

Research Report Series 12-B-11-01

K O R E A N I N S T I T U T E O F C R I M I N O L O G Y

Improving the DNA Identification Act in South Korea

Minyoung Choi

■ Choi, Minyoung

Ph.D in Law, Associate Research Fellow,
Korean Institute of Criminology

Preface

Currently, scientific evidences based on various types of investigation strategies are being utilized because of advance of science technology. In Korea, as one of these scientific evidences, DNA evidences that are collected are being loaded to the database, after the Act on Use and Protection of DNA Identification Information (hereby after, “DNA Identification Act”) was legislated. The DNA Identification Act was enacted in January 2010, and started to be enforced in July 2010. This Act justifies collecting DNA evidences and loading it to the database for the purpose of crime investigation, crime prevention and protection of benefits and interests of citizens. The DNA Identification Act aims at preventing second conviction in the future, and it enables collection and analysis of DNA samples from detained suspects or prisoners, and it allows DNA identification information acquired from this procedure to be retained in the database which is managed by the Prosecution and the Police. Therefore, if crimes are committed in the future, it is expected to arrest criminals in an efficient manner based on DNA identification information that is already obtained.

However, issues of infringement on human rights cannot be neglected, because DNA itself entails a lot of information regarding individuals, and the DNA Identification Act enables to collect one’s DNA information on the premise of potential crimes that might be committed in the future rather than pertinent crimes. Actually, the fact that the DNA Identification Act had to go through long period of legislation procedure over 15 years was largely caused by this issue.

And in June 2011, in Korea the constitutional appeal was filed to the DNA Identification Act on the grounds of infringement on the fundamental rights such as the right of self-determination to individual information and freedom of privacy.


In this respect, this report would examine whether the DNA Identification Act has established legitimacy according to the Criminal Law, and further provide improvement suggestions for this Act based on the examination. First of all, in the first chapter, this report would explain process of enactment of the DNA Identification Act, and show current status of establishment of the DNA database. Subsequently, in the second chapter, whether the DNA Identification Act is actually needed would be discussed especially centered around risk management policies and efficacy of DNA database. And the constitutionality of this Act also would be covered. Finally, in the third chapter, implications in criminal policies of the DNA Identification Act as well as legitimacy of legislative purpose would be discussed, and then improvement suggestion through reviewing each contents would be provided.

Expecting that this research can be valuably used in legal discussion regarding improvement of the DNA Identification Act, I would like to express my gratitude to Dr. Choi Min-Young, Associate Research Fellow, KIC for the research and Intern, Yoo Sarah that helped her for English translation and proofreading.

December, 2012

Korea Institute of Criminology

President



CONTENTS

Preface	3
---------------	---

Chapter 1. General Overview of the DNA

Identification Act	9
--------------------------	---

I. Legislation Process	11
------------------------------	----

1. The Process of Publicizing the DNA Database Bill	11
2. Legislation of the DNA Identification Act	13
3. Summary of Legislation Process	17

II. Major Contents of the DNA Identification Act	18
--	----

1. Definition of Terms and Legislation Purpose	18
2. Target of DNA Sample Collection and List of Applicable Crimes ..	19
3. DNA Samples and DNA Identification Data	20
4. Management of the DNA Database	22

III. Current Situation of Establishment of the DNA	
--	--

Database	23
----------------	----

1. The National Police Agency and the National Forensic Service	23
2. The Public Prosecutors' Office	26
3. Current Status of Management of the DNA Database and DNA Management Committee	27

Chapter 2. Review on Unconstitutionality of the DNA Identification Act	31
I. Discussion on Necessity of the DNA Identification Act ...	35
1. Essence of the Risk Management Policies	35
2. The Efficacy of DNA Databases	38
II. Constitutionality of the DNA Identification Act	44
1. Restricted Fundamental Rights: the Right of Self-Determination to Individual Information	45
2. Review of Important Issues	48
 Chapter 3. Review on Legitimacy of the DNA Identification Act from the Perspective of Criminal Law	 55
I. Implications for Criminal Justice Policy	59
1. Safety vs. Freedom and Protection of Privacy	59
2. Necessity of Information Collection	60
3. Principle of Proportionality and Information Collection	61
4. Civil Trust toward Government Institutes	62
II. Legitimacy of Legislative Purpose	62
1. Purpose for Crime Investigation	63
2. Purpose for Crime Prevention	64

3. Purpose for Protecting Rights and Interests	69
III. Review on Major Issues	71
1. Legal Characteristics of Acts Concerned	71
2. Target of DNA Sample Collection an List of Applicable Crimes ..	73
3. DNA Samples and DNA Identification Information	77
4. Management of DNA Database	82
5. Equality of Punishment	83
IV. Measurement for Improvement	84
1. Effective Securement of Legislative Purposes	84
2. Direction for Improvement of Respective Clauses	85
3. Database Management and Follow-up Measures	86
4. Necessity for Amendment of the Criminal Procedure Law	87
Chapter 4. Conclusion	89
References	95

Table

〈Table 1.1〉 Organizational Structure of the DNA Identification Center ...	24
〈Table 1.2〉 Division of the DNA Identification Center	25
〈Table 1.3〉 Organizational Status regarding DNA Database within the Prosecutors' Office	26
〈Table 1.4〉 Current Status of DNA Database Operation	27
〈Table 1.5〉 Current Status of Database Operation according to Types of Crimes	28
〈Table 1.6〉 People in Charge of Analysis Information and Individual Information	28
〈Table 3.1〉 Reimprisonment Rate of People Released in 2007 in 3 years	67

Chapter 1

General Overview of the DNA Identification Act

General Overview of the DNA Identification Act

I. Legislation Process

1. The Process of Publicizing the DNA Database Bill

1) Initial Phase: Legalization of the Police and the Prosecution

Since 1986, the National Forensic Service introduced the DNA analytic techniques of the advanced countries and had examined the means to apply it to investigation, and in 1991 it had separately established the Division of DNA Analysis and has operated in the after. Afterwards, the National Police Agency suggested establishing the DNA database to the Administrative Reform Committee in May 1993, and the National Forensic Service worked on 'a Legislative Bill on the Establishment and Operation of the DNA Database' in September 1994. The Supreme Prosecutors' Office established the Department of DNA Identification under the Digital Forensic Center of the Central Investigative Department, and it started to operate the laboratory in July 1993. In 1994, it independently drafted legislation to establish the DNA databank.¹⁾ In this way, the police and the

prosecution independently suggested the bills regarding the DNA database operation starting from the initial phase of the legislation.

2) In 2006: A Bill on Collection and Management of the DNA Identification Information

The effort for establishing the DNA databank of the Police and Prosecution stopped due to opposition of human rights groups and issues on management agency. This subject appealed to the public again because of increasing consecutive murder cases and sexual violence crimes.²⁾ With regards to this increasing interests, establishment of the national DNA databank was suggested as a system that can arrest sexual offenders and prevent sexual violence crimes which have high rate of offense recommitment, at 'the Symposium to Eradicate Women-related Violence' which was co-held by the Ministry of the Gender Equality and Family and the Ministry of Justice in November 2002.³⁾ Subsequently, in August 2004, the Police and the Prosecution that had conflicts over who should be in charge of managing DNA databank, started consultation detailed bill together. In April 2005, the Police and Prosecution consulted with the Prime Minister's Office, and drafted the bill to establish 'the Committee of DNA Identification Information' that can manage the databank in the neutral-stance Prime Minister's Office, and this was followed by public hearings on legislation in October same year. Based on this, the Ministry of Justice and Ministry of Government Administration and Home Affairs co-drafted the Bill on Collection and Management of DNA Identification Information, and this

1) Yangkyun Shin, "The System of DNA Databank and Human Rights - Especially Considering Latest Enacted 『Use and Protection of DNA Identification Data Act 2012』", Journal of Criminal Law, Vol. 22, No. 3, The Korean Criminal Law Association, 2010, 60 ff.

2) Yangkyun Shin (2012: 61).

3) Seungwhan Lee, "Suggested Establishment of a DNA Data Bank to Prevent Sexual Violence against Females," presented at the symposium for eliminating violence against females, Nov, 21st, 2002, 28 ff.

government bill was submitted to the National Assembly in August 2006.⁴⁾

On this government proposal, the Legislation and Judiciary Committee of the National Assembly examined some problems from almost all the articles (types of specific crimes that this bill can be applied, management entity of the DNA identification information, collection of the DNA identification sample and restoration of the information, procedures of searching DNA identification material and reporting, disuse of the DNA identification samples and deletion of data, the committee on the DNA identification data, penalty, and etc.) and reported it.⁵⁾ Regarding this, the subcommittee under the Legislation and Judiciary Committee considered that it would be hard to process the bill before the end of the session in order to carefully examine, and thus this bill became abolished along with termination of the 17th National Assembly.

2. Legislation of the DNA Identification Act

As the DNA testing played an important role in investigating Kang Ho-soon's consecutive murder incidents in 2009, more people became conscious that the number of heinous crimes is increasing, and the Ministry of Justice drafted the Bill on Use and Protection of DNA Information as a countermeasure.⁶⁾ In April 2009, the Ministry of Justice and the Ministry of Government Administration and Home Affairs held the public hearings, and then they submitted the bill to the National Assembly in October 2009.

4) Dongkyun Park & Younggu Hwang, "A Study on the Operating Methods of DNA Data Bank", The Korean Association of Police Science Review, Vol. 10, No. 2, Korean Association of Police Science, 2008, 95 ff.

5) The Review on the Bill on Collection and Management of the DNA Identification Information, the Legislation and Judiciary Committee, December 2006.

6) Draft Bill on the Act on the Use and Protection of DNA Identification passes the Cabinet (as a major countermeasure) in the aftermath of the "Cho Doo-Soon case", Ministry of Justice, Press release, October 2009.

1) Opinion of the Supreme Court and Civic Groups

The Supreme Court remained cautious tone. The Supreme Court considered that it is inevitable for the state to retain information of ex-convicts to a certain extent, because it can improve crime prevention and efficient criminal investigation. However, the Supreme Court also regarded that the bill has to be processed after forming a social consensus, while not intervening constitutional values such as human dignity, personal liberty and privacy protection. Under this premise, the Supreme Court contemplated that the biggest problem is management of the database as well as an extent of crimes and criminals with which the samples would be collected. In other words, the Supreme Court suggested that the DNA should be collected and the database should be operated by the third institution, because the binary management system of the DNA database would lead to wasting of the budget and human rights abuse. Also, the Supreme Court stated that the extent of subject crimes of collecting DNA samples is too broad, and that collecting DNA samples from suspects under the investigative process and procuring data for the future investigation possibly violates the constitution especially regarding the presumption of innocence.⁷⁾

The civic groups took a further step and indicated their negative stance toward this bill. Their arguments are as follows: First, DNA data are sensitive private and include a lot of information about individuals and their family members. Second, when collecting DNA samples, it is likely that there would be infringement on human rights of the subjects. DNA samples have to be cautiously collected by the law and the warrant. Particularly, sample collection from detained suspects and young offenders is problematic, in that it possibly

7) The Review on a Legislative Bill on the Use and Protection of DNA Identification Information, The Supreme Court, November 2009.

violates the constitutional value in presumption of innocence, and it also leaves labeling effect. Third, it is expected that DNA database would be inevitably expanded. Especially, considering that resident registration numbers are provided to the all of the Korean citizens, and the fingerprints of people over 17 are registered, there is a risk that the database would be expanded to the large-scale national surveillance database. Forth, there runs the risk of abuse of power of the police and the prosecution. DNA sample collection and the binary management system increase the possibility that the information would be misused and abused as well as spilled. With these reasons, civic groups have argued that DNA database should not be established and there has to be a limit so that DNA information would be limitedly used for individual investigations.⁸⁾

2) Opinion of the Korean Bar Association and the Legislation & Judiciary Committee

Regarding this bill, the Korean Bar Association presented its overall approval, and then pointed out some details that have to be improved. In the first place, the Korean Bar Association agreed with the investigation method of the DNA identification. Yet, it presented its suggestions for improvement which would be followed here: First, DNA sample collection and its analysis have to be based on the applicable law. Second, DNA analysis has to be conducted in a fair and ethical manner. Third, DNA analysis is supposed to be conducted in the analysis institute that is independent from the investigative agency, and there should be another independent institution to supervise this process. Fourth, DNA analysis has to be limitedly conducted for the purpose of investigation. Fifth, DNA collection and analysis should be allowed only when the warrant was issued. In the second place, the Korean Bar Association agreed with establishing DNA

8) Human Rights Civic Groups including Korean Progressive Network Jinbonet, Opinion on the Bill on Use and Protection of the DNA Identification Act, Nov. 2009.

database. However, it suggested that data should be collected merely from cases having high offense recommitment rate as well as having high level of statutory punishment. Besides, as a means to prevent DNA data from being spilled, the Korean Bar Association claimed that database should be managed by an institute independent from the investigative agency, and the independent supervising committee should be established in order to operate the database.⁹⁾

The Legislation and Judiciary Committee also presented overall approval toward this bill. However, it suggested the management entities should be unified through entrusting to an independent third agency, but this point hasn't been reflected to the amendment. In the suggestion of the Legislation and Judiciary Committee, it has been reflected to delete the crimes of illegal arrest and confinement from the list of applicable crimes, to notice beforehand that the sample collection can be refused when collecting is conducted without a warrant, and to receive written consent. Also, in this suggestion, it was reflected that it would be punished with dereliction of duty in the Criminal Law when violating the obligation to discard samples and delete data.¹⁰⁾ On December 17, 2009, this subcommittee reported this examination result to the plenary session of the Legislation and Judiciary Committee, and then this was accepted to the Committee Draft, leading to the amendment decision.

On December 29, 2009, (the DNA Identification Bill) that was proposed to the general meeting of the National Assembly became passed by majority, following the amended bill. The government enacted and proclaimed the bill which composes of 17 preambles, 3 supplementary provisions on January 25, 2010, and

9) Korean Bar Association, Opinion on the Bill of Use and Protection of the DNA Identification Information, Nov. 2009.

10) Legislation and Judiciary Committee, Examination on the Bill of Use and Protection of the DNA Identification Information, Dec. 2009.

it was to be enforced starting from on July 26 in the same year.

3. Summary of Legislation Process

It took 15 years to enact the DNA Identification Act and establish the DNA database, and for these long years, various opinions and bills were proposed. Nevertheless, two issues that have been commonly discussed through all the legislation process which was difficult could be found.

1) Fundamental Human Rights vs. Efficient Criminal Arrest and Prevention

The DNA Identification Act provides to quickly arrest the criminal through comparing the DNA samples with what's registered as DNA identification data, and to exclude innocent suspects from the investigative pool early, and further to better prevent offense recommitment of people whose DNA identification data are loaded to the database. In other words, it was suggested in order to improve efficiency of criminal investigation and prevent future crimes. Even though this legislative purpose has gained approval, details in the list of crimes that are applied for sample collection, legal base on the process of collecting and analyzing DNA samples, and sample misuse as well as data deletion have always entailed concerns on infringing fundamental rights such as privacy and rights to the self-determination of their personal data. Furthermore, the effect of preventing offense recommitment has also been questioned.

