

## DNA-Analysis and the right to privacy: Federal Constitutional Court Clarifies Rules on the use of „genetic fingerprints

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[1] On January 18, 2001, the Federal Constitutional Court (FCC) issued its judgment concerning three cases in which the use of the so called "genetic-fingerprint" had been contested as unconstitutional. According to the contested statute, a court may order a persons DNA to be tested and the result to be saved in a database. The database is used as a reference tool in future criminal cases. The relevant statutes, § 2 *DNA Identitätsfeststellungsgesetz* (Statute on identification through DNA-Testing), § 81g *Strafprozessordnung* (Code of Criminal Procedure), both enacted in 1997, allow such a test if the person is convicted of a major crime ("*Straftaten von erheblicher Bedeutung*") and there is probable cause to assume („*Grund zu der Annahme besteht...*") that the person will be involved in similar crimes in the future.

[2] The cells used for the DNA-test have to be destroyed immediately after the test and the use for any purpose other than to obtain the information needed to create the "genetic fingerprint" is illegal. The statutes, with this requirement, prohibit testing that will reveal any sensitive genetic data, supposing that the creation of a "genetic fingerprint" alone does constitute the manipulation of sensitive genetic information. Information concerning illnesses, character and hereditary is, for example, protected.

[3] The description of a "genetic fingerprint" is accurate, since the information needed to identify a person on the basis of his or her DNA reveals no more about this person than a conventional fingerprint. The DNA process is, of course, far more accurate.

[4] In the three cases before the FCC, lower courts had ordered the creation of "genetic fingerprints". All three appellants asserted this as a violation of their constitutional right to privacy. The right to privacy (in German law: *Allgemeines Persönlichkeitsrecht*, Art. 2 I and 1 I *Grundgesetz*), and the right to "self-determination over personal information," that is derived from the right to privacy, entitle every individual to control the disclosure and use of any personal information. Originally identified by legal scholars and only officially recognized in 1983 by the FCC (Decisions of the Federal Constitutional Court, Vol. 65, 1), only a compelling public interest justifies interference with or a limitation upon the right to privacy regarding personal information.

[5] The FCC held that the statutes allowing the creation of a "genetic fingerprint" and the use of these fingerprints in a database is constitutional. The Court held that facilitating future investigations on major crimes is a compelling public interest and therefore justifies the interference with the right to self determination over personal information.

[6] The FCC accepted the statutes' requirement that a DNA test and storage of the results must be based on a finding that probable cause exists to assume that the person will be involved in a similar crime again. The Court emphasized, however, that a careful prognosis based on the complete facts of every individual case must be made in reaching this conclusion. To ensure this careful analysis, the FCC required courts confronted with the decision whether to order the creation of a "genetic fingerprint" to show in their reasoning exactly how the prerequisites are met in each case. The Court held that merely stating that the possibility of a repeat offence cannot be ruled out, or simply repeating the wording of the statute and listing the convictions of the person concerned does not satisfy these strict standards. Because, in one of the cases before the FCC, the lower court had done just that, its decision was reversed by the FCC. In the other cases, the reasons given in support of the court's decision to order the creation of a "genetic fingerprint" were deemed sufficient by the FCC and their rulings were upheld.

[7] The impact of the decision is twofold. First, the statutes governing the use of the "genetic fingerprints" with regard to persons already convicted are only a few years old and they have now been ruled to be constitutional by the FCC. The statutes are considered to be a success; the database has contributed valuable information in more than 600 cases, although collecting the data has only been possible for little more than three years. It is important to note, however, that the Court put heavy emphasis on the non-sensitive nature of the genetic information that is gained. Therefore, it is clear that this decision says nothing about gaining other, more sensitive genetic data which would be a much greater interference of right to privacy but might also be a much greater aid to criminal investigations. Second, the Court put a stop to an increasingly lax use of the statute. This is important in view of the fact that the database of "genetic fingerprints" has been growing exceedingly fast and is expected to contain more than 100,000 fingerprints in early 2001. As a result of the courts' loose interpretation of the statute many district attorney's offices have been going through their old cases and petitioning the courts for new orders to create "genetic fingerprints". This practice will not stop completely, but the petitions will need more substantial arguments in order to be successful.

[8] What the FCC did not decide, since all of the complainants were convicted criminals, was the constitutionality of the possibility under § 81g of the Code of Criminal Procedure to order the creation of "genetic fingerprints" for those who have only been accused in a criminal procedure (and not yet convicted). In such cases all the other requirements remain the same. Groups concerned with the protection of the privacy of personal data have considered this the biggest problem with the 1997 statutes. Whether this will survive constitutional scrutiny remains to be seen.

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*For more information:*

FCC Decision online (German): <http://www.bundesverfassungsgericht.de>

English language version of the Basic Law on-line: [www.uni-wuerzburg.de/law](http://www.uni-wuerzburg.de/law)