

REGULATING POLITICAL ACTIVITY OF CIVIL SOCIETY

A COMPARATIVE ANALYSIS OF REGULATION OF CIVIL SOCIETY
ORGANISATIONS' 'POLITICAL ACTIVITY' AND INTERNATIONAL
FUNDING – IRELAND, NETHERLANDS, GERMANY, FINLAND

CIVICUS and the Irish Council for Civil Liberties



ACKNOWLEDGMENTS

This paper was researched and written by Cathal Gilbert of CIVICUS and edited by Andrew Firmin, CIVICUS, and Liam Herrick and Maeve O'Rourke of the Irish Council for Civil Liberties (ICCL). Special thanks to Andrea Rocca at Front Line Defenders, Katerina Hadzi Miceva-Evans at the European Center for Not-for-Profit Law (ECNL) and Marianna Belalba, Dominic Perera, Mandeep Tiwana, Erika Richter and Lebo Koatlhai at CIVICUS for their contributions. The author also wishes to thank the many people from civil society and academia who contributed advice and suggestions for this paper.



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INTRODUCTION

Ireland has a vibrant and diverse civil society. An estimated 29,000 civil society organisations (CSOs), ranging from informal local non-profit groups to formally-registered national charities, play an active role on a wide range of issues and make a significant contribution to life in Ireland.¹ They do so, in the main, with a high degree of freedom to exercise their rights to the freedoms of association, peaceful assembly and expression. This healthy “civic space” reflects the vital role played by civil society in Ireland’s democracy, a role perhaps most effectively fulfilled when groups of citizens act collectively to influence government policy and shape the future direction of the country. This freedom is however being undermined in certain circumstances by provisions in Ireland’s Electoral Acts, which impose restrictions on the work of organisations which could be deemed to have “political purposes.” The Charities Act also constitutes a limitation on CSO activities because it does not include “human rights” as a legitimate charitable purpose.

Working on the basis that civil society in Ireland would be significantly strengthened through a repeal or reform of these provisions, this paper provides a comparative assessment of how “political activities” of CSOs are regulated in Ireland and three other European Union (EU) member states. This paper focuses particularly on organisations, such as human rights organisations, which carry out public advocacy activities and rely on international sources for a substantial portion of their funding. Considering the international and European law on the freedom of association, and reflecting on Ireland’s existing laws in this area, the report examines how these issues are dealt with in Netherlands, Germany and Finland.

Along with Ireland, these countries share a strong respect for democratic principles, a vibrant civil society and similar levels of socio-economic development. All four countries are rated as “open” by the CIVICUS Monitor, a global platform which tracks respect for civic space in 196 countries.² These four countries are also well known for their strong promotion of civil society, human rights and democratic freedoms through their foreign policy and international development cooperation programmes. While Ireland is the only common law country among the four, the legal and policy issues explored apply to the actions of civil society groups, regardless of whether they operate in common or civil law systems.

Following a brief outline of key international and regional norms, the paper outlines relevant aspects of domestic regulatory systems in Netherlands, Germany and Finland. A final section sets out what Ireland could learn from these examples, with a view to reforming its laws and policies governing “political activities” and foreign funding of CSOs.

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PURPOSES.”

¹‘When is a non-profit not a charity?’, Benefacts, 21 May 2018: <https://en.benefacts.ie/2018/05/21/nonprofit-not-charity>.

²CIVICUS Monitor, ratings as of 6 September 2018, <https://monitor.civicus.org>.

FREEDOM OF ASSOCIATION IN INTERNATIONAL LAW

The right to associate freely with others in order to advance collective interests has been an established facet of international human rights law since the Universal Declaration of Human Rights was signed 70 years ago.³ Ratified by Ireland in 1989, the International Covenant on Civil and Political Rights (ICCPR) also protects the freedom to associate, stating that it can only be restricted when “necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”⁴

The freedom of association is also protected by Article 11 of the European Convention on Human Rights,⁵ which was domesticated into Irish law through an act of the Oireachtas in 2003.⁶ Since 2012 the Charter of Fundamental Rights of the European Union has protected this right, specifying that the freedom of association applies to everyone and “in particular in political, trade union and civic matters.”⁷

Through Article 25 (a), the ICCPR also guarantees that everyone shall have the right and opportunity to “take part in the conduct of public affairs, directly or through freely chosen representatives.”⁸ The United Nations (UN) Human Rights Committee - an authoritative body tasked with interpreting and monitoring the implementation of the ICCPR - issued a General Comment on this right, specifying that any restriction on this right shall be based on “objective and reasonable criteria.” The General Comment goes on to say that “[c]itizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association.”⁹

This right has been further interpreted by international experts, in terms of how “participation” can include “political activities” by CSOs. These include the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, who assessed the impact of broad regulations on CSO political activism. Following a visit to assess the UK’s 2014 Lobbying Act, which requires charities to register as non-party campaigners if their spending during an election period passes a certain threshold, the Special Rapporteur noted a very definite “chilling effect” whereby CSOs were less willing to engage in campaigning during an election period in case they be accused of trying to influence the outcome of an election.

³Universal Declaration of Human Rights, 1948, Article 20, <http://www.un.org/en/universal-declaration-human-rights>.

⁴International Covenant on Civil and Political Rights, 1966, Article 22.2, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

⁵Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, Article 11, <https://www.coe.int/en/web/human-rights-convention/the-convention-in-1950>.

⁶European Convention on Human Rights Act, 2003, <http://www.irishstatutebook.ie/eli/2003/act/20/enacted/en/print#sec2>.

⁷Charter of Fundamental Rights of the European Union, 2012, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>.

⁸Ibid., Article 15(a).

⁹General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, Adopted by the Committee at its 1,510th meeting, UN Human Rights Committee, UN Doc. CCPR/C/21/Rev.1/Add.7, 1996, Comment 25 (57), <http://hrlibrary.umn.edu/gencomm/hrcom25.htm>.

