

An illustration on a dark blue background showing a group of people engaged in a protest or demonstration. The figures are stylized and colorful. Some individuals are holding white signs on poles, while others are holding large white banners with green and blue patterns. One person is using a camera to take a photo. The scene is depicted from an isometric perspective, with shadows cast on the ground.

Shrinking Space in Germany, Shrinking Space in Europe:

Why a Politically Engaged Civil Society Is Essential for a Strong Democracy
and How Germany Can Safeguard It

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1. Introduction

Climate crisis, ever-increasing social injustice, the fight against corruption and terrorism, the challenges of global migration: Many of the most pressing challenges of our time have a European and global dimension. Civil society organisations have joined forces to form Europe-wide and international alliances working together on solving these challenges.

However, in many European countries, civil society's scope for action is being limited. Critically engaged civil society organisations and their media representatives face criminal prosecution, defamation, intimidation, restrictions on freedom of expression and association, administrative obstacles and restrictions, and other targeted attacks. While these developments are well known in states like Hungary, Poland, and Slovenia, now also unusual suspects like France, Spain, Austria and Germany are directing worrisome measures at their own civil society.

In Germany, politically engaged civil society organisation risk losing their charitable status and thus not only their tax privileges and grant opportunities, but also their reputation, the trust of the public, and their credibility. In January 2019, the Federal Fiscal Court (Bundesfinanzhof/BFH) declared the campaign work of the anti-globalisation network, Attac, to be irreconcilable with its charitable status. According to the judges, the campaign work illegitimately interferes with public opinion- and decision-making.¹ The ruling has increased the legal uncertainty regarding the extent to which non-profit civil society organisations may engage in politics or voice political opinions. The direct impact of this ruling can be seen in the cases of the DemoZ culture and education centre² in Ludwigsburg and the petition platform Change.org³, who lost

their charitable status following the Attac ruling.⁴ Many other organisations have since adapted their activities and have withdrawn from public participation.

Yet, while German civil society is aware of the threats these developments pose, an important aspect remains neglected in the debate:

German non-profit legislation has effect well beyond the country's borders. Germany is an important democratic and economic actor within the European Union and portrays itself as an important force for upholding liberty and democracy in Europe. Germany therefore has to serve as a role model when it comes to civil society's scope for action: The neighbouring states closely monitor how Germany treats its civil society. If Germany moves towards restricting non-profit legislation, or leaves civil society hanging in a legal limbo, Germany will hardly be perceived as a credible voice when calling upon other EU Member States to protect critical civil society. And what is more: The developments in Germany and other European countries must be measured against European legal requirements.⁵ At EU level, the role of civil society as a key player in the promotion of democracy, rule of law and basic rights is well recognised.

This paper gives an overview over recent restrictions for civil society in Germany and selected EU member states, illustrates legal requirements and support for civil society engagement stemming from EU level and translates these requirements into concrete recommendations for German policy makers, thereby showing what Germany must do in order to live up to its role model function as an international advocate for democracy, fundamental rights, the rule of law and for a strong European civil society.

1 „Wer politische Zwecke durch Einflussnahme auf politische Willensbildung und Gestaltung der öffentlichen Meinung verfolgt, erfüllt keinen gemeinnützigen Zweck i[m] S[inne] von § 52 AO.“ (Those who pursue political objectives by exerting influence on political decision-making and shaping public opinion, do not fulfil a non-profit purpose in the sense of § 52 of the Fiscal Code (AO)). Federal Fiscal Court (BFH), ruling from 10 January 2019 – V R 60/17, Federal Tax Gazette (BStBl) II 2019, 301 = juris, headnote 1.

2 Demokratisches Zentrum Ludwigsburg, <https://www.demoz-lb.de/> (the last access to this and all other online sources of this paper was on 09 June 2021).

3 Change.org Deutschland provides everyone with the opportunity to launch campaigns for important causes, <https://www.change.org/>.

4 Die Gesellschaft für Freiheitsrechte (GFF) is supporting DemoZ and Change.org in the dispute about their charitable status. For more specific information on the procedure, see <https://freiheitsrechte.org/gemeinnuetzigkeit/>.

5 More information on this: Mirko Schwärzel, Auf dem europäischen Auge blind: Die Debatte um die Gemeinnützigkeit in Deutschland (8-11) and Sebastian Unger, Rechtliche Perspektiven für eine politischere Zivilgesellschaft (36-39), in: BBE Gemeinnützigkeit und Zivilgesellschaft in Europäischer und Deutscher Perspektive, Dossier No. 7, 20 August 2020.

What Do We Mean by Civil Society and Shrinking Spaces?

