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The DNA Technology (Use and Application) Regulation Bill, 2019 and its Effectiveness in Upholding the Principles of Privacy

Udhaya Karthika* and Tanisha Verma**

Abstract

The recent progress in biotechnology has marked a new beginning in the extent and scope of performance of law. One such widely expanding area of technology is the DNA Fingerprinting and DNA Profiling Technologies. It is pertinent to structure law in line with new forms of science. The infusion of new technology with law requires extensive research to circumvent any abuse on both the law and technology and still upholding the facets of justice. The first requirement is to see whether these technology laws will be in consonance with the constitution of the land. The second obligation is to ensure the negation of any fortuitous concomitant of the implementation of such laws.

This paper aims to critically analyse the perseverance of the fundamentals of privacy as per the decision in K.S Puttaswami v UOI, 2017 while implementing the law on DNA. Thus, the objective of the paper is to analyse the DNA Technology (Use and Application) Regulation Bill, 2019, its loopholes and suggest corrective measures, so that it can be brought at par with the facets of privacy.

DNA, being a storehouse of sensitive information can convict as well as acquit a person from any crime and therefore it becomes exigent for lawmakers to be fair without giving an opportunity for discrepancies to creep in.

***Keywords**: DNA Technology, DNA Fingerprinting, DNA Profiling Bill, DNA Analysis, Privacy, Puttaswami Judgment*

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Introduction - Privacy, Criminal Laws and the Emerging Technology: Formation of an Equilateral Triangle

Even the slightest variation made in the length and angle of an equilateral triangle collapses its whole structure. Similarly, in a society, law should be framed in such a way that there is absolute consistency and balance between these three elements – Privacy, Criminal Laws and Emerging Technologies, so as to achieve the desired results. In order to ensure an equilateral balance between the three, there is a need to understand the denotation of the word 'privacy'.

Privacy as a Right and Privacy as a Fundamental Right

Privacy means the right to be free from any kind of surveillance. Privacy refers to a state wherein the liberty of the citizen is free from the ascendency of the state.[1] It is the "absence or avoidance of publicity or display; the state or condition from being withdrawn from the society of others, or from public interest; seclusion."[2]

The Right to Privacy has been given the status of a human right. It is a right that protects interests that pertains to the physical realm and the mind.[3] However, it was not a fundamental right. Since the 1960s, the Indian judiciary has dealt with privacy, as a fundamental right under the constitution of India, as well as common law right. It was only recently in the year 2017, that the 'Right to Privacy' got incorporated as a fundamental right under Article 21 of the Constitution of India.[4]

However, expanding the scope of fundamental rights to include the right to privacy wasn't a low hanging fruit to grab for the Supreme Court. The issue in hand in the said historic decision wasn't one of a kind. The same had cropped up in a number of instances before but couldn't see the light of the day. For instance, in *M.P. Sharma v. Satish Chandra*[5] the issue arose regarding the constitutionality of 'search and seizure' and the same was seen as being violative of Article 20(3). The court refused to recognise a right against search and seizure to be violative of the fundamental rights as the right to privacy wasn't seen as a fundamental rights by the courts. In fact, the court held that recognising privacy as a fundamental right is unknown to the Indian Constitution. Similarly, in *Kharak Singh v. The State of U.P*,[6] it

1 John Stuart Mill, *On Liberty,* (1859)
2 New Oxford English Dictionary
3 *Justice K.S Puttaswami v. UOI* (2017) 10 SCC 1.
4 *Justice K.S Puttaswami v. UOI* (2017) 10 SCC 1.
5 *M.P. Sharma v. Satish Chandra* (1954) SCR 1077
6 *Kharak Singh v. The State of U.P* (1964) 1 SCR 332

was stated that the right of privacy is not an assured right under our Constitution and thus ascertaining the movements of an individual which is done in a manner similar to in which privacy is invaded is not an infringement of a fundamental right.

As seen, the trend that was being followed up till now was based on the sole idea that fundamental rights were undivided and absolute and had to be read in isolation. But the said view was given up via the upcoming precedents and it was seen that Article 14, 19 and 21 must not be read in isolation but in toto and by interlinking one with the other.

