

## Research Article

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# Minors Inclusion in the Italian Forensic DNA Database: Which Safeguard between Justice and Individual Rights?

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**Abstract**

This work deals with issues that arise from some of the provisions of the Italian Law 85/2009, particularly regarding children inclusion in the Italian national Forensic DNA database, that can be considered as an example of legislation which is not "proportionate" to the legitimate aim to protect minors in a context of society's security through the use of such database. The interesting debate on the juveniles involvement in the forensic database regards the balance between individual rights and the interests of justice, considering that in Italy the interests of justice seems to overcome the minors' individual rights.

**Keywords:** Juveniles; Forensic DNA; Crime forecasting; Prum convention

**Introduction**

In a little less than 30 years, advances in DNA technology and the use of DNA polymorphisms have contributed to the creation of DNA databases of genetic profiles for the purpose of criminal investigation [1,2]. Indeed, if the DNA analysis of evidence found at a crime scene is compared with the analysis of samples which make up a criminalist DNA database, it is possible to find the possible responsible of a crime. Operational national DNA databases were first established in the UK (1995), in The Netherlands and Austria (1997) and in Germany (1998), followed by other European Countries [3].

In recent years, given the increasing public concern about terrorism and crime in general, in the European policing arena a lot of incremental weight has been given to police co-operation, in the form of information exchange, training and research, crime analysis, crime forecasting, police missions, shared intelligence, and joint investigations[4,5]. The Prum Convention is one of the international instruments thought to be useful for European co-operation against crime, terrorism and illegal migration. However, despite the increasing importance of these forms of crime prevention in the European Union, sometimes international treaties are followed by slow or slack implementation in Member States.

The Prum Convention is an agreement of seven EU Member States regarding co-operation in justice and home affairs [6]. It establishes the highest possible standard of co-operation and exchange of information, particularly in combating terrorism, cross-border crime, and illegal migration. The Contracting Parties intended to step up cross-border cooperation, particularly the mutual exchange of information about national automated fingerprint identification systems and national vehicle registration data established for the prevention and investigation of criminal offences. Furthermore, according to Article 2 of this Treaty, "The Contracting Parties hereby undertake to open and keep national DNA analysis files for the investigation of criminal offences."

In Italy, Law 85/2009, which ratifies the Prum Treaty, regulates the institution of the forensic DNA database and introduces modification articles of the Code of Penal Procedure relative to the technical assessments that can affect personal freedom [7]. Law 85 consists of 33 articles regulating the activities of the DNA database, which include the collection of DNA profiles of criminals, the collection of data on biological evidence found in the crime scenes, data on missing persons and their relatives, unidentified bodies or body parts, and

the comparison of DNA profiles for personal identification purposes. This Law also regulates the activities of the Central Laboratory, which include analyses to determine the DNA profiles of subjects and of biological evidence, and the storage of biological samples from which DNA profiles have been obtained.

In this paper we will focus on a particular aspect of the Italian National Forensic DNA that is the inclusion of data belonging to minors without specific provisions in the regulation protecting the rights of this vulnerable group.

There are currently significant differences between the European countries regarding the criteria to enter a person onto the database, regarding the removal of records, and regarding the possibility of collecting reference samples from offenders or suspects. In many European countries it is possible to collect samples from minors with forensic purposes, sometimes with restrictions or under special conditions. For example in Cyprus it is necessary to have the legal guardian's consent or a court order, and the court shall take into consideration the legal guardian's opinion; in Slovakia the taking of a DNA sample from minors is only allowed when this is necessary for a search for missing persons; in Finland it is possible to collect a sample from a minor when this is deemed necessary for crime investigations and only for young people older than 15, and in Germany samples can be collected from minors aged between 14 and 17 and normally only with their legal guardian's consent. Regarding the retention time, in Austria DNA samples of minors must be destroyed 3 years after collection. In Belgium it is possible to obtain tissue samples from the suspect only where the suspect has reached the age of eighteen years and also in Sweden it is not possible to collect samples from minors [8-11]. These are examples to demonstrate how far we are from a governance harmonization on rules about the inclusion of minors in

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forensic DNA databases, in terms of inclusion criteria, of minimum age whereupon minors can be sampled, of retention time of samples and profiles, and of removal criteria.

