

THE REGULATIONS ON THE USE OF DNA IN FRENCH CRIMINAL PROCEEDINGS*

“Fransız Ceza Muhakemesinde DNA Kullanımına İlişkin Düzenlemeler”

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ABSTRACT

DNA samples are unique evidence for criminal proceedings to identify the criminals. DNA analysis in criminal proceedings is performed in a variety of ways, including comparisons between the samples collected at the crime scene with the DNA of a person or with a DNA profile stored in a DNA databank. Even it is further used by law enforcement officers to find out the suspects, witnesses, as well as victims of future crimes. All these different ways of collecting and analysing DNA samples are conducted for the same purpose: Finding out the truth.

France is one of the pioneering countries in the world in terms of legislative grounds and the increasing capacity of the DNA databank, which is called the Automated National File of Genetic Prints (Fichier National des Empreintes Génétiques, or FNAEG). With the increasing demand over time, the scope of the use of DNA in criminal proceedings has expanded inevitably. Thus, the legislation has been repeatedly amended in different years. Having acknowledged the importance of DNA samples, the exponential use of them has raised some concerns on the right to respect private life, particularly on data protection issues. To this extent, the European Court of Human Rights (ECtHR) has significant reverberations over these legislative changes.

In this study, the provisions of the French Criminal Procedural Code (FCPC) on collecting and processing DNA in criminal proceedings will be under scrutiny, and proposals will be made for the Turkish legislative amendments, in conclusion.

Key Words: DNA, DNA databank, molecular genetic examination, protection of personal data in criminal procedure.

* There is no requirement of Ethics Committee Approval for this study.

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ÖZET

DNA örnekleri, ceza davalarında suçluların kimliğini tespit etmek için eşsiz bir delil niteliğindedir. Suç yerinden elde edilen örnekler ile bir kişinin DNAsı veya yine bu örneklerle bir DNA veri bankasında muhafaza edilen bir DNA profili arasında karşılaştırmalar dahil olmak üzere ceza muhakemesinde DNA analizi çeşitli şekillerde gerçekleştirilebilir. Hatta, kolluk görevlileri tarafından gelecekte işlenecek suçların şüphelileri, tanıkları ve mağdurlarını bulmak için yeniden kullanılabilir. DNA örneği toplamanın ve analiz etmenin tüm bu farklı yolları aynı amaç için gerçekleştirilmektedir: Gerçeği ortaya çıkarmak.

Fransa, yasal zemini ve Otomatik Ulusal Genetik Veri Bankası (Fichier national des empreintes génétiques - FNAEG) olarak adlandırılan DNA veri bankasının artan kapasitesi açısından dünyadaki öncü ülkelerden biridir. Zaman içinde artan taleple birlikte DNA'nın ceza yargılamalarında kullanımının kapsamı da kaçınılmaz olarak genişlemiştir. Bu nedenle, mevzuat farklı yıllarda defalarca değiştirilmiştir. DNA örneklerinin önemi kabul edilmekle birlikte, bu örneklerin kullanımındaki artış, özel hayata saygı hakkı ve özellikle de veri koruma konularında bazı endişelere yol açmıştır. Bu kapsamda, Avrupa İnsan Hakları Mahkemesi'nin (AIHM) bu mevzuat değişiklikleri üzerinde önemli yansımaları olmuştur.

Bu çalışmada, Fransız Ceza Muhakemesi Kanunu'nun (FCPC) ceza yargılamalarında DNA'nın toplanması ve işlenmesine ilişkin hükümleri mercek altına alınacak ve sonuç bölümünde Türkiye'deki mevzuat değişiklikleri için önerilerde bulunulacaktır.

Anahtar Kelimeler: DNA, DNA veri bankası, moleküler genetik inceleme, ceza muhakemesinde kişisel verilerin korunması.

INTRODUCTION

The use of DNA to uncover material truth in criminal proceedings is of undeniable importance. Being aware of this fact, many countries have invested in the use of DNA analysis in criminal proceedings. In this era, at the point where the criminal system stands, it is now impossible to deny the contribution of DNA evidence to criminal proceedings since many cold cases are now solved with the help of it. However, what is indisputable is that there need to be dedicated regulations covering all the needed safeguards and protecting the right to respect for private life.

France introduced a wide range of novelties in the FCPC to expand the scope of DNA analysis in criminal proceedings. Although it was introduced to be used in the investigation and prosecution of sexual offenses, the scope has been expanded to most of the offenses laid down in the FCPC. In the wake of these changes, some concerns on fundamental rights have emerged, especially recently

after a significant decision of the ECtHR: *Aycaguer v. France*. Even though some amendments have been made to be in compliance with this judgment, there are still prevailing concerns in respect of private life, and particularly data protection.

In this study, the importance of DNA as evidence in criminal proceedings will be summarised with the historical background of it. The second part is devoted to the leading judgments of the ECHR on the use of DNA. In the third part, the provisions of the FCPC will be looked into with recent amendments made in France. These changes will also be assessed in terms of private life and protection of personal data. By doing so, current debates connected with fundamental rights will be shared where needed. Finally, concrete suggestions with regards to the processing of DNA data for Turkish legislation will be made in the conclusion.

