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ZAŠTITA POVERLJIVE KOMUNIKACIJE IZMEĐU ADVOKATA I KLIJENTA U PRAKSI EVROPSKOG SUDA ZA LJUDSKA PRAVA[9]**

SAŽETAK: Poverljivost komunikacije predstavlja jedno veoma važno ljudsko pravo koje svoj još veći značaj dobija kada se komunikacija vrši između advokata i klijenta. Naime, da bi advokat mogao adekvatno da zastupa svog klijenta potrebno je da klijent bude siguran da informacije koje poveri advokatu neće doći do trećih lica, odnosno da će komunikacija ostati poverljiva. U tom smislu zaštita poverljivosti komunikacije između advokata i klijenta veoma je važna ne samo za zastupanje klijenta u svakom pojedinačnom slučaju, nego i za pravilno funkcionisanje pravnog sistema jedne države. Cilj ovoga rada je da se ustanovi kojim članovima Evropske konvencije se štiti pravo na poverljivu komunikaciju advokata i klijenta, odnosno na koji način se ova komunikacija štiti u praksi Evropskog suda za ljudska prava. Takođe, u radu je posebno razmatrano da li je moguće propisati meru kojom bi se jedno tako važno pravo kao što je pravo na privilegovanu i poverljivu komunikaciju između advokata i klijenta moglo ograničiti i, ako bi moglo, pod kojim uslovima.

Ključne reči: Evropski sud za ljudska prava, Evropska konvencija o ljudskim pravima, komunikacija, poverljivost, pravo na privatnost (čl. 6), pravo na pravično suđenje (čl. 8), advokat, klijent

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UVOD

Komunikacija između advokata i klijenta predstavlja jedno od temeljnih prava u svakom demokratskom društvu. Da bi advokat mogao efektivno da pruža pravne usluge, potrebno je da komunikacija sa klijentom bude poverljiva, privilegovana i slobodna od trećih lica. Pravo advokata i klijenta na poverljivu, privilegovanu i slobodnu komunikaciju široko je priznato i proklamovano u zakonima brojnih država,[96] ali i u presudama evropskih[97] i međunarodnih sudova.[98]

Zaštita prava na komunikaciju između advokata i klijenta nije izostavljena ni od strane Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda (u daljem tekstu: Konvencija ili Evropska konvencija), odnosno Evropskog suda za ljudska prava (u daljem tekstu: Evropski sud ili Sud). Iako se u tekstu Konvencije nigde izričito ne pominje, to ne treba da navede na pogrešan zaključak da Konvencija ne pruža zaštitu komunikaciji između advokata i klijenta i to bar iz dva razloga. Prvi je zato što se u čl. 8(1) Konvencije[99]. pominje pojam prepiska, što predstavlja jedan od vidova komunikacije, a drugi je to što Evropski sud kada odlučuje o podnetim predstavkama ima nadležnost da primenjuje i tumači odredbe Konvencije.[100] Upravo zato je praksa Evropskog suda značajna jer on svojim tumačenjem Konvencije, tj. stavovima koje je zauzeo, proširuje ili dopunjuje odredbe Konvencije dajući im značenje u skladu sa savremenim shvatanjima, a ne onim koja su važila u vreme kada je Konvencija doneta.[101] Na taj način Evropska konvencija se stalno razvija i predstavlja tzv. „živi instrument“,[102] a stavovi Evropskog suda postaju obavezujući za države potpisnice.

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[96] Spronken. T., Fermon. J. (2008). Protection of Attorney–Client Privilege in Europe. *Penn State International Law Review,* 27 (2), Article 9, 439–440.

[97] *AM & S Europe Limited v. Commission of the European Communities* (od 18. 5. 1982) ECR 1575, paras. 18–21; *S. v. Switzerland*, (App. no. 12629/87; 13965/88), 28. 11. 1991; *Campbell v. United Kingdom*, (App. no. 13590/88), 25. 3. 1992.

[98] Questions relating to the Seizure and Detention of Certain Documents and Data (*Timor Leste v. Australia*), Request for the Modification of the Order Indicating Provisional Measures of 3 March 2014, Order of 22 April 2015, I.C.J. Reports 2015, 556, 557, para. 3 (3).

[99] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*. Rome, Italy, 1950, čl. 8(1).

[100] *Ibid*., čl. 32.

[101] Krstić, I., Marinković, T. (2016). *Evropsko pravo ljudskih prava*. Beograd: Savet Evrope, 23; *Tyrer v. Ujedinjenog Kraljevstva* (App. no. 5856/72), 25. 4. 1978, para. 31; Letsas, G. (2010). Strasbourg's Interpretive Ethic: Lessons for the International Lawyer. *The European Journal of International Law,* 21 (3), 518.

[102] Cozzi, A., Sykiotou, A., Rajska, D., Krstić, I., Filatova, M., Katić, N., ... Bourgeois, S. (2016). *Uporedni prikaz primene Evropske konvencije o ljudskim pravima na*

Razmatrajući praksu Evropskog suda može se primetiti da je pravo na komunikaciju između advokata i klijenta zaštićeno čl. 6. ili preciznije čl. 6(3)(c) i čl. 8. Evropske Konvencije.[103] U ovom radu biće analiziran način na koji se komunikacija između advokata i klijenta štiti čl. 6. [1] i čl. 8. Konvencije [2], te da li je poverljivu i privilegovanu komunikaciju između advokata i klijenta moguće ograničiti [3].

ZAŠTITA KOMUNIKACIJE IZMEĐU ADVOKATA I KLIJENTA čl. 6. KONVENCIJE

Kada se pogleda čl. 6. Konvencije, može se primetiti da u tekstu ovoga člana ne postoji nijedna odredba kojom se štiti pravo na komunikaciju između advokata i klijenta. Ipak, kao što je napred navedeno, mora se imati na umu da Evropski sud može da tumači odredbe Konvencije dajući im značenje u skladu sa savremenim shvatanjima. Upravo zato poznavanje prakse Evropskog suda je nužno za pravilno razumevanje prava zaštićenih Konvencijom. U presudi *S. protiv Švajcarske*, Sud je prvi put istakao da se pravo okrivljenog na poverljivu komunikaciju sa advokatom izvodi iz teksta čl. 6(3)(c) Konvencije, kojim se jemči pravo svakoga da se brani lično ili putem branioca koga sam odabere. Ovaj stav Suda svakako se čini opravdanim, jer nakon što neko lice odabere advokata biće nužno da sa njim i komunicira. Stoga pravo na komunikaciju čini sastavni deo prava na odabir advokata. Takođe, u istoj presudi Sud navodi da će pomoć koju advokat pruža izgubiti na značaju ukoliko advokatu nije omogućeno da sa svojim klijentom vodi poverljivu konverzaciju, te da Konvencija služi kako bi garantovala prava koja su praktična i delotvorna.[104] Evolutivno tumačenje čl. 6(3)(c) Konvencije i stavovi koje je Sud izrazio u presudi *S. protiv Švajcarske* potvrđeni su i često citirani u kasnijim presudama ovoga Suda.[105]

Iako je Evropski sud nedvosmisleno utvrdio da je pravo na poverljivu komunikaciju između advokata i klijenta garantovano čl. 6(3)(c) Konvencije, domašaj ovoga prava i dalje je ostao upitan. Ukoliko se na celokupan čl. 6. Konvencije primeni jezičko tumačenje, može se zaključiti da se samo prvi stav odnosi

nacionalnom nivou. Beograd: Savet Evrope, 182; Šarin, D. (2015). Pravo na pristup sudu u praksi Europskog suda za ljudska prava. Osijek: *Pravni vjesnik: časopis za pravne i društvene znanosti Pravnog fakulteta Sveučilišta J. J. Strossmayera*, 31 (3–4), 267–296, 271.

[103] Björgvinsson, D. T. (2011). *Lawyer – Client confidentiality Case law of the ECHR*. Madrid: FBE, 2.

[104] *S. v. Switzerland*, (App. no. 12629/87; 13965/88), 28. 11. 1991, para. 48.

[105] *Brennan v. United Kingdom*, (App. no. 39846/98) 16. 10. 2001. para. 58; *Lanz v. Austria*, (App. no. 24430/94) 31. 1. 2002. para. 50; *Öcalan v. Turske*, (App. no. 46221/99) 12. 5. 2005. para. 133; *Moiseyev v. Russia*, (App. no. 62936/00) 9. 10. 2008. para. 209.

na krivični i građanski postupak, dok se drugi i treći, pa samim tim i čl. 6(3)(c), odnose isključivo na krivični postupak.[106] Štaviše, jezičkim tumačenjem i samog čl. 6(3)(c) dolazi se do istog zaključka budući da čl. 6(3) koristi termin „svako ko je optužen za krivično delo".

