

## DNA PROFILES AND DATABASE – RELEVANCE AND ETHICAL DILEMMAS IN CRIMINAL JUSTICE\*

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*The application of DNA data in the criminal justice system has become a gold standard for identification of guilty and release of innocent. Initial success and application of DNA in criminal proceedings led to development of DNA database, exchange and share of DNA profiles, and cross-border cooperation that required development of national and international instruments to regulate use of DNA data. However, a number of ethical and human rights concerns were raised on the DNA sample collection, analysis and retention of DNA data. In this article author analysis the EU acquis on use of DNA in forensic purposes, limitation of human rights and mechanisms for prevention of abuses. Special attention is paid to right to privacy and personal data protection. Since EU acquis are binding for EU members states, as well as candidate country, and Serbia has took obligation to harmonize national legislation with EU acquis, the author assesses Serbian Law on DNA registry against EU acquis and case law of European Court of Human Rights.*

*KEY WORDS: DNA profile / DNA database / data protection / human rights / Prüm Treaty*

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## 1. DNA AS DATA RELEVANT FOR CRIMINAL JUSTICE

Since its first successful use in criminal investigations in the 1980s,<sup>1</sup> DNA analysis has become a backbone of the criminal justice system – the gold standard for identification of guilty and to release the innocent (Cole, Lynch, 2010: 123). The widespread application of DNA analysis in the criminal justice has incited the development of national and international legal instruments that have facilitated the use of DNA profiling in the criminal justice, establishment of DNA databases and cross-border cooperation. The centralized and automatized storage of DNA profiles in a database enables smooth comparison of crime scene samples and individual profiles (Cutter, 2006: 6) and active use of DNA technologies in criminal investigations (Williams, Johnson, 2005: 7). According to INTERPOL's Global DNA Profiling Survey from 2016, 84 countries use DNA profiling in criminal investigations, while 69 of them have national DNA databases.

The use of DNA profiling in criminal justice brings into cooperation science and law. The cooperation of these two disciplines requires that standards of both are applied to ensure justice (Jasanoff, 2006: 328). The extensive use of DNA analysis in criminal justice system is example how science can contribute to the efficient delivery of justice (Harlan, 2004: 179).

Although the DNA analysis has transformed identification in the criminal justice system over the last three decades, it has also raised ethical and legal concerns. The debate relates to ethical issues, human rights, individual privacy and lack of safeguards. Specifically, 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 cross-border cooperation. The legislative framework should provide safeguards and ensure balance between effectiveness of DNA analysis and use of database and protection of human rights.

Some authors see growth of DNA databases as a new form of social control that lead to less tolerant and inclusive society (Garland, 2001: 194). Critics of DNA databases emphasized extension of police powers to take, retain and search a large collection of DNA profiles is disproportionate to the public interest (Marx, 2002: 15). In addition, several empirical researches conducted on the use and relevance of DNA database for the identification and prosecution of criminals could not linked size of the forensic DNA database with the greater output performance (Santos, Machado, Silva, 2013: 11).

The Republic of Serbia, as EU candidate country, is obliged to aligned national policies and legislation with EU acquis. Action plan for Chapter 24 – Justice, Freedom and Security envisages establishment of forensic DNA registry and adoption of relevant legislation.<sup>2</sup> To better understand obligations under EU

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<sup>1</sup> The first conviction based on DNA profiling evidence took place in 1987 in England. Colin Pitchfork was thereby sentenced to life imprisonment for the rape and murder of two girls. In 1987, Florida rapist Tommy Lee Andrews was the first person in the United States to be convicted as a result of DNA evidence, for raping a woman during a burglary; he was convicted on November 6, 1987, and sentenced to 22 years in prison.

<sup>2</sup> Recommendation 6.3.1. of the Action plan for Chapter 24 “Strengthen human resources and the operational capacities to implement various instruments in the field of police cooperation, in particular the Prüm Treaty”.

accession process it is important to have insight into EU acquis applicable to DNA profiles, database and exchange of DNA data, as well as challenges in human rights protection.