I. The Importance of DNA as an Investigative Tool in Criminal Proceedings

DNA was first used in criminal proceedings in the UK in 1986 to solve a rape case. In this case, after two young girls were found dead, a suspect called Richard B. was accused of being a perpetrator of these two crimes. The Police carried out the DNA identification method with the assist of Prof. Alec Jeffreys, and the innocence of Mr. Richard B. was proved accordingly. Through the process of gathering the DNA of over 5.000 men living in the neighborhood, Colin P. was found guilty and sentenced to 30 years of imprisonment for two separate crimes¹. Following this judgment, the use of DNA in solving crimes increased, and DNA results started to be used as evidence, afterwards. These developments paved the way for setting up a DNA Databank (CODIS - Combined DNA Index System) in the USA in 1994². According to the recent statistics, France with 3.902.741 of profiles³, has one of the largest databases in Europe, preceded by the United Kingdom which has 7.226.795 profiles from 6.031.139 individuals by 31 March 2024⁴.

¹ Ian Cobain, 'Killer Breakthrough – The Day DNA Evidence First Nailed a Murder' *The Guardian* (London, 7 June 2016) <<https://www.theguardian.com/uk-news/2016/jun/07/killer-dna-evidence-genetic-profiling-criminal-investigation>> accessed 12 June 2024.

² Rahime Erbaş, 'DNA Databases for Criminal Justice System: A Pathway Towards Utopian or Dystopian Future?' (2022) 18 *The Age of Human Rights Journal* 331, 334.

³ J. F. avec AFP, '6,5 Millions de Personnes Sont Enregistrées en France dans le Fichier des Empreintes Digitales' (*BFMTV*, 13 April 2023) <[⁴ Home Office, *National DNA Database \(NDNAD\) Statistics*, <<https://www.gov.uk/government/statistics/national-dna-database-statistics#full-publication-update-history>> accessed 30 September 2024.](https://www.bfmtv.com/police-justice/6-5-millions-de-personnes-sont-enregistrees-en-france-dans-le-fichier-des-empreintes-digitales_AD-202304130754.html#:~:text=Des%20donn%C3%A9es%20conserv%C3%A9es%2010%20%C3%A0,de%20police%20scientifique%20(SNPS).> accessed 30 May 2024.</p>
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DNA is a unique, inherited genetic material that reveals a wide range of information from genetic disorders to familial relationships⁵. DNA is such a powerful tool widely used in criminal proceedings that it could ensure the exoneration of innocent and the conviction of guilty⁶. With the help of running DNA tests, the identification process is conducted in a shorter time compared to any other investigation method. Moreover, high accuracy of results also contribute to the deterrence for some potential criminals⁷. Besides, DNA evidence has become such an incontestable evidence due to its complex nature that even judges, prosecutors, and lawyers are not in a position to comprehend every detail of it. To this end, courts are now more dependent on it, while lawyers are not expertised enough to challenge DNA evidence⁸.

DNA samples contain a wide range of information, such as physical traits of a person, while DNA profiles stand for a set of numbers which help reveal the identity of that person⁹. In this respect, it is deduced that setting up a DNA profile is less intrusive than storing a DNA sample, as the latter could be used to reach further information. As it is examined below, DNA profiles stored for the purpose of law enforcement basically do not reveal any information with regard to the physical appearance, race, genetic, or medical disorders of the person in question. Indeed, after law enforcement officers collect a DNA sample, laboratory technicians translate the sample into a DNA profile (a numerical sequence), subsequently. It is that profile, and not the genetic material itself, that enters the DNA database. The information contained in the DNA profile does not predict or identify physical characteristics, race, medical disorders or genetic disorders.

Even though DNA generally offers undeniable help in solving crimes, some concerns are sometimes raised about the contamination of samples, which could lead to miscarriages of justice¹⁰. It is noteworthy that to prevent DNA samples from being contaminated, some planned measures should be taken, including

⁵ Liz Campbell, 'Non – Conviction DNA Databases and Criminal Justice: A Comparative Analysis' (2022) 1 *Journal of Commonwealth Criminal Law* 55, 57.

⁶ Andrew Roberts, Nick Taylor, 'Privacy and the DNA Database' (2005) 4 *European Human Rights Law* 373, 373.

⁷ Campbell (n 6) 55.

⁸ Vololona Rabeharisoa, Florence Paterson, 'Maintenir une Infrastructure en Droit: le Rôle du Comité Technique du Fichier National Automatisé des Empreintes Génétiques' in Joëlle Vailly (ed), *Sur la Trace des Suspects, L'incorporation de la Preuve et de l'indice à l'ère de la Génétique* (Éditions de la Maison des Sciences de l'Homme, coll. "Le bien commun" 2021) 54.

⁹ Campbell (n 6) 69.

