Aleksandar Stevanović[*]
Jelena Kostić[**]

FREEDOM OF EXPRESSION WITHIN THE EMPLOYMENT RELATIONSHIP - BETWEEN DIGNITY AND DUTY OF THE EMPLOYEE[1]

This paper deals with the issues of freedom of expression at the workplace in European and comparative labour law and practice. The authors start from the fact that the right to freedom of expression is guaranteed to all citizens with restrictive possibilities to limit that right. The paper acknowledges the fact that employment implies a certain set of rights and obligations of the employer and the employee that shapes the exercise of the right to freedom of expression at the workplace. For this reason, an evolutionary overview of the development of the employment concept was given. It was pointed out that broad restrictions should not be accepted as justified while particular importance was given to the issue of protecting the efficiency of the employer work organization and work process. This criterion should be taken into account when balancing the employee's right to freedom of expression and protection og the legitimate interests of the employer. The paper discusses the numerous case law material of the European Court of Human Rights, as well as the case law of the highest courts within several important national legislations.

Keywords: : *freedom of expressiom, employment, workplace, human rights*

[*] Research Assistant, Institute for Criminological and Sociological Research in Belgrade, Serbia. E-mail: aleksandar.stevanovic993@gmail.com.

[**] Research Fellow, Institute of Comparative Law in Belgrade, Serbia. E-mail: j.kostic@iup.rs.

[1] The paper is result of the project “Crime in Serbia: phenomenology, risks and opportunities of social interventions” (number 47011) financed by the Ministry of Education, Science and Technological Development of the Republic of Serbia.

Introductory considerations

Freedom of expression[2] is one of the fundamental rights in a democratic society. According to some authors, it is characterized by a dual function in the sense that it is both the goal and the instrument for the realization of many other proclaimed rights that are considered important achievements of civilization heritage (Alaburić, 2002: 1). In addition to the doctrine of philosophical, political, sociological and many other social sciences that put freedom of expression at the very center of the corpus of basic human rights, it should be noted that it is not an absolute right that cannot be limited, ie. public discourse, even in the most democratic and liberal countries, is conditioned by respect for the rights and freedoms of the others. This principle is codified in one of the fundamental acts proclaiming basic human rights, *The Universal Declaration of Human Rights*, so the Article 19 of the Document states that: "Everyone has the right to freedom of opinion and expression, which includes the right not to be disturbed because of opinion, as well as the right to seek, receive and disseminate information and ideas by any means and regardless of borders."

Since 1970, many entities have entered the human rights space. Human rights principles appear in instruments of several supra-national bodies while on the other hand some of them are laid down at regional level. Yet the the scope of the right and the circumstances in which it can be excercised, have to be fully determined (Vickers, 2002: 1). For this reason, it was said in the literature that the essence of the legal problem of the conflict between personality rights and the freedom of expression is the identical legal power of rights in conflict (Popesku, 2018: 159). The previous statement, however, is valid only when the public display of certain content or information by the employee violates the personal rights of the employer such as reputation and honor. On the other hand, such statement can not be taken into account when it comes to disclosing information that may harm the employer's business reputation, working processes market power etc. In any case, it is important to strike a balance between the interests of the employer and the guaranteed human rights of all citizens, including those employees, who on that basis are the subjects of specific labor rights and obligations.

The limits to the freedom proclaimed in the aforementioned article of the Universal Declaration are set out in its Article 29: "In exercising their rights and freedoms, everyone may be subject only to such limitations as are prescribed by law solely for the purpose of

[2] By this term we mean freedom of speech, but also the other types of expression of the state of soul and consciousness, which can be verbal, real, symbolic, etc.

securing the necessary recognition and respect for the rights and freedoms of others, as well as meeting the just demands of morality, public order and general welfare in a democratic society."

It is therefore indisputable that normative practice, at the supranational and national level, recognizes certain restrictions on the right to freedom of speech and expression. Thus, the main point of contention and essence of the issue of the right to freedom of expression is the scope and mechanism of its limitations. This issue is especially more complex when viewed in the context of the employment relationship, which implies a system of mutual rights and obligations of the employer and the employee, including specific obligations of a personal legal nature, among which we will consider the so-called. "the obligation of loyalty to the employer." The key question that needs to be answered in the context of the topic of this paper is how far freedom of speech may be curtailed in the context of employment relationship (Barendt, 2009: 486)? In other words, it is necessary to determine whether the right to freedom of expression in the workplace can be treated as *ius cogens* within the set of human rights, ie if the certain restrictions are already envisaged due to the needs of the employer and work organization, it should be analyzed and determined in detail.

1. General remarks on the right to freedom of expression

The freedom of expression right was proclaimed by the Universal Declaration of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and other important international and regional documents that are guaranteeing fundamental political and civil rights. In addition, not only in the Republic of Serbia, but also in almost all other countries, the right to freedom of expression was provided in the provisions of the constitutional acts. Freedom of expression is one of the most important rights in a democratic society and according to some authors, it is characterized by a dual function in the sense that it is both a goal and a means of exercising many other proclaimed rights that are today considered important civilizational achievement (Alaburić, 2002: 1). Such approach indicates the dual character of the right to freedom of expression, which viewed as a goal *per se* expresses its subjective character, while the socio-political character of that right prevails if it is seen as a instrument for exercising other rights.

