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HUMAN RIGHTS AND SCIENTIFIC AND TECHNOLOGICAL DEVELOPMENTS

RESPECT FOR THE PRIVACY OF INDIVIDUALS AND THE INTEGRITY
AND SOVEREIGNTY OF NATIONS IN THE LIGHT OF ADVANCES IN
RECORDING AND OTHER TECHNIQUES

Report of the Secretary-General*

(Addendum)

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* The present document constitutes the section entitled "Examples of National
Legislation and Jurisprudence" referred to in paragraph 276 of document E/CN.4/1116.

EXAMPLES OF NATIONAL LEGISLATIVE AND OTHER MEASURES AND JURISPRUDENCE CONCERNING
INVASIONS OF PRIVACY BY MODERN PSYCHOLOGICAL AND PHYSICAL TESTING METHODS USED FOR
NON-MEDICAL PURPOSES

Introduction

1. The information available to the Secretary-General suggests that there has been less legislation concerning invasions of privacy for non-medical purposes by psychological testing methods than concerning invasions of privacy by physical testing methods and considerably less such legislation than has been adopted in relation to auditory and visual devices and techniques. Nevertheless, there have been regulatory provisions and court rulings on both types of testing methods, and examples are to be found below. These concern largely personality assessment (personality tests), narco-analysis and polygraphing, and breath, blood and urine tests, as did the discussion in paragraphs 179-275 of document E/CN.4/1116. Also included are examples of relevant provisions contained in Codes of Professional Ethics of psychologists' associations in a number of countries.
2. Penal provisions requiring physicians and members of certain other professions to observe professional secrecy have been in existence for many years and are therefore not emphasized in the present paper.

I. Regulation of the use of personality assessment, "lie-detectors"
and narco-analysis

3. It will be recalled that non-medical personality assessment ("personality testing") is used largely in situations relating to employment and education. Extensive questionnaires which may or may not be "personality tests" in the psychologist's sense but which by the nature of their questions intrude upon the privacy of the person concerned may also be used in social science research and in surveys conducted, e.g., for statistical purposes.

4. Non-medical polygraphing may be used in situations relating to employment or to penal proceedings.

5. Narco-analysis for non-medical purposes may be used in situations relating to penal proceedings, either for purposes of interrogation or to help establish the sanity or otherwise of the person concerned and thus his accountability before the law.

6. In Belgium, the Cour d'assises of Limbourg was reported to have ruled in 1955 that methods such as narco-analysis, amphetamine shock and cardiazol injections were not admissible in penal proceedings, because they impaired the mental faculties of the accused and violated his spiritual integrity (l'intégrité psychique); that, moreover, their efficacy was debatable and that they could present a risk to the person concerned, even if a minimal one. On the other hand, the Court considered psychogalvanographic and encephalographic tests to be acceptable, on the grounds that they did not impair the subject's mental faculties and power of decision and caused him no danger or suffering.^{1/}

7. The same court rejected, however, a request by an accused that he be examined concerning the facts of the case by methods such as narcoanalysis or electric shock, on the grounds that the judiciary alone was empowered to judge offences and in doing so had to exclude all methods other than those specified in the Code of Criminal Procedure.^{2/}

8. "Eliciting statements by means of drugs or by the use of certain devices" is prohibited in Egypt.^{3/}

^{1/} Decision of 22 November 1955; Recueil annuel de jurisprudence belge (Bruxelles, Larcier), 1955, p.373, No. 53.

^{2/} Decision of 30 November 1955; loc. cit., No. 54

^{3/} Information forwarded by the Government of Egypt on 17 July 1972.

9. The Code of Criminal Procedure of the Federal Republic of Germany provides that the freedom of the accused to determine and to exercise his will shall not be impaired by ill-treatment, by fatigue, by physical interference, by dispensing medicines, by torture, by deception or by hypnosis. It also bars measures which impair the accused's ability to remember or comprehend. It specifies that these prohibitions apply even where the accused gives his consent to such measures (article 136 a).

10. The Supreme Federal Court (Bundesgerichtshof) reversed a Juvenile Court decision to convict because the latter Court admitted in evidence a statement made by the juvenile defendant to a medical expert while under the influence of the drug pervitin.^{4/}

11. The Government of Norway stated that there was much to be said for not allowing means such as lie-detectors or narco-analysis to be used in police investigations, even with the consent of the person concerned, unless they were specifically authorized by statute; that no such authority existed in Norway; and there were no immediate plans to grant this authority.^{5/}

12. In Greece, the use of "truth drugs" without the consent of the person concerned is indictable under article 308 of the Penal Code, relating to intentional physical assault.^{6/}

13. The use of "truth serum", e.g., penthotal, is not permitted in Morocco as it violates the spiritual and physical integrity of the individual and, moreover, its reliability has not been established.^{7/}

14. In 1967 the New Zealand Court of Appeal declared inadmissible the evidence of two psychiatrists who conducted a voluntary interrogation of a defendant while he was under the influence of Drugs, which corroborated his innocence. The court held

^{4/} Information forwarded by the Government of the Federal Republic of Germany on 3 July 1972.

^{5/} Information forwarded by the Government of Norway on 7 September 1972.

^{6/} Information forwarded by the Government of Greece on 12 July 1972.

