

# Defending democracy: When do parliaments resist restrictive civil society laws?

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*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. Using two paired comparisons – one of Kenya and Uganda, and another of Kyrgyzstan and Kazakhstan – it exposes the critical role of the incentives that face individual legislators. We identify three contextual factors that influence how easy (or difficult) it is to motivate legislators to defend democracy: the existing level of democracy, the strength of international leverage, and the nature of the electoral system. We also identify the kinds of campaigns that are most effective in shifting legislators' incentives. Such campaigns are pre-emptive and sustained, are led by local actors and engage pragmatically with parliamentary procedures.*

## Introduction

Civil society, broadly understood as the set of associations and groups operating outside of the state (Mercer 2002), is often said to be critical to the success of democratization – even though democratization has sometimes occurred in its absence (Molutsi and Holm 1990; Ottaway and Carothers 2000). The significance of civil society is attested to by the determination of many governments – some already authoritarian, but also some more democratic – to deploy a wide variety of tactics to restrict, control and harass Civil Society Organizations (CSOs). Between 2012 and 2015, more than 120 laws restricting the operation of civil society were proposed or enacted around the world (Rutzen 2015b, 30). 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 (Rutzen 2015a). 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. In Kenya, for example, the government has repeatedly linked civil society to security threats, shifting responsibility for regulation of the sector to the security-focussed Ministry of Interior and National Co-ordination.

Policy makers in established democracies have struggled to develop an effective response to attacks on civil society overseas (Brechenmacher 2017). That struggle has been particularly acute with respect to attempts to constrain civil society through legal regulation (Carothers and Brechenmacher 2014). 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 (Human Rights Watch 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. In Kazakhstan, human rights activist Amangeldy Shormandaev observed, “It’s a [government] tactic to say, ‘the members of the parliament did it, so what can we do about it?’” (quoted in Grishin 2015). 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 they do so. We present two paired comparisons – one of Kenya and Uganda, and another of Kyrgyzstan and Kazakhstan – and inductively identify the most significant factors at work in these cases.

In addition to the initial quality of democracy in a given country, we highlight two further contextual factors that influence how easy (or difficult) it is for proponents of democracy to motivate legislators to protect civil society: the strength of international leverage and the nature of the electoral system. We also identify the types of campaigns that are more likely to succeed in influencing the behaviour of parliamentarians. These are campaigns that are pre-emptive and sustained, are led by (or at least channelled through) local actors, and engage pragmatically with the ‘mechanics’ of legislatures. Thus, our explanation directs attention to both structure and agency. No one factor can explain the outcomes that we see on its own, but taken together they can significantly increase the prospect that democracy will be defended in this area.

### **The shortcomings of the obvious answer**

It would be easy to assume that variation in the willingness of parliaments to resist restrictive civil society laws can be explained simply looking at the pre-existing level of democracy. We might expect parliaments to defend civil society in more democratic countries, but not in more authoritarian ones. Yet several recent cases make it clear that while the level of democracy is an important background factor it cannot fully explain why some parliaments act to protect political space and others do not.

One of these cases is Myanmar, where in July 2013, the 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 (Soe 2014). However, in what has been termed an “unprecedented show of collaboration,” members of Myanmar’s legislature, the Assembly of the Union (*Pyidaungsu Hluttaw*) met with CSOs to discuss their complaints (Morgan 2014, 508). These consultations ultimately produced the far more liberal Association Registration Law 2014. Although the Assembly retained some ambiguous – and thus potentially problematic - provisions (ICNL 2017c), 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 categorized the country as “Not Free” and the military-backed Union Solidarity and Development Party, a party whose democratic credentials are highly questionable, dominated the legislature. In such a context, the legislature’s defense of civil society is surprising.

The case of Hungary demonstrates the same point from a different angle, showing that parliaments in more democratic states cannot be counted on to defend civil society by rejecting restrictive laws. 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<sup>1</sup> 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 (Commissioner for Human Rights 2017). Following a request from the Parliamentary Assembly of the Council of Europe, the European Commission for Democracy through Law (commonly known as the Venice Commission) issued an opinion that criticised both the process through which the law had been developed, and its contents (Venice Commission 2017). Despite these criticisms and appeals, and despite Hungary’s status as a “semi-consolidated democracy” (Freedom House 2017), the National Assembly passed the law in June 2017. International NGOs condemned it as “a vicious and calculated assault on civil society” (Amnesty International 2017).

