criminal matters!

Targeting of individuals from poor socio economic backgrounds

History stands witness to the fact that the Indian Criminal Justice system often preys on the socio economically marginalised sections of society. And this process is sadly still in continuation, and it will continue hitherto. And according to the Bill, the DNA

data of these individuals (under trials, suspects etc.) will be collected and stored, ergo strengthening this vicious cycle of social oppression and marginalisation.

Data protection and right to privacy

It is also argued that, “Right to Privacy has been included under Right to Life and Personal liberty or Article 21 of the Indian Constitution, and Article 20(3) provides Right against Self-Incrimination which protects an accused person in criminal cases from providing evidences against himself or evidence which can make him guilty. But it has been held by the Supreme Court on several occasions that the Right to Life and Personal Liberty is not an absolute Right. In *Govind Singh v. State of Madhya Pradesh*, Supreme Court held that a fundamental right must be subject to the restriction based on compelling public interest. In another case *Kharak Singh v. State of U. P.*, Supreme Court held that the Right to privacy is not a guaranteed right under our Constitution. It is clear from various decisions which have been delivered by the Supreme Court from time to time that the Right to Life and Personal Liberty which has been guaranteed under our Indian Constitutions not an absolute one and can be subject to some restriction. And it is on this basis that the constitutionality of the laws affecting the Right to Life and Personal Liberty are upheld by the Supreme Court which includes a medical examination. And it is on the basis that various courts in the country have allowed DNA technology to be used in the investigation and in producing evidence. To make sure that modern technologies can be used effectively, there is an urgent need for specific legislation that would provide the guidelines regulating DNA testing in India.” Yet, two major issues – privacy violations and capacity – have not been adequately tackled in the report. The Parliamentary Standing Committee report comprises two dissent notes, both of which highlight the risks of privacy violation caused by this Bill. It would be prudent, at the least, to wait for the Personal Data Protection Bill to be passed before debating this Bill.

Immoral Trafficking (Prevention) Act, 1956 and DNA Profiling

In one of the articles, author argues that “In the Indian law, sex work in India is conflated with trafficking and no agency has been given to those who voluntarily carry out sex work as a means of livelihood. Sections 7 and 8 of ITPA criminalize ‘carrying on prostitution by any person’ and ‘soliciting in a public place for the purpose of prostitution’. On a day to day basis, women and trans persons who practice sex work suffer sexual abuse and extortion at the hands of police personnel. The stigma attached to sex work and the daily abuse by police personnel pushes HIV prevention programmes underground and further deprives sex workers of their right to health.”

Analysis of Standing Committee Report

The Parliamentary Standing Committee on Science and Technology, Environment, Forests and Climate Change has recommended that the government assuage concerns raised over the DNA Technology (Use and Application) Regulation Bill, 2019, including over creation of a national databank of crime scene DNA profiles and fears of communities being targeted. While recognising the importance of DNA technology in criminal investigation, the committee, in its report tabled in Parliament

Wednesday, says, “The risk with a national databank of crime scene DNA profiles is that it will likely include virtually everyone since DNA is left at the ‘crime scene’ before and after the crime by several persons who may have nothing to do with the crime being investigated.” It adds, “These fears (regarding the Bill) are not entirely unfounded (and) have to be recognized and addressed by the government and by Parliament as well... The Committee is of the strong opinion that an enabling ecosystem must be created soon to ensure that DNA profiling is done in a manner that is fully consistent with the letter and spirit of various Supreme Court judgments and with the Constitution.” The committee further observed that “While conviction rates have remained abysmally low, the majority of those arrested as under trials belonged to just three communities: Dalits, Muslims and Adivasis. Therefore, the committee recommended the deletion of all references to inclusion of DNA data about non-convicts, including suspects and under trials which are proposed to be held in an indexed data bank.”