^{7/} Information forwarded by the Government of Morocco on 5 July 1972.

that such evidence was hearsay and unreliable; and that, moreover, psychiatrists could not be allowed to give opinions on the ultimate issue of guilt or innocence, as this would amount to substituting trial by psychiatrists for trial by jury.^{8/}

15. The United States Supreme Court reversed a murder conviction where the defendant, a heroin addict, was given a drug to relieve the pain of withdrawal symptoms and seventeen hours later made a confession, although the effects of the drug are believed to dissipate in five to eight hours.^{9/}

16. As for the use of personality testing for employment purposes, a 1971 decision of the United States Supreme Court stated as follows:

"Nothing in the [Civil Rights Act of 1964] precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract."^{10/}

17. By 1966, the States of Alaska, California, Hawaii, Massachusetts, Oregon, Rhode Island and Washington had enacted laws prohibiting or severely curtailing the use of polygraph examinations of applicants for employment or existing employees in private industry.^{11/} The California statute, for example, provided:

"no employer shall demand or require any applicant for employment or any employee to submit to or take a polygraph, lie detector or similar test or examination as a condition of employment or continued employment."

^{8/} New Zealand Review (Auckland, 1967), p.139, and D.L. Mathieson, "The Truth Drug: Trial by Psychiatrist", The Criminal Law Review (London), November 1967, p.645.

^{9/} Townsend v. Sain (1963), 372.U.S. 293.

^{10/} Griggs et al. v. Duke Power Co., Official Reports of the Supreme Court, vol. 401 U.S. - Part 2, p.436.

^{11/} Alaska Ann.Stats., Sec.23.10.037 (1964); Calif.Labor Code, Sec.432.2; Hawaii Laws, Act 168; Mass.Gen.Laws, Ch.149, Sec.19B (1959, amended in 1963); Oregon Rev.Stats., 249 p.33 (1963); R.I. Gen.Laws, Ch.6.1 (1964); Wash. Rev. Code, Ch. 152 (1965).

18. The Alaska statute has extended the scope of the prohibition contained in the Californian statute by including the words "request or suggest". Violations of these statutes are misdemeanors, punishable by fine or imprisonment or both.^{12/} Some exemptions have, however, been allowed. Thus the California, Alaska and Washington State statutes specifically exempt polygraph testing of policemen and applicants for police positions.^{13/}

19. The arbitrator^{14/} in General Amer. Transp. Corp. (1958) noted as objections to the use of the device, in addition to the question of its scientific reliability,

"that its use is a violation of the privilege against self-incrimination; and ... that its use constitutes an unwarranted invasion of the subject's privacy."

The decision in that case finally turned, however, on the question of reliability. In the 1962 case In re Lag Drug Co.,^{15/} the arbitrator noted that:

"In view ... of the overwhelming weight of impartial scientific authority that these lie detector tests are not accurate and legal authority that they ... invade the right of privacy and constitutional rights against self-incrimination, this Board cannot uphold such a requirement in this case."^{16/}

^{12/} Paul Falick, "The Lie Detector and the Right to Privacy," New York State Bar Journal, Vol. 40, No.2 (February 1968), pp.103-4. The author reports that by 1966, anti-polygraph legislation had been introduced in eighteen other States of the U.S.A. The information given in paras. 17 to 19 of this paper is taken from Mr. Falick's article.

^{13/} Ibid., p.104.

^{14/} In the United States, Clauses barring the use of lie-detectors are often included in union-management labour contracts. In the absence of such clauses, cases involving the use of lie-detectors have been submitted to labour arbitrators and various administrative agencies such as the National Labor Relations Board.

^{15/} 39 Labor Arbitration 1121 (1962) at 1123.

^{16/} Paul Falick, op. cit., p. 105.

II. Codes of Professional Ethics for Psychologists

20. Codes of ethics have been adopted by psychologists' professional associations in a number of countries. Some provisions relevant to the topic under discussion are given below. The sanctions which may be applied to association members who violate provisions of a Code vary from country to country.

21. The Australian Psychological Society adopted a Code of Professional Conduct^{17/} and subsequently a separate document, Advice to Members.^{18/}

22. In addition to provisions concerning general ethical standards, such as integrity, objectivity and scientific honesty, the Code contains a number of provisions which may be considered to be of specific relevance to the topic under consideration.

23. A member must not approve the use by inadequately trained persons of techniques requiring psychological competence, except when they are being trained in the use of such techniques under the direct supervision of a qualified psychologist (A.1).

24. Where the client has been guaranteed, or can reasonably expect, that information given by him will be treated confidentially, the member must not divulge such information without the client's permission. Before communicating confidential information to another professional worker, he must obtain the client's permission, unless professional communication is clearly implied by the nature of the consulting relationship or the setting in which it takes place (A.5-6).

25. A client is entitled to assume that a clinical or consulting relationship is confidential, and a member must "make clear the nature of his role or function if he can foresee that any departure may be required from this principle". A member must not disclose information about criminal acts of a client "unless there is some overriding legal or social obligation to do so" (A.7-8).

26. A member engaged in research in which there is a possibility of harmful effects to subjects must take steps to protect the subjects. Where effects are uncertain he must obtain the subjects' consent to proceed with the investigation after informing them that risks may be involved (F.22).

27. A section of the Code devoted to "Principles Relating to Publication, Distribution and Use of Psychological Tests" reads as follows:

"A member must not publish or divulge the contents of a psychological test in any of the mass media or in any public display.

