LEGISLATIVE BRIEF
(August 6, 2015)
THE HUMAN DNA PROFILING BILL, 2015

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PART I. INTRODUCTION

The Human DNA Profiling Bill was conceived by the DNA Profiling Advisory Committee established by the Department of Biotechnology in 2003. The first draft of the Bill was made in 2007 but was not tabled in the Parliament. In 2012 a new version of the Bill was leaked into the public domain. According to media reports the latest draft of the Human DNA Profiling Bill, 2015 will be presented to Parliament in the current monsoon session.

This Bill aims to create a National DNA data bank which would contain DNA samples of offenders, inter alia. The objective of the DNA Profiling Bill is to simplify criminal investigation at the outset, as there would now be a repository of DNA samples of offenders. These samples will also be used for identifying missing persons, unknown deceased persons, volunteers and suspects. Additionally there is an implicit suggestion throughout the Bill that the DNA profiling will be used beyond its intended purpose of just assisting Law Enforcement Agencies in their investigations and identification of missing persons. The provisions of the Bill further explain in detail about the functioning of the DNA data bank, maintenance of DNA samples, training of the staff in DNA laboratories and penalties in case of mishandling of the DNA samples.

The Bill is engulfed in a lot of controversy, and rightly so, especially from civil society activists who see the proposed legislation as intrusive and violative of people’s Right to Privacy and other human right. The Bill’s focus on the virtual infallibility of ascertaining who the criminal is on the basis of matching the DNA samples is not entirely well placed. What happens in case someone plants the DNA sample of the accused at the crime scene? Is there a way of dealing with such a circumstance when DNA profiling is being ‘sold’ on the grounds that it will reduce the work of the courts since they now will only have to tally the DNA samples from the crime scene with that of the accused without necessarily any application of mind?

Another very disturbing fact is that the form that needs to be filled before collecting the DNA sample requires the individuals to fill in their caste. The Centre for DNA Fingerprinting Diagnostics (CDFD) has stated that it will create a DNA marker database for various caste populations. Including cast data in a legislation that is ostensibly meant to assist law enforcement agencies in criminal investigations seems unnecessary and at the same time dangerous because of its ambiguity in indulging in caste based classification of criminals.

Additionally the provisions of the Bill are loosely framed suggesting that the scope of DNA profiling is meant to be broadened in the future. Given the lack of any privacy laws in the country, the provisions of the Bill also raise a number of concerns with regard to the possibility of misuse of sensitive personal information like DNA samples.
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PART II: KEY ISSUES

The introductory paragraph of the 2015 draft of the Bill iv presupposes the infallibility of genetic analysis when it states that DNA samples can be used to establish facts ‘without any doubt’. There are short comings involved when dealing with DNA samples which need to be addressed rather than ignored. Since it is the US and UK laws that have been used as a basis of the drafting the provisions of this Bill, it is significant to note that in these countries DNA profiling is largely used to eliminate suspects rather than pin unequivocal blame on the accused.v

The concerns regarding violation of privacy as well as lack of any form of consent taking from individuals before collection of DNA samples heavily looms in the background of this Bill. The latter is in gross violation of basic human right. The following provisions are distinctly alarming and a grave cause for concern.

1. Broad Definitions

The definitions are worded expansively in order to make as many persons eligible for DNA profiling as possible. According to the definition of ‘crime scene index’ DNA samples are to be collected in case of specified offences. Specified Offences vi are vaguely defined as offences listed under Part 2 of the Schedule which lists them to be as such offences which are recognized as cognizable by the Criminal Procedure Code, 1973 (hereinafter CrPc). This is in sharp contrast with the 2007 draft of the Bill which specified the offences when DNA samples were to be collected like- unnatural offences, rape, offences relating to dowry and defamation.vii

This means that as long as an offence is listed as cognizable in the CrPC it qualifies for collection of DNA samples from the offender, even if collection of the sample is not central to the investigation. For instance certain offences under ‘offences relating to coins and government stamps’ or ‘offences relating to religion’ in the Indian Penal Code, 1860 (hereinafter IPC) need not require matching DNA samples from crime scenes to establish the crime. But only by the virtue of it being mentioned in the IPC, it gives the right to the authorities to collect DNA samples.