Civil society can be viewed from at least two perspectives, namely from a normative and an actor-centric perspective.⁶ These perspectives overlap. From a *normative perspective*, “civil society” functions as a model for good and just coexistence in a democracy.⁷ It plays a critical counterpart to well-established decision-making bodies in politics, the economy and public administration. Social movements are key civil society actors that initiate political change by engaging with policy makers as well as by means of protest.⁸ In the past, among others the women’s movement and the environmental movement not only formed the public debate, but also led to major changes in legislation. Today, movements such as Fridays for Future, #MeToo und Black Lives Matter steer politicians towards the great challenges of our times.⁹ Politics are to some extent a consequence of the agenda setting by civil society and politicians must consider such movements as an expression of the will of its citizens when taking decisions.¹⁰

The *actor-centric perspective* places a focus on the nature of the organisation.¹¹ What is crucial is that the organisations are not state, economic, or family actors, but instead primarily operate in a social sphere beyond the state, market, and private.¹² Civil society actors are therefore associations, unions, foundations, networks, social movements, and other non-governmental organisations. These civil society organisational structures

are primarily shaped by the legal framework applicable to them, for instance the non-profit legislation in Germany. Civil society can only exist if the state respects individual and collective constitutional rights such as the freedom of association and assembly. Furthermore, a functioning civil society also needs the support of states. They should actively encourage public participation, for instance by institutionalising civil society’s participation in political processes and publicly promoting civil society activities, while leaving ample room for independency and self-regulation.¹³

The term “shrinking space” has become established in the literature and political discourse – often with a view to non-European countries – to conceptualise the encroachment on civil society’s scope for action. Shrinking space can be caused by limitations to freedom of association, expression, and assembly which prevent civil society organisations from effectively participating in the public discourse and criticising political and societal developments (also referred to as their watchdog function).¹⁴ In some cases civil society actors also face unjustified criminalisation or detainment.¹⁵

However, shrinking space is not only caused by direct infringements of democratic rights, but also by administrative restrictions that impede civil society from properly functioning. According to the EU’s Economic and Social Committee this may include the withdrawal of public funding, which often especially affects civil society organisations advocating for marginalised interest.¹⁶ Tax law can also unduly limit financial resources or create such bureaucratic obstacles that smaller organisations are no longer able to

6 Annette Zimmer, Die verschiedenen Dimensionen der Zivilgesellschaft, in: German Federal Agency for Civic Education (bpb), 31 May 2012, <https://www.bpb.de/politik/grundfragen/deutsche-verhaeltnisse-eine-sozialkunde/138713/dimensionen>.

7 Ibid.

8 Ibid.; Dieter Rucht, Soziale Bewegungen, in: Nohlen, Grotz (ed.), Kleines Lexikon der Politik, Munich, 2011, 556-559.

9 Carolin Wiedemann, Eine neue Generation stellt die Systemfrage, Tagesspiegel, 24 June 2020, <https://www.tagesspiegel.de/kultur/fridays-for-future-metoo-und-black-lives-matter-eine-neue-generation-stellt-die-systemfrage/25936510.html>.

10 Streinz, in: von Mangoldt/Klein/Starck, Basic Law (GG), volume 2, 7 Edition 2018, Article 21 of the Basic Law (GG).

11 Annette Zimmer, Die verschiedenen Dimensionen der Zivilgesellschaft, in: German Federal Agency for Civic Education (bpb), 31 May 2012, <https://www.bpb.de/politik/grundfragen/deutsche-verhaeltnisse-eine-sozialkunde/138713/dimensionen>.

12 Netzwerk Stiftungen und Bildung, glossary “civil society”, <https://www.netzwerk-stiftungen-bildung.de/wissenscenter/glossar/zivilgesellschaft>.

13 Brot für die Welt (ed.), Atlas der Zivilgesellschaft, Berlin 2020, 14.

14 Brot für die Welt (ed.), Atlas der Zivilgesellschaft, Berlin 2020, 17.

15 Exemplary for this is the criminal case against the human rights activist Peter Steudner, see Peter Steudner acquitted in Turkey, DW, 3 July 2020, <https://www.dw.com/de/peter-steudner-in-t%C3%BCrkeifreigesprochen/a-54036089>.

16 European Economic and Social Committee, The future evolution of civil society in the European Union by 2030, 27.

manage them besides their main operative tasks.¹⁷ Civil society work can also be obstructed by state interference in the organisations' internal affairs and by excessive use of monitoring mechanisms.¹⁸

Sometimes states or private actors use public campaigns to systematically delegitimise civil society organisations. Discrediting, stigmatisation (also called "labelling") and defamation (also through "fake news") are employed to make the daily work more difficult and create an atmosphere of fear. Another problem is the lack of adequate protection for civil society organisations who are exposed to verbal and physical violence by third parties (including "hate speech").

¹⁷ European Economic and Social Committee, The future evolution of civil society in the European Union by 2030, 27.

¹⁸ Barbara Unmüßig, Zivilgesellschaft unter Druck: Shrinking – closing – no space, Heinrich-Böll-Stiftung, May 2016, https://www.boell.de/sites/default/files/uploads/2016/03/zivilgesellschaft_unter_druck_shrinking_spaces.pdf.

2. Shrinking Space in Germany

The Atlas der Zivilgesellschaft (Civil Society Compass, 2020) published by Brot für die Welt, which reports on the state of civil society worldwide, classifies Germany as “open”.¹⁹ The Federal Government largely upholds civil society freedoms such as the freedom of expression, assembly, and association. However, non-profit legislation and a whole array of other developments are increasingly restricting civil society’s scope for action.

Restrictive Non-Profit Legislation

Germany’s non-profit legislation is outdated and vague and no longer addresses the socio-political challenges of our time. That becomes especially evident when looking at the list of charitable purpose (§ 52 (2) of the Fiscal Code), which organisations must pursue in order to receive the charitable status: The list mentions sports and chess, preservation of local history, local lore and local beautification but does not recognise the promotion of human rights or social justice or the fight against racism and other forms of discrimination as charitable purposes.

