



**WESTMINSTER  
FOUNDATION FOR  
DEMOCRACY**



**UNIVERSITY OF  
BIRMINGHAM**

# DEFENDING DEMOCRACY

## WHEN DO PARLIAMENTS PROTECT POLITICAL SPACE?

**Susan Dodsworth**

s.dodsworth@bham.ac.uk

**Nic Cheeseman**

n.cheeseman@bham.ac.uk

INTERNATIONAL DEVELOPMENT DEPARTMENT,  
UNIVERSITY OF BIRMINGHAM

Governments seeking to close political space have a number of tools at their disposal. One popular tactic is to suppress civil society by restricting foreign funding, controlling registration and imposing onerous reporting requirements. Parliaments often aid and abet executives in this process, even in purportedly democratic states. This paper examines when parliaments protect political space by rejecting restrictive civil society laws. In doing so, it identifies several factors that shape the success (or failure) of international efforts to motivate legislatures to defend democracy. Two paired comparisons – one of Kenya and Uganda, and another of Kyrgyzstan and Kazakhstan – expose the importance of local actors and the critical role of the incentives that face individual legislators.



*In July 2014, government attempts to restrict NGOs' interactions with journalists triggered protests in Sri Lanka.*

Photo: Vikalpa/Groundviews/Maatram (CC BY 2.0)



*Restrictive NGO laws triggered protests in Phnom Penh, Cambodia.*

Photo: Daniel Hjort (CC BY-NC-ND 2.0)



*Support for LGBTI rights has been used to discredit civil society groups in several countries, including Russia and Uganda.*

Photo: Marco Fieber (CC BY-NC-ND 2.0)



## KEY LESSONS

---

- When the right interventions are employed in the right context, parliaments can be persuaded to defend democracy by resisting laws that seek to constrain civil society.
- The way in which legislators do this will be shaped by the parliament's rules and procedures. Resistance may not always mean rejecting laws outright.
- Two factors influence the success – or failure – of the strategies that international actors use to motivate parliamentarians to defend democracy: (i) the strength of international leverage; and (ii) the nature of the electoral system.
- Forceful diplomacy has limits; it can trigger backlash and is vulnerable to shifting circumstances, so rarely has enduring effects.

## IMPLICATIONS

---

- The international community needs to find ways of protecting civil society that are not seen as being externally imposed.
- Strong diplomatic pressure is not always the best solution.
- Locally grounded solutions are critical but work best when their foundations are built in advance, and when campaigns are sustained over time.
- Parliaments can be valuable allies for international actors seeking to preserve political space. However, their willingness to defend democracy cannot be assumed.

## OUR COLLABORATION

This policy paper is the product of a collaboration between the Westminster Foundation for Democracy and the International Development Department at the University of Birmingham. That collaboration – the Political Economy of Democracy Promotion Project - aims to identify the conditions under which democracy support activities are successful, and explain how such interventions can be improved. More detail about the project, including copies of all our policy papers, is available on the project website: <https://democracypromotion.wordpress.com/>. The views expressed in this paper are those of the authors, and may not reflect the views of WFD.

Civil society is critical to the success of democratization. In the 1990s, southern African trade unions – such as the Zambia Congress of Trade Unions played an important role in transitions to multi-party elections. More recently, civil society generated much of the momentum that drove “colour revolutions” in Eastern Europe and Eurasia, including Georgia’s Rose Revolution in 2003 and Ukraine’s Orange Revolution in 2004/2005.

The importance of civil society in democratisation explains why governments around the world – some already authoritarian, but also some more democratic – have employed a wide variety of tactics to restrict, control and harass Civil Society Organisations (CSOs). Between 2012 and 2015, more than 120 laws restricting the operation of civil society were proposed or enacted around the world.<sup>1</sup> These have included burdensome registration processes, restrictions on foreign funding – often in the form of funding caps or requirements to register as a “foreign agent”, onerous reporting requirements, and a range of other mechanisms designed to increase government control over the activities and internal structures of CSOs. Where such laws are introduced, the government commonly paints civil society as a threat to stability, manipulating the existence of radical groups (real, or imagined) to pass anti-terror legislation that enables them to exert control over non-state actors.

Policy makers in established democracies have struggled to develop an effective response to attacks on civil society overseas. Saskia Brechenmacher observes that diplomatic efforts to defend civil society have often been hesitant and incoherent because of Western government’s competing security and geopolitical interests.<sup>2</sup> She also points to constraints imposed by internal divisions within US administrations and between European governments, where there has been disagreement about the relative effectiveness of a forceful diplomacy versus continued engagement and behind the scenes pressure.

The struggle to develop effective responses has been particularly acute with respect to attempts

1 Douglas Rutzen. 2015 ‘Civil Society Under Assault’. *Journal of Democracy* 26 (4): 28-39.

2 Saskia Brechenmacher. 2017. *Civil Society Under Assault: Repression and Responses in Russia, Egypt, and Ethiopia*. Washington, D.C.: Carnegie Endowment for International Peace.

to constrain civil society through legal regulation.<sup>3</sup> Western donors and international organizations routinely make diplomatic appeals to reject overly restrictive laws to legislatures, often having provided them significant financial support. In October 2016, for example, Human Rights Watch unsuccessfully appealed to the Parliament of Bangladesh – an institution that has benefited from parliamentary strengthening programmes funded by both the United States Agency for International Development (USAID) and the United Kingdom’s Department for International Development (DFID) – to repeal The Foreign Donations (Voluntary Activities) Regulation Act 2016. That law imposed a variety of restrictions on groups receiving foreign funding, including a requirement to seek government approval for virtually all their activities.