It is shocking that the definition section of the Bill does not define ‘DNA analysis’, which is the bed rock of this proposed legislation. It is suggested that a possible reason for this could because DNA analysis can be of two kinds- one which analyses the entire medical and genetic history of a person and the second is forensic analysis that restricts itself to certain limited markers not involving genetic traits.viii Since the Bill is a subject matter of policy making it should be restricted to forensic analysis only. The lack of definition for DNA analysis is too glaring to be an oversight. It is evident that this omission is an attempt by the drafters to use DNA samples for purposes other than just policy making.

The Bill collects DNA samples from suspects as well as volunteers. By keeping the net wide for collection it is clear that this proposed legislation intends to deliver more than just a speedy/more accurate criminal investigation. And that stipulation is vague and broad leaving the individuals to the mercy of the DNA Profiling Board.
2. **Narrow representation and excessive powers to the DNA Profiling Board**

The Board comprises largely of experts from the field of forensics, scientists and molecular biologists. Given that DNA sampling is largely expected to be done in context of investigative purposes, it is curious to note that there is no person on the Board who is proficient in criminal investigations. Also the lack of any representative from the Human Rights arena is also a matter of great concern especially as the Board will be dealing with sensitive information contained in DNA samples which are extremely private to the individuals, who according to the wordings of this Bill may not always be offenders.

The functions of the Board are not restricted to just managing DNA samples. In fact, the Board’s remit seems to be far wider and extends even to identifying ‘scientific advances that may assist law enforcement agencies in using DNA techniques to protect the public’.

Is this indicative of the fact that the DNA samples collected by the Bank shall be shared with such agencies? Will these samples be used in experimentation by the Law Enforcement Agencies to find out if these advances are viable? The Bill does not address these issues. It can even go beyond its scope of utility and make suggestions regarding DNA profiling and intellectual property issues for which there is no expert on the Board. Further it can establish procedures to aid criminal investigation with international agencies as well and extend the list of instances when DNA sampling can be done beyond the ones already mentioned in the Schedule.

And the coda is in the last clause which lets the DNA Profiling Board perform ‘such other functions as may be assigned from time to time’. It is clear that the wording of the provisions is not to create a presumption that the DNA data bank will be used only for bringing offenders to book, reducing crime or identifying missing persons. By giving vast powers to an unelected DNA Profiling Board, with members largely appointed by the Central Government, to decide how to deal with the DNA samples, individuals are put to grave risk. Giving such vast powers to the Board without any supervising authority to look over, is either an oversight on part of the drafters of this Bill or a deliberate attempt so that this legal lacuna can be used to their favour at a later date.

3. **Provisions regarding the DNA laboratories**

There are contravening provisions in the draft with regard to DNA laboratories. Where Section 13 states clearly that no laboratory will be used under the proposed Act unless approved by the DNA Profiling Board, Section 14(2) allows laboratories already in existence at the time of the commencement of the proposed Bill to begin with DNA profiling without the approval of the Board, as long as it has made an application for approval. This contravention is a question on the need and authenticity of an approval for laboratories from the Board. The lax construction of provisions relating to laboratories that will be responsible for DNA sampling is shocking, emphasizing nothing but a clear lack of concern on part of the government while dealing with such sensitive information.

