

Freedom of Religion and Tolerance in a Pluralistic Society - illustrated by the Example of Germany -

Art. 4(1, 2) Basic Law for the Federal Republic of Germany of 1949² (the current German constitution)

- (1) Freedom of faith, of conscience and freedom to profess a religious or philosophical creed shall be inviolable.
- (2) The undisturbed practice of religion is guaranteed.

Art. 136 Weimar Constitution of 1919 (incorporated into the Basic Law via art. 140 BL)

- (1) Civil and political rights and duties are neither dependent on nor restricted by the exercise of the freedom of religion.
- (2) Enjoyment of civil and political rights and eligibility for public office are independent of religious denomination.
- (3) No one is obliged to disclose his religious convictions. The authorities shall have the right to inquire into a person's membership of a religious society only to the extent that rights or duties depend upon it or that a statistical survey mandated by a law so requires.
- (4) No one may be compelled to perform any religious act or ceremony or to participate in religious exercises or to use a religious form of oath.

I. Introduction

1. A changing society in a globalising world

- Due to development, globalisation and migration the societies of many countries have changed in the last decades. There is more awareness of the cultural, ethnical, ideological and also religious *diversity*, which had often been ignored before. New lifestyles and philosophies of life have developed, cultures of different origins are mixed and religions previously insignificant in a country have become more important. In Europe there has been in particular a *rise of Islam*. On the other hand, resistance has evolved from parts of the population who are less flexible and insist on a mandatory homogeneous traditional orientation of the society. This has caused some special problems and tensions in daily life. It raises the question of freedom of religion, as a constitutional fundamental right, of its scope of protection and its limits, of the role of religion and tolerance in a pluralistic society. The lecture will discuss it in its various aspects from the constitutional perspective, illustrated by the example of the German constitutional law.
- Why discuss this topic by the *example of Germany*? First, it is necessary to focus on one state because the constitutional approaches differ from state to state, in detail even within the European Union. German constitutional law forms a good example because the Basic Law provides a strong protection for the freedom of religion (see below, II.3). Second, due to the rich jurisprudence of the German Federal Constitutional Court on all aspects of fundamental (human) rights, which has been caused by a high number of individual constitutional complaints, German fundamental rights doctrine is one of the most sophisticated and comprehensive in the world and has influenced constitutional development in numerous other countries - in Europe and in Asia.

2. Pluralism and tolerance in a free and democratic state

- Pluralism is a key feature of the society in any free and democratic state. It is an inevitable consequence of any sincere commitment to human rights, since the described diversity, combined with freedom, leads to a *parallelism of different - often contrary - ideologies, philosophies of life, religions and also ways of life*. Citizens with very different attitudes, mindsets and morals need to live together in the same neighbourhood or apartment building, learn together at the same school or university, work together in the same office and even belong together to the same family. Therefore, in a free and democratic state, *any assault on pluralism is an assault on the society*.
- Tolerance is a key requirement for the functioning of any pluralistic society. Without it, tensions will rise and finally explode and the society will break, leading to a new dictatorship or totalitarian regime, a civil war or economic and civilisatory decline or even all of it. The recent developments in the U.S.A. illustrate how quickly even a highly developed country with a long democratic tradition can be torn apart. Therefore, *tolerance is a key obligation of every citizen in any free and democratic state*. However, strictly speaking, it is an ethical, *not a legal obligation* of the citizen. Real tolerance means to be willing to suffer [Latin: tollere] from the "wrong" behaviour of others but still to mentally respect and support their freedom. The law, however, can only require the citizen to refrain from certain (in particular physical) interfering action (see in particular the criminal law) or from discrimination on illegitimate grounds (race, religion, sexual orientation etc.) in public life (see for the example of Germany the General Act on Equal Treatment, which prohibits discrimination in working life and the supply of goods and services available to the public, including housing).

3. Germany as a typical example of a modern European state: a pluralistic, not Christian state

- Like the other EU member states³, Germany is not a Christian state with a Christian value system but *only strongly influenced by its Christian history*. This distinction is crucial for the understanding of contemporary Europe. Today only

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² Underlined text passages indicate links to relevant internet resources. Just click on the link in the PDF file!