¹⁰ H. M. Wallace, A. R. Jackson, J. Gruber, A. D. Thibedeau, 'Forensic DNA Databases – Ethical and Legal Standarts: A Global Review', (2014) 4 *Egyptian Journal of Forensic Sciences* 57, 60.

forensic training for those collecting the sample and setting standards for the laboratories processing the data. In addition to contamination of samples, mislabeling of samples, or misinterpretation of results could also be misleading in a criminal proceeding¹¹. Therefore, the results of DNA analysis should be interpreted together with other evidence to reach a final conclusion. In other words, the matching of samples does not undoubtedly confirm the accomplice of a person to a crime, rather, it underpins the presence of that person at the crime scene. In that sense, suspects should be in a position to elucidate for what reason he/she was present at the crime scene. By doing so, it is fair to admit that burden of proof in that kind of cases is reversed from the prosecutor to the suspect himself/herself¹².

Nevertheless, after the DNA match, the purpose of the perpetrator must be made clear by the investigator with additional evidence¹³. Namely, DNA matches should be interpreted with further answers in the context of the investigation¹⁴. For this reason, DNA evidence is mainly considered among circumstantial evidence¹⁵, rather than direct evidence.

II. THE REGULATIONS ON THE USE OF DNA IN CRIMINAL PROCEEDINGS IN FRANCE

A. The Purpose of DNA Databank in France

The FNAEG is such a significant platform that it establishes a robust bridge between judicial procedure and evidence by ensuring technical reliability and judicial admissibility¹⁶. Pursuant to article R53-9 of the FCPC, the main purpose of having a DNA databank is to facilitate the search for and the identification of the perpetrators of the crimes set out in article 706-55. In other words, the FNAEG enables investigators to match the DNA of a person or taken from a crime scene with the DNA already stored in the database¹⁷. As it is understood from what is

¹¹ Erbaş (n 3) 334.

¹² Valerie Olech, 'La Place de l'AND dans les Procédures Policières et Judiciaires' in Bruno Py, Julie Leonhard, Mathieu Martinelle, Catherine Ménabé (eds), *ADN et Justice: l'utilisation de l'empreinte Génétique dans les Procédures Judiciaires*, (Presses Universitaires de Nancy et Éditions Universitaires de Lorraine 2020) 53.

¹³ Ibid 46.

¹⁴ Joëlle Vailly, Gaëlle Krikorianp, 'Durabilité et extension du soupçon Catégorisations et usages policiers du fichier d'empreintes génétiques en France' (2018) 59 *Reveu Française de Sociologie*, 707, 717.

¹⁵ Circumstantial evidence is defined as evidence not drawn from direct observation of a fact in issue. For further information, see <<https://www.britannica.com/topic/circumstantial-evidence>>

¹⁶ Rabeharisoa, Paterson n (9) p. 30.

¹⁷ For further information, see 'Cahier des Clauses Techniques Particulières Tierce Maintenance

described in this context, the collection and storing of DNA of a person is not just relevant to the crime already committed. The DNA collected within the flow of an investigation or prosecution would be used to identify suspects or accused persons in future crimes. In fact, one of the main purposes of setting up such a databank is the prevention of new heinous crimes before committed¹⁸. However, with the expansion of its scope over time, the functionality of the FNAEG has gone beyond it. According to the research conducted in France, approximately 70 – 80% of DNA analyses in criminal proceedings are done in the wake of the identification of perpetrators in order to strengthen the bundle of clues and to psychologically affect persons involved in the proceedings¹⁹.

Another aim of the DNA databank is to help the search for missing minors and adults in need. In addition to this, the identification of a deceased person would be another reason for the use of DNA databank in France. The latter is quite substantial to find out the identity of persons, specifically during natural disasters. As a result, it could be put forward that the FNAEG stores two different profiles: profiles of identified persons, and profiles of unidentified persons whose samples somehow gathered from crime scenes²⁰.

B. Scope

The French DNA Databank is under criticism for two main reasons: One of which is the extension of the scope of the implementation of DNA gathering in criminal procedures. The amendments made over time have mainly paved the way for this argument. The second reason could be stated that the power of police forces over the processing of personal data through DNA collecting, storing, and analysing²¹.

Indeed, the FNAEG mainly comprises a wide range of DNA data of persons, from suspects, convicts, and unknown persons to the relatives of missing persons²².

Applicative de l'application FNAEG - NG (Fichier National Automatisé des Empreintes Génétiques – Nouvelle Génération) Annexe 1 Présentation Fonctionnelle', <<https://cdn.nextinpact.com/data-next/file-uploads/CCTPFNAEG-NG-Annexe1V16.pdf>> accessed 25 May 2024.

¹⁸ Rabeharisoa, Paterson n (9) 27.

¹⁹ Olech n (13) 49.

²⁰ Bruno PY, 'ADN et Procédure Penale: la science au service des enqueteurs' in Bruno Py, Julie Leonhard, Mathieu Martinelle, Catherine Ménabé (eds), *ADN et Justice: L'utilisation de L'empreinte Génétique dans les Procédures Judiciaires* (Presses Universitaires de Nancy et Éditions Universitaires de Lorraine, Collection Santé, qualité de vie et handicap 2020) 24.

²¹ Ousmane Gueye, François Pellegrini. 'Vers une Remise en Cause de la Légalité du FNAEG?' (2017) *Convergences du Droit et du Numérique*, Forum Montesquieu 1, 3.

