Memorandum on The DNA Technology (Use and Application) Regulation Bill, 2019

Submitted to Department-related Parliamentary Standing Committee on Science & Technology, Environment & Forests, Rajya Sabha, Parliament of India.

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I Introduction

The "The DNA Technology (Use and Application) Regulation Bill, 2019" (henceforth DNA Bill) has been introduced with the purpose of providing the terms and conditions for the collection and use of DNA and the institutional architecture for governing it.

In response to the call for public views/opinion, this memorandum is prepared. It may be noted that while preparing the memorandum, the Group had kept in mind what Lyndon B. Johnson has said: "You do not examine legislation in the light of the benefits it will convey if properly administered, but in the light of the wrongs it would do and the harms it would cause if improperly administered."

This memorandum is structured in three parts. In the second part, we provide general comments on the Bill drawing on the scientific studies of DNA technology, the use and application of DNA technology in legal systems in other jurisdictions, Indian jurisprudence on the use of DNA technology in criminal and civil cases and Constitutional jurisprudence. The third part provides detailed comments on specific provisions of the Bill.

II General Comments

1. Legal Status of DNA information: DNA constitutes sensitive biometric information of a person. Unauthorized disclosure could lead to genetic profiling and other forms of profiling (leading to discrimination) which can undermine the dignity and harm the privacy of the person concerned. DNA samples are a potential source of human genetic information and can reveal sensitive health information. It can, therefore, violate bodily integrity, privacy (information concerning health, familial relationships and so on) and lead to disadvantage and discrimination; and pose a grave threat to life and liberty. DNA information can also be used to create familial linkages and have similar repercussions on other family members that are both inter generational and profiles an entire community/ethic group/caste/tribe/race. This could lead to grave violation of group rights. Profiling of minority groups like religious, ethnic, linguistic, etc., has in many jurisdictions led to persecution of the entire group. The use of the word "person" includes migrants, refugees, asylum seekers and foreigners, who are at a greater risk of not being able to protect their human rights. Every effort shall be made to ensure that the provisions of the Bill are in total conformity with the rights guaranteed under Part III of the Constitution most particularly under articles 14 and 21. We suggest that explicit

obligations shall also be cast to uphold International Law including International Declaration on Human Genetic Data, UN Convention on the Rights of Child, International Convention on Civil and Political Rights, etc.

2. Unnecessary collection, access and use of DNA information: This can cause grave harm to the individual and groups. Given that the fundamental Right to Privacy has been recognized under the Constitution of India, it is critical that indiscriminate collection and non-necessary use of DNA information should be prohibited by strictly applying purpose limitation. DNA collection should only be mandated through a strictly consensual procedure (ensuring prior informed written consent) in case of civil matters – regarding missing persons. In criminal investigation and trials, DNA should also be obtained consensually and from arrested persons only as per a Judicial Magistrate's order. It should be explicitly mentioned that the burden of proof, while obtaining such order from the judicial magistrate, is on the Investigating Officer to demonstrate how collection of DNA samples and access to DNA samples are absolutely necessary for the investigation. Further persons have to be informed (in their own language while explaining implications of DNA sharing on privacy and constitutional rights.) when and for what purpose their DNA information has been shared; when they can seek deletion of their DNA profile from the Databank, etc,. Institutionally a DNA Databank Ethics Advisory Committee should be formed which is independent of the DNA Board that includes members from ICMR (bio-ethics), Data Protection Authority (to be established under the Data Protection Bill), National Commission for Scheduled Castes, National Commission for Scheduled Tribes, National Commission for Minorities, National Commission for Backward Classes, National Commission for Protection of Child Rights, Ministry of Women and Child Development, Ministry of Law and Justice, Social Scientists, legal academics/lawyers and civil society organizations working on data protection in India. Additionally, given that the Data Protection Bill has been referred to the Joint Parliamentary Committee, before it is enacted, creating a DNA database would be akin to putting the cart before the horse.

