

So-called Extraordinary or Untraditional Investigative Methods A Contribution Towards a Common Understanding of Terminology

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1 Introduction

The terms “extraordinary investigative methods” or “untraditional investigative methods” have been used in Norwegian criminal procedure for nearly a generation, probably introduced by the Director of Public Prosecutions (DPP), L. J. Dorenfeldt, in a speech to the Chiefs of Police in April 1978. The speech mainly discussed so-called provocative methods. It was published in the Norwegian law journal, *Lov og Rett*, 1978 page 291, with the title: *Can extraordinary investigative methods be accepted in certain cases?*¹

In this context, the terms “extraordinary” and “untraditional” are synonyms, and thus interchangeable. The Norwegian Supreme Court has for instance used both “extraordinary” and “untraditional” about provocative methods.²

Even though the terminology has been used in court decisions, preparatory works by law committees, White Papers, proposals to Parliament (Stortinget), as well as in jurisprudence and textbooks for nearly 30 years, there is no formal definition or common understanding about which methods the terms encompass. They are not to be found in The Criminal Procedure Act³ and consequently, there are no direct and statutory consequences by describing a method as “extraordinary” or “untraditional”.

The terms seem, however, associated with investigative methods that only are considered lawful when combating very serious crimes, in situations where a successful investigation is impossible with conventional methods.⁴ The basis for this understanding is partly that some methods which usually are characterized as extraordinary or untraditional, such as communication surveillance (telephone-tapping) or concealed search of premises, according to the Criminal Procedure Act are allowed only when combating crimes with a sentencing maximum of 10 years or more, and only if the method is of substantial significance for the clearing up of the case. Only very serious crimes have sentencing maximum of 10 years or more. However, the main reason behind the idea that these police methods may only be used in conjunction with very serious crimes, is probably that when case law and jurisprudence deal with the terms “extraordinary” or “untraditional” investigative methods, it is first and foremost provocative methods that are discussed. Methods that raise problems concerning guarantees for a due process of law, and thus should be used with great care and within strict limitations.

However, the terms “extraordinary or untraditional investigative methods” may also be used for investigative methods that do not raise the same problems concerning due process of law. Here, a perception of the methods’ lawfulness in cases of very serious crimes only, may cause the police to employ them perhaps too sparingly, to the detriment of combating crime. This carefulness can be increased by the fact that defence lawyers, based on the uncertainty of the terms

1 My translation.

2 Norsk Retsidende (Rt.) 1998 p. 407 and Rt. 2000 p. 1223.

3 Act of 22 May 1981 No 25.

4 Such as visual surveillance, search, seizure and interrogation.

“extraordinary or untraditional investigative methods” will argue strongly that the method was illegal in that particular case, and that the prosecution authority should not be allowed to produce and use the evidence obtained by it.

As a departure point, it may be useful to look into the linguistic meaning of “extraordinary” and “untraditional” (2), and proceed to how the terms have been used by the Supreme Court, by law committees, White Papers, in proposals to the Parliament, and in jurisprudence and legal textbooks (3). Then, I will move on to discuss some criteria, which in my view should not be decisive for labelling a method as “extraordinary” or “untraditional” (4). Subsequently, I will discuss which characteristics that could be used as decisive criteria (5), and whether the application of the terminology in Norwegian criminal procedure is compatible with these criteria (6). In conclusion (7), I ask whether the term “extraordinary investigative method” is at all needed, or if it at least could be considered useful.

2 Linguistic Meaning

In dictionaries “untraditional” means something that is “not customary”. It follows that “untraditional” in this context has a dynamic meaning. When an investigative method has been applied for some time, it will lose its character of being “untraditional”. Communication surveillance such as telephone tapping has been used in criminal cases concerning national security for more than 40 years, and in more serious drug cases for nearly 30 years. In criminal investigation, this method must now be regarded as customary and regular, and in a linguistic context no longer “untraditional”.⁵

However, even if a method is traditional or customary, it could be regarded as “extraordinary”. In the dictionaries “extraordinary” is defined as something that is unusual or “not regular”. Communication surveillance such as telephone tapping is only allowed in “extraordinary” cases, and not in all criminal cases where it might prove useful. The reason for this is that The Criminal Procedure Act; section 216a (with some exceptions) requires that the investigation concerns an offence with a sentencing maximum of ten years or more. In Norwegian criminal law, this applies only for a very small number of offences. But as we shall see, the term “extraordinary” is also frequently used about covert seizure of goods and covert video surveillance. For such methods, The Criminal Procedure Act only requires a sentencing maximum exceeding 6 months imprisonment.⁶ This requirement is met by most offences, thus making these methods far from unusual or “extraordinary”.

The linguistic meaning of the words “untraditional” and “extraordinary” will never be decisive for the legal understanding of the terms. But without a definition or a common understanding of which investigative methods that

5 See Kjell Andorsen in “Jussens Venner” 2001 p. 3 where he in the article “*Provokativ politietterforskning:*” states that “... telephone tapping in drug cases is far from untraditional today.” (My translation.)

6 See section 202a and 208a.

should be regarded as “untraditional” or “extraordinary”, it is a possibility that the linguistic meaning as something we “usually do not do but somehow employ in special cases”, will influence the use of all methods given this characterisation, whether it raises special problems concerning due process of law or not.