2) Binary Management of the DNA Database

Starting from the early phase of legislation, (the DNA identification act) has been involved with conflicts between the police and the prosecution on the issue of managing DNA database. Eventually, this issue was resolved in a way

that both parties separate the database and operate it. Regarding the binary management of the DNA database, the government argued that it could prevent inefficient operation because both institutions manage the database altogether, and principle of checks and balances out of binary management can decrease the risk of misuse and abuse.¹¹⁾ However, following the majority opinion, unifying operational process of the DNA database is proper. Binary management would decrease efficiency and waste the budget as well as increase the risk of misuse and abuse. Furthermore, the DNA database should be operated by the independent third agency, and there should be another institute to supervise this agency when operating.

II. Major Contents of the DNA Identification Act

1. Definition of Terms and Legislation Purpose

1) Definition of Terms

DNA in the DNA Identification Act refers to the Deoxyribonucleic Acid which is chemical substance including the data regarding vital phenomenon of living organism. "DNA identification" aims at personal identification and it examines and analyzes specific part of base sequence where genetic information is not included in order to obtain DNA identification data. "DNA sample" refers to blood, saliva, hair or oral mucosa subject to DNA identification, and these gathered data which are formed with a series of numbers or marks are called "DNA identification data". The "DNA identification database"(hereby after, DNA database) refers to an array of DNA identification data that is acquired according

11) Legislation and Judiciary Committee, Examination on the Bill of Use and Protection of the DNA Identification Information, Nov. 2009.

to this law and stored on storage media like computers, and independent access or search for this data is possible through this database. (Article 2, the DNA Identification Act)

2) Legislation Purpose

The DNA Identification Act provides what's needed to collect, use, and protect the DNA identification data, and aims at these two objectives. (Article 1, the DNA Identification Act) First, it contributes to crime investigation and crime prevention. Second, it aims at protecting rights and interests of the citizens.

Consequently, the DNA identification data cannot be used or revealed, provided to the others for purposes other than normal duty (Article 15, the DNA Identification Act), the data cannot be falsely drafted or altered. (Article 17 Clause 1, the DNA Identification Act) Also, the collected DNA samples shouldn't be destructed, concealed, or damaged, and treated in a way to ruin usefulness of the data. (Article 17 Clause 2, the DNA Identification Act)

2. Target of DNA Sample Collection and List of Applicable Crimes

1) Target of DNA Sample Collection

There are three cases subject to DNA sample collection. First, DNA samples can be collected from convicted people and more. Hereby, “convicted people and more” refers to people who got sentenced, people under the supervision order or medical treatment and custody, people whose sentence is decided with protective disposition decision in the Juvenile Act (Article 5, the DNA Identification Act). Second, the DNA samples can be collected from the confined suspects and more. Here, confined suspects and more refer to suspects who are

confined, or people under the medical treatment and custody who are confined, (Article 6, the DNA Identification Act). Third, the DNA samples can be collected at the crime scenes and more. Hereby, "crime scenes and more" means what has been found at the crime scenes, what has been discovered from the victim of the crimes, what has been discovered from the things, places or people that are related to the crime practices. (Article 7, the DNA Identification Act)

2) List of Applicable Crimes

The DNA Identification Act lists up these 11 crimes that can be subject to the sample collection as follows (Article 5, the DNA Identification Act) : 1) arson, 2) murder, 3) kidnap or invitation, 4) rape or sexual molestation, 5) trespass upon residence at night for stealing, special larceny, and burglary, 6) crimes of assault, threat, apprehension, confinement, property damage, violation of domicile and coercion, and composition of criminal organization and activity under the Act on the Punishment of Violence, 7) crimes of kidnap or invitation and customary theft and robbery under the Act on Additional Punishment on Specific Crimes and etc, 8) sexual violence crime under the Act on the Punishment of Sexual Violence Crimes, 9) the crimes regarding narcotics under the Act on the Control of Narcotics, etc., 10) sexual violence crimes, crimes of juvenile prostitutes, crimes of exploitation of minors and coercion, 11) the crime of sentry and superior murder under the Military Criminal Act and an incendiary crime.

3. DNA Samples and DNA Identification Data

1) Collection, Analysis, Storage and Disuse of DNA samples

A warrant is required when collecting DNA samples from convicted persons or confined suspects. However, when there is a written consent from the person

directly involved, the DNA identification sample can be collected without a warrant. In this case, it should be advised beforehand to the person involved that they can refuse to be subject to collecting DNA samples. (Article 8, the DNA Identification Act) The sample collection has to be conducted in a way to minimize infringement of one's body and honor. (Article 9, the DNA Identification Act) Also, when identification data acquired from the collected samples is stored in the database, the DNA samples and the DNA extracted from the samples should be discarded without delay. (Article 12, the DNA Identification Act)

2) Search, Report and Deletion of DNA Identification Information

The DNA identification data which has been acquired through the DNA identification is loaded to the database. (Article 10, the DNA Identification Act) The person who is in charge of the DNA identification is able to search the DNA identification data and report the results if needed when 1) including new DNA identification data to the database, 2) there is a request from the prosecutor or the judicial police for the purpose of crime investigation or identifying a person who has died unnaturally, 3) the court finds facts in a criminal trial, and 4) it is needed to compare the database mutually. (Article 11, the DNA Identification Act)

When convicted persons received the judgment on the innocence, acquittal, dismissal of public prosecution or the decision of dismissal of public prosecution, or when the prosecution decides that confined suspects and etc. is clear from suspicion, or when the court decision of innocence, acquittal or dismissal of a prosecution is confirmed, the DNA identification data should be deleted by the DNA Information Administrator or by the request of persons whose DNA sample has been collected. Also, when the convicted persons or

confined suspects died, the DNA identification data should be discarded by the authority or requests from the relatives. Also, the data should be disused when the identification is finished through identification data collected from the crime scenes and etc. And when having discarded the DNA identification data with these reasons, it should be notified to the person who's directly related and etc., in 30 days. (Article 13, the DNA Identification Act)

4. Management of the DNA Database

1) Binary Management of the DNA Database

The DNA Identification Act specifies the Public Prosecutor General and the Police Chief as directors of DNA information management, while making the management process binary. The Public Prosecutor General handles affairs regarding the DNA identification data acquired from the convicted persons, whereas the Police Chief deals with the DNA identification data acquired from the confined suspects, crime scenes, and etc. At the time, each database can be operated, while closely connected. (Article 4, the DNA Identification Act)

2) Establishing a Management Committee for the DNA Database

The DNA Identification Act requires the DNA Identification Data Database Management Committee under the Prime Minister, which deliberate 1) details regarding collection, transportation, storage and disuse of the DNA identification samples, 2) details regarding methods and procedures of DNA identification as well as standardization of identification technology, 3) details regarding the draft of the DNA identification information, input of DNA information on the database, and deletion of DNA information from the database, and 4) details ordered by a Presidential Decree. This Committee is composed of members of 7 to 9 who 1)

high-level public officials or corresponding people who have taken positions of public institution while working on DNA-related works, 2) Associate professors or higher leveled people at the universities or certified research institute, or people who have been on the corresponding positions, while having expertise and research experiences under the section of life science or medicine, and 3) people of learning and experiences at the section of ethics, social science, law, or media (Article 14, the DNA Identification Act).

III. Current Situation of Establishment of the DNA Database

Currently, the DNA Database has been managed by both the National Police Agency and the Public Prosecutors' Office. The National Police Agency is operating the database through consigning to the National Forensic Service, and the National Forensic Service is in charge of analyzing DNA samples, loading DNA information to the database, and managing the database. The Public Prosecutors' Office manages the database in the Digital Forensic Center within the Public Prosecutors' Office. Organizational status in detail and operation status regarding the DNA database are as follows.

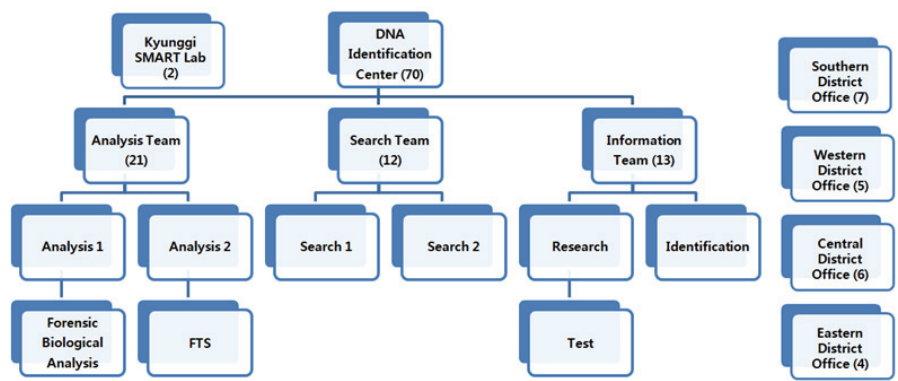
1. The National Police Agency and the National Forensic Service

In the National Police Agency, administrative officers under the Department of Forensic Investigation deal with affairs regarding the DNA database. Currently, almost 400 forensic investigative officers are arranged in each office.¹²⁾ And in the National Forensic Service, the Forensic DNA Center handles the works related to the DNA database. While having one chairperson of the center, this

12) Internal Data, the National Police Agency, March 2012.

center deals with consigned works from the Police Chief according to the DNA Identification Act, identification of DNA substance taken at the crime scene as well as forensic biological analysis, operation of the DNA identification database, office work of the DNA Information Database Management Committee, consigned genetic testing under the Act on the Protection and Assistance of Missing Children, and cooperation with the DNA identification conducted by the other governmental institute and local governments.¹³⁾ At the time of June 2012 in the DNA Identification Center, 70 officers are divided to the DNA analysis team, the DNA search team and the DNA data team, and handle the affairs related to the DNA identification and DNA identification data operation. Organizational status in detail and divisions would be provided under.

Table 1.1 Organizational Structure of the DNA Identification Center



13) The Article 15 Clause 1, the Basic Operation Rules, the National Forensic Service.

Table 1.2 Division of the DNA Identification Center

Team	Tasks	
DNA Analysis Team (18)	Analysis 1	Analysis DNA samples from the scenes of homicide, arson, negligence of arson and burglary; Analysis DNA samples from the scenes of crimes related to the Act on Punishment of violence, the Act on the control of Narcotics, etc., and Act on the additional punishment for certain crimes
	Analysis 2	DNA identification at the crime scenes of rape, molestation, capture and kidnap; DNA identification regarding sexual offences provided by the Act on punishment of sexual offences and protection of victims, and the Act on the protection of children juveniles from sexual abuse; DNA identification regarding other sexual offences and crime scenes of violation
	Research	DNA identification requested from the bereaved family of unidentified persons who have accidentally killed and victims of disaster, and management of DNA database for the purpose of identification; confirmation of biological parental relation of fetus tissue caused by abandonment of a baby or rapes; analysis of mitochondrial DNA of crime scene evidences
	Forensic Biological Analysis	Blood type of crime scene evidences; discernment of species of plants, microorganism and animals; personal identification of crime scene evidences and Blood Alcohol Concentration(BAC); Other forensic biological analysis
DNA Search Team (12)	Search 1	Identification and search of DNA of detained suspects out of subjects of DNA sample collection by law
	Search 2	Identification and search of subjects of search related to the crime scene DNA Information
Identification Information Team (13)	Identification Information	Search and report of DNA information from crime scenes and DNA database of detained suspects; retention, disuse, deletion regarding DNA database as well as input and organization of DNA database; tasks regarding the DNA Database Management Committee
	Examination	DNA testing according to the Act on Protection and Support of Missing Children and Etc. and disuse of information from the DNA database, deletion and management of DNA information; DNA testing regarding identification of missing persons and etc; cooperation with DNA testing for the purpose of identification conducted by the central administrative agency and local government and etc.
	Analysis 3	Emergent identification and DNA identification regarding crimes of burglary and etc.
Smart Team		Tasks of emergent major cases of the Kyunggi Provincial Police Agency, and identification of detained suspects
KOLAS Support		Tasks of KOLAS quality assurance regarding international certified test institution

*Resource: Internal Data, the DNA Identification Center, the National Forensic Service

2. The Public Prosecutors' Office

The Public Prosecutors' Office deals with the DNA database related works while maintaining binary operation of the Department of DNA Investigation and the Department of Forensic Investigation. The Department of DNA Investigation is centered around the research public officials and handles DNA identification, whereas the Department of Forensic Investigation is centered around the prosecutors and deals with works regarding human information. Organizational status in detail would be provided under.

Table 1.3 Organizational Status regarding DNA Database within the Prosecutors' Office

Department of the DNA Investigation

(Unit: persons)

Division	Prosecutors	Research Service Officials			Prosecution Service Officials
		Health Research Officers	Health Researchers	Industry Researchers	
Number of People (12)	1	4	7	1	1

*Resource: Internal Data, the Forensic Center, the Supreme Prosecutors' Office

Department of the Forensic Investigation

(Unit: persons)

Division	Prosecutors	Note
Number of People	2	In charge of DNA Personal Information

*Resource: Internal Data, the Forensic Center, the Supreme Prosecutors' Office

3. Current Status of Management of the DNA Database and DNA Management Committee

From July 26, 2010, the time when the DNA Identification Act started to be enacted to March 31, 2012, the number of the DNA identification data which the police and the prosecutor keep is 84,235. 41,255 of these belong to the category of convicted people and etc., and 19,728 belong to the confined suspects, while 23,252 of these are from the crime scenes.

Table 1.4 Current Status of DNA Database Operation (July 26, 2010 to March 30, 2012)

(Unit: persons)

Division In total	Prisoners	Detained Suspects	Crime Scenes
84,235	41,255	19,728	23,252

*Resources: Internal Data, Forensic Investigative Center, the National Police Agency

Operational status of the DNA database under the 11 categories of crime which are provided by the DNA Identification Act is as follows. Among these, DNA identification data for the purpose of crime investigation and other affairs, that is, finding missing children or family, are included. And the number of DNA identification data of which have been stored from May 2004 (before the enforcement of this act) to June 2012 is 21,903 of missing children and 1,527 of missing family members.