Many parliaments, including that of Bangladesh, ignore diplomatic appeals and approve restrictive laws. Indeed, some authoritarian rulers are quite strategic, deliberately using parliamentary votes as a way of legitimating the closure of political space for civil society. Parliamentary approval of laws that seek to restrict or repress civil society is not, however, a *fait accompli*. In some cases, parliaments do resist. In this paper, we examine the question of when parliaments protect political space by rejecting laws that seek to restrict or repress civil society, and the extent to which the activities of democracy supporters have encouraged them to do so.

## THE SHORTCOMINGS OF THE OBVIOUS ANSWER

We might expect parliaments to defend civil society in more democratic countries, but not in more authoritarian ones. Yet several recent cases – which we discuss in Box 1 and Box 2 – make it clear that while the level of democracy might be an important background factor, it cannot fully explain why some parliaments act to protect political space and others do not. If the existing level of democracy cannot fully explain when parliaments do – and do not – defend civil society, what does? To answer this question, it is necessary

3 Thomas Carothers and Saskia Brechenmacher. 2014. *Closing Space: Democracy and Human Rights Support Under Fire*. Washington, D.C.: Carnegie Endowment for International Peace, 2014.

to move beyond structural factors – such as the level of democracy – to focus on the incentives that motivate individual legislators. It is well established that incentives have a critical impact on how Members of Parliament (MPs) respond to the programmes of those seeking to support democracy.<sup>4</sup> Yet parliamentary incentives remain very poorly understood. This has hampered efforts by practitioners to design programmes that foster more constructive relationships between parliaments and civil society. They know that legislators' incentives matter, but research offers little insight into how the interventions of international actors affect those incentives.

This policy paper is based on research supported by Westminster Foundation for Democracy (WFD) – an organisation that works closely with parliaments in newer democracies. The paper helps to fill this gap, drawing on two paired comparisons – Kyrgyzstan and Kazakhstan, and Kenya and Uganda – and focussing on recent legislative debates. Each of those legislative debates centred on the introduction of new laws, or the amendment of existing laws, that regulate

the registration, funding and activities of CSOs. In one case that regulation was limited to Non-governmental Organisations (NGO) (Uganda), in the others it was applicable to CSOs – a broader group that includes, but is not limited to, NGOs.<sup>5</sup> In focussing on one particular tactic over others, we recognize that that we cannot speak to every case of civil society repression. We focus here because these laws are a central part of the would-be dictator's "arsenal," enabling them to control civil society without outright repression. Together with the veneer of legitimacy provided by parliamentary endorsement, this makes them one of the more effective means of closing political space. In two of our cases – Kazakhstan and Uganda – parliaments adopted new laws that imposed a variety of restrictions on civil society. In the other two cases – Kyrgyzstan and Kenya – the parliaments ultimately rejected such laws.

Our most important finding is that the interventions of international actors can influence the incentives that drive parliamentary behaviour, but so too can locally-grounded campaigns driven by domestic civil society. Which kind of intervention is most

4 Greg Power. 2011. 'The Politics of Parliamentary Strengthening: Understanding Political Incentives and Institutional Behaviour in Parliamentary Support Strategies'. London: Westminster Foundation for Democracy and Global Partners & Associates, 2011.

5 CSOs can include community-based organizations and village associations, environmental groups, women's groups, farmers' associations, faith-based organizations, labour unions, cooperatives, professional associations, chambers of commerce, independent research institutes and not-for-profit media.

## BOX 1

### A SURPRISING DEFENCE OF DEMOCRACY IN MYANMAR

In July 2013, Myanmar's government proposed a new Draft Law on Associations. This contained a number of draconian provisions that would have left domestic and foreign NGOs vulnerable to government repression, including criminal sanctions for joining unregistered NGOs. The draft triggered vociferous objections from civil society. However, to the surprise of many, members of Myanmar's legislature, the Assembly of the Union (Pyidaungsu Hluttaw) met with CSOs to discuss their complaints. These consultations ultimately produced the far more liberal Associations Registration Law 2014. Although the Assembly retained some ambiguous – and thus potentially problematic – provisions, it did far more to protect space for civil society than we would expect based on Myanmar's level of democracy alone. In 2014, Freedom House categorises the country as "Not Free" and the legislature was dominated by the military-backed Union Solidarity and Development Party, a party whose democratic credentials are highly questionable.

likely to succeed depends on two factors. One of these relates to the international dimension of democratisation – leverage, the vulnerability of foreign governments to the pressure exerted by Western states.<sup>6</sup> The other is domestic – the electoral system. While these are unlikely to be the only factors that matter, both play an important role in shaping legislators' incentives, and thus the kinds of arguments that can persuade them to protect civil society. Our analysis also reveals that there are often serious divisions within both legislatures and ruling parties. With the right incentives, MPs from ruling parties can be motivated to block restrictive laws, though they often use parliamentary procedures to avoid outright opposition to the Executive.

## PROTECTING POLITICAL SPACE IN EAST AFRICA

East Africa is a region where attempts to restrict civil society through the introduction of new laws have become common place. Yet, while the general trend across East Africa has been

<sup>6</sup> For discussion of the role of leverage in democratization see: Steven Levitsky and Lucan Way. 2015. 'International Linkage and Democratization'. *Journal of Democracy* 16 (3): 20–34.

towards the closure of political space, there has been substantial variation in how effective attempts to resist that closure have been. One point of variation is how successful locally led campaigns have been in persuading their national legislatures to defend them.

