

The DNA Identification Act in South Korea: Issues of Justifiability and Efficacy

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Abstract

The DNA Identification Act was enacted in South Korea in 2010 after a long series of discussions spanning 15 years. The DNA Identification Act deals with how to collect and use DNA samples from criminal suspects and how to retain the derived information in a database. First, Part II of this paper describes the legislative process and contents of the DNA Identification Act, illustrating the conflict between different interest groups concerned respectively about public safety and individual freedoms. Part III discusses the implications of this Act to the current criminal justice policy in South Korea and discusses whether the DNA Identification Act is necessary by examining risk management policy as well as asking whether the expanded DNA database has an effect on crime prevention. Part IV analyzes whether the current Act is justifiable by focusing on its three legislative purposes: criminal investigation, crime deterrence, and protection of individual rights and reviews major issues of this Act.

KEY WORDS: DNA Identification Act in South Korea, Justifiability, Efficacy, DNA Database, Criminal Justice Policy, Freedom, Security

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I. Introduction

After a long series of discussions, the DNA Identification Act (hereinafter **the Act**) was enacted in 2010 in Korea. The Act deals with how to collect and use DNA samples from criminals and how to retain DNA information obtained from DNA samples through the DNA database. DNA information had already been used as important evidence in crime investigations before the Act was established. For example, 8 cases of sexual offence which had been unsolved between 2008 and 2010 were solved by

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DNA information analysis in Oct, 2010. Aside from the sexual offences, the suspect was arrested for attempted theft but released on the grounds of a suspended sentence. While investigating this case, the police, who recognised that the way of getting into the house was similar to that for the sexual crimes which had occurred previously, tried matching DNA information gained during the investigation. Finally, the police found that the DNA information collected from the scenes of the 8 sexual crimes matched that gained from the scene of the theft.¹⁾ As learned from the case, DNA information can play a critical role in crime investigation. Furthermore, if the DNA information of the criminal had been stored in a DNA database, the criminal could have been arrested immediately and thus, the 8 sexual crimes and the attempted theft would not have occurred.

In contrast, DNA information can have a negative effect on criminal justice. For instance, DNA information can be contaminated, thereby confusing a crime investigation, and it might not always prevent crimes as expected. Moreover, DNA information stored in a database might possibly infringe on an individuals' rights, expanding the state's powers of surveillance.

Indeed, after the Act was established, a constitutional petition was presented in June, 2011 in that Articles 2, 5, 8, and 13 of the Act violated the Constitution, infringing on fundamental human rights.²⁾ In other words, the provisions of the Act are against an individuals' right to self-determination, the principle of proportionality, the principle of due process, the warrant requirement, and the principle of the presumption of innocence. On this issue, however, the Constitutional Court of Korea ruled in August, 2014 that the Act does not constitute infringement of the Constitution. Despite the court ruling, the controversy over the justifiability and effectiveness of the act is still ongoing. Although the court made the judgement, 4 out of 9 judges of the court decided that the provisions for DNA sampling are

1) See, e.g., Park Hong-Doo & Park Hyo-Jae, *Singildong balbali, DNA Geomsalo Jabassda* [A serial sexual offender arrested by DNA analysis], THE KYUNGHYANG SHINMUN, Jan. 23, 2011 (S. Kor.).

2) See DNA Sinwonhwaginjeongboui Iyong Mich Bohoe Gwanhan Beoblyul [Act on Use and Protection of DNA Identification Information], Act No. 12776, Oct. 15, 2014, arts. 2, 5, 8, 13 (S. Kor.) [hereinafter DNA Identification Act]. The articles of the Act deal with the collection of DNA samples from prisoners, the procedure of requesting a warrant for DNA sampling, and deletion of DNA information stored in a DNA database.

unconstitutional and another 4 judges submitted a recommendation that the provisions for deletion of DNA samples are not against the Constitution but they are subject to amendment.³⁾

The reason for the 15 years taken to establish the Act is the heated controversy over the justifiability and effectiveness of the Act. In consideration of the background of the Act, the purpose of this paper is to discuss the justifiability of the Act from the perspective of criminal law, and to suggest an alternative for improving the Act, on the basis of examining the justifiability of the legislation and the effectiveness of the legislative purpose.

II. The Legislative History and Content of the DNA Identification Act

1. *The Legislation of the DNA Identification Act*

1) *The Legislation Process*

Since 1986, the National Forensic Service introduced DNA analytic techniques from advanced countries and examined the means to apply them to investigations, and in 1991 it separately established the Division of DNA Analysis which has continued to operate. Afterwards, in May 1993, the National Police Agency suggested to the Administrative Reform Committee that a DNA database be established, and the National Forensic Service worked on “a Legislative Bill for 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, which started to operate a laboratory in July 1993. In 1994, it independently drafted legislation to establish the DNA databank.⁴⁾ In this way, the police and the

3) Constitutional Court [Const. Ct.], 2011Hun-Ma106, 141, 156, 326, 2013Hun-Ma215, 360, Aug. 28, 2014 (S. Kor.).

4) See, e.g., Shin Yang-Kyun, *Yujeonjajeongboeunhaengjedowa Ingwon – DNA Sinwonhwaginjeongboui Iyong Mich Bohoe Gwanhan Beoblyuleul Jungsimeulo [The System of DNA Databank and Human Rights – Especially Considering Latest Enacted Use and Protection of DNA Identification Data Act 2012]*, 22 HYEONGSABOEYONGU [JOURNAL OF CRIMINAL LAW] (2010).