³ The only exception is Ireland, whose constitution of 1937 is Christian and likewise free and democratic.

about 60 percent of the German citizens belong to the Churches, and also in the other European countries, the Churches have lost a lot of their influence in society. The fundamental values of Germany are those of the *free and democratic constitutional state based on the rule of law*, namely human dignity and human rights, democracy, rule of law and social solidarity, justice and coherence (principle of the social state). These values, which are European values, trace back to the philosophy of the Enlightenment and partly had to be forced through against the resistance of the Churches. They are laid down in art. 1 and 20 BL but nowadays find their best formulation in the European fundamental value clause of art. 2 of the Treaty on European Union.⁴

II. Freedom of religion as a fundamental right

1. General aspects

- a) A classical fundamental right and a response to a long history of Christian intolerance
 - Freedom of religion [= freedom of faith] is a classical fundamental right. Historically, it is the answer to the long-standing struggle among the Christians, between the Christian denominations. Previously, according to the principle "*cuius regio eius religio*", the Prince determined the denomination of his subjects and religious minorities had no other option than to emigrate. Tolerance was never a characteristic of the Christian civilisation. ***In Europe, religious tolerance was granted first by Muslims***, in fact during the era of the Moorish Muslim rule in Andalusia.
- b) Freedom of religion and freedom of philosophical and ideological creed
 - Art. 4(1, 2) BL forms one integrated fundamental right. Some aspects are concretized by art. 136 et seq. of the Weimar Constitution of 1919, which have been incorporated into the Basic Law by art. 140 BL. The guarantee in art. 4(1, 2) BL is not limited to religion but also protects non-religious worldviews [*Weltanschauungsfreiheit*].
- c) Privileged state-church-relations but religious-philosophical neutrality of the state
 - The fundamental right of freedom of religion is complemented by the German *constitutional law on state-church-relations* [*Staatskirchenrecht*] (art. 140 BL, 137 et seq. Weimar Constitution). It determines the status of the churches and other religious societies and their relationship to the state. This relationship is very different in the various EU member states, ranging from state church (England) to laicism (France). In Germany, the religious societies, if firmly organised, can enjoy the status of a public corporation and even levy taxes. The Basic Law does not require a strict separation from the state but shows a *general friendly attitude*, even encouraging cooperation. Nowadays, in the German society this privilege is not popular anymore. In the case of making a new constitution, most citizens would probably prefer the French concept of laicism.
 - Granting the religious societies a privileged status, the Basic Law recognizes their important social function but does not concede a special role to religion per se. There is no equivalent to art. 29 of the Indonesian Constitution of 1945. Religion or religious values are not constitutional values, even if they may play a role in the implementation of the constitutional values by the politicians. The Basic Law does not allow the state to side ideologically with any confession or religion or even with religion at all but insists on the ***religious-philosophical neutrality of the state***.
- d) Protection of the freedom, not of religion
 - In the free and democratic constitutional state, the freedom of religion protects the religious latitude of the individual as an essential aspect of his human dignity, but neither serves nor protects religion itself. There is no right to religious activities or symbolism of the state, to a behaviour of the state that conforms with religious rules or beliefs or to measures fostering religion or shielding it against challenges. There can also not be any dominance of religion. Although it may play a role in politics, any acting of the state is bound to the constitutional, not the religious values. In particular, *religion cannot justify any restrictions on fundamental rights*. The ***constitutional order of the state ranks above religion, not religion above the state***.

2. The sphere (scope) of protection of the freedom of religion

- a) The personal sphere of protection and religious maturity
 - Freedom of religion is enjoyed by all human beings, all religious communities and all legal persons whose activities serve to cultivate a religion. For predominantly commercial organisations such as the American "Church of Scientology" the classification is doubtful.
 - By virtue of their parental right (art. 6(2) BL) combined with their freedom of religion, parents have the *right to child education in religious and philosophical respects*. According to the Law on the Religious Education of Children, this right of the parents ends in Germany with the completion of the 14th year of life. The teenager then enjoys *religious maturity*. He (or she) decides himself whether and which religion or religious confession he will follow. He may also abandon the religion, in which he was raised, regardless of whether this religion "allows" it or not. The religious community and also the family are legally obliged to respect his decision. If they do not, the authorities must intervene to protect the freedom of religion of the teenager.
- b) The material sphere of protection
 - There is no clear distinction between freedom of "faith" and of "Weltanschauung". In the end, every metaphysical conviction about the origin and nature of the world and the status and role of the human being in it is protected. The