### **Kenya:** *Amendments to the Public Benefits Organisations Act*

Civil society is an important political actor in Kenya, one that has helped to push the country towards democracy at several critical junctures. Kenya also has a Parliament that has begun to emerge as an independent and genuine check on executive power, and which operates in the context of elections that are genuinely competitive, if not entirely free and fair. In 2012, the Parliament passed the Public Benefits Organizations (PBO) Act with President Mwai Kibaki signing it into law in early 2013. Many – including Kenyan CSOs – regard the PBO Act as representing “best practice” in regulation of the sector, albeit with one important caveat: it is not yet in force because the relevant Minister has refused to gazette a date for its commencement. Since 2013 there have been several attempts

## BOX 2

### CLOSING SPACE AGAINST A DEMOCRATIC BACKDROP IN HUNGARY

In April 2017, three government MPs introduced the Draft Law on the Transparency of Organisations Receiving Support from Abroad in Hungary's National Assembly. The law, purportedly intended to prevent money laundering and the financing of terrorism, included provisions requiring organizations that receive foreign funding above a certain threshold (7.2 million forints – approximately \$26,200 – a year) to register as “foreign funded.” This was widely seen as an attempt to stigmatize CSOs critical of the government. The Council of Europe's Commissioner for Human Rights wrote to the Speaker of the National Assembly urging its members to reject the draft law, and the Venice Commission issued an opinion that criticised both the process through which the law had been developed, and its contents. Despite this, and despite Hungary's status as a semi-consolidated democracy, the National Assembly passed the law in June 2017. International NGOs, such as Amnesty International, condemned it as a deliberate and vicious assault on civil society.

to amend the PBO Act in a manner that would convert it from a progressive law, into one that is far more restrictive. The first of these took the form of the Miscellaneous Amendment Bill 2013. This included a proposal to cap the amount of foreign funding that organizations registered under the PBO Act could receive at 15 percent. Given the heavy reliance of most Kenyan CSOs on foreign funds, this would have forced many to seriously curtail their activities. Other proposed amendments significantly expanded the discretionary powers of the body responsible for the registration of PBOs, with the potential to substantially increase the government's control over their activities.

The proposed amendments triggered a robust and co-ordinated response from local CSOs. Though several INGOs – including Human Rights Watch and Amnesty International – made statements criticising the proposed amendments, domestic organisations – spearheaded by the Civil Society Organisation Reference Group (Reference Group) – assumed the leading role in a politically smart campaign that focussed on the potential developmental, rather than democratic, impact of the amendments. That campaign saw civil society deliberately target MPs – elected to represent single-member constituencies on a First-Past-The-Post (FPTP) basis – whose electorates were most reliant on non-government actors to provide basic services. These MPs, many representing remote and semi-arid areas such as Garissa, were targeted with warnings that the proposed funding cap would dramatically reduce the ability of NGOs to meet provide services. Civil society targeted these MPs in meetings, and through a text message campaign that urged voters to contact their MP.

Records of debates in the Parliament suggest that these targeted, constituency-level arguments resonated strongly with MPs. Members of the opposition grouping, the Coalition for Reforms and Democracy (CORD), made the strongest objections, with many drawing an explicit link between their opposition to the amendments, and the potential impact of the funding cap on service delivery in their constituency. John Mbadi Ng'ongo, the MP for Suba and the Chairperson of the Orange Democratic Movement (ODM, a member of CORD) explained his objections in this way during the debate:

*World Vision is carrying out a massive project in my constituency, distributing water to almost a whole sub-location. You are now telling me that I should sit in this House and legislate to restrict funding to certain organizations to just a mere 15 percent of the budget. You are telling me that my people in Suba, who have not been drinking clean, that I should stop them from getting clean water ... It is immoral and unacceptable.<sup>7</sup>*

Others spoke in more general terms, emphasizing the potential impact on more remote parts of the country. While the official record of the debate captures far less criticism from government MPs, this is likely due to the fact that more progressive members of the government elected to strategically absent themselves from the House rather than oppose the government directly.

A critical feature of Kenyan civil society's campaign against the amendments to the PBO Act was that it did not begin when those amendments were first proposed in October 2013, but before. Between June and August 2013, the Reference Group, with support from several INGOs, held a series of meetings with CSOs in different regions. These consultations educated local groups about the PBO Act and how it would benefit them. It was not entirely coincidental that these meetings took place before the first attempt to amend the PBO Act. After the change of government in 2013, Kenyan CSOs anticipated an attempt to amend the PBO Act was likely, in part because of their earlier support for the International Criminal Court's (ICC) indictment of the incoming President. This foresight proved valuable; the existence of a constituency already motivated to defend the PBO Act increased the electoral costs of amending the PBO Act for MPs.

Notably, civil society did not cease its advocacy around the PBO Act after the Parliament rejected the proposed amendments in December 2013. Instead, between March and May 2014, the Civil Society Reference Group held another round of regional meetings, in part because "We [civil society] knew they would come back, because they said they would" (Interview, 17 March 2017). Again, this foresight proved valuable; civil society was able to leverage this to ensure that

<sup>7</sup> National Assembly of Kenya, Official Report, 4 December 2013.

subsequent attempts to amend the PBO Act – in late 2014 and again in 2015 – failed.