The charitable status goes hand in hand with several practical benefits, such as tax privileges, and is prerequisite for further funding by states or private foundations. Many associations cannot carry out their work without the charitable status as their entire financial infrastructure depends on it. Other practical benefits, such as using public spaces also go hand in hand with the charitable status. At the same time the charitable status is a quality label, creating public trust and credibility.

Since 2019, there is an ongoing debate on the extent to which non-profit civil society organisations may participate in political opinion- and decision-making alongside political parties. This debate was sparked by a decision of the Federal Fiscal Court, which revoked the charitable status of the anti-globalisation network Attac due to their political

¹⁹ Brot für die Welt (ed.), Atlas der Zivilgesellschaft, Berlin 2020, 10; Critical of this: Rupert Graf Strachwitz, Der Shrinking Civic Space: Gefahr für Europa, in: BBE Newsletter, 16/2019, 5, footnote 10: „Bspw. wird im Civicus-Bericht die Situation in Deutschland zu optimistisch dargestellt, weil die entsprechende Berichterstattung bestimmte Symptome nicht richtig deutet.“ (for example, the Civicus report presents the situation in Germany in an optimistic light because the corresponding reporting does not correctly interpret certain symptoms).

engagement. This decision placed German non-profit legislation on the public agenda: Politicians seem to fear an increased relevance of civil society as a voice in politics, in the media and as a shaper of the public opinion. However, the limitation of political activity of civil society organisations is not in line with the role the German constitution affords to the civil society: While civil society organisations must be personally and financially independent from political parties and must not compete with them for a political mandate, they play an essential role in the democratic discourse, especially when drawing attention to the concerns of marginalised social groups. Democratic participation of citizens is more than just the act of voting. Democratic participation takes place on the streets and in associations. Taking part in the political and public debate is not the sole prerogative of political parties, it is also the responsibility of civil society.²⁰

The impact of the ruling in the Attac-case can be seen in the cases of the DemoZ culture and education centre in Ludwigsburg and the petition platform Change.org. However, the ruling has had an effect on many more civil society organisations. Since the Attac ruling, an increasing number of civil society organisations have shied away from political activism, for fear of losing their charitable status (often referred to as the “chilling effect”).

The legal uncertainty stemming from non-profit legislation makes it easier for political opponents to delegitimise the work of civil society actors and publicly cast doubt upon their non-profit situation. For instance, Thorsten Frei, Vice-Chairman of the CDU/CSU parliamentary group in the Bundestag, called for examining whether protests against deportations are compatible with the charitable status.²¹ Several years before, CDU politi-

²⁰ The German Federal Constitutional Court clearly states, that: „Nach Art. 21 Abs. 1 Satz 1 GG wirken die Parteien bei der politischen Willensbildung des Volkes mit. Zwar haben sie kein Monopol, die Willensbildung des Volkes zu beeinflussen. Neben ihnen wirken auch die einzelnen Bürger sowie Verbände, Gruppen und Vereinigungen auf den Prozeß der Meinungs- und Willensbildung ein.“ (pursuant to Article 21 (1) sentence 1 of the Basic Law, the parties participate in the formation of the political will of the people. They do not have a monopoly on influencing the will of the people. In addition to them, individual citizens as well as associations, groups and unions also have an influence on the process of opinion- and will-forming). Federal Constitutional Court (BVerfG), ruling from 9 April 1992 – 2 BvE 2/89, (cf. BVerfGE 85, 264 (284)). § 55 of the Fiscal Code (1) No.1 p. 3 regulates that charitable organisations must keep a distance from political parties.

²¹ Maximilian Pichl, Kriminalisierung der Zivilgesellschaft – Wie die Flüchtlingshilfe europaweit unter Druck gesetzt wird, in: Austermann, Fischer-Lescano among others. (ed.), Recht gegen Rechts Report, Frankfurt a.M., 2020, 41-47, 45.

cians called for the withdrawal of the charitable status of Campact for taking a stance against the planned TTIP free trade agreement.²² The Alternative für Deutschland (AfD) parliamentary fraction accused the Hamburg tax authorities of granting tax benefits to “extremist” associations and demanded that such associations be shown “the red card.”²³ In the aftermath, several organisations lost their charitable status, amongst them a study club for critical Marx theory.²⁴

Stigmatisation and Criminalisation

Many civil society organisations have been subject to criminalisation. Particularly organisations that advocate for refugees’ and migrants’ rights are increasingly facing defamation and criminalisation. In 2018, for instance, the AfD parliamentary group in the Baden-Wuerttemberg Parliament initiated criminal proceedings against a political initiative that published deportation dates on its website.²⁵ The AfD strategically uses defamatory labelling. “Anti-deportation industry”²⁶, “sympathy industry” and “outrage industry” – these and similar terms have been established in the current discourse by right-wing and far-right extreme political actors.²⁷ The party also attacks civil society organisations through parliamentary inquiries casting doubt upon their work.²⁸ These attacks have the potential to erode fundamental democratic values if the attackers gain interpretive authority over societal debates. What is more, this narrative provokes action by others: Time and again, accommodation for refugees are attacked and set on fire, volunteers are threatened and

22 For more cases, see <https://www.zivilgesellschaft-ist-gemeinnuetzig.de/tag/empoeerungsindustrie/>.

23 Große Anfrage der AfD vom 13.10.2020 (great inquiry of the AfD of 13 October 2020), Extremistischen Vereinen gemäß § 51 (3) Abgabenordnung die Gemeinnützigkeit aberkennen – warum sieht die Hamburger Finanzbehörde seit Jahren weg?, Drucksache 22/1757.

