Manuel Díaz Martínez
Professor of Procedural Law
UNED

THE EXISTENCE OF SPECIFIC ENCOUNTERS OF THE PERSON UNDER INVESTIGATION AS A LEGITIMISING FACTOR IN CAPTURING AND RECORDING ORAL COMMUNICATIONS AND IMAGES: A HYPOTHESIS THAT IS DIFFICULT TO IMPLEMENT

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SUMMARY: I. GENERAL CONSIDERATIONS. II. CAPTURING AND RECORDING ORAL COMMUNICATIONS AND IMAGES. 1. Legal regulation. 2. Guiding principles. 3. Presuppositions of legality. III. THE EXISTENCE OF SPECIFIC ENCOUNTERS OF THE PERSON UNDER INVESTIGATION AS A SPECIFIC HYPOTHESIS FOR THE MEASURE. IV. THE DIFFERING INTERPRETATION OF THE SCOPE OF "SPECIFIC ENCOUNTERS OF THE PERSON UNDER INVESTIGATION" BY THE SUPREME COURT AND THE CONSTITUTIONAL COURT. 1.- Supreme Court Ruling 4436/2020, of 28 December 2020. 2. Constitutional Court Ruling 99/2021 of 10 May 2021. V. PERSONAL REFLECTIONS.

ABSTRACT: This paper studies the specific requirement consisting of the "existence of specific encounters of the person under investigation" as a legitimising factor in the adoption of the technological investigation measure consisting of capturing and recording of the oral communications and images of the person under investigation, analysing two important court rulings, one from the Supreme Court and the other from the Constitutional Court, which offer a different take on this requirement, which requires greater legal specification to ensure the necessary legal certainty.

KEYWORDS: Fundamental Rights; Procedural Guarantees; Technological investigative measures; Capturing and recording oral communications and images; Specific encounters of the person under investigation.

I. GENERAL CONSIDERATIONS

Prior to the approval of the reform of the Criminal Procedure Act (hereinafter LECrim) undertaken by Organic Law 13/2015, of 5 October, for the strengthening of procedural guarantees and the regulation of technological investigation measures there was barely any express legal coverage for "technological investigation measures", which had a negative impact on the investigation and apprehension of new forms of criminality, and also on necessary legal security.

The shortcomings of our procedural laws made it difficult or even impossible to prosecute serious forms of crime. Urgent legislative reform was required to provide a legal framework for these investigative measures related to communications and mass data

storage devices, pursuant to the parameters of the quality of the law established in the case law of the European Court of Human Rights (hereinafter ECHR[189]).

The key aspect of technological investigative measures, as referred to in the reform of the LECrim in Organic Law 13/2015, of 5 October, is not that they are aimed at or that they use technology, but the type of technology they use to achieve their purpose, which is none other than to obtain relevant evidence for the criminal investigation of offences. This technology used in each of the investigative measures is known as digital electronics, which allows for the interception, recording, monitoring and forensic analysis of human behaviour and activities that also use digital electronics.

As the ECHR points out, as technology becomes more sophisticated, adequate legal instruments are required evolving at such a pace that they ensure that citizens' fundamental rights and freedoms are not breached with impunity.

LECrim, based on the technologies of the time, could only contemplate, in Articles 579-588 thereof, postal and telegraphic interventions. Later, following the reform carried out by Organic Law 4/1988, of May 25, Article 579.2 to 579.4 incorporated the intervention of private communications through express reference to telephone formats. Nevertheless, this regulation proved insufficient, on account of the considerable number of gaps it left in matters such as: the absence of regulation of online communications and the traffic or external data from emails; the failure to determine the cases in which telephone intervention is justified, the duration of the measure, the purpose and procedure of intervention and transcriptions of the content of the magnetic supports, the safekeeping and destruction of the magnetic or online supports, etc., therefore it did not satisfy the necessary requirements set out in Article 18.3 of the Spanish Constitution in relation to the protection of the right to the secrecy of communications interpreted as established in Article 10.2 of the Spanish Constitution, in line with Article 8.1 and 24 of the European Convention on Human Rights (hereinafter ECHR).

This lack of regulation led to the Spanish State being condemned in the ECHR ruling of 18 February 2003, Prado Bugallo v. Spain[190], opposing this legal vacuum and stating that "these gaps have been pointed out by the higher Spanish jurisdictions, which have understood that the amendments in this Law were insufficient to respond to the guarantees that should surround wire tapping", although a subsequent admissibility ruling of the ECHR of 25 September 2006, in the case of Abdulkadir Coban v. Spain case seems to rectify this precedent as, although it considered necessary a legislative amendment to include the principles arising from the case law of the Court into the Law, it recognised that in Spanish law there was already consolidated and well-established case law[191].

[189] Report of the Public Prosecutor's Office on the Draft Bill of the Organic Law amending the Criminal Procedure Act for the streamlining of criminal justice, the strengthening of procedural guarantees and the regulation of technological investigation measures. Madrid, 23 January 2015.