3. The Scientific Validity of DNA forensic tests: William C Thompson[1] has discussed in great detail the issues of infallibility of DNA testing techniques, erroneous and partial matches, false positives and cold hits, and how all these could magnify in a complex statistical database. He highlighted that false incrimination can occur due to coincidental and partial matches, inadvertent or accidental transfer of cellular material,

[1] Thompson, William C. "The potential for error in forensic DNA testing (and how that complicates the use of DNA databases for criminal identification)." In council for responsible genetics (CRG) National Conference: forensic DNA databases and race: Issues, Abuses and Actions.

errors in identification and labeling of samples, misrepresentation of test results, and intentional planting of evidence. It has been said, in giving epistemic justification of infallibility of DNA analysis as a technique, that degraded and mixed samples, and human errors are to be blamed for any unexpected matches but as many examples show, that is not the case, statistically and practically. A large database, as envisioned in the Bill, would have a high probability of partial matches, on some of the loci out of 13, and the problem would only worsen if the sample collected from a crime scene is mixed. A database made out of such samples would have class and caste disparities with stronger implications on the already marginalised. There are many examples of cold hits, or searching the database using older DNA profiles expecting a match, leading to prosecution of people due to partial matches. Hence, it is suggested that there should be an independent, public programme of research for checking anonymised datasets for bias and reducing disparities, studying the quality of the database and deciding when to delete information that is obsolete. Experimental studies should be conducted where DNA kits could be randomly assigned to some police departments across different conditions to observe a certain kind of crime. This kind of study was done in Australia for burglary cases and the results reflected that cost and local law enforcement practices impacted results. It was found to be most prudent in a review of five studies to answer whether DNA evidence helps solve crime.[2] There needs to be further research and field studies to ensure that DNA technology is used and regulated, ethically. In an ethical-legal analysis[3] quoted in the Law Commission's 271st Report on DNA, several law scholars have argued that the DNA analysis must only be done on non-codifying DNA, with no phenotypical information. Further, forced subjection to the probative practice of DNA collection should only be considered proportional when some indication exists which relates the person to the perpetration of the crime. There should be explicit provisions for the above two.

4. <u>Evidentiary value of DNA profile:</u> The DNA Bill is silent on the admissibility of DNA profiles as evidence in civil and criminal trials. This should be explicitly clarified in the Bill. Further in trials whether experts drawn from DNA laboratories can serve as expert witnesses and be made available for cross-examination should also be clarified. Particularly having regard to the infallibility of DNA testing, it should be provided, as a legal safeguard, that the DNA/ forensic material shall not be the sole basis of conviction in a criminal trial.

[2] Wilson, David B., David McClure, and David Weisburd. "Does forensic DNA help to solve crime? The benefit of sophisticated answers to naive questions." Journal of Contemporary Criminal Justice 26, no. 4 (2010): 458-469.
[3] Guillén, Margarita, María Victoria Lareu, Carmela Pestoni, Antonio Salas, and Angel Carracedo. "Ethical-legal problems of DNA databases in criminal investigation." Journal of Medical Ethics 26, no. 4 (2000): 266-271

5. Policing infrastructure and the use of DNA: It is useful to underline that DNA analysis is not a one-time laboratory test which creates a profile but it is a process from the crime scene till the conviction of the accused. Hence, the whole cost of modernization of policing infrastructure needs to be taken into account as without the whole investigative process being fool-proof, DNA evidence will not be effective. This includes, for examples, providing 'rape collection kits' in every police station and training of Investigating Officers in collection and safekeeping of DNA forensic evidence. The collection of DNA through unsafe medical procedures such as uses of infected syringes could put people at health and hygiene risks. Who is going to bear the cost of this overhaul of policing in India? Police is already over-burdened, this will only create more disadvantages for the deprived sections, since there is over representation of certain communities amongst undertrials, arrested and detained. Additionally there is no clarity as the following protocols – collection points, storage of samples, DNA profiles – and the chain of custody for the collection and usage of DNA samples. Ultimately who at the various parts of this chain is responsible for each step?

6. Segregation of DNA Data Banks: Criminal and civil DNA databanks should be segregated. And suspects and undertrials indexes should be deleted or separated. DNA databank should only be used like a Fingerprint databank for criminal investigative purposes with more stringent safeguards because it is more 'sensitive personal information' than only human fingerprints. There can be a separate DNA databank for humanitarian purposes (missing persons, disaster) and this should be separate from the criminal DNA databank. Additionally a requirement for 'Staff Elimination Database' be entered as an added safeguard according to international best practices[4] which will include the DNA profiles of police officers, forensic scientists, medical professionals and any other personnel who pose a risk of DNA contamination.

