Poland

Abstract Poland established its DNA database in 2007 and joined the Prüm system in 2013. In comparison to the other countries in the European Union, the Polish DNA database is small. The facilitation of international DNA data exchange was considered as fundamental to Poland's project to technologically modernize, integrate into Europe and incorporate international crime control standards. Furthermore, the country has demonstrated openness to those new and emergent forensic DNA technologies that have been critically assessed and strictly regulated in other countries. Poland is among Prüm's most proactive members and is a country ambitious to *catch up with a circumscribed expansive mode of debordering*. This proactivity is manifested in the range of bilateral data exchange connections Poland has made with other Member States and in the data categories it makes available. Poland's commitment to expansive debordering dynamics goes hand in hand with the EU's agenda of integrating security policies.

Keywords Poland • DNA database • Data exchange •
Debordering • Prüm

INTRODUCTION

Poland established its DNA database in 2007. According to the European Network of Forensic Science Institutes (ENFSI), in June 2016, the Polish database had 45,679 profiles of individuals in its DNA database. This accounts for 0.12 per cent of the resident population of 38,200,000. In comparison to the other countries in the European Union, the Polish DNA database is small, although it is comparable to Portugal's, which holds profiles of 0.09 per cent of the resident population (Reed & Syndercombe-Court, 2016).

From the beginning, forensic DNA data exchange was considered as fundamental to Poland's project to technologically modernize, integrate into Europe and catch up with international crime control standards. The prominence of migration flows from Poland (and some other East European countries) to other European countries and assumptions about the role of Polish criminal networks have shaped the imaginations of security professionals engaged in EU transnational police and judiciary cooperation. These views about Polish criminals have also influenced EU Member States' interest in connecting with Poland within the Prüm system to control cross-border criminality in the EU (Machado, Granja, & Amelung, 2020).

Among the five national cases presented in this book, Poland is the last to have joined the EU. While the others joined between 1958 and 1986, Poland joined in 2004. Poland's trajectory thus poses a particularly interesting scenario with which to understand modes of (dis)integration in Europe through the study of bioborders. Poland joined the Prüm system in 2013. According to the latest DAPIX report, Poland exchanges DNA data with 22 countries and is, therefore, one of Prüm's most proactive members (Council of the European Union, 2020). Beyond that, Poland exchanges a broad range of DNA data categories, including data related to 'unidentified persons', 'unidentified human remains' and 'missing persons', which are among the less common categories identified (Council of the European Union, 2020). In this context, Poland represents a country ambitious to *catch up with an expansive mode of debordering*.

As Ryan (2016, p. 308) has emphasized, Poland has a 'chequered history' that has influenced its legal and criminal justice cultures. From 1795 to 1918, its history was characterized predominantly by occupation and control by foreign powers, as it was divided between the Russian, Prussian and Austrian Empires. Independence followed in 1918. However, after

the Second World War and up to the fall of the communist regime in 1989, Poland was again under the control of Soviet Russia. The primacy of politics over law in the Stalinist period affected Poland's public life as part of its 'Sovietization'. The criminal justice system was instrumentalized to ensure conformity with the norms and rules of the Communist Party, and this had effects that have lasted until today (Ryan, 2016, p. 310).

Poland's transition towards being a democratic, capitalist society, and the absence of many welfare guarantees, such as for housing or work, which had been ensured by the communist regime, had an impact on rates of criminality in the country. In particular, petty crime increased after the fall of communism (Ryan, 2016, p. 311). After analysing data on criminal cases presented by the Ministry of Justice, Bulenda, Gruszczynska, Krempleski and Sobota (2006) record that, between 1993 and 2002, the number of cases filed annually with the public prosecution service increased by 64 per cent (from 1,033,893 to 1,644,763). However, after a peak in the early 2000s, the crime rate decreased again to the end of the first decade of the new millennium. Harsher crime policies were the government's response to the crime statistics and to the growing public fear of crime at that time. These developments coincided with the harmonization of law to prepare and comply with the requirements for entry into the EU (Buczkowski, 2016).

A particularity of the Polish context is a project of nationhood linked to the humanitarian use of DNA technologies in the investigation of missing person cases as a way to heal and overcome the collective traumas of the past (Granja & Machado, 2019). DNA technologies are, on the one hand, applied to overcome painful and traumatizing periods in Polish history and to give visibility, dignity and respect to victims of oppression and their relatives. On the other hand, it is used, with great media visibility, to identify missing persons in the present, as Poland has an additional DNA database dedicated to civil identification purposes.