24 Katharina Schipkowski, Ein Gespenst geht um in Hamburg – Weil der Verfassungsschutz die Marxistische Abendschule als „linksextremistisch“ einstuft, hat die Finanzbehörde ihr die Gemeinnützigkeit entzogen, taz, 19 January 2021, <https://taz.de/Marx-Lesekreis-nicht-mehr-gemeinnuetzig/15741941/>.

25 Maximilian Pichl, Kriminalisierung der Zivilgesellschaft – Wie die Flüchtlingshilfe europaweit unter Druck gesetzt wird, in: Austermann, Fischer-Lescano among others. (ed.), Recht gegen Rechts Report, Frankfurt a.M., 2020, 41-47, 42.

26 In summer 2018, Alexander Dobrindt said that those who try to prevent the deportation of criminals with lawsuits do not work for the right to asylum, but rather against social peace: „Es ist nicht akzeptabel, dass durch eine aggressive Anti-Abschiebe-Industrie bewusst die Bemühungen des Rechtsstaats sabotiert und eine weitere Gefährdung der Öffentlichkeit provoziert wird.“ (It is not acceptable that an aggressive anti-deportation industry deliberately sabotages the efforts of the rule of law and provokes further endangerment to the public).

27 Rupert Graf Strachwitz, Der Shrinking Civic Space: Gefahr für Europa, in: BBE Newsletter, 16/2019, 5.

28 Jens Rosbach, AfD will Demokratie-Vereinen Förderung entziehen, DLF, 11 January 2018, https://www.deutschlandfunk.de/parlamentarische-anfragen-afd-will-demokratie-vereinen.862.de.html?dram:article_id=408111 (mwN).

verbally and physically assaulted.²⁹

Lack of Financial Support in Times of Corona Crisis

The corona crisis has once again illustrated how fundamental a critical and politically engaged civil society is for a vibrant democracy: Civil society has tirelessly deployed creative methods of protest to draw attention to marginalised interests neglected by politicians.³⁰ For instance, public protest repeatedly recalled the increase in violence against women and children in families, the humanitarian emergency at Europe’s external borders and the effects of the crisis on socially and economically disadvantaged social groups. Policy makers have (partly) responded and adjusted their policies. During the first months of the corona crisis unconstitutional blanket bans on the freedom of assembly did not stop civil society from continuing to protest on the streets while complying with anti-Covid-19-measures. Ultimately, these protests provoked two decisions by the Federal Constitutional Court, which brought an end to the unconstitutional blanket ban and obliged the authorities to strike a fair balance between the freedom of assembly and the right to health.³¹

Still, the majority of policy makers fail to recognise the importance of such democratic commitment. The survival of these organisations during the corona crisis has not been adequately assured. The economic aid packages issued by the government to provide relief during the Corona-crisis helped some branches of the non-profit sector, but particularly the smaller politically engaged associations were excluded and many now face financial problems.³²

29 According to data from security authorities, in 2018 there were a total of 173 attacks on refugee accommodation, and almost 130 in 2019 (cf. 1620 Angriffe gegen Geflüchtete im vergangenen Jahr, Tagesspiegel, 27 March 2020, <https://www.tagesspiegel.de/politik/attacken-auf-unterkuenfte-und-ausserhalb-1620-angriffe-gegen-gefuechtete-im-vergangen-jahr/25689040.html>).

30 Cf. legal brief study by GFF on behalf of Greenpeace on „Versammlungsfreiheit in Zeiten von Corona“ (freedom of assembly in times of corona), 9 April 2020, https://www.greenpeace.de/sites/www.greenpeace.de/files/publications/2020-04-09_juristische_expertise_versammlungsrecht.pdf.

31 Vivian Kube, Pauline Weller, Protest stärkt demokratische Freiheitsrechte – Eine Beleuchtung der Versammlungsfreiheit in Zeiten der Corona-Pandemie, in: Beckmann (ed.), free, Perspektiven auf die Freiheit, 88-100.

32 Comprehensive information on the needs and offers during the corona crisis: Malte Schrader, Johannes Roth und Rupert Graf Strachwitz, Ein Rettungsschirm für die Zivilgesellschaft?, 2020, <https://www.maecenata.eu/2020/10/12/ein-rettungsschirm-fuer-die-zivilgesellschaft/>.

3. Shrinking Space in EU Member States and at the European External Borders

As shown by the data collected by the CIVICUS Monitor, civil society is experiencing restrictions in many European countries. Only one third of EU citizens live in EU states that are classified as “open”.³³ The curtailment of civil society’s scope for action in many EU states is intricately linked to the rise of authoritarian and right-wing populist parties. However, the following cases illustrate that by now the problem of shrinking space is prevalent all over Europe.