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

The effort to establish the DNA databank of the Police and Prosecution stopped due to opposition from human rights groups and issues about the management agency. This subject appealed to the public again because of increasing serial murder cases and crimes of sexual violence.⁵⁾ Subsequently, in August 2004, the Police and the Prosecution, in conflict over who should be in charge of managing the DNA databank, started consultation on making a detailed bill together. In April 2005, the Police and the Prosecution consulted with the Prime Minister's Office, and drafted the bill to establish 'a Committee of DNA Identification Information' that could manage the databank in the neutral-stance Prime Minister's Office, which was followed by public hearings on the legislation in October the 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, which was submitted to the National Assembly in August 2006.⁶⁾ Following this government proposal, the Legislation and Judiciary Committee of the National Assembly examined and reported problems in almost all the articles (types of specific crimes that this bill can be applied to, management entity of the DNA identification information, collection of the DNA identification samples and restoration of the information, procedures of searching for DNA identification material and reporting, disuse of the DNA identification samples and deletion of data, the committee for the DNA identification data, penalties).⁷⁾ Regarding

5) *Id.* at 61. With regards to this increasing interest, 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. *See, e.g.,* Lee Seung-Whan, *Yeoseong Seongpogyeog Yebangeul Wihan Yujeonjajeongboeunhaeng Sinseol Jean* [Suggested Establishment of a DNA Data Bank to Prevent Sexual Violence against Females], in YEOSEONGPOGLYEOGGEUNJEOLEUL WIHAN SIMPOJIUM JALYOJIB [SYMPOSIUM FOR ERADICATING FEMALE VIOLENCE] (Nov. 21, 2002) (unpublished manuscript) (on file with author).

6) *See, e.g.,* Park Dong-Kyun & Hwang Young-Gu, *Beomjoeja Yujeonjajeongboeunhaengui Unyeongbangane Gwanhan Yeongu* [A Study on the Operating Methods of DNA Data Bank], 10(2) HANGUGGYEONGCHALHAGHOEBO [THE KOREAN ASSOCIATION OF POLICE SCIENCE REVIEW] (2008).

7) BEOBJESABOEOWIWONHOE [THE LEGISLATION AND JUDICIARY COMMITTEE OF THE NATIONAL

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 it, and thus this bill was abolished along with the termination of the 17th National Assembly.

As DNA testing played an important role in investigating Kang Ho-soon's serial murder in 2009, more people became conscious that the number of heinous crimes is increasing, and the Ministry of Justice drafted the Bill on the Use and Protection of DNA Information as a countermeasure.⁸⁾ In April 2009, the Ministry of Justice and the Ministry of Government Administration and Home Affairs held public hearings, and then they submitted the bill to the National Assembly in October 2009. On December 29, 2009, (the DNA Identification Bill) that was proposed to the general meeting of the National Assembly was passed by a majority, following the amended bill. The government enacted and proclaimed the bill which was composed of 17 preambles-, 3 supplementary provisions on January 25, 2010, and it was to be enforced starting from July 26 in the same year.

2) Main Contents of the DNA Identification Act

First, the DNA Identification Act provides clear definitions for the terms and purpose of the legislation of the Act. DNA in the DNA Identification Act refers to Deoxyribonucleic Acid which is a chemical substance including data regarding vital phenomena of a living organism. "DNA identification" refers to personal identification which examines and analyzes specific parts of the 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. These gathered data which are formed with a series of numbers or marks are called "DNA identification data". The "DNA identification database" (hereinafter, **DNA database**) refers to an array of DNA identification data

ASSEMBLY], *Yujeonjagamsigjeongboui Sujib Mich Gwanlie Gwanhan Beoblyulan Geomtobogo* [Review on the Bill on Collection and Management of the DNA Identification Information] (Dec. 2006).

8) Beobmubu Bodojalyo [Ministry of Justice Press Release], 'Jodusun sageon' Haegsimdaechaegui Ilhwanin DNA Sinwonhwaginjeongboui Iyong Mich Bohoe Gwanhan Beoblyul Jejeongan Gugmuhoewi Tonggwa, [Draft Bill on the Act on the Use and Protection of DNA Identification passes in Cabinet (as a major countermeasure) in the aftermath of the "Cho Doo-Soon case"] (Oct. 2009).

that is acquired according to this law and stored on storage media like computers, and for which independent access or search is possible through the database.

The DNA Identification Act provides what is needed to collect, use, and protect the DNA identification data, and aims at two objectives:⁹⁾ first, it contributes to crime investigation and crime prevention; second, it aims at protecting the rights and interests of citizens. Consequently, the DNA identification data cannot be used, revealed, or provided to others for purposes other than for the purpose of identification,¹⁰⁾ and the data cannot be falsely drafted or altered.¹¹⁾ Also, the collected DNA samples should not be destroyed, concealed, damaged, or treated in any way that ruins the usefulness of the data.¹²⁾

Second, the DNA Identification Act regulates a Target of DNA Sample Collection and List of Applicable Crimes as follows. 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 have been sentenced, people under a supervision order or medical treatment and custody, people whose sentences have been decided according to the protective disposition decision in the Juvenile Act.¹³⁾ Second, DNA samples can be collected from confined suspects and more. Here, “confined suspects and more” refers to suspects who are confined, or people under medical treatment and custody who are confined.¹⁴⁾ Third, DNA samples can be collected at crime scenes and more. Hereby, “crime scenes and more” means anything that has been found at a crime scene, that has been discovered from a victim of a crime, or that has been discovered from things, places or people that are related to crime.¹⁵⁾

The DNA Identification Act lists 11 crimes that can be subject to sample

9) DNA Identification Act, art. 1.

10) DNA Identification Act, art. 15.

11) DNA Identification Act, art. 17.

12) *Id.*

13) DNA Identification Act, art. 5.

14) DNA Identification Act, art. 6.

15) DNA Identification Act, art. 7.

collection as follows¹⁶⁾: 1) arson, 2) murder, 3) kidnapping, 4) rape or sexual molestation, 5) trespass upon a residence at night in order to steal, special larceny, and burglary, 6) crimes of assault, threat, apprehension, confinement, property damage, violation of domicile and coercion, and composition of criminal organizations and activity under the Act on the Punishment of Violence, 7) crimes of kidnapping and customary theft and robbery under the Act on Additional Punishment on Specific Crimes and etc. 8) crimes of sexual violence under the Act on the Punishment of Crimes of Sexual Violence, 9) crimes regarding narcotics under the Act on the Control of Narcotics, etc., 10) crimes of sexual violence, 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.