3 How are the Terms “Extraordinary or Untraditional Investigative Methods” Employed?

In Norwegian criminal procedure, the terms “extraordinary or untraditional investigative methods” have been used about provocative methods, infiltration (with covert or fake identity), covert audio surveillance of premises, communication surveillance, covert search of premises, covert seizure or secret surrender order, covert video surveillance, use of electronic tracking device on persons or objects (mainly vehicles), and controlled delivery. Also gaining information from paid informers has been characterized as an extraordinary or untraditional method. For some of these methods the terms are obviously spot on, but for others the usage perhaps more questionable.

In this paragraph I will take a closer look on how consistent the terminology is applied in decisions from the Supreme Court, in preparatory works by law committees, in law proposals to the Parliament and in jurisprudence and legal textbooks.

(1) Provocative methods: It is unlawful to make a person commit a crime that he otherwise would not have done. It is, however, accepted that the police initiate changes in time and place of a crime (e.g. delivery of drugs), and also in the way it is committed (the goods should be transported from A to B by car and not by train). It is also accepted that provocation may be used for the purpose of gaining evidence about a crime that already has been committed, for instance that a person is in possession of illegal weapons or drugs. In such a case, the police may ask the suspect if he or she is willing to sell two automatic guns or 50 grams of heroin or similar. If the response is affirmative, the suspect cannot be prosecuted and convicted for the attempt of selling, but only for illegal import and/or possession.

Such an investigative method is in Norwegian criminal procedure normally characterized as being of a “provocative nature”, and has as such been consistently characterized as an extraordinary or untraditional method. As pointed out earlier, provocation as a police method was the main topic in the speech DPP Dorenfeldt gave to the Chiefs of Police in 1978 where he posed the question whether extraordinary investigative methods could be allowed in certain cases.⁷ The term “extraordinary” was also used in 1979 when The Ministry of Justice in the bill for a new Criminal Procedure Act decided not to propose statutory regulations for provocative methods, infiltration and undercover operations.⁸ When The Supreme Court in 1984⁹ ruled on extraordinary or

⁷ See Lov og Rett 1978 p. 291.

⁸ Ot.prp. nr. 35 (1978-79) p. 179.

untraditional investigative methods, the main question was whether the police during the investigation of a drug case had exceeded the limits for the use of provocative methods. The Supreme Court characterized the method as “extraordinary” and has in later rulings used this term or the term “untraditional” when discussing provocative methods.¹⁰ In preparatory works and proposals for new legislation, provocative methods have consistently been termed “extraordinary” or “untraditional”.¹¹ The same consistency characterizes the terminology used in frequently used legal textbook as well as in jurisprudence.¹²

(2) *Infiltration (with covert identity) or “under-cover” operations*: When moving on to the methods of infiltration or under-cover operations, we will find that the terms “extraordinary” or “untraditional” are applied with nearly the same consistency. However, it was somewhat unclear whether DPP Dorenfelt considered infiltration as an “extraordinary method”. In his article from 1978,¹³ his point of departure was that receiving information from informers for some small remuneration “has always been accepted”. He went on: “Infiltration has also been accepted, as the police in these cases must infiltrate the drug scene and often affiliate with criminals to obtain information.” It might be police officers in plain clothes joining the drug scene in public places (streets and parks) he had on his mind. This kind of infiltration is not very intrusive, and it is perhaps only a matter of preference whether it should be seen as surveillance or infiltration. In a more invasive context, where police officers using a false identity infiltrate a smaller and limited group of people, probably in a private setting, there is no doubt that such an investigative method is characterized and considered as “extraordinary” or “untraditional” by the Supreme Court,¹⁴ as well as in preparatory works for new legislation¹⁵ and in legal textbooks.¹⁶

9 Rt. 1984 p. 1076.

10 See judgements in Rt. 1992 p. 1088, 1993 p. 473, 1993 p. 407, 1994 p. 319, 2000 p. 1223 and 1345, 2003 p. 1814 and 2006 p. 120.

11 See NOU 1997:15 Etterforsningsmetoder for bekjempelse av kriminalitet - p. 52 and 120, NOU 2004:6 Mellom effektivitet og personvern. Politimetoder i forebyggende øyemed - p. 54 -55, Ot.prp. nr. 64 (1998-99) Om lov om endringer i straffeprosessloven og straffeloven m.v. (etterforsningsmetoder m.v.) p. 17, and Ot.prp. nr. 64 (2004-05) Om lov om endringer i straffeprosessloven og politiloven (romavlytting og bruk av tvangsmidler for å hindre alvorlig kriminalitet) p. 20-21.

12 See Johs. Andenæs: *Norsk straffeprosess*, Bind I (3. utg. 2000) p. 285-288, Auglend a/o: *Politirett* (2. utg. 2004) p. 632 -638, Bjerke/Keiserud: *Straffeprosessloven med kommentarer*, Bind II (3. utg. 2003) p. 793-800), Jo Hov: *Rettergang II –Straffeprosess* (1999) p. 164-65. See also Kjell Andorsen: *Provokativ politietterforskning*, in Jussens Venner 2001, p. 3, who don't find the terms “extraordinary” and “untraditional” suitable, but mentions that the terms are frequently used about provocative methods.