⁴ Art. 2 EU Treaty reads: " The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

faith does not need to correspond to any particular religion (e.g. a world religion, monotheist or traditional religion). It may be contradictory in itself or appear immoral: Even novel sects with abstruse doctrines, satanists and churches preaching free sex enjoy the freedom of religion. It may also be a distortion of existing religions (so-called "heresy"). With regard to the religious-philosophical neutrality of the state, a "heresy" enjoys the same protection as the original. Any intervention of the state in order to protect the "pure belief" would be considered a totalitarian approach, more close to Stalinism and Maoism than to the idea of a democratic state.

- The fundamental right guarantees the freedom to *develop, have and express a faith* (also by visual and acoustic symbols) and to *act in accordance with the faith*, even to align one's lifestyle to the rules of the faith (for example, eating only certain foods or wearing certain clothes). However, this entails **no right to require consideration of the fellow citizens or the state for one's religion** or its exercise. It *neither grants a right to be spared from criticism of one's religion* (even harsh, biased or satiric criticism) *or from religiously forbidden behaviour* in the public or one's personal environment. The free and democratic state respects the freedom of religion but also requires tolerance for non- and anti-religious behaviour.⁵ Believers who try to impose certain behaviours on others for religious reasons, are punished for attempt of coercion under sect. 240 of the Criminal Code.
- The fundamental right also guarantees the **negative freedom of religion**, i.e. the right not to disclose one's religious beliefs (cf. art. 136(2) Weimar Constitution), not to participate in any religious activities (cf. art. 136(4) Weimar Constitution), not to have a faith and not to exercise any religion. This concerns especially agnostics who do not care whether God exists or not. Atheists may also invoke the freedom of religion. In their case it is often not clear if the positive or negative freedom of religion is concerned since the firm belief that God does not exist (what cannot be proved by evidence) also is a form of faith.

3. The limits of the freedom of religion

- The limits of the freedom of religion under the Basic Law are controversial. Art. 4(1, 2) BL does not define them but that cannot mean that the freedom is unlimited. The Federal Constitutional Court and most scholars refer to the so-called *inherent limits of fundamental rights*, which apply to all rights guaranteed in the Basic Law without a specific limitation clause. These rights are especially important and can *only* be restricted *in the event of a collision with fundamental rights of other citizens or other constitutional values*, and even then only by virtue of a statutory law and if in the concrete case, thoroughly weighed, the freedom of religion proves to be subordinate.⁶
- The latter is, however, often the case. For example, the ringing of church bells during the night can be easily banned with regard to the health of the neighbours who need to sleep (their right to physical integrity).

III. Special problems

- When dealing with special problems of the freedom of religion, it is crucial to *pay close attention to the individual circumstances of the concrete case*, because they may be decisive. Even small, inconspicuous details can give the case a different twist. This is often ignored, sometimes even deliberately ignored, in the emotionally heated discussion.

1. A crucifix in the classroom? (→ BVerfGE 93,17)

- The cross (in particular the variant of the crucifix) is not a traditional expression of occidental culture but a symbol of Christianity. A state-imposed cross in office premises, court rooms or classrooms in the public schools *violates the religious-philosophical neutrality of the state*, if, according to the individual circumstances, it gives the impression that the state identifies with the Christian religion. Moreover, it *can violate the negative religious freedom of atheist students and the positive religious freedom of Muslim students*, if it is installed in a way that it exerts *psychological compulsion* on the pupils (e.g. unavoidably in the field of vision, big and impressive behind the teacher). However, the coercive effect must be proven in the individual case. In this case, also the parents' right to child education in religious and philosophical respects is violated.
- There is no justification of the encroachment. The educational mandate of the state, which derives from its sovereignty over the school system (art. 7(1) BL), does not release the state from its obligation to religious-philosophical neutrality. Moreover, there is *no collision with the positive religious freedom of the Christian school students* (which could justify an encroachment), since the freedom of religion does not entitle the believer to require the state to mount the symbol of his personal beliefs in its premises and to identify with it.
- The case is different when the Christian school students themselves place a cross unostentatiously at a place in the classroom where it becomes clear that this is the students' private expression of their personal belief. In the pluralistic society under the Basic Law, however, Muslim students may then hang a symbol of Islam (calligraphy, image of the Qur'an etc.) and atheist students may hang religion-critical symbols next to it. This must be tolerated. There is no privileged position of Christianity under the Basic Law.