Međutim, kao što pojedini autori navode, u određenim situacijama čl. 6(2) i čl. 6(3) Konvencije mogu se odnositi kako na krivičnu tako i na građansku materiju.[107] Pored toga, smatram da bi napred izneto jezičko tumačenje čl. 6(3)(c) Konvencije, kojim se garantuje pravo na poverljivu komunikaciju između advokata i klijenta bilo suprotno ciljnom tumačenju. Svrha celokupnog čl. 6. Konvencije jeste da se svakom licu u krivičnom i građanskom postupku omogući pravično vođenje takvog postupka, a skup prava posebno naveden u čl. 6. zajedno čini pravo na pravično suđenje. Imajući u vidu da je svako lice kako u krivičnom tako i u građanskom postupku slobodno da samostalno odabere advokata koji će ga u postupku zastupati[108] i sa kojim će moći slobodno da opšti, nema razloga da se ovo pravo ograniči samo na krivični postupak. Štaviše, kršenje prava na nesmetanu komunikaciju advokata i klijenta može imati za posledicu povredu prava na pravično suđenje i to kako u materiji krivičnog, tako i u materiji građanskog prava. Konačno, obuhvatanje materije građanskog prava čl. 6(3)(c) kojim se štiti pravo na pravično suđenje, rezultiralo bi da se Konvencijom zaista garantuju prava koja su praktična i delotvorna, a ne teorijska i prividna, što je uostalom i cilj Konvencije koji je Evropski sud apostrofirao u velikom broju slučajeva.[109]

Iz svih ovih razloga smatram da se pravo na poverljivu komunikaciju između advokata i klijenta, koje se izvodi iz čl. 6(3)(c) Konvencije, mora odnositi ne samo na krivične već i na građanske postupke. Ipak, treba imati na umu i to da Evropski sud ima svoje autentično tumačenje građanske i krivične stvari koje se može razlikovati od onoga što se smatra pod građanskom, odnosno krivičnom stvari u domaćem pravu.[110]

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[106] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, Rome, Italy, 1950, čl. 6.

[107] Mole, N., Harby, C. (2006). The right to a fair trial: A guide to the implementation of Article 6 of the European Convention on Human Rights, preuzeto 31. 8. 2020. sa https://www.refworld.org/docid/ 49f180362.html

[108] Gerven, D. V. (2013). Professional Secrecy of Lawyers in Europe, chapter I in book: *Professional Secrecy of Lawyers in Europe*. Cambridge: Cambridge University Press, 7.

[109] Van Dijk, P., Van Hoof, G. J. H. (1998). *Theory and Practice of the European Convention on Human Rights. 3rd Edition*, the Haue: Kluver Law International, 74; *Airey v. Ireland* (App. no. 6289/73) 9. 10. 1979. para. 24; *Sporrong and Lönnroth v. Sweeden*, (App. no. 7151/75; 7152/75) 23. 9. 1982. para. 63; *S. v. Switzerland*, (App. no. 12629/87; 13965/88), 28. 11. 1991, para. 48; *Kutić v. Croatia*, (App. no. 48778/99) 1. 3. 2002. para. 25.

[110] Etinski, R., Đajić, S. (2012). *Međunarodno javno pravo*, peto izmenjeno i dopunjeno izdanje. Petrovaradin: Futura (Pravni fakultet Novi Sad), 395.

Na kraju, važno je napomenuti da je kroz svoju praksu Evropski sud istakao da će za povredu čl. 6 Konvencije podnosiocu predstavke biti dovoljno samo da tvrdi da je ograničenje komunikacije između advokata i klijenta neposredno pogodilo njegovo pravo na odbranu, a nije neophodno da dokaže da je imalo i štetno dejstvo na tok suđenja.[111] Odnosno, biće dovoljno da postoji osnovana sumnja da komunikacija nije bila slobodna i poverljiva, tj. da je bila prisluškivana ili presretana da bi se smatralo da pomoć advokata nije bila efektivna.[112] Pored toga, povreda prava na poverljivu komunikaciju između advokata i klijenta za posledicu može imati i povredu čl. 5(4) Konvencije, jer čl. 5(4) sadrži gotovo iste garancije kao one proklamovane čl. 6.[113]

ZAŠTITA KOMUNIKACIJE IZMEĐU ADVOKATA I KLIJENTA čl. 8. KONVENCIJE

Čl. 8. Konvencije jemči se pravo na poštovanje privatnog i porodičnog života. Ovaj član podeljen je u dva stava od kojih prvi stav garantuje pravo svakog lica na poštovanje privatnog i porodičnog života, doma i prepiske, dok su u drugom stavu predviđena odstupanja od prava garantovanih prvim stavom.[114] Kao što se može primetiti, u čl. 8(1) Konvencije izričito se pominje termin prepiska koji predstavlja samo jedan vid komunikacije. Stoga se mora postaviti pitanje da li se čl. 8. Konvencije štiti svaki vid komunikacije ili samo prepiska, kao vid komunikacije koji podrazumeva razmenu poruka u pisanom obliku. Takođe, mora se postaviti i pitanje da li je čl. 8. Konvencije primenjiv na komunikaciju između advokata i klijenta koja je uvek poslovnog odnosno profesionalnog karaktera, budući da se jezičkim tumačenjem ovoga člana dolazi do zaključka da se čl. 8. Konvencije štiti samo privatni, a ne profesionalni i poslovni život.

U svojoj praksi Sud je konstantno proširivao pojam prepiske iz čl. 8(1) Konvencije i istakao da prepiska obuhvata usmenu komunikaciju u vidu telefonskih razgovora,[115] poruke poslate putem „pejdžera“,[116] teleks, elektronske

[111] *Brennan v. United Kingdom*, (App. no. 39846/98) 16. 10. 2001. para. 58.

[112] *Modârcă v. Moldova*, (App. no. 14437/05) 10. 5. 2007. para. 89.

[113] *Ibid.,* paras. 80, 99; *Reinprecht v. Austria*, (App. no. 67175/01) 15. 11. 2005. para. 31.

[114] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, Rome, Italy, 1950, čl. 8.

[115] *Klass and others v. Germany*, (App. no. 5029/71) 6. 9. 1978. para. 41.

[116] *Taylor-Sabori v. United Kingdom*, (App. no. 47114/99) 22. 10. 2002. paras. 18, 19.

poruke (e-mail),[117] (privatni) radio.[118] Ipak, svoj najznačajniji stav Sud je izneo u presudi *Mišo protiv Francuske* u kojoj je naveo da se čl. 8. Konvencije štiti poverljivost privatne komunikacije, bez obzira na sadržaj i oblik (formu) prepiske.[119] Time je Evropski sud konačno utvrdio da pojam prepiske iz čl. 8(1) Konvencije treba izjednačiti sa pojmom komunikacije.

Dilemu oko toga da li se čl. 8. odnosi isključivo na privatni, a ne profesionalni i poslovni život, Evropski sud je razrešio u slučaju *Nimic protiv Nemačke*. U ovom slučaju Sud je naveo da nije moguće niti je nužno dati definiciju privatnog života, te da ne postoje nikakvi razlozi zbog kojih „privatni život" ne bi obuhvatao profesionalne i poslovne aktivnosti.[120]

Upravo zahvaljujući stavovima Evropskog suda izraženim u presudama *Nimic protiv Nemačke* i *Mišo protiv Francuske* sa sigurnošću se može reći da se čl. 8. Konvencije štiti pravo na komunikaciju advokata i klijenta, bez obzira na sadržinu i formu te komunikacije, ali i nezavisno od toga da li advokat šalje informacije klijentu ili klijent advokatu.

Takođe, važno je napomenuti da je u brojnim slučajevima Sud istakao da komunikacija između advokata i klijenta mora da uživa veći stepen zaštite kako bi advokati mogli efektivno da pružaju pravne usluge svojim klijentima.[121]

OGRANIČENJA PRAVA NA KOMUNIKACIJU IZMEĐU ADVOKATA I KLIJENTA

Nakon razmatranja na koji način je pravo na komunikaciju advokata i klijenta zaštićeno Evropskom konvencijom, odnosno pred Evropskim sudom potrebno je ustanoviti eventualnu mogućnost ograničenja ovakvoga prava. Stoga, u ovom radu biće razmatrana mogućnost ograničenja prava na poverljivu komunikaciju između advokata i klijenta kada je ono zaštićeno čl. 6(3)(c) Konvencije [3.1] i kada je zaštićeno čl. 8. Konvencije [3.2].

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[117] *Copland v. United Kingdom*, (App. no. 62617/00) 3. 4. 2007. para. 41.

[118] Kilkelly, U. (2003). The right to respect for private and family life. *A guide to the implementation of Article 8 of the European Convention on Human Rights*, preuzeto 31. 8. 2020. sa https://www.refworld.org/docid/ 49f17e212.html, 13; *Camenzind v. Switzerland* (136/1996/755/954) 16. 12. 1997.

[119] *Michaud v. France*, (App. no. 12323/11) 6. 12. 2012. para. 90.

[120] *Niemietz v. Germany*, (App. no. 13710/88) 16. 12. 1992, paras. 27, 29.

[121] *Campbell v. United Kingdom*, (App. no. 13590/88), 25. 3. 1992, para. 44; *Foxley v. United Kingdom* (App. no. 33274/96) 20. 6. 2000. para. 43; *Michaud v. France*, (App. no. 12323/11) 6. 12. 2012. paras. 117–118; *R. E. v. United Kingdom*, (App. no. 62498/11) 27. 10. 2015. para. 131.