13 Lov og Rett 1978p. 291, on p. 294.

14 Rt. 1984 p. 1076, 1990 p. 531, 2000 p. 1345 and p. 1482.

15 See NOU 1997:15 Etterforsningsmetoder for bekjempelse av kriminalitet - p. 52 and 120, NOU 2004:6 Mellom effektivitet og personvern. Politimetoder i forebyggende øyemed - p. 54-55, Ot.prp. nr. 64 (1998-99) Om lov om endringer i straffeprosessloven og straffeloven m.v. (etterforsningsmetoder m.v.) p. 17, and Ot.prp. nr. 64 (2004 -05) Om lov om endringer i straffeprosessloven og politiloven (romavlytting og bruk av tvangsmidler for å hindre alvorlig kriminalitet) p. 20-21.

(3)*Covert audio surveillance*: As an investigative method, covert audio surveillance was prohibited until The Criminal Procedure Act was amended in December 2005. The Criminal Procedure Act Section 216m now allows covert audio surveillance, but only if a person with just cause is suspected of committing or attempting a terrorist act,¹⁷ murder, armed robbery or serious and organized drug crimes. When the Government in Ot.prp. nr. 64 (1998-99) decided not to propose a bill allowing covert audio surveillance, this investigative method was characterized as “extraordinary” or “untraditional”.¹⁸ Five years later, in Ot.prp. nr. 60 (2004-2005) such a bill was proposed, and covert audio surveillance termed an “untraditional” investigative method. Since covert audio surveillance until recently has been unlawful as an investigative method, there is no decision from the Supreme Court, or for that matter opinions in textbooks. An exception is the commentary by *Bjerke/Keiserud*¹⁹ where apparently all secret surveillance is perceived as extraordinary or untraditional investigative methods.²⁰ Covert audio surveillance is mentioned as an extraordinary method that in future might be allowed. When communication surveillance in Norwegian criminal procedure in general is characterized as an extraordinary or untraditional method (see below), there is no doubt that the same will apply for the rather limited use of lawful covert audio surveillance.

(4)*Communication surveillance*: Communication surveillance, most commonly telephone tapping or traffic data, has been used as an investigative method since 1960 in cases concerning national security, and since 1976 in more serious drug cases. Since 1999 telephone tapping has been a lawful method in every criminal case where there is just cause to suspect an offence with a sentencing maximum of ten years or more, and in form of telephone traffic data in cases with a sentencing maximum of five years imprisonment or more. Even though the method now is a legal investigative method for fairly ordinary crimes such as aggravated thefts, violence and gross fraud or embezzlement, it is still frequently termed extraordinary or untraditional. In White Papers and in bills for amendments of the Criminal Procedure Act, communication surveillance has consequently been characterized as an extraordinary or untraditional method since 1978. The Supreme Court characterized communication surveillance as an extraordinary method in 2004.²¹ The use of the terms in textbooks varies. Both *Andenæs l.c.*²² and *Hov l.c.*²³ discuss the statutory requirements, but do not make

16 See Johs. Andenæs: *Norsk straffeprosess*, Bind I (3. utg. 2000) p. 285-288, Auglend a/o : *Politirett* (2.utg. 2004) p. 632 -638 and Bjerke/Keiserud: *Straffeprosessloven med kommentarer*, Bind II (3.utg. 2003) p. 793-800).

17 Norwegian Penal Code Section 147a.

18 See p. 17.

19 *Straffeprosessloven med kommentarer* (2003).

20 “... use of secret surveillance and other forms of so called extraordinary or untraditional investigative methods.” (P.794 – 95 in the 2003 edition).

21 Rt. 2004 p. 1400 – paragraph 47.

22 P.200.

23 P.75.

use of the terms “extraordinary” or “untraditional” about the method. *Auglend o/a. l.c.* deals with the statutory requirements for using communication surveillance under the heading “More about so-called extraordinary and untraditional investigative methods”.²⁴ Communication surveillance is also the first method discussed by *Bjerke/Keiserud l.c.*²⁵ under the heading “secret surveillance and other forms of so-called extraordinary or untraditional investigative methods”.

(5) *Covert search of premises, covert seizure or secret surrender order:* Covert search, seizure and secret surrender orders have been legal investigative methods only since 1999 when the Criminal Procedure Act was amended. The statutory requirements (paragraph 200a, 208a and 210a) vary, especially on the point on which sentencing maximum that is required. Covert search is only allowed when investigating serious crimes with a maximum of 10 years or more. On the other hand, if there is no need for a search of premises, covert seizure or secret surrender order may be used as an investigative method in practically all criminal cases as the sentencing maximum required is only more than six months.

However, the general impression is that covert search, seizure and secret surrender order are not considered as extraordinary or untraditional investigative methods. The textbooks mentioned above do not use these terms. The only reference to covert search, seizure and secret surrender order as extraordinary or untraditional methods is in the bill on covert audio surveillance.²⁶

(6) *Covert video surveillance:* Until 1991, covert video surveillance of public places was lawful in the sense that statutory law did not prohibit it. By an amendment in The Penal Code in 1991,²⁷ it was made a criminal offence to carry out covert video surveillance in public places if the recording was automatic or operated by remote control (CCTV). To make sure that the police could use covert video surveillance as an investigative method, an amendment in the Criminal Procedure Act was required. When investigating a criminal offence with a sentencing maximum of more than six months, section 202a now states that the police as an investigative measure may ask for a court decision for using covert video surveillance in a public place.