The above view was first upheld in *R. C. Cooper Case*[7] where the court discarded the idea that the fundamental rights can be classified in water-tight compartments, agreeing with the dissenting judgment in Kharak Singh. Further, in *Maneka Gandhi v. Union of India*[8] the court stated that a right that has been included under Article 19 is not per se deprived from being included under the ambit of article 21. A state cannot suspend a particular right just based on the reasoning that it was not included under Article 21 initially.

It was only after the 2017 judgment[9] that the right to privacy was regarded as a fragment of Article 21. Nonetheless, the Right to Privacy as a Fundamental Right is also not absolute. It is conditional to certain tests and can be overridden by the state for larger interest of an individual. Now, privacy is no more an elitist construct. It has three facets namely-

a) *Repose* i.e. the freedom from unwanted stimuli,

b) *Sanctuary* i.e. protection from intrusive observation

c) *Intimate decision* i.e. autonomy to make personal life decisions.[10]

The judgment aims at highlighting the need of protection of certain kind of data from the state actors and the non- state actors.[11] Where a citizen is required to make a choice between privacy and social welfare schemes, then surely he would choose basic amenities like food and shelter first.[12]

7 *R. C. Cooper Case* (1970) 1 SCC 248

8 *Maneka Gandhi v. Union of India* (1978) 1 SCC 248

9 *Justice K.S Puttaswami v. UOI* (2017) 10 SCC 1

10 *Justice K.S Puttaswami v. UyOI* (2017) 10 SCC 1

11 Kaul J., *ibid*

12 Shraddha, *What impact the recent Right to Privacy judgment will have on existing law?,* ipleaders blog, available at, https://blog.ipleaders.in/right-to-privacy-judgment-impact/, last seen on 20.10.2018 at 12:15 AM

Efficacy of the Privacy Judgment

The 2017 judgment[13] has brought in a paradigm shift in the jurisprudence of privacy in India. The right has given protection to the citizens from intrusive hindrance from state and non-state actors. Privacy forms an integral part of "personal liberty" under the Constitution, which cannot be denied except through a "procedure established by law".[14] The procedure that the law prescribes must essentially be "just, fair and reasonable". However, the state can anyway impose reasonable restrictions on the right to privacy. The restrictions however, must solely be "on the basis of social, moral and compelling public interest in accordance with law."[15]

There are certain laws that may at times put the right to privacy in a compromising situation. But now that it is a fundamental right, ensuring the same becomes all the more important. Mere creation of a right cannot be considered to be sufficient. The right must be protected not only from direct violation of the same but also indirect violation.

The nexus between the right to privacy and the DNA Technology (Use and Application) Regulation Bill, 2019 is so strong that it cannot be ignored at any cost. The Right to Privacy also includes under its ambit the right not to be compelled to speak anything or give self-incriminating evidences against one self. The rationale behind this right is that a person in whom the right to privacy is embodied, he cannot be asked to give out information that goes against him. Where paternity is in question, taking of DNA samples is a very sensitive issue. The court in *Bhabani Prasad Jena v Orissa State Commission for Women* has held it to be violation of right to privacy of an individual and is prejudicial to the rights of the parties as well as, it may cause tremendous effect on the mind of the child[16]. Thus, the judgment focuses on right to privacy as a multi-dimensional aspect. Having a proper legislation will strengthen the national ethos with respect to privacy in India. What is required at the moment is to strike a balance as to how the benefits of emerging technology can be gleaned while keeping the privacy of an individual intact.