Ograničenje prava na komunikaciju između advokata i klijenta koje je zaštićeno čl. 6(3)(c) Konvencije

Da bi se moglo uspostaviti ograničenje prava zaštićenih čl. 6. Konvencije potrebno je da se ograničenjem ne zadire u suštinu zaštićenog prava, te da služi legitimnom cilju i bude proporcionalno takvom cilju.[122]

Na pitanje da li je ograničenjem povređena sama suština prava, Evropski sud će morati da ceni na osnovu činjenica svakog pojedinačnog slučaja. Ipak, teško je zamisliti meru kojom se ograničava pravo na poverljivu komunikaciju advokata i klijenta, a da ta mera ne zadire *u suštinu* ovoga prava, odnosno da se takvom merom ne stvara nepravično suđenje. Stava da se ne mogu uspostaviti izuzeci od prava na poverljivu komunikaciju advokata i klijenta bio je sudija De Mejer (De Mayer) koji je to naveo u svom saglasnom mišljenju u presudi *S. protiv Švajcarske*,[123] a isto mišljenje ima i Savet advokatskih i pravnih društava Evrope (CCBE).[124]

Međutim, u brojnim presudama nakon slučaja *S. protiv Švajcarske* Evropski sud je istakao da pravo na pristup advokatu, odnosno pravo na komunikaciju između advokata i klijenta nije apsolutnog karaktera, te da može biti ograničeno zbog postojanja „dovoljno jakih" razloga.[125] Inače, ovakvo shvatanje Suda predstavlja svojevrsni korektiv onoga što je u izdvojenom mišljenju u presudi *S. protiv Švajcarske* naveo sudija Mašer (Matscher), koji je smatrao nužnim da se uspostave određeni izuzeci od prava na poverljivu komunikaciju advokata i klijenta.[126]

U slučaju *Kembel protiv Ujedinjenog Kraljevstva,* koji se doduše ticao povrede čl. 8. Konvencije, Sud je na opšti način odredio šta bi se moglo smatrati „jakim", odnosno „razumnim" razlogom i naveo da će „razuman" razlog postojati onda kada se na osnovu dostupnih činjenica i informacija objektivnom posmatraču učini da se privilegija advokat–klijent zloupotrebljava.[127] Na

[122] Omejec, J. (2014). *Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Europskog suda za ljudska prava,* Zagreb: Strasbourški acquis, Novi informator, 846–847; Spronken, T., Fermon, J. (2008). Protection of Attorney–Client Privilege in Europe. *Penn State International Law Review,* 27 (2), Article, 445.

[123] *S. v. Switzerland*, (App. no. 12629/87; 13965/88), 28. 11. 1991, saglasno mišljenje sudije De Mejera.

[124] CCBE (2016). Recommendations on the protection of client confidentiality within the context of surveillance activities, 11, pristupljeno 5. 9. 2020. na: http://uploads.ordineavvocatimessina.it/downloads/en-ccbe-recommendati1-1463743795.pdf .

[125] *Brennan v. United Kingdom*, (App. no. 39846/98) 16. 10. 2001. para. 58; *Lanz v. Austria*, (App. no. 24430/94) 31. 1. 2002, para. 52; *Moiseyev v. Russia*, (App. no. 62936/00) 9. 10. 2008, para. 210; *Öcalan v. Turske*, (App. no. 46221/99) 12. 5. 2005, para. 131.

[126] *S. v. Switzerland*, *Op. cit.,* izdvojeno mišljenje sudije Mašera.

[127] *Campbell v. United Kingdom*, (App. no. 13590/88), 25. 3. 1992, para. 48.

stavove izražene u ovoj presudi pozvao se Sud u slučaju *Mojsejev protiv Rusije*,[128] te je istakao da se prepiska advokata i klijenta može ograničiti samo u izuzetnim okolnostima, kada vlasti smatraju da sadržina pisma može da ugrozi bezbednost zatvora, bezbednost drugih, ili je inače kriminalne prirode. Važno je napomenuti da je u toj presudi Sud napravio izvesnu analogiju čl. 6. sa čl. 8. Konvencije, bar u pogledu ograničenja prava na komunikaciju advokata i klijenta. U presudi *Lanc protiv Austrije* Evropski sud je kao primer „dovoljno jakih" razloga naveo neobjavljeni slučaj *Kempers protiv Austrije*, u kome je nadzor nad komunikacijom advokata i klijenta bio uspostavljen, jer je klijent advokata bio član bande, a mera je bila neophodna da bi se uhapsili i drugi članovi bande.[129]

Na osnovu svega navedenog može se zaključiti da je teorijski moguće ograničiti pravo na poverljivu komunikaciju između advokata i klijenta. Ipak da bi ograničenje ovoga prava bilo dozvoljeno nije dovoljno samo postojanje „dovoljno jakih" razloga, nego je potrebno da ti razlozi budu proporcionalni cilju koji se želi postići i da ne zadiru u samu suštinu prava na komunikaciju advokata i klijenta, odnosno prava na pravično suđenje.

Da bi se ustanovilo da li je i praktično moguće ograničiti pravo na poverljivu komunikaciju između advokata i klijenta, u ovom radu će biti razmatrane tri hipotetičke situacije:

Situacija br. 1: Celokupna komunikacija između klijenta i advokata koji ga zastupa u nekom krivičnom ili građanskom postupku se nadzire zbog postojanja nekog dovoljno jakog razloga, u skladu sa propisom koji omogućava takvo nadziranje. U slučaju da su komunikaciju nadzirala lica koja imaju neposredan ili posredan interes da saznaju sadržaj te komunikacije, zaključak bi bio da takva mera zadire *u suštinu prava na pravično suđenje.* Sa druge strane, ukoliko bi celokupnu komunikaciju nadziralo neko treće lice koje nema nikakav interes da sazna sadržinu komunikacije, a čiji bi jedini zadatak bio da ustanovi da li se komunikacija advokata i klijenta zloupotrebljava, tada ograničenje prava na komunikaciju advokata i klijenta ne bi zadiralo u suštinu prava na pravično suđenje. Ipak, iako se u takvom slučaju ne bi moglo smatrati da je došlo do kršenja čl. 6. Konvencije, (pod pretpostavkom da su postojali na zakonu zasnovani legitimni razlozi za uspostavljanje takve mere) moglo bi se postaviti pitanje da li je došlo do kršenja čl. 8. Konvencije.

Situacija br. 2: Samo određeni vid komunikacije, npr. putem pisama je podvrgnut nadzoru zbog postojanja nekog dovoljno jakog razloga. Iako se u ovom slučaju nadzire samo određeni vid komunikacije, smatram da bi rezultat

[128] *Moiseyev v. Russia*, (App. no. 62936/00) 9. 10. 2008, para. 210.

[129] *Kempers v. Austria*, (App. no. 21842/93); *Lanz v. Austria*, (App. no. 24430/94) 31. 1. 2002. para. 52.

ograničenja komunikacije između advokata i klijenta morao da se posmatra jednako kao u prethodnoj situaciji.

Situacija br. 3: U skladu sa određenim propisom koji to reguliše, komunikacija između advokata i klijenta se nadzire zbog postojanja dovoljno jakog razloga, tj. sumnje da se komunikacija zloupotrebljava. Komunikaciju nadzire lice koje nema interes da sazna sadržinu te komunikacije, niti je na bilo koji način uključeno u postupak u kome advokat zastupa svog klijenta. Međutim, prilikom provere da li se komunikacija između advokata i klijenta zloupotrebljava dođe do toga da informacije koje klijent šalje advokatu ili obrnuto ne stignu „na vreme" ili čak uopšte ne budu prosleđene advokatu, odnosno klijentu. U oba ova slučaja došlo bi do kršenja prava garantovanih čl. 6. Konvencije, bez obzira što je postojao legitiman razlog za ograničenje i što je komunikaciju nadziralo lice koje je potpuno nezavisno od postupka u kome advokat zastupa svog klijenta, jer je način na koji je ograničenje vršeno, bio neproporcionalan legitimnom cilju i bitno zadirao u pravo na pravično suđenje.

Na osnovu navedenih hipotetičkih situacija može se zaključiti da je i praktično zamislivo ograničenje prava na poverljivu komunikaciju između advokata i klijenta kojom se ne bi zadiralo u suštinu prava garantovanih čl. 6. Konvencije. Na kraju, čak i kada ograničenje komunikacije između advokata i klijenta ne bi predstavljalo kršenje čl. 6, odnosno čl. 6(3)(c) Konvencije, bilo bi potrebno razmotriti da li se takvim ograničenjem krši čl. 8. Konvencije.

Ograničenje prava na komunikaciju između advokata i klijenta koje je zaštićeno čl. 8. Konvencije

Da bi se moglo uspostaviti ograničenje prava na poverljivu komunikaciju između advokata i klijenta koja je garantovana čl. 8(1) Konvencije, potrebno je da se ispune svi uslovi koje predviđa čl. 8(2) Konvencije. Odnosno, potrebno je da ograničenje bude propisano zakonom, da služi legitimnom cilju i da bude nužno u demokratskom društvu.