However, covert video surveillance is not generally termed an extraordinary or untraditional investigative method. But as is the case with covert search and seizure, covert video surveillance is listed as an extraordinary or untraditional method in the bill on covert audio surveillance mentioned above. And since *Bjerke/Kreiserud* in their commentary on the Criminal Procedure Act regard all covert or secret surveillance as extraordinary or untraditional methods, covert video surveillance is also regarded as such, see *lc.* page 796-97.

(7) *Use of electronic tracking device on persons or objects (mainly vehicles):* Electronic tracking devices have been in use as an investigative method for more than 20 years. Until 1999, the use was based on directives and guidelines from

24 “Nærmere om såkalte ekstraordinære og utradisjonelle etterforskningsmetoder” p. 632 to 639.

25 P.794.

26 Ot.prp. nr. 69 (2004-05) p. 20.

27 The statute is later transferred to The Personal Data Act (2000) section 40.

The Director of Public Prosecution only. Thus, a tracking device could not be attached to persons or their hand luggage, and the police were not allowed to commit an otherwise criminal act to make use of a tracking device, for instance breaking and entering to gain access to a car in a garage. Since 1999, the method has been regulated in The Criminal Procedure Act section 200b and 200c. According to section 200b, the prosecution authority can decide placing electronic tracking devices on vehicles and objects as an investigative method in cases where there is just cause to suspect a crime with a sentencing maximum of five years or more. If the tracking device is to be attached to a person or hand luggage, or it is necessary to force an entry to conceal the device, a court order is required, and the sentencing maximum must be ten years or more.

The use of electronic tracking devices is characterized as an extraordinary or untraditional method in documents from the Ministry of Justice in 1999,²⁸ regarding amendments in The Criminal Procedure Act, as well as in the Ministry's document on the proposal on covert audio surveillance.²⁹ As a method for covert surveillance it is also given the same characterisation in the commentary by *Bjerke/Keiserud*.³⁰ On the other hand, two textbooks by *Andenæs* and *Auglend a/o* both have a paragraph captioned "extraordinary or untraditional investigating methods", but the use of electronic tracking devices is not discussed there, seemingly not regarded as an extraordinary or untraditional method by these authors.

(8) *Controlled delivery* may somewhat simplistically³¹ be described as a situation where the police know that illegal goods are being transported and where it is presently located, but are not aware of the final destination and the recipient. In order to gain this information and make an arrest of the "ringleader", the police decide not to seize the goods and make an arrest of the courier, but instead monitor the shipment and follow it to its final destination.

Whether The Supreme Court sees "controlled delivery" as an extraordinary or untraditional investigative method is somewhat unclear. The method have been discussed in three decisions, Rt. 1986 page 779, 1990 page 531 and 2000 page 1482. In the 1986 decision, a courier was arrested in Oslo when driving off a ferry from Denmark, and more than 2 kg of amphetamine was seized. The courier did not know the identity of the recipient of the amphetamine, but was to receive further information from his principal in The Netherlands. In order to expose the recipient, the courier was willing to cooperate with the police. He kept on following instructions from his principal in The Netherlands, thus making it possible for the police to apprehend the recipient in Trondheim. During the hearing in The Supreme Court, the defence for the recipient argued that it was used untraditional investigative methods which contravened the guidelines given by The Supreme Court in the basic decision in Rt. 1984, page 1076, as well as directives from the DPP. The Supreme Court did not agree, and

28 Ot.prp. nr. 64(1998-99) p. 17.

29 Ot.prp. nr. 60 (2004-2005) p. 20.

30 P.797.

31 Controlled delivery is often combined with infiltration, use of informers, attaching electronic tracking device on the object or the vehicle, or covert seizure and replacement of the goods.

stated that this case differed substantially from the case in the 1984 decision. The method used was not of a “provocative nature”, but was described as a “controlled delivery” without use of infiltrators. The Supreme Court continues: “The procedure in this case does not – as I see it – particularly differ from *traditional investigation*³² where one has successfully gained possession of objects that have been used for a criminal purpose.”³³

In the 1990 decision, an extreme right wing organization planned to blow up a camp for asylum seekers. One of the participants got second thoughts about the operation and informed the police. The informer stayed on in the organization and supplied the police with information, but the police took no initiative to alter the plan. The operation was kept under surveillance by the police, and an arrest of the participants was made before an attempt to set off the explosion was made. They were indicted for violation of section 161 in the Criminal Code for illegal possession of explosives with intent to commit a felony. Before The Supreme Court, the defence argued that it was used untraditional investigative methods that contravened the given guidelines. The Court did not agree, and stated that the investigation started with a traditional use of an informer. The police had not used provocative methods, and what had passed could not be characterized as infiltration. With reference to the decision in 1986, The Supreme Court found that the investigation had several similarities with a controlled delivery, and characterized the investigative method as a “controlled operation”.³⁴

The facts of the 2000 decision were quite similar to the one of 1986. The original recipient, however, suspected that the police were involved and disappeared when the delivery should take place. Instructed by the police, the courier informed his principal about this, and ensured him that he not was under police surveillance. After a while, the courier received information about a new recipient and time and place for the delivery. The police succeeded in arresting the recipient, who was indicted for attempting to receive the given quantity (200kg) of cannabis. It was argued in court that the police had used unlawful provocative methods, and so caused the recipient to commit a crime he otherwise would not have done. The Supreme Court did not agree, and stated that the police operation had many similarities with a controlled delivery, and also found that the police intervention of asking the courier to give false information to his principal could not make the investigative method illegal. The Court continues: “When using *untraditional investigative steps*, it is often necessary for the police to act covertly, and as far as it is necessary to keep the cover, it must be accepted that they give false information.”