²² Coralie Ambroise Casterot, 'Le FNAEG, un Outil de Fichage au Service des Enquetes' (2019) 9 *Le Proces Penal a L'epreuve de la Genetique* 23, 26.

Given the circumstances of perpetrators, the DNA match in criminal proceedings in France is mainly done in two different circumstances. One of which is in the case of the perpetrator, who is already known and apprehended, and there is a need to compare the DNA of that person with the samples gathered either at the crime scene or on the body of the victim. In this case, the FNAEG does not play a role since there is no comparison with the profiles in the databank. However, in the second, the FNAEG is essential. Should the perpetrator is not known or even unidentified, those samples could be compared with the DNA profiles that are already stored in the FNAEG databank. On the other hand, the DNA profiles processed from unidentified person's samples are also stored in the FNAEG by virtue of having a future match in a potential case²³.

The use of DNA in criminal procedures in France is laid down between articles 706-54 and 706-56-1-1 in the FCPC. The DNA Database in France²⁴ was set up in 1998 to store DNA profiles of sexual offenders. However, due to the amendments made over time, its scope now covers most of the offenses in the FCPC²⁵. It is evident that with all these changes, the prerogative of the police has been expanded at the expense of the rights of people over the course of time²⁶. For the time being in France, it is estimated that at least three – fourths of files handled by courts comprise a DNA file²⁷.

The FNAEG holds DNA of persons who are accused or have been convicted of one of the extensive scale of crimes with the specific purpose of facilitating the identification of offenders. Namely, the DNA of those investigated because of these offenses is also included in the system of the FNAEG. It should be noted that almost 75% of the profiles in the FNAEG belong to those who are not convicted²⁸.

²³ Olech n (13) 48.

²⁴ Pursuant to Article R53-16 of the FCPC, The FNAEG is established under the Ministry of Interior Affairs and is supervised by a magistrate who is appointed by the French Minister of Justice for a three-year term. A committee which consists of a magistrate and two specialists in the field of genetics or information technology assists the magistrate.

²⁵ The first extension was made by the Law 2001-1062 of November 15, 2001, and this amendment was mainly related to the offences against persons, such as wilful attacks on the life of the person. In 2003, with the Law 2003-239 of March 18 new offenses were added to the list of offenses, including threats of attacks against persons, drug trafficking, attacks on personal freedoms, destruction, damage and threats of damage to property. Even though some minor amendments have also been made in the Article to expand its scope, in the following years, the main changes were made in the years mentioned above.

²⁶ Gueye, Pellegrini n (22) 2.

²⁷ Vailly, Krikorian n (15) 712.

²⁸ Ibid 708.

In the file of each person, in addition to the information on DNA, names, data, and place of birth, as well as the nature of the case are stored, respectively. In the event of natural disasters or missing people, DNA samples taken by ascendants, descendants, or collaterals could also be stored in the FNAEG to find out the identity of the person in question. In this case, written consent must be taken from those the sample could be taken from. Pursuant to article R53-11 of FCPC, the following information must be added to the file retained in FNAEG:

- The number of the procedure for which registration in the file is requested,
- The judicial authority or judicial police officer requesting registration in the file,
- The date of the application for entry in the file,
- The date of the decision if there is any decision declaring the person guilty or not criminally responsible.
- The name of the authorised natural or legal person who carried out the analysis.

Moreover, some other information should be added considering the reason for collecting a sample of DNA. For instance, during the investigation of offences laid down in Article 706-55, it is required to have a reference to the specific offence. If possible, the date on which the offence was committed, the name, surname, date and place of birth of the person from whom the DNA was collected²⁹.

The FNAEG stores a wide range of DNA profiles collected from different stages of criminal procedure. Pursuant to Article 706 – 54 and 706 – 55, the sources of DNA stored in the FNAEG are as follows:

- DNA left by unknown persons under the investigation of the offences referred to in Article 706-55 of the FCPC.
- Persons convicted of one of these offences are required to give samples in order to facilitate identification and search for the perpetrators of these offenses.
- Persons who have been prosecuted for one of these same offences but who have subsequently found not criminally responsible are also enlisted in the databank.
- Suspects of these offenses referred above are supposed to give samples if there is serious or corroborating evidence making it likely that they have committed one of these same offences.

French Law enshrines two separate ways of collecting and storing DNA for suspects. In other words, a kind of hierarchy is set up among suspects³⁰. As it is

²⁹ Article R53-11 of the FCPC.

³⁰ Casterot n (23) 28.

underlined above, if there is serious or corroborating evidence laying out that the suspect has committed the offence in question, then there is no doubt that the DNA of that person would be collected and kept in the FNAEG. In this case, it is not needed to have an indictment against those whose data has been collected³¹. Besides, in Article 3 of the 706 – 54, it is laid down that if there is a plausible reason to suspect that a person has committed one of the offenses mentioned in Article 706 – 55, then DNA samples would be taken. However, the analysis of DNA gathered in this way can't be kept in the FNAEG. To elaborate more, it should be noted that the latter suspects have looser connection with the offense in question than the suspects categorised in the first concept of suspects. For instance, to reach out the suspect, there may be a need to collect DNA of persons who were at the vicinity of crime scene at the time of the crime committed. In this case, these persons could be classified as suspects, and their DNA could also be collected, but their DNA can not be stored in the FNAEG since there is no serious or corroborating evidence to blame them for the offence³². In addition to these ways, DNA of persons could also be stored in the system if there is any need to determine the cause of death or the cause of a disappearance in an investigation. Lastly, if there is any need to identify deceased persons, the DNA of those persons are also kept in the system.