7. Accreditation of labs: should be based on inspection and recommendation of an independent expert body. NABH which is competent and has been undertaking inspection of non-DNA laboratories can be resourced accordingly to increase capacity. This will allow benchmarking and best practices across laboratories. The DRB can provide accreditation based on NABH recommendations.

[4] DNA and Fingerprint Elimination Databases, Service Instruction, Police Department, Northern Ireland, 2017. https://www.psni.police.uk/globalassets/advice--information/our-publications/policies-and-service-procedures/elimination-databases-180119.pdf

8. Excessive delegation of legislation powers to Central Government and DNA Regulatory Board: Bill provides for an excessive delegation of legislative powers to central government and most particularly to DRB. Having regard to the excessive delegation of legislative power, they may frame rules and regulation, in exercise of their delegated powers, so as to fundamentally alter the legislative policy itself. This excessive delegation of legislative powers violates the principle of separation of powers – which is recognized as one of the basic features of the Constitution of India.

III Specific Comments (with reference to clauses in the DNA Bill)

1. Short and long title of the Bill: It is mentioned that the DNA Bill is "…for the purpose of establishing the identity of certain categories of persons including the victims, offenders, suspects, undertrials, missing persons and unknown deceased person…" Collection of DNA samples is not mentioned. The DNA Bill should both in its title and description, categorically refer to the "collection of DNA samples" – because that seems to be one of the primary purposes of the Bill.

2. Clause 1: Proviso to this clause states that "different dates may be appointed for different provisions of this Act…." This clause should be amended to allow for simultaneous commencement of all provisions. Given that the Bill will affect the fundamental rights and liberties of citizens, it may happen that provisions referring to the involuntary collection of DNA may be notified before the notification of safeguard provisions. This would effectively dilute the effectiveness of the Bill.

3. Clause 2 (2) states that "…words and expressions used and not defined in this Act, but defined in the Indian Penal Code, the Indian Evidence Act, 1872 and the Code of Criminal Procedure, 1973, shall have the same meanings respectively assigned to them in those Codes or that Act." However there are certain essential words/expressions – like "suspects"; "offenders" and "undertrials" – which are left undefined in the DNA Bill and are also not defined in the legislations mentioned. Further the definition of "victim" in the CrPC (Section 2 (wa)) includes "his or her guardian or legal heir" – for the purpose

of DNA collection, the scope of this definition is too broad. We suggest that the DNA Bill should provide a definition of these terms.

4. Clause 3(1) states that the Central Govt. "may" by notification establish the DNA Regulatory Board (henceforth DRB). We suggest that the word "may" be replaced by "shall". This would imply that the Central Govt. would be under a legal obligation to establish the Board. Given the far reaching implications of collection and use of DNA, the establishment of the DRB is necessary to oversee the process. On perusal of the Bill, it appears that the DRB is so central in the entire scheme of the legislation. Its establishment shall be made mandatory.

5. Clause 4 relates to the composition of the Board. The DRB is empowered with extensive powers of rule-making, enforcement, accreditation functions under the DNA Bill. It also has adjudicative/quasi judicial powers. However only two members of the DRB – the vice chairperson and one expert member are engaged on full time basis. All other ten members are in an *ex officio* capacity. This is a seriously faulty structure because, having regard to the enormity of the workload, the DRB requires full time members to function effectively. Further the representation of State Police is completely inadequate. Policing is a state function and the DNA collection and use is predominately within the criminal policing system. Therefore we suggest the DRB should have representatives from each State (and UTs) at all times. Further, the DRB should also include independent civil society organizations working within the criminal justice system and independent experts drawn from criminal law, ethics, and representatives from National Commission for Women, National Commission on Minorities, National Commission for Schedule Castes, National Commission for Schedule Tribes, National Commission for Backward Classes, and National Commission for Protection of Child Rights. Given the disproportionate representation of minorities and backward classes amongst undertrials, and because children's interested are particularly affected by collection of DNA samples – it is necessary that all these bodies are represented since, the DRB has extensive powers of rule-making.

6. Clause 7 relates to conflict of interest. It allows for members of DRB to take initiative to exclude themselves from the deliberations if there is any matter in which they have a direct or indirect interest. It is necessary that the conflict of interest provision is further strengthened. It should require all members of DRB declare upon their appointment that they pledge/take oath which requires them not to undertake any action or omission in any matter of the DRB in which their personal interests are involved. This oath should be enforceable and if the member is found to be violating the oath, action

for suspension and penalty should be taken against the concerned member. This should be a ground for removal of the member under Clause 8. It should also be specifically provided that they shall not have, direct or indirect, association with any DNA laboratories.