## Juveniles Involvement in DNA Data Banking

What makes DNA forensic databases peculiar is that they at once hold great value for society as a whole and have a great impact on individuals' rights. When considering the involvement of vulnerable groups, such as minors, it may be troublesome to solve the balance between public interest in crime control and minors' interests, and judicial or police powers should be exercised reasonably and proportionately. Vulnerable individuals may find having their DNA taken and their records kept particularly distressing; furthermore, the risk of stigmatization of young people, especially for minor crimes or on the basis of false accusations, can also be disturbing: some evidence suggests that this may make them more likely to commit offences in the future. One of the main concerns in this field is the risk of leading to discriminatory practices through the inclusion of minors in forensic databases [12]. The concern reported by the Grand Chamber of the European Court of Human Rights in *S and Marper vs United Kingdom* judgment was about the risk of stigmatization of an innocent person whose data is retained in the same way as that of convicted persons [13]. This concern should be greater in the case of minors. In fact, they are not only particularly at risk of discrimination, but also in special need of avoiding any unjust accusation which might impede their development and integration into society. If a minor is innocent, simply being the subject of criminal investigation can cause harm, distress and stigma during one of the most important developmental phases of its life.

In Italy the criteria for minors' inclusion in the forensic DNA database have been regulated by art. 29 of the law n. 85 which modifies art. 72-bis of the Code of Penal Procedure. This article states that "if the person whose biological sample has to be taken is a minor or incompetent, the consent is given by the parent or the guardian, who can assist the procedures". The biological samples have to be collected in cases of investigations for serious crimes, provided by art. 24 of the same Law, in which criminal evidence, produced through the analysis of biological samples or particular medical assessments, is necessary for the prosecution of the investigation.

The protection of the public from criminal activities is a primary obligation of the state. However, this obligation must be exercised on the basis of fundamental civil liberties and values [14] and in light of modern respect of human rights, particularly towards vulnerable groups such as minors. If technology is used in the pursuit of justice, it should be used in with the aim of preserving privacy and autonomy minimizing stigmatization and making fairness as prevailing in the criminal justice system.

One of these values is the protection of minors' well-being, considering that it is difficult, in such situations, to establish who is more suitable to guarantee the best interest of the child and whether or not the minor may be considered morally competent and a responsible agent. In these particular scenarios children may be involved in penal investigations with relevant psychological impact, or they may be relatives of missing persons or, potentially, of deceased unidentified persons. It is undoubted that in such cases there could be important instant and long-term psychological consequences, so the best interest of the child may be difficult to assess, even if for "the parent" or "the legal guardian", who are the only two figures identified by the legislator as guarantors for these vulnerable persons. We argue whether, according

to the advancing age, the best interest could also be assured by the minor himself, or by third parties, such as the lawyer or the judge, or other figures. Under Law n. 85/2009 there are no provisions about considering the minor's opinion. It is interesting to underline that in other cases of sample collections, for example in research biobank, it is well recognized, both in literature and in the referring international documents, that parents or legal guardians should consent and children have the right to give their opinion on the matter and as soon as the child is capable of expressing its own opinion he or she should be given the possibility to do so [15-20]. In our country, where there is a separate youth justice system in recognition of the special protection that should be afforded to children and young persons, and despite the tendency to emphasize the respect of minors' autonomy, for example in pediatric research and medical practice, it seems that in this case the effort to guarantee the respect of children's right to autonomy seems to disappear when faced with society's interest in fighting against crime. A second consideration involved in minors' inclusion in forensic databases is privacy, in particular, in relation to the risk of stigmatization. Stigmatizing labels are by their nature exceptionally difficult to remove and deleterious in their short and long-term consequences; they often function as markers for exclusion; thus triggering the social problems that led to the behaviours that precipitated their application [21].

