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СЛОВО МОЛОДИМ ВЧЕНИМ

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THE NEED FOR THE MINIMUM STANDARD REQUIREMENT IN THE PROTECTION OF FREEDOM OF RELIGION AND BELIEF AT THE WORKPLACE: THE CASE OF *WABE* AND *MH MUELLER HANDELS GMBH V. MJ*

Abstract. Legal disputes around freedom of religion or belief (FoRB) and the right not to be discriminated against at the workplace have arisen in many countries in Europe. While developing their approaches to the ratio of freedom from discrimination and the ability of private employers to restrict the manifestations of employees' identity, legislators, courts, and business communities of those countries have to follow or take into account standards and recommendations developed by international organizations they participate in, and the relevant courts, including the Council of Europe (CoE), the European Union (EU members), European Court of Human Rights (ECtHR), Court of Justice of the European Union. However, the approaches to FoRB, non-discrimination, and Employment developed by those entities are vague and sometimes contradict each other.

The purpose of the article is to analyze the legal frameworks of the abovementioned institutions to ensure the freedom of religion and beliefs in the workplace, and the inconsistency between them, which causes its incorrect applications used by state and private employers. The work proposes a possible approach to solving the problems of different judicial interpretations of international acts, namely the implementation of the requirement of the minimum standard for the protection of human rights, which will set general and basic criteria that employers must be observed when creating certain restrictions on expressing employees' religious identity.

Resolution 2318 (2020) adopted by CoE on "The protection of freedom of religion or belief in the workplace" calls to "promote a "living together" in a religiously pluralist society". Recently, the CJEU concluded that only an absolute prohibition on all visible forms of expression of political, philosophical, or religious beliefs which also concerns religious clothing at work can ensure a policy of neutrality at the workplace without discrimination. Hence, the concepts of "living together" and "living environment" take on different meanings in EU and CoE regulations and judicial decisions and are interpreted

not as the original idea of religious pluralism, but as an excuse to restrict the right to freedom of religion to ensure a policy of neutrality and non-discrimination. This line of argumentation is sometimes supported by gender-equality arguments but this approach often completely eliminates the consideration of the needs of religious people and, especially religious women, which are an integral part of their identity, and, thus, can significantly restrict or deprive them of access to the employment market.

These concerns and complexities also invigorate the role of corporate responsibility in protecting FoRB and non-discrimination at the workplace. In this context, a coherent doctrine of the interpretation of these categories by international institutions is important, as can ensure exclude the possibility of employers implementing "absolute neutrality policies" that automatically forbid any manifestations of religious identity.

KEYWORDS: the minimum standard in human rights protection; right to freedom of religion and belief; gender equality; business and human rights; discrimination.

This article argues that creating and applying neutral policies by private actors for religious people at the workplace is the practice of exclusion of religiosity from public life and directly discriminative against persons based on their religion or beliefs at the workplace. Therefore, the private actors' policies of neutrality at the workplace have to pass much harder scrutiny analysis on their consistency with international standards before entering into force. The paper observes which challenges and obstacles different actors face in implementation of such standards in their policies and practices and proposes the way to address them.

Resolution 2318 (2020) adopted by CoE on "The protection of freedom of religion or belief in the workplace" calls to "promote a "living together" in a religiously pluralist society". Although promoting coherent interpretations of the freedom of thought is proclaimed as an important aim Mark Bell notices rightly that litigation in courts of different jurisdictions on FoRB matters looks like "a deep-seated dissonance between religious freedom and anti-discrimination law"[1]. Recently, the CJEU concluded that only an absolute prohibition on all visible forms of expression of political, philosophical, or religious beliefs what also concerns religious clothing at work can ensure a policy of neutrality at the workplace without discrimination. The concepts of "living together", "living environment" take on different meanings in EU and CoE regulations and judicial decisions and are interpreted not as the original idea of religious pluralism, but as an excuse to restrict the right to freedom of religion or belief (FoRB) to ensure a policy of neutrality.

The paper *aims* to analyze the vague interpretations of FoRB and criteria of its restriction at the workplace, especially in the context of religious clothing, by different judicial and international jurisdictions. The article includes six chapters focused on above stated issues. Following this introduction, the second chapter highlights main provisions on protection and possibility of restriction

[1] Bell M, 'Bridging a Divide: A Faith-Based Perspective on Anti-Discrimination Law' (2020) 9 Oxford Journal of Law and Religion 1.

freedom of religion and belief at the workplace enshrined in the international standards. The third chapter analyses the recent CJEU decision in *WABE and MH Mueller Handels GmbH v. MJ* highlighting challenges this decision poses for coherent interpretations of safeguards and restrictions of FoRB at the workplace. The fourth section emphasizes the specific vulnerability of religious women in the access to labor market due to judicial legitimization of policies of absolute neutrality enshrined by employers. The fifth chapter consists of two sub-chapters: critics of the unrestricted margin of appreciation of private companies in deciding on restrictions of FoRB and explains the need of introducing the minimum standard *of due consideration* of the FoRB needs by employee. The last chapter provides the conclusion on the results of conducted analysis.