Table 1.5 Current Status of Database Operation according to Types of Crimes (July 26, 2010 to March 30, 2012)

(Unit: persons)

Division	In total	Arson and negligence of arson	Homicide	Abduction and Kidnap	Rape and Molestation	Burglar and Larceny	Violence	Aggravated Punishment of Specific Crimes	Sexual Violence	Drug	Juvenile Sex Protection	Military Criminal	Etc.
Prisoners	41,255	672	4,202	54	2,580	9,305	8,498	6,592	4,223	3,877	1,251	1	
Detained Suspects	19,728	412	1,381	47	1,303	6,043	2,513	3,000	2,379	1,882	768		
Crime Scene	23,252	494	1,515	352	1,043	12,577	1,634	2,271	669	199	10		2,488
In total	84,235	1,578	7,098	453	4,926	27,925	12,645	11,863	7,271	5,958	2,029	1	2,488

*Resource: Internal Data, the Forensic Investigative Center, the National Police Agency

According to the Article 3 Paragraph 1 and the Article 4 of the Enforcement Ordinance of the DNA Identification Act, the DNA ‘Personal Information’ Administrator has been newly established in order to operate personal data related to the samples, and the DNA Identification Information Administrator only input the results of the DNA analysis and the identifying code that replaces the personal information. By each institute, the DNA personal information administrator and the DNA identification data administrator are as follows.

Table 1.6 People in Charge of Analysis Information and Individual Information

	DNA Identification Information Administrator (DNA Analysis, Management of the Database)	DNA Personal Information Administrator
The Prosecution	Director General of Forensic Investigation of the Supreme Prosecutor’s Office	Action Officer of Forensic Investigation of the Supreme Prosecutor’s Office
The Police	Chair of the National Forensic Science	Chair of the Forensic Investigative Center(the National Police Agency)

*Resource: Internal data, the Forensic Investigative Center, the National Police Agency

The DNA Identification Information Database Management Committee (hereby after, the DNA Management Committee) is currently placed under the Forensic Investigative Center within the National Police Agency, and it has 7 members from the outside of the agency. In addition, the DNA Identification Database Practice Committee (hereby after, the DNA Practice Committee) is placed under the forensic investigative center so as to support the DNA operational committee. The DNA working committee is operated with 12 committee members including 2 internal members and 10 external members.

Chapter 2

Review on Unconstitutionality of the DNA Identification Act

In June 2011, a constitutional appeal has been filed to the DNA Identification Act by a reason of infringement on fundamental rights such as the right of self-determination to individual information, the personality right, the right to pursue one's happiness, human dignity and value, and the right to privacy of people whose DNA samples have been collected.¹⁴⁾ In this regard, this chapter would examine whether the enactment of the DNA Identification Act was practically needed particularly under the social context of risk-management policies. Also, efficiency of expanded DNA database in crime investigation and prevention would be also discussed. Furthermore, this chapter would examine whether this DNA Identification Act on a constitutional complaint could be constitutionally legitimate or not.

14) When it is disputable whether the right of self-determination to individual information is violated, the Constitutional Court sees that human dignity and value, rights to pursue one's happiness, personality right, freedom of privacy are fundamental rights that are mentioned as constitutional grounds of the right of self-determination to individual information. Here, the protection range of these fundamental rights is related only to the area to be overlapped with protection range of the right of self-determination to individual information. And thus the Constitutional Court considers that whether these rights are violated or not does not have to be separately covered (헌재 2005.5.26. 99헌마513). Accordingly, we would like to examine the unconstitutionality especially regarding the right of self-determination to individual information below.

Review on Unconstitutionality of the DNA Identification Act

I. Discussion on Necessity of the DNA Identification Act

1. Essence of the Risk Management Policies

1) Reproduction of Distorted Crime Images

The DNA Identification Act which had been discussed before 2000 was embroiled in controversy for reason of human rights protection. However, violent crimes, particularly sexual violence crimes which have been rapidly increased since 2000 caused the revival of the bill, and this act became enacted for the purpose of resolving violent crimes and prevention. However, it should be examined if the violent crimes in an extreme form have been actually increased. It is because the government and the press might have been tactfully using some of extremely violent crimes. This tendency can be clearly found from the sexual violence crimes against child. The government and the press

continually produce the image that “a strange adult suddenly comes up and commits violent crimes against vulnerable children.” However, this is a very extreme case, and 70-80% of sexual crimes against child occur by ‘acquaintances’.¹⁵⁾ The government and the press re-produce these distorted crime images while using some extreme cases and disregarding facts on the sexual crimes against child. Through this, threats regarding the public order spread, and this occurs as demand calling for safety through reinforcing the public authority.¹⁶⁾

2) Combination of 'Victimization' and 'Risk' Code

These days, criminal policies are closely related to the concept of victim protection. In other words, it means firm control and surveillance toward criminals would be needed in order to protect victims. This appears as the dichotomous way that contrast ‘dangerous criminals’ with ‘good victims’. However, this dichotomous comparison disregards social structural causes (i.e. economic inequality) and cultural causes (i.e. distorted notion regarding sex). Eventually this concept of victim protection combines with the code of ‘risk control’ or ‘risk management’. Under the moral justification of protecting citizens’ safety from dangerous criminals, policies reinforcing state surveillance and control gain political legitimacy.¹⁷⁾

3) Neo-liberalism and the Principle of Individual Responsibility

Neo-liberal economic structure rapidly increases social instability and

15) Mijung Lee & Deokkyung Yoon. et al., *Keeping Children Safe from Sexual Abuse (II)*, Korean Women’s Development Institute, 2010, 21 ff.

16) Hojoong Lee, “Reviewing the Constitutional Challenge and Problems of the DNA Act - the Act on the Use and Protection of DNA Identification, What’s the Problem?”, presented at the parliamentary discussion, Feb, 22nd, 2012, 8.

17) Hojoong Lee (2012: 9).

unpredictability. Under the neo-liberalism, as risks which were caused from these instability and unpredictability are shifted to the individuals, the principle of individual responsibility becomes strengthened. In other words, this society lets individuals take risks by themselves and take precaution against it within the boundary of law and order. Here, it is not allowed to pose a threat to the market order or safety of other people while coming outside of the boundary of law and order. In this regard, as social structural reasons that cause crimes and criminal acts become regarded as individual faults, legal discourses that legitimate stern punishment and social isolation would be strengthened. Furthermore, autonomy and publicness of the community would be diminished, and the individuals would tend to be more dependent on state punishment of the state with their safety.¹⁸⁾

4) 'Risk Management'

The factors mentioned above would modify existing role of criminal justice system and the rule of law. Above all, criminal justice system would play a role to regulate factors of instability caused from the inside or outside of the market under the premise of trust on autonomous neo-liberal market order. In other words, punishment power of the state sorts out acts that should be controlled, according to the 'degree of risk' that would increase instability of the neo-liberal order. Next, the rule of law becomes denatured from the rule of controlling abuse of state power to rule of legitimizing thorough punishment and control toward the individuals who violated rules to follow for adapting to the market order as well as legal standards.¹⁹⁾

18) Hojoong Lee (2012: 10).

19) Hojoong Lee (2012: 10).

In this regard, current criminal policies aim at ‘risk management’ . Criminal policies take a step further from aiming at stern punishment to reinforce state control and surveillance through controlling ‘dangerous personnel’ that increase social instability. From this perspective, the current DNA Identification Act could pose a threat toward the basis of democracy and human rights, while being one of the legislations that entail risks of routinizing coercing authority and obedience through state control and surveillance. In other words, having this perspective reaches the need of serious examination on whether to maintain this act or not.

2. The Efficacy of DNA Databases

Then, how efficient is the DNA databases in crime investigation and prevention? It is more universally held that the larger the databases, the more crimes will be solved and the more crimes will be prevented. The current statistical data from the police shows the same context.²⁰⁾ DNA evidences enabled to arrest murder-rapists who could have been escaped otherwise, and it is expected to exclude suspects early with DNA evidence which eventually can

20) This statistical data tells that the number of matches in DNA information has been increased after the database operation. It can be inferred that increase in DNA information matches improves crime detection (resource: internal statistical data of the Korea Crime Scene Investigation, the National Police Agency).

〈Number of Matches in Detained Suspects’ s DNA with the DNA Database gathered from Crime Scenes〉

(unit: persons/cases)

Period	In total	'10.07.26~1 2.31	'11.01.01~1 2.31	'12.01.01~0 8.31	09.01~09.30
Number	3,118/4,633	407/583	1,692/2,562	934/1,371	85/117

〈Number of Matches in Crime Scene DNA with DNA Database of Detained Suspects〉

(unit: case)

decrease investigative costs. However, the ‘more’ DNA identification data doesn’t necessarily result in ‘better’ results. Sometimes ‘more’ can result in diminishing returns and increasing inefficiencies.²¹⁾ In other words, it is needed to examine how the size of the DNA database and the rates of solving crimes are actually correlated.

1) Current Standards for Measuring Database Efficacy

The FBI measures the efficacy of the database by the number of “hits”, that is the number of matches of the DNA data from the crime scenes made against the DNA database. However it is not that this match accounts for how many people were arrested and convicted.²²⁾ Furthermore, whether this number of matches increases proportionally to the expansion of the database is another matter.

In the case of the United Kingdom, it is explained through the concept of crime detection rate. The “crime-detection rate” is defined as the ratio of recordable crimes that are cleared up by the police. Police in the United Kingdom reported that these rates of crimes that are cleared up are much higher when DNA evidence is found than the rates where there is no DNA available.²³⁾ However, the criminal standard indicates that the DNA database is successfully operated when the criminal is convicted rather than when the crime is detected. DNA information might have contributed to finding people who are not charged

Period	In total	'10.07.26~1 2.31	'11.01.01~1 2.31	'12.01.01~0 8.31	09.01~09.30
Number	536	0	65	424	47

21) Sheldon Krinsky & Tania Simoncelli, *Genetic Justice*, Columbia University Press, 2011, 305 ff.

22) Sheldon Krinsky & Tania Simoncelli (2011: 306).

23) Sheldon Krinsky & Tania Simoncelli (2011: 307).

of the crimes or not relevant to the crime as suspects. However, as DNA information rarely accounts for the major factor to judge that someone is guilty, we cannot jump to the conclusion that DNA data contributes to the rate of a judgment of a conviction.²⁴⁾

Next, whether expansion of the DNA database has improved crime-solving capacity can also be asked. The proportion of matches resulting in a successful detection in the United Kingdom rose from 37 percent (1999-2000) to 48 percent (2000-2001) but then fell in 2002-2003 to 42 percent. The size of the United Kingdom's DNA database rose significantly from 1999 to 2003, but the proportion of matches has not followed that trend.²⁵⁾

2) Evaluation of DNA Database Efficacy

Consequently, when evaluating the efficacy of DNA database as in solving crimes, we have to examine following factors, rather than simply exploring the rate of “hits” or “detection rates”. 1) Rate of crime scenes blocked for DNA collection (P): the DNA profile information can contribute to crime detection only when the crime scenes were blocked for collecting DNA evidences. 2) Rate of crime-scene DNA samples and DNA profile entered into the DNA database (Q): the fact that the crime scenes have been analyzed doesn't always follow DNA profiles obtainment, because quality of DNA could be deteriorated or the sample could be contaminated. 3) Rate of crime scene profiles that match with profiles loaded in the DNA database (R): the matches of profiles disclose more than one suspects to be investigated for the pertinent crime. 4) Rate of people prosecuted according to these matches (S): the matches of DNA profile don't

24) Sheldon Krinsky & Tania Simoncelli (2011: 308).

25) Carole McCartney, “DNA Expansion Programme and Criminal Investigation”, *British Journal of Criminology* 46(2), 2006. 182.

resolve the crime. There has to be an explanation regarding why one's DNA was left at the crime scene. For example, in the U.K. confirmative evidence is additionally required in order to conduct prosecution. 5) Rate of conviction based on matches with the crime scenes (T): the efficacy of DNA database can be measured by how the database contributed to the judgment of conviction.²⁶⁾

The rate of crime scenes analyzed for DNA collection (P) is the number of crime scenes that are analyzed for DNA per the number of entire crimes that are recordable. In the United Kingdom, it is possible to collect DNA evidence from 17 percent of crime scenes that are analyzed, and in this case only 5 percent result in DNA samples successfully to be collected, profiled and loaded in the database (Q).

The third factor (R) is the rate of matches by the database. A lot of crimes are solved through the matches between the DNA at the crime scenes and the DNA from a suspect. However in this case, the DNA database is not involved. If we attempt to evaluate the efficacy of DNA database, we will have to calculate this indicator only through the matches of crime-scene DNA uploaded to the database. In the United Kingdom, this rate of match reaches reportedly at 52 percent as of March 2006, and in averaged it remained about 50 percent throughout that year.

The fourth factor is the rate of prosecutions of crimes. In the United Kingdom, the prosecutions rates for crimes involving DNA matches ranged from 37 percent to 48 percent from 1999 to 2003. However we estimate this figure to 50 percent for illustration objectives. The last ratio (T) is the rate of conviction. The fact that someone's DNA information matches with DNA collected from crime scenes doesn't necessarily follow conviction. Someone might have stayed in the scene

26) Sheldon Krinsky & Tania Simoncelli (2011: 310 ff).

before the crime was committed, or the DNA matches could have been made from evidence contamination. Accordingly, for illustration purposes, we would estimate this ratio of conviction to 50 percent. From these numbers, we can estimate the values for the Crime-Solving Efficacy Index.

Crime-Solving Efficacy Index = $.07 \times .05 \times .50 \times .50 \times .50 = .0010625$, or 0.1 percent

We can see that DNA plays a role in only about 1 per every 1,000 convictions of all crimes. In other words, DNA evidence plays only an incompetent role as in convictions.²⁷⁾

If we begin with the assumption that DNA screenings will be taken only in serious crimes while excluding minor offences, would the result be different? In this case, P will be 100 percent ($P=1$). Using the same values from the previous example ($Q=.05$; $R=.50$; $S=.50$; $T=.50$), the Crime-Solving Efficacy Index will be estimated to be 0.63 percent, which is still less than 1 percent.²⁸⁾

If we calculate the number corresponding to the size of the database, we can see diminishing returns from expansion of the DNA database. If we choose a base year to set the size of the database $N(b)$, and we designate the database of any other year as N , the index regarding the efficacy of the database will be as follows. $CSE = P \times Q \times R \times S \times T \times N(b)/N$. This indicator tells that the efficacy of the DNA database decreases when the size of database grows.²⁹⁾

3) Size of DNA Database versus Crime Detection

A larger database does not necessarily result in more crime control, and there

27) Sheldon Krinsky & Tania Simoncelli (2011: 311 ff).

28) Sheldon Krinsky & Tania Simoncelli (2011: 313 ff).

29) Sheldon Krinsky & Tania Simoncelli (2011: 314 ff).

are some reasons behind this. First, as we have estimated previously, the factor that limits efficacy of database is the number of crime-scene profiles, rather than the number of individual profiles from suspects. Therefore, to improve the efficacy of DNA database, it is needed to increase the number of DNA information obtained from the crime scenes in the first place, but this is not an easy task. It is because it requires efforts and costs to find DNA when there is no obvious crime-scene DNA sample.