Based on the last decision, it would seem that the Supreme Court see “controlled delivery” as an untraditional investigative method, but seen as a

32 Italics added.

33 “Fremgangsmåten i denne sak avviker – etter mitt skjønn – ikke i særlig grad fra tradisjonell etterforskning i sak hvor man har lykket å få hånd om gjenstander brukt i forbrytersk øyemed.”

34 In Norwegian “kontrollert aksjon”.

whole, the three decisions give the impression that the court regards the method bordering on traditional investigative methods.

Neither in preparatory work from law committees nor proposals for amendments of the Criminal Procedure Act or the Police Act from the Ministry of Justice, “controlled delivery” is characterized as an extraordinary or untraditional investigating method. However the white paper, NOU 1997:15, discusses “controlled delivery” in the same paragraph and under the same heading as investigating methods of a provocative nature, and this might be interpreted as if the methods are of the same extraordinary character.

The two legal textbooks that contain a section headed “extraordinary or untraditional investigating methods”, both include “controlled delivery” in the same paragraph.³⁵

Use of “controlled delivery” is not subject to statutory regulations in Norway. The DPP gave some directives in 1980, but the main framework is a directive given by the Ministry of Justice in January 1989, concerning when and how an application for “controlled delivery” shall be processed in cases where cooperation from police and customs in another Nordic country is necessary. The height of threshold - i.e. the gravity of the crime – that is required before asking for assistance from an other country, might have influenced on how “extraordinary” controlled delivery are regarded in general.

(9)*Gaining information from paid informers*: Use of informers is considered as a traditional investigating method even if the informer is given a small remuneration or a generous reimbursement of expenses. Dorenfeldt stated in the article from 1978 that this “has always been accepted”,³⁶ and Andenæs l.c. page 286 categorically states that “Use of informers is therefore not an untraditional investigating method ...” The same follows from the Supreme Court ruling published in Rt. 1990 page 531, where the court as a point of departure when reviewing the investigation, states that the police surveillance had its basis in “traditional use of informers”.³⁷

How and when the use of paid informers in the investigation is applicable, is not subject to statutory regulation in the Criminal Procedure Act. The conditions are laid down in the circular from the DPP dated 26. April 2000.³⁸ The directive renders an opening for the police to go a step further than providing a “small remuneration or a generous reimbursement of expenses”. It allows for a payment of up to 15000 NOK (i.e. slightly less than 2000 EUR). Such payment can only take place if this is the only possible way to get hold of the information, and it is also required that the use of paid informers is proportionate to the suspected crime. The Director of Public Prosecutions characterizes use of paid informers as an extraordinary investigating step that the police should apply with caution.

35 See Andenæs l.c. p. 288 and Auglend a/o l.c. p. 637.

36 See Lov og Rett 1978 p. 291 on p. 294.

37 “... tradisjonell tysting” - p. 534.

38 The circular is written by me in my former position as senior public prosecutor with the Director of Public Prosecutions.

4 Criteria which should not be Decisive for the Terminology

Except for provocative methods and under-cover operations, the discussion in paragraph 3 shows that the terms “extraordinary” or “untraditional” are used with great disparity. Sometimes it is said explicitly what has been decisive for the characterisation, sometimes it follows from how the terminology is used. In this paragraph, I shall discuss some of the criteria that seem to or may have been used, but from my point of view are insignificant for whether an investigative method should be characterized as “extraordinary” or “untraditional”.

(1)*The method is new:* The fact that the method is new, is listed as one of two criteria for using the terms “extraordinary” or “untraditional” investigating methods in NOU 1997:15 page 52 and in O.t.prp. nr. 64 (1998-99) page 17.³⁹ This view is also adopted by Auglend o.a. l.c. page 632. It is true that many of the methods characterized as “extraordinary” or “untraditional” are new, but a thorough discussion easily shows that this cannot be a deciding factor. There are many new methods of investigation that are obviously not “extraordinary”, and some of the methods for which the terminology are applied, are not new.

It is fairly new to do a DNA analysis of saliva from the mouth in order to positively identify or exclude possible suspects in criminal cases where biological material has been secured from the victim or the crime scene. As far as I know, this has never been characterized as extraordinary or untraditional. But also in a less scientific area of police investigation, new methods for uncovering crimes have come into use, without having been characterized as “extraordinary” or “untraditional”. The Supreme Court decision published in Rt. 1978 page 657 is an example. This was one of the first cases where severe speeding was uncovered by using an instrument which measured the length and the time used on the distance A to B, and thereby showing the average speed.⁴⁰ Neither the defence, the prosecution nor the court seem to have suggested that the new method should be named “extraordinary” or “untraditional”.

On the other hand, some of the investigating methods that are characterized as “extraordinary” or “untraditional” have been in use for more than a generation. Covert communication surveillance is already mentioned. But the terminology is also applied on “controlled delivery”. It is true that the method has been used most frequently in drug cases during the last 25 years, but it must have been employed in earlier times as well. It will be surprising if “controlled delivery” was not used as an investigating method by the police in the 1920s, when trade with spirits was banned in Norway, which inevitably led to extensive smuggling and illegal trade. It might have been situations like this the judges in The Supreme Courts had in mind when they in the decision published in Rt. 1986 page 779 ruled that: “The procedure in this case does not – as I see it – differ from traditional investigation where one successfully has gained possession of objects that have been used for a criminal purpose.”