Existing law regulation on FoRB at the workplace

The idea of guaranteeing the FoRB at the workplace found its implications in international documents. The 1981 Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion proclaims that 'any exclusion aiming to nullify or impair the recognition of person's religion or belief means intolerance and discrimination based on religion or belief"[2].

PACE Resolution 2318 (2020)3 in the first paragraph calls for "living together" based on religious pluralism. So, *the notion of living together is directly based on religious pluralism and does not need to confront with it*. They both are reinforcing each other in that sense that they are providing basics for a variety of people operating in the same place but not in the way of exclusion of some groups or giving preference to one group over another but in the way of raising the level of tolerance to other identities. Further, it notes that:

> the presence of members of different religious or non-religious groups may cause challenges in the workplace that some employers may try to resolve by imposing prima facie neutral rules. However, the application of prima facie neutral rules in the workplace – such as those on dress codes, dietary rules, public holidays or labour regulations – can lead to indirect discrimination of representatives of certain religious groups, even if they are not targeted specifically[4].

Along with international standards on FoRB at the workplace, the EU Council Directive 2000/78/EC establishes equal treatment in employment and occupation. This document is the basis for decisions of CEJU and enshrines the term *"occupational requirement"* which in some cases can be the ground for

[2] Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief *(General Assembly resolution 36/55,* 25.11.1981) <https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-elimination-all-forms-intolerance-and-discrimination> (accessed: 31.06.2022).

[3] Resolution 2318 (2020) on the protection of freedom of religion or belief in the workplace, Parliamentary Assembly of Council of Europe <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=28556&lang=en> (accessed: 31.06.2022).

[4] Ibid.

infringing FoRB at the workplace. The concept of occupational requirement includes the possibility of the employee restricting certain human rights and it will not be considered discrimination if there is 'a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate'[5].

The condition of infringement of FoRB should meet *four* requirements: to be genuine and determined, that is the position should be so specific that with the expression of FoRB at the workplace it would be impossible to fulfill its obligations; the objective should be legitimate (so, no one can just create demands restricting certain human rights without giving it any justification); and, eventually, it should be proportionate, that is the restriction imposed should not be cause more damage to the human right that it is needed to achieve the legitimate aim.

The close criteria for assessment of the possibility of infringement human rights are enshrined in the practice of ECHR: *respecting the very hard core of the affected right, legality, legitimate aim, and proportionality*[6]. In the regard to anti-discrimination provisions, ECHR enshrines article 14 where any restriction of rights set up in the Convention is prohibited[7]. Further, according to the Protocol 12 of the Convention[8] the application of "any right set forth by law" shall be protected from discrimination[9] that is that the anti-discrimination requirement is widespread not only to rights enshrined in Convention but to all rights that exist in the national legislation of Member States[10].

In this context UN Special rapporteur on FoRB argues in the context of applying article 18 of ICCPR that the interpretation of the article should not *"vitiate"* the right guaranteed by it as well the interpretation of the limitation clause of FoRB should be very strict11 although it is still far from the implementation in the practice[12].

[5] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0078&from=EN> (accessed: 01.07.2022).

[6] Van Drooghenbroeck S, Cecilia R, 'The ECHR and the essence of fundamental rights: searching for sugar in hot milk?' (2019) 20 German Law Journal 6.

[7] European Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5 <https://www.echr.coe.int/documents/convention_eng.pdf> (accessed: 31.06.2022).

[8] Protocol 12 was not ratified by all CoE member states.

[9] Protocol 12 to the European Convention on Human Rights and Fundamental Freedoms on the Prohibition of Discrimination, Council of Europe, 4 November 2000, ETS 177 <https://www.echr.coe.int/Documents/Library_Collection_P12_ETS177E_ENG.pdf> (accessed: 31.06.2022).

[10] Lemmens P, 'The Relation between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights–Substantive Aspects' (2001) 8 Maastricht Journal of European and Comparative Law 1; Quek J, 'A View from across the Water: Why the United Kingdom Needs to Sign, Ratify and Incorporate Protocol 12 to the European Convention on Human Rights' (2011) UC Dublin L. Rev. 11.

[11] Report of the Special Rapporteur on Freedom of Religion and Belief, U.N. Doc. A/HRC/34/50 30, 44 (Jan. 17, 2017) <https://www.ohchr.org/en/documents/thematic-reports/ahrc3450-report-special-rapporteur-freedom-religion-and-belief> (accessed: 05.07.2022) (noting that states are continuously applying restrictions on the right to manifest religion, and they are beginning to apply "restrictions as the rule and not as the exception").