⁵ Therefore, under sect. 166 of the German Criminal Code *blasphemy* is only a criminal offense in case of a defamation ["Beschimpfung"] in a manner capable of disturbing the public peace. Not the religion or religious values are protected under the criminal law but the public peace. For this reason, not only the defamation of a religion but also of a non-religious philosophical creed (e.g. humanitarian atheism) is a criminal offense. Moreover, what is a "defamation" must not be judged from the perspective of the religion in question (whose followers may feel defamed by any criticism) but from that of an *objective observer* who is above religious sentiment.

⁶ See for a more thorough discussion of this problem my practical training case 1 from the course Comparative Constitutional Law at Universitas Gadjah Mada, Semester 1, 2020/21, p. 4 f., http://www.thomas-schmitz-yogyakarta.id/Downloads/Schmitz_CompConstLaw_case1.pdf.

⁷ Entscheidungen des Bundesverfassungsgerichts [Decisions of the Federal Constitutional Court], vol. 93, p. 1 ff.; English translation at www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=615. See also the dissenting vote of three judges, p. 25 ff.

2. The ban on headscarves for teachers in the classroom (→ BVerfGE 108, 282⁸, BVerfGE 138, 296⁹)

- As in many European countries, it is still **CONTROVERSIAL**, whether the state may prohibit to female teachers in public schools to wear headscarves (*hijabs*) in the classroom, in order to preserve the religious-philosophical neutrality of the school. The question is even controversial within the Federal Constitutional Court. In 2003, the Court declared a ban constitutional but demanded an explicit legal basis, since the fundamental rights also apply to public servants (including teachers) in their relationship with the state. Three dissenting judges¹⁰ argued that public servants on duty may invoke the fundamental rights only under certain restrictions, due to their special relationship of service and loyalty with the state, and that wearing headscarves as officials is incompatible with their obligation to religious-philosophical neutrality. In 2015, the Federal Constitutional Court considered a general ban unproportional. If the behavior of the teacher was reasonably traceable to a religious commandment that was regarded as obligatory, a headscarf ban would require a *sufficiently concrete threat* to the peace at school or to the religious-philosophical neutrality of the school. Two dissenting judges¹¹ objected that this does not attach enough weight to the conflicting values and disregards the margin of discretion of the legislator. The scholars also predominantly criticise the decision.
- In any case, prohibitions must not only be directed against the headscarves of Muslima but also against those of Christian nuns and against crosses (if worn as a symbol of faith).
- The headscarf ban for judges, public prosecutors and legal trainees is justified by the constitutionally required functional and personal independence and neutrality of the judges (cf. art. 97(1) BL). In 2020, this was confirmed by the Federal Constitutional Court which rejected a constitutional complaint of a legal trainee.¹²

3. The ban on headscarves for schoolgirls in the classroom

- The constitutionality of a headscarf ban for schoolgirls in the classroom (as in France) is also **CONTROVERSIAL**. Such a ban would be a serious encroachment on the right to align one's lifestyle to the rules of one's faith because the school students cannot escape from it, given that school attendance is compulsory in Germany. The encroachment cannot be justified with regard to the religious-philosophical neutrality of the school, since the student, unlike the teacher, is *not part of the school as state institution but user*.
- However, in schools or school classes with a high proportion of Muslim students the ban can be justified by the need to *protect the freedom of religion and free development of school students not willing to wear a headscarf*. This is about female school students from Muslim families who prefer a western lifestyle, who understand Islam in a more moderate way or do not want to follow it. They must not be affected in their free decision at the age where they attain religious maturity and must decide themselves about their religious confession and their way of life. However, according to the experiences at German schools, they are often put under pressure by intolerant Muslim classmates and the headscarf in the classroom serves not only to express the own religiousness but also to intimidate dissenters. A law could order that a headscarf ban be imposed in schools or school classes in which this problem occurs but could not ban the headscarf generally itself because this would even affect girls who are the only Muslim on site.
- A ban on headscarves for students at universities could not be justified on these grounds: Since these students are adults they can be expected to have developed their own personality so that they are strong enough to resist any undue pressure to adapt and go their own way - with or without scarf.