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In its guidance on "Regulating Political Activities of Non-Governmental Organisations," the Expert Council on NGO Law¹⁰ further clarified that the definition of political activities is not tied to areas of work or influence of CSOs (such as human rights, children, women, disabilities, science, culture, arts) but follows the nature of what constitutes engagement in the political arena. In almost all European countries, CSOs generally have the right to criticise or endorse state officials and candidates for political office. The Expert Council illustrates the importance of this political engagement as being underpinned by CSOs' commitment to "promoting and strengthening" the core values of "democracy, human rights and the rule of law."¹¹

Our review of the law and guidance on this questions suggests there is a clear distinction to be made between activities which fall within the realm of "electoral" and those which could be considered "political" activities by CSOs. In its recommendation to member states on the legal status of non-governmental organisations (NGOs) in Europe, the Council of Europe makes it clear that "NGOs should be free to support a particular candidate or party in an election or a referendum provided that they are transparent in declaring their motivation. Any such support should also be subject to legislation on the funding of elections and political parties."¹² Therefore regulation of direct engagement with elections and referendums by organisations, including CSOs, is legitimate, so long as it is "objective" and "reasonable."¹³

There appear to be two key conclusions to draw at this point:

1. That it is legitimate and permissible for CSOs to engage in electoral politics and referendums, and that reasonable, necessary and proportionate regulatory measures can apply to those activities;
2. That those activities should be clearly distinguished from the other kinds of public advocacy activities, including human rights promotion, which CSOs can engage in and which are protected by states' commitments in international law to the freedoms of association, peaceful assembly and expression.

¹⁰The Expert Council on NGO Law is a body of the Conference of INGOs of the Council of Europe. See: <https://www.coe.int/en/web/ingo/expert-council>.

¹¹'Regulating Political Activities of Non-Governmental Organisations', Expert Council on NGO Law, prepared by Katerina Hadzi-Miceva Evans, 2015, <https://rm.coe.int/1680640fc2>.

¹²Recommendation CM/Rec (2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe, para. 13, Council of Europe, 2007, <https://www.osce.org/odihr/33742?download=true>. See also para. 12, which stresses that CSOs should be free to undertake "advocacy on issues of public debate, regardless of whether the position taken is in accord with government policy or requires a change in the law."

¹³UN Human Rights Committee Comment 25 (57), op. cit.

ACCESS TO FUNDING, DOMESTIC AND INTERNATIONAL: A KEY COMPONENT

International norms on the right to the freedom of association has made it clear that access to resources, including funding, is a key component of the right. Article 13 of the 1998 UN Declaration on Human Rights Defenders states that everyone has the right “individually and in association with others to solicit receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms.”¹⁴ The UN Human Rights Committee has consistently held that the freedom of association includes “accessing foreign funding and that limitations to it may constitute violations of the right to freedom of association.”¹⁵ The European Court of Human Rights came to a similar conclusion in the case of *Ramzanova and Others v. Azerbaijan*.¹⁶

At a meeting in Copenhagen in 1990, the Organization for Security and Co-operation in Europe (OSCE), of which Ireland is a member, agreed a set of principles on human rights and democracy which included a commitment that states would allow CSOs to “receive and utilize for the purpose of promoting and protecting human rights and fundamental freedoms voluntary financial contributions from national and international sources as provided for by law.”¹⁷ In its Guidelines on Political Party Regulation, the OSCE also stresses that regulation of foreign funding should take account of support for these types of activities in the context of external cooperation.¹⁸

¹⁴UN Declaration on Human Rights Defenders, 1998, <https://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Translation.aspx>.

¹⁵‘Access to Resources’, Former UN Special Rapporteur on the Rights to the Freedom of Peaceful Assembly and of Association, <http://freeassembly.net/foaa-online/access-to-resources>.

¹⁶Judgment from 1 February 2007, European Court of Human Rights, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-79301%22%5D%7D>.

¹⁷Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 1990, para. 10.4, <https://www.osce.org/odihr/77812?download=true>.

¹⁸Guidelines on Political Party Regulation, OSCE Office for Democratic Institutions and Human Rights and Venice Commission, 2011, <https://www.osce.org/odihr/77812?download=true>.

SITUATION IN IRELAND

Everyone has the right to form and join an association freely in Ireland. The law recognises many different types of associations, including cooperatives, religious organisations, trade unions and foundations. CSOs can choose to register or remain unincorporated. In order to be eligible for charitable status, an organisation must serve the public benefit, a term that is defined by the Charities Act of 2009.

Although organisations are able to receive foreign funding, the Electoral Act restricts national and foreign donations for certain types of advocacy and campaign work. An amendment to the Act in 2001 regulates third parties, defined as any other entity besides a political party that receives money for a political purpose. The definition of political purpose is broad and could potentially impact on all CSOs in Ireland. In January 2018, the EU Fundamental Rights Agency (FRA) released a report on conditions for CSOs in Europe in which they expressed concerns “over the vague wording and overly broad application of [section 22 of] the Electoral Act 1997 as amended in 2001, which imposes restrictions and reporting obligations on “third parties” which accept donations of over €100 for “political purposes.” The FRA report also criticised the legislation’s “broad definition” of “political purposes,” which includes the wording “promoting or procuring a particular outcome in relation to a policy”¹⁹ as it potentially covers “the activities of a wide range of CSOs, including human rights NGOs.” As pointed out by the FRA, the effect of applying this law to civil society is that CSOs are prevented from receiving “any donations from foreign sources and from any individual exceeding €2,500 in any year. The blanket ban on foreign funding can have a particularly serious impact in Ireland, where most independent funding of human rights work comes from trusts and foundations based outside of Ireland.”²⁰

In Ireland, while it is not common for CSOs to take part in elections directly, CSOs do take part in referendums from time to time. When they engage directly in election or referendum campaigns, there is a general acceptance that they should be bound by election and referendum funding regulations (see the example of Germany below for more on this point). There have been proposals to review and reform existing provisions in this regard, including through the establishment of an Electoral Commission.²¹ The primary area of concern for CSOs on this topic at this

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¹⁹Electoral (Amendment) Act, Government of Ireland, 2001, <http://www.irishstatutebook.ie/eli/2001/act/38/enacted/en/print>.

²⁰‘Challenges Facing Civil Society Organisations working on Human Rights in the EU’, FRA, January 2018, <http://fra.europa.eu/en/publication/2018/challenges-facing-civil-society-orgs-human-rights-eu>.

