

"Human DNA (deoxyribonucleic acid) Profiling Bill 2015"

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Abstract

Human DNA (deoxyribonucleic acid) profiling Bill 2015, which seeks to create a database where the DNA samples of all the offenders must be kept in order to catch the offenders by identifying the evidences with that DNA. DNA exists in every cells of a human body and contain the genetic information all living cells. They also control the inheritance of characteristics from parents to offspring. Each person's DNA is unique except identical twin, which makes DNA sampling useful for solving crimes, help in identifying victims of disasters, and locating missing persons.

DNA profiling can play a crucial role in solving crimes, as during the crime many times an offender leaves some evidences at the place of crime scene and that can be used to identify the offender. Also, DNA profiling can help to prove a suspect's innocence. In India the bill has been surrounded with clouds over its legal existence, as many parties oppose it, calling it anti-privacy bill.

It will be an attempt to discuss the about the bill, the reason which has made it so controversial; benefits and repercussions and legal aspects about the bill.

Introduction:

DNA testing is a tool to identify crime suspects and convicts, by taking the samples of their DNA, so that if they are arrested again in the future their DNA can be matched against the details in the database. This database will help not only as deterrence of repeat offenders, but also improves the accuracy of matching profiles. DNA profiling is a foolproof technique that can identify the perpetrator of cruel acts from the traces left at the crime scene and provide a tool for tackling the criminals."¹ Since it was developed in 1988, DNA profiling has been

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¹ Caudill, David S. "DNA and the Genealogy of Scientific Truth in the Courtroom". The Journal of Criminal Law and Criminology (1973) 98.2 (2008): 687–697.

widely used around the world. There are around 60 national DNA database around the world. In Europe Interpol reported there were 31 national DNA databases and six more to come.² In 2014 the European Network of Forensic Science Institutes (ENFSI), a DNA working group made 33 recommendations for management and guidelines for auditing DNA databases. There are many other countries which have adopted privately developed DNA databases, such as Qatar, which has adopted Bode dbSEARCH.³

In India, this bill was to be introduced in the 2015 monsoon session but was not introduced due to the controversies surrounding it regarding its merit and the scope of misuse of the people's privacy. The Human DNA profiling Bill was initially proposed in 2007 and the drafting of the bill began in 2012. But due to criticism over its existence from the people and the opposition, an expert committee was constituted by the DBT in 2013. The committee formed for this bill was headed by Dr. T.S. Rao.

How the bill came into existence:

Before initiation of this bill, there was no clear and comprehensive legislation regulating the collection, use, analysis and storage of DNA samples in India.

In 2003, the Department of Biotechnology (DoB) to regulate the use of DNA samples for crime-related reasons established a committee known as the DNA Profiling Advisory Committee to provide recommendations for the drafting of the DNA profiling Bill 2006, which ultimately became the Human DNA Profiling Bill 2007.

The 2007 draft Bill was prepared by the Department of Biotechnology (DoB) along with help of Centre for DNA Fingerprinting and Diagnostics (CDFD)⁴. The CDFD is an autonomous institution which is supported by the DoB. There are other Central Forensic Science Laboratories in India which are under the control of the Ministry of Home Affairs and the Central Bureau of Investigation, along with a number of private labs like International Forensic Sciences, Truth Labs, DNA Labs India (DLI), and Bio-Axis DNA Research Centre (P) Limited to analyze DNA samples for crime-related purposes.

² Global DNA Profiling Survey Results and Analysis. Interpol DNA Unit. 2009. p. Appendix 1. Retrieved 12 October 2015

³ ENFSI DNA Working Group. (2010). DNA database management: Review and Recommendation. The Hague (The Netherlands): ENFSI

⁴ Chhibber, M. *Govt Crawling on DNA Profiling Bill, CBI urges it to hurry, cites China*. The Indian Express. July 12 2010.