Human DNA: The puzzle as well as the solution

DNA is Deoxyribonucleic Acid that is also regarded as a thread of human life and 'the' point of origination of every DNA based organism's life in this universe. It is an identity,

13 *Justice K.S Puttaswami v. UOI* (2017) 10 SCC 1

14 Constitution of India, Article 21

15 *Justice K.S Puttaswami v. UOI* (2017) 10 SCC 1

16 *Bhabani Prasad Jena v Orissa State Commission for Women* (2010) 8 SCC 633

so strong, that it can neither be created nor destroyed, but of course be duplicated via advance genetic technologies but can still never be the same. Even in case of Identical twins, studies have shown that twins 'share similar genes' which means, their DNA need not be identical.[17] It is proven that 99.9 % of base sequence is same in all humans and the uniqueness arises due to the 0.1 per cent of variation in it.[18] This 0.1 per cent of variation is the beauty of nature, which can be put to use by mankind to solve crimes and disputes arising from the brutality of mankind itself.

Evolution of DNA as Evidence

In 1953 Dr. J.D. Watson from U.S and Dr. Francis Crick from Britain, published in *Nature* an essay on the basic forms of life.[19] It depicted a model on the process of the transfer of genetic information between generations of the same organism.[20] Then it was Mendel who made remarkable discoveries in the field of biology. From then we have been successful in unlocking some of DNA's secret, which is not only a genetic advancement but has sustained the criminal law justice system by providing it with remarkable accurate evidence though it is yet to be regularised in the field of law.

In 1985 Dr. Alec J. Jeffreys, first proposed DNA Analysis which was used in the *Lynda Mann Case (1987),*[21] where a 15 year old girl was abducted, raped and murdered. The 'genetic fingerprinting' technology was applied in which the body samples taken from the accused, Colin Pitchfork matched the samples that were collected from the deceased victim and in 1987 he became the first murderer convicted by DNA.

Then in late 1980's, law enforcing agencies started performing DNA Analysis. The same was also being conducted by the Federal Bureau of Investigation (FBI) and other commercial laboratories.

DNA Fingerprinting has provided with higher odds of determining the identity of offenders as well as is unlike the regular blood sample and therefore remains usable endlessly on proper preservation and can be extracted from human remains even years later. This makes DNA a much reliable and authentic mode of finding proof. Even in case of disintegration of

17 Anahad O'Connor, *The Claim: Identical Twins Have Identical DNA*, The New York Times, available at https://www.nytimes.com/2008/03/11/health/11real.html

18 *Biology, Textbook for Class XII, NCERT*, NCERT Campus, 120-123 (2015)

19 J D Watson and F H C Crick, *Nature vol. 171*, 737 (1953)

20 *Human Genome News,* 9 (1998)

21 Ashok Bhan, *DNA and Indian Legal System,* Greater Kashmir Blog, available at https://www.greaterkashmir.com/news/opinion/dna-and-indian-legal-system/265178.html

blood, DNA remains stable unless it is burnt by fire.[22] Owning to its high level of utility, it is the need of the hour to recognise the admissibility of DNA as evidence. Globally, DNA evidence is being used by only some countries however, in a very efficient and effective way which has been analysed in the next section.

Comparative Status of DNA Profiling

Though only few countries around the world have adopted DNA profiling as a means of investigation in the criminal matters, they have been well established in these countries to an extent which utilise DNA samples to bring out justice for the victims.

i. *United Kingdom:* The first government database for DNA was setup in *United Kingdom in 1995*. The crime scene profile is compared with a profile in the database, and a match between the two helps the police to identify a possible suspect. For cheek swabs no consent is required however for intimate samples, it requires consent and authorisation. Profiles of individuals can only be retained up to three years if they are not convicted. The Forensic Information Database Strategy board and the Forensic Science Regulator govern and ensure standards in the DNA base services respectively.

ii. *New Zealand:* The second database after UK was set up in *New Zealand in 1995*. There are two databank operation involved which are called the DPD which contains the profiles of individuals and the Crime Sample Database which contains the profiles from unsolved crimes. Both these databanks are compared and then possible suspects are identified and then the crimes are linked.

iii. *France:* The Fichier National Automatisé des Empreintes Génétiques (FNAEG) database was set up in 2001 only.

iv. *United States of America:* In the *USA*, the DNA is collected for criminal investigations and identification of missing and deceased persons. The DNA samples can be taken when a person is charged with federal offences and the process varies across states. If conviction of the individual does not occur or the arrested person is dismissed, then his DNA profile has to be removed. FBI has organized the Combined DNA Index System (CODIS) database. The data base was originally to be used for prosecuting the sex offenders but now extends to include other criminal offender also with a holding over 9 million records as of 2011.