"Members, recognising the trust placed in them when purchasing psychological tests and materials, must observe the restrictions on distribution and use laid down in these rules.

^{17/} Adopted at the Society's Second Annual General Meeting, 21 August 1968; text in Australian Psychologist (Brisbane), Vol. 5, No. 1, March 1970, pp. 75-88.

^{18/} Text ibid., pp. 89-95

"A member must not act as an agent in procuring a test for an untrained person or a person who does not conform to the standards laid down in these rules.

"A member must not allow psychological test material to fall into the hands of the general public or of persons who could make unqualified use of them.

"A member who demonstrates psychological material to students must warn the students against using them except under supervision for training purposes, and must recover material which might be so used". (H.31-35).

28. The Code also deals with the "Employment of Unqualified Persons in Psychological Practice" (Appendix C)^{19/}. Under this heading the Society considers that:

"(1) Work of an undoubted psychological character should be performed only by a qualified psychologist. Work undoubtedly psychological includes giving, interpreting and reporting the results of psychological tests and the conduct of psychological enquiries or research surveys which require the use of psychological tests, schedules, scales or inventories.

"(2) Work which, while not of a completely psychological character is nevertheless sufficiently so to be under the direction of a psychologist, should be performed by a qualified psychologist or under the direction of a qualified psychologist by a psychological assistant. An example is the construction of tests, schedules, scales which require psychological theory for their interpretation.

"(3) Having in mind the duty a psychologist has to the public to ensure that work designated as psychological, i.e., requiring special knowledge, competence and professional responsibility should be performed only by a qualified psychologist, members should not countenance the unsupervised use of psychological techniques by any of the following persons:
(i) students of psychology; (ii) unqualified persons."

29. The above-mentioned Advice to Members of the Society includes the following provisions relating to the confidentiality of information:

"(xii) A member employed by an organisation cannot ensure that information recorded by him will not be communicated to others; he will therefore need to develop considerable discretionary powers in regard to how much he encourages a client to tell, how much he records and whether he should in some circumstances warn clients.

"(xiii) In the event of any doubt about what information to record, or where the case has a possible contentious character, a member should confine recorded information to that relevant to the immediate purpose of the examination.

. . . .

^{19/} An "unqualified person" is defined as one "having a knowledge of psychology or otherwise who is not a qualified psychologist nor a psychological assistant nor a student of psychology".

"(xv) Items of confidential data should not be allowed to circulate as topics of general conversation either within or outside the employing organisation. Where information about a client is to be regularly communicated outside the organisation to persons other than qualified psychologists, then it is essential to ask the organisation to come to an arrangement whereby the client's permission is obtained, particularly if the client has voluntarily sought the assistance of the organisation or the psychologist employed therein.

"(xvi) On request, full data, interpretations and recommendations may be communicated to psychologists either in private practice or in fee-charging organisations, provided that an arrangement is made to obtain (a) permission of the client, (b) permission of the employing organisation."

30. The Advice also contains, among other things, provisions relating to examination by members of the Society of cases coming, or likely to come, before a court (points (xxxv) to (xlii)).

31. The "Ethical Standards of Psychologists" adopted by the Canadian Psychological Association include the following provisions:

"Principle 6. Confidentiality

Safeguarding information about an individual that has been obtained by the psychologist in the course of his teaching, practice, or investigation is a primary obligation of the psychologist. Such information is not communicated to others unless certain important conditions are met:

"a. Information received in confidence is revealed only after most careful deliberation and when there is clear and imminent danger to an individual or to society, and then only to appropriate professional workers or public authorities.

"b. Information obtained in clinical or consulting relationships, or evaluative data concerning children, students, employees, and others are discussed only for professional purposes and only with persons clearly concerned with the case. Written and oral reports should present only data germane to the purposes of the evaluation; every effort should be made to avoid undue invasion of privacy.

.....

"d. The confidentiality of professional communications about individuals is maintained. Only when the originator and other persons involved give their express permission is a confidential professional communication shown to the individual concerned. The psychologist is responsible for informing the client of the limits of the confidentiality.

.....

"Principle 7. Client Welfare

The psychologist respects the integrity and protects the welfare of the person or group with whom he is working.

"a. The psychologist in industry, education, and other situations in which conflicts of interest may arise among various parties, as between management and labour, or between the client and employer of the psychologist, defines for himself the nature and direction of his loyalties and responsibilities and keeps all parties concerned informed of these commitments.

. . . .

"d. The psychologist who asks that an individual reveal personal information in the course of interviewing, testing, or evaluation, or who allows such information to be divulged to him, does so only after making certain that the responsible person is fully aware of the purposes of the interview, testing, or evaluation and of the ways in which the information may be used.

. . . .

"Principle 9. Impersonal Services

Psychological services for the purpose of diagnosis, treatment, or personalized advice are provided only in the context of a professional relationship, and are not given by means of public lectures or demonstrations, newspaper or magazine articles, radio or television programs, mail, or similar media.

