The DNA-proof in Practical Danish Criminal Justice

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At the time of writing, on the 1st of July 2005 I tried a case of rape. A couple of weeks before the trial two counts of burglary committed in 2001 (just in time before limitation) and 2003 were added to the indictment. That this was possible was due to the fact that at both scenes of crime was found a cigarette stub clearly emanating from the perpetrator and containing spit from which DNA could be sampled. A sample taken from the suspect in connection with the rape case was routinely compared to the existing register of DNA samples from unidentified perpetrators collected at scenes of crime and disclosed a certain identification with a likelihood of more than 1 to 1 million in comparison with other denizens of Denmark. The defendant having initially denied his guilt on all counts at the last moment changed his plea to guilty as concerned the burglaries.

This routine case illustrates the great importance of DNA, the new means of proof which in Denmark has been used since the late nineteen-eighties. At first analyses were carried out abroad – as late as 1988 the Medico-Legal Council, *Retslægerådet*, labelled the method as "experimental", i.e. not a valid proof – but since January 1990 the Forensic Genetics Institute, *Retsgenetisk Institut*, at the University of Copenhagen, has carried out all analyses. (The case also showed that DNA is not a panacea for all problems of proof, as the defence to the count of rape was that of consent, not denial of sexual relations with the woman in question.) Statistics show the exponentially growing use of DNA in practical police work. Until 1995 a DNA analysis was carried out in less than a hundred cases per year, 1996 the two-hundred mark was passed, 2000 943, 2001 1,911, 2002 3,064, 2003 4,016, 2004 4,380.

In this chapter I shall not deal with practical questions of proof and reliability. There is no doubt that the proof is regarded as highly reliable, next to certain. Whereas in the beginning the institute only applied a scale of 1 : 100,000 as to the chance of the sample coming from another than the alleged perpetrator, the scale has as shown above been increased to 1 : 1 million. Instead I shall describe the legal rules covering the sampling and testing of DNA in Danish criminal

justice, including the important question of retention and storing of DNA samples for use in other cases, the so-called DNA profile register.

Inspection of the body as a means of investigation in the criminal process is treated in the large and comprehensive Administration of Justice Act, AJA, *Retsplejeloven*, in force since 1919 (but of course amended hundreds of times, latest promulgated as Act No. 910 of 27st September, 2005), §§ 792 seq., a chapter inserted in 1989 on the basis of a report of 1987, *Betænkning nr. 1104/1987 om legemsindgreb under efterforskning*, Inspection of the body during investigation. Inspection of the body is subdivided in 1) *viewing of the body*, incl. photographing and the taking of fingerprints, and 2) *closer inspection of the body* incl. blood tests and other corresponding samples, now – according to Act 369 of the 24th May, 2005 – also spit tests. The relevant clause, § 792, does not mention DNA analysis, not because DNA as a means of proof was unknown in Denmark at the passing of the act, but because the act only covers the encroachment on the body, such at the taking of a blood test or other samples, but not the later analysis. If the taking of the sample is authorized, all possible analyses incl. DNA analysis are also legitimate, no further legal requirements being necessary.

The means under 1) respectively 2) may be applied to an *accused*, AJA § 792 a subs. 1 and 2, provided as concerns 1) reasonable ground to suspicion that he has committed an offence prosecuted by the prosecution service – in practice every offence – *and* the means is deemed to be of substantial importance for the investigation, and as concerns 2) provided justified suspicion that he has committed an offence which may in law result in imprisonment for 1 year and 6 months or more, which includes most offences in the middle range such as assault and property crimes except for petty larceny, *and* the means is deemed to be of decisive importance to the investigation. "Justified suspicion" corresponds to the condition necessary for pre-trial detention, AJA § 762, while the weaker criterion "reasonable ground to suspicion" corresponds to the condition necessary for mere arrest, AJA § 755. In the case UfR 1997,972 V – UfR, *Ugeskrift for Retsvæsen*, "Legal Weekly", est. 1867, is the most important collection of decisions, also legal articles etc. – the Western High Court, *Vestre Landsret* (the Eastern and Western High Courts are the intermediate level in the three tiers system of courts in Denmark) held that mere brief presence near the place, where the body of a raped and murdered woman had been found, did establish "reasonable ground for suspicion", but not "justified suspicion", so that a blood sample with the view of a DNA analysis could not be taken from the man in question against his will.