22 *Dharam Deo Yadav v. State of Uttar Pradesh* 2005 DNR (HC) 675

v. *South Africa:* Here the DNA profile management is similar to that of United Kingdom. The profiles of person acquitted are to be removed and cannot be retained beyond three years. One most impressive feature here is that the profile cannot include physical or medical details.

iv. *Ireland:* The DNA database in *Ireland* is operated by the Director of Forensic Science Ireland (FSI). It provides a much stringent law which requires removal of profile in three months in case of acquittal. It also envisages that only that part of DNA will be profiled which provides for the identity.

Setting up of DNA database has brought up different issues in different countries. Not all countries are desirous of sharing the data internationally as there is still a lot of potential for strengthening the privacy concerns. It needs great infrastructure for sharing data internationally which brings with it huge costs for setting up the same.

Admissibility and Need of DNA as Evidence in India

Currently, there is no specific legislation on DNA as a subject however; in 1989 DNA testing got its legal validity. There are only few sections in the Indian Evidence Act, 1982 which create at least a scope for the possibility to ask for or order a DNA Analysis or Test where required though it is not mandatory for the court to order one and highly depends upon the case and circumstances.

The case, *Kunhiraman v. Manoj*[23] is the first case where the paternity dispute arose and required DNA evidence as a proof. Slowly, DNA evidence became a requirement in many cases however, was only given the status of an expert opinion as per Section 45 of the Evidence Act.[24] Then in *Marada Venkateshwara Rao v. Oleti Vara Lakshmi*[25] the court ordered a DNA test to solve a dispute whether the plaintiff and defendant were born to the same woman. In *State of Uttar Pradesh v. Amaramani Tripathi*[26] the former UP Minister, Amaramani Tripathi was sentenced to life for the murdering one Madhulikha Shukla where they relied upon DNA fingerprinting as evidence. Even after such serious cases, the Apex court has been strict in ordering DNA Tests as a matter of routine and has limited it to only deserving cases.[27] When such DNA Test is ordered, it cannot be held to be in violation

23 *Kunhiraman v. Manoj* (1991) 3 Crimes 860 (Ker)

24 The Indian Evidence Act, 1872

25 *Marada Venkateshwara Rao v. Oleti Vara Lakshmi* AIR 2008, AP 195(196) (Para 9)

26 *State of Uttar Pradesh v. Amaramani Tripathi* AIR 2005 SC 3490

27 *Banarasi Das v Teeku Dutta* (2005) 4 SCC 449

of the rights guaranteed under Article 21 of the Constitution of India[28]and also the court has to record reasons as to why the test has been made necessary and to resolve what controversy.[29]

Section 112 of Evidence act is based on the Latin phrase '*pateris est quem nuptiae demonstarnt'* means, 'he is the father whom the marriage indicates'. It upholds the presumption of legitimacy of a child born to a married woman and where the child is deemed to be legitimate then the burden of proving the contrary lies upon the person who wants to prove the child's illegitimacy. What is required to prove illegitimacy is a strong preponderance of evidence and not an indefinite balance of probabilities[30], but this 'strong preponderance' of cannot be the DNA Test and can be only the proof of non-access. Though scientifically strong, DNA test is not substantial enough to escape the conclusiveness of Section 112.[31] In *H.M Prakash alias Dali v. State of Karnataka*[32] the court held that ordering of a DNA Test is neither a breach of his right to privacy or will invoke the provision of protection from self-incriminating statements. Thus, DNA analysis still stays as expert evidence and not a conclusive proof, in spite of the court observing in few cases that the ordering of DNA text does not violate Article 21. In the case of *Ramesh Thakur v NCT*[33] Hon'ble High Court of Delhi, for the purpose of investigation and on the request of the police, ordered the use of DNA Profiling technique to identify the body samples found on a bed sheet by virtue of Section 54 A of the IPC.[34]