Third, the DNA Identification Act regulates DNA Samples and DNA Identification Data as follows. A warrant is required when collecting DNA samples from convicted persons or confined suspects. However, when there is written consent from the person directly involved, a DNA identification sample can be collected without a warrant. In this case, the person involved should be advised beforehand that they can refuse to be subject to the collection of a DNA sample.¹⁷⁾ The sample collection has to be conducted in a way to minimize any infringement of body or dignity.¹⁸⁾ 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.¹⁹⁾

The DNA identification data which has been acquired through DNA identification is loaded to the database.²⁰⁾ 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) new DNA identification data has been included to the database, 2) there is a request from the prosecutor or the judicial police for the purpose of crime investigation or to identify a person

16) DNA Identification Act, art. 5.

17) DNA Identification Act, art. 8.

18) DNA Identification Act, art. 9.

19) DNA Identification Act, art. 12.

20) DNA Identification Act, art. 10.

who has died unnaturally, 3) the court intends to find the facts in a criminal trial, and 4) it is needed to compare both databases.²¹⁾ When a convicted person has received judgment on their innocence, acquittal, dismissal of public prosecution or a decision of dismissal from the public prosecution, or when the prosecution decides that a confined suspect and etc. is clear from suspicion, or when the court's decision of innocence, acquittal or dismissal of 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 a convicted person or confined suspect has died, the DNA identification data should be discarded by the authority or if requested by the person's relatives. Also, the data should be disused when the identification is finished through the identification data collected from the crime scenes and etc. When the DNA identification data has been discarded for these reasons, any person who is directly related and etc., should be notified within 30 days.²²⁾

Fourth, the details of management of the DNA Database are clearly spelt out in the DNA Identification Act as follows. 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 convicted persons, whereas the Police Chief deals with the DNA identification data acquired from confined suspects, crime scenes, and etc. Each database can be operated at the same time, while also being closely connected.²³⁾

The DNA Identification Act requires the DNA Identification Data Database Management Committee, which is under the Prime Minister, to deliberate 1) details regarding collection, transportation, storage and disuse of DNA identification samples, 2) details regarding methods and procedures of DNA identification as well as standardization of identification technology, 3) details regarding the drafting of the DNA identification information, input of DNA information into the database, and deletion of DNA information from the database, and 4) details ordered by Presidential

21) DNA Identification Act, art. 11.

22) DNA Identification Act, art. 13.

23) DNA Identification Act, art. 4.

Decree. This Committee is composed of 7 to 9 members who are 1) high-level public officials or corresponding people who have taken positions in public institutions while working on DNA-related work, 2) associate professors or higher level people at universities or certified research institutes, or people who have been in corresponding positions, while having expertise and research experience in the area of life sciences or medicine, and 3) people of learning and experience in the departments of ethics, social science, law, or media.²⁴⁾

2. Main Character of the Legislation Process

It took 15 years to enact the DNA Identification Act and establish the DNA database, with various opinions and bills proposed during this time. Nevertheless, two issues that have been commonly discussed through all the Legislation Process could be found as follows. The first issue is about the conflict posed between the purpose of the act for effective crime prevention and the arrest of criminals and individual rights restricted by the purpose of the act. The DNA Identification Act provides a means to quickly arrest a suspected criminal through comparing DNA samples with what is registered as DNA identification data, and to exclude innocent suspects from the investigative pool early, and further to better prevent reoffending by people whose DNA identification data are loaded to the database. In other words, it was suggested in order to improve the efficiency of criminal investigations and prevent future crimes. Even though this legislative purpose has gained approval, details in the list of crimes that have applied for sample collection, the legal basis for the process of collecting and analysing DNA samples, and sample misuse as well as data deletion have always entailed concerns of infringing fundamental rights such as privacy and rights to the self-determination of personal data. Furthermore, the effect of preventing reoffending has also been questioned.

The second issue is in regard to who should be responsible for the management of the DNA database. Starting from the early phase of

24) DNA Identification Act, art. 14.

legislation, the DNA Identification Act has been involved with conflicts between the police and the prosecution on the issue of managing the DNA database. Eventually, this issue was resolved in a way that allowed both parties to separate and operate their own databases. Regarding the binary management of the DNA database, the government argued that it could prevent inefficient operation because both institutions would manage the database together, and the principle of checks and balances out of binary management would decrease the risk of misuse and abuse.²⁵⁾ However, following majority opinion, unifying the operational process of the DNA database is preferred. Binary management would decrease efficiency and waste the budget as well as increase the risk of misuse and abuse. Furthermore, it was suggested that the DNA database should be operated by an independent third agency,²⁶⁾ and there should be another institution to supervise this agency when it is operating.

III. Implications for Criminal Justice Policy

Before discussing the justifiability of the Act, the implications of regulations on the DNA database for criminal justice policy will be discussed below in terms of its legitimacy in criminal law and its effectiveness.

1. *Security v. Freedom*

The conflicts between effective enforcement of law and security, and protection and freedom of privacy can easily be found in the discourse of

25) BEOBSESABEOBWIWONHOE [THE LEGISLATION AND JUDICIARY COMMITTEE OF THE NATIONAL ASSEMBLY], *DNA Sinwonhwaginjeongboui Iyong Mich Bohoe Gwanhan Beoblyulan Geomtobogo* [Examination on the Bill of Use and Protection of the DNA Identification Information] (Nov. 2009).