Smatraće se da je neka mera propisana zakonom ukoliko je postojao pravni akt na osnovu koga je mera sprovođena, te ukoliko je taj pravni akt bio dostupan javnosti i predvidiv.[130] Legitiman cilj u smislu čl. 8. Konvencije bio bi svaki onaj cilj koji bi služio zaštiti nacionalne bezbednosti, javne bezbednosti, ekonomske dobrobiti zemlje, sprečavanju nereda ili kriminala, zaštiti zdravlja ili morala i zaštiti prava i sloboda drugih.[131] Mera će biti „nužna u

[130] *Kopp v. Switzerland*, (App. no. 13/1997/797/1000) 25. 3. 1998. paras. 55–64; *R. E. v. United Kingdom*, (App. no. 62498/11) 27. 10. 2015, para. 120.

[131] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*. Rome, Italy, 1950, čl. 8(2).

demokratskom društvu" onda kada se radi o stanju koje zahteva hitno reagovanje države, a sama mera kojom se ograničava ljudsko pravo je dovoljna i adekvatna, te proporcionalna cilju koji se želi postići.[132]

Teorijski nije sporno da se pravo na poverljivu komunikaciju između advokata i klijenta može ograničiti ukoliko mera kojom se uspostavlja ograničenje bude „u skladu" sa zakonom, teži legitimnom cilju i bude nužna u demokratskom društvu. Međutim, osnovno pitanje jeste da li će praktično bilo kakva mera uspeti da ispuni sve ove uslove i, ako hoće, u kojoj situaciji će se dozvoliti ograničenje jednog tako važnog prava kao što je nesmetana i poverljiva komunikacija između advokata i klijenta.

Na osnovu stava Evropskog suda izraženog u presudi u slučaju *Mišo protiv Francuske* može se zaključiti da će mera kojom se ograničava pravo na poverljivu komunikaciju između advokata i klijenta ispunjavati sve uslove iz čl. 8(2) ukoliko ne zadire u srž advokatske delatnosti.[133] Argumentom *a contrario,* mera neće ispunjavati uslove propisane čl. 8(2) Konvencije ukoliko se njome zadire u srž advokatske profesije. Pod „srži" advokatske profesije u pomenutom slučaju, Evropski sud je smatrao sve aktivnosti advokata vezane za sudske postupke.[134]

Važni stavovi u pogledu mogućnosti ograničenja prava na komunikaciju izraženi su i u slučajevima *Klas i drugi protiv Nemačke*[135] i *Kembel protiv Ujedinjenog Kraljevstva.*[136]

U slučaju *Klas i drugi protiv Nemačke*, Evropski sud je naveo da se usled sofisticiranih metoda špijunaže i terorizma u određenim situacijama može uspostaviti tajni nadzor komunikacije kao mera koje bi služila zaštiti nacionalne sigurnosti i kao takva bila nužna u demokratskom društvu.[137] Na osnovu zauzetog stava Evropskog suda u ovom slučaju može se zaključiti da se i komunikacija između advokata i klijenta može ograničiti usled povezanosti advokata, odnosno klijenta sa špijunažom ili terorizmom, a što je potvrđeno

[132] *Chauvy and others v. France*, (App. no. 64915/01) 29. 9. 2004. para. 70; Korff, D. (2008). *The Standard Approach under Articles 8–11 ECHR and Article 2 ECHR*. London: London Metropolitan University, 3; White, R. C. A., Ovey, C. (2010). *The European Convention on Human Rights*. Oxford: Oxford University press (fifth edition), 325, 326; *Zana v. Turky*, (App. no. 69/1996/688/880) 25. 11. 1997, para. 51; *De Diego Nafría v. Spain*, (App. no. 46833/99) 4. 9. 2002. para. 34; *Pedersen and Baadsgaard v. Denmark*, (App. no. 68693/01) 14. 1. 2005. para. 70.

[133] *Michaud v. France*, (App. no. 12323/11) 6. 12. 2012*,* paras. 127–132.

[134] *Ibid*., paras. 127–128.

[135] *Klass and others v. Germany*, (App. no. 5029/71) 6. 9. 1978.

[136] *Campbell v. United Kingdom*, (App. no. 13590/88), 25. 3. 1992.

[137] *Ibid.,* para. 48.

u slučaju *Erdem protiv Nemačke*.[138] Važno je napomenuti da je u slučaju *Erdem protiv Nemačke* bila nadzirana samo pisana komunikacija između advokata i klijenta koju je nadzirao nezavisni sudija i koji je sve informacije morao da čuva kao poverljive.[139]

Iako su navedene presude veoma bitne za shvatanje stavova Suda u pogledu mogućnosti ograničenja komunikacije između advokata i klijenta koja se štiti čl. 8. Konvencije, ipak najveći doprinos povodom ovog pitanja Evropski sud je dao u slučaju *Kembel protiv Ujedinjenog Kraljevstva*. U tom slučaju Sud je ustanovio da se pisma koja advokat šalje, odnosno prima od klijenta koji se nalazi u zatvoru mogu otvarati, da bi se proverilo da li u sebi sadrže neki nedozvoljeni predmet kojim bi se mogla ugroziti bezbednost zatvora ili bezbednost drugih, ali da se ne smeju čitati. Takođe, Evropski sud je istakao da se takva provera pisma mora vršiti u prisustvu zatvorenika.[140] Ovakav stav ipak ostavio je otvorenim neka pitanja. Jedno od tih pitanja je da li je opravdanost takvog mešanja identična u situaciji kada advokat šalje pismo klijentu koji je u zatvoru i kada prima pismo od njega. Sudija Morenila (Morenilla) u svom delimično izdvojenom mišljenju u slučaju *Kembel protiv Ujedinjenog Kraljevstva* smatrao je da bi u situaciji kada pisma šalju zatvorenici svojim advokatima, rizik od eventualne zloupotrebe bio manji, pa bi samim tim opravdanost mešanja morala biti očiglednija.[141] Zaista ovaj stav sudije deluje opravdan jer je u tom slučaju gotovo nemoguće da se ugrozi bezbednost zatvora, ili bezbednost drugih. Ipak, mogla bi se zamisliti situacija u kojoj bi zatvorenik tokom boravka u zatvoru počinio neko krivično delo dozvoljenim ili nedozvoljenim predmetom te bi, zloupotrebljavajući nepovredivost pisama koja šalje svom advokatu, mogao pokušati da se na taj način „otarasi" predmeta kojim je počinio krivično delo. Upravo takve situacije opravdale bi vršenje bezbednosne provere pisama kada ih zatvorenik šalje svom advokatu. Drugo pitanje koje se postavilo jeste šta će se desiti u situaciji kada zatvorenik nije u mogućnosti da prisustvuje otvaranju pisma. Sudija Pinjerio Farina (Pinherio Farinha), u svom izdvojenom mišljenju napisao je da bi se u takvom slučaju pismo moglo otvoriti i u prisustvu predsednika Advokatske komore, ili advokata koga on ovlasti.[142] Stav sudije Farine takođe se čini opravdanim, iako je posebno pitanje koja bi situacija dovela do toga da je zatvorenik onemogućen da prisustvuje otvaranju pisma.

[138] *Erdem v. Germany*, (App. no. 38321/97) 5. 7. 2001, paras. 50, 67, 69.

[139] *Erdem v. Germany*, (App. no. 38321/97) 5. 7. 2001, para. 67.

[140] *Campbell v. United Kingdom*, (App. no. 13590/88), 25. 3. 1992, para. 48.

[141] *Ibid.,* delimično izdvojeno mišljenje sudije Morenile.

[142] *Ibid.,* izdvojeno mišljenje sudije Pinjerije Farine.