²¹‘Government publishes first Report of the Interdepartmental Group on security of Ireland’s Electoral Process and Disinformation’, Department of the Taoiseach, 2018, https://www.taoiseach.gov.ie/eng/News/Government_Press_Releases/Government_publishes_first_Report_of_the_Interdepartmental_Group_on_security_of_Ireland%E2%80%99s_Electoral_Process_and_Disinformation.html.

time is the application of the Electoral Act to non-electoral activity; in other words to advocacy or political action which is not directly related to an election or referendum, and where no justification for special regulation of the freedoms of association and expression arises.

This problem was starkly illustrated in 2017, when the provisions of the Electoral Act negatively impacted on the work of Education Equality, a small Irish CSO which mostly relies on the support of volunteers. Education Equality, which describes itself as “a voluntary human rights organisation established to campaign for equality in the provision of education for all children regardless of religion,” had received a donation of €10,000 from the Humanist Association of Ireland. In June 2017, the Standards in Public Office Commission (SIPO) ordered Education Equality to return €7,500 of that funding, as this was above the €2,500 threshold stipulated in the Electoral Act.²² This order had a serious impact upon Education Equality’s ability to carry out its work. Education Equality is now refusing to take any donations over €100 as it fears being sanctioned again under the Act.²³

A further associated difficulty arises in relation to human rights CSOs, and their treatment under Irish charities law. In many states, human rights CSOs are able to register as charities, something which implies special protections associated with their financial status and their right to the freedom of association. However, under the Irish Charities Act 2009, the promotion of human rights is not included as a charitable purpose. Consequently, many human rights CSOs cannot avail themselves of the protections that attach to charitable status, when they do not have an additional and separate purpose which is considered charitable. The Irish Charities Regulator has provided guidance to Irish charities to explain that they may engage in political activity as long as it is in pursuit of their charitable aim.²⁴

At the international level, Ireland is one of the strongest supporters of the defence of civil society space and the position of human rights defenders, through the leading role it played in the development of EU Guidelines on Human Rights Defenders, and through its sponsorship of the UN Human Rights Council Resolution on Civil Society Space. Ireland has also developed a progressive overseas development programme which places support for civil society at the heart of its strategy, and which is supported by significant investment in CSOs in its priority countries. The protection of HRDs is explicitly stated as a priority in “The Global Island,” Ireland’s foreign policy strategy paper.²⁵

²²More information is available on Education Equality’s website: <https://www.educationequality.ie>.

²³‘April Duff of Education Equality on Sipo threatening them with prosecution and no longer accepting donations over €100’, Irish Council of Civil Liberties, July 2018, <https://www.iccl.ie/human-rights/civil-society/education-equality-sipoc>.

²⁴‘Charities Regulator launches guidance on charities and the promotion of political causes’, Charities Regulator, 5 February 2018, <https://www.charitiesregulator.ie/en/information-for-the-public/our-news/2018/february/charities-regulator-launches-guidance-on-charities-and-the-promotion-of-political-causes>.

²⁵‘The Global Island, Ireland’s Foreign Policy for a Changing World’, Department of Foreign Affairs and Trade, January 2015, <https://www.dfa.ie/our-role-policies/our-work/casestudiesarchive/2015/january/the-global-island>.

COMPARATIVE ANALYSIS

Taking as a starting point that there is a clear need to revisit the provisions of the Electoral Act and the Charities Act, as outlined above, what are the policy options for Ireland? Are there examples from other countries that, in whole or in part, could be considered in Ireland as alternatives to the current regulatory approach? The following three sections of this paper outline how the regulation of “political activities” by CSOs is dealt with in Netherlands, Germany and Finland. Information was compiled through desk research and interviews with key informants in each country.²⁶

NETHERLANDS

A “hands off” legal framework for civil society

The Constitution of the Netherlands, in Article 8, provides that “the right of association shall be recognised. This right may be restricted by Act of Parliament in the interest of public order.”²⁷ In practice, laws governing civil society are unobtrusive, meaning that Dutch CSOs enjoy a high degree of self-regulation.²⁸ The law defines three different kinds of CSOs. These are public benefit organisations (PBOs) dedicated to the “general good” and working towards one of 13 aims set down in law (which include “promoting the democratic legal order” but do not explicitly include “human rights”), organisations representing social interests (ORSIs) focused on the social interests of a selected group and foundations supporting an ORSI, which can be set up to provide temporary financial support.

Each organisation which falls into those three categories of CSO must first be registered as a foundation or association, the two legal forms most commonly used to create CSOs in the Netherlands.²⁹ Beyond this, the Civil Code does not overly regulate the sector. There are no provisions related to CSO activities in Dutch electoral law.³⁰

Subsidiarity is the principle that social and political issues should be addressed at the most immediate or local level consistent with their resolution. It is a general principle of EU law and is also the guiding principle behind Dutch

IN PRACTICE, LAWS GOVERNING CIVIL SOCIETY ARE UNOBTRUSIVE, MEANING THAT DUTCH CSOS ENJOY A HIGH DEGREE OF SELF-REGULATION.

²⁶Interviews were conducted with activists, civil society leaders and academics in each country. Requests for comment were also sent to relevant government ministries. However, no responses had been received by the time of writing.

²⁷Constitution of the Netherlands 1815 (as amended 2008), The Constitute Project, https://www.constituteproject.org/constitution/Netherlands_2008?lang=en.

²⁸‘Charitable law in the Netherlands - An Overview’, Reinier W L Russell, 1 January 2018, [https://uk.practicallaw.thomsonreuters.com/7-633-0326?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1&comp=pluk](https://uk.practicallaw.thomsonreuters.com/7-633-0326?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1&comp=pluk).

²⁹Dutch Civil Code, Book 2 - Legal Persons, <http://www.dutchcivillaw.com/civilcodebook022.htm> Accessed 27th July 2018.

³⁰Dutch Electoral Law, as amended in 2009, www.legislationline.org/documents/id/17116.

policy. The principle of subsidiarity and the availability of relatively undemanding legal systems create a positive environment for CSOs.³¹ Subsidiarity is enabling, as it implies that the growth of democracy and response to societal challenges should occur through civil society.