7. Clause 9 provides that vacancies in the DRB will not invalidate its proceedings. We suggest that a quorum of atleast 70% members is statutorily provided in the Bill, for validating its proceedings. Given the extensive powers and functions of the DRB, it is critical that representation in meetings is ensured through a requirement of quorum and for effective deliberations.

8. Clause 12 provides for the functions of the DRB. We suggest that the DRB should be explicitly obligated to be guided, while discharging its functions, by International Law including International Declaration on Human Genetic Data, UN Convention on the Rights of Child, International Convention on Civil and Political Rights, etc. Constitutional jurisprudence specifically on fundamental rights (Part III) should also be referred explicitly. DRB should undertake its functions within the parameters set by international and domestic law.

9. Clause 13 relates to prohibition of DNA testing without accreditation. The proviso to Clause 13(1) allows existing DNA labs to continue DNA testing till its application for accreditation is decided by the DRB. This will allow for delay in compliance and since timelines for consideration of application allows flexibility to the DRB, it may lead to irregularities. Laboratories only granted accreditation should be allowed to operate as DNA labs.

10. Clause 15(4) obligates DNA laboratories to hand over DNA samples and records if accreditation is suspended or revoked as directed by DRB. DNA samples and records are personal information and should be handed over immediately after analysis is complete. No such information should be maintained by the DNA laboratory under any circumstances so as to prevent their misuse. Clause 20(2) should be revised and clarified in this regard.

11. Clause 21 relates to consent for taking of bodily substances. It creates two categories of persons: (i) Those who are arrested for any offence punishable with death or imprisonment for a term exceeding seven years and; (ii) and those arrested for offences punishable with a lesser penalty (not punishable with death and carrying a sentence of less than seven years). For the first category there is no requirement of obtaining

consent. For the second category written consent is mandated but if it is not given, then it can be mandated through an order of a Magistrate. We suggest that the following phrase be used instead of "consent is given in writing" – "prior informed consent in writing shall be recorded by the Investigation Officer". We should be aware that involuntary consent amounts to coerced consent. Also coerced consent may be thought of as custodial torture. Rules should be drawn for procedures and parameters which would ensure that consent given is valid and fully informed. For the second category of persons, under no circumstances should consent be involuntary, as the nature of crimes is not grave or heinous. Therefore the magistrate should not be empowered to order involuntary consent for DNA collection. For the first category – the definition of specified offences is too wide. The collection of DNA samples should be linked to investigation of offences specified in the Schedule (Refer to point 40 later in the Memorandum). Only such crimes which are listed in the Schedule should attract the involuntary collection of DNA samples. Even in such circumstances the prior informed consent in writing of the arrested person should be taken and if not given, then the Magistrate can order for its involuntary taking if reasonable cause exists. There should be provision to ensure that the person from whom bodily substance is taken for DNA testing is given the "right to be heard" by the magistrate. And it should be clarified that a Judicial Magistrate will hear the request.

12. Clause 22 relates to voluntary submission of bodily substances for DNA testing. It allows any person, present at the crime scene, being questioned for a crime under investigation and for relatives of missing persons. The phrase which should be used "prior informed consent in writing shall be recorded by the Investigation Officer". Subsection (2) applies to persons below age of eighteen (non-adults) and envisages a situation – when children consent to voluntarily give their DNA and parents/guardians disagree, the investigating officer can request for an order for the mandatory taking of bodily substance. We suggest that this subsection be wholly deleted. The section allows for mandatory collection of DNA from children on the basis of their consent. Children are not legally capable of providing valid consent. The essence of voluntary submissions of bodily substances is that it is non-mandatory so there is no role for the magistrate to play in such instances.

