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## THE CONSTITUTIONALITY OF TAKING DNA REFERENCE SAMPLES

### Abstract

*This paper focuses on the opinions of constitutional courts in the Federal Republic of Germany, United States of America, Canada, the Czech Republic, and the Constitutional Tribunal in Poland on taking reference samples for DNA tests from a suspect (an accused). The inconsistency of Polish regulations referring to the DNA analysis is the main object of criticism.*

### Keywords

*reference DNA samples – constitutional rights – Polish Code of Criminal Procedure – Polish Police Act*

*“The value of DNA evidence in a criminal investigation may seem as obvious as the value of a parachute when jumping out of an airplane”.*

David B. Wilson, David McClure, David Weisburd<sup>1</sup>

In 1993 four German right-wing extremists set fire to a house in Solingen, in which five members of a Turkish family died. In May 1995, the

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<sup>1</sup> D.B. Wilson, D. McClure, D. Weisburd, *Does Forensic DNA Help to Solve Crime? The*

Düsseldorf Regional Court received an anonymous letter with a forged notarial document denouncing a Turkish citizen living in Berlin (with whom a Detlef-Harro Schmidt had a legal dispute) as the perpetrator of the Solingen crime. In order to determine the sender of the letter the saliva on the stamp was investigated. In 1995 the Tiergarten District Court ordered, in accordance with § 81a of the German Code of Criminal Procedure (Strafprozeßordnung, StPO) the taking and examination a sample of blood and saliva of Detlef-Harro Schmidt. He was subsequently convicted in 1996 for casting false suspicion on a third person, forgery, and defamation and was sentenced to two and a half years' imprisonment. On 23 October 2001, the Berlin Regional Court dismissed Schmidt's appeal against the Tiergarten District Court's order to take the blood and saliva sample. On 7 March 2002, the Federal Constitutional Court (Bundesverfassungsgericht) refused to admit Schmidt's constitutional complaint since the order to take the blood and saliva had been proportionate. The European Court of Human Rights in its decision of 5 January 2006 unanimously also rejected the applicant's complaint. The Court confirmed that taking reference samples such as blood and saliva must be considered as interference in the right to privacy under Article 8 of the Convention unless it was compliant with Section Two of that Article.

The Court noted that the interference was based on §81a of the German Code of Criminal Procedure and was compliant with it. The applicant did not state that the samples had been taken in a manner contrary to the Code of Criminal Procedure; moreover, his blood and saliva samples were necessary to determine his authorship of the letter<sup>2</sup>.

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The German Code of Criminal Procedure describes genetic examinations in §§ 81e-81h. According to § 81a, a body sample may be taken from the accused (Beschuldigte) also without his/her consent. The authority to give such order shall be vested in the judge, and if delay was to endanger the

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*Benefit of Sophisticated Answers to Naïve Questions*, „Journal of Contemporary Criminal Justice” 2010, Vol. 26, No. 4, p. 459.

<sup>2</sup> ECtHR, *Schmidt v. Germany*, Application no. 32352/02, Judgment of 05.01.2006, available at: <http://hudoc.echr.coe.int/eng> [last accessed 07.01.2017].

success of the examination, also in the public prosecution office. Blood samples or other body cells taken from the accused may be used only for the purposes of the criminal procedure, and they shall be destroyed without delay as soon as they are no longer required for such purposes.

If the accused person is suspected of a criminal offence of substantial significance, or of a crime against sexual self-determination, then, for the purposes of establishing identity in future criminal proceedings, cell tissue may be collected from that person and subjected to molecular and genetic examination in order to establish the DNA profile or the gender if the nature of the offence or the way it was committed, the personality of the accused, or other information provide grounds for assuming that criminal proceedings will be conducted against the accused person in the future with respect to a criminal offence of substantial significance. If the person concerned habitually commits other criminal offences, this may be deemed to be equivalent to a criminal offence of substantial significance by reference to the level of injustice done (§ 81g item 1).