This approach, coupled with a relatively “hands off” Civil Code, has opened the door to the development of a number of “soft law” initiatives for civil society, including the Samenwerkende Brancheorganisaties Filantropie (SBF) Good Governance Code 2015. Within this self-regulatory framework, an organisation engaging in lobbying or other political activities, including those related to elections or referendums, is not excluded from being considered a PBO, which implies certain benefits, including tax relief.³² PBOs do not pay Dutch inheritance tax or gift tax on inheritance or gifts, including gifts that institutions make for the general good. Natural and legal persons making donations to a PBO may deduct their gifts from their income tax. Under Dutch law, even political parties can be recognised as PBOs.

There is therefore no specific legislative framework governing the public policy or political activities of CSOs. As such, there are no hard-law limitations on CSO activities, including lobbying, public policy advocacy or other activities that could be deemed “political” in nature.³³ This lack of state regulation means that there is no distinction under Dutch law between CSOs pursuing policy change, political activities, or cultural activities.³⁴ More specific regulations (through the Electoral Act) only apply to CSOs when the organisation is registered as a political party and wants to participate in elections.

Since 2016, the Dutch government has also supported a “Dialogue and Dissent” policy framework, which supports the lobbying and advocacy work of CSOs. While its main thrust is externally focused, the policy allows lobbying and advocacy by CSOs to take place anywhere, including in Netherlands.³⁵

In practice, CSOs in Netherlands freely engage in “political” activism on a wide range of causes, including environmental protection, anti-racism and support to migrants and refugees. From time to time, interferences can arise with regard to their freedom to engage in this way, most notably through restrictions on the freedoms of peaceful assembly and expression.³⁶ In practice, interference with their freedoms can take the form of hostility, threats or in some cases violence from individuals or groups opposed to their views. Dutch activists also report that certain groups, including those promoting anti-racism and support for the Palestinian cause, are less able to exercise their rights and express their views freely than others.³⁷

³¹‘Regulating Political Activities of Non-Governmental Organisations’, Expert Council on NGO Law of the Conference of INGOs of the Council of Europe, prepared by Katerina Hadzi-Miceva Evans, 2015, <https://rm.coe.int/1680640fc2>.

³²‘Which tax advantages are available to a Public Benefit Organisation’, guidance via the official website of the Netherlands Tax Authorities, https://www.belastingdienst.nl/wps/wcm/connect/bldcontenten/belastingdienst/business/other_subjects/public_benefit_organisations/tax_advantages_pbo/which_tax_advantages_are_available_to_a_pbo.

³³‘The nonprofit sector in the Netherlands’, Working Document 70, Ary Burger and Paul Dekker, 2001, p. 23, <https://www.scp.nl/dsresource?objectid=316d28b5-799a-4acb-8392-cca00cdfb86b&type=org>.

³⁴Expert Council on NGO Law of the Conference of INGOs of the Council of Europe, op. cit.

³⁵Dialogue and Dissent Policy Framework, <https://www.government.nl/binaries/government/documents/regulations/2014/05/13/policy-framework-dialogue-and-dissent/dialogue-and-dissent.pdf>.

³⁶See reports on these issues from the CIVICUS Monitor between September 2016 and March 2018, <https://monitor.civicus.org/newsfeed/?country=107>.

³⁷CIVICUS Interview with Civil Society Respondent A, 26 July 2018.

Regulation of funding for “political activities”

In the same way that there are no laws pertaining to the political activities of CSOs, there are no specific restrictions for international funding of CSOs in Netherlands.³⁸ There are, however, some restrictions on public fundraising made by municipalities which prohibit door-to-door fundraising and on-the-street solicitation without a permit. The same restrictions apply to organising lotteries or games of chance.

Otherwise, fundraising is self-regulated by the Netherlands Fundraising Regulator (CBF).³⁹ This provides a good example of how, in the absence of state-driven regulation, civil society has itself stepped in to provide a regulatory mechanism for fundraising. In 2017, the CBF published detailed regulations governing how CSOs in Netherlands can be recognised as charitable organisations for the purposes of fundraising. In order to benefit from this scheme, CSOs have to be considered a “charitable organisation,” defined as an organisation which abides by the principle of “by us, for others,” is not-for-profit and which relies on fundraising in order to achieve its aims.⁴⁰ CSOs must also publish certain information on their websites, including their fundraising methods, strategic policy and annual report.⁴¹ The regulations make no mention of fundraising from outside the state, nor deal with fundraising for activities that could be deemed “political” or that might relate to elections or referendums.

Foreign funding of political parties is also unrestricted in Netherlands. There are no provisions in the Netherlands’ Electoral Act (as amended 2009) which relate to the funding of political parties or third parties. However, a proposal from the Interior Minister in February 2018 sought to change this by imposing a ban on foreign funding of political parties.⁴² At the time of writing, there were no indications that any blanket measures to restrict foreign funding to CSOs were under consideration. Foreign funding of Muslim organisations has however come under the spotlight recently in the Netherlands. Media reports in 2018 indicated that the government was considering tightening rules on funding coming into the country from “restrictive states.”⁴³ The motivation for tightening these rules reflects a desire by political leaders to respond to national security concerns connected to the actions of extremist groups and terrorist organisations.

³⁸Expert Council on NGO Law of the Conference of INGOs of the Council of Europe, op. cit.

³⁹The Central Bureau on Fundraising (CBF), <https://www.cbf.nl/the-central-bureau-on-fundraising>.

⁴⁰‘Regulations and Appendices CBF Recognition for Charitable Organizations’, CBF, 29 November 2017, Article 1, <https://www.cbf.nl/the-central-bureau-on-fundraising>.

⁴¹‘CBF Recognition Scheme Standards’, CBF, version as of 1 December 2017, Article 6.2.1 of Appendix 1, <https://www.cbf.nl/the-central-bureau-on-fundraising>.

⁴²‘Dutch Ban on Foreign Funding for Political Parties Would Hit Far-Right PVV’, Politico, 2 January 2018, <https://www.politico.eu/article/dutch-ban-on-foreign-funding-for-political-parties-would-hit-far-right-pvv-geert-wilders>.