International actors played a supportive but subsidiary role. While donors helped on strategy, INGOs provided logistical and financial support that made both the regional meetings, and engagement with the Parliament possible. Western governments exerted some diplomatic pressure, with several Ambassadors attending and making statements at meetings between civil society and parliamentarians. However, in doing so they understood that playing too overt a role might play into the hands of government accusations that civil society is a mouthpiece for foreign governments. Their diplomatic statements, which emphasized the importance of the PBO Act in terms of national development and democracy, kept the PBO Act on the agenda. Though the Kenyan government appears to have abandoned attempts to amend the PBO Act, the victory of civil society remains incomplete. The PBO Act is still not in force, a state of affairs that CSOs continue to challenge in court.

## ***Uganda: The Non-Governmental Organisations Act***

Civil society faces significantly more challenges in Uganda than in Kenya. In the absence of term limits, President Museveni has demonstrated a distinct disinclination to relinquish power. Elections are held on a regular basis, but it is clear that they do not take place on a level playing field. Civil society remains vibrant but vulnerable; their activities are tolerated so long as they are politically and socially acceptable to the Government. Harassment of political activists and intolerance of dissent has increased in the last few years, with the Public Order Management Act 2013 often used to prevent opposition critical NGOs from holding protests and meetings.

Though generally regarded as having acted as a greater check on the Executive during the era of “no party democracy”, Uganda’s Parliament is one of the more independent legislatures to have emerged in Africa. Dominated by the ruling National Resistance Movement, it does sometimes defy the wishes of the Executive. This has not, however, been the case with

respect to Uganda’s NGO laws. In April 2015, the government gazetted a new Non-Governmental Organisations Bill (NGO Bill). CSOs immediately raised concerns that it would close political space by increasing government control over their funding and activities. The Bill proposed a requirement to seek permission from new District NGO Monitoring Committees to operate in each area of the country. It also included a vaguely worded prohibition on engaging in activities “prejudicial to the interest of Uganda and the dignity of the people of Uganda” (Section 44(f) in the Act), and gave the NGO Bureau power to “black list” NGOs (Section 7(b)(iv) in the Act).

A small group of CSOs launched a spirited campaign against the new NGO Bill. This was primarily a reactive campaign, picking up speed only after the draft had been gazetted. While drafting of the Bill had begun in late 2013, it was only in late April 2015 the National NGO Forum (an umbrella group whose membership includes a wide range of groups) convened a Civil Society Leaders Strategy meeting that sought to develop a joint engagement strategy. Following this, there was a flurry of consultations – between civil society leaders, who sought to develop a common position on the Bill – as well as between civil society and the NGO Board, donor community and MPs in May 2015. This fed into the public hearing of the parliamentary Committee on Defense and Internal Affairs, at which several NGOs made statements in broad national terms. Though they emphasised the potential impact on both advocacy and service delivery, the campaign was not grounded at the constituency level as in Kenya, despite an electoral system<sup>8</sup> that – like that of Kenya – provided a clear line of accountability from MPs to voters.

The report of the Committee suggests that CSOs statements had little impact on MPs. Its report endorsed the narrative that groups who criticised the government were dishonest and re-iterated the government’s belief that NGOs were a security threat. The voting record suggests that these broad arguments failed to motivate MPs to defend civil society. Despite the efforts of civil society to rouse parliamentarians to their defence, the Parliament passed the bill unanimously in November 2015. Though MPs made several progressive amendments, the most problematic

<sup>8</sup> As in Kenya, most Ugandan MPs are elected from single member constituencies using FPTP.

provisions remained. The President signed the Bill several months later, and it became the NGO Act 2016.

While INGOs spoke out strongly against the NGO Bill, the diplomatic response was muted. In July 2015, the US Ambassador released a statement explaining that donors were watching the progress of the draft NGO Bill with great interest, stressing the role that NGOs played in national development, including their role as implementers of much of the US's development assistance. Other aid donors used a National Civil Society Fair to make similar comments, avoiding direct criticism in favour of comments that stressed the need to create an enabling environment given NGO's contributions to national development. Of all the donors active in Uganda, only the EU delegation made a written submission to the relevant parliamentary committee, though representatives from the German aid agency, GIZ, did attend the committee's hearings on the NGO Bill.

### *The importance of domestic actors*

In both Kenya and Uganda, domestic campaigns against restrictive civil society laws were far more prominent than diplomatic pressure. Yet the campaign in Kenya was clearly more successful than in Uganda – why? The nature of those campaigns seems to have been a crucial factor. In both countries, civil society emphasized the potential developmental impact of the proposed laws. However, in the Ugandan case these arguments were made in broad, national terms. For example, the joint-position paper produced by CSOs pointed out that NGOs provided about 40% of health services in the country. In contrast, CSOs in Kenya ran a more politically savvy campaign that aimed to shift the incentives of specific MPs on a targeted basis. Their campaign extended well beyond Nairobi. This was important, because MPs from more remote areas were far more vulnerable to backlash from constituents who relied on services delivered by NGOs with foreign funding. Another significant difference between Kenya and Uganda is the pro-active response of civil society in the former. While Ugandan CSOs appear to have swung into action only after the NGO Bill became a “live” issue, Kenyan CSOs saw trouble coming and

took steps to build the support base they knew they would need to coax MPs into action.

The level of democracy may have played a role – though not a direct cause of the outcomes we see, it helped to make those outcomes possible. It is undeniable that there is more genuine political competition in Kenya, where political power has changed hands via the ballot box several times. This made the potential for electoral backlash far greater in Kenya than in Uganda, making it easier for CSOs to give MPs an incentive to reject amendments to the PBO Act.