At the scenes of violent crimes where biological evidences like blood, semen, or skin cells are left, it is comparatively easier to obtain DNA samples. But most of the crimes are committed in the form of property crimes, and thus collecting samples is difficult. Moreover, in the case of rape which comes under the violent crimes, DNA sample collection is rarely useful, because what is most often disputable in this case is if the act was forced or consensual. Secondly, additional evidence would be needed even when the DNA sample is collected and stored as profiled data. Also, even when the DNA match is found, the rate of conviction is not that high as we have examined previously. Thirdly, the efficacy of DNA database decreases when we include data of minor offenders or mere arrestees to the database that cannot be charged of specific crimes. Expanding DNA database increases the cost of informatizing DNA samples, as well as risks of error coming from cross-contamination of samples. Also, as the size of database becomes larger, the possibility of wrongly prosecuting individuals or making someone seem guilty increases. There have been cases where criminals intentionally leaves evidences or switches, or confuses investigative polices.³⁰⁾

30) Sheldon Krinsky & Tania Simoncelli (2011: 315 ff).

4) Size of DNA Database versus Crime Prevention

Generally, it has been argued that DNA database is not only efficient in crime solving but also in preventing crimes in the future. This argument presumes that people whose DNA data are loaded in the database will be prevented from committing a crime while having a fear of getting arrested again. However, this argument doesn't apply to many innocent people who have not yet committed any serious crimes and who would never commit any in the future.³¹⁾ Also, there is no evidence to support that the growth of DNA databases caused to decline crime rates. The database cannot deter sophisticated criminals from committing crimes, because they will find measures to confuse the criminal justice system in any way.³²⁾

II. Constitutionality of the DNA Identification Act

A constitutional appeal has been filed to the Articles 2, 5, 8, 13 of the DNA Identification Act and the act of collecting DNA samples for a reason of restriction of the right of self-determination to individual information. Regarding this, particularly, extensivity of subjects whose DNA samples are on the database, extensivity of crimes that are applied, unconstitutionality of process of collecting DNA samples, and retention period of DNA identification information are filed as to violate the principle of prohibition of excess. Also, it has been asserted that there has been violation against the Article 12 Clause

31) On the other hand, it is said that establishment of the DNA database has a preventive effect to deter serial crimes from taking place. This mainly refers to serial or repetitive crimes that are of serious crimes. Regarding this point, Seungwhan Lee, "The Theory and International Trends of DNA Data Banks for Investigative Purposes", *New Trends of Criminal Law*, Vol. 18, Supreme Prosecutors' Office, Feb, 2009, 136.

32) Sheldon Krinsky & Tania Simoncelli (2011: 319 ff).

3 of warrant system in the Constitutional Law, the Article 12 Clause 1 of principle of lawful procedures and the Article 27 Clause 4 of principle of presumption of innocence of the constitution.³³⁾

1. Restricted Fundamental Rights: the Right of Self- Determination to Individual Information

1) Definition of Individual Information

Individual information refers to all the information that can identify the person.³⁴⁾ Consequently, it does not limit to the 'secret' in regard with a certain individual, but information that can identify an individual can come under this information. In other words, the essence of individual information lies in 'identification'.³⁵⁾ And this can be shown in the legislations. According to the Article 2 Clause 2 of the Act on Protection of Individual Information³⁶⁾, individual information is defined as "information regarding a person alive which can identify an individual through full name, resident registration number, and image." Also, according to the Article 2 Clause 1 Number 6 of the Act on Promoting of Use of Information Network and Information Protection, individual information is "information regarding a person alive which includes mark, letter, voice, sound and image and is able to identify a certain person", and it includes information that can "identify a person while combining with other information, despite not being able to identify for itself."

33) Refer to the Constitutional Complaint filed in June 2011.

34) Wuisoo Han, "Protection of Privacy", The Justice, Vol. 76, The Korean Legal Center, 2003, 21.

35) Junil Lee, "A Review on Act on the Use and Protection of DNA Identification Information", Human Right and Justice, Vol. 422, Korean Bar Association, 2011, 86.

36) Before, individual information was defined by 'the Act on Protection of Individual Information by Public Institutions', but this act was abolished after an enactment of the 'Act on Protection of Individual Information' in March 2011.

2) The Right of Self-Determination to Individual Information in the Constitutional Law

This information is protected by the right of self-determination to individual information in the Constitutional Law. The Constitutional Court regards the right of self-determination to the individual information as “the right that the subjects of the information can decide when, to whom and to what extent their information can be revealed and used by themselves.”³⁷⁾ Even though the Supreme Court doesn’t use the term “the right of self-determination to the individual information”, but it also considers the right that have the same contents as fundamental rights that can be protected by the Constitutional Law.³⁸⁾

As constitutional grounds of the right of self-determination to individual information, the fundamental right of freedom and privacy according to the Article 17 of the Constitutional Law has been mentioned³⁹⁾, and human dignity and value and the right to pursue one's happiness according to the Article 10 of the Constitutional Law have been mentioned.⁴⁰⁾ The Constitutional Court understood the right of self-determination to individual information as individual fundamental right that is not listed according to the Article 37 Clause 1 of the Constitutional Law.⁴¹⁾ However, the Constitutional Court subsequently changed

37) 헌재 2005.5.26. 99헌마513; 2005.7.21. 2003헌마282.

38) Junil Lee (2011: 86).

39) Youngsung Kwon, Introduction to Constitutional Law, Bobmunsa, 2008, 450 ff; Seungwhan Kim, “A Right of Information Self-Determination”, Korean Constitutional Law Journal, Vol. 9, No. 3, Korean Constitutional Law Association, 2003, 166 ff; Nakin Sung, Constitutional Law, Bobmunsa, 2011, 618; Soonchul Huh, “Internet Search and the Right to Informational Self-Determination”, Public Law Review, Vol. 10, No. 2, Korea Comparative Public Law Association, 2009, 169.

40) Chulsoo Kim, Introduction to Constitutional Law, Pakyoungsa, 2007, 725. Meanwhile, there is an argument which claims that the Article 10 of the Constitutional Law directly protects the right of self-determination to individual information, and the Article 17 of the Constitutional Law indirectly protects this right. Regarding this argument, refer to Yunchul Baek, “Human Right to Control Oneself and Human Right to Control the Circulation of Oneself in the Constitution”, Korean Constitutional Law Journal, Vol. 9, No. 3, Korean Constitutional Law Association, 2003, 230 ff

its stance and found the constitutional ground of this right from the Article 10 and 17 of the Constitutional Law.⁴²⁾ The Supreme Court finds the constitutional ground of this right from the Article 10 and 17 of the Constitutional law.⁴³⁾ Considering that the essence of this right lies in the "consent" on disclosure and use of their individual information, it would be reasonable to see that Article 17 of the Constitutional Law on the fundamental right of freedom and privacy would be the direct grounds of this right.⁴⁴⁾

3) DNA Information and its Collection, Analysis, Retention and Use

Information that can be protected by the right of self-determination to the individual information refers to "all the information that enables to identify uniformity of an individual while characterizing personal subjectivity of an individual such as body, personal beliefs, social status, position, and etc." And it includes "personal information that has been already disclosed or formed publicly, while not limiting itself to the information that only belongs to private or inner sector of an individual."⁴⁵⁾ For example, finger prints⁴⁶⁾, full name, date of birth, date of graduation⁴⁷⁾, personal medical information⁴⁸⁾, name of a disease of recipients of medical treatment, number of days for medical treatment, code(number) of institution that issued prescription, issue number of prescription⁴⁹⁾, investigative related data⁵⁰⁾, name of debtor, address, resident registration

41) 헌재 2005.5.26. 99헌마513.

42) 헌재 2005.7.21. 2003헌마282.

43) 대법 1998.7.24. 96다42789.

44) As a similar opinion, Junil Lee (2011: 88); Andreas Geiger, "Die Einwilligung in die Verarbeitung von persönlichen Daten als Ausübung des Rechts auf informationelle Selbstbestimmung", NVwZ 1989, 36.

45) 헌재 2005.5.26. 99헌마513; 2005.7.21. 2003헌마282.

46) 헌재 2005.5.26. 99헌마513.

47) 헌재 2005.7.21. 2003헌마282.

48) 헌재 2008.10.30. 2006헌마1401.

number, the ground of execution, amount of debt that hasn't been performed, record reasons, dates⁵¹⁾, and etc, would conform to individual information that would be protected by the right of self-determination to individual information. DNA information can also be included, in that it is information that identifies uniformity of an individual.⁵²⁾

Subsequently, the Constitutional Court sees that acts of investigation, collection, retention, disposal, and use are, in principle, restriction to the right of self-determination to individual information.⁵³⁾ Accordingly, we can see that articles of the DNA Identification Act that have been legislated for the purpose of collection, analysis, retention and use conform to the legislation that restricts the rights of self-determination to individual information.⁵⁴⁾

2. Review of Important Issues

In this way, the right of self-determination to the individual information can be restricted through the articles of the DNA Identification Act. These restrictions can be possible because this right is not absolute fundamental rights. However, it is separate matters whether this act violates constitutional principles like below.

49) 헌재 2009.9.24. 2007헌마1092.

50) 헌재 2009.10.29. 2008헌마257.

51) 헌재 2010.5.27. 2008헌마663.

52) There is an argument that deducts the right to the DNA information management control. This right emphasizes characteristics of genetic information from the right of self-determination to individual information. Regarding this point, refer to Deokyoung Jung, "The Constitutional Review for DNA Database", Chungbuk National University Institute Journal, Vol. 20, No. 2, The Law Research Institute, Chungbuk National University, 2009, 168.

53) 헌재 2005.5.26. 99헌마513; 2005.7.21. 2003헌마282.

54) In addition, collecting DNA samples inevitably causes infringement on the body of individual through collecting blood or buccal cell. Accordingly, it is related to the personal liberty according to the Article 12 Clause 1 of the Constitutional Law and the right not to injure individual body of the Article 37 Clause 1 of the Constitutional Law.

1) Principle of Prohibition of Excess

Above all, the principle of prohibition of excess can be concerned in this matter. This principle reviews the unconstitutionality of this act while dividing itself to the legitimacy of objective, suitability of means, minimization of damage, and proportionality of legal interests. First, the DNA Identification Act aims at crime investigation, crime prevention, and protection of rights and interests. Regarding the legitimacy of objective, it can be examined whether crime investigation and crime prevention can conform to constitutional “maintenance of order (Article 37 Clause 2, the Constitutional Law)” which can limit freedom and rights of citizens. While leaving whether crime investigation and crime prevention belong to purpose that has clear contents off, it appears that counterargument cannot be raised against the legitimacy of this legislation of this act.

Secondly, the DNA Identification Act uses measures of analyzing DNA information and loading it to the database for the purpose of crime investigation and prevention. In this regard, crime investigation refers to arresting criminals and uncovering the truth regarding the crimes committed. And crime prevention refers to deterring occurrence of crimes and preventing offense recommitment of certain people. It cannot be denied that DNA identification and data retention are efficient means as in arresting criminals. However, regardless of if this act intends the general prevention effect or special prevention effect whether the DNA data analysis and its retention can be effective measures as in prevention effect should be examined through empirical data and objective verification.

Thirdly, the DNA Identification Act restricts the right of self-determination to individual information of the nationals for the purpose of crime investigation and prevention. Additional examination is required to whether this restriction minimizes damages. Under the category of minimization of damage, extent of subjects whose DNA samples would be collected and retained, unconstitutionality of the process of DNA collection, period of retention of DNA identification data, and etc. would

be concerned. Examination in detail would be done in the next chapter.

Fourthly, it has to be examined whether it is proportionate to cause damage to the right of self-determination to individual information of prisoners or detained suspects for the benefits from legislative purpose which are crime investigation and prevention. Utilizing DNA database for the purpose of crime investigation and prevention can be efficient. However, since DNA information entails more information about individuals than other types of information, and it is sensitive information that can disclose family relations going over personal information, it can be said that the damage done to the individuals is bigger than benefits of legislative purpose. Consequently, it is hard to see this act fulfils the proportionality of legal interest.

2) Due Process and Warrant

The Constitutional Law provides that warrant has to be issued by the judiciary on request of the prosecutor when arresting, imprisoning, confiscating and searching (Article 12 Clause 3, the Constitutional Law). The DNA Identification Act doesn't appear to violate the principle of warrant requirements in that the warrant is required when collecting DNA samples.⁵⁵⁾ However, the clause that accepts exceptions when the consent is given violates the Constitutional Law. As an exception that is admitted by the Constitutional Law, the post warrant can be requested when there is a risk of escape or destruction of evidence after committing a crime corresponding to serving a sentence of more than 3 years or when there is a case of flagrant offender (Article 12 Clause 3, the Constitutional Law) Also, the exception of the principle of warrant requirement can be admitted when it's under the emergency martial law (Article 77 Clause, the Constitutional Law). The fact that the Constitutional Law provides exceptions to

55) Hojoong Lee (2012: 15).

the principle of the warrant requirement means the other exceptions cannot be admitted. Consequently, this act regarding the consent as an exception of warrant requirement violates the Constitutional Law.⁵⁶⁾

Even if we can admit the exception of the warrant requirement because collecting the samples under the DNA Identification Act doesn't conform to 'legal disposition', collecting samples by the consent can be problematic. Above all, it is hard to expect voluntary consent from the detained suspects or prisoners. Detained suspects or prisoners are intimidated compared to the ordinary persons, and the voluntary consent can be limited because of fear of imprisonment or disadvantage of treatment.⁵⁷⁾ And investigative agencies could take advantage of this circumstance and abuse collecting samples under the consent. Also, the Article 8 Clause 3 of the DNA Identification Act doesn't regulate valid requirements enough, which increases the risk of abuse.⁵⁸⁾

Furthermore, regardless of whether we accept this exception of warrant requirement with the personal consent or we strictly adhere to the principle of warrant requirements, the consent given once enables to collect, analyze, retaining and use DNA further. And thus the Article 8 of the DNA Identification Act possibly violates the Constitutional Law.

56) Junil Lee (2011: 89).

57) Jesung Ryu, "The Constitutional Challenge to the Current DNA Act and Its Investigative Problems (Problems of the Act on the Use and Protection of DNA Identification and Policy Directions)", presented at the parliamentary discussion on June, 29th, 2011, 19 ff. According to the cases that have been proved so far, DNA sample collection is conducted by the prosecutors sending 'the Notice regarding DNA Sample Collection'. And this notice does not entail any details regarding refusal or consent that are provided in the Article 8 Clause 3 of the DNA Identification Act and the procedures for the written consent are not taken.

58) It order to make the consent valid, explanation regarding method of DNA sample collection, information that comes from identification process, meaning and effects of disposition conducted for the DNA identification, and use of DNA information should be premised. About this point, refer to Hojoong Lee (2012: 19).

3) Presumption of Innocence

The Constitutional Law provides the principle of presumption of innocence of suspects or defendants that presumes innocence before receiving a judgment of guilty (Article 27 Clause 4, the Constitutional Law). In other words, whether the verdict is guilty or not guilty, the criminal suspects or criminal defendants should be regarded as not guilty before the final judgment, and the penalty regarding this status has to be limited to be minimum. Hence, even if checking on the DNA matches of the suspects to the crime scene DNA data is allowed, retaining the data on the database or randomly comparing the sample to data of other crime scenes possibly violates the principle of the presumption of innocence.⁵⁹⁾

4) Other Issues

In addition to these, the DNA Identification Act possibly violates the prohibition of cumulative punishment, the prohibition of implicative system, the principle of equality, and the prohibition of extensive delegated legislation.