The evident ambiguity of the German Code of Criminal Procedure has had to be cleared up by the Federal Constitutional Court, which had already passed some judgments in the field<sup>3</sup>. One of the most recent and most important is the judgment of 29 September 2013, 2 BvR 939/13<sup>4</sup>. In this case the applicant, convicted of the handling of stolen goods and sentenced to one year and five months of prison with probation, claimed the violation of his right to informational self-determination pursuant to Article 2.1 in conjunction with Article 1.1. of the Constitution by the Hamburg courts' orders to take his DNA samples. The Federal Constitutional Court accepted the constitutional complaint. The Court stated that the establishment, storage and future use of a DNA profile interferes with the fundamental right to informational self-determination guaranteed by the German Constitution. This guarantee may only be limited in the overriding interest of the public, provided that the limitation complies with the principle of proportionality, and may not be wider than is absolutely necessary in order to protect public interests. When interpreting and applying § 81g StPO, the court must

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<sup>3</sup> See for instance *supra* note 2.

<sup>4</sup> <http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidung...> [last accessed 02.01.2017].

adequately consider the meaning and scope of this fundamental right. As concerns the prognosis of future criminal behaviour, it is necessary to give affirmative reasons that relate to the specific case at hand; the mere repetition of the legal text is not sufficient. The challenged decisions of the courts did not meet these constitutional requirements because the courts did not include all relevant circumstances or did not evaluate them sufficiently.

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In trials in the USA, taking reference samples from the arrested, accused, or convicted persons should be considered in the context of the Fourth Amendment of the Constitution, which reads: „The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized”<sup>5</sup>. Thus the pivotal problem is the meaning and connotation of the term “search”, which can refer to both a personal search and to an inspection. The doctrine of the American trial is dominated by a view that collecting buccal swab samples (inside a person’s cheek) is the search referred to in the Fourth Amendment with all its relevant requirements<sup>6</sup>. However, only as late as in 2013, the Supreme Court of the United States dispelled all the doubts by giving a verdict by 5 votes to 4 in *Maryland v. King*<sup>7</sup>.

The Supreme Court ruled in favour of the constitutionality of the Maryland DNA Collection Act, which allows the taking of buccal swab samples from arrestees: „When officers make an arrest supported by probable cause to hold for a serious offense and bring the suspect to the station to be detained in custody, taking and analyzing a cheek

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<sup>5</sup> D. H. Kaye, *The Constitutionality of DNA Sampling on Arrest*, „Cornell Journal of Law and Public Policy” 2001, Vol. 10, Issue 3, Article 2, p. 472.

<sup>6</sup> Ibidem, pp. 480-481.

<sup>7</sup> <https://www.law.cornell.edu/supremecourt/text/12-207> [last accessed 05.01.2017]; J. Wójcikiewicz, „Genetyczny panoptikon” czy oczywista konieczność? Wyrok Sądu Najwyższego Stanów Zjednoczonych w sprawie *Maryland v. King* (2013) [„Genetic panopticon” or evident necessity? The US Supreme Court’s judgment in *Maryland v. King* (2013)], „Przegląd Sądowy” 2013, No. 11-12, pp. 17-25.

swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment". The court was also of the opinion that using the buccal swab sample inside a person's cheek to obtain a DNA sample is a search, but the intrusion is negligible and minimal. That fact is of central relevance to determining whether the search is reasonable, and the government interest must outweigh the degree to which the search invades an individual's legitimate expectations of privacy.

The majority regarded taking DNA samples as a means of establishing the identity of the arrestee. The dissenting minority by Justice Scalia wrote that "The Court's assertion that DNA is being taken, not to solve crimes, but to *identify* those in the State's custody, taxes the credulity of the credulous (...). Solving unsolved crimes is a noble objective, but it occupies a lower place in the American pantheon of noble objectives than the protection of our people from suspicionless law-enforcement searches". Justice Scalia expressed his hope that such an incursion upon the Fourth Amendment would someday be repudiated.

However, Maryland's DNA law is not unique: as of June 2012 twenty-eight states and the federal government had adopted laws similar to Maryland's, thus authorizing the collection of DNA samples from some or all arrestees<sup>8</sup>.

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The Canadian Supreme Court took a similar stance. As regards the constitutionality of taking DNA reference samples, the Supreme Court declared its opinion specifically in two verdicts: *R. v. S.A.B.* (2003)<sup>9</sup> and *R. v. Saeed* (2016)<sup>10</sup>.