## 2. CROSS-BORDER CRIMES AND DNA

Globalization, movement of people, exchange of information and development of technologies influenced the forms of preparation and committing of crime, as well as on the possibilities to escape from response to justice system. At the international level, interest in the exchange of DNA files exists, especially in relation to the investigation of terrorism and organized crime.

The investigation and prosecution of crime have to overcome borders, challenges of different jurisdictions and applicable law, which resulted in development of various instruments of police and judicial cooperation in criminal matters.

Decade ago DNA profiles were only exchanged on an individual basis through different judicial and police cooperation mechanisms, which required sending requests to other countries through Interpol's or the Europol national units and liaison officers, or on the basis of bilateral or multilateral agreements (Muñoz, Fiodorova, 2014: 151). However, exchange of individual DNA profiles is not very useful since request has to be made to each state which is likely to possess information. This was changed in 2002 when Interpol established DNA database.<sup>3</sup>

Cross-border crimes, establishment of national DNA databases and exchange of DNA profiles incentivized development of international and regional standards. Legal instruments concerning forensic DNA exist on international level, Council of Europe and EU level to ensure smooth cooperation and establish minimum standards of human rights protection.

At the international level Interpol established DNA Gateway database that provides member states with the opportunity to load DNA profiles and access to submitted profiles through 24/7 communication system. G8 also recognized significance of DNA data sharing and following the meeting of the G8 member states' ministers of Justice and Home Affairs plus the European Commissioner in charge of Justice and Home affairs in Paris on 5 May 2003 "G8 Statement of Principles Concerning the Use and the Sharing of DNA Information" was published. This statement contained 11 guiding principles for DNA data exchange.

At the regional level some of the first instruments were developed within the Council of Europe. Recommendation No. R (92)1 adopted in 1992<sup>4</sup> established framework in the European criminal justice system for the collection of samples and use of DNA analysis within the framework of the investigation and prosecution of criminal offences. Based on the Recommendations, most European countries adopted legislation to regulate use of DNA and national forensics DNA databases, with rather distinct orientations on the establishment of criteria for inclusion and retention of profiles (McCartney, Wilson, Williams, 2011: 310).

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<sup>3</sup> Database currently contains more than 180.000 profiles from 84 member countries.

<sup>4</sup> Recommendation No R (92) 1 of the Committee of Ministers to member states on the use of analysis of Deoxyribonucleic Acid (DNA) within the framework of the criminal justice system (adopted by the Committee of Ministers on 10 February 1992 at the 470<sup>th</sup> meeting of the Ministers' Deputies).

Information obtained should only be used for the case and only in conformity with Council of Europe rules on data protection. Having this in mind, relevant Council of Europe instruments for the exchange of DNA are also Data Protection Convention from 1981 and Recommendation No. R (87)15<sup>5</sup> regulating the use of personal data in the police sector. In line with Explanatory memorandum of Recommendation No. R (92)1, collection of samples should be implemented in line with Principle 2 of the Recommendation No R (87)15 that regulates use of personal data in police sector. This principle requires that collection of personal data for police purposes should be limited to such as it necessary for the prevention of a real danger or a suppression of a criminal offence.

## 2.1. EU instruments and practice on DNA profiles sharing

In parallel with existence of free movement across European Union, European citizens expect national governments and the EU institutions to guarantee their security, especially in the environment of growing threats from terrorism and organized crime. In addition, EU citizens request that their fundamental rights are not violated in the process of ensuring security and fighting terrorism and organized crime.