[190] ECHR Ruling 2003/6. The appellant claims to have been subjected to wire tapping in breach of his right to respect for his private life, in breach of Article 8 of the Convention.

[191] "The decision of 25 September 2006, rejecting the claim filed by Abdulkadir Coban, marked a significant change with regard to Spain and complaints about the quality of its law. Although the regulations continued to suffer from the shortcomings denounced, the European Court took the work carried out by this Constitutional Court into consideration, citing up to seven ruling, as well as the work of the Supreme Court to complete the legal norm, incorporating the guarantees established by European case law, to, in this case, dismiss the complaint" SEMINAR COINCIDING WITH THE VISIT OF THE PRESIDENT OF THE

Particularly noteworthy is the ruling of the ECHR in the case of Vetter vs. France of 31 May 2005, concerning the particular interception measures in relation to oral communications using electronic devices in which the claimant alleged, in relation to a court investigation of homicide, the illegality of interceptions made in a third party's flat from being recorded, as this procedure was not included in the French Procedural Code and entailed a violation of what is enshrined in Art. 8.1 of the ECHR. The French Court had admitted these recordings and considered them lawful, even though it did not contain any specific procedural provision for them, on the basis of the regulation on wire tapping and provided that such acts were carried out under court authorisation and under conditions that did not affect the rights of the defence and the principle of the impartiality of evidence.

The ECHR ruled in this respect that: "...like wire tapping, listening to conversations through bugging represents a serious breach of privacy. Therefore, this process must be based on a particular law in this field, the existence of clear and detailed rules is essential, especially since the technical processes that can be used are constantly improving, the law must provide litigants with "adequate safeguards" against the feared similar abuse of power as in the case of wire tapping". Since French law did not indicate the scope and exercise of this form of intrusion with sufficient clarity, it stated that in these circumstances: "...the claimant did not receive the minimum degree of protection sought by the rule of law in a democratic society and that there has been a breach of Article 8 of the Convention".

The lack of regulatory determination and foreseeability for the practice of technological investigation proceedings has also been denounced by our Constitutional jurisprudence. The Constitutional Court's ruling 184/2003, of 23 October, with regard to the requirements of legal certainty in the context of interference with the right to secrecy of communications and the right to privacy, set out that "...we asserted, not only that the existence of a legal provision is inexcusable; but that the court ruling authorising interference with privacy must be based on the law, from which it follows that the law must express each and every one of the premises and conditions of the intervention. And we share this sentiment in the specific field of the right to secrecy of communications, affirming that state interference in this right must be governed by the principle of legality". And in the same sense, Constitutional Court Ruling 184/2003, of 23 October, concluded that: "... it is asserted that neither Article 579 LECrim or Article 18.3 of the Spanish Constitution meet the necessary conditions to ensure the foreseeability of the "law" pursuant to the criteria of the European Court of Human Rights".

Likewise, this lack of legal coverage has been reflected in Supreme Court rulings, which has had to face the need to decide on the lawfulness of surveillance-based investigation techniques, categorically stating "...Given the notorious insufficiency of Article 579 of the Criminal Procedure Act, the case law of this Chamber has had to define the boundaries that mark the insurmountable lines that guarantee the constitutionality of a measure that seriously affects such substantial rights as personal privacy and the right to secrecy of telephone communications[192]".

ECHR", Madrid, 22 May 2015, Speech by the Hon. Francisco Pérez de los Lobos Orihuel, President of the Constitutional Court.

[192] Supreme Court Ruling 393/2012 of 29 May and Supreme Court Rulings 276/2015, of 6 May, 412/2015 of 30 June.

This situation has not, however, prevented, for a long period of time, court authorisation of measures that, to varying extents, directly affect the right enshrined in Article 18.3 of the Spanish Constitution, with the questionable argument that this regulatory insufficiency does not inevitably lead to the declaration of a violation of the right, provided that the authorising court decision makes up for the deficiencies found in the legal provision in line with the requirements established by the precedents set by our highest Courts[193], in other words, abandoning the jurisprudential creation of what has to be subject to legal regulation, which has led to a deficit in the democratic quality of our procedural system[194].

The situation is aggravated by the fact that, far from making up for this legal insufficiency, the silence of lawmakers has been parallel to a practice in which the dubious validity of investigative measures restricting fundamental rights (because they do not exist, because they are not legally contemplated) has been circumvented, as MARCHENA[195] points out, by means of the analogical application of the legal system set out in Art. 579 LECrim for the interception of communications. It so happened that the inadequacy of this precept was no obstacle to obtaining maximum elasticity therefrom.

This was also reflected in Circular 1/2013, on guidelines in relation to the wire tapping of telephone communications which, while recognising that the measure lacks specific regulation in the LECRIM, advocated its restricted use in cases where the measure is essential due to the lack of other options when the facts subject to investigation are also serious.