The first case concerned sexual relations with a 14-year-old girl, and DNA testing was based on comparing the DNA of the post-abortion fetus and the DNA of the accused. He claimed that Sections 487.05 to 487.09

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<sup>8</sup> DNA Sample Collection from Arrestees, National Institute of Justice, <http://www.nij.gov/topics/forensics/evidence/dna/pages/collection-from-arrestees.aspx> [last accessed 06.11.2017].

<sup>9</sup> <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2094/index.do> [last accessed 22.05.2017].

<sup>10</sup> <https://scc-csc.lexum.com/scc-csc/scc-cse/en/item/16023/index.do> [last accessed 22.05.2017].

of the Criminal Code that regulate collecting obtaining DNA reference samples were not compliant with Sections 7 and 8 of the Canadian Charter of Rights and Freedoms<sup>11</sup>. Section 7 stipulates that “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”<sup>12</sup>, and Section 8 says that “Everyone has the right to be secure against unreasonable search or seizure”<sup>13</sup>.

The Supreme Court in the verdict authored by Judge Arbour decided that Sections 487.05 do 487.09 of the Criminal Code do not infringe Section 7 or Section 8 of the Canadian Charter of Rights and Freedoms.

Ali Hassan Saeed’s case started around 4 a.m., 22 May, 2011, when the victim was sexually assaulted. Saeed was arrested on suspicion of sexual assault at 6.05. However, he was soon released by mistake and detained again at 8.35 a.m. While relying on the testimony of the victim, police officers hoped to find the victim’s DNA on Saeed’s penis. A penis swab could not be collected immediately, and police officers placed the handcuffed arrestee in a prison cell without any access to water and toilet. The swab was taken at 10:45. The police allowed the arrestee to take it himself. The evidence showed the presence of the victim’s DNA on Saeed’s penis. Judge of the first instance court ruled that although the swab sampling was contrary to Section 8 of the Charter of Rights and Freedoms, yet she allowed the DNA analysis evidence following Section 24 (2): „Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute”<sup>14</sup>. The Court of Appeal shared this view. The Supreme Court stated that “the accused was validly arrested. The swab was performed to preserve evidence of the sexual assault. The police had reasonable grounds to believe that the complainant’s DNA had transferred

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<sup>11</sup> Constitution Act, 1982, <http://laws-lois.justice.gc.ca/eng/Const/page-15.html> [last accessed 22.05.2017].

<sup>12</sup> *Ibidem*, p. 3.

<sup>13</sup> *Ibidem*.

<sup>14</sup> *Ibidem*, p. 7.

to the accused penis during the assault and that it would still be found on his penis. The swab was performed in a reasonable manner. The police officers were sensitive to the need to preserve the accused's privacy and dignity. The accused was informed in advance of the procedure for taking the swab and its purpose. The swab itself was conducted quickly, smoothly, and privately. The swab took at most two minutes. The accused took the swab himself. There was no physical contact between the officers and the accused. The officers took detailed notes regarding the reasons for the process of taking the swab. The swab did not fundamentally violate the accused's human dignity"<sup>15</sup>.

In consequence, the Court held that the rights of the accused granted by Section 8 of the Charter of Rights and Freedoms were not breached and the evidence of the complaint's DNA obtained from the swabbing was properly admitted.

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The Czech Constitutional Court has on several occasions commented on obtaining reference samples from an accused. In the judgments of I. ÚS 671/05 of 22 February 2006 and III. ÚS 655/06 of 23 May 2007, the Court found it unacceptable to impose a penalty for default to make the accused give a sample of a scent, hair or smear from the mucosa inside the cheek. To this last judgment, issued in a panel of three judges, a dissenting opinion was annexed by Jan Musil<sup>16</sup>. His views were shared three years later by the Court sitting in plenary session, on 30 November 2010 that issued resolution Pl. ÚS-st 30/10<sup>17</sup> stating that the actions referred to in §114 of Law No 141/1961 of the Code of Criminal Procedure (*trestní řád*), as amended<sup>18</sup>, that consisted in collecting scent samples, hair samples

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<sup>15</sup> See *supra* note 10, p. 522.

<sup>16</sup> J. Musil, *Zákaz donucování k sebeobviňování [Ban of compelling self-accusation] (nemo tenetur se ipsum accusare)*, „Kriminalistika“ 2009, No. 4, pp. 252-264.