## **DEFENDING CIVIL SOCIETY IN CENTRAL ASIA**

Governments in Central Asia have not had to look far for demonstrations of how civil society might be contained. Many have drawn inspiration from Russia's “foreign agents law,” which requires organizations that engage in “political activities” to register as “foreign agents” if they receive foreign funding. Kyrgyzstan provides one example where this was the case, though – to the surprise of many – the Kyrgyz Parliament ultimately rejected the proposed law.

### ***Kyrgyzstan: The Foreign Agents Law***

Kyrgyzstan adopted a new constitution in 2010 in the aftermath of a “revolution” that saw the increasingly authoritarian President Kurmanbek Bakiyev deposed in favour of a more democratic government. Although the 2010 constitution introduced a parliamentary system, the President – currently Almazbek Atambayev – remains at the centre of political power. Civil society is relatively active, and among the strongest in the region, but is concentrated in the capital, Bishkek. Kyrgyzstan's elections may not take place on a level playing field, but they are far more competitive than those of its neighbours, including Kazakhstan. However, in the last few years Kyrgyzstan's political trajectory appears to be taking it away from democracy; in 2017, Freedom House changed the country's classification to “consolidated authoritarian regime”.

One marker of the shift away from democracy occurred in September 2013, when several deputies in the Supreme Council (Jogorku Kenesh, Kyrgyzstan's unicameral parliament) proposed a series of amendments, primarily to the Non-commercial Organisations Law, under which CSOs are registered. Though cast as a parliamentary initiative, civil society activists report that parliamentary proponents of the law were acting with the encouragement of the State Committee on National Security (Interview 6, 24 May 2017). The amendment bill became known as the "Foreign Agents Law" because it was so clearly modelled on the Russian example.

As with Russia's law, the most problematic provisions would have required organisations receiving foreign funds to register as "foreign agents" – a highly pejorative term generally seen as synonymous with "spies". This provision had the potential for far-reaching impact; at present, the majority of CSOs in Kyrgyzstan are heavily reliant on funding from foreign sources. The draft law also provided for the introduction of onerous reporting requirements, some so costly that they would have made it difficult for smaller organisations to continue to operate. The proposed law also granted the agency responsible for registering organisations as "foreign agents" extensive powers to oversee (and potentially interfere with) their activities. This included the power to inspect these organisations without notice, and appoint a representative to participate in their activities.

A small core of CSOs mounted a campaign against the Foreign Agents Law. At first, this campaign struggled to get traction, it became clear that progressive parliamentarians lacked the numbers to defeat the bill. Instead, they used parliamentary procedures to secure a delay. During the second reading debate in April 2016, the bill was pared down to leave only the new reporting requirements. In the meantime, parliamentary elections took place; the party associated with the President, the Social Democratic Party (SDPK) won the largest number of seats. While it lacked a majority, the presence of several pro-Russia parties meant the new legislature was widely expected to pass what remained of the Foreign Agents Law. To the surprise of many, the Supreme Council rejected the bill completely.

Interviews we conducted suggest that the diplomatic response of Western actors was an important factor in the Parliament's rejection of the Foreign Agents Law. At various stages in the debate, INGOs, of whom Human Rights Watch was the most vocal, made statements calling on parliamentarians to reject the law, as did multilateral organizations such as the United Nations' (UN) Office of the High Commissioner for Human Rights (OHCHR). These statements set out principled arguments that made reference to international human rights standards and the potential damage to Kyrgyzstan's international reputation. Those arguments were also elaborated at length in a joint opinion issued by the Venice Commission<sup>9</sup> and the OSCE's Office for Democratic Institutions and Human Rights (ODIHR) in October 2013, at the request of several members of the Supreme Council. Similar, if less legalistic, versions of these arguments were consistently reinforced by representatives of international donors in high level meetings with government.

While diplomatic pressure was important, it did not so much change the mind of deputies, as create space for them to more honestly express their preferences by eroding the Executive's enthusiasm for the law. In interviews, civil society activists cited the Presidential trip to Brussels – during which he was reportedly warned of a likely cut in aid if the Foreign Agents Law was adopted – as a critical turning point, after which the President's attitude clearly changed. This was important; local campaigners had initially found it difficult to get traction with principled arguments that appealed to international standards and treaties because deputies were unwilling to challenge directions given by their party or factional leaders. Even those parliamentarians sympathetic to civil society avoided promises to directly oppose the bill, instead telling activists they would attempt to delay it. Once the President's position on the law became more ambivalent, a direct rejection of the law was less politically costly.

---

9 The European Commission for Democracy through Law, commonly known as the Venice Commission.

## **Kazakhstan:** *The Operator Law*

Kazakhstan is clearly more authoritarian than Kyrgyzstan – a challenge for any attempt to defend civil society – but it is less repressive than other post-Soviet states in Central Asia. Western observers typically describe Kazakhstan's elections as efficiently administered, but falling a long way short of democratic standards. Politics is dominated by a small group of political elites, many of whom are related to President Nursultan Nazarbayev, who has held power since the fall of the Soviet Union. Harassment of political activists and independent journalists is common, with several individuals jailed for organising protests, alleged corruption, or “disseminating false information” in the last few years. The President's ruling party “Nur Otan” (Light of the Fatherland) has a comfortable majority in the Mazhilis (lower house), while the Senate is nominally non-partisan.