It is a moot point whether the *refusal* from a possible suspect to submit to a blood test *per se* creates a justified suspicion, if none existed before. In UfR 1997,972 V the lower court posed the question, answering it in the negative, whereas the High Court did not add this reason, in my view rightly so, as in a stronger case the refusal may tip the scales exactly so much that a very reasonable suspicion becomes justified. This could be so in the possibly most notorious case where the DNA proof was decisive, the "Susan"-case, UfR 2000,2405 H, the strangling of a girl of ten and sexual molestation of the body. When the murdered girl was found in a cellar in the big block of flats where she

had lived, all men in the block voluntarily submitted to a test except one who refused, averring consultation with a well-known attorney who had in the press adduced the cause of civil liberties. The man's residence in the same block and his refusal being the only one from a small number were rightly deemed to distinguish the case from UfR 1997,972 V, and he was arrested, blood-tested by court order, and detained. At the third attempt the analysis was successful, and there were a positive identification. Later, also genetic traces from the girl were found in his flat. He was convicted by the jury and sentenced to imprisonment for life, the Supreme Court upholding the sentence. The point sometimes made in the debate that no one can sign away the rights of others, i.e. that the consent of one man cannot colour the estimation of a possibly very reasonable refusal by another, is thus not part of Danish criminal justice in practice, in my view rightly so, as shown by the Susan-case.

In many cases a blood test and a subsequent DNA analysis is of no importance to the case in point, e.g. because the suspect was arrested red-handed or makes a credible full confession at once; also, the loose supposition that he may well have committed further offences does not amount to a reasonable suspicion, let alone a justified suspicion. But if there are reasonable grounds to believe that he has committed an offence which may in law result in imprisonment for 1 year and 6 months or more, he may be photographed and fingerprinted, and a blood test and spit sample may be taken for later identification, even if not necessary for the actual offence, AJA § 792 b subsect. 1, which clause originally only included photographing and fingerprinting, the other tests being added to the list by Act 369/2005.

A *non-accused person*, whether victim or not, must submit to the means under 1), viewing of the body, except that the person may always remain clothed, provided that the relevant offence carries a possible penalty in law of imprisonment for 1 year and 6 months, and the means is of decisive importance to the investigation, AJA § 792 d, subsect. 2. The law does not except such persons as are not compellable witnesses against the accused, his "nearest", AJA § 171. The means under 2), closer inspection of the body, can never be applied to a non-accused except by consent. I have suggested that it ought perhaps to be possible to order a witness to submit to the taking of a sample in an extreme case, e.g. a complainant of rape, but this is not the law of the land.

As for the *procedure* the police have a direct competency to decide upon the means listed under 1) plus the taking of a blood or spit test from the accused, AJA § 792 c, notwithstanding a possible protest. The accused or defending counsel is, however, entitled to complain subsequently to the court as in other disputes between the parties during the phase of the criminal investigation, AJA § 746. The court will then by court order, which may be appealed against to the High Court, decide upon the legality of the measure taken. A court order must always set out the reasoning.

A court order is necessary for the application of other means listed under 2), but in case of danger in delay the police may act at once, subject to notification to the court within 24 hours, whereupon the court will, having heard (or read) arguments from both sides decide by court order whether to approve the action of the police.

The *consent* of the accused which must be given in writing, removes the competency from the court to the police, but the substantive requirements remain unchanged. The reason for the limited importance of the consent of the accused is that such consent is never completely voluntary, as the accused will expect the police to act at once, adducing danger in delay, if the consent is withheld. If defending counsel is appointed, also his consent is necessary, a rare case of the accused not having full competency to waive a right on his own.