[12] Interestingly, that Section B "Draft recommendation" of the Draft Resolution 2318 (2020) contained a provision on the need for coherent interpretation of the FoRB but was not included in the final approved version of the PACE:

Ahmed Shaheed proclaims that people following certain beliefs are at threat of 'being left behind'[13] by policymakers. This threat is enhanced in reality due to corporate and court practice which recognizes the right of employees to introduce policies banning any use of visible religious signs with the aim to ensure the "living together" concept. CJEU decision in the case of WABE and MH Mueller Handels GmbH v. MJ is the example of this practice.

The threat of the new CJEU Decision in WABE and MH Mueller Handels GmbH v. MJ

In the case *WABE and MH Mueller Handels GmbH v. MJ* the question at issue is whether the prohibition on any visible religious signs at the workplace constituted direct or indirect discrimination and whether this discrimination can be legitimate.

The IX was the worker in the private children's daycare institution *WABE* and followed the Muslim religion. *WABE* followed the Educational recommendation of the city of Hamburg introduced in 2012 stated as follows:

> All child day care facilities have the task of addressing and explaining fundamental ethical questions as well as religious and other beliefs as part of the living environment <…> This consideration increases the child's self-understanding and experience of a functioning society <…> By encountering other religions, children experience different forms of reflection, faith and spirituality[14].

In 2018, the policy on neutrality was introduced by WABE stating that in the order to fulfill 'the aim of cultural and religious diversity *any sign of religion should be non-permitted at the daily care center to 'guarantee the children's individual and free development with regard to religion, belief and politics,* <…> employees are required to observe strictly the requirement of neutrality that applies in respect of parents, children and third parties (italicized by me – *T. H.*)'[15]. Further, according to the information brochure on the new policy, there should be no visibility of Christian, Muslim, and Jewish religious signs worn by teachers as it can affect children's choice of religion[16].

The CJEU in it is reasoning raised two questions that are important for the analysis in the article: whether the banning all religious signs at the workplace constitutes direct discrimination and if not whether it is legitimate and

1.4 strengthen cooperation with the European Union, the Organisation for Security and Cooperation in Europe (OSCE) and the United Nations, with a view to promoting coherent interpretations of the freedom of thought, conscience and religion and the implementation of common policies in the field of combating discrimination based on religion or belief in the workplace.

[13] Interim report of the Special Rapporteur on freedom of religion or belief on Elimination of all forms of religious intolerance (2020) 3 <https://digitallibrary.un.org/record/1305380> (accessed: 05.07.2022).

[14] IX v WABE eV and MH Müller Handels GmbH v MJ App no C-804/18 341/19 (CJEU, 15 July 2021) 23.

[15] Ibid 25.

[16] Ibid 26.

proportionate to introduce a neutral policy banning all the religious signs in the order to ensure the neutrality of the employer.

Responding to the first question the CEJU found that there *is no direct discrimination in the case of banning all the visible religious signs if such a ban is introduced 'in a general and undifferentiated way'*[17]. Further, the Court argues that

> neutrality <…> can be effectively pursued only if no visible manifestation of political, philosophical or religious beliefs is allowed when workers are in contact with customers or with other workers, since the wearing of any sign, even a small-sized one, undermines the ability of that measure to achieve the aim allegedly pursued and therefore calls into question the consistency of that policy of neutrality[18].

In this regard, the Court doesn't provide a scrutiny analysis at all on whether an absolute ban on religious symbols can be proportionate and whether it constitutes a violation of FoRB as a basic human right. The scope and focus of the analysis were only on how to ensure the aim of being neutral properly and in a non-discriminative manner but the problem is that the decision on discrimination cannot be made by one-side analysis when the preference is *automatically* given to the value of neutrality but not to its balance with the need to ensure the FoRB.

Other reasons to legitimate such neutral policies were such as different rights and freedoms in question as well as the risk of specific disturbances within the undertaking or the specific risk of a loss of income. These reasons, according to the Court's view, can constitute the absolute ban of religious clothing if all workers regardless of their religious affiliation are made to follow the same rules of neutrality[19]. But where there is the analysis of what would such a ban mean to all workers, whose religion is an undeniable part of their identity and they cannot just sacrifice it due to the need of saving their job? The decision in WABE neither answers this question nor even tries to do that. Katayoun Alidadi calls the neutrality reason in this case *"Aura Legitimacy"* for discrimination on the basis of religion[20].

[17] IX v WABE eV and MH Muller Handels GmbH v MJ (n 14) 55.

[18] IX v WABE eV and MH Müller Handels GmbH v MJ (n 14) 76–8; see also Samira Achbita, Centre for Equal Opportunities and Opposition to Racism v G4S Secure Solutions NV App no C-157/15 (CJEU, 14 March 2017): In the present case, the internal rule at issue in the main proceedings refers to the wearing of visible signs of political, philosophical or religious beliefs and therefore covers any manifestation of such beliefs without distinction. The rule must, therefore, be regarded as treating all workers of the undertaking in the same way by requiring them, in a general and undifferentiated way, inter alia, to dress neutrally, which precludes the wearing of such signs." (§ 30);"The ECJ starts in Achbita from the observation that "the desire to display, in relations with both public and private sector customers, a policy of political, philosophical or religious neutrality must be considered legitimate. (§ 37).