Pored ustanovljavanja izuzetka kada će se mešanje u komunikaciju advokata i klijenta smatrati dozvoljenim, Evropski sud je u istom slučaju ustanovio i izuzetak od izuzetka. Naime, Sud je naveo okolnosti pod kojima bi se sadržina pisma mogla čitati. Takve okolnosti bi postojale u situaciji kada bi postojao „razuman" razlog koji bi nagoveštavao da se privilegija advokat–klijent zloupotrebljavala i ukoliko bi sadržina pisma mogla da ugrozi bezbednost zatvora, sigurnost drugih, ili je već kriminalne prirode. „Razuman" razlog će uvek postojati kada na osnovu činjenica i informacija zadovolji objektivnog posmatrača. Pritom, treba imati u vidu da čitanje komunikacije ne sme biti dozvoljeno licima koja imaju direktan interes da saznaju sadržinu te prepiske.[143] U slučaju *Jankauskas protiv Litvanije* Evropski sud se na neki način osvrnuo na postojanje „razumnog" razloga i istakao da puka opasnost od neke radnje ne predstavlja dovoljan razlog da pisma koja klijent šalje advokatu i obrnuto budu otvarana i čitana.[144]

Na osnovu svega navedenog može se zaključiti da je stav Evropskog suda jasan u pogledu toga da se bezbednosna provera pisama koja advokat šalje klijentu koji je u zatvoru i obrnuto, može vršiti radi zaštite bezbednosti zatvora i bezbednosti drugih lica. Iako se Evropski sud o tome nije izjasnio, bezbednosna provera pisama bi se morala ustanoviti i kod klijenta advokata koji se privremeno, ili trajno nalaze u različitim ustanovama i institucijama, poput, pritvora, bolnica i sl. Takođe, nedvosmislen je stav Suda da se usled povezanosti, ili indicija da postoji povezanost advokata ili klijenta, pre svega sa terorističkom organizacijom ali i špijunažom, mogu uspostaviti ograničenja komunikacije advokata i klijenta, u smislu da se komunikacija može čitati, ali takvu komunikaciju ne bi smela da nadziru lica koja imaju direktan interes da saznaju sadržaj komunikacije.[145] Stav Suda da se komunikacija između advokata i klijenta može čitati smatram jedino ispravnim u situaciji kada se i sam advokat sumnjiči za vršenje krivičnog dela u koje je umešan i njegov klijent. U svim ostalim slučajevima smatram da se mešanje države ne bi smelo uspostaviti, odnosno da bi takvo mešanje predstavljalo povredu prava na privilegovanu komunikaciju između advokata i klijenta, tj. prava koje je toliko široko priznato da se možda može reći da predstavlja i opšteprihvaćeno načelo u smislu čl. 38. Statuta Međunarodnog suda pravde.[146]

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[143] *Campbell v. United Kingdom*, (App. no. 13590/88), 25. 3. 1992. paras. 47, 48.

[144] *Jankauskas v. Lithuania*, (App. no. 59304/00) 24. 2. 2005. paras. 17–23.

[145] *Campbell v. United Kingdom*, (App. no. 13590/88), 25. 3. 1992, para. 47.

[146] Statut Međunarodnog suda pravde, usvojen zajedno sa Poveljom UN u San Francisku 26. juna 1945. godine, ratifikovan i objavljen u *Službenom listu DFJ*, br. 69/45, čl. 38.

ZAKLJUČAK

Komunikacija između advokata i klijenta proklamuje se i štiti čl. 6(3)(c) i čl. 8. Konvencije. Naime, članom 6(3)(c) Konvencije proklamuje se pravo svakoga na slobodan odabir advokata, a iz ovoga prava Sud „izvlači" pravo na komunikaciju između advokata i klijenta. S druge strane članom 8. Konvencije proklamuje se i štiti svaka vrsta prepiske u koju spada i prepiska advokata i klijenta. Međutim, treba imati u vidu da je Evropski sud kroz svoju praksu proširio pojam prepiske praktično izjednačivši ga sa pojmom komunikacije.

Evropski sud je prilikom rešavanja slučajeva koji su se ticali prava na komunikaciju između advokata i klijenta uvek naglašavao značaj takvoga prava i isticao da komunikacija između advokata i klijenta mora biti poverljiva, privilegovana i slobodna od trećih lica. Takođe, po stavu Suda takvoj komunikaciji se mora pružiti veća pravna zaštita kako bi advokati mogli efektivno da pružaju pravne usluge svojim klijentima. Međutim, to ne znači da je zaštita apsolutna i neograničena. Ograničenja čl. 6(3)(c) Konvencije moraju biti takva da, u svetlu celokupnog građanskog odnosno krivičnog postupka, advokat i njegov klijent ne budu lišeni prava na pravično suđenje, odnosno efektivno zastupanje, a pored toga takvo ograničenje mora da služi legitimnom cilju i bude nužno u demokratskom društvu. Ograničenja čl. 8. Konvencije u tom smislu je jednostavnije ograničiti, jer je potrebno samo da budu propisana zakonom, služe legitimnom cilju i budu nužna u demokratskom društvu. Dakle, kod ograničenja čl. 8. Konvencije ne treba voditi računa o tome da se njim ne zadire u suštinu prava na pravično suđenje.

Na kraju, važno je naglasiti da se čl. 6(3)(c) Konvencije štiti samo ona komunikacija između advokata i klijenta koja je vezana za neki krivični ili građanski postupak, u skladu sa autentičnim tumačenjem Suda o tome šta se smatra krivičnom, a šta građanskom stvari, dok se čl. 8. Konvencije štiti svaka komunikacija između advokata i lica koje mu se obrati radi dobijanja pravnog saveta ili pravne usluge.

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Pedersen and Baadsgaard v. Denmark, (App. no. 68693/01) 14. 1. 2005.
R. E. v. United Kingdom, (App. no. 62498/11) 27. 10. 2015.
Reinprecht v. Austria, (App. no. 67175/01) 15. 11. 2005.
S. v. Switzerland, (App. no. 12629/87; 13965/88), 28. 11. 1991
Sporrong and Lönnroth v. Sweeden, (App. no. 7151/75; 7152/75) 23. 9. 1982.
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Presude suda pravde Evropske unije

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Presude međunarodnog suda pravde

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Pravni akti

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THE PROTECTION OF CONFIDENTIAL COMMUNICATION BETWEEN A LAWYER AND A CLIENT IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS**

ABSTRACT: Confidentiality of communication is a very important human right that gains in importance when the communication is conducted between a lawyer and a client. Namely, for a lawyer to be able to adequately represent their client, the client must be sure that the information they entrust to the lawyer will not reach third parties, i.e. that the communication will remain confidential. In this sense, protecting the confidentiality of communication between a lawyer and a client is very important not only for representing the client in each case, but also for the proper functioning of the legal system. This paper aims to establish which articles of the European Convention protect the right to confidential communication between a lawyer and a client and how this communication is protected in practice by the European Court of Human Rights. The paper also examines whether it is possible to prescribe a measure by which such an important right as the right to privileged and confidential

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communication between a lawyer and a client could be limited and if so under what conditions.

Keywords: European Court of Human Rights, European Convention on Human Rights, communication, confidentiality, right to privacy (art. 6), right to a fair trial (art. 8), lawyer, client

INTRODUCTION

Communication between a lawyer and client is one of the fundamental rights in any democratic society. For a lawyer to be able to effectively provide legal counsel, their communication with the client needs to be confidential, privileged and unknown to third parties. The right of lawyers and clients to confidential, privileged and free communication is widely recognized and proclaimed by the laws of many states,[1] as well as by the judgements of European[2] and international courts[3].

Protection of the right to communication between a lawyer and client is not omitted by the European Convention on Human Rights and Fundamental Freedoms (hereinafter: the Convention), that is, the European Court of Human Rights (hereinafter: the Court). Even though this right is never explicitly stated by the wording of the Convention, this should not steer towards the wrong conclusion that the Convention does not protect the communication between lawyers and clients, because of at least two reasons – the first one being that Art. 8(1) of the Convention[4] mentions the term correspondence; the second one is that the Court, when deciding on the applications submitted, has the jurisdiction to apply and interpret the provisions of the Convention.[5] For this reason, the case law of the Court is important, as its interpretations, that is, the positions it took, expand and supplement the provisions of the Convention

[1] Spronken, T., Fermon, J. (2008). Protection of Attorney-Client Privilege in Europe. *Penn State International Law Review,* 27 (2), Article 9, 439–440.

[2] *AM & S Europe Limited v Commission of the European Communities* (from May 18, 1982) ECR 1575, paras. 18−21; *S. v. Switzerland*, (App. no. 12629/87; 13965/88), 28. 11. 1991; *Campbell v. the United Kingdom*, (App. no. 13590/88), 25. 3. 1992.

[3] Questions relating to the Seizure and Detention of Certain Documents and Data (*TimorLeste v. Australia*), Request for the Modification of the Order Indicating Provisional Measures of 3 March 2014, Order of 22 April 2015, I. C. J. Reports 2015, 556, 557, para. 3 (3).

[4] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, Rome, Italy, 1950, Art. 8 (1).

[5] *Ibid*, Art. 32.

by conferring meaning in accordance with modern understandings, and not in accordance to those which existed when the Convention was first written.[6] In this way, the Convention is continuously evolving and is a "living instrument,"[7] and the judgements of the Court become binding to states signatories of the Convention.

By examining the case law of the Court, it can be deduced that the right to communication between an attorney and client is protected by Art. 6 (more precisely Art. 6(3)(c)) and Art. 8 of the Convention.[8] This paper will analyse the manner in which communication between an attorney and client is protected by Art. 6 [1] and Art. 8 [2] of the Convention, and whether it is possible to limit the confidential and privileged communication between a lawyer and a client [3].

PROTECTION OF COMMUNICATION BETWEEN A LAWYER AND A CLIENT BY ART. 6 OF THE CONVENTION

By examining Art. 6 of the Convention, it can be seen that no provision of this article protects the communication between a lawyer and a client. Yet, as was previously stated, we must bear in mind that the Court can interpret the provisions of the Convention and assign them meaning in conformity with modern understandings. This is why knowing the case law of the Court is essential for a correct understanding of the protections provided by the Convention. In the *S. v. Switzerland* judgement, the Court, for the first time, noted that the right of the accused for confidential communication with their lawyer stems from the text of Art. 6(3)(c) of the Convention, which guarantees the right of anyone to defend themselves in person or through legal assistance of their own choosing. This position of the Court certainly seems justified, as after a person chooses an attorney, they will necessarily need to communicate.

