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Cross border exchange of forensic *DNA* and human rights protection

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ABSTRACT

This paper reviews the protection afforded by legal instruments to human rights with regard to each stage surrounding *DNA* evidence: sample collection, analysis and retention. It focuses on transnational cooperation and the specific challenges arising within the cross-border exchange perspective. It concludes with a discussion as to how transnational cooperation could be better achieved with respect to fundamental rights.

1. Introduction

The development and widespread application of *DNA* profiling in the criminal justice systems all over the world has been one of the most significant contributions of forensic science in the delivery of justice. It has spurred the development of national and international legal mechanisms that have facilitated the increased use of *DNA* profiling for the purposes of criminal justice, the establishment and continuing expansion of *DNA* databases and the collaboration in a transnational level.

A number of ethical and legal concerns surround the forensic use of *DNA*. These issues relate to the protection of individual rights during *DNA* sample collection, analysis and retention, their subsequent use for investigative and evidentiary purposes and, in the context of transnational cooperation, the transmission of data to another country. Among the rights involved are the right to physical and moral integrity, not to be subjected to degrading treatment, the right not to incriminate oneself, the right to privacy, children's rights and personal data protection. Cross-border exchange of forensic *DNA* raises specific concerns as the protection of fundamental rights has to be assured by the domestic legislation of each country involved which in turn must be compliant to international legal provisions binding on those countries.

2. Methods

Legal frameworks and mechanisms concerning forensic *DNA* are developed and operate in different levels. Legal instruments operating in the EU, Council of Europe and international level establish minimum requirements regarding the protection of human rights and fundamental freedoms. Countries may opt for a stricter regulation of the issues surrounding the use of *DNA* in different stages. Some of the earliest legal instruments were issued by the Council of Europe such as *Recommendation No.R(92) 1 1992* which proposed a framework for the use of *DNA* in the European criminal justice systems. Pursuant to this instrument most European countries set in place legislation which regulates the use of *DNA* and national forensic *DNA* databases. Other relevant legal instruments include *Data Protection Convention 1981* and the recommendations on data protection, in particular *Recommendation No.R(87) 15* regulating the use of personal data in the police sector.

The jurisprudence of European Court of Human Rights (ECtHR) has significantly contributed in the interpretation of the articles of the European Convention on Human rights (ECHR) and in the establishment of minimum legal safeguards to human rights in the context of domestic legislations concerning *DNA* collection and retention in national *DNA* databases. Some of the most significant cases include *S & Marper v UK* 30562/04 [2008] ECHR 1581; *Van der Velden v Netherlands* [2012] ECHR 21203/10; *Gardel v France* [2009] ECHR 16428/05; *Peruzzo and Martens v Germany* [2013] ECHR 7841/08 and 57900/12.

The current EU legal framework regarding *DNA* analysis includes the *Council Resolution 2009/C 296/01* on the exchange of *DNA* analysis results and the *Council Framework Decision 2009/905/JHA* on accreditation of forensic service providers carrying out laboratory activities. Both instruments seek to ensure the integrity of the *DNA* profiles made available or sent for comparison between Member States accreditation of laboratory activities and compliance with international standards such as EN ISO/IEC 17025. Legal

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instruments on the data protection include *Council Decision 2008/615/JHA*(Prüm decision)*; Council Framework Decision 2008/977/JHA on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters* and The *European Data Protection Directive 95/46.*

3. Results

The reliability and validity of *DNA* evidence for criminal justice purposes depends as much on the scientific and technological aspects, compliance with accredited laboratory standards and practices as on the respect of fundamental rights of individuals during each stage: *DNA* collection, analysis, retention and database uses within and outside a country's jurisdiction.

The benefits of establishing *DNA* databases to combat crime, eliminate suspects, save police resources and deter offenders from committing further offences are well recognised and deemed as legitimate reasons for the restriction of human rights (*Van der Velden v Netherlands*). However, in order to ensure a fair balance between competing private and public interests, the provisions for the collection and retention of *DNA* profiles should not overstep the acceptable margin of appreciation of the right to respect for private life. The domestic law should notably ensure that *DNA* data collected and retained are relevant and not excessive in relation to the purposes for which they are stored and that they are preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored. Adequate guarantees must be in place to ensure that retained personal data are efficiently protected from misuse and abuse (*Gardel v France*).

The indefinite retention of *DNA* profiles of persons who have not been prosecuted or convicted has been condemned by ECtHR. The retention was provided for by law and pursued a permitted aim, the prevention of crime, but it failed the proportionality test, as a blanket provision which did not permit exceptions where people were suspected of offences but had subsequently been acquitted (*Marper v UK*).

In England and Wales this decision was reflected on the Protection of Freedoms Act 2012 which allows for speculative searches on the *DNA* profiles of non-convicted individuals but eliminates their indefinite retention by establishing retention periods based on the seriousness of the suspected offence. As of 2013, over 1.7 million *DNA* profiles taken from innocent people and from children have been removed from the *DNA* database and 7,753,000 *DNA* samples have been destroyed [1].