[19] IX v WABE eV and MH Müller Handels GmbH v MJ (n 14) 82–3.

[20] Alidadi K, Religion, *Equality and Employment in Europe: The Case for Reasonable Accommodation* (Bloomsbury Publishing, 2017).

Moreover, if the Court would conduct the analysis of the city of Hamburg Recommendations on daily care centers and the WABE neutral policies introduced several years later, it could see the direct contradiction. The Recommendations are telling how it is important not only to be aware of different religions but also that encountering such religions provides children the real experience of functioning society. However, if to follow the argumentation of the policy of neutrality of *WABE* and CJEU decision in the future, the real experience of encountering different religions is excluded from the live experience of children artificially by regulations prohibiting real people to express their belonging to certain religion.

Intersectionality of the issues: rights of religious women at the stake

According to General Recommendation 25 on CEDAW, there should be three main pillars addressing gender inequality: 'formal equality (ensuring women are not directly or indirectly discriminated against), substantive equality (through improving the de facto position of women), and transformative remedy (to address prevailing gender relations and the persistence of gender-based stereotypes)'[21].

The three CJEU cases of analysis (*Achbita, Bougnaoui,* and *WABE*) are posing the dangerous case law in particular – for religious women. The question of woman emancipation and ability to decide for themselves what is better is still underestimated in the courts' argumentation thus bringing them to the life matter choice between following the rules of a particular religion or the possibility to work[22]. Furthermore, specific dress-code neutrality requirements for Muslim women can *'directly exclude women from certain employment contexts and/or lead to self-exclusion from particular careers and places of work* (italicized by me. – *T. H.*)'[23]. In that case, the Muslim women are facing triple discrimination – as a woman, as a religious person, and as a representative of other ethnic communities[24]. Celine Paré argues that 'Muslim women

[21] General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, UN Committee on the Elimination of Discrimination Against Women (CEDAW), 2004, note 141, para 10 <https://www.refworld.org/docid/453882a7e0.html> (accessed: 08.07.2022).

[22] Bribosia E, Rorive I, 'ECJ Headscarf Series (4): The Dark Side of Neutrality' (Strasbourg Observers, 14 September 2016) <https://strasbourgobservers.com/2016/09/14/ecj-headscarf-series-4-the-dark-side-of-neutrality> (accessed: 20.07.2022).

[23] Young Y, 'Fighting subtle forms of employment discrimination against Muslim refugees' <https://scholars.org/contribution/fighting-subtle-forms-employment-discrimination-against-muslim-refugees> (accessed: 20.07.2022); Malik A, Qureshi H, Abdul-Razakq H, et al '"I decided not to go into surgery due to dress code': a cross-sectional study within the UK investigating experiences of female Muslim medical health professionals on bare below the elbows (BBE) policy and wearing headscarves (hijabs) in theatre' <https://bmjopen-bmj-com.ezproxy.library.wur.nl/content/9/3/e019954> (accessed: 20.07.2022).

[24] Sharpston E, 'Shadow Opinion of former Advocate-General Sharpston: headscarves at work (Cases C-804/18 and C-341/19)' (2021) EU Law Analysis <http://eulawanalysis.blogspot.com/2021/03/shadow-opinion-of-former-advocate.html> (accessed: 20.07.2022).

are politically constructed as victims of Islamic teachings, evidencing the "backwardness" of the Islamic religion and culture'[25].

Farrah Razza argues that the need for women to wear a religious scarf in public life should be not prohibited as wearing the headscarf meets all three requirements of FoRB to be implemented: it causes no direct harm to others; involves a minimal cost to implement this; and causes no indirect harm to others[26]. In light of this argumentation, *the aim of protecting the living together concept as well as the notion of living environment even if it is legitimate does not meet the criteria of proportionality if these concepts are used to satisfy the restriction of wearing religious clothing.* Moreover, as was explained above, the living together approach should not be interpreted as such that requires hiding some specific expression of the person at the workplace. Contrary, the living together concept should enhance and introduce *an inclusive environment*, thus really providing the possibility for different groups of people to exist in one space. In addition, there is no evidence providing that the wearing the Muslim burqa or niqab hinder the ability of society to live together and communicate[27].

If to look closely at the business actors' conduct it can often happen that the employer doesn't provide any specific, gender-sensitive provisions in their policies which means that gender-neutral policies having an impact on employees or the community may cause or deteriorate discrimination against women which existed in the society before introducing such neutral rules[28]. That is why it is crucial for the business actors to analyze the context in which they are going to operate before imposing some policies. This is directly related to the examination of whether the employer has Muslim women working for him or her and whether their activity affects the Muslim community.