26) See, e.g., Seo Gae-Weon, *Dieneisinwonhwaginjeongboui Iyong Mich Bohoe Gwanhan Beoblyului Munjejeongwa Gaeseonbangan* [Problem and Improvement for the Use and Protection of DNA Identification Act], 16(2) SEGYEHEONBEOBYEONGU [WORLD CONSTITUTIONAL LAW REVIEW] (2010); Cho Sung-Yong, 「DNA Sinwonhwaginjeongboui Iyong Mich Bohoe Gwanhan Beoblyul」e Daehan Bipanjeog Geomto [A Critical Review on the Act on the Use and Protection of DNA Identification], 21(3) HYEONGSAJEONGCHAEGYEONGU [KOREAN CRIMINOLOGICAL REVIEW] (2010).

modern criminal law and criminal procedure law. This discussion deals with security issues in modern society, particularly as it covers the role of criminal law for the purpose of security. The role of criminal law is shifting in the direction of reinforcing security, and criminal law is placed as a part of a new structure of “security.” Particularly, starting from late in the 1990s, as there had been rapidly increased risks and danger from criminal networks and international terrorism, criminal law was justified and the criminal procedure law changed for the purpose of security.²⁷⁾ In this regard, the concept of security combines with the narrow meaning of risks coming from serious crimes or particular violence. The concept of security is shifting in the direction of combining interior security and exterior security, which allows a blurring of the lines between the military and law enforcement, outside information institutions and inside information institutions, and information institutions and law enforcement agencies.

What is important in comparing security to freedom and the protection of privacy is that the basic condition of freedom lies in security. From this perspective there can be no conflicts between freedom and security because freedom does not exist without security. In other words, an individual can expect to have their human rights and fundamental rights in a safe circumstance. However, security from this perspective has to be understood as a broader concept. In particular, when discussing social security, it needs to be recognized that security has to include all types of security. Thus, in this respect, issues about what type of security is pursued and what risk threatens security become important.²⁸⁾

Next, how much information and data would be needed for state law enforcement in order to identify an individual and effectively implement criminal law would be an important matter to discuss. Currently, many states are collecting individual information in relation to security issues, and a number of human rights groups are claiming that this constitutes

27) See. e.g., Cho Sung-Yong, *Dogil Hyeongsasosongbeobui Byeoncheongwa Gineungbyeonhwa* [Changes to Criminal Procedural Law and Its Function in Germany], 27 BEOBHAGNONCHONG [DANKOOK LAW REVIEW] (2003).

28) See. e.g., Hans-Jörg Albrecht, Security, Crime Prevention and Secret Surveillance: How Criminal Law Adjusts to the Challenges of a Global Risk Society, in 4TH ANNUAL CONFERENCE: DEVELOPMENT & SECURITY: RETHINKING CRIME AND CRIMINAL POLICIES IN ASIA 141, 141-152 (Asian Criminological Society, Program Book, 2012) (unpublished manuscript) (on file with author).

infringement of human rights regarding protection of privacy.²⁹⁾ If retention of individual information is justified because the mere purpose of law enforcement lies in the maintenance of public security, all types of individual information can be retained without any reasonable grounds. However, it is not possible to load all types of individual information only for the purpose of public security. If we expand the criminal policies in the direction of preventing all types of risks to public security, it would eventually result in excluding all individual freedom.³⁰⁾ This is a result opposing the original purpose of security for freedom.

Therefore, discussions regarding data collection according to criminal law once again lead 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 or her information is not monitored by the state is very important in a democratic law-governed state because the risk of personal information being permanently monitored by the state results in citizens who cannot entirely exercise their fundamental rights.³¹⁾ 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 because personal privacy and the essence of freedom should not be infringed upon even when collecting and retaining DNA information. Therefore, when collecting and retaining DNA information, procedural justice has to be functioning to prevent crimes and pursue security, and there have to be grounds written in law in order to allow this.³²⁾

29) See Albrecht, *supra* note 28, at 145; regarding this, England is a representative country, which retains the highest ratio of DNA information per capita around the world. Human rights organisations such as GeneWatch, and Liberty, etc. have criticised the DNA database established by the U.K. government. In the case of Korea, a representative human rights group which has raised the issue of privacy against the state's power is "Jinbo network (www.jinbo.net)."

30) See Cho, *supra* note 27, at 334.

31) See Albrecht, *supra* note 28, at 146.

32) *Id.*

2. *Essence of the Risk Management Policies*

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 rapidly increased since 2000 caused the revival of the bill, and this act became enacted for the purpose of resolving and preventing violent crimes. It should be examined, however, if the number of violent crimes in an extreme form has actually increased because the government and the press might have been using figures about some extremely violent crimes. This tendency can be clearly found in sexually violent crimes against children. 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 children occur by ‘acquaintances.’³³⁾ The government and the press re-produce these distorted crime images while using some extreme cases and disregarding the real facts about sexual crimes against children. Through this, threats regarding the public order spread, which occur as demands calling for security through reinforcing public authority.³⁴⁾

On the other hand, present criminal policies are closely related to the concept of victim protection. In other words, firm control and surveillance of criminals would be needed in order to protect victims. This appears as a dichotomous approach that contrasts ‘dangerous criminals’ with ‘good victims’. However, this dichotomous comparison disregards social structural causes (i.e. economic inequality) and cultural causes (i.e. distorted notions regarding sex). Eventually this concept of victim protection combines with the code of ‘risk control’ or ‘risk management’.

33) See, e.g., LEE MI-JUNG & YOON DEOK-KYUNG, ET AL., YOAWA YEOSEONGI ANJEONHAN JIYEOCSAHOE HWANGYEONG JOSEONGBANGAN (II) [KEEPING CHILDREN SAFE FROM SEXUAL ABUSE (II)] 21 (Hangug Yeoseong Jeongchaegyonguwon [Korea Women’s Development Institute], 2010).

34) See, e.g., Lee Ho-Joong, *DNAbeobui munjejeomgwa wiheonseong geomto* [Reviewing the Constitutional Challenge and Problems of the DNA Identification Act], in GUGHOE TOLONHOE BALPYOMUN [A DISCUSSION OF THE NATIONAL ASSEMBLY - THE ACT ON THE USE AND PROTECTION OF DNA IDENTIFICATION, WHAT’S THE PROBLEM?] (Feb. 22, 2012) (unpublished manuscript) (on file with author).

Under the moral justification of protecting citizens' security from dangerous criminals, policies reinforcing state surveillance and control gain political legitimacy.³⁵⁾

In this regard, current criminal policies aim at 'risk management'. Criminal policies take a step further from aiming to stern punishment to reinforcing state control and surveillance through controlling 'dangerous personnel' that increase social instability. From this perspective, the current DNA Identification Act could pose a threat to 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 reveals the need for serious examination into whether to maintain this act or not.

