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The DNA Technology (Use and Application) Regulation Bill, 2019: A Compromise on Privacy Rights of Individual

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ABSTRACT

On July 8, 2019, the Lok Sabha introduced the DNA Technology (Use and Application) Regulation Bill, 2019, which is also known as the DNA Profiling Bill. The Bill proposes to create a DNA Regulatory Board with a mandate to construct DNA Data Banks as well as accredit DNA Profiling Laboratories. The Bill will govern utilization as well as application of DNA technologies to determine the identities of: a) missing individuals; b) crime victims; c) offenders or criminals; d) defendants or accused; and e) unidentified dead people. The Bill contemplates a variety of indexes for criminal offences but it is completely quiet on civil matters causing uncertainty about where as well as how DNA profiles will be kept. This article discusses how the Bill has sparked questions on a number of fronts, the extremely severe of which is the use of DNA profiling in criminal cases, which violates the constitutional right to privacy.

Privacy is the supreme manifestation of a person's sanctity, a statutory principle that cuts through the continuum of fundamental rights as well as preserves a sphere of self-determination and choice of an individual. The permission of the convicted is not necessary to be obtained by the investigation authorities for crimes punishable by imprisonment for more than seven years or death, according to Clause 21 of the Bill. In all other circumstances, the individual whose sample is to be taken must give written permission. A magisterial order may be issued in the lack of this voluntary consent. This clause is a blatant breach of the right to privacy, as held in the *Puttaswamy* case.

Many might contend at the outset of the discourse that the imminent outcome of DNA profiling would be useful to the State in terms of providing investigative agencies with possible leads, and that this outstrips citizens' privacy concerns. That being said, such an assertion ignores the premise that the invasion of privacy is caused not only by the imminent processing of body samples for DNA profiling, but also by the prospect of potential coercion by government bodies. Misappropriation of such data may take the form of documentation

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planting of serial criminals, data having being shared with private parties involved in the information, such as healthcare as well as insurance providers, unauthorized family searches, and so on. While this can make the work of investigators simpler, it also adds a certain amount of arbitrariness in the enforcement of the rule. While DNA profiling is particular, clear familial similarities will jeopardize the privacy of those family members that are on the central database. When it comes to crimes involving a huge number of people (for example, riots), where everyone is a suspect for no reason, thousands of people will be subjected to DNA profiling based on sheer suspicion. Such ubiquitous power has the potential to be abused by intimidating innocent people for which there is little proof. Another significant challenge to solve is the deletion of such records. It is crucial to know how long those data will be kept because comparing biological samples at the crime scene will make it easier to apprehend as well as convict serial offenders.

One of the most common problems regarding databases is "function creep," which occurs when data is gathered for one reason but its usage expands. Clause 34 of Chapter VI explains that the documents kept will be used for a variety of purposes, ranging from enabling judicial adjudication and conviction to recognition of civil matters. As a result, people who agree to supply their DNA for civil matters can also be susceptible to criminal cross-referencing of the data. As a result, permission to obtain DNA for civil purposes cannot be construed as blanket consent to be identified in a criminal matter. Using a centralized repository makes the distinction between innocence and guilt hazier. The presumption of innocence is shattered, rendering those who have provided their DNA for civil purposes appear less innocent than someone whose DNA is not in the database. This might also transfer the burden of proof onto those whose DNA matches in a future criminal proceeding, forcing them to validate their innocence in the face of a DNA match. Hence, if databases are to be established, criminal and civil databases should be kept separate.

The case of *Selvi vs. State of Karnataka*² stressed the value of individual autonomy, stating that any interaction with it violates the right to privacy, especially when a person faces criminal allegations or penalties. As a result, any compulsory test is incompatible with human rights and therefore inadmissible. As a result, a consolidated civil and criminal case database could lead to misleading searches and compromise one's privacy rights. In the same case, Justice Ranjana Desai had observed that even though retention and collection of DNA samples are not unconstitutional, future use and development of DNA profiling for testimonial purposes could face constitutional obstacles under Article 20(3) of the

² (2010) 7 SCC 263

Constitution of India. DNA is much more than a physical fact because of its capacity to recreate a variety of psychological and behavioral traits about individuals, and using it as a basis for charging crimes will be nothing less of self-incrimination, thereby breaching Article 20's Clause 3.

The Supreme Court held in the historic *Puttaswamy* decision that privacy allows a citizen to retain body and mind autonomy, and that the freedom to monitor the collection, use, storage, and distribution of personal information is an important part of that right. In the case of *KS Puttaswamy Vs Union of India & Others*³, five parameters were used to determine whether a law affecting the right to privacy was valid:

- The legality: It must be a legitimate statute.
- A statutory state goal: The legislation's goal should be aligned with the constitutional goals.
- Necessity: The violation must be appropriate in order to meet the prescribed goal and must not infringe on the rights to a larger extent than is required to accomplish the goal.
- Proportionality: There has to be a distinction regarding the importance of the goal and the extent to which rights are violated; the state should use the minimal restrictive option.
- Procedural Safeguards: To guarantee procedural due process

Citizens' DNA profiling by a DNA data bank may fail miserably of these criteria, affecting citizens' right to privacy disproportionately. The Bill would certainly fail the "least restrictive measure" test because there are other options, such as erasing all victims' and their family members' DNA samples after the trial is done or limiting non-consensual DNA collection to some certain exceptional situations. Furthermore, owing to occurrences such as blood transfusion, bone marrow transplants, as well as other cases of different genomes in the human body, data suggests that DNA profiling might not be the most effective means of distinguishing people. In that case, collecting DNA samples would not be the most effective, let alone the least restrictive form of identification. Aside from endangering the security of those on the list, an investigation mechanism that strongly relies on this database to indict crimes will also negate the principle of presumption of innocence, which is shielded by the right to a fair trial.

³ (2017) 10 SCC 1

Several provisions of the Bill are in conflict with the Constitution of India as well as with the legal precedents. The Bill disregards the interrelationship of rights and infringes an individual's autonomy, privacy, and right to make choices. Prior to passing this Bill, the government should divide the database into civil and criminal databases, sketch out the civil database's specifics, and assure there is no cross-referencing amongst databases. Furthermore, the magistrate is granted wide discretion to override consent; such powers must be defined to ensure that they are not abused. Although the Bill provides for the permanent collection of DNA data in the criminal record, it should not do so in the civil database. If the civil case is resolved, the DNA profiles should be automatically deleted. The rationale for excluding civil samples is bolstered by the theory that a bigger repository would be prone to false positives and will not be able to detect them.

To conclude, the DNA Technology Regulation Bill, 2019, explicitly disregards citizens' security and privacy concerns, fails the *Puttaswamy* constitutional standards, and therefore should not be enacted without detailed evaluation and thorough assessment of its probable future repercussions. Before the Bill is turned into an Act, the Parliament must correct and fill the gaps relating to violations of fundamental rights.

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