This is not to say that the level of democracy is irrelevant; the scope for CSOs to campaign, and for MPs to hold the government to account, clearly shapes the prospects for the protection of civil society from government attack. The degree of democratization is therefore an important background factor. However, as these cases and those that we discuss below demonstrate, parliaments have sheltered civil society in some authoritarian states and left it to fend for itself in some democratic ones. This raises the question of what other factors need to be taken into account to fully explain when parliaments do – and do not – defend democracy. To answer this question, attention must be paid to the incentives that motivate individual legislators; an area widely acknowledged as important (Power 2011), but poorly understood (Menocal and O’Neil 2012).

### **Our approach**

Our research, which has been supported by the Westminster Foundation for Democracy (WFD) – an organization that works closely with parliaments in newer democracies<sup>2</sup> – helps to fill this gap, drawing on two paired comparisons – Kyrgyzstan and Kazakhstan, and Kenya and Uganda. To the extent that it is possible, these pairs enable us to hold region and past political history constant, while generating variation on our outcome: protection of civil society. Kenya and Uganda border each other in East Africa and are both former British colonies. Kyrgyzstan and Kazakhstan border each other in Central Asia and are post-communist states that emerged from the breakup of the Soviet Union. Within each comparison we are therefore able to deploy a “most-similar” approach (Anckar 2008). While parliaments in Kazakhstan and Uganda adopted new laws that imposed a variety of restrictions on civil society, those in Kyrgyzstan and Kenya did not.

Following Laurence Whitehead’s (2002) invocation of the value of pairwise comparisons that draw out the lessons of paradigmatic cases, we focus on Central Asia and East Africa because this allows us to learn lessons from the two regions in which restrictions on civil society have become particularly common (Rutzen 2015b; ICNL 2016). In selecting cases of “failure” we have deliberately excluded more authoritarian options – such as Ethiopia or Uzbekistan – where it is not plausible to expect the Parliament to act as even a weak check on executive power. This step is necessary because we are interested identifying which factors may be significant in addition to democracy, and they are unlikely to show up in more closed authoritarian regimes.

In each case, we focus on recent legislative debates that 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 NGOs (Uganda), in the others it was applicable more broadly to CSOs. We focus

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<sup>1</sup> The threshold is 7.2 million forints – approximately \$26,200 – a year.

<sup>2</sup> This research forms part of the Political Economy of Democracy Promotion Project, a collaboration between WFD and the University of Birmingham. WFD plays an active role in shaping the research agenda and funds a post-doctoral position at the University of Birmingham. More information is available at <<https://democracypromotion.wordpress.com/>>.

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.

Our analysis of what went right in the “success stories” 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).<sup>3</sup> This was essential to make sure that our analysis of what works and what does not reflects the ideas and experiences of those on the ground.

As we tease out in the case studies that follow, what these testimonies reveal is that in addition to the quality of democracy, the successful defence of civil society in Kenya and Kyrgyzstan was made possible by two further contextual factors. One of these relates to the international dimension of democratization – leverage, or “governments’ vulnerability to western pressure” (Levitsky and Way 2005: 379). When governments are more dependent on Western aid, the threat of cutting off financial assistance can be used to create political space for more critical MPs to push back against repressive legislation. The other is domestic – the electoral system. This is important because MPs elected under proportional representation systems typically owe their seats to the executive, who decides how to rank individuals on the party list, and are more distant targets for blame by vulnerable constituents adversely affected by the repressions of civil society. By contrast, MPs elected under the First-Past-The-Post model owe their seats to the support of their constituents – at least where elections are competitive – and so can more easily be given incentives to vote against the executive.