In **Hungary**, civil society’s scope for action is considered “obstructed”. The government limits “a free exercise of fundamental rights through a combination of legal and factual restrictions”³⁴. Under the authoritarian ruling of Prime Minister Viktor Orbán, in 2018 the parliament adopted an anti-NGO law that curtails freedom of expression and association.³⁵ The law allows for criminal prosecution of humanitarian organisations for “aiding and abetting illegal migration.” Major non-governmental organisations and foundations such as Open Society Foundations had to leave the country due to multiple threats.³⁶ The freedom to report is being curbed by new media laws designed to make public media conform with state propaganda. Private media faces an existential crisis due to the introduction of a special tax on advertising revenue.³⁷ Orbán and his FIDESZ party are exploiting the corona crisis to further expand their power. For example, the government has constructed a link between migration and dangers emanating from the virus.³⁸ Furthermore, Orbán is using

the opportunity to cut funding for work carried out by opposition parties.³⁹

In **Slovenia**, the government has instrumentalized the corona crisis to curtail the right to peaceful assembly.⁴⁰ Prime Minister Janez Janša has also been criticized for disseminating misinformation about civil society organisations and strategically creating mistrust amongst the general population.⁴¹

In **Poland**, too, civil society’s scope for action is deemed to be “narrowed”.⁴² Poland’s large women’s rights movement has been completely ignored. Despite the Czarny protests in which several hundred thousands of women dressed in black took to the streets all over Poland fighting for the right to abortion, the ruling right-wing nationalist PiS initiated Court proceedings, which ultimately lead to the Polish Constitutional Court declaring the previously applicable laws on abortion to be unconstitutional.⁴³

Shrinking spaces are also increasing in other parts of Europe such as in **France, Spain, and Austria**⁴⁴. During the “yellow vests” protests in 2019, journalists in **France** who reported about the movement were targeted by the authorities. Media representatives were interrogated and detained, which considerably restricted reporting or even made it

33 Brot für die Welt (ed.), Atlas der Zivilgesellschaft, Berlin, 2020, 14 (with reference to the CIVICUS Monitoring categories).

34 Ibid. 11.

35 Oscar Del Valle Dávila, Shrinking Spaces: Was steckt dahinter und wie könnten NRO darauf reagieren?, VENRO Blog, 8 January 2018, <http://blog.venro.org/shrinking-spaces-was-steckt-dahinter-und-wie-koennen-nro-darauf-reagieren/>.

36 Soros-Stiftung bestätigt Umzug: Der Druck wurde zu groß, Tagesschau, 15 May 2018, <https://www.tagesschau.de/ausland/soros-stiftung-ungarn-103.html>.

37 Keno Verseck, Claus Hecking, Was wurde eigentlich aus Ungarns Mediengesetz, Der Spiegel, 18 October 2014, <https://www.spiegel.de/politik/ausland/ungarn-was-aus-dem-mediengesetz-von-victor-orban-wurde-a-996340.html>; Erneuter Angriff auf die Pressefreiheit in Ungarn, DW, 12 June 2014, <https://www.dw.com/de/erneuter-angriff-auf-die-pressefreiheit-in-ungarn/a-17702289>.

38 Endre Borbáth, How Does the Corona Virus Strengthen Authoritarianism in Hungary?, WZB, 15 April 2020, <https://wzb.eu/en/research/corona-und-die-folgen/how-does-the-corona-virus-strengthen-authoritarianism-in-hungary>.

39 Ibid.

40 Civic Space Watch, SLOVENIA: Peaceful assembly and media freedom strained under Janša’s government, 30 October 2020, <https://civicspacewatch.eu/slovenia-peaceful-assembly-and-media-freedom-strained-under-jansas-government/>.

41 Civic Space Watch, SLOVENIA: Janša’s government continues its attack on media freedom; spreads misinformation about CSOS21, May 2021, <https://civicspacewatch.eu/slovenia-jansas-government-continues-its-attack-on-media-freedom-spreads-misinformation-about-csos/>.

42 Brot für die Welt (ed.), Atlas der Zivilgesellschaft, Berlin, 2020, 10 (with reference to the CIVICUS Monitoring categories).

43 Verfassungsgericht verbietet Schwangerschaftsabbruch bei kranken Föten, DIE ZEIT, 22 October 2020, <https://www.zeit.de/politik/ausland/2020-10/polen-schwangerschaftsabbruch-krankheit-foetus-verbot-gesetz>.

44 With insights into developments across Europe, the European Civic Forum, incorporating research from the European Center for Non-Profit Law, Civil Society Europe et al. publishes Civic Space Watch, <https://mailchi.mp/civic-forum/civic-space-watch-looking-for-success-stories-of-resistance-4891910>; s.a. FRA, Civic Space – experiences of organisations in 2019, 28 July 2020, <https://fra.europa.eu/en/publication/2020/civic-space-experiences>.

impossible at times.⁴⁵ The G-7 summit in 2019 in **Biarritz** also witnessed police violence against demonstrators and journalists.⁴⁶ Currently, a so-called “Global Security” law is under debate whose aim is to prevent journalists from taking photos and publishing photos of police activity.⁴⁷ In the past, it has often been exactly this kind of documentation that made proper investigations of police violence possible. There have been many reports of the police intimidating supporters of asylum seekers and migrants, particularly around the camp in **Calais**.⁴⁸ In the wake of terrorist attacks in autumn 2020, the government restricted freedom of association by dissolving a civil society organisation dedicated to combatting discrimination against Muslims.⁴⁹ Such limitations are especially alarming in light of growing Islamophobia in France.⁵⁰

In **Spain**, a “law on public security” was adopted in 2015, which became known as “Gag Law” as it massively curtails freedom of expression and assembly.⁵¹ The law issued by the conservative Partido Popular and its Prime Minister Rajoy introduces harsh sanctions for protest-related offenses, such as fines of up to 600,000 euros for unannounced protests at certain locations. In Spain, civil society is now classified as “narrowed”.⁵²

Prior to the Greens celebrating their electoral victory in September 2019 and replacing the right-wing populist FPÖ in the coalition with the ÖVP, the social climate in **Austria** towards civil society had also deteriorated significantly. In 2019, CIVICUS monitoring classified civil

45 Growing restriction and state violations against journalists covering continuous protests in France, Civicus Monitor 30 June 2019, <https://monitor.civicus.org/updates/2019/06/30/growing-restriction-and-state-violations-against-journalists-covering-continuous-protests-France/>.

