

# DEMOCRATIC LEGITIMACY, RULE OF LAW AND THE LIMITS OF TECHNOLOGICAL INNOVATION IN POLICING

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# ECHR AND POLICE METHODS: "QUALITATIVE LEGALITY"

- Restrictions of rights must have a legal basis. This legal basis needs to reach certain quality thresholds:
  1. Legal rules (or where applicable, the collection of legal principles or case-law) underpinning a restriction of a right must be published and accessible to the public.
  2. Legal rules must reach a certain level of precision and foreseeability, enabling the individual to ascertain their future application to some degree.
  3. Legal rules must limit the extent of discretionary or arbitrary power of the authorities. Further implies that rules conferring authority must clearly state the limits of this authority.



# QUALITATIVE LEGALITY AS RULE OF LAW VALUE

- Theoretical: Fuller's "Inner Morality of Law" – qualities needed for law not to fail in governing behaviour (and thus fail as law)
- Also tied to freedom and autonomy of the individual (Hayek, Tamanaha, Raz, Frändberg)
- Now established as Rule of Law criteria through CoE Venice Commission.
- Closely associated with the *individual* – to ensure legal certainty and safeguard individual rights.



# QUALITATIVE LEGALITY AND DEMOCRATIC LEGITIMACY

- Police mandates (as legal rules) should be based on democratic decision making.
- Law's claim of authority must be understood as a claim of legitimate authority. (Dyzenhaus)
- "Citizens should always be able to understand themselves also as authors of the law to which they are subject as addressees" (Habermas)
- As applications of law diverges from what the legislator explicitly or implicitly could have foreseen, the connection with the deliberative processes of democracy that underpin its legitimacy is reduced.
- Deficiencies in qualitative legality may result in a situation where neither citizens nor elected legislators really understand the implications of a law, nor the power it confers to authorities. Especially important when legal practice is opaque.



# INNOVATION CHALLENGING LEGALITY



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# DRIVERS AFFECTING LEGALITY

- Increase in unmediated methods of surveillance and control (e.g. IMSI-catchers).  
Function of law as mediator between law enforcement needs and communication providers responsibilities is reduced.
- Increase in private sector product development targeting law enforcement agencies (e.g. FinFisher, IMSI-catchers.)  
External development of capabilities. Less governmental awareness of capabilities. Features may develop gradually.
- Increase in consumer level products functional for police purposes (e.g. GPS-trackers, consumer drones, apps).  
Reduces reliance of central procurement, may cause individual or team-based practices. Reduces awareness of needed legal changes.



# EXAMPLE: SWEDISH POLICE IMPLEMENTATION OF IMSI-CATCHERS

*Need for legal mandate identified*

**"A certain type of technical equipment, used in some nearby countries."**

SOU 2005:38

*Method implemented and in use*

**"Within law enforcement agencies exist a relatively large-scale use of so-called IMSI-catchers."**

SOU 2010:103

**"Unregulated surveillance method"**

Legal department, Swedish police auth.

2005

*Legislative inaction*

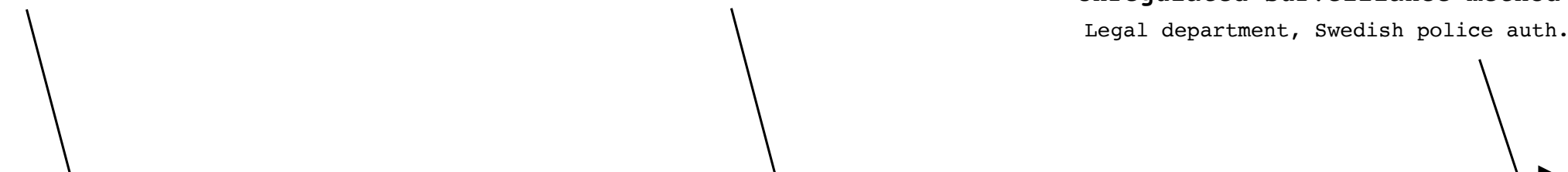
2010

*Internal regulation*

TjF 2011:5 409

**Police regulation on certain technical surveillance measures.**

2015



# EXAMPLE: IM/CHAT APPLICATIONS FOR POLICE COMMUNICATION

- 2014: Private citizen begins receiving messages from police surveillance units on his WhatsApp account. Including photos of suspects, discussions about ongoing surveillance, photos of confiscated items etc.
- Lack of police-issued communications equipment led officers to use their private phones and free software to coordinate operations. (In this process, one person got a number wrong.)
- Mid 2016: Swedish police force issue officers with 13 000 mobile phones. Secure camera and instant messaging apps under development.