Presently the EU legislation deals mainly with cross-border information exchange and proclaims respect to fundamental rights only within this scope. *Council Decision 2008/615/JHA* covers several aspects of data protection such as the purpose for which provided data can be processed; competent authorities to deal with data processing; the accuracy, relevance and storage time of data; technical and organizational measures to ensure data protection and data security; logging and recording: special rules governing automated and non-automated supply; the rights of data subjects to information and damages. *Council Framework Decision 2008/977/JHA* lays down the main principles in transnational information exchange: lawfulness, proportionality and purpose (article 30). Personal data may be collected by the competent authorities only for specified, explicit and legitimate purposes in the framework of their tasks and may be processed only for the same purpose for which data were collected. Processing of the data shall be lawful and adequate, relevant and not excessive in relation to the purposes for which they are collected.

The *European Data Protection Directive 95/46* requires that every EU member state should have in place data protection legislation. Because *DNA*-profiles and the cell-material from which they are derived are also regarded as personal data, they fall under the umbrella of this legislation unless the data protection legislation is over-ruled by specific *DNA*-legislation containing other provisions. As ENFSI recommends it is advantageous to have specific *DNA*-legislation in addition to data protection legislation to better address the particular issues arising from this type of information [2].

Despite a comprehensive overall regulation, only minimum data protection requirements are established on the EU level and the protection of fundamental rights is made only from the cross border exchange perspective. The *Draft Data Protection Directive* proposed by the European Commission in 2012 goes beyond the existing instruments as is not limited only to the cross border exchange but also aims the harmonization of data protection on the national level.

4. Discussion and conclusions

The overall level of rights' protection internationally depends on the level of protection afforded by the domestic legislation of any of the countries involved in transnational cooperation channels. In order to balance the public interest in the fight against crime with the rights of citizens it is essential that legislators in each country where forensic *DNA* is used and databases are established comply with minimum standards of protection as specified in international and EU measures and address a range of important issues such as:

- the category of offences and circumstances in which the samples can be obtained without consent; procedures for sample collection, who gives authorisation, the personnel authorised for collection;
- provisions for collection and retention of *DNA* samples from minors, victims and volunteers
- specific provisions for the storage of samples and profiles differentiating on the basis of offences; whether the individual has been convicted or not and on the action taken by prosecuting authorities;
- the criteria for the inclusion of *DNA* profiles on databases and their deletion;
- the legitimate uses of samples and profiles held by the police;
- arrangements about ownership, management and governance of the *DNA* databases accessible by the police and the range of persons permitted to access these databases;
- the establishment of systems of accreditation and quality control of practices related to *DNA* analysis.
- *DNA* specific data protection and cross border exchange provisions

The existing differing national legislations concerning forensic *DNA* reflect their different historical, political and cultural legacies and different approaches to human rights protection. They involve different assessments and understanding of where the line should be drawn between individual rights and public interest. Differing standards of protection in the national level make for inequality of data and other fundamental rights protection when the information is exchanged across the border.

The difference in national legislations can cause legal difficulties when requesting or requested country has stricter data and fundamental rights protection rules. Where the requesting country provides a higher level of protection, the *DNA* profile obtained as a result of collaboration may not be suitable for use as evidence in the requesting country, thus be declared as invalid or inadmissible. Where the requested country is the one that provides a higher protection level, it could deny to supply the information requested

which in turn would be damaging for the investigation and the public interest in prosecuting crime in the requesting country.

Most transnational cooperation channels, such as Prüm, require that both requesting and requested states check and comply with their different national laws. States should ensure that other states cannot abuse the data of their citizens. It is proposed that, where at least the minimum standards and safeguards to fundamental rights set by EU and non EU instruments are complied with, differences in legislation should not impede transnational cooperation based on the principles of mutual respect and authority recognition.

Much of the transnational cooperation between states is at an intelligence level. Where possible, *DNA* evidence must be re-obtained by authorities of the requesting country according to the respective national legal requirements so as to avoid any issues that could affect its admissibility as evidence.

Monitoring of cross border exchanges under Prüm is left to national data-protection authorities who can decide upon the lawfulness of the data supply. It is important that in each country there is an oversight body to monitor or assess the exchange of *DNA* profiles or any organization to make enquiries and possible complaints on behalf of individuals [3].

It is difficult to attain the full potential of transnational cooperation in the context of different national, legal and administrative systems and data protection legislations. The approximation of legislations and harmonisation of procedures while desirable is currently difficult to be fully achieved. There must exist the political will, financial resources, legislative measures, greater awareness and an appreciation that practitioners and officers at the lower levels play just as an important role in guaranteeing the successful cooperation in the fight against crime whilst maintaining an adequate level of protection and respect for human rights.

Conflict of interest

None.

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