One of the crucial regulations of the FCPC is the fact that the genetic file should only contain non-coding deoxyribonucleic acid segments, which correspond to the type of DNA that does not contain proteins. In other words, DNA stored for criminal purposes in the FCPC enables experts to match the results. It is mainly underlined that the DNA stored in the FNAEG does not reveal any further information, including diseases, pathological predispositions, and race of individuals³³. If the FNAEG collected such sensitive data in the system, it could create highly intrusive implementation for those whose data is processed. However, there are also some concerns, claiming that given the type of DNA stored by the FNAEG, more information could be obtained, such as the disease or geographic origin of the person to whom the DNA in question belongs³⁴. Should there be a possibility of reaching the disease or origin of a person, this

³¹ Rabeharisoa, Paterson n (9) 33.

³² Vailly, Krikorian n (15) 720.

³³ For further information see 'Cahier des Clauses Techniques Particulières Tierce Maintenance Applicative de l'application FNAEG - NG (Fichier National Automatisé des Empreintes Génétiques – Nouvelle Génération) Annexe 1 Présentation Fonctionnelle', <https://cdn.nextinpact.com/data-next/file-uploads/CCTPFNAEG-NG-Annexe1V16.pdf>, accessed 25 May 2024.

³⁴ Joëlle Vailly, Yasmine Bouagga, 'Opposition to the Forensic Use of DNA in France: The Jurisdiction and Veridiction Effects' (2019) 15 *BioSocieties* <<https://shs.hal.science/halshs-02132130/document>> accessed 12 May 2024.

means that broader information than aimed is under risk. While the purpose of the FCPC by allowing just non-coding DNA is compatible with protection of personal data in this regard, the ambiguity over if there is any possibility to obtain further information by processing DNA data held by the FNAEG still creates question marks. To put these concerns aside, the actual statistics of the FNAEG should be shared with the public regularly.

Another point in the French system is that the samples can not be kept in the system. The FNAEG only enables to store DNA profiles, not the samples from which the profile constituted. This fact is quite important not to allow unlawful intrusion into one's personal data. Otherwise, the samples would be at a risk of being used for further studies to gather unlawful information.

In French criminal investigation procedure, the recording of DNA of a person in the FNAEG is conducted by the decision of a law enforcement officer, acting either *ex officio* or at the request of the public prosecutor or the investigating judge. It should be noted that almost 93% of the records to the FNAEG are based on the decisions of these officers while the rest are of the decision of a magistrate. Namely, the decision of whether serious or corroborating evidence is at place is made by law enforcement officers, not the judiciary itself³⁵.

C. The Retention Period and Deletion

As it is explicitly laid out by the ECtHR in many judgments, indefinite retention of DNA by governments could lead to disproportionate interference with human rights, specifically the right to respect for private and family life. As it is explained in detail below, the ECtHR underlines the importance of differentiation of storage time based on the seriousness of the crime as well as the age of the suspect. Considering this, Decree No. 2021-1402 Of 29 October 2021 Amending The Code of Criminal Procedure and Relating to The National Automated Genetic Fingerprint Database and The Central Service for the Preservation of Biological Samples amended the FCPC and incorporated the specific articles in the FCPC.

The storage time of DNA profiles in France varies due to from whom the sample is taken. The maximum time for storing data is forty years for persons who are convicted of a serious crime and for missing or deceased persons. The DNA of accused persons could be kept for twenty-five years, at most. During that time, DNA profiles could be deleted either by the *ex officio* decision of the public prosecutor or at the request of the relevant person if the DNA profile is about a suspect. However, the former is mostly not the case³⁶.

³⁵ Vailly, Krikorianp n (15) 720.

³⁶ Vailly, Bouagga. n (35).

According to the FCPC,

- If DNA has been taken from an unidentified person during the investigation of the offences referred to in Article 706-55, the storage time will be 25 years, at most. That time is also valid for DNA taken during the investigation of a deceased person.
- If DNA has been taken from a suspect about whom there is serious or corroborating evidence making it likely that he/she has committed one of the offences referred to in Article 706-55, the storage time will be 15 years. In case the suspect is a minor, that time would be 10 years.
- If there is a conviction or non-liability decision about one of the offences referred to in Article 706-55, the DNA taken from that convicted person would be kept for 25 years. In case the convicted person is a minor, that time would be 15 years.
- If DNA has been obtained from an unidentified corpse, a missing person, a victim of a natural disaster, and an ascendant or descendant of a missing person, the time of retention would be 40 years.