Constitutional Court Ruling 145/2014, of 22 September, marks a turning point, as in this case, the Spanish Constitutional Court ruled on the legitimacy of the use of hidden microphones to capture conversations in police cells between detainees, already subject to the coercive powers of the State following their detention, declaring that in this area these interceptions must be reinforced with the fullest guarantees and the due autonomy and singularity of the regulations. As the Public Prosecutor rightly pointed out, the precedent set by the Constitutional Court and by the Second Chamber of the Supreme Court on the insufficiency of the legal regulation (in relation to telephone communications) and the possibility of making up for the shortcomings of the Law, cannot be transferred to a scenario of interference in the secrecy of communications for which there is no legal provision, or for which, at least, such regulations do not correspond to what is identified and cited in the appealed rulings.

Faced with this conclusion and its consequences and as Article 579.2. LECrim was not the legal provision under consideration, (nor the prison regulations referred to in the

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[193] The provisions of Constitutional Court Ruling 184/2003 are enlightening to this end: *"It cannot be said that domestic law does not respect the requirements set out in Article 8 ECHR, rather, on the contrary, in this new scenario of court rulings, it will be up to this Court to make up for the shortcomings found in the aforementioned legislation until lawmakers make the necessary intervention*".

[194] This is expressly stated in the Explanatory Memorandum of Organic Law 13/2015: "*However worthy of praise the efforts of judges and courts have been in defining the limits of the state in the investigation of crime, the abandonment of what should be the object of legislative regulation to the courts has led to a shortcoming in the democratic quality of our procedural system*".

[195] In MARCHENA GÓMEZ, M., GONZÁLEZ-CUÉLLAR SERRANO, N., La reforma de la Ley de Enjuiciamiento Criminal en 2015, Ed. Castillo de Luna, 2015. pg. 336.

appealed rulings[196]) since they cannot provide any guarantee against possible abuses or provide the individual with adequate protection against arbitrariness, the Constitutional Court concluded in a categorical and devastating manner: “We are therefore not dealing with a shortcoming due to the inadequacy of the law, with a ruling on the quality of the law, rather with the impact of a total and complete absence of law”. And, as a result, it declared the evidence obtained in this way was invalid, underlining: “It is up to the legislator to specify the rules in order to avoid, if necessary, this (perhaps paradoxical) result of the contrast between the regulated cases and those of anomie”.

This proved to be the last straw, with lawmakers deciding to reform LECrim under Organic Law 13/2015, of 15 October, with the aim, inter alia, of providing for and regulating not only the recording of oral conversations using electronic devices, but also many other investigative measures arising as a result of the advance of technology, in an attempt to mitigate this situation of anomie and in other cases of legal insufficiency.

As a result of the aforementioned Constitutional Court Ruling 145/2014, of 22 September, and prior to the entry into force of the reform of the LECrim on 6 December 2015, which defines the categories of technological investigation and the constitutional and legal assumptions that legitimise its adoption are set out, there have been numerous requests to challenge the use of this measure (having already declared the insufficiency of the Law that enables such interventions), with various rulings depending on whether or not there was other evidence in the investigation of the case that could support a conviction and also that such evidence had not been obtained subsequently as a result of the challenged investigative measure[197].

Among the technological investigative measures regulated in LECrim, this paper will refer especially to specific aspects of capturing and recording oral communications using electronic devices, regulated in Articles 588 quater a. to 588 quater e.

Specifically, a brief analysis will be performed of the measure and a more extensive analysis of the case law set out by both the Supreme Court (hereinafter SC) and the Constitutional Court (hereinafter CC) in two rulings that appear to contradict each other with regard to the possibility of setting a time limit during which the measure can be implemented.

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[196] With reference to Article 51 Organic Law 1/1979 of 26 September, in relation to paragraph two thereof: “*The communications of the inmates with the defence lawyer or with the lawyer expressly called in relation to criminal matters and with the lawyers representing them shall be held in appropriate spaces and may not be suspended or intercepted except by order of the court authority and in cases of terrorism"* and paragraph five thereof: *“The oral and written communications provided for in this article may be suspended or intercepted by the director of the establishment, giving notice to the competent judicial authority”.*

[197] In Supreme Court Rulings 747/2015, 19 November; 1032/2017, 15 June; Ruling of the High Court of Las Palmas (6th Panel of Judges), No. 248/2016, 15 July.

II. CAPTURING AND RECORDING ORAL COMMUNICATIONS AND IMAGES

1. Legal regulation

Capturing and recording direct oral communications is regulated in Articles 588 quater a - e of LECrim, the first of which authorises the *placement and use*[198] of electronic devices for *capturing and recording*[199] direct oral communications *held by the person under investigation*[200] on public streets or other open spaces, in their home or any other enclosed places. If it is necessary to enter the home or other comparable spaces for the purposes of constitutional protection, the authorising decision shall include the reasons that make access to these places necessary in its statement of reasons.

Likewise, the listening to and recording of communications may be *complemented with the obtaining of images*, if expressly authorised by the corresponding court order.

Doubts have been raised as to whether the judge can authorise capturing and recording in closed spaces, of only images without sound (the recording of images in public places without court authorisation is provided for in Art. 588 quinquies a)).