Expression includes different types of manifestation of the state of consciousness, but regardless of the form, the main classification of the expressed content makes a difference between value of judgments and statements. In the first case, it is about the content that

is objectively verifiable and that can be proven, while on the contrary, in the latter case it is about content that is not verifiable and that cannot be proven, or content that represents a value of judgment (opinion) about the event, appearances, things or persone. The distinction between potentially provable claims and value judgments that cannot be the subject of proof was particularly important in the jurisprudence of the ECtHR, that was based on the rule set out in *Steel and Morris v. UK* case, according to which the requirement to prove value judgments, especially if they are based on sufficient factual material, would lead to a violation of the right to freedom of expression (Ilić, 2018: 38).

The European Court of Human Rights in the judgment in *Handyside v. United Kingdom* case states that the protection of freedom of expression extends even to information which content may be offensive, harassing or in some way harassing to individuals. This view was later confirmed several times in a number of judgments, such as the *Castells v. Spain* in 1992 and *Vogt v. Germany* from 1995. The doctrinal starting point for this attitude of the court is found in the prevailing thesis that freedom of expression is important for the enjoyment of democracy and its values within society (Milo, 2008: 62). In that sense, the importance of "circulation and flow of information" from the political spectrum is especially emphasized and recognized in the landmark decision of the US Supreme Court, *Hustler Magazine Inc. v Falwell*, as the heart and essence of the First Amendment to the US Constitution (Milo, 2008: 67).

According to the above stated, the right to freedom of expression serves the intellectual and spiritual development of the individual as a person, ie his self-affirmation within society, while respecting his special cultural and psychological characteristics. On the other hand, the political character of the right to freedom of expression is reflected in the contribution to the public debate on topics and issues of general importance.

The enjoyment of the right to freedom of expression is basically proclaimed and guaranteed in a way that it is exempt from the interference of state and non-state entities. Such interference generally constitute a violation of the right to freedom of expression, however, in certain situations and under certain circumstances, the right to freedom of expression may be limited. When considering the violation of the right to freedom of expression, the European Court of Human Rights, without exception, applies the control test known as the "*tripartite test*" (Alaburić, 2002: 31). In order to justified certain restriction on the right to freedom of expression in accordance with the mentioned test, it is necessary for the restrictions to be cumulatively provided by law, prescribed for the protection of a legitimate aim and necessary in a democratic society.

As for the first condition, ie the first phase of the test, it produces the least problems in practice, so it is enough for the restrictions to be provide in a clear and unambiguous way. The protection of a legitimate interest does not create significant difficulties in practice either, since the protection of national security, public budget, public health, environment and the like, unequivocally appear as justified and legitimate interests to restrict freedom of expression when they are threatened by its exercise, respecting the principle of restrictive and *ultima ratio* restriction. The last phase of the tripartite test, as a rule, is the most complex because it implies a flexible notion of what is necessary in a democratic society. This flexible term should actually further narrow the scope of the restriction, however, quite the opposite, it often happens that it expands its scope, since the interpretation of the term necessary in a democratic society largely depends on historical, political, cultural and situational factors.

The constitution guarantees of freedom of opinion and expression ("to seek, receive and otherwise disseminate information and ideas through speech, writing, painting or otherwise"), which may be restricted by law, if necessary to protect the rights and reputation of others ... ", is traditionally limited by labor legislation to protect the rights of the employer. Thus, for a long time in labor law (court practice) it was considered that an employee who critically relates to the practice of the employer in terms of the organization of work and the like, violates the obligation of loyalty (duty of trust and fidelity), so disciplinary sanctions were considered justified (Willey, 2009: 54).

2. Freedom of expression and employment

Freedom of expression in the workplace is an integral part of the right to dignity of every person and mentioned right undoubtedly has the *ius cogens* characteristic. The United States Supreme Court in the judgment of *Cohen v. California*, points out that the constitutional guarantee of freedom of expression stems from "the belief that no other right is linked to the principle of dignity and free choice of each individual, on which the American political system rests."

During the course of the 1990s, the characterization of the key worker rights involved began to move from 'labor standards' to 'human rights at work' (Bellace, 2014: 177). The term 'labor standard' conveys an image of a technical issue; for instance, whether workers should have a break after working, while on the other hand the term 'human rights at work' includes something of fundamental moral importance that is owed a human being at all times and in all places (Bellace, 2014: 177).

The exercise of the right to freedom of expression by an employee in employment and in connection with work is primarily viewed in the context of the justification of the dismissal for exercising that right. Of course, all other types of disciplinary sanctioning of the employee should also be considered.

The legal and economic relationship between the employer and the employee is reflected in the light of the existence of an employment relationship. The International Labor Organization (ILO) defines an employment relationship as a relationship between an employee and an employer in which an employee performs work under certain conditions, receiving wages in return.[3] In addition to subordination, which is the central concept of employment and labor law in general, the relationship between employer and employee is based on mutual loyalty, which is reflected in the obligation of cooperation and loyalty to the employer and labor organization (Kovačević, 2011: 221). However, the obligation of loyalty is not considered to be the main element of the employment relationship, which is otherwise characteristic of contracts that are concluded with regard to the personal characteristics of the contractor. Regardless of the additional character of the obligation of loyalty to the employer, it cannot be reasonably claimed that it does not permeate the relationship between employer and employee, at least through the principle of conscientiousness and honesty, which is one of the fundamental principles of contract law and labor law. For that reason, it is necessary to look at the nature and significance of that obligation when it is based opposite to the freedom of expression in every single case.