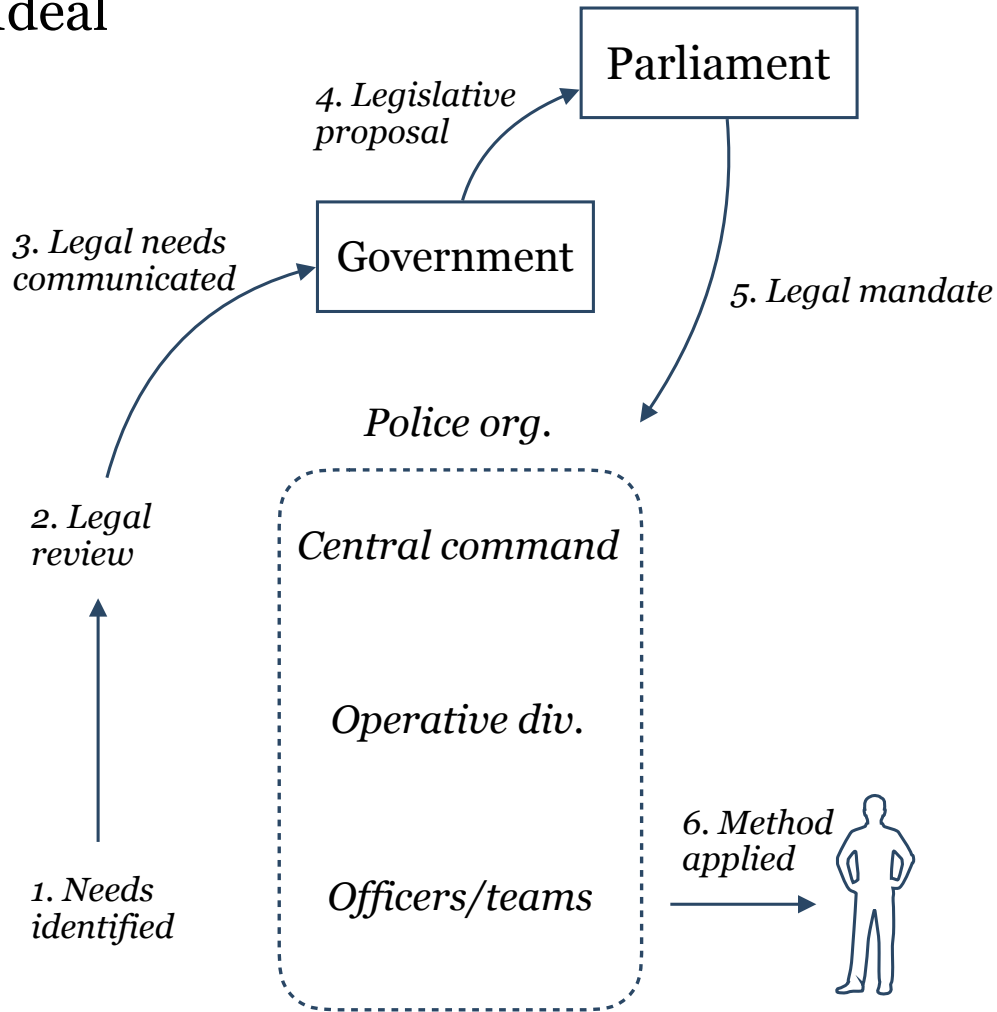
# SIMILARITIES IN NON-TECH INNOVATION

## THE "LINKÖPING MODEL"

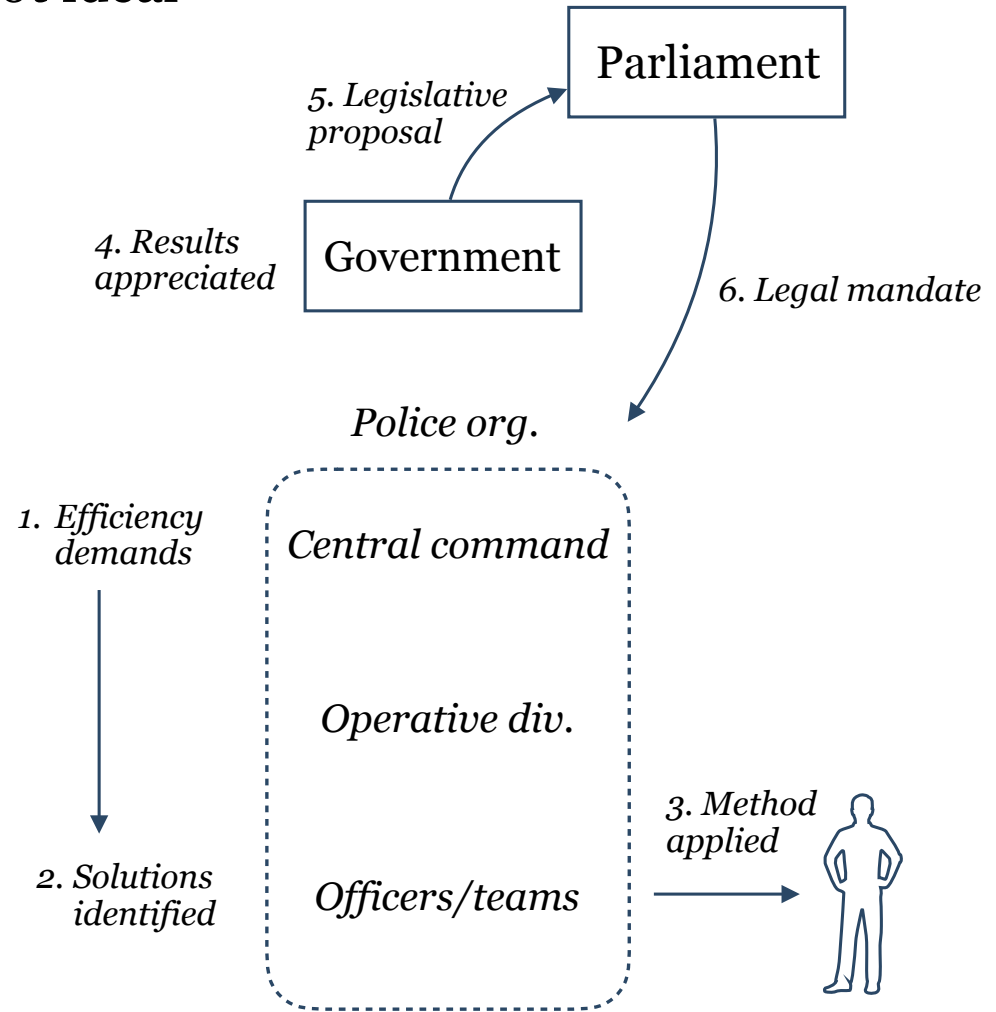
- Method developed by narcotics officers for early intervention against suspected young narcotics users when reasonable suspicion could not be reached.
- Officers visited home of suspected users, sometimes accompanied by social services, asking parents if they can come in due to concerns about drug use.
- "Voluntary" conversation about the young individual's relationship with drugs, used to "work up" reasonable suspicion to allow for formal search of premises and/or person.
- Circumvented legal safeguards relating to interrogation and police searches. Blurs the line between welfare action and criminal investigation.
- Initially perceived internally as a success and picked up by other districts, but later revised due to legal concerns.



# Ideal



# Not ideal



# ISSUES

- Legality assumes a normative top down process while innovation is often a bottom up process.
- Innovation within legal limits is needed and desirable, but stretching legal limits challenges foreseeability.
- Lack of qualitative legality creates a legitimacy gap as methods and mandates are not subject to democratic debate and decision making.
- Higher levels of police organisation may be unaware of workarounds or innovation on lower levels – creates a divergence of practice and legality.
- Oversight mechanisms may be tied to specific existing measures – court review not always strong where evidence may be freely admitted.



# POSSIBLE SOLUTIONS

- Establish or strengthen internal functions for advising on and assessing legality.