4. The ban on full-body veiling in the public

- Several EU Member States have banned the full-body veiling and thus the wearing of *niqab* or *burqa* in the public. In 2017, the European Court of Human Rights confirmed¹³ that art. 9 of the European Convention on Human Rights, which defines less generous limits of the freedom of religion than art. 4(1, 2) BL, allows such bans.
- In Germany, with regard to the general principle of equality (art. 3(1) BL), a possible ban needs to prohibit not only the veiling for religious but also for non-religious reasons (masks, ski masks, animal costumes, helmets with visors etc.), unless there are objective reasons for a different regulation (e.g. for the use of motorcycle helmets while driving). In Austria, such a general veiling ban has not affected many burqa wearers but shown strange, unexpected side-effects.¹⁴
- In Germany, the fundamental right of freedom of religion allows a ban on full-body veiling *if it is necessary for the protection of other constitutional values*, which have priority in the given context (e.g. the functioning of schools, universities and authorities as public institutions, the integrity of court hearings, traffic safety and controllability). Often, this may be the case because the citizen must be identifiable (also by remote monitoring), an open communication with a clear view on the face of the partner is required (important for the assessment of the person's credibility) or the person must be physically agile. The protection of the "cultural identity" of Germany, however, cannot justify the ban since under the Basic Law, which is committed to pluralism and builds on tolerance, the national "cultural identity" is not a constitutional value.
- In general, the *protection of public security* can justify the ban on full-body veiling because the ban is necessary for the *fight against crime* and the *defence against terrorism* (for identifying delinquents, e.g. by video surveillance, averting the camouflage of terrorists, preventing explosive belts underneath clothing etc.). Indeed, many criminals such as bank

⁸ English translation at www.bundesverfassungsgericht.de/entscheidungen/rs20030924_2bvr143602en.html.

⁹ English translation at www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2015/01/rs20150127_1bvr047110en.html.

¹⁰ See their dissenting vote at BVerfGE 108, 282 (315 ff.).

¹¹ See their dissenting vote at BVerfGE 138, 296 (359 ff.).

¹² BVerfGE 153, 1; English translation at www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/01/rs20200114_2bvr133317en.html.

¹³ ECHR, Decision of 11.07.2017, 37798/13, Belcemi and Oussar v. Belgium.

¹⁴ See the report of *Deutsche Welle*, Austria's controversial 'burqa ban,' a year on, 01.10.2018, <https://www.dw.com/en/austrias-controversial-burqa-ban-a-year-on/a-45719874>.

robbers and burglars use veiling as a method to avoid identification and therefore a general ban would be useful. In the end, such a ban is largely at the discretion of the legislator.

