

VI

THE DNA BASED TECHNOLOGY (USE AND REGULATION) BILL, 2017: AN ANALYSIS¹⁶⁴

ABSTRACT

Human DNA Profiling has the means and potential to revolutionize not only forensic science but also criminal and civil investigations. With the need for evidence by the Courts DNA-based Technology provides accurate information which is needed to provide speedy justice. The DNA Based Technology (Use and Regulation) Bill, 2017 is yet to be tabled in the Parliament, but can India successfully execute such a law that may not be voluntary with regard firstly the bar of Article 20(3) of the Constitution of India and on the matter of Right to Privacy as an intrinsic part of Article 21. The researcher by the virtue of this comment seeks to investigate the following:

- 1) That whether DNA profiling will fall within these reasonable restrictions of Article 21 vis-à-vis privacy rights?
- 2) Can there be a guarantee of the law that DNA does not suffer from manifest arbitrariness?
- 3) Does it suffer from the Bar under Article 20 (3) i.e. compelled testimony?

¹⁶⁴ Gaurav Puri and Rhea Lobo, Symbiosis Law School, Pune

THE DNA BASED TECHNOLOGY (USE AND REGULATION) BILL, 2017: AN ANALYSIS

INTRODUCTION

DNA:

The discovery of *Deoxyribon Nucleic Acid* (DNA) is one of the most important biological discoveries of the 20th century vis-à-vis its impact on fields such as science and medicine.

It gains special importance in the forensic field. The help provided by DNA samples in criminal investigations and civil disputes is impeccable, further the assistance it gives the court via information on criminals is another important aspect.¹⁶⁵ Scientifically, DNA has a 99.99% success rate, hence it is important to incorporate it in our legal system and a specific law that governs the same. The most interesting aspect is the fact that leaving identical twins no two people share the same DNA plus it can be taken from decomposed human bodies and culprits both.¹⁶⁶

The biological relationships between people can be established wherefrom cases where there is a denial of parentage and many such instances can be solved. The technology is highly relied upon for solving a crime, identifying bodies etc. The DNA not only reveals looks but intricate details such as intricate details of allergies, or likeliness of disease.¹⁶⁷

There is a lacuna in the law when it comes to legal provisions vis-à-vis identification of any person for a specific purpose such as victims of calamities or suspects. The chances of misuse of DNA are also very highly probable, especially in a country such as India hence a regulatory body that is proposed to be established is a must.

It is admitted that Right to Privacy as a basic right is enunciated in the jurisprudence of India which was first enunciated in the Universal Declaration of Human Rights, 1948. Under the Declaration, no one shall be subjected to **arbitrary** interference with his privacy, family, home or correspondence, **attacks upon his honour or reputation**.¹⁶⁸ Everyone has a right to protection by law against such interference or attacks. the right to privacy has been included in several major human rights instruments like the International Covenant on Civil and Political

¹⁶⁵ Kamti Devi v. Poshi Ram, 2001 (5) SCC 311.

¹⁶⁶ LAW COMMISSION OF INDIA Report No.271 Human DNA Profiling – A draft Bill for the Use and Regulation of DNA-Based Technology (July 2017) Pg.1

¹⁶⁷ Amitabh Sinha;Understanding the new DNA tech Bill: All your questions answered; Indian Express (August 1, 2017 9:05 am) ;available at: <http://indianexpress.com/article/explained/simply-put-understanding-the-new-DNA-tech-bill-4776304/> (Accessed at: 2nd November, 2018)

¹⁶⁸ Universal Declaration of Human Rights, 1948; Art 12

Right, 1966¹⁶⁹; The Convention on the Rights of the Child, 1989.¹⁷⁰

As signatories of the UDHR and ICCPR we need to take into account the explanation of the right to privacy under UDHR. Here the word arbitrary holds key importance, as shown above the reasonable restriction on Art. 21 are almost the same as the one on UDHR. Here the state needs to prove that the DNA is of eminent need and not an ultra vires move.

India seeks to benefit from having national and state DNA databases. The bill draws the best practices from the countries that already have a statute on DNA.

DNA is not to replace the already investigation methods but to supplement them.