3. *The Efficacy of the DNA Database*

It could then, be asked how efficient DNA databases actually are in crime investigation and prevention. It is universally held that the larger the database, the more crimes will be solved and the more crimes will be prevented.³⁶⁾ DNA evidence enables the arrest of murder-rapists who could have escaped otherwise, and it is expected to exclude suspects early with DNA evidence which eventually can decrease investigative costs. However, 'more' DNA identification data doesn't necessarily result in 'better' results. Sometimes 'more' can result in diminishing returns and increasing inefficiencies.³⁷⁾ In other words, it is necessary to examine how the size of the DNA database and the rates of solving crimes are actually correlated.

At present, the efficacy of the database in South Korea is measured by the number of "hits" as measured in other countries, which is the number of matches of the DNA data from crime scenes made against the DNA stored in the database.³⁸⁾ However this match does not account for how

35) *Id.* at 9.

36) See Lee, *supra* note 5, at 28.

37) See, e.g. SHELDON KRIMSKY & TANIA SIMONCELLI, *GENETIC JUSTICE* 305 (1st ed. 2011).

38) Since the implementation of the DNA, the DNA profiles matches are as follows (the Prosecutor's Office of Korea and the Korean National Policy Agency requested the matches to the National Forensic Service of Korea).

DNA Profiles Match (July 26, 2010 – Dec. 31, 2011)

many people were arrested and convicted. Furthermore, whether this number of matches increases proportionally to the expansion of the database is another matter although it is sometimes explained through the concept of the crime detection rate. The “crime-detection rate” is defined as the ratio of crimes that are cleared up by the police. However, the criminal standard indicates that the DNA database has operated successfully when a criminal is convicted rather than when a crime is detected. DNA information might have contributed to finding people who are not charged of the crimes or not relevant to the crime as suspects. However, as DNA information rarely is the major factor to judge whether someone is guilty or not, we cannot jump to the conclusion that DNA data contributes to the rate of judgment of convictions. That is to say, the fact that someone’s DNA information matches with DNA collected from crime scenes doesn’t necessarily mean that they will be convicted. Someone might have stayed in the scene before the crime was committed, or the DNA matches could have been made from evidence contamination. If we consider such a criterion when evaluating the efficacy of the DNA database, we can actually see that DNA evidence plays a disputable role in convictions.³⁹⁾

A larger database does not necessarily result in more crime control. There are several reasons behind this. First, as we have estimated previously, the factor that limits the efficacy of the database is the number of crime-scene profiles, rather than the number of individual profiles from suspects. Therefore, to improve the efficacy of the DNA database, there needs to be more DNA information obtained from crime scenes in the first place, but this is not an easy task as it requires effort and expense to find

DNA Profiles Match		
1)1728 / 2)12,864	3)1,200 / 4)14,459	5)2,987/ 6)16,707

- 1) The number of DNA profiles from crime scenes matched with those from prisoners
 - 2) The number of searches
 - 3) The number of DNA profiles from crime scenes matched with those from other crime scenes (criminals unidentified)
 - 4) The number of searches
 - 5) The number of DNA profiles from crime scenes matched with those from suspects in custody
 - 6) The number of searches
- 39) See Krimsky & Simoncelli, *supra* note 37, at 306.

DNA when there is no obvious crime-scene DNA sample. It is comparatively easier to obtain DNA samples at the scenes of violent crimes where biological evidence like blood, semen, or skin cells is left. Most crimes are property crimes, however, and thus collecting samples is difficult. Moreover, in the case of rape, which comes under the category of 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 is needed even when the DNA sample is collected and stored as profiled data. Also, even when a DNA match is found, the rate of conviction is not that high as we have examined previously. Thirdly, the efficacy of a DNA database decreases when we include data of minor offenders or people who have been arrested but were not charged with specific crimes. Expanding the DNA database increases the cost of profiling DNA samples, as well as the risk of error coming from cross-contamination of samples. Also, as the size of the database becomes larger, the possibilities of wrongly prosecuting individuals or making someone seem guilty increases. There have been cases where criminals have intentionally left evidence or switches, or confused investigative polices.⁴⁰⁾

Generally, it has been argued that a DNA database is not only efficient in solving crime but also in preventing future crimes. This argument presumes that people whose DNA data is loaded in the database will be prevented from committing a crime while having a fear of being arrested again. However, there is no evidence to support the view that the growth of DNA databases causes crime rates to decline. The database will not deter sophisticated criminals from committing crimes because they will find measures to confuse the criminal justice system in any way they can.⁴¹⁾

IV. Justifiability and Efficacy of the DNA Identification Act

In consideration of the discussion mentioned above, we raise a question of whether the DNA Identification Act of Korea observes the principle of proportionality. The justifiability of the DNA Identification Act depends on

40) See KRIMSKY & SIMONCELLI, *supra* note 37, at 315.

41) See KRIMSKY & SIMONCELLI, *supra* note 37, at 319.

whether the act operates in accordance with this principle. The justifiability of the act will be addressed first, focusing on the three purposes of the legislation of the act. Then, our focus will move onto some of the main provisions of the DNA Identification Act in terms of its justifiability and efficacy.

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 the rights and interests of nationals.” In other words, the purpose of this Act is to support crime investigation and crime prevention, while also protecting rights and interests.