Even though the consent of the accused does not remove the substantive requirements for the inspection of the body, the police are undoubtedly entitled to take a sample from an accused who expressly wishes so in order to clear himself, notwithstanding whether the substantive requirements are met with. Whether the accused upon the police's refusal is entitled to complain to the court, is a moot point, not settled in the AJA.

Except for the rule of defending counsel's consent, this system – competency of the police in smaller cases and when there is danger of delay, court order in other cases, limited importance of the consent of the accused – is typical of the regulation of means of compulsion in Danish criminal procedure.

Upon the consent of a non-accused person all means without exception may be applied without regard to the requirements in the AJA. Thus the taking of fingerprints and other tests for purposes of elimination both from witnesses and outsiders, e.g. the entire male population of a town, is legal, consent provided.

In Danish criminal justice a *general principle of proportionality* is assumed entailing a reasonable proportion between the end to be achieved and the means to be employed plus an obligation to choose always the least oppressive means, when more than one exists. The principle is expressly stated in § 792 e and is combined with a principle of *leniency*, adding that such means might violate a sense of decency, esp. if undressing is necessary, should only, if feasible, be applied by a person of the same sex as the person whose body is to be inspected, or medical personnel. Only a general sense of decency is protected, not personal ideosyncracies. A medical practitioner must assist when a means listed under 2) is to be employed, except for the taking of a spit sample, and must take the inherent pain and medical risk into consideration. The necessity of the means and the proportionality between means and ends is, however, not his province, but for the police or the court to decide.

The AJA does not mention the use of *physical force* against the accused in order to obtain a sample of whatever kind, but there is no doubt that the necessary force may be employed (thus the report 1104/1987, mentioned *supra*, p. 60 seq.). Also, the legislator, by expressly establishing lesser means of compulsion for the non-accused, takes for granted that force may be used against the accused. The police are thus entitled to hold or even strap the accused and carry through the measure in question. However, the principles of proportionality and leniency and the need for the assistance of a medical practitioner still apply. UfR 1994,319 V held that the police were entitled to shave a suspect who had grown a full beard after being detained, for the purpose of confrontation with witnesses. (*Birgitte Kofod Olsen*, who is attached to the The Danish Institute of Human Rights, has criticized that the possible application of physical force without express legislation may be a violation of

the European Convention of Human Rights, ECHR, art. 8, *Lov & Ret 1/1999* p. 16 seq., but no Danish case has reached the Strasbourg Court, and I strongly doubt that Denmark will be criticized in a hypothetical case.)

In the very rare cases where a means may be applied to a non-accused who does not consent, "instead of direct enforcement" (the wording of the AJA) the same means as for recalcitrant witnesses may be applied, AJA § 792 d referring to § 178, which includes fines, even deprivation of liberty until 6 months. I know of no cases.

In a case involving a *child* the consent of a/the parent(s) or guardian should be obtained, also the consent of the minor himself from the age of about fifteen. If a minor is accused of an offence, the normal rules are followed except for the question of consent, where the parents or guardian should accede as well. In case of a clash of interests, e.g. when a parent is accused of molesting his own child, a temporary guardian will probably be appointed, if the question of consent emerges. The municipal welfare office is always drawn in in cases regarding minors both as victims and as offenders. The report of 1987 advised against legislation in this field, probably rightly.