NATIONAL DNA DATABASE DEVELOPMENT

In 2007, the Polish DNA database was created as a direct consequence of the Council of Europe's Rec(92)1 of 10 February 1992 on the use of DNA analysis within the framework of the criminal justice system and the European Union Resolution of 9 June 1997 (97/C193/02) 56 (Sándor, Sliwka, & Bárd, 2009, p. 20), which asked Member States to consider the

possibility of creating national genetic databanks. It took a decade to set up the legal conditions and get the first national DNA database started as a technical infrastructure.¹

The *legislative framework* of the forensic DNA database needs to be understood in the context of Poland's legal system. Since 1989, the criminal procedure system in post-communist Poland has been described by commentators as a mixed system that combines elements of inquisitorial practices shaped by its socialist past and adversarial practices deriving from recent reforms of the Code of Criminal Procedure (Ryan, 2016, pp. 308–311). Wilson (2016, p. 321) has concluded that 'these changes culminated in July 2015 with a switch to a more adversarial approach that appears to have created significant challenges for prosecutors, the police and the forensic science community'. However, in parallel, Ryan (2016, p. 322) concludes that although the forces of the EU Area of Freedom, Security and Justice, on the one hand, and the European Court of Human Rights, on the other hand, bring Europe's criminal procedural traditions (including Poland's) closer together, 'the criminal procedure appears to depend very much on which political party holds the political power', and recent politics are taken as a signal of a return to socialism in Poland.

Poland's forensic DNA database is regulated by the Police Act, the Code of Penal Proceedings and the Data Protection Act.² The Police Act was amended several times as it established the legal framework to regulate the conditions for the DNA database over time. In 2001, a substantial amendment provided the initial legal basis for the establishment of a DNA database. In 2004, another modification clarified that it was one of the police's main tasks to run a database that includes DNA-related information. Yet, the Polish Ombudsman, an oversight body that ensures that legislation conforms with the constitution and, in particular, with human rights, had various concerns regarding some of the amendments at that time. In consequence, they were subject to Constitutional Tribunal scrutiny. The main concerns were related to the seemingly insufficient clarification of conditions for gathering DNA data and the absence of regulations for data removals in cases where suspects were acquitted or proceedings terminated. In 2005, the Constitutional Tribunal confirmed that the retention criteria were insufficiently clear. However, regarding the

¹<http://clkp.policja.pl/cfl/cflp/history/90497,History-of-CFLP.html>

²<http://clkp.policja.pl/cfl/cflp/structure/biology-department/90076,DNA-Database-Unit.html>

data removal criteria after acquittal, the Tribunal approved the existing legislation and did not note any infringement. It argued that ‘under certain circumstances gathering data on acquitted persons might be appropriate given that such data is not of a sensitive nature’ (Sándor et al., 2009, p. 20). In the following amendment to the Police Act, in 2006, it was settled in Article 20 Section (2a) that, while carrying out their statutory duties, the police could gather, process and use DNA data (including personal data) without the individual’s knowledge or consent if they were ‘suspected of committing a crime that is prosecuted upon public accusation, a minor who committed unlawful acts prosecuted upon public accusation, of unidentified personality or tries to disguise his or her personality, [or] fugitive’ (Sándor et al., 2009, p. 21). Yet, data cannot be obtained if there is no detection, evidence or identification purpose to an investigation procedure. In addition, the Code of Penal Proceedings defines that the national DNA database stores and processes DNA profiles for the following criteria:

of individuals as laid out in Articles 74 and 192a of the code of penal proceeding, i.e. accused, charged, suspects and other persons, in relation to whom there were no premises for removal from case files and destruction of evidential material collected from these persons; of unknown individuals or persons trying to conceal their identity; of unknown dead corpses; of unknown stains collected at crime scenes, whose origin cannot be attributed to a particular person.³

If a suspect individual does not give consent for a DNA sample to be taken, an order for compulsory collection can be issued by a court (Reed & Syndercombe-Court, 2016, p. 70).

