VI. STEPS TAKEN FOR ENACTING DNA LEGISLATION IN INDIA – 2007 & 2012

In 2007, the Draft DNA Profiling Bill was piloted by the Centre for DNA Fingerprinting and Diagnostics, an autonomous organization funded by the Department of Biotechnology in India’s Ministry of Science and Technology.\textsuperscript{537} The Draft DNA Profiling Bill was made public. But, it had many shortcomings and led to a lot of opposition from NGO’s and activists. Hence, this Bill was never introduced in Parliament. Then the Government asked the Department of Biotechnology and the Centre for DNA Fingerprinting and Diagnostics (CDFD), Hyderabad, to update the 2007 Bill.\textsuperscript{538} In February 2012, the Bill was drafted by the Department of Biotechnology.\textsuperscript{539} The Bill was sent to various ministries for their comment and feedback.\textsuperscript{540} Another Working Draft of the Bill (Human DNA Profiling Bill 2012) was created in April 2012.\textsuperscript{541} The Planning Commission, Government of India appointed a group of experts to analyze the 2012 Bill on privacy under the Chairmanship of Former Chief Justice A.P. Shah, Delhi High Court. But, the Bill was not passed due to privacy issues.

In December 2012, Centre for Bureau of Investigation (CBI) wrote a letter to Government of India to quickly pass this DNA Profiling Bill.\textsuperscript{542} In 2014, \textit{Lokniti Foundation v. Union of India},\textsuperscript{543} a non-government organization (NGO) called Lokniti Foundation filed a public interest litigation against the government in the Supreme Court of India, stating that India does not have a national DNA database to address the issue of thousands of unclaimed dead bodies that are reported annually. The Supreme Court asked the government to present a roadmap

\textsuperscript{537} Available at http://cis-india.org/internet-governance/blog/privacy/dna-profiling-bill , viewed on 24-05-2014 at 8.30pm
\textsuperscript{538} Available at http://mrunal.org/2013/01/polity-dna-profiling-bill-feature-application-criticism.html , viewed on 24-05-2014 at 8.30pm
\textsuperscript{539} Available at http://cis-india.org/internet-governance/blog/draft-human-dna-profiling-bill-april-2012 , viewed on 24-05-2014 at 8.30pm
\textsuperscript{540} Available at http://mrunal.org/2013/01/polity-dna-profiling-bill-feature-application-criticism.html, viewed on 24-05-2014 at 8.30pm
\textsuperscript{541} Available at http://cis-india.org/internet-governance/blog/draft-human-dna-profiling-bill-april-2012, viewed on 24-05-2014 at 8.30pm
\textsuperscript{542} Available at http://mrunal.org/2013/01/polity-dna-profiling-bill-feature-application-criticism.html, viewed on 24-05-2014 at 8.30pm
\textsuperscript{543} Borrowed from http://en.wikipedia.org/wiki/Human_DNA_Profiling_Bill, viewed on 24-05-2014 at 8.30pm
detailing how the bill would implement mandatory DNA profiling of unclaimed bodies. The government replied that the bill would establish a national DNA database which would help to identify unclaimed bodies, and returned rescued children and adults to their families. The database would store DNA profiles from the relatives of missing persons, and also from convicts, accused, and volunteers. The government also added in the affidavit that India lacked trained personnel to implement it. India has 30-40 DNA examiners and a DNA examiner can handle 100 cases per year. However, India gets 40,000 unclaimed dead bodies annually, the purpose will require at least 400 DNA examiners. Since, a single case requires 20,000, annually 80 crores will be required for 40,000 cases. The government also said that the final bill would be presented in March 2015. Till now, the bill is pending.

The Human DNA Profiling Bill 2012 and Application of National Privacy principles to proposed legislation on ‘Human DNA Profiling Bill 2012’ are discussed below.

6.1. HUMAN DNA PROFILING BILL 2012

The Bill was drafted with an objective to enhance the protection of people in the society and administration of justice by analyzing DNA found at a crime scene, the victim or an offender to establish the identity in a criminal or civil proceeding mentioned under this Bill. In order to achieve these objectives, the following are essential:

(i) for regulating the use of DNA analysis of human body substance profiles,
(ii) for the establishment of DNA Profiling Board to lay down the standards for DNA laboratories, collection of human body substances, custody trail from collection to reporting,
(iii) for the establishment a National DNA Data Bank, and
(iv) for matters connected therewith or incidental thereto.