13. Clause 23 relates to the collection of samples for DNA testing and lists the four sources for collection of DNA. Cl. 23(1)(b) states "such other sources as may be specified by regulations". This is over expansive and provides too much power to the DRB. Any addition should be via rules made under the Act. Clause 23(2)(a) and (b) collection of both intimate and non-intimate bodily substances using intimate and non-intimate

procedures should only be performed by registered medical practitioners in government hospitals. Given that both non-intimate bodily substances and non-intimate forensic procedure are physically invasive in nature it requires the supervision of a medical practitioner from a government hospital. For women, transgender and persons who identify as women, both these procedures should be performed by women registered medical practitioners from government hospitals. Proviso to the Clause allows for collection from victims and "those reasonably suspected of being a victim." Only victims can voluntarily consent to providing DNA samples. And this consent should be "prior informed consent in writing shall be recorded by the Investigation Officer." There should not be mandatory collection of DNA sample from victims or those reasonably suspected to be victims. "Suspected to be victims" category should be removed – since victim should be a category that can only be through self-identification by any person. Further there should be a clear statement that – least "physically invasive" procedures for collection of DNA samples will be preferred over intimate forensic procedures that are more intrusive.

14. The DNA Bill specifies that intimate forensic procedure such as collecting samples from the genitalia and breasts will be gender specific – limited only to women. (Cl. 23(2) (b) - Intimate forensic procedure through vacuum suction or making casts of the genitals for collection of DNA samples for all women is not necessary either for crime detection or identification. Such women would include living suspects, accused, victims or dead women. This provision directs DNA profiling of a vast number of women as a targeted population without providing any rationale or nexus. The procedure is violation of women's bodily integrity and it is a grave intrusion amounting to medically sanctioned violence against women. It is a grave violation of women's privacy and the right to life with dignity.

15. The Bill does not protect the rights of victims of sexual violence, domestic violence, dowry violence, sexual torture or any other form of gender violence. A victim of any sexual offence, domestic violence, or any other gender violence must be treated with courtesy, compassion and respect for their rights and dignity. Forensic Tests which lack scientific validity and harm women (such as the two finger test) are prohibited in law and convention. Inventing a forensic procedure which is gender specific is a violation of Articles 14 and 21 also not in conformity with the spirit of the relatively progressive Criminal Law Amendment Act of 2013 and Protection of Children from Sexual Offences Act, 2012.

16. Medical professionals also recognize that victims of sexual violence may not only be women. They include men, transgender, inter-sex, lesbian, gay, and all queer citizens, adult and minors. POCSO is gender neutral. Hence, the procedure for collecting intimate body samples should not only be gender neutral but it should be preceded with an emphasis on therapeutic care and counseling. It is now prohibited by law to adopt forensic procedures in manner that cause trauma. For instance, as per Section 36A(3) under the Criminal Procedure Act,1977 of South Africa, certain samples must not only be taken by an authorized person but also by a person of the same gender as the person from whom the sample is required, maintaining 'strict regard to decency and order'.

17. The DNA Bill, 2019 appears to be in conflict with the guidelines for forensic examination in sexual assault cases issued by the CFSL, Home Ministry in 2018. These guidelines provide the rationale for forensic examinations that include DNA analysis i.e. to link a suspect to the victim in a crime. Therefore, a procedure for the collection of DNA samples (intimate and non-intimate) of both victim and the accused has been laid down. The CFSL clearly lays down, in the guidelines, that only a registered medical practitioner shall conduct such test on sexual assault victims. The Bill should be amended to include such a provision.

18. The Bill should oblige the police officer to explain to the victim in order to secure her prior informed written consent. It should specify that every reasonable effort must be made to ensure that the forensic procedure is carried out in privacy, as quickly as possible and with minimum discomfort and inconvenience to the victim. And that carrying out forensic procedures must not involve the removal of more of the victim's clothing or more inspection or examination of the victim than is necessary.

19. No protocol has been laid down for the data security and protection of photographs or casts taken – who is the authority, which cameras are used, where are images is it stored, what happens if the image is leaked and how is privacy assured?

20. The DNA Bill should maintain anonymity of rape victims as per the law.

21. In cases of custodial violence and torture, a strict and accountable procedure to ensure that DNA samples are not destroyed by the police must be laid down.

22. Clause 24 relates to accused persons petitioning the trial Court for re-collection of bodily substances in case of suspicion of contamination. This provision should be extended to all those persons who have submitted their DNA samples. This can be

overseen by the DRB in case of non-criminal cases. Definition of “contamination” provided should be provided in the Bill, as this will trigger right to submit re-submit sample for DNA and may impinge for criminal and civil purposes.