In principle, the provision provides for capturing and recording images as a complement to sound, meaning that the recording of images alone would not be possible. However, a logical interpretation of the provision should provide for the authorisation of capturing and recording only images without sound; on the one hand, there is a legal provision that provides for the recording of images and, on the other, the exclusion of sound represents a minor interference with the rights of the person under investigation, which may respond, in some cases, to the application of the principles of necessity and proportionality to the specific case. Furthermore, LECrim itself expressly foresees the possibility of the judge authorising the capture of images with regard to the regulation of the figure of the undercover agent in Article 282 bis 7, which would reinforce the position taken here.

In short, under the protection of the provisions of Article 588 quáter a LECrim, the court authority can authorise measures with a very different nature and scope in the particular area of exclusion of any citizen, namely: a) Capturing and recording oral communications on public streets or in another open or closed space; b) Capturing and

[198] As stated in the provision, the judge may authorise both the use of the device and the fitting of the device. This clarification is important, as the placement of electronic devices may, in some cases, require court authorisation, as they invade areas of privacy not accessible to the police without such authorisation.

[199] A distinction is also made between capturing and recording, which refers both to the simultaneous listening of conversations while they are taking place, and to their storage on suitable media, the latter assumption entailing a greater degree of intrusion into the privacy of the person under investigation.

[200] The only conversations susceptible that may be captured and recorded using this measure will be those held by the person under investigation with any person, even if they are not involved in the investigation. However, it will not be possible, as authorised under Art. 588 ter c for the interception of communications, to capture or record conversations of a third party used by the person under investigation to transmit or receive information or who is collaborating with the person under investigation or who is benefiting from their activity. In these cases, either the third party is named as a person under investigation, justifying in the court decision authorising the measure the suspicions that may exist about them, or their direct oral communications may not be captured or recorded.

recording oral conversations in a person's own home[201]; and c) Capturing and recording images in the same circumstances in which these conversations of interest take place.

2. Guiding principles

Obviously, this measure cannot be arbitrarily approved by judges, but must comply with the guiding principles set out in Article 588 bis a. LECrim, not only for this measure, but for all investigative technological measures.

In short, these requirements aim to ensure that judges respect citizens' rights and are as follows: a) the requirement of an investigation into a specific offence, which prevents them from being adopted prospectively (principle of speciality); b) the measure must be appropriate to the aim pursued (principle of suitability); c) there are no other measures that are equally useful for the aims pursued and less burdensome for the rights of the affected party (principle of exceptionality); d) the result of the investigation must be compromised if the measure is not used (principle of necessity) and e) taking into account the circumstances of each case, the sacrifice of the rights affected must not be greater than the public and third party interest that would result from the adoption of the measure.

3. Presuppositions of legality

Firstly, the measure requires, on the one hand, that in the case in hand, facts are being investigated that apparently constitute: (1) intentional offences punishable by a maximum of three years' imprisonment; (2) offences committed by a criminal organisation or group; or (3) terrorist offences. Furthermore, it requires that it can be reasonably foreseen that the use of the devices will provide essential information of evidential relevance to clarify the facts and to identify the perpetrator.

As can easily be seen, lawmakers, when establishing the premises of this jurisdictional boundary, practically associate the standard required for its legitimacy (Article 588 quater b.) with the standard imposed, in general, for the interception of telephone communications (Article 588 ter a. and Article 579.1 LECrim), with the sole exception that, when conversations are recorded using a microphone or other open oral recording device, as opposed to closed conversations held via a telecommunications channel (telephone or telematic), those which aim to confirm offences committed using a computer or other information or communication technology or communication service cannot be authorised by the courts.

Notwithstanding this comparison, as MARCHENA rightly points out, the adoption of any of the interference measures authorised by Article 588 quater a. is more intense than that which can be attributed to the interception of electronic communications. Indeed, capturing and recording of oral communications held by the person under investigation, on a public road or in another open space, in their home or in any other enclosed place, which

[201] As MARCHENA points out, it must be understood that court authorisation to access the home is only permitted as regards the property or properties in which the person under investigation lives: it would not be legitimate to install these devices in the home of a third party who is not under investigation but who serves, for one reason or another, as a meeting point of interest for the investigation. MARCHENA GÓMEZ, M., GONZÁLEZ-CUÉLLAR SERRANO, N., La reforma de la Ley de Enjuiciamiento Criminal en 2015, *ibid*, pg. 338.

may also be accompanied by the recording of images, has a much greater invasive potential than wire tapping[202].

Therefore, and leaving aside offences committed by a criminal group or organisation and terrorist crimes, we believe that this technological investigation measure, which, as we have seen, has the potential to affect not only the secrecy of communications, but also other fundamental rights enshrined in Article 18 of the Spanish Constitution (inviolability of the home, privacy), should only be justified when the purpose pursued corresponds to a serious crime, i.e., one punishable by a serious prison sentence (more than five years), pursuant to the classification established for criminal offences in Article 13 of the Spanish Constitution, which distinguishes between serious crimes (punishable by a serious sentence), less serious crimes (punishable by a less serious sentence) and minor crimes (punishable by a minor sentence). It does not seem admissible that this kind of invasion of privacy should be permitted in order to investigate an offence punishable by a three-year sentence[203].