However, favourably contextual factors are not always enough to shift the incentives facing legislators. Other actors – local and international – must make use of the opportunities a favourable context creates. Thus, the campaigns they launch matter. These campaigns are most effective when they are pre-emptive and sustained, are led by – or channelled through – local actors, and engage pragmatically with the ‘mechanics’ of legislatures. As we argue in the final part of the paper, it is only by paying attention to both context (structure) and campaigns (agency) that we can better understand when parliaments defend civil society, and when they do not.

### **Defending civil society in Central Asia**

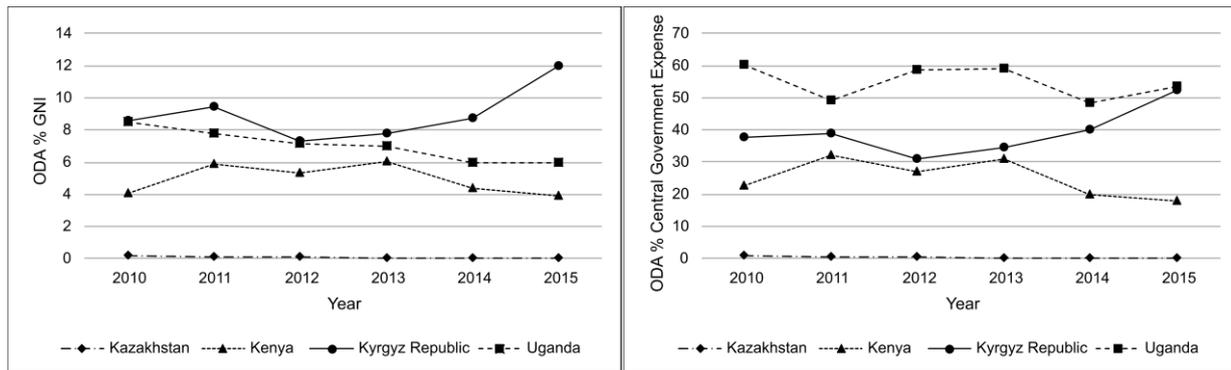
Governments in Central Asia have not had to look far for demonstrations of how civil society might be contained. Many have drawn inspiration from a Russian law requiring organizations that engage in “political activities” to register as “foreign agents” if they receive foreign funding. Kyrgyzstan provides one example where this was the case, though – to the surprise of many – the Kyrgyz Parliament ultimately rejected the proposed law. The reasons why demonstrate the significance of international leverage, seen here in the role of foreign aid in creating space for Kyrgyz legislators to oppose a restrictive law.

In Kyrgyzstan, this form of leverage was moderately strong. As Figure 1 shows, in the relevant period, the country received around 10% of its Gross National Income (GNI) and Official Development Assistance (ODA), equivalent to roughly 40% of government expenses. In contrast, in Kazakhstan, international leverage was extremely low because Kazakhstan, now an upper middle-income country, is far less dependent on aid. Indeed, it hardly relies on it at all. Both countries operate a proportional electoral system with a single nationwide constituency; it therefore does not explain why the context in Kyrgyzstan was more conducive to the defence of democracy than that in Kazakhstan, though it does come into play in our East African cases.

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<sup>3</sup> Due to the sensitivity of these debates, we have preserved the anonymity of interviewees. A list of interviews is provided in the Appendix.

**Figure 1 Aid dependence measured in two ways**



Source: OECD-DAC, *Geographical Distribution of Financial Flows to Developing Countries, Development Co-operation Report*, and *International Development Statistics* database. ODA figures reflect aid received (disbursements). World Bank GNI estimates are used for the denominator.

### ***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 do not take place on a level playing field, but they are far more competitive than those of its neighbours, including Kazakhstan.

In the last few years Kyrgyzstan’s political trajectory appears to be taking it away from democracy (Marat 2017). One step in this direction 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 Organizations 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 clearly modelled on the Russian example.

As with Russia’s law, the most problematic provisions would have required organizations 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 (ICNL 2017b). The draft law also provided for the introduction of onerous reporting requirements, some so costly that they would have made it difficult for smaller organizations to continue to operate (Interview 4, 24 May 2017). In addition, the proposed law granted the agency responsible for registering organizations as “foreign agents” extensive powers to oversee (and potentially interfere with) their activities.