The Schengen Agreement of 1985 intended to complete establishment of European Single Market, free movement of goods, capital, services and persons and abolition of checks at common borders of EU (Walsch, 2008: 83). Development of enlarged single market and abolition of border controls in 1995 increased security risks and possibilities for illegal migration, transnational crime and international terrorism. To overcome this problem the Council of Europe adopted on June 9, 1997 Resolution on the exchange of DNA analysis and establishment of compatible national DNA databases.<sup>6</sup>

Signing of Treaty of Amsterdam in 1997 and later Treaty of Nice in 2001 changed EU legislative framework in the area of justice and criminal law (Vervaele, 2014: 52). Under the new legislative framework in 2005 the Prüm Treaty was signed by seven EU member states with the aim to enhance cooperation by exchange of information, including DNA data and prevent negative spill-overs of the Schengen area (Bellanova, 2008: 204).<sup>7</sup> In 2008 some of the provisions of Prüm Treaty became part of EU *acquis*, via transposition into European law (Council Decisions) of the provision contained in the Treaty (Pisarić, 2010: 561).<sup>8</sup>

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<sup>5</sup> Recommendation No R (87) 15 of the Committee of Ministers to member states regulating the use of personal data in the police sector (adopted by the Committee of Ministers on 17 September 1987 at the 410<sup>th</sup> meeting of the Ministers' Deputies).

<sup>6</sup> Council Resolution 97/C 193/2, OJ C 193, 24.6.1997, p. 2. Later, the Council Resolution of 25 June 2001 on the exchange of DNA analysis results (Council Resolution 2001/C 187/01, OJ C 187, 3.7.2001, p. 1) with the relevant amendments made in 2009 (Council Resolution 2009/C 296/1, OJ C 296, 5.12.2009, p. 1) established a minimum number of DNA markers that have to be used for forensic analysis.

<sup>7</sup> Austria, Belgium, France, Germany, Luxemburg, the Netherlands and Spain signed the Prüm Treaty in May 2005.

<sup>8</sup> Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime; Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime.

Council Decision 2008/615/JHA that transposed Prüm Treaty into EU acquis obliges EU Member States to establish national databases and provides for rules for the competent authorities of other EU Member States to search in national DNA databases. This is the first EU instrument that foresees direct access to the national databases of other countries.

Although the Prüm Treaty lead to technological harmonization, differences in rules for inclusion and retention of data in forensics DNA databases present a challenge for standardization (Prainsack, Toom, 2013: 76).<sup>9</sup>

To ensure smooth and trusty exchange of DNA profiles, the Council Decision 2008/615/JHA envisaged as a safeguard that only designated contact points that are usually forensic science services can conduct searches in the national DNA database of other countries. Article 4 of the Council Decision 2008/615/JHA allows direct access to other countries database to compare unidentified DNA profiles from one EU Member State with all DNA profiles from another national DNA database for the investigation of criminal offences. Direct access to the national databases is also applied in the European Criminal Records Information System (ECRIS) and Council Decision 2009/316/JHA on the establishment of the ECRIS.

Precondition for introduction of instruments that allows direct access to other countries DNA database is mutual recognition and mutual trust. Both principles were developed in the context of development of internal market but gradually applied to other areas including cooperation between law enforcement and judicial bodies in criminal matters.<sup>10</sup> The principle of mutual recognition is understood as although “the another state may not deal with a certain matter in the same or even a similar way as one’s one state, the result will be such that they are accepted as equivalent to decisions by one’s own state”.<sup>11</sup> To complement the mutual recognition is understanding of mutual trust that partner country rules are also correctly applied.

Application of mutual trust principle on DNA data exchange means that country searches DNA profiles will perform searches and data will be used for the purpose for which it was provided, with the respect of data protection and human rights; while requested country will trust in the accuracy of data provided.

Data protection safeguards are included in the Council Decision 2008/615/JHA and each member state should guarantee a level of protection of personal data in its national law at least equal to those from Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981 and its Additional Protocol of 8 November 2001.<sup>12</sup> Article 25(2) of Council Decision establishes that the supply of personal data may not take place until data protection provisions are implemented in national law and the Council unanimously decides whether this condition has been met. Council Decision 2008/616/JHA regulates in article 20 procedure for deciding whether condition has been met. Before giving the Member State in question direct access to national DNA

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<sup>9</sup> For example, in England and Wales, a sample can be obtained for any recordable offences, while in France DNA will be obtained and included in the database only for violent and property crimes.

<sup>10</sup> The Stockholm Programme, OJ C 115, 4.5.2010, p. 5.