Employees who exercise the right to free speech may face many potential difficulties at workplace. It is a generaly accepted view that an employer may take advantage of the employment relationship to censure a free speech at workplace within a work based penalty. This is the case regardless of the fact that speech shames employer, interferes with work organization or ig an employer dissagrees with the sentiment expressed (Vickers, 2002: 2).

The starting point is that the right to freedom of expression is a conventional and constitutional right that the state, due to its positive obligation, is obliged to provide to every citizen. Such an attitude is in the judgment in the ECtHR case of *Fuentes Bobo v. Spain*, accepted by the European Court of Human Rights. However, comparative practice shows that courts attach special importance to employment as an important socio-

[3] The employment relationship, International Labour International Labour Conference, 95th Session, International Labour Office, 2006.

economic category. Thus, for example, a German court confirmed (the same stand point was taken by the European Human Rights Commission) dismissal in one case[4] explaining that by entering into contractual obligations vis-à-vis the employee accepted a duty of loyalty towards the employer which limited his freedom of expression to a certain extent, adding that the courts were not required to protect the applicant (employee) as he had accepted limitations of his freedom of expression in his employment contract. It follows that courts in both the European legal environment and the USA (*Pickering* case)[5] attach particular importance to protecting the efficiency of the employer work organization and work process and that this criterion should be taken into account when balancing the employee's right to freedom of expression and protection legitimate interests of the employer.

2.1 General remarks on the employment relationship - an evolutionary view

In Ancient times, the work of slaves was dominant, so there were no individual labor rights that need protection by the state interventionism. The work, which implied increased intellectual capacity and engagement, was not charged and was performed on a voluntary basis, which did not lead to the regulation in a way that it was done in modern legislation. During the Middle Ages, the new feudal socio-political, economic model entered the scene and was proclaiming the work of dependent peasants - serfs who did not consider themselves workers. Until the period of the Bourgeois Revolution in 1789, serf labor was dominant in Europe, with a noticeable maturation of the elements of capitalism and its inherent processes. Among the most important features of serf labor is strict personal dependence on the employer, which according to the doctrine has its roots in "paternal authority" as manifested in ancient Rome in the processes of work within a family household by *pater familias* (Horvat, 1954: 128). Therefore, the traces of paternal, ie domestic authority were also manifested in the medieval world of work, in the relations between masters and journeymen or apprentices, especially when they lived in the households of their masters. This is because the power of the master over the workers was understood as a kind of extension of the paternal power over the members of the household (Kovačević, 2013: 126).

The personal component has remained in the new century, when it comes to influencing the concept and manifestation in the practice of employment. In that sense, we can talk about the state of affairs in German doctrine, where over the time, a radical variant of the

[4] Rommelfager (1990) 62 D & R 151.

[5] Pickering 391 US 563, 568 (1968).

status concept of labor relation was developed, in which the employment relationship is understood as a purely personal relationship that does not spring from a contract. In that hypothesis, the actual joining and belonging of the worker to the company becomes a true source of employment, so that, instead of in the contract, the worker is in a status position. This conception experienced a renaissance in the 1930s, when, in the light of National Socialist conceptions of society and social organization, the community of employees and employers was viewed as an integral part of the national community (Kovačević, 2013: 79).

The strong influence of the status concept of employment, in which personal relations between the employee and the employer dominate, was present in the jurisprudence of French courts until the 1990s, so they accepted the view that an employer could terminate an employment contract because he lost trust in the employee. The turn was made by the verdict in which the Social Department of the Court of Cassation decided that the loss of trust (which would correspond to the violation of the principle of the obligation of loyalty) does not itself constitute a justifiable reason for termination of employment contract (Kovačević, 2013: 103).

Since 1970, many entities have entered the human rights space. Human rights principles appear in instruments of several supra-national bodies, such as the UN's Human Rights Council's Guiding Principles on Business and Human Rights (UN Principles), the OECD Guidelines for Multinational Enterprises as well as the UN Global Compact (UNGC). Furthermore, over the last two decades companies have come to accept that they have anobligation to act responsibly, a concept often called Corporate Social Responsibility (CSR). (Bellace, 2014: 176). This state of affairs had its roots in abandoning the status concept of employment that was taken over by the institutional and contractual concept of employment.

The institutional approach, which over the time gained a dominant position in the construction of the concept of employment, starts from the need to limit the power of the employer in proportion to the needs of the work process. It should be noted that some proponents of the institutional conception of labor relations, above all the father of modern French labor law, *Paul Durand*, define the content of labor relations in the light of its comparison with the relationship between the state and the individual. In that sense, the similarity between the company, as a hierarchically organized community, and the state is pointed out, while in the analysis of the functions of the employer's government certain, true, only rough, similarities between the normative power of the employer and the legislative state power, ie between the governing power of the employer and the

executive state authority, or between the disciplinary authority of the employer and the judiciary. Recognition of the similarities between the company and the state does not end, however, with the comparison of different functions of government, but also the employees in the company are compared with the citizens. In the French doctrine, such an approach has resulted in the concept of "citizenship in the company", which implies that employees qualify as "citizens of the company" (Kovačević, 2013: 33).