The Law Commission has tried to overcome the drawbacks of the previous bills regarding the same issue. The requisite steps to stop the infringement of the Right to Privacy have been taken, as any other legislation the law needs proper execution to be a success. We as the citizens of this country must realise that if we have a right similarly we have a duty. The duty is to enhance science, further the identification of victims of natural disasters, culprits of heinous crimes etc.

EVALUATION THROUGH:

The Constitution of India Under Article 51(A)(H)¹⁷¹ and (J)¹⁷² casts a duty on every citizen of India “To develop the scientific temper, humanism and the spirit of inquiry and reform” and “to strive towards excellence in all spheres of individual and collective activity” Parliament is competent to undertake legislations which encourage various technological and scientific methods to detect crimes, speed up investigation and determine standards in institutions for higher education and development in technical institutions (Entry 65 & 66 of the Union List).¹⁷³ The other relevant provisions of the Constitution are, (i) Article 20(3)¹⁷⁴ which guarantees a right against the self-incrimination; and (ii) Article 21¹⁷⁵ which guarantees protection of life and liberty of every person.

FUNDAMENTAL RIGHTS

i) ARTICLE 20 (3)

The whole idea of a DNA test is seemed to be deemed as self-incrimination as if you are providing your DNA sample it is ideally giving evidence against yourself.

¹⁶⁹ International Covenant on Civil and Political Rights, 1966

¹⁷⁰ The Convention on the Rights of the Child, 1989

¹⁷¹ The Constitution of India, 1950, Art. 51(A)(H)

¹⁷² The Constitution of India, 1950, Art. 51(A) (J)

¹⁷³ The Constitution of India, 1950, Schedule VII, List I, Entry 65 and 66

¹⁷⁴ The Constitution of India, 1950, Article 20 (3)

¹⁷⁵ The Constitution of India, 1950, Article 21

A judgment rendered by an eleven-Judges Bench of the Supreme Court in *State of Bombay v. Kathi Kalu Oghad & Ors.*¹⁷⁶ dealt with the issue of self- incrimination and held:

“When an accused person is called upon by the Court or any other authority holding an investigation to give his finger impression or signature or a specimen of his handwriting, he is not giving any testimony of the nature of a 'personal testimony'. The giving of a 'personal testimony' must depend upon his volition. He can make any kind of statement or may refuse to make any statement. But his finger impressions or his handwriting, in spite of efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character. Thus, the giving of finger impressions or of specimen writing or of signatures by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression 'to be a witness.'”

Hence this judgement distinguishes between the ideas of giving a statement i.e. personal testimony. The evidence other than statements are going to reveal the true nature of the event and cannot be concealed, even though it is furnishing evidence but does not fit the ambit of being a ‘witness’ hence, it does not violate Art. 20(3).

In *Smt. Selvi & Ors. v. State of Karnataka*¹⁷⁷ a three-Judge Bench of the Supreme Court considered whether involuntary administration of certain scientific techniques like narco-analysis, polygraph examination and Brain Electrical Activation Profile (BEAP) tests and the resultst here of are of a 'testimonial character' attracting the bar of Article 20(3) of the Constitution. The Court held that such examinations revealed material facts and did amount to a violation of Art. 20(3) but later this discussion arose once again in *Ritesh Sinha v. State of U.P*¹⁷⁸

Justice Ranjana Desai held

“the taking and retention of DNA samples which are in the nature of physical evidence does not face constitutional hurdles in the Indian context. However, if the DNA profiling technique is further developed and used for testimonial purposes, then such uses in the future could face challenges in the judicial domain.”

The judgement explains itself, the separation of a testimony vis-à-vis taking and retention of DNA and its use in testimony. Being a ‘witness’ according to the courts entails a testimony/statement in an oral or written from and not giving evidence in form of medical

¹⁷⁶ State of Bombay v. Kathi Kalu Oghad & Ors. AIR 1961 SC 1808

¹⁷⁷ Smt. Selvi & Ors. v. State of Karnataka AIR 2010 SC 1974

¹⁷⁸ Ritesh Sinha v. State of U.P (2013) 2 SCC 357

examinations.

ii) ARTICLE 21

Article is the looked at as the biggest hurdle constitutionally in front of the DNA Technology regulation bill because right to privacy has been interpreted under the ambit of Art.21.