23. Clause 26 provides that the National DNA Databank shall categorize DNA profiles in five indices – (i) crime scene, (ii) suspects/undertrials; (iii) offenders, (iv) missing persons and (v) unknown deceased person. This enables that searches for DNA profile match may be performed across all indices, as all of them are maintained together in a single DNA Data Bank. This will allow a “bottom trawling” kind of searches which will lead to violations of privacy of the persons whose DNA profiles are stored but may also allow for indiscriminate searching and open the doors for false positives based on similarity rather than a complete match. In other jurisdictions like Canada, strict segregation is maintained between criminal and non-criminal databases. In Canada, there are two national DNA databases: (i) Crime Scene Index and (ii) Convicted Offender's Index. For non-crime there is a separate DNA databank: National Missing Persons DNA Program (NMPDP) which has three indices (i) Missing Persons Index (ii) Relatives of Missing Persons Index and (iii) Human Remains Index. There is a clear distinction between uses for criminal purposes and uses for humanitarian purposes (specifically, assisting investigations of missing persons or unidentified remains). Similar separation (criminal and non-criminal) needs to be maintained in terms of databases in India. Further DNA profiles should only be identifiable as per case reference number and not by the identity of the person. This will also provide added privacy safeguard to unauthorized disclosure and access to DNA profile. Further “”suspects and undertrials” should not be categorized together. Further there is no definition given for “suspects” (it also not defined under IPC, CrPC and the Indian Evidence Act) – presumably the Investigating Officer has complete discretion to define a “suspect” – it is unclear whose DNA profile will be uploaded in the “suspects and undertrials” index. Since mandatory collection is only allowed for arrested persons, a separate index can be maintained for arrested persons. DNA profiles generated from all other biological samples obtained from living persons voluntarily in connection with a crime investigation should be stored in a voluntary person’s index.

    Further, it is not clear in which of these five indexes, DNA details collected under clause 22 (c) will be maintained. It won’t fit into any of these five categories.

24. Under Clause 23(3) “information based on DNA testing and records relating thereto”” is unclear. The DNA laboratory is supposed to generate DNA profiles from samples collected and the profile is supposed to be handed over to the National DNA databank.

Therefore the clause should refer to DNA profiles. A provision shall also be made regarding disposal/destruction of samples too.

25. Clause 29 disallows comparison under certain circumstances. However this not an adequate safeguard, since the indices are stored physically in a single National Databank.

26. Clause 30 relates to sharing of DNA profiles across jurisdictions. We recommend that the sharing of DNA data with international bodies be restricted to only governmental bodies following the international law framework for policing co-operation signed between countries and India. If a country wishes to check the DNA profile then it should be routed through the 'Interpol DNA Gateway' only. In all cases of sharing of such profiles, the person concerned whose DNA profile is being shared has the right to be informed and prior informed written consent should be sought and given before such disclosure is made. Further only perfect matches should be allowed to be shared and not similarity findings – since the latter creates familial profiling and could become ground for unnecessary harassment; disadvantage and discrimination.

27. Clause 31 provides for retention and removal of records. Mandatory deletion of DNA profiles and accompanying records should be provided for in case suspects and undertrials on completion of trial if acquitted. Period of retention should be specified for other categories like “offenders”; “missing persons”. It is too onerous to expect undertrials to understand and actively intervene to seek deletion of their records. Children deserve special protection in this regard. DNA data of children below legal age should be immediately deleted on discharge or acquittal or at end of the investigation as per international best practices (See *S and Marper v. United Kingdom* ([2008] ECHR 1581)). And a certificate of deletion should be provided to the person concerned. Other Jurisdictional laws, like the Ireland Criminal Justice(Forensic Evidence and DNA Database System)Act, 2014 under section 76(1)(a) provides for mandatory removal and destruction of profiles in cases of acquittal before the expiration of 3 months. The South African Criminal Procedure Act, 1977 under section 36C(3) specifies for destruction of fingerprints and body-prints for investigation purposes by the officer commanding the Division responsible for criminal records but strictly within 30 days in cases where the ‘person is not found guilty’. Therefore global best practices are based on automatic deletion rather than deletion via petitions.

28. Clause 33 states that DNA samples, profiles and records will only be used for identification of the person. It should be clarified in explicit terms that the National DNA

databank will not be linked to any other existing databases – like Aadhaar, National Population Register, National Population Register (NPR), National Voters Register, etc. Further it should be explicitly mentioned that the DNA profiles will not be shared with private parties and will only be used for crime investigation and in criminal trials.