<sup>11</sup> COM (2000) 495 Communication from the Commission to the Council and the European Parliament – Mutual recognition of Final Decisions in criminal matters.

<sup>12</sup> Article 25 (1) of the Council Decision 2008/615/JHA.

databases and the right to exchange DNA data, other Member States have a possibility to become acquainted with the specific system and decide if they could trust it.

To ensure mutual trust in DNA profile exchange in 2009 Council Framework Decision 2009/905/JHA was adopted with the aim to standardize forensic laboratories to the same ISO/IEC standard.

To ensure better data protection the EU adopted a new Data Protection Package on 27 April 2016: Regulation (EC) 2016/679<sup>13</sup> and Directive (EU) 2016/680.<sup>14</sup> Directive (EU) 2016/680 relates to protecting persons regarding the personal data's processing by the qualified bodies for the aims of preventing, prosecuting and investigating of penal offences or enforcement of crime sanctions. The free movement of data is also applicable here. Having in mind the legal status of the legislative act it should ensure higher level of EU member states compliance with adopted standards.

Directive 2016/680 aims to harmonize Member States' laws as regards the information exchange among judicial bodies and police. In comparison to the Framework Decision 2008/977/JHA the Directive widen scope and concerns both the cross-border and national processing of personal data. The Directive aims to improve Member States' mutual work in the combat against terrorism and other criminal offences in the EU. In addition, the Directive set standards of protection in case of personal data transmission from outside the EU by law enforcement bodies of criminal law. The Directive in recital 31 also call for differentiation between personal data of varied categories of data subjects such as individuals guilty of a crime, victims, witnesses, individuals holding relevant information or contacts, suspects, suspects associates', and convicted criminals.

## 2.2. Challenges for human rights protection

DNA sample collection, retention, access and use of DNA samples are linked to fundamental rights. The cross-border transfer of DNA evidence presents potential limitation and violation of rights protected by European Convention of Human Rights - article 6 (right to a fair trial), article 8 (right to privacy), and to general data protection principles. Since different states can provide different safeguards and can apply different technologies, already the Council of Europe in 1992 recognized the need to establish standards in this regard.<sup>15</sup>

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<sup>13</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance)

<sup>14</sup> Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

<sup>15</sup> Recommendation No. R (92) "DNA analysis may be obtained from a laboratory or institution established in another country provided that the laboratory or institution satisfies all the requirements laid down in this recommendation. Transborder communication of the conclusions of DNA analysis should only be carried out between states complying with the provisions of this recommendation and in

Although the DNA data presents successful tool for investigation of crimes that jeopardize security some limitations to fundamental rights exists, especially at national level. In national legislation, limits of fundamental rights are reasonable and proportional of criminal proceedings.

Limitations on fundamental rights are allowed according to the Article 52 of the Charter of Fundamental Rights of the European Union if they are ‘*subject to the principle of proportionality, if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others*’.<sup>16</sup>

In addition, the Council of Europe and European Court of Human Rights (ECtHR) recognized exceptions to article 8 (right to respect for private and family life, home and correspondence). The exceptions are difficult to classify, but they concern public interest and specifically prevention of disorder or crime (Greer, 1997: 29). Prevention of crime has been successfully pleaded in cases involving the regulation of compulsory psychiatric examination, the secret surveillance of criminal suspects,<sup>17</sup> and searches of evidence of crime.<sup>18</sup>

National legislation contains limitation of fundamental rights based on the principle of proportionality in the context of criminal procedure, interpreted in line with ECtHR case law. Collection of DNA samples for purpose of investigation of crime, retain of samples and searches of forensic DNA database present limitation of fundamental rights. However, strict rules for each phase are required.

The ECtHR recognized that human rights are limited in the situation of taking DNA sample in the criminal investigation. In the case *Saunders v United Kingdom*<sup>19</sup> the ECtHR made it clear that the taking of DNA sample from suspect is allowed as it concerns material that has an existence independent from the will of the suspect. The presumption of innocence might be violated, since stored DNA profiles can be used to find matches with DNA material that has been retained from old crimes without any knowledge that individual is involved in a particular offence (Vervaele, Graaf, Tielemans, 2012: 474).