In comparative labor law, especially within the European social model, the affirmation of the concept of employee-citizen led to the legal recognition of the individual employee's right to freedom of expression in the workplace, not only in relation to working conditions, but also in relation to work organization and production at the employer (Lubarda, 2012: 80). Finally, the Council of Europe, ie the European Convention on Human Rights, guarantees the right to express an opinion (Article 10), which "represents one of the essential foundations of a democratic society, one of the basic conditions for its development and for the development of every human being." The right to freedom of expression is thus most closely connected with modern constitutions guaranteed by the right to free development of personality and dignity (Article 23 of the Constitution of Serbia), as well as the right to work and the right of employees to express opinions at work and outside the employer (Lubarda, 2012: 80).

When it comes to ILO normative framework, we single out that Director-General *Michel Hansenne* identified four fundamental values which flowed from several core ILO conventions, all concerned with the protection of basic human rights at work. *Hansenne* aimed to achieve a consensus among the ILO's tripartite constituents on what rights would be deemed 'fundamental' and equally important, what conventions would be termed 'core' conventions (Bellace, 2014: 178). In June 1998, the ILC adopted a 'Declaration on Fundamental Principles and Rights at Work,' setting out four rights, 'the principles concerning the fundamental rights which are the subject of those Conventions,' namely:

a) freedom of association and the effective recognition of the right to collective bargaining;

b) the elimination of all forms of forced or compulsory labor;

c) the effective abolition of child labor; and

d) the elimination of discrimination in respect of employment and occupation.

In the context of freedom of expression in the workplace, this determination of fundamental labor rights is important because the right to freedom of expression in certain segments is inextricably linked to the freedom of the right to collective bargaining and the elimination of discrimination in respect of employment and occupation. In the first case, the collective bargaining is inconceivable without an open exchange of ideas and views, even publicly, while the prohibition of discrimination certainly applies to those who themselves publicly state the reason concerning their political beliefs, sexual orientation, ethnicity, etc., and which may be grounds for discriminatory treatment. In this sense, the right to freedom of expression became fundamental values in labor law more than two decades ago.

Two ILO's conventions are of relevance when it comes to the issue of freedom of expression at the workplace. The first one is Convention NO 158 on the Termination of Employment in which is laid down the requirement that the dismissal could be justified only with the good cause. The second one is Convention NO 111 that obliges the state to ensure the measures to protect workers against any type of discrimination.

Work within the employment relationship was one of the key factors of the economy of the 20th century and an element that served to neutralize social and economic inequality in the relations between employees and employers. In the last few decades, radical changes have happened in the labor market that have affected the social and economic pillar on which labor law is based. First of all, technological changes have led to a change in the process of production and work in general, which has caused the emergence of new flexible forms of work and thus actualized the discussion on employment and the circle of those entities to which labor legislation applies. Such a state of affairs in the labor market was accompanied by ILO regulation (Recommendation No. 198) in order to provide a wider range of persons covered by labor legislation, from employees to workers outside such a relationship. The European Court of Justice reasoned similarly, defining the term worker in order to expand the application of the institute of labor law of the Union. Thus, only activities that can be considered extremely marginal and auxiliary are excluded from the domain of personal application of labor law. The reasoning of supranational institutions was followed by many national legislations and gradually expanded the field of application of labor legislation.

The dramatic change in employment has been the sharp increase in the number of domestically owned companies in Asia and South Asia that produce goods purchased by companies in Europe and North America. Besides directly owning and operating factories, companies increasingly use two other global supply chain models. In one

model, a company makes nothing in its home country but simply brands products made in other countries by its suppliers. Nike epitomizes this model. In another model, a retailer sources goods from the lowest cost suppliers and, as a result, buys most of its products from suppliers outside its home country. The products may or may not be sold under the retailer's brand name by the retailer. Walmart and H&M are examples of this model. Traditionally, companies adopting these two models had not paid attention to labour policies at the suppliers' factories since they did not view themselves as employers, but merely buyers of finished products (Bellace, 2014: 176).

Finally, since 1990, there has been a growing concern about the impact of increasing globalization on workers. The processes of globalization led to the flexibility of the employment relationship, and the creation of new forms of work that were less rigid. This also means that the personal labor law component was increasingly becoming the less important element and that the elements of the above-mentioned status concept of work performance, among which the most important is the obligation of loyalty to the employer, are slowly being pushed into the background.

2.2. Employees's forms of expression at the workplace

In general, according to the functional criterion, we can distinguish at least three different forms of expression of the employees. First, we could think of situations in which the employee publicly, in a formal or informal way, expresses feelings, emotions and attitudes, which in any sense may be contrary to the structure and functioning of employer's work organization. In the second case, it comes to the situations when the employee publicly expresses dissatisfaction or views concerning the work process and working conditions. Finally, the third type refers to the disclosure of information important for the public interest, which directly affects the employer, ie which occurred in the process of work. In that sense, we will particularly explain whistleblowing as a typical example for this form.