1. Purpose for Crime Investigation

Considering that it is hard to obtain evidence 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 the human rights of suspects, while breaking away from outdated investigative practices that were centred on a confession.⁴²⁾

However, current crime investigation does not aim at establishing the DNA database through DNA identification information, but it has the purpose of collecting and analysing DNA samples. Therefore, current crime investigation comes under the criminal procedure law as being a part of an inspection in order to identify criminal charges of suspects quickly and precisely. This differs from the DNA Identification Act which aims at establishing a 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 the criminal charges. Again, this would cause a controversy over infringement of the

42) See, e.g., Kim Hye-Kyung, *Yujeonjajeongbosujibui ibbeobmogjeogui jeongdangseong* [The Legislative Justness of Law for DNA Database], 22(3) HYEONGSABEOPYEONGU [JOURNAL OF CRIMINAL LAW] (2010); Yoon Young-Cheol, 「DNA sinwonhwaginjeongboui iyong mich bohoe gwanhan beoblyul」e daehan bipanjeog gochal [A Critical Review on the Act on the Use and Protection of DNA Identification], 12(1) HONGIGBEOBHAG [JOURNAL OF HONGIK LAW REVIEW] (2011).

right of self-determination to individual information and violation against the presumption of innocence. Accordingly, in order to clarify the legislative purpose, it would be more appropriate to have this purpose of crime investigation reflected in criminal procedure law rather than in the DNA Identification Act.⁴³⁾

2. Purpose for Crime Prevention

1) Meaning of Crime Prevention

Crime prevention seems to belong to the Police Act rather than the criminal procedure law in that it prevents potential criminal procedures in the future.⁴⁴⁾ This is because the criminal procedure law mainly deals with a criminal trial at the time it has occurred rather than criminal actions in the future, and the Police Act primarily deals with prevention of threats 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-directed or future-oriented. According to this division, the task for identification that collects pictures or fingerprints, or measures the bodies of suspects regardless of current criminal suits conforms to preventive action of the police.⁴⁵⁾

However, it is inaccurate to consider the purpose of crime prevention of the DNA Identification Act as merely being preventive. In the first place, the major objective of collecting DNA information and loading it to the database is to obtain evidence for future criminal prosecution rather than to prevent crimes. Once DNA identification information is loaded in the DNA database, criminals can be arrested in cases where the DNA information of convicted criminals is obtained and there are no other suspects in a case. This effective criminal prosecution conforms to the preventive purpose of this Act. In the second place, the DNA Identification Act uses the term "suspects", and when attempting to collect DNA samples a warrant is

43) See Yoon, *supra* note 42, at 384.

44) See Kim, *supra* note 42, at 243; Yoon, *supra* note 42, at 384.

45) See, e.g., Cho Sung-Yong, *Beomjoeja yujeonjajeongboeunhaengui seollibe gwanhan beobjeog gochal* [A Review on the Establishment of a Criminal DNA Data Bank], 48 GOLYEOBEOBHAG [KOREA LAW REVIEW] (2007).

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.⁴⁶⁾ Lastly, the DNA Identification Act sets limits on searches, so that a search and report can be conducted only for criminal procedures for potential crimes that are expected (Article 11, the DNA Identification Act). This shows that DNA sample collection and searching can also be seen as a characteristic of the criminal procedure law.⁴⁷⁾

For these reasons, it is hard to accept that the DNA Identification Act aims at extensive general prevention that corresponds to prevention of risks in the Police Act. However at the same time, we cannot say that this purpose belongs to the original criminal procedure law.⁴⁸⁾ 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.

2) Prediction and Prevention of Recidivism

(1) Evaluating the Possibility of Recidivism

Accordingly, 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 a special crime prevention which is an attempt to decrease the risks of recidivism because retaining DNA information of offenders of certain crimes has not proven to be effective in general prevention of crimes against ordinary persons.⁴⁹⁾

However, even when a certain person has committed a serious crime, there are no specific grounds to predict that this person has potential risks of re-offending. Thus, the recidivism rates of offenders for specific crimes should be evaluated individually, and crime prediction for the purpose of investigation must be based on scientific knowledge from criminology, for

46) *Id.* at 993.

47) See Yoon, *supra* note 42, at 384.

48) There is a view that collecting and loading DNA information belong to the area of “precautionary crime struggle” and it can be seen as an expression of a 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 struggle against crime. Regarding this point, see Cho, *supra* note 45, at 993.

49) See Kim, *supra* note 42, at 254.

example, 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, performance methods, the personality of suspects and other perceivable reasons. In this context, the type and method of an offence refer to all those objective circumstances which are related to the cause of the action, that is, the type of the crime, seriousness of the crime, intention of the action, recidivism of the action, collectivity of the action, and post-control effects toward the victims. Next, the personality of suspects refers to subjective factors related to the offender, meaning their inner attitude that would cause them to constantly commit crimes. This inner 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. Lastly, other meaningful circumstances with regard to recidivism prediction can also be considered despite the fact that those circumstances do not come under the two previous cases. For example, the empirical studies rule that has been approved by criminology can be concerned.⁵⁰⁾

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

(2) Evaluating Recidivism Rates in Action

The fact that 11 serious crimes which are provided in the DNA Identification Act have a higher rate of recidivism does not mean that a certain offender of a crime in 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 is actually included in those crimes with higher risks of recidivism. Currently, the statistical data of recidivism in the strictest manner shows a re-imprisonment rate within three years. The data for this is as follows:

50) See. e.g., Cho Sung-Yong, *Dogil Hyeongsasosongbeobsangui Yujeonjajeongboeunhaenge Gwanhan Beobjeog Gochal* [A Review of the DNA Data Bank in Criminal Procedural Law in Germany], 19(1) HYEONGSAJEONGCHAEG [KOREAN JOURNAL OF CRIMINOLOGY] (2007).

Re-imprisonment Rate within 3 years of People Released in 2007

(Unit: percent, person)

Reasons of Release	Division	Re-released	Crimes								
			Homicide	Robbery	Sexual Offense	Violence	Larceny	Fraudnyef-fenseease	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
	Re-imprisoned	5,396	50	313	222	558	2,008	885	833	296	231
	Re-imprisonment Rate	22.3	6.5	23.0	17.5	22.3	40.0	13.1	41.5	15.7	9.0

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

Examining homicides and robberies listed in the DNA Identification Act, the actual rates of re-imprisonment are only 6.5% and 23%, respectively. Therefore, if we attempt to prevent recidivism in the future in a strict manner, the list of crimes that would be applied in the DNA Identification Act have to be readjusted through not only focusing on the specific standards to evaluate the risks of recidivism as above but also by 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 Concerned

Regarding the purpose of protecting rights and interests of this act, it is said that the DNA Identification Act can indirectly protect the human rights of victims and people related through early arrest of the criminals as a result of this Act.⁵¹⁾ However, the victims and people related are not the ones this law is directed at. Also, even though these people receive some benefit from early arrest through DNA identification, it is only limited to by-effects that are far from protecting their rights and interests, which is one of the legislative purposes of the law.⁵²⁾

51) See Kwon Chang-Kook, *DNA Deiteobeiseuui Doib Mich Gwanlyeonbeobjee Gwanhan Yeongu* [The Study on Introduction of DNA Databases and Related Legislative System in Korea], 16(4) HYEONGSAJEONGCHAEGYEONGU [KOREAN CRIMINOLOGICAL REVIEW] (2005).