"a. The preparation of personnel reports and recommendations based on test data secured solely by mail is unethical unless such appraisals are an integral part of a continuing client relationship with a company, as a result of which the consulting psychologist has intimate knowledge of the client's personnel situation and can be assured thereby that his written appraisals will be adequate to the purpose and will be properly interpreted by the client. These reports must not be embellished with such detailed analyses of the subject's personality traits as would be appropriate only after intensive interviews with the subject. The reports must not make specific recommendations as to employment or placement of the subject which go beyond the psychologist's knowledge of the job requirements of the company. The reports must not purport to eliminate the company's need to carry on such other regular employment or personnel practices as appraisal of the work history, checking of references, past performance in the company.

. . . .

"Principle 14. Test Interpretation

Test scores, like test materials, are released only to persons who are qualified to interpret and use them properly.

- "a. Materials for reporting test scores to parents, or which are designed for self-appraisal purposes in schools, social agencies, or industry are closely supervised by qualified psychologists or counsellors with provisions for referring and counselling individuals when needed.
- "b. Test results or other assessment data used for evaluation or classification are communicated to employers, relatives, or other appropriate persons in such a manner as to guard against misinterpretation or misuse. In the usual case, an interpretation of the test result rather than the score is communicated.
- "c. When test results are communicated directly to parents and students, they are accompanied by adequate interpretive aids or advice."

32. The Code of Professional Ethics of the Norwegian Psychologists' Association recognizes as a fundamental principle the right of each person to have his individual integrity respected and protected and provides that psychologists in their professional work are to act in accordance with this principle (Section II). The Code further requires the psychologist not to use psychological methods and tools except in cases where a professional relationship has been established (III.A.1). He is to inform his client, patient, student, etc., about the scope of professional secrecy (III.B.2). Subject to restrictions provided by law, he is to observe the right of professional secrecy with regard to confidential information obtained through his work about other persons' private lives and medical conditions; he may furnish such information to third parties only upon agreement with his client, etc., or with the latter's guardian (III.F.1 and 2). The client, etc., may not be obliged to participate in the professional relationship against his will (III.C.1).

33. The Professional Code of Ethics of the Psychological Association of Spain provides in part as follows:^{20/}

"2. Respect for others

In the exercise of his profession, the psychologist's task is to describe or counsel persons, groups or institutions which have rights, ways of life and goals that cannot be interpreted exclusively as psychological phenomena or used to gain private ends.

"2.2. All information obtained in investigations or counselling work must be protected from the curiosity or self-interest of third persons. The psychologist is always responsible if such information is used with indiscriminatio and he must protect himself by any means he deems necessary. The communication of information exclusively by specialized means, the use of technical language in records or descriptions and certain professional codes may be effective aids in safeguarding information.

^{20/} "Normas deontológicas para psicólogos en orientación escolar y profesional," Revista De Psicología General y Aplicada (Madrid) Vol. XXV, No. 102, 1970, 25, 1-8.

"2.3.4. The psychologist may use such technical resources as he deems necessary (auxiliary personnel, specially-equipped rooms, confidential records, equipment, tests, etc.), but he shall adapt them as much as possible so as to respect the client's system of values and modesty. If the use of such resources might discredit or humiliate the client, the latter shall be informed in time and given the opportunity to refuse them.

"2.3.5. During counselling, the personnel, as well as the information contained are exclusively at the service of the client and may not be employed for other purposes.

"2.3.6. If the information collected in the treatment of specific cases is to be used for educational or research purposes, any data which might reveal the identity of the person concerned or of his setting must be eliminated or disguised.

"2.3.7. The psychologist must do everything possible to ensure that his information is not used against the client (self-promotion of third parties, non-psychological justification for disciplinary measures, elimination of disturbing subjects, etc.), especially when the psychologist might be able to take advantage of persons or institutions attempting to make use of the information.

"2.3.8. In general, an oral personalized report is preferable to a written one and the communication of psychological information by mail should be avoided when the specific circumstances of those being counselled are not known or when the information might cause uncontrolled stress.

"2.3.9. Standard reports communicated to teachers or relatives of clients must not include information which may be considered final or restrictive (aptitudinal shortcomings, unconscious mechanisms, causes of stress, etc.) and must emphasize the harm which might be caused by incomplete or deficient interpretation of the information they contain."

34. The draft Ethical Standards for Research with Human Subjects of the American Psychological Association as published for review and discussion in May 1972, include the following Principles:^{21/}

^{21/} American Psychological Association, APA Monitor (Washington, D.C.), 1972 3, No. 5. The draft includes an extensive commentary relating, among others, to the questions of informed consent as to participation by subjects in the research, and the confidentiality of data.

"1. It is the personal responsibility of the investigator to make a careful evaluation of the ethical acceptability of each study he plans to undertake, taking into account the following guidelines for research with human beings. To the extent that this appraisal, weighing scientific and humane values, leads the investigator to consider a deviation from any principle, the investigator incurs a correspondingly greater obligation to seek ethical advice and to observe more stringent safeguards to protect the rights of the human research participant.

"10. The investigator should keep in confidence all information obtained about research participants. When any known possibility exists that others may obtain access to such information, this possibility, together with the plans for protecting confidentiality, should be explained to the participants as a part of the procedure for obtaining informed consent."