Above all, the Constitutional Law provides the principle of prohibition of cumulative punishment (Article 12, the latter part of the Clause 1, the Constitutional Law). However, collecting DNA samples from the prisoners of certain crimes which have high possibility of offense recommitment is another cumulative punishment to a criminal act, and this possibly violates the principle of prohibition of cumulative punishment.⁶⁰⁾

59) Gaeweon Seo, "Problem and Improvement for the Use and Protection of DNA Identification Act", *International Constitutional Law Review*, Vol. 16, No. 2, *Korean International Constitutional Law Review*, 2010, 220; Yangkyun Shin (2010: 71); Jibong Lim, "The Constitutionality and Other Problems of the Bill on the Use and Protection of DNA Identity Establishment Information and Its Alternative", *Sogang Law Journal*, Vol. 11, No. 2, *Institute for Legal Studies, Sogang University*, 2009, 118; Deokyoung Jung (2009: 170).

60) Gaeweon Seo (2010: 216); Jibong Lim (2009: 118).

Next, the Constitutional Law restricts the implicative system that could cause disadvantage through acts of relatives (Article 13 Clause 3, the Constitutional Law). DNA data includes not only the information about oneself but also of one's relatives, the information of the relatives can be disclosed through the database without consent. Therefore, close relatives of the suspects or the prisoners can receive disadvantageous treatment, and this possibly violates the prohibition of implicative system.⁶¹⁾

Next, the Constitutional Law articulates that all the people are equal before the law (Article 11, the Constitutional Law). Equality in this regard is not an absolute one that excludes all the discrimination, but a relative one that excludes discrimination without reasonable grounds. Accordingly, discrimination having reasonable grounds can be justified. From this perspective, it is not clear under what ground the DNA Identification Act perceives the prisoners and detained suspects as the subjects requesting equal treatment. Also it is not clear how the prisoners and detained suspects are distinguished from suspects without detention. Also, under what ground crimes that are listed in the DNA Identification Act are requested to be treated equally, and what reasonable differences there are between the listed crimes and crimes that are not listed could be concerned as well.⁶²⁾

Finally, the Constitutional Law provides a Presidential Decree can decide necessary details in order to execute the laws and details that are delegated by law with specific extent (Article 75, the Constitutional Law). The DNA Identification Act allows the details regarding DNA sample identification, retention to the database, access to the retained data and use to be delegated or consigned by the person or institute that are decided by the public prosecutor

61) Jibong Lim (2009: 121).

62) Gaeweon Seo (2010: 225); Junil Lee (2011: 90); Jibong Lim (2009: 116).

general or the police chief with the Presidential Decree (Article 10, the DNA Identification Act). Also it delegates necessary details for the DNA data searching and report to the Presidential Decree (Article 11, the DNA Identification Act). This means practically all the details regarding collecting DNA data and using it further are extensively delegated. However, it means this act cannot predict the general contents that can be decided by the Presidential Decree, and thus, this possibly violates the prohibition of extensive delegated legislation.⁶³⁾

63) Junil Lee (2011: 91).

Chapter 3

Review on Legitimacy of the DNA Identification Act from the Perspective of Criminal Law

The DNA Identification Act is placed in risk management of criminal policies, and it possibly violates constitutional principles such as prohibition of excess, warrant requirement, presumption of innocence, etc. Nevertheless, the demand in individual safety against the crimes is rapidly increasing, and there are more people who claim the necessity of this act. As we discussed earlier, the DNA Identification Act has been enacted in this background. Now the implications of this act regarding criminal policy would be examined, and the purpose of this legislation and its criminal legitimacy would be followed. Also, improvement suggestion that can reduce this possible unconstitutionality would be examined as well.

Review on Legitimacy of the DNA Identification Act from the Perspective of Criminal Law

I. Implications for Criminal Justice Policy

1. Safety vs. Freedom and Protection of Privacy

The conflicts between effective enforcement of law · safety, and protection · freedom of privacy can be easily found in the discourse of the modern Criminal Law and the Criminal Procedure Law. This discussion deals with safety issues in the modern society, and particularly it covers the role of the Criminal Law for the purpose of safety. The role of the Criminal Law is shifting in the direction of reinforcing safety, and the Criminal Law is placed as a part of new structure of “safety.”

Particularly, starting from late in 1990s, as there has rapidly increased risks

and danger from the crime networks and international terrorism, it has been justified that the Criminal Law and the Criminal Procedure Law change for the purpose of safety.⁶⁴⁾ In this regard, the concept of safety combines with narrow meaning of risks coming from serious crimes or particular violence. The concept of safety is shifting in the direction of combining interior safety and exterior safety, and it allows blurring the lines between the military and law enforcement, the outside information institution and inside information institution, and the information institutions and law enforcement agencies.

What is important in comparing safety to the freedom and protection of privacy is that the basic condition of freedom lies in safety. In this perspective there cannot exist conflicts between freedom and safety. It is because freedom does not exist without safety. In other words, an individual can have one's human rights and fundamental rights in the safe circumstance. However, safety in this perspective has to be understood as a broader concept. Particularly, as to discuss social safety, safety has to include all types of safety. Thus, in this respect, the issues on what type of safety is pursued and what risk threatens safety become important.⁶⁵⁾

2. Necessity of Information Collection

Next, how much information and data would be needed as in state law enforcement in order to identify an individual and effectively implement the Criminal Law would be an important matter to discuss. Currently, many states

64) Sungyong Cho, "Changes to Criminal Procedural Law and Its Function in Germany", *Dankook Law Review*, Vol. 27, Institute for Legal Studies, Dankook College of Law, Dankook University, 2003, 300 ff.

65) Hans-Jörg Albrecht, "Security, Crime Prevention and Secret Surveillance: How Criminal Law Adjusts to the Challenges of a Global Risk Society", presented at the Asian Criminological Society 4th Annual Conference, 2012, 144 ff.

are collecting individual information regarding safety issues, and a number of human rights groups are claiming that this constitutes infringement on human rights regarding protection of privacy.⁶⁶⁾

If retention of individual information is justified because the mere purpose of law enforcement lies in maintenance of public safety, all types of individual information can be retained with having no reasonable grounds for this purpose. However, all types of individual information cannot be loaded only for the purpose of public safety. If we expand the criminal policies in the direction of preventing all types of risks for public safety, it would result in excluding all the individual freedom eventually.⁶⁷⁾ This is a result opposing the original purpose of safety for the freedom.

3. Principle of Proportionality and Information Collection

Therefore, discussions regarding data collection according to the Criminal Law once again head to the principle of proportionality. Investigation with DNA information collection possibly violates the principle of proportionality with regard to the procedural rights of people whose DNA samples are taken. In particular, one's confidence that his information is not monitored by the state is very important in a democratic law-governed state. It is because a risk of personal information to be permanently monitored by the state results in the citizens who cannot entirely exercise their fundamental rights.⁶⁸⁾

In this context, it is important to examine proportionality between benefits coming from DNA information collection and retention, and benefits coming from individual fundamental rights. It is because personal privacy and the

66) Hans-Jörg Albrecht (2012: 145 ff).

67) As a similar opinion, Sungyong Cho (2003: 334).

68) Hans-Jörg Albrecht (2012: 146).

essence of freedom should not be infringed even when collecting and retaining one's DNA information. Therefore, when collecting and retaining one's DNA information, procedural justice has to be functioned for preventing crimes and pursuing safety, and there have to be grounds written in law in order to allow this.⁶⁹⁾

4. Civil Trust toward Government Institutes

Collection of DNA sample and information should be conducted based on the civil trust toward the state and governmental institution. Unfavorable opinions that were suggested by the civic groups and the academics were also partly caused by the fact that this trust has not been well established yet. In a democratic law-governed state, how civil trust toward government institutes including law-enforcing agencies is related to the state capacity to restrict individual privacy has not been discussed much. Regarding this, when it comes to applying the principle of proportionality, the transparency of statistical information regarding collecting DNA data can be considered as well.⁷⁰⁾

II. Legitimacy of Legislative Purpose

The Article 1 of the DNA Identification Act provides, "this act appoints details needed to collect, use and protect the DNA identification information, and it aims at contributing to crime investigation and prevention as well as protecting rights and interests of the nationals." In other words, this Act has its purpose of crime investigation, crime prevention, protection of rights and interests. These purposes have different legal terrains respectively. The purpose of crime

69) Hans-Jörg Albrecht (2012: 146 ff).

70) Hans-Jörg Albrecht (2012: 148 ff).

investigation belongs to the Criminal Law, and the purpose of crime prevention comes under the Police Act, while the purpose of protecting rights and interest belongs to the Constitutional Law.⁷¹⁾ We would like to examine the original legislative purpose centered around each purpose, and see if setting these purposes on this act would be proper or not.

1. Purpose for Crime Investigation

Considering that it is hard to obtain evidences from crime scenes, forensic science utilizing DNA identification information enables effective crime investigation even with small amounts of sample. This investigative method could establish investigative practices that respect human rights of the suspects, while breaking away from outdated investigative practices that were centered around a confession.⁷²⁾

However, the current crime investigation does not aim at establishing the DNA database through the DNA identification information, but it has its purpose on collecting and analyzing DNA samples. Therefore, the current crime investigation comes under the Criminal Procedure Law as being a part of inspection in order to identify criminal charges of suspects quickly and precisely. Unlike this, the DNA Identification Act aims at establishing the database based on DNA identification information. If we include crime investigation in the legislative purpose, DNA information of suspects can be retained in the database in order to check in the criminal charges. Again, this would cause a controversy over infringement on the right of self-determination to individual information and

71) Hyekyung Kim, "The Legislative Justness of Law for DNA Database", *Journal of Criminal Law*, Vol. 22, No. 3, The Korean Criminal Law Association, 2010, 239; Youngcheol Yoon, "A Critical Review on the Act on the Use and Protection of DNA Identification", *Hongik Law Review*, Vol. 12, No. 1, The Law Research Institute, Hongik University, 2011, 383.

72) Hyekyung Kim (2012: 242); Youngcheol Yoon (2011: 384).

violation against the presumption of innocence. Accordingly, in order to clear up the legislative purpose, it would be more appropriate to have this purpose of crime investigation reflected in the Criminal Procedure Law rather than in the DNA Identification Act.⁷³⁾

2. Purpose for Crime Prevention

1) Crime Prevention in the Police Act

Crime prevention seems to belong to the Police Act rather than the Criminal Procedure Law in that it early prevents potential criminal procedures in the future.⁷⁴⁾ It is because the Criminal Procedure Law mainly deals with the criminal trial at present rather than criminal actions in the future, and the Police Act primarily copes with prevention of dangers in the future. Generally the ‘repressive’ Criminal Procedure Law can be distinguished from the ‘preventive’ Police Act according to whether the pertinent action is past-looking or future-oriented. According to this division, the task for identification that collects pictures or fingerprints, or measure body of suspects regardless of current criminal suits conforms to preventive action of the police.⁷⁵⁾

However, it is ambiguous to consider the purpose of crime prevention of the DNA Identification Act as merely preventive action. In the first place, the major objective of collecting DNA information and loading it to the database is to obtain evidences for the future criminal prosecution rather than to prevent crimes. Once DNA identification information is loaded in the DNA database,

73) Youngcheol Yoon (2011: 384).

74) Hyekyung Kim (2012: 243); Youngcheol Yoon (2011: 384).

75) Sungyong Cho, “A Review on the Establishment of a Criminal DNA Data Bank”, Korea Law Review, Vol. 48, Legal Research Institute of Korea University, 2007, 991 ff.

criminals can be arrested, in case that the DNA information of the criminals is obtained and there is no suspect in the case. This effective criminal prosecution conforms to the preventive purpose of this Act. In the second place, this DNA Identification Act uses the term “suspects”, and when attempting to collect DNA samples, the warrant is required from the judiciary of the District Court according to the process of the Criminal Procedure Law (Article 8, the DNA Identification Act). In this respect, we can see how it is related to the Criminal Procedure Law.⁷⁶⁾ Lastly, the DNA Identification Act sets its limit on the search, so that the search and report can be conducted only for the criminal procedures on the potential crimes that are expected (Article 11, the DNA Identification Act). This part also shows that DNA sample collection and search can be seen as characteristics of the Criminal Procedure Law.⁷⁷⁾

With these reasons, it is hard to regard that the DNA Identification Act aims at extensive general prevention that corresponds to prevention of risks on the Police Act. However at the same time, we cannot say that this purpose belongs to the Criminal Procedure Law.⁷⁸⁾ It can only be concluded that this act aims at preventing crimes to such an extent that it prevents potential offense recommitment in the future.

76) Sungyong Cho (2007: 993).

77) Youngcheol Yoon (2011: 384 ff).

78) There is a view that collecting and loading DNA information belong to the area of “precautionary crime struggle” and it can be seen as expression of new trend of lawsuit. According to this argument, the purpose of crime prevention in this legislation is related to the lawsuit culture where suppression and prevention are harmonized in the perception of efficient crime struggle. Regarding this point, refer to Sungyong Cho (2007: 993).

2) Prediction and Prevention of Recidivism

a) Evaluating the Possibility of Recidivism

In this way, if we consider the purpose of crime prevention, which is one of the legislative purposes of the DNA Identification Act, as prevention of recidivism in the future, this purpose has to be seen as crime prevention in special prevention which is an attempt to decrease risks of recidivism. It is because retaining DNA information of offenders of certain crimes has not been proved to be effective in general prevention toward ordinary persons.⁷⁹⁾

However, even when a certain person is a offender of serious crimes, there is no specific standard to think that this person has potential risks of re-offending. Therefore, individual prediction and crime prediction which are oriented from the criminology are additionally required. As an example, the Article 81g of the amended Criminal Procedure Law in Germany can be presented. In the German Criminal Procedure Law, the risk of recidivism is evaluated through types of action, performing methods, personality of suspects and other perceivable reasons. In this context, type and methods of an offences refer to all those objective circumstances which are related to the causing action, that is, the type of the crime, seriousness of the crime, intention of the action, recidivism of the action, collectivity of the action post-control effects toward the victims and etc. Next, the personality of suspects refers to subjective factor of the offender, and it means interior attitude that would cause to constantly commit crimes. This internal attitude can be inferred through external circumstances. For example, if this suspect has successfully gone through drug rehabilitation, then there is no risk of recidivism. Finally, other meaningful circumstances by the perspective of criminology can be concerned as well even though it does not come under two previous cases. For example, the empirical studies rule that has been approved

79) Hyekyung Kim (2012: 254).

by criminology can be concerned.⁸⁰⁾

If it attempts to prevent recidivism of offenders of certain crimes, then standards to evaluate risks of recidivism in detail have to be provided in the law.

b) Evaluating Rcidivism Rates

The fact that 11 serious crimes which are provided in the DNA Identification Act have a higher rate of recidivism does not follow that a certain offender of the crime of this category has a higher possibility of recidivism in the future. Also, it cannot be assured that this list of 11 crimes on the DNA Identification Act actually is included in the crimes with higher risks of recidivism. Currently, the statistical data of recidivism in the strictest manner is the reimprisonment rate in three years, and the result is as follows.