In Denmark, the general practice in cases where *questions of forensic medicine* arise, such as cases of drunken driving, cases concerning DNA tests, and cases of criminal insanity, is for the police to forward the material to a public body or an expert appointed by the court, whose findings are invariably accepted by either party. Difficult cases are submitted to the *Retslægerådet*. The "battle of experts", sometimes seen in Anglo-Saxon trials, is unknown here (but not seldom the defending counsel has a say before questions to e.g. the *Retslægerådet* are formulated). The Forensic Genetics Institute is regarded as independent and neutral, and it enjoys general confidence. Where the defence has a right of *disclosure*, AJA § 745, entailing a right to a copy of the findings of the institute, there are no rules regarding the possible right of the defence to a portion of the substance available for analysis with the view of a supplementary analysis as mentioned in a recommendation of the Council of Europe of 12th February 1992 under the significant heading "Equality of Arms". The question simply does not arise. On the other hand the defence may well ask the institute to carry through supplementary tests. If the police/prosecution protest, averring e.g. irrelevancy or disproportionate costs, the court decides according to AJA § 746. Independent investigation by the defence, i.e. not assented to by the prosecution or authorized by the court, is virtually non-existent, partly because of the implicit trust in the Forensic Genetics Institute, partly because the costs of such investigation will only be refunded the defence from the public purse, if the court "as an exception" considers that the defence had reasonable grounds, AJA § 1007, which happens exceedingly rarely. Only once during my 23 years as a judge defence counsel in an early stage of a case of serious assault without prior leave procured a doctor's report from a retired expert, asking the court to refund the cost. The prosecutor protested. As the report was partly relevant to the case, and the costs were small, I acceded to the request, rebuking defence counsel, however, in open court, as he should have known better.

DNA test results are proffered in writing as *second-hand evidence*, "hearsay", but as they are regarded as made "in furtherance of a public duty", they are

admitted directly, AJA § 877 subsect. 2. If a representative of the institute is called by the prosecution, this is with the view of enhancing the weight of the evidence, not as a matter of law. *Unlawfully obtained evidence* – e.g. the court considers during a dispute according to AJA § 746 that the police acted *ultra vires* – must be destroyed "at once", AJA § 792 f, subsect. 3. This clearly means that such evidence cannot be stored after the case, but it is a moot point whether it can be used during the trial. The categoric wording suggests a negative answer, but the placing of the rule in AJA § 792 f, the first two subsections of which clearly only deal with the later storing of materials tends the other way. The latter view is adopted by the report of 1987 (p. 91) and, more clearly, by a later report of 1996, *Etablering af et DNA-profilregister – med henblik på behandling af straffesager,* Establishing a DNA Profile Register – with Reference to Criminal Procedure (p. 29). I accede to this view, partly because of the placing of the rule, but also the general tendency in Denmark to admit reliable evidence, also if obtained unlawfully, at least if the police only made a mistake, as opposed to wilful arbitrariness.

More practical is the question of evidence obtained not unlawfully, but *accidentally*, and where the evidence could possibly not have been obtained legally. In the cases of invasion of communication such as a telephone tapping or a search, AJA §§ 789 and 800, accidentally acquired evidence regarding other and lesser offences than the one causing the means in question cannot be admitted in evidence during the trial for such offences, whereas the police are expressly authorized to use the evidence for the purpose of further investigation and to adduce such derivative evidence. Only evidence for lesser offences is excluded; if the means could have been authorized independently for the accidentally disclosed offence, the evidence will be admitted. The dubious question, whether §§ 789 and 800 should be applied by analogy to DNA testing, thus loses practical relevance.

Also before the days of the profile register discussed *infra* it was probably assumed that a sample taken from the suspect's body in one case could be tested for DNA in other cases, even though no reasonable or justified suspicion existed that the suspect had committed those other crimes. E.g. if by consent samples had been taken from non-accused persons, whether witnesses or outstanders, for purposes of elimination, such samples may be run against anonymous samples in unsolved cases. It is true that after the conclusion of the actual case all samples from such persons must be destroyed without storing, AJA § 792 f subsect. 2, but until then it is not unthinkable that a policeman with a good memory gets a hunch when an outstander arrives at the police precinct to submit a sample. As long as the police are in lawful possession of the sample, it may be used. The person giving up the sample has no claim of amnesty in other cases. Also, a blood sample taken in a case of drunken driving – which samples are automatically stored for one year to counter later submission by the accused of irregularities in the course of analysing – may be analysed for DNA, if a case of e.g. rape emerges during the year of storing.