<sup>17</sup> *Sbírka zákonů [Law Reports]*, Česká Republika 2010, No. 151, item 439; See also J. Wójcikiewicz, *Uzyskiwanie dowodów do badań kryminalistycznych. Glosa do uchwały pełnego składu Sądu Konstytucyjnego Republiki Czeskiej z dnia 30 listopada 2010 r. (Pl. ÚS-st 30/10) [Gaining evidence for criminological examinations. Comment to the resolution of the Constitutional Court of the Czech Republic of 30 November 2010]*, „Przeegląd Sądowy“ 2011, No. 11-12, pp. 202-205.

<sup>18</sup> *Sbírka zákonů [Law Reports]*, Česká Republika 2006, No. 99, item 321. § 114

or buccal swabs and whose aim was obtaining objectively available evidence for forensic investigations and which did not require the active participation of the accused or the suspect, but only the sampling, should not be considered as activities by which the accused or suspected person would be forced into a self-incrimination that is incompliant with the constitution. In order to ensure the participation of the accused or the suspect in obtaining such evidence, legal coercive measures may be used. The court found in particular that obtaining a hair sample leads to cutting a small tuft of hair, and the buccal swab sampling consists in rubbing the inside of the oral cavity with a proper sterile spatula; there is even no need for a forceful opening of the suspect's mouth, since it is enough to pull the lower lip slightly down and rub its inner side. These are non-invasive activities that are pain-free and do not pose any threat to the physical and mental health of a person; they are also brief and the methodology of these activities has been described in detail in relevant police regulations.

The court rightly stated that the principle of *nemo tenetur se ipsum accusare* is not unlimited and does not guarantee absolute protection to the accused. A different interpretation would be contrary to the obligation of protecting the public against crime and the principle of fair punishment imposed on perpetrators of crimes.

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In 2011, the co-author of this article (J.W.), in the final part of the commentary to the judgment of the Constitutional Court of the Czech Republic wrote that "The Polish Constitutional Tribunal has very rarely had an opportunity to issue criminally conditioned decisions<sup>19</sup>, thus maybe in the foreseeable future it will try to issue other decisions?"<sup>20</sup>.

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(inspection of the body and other similar procedures) imposes on the person the obligation to allow blood sampling or the taking of other samples (2), and it also allows the application of resistance-relevant direct coercive measures (4).

<sup>19</sup> See J. Wójcikiewicz, V. Kwiatkowska-Wójcikiewicz, *Problematyka kryminalistyczna w orzecznictwie polskiego Trybunału Konstytucyjnego* [Criminological problems in the judgments of the Polish Constitutional Tribunal] [in:] *Na křižovatkách práva. Pocta Janu Musilovi k sedmdesátým narozeninám* [On the legal crossroads. Liber amicorum Jan Musil for his 70th birthday], Praha: C.H. Beck 2011, pp. 69-78.

<sup>20</sup> See supra note 17, p. 205.



The court did, indeed, try as within the subsequent five years it gave two judgments relating to reference samples for identification.

The first judgment, of 5 March 2013, file No U 2/11<sup>21</sup>, was issued after the Ombudsman's request was considered. The Tribunal stated that § 5 Section 1 of the Regulation of the Minister of Justice of 23 February 2005 on testing or performing actions involving the accused<sup>22</sup> and the suspected person<sup>23</sup> is incompliant with Article 74 § 4 of the Code of Criminal Procedure<sup>24</sup> and Article 92 Section 1, Article 41 Section 1 and Article 47 in conjunction with Article 31 Section 3 of the Constitution of the Republic of Poland, and § 5 Section 2 is incompliant with Article 74 Section 4 of the Code of Criminal Procedure and Article 92 Section 1 and Article 41 Section 1 of the Constitution, similarly as is § 10 Section 1 of the regulation, specifically in the fragment including the words "despite the use of direct coercive measures".