V. FoRB within business activities: the need for the minimum standard requirement

The wide business margin of appreciation due to CJEU decisions

Special Rapporteur on FoRB states in the UN interim report that if the public institutions of the Member states 'unduly hinder or openly discriminate against religious or belief minorities within their staff'[29] this will create a threat for doing the same by private actors.

[25] Paré C, 'Selective solidarity? Racialized othering in European migration politics' (2022) Amsterdam Review of European Affairs 1.1.
[26] Raza F, 'Limitations to the right to religious freedom: rethinking key approaches' (2020) Oxford Journal of Law and Religion 9.3.
[27] Report of the Special Rapporteur on Freedom of Religion and Belief, U.N. Doc. A/HRC/34/50 30, 44 (n 11).
[28] Meyersfeld B, 'Business, human rights and gender: a legal approach to external and internal considerations' (2013) Human rights obligations of business: beyond the corporate responsibility to respect.
[29] Elimination of all forms of religious intolerance: note / by the Secretary-General A/69/261, 43, <https://undocs.org/A/69/261> (accessed: 08.07.2022).

That is what is done by the recent decision of CEJU in the case *WABE and MH Mueller Handels GmbH v. MJ* where the highest court in the EU used an interpretation that legitimized the possibility of imposing directly discriminating corporate policies banning any signs of religion worn by their employees. What is missing in the argumentation of the court is the scrutiny analysis of the balance between the employee's need to express their affiliation with the concrete religion and the employer's aim to ensure a neutral corporate image[30]. The wide margin of appreciation of private companies in deciding on restrictions of human rights is closely connected to the interpretations and wording of legal rules on anti-discrimination laws regarding private actors. It was confirmed in the most recent decision of CJEU in WABE.

Matteo Corsalini in analysing CJEU decisions in *Achbita* and *Bougnaoui* case states that even though implicitly but often the corporate law regulation shapes the judicial decisions and not vice versa[31]. So, the preference is usually given to the corporate legal framework rather than to human rights. The difference in the implementation can be explained as due to *the absence of a universal standard of FoRB protection,* that's why the decisions of CJEU vary depending on the presence or absence of corporate policies, that's also giving a too wide margin of appreciation to private actors. Based on the argumentation of these decisions corporate actors can create a policy on neutrality *whatever strict they want it to be* and then it could be automatically upheld by CJEU without any considerable judicial review (as it was made in *Achbita*). This creates a power of private actors to put as many restrictions on the expression on FoRB at the workplace as they wish to without making any proportionate test between these two overlapping concepts[32]. The rising number of such decisions recognizing the right to impose strict neutrality policies by private actors according to the Alidadi creates "a mushrooming of such practices – which have exclusionary effects – on the ground"[33].

The question of neutrality as a legitimate aim in restriction of FoRB is also questioned to be a mere managerial rule[34]. In the regard to decisions in *Achbita*, *Boungai*, and *WABE* the risk of using neutral policies to cover some human rights violations became much more considerable. The "managerialization"[35]

[30] Report on the protection of freedom of religion or belief in the workplace, Committee on Legal Affairs and Human Rights <https://pace.coe.int/en/files/28322> (accessed: 08.07.2022).

[31] Corsalini M, 'Religious Freedom, Inc: Business, Religion and the Law in the Secular Economy' (2020) Oxford Journal of Law and Religion 9.1, 36:

In Achbita, the presence of an explicit policy regulating religious garments was aimed at providing an image of neutrality to enhance commercial performance. This allowed the CJEU to develop a simplistic libertarian approach which underestimated that G4S's internal rule might conceal a particular prejudice or discriminatory intent. Accordingly, the Court prioritized corporate interests by granting employers selective exemptions from anti-discrimination laws.

[32] Ibid 38.

[33] Alidadi (n 20).

[34] Corsalini (n 31) 42.

[35] Monciardini D, Bernaz N, Alexandra A, 'The organizational dynamics of compliance with the UK Modern Slavery Act in the food and tobacco sector' (2021) Business & Society 60.2.

of neutral policies within business actors' activities means that by legitimizing them with an aim to provide a neutral corporate image, or living together, or living in a secular society, *the real aim of exclusion*[36] *of certain expressions of person's identity, in particular, their religion, will be hidden by artificial compliance reports,* whereas in the practice equality and anti-discrimination provisions will not be applied by business actors. Thus, it will be ineffective and contradictive towards neutrality policies implicitly aimed to "legitimately" exclude some groups of people from their workforce. In this case, a preference could be easily given to the standardized work rules over religious identity and expression[37]. It also becomes possible to put religious people in the "closet" of the company or to "cover" them which is the practice of restriction of person's autonomy[38]. Such results of decisions by CJEU Lucy Vickers call "a missed opportunity"[39] to bring more protection and inclusion for religious minorities at the workplace.