29. Clause 34 (f) allows for use of DNA profiles - "for such purposes" as may be specified by regulations. This should be deleted. DRB cannot via regulations expand the scope of uses of DNA profiles. Further whenever DNA profiles are shared the person whose information is shared has a right to be informed. It should be explicitly mentioned that DNA profiles will not be allowed to be used for genetic profiling even in case of research.

30. Clause 37 access restriction should not only apply to victims and erstwhile suspects, but also to all other indices categories. Further the Investigation Officer has wide discretion in denoting a suspect as a non-suspect since there is no definition given of the term "suspect" in the Bill.

31. Clause 40(b) allows the DRB to receive donations. This should be removed. Donations to a regulatory body may create conflict of interest and may compromise its independence and thus affects its regulatory functions.

32. Clause 45 uses the term "individually identifiable DNA information". Replace this with the phrases expressly defined and used in the other clauses in the Bill – i.e. bodily substances, DNA sample and DNA profile.

33. Clauses 45, 46, 47 and 48 relates to offences and penalties. Minimum sentence should be specified for penalties and it should not be left to the discretion of the Court.

34. Clause 50 is a residuary criminalization clause. Penalization of acts which are yet to be defined and will in future be defined through Rules and Regulations should be deleted. It is a clear case of excessive delegation of legislative powers to the DRB.

35. Clause 54 is a clear case of excessive delegation of DRB functions to a single administrator. Given the expansive nature of functions to be performed by the DRB, expecting one administrator to function in lieu of the DRB is inadequate and will lead to regulatory collapse. Clause 54(3) replace the word "may" with "shall" – it must be made

obligatory on the part of the Central Government to constitute a DRB before the period of supersession expires.

36. Clause 56 deals with amendment to the Schedule. It should not be via executive notifications but only via amendment to the Act itself passed through the Parliament. Given that the Schedule lays down the civil and criminal matters for which DNA profiles can be used – Careful scrutiny by the Parliament is required to ensure that expansion of use of DNA profiles for criminal or civil matters is not unnecessarily expanded without due application of mind and wider debate.

37. Clause 57, which excludes the jurisdiction of even the SC/HCs violates the Basic Structure of the Constitution of India. This should be removed. The Jurisdiction of the appellate Courts (High Courts and Supreme Court) cannot be excluded even by a constitutional amendment let alone legislative enactment.

38. Clauses 58 and 59 represent a clear case of excessive delegation of power to the Central Government and the DRB. Having regard to the excessive delegation of legislative power to the Central government and the DRB, they may frame rules and regulation in exercise of their delegated powers so as to fundamentally alter the legislative policy itself. This excessive delegation of legislative powers violates the principle of separation of powers – which is recognized as one of the basic features of the Constitution of India.

39. Clause 60 – rules and regulations made under the Bill should not be operationalized before they are laid down before each House of the Parliament.

40. Schedule to the Bill has three sections – A, B, C and D. In Part A, DNA testing will be done for offences under the IPC where DNA testing is “useful”. This is too vague. It may lead to indiscriminate and unnecessary use of DNA tests. Given that DNA constitutes “sensitive personal data or information” it is critical that DNA tests are only mandated for crimes for which necessity is clearly established. Therefore this Part should be deleted. The logic for selecting special legislations listed in Part B is unclear. For instance it is unclear how DNA tests will help in identification in the context of protection of domestic violence, given that perpetrators are well known to the victim and therefore identification should not be a problem. DNA tests are supposed to be in the aid of identification of habitual offenders indulging in crimes. There has to be application of mind as to the selection of certain crimes in the IPC and special legislations wherein DNA can be of substantial help. For instance, data on recidivism should be adduced to support the inclusion of specific crimes in the Schedule.

41. Part C relates to civil disputes and civil matters. Only paternity and maternity disputes should be included, but there has to be application of mind to see whether this would require an amendment to Sec 112 of the Indian Evidence Act which creates a conclusive presumption of the paternity of child in case of co-habitation of parents. The “best interest of the child” should be respected and followed and therefore DNA testing should be allowed in parental disputes only when the child is an adult. Deletion of the term “pedigree” is suggested as DNA profiles should not be used for genetic mapping. Issues related to immigration and emigration should also be deleted as this may also lead to discrimination for refugees and other communities. In Part D, medical negligence should be deleted. It is unclear how DNA tests will be useful in cases of medical negligence.