Article 74 of the Code of Criminal Procedure says in § 2 and 3 that the accused, similarly as a suspected person, is obliged to undergo, in particular, the inspection of the body, fingerprinting, blood, and hair sampling and sampling of secretions. Collecting buccal swabs by a police officer (§ 2 item 3 and § 3) may occur if this is indispensable and there is no risk that it would jeopardize the health of the accused or a suspected person or other persons<sup>25</sup>. The Tribunal rightly held that the legislation did not explicitly authorize the Minister of Justice in Article 74 § 4 of the Code of Criminal Procedure to regulate both the issue of direct coercive measures during the inspection of the body and taking reference samples

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<sup>21</sup> Dz. U. [Journal of Laws] 2013, item 375.

<sup>22</sup> According to Art. 71 § 3 of the Polish Code of Criminal Procedure (hereinafter C.C.P.) "the accused" means also "a suspect".

<sup>23</sup> Dz. U. [Journal of Laws] 2005, No. 33, item 299. The suspected person is a person, in regard to whom there is a justified reason of suspecting this person of having committed a crime, yet no charges were made against this person (thus it is a person 'less' suspected). A. M. Tęcza-Paciorek, *Pojęcie osoby podejrzanej i jej uprawnienia* [The concept of a suspected person and his/her rights], „Prokuratura i Prawo” 2011, No. 11, p. 60.

<sup>24</sup> Dz. U. [Journal of Laws] 1997, No. 89, item 555, with changes.

<sup>25</sup> See also A. Lach, *Granice badań oskarżonego w celach dowodowych. Studium w świetle reguły nemo se ipsum accusare tenetur i prawa do prywatności* [The limits of the investigative tests of the accused for evidential purposes. A study in the light of the rule nemo se ipsum accusare tenetur and the right to privacy] Toruń: TNOiK 2010, passim.

as well as the issue of “assistance” in a situation where no provision of the Code authorizes the use of direct coercive measures against the accused and the suspect. The Tribunal stated that this regulation supplements the Code and loses its secondary legislative character, and breaks the connection between the regulation and the act (Article 92 (1) of the Constitution). From the point of view of other constitutional norms, the provisions of the regulation under appeal imposed a limitation on the constitutionally protected integrity of the person and personal freedom (Article 41 (1) and Article 31 (1) of the Constitution) and the right to privacy (Article 47 of the Constitution).

The said sections of the Regulation of 2005 ceased to be in effect on 20 March 2013, but the legislature finally regulated by relevant acts the problem of direct coercive measures in order to obtain reference samples from the suspect, the accused, and the suspected person by adopting the amended Act of 27 June 2013 on the Criminal Procedure Code, and other acts<sup>26</sup>, whose Article 1 Section 19 was introduced in Article 74 of the Code of Criminal Procedure § 3a as follows: “The accused or the suspect is called upon to submit to obligations under § 2 and 3. In the event of the refusal to comply with these obligations, the accused or the suspect may be issued a warrant for detention and compulsory appearance, and physical force may be used against them, or technical means of overpowering, to the extent necessary for the performance of a given activity “. This provision has been in force since 9 November 2013.

The judgment of 11 October 2016, file No SK 28/15, is the second decision on reference sampling. It was taken in the context of the famous case of Marek Haslik, a healer from Nowy Sącz, who was accused of a crime under Article 18 § 1 in connection with Article 160 § 1 and 2 and Article 155 in connection with Article 11 § 2 of the Criminal Code<sup>27</sup> and of the crime under Article 58 Section 2 of the Act of 5 December 1996 on the professions of doctor and dentist<sup>28</sup>. Haslik, a “god man” (a driver and a storekeeper by profession) used to “heal” people with e.g., goat milk and grass from his own garden. He was accused of imposing the threat of the loss of life and of manslaughter by making a six-month-old

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<sup>26</sup> Dz. U. [Journal of Laws] 2013, item 1247.

<sup>27</sup> Dz. U. [Journal of Laws] 2016, item 1137.

<sup>28</sup> Dz. U. [Journal of Laws] 2015, item 464.

girl starve to death; her parents, following his orders, used to feed her by giving very small amounts of diluted goat milk every half an hour. The healer was convicted in February 2017 with a non-final sentence of 3.5 years of imprisonment<sup>29</sup>. The trial at the appellate court is due to start on 28 November, 2017.