Poland’s data protection regime is defined by the Act on the Protection of Personal Data of 1997 (Dz. U. 1997 Nr 133 poz. 883 with later amendments), which is applicable to forensic databases and the collection of genetic information in Poland for investigative purposes. Personal data can only be collected and stored if it is exclusively of non-coding regions of the DNA (Sándor et al., 2009, p. 21). Every ten years, police bodies are required to verify all collected and stored information and remove obsolete data. Personal data that discloses ‘the race or ethnicity, political views, religious or philosophical attitudes, religion, party or trade union

³ <http://clkp.policja.pl/cfl/cflp/history/90497,History-of-CFLP.html>

membership, data about health, addictions or sexual relations of persons suspected of a crime prosecuted by a public prosecutor that have not been convicted for those crimes, shall be destroyed promptly after a relevant ruling takes effect' (Sándor et al., 2009, p. 24). The removal of data must be witnessed by a committee, and a report must evidence the process. The retention periods for DNA data are 20 year or 35 years for data related to suspects and those prosecuted or sentenced in connection with a crime (ibid.).

As noted above, in 2013 and 2015, major amendments to the Code of Criminal Procedure shifted the criminal justice system towards a more adversarial approach. The amendments have also had an impact on the collection and use of forensic biometric data, including its uploading to the national database. Further new legislation—the Act on Proceedings against Persons with Mental Disorders—that involves forensic biometrics and deals with unidentified bodies and persons who attempt to conceal their identity might 'also have placed extra demands on forensic database management and staff during the Prüm implementation period' (Wilson, 2016, p. 321).

The *technical database infrastructure* of the national DNA database is operated by the Biology Department of the Central Forensic Laboratory of the Police (CFLP), which is the custodian of the DNA database as well as of other biometric databases. As one of the main providers of forensic services in Poland, CFLP is responsible for casework, provision of technical and forensic resources, but it is also involved in forensic science research (Sándor et al., 2009, p. 19). CFLP participates in the development of the research methodologies, procedures and standards to be used during criminal investigation.⁴ Two groups are in charge of operations: one is responsible for profiling DNA from evidential material, and the other is responsible for profiling samples from persons and introducing them into the national database. Regional forensic laboratories provide information on profiles developed from crime stains that are added to the central database.

The IT system used in Poland is CODIS (Combined DNA Index System).⁵ The support provided by the FBI for CODIS, which includes the provision of a helpdesk, is among the reasons why 22 Member States

⁴<http://clkp.policja.pl/cfl/cflp/history/90497,History-of-CFLP.html>

⁵<http://clkp.policja.pl/cfl/cflp/structure/biology-department/90076,DNA-Database-Unit.html>

have chosen to use the system for the collection and search of DNA profiles. Thus, the software has led to some standardization across national systems (Council of the European Union, 2020).

Regarding the *organizational imperatives and principles* that shape how the national DNA database is managed, Poland's trajectory has been shaped by its history. Since the fall of the communist regime in 1989, exchanging knowledge with foreign law enforcement agencies has become one of the mechanisms contributing to police training directed towards modernization. Part of this process has been a drive for the internationalization of policies, including international collaboration with Interpol and Europol and involvement in other external programmes (e.g. EULEX, Leonardo da Vinci and NEXUS) (Karolewski & Benedikter, 2017). It is also worth mentioning that, in 2008, the Polish police received access to Interpol's DNA database through the International DNA Gateway portal (Sándor et al., 2009). Karolewski and Benedikter (2017) understand these endeavours as giving Polish officers the opportunity to participate in various undertakings that have allowed them to compare, contrast and exchange experiences. In the context of forensic genetics at the European level, the Central Forensic Laboratory of the Police (CFLP) has been a member of ENFSI since 1995.

The *Implementation of Prüm Decisions. Preparations of the joint police operations in Estonia, Latvia, Lithuania and Poland* project is a further example of Poland's proactive approach to training police officers. It was led by the Lithuanian Police, funded by the EU, Estonia, Latvia, Lithuania and Poland, began in 2011 and ran until 2013.⁶ According to Karolewski and Benedikter (2017), police training in Poland provides a mechanism for the professionalization of the police that responds to international risks and follows worldwide training standards. The regional collaboration, including the collaboration with Nordic and other East European countries, is not only of interest for its part in police training, it was also of use in intensifying the flow of police information where the flow of risky people is suspected to be of higher volume.

The *development of DNA technology* in Poland has been influenced by an experimental and wide use of DNA technology in the criminal justice system. Its development is oriented towards highlighting the country's openness to innovation and its modernity. This openness extends even to

⁶Further information about the project can be found in the project description: <https://www.statewatch.org/news/2013/oct/ee-lv-lt-pl-prum-jpos.pdf>

those new and emergent technologies that have been critically assessed and strictly regulated in other countries.