In 2007, before the bill could be introduced in the parliament, it was made public. The same thing happened in 2012, a new version of the Bill was leaked but was not passed. That newer version provided about establishing of state-level DNA databases which will be added into a national-level DNA database and it proposes to regulate the use of DNA for the administration of justice and enhancing protection of people in the society.⁵

In January 2013, a committee was formed to scrutinize the 2012 draft.⁶ This committee made changes to the draft Bill. Then, it was circulated within the Ministry of Science & Technology for comments, which were then included in the draft.

About the Bill:

- The Human DNA (deoxyribonucleic acid) profiling Bill 2015 seeks to create a DNA database and profiling board to regulate DNA profile analysis. Deoxyribonucleic acid is the molecule that encodes the genetic instructions used in the development and functioning of all known living organisms, including humans and viruses.
- Section 14 to 18 seeks to create a regulatory body–DNA Profiling Board–to administer all activities related to DNA profile and to run the DNA data banks, which will store the samples.
- Every DNA data bank would store the samples under various indices like offender's index; crime scene index; missing person's index; suspect index; volunteer's index and unknown deceased person's index
- Section 19 to 28 of the bill provides about the staffs qualifications, proficiency testing, collection of body substances; establish laboratories, custody trail from collection to reporting, training.
- It involves policies related to the retention, deletion of the information.
- It involves collection of "intimate body samples" of living persons from the buttocks, the genital area, and also breasts in the case of a female.
- It also involves intimate forensic procedure which includes "external examination" of private parts, taking samples from there "of pubic hair" or "by swab or washing" or

⁵ Draft Human DNA Profiling Bill 2012. Introduction page

⁶Committee comprising of- J. Gowrishankar, Director, CDFD; R.K. Gupta, adviser (C&I), Planning Commission; Jacob P. Koshy, science writer, Mint; Kamal Kumar, retd. IPS, retd. DGP of Hyderabad; C. Muralikrishna Kumar, senior adviser (ICT), Planning Commission; Usha Ramanathan, researcher and advocate; T.S. Rao, adviser, DBT; N. Madhusudan Reddy, staff scientist, CDFD; Raghbir Singh, fm. Secy., Ministry of Law; Alka Sharma, Director, DBT.

“by vacuum suction, by scraping or by lifting by tape” and “taking of a photograph or video recording of, or an impression or cast of a wound” in those areas.

- This bill also allows the use of DNA data in all the crimes against the law of nature which will also include the offences like abortions, paternity disputes etc.
- When DNA data are collected, the person will also have to provide their name, gender, address, and their caste. There is no limit on how long someone's DNA will keep on record. In the UK, DNA data of a recordable offence can be kept for only six years.⁷

Does India need DNA Profiling Law:

- A law is needed so that DNA data bank can be used as evidence in judicial trials, and the information generated can be of use to law enforcement agencies.
- The current scenario in the country is that DNA test labs are unregulated and they lack testing protocols and procedures.
- As there is no legal framework related to DNA, a data bank can be misused. A DNA profiling law is meant to codify everything, thus setting procedures for collection, safety, use and access of DNA samples and data.

Uses of the bill:

- This bill can be useful in connecting accused people with some crime or identify the accused.
- This can help the judge to use this data as a material evidence to provide a speedy justice.
- The bill will also help in identification of unknown bodies, according to NCRB report there are 40,000 unidentified bodies in India each year.
- This bill can have many accused persons spare their jail terms, as the judicial process will speed up so an innocent person will not languish in jail.
- The convicted person would get a chance to prove their innocence on the DNA test.

⁷ Rath, Akshat, *India's DNA profiling bill may become one of the world's most intrusive laws*. Quartz India, July 24, 2015

Available at: <http://qz.com/463279/indias-dna-profiling-bill-may-become-one-of-the-worlds-most-intrusive-laws/>

- It will not only take DNA of offenders but also of the suspects so that the missing person can be identified in relation to that offence.
- The DNA project aims to assist in solving crimes, identify victims after a natural disaster, and trace missing persons.
- Though there is provision which establishes that who can collect samples, creates permitted circumstances for collection but it does not provide how the collected DNA evidence should be handled, and what will happen to the evidence after it is collected and analyzed. So this bill will help in regulating the collection, use, analysis and storage of DNA samples.