⁴³‘30 Islamic organisations in NL have requested funding from Kuwait, Saudi Arabia’, DutchNews.nl, 24 April 2018, <https://www.dutchnews.nl/news/2018/04/30-islamic-organisations-in-nl-have-requested-funding-from-kuwait-saudi-arabia>.

GERMANY

No dedicated NGO law

Germany's civil society is large and vibrant, including many "development CSOs" that have an external focus.⁴⁴ Historically, scholars point out that Germany has had a "strong state and strong civil society" in which associations played the role of promoting specific interests.⁴⁵ Close government-civil society cooperation in both local and national-level governance has also been a prominent feature in Germany since the 19th century. This includes cooperation on policy making and policy implementation.⁴⁶ Today, civil society is heavily involved in the provision of social services and, consequently, is highly dependent on the state for funding. However, non-professional CSOs staffed exclusively by volunteers are less reliant on the state and depend more on the public for their funding.⁴⁷

In Germany, the term "charity" (Gemeinnützigkeit) is only legally defined in terms of tax law. There is no civil society law in Germany and no separate body of law for charities. Instead, the German civil code provides for the establishment of non-profit organisations (NPOs) as associations, foundations and corporate enterprises.⁴⁸ All forms of NPO are allowed to pursue any lawful interest, including political ones. Restrictions related to political activity however "apply predominantly to tax-exempted NPOs".⁴⁹ There are no provisions related to the activities of CSOs in Germany's electoral law.⁵⁰

THERE IS NO CIVIL SOCIETY LAW IN GERMANY AND NO SEPARATE BODY OF LAW FOR CHARITIES. INSTEAD, THE GERMAN CIVIL CODE PROVIDES FOR THE ESTABLISHMENT OF NON-PROFIT ORGANISATIONS (NPOS) AS ASSOCIATIONS, FOUNDATIONS AND CORPORATE ENTERPRISES.

⁴⁴'Germany's Government-Civil Society Development Cooperation Strategy: the dangers of the middle of the road', Susan N Engel, *Cosmopolitan Civil Societies Journal*, Vol. 9, No.1, 2017, pp. 42-59, <https://ro.uow.edu.au/cgi/viewcontent.cgi?referer=https://www.google.ie/&httpsredir=1&article=3917&context=lhapapers>.

⁴⁵'European Civil Societies Compared: Typically German-Typically French?', E Archambault, E Priller and A Zimmer, *Voluntas*, Vol. 25, No. 2, pp. 514-537, <https://doi.org/10.1007/s11266-013-9349-6>.

⁴⁶Ibid.

⁴⁷Ibid.

⁴⁸German Civil Code (English Translation), Sections 21-89, http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html.

⁴⁹Expert Council on NGO Law of the Conference of INGOs of the Council of Europe, op. cit.

⁵⁰Federal Electoral Act, as amended in 2017, www.legislationline.org/documents/id/21725.

Regulation of political purposes through tax laws

Associations, foundations and corporate NPOs are all entitled to apply for tax exemptions in Germany, if they “pursue public benefit, charitable, and church-related purposes.” Through this system donations to exempted organisations are tax-deductible, providing an important stream of revenue from individual, public and private foundation sources for civil society in Germany. Section 52 of Germany’s tax code provides for the granting of a designation of “charitable purposes” if the organisation is “aimed at unselfishly promoting the general public in the material, spiritual or moral domain.”⁵¹ The code lists 25 specific domains of activity under which an organisation can be involved in order to benefit from being considered to have charitable purposes. These include “the general promotion of the democratic state” and “the promotion of civic engagement in favor of charitable, benevolent and ecclesial purposes.”⁵² Neither the promotion of human rights nor engagement in political advocacy are specifically listed in the tax code. The code also does not specify anything related to the means (for instance lobbying, advocacy, public campaigning and awareness raising) which may be used to achieve any of the listed purposes.

The tax code imposes some limitations on the political activities of CSOs which benefit from a tax exemption on charitable purposes grounds. First, organisations pursuing tax-privileged purposes must not spend any of their assets for the “direct or indirect benefit of political parties,” for instance through campaigning in support of a party or candidate.⁵³ Further guidance on the the “general promotion of the democratic state” purpose is provided in the implementing rules (Anwendungserlass) of the tax code. Section 43.8 of the implementing rules states that this purpose includes an engagement with “basic democratic principles” which are “objectively and neutrally” appreciated. This charitable purpose also encompasses popular political education, which can include “promoting political perceptiveness and political responsibility” and both theoretical instruction and calls to action. However, the implementing rules make clear that the charitable purpose does not extend to “one-sided agitation,” “uncritical indoctrination” or “party-politically motivated influence.”⁵⁴ In other words, the implementing rules of the tax code make it clear that activities which fall under the “promotion of the democratic state” purpose may have a political nature but are not automatically considered to be activities for the direct or indirect benefit of political parties. Hence such CSO activities should not be subject to restrictions on tax benefits.

⁵¹German Tax Code, Section 52, http://www.gesetze-im-internet.de/ao_1977/_52.html.

⁵²Ibid.

⁵³German Tax Code, Section 55 (1), http://www.gesetze-im-internet.de/ao_1977/_55.html.

⁵⁴Implementing Rules of the German Tax Code (quotations translated from German), Section 52.2.6.8, http://www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Weitere_Steuertemen/Abgabenordnung/AO-Anwendungserlass/2014-01-31-Neubekanntmachung-AEAO.pdf?__blob=publicationFile&v=2.