A small core of CSOs mounted a spirited campaign against the Foreign Agents Law. At first, this campaign struggled to get traction and it became clear that progressive parliamentarians lacked the numbers to defeat the bill. Even those parliamentarians sympathetic to civil society avoided promises to directly oppose the bill, instead telling activists they would attempt to delay it (Interview 8, 26 May 2017). As a result, though the law was first proposed in 2013, the second reading debate was held in April 2016. During that debate 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 moderate (but not overwhelming) diplomatic leverage available to Western actors was an important factor in the Parliament's rejection of the Foreign Agents Law. Their criticisms of the law carried weight given Kyrgyzstan's dependence on aid. Between 2010 and 2014, donors who viewed the Foreign Agent's Law with concern (the United States, EU and DAC-EU member states) provided between a quarter and one third of Kyrgyzstan's ODA each year.<sup>4</sup> Their combined contribution dropped (in relative terms) to just over 16% in 2016 due to a marked increase in Russian aid. Thus, Kyrgyzstan's vulnerability to aid sanctions was mitigated by the presence of a regional power – Russia – that was both disinclined to criticise the Foreign Agents Law and, following Kyrgyzstan's accession to the Eurasian Economic Union in 2015, willing to provide a substantial volume of aid.

However, Kyrgyzstan's vulnerability to aid sanctions was combined with a relative absence of countervailing strategic interests (on the part of Western donors) that would have made threats to reduce or suspend aid less credible. As a result, when representatives of international donors consistently expressed concern about the Foreign Agents Law – typically in normative terms, appealing to international standards and treaties – legislators were at least willing to listen. In interviews, civil society activists cited the President's trip to Brussels – during which he was reportedly warned of a significant cut in aid if the Foreign Agents Law was adopted – as a critical turning point. After this, “the President came back a different man” (Interview 6, 24 May 2017). Once the President's position on the law became more ambivalent, a direct rejection of the law was less politically costly for progressive legislators and offered fewer political rewards to those who had seen support for the law as a means of earning the Executive's favour. CSOs campaigning against the law found that deputies previously unwilling to challenge directions given by their factional leaders were more willing to take a critical stance, while proponents of the law became far less vocal.

This reveals that diplomatic pressure was important not because it directly changed the mind of a large number of deputies, but because it created space for them to more honestly express their preferences by eroding the Executive's enthusiasm for the law. Moreover, the leverage available to Western actors did not – in itself – change the behaviour of legislators. Pro-democracy actors – local and international – had to make use of the window of opportunity it created to do so. Bolstered by statements made by INGOs (for example, Human Rights Watch) and multilateral institutions (such as the United Nations' (UN) Office of the High Commissioner for Human Rights (OHCHR)), local CSOs made the Joint Opinion issued by the Venice Commission and the OSCE's Office for Democratic Institutions and Human Rights (European Commission for Democracy Through Law and OSCE Office for Democratic Institutions and Human Rights 2013) a focal point for their campaign. That opinion, issued in October 2013, had been formally requested by the Chairman of the Human Rights, Constitutional Legislation and State Structure Committee of the Supreme Council. This lent it a degree of legitimacy that interventions by 'outside' actors lacked; many Kyrgyz legislators appear to have felt some degree of ownership of the Joint Opinion. According to the activists we interviewed, this made it a far more effective tool for motivating Kyrgyz legislators to reject the Foreign Agents Law.

### ***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

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<sup>4</sup> Author's calculations, based on the OECD-DAC Dataset, 'Aid (ODA) disbursements to countries and regions [DAC2a]'.

Nazarbayev, who has been held power since the fall of the Soviet Union. Harassment of political activists and independent journalists is common, with several individuals jailed for organizing protests, alleged corruption, or “disseminating false information” in the last few years (Lillis 2017). 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 (ICNL 2017d). The most notable of these increased government control of NGO funding via the establishment of a single state “Operator,” responsible for determining that 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 restrict NGO activity to the social sphere. Despite objections from CSOs, who employed “boomerang tactics” (Keck and Sikkink 1998), making joint statements with INGOs, such as the International Federation for Human Rights (FIDH 2015), the law passed very swiftly through the Parliament. 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.’ (quoted in Grishin 2015).