5. A ban on cartoons critical of religion?

- The non-intervention of the public authorities against the publication of satiric cartoons on the Prophet Mohammed in European media has caused a controversy. Within the limited scope of this lecture, the German - and largely European - position can only be presented briefly. It is essential to distinguish three different aspects: (a) the fundamental (human) right to present and publish cartoons, including those depicting God or religious leaders, (b) the moral question if such behaviour would be appropriate, and (c) the prohibition of cartoons which would insult or degrade the followers of a religion or incite hate against them.
- a) The fundamental right to present and publish cartoons
 - Under the Basic Law, the freedom to present and publish cartoons derives from the freedom to express and disseminate one's opinion (art. 5(1) phrase 1), the freedom of the press (art. 5(1) phrase 2) and the freedom of art (art. 5(3)). It extends to the dissemination of satiric and critical cartoons, including those who make fun, criticise or even criticise harshly an ideology or religion. From the European perspective, this is a basic condition for a democratic state.
 - In this context, it is *irrelevant if a religion prohibits the pictorial presentation of God or religious leaders*, since in a free and democratic state it is not the religion which defines the freedom but its followers must practice tolerance. Otherwise a country with many religions, confessions, sects etc. could end up in a dystopian religious totalitarianism. For the Muslims in Germany as everywhere in Europe this means that they may criticise but must tolerate in the same way cartoons showing God or the Prophet Mohammed, as, for example, atheists and agnostics who detest religious symbols or behaviours must tolerate Muslima wearing headscarves in the streets. In both cases, in case of threats or violence the *state must intervene against the intolerant*, because *they* are the ones who disturb the public order, and not against the citizen who is making use of his or her fundamental rights.¹⁵
 - b) The moral imperative to refrain from cartoons which would hurt religious feelings
 - It is, however, a moral imperative in the pluralist society to refrain from presenting or publishing cartoons which would hurt the religious feelings of others. Therefore, responsible media will not republish them, lecturers not present them in their lectures and friends and colleagues not show them around, even if they defend the legal right to do so. From the German and European perspective, *morality and law must be strictly separated*. The state is not legitimised to enforce morality - but society is. Unethical acting may be *sanctioned socially*, by means such as boycott, dismissal by the employer or heavy criticism and isolation within the group of friends or colleagues, the professional association, the sports club, the neighbourhood or the family. This is a common way to react against racism, anti-semitism or islamophobia. Citizens whose religious feelings have been hurt may ask the society to do so.
 - c) The prohibition of cartoons that are insulting, defamatory or incite hatred
 - While there can be no general ban of satiric cartoons on God or religious leaders, there are limits. The communicative freedoms find their limits in the general laws (here: those protecting public security) and in the right to personal honour (cf. art. 5(2) BL). In Germany as in other European countries (including France), cartoons and other kinds of expression are prohibited if they are insulting, defamatory, inflammatory or incite hatred against religious groups. They may fall under crimes such as insult (sect. 185 Criminal Code), incitement of masses (sect. 130 Criminal Code) or revilement of religious faiths and communities (art. 166 Criminal Code). Whether this is the case or not must not be *judged from the biased perspective* of the concerned religion but from that of *a neutral, objective observer*. So it is not possible to consider already the fact of depicting Prophet Mohammed insulting or defamatory. Moreover, the criminal prohibitions must be interpreted narrowly, in the light of the communicative freedoms, taking into account their importance for the democratic constitutional order. Yet, even under these criteria probably some of the controversial cartoons published in Europe have exceeded the limits.

Further reading

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¹⁵ See on this topic my practical case study from the course Administrative Law at Universitas Gadjah Mada, Semester 2, 2020/21, www.thomas-schmitz-yogyakarta.id/Downloads/Schmitz_AdminLaw_case1.pdf.

Zaatan, Fatima-Zahra; Wallrabenstein, Astrid: The Impact of the German Federal Constitutional Court on the Educational Agenda: Freedom of Faith in the German Educational System, CPG Online Magazin, 03/2018, www.cpg-online.de/2018/05/01/the-impact-of-the-german-federal-constitutional-court-on-the-educational-agenda/freedom-of-faith-in-the-german-educational-system/

See for English translations of the landmark decisions of the Federal Constitutional Court on the freedom of religion Jürgen Bröhmer; Gisela Elsner; Clauspeter Hill; Marc Spitzkatz (editors): 70 Years German Basic Law: The German Constitution and its Court, 3rd edition 2019, p. 330 ff, www.kas.de/de/web/rspa/publikationen/einzeltitel/-/content/70-years-german-basic-law-the-german-constitution-and-its-court-1.

See for examples of *practical case studies* on freedom of religion my cases from the courses Comparative Constitutional Law (UGM, Semester 1, 2020/21, www.thomas-schmitz-yogyakarta.id/Downloads/Schmitz_CompConstLaw_case1.pdf) and Administrative Law (UGM, Semester 2, 2020/21, www.thomas-schmitz-yogyakarta.id/Downloads/Schmitz_AdminLaw_case1.pdf).

See for a current inventory on religious freedom in Europe from the perspective of political science the coming ECPR General Conference 2021 (online conference), 30.08.-03.09.2021, Section 54: Religious Freedom in Europe in the 2020s, <https://ecpr.eu/Events/Event/SectionDetails/1118>.