Table 3.1 Reimprisonment Rate of People Released in 2007 in 3 years
(Unit: percent, person)

Reasons of Release	Division	Released	Crimes								
			Homicide	Robbery	Sexual Offense	Violence	Larceny	Deceit · Conversion	Drugs	Negligence	Etc
In total	Released	24,151	764	1,361	1,266	2,502	5,026	6,774	2,005	1,890	2,563
	Reimprisoned	5,396	50	313	222	558	2,008	885	833	296	231
	Reimprisonment Rate	22.3	6.5	23.0	17.5	22.3	40.0	13.1	41.5	15.7	9.0

80) Sungyong Cho, “A Review of the DNA Data Bank in Criminal Procedural Law in Germany”, Korean Journal of Criminology, Vol. 19, No. 1, The Korean Association of Criminology, 2007, 164.

General Overview of the DNA Identification Act

Release on the expiration of punishment	Released	16,004	138	638	842	1,959	4,150	4,047	1,989	1,139	1,102
	Reimprisoned	4,645	22	196	175	505	1,755	758	827	229	178
	Reimprisonment Rate	29.0	15.9	30.7	20.8	25.8	42.3	18.7	41.6	20.1	16.2
Parole	Released	8,062	626	700	419	541	842	2,724	16	751	1,443
	Reimprisoned	713	28	105	43	53	231	127	6	67	53
	Reimprisonment Rate	8.8	4.5	15.0	10.3	9.8	27.4	4.7	37.5	8.9	3.7
Expiration of Term of Custody	Released	0									
	Reimprisoned	0									
	Reimprisonment Rate	0									
Conditional Release	Released	63	0	23	5	0	34	1	0	0	0
	Reimprisoned	38	0	12	4	0	22	0	0	0	0
	Reimprisonment Rate	60.3	0.0	52.2	80.0	0.0	64.7	0.0	0.0	0.0	0.0
Amnesty	Released	22									
	Reimprisoned	0									
	Reimprisonment Rate	0									

*Resource: internal administrative statistics, the Correctional Service, Ministry of Justice

Examining homicide or robbery that is listed in the DNA Identification Act, the actual rate of reimprisonment is only 6.5% and 23%, respectively. Therefore, if we attempt to prevent recidivism in the future in the strict manner, the list of crimes that would be applied in the DNA Identification Act has to be readjusted through not only focusing on the specific standards to evaluate risks of

recidivism above but also examining objective data such as the rate of recidivism.

3. Purpose for Protecting Rights and Interests

1) Protecting Human Rights of the Victims and People Involved

Regarding the purpose of protecting rights and interests of this act, some people say that the DNA Identification Act can indirectly protect human rights of the victims and people related through early arrest of the criminals based on this Act.⁸¹⁾ However, the victims and people related are not the ones who are applied with this law. Also, even though there are some benefits these people receive from early arrest through DNA identification, it is only limited to by-effects that are far from the protecting rights and interests which is one of the legislative purposes of this law.⁸²⁾

2) The Rights of Self-determination to Individual Information, and Protecting Rights and Interests

Regarding the purpose of protecting rights and interests, fundamental rights on the Constitutional Law, that is, the right of self-determination to individual information should be concerned.⁸³⁾ As mentioned previously, the DNA Identification Act restricts this right of self-determination to individual information for the purpose of crime investigation and prevention. However, as we previously discussed, this restriction has to be properly set within the principle of proportionality. With this perspective, this purpose of protecting rights and

81) Seungwhan Lee (2009: 137).

82) As a similar opinion, Youngcheol Yoon (2011: 385).

83) As a similar opinion, Hyekyung Kim (2012: 257).

interests can be seen as declaratory provisions which would enable to maintain this propriety. Most articles that are provided in this act, that is, the list of crimes, subjects, methods for collecting and analyzing DNA samples, methods for retaining DNA information, managerial entity of the database, disuse of samples, retention of information, and deletion of data are related to restriction of the right of self-determination to individual information. Whether these clauses properly restrict the right of self-determination to individual information, while abiding by the principle of proportionality, would be examined in detail in the next chapter.

3) Familial Searching and the Right of Self-determination to Individual Information

DNA identification in this Act refers to examining and analyzing particular DNA sequence that does not include genetic information as well as obtaining DNA identification information for the purpose of identifying an individual. In this respect, the particular DNA sequence that is used for identifying also has information regarding family as genetic information. Therefore, even though there is no exact DNA information that matches with the DNA samples from the crime scene, when similar DNA is searched, it can be used for investigation with the possibility that the relatives can be suspects of the case. This investigation method is called familial searching.⁸⁴⁾ When familial searching is conducted, DNA identification information cannot be seen as being limited to one individual. Regarding this, the issue of infringement on the right of self-determination to individual information can be raised again.⁸⁵⁾ Even when

84) Myunsoo Han, "The Role of DNA Profile in Forensic Science and Evidential Trial", *The Journal of Police Science*, Vol. 4, Korea National Police University, 2003, 269.

85) Hyekyung Kim, "A Study on Efficiency and Rightfulness of DNA Information Collection", *Yonsei Journal of Medical and Science Technology Law*, Vol. 2, No. 1, Institute for Legal Studies, Yonsei University, 2011, 182 ff.

the DNA identification was conducted with the consent of the individual, it entails risks of disclosing information of other people. Currently, the DNA Identification Act does not have any clauses that covers this matter. Considering the legislative purpose of protecting rights and interests of relevance to the right of self-determination to individual information, the clauses regarding familiar searching should be supplemented.

III. Review on Major Issues

1. Legal Characteristics of Acts Concerned

1) DNA Collection and Analysis for the Current Criminal Prosecution

Generally in the criminal procedure, if there is no consent, the act of collecting DNA is legal disposition for compulsory investigation and it has to be conducted along with the principle of warrant requirement.⁸⁶⁾ In the criminal procedure law, as the act of collecting DNA samples which is conducted for the general criminal procedure is limited to deal with an exterior part of body without any infringement of body, we can say that it is approved by the warrant for medical inspection(Article 141 Clause 1 and Article 219 of the Criminal Procedure Law).⁸⁷⁾ Meanwhile, analyzing DNA samples is different from the act of collecting which is related to the physical completeness in that the fundamental rights such as rights of self-determination to individual information

86) Jungnyum Lee, "The Necessity of and Direction on the Criminal Legal Discussions on DNA Data", Korean Journal of Criminology, Vol. 21, No. 1, The Korean Association of Criminology, 2009, 105 ff.

87) Sungyong Cho, "Introducing DNA Fingerprint Identification and Its Limitations in Criminal Procedural Law", Korean Criminological Review, Vol. 15, No. 2, Korean Institute of Criminology, 2004, 77 ff.

are restricted. In this regard, DNA analysis is approved by the permit of disposition necessary for expert opinion in that this Act has its characteristics that needs professional knowledge and experience(Article 221 Clause 4, the Criminal Procedure Law). Then what kind of legal act is collection and analysis of DNA provided by the DNA Identification Act?

2) DNA Collection and Analysis for Potential Prosecution

Regarding this, the Ministry of Justice regards that the collection and analysis of DNA by the DNA Identification Act imposes a duty of cooperation as a warning for potential possibility of offense recommitment rather than the trial or execution of sentence. Therefore, the Ministry of Justice indicated its stance that warrant is not needed for search or fact-finding, because utilizing DNA information is not a mandatory investigation with disadvantages, but it is merely identification of an individual like utilizing fingerprints.⁸⁸⁾

However, the act of retaining DNA information conforms to the act of obtaining evidence for potential crime investigation and prosecution in the future. This act cannot be seen as a simple duty of cooperation close to the criminal investigation conducted on a non-compulsory basis rather than legal disposition according to the Criminal Procedure Law. Also, it cannot be seen as an act close to the task for identification in the Police Act. Of course, it can be similar to collection and handling of fingerprints according to the Police Act, in that it gathers evidences beforehand in preparation of potential crimes rather than pertinent crimes.⁸⁹⁾

88) Law Times, 2009.06.01. Aside from this, there is a view to understand this action as security measures (Dongkyun Park & Younggu Hwang (2008: 108 ff)). However, considering suspects who haven't received a sentence, this action cannot be seen as security measures.

89) Concerning this, there is a view that DNA information and fingerprints cannot be regarded

However, the purpose of collecting DNA information in the DNA Identification Act, as previously mentioned, should be seen as gathering evidences according to the Criminal Procedure Law for preventing potential offense recommitment, rather than crime prevention in the broad sense. Therefore, the act of collecting and handling DNA identification information from related people to obtain evidences for potential crime investigation and prosecution should be understood as legal disposition in the Criminal Procedure Law that restricts personal liberty and the right of self-determination to individual information .⁹⁰⁾

2. Target of DNA Sample Collection and List of Applicable Crimes

1) Target of DNA Sample Collection

a) Detained Suspects

Above all, DNA information of detained suspects can be retained according to this Act. DNA sample of suspects can be collected and used for the pertinent case, but loading DNA information in the database is strongly criticized for violating the principle of presumption of innocence, in that this treats a person without a judgment of conviction as a criminal.⁹¹⁾ In this regard, it can be

the same because DNA information has much higher possibility of being revealed, abused and misused. For this view, refer to Eunwoo Lee, "How to Deal with Heinous Crimes such as Homicide or Rape", the public hearing on legislation co-held by the Ministry of Justice and the Ministry of Public Administration and Security, 2009, 91. Also, it can be argued that this comparison is not appropriate, because legal grounds on collecting and handling fingerprints are weak. For this argument, refer to Changik Oh, "How to Deal with Heinous Crimes such as Homicide or Rape", the public hearing on legislation co-held by the Ministry of Justice and the Ministry of Public Administration and Security, 2009, 80.

90) Sungyong Cho, "A Critical Review on the Act on the Use and Protection of DNA Identification", Korean Criminological Review, Vol. 21, No. 3, Korean Institute of Criminology, 2010, 237.

91) Hyekyung Kim, "The Legislative Justness of Law for DNA Database", Journal of Criminal Law, Vol. 22, No. 3, The Korean Criminal Law Association, 2010, 253; Yongchul Park, "Reconsidering Getting a DNA Evidence from Suspects", Korean Journal of Criminology, Vol. 18, No. 2, The

refuted that the warrant of DNA sample collection issued by the judiciary can resolve this matter. However, this warrant only is issued regardless of specific charges of the potential crimes.

Also, the ground supporting that whether the suspects are detained or not becomes a standard of retention of DNA information is not clear. Detained suspects are included in the applicable subjects for DNA sample collection, because their identities are already procured and this fact makes sample collection easy. However, it cannot be seen as discrimination by the rational standard, and thus it possibly violates the principle of equality.⁹²⁾ In the case of detained suspects, there is no risk of offense recommitment because the investigation process is conducted under the status of detention. Therefore, the DNA information does not have to be stored. In this regard, retention of detained suspects' DNA information has its purpose in checking additional crimes of detained suspects. However, this is an illegal investigative method for additional crimes.⁹³⁾

b) Prisoners

Next, according to this law, DNA information from the prisoners can be retained as well. In this case, violation of the presumption of innocence can also be raised like the case of suspects,⁹⁴⁾ because DNA samples are collected and the information is retained with the premise of potential crimes rather than the

Korean Association of Criminology, 2006, 23; Youngcheol Yoon (2011: 390); Gaeweon Seo (2010: 219); Yangkyun Shin (2010: 71); Sungyong Cho (2010: 237).

92) Gaeweon Seo (2010: 225); Jibong Lim (2009: 116 ff).

93) Yangkyun Shin (2010: 77).

94) Gaeweon Seo (2010: 217); Youngcheol Yoon (2011: 389); Sungyong Cho (2010: 242 ff); Dongyiel Syn, "On the Use of DNA Databases for Forensics", Korean Journal of Criminology, Vol. 24, No. 1, The Korean Association of Criminology, 2012, 28.

pertinent crime. If it sets prisoners as applicable subjects for the purpose of offense recommitment prevention, then specific standard to predict risks of offense recommitment has to be prepared in advance, as previously mentioned in the legislative purpose. In addition, in the case of prisoners, the time to load information in the database would be controversial. It appears to be advisable to set this at the end of sentence execution, rather than at the time of a judgment of conviction as provided in this Act. It is because human rights of prisoners and demands in their re-socialization have to be preferentially considered.⁹⁵⁾

And also, this act includes people who are confirmed with probation, medicare under probation, and protective disposition in the applicable subject category. However, this action per se belongs to disposition for preventing of offense recommitment. Therefore, retention of DNA information due to prevention of offense recommitment results in aggravated unfavorable disposition, and it possibly conflicts with the principle of proportionality. Furthermore, this Act is intended for the minors confirmed with protective disposition in the Juvenile Act. However, considering the idea of juvenile protection that lets minors be treated differently from the adults, this clause also possibly violates the principle of proportionality.⁹⁶⁾

c) Crime Scenes

Lastly, according to this Act, DNA information obtained from the crime scenes and etc. can be retained as well. In this case, the relevance to a particular crime has not been clearly specified unlike the case of suspects or prisoners. Therefore, DNA samples can be collected from what has been found in the crime scenes that are not related to a particular crime or what has been found

95) Yangkyun Shin (2010: 77); Youngcheol Yoon (2011: 389).