The assessment of evidence in criminal cases is free, AJA § 896, and there is no *special standard of proof* when DNA evidence is proffered, but some tendencies may be discerned. As DNA evidence has not the same absolute

certainty as the finger-print – for which reason, by the way, the popular term "genetic finger-print" should be avoided – the main question has been whether a conviction would be safe in cases where there was no other proof but DNA profiling. In the early nineties, when the means of evidence was still young, there were a few acquittals; thus in a murder case of 1992 (the "Lille-Skensved case"), where the only link between the accused and the crime was a DNA testing and residence in the same village, the jury brought in a verdict of not guilty. As long as the institute said that the possibility of another perpetrator was less than 1 : 100,000, I have heard defence counsel argue that in the Danish population of 5 million that left fifty hypothetic perpetrators – one defence counsel even said that there was only a 2 per cent probability against the accused – but as the institute has by now changed the formula to "less than 1: 1,000,000", courts and lay judges are by now less reluctant to convict even when the DNA profile is the only evidence.

Also, the DNA proof is not only splendid evidence to convict the guilty, but just as good when it comes to *clearing the innocent*. In a case with no DNA evidence acquittal or withdrawal of charges often only means that while there was some evidence against the accused that evidence was just not strong enough. I have heard it said by many lawyers that there cannot be two classes of acquittal and that once acquitted you are white as driven snow, but we all know that not guilty in the eyes of the law does not amount to not guilty in the minds of the fellow citizens of the whilom accused. The stronger the principle of the reasonable doubt and the presumption of innocence is applied, the more certain you can be that out of a larger group of acquitted persons the majority are "really" guilty. (I have elaborated this point in my article *Frifindelsens begrænsning*, The Limitation of Acquittal, UfR 2003 B, 271-76 in connection with the problem of a person after acquittal in a criminal case being held responsible for a civil tort arising out of the same facts.) But when charges are withdrawn because of a negative DNA match, there is no doubt that the suspect is in fact innocent. I did not say acquittal, because no sane prosecutor will go to court with a hopeless case, where the DNA evidence points away from the accused. Not only the innocent is cleared, he is also cleared more quickly and expeditiously, which is both a humane gain seen from his point of view and a practical gain for society as police time and public money will not be wasted. E.g. after a sexual crime which was not cleared up immediately, it used to be the custom to "round up the usual suspects", test their alibis, talk to them and also possible witnesses, before such suspects or all but one of them could be cleared, but to-day it will only be necessary to compare their DNA to possible traces at the scene of crime, and the suspect will never know that he has been in fact under suspicion. As for the standard of proof, while it is still a moot point whether to convict on the strength of DNA evidence and only that, there is no doubt that negative DNA evidence will be treated as absolute proof for the suspect.

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The Council of Europe's recommendation No. R (92) 1 of 1992, mentioned earlier, suggested that "... samples ... should not be kept after the rendering of the

final decision in the case for which they were used" and that "the results of DNA analysis and the information so derived [should be] deleted when it is no longer necessary to keep it for the purposes for which it was used". Because of that hopelessly restrictive and unpractical clause the Kingdom of Denmark along with Norway, the Netherlands, and Germany made a reservation to the recommendation.