The provisions relating to the working of these laboratories are questionable too. While Section 21 mandates that laboratories minimise contamination of the samples there is no penalising section punishing contamination itself. Interestingly Section 18 to 30 dealing with standards, quality control and quality assurance obligations of DNA laboratories infrastructure and training all end with the clause ‘as
may be specified by regulations’. Thus, there are no determinative rules with regard to laboratories and they can further be changed according to their will by the Board.xv

4. Maintenance and Financial Implications of the DNA data bank

The financial implication of maintaining such a vast database of DNA samples with no cap on the number of regional data banks is massive keeping in mind that the CDFD charges rupees ten thousand for every DNA profiling done.xvi While the Bill is being advocated on the tenet that it will be used primarily for identification of criminals Section 31(4)(g) supposes otherwise. After listing down the indices needed to be maintained there is a vague category of ‘such other DNA indices as may be specified by regulations’. While all offences, criminal as well as certain civil matters, have been already identified for sampling where does the need arise for clause (g)? This is only indicative of the fact that the Bill intends to cover people beyond offenders at some point in the future.

Moreover there is no clause for expunction of DNA samples in any case whatsoever. While the DNA sample of a convict once acquitted will be removed from the offender’s index but it is unclear whether the samples will still be retained at the Bank. Thus once entered into the DNA data bank there is no provision for removal of DNA samples.

5. Accessibility of DNA samples

The provisions of the Bill are not equipped to stringently monitor the accessibility of the DNA samples thereby leaving it to potential misuse. While stipulating the creation of a population statistics data bankxvii the DNA samples will be made available for ‘research, protocol development or quality control’ not in violation of ‘ethical norms’. At the discretion of the DNA data bank manager the DNA samples may be given for training purposes.xviii Clause(g) of the same section allows DNA samples to be used for ‘any other purpose, as may be prescribed’. These provisions are an obvious testimony to the fact that this Bill does not take privacy or human right concerns into considerations. There is an abysmally low standard of sharing personal DNA information collected without the consent of the individuals.

6. Lack of adequate penalties

The penalty for unauthorized disclosure of informationxix, unauthorized obtaining of informationxx, unlawful access to DNA informationxxx and for using DNA samples without authorizationxiii has a minimum punishment of just one month. That is hardly any deterrence for leaking such sensitive information. Particularly since the said offending sections use the qualifying words- ‘willingly’, ‘intentionally’ and ‘knowingly’. Is it then to be understood that an unintentional disclosure of information shall not be punished at all? Fairly obvious is the lack of any provision for bringing about a private cause of action against the DNA data bank. The aggrieved individual can approach the Court only after three months from first submitting a complaint application to Central Government or the Board, only in a case where there is no response from them.xxx An individual also does not have any right to view his own personal data in the Bank.
PART III: COMPARITIVE ANALYSIS

The Human DNA Profiling Bill, 2007 was never tabled in Parliament because of the widespread criticism it received from NGOs and civil society activists then. The draft was updated in 2012 and again in 2015. A quick comparison of the two drafts shows that the privacy concerns in relation to sensitive DNA information have not been tackled in the 2015 version too. Instead the current draft includes broadly worded provisions which lay wide open the ambit of possible violation of individual’s privacy rights.

Comparison between the Draft Bill 2007\textsuperscript{xxiv} and 2015\textsuperscript{xxv}

<table>
<thead>
<tr>
<th>Issue</th>
<th>2007</th>
<th>2015</th>
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<tr>
<td>1. Composition of the DNA Profiling Board</td>
<td>A social scientist of national eminence was to be nominated by the MHRD under Section 4(q)</td>
<td>This provision has been done away with in the current draft</td>
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<td>2. Duties of the Chief Executive Officer (CEO)</td>
<td>The duties of the CEO were categorically laid out under Section 11</td>
<td>This duties of the CEO are deleted from the current draft, leaving them at the discretion of the regulations made by the Member secretary under Section 10</td>
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<td>3. Functions of the DNA Profiling Board</td>
<td>Under Section 13(x) the Board had to communicate DNA information for \textit{criminal investigation by law enforcement agencies}</td>
<td>Under Section 12(k) the Board can communicate DNA information for \textit{civil proceedings} in addition to criminal investigation and to other agencies apart from law enforcement agencies</td>
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<td>4. Number of Regional Data Banks</td>
<td>The draft postulated formation only of a National Data Bank under Section 33(1)</td>
<td>In addition to a National Data Bank the draft postulates that any number of Regional Data Banks can be made in the States under Section 31(1)</td>
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<td>5. Data retention</td>
<td>No clarification regarding how long the data will be retained or in what manner</td>
<td>Under Section 31(3) it is broadly stated that DNA profiles shall be maintained in the format as may be specified by regulations</td>
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<td>6. Communication of DNA Profiles</td>
<td>Sub-clause 2 and 3 of Section 35 were used to prohibit use of DNA profiles for any purpose</td>
<td>These clauses have been removed from the current draft and further under Section</td>
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*other than the administration of the Act and also laid restrictions on their communication*