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[6] Krstić, I., Marinković, T. (2016). *Evropsko pravo ljudskih prava*. Belgrade: Council of Europe, 23; *Tyrer v. the United Kingdom* (App. no. 5856/72), 25. 4. 1978, para. 31; Letsas, G. (2010). Strasbourg's Interpretive Ethic: Lessons for the International Lawyer. *The European Journal of International Law,* 21 (3), 518.

[7] Cozzi, A., Sykiotou, A., Rajska, D., Krstić, I., Filatova, M., Katić, N., ... Bourgeois, S. (2016). *Uporedni prikaz primene Evropske konvencije o ljudskim pravima na nacionalnom nivou*. Belgrade: Council of Europe, 182; Šarin, D. (2015). Pravo na pristup sudu u praksi Europskog suda za ljudska prava. Osjek: *Pravni vjesnik: Journal of Law and Social Sciences of the Facuty of Law Josip Juraj Strossmayer University of Osijek*, 31 (3–4), 267–296, 271.

[8] Björgvinsson, D. T. (2011). *Lawyer – Client confidentiality Case law of the ECHR*. Madrid: FBE, 2.

Thus, the right to communicate is a fundamental component of the right to legal assistance of their own choosing. Further, in the same judgment the Court notes that the legal assistance which the lawyer provides loses in meaning if the attorney and client are not able to communicate in confidentiality and that the purpose of the Convention is to guarantee rights that are practical and effective.[9] The evolved interpretation of Art. 6(3)(c) of the Convention and the position the Court took in the judgement of *S. v. Switzerland* were corroborated and often cited in later judgements by the Court.[10]

Despite the Court undeniably determining that the right to confidential communication between a lawyer and a client is guaranteed by Art. 6(3)(c) of the Convention, the scope of this right remains in question. If a linguistic interpretation is applied to the entirety of Art. 6, it can be concluded that only provision (1) refers to criminal and civil proceedings, while provisions (2) and (3) (which would include Art. 6(3)(c)) refer exclusively to criminal proceedings.[11] Further, applying a linguistic interpretation solely to Art. 6(3)(c) confirms this conclusion, as Art. 6(3) uses the phrase "everyone charged with a criminal offence".

However, as certain authors note, Art. 6(2) and 6(3) of the Convention may refer to both criminal and civil subject matter in specific situations.[12] Further, I believe that the aforementioned linguistic interpretation of Art. 6(3)(c) of the Convention, which guarantees the confidentiality of communication between a lawyer and a client, is contrary to the intended interpretation. The purpose of Art. 6 of the Convention is to enable a fair trial for any person involved in criminal or civil proceedings, and the rights separately listed in Art. 6 jointly form the right to a fair trial. Given the fact that each person is allowed to freely choose a lawyer that will represent them, be it in criminal or civil proceedings,[13] and with whom they can freely communicate, there is no reason to limit this right to only criminal proceedings. Additionally, violating the right to free communication between a lawyer and their client can lead to a violation of the right to a fair trial, both in the domain of criminal and civil

[9] *S. v. Switzerland*, (App. no. 12629/87; 13965/88), 28. 11. 1991, para. 48.

[10] *Brennan v. the United Kingdom*, (App. no. 39846/98) 16. 10. 2001, para. 58; *Lanz v. Austria*, (App. no. 24430/94) 31. 1. 2002, para. 50 ; Öcalan v. Turske, (App. no. 46221/99) 12. 5. 2005, para. 133; *Moiseyev v. Russia*, (App. no. 62936/00) 9. 10. 2008, para. 209.

[11] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, Op. cit.,* Art. 6.

[12] Mole, N., Harby, C. (2006). The right to a fair trial: A guide to the implementation of Article 6 of the European Convention on Human Rights, retrieved on August 31, 2020. Available at: https://www.refworld.org/docid/49f180362.html .

[13] Gerven, D. V. (2013). *Professional Secrecy of Lawyers in Europe*, *chapter I in book: Professional Secrecy of Lawyers in Europe*, Cambridge: Cambridge University Press, 7.

law. Finally, by Art. 6(3)(c) that protects the right to a fair trial encompassing civil proceedings, the Convention would truly be protecting rights that are practical and effective and not theoretical and illusory, which is the purpose of the Convention, as the Court had stressed in numerous cases.[14]

For these reasons, I find that the right to confidential communication between a lawyer and a client, which stems from Art. 6(3)(c) of the Convention, must not only refer to criminal proceedings, but include civil proceedings as well. However, it should be noted that the Court has its own authentic interpretation of what constitutes criminal and civil subject matter, which could be distinct from what is considered criminal or civil subject matter by national courts.[15]

Finally, it is important to stress that case law of the Court has demonstrated that for an applicant to claim a violation of Art. 6 of the Convention they only need to claim that restricting their communication with their lawyer directly impacted their right to defence and it is not necessary for the applicant to prove that it had a detrimental effect on the course of the proceedings.[16] In other words, reasonable suspicion that communication was not free and confidential, i.e. that it was monitored and intercepted, is grounds for considering the legal assistance of a lawyer ineffective.[17] Additionally, a violation of the right to confidential communication between a lawyer and a client can be the grounds of a violation of Art. 5(4) of the Convention, as Art. 5(4) contains almost the same guarantees as those found in Art. 6.[18]

PROTECTION OF COMMUNICATION BETWEEN A LAWYER AND A CLIENT BY ARTICLE 8 OF THE CONVENTION

Art. 8 of the Convention guarantees the right to respect for private and family life. This article contains two provisions, the first of which guarantees every persons' right to respect for family and private life, their home and

[14] Van Dijk, P., Van Hoof, G. J. H. (1998). *Theory and Practice of the European Convention on Human Rights. 3rd Edition*, the Hague: Kluver Law International, 74; *Airey v. Ireland* (App. no. 6289/73) 9. 10. 1979, para. 24; *Sporrong and Lönnroth v. Sweeden*, (App. no. 7151/75; 7152/75) 23. 9. 1982, para. 63; *S. v. Switzerland*, (App. no. 12629/87; 13965/88), 28. 11. 1991, para. 48; *Kutić v. Croatia*, (App. no. 48778/99) 1. 3. 2002, para. 25.

[15] Etinski, R., Đajić, S. (2012). *Međunarodno javno pravo*, 5th edition. Petrovaradin: Futura (Faculty of Law in Novi Sad), 395.

[16] *Brennan v. United Kingdom*, (App. no. 39846/98) 16. 10. 2001, para. 58.

[17] *Modârcă v. Moldova*, (App. no. 14437/05) 10. 5. 2007, para. 89.

[18] *Ibid,* paras. 80, 99; *Reinprecht v. Austria*, (App. no. 67175/01) 15. 11. 2005, para. 31.

correspondence, while the second provision prescribes exceptions to the right guaranteed by the first provision.[19] As can be seen, Art. 8(1) of the Convention explicitly mentions the term correspondence, which is only one medium of communication. Consequently, it must be examined whether Art. 8 protects all forms of communication or only correspondence as a form of communication via messages in writing. Further, it must be examined whether Art. 8 of the Convention is applicable to the communication between a lawyer and their client, which is always of a business, i.e. professional nature, as a linguistic interpretation of this article leads to the conclusion that Art. 8 only protects a person's private and not their professional life.

The praxis of the Court has seen a continual expansion of the term correspondence from Art. 8(1) of the Convention and it was emphasized that correspondence encompasses verbal communication in the form of telephone calls,[20] messages sent via a pager,[21] telex messages, electronic messages (e-mails),[22] and (private) radio.[23] Yet, the most important position that the court took was in the *Michaud v. France* judgement, wherein it stated that Art. 8 of the Convention protects the confidentiality of private communication, regardless of the content and form of the correspondence.[24] By taking this position, the Court definitively established that the term correspondence from Art. 8(1) of the Convention should be equated with the term communication.

The dilemma regarding whether Art. 8 refers exclusively to private life and not to professional and business life was resolved by the Court in the case of *Niemietz v. Germany*. Regarding this case, the Court stated that it is neither possible nor necessary to define the notion of private life and that there is no reason why "private life" could not encompass professional and business activities.[25]

Because of the positions the Court took in the *Michaud v. France* and *Niemietz v. Germany* cases, it can be conclusively said that Art. 8 of the Convention protects the right to communication between a lawyer and a client,

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[19] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*. Rome, Italy, 1950, Art. 8.

[20] *Klass and others v. Germany*, (App. no. 5029/71) 6. 9. 1978, para. 41.

[21] *Taylor-Sabori v. the United Kingdom*, (App. no. 47114/99) 22. 10. 2002, paras. 18, 19.

[22] *Copland v. the United Kingdom*, (App. no. 62617/00) 3. 4. 2007, para. 41.