Certain cases over the same have been discussed:

In *Ram Jethmalani v. Union of India*¹⁷⁹ Supreme Court dealt with the right of privacy elaborately and held as under:

“Right to privacy is an integral part of right to life. This is a cherished constitutional value, and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner”

The judgement holds an important value for two reasons:

- 1) Recognising right to privacy under the ambit of Art. 21
- 2) Imposing the test of ‘*reasonable restrictions*’ that are the edifice of all Fundamental rights.

Here such restrictions are acting in an unlawful manner after which your right to privacy can be infringed upon.

In *District Registrar and Collector, Hyderabad v. Canara Bank*.¹⁸⁰

“The Supreme Court held that right to privacy is a personal right distinct from a right to property. Intrusions into it by the legislature, is to be tested on the touchstone of reasonableness and for that purpose the Court can go into the proportionality of the intrusion vis-a-vis the purpose, sought to be achieved as “right to privacy” is part of the right to life enshrined in Article 21 of the Constitution of India.”

The bill must stand the test of the ingredients that Right to Privacy curtails which is the biggest challenge in front of the bill faces i.e.:

- 1) Informed Consent: Implying that the person must be aware of where his DNA is being used. For what purpose and objective.
- 2) Specific Consent: Authorities must seek consent for their specific acts.

Hence we can conclude that the Right to Privacy will undergo the test of reasonable restrictions and a balance vis-à-vis state interest. Hence we realise that DNA profiling is very important for the future of this country and therefore the Law Commission gives checks and balances to the bill to avoid arbitrariness.

¹⁷⁹ Ram Jethmalani v. Union of India, (2011) 8 SCC 1

¹⁸⁰ District Registrar and Collector, Hyderabad v. Canara Bank, AIR 2005 SC 186

ISSUES:

1. There are chances that **a wrong match is generated.**
2. If the DNA result is taken as the **ultimate evidence, no recourse will be available** to an individual who has been wrongly matched.
3. **Privacy-related objections**-main concerns are who's DNA can be collected and under what circumstances, who can access the database etc.
4. Information like ancestry or susceptibility to a disease, or other genetic traits, is **liable to be misused.**
5. DNA tests have are surmised **not led to an improvement in conviction rates** in countries where it is already being followed.

IMPORTANT PROVISIONS UNDER THE BILL THAT SEEK TO ADDRESS THE PROBLEMS

The 2015 draft bill was criticized as being arbitrary. Hence the 2017 bill has been drafted keeping the same in mind. Some important features of the bill are:

- 1) The report constitutes a **DNA Profiling board**¹⁸¹, a statutory body that undertakes the functions of laying down standards and procedures for the establishment of DNA laboratories. Accreditation is another important function of the same board as only accredited bodies can undertake DNA profiling. It also advises departments and ministries on DNA related issues. The Board shall also be responsible to supervise, monitor, inspect and assess the laboratories. The Board will frame guidelines for training of the Police and other investigating agencies dealing with DNA related matters. Advising on all ethical and human rights issues relating to DNA testing in consonance with international guidelines will be another function of the Board. It will recommend research and development activities in DNA testing and related issues, etc.
- 2) DNA profiling would be undertaken **exclusively for identification of a person**¹⁸² and would not be used to extract any other information.
- 3) There shall be a National **DNA Data Bank**¹⁸³, and Regional DNA Data Banks for the States, to be established by the Central Government. The Data Banks will be responsible for storing DNA profiles received from the accredited laboratories and

¹⁸¹ The DNA Based Technology (Use and Regulation) Bill, 2017, Section 3 (1)

¹⁸² The DNA Based Technology (Use and Regulation) Bill, 2017, Section 33

¹⁸³ The DNA Based Technology (Use and Regulation) Bill, 2017, Section 25(1)

maintaining certain indices for various categories of data, like crime scene index, suspects' index, offenders' index, missing persons' index and unknown deceased persons' index.