The DNA profiles sharing with other countries is more complicated in view of fundamental rights as the principle of proportionality has to be assured by the law of both countries involved. Council Decision 2008/615/JHA introduces rules on opening DNA files and the storage of DNA profiles for the purpose of investigation and prosecution of crimes. Council Decision does not make distinction of seriousness of crimes, but Member States could establish stricter rules on DNA data search. In addition, each Member State’s national legislation deals differently with the use, storage and deletion of data (Kietz, Maurer, 2006: 5). The police force in Sweden uses DNA data only in cases where the culprit was imprisoned for a minimum of two years. In Germany and Austria, the collection of DNA data is a standard practice of police investigators in criminal cases.

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*particular in accordance with the relevant international treaties on exchange of information in criminal matters and with Article 12 of the Data Protection Convention.”*

<sup>16</sup> Charter of Fundamental Rights of the European Union, OJ C 364, 18.12.2000, p. 21.

<sup>17</sup> Appl. No. 8170/78, X v. Austria.

<sup>18</sup> Appl. No. 5488/72, X v. Belgium; Appl. No. 530/59, X v. the Federal Republic of Germany.

<sup>19</sup> Application No. 19187/91, Saunders V United Kingdom, para. 69.

DNA data base contain DNA profiles and collected DNA samples (cellular material). The issue of storage is usually under discussion and critics. Even the European Court of Human Rights stated in the case *S and Marper v United Kingdom*<sup>20</sup> that indefinite retention by UK police of the DNA data of persons once suspected but acquitted, represented an unjustified interference with the right to respect for private life under article 8 of the European Convention of Human Rights.

The Grand Chamber of the European Court of Human Rights unanimously decided on human right implications of the retention by national authorities of DNA data for use on criminal identification databases. The ECtHR assessed the rules that envisage that DNA material may be retained irrespective of the nature or gravity of the offence with which the individual was originally suspected or of the age of the suspected offender (Heffernan, 2009: 495). The retention is not time limited and there are only restricted possibilities for an acquitted individual to have the data removed from the database or the materials destroyed. The Court concluded that the nature of the powers of retention of the cellular samples and DNA profiles of acquitted persons failed to strike a fair balance between the competing public and private interests and that retention presents a disproportionate interference with the applicants' right to respect for private life. The Court examined law and practice in some of the Council of Europe member states to compare with England and Wales legislation. The legislation of five Council of Europe member states (Belgium, Hungary, Ireland, Italy and Sweden) requires the storage of cellular material and DNA profiles to be destroyed *ex officio* upon acquittal or the discontinuance of the criminal proceedings. The other member states apply the same general rule with certain very limited exceptions.<sup>21</sup>

The Court recognized that DNA profiles of convicted persons are allowed for limited periods of time after the conviction or after the convicted person's death. However, the United Kingdom is the only Council of Europe member state to allow the systematic and indefinite retention of both profiles and samples of convicted persons. In addition, in the case *Van der Velden v the Netherlands*<sup>22</sup> the ECtHR stated that compilation and retention of DNA profile serves the legitimate aims of the prevention of crime and the protection of rights and freedoms of others. DNA data can be stored even if it do not have role in the "investigation and trial of the offences committed".<sup>23</sup> In addition, the Court does not consider it unreasonable for the obligation to undergo DNA testing to be imposed on all persons who have been convicted of offences of a certain severity.

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<sup>20</sup> Application No. 30562/04 and 30566/04 *S and Marper v United Kingdom*.