The retention time of DNA profiles from minors convicted of a recordable offence should be adapted to the individual and societal interest of rehabilitation of offenders. When included in a forensic DNA database, both minors and their families may be concerned about stigma and the risk not to have a chance to change. In this case the interest of justice, limiting the individual's right to privacy, should not rule out the possibility of keeping minors' profiles in a separate part of the database that is not routinely searched, or the possibility of removal after a shorter number of years than for adults. In fact, young offenders seem to be more compliant and able to quit criminal behaviour. Since they are in a state of change, in which their intellectual and emotional development can be affected by environmental factors, even if they have been considered criminally responsible with the capacity to be tried and convicted, it is possible that they will grow out of their socially unacceptable behavior and in this case the retention of samples and profiles may be counterproductive.

The retention of bio-information belonging to minors for a great number of years, when it causes stigmatization and difficulties in social rehabilitation, may be considered in contrast with the provision of art. 40 of the United Nations Convention of the Rights of the Child of 1989 [20] which states that: "States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society".

Another important aspect of the collection of children's samples in the setting of forensic databases is informed consent. Considering minors' involvement, in Italy consent should be taken from "the parent", distinctly cited singular, or the legal guardian. If there is no consent, as for adults, according to art. 24 and 25 of Law n. 85/2009, the judge, following a request of the prosecutor or by office's authority, issues an order of forced execution of withdrawal. According to this provision, in particular situations, a forced sampling or medical assessment can be performed on a vulnerable subject, as a minor. In this case, the Law establishes that every operation has to be conducted

“respecting the person’s dignity”. Under this provision it seems that the interest of justice overcomes the children right to bodily integrity, without considering the potential impact of the involvement with the criminal justice to the children’s well-being. Forced subjection implies a disregard for child’s consent and may violate its right to freedom and in some cases, when psychological development may be affected, it may violate its right to bodily integrity and health.

In this context, it is important to highlight what is reported in the United Nations Declaration of the Rights of the Child in 1959 [22]: “The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.”

In the Italian Lawn 85/2009, as regards the inclusion of samples, the specific term utilized is “citizens/subjects” and not adults, so children are treated in the same way as adults, without provisions of special protection. In a better regulated system, the retention of samples and profiles should be subjected to strict criteria and procedural safeguards towards minors, for example, to reserve separate rooms for the collection of biological samples for children and for adults, to provide specific training for the personnel who perform the collection, and to reduce the retention time of DNA samples and genetic data (20 and 40 years, respectively, according to the Italian rules) or not to carry out sampling in particular cases, for example if the minor is too young (under 10-12 years) [23].

## Conclusion

The debate on the issues related to minors’ inclusion in the forensic databases, regards the balance between the respect of individual rights, especially towards vulnerable groups, and the interests of justice. In Italy the interests of societal protection against crime seems to overcome the minors’ individual rights, especially the right to liberty and autonomy, the right to respect for private and family life, and the right to have special protection, without considering that minors are a vulnerable group, and without making specific provisions towards them. Indeed, the new Lawn 85 that regulates the forensic database makes no distinction between minors and adults, without considering that the former are a vulnerable group and without making specific provisions for samples belonging to minors. The crucial questions are whether the current legislation is “proportionate” to the legitimate aim to protect minors in the context of society’s security through the use of such database, and whether the current extensive scope of this Law is necessary to achieve the objectives in question. The pursuit of justice involves more than simply the resolution and reduction of crime. Impartiality, equity, and protection of basic human rights are as much a part of justice as are conviction and punishment of the guilty.

The necessity of protecting minors’ rights, as well as the necessity of protecting citizens from crime, are deeply rooted in the existence of a civil society, but balancing the interests involved is still difficult and deserving of particular attention. This balance should be reached through a rights-based approach following the principle of proportionality and keeping in mind that children, in every Country and in every situation, are in need of special protection.

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