- Formalise innovation processes to allow for central awareness of initiatives taken.
- Widening mandate of oversight bodies to include "similar measures".
- Legislator should avoid overly technology neutral surveillance legislation – will force periodic review of mandates and effects and maintains clarity regarding legality of new measures.



Thank you for your attention.

*Some references...*

- Bingham, Tom, *The Rule of Law* (Penguin Books: London 2010).
- Dyzenhaus, David, *Constitutionalism in an old key: Legality and constituent power*, 1(2) *Global constitutionalism* 229, 2012
- Fuller, Lon L., *The Morality of Law* (Yale University Press: New Haven 1969)
- Habermas, Jürgen, *Between Facts and Norms* (Polity Press: Cambridge 1996)
- Marmor, Andrei, *Law in the Age of Pluralism* (Oxford University Press: New York 2007)
- Naartijärvi, Markus, *Swedish police implementation of IMSI-catchers in a European law perspective*, *Computer Law & Security Review* 32 (2016) 852–867.
- Ohm, Paul, *The Argument Against Technology Neutral Surveillance Laws*, 88 *Texas Law Review* 1685 (2010).
- Tamanaha, Brian Z., *On the Rule of Law – History, Politics, Theory* (Cambridge University Press: Cambridge 2004)
- Venice Commission, CDL-AD(2011)003rev-e "Report on the Rule of Law", March 2011  
— — —
- *Sunday Times v. The United Kingdom*, no. 6538/74, 26 April 1979.
- *Silver and others v. The United Kingdom*, (5947/72 ...), 25 March 1983.
- *Malone v. The United Kingdom* (8691/79), 2 August 1984.
- *Roman Zakharov v. Russia* (47143/06), 4 December 2015;
- *Klass and others v. Germany* (5029/71), 6 September 1978



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