



Towards a Genetic Panopticon

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(This editorial is based on the article “Towards a Genetic Panopticon” which appears in The Hindu on 21st December.)

The genes encoded in our deoxyribonucleic acid (DNA), which are collected from blood, hair, skin cells and other such bodily substances, have undoubtedly proven to be an important tool in forensic science. Much like fingerprints, a person’s DNA profile is unique (except in the case of identical twins), therefore, help in establishing the identity of a suspect.

That only a small amount of genetic material is needed to create such a profile makes the form of evidence for criminal investigators. Across the world, the use of DNA evidence has helped to discharge a number of innocent people from wrongful conviction and has also helped find the guilty party in complex investigations.

Considering its importance, **the government introduced the DNA Technology (Use and Application) Regulation Bill, 2018 in Lok Sabha in August 2018. The Bill provides for regulation of the use of DNA technology for establishing the identity of certain persons.**

Key Highlights of Proposed Bill

- **The Bill regulates the use of DNA technology for establishing the identity of persons in respect of matters listed in a Schedule.** These include criminal matters (such as offenses under the Indian Penal Code, 1860), and civil matters such as parentage disputes, emigration or immigration, and transplantation of human organs.
- **The Bill establishes a National DNA Data Bank and Regional DNA Data Banks.** Every Data Bank will maintain the following indices: (i) crime scene index, (ii) suspects’ or undertrials’ index, (iii) offenders’ index, (iv) missing persons’ index, and (v) unknown deceased persons’ index.

- **The Bill establishes a DNA Regulatory Board.** Every DNA laboratory that analyses a DNA sample to establish the identity of an individual, has to be accredited by the Board.
- Written consent by individuals is required to collect DNA samples from them. **Consent is not required for offenses with the punishment of more than seven years of imprisonment or death.**
- **The Bill provides for the removal of DNA profiles of suspects on the filing of a police report or court order,** and of undertrials on the basis of a court order. Profiles in crime scenes and missing persons' indexes will be removed on a written request.

Problems with Bill

- The draft statute, not only disregards the serious ethical dilemmas that are attached to the creation of a national DNA database, but also, contrary to established wisdom, **virtually treats DNA as infallible, and as a solution to the many problems that ail the criminal justice system.**
- This Bill fatally ignores the **disproportionality of the DNA bank that it seeks to create, and the invasiveness of its purport and reach.**
- It also conflates its objectives by allowing the collection of DNA evidence not only in aid of criminal investigations but also to aid the determination of civil disputes.
- Importantly, while consent is not required before bodily substances are drawn from a person accused and arrested for an offence punishable with either death or imprisonment for a term exceeding seven years, in all other cases a person refusing to part with genetic material can be compelled to do so if a Magistrate has reasonable cause to believe that such evidence would help establish a person's guilt. Therefore, there's no end to the state's power in coercing a person to part with her DNA.
- **In Justice K.S. Puttaswamy (Retd) v. Union of India declared that the Constitution recognizes a fundamental Right to Privacy. But, it is unclear whether the proposed bill is compatible with the Right to Privacy or not.**
- The Bill's failure to place sufficient checks on the use of DNA evidence collected in breach of the law makes the process altogether more frightening.
- The Schedule lists civil matters where DNA profiling can be used. This includes "issues relating to the establishment of individual identity." DNA testing carried out in medical or research laboratories can be used to identify an individual. It is unclear if the Bill intends to regulate such laboratories.
- **The Bill requires the consent of the individual when DNA profiling is used in criminal investigations and identifying missing persons.** However, consent requirements have not been specified in the case of DNA profiling for civil matters.
- DNA laboratories are required to share DNA data with the Data Banks. It is unclear whether DNA profiles for civil matters will also be stored in the Data Banks. Storage of these profiles in the Data Banks may violate the right to privacy.

- **DNA laboratories prepare DNA profiles and then share them with DNA Data Banks. The Bill specifies the process by which DNA profiles may be removed from the Data Banks. However, the Bill does not require DNA laboratories to remove DNA profiles. It may be argued that such provisions be included in the Bill and not left to regulations.**

Way Forward

- **DNA profiling should be undertaken exclusively for the identification of a person and should not be used to extract any other information.**
- The state must show that there exists a legitimate reason for extracting DNA evidence and that the extent and scope of such extraction do not disproportionately contravene a person's right to privacy.
- **To enact the law in its present form would only add a new, menacing weapon to the state's rapidly expanding surveillance mechanism.** The government should not allow the benefits of science and technology to be privileged over the grave risks in allowing the unrestricted access to deeply personal material.
- **Maintenance of strict confidentiality with regard to the keeping of records** of DNA profiles and their use should be considered a priority.

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