It is therefore unsurprising the Parliament did little to protect political space when, in 2015, the government proposed the law “on Introducing Changes and Amendments to Several Legal Acts of the Republic of Kazakhstan on the Question of the Activities of Nongovernmental Organizations.” Several aspects of the law had the potential to restrict the political space available to CSOs in Kazakhstan. The most notable of these increased government control of NGO funding via the establishment of a single state “Operator,” responsible for determining which NGOs would be given funding, and for what purposes. NGOs and INGOs expressed fears that the law would allow the government to starve more critical groups of funds, though the extent to which it would affect foreign funding was (and remains) unclear. The law also introduced requirements for NGOs to submit detailed documentation, including sensitive information about employees, to a government database, and imposed a registration process with the potential to restrict NGO activity to the social sphere. Despite objections from CSOs, the law passed very swiftly through the Parliament. The lower house approved it in back-to-back first and second readings in late September 2015, and while the Senate took slightly more time, President Nazarbaev had signed the law by December 2015.

In contrast to Kyrgyzstan, the response from international actors was neither particularly forceful, nor particularly timely. The US was to some extent an exception; the US Ambassador to the OSCE raised the issue in the OSCE Permanent Council in January and May 2015, calling for greater clarity around the role of the Operator, and cautioning against attempts to use it as a means of controlling civil society. For the most part, however, diplomatic objections to the law only became clear after the bill had passed through the lower house. Moreover, that concern was expressed primarily by rights-focused intergovernmental organizations, rather than foreign embassies (though it is possible that the latter did raise the issue behind closed doors). On the day, the lower house assented to the bill, 8 October 2015, the UN High Commissioner for Human Rights expressed concern that its vague wording left space for arbitrary and discriminatory application.

A number of local NGOs and CSOs, campaigned against the law by making joint statements with INGOs, such as the International Federation for Human Rights. While Human Rights Watch expressed concern about the bill and called for amendments while it was under debate in the Senate, many these appeals were made to the President, imploring him not to sign the draft law after it had been passed by the Parliament. When it came to engagement with parliamentarians, CSOs failed to get traction with their arguments. One human rights activist who heads a prominent NGO (Amangeldy Shormanbaev, from the International Legal Initiative), described their attempts to engage with parliamentarians:

*There were parliamentarians who initially supported us ... The rest didn't listen to us. Maybe their minds were already made up. One could see many of them didn't quite know what the NGO sector was about, and didn't care. Whenever they don't care, they follow the state line – control everything, keep an eye on everyone.<sup>10</sup>*

Clearly, neither diplomacy nor domestic campaigning did much to motivate parliamentarians to resist the introduction of new restrictions.

<sup>10</sup> quoted in Andrei Grishin. 12 December 2015. ‘Dismay as NGO Law Goes Through Kazakhstan’. *Kazakhstan International Bureau for Human Rights and Rule of Law*. [https://bureau.kz/en/news/kibhr\\_information/dismay\\_as\\_ngo\\_law/](https://bureau.kz/en/news/kibhr_information/dismay_as_ngo_law/).

## *Diplomacy can make a difference*

We argue that the contrast between Kyrgyzstan and Kazakhstan shows that diplomacy can work, but that successful diplomacy takes time and sustained effort. In Kyrgyzstan, the domestic campaign initially struggled to convince deputies to reject the Foreign Agents Law, however it was sufficient to buy time. This was important, because it was only over a longer period that diplomatic pressure had an effect, gradually shifting the attitude of the President and so creating a political climate in which deputies were more willing to openly oppose the law. The contrast between these cases also suggests that pressure from international actors tends to be more effective when it is channelled through local intermediaries. The joint opinion of the Venice Commission/ODIHR was influential in Kyrgyzstan in part because it had been actively sought by some members of the Supreme Council, rather than external actors. This made it a “very useful” tool for influencing the parliamentary debate (Interview, 26 May 2017). In contrast, the opinion of the Venice Commission had little impact in Hungary (see Box 2), where it had been sought by external actors – the Parliamentary Assembly of the Council of Europe – rather than local ones.

There is of course, no guarantee that a more forceful and sustained diplomatic campaign would have produced a different result in Kazakhstan, even had it been one channelled through local intermediaries. Indeed, there is a significant chance of selection bias here: diplomats may have chosen not to launch a stronger campaign in Kazakhstan precisely because they thought it would be unlikely to succeed. Diplomatic influence is a finite resource, and there is a limit to what it can achieve. Western governments and INGOs are unlikely to invest in sustained diplomatic campaigns unless they judge the targets of those campaigns to be vulnerable to such pressure.

## **LEARNING FROM SUCCESS**

Most research on the closure of political space available to civil society has focussed on cases like Russia, Egypt and Ethiopia, where efforts to defend that space have clearly failed. Yet it is

vital to examine cases of success, both to ensure we have the full picture, and because cases of success tend to offer more useful “lessons learned” for policy makers. Thus, a comparison of the two cases of relative success in defending civil society space – Kyrgyzstan and Kenya – is valuable, even if both of those successes were qualified.

The contrast between those two cases highlights two factors that affect the ability of international actors to shape the incentives of legislators – one is the electoral system. In both countries, this shaped the responsiveness of MPs to the campaigns mounted by domestic civil society, as well as the kinds of arguments that gained traction with parliamentarians. In Kenya, MPs are elected in single member districts using FPTP. This makes them a clear target for blame should constituents be adversely affected by legislation, such as amendments to the PBO Act. By contrast, Kyrgyzstan’s electoral system blurs the chain of accountability between voters and representatives to a much greater extent. There, deputies are elected on a proportional basis from a single nation-wide constituency, using a closed party-list system. This difference appears to have had an important influence on the kinds of arguments that were used to persuade MPs to defend civil society. While in Kenya the arguments that gained traction were those that emphasized the potential adverse impact on specific regions, in Kyrgyzstan the critique of the Foreign Agents Law was overwhelmingly phrased in national terms.