Heiner Bielefeldt states that the aim of maintaining corporate identity is not hard to implement simultaneously with religious pluralism at the workplace[40]. The requirement of neutrality at the workplace as a part of corporate identity is in most cases not genuine and determining to be able to restrict FoRB. For that, it is a lack of argumentation why and how the expression of FoRB at the workplace can deteriorate the corporate identity in a so strong manner that becomes legitimate to infringe it.

Alidadi describes the image of a worker perceived as a neutral, impersonal labor force, which is a narrative of huge growth of "neutral politics" in the private sector denying the personality and the particularity of the employee[41]. In that sense the identity of the person at the workplace is underestimated and not valued which is in contradiction with the value of human autonomy[42]. In regard to banning the wearing of religious clothing due to the prohibition of wearing any religious sign, the religious autonomy of a person is rejected in the space where a person spends most of their daily life when working[43]. Thus, religious employees entering the workplace face an existential dilemma between preserving their identity or saving a job position.

[36] de Albuquerque P, 'The rights of workers, migrant workers and trade unions under the European Convention on Human Rights' (2020) European Human Rights Law Review 1.
[37] Vickers L, 'Achbita and Bougnaoui: One Step Forward and Two Steps Back for Religious Diversity in the Workplace' [2017] 8 (3) European Labour Law Journal.
[38] Ouald-Chaib S, David V, 'European Court of Justice keeps the Door to Religious Discrimination in the Private Workplace Opened. The European Court of Human Rights could Close it' (Strasbourg Observer, 27 March 2017) <https://strasbourgobservers.com/2017/03/27/european-court-of-justice-keeps-the-door-to-religious-discrimination-in-the-private-workplace-opened-theeuropean-court-of-human-rights-could-close-it> (accessed: 21.07.2022).
[39] Vickers (n 37) 240.
[40] Elimination of all forms of religious intolerance (n 29).
[41] Ronald A, 'Balancing Employee Religious Freedom in the Workplace with Customer Rights to a Religion-free Retail Environment' (2012) 117 Business and Society Review 3.
[42] Norton J, *Freedom of religious organizations* (Oxford University Press 2016).
[43] Kelly M, *The divine right of capital: Dethroning the corporate aristocracy* (Berrett-Koehler Publishers 2001).

Alidadi argues that such "neutral" practices are not really neutral, because they are aimed at eliminating religiosity from the customer service space. Such practices are different from truly neutral practices that can be aimed at safety (Jeroen Bosch Ziekenhuis V X[44] in which Muslim women violated requirements for a woman's hands for at least three fourth) or providing hygiene (known Chaplin versus United Kingdom[45])[46]. She further refers to the practice of the Netherlands Commission in the Netherlands, which in the Council of Decisions resolved that neutral policies to ban the wearing of religious symbols in the workplace are direct discrimination, because they are aimed at restricting specifically FoRB[47].

Criteria for setting up minimum standards in employment

The current situation with the FoRB protection in the European workplace market reveals that there are two angles of the issue: 1) the exclusion of the possibility of the employee to apply for the realization of FoRB at the workplace due to policies on the absolute ban on religious symbols, and, as a result, 2) the absence of any internal corporate mechanism to protect the right to FoRB forcing workers to appeal to the courts regarding the unlegitimacy of the whole policy on neutrality which was actually done in *Achbita, Bougnaoui,* and *WABE*. In this sub-section, we try to describe *how to prevent the existence of the second angle by addressing the first one more properly*.

In its Resolution 2318 (2020) the PACE recalls that in sub-paragraphs 9.2 and 9.3 that CoE members should strive to

> legislative and any other appropriate measures, in order to ensure that employees can lodge a claim that their right to non-discrimination on the grounds of religion or belief has been breached" and "establish appropriate adjudication and other adequate mechanisms to deal with claims of discrimination on the grounds of religion or belief, or any other prohibited grounds[48].

But what are the criteria for such mechanisms? How private actors can implement them in a proper manner? As we have seen from the previous sections, the final decisions of the courts were the results of the need of the person affected by corporate policies to apply to the court after their attempts to protect the right to FoRB in the corporation failed.

[44] Jeroen Bosch Ziekenhuis v X, App no 620353, LJN: BJ2840 (District Court-Hertogenbosch, 13 July 2009).
[45] Eweida and others v United Kingdom, App no 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013).
[46] Alidadi (n 20) 139–47.
[47] Ibid 150, 161–612.
[48] Alidadi K, 'Reasonable accommodations for religion and belief: adding value to article 9 ECHR and the European Union's anti-discrimination approach to employment?' (2012) 37 European Law Review 6.

In this sense, the negative obligation of the employee to refrain from unreasonably infringing the employee's rights to FoRB[49] is closely related to the UNDPs Framework on "Protect, Respect, Remedy"[50] which also requires businesses not to violate human rights and to implement effective protection mechanisms, *the concept of "due consideration" can be added to such protection mechanisms,* which would enable employees to initiate the issue of rational argumentation of the employer on the possibility of expression of FoRB at the workplace.