96) Yangkyun Shin (2010: 78); Youngcheol Yoon (2011: 391).

from interior or exterior of injured victim's body. However, this appears to be against the original legislative purpose that attempted to resolve unnecessary human rights infringement, or misuse and abuse of DNA information through classifying specific crimes.⁹⁷⁾

2) List of Applicable Crimes

The DNA Identification Act lists 11 types of crimes that would be applied in this Act. Examining propriety of these types of crimes would be as follows. First of all, in the case of parricide or part of crimes in the Act on Aggravated Punishment of Specific Crimes, reexamination would be required because it does not have high possibility of offense recommitment after the discharge due to long-term sentence such as life imprisonment. Second of all, kidnap or invitation according to the Criminal Law has a possibility of overlap with kidnap or invitation according to the Act on Aggravated Punishment of Specific Crimes, because these crimes are according to the Act on Aggravated Punishment of Specific Crimes and thus most of these are aggregately punished. It is advisable to delete the crime of kidnap or invitation in the Criminal Law. Thirdly, larceny is basically a crime that is not directly related to serious infringement on life, body and freedom. Therefore, in the case of aggravating illegality because of act circumstances or act manners such as trespass upon residence at night for stealing or special larceny in this Act, these crimes should have been evaluated as equivalent to serious crimes as in illegality. Also, when evaluating it has high possibility of offense recommitment because of recidivism, there should have been illegality that can be seen as equivalent to the serious crimes. In this regard, it is advisable that the clauses of punishing the trespass upon residence at night for stealing, special larceny, and the habitual and repeated offenders of

97) Sungyong Cho (2010: 245).

the simple larceny would be deleted from the list. Fourth of all, the Article 2 and 3 of the Act on Punishment of Violences and etc. are applied when the crimes such as violence, threat, violation of domicile, non-acceptance to eviction and damage property in the Criminal Law are repeatedly committed, or when the crimes are committed in a way of showing force of organizations or groups, or force of feigned organizations or groups. These crimes also appear to be on the subject crimes because of recidivism or collectivity. However, uniformly applying the same standard to minor crimes such as violation of domicile, non-acceptance to eviction and property damage possibly violates the principle of proportionality. Furthermore, violence that includes various types of crimes such as injury, violence, threat, arrest · confinement, capture · invitation, intimidation, destruction, etc cannot be uniformly seen as serious crimes. In this regard, this list of crimes is required to be reexamined.⁹⁸⁾ Fifth of all, regarding the range of application for these particular crimes, it is not clear whether the accomplice or the attempted are included in this. And the clear legislation would be required here.

3. DNA Samples and DNA Identification Information

1) Collecting, Analyzing, and Discarding DNA Samples

a) Suspects, Prisoners and etc.

According to the Article 8 of this Act, when there is no written consent, DNA samples can be collected through the warrants issued by the judiciary. However, the DNA Identification Act does not have any procedural clauses regarding analyzing samples that are already collected.⁹⁹⁾ Therefore, this law does not

98) Yangkyun Shin (2010: 75 ff); Youngcheol Yoon (2011: 388 ff); Hyekyung Kim (2010: 255 ff); Sungyong Cho (2010: 232 ff).

require judiciary warrants when it comes to analyzing the DNA samples collected from suspects and etc. Collecting DNA samples without the premise of DNA analysis can be seen as meaningless, or DNA analysis can be limited to be subordinate acts to collection of DNA samples.¹⁰⁰⁾ However, collection of DNA samples and its analysis are acts infringing dissimilar fundamental rights such as physical completeness and the right of self-determination to individual information. Therefore, for justifying the DNA analysis, additional legal grounds would be needed. Considering that DNA analysis itself has its characteristic requiring professional knowledge and experience, the permit of disposition necessary for expert opinion (Article 221 Clause 4, the Criminal Procedure Law) would be needed.¹⁰¹⁾

b) Crime Scenes and Etc.

When collecting DNA samples from the crime scenes and etc., the DNA Identification Act does not require the warrant for DNA sample collection. However, the right of self-determination to individual information of the person not identified would be also infringed in this case as well. The meaning and purpose of principle of warrant requirements lie in protecting fundamental rights of persons related through independent control institutes aside from prosecution institutes, and this independent institution legally controls compulsory measures in the Criminal Procedure Law. In this respect, there is no reason to treat this unidentified person differently from the person who is identified such as suspects or prisoners. At this time, when the judiciary issues the warrant,

99) According to the Article 10 Clause 1 of this Act, it is provided that the Public Prosecutor General and the Chief of National Police Agency can delegate or consign identification of DNA samples collected from suspects and etc. to the DNA Identification Information Administrator.

100) Hyekyung Kim (2010: 246 ff).

101) Sungyong Cho (2010: 240 ff).

benefits of unidentified person can be considered enough with the typical evaluation means. Likewise, for analyzing the DNA samples, the permit of disposition necessary for expert opinion issued by the judiciary additionally would be required.¹⁰²⁾

2) Loading, Searching, Reporting, and Deleting DNA Identification Information

a) Loading, Searching and Reporting DNA Identification Information

Following the procedure of the DNA Identification Act, DNA identification data which are legally collected can be loaded in the database without having the warrant from the judiciary. Collecting DNA samples and loading DNA information in the database become a premise for further comparison with other information, and search as well as report. Accordingly, it is advisable that contents regarding the further use of DNA information would be specified in the warrant of DNA sample collection.¹⁰³⁾

What is primarily problematic about entering DNA information is that whether application of the supplementary provision of this act violates the prohibition of a retroactive effect.¹⁰⁴⁾ Loading DNA information in the database can be

102) Sungyong Cho (2010: 247).

103) Sungyong Cho (2010: 242); Manseong Hwang, "A Debate on Forensic Applications of DNA Databases", Korean Criminological Review, Vol. 18, No. 1, Korean Institute of Criminology, 2007, 195.

104) According to the Article 2 of the Supplementary Provisions, DNA sample can be collected and its information can be further loaded to the database from 1) people detained by confirmed sentence at the time of enforcement of this Act, 2) people who are detained at medical treatment and custody facilities or the youth detention center by receiving a sentence of medical under probation according to the Act of Medical under Probation, or decision of protective disposition according to the Article 32 Clause 1 Number 9 or 10 of the Juvenile Act, 3) detained suspects for specific crimes, or 4) subjects of medical treatment and custody who are imprisoned for protection according to the Act on Medical Treatment and Custody.

understood as legal disposition in the Criminal Procedure Law as previously examined. Hence, whether the prohibition of a retroactive effect would be applied to the change of provisions in the Criminal Procedure Law would become a key indicator. Generally, it is interpreted that the clauses regarding the procedure do not apply the principle of prohibition of a retroactive effect.¹⁰⁵⁾ For this reason, the Article 2 of the supplementary provisions of this Act does not violate the prohibition of a retroactive effect. However, applying this Act to all the people who are imprisoned after receiving sentence of particular crimes before the enactment of this law can be problematic when considering the principle of prohibition of excess.¹⁰⁶⁾

According to the Article 11 of the DNA Identification Act, when it is applied to each number of this Article, searching or reporting DNA identification information can be conducted.¹⁰⁷⁾ If it is provided that the pertinent information can be searched or reported while going over the original purpose of potential crime investigation and prosecution, a warrant of search and seizure would be required to be issued from the judiciary. It is because the random search and report of DNA identification information would infringe the right of self-determination to individual information. From this perspective, it is hard to see that the current contents of each number that is provided in the Article 11 Clause 1 of this Act can control random search and report. Additional clauses controlling this matter would be needed.¹⁰⁸⁾

105) As a representative literature, Jaesang Lee, A General Theory of Criminal Law, Pakyoungsa, 2008, 19.

106) Sungyong Cho (2010: 249).

107) According to the Article 11 Clause 1 of this Act, DNA information can be searched or reported 1) when loading new DNA information to the database, 2) when there is a request from prosecutors or judicial police officers for the purpose of crime investigation or investigation of a person accidentally killed, 3) when the court inquires into the fact in a criminal trial, and 4) when the search or report is needed in order to compare to the database.

b) Deleting DNA Identification Information

DNA identification information would be deleted only when innocence, dismissal, judgment of dismissal of prosecution or decision of dismissal of prosecution to prisoners is confirmed through the retrials, or when the person related is dead. Considering that the retrial is limitedly conducted, most of the prisoners' data are retained right before they are dead. This can be regarded as actions violating the protection of basic human rights of prisoners, demand in re-socialization, and the principle of prohibition of excess.¹⁰⁹⁾ Regarding this matter, we can think of the resolutions to evaluate whether to delete the data or not within the certain amount of time for each case while considering prisoners' individual circumstance. Or the way to delete the DNA data uniformly after a certain amount of time can be concerned as well.

When it comes to suspects, their DNA information would be deleted when they receive non-prosecution not to institute a public action, or when the procedure is terminated with acquittal or formal trial, or when the suspects are dead. Aside from these cases, when the DNA data is found to be gathered in a procedurally illegal manner, it has to be deleted as illegally seized evidence.¹¹⁰⁾

108) Youngchan Yoo & Youngmin Jang, "A Study on the Direction and Development of Forensic Science for Police Investigation - Establishment of a DNA Data Bank and Its Use", 1998 Police Science Journal, Vol. 14, Police Science Institute, Korean National Police University, 1998, 513; Hojoong Lee (2012: 16 ff). On the other hand, there is a view that search and report of DNA information can be controlled with this provision. For this argument, refer to Sungyong Cho (2010: 250).

109) Yangkyun Shin (2010: 79 ff); Youngcheol Yoon (2011: 394); Sungyong Cho (2010: 252 ff).

110) Yangkyun Shin (2010: 80).

4. Management of DNA Database

1) Dualism of Management

According to this Act, DNA database is operated by both the Prosecution and the Police, while maintaining dual management. This issue of managing entity has been always controversial starting from the legislation process and to the post-legislation period. Currently, the Article 4 of this Act provides that the database can be co-managed by the Public Prosecutor General and the Police Chief, and in this way this Act attempts to partly resolve the problems caused by declined effectiveness which is resulted from dual management. Also, the Article 10 of this Act provides that drafting the DNA information and loading it in the database as well as operating the database can be delegated or consigned to a person or an institution decided by the Presidential Decree, so that the managerial entity can be actually unified when the disputes between these two departments are arbitrated. However, for efficiency and fairness of database management, it is preferable for the law to provide unifying managing entities or having a third organization independent from the Police and the Prosecution to operate the database.¹¹¹⁾

111) Gaeweon Seo (2010: 221); Yangkyun Shin (2010: 73); Sungyong Cho (2010: 253). Regarding the management of the database, it has been argued that there is a lack of provisions that covers issues of handling DNA information collected before the enactment of this act. The National Police Agency conducted identification of 124,933 DNA samples up until 2005 through the National Forensic Science, and proceeded loading it to the database. Also the prosecution said they retain DNA samples and identified data in case there is a need to check the data again due to arrestment of new suspects. However, the DNA Identification Act has not revealed whether DNA information that have been collected so far would be retained in the database according to this law, or the data collected so far would be discarded, then the database would be newly established. Regarding this matter, refer to Gaeweon Seo (2010: 221).

2) Status and Operation of the DNA Identification Information Management Committee

At present, the DNA Identification Information Management Committee is composed of 7 members including 1 chairperson. This Committee is made up by 4 members recommended from the Prosecution and 3 members recommended from the Police, and the one proposed by the Police takes the chairperson. Most of all, the matter about loading DNA information in the database and deletion of DNA information becomes the center of contents that are deliberated by this committee. Accordingly, it would be advisable to clearly specify this matter in detail in the DNA Identification Act. Next, this Committee has to be operated as an independent deliberation organization. For this, the members of this Committee have to come from people who are not related to DNA investigation.¹¹²⁾ When the members come from the both managing institutions with similar ratios as it is at present, the deliberation is likely to be conducted as an extension of interests of the Prosecution and the Police. Lastly, in order for this Committee to supervise the database as being the third agency, the opinion coming from this Committee should be reinforced so that it has a binding force going over the mere deliberation.

5. Equality of Punishment

The DNA Identification Act provides that one shall be punished when one uses the DNA identification information for other than business purposes or reveals or provides it to others, when one falsely drafts the information or changes it, and when one destructs, conceals, or damages the samples or harms the utility of it. Comparing these cases to the punishment for the crime against

112) Dongyiel Syn (2012, 28 ff).

the occupational leakage of secret, the crime to falsify an official note, the property damage, etc., the level of punishment is similar. Considering the DNA identification data is sensitive while including information about an individual and one's family, the upper limit of the punishment could go higher.

IV. Measurement for Improvement

1. Effective Securement of Legislative Purposes

The DNA Identification Act aims at crime investigation, crime prevention and protection of benefits and interests. Above all, as the current crime investigation comes under the Criminal Procedure Law that regulates criminal procedure in a broad sense, it does not appear to be appropriate to have this as legislative purpose of this Act. Next, we can say that the crime prevention in this Act refers to crime prevention in a narrow sense that aims at preventing potential offense recommitment in the future rather than the 'prevention risks' in a broad sense that is discussed in the police act. For the purpose of this prevention of crimes in this sense, this Act has to provide detailed standards that can evaluate possibility of offense recommitment of offenders in the future. Also, the crimes listed in the DNA Identification Act to enable collection of DNA sample and retention of DNA information have to be examined based on objective statistical data to see if these have actually higher rates of offense recommitment. Lastly, the purpose of protecting benefits and interests can become an standards as to examine whether each clause of this Act properly abides by the principle of proportionality while restricting the constitutional right of self-determination to individual information. With this perspective, the DNA Identification Act is in need of newly legislating clauses that cover familial searching.

2. Direction for Improvement of Respective Clauses

The DNA Identification Act provides that the sample can be collected from detained suspects, prisoners and crime scenes and further analyzed. As for the detained suspects, it is inappropriate to retain their DNA information because it possibly violates the principle of presumption of innocence, and it is hard to distinguish them from suspects who were not detained. As for the prisoners, when we consider that the sample is collected with the premise of occurrence of potential crimes, rather than pertinent crimes, the legal grounds for retaining their DNA information are not clear. If this Act aims at preventing offense recommitment, the samples of prisoners should be collected at the end of execution. Also, when gathering DNA samples from the crime scenes, the relevance to particular crimes has to be clearly specified in order to prevent unnecessary infringement on human rights.

Also, the applicable crimes listed in the DNA Identification Act so that DNA samples can be collected should be readjusted. First of all, out of the 11 types of crimes listed, parricide or some crimes in the Act on Aggravated Punishment of Specific Crimes is not appropriate to be listed because it does not carry higher possibility of offense recommitment. Secondly, the kidnap and invitation have to be deleted because many times it is aggregately punished with the kidnap and invitation according to the Act on the Aggravated Punishment of Specific Crimes. Thirdly, crimes related to larceny should be reconsidered to be enlisted because it does not have same level of illegality to other serious crimes. Fourthly, the violence that includes many types of crimes such as injury, violence, threat, arrest, confinement, kidnap, invitation, intimidation, destruction, etc. cannot be uniformly regarded as serious crime. In this regard, the list of crimes in the Article 2 and 3 of the Act on Punishment of Violences and etc. has to be readjusted as well.

According to the DNA Identification Act, when there is no written consent, DNA samples can be collected with the warrant issued by the judiciary. However, when it comes to DNA analysis and loading in the database, this additional control procedure in this Act is lacked. The additional warrant and control procedure would be needed in that collecting and analyzing DNA samples, and loading DNA information in the database restrict dissimilar fundamental rights. Also, considering that DNA sample collection and analysis from crime scenes restrict fundamental rights of people who have not been identified yet, the additional warrant appears to be needed here as well. Furthermore, when searching and reporting DNA information, additional restriction is needed in order to prevent random search and report. It is hard to expect to control random search and report with the current clauses of the DNA Identification Act, and the more detailed clauses would be required. Also, the clauses regarding deletion of DNA identification information should be in more detail. With the current clauses, information from the prisoners is likely to be retained right before they are dead. For each case, whether to delete the information should be evaluated within a definite period of time while considering individual circumstances of prisoners. Or, DNA information should be uniformly deleted after a certain period of time for all the cases.