A constitutional complaint, on behalf of Marek Haslik, was filed by his attorney. She requested for investigation the compatibility of Article 74 § 2 Subsection 3 of the Act of 6 June 1997 – the Code of Criminal Procedure (Journal of Laws No. 89, item 555, as amended, with Article 41 (1) (the integrity of the person), Article 47 (the right to privacy) and Article 51 (2) in conjunction with Section 3 (right to information autonomy) and Article 45 (1) (the right to an impartial and independent court), in conjunction with Article 77 (2) of the Constitution, and with Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, subsequently amended by sixteen Protocols (Journal of Laws of 1993, No 61, item 284, as amended).

In this case, with the suspect currently in detention, on 23 October 2014, the action of sampling biological reference material for genetic tests was carried out in the following way. According to the words of the accused, he was knocked to the ground and a cotton swab was forcefully put into his mouth<sup>30</sup>. On 21 October 2014, the lawyer was informed by fax that on 23 October 2014 her client, still detained in prison, would be subject to the procedural action of sampling biological reference material for genetic tests. As a result, the lawyer asked the prosecutor to suspend this action and postpone to some other date and to send information about the circumstances under which the evidence was to be taken. On 22 October 2014 the prosecutor, also by fax, sent the following information: “Reference sampling for genetic testing is a technical activity, does not require any statement to be submitted by

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<sup>29</sup> *Guru i ludzie, którzy gotowi byłiby niemal za niego oddać życie*. Kim jest znachor z Nowego Sącza? [„Guru and the people almost ready to give their lives for him”. Who is the quack from Nowy Sącz?], available at: <http://www.tvn24.pl/wiadomosci-z-kraju,3/znachor-z-nowego-sacza> [last accessed 20.05.2017].

<sup>30</sup> *Przewrócili i wsadzili patyk do ust* [They flipped him to the floor and put a stick into his mouth], „Gazeta Wyborcza. Duży Format”, 7 January 2016, p. 7.

the suspect, and therefore the presence of the lawyer is not necessary”<sup>31</sup>. It appears that the lawyer’s involvement during the swabbing of the suspect’s mouth, in this and in other cases, could secure the correctness and relevance of the action performed. It would also prevent any real or alleged abuse of power as manifested by the police.

The lawyer filed a complaint against the swabbing, claiming a breach of Article 74 § 2 subsection 3 of the Code of Criminal Procedure<sup>32</sup>, i.e., the performance of the action, despite the imprecise nature of the condition of “necessity” and its non-occurrence in this case, and the lack of any connection between the effects of this action and the charges against the suspect, as well as the violation of Article 117 § 2 of the Code of Criminal Procedure in connection with the performance of the actions in the absence of the lawyer, who justified and explained the reasons for her absence and requested that the action be abandoned within the prescribed time limit. The prosecutor’s decision of 17 November 2014 failed to take account of this complaint.

The Constitutional Tribunal discontinued the proceedings, pursuant to Article 40 (1) Subsection 1 of the Constitutional Tribunal Act, regarding the examination of compliance with Article 8 of the Convention owing to the inadmissibility of the judgment, since international agreements, including the Convention itself, cannot constitute a relevant control pattern. Moreover, the applicant’s lawyer withdrew the complaint in this regard<sup>33</sup>.

The constitutional problem in the said matter was reduced to the question of whether the obligation imposed on the accused under Article 74 § 2 Subsection 3 of the Code of Criminal Procedure consisting in allowing a police officer to take a buccal swab, if this is indispensable and there is no fear that it would pose a threat to the health of the accused or other persons, constitutes a proportionate limitation of the integrity of the person (Article 41 (1) of the Constitution), the right to protect

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<sup>31</sup> Judgment of the Constitutional Tribunal of 11 October 2016, file No SK 28/15, sec. 5.

<sup>32</sup> Unconstitutionality of Article 74 § 2 subsections 2 and 3 of the Code of Criminal Procedure was also alleged in the constitutional complaint of 30 December 2011; this complaint was not considered by the Constitutional Tribunal due to having been submitted with delay (decision of 18 December 2013, Ts 2/12, LEX No 1739530).