According to the UN Guiding Principles on Business and Human Rights, all actors should establish an appropriate mechanism to protect the breached right of the person. The II Pillar on respecting the human rights by business actors includes the appropriative mechanisms for the fulfilment of human rights without its infringement. Such mechanisms should be part of prevention of the human rights abuses within business operations. The III Pillar on providing remedies is mostly related to the procedures provided to already infringed rights[51].

While it is not stated implicitly the UNGPs Pillar of Respect to human rights is based upon the need to prevent the "actual impacts" what in the case of ensuring FoRB at the workplace can be done throughout creating a system not only of grievance mechanism when the breach already occurred but by applying the due consideration procedure of assessing the needs of employees to fulfill FoRB. This can be done by providing the philosophical basis for setting the minimum standard requirement[52] in ensuring human freedoms and opportunities in practicing their rights. Minimum standard requirement is 'the idea that a minimally just society ought to secure certain central capabilities up to a threshold level for all its members, which is compatible with human dignity'[53].

Moreover, the concept of ensuring FoRB at the workplace could be found in the provision of Principle 23 (b) ("in all contexts, business enterprises should seek ways to honor the principles of internationally recognized human

[49] González-González M, 'Reconciling spirituality and workplace: Towards a balanced proposal for occupational health' (2018) 57 Journal of religion and health 1.

[50] Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN, 2011 <https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf> (accessed: 23.07.2022).

[51] Thompson B, 'Determining criteria to evaluate outcomes of businesses' provision of remedy: Applying a human rights-based approach' (2017) Business and Human Rights Journal 2.1; In the commentary to the Principle 19 it is stated that 'potential impacts should be prevented or mitigated through the horizontal integration of findings across the business enterprise, while actual impacts – those that have already occurred – should be a subject for remediation'.

[52] Len L, *Minimum contract justice: a capabilities perspective on sweatshops and consumer contracts* (Bloomsbury Publishing 2017).

[53] Ibid. The author writes:

From a capabilities perspective we can say that minimum contract justice requires that freedom of contract is constructed as to create an enabling environment in which persons have the ability to pursue valuable functionings through market exchange on an equal basis with others <…> A capabilities approach to minimum contract justice identifies those agreements that are incompatible with securing and protecting basic capabilities, ie, those agreements that should not be recognised as contracts.

rights when faced with conflicting requirements"[54]). In that sense, *the need to fulfill the FoRB as a basic human right even when conflicting with other values (like living together or corporate image, or safety) should be conducted to the maximum extent possible.* It means that when specific standards on business and human rights policies restricting FoRB the assessment of such restrictions has to go through more scrutiny than just allowing an automatic ban on the whole visible religious signs at the workplace. It further relates to Principle 24 on making remediation effective as in some situations delayed response can make human rights not possible to remediate at all that is why prevention as a part of the II Respect Pillar is so important. The concept of "respect" for human rights implies not only the principle of no harm, but there is a creation of mechanisms by which such rights can exercise, so the minimum basis of no-interference should be supplemented *by the minimum principle of appeal to their rights in the workplace.* Effective crossing of pillars of respect and remedy can create an overall effective prerequisite for such security.

A mechanism to prevent a breach of FoRB at the private workplace could be possible throughout the mandatory due consideration procedure of employees' will to express their religious identity, which is the minimum level of protection of such a right. This requirement would mean that the policies of business actors prohibiting all religious signs do not provide the employee with such *a minimum standard as due consideration* of their FoRB needs request which will automatically force the employee go each time to the long-lasting court proceedings to appeal unlegitimate of the full ban policy introduced by the employer[55].

Conclusion. The absolute policies prohibiting all visible religious signs should not be tolerated by court case law and state regulations as they directly and fully exclude the FoRB needs of employees. The concept of "living together" acquires different meanings in normative documents and in the decisions of judges and is interpreted not as an original idea of religious pluralism, but as a reason to limit the right to freedom of religion in order to ensure a policy of neutrality which frequently overlaps with the need to promote a culture of tolerance and "living together" in a religiously pluralist

[54] Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (n 50) 23.

[55] Veit Bader, Katayoun Alidadi, Floris Vermeulen in their article write as follows:

As soon as we get rid of the misleading idea of 'absoluteness', however, we are able to reconceptualize the normative ideals of impartiality of normative judgements, neutrality of state institutions and objectivity of truth claims in order to rescue the laudable intuitions not only under ideal conditions, but in the real world <…> Strict neutrality should not be sacrificed in favour of outright particularism, but replaced by relational or inclusive neutrality, which – under conditions of serious cultural inequalities – are better able to realize the intuition that constitutions, laws, institutions, policies and administration should be ethnoculturally and religiously as neutral as possible.

Bader V, Alidadi K, Vermeulen F, 'Religious diversity and reasonable accommodation in the workplace in six European countries: An introduction' (2013) 13 International journal of discrimination and the law 2–3.

society, in accordance with Articles 9 and 14 of the Convention and other international legal instruments on human rights protection.