52) See Yoon, *supra* note 42, at 385.

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

Regarding the purpose of protecting rights and interests, fundamental rights in the Constitutional Law, that is, the right of self-determination to individual information should be a concern.⁵³⁾ 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 previously discussed, this restriction has to be properly set within the principle of proportionality. From this perspective, this purpose of protecting rights and interests can be seen as a declaratory provision which would enable this propriety to be maintained. Most articles that are provided in this act, that is, the list of crimes, subjects, methods for collecting and analysing 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, can be determined as follows.

First of all, the DNA Identification Act provides that sample can be collected from detained suspects, prisoners and crime scenes and further analysed. It is, however, inappropriate to retain the DNA information of detained suspects, because this possibly violates the principle of presumption of innocence, and it is hard to distinguish them from suspects who have not been detained. As for the prisoners, when we consider that the sample is collected under the premise of occurrence of potential crimes, rather than crimes committed, the legal ground for retaining their DNA information is not clear. If this Act aims at preventing reoffending, the samples of prisoners should be collected at the end of their prison terms. Also, when gathering DNA samples from crime scenes, the relevance to particular crimes has to be clearly specified in order to prevent unnecessary infringement of human rights.

Secondly, the applicable crimes listed in the DNA Identification Act

53) See Kim, *supra* note 42, at 257.

from which DNA samples can be collected should be readjusted according to the following criteria: (i) Out of the 11 types of crimes listed, parricide or some crimes in the Act on Aggravated Punishment of Specific Crimes are not appropriate to be listed because they do not carry a higher possibility of reoffending; (ii) kidnapping invitation have to be deleted because in many cases they are aggregately punished according to the Act on the Aggravated Punishment of Specific Crimes; (iii) it needs to be reconsidered whether crimes related to larceny should be listed because they do not have same level of illegality compared to other serious crimes; (iv) many types of crimes that involve violence such as injury, violence, threat, arrest, confinement, kidnapping, intimidation, destruction cannot be uniformly regarded as serious crimes. In this regard, the list of crimes in Articles 2 and 3 of the Act on Punishment of Violence should be readjusted as well.

Thirdly, according to the DNA Identification Act, when there is no written consent, DNA samples can be collected with a warrant issued by the judiciary. However, when it comes to DNA analysis and loading in the database, this additional control procedure is lacking in this Act. The additional warrant and control procedure is necessary as collecting and analysing DNA samples and loading DNA information in the database restrict different fundamental rights. Also, considering that DNA sample collection and analysis from crime scenes restricts the fundamental rights of people who have not been identified yet, the additional warrant appears to be needed here as well. Furthermore, when searching for and reporting DNA information, additional restriction is needed in order to prevent random searches and reports. It is hard to expect to control random searches and reports with the current clauses of the DNA Identification Act, and subsequently 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 prisoners is likely to be retained until right before they are dead. For each case, whether to delete the information or not should be evaluated within a definite period of time while considering the individual circumstances of prisoners. Alternatively, DNA information should be uniformly deleted after a certain period of time for all cases.

Lastly, the managerial entity of the 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 by operating the database cooperatively. However, it can be considered that a third agency that is neutral should operate the database in order to establish efficiency and fairness in its management as well as maintaining its independence from investigative work. Aside from this, persons or systems that independently manage or deal with post-control operation of the databases need to be clearly specified. Currently, shifting the operation guide and the status of the DNA Database Management Committee in this Act can be an alternative.

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

DNA identification in this Act refers to examining and analysing particular DNA sequences that do 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 identification 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 a suspect's relatives can also be suspects in the case. This investigation method is called familial searching.⁵⁴⁾ 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.⁵⁵⁾ Even when the DNA identification has been conducted with the consent of the individual, it entails risks of disclosing information about other people. Currently, the DNA Identification Act does not have any clauses that cover this matter. Considering the legislative purpose of protecting rights and interests of relevance to the right of self-determination to individual

54) See. e.g., Han Myun-Soo, *Gwahagsusawa jeunggeojaepaneseo DNApeulopilui yeoghal* [The Role of DNA Profile in Forensic Science and Evidential Trial], 4 GYEONGCHALHAGYEONGU [THE JOURNAL OF POLICE SCIENCE] (2003).

55) See. e.g., Kim Hye-Kyung, *Yujeonjajeongbosujibui hyoyulseonggwa jeongdangseong* [A Study on Efficiency and Rightfulness of DNA Information Collection], 2(1) YEONSEULYO · GWAHAGGISULGWA BEOB [YONSEI JOURNAL OF MEDICAL AND SCIENCE TECHNOLOGY LAW] (2011).

information, the clauses regarding familiar searching should be supplemented.

4. Review of Major Issues

1) Target of DNA Sample Collection and List of Applicable Crimes

(1) Target of DNA Sample Collection

Above all, DNA information of detained suspects can be retained according to this Act. DNA samples of suspects can be collected and used for pertinent cases, 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 any judgment of conviction as a criminal. In this regard, it can be refuted that a warrant for DNA sample collection issued by the judiciary can resolve this matter. However, this warrant is issued regardless of specific charges for potential crimes.