The report of 1996 made a strong recommendation in favour of a *DNA profile register*, both electronic and manual, and containing both profiles of known individuals and unknown perpetrators on the basis of samples from scenes of (unsolved) crime, and by Act No. 434 of 31st May, 2000 the register was established, consisting of two parts. The first part of the register consisted of *DNA profiles of persons* who were or had been *accused* of one of a list of serious crimes listed in the act, to-wit, assault or threat against a public servant or a witness; arson; causing danger to means of transportation, incl. explosion, high-jacking; sexual crimes, incl. rape and intercourse with children; obscene behaviour; homicide; dangerous or aggravated assault; reckless causation of danger or a fatal and incurable disease; coercion; deprivation of liberty; aggravated theft; robbery; crimes against the independence and safety of the realm, etc. Thus, mass crimes like simple assault and ordinary theft were not included. The second part of the register consisted of *DNA samples from traces of crime*, i.e. of all crimes not only the crimes listed above. If a burglar had left a cigarette stub with DNA on the scene of the crime as in the case described in the beginning of the article, that stub could be sampled for later storage and compared to other samples in the register, although common burglary was not one of the listed crimes. By virtue of being accused of rape the alleged perpetator thus incurred the risk of comparison between his known DNA and all samples from unknown offenders.

As concerns the first part of the register the keyword is "*accused*", i.e. the DNA sample is included in the register immediately upon accusation without waiting for a formal indictment, let alone conviction and sentence. And – a rule, which at least then was unique for Denmark – the DNA profile of the accused was not *purged* from the register upon acquittal or withdrawal of charges, but was left upon the register for later comparisons in subsequent cases. That rule was a continuance of the old practice as concerned finger-prints. Until 1989 there was no express legislation empowering the police to store photographs and finger-prints, only general instructions from the Ministry of Justice. Gradually, however, the police adopted the practice of destroying photographs of the accused upon acquittal and withdrawal of charges because of the risk of invasion of privacy, were the photograph to be shown to witnesses in later cases ("the rogues' gallery") – UfR 1994,199 V awarded compensation, when a photograph was illegally stored and shown to witnesses in later cases – but only destroying finger-prints and other samples in cases of proven mistaken identity or clearly wrongful accusation, but not upon acquittal etc. because of insufficient evidence.

The report of 1987 proposed the codification of this practice, arguing that the invasion of privacy was minimal as there was no risk of recognition, and that there were "not few" cases of the decisive probative value in later cases of finger-prints from accused, not convicted persons. The Minister of Justice added

in Parliament, *Folketinget*, that the retention of the finger-prints of the former accused could clear him at once in the new case without a vexing control of alibis etc. The overwhelming majority of the *Folketinget* voted in favour, only the left-wing Socialist People's Party dissenting. The relevant rule is AJA § 792 f, whereby finger-prints and other samples are only destroyed in the case of non-accused persons and unlawfully obtained evidence.

The rule on finger-prints has been challenged twice in the courts, however, without success. In UfR 1992,948 V a person after acquittal for attempted rape demanded the destruction of his finger-prints, adducing the ECHR article 8 on the respect of privacy. The court approved the retention of the finger-prints, citing AJA § 792 f. In UfR 2000,2101 V a person after withdrawal of charges for wanton destruction of property made the same demand now adducing both ECHR article 8 and i.a. the presumption of innocence. The court rejected his demand, stating that the storing of finger-prints was only an objective noting that he had in fact been accused (i.e. not a new accusation) and that the intensity of the means was so low that it could not be regarded as an invasion of privacy. None of the cases were appealed to the Supreme Court, and no complaint to the Strasbourg Court was made. In other cases (not Danish) of retention of finger-prints etc. the Strasbourg Court has stated so low intensity that no invasion of privacy had occurred.

Unlike the report of 1987 and politicians in 1989 the report of 1996 not only adduced common sense, but offered highly significant *statistical data*: 1989-93 15,231 persons were convicted of a least one of the serious listed offences. Of these 11,732 had neither been accused or convicted of a relevant offence in 1988, indicating when compared to the large majority of the population neither accused nor convicted in 1988 a risk of such conviction within 5 years of about 0.28 % in proportion to the whole population above 15 years, or, more realistically about 0.67 % of the male population in the age group of 15-64 years. 1,108 of those convicted 1989-93 had been accused in 1988, but not convicted, indicating a risk of later conviction of 12.2 %. The remaining 2,391 of those convicted 1989-93 had been both accused and convicted in 1988, indicating a risk of 23.2 % of later conviction. If, roughly speaking, a former criminal relapses if caught and convicted just as often as if he escapes from the clutches of the law, this supports a supposition that a little more than half of those acquitted etc. are actually guilty. The proportion grows if we accept the view of many criminologists that convicted criminals relapse more often because of the negative effects of punishment.