In the case when the employee expresses feelings, emotions and attitudes, the principle is that he is free to do so, with possible limitations on that right only when they prevent the employee to perform work efficiently for the employer due to the presented content. Thus, for example, the United States Supreme Court concluded in the *Pickering* case[6] that the primary interest of the employer is to ensure efficiency in performing work within its activity (Barendt, 2009: 491). This is actually one of the most important criteria in

[6] Pickering 391 US 563, 568 (1968).

assessing whether the interest of the employer has been violated in every particular case. In this regard, the stated position, regardless of whether the speech is related to religious, national security or other issues, should be interpreted in the context of the possibility of further work with the same employer with the aim of efficient organization and work process. However, case law has shown that interpretations of this criterion can be diverse and conditioned by different cultural, political and psychological grounds.

In the *Rommelfanger* case[7], the European Human Rights Commission took the stand point that the Catholic Hospital, as an employer, justifiably terminated the employment contract of an employed doctor who publicly stated for *Der Stern* his positive attitude towards the medical procedure of abortion, which is essentially contrary to socio-political and religious position of the Hospital - the employer. The Commission justified its decision by stating that the employer is an organization based on certain convictions and value judgments which it considers essential for the performance of its functions in society, it is in fact in line with the requirements of the Convention to give appropriate scope also to the freedom of expression of the employer. An employer of this kind would not be able to effectively exercise this freedom without imposing certain duties of loyalty on its employees. As regards employers such as the Catholic foundation which employed the applicant in its hospital, the law in any event ensures that there is a reasonable relationship between the measures affecting freedom of expression and the nature of employment as well as the importance of the issue for the employer. The Commission also notes that by entering into contractual obligations *vis-à-vis* his employer the applicant accepted a duty of loyalty towards the Catholic church which limited his freedom of expression to a certain extent.

On the other hand, we could hypothetically consider an example that would illustrate the position on the allowed sanctioning (dismissal, reduction of salary, etc.) of an employee for expressing his views and ideas and the like, only when it contradicts the efficiency of the work organization, process of work and organization of the employer. Let's assume that in our example one person works in a Catholic general school. Let's assume also that "our employee" at one point publicly states that he is an atheist. If the same person in our hypothetical school teaches physical education, we could justifiably doubt whether the termination of the employment contract would be adequate and in accordance with the right to freedom of expression, having in mind the mentioned criterion of work efficiency.

[7] Rommelfager (1990) 62 D & R 151.

It would be a completely different situation if the same person teach religious studies or sociology at the same school.

When it comes to the expressions and views concerning the work process and working conditions, French labor legislation (laws from 1982 - general regime and 1983 - public sector) introduces the right of the employee as an individual right that is directly exercised in the workplace during working hours, by expressing opinions, giving suggestions to superiors in the hierarchy with the employer, ie management of the company. For the sake of saving time, the varieties of exercising this right of the employee (citizen) are determined in such a way that collective meetings (meetings) are provided for more employees at workplaces during working hours.

The legislator envisages the obligation to negotiate for the employer when representative trade unions (trade union sections) are established in order to conclude a special type of collective agreement with the employer – "agreement on expression of opinion" (*les accords d'expression*), whose mandatory content includes: level of organization, schedule and duration of meetings (in practice often three to four meetings per year, at least six to eight hours per year); the manner of expressing opinions and their transmission to the employer; measures that will enable the unions and the employees' council (company committee) to get acquainted with the opinions, requests and proposals presented at those meetings. Of course, the law stipulates that employees enjoy immunity, that is, that they cannot invoke (disciplinary) liability for an opinion expressed or fired (except in the case of abuse or offensive proposals that are not related to the subject of the right to express an opinion) (Lubarda, 2012: 78). In this regard, there is a specially protected category of employed trade unionists who cannot suffer harmful consequences from the employer due to their trade union activism, and thus the expression of views and ideas. This is, after all, the position of Serbian Labor law (Article 188). In addition, in our opinion, it should be considered affirmatively the legal stand point of the Supreme Court of Cassation of Serbia when dealing with expressing employee dissatisfaction with working conditions and low wages in media. The Court found that the expressing employee dissatisfaction with working conditions and low wages into the media does not represent a violation of the employer's reputation or a reason for dismissal due to violations of work discipline.[8]

Finally, a number of the authors define whistleblowing as the detection of illicit acts at work, by employees or former employees (Lewis, 1995: 208). For instance, crimes

[8] Sentence from the judgment of the Supreme Court of Cassation Rev2 1186/2015 of 24.12.2015. year, determined at the session of the Civil Department on 31.5.2016.

characterized by a huge dark, hidden or grey figure (Stevanović, Cvetković, 2019: 48) or crimes undertaken in a conspiratorial alliance of powerful state and non-state actors (Stevanović, 2018: 120) are easier to detect within the system, while on the other hand, the system and its leaders are able to respond to whistleblowing by retaliating against the "insider", unjustifiably restricting or depriving him of his rights within that system. Regulations dealing with whistleblowing are aimed to protect the employed (hired) whistleblower who notices and then reveals the illegalities of his employer or another person within that system who is in a superior position in relation to the whistleblower.

