

Towards a genetic panopticon

The DNA Bill will give the state untrammelled access to deeply personal and penetrating material



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Parliament today serves less as a locus for debate and discussion and more as one for din and discord. But the pandemonium that appears to be the permanent state of affairs in both Houses scarcely seems to stop the government from passing laws, as we've seen this winter session. The government's disdain for dissent, though, makes the potential introduction of the DNA Technology (Use and Application) Regulation Bill, 2018, for consideration by the Rajya Sabha an especially invidious proposition.

Problems with the draft Bill

The draft statute, approved by the Union Cabinet in July, not only disregards the serious ethical dilemmas that are attendant 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. What's more, any infringement of civil liberties, caused by an almost indiscriminate collection of DNA, is seen as a legitimate trade-off made in the interests of ensuring superior justice delivery. But what the Bill fatally ignores is that the disproportionality of the DNA bank that it seeks to create, and the invasiveness of its purport and reach, imposes a Faustian bargain on the citizen.

The genes encoded in deoxyribonucleic acid (DNA), which can be 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) and can, therefore, help in establishing the identity of, say, a suspect. That only a small amount of genetic material is needed to create such a profile makes the form of evidence especially appealing to criminal investigators. And to be sure, across the world, the use of DNA evidence has helped exonerate a number of innocent people from wrongful conviction, and has also helped find the guilty party in complex investigations.

It is to that end that we no doubt need a law to help regulate the manner and circumstances in which the state may be entitled to collect biological material from a person. The requirement for such a law is only accentuated by an amendment made to the Code of Criminal Procedure in 2005, which expressly authorises investigating officers of a crime to collect a DNA sample from an accused with the help of a medical practitioner. But for years, every iteration of a proposed Bill, aimed at regulating the use of DNA, has failed to provide a constitutionally sustainable model.

In its latest form, the draft law seeks to create a National DNA Data Bank, which will be maintained on the basis of various different categories, including a crime scene index, a suspects' index and an offenders' index, with a view to "facilitating identification of persons". This attempt at identification may relate, among other things, to a criminal investigation, to a judicial proceeding of any kind, and even to civil cases such as "parental disputes", "issues relating to pedigree", and "issues relating to establishment of individual identity". The proposed law, however, is not only decidedly vague on how it intends to



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maintain this DNA Bank, but 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.

Moreover, 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.

Infringement of privacy

When, in August 2017, a nine-judge bench of the Supreme Court in Justice K.S. Puttaswamy (*Retd*) v. *Union of India* declared that the Constitution recognises a fundamental right to privacy, it also explicated the various facets of this right. Significantly, it ruled that any meaningful right to privacy would include protection over the physical body. As a result, even if, for the purposes of argument, we were to consider a mandatory collection of bodily substances from a person as consonant with the right against self-incrimination that the Constitution guarantees – although on a dubious rationale courts have tended to see the drawing of genetic material as non-testimo-

nial – it would unquestionably impinge on a person's right to privacy. Indeed, a 2012 report filed by a group of experts on privacy, led by Justice A.P. Shah, found explicitly that a person's basic liberties stand violated by a compelled extraction of DNA from her body.

To be sure, that the right to privacy is infringed does not mean that the government cannot under any circumstances gather DNA evidence. What it does mean is that such collection ought to be made under a legislative regime guided by principles of necessity and proportionality. That is, the state must show that there exists a legitimate reason for extracting DNA evidence, and that the extent and scope of such extraction does not disproportionately contravene a person's right to privacy.

The use of DNA evidence

In its present draft, however, the Bill woefully falls short of meeting these tests. World over, the idea behind maintaining a DNA database is to help match and compare samples collected from a crime scene against a set of stored profiles, thereby helping in the identification of a potential suspect in a criminal investigation. India's Bill, though, seeks to make the DNA Bank available for a slew of unconnected purposes, including permitting its use in civil cases. Consider the consequences: a person wrongfully accused of a crime, say, for speeding a vehicle over permissible limits, who might have been compelled to give her genetic material may well see this evidence being used against her in an altogether different proceeding of a purely civil nature. Given that in India, even illegally obtained evidence is admissible in a court of law, so long as the relevance and genuineness of such material can be established, 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.

What's more ominous is that the Bill potentially allows DNA evidence to be used for any other purpose that may be specified through subsequent regulations, thereby according to the state a potential power to create a "genetic panopticon," to borrow the words of the late U.S. Supreme Court Justice Antonin Scalia. That this is a distinct possibility is clear from the range of privacy protections that are absent in the Bill. As Helen Wallace, Director, Gene-Watch UK, wrote in these pages, the draft law does not restrict DNA profiling to the use of non-coding DNA, which would ensure that the evidence can only be used for the purposes of identification and not for determining personal characteristics, including medical conditions.

As a result, the state will effectively have at its disposal the ability to profile every one of its citizens. It's been reported previously, for instance, that the Centre for DNA Fingerprinting and Diagnostics, whose director will occupy an ex officio place in the DNA Regulatory Board, already seeks information on a person's caste during the collection of genetic material. One hardly needs to spell out the dangers inherent in gathering such data.

To enact the law in its present form, therefore, would only add a new, menacing weapon to the state's rapidly expanding surveillance mechanism. We cannot allow the benefits of science and technology to be privileged over the grave risks in allowing the government untrammelled access to deeply personal and penetrating material.