Secondly, Article 588 quater b stipulates that the use of the devices must be linked to communications that may take place in one or several specific encounters of the person under investigation with other persons and the investigative actions have made these encounters foreseeable. Furthermore, it indicates that the court ruling authorising the measure must contain, in addition to the mentions in Article 588 bis c, the specification of the place or premises, as well as the specific meetings of the person under investigation that are going to be subject to surveillance.

Furthermore, the officers of the court shall provide the courts with the original support or the authentic electronic copy of the recordings and images, with a transcription of the conversations of interest, specifying the identity of the agents who participated in the execution and monitoring of the measure in the report (Article 588 quater d). Finally, the measure will cease in the case of any of the generic causes in Article 588 bis j, in which case a new recording of other encounters or images of such occasions would require a new court authorisation.

III. THE EXISTENCE OF SPECIFIC ENCOUNTERS OF THE DEFENDANT AS A SPECIFIC HYPOTHESIS FOR THE MEASURE

As can be seen, the conditions for the adoption of this measure are clearly different from any other measure, since in this case it can only be authorised when the specific encounter or encounters take place and its duration must be limited to the strict duration of the encounter or encounters.

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[202] Consider, as RICHARD points out, the fact that the tapping of telephone or telematic devices affects a specific communication activity carried out using a specific device. However, the installation of listening and recording devices in the home affects the entire personal life of the residents of the home who live with the suspect, which is why the expectation of privacy of a person in his own home, pursuing, where appropriate, the relationships typical of any family community, is much more evident than that of someone who uses a telephone to communicate with another person. In RICHARD GONZÁLEZ, M., “Conductas susceptibles de ser intervenidas por medidas de investigación electrónica. Presupuestos para su autorización”, in *Diario La Ley*, No. 8808, 2016, pg. 6.

[203] In CASANOVA MARTÍ, R., "La captación y grabación de comunicaciones orales mediante la utilización de dispositivos electrónicos", in *Diario La Ley*, No. 8674, 2016, p. 4.

In this sense, the main problem posed by this provision is the interpretation of what should be understood by a specific encounter or, in particular, specifying the degree of specificity that must be given in order for the adoption of the measure to be consistent with the legal regulation.

In this sense, the preamble and Article 588 quater b) of LECrim make the concept of specificity, as opposed to generality or indiscrimination, dependent on the existence of indications that make the encounter foreseeable.

As a result, a specific encounter must be foreseen as a result of the evidence gathered[204]. In relation to the previous paragraph, Article 588 quater c) requires that the court ruling authorising the measure specifies the place or premises and the precise encounters that will be subject to surveillance.

This also imposes the need to identify the persons involved in the encounter and their participation in the offence under investigation, even if it is not necessary to identify each of them by name.

From the perspective of the principle of speciality, it should be pointed out that the specific encounter authorised by the courts does not require that what was foreseen and what actually happened necessarily coincide, as such encounters progress naturally[205].

With this in mind, to assess the specificity of the encounter, the following parameters must be taken into consideration, without this meaning that, in any case, they must all occur: a) authorisation must be given to capture and record a specific encounter, avoiding the authorisation giving coverage to prospective investigations, to which end a precise location must be defined (Article 588 quater c)), although it may extend to relocated meetings (it is known that there will be an encounter, although the actual place remains unknown[206]); b) it will be necessary to specify that the person under investigation is due to attend the meeting, as only their conversations can be captured or recorded, it being necessary to identify the other attendees in a comprehensive manner to avoid the indiscriminate recording[207] of encounters that, in general, the person under investigation could celebrate; c) it will be necessary to determine their duration, it being sufficient to this end that indications are provided that specify the foreseeability of the encounters, regardless of their duration208.

Unlike in the case of the interception of communications, which cannot be prolonged for a period of more than 18 months (Article 588 ter g), lawmakers have not

[204] The general and indiscriminate placement of microphones and cameras is not allowed without a justification in each case, meaning that, unlike the case of wire tapping in which it is possible to capture all communications and then select those that may be relevant to the investigation, the aim is to authorise only the capture and recording of conversations that are relevant to the investigation.

[205] Supreme Court Ruling 412/2011, of 11 May.

[206] The figure of the “undercover agent” could be used.

[207] For example, in case there are several encounters in succession, if recording devices are left installed inside a home, it should be possible to deactivate them as the interim periods are outside the scope of the court authorisation. In this sense, the assertions made by VELASCO NUÑEZ, E., Delitos tecnológicos: definición, investigación y prueba en el proceso penal, Editorial SEPIN, 2016 are worth particular note.