[23] Kilkelly, U. (2003). The right to respect for private and family life. *A guide to the implementation of Article 8 of the European Convention on Human Rights*, retrieved on August 31, 2020. Available at: https://www.refworld.org/docid/49f17e212.html, 13; *Camenzind v. Switzerland* (136/1996/755/954) 16. 12. 1997.

[24] *Michaud v. France*, (App. no. 12323/11) 6. 12. 2012, para. 90.

[25] *Niemietz v. Germany*, (App. no. 13710/88) 16. 12. 1992, paras. 27, 29.

regardless of the content and form of the communication, but also irrespective of whether the attorney is sending information to the client or vice-versa.

It is also important to note that the Court emphasized in many judgements that the communication between a lawyer and a client must enjoy a higher degree of protection for the lawyers to be able to effectively provide legal services to their clients.[26]

RESTRICTIONS ON THE RIGHT TO COMMUNICATION BETWEEN A LAWYER AND A CLIENT

After examining the manner in which the communication between a lawyer and a client is protected by the European Convention, that is, by the European Court of Human Rights, it is necessary to establish potential limitations to this right. Thus, this paper will study the possibility of restricting the right to confidential communication between a lawyer and a client when it is protected by Art. 6(3)(c) of the Convention [3.1.] and when it is protected by Art. 8 of the Convention [3.2.].

Restrictions on the right to communication between a lawyer and a client that is protected by Art. 6(3)(c) of the Convention

For the right protected by Art. 6 of the Convention to be restricted, it is necessary that the restriction does not infringe on the essence of the protected right and that it serves a legitimate purpose, while being proportional to that purpose.[27]

To determine whether the restriction infringes on the very essence of the right, the Court will need to examine the facts of each individual case. Yet, it is difficult to imagine a measure that would limit the right to communication between a lawyer and a client, without those measures infringing on the very essence of the right, that is, without those measures leading to an unfair trial. Judge De Meyer agrees with the position that there can be no exceptions to

[26] *Campbell v. the United Kingdom*, (App. no. 13590/88), 25. 3. 1992*,* para. 44; *Foxley v. the United Kingdom* (App. no. 33274/96) 20. 6. 2000, para. 43; *Michaud v. France*, (App. no. 12323/11) 6. 12. 2012*,* paras. 117–118; *R. E. v. the United Kingdom*, (App. no. 62498/11) 27. 10. 2015, para. 131.

[27] Omejec, J. (2014). *Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Europskog suda za ljudska prava.* Zagreb: Strasbourški acquis, *Novi informator*, 846–847; Spronken, T., Fermon, J. (2008). Protection of Attorney-Client Privilege in Europe. *Penn State International Law Review,* 27 (2), Article 9, 439–440.

the right to confidential communication between an attorney and client, as he noted in his concurring opinion in *S. v. Switzerland*,[28] and the Council of Bars and Law Societies of Europe (CCBE) agrees.[29]

However, in numerous judgements after *S. v. Switzerland*, the Court emphasized that the right of access to a legal representative, that is, the right to communication between a lawyer and a client, is not of an absolute nature and that it can be restricted for "good cause".[30] This position of the Court is a type of correction in alignment with the separate opinion of judge Matscher as it was given in *S. v. Switzerland*, wherein he stated that certain exceptions to the right to communication between a lawyer and a client must be established.[31]

In *Campbell v. the United Kingdom*, although it dealt with a violation of Art. 8 of the Convention, the Court determined, in general terms, what could be considered "good" or "reasonable" cause and stated that "reasonable cause" would exist if based on the available facts and information an objective observer would be satisfied in the knowledge that the privileged channel of communication is being abused.[32] The opinions present in this judgement were referred to by the Court in *Moiseyev v. Russia*,[33] and the Court noted that correspondence between a lawyer and a client can only be restricted in exceptional circumstances, such as when the contents of the letters endanger prison security or the safety of others, or are otherwise of a criminal nature. It is important to note that in the *Moiseyev v. Russia* judgement, the court made a type of analogy between Arts. 6 and 8 of the Convention, at least in respect of restricting the right to communication between a lawyer and a client. In the *Lanz v. Austria* judgement, as an example of "sufficient" reasons, the Court referred to the unpublished *Kempers v. Austria* case, wherein the communication between the applicant and their attorney was under surveillance, as the applicant was a member of a gang and the measure was necessary to apprehend the other members.[34]

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[28] *S. v. Switzerland*, (App. no. 12629/87; 13965/88), 28. 11. 1991, concurring opinion of judge De Mayera.

[29] CCBE. (2016). Recommendations on the protection of client confidentiality within the context of surveillance activities, 11. Retrieved on: September 5, 2020. Available at: http://uploads.ordineavvocatimessina.it/downloads/en-ccbe-recommendati1-1463743795.pdf.

[30] *Brennan v. United Kingdom*, (App. no. 39846/98) 16. 10. 2001, para. 58, *Lanz v. Austria*, (App. no. 24430/94) 31. 1. 2002, para. 52; *Moiseyev v. Russia*, (App. no. 62936/00) 9. 10. 2008, para. 210; *Öcalan v. Turske*, (App. no. 46221/99) 12. 5. 2005, para. 131.

[31] *S. v. Switzerland*, (App. no. 12629/87; 13965/88), 28. 11. 1991, separate opinion of judge Matscher.

[32] *Campbell v. the United Kingdom*, (App. no. 13590/88), 25. 3. 1992, para. 48.

[33] *Moiseyev v. Russia*, (App. no. 62936/00) 9. 10. 2008, para. 210.

[34] *Kempers v. Austria*, (App. no. 21842/93); *Lanz v. Austria*, (App. no. 24430/94) 31. 1. 2002, para. 52.

Based on the facts previously presented, it can be concluded that it is theoretically possible for the right to confidential communication between a lawyer and a client to be restricted. Still, for this right to be restricted, "good cause" is not enough; the cause must be proportional to the desired aim and it must not infringe on the very essence of the right to communication between a lawyer and a client, i.e. the right to a fair trial.

To determine whether it is practically possible to restrict the right to confidential communication between a lawyer and a client, three hypothetical situations will be examined:

Hypothetical situation 1: The entirety of the communication between a client and a lawyer that is representing them in criminal or civil proceedings is being monitored for a reasonable cause, in accordance with a legal regulation that allows such monitoring. If the communication was being monitored by persons who had a vested direct or indirect interest in knowing the content of the communication, the conclusion would be that such measures infringe on the very essence of the right to a fair trial. Conversely, if the communication was being monitored by a third person that has no vested interest in knowing the content of the communication and whose only purpose is to establish whether the communication between the client and the lawyer was being abused, then the measures would not infringe on the essence of the right to a fair trial. Yet, even if Art. 6 of the Convention would not be violated in such a case (assuming legal grounds existed for the monitoring), it could be brought into question whether Art. 8 was violated.

Hypothetical Situation 2: Only a certain means of communication, e.g. written correspondence, was monitored for a reasonable cause. Even though only a specific means of communication would be monitored in this situation, I believe that the result of the restriction on the communication between a lawyer and a client should be viewed in the same light as in the previous situation.

Hypothetical Situation 3: Pursuant to a legal provision that regulates it, the communication between a client and a lawyer is monitored for a reasonable cause, i.e. there is suspicion that the communication is being abused. The communication is being monitored by a person that has no vested interest in knowing the content of the communication nor are they involved in the proceedings in which the lawyer represents the client. However, due to the investigation of whether the communication is being abused, information from the lawyer does not reach the client on time or at all, or vice-versa. In both cases, there would exist a violation of Art. 6 of the Convention, regardless of the fact that there was a legitimate reason for the restriction and that the communication was monitored by a person fully separate from the proceedings in

which the lawyer represents the client, as the manner in which the restriction was implemented was disproportional to the legitimate aim and substantially infringed on the right to a fair trial.

Based on the hypothetical situations presented, it can be concluded that restricting the right to confidential communication between a lawyer and a client without infringing on the essence of the rights guaranteed by Art. 6 of the Convention can be done in practice. Finally, even when restrictions on the communication between a lawyer and a client would not violate Art. 6, that is, Art. 6(3)(c) of the Convention, it needs to be considered whether such restrictions violate Art. 8.

Restrictions on the right to communication between a lawyer and a client that is protected by Art. 8 of the Convention

To implement restrictions on the right to confidential communication between a lawyer and a client that is protected by Art. 8(1) of the Convention, all conditions prescribed by Art. 8(2) of the Convention must be met. In other words, the restriction must be in accordance with the law, serve a legitimate purpose and be a necessary measure in a democratic society.

A measure will have been implemented in accordance with the law if it has some basis in a legal act, if that legal act is accessible to the public and the consequences are foreseeable.[35] A legitimate purpose as it relates to Art. 8 of the Convention is such a purpose that would be in the interest of national security, public safety, the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedoms of others.[36] The measure will be "necessary in a democratic society" when the situation is such that it requires a swift response from the state, and the measure that restricts the right is sufficient and relevant, and also proportionate to the legitimate aims pursued.[37]

[35] *Kopp v. Switzerland*, (App. no. 13/1997/797/1000) 25. 3. 1998, paras. 55–64; *R. E. v. the United Kingdom*, (App. no. 62498/11) 27. 10. 2015*,* para. 120.