Criticism of the bill

- Violation of right to privacy- it will violates people right to privacy as there are high chances of misuse of data as this bill does not have enough safeguards As DNA can reveals very personal information about a person. The Bill does not say who can access the database, and does not provide a guarantee that it would not be used for anything other than the specified.
- In most countries, the DNA database is used only for criminal investigations. But in India it can be misused for other purposes. Technically it may be possible that data can be used for non-forensic purposes such as, medical history, family history etc.
- The DNA-database project also categorizes people by caste. When such data is overlaid with data from Aadhaar, which has people's addresses, it makes the job of identifying specific groups simpler. Given India's record of communal violence, it is not far-fetched to think that anthropologists, demographers or market researchers are not the only ones who would want access to such data.
- There are some circumstances when even DNA data may not be for instance, if a person has had blood transfusion or a bone marrow transplant, they will have someone else's DNA in their body for some time. There are also cases of DNA chimeras, where one individual may possess multiple genomes.
- The bill does not clarify under what circumstances someone's DNA will be collected for the database with or without consent of the person.
- To pursue the extraordinary ambitions that the Bill sets out, it will cost vast sum of money. "The DNA database annual report of UK shows that the UK Home Office spent £2.2 million in 2013-14 in running the National DNA Database on behalf of the

UK police forces. Can India afford to pump in such vast sums of money to aid a scientific agency's research ambitions?"⁸

- This provision strengthens the state, not the individual; it empowers the government, not the citizens; it extends the reach of the state and its agencies to intrude deeper into people's lives, offering limited protection to the people. It will provide enormous powers to the state, and there are few credible safeguards.

Intrusion over Privacy:

The term privacy is not new; it has been in debate form a long time ago. Earlier the need to recognize privacy did not arise because, in small rural communities, as there was less distinction between 'Private' and 'Public Life'.⁹ The right to privacy originated in an 1890 article by Samuel Warren and Louis Brandeis, "The Right to Privacy"¹⁰, which created a minor revolution in the development of the common law. The article criticized the press for "overstepping in every direction the obvious bounds of propriety and of decency" and proposed a new tort for the violation of privacy rights. Soon by 1960's majority of states recognized the right to privacy in some form.¹¹

Presently in India, the right to privacy under article 12 of the Indian Constitution seems to be under a catch. The attorney general Mukul Rohtagi, in the case related to collecting and compiling both the demographic and biometric data in Aadhaar card argues on behalf of government that it does not violate privacy, as right to privacy is not a fundamental right in our constitution.¹²

What present India laws say of it:

- In India, DNA evidences have been accepted by courts since 1985¹³.
- In 2005, the Criminal Procedure Code (CrPC) was amended to allow medical practitioners to examine a crime suspect, but only after an authorization from a police officer who is not below the rank of sub-inspector, to examine a person arrested on

8 Vidya Venkat. 2015 '*Scientific ambitions behind DNA Profiling Bill*', The Hindu, Aug 16, 2015.

⁹ F. Schoeman, Privacy and social freedom (Cambridge University press 1992), Chap 7

¹⁰ "The Right to Privacy", 4 *Harvard Law Review* 193 (1890)

¹¹ Mozika, J. Jyoti (2012). Law and Protection of Right to Privacy, (1st edition, 2012)

¹² K.S. Puttaswamy & ors v. Union of India & ors, 2015 8 SCC 735 The three bench judges of Justice J. Chelameswar, S.A. Bodbe and C. Nagappan, referred a batch of petitions challenging the Aadhaar card to the Chief Justice H.L. Dattu for posting a larger bench

¹³ 69th Report of Fifth Law Commission India, Review of the provisions of the Indian Evidence Act, 1872 pg. 43

the charge of committing an offence and with reasonable grounds that an examination of the individual will bring to light evidence regarding the offence. This include "the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples, and finger nail clippings, by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case"¹⁴.