The lower house approved it in back-to-back first and second readings in late September 2015 (Central Asian News Service 2015), and while the Senate took slightly more time, President Nazarbaev had signed the law by December 2015, (Lillis 2017; ICNL 2017d).

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 (U.S. Mission to the OSCE 2015b, 2015a). This muted diplomatic response was – we suspect – a product of the very limited leverage available to pro-democracy actors at the time. 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. As Figure 1, above, makes abundantly clear, the threat of cuts to aid provided almost no leverage in the case of Kazakhstan. Nor, during the period in which the Operator Law was being debated, did circumstances provide an alternative source of leverage.

Here, it is useful to contrast the lack of leverage available in 2015, with the situation in 2005, when the Kazakh government abandoned a legislative proposal that would have severely restricted the operation of civil society,<sup>5</sup> largely due international diplomatic pressure (Christensen and Weinstein 2013). It was effective

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<sup>5</sup> The relevant law would have banned NGOs “created for expressing the political will of citizens, various social groups, as well as for the purposes of representation of their interests,” from receiving foreign funding (ICNL 2005)

because Kazakhstan was in the process of bidding for the rotating Chairmanship of the OSCE – something that was a top priority for the President. This provided significant leverage and was deliberately exploited by Western diplomats (US Consulate Almaty 2005). Unfortunately, as our discussion above lays bare, by 2015, the Kazakh government was far less vulnerable to Western pressure, and so a diplomatic success became a failure.

### **Protecting political space in East Africa**

East Africa is a region where attempts to restrict civil society through the introduction of new laws has become commonplace. Yet, while the general trend across East Africa has been towards the closure of political space, there has been substantial variation in how effective attempts to resist that closure have been. In Kenya, international actors supported a locally led campaign that was successful in part due to the combination of the country's higher level of democracy and first-past-the-post electoral system, which exposed MPs to pressure from below. Strikingly, this occurred even though Western powers had relatively little leverage in both countries. Notably, that lack of leverage did not stem from the absence of foreign aid. As Figure 1, above makes clear, ODA remains an important source of revenue for both countries. Rather, in these cases, the lack of leverage stemmed from factors that significantly reduced the *vulnerability* of both Kenya and Uganda to potential aid sanctions. In the case of Uganda, donors countervailing security interests would have made threats to suspend aid less credible. In Kenya, it was clear that threats to suspend would only serve to further undermine the legitimacy of civil society.

#### ***Kenya: Amendments to the Public Benefits Organizations 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 and an independent and genuine check on executive power (Barkan 2009), and which operates in the context of elections that are genuinely competitive, if not entirely free and fair. In 2012, that 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 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 – made statements criticizing the proposed amendments, domestic organizations – spearheaded by the Civil Society Organization 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 (Interview B, 17 March 2017). These MPs, many representing remote and semi-arid areas such as Garissa, were targeted

with messages that highlighted how 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 this strategy was highly successful. 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. (National Assembly of Kenya, Official Report, 4 December 2013).

Others spoke in more general terms, but emphasized 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 (Interview A, 16 March 2017).

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 (Interview A, 16 March 2017). 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 (Abrahamsen and Bareebe 2016). Civil society remains vibrant but vulnerable; their activities are tolerated so long as they are politically and socially acceptable to the Government (ICNL 2017a). 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 (Freedom House 2016b).

Though generally regarded as having acted as a greater check on the Executive during the era of “no party democracy” (Carbone 2008), Uganda’s Parliament is one of the more independent legislatures to have emerged in Africa, (Barkan 2009). Dominated by the ruling National Resistance Movement (NRM), 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). Despite the efforts of civil society to rouse parliamentarians to their defence, the Parliament passed the bill in November 2015. Though MPs made several progressive amendments, the most problematic provisions remained. The President signed the Bill several months later, and it became the NGO Act 2016.

A small group of CSOs campaigned 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 (Chapter Four Uganda n.d.). This fed into 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>6</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 criticized the government "were more likely to hide information and be dishonest" and re-iterated the government's belief that NGOs were a security threat (Committee on Defense and Internal Affairs 2015, para. 5.3). The voting record suggests that these broad arguments failed to motivate MPs to defend civil society – the Parliament passed the NGO Bill unanimously.