[36] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*. Rome, Italy, 1950, 8 (2).

[37] *Chauvy and others v. France*, (App. no. 64915/01) 29. 9. 2004, para. 70; Korff, D. (2008). *The Standard Approach under Articles 8–11 ECHR and Article 2 ECHR*. London: London Metropolitan University, 3; White, R. C. A., Ovey, C. (2010). *The European Convention on Human Rights*. Oxford: Oxford University press (fifth edition), 325, 326; *Zana v. Turky*, (App. no. 69/1996/688/880) 25. 11. 1997, para. 51; *De Diego Nafría v. Spain*, (App. no. 46833/99) 4. 9. 2002, para. 34; *Pedersen and Baadsgaard v. Denmark*, (App. no. 68693/01) 14. 1. 2005, para. 70.

It is not disputed that the right to confidential communication between a lawyer and a client can be restricted in theory, if the measures which implement the restrictions are in accordance with the law, serve a legitimate purpose and are necessary in a democratic society. However, the issue at hand is whether any such measure can meet these conditions in practice; and if a measure does, in which situations would restrictions on a right as important as the right to free and confidential communication between a lawyer and a client be allowed.

Based on the position the Court took in the *Michaud v. France* judgement, it can be concluded that a measure which restricts the right to confidential communication between an attorney and client will have met all of the conditions from Art. 8(2) of the Convention if it does not infringe on the essence of the lawyer's profession.[38] By *argumentum a contrario*, a measure will not have met the conditions from Art. 8(2) if it infringes on the essence of a lawyer's profession. Under the "essence" of a lawyer's profession in the given case, the Court considered any activities of the lawyer relating to judicial proceedings.[39]

Positions of significance regarding potential restrictions on the right to communication were taken in *Klass and others v. Germany*[40] and *Campbell v. the United Kingdom*.[41]

In *Klass and others v. Germany*, the Court stated that due to the sophisticated forms of espionage and terrorism, secret surveillance of communication can be established in certain situations, as a measure that is in the interest of national security and is necessary in a democratic society.[42] Based on this position of the Court, it can be concluded that the communication between a lawyer and a client can also be restricted as a result of the lawyer's or client's links to espionage or terrorism; this was confirmed in the *Erdem v. Germany* case.[43] It is important to note that in the *Erdem v. Germany* case, only written communication between a lawyer and a client was monitored, and it was monitored by an independent judge who was obligated to keep all of the information confidential.[44]

Even though these judgements are very important for understanding the position of the Court regarding restrictions on the communication between a lawyer and a client as it is protected by Art. 8 of the Convention, the largest

[38] *Michaud v. France*, (App. no. 12323/11) 6. 12. 2012*,* paras. 127–132.
[39] *Ibid*., paras. 127–128.
[40] *Klass and others v. Germany*, (App. no. 5029/71) 6. 9. 1978.
[41] *Campbell v. the United Kingdom*, (App. no. 13590/88), 25. 3. 1992*.*
[42] *Ibid.,* para. 48.
[43] *Erdem v. Germany*, (App. no. 38321/97) 5. 7. 2001, paras. 50, 67, 69.
[44] *Ibid.* para. 67.

contribution to resolving this issue was provided by the Court in the *Campbell v. the United Kingdom* case. In this case, the Court determined that the letters which a lawyer sends to or receives from a client in prison can be opened to ascertain whether the letters contain a forbidden object which could endanger the security of the prison or the safety of others, but that they must not be read. Further, the Court stressed that opening such letters must be done in the presence of the prisoner.[45] Yet, this position the Court took still leaves some questions open. One of those questions is whether the justification for such an interference is identical in cases where the lawyer sends letters to a client in prison and when the lawyer receives letters from the client in prison. In his partially dissenting opinion in *Campbell v. the United Kingdom*, judge Morenilla stated that when a prisoner sends a letter to their lawyer there is less risk of abuse and, consequently, the justification for the interference must be more apparent.[46] This opinion truly seems justified, as in such a case it is practically impossible to endanger the security of the prison or the safety of others. Yet, it is possible to imagine a hypothetical situation where a prisoner commits a criminal act by use of an allowed or forbidden object and by abusing the inviolability of letters attempts to dispose of the object by which they committed the act. Those types of situations would justify security checks of letters which prisoners send their lawyers. The other issue relates to what happens when a prisoner is unable to attend the opening of the letters. In his separate opinion, judge Pinheiro Farinha stated that in such a case, the letter could be opened in the presence of the chairman of the bar council or a lawyer of their choosing.[47] The opinion of judge Farinha also appears justified, even though which practical situation would make a prisoner unable to attend the opening is a separate issue.

Besides establishing exceptions when interference in the communication between a client and a lawyer is allowed, the Court established an exception to the exception in the same case. Namely, the Court determined circumstances in which the content of the letters could be read. Such circumstances would exist if there were "reasonable" cause to believe that the lawyer-client privilege is being abused and if the content of the letters could endanger the security of the prison, the safety of others, or is of an otherwise criminal nature. "Reasonable" cause will always exist if, based on the facts and the information available, it would satisfy an objective observer. Additionally, it should be noted that the communication should not be read by persons who have a direct interest

[45] *Campbell v. the United Kingdom*, (App. no. 13590/88), 25. 3. 1992, para. 48.

[46] *Ibid.,* partially dissenting opinion of judge Morenilla.

[47] *Ibid.,* separate opinion of judge Pinheiro Farinha.

in knowing the content of the correspondence.[48] In *Jankauskas v. Lithuania*, the Court, in a certain way, reviewed the existence of "reasonable" cause and noted that the mere danger of an action happening is not sufficient reason to open and read letters that a client sends their lawyer, or vice-versa.[49]

Based on the facts presented above, it can be concluded that the Court's position is clear regarding the security checks of letters that a lawyer sends a client in prison and vice-versa – they can be conducted for the security of the prison or for the safety of others. Even though the Court has not, as of yet, provided an opinion on the matter, security checks would be conducted on letters of clients that are temporarily or permanently placed in different institutions, such as in detention or in a hospital, or a similar institution. Further, the position of the Court is unambiguous in that if there is a connection, or an indication of a connection, of a client or a lawyer with, primarily, a terrorist organization, but also espionage, restrictions on the communication between the lawyer and the client can be implemented, in the sense that the communication may be read, but that the communication may not be monitored by persons who have a direct interest in knowing the content of the letters.[50] It is my opinion that the position of the Court that communication between a lawyer and a client can be read is only justified if the lawyer is also suspected of being involved in the same criminal acts as the client. In all other cases, I believe that the state should not be allowed to interfere, that is, that such interference would violate the right to privileged communication between a lawyer and a client, i.e. the right that is so widely recognized that it a generally accepted principle in the sense of Art. 38 of the Statute of the International Court of Justice.[51]

CONCLUSION

Communication between a lawyer and a client is proclaimed in and protected by Arts. 6(3)(c) and 8 of the Convention. Namely, Art. 6(3)(c) proclaims the right of everyone to freely choose their legal counsel and from this the Court draws the right to communication between a lawyer and a client. Art. 8 of the Convention protects any kind of correspondence, including correspondence between a lawyer and a client. However, it should be noted that through

[48] *Campbell v. the United Kingdom*, (App. no. 13590/88), 25. 3. 1992, paras. 47, 48.

[49] *Jankauskas v. Lithuania*, (App. no. 59304/00) 24. 2. 2005, paras. 17–23.

[50] *Campbell v. the United Kingdom*, (App. no. 13590/88), 25. 3. 1992, para. 47.

[51] Statute of the International Court of Justice, adopted together with UN Charter in San Francisco on June 26, 1945, ratified and published in the *Official Gazette of the* DFY, no. 69/45, art. 38.

case law, the Court has expanded the term correspondence, practically identifying it with communication.

In dealing with cases that related to communication between a lawyer and a client, the Court always stressed the importance of such a right and emphasized that the communication between a lawyer and their client must be confidential, privileged, and free from third parties. Further, it is the position of the Court that such communication requires additional legal protection, in order for lawyers to be able to provide legal services to their clients effectively. However, this does not mean that such protections are absolute and unlimited. Restrictions on Art. 6(3)(c) of the Convention must be such that in light of the entirety of a civil or criminal proceeding, the lawyer and their client are not deprived of the right to a fair trial, that is, effective legal representation; additionally, the restriction must serve a legitimate aim and be necessary in a democratic society. In that sense, restrictions on Art. 8 are easier to execute, as they only need to be in accordance with the law, serve a legitimate aim and be necessary in a democratic society. Thus, with restrictions on Art. 8, there is no reason to worry about infringing on the essence of the right to a fair trial.

Finally, it is important to note that Art. 6(3)(c) only protects communication between a lawyer and a client that is related to criminal or civil proceedings, in accordance with the authentic interpretation of the Court on what is considered a criminal and what a civil matter, while Art. 8 protects all communication between a lawyer and a person that addresses them with the aim receiving legal advice or services.

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