For the regulation of DNA analysis, the Bill created the following:

- DNA Profiling Board,
- DNA Laboratories,
- DNA Databank, and
- Offenses and Penalties.
6.1.1. DNA PROFILING BOARD

The DNA Profiling Board shall be appointed by the Central Government. The Bill lays down a number of fields from which the members are to be chosen including molecular biology, population biology, criminal justice, and bioethics. The board consists of one Chairperson, 11 ex-officio Members, 4 Members and one Secretary, totally 16 members. The Board shall exercise and discharge the following functions:

1. Advise
2. Recommendation
3. Guidelines

1. Advise

(a) Concerned Ministries and Departments of the Central and State Governments for the creation of DNA laboratories,
(b) On planning, organization and management of DNA laboratories,
(c) On all ethical and human rights issues emanating out of DNA profiling in consonance with international guidelines set by the United Nations Organization. It relates to,
(i) The rights and privacy of citizens,
(ii) The issues concerning civil liberties,
(iii) Issues having ethical and other social implications, and
(iv) Professional ethics in DNA profiling.

2. Recommendation

(a) Central funds for the creation of DNA labs and DNA Databanks,
(b) Funds for the functioning of DNA labs for a specified period,
(c) For maximizing the use of DNA technology in the administration of justice,
(d) For privacy protection laws, regulations and practises relating to access, or use of stored DNA samples, and
(e) To ensure,
   (i) The appropriate use and dissemination of DNA information,
   (ii) The accuracy, security and confidentiality of DNA information,
   (iii) Timely removal and destruction of obsolete and inaccurate DNA information, and
   (iv) Take any other necessary steps required to be taken for the protection of privacy.

3. Guidelines

(a) For the development of training modules, and
(b) For storage of biological substances and their destruction.
6.1.2. DNA LABORATORIES

Every DNA laboratory shall get an approval from the board before conducting any human DNA procedures. But there is an exception that the DNA laboratory in existence on the date of commencement of this Act, shall conduct human DNA procedures immediately without first obtaining approval. For getting an approval, every DNA laboratory shall make an application to the board. The DNA laboratory in existence at the time of commencement of this Act must make an application for approval before the expiry of six months from such commencement. The DNA Profiling Board should make necessary inspection of DNA laboratory, record and book before granting approval. But, the application for approval shall not be rejected unless the applicant has been given an opportunity of being heard. The Board can withdraw the approval granted to a DNA laboratory, if it fails to fulfill the conditions. Any DNA laboratory aggrieved by an order of non-approval may prefer an appeal to the Central Government or any other authority specified by the Central Government within a period of thirty days from the order of withdrawal. Every DNA laboratory which has been approved for performing DNA analysis shall,

(a) follow such standards for quality assurance for DNA testing as specified by the board,
(b) establish and maintain a documented quality system, and
(c) establish and maintain quality manual with details.

The Bill requires that every DNA laboratory should ensure adequate security to minimize contamination. Similarly, it requires that DNA labs should follow documented evidentiary control, validation process, and analytical procedure and use of such equipment suitable for methods employed as the regulations made by the board. Every DNA laboratory should possess proper infrastructure. It should also employ qualified technical personnel, appropriate security, and system for safety of personnel as the regulations made by the board.

6.1.3. DNA DATA BANK

The Central Government shall establish a National DNA Data Bank and many Regional DNA Data Banks. Every State Government may establish State
DNA Data Bank which will share the information with the National DNA Data Bank. Every DNA Data Bank shall maintain following indices namely,

(i) Crime-scene index – an index of DNA profiles derived from forensic material found at any place and the victim at the time when an offense was committed. Crime scene index contains the case reference number of the investigation associated with the body substances from which the profile was derived

(ii) A suspect’s index – an index of DNA profiles derived from forensic material lawfully taken from suspects. A suspect’s index contains the case reference number of the investigation associated with the body substances from which the profile was derived

(iii) An offender’s index – an index of DNA profiles derived from known samples of body substances taken from offenders. An offender’s index contains the information relating to the identity of the person from whose body substances the profile was derived

(iv) A missing person’s index – an index of DNA profiles derived from forensic material taken from the persons who are missing and the volunteers who are relatives of missing persons. A missing person’s index contains the case reference number of the investigation associated with the body substances from which the profile was derived