The contrast between Kyrgyzstan and Kenya also lays bare the fact that historical context and international relations plays an important role in shaping the way that MPs respond to external interventions in defence of civil society. In general, the literature assumes that where the leverage is strong – that is, where the targets for diplomacy are vulnerable to Western pressure by virtue of their reliance on foreign aid and trade relationships, for example – the greater their ability to defend democracy<sup>11</sup>. While this may be true in general, it is important to note that in the context of protecting civil society, perceptions of external intervention – especially from states with a colonial past – may prove counterproductive, undercutting Western leverage.

11 Steven Levitsky and Lucan Way. 2015. ‘International Linkage and Democratization’. *Journal of Democracy* 16 (3): 20–34.

In Kenya, the legacy of colonialism has a lingering effect on how Western support to civil society is perceived. This was particularly true when the amendments to the PBO Act were proposed – at the time the ICC was pursuing a case against Kenya’s President, Uhuru Kenyatta, for crimes against humanity in connection with post-election violence in 2007 and 2008. The President’s indictment – something that some Kenyan activists had campaigned for – coloured much of the debate about the proposed amendments. Even in Kyrgyzstan – where the legacy of Western colonialism was absent – there was also a risk that excessively assertive diplomacy might undermine the legitimacy of the campaign against the Foreign Agents Law. In an interview, one deputy closely involved in the debate explained that some of their colleagues saw the statements of international actors in a negative way, as interference. In other interviews, activists suggested the statements of some US-based organizations were too forceful, in some instances undermining their attempts to persuade deputies to reject the law.

Put together, these two factors may help to identify the circumstances under which different kinds of responses to restrictive legislative initiatives are more or less likely to succeed. As Figure 1 illustrates, targeted domestic campaigns are more likely to work in countries with FPTP, single-member electoral systems, while diplomacy is more effective where the strength of leverage is not undermined by a problematic colonial past. Both, however, take time to work. In contrast,

countries with both proportional electoral systems and weak international leverage are likely to be the most difficult in which to motivate parliaments to resist laws that would restrict civil society – in the former domestic campaigns will struggle to gain traction, while in the latter diplomacy is likely to trigger backlash.

Many of the reports that examine the shrinking space for civil society criticise Western governments for their hesitant diplomatic responses, implying that if those responses had been more forceful, civil society would be better off. Yet our analysis indicates that concerns about backlash against such strong responses should be taken seriously; more forceful diplomacy is not always a good idea. The international community needs to find ways of protecting civil society that are not seen as being externally imposed – and thus illegitimate. As Thomas Carothers and Saskia Brechenmacher point out, “knowing how to most effectively work in parallel with and in support of local activists’ domestic campaigns against civil society restrictions is particularly crucial.”<sup>12</sup> Helping activists to persuade parliaments that defending them is not only the right thing to do, but in their own interests, is one way of doing this.

<sup>12</sup> Carothers and Brechenmacher, *Closing Space*, 58.

## BOX 3

### OUR EVIDENCE BASE

In this policy paper, our analysis of two of the cases – Kenya and Kyrgyzstan – is supported by short periods of fieldwork in which we carried out a limited number of interviews with leading civil society activists, staff at donor agencies and international NGOs, and (where possible) parliamentarians who engaged more closely in the relevant debates (e.g. members of relevant parliamentary committees). Due to the sensitivity of these debates, and the history of harassment of civil society in the countries concerned, we have preserved the anonymity of interviewees.

		Leverage	
		Weak	Strong
Electoral System	Proportional	NEITHER TACTIC LIKELY TO WORK WELL. BACKLASH MORE LIKELY.	DIPLOMACY MAY WORK OVER TIME. DOMESTIC CAMPAIGNS HELP, BUT MAY STRUGGLE TO GET TRACTION.
	FPTP + single member	DOMESTIC CAMPAIGNS MORE LIKELY TO WORK, IF TARGETED. DIPLOMACY LESS LIKELY TO WORK, MAY TRIGGER BACKLASH.	BOTH DIPLOMACY AND TARGETED DOMESTIC CAMPAIGNS MORE LIKELY TO WORK.

Figure 1

*Likely success of different strategies*

Comparing these the cases of Kenya and Kyrgyzstan highlights the importance of parliamentary rules and procedures in shaping how legislators respond to changed incentives. The reality in many of these cases is that for restrictive civil society laws to be defeated, MPs from the ruling party must be persuaded to vote against their own bloc. This is a daunting prospect in countries where political fortunes are often dependent on maintaining the leader's good will. The cases of Kenya and Kyrgyzstan suggest that in such contexts, MPs can make strategic use of parliamentary rules. In Kyrgyzstan, more progressive MPs used these rules to delay debates on the Foreign Agents Law, buying time to seek an opinion from the Venice Commission and ODIHR. In Kenya, opposition MPs were happy to speak against the amendments to the PBO Act, but it was government MPs who tipped the balance in favour of defending civil society by absenting themselves from the chamber when the time came for a vote.