On the other hand, the retention period underlined above could change under certain circumstances provided in Article R53-14. Pursuant to the relevant sentence in the article, if the offence in question is among some specific offences³⁷, then 10 years of retention period would be extended to 15 years, 15 years of retention period would be extended to 25 years, and 25 years of retention period would be extended to 40 years. Considering a wide-range of offences listed under this Article, the actual period of retention is quite longer than what is actually laid down. In other words, the article that specifies the exception makes the exception the main rule. Besides, the data of a deceased person should also be deleted if the identification is definitively complete. This fact is also similar to the situation for missing persons. Once the person has been reached, the data in the FNAEG should be removed. Otherwise, the data will be kept for 40 years.

One of the significant criticisms to be made in that sense is the lack of automatic deletion of the DNA profile from the FNAEG once investigation or prosecution has concluded that the suspect or defendant is not guilty. If investigation or prosecution phases have concluded in that way, the DNA profiles of suspects or defendants should be erased automatically once the decision has become final. However, it is not exactly the case. In practice, it is underscored that the number of the deleted profiles over the decision of judicial authorities after the request of the person whose data has been processed is quite low³⁸.

³⁷ In fact, most of the offences are included. For instance, crimes against humanity, wilful attacks on life, torture and act of barbarism, theft, sexual assault, drug trafficking, kidnapping, human trafficking, endangering minors, robbery with violence, extortion, treason and espionage, acts of terrorism, etc.

³⁸ Rabeharisoa, Paterson n (9) 27.



D. Refusal to Give a Sample

Considering the number of DNA profiles in the FNAEG, there is an unavoidable concern regarding whether the process of DNA collecting and storing would constitute disproportionate interference with freedoms³⁹. From this point of view, there are some debates over whether the suspect has a right to refuse to give samples that are to be under analysis for the DNA matching.

There are also some deterrence factors that lead people to give a DNA sample. A person who is demanded to give a DNA sample could not know that there is a possibility of refusing. Moreover, fear of further proceedings he/she may face when refusal could also be deemed another reason. Indeed, unprecedented costs in further proceedings could be a serious deterrent⁴⁰. Furthermore, refusing to give a DNA sample could also be construed as an acknowledgement of the offence in question⁴¹. In other words, if a person refused to give a sample, this could turn out to be a negative consequence for him/her in the course of the establishment of truth in a criminal procedure.

Gathering that amount of DNA data without having classification among crimes is one of the motives for refusing to give the DNA sample. In fact, once the data of a person is stored in the FNAEG, this means that that person's personal data, the DNA profile in this case, is listed on the same list of serious offenders. On the other hand, it is underlined that there is no substantial objection to giving a DNA sample if that sample would be used to match a certain sample found at crime scenes⁴². The main objection piles up around the indiscriminate collection of personal data, and the lack of categorisation of crimes.

On the other hand, according to the FNAEG, refusal to give sample for the DNA test is possible, but it could result in imprisonment. In fact, under Article 706-56, refusing to give the sample would constitute an offence with one year of imprisonment and a fine of 15.000 euros. If a convicted person refused that, it would increase to two years of imprisonment and 30.000 euros of fine. On the other hand, if a suspect or convicted who is required to give samples, would be in an act to substitute his/her samples with a third person's samples, then he/she would face three years of imprisonment and a fine of 45.000 Euros.

³⁹ Gueye, Pellegrini n (22) 4.

⁴⁰ Vailly, Bouagga n (35).

⁴¹ Chloe Lievaux, 'Du Droit de la Prevue par le Corps aux Droits de la Personne sur son Corps' in Bruno Py, Julie Leonhard, Mathieu Martinelle, Catherine Ménabé (eds), *ADN et Justice: L'utilisation de L'empreinte Génétique dans les Procédures Judiciaires* (Presses Universitaires de Nancy et Éditions Universitaires de Lorraine, Collection Santé, qualité de vie et handicap 2020) 186.

⁴² Vailly, Bouagga. n (35).

In French criminal proceedings, either in investigation, prosecution, or after conviction, consent of the person whose sample is to be processed, needs to be taken beforehand. However, this does not mean that the person who refused to give consent would not face any sanction. The only situation that does not give rise to any sanction is when a relative of a missing person would refuse to give sample⁴³. It could be put forward that consent in its true sense is only sought in such situations. Besides, Article 706 – 56 of the FCPC which specifies in a case that a person has been convicted of a crime that requires ten years or more of imprisonment, there is no need to take consent from him/her. The same applies to persons prosecuted for at least ten years of imprisonment⁴⁴.

Given these regulations above, this becomes an intricate issue considering the fact that refusal to give a sample is laid down as a separate crime. One says that knowing the latter has dissuading effect on persons once they think not to give consent⁴⁵. It turns out that “requirement of taking the consent” is not an effectively implementable regulation when the impugned person is aware of being imprisoned for refusing to give the sample. In that sense, if a person is not in favour of giving consent, that person automatically would be in a position of “refusal to give sample”.

III. ECHR Judgments Regarding the Use of DNA in Criminal Proceedings

A. S. and Marper v. The United Kingdom

DNA profiling and sample collection are related to the right to data protection, which the ECHR does not recognize as a separate right. The ECtHR instead acknowledged that protection of personal data is recognised as a component of Article 8 of the ECHR, which guarantees the right to respect for one’s private and family life. The Court first needs to figure out whether the impugned interference has a basis in the law, and the law is clear, foreseeable, and accessible. After this examination, the second phase is to check if the interference with the right to respect for private life has a legitimate purpose, and it is regarded as necessary in a democratic society.

