



SAVE OUR PRIVACY

Internet Freedom Foundation's brief on the **DNA Technology Regulation Bill, 2018**

This brief focuses research to support the work of legislators on issues of digital rights

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#SavingTheInternet

IFF works on issues of online censorship, advocating for privacy, safeguarding net neutrality and innovation.

We are guided by values of human freedom from the Constitution of India. We support research, do civic education, build participatory campaigns, advocate with regulators and approach courts.

This brief has been authored by SaveOurPrivacy volunteers (Akash Singh, Raman Chima, Gautam Bhatia) to assist legislative engagement.

#SaveOurPrivacy

The Internet Freedom Foundation (IFF) has consistently worked to support privacy.

Our work includes supporting the community campaign at #SaveOurPrivacy which presents a model law called the, "Indian Privacy Code".

The campaign has close to 11,000 individual and 27 organisational supporters who have pledged support.

www.saveourprivacy.in

The DNA Bill

Key facts and legislative history

- Status:** Union Cabinet approved the **DNA Technology (Use and Application) Regulation Bill, 2018** on 4 July. Was introduced in the last session of parliament in the Lok Sabha & per the tentative list of business is up for consideration & passage.
- What the bill does:** Allows law enforcement agencies to collect DNA samples, create "DNA profiles" and databanks for criminal investigations.
- How the bill does it:** According to an official statement of the government, "*The primary intended purpose for enactment of the Bill is for expanding the application of DNA-based forensic technologies to support and strengthen the justice delivery system of the country.*"
- Prior history:** The PIB press release says that the Bill is akin to what the Law Commission has drafted in its 271st Report. That Bill, as is stated in the Report, is a modified version of what was given to the Law Commission by the Department of Biotechnology (DBT). The Bill that the DBT prepared with the Centre for DNA Fingerprinting and Diagnostics (CDFD), Hyderabad has been critiqued by the Justice AP Shah Committee of Experts on Privacy (2011-12), the Expert Committee set up in the DBT (2013-14) and the Consultation held in the DBT in 2015
- Expert Committee on Human DNA Profiling Bill in the DBT:** The report sets out some major concerns including the collection of genetic material from the crime site, chain of custody, contamination. This becomes even more significant in the context of the broken down criminal investigation system. The Home Ministry has recently issued guidelines on what the police need to do at the crime scene to collect evidence carefully. The Expert Committee deliberations took place while the AP Shah chaired committee on privacy was working on its report. Chairperson of the Committee did not consider inputs provided by the independent legal academic expert on the committee (Dr. Usha Ramanathan), leading to the publication of a dissent note.
- A. P. Shah Committee of Experts Report on Privacy:** The report suggested safeguards to prevent illegal collection and use of DNA data. Also provides safeguards to prevent the proposed body from misusing the same.
- Law commission Report:** The Law Commission of India, in its 271st report, prepared the draft Bill named The DNA Based Technology (Use and Regulation) Bill, 2017 after examining judicial pronouncements and constitutional provisions. It also flagged that privacy concerns and the ethics involved in this scientific collection of data were very high. The Commission highlighted that the procedure for DNA profiling, if given statutory recognition, should be done legitimately as per constitutional provisions.

A legal analysis

Loopholes in the DNA Bill

- Selection of members of the DNA Regulatory Board-** In sub-clauses 4(b), the criteria of being an 'Eminent Person' for the position of Vice-president, and in sub-clause 4(k), the criteria of being an 'Expert' for the position of member of the Board- will entitle the government with discretionary power to choose person favourable to it. Similarly, clause 27 entitles the Government to choose Director of National DNA Data Bank based on its discretion.
- Data Processors and Data Collectors do not have compliance to ensure data protection -** In Chapter IV of the Bill titled as 'Obligations of DNA Laboratory, no obligations have been prescribed for the data processor to ensure data protection and privacy. The DNA laboratories also being the data collectors, do not have to comply with specified processes/ methods of data collection in order to ensure personal data breach.
- Huge Cost-** A total of 25 Crores Rupees are expected to be spent as recurring and non-recurring expenses - and which is likely to be far lower than actual costs. Which would be a huge burden on public pocket. Why should the nation spend such a huge amount for an initiative that costs their privacy?
- Entitlement of powers to DNA Regulatory Board overpowering judiciary-** Clause 57 of the Bill reads, "No court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Board is empowered by or under this act to determine." The Bill seeks to entitle the DNA Regulatory Boards with powers that might not come under the jurisdiction of judiciary.
- No information to Data Subjects about data sharing with third parties:** The Data Subjects will have no clues as to for which purposes their personal data are being used once they are collected. For example- how will the government ensure that "no person to whom information is communicated or who has access to information under this Act shall use that information for any purpose other than for which the communication or access is permitted under the provisions of this?
- No clarity on deletion of data:** The Bill does not set a limit on how long someone's DNA will be kept on record. According to clause 31 of the Bill, the DNA Data Bank will not store data permanently and will be removed, as per "order of the court".