<sup>21</sup> Germany, Luxembourg and the Netherlands allow such information to be retained where suspicions remain about the person or if further investigations are needed in a separate case; Austria permits its retention where there is a risk that the suspect will commit a dangerous offence and Poland does likewise in relation to certain serious crimes; Norway and Spain allow the retention of profiles if the defendant is acquitted for lack of criminal accountability; Finland and Denmark allow retention for one and ten years respectively in the event of an acquittal and Switzerland for one year when proceedings have been discontinued. In France, DNA profiles can be retained for twenty-five years after an acquittal or discharge; during this period the public prosecutor may order their earlier deletion, either on his or her own motion or upon request, if their retention has ceased to be required for the purposes of identification in connection with a criminal investigation. Estonia and Latvia also appear to allow the retention of DNA profiles of suspects for certain periods after acquittal.

<sup>22</sup> Application No. 29514/05, *Van der Velden v the Netherlands*.

<sup>23</sup> *Van der Velden v the Netherlands*, pp. 9.



The ECtHR paid special attention to the position of minors in the criminal proceeding and in relation to DNA data. In the case *S & Marper v United Kingdom* the Court emphasized that retention of the unconvicted persons' data may be especially harmful in the case of minors given the importance of their integration in society and their development. The ECtHR in case *T v United Kingdom* also noted the need for the protection of minors' privacy at the criminal trials.<sup>24</sup> The ECtHR stressed that particular attention should be paid to the protection of juveniles from any detriment that may result from the retention by the authorities of their private data following acquittals.

The ECtHR considers that the storage of cellular material is more dangerous for the right to privacy than the storage of the DNA profile, as an analysis of cellular material can reveal much more personal data. DNA samples are a potential source of human genetic information and can reveal sensitive health information. It can, therefore, violate bodily integrity; privacy through information concerning health, familial relationships; facilitate discrimination against people and have other social consequences (Patyn, Dierickx, 2010: 319). DNA profiling may reveal very sensitive information about an individual and their family which may affect them adversely if not properly guarded against potential misuse. Namely, DNA profiling has the potential to provide personal information such as medical characteristics, physical traits, and consanguinity that carries with it risks of discrimination (Parven, 2013: 42).

### 3. SERBIAN LAW ON DNA REGISTRY AND COMPLIANCE WITH EU ACQUIS

As a part of EU integration process Serbia adopted Action plan for Chapter 24 and took over obligation to adopt legislation on DNA registry and align national framework with Prüm decision. The Law on DNA registry was adopted by Serbian National Assembly in March 2018,<sup>25</sup> while establishment of national DNA registry (database) is envisaged for March 2020. Establishment of DNA registry and operation of the registry require amendments of existing legislation, as well as preparation of bylaws necessary for regulation of day to day functioning of the registry. The Law on Police should be amended as well as Criminal Procedure Code to ensure full personal data protection.

Although there is no doubt that Serbia needs legislation that regulates DNA database and operational DNA registry, drafting of Law on DNA registry caused discussion among key stakeholders: Ministry of Interior as institution coordinating implementation of the Action plan for Chapter 24 and Data Protection Commissioner. In addition, professionals in the area of DNA also stressed shortcomings of the Law on DNA registry draft. Data Protection Commissioner submitted request to the Constitutional Court for assessment of constitutionality of Law on DNA registry.

One of the controversial issues is the fact that Law on DNA registry in article 10(3) envisages that condition for exchange and share of DNA data will be define

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<sup>24</sup> Application No. 24724/94, *T v United Kingdom*.

<sup>25</sup> Official Gazette RS, No. 24/20018.

in the bylaw, contrary to the personal data protection from article 42 of the Constitution of Serbia. Furthermore, the Council of Europe Recommendation No. R (92)1 sets as a standard that analysis of DNA profiles should be regulated by law to ensure higher standards of protection, since collection of DNA samples, retain and search presents limitation of human rights.

Other criticism relates to the fact that DNA registry will be held in the police and there is no mechanism of civic oversight of database use. Many countries keep forensic DNA database within the police, but oversight mechanisms are established by professionals (lawyers and biologists) to prevent abuses.

The Law on DNA registry does not contain clear provision on ex officio removal from registry for those who are not guilty, nor for convicted persons under certain conditions are fulfilled. The Law contains possibility that issue of removal from the registry could be regulated by police bylaw, which is not in line with the best practice or ECtHR case law.