The proposed scope of the register to include those accused, also after acquittal or withdrawal of charges was sporadically criticized in the debate before the passing of the act (articles by *Eva Smith* in Lov & Ret 1997/2, 21-24, *Mette Hartlev* in the same 1998/4, 4-7, *Peter Blume & Mette Hartlev* in UfR 1999 B, 1-6, also by the Bar Association, *Advokatrådet*), but to no avail. The Ministry of Justice examined the practice of the court in Strasbourg, but found very little. The most important case was probably *Kiinunen v. Finland*, 24950/94, according to which the retention of photographs and finger-prints upon acquittal did not constitute a violation of ECHR articles 6 and 8. In the *Folketinget* two left-wing parties and a right-wing party, The Danish People's

Party, voted against the proposed scope of the register, stressing the human rights aspects, but the statistical data made an overwhelming impression on a large majority – it was stressed that 12,2 % exceeded 0,28 % by 44 times – also the Minister of Justice made the point that the thwarted clearing up of a later crime could be regarded as a worse violation of everybody's legal rights than the retention of DNA profile registers upon acquittal etc. As a compromise it was decided that whereas information about convicted persons would be retained until the age of 70, information about persons accused, but not convicted, would only be retained for 10 years after acquittal or withdrawal of charges (both time-limits may be extended). Also it was decided that no samples be stored if taken unlawfully or from witnesses etc., and that samples must be destroyed at once if the accusation is withdrawn as "groundless", opposed to "insufficient evidence"; also samples are destroyed if "special circumstances" prevail, which in practice means that the guilt of another has been proved. The exceptions are logical: if the accusation is groundless, there is no reason to suspect that the accused person might in fact still be guilty, likewise if another is proved to be the real perpetrator. In those cases the formerly accused in reality belongs to the 0.28%-group, not the 12.2%-group.

Unlike the finger-print register the DNA profile register has never been challenged in a Danish court.

The register has grown apace. As by 1st of March, 2005, there were 3,195 samples from persons and 6,141 samples from scenes of crime, i.e. from still unsolved crimes. The 3,195 persons were subdivided as follows:

Accused, i.e. case pending	1,412
Convicted	1,301
Prosecution wavered	31
Charges withdrawn	387
Acquitted	64
	3,195

The last two groups, 451 persons in all, are the ones where criticism has earlier been made.

From the establishment of the register on 1st of July, 2000, there have been 2,465 "matches" or, in the local jargon, "hits", 1,389 from trace to trace, i.e. the same man has committed more than one crime, but we still do not know who, 523 from trace to person, and 553 from person to trace.

I requested the register to take a group of cases at random from the groups of 387 and 64. 20 cases were examined. It turned out that 4 of the 20 had since their retention on the register after acquittal or withdrawal of charges in the original case been successfully connected to other crimes because of their inclusion in the register. One person who had been accused of robbery in 2001-02, which charge had been withdrawn, had as much as six "hits" later in 2002 and 2003. Undoubtedly many offences committed by the 451 have been discovered because of their retention on the register.

In the spring of 2005 Act 434/2000 and the AJA were altered in several important respects by Act No. 369 of 24th May, 2005, in force from the following day, as follows:

Whereas earlier only persons accused of a specified list of serious crimes were included, now persons accused of all offences which in law carry a maximum penalty of 1 year 6 months or more are included (plus persons accused of child pornography), which encompasses mass crimes like ordinary theft and simple bodily assault. It was expected that the register would be gradually be extended to include profiles from 20,000 persons, six times as much as in 2004-05.