Interpretation of the tax code is also contained in section 43.15 of the guidance on application of the tax code, which is provided by the finance ministry, updated as of 26 February 2018. This guidance makes it explicit that “political purposes (influencing the formation of political opinion, promotion of political parties and the like) do not count as charitable purposes.”⁵⁵ The interpretation continues by saying that “a certain influence on the formation of political opinion does not preclude charitable status,” a position supported with reference to a German Federal Finance Court Decision which found that it was not reasonable to classify a citizens’ initiative for the protection of the environment as a political association just because of “the possible political effects of its activities.”⁵⁶ The tax code interpretation clarifies that it is acceptable for an organisation benefitting from a charitable purposes exemption to “occasionally” take “a position on political topics within the framework of its statutes” but that such activities should not become the “sole overriding purpose” of the organisation’s statutes. A decision of the Federal Fiscal Court in March 2017 further clarified that “political influence must not ‘far outweigh’ the other activities developed by the body.”⁵⁷

Should an organisation be deemed to have deviated from the acceptable limits of the regulations governing charitable purposes, they lose the designation of having a charitable purpose and therefore their tax exempt status. Given the significant amount of funding that many German CSOs receive through public donations, such a loss can have significant implications for their survival, including the loss of their property or the payment of 30 per cent taxes on the sum of donations over the past 10 years. The determination of whether a CSO is entitled or not to the exemption based on charitable purposes is left up to officials working for Germany’s approximately 400 local tax authorities. A study published in 2018 by a coalition of CSOs in Germany revealed that out there are dramatic inconsistencies in the way these rules are applied by local tax offices, with some giving broader interpretation to “political purposes” than others.⁵⁸

There is growing consensus within German civil society that, while civil society remains relatively free to set its own agendas and engage in a variety of activities, including those that could be deemed “political,” a legal “grey area” exists which can become problematic for organisations heavily engaged in advocacy. The case of Attac Germany is illustrative of the problem.

⁵⁵AEAO Application of the Tax Code, Section 43, Sub-section 15, <https://www.jurion.de/gesetze/aeao/43/?from=1%3A143570%2C1%2C20180629>.

⁵⁶Federal Finance Court, Urt. 29.08.1984, Az.: IR 203/81, https://www.jurion.de/urteile/bfh/1984-08-29/i-r-203_81/?from=1%3A143570%2C45%2C20180226.

⁵⁷Judgment XR 13/15 of 20 March 2017, para. 93 (3),

<https://juris.bundesfinanzhof.de/cgi-bin/rechtsprechung/document.py?Gericht=bfh&Art=en&nr=34884>.

⁵⁸‘Engagiert Euch - nicht? Wie das Gemeinnützigkeitsrecht politisches Engagement erschwert’, Stefan Diefenbach-Trommer, Mitarbeit von Jannika Marré, Jan-Hendrik Klugkist and Melina Schmidt, Allianz Rechtssicherheit für politische Willensbildung, 22 March 2018, <https://www.zivilgesellschaft-ist-gemeinnuetzig.de/finanzamt-studie-gemeinnuetzigkeitsrecht-muss-verbessert-werden>.

Attac is an international network of activists and public education movement which campaigns on a range of problems it has identified as associated with “neoliberal globalisation.”⁵⁹ In 2014, a local tax authority told Attac Germany that its public benefit status had been revoked due to the fact that it “pursues activities of political nature beyond its prescribed public-benefit purposes that, in line with Germany’s Fiscal Code, qualify it for the tax privileges.”⁶⁰ A court later overturned the decision, stating that Attac’s political activities were a legitimate means to reach its official objectives.⁶¹ The Federal Ministry of Finance refused to accept this decision and an appeal is currently under way. At the time of writing, Attac’s charitable purpose status remains suspended pending the outcome of the appeal. According to the “Legal certainty for political decision-making” coalition, a group of 80 CSOs that have joined together to ensure that CSOs involved in influencing political decision making can receive charitable status, the Attac Germany case is not an isolated incident and there are several other cases of CSOs that have been negatively affected by the lack of clarity on this issue.⁶²

Regulation of foreign funding for these activities

There are no specific laws or regulations restricting the receipt of foreign funding by CSOs in Germany, although CSOs must comply with regulations against money laundering and the financing of terrorist activities. These regulations do not specifically target foreign funding of CSOs and their activities, but instead apply to all natural and legal persons living or having their legal seat in Germany. Indirectly, the availability of foreign funding may be influenced by existing tax rules as described above: it is conceivable that the designation of “charitable purpose” by the German tax authorities, or lack thereof, may influence whether foreign funders are inclined to support a particular organisation. Aside from these restrictions, the German regulatory framework does not hinder any kind of cross-border giving.⁶³

⁵⁹A full description of Attac’s background, purpose and activities is available on their website: <https://www.attac.de/was-ist-attac>.

⁶⁰‘Germany Sets a Poor Example: The Case of ATTAC in Light of Globally Closing Civic Spaces’, Annika E Poppe and Jonas Wolff, Center for Strategic and International Studies, 17 July 2017, <https://www.csis.org/blogs/international-consortium-closing-civic-space/germany-sets-poor-example-case-attac-light>.

⁶¹Judgment of the Tax Court in Kassel, 10 November 2016, https://www.attac.de/fileadmin/user_upload/Kampagnen/Gemeinnutz/downloads/170406_Urteil-HessFinanzgericht.pdf.

⁶²The coalition’s website provides a number of examples: <https://www.zivilgesellschaft-ist-gemeinnuetzig.de/beispiele-fuer-gemeinnuetzigkeitsprobleme>.

⁶³Expert Council on NGO Law of the Conference of INGOs of the Council of Europe, op. cit.

FINLAND

No exclusion under law for political activity of CSOs

Finnish law views the freedom of association as a basic right. Under section 1 of the Association Act, an association can be founded “for the common realisation of a non-profit purpose.”⁶⁴ The law does not define “non-profit purpose” nor provide a list of activities which fit within that purpose. Finland’s freedom of association principle also implies the right to form an association without a permit.⁶⁵ Political parties, trade unions, athletic clubs, charitable organisations and hobby clubs are all examples of non-profit organisations.⁶⁶ Thus, non-profit organisations, as defined by Finland’s Association Act, are not excluded from political activities. There are no provisions related to the activities of CSOs in Finland’s electoral laws.⁶⁷

Funding for political activities of CSOs in Finland

There are no laws or regulations restricting the receipt of domestic or foreign funding for political purposes by CSOs in Finland, although all international transfers are subject to the Act on Detecting and Preventing Money Laundering and Terrorist Financing.⁶⁸ Such restrictions are in place in the majority of countries and are generally considered legitimate and proportionate restrictions on funding flows to all organisations, and not only CSOs. CSOs can obtain total income tax relief for small-scale non-commercial business activities.⁶⁹ Foundations and associations are also exempt from paying value-added tax if they are “promoting the public good.”⁷⁰

Legislation is also in place to regulate charities’ collection of donations from the public. Currently, out of almost 100,000 registered associations and foundations, only around 500 charities have a licence to ask the public for donations. The application process is prohibitive, as charities must send a one-to-two-year fundraising plan to the police for approval. Charities then may have to wait for as long as eight months to receive a licence.⁷¹

⁶⁴Finnish Associations Act (unofficial English translation), as amended 2016, <https://www.prh.fi/en/yhdistysrekisteri/act.html>.