<sup>33</sup> See *supra* note 31, sec. 51.

private life (Article 47 of the Constitution) and information autonomy (Article 51 (2) of the Constitution)<sup>34</sup>. By referring to the above-mentioned control patterns, the Court stated that “integrity of the person can be defined as the guaranteed ability of the individual to maintain his or her identity and integrity, including the physical one and prohibition of any direct external interference that violates this integrity”. The Tribunal indicated that integrity of the person “is particularly strongly connected with inherent human dignity”. The Tribunal also stressed, pursuant to Article 41 Section 1 of the Constitution, “the relationship between personal freedom and the integrity of the person,” where freedom – “integrity of the person “ is its negative aspect, safeguarding “freedom from” intrusion into the inner and outer integrity of every person, whereas the concept of “personal freedom” is close in meaning to its positive aspect that protects the most widely understood possibility of realizing the will and behaviour of the individual”<sup>35</sup>.

In a similar view, the Tribunal analyzed the control pattern of Article 47 of the Constitution, in accordance with which everyone has the right to legal protection of their private life, family life, honour, good name, and the taking of decisions on their own personal life, and of Article 51 Section 2 of the Constitution, which prohibits public authorities to acquire, collect, and make available “information about citizens other than it is necessary in a democratic state of law”. The Tribunal aptly drew attention to the fact that this regulation “legitimizes – which is inevitable in any contemporary society – the actions of public authorities consisting in acquiring, collecting, and disseminating information about individuals in a way other than by submitting such data by the citizen him/herself who is obliged to do so under Article 51 Section 1 of the Constitution”<sup>36</sup>. Therefore, the information autonomy resulting from this regulation is one of the “components of the right to privacy”<sup>37</sup> that is derived from Article 47 of the Constitution and includes the right to take autonomous decisions on disclosing information about themselves to

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<sup>34</sup> Ibidem, sec. 82.

<sup>35</sup> Ibidem, sec. 66.

<sup>36</sup> Ibidem, sec. 75.

<sup>37</sup> Ibidem, sec. 76.

other persons and the right to control this information. The Constitutional Tribunal indicated that these rights are not absolute and may be subject to restrictions, on the terms and in the manner specified in the Act<sup>38</sup>.

In consequence, the Tribunal found that taking buccal swabs samples was an interference with the constitutionally protected integrity of the person, the right to protect private life, and information autonomy<sup>39</sup>. For these reasons, Article 74 § 2 subsection 3 of the Code of Criminal Procedure is to be construed restrictively: indispensability means that evidence from DNA analysis must be a prerequisite for the accomplishment of objectives of criminal proceedings, i.e., that the perpetrator of the crime is to be detected and held criminally liable, and that an innocent person is not to be held liable (Article 2 § 1 subsection 1 C.C.P.)<sup>40</sup>.

The Tribunal found the applicant's plea incorrect, stating that indispensability as such was insufficient for the proper implementation of the requirements resulting from the principle of proportionality, and correctly held that, if in the applicant's case, the action (taking buccal swabs samples and a subsequent DNA analysis) under Article 74 § 2 Subsection 3 of the Code of Criminal Procedure was performed, although it was not indispensable for criminal proceedings, then it would mean a case of a wrong practice of applying the law which cannot be recognized by the Tribunal by means of a constitutional complaint<sup>41</sup>.

In the last paragraphs of the judgment's grounds, the Tribunal also addressed certain more criminalistic than legal aspects of taking buccal swabs: the evidence value of DNA analysis, minimal discomfort for the person subject to the reference sampling procedure, and limitations of tests to only non-coding regions of the genome.

The judgment of the Tribunal stating that Article 74 § 2 Subsection 3 of the Code of Criminal Procedure is compliant with Article 41 Section 1, Article 47 and Article 51 Section 2 in conjunction with Article 31 (3) of the Constitution of the Republic of Poland is to be considered correct, yet certain fragments of the grounds require some comments.

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<sup>38</sup> Ibidem, sec. 74.

<sup>39</sup> Ibidem, sec. 120.

<sup>40</sup> Ibidem, sec. 131, 132.

<sup>41</sup> Ibidem, sec. 134.