46 Police violence against protesters and journalists under spotlight, Civicus Monitor, 8 May 2020, <https://monitor.civicus.org/updates/2020/05/08/police-violence-against-protesters-and-journalists-under-spotlight/>.

47 Civic Space Watch, FRANCE: Draft law on “Global security” is dangerous for fundamental rights, 16 November 2020, <http://civicspacewatch.eu/france-draft-law-on-global-security-is-dangerous-for-fundamental-rights/>.

48 NGO workers assisting migrants regularly harassed by police, Civicus Monitor, 13 August 2018, <https://monitor.civicus.org/updates/2018/09/13/NGO-workers-harassed-police-refugees/>.

49 Among others see Collective Against Islamophobia in France, <https://www.islamophobia.net/en/>; Vox Public, <https://www.voxpublic.org/?lang=en:European-Network-Against-Racism>, <https://www.enar-eu.org/Joint-statement-French-Minister-threatening-to-close-down-anti-racist-civil>.

50 <https://www.enar-eu.org/Joint-statement-French-Minister-threatening-to-close-down-anti-racist-civil>.

51 Ana Pastor, A Worrying Setback for Freedom of Expression in Spain, Freedom House, 29 June 2015, <https://freedomhouse.org/article/worrying-setback-freedom-expression-spain>.

52 Brot für die Welt (ed.), Atlas der Zivilgesellschaft, Berlin, 2020, 10 (with reference to the CIVICUS Monitoring categories).

society’s scope for action as “narrowed”.⁵³ Under the coalition of ÖVP and FPÖ, police presence and violence at protests grew significantly. Constructive dialogue with civil society was abolished. Since the Greens are in government, the situation has improved. The party has promoted dialogue with NGOs and has ensured that their work is recognised and safeguarded through a corona aid package worth 700 million euros.⁵⁴

Positive developments are also to be noted in **Ireland**, where civil society’s scope for action has been expanded over recent years. Ireland places a focus on human rights at the international level, and particularly the rights of civil society.⁵⁵ However, the Irish electoral law is in urgent need of reform. This law basically applies the rules on political party funding to the civil society sector. Accordingly, donations from foreign sources amounting to more than 200 euros, and in the case of anonymous donations, to more than 100 euros, are not permitted.⁵⁶ This restricts NGOs in receiving donations from abroad and thereby hinders their engagement for human rights and social justice. Organisations such as the Irish Council for Civil Liberties are therefore campaigning for the electoral law to be amended immediately.⁵⁷

Safeguarding civil society organisations is a joint responsibility of all EU member states. This becomes especially clear when looking at the EU asylum and migration policy. The humanitarian catastrophes at EU’s refugee border camps on the Greek islands and the ongoing attacks against sea rescue organisations on the Italian external borders cannot be blamed on the national governments in Greece and Italy alone but are the result of a joint European strategy to undermine the right to asylum and hinder humanitarian

53 Ibid.

54 Austria’s civic space rating upgraded, CIVICUS, 15 September 2020, <https://www.civicus.org/index.php/media-resources/media-releases/4622-austria-s-civic-space-rating-upgraded>.

55 Department of Foreign Affairs Ireland, Press Release 6 July 2018, Ireland successfully leads on championing Civil Society Space at the UN Human Rights Council in Geneva, <https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2018/july/human-rights-council-in-geneva/>.

56 For an overview of the Electoral Act, see homepage of ICCL, <https://www.iccl.ie/human-rights/civil-society-space/reform-electoral-act/>.

57 <https://www.iccl.ie/human-rights/civil-society-space/reform-electoral-act/>.

interventions.⁵⁸ In Germany, migrants' rights organisations face defamation and repression (cf. section 2). As in many other countries, sea rescue organisations face massive administrative hurdles when trying to register their vessels.⁵⁹

Civil society's scope for action in Europe can only be effectively protected if EU Member States take joint responsibility for this common European task.⁶⁰

58 See, also, Christina Goßner, Erik Marquardt on sea rescue: „Auch an unseren Außengrenzen ersticken Menschen wegen ihrer Hautfarbe“ (People are drowning due to the colour of their skin on our external borders, too), Euractiv, 6 July 2020, <https://www.euractiv.de/section/eu-innenpolitik/interview/erik-marquardt-ueber-seenotrettung-auch-an-unseren-auss-engrenzen-ersticken-menschen-wegen-ihrer-hautfarbe/>; The Moria Camp on the Greek island of Lesbos has become a symbol of failure of joint European responsibility cf. RND, 21 October 2020, <https://www.rnd.de/politik/zerstortes-moria-neues-fluchtlingscamp-auf-lesbos-laut-oxfam-noch-schlimmer-P7D2J3HUTCYFEL7S2A0K0Y0PVI.html>.

59 See, for instance, Madjidian, Nassim: Zivile Seenotrettung vor deutschen Gerichten: Das NGO-Schiff „Mare Liberum“ darf weiterhin ausfahren, VerfBlog, 13 September 2019, <https://verfassungsblog.de/zivile-seenotrettung-vor-deutschen-gerichten/>, DOI: 10.17176/20190913-112802-0.