Also, the grounds supporting whether a suspect can be detained or not and the standard for retention of DNA information is not clear. Detained suspects are included in the applicable subjects for DNA sample collection because their identities are already known, a fact which makes sample collection easy. However, it cannot be seen as discrimination by any rational standard, and thus it possibly violates the principle of equality. 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 the purpose of checking for additional crimes by detained suspects. However, this is an illegal investigative method for additional crimes.

Next, according to this law, DNA information from prisoners can be retained as well. In this case, as in the case of suspects, the question of violation of the presumption of innocence can also be raised because DNA samples are collected and information is retained under the premise of potential crimes rather than an existing crime. If the law treats prisoners as subjects for the purpose of offense recommitment prevention, then specific standards to predict the risk of offense recommitment have 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 the human rights of prisoners and the demands of their re-socialization have to be preferentially considered.

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

Lastly, according to this Act, DNA information obtained from crime scenes and etc. can be retained as well. In this case, the relevance to a particular crime has not been clearly specified in contrast to the case of suspects or prisoners. Therefore, DNA samples can be collected from what has been found in a crime scenes that are not related to a particular crime or that have been found from the interior or exterior of an 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.⁵⁶⁾

(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.

56) See Cho, *supra* note 26, at 245.

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 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.⁵⁷⁾ 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.

57) See Shin, *supra* note 4, at 75; Yoon, *supra* note 42, at 388; Kim, *supra* note 42, at 255; Cho, *supra* note 26, at 232-

2) *DNA Samples and DNA Identification Information*

(1) Collecting, Analyzing, and Discarding DNA Samples

First of all, 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. Therefore, this law does not 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. 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.

Next, when collecting DNA samples from the crime scenes, 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, 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.

(2) Loading, Searching, Reporting, and Deleting 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.⁵⁸⁾

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.⁵⁹⁾ Loading DNA information in the database can be 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.⁶⁰⁾ 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.⁶¹⁾

58) See Cho, *supra* note 26, at 242; Hwang Man-Seong, *Yujeonjagamsigjeongboui hyeongsajeolchasang hwalryongbangan* [A Debate on Forensic Applications of DNA Databases], 18(1st) HYEONGSAJEONGCHAEGYEONGU [KOREAN CRIMINOLOGICAL REVIEW] (2007).

59) 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.

60) See, e.g., LEE JAE-SANG, HYEONGBEOBCHONGLON [A GENERAL THEORY OF CRIMINAL LAW] (6th ed. 2008).

61) See Cho, *supra* note 26, at 249.

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.⁶²⁾ 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.⁶³⁾

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' 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 r⁶⁴⁾ 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

62) 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.

63) See, e.g., You Young-Chan & Jang Young-Min, *Gyeongchalgwahagsusau baljeonbangane gwanhan yeongu - yujeonjaeunhaengui seollibgwa hwalyonggeul jungsimeulo* [A Study on the Direction and Development of Forensic Science for Police Investigation - Establishment of a DNA Data Bank and Its Use], 14 CHIANNONCHONG [POLICE SCIENCE JOURNAL] (1998); See also Lee, *supra* note 34, at 16. 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 Cho, *supra* note 26, at 250.

64) See Shin, *supra* note 4, at 79; Yoon, *supra* note 42, at 394; Cho, *supra* note 26, at 252-

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.⁶⁵⁾

3) *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 uniformed 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.⁶⁶⁾

65) See Shin, *supra* note 4, at 80.

66) See Seo Gae-Weon, *supra* note 26, at 221; Shin, *supra* note 4, at 73; Cho, *supra* note 26, at 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 Seo Gae-Weon, *supra* note 26, at 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.⁶⁷⁾ 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.

4) 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 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.

67) See Syn Dong-Yiel, *DNAsinwonhwaginjeongbo Iyong Mit Bohoe Gwanhan Beoblyuleui Munjejeongwa Daean* [On the Use of DNA Databases for Forensics], 24(1) HYEONGSAJEONGCHAEG [KOREAN JOURNAL OF CRIMINOLOGY] 28 (2012).

V. Conclusion

The DNA Identification Act of Korea, established for the construction of a DNA database for the purpose of crime prevention and arrest of criminals, poses questions of whether public security and individual freedom can be balanced. This is because, while public security needs to be ensured, individual freedom is likely to be intruded upon, and whereas individual freedom is to be protected, the social security on which individual freedom is based can be threatened. The 15 years taken to establish the act in Korea tells us that the question above is not easily answerable.

It was challenging to resolve the conflict between placing an emphasis on public security and on individual freedom through the process of legislating the act, which was established after a long series of conflicts. According to the view concerning the intrusion on individual freedom, the act can be understood in the context of a risk management policy which reinforces the state's surveillance. The justifiability of the legislation of the act itself can be doubted in consideration of the fact that an expansion of the DNA database has not directly led to an increase in its efficacy. In contrast, the opposite view arguing for an expanded application of the act for crime prevention and the arrest of criminals is equally strong. Under these circumstances, the most realistic alternative is to amend the act to strike a balance between individual freedom and public security while considering the principle of proportionality. Examining the justifiability of the act in accordance with this principle, it appears inappropriate that crime investigation is to be included in the purpose of the legislation of the act for the reason that the act is oriented toward the construction of a DNA database. Therefore, a specific set of criteria for the risks of re-offence of a criminal should be provided in advance to construct a database for the purpose of crime prevention, and the crime list in the law should also be re-arranged, based on accurate statistics on recidivism. Lastly, the subject of DNA collection and the category of the crime should be re-arranged to not infringe upon the individual right to informational self-determination in the Constitution, strict procedures for the storage of DNA information in the database and searching for information stored should be provided, and

the provision for the deletion of DNA information stored needs to be changed.

The conflict between public security and individual freedom in regard to DNA is, essentially, not raised by an objection to the establishment of the act for public security. As mentioned earlier, public security is important in that it provides the basis for individual freedom. Instead, the conflict occurs from the distrust of the government institutions which apply the law to expand the state's surveillance indiscriminately in the name of public security. Thus, even if the act is to be amended, a practical institution needs to be established to supervise whether the act is applied and enforced appropriately.