(v) Unknown deceased person’s index – an index of DNA profiles derived from forensic material of deceased persons whose identities are not known. Unknown deceased person’s index contains the case reference number of the investigation associated with the body substances from which the profile was derived

(vi) A volunteer’s index – an index of DNA profiles derived from body samples taken from volunteers. A volunteer’s index contains the case reference number of the investigation associated with the body substances from which the profile was derived

(vii) Such other indices as may be specified by regulations made by the board.
All operations concerning the National DNA Data Bank shall be carried out under the supervision of a DNA Data Bank Manager who shall be appointed by the selection committee which is nominated by the board. When the DNA Data Bank Manager considers it appropriate shall communicate the information contained in the DNA Data Bank to court, tribunal, and law enforcement agency or DNA laboratory in India,

(a) whether the DNA profile received is already in the Data Bank; and
(b) Any information other than the DNA profile received is in the Data Bank.

On the request made by the law enforcement agency in the investigation of a specified offense, the DNA Data Bank Manager may communicate any DNA profile contained in the National DNA Data Bank with the approval of the Central Government to the government of a foreign state, an international organization or an institution of any government. The information contained in the offender’s index must be kept on a permanent basis unless the individual had been acquitted. The DNA profile of a person should be expunged from the offender’s index if he had been acquitted on the charges against him or his conviction had been set aside by the court.

DNA profiles, samples and records forwarded to or in custody of the DNA Data Bank Manager or DNA laboratory or any other person or authority under this act shall be kept as confidential. All DNA profiles, samples, and records shall be used solely for the purpose of facilitating identification of the perpetrator of a specified offense under part I of the Schedule as well as to identify victims of accidents or disasters or missing persons or for purposes related to civil disputes and other civil matters listed in part I of the Schedule or for the other purposes specified by the regulations made by the board. The information of DNA profiles, samples, and DNA identification records shall be made available for the following purposes:

(a) To law enforcement agencies for identification in a criminal case;
(b) In judicial proceedings;
(c) For facilitating decisions in cases of criminal prosecution;
(d) For defense purposes;
(e) For population statistics data base, identification, research and protocol development, or for quality control provided that it does not contain any personally identifiable information and does not violate ethical norms; or

(f) In the case of investigation relating to civil disputes; and

(g) For any other purposes as may be prescribed.

The DNA Data Bank Manager is empowered to grant an access to any information in the DNA Data Bank to any person or class of persons for the purpose of training, proper operation and maintenance. Any person who is authorized to access an index of the DNA Data Bank may also access that index for the purpose to carry out one-time keyboard search on information of any DNA sample lawfully collected for a criminal investigation purpose except for a DNA sample voluntarily submitted solely for elimination purposes. Access to the information stored in the National DNA Data Bank shall be restricted to,

(a) A victim of an offense, or

(b) A person who has been excluded as a suspect.

The Bill contains a post-conviction DNA testing. Any individual undergoing a sentence of imprisonment or death pursuant to conviction for an offense may apply to the court for an order of DNA testing of specific evidence. The court may order for DNA testing of specific evidence if it is satisfied.

6.1.4. OFFENSES AND PENALTIES

- Penalties for willful disclosure
  
  Any person willfully discloses DNA information contained in the DNA Data Bank shall be punished with one month imprisonment which may extend to 3 years with fine up to one lakh rupees.

- Penalties for obtaining information without authorization
  
  Similarly, any person who willfully obtains DNA information from the DNA Data Bank without authorization shall be punished with one month imprisonment which may extend to 3 years with fine up to one lakh rupees.

- Penalties for unlawful access
  
  Any person unlawfully assesses the information contained in the DNA Data Bank shall be punished with one month imprisonment which may extend to 2 years with fine up to fifty thousand rupees.

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• Penalties for providing DNA sample or result without authorization
  Any person knowingly provides a DNA sample or result to any person without authorization shall be punished with one month imprisonment which may extend to 3 years with fine up to one lakh rupees.
• Penalties for destruction, alteration, contamination or tempering with biological evidence
  Any person knowingly and intentionally destroys, alters, contaminates or tampers with biological evidence in order to prevent the production or use of that evidence in a judicial proceeding shall be punished with one month imprisonment which may extend to five years with fine up to two lakh rupees.
• Offenses by companies or the institution
  When an offense has been committed by the company or the institution, every person who at the time of commission of the offense shall be deemed to be guilty and punished accordingly. But, if such person has proved that the offense was committed without his knowledge or such person has exercised all due diligence to prevent the commission of such offense shall be excused from punishment.
• Cognizance of offenses
  The court shall not take cognizance of any offense punishable under this Act except on a complaint made by the Central Government or its officers or Board or any other person authorized by them. If the Central Government or the DNA profiling board does not take any steps within 3 months from the date of the receipt of application, the aggrieved party shall approach the court. The court inferior to that of Metropolitan Magistrate or a Judicial Magistrate of first class shall not try any offense punishable under this Act.