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<th>35(2) the DNA profiles can even be shared with international organisations</th>
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<td>7. Availability of DNA profiles and samples</td>
<td>Section 40 categorically laid down the instances when such information would be shared</td>
<td>An addition was made to these instances to include Section 39(g) which allowed the use of this information for <em>any other purpose as may be prescribed</em>, thereby broadening the scope of sharing DNA information</td>
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DNA Data Banks are in existence in the US and UK too. The Combined DNA Index system or CODIS in the United States and the National DNA database or NDNAD are the national DNA databanks in the respective countries. The Protection of Freedoms Act, 2012 passed by the United Kingdom and the Justice For All, 2004 lay down the guidelines for collection of DNA samples. The following table compares key aspects regarding DNA profiling in the three countries.

### Comparison between the DNA Profiling laws in the US, UK and India

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<tr>
<th>Issue</th>
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<th>UK</th>
<th>India</th>
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<tr>
<td>Retention of DNA samples</td>
<td>Retention of DNA samples except when there is a removal of charges post arrest or over turn of conviction. (Law varies from State to State for instance Virginia removes the profile and DNA sample of any arrestee subsequently acquitted)</td>
<td>Retention of DNA samples only for certain time period, according to the kind of offence and offender, specifically mentioned in the Act.\textsuperscript{xxvii}</td>
<td>No clarification about retention but there is also no provision for expunction of DNA samples from the records.</td>
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<td>DNA Laboratories</td>
<td>Public forensic laboratories engage in DNA sampling, on behalf of the Federal, State or Local Government, which</td>
<td>Public and Private both laboratories engage in DNA sampling on behalf of the Home Office of the Government.</td>
<td>Laboratories need to apply to the DNA Profiling Board to be approved.</td>
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<th>3. Data Anonymity</th>
<th>The FBI only uses ‘junk DNA’ i.e. enough information needed for identification which does not give way to any personal information.</th>
<th>The profiles are stored anonymously used only for purposes of identification.</th>
<th>The offender’s identity is stored in the offender’s index and reference numbers are not anonymous but given to the rest of the samples in association with the body substance (Section 32 of the Draft).</th>
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<td>4. Data Security</td>
<td>Data security is ensured as the NDIS (a part of CODIS) Operational Procedures are strictly followed under the aegis of the FBI. Additionally States also have their own specific operational procedures to ensure data security.</td>
<td>Data security is protected under the Data Protection Act, 1998 that particularly recognises unauthorised and unlawful use of personal data and also its accidental loss or destruction.</td>
<td>The DNA profiles and samples are to be in custody of the DNA data bank manager or any other person or authority under this Act. (Section 37 of the Draft)</td>
</tr>
<tr>
<td>5. Types of offence</td>
<td>To be used only for federal offenders.</td>
<td>To be used only for criminal investigation.</td>
<td>For criminal as well as civil offences.</td>
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<td>6. Privacy</td>
<td>There are concerns regarding privacy although the State and the Federal courts have upheld the constitutionality of the concerned legislations.</td>
<td>There are provisions for deletion of DNA from the system and the expunction of DNA samples is allowed although the concerns for privacy still remain.</td>
<td>No privacy legislations in place.</td>
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PART IV: CONCLUSION