In the case of S. and Marper v. the United Kingdom, the DNA samples of Mr. S. were processed when he was accused of robbery and arrested at the age of 11. Then he was acquitted of those crimes. On the other hand, the other applicant Mr. Michael Marper, was also charged with the harassment of his

⁴³ Casterot, n (23) 29.

⁴⁴ Lievaux n (42) 184.

⁴⁵ Julie Leonhard, ‘Le Fichage de L’empreinte Genetique’ in Bruno Py, Julie Leonhard, Mathieu Martinelle, Catherine Ménabé (eds), *ADN et Justice: L’utilisation de L’empreinte Génétique dans les Procédures Judiciaires* (Presses Universitaires de Nancy et Éditions Universitaires de Lorraine, Collection Santé, qualité de vie et handicap 2020) 84.

partner, and his samples were also taken for the DNA test. However, since his partner and his were reconciled, the file was not continued. Both requested police to remove their DNA and samples, yet they were refused. They applied to the Administrative Court and the Court of Appeal respectively, but the decision was not changed in favour of them.

The applicants submitted their application before the ECHR by underlining that retention of their DNA samples, and DNA profiles for an indefinite duration is in violation of Article 8 of the European Convention on Human Rights. They further underlined that storing the DNA samples would give rise to even more immense interference with their right to respect for private life since those samples could be further processed to reveal their and their relatives' genetic information.

The Court underlines that the retention of DNA information for the purpose of detection and prevention of crime is regarded as a "legitimate aim" within the context of Article 8 of the Convention. However, it also emphasises that the retention of DNA is as significant as telephone tapping, secret surveillance, etc. Thus, it requires rather detailed regulations to ensure robust safeguards and to prevent any abuse or arbitrariness. On the other hand, at the time of the impugned case, England, Wales, and Northern Ireland are the only states where indefinite retention of DNA information of any suspect of any offence is allowed. Acknowledging the importance of DNA information in the pursuit of crimes, the Court repeatedly lays out that the states should not be in a position to allow the extensive use of DNA information without any limits, and any balance between the right to protection of personal data and the interest of the criminal system.

The Government put forward that the retention of DNA information of the applicants does not give rise to interference with the private life unless it matches with the offenses to be committed in the future. However, this argument is not upheld by the Court since the mere retention is already tantamount to the interference with the right in question. Therefore, future use of data is not a prerequisite in this regard. The Court further emphasises that indefinite retention of DNA information of acquitted people could lead to stigmatisation as they are treated in the same way as convicted persons. For this reason, the data of innocent persons, as it is the case in the file, should be destroyed after a certain while to be envisaged in the law. Moreover, the law should lay down more precise provisions to protect children's rights. Indeed, indefinite retention of personal data of children could hinder their development and integration in society. Having underlined all these facts, the Court came to the conclusion that having a blanket and indiscriminate retention of DNA fingerprints, samples, and DNA profiles of not convicted persons, as happens in the present case, results in the violation of Article 8 of the Convention. The balance between personal and public interests is undermined to the detriment of the applicants and ultimately

not established in a fair manner⁴⁶.

The case of *S. and Marper v. the United Kingdom* is regarded as one of the landmark judgments on the use of DNA in criminal proceedings. It is so significant that countries even outside the EU shaped their policy according to the outcomes of it⁴⁷. In the wake of this judgment, the UK destroyed 7.7 million DNA samples and removed 1.7 million profiles⁴⁸. It underlines the importance of striking a balance during the collection of DNA samples and setting up profiles so as to refrain from unfair and disproportionate interference with the rights of persons. However, even though the Court brought proportionality issue on the table in this judgment, it did not reveal the details of the proportionality. Considering that the use of DNA in criminal proceedings has widely expanded since the decision made, vagueness has also increased on how to substantially protect the right to privacy⁴⁹.

B. Aycaguer v. France

One of the most significant decisions made by the ECtHR is in the case of *Aycaguer v. France*. In that case, the applicant attended a rally organised by a trade union, and a scuffle broke out between gendarmes and demonstrators. It was alleged that the applicant used intentional violence against gendarmes with his umbrella. After an immediate summary trial, the court sentenced him to a suspended 2 months of imprisonment. The applicant was summoned by the police to give a DNA sample on the basis of Articles 706-55 and 706-56 of the FCPC. Upon his refusal to comply with this order, the applicant was fined 500 euros by the Bayonne Regional Court. The appeal of the applicant was dismissed, and the decision became final, subsequently.

The applicant claimed that his right to respect for his private life was violated since the DNA Database in France (FNAEG) was established as a platform to store DNA profiles of sexual offenders, but it is now extended to a wide range of offences without any differentiation among them. He also underlined that considering the seriousness of the offence he committed, storing his DNA profile for forty years is quite disproportionate.

According to the Court, DNA profiles contain substantial amount of unique personal data, and storing that DNA resorts to interference with the right to respect private life. It is coherent that states set up DNA databases within their legislation to prevent and prosecute certain crimes, however, it does not give

⁴⁶ *S. and Marper v The United Kingdom* App no 30562/04 and 30566/04 (ECtHR, 4 December 2008).