[208] To this end, it would be just as specific to foresee a meeting on a given day and time as, for example, in the case of criminal organisations or groups meeting once a week inside a vehicle or in a certain public establishment (Order of the Hight Court of Madrid, Sixteenth Panel of Judges, 28 June 2017).

defined a time limit beyond which the examining magistrate can continue to authorise the capture and recording of specific encounters of the person under investigation, although consideration must be given to the fact that this will be less significant given that the authorisation will have to respect the principles of proportionality and exceptionality, assessed in relation to each specific case, which will undoubtedly prevent the indiscriminate adoption of this measure.

IV. THE DIFFERING INTERPRETATION OF THE SCOPE OF "SPECIFIC ENCOUNTERS OF THE DEFENDANT" BY THE SUPREME COURT AND THE CONSTITUTIONAL COURT

With regard to the specific provisions contained in Articles 588 quater b. and 588 quater c., the answer given by both the Supreme Court and the Constitutional Court to the following question will be analysed below: Can the installation and use of devices that allow conversations held by the person under investigation to be recorded over a certain period of time be authorised, or can authorisation only be given for specific conversations in which the person under investigation is involved, the foreseeability of which has been confirmed by the investigation?

1. Supreme Court Ruling 4436/2020, of 28 December 2020.

In this case, the Constitutional Court heard an order issued by an examining magistrate that allowed the placement of technological devices inside a home, which constituted the main singularity of the case and allowed the court to rule on the singularity of this measure when the devices used to make these recordings are located in the space in which the individual exercises his or her most intimate freedom.

In relation to the specific measure used, the ruling asserted that “the use of the devices referred to in Art. 588.4.a does not only affect the person under investigation. It also affects the suspect’s family, regular residents and those who may exceptionally or sporadically share the suspect’s home", later adding that "the court authorisation for the placement of such devices invalidates the constitutional protection of inviolability of the home. It also neutralises the right to privacy and self-image”.

In this sense, "the investigating judge cannot be converted into a simple body validating a government decision to encroach on the privacy of the person under investigation (...) they must filter the request through the principles of proportionality and necessity referred to in Article 588 bis a) of LECrim".

A second point in the ruling that must be highlighted, which is relevant because it depicts an idea that is somewhat contradictory to the opinion upheld by the Constitutional Court in the ruling to be analysed below, is that when the device is placed inside a home, its duration must be minimal, given the significant interference that this entails with fundamental rights (as explained previously).

The Supreme Court considers that the fact that Article 588 quater of LECrim does not set a maximum time limit for the duration of the measure cannot be understood in the sense that the judge can resort to the rules regulating other technological investigation measures and rely on them for their determination. It has already been indicated that the Supreme Court considers this measure to be more burdensome than any other

contemplated in LECrim, and hence the greater demand for specificity, in this case in terms of duration.

In particular, with regard to the issue of the duration of the measure and the times at which conversations can be recorded, the aforementioned Supreme Court Ruling points out that the fact that Article 588 quater a et seq. LECrim fails to define a specific duration (unlike the case of tapping communications) “cannot be interpreted as an invitation to jurisdictional decisions with open-ended time limits that can be successively extended”. From this perspective, the duration of the measure must be related, according to the Supreme Court, to the conversations that may take place in one or more specific and foreseeable encounters given the existing evidence.

In this sense “the installation of sound and image recording devices - in the present case, only sound - may not be authorised for "...a period of thirty calendar days, after which it shall cease if the facts under investigation are not proven or discovered, unless an extension is necessary, following a reasoned request to that effect".”

Thus, only in cases where the foreseeability of the encounter cannot be defined accurately “shall it be possible to set a short period of time within which the encounter may take place. But a chronological arc of one month is the best evidence that there is insufficient data to justify violating home privacy.” Furthermore, once the foreseeable encounter or encounters have ended “it will be essential to justify information about a new meeting or a more specific date to justify the interference”.

In this respect, court authorisation for the recording of oral communications cannot be extended, given their connection to one or more encounters, notwithstanding subsequent applications for authorisation, to which end all the legally applicable conditions must be met. On the other hand, the circumstance that a specific encounter is interrupted and continued at another time will not require an extension of the measure, authorised for the entire encounter, regardless of its duration, with notification of the interruption to the judge being sufficient for the purposes of controlling the measure, without the need for a new ruling to be issued”[209].

In the case in hand, the Supreme Court considered that the order authorising the measure was contrary to the constitutional framework of guarantees because a time limit for the measure (thirty days) was granted without taking into account a foreseeable encounter in the petition. Moreover, the authorising judge himself was in favour of extending the time limit if nothing was heard during the month that was relevant to the investigation. The High Court also criticised the fact that the authorising order did not specify “the places or premises in which the State's interference could be considered legitimate and, in particular, "...the encounters of the person under investigation to be subject to surveillance".”