60 The handbooks of the European Center for Non-Profit Law (ECNL) provide practical help to improve the protection of civil society's scope for action in Europe. Specifically, it provides, for instance, information on how a civil society organisation can be best set up in the European Member States, <https://ecnl.org/publications/handbook-registering-civil-society-organization-cso-new-volume-out-now>.

4. At the EU Level: Civil Society Is Political

The idea of limiting the political activities of civil society organisations, which is prevalent in the German debate, stands in stark contrast to the understanding of civil society at EU level. At EU level the importance of a politically active civil society is well recognised both for enhancing democratic participation as well as for better and effective law-making. Civil society is understood to be political in nature and is recognised by the EU Constitution as a complement to representative democracy. The European Union Agency for Fundamental Rights (FRA) considers civil society to be essential for enforcing and safeguarding the Charter of Fundamental Rights of the European Union (EU Charter/CFR). The Commission's current Rule of Law Report deems civil society to be a cornerstone of rule of law.

The EU Constitution Protects Civil Society's Political Engagement and Establishes a "Single Market" for Non-Profit Activities

Civil society engagement is protected under the EU Constitution. Important standards can be found in the Treaty on the European Union (TEU) as well as in the Treaty on the Functioning of the European Union (TFEU) and the EU Charter. According to Article 11 TEU, the EU is mandated to include civil society in all political processes. To implement Article 11 TEU, the Commission has issued a number of guidelines prescribing extensive consultations with civil society organisations, expert organisations as well as non-organised stakeholders.⁶¹

Article 12 (1) CFR explicitly stresses the importance of freedom of assembly and association in civic matters alongside political and trade union matters. In its ruling on the Hungarian "Transparency Act", the European Court of Justice (ECJ) emphasises that state measures that factually and significantly impede the work of associations constitute an interference with the freedom of association, which must be justified. This includes legislation that limits the opportunities to obtain funding, that increases risks of dissolution and that may lead to a climate of mistrust towards civil society organisations.

⁶¹ Communication from the Commission - Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, page 11, December 2002, COM(2002)704; see Toolbox for better regulation https://ec.europa.eu/info/law/law-making-process/planning-andproposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox_en.

The Court of Justice invokes the case law of the European Court of Human Rights on the freedom of association and expression. In its case-law, the European Court of Human Rights (ECHR) recognises that civil society organisations play a similar role to that of the free press: As "social watchdogs" they have an important impact on an informed public debate. Civil society organisations must therefore be granted similar protection as the independent media. The European Court of Human Rights has consistently held that civil society organisations' contribution to the formation of a political opinion is an important element of democracy. Accordingly, the Court of Justice emphasises that it is in the public interest of a democratic state to enable civil society organisations to fulfil this role.

The EU fundamental freedoms also protect NGOs' activity. The European internal market, particularly the free movement of capital and the principle of equal treatment, do not only apply to economic activity but also to philanthropic and non-profit activity.⁶² The free movement of capital under Article 63 TFEU comprises financial contributions to support civil society organisations in other member states; these must therefore be possible without discrimination.⁶³

The legal frameworks and practices of the Member States often fall behind these EU requirements. In the past, the EU Commission has demonstrated its willingness to initiate legal proceedings in cases of constant and major infringements. That was the case in the infringement proceedings against Hungary, in which the EU Commission denounced the limitation of foreign donations to NGOs.⁶⁴

Over the course of the corona crisis European Union institutions have repeatedly

⁶² For further steps necessary to promote and secure a single market for philanthropy and non-profit activities, see Dafne and the European Foundation Center, European Philanthropy Manifesto, 2019, <https://www.philanthropyadvocacy.eu/manifesto/european-philanthropy-manifesto-in-your-language/>.

⁶³ ECJ ruling from 18 June 2020 - C-78/18, ECLI:EU:C:2020:476, Rn. 45ff. 98; ECJ ruling from 14 September 2006 - C-386/04, ECLI:EU:C:2006:568.

⁶⁴ ECJ ruling from 18 June 2020 - C-78/18, ECLI:EU:C:2020:476; cf. Petra Bárd, Joelle Grogan, Laurent Pech, Defending the Open Society against its Enemies: The Court of Justice's ruling in C-78/18 Commission v Hungary (transparency of associations), VerfBlog, 22 June 2020, <https://verfassungsblog.de/defending-the-open-society-against-its-enemies/>.

emphasised civil society's vital role when combating crises and warned against putting pressure on civil society under the guise of pandemic response measures.⁶⁵ The Economic and Social Committee (EESC) warns that advocacy work of NGOs is being confused with the work of political parties in some member states – to the detriment of these organisations.⁶⁶

Active Support for Civil Society

The EU also actively supports civil society to ensure that it can work and function. For instance, project funding in Member States is often tied to the condition that civil society has to be involved in the development of such projects.⁶⁷ The European Social Fund, which will be increased in the multi-annual financial framework from 2021 to 2027 due to the corona crisis, contributes towards funding civil society activities. The fund will, for instance, promote social projects together with national or local public bodies, whose aim is to combat youth unemployment. Such projects funded by the European Social Fund often explicitly specify the involvement of NGOs during the planning as well as the execution phase.⁶⁸

Financial contributions are also made directly to NGOs under the “Europe for Citizens” programme. It was recently endowed with 185 million euros to fund projects that deal with democratic engagement and citizen participation.⁶⁹ Furthermore, the European Parliament and the German EU Presidency have decided that the budget for the Justice, Rights and Values Fund, which also provides support for grassroots organisations, should be doubled for the period between 2021 and 2027.⁷⁰

65 For instance, High Representative for Foreign Policy, Council press release from 5 May 2020, <https://www.consilium.europa.eu/de/press/press-releases/2020/05/05/declaration-by-the-high-representative-josep-borrell-on-behalf-of-eu-on-human-rights-in-the-times-of-the-coronavirus-pandemic/>.