In order to characterize an action taken by a one person as whistleblowing, it is necessary that the information disclosed indicates that the public interest is endangered. The judicial protection could be given if the harmful action has been taken against the whistleblower in relation with the whistleblowing. As we have previously pointed out that the work environment is the most common forum where employed "insiders" can detect well-concealed illegalities, particularly corruption, it follows that the damage they suffer due to possible retaliation concerning the violation of the employment status and the violation of the rights from work and on the basis of work.

Having in mind the obligation to report criminal acts to the competent authorities from the aspect of criminal responsibility of a person who fails to report (Article 331 and 332 of the Criminal Code of the Republic of Serbia), it should be noted that the obligation of loyalty to the employer is not a basis suitable to exclude illegality as a constitutive element of the crime. In this regard, although from the ethics point of view, the question of the employee's motive for whistleblowing may be raised, we believe that it is not of particular importance for the subject matter. This because important information for preventing damage to human health by a pharmaceutical company will not be less useful or less important, only because it was published in revenge to the owner or director of that company for moving to a lower paid job position.

Based on the previously elaborated obligation to blow a whistle – to report (report the act and the perpetrator) if other preconditions are met, which as a rule refer to the severity and threatened punishment for a specific act, we conclude that the issue of whistleblowing exceeds the employment relationship and balancing between employee and employer interests. Thus, when the head of the press service of the Public Prosecutor discloses evidence indicating the influence of high-ranking state officials on a current criminal procedure, and is therefore dismissed, it will be considered that his employment position has been endangered as a direct consequence of disclosing information of public importance. This position was confirmed by the ECtHR in the case with the described

factual situation, *Guja v. Moldova* from 2008. It is the same in the situation when a geriatric nurse publishes data on inadequate care for the elders within the hospital, which puts people's health as a top public interest in question. This state of affairs was confirmed by the ECtHR in the judgment *Heinisch v. Germany* case from 2011. In both cases, the stand point is that publishing information of public interest takes precedence over the interests of the employer, ie that it goes beyond the scope of the loyalty obligation. In that sense, it can be concluded that whistblowing can be justified only when it is aimed to defend values that are more important than loyalty values, such as public health, human safety, the environment, etc. (Kovačević, 2013: 106). When it comes to special labor law clauses such as the business secrets clause, the same rule needs to be applied.

The mechanism of protection of the whistleblower is realized particularly in the system within he came to the disputed data. As a rule, this system is the working environment of whistleblowers for the reasons we have previously pointed out. The system of labor law provides the basics, principles and procedure for protection from the employer's harmful actions, so such protection can be requested from the court or other competent authority by any employee if he considers that his right has been violated. For example, every employee can successfully challenge the employer's decision on dismissal with a lawsuit if, for example, it does not state the grounds for dismissal. On the other hand, the managerial authority of the employer, which undoubtedly includes the right of discretionary decision-making, allows him to organize the work process in accordance with the law, which in practice is manifested in issuing general and individual acts determining and deciding on the rights, obligations and responsibilities of employees. The importance of protecting whistleblowers is reflected in the fact that the process of isuing these acts, especially individual ones, can be legally perfect from the formal aspect of view, however, the whistleblower could point out in a labor dispute the fact that his transfer to another place of work for example, although in accordance with the legal procedure, in fact formally disguised retaliation by the employer for whistleblowing.

2.3. Employees in the public and private sectors in the context of the right to freedom of expression

The jurisprudence of the courts in the US, due to the supremacy of the principle of protection of private capital, which is most pronounced there, makes a significant difference in terms of employees in the public and private sectors in the context of the right to freedom of expression at the workplace. In this regard, the courts in the US recognize the right to legal protection for employees in the public sector for expressing their views or allegations that harm the interests of the employer, while they do not

recognize the same right for employees of private employers (Barendt, 2009: 486). This state of affairs can be explained by the position of a number of authors according to which the relations between the employee and the employer in the private sector is regulated by the contract as opposed to the administrative act-decision, which has this function in terms of public sector employees.

Such situation is quite the opposite when it comes to the countries of the continental legal systems, where we particularly refer to the judgments of the ECtHR, ie the judgments of the highest court instances of numerous European countries, with the indisputable existence of various deviations and exceptions. Thus, the ECtHR in the case of *Fuentes Bobo v. Spain* noted the existence of a positive state obligation to protect the right to freedom of expression even in relations between private individuals, having in mind the conventional and constitutional rank and character of the right to freedom of expression.

However, it must be taken into account that civil services have certain characteristics that in special cases can expand the field of restrictions on freedom of expression, in contrast to the private sector. This often implies the application of other important legal standards that correct and concretize the right to freedom of speech Thus, when considering the case of the civil servant – a teacher who was member of extremist political party,[9] ECtHR did hold that state is free not to give permanent employment to mentioned probationary teacher. It is important to note thata the Court treated this case in the light of the right of access to the civil service which is not guaranteed by the ECtHR. The same Court in landmark case *Vogt v. Germany* developed a *fair balance test* under which the civil servant's freedom of expression should be weighd against the state's interest in achieving the importan aims (Barendt, 2009: 489).