Though Indian courts have started relying upon DNA evidence, there is still a fluctuation in the way the courts treat and use such evidence as it is evident, from the approach of courts towards individual cases. The various forensic materials like enzyme typing, fingerprints, serum-protein, dental impressions, blood-grouping, striations on bullets, hair and fiber comparisons, voice spectrograms, neutron-activation analysis, as well as DNA profiling[35], have an ability to match samples with reasonable accuracy which helps to differentiate one source from another thereby aiding criminal investigations, civil disputes such as parentage related disputes, family disputes which requires establishment of biological connection

28 *B. Vandana Kumari v. P. Praveen Kumar* AIR 2007 AP 17(20)

29 *Sunil Eknath Trambake v. Leelavati Sunil Trambake* AIR 2006 Bom 140

30 *Gautam Kundu v. State of West Bengal* AIR 1993 SC 2295 (2301)

31 *Kamti Devi v. Poshi Ram* (2001) 5 SCC 311

32 *H.M Prakash alias Dali v. State of Karnataka* 2004(3) Cr.C.C 322

33 *Ramesh Thakur v NCT* CRL.M.C. 3182/2011

34 Indian Penal Code, 1860

35 The Evaluation of Forensic DNA Evidence - National Research Council (US) Committee on DNA Forensic Science: An Update. Washington (DC): National Academies Press (US); 1996.

between individuals, identification of victims of natural and man-made disasters.[36] It is worth to take note of the role played by DNA Technology in identification of victims of terrorist attack of 2001 on the World Trade Centre and disasters such as the Asian tsunami that took place in 2004.[37]

There is no doubt that such evidence would be useful to the court, especially in an era where the amount of litigation pending is increasing in an alarming rate than that of the increasing population. However, scientifically acceptable procedures may be used to extract information required from such DNA evidence, without compromising the privacy of the individual.

In this regard, an attempt has been made by the introduction of the DNA (Use and Application) Regulation Bill, 2019 to lay down a formal set of rules and procedures for use of DNA evidence for deciding crimes and disputes.

Analysis of the DNA Technology (Use and Application) Regulation Bill, 2019

The DNA Technology (Use and Application) Regulation Bill, 2019 was introduced in Lok Sabha by Mr. Harsh Vardhan, Minister for Science and Technology, on 8 July, 2019. The Bill was previously introduced in Lok Sabha in August 2018, but it lapsed. The Bill provides for regulation of use of DNA technology for establishing the identity of certain persons[38]. However, the Bill has a faced a lot of criticism on several grounds for arbitrarily assigning wide ranging discretionary powers to the state and it poses a great threat to the privacy and gives rise to several data security issues. Over the years several amendments were made to make the Bill full proof with regard to privacy concerns. They were introduced time and again in the years 2015, 2017, 2018 and 2019.

Key Features of the Bill

The DNA Technology for identification of individuals in not regulated as of now. Hence the need of a law arises to utilise this dimension of law effectively without violating the core human rights. A lot of research has been conducted by experts and especially the Law

36 "Report No. 271: Human DNA Profiling- A draft Bill for the Use and Regulation of DNA-Based Technology", Law Commission of India, July 2017, http://lawcommissionofindia.nic.in/reports/Report271.pdf.

37 *"Nothing to Hide, nothing to fear?"*, Human Genetics Commissions, United Kingdom, November 2009

38 *DNA Technology (Use and Regulation) Bill, 2019*, PRS Blog available at https://www.prsindia.org/Billtrack/dna-technology-use-and-application-regulation-Bill-2019

Commission in the use and regulation of DNA Technology. The draft Bill of 2018 was a result of the report submitted by the Law commission in July 2017. The current active Bill of 2019 aims to regulate the use of DNA technology for the purpose of identification of persons in criminal and civil matters. The key features of the Bill that are essential to protect and regulate the use of DNA Data have been discussed below:

It is important to first understand the purposes for which DNA Data can be used. This has been laid down in the schedule of the Bill. DNA evidence can be used for establishing offences under the Indian Penal Code, 1860, Immoral Traffic (Prevention) Act, 1956, the Medical Termination of Pregnancy Act, 1971, the Protection of Civil Rights Act, 1955, the Motor Vehicles Act, 1988, and other such laws and for deciding various civil issues like parentage disputes, pedigree, immigration, or emigration, assisted reproductive technologies, transplantation of human organs, and for establishing individual identity.[39]

Further, the bill requires consent for collecting the bodily substances.[40] In an offence with punishment up to seven years, the authorities are required to obtain written consent of the arrested person before collecting his bodily substances. Where accused does not give consent, the authorities will have to approach a Magistrate who may order for collecting the bodily substances from the individual. Provided, the Magistrate should be satisfied that such DNA testing will approve or disprove the individual's involvement in the alleged offence. In an offence with punishment of more than seven years of imprisonment or death, there is no need to take consent from arrested person to collect his bodily substances. In case of a victim or a missing person the authorities are required to obtain written consent from their relatives to collect the bodily substances and in case of a minor or disabled person, the written consent of the parent or guardian is taken and where such consent is not given by them, the authorities may approach a Magistrate for ordering the collection of such required DNA sample.

The next focus of the Bill is on the DNA Laboratories used for DNA testing. The Bill lays down such DNA Labs conducting DNA testing will have to obtain accreditation from the DNA Regulatory Board, with validity of two years. Such accreditation can be revoked by the board for reasons like failure to undertake DNA testing, or complying with other provisions of the Act. The DNA laboratories need to follow quality assurance standards in collection, storing, testing, and analysis of the DNA samples. Further, the Central Government will set up National DNA Data Bank and Regional DNA Data Banks. These DNA Data Banks have to maintain crime scene index, suspect index, under-trial's index,

39 The Schedule, The DNA Technology (Use and Application) Regulation Bill, 2019

40 Section 21, The DNA Technology (Use and Application) Regulation Bill, 2019

offender index, missing person's index and unknown deceased person's index.[41]

Existence of Data Banks raises the issue of sharing of DNA data with such Data Banks. The Bill lays down that the DNA laboratories have to share the DNA data prepared by them with the National and Regional DNA Data Banks. In cases of criminal nature, the laboratory has to return the body sample to the investigating officer after depositing the DNA profile with the DNA Data Banks and in other cases, the labs are required to destroy the sample and inform the person concerned with the same.[42] The Bill also lays down the procedure to remove DNA profiles from DNA Data Banks. DNA profiles index will be removed from DNA Data Banks after a written request is made by the individual. In case of suspects the DNA Profiles will be removed after the police report is filed or as per the order of the court. In case of an under-trial the DNA Profile will be removed after the court orders for the same. The one-time keyboard search provision says that DNA samples can be compared with information provided in the index of the Data Bank, without the information being included in the index.

Chapter VII of the Bill lays down provisions on DNA Regulatory Board. It says that the DNA Data Banks and DNA laboratories will be supervised by DNA Regulatory Board. The board performs the functions of supervising DNA laboratories and DNA Data Banks for quality control, granting accreditation to DNA laboratories, training manpower, make recommendations to the central government on use and analysis of DNA samples. Further the board has to keep confidential the information relating to DNA profiles in Data Banks, DNA laboratories, and use it only for identification purpose only.[43]

The chapter on 'Offences and Penalties' of the Bill has prescribed a penalty of imprisonment up to three years and a fine up to one lakh rupees for unauthorised disclosure of information or obtaining information from Data Banks or using them without authorisation. Further, a penalty of imprisonment up to five years and a fine of up to two lakh rupees for intentional tampering or destruction of biological evidence has also been prescribed.[44]

Issues and Legal Lacunae in the Bill

There are certain lacunas in the Bill that are required to be amended before it becomes a law. The *Puttaswami Judgment*[45] upheld the right to privacy as a fundamental right under

41 Chapter III and Chapter IV, The DNA Technology (Use and Application) Regulation Bill, 2019
42 Chapter V and Chapter VI, The DNA Technology (Use and Application) Regulation Bill, 2019
43 Chapter VII, The DNA Technology (Use and Application) Regulation Bill, 2019
44 Chapter VII, The DNA Technology (Use and Application) Regulation Bill, 2019
45 *Justice K.S Puttaswami v. UOI* (2017) 10 SCC 1

Article 21 of the Constitution of India and overruled the verdicts given in *the M.P. Sharma case*[46] of 1958 and the *Kharak Singh case*[47] of 1961. Right to privacy is now intrinsic to life and liberty and thus comes under Article 21 of the constitution.