In conclusion, the Supreme Court asserts that the measure analysed is not merely another investigative instrument, but rather, as it affects the most protected sphere of privacy (recordings can even be made in the home of the person under investigation,

[209] DÍAZ MARTÍNEZ, M., "La captación y grabación de comunicaciones orales mediante la utilización de dispositivos electrónicos", in *La nueva reforma procesal penal. Derechos fundamentales e innovaciones tecnológicas*, Tirant lo Blanc, 2018, p. 815 et seq.

potentially affecting other people living with them who have nothing to do with the investigation) “it is not comparable with any other and its use must be considered as absolutely exceptional”. Consequently, only in exceptionally serious cases may such a measure be adopted, subject to the general principles of suitability, necessity and proportionality.

2. Constitutional Court Ruling 99/2021 of 10 May 2021

In this ruling, the Constitutional Court analyses the constitutionality of an order that authorised the placement, for a period of three months, of a device that captured and recorded conversations held inside a vehicle, although ultimately it was only kept there for one month.

The Constitutional Court indicates that the constitutionality of such an order requires two filters to be taken into account: first, to examine whether the interpretation of Article 588c, when authorising the measure for a duration of three months, is respectful of its literal wording; second, whether said order exceeded the requirements arising from the principle of proportionality.

As regards the first filter, the Constitutional Court considered that, in this case, an interpretation of Article 588c resulting in authorising the measure for a period of three months is constitutional for several reasons:

Firstly, because the term "foreseeability" in Article 588 quater b. implies the factual impossibility of determining the moment, or moments, at which the different encounters as part of which the conversations to be recorded would take place, meaning that the procedural guarantees were sufficiently satisfied with the determination of the place, subjects, and period of time in which they would take place.

To this end, as it is possible that the subject of the interception may be constituted by a series of meetings, the Constitutional Court stated that the extension of the measure may be delayed until the end of these encounters, there being, therefore, no obligation to connect and disconnect the microphones between them, nor to issue additional court rulings to extend the aforementioned interception. The Constitutional Court considered that this interpretation was not contrary to the literal wording of the rule, since the rule uses the plural (“specific encounters”), meaning that the measure need not be limited to a specific encounter;

Secondly, because, in line with the previous idea, the word “specific” in Article 588 quater c. refers to the place or premises where the conversation to be recorded will take place, but not to the encounters in which this conversation will take place, as demonstrated, according to the Constitutional Court, by the fact that the precept uses the expressions “specific” (singular) and “meetings” (plural).

Thirdly, because the reference to Article 588 quater c. to Article 588 bis b. means that the law has empowered the judge to indicate the duration of the measure, as this is one of the points that the order must contain pursuant to Article 588 bis b.

Fourthly, because the reference to Article 588 quater e to Article 588 bis j, in relation to the causes for terminating the measure, includes the period for which it was authorised coming to an end.

Fifth, because the examining magistrate weighed the constitutional rights and values at stake and took into account the systematic interpretation of the rule in question, as well as the minimum guarantees established by law for the protection of other similar communications. These guarantees are satisfied if the order specifies: the place (specific location), the subjects (specific subjects), and the specific encounters between these subjects that will foreseeably occur within a period of time (specific duration).

Additionally, it points out that although the Explanatory Memorandum of Organic Law 13/2015 states that "the listening device and, where appropriate, the cameras associated with it, must be deactivated as soon as the conversation for which capturing was authorised ends", the term "conversation" should not be understood literally, as a single conversation, due to the fact that an Explanatory Memorandum lacks regulatory scope and that in practice it may be the case that several conversations take place in a period of time, over which period the measure may remain in place.

With regard to the second filter, the Constitutional Court considers that the order authorising this measure complied with the requirements of Article 588 bis LECrim, which have been explained above. Particularly interesting, given its connection with the Constitutional Court ruling analysed above, is the argument that interference with the fundamental rights of the person under investigation varies depending on where the devices are located. In fact, the Constitutional Court seems to refer to the Supreme Court ruling explained above when it says that (W)e must specify that, as highlighted by the Supreme Court, within the scope of Article 588 LECrim, not all measures involve the same degree of interference (...), comparing between a home, a vehicle and an office as places where the right to privacy is different.

It also takes into account the nature of the conversation being intercepted, since, although the room in which a doctor and a patient converse is not a place where the inviolability of the home applies, the sensitivity of the data that could be expressed in the conversations held there may require greater protection of the right to privacy. In short, the determining factor in relation to the need for greater protection (which translates into greater guarantees in the order granting the measure, such as setting a shorter period of time) is the risk of going beyond the content of the right to secrecy of communications (Article 18.3 Spanish Constitution) and entering the realm of the essential core of privacy (Article 18.1 Spanish Constitution), which evidently occurs when the devices are placed inside a home.

V. PERSONAL REFLECTIONS

The main conclusion that can be drawn from the analysis of the above rulings is that the system for the protection of fundamental rights affected by Article 588 quater LECrim varies depending, inter alia, on the location of the encounters where the conversations to be captured and recorded will take place.

This protection system includes the duration of the measure, since, logically, the more exposed the fundamental rights of the person under investigation are, the shorter the

duration should be and the more exhaustive the reasons for the ruling which, if applicable, establishes a significantly long period of time.