6.2. APPLICATION OF NATIONAL PRIVACY PRINCIPLES TO PROPOSED LEGISLATION ON HUMAN DNA PROFILING (HDP) DRAFT BILL, 2012

In 2012, the above Draft Human DNA Profiling Bill was piloted by the Department of Biotechnology, Ministry of Science and Technology, Government of India. The DNA Profiling Bill intends to legalize the collection and analysis of DNA samples of offenders, suspects, missing persons, unknown deceased persons, and volunteers for forensic purposes. This list may be expanded by

Available at http://planningcommission.nic.in/reports/genrep/rep_privacy.pdf, viewed on 24-05-2014
regulations made under this Bill. The Bill provides for the creation of a centralized national database, setting up of a DNA Profiling Board, and sharing of offender’s DNA profile with other countries. It includes provisions to establish standards for laboratories, staff qualifications, collection of body substances, policies of use and access for DNA samples, and the retention and deletion of DNA samples. The Planning Commission, Government of India appointed a group of experts to analyze the Bill on privacy under the chairmanship of former Chief Justice A.P. Shah, Delhi High Court. The group of experts analyzed the proposed bill and made their recommendations.

The recommendations of the committee are as follows:

1. The individual should be provided with notice for collection of DNA samples.

2. The notice should contain the following:
   (a) Personal information of individual,
   (b) The purpose for which DNA samples were collected,
   (c) Useful of collected DNA samples,
   (d) To whom the personal information is disclosed,
   (e) Security safeguards established by the DNA Data Bank in relation to personal information, and
   (f) Contact details of the privacy officers and SRO Ombudsmen for filing complaints.

3. A public privacy notice should be provided by body or organization for collection of DNA samples.

4. The affected individual should be given notice if the sample was contaminated.

5. If a DNA profile is legally assessed, the affected individual should be given notice after the investigation is closed.

6. The notice of change in privacy policy regarding the collection, storing, processing, use, retention, disclosure and deletion of information should be made public.

7. Collection of DNA samples should be done with consent (from a victim or for the purpose of elimination), and circumstances wherein the collection takes place without consent (for example, from crime scene) should be distinguished.

8. Proper mechanism should be incorporated to withdraw volunteer’s information from the volunteer’s indices if they desire.
9. The collection of DNA samples by law enforcement authorities should be done in accordance with the laws in force.

10. Circumstances when the medical examiner can collect DNA samples should be specified.

11. The relevant and necessary information should only be disclosed.

12. Collection and processing of DNA samples and personal information should be adequate and relevant to the purposes specified under this bill. The purpose should be clear and specific.

13. The use of DNA samples should be limited to the purposes and timeframe specified under this bill.

14. The Data retention should be in compliance with the national privacy principles.

15. The procedure for the destruction of DNA samples and personal information should be established after the purpose was served.

16. The DNA Databases of innocent persons should be automatically removed from the database.

17. The individual should have the right to correct and access any personal information pertaining to DNA database.

18. The personal information stored in the DNA database should not be disclosed to third parties, except after providing notice and seeking consent from the individual for such disclosure.

19. Disclosing personal information of individual stored in DNA database to law enforcement authorities should be done in accordance with laws in force.

20. Bodies and organizations collecting DNA sample should be required to publish transparency report annually regarding,
   a) Internal governance structure of body or organization,
   b) Practices,
   c) Finances, and
   d) Success and error rates.

21. A redress mechanism should be created to file a complaint by an individual whose DNA was illegally used or collected.

22. An appeal against the retention of data should be made available to individuals.
23. Individuals should be able to have a second sample taken and reanalyzed with the permission of court.
24. Process should be added to verify the correctness of the DNA analysis and the information placed in the DNA databases.

The admissibility of DNA technology under Criminal Justice System in India is discussed in the following chapter.