Whereas earlier an accused could only be photographed or fingerprinted for later identification, AJA § 792 b subsect. 1, while other means of inspection of the body could only be applied if deemed to be of decisive importance to the investigation, blood tests and spit samples were now added to the list. In practice that means that even if the accused is caught redhanded or confesses at once, a test which makes a DNA analysis possible may be applied. As also the suspicion need only be "reasonable", not "justified", the storing of DNA profiles was thus in all respects regulated parallel to that of finger-prints.

Whereas earlier a profile was purged, when the person involved reached the age of 70 years, and after 10 years irrespective of age if he had been acquitted etc., a general age limit of 80 years was enacted, the 10 year rule being abolished.

The Ministry of Justice had before introducing the bill looked to Norway, Sweden, Finland, England, and the practice according to the ECHR. There were no new decisions in the Strasbourg Court, but there were indications that the rules concerning registers were in a process of change in other countries so that the Danish rules may in future not be as unique as they were now.

In 1989 and in 2000 a small, but significant minority had voted against, now there was almost unanimity in the *Folketinget*.

It is too early to make statistical compilations, but already it can be seen that the new act has brought about significant changes. The head of the relevant section in the police has said (*Politiken*, 18th July 2005) that while under the old act 10 blood tests were sent to the section per day, by now 25 tests are sent per day. Leading policemen expect the clearance rate for burglaries to be doubled.

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It is legitimate to argue that in spite of the Kiinunen case the ECHR article 6 § 2 and/or article 8, § 1 are nevertheless violated by the inclusion of DNA profiles from persons acquitted or for whom the charge has been dropped. As I have heard it stated, "There can be no such thing as a second class acquittal". At the end of this chapter I shall shortly state my own views.

As for *the presumption of innocence*, ECHR art. 6 § 2 it has been repeatedly stated by the Strasbourg Court, e.g. in the *Sekanina* case that upon acquittal the organs of the state may not make statements to the point that the person acquitted is probably or possibly guilty, or that the suspicion still remains. Not only a large group of persons per 1st of March, 2005, 451 – were included in

the register despite acquittal etc., but as profiles from persons the accusation against whom had been withdrawn and "groundless", or whose innocence was positively established, were purged from the register, the suspicion against the remainder was stressed the more (thus e.g. Eva Smith).

In my opinion there are three decisive respects whereby the inclusion in the register is to be distinguished from the forbidden statements as in *Sekanina* and other cases: Firstly, a large number of persons are included automatically without authorities weighing the pros and cons of single cases. Secondly, the exclusion of a very limited number of formerly accused – possibly only by single digits per year – only creates a very limited positive discrimination; it would be otherwise were the majority excluded and only a small proportion included in the register. Thirdly, the purpose of the register is not to retain or reopen the old case, but to pinpoint a significant number of persons for whom the risk of future crimes is far greater than the population at large; the chance of clearing up the new crime is enhanced, and possibly the formerly suspected and accused may be deterred from committing a new crime, when he realises the bigger risk of being caught.

As to the *respect for privacy* the chain of reasoning is short and easy: To know that one is included in a large register without risk of recognition – it is the old discussion of the finger-prints register as opposed to the retaining of photographs from the eighties – is a means of so limited intensity that it cannot possibly be regarded as invasion of privacy as described in ECHR article 8. That a person with a very thin skin "feels" that his privacy has been invaded, is insufficient. Law is general, and the feelings of a very small number of individuals cannot be decisive.

Once it is clear that the ECHR cannot limit the scope of the register, the field remains open for practical considerations. Two considerations are in my opinion of paramount importance: The inclusion in the register of accused, both in current cases and formerly, persons enhances the chances of the clearing up of crimes significantly. And the innocent may be removed from the investigation without being bothered further, perhaps even without knowing that a fleeting suspicion came his way.

The DNA analysis as applied in practical Danish criminal justice is probably the most beneficent innovation in the latest generation, the new register is a splendid tool in the fight against crime, and the legal rules in Danish law covering both are practical and supple.