35. In Yugoslavia, the Code of Professional Ethics of the Psychologists' Association of the Socialist Republic of Serbia contains provisions dealing with the utilization of modern psychological testing devices. It stipulates, among other things, that the use of testing devices by the general public may not be permitted on any account; that the psychologist must bear in mind that such devices are often misused, most frequently by lay persons; and that he must make every effort both at his place of work and elsewhere to prevent their use by unqualified persons. The Code also requires the psychologist to observe professional secrecy and discretion concerning information in respect not only of clinical practice but of other types of testing as well. It emphasizes that this obligation extends also to information relating to children, in view of the harm that may be caused to them, either immediately or at some future time, and the harm that may be caused to their families; and stipulates that the psychologist must do whatever is necessary to preserve confidentiality in his work.^{22/}

^{22/} Yugoslavia, Psychologists' Code of Ethics of the Socialist Republic of Serbia, *Psihologija* (Belgrade) Vol. IV, No. 4, December 1971, pp. 239-244, more particularly Principles No. 13 and 20).

III. Blood, breath and urine tests

36. The tests being considered here are for such non-medical purposes as identification in criminal cases; determination of the alcohol content of blood or urine, or the presence of alcohol on the breath, in traffic cases involving questions of drunken driving; or the determination of blood groupings in paternity suits.

37. Part of the information included in this section was originally forwarded to the Secretary-General for the Study of Equality in the Administration of Justice ^{23/} and was included in the country monographs prepared as Conference Room Papers in connexion with that study. Such information is identified by the letters SEAJ, followed by the number of the Conference Room Paper (CRP).

A. Penal proceedings and traffic cases

38. Amendments adopted in 1968 to the Traffic Acts of the Australian State of Queensland provide for the taking of specimens of breath and blood for testing purposes from persons suspected on reasonable grounds of having, within the two preceding hours, been driving while under the influence of alcohol. (The amending Act makes it a punishable offence for a person to drive while the concentration of alcohol in his blood equals or exceeds 100 milligrams of alcohol to 100 millilitres of blood). A person who fails to provide such a specimen is liable to penalties which are the same as for conviction of the actual offence.

39. The penalties involved are fines, ranging from 200 to 400 Australian dollars, and disqualification from holding or obtaining a driver's licence for periods of from one to three months. Suspension of the driver's licence is not subject to appeal.

40. The laboratory tests are to be made by legally qualified medical practitioners. ^{24/} Evidence by the practitioner as to the concentration of alcohol in the blood indicated by the tests is, in the absence of evidence to the contrary, considered conclusive evidence.

41. A person required by the Police to provide blood for a laboratory test is entitled to obtain from the police a specimen of the blood.

42. Evidence that a specimen of breath or blood has been provided under these provisions, and the result of the analysis, may not be led or admitted in civil proceedings, except at the instance or with the consent of the person who provided it. The fact that such evidence has not been led or that consent to its being led has been withheld "shall not be a matter for comment in any such proceedings". ^{25/}

^{23/} United Nations Publication Sales No. 71.XIV.3.

^{24/} The policeman may request a breath specimen for making, himself, a breath test for alcohol. If that test indicates a concentration of alcohol of 80 or more milligrams per 100 millilitres of blood, or if the person fails to provide a breath specimen, he may be taken to a police station or hospital for a laboratory test, by the use of "such force as is necessary".

^{25/} Australia, Queensland, An Act to Amend "The Traffic Acts, 1949-1967", in Certain Particulars (No. 22 of 1968).

43. The Austrian Road Traffic Regulations of 1960 26/ make it a punishable offence for anyone to be driving or attempting to drive a vehicle while under the influence of alcohol (defined as an alcohol content in his blood of 0.8 per mille or more). Under those regulations, officers of health or road patrol officers with special training and duly authorized, may examine for its alcohol content the breath of any person driving or attempting to drive a vehicle if that person can be suspected of being under the influence of alcohol. The examination is to be carried out with "suitable devices".

44. If the examination makes it appear that the person is under the influence of alcohol; 27/ if he is driving, or attempting to drive, a vehicle and obviously under the influence of alcohol and the above-mentioned breath test is not possible; or if he is a driver or a pedestrian suspected of having caused a traffic accident while under the influence of alcohol, the road patrol officer is authorized to produce him before a physician of the public health service for the purpose of determining the degree to which he is under the influence of alcohol.

45. Where the person is under suspicion of having caused a traffic accident in which a person was killed or seriously injured, the examination is to include a blood test "if required and if medically unobjectionable". 28/

46. It is a breach of administrative law, punishable by a fine of from 5,000 to 30,000 shillings or by detention of from one to six weeks, for a person as described in para. 44 above, to refuse to have his breath examined, to have himself produced before a physician or to fail to undergo medical examination; or for a person as described in para. 45, above, to refuse to have a blood sample taken.

47. Belgian traffic legislation, too, provides for breath tests and blood tests for persons who appear to be under the influence of alcohol (1.5 gramme or more of alcohol per litre of blood). Refusal to undergo a breath test or to undergo a blood test without legitimate reason, is subject to the same penalty as drunken driving, i.e., a fine ranging from 100 to 1,000 Belgian francs, or imprisonment of from two weeks to three months, or both. Belgian traffic legislation specifies, moreover, the medical conditions for making blood tests and also prescribes the specific device to be used for breath tests. 29/

26/ Information forwarded by the Government of Austria on 16 October 1972.

27/ Except where such a person has not yet started the vehicle and on learning the result of this examination desists from doing so.

28/ Blood tests are also to be made in certain other circumstances, if demanded or agreed to by the person concerned.