(2)*Lack of statutory provisions:* It is reasonably clear that a lack of statutory provisions is not decisive for whether an investigating method should be labelled

39 The other is that the method is intrusive.

40 137 kmph in an area where the speed limit was 80 kmph.

extraordinary or untraditional. Covert communication surveillance and methods of a provocative nature is most frequently named extraordinary or untraditional. The first has for a generation been subject to statutory regulation, the latter has not. But the view that a lack of statutory provisions could be of importance is not totally without grounds. The leading (principal) textbook in Norwegian criminal procedure; *Andenæs: Norsk straffeprosess*, under the heading “untraditional investigating methods”, only discusses use of informers, infiltration, under cover, provocation and controlled delivery. These are all methods which are not subject to statutory regulation. Covert communication surveillance, covert video surveillance and use of electronic tracking devices are discussed in volume II of the textbook as coercive methods, and are not termed “untraditional investigative methods”.

(3)*The police act covertly*: When applying methods that are characterized as extraordinary or untraditional, the police frequently act covertly; most typically when working under cover in a criminal organisation. But is it vital for how the method is characterized that the police act covertly, and therefore deceiving the surroundings? If the answer is yes, ordinary road traffic surveillance by officers in plain clothes and unmarked cars must also be characterized as an extraordinary method. Is it not exactly such a deception we are being subjected to when we with great speed and in a dangerous manner overtake an unmarked patrol car with invisible sophisticated instruments, but also with a tennis racket to be viewed through the back screen, driven by a police officer in a pink sports outfit - only to experience that after a couple of kilometres, the same car is rapidly catching up on us, sounding a siren and flashing lights on the roof, and that the same nice looking woman submits a considerable fine and withdraws our driving licence?

Likewise, we do not see it as an extraordinary method when a police officer attends a football match wearing the away team’s sweater and scarf, with the purpose to spot and report possible hooligans.

The answer to the question above is clearly that it should not be decisive for being “extraordinary” or “untraditional” that the police act covertly and actively try to deceive the surroundings.

(4)*Information is gathered by technical remedies*: Criminal investigation has traditionally made little use of sophisticated technical equipment. Besides taking photographs at the crime scene and searching for fingerprints, the contents of an investigation have mainly been questioning of witnesses and suspects. Use of technical resources are on the other hand the essential feature of many of the methods termed extraordinary or untraditional, such as electronic tracking devices, covert audio surveillance, communication surveillance and covert video surveillance. But even so, use of sophisticated technical equipment must obviously be discarded as a decisive criterion. Many of the investigating methods labelled extraordinary or untraditional do not require use of technical equipment, for instance infiltration, covert search and seizure, and controlled delivery. Furthermore, video surveillance of public places as an investigative method is not considered extraordinary if the surveillance is overt, even though the technical equipment is identical when used covertly.

(5)*Access to new sources of information*: The very reason for using extraordinary or untraditional investigative methods is often to get access to new

sources of information; either sources where access requires technical equipment, e.g. communication surveillance, or canals of information that would be closed if the participants knew or suspected that the police is at the receiving end, for instance infiltration of a criminal organisation. But as shown in paragraph 3, also covert search and seizure, secret surrender order and covert and automatic video surveillance, are considered as extraordinary investigating methods. When applying these methods, the essential point is not that information is gathered from new sources, but that the police get hold of it without damaging the ongoing investigation or without the need to use a large number of personnel for surveillance. The same goes for using electronic tracking devices on vehicles: The information is more or less the same that could be gathered with ordinary surveillance carried out by several police officers in unmarked cars.

It follows from this that even though “access to new sources” often is the main purpose when using extraordinary investigating methods, it cannot be applied as a general criterion.

5 Criteria that might be Decisive for the Classification

In order to call an investigating method “extraordinary” or “untraditional”, it should – as I see it – have two of the following three features:

- Covert or secret gathering of information.
- When applying the method, it is a possibility or risk that the police endorse rather than combat crime.
- The method will give the police considerable surplus information not relevant to crime fighting.

(1) *Covert or secret gathering of information:* In my view, an investigating method, in order to be characterized as extraordinary or untraditional will have as one of its fundamental attributes that it permanently or for a considerable length of time gives the police covert or secret information. Furthermore, this information is not subject to contradiction and therefore gives the person or persons concerned no opportunity to control, explain or correct.

Information gathered by communication surveillance, covert search or video surveillance can often be interpreted differently. Also, persons occupied with criminal activities often communicate with coded messages, or in other ways try to obscure their activities. But even if there have been no such obscuring efforts, it is always a possibility that information that from the investigators’ point of view looks highly suspicious could have a very plausible explanation when interpreted in the right context. Some examples, partly based on authentic incidents, will illustrate this:

In the early 1980s, a shopkeeper was suspected of dealing with relatively large quantities of drugs. Communication surveillance (here, telephone tapping), which had been implemented as an investigating method in severe drug cases only a few years earlier, was employed. It was a challenge for the investigators

to decide on whether talk about a large shipment of kiwis in fact was kiwis - or a code for amphetamine. The interpretation was crucial for whether the information should be followed up with a search and possibly arrest of the shopkeeper.