A policy analysis

Reasons to oppose the DNA Bill

- **Sensitive information:** It provides for the creation of DNA databases, in the nature of Data Banks in the States (regional data banks) and at the Centre. This data basing of DNA profiles, and maintaining them over time and for various uses, is fraught with risk. DNA is very sensitive information, and creating databases of such sensitive information puts those in the database at unnecessary.
- **Another Aadhaar-like database:** India has witnessed the threat of function creep when databases get created. The Bill seeks to create an Aadhaar like database with sensitive information of individuals and help the government to surveill the people with unprecedented power.
- **Profiling of an individual:** DNA samples can reveal not just how a person looks, or what their eye colour or skin colour is, but also more intrusive information like their allergies, or susceptibility to diseases. As a result, there is a greater risk of information from DNA profiling getting misused to create a profile of an individual and use it for surveillance as well as for making profits.
- **No guarantee of data security:** The bill has only limited attempts to prevent misuse of data, with a few provisions seeking the imposition of jail terms of up to three years and a fine of up to just Rs 2,00,000 on those who leak information stored in such data banks. There is no legal requirement under the law for any data breaches of the proposed DNA banks to be disclosed either to the government or to the original individuals whose data is collected. There is no linkage shown between the government's other cybersecurity projects and regulations, and the present law
- **Not in line with international Convention:** The International Convention for the Protection of all Persons from Enforced Disappearance sets out the protection that should be built into the law when genetic material is used for identification. It reads: "Personal information, including medical and genetic data, which is collected and/or transmitted within the framework of the search for a disappeared person shall not be used or made available for purposes other than the search for the disappeared person. This is without prejudice to the use of such information in criminal proceedings relating to an offence of enforced disappearance or the exercise of the right to obtain reparation." The provisions of the Bill violate the principles of the international convention by allowing DNA Profiling for purposes other than searching for a disappeared person.
- **Sensitive data on gender and caste:** The Bill will not only give intrusive details like DNA data, but also gender and caste which is sensitive from sociological aspect.
- **Opposition by AP Shah Committee:** The AP Shah committee on privacy expressed its concerns on the issue of breach of privacy by DNA profiling. The Committee made several recommendations including ensuring safeguards against breach of data by the government, right of citizens against retention of data, notification and mandatory consent of Data Subject taken before sharing the data with third party, besides many. The bill does not seem to consider either of the recommendations.
- **Disproportionate impact:** Dalits and Muslims are disproportionately represented in India's prison population

(whether as undertrials or as convicts), a statistic that is linked to the fact that criminal justice regimes inevitably are inevitably skewed along socio-economic parameters. Consequently, if the DNA databank “is primarily composed of those who have been touched by the criminal justice system and that system engages in practices that routinely and disproportionately target minority groups, there will be an obvious skew or bias in the database and the repositories.” (Sheldon Krismky & Tania Simoncelli, Genetic Justice: DNA Data Banks, Criminal Investigations and Civil Liberties 152 (New York: Columbia University Press 2011)). As it stands, the Bill makes no effort to mitigate this.

- **Disproportionality more generally:** Permanent storage of the data of convicted individual - without any discrimination with respect to the nature of the crime or the criminal - violates the proportionality standard laid out under the right to privacy judgment. Even under existing laws such as the Habitual Offenders Act, personal records are taken after the third conviction, and then deleted after a period of five years, in case there has been no recidivism.
- **Contrary to Right to Privacy Judgment:** The Law Commission Report dates prior to the Puttaswamy Judgment of Supreme Court, interpreting Right to Privacy as a fundamental right. The bill needs to be redrafted and tested against the Right to Privacy judgement.
- **Government’s proposed privacy bill is still pending and expected to come to Parliament:** At a time when the Justice Srikrishna chaired Committee to the Government has submitted a draft legislation on data protection and privacy which the Ministry of Electronics and IT (MeitY) has even put to public consultation is to bring to Parliament, why is the DNA Bill being advanced as a more important priority? Is the government sure that the DNA Bill will not violate the privacy provisions of the Srikrishna Committee draft bill on Data Protection? Existing provisions of the DNA Bill do not match up with data protection

language, with no clarity on the obligations of government agencies and any entities they contract as data controllers, and whether Indian citizens will have true data protection rights regarding their DNA. If MeitY acts on the draft data protection bill which gets introduced as a legislation, how will the government deal with two contrary laws? Already, the Ministry of Health has been reported to have reconsidered its own separate health records privacy law (DISHA) and said that they will await the conclusion of the process of the Draft Data Protection Bill and favour one horizontally applicable law.

- **Based on a problematic, and outdated report from the Law Commission:** The Law Commission had noticed that the fundamental right to privacy had been questioned in the Supreme Court and been referred to a larger bench, but, since the judgment had not yet been delivered, it had no means of testing it against the right to privacy as it has emerged from this judgment. The Bill will have to pass the test of life, liberty, dignity and privacy that has been explained in great detail in the judgment.
- **Corporate Lobbying:** In India, corporates associated with business of DNA are constantly lobbying to promote the use of DNA Profiling and the use of DNA. In recent times, even as this Bill has been making its way through to Parliament, companies like Gordon Honeywell- who make and sell DNA kits has been very active promoting more aggressive use of DNA. This includes organising lectures and other press activities which shows there is a financial interest for private contractors in the passage of this legislation which may not match with larger public benefit.
- **No Consultation:** While drafting the Bill, no public consultations were called for by the Ministry. Consultations are one of the most recent phenomena in the democracy and makes policymaking more participative. Contrary to the idea, not even a single consultation was carried out to take to opinion of the stakeholders and the civil society on such a comprehensive and widely debated issue.