- 4) With a view to assist the kith and kin of **missing persons**¹⁸⁴, provisions have been made for proper identification of missing persons on the basis of their bodily samples/substances.
- 5) Appropriate **regulations**¹⁸⁵ may be notified by the Board for entry, retention and expunction of DNA profiles.
- 6) Maintenance of strict **confidentiality**¹⁸⁶ with regard to keeping of records of DNA profiles and their use.
- 7) **Sharing of DNA profiles**¹⁸⁷ with and by foreign Government or Government organisation or Government institutions or any of its agencies, for the purpose of this Act.
- 8) The violators of the provisions would be liable for **punishment**¹⁸⁸ of imprisonment, which may extend up to three years and also fine which may extend up to Rs.2 lakhs.
- 9) The under trial may **request the trial court for another DNA testing**¹⁸⁹ if s/he satisfies the court that the previous DNA sample(s)/bodily substance(s) stood contaminated and hence could not be relied upon.

The **DNA experts** may be specified as Government Scientific Experts and be notified as such under clause (g) of sub-section (4) of section 293 of Cr. P.C.¹⁹⁰

In Canada the DNA Identification Act, 2000¹⁹¹ incorporates practices such as

- 1) Appropriate use and dissemination of DNA information.
- 2) Accuracy, security and confidentiality of DNA information.
- 3) The timely removal and destruction of obsolete and inaccurate DNA information.

¹⁸⁴ The DNA Based Technology (Use and Regulation) Bill, 2017, Section 26

¹⁸⁵ The DNA Based Technology (Use and Regulation) Bill, 2017 Section 28

¹⁸⁶ The DNA Based Technology (Use and Regulation) Bill, 2017, Section 32

¹⁸⁷ The DNA Based Technology (Use and Regulation) Bill, 2017, Section 30

¹⁸⁸ The DNA Based Technology (Use and Regulation) Bill, 2017, Section 48

¹⁸⁹ LAW COMMISSION OF INDIA Report No.271 Human DNA Profiling – A draft Bill for the Use and Regulation of DNA-Based Technology (July 2017) Pg. 42

¹⁹⁰ The DNA Based Technology (Use and Regulation) Bill, 2017

¹⁹¹ DNA Identification Act, 2000 (Canada)

4) Measures are taken to protect privacy.

In *Andrews v. State of Florida*¹⁹², the DNA evidence was accompanied by Andrew's regular fingerprints left on a windowsill, and his identification by the most recent victim in a photo-lineup. In this case, the strong DNA evidence was admitted. In *People of the State of*

*New York v. Joseph CASTRO*¹⁹³, a three-pronged test was developed to determine whether DNA evidence should be admitted:

I. Is there a generally accepted theory in the scientific community which supports the conclusion that DNA forensic testing can produce reliable results?

II. Are there techniques or experiments that currently exist that are capable of producing reliable results in DNA identification, and which are generally accepted in the scientific community?

III. Did the testing laboratory perform the accepted scientific techniques in analysing the forensic samples in this particular case?

In *Daubert v. Merrell Dow Pharmaceuticals*¹⁹⁴, after analysing the details of the standards of evidence previously set and the Federal Rules of Evidence, the Court put forth 5 criteria to characterize the weight of evidence:

I. Whether the theory or technique has been tested?

II. Whether the theory or technique has been subjected to peer review and publication?

III. Whether the theory or technique has a known or potential rate of error.

IV. Whether the theory or technique has standards for controlling the technique's operation.

V. The degree to which the theory or technique has been accepted in the relevant scientific community.

¹⁹² 533 So.2d 841 (1988)

¹⁹³ 143 Misc.2d 276 (1989).

¹⁹⁴ 509 U.S. 579 (1993)

These are certain practices and measures that can be imbibed by India for the successful implementation of the DNA Bill which is a step in the right direction because it has kept accountability in the Act along with keeping in check the bar of Article 20 (3) and Article 21 vis-à-vis compelled testimony and reasonable restrictions respectively.

CONCLUSION

The Constitution of India is 'living and breathing document'. Hence, to conclude DNA just as Privacy is an evolving concept and is yet to be put to the test. It has great potential to **eliminate a lot of hardships in the Justice System of India. This bill, if used properly will be** able to achieve its objective of bringing transparency in the Government functioning and help eliminate corruption. As we move forward we will be able to expand this bill and reap the benefits of this legislation.

To conclude the draft Bill has imbibed the very objective of Human DNA profiling by DNA laboratories. Accountability has been ensured by statutory obligations and stringent measures for standard and quality have been set forth. The proposed bill promotes uniform practices of DNA Profiling from around the world and will promote scientific temper in India. It is submitted that the bill is in conformity with all the constitutional obligations and bars.