29/ Royal Order of 16 March 1968 co-ordinating legislation relating to the road traffic police; Royal Order of 10 June 1959 relating to blood tests for determination of alcohol content ...; Royal Order relating to determination of the equipment to be used for carrying out breath tests; forwarded by the Government of Belgium on 13 July 1972.

48. A resolution of the Brazilian National Traffic Council, provided for tests for alcohol in traffic accident cases, the maximum amount allowable being 8 decigrams of alcohol per litre of blood. Provision is made for the use of balloon tests. 30/

49. In Canada, (Attorney-General of Quebec v. Begin) a man, subsequently charged with manslaughter, consented to a blood test but was not warned that the results might be used against him in evidence; the highest court in Canada held in 1955 that no warning was necessary as blood tests were not analogous to confessions. 31/

50. In Dahomey, a suspect is obliged to undergo blood tests to determine, for example, the alcohol content in his blood. 32/

51. In Denmark, 33/ according to the Road Traffic Act, motor vehicles may not be driven by anyone who has consumed alcoholic beverages in such volume as to make him incapable of driving the vehicle in a perfectly safe manner. If there is reason to believe that a person has violated these provisions, the police may take him to a medical officer for medical examination, in the course of which blood and urine samples may be taken to determine the level of alcohol concentration.

52. By circular letter dated 20 May 1968, the Danish Ministry of Justice authorized the police to use "alcotests" (whereby a person breathes into a glass ampoule containing yellow crystals turning green to a degree which reflects the amount of alcohol consumed). The test is not acceptable as evidence in court. It is merely intended to help the police decide whether a person should be submitted to a medical examination in pursuance of the above-mentioned provisions of the Road Traffic Act. Unlike that examination, the alcotest is voluntary; if a person refuses to submit to it, the police must decide whether he should be taken to a medical officer for examination.

53. The alcotest may be used especially if (a) there is a concrete suspicion of a person being under the influence of alcohol or (b) if he has been involved in a serious traffic accident, whether or not there is any suspicion of his being under the influence of alcohol.

54. The alcotest may not be used for routing checks of road users.

30/ Resolution No. 413 of 21 January 1969; information forwarded by the Government of Brazil on 28 June 1972.

31/ 112 CCC.209 (SCC), cited in Stanley M. Beck, "Electronic Surveillance and the Administration of Criminal Justice", Canadian Bar Review (Ottawa), Vol. 46, 1968, pp. 666-667.

32/ Information forwarded by the Government of Dahomey on 7 May 1969, SEAJ, CRP. No. 73, Addendum of 14 June 1969.

33/ Information forwarded by the Government of Denmark on 5 June 1972.

55. In Finland, blood tests can be taken without the consent of the suspected person, provided that he is suspected on plausible grounds of an offence for which the penalty exceeds imprisonment for six months and that such measures can be taken without "noteworthy" inconvenience. 34/
56. In criminal proceedings in the Federal Republic of Germany, a physical examination of a defendant may be ordered for the determination of facts relevant to Court proceedings. For this purpose, blood tests and other physical manipulations may be performed by a doctor in accordance with medical rules without the defendant's consent, provided no detrimental effect on his health is to be expected. Such examination may be ordered by the judge; it may be ordered by a public prosecutor and his officials if delay would jeopardize the effectiveness of the examination. 35/
57. In Greece, taking blood for testing purposes without the consent of the person involved is indictable under article 308 of the Greek Penal Code concerning intentional physical assault. 36/
58. The Indian Constitution provides that no person accused of any offence shall be compelled to be a witness against himself. The Government of India, commenting on this provision, stated that while, accordingly, an accused was not bound to answer a question put to him by the police during investigation and a confession made to the police was inadmissible in evidence against him, the police could subject the accused during investigation to such measures as a blood test for the purpose of collecting evidence against him. 37/
59. The Bombay Prohibition Act provides that a prohibition officer or police officer may take a person suspected of having consumed liquor, to an authorized medical practitioner for collection of blood, which is then sent to the Government Chemical Examiner for examination. The Act lays down the range of culpability (section 66 (2)).
60. In Ulka Kohle v. State of Maharashtra the court held that blood taking was permitted if the person arrested was believed to have committed a non-bailable offence. A doctor had taken blood from the accused following a car accident without specific orders from a police officer and without any purpose of treatment and was charged with committing battery against the accused but was acquitted. 38/

34/ Act No. 260/59 of 12 June 1959, Art. 22; information forwarded by the Government of Finland on 2 June 1965, SEAJ, CRP. No. 13.

35/ Articles 81a (1) and 81c (1) of the Code of Penal Procedure; information forwarded by the Government of the Federal Republic of Germany on 3 July 1972.

36/ Information forwarded by the Government of Greece on 12 July 1972.

37/ Information forwarded by the Government of India on 26 July 1965, SEAJ, CRP. No. 23.

38/ S.N. Jain, "Blood Taken by a Doctor: Whether the Result of the Text Admissible in Evidence - Ulka Kohle v. State of Maharashtra", Journal of the Indian Law Institute, vol. 5, April-June 1963, p. 296.