66 European Economic and Social Committee, The future evolution of civil society in the European Union by 2030, 27.

67 See, for example, Commission press release, cohesion policy: Involving citizens to ensure better results, 6 February 2020: Regulation (EU) No. 1303/2013 of the European Parliament and Council dated 17 December, Article 5 (1) lit. c

68 Regulation (EU) No. 1304/2013 of the European Parliament and Council dated 17 December 2013, in particular recital No. 17.

69 The legal basis is Regulation (EU) No. 390/2014 dated 14/04/2014, which established the “Europe for Citizens” programme for the period between 2014 and 2020. The Regulation, which is intended to implement Article 11 TEU, has also improved the institutional involvement of civil society for example through structured dialogue between civil society and the Commission's Citizenship Policy Unit.

70 European Civic Forum, Civic Organisations to win historic victory! The Justice, Rights and Values Programme has been scaled-up, 13 November 2020, <https://civic-forum.eu/press-release/civic-organisations-to-secure-a-historic-victory>. However, Hungary and Poland have so far blocked EU budget plans in their entirety to date, see Hanna Surmatz, Rule of law and European core values at a crossroads?, 19 November 2020, <https://www.philanthropyadvocacy.eu/news/rule-of-law-and-european-core-values-at-a-crossroads/>.

Since 2016, the European Solidarity Corps brings volunteers and civil society initiatives together: Young people between 17 and 30 are placed in social projects for a few months. Travel costs, food and accommodation are covered by the European Solidarity Corps.⁷¹

Currently, the EU is also discussing the appointment of an EU Ombudsman for civil space freedoms.⁷² Moreover, discussions on a European law on associations and the European Foundation will be resumed. A further project for the participation of citizens and organised civil society is the Conference on the Future of Europe: Since 2020, EU institutions and civil society are to engage in an exchange in order to discuss future substantive and institutional challenges of the EU in its entirety.⁷³

At EU level, it is also recognised that civil society organisations are essential helpers and partners in crises such as the corona pandemic, provided they receive the necessary support by governments, such as financing, infrastructure or even data. A Data Governance Regulation is currently under discussion in the Commission to enable non-profit data donations (so-called data altruism).⁷⁴ If the necessary data is made available to non-profit organisations, they can use it to improve health protection or to fight against climate change.⁷⁵ In foreign policy, civil society is believed to be indispensable for strengthening fledgling democracies and enforcing human rights. To this end, the EU also provides extensive funding to civil society initiatives in third countries.

71 Regulation (EU) 2018/1475 on determining the legal framework of the European Solidarity Corps as well as amending Regulation (EU) No. 1288/2013 and Regulation (EU) No. 1293/2013 and Decision No. 1313/2013/ EU, 2 October 2018.

72 EESC, own-initiative opinion: Finanzierung zivilgesellschaftlicher Organisationen durch die EU, 19 October 2017, number 1.5, <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/financing-csos-eu-own-initiativeopinion>.

73 According to the Commission's opinion dated 22 January 2020 – COM (2020) 27, https://ec.europa.eu/info/sites/info/files/communication-conference-future-of-europe-january-2020_en.pdf.

74 Alexander Fanta, EU möchte Datenspenden erleichtern, Netzpolitik.org, 16 November 2020, <https://netzpolitik.org/2020/open-data-ev-moechte-datenspenden-erleichtern/>.

75 Recital 3 of the Data Governance Regulation, published under <https://netzpolitik.org/2020/open-data-ev-moechte-datenspenden-erleichtern/>.

5. What Germany Must Do Now to Enhance Civil Society Space

Every democracy relies on the work of civil society organisations: These organisations bundle the interests of people and transfer them to politics through protest and information. States are therefore responsible for creating a legal framework that safeguards the work of civil society organisations. If Germany wants to credibly advocate for civil society freedoms and rights to participation in Europe and worldwide, it must start with its own policies:

- **Germany must integrate civil society organisations into political decision-making processes, recognise them as a legitimate actor in the political sphere and endow them with legal certainty.**
- **The new legislative period is high time for a comprehensive reform of the non-profit legislation. Political activities and public engagement need to be safeguarded by clear regulations. The non-profit legislation needs to include pressing issues of our time such as the promotion of fundamental and human rights, gender justice, anti-racism work, social justice, global climate justice and the promotion of democracy and peace. Cross-border activities need to be facilitated to enable cooperation between civil society organisations within Europe and globally.**
- **Germany needs to open up to the European understanding of civil society organisations and transpose it into German law. Civil society's role in the public and political debate are constitutionally protected at the EU level and must also be enshrined in German law. Germany should be guided by the innovative measures for supporting civil society that are discussed at the EU level. Germany needs to finally fully implement and promote a European Union without borders not only for economic actors but also for philanthropic and non-profit cooperation.**

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