Another example⁴¹ will be where the police, incited by reliable information that there is a conspiracy to rob the bank located on the ground and first floor, put an area in front of the building under covert video surveillance. However, the identities of the persons in the conspiracy are not known. On the monitors, person A with a criminal record which also includes a conviction for driving a getaway car in a bank robbery, is spotted. His last conviction was three years previously. For one week he appears on the video four times, always together with his six year old son. They appear on different times of the day, but will each time stroll around the area before entering the building, from which they will return after 15 -20 minutes. The police interpreted this observation as A is checking out the getaway possibilities both outside and inside the building, bringing his son along to make him look as a family man out shopping. The police decide to put A under tight surveillance as the main lead to other persons in the conspiracy. While the police use all available personnel on surveillance of A, the bank robbery takes place. When A is questioned, the police learn that his business in the building was with children's health services on the fifth floor, as they were carrying out tests on his son to uncover a possible hearing deficiency.

The examples above show that one of the main features of investigating methods labelled extraordinary or untraditional, are that they allow for limited possibilities to validate the information and its interpretation. When such methods are used, there is an *extraordinary* higher possibility that the basis for further investigation will be incorrect.

(2) *A possibility that the police promote rather than combat crime:* When applying methods of a provocative nature, such as undercover operations or getting information from paid informers, there is always a risk that crime is encouraged rather than combated. And as we shall see, to some degree it could also be the result of controlled delivery.

Even though the purpose of provocation is only to secure evidence for a criminal activity that has already taken place, it is a possibility that the police thereby endorse crime. An example will illustrate this point: In the early 1990s, the police in the northern part of Norway suspected that illegal (stolen) automatic weapons and ammunition were sold from a Russian trawler. In order to get conclusive evidence, the police wished to place an order, and asked permission from the regional public prosecutor. The request was not approved. The reason for this was due to the number of days between placing the order and the delivery, and the possibility that the weapons could be stolen as a result of the order from the Norwegian police, could not be ignored.

When the police infiltrate a criminal organisation or are engaged in undercover activities, the officers may in order not to uncover their identities, be compelled to participate in criminal activities. But even if they avoid committing a crime, it is always a possibility that the officers are supporting or strengthening

41 It is mainly made up, but not entirely without founding in real cases.

other members' intentions by being part of the organisation without voicing objections to the criminal activity.

When informers are paid for information or in other ways receive favours from the police, it is possible that the informer will not only report what is going on, but also make sure that there is something to report. Even with the Norwegian payout maximum of 2000 EUR, it can be tempting for an informer to influence events to make sure that the police are satisfied with the information they have received, to promote further business.

When the courier accepts to cooperate with the police during a controlled delivery, the courier and the principal may try to ride two horses: On the one hand, cooperating with the police in order to reduce the sentence for the courier, and avoiding disclosure of the ordinary receiver which has proved very valuable to the organisation on the other. In order to achieve this, the courier or principal might talk someone else into being the recipient of the shipment. Legally, this would not be considered as the police have caused, provoked or induced the new recipient to commit a crime, but ethically it is difficult to dismiss the controlled delivery as a cause for the new receivers' crime.⁴²

When summing up, it can be argued that one of the main features that makes it appropriate to consider a method as extraordinary is that it requires *extraordinary* caution avoiding the police investigation not to encourage or induce crimes.

(3) *Applying the method gives considerable surplus covert or secret information irrelevant to the investigation at hand:* The surplus information may either concern a part of the suspects life that is irrelevant to the investigation, or relate to completely innocent persons.

Listening in on a private telephone will give the police information not only about calls relevant to the crime under investigation, but also about calls revealing problems concerning the children's school attendance or calls to a friend where the suspect reveals that she is planning to leave her husband. Likewise, a covert search of premises will give the police access to information, which they during an open search would recognise immediately as irrelevant to the investigation by consulting the suspect. During an undercover operation, the agent might gain the confidence of the persons involved, and as a close friend be given access to information of a strictly personal character and also completely irrelevant to the crime investigated.

Both communication surveillance and covert video surveillance will regularly provide information about persons that are not in any way connected with the crimes being investigated. When the telephone in a suspect's home is subjected to communication surveillance, it will also give to the police access to calls that friends of the suspect's wife are making to her, or calls to and from the lodging student. A covert video surveillance at the rear side of a factory building will also not only provide the police with information about employees whom during the evenings and nights are stealing from the employer, but also about Mrs A and Mr. B that every Wednesday use the place for an hour of lovemaking in Mrs. A's car. When the police equip a car with an electronic tracking device,

42 The case published in Rt. 2000 p. 1482 is an example of this.

it will provide the police with information about the position of the car - also when used by the suspect's wholly unconnected 22-year-old daughter. If the car had been under visual surveillance, the car would not have been followed at all.

It follows from this that the third feature of investigating methods characterized as extraordinary or untraditional, is that when applied, the police will not be able to aim the investigation to specifically obtain information on situations and persons relevant to the investigation. There is the element of randomness - "what you get is what you get" - that in this sense make them "extraordinary".

6 Based on these Criteria: To which Extent are the Different Methods "Extraordinary"?

In this paragraph, I will discuss if and to what extent the different methods listed in paragraph 3 should be seen as "extraordinary" based on the criteria discussed in paragraph 5.