This is the main reason why the Constitutional Court deems an order allowing this measure to last for three months inside a vehicle as being constitutional, while the Supreme Court considers setting an extendable duration of 30 days as unconstitutional when the device is placed inside a home.

In my opinion, should we follow the literal wording of Article 588 quater b, it seems clear that two conditions are required for the encounters being intercepted: a) they must be specific; and b) they must be foreseeable on the basis of the evidence uncovered during the investigation. Similarly, Article 588 quater c requires that the authorising court ruling contain "specific mention of the place or premises, as well as the meetings of the person under investigation that are to be subject to surveillance".

The reasoning used by the Constitutional Court according to which the word "specific" in Article 588 quater c. refers to the place or premises where the conversation to be recorded will take place, but not to the encounters at which this conversation will take place, is weak, because LECrim does not even use the term "specific" but literally states that the order approving this measure must make "specific mention of the place or premises, as well as the encounters of the investigated person that will be subject to surveillance". Specification is required as regards the mention of the place, premises and encounters subject to surveillance, but lawmakers do not speak in any case of a "specific place", rather, they say "specific" in the singular and "place or premises" in the plural, which is a contradiction of one of its own reasons for defending the measure.

Therefore, both spatial and temporal specification of the interventions is required at all times and the fact that the intervention affects the fundamental rights involved to a greater or lesser extent does not alter this conclusion. Whether in a home or another less "private" setting, this measure very significantly interferes with fundamental rights, not only of the person under investigation, but very easily with those of other persons, such as cohabitants or visitors, who may have no connection with the measure adopted, thus justifying greater specifications in relation to time than a mere time limit.

Furthermore, the reasons according to which Article 588 quater c., when referring to Article 588 bis c., authorises the judge to set a time limit for the duration of the measure which must not exceed the three months indicated by LECrim for the others regulated by this Court is also weak, as this contradicts Supreme Court Ruling 4436/2020, of 28 December 2020, insofar as it indicates that the measure is autonomous and different from the others, which not only means requiring extra motivation when granting it, but also prevents taking into account the rules contained in LECrim for the duration of other measures.

For this reason, the justification for the order setting a time limit based on the reference to Article 588 quater e to Article 588 bis j, which provides for the expiry of the time limit for which the measure was authorised as a cause for its termination, lacks weight.

Moreover, the sense of protected privacy is much greater in this measure than in others such as the tapping of telephone or telematic communications, since a person is less

capable of anticipating that their direct oral communications are being captured and recorded, as opposed to those that using telephones or similar devices, which the average citizen with a basic understanding of criminal investigations assuming that it is easier to be tapped. This circumstance justifies taking a much more scrupulous approach when adopting the measure of 588 quater a LECrim.

It is also important to highlight the Explanatory Memorandum of Organic Law 13/2015, which states that "this measure may only be agreed for specific encounters that the person under investigation is going to have, and the place or premises under surveillance must be accurately identified. Therefore, general or indiscriminate authorisations to capture and record oral conversations are not permissible", meaning that the measure in question must be limited to certain encounters.

This part of the Explanatory Memorandum goes on to state that “consequently, the listening device and, where appropriate, the cameras associated with it, must be deactivated as soon as the conversation being recorded ends, as is clear from Article 588 quater c". Specifically, if the devices must be deactivated immediately after the intercepted conversation, this is because it is not possible to maintain the interception for a long time, much less one or several months, rather, this can only be maintained for specific and foreseeable encounters. It is true that the Explanatory Memorandum does not have the same legal value as the articles, but its interpretative potential should not be disregarded.

To this end, some may argue that obtaining specific indications of one or more specific and foreseeable encounters may be very complicated and thus make the practical application of the measure and the investigations as a whole difficult. However, in my opinion, this thesis should be ruled out, because it is precisely when there are no indications that one or more specific encounters can be foreseen that the measure requested in Article 588 quater a LECrim does not meet the requirement of exceptionality and necessity of any legitimate interference with a fundamental right.

Indeed, if the quantity and quality of the evidence is insufficient, it is very likely that there will be an equally effective and less burdensome measure for the purpose pursued, such as an order for capturing images, tracking or location under Article 588 quinquies a - c LECrim or, more restrictive in relation to fundamental rights, such as a wiretap of telephone and telematic communications (Articles 588b a et seq. LECrim) which expand the evidence of criminal conduct and, possibly, of specific encounters to which end the measures under Article 588 quater a LECrim can be granted.

Furthermore, consideration should be given to the fact that the matter is very subjective and will depend on the circumstances of each case. In any event, it seems clear that authorising the measure for periods of one or three months is clearly contrary to the “specific” nature of the encounters under investigation.

In conclusion, in my opinion, the measure analysed has one of the greatest (if not the greatest) potential for interfering with fundamental rights such as the privacy and secrecy of communications, which requires adopting a particularly protective stance in its limitation, given, moreover, that there may well be other means of investigation that are equally suitable for clarifying the facts and that are less harmful to these rights, without forgetting the subjective nature of the issue, which will require weighing up the interests at stake in each case on an individual basis in light of the existing circumstances.