The failure of civil society's campaign against the NGO Bill shows that the impact of the electoral system only makes it easier to affect the incentives of parliamentarians in a manner conducive to the defence of democracy when there is sufficient political competition for the potential costs that such a campaign can threaten outweigh the costs of Executive displeasure.

### **Contextual factors: When is it easier to motivate legislators to defend democracy?**

The four cases we present above illustrate the role of contextual factors – and interactions between them – in making it easier (or harder) for proponents of democracy to shift legislator's incentives in a manner that motivates them to defend democracy by resisting restrictive civil society laws. In addition to the existing level of democracy, two factors stand out; the nature of the incentives created by the electoral system, and the importance of international leverage.

In both cases, the greater level of democracy and political space as compared to Kazakhstan and Uganda played an important role. As we saw on the contrast between Kenya and Uganda, greater respect for both civil liberties and political rights enabled CSOs to operate more openly and meant that there was greater scope for challenging the executive both inside and outside of the legislature. But as we argued above, this is not the only important factor that separates cases in which civil society was protected from those in which it

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<sup>6</sup> As in Kenya, most Ugandan MPs are elected from single member constituencies using FPTP.

was not. More specifically, the electoral system 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.

The FPTP system in Kenya made MPs 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. 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 by reference to its impact on the nation, rather than particular regions.

The contrast between Kyrgyzstan and Kenya also lays bare the fact that international relations, and the history of international relations, plays an important role in shaping the way that MPs respond to external interventions in defence of civil society. This clearly helps to explain the difference between the experiences of Kyrgyzstan and Kazakhstan, where the threat of curtailing foreign aid played a critical role in the failure of anti-CSO legislation, but as the case of Kenya shows even countries in which international leverage is relatively limited may protect civil society.

Leverage, while important, has limits. Our cases back up this point. 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 – a time at which 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 actively 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. One MP closely involved in the debate explained that deputies often see the statements of international actors in a negative way, as interference (Interview 7, 25 May 2017). Some activists suggested that – in contrast to more “diplomatic” statements by European actors – the statements of some US-based organizations were too forceful, in some instances undermining their attempts to persuade deputies to reject the law (Interview 6, 24 May 2017). Under these conditions, international actors may need to think carefully about how to support democracy – making a strong case behind the scenes and facilitating the role of domestic actors may be a far more effective way to operate than making public ultimatums.

### **Characteristics of effective campaigns**

As the section above makes clear, different combinations of contextual factors can make it easier – or harder – for proponents of democracy to affect the incentives facing legislators, and thus their behaviour. However, context alone does not determine whether or not parliamentarians resist restrictive civil society laws. As the cases illustrate, actors – local and international – must make the most of favourable contexts by mounting effective campaigns designed to motivate parliaments to defend democracy. This begs the question: what does an effective campaign look like? While it is beyond the scope of this paper to answer that question in an exhaustive manner, our cases point towards three characteristics associated with effective campaigns. These characteristics do not guarantee success, but where context is favourable, such campaigns stand a better chance of motivating legislators to defend democracy than others.

The first characteristic of effective campaigns is that they are pre-emptive and sustained. This is particularly apparent in the case of Kenya. 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 meeting 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 (Interview A, 16 March 2017). 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. Moreover, 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 B, 17 March 2017). Again, this foresight proved valuable; civil society was able to leverage this to ensure that subsequent attempts to amend the PBO Act – in late 2014 and again in 2015 – failed.

The second characteristic of effective campaigns is that they engage pragmatically with the ‘mechanics’ of legislatures. Both the case of Kenya, and that of Kyrgyzstan, highlight 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.

Finally, campaigns against restrictive civil society laws tend to be more effective when they led by, or channelled through, domestic actors. Our cases show that the strength of international leverage is important in shaping the odds of success, but they also suggest 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 8, 26 May 2017). In Kenya, the fact the defence of the PBO Act was spearheaded by a local organization, the CSO Reference Group was critical to its success. Western donors provided that group with support, and kept the issue on the agenda. However, they deliberately adopted a subsidiary role, knowing that more forceful intervention was likely to undermine the legitimacy of the campaign to protect the PBO Act. This point is important. 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 more forceful diplomacy is not necessarily more effective.