The DNA Bill was originally drafted in 2003-04 under the NDA government. Even while it was being re-drafted in 2005 the intention of the Bill was essentially to create a legal framework to help innocent convicts under the criminal justice system through DNA profiling.\(^1\) Despite this when the drafting was completed in 2007 the Bill was never introduced in Parliament by the UPA government as strong concerns were raised by members of civil society on the issues of privacy and the almost sweeping powers being given to the State for collecting DNA samples of anyone in conflict with law. The 2012 draft circulated by the UPA government was virtually put on hold based on these concerns and the AP Shah Committee was set up to research privacy principles that need to be adopted by India. However in less than five months after a draft was submitted by an expert committee the present government has rushed through approvals by key ministries like Home Affairs and Health. It is a matter of great concern that the government has not taken into consideration the strong note of dissent from Usha Ramanathan, and Centre for Internet Society (CIS), members of the drafting committee, and is instead pushing for the introduction of the Bill in Parliament.

Throughout this version of the draft Bill no concern has been shown for keeping the DNA samples confidential. Chapter VII dealing with confidentiality is rendered toothless with all the discretionary power given to the DNA Data Bank Manager to share information. Lack of stringent punishments also emphasizes the inadequacy of the current Bill in maintaining the privacy of the DNA samples. The Centre for Internet Society\(^2\) in its dissent note to the Expert Committee discussing the draft Bill has expressed its ‘foundational objections’ to the DNA samples being used for non-forensic purposes. Additionally they condemn the low standard of sharing DNA information, missing privacy safeguards and over-delegation of powers to the DNA Profiling Board. It has been suggested by Lalji Singh, the man considered to be the father of DNA fingerprinting technology in India, that instead of employing public money in expensive DNA profiling to generate a general database of DNA samples, it would be wiser to recognise DNA fingerprinting as an important piece of evidence under the Indian Evidence Act, 1872. Thus, DNA sampling will be done on a case to case basis.\(^3\)

Given these alarming drawbacks in the current version of the Bill, it will be dangerous, to say the least, if this Bill becomes law. A Bill that will have such far-reaching implications on the very ‘DNA’ of our right to privacy must be more widely debated by all stakeholders, and if it is indeed tabled in Parliament (as media reports indicate) then it should ideally be referred to a standing committee to ensure that all views are considered before it is passed.

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v Article, ‘Can DNA demand a verdict?’, Genetic Science Learning Centre, Utah, US. Available at http://learn.genetics.utah.edu/content/science/forensics/ (Accessed 1.8.2015)

vi Section 2(z)(zh) of Draft of Human DNA Profiling Bill, 2015


ix Section 4 of Draft of Human DNA Profiling Bill, 2015

x Section 12(l) of Draft of Human DNA Profiling Bill, 2015

xi Section 12(i) of Draft of Human DNA Profiling Bill, 2015

xii Section 12(u) of Draft of Human DNA Profiling Bill, 2015

xiii Section 12(w) of Draft of Human DNA Profiling Bill, 2015

xiv Section 12(z) of Draft of Human DNA Profiling Bill, 2015

xv Section 2(z)(zh) of Draft of Human DNA Profiling Bill, 2015

xvi Comment at Section 4(p) of Draft of Human DNA Profiling Bill, 2015

xvii Section 39(e) of Draft of Human DNA Profiling Bill, 2015

xviii Section 40 of Draft of Human DNA Profiling Bill, 2015

xix Section 51 of Draft of Human DNA Profiling Bill, 2015

xx Section 52 of Draft of Human DNA Profiling Bill, 2015

xxi Section 53 of Draft of Human DNA Profiling Bill, 2015

xxii Section 54 of Draft of Human DNA Profiling Bill, 2015

xxiii Section 57 of Draft of Human DNA Profiling Bill, 2015


xxv Supra 4


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