⁶⁵‘Civil Society Space Report - Input’, Human Rights Centre, 25 June 2015, https://www.ihmisoiikeuskeskus.fi/@Bin/2464111/Civil_Society_Space_HRC_Finland.pdf.

⁶⁶‘How to found an association’, Finnish Patent and Registration Office, 3 July 2014, <https://www.prh.fi/en/yhdistysrekisteri/perustaminen.html>.

⁶⁷Electoral Law, as amended in 2016, www.legislationline.org/documents/id/19932; Act on a Candidate’s Election Funding, 2009, www.legislationline.org/documents/id/21921.

⁶⁸Act on Detecting and Preventing Money Laundering and Terrorist Financing (unofficial English translation), as amended up to 2013, https://www.finlex.fi/en/laki/kaannokset/2008/en20080503_20130327.pdf.

⁶⁹Finland, Compendium - Cultural Policies and Trends, <https://www.culturalpolicies.net/web/finland.php?aid=515>.

⁷⁰Value added tax, Finnish Tax Authority, 1 February 2017, <https://www.vero.fi/en/businesses-and-corporations/about-corporate-taxes/vat>.

⁷¹Money Collection Act (unofficial English Translation), 2006, <http://www.finlex.fi/en/laki/kaannokset/2006/en20060255.pdf>.

Despite these restrictions, the wording of the current Money Collection Act 2006 is very broad in terms of the purposes for which donations may be collected from the public. Section 7 of the act simply states that donations should be collected for “non-profit purposes,” a term that is not defined either in this act or, as noted above, in the Law on Associations. At the time of writing, reforms to the law were being considered which would liberalise the rules in place for public fundraising by removing the need for a licence and allowing some unregistered groups to fundraise.⁷²

Civil society policy: a culture of openness and cooperation

At a policy level, Finland has created a system within the government to protect and expand civic space and directly address issues in civil society. In 2007, the Government appointed an Advisory Board on Civil Society Policy (KANE) within the Ministry of Justice.⁷³ The Board works to address issues related to CSOs and remains active as of 2018. In addition, in May 2015, the Ministry of Finance appointed the Open Government Support Group. This group is made up of 16 civil servants from national and local government bodies and five CSOs. The Support Group works on Finland’s national action plan on the Open Government Partnership, an international initiative which aims to secure commitments from governments to their citizenry to promote transparency, empower citizens, fight corruption and harness new technologies to strengthen governance.⁷⁴

These open feedback loops ensure that issues that arise in civil society, such as legislated restrictions on funding, can be brought to the attention of an open and responsive government. In fact, Finland’s Constitution states that public authorities shall promote opportunities for citizens to participate in societal activity and influence decisions that concern them.⁷⁵

The Finnish Government also works to promote human rights through the Human Rights Strategy of the Foreign Service of Finland (2013) and the Public Guidelines of the Foreign Ministry of Finland on the implementation of the European Union Guidelines on Human Rights Defenders (2014). These guidelines aim to support human rights defenders globally and engage in dialogue with them.⁷⁶ Finland’s international human rights policy is mainstreamed into all of the government’s foreign policy activities. The policy stresses openness as a prerequisite for successful human rights policy. Finland is the only state which allows domestic CSOs to lodge collective complaints to the European Committee of Social Rights under the European Social Charter.

⁷²‘Your Voice: why Finland is reforming its public collections law’, European Fundraising Association, 20 July 2017, <http://www.efa-net.eu/features-and-opinions/your-voice/652-your-voice-why-finland-is-changing-its-public-collection-laws>.

⁷³‘KANE: Strengthen the working conditions of Civil Society’, Finnish Ministry of Justice, 26 June 2018, https://translate.googleusercontent.com/translate_c?depth=1&hl=en&rl=translate.google.co.uk&sl=auto&sp=nmt4&tl=en&u=https://oikeusministerio.fi/artikkeli/-/asset_publisher/kane-kansalaisyhteiskunnan-toimintaedellytyksia-vahvistettava&xid=17259,1500004,15700023,15700124,15700149,15700186,15700190,15700201&usg=ALkJrhgVU3oeR5GHkZhInbpkfeUO45K04g.

⁷⁴Finland Progress Report 2015-2017, Open Government Partnership, https://www.opengovpartnership.org/sites/default/files/Finland_Progress-Report_2015-2017_for-public-comment.pdf.

⁷⁵Human Rights Centre, op. cit.

⁷⁶Finland’s International Human Rights Policy, Ministry of Foreign Affairs of Finland, <http://formin.finland.fi/public/default.aspx?nodeid=49583&contentlan=2&culture=en-US>.

COMPARATIVE MATRIX: HOW COUNTRIES REGULATE “POLITICAL ACTIVITIES” OF CSOS

The following table provides a comparative assessment of how each of the four countries regulates the political activity of CSOs. This is done across four dimensions:

1. How **tax rules** are applied to CSOs and whether tax exemptions are linked to the types of activities a CSO is engaged in;
2. The extent to which **electoral laws** in each country impact upon CSO activities or receipt of funds;
3. Laws or other measures in place in the country which restrict or regulate the receipt of **foreign funding** by CSOs;
4. The country’s **overall regulatory approach** to civil society.