The 2019 DNA Bill[48] has not defined on how DNA profiling can be used. It is missing a "number of safeguards that would enable individual rights". Thus the lacuna in data protection is highly likely to violate the *ratio decidendi* given by the Hon'ble Supreme Court in the judgment.[49]

The 2017 Law Commission Bill claims that it has used the 13 CODIS (combined DNA index system) profiling standard in the drafting of the Bill as a way of protecting privacy, but it has left the "defining of privacy and security safeguards to actual regulation"[50] meaning that CODIS standard is not in the text of the Bill. Further, the following issues have not been answered by the Bill effectively:

The first issue is *whether the scope of the Bill covers the Disease Diagnostic Laboratories or not*. It is not clear if the intention of the Bill is to also regulate the DNA laboratories that conduct DNA testing for medical and diagnostic purposes. This issue has arisen because of the non-synchronous objective of the Bill as given in the Long Title, the Schedule and the other provisions of the Bill. The Bill requires DNA testing labs to get accreditation from the DNA Regulatory Board. There are also Labs that carry out DNA testing for other purposes such as medical or research, like a diagnostic lab for testing various diseases. The confusion arises because the DNA testing conducted in these labs can also be used to establish identify of an individual.

The second issue is *whether the consent of individuals in civil matters is taken into consideration or not while collecting the bodily substances*. For purpose of civil matters, the requirement to obtain the consent of an individual has not been specified for DNA profiling. This raises concern about the privacy of the bodily substances collected in civil disputes.

Thirdly, it is also not clear as to *whether the mandate of DNA Data Bank applies to civil matters as well*. The Bill does not lay down any provision which says that the storage and

46 *M.P. Sharma v. Satish Chandra* (1954) SCR 1077

47 *Kharak Singh v. The State of U.P* (1964) 1 SCR 332

48 *DNA Technology (Use and Regulation) Bill, 2019*, PRS Blog available at https://www.prsindia.org/Billtrack/dna-technology-use-and-application-regulation-Bill-2019

49 *Justice K.S Puttaswami v. UOI* (2017) 10 SCC 1.

50 271st , Law Commission of India Report, *Human DNA Profiling,* 2017

removal of DNA profiles in the DNA Data Bank applies to DNA Data collected in civil matters also. The lack of such a provision raises concern of privacy in matters of civil disputes and hence, there may be a violation of the right to privacy. The Supreme Court in the *Puttaswami Judgment* has observed that right to privacy is a fundamental right and the right will be infringed only when there is a law and the law aims to achieve a public purpose and the public purpose is proportionate to the infringement of privacy.[51] The storage of DNA profiles in civil matters may not necessarily serve a public purpose and hence it may violate the right to privacy.

The next issue is regarding the fate of *additional information provided by DNA during profiling has not been made clear*. DNA samples are potential enough to provide additional information other than the identity, such as the medical and physical characteristics of the individual. But on the contrary, the Bill nowhere explicitly mentions that such other will not be included in the DNA profile. Thus, if this provision is not brought in the Bill, it may lead to violation of privacy. However, this issue can be resolved with stricter profiling of the requisite part of DNA which does not reveal the additional information. The United States of America and United Kingdom follow this practice to protect the privacy of individuals[52]. Further, Ireland and South Africa specifically mention that the DNA profile will not contain additional information other than the identity of the individual.[53] It is important to note here that the Law Commission has also mentioned in its report on the Human DNA Profiling that only portions of DNA that provide information related to identity of the individual shall be used. It raises concern because this provision has been not specified in the Bill.