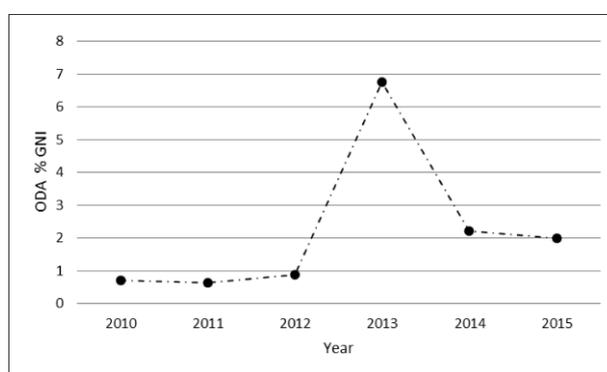
### **Are our ‘surprising’ cases now less surprising?**

Earlier, we argued that the ‘obvious answer’ – the existing level of democracy – was inadequate because, on its own, it failed to explain the outcomes in two recent cases; Myanmar (in 2013-2014) and Hungary (in 2017). A good test of our explanation, derived inductively from the four cases we present above, is whether or not,

given the additional contextual factors we highlight and the elements of effective campaigns that we identify, the outcomes observed in Hungary and Myanmar come as less of a surprise. We argue that they do.

On the face of it Myanmar, a manifestly un-democratic regime in 2013 and 2014, does not appear to be a context favourable to encouraging legislators to defend democracy. Yet the majority of Myanmar’s legislators, like those of Kenya, are elected from single-member districts on a FPTP basis.<sup>7</sup> Moreover, while Myanmar may have been ‘Not Free’ in 2013 and 2014, the prospect of an election in 2015, in which the opposition National League for Democracy was expected to compete (having boycotted the 2010 election), meant that many anticipated a significant increase in political competition in the near future. Further, as Figure 2 illustrates, the period in which the Association Regulation Law was proposed, debated, and adopted overlapped with a dramatic spike in aid to Myanmar, relative to GNI.<sup>8</sup> This was due to a massive package of debt relief agreed (in principle) by the Paris Club in January 2013, and then implemented by donors throughout 2013 and 2014 (Paris Club 2013).

**Figure 2 Aid in Myanmar**



*Source: OECD-DAC, Geographical Distribution of Financial Flows to Developing Countries, Development Co-operation Report, and International Development Statistics database. ODA figures reflect aid received (disbursements). World Bank GNI estimates are used for the denominator.*

Several donors, including Germany – which forgave more than €500 million of Myanmar’s debt in 2014, justified their promises of debt relief with references to the country’s democratic progress (Deutsche Presse-Agentur 2014). In case of Japan, by far Myanmar’s largest creditor, the cancellation of ¥176.1 billion (approximately \$1.74 billion) in ‘overdue charges’ on 26 May 2013 had been contingent on one year of joint monitoring of Myanmar’s continued reforms, including political liberalization (Ito 2012; Ministry of Foreign Affairs of Japan 2013). While there is no evidence that directly links debt relief to the Association Regulation Law, the willingness of MPs to listen to CSO’s objections to the initial draft of that law appears far less surprising when considered against the backdrop of the electoral system (combined with an expectation that political competition would increase) and the temporal proximity of such a large surge in aid.

Details of the campaign to protect civil society from an unduly harsh version of the Association Regulation Law are unfortunately hard to come by. It is notable, however, that while donors such as USAID facilitated consultations between Burmese NGOs and parliamentarians that led to significant improvements in the law, direct public criticism of the law (by donors) was largely absent. Instead, it appears, donors preferred to let local actors voice their own criticisms of the law – a tactic that appears to have succeeded, with the Parliament

<sup>7</sup> A quarter of the seats in the lower house are reserved for military appointees.

<sup>8</sup> Data on ODA relative to government expenses, the second measure of aid dependence shown in Figure 1, is not available for Myanmar in this period.

itself later referring to the consultation process as “a model for future legislative drafting” (States News Service 2014).