According to the Law, all DNA laboratories are obliged to submit all DNA profiles they obtain in the course of criminal procedure. The Law does not make distinction between DNA profiles of victims or suspects, accused or convicted person. The Law does not follow ECtHR standards that acquitted persons DNA profiles should not be kept in the DNA registry, so it is not clear why Law envisages migration of these data in new DNA registry.

As already mentioned in the paper, there is no evidence that size of the database influences the reduction of criminality and increase of identified offenders.

## CONCLUSIONS

The Constitutional Court will decide on submitted initiatives and assess if Law on DNA registry is in line with Constitution. However, Serbian authorities and legislative power should bear in mind ECtHR case law on storage and retain of DNA samples and DNA profiles, time limitation for retaining of DNA data in the registry, conditions for assessing and analyze of DNA data in the registry, and specially conditions for destroy od DNA data and remove from DNA registry of minors and victims of crime. Special attention should be paid to data sharing between Serbia and other states and international organizations that should be regulated only by law and international agreements.

Law on DNA registry should be amended before establishment of the registry to ensure procedure for removal from the database in line with the standards set in the ECtHR case *S and Marper v United Kingdom*. The Law should introduce addition protection measures for minors, including conditions for including their DNA samples and profiles in the registry and deletion from the registry.

Law on DNA registry should include all rules that relate to keeping of registry, exchange and sharing of DNA data from the registry in line with the EU acquis and ECtHR case law. These rules should be developed together with experts in biology and medicine to ensure implementation of professional standards.

The Law on DNA registry should include oversight mechanism in line with the best practice. Many countries develop these mechanisms since there is considerable potential of abuse of forensic databases and any harmful effects must be minimized. The UK Home Office developed robust ethic and governance oversight of forensics databases to protect liberty and privacy of persons whose data are recorded and to ensure public trust in database and criminal justice system.<sup>26</sup>

In the process of amendments of the Law on DNA registry the legislator should address following issues: procedure for sample collection, including who gives authorization; the category of offences and circumstances in which the samples can be obtained without consent; provisions for collection and retention of DNA samples from minors and victims; the criteria for the inclusion of DNA profiles on registry and their deletion; the legitimate uses of samples and profiles held in the registry; governance and ethic arrangements; system of accreditation and quality control of DNA analysis; DNA specific data protection; rules on cross border exchange and data sharing. In parallel with amending the Law on DNA registry the authorities should amend Criminal Procedure Code to address novelties and procedural steps.

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## DNK PROFILI I BAZE PODATAKA – ZNAČAJ ZA KRIVIČNO PRAVOSUĐE I ETIČKE DILEME

*Upotreba DNK podataka u krivičnom pravosuđu postala je zlatni standard za identifikovanje izvršilaca krivičnih dela i oslobodanje osumnjičenih. Početni uspeh i primena DNK u krivičnim postupcima imala je za posledicu razvoj DNK baza podataka, razmenu DNK provila, i prekograničnu saradnju koja je zahtevala i usvajanje nacionalnih i međunarodnih instrumenata kojima će se urediti upotreba DNK podataka. Međutim, značajan broj etičkih dilema i zabrinutost o ograničavanju ljudskih prava javio se u pogledu prikupljanja DNK uzoraka, analize i čuvanja DNK podataka. Autor u članku analizira EU pravne tekovine o upotrebi DNK u forenzičke svrhe, ograničenje ljudskih prava i mehanizme prevencije zloupotreba. Posebna pažnja posvećena je pravu na privatnost i zaštitu podataka o ličnosti. S obzirom da su pravne tekovine EU obavezujuće za države članice, a Srbija kao država kandidat za članstvo je preuzela obavezu da uskladi domaće zakonodavstvo sa pravnim tekovinama, autor u radu analizira srpski Zakon o DNK registru i usklađenost sa pravnim tekovinama EU i praksom Evropskog suda za ljudska prava.*

*KLJUČNE REČI: DNK profil / DNK baza podataka / zaštita podataka / ljudska prava / prumski sporazum*