⁴⁷ Wallace, Jackson, Gruber, Thibedeau n (11) 60.

⁴⁸ Vailly, Krikorianp n (15) 725.

⁴⁹ Erbaş (n 3) 338.

rise to storing data more or longer than needed. Even if fourty years of storing duration is set out in the FCPC, there is no differentiation made among the crimes, taking into account their seriousness. Besides, in the relevant articles of the FCPC, convicted persons were not endowed with a right to lodge a request to have their DNA data deleted.

Based on these facts, the Court observes that the French legislation regarding the storage of DNA profiles does not provide the applicant with sufficient protection. As a consequence, the conviction of the applicant for having refused to give DNA samples violated his right to respect for private life⁵⁰. This judgment of the Court has immensely affected the legislation of France. As it is magnified below, with the amendment made in 2019 by Law 2019-222, convicted persons were given the right to request his/her data to be deleted from the databank.

C. Gaughran v. the United Kingdom

This case also underlines the importance of safeguards by making references to the S. and Marker judgment that is explained above. The applicant, Mr. Gaughran was arrested for driving with alcohol, and his photograph, fingerprints, and DNA samples were taken subsequently. He was fined, and 12 months of driving ban was also given. The applicant's DNA sample was destroyed on his request; however, his demand to have his DNA profile removed was rejected by domestic courts.

The Court firstly admits that the aim of having a DNA databank and adding profiles to it pursues a legitimate purpose, which is the detection and prevention of crimes. The margin of appreciation of states in terms of DNA gathering and retention must be limited with certain safeguards provided in the law. In this regard, the Court found that the seriousness of offences, the need for keeping the data, as well as the duration of retention should be given importance when assessing if the margin of appreciation is overstepped. Indeed, the law should enshrine such details to delimit the extensive power of indefinite retention. Moreover, the data subject, the applicant in this case, should be endowed with the right to resort to a request for his/her data to be deleted. The Court reached the conclusion that Article 8 of the Convention had been violated since there was no provision in the law to provide safeguards to the applicant, and the State overstepped the margin of appreciation⁵¹.

⁵⁰ *Aycaguer v France* App No 8806/12 (ECtHR, 22 June 2017).

⁵¹ *Gaughran v The United Kingdom* App No 45245/15 (ECtHR, 13 February 2020).

CONCLUSION

The ways of committing crimes have been rapidly changing in line with the advancements in technology, and thus new and effective methods for the investigation of crimes have emerged. In this era, it is unavoidably important to set up a DNA databank for a country, which aims to effectively prevent, investigate, and prosecute crimes.

In France, if the DNA is kept under the FNAEG, that DNA is always comparable with the new DNA samples, which have been found in more recent cases. Evolved particularly with recent amendments in the legislation, the DNA tests are run not just for the purpose of identification of suspects but also strengthening evidence in the relevant case. As it is explained above, in France, 70 – 80% of the DNA tests in criminal proceedings are conducted after the perpetrator has been identified. In other words, regardless of whether the identification of the suspect has been made, the DNA test could be run for the purpose of confirming the suspect, victim, etc. Our research has shown that collecting and storing DNA from persons has started to be done for the sake of feeding the French National DNA Databank. Automatically processed DNA is not for the elucidation of the crimes in question but mainly for future crimes.

Having a DNA databank is not just efficient for the purpose of criminal issues; it is rather efficient during natural disasters, such as earthquakes or floods. Indeed, the identification process of corpses requires a solid DNA analysis to find out who has passed away. Considering Türkiye is among the countries, which earthquakes occur quite likely, the need for a DNA databank is felt thoroughly.

However, it should be kept in mind that personal freedoms must not be jeopardised for the sake of elucidation of crimes. As is underlined in many cases by the ECtHR, there should be a fair balance between personal freedoms and the power used to solve crimes. To do so, some concrete measures, among others, to avoid disproportionate infringement of the right to privacy should be taken.

- It is evident that the wording of Article 78 “molecular genetic examination” in Turkish CPC should be reviewed, including the purpose and the scope of the measure.
- While doing that, a proportionate balance shall be struck between public interest and personal rights. The rules to be laid down in the relevant regulation must consider this fact in all articles.
- A national DNA databank should be set up under certain digital safeguards, and compliance of it with the UYAP must be securely ensured.
- The laboratories running DNA tests for criminal purposes must be shaped in compliance with certain requirements to protect personal data.
- Any interference into the system is to be thwarted in advance with regularly updated measures.



- The DNA databank should keep the profiles constituted from the samples gathered. However, the samples themselves are not kept since they could be used to reach further information about the person concerned.
- There should be appropriate standards to set out the way of collecting, sealing, storing, and transferring DNA samples and test results. These standards would contribute to the reliability of tests.
- A supervisory authority consisting of a judge(s) and scientific experts must be established to monitor the compliance of the DNA Databank with the regulations.
- The Turkish Data Protection Authority must be endowed with special powers to monitor the DNA Databank in terms of data protection issues.
- Statistics of this national DNA databank should regularly be shared with the public.

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