Further, the Bill neither provides for the *removal of DNA profiles of unknown deceased persons*, as provided for the case of a suspect, under-trial and missing persons nor it discusses about the *removal of the DNA Profiles stored by DNA Laboratories*. According to the Bill, the DNA Data stored in various index will be removed, however, the Bill does not require DNA laboratories to remove DNA profiles and it has been left to regulations. Further, the Bill does not provide for a *mechanism for redressal of grievances* when the DNA profile is not removed from the data banks by the National DNA Data Bank.

Lastly, the issue, that *whether there is any need of Photographs and Video Recording under the Bill* has not been answered by the Bill. The Bill surprisingly lists photographs and video recording of body parts as a source for sample collection; however, it does not mention or

51 *Justice K. S. Puttaswamy and Ors. v. Union of India and Ors*, AIR 2017 SC 4161.

52 *Maryland v King, Supreme Court of the United States*, October 2012.

53 Section 36A(1)(fC), Criminal Procedure Act, 1977, South Africa and Section 2(1), Criminal Justice (Forensic Evidence and DNA Database System) Act, 2014, Ireland.

explain the purpose of the same.

Challenges for the Implementation of the DNA Technology Bill, 2019

After considering the key features and the lacunae of the Bill, it is pertinent to discuss the challenges in enforcing and implementing such a Bill. It depends upon the resource available with the country to enforce a DNA Technology Bill, which requires high costs and high standards of technical support from the government.

i. *India's Law Enforcement System:* India lacks proper infrastructure and technical know-how thereby restricting use of DNA Analysis in an effective manner. There are risks of contamination of the sample, and risks in how the crime site is treated and analysed by the so called experts.

ii. *Installation Cost Analysis:* The Bill provides for setting up a DNA data base at national level and state level for recording the DNA of persons arrested in criminal offences. The Indian government has analysed a cost of twenty crores ($3.3 million)[54] only which is a very less amount to maintain a perfect database. In UK, an amount of three thousand million euros ($450 million) has been spent to just setup a database.

iii. *Reliability:* In cases such as blood transfusion or bone marrow transplant, persons will have the donor's DNA in their body for some time. Here, the percentage of reliability of the DNA evidence collected may not be satisfactory. In other cases such as when DNA data is recovered from a crime scene but is not enough to produce a correct match for the algorithms[55], then also the reliability factor of DNA sample goes down. Here, the DNA samples may not be put to use and an alternative mechanism has to be devised.

iv. *Unlimited Use of Data:* A positive note about India's DNA Bill is that it is wider in nature as compared to the law in other countries which use DNA sample for only criminal matters. But India has attempted to include both civil and criminal matters to be resolved through the available DNA samples. However, the same can be a negative aspect as well because the wider is the use of data extracted from DNA more will be the risk of breach of privacy.

54 Gowrishankar, Director, CDFD.

55 Mark Jobling, professor of genetics at the University of Leicester.

Conclusion

DNA is an exact science having prominent use in matters of evidence. However, in India the collected evidence is affected by lack of professionalism keeping the evidence under a question mark. Proper training must be imparted to the concerned authorities, for collection of the DNA from the site of crime along with legally valid guidelines. Moreover, the composition of the DNA regulatory board is also a matter of concern. The Board must also incorporate members from legal fraternity, for instance, a retired judge or a senior advocate of privacy laws. Incorporation of civil societies and human right activists will go a long way to ensure the privacy of the individuals.

It is important to ensure that the board does not assume unauthorised power over the years. The role of the board must be limited to licensing, safeguarding privacy and developing norms for ensuring public transparency. Also, the data protection laws must be made more stringent so that they confirm with the OECD guidelines. Arbitrary use of power by the Government with respect to personal information of the people should be avoided and a just and transparent system of DNA evidence should be built.

The issue of assurance of personal data before the birth of the legislation is very important as only then, the DNA Profiling Bill could be seen as a powerful tool in detecting crimes without compromising with the privacy of the individuals.