	TAX RULES	ELECTORAL LAWS	FOREIGN FUNDING	REGULATORY APPROACH
IRELAND	Tax breaks for organisations with a charitable purposes – does not include human rights/public advocacy	Restriction in section 27 of the Electoral Act	Electoral Act limits foreign funding of CSOs deemed “third parties”	Charities Act
NETHERLANDS	CSOs get tax breaks if they are a charitable organisation abiding by the principle of “by us, for others”	No regulation of CSO activities through electoral laws	No legal restrictions, but some political moves to restrict funding to “salafist” organisations	“Hands off” approach, significant self-regulation
GERMANY	Tax breaks for CSOs with a charitable purpose: includes democracy promotion, civic education, but not human rights or “political” activities	No regulation of CSO activities through electoral laws	No legal restrictions	No dedicated law; main regulation through tax code and civil code
FINLAND	Tax exemption linked simply to “non-profit purpose” and promotion of “public good”	No regulation of CSO activities through electoral laws	No legal restrictions	Association Act

LESSONS AND POLICY OPTIONS FOR IRELAND

It is clear from this brief assessment that none of the countries analysed here operates a perfect or optimal regulatory regime for the political activities of CSOs. Nevertheless, it is clear that there are aspects of each country's approach to regulation of the political activities of CSOs that could be useful in an Irish context.

First, to varying degrees, Netherlands, Germany and Finland all allow greater scope for what are considered to be "charitable purposes" under domestic legislation, particularly tax codes. While there are strong arguments, most notably in Germany, for the need to avoid using tax rules as a driving mechanism for civil society regulation, a more liberal approach to deciding what constitutes a charitable purpose does seem to be of benefit to civil society. The example of Finland, where no definition is provided beyond "non-profit purpose" and promotion of "public good," appears particularly progressive.

Second, the absence of any similar provision in the electoral law in the Netherlands, Germany and Finland suggests that lawmakers in those countries have not seen the need to tie civil society's public advocacy role specifically to the rules governing elections and referendums, and the activities of political parties and candidates. Given a reasonably similar level of democratic development, and a similar level of respect for the norms of free and fair elections across all four countries, this raises the question of the necessity of such a provision in Ireland's electoral laws.

Finally, legal restrictions on foreign funding to CSOs in Netherlands, Germany and Finland are noticeably absent. While recognising that there is an emerging political debate about foreign funding to religious organisations in these countries, thus far legal regimes remain liberal in this regard. None of the civil society interlocutors spoken to for this study reported any restrictions on the receipt of foreign funds for any kind of civil society activities, including political activities or public advocacy. This approach appears to be in line with these governments' generally open, supportive and cooperative attitude to working with civil society, most noticeably in Netherlands through the Dialogue and Dissent policy framework and in Finland through the KANE structure.

Considering these lessons, the Irish Government could consider a range of actions to reform the current rules on the political activities of CSOs in Ireland.

LAWMAKERS IN THOSE COUNTRIES HAVE NOT SEEN THE NEED TO TIE CIVIL SOCIETY'S PUBLIC ADVOCACY ROLE SPECIFICALLY TO THE RULES GOVERNING ELECTIONS AND REFERENDUMS, AND THE ACTIVITIES OF POLITICAL PARTIES AND CANDIDATES.

1 Ireland should review the Electoral Act and examine whether it allows Ireland to uphold its commitments under international law on the freedom of association. Given that any human rights advocacy activity could potentially be viewed as “political” in its broadest sense, the Irish Government should examine whether this provision meets the test of the ICCPR to be “necessary in a democratic society” and whether it fulfils the requirement under Article 25 (a) of the ICCPR to give everyone the right and opportunity to “take part in the conduct of public affairs, directly...”

2 In general, it does not seem to be advisable to attempt a catch-all definition of “political activities” or “political purposes”, if such a definition is to apply to a range of activities or purposes broader than those pertaining to direct engagement with elections or referendums. As the German experience shows, attempts by the government to provide clarity on the limits of such activity have not been successful and have instead led to decisions being taken in an arbitrary manner. As the Attac case shows, such decisions can have substantial and lasting consequences for the activities of CSOs engaged in widescale public campaigning. By contrast, Netherlands and Finland have not attempted, as Ireland has through the Electoral Act, to define the meaning of “political purposes.” The Irish government could consider these approaches as a better model for providing the minimum level of regulation and allowing CSOs to play their full role in Ireland’s democracy.

3 A clear distinction should be made between CSO activities of CSOs which are considered to be “electoral” and those which are “political” but “non-electoral.” The former category of activities, including explicit support for a particular candidate or party in an election, or campaigning for a particular outcome during a referendum, should be subject to rules set down in the Electoral Act, as would apply to all actors seeking to influence the outcome of an election or referendum. Anything outside that specific realm of “electoral” activity, including public advocacy work which seeks to influence the content of laws and policies, should not be subject to specific restrictions or regulation under Irish law, beyond laws governing the activities of CSOs in Ireland in general.

4 Regarding the definition of “charitable purposes,” this study also reveals that attempts to be overly specific can lead to a lack of clarity. In Finland, a much more liberal approach is taken, which could also be considered in Ireland, with a view to reform of Section 3 of the Charities Act 2009. This would mean moving away from specifically listing the types of charitable purpose that exist, which is problematic for a number of reasons, including the specific exclusion of “human rights” as a charitable purpose in Irish law. An alternative approach is to adopt an omnibus term for all charitable activities which promote the public good. So long as they are lawful, the means of achieving that public good, be it service provision, promotion of human rights or public advocacy, should not be defined.

5 Self-regulation plays a much more central role, particularly in Netherlands, than it does in Ireland. The government, working closely with civil society representative bodies, could consider whether such an approach could work in an Irish context.

6 Ireland should continue to show leadership in defence of civil society, human rights defenders and civic space on the international stage. That strong international role should be supported at home through the promotion of a vibrant civil society as a social good and the creation of the space for continuous dialogue between government bodies and civil society representatives. This could include a regular forum between CSOs and governments where civil society representatives can discuss the impact of regulation on civil society. It could also involve “bigger picture” conversations involving groups from all sections of society in Ireland about the value and role of civil society in the future of Ireland’s democracy.

7 There is a more fluid delineation between political activities and civil society in Netherlands, Germany and Finland, placing them closer to international and European guidance which states that CSOs should be free to play a role during elections and referendums. Regardless of the regulatory approach to be taken, the Irish Government is encouraged to avoid adoption of artificial distinctions between “civic” and “political” activities of CSOs. In this light, one option could be to engage in or support a series of dialogues with civil society in Ireland with a view to reflecting on our shared conception of what civil society is, how it relates to “political society” and what the roles are of all actors in Irish democracy.

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