Among those critically assessed technologies are familial searching and forensic DNA phenotyping. Familial searching allows for the analysis of kinship relations based on an individual DNA profile. Poland was one of the earliest countries in Europe to use Y-STR profiles, which can be analysed in order to assess the familial connections of male profiles. The technology was used as early as 2000, when it was used in the elimination process of a mass screening in the case of a serial rapist and murderer known as the ‘Vampire from Świnoujście’ in Northern Poland (Dettlaff-Kakol & Pawlowski, 2002). The case received special media attention because about 11,000 men were screened. One of them showed an identical profile in all Y-STR loci, e.g. a short tandem repeat (STR) on the Y-chromosome, with the DNA profile of the unknown suspect drawn from crime scene samples; this suggested that the rapist and the typed volunteer were closely related males. The volunteer’s brother turned out to be the person with an identical profile of the person which had been found at the crime scene and was convicted.

Forensic DNA phenotyping (FDP) is a set of techniques that aims to use biological material to infer the externally visible characteristics—such as eye, hair and skin colour—and continent-based biogeographical ancestry, that is, what larger genetic population(s) they belong to, of an unknown person. Outside Poland, the ethical and social implications of FDP are regarded ambiguously (Wienroth, 2018a, 2018b). Inside Poland, however, ambiguous legal regulation of FDP means that its techniques have been put into practice (Samuel & Prainsack, 2018, p. 44).

As mentioned, according to legal rules in Poland, only data concerning the non-coding part of the DNA can be gathered and processed. Data regarding the coding part of DNA cannot be gathered or processed by the police. A recent regulation (No. 26 from the Commander in Chief of the Police, dated 10 July 2017 and published in the Official Journal of the Main Police Headquarters, item 48 (Appendix A.3.2)) defined the process for managing the DNA database and information about the results of DNA analysis. Interpreting the document, Samuel and Prainsack (2018, p. 45) suggest that the findings of forensic DNA analyses that derive from the context of storing short tandem repeat (STR)⁷ profiles in the national DNA database are regulated, but not what types of DNA analyses may be

⁷STR analysis is a common method of molecular biology to compare DNA from two or more samples.

performed. Their interpretation continues by assuming that non-coding regions of DNA may be analysed and stored as forensic DNA profiles, while coding region can be at least analysed but not stored (Samuel & Prainsack, 2018, pp. 41–45). Consequently, FDP is used in Poland for determining potential biogeographical ancestry, age and appearance (Samuel & Prainsack, 2018).

Advocating the normalization of analysis of the coding area and the establishment of new forensic genetic technologies, leading Polish forensic geneticists have argued in favour of expert training:

It also seems that the potential of the national DNA database in Poland has not been fully developed, and it is necessary to implement an appropriate information policy in order to improve it. Novel methods that can be applied at the level of investigation include analysis of biogeographic ancestry, prediction of visible traits, and estimation of human chronological age. Moreover, next-generation sequencing has a potential to entirely replace capillary electrophoresis in forensic genetics. Further works are necessary to ensure a proper implementation of uniform standards of data interpretation and evaluation of DNA evidence in forensic genetics. In order to maintain proper standards of forensic DNA assessment, continuous training of DNA experts and appropriate information policy for recipients of DNA assessments are required. (Branicki, Pośpiech, Kupiec, & Styrna, 2014)

The argument for further training and broader knowledge production accords with a tendency towards further professionalization that can be observed in the general organizational imperatives and principles of the criminal justice system since the fall of the communist regime in Poland in 1989.

The Polish case is marked by its iconic use of forensic genetic technologies to identify missing persons, particularly victims of the totalitarian occupations Poland has experienced (Ossowski et al., 2016a, 2016b, 2017). DNA technologies have been also used increasingly by forensic geneticists to provide evidence about mass graves from the Second World War and Nazi occupation of Poland, when almost 3 million people were killed; from the Soviet occupation, when 570,000 people died; and from the communist terror of 1944–1956, when more than 50,000 people died. Thus, in Poland, DNA technology has become closely connected with historical reprocessing and overcoming historical trauma (Granja &

Machado, 2019). In 2012 forensic scientists from the Pomeranian Medical University in Szczecin, in cooperation with historians from the Institute of National Remembrance (Commission for the Prosecution of Crimes against the Polish Nation), created the Polish Genetic Database of Victims of Totalitarianism with the aim of identifying all those who went missing or were killed between 1939 and 1956. The forensic genetic technique used to identify the victims is a variation of familial searching. Together with other technologies and strategies—such as dental records, x-rays and photographic comparisons—the procedures use DNA to match unidentified bodies and/or persons with individuals thought to be their biological relatives.