3. Database Management and Follow-up Measures

The managerial entity of DNA database should be unified in order to make it efficient and decrease risks of its abuse and misuse. For now, two institutions are dealing with this issue through operating database cooperatively. However, eventually for efficiency and fairness of database management as well as for maintaining its independence from the investigative works, it can be considered that the third agency that is neutral operates the database.

Aside from this, it is needed to clearly specify persons or systems that independently manage or post-control operation of the database. Currently, shifting the operation guide and the status of the DNA Database Management Committee in this Act can be an alternative. For this, above all, it is advisable that the contents about loading in the database and deletion of the DNA information, which is a part of deliberation for this Committee, would be specified and stated more concretely in this Act. Next, the Committee Members should be made up from people who are not related to the investigation and establishment of the database unlike the present. Lastly, the decision of this Committee should be reinforced so that it has binding force which goes over just deliberation.

Aside from this institute for the post control of database, it is also important to manage statistical data related to the database and disclose this information with transparency. This database can be managed through the readjustment with the objective data, and this would enable earning trust from the citizens. Moreover, it is needed to constantly examine and verify whether the database is efficient in preventing offense recommitment.

4. Necessity for Amendment of the Criminal Procedure Law

The DNA Identification Act was legislated as legal grounds for loading the DNA identification information in the database. Having this background, this Act entails clauses in regard to DNA sample collection and analysis. Accordingly, when the DNA information is not loaded in the database and merely used as evidences in the criminal procedure, whether this law would be applied or not can be discussed. The DNA Identification Act aims at entering DNA information in the database for the purpose of criminal prosecution in the future. Thus, when it comes to the DNA analysis for only identification for current crimes, we can say that this law cannot be applied. However, in the current Criminal Procedure Law,

there is no specific clause regarding DNA identification, and it can cause confusion. Regarding this, the clauses have to be newly established in the Criminal Procedure Law. In other words, it is advisable that all the contents about obtaining and using genetic information are included in the Criminal Procedure Law.

For this, above all, general clauses regarding purpose of using genetic information and internal body inspection should be newly legislated in the Criminal Procedure Law. It is because the genetic information has to be used only for finding the facts in the criminal procedure. Also, it is advisable that the contents on obtaining genetic information and using it further would be applied in the clauses of general medical inspection, because gathering genetic information also can be a type of medical inspection. Next, in the crime investigation procedure, the subject of collecting genetic information has to be limited to be suspects. It is because collecting genetic information in the pertinent clause is needed in order to resolve the pertinent crime. Next, the materials that can be collected from the human body should include hair, saliva, oral mucosa cell, blood, contents in vaginal mucosa, semen and etc. Also, when collecting materials from the suspects' body in the criminal procedure, permission from the court should be required. In this court permission, facts on delict should be specified, and when there is a serious infringement, the urgency and inevitability of an Act should be clearly stated. The Article 114 through the Article 122 are clauses on the warrant, and thus it would be consistent to apply these articles to clauses regarding the court permission. Lastly, some clauses minimizing infringement on the rights of suspects through obtaining DNA samples would be needed. For this, clauses that limits people who can access to DNA information, specifies and explains limited purpose should be newly legislated, as well as the clauses that provides deletion of material from human body and genetic information.¹¹³⁾

113) Jungnyum Lee (2009: 120 ff).

Chapter 4

Conclusion

In this report, research was conducted in order to suggest improvement measures on the DNA Identification Act which has been enforced in Korea.

For this purpose, in the first chapter, this report presented the process of this Act to be legislated, explained major contents of this Act, and showed current status of establishment of the DNA database. It took 15 years for the DNA Identification Act to be legislated because of possible infringement on individual human rights through collecting DNA evidences. After the long period of disputes, this Act could be legislated finally in 2010, and this was because of expectations to effective arrest of criminals and prevention of recommitted offences. In addition to issues on human rights, there has been a dispute between the Prosecution and the Police over the issue of DNA database management. As a result, the DNA database in Korea is managed by both Prosecution and the Police, which is unprecedented.

The DNA Identification Act in Korea aims at crime investigation, crime prevention, and protection of benefits and interests of citizens. Under these legislative purposes, this Act provides clauses regarding subjects of DNA sample collection, list of applicable crimes, collection, analysis and disuse of DNA samples, retention, search and report of DNA information, and management of DNA database. As for management of DNA database, the police is in charge of DNA information of detained suspects, and the prosecution takes care of information of prisoners.

In the second chapter, whether the DNA Identification Act is actually necessary was discussed, particularly regarding the discussion of risk management policies and efficacy of DNA database. Then, unconstitutionality of this Act was examined. In June 2011, a constitutional appeal has been filed to the DNA Identification Act, in that this Act infringes on the right of self-determination to

individual information of applicants whose DNA samples were collected. With the perspective of current criminal policies, the DNA Identification Act is placed under the risk management criminal policies that are oriented toward safety of society rather than freedom of individuals. In other words, this Act possibly threatens the democracy and human rights through government control and surveillance for the purpose of safety in the society. Having this critical stance, it should be reconsidered whether this Act would be necessary or not. Also, actually the larger size of DNA database does not necessarily result in better crime detection and crime prevention.

However, there are many people claiming that the DNA Identification Act has to be maintained for the purpose of effective criminal arrest and prevention of recommitted crimes. The DNA Identification Act that is currently enforced could limit the right of self-determination to individual information for the reason of criminal arrest. However, this Act is required to be improved, in that it possibly violates the principle of prohibition of excess, the proper procedure and warrant requirement, and the principle of presumption of innocence according to the Constitutional Law.

In the third chapter, legitimacy of legislative purposes of this Act was discussed, and then improvement measures was suggested after reviewing each topic. In conclusion, the DNA Identification Act has to draw up measures to ensure effectiveness of the legislative purpose. Currently, this act aims at crime investigation and prevention as well as protection of rights and interests of citizens. Most of all, this measure is not proper for crime investigation because it is subjects to restriction of the criminal procedure law which deals with a broad sense of criminal procedure. Next, crime prevention can be seen as narrow sense of crime prevention that only aims at prevention of second conviction. In this regard, this act has to prepare specific standards to evaluate

the risk of second conviction of future criminals, and the list of crimes that have high rates of second conviction has to be confirmed based on objective statistical data. Lastly, for the purpose of protecting rights and interests of people, the range of subjects to collect DNA samples, list of crimes, requirement for a warrant, requirement for deletion of data, measures for DNA database management and etc. which are provided by the DNA Identification act have to be revised.

References

- Albrecht, Hans-Jörg, “Security, Crime Prevention and Secret Surveillance: How Criminal Law Adjusts to the Challenges of a Global Risk Society”, presented at the Asian Criminological Society 4th Annual Conference, 2012.
- Baek, Yunchul, “Human Right to Control Oneself and Human Right to Control the Circulation of Oneself in the Constitution”, Korean Constitutional Law Journal, Vol. 9, No. 3, Korean Constitutional Law Association, 2003.
- Cho, Sungyong, “Changes to Criminal Procedural Law and Its Function in Germany”, Dankook Law Review, Vol. 27, Institute for Legal Studies, Dankook College of Law, Dankook University, 2003.
- Cho, Sungyong, “Introducing DNA Fingerprint Identification and Its Limitations in Criminal Procedural Law”, Korean Criminological Review, Vol. 15, No. 2, Korean Institute of Criminology, 2004.
- Cho, Sungyong, “A Review on the Establishment of a Criminal DNA Data Bank”, Korea Law Review, Vol. 48, Legal Research Institute of Korea University, 2007.
- Cho, Sungyong, “A Review of the DNA Data Bank in Criminal Procedural Law in Germany”, Korean Journal of Criminology, Vol. 19, No. 1, The Korean Association of Criminology, 2007.
- Cho, Sungyong, “A Critical Review on the Act on the Use and Protection of DNA Identification”, Korean Criminological Review, Vol. 21, No. 3, Korean Institute of Criminology, 2010.

- Geiger, Andreas, “Die Einwilligung in die Verarbeitung von persönlichen Daten als Ausübung des Rechts auf informationelle Selbstbestimmung”, NVwZ 1989.
- Han, Myunsoo, “The Role of DNA Profile in Forensic Science and Evidential Trial”, The Journal of Police Science, Vol. 4, Korea National Police University, 2003.
- Han, Wuisoo, “Protection of Privacy”, The Justice, Vol. 76, The Korean Legal Center, 2003.
- Huh, Soonchul, “Internet Search and the Right to Informational Self-Determination”, Public Law Review, Vol. 10, No. 2, Korea Comparative Public Law Association, 2009.
- Human Rights Civic Groups including Korean Progressive Network Jinbonet, Opinion on the Bill on Use and Protection of the DNA Identification Act, Nov. 2009.
- Hwang, Manseong, “A Debate on Forensic Applications of DNA Databases”, Korean Criminological Review, Vol. 18, No. 1, Korean Institute of Criminology, 2007.
- Jung, Deokyoung, “The Constitutional Review for DNA Database”, Chungbuk National University Institute Journal, Vol. 20, No. 2, The Law Research Institute, Chungbuk National University, 2009.
- Kim, Chulsoo, Introduction to Constitutional Law, Pakyoungsa, 2007.
- Kim, Hyekyung, “The Legislative Justness of Law for DNA Database”, Journal of Criminal Law, Vol. 22, No. 3, The Korean Criminal Law Association, 2010.
- Kim, Hyekyung, “A Study on Efficiency and Rightfulness of DNA Information Collection”, Yonsei Journal of Medical and Science Technology Law, Vol. 2, No. 1, Institute for Legal Studies, Yonsei University, 2011.
- Kim, Seungwhan, “A Right of Information Self-Determination”, Korean Constitutional Law Journal, Vol. 9, No. 3, Korean Constitutional Law

- Association, 2003.
- Korean Bar Association, Opinion on the Bill of Use and Protection of the DNA Identification Information, Nov. 2009.
- Krimsky, Sheldon / Simoncelli, Tania, Genetic Justice, Columbia University Press, 2011.
- Kwon, Youngsung, Introduction to Constitutional Law, Bobmunsa, 2008.
- Lee, Eunwoo, “How to Deal with Heinous Crimes such as Homicide or Rape”, the public hearing on legislation co-held by the Ministry of Justice and the Ministry of Public Administration and Security, 2009.
- Lee, Hojoong, “Reviewing the Constitutional Challenge and Problems of the DNA Act - the Act on the Use and Protection of DNA Identification, What’s the Problem?”, presented at the parliamentary discussion, Feb, 22nd, 2012.
- Lee, Jaesang, A General Theory of Criminal Law, Pakyoungsa, 2008.
- Lee, Jungnyum, “The Necessity of and Direction on the Criminal Legal Discussions on DNA Data”, Korean Journal of Criminology, Vol. 21, No. 1, The Korean Association of Criminology, 2009.
- Lee, Junil, “A Review on Act on the Use and Protection of DNA Identification Information”, Human Right and Justice, Vol. 422, Korean Bar Association. 2011.
- Lee, Mijung & Yoon, Deokyyung. et al., Keeping Children Safe from Sexual Abuse (II), Korean Women’s Development Institute, 2010.
- Lee, Seungwhan, “Suggested Establishment of a DNA Data Bank to Prevent Sexual Violence against Females”, presented at the symposium for eliminating violence against females, Nov, 21st, 2002.
- Lee, Seungwhan, “The Theory and International Trends of DNA Data Banks for Investigative Purposes”, New Trends of Criminal Law, Vol. 18, Supreme Prosecutors’ Office, Feb, 2009.
- Legislation and Judiciary Committee in Korea, The Review on the Bill on

- Collection and Management of the DNA Identification Information, Dec. 2006.
- Legislation and Judiciary Committee in Korea, Examination on the Bill of Use and Protection of the DNA Identification Information, Nov. 2009.
- Legislation and Judiciary Committee in Korea, Examination on the Bill of Use and Protection of the DNA Identification Information, Dec. 2009.
- Lim, Jibong, "The Constitutionality and Other Problems of the Bill on the Use and Protection of DNA Identity Establishment Information and Its Alternative", *Sogang Law Journal*, Vol. 11, No. 2, Institute for Legal Studies, Sogang University, 2009.
- McCartney, Carole, "DNA Expansion Programme and Criminal Investigation", *British Journal of Criminology* 46(2), 2006.
- Oh, Changik, "How to Deal with Heinous Crimes such as Homicide or Rape", the public hearing on legislation co-held by the Ministry of Justice and the Ministry of Public Administration and Security, 2009.
- Park, Dongkyun & Hwang, Younggu, "A Study on the Operating Methods of DNA Data Bank", *The Korean Association of Police Science Review*, Vol. 10, No. 2, Korean Association of Police Science, 2008.
- Park, Yongchul, "Reconsidering Getting a DNA Evidence from Suspects", *Korean Journal of Criminology*, Vol. 18, No. 2, The Korean Association of Criminology, 2006.
- Ryu, Jesung, "The Constitutional Challenge to the Current DNA Act and Its Investigative Problems (Problems of the Act on the Use and Protection of DNA Identification and Policy Directions)", presented at the parliamentary discussion on June, 29th, 2011.
- Seo, Gaeweon, "Problem and Improvement for the Use and Protection of DNA Identification Act", *International Constitutional Law Review*, Vol. 16, No. 2, Korean International Constitutional Law Review, 2010.
- Shin, Yangkyun, "The System of DNA Databank and Human Rights -

- Especially Considering Latest Enacted 『Use and Protection of DNA Identification Data Act 2012』 ”, Journal of Criminal Law, Vol. 22, No. 3, The Korean Criminal Law Association, 2010.
- Sung, Nakin, Constitutional Law, Bobmunsa, 2011.
- Supreme Court in Korea, The Review on a Legislative Bill on the Use and Protection of DNA Identification Information, Nov. 2009.
- Syn, Dongyiel, “On the Use of DNA Databases for Forensics”, Korean Journal of Criminology, Vol. 24, No. 1, The Korean Association of Criminology, 2012.
- Yoo, Youngchan & Jang, Youngmin, “A Study on the Direction and Development of Forensic Science for Police Investigation - Establishment of a DNA Data Bank and Its Use”, 1998 Police Science Journal, Vol. 14, Police Science Institute, Korean National Police University, 1998.
- Yoon, Youngcheol, “A Critical Review on the Act on the Use and Protection of DNA Identification”, Hongik Law Review, Vol. 12, No. 1, The Law Research Institute, Hongik University, 2011.

Research Report Series 12-B-11-01

Improving the DNA Identification Act in South Korea

First Published 2012

© Il-Su Kim

Printed in Seoul, Korea

by Korean Institute of Criminology

+82-2-3460-5180

Published by Intermedia Sunglim D&P

+82-2-2263-5931

This publication in copyright.

Subject to statutory exception and to the provisions of
relevant collective licensing agreements,

no reproduction of any part may take place

without the written permission of Korean Institute of Criminology.

₩ 7,000

ISBN 978-89-7366-995-0 93330