Furthermore, the literature has even accepted the position that public servants, unlike those employed in the private sector, have an obligation to take care of their behavior, as well as what and to whom they speak, in order to preserve the integrity and authority of the state body they work for. Such duty should be present even out of the regular workplace. Corrective factor to such obligation should be taken into account that public officials should not be subject to a broad ban that would negatively affect their private life and personal development. For example the Serbian Law on Civil Servants and the Law on Employees in Autonomous Provinces and Local Self-Government Units prescribe public employees' labor rights and obligations. In accordance with national legislation of the Republic of Serbia, a public employee is obliged to follow an oral order

[9] Glasenapp v. Germany (1987) 9 eHRR 25.

from his/her superior, exept when he/she belives that such order is contrary to the regulations or the rules of the profession or thet his/her actions on executing the order could result in a violation, which he/she is obliged to communicate to his/her superior. If such an order is repeated, the public employee is obliged to execute it and inform the manager accordingly. However, he/she is also obliged to refuse to execute an oral or written order if such an act would constitute a criminal act and to inform the manager, i.e., the authority that supervises the work of the state authority if the order was issued by the manager, in writing (Kostić & Matić Bošković, 2019).[10]

Public employers may also argue that restrictions of freedom of speech of their staff are necessary to ensure their political neutrality, particularly in line with European political tradition. However, in Canada,[11] restrictions which banned all public employees irrespective of their position, from engaging in any type of political speech were held too broad (Barendt, 2009: 492). This is not to say that some posts may not require the staff to be politically neutral. Restrictions on the ground of expressing political opinion would be justified for jobs whicih involve high level of responsibility for policy making (Vickers, 2002: 66). Finally, it should be noted that the ILO has criticized certain laws that provide for a ban of employment in the public service only on the basis of political and ideological views (Stevanović, 2018: 113).

Freedom of speech could be especially limited when it comes to members of the armed forces who have special obligations to preserve national security and order. US Supreme Court accepted approach that only a low degre of freedom of speech is justified for the memebers of armed forces (Barendt, 2009: 494). Such low degre as a rule implies a prior approval from the superior.[12] In contrast, ECtHR took the legal approach which is prefarable to that of the US Supreme Court. In the ECtHR jurisprudence, in determing whether the restrictions is necessary to achieve for instance national security aim, the Court examines the character of the speech and whether it could objectively be considered a serious threat to discipline and order amnog the armed forces. Thus, in *Gubi v. Austria* case the Court found that Austria was in breach of Article 10 when a solider had been prevented from distributing in army barracks copies of a solider's association magazine,

[10] Article 18. of the Law on Civil Servants. The obligation of such conduct exists when it comes to suspected superior order execution is a crminal offense and when there is a suspicion that the compliance with such an order is misdemeanor. Article 31. of the Law on Employees in Autonomous Provinces and Local Self-Government Units provides the same obligation for employees in their organizational units.

[11] Osborne v. Canada (1991) 2 SCR 69.

[12] Brown v. Glines 444 US 348 (1980).

emphasizing the fact that the critical aspects of military life contained in the magazine did not urge disobedinece.

Finally, it should be stated that civil servants have in some certain circumstances obligation to inform the superior or manager if in relation with the work find out that an act of corruption has been committed by an official, civil servant or employee of the state body in which they work (Article 23a Law on Civil Servants of the Republic of Serbia). In light of this, we could refer to the rule that the disclosure of information important for the public interest must be treated as an obligation for every person, and particularly for an employee in the public service. That obligation is prescribed also for internal auditors in public sector. According to the Rulebook on Common Organization Criteria and Standards and Methodological Guidelines for the Treatment and Reporting of Internal Audit in the Public Sector, an internal auditor who, in the course of the audit procedure, "identifies indicators of fraud" is obliged to terminate the audit procedure and notify the Internal Audit Manager immediately, who should in turn inform the manager of the public funds beneficiary institution (Article 20 of the Rulebook on Common Organization Criteria and Standards and Methodological Guidelines for the Treatment and Reporting of Internal Audit in the Public Sector). That means that when the internal auditor establishes that there are grounds for suspicion that a crime has been committed, he/she is obliged to inform the above persons accordingly (Šuput: 2012). The obligation to expres theirs' opinion in their public reports exist for supreme auditors, bearing in mind that they can contribute not only to the detection of criminal acts, but also to the acquisition of the evidence necessary for the initiation of criminal proceedings and the insurance of the final judgement (Šuput: 2014).

Concluding remarks

The employment relationship is marked by duty of mutual trust and confidence of employee and employer. On the other hand, it must be noted that freedom of speech as a fundamental human right includes a freedom of speech at the workplace. In determing whether the restrictions to the freedom of speech made by employer is in line with principles of the labor law and human rights law, it is important to strike a balance between the interests of the employer and the guaranteed human rights of all citizens, including those employees, who on that basis are the subjects of specific labor rights and obligations. Of course, this is not always an easy task, since it implies reliance on various political, economic and cultural factors. However, the fact that prohibitions must not adversely affect the private life and personality development of employees, should be

taken into account in policy making processes in order to deal with issue of freedom of speech at the workplace.

Numerous case law in this area still cannot establish general rules that would be applicable in each specific situation, but it is important to always keep in mind as a corrective factor, the principle of the *least possible encroachment on the right to freedom of expression*, which is one of the most important human rights, not only for the reason of enjoyment that right but also for the exercise of other guaranteed human rights such as the right to life, a healthy natural environment and the like, through the right to freedom of expression.