One of the articles states that, “The National Crime Records Bureau (NCRB) reports that there are over 36,000 unidentified bodies each year. A DNA databank can be useful in identifying these bodies. The other use of a databank would be in identifying and tracking down repeat offenders. A 2016 NRCB report claims that, of all criminals arrested in India in 2015, around 8 percent were repeat offenders. It is important to note that DNA evidence cannot be inculpatory i.e., it cannot be used as evidence that someone committed a crime. At best, it can show that a person may have been at a scene where the crime took place, and add suspects to a case. The Committee report addresses both these issues, and recommends purpose limitation for the Bill and a mechanism that purges data post closure of a case.” The article further suggests that “The issue with capacity can be addressed by increasing investment towards infrastructure. As per a note submitted by the Department of Biotechnology to the Committee, DNA testing is currently being done on an extremely limited scale in India, with approximately 30-40 DNA experts in 15-18 laboratories undertaking fewer than 3,000 cases a year. In other words, 2-3 percent of the total need for DNA profiling is being met. The creation of a databank for all criminal offenders will go hand-in-hand with the increase in demand for DNA profiling. With the capacity deficit that follows, it is likely that the implementation of this Bill stalls judicial proceedings that demand DNA profiles. This can be resolved by staggering the implementation of the databank – use it primarily to identified deceased remains in the beginning, and later for specific crimes, where DNA evidence may be a useful piece of the puzzle. If the databank truly helps in expediting justice, the provisions of the Bill can be expanded to other crimes.”

The committee also observed that “DNA is not only used for the detection of crime. It is a unique identifier of the person, & if not recorded or retained with appropriate safeguards, may allow for the identification of a person and critical information about them. This not only raises concerns about the privacy of individual citizens but also national security.” The committee further states that “Therefore it is recommended that urgent steps are taken to incorporate substantive safeguards about the collection, transfer, contamination and matching of DNA. Furthermore, it must be ensured that the revised draft of the Bill prevents excessive & undue delegation of the powers and functions of the Board, as well as the purpose for which DNA information may be used. The

manner in which data is retained, shared & controlled must be a matter that Parliament must be concerned with. Within the framework of the Puttuswamy judgment, it is not possible to envisage a situation where the use of such critical data is managed & controlled by a mere statutory body.”

Regarding the absence of the Data Protection Law, the committee stated that “Government continues to collect citizen’s private data is critical because it provides a mechanism for enforcement of rights, grievance redressal and independent oversight. When the data being collected is sensitive as DNA, it requires additional protections.” Therefore, the committee recommended that the bill should not be introduced till the enactment of Private data protection Bill. For effective privacy protection, an autonomous and independent remedial process is paramount. This can only be achieved when there is an independent regulator such as Data Protection Authority as envisaged in the Data protection Bill. The committee further suggested that “The absence of procedural and substantive safeguards makes the proposed legislation suspect. It must be noted that the indefinite retention of DNA profiles of persons without a straightforward process for its removal is a violation of a person’s right to privacy. Under section 31 of the Bill, data is effectively retained indefinitely because it is preconditioned on police reports or court orders. The indefinite retention of personal information, condition on court orders, violates the principle of privacy and control over personal information. Therefore, the database is likely to be lopsided and consist of people who are presumed to be innocent in the eyes of the law. In such a case, there is no constitutional justification to include their data in a database or index. Furthermore, removal of a DNA profile of someone who is not an offender or suspect or undertrial from the database would require an application.”

Conclusion and Suggestions

DNA Profiling is undoubtedly proven forensic technology for criminal investigation, disaster victim identification, identification of missing persons and human remains. However, the use of DNA Profile involves various legal and ethical issues. Therefore, it needs to be regulated through a piece of legislation. The present Bill on DNA Profiling is indeed a welcome step. From the standing Committee Report and after reviewing the existing literature on the subject it is very clear that DNA Profiling may reveal sensitive information about individuals, skin, colour, behaviour, illness, health status, etc., which may result in abuse of this information to target individuals and their families using their genetic data. It was also rightly observed by the committee that, it may be misused for caste/ community based profiling. So the process may result in a serious violation of the right to privacy and human rights. The whole process of DNA profiling, handling and controlling is vulnerable to manipulation, mislabelling and contamination by accident or design. Therefore the Bill must ensure an independent regulator of data as suggested in the Data Privacy Bill. So the government may reconsider the Bill in the light of the recommendations forwarded by the Standing Committee and the recent judicial practices in respect of the right to privacy. This is as far as reality has fared. The gravity with which the two houses of Parliament will weigh the recommendations of the committee is as of now, unknown to us all. The spine of the proposed DNA Bill requires concrete spine reinforcement if it is to come through on the hoped and claimed judicial delivery while protecting the rights of the Indian citizens.

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