61. In Morocco, too, "alcotests" are used for tracking drunken drivers and blood analysis is employed to determine the percentage of alcohol in the blood. No coercion is used against a driver who refuses a test but in judging the case account is taken of such a refusal in determining the good or bad faith of the driver. However, the blood tests have not raised great problems for Morocco because drinking is forbidden and subject to strict sanctions for Muslims. 39/

62. In accordance with the Netherlands Road Traffic Act, blood tests may be made with the consent of the suspect. A refusal by the suspect to take the test is not acceptable as evidence in his trial. 40/

63. The Norwegian draft Act Relating to Judicial Procedure in Penal Cases provides as follows:

"Anyone, whom there is reason to suspect of having committed an act which by law is punishable with imprisonment, may be required to submit to a physical examination when it can be assumed to be important for the clarification of the case and does not appear to be an unreasonable encroachment. Blood tests and other forms of physical examination may be undertaken which can be effected without risk or significant pain."

64. If the suspect refuses to undergo physical examination it may be carried out only by order of the court. "To the extent that this is possible and advisable," the suspect is to be given the opportunity to express his opinion before the decision is made. If, however, the object of the examination might be lost through delay, a written order from the Public Prosecution may take the place of the court order. The order must indicate the grounds for this action.

65. A person other than the suspect may be obliged to undergo physical examination, if this appears "essential and reasonable" considering, e.g., the importance of the case, the nature of the examination, the extent of that person's involvement in the case as well as "the circumstances as a whole".

66. The investigation is to be carried out with due consideration for the persons concerned and the court may impose on the participants the duty to maintain secrecy on what they have observed. 41/

67. The Penal Code of Pakistan does not permit any psychological or physical test, except with the explicit permission of the subject. If such a test is carried out against the will of the person concerned, he can sue the examining authority for assault. 42/

39/ Information forwarded by the Government of Morocco on 5 July 1972.

40/ R. Meyjes, "Scientific Criminal Investigation Techniques Under Dutch Law", Journal of Criminal Law, Vol. 51, March-April 1961, p. 654.

41/ Draft articles 160 to 162; information forwarded by the Government of Norway on 7 September and 10 November 1972.

42/ Information forwarded by the Government of Pakistan on 6 September 1972.

68. In Poland the suspect or accused is obliged to submit to medical examination, both physiological and psychiatric, including blood tests. 43/
69. The Swedish Code of Judicial Procedure (Chp. 28, sec. 42) authorizes bodily inspection, including blood tests, to be carried out during investigation where a person is suspected of a crime punishable by imprisonment, provided no "considerable" harm is done to the suspect. The Government reports that this provision is frequently applied in cases where a person is suspected of driving while under the influence of alcohol. Any blood tests required must be performed by a physician. 44/
70. According to the Code of Criminal Procedure of the Ukrainian Soviet Socialist Republic, the accused may be given a physical examination, including a blood test, when required by the circumstances of the case, if the investigator so decides. The consent of the accused is not required. 45/
71. In the Union of Soviet Socialist Republics, the Code of Criminal Procedure of the RSFSR authorizes the investigator to carry out an examination of the accused in order to detect evidence of the offence on his body, if for that purpose the services of an expert in forensic medicine are not required. The accused is obliged to comply with the order for an examination. Actions offensive to the dignity or harmful to the health of the person undergoing the examination are forbidden. 46/ Taking samples from a person for comparative analysis is permitted only upon the decision of the official carrying out the criminal investigation. 47/
72. In the United Kingdom, according to the British Road Traffic Act of 1967, a police constable may require any person driving or attempting to drive a motor vehicle on a road or other public place to provide a specimen of breath for a test if he has reasonable cause (a) to suspect him of having alcohol in his body, (b) to suspect him of having committed a traffic offence while the vehicle was in motion, or (c) if there has been an accident (Section 2). Failure to provide a specimen without reasonable excuse is a criminal offence, and if a person fails to pass a breath test he may be arrested and required to provide a urine or blood specimen. Failure to provide these specimens without an excuse is an offence subject to the same penalties as driving with a blood alcohol concentration above

43/ Information provided by the Government of Poland, 20 May 1965, SEAJ, CRP. No. 3.

44/ Information forwarded by the Government of Sweden on 8 June 1972.

45/ Information furnished by the Government of the Ukrainian SSR, SEAJ, CRP. No. 15.

46/ Article 181; information forwarded by the Government of the Union of Soviet Socialist Republics on 18 March 1965, SEAJ, CRP. No. 32.

47/ Code of Criminal Procedure of the Russian Soviet Federative Socialist Republic, arts. 181 and 186; information forwarded by the Government of the Union of Soviet Socialist Republics on 11 October 1972.

the prescribed limit. A person who is a patient may not be required to submit to breath, urine or blood tests without the agreement of the medical practitioner in immediate charge of the case (Section 3(2)). 48/

73. In the United States, the Supreme Court has confirmed the power of courts to order and admit into evidence the results of blood tests for purposes of determining alcohol concentration in suspected drunken driving cases. 49/ Each State is responsible for setting the permissible alcohol rate, that rate being .15 per cent in the majority of States and as low as .05 in some States. 50/

74. In 1966, the Supreme Court ruled as follows:

"We hold that the privilege [against self-incrimination] protects an accused only from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question did not involve compulsion to these ends." 51/

The Court added, however:

"That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions."