CJEU's decisions in *Achbita, Bougnaoui,* and *WABE* created two issues in the protection of FoRB at the workplace of business actors: 1) the exclusion of the possibility of the employee to apply for the realization of FoRB at the workplace due to policies on the absolute ban on religious symbols, and, as a result, 2) the absence of any internal corporate mechanism to protect the right to FoRB.

Additionally, the international institutions' case law such as CJEU decision in WABE deteriorates implementation of gender equality as by legitimizing absolute religious symbol bans at the workplace enables employers not to provide any specific, gender-sensitive provisions in their policies which means that gender-neutral policies having an impact on employees or the community may cause discrimination against women which existed in the society before introducing such neutral rules.

To address these matters within business activities the thorough analysis of the United Nations 'Protect, Respect and Remedy' Framework may be sufficient. Effective crossing of respect and remedy pillars can create an overall prerequisite for prevention and appropriate remediation of unreasonable breaches of FoRB at the workplace.

The concept of "respect" for human rights implies not only the principle of no harm, but there is a creation of mechanisms by which such rights can exercise, so the minimum basis of no-interference should be supplemented *by the minimum principle of appeal to their rights in the workplace.* Establishing such a minimum standard would cease the employee from the burden of proof of indirect discrimination that could be really hard to establish and will be transferred as a burden of proof to the employer to argue why the realization of FoRB on the workplace will *"impose an unreasonable degree of hardship"*[56] or contradict to genuine occupational requirement.

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Тамара Горбачевська

ПОТРЕБА У ВИМОЗІ МІНІМАЛЬНОГО СТАНДАРТУ У ЗАХИСТІ ПРАВА НА СВОБОДУ РЕЛІГІЇ ТА ПЕРЕКОНАНЬ НА РОБОЧОМУ МІСЦІ: СПРАВА *WABE і MH MUELLER HANDELS GMBH V. MJ*

Анотація. Судові дискусії щодо свободи релігії та переконань і права не піддаватися дискримінації на робочому місці виникають у багатьох країнах Європи. При розробці правових підходів щодо співвідношення свободи від дискримінації та можливості приватного роботодавця обмежувати прояви ідентичності працівників, законодавці, суди та бізнес-спільнота цих країн повинні дотримуватися або враховувати стандарти й рекомендації, розроблені міжнародними організаціями та судами (Рада Європи (РЄ), Європейський Союз (ЄС), Європейський суд з прав людини, Суд справедливості ЄС). Проте інтерпретації вказаних інституцій почасти є непослідовними й такими, що суперечать один одному.

Метою статті є аналіз правових рамок зазначених вище інституцій щодо забезпечення свободи релігії та переконань на робочому місці, і невідповідності між ними, яка є причиною некоректного їх застосування державними та приватними працедавцями. Стаття пропонує можливий підхід до вирішення проблематики різних судових інтерпретацій міжнародних актів, а саме впровадження вимоги мінімального стандарту щодо захисту прав людини, яка встановлюватиме загальні й базисні критерії, яких повинні дотримуватися роботодавці при створенні тих чи інших обмежень щодо вираження релігійної ідентичності їхніх працівників.

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Резолюція 2318 (2020) "Захист свободи релігії або переконань на робочому місці", ухвалена РЄ, закликає 'пропагувати "спільне проживання" у релігійно плюралістичному суспільстві'. Проте нещодавно Суд ЄС у справі IX проти *WABE* та *MH Mueller Handels GmbH* проти *MJ* дійшов висновку, що лише абсолютна заборона на всі видимі форми вираження політичних, філософських чи релігійних переконань, що також стосується релігійного одягу, може забезпечити політику нейтральності на робочому місці без дискримінації. Поняття "спільне проживання" і "життєве середовище" набувають різного характеру та значення у постановах ЄС і Ради Європи та судових рішеннях, і тлумачаться не як оригінальна ідея релігійного плюралізму, а як привід для обмеження права на свободу віросповідання для забезпечення політики нейтралітету та недискримінації. Ця лінія аргументації іноді підкріплена доводами щодо гендерної рівності, але такий підхід часто повністю виключає розгляд потреб релігійних людей і, особливо – релігійних жінок як невід'ємної частини їхньої ідентичності, що може значно обмежувати або позбавляти їх доступу до ринку працевлаштування.

Ці невідповідності та складності також посилюють роль корпоративної відповідальності у захисті свободи релігії та переконань і недискримінації на робочому місці. У цьому контексті важливою є цілісна доктрина тлумачення цих категорій міжнародними установами, яка може бути забезпечена виключенням можливості впровадження роботодавцями "абсолютних політик нейтральності", що автоматично виключають будь-які прояви релігійної ідентичності.

Ключові слова: вимога мінімального стандарту у захисті прав людини; право на свободу релігії та переконань; гендерна рівність; бізнес і права людини; дискримінація.