Undercover operations or infiltration of some duration are methods that meet all three criteria. The agent will get access to information needing clarification or interpretation, but with the fear of blowing his or her cover it is limited how much checking or validation that can be done. And secondly; even if the agents avoid partaking in crimes, it is always a possibility that other member's intentions are strengthened by the implied support of a seemingly passive collaborator. When infiltrating an organisation for some time, the third criteria will also be met: The agent might gain confidence from the persons involved, and as a close friend be given access to information of a strictly personal character, also completely irrelevant to the crime that is investigated.

Covert audio surveillance, communication surveillance, covert video surveillance, use of electronic tracing device, covert search and seizure and secret surrender order are all methods where criteria (1) and (3) are relevant. But the degree varies considerably. A lengthy covert audio surveillance or communication surveillance will invariably give the police huge amounts of information that need interpretation to establish if and how it is relevant to the investigation. Likewise, the police will get access to considerable surplus information without any relevance to the crime. Covert seizure or secret surrender order provide examples at the other end of the scale: A bag, not reclaimed from the airport baggage belt, is delivered to the airport police for security reasons and to track the owner. The contents of the bag reveal the identity of the owner, but also a plan for robbing a security van. The owner of the bag turns out to have a criminal record. The police decide to put an identical copy of the plan in the bag, and deliver it to the airport authorities with the name of the owner. The original document is searched for fingerprints, and prints from another person with a criminal record are secured. In this example there is very little surplus information not relevant to the investigation. Even though the message in the written plan is fairly clear, it still needs interpretation: Is it a genuine plan, a joke or is it meant to mislead the police. Given the criminal record of the persons involved it is probably not a joke. And even if it is meant

to mislead the police; it will justify subjecting the suspect to surveillance. Although covert seizure is used in this example,⁴³ this is in my view a method in the periphery of what should be characterized as extraordinary investigative measures. The same goes for investigations where the police, based on a secret surrender order, receive transcripts of the suspect's bank account from his bank. The use of covert seizure or secret surrender order may (but not always) represent borderline cases of what should be characterized as "extraordinary" investigative measures, as also demonstrated by the fact that they are applicable when investigating crimes with a sentencing maximum exceeding six months.⁴⁴

When applying *methods of a provocative nature, paid informers and to some extent also controlled delivery*, it is first and foremost a possibility that the police are endorsing rather than combating crime that make the methods "extraordinary". But information received as response to a provocation or information from an informer invariably needs validation. Since the police involvement must be kept secret, validation is difficult.

For "controlled delivery", one reservation must be made: Controlled delivery is in Norway explained as goods that could have been seized, but are put under tight surveillance during transportation to the recipient, in order to enable the police to uncover the criminal organisation. It is neither required that the police have infiltrated the organisation, nor that the courier has been arrested and volunteered to cooperate with the police. In this simple form, where objects are located, and by means of visual surveillance followed to the receiver, the method does not meet any of my criteria for extraordinary investigating methods, and should consequently not be characterized as such. The police have no influence on what is happening. Consequently, the police cannot endorse crime, and do not receive any inside information that need interpretation or validation. Only when the police have an insider that may influence the course of events and provide the police with information, should "controlled delivery" be characterized as an extraordinary investigative method.

The common denominator related to investigative methods characterized as "extraordinary" or "untraditional" will be that they give the police access to information that, because of the covert character of the methods, gives limited possibilities for a safe interpretation or validation. Also, the methods will either represent a possibility for endorsing rather than combating crime, or the method results in access to large quantities of surplus information.

7 Is the Terminology Needed or Useful?

The answer to the first alternative in the question is probably "no". The terminology is not used in The Criminal Procedure Act, and implicates no legal consequences. And elsewhere (court decisions, legal textbooks etc) the application of the terminology varies considerably, se paragraph 3. In spite of this, it is a fact that the terminology has survived for nearly a generation and

43 Based on a real incident.

44 The Criminal Procedure Act section 208a and section 210a.

there is no sign of an imminent death. But if we shall continue to use the terminology, it will be advantageous if there could be a consensus on appropriate use. This paper is a contribution to such a consensus.

However, I believe the term “extraordinary” is appropriate; the term “untraditional” is not. Many of the methods must now be seen as traditional, but they too have some extraordinary features. First and foremost, a limited possibility to validate the relevance of the information they give access to. In a computerised police force, it might be an advantage to have a common term for investigative methods that are likely to generate such invalidated information. The quality (accuracy and relevance) of what is stored in the police computers will be of increasing importance to the relationship between the police and the public. An example from “the real world” will illustrate this, although it does not involve use of extraordinary methods:

Several years ago, the police in Oslo received a complaint from people kept awake by loud music originating from a neighbouring flat. The unit given the assignment found the owner and another person operating the stereo. When the police turned the music off, three other persons asleep in the flat woke up (!) and entered the living room. The police officers took down personal data of everyone present. When the police officers were leaving, they spotted an illegal soft gun belonging to the owner of the flat. The weapon was seized. The information about the persons and the weapon were entered into the electronic police incident log. Some five years later, as two officers were to make a routine stop of a vehicle, they asked their central command for information about the car. The owner turned out to be one of the guests asleep in the flat where the owner played loud music and were in possession of an illegal soft gun. The car owner’s name appeared on the computer with a warning: Caution – firearms! It is an understatement to say that this – in this context – irrelevant information made the police officers approach the persons in the car in a rather brisk manner!