Poland is also concerned with identifying human remains and finding missing persons from the present (Granja & Machado, 2019). To this end, a dedicated DNA database of missing persons and their families has been established by the Centre for the Search of Missing Persons, which evolved from a collaboration between the police and a civil society foundation and has received relatively high media attention (TVP, 2015). Identifying familial relationships with the help of DNA technology has been key to its efforts.

BORDERING PRACTICES AND ORDERING TRANSNATIONAL DNA DATA EXCHANGE

Poland prepared the path for DNA data exchange and conformity with the Prüm Decisions from 2005. Its readiness for DNA data exchange was assessed in October 2012, and, shortly after, in January 2013, Poland began to exchange data on a routine basis. The country is among the most proactive Member States and has established connections with 22 other countries (Council of the European Union, 2020, p. 21). Poland represents a country ambitious to catch up with an expansive mode of debordering.

Poland exchanges a higher number of *data categories* than many other Member States, but does not only allow access to data on ‘suspects’ and ‘crime stains’, which are the most common categories exchanged. It does, however, exchange data on ‘unidentified persons’, ‘unidentified human remains’ and ‘missing persons’, which are among the less common categories to be identified (Council of the European Union, 2020, p. 22).

According to the ENFSI, Poland is among the EU Member States that include data on missing persons in their criminal databases (ENFSI, 2017, p. 59). In Portugal, there is one forensic DNA database. It serves both criminal investigation and civil identification purposes. However, there are separate files for criminal investigation purposes and for missing persons (see Chap. 7). The other countries in our study—Germany, the Netherlands and the UK—store data on missing persons in databases separate from their criminal DNA databases.

The specific *national legacies of DNA databases and DNA technologies* in Poland rely, in particular, on the securitization of the nation-state through internationalization. As Baylis and Matczak (2019) suggest, the Polish police continues to be the subject of transformation. They argue that the transformation of Poland's police organizations consists of many layers that aim to shift them from the repressive orientations shaped before 1989 to orientations that are sensitive to human rights through internationalization and Westernization.

Baylis and Matczak (2019) argue that, while structural changes in the police are easy to achieve, changes in values and attitudes are more difficult to achieve but have been targeted by training in Poland. Thus, it can be assumed that the international police collaboration strengthened through the Prüm Decisions should be understood through the rationale of internationalization and professionalization. Thus, the Prüm system per se is seen to come with the promise of support for more effective crime control through internationalized and professionalized police collaboration, which in turn is used to increase acceptance of the mechanisms of Prüm in times of transnationally organized crime and the criminalization of migration.

Regarding the *motifs of Member States complying with* the Prüm regime, it should by now be obvious that Poland fully supported the implementation of Prüm and was ambitious and quick in realizing its integration into the system in order to catch up with Central European and Nordic EU Member States. Yet, another motif that marked its swift integration into Prüm was that Polish offenders are considered to be overrepresented in comparison with other nationalities of foreign criminals in several EU Member States (Ludwig & Johnson, 2016). Assumptions about the role of Polish criminal networks frame the discourse of professionals operating the Prüm system about the importance of joining collective efforts to

control cross-border criminality in the EU (Machado et al., 2020) and help explain the interest of other Member States in data exchange with Poland. At the same time, however, Polish agents also reproduce the idea that Poland ‘exports’ criminals.

In terms of *hidden (dis)integration*, it could be argued that technically, scientifically and in terms of organizational matters, Poland’s debordering approach has led to some integration and harmonization, thus contributing to the more hidden techno-scientific forms of integration. From the start of the DNA database, issues of standardization and the facilitation of international DNA data exchange were considered as fundamental to Poland’s project to catch up with international crime control standards.

Poland has passed a couple of laws reforming its judicial and criminal justice system, including its police law of 2016, which have been investigated by the EU to assess whether they conform with EU democratic standards regarding the rule of law and human rights (European Commission, 2016). What seems to have created tension is Poland’s current tendency towards securitization and surveillance beyond that sanctioned by EU standards. The reform of the police law in 2016 expanded the Polish police’s powers by allowing law enforcement agencies much broader surveillance measures over the population (Karolewski & Benedikter, 2017). Some civil society stakeholders in Poland are also questioning the free border-crossing and debordering dynamics of the country (Limone, 2017). In this context, it is important to acknowledge the tensions between the EU and Poland regarding the latter’s status as a democratic and constitutional state on the one hand. On the other hand, however, Poland’s commitment to expansive debordering dynamics, enabling free data flow within the EU, conforms with the EU’s agenda of integrating security policies.

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