75. In Barbados, Guinea, Jamaica and Trinidad and Tobago, suspects or accused persons may refuse to submit to blood tests. In Zambia, a person may refuse to be examined by a physician in a suspected drunken driving case. 52/

B. Civil Proceedings

76. In Austria, genetic examinations, in particular the taking of blood samples for blood grouping tests, are compulsory to the extent that they are necessary for the determination of paternity. This applies to the parties directly concerned, interested parties and witnesses and, if required, their parents and grandparents, in defended cases and in non-contentious proceedings. Where a person refuses such an examination without reasonable grounds, he may be ordered brought by force to

48/ International Commission of Jurists, "The Legal Protection of Privacy", International Social Science Journal (Paris: UNESCO), Vol. XXIV, No. 3, 1972, pp. 475-476.

49/ Breithaupt v. Abram 352 US 432; Schmerber v. California 384 US 757.

50/ S.C. Versele, "La Loi du 15 avril 1958" Revue de Droit Pénal et de Criminologie (Brussels) Vol. 44, June 1964, p. 810.

51/ Schmerber v. California 384 US 757 (1966) at pp. 761 and 772.

52/ SEAJ, information forwarded by the Government of Barbados on 27 July 1967 (CRP. No. 59); by the Government of Guinea on 4 November 1968 (CRP. No. 52); by the Government of Jamaica on 24 February 1965 (CRP. No. 1); by the Government of Trinidad and Tobago on 30 March 1966 (CRP. No. 18); by the Government of Zambia on 2 July 1966 (CRP. No. 5).

the examination. The court rules on the reasonableness of the grounds, risk of being prosecuted as a result of the examination not being deemed to constitute reasonable grounds. A court ruling declaring a refusal unfounded may be attacked by the person to be examined; a decision upholding the refusal may be attacked by the parties directly concerned and by interested parties. 53/

77. In Brazil, blood tests are permitted in paternity suits, but their results are not considered binding proof, in the absence of legal provisions on the subject. 54/

78. In Denmark, a court may order the parties in a paternity case to submit to a blood-grouping test if it finds such a test necessary for the provision of evidence. Where a party refuses to co-operate, the court has the same enforcement powers it has against reluctant witnesses. 55/

79. In the Federal Republic of Germany, an obligation to submit to physical examination exists in cases concerning the determination of paternity. The examination includes, in particular, blood tests to determine blood groupings. Appropriate third parties as well as the parties directly concerned are obliged to submit to such examinations. 56/

80. In France, the putative father of an illegitimate child may ask for a blood test to prove that the child cannot be his offspring. The mother of the child may refuse to submit to the test but her refusal can be interpreted to her detriment. 57/

81. Blood tests to establish paternity are not admitted as evidence in Morocco, as legislation prohibits the judicial search for paternity. 58/

82. Norwegian law makes provision for taking blood samples from the parties involved in paternity cases. 59/

83. Blood grouping tests are sometimes invoked in paternity suits in Pakistan but the courts do not assign much importance to them because the system of evidence in Pakistan does not admit such procedures for establishing any claim or as proof of guilt. 60/

53/ Information forwarded by the Government of Austria on 16 October 1972.

54/ Information forwarded by the Government of Brazil on 28 June 1972.

55/ Administration of Justice Act, sections 456 (1) and 178; information forwarded by the Government of Denmark on 5 June 1972.

56/ Code of Civil Procedure, art. 372 a; information forwarded by the Government of the Federal Republic of Germany on 3 July 1972.

57/ Law of 15 July 1955, article 340, as amended by Law of 9 July 1970; cf. International Commission of Jurists, *op. cit.*, p. 471.

58/ Information forwarded by the Government of Morocco on 5 July 1972.

59/ Act of 21 December 1956, No. 8, Concerning Investigation of Inherited Characteristics in Paternity Cases; information forwarded by the Government of Norway on 7 September 1972.

60/ Information forwarded by the Government of Pakistan on 6 September 1972.

84. Swedish courts may order blood tests in paternity cases, if "no considerable harm" is done to the person concerned. 61/ The courts may order blood tests and ancillary medical examinations against the will of the parties and may order tests for a man other than the putative father. This power has recently been extended to give courts authority to order tests for all men alleged to have had intercourse with a given woman. 62/

85. In the United Kingdom, both case law and statutory authority permit the court to order blood tests on a child. 63/ In affiliation proceedings, the courts do not have the power to order an adult to undergo a blood test against his will but are allowed to draw inferences from such a refusal. 64/

C. Blood tests for establishing identity

86. In Romania, Act No. 5 of 18 March 1971 Concerning Identity Documents of Romanian Citizens and the Procedures for Changes of Domicile and Residence provided, among other things, that to permit prompt action to save lives of persons injured in accidents etc., the blood group of each identity card holder is to be noted on his identity card; on request the blood group of children under 14 is noted on the parents' card. 65/

61/ Act of 1958, promulgated under Code of 1949, concerning Parenthood and Guardianship; information forwarded by the Government of Sweden on 8 June 1972.

62/ International Commission of Jurists, op. cit., p. 472.

63/ David Lanham, "Further Developments in the Law Relating to Blood Tests", Medicine, Science and the Law, Vol. 8, April 1968, pp. 81, 84.

64/ International Commission of Jurists, op. cit. p. 476.

65/ Buletinul Oficial, No. 36, part I, of 18 March 1971; information forwarded by the Government of Romania on 5 July 1972 (E/CN.4/1098/Add.10) pp. 14-15.