The key point here is that legislative resistance to attempts to close political space does not always take the form of immediate, outright rejection of restrictive laws on the floor of a parliament. Democracy's defenders may act in a strategic manner, their tactics heavily shaped by the distinct rules and procedures of the institution in which they operate. This is generally not recognised

by current practice, which tends to rely on broad diplomatic appeals to parliaments, calling on them to reject proposed laws entirely. The importance of parliamentary rules and procedures in shaping and facilitating legislators' defence of democracy may create windows of opportunity for organisations – like WFD – that have expertise in this area.

## CONCLUSION

The good news is that when the right interventions are employed in the right context, parliaments can be persuaded to defend democracy by resisting laws that seek to constrain civil society. The bad news is that these victories are often partial or temporary. Both of our "success stories" were qualified; one incomplete, and one vulnerable. In May 2017, Kenya's High Court gave the government 30 days to gazette a day for commencement of the PBO Act, but it remains unclear whether it will comply – similar rulings have been ignored in the past. In Kyrgyzstan, the Supreme Council rejected the Foreign Agents Law, but the campaign against the law left civil society drained and vulnerable to future attacks. This remains a distinct possibility; in early 2017, the President gave a number of anti-civil society speeches, in which he has characterised foreign funded groups as a threat to national security.

Moreover, and as we mentioned at the outset, laws that directly restrict the funding, registration and operation of civil society are just one tool among the many available to executives seeking to curtail political space. Presidents or governments that find more obvious tactics – like the regulation of civil society – unavailable because of recalcitrant parliaments may resort to other, more subtle methods. In Kyrgyzstan, recent Freedom House reports note increased intimidation of civil society activists, including prosecutions for defamation, and surveillance of those working on particularly sensitive issues, such as proposed constitutional amendments. In Kenya, the government's NGO Coordination Board continues to make allegations of financial mismanagement against outspoken NGOs, threatening them with mass deregistration and creating an uncertain operating environment for civil society. These more insidious methods of closing political space are harder for the international community to detect, and less useful as focal points around which civil society can

mobilise opposition.

The availability of more subtle alternatives makes it important to have sustainable, long term interventions that “get ahead of the curve,” a point that has previously been made by Richard Youngs.<sup>13</sup> He observed that international actors have become relatively effective in terms of crisis response, but have yet to develop strategic, long term solutions. The Kenyan case, in which local groups – supported by international actors – built a domestic constituency ready to defend the PBO Act through repeated consultations over an extended period of time, provides some insight into what such solutions might look like. It is not, however, a solution that will work in all cases. As we have discussed above, the electoral system in Kenya shaped the incentives of MPs in a way that helped to make that tactic work. Where proportional electoral systems create a more attenuated link between voters and representatives, such an approach may struggle to gain traction.

Locally grounded solutions have an important role to play because diplomacy is vulnerable to shifting circumstances and so does not always have an enduring effect. The experience of Kazakhstan provides an excellent case in point. In 2005 the Kazakh government abandoned a legislative proposal that would have severely restricted the operation of civil society, largely due to international diplomatic efforts.<sup>14</sup> Those efforts were effective because Kazakhstan was in the process of bidding for the rotating Chairmanship of the OSCE – something that was a top priority for the President, and one that was deliberately exploited by Western diplomats. Unfortunately, as our discussion above lays bare, by 2015, the Kazakh government was far less vulnerable to Western pressure, and so the case previously classed as a diplomatic success became one of failure.

Our analysis suggests that while the willingness of parliaments to defend democracy cannot be taken for granted, they can be valuable allies for international actors seeking to preserve political space. Civil society is vulnerable to attack in part because the support it receives from Western

actors leaves it open to accusations of bias. This problem is magnified by the fact that, in many less established democracies, some parts of civil society are more focussed on protest than on constructive engagement with political institutions, including legislatures.<sup>15</sup> This makes it easier for those in power to maintain the narrative that CSOs are partisan trouble-makers, who do not have the national interest at heart. Developing responses that see both the international community and domestic CSOs engage with parliaments in a more systematic manner may therefore do more to address root causes of the problem.

## FURTHER READING

Brechenmacher, Saskia. 2017. *Civil Society Under Assault: Repression and Responses in Russia, Egypt, and Ethiopia*. Washington, D.C.: Carnegie Endowment for International Peace.

Carothers, Thomas, and Saskia Brechenmacher. 2014. *Closing Space: Democracy and Human Rights Support Under Fire*. Washington, D.C.: Carnegie Endowment for International Peace.

International Center for Not-for-profit Law (ICNL). ‘Civic Freedom Monitor’ ICNL. <http://www.icnl.org/research/monitor/>.

Rutzen, Douglas. 2015 ‘Civil Society Under Assault’. *Journal of Democracy* 26 (4): 28–39.

Youngs, Richard. 2017. ‘Shrinking Space for Civil Society: The EU Response’. Paper requested by the European Parliament’s Subcommittee on Human Rights. Brussels: Directorate-General for External Policies, European Parliament

<sup>13</sup> Richard Youngs. 2017. ‘Shrinking Space for Civil Society: The EU Response’. Paper requested by the European Parliament’s Subcommittee on Human Rights. Brussels: Directorate-General for External Policies, European Parliament, 30.

<sup>14</sup> Darin Christensen and Jeremy M. Weinstein. (2013). ‘Defunding Dissent: Restrictions on Aid to NGOs’. *Journal of Democracy* 24 (2): 77–91.

<sup>15</sup> Richard Youngs. 2015. ‘Rethinking Civil Society and Support for Democracy’ Stockholm: EBA.