Working conditions in global supply chains more than ever demand coordinated action based on shared understandings of what fundamental rights mean. There is now an urgent need for governments, employers and workers to confirm that internationally recognized human rights, as expressed in the core conventions, apply universally. After considering the relevant normative framework, we pointed out that the right to freedom of speech of employees is *ius chogens* in labor law and one among many, manifestation of the right to freedom of expression as a fundamental, universal human right.

Literature and information sources

Alaburić, V. (2002) Sloboda izražavanja u praksi Europskog suda za ljudska prava. Zagreb: Narodne novine.

Barendt, E. (2009) Freedom of Speech. Oxford: Oxford Univerity Press.

Bellace, J.R. (2014) Human Rights at Work: The Need for Definitional Coherence in the Glob Governance System'. The International Journal of Comparative Labour Law and Industrial Relations 30, no. 2.

Brown v. Glines 444 US 348 (1980).

Glasenapp v. Germany (1987) 9 eHRR 25.

Horvat, M. (1954) Rimsko pravo, sv. 1: Pregled rimske pravne povijesti, pravo osoba, obiteljsko pravo i stvarna prava, drugo izdanje. Zagreb: Školska knjiga.

Ilić, P.G. (2018) Pojam, standardi i ograničenja prava na slobodu izražavanja s posebnim osvrtom na praksu Evropskog suda za ljudska prava. Godišnjak Fakulteta bezbednosti, 29-40.

Kostić, J., Matić Bošković, M. (2019) Criminal liability of Public Employees in the Republic of Serbia, in: The Position of the Individual in Modern Legal Systems (eds. Marko Novaković and Jelena Kostić), Belgrade: Institute of Comparative Law, 161-180.

Kovačević, LJ. (2011) Cilj i smisao radnopravne zaštite "uzbunjivača". u: Đ. Ignjatović (ur.) Kaznena reakcija u Srbiji, Beograd: Pravni fakultet Univerziteta u Beogradu, 221-238.

Kovačević, LJ. (2013) Pravna subordinacija u radnom odnosu i njene granice. Beograd: Pravni fakultet Univerziteta u Beogradu, Centar za izdavaštvo i informisanje.

Lewis, D. (1995) Whistleblowers and job security, Modern Law Review.

Lubarda, B. (2012) Posebna zaštita zaposlenog uzbunjivača. Evropsko, uporedno i domaće pravo i praksa, u: Stevan Lilić (ur.) Perspektive implementacije evropskih standarda u pravni sistem Srbije - knjiga 2, Beograd: Pravni fakultet Univerziteta u Beogradu, 77-92.

Milo, D. (2008) Defamation and Freedom of Speech. Oxford: Oxford Univerity Press.

Osborne v. Canada (1991) 2 SCR 69.

Pickering 391 US 563, 568 (1968).

Rommelfager (1990) 62 D & R 151.

Sentence from the judgment of the Supreme Court of Cassation Rev2 1186/2015 of 24.12.2015.

Stevanović, A., Cvetković, D. (2019) Pojam i karakteristike privrednog kriminaliteta. Revija za kriminologiju i krivično pravo, 1/2019, 45-62.

Stevanović, A. (2018) Lustracija: pojam i pravni aspekti. Zbornik Instituta za kriminološka i sociološka istraživanja, no. 3 XXXVII/2018, 109-125.

Stevanović, A. (2018) Značaj povezivanja organizovanih kriminalnih struktura i političke elite. Zbornik Instituta za kriminološka i sociološka istraživanja, no. 1 XXXVII/2018, 115-129.

Šuput, J. (2012) Usaglašenost propisa koji uređuju internu reviziju sa međunarodnim standardima, Dobra uprava i interna revizija, Dejan Šuput (ur.), Beograd: Institut za uporedno pravo i Udruženje ovlašćenih internih revizora Srbije u javnom sektoru, 96-110.

Šuput, J. (2014) Uloga Državne revizorske insittucije u prevenciji kriminaliteta belog okovratnika u javnom sektoru Zbornik radova pravnog fakulteta Univerziteta u Nišu, no. 67, 331-346.

The employment relationship, International Labour International Labour Conference, 95th Session, International Labour Office, 2006.

The Law on Civil Cervants of the Republic of Serbia, Official Gazette of the Republic of Serbia, no. 79/2005, 81/2005-corrigendum, 83/2005-corrigendum, 64/2007, 67/2007-corrigendum, 116/2008, 104/2009, 99/2014, 94/2017 and 95/2018.

The Law on Employees in Autonomous Provinces and Local Self-Government Units, Official Gazette of the Republic of Serbia, no 21/2016, 113/2017, 95/2018 i 114/2017-other law.

The Rulebook on Common Organization Criteria and Standards and Methodological Guidelines for the Treatment and Reporting of Internal Audit in the Public Sector, Official Gazette of the Republic of Serbia, no. 99/2011 and 106/2013.

Vickers, L. (2002) Freedom of Speech and Employment. Oxford: OUP.

Willey, B. (2009) Employment Law in Context. Longman.

Popesku, D. (2018) Conflict Between Personality Rights and Freedom of Expression. Yearbook Human Rights Protection "From Unlawfulness to Legality" no.1. Novi Sad: Vojvodina Provincial authorities Common Affairs Department, 155-171.