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There is no separate act on DNA analysis in the Polish legislation. This issue is regulated by the Code of Criminal Procedure, the Police Act<sup>42</sup>, and secondary legislation. The Code includes provisions discussed above that are used in criminal procedures, whereas the Police Act encompasses provisions relating to the DNA database. The only link between these instruments is Article 21b subsection 1 of the Police Act: information about the results of DNA analysis carried out in connection with criminal proceedings shall be entered in the DNA database, which is managed by the Police Commander-in-Chief, pursuant to the order of the authority conducting pre-trial proceedings or of the court. Thus, a genetic test carried out in criminal proceedings does not necessarily need to include the defendant's profile in the database, as the authorized entities are not willing to issue relevant regulations. It should be noted that, in theory, this profile could be obtained from the person suspected<sup>43</sup> of committing an indictable offence (Article 20 Section 2a Subsection 1 of the Police Act). The legislation, however, gradually narrowed the possibility of obtaining DNA material on the one hand by introducing in Article 74 § 2 Subsection 3 of the Code of Criminal Procedure the criterion of "indispensability" and, on the other, by passing Article 20 Section 2c - this section states that information is not to be collected when it does not demonstrate detection, evidence, or identification usefulness in the proceedings conducted. As a result, the Polish DNA database included, as of 10 October 2017, only 66,197 personal profiles<sup>44</sup> (out of over 38 million citizens), plus 9,538 profiles of N.N. perpetrators, whereas, for instance, the Lithuanian database (Lithuania's population is close to 3 million) included in June 2016 as many as 87,310 personal profiles<sup>45</sup>. In this context, "indispensability" can and should be understood as the need to take a swab sample from all "suspected persons" to obtain a DNA profile

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<sup>42</sup> Dz. U. [Journal of Laws] 1990, No 30, item 179 as amended.

<sup>43</sup> See *supra* note 23.

<sup>44</sup> <http://clk.policja.pl/clk/baza-danych-dna/dane-statystyczne/109310,Liczba-profilu.html> [last accessed 06.11.2017].

<sup>45</sup> ENFSI survey on DNA Databases in Europe - June 2016, available at: [www.enfsi.eu/documents/other-publications](http://www.enfsi.eu/documents/other-publications) [last accessed 22.05.2017].



and enter it into the database that, after all, should provide an excellent tool for detecting perpetrators of crimes. King's case is the best example here. In Poland, the case of the theft of Claude Monet's *Beach in Pourville* from the Poznań Museum in 2000 would probably have been unresolved until today if the thief's fingerprints had not been entered into the AFIS database in the context of a petty crime; these fingerprints were collected in relation to an alimony case<sup>46</sup>, thus they were not "indispensable" as this concept is interpreted by the Constitutional Tribunal.

The Constitutional Tribunal in the above-mentioned judgment SK 28/15 explicitly supported the limitation of DNA testing only to non-coding regions of the genome. Indeed, the Police Act in Article 20 Section 2b Subsection 1 does impose such limitation, but it refers only to the database context! However, in criminal proceedings, the Central Forensic Police Laboratory (rightly) performs phenotypic investigations of biological traces of unidentified perpetrators. Yet, no legal regulations are in existence with regard to phenotype testing, similarly as it is the case of *familial searching* (although the scarcity of the DNA database in Poland seems insufficient for it). Moreover, the principle that "if something is not forbidden, it is allowed" does not necessarily have to be used in such delicate matter as integrity of the person, protection of privacy, or information autonomy. It seems that in this situation Article 138a of the Dutch Code of Criminal Procedure could be a good starting point for the Polish regulations: "DNA testing" shall be understood to mean the testing of cellular material which is aimed solely at comparing DNA profiles, establishing externally observable personal characteristics of the unknown suspect or the unknown victim or establishing consanguinity"<sup>47</sup>.

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<sup>46</sup> B. Janiszewski, *Monet odnaleziony w szafie* [*Monet found in a wardrobe*], „Newsweek Polska” 26.07.2010, available at: [www.newsweek.pl/kultura/wiadomosci-kulturalne/monet-odnaleziony-w-szafie,62418,1,1.html](http://www.newsweek.pl/kultura/wiadomosci-kulturalne/monet-odnaleziony-w-szafie,62418,1,1.html) [last accessed 19.06.2017].

<sup>47</sup> [www.ejtn.eu/PageFiles/6533/.../Omsenie/WetboekvanStrafvordering\\_ENG\\_PV.pdf](http://www.ejtn.eu/PageFiles/6533/.../Omsenie/WetboekvanStrafvordering_ENG_PV.pdf) [last accessed 22.05.2017].