- In *Thogorani Alias K. Damayanti v. State of Orissa and Ors*,¹⁵ the Orissa High Court affirmed the legality of ordering a DNA test in criminal cases to ascertain the involvement of persons accused. Refusal to cooperate would result in an adverse inference drawn against the accused.
- *Lokniti Foundation v. Union of India*¹⁶ - In 2014, Lokniti Foundation, a public interest litigation was filed, to draw the attention of the court that India lacked a DNA database by which thousands of unclaimed dead bodies in India that are reported annually. The Supreme Court asked the government to provide the detail about how the bill will implement mandatory DNA profiling of unclaimed bodies.¹⁷ The government replied to concern by stating that the bill will set up a national database which will help in identify unclaimed bodies, and returned rescued children and adults to their families. This database would store DNA profiles from the relatives of missing persons, and also from convicts, accused and volunteers.¹⁸ The government also added in the affidavit that India also lacks trained personnel to implement it.¹⁹ India has 30-40 DNA examiners and a DNA examiner can handle 100 cases per year. However, India gets 40,000 unclaimed bodies annually; the purpose will require at least 400 DNA examiners. Since, a single case requires ₹20,000, annually ₹80 crore will be required for 40,000 cases, excluding salaries of the examiners and support personnel.²⁰

¹⁴ Section 53 The Criminal Code of Procedure, 1973.

¹⁵ 2004 Cri LJ 4003 (Ori)

¹⁶ W.P.(C.) Nos. 491/2012

¹⁷ Mahapatra, Dhananjay. *SC wants roadmap for DNA profiling of all unclaimed bodies*. The Times of India, 15 July 2014.

¹⁸ 'DNA bank plan unveiled'. The Telegraph (India) 22 September 2014

¹⁹ Anand, Utkarsh. "Bill stuck so cannot create DNA data bank: Centre to SC", The Indian Express, 15 September 2014

²⁰ Bawa Singh Askirat. *Centre's ambitious DNA Profiling Bill hits privacy roadblock*". India Today, 15 September 2014.

Conclusion and Suggestion:

The DNA bill which seeks to create a DNA database and profiling board to regulate DNA profile analysis DNA samples should be destroyed once the DNA profiles needed for identification purposes have been obtained from them, allowing for sufficient time for quality assurance, e.g. six months. Such law in India can be very useful for finding the culprits, suspects, or to find the missing persons. The controversy regarding its privacy must be resolved the government should add some measures to secure individuals privacy as DNA can tell all about family history, so the measures should be such that an individual should not suffer from such law. In India, currently National Population Register (NPR) and the UIDAI Scheme also deal with creating a database with biometrics like including iris and fingerprints of residents. However, the later one has proved to be a complete disaster, with lot of UIDAI identification numbers falsely generated, shortage of machines and lack of trained staff at camps. Hence, for India, it would not be viable to enact such a law in near future.

The government must take into account such measures or suggestions in order to make the bill more fruitful:

- Individuals must have a right to have a second sample taken from them and reanalysed as a check
- Relevant safeguards must be proscribed by law and there should be appropriate penalties for abuse
- Impacts on children and other vulnerable persons (e.g. mentally ill) must be considered
- Potential for racial bias must be minimized
- Analysis of DNA should take place only in laboratories with quality assurance
- DNA Laboratories should be independent of police and regulated at discretion of DNA Profiling Board.
- Crime scenes should be promptly examined if DNA evidence is likely to be relevant and quality assurance procedures which must protect against contamination of evidence.
- There must be transparent system of governance with regular information published e.g. annual reports, etc.
- Restriction on the Access to databases and samples.

- Uses should be restricted by law to solving crimes or identifying dead bodies/body parts. It is not an acceptable use to identify a person. Missing people's databases (if they exist) should be separate from police databases.