On the face of it Hungary, an EU member state recognised as democratic (if not fully consolidated), constitutes a context more conducive to legislative defence of civil society. Hungary’s elections are competitive, but the electoral system is mixed; 106 members of the National Assembly are elected from single member constituencies using FPTP, while the remaining 93 members are elected on a proportional basis, from nation-wide party lists. Yet the leverage available to international actors was minimal. Hungary no longer receives ODA, and while EU institutions threatened (and eventually commenced) ‘infringement’ proceedings, such threats had little prospect of influencing the incentives faced by legislators. In this context, our analysis suggests that while it would not be impossible to motivate Hungarian legislators to defend civil society, that task would not be as easy as the level of democracy alone would suggest. Success would be possible, but it would require an extremely effective campaign.

Unfortunately, in this case, the campaign lacked some of the characteristics that are associated with success. While local groups did criticise the proposal law vocally, mobilizing several large protests against it (and other related laws), much of the campaign appeared to be ‘led’ by European actors. For example, the opinion of the Venice Commission was sought not by local MPs (as had been the case in Kyrgyzstan), but by the Parliamentary Assembly of the Council of Europe. Given that the ‘public consultation’ in relation to the relevant law took the form of a survey titled ‘Let’s Stop Brussels!’, it is hardly surprising that a campaign spear-headed by European organizations struggled to gain traction. The report of the Venice Commission did lead to some small improvements in the proposed law, but it had no impact on the more problematic provisions.

Ultimately, the examples of Myanmar and Hungary reinforce our argument that explaining parliamentary behaviour with respect to civil society regulation requires us to pay attention to both structure and agency. Context alone does not provide clear cut explanations in either case. Nor does the nature of the campaigns mounted in each instance. It is only when we look at both the impact of contextual factors on the ease of shaping parliamentary incentives, and the nature of the campaigns launched in response to restrictive laws, that the ultimate outcomes in these two cases become less surprising.

## Conclusion

Our analysis provides some good news; when effective campaigns are employed in favourable contexts, parliaments can be persuaded to defend democracy by resisting laws that seek to constrain civil society. Yet there is, unfortunately, bad news as well. Our cases also reveal that victories are often partial or temporary, in part because some important factors – like international leverage – are not constant, but vary over time. 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 future attacks. This remains a distinct possibility; in early 2017 the President gave a number of anti-civil society speeches, in which he has characterized foreign funded groups as a threat to national security (Russia & CIS Military Newswire 2017).

It is also important to keep the ‘big picture’ in mind. 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 (Marat 2017). 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 (Freedom House 2016a). 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 mobilize opposition.

The availability of more subtle forms of repression 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 (2017, 30). He has 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 context is less favourable because political competition is low, or because proportional electoral systems create a more attenuated link between voters and representatives, such an approach may struggle to gain traction.

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 (Youngs 2015). 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.

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## **Appendix      List of interviews**

### *Kenya*

Interview A, civil society activist, 16 March 2017, interviewed by S. Dodsworth, Nairobi.

Interview B, civil society activist, 17 March 2017, interviewed by S. Dodsworth, Nairobi.

### *Kyrgyzstan*

Interview 1, civil society activist, 23 May 2017, interviewed by S. Dodsworth, Bishkek.

Interview 2, civil society activist, 23 May 2017, interviewed by S. Dodsworth, Bishkek.

Interview 3, civil society activist, 23 May 2017, interviewed by S. Dodsworth, Bishkek.

Interview 4, civil society activist, 24 May 2017, interviewed by S. Dodsworth, Bishkek.

Interview 5, civil society activist, 24 May 2017, interviewed by S. Dodsworth, Bishkek.

Interview 6, civil society activist, 24 May 2017, interviewed by S. Dodsworth, Bishkek.

Interview 7, parliamentarian, 25 May 2017, interviewed by S. Dodsworth, Bishkek.

Interview 8, parliamentarian, 26 May 2017, interviewed by S. Dodsworth, Bishkek.

Interview 9, civil society activist, 30 May 2017, interviewed by S. Dodsworth, Bishkek.